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The Öresund: Mobility and Administrative Cooperation in a Nordic Cross-Border Region

Henrik Wenander¹

1 Introduction: History and Legal Context

The Öresund² – the strait between eastern Denmark and southwestern Sweden – is an ancient focal point for trade, conflict, and cooperation in Northern Europe. The control of the strait has been of utmost strategic importance in Northern Europe over the centuries, involving several wars between Denmark and Sweden. During the 19th and 20th centuries, a decidedly more peaceful relationship developed between the two states. The Öresund Bridge was finished in 2000, joining the Danish capital Copenhagen and Malmö, the third biggest city in Sweden.³ This connection spurred ambitions to develop the area into a cross-border region, taking advantage of the possibilities of mobility and contacts between the countries. For example, the number of commuters who travel daily between the countries, mostly from Sweden to Denmark, rose to around approximately 19 000 daily commuters in 2008, with number then diminishing to 14 000 in 2015 (the latest year of confirmed statistics).⁴

This chapter outlines the legal structures and challenges for the ambitions to establish and develop a cross-border region with free movement, given the developments during the two decades since the bridge was built. Especially, it highlights both the measures to eliminate obstacles to free movement (so-called border barriers) by administrative cooperation and the

¹ Henrik Wenander is Professor of Public Law at Lund University, Sweden. This work was supported by The Swedish Foundation for Humanities and Social Sciences (Riksbankens Jubileumsfond) within the project *The Constitutional Role of Public Administration in the Nordic Countries: Democracy, Rule of Law and Effectiveness under European Influence* under grant number P18-0532:1.

² In Danish *Øresund*, in Swedish *Öresund*.

³ The Öresund connection – apart from the bridge also consisting of a tunnel and an artificial island – is operated by a consortium organised under private law. The bridge was funded by loans on the financial markets, which are being repaid with the revenues coming from the fees that are paid for crossing the bridge, see ‘About Øresundsbro Konsortiet’ <www.oresundsbron.com/en/info/company> accessed 16 August 2021.

⁴ Statistics are found at the site of the Interreg funded statistics cooperation Örestat <www.orestat.se>. Owing to difficulties in the cross-border exchange of data between Denmark and Sweden, there are no statistics for the number of commuters after 2015, Örestat, ‘Problem med datautbytet vilket påverkar pendlings- och inkomsttabeller’ (4 April 2019) <www.orestat.se/sv/nyheter/problem-med-datautbytet-vilket-paverkar-pendlings-och-inkomsttabeller> accessed 8 June 2021; see also Jesper Falkheimer and Nils Gustafsson, ‘Greater Copenhagen och Mindre Öresund?’ in Ulrika Andersson (ed), *Slutna rum och öppna landskap* (SOM Institute, University of Gothenburg 2017).

challenges brought about by external factors in recent years such as the migration crisis in 2015, criminality, and the COVID-19 pandemic. A special question for this contribution is to what extent the Öresund Region may function as a model to other European cross-border regions.

The legal structures for cross-border cooperation are linked to the historical preconditions as well as the structures for public law in the two countries. Therefore, this contribution first (Section 2) provides a brief historical background on the development of the relations between Denmark and Sweden in the wider Nordic context. This is followed by an overview of the communalities and differences concerning the public law structures in the countries (Section 3). Thereafter, the article highlights the more formal, legal cooperation structures of importance the region (Section 4). These include the EU level, Nordic cooperation, and bilateral forms of cooperation. The measures to combat border barriers in the region are discussed (Section 5) followed by an account of new barriers created by the last few years' societal crises – migration, crime, and the COVID-19 pandemic (Section 6). In Section 7, some concluding remarks are made.

2 History: From Conflict to Cooperation

Although this chapter focuses on the developments in the region since 2000, a brief background of the longer historical perspective might be useful. As indicated above, the relation between Denmark and Sweden was for a long time one of constant conflict, culminating in the wars of the 17th century. Then, both states aspired to be a Great Power in the Baltic Sea area. Eventually, Sweden occupied the Danish province of Scania (Skåne) on the eastern side of the Öresund, making it the border waterway between the two countries, with the island of Zealand with Copenhagen on its western side.

Gradually, the relations between the countries developed more peacefully. The era of nationalism of the 19th century, saw an increased interest in cooperation and cultural exchange between Denmark, Sweden and Norway. Although this ideology of 'Scandinavism' never led to the establishment of a political union between the countries, it still formed a basis for cooperation within various fields, including law.⁵ Today, Denmark and Sweden form part of

⁵ Johan Strang, 'Introduction', in Johan Strang (ed), *Nordic Cooperation. A European region in transition* (Routledge 2016) 4 ff.

the Nordic region, together with Finland, Iceland, and Norway. The five Nordic countries are linked by history, language and cultural similarities. From a linguistic point of view, Danish and Swedish are closely related and regarded as mutually intelligible.⁶

In the 20th century, especially after World War II, ideas of Nordic unity – now including also the independent states of Finland and Iceland – developed into a more structured cooperation, basing on mutual trust between the countries and legal systems. Already in 1958, Denmark and Sweden (together with Finland and Norway and later also Iceland) established the Nordic Passport Union, which meant that the citizens of these countries could travel freely without passport controls, around 30 years before the Schengen Agreement.⁷ This is a clear expression of the spirit of cooperation and the high degree of trust between the countries, which has been a central feature of the Nordic cooperation.⁸ In today's context, this mutual trust is a precondition for the Öresund Region to work.

This cooperation included legislative cooperation on private international law and rules on cross-border mobility, which still are important (see Section 4.2). In 1973, following the United Kingdom, Denmark joined what is now the European Union (EU). This meant that the Nordic cooperation gradually lost importance. This tendency was reinforced in the 1990s. Then, EU membership was in the focus of discussion in Sweden and the other non-EU Nordic states.⁹

The 2010s saw a slightly increase in interest in Nordic cooperation in public debate. In 2010, Gunnar Wetterberg, a well-known historian and public figure in Sweden proposed that the Nordic countries should form a federation.¹⁰ Although this idea was not really taken seriously at the political level, it spurred some debate within the institutions in the formal Nordic cooperation (see Section 4.2). The Nordic Governments later adopted a 'Nordic Vision', including the goal that the Nordic countries shall be the most integrated region of the world

⁶ Cf Lars-Olof Delsing and Katarina Lundin Åkesson, *Håller språket ihop i Norden?: En forskningsrapport om ungdomars förståelse av danska, svenska och norska* (Nordic Council of Ministers 2005).

⁷ *Överenskommelse mellan Sverige, Danmark, Finland, och Norge om upphävande av passkontrollen vid de internordiska gränserna* (Copenhagen 12 July 1957); Iain Cameron, 'Nordic Cooperation' *Max Planck Encyclopedia of Public International Law* (September 2009) <opil.oup.com> accessed 8 June 2021, paras 3 and 17.

⁸ Henrik Wenander, 'Recognition of Foreign Administrative Decisions', (2011) 71 *ZaöRV* 755, 783.

⁹ Cameron (n 7) para 25.

¹⁰ Gunnar Wetterberg, *The United Nordic Federation* (Nordic Council of Ministers 2010).

by 2030.¹¹ This is of course an ambitious goal. As is elaborated below, the developments have shown that there are serious challenges involved in achieving this goal in the Öresund Region.

3 Public Law Framework in Denmark and Sweden

In traditional comparative law categorisations, Denmark and Sweden are described as being part of a Nordic legal family. This group is closely related to the continental legal traditions, but shows a number of characteristics that distinguish the Nordic legal systems from their continental counterparts.¹² These characteristics include a practically oriented view of law, with a limited role for formalism and abstract theoretical concepts ('Scandinavian pragmatism'), and a trust in and respect for the democratically legitimate parliamentary legislator. No Nordic country has a constitutional court.¹³ Instead, the constitutional structures focus on the thorough drafting of legislation in order to achieve reasonable legislation that protects individual rights. In both Swedish and Danish Law, Europeanisation has meant that the traditional constitutional focus on the legislator has to some extent shifted, giving the courts a more important position in defining rights according to European principles.¹⁴

The focus on the role of the parliament is linked to the view of the effect of obligations under public international law. In both Danish and Swedish constitutional law, a dualist approach applies, meaning that international treaties need to be implemented into national legislation to be applicable in courts and administrative agencies.¹⁵ Both legal systems are seemingly firmly rooted in the idea that administrative authorities only apply the state's own administrative law

¹¹ The Nordic Prime Ministers and Ministers for Co-operation, 'Our Vision 2030' (*Nordic Co-operation* 20 August 2019) <www.norden.org/en/declaration/our-vision-2030>, accessed 17 June 2021; *The Nordic Region – towards being the most sustainable and integrated region in the world Action Plan for 2021 to 2024* (Nordic Council of Ministers 2020).

¹² Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 273; Michael Bogdan, *Concise Introduction to Comparative Law* (Europa Law Publishing 2013) 76; Jaakko Husa, *A New Introduction to Comparative Law* (Hart 2015) 228.

¹³ Pia Letto-Vanamo and Ditlev Tamm, 'Nordic Legal Mind' in Pia Letto-Vanamo, Ditlev Tamm, and Bent Ole Gram Mortensen (eds), *Nordic Law in European Context* (Springer 2019) 12 f; Helle Krunke and Björg Thorarensen, 'Introduction' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions. A Comparative and Contextual Study* (Hart 2018) 7; Helle Krunke and Björg Thorarensen, 'Concluding Thoughts' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions. A Comparative and Contextual Study* (Hart 2018) 213.

¹⁴ Henrik Wenander, 'Europeanisation of the Proportionality Principle in Denmark, Finland and Sweden' (2020) 13 *REALaw* 133.

¹⁵ Tuomas Ojanen, 'Human Rights in Nordic Constitutions' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions. A Comparative and Contextual Study* (Hart 2018) 151 ff.

(‘lex fori’).¹⁶ A further common feature is the combination of a centralised state with local government in the form of regions and municipalities acting somewhat independently from the state and providing public services within the national legal framework.¹⁷

Beside these clear similarities of the Danish and Swedish legal systems on a general level, there are also important differences in the field of Public Law, relating to both the constitutional structure and the administrative organisation. The constitutional framework differs between the two countries owing to the historical development. The Danish Constitution bases on a traditional Western European separation of powers between the Parliament, the Executive (Government), and the Judiciary.¹⁸ The state administration is as a rule organised within the ministerial hierarchies, headed by the relevant minister. As in many constitutional systems, a principle of ministerial rule applies, with the minister being able to intervene in individual matters and, correspondingly, being accountable for decisions within the administration.¹⁹ Contrastingly, the Swedish constitution theoretically bases on a principle of undivided popular sovereignty.²⁰ The constitutional function of governing the realm is allocated to the Government, whereas courts and administrative authorities are responsible for the administration of justice and public administration. Following legal developments that can be traced to the 17th and 18th centuries, the Swedish administrative agencies are organised separately from the Government. Importantly, in a similar fashion as the courts, the administrative agencies shall act independently in particular cases when applying Acts of Law (parliamentary legislation) or exercising public power vis-à-vis an individual or a local authority.²¹

¹⁶ Henrik Wenander, ‘A Tool-box for Administrative Law Cooperation beyond the State’ in Anna-Sara Lind and Jane Reichel (eds), *Administrative law beyond the state – Nordic Perspectives* (Nijhoff/Liber 2013) 66 f.

¹⁷ Eija Mäkinen, ‘Controlling Nordic Municipalities’ (2017) 23 EPL 123; Vilhelm Persson, ‘Local Government in Sweden: Flexibility and Independence in a Unitary State’ in Carlo Panara and Michael R Varney (eds), *Local Government in Europe; The ‘Fourth Level’ in the EU Multi-Layered System of Governance* (Routledge 2013) 318 ff.

¹⁸ Constitution of Denmark 1953 (Danmarks Riges Grundlov) art 3.

¹⁹ Thomas Bull, ‘Institutions and Division of Powers’ in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions: A Comparative and Contextual Study* (Hart 2018) 45 f.

²⁰ Olle Nyman, ‘The New Swedish Constitution’ (1982) 26 ScStL 170, 176 f.

²¹ Ch 12 Art 2 Instrument of Government (Regeringsform, the central constitutional Act); Henrik Wenander, ‘Administrative Constitutional Review in Sweden – Between Subordination and Independence’ (2020) 26 EPL 987, 992 ff.

4 Formal Cooperation Structures

4.1 EU

The far-reaching formal cooperation structures within the EU is today a natural point of departure for discussing the more formal aspects of cooperation within the Öresund Region. Naturally, harmonisation and other measures for integration have been very important for a cross-border region. Both Denmark and Sweden may be categorised as somewhat reluctant EU Member States, since both states have important exceptions to the EU *acquis*. According to an agreement entered when Denmark joined the EU, Denmark may prohibit foreign citizens (also EU citizens) from acquiring summer houses in Denmark.²² After a referendum rejecting the Maastricht Treaty in 1992, Denmark further obtained opt-outs from EU Law, meaning that Denmark does not participate in the cooperation on security and defence, police and justice, and the adoption of the euro as the currency (the third stage of the European Monetary Union, EMU).²³ After a referendum in 2003, Sweden decided not to enter the third stage of the EMU and replace the Swedish Krona with the euro. In contrast to Denmark, there was no agreement with the EU supporting this decision.²⁴

Since Denmark and Sweden have a long history of taking part in Nordic and bilateral cooperation (see Sections 4.2 and 4.3), it is necessary to consider the scope for this kind of agreements between EU Member States. When Sweden joined the EU in 1994, the Accession Act included a non-binding declaration where the ‘Contracting Parties record that Sweden, Finland and Norway, as members of the European Union, intend to continue, in full compliance with Community law and the other provisions of the Treaty on European Union, Nordic Cooperation amongst themselves as well as with other countries and territories.’²⁵ The case-law of the Court of Justice of the EU (CJEU) indicates that this declaration has no particular impact on the scope for cooperation between Nordic countries. As indeed is stated expressly in the declaration, Nordic cooperation must take place in compliance with EU

²² Protocol (No 32) to the TEU and TFEU on the acquisition of property in Denmark.

²³ Protocol (No 22) on the position of Denmark; Helle Krunke, ‘From Maastricht to Edinburgh – the Danish Solution’ (2005) 1 European Constitutional Law Review 339.

²⁴ Joakim Nergelius, ‘The Constitution of Sweden and European Influences: The Changing Balance Between Democratic and Judicial Power’ in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C. Asser Press 2019) 327 f.

²⁵ Joint Declaration on Nordic Cooperation (28), OJ 1994 C 241/392.

Law.²⁶ This means that the scope for formal Nordic agreements within the scope of application of EU Law is very limited. However, explicit provisions in secondary law occasionally allow for supplementing agreements between Member States.²⁷ For example, in the field of social security coordination, Denmark and Sweden have previously used the scope for agreeing on exceptions making it possible for commuters to work from home to a greater deal without changing the applicable legislation, as provided for in the relevant Regulation.²⁸

EU law and policy provide for different mechanisms that support regional development, including measures relating to border regions (Articles 174 and 175 TFEU). The Union's structural funds, especially the Regional Development fund, are important for the financing of cross-border activities in the Öresund Region.²⁹ EU Law provides for the possibility of establishing special cooperation bodies in the form of European Groupings for Territorial Cooperation (EGTCs) for facilitating administration of EU funding for common projects.³⁰ The political actors in the Öresund Region have so far not made use of the possibility to establish an EGTC.³¹

4.2 Nordic Cooperation

Although the political interest in Nordic cooperation has diminished during the last few centuries, as has also the scope for agreements within the fields of application of EU Law, Nordic cooperation still forms an important background to the legal situation in the Öresund Region. First, there are a number of formal agreements under Public International Law that have great practical importance for everyday life in the region. Furthermore, the institutional structures established within the framework of the parliamentary cooperation within the

²⁶ C-435/00 C EU:C:2007:714 para 62 ff.

²⁷ Päivi Leino and Liisa Leppävirta, 'Does Staying Together Mean Playing Together? The Influence of EU Law on Co-Operation Between EU and Non-EU States: The Nordic Example' (2018) 43 ELRev 295.

²⁸ Art 17 Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ Spec Ed II 416; Försäkringskassan, *Tillämpning lagstiftning, EU, socialförsäkringskonventioner, m.m. 2004:11* (Version 4, Försäkringskassan 2013) 116: cf below Section 5 on the similar situation on working in both Denmark and Sweden with different employers.

²⁹ Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L 347/32.

³⁰ Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC) [2006] OJ L 210/19.

³¹ Lina Engström, Joakim Nergelius, Vilhelm Persson, and Pontus Tallberg, *European Grouping of Territorial Cooperation – Report on EGTC* (Gränshindersforum/Region Skåne 2011) 4, available at <<https://portal.cor.europa.eu/egtc/SiteCollectionDocuments/EN%20-%20Swe.pdf>> accessed 11 June 2021.

Nordic Council and the governmental Nordic Council of Ministers are important for identifying problems for cross-border activities and for suggesting solutions.

The Nordic countries have negotiated and agreed on a number of international conventions covering subjects such as double taxation,³² social security coordination,³³ and popular registration for people who move between the states.³⁴ These agreements all in a very concrete way simplify cross-border activities in the Öresund Region.

The agreements mentioned would in many respects seem to be permissible under EU law since they either fall outside the scope of EU law entirely or complement EU legislation, sometimes basing on an explicit scope for further agreements between Member States. However, the conformity of some parts of the Nordic agreements with EU Law has been questioned. Therefore, the scope for Nordic conventions as a means of furthering integration in Nordic border regions would seem to be very limited.³⁵

Concerning the institutional structure, the formal Nordic cooperation bases on the 1962 Treaty of Co-operation between the Nordic states (the Helsinki Treaty).³⁶ For the most part, the Helsinki Treaty expresses a general spirit of cooperation, rather than laying down concrete legal duties for the member states. Importantly, the Treaty establishes an institutional framework in part inspired by the structure of the EU, but without the supranational features. There are also parallels to the Benelux cooperation. The *Nordic Council* consists of representatives from the national parliaments and acts as an advisory and agenda setting body. The Council does not have any formal power of making legally binding decisions. The Council may adopt recommendations or statements.³⁷ Such decisions may have some political impact, not least through media coverage. Overall, however, the political position of the Council must be regarded as limited, and there have been repeated proposals to abolish the Nordic Council altogether.³⁸ On the governmental level, the *Nordic Council of Ministers* convenes in different constellations, depending on the subject in the same way as the Council

³² Convention between the Nordic countries for the avoidance of double taxation with respect to taxes on income and on capital (Helsinki 23 September 1996).

³³ Nordic Convention on Social Security (Bergen 12 June 2012).

³⁴ Nordic Agreement on Popular Registration (Stockholm 1 November 2004).

³⁵ Leino and Leppävirta (n 27) 303 f.

³⁶ Treaty of Co-operation between Denmark, Finland, Iceland, Norway and Sweden (Helsinki 23 March 1962, with later amendments), published in English in *The Helsinki Treaty Treaty of Co-operation between Denmark, Finland, Iceland, Norway and Sweden* (Nordic Council of Ministers and Nordic Council 2018).

³⁷ Arts 44–59 of the Helsinki Treaty.

³⁸ Cameron (n 7) paras 9–15; Henrik Wenander, *Fri rörlighet i Norden. Nordiska gränshinder i rättslig belysning* (Juristförlaget i Lund 2014) 25 ff.

of the EU.³⁹ Below the ministerial level, there are *Committees of Senior Officials*, experts in various fields coming from the Government Offices or central administrative authorities.⁴⁰ A number of *Nordic institutions*, funded within the framework of Nordic cooperation, are organised as separate entities under the Nordic Council of Ministers.⁴¹ These institutions engage in activities such as administering Nordic funding programmes and conducting policy studies. Examples include the Nordregio, focusing on regional development, policy and planning, Nordic Innovation, aiming at promoting Nordic business, and Nordforsk, supporting research.⁴²

Furthermore, the Nordic Council of Minister supports the establishment of cooperation bodies for border regions. These *Cross-border Cooperation Committees* engage in developing business opportunities, eliminating border barriers, and providing information to citizens through (see further Section 4.3).⁴³

Also important in the perspective of facilitating cross-border mobility in general is *The Freedom of Movement Council*, which is established by decision of the Nordic Governments. It is composed by politicians from the Nordic countries. The task of the council is to identify obstacles to free movement ('border barriers', see Section 5) and to raise political attention to such matters before the Nordic institutions as well as national governments and authorities, so that these obstacles may be removed. Furthermore, the Council works to prevent new border barriers and to improve information to citizens, in cooperation with the border region information services. The work of the Council is linked to the political ambition to establish the Nordic countries as the world's most integrated region (see Section 2).⁴⁴ Notably, the Freedom of Movement Council has only an advisory role, and lacks formal decision-making powers.⁴⁵

³⁹ Arts 60–67 of the Helsinki Treaty.

⁴⁰ Nordic Council of Ministers, 'Welcome to the Nordic Council of Ministers – what we do and how we do it' (Nordic Council of Ministers 2019) 25.

⁴¹ Ibid 28 f.

⁴² 'About the Nordic Council of Ministers' <www.norden.org/en/information/about-nordic-council-ministers>; Nordregio <nordregio.org>; Nordic Innovation <www.nordicinnovation.org>; <<https://www.nordforsk.org>> all accessed 15 June 2021.

⁴³ Lisbeth Greve Harbo, *Nordic Cross-border Cooperation Committees and Cross-border Authority Integration* (Nordregio Electronic Working Paper 2010:3) <norden.diva-portal.org/smash/get/diva2:700371/FULLTEXT01.pdf> accessed 22 June 2021, 11 f.

⁴⁴ The Freedom of Movement Council, Gränshinderrådets verksamhetsrapport med kommentarer från de nordiska regeringarna 18/19 (Nordic Council of Ministers 2020) 10 ff.

⁴⁵ Wenander (n 38) 45; 'The Freedom of Movement Council' <www.norden.org/en/organisation/freedom-movement-council> accessed 11 June 2021.

These different levels of political and administrative cooperation make possible formal and informal contacts between decision-makers in the Nordic countries. In this way, possible problems relating to mobility in border regions may be addressed (see further Section 5).

There is no counterpart to the Court of Justice of the EU or, to compare with the Benelux Union, the Benelux Court of Justice. In the 1980s, this was explained by the lack of need for such a court, since it is for the legislator to act if there are diverging views on the meaning of a Nordic treaty.⁴⁶ This attitude is a clear reflection of the constitutional culture of putting trust in democratically legitimate politicians, rather than allocating power to courts.

4.3 Bilateral Cooperation

In the bilateral cooperation between Denmark and Sweden relevant to the Öresund Region, a few formal agreements under public international law could first be mentioned. They complement EU provisions or Nordic agreements in fields falling outside the scope of EU Law. Examples include an agreement making possible taxi travels across the border⁴⁷ and certain arrangements relating to tax matters.⁴⁸

On the institutional side, there is a number of public or semi-public Öresund bodies. Most important, the *Greater Copenhagen and Skåne Committee* (since 2015 replacing a previous Cross-border Cooperation Committee named the *Öresund Committee*) is, according to its statutes, ‘a political committee’ for Danish and Swedish municipalities and regions around the Öresund. The Committee consists of politicians from the participating municipal and regional decision-making bodies. The aim of the Committee is to support the common marketing of the region, strengthen infrastructure, make efforts for an integrated and sustainable region, including supporting a common labour market and working to legislation and border barriers that limit growth, and establish common strategic business measures.⁴⁹ The legal status of the Committee has seemingly not been discussed in detail, but it would most probably be best categorised as a private association under Danish Law, with public bodies as members.

⁴⁶ Leif Sevón, ‘Tolkning av samnordisk lagstiftning’ i *Förhandlingarna vid det 31 nordiska juristmötet i Helsingfors 19–21 augusti 1987 Del I* ([De nordiska juristmötenas lokalstyrelse för Finland 1988) 20.

⁴⁷ Överenskommelsen mellan Danmark och Sverige om internationell taxitrafik på väg (Agreement between Denmark and Sweden on International Tssxi traffic by road) (Copenhagen 3 March 2000).

⁴⁸ Avtal om vissa skattefrågor (Agreement on certain Tax Matters) (Copenhagen 29 October 2003).

⁴⁹ Statutes for the Greater Copenhagen Committee (4 March 2019) <www.greatercph.dk/om-dokumenter> accessed 11 June 2021.

Importantly, the Committee does not have any formal decision-making power concerning the adoption of legally binding norms or similar.

Furthermore, *Øresundsinstitutet* (the Öresund Institute) has been established as an association under Swedish Law in the form of a non-profit member organisation (*ideell förening*). The institute shall further integration in the region by promoting cross-border public debate, among other things by publishing reports and other publications on matters of regional integration. Membership is open to companies, private and public bodies, and individuals.⁵⁰ The Institute operates the cross-border news agency *News Öresund*, which acts in a media environment otherwise lacking cross-border media outlets.⁵¹

Danish and Swedish administrative agencies have further established the public information service *Øresunddirekt* to provide information on working, living, and studying in Denmark and Sweden. This service, where civil servants from different branches answer questions from individuals, is supported by the Nordic Council of Ministers (see Section 4.2).⁵² This kind of cooperation does not change the traditional distribution of roles, meaning that an administrative authority only applies the legislation of its own legal system ('lex fori') and not foreign administrative law (Section 3). Still, to inform citizens in a meaningful way, the civil servants in one country must be sufficiently informed about legislation and the administrative structures of the other country. This would of course presuppose contacts between the national authorities.⁵³ These contacts may as such promote trust and cooperation.⁵⁴ Interestingly, in spite of the considerable constitutional differences in administrative organisation between Danish and Swedish state authorities (Section 4) there are no signs of this causing more important problems in practice.

5 Eliminating Border Barriers

Since the beginning of this century, the problem of so-called border barriers has been highlighted in Nordic and bilateral Danish-Swedish Cooperation. The concept of border

⁵⁰ Statutes for the Øresund Institute (18 May 2017) <www.oresundsinstitutet.dk/om-oss/stadgar> accessed 22 June 2021.

⁵¹ News Öresund, 'Om News Öresund' <www.newsöresund.se/om-news-oresund> accessed 15 June 2021; cf Falkheimer and Gustafsson (n 4) 116. Already in the mid-90s the well-known Swedish TV personality Lasse Holmqvist (1930–1996) tried to establish a cross-border Öresund channel, an attempt that ended in bankruptcy.

⁵² Öresunddirekt <www.oresunddirekt.se> accessed 11 June 2021; Wenander (n 38) 44.

⁵³ Wenander (n 38) 118 f.

⁵⁴ Wenander (n 16) 68.

barriers⁵⁵ is not primarily a legal one, but could rather be understood as a political concept used in the context of political efforts to removing legal obstacles to integration. This political focus of the debate and conceptualisation is related to the tradition in Nordic societies of prioritising political discourse before legal discussions.⁵⁶ Naturally, such problems are especially pressing in border regions, such as the Öresund Region. The political goal of making the Nordic countries the most integrated region of the world by 2030 (Section 2) includes an objective to support the freedom of movement. The role of the Freedom of Movement Council to identify and breaking down obstacles to the free movement is especially highlighted in the general action plan.⁵⁷ The point of departure for all discussions on border barriers is that administrative authorities in Denmark and Sweden apply their national administrative law on taxation, social security etc, but that there may be a need for measures adapting to the cross-border setting, for example by suggesting legislative changes or informing citizens on the relevant legislation.⁵⁸

In general, activities on the different levels – the EU, Nordic cooperation, and bilateral cooperation – make it possible to address cross-border mobility problems in the Öresund region at a suitable level. The Freedom of Movement Council (see Section 4.2) has a central role in this work, monitoring progress, and identifying remaining and new obstacles. According to the Council itself, 64 border barriers have been removed since the Council was established in 2014.⁵⁹ From an academic point of view, this kind of statistics should be viewed sceptically. The criteria for identifying what constitutes border barriers, defining what removal means, and for quantifying the barriers are rather obscure and probably coloured by political considerations.⁶⁰

Below, some examples are given of how the various levels of cooperation have helped to identify problems for cross-border mobility in the Öresund Region. The account focuses on obstacles to mobility relating to legal rules. Practical problems, such as poorly functioning cross-border train traffic and possible cultural differences limiting the willingness to commute to work across the border will be left aside.⁶¹ It should also be said that certain border barriers

⁵⁵ Danish grænsehindringer, Swedish gränshinder.

⁵⁶ Wenander (n 36) 38 ff.

⁵⁷ Nordic Council of Ministers (n 11).

⁵⁸ Wenander (n 36) 118 ff.

⁵⁹ The Freedom of Movement Council (n 44) 9.

⁶⁰ Wenander (n 36) 117.

⁶¹ Wenander (n 36) 41 f.

relate to the Danish and Swedish exceptions from EU Law, such as problems relating to the countries having different currencies or to obstacles for Swedes wanting to buy summer houses in Denmark. Although EU Law would allow the countries to not make use of these exceptions, changes in policy would probably not be made in order to satisfy the needs for regional integration. These obstacles are therefore left aside below.

A first example concerns the coordination of social security and the effects of Regulation 883/2004⁶² for persons with employments in both Denmark and Sweden. According to the main rule of the Regulation, a worker shall be covered by the social security legislation (both in terms of fees and of rights to benefits) in the country of work ('lex loci laboris') (Article 11.3 a of Regulation 883/2004). However, persons working simultaneously in two countries for different employers shall be covered by the social security regime of the state of residence ('lex loci domicilii') (Article 13.1 of Regulation 883/2004). In the Öresund Region context, this has meant that for a person living in Sweden and working in Denmark, the employer should pay social security contributions under the Danish system. However, if the employee takes on an extra job in Sweden, both the Danish employer and the Swedish employer should pay contributions under the Swedish system. The problem is that the Danish and Swedish social security systems are constructed very differently, with the Danish system to a far greater extent being financed by general taxes and not by social security contributions. This means that the Danish contributions are considerably lower than the Swedish ones. If a Danish employer has an employee who lives in Sweden and who takes on an extra work in Sweden, the employer must pay much higher contributions, to the Swedish state, under the mentioned rule. This state of affairs has had as a consequence that Danish employers have required that employees living in Sweden signed a contract that they would not take an extra work in Sweden. Obviously, this was an obstacle for mobility in the Region. Discussions within the Nordic and bilateral organs highlighted the possibility for an agreement supplementing the Regulation (Section 4.1). Eventually, efforts on the EU level led to changes in the relevant Regulation. Now, only if the employee is pursuing a substantive part of the activity in the Member State of residence, the legislation of that state shall apply.⁶³ In

⁶² Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1.

⁶³ Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 [2012] OJ L 149/4.

other words, persons living in Sweden and working in Denmark can now take on limited paid assignments in Sweden without their social security affiliation changing.

A further example concerns personal registration numbers. The administration of the Scandinavian welfare states includes a widespread use of personal identification numbers of different kinds. Especially in Sweden, such numbers are often required by companies to enter agreements with consumers on electricity, telecom, internet access, and similar. This has created considerable problems for Danish residents who own summer houses in Sweden. The Nordic Freedom of Movement Council as well as other Nordic bodies (Section 4.2) have highlighted this problem over the years.⁶⁴ In 2021, the Swedish Riksdag adopted an amendment in the Population Registration Act. It is now possible for persons having a connection to Sweden, such as Danish owners of Swedish summer houses, to receive a so-called coordination number.⁶⁵

To establish a fully functioning cross-border region, individuals on both sides of the border must be able to take part in the local democratic decision-making. In both Sweden and Denmark, an employee has a right to unpaid leave of absence to participate in meetings of local government bodies. This right, however, has not included participation in foreign local bodies, which means that a commuter from Sweden to Denmark has in practice not been able to stand as a candidate for local or regional political bodies. This problem has been highlighted both in the discussions among the parliamentarians in the Nordic Council and in the work of the Nordic Freedom of Movement Council.⁶⁶

A special category of border barriers that has been identified more recently concerns digital services. Both private and public actors in Sweden and Denmark to a great deal take for granted that individuals use digital services. However, the electronic personal identification systems for business and administrative contacts, ‘e-IDs’, are limited to one state, and commuters and others from the other country may be excluded from them. This goes also for electronic payment systems for smart phones that are widely used today.⁶⁷ The Nordic Council of Minister in 2018 launched a Nordic and Baltic e-ID project, aiming at establishing

⁶⁴ Wenander (n 38) 70.

⁶⁵ Population Registration Act (Folkbokföringslag, 1991:481); Prop 2020/21:160 Säkrare samordningsnummer och bättre förutsättningar för korrekta uppgifter i folkbokföringen 49 ff.

⁶⁶ Report of the work of the Freedom of Movement Council 18/19 (n 59) 27.

⁶⁷ Daniel Jaakkola, *e-ID and digital border obstacles in the Nordic region* (Nordic Council of Ministers 2018, DOI 10.6027/ANP2018-777).

a technical solution making it possible to use national e-IDs across borders. At the time of writing, the results of this project are uncertain.⁶⁸

Yet another example of border barriers that have been identified, although not eliminated, in the multi-level structure described above concerns the communications between the Danish islands of Zealand (where Copenhagen is situated) and Bornholm, situated southeast of the Swedish southern coast. As opposed to the other Danish provinces east of the Öresund, Bornholm remained Danish after the 17th century wars. Today, the most convenient way of going from Copenhagen to Bornholm is to travel to the Swedish town of Ystad and to take a ferryboat from there. This has created a number of transit problems for people travelling from the Danish capital region via Sweden to Bornholm. Identified border barriers include problems for travellers to bring pets, weapons for hunting, and medicines.⁶⁹

As is exemplified above, a number of problems for cross-border mobility in the Öresund Region have clearly been solved, whereas others remain. The EU Commission has highlighted as good practice the work of both the Nordic intergovernmental cooperation and Greater Copenhagen and Skåne Committee to identify and address obstacles to cross-border mobility and integration.⁷⁰ The examples on problems that remain unsolved illustrate the complexity involved. Established systems may be deeply entrenched in national or EU law and policy, and the involved national actors may not necessarily be able to easily adjust the relevant legal provisions.

6 Closing Borders?

In spite of the undeniable successes for integration in the Öresund Region since the Öresund bridge was opened, the last few years have also included worrying tendencies of closing borders. Important examples of measures limiting cross-border mobility are discussed below. They are all linked to societal factors of a highly political character, viz the migration crisis, problems of organised crime, and measures to counter the COVID-19 pandemic.

⁶⁸ Skrivelse 2020/21:90 *Nordiskt samarbete 2020* (Report of the Swedish Government on Nordic Cooperation in 2020) 17.

⁶⁹ Ministeren for nordisk samarbejde (Danish Minister for Nordic Cooperation), 'Redegørelse om fjernelse af grænsehindringer mellem de nordiske lande' R 10 (11/4 2012), 11 f.; Wenander (n 38) 111.

⁷⁰ Commission, 'Boosting growth and cohesion in EU border regions' COM(2017) 534 final 7.

A first illustration of this development came in 2015 when, as is well known, a wave of migrants reached Europe and the EU member states. This also affected the Öresund Region. The political debate on migration had developed very differently in Sweden and Denmark, with Sweden being decidedly more open to accepting refugees. In both countries, the policy of the other country was depicted as totally alien to fundamental values and reasonableness. Under such political differences, it would seem to be difficult to maintain the trust and spirit of cooperation needed for a functioning region. Given the very different political views on asylum seekers, the Governments did not manage to find a common solution within the framework of EU Law. Here, the Nordic spirit of cooperation obviously had been lost. In 2015, Sweden received 163 000 asylum seekers, with 114 000 arriving between September and December, many of them via Denmark and the Öresund bridge.⁷¹ As a political response, the Swedish government initiated legislative and administrative measures. These included the introduction of border controls owing to serious threats to public policy or internal security, as allowed for by the Schengen legal framework.⁷² This meant that also Danish and Swedish citizens, as well as other residents in the Öresund Region, needed to show a passport or other identity card when travelling from Denmark to Sweden, this for the first time since the introduction of the Nordic Passport Union.⁷³ The government decision, has been renewed several times and is at the time of writing (June 2021) still in force.⁷⁴ Furthermore, on the Government's proposal, legislation on identity controls was introduced in 2015, requiring operators of train, bus, and boat travel to control the identity of passengers.⁷⁵ These identity controls were discontinued in 2017 when the temporarily applicable legislation was not renewed.⁷⁶ Apart from their obvious symbolic value, the border controls (and even more so

⁷¹ SOU 2017:12 *Att ta emot människor på flykt – Sverige hösten 2015* (Governmental inquiry on the migration crisis, with English summary) 27.

⁷² Art 25 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L 77/1.

⁷³ Government Decision 12 November 2015, Ju2015/08659/PO; cf Council Implementing Decision (EU) 2016/894 of 12 May 2016 setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk [2016] OJ L 151/8, followed by later similar decisions.

⁷⁴ Government Decision 6 May 2021, Ju2021/01854/PO.

⁷⁵ Act on Special Measures in the Event of a Serious Threat to Public Policy or the Internal Security in the Country 2015 (Lag om särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet, 2015:1073); Ordinance on Certain Identity Controls in the Event of a Serious Threat to Public Policy or the Internal Security in the Country (Förordning om vissa identitetskontroller vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet, 2015:1074); the Ordinance was later replaced by new pieces of legislation extending the temporal validity of the requirements, see Ordinances 2016:723, 2016:946, and 2017:16.

⁷⁶ Ordinance 2017:16.

the combined effect with the identity controls) caused delays and longer travelling times for commuters. This in turn affected the interest in taking an employment in Denmark.⁷⁷

In 2017, a number of commuters claimed damages from the Swedish state for the border controls, which in their view infringed EU Law, the European Convention on Human Rights, and the Instrument of Government (the Swedish central constitutional act). The Swedish Chancellor of Justice, who acts as the legal representative of the State with competence to reach out-of-court settlements, rejected the claims, among other things referring to the Member States having a certain margin for discretion under the Schengen Acquis.⁷⁸

A second illustration of the tendency of closing borders relates to criminality. For a rather long time now, Sweden has had a significant problem with criminal gangs, which are involved in shootings and also use bombs. This part of society is also engaged in cross-border activities. This problem has also spilled over to neighbouring Denmark, which does not at all have the same situation. This problem has probably damaged the trust in Sweden as such. This has also had consequences in policy. In 2019, two people were killed in a gang related shooting in Copenhagen, and a bomb exploded and damaged buildings of the Danish Tax Authority in Copenhagen. It turned out that individuals from Sweden were involved in the crimes.⁷⁹ The Danish government decided to introduce temporary border controls in the form of spot checks between Sweden and Denmark. As its Swedish counterpart during the refugee crisis, the Danish Government based its decision upon the Schengen legal framework and referred to the threat from terrorism, but added organised crime to the rationale behind the decision. Another part of this political package was the reinforced cooperation between Danish and Swedish Police.⁸⁰

As a third and last illustration of the phenomenon of closing borders, the COVID 19-pandemic has, as in many parts of the world, meant severe limitations to mobility also in the Öresund Region. Whereas Denmark has introduced fairly harsh measures, including a partial

⁷⁷ Øresundsinstitutet, 'Fact Sheet: The Effects of the ID- and Border Checks between Scania and Zealand' (1 November 2016) <<https://www.oresundsinstitutet.org/fact-sheet-the-effects-of-the-id-and-border-checks-between-scania-and-zealand>> accessed 18 June 2021.

⁷⁸ The Chancellor of Justice (Justitiekanslern), decision 18 May 2017, dnr 5943-16-40 and others.

⁷⁹ Jon Henley, 'Denmark reinstates border checks at crossings to Sweden after bombings. Spot checks at ferry ports and on trains and vehicles follow attacks in Copenhagen area' *The Guardian* (12 November 2019) <www.theguardian.com/world/2019/nov/12/denmark-border-checks-crossings-sweden> accessed 18 June 2021.

⁸⁰ Ministry of Foreign Affairs (Udenrigsministeriet), 'Orientering samt brev: Forlængelse af den midlertidige grænsekontrol mod Tyskland og indførelse af midlertidig grænsekontrol mod Sverige' (Information to the European Affairs Committee of the *Folketing*) <www.ft.dk/samling/20191/almdel/euu/bilag/34/index.htm> (10 October 2019) accessed 19 June 2021.

lock-down of society, however without curfews, Sweden has opted for a much more lenient approach basing on the trust in citizens and in non-binding rules.⁸¹ Both countries have, at different times, introduced travel restrictions and mandatory testing for foreigners crossing the border, albeit with exceptions for cross-border commuters. The Nordic Freedom of Movement Council has been active in contacting the national governments, aiming at eliminating unnecessary border barriers linked to the restrictions. One example concerns taxation of cross-border commuters. The provisions of the Nordic Treaty for the avoidance of double taxation mean that commuters as a rule are taxed in the country where the work is carried out. In times of distance working, this means that the state competent for taxation may change, with consequences for the taxation for individuals. The response of the Danish and Swedish governments was, however, to refer to the existing rules and to reject proposals to enter special agreements adjusted to the situation.⁸²

7 Conclusion

The preceding account has showed that the legal preconditions for the Öresund Region may best be understood as a multi-level structure. EU Law, Danish and Swedish Law, Nordic Agreements, as well as bi-lateral forms of cooperation are important means to realise the aims of creating and maintaining a cross-border region. The idea of a cross-border region presupposes open borders and mobility for businesses and commuters. There are examples of both successful measures and failures in this. This section summarises some of the main findings of this contribution.

Clearly, the formal legal arrangements on different levels are of fundamental importance here. The principles and rules on free movement under EU Law, as well as the Nordic agreements complementing them, for example on double taxation, social security, or popular registration, have a great practical importance, eliminating border barriers. Just as important, however, as the formal agreements is probably the institutional infrastructure for addressing problems in Nordic cooperation and bilaterally, both on the political and administrative level. This

⁸¹ Anne Mette Fallentin Nyborg, Sune Klinge, Helle Krunke, and Jens Elo Rytter, 'Covid-19 and Emergency laws in Denmark' [2020] SvJT 1098; Henrik Wenander, 'Sweden – Non-binding Rules against the Pandemic: Formalism, Pragmatism and Some Legal Realism' (2021) 12 EJRR 127.

⁸² 'Brev från Gränshinderrådet till de nordiska skatte- och finansministrarna om Nordiska skatteavtalet och ofrivilligt hemarbete' (Letter from the Freedom of Movement Council to the Nordic Ministers of Tax and Finance on the Nordic Tax Agreement and Involuntary Work from Home), 26 May 2020 < [urn:kb.se/resolve?urn=urn:nbn:se:norden:org:diva-6200](https://norden.org/diva-6200) > accessed 21 June 2021.

infrastructure ranges from the parliamentarians in the Nordic Council to the ministers over the Nordic Council of Ministers and political representatives in the Nordic Freedom of Movement Groups to the cross-border regional bodies of Greater Copenhagen and Skåne Committee, Øresundsinstituttet, and Øresunddirekt. These bodies may in their different capacities raise awareness on problems, suggest solutions to border barriers, or inform individuals on the legal preconditions for activities in the border region. These contacts may also foster a spirit of trust and cooperation.

In formal legal perspective, the structures for cross-border cooperation in the Öresund region are weak. Neither the Nordic institutions nor the cross-border regional bodies have supranational decision-making powers, and there are no regional cross-border courts. Problems are in public discourse rarely primarily discussed as relating to ‘choice of law’ or ‘transnational administrative law’. The traditional Nordic distribution of constitutional roles, focusing on nationally elected politicians with a more limited role for courts is evident here. Lawsuits have not been an important means for fostering cross-border integration in the Öresund Region. This may be exemplified by the decision by the Swedish Chancellor of Justice to give a certain latitude to the political level and reject claims for damages from commuters affected by the border and identity controls after 2016.

A worrying development in the perspective of regional cross-border mobility is the tendency of the last few years to respond to societal crises by introducing various forms of travel restrictions. Such measures may indicate that the spirit of trust and cooperation is threatened. Seemingly, the possibilities of mutual dialogue and cooperation had not been exhausted in any of the situations exemplified. This kind of development indicates that the cross-border region with weak legal structures in practice is dependent on the good will of the national politicians in power in the two countries.

To conclude, the question, in what respects the Öresund Region may function as a model to other European cross-border regions, may be addressed. As mentioned, the multilevel cooperation gives opportunities to address problems on a suitable level. Nordic legal cooperation may complement EU Law and act as an intermediary between the states, the cross-border Region, and the EU, fine-tuning the legal arrangements. However, the scope for such arrangements beyond EU Law are often legally limited and uncertain, meaning that such arrangements may not be attractive. Perhaps more interesting to other European border regions is the institutional infrastructure, with contacts at virtually all levels, which may address limits to integration and mobility. However, this type of contacts bases more on the

existence of a pragmatic and political structures, than on legal arrangements that may as a last resort be scrutinised by courts. This pragmatism and non-formal approach may be more difficult to use in other parts of Europe, where the legal culture is different. As indicated in the article, this kind of cooperation structures have proven difficult to maintain even in the well-established cooperation between Denmark and Sweden in the Öresund Region.