

Cross-border working and living in a free movement of workers perspective

**Report from the Regional seminar on free movement rights – Sweden and Denmark
Copenhagen, 31 May 2012**

The objective of the seminar – organized by the Network on Free Movement of Workers within the European Union – was to discuss and analyze cross-border working and living between Denmark and Sweden in a free movement of workers perspective. The seminar attracted great interest from representatives of State agencies, local authorities as well as researchers and organizations involved in co-operation activities between the Nordic countries in particular concerning labour market issues.

The starting points were EU Regulation 492/2011 on freedom of movement for workers within the EU (former Regulation 1612/68) and Directive 2004/38 on the right of EU citizens and their family members to move and reside freely within the EU. Special attention was paid to the important rights attached to European citizenship based on Article 21 of the Treaty on the Functioning of the European Union (TFEU). Further, Regulations 1408/71 and 883/04 concerning the coordination of social security systems as well as national tax laws were matters important to consider at the seminar.

The opening speech was held by Mr. *Jackie Morin*, Head of Unit, Free movement of workers and coordination of social security schemes, DG Employment, Social Affairs and Inclusion, European Commission. He pointed at the fact that the international financial crisis had implications on the EU Member States in terms of growth and unemployment. Focus is now on the reestablishment of the conditions of growth and employment, which means the pursuit of structural reforms of the labour market and the fiscal and budgetary consolidation. In the Employment package adopted 21 March, the Commission has presented the potential benefits from a better functioning of the labour market at the EU level.

The problematic of frontier work is central in Europe; there are more than one million frontier workers in the EU today, facing all the possible difficulties the EU migrant workers could face. Furthermore, discrimination on the grounds of nationality takes place and it is therefore difficult for workers to exercise their rights in practice. In this regard, particularly workers from the new Member States Romania and Bulgaria moving to other Member States searching for jobs were mentioned by Mr. Morin.

In the following, the seminar dealt with four topics relevant for cross-border workers. After the first topic presenting a more general perspective on the free movement of workers and EU citizenship, the legal situation and actual problems concerning the free movement of workers in relation to each of the following topics were introduced by a Danish *and* a Swedish national expert, focusing on the law and co-ordination problems and practice on the matter from the perspective of both Member States.

- **Free movement, EU citizenship and border regions**

The development of EU law and the free movement of workers was presented by Professor *Elsbeth Guild*, Radboud University Nijmegen. She discussed the right to free movement and the transitional arrangements previously made for workers from the new Member States and in particular experiences from Austria, Germany and the UK were focused upon. Regarding job-seekers two types of problems were observed: (1) correct transposition in law, but imperfect implementation in practice, and (2) inadequate transposition. In addition, various obstacles to cross-border free movement were identified in the context of border controls, social security and welfare benefits, taxation, and formalities on residence right beyond 3 and 6 months.

She also informed about the development in CJEU case law and in particular she discussed the conclusions to be drawn from Case C-34/09 *Zambrano* where the Court dealt with a refusal to grant a right of residence to a third-country national with dependent minor children holding EU citizenship as nationals of the Member State where those children were residing, and also a refusal to grant such a person a work permit.

Further, she discussed Case C-256/11 *Dereci*; EU law and the Union citizenship should not prevent a Member State from refusing a third-country national to reside on its territory, where this person wishes to reside with a member of his family who is an EU citizen, provided that the refusal of residence does not mean a denial of the rights connected to the Union citizenship of that family member.

- **Social security and social welfare aspects on free movement in a border region**

In her presentation Professor *Ann Numhauser-Henning*, Lund University, discussed the access to social rights and benefits for EU citizens and their families working in one of the Member States and living in another Member State (i.e. here Sweden and Denmark). Residence criteria for the access to social benefits were considered to be problematic. Further, there are problems concerning the co-ordination of social benefits, for instance if a person is part-time employed and part-time unemployed in a cross-border situation. This also means that several authorities are involved which creates further problems.

Professor *Kirsten Ketscher*, University of Copenhagen, made a difference between a "European model" and the "Danish model" for financing social security. In the first model social benefits are financed in connection with the employers, while in the Danish model financing is based on general taxation. She claimed that Danish benefits must be "translated into EU format" in order to avoid popular resistance against financing social security benefits to citizens from other Member States. Further, she drew conclusions from CJEU case law on the European citizenship, for example from C-138/02 *Collins*.

- **Labour law aspects of free movement in a border region**

Professor *Birgitta Nyström*, Lund University, pointed at similarities and differences between the Swedish and the Danish labour market rules. Both Member States are characterized as part of

the Nordic model for industrial relations, which means that, by example, collective agreements are important for the regulation of working life. Disregarding that, she stressed, there are important differences. For instance, the employment security in Sweden is basically regulated by law, while it in Denmark is regulated by collective agreements. However, the largest problems are the lack in knowledge on these differences and how to co-ordinate in practice.

Attorney *Michael Møller Nielsen*, Bech-Bruun Law Firm, Copenhagen, presented the legal regime governing cross-border labour relations, focusing in particular on the fundamental nature of the rights laid down in the TFEU and the EU Charter and developed in the CJEU case law. He further identified various issues that potentially prevent cross-border movement, based on practitioner's reflections from a Danish perspective. Here he mentioned such issues as voting rights, taxation of increased value of real estate, bank practices and costs, differences in maternity leave, and issues concerning office in the employee's home.

- **Taxation issues and free movement in a border region**

The Principal rule – tax in the country of work – was mentioned as fundamental by Tax Information Officer *Jenny Persson*, Swedish Tax Agency. She also discussed the tax reduction on 25 percent for workers from other states in accordance with SINK. Further, she presented different types of cross-border work arrangements leading to consequences concerning cross-border work between Sweden and Denmark.

Senior Consultant *Erik Jørgensen*, Danish Ministry of Taxation, claimed that in a broader perspective there are few frontier barriers of any real significance left between Denmark and Sweden regarding taxation. He meant that before there were great problems when working both in Sweden and Denmark, but EU law has now resolved these difficulties. However, these amendments have led to new imbalances and incentives to tax driven (negative) behaviour. Disregarding this, the DK-SE Øresund Tax Agreement provides a flexible solution for the average cross-border worker.

The discussion on these topics was followed by a *panel discussion* on the topics presented by previous speakers, i.a. focusing on the requisite relationship to EU law, and the impact of new interpretation practices from the EU Court of Justice. In the panel Special Consultant *Sultana Baig*, Danish Ministry of Justice, commented on the specific issues of residence right that arise in a border region; she identified three types of movement of EU citizens and third-country nationals and discussed the various legal problems arising from primary movement of EU citizens, return movement for the purpose of family reunification, and the posting of third-country nationals providing services in another Member State. In addition, she pointed at the current legal issues pertaining to the distinction between cross-border movement and purely internal situations.

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