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## Track 2

### Recent trends in collective bargaining structures in the Swedish model

#### 1. Introduction

A very clear trend in collective bargaining during recent years is the growing popularity of a model for wage formation using so-called ‘figureless agreements’. The number of agreements based on this model has increased rapidly, particularly within the public sector, for academically qualified professionals and white-collar workers. In this model, both the size of pay rises and their distribution among individuals are determined on a local level. Thus, wage increases become dependent on individual performance and the development of business operations. The focus here is on the dialogue between individual employees and their respective managers in terms of goals, results and salary. The union’s role is changing – from representing the members during local and industry-wide bargaining to serving them in a more supportive and consulting capacity.

Collective agreements for blue-collar workers in the private sector, on the other hand, are trending towards a more controlled wage formation through industry bargaining. Here, the applicable industry-wide collective agreement normally stipulates that an individual pay guarantee and a small, fixed pay-pool shall be distributed among the employees, according to an agreement between the employer and the local union and following guidelines given in the industry-wide agreement. The control and management of wage development is strict and similar for all the companies in the sector that are parties to the collective agreement.

As in many other European countries, Sweden is experiencing a structural shift in employers often made use of temporary agency workers, also employers’ use self-employed workers at the expense of the employees. One trend in Sweden is that increasing numbers of workers, either voluntarily or against their will, are leaving their positions for self-employment. Both of these phenomena are the result of increased demands on companies to be more flexible in terms of the number of employees and skills exchange.<sup>1</sup> This has far-reaching consequences for labour relations. Traditional labour law is challenged in a number of ways, since self-employment lies outside the established labour market structure. Trade union influence on working conditions is eliminated when work is carried out by self-employed persons.<sup>2</sup> A particular challenge for the labour market’s different parties within all sectors

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<sup>1</sup> See Barnard, Catherine, *EU Employment Law* (4th edn, Oxford University Press 2012) and Green Paper, ‘Modernising labour law to meet the challenges of the 21st century’/ COM/2006/708 final.

<sup>2</sup> A self-employed person is defined as a performing party who operates in a sole proprietorship or a private, one-person, limited company, see Westregård, Annamaria, ‘The Notion of “employee” in Swedish and European Union Law. An Exercise in Harmony or Disharmony?’ in *Globalisation, Fragmentation, Labour and Employment Law – A Swedish Perspective*, Laura Carson, Örjan Edström and Birgitta Nyström (eds), Iustus 2016.

is the new digitalised economy, which the rise of companies such as Airbnb and Uber. The performing parties, called crowdworkers, find themselves completely outside existing collective agreements, which are built on a traditional relationship between the employer and employee. One problem for the social partners is that parties' attempts to regulate the relationship for the self-employed easily create conflicts with competition law.

In Section 2, we analyse the the driving forces behind the very diverse structure of collective agreements for different employee categories. Section 3 offers our discussion of how the social parties are handling the situation they now face in the new digitalised economy – where working conditions and salaries are determined outside the framework of traditional collective bargaining.

## 2. Collective bargaining and wage formation

### 2.1. The Swedish model

The term Swedish model refers to the negotiation system that has developed in Sweden among the social partners since the establishment of the Saltsjöbad agreement in 1938. The state does not involve itself in wage formation; instead this is determined wholly by the social partners.<sup>3</sup> Nor does the state become directly involved in negotiations on size of pay rises – not even for the public sector.<sup>4</sup> The state's role in wage formation is instead to work through the National Mediation Office to ensure the proper function of wage formation and to mediate in agreement disputes.

The Swedish model for industrial relations traditionally divides the employee community into two main categories: blue-collar workers and white-collar workers. The category of white-collar workers usually includes academically qualified professionals. These professionals comprise the third main group that concludes collective agreements. The structure of the negotiation means that every company in a sector has one collective agreement for each group.<sup>5</sup> There is also a distinct difference between the private sector and the public sector, in terms of both collective agreements and special legislation. The public sector is divided into central-government employees and municipal employees, with respective collective agreements.

Because the state is not involved in wage formation, Sweden has no minimum wages established by law. Surprisingly, many collective agreements also lack specified minimum wage levels, especially

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<sup>3</sup> For example Government Bill to Parliamen 1999/2000:32 Lönebildning för full sysselsättning. A new and completely unique occurrence in the Swedish context is that in 2016, the state got involved in wage formation for teachers through Decree 2016:100, ordering a three-billion increase in government subsidies for higher wages to teachers and some other related staff categories. The background here was that since the 1970s, teachers as an occupational group have had weak salary development compared to other academically qualified professionals. Few students are applying to teacher education programmes and many leave the field after only a few years. Thus it has become a matter of political urgency to increase teacher salaries. Most teachers are municipal employees, as the Swedish school system shifted from state to municipal control in 1989. Fifteen per cent of compulsory-school students and 25 % of secondary-school students attend private schools, <http://www.ekonomifakta.se/Fakta/Valfarden-i-privat-regi/Skolan-i-privat-regi/Ellever-i-friskola>.

<sup>4</sup> In 1965 the law for the public sector was changed so that white-collar employees and professionals were able to negotiate all matters relating to salaries with their public-sector employers.

<sup>5</sup> Academically qualified professionals have their own federation of unions called SACO, the Swedish Federation of Professional Associations. The professionals have their own collective agreements in addition to blue- and white-collar agreements. There are also various collective agreements for different fields, such Sweden's organization for managers (Ledarna).

some collective agreements for white-collar workers and academically qualified professionals in the public sector<sup>6</sup>, but examples can be found also in the private sector.<sup>7</sup> However, while many private-sector collective agreements specify minimum wages, in practice these are significant only for blue-collar workers, see section 2.6.

In addition, most of the labour-related laws are semi-discretionary law. This means that these regulations can be derogated by collective agreements between the social partners at industrial level, but not by a personal contract between employer and employee or by a collective agreement at local level between an individual employer and a local union. These regulations can also be improved but also – with few mandatory exceptions –<sup>8</sup> can be made worse for the employees through collective agreements on the industrial level.<sup>9</sup> Thus, when they act together, the social partners at industrial level have a great deal of influence and control the regulation of the Swedish labour market.

In Sweden the coverage of collective agreements is high. In the public sector it is 100 per cent for all groups of employees; for the private sector it is 92 per cent for blue-collar workers and 82 per cent for white-collar workers and professionals.<sup>10</sup> The primary reason for this degree of coverage is that employers in Sweden are highly organised, and therefore collective agreements are applied to all employees in a workplace – irrespective of whether they are members in a union.<sup>11</sup> Collective agreements lack an ergo omnes effect in Sverige. Therefore, it is not possible to enlarge the scope of a collective agreement to make it applicable to employers that were not originally covered by it. As for the union aspect, union organisation has decreased. In 2015 the degree of organisation for blue-collar workers had declined to 63 per cent, while the degree of organisation for white-collar workers and academically qualified professional was 74 per cent.<sup>12</sup>

As for the private sector, negotiations took place on three main levels until the 1980s. The first agreement concluded was on the federation level between the federal organisations the former Swedish Employers Confederation (SAF), now the Confederation of Swedish Enterprises, (SN) and Swedish Federation of Trade Unions (Landsorganisationen i Sverige, LO) for blue-collar workers and the Private Sector White-Collar Workers' Cartel (Privattjänstemannakartellen, PTK).<sup>13</sup> Thereafter, the

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<sup>6</sup> See for example the Main Agreement on salary and general employment conditions and recommendation for the local agreement etc. Huvudöverenskommelse om lön och allmänna anställningsvillkor samt rekommendation om lokalt kollektivavtal m.m. - HÖK 12 between the National Union of Teachers in Sweden (LR) and the Swedish Association of Local Authorities and Regions (SKL).

<sup>7</sup> For example, several of the collective agreements for academically qualified professions, such as the Agreement on salary and general employment conditions (Akademikeravtalet) between Almega Technology & Design employers and the Swedish Association of Graduate Engineers (Sveriges Ingenjörer) the Swedish Association of Architects (Sveriges arkitekter).

<sup>8</sup> The mandatory minimum regulations often have their origins in EU law.

<sup>9</sup> Fahlbeck, Reinhold; Derogation from Labour Law Statutes under Swedish Law, Juridisk Tidskrift, nr 1 2006/07 pp. 42-56.

<sup>10</sup> See statistics from the Swedish National Mediation Office, [http://www.mi.se/files/PDF-er/ar\\_diagram\\_och\\_tabeller/ar\\_2015\\_diatab/Siffror%20och%20diagram%20om%20medlemsantal.pdf](http://www.mi.se/files/PDF-er/ar_diagram_och_tabeller/ar_2015_diatab/Siffror%20och%20diagram%20om%20medlemsantal.pdf), for 2014

<sup>11</sup> If a company do not have a collective agreement it is often in a "new" industry.

<sup>12</sup> [http://www.mi.se/files/PDF-er/ar\\_foreign/ar\\_2015\\_int/eng\\_smftn\\_2015.pdf](http://www.mi.se/files/PDF-er/ar_foreign/ar_2015_int/eng_smftn_2015.pdf)

<sup>13</sup> PTK unites unions at industry level belonging to the Swedish Federation of Professionals Association (Sveriges Akademikers Centralorganisation, SACO) and the Federation of White-Collar Workers (Tjänstemännens centralorganisation, TCO).

federal organisations' member associations, the sectoral/industry-wide organizations on industrial level, 'translated' the agreements for their different groups through industry-wide collective agreements. Lastly, negotiations took place at the local company level. According to SAF, this system led to an upward 'spiral' in salary costs. In light of this, SAF decided at the end of the 1980s to no longer participate in the negotiations at federation level.<sup>14</sup> The goal was to ensure that the negotiations took place wholly on the local company level, and that the salary cost would be set in relation to the individual company's profitability; in addition, salary levels would be set in relation to each employee's work efforts. For most cases in the private sector, decentralisation has not spread all the way to the company level; instead, negotiations take place on the industrial level with a larger or smaller centrally prescribed wage span for local distribution.

In the event of local bargaining between the individual employer and local union, it is normally in situations where the industrial-level parties have delegated such tasks in the nationwide agreement to the local parties. The figureless-agreement model for wage formation, see below, is just such as example.

## **2.2. Industrial Negotiation Agreement and 'the cost mark'**

Wage formation for the Swedish labour market as a whole has been dominated during the past 20 years by the Industrial Negotiation Agreement (Industriavtalet)<sup>15</sup>, which was first concluded in 1997, the current version was concluded in 2011. The Industrial Negotiation Agreement was concluded against the background of years of high salary costs – which diminished Swedish employers' ability to compete. In addition, high inflation meant that real-wage increases were small.<sup>16</sup> The initiative for the Industrial Negotiation Agreement came from labour organisations who saw how high salary agreements were outcompeting employment opportunities in Sweden. The agreement was concluded in turbulent times, and since then salary development has not progressed.<sup>17</sup>

The idea is that the competitively disadvantaged export industry agreement on pay rises shall serve as a benchmark – or rather as a ceiling – for the other areas of the agreement. The agreement states: 'The industrial parties undertake, jointly and severally, to promote the "cost mark" within industry as the norm to which other parties on the labour market are to keep'.<sup>18</sup>

The Industrial Negotiation Agreement has been concluded between the social partners in the private sector, five unions and 12 employer organisations on industry level, but has had an impact throughout the entire Swedish labour market. Other areas, the public sector and remaining private sector have added sections to their respective area's negotiation agreements, in which they agree in

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<sup>14</sup> Nycander, Svante, *Makten över arbetsmarknaden, Ett perspektiv på Sveriges 1900-tal* p 146 f, 2002 and the development from the coordinated negotiations in Chapter 9.

<sup>15</sup> [http://www.industriradet.se/home/ik2/res.nsf/vRes/ik\\_1281698172484\\_industriavtalet\\_120612\\_eng\\_pdf/\\$File/Industriavtalet%20,%20120612%20eng.pdf](http://www.industriradet.se/home/ik2/res.nsf/vRes/ik_1281698172484_industriavtalet_120612_eng_pdf/$File/Industriavtalet%20,%20120612%20eng.pdf);

<http://www.industriradet.se/wp-content/uploads/Industriavtalet-2011.pdf>

The agreement contains the purpose and direction of the Negotiation Agreement, negotiation procedure and cooperation in labour-market issues – the Industrial Negotiation Council the parties on sectorial or industrial level.

<sup>16</sup> For a detailed description see Nycander, Svante, *Makten över arbetsmarknaden, Ett perspektiv på Sveriges 1900-tal*.

<sup>17</sup> Fahlbeck, Reinhold; *Open Heart Surgery: Reform of Labour Mediation Regime in Sweden*, Vol 16, The International Journal of Comparative Labour Law and Industrial Relations, 2000, pp 409-427.

<sup>18</sup> Part I Introduction - the purpose and direction of the Negotiation Agreement, para 7.

various ways to abide by the 'cost mark' – the so-called Mark – and have thus accepted the industry's salary-normalising role.<sup>19</sup> Thus, in practice the the Industrial Negotiation Agreement covers the entire Swedish labour market. The Mark for the period of 1 April 2016 to 31 March 2017 is 2.2 per cent.<sup>20</sup> Salary normalisation affects not only the actual salary cost but also the total labour cost. This means that room for negotiation has diminished, and that any increase in a centrally wage span must be financed through cuts in the general conditions.<sup>21</sup> The instructions for the National Mediation Office also emphasize the normalising function of the Industrial Negotiation Agreement.<sup>22</sup>

### **2.3. Wage formation in collective agreements**

Negotiations normally involve nationwide collective agreements for whole sectors. There are about 650 agreements in the Swedish labour market.<sup>23</sup> The wage formation in the nationwide collective agreements is manifested in many different forms. In general it can be said that employers in the public and private sectors have an interest in maintaining a local salary development process, in which the centrally wage span is not locked in to different unions with different pay pools and general pay rises. Among the unions, the academically qualified professionals and white-collar unions are much more interested than blue-collar unions in local wage formation.

In its statistics, the Swedish National Mediation Office has divided data into seven general categories depending on the design of the various salary agreements: 1) Wage formation agreements at local level without any centrally prescribed wage span are also called 'figureless agreements'; 2) Wage formation at local level with fall-back agreements<sup>24</sup> on the size of the centrally prescribed wage span; 3) Wage formation at local level with a fall-back agreement and some form of individual guarantee; 4) Pay pool without individual guarantee; 5) Pay pool with individual guarantee or, alternatively, fall-back agreement; 6) General pay rises and pay pools; and 7) General pay rises.<sup>25</sup>

During 2015, 25 per cent of employees were covered by figureless agreements and 60 per cent had no form of individual guarantee, that is wage formation in accordance with Categories 1,2 and 4 above.<sup>26</sup> The most remarkable aspect here is the development in the public sector. For the state level, 46 per cent of white-collar employees are covered by agreements in Category 1 and 54 per cent are covered by agreements in Category 2. One hundred per cent of state-level blue-collar workers are covered by agreements in Category 2. The municipal sector has seen the greatest change for white-collar workers. In 2013, 32 per cent were covered by Category 1; now this figure is 100 per cent. Municipal blue-collar workers are covered 100 per cent by Category 4. For the private sector,

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<sup>19</sup> For an overview see Lönebildning och jämställdhet, en rapport från Medlingsinstitutet (Swedish National Mediation Office) 2015 p 64 ff.

<sup>20</sup> See Final offer, 31 March 2016 to companies/unions in the engineering industry; to Association of Swedish Engineering Industrie (Teknikarbetsgivarna) and Metalworkers and Industrial workers (IF Metall), to Teknikarbetsgivarna and Unionen (white-collar union) and to Teknikarbetsgivarna and (The Swedish Association of Graduate Engineers (Sveriges Ingenjörer). Salary agreement value 2.2 % and premiums for part-time pension 0.2 %.

<sup>21</sup> Lönebildning och jämställdhet, en rapport från Medlingsinstitutet (Swedish National Mediation Office) 2015 p 73.

<sup>22</sup> Para 2 item 3 Decree (2007:912) with instructions for the National Mediation Office.

<sup>23</sup> Eriksson, Kurt; the Swedish rules on Negotiation and Mediation – a brief summary [http://www.mi.se/files/PDF-er/ar\\_foreign/swedish\\_rules\\_feb\\_%202010.pdf](http://www.mi.se/files/PDF-er/ar_foreign/swedish_rules_feb_%202010.pdf).

<sup>24</sup> A fall-back agreement is a collectively agreed rule that serves as a last-resort solution if the parties at local level have failed to agree on any other provision.

<sup>25</sup> See [http://www.mi.se/files/PDF-er/att\\_bestalla/arsrapporter/AR\\_15\\_uppdat.pdf](http://www.mi.se/files/PDF-er/att_bestalla/arsrapporter/AR_15_uppdat.pdf) pp 106-108.

<sup>26</sup> <http://www.mi.se/press/nyheter/2015/02/lonebildningen-ar-2014/>.

Category 5 dominates for white-collar workers, while Category 6 is most common for blue-collar workers.<sup>27</sup>

If a trend can be seen in wage formation in recent years, it is the proliferation of figureless agreements in the public sector for professionals and white-collar employees, while blue-collar employees in the private sector continue to prefer more centrally organised wage formation in terms of both size of pay rises and individual distribution.

#### **2.4. Figureless agreements**

The system of so-called figureless agreements has long been a goal of employers. Figureless agreements are the purest form of decentralised negotiations. This scenario offers no generally set centrally prescribed wage span or individual, guaranteed minimum pay rises. Individual guarantees have been replaced with a special process for those who receive no pay rise at all. This can involve support, training etc.<sup>28</sup> These agreements often lack a specified minimum salary as well.

However, the first figureless agreement with local wage formation was concluded in the private sector in 1993 – the so-called Manager Agreement (Ledareavtalet) between Almega and the Swedish Foremen's and Supervisor's Union (Sveriges arbetsledareförbund, SALF), now known as Ledarna – Sweden's Organization for Managers). The background to this model, which was new in the Swedish context, was found in the structural changes taking place at the time in the labour market. Ledarna was organising employees known at the time as first-line managers, i.e. supervisors and foremen. Such positions were rapidly disappearing in the wake of rationalisations made by many companies in the early 1990s. Therefore, Ledarna decided to re-orientate the organisation to managers on all levels in Swedish companies. One step in this reorientation was a review of the old collective agreement that had applied to first-line managers.<sup>29</sup>

These agreements were outdated and based on a formula where the salary for a first-line manager would always exceed that of subordinates in a certain way. The result of this process was the first nationwide agreement based on local wage formation. According to the agreement, an employee's pay rise would depend partly on individual performance and partly on the company's profitability.<sup>30</sup> This agreement caused a sensation and was not viewed in an entirely positive light by union representatives.

Still, with time the general view of figureless agreements has changed and increasing numbers of labour unions are embracing this new agreement model in different ways. As noted earlier, in recent years figureless agreements have grown in popularity – not in the private sector but in the public

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<sup>27</sup> See [http://www.mi.se/files/PDF-er/att\\_bestalla/arsrapporter/AR\\_15\\_uppdag.pdf](http://www.mi.se/files/PDF-er/att_bestalla/arsrapporter/AR_15_uppdag.pdf) pp 127-128.

<sup>28</sup> See for example HÖK 12 Annex 5.

<sup>29</sup> See also about The Leaders alternative dispute resolution in Fahlbeck, Reinhol; Abdication or coronation? The Leader's Agreement: An alternative model for labour-management relations and dispute handling in Sweden, Vol 2 Journal of Alternative Dispute Resolution in Employment (2000) pp 44-53.

<sup>30</sup> See the Agreement on Salary and General Employment Conditions and Wage Formation between Almega and Ledarna, Annex 1. This collective agreement has not changed very much since its inception and the agreement on wage formation in the company emphasises that the wage formation process is based on the company's financial health and its managers' contribution to financial development. Individually based salaries are related to the company's business goals, individual development and individual work contribution. The wage formation process shall be defined in the company's salary policy and is based on the dialogue between the manager and the immediately superior manager.

sector. As of 2015, for example, this model is being applied for all white-collar workers and academically qualified professionals in the municipal sector. One example of a collective agreement using the figureless wage formation approach is the agreement between the National Union of Teachers in Sweden (LR) and the Swedish Association of Local Authorities and Regions (SKL).<sup>31</sup> The collective agreement was concluded in 2012 with stepwise changes to a figureless agreement for 2014 and 2015. No minimum wage is specified in the agreement. The agreement has been extended for 2016 and 2017, and now completely lacks guaranteed pay rises.<sup>32</sup> As with the Manager Agreement, local wage formation becomes extremely important and places significant responsibility on the local employer. Here, for understandable reasons, the emphasis is on the development of the business and not the company's profitability.<sup>33</sup>

## **2.5. Why are figureless agreements concluded?**

Completely figureless agreements without minimum-wage requirements or individual guarantees result in fewer constraints on wage formation. The rise of figureless agreements should be viewed in light of the Industrial Agreement, and the wage formation model in which the pay-rise agreements in the export industry – an area subject to intense wage competition – shall serve as the 'cost mark' for pay rises in all other industries.

Growth of these agreements in the public sector, for example for women with advanced education and teachers, is partly a critique from these groups on the relative salary levels created by the strong connection to the Mark. Groups such as teachers have not been able to raise the general salary level through collectively agreed pay rises; instead, the Mark serves as a 'salary lock' that holds different group's salary levels the same in relation to each other. If agreements were reached for pay rises that exceed the Mark, many other public-sector employees would consider themselves underpaid, and these groups would carefully monitor the outcome of collective agreements on the industrial level. For teachers, figureless agreements have definitely influenced the relative salary level to some degree. Teachers have received 16.3 per cent in pay rises on average since 2012, when the gradual phase-out to completely figureless agreements began; during this same period, the Mark for pay rises has remained around 11 per cent. The effect of figureless agreements will likely be clearer in coming years because white-collar workers and academically qualified professionals in the public sector have just recently begun to be covered by this model. As a result, the wage span on the local level

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<sup>31</sup> The Main Agreement on salary and general employment conditions and recommendation for the local agreement etc. – HÖK 12.

<sup>32</sup> See the Extension of the Main Agreement on salary and general employment conditions and recommendation for the local agreement etc. HÖK 12, 16 November 2015.

<sup>33</sup> See the Main Agreement on salary and general employment conditions and recommendation for the local agreement etc. – HÖK 12 Annex 5. Here, the sectorial partners at industry level develop their common view on individual pay determination. The agreement is based on the concept of individual, differentiated pay determination and that the employer has developed salary policy guidelines for pay determination. The criteria for pay determination shall clearly specify how work performance shall be assessed and are based on the company's business mission and goals. The system presumes that annual review and follow-up will be carried out. This means that the employer is obligated to identify and analyse employee salaries to create the basis for salary review, and to develop an action plan that describes the employer's salary distribution and salary relations in light of the company's goals and needs. The employee and respective manager shall engage in a salary talk to discuss goals, results and the relationship of these aspects to the individual's salary. Weak salary development must have justification, and the employee shall be given the opportunity to influence his or her own salary development. Clear salary criteria shall demonstrate how individual work performance is assessed and shall be based on the company's business, goals and financial conditions. The entire pay determination process shall take place under a peace obligation.

have not been tied to the general pay rises for different groups. Highly educated employee groups with labour shortages could be served well by this situation, but this remains to be seen.

These particular increases above the Mark have garnered criticism, not least from the competition-beset export industry. The level of pay rises within their sector – consistent with the Mark – is easily interpreted by other occupational groups as a minimum. The purpose of the Industry Agreement was the opposite. Thus the rapid proliferation of figureless agreements can pose a threat to the wage formation process that has developed during the past 20 years through the Industry Agreement. The figureless agreements do not specify a minimum or maximum salary level, but the parties are nevertheless bound by their bargaining rules. The municipal sector, for example, has agreed to abide by the Mark. Thus the Mark affects the results of the figureless agreements and how future pay rises will be budgeted.<sup>34</sup>

In its analysis, the Mediation Institute finds that it is unclear whether the stricter application of the Mark in normalisation of labour costs explain the growing trend of agreement constructions 1–3.<sup>35</sup> The wage formation model contains possibilities to derogate from the Mark under certain conditions.<sup>36</sup> In an assessment by the Mediation Institute, the concept of good practice in wage formation is applied. An upward deviation from the Mark is in keeping with good practice if the counter-party agrees to it; i.e., the derogation shall not be compelled by a conflict, the parties are responsible for convincing the rest of the labour market that the reasons for the derogation are so strong that other groups will not make compensatory demands, and the derogation shall be used in a long-term process of addressing relative salary levels.<sup>37</sup>

In the private sector figureless agreements have not seen anything close to the public-sector development. One reason could be that the Union – the dominant labour union for private-sector, white-collar workers and a major stakeholder in the Industrial Agreement – does not seem intent on concluding figureless agreements as long as the Union remains a party to the Industrial Agreement.

It is important to emphasise that introduction of a figureless-agreement system requires that both the employer party and the labour unions agree to such a system. The system is based on strong cooperation and accepting mutual obligations, primarily in the local process. Thus, in practice, one party cannot force a figureless agreement on the other parties through industrial actions. In order for wage formation to work, parties must agree on a number of aspects, such as local processes, applicable criteria, the union's role in disputes etc. Figureless agreements place considerable responsibility on employers to manage wage formation so that salaries will be truly individual and based on the company's business, in the way that this was envisioned in the parties mutual agreements. Training in application of the agreement is a significant part of managerial education and crucial to the agreement's implementation. An industry's move toward figureless agreements is a process of maturity based on mutual trust.

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<sup>34</sup> Municipal Agreement on Bargaining Procedure (Kommunalt avtal om förhandlingsordning etc., KAF), wording from and including 1 May 2000 para 2.

<sup>35</sup> Lönebildning och jämställdhet, en rapport från Medlingsinstitutet (Swedish National Mediation Office) 2015 p 72.

<sup>36</sup> One example is HÖK 16 between SKL and the Swedish Municipal Workers' Union, with respect to nursing assistants, see above.

<sup>37</sup> Government White Paper SOU 2006:32 'Good Practice in Wage Formation – An Assessment' (God sed vid lönebildning – utvärdering av Medlingsinstitutet) p 66.

Labour market experience of figureless agreements varies. Some groups have tested the model on various occasions, only to abandon it and plan to return for a new attempt later.<sup>38</sup> For example the Financial Sector Union of Sweden (Finansförbundet), the union for white-collar workers in the private banking sector, gave advance notice to terminate its figureless agreement in 2013, despite a relatively good development in pay rises. One reason, among others, was dissatisfaction about the fact that some union members had received low or no pay rises. The agreement has now been replaced with an agreement that is valid until further notice, with some degree of individual guarantees and a salary development guarantee connected to overall industry development.<sup>39</sup> Collective agreements that are valid until further notice are long-term and salary reviews are carried out under a peace obligation. The agreement constructions are figureless, with or without guaranteed pay-rise levels. Examples can be found in both the private and public sectors.<sup>40</sup>

One reason for dissatisfaction with figureless agreements is that some union members are left without a pay rise.<sup>41</sup> Another reason is the fear that entire companies will decide to 'freeze' salaries, and critics assert that only generally set pay-rise levels can guarantee that employees really do receive a pay rise.

It is not unthinkable that the large number of public-sector workers covered by figureless agreements can drop if expectations of high pay rises are not fulfilled. When most groups are covered by figureless agreements, not all workers will experience salary development above the Mark; in fact, some will likely receive rises that are below the Mark.

## **2.6. Figureless agreements – Not the answer for blue-collar collective agreements?**

Among the blue-collar unions there is a strong tradition of centralised wage formation. Figureless agreements differ significantly from the idea behind so-called Solidaristic Pay, which for a long time was the dominant model on the Swedish labour market. The Solidaristic Pay Policy was adopted during LO's congress in 1951, and means that equal pay should be given for a similar kind of work, irrespective of the company's economic capacity or the the employee's individual work performance. This pay policy has been gradually abandoned and replaced with local wage formation and a certain amount of individual salary development.<sup>42</sup>

Wage formation in blue-collar agreements for the private sector is regulated through centralised negotiations. However, many such agreements contain some features of local, individual wage

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<sup>38</sup> Teachers, doctors and nurses are examples. There are municipalities that have given and continue to give their teachers pay rises below the Mark, and these employees are not satisfied with the model.

<sup>39</sup> See the collective agreement on salary and general conditions from 2015 between the Employers of the Financial Sector (BAO) and the Financial Sector Union of Sweden (Finansförbundet) Annex 1 item 2.2. Salary development, Collective guarantee.

<sup>40</sup> See for example HÖK T between SKL and the Graduate Professionals Alliance (AkademikerAlliansen) for the public sector, originally from 2001 and the Collective Agreement on salary and general conditions between BAO and JUSEK/Civilekonomerna/Sveriges Ingenjörer for academically qualified professionals i banking sector from 1997.

<sup>41</sup> Collective agreement rules on actions in cases where an employee does not receive a pay rise do not appear to have been sufficient. According to the agreements, the reasons why an employee has not received a pay rise shall have been clearly stated during the salary talk with the respective manager, and to improve the situation an action plan shall be implemented and followed up. The employee shall receive help and support to be able to improve fulfilment of his or her work goals, see for example HÖK 12 Annex 5.

<sup>42</sup> See Nycander, Svante, *Makten över arbetsmarknaden, Ett perspektiv på Sveriges 1900-tal* p 146 f, 2002.

formation. The Metalworkers and Industrial workers (IF Metall's collective agreement) with the Association of Swedish Engineering Industries (Teknikarbetsgivarna) for 2016/17 provides an agreement value of 2 per cent, with SEK 285 as an individual guaranteed pay rise and the rest in a pay pool. This means that approximately 50 per cent of the wage span reserves comprise the individual guarantee and 50 per cent is placed in the pay pool.<sup>43</sup> The Metalworkers and Industrial workers agreement resembles the wage formation practised by the Union (white-collar agreement) for a long time which it still uses for 2016/17.<sup>44</sup> Variations in wage formation in private-sector employee agreement are relatively large and some collective agreements still have strict tariffs.<sup>45</sup>

In contrast with white-collar agreements, almost all blue-collar agreements in the private sector stipulate minimum salaries, and they are often higher than any minimum salaries in white-collar agreements. The white-collar collective agreement between Almega (Employers' Organisation for the Swedish Service Sector) and the Union for salaries and general agreement conditions for technology and design industries (Teknik och Design) stipulates a minimum salary of SEK 17 355 per month,<sup>46</sup> the average industry salary of SEK 40 370 per month, which is SEK 23 000 above the minimum salary.<sup>47</sup> In 2015 the lowest salaries for white-collar employees in the banking industry was SEK 18 000 for those who had reached 18 years of age and SEK 20 000 for those who had reached 21 years of age. According to the collective agreement the minimum wage is set at 47.1 and 52.3 per cent respectively of the median salary for white-collar employees in banking, in 2014 it was SEK 38 220 per month.<sup>48</sup>

Minimum-wage levels in blue-collar agreements are generally higher than those in the white-collar agreements. Collective Agreement for service contractors between Almega and the Swedish Building Maintenance Workers' Union (Fastighets) and the Union of Service and Communication Employees (SEKO). In 2016/2017, the minimum wage is SEK 21 700 per month for those who have reached 22 years of age. Fixed supplements are paid according to tariff after 2, 4 and 6 years of industry experience, respectively.<sup>49</sup> In 2015 the average salary in this agreement scope was SEK 22 856 per month.<sup>50</sup> The Collective Agreement for Security Firms between Almega and the Swedish Transport

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<sup>43</sup> The Final offer to Association of Swedish Engineering Industrie (Teknikarbetsgivarna) and IF Metall, 31 March 2016.

<sup>44</sup> The Final offer to Association of Swedish Engineering Industrie (Teknikarbetsgivarna) and IF Metall, 31 March 2016 compared to The Final offer to Association of Swedish Engineering Industrie (Teknikarbetsgivarna) and Union , 31 March 2016.

and Metalworkers and Industrial workers (IF Metall),to Teknikarbetsgivarna and Unionen (white-collar union),

<sup>45</sup> Para 4 item 2 Collective Agreement for service contractors between Almega and the Swedish Building Maintenance Workers' Union (Fastighets) and the Union of Service and Communication Employees (SEKO).

<sup>46</sup> According to Annex 1 para 6.3 in the Agreement on salary and general employment conditions between Almega Technology & Design employers and the Union the minimum salary in 2016 for employees who have reached 18 years of age. A lower salary can be applied for 12 months if the local partners reach such an agreement. In 2016, the salary for a white-collar worker with one year of consecutive employment in the company shall be at least SEK 18 565.

<sup>47</sup> Almega and SN's salary statistics for September 2015. Average salary is based on salaries for all employees irrespective of union affiliation. The concept of salary is the total amount of fixed and variable pay, and any benefits in kind.

<sup>48</sup> The collective agreement on salary and general conditions from 2015 between the Employers of the Financial Sector (BAO) and the Financial Sector Union of Sweden (Finansförbundet) para 7.3.

<sup>49</sup> Para 4 item 2 Collective Agreement for service contractors between Almega and the Swedish Building Maintenance Workers' Union (Fastighets) and the Union of Service and Communication Employees (SEKO).

<sup>50</sup> Almega and SN's salary statistics, data retrieved in September 2015 for all employees over 22 years of age.

Workers' Union (Transportarbetarförbundet)<sup>51</sup> applies strict tariffs. The monthly entry-level salary for 2016/17 is SEK 20 018; after six months it is SEK 21 302 and after 15 months the employee shall be placed in a B, C, D or E salary group, whose minimum monthly salaries vary from SEK 25 240 to 26 749. In principle, strict tariffs prevent salary creep in this area. The average entry salary is SEK 22 550 per month, and for salary group B, C, D or E the average month salary vary from SEK 24 135 to SEK 29 076 for September 2015.<sup>52</sup> The average monthly salary in those examples is approximately SEK 1000-2300 above the minimum salary which, is much lower than the difference in the white-collar agreements example above.

Public-sector blue-collar collective agreements have progressed much further towards individual, local wage formation than many such agreements in the private sector. In the public sector, blue- and white-collar workers have traditionally had identical agreements, so-called single-status agreements.<sup>53</sup> In practice this has made it easier for blue-collar unions in the public sector to accept white-collar solutions. In 2012 blue-collar agreements in the public sector dropped requirements on individual guarantees, thus shifting from agreement construction 5 to 4. A collective agreement between the Swedish Association of Local Authorities and Regions (SKL) and the Swedish Municipal Workers' Union (Svenska Kommunalarbetarförbundet ) from 29 April 2016, there are no individual guarantees or general supplements.<sup>54</sup> This is a three-year agreement, in which the first year, 2016, has a fixed sum in SEK and an almost doubled amount for nursing assistants – a group that was prioritised for aligning salaries with those of other groups.<sup>55</sup> For 2017 and 2018 the fixed sum are set according to the Mark in the Industrial Agreement<sup>56</sup> for employees, but with a significantly lower extra SEK supplement for nursing assistants.<sup>57</sup>

Considering the tradition of wage formation in the blue-collar unions, it is not surprising that figureless agreements have had less success than for white-collar and academically qualified professionals. Still, in recent decades change has taken place, even in blue-collar agreements. The previous strict tariff wages with annual general supplements have been replaced in many instances with constructions including a pay pool and general supplements with or without a fall-back agreement, and in most cases including an individual guarantee. However, blue-collar unions are resisting going so far as to embrace figureless agreements. It is likely that many blue-collar unions

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<sup>51</sup> Para 3 of the Collective Agreement for Security Firms between Almega and the Swedish Transport Workers' Union (Transportarbetarförbundet)

<sup>52</sup> Almega and SN's salary statistics for September 2015.

<sup>53</sup> The most important collective agreement that applies to both municipality and provincial council level for all their employees, blue-collar workers, white-collar workers and academically qualified professionals, under one collective agreement; single-status agreement, is AB (Allmänna Bestämmelser), General Conditions. During the twentieth century there were also attempts in the private sector to bring together the three categories of employees under one collective agreement: the single-status agreement. However, it proved to be difficult to change the established structure, due to the social partners within the sectors having different constructions for their collectively agreed insurance for pensions and sickness benefits.

<sup>54</sup> The Main Agreement on salary and general employment conditions and recommendation for the local agreement etc. – HÖK 16. According to HÖK 16, Annex 1 para 7, the specified minimum salary from 19 years of age for 2016 is SEK 18 398 per month and SEK 20 474 per month for those who have completed vocational secondary school education.

<sup>55</sup> The Main Agreement on salary and general employment conditions and recommendation for the local agreement etc. (HÖK 16) Annex 1 para 2 SEK 1020 for nursing assistants and SEK 520 for others.

<sup>56</sup> The Main Agreement on salary and general employment conditions and recommendation for the local agreement etc. (HÖK 16) Annex 4 para 2 and Annex 1 para 2.

<sup>57</sup> SEK 180 for 2017 and SEK 150 for 2018.

believe that the members do not have the possibility to negotiate themselves with their managers, and their members want support from compulsory collective agreements that provide guaranteed pay rises for individuals. The striking feature here is that blue-collar agreements in the public sector no longer contain individual guarantees.

### **2.7. The roles of the parties**

Collective agreements play a crucial role as regulatory instruments in the Swedish model. Because most labour laws are semi-discretionary, the social partners have by tradition used collective agreements to create a regulatory framework adapted to the specific needs in different industries.

Naturally, the role of the unions is affected, as wage formation takes place according to models without individually guaranteed pay rises – and with figureless agreements. Many workers perceive membership in unions with collective agreements as a guarantee for getting the pay rises stipulated in the agreements. The role of unions has changed, from representing and negotiating for the individual member to supporting the member when he or she is to conduct salary talks with a manager. New requirements are also placed on employers, their human resources departments and salary-setting managers. In order for figureless agreements to function properly, employers must work actively with wage formation and carefully determine the kinds of work performance that will be rewarded. There are a variety of different control systems in the negotiation procedure, see footnote 30, and the annual review can be an object for negotiation between the employer and the union. Should an employee not receive a pay rise, he or she is entitled to help and support from the employer in order to improve, see footnote 41. In spite of these control systems there is a risk for discrimination and arbitrariness if the figureless agreements are not correctly practiced, containing clear and known wage criteria. In the public sector all wages are public, however, this is not so in the private sector, where the union is only allowed knowledge of its members wages. The unions have an important role in making sure that the wage formation in the figureless agreements is obeyed at a local level, in understanding with the intentions of the collective agreement.

In the latest negotiation processes for public-sector agreements, the unions have made more progress towards individual wage formation than for agreements in the private sector. White-collar workers and academically qualified professionals often have completely figureless agreements and blue-collar workers lack individual guarantees in their agreements. Blue-collar agreements in the private sector often include some scope for local wage formation, in that the share of funds devoted to individual distribution is larger. Blue-collar unions probably continue to be perceived as a guarantee of a pay rise and that minimum wages are kept at a certain level.

## **3. Collaborative economy – a new challenge for the social partners**

### **3.1. The legal scope for collective agreements**

A major challenge for the social partners is the emerging collaborative economy. This refers to a business model where a third actor, in the form of online collaborative, is used to bring together two other actors – a service provider and a service consumer – and enable a transaction between them. This area has quickly become a new phenomenon, with growing numbers of people taking work in this collaborative economy or ‘gig economy’ as it is also called. ‘Gig’ refers to very temporary, individual assignments that a person takes on to perform for others. The term has been borrowed

from the music industry. One example in Sweden is the Uber taxi service.<sup>58</sup> Those who take these 'gigs' are often called crowdworkers. This term refers to the fact that work tasks are offered to a large number of people, or the 'crowd'.<sup>59</sup>

The new phenomenon is challenging the labour market partners in terms of how this kind of work is carried out. Like many other countries, Sweden has an employment law system characterised by a 'binary divide'. The performing party shall be defined either as an employee or self-employed, with different legal consequences, such as someone having permanent employment, the right to sick pay, a period of notice etc. The introduction of a third employment form is not likely to happen in Swedish law.<sup>60</sup>

The margin for action available to the social partners can be related to the definitions of the concepts of employee, self-employed<sup>61</sup> and employer. One problem here is the classical conflict between collective agreements and competition law. The regulation of working conditions and salaries for employees is usually excluded from this field of law. If, on the other hand, there is a question of unlawful coordination, such as price fixing, between firms, an agreement can violate competition law.

If the social partners conclude a collective agreement that directly includes self-employed people with regard to conditions of employment, e.g. minimum salary, this could easily be in conflict with Article 101 of the Treaty on the Functioning of the European Union, TFEU, because the trade union acted as an association for self-employed workers and not as an employees' association.<sup>62</sup> It does not matter how the performing party is categorised in national law; the question is whether this party is to be regarded as an employee according to settled case law in EU law. If it is a question of false self-employment<sup>63</sup>, a collective agreement on minimum pay will not be in conflict with the competition law rules and is not covered by Article 101.1 TFEU. The socio-political aim of improving working and employment conditions through collective agreements between the social partners would be seriously compromised if these agreements were covered by Article 101.1 TFEU. However, the exclusion of self-employed from Article 101 in this case can be justified only when the situation definitely is a case of false self-employment.<sup>64</sup>

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<sup>58</sup> The Uber Pop service has been temporarily withdrawn from the Swedish market in anticipation of clarified regulations for taxi permits.

<sup>59</sup> The terminology of the collaborative economy is new, and is used in different ways depending upon the context.

<sup>60</sup> The matter has been included in earlier legislative processes, and so far no new forms of employment have been added to the concepts of employee and self-employed. See the earlier enquiry in the Government White Paper, *Ny anställningsskyddslag*, (New employment protection law), Statens offentliga utredning SOU 1993:32.

<sup>61</sup> A self-employed person is defined as a performing party who operates in a sole proprietorship or a private, one-person, limited company, see Westregård, Annamaria, 'The Notion of "employee" in Swedish and European Union Law. An Exercise in Harmony or Disharmony?' in *Globalisation, Fragmentation, Labour and Employment Law – A Swedish Perspective*, Laura Carson, Örjan Edström and Birgitta Nyström (eds), Iustus 2016.

<sup>62</sup> Judgment in *FNV Kunsten Informatie en Media*, C-413/13 EU:C:2014:2411 paras 27 and 28.

<sup>63</sup> The term 'false self-employed' refers here to persons operating their own companies, but under existing case law are considered employees.

<sup>64</sup> C413/13 p 42: In the light of those considerations, the answer to the questions referred is that, in a proper construction of EU law, it is only when self-employed service providers who are members of one of the contracting employees' organisations and perform for an employer, under a work or service contract, the same activity as that employer's employed workers, are 'false self-employed', in other words, service providers in a

The determination of whether the crowdworker should be considered an employee, self-employed or false self-employed can have significance in determining the social partners' available scope to regulate salaries and general conditions via collective agreements. The business model for the platform must be reviewed.

### 3.2. The concept of an employee in the collaborative economy

A collaborative platform can be designed in different ways and offer different services. It may be question of professional providers but also of a collaborative platform whose sole function is to connect private persons for the purpose of profit – for example, two persons who share a car journey and split the petrol costs.

In June 2016 the European Commission 2016 released an agenda for the collaborative economy.<sup>65</sup> The Commission provides criteria for determining whether a collaborative platform is a professional service provider or if it serves only as an agent for the activity between two private persons,<sup>66</sup> as well as criteria for determining whether the performing party is an employee or if he or she is self-employed.

To determine whether an employment relationship exists between the platform and the performing party, the Commission applies the definition established by the Court of Justice of the European Union, CJEU, in settled case law: the employment relationship is '*for a certain period of time a person performs a service for and under the direction of another person in return for which he receives remuneration*'.<sup>67</sup> Within Community law it is required that a person performs effective and genuine activities to the exclusion of activities on such a small scale that they are purely marginal and ancillary.<sup>68</sup> He or she must at least perform some economic activity. Part-time work is also covered by the term for this reason. So is a worker employed under an *oproepcontract*.<sup>69</sup> Nevertheless, it should be noted that no unified definition exists in EU law for the concepts of worker and employee.<sup>70</sup>

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situation comparable to that of those workers, that a provision of a collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU. It is for the national court to ascertain whether that is so.

<sup>65</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European agenda for the collaborative economy, Brussels 2 June 2016, COM (2016) 365 final.

<sup>66</sup> COM (2016) 365 p 5 ff. Criteria for determining whether a collaborative platform provides a service include price, other key contractual terms and ownership of key assets. 1) Price: does the platform determine the price or is this only a recommended price? 2) other key contractual terms: does the platform also determine e.g. mandatory instructions for the services? 3) ownership of key assets: Does the platform own the assets used to provide the service? Fulfilment of these criteria indicate that the platform provides the service. In all other cases, the platform serves as a go-between for the service provider and the user, and offers a payment system, insurance and other features.

<sup>67</sup> Judgment in *Lawrie-Blum v Land Baden-Württemberg*, C-66/85 EU:C:1986:284, paras 16–17.

<sup>68</sup> Judgment in *Levin v Staatssecretaris van Justitie*, C-53/81 EU:C:1982:105, para 17 and Judgment in *Raulin v Minister van Onderwijs en Wetenschappen*, C-357/89 EU:C:1992:87 para 10.

<sup>69</sup> Judgment in *Raulin v Minister van Onderwijs en Wetenschappen*, C-357/89 EU:C:1992:87 para 9: '(U)nder Netherlands law an *oproepcontract* is a means of recruiting workers in sectors, such as the hotel trade, where the volume of work is subject to seasonal variations. Under such a contract, no guarantee is given as to the hours to be worked and, often, the person involved works only a very few days per week or hours per day. The employer is liable to pay wages and grant social advantages only in so far as the worker has actually performed work. Furthermore, the Netherlands Government stated at the hearing that under such an *oproepcontract* the employee is not obliged to heed the employer's call for him or her to work.' The phenomenon is similar to the

The structure and functions of the platforms differ, and assessments based on EU law of whether a crowdworker is employed by the platform must be made on a case-by-case basis. The Commission stipulates three criteria: 1) the existence of a subordination link, 2) the nature of work and 3) the presence of remuneration.<sup>71</sup> The criterion of *subordination* requires that the platform leads the crowdworker's work by determining the choice of activity, remuneration and working conditions. The mere transfer of payment does not mean that remuneration is determined by the platform. The criterion *nature of work* requires the existence of an actual business activity with an economic value. In this regard, national law systems differ in applicable principles, but according to the Commission, conditions such as short work duration do not preclude an employment relation. The criterion *remuneration* shall primarily distinguish ordinary work from volunteer work. To determine whether a relationship is one of employment, an assessment shall be carried out using all three criteria.

Each EU Member State determines its own interpretation of the employee concept in national legislation. The concept of employee therefore differs quite often between EU law and national law.<sup>72</sup> For example, the definition of 'employee' as a concept does not look exactly the same across Swedish national law: '*a contract that a performing party shall personally perform work on behalf of another party*'.<sup>73</sup> In Swedish law there are no basic necessary prerequisites that remuneration shall be paid. However, if remuneration is not paid it would indicate that there is no employment contract.<sup>74</sup> Nor is there any specific time factor in Swedish national law which is significant for the assessment of whether or not a contract exists. A contract may exist even for very short periods of work.<sup>75</sup> These differences in the definition of 'worker' in EU law and national law poses a challenge when crowdworkers are to be included in binary national legal systems.

Instead of focusing on the performing party to determined employee or self-employed status, Prassle and Risak have concentrated on identifying the employer.<sup>76</sup> They applied five employer functions

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type of temporary work contracts that exist when an employer calls in people for temporary jobs as work arises. However, this should not be confused with the wage form of hourly employment.

<sup>70</sup> In the Treaty itself there is no definition of what is meant by the term *worker*. The fact is that there is no single definition of worker in Community Law. The definition varies according to the area in which it is to be applied, and even between articles in TFEU. The Court of Justice of the European Union, CJEU, for example, has said that the definition of worker in Article 45 TFEU and regulation No 1612/68 does not necessarily correspond with the definition of the term worker as it is used in Article 48 TFEU and Regulation No 1408/71 (Judgment in *Martínez Sala v Freistaat Bayern*, C-85/96 EU:C:1998:217 para 31). The term worker does not have the same meaning in article 157 FTEU (principle of equal pay) as it has in Article 45 FTEU, freedom of movement for workers (*Judgment in Allonby*, C-256/01 EU:C:2004:18 para 62 ff).

<sup>71</sup> COM (2016) 365 p 12 ff.

<sup>72</sup> See Westregård, Annamaria, 'The Notion of "employee" in Swedish and European Union Law. An Exercise in Harmony or Disharmony?' in *Globalisation, Fragmentation, Labour and Employment Law – A Swedish Perspective*, Laura Carson, Örjan Edström and Birgitta Nyström (eds), Iustus 2016.

<sup>73</sup> Regarding specific Swedish criteria for distinguishing employees from self-employed, see Westregård, Annamaria, 'The Notion of "employee" in Swedish and European Union Law. An Exercise in Harmony or Disharmony?' in *Globalisation, Fragmentation, Labour and Employment Law – A Swedish Perspective*, Laura Carson, Örjan Edström and Birgitta Nyström (eds) Iustus 2016.

<sup>74</sup> Government White Paper, Ds 2002:56 p 111 and note 63 with reference to Adlercreutz, Axel; *Arbetsstagarbegreppet*, Norstedt & söners Förlag, Stockholm 1964, p 276 ff and p 186 in particular.

<sup>75</sup> Sigeman, Tore; *Arbetsrätten – En översikt*, Fifth Edition, Norstedts Juridik 2010 p 30.

<sup>76</sup> Prassle, Jeremias and Martin Risak, 'Uber, TaskRabbit & Co: Platforms by Employers? Rethinking the Legal Analysis of Crowdwork' will be published as part of a forthcoming special issue (edited by Valerio de Stefano) of the *Comparative Labour Law and Policy Journal*.

when they analysed the business models of two platforms, Uber and TaskRabbit.<sup>77</sup> They note that Uber's business model – where the platform carries out all the employer functions – should be considered an employer. However, a far more common business model is that of TaskRabbit, where the platform manifests fragmentation of employer functions; the employer functions are shared by the performing party, the platform and the consumer.

### 3.3. The social partners and crowdworkers

Often it can be difficult to determine whether a crowdworker is employed, self-employed or false self-employed. In the Swedish model, the legislator has applied a broad approach to the problem. To ensure that self-employed do not receive worse conditions compared to employees, collective agreement include self-employed with a significantly similar position as an employee, called dependent contractor.<sup>78</sup> The Swedish competition rules are linked to the Co-determination Act's concept of dependent contractors, and a problem here could be that the Swedish exception appears to be broader than the concept for the false self-employed found in EU Law.<sup>79</sup>

The rules on dependent contractors open up opportunities for the unions to act on behalf of the self-employed. Some unions for white-collar workers and academic professionals have special departments for the self-employed.<sup>80</sup> They offer legal aid, advice and so on, and can also help members make application agreements.<sup>81</sup> Unions also want to attract crowdworkers. In early June 2016, the largest union for white-collar workers in Sweden, the Union, concluded a strategic partnership agreement with Germany's IG Metall regarding online collaborative platforms.<sup>82</sup> The purpose was to allow unions to cooperate and create transparency in work performed in the collaborative economy, cooperation in regulatory and policy matters for work in the field, and to share experiences in union recruitment of crowdworkers.

In its forthcoming report on collaborative platforms, the Union presents a concept based on the social partners' role in the Swedish model. The goal is to secure reasonable wage levels and conditions for the performing party and that in respect of social security matters, competitive neutrality shall apply between platforms and traditional providers.<sup>83</sup>

Private employers have not yet given their point of view. New phenomena such as crowdworkers and platforms will force social partners to take a position on how employer organisations should organise

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<sup>77</sup> Inception and Termination of the Employment Relationship, Receiving Labour and its Fruits, Providing Work and Pay, Managing the Enterprise-Internal Market and Managing the Enterprise-External Market.

<sup>78</sup> Section 1 (2) of the 1976 Co-Determination Act. Such an 'employee-like' contractor is embodied in the terms *dependent contractor* and *dependent worker*. The principal on whose behalf the work is carried out shall be considered as the employer. See Malmberg, Jonas, 'Collective Agreements and Competition Law in Sweden' pp 187–208 in *Collective Agreement and Competition in the EU*, Niklas Bruun and Jari Hellsten (eds), DJOF by the Association of Danish Lawyers and Economists 2001 p 196 and references therein. Källström, Kent, 2002, *Employment Agreements and Contract Work in the Nordic Countries*. Scandinavian Studies in Law vol pp 77–86, p 79.

<sup>79</sup> Section 2 of the 2008 Competition Act.

<sup>80</sup> See <http://www.unionen.se/in-english> and <http://www.unionen.se/medlemskapet/egenforetagare> and, for example, for university-educated union members in the legal sector <http://www.jusek.se/For-dig-som-ar/Egenforetagare/>.

<sup>81</sup> See the Union's report: *Unionen om plattformsekonomin och den svenska partsmodellen* p 55 ff. Forthcoming.

<sup>82</sup> Joint declaration between IG Metall, Germany and Unionen, Sweden, signed 8 June 2016.

<sup>83</sup> The Union's report: *Unionen om plattformsekonomin och den svenska partsmodellen*. Forthcoming.

these forms of work. The crowdworker concept also requires the parties to deal with the matter of the self-employed and decide whether to act beyond the scope of the traditional employer-employee relationship.

The social partners enjoy a strong legal status in Swedish labour law, and this gives them the possibility to act in these new situations. For example, they have the possibility to define the employee concept based on industry practice through collective agreements. This makes it easier to adapt the concept of employment to new forms of work. One example is the journalism field, where the so-called freelance agreement<sup>84</sup> is a collective agreement that simplifies definition by applying customary industry practice. The Labour Court therefore follows this industry practice and does now apply its 'own' definition of the employee.<sup>85</sup>

Of course, the social partners can use this if they wish to establish industry practice for crowdworkers. It is not self-evident that the platforms want crowdworkers to be considered as self-employed. Some platforms determine prices for services and other conditions, sometimes even an algorithm does this job: if it begins to rain in a certain location, taxi services there automatically become more expensive etc. As noted earlier, this approach could result in a conflict with competition law. If one must choose between a conflict with competition law and considering the crowdworker as an employee and regulating the conditions in the collective agreement, the labour-law solution may very well seem preferable. In this case the social partners in Sweden will be responsible for resolving the matter.

#### **4. Conclusion**

The Swedish model for regulation of the labour market is based on the idea that the social partners take significant responsibility. This responsibility also gives the parties the tools needed to address new situations in the labour market.

When faced with the difficult period of the mid-1990s, the parties used the Industrial Agreement to take firm control of wage formation. The initiative came from the unions, which were experiencing the effects of high pay rises – jobs were moving abroad. The normalising influence of the Industrial Agreement has created a downshift in pay rises, while real salary levels have increased as a result of lower inflation. On the one hand, the Industrial Agreement's normalising effect has centralised wage formation – and this does not chime well with employers' long-term goals to achieve local wage formation. On the other hand, the approach has brought about the gradual redesign of salary agreements. Strict tariffs have been abandoned for more decentralised wage formation. This is most evident among white-collar workers and professionals in the public sector; in just a few decades, wage formation has shifted from strict, fixed going-rate agreements, and sometimes as far as figureless agreements without minimum salaries and that are valid until further notice.

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<sup>84</sup> Collective agreement between the Swedish Media Publishers' Association (Svenska Tidningsutgivareföreningen) and the Swedish Journalists' Union for Freelance Work (Svenska Journalistförbundet för frilansarbete), 1994.

<sup>85</sup> Labour Court ruling AD 1987 no. 21, AD 1994 no. 104 and AD 1998 no. 138 and Ds 2002:56 p 121. Here, a performing party is considered to be self-employed, despite the fact that a customary assessment of evidentiary fact would define the performing party as only a principal; under 'normal' circumstances the aspects of regular work under a long period of time, the principal's provision of equipment and tools etc. would define the worker as an employee, Labour Court ruling AD 1994 no. 104.

The broad emergence of figureless agreements in the last year influences wage formation because there are no centrally prescribed wage span reserves 'earmarked' for a particular occupational group. Municipalities offer considerable scope for local wage formation. The private sector has not gone so far. Many blue-collar agreements are approaching the construction of white-collar agreements and contain more features of individual wage formation. In agreements for white-collar workers and academic professionals, figureless approaches are not at all as prevalent as in the public sector. In general, minimum salaries in the blue-collar agreements are more important because many industries stay close to these levels. Minimum salaries, if they are specified, have little significance for white-collar workers and academic professionals in the private sector. Oftentimes in the public sector minimum salaries have been completely removed from agreements.

It must be emphasised that the wage formation model of figureless agreements is based on the parties' mutual trust. If expectations are not fulfilled, the agreements are terminated. Figureless agreements are not just about money. They add value by initiating a conversation between the employee and the manager – a dialogue focused on the employee's individual development. This is important indeed in a constantly changing labour market. One trend in wage formation is that focus has shifted from the collective to the individual; this is particularly visible in the figureless agreement model.

In the early 1990s the phenomenon of temporary agency workers began to appear in the Swedish labour market. In 2000 Almega and all LO organisations concluded a collective agreement for workers. As a result the industry had a collective agreement that covered a new, large market. The interesting aspect here is that the agreement was concluded with all LO organisations; this means that an employee of a temporary work agency can work in the entire LO area without necessitating the application of different agreements. Workers for whom the agency cannot find an assignment received a guaranteed salary. Thus, in contrast with many other countries, Sweden gives temporary agency workers a level of security approaching the security of 'regular' employees.<sup>86</sup> Corresponding full-coverage agreements have also been concluded for white-collar workers.<sup>87</sup> The labour market parties took an active approach to the situation, and in a short time they had included this form of work in the collective-agreement system.

Considering the social partners' good history of handling new labour situations, it is very likely that they can also agree on regulation of the conditions for crowdworkers in the collaborative economy. Still, it is not clear just what these agreements would look like, and as we demonstrated in Section 2.3 the Swedish labour market offers a broad 'smorgasbord' of wageformation constructions from which to choose. The unions have expressed concern that unless some kind of regulation is put in place, the conditions for crowdworkers could become poor, and this can be seen in the wage

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<sup>86</sup> LO's collective agreement on general employment conditions with Almega Temporary Work Agencies.

<sup>87</sup> See the collective agreement of the Union and the Academic Alliance with Almega Temporary Work Agencies on general employment conditions. The Swedish Association of Graduate Engineers is the representative for the Academic Alliance. The Academic Alliance includes a variety of associations for different professional occupational groups, such as university teachers, physiotherapists, scientists, engineers etc: Akademikerförbundet SSR, Civilekonomerna, DIK, Sveriges Arbetsterapeuter, Fysioterapeuterna, Jusek, Naturvetarna, Sveriges Farmaceuter, Sveriges Ingenjörer, Sveriges Psykologförbund, Sveriges Skolledarförbund, Sveriges universitetslärarförbund och Sveriges Veterinärförbund.

formation model that is selected. It is possible that many crowdworkers will not be considered employees but as self-employed, depending on the platform's business model. Managing the employment conditions of the growing numbers of self-employed in the Swedish labour market is a unique challenge, and crowdworkers are no exception. The conflicts with competition law can be difficult to resolve. The solutions were perhaps easier to find for temporary agencies because these employers were already in a traditional employee-employer relationship; it is clear that many collaborative platforms are not in the same position.