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Advice case title: Problem to work in both Sweden and Denmark at the same time

Full official name of the advised entity: Øresunddirekt Sweden/County Administrative Board Skåne

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1. Executive summary of the border hinder

Around 16500 people are cross border workers in the Öresundregion. 90 % of the cross-border workers live in the Sweden and work in Denmark, due to a more prosperous labor market in Denmark.

The encountered border hinder is that the current social security systems in Sweden and Denmark hinders employee's from obtaining a job on the other side of the border.

Overcoming this hinder would amongst other entail a solution for the current unemployment in Sweden, as well as the lack of employees in Denmark.

An employee can solely be socially secured in one country. The social security system in Sweden and Denmark are financed differently. In Sweden, employers who do not have a permanent establishment in Sweden pay 19,8 % or otherwise 31.42% if the company would have a permanent establishment in Sweden. Whereas in Denmark, the employer pays around 1500 – 2000 EUR a year for social contributions. This difference entails that Danish employers do not wish to employ people who are or will become socially secured in Sweden.

In order for Danish employers to assure not to be bound by the Swedish higher social security contributions, Danish employers often hinder employees to either work from home or to have another job in Sweden. This hinders the mobility in the region and results in impeding a solution to the unemployment in Sweden, as well as the lack of labor in Denmark.

2. Legal background

2.1 Main rule

Regulation (EC) 883/2004 coordinates the national security systems within the framework of the free movement of persons within the EU. By this, regulation practically aims to coordinate which Member State's social security should be applicable in different scenarios, as a person can only be encompassed by the social security of one Member State. In accordance with the main rule in the Regulation (EC)

883/2004¹, employees are (1) subject to the social security legislation of the Member State where the employee resides, when pursuing employment in two or more countries, under the circumstance that the employee also pursues a substantial part of the employee's work in that Member State, or if employed by various employers, otherwise (2) employees are bound by the social security system of the country of the employer, if the employee does not carry out a substantial part of the work from the Member State of residence.

Regulation (EC) 987/2009 lays down the procedure for implementing Regulation (EC) 883/2004 on the coordination of social security systems. Article 14(8)² determines that the term "substantial part", in the sense of a "substantial part of his work" amounts to 25% of the employee's working hours during 12 calendar months.

This means that a Danish employer will be forced to pay employer fees in Sweden when an employee living in Sweden also carries out 25% or more of their total working hours in Sweden. The working time is counted in total, irrespective of the number of employers involved.

2.2 Exceptions to the main rule

The main rule describe above has several exceptions, namely (1) Corona and Teleworking, (2) the Öresund Agreement and (3) Social contribution agreements. These will be described in this report.

3. Social contributions in Denmark vs. Sweden

a. Comparison

Denmark

The Danish social contributions are considerably lower than the Swedish. The reason is that the social contributions are funded mainly through taxes. Employees contribute 8% of their monthly salary to social security through AM-taxes, and the employer is liable for paying yearly contributions of

¹ Regulation (EC) No 883/2004, Article 13 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02004R0883-20140101&from=EN>

² Regulation (EC) No 987/2009, Article 14(8) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R0987&from=EN>

approximately 7 975 to 16 356 DKK. The yearly social contributions consist of amongst other the following numbers:

- a) ATP (Danish Labour Market Supplementary Pension Scheme): 2 272 DKK /annually
- b) AUB (Employers' Reimbursement System): 2 700 DKK / annually
- c) AES (Labour Market Insurance): 283 – 6 239 DKK / annually
- d) AFU (Securing Payment for Foreign Workers in Denmark): 8 DKK / annually
- e) FIB (financing of ATP contribution for those without job): 546 DKK / annually
- f) Barselsfond (Parental leave fund): 950 DKK
- g) Arbejdsskadeforsikring (occupational injury insurance): 1 176 DKK (clerk) to 24 441 DKK (fishermen open sea)

Sweden

In Sweden, the social contributions, referred to as "employer fee's", amount to 31,42%³ of the salary if the company has a permanent establishment in Sweden, and 19,8% if the company does not have a permanent establishment in Sweden. The total 31,42% of Swedish employer fee's must be paid in conjunction with each employees' monthly salaries and consist of the following figures:

- a) Fee for retirement pension (in Swedish: "Ålderspensionsavgift") (10.21%)
- b) Fee for survivor's pension (in Swedish: "Efterlevandepensionsavgift") (0.6%)
- c) Fee for health insurance (in Swedish: "Sjukförsäkringsavgift") (3.55%)
- d) Fee for parental insurance (in Swedish: "Föräldraförsäkringsavgift") (2.60%)
- e) Fee for occupational injury (in Swedish: "Arbetskadavgift") (0.2%)
- f) Fee for labour charge (in Swedish: "Arbetsmarknadsavgift") (2.64%), and
- g) Fee for payroll tax (in Swedish: "Allmän löneavgift") (11.62%)

In case the employer fee's is not paid correctly and on time, the Swedish Tax Agency will require retrospective taxation.

Counting in on the average salary in Sweden for 2021, amounting to 37 100 SEK⁴, the employer would have to pay 11 656 SEK on top of the salary every month as social contributions. This means that the actual costs for the employer of having the employee in Sweden are 48 757 SEK each month.

³ The figure for 2023 comes from the Swedish Tax Agency:

<https://www.skatteverket.se/foretag/arbetsgivare/arbetsgivaravgifterochskatteavdrag/arbetsgivaravgifter.4.233f91f71260075abe8800020817.html>

⁴ The Swedish Statistics Authority's number for 2021 average salary: <https://www.scb.se/hitta-statistik/sverige-i-siffror/utbildning-jobb-och-pengar/medelloner-i-sverige/>

Conclusion

The figures demonstrate that the sum of the social contributions are significantly higher in Sweden than in Denmark. The difference between the social contributions in Sweden and Denmark, and the liability of a Danish employer to pay Swedish social contributions for an employee, has naturally been considered a border hinder and has been reported as such repeatedly.⁵

4. Foreign company's payment of employer fee's and "permanent establishment" in Sweden

Foreign employers who do not have a *permanent establishment* (in Swedish: "fast driftställe") in Sweden can pay lower amount of employer fee's. The fee for payroll tax (11.62%) in point g) above does not have to be paid. The employer fee's for a company without a permanent establishment in Sweden is thus 19.8% instead of 31.42%.

A permanent establishment is considered to exist if the company carries out business activities from a permanent place in the country. An activity is generally considered to be permanent if it is carried out for more than six months. Apart from this, a permanent establishment is also deemed to exist if any of the following are fulfilled:

- If the company has a branch ("filial")
- If the company has a deputy representative in the country. A deputy representative is a worker who holds a warrant who gives the right to enter into a contract on behalf of the company
- If a worker carries out work from home, if the worker on a regular basis works from home
- If the company has a consultant in Sweden
- If the company has a "place" in Sweden, such as: an office, a factory, a mine etc.
- If the company carries out any type of its essential business from a permanent place in Sweden, such as: management of business, sales, research.

⁵The Nordic Ministry made a report on border hinders in 2012 and included this aspect: [FULLTEXT01.pdf \(diva-portal.org\)](#); The Nordic Ministry has thereafter published articles regarding this border hinder: [Skillnader i nivåer på ländernas arbetsgivaravgifter | Nordiskt samarbete \(norden.org\)](#)

If any of the above are fulfilled, then the full 31.42% employer fee's must be paid, instead of solely 19.8%.

Conclusion

Despite not having a permanent establishment, the social contributions in Sweden are considerably higher than in Denmark.

A Danish employer could from the above note that an employee who works from home on a regular basis, and has the rights to enter into contracts, could lead to the company having a permanent establishment in Sweden, and would have to pay the social contributions amounting to 31.42%.

5. Exceptions to the main rule

a. The Öresund Agreement

In the border region of Öresund, the Öresund Agreement⁶ dictates an exception for employees with only one employer and where the employee is allowed to work from their country of residency up to 50%, without having the social security moved to the country of residency. Swedish citizens are hence eligible for an exception of being able work from home up to 50%, instead of only 25% which the EU Regulation mandates, conditioning that they only work for one employer.

The exception must be applied for at the national social security agency of the country where the employee wishes to belong to. In order to be eligible for the exception, the employee must solely for one employee in one country, and work from the country of residency due to carrying out work from home, or those who carry out work in their country of residency due to fiduciary assignments.

It is essential to note that this is a solution in cases where the employee only has one employer. It is thus not an option for employees wishing to work on both sides of the border for different employers.

⁶ Annex 4 to the Swedish Act: Lag (1996:1512) om dubbelbeskattningsavtal mellan de nordiska länderna: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-19961512-om-dubbelbeskattningsavtal-mellan_sfs-1996-1512

b. Registered social contribution agreement

Danish employers that do not have a *permanent establishment* in Sweden, and opt for employing employees in Sweden, are able to enter into a social security agreement with the employee, where the employee agrees to pay its own social security contributions and report salary.⁷ In case the employee fails to pay in accordance with the rules, the employer will be liable for paying the required amount to the Swedish taxation agency, despite the entered agreement.

An agreement of social security must be registered with the Swedish Tax Agency within two weeks from the date the agreement was entered into. The employee must be registered at the Tax Agency to be able to pay the social contributions and submit the required declarations. The foreign employer must also be registered and provide information for accounting of the transactions, since the foreign employer would be responsible to pay in case the Swedish worker fails to do so.

c. COVID-19 and Teleworking exceptions

COVID-19

During the spread of COVID-19, the Administrative Commission for the Coordination of Social Security Systems agreed on provisions for solutions to the application of the Regulations. The solutions were presented in a Guidance Note on COVID-19⁸, which gave support employees working from their residence while being in a different member state than where the worker usually work.

With the recommended guidelines, an employee could remain insured in their typical workplace state while working in their home member state. One of the reasons was closed borders but also respect to the distance measures applied in the member states. The regulations were limited to citizens whose

⁷ Swedish Act: Skatteförordning (2011:1244) chapter 5 article 5, https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/skatteforordning-20111244_sfs-2011-1244

⁸ [COVID-19 guidance note.pdf](#)

pattern only changed transitorily and the measures applied automatically without administrative procedures in the transition.

The Guidance Note on COVID-19 was valid from 1 February 2020 to 30 June 2022.

Teleworking

Due to the Guidance Note on COVID-19, telework increased considerably. For this reason, a new Guidance Note on Telework was adopted which is applicable since 1 July 2022, for a more flexible interpretation on the Regulations in respect to the applicable social security for cross border workers.⁹ The Guidance Note on Teleworking is to be applied during a 12 months period, until 30 June 2023. The Guidance Note on Teleworking entails that cross-border telework, when an employee under agreement with its employer performs work for its employer from home, which is in a cross-border nation, where the employers normal work is carried out, using the same technology, for the same clients, should remain socially secured in the country of workplace.

Legally, the agreement between the employer and the employee falls under Article 16 of Regulation (EC) No 883/2004, creating an exception to the main rule in Article 13.

The flexibility the Guidance Note on Teleworking entails that workers may freely, when agreed with the employer, chose to work from home, when the work if for the same employer and the same tasks are carried out. The exception would cover up to 100% of their work time, and not only 50% which the Öresund Agreement permits, or 25% which the main rule from Regulation (EC) 883/2004 allows. This is a flexible solution of cross-border hinder for employees that only have one employer, however, those with several employers are not granted the same flexibility nor solution.

6. Legality of prohibition to work from Sweden in Danish employment clauses

a. Danish legality of clause

Danish employment agreements occasionally include that employees who would bind the employers to pay Swedish social contributions, either for having other employments or for working from home, are

⁹ [125-22REV3en.pdf](#)

liable to pay their own social contributions requested by Sweden. In regards of Danish law, there are currently no prominent labor law obstacles for this type of agreements between an employee and employer.

b. Swedish legality of clause

A social contribution clause in an employment agreement in Sweden is only permitted when (1) the employer does not have a permanent establishment in the country, (2) the agreement has been registered at the Swedish Tax Agency and (3) the employee has been registered for payroll at the Swedish Tax Agency, (4) and the company also has been registered for payroll, as they would be liable to pay the social contributions in case the employee fails to.¹⁰ If the company has a permanent establishment, they are regarded as a Swedish employer and thus is not permitted to make this type of agreement, as Swedish labor law prohibits social contributions clauses since a Swedish employer holds the duty of paying employer fee's.

c. Which country's law is applicable?

In a cross-border situation, the employment contract is governed by the law of the country where the employee habitually carries out the work.¹¹

It is the overall circumstances that are taken into consideration, and if the facts are that the employee carries out the majority of the work from the country of residency, the employment contract must be governed by the law of the country of residence. However, if it cannot be determined where the employee performs the majority of the work, the law of the country where the employer has the place of business will govern the contract.

The parties may choose which law that shall be applicable, but if the choice would deprive the employee of protection that the primary would have provided, the agreement will not be recognized regarding these rights. The agreement will still be valid, with the exceptions of when the clauses that deprive the employee of more favorable rights.

¹⁰ Information from the Swedish Tax Agency: <https://www4.skatteverket.se/rattsligvagledning/1353.html>

¹¹ Regulation EC No 593/2008 (Rome I) article 8 - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0593&from=EN>

Conclusions

- An employee who resides in Sweden while performing most of their work in Denmark can have a clause mandating self-payment of social contributions in the employment agreement.
- A Danish company that obtains permanent establishment due to the employee's work carried out in Sweden, could not enforce a social contribution clause on an employee.
- An employee working more than 50% in Sweden will be protected by the Swedish labor law, annulling this type of clause.

7. Summary of obstacles

From the context given in this report, we note the following obstacles for Swedish workers being or wishing to be employed in Denmark:

a. One employer in Denmark and living in Sweden

The current exception in the Guidance Note on Telework permits employees only having one employer to carry out all their work from the country of residence, having agreed on telework with the employer, without affecting the social security, meaning that the social security will be bound to the country of the employer.

If the Guidance Note on Telework is not extended after 30 June 2023, employees with only one employer, can through the Öresund Agreement apply for an exception, meaning that they can work from home 50% without affecting the social security, entailing that the social security will be bound to the country of the employer.

Without the two mentioned exceptions above, the main rule of maximum 25% of work from the Member State of residency for the social security not to be transferred to the country of residence, would apply.

b. Several employers in Denmark/Sweden and living in Sweden

When having several employers, the two exceptions, namely (1) Öresund Agreement and (2) the Guidance Note Teleworking, are not applicable. The main rule is instead applicable, entailing that the employee is subject to the social security legislation of the Member State where the employee resides, if a substantial (25%) part of the work is carried out from the Member State of residence. The result is hence:

- If more than 75% of the total working hours are carried out in Denmark, social contributions are to be paid to Denmark.
- If less than 75% of the total working hours are carried out in Denmark, social contributions are to be paid to Sweden.

c. Forcing the social security burden on the employee through a Danish employment contract

This scenario is only possible if the required registrations are made at the Swedish Tax Agency, no permanent establishment exists in Sweden, and the employee does not carry out more than 50% of the work from Sweden making Swedish labor law applicable.

8. Description of possible solutions

a. One employer in Denmark and living in Sweden

A permanent interpretation in accordance with the Guidance Note on Telework, would be foreseeable for both the employer and the employee. The temporary exception in the Guidance Note of Telework, that replaced the exception in the Guidance Note of COVID-19, has been of great advantages for the border of Öresund's employers and employees. By making the exception permanent, the majority of the 18,200 commuters from Sweden will have an optimal solution. This exception would be in line with the adaptation that has occurred after COVID-19, where employees perform that exact same work from home, avoiding possibly several hours per day in commute.

The proposed solution of making the current temporary exceptions permanent could also be reached by inserting the exception in a new bilateral agreement between Sweden and Denmark, thus an updated version to the current Öresund Agreement.

b. Several employers in Denmark/Sweden and living in Sweden

The most challenging cross-border hinder affects the employees living in Sweden that have, or wish to have several employers. Swedish residents who have their main job in Sweden, and could have a part time job in Denmark, currently facing lack of work force, would face a cross-border hinder when the Danish employee would be forced to pay social security contributions in Sweden. Either because the Danish employer would choose not to employ part time workers from Sweden, or otherwise because they would try to have the employee pay the social contribution fees in Sweden.

Hence, the employer in Denmark has an interest in controlling the employee's other engagements since these can have a direct impact on the employer's fee. This may lead to employers enforcing agreements that binds the employee to not take on work from Swedish employers and once again, avoid employing Swedish residents.

Danish employers are faced with either paying the higher rates to the Swedish state, enforcing agreements that limit the working time the employee can work on the other side of the border, or simply prefer not to employ Swedish commuters.

A solution to this problem has been detailed considered, in all aspects from permitting the employer to solely pay social contributions in the country where they are seated, allowing the employee to chose the country of social security, opting for an exception in the application of the 25% in the regulation. It has also been considered whether changing the definition of "substantial part" in article 14(8), reg. 987/2009. However, none of these would practically and bureaucratically be optimal solutions.

The optimal solution would be to insert an exception to either the current Öresund Agreement, or as a Guide Note to According to Regulation No. 883/2004, for cases where an employee holds several jobs on each side of the border, to permit the employer to pay its own national level of social contributions, but to the Member State of residence of the employee.

The presented solution would entail that:

- Employees residing in Sweden would still be social secured in their country of residence (Sweden), in cases where 25% or more of the work is carried out in Sweden
- Danish employers, would not be discouraged from employing Swedish employees that seek part time jobs due to the high Swedish social contributions

- The lack of labor force in Denmark would have a boost from Swedish employees
- Denmark would however not obtain the social contributions from these employees, but it should be kept in mind that these numbers are marginal in Denmark, and further so when it comes to part time employee working less than 75% in Denmark.
- The Swedish state unemployment rate, of those not having full time jobs, would decrease
- Sweden would still obtain social contribution on behalf of the employees having part time jobs in Denmark, even if at a lower level.
- The lower level paid of social contributions could fractionally be allocated to the regular payment contributions in Sweden presented under section 3 above

c. Forcing the social security burden on the employee through a Danish employment contract

It creates a border-hinder when employees are put a burden on by employers, in the sense of an employment contract clause forcing the employee to possibly pay social contribution fees. Swedish labor law would not permit such a clause. In order to make the border coherent and facilitate the free movement of workers, it should not be permitted for Danish employers to enforce employment contract clauses that put the burden of payment of Swedish social contributions fees on the employee.

Such a prohibition could either be done in a mutual bilateral agreement, for instance updating the Öresund Agreement with such a prohibition, by prohibiting social security clauses under Danish law, either by a Guidance Note or Directive from EU level, stating that imposing the social security burden on an employee in cases of cross-border, constitute a hinder to the free movement of workers, and by such are prohibited.

9. List of legal provisions

- a. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1-123
- b. Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 ing down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009, p. 1-42.
- c. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6-16.

- d. Annex 4 to the Swedish Act: Lag (1996:1512) om dubbelbeskattningsavtal mellan de nordiska länderna:
 - a. https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-19961512-om-dubbelbeskattningsavtal-mellan_sfs-1996-1512
 - b. [English: Law \(1996:1512\) on double taxation between the Nordic countries](#)

- e. Swedish Act: Skatteförfarandelag (2011:1244) chapter 5 article 5,
https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/skatteforfarandelag-20111244_sfs-2011-1244
 - a. English: Law (2011:1244) on Tax Procedure

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