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FILLING LEGAL GAPS, OR NOT? - ON OCCUPATIONAL SAFETY AND HEALTH FOR PLATFORM WORKERS

In August 2022, a Swedish government inquiry was published (*SOU 2022:45*). This inquiry suggested a new legal category of responsibility in the Swedish legal framework for Occupational Health and Safety (hereafter OHS). This category has the potential of applying to atypical work, such as work mediated through digital platforms (hereafter platform work). To explain the relevance of this, some legal context is needed from a European and a Swedish perspective.

I - THE LEGAL CONTEXT OF PLATFORM WORK IN SWEDISH OHS LAW

Platform work is a relevant topic for OHS legislation. It can be a matter of classifying platform workers in a specific way, which allows for OHS legislation to be applied to the work performed[1]. It is a legal challenge to determine who, if anyone, is then responsible to prevent risks for the health and safety of platform workers[2]. Indeed, this challenge is taken seriously in the current EU proposal for a directive on platform work. The proposed directive suggests that a platform should be presumed to be an employer if it asserts control under at least two of five conditions[3]. Although the proposed EU directive will not be discussed in detail here, it highlights that a platform might be understood as an employer. From a Swedish perspective, identifying an employer is fundamental to provide workers with the full protection of national OHS legislation. According to the Swedish Work Environment Act (*Arbetsmiljölagen*, 1977:1160, hereafter *SWEAct*), *employers* are obliged to take all measures necessary to prevent illness or accidents among its employees[4]. Moreover,

1 See e.g. A. Cefaliello, « An Occupational Health and Safety Perspective on EU Initiatives to Regulate Platform Work : Patching up Gaps or Structural Game Changers ? », *Journal of Work Health and Safety Regulation*, no. 1/2023, p. 122 (on how legal responsibility can be triggered according to OHS law by attributing « worker » status to platform workers); A. Aloisi and V. De Stefano, *Your Boss Is an Algorithm. Artificial Intelligence, Platform Work and Labour*, Hart Publishing, 2022, p. 112; J. Prassl, *Humans as a Service. The Promise and Perils of Work in the Gig Economy*, Oxford University Press, 2018, p. 96 (on the legal relevance of employment or « worker » status for platform work).

2 See e.g. exemple A. Cefaliello, « An Occupational Health and Safety Perspective on EU Initiatives to Regulate Platform Work: Patching up Gaps or Structural Game Changers? », *op. cit*, p. 122.

3 A. Aloisi and V. De Stefano, *Your Boss Is an Algorithm. Artificial Intelligence, Platform Work and Labour*, *op. cit.*, p. 111 (for a discussion on employer status of platform companies under the proposed directive).

4 Chapter 3, section 2, SWEAct. Cf. art. 5 of the Directive 89/391/EEC, on the obligation of employers to prevent risks related to all aspects of work.

the scope of the SWEAct is in principle limited to work performed for an *employer* by an employee[5].

However, Swedish case law from recent years suggests that platform companies do not classify as employers according to OHS legislation. The case law shows that courts have dismissed the claims of the Swedish Work Environment Authority to consider the platforms as employers. Drawing on these cases, it might be difficult to attribute employer status to platform companies[6]. The matter of employer status is legally complex to begin with, since employer status according to the SWEAct is subject to an individual overall assessment[7]. This raises the question if, and under which conditions, platforms can be attributed employer status and responsibilty to prevent for the health and safety of platform workers.

To sum up: if Swedish OHS law even applies to platform work, it might be unclear if the platform has employer responsibility. For that reason, platform workers could be left without the protection and the enforcement of OHS law. This shows the challenge of identifying who, if anyone, is responsible to prevent OHS risks of platform workers according to Swedish law. From this point of view, it can be argued that there is a legal gap in the SWEAct. However, as indicated in the introduction above, this gap might be filled though a recent initiative. An inquiry, *SOU 2022:45 (hereafter The Inquiry)*, suggests a new legal category of responsibility: a principal (in *Swedish, uppdragsgivare*). While not only relevant for platform work, this category might very well apply to platform companies. The proposal of The Inquiry might, then, trigger legal responsibility to prevent OHS risks of platform workers, even if no employer can be identified or when employer status is legally contested[8]. The Inquiry will be briefly described and discussed below, with a special focus on how the proposed legal categories could be applied to platform work.

II - THE INQUIRY: STEPS TOWARDS NEW CATEGORIES OF RESPONSIBILITY

The Inquiry suggests two new sections in the SWEAct. These sections address the responsibility of the *principal,* a category that currently does not exist in Swedish OHS law. The proposed category attributes to physical or judicial persons, possibly including platform companies. It would apply to those who *engage a physical or a judicial person in working* within the business of the principal[9]. This condition could be more or less relevant for platform companies, since each platform is different. For example, a platform company

5 See chapter 1, section 2, SWEAct. However, the SWEAct can also be applied to some categories that are equated to employees, even though they are not formally contractual employees. See chapter 1, sections 3 and 4, SWEAct. See also P. Andersson and T. A. Novitz, « Risk assessment and Covid-19: systems at work (or not) in England and Sweden », *Revue de droit comparé du travail et de la sécurité sociale*, no. 4/2021, p. 70.

6 *Kammarrätten i Göteborg*, Case no. 4120-21 (November 19 2021) and Case no. 6394-21 (December 9 2021). « Risk assessment and Covid-19: systems at work (or not) in England and Sweden », *op. cit.*, p. 71 (on the legal issue of employer status for platforms according to Swedish case law).

7 H. Gullberg and K.-I. Rundqvist, *Arbetsmiljölagen i lydelse den 1 juli 2018, Kommentarer och författningar*, Norstedts, 2018, p. 57.

8 SOU 2022:45, p. 79 (on the legal problems adressed in The Inquiry).

9 *Ibid.*, p. 344.

does not meet this condition if it merely acts as a mediator between service providers and end-users[10].

Another prerequisite for being a principal is to have the main *influence* on the working environment[11]. This prerequisite is crucial to platform companies, since they might have main influence on the working environment. However, they also could merely mediate work without affecting its performance[12]. In order to have main influence, the platform company needs to have control over the performance of the work. In other words, it should have the possibility to take measures according to its responsibility for OHS. An example is if the « worker » or its potential employer does not have the means to affect the work environment. The question who has the main influence, then, depends on a few factors relating to the work environment. These factors could include control over the time of work, instructions on how to perform the work, manual or digital supervision of work performance or work quality or knowledge on risk factors of the platform work[13]. Again, a distinction can be made between actors that have main influence and those that do not. To name an example, there are self-employment companies that are only responsible for invoicing and administration on behalf of a person performing work. According to the Inquiry, such companies would typically *not* qualify as having main influence[14].

In short, a platform company could fit into the proposed category of a *principal*. As such, it would be responsible to take measures that largely overlap the OHS obligations of an employer towards its employees. While the principal would not be obligated to take long term measures, it would be responsible in terms of managing the daily work environment of the persons working[15]. The responsibilities of the principal would be limited to work performed within the business of the principal. For platform companies, the responsibilities of the principal are therefore limited to the services that the company provides (that is, the service required by the platform worker)[16].

III - CONCLUDING REMARKS

As described above, The Inquiry implies that Sweden could take a proactive approach to regulating OHS responsibility for platform work. This seems fitting, since it currently is complicated to establish who (if anyone) has the responsibility to prevent risk for platform workers[17]. One might argue, then, that new legislation on OHS is needed to identify a party responsible for the work environment of platforms. Introducing the category of a principal, as The Inquiry suggests, makes it possible to identify such a responsible party. This category might apply even if a platform worker has no employer. This way, the Inquiry marks a pragmatic shift in focus away from the legally complex matter of employer classification. It would provide platform workers with the legal protection of OHS law, even in cases where employer status is doubtful or contested.

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10 *Ibid.*, p. 162.
11 *Ibid.*, p. 344.
12 *Ibid.*, p. 171.
13 *Ibid.*, p. 172.
14 *Ibid.*, p. 173.
15 *Ibid*.
16 *Ibid.*, p. 174.
17 See section 1 above.

Nevertheless, The Inquiry proposal leaves some questions unanswered. As already noted, Swedish case law on platform work shows that an employer cannot always be identified. At least, this case law shows that platform companies might not have employer status according to the SWEAct[18]. As a result, it might not be possible to identify *any* employer relating to platform work[19]. In the absence of an employer, the SWEAct cannot be applied unless the worker falls into a category that is equated with an employee[20]. However, as platform workers do not necessarily fit into these categories, platform work might not even fall under the scope of the SWEAct at all. Paradoxically, The Inquiry *still* proposes a new category of responsibility in the SWEAct, which is intended to apply to platform work. This category, as well as the responsibility related to it, would be of little use in situations when the SWEAct does not apply (which could possibly be the issue with platform work). In sum, there is a potential risk that the proposed category of responsibility would not even apply to platform work - at least in cases where no employer can be identified. These concerns, however hypothetical, should be critically examined in order to consider how the proposal could be effectively applied according to Swedish OHS law.

To make one last remark, The Inquiry comes at a time when the EU has proposed a directive on platform work. If this directive become reality - as indicated in the EU Parliament in early 2023[21] - it remains to be seen if the proposals of The Inquiry are still considered relevant for legislation. Would there still be a need for a new category of responsibility, even if the proposed directive paves the way for a presumption on employer responsibility for platforms?[22] Or would the directive proposal of an employer presumption fill a « responsibility gap » for platform work? Would the new category of responsibility then be considered superfluous? These questions may be subject to political consideration, but they are no less relevant from a legal point of view. As pointed in The Inquiry, it is too early to predict how the directive might affect Swedish law[23]. Nevertheless, it will be interesting to see if the EU Directive becomes reality and if it has any effects on the proposal of The Inquiry.

All in all, The Inquiry is highly thought provoking. It could mark a regulatory intervention in Swedish OHS law, which would patch up a legal gap for platform workers. At the same time, it gives rise to questions on how platform work can and will be regulated in the future.

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18 *Ibid*.

19 SOU 2022:45 s. 83 for a similar conclusion.

20 See section 1 above.

21 https://www.europarl.europa.eu/news/en/press-room/20230130IPR70206/digital-workers-meps-ready-for-talks -on-new-law-to-improve-working-conditions

22 SOU 2022:45, p. 190.

23 *Ibid*.