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Advice case title: Harmonized cross border taxation in Greater Copenhagen

Full official name of the advised entity: Greater Copenhagen

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1. Executive summary

The opening of the Øresund-bridge created completely new possibilities for integrating the labour markets of Eastern Denmark and Southern Sweden. Companies on both sides of Øresund had access to labour from a much larger geographical area. In the period after the opening of the bridge, labour market integration in the region increased and in 2008 around 19.800 people commuted over the bridge daily. Since then, this number has stagnated, despite the fact the populations of Malmö and Copenhagen have increased. One of the challenges that could explain this negative trend in daily commutes is the taxation issues that affect Swedes and Danes, who work and live on different sides of the bridge. From a company-perspective, differing taxation systems and complicated rules in both countries make it a hassle for businesses to recruit on the other side of Øresund, which might also explain why daily commutes have stagnated.

Since 2003, taxation matters regarding work commutes between Denmark and Sweden were coordinated and regulated via the Oresund Agreement, which has contributed largely to the integration and flexible labour marked within the Greater Copenhagen area. However, both Confederation of Danish Industry, South Swedish Chamber of Industry and Commerce and Greater Copenhagen agree that the agreement does not reflect the current situation and problems of today. The reality is that the border between Denmark and Sweden has been closed numerous times, for example during the covid-19 pandemic and as such WFH options have become more and more widespread in many workplaces. The digitalisation of working life has created a need for more flexible regulations and working conditions, which the Oresund Agreement is not able to facilitate. An example of one of these challenges is the rule regarding the numbers of days a worker is required to be physically present at the workplace to avoid double taxation. In some cases, work commuters have experienced an increase of nearly 30 per cent in marginal tax as a consequence of involuntary absence from work and thus a mismatch of working hours during the pandemic. This shows that the rules ought to be adapted to the current dynamics of the labour market, WFH/WFA-forms, which are becoming increasingly prevalent in Denmark and Sweden.

Furthermore, the integration of the labour market in Eastern Denmark and Southern Sweden will also require a harmonisation of rules regarding pension systems, taxation times, reporting obligations etc., and workers should not be subject to rules from both countries, as this leads to unnecessary administrative costs and increases the risk of double taxation, which further dissuades Swedes and Danes to work on the other side of Øresund.

The Danish ministry of Finance also forecasts that there will be demand for 40,000 workers in the private sector within the green transition alone by 2030 (and many in the public sector too). The Danish government's analysis states that the natural increase in workforce can´t solve the problem. The forecast of demand is expected to be as high as 50,000 workers by 2030 considering that the current unemployment rate in Copenhagen is already as low as around 3 percent. The shortage is expected to steadily increase in the coming years. A Green Danish Thinktank, Concito, recently calculated that the demand for workers in the green transition will be between 30,000-50,000 by 2030. A survey conducted by the confederation of Danish Industry from January 2022 also stated, that 4 out of 10 Danish companies saw the labour shortage as the biggest barrier for growth in 2022. Many of the green competencies need in Denmark cannot be found nationally and educating Danish nationals with the correct competencies is not always possible and if it is, can take many years to gather the necessary skills, within for example wind power, solar power, energy efficiency of buildings etc. Therefore, these competences need to be imported, although as long as bureaucratic and complicated taxation regulations continue to make this difficult, Denmark and potentially Sweden will be unable to attract the necessary talent.

The four main obstacles within the taxation area, which are deemed unattractive for the needed labour, and which this report exclusively include, are:

a. The three-month reporting system for personal taxation of cross-border individuals who partially work from home.[1] The system entails that an employee can first after three months calculate whether three months have been worked from the country of residence or country where the employer is located.

b. From 1 January 2021, non-Swedish employers without a permanent establishment in Sweden must deduct preliminary tax from compensation for work carried out in Sweden.[2] This entails that Danish companies with employees living in Sweden, who occasionally work from Sweden, must deduct preliminary tax from work carried out in Sweden.

c. The bilateral Oresund Agreement provides recognition by the country of the employer of pension scheme payments made in the country of residence.[3] The opposite is not taken into account, namely recognition by the country of residence for pension scheme payments made in the country of the employer. There is thus a recognition for the employee's pension contribution as long as the employee is solely taxed in the country of the employer, where the

[1] Article 1 of the "Oresund Agreement" – Annex 4 to the Act (1996:1512) concerning double taxation in the Nordic countries: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-19961512-om-dubbelbeskattningsavtal-mellan_sfs-1996-1512 and the Danish corresponding Act BKI no. 36 of 28/10/2004: https://www.retsinformation.dk/eli/ltc/2004/36

[2] Chapter 10 § 6 of the Swedish Tax Procedural Act (2011:1244): https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/skatteforfarandelag-20111244_sfs-2011-1244#K10.

[3] Article 2 of the "Oresund Agreement" – Annex 4 to the Act (1996:1512) concerning double taxation in the Nordic countries: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-19961512-om-dubbelbeskattningsavtal-mellan_sfs-1996-1512.

recognition is made. However, if the employee for a period of time is taxed in the country of residence, there is a risk of double taxation.

d. The bilateral Oresund Agreement covers solely privately employed cross-border commuters, and not public sector cross-border commuters.[4]

The parties have agreed to initiate discussion regarding change of the current agreement or consider new terms within the Oresund Agreement in the event that obstacles would occur.[5]

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

The four mentioned obstacles described above (1 a – d) will be each discussed below (2 a – d):

a. The three-month reporting system for personal taxation of cross-border individuals who partially work from home

Cross-border individuals, who live in either Sweden or Denmark, and work in the opposite country, pay as a main rule, their income tax to the country of the employer, without risking being faced with double taxation. This entails that a Swedish resident who carries out the work in Denmark, pays their income taxation in Denmark.

In accordance with the Oresund Agreement, that covers employees within the private sector, the main rule described above of paying income taxation in the country of the employer, is valid as long as the employee works from the country of the employer at least 50% of the time within a three-month period.[6]

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[4] Article 1 of the ”Oresund Agreement” referring to Article 15 of the main act (1996:1512) – Annex 4 to the Act (1996:1512) concerning double taxation in the Nordic countries: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-19961512-om-dubbelbeskattningsavtal-mellan_sfs-1996-1512.
[5] Article 7 of the ”Oresund Agreement” – Annex 4 to the Act (1996:1512) concerning double taxation in the Nordic countries: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-19961512-om-dubbelbeskattningsavtal-mellan_sfs-1996-1512
[6] Article 1 of the ”Oresund Agreement” – Annex 4 to the Act (1996:1512) concerning double taxation in the Nordic countries: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-19961512-om-dubbelbeskattningsavtal-mellan_sfs-1996-1512.

The counting of the three-month period is ongoing and at all times, entailing a three-month period from 5 January – 5 March, but also simultaneously 10 January – 10 March, making the counting of the days worked from the country of residence challenging. The three-month period is also counted with the previous and upcoming three-month periods, entailing that to be certain of the days 10 January – 10 March, the three following months must also be taken into account. This means that for finalizing a year and determine the month of December, the following three months must be considered. In addition, any days of holiday or of sickness are counted as workdays from the country of the employer.

If the number of days worked from the country of the employer are more than 50%, then the entire period is income taxed in the country of the employer. However, if less than 50% of the workdays are carried out in the country of the employer, the income taxation for the days worked in the country of residence must be paid to the country of residence.

The system entails that an employee can first after three months calculate whether three months have been worked from the country of residence or country where the employer is located. Employees that have been working from home, for instance due to local restrictions made by authorities, have had to count each and every workday from the previous taxation year, in order to calculate whether the correct country taxed the individual workdays. The employee can first thereafter know the applied local taxation rate.

This creates uncertainty for cross-border individuals. It is hard to foresee which country should tax the income, and if the incorrect country taxed the income, there is a possibility that the individual is liable for paying a large sum of tax to the other country.

Due to the unforeseeable personal income taxation, the percentage level of taxation individuals are taxed, the difficult bureaucratic manner in counting the worked days – this is a major cross-border hinder, making job seeking in the opposite country unattractive.

b. *Since 1 January 2021, non-Swedish employers without a permanent establishment in Sweden must deduct preliminary tax from compensation for work carried out in Sweden.*

This entails that Danish companies without permanent establishment in Sweden and with employees living in Sweden, or employees that occasionally work from home Sweden, must register as employers at the Swedish Tax Agency and deduct 30% as preliminary tax from work carried out in Sweden.[7]

The law applies in case there is no individual taxational decision for the employee that determines a specific different outcome.

The law does not take into consideration the Oresund Agreement, that permits employees working in Denmark but living in Sweden, to be income taxed in Denmark, if they work less than 50% from home during a three-month period. However, if a Swedish resident employed in Denmark has worked from home less than 50%, and who in accordance with the Oresund Agreement are solely taxable in Denmark, a personal application of exemption can be made with the Swedish Tax Agency.

The result is that Danish companies employing Swedish employees:

- Must forbid the employee to occasionally work from home, or
- In case the employee occasionally works from home:
    - the company must register as an employer at the Swedish Tax Agency, and each month calculate the amount of days worked from home, and deduct 30% as preliminary tax from these days.
    - the employee can apply for tax exemption (jämkning), in case less than 50% of the work is carried out in Sweden, under which condition the employer does not need to deduct preliminary taxation to the Swedish tax agency.[8]
    - In case the employee does not apply for exemption, even if the possibility for granting the exemption would exist, the Danish employer would not be able to use the exemption and would have to deduct 30% of preliminary taxation to the Swedish Tax Agency on a monthly basis.
- In case the employer is a part of the public sector, the exemption within the Oresund Agreement is not applicable, and hence will have to deduct income taxation to the Swedish tax Agency and register as an employer in Sweden in case there would be any occasional day worked from home in Sweden by the employee.

[7] Chapter 10 § 6 of the Swedish Tax Procedural Act (2011:1244): https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/skatteforfarandelag-20111244_sfs-2011-1244#K10.

[8] Swedish Tax Agency, Information for non-Swedish enterprises: https://skatteverket.se/servicelankar/otherlanguages/inenglishengelska/businessesandemployers/newtaxregulationsfrom2021regardingworkinsweden/informationfornonswedishenterprises.4.5b35a6251761e69142034e8.html

Furthermore, there is an incoherence between the required reporting which should take place on a monthly basis, for Danish companies liable for deducting income preliminary taxation in Sweden, since in accordance with the Oresund Agreement, the employee's assessment of income taxation is made on a three-month basis, as described above.

Additionally, the Danish taxation Agency will require that the Danish employer withholds preliminary taxation in Denmark, whereas Sweden at the same time, could require to deduct the preliminary taxation in Sweden.

Prior to the new article requiring Danish employers to register as employers in Sweden and deduct preliminary taxation in Sweden, the entire deduction was made in Denmark. The following year, when the tax declaration was made for the previous year, when it was clear where the employee should be taxed for every three-months period, the Danish Taxational Agency would, if necessary, transfer the deducted income taxation from Denmark to Sweden, in line with the Trekk agreement[9].

The above described is a bureaucratic process that creates a border hinder between Sweden and Denmark, by Danish employers not wanting to employ Swedish employees, as they could risk having to register as employers in Sweden and deducting income taxation in Sweden. The Swedish income taxation system is not aligned with the Danish taxational system, for instance in relation to deadlines, tax levels etc. The Danish company forced to handle the unfamiliar Swedish system would face a complicated regulatory burden. Needless to say, a Danish employer would rather opt for a Danish employee, than risking having to face the burden of the Swedish taxation system.

c. *Recognition of pension schemes*

The Oresund Agreement sets that pension scheme payments are deductible or should not be reported as a benefit in Sweden or in Denmark, despite what the Danish or Swedish law otherwise might entail.[10] The referred payments cover both those made by the employer, and those made by the employee. The

[9] Annex to the Act (1997:1157) on assistance in tax matters betweend the Nordic countries: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-19971157-om-handrackning-i_sfs-1997-1157.

[10] Article 2 of the "Oresund Agreement" – Annex 4 to the Act (1996:1512) concerning double taxation in the Nordic countries: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-19961512-om-dubbelbeskattningsavtal-mellan_sfs-1996-1512.

cross-border worker can choose to contribute to either a Danish or a Swedish pension scheme. Once the pension payments are being paid out, the taxation follows regular local Swedish or Danish law. The definition of pension payment scheme is also defined in each national law.

In order for the recognition to apply, the cross-border worker must fulfil the requirement of earning at least 75% of the total income in the country of the employer. This entails that if the employee does not fulfil the 75% during a period of time, both the payment to the pension scheme and the pay-out to the employee will be taxed, and as such double taxed.

The Oresund Agreement also cover when a Danish person moves to Sweden, and continuous to make payments to the same Danish pension scheme. In order for this exception to apply, the pension contributions must be made prior to moving to Sweden.

The Administrative Court of Linköping recently rendered a decision regarding a Danish citizen that moved to Sweden, who continued to pay to the Danish pension scheme that her employer previously paid for her, but now she paid directly as she started her own business.[11] The individual this matter regarded, moved from Denmark to Sweden in 2009, and at the same time she left her job in Denmark, and started to work as a consultant in Denmark from her own company, but still living in Sweden. At the time she moved to Sweden, she opted for a Danish insurance coverage similar to the one she had while she was employed. At the time of retirement, the Swedish Tax Agency did not deem the payments to be covered by the Oresund Agreement, due to the fact that the pension was made when she lived in Sweden, and not before she moved.[12]

d. The bilateral Oresund Agreement covers solely privately employed cross-border commuters, and not public sector cross-border commuters.

The Oresund Agreement does not cover public sector cross-border workers.[13] The Oresund Agreement, which as such is an annex to the main Act (1996:1512) concerning double taxation in the Nordic

[11] Administrative Court of Linköping, Case no. 4269-22.

[12] Chapter 58 § 5 of the Swedish Act of Income taxation: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/inkomstskattelag-19991229_sfs-1999-1229#K58.

[13] Article 1 of the "Oresund Agreement" referring to Article 15 of the main act (1996:1512) – Annex 4 to the Act (1996:1512) concerning double taxation in the Nordic countries: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-19961512-om-dubbelbeskattningsavtal-mellan_sfs-1996-1512.

countries, refers back to article 15 in the main act, where it is stipulated that it concerns work in the private sector.

For public sector employees, this entails that the individual working days must be taxed in the country where the public employed employee was physically located during the specific working day, without taking into consideration a three-month period.

In accordance with the Swedish law from January 2021 (b above), employers within the Danish sector must register at the Swedish Tax Agency as employers and must deduct 30% income taxation for Swedish employees.

3. Description of possible solution(s)

The four mentioned obstacles described above in 1 a – d and thereafter correspondingly in 2 a – d, will in the same chronological order be handled below in respect to a solution for each hinder.

a. The three-month reporting system

In the description above of the three-month reporting system, it hopefully became clear that having a three-month counting system for knowing if 50% of the time was spent in the country of the employer, and in which country the income taxed, which can only be known three-months thereafter, is unforeseeable for employees and companies, resulting in a border hinder.

The advised entity has researched this matter and their recommended solution would be to have a full-year accounting period, following the annual taxational year.

The presented solution has been legally scrutinized. The essentiality is to count whether an employee has been in the country of the employer 50% of the time. For the employee and for the company, it would increase the foreseeability to follow the taxational year, and from that year count many of all the work days have been spent working from the country of residence or from the country of the employer.

b. non-Swedish employers without a permanent establishment in Sweden deduction of preliminary tax

As described above, Danish companies without permanent establishment in Sweden, with Swedish employees who occasionally work from home, must register as employers at the Swedish Tax Agency, and deduct preliminary taxation for the work carried out in Sweden. Danish employers who choose to employ cross-border workers from Sweden face an unreasonable administrative burden with end results that are hard to predict for the individual employer.

The advised entity has presented as a solution that preliminary taxation should be deducted in the country of the employer.

The proposed solution entails adapting the reporting system that has been known to employers previous to 2021, namely to follow the Nordic Trekk Agreement. This would entail that the employer deducts income taxation in their country, and the following year, when declaring the taxes and the overview of the full year is observable in order to count any given three-month period, if any days should be transferred to the country of residence, then the deducted taxes are transferred between the two countries taxational authorities.[14] The administrative burden lays on the experts at the national taxation agencies, and not on the individual employers.

The new law from 2021 entailed that the well-functioning Trekk Agreement was set aside. In order for it to be put prior the Swedish local taxational implementation from 2021, it could be solved either through adapting the law from 2021, giving advantage to the Trekk Agreement between Sweden and Denmark, or otherwise through a new adaptation of the Oresund Agreement, where the use of the taxational implementation from 2021 is exempted between Sweden and Denmark.

c. Recognition of pension schemes

When the Oresund Agreement covers the Danish-Swedish payments to pension schemes, the cross-border workers can choose pension scheme freely without risking double taxation.

[14] Article 1 of the "TREKK Treaty" – Annex 2 to the Regulation (1997:1157) on administrative assistance in tax matters among the Nordic countries: [Förordning (1997:1157) om handräckning i skatteärenden mellan de nordiska länderna Svensk författningssamling 1997:1997:1157 - Riksdagen]

The requirement for the employee to work a least 75% of the time in the country of the employer hinders the application in many relevant cases that have developed after the agreement came into force. This includes employees working from home, which after the covid-19 pandemic have revealed to be a lasting trend.

The suggested solution by the advised entity is to include bilateral recognition of pension schemes, without consideration of the 75% threshold, not only for the schemes made in the country of residence, but for those in the country of the employer as well. This solution also demands an obligation for the country which handles the pension, to tax the payments within the schemes, to avoid cases where the income avoid taxation completely.

Excluding the 75% measurement for pension schemes would result in more flexibility for employees in the area, make tax payments more predictable for the individuals and support the intended removal of border obstacles of the Oresund Agreement.

d. Non coverage of public sector cross-border commuters in the Oresund Agreement

The Oresund Agreement has its main purpose to remove hinders within the taxational areas, such as income taxation, pension payment, ability to work from home etc., for cross-border commuters between Sweden and Denmark. As presented above, the ease from the Oresund Agreement does not apply for workers within the public sector.

The presented solution from the advised entity is that the public sector cross-border commuters should be encompassed by the Oresund Agreement.

In order to include the public sector cross-border commuters, the Oresund Agreement, being Annex 4 to the Act (1996:1512) concerning double taxation in the Nordic Countries, should not referrer back to the main Act's article, which limits its scope to workers in the private sector, and instead define that the Oresund Agreement covers workers in both the private and public sector.

4. A full list of all legal provisions relevant to the case with the correct citation both in original language and in English

a. <u>Sweden</u>:

Bilaga 4, Lag (1996:1512) om dubbelbeskattningsavtal mellan de nordiska länderna, 25.11.1996.

Annex 4, the Act (1996:1512) on double taxation agreements between the Nordic countries, 25.11.1996.

Denmark:

Aftale mellem Kongeriget Danmark og Kongeriget Sverige om visse skattespørgsmål, BKI nr 36 af 28.10.2004.

Agreement between the Kingdom of Denmark and the Kingdom of Sweden on certain tax matters, BKI no. 36 of 28.10.2004.

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
c. https://www.retsinformation.dk/eli/ltc/2004/36

b. Sweden:

Skatteförfarandelag (2011:1244), 01.12.2011.

Tax Procedures Act (2011:1244), 01.12.2011.

https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/skatteforfarandelag-20111244_sfs-2011-1244#K10.

c. Sweden:

Bilaga 1, Förordning (1997:1157) om handräckning i skatteärenden mellan de nordiska länderna, 04.12.1997.

Annex 1, Act (1997:1157) on assistance in tax matters between the Nordic countries, 04.12.1997.

https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-19971157-om-handrackning-i_sfs-1997-1157.

d. Sweden:

"TREKK Treaty" – Bilaga 2, Förordning (1997:1157) om handräckning i skatteärenden mellan de nordiska länderna, 04.12.1997.

"TREKK Treaty" – Annex 2 Act (1997:1157) on assistance in tax matters between the Nordic countries, 04.12.1997.

Förordning (1997:1157) om handräckning i skatteärenden mellan de nordiska länderna Svensk författningssamling 1997:1997:1157 - Riksdagen

Copenhagen, 5 May 2023

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