EU Competition Law and the Swedish Labour Market: collective bargaining for the solo self-employed

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My intervention today

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- Swedish perspective on collective agreements for solo self-employed

1. Boundaries of Swedish (collective) labour law
2. Inherited relationship between competition law and labour law
3. Industrial relations and stakeholders' point of view

- I.e. not about communication with guidelines (2022/C 374/02)

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Boundaries of Swedish (collective) labour law

- SE is a three category jurisdiction
- Employee – Self-employed
- Concept of employee
  - Not in legislation; mandatory
  - Dynamic/inclusive – travaux préparatoires: presumption for employee status
  - Close to ILO R198

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Boundaries of Swedish (collective) labour law

- Dependent contractor/employee-like; ”person treated in law as similar to an employee”: Co-determination Act; Sect. 1(2)
- ”any person who performs work for another and is not thereby employed by that other person but who occupies a position of essentially the same nature as that of an employee”
- “the person for whose benefit the work is performed shall be deemed to be an employer”
- Latest expansion of collective labour law was 1945
  - Conflict of interest + handled through negotiations btw organizations
  - Expand peace obligation
  - Semi-inclusion in LL? Better terms and conditions to be achieved collectively (e.g. annual holiday, working time etc)

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Boundaries of Swedish collective labour law

- Assessment of all circumstances in casu
- Essentially q of ’fairness’ delegated from legislator to Labour Court
- Who? Outside of employment contract + strong economic dependency (on one counterparty) (AD 1980:24, 1994:130); e.g:
  - Petrol station operators (AD 1969:31, MD 1997:8)
  - Travelling sales persons
  - Lumberjacks w own equipment
  - Journalists, media, cultural sector
  - Franchisees
  - Can have own employees (i.e. be employer)

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Boundaries of Swedish collective labour law

- Implications for person deemed to be dependent contractor:
  - Rights to organize, to negotiations and to information
  - Collective bargaining agreements + peace obligation

- Must be claimed in casu – ultimately in court (system w license for organizations was considered but rejected in 1945)
- Rights are conferred to organizations in CDA = dependent contractors must organize to make use of
- CBA must explicitly confer rights to dependent contractors

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Inherited relationship between competition law and labour law

- Historical trajectory relationship btw competition law and labour law
- Collective Agreements Act 1928 + Saltsjöbaden Agreement 1938 → Restrictive Practicies Act 1953 = collective regulation of labour market already in place and accepted
- I.e. competition law adjusting to labour law – not vice versa
- 1953: labour market exemption to competition law (transferred to 1982 etc)
- Yes, collective agreements restrict competition, but low risk of abuse, because of legal framework already in place regarding collective bargaining + both conflicting interests are legitimate and equally strong

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Labour market exemption

- Swedish Competition Act (2008:579) Ch. 1 Sect. 2:
  - ”This Act shall not apply to agreements between employers and employees relating to *wages and other conditions of employment*.”
- I.e. narrower than scope of CBA – CDA Sect. 23:
  - ”an agreement in writing between an employers’ organisation or an employer and an employees’ organisation in respect of *conditions of employment or otherwise about the relationship between employer and employee*.”

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Labour market exemption

- Personal scope: exemption covers CBA:s concluded by dependent contractors – cf CDA sect. 1(2)
- Restrictions on competition on labour market accepted
- Covers core subjects of collective bargaining – direct regulation of relationship btw employer and employee, but also agreements that
- Have an effect on markets for goods and services, if restrictions are inevitable or a direct and necessary result of the regulation of employment conditions (e.g. MD 1997:8)

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Guidelines v. Swedish Law

- Def solo self-employed (1.2.a/2.2.18) = dependent contractor (can have employees in SE)
- Direct negotiations (2.1.14) – not possible in CDA
  - Collective = organization in SE
- Scope of CBA (2.1.7) – comparable, or larger scope
  - Collateral effects/restrictions on markets for goods/services as a result of regulating employment – quite unclear in SE

Guidelines v. Swedish Law

- Economically dependent (2.1.23) = dependent contractor
- Working ’side-by-side’ w worker (3.2.26) = often employee
- Through digital labour platforms (3.3.28-30) - ?

- Counterparty/-ies w certain level of economic strength = dependent contractor (also 3.1.23)
- Pursuant to national legislation = Co-determination Act, sect. 1(2)

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Industrial relations and stakeholders' point of view

- Unionen: 690 000 members - 11 000 non-employees
  - Consultants, IT, tech, education, accounting, finance, management
- Scen & film: 7 300 members – allow membership to non-employees
- Journalistförbundet: 8 750 employee + 1 700 non-employee
  - Welcomes guidelines, not high expectations for change

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Industrial relations and stakeholders' point of view

- Possibility for 'self-employed' in the Swedish model:
  - LLC with no other employees than owners: join TU and sign application agreement (i.e. btw TU and individual non-organized employer) regarding oneself
  - Effect: CBA-provisions on pension, insurance (life and accidents at work), (small) parts of new 'employability scheme' + allowed to partake in public procurement

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Industrial relations and stakeholders' point of view

- Trade unions' fears:
- Grey areas – unpredictable
- Third category with restricted rt of negotiation, can be forced to accept worse terms – downward pressure on levels in CBA, for employees
- Rt to industrial action? Collective action risky if organisation deemed not be TU?
- Worker – what if terms and conditions shift so that no longer fulfills criteria?
- Need for new organizations representing 'new category'?

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Industrial relations and stakeholders' point of view

- A non-issue – superseeded by other conflicts/problems…
- Government/legislator: no official standpoint
  - Attempts to water down platform work directive
- Courts/agencies: no cases about market behaviour
- (Courts/agencies: few cases about boundaries of labour law)
  - Labour court: 13 cases since 2000
  - Health and safety: handful of cases, no precedents
- Unemployment benefits, social security protection (illness, parenting) in flux

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Industrial relations and stakeholders' point of view

- Employment favoured by system – de facto two category system
  - Inclusive concept of employee + dependent contractors allowed to bargain collectively + no legislation on minimum wages (!?) + generous scope of fixed term employment + ideals of non-intervention and collective autonomy
  - = less incentive to attempt to mis-classify employees as self-employed

- Implication of CBA at Foodora – the market leader?
- Definition of 'umbrella company'?
- Concept of employee: refocus on 'economic dependency' (2002)
- In proper 'gig-economy' self-employed have for long been allowed to organise etc
- Restrictions on competition on labour market (?) accepted (?)

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