

Workers in the gig economy: employees or self-employed?

A comparative study on the concept of employment in the “gig economy”, focusing on Sweden and the United Kingdom

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Table of abbreviations

AMT	Amazon Mechanical Turk
AD	Arbetsdomstolens domar
DS	Departemensserien
ERA	Employment Rights Act
LAS	Lag (1980:80) om anställningsskydd
MBL	Lag (1976:580) om medbestämmande i arbetslivet
NJA	Nytt Juridisk Arkiv
NMWA	National Minimum Wage Act 1998
Prop	Proposition
TULRCA	Trade Union and Labour Relations (Consolidation) Act 1992
UK	United Kingdom
WTR	Working Time Regulations 1998

Abstract (Swedish)

Syftet med denna uppsats är att ge en överblick över det nya, men snabbt växande, konceptet crowdsourcing. Konceptet kan enkelt beskrivas som en åtgärd att ta en uppgift som vanligtvis utförs av en utsedd arbetspresterande part (vanligtvis en anställd) och outsourca denna till en odefinierad, anonym och generellt stort grupp av människor i form av en ”öppen inbjudan”. Marknaden har under det senaste decenniet exploderat med företag som marknadsför sig som plattformar som möjliggör crowdsourcing. Uber är kanske den mest kända av dessa. Individer ansluter sig till Uber eller andra crowdsourcingföretag som oberoende uppdragstagare eller egenföretagare i hopp om att tjäna pengar.

Problemet som uppstår i denna situation är att många av dessa företag är mer än bara plattformar som möjliggör crowdsourcing. De blir en tredje part i det avtalsförhållande som uppstår mellan den som outsourcar, och den arbetspresterande parten. Ofta har de ett stort inflytande över genomförandet av de tjänster som erbjuds via plattformen och den ersättning som utgår. Detta gör att det avtalsförhållande som uppstår avviker från vad som anses normalt för en oberoende uppdragstagare eller egenföretagare. Ett ytterligare syfte med denna uppsats är således att undersöka möjligheten att bemöta dessa nya förhållanden genom att applicera arbetstagarbegreppet. Är de som utför jobb genom dessa företag verkligen egenföretagare och oberoende uppdragstagare eller blir begreppet missbrukat i syfte att kringgå tvinga lagstiftning och kollektivavtal?

Resultaten från denna uppsats visar tecken både för och emot denna fråga. I svensk lagstiftning är arbetstagarbegreppet väldigt brett och visar prov på en stor anpassningsförmåga. Frågan är dock hur skydd ska regleras för de som faktiskt är egenföretagare. Arbetsrättslig lagstiftning och de skydd som medföljer förutsätter att en arbetspresterande part generellt är en arbetstagare. Med en växande andel egenföretagare ökar också risken för en större del av befolkningen. Resultaten i uppsatsen visare vidare att arbetstagarbegreppets anpassningsförmåga kanske inte är den springande punkten, utan att fokus även bör läggas på att identifiera arbetsgivarens funktion, sprida risken mellan parterna och även hitta andra sätt att anpassa marknaden efter nya utvecklingar.

Abstract (English)

The purpose of this thesis is to provide an overview of the new, but rapidly growing, concept of crowdsourcing. The basis of the concept can be described as the act of taking a job traditionally performed by a designated agent (usually an employee) and outsourcing it to an undefined, generally large group of people in the form of an open call. In the last couple of decades, the market has exploded with companies that market themselves as platforms that enable crowdsourcing, among which Uber might be the most famous one. People who join Uber or other crowdsourcing companies do so as independent contractors or self-employed workers in the hope of earning money.

The problem arising in this situation is that many of these companies are more than just platforms that enable crowdsourcing. They become a third party of the contractual relationship between the consumer and the performing party. The platforms often has a great deal of influence over the implementation of the services offered through the platform and the remuneration that expires. The contractual relationship formed deviates from what is considered normal regarding independent contractors or self-employed works, whom often have a greater deal of autonomy. An additional purpose of this paper is thus to investigate the possibility of apply the concept of employment to the relationships occurring in chosen gig-economy platforms and asses the possibility for a performing party to be considered an employee. Are the people performing work in these companies really self-employed and independent workers or is the term abused to circumvent legislation and collective agreements?

The results from this thesis shows signs both for and against this question. In the Swedish legislation, the notion of 'employee' is very broad and shows great adaptability. The question is how protection should be regulated for those who are actually considered self-employed, though with a greater dependence on the crowdsourcing companies. The protection following the labour law is generally under the presumption that the object of protection is an employee. With an increase in self-employed workers and independent contractors, there is also an increase in risk for these performing parties. The result of the paper further shows that the adaptability of the notion of 'employee' should perhaps not be the area on which to focus. On the contrary, focus should also be put on identifying the employer's function, spreading the risk between the parties and by other means adapting the market in accordance with new and exciting developments.

1. Introduction

1.1 Background

In recent years, following societal and economic developments such as an increased demand for flexibility from both employers and workers, new forms of employment have emerged.¹ The common denominator of these new types of employment is that they contribute to a casualisation of the work force, a shift in risk from companies to workers and an instability in income for workers.² These new forms of employment contest the traditional relationship between an employee and an employer, and thus contest a deeply rooted concept on which the labour law and labour market is built. Following this trend, with the technological development in the lead is the concept of crowdsourcing which constitutes “gig economy” (similarly known as the collaborative, sharing or platform economy).³

Crowdsourcing is spreading quickly around the world, mainly in the United States. In the European Union, the spread has been varied. In Sweden and the other Scandinavian countries, the spread of crowdsourcing is limited at the moment.⁴ In Germany, Italy, Spain and the United Kingdom, among other countries, crowdsourcing has developed further. The phenomenon has created controversy in many countries and some countries have even forbidden certain crowdsourcing companies such as Uber.⁵ The government of the United Kingdom has stated that they are embracing the new business model and that the country aims at being considered a “Mecca for sharing economy”.⁶

The term crowdsourcing was coined in 2006 by the journalist Jeff Howe in WIRED magazine, describing it as “the act of taking a job traditionally performed by a designated agent (usually an employee) and outsourcing it to an undefined, generally large group of people in the form of an open call.”⁷ The term is a fusion of the word crowd and the word outsourcing. In later years, the phenomenon has grown and become more professionalised.⁸

The performing parties are in most cases defined as freelancers, self-employed or independent contractors, but on a whole new level. They are classified by the platforms as independent contractors, and the platforms explicitly specify that no employment relationship is formed either between the performer and the platform, or between the performer and the client. At the same time, the performer and the client are limited in their ability to contact each other outside of the platform.⁹

¹ Eurofound, *New forms of employment* (Publications of the European Union 2015) https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1461en.pdf last accessed 2017-05-21, 116.

² Valerio De Stefano, ‘The rise of the «just-in-time workforce»: On-demand work, crowdwork and labour protection in the «gig-economy» (2016) Vol. 37, No 3 Comparative Labour law and Policy Journal, 6.

³ Marion Schmid-Drüner, *The situation of workers in the collaborative economy* (European Parliament 2016) [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA\(2016\)587316_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA(2016)587316_EN.pdf) last accessed 2017-05-21, 1.

⁴ Eurofound (n 1) 108.

⁵ Unionen, *Plattformsekonomin och den svenska partsmodellen*, 2016, 26.

⁶ Ron Matthew Hancock, in *Unlocking the sharing economy: An independent review*, Department for Business, Innovation and Skills, UK Government, 2014, 5.

⁷ Jeff Howe, ‘The Rise of Crowdsourcing’ *WIRED Magazine*, (1 June 2006) http://www.wired.com/wired/archive/14.06/crowds_pr.html, last accessed 2017-05-21.

⁸ Antonio Aloisi, ‘Commoditized workers. Case Study Research on Labour Law Issues Arising from a Set of “On-Demand/Gig Economy” Platforms’ (2016) Vol. 37, No 3 Comparative Labour Law & Policy Journal, 665.

⁹ De Stefano (n 2) 14.

The definition made in agreements is not decisive. Both in Sweden and in the United Kingdom, a principle of primacy of fact is prominent, which means that the “determination of the existence of an employment relationship is to be guided by the facts relating to the actual performance of work and not based on how the parties described the relationship”¹⁰

Even though the platforms classify the performing parties as independent contractors, characteristics from both employment and independent contractor agreements are applicable. For example, the performing party is at the disposal of the platform and it can be argued that performers are under the management and control of the platform in some cases, indicating an employment relationship. On the other hand, performers are able to choose when to work and are only remunerated for the task performed, which suggests they are independent contractors.

This inconsistency leaves the worker somewhere in the grey area between an employee and an independent contractor. The development of the traditional relationship between an employer and an employee has in turn created institutions on the labour market, with a clear order for responsibilities, rights and obligations. Furthermore, social security systems, pension systems and other regulations have continuously been based on this traditional relationship, with the purpose of enabling the work force to find new work in case of unemployment, secure income and rehabilitation in case of illness or injury and have vacation or time off to care for children.¹¹ By defining the performing parties as independent contractors, the platforms can use this definition and the uncertainties included in this new concept to circumvent the responsibilities of an employer. Because the performers are considered to be self-employed or freelancers, they cannot reap the benefits that come with the status of being an employee, such as regulation of working hours, protection against unlawful dismissal, a period of notice upon dismissal and the right to parental leave. Without the status of an employee, performers are left without social benefits like provisions for parental leave and pension insurance and unemployment benefits.¹² The risk has shifted from the companies to the individual workers, and the platforms can outcompete traditional employers offering the same services by avoiding to provide legislated benefits and protection to performing parties, thus reducing their costs.¹³ Meanwhile, the gig-economy and other new forms of employment are spreading.¹⁴ And as the standard form of employment is challenged, the question is whether the traditional concept of employment is still sufficient to protect workers in the developing labour market.¹⁵

Furthermore, it must be considered that successful platforms tend to form powerful monopoly positions in their respective markets. If the customers over whom the platforms compete experience a reduced cost compared to traditional companies, their competitive advantages can continue to grow.¹⁶

1.2 Purpose

The purpose of this thesis is to provide an overview of the development of crowdsourcing thus far on the labour market, mainly in Sweden and the United Kingdom, focusing on the

¹⁰ Ibid, 12.

¹¹ Unionen (n 5) 42.

¹² Eurofound (n 1) 115.

¹³ Unionen (n 5) 93.

¹⁴ Aloisi (n 8) 653.

¹⁵ Ibid, 665.

¹⁶ Unionen (n 5) 48.

opportunities and working conditions of workers and the issues emerging in labour law. The objective is to investigate the most common crowdsourcing platforms and how they operate.

The second purpose is to investigate the Swedish concept of employment. The aim is to apply the concept of employment to the relationships occurring in chosen gig-economy platforms and assess the possibility for a performing party to be considered an employee. A comparison will be made with the concept of employment in the United Kingdom and the line of reasoning made in similar cases in the United Kingdom. When making this assessment, a discussion will be held regarding the need to make a distinction between crowdwork and work on demand via apps.

1.3 Research Questions

1. How is the concept of employment and self-employment constructed in Sweden and in the United Kingdom?
2. What are the major crowdsourcing platforms in the gig economy today?
3. What are the opportunities and working conditions for workers in the gig economy?
4. Can a worker in the gig economy be regarded as an employee in Sweden?

1.4 Method

To answer the research questions, a combination of different methods has been used.

The legal dogmatic method is used to determine existing law, *de lege lata*, by studying relevant legal sources such as legislation and preparatory work, and interpretations of it made in case law and doctrine.

Legislation is traditionally the authoritative legal source.¹⁷ When studying the concept of employment in Sweden, however, preparatory work and case law in particular is expected to be prominent, as the concept is not defined in legislation. The determination of whether a performing party can be considered an employee or an independent contractor is rather an assessment of certain attributes of the working relationship, hence the precedents from the Swedish Labour Court and the line of reasoning used there have been taken into consideration. Regarding doctrine, the work of Adlercreutz is considered to be particularly relevant when examining the concept of the employee in Sweden. Even though the publication is over 50 years old, the circumstances he discusses “have remained remarkably consistent over the past 50 years, even if they are being challenged by changing patterns of work in the 2000”¹⁸. The case law used has been chosen based partly to show this consistency yet adaptability of the Swedish courts’ line of reasoning regarding the notion of the employee. Furthermore, as the cases are presented in the thesis, their relevance to the question at hand is clear.

The legal dogmatic method has been used when studying the United Kingdom as well. A common mistake often made when studying foreign law, however, is to consider the different legal sources from the perspective of the legal system in which one is taught. From a Swedish perspective, for example, the risk may lie in overestimating the importance of preparatory work

¹⁷ Karin Åhman, *Grundläggande rättigheter och juridisk metod* (Norstedts Juridik 2015) 19.

¹⁸ Annamaria Westregård, ‘The notion of “employee” in Swedish and European Union law. An exercise in Harmony or Disharmony?’ in Laura Carlson, Birgitta Nyström and Örjan Edström (eds) *Globalization, fragmentation and employment law: a Swedish perspective* (Iustus 2016) 188.

in English law. The basic principle is to respect the system and the hierarchy of the legal sources of the foreign country.¹⁹

The United Kingdom's legal system is based on the Anglo-Saxon model. The system is mainly based on common law, which is to say precedents from the courts rather than legislation, although in recent years the legislation has become more common as a complement to common law, mainly influenced by EU labour law.²⁰

As in Swedish law, precedents play a great role. Caution must be taken, however, when examining a case in UK law, as some precedent are binding, and some are not, even though they can be considered to have persuasive authority.²¹ This will be taken into consideration when evaluating the United Kingdom case law.

As the concept of crowdwork and work on demand is an international phenomenon, a comparative method aids in the process of understanding the challenges faced in different legislation and what lessons can be learned between the jurisdictions.

A formal, micro-comparative method has been used to compare the different legal systems at hand.²² The purpose of this is to determine the similarities and differences in issues concerning the concept of employment and self-employment, and evaluate the solutions applied in the different legal systems.²³ Using a comparative method is helpful when working *de lege ferenda*, and in the understanding of one's own legal order and the ability to assess it without being bound by legal solutions deemed natural or irreplaceable by others with a national limitation. However, as the legal systems in Sweden and United Kingdom belong to different legal families, caution should be taken in suggesting '*legal transplants*' without respecting and regarding the differences in legal tradition between two countries, as discussed before.²⁴

The United Kingdom has a more widespread use of services and work in the 'gig economy' than it currently has in Sweden²⁵ The government in the United Kingdom has made a statement to embrace the new sharing economy and to become a "Mecca for sharing economy".²⁶ In choosing the United Kingdom as the object of comparison, parallels can be drawn to lines of reasoning regarding the concept of employment in the UK, and measures taken to regulate the situation.

When studying the material, it is evident that work on demand via apps/internet, in comparison with crowdwork, has had more cases in which the performing parties have been considered or redefined as employees.²⁷ Considering this, a need has emerged to investigate if a distinction needs to be made between the two categories and whether they require different approaches in regulation.

In the thesis, the term *platform(s)* will be used to describe the crowdsourcing companies. The terms *self-employed worker* and *independent contractor* will both be used. The term self-employed has a slightly broader notion, including "small businessmen, professionals and others

¹⁹ Michael Bogdan, *Komparativ rättskunskap* (Norstedts Juridik 2003) 44.

²⁰ Birgitta Nyström, *EU och arbetsrätten* (5th edn Wolters Kluwer 2016) 58 ff.

²¹ Bogdan (n 19) 102.

²² *Ibid*, 56.

²³ *Ibid*, 18.

²⁴ *Ibid*, 29.

²⁵ Eurofound (n 1) 108.

²⁶ Unionen (n 5) 94.

²⁷ Aloisi (n 8) 685.

who sell goods and services to consumers rather than to companies or the state”²⁸, while independent contractors refers to “individuals who live of selling their labour to private or public employers, such as labour only contractors. Under this definition, a worker who has other workers employed can still be considered a self-employed worker or independent contractor.”²⁹ As the existence of an employment relationship is the topic under discussion the term *worker* or *performing party* will be used to describe anyone who performs work personally in exchange for an expected remuneration and the individuals performing, or seeking to perform work personally via the crowdsourcing companies.³⁰ As the relationship between the performing party, the platform and the client is somewhat unclear, the term *employer* will be used carefully. In a bilateral contract of labour the term signifies the “other contracting party, i.e. both the employer of an employee and someone buying the services of a self-employed worker.”³¹ However, as the contract, under which a worker performs work on or via the crowdsourcing platforms, concerns more than two parties, the distinction will be made between platform and client as they can be seen both as an employer of an employee and a party buying the services of a self-employed worker. The term *client*, with regard to the platforms, is used to describe the individual or company soliciting the service or product provided by or via the platforms.

1.5 Delimitations

This thesis is limited to investigating the scope of the gig economy and the conditions for workers mainly in Sweden and the United Kingdom. The reason for this delimitation is that it presents an opportunity to do a more qualitative study considering the scope of the thesis, rather than doing a shallower investigation over several legal systems.

Furthermore, the concept of employment will be investigated from a civil law and specifically labour law perspective. The concept can be studied both from a company law perspective and from a public law perspective such as tax law. Some discussions will be made in reference to social security law but the main focus will be on labour law.

²⁸ Samuel Engblom, ‘Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States’ (DPhil, European University Institute 2003) 13.

²⁹ Ibid, 13.

³⁰ Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 4.

³¹ Engblom, ‘Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States’ (n 28) 13.

2. The concept of Employment and Self-employment

2.1 In Sweden

In national Swedish law, there is no statutory definition of what constitutes an employment or contractual agreement. Instead the concept has been developed through case law in the Swedish Supreme Court and Labour Court and is constituted by a series of general principles.³²

In Swedish labour law, a contract of labour is the common term for employment agreements and independent contractor agreements.³³ The contracting parties in an independent contractor agreement can be either natural or juridical persons, while the performing party in an employment relationship can only be a natural person. This does not stop courts from exposing an employee “posing” as a juridical person in a labour agreement, and an employment relationship can still be at hand.³⁴

The distinction of whether a performing party is considered an employee or an independent contractor is made through a process where a series of circumstances linked together determines which definition is closer at hand, rather than relying on a legal definition of the term.³⁵

The function of the concept of the employee is to set the limitations for when labour law protection for the individual is to be applied.³⁶ The legislator has purposefully kept the definition of an employee and an independent contractor out of legislation, enabling an interpretation of the dispositive facts in each case and thus prevent such circumvention that would be possible had the content been fixed and determined.³⁷ The construction is considered to be enabling a smooth adaption of case law to the changing conditions and values on the labour market. In the preparatory work to the Swedish Codetermination Act, this flexibility is described as an advantage, and it is stated that future court rulings should be made to the benefit of an existing employment relationship in unclear cases.³⁸

The aim of the notion of employee, under its development in case law and doctrine, has been to develop a uniform concept to be applied, regardless of whether it is a question of civil, tax or social legislation.³⁹ However, when the assessment is being made, the legislation on which the assessment is being made affects where emphasis is being put. The importance of the circumstances assessed can vary depending on the purpose of the legislation applicable to the situation.⁴⁰

³² Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 85.

³³ Kent Källström and Jonas Malmberg, *Anställningsförhållandet: inledning till den individuella arbetsrätten* (Iustus 2016) 23 ff.

³⁴ Samuel Engblom, *Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States*, (DPhil, European University Institute 2003) 149.

³⁵ Annamaria Westregård, ‘The notion of “employee” in Swedish and European Union law. An exercise in Harmony or Disharmony?’ in Laura Carlson, Örjan Edström and Birgitta Nyströms (eds) *Globalization, fragmentation and employment law: a Swedish perspective* (Iustus 2016) 187.

³⁶ Axel Adlercreutz, *Arbetslagarbegreppet: om arbetslagförhållandet och därtill hörande gränsdragningsfrågor i svensk civil- och socialrätt* (Norstedt 1964) 16.

³⁷ Westregård (n 35) 187.

³⁸ Prop. 1975/76:105, *Med förslag till arbetsrättsreform*, annex 1 s. 309.

³⁹ Källström and Malmberg (n 33) 26.

⁴⁰ Alexander Åberg, *Working in a cross border situation: A study on the Concepts of employment and self employment* (Master Thesis, Lund University 2016) 17.

The civil concept of employee today, however, is based on the civil notion as it was formed in *NJA 1949 s. 768*, where the court reasoned that the question of whether a performing party is to be considered an employee should be judged based on what can be considered agreed upon, and all circumstances connected to the agreement and the performance. The social and financial status of the parties was emphasised to indicate how the agreement should be perceived.

In Sweden, a person performing a service in exchange for remuneration can be categorised as either an employee or an independent contractor.

Based on the definition, different laws and different regimes in term of liability and contributions to mandatory social insurance apply.⁴¹ If a performing party is considered an employee, the labour legislation and its legal consequences are applicable.⁴² If so, the employer is obligated to pay insurance contributions and withhold preliminary income tax.⁴³ If the performing party is instead considered an independent contractor or self-employed, traditional civil law and interpretation of agreements is applied⁴⁴ and the performing party is obligated to register for a Business Tax Certificate and pay the corresponding social contributions and preliminary income tax themselves.⁴⁵

The common feature for an employee and a self-employed worker is that they both perform work personally. The main characteristic of the self-employed worker is the independence she enjoys.⁴⁶ As opposed to an employee, whose relationship with the employer is characterised by subordination.⁴⁷

At the core of a traditional industrial organisation are the workers with firm specific skills. In other words, the skills that are needed and utilised to run the specific organisation. Traditionally in models of industrial organisation, self-employed workers are described as being 'non-core workers' with a weak connection to the employer.⁴⁸ Characterising a more flexible organisation is the offloading of risk to the periphery through sub-contracting and replacing contracts of employment with other types of contracts, while shrinking the core or internal sectors of the organisation.⁴⁹

2.1.1 Ground pillars of the overall assessment

The assessment of the civil concept of employment is distinguished by the fact that an overall assessment is made on the circumstances at hand in each situation. The courts use a method of comparing the contested work relationship with a typical employer relationship and a typical independent contractor relationship respectively and then 'assign' the case at hand to the definition that is closer at hand.⁵⁰ There are, however, some basic requisites that need to be met. First, a service must be performed on the basis of a voluntary spoken or written agreement, or

⁴¹ Andreas Inghammar, 'The Concept of 'Employee': The position in Sweden' in Bernd Waas and Gus Heerma van Voss (eds) *Restatement of Labour Law in Europe* (Hart Publishing, forthcoming) 678

⁴² Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 76.

⁴³ *Ibid*, 678.

⁴⁴ Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 76.

⁴⁵ Inghammar (n 41) 679.

⁴⁶ Engblom, 'Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States' (n 34) 13.

⁴⁷ Källström and Malmberg (n 33) 27.

⁴⁸ Engblom, 'Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States' (n 34) 19.

⁴⁹ *Ibid*, 19.

⁵⁰ Sigeman, *Semesterrätt (5th rev edn Iustus 1991)* 33.

on an agreement incurred by implicit acquiescence. Second, the agreement is to perform this service on behalf of another. Third, the performing party should carry out the service personally.⁵¹ If these criteria are fulfilled, the circumstances regarding the case at hand is considered and the following characteristics have been deemed to be of importance in past case law and concluded in preparatory work. The performing party:

- “1) Is personally obligated to perform the work, whether it is stated in a (written or oral) contract or could be presumed by the parties to the contract;
- 2) Has himself or herself, personally or practically personally, performed the work;
- 3) is at the disposal (of the employer) continuously for work arising within the business of the employer;
- 4) the relationship between the parties is of a continuous, or of a ‘more lasting’ character;
- 5) is prohibited, under the contractual agreement or as a consequence of the conditions of work (time or capacity for other work), from undertaking similar work on behalf of someone else;
- 6), is, for the performance of the work, subject to the employer’s instruction or control in relation to how, where and when to carry out the work;
- 7) has to use the machinery, tools and materials provided by the other party (the employer);
- 8) is compensated for direct expenses, such as travel costs;
- 9) is remunerated for the work effort, at least partially, through a guaranteed salary;
- 10) is economically and socially, in a similar position to an employee.”⁵²

The general notion is that if these circumstances are not present, an independent contract agreement is at hand.⁵³ These circumstances are not necessary prerequisites but rather characteristics of what constitutes an employment relationship. The circumstances are not exhaustive, nor is there a clear hierarchy regarding the individual importance of each characteristic listed.⁵⁴

Furthermore, when classifying a work relationship in Swedish labour law, the notion of the primacy of facts is used. This means that the decisive factor is not the definition used in the agreement, nor is it, as in other civil contractual law, the intention of the parties at the point of agreement that is the main object of interest. Instead it is mainly the conditions post and pre-agreement that is the point of interest.⁵⁵ However, the definition an intention of the parties beforehand can give some guidance.⁵⁶

2.1.2 Personal work duty

Personal work duty is important, considering it puts the performing party in a dependent position in relation to the principal. It is a basic characteristic of an employment relationship, as the principal turns to a specific person and not a company, to have work performed.⁵⁷

In a general employment relationship, a legal person cannot be considered to be an employee. However, in *NJA 1996 s. 311* the question at hand was whether a party who was a complementary part in a limited partnership could be considered to be an employee of a

⁵¹ Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 110.

⁵² Original source SOU 1975:1 p. 172 and prop 1976/77:90, 20. Translated by Inghammar (n 41) 686.

⁵³ Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 117.

⁵⁴ *Ibid*, 77.

⁵⁵ *Ibid*, 112.

⁵⁶ Inghammar (n 41) 688.

⁵⁷ Adlercreutz (n 36) 229

See also for example *AD 1989 nr 39* and *AD 1996 nr 135*.

construction and installation company. When the company filed for bankruptcy the plaintiff argued that he had the right to take part in the state wage guarantee system. The court contemplated the issue that the plaintiff had entered the agreement through a company and not as an individual legal counterpart, and accordingly was not personally obligated to perform work for the construction and installation company. The plaintiff argued that he had formed his company solely for the purpose of cooperating with the construction and installation company, on recommendation from the owner of the construction and installation company. The court further discussed the possibility that this arrangement was a means to circumvent mandatory and, for the employer, inconvenient legislation and went on to consider the circumstances in the case to determine if the characteristics pointed in the direction of an employment relationship. The court specifically considered the fact that the work performed was not predetermined but occurred in line with the contracts that the construction and installation company acquired. Thus, the performing party was at the disposal of the principal. Furthermore, the work was performed under the management and control of the principal, the plaintiff had practically been unable to perform work for another party and the principal had provided most of the equipment used.

One question of interest is whether a performing party has the right to refuse work assigned by the employer. In *AD 1987 nr 21* a writer had been working continuously with a union paper for many years, mainly writing book reviews. Several circumstances were discussed. For example, the newspaper had not exercised any specific management or control over the performing party and the plaintiff had been free to perform work for other parties. Furthermore, the performing party could use the information and knowledge gained when working for the newspaper at hand while working for other parties. However, the plaintiff noted he had had access to the newspaper's offices and technical equipment, and that he had participated in editorial meetings on the newspaper, leading him to the conclusion that he was part of the editorial staff. The investigation showed that the participation in editorial meetings had been occurring sporadically and there had been no obligation for the plaintiff to participate in these meetings. Furthermore, the investigation showed that most of the work performed was done outside the news paper's offices. This was one of the distinctive features of an independent freelance worker, according to the collective agreement regulating the news industry.

None of these circumstances was deemed to be of crucial importance, pointing in one direction or the other. However, the fact that the writer had been under no obligation to be at the disposal of the principal for upcoming tasks, and that he could control the work performed regarding extent and focus of topic was deemed to be a crucial point. In addition, the plaintiff had been paid for each specific task and had the opportunity to turn down new tasks, also contradicting an employment relationship. Even though the income from the newspaper could be considered a large addition to the plaintiff's economy, the fact that no guaranteed payment was made indicated that he should be considered an independent contractor.

Nowadays, the fact that work is being performed outside of the office is not considered to have the same impact when making these assessments, as the development of the IT sector has provided new opportunities. On the other hand, it is still not unusual that contractors are physically integrated in the principal's facilities.⁵⁸ Thus, a conclusion must be made in each individual case.

The right to turn down work is stressed in the case *AD 1989 nr 39*. The case regarded a local newspaper who had hired a woman to represent the newspaper in certain areas. An overall

⁵⁸ Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 130.

assessment was made and investigations showed that she had been remunerated with a set fee every month, the agreement seemed to have been made without a time limit and she had been reimbursed by the newspaper for travels she had done. But the more decisive circumstance was, according to the court, the fact that the performing party had been hired to be the newspaper representative, covering upcoming events in certain areas, and even though the newspaper argued that she had had the right to turn down assignments, this had not been the case in reality. Neither could the newspaper show that this had been the case in the past. The woman was concluded to be an employee.

2.1.3 Rate, intensity and duration of work

Given the flexibilisation of the labour market in the last decades, the duration of a labour contract has lost some of its significance in comparison to other circumstances, and seems to be given crucial importance mainly in businesses where a longer duration of work is unusual.⁵⁹ As mentioned above, one of the characteristics indicating an employment relationship is that the relationship is consistent over a longer period of time, and the performing party is at the disposal of the principal. However, the fact that the relationship had been continuous in the case described above was not deemed to be of great importance when considering the customs of the industry. Conversely, the fact that a work is done on a temporary basis does not mean it cannot be considered an employment relationship.

In *AD 1998 nr 11* a man had been working as a church cashier with general financial management for a parish. The parish argued that the man had been elected as a cashier in accordance with a regulation in the Swedish church law, effectively overruling the regulation in the Employment Protection Act as it was a special law. The court did not comply with this line of reasoning and continued to assess the circumstances at hand. The overall assessment led the court to conclude that an employment was at hand, showing that even though the work performed could be calculated to no more than 40 %, the performing party was still considered to be an employee as the relationship had been consistent over a period of time.

In *AD 1995 nr 26* an employee had agreed with his employer to end the employment relationship and henceforth invoice additional work that he performed as an architect. However, after investigation, the court found that the working hours for the performing party had stayed the same as it had been before the change in agreement, effectively preventing the performing party to perform work for someone else. Apart from invoicing his work, the performing party functioned as a normal employee and was considered so by other employees, leading the court to conclude that he was to be considered an employee.

2.1.4 Number of principals

There is nothing hindering a performing party from having more than one principal for which they perform work, and still being considered an employee to one or several of these principals. However, the courts consider whether the performing party has the possibility to perform work for another principal. As stated above in *NJA 1996 s. 311* the performing party was only able to perform work for the construction and installation company, which contributed to the indication that he was to be considered an employee. In the case of *AD 1987 nr 21*, discussed above, consideration was taken to the fact that the performing party had the opportunity to perform work for others, thus not indicating an employment relationship.

⁵⁹ Adlercreutz (n 36) 237.

2.1.5 Employer's control and labour management

As stated above, the general characteristic of an employment relationship is that of subordination. With the traditional employment, certain work hours and a specific working place are assigned. The employer determines the work performance and the work is in accordance with the employer's organisation. A palpable presence of obedience is often an indicator of an employment relationship.⁶⁰ This does not mean that the employer must necessarily monitor every aspect of the work performed, but the work should be somewhat framed by the principal and structurally the performing party should be subordinate to the principal. Furthermore, the work is integrated in the organisation of the principal.⁶¹

In *AD 1990 nr 116* a traffic warden had previously been employed by a company, and after ending this employment relationship on the request of the employee, the relationship continued for a couple of months in the same fashion. However, according to the defendant the performing party had been considered a contractor in this case. The court's line of reasoning was that an employment relationship clearly was at hand. The court based this assessment mainly on the fact that the performing party had worked full time, under the instruction of the company and with a guaranteed remuneration. The fact that the performing party had been remunerated to some extent via invoice was not considered relevant in the context.

However, control from the employer is not necessary for the relationship to be considered that of employment. A lack of control can be derived to the fact that the performing party is more competent in the area of work performed.

In *NJA 1973 s. 501* an accountant who performed work for another principal, in addition to his regular employment, was considered to be an employee of this principal. He had continuously been helping the principal with accounting for approximately six hours per month. This agreement had been made verbally and the principal himself had no knowledge of accounting, leaving the performing party to structure the work and perform it without any supervision. However, the agreement was considered to have been made for an unlimited period of time, the performing party was at the disposal of the principal for continuously occurring work, a set remuneration was to be paid and the principal provided materials and reimbursement for postage.

In the case *AD 1981 nr 172*, two artists were approached by representatives of a municipality and offered to be part of an operetta tour. The outline of the performances themselves was left to the artists. However, the municipality gave the outline structure of the work that was to be performed, for example how many shows there were to be, limitations to the length of the concerts and the name of the tour. Additionally, all equipment was provided by the municipality, remuneration or travel costs had been paid by the municipality, the artists had no real possibility to perform other work during the time of the tour and the court also considered the fact that the commitment from the artist was relatively long term in comparison with other contracts common in the industry.

⁶⁰ Adlercreutz (n 36) 244.

⁶¹ Källström and Malmberg (n 33) 27.

2.1.6 Equipment

Another area considered by the courts is whether the principal provides the performing party with equipment, tools, materials or office space. If the principal is providing this equipment, this indicates an employment relationship.

In the case presented above, *AD 1995 nr 26*, an architect had been previously employed but on the principal's suggestion ended his employment to perform work as a contractor instead. In this case, the actual circumstances before and after the employment had been terminated were essentially the same, and consideration was given to the fact that the performing party was still using equipment such as office space, computers and other materials and tools provided by the principal.

The same line of reasoning was made in *NJA 1996 s. 311*, where the owner of a construction and installation company had provided a performing party with all the tools and machines (apart from a handsaw) needed to perform the work necessary. According to the court, this circumstance indicated that an employment relationship was at hand, even though the principal argued that the agreement between the parties had been a partnership between two firms.

One thing that needs to be taken into consideration when considering the development and flexibilisation in the labour market in recent years, is that the usage of office space or equipment differs from previous times. Working hours are becoming less regulated, a lot of work can be done from home, and often, the only tool required is a laptop.⁶²

2.1.7 Remuneration

The criterion of remuneration has been identified as a special feature in Swedish labour law.⁶³ The common denominator in the cases presented seems to be the court's line of reasoning in what is generally true for remuneration in employment relationships. An agreed upon remuneration is not necessary, the performing party's reasonable perception that compensation would be paid is sufficient. However, this is true for an independent contractor as well.⁶⁴

In the case *AD 1989 no 66* where work had been performed in a home without the perception that remuneration would be paid at the time, the court comments that remuneration for the employee is considered the most essential element in an employment relationship.

As will be further discussed below, the specific industries and the nature of the organisation at hand is taken into consideration. In the case *AD 1996 nr 135*, a woman had undeniably performed work for a political party in their facilities for a longer period of time. However, considering the fact that non-profit organisations generally are dependent on their members to perform work in the interest of the organisation without remuneration, the woman was not deemed to have a reasonable perception that she should be remunerated for her work, and was not found to be an employee.

In the case regarding a traffic warden mentioned above, *AD 1990 nr 116*, the court noted that the performing party had been paid a set amount for his work every month. In the case *AD 1979 nr 155* a man was working for a company installing heating units. The agreement that had been made was considered an independent contractor agreement by both parties. However, the court

⁶² Westregård (n 35) 191.

⁶³ Källström and Malmberg (n 33) 27.

⁶⁴ Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 111.

still made an assessment of the circumstances applicable in the case. Special consideration was given to the fact that no minimum amount of compensation was agreed upon, which separates the relationship from what is a general term for an employee.

In addition, consideration is given to whether performing parties are reimbursed for costs and outlay they have incurred when performing work. In the case presented above regarding the church cashier working for a parish, *AD 1998 nr 11*, consideration was given not only to the fact that he had been paid a fixed amount of money every month, but also that he had been reimbursed for travels as well as for renting a computer and a fax machine among other things.

2.1.8 Industry specific practises and customs

As previously mentioned, practices and customs established in specific industries have become a significant factor when assessing whether an employment relationship is at hand.⁶⁵ It is stated already in *NJA 1949 s. 768* that if an agreement is relatively common in the industry and has become generally applicable, guidance can be gained from it regarding the legal position/status. Regarding case law up until the 21th century, industry specific customs have been deemed essential when reasoning around the distinction between an employee or an independent contractor, often being the deciding factor in the case.⁶⁶

In the case *AD 1987 nr 21* presented above, regarding a writer working for a union paper. The Labour Court stated that the duration of the cooperation between the parties was a circumstance that strongly suggested that an employment relationship was at hand. However, the conditions of the industry were taken into account. Even though the parties were not bound by the collective agreement operating in the news industry, the so called Freelance Agreement, the court determined that it should still be considered. In accordance with the practise in the specific industry and the fact that many freelancers worked for longer periods for the same principals, the court found that this circumstance was not of crucial importance in the current case.

The opposite applied in the case *AD 1998 nr 172* presented above regarding the artists who had made an agreement with a municipality regarding an operetta tour. The court considered the fact that the commitment from the artist was relatively long term in comparison with other contracts common in the industry, indicating an employment relationship.

Regarding the customs in the entertainment industry, an actress in the in *NJA 1992 s. 631* cited a collective agreement concerning artistic workers such as actors, claiming that an employment relationship was at hand for these types of workers and their principals. The court stated that this type of short-term assignments of one or two days, which were prominent in the case, were a common feature in the industry, and found that the parties were assumed to have agreed that an employment contract was at hand. Special emphasis is given to the customs in an industry where a collective agreement is made on a central level, as the general view is that such an agreement is made between equal parties and can be assumed to reflect balanced solutions and well established practices in the industry.

The so called Freelance Agreement has been under scrutiny more than once. In the case *AD 1998 nr 138* a journalist claimed she was entitled to occupational pension, as she had been an employee of a weekly newspaper. The Freelance Agreement was not in force between the

⁶⁵ Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 120.

⁶⁶ *Ibid*, 120.

parties at the time, but was still considered to express the customs and practises of what distinguishes a freelance worker in the industry, and should therefore be taken into account. As in the case above⁶⁷, the fact that the journalist had been working for the newspaper for a longer period of time was deemed to be considered standard practise in the industry, and thus the court reasoned that this should not be a decisive factor in the judgement made in the case, as it might have been in other cases. The plaintiff argued that remuneration had been paid each month, indicating an employment relationship, but this remuneration had been calculated in accordance with articles submitted, even if these were reoccurring every month. The fact that the journalist had not been performing work for any other principal was not given much emphasis in this case. She was not considered an employee.

2.1.9 Dependency, the social and economic criteria

Another factor of consideration is the performing party's dependency on the principal, both socially and economically, in comparison with an employee. In case law this is particularly salient in cases regarding hairdressers leasing a hairdresser's chair at a salon.

In *AD 1978 nr 7*, the Labour Court discusses the fact that the leasing of a hairdresser's chair at a salon usually results in a relationship between the principal and the performing party that departs from what is usually considered an independent contractor. For instance, from a customer's perspective, the performing party acts as an employee would have. The performing party is also dependent on the management of the salon at large without having any influence over it.

In the case at hand, the agreement between the owner of the salon and the hairdresser was that the latter was an independent contractor. However, the hairdresser had to abide by the prices set by the owner of the salon, and there were no signs indicating that she was self-employed. As exemplified above, she did not have any influence over the management of the salon, nor did she keep her own booking. The court gave special consideration to the fact that the hairdresser was very young and lacked work experience in the field, and had been terminated two months prior from a so-called student employment by the owner of the salon, who had claimed redundancy. This indicated a non-independent and subordinate position to the owner of the salon. The court concluded that this was an employment relationship.

In *AD 1979 nr 12* however, the case was quite the opposite, even though it regarded the same field. Two hairdressers had leased hairdresser's chairs at a salon. The court considered the special circumstances for this type of relationship and took note of the fact that the agreements assumed personal obligation for the hairdressers to fulfil their duties. However, the independence of, and established position on the labour market for the two hairdressers was taken into consideration. Furthermore, they ran their establishments independently, setting their own prices and working hours and were under no obligation to perform work for the owner of the salon. Additionally, they worked with their respective exclusive clientele, kept their own booking and ordered their own products, paying on separate invoices and paying their own social contribution and preliminary income tax.

2.1.10 The mandatory nature of the concept of employment

The regulations in the Swedish Employment Protection Act is mandatory to the employees' advantage. Neither the designation nor the intention of an agreement is a decisive factor when

⁶⁷ *AD 1987 no 21*.

assessing whether a performing party is an employee or an independent contractor. In the preparatory work for the Employment Protection Act, a discussion on the topic was held, and the general view was that making the agreement and designation decisive would lead to the entire legislation becoming dispositive.⁶⁸ However, the parties are free to make an agreement on their choice of work contract, as long as the relationship post contract is characteristic of the designation in the agreement. There is no obligation for a principal to hire someone as an employee as opposed to an independent contractor.⁶⁹ However, limitations in collective agreements may still apply⁷⁰

A clear example of these mandatory regulations is *AD 1979 nr 155* mentioned above regarding a man who had been working with heating installations. The agreement made was considered an independent contractor agreement from both parties. To this end, the remuneration had been calculated based on the performing party's intention to pay his own social fees, which he had done. The court stated, however, that an overall assessment has to be made in each individual case, and that the construction and content of the agreement is of importance only to the extent that it reflects the actual relationship between the parties. The court considered the following circumstances:

The performing party had not been shown to be personally obligated to perform work for the principal, though investigations showed that this had been assumed. The court gave special consideration to the fact that the performing party could not have been performing the heating installations by himself, but had not hired others to help him. Instead, he had been cooperating with another performing party who had had the same relationship to the principal as he had.

Furthermore, the court considered the fact that the principal had continuously prepared schedules for the work that needed to be done and when it should be initiated, and had also provided the performing party with the equipment used. He had used his own car, but had been reimbursed for travel costs such as for fuel. In comparison with other employees, the work had been conducted in the same way for the performing party at hand, apart from a greater freedom to affect his working hours by being efficient, while other employees were working on a time schedule. As considered above, the fact that the performing party was not guaranteed a minimum salary was a circumstance that set him apart from a normal employee. However, in this case, it was clear that the agreement between the parties had been such that the performing party could assume to be offered work for the main duration of his working hours, and the remuneration had been calculated in such a way that after social fees had been deducted, the amount left would represent the same amount of earnings per hours as an employee. The fact that the performing party had been working for the principal for a long duration of time, had been at the disposal of the principal for occurring tasks and had been performing work for other principals to a very limited extent was taken into consideration as well, leading the court to conclude that the performing party should be considered an employee.

2.1.11 Circumvention of mandatory legislation and collective agreements

In Swedish case law, the question of whether a performing party is considered an employee or an independent contractor is often followed by the question of whether an agreement is constructed with the purpose of taking advantage of the situation at hand and circumvent

⁶⁸ SOU 1993:32, *Ny anställningsskyddslag*, 244.

⁶⁹ Apart from some limitations that can be met in the regulation 38-40 §§ Codetermination Act.

⁷⁰ Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 113.

mandatory legislation. It has been described as a checkpoint where the courts verify the conclusion made by the overall assessment.⁷¹ If the principal has dictated the terms and conditions of the agreement, and a purpose to circumvent mandatory legislation can be identified, this is a circumstance that in itself speaks for the labour protection legislation to be applied.⁷² A circumstance that generally speaks against such a purpose is for example that a contracting party voluntarily refrains from this protection, while a former employment with the principal generally speaks for the opposite.⁷³

In AD 1994 no 66 the issue at hand concerns three men who for more than a decade had been performing personal examinations of suspects in criminal cases. An order of personal examination is made by the court in the present case and executed through assignments by different institutions within the Swedish Prison and Probation Service. During these years, the three men had performed these assignments to such extent that it could be said to represent their main source of income. The assignment of personal examination was regulated in detail in constitution and the court deemed that the agreement between principal and performing party in this case should be considered rudimentary. Furthermore, the court deemed that the terms of these assignment, including remuneration, was dictated by the laws and regulations of personal examinations, in accordance with constitutional regulation and was not in an agreement between principal and performing party. Accordingly, the remuneration was paid by the Swedish Court Authority and was set in each individual assignment by the criminal court ordering the examination, and had included the option of appealing to a higher court. The performing parties had been performing assignments for around 20 different institutions within the Swedish Prison and Probation Service, and investigations had shown that they were not at the disposal of either of them. They had no obligations to the institutions but could at their own choice turn down an assignment. Interestingly, the court does consider the fact that the three men had been well-respected as personal examiners within the institutions and that turning down an assignment would risk their names losing in currency. This however, was deemed a different matter and did not contribute to the employee definition being closer at hand.

After this conclusion, the court considered whether this construction of the relationships between the performing parties and the different institutions had been purposefully made in order to circumvent the mandatory labour rights legislation. The court noted that a labour contract could still be considered an employment relationship if the principals could be deemed to take advantage of the situation to circumvent the legislation applicable on an employment relationship. However, the conclusion from the investigation did not show anything attesting to this thesis, but rather that the three men had made themselves financially dependent on the income from these assignments on their own initiative. The background for this initiative, apart from interest in the field, was that they had considered that this line of work could result in an option for providing a living, given the quantity and intensity of assignments to external personal examiners.

There seems to be some circumstances that generally indicate a purpose to circumvent mandatory legislation or collective agreement. For instance, this could be the case if a performing party has previously been employed by a principal and has subsequently been performing similar tasks as an independent contractor. Another example could be if a person,

⁷¹ DS 2002:56, *Hållfast arbete för ett föränderligt arbetsliv*, 118.

⁷² Källström and Malmberg (n 33) 28.

⁷³ DS 2002:56, *Hållfast arbete för ett föränderligt arbetsliv*, 118 ff.

whose company is the contracting party, has a personal obligation to perform work for the principal.⁷⁴

In the cases *AD 2012 nr 24* and *AD 2005 nr 16*, two cases with similar circumstances, the court identified a purpose to circumvent mandatory legislation. In *AD 2012 nr 24*, a reporter had been hired as a contractor through her company as a hostess for a radio show. The reporter had previously been hired as an employee for shorter periods of time for different assignments. The investigation further showed that her previous time limited assignments as an employee had been purposefully placed in time in such a manner that her legal right to precedence to an employment on an indefinite period had been circumvented. As her previous employments were similar to the current assignment, the court found this new definition curious. The court concluded that it must be shown that there is a difference in the reporter's working conditions and her position in comparison with previous assignments. The main difference identified in the new agreement was that an agreement had been made of a fixed lump-sum, although in reality it had been paid monthly by invoice, and was marginally higher than what she would have received had she been an employee. Other than this, the court could not conclude that the circumstances in the reporter's assignment were significantly different from what they would have been for a regular employee. In *AD 2005 nr 16* the circumstances were similar. In this case a woman hired as a producer for a TV-show under an independent contractor agreement. However, she had had several project employments with the principal previously and there too, the court concluded that her working conditions had only changed marginally from what they had been before. This construction of the agreement indicated a purpose to circumvent mandatory legislation.

In the case presented above, *NJA 1996 s. 311* regarding a man who had formed a partner company with a construction and installation company, it was concluded that the performing party had been at the disposal of his partner company, personally obligated to perform work that occurred under the management and control of the partner company.

Bogus/False self-employment

Within the Swedish labour market, there have been cases of principals demanding performing parties to be self-employed and pay their own social fees, even though the tasks performed are practically the same as those of the employees. These performing parties are often highly dependent on one principal. These types of relationships have become more common in many European countries, leading critics to refer to bogus or false self-employment.⁷⁵

The labour court in Sweden has proven vigilant when it comes to exposing employers' attempts to circumvent the mandatory legislation by disguising employment relationships as other forms of contractual arrangements.⁷⁶

2.1.12 The courts' ruling in equilibrium

The identification of a purpose to circumvent mandatory legislation is of greater relevance in cases where the court is in doubt of how to assess the various circumstances. In the preparatory

⁷⁴ Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 116.

⁷⁵ *Ibid*, 89.

⁷⁶ Inghammar (n 41) 690

work to the Swedish Codetermination Act⁷⁷ and the Swedish Employment Protection Act⁷⁸, a wide application of the notion of employment is identified. It is also stated that the development of this widening application should continue and that the courts in doubtful situations should be determined to the employee's advantage. This was echoed in the previously mentioned case *NJA 1996 s. 311*, referring to this principle growing in case law in the last decades. However, this type of statement has not been made in the Labour Court in the last decades, nor has this type of position taken by the Labour Court been identified that indicates the use of this type of in-dubio rule.⁷⁹

In the case *AD 1983 nr 89*, a salesman for a trading company was selling treats that he bought from the company and sold in a specific area. In the case, the circumstances seemed to be equal in speaking for or against an employment relationship being at hand. For example, the salesman had been working with the trading company for a long duration of time and it could be assumed that it would have continued indefinitely had a dispute not occurred. Furthermore, the salesman's earnings from this job was his main source of income and he had been performing the job personally. On the other hand, the court took note of the fact that the performing party had had the freedom to construct his work of selling the treats as he wished, and that there had been no specific management or control. The treats had been bought by the salesman who had paid the company through invoice before in turn selling them. In addition, he had been free to work with other types of sale parallel to the one at hand.

The court discussed the aim of the widespread application of the notion of employment made in the preparatory work mentioned above, but could not identify a purpose to circumvent the mandatory legislation. Finally, the court noted that neither of the parties had initially intended to enter into an employment relationship. When unable to reach a conclusion based on other circumstances, this proved to be the decisive factor.

2.1.13 Equal/Dependent contractors according to the Codetermination Act

In Sweden, there is a so-called middle group of performing parties who do not fulfil the criteria for being labelled employees, but are still considered to be in need of additional protection in comparison to traditional independent contractors, since they are defined as such, yet in many ways function as employees and are often dependent on one main principal. Usually they run their business on a small scale and their position is often comparable to an employee in terms of financial, social and bargaining possibilities.⁸⁰ In the Swedish Codetermination Act⁸¹, these performing parties should be considered employees and accordingly be given the same rights as traditional employees when it comes to association, information, bargaining, collective action and mediation.⁸² Normally, if an independent contractor was being represented by a union, this would be in breach of the Swedish Competition Act. This law, however, has made an exception to agreements between employers and employees, as described in the Codetermination Act. This includes individual contracts and contracts between social partners.⁸³

⁷⁷ Prop. 1973:129, 196.

⁷⁸ Prop 1975/76:105 annex 1, 109.

⁷⁹ Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 119.

⁸⁰ *Ibid*, 82.

⁸¹ Codetermination Act Para 1, part 2.

⁸² Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 125.

⁸³ See Carlsson, Karnov Online, Konkurrenslagen, Chapter 1, Section 2, comments. <https://pro-karnovgroup-se.ludwig.lub.lu.se/document/860214/1#SFS2008-0579> last accessed 2017-05-21.

Examples of these kinds of dependent contractors could be different franchisees, constructional or agricultural workers, travelling salesmen and petrol station directors. In the assessment of whether a performing party is to be considered a dependent or equal contractor, the same circumstances as has been discussed above should be taken into consideration, according to the preparatory works of the Swedish Codetermination Act⁸⁴ and the Employment Protection Act.⁸⁵

However, this inclusion of a dependent contractor in the Codetermination Act as it was formed was made due to concern for a limited coverage of the Act. Since then, the notion of the employee has been broadened as seen above, and many consider the special provision of the dependent contractor outdated.⁸⁶

2.1.14 The Swedish Model and the purpose of the notion of employment in Swedish civil law

The Swedish model is a labour market regime that traditionally supports the opinion that the government as far as possible should refrain from interfering in the employer-employee relationship.⁸⁷ The notion can be defined as a reflection of the uniqueness of the Swedish social model with a foundation in the Swedish social partners' specific position on the labour market, and the equal harmony and understanding between these parties in relying on collective agreements, rather than legislation. The general idea is that the social partners negotiate on wages and working conditions through central unions and employer representatives, attempting to take a broad responsibility for the development of the labour market, and society by extension.⁸⁸ This self-regulation through collective agreement has enabled the relationship to be developed, reconsidered and adapted according to new conditions on the labour market, whereas legislation would be slower to follow.⁸⁹ Furthermore, it could be argued that one of the strengths of the Swedish Model is its ability to adapt to different branches and industries.

2.1.14.1 The Freelance Agreement

As discussed above, the courts take into account the traditional customs and usages in the industry when assessing whether a performing party is an employee or an independent contractor. This facilitates the adaption of the concept to new situations on the labour market. One of the most significant examples of this is the collective agreement known as the Freelance Agreement which stipulates the special conditions for journalist and the boundary between employee and self-employed is drawn by traditional practice.⁹⁰ In Section 2 of the Agreement, the definition of a freelance worker is a person who “without being employed has journalism as their main occupation and by agreement undertakes assignments for one or more companies and is normally paid for each assignment.”⁹¹ In a “normal” assessment made by the court, it would take into consideration the fact that one principal may continuously hire the same performing party, provide them with necessary equipment and reimburse for travel costs and that this may go on for a longer duration of time. This would most likely lead the court to

⁸⁴ SOU 1975:1 *Demokrati på arbetsplatsen*, 726.

⁸⁵ SOU 1993:32, *Ny anställningsskyddslag*, 249.

⁸⁶ Inghammar (n 41) 682.

⁸⁷ Nyström (2017), *EU och arbetsrätten*, 58 ff.

⁸⁸ Westregård and Milton ‘Recent trends in collective bargaining structures in the Swedish model’ (The 11th ILERA European Congress, Milan, 8-10 September, 2016) 2.

⁸⁹ *Ibid*, 17.

⁹⁰ The Freelance Agreement (1994). The collective Agreement between the Swedish Media Publishers' Association and the Swedish Journalist Association for Freelance Work. The latest edition of the Freelance Agreement (2015) can be found here: <https://www.sjf.se/lon-och-villkor/aktuella-kollektivavtal-och-frilansavtal/frilansavtal> last accessed 2017-05-21.

⁹¹ Freelance Agreement (1994), Section 2. Translation by Westregård (n 35) 191.

conclude that an employment is at hand. However, as shown above, the court will take special consideration to the traditional customs and usage of the industry.⁹²

The opportunity in Sweden to develop according to new trends on the labour market and adapt collective agreements to different industries has made the model resilient. In accordance with these developments, the concept of an employee and the scope of the labour law has been widened, and the weight and topicality of the circumstances considered by the court may change in accordance with labour market developments. What has previously been considered circumstances indicating an employment relationship, is no longer distinctive of how an employee performs work, but may just as well be typical of how an independent contractor performs their work.

When continuing the development of the labour market, it is important to consider solutions that favour predictability, as an inaccurate definition of a performing party made by an employer can be costly.⁹³

2.1.15 The concept of the employer

Like the notion of the employee, there is no statutory definition of the notion of the employer in Swedish law. It has rather been developed in case law, though not the same extent as the notion of the employee. An employer is generally a natural or legal person who is bound by a contract with another person performing a service under such circumstances constituting an employment relationship, or else accommodating a performing party's achievements.⁹⁴

2.2 In the United Kingdom

As described above, The United Kingdom's legal system is based on the Anglo-Saxon model. The system is mainly based on common law, which is to say precedents from the courts rather than legislation. In contrast to Swedish case law however, some precedents are binding, and some are not, even though they can be considered to have persuasive authority.⁹⁵ As the common law has such a dominant effect on the legal system and precedents are very leading,⁹⁶ a continuity can be detected, and precedents and judicial decisions are integrated in the legal system in such a way that it can be hard to adapt as society develops, and social conditions may have changed since the precedent was made.⁹⁷

As in Sweden, there is no basic definition of the employment relationship in UK legislation. In case law, it has been expressed that it is almost impossible to give a precise definition of the employment relationship, even though it is often "easy to recognise a contract of employment when you see it".⁹⁸ However, in the UK Employment Rights Act 1996 (ERA 1996), definitions are made to the notion of a contract of employment, stating that it "means a contract of service or apprenticeship, whether expressed or implied, and (if it is expressed) whether oral or in writing."⁹⁹ The vague the definition made in legislation is considered to have marginal impact,

⁹² Westregård and Milton (n 88) 191.

⁹³ Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 93.

⁹⁴ Källström and Malmberg (n 33) 27.

⁹⁵ Bogdan (n 19) 102.

⁹⁶ *Ibid*, 91.

⁹⁷ Deakin and Morris, *Labour Law* (6th edn Hart 2012) 59.

⁹⁸ *Stevenson, Jordan & Harrison LD. v. MacDonald & Evans*, [1952] 1 TLR 101 [111].

⁹⁹ ERA 1996 Section 320.

and the existence of a contract of employment is determined through an examination of common law.¹⁰⁰

2.2.1 The scope of the notion of ‘worker’ and the notion of ‘employee’

An employment relationship in the UK can be between an employer and an employee. However, in UK labour law, there is a notion of the ‘employee’ that is distinct from a broader category of a ‘worker’. The definition of a worker in the ERA 1996 is

“an individual who has entered into works under (or, where the employment has ceased, worked under) (a) a contract of employment or (b) any other contract whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.”¹⁰¹

The notion of ‘worker’ has been given a wide definition and includes anyone who personally performs work in exchange for remuneration. Accordingly, this includes self-employed or independent contractors.¹⁰² It should be noted that a distinction is made between a ‘contract *for* service’ and a ‘contract *of* service’. The former is made between a contractor and a client. For example, individuals who sell an end product or a service which does not necessarily consist of their own work and do not contract to provide personal *service*. They are excluded from the notion of ‘worker’.¹⁰³

A narrower notion than that of ‘worker’ is the one of ‘employee’ or ‘wage earner’, which assumes that the performing party is subordinate to the principal. The latter might be more relevant when comparing to the Swedish notion of employee in terms of what protection is provided to them, but has a much narrower scope.¹⁰⁴ Workers in the UK legislation are included in the National Minimum Wage Act 1998 (NMWA), and are thus protected from unauthorized wage deductions, though they are excluded from the sections concerning dismissals, which is only applicable to employees. Furthermore, the Working Time Regulation 1998 (WTR) and Part Time Workers (Prevention of less favourable treatment) Regulation 2000 apply for workers as well.

An employee in the ERA 1996 is defined as “an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment”.¹⁰⁵ An employee who is employed under a contract of employment is protected by the above-mentioned legislation as a worker, but additionally enjoys the protection of the provisions in the ERA 1996 pertaining to unfair dismissal protection, redundancy compensation, parental rights, minimum notice upon termination and the right to guaranteed payments.¹⁰⁶ As the definition in legislation is rather vague here too, the scope of the notion of ‘employee’ rests

¹⁰⁰ Benjamin Jones and Jeremias Prassl ‘The Concept of ‘Employee’: The position in UK’ in Bernd Waas and Gus Heerma van Voss’s (eds) *Restatement of Labour Law in Europe* (Hart Publishing, forthcoming) 748.

¹⁰¹ ERA 1996 Section 320.

¹⁰² Deakin and Morris (n 97) 145.

¹⁰³ Engblom, ‘Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States’ (n 34) 163.

¹⁰⁴ Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 80 ff.

¹⁰⁵ ERA 1996 Section 320.

¹⁰⁶ Engblom, ‘Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States’ (n 34) 164.

upon the common-law tests developed by the courts.¹⁰⁷ The definition of the employee as defined in ERA 1996, and the common law following it, is considered the most important one in labour law. However, similarly to what has been discussed above, the notion of employee in the ERA 1996 cannot be considered a uniform concept applicable to all statutes,¹⁰⁸ and a court case concerning labour law might not pay much heed to a worker's status in social or security law when deciding on their employment law status.

A statement on the difference between the statuses of 'employee' or 'worker' was made by the Court of Appeal in the case *Byrne Bros (Formwork) Ltd v Baird* and was described as following:

Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services — but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers¹⁰⁹

UK income taxation and social security legislation divides the labour force into the two principal groups of employees and self-employed workers. For an employee, the employer is responsible for making relevant tax and social fee deductions, while a self-employed worker or independent contractor is responsible for doing so themselves.¹¹⁰ As in Sweden, the primacy of facts principle applies in the UK, which means that the parties cannot choose a definition in their contract to avoid the impact of social security and tax legislation, but it is the actual circumstances in the relationship that is the basis of the definition.¹¹¹

Furthermore, there is a distinction made within the scope of the notion of self-employed, which is described in the case *Bates Van Winkelhof v Clyde & Co LLP and another*:

“One kind are people who carry out a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them [...] the other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else.”¹¹²

2.3. The ground pillars of the overall assessment

Since the notion of 'employee' in UK statutory law does not give much guidance to the content of the concept of employment, the courts play a large role in determining this.¹¹³ As in Sweden,

¹⁰⁷ Deakin and Morris (n 97) 147.

¹⁰⁸ Jones and Prassl (n 100) 751.

¹⁰⁹ *Byrne Bros (Formwork) Ltd v Baird*, [2001] WL 1422841, [17].

¹¹⁰ Deakin and Morris (n 97) 148.

¹¹¹ *Ibid*, 151

¹¹² *Bates Van Winkelhof v Clyde & Co LLP and another* [2014] 1 WLR 2047.

¹¹³ Deakin and Morris (n 97) 131.

an overall assessment is made from several factors that are to be considered together, in order to determine whether a performing party is an employee or not. A list of circumstances, as can be derived from Swedish preparatory work, has not been developed in the UK courts however¹¹⁴, and the circumstances assessed are somewhat different, even though similarities can be detected.

Some guidance can be gotten from case law that a service contract can be identified in cases where the following conditions are fulfilled:

- (1) "The servant agrees that, in consideration of a wage or remuneration, he will provide his own work and skill in the performance of some service for his master"
- (2) "He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master"
- (3) "The other provisions of the contract are consistent with its being a contract"¹¹⁵

Much like in the Swedish labour law, an obligation of personal performance is assumed for a conclusion of employment to be made. Furthermore, it is assumed that this work is performed under the management and control of the principal. However, an assessment of further provisions in the contract must be consistent with its being a contract.¹¹⁶ In more recent case law, several additional circumstances have been considered and common law 'tests' are applied when assessing the occurrence of an employment relationship.¹¹⁷ These encompass control, integration, economic reality and mutuality of obligation.¹¹⁸

2.3.1 Personal work duty

The criterion of the personal obligation to perform work is taken into consideration in Swedish case law. Similarly, in the UK, it is a necessary condition for a contract of employment to exist. However, this circumstance is often further investigated in the UK.¹¹⁹ Two main issues have become decisive when considering whether this obligation is present in the contract. The first issue is whether a performing party has a right to substitute their labour for another performing party, the second is whether such a substitution requires approval from a principal.¹²⁰

In the case *Ready Mixed Concrete v. Minister of Pensions and National Insurance*¹²¹ a driver delivering for a company that sold concrete was defined as an independent contractor in the agreement. The driver had bought his lorry through a financing agreement with the company. He paid his own lorry running costs, but was remunerated for mileage and load. Furthermore, he was under the obligation to wear a company uniform, could only use the lorry for purposes connected to the company and had painted the lorry in the company colours. He and eight other owner drivers had jointly hired a relief truck driver to take over when someone was sick or on holiday. However, the company was, according to the contract, entitled to require the driver himself to operate the truck, should he not have a valid reason not to. Furthermore, any such

¹¹⁴ Engblom, 'Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States' (n 34) 173.

¹¹⁵ *Ready Mixed Concrete v. Minister of Pensions and National Insurance* [1968] 2. Q.B. 497 (HC), 515.

¹¹⁶ Engblom, 'Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States' (n 34) 167.

¹¹⁷ Jones and Prassl (n 100) 755 ff.

¹¹⁸ Deakin and Morris (n 97) 145.

¹¹⁹ Engblom, 'Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States' (n 34) 168 ff.

¹²⁰ *Ibid.*, 169.

¹²¹ [1968] 2. Q.B. [497].

reason should be proven and the vacations planned should be done in agreement with the company.

In the matter of personal obligation to perform work, this limited right to substitute another to do part of the agreed work was not enough to conclude that a personal obligation to perform work was not present, as the required valid reason for not performing work and the need to provide evidence for this reason was similar to that of an employee.

In the case *MacFarlane v. Glasgow City Council*,¹²² the two applicants had been working at a recreational sports centres as gymnastic instructors for Glasgow City Council. According to the council, the instructors had been self-employed, and the contract stipulated that could they not instruct a class, they should arrange for a replacement. However, this substitute was to be chosen from a register of other instructors provided by the council. To that extent, the council could veto a replacement. The line of reasoning from the *Ready Mixed Concrete* case was echoed with regard to the limited and occasional power of delegation, and the limitation of the power of delegation was deemed even more prominent in this case.

In another case, *Express & Echo Publications Ltd v. Tanton*,¹²³ the contract for a performing party defined as an independent contractor stipulated the contractor had a right to, on his own expense, substitute himself for “another suitable person to perform the service”. This led the court to conclude that an obligation to personally perform the service did not exist, even though the applicant argued that this was not the actual case in practical circumstances. In later years an increase in employers using standard forms of contracts that are incompatible with employee status has been noted,¹²⁴ this could in part be a result of the decision in *Express and Echo*.¹²⁵ In the case *Staffordshire Sentinel Newspapers Ltd v Potter*, the court refers back to the case of *Express & Echo Publications*. It states that the presence of this type of effective substitution clause, that had been used in reality, led the court to conclude that a contract of personal service was not at hand, as there was an absence of the “irreducible minimum” of a contract of service, which involves a provision of personal service.¹²⁶

However, in the case *Redrow Homes (Yorkshire) Ltd v Buckborough*¹²⁷ the court concluded that there was a possibility that if a substitution clause in the contract had never genuinely been intended to be effective by the parties, it could be considered a “sham”, although this was not true in the case at hand. Such a sham was identified in the case *Autoclenz Limited v Belcher and others*.¹²⁸ The claimants in the case were car valeters who had been signed on a sub-contract basis, and in their contract, substitute clauses were included. However, the substitution clause and the right to refuse work described were deemed practically unrealistic, thus personal obligation to perform work was concluded. The personal obligation to perform work seems to be a fundamental criterion. Should the courts find that this criterion is not fulfilled, the additional circumstances in the case is not regarded.

¹²² [2001] IRLR 7, [10].

¹²³ [1999] ICR 693, [696].

¹²⁴ Deakin and Morris (n 97) 152.

¹²⁵ Engblom, ‘Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States’ (n 34) 170.

¹²⁶ [2004] IRLR 752.

¹²⁷ [2009] IRLR 34.

¹²⁸ [2011] IRLR 820.

2.3.2 Employer's control and labour management

Having determined a presence of personal obligation, the employer's control over the work performed has been described as a "necessary, though not always sufficient, condition of a contract of service".¹²⁹ The source of the control criterion comes from the traditional relationship between the servant and the master defined in a case from 1880.¹³⁰ However, the term 'servant' used then is not the same as the modern term 'employee', and the relevant criteria have since changed.¹³¹ In more recent cases, the courts are looking at factors such as the extent of actual control over the substance of work done, the method of control, transfer of control and the extent of integration into the employing organisation, the powers of appointment, suspension and dismissal, and the existence and form of payment of wages, salaries and other benefits.¹³² The criterion of control is contemplated in relation to other circumstances relevant to the case, and a clear methodology to assess these factors has not been found in the courts. Given this difficulty, the importance attested to the control test has somewhat diminished.¹³³

In the case *Market Investigations Ltd v Minister of Social Security*,¹³⁴ a woman had been hired for a series of short term contracts as an interviewer for a market research company. When she signed a contract for each individual assignment, she was supplied with the company's "Interviewer guide", and given detailed instructions on the methods that were to be used in the individual assignments. At times, she was asked to attend the company briefing meetings. Provided she was finished with the work on a set deadline, she was free to structure her schedule as she pleased during the assignment, and was free to work for other principals. The judge in the case stated that the company indeed had an extensive right to control how the interviewer conducted her work. The fact that the work schedule was left to the discretion of the worker was not inconsistent with it being a contract of service. However, the importance of the control test was discussed at length in the case, and the judge made a statement saying that:

"No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor"¹³⁵

2.3.3 Organisational integration

Additionally, or alternatively, to the test of control, the courts have approached the definition of control in combination with the integration of the performing party in the organisation, and thus their subjection to the rules and procedures of the organisation.¹³⁶ In the case *Stevenson, Jordan and Harrison v MacDonald and Evans*, the Court of Appeal stated that

"one feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his

¹²⁹ *Ready Mixed Concrete (n 121)* [517].

¹³⁰ *Yewens v Noakes* [1880] 6 QBD.

¹³¹ *Deakin and Morris* (n 97) 159.

¹³² *Jones and Prassl* (n 100) 755.

¹³³ *Ibid*, 755.

¹³⁴ [1969] 2 Q.B. 173.

¹³⁵ *Market Investigations* (n 134) [184-185].

¹³⁶ *Deakin and Morris* (n 97) 161.

work, although done for the business, is not integrated into it but is only accessory to it." ¹³⁷

This test was a response to the difficulties for the courts to apply the control tests uniformly to skilled workers.¹³⁸ As in Sweden, a lack of control can be derived from the fact that the performing party is more competent in the area of work performed.¹³⁹ In the case *Beloff v. Pressdram Ltd*, the court concluded that "the greater the skill required for an employee's work, the less significant is control in determining whether the employee is under a contract of service."¹⁴⁰

2.3.4 Economic reality

The control test and the organisational integration test do in some cases indicate that a performing party is indeed an employee. However, it has been less effective when applied to performing parties who work for a sub-contractor, as their work can often be seen as integral to the sub-contractor's business, while they are still not considered employees. Furthermore, in *Market Investigations* the fact that the performing party in this case was somewhat autonomous in her schedule, and the fact that her assignments were irregular, was not deemed inconsistent with a contract of service being at hand.¹⁴¹ With the developing trend of companies outsourcing certain tasks and hiring labour for work not directly linked to the business, the courts have developed a test of 'business or economic reality', to ascertain whether the performing party is performing work on their own account as an entrepreneur, and thus takes their own risk of loss or chance of profit.¹⁴² This was demonstrated in the case mentioned above. The judge stated that the fundamental test to be applied was whether "the person who engaged himself to perform these services was performing them as a person in business on his own account"¹⁴³

The question of whether the performing party is dependent on their principal additionally falls under the scope of the economic reality criterion. In *Market Investigations Ltd v Minister of Social Security*, it was held that the interviewer could be an employee for this reason, even though she worked part time.

In the case *Lane v Shire Roofing Company Oxford Ltd* a carpenter had previously worked as a self-employed carpenter under contracts for service, but had recently been hired on a regular basis by a sub-contractor where workers were paid by assignments.¹⁴⁴ In the case at hand, the carpenter had been hired for a specific roofing assignment, and in addition to this he was asked to perform another assignment on a private house. The company negotiated the price with the clients and then offered the carpenter a fee to perform the work. Security equipment was offered to the carpenter for performing the work, but he preferred to use his own equipment. When performing the assignment, the carpenter fell from the ladder and sustained brain damages. The court was to try whether the carpenter was an employee or self-employed, and thus whether the company was liable for his injuries or not. The court considered the criterion of the extent of

¹³⁷ *Stevenson, Jordan and Harrison v MacDonalld and Evans* [1952] 1 TLR 101, [111].

¹³⁸ Deakin and Morris (n 97) 162.

¹³⁹ Engblom, 'Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States' (n 34) 171.

¹⁴⁰ *Beloff v. Pressdram Ltd* [1973] 1 All ER 241, [250].

¹⁴¹ *Market Investigations* (n 134) [173].

¹⁴² Deakin and Morris (n 97) 162.

¹⁴³ *Market Investigations* (n 134) [184].

¹⁴⁴ [1995] IRLR 493.

control the employer had over the carpenter, but as he was a highly skilled carpenter, this had existed not to a great extent. This fact was deemed not inconsistent with a contract of service. The company had provided most of the equipment and offered to provide the carpenter with safety equipment. The decisive question in this case seemed to be that the business was clearly that of the company, and not of the carpenter, as the business stood the financial risk. The court stated that the carpenter was neither an employee nor a specialist sub-contractor, but was nearer the former because the business was clearly that of the company. The court noted the perceived advantages for both performing party and employer in defining the performing party as self-employed, but concluded that when it comes to the question of safety at work, there was a public interest in recognising the employer-employee relationship when it exists, given the responsibilities that the common law and statutes place on the employer.

2.3.5 Mutuality of obligation

An additional test that has been used in the courts is that of mutuality of obligation, consisting of the mutual promises of future performance. This has been applied mostly in cases involving performing parties hired on casual, short-term or intermittent basis. The mutual obligation criterion does not only include the performing party's obligation to be at the disposal of the employer, but also on the employer's part the commitment to make work available in the future. The mutuality of obligation has in some cases been viewed as such an irreducible minimum necessary to create a contract of service as that of personal obligation and control and management.¹⁴⁵ This test has often been applied in cases regarding termination of contracts.¹⁴⁶ The central question has often been whether there has been a 'global' or 'umbrella' contract connecting the separate assignments.¹⁴⁷ In *Market Investigations*, the fact that the interviewer had been hired for several individual assignments was not inconsistent with a contract of service.¹⁴⁸

In a leading case, *O'Kelly v Trusthouse Forte Plc*, the applicants had worked as wine waiters hired on individual catering assignments by a hotel chain.¹⁴⁹ The wine waiters had been on a list of performing parties to contact for these catering assignments, and there had been an assumption that these wine waiters could be relied upon to offer their services on regular intervals and in turn have the insurance of preference in upcoming assignments. If they refused work at any given offer, they would be taken off this preferential list. The court considered the fact that during the assignments, the work performed was under the control and management of the principal and the equipment used was provided by the same.

The court concluded however that the transactions between the parties had been purely commercial for the supply and purchase of services for specific events. There was no obligation for the performing parties to provide work and, there was no obligation for the hotel chain to provide further work.

“It is freely recognised that the relationship of the respondents to the appellants had many of the characteristics of a contract of service. In our view the one important ingredient which was missing was mutuality of obligation. [...] The respondents were in no different position than any independent

¹⁴⁵ *Carmichael v National Power* [2000] IRLR 43.

¹⁴⁶ Engblom, 'Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States' (n 34) 181.

¹⁴⁷ Deakin and Morris (n 97) 165.

¹⁴⁸ *Market Investigations* (n 134) [173].

¹⁴⁹ [1983] ICR 728.

contractor who offers his services for a particular purpose or event [...] and it was by their choice that they made their services available to a single customer.”¹⁵⁰

This position held by the court has been criticised for putting too much weight on formal contractual obligations, rather than the actual relationship between the parties.¹⁵¹

2.3.6 Other factors

The criteria listed so far are not necessarily sufficient to determine whether a contract of service or employment is in effect. As cited above, the criteria for personal performance and control of the principal are followed by the rather vague criterion that “the other provisions of the contract are consistent with its being a contract”.¹⁵² This leaves the courts to engage in a balancing act, with great difficulty in predicting the outcome in each individual case.¹⁵³ As presented above, the courts have applied different tests when dealing with different questions, the mutual obligation test used when discussing dismissal protection and the economic reality criterion, and the question of whether the work has been performed on the performing party’s own account or not when discussing health and safety protection. In addition to this, the somewhat harsh and criticised verdict in *O’Kelly* has contributed to the difficulty for parties to rely on earlier decisions in similar cases.¹⁵⁴

2.3.7 Rate intensity and duration of work

As in Sweden, the rate, intensity and duration of work does have an impact on the courts assessments. In a case where a woman had been hired on a regular basis to assemble shoe parts, she was provided with materials and performed the work at home. The company was under no obligation to provide her with work and the quantity of the work varied according so seasonal changes. The court concluded that usually under these circumstances, where a person carried out sporadic work for a company so that a pattern emerged of an occasional week’s work a few times a year, this would not be consistent with a contract of employment. However, in the present case, the woman had worked on an average five days a week for the past seven years, which led the court to conclude that a contract of employment had grown up between the parties.¹⁵⁵

Unlike in Sweden, the length and regularity even in employment limit the personal scope of certain employment rights. The regulation for dismissal protection, excluded dismissals for inadmissible reasons such as discrimination of trade union membership, is dependent on one year of continuous service.¹⁵⁶

2.3.8 Number of principals

¹⁵⁰ *O’Kelly* (n 149) [744].

¹⁵¹ Engblom, ‘Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States’ (n 34) 181.

¹⁵² *Ready Mixed Concrete* (n 121) [515].

¹⁵³ Deakin and Morris (n 97) 169.

¹⁵⁴ *O’Kelly* (n 149).

¹⁵⁵ *Airfix Footwear Ltd. v. Cope* [1978] ICR 1210.

¹⁵⁶ Engblom, ‘Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States’ (n 34) 164.

As in the Sweden, the fact that a performing party has the opportunity to work for another principal is not inconsistent with there being a contract of service at hand. In the case *Market Investigations Ltd v Minister of Social Security*, the court stated that:

“It is by no means a necessary incident of a contract of service that the servant is prohibited from serving any other employer. Again, there is nothing inconsistent with the existence of a contract of service in the master having no right to alter the place or area within which the servant has agreed to work.”¹⁵⁷

2.3.9 Remuneration

The way in which a performing party is remunerated is to some extent considered in the UK case law. A regular, fixed sum and the circumstance that a performing party receives holiday pay and sick pay, can indicate the likelihood of an employment relationship, though it seems to have little impact on the overall assessment.¹⁵⁸ In the case *O'Kelly*, the applicants had been holiday pay or an incentive bonus calculated by reference to past services. The court included it in the list of factors considered to be consistent with a contract of employment, but did not put any emphasis on the fact. However, the fact that they did not receive sick pay, were not included in the staff pension scheme and did receive other benefits accorded to established employees was not deemed inconsistent with a contract of employment.¹⁵⁹

2.3.10 Equipment

The question of the provision of equipment, materials and tools somewhat falls under the criteria of the economic reality mentioned above. If the provision of equipment falls on the performing party to provide, this is indicative of them not being an employee.¹⁶⁰ The criteria does not seem to be decisive, but nonetheless indicative of a contract of employment.¹⁶¹

2.3.11 Industry specific practises and customs

As in Sweden, the UK courts *may* take into consideration the practice in the industry to classify a certain type of worker as an employee or an independent contractor.¹⁶² In *O'Kelly* it was stated however, that the general practice in the industry was “a factor, although not a particularly important factor, which the Industrial Tribunal were entitled to consider as part of the background against which the parties regulated their relationship.”¹⁶³

2.3.12 Mandatory nature of the concept of employment

As in Sweden, the regulations regarding employment and worker protection is mandatory as the principle of primacy of facts exists. This means that the definition of a performing party in

¹⁵⁷ *Market Investigations* (n 134) [186].

¹⁵⁸ Engblom, ‘Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States’ (n 34) 175.

¹⁵⁹ *O'Kelly* (n 149).

¹⁶⁰ Jones and Prassl (n 100) 757.

¹⁶¹ See for example *O'Kelly* (n 149).

¹⁶² Engblom, ‘Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States’ (n 34) 177.

¹⁶³ *O'Kelly* (n 149) [117].

a contract has to be in line with the characteristics of the actual relationship post contract. Contrary to in Sweden, however, the definition can be the decisive factor in some cases. In *Massey v. Crown Life Insurance*, a man had worked as a manager for an insurance company as an employee for two years, with the company paying him wage, deducting tax before paying him, and including a pension scheme.

On his own accord, he had thereafter agreed with the company to be hired as self-employed instead, for more advantageous tax deductions. The work he performed was almost identical to what they had been before, though he ceased to be a member of the company's pension scheme, and the pension contributions he had made under the previous agreement were returned to him. Two years after this, the man was dismissed and thus claimed unfair dismissal. The court discussed shortly whether the man had actually been working under a contract of service before the change in contract, but argued that a definition of commission agent was closer at hand as he was paid on commission and was free to perform work for others. This is not discussed further, but it is stated that:

“In the present case there is a perfectly genuine agreement entered into at the instance of Mr. Massey on the footing that he is self-employed. He gets the benefit of it by avoiding tax deductions and getting his pension contributions returned. I do not see that he can come along afterwards and say it is something else in order to claim that he has been unfairly dismissed. Having made his bed as being self-employed, he must lie on it. He is not under a contract of service.”¹⁶⁴

2.3.13 Circumvention of mandatory legislation

In *Autoclenz*¹⁶⁵, the claimants were car valeters who had been signed on a sub-contract basis. Mr. Huntington, one of the car valeters, had previously had a contract stating that he was a sub-contractor. This contract had not, however, had a substitute clause, nor had it stated that Mr. Huntington was not obliged to perform work or that Autoclenz was not obliged to provide him with work. These clauses were subsequently added in contracts between the parties. The court concluded however, that it had been clear that Mr. Huntington and the other car valeters would not have been provided work had they not signed these contracts, and that they had had no input into the negotiations of the terms.

Mr. Huntington had been working on an almost full time basis with the company for several years. The work was required to be performed in accordance with detailed instructions set by the principal. The valeters rendered weekly invoices which were calculated and prepared by Autoclenz, being generated by Autoclenz at head office based on the information provided by the valeters. The valeters undertook responsibility for payment of tax and national insurance. The provision of equipment had varied. At one point Autoclenz had provided all materials, but had later charged the valeters 5 % which was contained in separate invoices.

The court held a line of reasoning regarding the possibility of the contract being a sham. The court focused mainly on the rights in the contracts to refuse work or to work for someone else, and the substitution clause's practical application. The court found that the work could not have been performed without the understanding that the valeters could be relied upon to turn up and

¹⁶⁴ [1978] 2 All ER 576 [581].

¹⁶⁵ *Autoclenz (n 128)*.

perform the work that was provided. Furthermore, the provisions in the contract stating that there was no obligation on Autoclenz to provide work was deemed wholly inconsistent with the facts in the case, as the valeters were expected to turn up each day and there had been a requirement for valeters to notify Autoclenz in advance if they were not available. As mentioned above, the substitution clause was deemed to be an unrealistic possibility.

“Accordingly, I find that the claimants entered into contracts under which they provided personal service, where there were mutual obligations, namely the provision of work in return for money, that these obligations placed the contracts within the employment field and that the degree of control exercised by Autoclenz in the way that those contracts were performed placed them in the category of contracts of employment.”

Furthermore, while conducting this discussion in the case, the court refers to an earlier judgement in *Consistent Group Ltd v Kalwak*¹⁶⁶ and quotes:

”The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work, in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He said this ‘Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham it will want to say so.’”

This shows that the courts are attentive to the possibility of circumvention of mandatory legislation and sees to the protection of the performing party. In the case at hand, they also took into consideration the negotiating position that the performing parties had had.

2.3.14 The concept of the employer

The definition of the employer is, as with employee, not established fully in in common law. The focus lies on identifying the employee working under a contract of employment, and the employer is defined principally through the relationship with the employee and the jurisprudential definition has not been developed to the same extent as the definition of the employee.¹⁶⁷ Prassl has identified certain indicators as a means of identifying the employer, drawing parallels of what constitutes an employee and identifying these following functions:

- “Inception and termination of the contract of employment: this category includes all powers of the employer over the very existence of its relationship with the employee.
- Receiving labour and its fruits: duties owed by the employee to the employer, specifically to provide his or her labour and the results thereof, as well as rights incidental to it.
- Providing work and pay: the employer’s obligations towards its employees.
- Managing the enterprise-internal market: coordination through control over all factors of production.

¹⁶⁶ [2007] IRLR 560.

¹⁶⁷ Jones and Prassl (n 100) 751 ff.

- Managing the enterprise-external market: undertaking economic activity in return for potential profit, whilst also being exposed to any losses that may result from the enterprise.”¹⁶⁸5

2.3.16 Mr Y Aslam, Mr J Farrar and Others v Uber Employment Tribunal

One of the more interesting cases regarding this particular thesis is the case of Mr Y Aslam, Mr J Farrar and Others v Uber. For the purpose of giving the reader of this thesis a better background of the issues at hand, the resume of this case will be presented after the third chapter regarding the concept of crowdsourcing and the different crowdsourcing platforms.

2.4 Comparison

In comparing the concepts of employee and worker in Sweden and the United Kingdom, there are a lot of similarities in how the courts reason. Both countries’ courts use a multi-factor test to make an overall assessment of whether a performing party is an employee, or a worker or self-employed/independent contractor. The Swedish notion of the employee has been developed to be very broad and inclusive. This has been attributed to the fact that no single factor considered is a necessary prerequisite for the performing party to be considered an employee, but rather an overall assessment is made. The UK notion of employee however, is considered very narrow, and a broadening of the language has been necessary to implement certain EU directives.¹⁶⁹ When comparing the two countries it is closer at hand to compare the broadness of the notion of employee in Sweden with the notion of worker in the UK.¹⁷⁰

2.4.1 Personal work duty

In the UK, the obligation to perform work personally and, in some cases, the mutuality of obligation, has been named to be an irreducible minimum for a contract of service to be at hand, and thus if the performing party is to be considered as a worker as well. Without the criteria of personal obligation to perform work, the rest of the factors are considered unnecessary to assess. However, even if it has not been explicitly stated in jurisprudence, this circumstance is a necessary condition for an employee in Sweden as well.¹⁷¹

2.4.2 Rate, intensity and duration of work

The duration of a performing party’s work for the same principal does have some importance in both Sweden and the United Kingdom. In the case *Airfix Footwear Ltd. v. Cope*, the fact that a woman had worked for the same principal for seven years was considered to indicate that she was indeed an employee.¹⁷² In Sweden, this seems to be an important factor in cases where a longer duration of work is considered unusual.

¹⁶⁸ Jeremias Prassl, *The Concept of the Employer* (Oxford University Press 2015) 32 ff.

¹⁶⁹ Engblom, ‘Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States’ (n 34) 210.

¹⁷⁰ Engblom, ‘Viktiga lärdomar om Uber, plattformsekonomin och arbetsrätten’ (Engblom 2016) <http://www.utredarna.nu/samuelengblom/2016/10/30/viktiga-lardomar-om-uber-och-arbetsratten/>, last accessed 2017-05-21.

¹⁷¹ Engblom, ‘Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States’ (n 34) 207.

¹⁷² [1978] ICR 1210.

2.4.3 Number of principals

In neither of the countries, the fact that the performing party is able to perform work for another party is deemed inconsistent with them being an employee. However, a prohibition or impediment to do so might indicate that the performing party is an employee.

2.4.4 Employers control and labour management

In Sweden, one of the main factors indicating that the performing party is an employee is whether they are at the disposal of the principal for occurring tasks, and thus subject to specific orders or control as to how work is performed, the working time, or the place of work. In the UK, this is of paramount importance in regarding the performing party an employee or not. The more control issued by the principal, the more likely it is for the court to consider them an employee. In the UK, the test of integration of the worker into the organisation of the employer is crucial for determining this. Engblom has identified the integration test as a fairly generous one.¹⁷³ As with the obligation to perform work personally, subordination is a necessary factor, but not solely sufficient to be considered an employee. In both countries, the skill required of the worker is considered. The more skilled the worker, the less control is needed, but the performing party can still be considered an employee.

2.4.5 Remuneration

In Sweden, the fact that a performing party is paid, at least in part, a set fee or some form of guaranteed salary, as well as them being reimburse for expenses, are clear indicators that they are an employee. In the UK, the type of remuneration has become a factor that seems to have little impact, but the mutuality of obligation test does consider the fact that the performing party is obligated to perform work, and the principal is obligated to remunerate the performing party. Furthermore, the UK courts consider the performing party's opportunity for profit and the risk of loss as an indicator. If this opportunity or risk lies with the performing party, it is less likely that they will be considered an employee.

2.4.6 Equipment

In Sweden, the fact that a performing party is using the equipment of the principal is an important factor to be taken into consideration when doing an overall assessment of the status of the performing party. On the contrary, the fact that they are not using equipment does not necessarily indicate that they are not employees, as the factor has lost some of its relevance with the technological development and the fact that the only equipment needed in some cases is a laptop. In the UK, the question of the provision equipment is regarded in many cases, but does not seem to be decisive.

2.4.7 Industry specific practises and customs

In Sweden, the specific practices and customs are very decisive when regarding the concept of employment and self-employment. As the social partners can come to agreements on a central level, these agreements are very much regarded, since the parties of the agreement are considered equal, and the protection of the performing parties has been regarded when adapting the regulations in the industry. In the UK, the collective agreements do not have such power, and regard to specific industry customs is not given to the same extent.

¹⁷³ Engblom, 'Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States' (n 34) 210.

2.4.8 Dependency, the social and economic criteria

The economic criteria and to what extent the performing party is dependent on a single principal is an important factor to take into consideration in Sweden. If a working relationship is of a more lasting character and the performing party is hindered by contract or by practical consequence to work for another, the performing party might be considered to economically dependent on the principal. In the UK, the economic dependence criterion can be seen as a necessary to establish the definition of an employee. The mutuality of obligation test does consider whether the performing party is dependent on one single principal to obtain work, but at the same time, if used as a necessary criterion, the factor of economic dependence can serve to restrict the reach of the concept of employee, as seen in the case *O'Kelly v Trusthouse* regarding the wine waiters.¹⁷⁴

¹⁷⁴ *O'Kelly* (n 149).

3. Crowdsourcing

3.1 The concept of crowdsourcing

The concept of crowdsourcing is simple, yet unique in its vastness. Via a technological platform, such as a website or a smartphone application, you can access a virtual pool of workers, a crowd, that are instantly available. With the click of a button, you can locate a personal driver, a handyman or a clerk. Or rather, a worker can locate your need and undertake the task needed. It is described as a transaction between peers, and the companies enabling these transactions act as brokers between peers.¹⁷⁵ The platforms act as matchmakers between demand and supply.

In the gig economy, two types of labour dimensions can be distinguished.¹⁷⁶ Crowdwork consists of tasks mainly performed on an online digital platform.¹⁷⁷ Tasks can be accessed and completed from remote places and can connect peers on a global scale.¹⁷⁸ The task that would traditionally be delegated to a specific employee, is now distributed over a larger pool of virtual workers.¹⁷⁹ A larger task is usually divided up into smaller subtasks that are often simple and monotonous. These tasks are carried out separately and generally appear in high volume with low compensation.¹⁸⁰ Platforms such as Amazon Mechanical Turk or Crowdfunder allows clients to upload a “HIT”, a Human Intelligence Task, that they want executed. This HIT could consist of identifying and tagging objects in a video or a photo, providing survey feedback or writing short reviews of products or websites.¹⁸¹

Performing parties can also be requested to do a simple project such as designing a simple website or building a database, or more complex projects such as building the backend of a complicated interactive website or designing a patentable product. The latter often offers a greater remuneration, but is rarer.¹⁸² There are platforms that launch competitions, for example to generate a slogan or a logo. Performing parties may post their contributions, but only the ones chosen are paid for their work.¹⁸³ In crowdwork the performing party is anonymous and there is rarely any contact between the client and the performing party.¹⁸⁴

¹⁷⁵ European Parliamentary Research Service, *Interesting reads from the European Parliamentary Research Service* ((European Parliament 2014) 33.

¹⁷⁶ Valerio De Stefano, ‘The rise of the «just-in-time workforce»: On-demand work, crowdwork and labour protection in the «gig-economy»’ (2016) *Comparative Labour law and Policy Journal*, Vol. 37, No 3, 2; Unionen, *Plattformsekonomin och den svenska partsmodellen*, 2016, 36.

¹⁷⁷ The term crowdwork is in many cases used to describe the concept of crowdsourcing and as an umbrella term for work in the gig economy, in this thesis however, the term refers to the type of work described above. See also De Stefano (n 176) 2.

¹⁷⁸ De Stefano (n 176).

¹⁷⁹ Eurofound, *New forms of employment* (Publications of the European Union 2015) https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1461en.pdf last accessed 2017-05-21, 107.

¹⁸⁰ Alek Felstiner, ‘Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry (2011) *Berkeley Journal of Employment and Labour Law*, Vol. 32, Issue 1, No 3, 143, 150.

¹⁸¹ *Ibid*, 150

¹⁸² *Ibid*, 150

¹⁸³ Marion Schmid-Drüner, *The situation of workers in the collaborative economy* (European Parliament 2016) [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA\(2016\)587316_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA(2016)587316_EN.pdf) last accessed 2017-05-21, 10.

¹⁸⁴ Eurofound (n 179) 109.

The other labour dimension in the gig economy is work on demand via apps/internet. The connection between peers is still made online. But the service requested is one that must be performed locally and in person. In these businesses, the platforms normally intervene in setting minimum quality standards of service and in the selection and management of the workforce.¹⁸⁵ Uber, for example, uses its platform service to connect a client with a driver who performs the service requested. When the service is provided, the client pays via the app and can rate their customer experience. One of the common denominators for these crowdsourcing variants is the “enabling role of technology and the common business model”.¹⁸⁶

Review and rating mechanisms have been created in most of these platforms, so that a transaction can be evaluated in order to build and create trust between peers in the gig economy. This impacts the parties’ possibility to be desirable as cooperation partners in the future, for other parties.¹⁸⁷

3.2 The development of crowdsourcing in Sweden and the United Kingdom

Since the beginning of the 21st century and up until today, the sharing economy has been on the rise. The consulting firm PWC has estimated that by the year 2025 the sharing economy will have a global revenue of over 335 billion US dollars, whereof 120 billion dollars is estimated to come from service enabling platforms. As seen in the total world economy, this is not a large number, but the estimate should be seen as conservative.

In Sweden, a survey was conducted in March, 2016 by the Foundation for European Progressive studies (FEPS) and UNI Europa. The Swedish union for white collar workers and academic professionals in the private sector, Unionen, was a co-sponsor. The purpose of the survey was to investigate the “size of Sweden’s gig-economy”. The survey found that 12% of working Swedes, age 16-65, are working in the gig economy and about 24 % are using these platforms to try and find work.¹⁸⁸ Out of these 12 %, or 737,000 people, around a quarter state that this type of work constitutes their main source of income. According to the survey, 82% of performing parties are looking for work which they can do online. At the same time, 62 % say they are looking for work on demand locally such as cleaning, carpentry or gardening, while 35% state that they are looking for work as drivers via Uber, for example.¹⁸⁹ This shows that workers are willing to perform different types of work and according to the survey, “the picture that emerges is of people piecing together a livelihood from a range of different tasks”.¹⁹⁰ Though the rate of people working in the gig economy in Sweden is rather low at the moment, the rate of the growth of the gig economy at large indicates that the business will continue to grow in Sweden as well as in other countries.¹⁹¹

In the United Kingdom, the same survey was conducted, and it was found that 21 % of working citizens are working in the gig economy, and that out of these 21 %, or 9,000 000 people, over a third state that this type of work is their main source of income. Similar to Sweden, workers

¹⁸⁵ De Stefano (n 176) 3.

¹⁸⁶ Antonio Aloisi, ‘Commoditized workers. Case Study Research on Labour Law Issues Arising from a Set of “On-Demand/Gig Economy” Platforms’ (2016) Vol. 37, No 3 Comparative Labour Law & Policy Journal, 661.

¹⁸⁷ Schmid-Drüner (n 183) 2.

¹⁸⁸ Ursula Huws and Simon Joyce, *Size of Swedens ‘Gig Economy’ revealed for the first time*, (Foundation for European Progressive Studies UNI Europa 2016) <http://www.feps-europe.eu/assets/3f853cec-1358-4fb4-9552-274b55e05ecf/crowd-working-survey-swedenpdf.pdf> last accessed 2017-05-21, 1.

¹⁸⁹ Huws and Joyce, ‘Size of Swedens ‘Gig Economy’ revealed for the first time’ (n 188) 2.

¹⁹⁰ Ibid, 3

¹⁹¹ Unionen (n 176) 36

in the gig economy in the United Kingdom are willing to perform different types of work and 65 % say that they are registered in more than one platform at the same time.¹⁹²

In line with the United Kingdom's aim at being the world's leading sharing economy,¹⁹³ Debbie Wossow¹⁹⁴ has taken on the task of assessing the social and economic potential of sharing economy in the United Kingdom, by request of Business Minister Matthew Hancock.¹⁹⁵ Wossow's report and assessments focus on the platforms that enable sharing, rather than work. For example, people renting out their spare rooms via Airbnb, renting their spare parking space via JustPark, renting out their car via easyCar Club or sharing a ride to work. Wossow paints the picture of sharing economy as a very positive opportunity for people to earn extra money and to share their unused assets, and for clients to save money by for example carpooling instead of taking a taxi. Wossow briefly addresses the issue of the employment status of performing parties in the sharing economy, referring to a government launch to review the legislation around employment status.¹⁹⁶ Wossow makes a general statement that the task-sharing companies passively match freelancers offering their services to people who want them. The platforms that play a more active role in directing the nature of the work performed, such as Uber, is not mentioned. Her recommendation is that:

“The government should make clear the legal status and responsibilities of task-sharing platforms. In particular, it should be detailed that platforms which play a passive role in matching users (where there is no human intervention by the platform) are neither employment businesses nor employment agencies, but instead are a new form of service with lighter regulatory needs.”¹⁹⁷

On the other hand, Wossow gives as an example Ahmed, the cleaner at Hassle.com, explaining that through hard work and determination he has built up a base of regular clients. He works 40 hours per week, according to the study, and travels all over London to his customers' homes.

“When he first started working for Hassle.com he didn't sleep some nights waiting for text alerts for new jobs to come in. He says: ‘My phone didn't leave my hand as I wanted to be the first to get the work.’”¹⁹⁸

Wossow brings up Ahmed as an example of entrepreneurship, not further discussing the issues of travel expenses, the fact that Ahmed did not sleep some nights waiting for work, or other types of security that Ahmed lacks when he is ill or injured for example.

¹⁹² Ursula Huws and Simon Joyce, *Size of UK's 'Gig Economy' revealed for the first time*, (Foundation for European Progressive Studies UNI Europa 2016) <http://www.feps-europe.eu/assets/a82bcd12-fb97-43a6-9346-24242695a183/crowd-working-survey.pdf> last accessed 2017-05-21, 1 ff.

¹⁹³ Debbie Wossow, ‘Unlocking the sharing economy: An independent review’, (Department for Business, Innovation and Skills, UK Government 2014) 14.

¹⁹⁴ Debbie Wossow entitles herself as an entrepreneur, investor and sharing economy expert. She is also CEO of peer-to-peer travel club, Love Home Swap, and the founder of the Collaborative Consumption Europe network.

¹⁹⁵ Wossow (n 193) 8.

¹⁹⁶ Ibid, 31 ff.

¹⁹⁷ Ibid, 32.

¹⁹⁸ Ibid, 32.

3.3 Crowdsourcing platforms

Major companies in the on-demand economy

To better understand the differences in operation and concept of the companies in the gig economy, a compilation of brief summaries will be made regarding different types of crowdsourcing companies and how they operate. Considering the continuous and rapid growth of the gig economy, the reluctance of certain platforms to disclose data, and performing parties often being active on several platforms at the same time, an estimation of the spread and workforce of the different platforms is difficult to make.¹⁹⁹ The chart below is from late 2015, which in some cases constitutes a recent update, but in the gig economy, these numbers will have changed considerably and the numbers can be assumed to have a short expiration date.²⁰⁰ Some platforms only operating in the United States have been removed and others have been added to widen the range of different types of crowdsourcing and to match the development specifically in Sweden and United Kingdom. This is not a complete mapping of all companies active in the gig economy, but rather a selection to exemplify how these companies operate in regards to their performing parties.

Name	Field	Size of workforce	Operating Areas
Uber	Transportation	160,000*	International
Taskrabbit	Home service	30,000*	International
Care.com	Home service	6,600,000*	International
Foodora	Food delivery	Unknown	International
Amazon Mechanical Turk	Crowdwork	500,000*	International
Crowdfunder	Crowdwork	5,000,000*	International
OneSpace (formerly Crowdsource)	Crowdwork	8,000,000*	International
Clickworker	Crowdwork	800,000 ²⁰¹	International
UpWork	Crowdwork	10,000,000 ²⁰²	International
Pillar (formerly CoContest)	Crowdwork	25,000 ²⁰³	International

*²⁰⁴

3.3.1. Work on demand via apps/internet

¹⁹⁹ De Stefano (n 176).

²⁰⁰ Unionen (n 176) 36.

²⁰¹ Clickworker, 'Our crowd – the Clickworkers' (Clickworker 2017) <<https://www.clickworker.com/about-us/clickworker-crowd/>> last accessed 2017-05-21.

²⁰² Aloisi (n 186) 690.

²⁰³ Cristiano Codagnone, Fabienne Abadie and Federico Biagi 'The future of Work in the 'Sharing Economy': Market Efficiency and Equitable Opportunities or Unfair Precarisation?' (JRC Science for Policy Report, European Commission 2016) 23.

²⁰⁴ Rebecka Smith and Sarah Leberstein 'Rights on Demand: Ensuring Workplace Standards and Worker Security In the On-Demand Economy (National Employment Law Project 2015) 3 see this publication for original references.

3.3.1.1 Driving

Uber is perhaps the best-known company in the gig economy. As of early 2017, the company operates in 562 cities in 78 countries.²⁰⁵ Uber is a platform that mainly enables transportation for clients, and is regarded as a low to medium skilled work platform.²⁰⁶ Via the Uber app, a client can create a personal account and enter where they wish to travel, using a GPS to pinpoint the drivers position.²⁰⁷ Within minutes, a driver can accept to take the assignment and turns up at the client's location. The driver is not informed of the destination before accepting the ride.²⁰⁸ Despite Uber's success as a world leading "taxi" company, it does not have any employed drivers or own any cars. A person wishing to be a driver must sign up as an "Uber Partner" and provide their own car. This gives Uber a competitive advantage as administrative and other fixed costs are significantly reduced.²⁰⁹ In applying, the driving license and vehicle registration and insurance must be provided. Other requirements include that drivers have to be above minimum age, have a legal right to drive in the country, and to watch a short introduction video. A background check is performed, where driving history and criminal record is audited.²¹⁰ It has been argued that the background check conducted is of a "lighter" nature and that the issue is not taken seriously, as some Uber drivers have "slipped through the net."²¹¹

After a ride has been completed the client can rate the ride, and by extension the driver, with a 1 to 5 star rating system via the app. If the average rating of a driver falls below 4.5 stars, the driver loses access to the Uber application.²¹² It has been argued that this system suggests employer-like control over Uber drivers, and that Uber can use the system to enforce specifically desired behaviour with the drivers.²¹³ Drivers may choose for themselves when to log on to the app. To ensure that the demand for cars is filled, Uber uses a price surge mechanism, which means that the price for clients increases with increased demand in a certain geographical area. This creates an incitement for drivers to enter the market and meet the demand.²¹⁴ The price is determined and fixed through the app, and is non-negotiable for drivers.²¹⁵ Additionally, Uber can decide to lower prices for clients to meet reduced power of purchase for a specific period. This occurred after the Christmas and New Year's Holiday in 2016, when Uber lowered their rates by 15 %, causing an outbreak of protests and strikes among Uber drivers.²¹⁶

When the clients pay for their ride, they enter into a contractual agreement and the transaction occurs between the client and Uber, not with the driver.²¹⁷ Uber charges a 20-30 % commission

²⁰⁵ Uber, 'Internationella webbplats' (Uber 2017) <<https://www.uber.com/sv-SE/country-list/>> last accessed 2017-05-21.

²⁰⁶ Willem Pieter De Groen and Ilaria Maselli, 'The Impact of the Collaborative Economy on the Labour Market' (2016) CEPS Special Report No 138, 2.

²⁰⁷ Aloisi (n 186) 672.

²⁰⁸ *Mr Y Aslam, Mr J Farrar & Others v. Uber B.V., Uber London Ltd, Uber Britannia Ltd* [2016] WL, [16].

²⁰⁹ Aloisi (n 186) 672.

²¹⁰ Uber, 'Requirements' (Uber 2017) <<https://www.uber.com/sv-SE/drive/requirements/>> last accessed 2017-05-21.

²¹¹ Aloisi (n 186) 673.

See also, Daniel Goldberg, 'Ubers förarkontroller är en bluff' *Digital* (6 July 2015) <<http://digital.di.se/artikel/ubers-forarkontroller-ar-en-bluff>> last accessed 2017-05-21

²¹² Aloisi (n 186) 674.

²¹³ *Ibid*, 674.

²¹⁴ Unionen (n 176) 25.

²¹⁵ Aloisi (n 186) 674.

²¹⁶ Unionen (n 176) 26

see also Selina Wang, 'Uber drivers strike to protest fare cuts in New York City' *Bloomberg Technology* (1 February 2016). <<https://www.bloomberg.com/news/articles/2016-02-01/uber-drivers-plan-strike-to-protest-fare-cuts-in-new-york-city>> last accessed 2017-05-21.

²¹⁷ Aloisi (n 186) 674.

for each ride.²¹⁸ In the United Kingdom, a parallel company has been developed, offering new and existing “partner drivers” help with purchasing or renting a car at an advantageous cost and giving information on insurance²¹⁹ claiming that

“The Marketplace enables Uber partner-drivers, who are independent contractors [...] to be eligible to receive certain products, services and/or discounts provided by third parties [...] Neither use of the Marketplace nor anything on this website shall be deemed to establish and employee/employer relationship between any of the following parties: Uber, the Driver or website user.”²²⁰

3.3.1.2 Home service

Taskrabbit is a platform connecting peers for different kinds of home service, such as house cleaning, assembling furniture, grocery shopping or moving. It is considered to be a platform for low and medium skilled work on demand²²¹ and has become known as the Ebay for real world labour²²² or the Uber for everything.²²³ The design of the platform is that of an “auction site” where clients post tasks and potential performing parties (rabbits) bid on them, though background checks are made on the performing parties.²²⁴ The client pays performing parties by the hour and the platform charges a fee from the client of circa 15 %.²²⁵ The platform does not interfere with the classification of the relationship between client and performing party, transferring the liability of a wrongful classification of a performing party to the parties.²²⁶

Taskrabbit requires performing parties to indicate when and where they will be available for work and for which types of work. Based on these indications, the performing parties are required to accept at least 75 % of offers, and complete at least 85 % of tasks accepted. Furthermore, they are required to respond within 30 minutes in 85 % of the cases. Failure to comply with these requirements results in the performing party not being included in search results and receive more offers.²²⁷ TaskRabbit in the United States have started to offer independent contractors access to discounted health insurance and accounting systems,²²⁸ and following litigation concerning the classification of workers, it has introduced a wage floor so that performing parties can not earn less than \$12.80 an hour, which is higher than any state set minimum wage in the United States²²⁹

Other home services platforms include Care.com, which in some cases require specific or somewhat higher skills. The platform advertises that they offer childcare, elderly care, animal

²¹⁸ Aloisi (n 186) 688.

²¹⁹ Uber, ‘Welcome to Uber Marketplace’ (Uber 2017)

<<https://drive.uber.com/ukmarketplace/location/london/>> last accessed 2017-03-21.

²²⁰ Uber, ‘Terms and Conditions’ (Uber 2017) <<https://drive.uber.com/ukmarketplace/terms-and-conditions/>> last accessed 2017-05-21.

²²¹ De Groen and Maselli (n 206) 2.

²²² Aloisi (n 186) 684.

²²³ Casey Newton, ‘TaskRabbit is blowing up its business model and becoming the Uber for everything’, *The Verge* (17 June 2014) <<http://www.theverge.com/2014/6/17/5816254/taskrabbit-blows-up-its-auction-house-to-offer-services-on-demand>> last accessed 2017-05-21.

²²⁴ De Stefano (n 176) 16.

²²⁵ Aloisi (n 186) 688.

²²⁶ De Stefano (n 176) 13.

²²⁷ De Groen and Maselli (n 206) 10.

²²⁸ Aloisi (n 186) 684.

²²⁹ Schmid-Drüner (n 183) 12.

care or house and gardening tasks.²³⁰ Users are allowed to upload a profile stating what kind of qualifications and skills they possess and what they want to offer in terms of service and availability. “Care seekers” register an ad specifying what service they need and the minimum qualifications required from a performing party.²³¹ As a “care seeker” enters what kind of service they want provided, profiles appear on performing parties that match their requirements, showing ratings from previous “care seekers” on the respective profiles.²³² Performing parties can search for ads from “care seekers” and apply, although no previous comments or ratings on “care seekers” seem to be available for performing parties beforehand.²³³ On matching, the parties can discuss the scope and details of the service required.

Care.com state on their home page that they are solely an online venue enabling matching between “care seekers” and “care providers”. They do not seem to actively match parties together, nor do they seem to ask of performing parties specific skills, instead leaving this up to the “care seekers” to specify.²³⁴ On the site adapted to the United Kingdom, a specific section is devoted to links to government sites explaining regulations regarding “care seekers” being considered employers, both for “care seekers”²³⁵ and for performing parties.²³⁶ The site urges both “care seekers” and performing parties to write a contract specifying the job details and seemingly actually enabling employment.²³⁷ On the Swedish adapted site, no similar recommendations are given.²³⁸

3.3.1.3 Delivery

Among other platforms, Foodora and UberEats offer a food delivery service to a chosen address from different restaurants in the selected city with whom they have a cooperation. The order is placed via the platform app and the food is delivered via bike or car.²³⁹ Like Uber or Taskrabbitt, the performing parties of Uber Eats are referred to as couriers, freelancers or independent contractors, being paid for tasks performed and not by the hour.

Foodora differs from the other crowdsourcing companies by the fact that most of their delivery couriers are in fact employees, with an hourly rate.²⁴⁰ However, employment contracts are by the month and Foodora²⁴¹ have freelancing deliverers as well, working for remuneration per task performed.²⁴²

²³⁰ Care.com, ‘Hjälp i vardagen’ (Care.com 2017) <<https://www.care.com/sv-se/>> last accessed 2017-05-21.

²³¹ Care.com, ‘Find your perfect care’ (Care.com 2017) <https://www.care.com/en-gb/join-now?registrationType=Seeker> last accessed 2017-05-21.

²³² Care.com, ‘Äldreomsorg’ (Care.com 2017) <<https://www.care.com/sv-se/profiler/aldreomsorg>> last accessed 2017-05-21.

²³³ Care.com, ‘Matching Jobs’ (Care.com 2017) <<https://www.care.com/sv-se/my-account/profiles/showMatchingJobs>> last accessed 2017-05-21.

²³⁴ Care.com ‘Hjälp i vardagen’ (n 230).

²³⁵ Care.com, ‘Safety Guide for Care Seekers’ (Care.com 2017) <<https://www.care.com/en-gb/safety-guide-care-seekers>> last accessed 2017-05-21.

²³⁶ Care.com, ‘Safety Guide for Carers’ (Care.com 2017) <<https://www.care.com/en-gb/safety-guide-carers>> last accessed 2017-05-21.

²³⁷ Ibid

²³⁸ Care.com, ‘Säkerhet’ (Care.com 2017) <<https://se.care.com/sakerhet/>> last accessed 2017-03-29.

²³⁹ Catariina Salo, ‘Hårt lopp när företagen budar restaurangmat till hemmen – upp till en miljon leveranser görs utan kollektivavtal’ *Yle Nyheter* (1 June 2016) <https://svenska.yle.fi/artikel/2016/06/01/hart-lopp-nar-foretagen-budar-restaurangmat-till-hemmen-upp-till-en-miljon> last accessed 2017-05-21.

²⁴⁰ Ibid

²⁴¹ Henning Eklund, ‘ “Jag sparkades när jag bad facket om hjälp” ’ *Dagens Nyheter* (19 April 2017) <<http://www.dn.se/ekonomi/jag-sparkades-nar-jag-bad-facket-om-hjalp/>> last accessed 2017-05-21.

²⁴² Salo (n 239).

Qualifications for delivering food for Uber Eats is, as with Uber, that the performing party provides their own car with insurance and a valid driver's license. Furthermore, they need one year of driving experience and being able to lift around 14 kg. Background checks do not seem to be made.²⁴³ Upon asking to be a delivering partner on UberEats website, one is redirected to the Uber website to sign up, indicating that the terms and conditions are the same for an UberEats deliverer as they are for an Uber driver. UberEats and Foodora do not seem to require rating the deliverers as with other crowdsourcing platforms.²⁴⁴ The qualifications asked of Foodora deliverers are that they fulfil the age requirement and own their own bikes, however they also make requirements on availability and servicemindedness. UberEats advertises a free schedule, giving the drivers the opportunity to work whenever it suits them.²⁴⁵ Given the requirements, this indicates that these tasks should be considered low skilled.

3.3.2 Crowdwork

The fact that crowdwork can be executed from a distance has led to a work force explosion on a global scale. Among the giants of crowdwork companies²⁴⁶, they host millions of performing parties respectively.²⁴⁷

3.3.2.1 Low skilled crowdwork

Among the largest companies presented above, a majority act in the field of low skilled microtask platforms where most transactions are in the form of peer-to-business.²⁴⁸ These include Amazon Mechanical Turk, Clickworker, Crowdfunder and OneSpace. On Amazon Mechanical Turk, a majority of workers are from The United States and India, with only 20 % from other countries.²⁴⁹ The majority of the Clickworker work force is from Europe, mainly from Germany, with around 30 % working from the United States.²⁵⁰ The work force population of crowdworkers is generally quite young. On Clickworker the average age is between 22 and 40 and around half of Amazon Mechanical Turk workers are around 35 or younger.²⁵¹ Performing parties are classified as independent contractors and are referred to as Turkers, Contributors,²⁵² Clickworkers,²⁵³ or Freelancers²⁵⁴

Clients of these crowdwork platforms vary from large companies such as Facebook, Google, Ebay, Honda and Twitter among others,²⁵⁵ to small businesses or start-ups, and individual

²⁴³ Uber, 'Deliver with Uber' (Uber 2017) <<https://www.uber.com/signup/drive/deliver/>> last accessed 2017-05-21.

²⁴⁴ No source specifically states that ratings are NOT included in the service, however, no source mentions this as a feature in the service, leading to a conclusion that this is not a feature.

²⁴⁵ Uber 'Deliver with Uber' (n 243).

²⁴⁶ AMT, Crowdfunder, Clickworker and OneSpace, as seen above.

²⁴⁷ Smith and Leberstein (n 204) 3.

²⁴⁸ Codagnone, Abadie and Biagi (n 203) 3.

²⁴⁹ Eurofound (n 179) 112.

²⁵⁰ Clickworker, 'Our crowd – the Clickworkers' (n 201).

²⁵¹ Eurofound (n 179) 112.

²⁵² Crowdfunder, 'Contributors' (Crowdfunder 2017) <<https://www.crowdfunder.com/contributors/>> last accessed 2017-05-21.

²⁵³ Clickworker, 'General Terms and Conditions, (Clickworkers)' (Clickworker 2017)

<<https://workplace.clickworker.com/en/agreements/10123>> last accessed 2017-05-21.

²⁵⁴ OneSpace, 'Terms of Service' (OneSpace 2017) <<https://www.onespace.com/terms-of-service/>> last accessed 2017-05-21.

²⁵⁵ Crowdfunder, 'AI for your business' (Crowdfunder 2017) <<https://www.crowdfunder.com/>> last accessed 2017-05-21

see also Clickworker, 'Managing e-commerce data has never been smarter' (Clickworker 2017)

<<https://www.clickworker.com/>> last accessed last accessed 2017-05-21.

academics in need of a large amount of input in a short time, for example for a survey. They are referred to as Requesters, Clients etc.²⁵⁶ Clients turn to crowdwork platforms because large quantities of content can be created in a short time. The workforce is flexible and costs otherwise dedicated to in-house recruitment and employment can be avoided. As it can be spread globally, there is access to performing parties with different language skills and cultural backgrounds.²⁵⁷ Clients can for instance ask the crowd to search their social network website for content deemed inappropriate, metadata tagging and character recognition, transcribing or translating, give feedback on surveys or testing websites.²⁵⁸

On Amazon Mechanical Turk, clients provide relevant information for the task, set the price and estimate the time needed to complete the task.²⁵⁹ Amazon Mechanical Turk charges 10 % of the fee from the client.²⁶⁰ On Clickworker and Crowdfunder, both the client and the platform can post the task.²⁶¹ Clickworker, Crowdfunder and OneSpace seem to take a more involved role in the tasks in terms of discussing the order and the option with the clients, and taking it upon themselves to divide the project into microtasks and to provide quality assurance.²⁶² In some cases they seem to set the price for these services, indicating that the remuneration is coming from them, and not from the clients.²⁶³ On Amazon Mechanical Turk and Clickworker, the platform acts as an intermediary between the client and the performing party, who lack the option to communicate directly. This renders the performing parties anonymous to the clients.²⁶⁴

Performing parties of Clickworker must go through test and trainings to be allowed to perform the task they have indicated that they are qualified for. Work samples have to be submitted, which are then rated, and tasks that match their score are presented to them.²⁶⁵ When tasks are posted on the site, performing parties may offer to do them, but they need to be accepted by the platform.²⁶⁶ After performing a task for a client, the results submitted are evaluated and additional training can be requested if a performing party wishes to reach the “expert level”.²⁶⁷ OneSpace and Crowdfunder use tests to ensure the qualifications of their performing parties. If you pass sufficiently difficult tests, you are allowed to be classified as a “skilled contributor”,

²⁵⁶ Clickworker, ‘Customer registration’ (Clickworker 2017)

<https://marketplace.clickworker.com/en/customer_registration/32/agreement> last accessed 2017-05-21; see also AMT, ‘Welcome’ (AMT 2017) <<https://www.mturk.com/mturk/welcome>> last accessed 2017-05-21.

²⁵⁷ Eurofound (n 179) 113.

²⁵⁸ Felstiner (n 180) 150.

²⁵⁹ Ibid, 161

²⁶⁰ Ibid, 161

²⁶¹ Crowdfunder, ‘Terms and Conditions’ (Crowdfunder 2017)

<<https://elite.crowdfunder.com/index.php?view=terms>> last accessed 2017-05-21

see also, Clickworker, ‘About Crowdsourcing’ (Clickworker 2017) <<https://www.clickworker.com/about-crowdsourcing/>> last accessed 2017-05-21.

²⁶² Clickworker, ‘About Crowdsourcing’ (Clickworker 2017) <<https://www.clickworker.com/about-crowdsourcing/>> last accessed 2017-05-21; Crowdsourc, ‘FAQs’ (Crowdsourc 2017) <<https://www.crowdsourc.com/faqs/>> last accessed 2017-05-21; Crowdfunder, ‘Pricing’ (Crowdfunder 2017) <<https://www.crowdfunder.com/pricing/>> last accessed 2017-05-21.

²⁶³ Crowdsourc, ‘FAQs’ (Crowdsourc 2017) <<https://www.crowdsourc.com/faqs/>> last accessed 2017-05-21; Crowdfunder, ‘Pricing’ (Crowdfunder 2017) <<https://www.crowdfunder.com/pricing/>> last accessed 2017-05-21; Clickworker, ‘Pricing’ (Clickworker 2017), <<https://www.clickworker.com/pricing/>>, last accessed 2017-05-21.

²⁶⁴ Felstiner (n 180) 162.

²⁶⁵ Eurofound (n 179) 110.

²⁶⁶ Clickworker, ‘General Terms and Conditions, (Clickworkers)’ (n 253).

²⁶⁷ Clickworker Our crowd – the Clickworkers’ (n 201).

gaining access to more and better paid tasks.²⁶⁸ However, Crowdfunder reserves the right to create, edit or revoke qualifications listed, without having to give a reason.²⁶⁹ On Amazon Mechanical Turk there is a possibility to for a client to make demands regarding the skills of the performing parties, which means that if a performing party wants to perform a task, they might be asked to answer a set of questions or have a prior success in similar tasks before.²⁷⁰

The impact of ratings and approved work is harsh, as a bad rating will directly affect the likelihood of being offered new assignments.²⁷¹ On Amazon Mechanical Turk, when a task has been performed, the client reviews the result and determines whether it is satisfactory. If it is, remuneration is payed to the performing parties. If the client considers the result not satisfactory, however, the client can refuse to pay the fee, although still keeping the work submitted. The client does not need to motivate this decision.²⁷² Nor is the performing party given the chance to correct the error.²⁷³ The ratings are measured by how much work has been approved, not how many assignments have actually been finished.²⁷⁴ On Clickworker, if a task has been submitted, Clickworker will perform a quality check and the claim that “if the job is rejected it will usually be returned with instructions for corrections”²⁷⁵. However, if a task is not performed within the set time limit, the task is not approved, and the performing party will have wasted their time.²⁷⁶ Crowdfunder does not seem to give performing parties the right to correct their work, nor have to offer a reason for rejecting work.²⁷⁷

On neither of these platform is a schedule set for when and how long a performing party must work. It is explicitly stated that there is no obligation for performing parties to perform or complete tasks via the platforms.²⁷⁸

3.3.2.2 High-skilled crowdwork

Another aspect of crowdwork are the platforms that distribute tasks that require higher skills.²⁷⁹ One example is Upwork, which is one of the largest crowdwork platforms with twelve million registered freelancers²⁸⁰ from all around the world, but mainly in the United States and Europe.²⁸¹

²⁶⁸ Crowdfunder, ‘Contributors’ (n 252).

²⁶⁹ Crowdfunder, ‘Crowdfunder Master Terms of Service’ (Crowdfunder 2017)

<<https://www.crowdfunder.com/legal/>> last accessed 2017-05-21; Crowdfunder (n 261).

²⁷⁰ Felstiner (n 180) 161.

²⁷¹ Unionen (n 176) 31.

²⁷² Eurofound (n 179) 115.

²⁷³ Felstiner (n 180) 192.

²⁷⁴ Aloisi (n 186) 667.

²⁷⁵ Clickworker, ‘FAQ – Frequently Asked Questions’ (Clickworker 2017) <<https://www.clickworker.com/faq/>> last accessed 2017-05-21.

²⁷⁶ Clickworker, ‘General Terms and Conditions, (Clickworkers)’ (n 253) Para 4, 3,2 and 4.1; Crowdfunder, (n 261) Para 14.

²⁷⁸ Clickworker, ‘General Terms and Conditions, (Clickworkers)’ (n 253); Crowdfunder (n 261)

²⁷⁹ Codagnone, Abadie and Biagi (n 203) 26.

²⁸⁰ UpWork, ‘About us’ (UpWork 2017) <<https://www.upwork.com/about/>> last accessed 2017-05-21.

²⁸¹ UpWork, ‘Browse’ (UpWork 2017) <<https://www.upwork.com/browse>> last accessed 2017-05-21.

Upwork advertise their platform to clients with the slogan “Hire and work with top-rated freelancers”.²⁸² Performing parties create a profile and upload their CV and profile picture.²⁸³ The types of tasks that performing parties can perform range from middle skilled work such as transcriptions, translations, and administrative work to more highly skilled work such as web and software development or design.²⁸⁴

Clients, called employers, create tasks that they want executed with a description of the nature of the work and the skills required to do it. The platform is then actively reviewing the task, and then posts it on the website. Performing parties can actively search the site for tasks corresponding with their qualifications and can apply for a task that they find interesting. Information about the client is included in the post, such as number of past tasks and average rate paid.²⁸⁵ The matching can be reversed, so that a client can search for performing parties with the right qualifications. On the performing parties’ profiles, their work history is included, such as number of bids offered, number of hours worked, and feedback and rating from previous clients. The client can then send a recruiting invitation to the performing party. The client has the opportunity to interview the performing party from a distance, with Upwork providing a template for interview questions.²⁸⁶ Both parties must approve the other for a match to be made. When it is, Upwork acts as an intermediary by having performing parties install a type of digital punch clock on their computer, to monitor the hours worked on the task posted.²⁸⁷ Other platforms require performing parties to work in virtual office applications with regular screen shots and activity.²⁸⁸

When a performing party creates a profile on Upwork, they can fill out their qualifications. The platform provides voluntary skill tests for performing parties within different areas of expertise, with feedback included, though it is not required.²⁸⁹ Difficulty seems to arise when no previous tasks have been performed in the business area, and in most cases, the deciding factor seems to be the ratings and comments from the most recent previous client.²⁹⁰ This has led to a focus on ratings and evaluation, rather than training.²⁹¹ The ratings seem to be effective when new matches are made between parties, but when an initial task leads to a steadier cooperation, the

²⁸² UpWork, ‘Registration’ (UpWork 2017)

<https://www.upwork.com/ppc/registration/?utm_campaign=REG&utm_content=%5BRetarget%20%7C%20DNF%20%7C%201%20Day%20Visitors%5D%20All&utm_medium=social-paid&utm_source=facebook&vt_cmp=REG&vt_src=facebook&video=2> last accessed 2017-04-03.

²⁸³ Codagnone, Abadie and Biagi (n 203) 26.

²⁸⁴ UpWork, ‘Job search results’ (UpWork 2017) <<https://www.upwork.com/o/jobs/browse/>> last accessed 2017-05-21.

²⁸⁵ Codagnone, Abadie and Biagi (n 203) 26.

²⁸⁶ UpWork, ‘7 interview questions you must ask remote candidates’ (UpWork 2017) <https://pages.upwork.com/rs/518-RKL-392/images/CL_Onboarding_Mod3_Final.pdf> last accessed 2017-05-21.

²⁸⁷ Codagnone, Abadie and Biagi (n 203) 26.

²⁸⁸ Schmid-Drüner (n 183) 19.

²⁸⁹ Aloisi (n 186) 690.

²⁹⁰ Freelancer (Former Employee), ‘Productive, “I had a hard time landing a job during the first few months but as time went on, I got accepted to various projects depending on the skill needed. The hardest part would have to be finding an employer to choose you even if you have no experience yet. But that is totally nothing once you start getting offers.”’ (Indeed, 6 February 2017) <<https://www.indeed.com/cmp/Upwork/reviews>> last accessed 2017-05-21.

²⁹¹ Christophe Degryse, ‘Digitalisation of the economy and its impact on labour market’ (2016) European Trade Union Institute Research Papers, 2/2016, <<https://www.etui.org/Publications2/Working-Papers/Digitalisation-of-the-economy-and-its-impact-on-labour-markets>>, 48.

client seems less inclined to evaluate the work performed, which leads to a decrease in the job score of the performing party.²⁹²

It is up to client to determine the rate for a task uploaded, but the normal rate for performing parties is posted on their profile. Rates can differ from up to \$16 per hour for software development, to lower rates for middle skilled tasks such as administration.²⁹³ Upwork acts as an intermediate and both parties are required to implement the transaction through the platform payment services.²⁹⁴ The payment is supposedly made from client directly to performing party, though in Upwork's terms of service the platform reserves the right to hold disbursement of the payment if they for example consider that the Terms of Service have been violated.²⁹⁵ When the transaction is made, a fee is deducted from the performing party by 5-20 % of the rate, on a sliding scale depending on the contingency of the relationship between the performing party and the client. The more continuous the relationship, the less Upwork charges.²⁹⁶

Similar to lower skilled crowdwork platforms, work that does not fill the requirements is not paid for.²⁹⁷ This is, again, up to the client and unilateral. Upwork state that they may investigate remarks on unapproved work for accuracy and reliability if requested, but that this is not done regularly.²⁹⁸

As with the other crowdwork platforms, flexibility in when the performing party wishes to work is advertised. No schedule is set, but the performing parties do have a deadline when they accept a task.

3.3.2.3 Contest Crowdwork

Another high skilled type of crowdwork platform is CoContest, which in 2017 has changed its name to Pillar.²⁹⁹ It directs its business specifically towards architecture and interior design.³⁰⁰ A client, company or a private individual, can open a contest on the site with a description of a certain space, such as an apartment or an office space, what they want done with it and in what kind of style.³⁰¹ The client pays a set fee to launch the competition, which differs depending on the scale of the competition and the size of the space.³⁰² The client sets a deadline of a minimum

²⁹² Ghostwriter (current employee) *"I enjoy the flexibility but the Job Score is lacking Upwork is definitely going places. The only thing that is holding this company back, is the Job Score formula. It is a rolling formula that generates a Job Success percentage based on monthly increments. Which sounds great, until you have steady clients that do not leave feedback because the work is ongoing. Without constantly getting new feedback, the Job Score will decline. As of right now, the majority of my jobs received a 5-star feedback. The others did not give me any feedback. This is the other drawback with the Job Score formula, clients do not have to leave feedback, and without it, employee's Job Score decreases. I'd recommend Upwork if you are prepared to constantly be on the lookout for new clients."* (Indeed 20 February 2017) <https://www.indeed.com/cmp/Upwork/reviews>, last accessed 2017-05-21.

²⁹³ Codagnone, Abadie and Biagi (n 203) 18.

²⁹⁴ UpWork, 'User Agreement' (UpWork 2016) <<https://www.upwork.com/legal/>> last accessed 2017-05-21, Para 6.1.

²⁹⁵ UpWork, 'User Agreement' (n 294) Para 4 and 6.4.

²⁹⁶ Stephanie Kasriel, 'UpWorks new pricing: a message from the CEO' (UpWork 2016) <<https://www.upwork.com/blog/2016/05/upwork-pricing/>> last accessed 2017-05-21.

²⁹⁷ UpWork, 'How it Works' (UpWork 2017) <<https://www.upwork.com/i/how-it-works/client/>> last accessed 2017-05-21.

²⁹⁸ UpWork, 'User Agreement' (n 294) Para 3.6.

²⁹⁹ CoContest 'Cocontest is now pillar' (Pillar 2017) <<http://www.cocontest.com/>> last accessed 2017-05-21.

³⁰⁰ De Groen and Maselli (n 206) 2.

³⁰¹ Ibid, 2.

³⁰² Pillar, 'Pricing' (Pillar 2017) <http://gopillar.com/pricing/>, last accessed 2017-04-03.

of 14 days. During this time, design proposals based on the description included can be submitted by performing parties. The performing parties may be in contact with the client via a platform chat to ask questions about the design. When the competition deadline has passed, the client gains access to all the project proposals, and is required to rank the proposals from one to five.³⁰³

Performing parties must have and submit details about their expertise and qualifications in architectural design, and are asked upon signing up to provide and present their portfolio.³⁰⁴ Tutorials on for example Photoshop Editing are made available for performing parties on the site, but are not required.³⁰⁵

When the project proposals have been reviewed and ranked by the client, the reward is distributed among the top five³⁰⁶ with 60 % of the price money going to the winner, 20 % to the runner-up and so on.³⁰⁷ This system means that any performing party participating in the contest risks not being remunerated at all.³⁰⁸ CoContest act as the intermediary between the two parties and charges compensation from the total fee that the client pays.³⁰⁹

The client is allowed to see all the designs proposed by the performing parties, but only ranks among the top five who gets a price. This means that the client could still utilize ideas that performing parties are not compensated for. However, the client is required to pay the fee for the contest in advance and to rank the project proposals, and it is stated in the terms and conditions that if a ranking among the project proposals is not made, the prize is split between all participants. If a client requests a refund after the competition is finished, certain requirements on the client's disclosure of information and behaviour in informing competition participants must have be fulfilled. This ensures security that at least the top five participants will be paid.

3.4 Opportunities and working conditions for performing parties

3.4.1 Experience and Work opportunity

For a performing party, crowdwork and work on demand is part of making the labour market more widespread, as tasks can be performed from a distance such as more rural areas, making the labour market more inclusive in some ways.³¹⁰ For some types of crowdwork, there is a theory that it is a stepping stone that can lead to more stable employment in the future. Specifically for the platforms such as Pillar that launch designer competitions, they seem to contribute to creating a stepping stone for young professionals to gain work experience, constantly updating their portfolio, and gaining an insight into clients expectations, improving prospects of getting clients in the future.³¹¹ According to a Czech platform launching designer competitions, it is estimated that about one-third of clients continue business relationships with

³⁰³ Pillar, 'Terms and Conditions' (Pillar 2017) <<http://gopillar.com/terms-conditions/>> last accessed 2017-05-21, Para 6.6.

³⁰⁴ Ibid, Para 5.5.

³⁰⁵ CoContest, 'Support' (CoContest 2016) <<http://support.cocontest.com/en/article-category/tutorial/>> last accessed 2017-05-21.

³⁰⁶ this is new, before the reward was split among the top three, Ilaria Maselli and Brian Fabo, 'Digital workers by design – An example from the on-demand economy' (2015) CEPS Special Report No 414, 2.

³⁰⁷ Pillar, 'Terms and Conditions' (n 303).

³⁰⁸ De Groen and Maselli (n 206) 11.

³⁰⁹ Maselli and Fabo (n 306) 2 ff.

³¹⁰ Eurofound (n 179) 116.

³¹¹ Maselli and Fabo (n 306) 10 ff.

the workers after the first task is concluded, and clients' recommendations and comments help workers find clients beyond the platform”³¹² However, many platforms act as the intermediary between the client and the worker, limiting or fully excluding communication between the two parties.³¹³ If communication is made possible, many platforms prohibit by-passing them as intermediary. Pillar explicitly prohibits parties from giving out contact information when discussing a project proposal³¹⁴, while Upwork devotes a section in their User Agreement to prevent circumvention of payment through the platform for a minimum of 24 months from first contact between parties, effectively limiting chances for future cooperation unless it is continuously done through the platform.³¹⁵ In most cases, a continuous relationship between client and performing party is more potential than reality.³¹⁶

3.4.2 Flexibility

The crowdwork and on demand work platforms often advertise³¹⁷ a large amount of flexibility for their performers of service as it allows them to choose when and where to work, which enables performers of service to adapt it to their specific routine and an opportunity to combine different jobs.³¹⁸ The flexibility is lifted as a positive aspect in Debbie Wossrows report, particularly as a way for women who have been inactive in working life to receive a “lifeline” back into work, by working when it best suits them.³¹⁹

However, the problem for a lot of performing parties is that they work for platforms who are demand-dependent.³²⁰ TaskRabbit requires performers of service to state what types of tasks they can perform, at what times they are available and on which locations. They are then required to accept at least 75 % of the tasks offered that matches these criteria, and respond to the offers within 30 minutes in at least 85 % of the cases. If these standards are not met, the search results for these criteria will no longer show this performer of service.³²¹

Via the price surge mechanism, an Uber driver is offered more money if they fulfil certain conditions regarding when they are available and how many rides they accept, steering them to work in rush hours and times more convenient and profitable for the platform.³²² They are urged to travel to certain areas where there is a surge in demand, but there is no guarantee that the “rush” remains when they get there. With a vast amount performers of service, the competition is harsh, and the rule is “first come, first served”, shifting the risk from the platform to the individual performing party.³²³ This forces them to work long hours and give up their flexibility to produce a fair income. Furthermore, Uber requests their drivers to accept at least 80 % of their offered rides. A warning system is activated if a driver is active on the app but has not accepted a number of rides offered in a row. The app then sends a warning that if, for example,

³¹² Eurofound (n 179) 114.

³¹³ Ibid, 110.

³¹⁴ Pillar, ‘Terms and Conditions’ (n 303) Para 6.5.

³¹⁵ UpWork, ‘User Agreement’ (n 294) Para 7.

³¹⁶ Eurofound (n 179) 116.

³¹⁷ Uber, ‘Bli förare’ (Uber 2017) <https://www.uber.com/a/join/?var=v3h&exp=70117_t2> last accessed 2017-05-21, se also Upwork, ‘Become a Freelancer’ (UpWork 2017) <<https://www.upwork.com/i/how-it-works/freelancer/>> last accessed 2017-05-21.

³¹⁸ Eurofound (n 179) 114.

³¹⁹ Wossrow (n 193) 14.

³²⁰ Codagnone, Abadie and Biagi (n 203) 36.

³²¹ De Groen and Maselli (n 206).

³²² Ibid, 10.

³²³ Ilaria Maselli, Karolien Lenaerts and Miroslav Beblavý, ‘Five things we need to know about the on-demand economy’ (2016) CEPS Special Report No 21, 5.

the driver does not accept the next two rides offered, she will be logged of the app for a period of time.³²⁴

The same problem can be applied to crowdwork such as Amazon Mechanical Turk or Upwork. The vast competition in crowdwork leads to price-dumping and in order to make actual earnings, a lot of performing parties are forced to give up their flexibility and work long hours.³²⁵

3.4.3 Remuneration

Remuneration seems to differ a lot between different crowdsourcing platforms. Depending on the skills required to perform a task naturally causes the payment to vary.

Crowdwork remuneration for micro tasks, such as the HITs mentioned above, is generally very low. On study, for instance, shows that 90 % of the task offered at Amazon Mechanical Turk is less than \$0.10, or €0.07, which constitutes around €1.44 an hour. Remuneration for tasks performed is only paid in cash in the United States and India. In other countries, voucher checks for the Amazon website are distributed.³²⁶ On Crowdfunder the average hourly wage is €1.6³²⁷ and on Clickworker an estimation of 200-400 per month is possible to earn after around 30 hours of work.³²⁸

Naturally, for more high skilled work, remuneration is higher. On Upwork task including software development can result in an hourly wage of up to \$16 in software, which reduces in line with skills required so that a writing or translation results in around \$8. For administrative support, hourly remuneration is around \$4, and for customer support, sales and marketing \$5.³²⁹

For the more highly skilled participants on the platform Pillar, the average hourly income has been calculated to be between €9.30 and €10.30. Though in this case the calculation must include the fact that among around ten submittals, not everyone gets payed. When including these “zero-earners” in the calculation, the average earning per hour is between €3.50 and €5.50.³³⁰ For participants in high income countries, the pay is lower than the average pay would be, while it is higher than average for participants from low income countries.³³¹ Crowdwork on some platforms can provide a rather fair income, if a performer of service is willing to work 12-15 hours per day, but the phenomenon of the so called “superstar effect” must be taken into account, which means that a high rating results in more tasks, and studies show that on a lot of platforms, 20 % of performers of service are doing 80 % of the work.³³²

In most crowdwork cases, there is also the issue of insecurity of income. 94 % of performers of service on Amazon Mechanical Turk report that they have experienced a task being rejected,³³³ and this can be done without the client having to motivate their decision.³³⁴ However, clients

³²⁴ *Aslam, Farrar & Others v. Uber BV* (n 208) [52].

³²⁵ De Stefano (n 176).

³²⁶ Unionen (n 176) 31.

³²⁷ Eurofound (n 179) 115.

³²⁸ Ibid, 115.

³²⁹ Codagnone, Abadie and Biagi (n 203) 36.

³³⁰ De Groen and Maselli (n 206) 6.

³³¹ Schmid-Drüner (n 183) 10.

³³² Ibid, 10

³³³ Janine Berg, ‘Income security in the on-demand economy: Findings and policy lessons from a survey of crowdworkers’ (2016) *Comparative Labour law and Policy Journal*, Vol. 37, No 3, 15.

³³⁴ De Groen and Maselli (n 206) 11.

are still allowed to keep the results presented.³³⁵ On Clickworker, if a task is not performed by the stated deadline, the performing party loses access to the task, and work performed is not remunerated.³³⁶ On the contest platforms, only the entries chosen are remunerated.³³⁷

Furthermore, there is a difference in remuneration for work on demand versus crowdwork³³⁸ and it seems to be adjusted depending on the labour force available to perform the service.³³⁹ When it comes to crowdwork the competition is much more widespread across different areas and countries, causing prices to be lowered.³⁴⁰

In a report regarding Uber drivers' wages and terms, the authors³⁴¹ state that drivers' remunerations are on average six dollars higher per hour compared to "regular" taxi drivers.³⁴² This comparison has been met with critique, as this sum is the result before calculating withdrawals for fuel costs, toll costs, service of vehicle, insurance or social security, which Uber does not pay for. Nor is Uber responsible for drivers paying taxes or other fees. The drivers are independent contractors responsible for keeping their own accounting in order. If these necessary costs are included in the calculations, the average Uber driver is earning less per hour than the average taxi driver.³⁴³ In addition Uber drivers are required to accept rides without knowing the destination or the fare in advance, giving them no opportunity to refuse a ride because of low profit. In refusing a ride, drivers also risk being suspended from the platform.³⁴⁴ With the transaction being made online, in the case of Uber for example, the possibility for drivers or deliverers to get tipped is eliminated.³⁴⁵ The fare is set and calculated by the Uber servers. Uber drivers are not allowed to negotiate a higher price with the customers. The payment is made to Uber and the customer receives a receipt. The driver receives a copy of the transaction, which appears to be an invoice addressed to the passenger from the driver, though with only the passengers first name. The 'invoice' is never sent to the passenger. Payment is made by Uber weekly, in accordance with the rides they have given.³⁴⁶

On Taskrabbit, an average task can give a remuneration of \$55.³⁴⁷ According to a study done on the Belgian work on demand app ListMinut, a platform providing services such as transport, tutoring and gardening, 90 % of the hourly pay is larger than minimum wage compared to traditional "offline" service providers. The reason for the higher wages is limited supply in the area in which the service is performed, given its physical limitations.³⁴⁸ By working from

³³⁵ Aloisi (n 186) 667.

³³⁶ Clickworker 'FAQ – Frequently Asked Questions' (n 275).

³³⁷ De Groen and Maselli (n 206) 11

Some compensation is also given to the runner-up and the second runner up.

³³⁸ De Groen and Maselli (n 206) 14.

³³⁹ Ibid, 6.

³⁴⁰ Schmid-Drüner (n 183) 9.

³⁴¹ Jonathan Hall is the Head of Economic Research at Uber Technologies.

³⁴² Jonathan V. Hall and Alan B. Kreuger, 'An Analysis of the Labor Market for Uber's Driver-Partners in the United States' (2015) Princeton University, Industrial Relations, 23
<<http://dataspace.princeton.edu/jspui/handle/88435/dsp010z708z67d>> last accessed 2017-05-21.

³⁴³ Unionen (n 176) 25 ff.

³⁴⁴ De Groen and Maselli (n 206) 11.

³⁴⁵ Aloisi (n 186) 673.

³⁴⁶ *Aslam, Farrar & Others v. Uber BV* (n 208) [21].

³⁴⁷ Codagnone, Abadie and Biagi (n 203) 36.

³⁴⁸ De Groen and Maselli (n 206) 14.

different platforms such as Uber or Taskrabbit, and working up to 12-15 hours a day, performing parties can make up to \$25 per hour.³⁴⁹

For Foodora deliverers, wages seem to differ depending on whether the performing party is an employee or considered a freelancer. Even then, information on remuneration differs, from around €6.8 per hour and, on weekends, €7.3 per delivery³⁵⁰, to one source stating remuneration is always €6.8 per hour and around €2 per delivery.³⁵¹ For some deliverers the wage seems to be €9 per hour on weeks and €11 and €18 on Saturday and Sunday respectively.³⁵² These numbers have been calculated by asking Foodora deliverers anonymously. The CEO of Foodora confirms that these numbers are accurate but that there are different types of agreements. Foodora do not discuss why they differ but also state that asking random deliverers about their salary is not sufficient, and claim that deliverers earn between around €500 and up to €4000 per month. They do not, however, specify further how this amount can be reached.³⁵³ According to the Swedish Union, for transport workers (Transportarbetarförbundet), the lowest wage for deliverers is around €12.7, and that deliverers seldom reach these wages.³⁵⁴

In almost all crowdsource cases, performing parties are paid per task completed and, in some cases, approved. Furthermore, the time period in between tasks is not compensated for, and a lot of time is often spent on finding tasks to perform.³⁵⁵ This insecurity of income, often not dependent on the quality of the work performed, also entails a psychological stress for the performers of service, who are often dependent on their platform-based income.³⁵⁶

3.4.4 Management and control

Another issue identified in the gig economy is the rating systems. It is a system deemed necessary in order to build trust in the sharing economy, so that consumers feel safe in getting into a car with an Uber driver for example.³⁵⁷ Uber themselves notably do not assume responsibility for damage done to a person or personal belongings during travels arranged through the platform.³⁵⁸ Clients are in most cases asked to rate the experience of a service. This has been argued to have become a supervisory power put in the hands of the consumer, rather than, as it traditionally would have been, assigned to an employer or manager.³⁵⁹ It is a form of constant monitoring system.³⁶⁰ For example, an Uber driver is required to always be on their best behaviour towards clients, otherwise they risk a negative rating. Though this is a given requirement for a traditional service job, a client must be considered to be substantially more

³⁴⁹ Codagnone, Abadie and Biagi (n 203) 36 Daniel Goldberg, 'Ubers förarkontroller är en bluff' *Digital* (6 July 2015).

³⁵⁰ Veckans Affärer, 'Uber Eats och Foodora vittnar om slavlöner - så lite tjänar de' (23 March 2017) <<https://www.va.se/nyheter/2017/03/23/sa-lite-tjanar-ubers-och-foodoras-cykelbud--vittnar-om-slavloner/>> last accessed 2017-05-21.

³⁵¹ Ibid.

³⁵² Salo (n 239).

³⁵³ Andreas Jennische, 'Matleverantören Foodora anklagas för att dumpa lönerna' *Stockholm Direkt* (5 October 2015) <<http://www.stockholmdirekt.se/nyheter/matleverantoren-foodora-anklagas-for-att-dumpa-lonerna/reppjdi78NfTofUc033JqW0Iv60Q/>> last accessed 2017-05-21.

³⁵⁴ Karin Eurenus, 'Dumpade löner och inga kollektivavtal för Foodoras cykelbud' (21 September 2016) <<http://www.goteborgdirekt.se/nyheter/dumpade-loner-och-inga-kollektivavtal-for-foodoras-cykelbud/reppiulYm9@saAmXZaCQzNyzyAXMg/>> last accessed 2017-05-21.

³⁵⁵ Berg (n 333) 15.

³⁵⁶ Masselli, Lenaerts and Beblavý (n 323) 5.

³⁵⁷ Wossow (n 193) 18.

³⁵⁸ Uber, 'Uber BV Villkor' (Uber 2016) <<https://www.uber.com/legal/terms/se/>> last accessed 2017-05-21.

³⁵⁹ Aloisi (n 186) 662.

³⁶⁰ Ibid, 676.

capricious with their rating, and this can lead to faulting the driver for circumstances that are out of their control, such as bad traffic or a longer queue for the drive than normal, following a high demand. The rating could also be dependent on the individual client's perception of what warrants a good rating. Uber drivers' accounts are deactivated if they receive too low ratings, even though a rating of three out of five could be the result of an indifferent, but not dissatisfied, client. Again, this makes the rating capricious.³⁶¹ Furthermore, Uber send drivers with low rating messages with 'recommendations', 'tips', 'advice' or feedback in order to modify their behaviour. Uber have stated before that they do not perform ride-alongs or performance inspections, but it has been argued that this is not needed to conform drivers to act in the desired manner, as Uber still have the power to terminate accounts if ratings fall below a certain average, or assign performing parties fewer tasks.³⁶²

Concerning crowdwork, the fact that there is rarely a relationship between the client and the performer of service leads to a "dehumanising" of the performer of service.³⁶³ If a task is performed from a distance, with no "face behind the screen", the client could be expecting the task to be performed as well as if done by a machine, without room for human errors. With a delay or an error, which could again be the result of circumstances out of the performing party's control, the ratings are affected in a negative way. Additionally, it has been contested that ratings are a reliable indicator of quality, as the two do not necessarily correlate.³⁶⁴ The development of these rating and monitoring systems have become an automatic management, enabling a deviation of management, supervision and control that is traditionally regarded and a built-in computer code can now perform supervisory tasks such as assigning tasks to workers, determining the timing and length of breaks, monitoring quality, ranking workers and the provision of incentives, whether positive or negative.³⁶⁵

Felstiner has identified several aspects of the Amazon Mechanical Turk Participation Agreement that structures the relationship between client and worker and exerts control over the terms and conditions of work. One of these is the fact that the Participation Agreement includes a satisfaction clause for clients to keep and use rejected work without compensating the performing party, which Felstiner identifies as a key employment condition.³⁶⁶ Secondly, the platform mandates that all transactions and work submitted is done via the platform, making it the exclusive venue on which to exchange business and any independent contracting or negotiation is limited and risks expulsion from the platform.³⁶⁷ The platform requires workers to relinquish all property rights to work submitted and to waive the right to negotiate employee benefits for themselves. AMT further reserves the right to unilaterally terminate accounts of worker that the platform, in its sole discretion, has deemed to have broken the participation agreement.³⁶⁸

On Upwork, to ensure a work is being performed, specifically in the cases when a performing party is working on an hourly rate, a software function is required to be used, functioning as a

³⁶¹ Aloisi (n 186) 624. The accounts are deactivated if the drivers get an average of under 4.6 out of 5 in the last 25 or 50 trips, depending on the region.

³⁶² Ibid, 676.

³⁶³ Schmid-Drüner (n 183) 9.

³⁶⁴ Codagnone, Abadie and Biagi (n 203) 7.

³⁶⁵ Miriam A. Cherry, 'Beyond misclassification: The digital transformation of work' (2016) *Comparative Labour Law and Policy Journal*, Vol. 37, No 3, 21.

³⁶⁶ Felstiner (n 180) 191.

³⁶⁷ Ibid, 191 ff.

³⁶⁸ Ibid, 192 ff.

digital punch clock.³⁶⁹ On other platforms, productivity can be measured by an algorithm counting keystrokes or taking screenshots of the work performed.³⁷⁰ It has been argued that this “often results in determination of work that is so pronounced that it equals “classical” personal dependency necessary for an employment relationship”.³⁷¹

3.4.5 Dependence

As stated above, a small but growing part of people active in the labour market in both Sweden and the United Kingdom are also active in the gig economy, many using earnings from these platforms as their main source of income. This means a growing amount of people are dependent on these earnings. Regarding the individuals who performs work on crowdsourcing platforms in general, they are not generally typical entrepreneurs, bargaining independently and using initiative to maximize their profits, but rather “fungible particles in an on-demand labour pool”.³⁷² In truth, particularly in low skilled crowdwork, the opportunity for entrepreneurship is very limited.³⁷³ On the crowdsourcing platforms, the performing parties are dependent on the consumers to rate or approve their work, in many cases without being given the opportunity to contest if it is not approved. The terms are often unilaterally written and, the platforms can one-sidedly deactivate a user’s account.³⁷⁴ On most platforms, the rating and quality control is also one-sided, as only performing parties are evaluated.³⁷⁵ As stated above, the work on crowdsourcing platforms is demand dependent.³⁷⁶ Performing parties of Amazon Mechanical Turk, for instance, have stated that they need to stay up late and wait for the tasks that are “well paying”, relatively speaking.³⁷⁷

Furthermore, many of the platforms include in their terms a clause preventing workers and clients from contacting each other of the platform, and to make payment only through the platform. This actively prevents the parties from contracting independently.³⁷⁸ On many platforms the remuneration is set beforehand, and what remains for the worker is to either accept the agreement, or not accept the task at all. In the case of Uber, for example, the fares consumers are charged for a service performed is set by the platform. Uber does not give their drivers the opportunity to accept or deny a ride based on its profitability, as the drivers are not given the information about destination or fare in advance. Should they refuse a ride, they risk being suspended. Should the consumer file a complaint with Uber, the driver must prove that the complaint is unfounded.³⁷⁹ Some of the remuneration for Foodora drivers is provision based, but the deliverers cannot affect the number of deliveries they receive, they depend on the platform to provide them. One deliverer states that more than two deliveries per hour is very rare.³⁸⁰

³⁶⁹ Codagnone, Abadie and Biagi (n 203) 26.

³⁷⁰ Codagnone, Abadie and Biagi (n 203) 39.

³⁷¹ Martin Risak and Johannes Warter, ‘Legal Strategies towards fair employment conditions in the virtual sweatshop’ (Regulating for Decent Work Conference, Geneva, 8-10 July 2015) 8.

³⁷² Felstiner (n 180) 197.

³⁷³ Cherry (n 365) 6.

³⁷⁴ Aloisi (n 186) 663.

³⁷⁵ Lilly C. Irani and M. Six Silberman, ‘Turkopticon: interrupting worker invisibility in Amazon Mechanical Turk’ (CHI, Paris 27 April-2 May, 2013) 613.

³⁷⁶ De Groen and Maselli (n 206) 15.

³⁷⁷ Moshe Z. Marvit, ‘How Crowdworkers Became the Ghosts in the Digital Machine’ *The Nation* (5 February 2014) <<https://www.thenation.com/article/how-crowdworkers-became-ghosts-digital-machine/>> last accessed 2017-05-21.

³⁷⁸ Felstiner (n 180) 192.

³⁷⁹ De Groen and Maselli (n 206) 11.

³⁸⁰ Eurenus (n 354).

3.4.6 Result and copyright

On Amazon Mechanical Turk, the design of the platform is such that if a consumer is not happy with the result of a task performed, they do not need to pay. However, they are still entitled to full intellectual property rights to the result submitted, regardless of approving or rejecting the work. This has created a loop-hole for consumers to avoid paying for submissions, and yet being able to utilize the result.³⁸¹ On Crowdfunder, any work submitted is considered the property of the site.³⁸² On platforms launching competitions, only the winners, and in some cases the submissions placing in second and third place, are remunerated. However, the work submitted by other contestants is still available for viewing by visitors of the site in many cases.³⁸³ This is in spite of the fact that the project proposals submitted on Pillar, for example, are officially considered the intellectual property of the designer.³⁸⁴ On Upwork, once a submission has been made and the payment has been approved, any intellectual property is considered to be the “sole and exclusive property of Client, and Client will be deemed to be the author thereof”.³⁸⁵

3.4.7 Competition limitations

Many of the gig economy companies claim that they are nothing but a technical platform enabling freelancers or independent contractors and clients to connect with each other. Yet in their terms and agreements it is clearly stated that performing parties and clients are not allowed to engage in professional contact outside of the platform, or in other cases, make it difficult or impossible for client and performing party to identify one another. Uber drivers are expressly discouraged from contacting passengers before or after a drive to ask for or offer an exchange in phone number without the approval of Uber. It is explained that it can be seen as solicitation, which is a violation of the partner agreement.³⁸⁶

As an example, In UpWork's terms and agreement, a section is specifically devoted to prevent circumvention of payment through the platform for a minimum of 24 months from the time of parties identifying one another through the site, effectively limiting cooperation between parties if not through the site.³⁸⁷ In Pillar's terms and condition it is clearly stated that the platform is not a tool to organize, negotiate or mediate for professional engagement and that it is forbidden to utilize their Q&A module to contact the counterpart to exchange contact information.³⁸⁸ As the performing parties are considered independent contractors however, the platforms cannot limit them from performing services elsewhere. A company called eRated allows “sellers” to be active on more than one platforms at the same time, and “pooling” their combined existing reputation from different platforms. It is not yet applicable to every platform, or as eRated calls them, marketplaces.³⁸⁹

3.4.8 Equipment

As stated above, most gig economy platforms claim that they are merely technical platforms connecting peers. In accordance with this, equipment provided from these companies to enable

³⁸¹ Irani and Silberman (n 275) 613.

³⁸² Crowdfunder, ‘Terms and Conditions’ (n 261).

³⁸³ Eurofound (n 179) 111.

³⁸⁴ Pillar, ‘Terms and Conditions’ (n 303) Para 4.2.

³⁸⁵ UpWork, ‘User Agreement’ (n 294).

³⁸⁶ *Aslam, Farrar & Others v. Uber BV* (n 208) [14].

³⁸⁷ UpWork, ‘User Agreement’ (n 294) Para 7.

³⁸⁸ Pillar, ‘Terms and Conditions’ (n 303) Para 4.4, 6.5.

³⁸⁹ Steve O'Hear, ‘Online Seller Profiling Startup eRated Raises \$1.7M’ *TechCrunch* (19 January 2016) <<https://techcrunch.com/2016/01/19/erated/>> last accessed 2017-05-21.

performing parties to execute their work is rarely included. Uber require drivers to provide their own car and to pay for taxes, insurance and eventual toll costs.³⁹⁰ As stated above, however, Uber in the UK has developed a Marketplace for renting cars at a lower cost if you are an Uber Partner Driver. If you deliver food for Foodora, you are required to provide your own bike³⁹¹, tough for some employees a small amount of 13 cents per hour seems to be paid for using their bike.³⁹²

Considering crowdwork, a computer and efficient Wi-Fi or other internet connection is the basic need.³⁹³ The argument that the gig economy would contribute to a more inclusive labour market as stated above somewhat meets its limitations here, as a quick internet connection can be expected to be more rare in rural area across the world. In some cases, to fulfil more high-skilled tasks such as programming or designing, certain programs that are not always cheap might be needed.³⁹⁴

3.4.9 Organising

Depending on the nature of the platform, performing parties are dealing with a situation more or less like that of a freelancer or independent contractor, in theory free to negotiate terms with each transaction or more standardised execution. In most cases the client requests a temporary contract. Comparing this with a more permanent principal, the counterpart with whom to negotiate issues regarding work conditions or other matters is unclear.³⁹⁵ As stated above, successful platforms tend to form strong monopolies, leading to a domination of their respective markets, which further contributes to weakening the negotiation position of performing parties.³⁹⁶ Amazon Mechanical Turk has been critiqued for its one-sided evaluation system being used by unserious clients, but has yet to amend the system to better fit the needs of the performing parties. The company has been reluctant to communicate with its workforce. This has led performing parties to organise the database Turkopticon, giving users the opportunity to evaluate transactions and rate experiences with individual clients to give performing parties knowledge on which to base their choices in tasks performed.

Foodora has been critiqued for dumping wages for their delivery employees. Swedish union Transportarbetarförbundet has sought negotiations with the company to bring about a collective agreement, but without success. Considering the fact that no deliverers for Foodora are members of Transportarbetarförbundet, the union has difficulty in actually affecting the working conditions of these employees.³⁹⁷

3.4.10 Discrimination

As in other labour markets, the gig economy does not seem to be free of discrimination.

³⁹⁰ Schmid-Drüner (n 183) 5.

³⁹¹ Foodora, 'Bli en av våra Foodorabud' (Foodora 2017)

<https://bud.foodora.se/?utm_source=foodora&utm_medium=website&utm_campaign=footerlink> last accessed 2017-05-21.

³⁹² Salo (n 239).

³⁹³ se for example Crowdfunder, 'Contributors' (n 252).

³⁹⁴ Clickworker, 'About Clickworker' (Clickworker 2017) <<https://www.clickworker.com/about-us/>> last accessed 2017-05-21.

³⁹⁵ Unionen (n 176) 44.

³⁹⁶ Ibid, 49.

³⁹⁷ Niklas Thander, 'Usla löner gör att facket vill möta Foodora' *FoodSupply* (22 December 2016)

<https://www.food-supply.se/article/view/306992/usla_loner_gor_att_facket_vill_mota_foodora> last accessed 2017-05-21.

In the low-skilled crowdwork platforms, where performing parties are anonymous to the clients, bias towards who performs the task is limited.³⁹⁸ Additionally, it can be argued that crowdwork contributes to creating opportunities for people who are ill or disabled and unable to leave their homes.³⁹⁹ However, some crowdwork platforms allow clients to restrict the geographical area in which performing parties can participate in committing to tasks, claiming that it is for reasons related to language skills.⁴⁰⁰ In more high skilled platforms, such as UpWork, there seems to be a biased way of thinking when choosing whom to work with. Female performing parties seem to be chosen to a greater extent for tasks such as customer service and other tasks that would be considered stereotypically female, while offer for typically male tasks, such as programming, is less occurring for women.⁴⁰¹ Statements have been found on the platform such as:

“This job is not for people from Bangladesh and Pakistan and your bid would be rejected automatically if you are from any one of the mentioned countries”

“Business to Business appointment setters needed: with previous calling experience Filipinos are preferred”

“The client has requested they want a female caller with a British or Australian or New Zealand accent working on the campaign. MEANING UNLESS YOU ARE FEMALE AND UNLESS YOU ARE A KIWI, AN AUSSIE OR BRITISH, DO NOT APPLY!!!!.”⁴⁰²

These kinds of statements seem to be possible due to the regulatory vacuum on these platforms.⁴⁰³ Furthermore, it could be assumed that it is not educated recruiters familiar with labour law that are posting these comments. Many platforms encourage users to upload personal information and a picture to facilitate a trust mechanism for their counterpart. However, this facilitates discrimination based on race, gender, age or other type of appearance. With the importance of the rating system of some platforms explained above, a biased review from a client can have a great negative effect on users’ future possibilities to get jobs via the platform.⁴⁰⁴ On Care.com, a tip for both clients and performing parties in the screening process is to conduct an internet search on potential candidates on various social network sites to help shape an opinion of them.⁴⁰⁵

3.4.11 Well-being of workers

A consequence of performing parties being classified as freelancers and independent contractors is that the risks that would traditionally be placed on an employer in case of unexpected events, is now placed on the performing parties. For example, in the case of illness, no paid sick leave is guaranteed for the performing party. This leads to them risking their health, as they feel they need to work even while ill. There is a constant stress on them in knowing that they cannot get sick, or they will lose income and possibly get a bad review if a task was delayed

³⁹⁸ De Stefano (n 176) 11.

³⁹⁹ Schmid-Drüner (n 183) 8.

⁴⁰⁰ De Stefano (n 176) 11.

⁴⁰¹ Codagnone, Abadie and Biagi (n 203) 45.

⁴⁰² Ibid, 247.

⁴⁰³ Ibid, 42.

⁴⁰⁴ Degryse (n 291) 49.

⁴⁰⁵ Care.com, ‘Safety Guide for Care Seekers’ (n 235).

for this reason.⁴⁰⁶ There is no risk for the platforms, as they have a pool of willing performing parties to take over if someone is absent.

Psychological pressure is also placed on performing parties when considering the insecurity of pay and whether there will be work to do from one hour to the next.⁴⁰⁷ Considering the price surge mechanism explained above, there is also the risk of travelling to certain areas where demand for the service is high, and realising upon arrival that the need has shrunk.⁴⁰⁸ Referring to the monitoring system explained earlier, this too entails significant psychological stress on performing parties to always be friendly, serviceminded and efficient. There can be no such thing as a “bad day” for these performing parties. An additional risk lies in a difficulty to separate work life from personal life as there is in some cases a constant need to be available if work appears.⁴⁰⁹ As mentioned earlier, a lot of performing parties are under pressure to work on tight deadlines and long hours to make sufficient earnings.⁴¹⁰ Furthermore, performing parties in the gig economy often work isolated, which further increases the risks posed to psychological well-being.⁴¹¹

3.4.12 Terms and conditions

The platforms have different ways of trying to ensure that the performers of service cannot be mistaken for employees, nor that there is any employment relationship between either the performer of service and the platform, or between the performer of service and the client.⁴¹² In order to become a “Partner” with Uber, for example, drivers must first approve Uber's terms and conditions.⁴¹³ This contract explicitly states that the relationship between Uber and the driver is between independent contracting parties, and that by signing, it is expressly agreed that no employment agreement or employment relationship exists between the parties.⁴¹⁴

Regarding the terms and conditions to which clients and performers of service agree, it is often explicitly specified that the performer of service acts as an independent contractor. In addition to dismissing the possibility that the platforms act as employers, however, the terms and conditions state in several cases that the client and the performer of service are not allowed to enter an employment or other professional relationship outside of the platform, as exemplified above in section 3.4.7 regarding competition limitations. De Stefano identifies this as “enhanced independent contractor’s clauses” as the platforms dictate terms and conditions of employment between performing parties and clients, indicating that the platform can be defined as a “joint employer” of a performing party in a particular transaction.⁴¹⁵

If a performer of service should be re-classified as an employee in any way, the platforms make sure to denounce their responsibility. For instance, the terms and conditions may inform the client of the risk of repeatedly requesting the same performer of service. The conditions for the

⁴⁰⁶ Degryse (n 291) 44.

⁴⁰⁷ De Groen and Maselli (n 206) 5.

⁴⁰⁸ Ibid, 5

⁴⁰⁹ Ursula Huws, ‘Platform labour: Sharing economy or virtual wild west’ *Journal for Progressive Economy* (29 January 2016).

⁴¹⁰ Schmid-Drüner (n 183) 16.

⁴¹¹ Ibid, 16.

⁴¹² De Stefano (n 176) 12.

⁴¹³ Uber, ‘Godkänna regler och villkor’ (Uber 2016) <https://help.uber.com/sv_SE/h/44cflf0e-27ca-4919-9621-f1321a0381c1> last accessed 2017-05-21.

⁴¹⁴ O’Connor et al. v. Uber Technologies, Inc., et al., *Order Denying Cross-Motion for Summary Judgement*, 11 March 2015, Document 251.

⁴¹⁵ De Stefano (n 176) 13.

client can ensure that the client is obligated to reimburse the platform, should the platform be found liable for any tax, etc. connected to the clients use of the service of a performer.⁴¹⁶ One platform claims to leave the classification of the relationship to the client and performer of service, while simultaneously denouncing any liability or responsibility should the performer of service be “misclassified as an employee”.⁴¹⁷

De Stefano further identifies a restraint-of-trade effect taking place, where platforms in some cases bind clients and performers of service to only use the platform as a means of communication, as exemplified in section 3.4.1 above. Some platforms urge performers of service to notify the platform, should a third party contact them with an offer of employment, without the written consent of the platform.⁴¹⁸

With the advancement of technology, the concept of crowdsourcing has evolved in a much quicker pace than the regulation surrounding it.⁴¹⁹ According to a study made by Eurofound⁴²⁰ no legal framework could be identified that specifically regulates crowd employment.⁴²¹

“[...] In general, the employment relationship between the client and the worker is based on individual agreement, hence pay, working conditions and other issues, notably intellectual property rights, are determined either by the two parties or the terms and conditions of the platform [...]”⁴²²

3.5 Mr Y Aslam, Mr J Farrar and Others v Uber Employment Tribunal⁴²³

The question of the designation of performing parties on the Uber platform has been under scrutiny in the United Kingdom. The claimants held that they had worked for Uber as workers, as defined by the ERA and were thus entitled to protection under the National Minimum Wage Act, and the Working Time Regulations. The two claimants were put forward by the GMB unions as a test case for the 40 000 individuals currently operating as Uber drivers in the UK.

The court reviewed in detail how the Uber app works and scrutinised the contracts under which the claimants had performed work, and compared it with the reality of the relationship between the parties.

At first the court analysed the question of obligation between the parties. The respondents claimed that while the drivers’ app is turned off, the drivers are never under any obligation to switch the app on, or to accept any rides when it is switched on. The former claim was accepted by the court. However, the fact that Uber contacts the driver when the app is switched on if the driver has not accepted a number of rides offered and “warns“ the driver if, for example, the next two ride offers are not responded to, the user will automatically be logged of for a period of time, was seen as an obligation to accept work. It is clearly stated in the terms and conditions

⁴¹⁶ De Stefano (n 176) 13.

⁴¹⁷ Ibid, 13.

⁴¹⁸ Ibid, 14.

⁴¹⁹ Maselli and Fabo (n 306) 1.

⁴²⁰ ett trepartsorgan inom EU som förmedlar kunskap för att stödja utformningen av social- och arbetsmarknadspolitik.

⁴²¹ Eurofound (n 179) 109.

⁴²² Ibid, 109.

⁴²³ *Aslam, Farrar & Others v. Uber BV* (n 208).

that the right to use the app is non-transferrable, and that access to the app is personal. There is no question of any driver being replaced by a substitute.

Furthermore, the respondents claimed that Uber is not a transportation company, but simply a technological company connecting self-employed drivers and passengers. The court discarded this as “unreal” and referred to the fact that the Uber core function is to provide a variety of driving services and that they employ drivers to that end. The court referred to a quote from a similar case from the United States saying that “Uber is no more a ‘technology company’ than Yellow Cab is a ‘technology company’ because it uses CB radios to dispatch taxi cabs”.⁴²⁴

The respondents claimed in the case that the drivers are self-employed and run their own businesses. Something that the court found “faintly ridiculous” as this would mean that Uber in London is a “mosaic for 30 000 small businesses” with Uber linking them together by providing a common platform. The respondents had further claimed that Uber was assisting the drivers to grow their businesses and that Uber was providing them with leads. This was discarded as it was concluded that the drivers were in no position to grow their businesses unless they simply drove more hours. They were expressly discouraged in terms and agreements and in correspondence with Uber to make any contact with the passengers outside of the ride, to give them their phone number or to contact them. Furthermore, the claim of providing drivers with leads was rejected, as it was clear that when the driver meets the passenger, the agreement of destination and payment has already been made between the passenger and Uber. The driver has no possibility of negotiating or striking a bargain with the passenger in regards of the price, but is offered and accepts terms strictly on Uber's terms.

Furthermore, the respondents claimed that the contract struck is between the driver and the passenger. The court regarded the absurdity of this claim, as it would entail the driver to enter into a binding agreement with an unknown person, to undertake a journey that is beforehand unknown to him, with a route prescribed by a stranger to the contract, who also determines his remuneration and receives the payment from the passenger. Uber's case would then be that if the organisation became insolvent, the drivers would have enforceable rights directly against the passenger, which is not suggested in any of the terms.

Upon ‘onboarding’, the drivers were shown a ‘Welcome Package’ with ‘tips’ on what passengers like, and what Uber looks for. It was explained to them that Uber would continually look at their driver rating, client comments and feedback provided to them in order to ensure top service to riders. Further, it ‘advised’ on how it was perceived by a client when not accepting or cancelling trips, and a request to turn off the app if they are not available. Furthermore, the facts that the driver's app could be switched off when the driver did not accept ride offers, that an account could be terminated if drivers had low average scores, and that Uber provided drivers with ‘advice’, ‘tips’, ‘recommendations’ or ‘feedback’ in order to modify the driver's behaviour and improve the rider experience were all, among other things, seen as means of management and control of the drivers.

The court then proceeded to refer to the *Autoclenz* case, stating that “the employer is precluded from relying upon its carefully crafted documentation because we find it bears no relation to reality”.⁴²⁵ The court refers to the fact that in the case at hand, Uber could unilaterally change

⁴²⁴ *Aslam, Farrar & Others v. Uber BV* (n 208) [27].

⁴²⁵ *Ibid*

the conditions of the terms and agreement, without negotiation. Also, the drivers, whom often do not speak English as their native language, are not on equal bargaining position with Uber.

4. Can a worker in the gig economy be regarded as an employee in Sweden?

When attempting to answer this question, two different crowdsourcing platforms will be used as examples. It should be noted however, that the assessment of whether a performing party is an employee or not needs to be made in each individual case. As presented above, the crowdsourcing companies display great variety in how they construct their platforms and to which extent they are involved in the work performed, which undoubtedly will affect the assessment made regarding the definition of the workers.

The assessment attempted below will regard the platforms Uber and Upwork, as they are on opposite ends of the spectra. One is a crowdwork platform, which distributes relatively high-skilled labour for workers competing online on a global scale. The other is a work on-demand app, where work needs to be performed locally and does not require workers to have any specific skills. The assessment will be made based largely on the contracts between the platforms and the performing parties, but examples will also be drawn from the actual relationship documented from the different platforms to uncover inconsistencies between the contracts and the actual execution of the tasks. Regarding Upwork, the assessment will have to be made in a more general notion and draw greater conclusions from the contracts rather than in reality, as individual situations have not been documented to the same extent as they have with Uber, for example.

Parallels will be drawn to other platforms in certain cases, to emphasize the differences in the extent to which a worker can be perceived to be an employee to a crowdsourcing platform.

4.1 Uber

Regarding the Uber contracts, there are several to take into consideration. The initial contract between the Driver and Uber is called the “Partner Contract” which dates back to the 1st of July 2013. In this, a Partner is described as the party that has sole responsibility for the Driving Service, while Driver is defined as the person who is an employee or business partner of the Partner, whom renders the Driving Service. This supposedly allows the Partners to, in their own business, hire or work with business partners to perform the Driving Service. However, the vast majority of the Partners are sole operators who perform the Driving Services through their Drivers, meaning themselves. The Customers in this agreement is the person using the services, meaning, for the most part, taking a ride.

In October 2015, Uber issued revised terms in an agreement called “New Terms”. The substance of the “New Terms” is reproduced in a somewhat modified language, but in this agreement, the ‘Partner’ is now called the ‘Customer’, and the ‘Customer’ is now called the ‘User’. A Customer, as defined in the New Terms, is required to acknowledge and agree that:

“it is at all times responsible and liable for the acts and omissions of its Drivers vis-à-vis Users and Uber, even where such liability may not be mandated under applicable law. Customer shall require each driver to enter in a Driver Addendum (as may be updated from time to time), and shall provide a copy of each executed Driver Addendum to Uber. Customer acknowledges and agrees that Uber is a third-party beneficiary to each Driver Addendum, and that, upon a Driver’s execution of the Driver Addendum, (electronically or otherwise), Uber will have the irrevocable right (and will

be deemed to have accepted the right unless it is rejected promptly after receipt of a copy or the executed Driver Addendum) to enforce the Driver Addendum against the Driver as a third-party beneficiary thereof’

Accordingly, a Partner, or Customer as defined by the New Terms, who is a sole operator, is also bound by the Driver Addendum.

For the purpose of aiding and facilitating for the reader of this thesis to follow the line of reasoning, the terminology of the New Terms will be followed. This means that the Customer is the party that has sole responsibility for the Driving Service, which will also mean the Driver, if not specified otherwise. The User is the person using the services, thus taking the ride.

4.2 UpWork

On the Upwork platform, a client can find web and mobile developers, writers, virtual assistants, accountants and consultants and customer service agents, among other performers. It is a wide variety of the workforce, and initially and in general, a person who creates an account on Upwork is defined as a Freelancer. Similar to Uber, there is a possibility to in turn employ ‘agency members’ as employees to an Agents Account. These agency members may act on account of the Agents Account, but do not need to be registered to the platform.⁴²⁶ Individual Freelancers and those who have an Agents Account, as well as Clients, are bound by the User Agreement.⁴²⁷ To facilitate for the reader, the terms used in the agreement will be used in this chapter. The Freelancer is the performing party unless specified otherwise, and the Client is the client/customer who intends to acquire a service via the platform. Both Freelancer and Client can be referred to as a User.

Upwork has a section in their User Agreement labelled ‘Employment Service’,⁴²⁸ allowing the Client to, through Upwork, employ a Freelancer.

“If a Client will receive services from a Freelancer it has classified as an employee, then the Client agrees that the Upwork Payroll Agreement applies, and Client agrees to enroll in Upwork Payroll for each such relationship. In this case, Upwork’s third-party staffing vendor (the “Staffing Provider”) will hire the Freelancer at the request of Client and assign the Freelancer to work for Client, as described in the Upwork Payroll Agreement.”⁴²⁹

Accordingly, if a Client classifies a Freelancer as an employee, then she will be employed, not by the Client, but by Upwork (or rather its ‘third-party staffing vendor’). The Client can employ the Freelancer herself, but only for a so called opt-out fee.⁴³⁰ It is unclear how the classification of the Freelancer as an employee is conducted. Upwork requires clients to take responsibility and assume all liability for determining whether Freelancers are independent contractors or employees and engaging them accordingly.⁴³¹ As seen in the quote above, it is up to the client to classify the Freelancer as an employee, and Upwork takes no part in this classification. A client hiring on Upwork might be less inclined to hire performing parties as employees, and

⁴²⁶ UpWork, ‘User Agreement’ (UpWork 2016) <<https://www.upwork.com/legal/>> last accessed 2017-05-21, Para 3.4.

⁴²⁷ Ibid.

⁴²⁸ Ibid, Para 8.8.

⁴²⁹ Ibid, Para 8.8.

⁴³⁰ Ibid, Para 8.7.

⁴³¹ Ibid, Para 8.7.

accordingly, this classification might be an exception. It is unclear whether Upwork warns a client who has recurrently hired a Freelancer for the same tasks to consider reclassifying the working relationship, but in regards to the above mentioned quote, this does not seem to be the case. There might be a grey area of Freelancers on Upwork who should in fact be classified as employees to specific clients according to Swedish regulations. Further investigation into the working conditions for Freelancers who have indeed been classified as employees will not be made.

4.3 Obligation to perform work personally

4.3.1 Uber

Under all three agreements presented above, it is clearly stated that access to the App is personal to the Customer and the Driver and the right to use the app is non-transferrable. There is no question of a driver replacing themselves with a substitute. Further, considering the right for the driver to refuse work, it is clearly stated in the Driver Addendum that:

“Driver acknowledges that neither Uber nor any of its Affiliates in the Territory controls, or purports to control: (a), when or for how long Driver will utilise the driver App for Uber Services; or (b) Driver’s decision [...] to decline or ignore a User’s request for Transportation Services, or to cancel an accepted request [...] for Transportation Services.⁴³²

This is true while the Driver is not logged on to the App. While they are, however, failure to accept several rides in a row will lead to an inquiry from the App and a warning to be logged off if this continues. This indicates that while logged on to the App, the Driver is assumed to be at the disposal of Uber to accept rides when they are offered, and are punished if they do not. Following the reasoning in the case *AD 1989 nr 39* regarding a local newspaper representative, the decisive factor was that the performing party had been hired to cover upcoming events and even though the newspaper argued that she had had the right to turn down assignments, this had not been the case in reality. Neither could the newspaper show that this had been the case in the past.

4.3.2 UpWork

As with Uber, the work performed under a Freelancer’s Account must be performed by the person that has the account. It is not allowed to transfer an account between parties.⁴³³ Accordingly, if Freelancer is hired she is required to perform the work personally. However, as a Freelancer who has created an Agents Account may in turn delegate the task required to her own employees or sub-contractors. This is evident when an agreement is made between Client and Freelancer.

As presented above, clients can post tasks that they want executed with a description of the nature of the work and the skills required to do it. The platform reviews the task and posts it on the website. Freelancers can actively search for tasks corresponding with their qualifications, and apply for tasks they find interesting. Information on the client is included on the post, such as number of tasks and average rate paid. A client can also search for workers with the right qualifications through their profile. Work history is included, such as number of bids offered,

⁴³² Uber Driver Addendum paragraph 2.3, see Mr Y Aslam, Mr J Farrar & Others v. Uber B.V., Uber London Ltd, Uber Britannia Ltd [2016] WL [38].

⁴³³ UpWork, ‘User Agreement’ (n 426) Para 3.4.

number of hours worked and feedback and ratings from previous clients and tasks performed. If the Client searches for profiles, the Freelancers' normal hourly rate can be visible. A Freelancer can apply for a task or a Client can send a recruitment invitation to a Freelancer, or a Freelancer with an agent account. Regarding the right to refuse work, both the Client and the Freelancer are required to approve each other before they can agree on a contract.

Upwork does not require the Freelancer to accept a certain percentage of tasks or, as in Ubers case, suspend Freelancers from the platform if they do not. However, the platform displays its 'Top Rated' Freelancers on the website for Clients to see. In order to become 'Top Rated', Freelancers are urged, among other things, to keep their availability up to date. Furthermore, when calculating the 'Top Rated' status, the activity on the platform is measured.⁴³⁴ In other words, with the incentive of becoming 'Top Rated' and thus have their profiles advertised on the site, Freelancers are required to be at the disposal of the Clients when they have indicated and to be active on the platform. Granted, a Freelancer is not required to fulfil the factors resulting in a 'Top Rated' status. However, an incentive is created to achieve or maintain this status by fulfilling these requirements, and by not fulfilling them, a Freelancer could be seen as being punished, by losing the perks of this status. Upwork states that they do not introduce or match Clients and Freelancers.⁴³⁵ However, the platform advertises, and thus indirectly recommends, Freelancers keeping a high standard based on factors, determined by the platform to be desirable and worthy of pursuit for Freelancers, one of these being that the Freelancers are active and available to work when they have indicated. This way, Upwork ensures that the Freelancers they advertise are at the disposal of the Clients most of the time.

Furthermore, the question of being at the disposal of the Client would have to be regarded in each individual case between the Client and the Freelancer. According to the User Agreement, Clients are not allowed to require exclusive relationships with a Freelancer who has been deemed to be an independent contractor.⁴³⁶ However, this does not mean that a Freelancer in reality could not be seen as being at the disposal of one Client. Upwork seems to be encouraging Freelancers to pursue recurring relationships with the clients, as the fee charged from the Freelancer is on a sliding scale depending on the contingency of the relationship between the performing party and the client, the more continuous the relationship, the less Upwork charges.⁴³⁷ This might be seen as a means for the platform to retain Freelancers on the platform and to specific Clients, and an urge to Freelancers to be at the disposal of these specific Clients.

In conclusion, the Freelancers are required to perform their work personally and it can be argued that they, to a certain extent, are at the disposal of the platform. The right to refuse any specific contract with a Client seems to be present both in contract and in reality, but an incentive to maintain an ongoing relationship with a Client can indicate that Freelancers are at the disposal of certain Clients. Any individual Freelancer does not seem to be required to be at the disposal of Upwork in order to retain their access to the website, but it is needed in order to achieve or maintain their 'Top Rated' status.

4.4 Rate, intensity and duration of work

⁴³⁴ UpWork (2017), *Become Top Rated*, <https://support.upwork.com/hc/en-us/articles/211068468-Become-Top-Rated>.

⁴³⁵ UpWork, 'User Agreement' (n 426) Para 6.3.

⁴³⁶ Ibid, Para 8.7.

⁴³⁷ Stephanie Kasriel, 'UpWorks new pricing: a message from the CEO' (UpWork 2016) <<https://www.upwork.com/blog/2016/05/upwork-pricing/>> last accessed 2017-05-21.

This factor is in neither of the cases connected to a specific situation or a specific worker. However, an assessment can be made regarding the importance of this circumstance. Many of the performing parties on crowdsourcing platforms work on a flexible schedule when they find the time. For the part of the workforce who have their remuneration from crowdsourcing as their main source of income, one can draw the conclusion that their work via the platforms is comparable to a fulltime job. However, the survey presented above suggests that performing parties often work for several different crowdsourcing platforms.⁴³⁸

In UK labour law, the courts would be looking at the existence of a mutuality of obligation and an ‘umbrella relationship’ connecting the individual tasks performed. Prassl argues that it is problematic for the courts to introduce an ‘umbrella relationship’ as a proxy for subordination, where employment on an intermittent basis as introduced in the gig economy potentially indicates a degree of independence.⁴³⁹ On the contrary, Prassl argues that in all but the very top of the spectrum of independent workers, a lack of promised future work most likely leads to an even higher degree of subordination when workers are “required to tend to their employers’ every whim for fear of losing their next shift.”⁴⁴⁰ In Swedish labour law, the duration of a labour contract has lost some of its significance in comparison with other circumstances and seems to be given crucial importance mainly in businesses where a longer duration of work is unusual. The fact that a work is done on a temporary or intermittent basis does not mean it cannot be considered an employment relationship, though a recurring relationship can indicate it.⁴⁴¹

Even though the performing parties in many cases perform work for different clients, the relationship between platform and performing party begins with acceptance of the, unilaterally written, terms of use and continues throughout the entire period within which the worker is active on the platform. A long duration of the relationship between platform and performing party in combination with an obligation to be at the disposal of the platform could indicate an employment relationship.

4.4.1 Uber

As many of the contracts seem to be on a more temporary basis, the fact that a Driver has worked for a long duration of time could, in combination with other factors, indicate that they are employees. When Drivers are rated and placed on an average score below the “Minimum Average Rating”, the “experienced” Drivers⁴⁴² do not receive the quality interventions aimed at assisting them to improve to the same extent as new Drivers.⁴⁴³ This indicates that Uber relies on Drivers who have worked a certain duration of time to perform work to a certain standard, and that working for a longer duration of time does have an impact on the

⁴³⁸ Ursula Huws and Simon Joyce, ‘Size of UK’s ‘Gig Economy’ revealed for the first time, (Foundation for European Progressive Studies UNI Europa 2016) <http://www.feps-europe.eu/assets/a82bcd12-fb97-43a6-9346-24242695a183/crowd-working-survey.pdf> last accessed 2017-05-21; Ursula Huws and Simon Joyce, Size of Swedens ‘Gig Economy’ revealed for the first time, (Foundation for European Progressive Studies UNI Europa 2016) <http://www.feps-europe.eu/assets/3f853cec-1358-4fb4-9552-274b55e05ecf/crowd-working-survey-sweden.pdf> last accessed 2017-05-21

See also section 3.2 above.

⁴³⁹ Jeremias Prassl, ‘Pimlico Plumbers, Uber Drivers, Cycle Couriers, and Court Translators: Who is a Worker?’ (forthcoming) Oxford Legal Studies Research Paper <<https://ssrn.com/abstract=2948712>>, last accessed 2017-05-21, 8.

⁴⁴⁰ Ibid, 9.

⁴⁴¹ Axel Adlercreutz, *Arbetstagarbegreppet: om arbetstagarförhållandet och därtill hörande gränsdragningsfrågor i svensk civil- och socialrätt* (Norstedt 1964) 237.

⁴⁴² those who have undertaken 200 trips or more.

⁴⁴³ *Aslam, Farrar & Others v. Uber BV* (n 432) [55].

relationship between Uber and the Driver, even if it does not in itself necessarily indicate that they are employees.

4.4.2 Upwork

As described above, an incentive is created for Freelancers on Upwork to be active, available and pursue ongoing relationships with Clients. This might be a means for the platform to retain Freelancers on the platform and ensure that they perform their work satisfactory. If a Freelancer in the individual case is deemed to be at the disposal of Upwork, the length of the relationship is indeed of importance. In regards to the individual Client a repeating relationship with the same Client for the same types of tasks might indicate an employment relationship. For example, the Clients who request customer service agents, this assignment might require time for the Freelancer to get insight into the products or services provided by the Client, and the relationship might be a longer one compared to, for example, a website developer who might work on an isolated task.

4.5 Number of principals

As presented above, there is nothing hindering a performing party from having more than one principal for which they perform work, and still being considered an employee to one or several of these principals. However, the courts consider whether the performing party has the actual possibility to perform work for another principal.

On both Uber and Upwork, in contract there is nothing preventing workers performing work for another principal. The workers are at some liberty to decide when they will not be available for work via the platforms. As presented above, however, many workers on the crowdsourcing platforms might be forced to work for long hours in order to make actual earnings. This might be a factor that prevents workers on both Uber and Upwork from performing work for another principal.

On Upwork, when a Freelancer accepts a task, a deadline might be set by the Client and it is unclear whether this deadline is considered reasonable in the individual case. When the Freelancer has agreed to perform an assignment for the Client, they might be free to structure their schedule as they wish within the deadline, but hindered in reality to actually perform work for another principal during this time, which could indicate an employment relationship with this individual Client. Other agreements with the Clients might be on hourly contracts however, giving the Freelancer a greater freedom to perform work for other principals. This would have to be assessed in each individual case, with each individual client. As stated above, the user agreement does not permit the Client to require an exclusive relationship if the Freelancer is classified as an independent contractor.

4.6 Employers control and labour management

The extent to which the crowdsourcing platforms exercise control over the performing parties is perhaps the factor that differs the most among the different platforms and which makes it difficult to produce a uniform answer to the question of whether a performing party in the whole gig economy in general can be considered to be an employee. However, there are some common features as well. On almost all crowdsourcing platforms, performing parties are defined as self-employed or independent contractors. However, when workers accede to a crowdsourcing platform they accept to conform to the terms and conditions unilaterally set by the platform. The platforms often have the power to, in their sole discretion, terminate the workers account or deny them access if they are deemed to have violated these terms. The factor of supervision and control of workers on the crowdsourcing platforms is deviating from what is traditionally

considered to be taken into account. Through the agreements that workers are required to agree to, they submit to a structure and control of the working conditions that would not have been present otherwise, if not after negotiations between parties of an independent contractor agreement. Most platforms use scores and ratings set by the fulfilment of certain criteria and feedback from clients. This type of systems results in “automatically disciplining performance that is poor or perceived to be as such and can therefore amount to a way of exerting control.”⁴⁴⁴

4.6.1 Uber

As quoted above, Uber clearly renounces in their contracts that they exercise any control over the Drivers.⁴⁴⁵ However, Drivers are required to comply at all times with the quality standards set by Uber.⁴⁴⁶

As presented in *Mr Y Aslam, Mr J Farrar and Others v Uber*, upon ‘onboarding’, the Drivers are presented with materials including “5 Star Tips” on “WHAT RIDERS LIKE” and “WHAT UBER LOOKS FOR”. In the latter, Uber states that they continually look at the Drivers ratings, Users’ comments, and feedback to aid in maintaining top service to riders. They go on to indicate that cancellation or non-acceptance of several ride offers in a row leads to a poor experience for Users, and thus a low rating. Furthermore, in this welcoming package, Uber states that acts of sexual harassment, aggressive or threatening behaviour and violence is not tolerated and the Drivers are urged to be polite and professional at all times, to have zero tolerance to any form of discrimination, to avoid inappropriate topics of conversation and to not contact a User after the trip has ended.⁴⁴⁷

While driving, the Uber App “suggests” a route that the Driver should take upon accepting a ride. This is not an instruction, and as the route presented is not necessarily the fastest, the Driver is free to select a route deemed more efficient. However, this is done on the Drivers own risk, as they would be required to justify any departure from the suggested route to Uber, should the question of a refund to a dissatisfied User arise. By extension, this indicates that the Driver is bound by the “suggestion”.

In the Partner Terms, the Customer (formerly Partner) and the Driver are required to agree to a constant monitoring by Uber and Uber’s retention of data.⁴⁴⁸ This is taken to mean retention of ratings, feedback and comments from Users in order to ensure top service to Users, as presented to the Drivers upon onboarding.⁴⁴⁹ When Drivers are below the average scoring they become subject to a graduated series of “quality interventions”. This starts with warnings, and thereafter Drivers receive messages with “recommendations”, “advice”, “tips” or “feedback” on how to raise their score.

“Customer acknowledges that Uber desires that Users have access to high-quality services via Uber’s mobile application. In order to continue to receive access to the Driver App and the Uber Services, *each driver must maintain*

⁴⁴⁴ Valerio De Stefano, ‘The rise of the «just-in-time workforce»: On-demand work, crowdwork and labour protection in the «gig-economy»’ (2016) *Comparative Labour law and Policy Journal*, Vol. 37, No 3, 17.

⁴⁴⁵ Uber Partner Terms Para 2.2.1, see *Aslam, Farrar & Others v. Uber BV* (n 432) [33]; *Uber New Terms paragraph 2.4*, see *Aslam, Farrar & Others v. Uber BV* (n 432) [37]; Uber Driver Addendum Para 2.3, *Aslam, Farrar & Others v. Uber BV* (n 432) [38].

⁴⁴⁶ Uber Partner Terms Para 6.1.1, see *Aslam, Farrar & Others v. Uber BV* (n 432) [35].

⁴⁴⁷ *Aslam, Farrar & Others v. Uber BV* (n 432) [48].

⁴⁴⁸ Uber Partner Terms Para 9.4, see *Aslam, Farrar & Others v. Uber BV* (n 432) [35]

⁴⁴⁹ *Aslam, Farrar & Others v. Uber BV* (n 432) [48]

*an average rating by Users that exceed the minimum average acceptable rating established by Uber for the Territory, as may be updated from time to time by Uber in its sole discretion (“Minimum Average Rating”). In the event a Drivers average rating falls below the Minimum Average rating, Uber will notify the Customer and may provide the Driver in Uber’s discretion, a limited period of time to raise his or her average rating [...] if such Driver does not increase his or her average rating above the Minimum Average Rating within the time period allowed (if any), Uber reserves the right to deactivate such Driver’s access to the Driver App and the User Services. Additionally, Customer acknowledges and agrees that repeated failure by a Driver to accommodate Users requests for Transportation Services while such driver is logged in the Driver App creates a negative experience for Users of Uber’s mobile application. Accordingly, Customer agrees and shall ensure that if a Driver does not wish to provide Transportation Services for a period of time, such Driver will log off of (sic) the Driver App.”*⁴⁵⁰

By this regulation, as the majority of Customers are sole operators and accordingly Drivers, they must agree to log off the app if they do not wish to accept rides, further indicating that they are at the disposal of Uber when they are logged on. Furthermore, the phrasing of the paragraph above (emphasised by author) regarding the average rating should be noted, as it states that Driver *must* be above the minimum average rating in the territory, and that Uber in its sole discretion, determines what that that minimum average rating is. In addition to the ratings the drivers do not have any possibility to negotiate their remuneration. The agreement of service has already been made between the user and Uber when the user sits in the car. The driver does not even have the information on the destination before this point, leaving them the subject of Uber’s agreement with the user and Uber’s directions.⁴⁵¹

Further it is declared that the cancellation of any trips is “subject to Uber’s then-current cancellation policies”. In a message to a driver who had cancelled more than 15 % of their rides during one week, Uber wrote:

“Cancelling jobs you have accepted leads to highly frustrating experiences for riders, an unreliable experience and lower earning. Only accept a job if you are prepared to pick up the user and complete that job and if you are not in a position to do work for Uber remember to log offline at any time”⁴⁵²

A message to another driver showed that Uber warned the driver to accept at least two trips in a row from that moment, or they would log of the driver for ten minutes.⁴⁵³

“[...] Driver may be deactivated or otherwise restricted from accessing or using the Driver App or the Uber Services in the event of a violation of this Addendum or Transportation Company’s violation of the Agreement or Driver’s or Transportation Company’s act or omission that causes harm to Uber’s or any of its Affiliates’ brands, reputation or business as determined by Uber in its sole discretion. Furthermore, Uber retains the right to deactivate or otherwise restrict Driver from accessing or using the Driver App or the

⁴⁵⁰ Uber New Terms Para 2.6.2, see *Aslam, Farrar & Others v. Uber BV* (n 432) [37].

⁴⁵¹ *Aslam, Farrar & Others v. Uber BV* (n 432) [16].

⁴⁵² *Ibid*, [53].

⁴⁵³ *Ibid*, [52].

Uber Service for any other reason at the sole and reasonable discretion of Uber.”⁴⁵⁴

The Partner Terms agreement stipulates that the agreement will terminate automatically, when the customer (Partner in the agreement) and/or its Drivers no longer qualifies, under the applicable law or the quality standards of Uber, to provide the Driving Service.

In conclusion, Uber presents upon ‘onboarding’ how they want their Drivers to act, with explicit suggestions as to what topics of conversation is appropriate for example. The Drivers are subjects to Uber constantly monitoring their ratings and feedback from Users. When this is not satisfactory, they proceed with a warning to the Driver in question and messages indicating how they should improve their ratings. Furthermore, the Driver is, upon accepting, bound by the destination agreed upon with the User, but is not in any position to turn down or accept rides based upon a calculated profit. The Driver is in reality bound by the route suggested by Uber and only able to deviate from it on their own risk.

Furthermore, in the event that a Customer should have employed Drivers or business partners, they also require to be a beneficiary part of that agreement, and require specific management of the Drivers from the Customer, for example, that they should agree “and shall *ensure*⁴⁵⁵ that if a Driver does not wish to provide Transportation Services for a period of time, such Driver will log off of (sic) the Driver App”.⁴⁵⁶ By extension, the Driver is required to log off the App when not able to take rides, and is to some extent punished when not accepting a certain amount of rides offered while logged on the App.

Another circumstance that should be taken into consideration, is the fact that Uber requires their Customers and Drivers to support Uber in all communications, and refrain from speaking negatively about Uber business and business concept in public.⁴⁵⁷ This is very similar to the Swedish concept of loyalty with regard to the employment contract. The loyalty obligation is considered to be part of the employment contract and includes, among other things, a limitation in the right to criticise the employer.⁴⁵⁸ If this is required of an Uber Driver, it might indicate such a limited right as can be assumed to be included in an employment contract, and further indicate such management and control that is consistent with an employment relationship.

As presented above, a palpable level of obedience is often an indication of an employment relationship.⁴⁵⁹ Following the line of reasoning in *AD 1990 nr 116*, one of the decisive factors was that the worker performed work under the directives of the principal. This does not mean that the employer must necessarily monitor every aspect of the work performed, but the work should be somewhat framed by the principal, and structurally the performing party should be subordinate to the principal.⁴⁶⁰

4.6.2 Upwork

In the Upwork User Agreement, Upwork requires Users to:

⁴⁵⁴ Uber Driver Addendum Para 2.3, see *Aslam, Farrar & Others v. Uber BV* (n 432) [38].

⁴⁵⁵ author’s emphasis.

⁴⁵⁶ Uber New Terms Para 2.6.2, see *Aslam, Farrar & Others v. Uber BV* (n 432) [37].

⁴⁵⁷ Uber Partner Agreement Para graph 4.3.4. see *Aslam, Farrar & Others v. Uber BV* (n 432) [35].

⁴⁵⁸ Mats Glavå, *Arbetsrätt* (Studentlitteratur 2011) 590.

⁴⁵⁹ Adlercreutz (n 441) 244.

⁴⁶⁰ Kent Källström and Jonas Malmberg, *Anställningsförhållandet: inledning till den individuella arbetsrätten* (Iustus 2016). 27.

”expressly acknowledge, agree, and understand that: (a) the Site is merely a venue where Users may act as Clients and/or Freelancers; (b) Upwork is not a party to any Service Contracts between Clients and Freelancers; (c) you are not an employee of Upwork, and Upwork does not, in any way, supervise, direct, or control the Freelancer or Freelancer Services; (d) Upwork will not have any liability or obligations under or related to Service Contracts for any acts or omissions by you or other Users; (e) Upwork has no control over Freelancers or the Freelancer Services offered or rendered by Freelancers; and (f) Upwork makes no representations as to the reliability, capability, or qualifications of any Freelancer or the quality, security, or legality of any Freelancer Services, and Upwork disclaims any and all liability relating thereto.”⁴⁶¹

When a performing party creates a profile on Upwork, they can fill out their qualifications. The platform provides voluntary skill tests for performing parties within different areas of expertise, with feedback included, though voluntary and not required.⁴⁶² Upwork does not seem to screen Users before they are allowed on the website and expressly states that it makes:

”no representations about, and does not guarantee the quality, safety, or legality of, the Freelancer Services; the truth or accuracy of Freelancer’s listings on the Site; the qualifications, background, or identities of Users; the ability of Freelancers to deliver the Freelancer Services; the ability of Clients to pay for the Freelancer Services; or that a Client or Freelancer can or will actually complete a transaction.”⁴⁶³

However, the platform does reserve the right to refuse, suspend or revoke access if it discovers that any information given is not true, accurate or complete. It is unclear how a determination might be regarding the competences of a Freelancer, but this action can be taken ”for any other reason or no reason in Upwork’s sole discretion.”⁴⁶⁴

As Upwork and other crowdwork platforms exists exclusively online, there can be no supervision in the traditional, physical sense. Control cannot be exercised by the platforms in the questions of how, when and what kind of work is performed. Nevertheless, through the Users Agreement for Upwork and other agreements between crowdwork platforms and workers, the platforms structure the relationship and exert control over the terms and conditions of work.⁴⁶⁵ For example, Upwork mandates that all transaction and work submitted is done so via the platform, making it the exclusive venue on which to exchange business.⁴⁶⁶ A violation of the User Agreement includes a restriction for Freelancers to include on their profile “email, Skype contact information, or links to any sites that include a way to contact you (User) outside of Upwork. This includes a link to your (Users) personal website or a third-party profile or certification (like LinkedIn).”⁴⁶⁷ Furthermore, the platform requires workers to relinquish all

⁴⁶¹ UpWork, ‘User Agreement’ (n 426) Para 13.1.

⁴⁶² Aloisi (n 186) 690.

⁴⁶³ UpWork, ‘User Agreement’ (n 426) Para 10.

⁴⁶⁴ Ibid, Para 3.1.

⁴⁶⁵ Alek Felstiner, ‘Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry (2011) Berkeley Journal of Employment and Labour Law, Vol. 32, Issue 1, No 3, 143, 191.

⁴⁶⁶ UpWork, ‘User Agreement’ (n 426) Para 7.

⁴⁶⁷ UpWork, Freelancer Violations and Account Holds, <https://support.upwork.com/hc/en-us/articles/211067618>.

property rights to work submitted.⁴⁶⁸ In a traditional agreement between a self-employed worker and a client, this right could be relinquished when negotiating the terms of the agreement, often in exchange for higher wages or other benefits. However, on Upwork and other crowdwork platforms, it is set as a default.⁴⁶⁹ The platform also reserves the right to, in its sole discretion, unilaterally terminate accounts of Freelancers that the it has deemed to have broken the User Agreement. An interesting and self-contradicting paragraph can be found in the User Agreement:

“Freelancer will perform the Freelancer Services in a professional and workmanlike manner and will timely deliver any agreed upon Work Product. The manner and means of performing the Freelancer Services will be determined and controlled solely by Freelancer, which is engaged by Client as an independent contractor.”⁴⁷⁰

This shows that Upwork is involved to some extent in the relationship between Client and Freelancer. What the platform requires of the Freelancers would typically be required by an employer with regard to an employee. This indicates a relationship of subordination between Upwork and the Freelancer. It is unclear whether this paragraph means that if services are not done in a professional manner, the Freelancer will be suspended from her account, nor how Upwork determines this and enforces this paragraph, as it follows directly with the claim that the manner of performing will be determined and controlled solely by the Freelancer.

Regarding client feedback and ratings, Upwork requires Users to allow comments, ratings, indicators of User satisfaction and other feedback to be posted on their profiles and made available to other users. Upwork claims to not monitor or censor the feedback given by Users.⁴⁷¹ Further, Upwork renounces that it investigates any remarks posted by Users for accuracy or reliability, but may still do so if a User requests it or if they deem, in their sole discretion, that the remark “violates the Terms of Service or negatively affects our marketplace.”⁴⁷² As discussed above, the rating system can be seen as a form of automated control. Upwork does not have to follow up on the work performed, as this management is delegated to the clients and the chance of a good rating or the risk of a bad one is always present. However, the rating and feedback system is not the only thing required for Freelancers to achieve a ‘Top Rated’ status. This is achieved not only by being at the disposal when indicating so or be active on the site. It also requires an account ‘in good standing’ without any recent account holds.⁴⁷³

‘Account holds’ can be activated if Upwork determines, in its sole discretion, that a Freelancer has violated the User Agreement. On the website, Upwork addresses the most common reasons for an account being terminated, and offers ‘recommendations’ on how to conduct oneself to avoid this. For example, it stipulates: “Don't pressure clients to give you good feedback, and don't withhold work until feedback is left”; “It's OK to let clients know that you strive to provide high-quality work and to earn a good rating, or to ask for feedback to be left.”

⁴⁶⁸ UpWork, ‘User Agreement’ (n 426) Para 8.6.

⁴⁶⁹ Felstiner (n 465) 192.

⁴⁷⁰ UpWork, ‘User Agreement’ (n 426) Para 8.1.

⁴⁷¹ Ibid, Para 3.6.

⁴⁷² Ibid, Para 3.6.

⁴⁷³ UpWork (2017), Become Top Rated, <https://support.upwork.com/hc/en-us/articles/211068468-Become-Top-Rated>, last accessed 2017-05-21.

The fact that Upwork reserves the right to remove information on its sole judgement does indicate that it has the right to control what is posted regarding individual Users and/or the platform. Upwork also reserves the right to suspend a User's access to the site upon discovery that any information the User has provided or posted on the site is "not true, accurate, or complete, or such information or other conduct otherwise violates the Terms of Service, or for any other reason or no reason in Upwork's sole discretion."

When a Client and a Freelancer has agreed on an hourly contract, the Freelances are required to install a tracking software functioning as a digital punch clock, to measure hours worked and earnings. If the Client and the Freelancer had found each other outside the Upwork platform and made a 'traditional' working agreement, this supervision of working hours would have been agreed upon and conducted between the parties, if at all. It is unclear whether Upwork is actively supervising the logged hours on behalf of the Client or if it is a question of Upwork merely providing a tool for the Client to exercise some control over the Freelancer. If it is the latter, the control function would be placed on the Client and not on Upwork, and this in itself does not indicate an employment relationship. If it is the former, this would mean that Upwork does exercise some form of supervision of the Freelancers, making this circumstance inconsistent with Upwork's claims in the contract.

In the event that a Client does not pay the Freelancer, Upwork offers a payment protection as a membership benefit to "foster fairness, reward loyalty, and encourage the Freelancer to continue to use the Site and Site Services for their business needs [...]".⁴⁷⁴ However, this payment protection is only activated if the Freelancer has performed her work in a certain way, logging her hours through the Upwork software and describing her work after every log. Similar to the 'suggested' route for Uber Driver, Freelancers can deviate from the manner of performing work via Upwork, but at their own risk. Thus, in reality, they are bound to perform work as 'suggested' by Upwork.

In conclusion, the relationship between Upwork and the Freelancer seems in some ways to be one of subordination. With the unilaterally written User Agreement, Upwork dictates many of the terms and conditions under which the Freelancers work. The when, how and where of controlling the work performed is less present on Upwork than in the traditional sense. However, following the reasoning in *NJA 1973 s. 501*, the fact that the performing party was not supervised was due to the fact that he was more skilled in the area of work performed. Many Freelancers on Upwork are advertised as experts in their field, and this would require less supervision and control from Upwork than for example Uber, who offers more specific services.⁴⁷⁵ Further, with both incentives and punishments, the platform can ensure that the Freelancers Upwork advertises perform their work in a desired fashion and attempts to modify their behaviour with 'suggestions' on how they should do so. There are some inconsistencies in the User agreements, noting especially the paragraph stating in the first sentence that Freelancer are required to perform their work in a 'professional and workmanlike manner', and in the next stating it is up to the Freelancer to decide the manner of performing work. In regards to a Client exercising control or supervising the Freelancers, this assessment would have to be made in the individual case.

⁴⁷⁴ Felstiner (n 465) 195.

⁴⁷⁵ Se for example: UpWork, Hire the World's Best excel experts, <https://www.upwork.com/hire/microsoft-excel-experts/>, last accessed 2017-05-21.

4.7 Remuneration

4.7.1 Uber

The Drivers of Uber are not paid a set fee, but are remunerated in accordance with the rides they have given each week. The remuneration does indicate a working contract, but does not necessarily indicate that the Driver is an employee. However, the remuneration is coming from Uber and not from the passenger, even though the registrations of the rides appear on the Drivers app as invoices addressed to the customer. This ‘invoice’ is never sent to the user as they have already paid Uber. Some information has been given that Uber in earlier agreements has paid a guaranteed fee initially to new Drivers. This was presented in *Mr Y Aslam, Mr J Farrar & Others v. Uber*, without representatives from Uber suggesting that when this guaranteed fee was removed from the contracts, the relationship with its drivers was changed in any other way. For Drivers who had a contract relationship with Uber before this change, this might be of importance and. If the overall assessment should conclude that the Driver would be an employee when including the guaranteed payment, the change in relationship thereafter might indicate a purpose to circumvent mandatory legislation.

4.7.2 Upwork

The remuneration for a task uploaded is up to the Client to decide. If the Client instead searches for Freelancers, their normal hourly rate is shown along with their profile. Accordingly, the remuneration can differ from task to task and from Client to Client. The Client and the Freelancer are free to agree upon an hourly rate, or a fixed price for a task. There seems to be a great degree of independence in agreeing on the size of the remuneration between Client and Freelancer. No guaranteed or set payment is made to the Freelancers from Upwork. When an assignment has been completed, Upwork act as an intermediary and both parties are required to implement the transaction through the platform’s payment services.⁴⁷⁶

Regarding the payment protection for hourly contracts, Upwork requires Freelancers to agree that they “hereby irrevocably assigns to Upwork the right to recover from the Client any amounts that Upwork or our Affiliates provide to the Freelancer in connection with the Payment Protection membership benefit”.⁴⁷⁷ Upwork renounces having any participation in a dispute between a Client and a Freelancer, but states that it will investigate the time log registered if Freelancer and Client cannot come to a resolution, and determine in its sole discretion if an adjustment is necessary: “Upwork’s determination of such dispute shall be final.”⁴⁷⁸

Felstiner identifies the fact that a platform will step in and force payment under certain circumstances, coupled with a cloudy nature of the platforms disclaimers regarding dispute resolution, may give performing parties the impression that they can rely on the platform to enforce payment under extreme circumstances.⁴⁷⁹ Further, Upwork reserves the right to hold disbursement of the payment if they for example consider that the User Agreement has been violated in some way.⁴⁸⁰ From that perspective, Upwork does have both concrete and, perhaps, perceived influence over the compensation process to a certain extent. There are some inconsistencies in these circumstances and a definite answer will be difficult to come by. However, the possibility to negotiate remuneration between the parties, the fact that no set or

⁴⁷⁶ UpWork, ‘User Agreement’ (n 426) Para 6.1.

⁴⁷⁷ Ibid, Para 6.10.

⁴⁷⁸ Ibid, Para 6.10.

⁴⁷⁹ Felstiner (n 465) 195.

⁴⁸⁰ UpWork, ‘User Agreement’ (n 426) Para 4, 6.4.

guaranteed salary is paid and the fact that Freelancers are not reimbursed for expenses while working does, in my opinion, indicate that in terms of remuneration, there is no indication that an employment is at hand regarding Upwork.

4.8 Equipment

As shown above, and this is the case with almost all the crowdsourcing platforms, neither Uber nor Upwork claim to provide their performing parties with any equipment. This is to be provided solely by the performing party. As presented above, the provision of equipment does indicate that an employment is at hand, but the opposite is not deemed inconsistent with an employment relationship.⁴⁸¹ Uber require drivers to provide their own car and to pay for taxes, insurance maintenance, repairs, and eventual toll costs. They are not provided with any additional equipment or uniforms. Uber does have some requirements on the age, model and colour of the car, however. Upwork does not seem to provide any equipment for the Freelancers.

4.9 Industry specific practises and customs

The question of industry specific practices and customs poses something of a problem. Should the industry be regarded as the platform based crowdsource industry or should the industry be regarded in each individual case? If it is the former, the industry regarding crowdsourcing is still relatively new, and there are up to this point no practises and customs, nor any collective agreements written in regards to crowdsourcing. In addition, as presented before, there are major differences in how the different crowdsourcing platforms construct their business and what type of work is present on the different platforms, indicating that the workers on the different platforms will be subject to different collective regulations, should they be considered employees and choose to organise.

4.9.1 Uber

Uber expressly claims that it is under no circumstances a transportation company. This is shown both in agreements with Customers and Drivers, but also in agreements with Users.⁴⁸² In the case *Mr Y Aslam, Mr J Farrar & Others v. Uber*, the question is debated, and the Employment Tribunal comes to the conclusion that the services offered, are offered by Uber, and not by each individual Driver, and that Drivers are hired, or onboarded in Ubers' terminology, to that specific end. Furthermore, which is deemed self-evident, the services are to promote Uber's name and 'sell' its transportation services.⁴⁸³ In case the Swedish Labour Court was to assess the question of whether a Driver was an employee or not, they would accordingly have to consider the Swedish transport industry and its specific practises and customs. Independent contractors are common among some sectors of the transport industry, and particularly within road haulage.⁴⁸⁴ However, this industry has also been criticised for problems with false/bogus self-employment.⁴⁸⁵ However, no specific custom of having individual drivers hired as independent contractors seems to be present specifically within the taxi industry. On the contrary, the construction of Uber and other crowdsourcing platforms within the transportation

⁴⁸¹ Westregård (n 35) 191.

⁴⁸² see for example the Uber Rider Terms, Para 2, see *Aslam, Farrar & Others v. Uber BV* (n 432) [29].

⁴⁸³ *Aslam, Farrar & Others v. Uber BV* (n 432) [89].

⁴⁸⁴ http://www.akeri.se/sites/default/files/uploaded_files/fakta_om_akerinaringen.pdf.

⁴⁸⁵ Annamaria Westregård 'Self-employment versus traditional employment – an analysis from the perspectives of the labour market and the individual' (Amsterdam, 25-27 June, 2015) 18 ff.

industry have met critique from the Swedish transport union.⁴⁸⁶ Furthermore, as presented above, certain emphasis is given to the customs in an industry where a collective agreement is made on a central level, as the general view is that such an agreement is made between equal parties and can be assumed to reflect balanced solutions and well established practices in the industry that have been ascribed certain meaning.⁴⁸⁷ In the case of Uber, the subject of the negotiation positions of the drivers has already been touched upon, and given the working conditions of Uber Drivers as described above, they cannot be argued to reflect balanced solutions between equal parties.

4.9.2 Upwork

As Upwork allows Users with very different skills to create accounts on the platform, there can be no specific industry customs or practises assessed in a general overview such as this. However, in regards to each individual Client, it could have an impact. For example, if a Client should hire a Freelancer to write articles on recurring occasions for a newspaper or similar the Freelance Agreement might be relevant in this case. This is in relation to the work performed however, and not in direct relation to Upwork.

4.10 Dependency, the social and economic criteria

Generally with crowdsourcing platforms, and in particular low-skilled crowdwork, “the opportunity for entrepreneurship, and with it risk-and-reward, is barely, if at all, present”.⁴⁸⁸ As discussed above, the terms and agreements in general are unilaterally written and if a worker does not comply with these terms, whether when affiliating to the site or when these are updated, they are not granted access (or continued access) to the site.

As discussed above, the terms of use dictate the structure and working conditions of workers in many ways and prevents them from negotiating independently regarding each task performed. Many crowdsourcing platforms reserves the right to suspend a user if they determine, in their sole discretion, that any terms of use have been violated. This could include any action from a worker that affects the platforms or their brand in a negative way, and for fear or risk of retribution a worker may refrain from criticising the platform.⁴⁸⁹

As the cases tried and presented above regarding the special emphasis put on dependency and the social and economic criteria are concerning hairdressers, an attempt will be made in drawing parallels to the crowdsourcing platforms and their concepts. The reasons for the Labour Court to find that the hairdresser in *AD 1978 nr 7* was an employee was the that the leasing of a hairdresser’s chair at a salon usually results in a relationship between the principal and the performing party that departs from what is usually considered an independent contractor. For example, as seen from a customer’s perspective, the performing party acts as an employee would have and is often seen as a representative of the business within which they are hired. The performing party is also dependent on the management of the salon at large without having any influence over it. In the case at hand the hairdresser had to oblige to the prices set by the owner of the salon and could not determine her own prices, nor did she keep her own booking.

⁴⁸⁶ Jan Lindkvist ’Statlig utredare granskar nya affärstrenden’ *Transportarbetaren* (9 April 2015)

<http://www.transportarbetaren.se/Transportarbetaren/Start/Nyheter/1/Statlig-utredare-granskar-nya-affarstrenden/> last accessed 2017-05-21.

⁴⁸⁷ Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 121.

⁴⁸⁸ Miriam A. Cherry, ‘Beyond misclassification: The digital transformation of work’ (2016) *Comparative Labour law and Policy Journal*, Vol. 37, No 3, 6.

⁴⁸⁹ De Stefano (n 444) 9.

4.10.1 Uber

A lot of parallels can be drawn from the examples provided above and placed within the construction of the relationship between Uber and its Drivers. For example, as seen from a User's perspective, one might see the Drivers as representatives of the business. It is explicitly stated in the contract with the User that the Drivers are independent contractors and not employee of Uber.⁴⁹⁰ However, the ride booking is made through the Uber App, and only the name of the Driver appears on the app. The transaction, from the User's side, is made directly to Uber. Furthermore, Uber is advertised with the slogan "everyone's personal driver" and the driver services provided are advertised by Uber and not by any individual Driver. Furthermore, the Drivers are not allowed to negotiate the price but are bound by the prices set by Uber. The Drivers are responsible for their own tax payments, but as presented above, they are not themselves managing the charge from the Users. This is handled by Uber. The Driver is somewhat dependent on the management and reputation of Uber to be able to perform their work, though they are also dependent on their individual average score.

In the case *AD 1979 nr 12*, the hairdressers were not deemed to be employees as they had established positions on the labour market and where independent in terms of prices settings and had their own exclusive clientele. The Uber App does not allow users to choose their specific Driver, so the possibility for Drivers to of establish their own exclusive clientele is very limited. As for the establishment of a position on the labour market, there is a possibility for a Customer (or a partner by the Partner Agreement terminology) to hire Drivers or work with business partners who offer services via the Uber App and thus establish a position on the labour market.⁴⁹¹ However, as stated above, the vast majority of Customers are sole Drivers without the opportunity to hire employees of their own.

In *AD 1978 nr 7* the court also took into special consideration the fact that the hairdresser was very young and lacked work experience in the field, and had been terminated two months prior from a so-called student employment by the owner of the salon, who'd claimed redundancy. This indicated a non-independent and subordinate position to the owner of the salon. The court concluded that this was an employment relationship. An argument can be made that many of the Drivers on Uber are not native to the country that they are in and that they do not speak Swedish as their native tongue. This issue is addressed in the case *Mr Y Aslam, Mr J Farrar & Others v. Uber*, and it is reasoned that these drivers are "not accustomed to reading and interpreting dense legal documents couched in impenetrable prose". This could be assumed to be true even to Drivers reading these contracts in their native tongue. In this case, the argument of unequal parties could be made to say that these Drivers are, in general, dependent. Given the arguments made above regarding management and control, the Drivers could be deemed, in general, to be subordinate. Furthermore, regarding the contracts between Uber and the customers, the fact that the Partner Terms agreement could be unilaterally changed by Uber to the New Terms agreement, also indicates a dependency.

A careful conclusion is drawn that the circumstance of economic and social criteria does indicate that the drivers of Uber, in general, are in fact employees.

⁴⁹⁰ Uber, 'Uber B.V Villkor' (Uber 2016) <<https://www.uber.com/legal/terms/se/>> last accessed 2017-05-01.

⁴⁹¹ Eskil Fagerström and Emma Johansson, 'Uber har skakat om taxibranschen' *Sydsvenskan* (20 March 2016) <http://www.sydsvenskan.se/2016-03-20/uber-har-skakat-om-taxibranschen>, last accessed 2017-05-01.

4.10.2 Upwork

Some of the circumstances regarding Freelancers on Upwork could be parallel to what has been discussed above. When browsing on Upwork's website, the sentence "Browse our highest-rated customer service talent" is displayed on one page.⁴⁹² This could, from a Client's perspective, indicate that it is Upwork providing the Freelancers as their employer. However, when requiring a service from a Freelancer on the site, the Client must send a recruitment invitation and offer an assignment themselves, which the Freelancer must accept in each individual case. Upwork acts as an intermediary in regards of the payment, but the price set is agreed upon by the Client and the Freelancer. This possibility to negotiate and to reject or accept work as they choose does indicate independence. There is also an opportunity for Freelancers to use their initiative to maximize their profits as they are allowed to apply for tasks and advertise their profiles on the site with their specific skills and with feedback from previous clients. However, in order to reach or maintain their status as 'Top Rated', they are required to be active on the site and thus cannot be entirely fastidious with which tasks they accept. Further, the Freelancer is in some ways dependent on the management and reputation of the site, and they do not have any influence over this management.

The question on dependency in regards to Upwork is interesting. Yes, in some regards the Freelancers are dependent and subordinate to the platform and should any problem arise, the platform can unilaterally terminate or 'hold' an account. This can be seen as some sort of punishment. On the other hand, some of the 'Top Rated' Freelancers have indeed built up a reputation on the site and can be regarded to have a good position to refuse work and to negotiate wages and other benefits with their Clients. A genuinely self-employed worker or independent contractor is dependent on the labour market as well, and cannot be fastidious about which work to perform, and their reputation and previously successful business arrangements have a great impact in their further success on the labour market. The argument used in the case *AD 1995 no 66* might be reused in this situation. In the referred case, the court stated that the three men had made themselves financially dependent on the income from these assignments on their own initiative and that the background for this initiative, apart from interest in the field, that they had considered this line of work could result in an option for providing a living, given the quantity and intensity of assignments to external personal examiners.

However, the difference between a self-employed worker or independent contractor, as opposed to Freelancers on Upwork or indeed, on any other crowdsourcing platform, is that if a Client gives a poor rating or feedback or the platform determines that any terms of use have been violated, the entire profile of the Freelancer will be affected, she might lose her 'Top Rated' status and if her account is terminated or put on 'hold', the entire marketplace on which she has advertised her 'independent' business is no longer accessible, and her reputation is not worth anything outside it. Returning to the cases *AD 1978 nr 7* and *AD 1979 nr 12*, the difference in the two cases were not the characteristic features of the leasing of a hairdresser's chair, that often departs from what is usually considered an independent contractor agreement. The difference was how the performing parties had managed their business in the individual cases. Accordingly, one might draw a parallel to the crowdsource industry as it has shown signs of departing, in several cases, from features often characterised with independent contractor agreements. An assessment would have to be made in the individual case, regarding the

⁴⁹² UpWork, 'Customer Service Pros' (UpWork 2017) <<https://www.upwork.com/cat/customer-service/>> last accessed 2017-05-21.

performing parties position on the “gig economy labour market”. Some, but assumingly a small portion of the work force, might indeed be genuinely self-employed, with a position to bargain independently while still having some dependency on the platform, using initiative to maximise their profits while most Freelancers are probably more dependent on the platform.

A further issue identified regarding crowdsourcing in general is the fact that the work performed is often not defined as ‘work’ at all. It is rather designated as “gigs”, “tasks”, “favours”, “services”, “rides” etc. A consequence of this is that by clients, the work performed is done so behind a computer screen or as part of an anonymous work force. Labour can be provided at the click of a button, the work is performed, and the individual actually performing the work disappears into the crowd.⁴⁹³ Even with Upwork, which in comparison with other crowdwork platforms is relatively open with identities of performing parties, Freelancers are only presented with their first names. The risk is that these workers are only identified as an extension of an IT device or online platform. This might incline clients to expect the worker to perform as smoothly as a software or technological tool, and rating their experience with the service accordingly, not taking the human factor into account, as they might do in other sectors of the economy: “This, in turn, might have severe implications on their ability to work or earn in the future as the possibilities to continue working with a particular app or to accede to better-paying jobs on crowdsourcing platforms are strictly dependent on the rates and reviews of past activities.”⁴⁹⁴

4.11 Circumvention of mandatory legislation and collective agreements

The question of circumvention of mandatory legislation and collective agreements has been described as a checkpoint where the courts verify the conclusion made by the overall assessment.⁴⁹⁵ In the case *AD 1995 nr 66* presented above, the overall assessment concluded that the three men working as personal examiners for the Swedish Prison and Probation Service were not employees. However, the court still considered the possibility of purposeful circumvention, and concluded that an employment relationship could be at hand if this purpose was detected.

It is evident that there are major differences in how work in the gig economy is constructed. In summarising the circumstances assessed above, two different, but careful conclusions can be drawn regarding the classification of performing parties on Uber and on Upwork. The argument made regarding each platform and each factor has been based on general assumptions, but again, it should be noted that these assessments will have to be made in each individual case. The figure below shows the circumstances considered and what conclusion has been drawn considering each factor. The factors emphasised are represented on both sides, as they are somewhat uncertain and would have to be considered in the individual case.

⁴⁹³ De Stefano (n 444) 5.

⁴⁹⁴ Ibid, 5.

⁴⁹⁵ Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 118.



In the case of Uber, when weighing the general circumstances at hand, the conclusion is made that the overall assessment indicates an employment relationship. The customers are generally sole Drivers, required to perform their work personally. They are, when logged on to the app, required to be at the disposal to perform tasks occurred and are limited in their possibility to refuse work. No industry specific practices or customs seem to speak for the function of individual Drivers being defined as independent contractors, and they can be assumed to be dependent on the platform with regard to the social and economic criteria. The fact that equipment is provided by the customer and/or driver, and that remuneration is not guaranteed, does not indicate that they are employees. However, when regarding the extent to which control is being exercised, the personal obligation to perform work at the disposal of the principal, and the extent of the Customer's and Driver's dependency on the platform is deemed to have special emphasis.

The overall assessment made regarding Upwork is more uncertain. Freelancers are most of the time individual performers, required to perform their work personally. Upwork does have influence over the working conditions and the relationship between Freelancer and Client and

can with incentives and punishments ensure that Freelancers are somewhat at the disposal of the platform and perform their work as desired. While the platform in itself does not rate the Freelancers, a calculation software based on factors Upwork deems relevant determines whether a Freelancers reaches the status ‘Top Rated’ or not. Furthermore, many Freelancers may be considered to be dependent on the platform to some extent, subject to the sole discretion of the platform to decide whether they have violated the User Agreement and a limited chance to protest, should they regard themselves mistreated. However, the opportunity for Freelancers to be independent seems to be greater on Upwork compared to other crowdwork platforms and it can be argued that they subject themselves to the competition on the labour market as would a self-employed worker or an independent contractor in other parts of the economy. The degree of dependence could be argued to also apply for self-employed workers and independent contractors on other parts of the labour market, who need to adapt to the clients and perform in a certain way in order to gain a reputation on the market and thus earn more work. In the general case, the level of independence of the individual Freelancers, combined with an uncertain degree of management and control and right to refuse work, the conclusion is that Freelancers are not employees of Upwork.

After making these assessments, the question remains whether there is a purpose for these platforms to circumvent mandatory legislation. In the case of crowdsourcing platforms in general, the advantages of providing labour without hiring the work force as employees is evident. By classifying the workers as independent contractors, there is no obligation for the platforms to pay social fees such as insurance contributions and withhold preliminary income tax. Saving these, among other, expenses, the platforms are able to offer services at greatly reduced prices and thus forming powerful monopoly positions in their respective markets. At the same time, it is evident that without the workers there would be no platforms at all. As put by Felstiner regarding the crowdwork platform Amazon Mechanical Turk:

“Providers are more than an “integral part” of Amazon’s AMT enterprise. They *are* the business. Without the 200,000–person crowd, Amazon cannot function as a crowdsourcing venue. True, each individual Provider adds very little, but together they generate nearly all of AMT’s value.”⁴⁹⁶

Comparing this to the traditional industrial model where workers with specific skills are considered to be at the core of the organisation, with a strong connection to the employer, they would traditionally be employees of the same business. Characterising a more flexible organisation is the offloading of risk to the periphery through sub-contracting and replacing contracts of employment with other types of contracts, while shrinking the core or internal sectors of the organisation.⁴⁹⁷ In the case of crowdsourcing, the organisation is considered to be extremely flexible, at the expense of the workers. They are, as described, core workers, though with a weak connection to the platform and considered to be self-employed.

On some crowdsourcing platforms, it would appear the agreements between platform and worker are specifically constructed with the purpose to circumvent mandatory regulation. Many of the contracts go above and beyond to ensure that workers are not employees, and that the platforms are simply intermediaries for clients and workers to find each other. However, this does not seem to be the case in many situations. When the contracts are constructed one way

⁴⁹⁶ Felstiner (n 465) 195.

⁴⁹⁷ Engblom, ‘Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States’ (n 34) 19.

and the reality is another, this would be a typical sign that an intent to circumvent the mandatory regulations is at hand.

4.11.1 Uber

As presented above, Uber is very explicit in denying that it is a provider of any transportation service, but merely offers information and a tool to connect users seeking Driving Services to Drivers who can provide this driving service. In addition to holding this position within the company, this is required to be acknowledged by all parties with whom Uber has a contract relationship.⁴⁹⁸ Furthermore, acknowledgement is required in the contracts with the User, the Customer and the Driver, that the Driver is not an employee of Uber, but that

“by providing the Driving Service to the Customer (client in the New Terms terminology) , the Partner (Customer in the New Terms terminology) accepts, agrees and acknowledges that a direct legal relationship is created and assumed solely between the Partner (Customer) and the Customer (User). And that Customers and Drivers perform these services as independent contractors.”

With regard to the claim that with every ride, an individual contract is made between Partner (Customer) and the User, the absurdity of this claim may be best described as it was phrased by the court in *Aslam, Farrar & Others v. Uber*:

“Uber’s case is that the driver enters into a binding agreement with a person whose identity he does not know (and will never know) and who does not know and will never know his identity, to undertake a journey to a destination not told to him until the journey begins, by a route prescribed by a stranger to the contract (UBV) from which he is not free to depart (at least not without risk), for a fee which (a) is set by the stranger, and (b) is not known by the passenger (who is only told the total to be paid), (c) is calculated by the stranger (as a percentage of the total sum) and (d) is paid to the stranger. Uber’s case has to be that if the organisation became insolvent, the drivers would have enforceable rights directly against the passengers. And if the n unknown person and who does not in turn know the driver, to undertake a journey that it beforehand unknown to him, with a route prescribed by a stranger to the contract, who also determines his remuneration and receives the payment from the passenger. Ubers case would then be that if the organisation became insolvent, the drivers would have enforceable rights directly against the passenger, which is not suggested in any of the terms [...] The absurdity of these propositions speaks for itself. Not surprisingly, it was not suggested that in practise drivers and passengers agree terms. Of course they do not since (apart from any other reason) by the time any driver meets his passenger the deal has already been struck (Between ULL and the passenger([...] We are satisfied that the supposed driver/passenger contract is pure fiction which bears no relation to the real dealings and relationships between the parties”⁴⁹⁹

⁴⁹⁸ See for example Uber Partner Terms 2.1.1, see *Aslam, Farrar & Others v. Uber BV* (n 432) [29].

⁴⁹⁹ *Aslam, Farrar & Others v. Uber BV* (n 432) [91].

This contradiction between contract and reality indicates an intent to circumvent mandatory legislation. Furthermore, the contrasts between contract and reality in terms of obligation to be at the disposal of Uber and the extent to which control is exercised also indicates purposeful circumvention. The fact that Uber has invented a whole new vocabulary to avoid any indication of an employment relationship is also an interesting topic of discussion. Uber refers to hiring as 'onboarding', and offers 'suggestions', 'tips', 'advice' and 'recommendations' instead of calling it directives or management. They also refer to 'deactivation' instead of termination or notice.

The drivers who have had contracts including an initial guaranteed payment that was later removed, without any further change in the relationship, could have an even greater claim to Uber's intent to circumvent mandatory legislation. As presented above, the court will take into consideration whether a performing party has previously been, or would have been deemed, an employee to a principal and has subsequently been performing similar tasks as an independent contractor.⁵⁰⁰

4.11.2 Upwork

Regarding Upwork, there are some inconsistencies in the User Agreement that need to be taken into consideration. One of these is the paragraph requiring Freelancers to perform their services in a "professional and workmanlike manner". If it is true that, as UpWork claims, it does in no way supervise, direct or control the Freelancers, this seems like an odd paragraph to insert into the User Agreement.

Furthermore, Upwork seems very aware that a relationship between a Client and a Freelancer could develop into an employment relationship depending on the circumstances in the individual case. They even have a function for this if a Freelancer is classified as an employee by a Client. The platform seems aware that an employment relationship could appear to exist between Upwork and the Freelancers. In the User Agreement Upwork states that it is not a party to any service agreement.⁵⁰¹ Nonetheless, the platform finds it necessary to expressly repeat on several occasions that Upwork does not in any way control or supervise the Freelancers and, that the Freelancers are not employees of Upwork in any form.⁵⁰² However, the parties are not free to negotiate their terms as they wish or contact each other outside the platform. De Stefano describes these types of clauses as 'enhanced independent contractor clauses', "as they do not only exclude the existence of an employment relationship between the platform or app and the worker but also exclude that the worker and the client may enter into an employment relationship, even when the terms and conditions of the service specify that these actors are "third parties" to the platform."⁵⁰³

De Stefano argues that this is another way for platforms to dictate terms and conditions of employment between workers and clients. Furthermore, other indications of control and supervision have been detected, as presented above. The argument is often used, not only by Upwork but by crowdsourcing platforms in general, that the platform is merely a marketplace for clients and workers to find each other. If this was to be compared to another forum or platform functioning as a marketplace for performing parties and clients to find each other there are some circumstances that differ. Imagine, for example, an advertising section in a newspaper.

⁵⁰⁰ Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 116.

⁵⁰¹ UpWork, 'User Agreement' (n 426) Para 5.1.

⁵⁰² See for example UpWork, 'User Agreement' (n 426) Para 8.2, 10 & 13.

⁵⁰³ De Stefano (n 444) 12 ff.

The provider of this ‘marketplace’ would indeed charge clients and independent contractors for advertising there. However, it is unlikely that the provider of this ‘marketplace’ would require to be a part of the agreement made between client and independent contractor, or require the right to be an intermediary to the payment and to hold disbursement of the payment if, in their sole discretion, the agreement between the provider of the marketplace and either party was deemed to be violated in some way. Further, it is unlikely that if an independent contractor did not perform to the standards of the client, they would somehow be punished by the ‘marketplace’. With the construction of the platform as it is, Upwork is able to provide Freelancers without employing them. There are some inconsistencies in the User Agreement that *could* indicate an attempt to circumvent mandatory legislation, should a Swedish court make an assessment in the individual case.

4.12 The courts ruling in equilibrium

The identification of an attempt to circumvent mandatory legislation is of greater relevance foremost in cases where the court is in doubt of how to assess the various circumstances.

In the preparatory work from the Swedish Codetermination Act⁵⁰⁴ and the Swedish Employment Protection Act⁵⁰⁵, a wide application of the notion of employment is identified and it is expressed that the development of this widening application should continue and that the courts in doubtful situations should be determined to the employee’s advantage. However, this type of statement has not been made in the Labour Court in the last decades, nor has this type of position taken by the Labour Court been identified that indicates the use of this type of rule.⁵⁰⁶ In the case presented above *AD 1983 nr 89*, the court seemed determined to find a decisive factor and does not consider the preparatory work at all. The question remains whether the Swedish Labour Court today would take this in-dubio rule into account if it could not come to a conclusion. However, in the case of Uber, with the argumentation presented above, the conclusion of the analysis on the general Uber drivers might mean that the Labour Court would not need to consider an in-dubio rule. The case regarding UpWork is more uncertain, but considering the case in *AD 1983 nr 89*, the court would presumably regard the workers presumed voluntary part-taking in the agreement if it could not come to another conclusion.

⁵⁰⁴ Prop. 1973:129 p. 196.

⁵⁰⁵ Prop 1975/76:105 annex 1, 109.

⁵⁰⁶ Ds 2002:56 *Hållfast arbete för ett föränderligt arbetsliv*, 119.

4.13 Summary and discussion

The discussion presented above shows that a worker in the gig economy can, indeed, be regarded as an employee. The purpose for the legislator to keep the definition of an employee or an independent contractor out of legislation is to enable an interpretation of the dispositive facts in each case. Accordingly, the case law can be adapted and applied to changing constructions, conditions and values on the labour market. As showed above, the unexplored structures of the gig economy in Swedish case law does not necessarily mean that the assessments made are outdated and cannot be used when challenged with new trends. Essentially, the actual work performed in the gig economy is in no way new, though it has been enhanced and made more available and efficient through technology. Accordingly, the phenomenon of self-employed workers subjecting themselves to the competition of the labour market is not in itself new either, even if the competition is on an immensely larger scale. However, some differences can be detected. One of the more important factors is the management and control of the workers in the gig economy, and their dependence on the platforms. There is a difference in how workers are controlled and how, when and where they perform work. This is most prominent in work performed online. Still, the rating systems on the crowdsourcing platforms, and the unequal positions between worker and platform does contribute to a control and a dependence that is not present in other parts of the labour market for an independent contractor. This is a fact that the Swedish courts will have to take into account, when faced with these questions, and to re-evaluate the way they view control over the worker and their dependence in the individual case.

The courts do take into account the special circumstances in each case, and as shown in the cases regarding workers leasing hairdresser's chairs at salons, the courts take into special consideration the fact that this construction often results in a relationship between the principal and the performing party that departs from what is considered a normal relationship between a principal and an independent contractor. The court reasons that the special features characterising these types of agreement should in most cases be regarded as non-valid, and the leaseholder should be considered an employee. Some similarities can be drawn to the crowdsourcing platforms and the way they have chosen to construct their agreements with workers. A presumption like the one described above might be valid for the courts to apply in the cases regarding crowdsourcing. This might be a vast generalisation to make, taking into account that crowdsourcing platforms do not provide services in one specific industry, however there are many similarities in how the crowdsourcing platforms construct their agreements.

Furthermore, particularly with the platforms providing services requiring physical work, such as Uber or TaskRabbit, the need for ratings and control might be larger than on crowdwork platforms. This is because the work performed requires consumers to trust the person they let into their house to clean, or with whom they get in a car. The platforms evidently have difficulty with ensuring quality in the work performed and encouraging consumers to trust and use their services, while at the same time giving the workers an independent status and not managing and controlling how their work is performed. It might be prudent for the courts to adapt the assumption that this difficulty is present, and that a presumption might be more relevant in these cases.

There is no denying, however, that workers in the gig economy might still struggle gaining the status of an employee. The similarity to employees in terms of financial, social and bargaining possibilities does suggest that while they might not fulfil the criteria for being labeled employees, this might be a cause to re-evaluate the use of the dependent contractors in some

cases. This would give the social partners an opportunity to negotiate working conditions for workers in the gig economy. However, as presented above, the inclusion of a dependent contractor in the Codetermination Act, as it was formed, was made due to concern of a limited coverage of the Act. Since then, the notion of the employee has been broadened as seen above, and many consider the special provision of the dependent contractor outdated.⁵⁰⁷ The risk is also present that with an increased use of an additional third definition of a performing party, many of the workers who should really be defined as employees could be defined as dependent workers instead, in order for crowdsourcing platforms to circumvent the mandatory legislation following an employee status. This problem has been described by De Stefano, among others.⁵⁰⁸

5 Conclusion

The first purpose of this thesis was to investigate the concept of employment and self-employment in Sweden and the United Kingdom. In both countries, the process of determining who is an employee and who is not is made through a linking process, regarding the circumstances in each individual case. In the United Kingdom, the definition of an employee or an independent contractor is made in legislation. However, in both countries the indicators of what constitutes one or the other has been developed thoroughly in case law. In the United Kingdom, the notion of the employee has a much narrower scope than in Sweden, with an extension being made to the notion of workers to ensure a wider range of protective legislation. The notion of the employee in Sweden has a very wide scope and a parallel can be drawn rather between the notion of worker in the UK and the employee in Sweden.

5.1 How is the concept of employment and self-employment constructed in Sweden and in the United Kingdom?

There are great similarities in the assessments made in the countries' respective courts regarding what circumstances are of importance. In both countries, the presence of an obligation to perform work personally is a ground pillar for an employment to be at hand. Both countries further regard the factors of control exercised over the performing party, the duration of work performed, who provides the equipment used, how remuneration is paid and the dependency of the worker on a particular employer. There are some differences however. In the UK, these factors are often assessed as part of larger 'tests' performed by the courts. For example, in the organization integration test can include both the equipment being used by the performing party, and the control exercised by the employer. Some criteria, such as the mutuality of obligation and the obligation to perform work personally, have been called irreducible minimum criteria required to define a performing party as an employee, but these statements have later been rebuked. This has made the predictability of defining an employee or independent contractor somewhat uncertain, and the different approaches made by the courts have been described as notorious in their complexity. Furthermore, the common law tradition has such a dominant effect on the legal system, precedents are very leading and a continuity can be detected. Precedents and judicial decisions are integrated in the legal system in such a way that it can be hard to adapt as society is developing and social conditions may have changed since the precedent was made.

⁵⁰⁷ Andreas Inghammar, *The Concept of 'Employee': The position in Sweden*, in Bernd Waas's and Gus Heerma van Voss's (eds) *Restatement of Labour Law in Europe* (Hart Publishing, forthcoming) 682.

⁵⁰⁸ De Stefano (n 444) 18 ff.

The Swedish notion of the employee and the courts line of reasoning have remained quite consistent over the past decades, proving that adaptations to new trends on the labour market have been possible, as was the legislator's intent. It has not been stated that there is a particular factor which effectively decides whether a performing party is an employee or an independent contractor. This can create difficulty in identifying what can be a decisive factor, and the court makes an overall assessment in the individual case. However, some factors seem to be more emphasized, such as the management and control of the principal, whether the performing party is at the disposal of the principal or can turn down work, and the dependency of the performing party on the principal.

One particular difference between Sweden and the UK is the importance of the industry specific customs and practices. As Sweden does have a strong reliance on the social parties to regulate the labour market, central collective agreements can be decisive in determining if a performing party is an employee or an independent contractor. As partly biased to this model, the opportunity to adapt regulations to specific industries is a possibility for Sweden to advance in the field of gig economy as well, ensuring reasonable working conditions for workers in the gig economy without impeding the technological developments and opportunities presented with the sharing economy.

5.2 What are the major crowdsourcing platforms in the gig economy today?

The second purpose of this thesis was to get an overview of the different types of crowdsourcing platforms, drawing examples from the most common ones. The results show a vast variety in how these platforms operate and what kind of services they provide. There is a distinction to be made between platforms providing services that need to be performed locally and platforms distributing labour for workers competing online on a global scale. Some platforms provide a specific service such as delivering or driving (Uber), while others provide a wide range of work (Taskrabit, UpWork), not working within a specific industry. There are also competition platforms (Pillar), enabling competitors to submit contest propositions, thus performing work without any guarantee of remuneration. Furthermore, there are the crowdwork platforms dividing work into microtasks (Amazon Mechanical Turk, Crowdfunder), enabling a performing party to perform work for a large number of clients in a single day. There are differences, but also many similarities in how the platforms choose to engage with workers. The concept is the same, however, in that work is provided in the form of an open call to an undefined crowd. Some platforms actively match a performing party with a consumer, while some platforms leave this up to the consumer. Almost all crowdsourcing platforms define the workers as independent contractors, shifting the risk from the companies to the individual. At the same time, many crowdsourcing platforms exercise a great amount of control over their workers, who are often dependent on the platform as their main source of income.

5.3 What are the opportunities and working conditions for workers in the gig economy?

The opportunities and working conditions for workers in the gig economy seem to be poor in general. The possibility for a flexible work schedule and a greater autonomy in when and where to work is often advertised as the main advantage in the gig economy. However, as shown above, this opportunity is very subjective. The remuneration is generally low and uncertain, sometimes leaving the workers dependent of the approval of the consumer. Low remuneration leads to long working hours in order to make actual earnings and the flexibility suffers. Furthermore, opportunities for development are generally scarce as work performed is often monotonous and divided into smaller tasks, with limited opportunity to negotiate directly with

the consumer or contact them outside the platform in order to develop a longer, independent relationship. In addition, performing parties often work in isolation, with limited possibility to organise among workers.

5.4 Can a worker in the gig economy be regarded as an employee in Sweden?

On the other hand, the working conditions described above are often true for independent contractors. Long working hours, low remuneration and isolated work. Similarly, the independent contractors are often dependent on the client and the larger economy. One of the major difference in the gig economy is that this is done on a much larger scale, with a lot of competition, driving prices down. As shown above, however there are large differences when comparing an independent contractor in other parts of the economy with an independent contractor in the gig economy. Mainly it is the dependence that these independent contractors have on the individual platforms. In the unilaterally written agreements between platforms and workers there are often, among other things, limitations to negotiation, to the possibility to contact consumers outside the platform, to initiating an employment relationship between consumer and worker, and to leaving the platform without losing one's earned reputation.

As shown above, there are platforms that offer workers a greater deal of independence and possibility to negotiate, such as Upwork. While the limitations listed above are also true for Upwork, it enables independent contractors to take advantage of the possibility to market themselves on a larger scale and building a name on the website in a different way than many other crowdwork platforms. While there might still be areas in which to improve, Upwork in a way comes closer to achieving a more sought after effect of the gig economy, namely workers who are given the chance to negotiate their terms and use their individual skills on a competitive market as independent contractors. The problem still remains regarding the dependence on particular platforms. However, a development of a rating system that is transcendent over multiple platforms, such as the company eRated, could contribute to making workers more independent.

An increase in individuals working as independent contractors does pose a problem, as labour law protection is adapted to the traditional model of an employer and an employee, and is poorly adapted to protect independent contractors. There is a possibility in Swedish law to be defined as a dependent contractor, which could be a means of addressing the issue of workers being defined as independent contractors while still being quite dependent on a single principal. However, there is difficulty regarding the dependent contractors. For one, the use of dependent contractors is limited in Sweden, as the wide scope of the notion of employee would normally lead to a dependent contractor being deemed an employee instead. On the other hand, if this definition could be adapted to include some self-employed workers, then basic rights to collective action, mediation and bargaining, among other things, that come with the protection of the Swedish Codetermination Act could cover the workers who are not 'genuinely' self-employed.

However, as stated above, the notion of the employee, in Sweden at least, is very broad and has proven to be adaptable to new trends in the labour market. It is evident that there are a great deal of workers in the gig economy that, when examined, should indeed be redefined as employees and that the definition of independent contractors is being abused. If a case regarding this were to ascend to the Swedish Labour Court, this could create a very interesting precedent. The court could then address the special features identified in the relationship between worker and crowdsourcing platform, and perhaps suggest a presumption such as the one regarding hairdressers leasing a hairdresser's chair.

It would further be interesting to investigate the possibility to adapt, not the concept of the employee or self-employed, but the concept of the employer. Identifying certain functions with either the platforms, the consumers or the performing parties could contribute to shifting the risk among the parties, rather than putting all the eggs in the basket of the performing party, so to speak.

6 Bibliography

6.1 Primary sources

Propositions

Prop 1973:129

Prop. 1975/75:105

SOU

SOU 1975:1 *Demokrati på arbetsplatsen*

SOU 1993:32, *Ny anställningsskyddslag*

DS

DS 2002:56. Hållfast arbete för ett föränderligt arbetsliv

Case law

NJA 1949 s. 768

NJA 1973 s. 501

NJA 1992 s. 631

NJA 1996 s. 311

AD 1978 nr 7

AD 1979 nr 155

AD 1981 nr 172

AD 1983 nr 89

AD 1987 nr 21

AD 1989 nr 39

AD 1989 nr 66

AD 1990 nr 116

AD 1994 nr 66

AD 1994 nr 104

AD 1995 nr 26

AD 1996 nr 135

AD 1998 nr 11

AD 1998 nr 138

AD 1998 nr 172

AD 2005 nr 16

AD 2012 nr 24

UK

Case law

Airfix Footwear Ltd. v. Cope [1978] ICR 1210
Autoclenz Limited v Belcher [2011] IRLR 820
Bates Van Winkelhof v Clyde & Co LLP and another [2014] 1 WLR 2047
Beloff v. Pressdram Ltd [1973] 1 All ER 241
Byrne Bros (Formwork) Ltd v Baird, 2001 WL 1422841
Carmichael v National Power [2000] IRLR 43
Lane v Shire Roofing Company Oxford Ltd [1995] IRLR 493
MacFarlane v. Glasgow City Council [2001] IRLR 7
Market Investigations Ltd v Minister of Social Security, [1969] 2 Q.B. 173
Mr Y Aslam, Mr J Farrar & Others v. Uber B.V., Uber London Ltd, Uber Britannia Ltd [2016] WL
O'Kelly v Trusthouse Forte Plc [1983] ICR 728
Ready Mixed Concrete v. Minister of Pensions and National Insurance [1968] 2. Q.B. 497 (HC), p. 515.
Redrow Homes (Yorkshire) Ltd v Buckborough [2009] IRLR 34
Staffordshire Sentinel Newspapers Ltd v Potter, [2004] IRLR 752
Stevenson, Jordan and Harrison v MacDonald and Evans [1952] 1 TLR 101
Yewens v Noakes [1880] 6 QBD

6.2 Secondary Sources

Adlercreutz A, *Arbetsstagarbegreppet: om arbetsstagarförhållandet och därtill hörande gränsdragningsfrågor i svensk civil- och socialrätt.* (Norstedt 1964)

Antonio A, 'Commoditized workers. Case Study Research on Labour Law Issues Arising from a Set of "On-Demand/Gig Economy" Platforms' (2016) Vol. 37, No 3 *Comparative Labour Law & Policy Journal*

Berg J, Janine Berg, 'Income security in the on-demand economy: Findings and policy lessons from a survey of crowdworkers' (2016) *Comparative Labour law and Policy Journal*, Vol. 37, No 3

Bogdan M, *Komparativ rättskunskap* (2:1 edn Norstedts Juridik 2003)

- Cherry M.A, 'Beyond misclassification: The digital transformation of work' (2016)
Comparative Labour law and Policy Journal, Vol. 37, No 3
- Codagnone C, Abadie F, and Biagi F, 'The future of Work in the 'Sharing Economy': Market Efficiency and Equitable Opportunities or Unfair Precarisation?' (JRC Science for Policy Report, European Commission 2016)
- Deakin S, and Morris G.S, 'Labour Law' (6 edn Hart 2012)
- De Groen W, and Maselli I, 'The Impact of the Collaborative Economy on the Labour Market' (2016) CEPS Special Report No 138
- De Stefano V, 'The rise of the «just-in-time workforce»: On-demand work, crowdwork and labour protection in the «gig-economy» (2016) Comparative Labor Law and Policy Journal, Vol. 37, No 3
- Eklund, H. '“Jag sparkades när jag bad facket om hjälp”' *Dagens Nyheter* (19 April 2017)
- Engblom S, 'Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States' (DPhil, European University Institute 2003)
- Eurofound, New forms of employment , Publications of the European Union (2015)
- Eurenius K, 'Dumpade löner och inga kollektivavtal för Foodoras cykelbud' (21 September 2016)
- European Parliamentary Research Service, *Interesting reads from the European Parliamentary Research Service* ((European Parliament 2014)
- Fagerström E, and Johansson E, Eskil Fagerström and Emma Johansson, 'Uber har skakat om taxibranschen' *Sydsvenskan* (20 March 2016)
- Felstiner A, 'Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry (2011) Berkeley Journal of Employment and Labour Law, Vol. 32, Issue 1, No 3, 143-204.
- Freelance Agreement (1994). The collective Agreement between the Swedish Media Publishers' Association and the Swedish Journalist Association for Freelance Work
- Hall J.V, and Kreuger A.B, 'An Analysis of the Labor Market for Uber's Driver-Partners in the United States' (2015) Princeton University, Industrial Relations
- Howe J, 'The Rise of Crowdsourcing' *WIRED Magazine*, (1 June 2006)
- Huws U, 'Platform labour: Sharing economy or virtual wild west' *Journal for Progressive Economy* (29 January 2016)
- Huws U, and Simon J, Size of Sweden's 'Gig Economy' revealed for the first time, (Foundation for European Progressive Studies UNI Europa 2016)

- Huws, U., & Simon, J. (2016). Size of UK's 'Gig Economy' *revealed for the first time*, (Foundation for European Progressive Studies UNI Europa 2016)
- Inghammar A, 'The Concept of 'Employee': The position in Sweden' in Bernd Waas and Gus Heerma van Voss (eds) *Restatement of Labour Law in Europe* (Hart Publishing, forthcoming)
- Irani L.C, and Silberman M.S, 'Turkopticon: interrupting worker invisibility in Amazon Mechanical Turk' (CHI, Paris 27 April-2 May, 2013)
- Jennische A, 'Matleverantören Foodora anklagas för att dumpa lönerna' *Stockholm Direkt* (5 October 2015)
- Jones B, and Prassl J, 'The Concept of 'Employee': The position in UK' in Bernd Waas and Gus Heerma van Voss's (eds) *Restatement of Labour Law in Europe* (Hart Publishing, forthcoming)
- Källström, K., & Malmberg, J., *Anställningsförhållandet: inledning till den individuella arbetsrätten* (Iustus Förlag 2016)
- Lindkvist J, 'Statlig utredare granskar nya affärstrenden' *Transportarbetaren* (9 April 2015)
- Marvit, M. Z. 'How Crowdworkers Became the Ghosts in the Digital Machine' *The Nation* (5 February 2014)
- Maselli I, and Fabo B, 'Digital workers by design – An example from the on-demand economy' (2015) CEPS Special Report No 414
- Nyström, B. Birgitta Nyström, *EU och arbetsrätten* (5th edn Wolters Kluwer 2016)
- O'Hear S, 'Online Seller Profiling Startup eRated Raises \$1.7M' *TechCrunch* (19 January 2016)
- Prassl J, *The Concept of the Employer* (Oxford University Press 2015)
- Prassl J, 'Pimlico Plumbers, Uber Drivers, Cycle Couriers, and Court Translators: Who is a Worker?' (forthcoming) Oxford Legal Studies Research Paper
- Risak M, and Warter J, 'Legal Strategies towards fair employment conditions in the virtual sweatshop' (Regulating for Decent Work Conference, Geneva, 8-10 July 2015)
- Salo C, 'Hårt lopp när företagen budar restaurangmat till hemmen – upp till en miljon leveranser görs utan kollektivavtal' *Yle Nyheter* (1 June 2016)
- Schmid-Drüner M, 'The situation of workers in the collaborative economy' (European Parliament 2016)
- Smith R, and Leberstein S, 'Rights on Demand: Ensuring Workplace Standards and Worker Security In the On-Demand Economy (National Employment Law Project 2015)

- Sigeman T, *Semesterrätt* (5 edn Iustus Förlag 1991)
- Thander N, 'Usla löner gör att facket vill möta Foodora' *FoodSupply* (22 December 2016)
- Unionen, 'Plattformsekonomin och den svenska partsmodellen', (Unionen 2016)
- Wang S, 'Uber drivers strike to protest fare cuts in New York City' *Bloomberg Technology* (1 February 2016).
- Westregård A, 'Self-employment versus traditional employment – an analysis from the perspectives of the labour market and the individual' (Amsterdam, 25-27 June, 2015)
- Westregård A, 'The notion of "employee" in Swedish and European Union law. An exercise in Harmony or Disharmony?' in Laura Carlson, Örjan Edström and Birgitta Nyströms (eds) *Globalization, fragmentation and employment law: a Swedish perspective* (Iustus 2016)
- Westregård A, and Milton J, Westregård and Milton 'Recent trends in collective bargaining structures in the Swedish model' (The 11th ILERA European Congress, Milan, 8-10 September, 2016)
- Wosscow, D. Debbie Wosscow, 'Unlocking the sharing economy: An independent review', (Department for Business, Innovation and Skills, UK Government 2014)
- Åberg A, 'Working in a cross border situation: A study on the Concepts of employment and self employment (Master Thesis, Lund University 2016)
- Åhman K, *Grundläggande rättigheter och juridisk metod* (Norstedts Juridik 2015)
- Veckans Affärer, 'Uber Eats och Foodora vittnar om slavlöner - så lite tjänar de' (23 March 2017)

Websites

- Commentator. *Indeed*.
<https://www.indeed.com/cmp/Upwork/reviews>
- Commentator. *Indeed*.
<https://www.indeed.com/cmp/Upwork/reviews>
- Crowdfunder.
<https://www.crowdfunder.com/>
- Amazon Mechanical Turk.
<https://www.mturk.com>
- Care.com.
<https://www.care.com/en-gb>

Clickworker.

<https://www.clickworker.com>

CoContest.

<http://www.cocontest.com/>

Crowdfunder.

<https://www.crowdfunder.com>

Crowdfunder.

<https://www.crowdfunder.com>

Engblom, S. *'Viktiga lärdomar om Uber, plattformsekonomin och arbetsrätten.'*

<http://www.utredarna.nu/samuelengblom/2016/10/30/viktiga-lardomar-om-uber-och-arbetsratten/>

Foodora.

Foodora.se

Kasriel S, 'Upwork's New Pricing: A Message from the CEO All Things Upwork.

<https://www.upwork.com/blog/2016/05/upwork-pricing/>

Karnov Online. (u.d.)

<https://pro-karnovgroup-se.ludwig.lub.lu.se>

OneSpace.

<https://www.onespace.com/terms-of-service/>

Pillar.

<http://gopillar.com>

Uber.

www.uber.com

Upwork.

<https://www.upwork.com>