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Advice case title: Third country citizens excluded from the labour market in the region of Öresund

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

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1. Executive summary

Third country citizens living in an EU/EEA country cannot automatically work in another EU/EEA country even if they have permanent residence permit. Many countries permit third country citizens living in a neighboring country to carry out work after 5 years, if they have a "long term residence ship". This is not the case in Denmark, since Denmark has opted for an exemption of applying the EU Directive regulating this matter. If a third country citizen fulfills certain difficult criteria's they could obtain a work permit in Denmark under Danish national laws.

Around 16 500 people are cross border workers in the Oresundregion. 90 % of the cross-border workers live in the Sweden and work in Denmark, due to a more prosperous labor market in Denmark. However, third country citizens are excluded from this opportunity. The south of Sweden, bordering to Denmark, has a high amount of third country citizens.

In Denmark there is a large demand for labor and it is expected to consistently grow. The current forecasts of the Danish demand of workers by 2030 is as high as 50,000 employees, while already in 2022, 4 out of 10 Danish companies saw the labor shortage as the largest barrier for growth, according to a survey conducted by the confederation of Danish Industry. At the same time there is a high unemployment rate in Sweden and a high amount of third country citizens in comparison with the neighboring countries.

This scenario demonstrates that there would be a profit for both Denmark, Sweden as well as the affected individuals, to increase the flow of workers, by solving the border hinders.

2. Description of the obstacle with indication of the legal/administrative provisions causing the obstacle

The legal obstacle concerns non-EU citizens in the border region of Oresund. A non-EU citizen, with a Swedish work- and residence permit, is not permitted to work in Denmark. At the same time, a Danish work- and residence permit could be withdrawn, if a non-EU citizen that has been granted it works in Sweden. The background for this border hinder lays in Denmark holding a restrictive approach, which includes not adopting EU Directives in the migration area and by setting high requirements in national

law. The following section will describe the applicable EU Directive and thereafter the Danish national requirements.

a. EU Directive

The EU Council directive 2003/109/EG (hereafter “the Directive”) concerns the free movement third-country nationals who are long term residents within EU.¹ The European Council, through the Directive², has established that the legal status of third-country nationals should be approximated to that of Member States' nationals and that a person who has resided legally in a Member State for a period of time and who holds a long-term residence permit should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union. Furthermore, the directive determines the rights and the areas where third-country nationals enjoy equal treatment with EU citizens. The directive also defines the conditions that apply for third-country nationals that wish to move to another EU country.

In summary, the aim of the directive is to set out terms and conditions for granting — and withdrawing — long-term residence status to non-European Union citizens (third-country nationals) living legally in a nation within the European Union (EU) for at least 5 years.

According to the main rule,³ a third-country national who has had a permanent residence permit in Sweden for five years can be granted permanent resident status and can with this status, under certain conditions, move and take up work in another EU country.

The main principle of the Directive is established in Article 14 and states that a long-term resident shall acquire the right to reside in the territory of Member States other than the one which granted him or her the long-term residence status, for a period exceeding three months, provided that the conditions set out in this chapter are met. This means that a third country national that has the right to reside and work in for instance Sweden, should also have the right to live in Denmark. Noticeably, the countries can set out requirements for the persons concerned to provide the criterion set out in Article 15.2, such as stable and regular resources which are sufficient to maintain themselves and the members of their families.⁴ Long-term residents may move to live, work or study in another EU country for more than 3

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0109&from=sv>

² Preamble (2)

³ Article 14

⁴ Article 14 and 15

months, provided they satisfy certain conditions. They may also be accompanied by their family members (see Chapter III, Article 14, 15 and 16).

This is for instance the current state in Sweden where persons who have lived in an EU country for at least five years with a residence permit may apply for long-term resident status in that country. Persons who are granted long-term resident status receive a special EC/EU residence permit. This gives them certain rights, similar to those of an EU citizen. This makes it easier for them to move to another EU country in order to work, study, start their own business or live on their pension, for example.⁵

The preambles no. 25 and no. 26 explicitly stipulate that three Member States, namely Denmark and Ireland (before Brexit the United Kingdom as well) have not participated in the adoption of the Directive and are not bound by the Directive or are subject to its application. Thus, Denmark does not take part in the adoption of the Directive and is hence not bound by it or its application.⁶ The result of this is that non-EU citizens are not entitled to and cannot enjoy the uniform rights provided in the Directive. Denmark has also opted to not take part in other Directives in the area of immigration, such as 2003/86/EF⁷ on the right to family reunification.

Instead, Denmark has a different set of national requirements for non-EU citizens to be able to work within the state.

b. Danish national requirements

Denmark has a national set of rules that apply for granting work permits to non-EU citizens. Apart from the main regulation, (i) the Danish Aliens Consolidation Act (Udlændingeloven), there is a particular exception in the (ii) Law of amendment of the Danish Aliens Consolidation Act and the withholding of Tax Act. These two will be presented below.

i. Danish Aliens Consolidation Act

The Danish system⁸ has three main tracks for third countries citizens to be granted working permits in the country, namely;

⁵ The Swedish Migration Agency, [Swedish residence permits for long-term residents of another EU country - Migrationsverket](#), 16 February 2023 and, the Swedish Aliens Act (2005:716) , § 1 Chapter 5a

⁶ Preamble (26)

⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0086&from=DA>, preamble (18)

⁸ See § 9a in the Danish Aliens Act "Udlændingeloven" which you can find in the following link: [Udlændingeloven \(dansklove.dk\)](#)

- (1) a minimum salary-payment scheme (called: “Pay Limit Scheme”)
- (2) that the employment is in line with an establishment list of requirements in Denmark (called the Positive lists)
- (3) The person must have been offered a job in Denmark by a company certified by SIRI (so called “Fast-track scheme”)

Please see a more detailed description of each below:

- (1) A minimum salary-payment scheme

The minimum salary-payment scheme is a requirement on a minimum wage, that for 2023 is set to DKK 465 000. The amount includes salary in form of liquid assets, fixed supplements, and bonuses but also payments to labor market pension schemes and paid holiday allowance.⁹ However, there is a strong indication that the minimum salary-payment scheme is to be lowered and set to 375 000 DKK.¹⁰

- (2) The employment is in line with an establishment list of requirements in Denmark (called the Positive lists)

The Positive List¹¹ consists of two subgroups - higher education and/or skilled work. Both serve the purpose of directing labor immigration to professions experiencing a shortage of qualified professionals. The lists are updated twice a year and are provided by the Danish Agency for Labor Market and Recruitment. The process of obtaining a permit can take up to four months as of today, normal processing time should be one month according to the Danish Agency for International Recruitment and Integration (SIRI). As of 2022, less than 50 non-EU nationals have been granted work permit through the skilled work group, ever since it was introduced in 2020. Up until 30 November 2022, a total of 363 employees had been granted permit through the positive lists during the year. As described above the positive list is to be broader and include more professions from 1 April 2023.

⁹ Information taken from [New to Denmark \(nyidanmark.dk\)](https://nyidanmark.dk) which is the Danish Immigration Service and the Danish Agency for International Recruitment and Integration’s official web portal about the rules for entering and residing in Denmark. Information taken on 16 February 2023.

¹⁰ Please see [Regeringen ingår en bred överenskommelse om internationell rekrytering \(fm.dk\)](https://www.regeringen.dk/nyheder/2022/12/16/regeringen-inger-en-bred-overenskomst-om-international-rekruttering)

¹¹ Information taken from authorized web portal [New to Denmark \(nyidanmark.dk\)](https://nyidanmark.dk) on 16 February 2023.

- (3) The person must have been offered a job in Denmark by a company certified by SIRI (so called “Fast track”)

To be granted a work permit through what is called the fast track scheme¹², the person must have been offered a job in Denmark by a company certified by SIRI. As of today, 734 companies¹³ have obtained the certification. An employer qualifies for admittance even if it qualifies the following conditions: the salary and terms of employment within the company must in general correspond to Danish standards, the company must be of certain size (there must be at least 20 full-time employees (and from 1 April 2023 – 10 full-time employees) employed), the company must participate in an online guidance meeting, within the past year from the time of the certification the company must not have been convicted under the Danish Aliens Act more than twice or must not have been subject to a fine under the Danish Aliens Act of at least 60 000 DKK, and the company cannot have any legal labor dispute and also no issue with the Danish Working Environment Authority.¹⁴ In 2022, 7,338 employees were granted permits through the fast track scheme until 30th of November.

The employment must also meet one of four criteria, where most of the permits have been given out because the employment has been checked for the criteria regarding a minimum salary at 465 00 DKK (which will most likely be lowered).

The Danish Parliament has set forth a new legislation regarding the option to obtain residence and work permits under the Danish Aliens Act. The regulation has not yet been adopted but is expected to be adopted on 23 March 2023 and enter into force on 1 April 2023.

The new rules include lowering the amount required for the Pay Limit Scheme, allowing companies with at least ten full-time employees to apply for a Fast-track certification, expanding the list of professions on the Positive List and the rules for establishing a company in Denmark. As it has not formally been adopted for the time being, these will not be discussed in further detail.

¹² Information taken from [New to Denmark \(nyidanmark.dk\)](https://nyidanmark.dk) on 16 February 2023.

¹³ Statistic from Danish authority, see [New to Denmark \(nyidanmark.dk\)](https://nyidanmark.dk) on 16 February 2023.

¹⁴ [New to Denmark \(nyidanmark.dk\)](https://nyidanmark.dk)

ii. **Law of amendment of the Danish Aliens Consolidation Act and the withholding of Tax Act, the the so called “ESS Scheme”**

As mentioned above, there is an exception to the main rule, where Denmark permits non-EU citizens that have employment or participate in PhD studies at the ESS (“European Spallation Source”) in Lund in Sweden, to obtain a Danish residence permit.¹⁵ This exception permits non-EU citizens to work in Sweden but live in Denmark, which otherwise would not be permitted. The conditions that must be met in order to enjoy the exception are the following:

1. Association with the ESS research facility, either through employment or PhD studies
2. You must uphold a Swedish work permit and
3. You must also meet the conditions for a Danish resident permit.

In order to be granted a residence permit, it is a condition that your PhD studies or employment would have been sufficient grounds for obtaining a residence permit in Denmark, if ESS was located in Denmark. Meaning, it is either through the Pay Limit Scheme, the Positive List as described above, as a paid researcher or as a PhD student. For PhD studies, the duration of the residence permit will correlate to the duration of the PhD studies plus six months granted for a job seeking period.

Furthermore, a residence permit in Denmark based on the ESS Scheme permits the non-EU citizen that applies for the exception, to bring its family to Denmark, including the partner as well as children under the age of 19 living at home.

3. Summary of obstacle

In short, the obstacle can be concluded in that Denmark opted to not take part in the adoption of the EU directive 2003/109/EG¹⁶, which the EU countries that took part in it had to incorporate prior to 23 January 2006. Hence, Denmark has not incorporated it to national law, and the applicable Danish

¹⁵ [New to Denmark \(nyidanmark.dk\)](http://nyidanmark.dk) and Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC) which can be found here [EUR-Lex - 32009R0723 - EN - EUR-Lex \(europa.eu\)](http://eur-lex.europa.eu/eur-lex.do?uri=CELEX:32009R0723:EN).

¹⁶ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents which you will find it in the following link [EUR-Lex - 32003L0109 - EN - EUR-Lex \(europa.eu\)](http://eur-lex.europa.eu/eur-lex.do?uri=CELEX:32003L0109:EN).

national laws do not provide the same treatment to non-EU citizens, as otherwise should be provided through the Directive, in particular when it comes to recognizing work permits.

The obstacle can be summarized in that Denmark does not recognize non-EU citizens work permission that has been granted in Sweden, or in any other EU country. This creates a particular border hinder in the Oresund Region, since the Swedish side faces unemployment and a high rate of non-EU citizens, and the Danish side is instead lacking work force.

4. Description of possible solution(s)

The solution to the presented border hinder is simple to conclude: if Denmark accepts work permits of non-EU citizens in the area of Oresund, the border hinder is solved. The next step would be to ascertain through which means Denmark can proceed to accept to recognize non-EU citizens work permit in Sweden. Different options to reach the solution are presented below.

a. Bilateral agreement for the Oresund Region

Due to the special relation between Sweden and Denmark, they have in certain mutual areas adopted bilateral agreements, in order to provide Danish and Swedish citizens particular benefits or facilitations, for working and living on opposite sides of the border. Such an agreement was concluded in 2003 for the taxation area in the “Oresund Agreement”.¹⁷

One solution could be to extend the existing Oresund Agreement to encompass further areas, such as immigration, which is the current one, or by making a completely new bilateral agreement that encompasses this area, and in particular should regulate that if a non-EU citizen has been granted residential permit in Denmark or Sweden, then a mutual recognition of the permission, together with granting of labor permit should follow.

This solution would solve the hinder in the Oresund Region, and at the same time, Denmark would not be liable for making the same exception for the other nations within the European Union.

¹⁷ Appendix in the law (1996:1512) of double taxation within the Scandinavian countries, Swedish: bilaga 4 till [lagen \(1996:1512\) om dubbelbeskattningsavtal mellan de nordiska länderna](#).

b. EU measures

Needless to state, that if Denmark would opt in for the Directive, and by such would have to accept non-EU citizens work permissions within the European Union, the hinder would be solved. This would however require a political change in Denmark, which is not foreseeable for the time being.

EU has stronger tools to enforce the provision the object of the Directive through other means, such as through a Regulation. EU Regulations apply automatically, uniformly and are applicable in all EU countries. Directives on the other hand, lay down certain results that must be achieved but each Member State is free to decide how to transpose directives into national laws.

It is stated in the Treaty on the Functioning of the European Union (TFEU)¹⁸ that the Member States should have uniform legislation on the area of freedom (Title V, Chapter 2) and free movement of workers (Title IV, Chapter 1). Thus, the aim of the Union is to have unified understand and regulations regarding movement and workers. In general, the law of the European Union is valid in all Member States, apart from specific scenarios where countries negotiated to opt out, like Denmark in the discussed matter. If the free movement of workers within the EU encompasses non-EU citizens, and as such is a matter that can be regulated through a Regulation, countries could not have the option to opt out from the application. Although this becomes a highly political matter, it could be a solution to analyze whether a Regulation on the area, without possibility of opting out, could be a solution. This would however be an invasive option, for which reason the presented solutions under a, c or d in this chapter would probably be practically preferred to reach a solution.

c. Inspiration from Swedish case law

In accordance with case law from the Swedish Supreme Migration Court, a time limited residence and work permit can be granted to a non-EU citizen living in Denmark, with the intention to continue living in Denmark, but commuting for work in Sweden.¹⁹ The Swedish adaptation of case law to the situation, sets precedence for the future, where the precedence must be applied.

¹⁸ Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01, see [EUR-Lex - 12012E/TXT - EN - EUR-Lex \(europa.eu\)](#)

¹⁹ Mig 2020:17

Using the decision as inspiration for adapting national laws in Sweden and Denmark, or for the Danish court to, by analogy, refer to the Swedish case, would also be a possible solution. It could be adopted as work permit for commuters within the region of Oresund.

d. Changes in Danish law

The main source of the problem is that Danish law hinders the granting of work permits for non-EU citizens, when such would have been provided for instance under the EU Directive. However, it would not be a hinder for the region if Danish law had a rule for the Oresund border – just like Denmark has opted for a special exception for the employees or PhD students at EES.

Such a particular rule for the Oresund Region would be a solution and could be implanted for instance through:

- a special exception for the region of Oresund (like EES), where non-EU citizens with work- and residence permits on either side of the border, are recognized on the opposite side.
- Denmark extending the Positive List and in it include that a Swedish work- and residence permit as a legitimate ground for granting work permission in Denmark.

5. List of legal provisions

- a. Treaty (on European Union and the Treaty on the Functioning of the European Union 2012/C326/01.
- b. Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure (ERIC).
- c. Council Directive (EC) No 2003/109 of 15 November 2003 concerning the status of third-country nationals who are long-term residents.
- d. Annex 4 to the Swedish Act: Lag (1996:1512) om dubbelbeskattningsavtal mellan de nordiska länderna:
Annex 4 to the Swedish Act (1996:1512 of 25 November 1996): on double taxation agreements between the Nordic countries, published on the Government Office's legal databases
 - 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: Utlänningslagen (2005:716 of 29 September 2005) chapter 5a § 1, published on the Government Office's legal databases
 - a. https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/utlanningslag-2005716_sfs-2005-716
 - b. English: Aliens Act (2005:716)
<https://www.government.se/government-policy/migration-and-asylum/aliens-act/>
- f. Danish Act: Udlændingeloven (LBK nr 1022 of 2 October 2019), published on the Government Office's legal database
 - a. [Udlændingeloven \(retsinformation.dk\)](https://retsinformation.dk/da/lovgivning/Udlændingeloven/2019-10-02/LBK1022.html)
 - b. English: Aliens Act

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