The Impact of Covid-19 on the Free Movement Regime in the North

Analysis of Border Closures in Denmark, Finland, Norway and Sweden

Saila Heinikoski | ORCID: 0000-0001-7449-8540

Senior Research Fellow, Finnish Institute of International Affairs,
Helsinki, Finland
saila.heinikoski@fia.fi

Tatu Hyttinen

Assistant Professor (tenure track) in Criminal Law, University of Turku,
Turku, Finland
tatu.hyttinen@utu.fi

Abstract

In this article, we analyse the measures during the Covid-19 pandemic with which the Nordic countries Sweden, Denmark, Norway and Finland have placed restrictions based on the Free Movement Directive 2004/38/EC and reintroduced internal border controls stipulated in the Schengen Borders Code (Regulation 2016/399). Although currently regulated by these EU rules, Nordic free movement dates back to the common Nordic labour market and Nordic passport union established in the 1950s. Already in the beginning of the Covid-19 pandemic, all Nordic countries except Sweden decided to reintroduce stricter internal border controls and restrict the entry of EU citizens into their countries. The article analyses these restrictions and illustrates that the countries interpret EU rules differently, lack a common Nordic approach to EU law in the field of free movement, and compromise even the rule of law.

Keywords

free movement – Schengen – European Union – Free Movement Directive – Nordic countries – restrictions – rule of law

1 Introduction

The Covid-19 pandemic challenged free movement in all of Europe but, in a historical light, hit especially hard the northern part of Europe. In the Nordic countries, only older people remember border checks that last existed in the early 1950s before the establishment of the common labour market and passport union.¹ The Covid-19 pandemic resulted not only in border checks, but led to considerable obstacles for travel in the region, as people from other Nordic countries were prevented from entering neighbouring Nordic countries, unless they had a necessary reason to do so. Families were separated on two sides of the border and people had to change their daily routines in the border regions and so-called twin cities, such as Tornio-Haparanda in the northern border between Finland and Sweden. The situation was aggravated by the fact that the Nordic countries imposed different types of restrictions and criteria for entry, even though the legal basis originates from the same EU provisions.

Nordic countries have had different opinions on border measures and EU matters even prior to the pandemic. The mass-scale movement of Finns, including Finnish Roma, in the 1960s and 1970s caused controversy in Sweden, as some of them were apparently considered “non-desirable elements”.² In addition, Denmark challenged the Schengen *acquis* in 2011 when it started to implement passport control at the Swedish border, which was eventually discontinued, after Swedish and EU-level criticism.³ It has also been illustrated in several studies that even though Nordic cooperation, mainly in the form of the Nordic Council, was close-knit long before the Nordics joined the European Union, the countries have never coordinated their EU policies,⁴ despite close Nordic administrative cooperation on other issues.⁵ The Nordic countries have even been called awkward partners in the European Union with little

1 E.g., C. Agius, *Social Construction of Swedish Neutrality* (Manchester University Press, Manchester, 2006) p. 106.

2 M. Tervonen, ‘The Nordic Passport Union and Its Discontents: Unintended Consequences of Free Movement’, in J. Strang (ed.), *Nordic Cooperation: A European Region in Transition* (Routledge, New York, 2015) p. 135.

3 *Ibid.*

4 T. Etzold, ‘The Nordic Council of Ministers: Aspirations for More Political Relevance’, 8:11 *Politics and Governance* (2020) pp. 11–20.

5 P. Læg Reid and L. H. Rykkja, ‘Nordic Administrative Collaboration: Scope, Predictors and Effects on Policy Design and Administrative Reform Measures’, 8:21 *Politics and Governance* (2020) pp. 21–32.

intra-regional solidarity.⁶ The lack of solidarity and coordination may also be visible in the free movement context, as we propose in this article.⁷

It is noteworthy that previous comparative research on Covid-19 measures in the Nordic countries has not linked comparative descriptions of certain Nordic countries with free movement, or focused on mobility restrictions. One study found that Swedes trusted their governments and authorities less than Danes.⁸ It has also been suggested that Sweden stuck to its principled approach, instead of selecting an adaptive and pragmatist approach, during the first wave and its exit phase.⁹ Another study points out that both in Sweden and in Denmark the media discourse on Covid-19 focused on justifying the adopted policies, regardless of whether the statements came from elected officials or leading experts.¹⁰ Overall, it seems that Covid-19 has showed that countries with similar characteristics, such as state stability, universal welfare state, multiparty system, high political engagement, generalised trust, social capital and political trust, may still end up choosing different policy options.¹¹

Given the societal similarities of the countries, the variation in the free movement restrictions during Covid-19 serves as a focal point to take a closer look at the Nordic approach to the free movement regime of the European Union.¹² With the free movement regime, we refer especially to the Free Movement Directive 2004/38/EC and the Schengen Borders Code (Regulation 2016/399) as well as the guidelines and recommendations issued by the European Commission and the Council, all of which currently regulate free movement

6 M. Stegmann McCallion and A. Brianson, *Nordic States and European Integration: Awkward Partners in the North?* (Palgrave Macmillan, London, 2018).

7 For Nordic coordination and lack of it in international organisations, see e.g., N. Götz and H. Haggrén, *Regional cooperation and international organizations: the Nordic model in transnational alignment* (Routledge, New York, 2009); T. B. Olesen and J. Strang, 'European Challenge to Nordic Institutional Cooperation: Past, Present and Future', in J. Strang (ed.), *Nordic Cooperation: A European Region in Transition* (Routledge, New York, 2015).

8 J. H. Nielsen and J. Lindvall, 'Trust in Government in Sweden and Denmark during the COVID-19 Epidemic', 44:5–6 *West European Politics* (2021) pp. 1180–1204.

9 A. Boin and M. Lodge, 'Responding to the COVID-19 Crisis: A Principled or Pragmatist Approach?', 28:8 *Journal of European Public Policy* (2021) pp. 1131–1152.

10 E. Baekkeskov, O. Rubin and P. O. Öberg, 'Monotonous or Pluralistic Public Discourse? Reason-Giving and Dissent in Denmark's and Sweden's Early 2020 COVID-19 Responses', 28:8 *Journal of European Public Policy* (2021) pp. 1321–1343.

11 Nielsen and Lindvall, *supra* note 8.

12 See also E. Recchi, *Mobile Europe: The Theory and Practice of Free Movement in the EU* (Palgrave Macmillan, Hampshire, 2015).

also in the Nordic countries. Despite some criticism presented in the past, we propose that the right to move freely in the Nordic countries has throughout its long history become an almost Nozickian individual liberty,¹³ which has fed into a duty of the Nordic countries not to create hindrances between them. Free movement may even be considered a stronger individual right for Nordic citizens than free movement within the EU; the legitimacy of which has been questioned in the political discourses of several countries.¹⁴

The main questions the article seeks to answer is: *how have the Nordic countries applied free movement restrictions in the Covid-19 pandemic, what problems do these measures entail, and what does this imply in terms of Nordic cooperation?* When answering these questions, we focus on the first year of the pandemic from March 2020 to the end of February 2021 in light of EU free movement regime. The examined countries include the continental Nordic countries Finland, Sweden, Norway and Denmark. Although Norway is not an EU member state, free movement also applies in Norway, which is part of the European Economic Area and the Schengen Area. Our approach focuses on the practical measures through an analysis of EU-level and national official documents, decisions, decrees and acts related to free movement restrictions during the Covid-19 pandemic.

After approximately 70 years of uninterrupted borderlessness and close Nordic cooperation, our underlying assumption is that the Nordic countries have genuinely struggled to determine in which ways and how powerfully free movement can be restricted in a state of exception.¹⁵ The issue has not only concerned political deliberation, but it is also a normatively difficult question.

13 R. Nozick, *Anarchy, State, and Utopia* (Blackwell, Cornwall, 2001). See also M. Matravers, 'Twentieth-Century Political Philosophy', in Moran Dermot (ed.), *The Routledge Companion to Twentieth Century Philosophy* (Routledge, New York, 2008) p. 900.

14 S. Heinikoski, *The History and Politics of Free Movement within the European Union: European Borders of Justice* (Bloomsbury Academic, London, 2020).

15 See also G. Agamben, 'Stato Di Eccezione e Stato Di Emergenza' *Quodlibet*, 30 July 2020, <www.quodlibet.it/giorgio-agamben-stato-di-eccezione-e-stato-di-emergenza>, visited on 28 September 2021.

16 The possibility to deviate from EU law should always be assessed in light of the pursued aims. On the proportionality principle, see e.g., A. Barak and K. Doron, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, Cambridge, 2012) p. 340; M. Klatt and M. Moritz, *The Constitutional Structure of Proportionality* (Oxford University Press, Oxford, 2012) p. 8.

For example, EU law requires a reserved approach to restrictions of free movement, stemming from the proportionality principle¹⁶ and the indirect effect of EU law, whilst the precedence principle of EU law may in some instances even require that no restrictions are made.¹⁷

After this introduction, the article is divided into four sections that critically analyse free movement restrictions in the Nordic countries. The subsequent section deals with the problems in the established entry restrictions in light of the Free Movement Directive. The next section is devoted to problems in the control of these restrictions, i.e., the reintroduced internal border control in the Nordic countries. These two sections (2 and 3) offer empirical insights based on EU and Nordic official documents regarding free movement restrictions, where the purpose is illustrative, rather than explicative. Section 4 discusses the problems of the enforcement of the restrictions in practice, focusing especially on the proportionality of the imposed sanctions related to border-crossing at the Finnish border. Finally, conclusions will be provided on the free movement restrictions in the Nordic countries and their implications for Nordic cooperation.

2 Problems in the Restrictions to the Free Movement Under EU Law

Free movement is a fundamental right of EU citizens enshrined in treaties and the Charter of Fundamental Rights of the European Union. Its concrete criteria for entry and restrictions are provided in Directive 2004/38/EC, which grants all EU citizens the right to reside in any EU country for three months without registration. After that, they have to demonstrate that they are working, studying, applying for work or have the means not to become a burden on the social security system of the state of residence. The Free Movement Directive also explicitly allows restrictions based on public health: “the only diseases

¹⁷ The precedence principle included in EU law and the so-called identification receive their institutional support from the CJEU judgments Case C-26/62, *Van Gend & Loos v. Netherlands*, 5 February 1963 and Case C-6/64 *Flaminio Costa v. ENEL*, 15 July 1964.

justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State" (Article 29(1)).¹⁸ The European Commission provided additional guidelines for the Covid-19 pandemic in its May 2020 guidance on restoring free movement. Herein, it outlined that in addition to the epidemiological situation and the necessity of the measures, the member states must take into account "proportionality, that is, comparing the benefits of maintaining blanket restrictions with the economic and social considerations, including the impact on EU cross-border labour mobility and trade".¹⁹ The Commission thus emphasised economic and social considerations in the assessment on whether to uphold the free movement restrictions.

One explanation for the lack of coordination among EU member states may be that all member states have separately transposed the Free Movement Directive in national legislation, and there has been quite a lot of variation in how the different criteria have been implemented in national legislations.²⁰ As illustrated in Table 1, the Nordic countries also made different decisions on entry restrictions, some with government announcements or decisions, others with a government decree.

From the perspective of EU law and recommendations, some of the decisions may be considered problematic. The European Commission urged all

18 See also P. Koutrakos, 'Public Security Exceptions and EU Free Movement Law', in P. Koutrakos, N. N. Shuibhne and P. Syrpis (eds.), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Bloomsbury, London, 2016), pp. 190–217.

19 European Commission, *Communication from the Commission, Covid-19: Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls*, C(2020) 3250 final, 13 May 2020.

20 E.g., S. McMahon, *Immigration and Citizenship in an Enlarged European Union: The Political Dynamics of Intra-EU Mobility* (Palgrave Macmillan, London, 2015); O. Parker and Ó. López Catalán, 'Free Movement for Whom, Where, When? Roma EU Citizens in France and Spain', 8:4 *International Political Sociology* (2014) p. 379.

TABLE 1 Transposition of Article 29 (restrictions based on public health) of the Free Movement Directive and the decisions on entry restrictions.

Country	Transposition	Decision on entry restrictions
Denmark	<ul style="list-style-type: none">• Decree 318 on foreigners' residence in Denmark transposes verbatim Article 29 in Section 37• Section 1 of the Aliens Act (1022/2019) states that Finnish, Icelandic, Norwegian and Swedish citizens can enter and reside in Denmark without a permit• Section 28 specifies that even a Nordic citizen without permanent residence can be denied entry for public health reasons• The entry and residence of other EU citizens can be restricted based on threats to public policy, public security and public health• Section 156a of the Aliens Act (301/2004): "the restrictions may apply only on the basis of a disease with epidemic potential as defined by the relevant instruments of the World Health Organization and other infectious diseases which would justify restrictions to the freedom of a Finnish citizen who had caught the disease or who was suspected of having caught the disease, so as to prevent the disease from spreading"	<ul style="list-style-type: none">• A government press conference announced entry ban and the closing of borders on 13 March 2020• The legal basis was Section 28 of the Aliens Act, according to the legal assessment made by the Ministry of Justice.²¹• The decision allowed the movement of goods and services, those working in Denmark, visiting seriously ill or dying family members or those who are the primary guardian of a minor born in Denmark to enter the country
Finland		<ul style="list-style-type: none">• Government decision on 17 March 2020• In addition to essential travel, transit was also allowed for EU citizens, and essential travel was defined, inter alia, as staff leaving and entering vessels, traffic related to search and rescue and health care

21 Danish Ministry of Justice, *Notat om den EU-retlige vurdering af grænsekontrol og afvisning som led i indsatsen vedrørende COVID-19*, no 1428814, 15 March 2020.

TABLE 1 Transposition of Article 29 (restrictions based on public health) of the Free Movement Directive and the decisions on entry restrictions. (cont.)

Country	Transposition	Decision on entry restrictions
Norway	<ul style="list-style-type: none">• Section 17(1) of the Immigration Act (15 May 2008 no 35): any foreign national can be rejected “when it is necessary out of consideration for national security, public health, public order or international relations of Norway or another Schengen country”	<ul style="list-style-type: none">• The decision refers to Section 156a of the Aliens Act allowing the restriction of entry for EU citizens²²• Decree on 15 March 2020 on the entry ban on foreigners²³• The decree refers to the Act on Protection Against Contagious Diseases (1994/55)• Exceptions: care duty for people in Norway or other weighty reasons• No quarantine for workers in critical societal functions and transport

²² Finnish Ministry of the Interior, *Muistio 17.3.2020: Rajavalvoman väliaikainen palauttaminen sisärajalle*, 17 March 2020.
²³ Norwegian Ministry of Justice and Public Security, *Forskrift om bortvisning mv av utlendinger uten oppholdstillatelse i riket av hensyn til folkehelsen nr 293*, 15 March 2020.

TABLE 1 Transposition of Article 29 (restrictions based on public health) of the Free Movement Directive and the decisions on entry restrictions. (*cont.*)

Country	Transposition	Decision on entry restrictions
Sweden	<ul style="list-style-type: none">• Did not explicitly transpose the public health provision into its Aliens Act (2005:716)• When Sweden introduced an entry ban also for European Economic Area (EEA) nationals from Denmark, Norway and the UK in December 2020, the Decree (2020:1258) referred to the Aliens Act, Aliens Decree (2006:97) and the Act on International Threats to Human Health (2006:1570)	<ul style="list-style-type: none">• Temporary entry ban from Denmark and the UK in December 2020,²⁴ from Norway in January 2021,²⁵ and from EEA countries in February 2021²⁶• Exceptions e.g. diplomatic staff, couriers of foreign states, transport sector workers, workers in international organisations, negative covid-19 test, minors, health transport, essential family reasons, humanitarian reasons, urgent health measures, reindeer herding and mariners

²⁴ Swedish Ministry of Justice, *Förordning om tillfälligt inreseförbud vid resor från Danmark eller Förenade kungariket till Sverige* srs 2020:1258, 21 December 2020.
²⁵ Swedish Ministry of Justice, *Förordning om dels fortsatt giltighet av förordningen (2020:1258) om tillfälligt inreseförbud vid resor från Danmark eller Förenade kungariket till Sverige, dels ändring i samma, förordning*, 21 December 2020.
²⁶ Swedish Ministry of Justice, *Förordning (2020:1258) om tillfälligt inreseförbud vid resor från EES-stater och vissa andra stater till Sverige*, 21 December 2020.

countries to lift their entry bans already in spring 2020,²⁷ and the European Parliament has strongly emphasised that also during the Covid-19 pandemic, free movement,²⁸ as well as the rule of law and fundamental rights, needs to be upheld.²⁹ In line with the previous characterization of the Nordic countries as awkward partners in the European Union,³⁰ some of the Nordic decisions appear questionable, as fundamental rights are restricted with an unclear legal basis. Whereas Sweden and Norway stipulated the entry bans of EU nationals with a government decree, the Finnish government seemed to conflate internal border controls and entry restrictions; the government only made a decision on internal border control and not a separate one on the entry ban. However, reintroducing internal border controls alone does not mean issuing a blanket travel ban for EU citizens. The initial Danish decision also had an unclear legal basis, as the closure of borders and entry restrictions was not stipulated by law, nor was there any official government decision available. Rather, the decision was just announced in a press conference. This legal ambiguity can be considered problematic, since it is a question of a serious interference with the fundamental rights of EU citizens.

The countries also took EU and Nordic considerations into account in diverse manners. To give some examples, Denmark was the only Nordic country where an EU law assessment was made. The Ministry of Justice provided this document on 15 March 2020.³¹ The conclusion of this legal assessment was that these restrictions are in compliance with EU law, since there are also health-based general restrictions directed at the country's own citizens, as required in Article 29 of the Free Movement Directive. All the other three countries, in turn, had special arrangements for the Nordic neighbours in their decisions, which could be considered problematic from the perspective of non-discrimination of EU citizens. In Norway, quarantine was first required from people coming from any countries besides Sweden and Finland (and even people coming from those countries had to stay in quarantine if they

27 European Commission, *supra* note 19.

28 See e.g. European Parliament, *European Parliament Resolution of 19 June 2020 on the Situation in the Schengen Area Following the COVID-19 Outbreak (2020/2640(RSP))*, <www.europarl.europa.eu/doceo/document/TA-9-2020-0175_EN.html>, visited on 28 September 2021.

29 European Parliament, *European Parliament Resolution of 13 November 2020 on the Impact of COVID-19 Measures on Democracy, the Rule of Law and Fundamental Rights (2020/2790(RSP))*, <www.europarl.europa.eu/doceo/document/TA-9-2020-0307_EN.html>, visited on 28 September 2021.

30 See Stegmann McCallion and Brianson, *supra* note 6.

31 Danish Ministry of Justice, *supra* note 21.

had been in other countries during the past 14 days).³² The Norwegian government also assessed the Nordic countries' epidemic situation region-specifically³³ and other EEA countries at a country level. Sweden eventually lifted entry restrictions from other Nordic countries at the end of May 2021,³⁴ even though other EU entry restrictions were valid until the end of August 2021.³⁵ Since August 2020, Finland allowed border communities in Lapland in the Swedish and Norwegian borders to freely cross the border, but this exception was removed along with the stricter entry restrictions that entered into force on 27 January 2021.³⁶

Since much of the daily border-crossing takes place between the Nordic countries, the exceptions to the entry bans can also be considered to be put in place mainly for fellow Nordics (and to some extent for the southern neighbours of Denmark and Finland, namely Germany and Estonia). Indeed, as visible in Table 1, all the countries seem to highlight the role of essential workers. It is noteworthy that the term "essential workers" has received extensive attention, and it seems that the countries have tried to limit cross-border working as little as possible, although quarantine restrictions made it more difficult. This focus suggests that in addition to securing the availability of healthcare workers, work and economy in general were relevant arguments when imposing the restrictions, in compliance with the Commission guidelines.³⁷ Family matters, in turn, did not seem to be as essential, and seemed to be secondary also in the Commission guidance, which mainly stated that those working in other countries should have the possibility to return to their families.³⁸ The Norwegian and Danish governments immediately mentioned care duties as permissible criteria for entry, but the Finnish government only included family relations

32 Norwegian Ministry of Health and Care Services, *Forskrift om karantene mv etter reiser utenfor Norden* nr 287, 13 March 2020.

33 In practice, entry bans from Nordic countries only covered certain regions, while entry bans from other countries covered the entire country.

34 Swedish Ministry of Justice, *Förordning om dels fortsatt giltighet av förordningen (2020:1258) om tillfälligt inreseförbud vid resor från EES-stater och vissa andra stater till Sverige, dels ändring i samma förordning*, 28 May 2021.

35 Swedish Ministry of Justice, *Förordning om fortsatt giltighet av förordningen (2020:127) om tillfälligt inreseförbud till Sverige*, 27 May 2021.

36 Finnish Ministry of the Interior, *Muistio 22.1.2021: Rajavalvonnan väliakaisesta palauttamisesta sisärajalle tehdyn päätöksen muuttaminen ja päätöksen voimassaolon jatkaminen*, 22 January 2021.

37 European Commission, *Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak*, C(2020) 2051 final, 30 March 2020.

38 *Ibid.*

from 13 July 2020.³⁹ Sweden, in turn, included essential family reasons in the exceptions of the first EEA entry ban decision. From the perspective of Nordic citizens, not being able to meet family members in other countries during the Covid-19 pandemic could decrease the willingness to reside in other Nordic countries in the future.

One specific border-crossing group that may have been affected more than average Nordic citizens are the indigenous Sámi people living in the northern parts of Finland, Sweden and Norway. They have practically lived without borders in the Nordic countries, where they have been able to move freely for reindeer herding. Sweden included reindeer herding as an entry criterion in the decision made in February 2021, which meant that Finnish reindeer herders could enter Sweden the whole time, unlike Norwegian ones (entry ban from Norway entered into force already in January 2021). In Finland, the Sámi had to apply for a border-crossing licence to cross the border outside the official border crossing points, and Sámi livelihood was included as part of weighty reasons to cross the border on the decision on 7 May 2020. Despite complaints, the parliamentary Ombudsman of Finland considered the Finnish measures lawful, as the Sámi reindeer herders were granted border-crossing licence upon application.⁴⁰ The reintroduced borders are reminiscent of the late 19th century when Sápmi, or Sámiland, was for the first time divided with border controls imposed by Russia.⁴¹ Despite this time receiving special permits from the authorities, the Covid-19-related border controls may again negatively affect the traditional reindeer herding practices of the Sámi.

The Nordic countries did not have any mutual coordination of the instituted measures, but neither did they comply with EU-level recommendations and agreements. In the autumn of 2020, EU institutions called for allowing the entry of EU citizens, considering it adequate to issue test and quarantine requirements. Already on 7 August 2020, the Commission provided a letter to the member states, stating that “[i]nstead of refusing entry, Member States should allow persons who arrive from another Member State subject to travel restrictions to undergo appropriate and proportional procedures to reduce risk to public health, such as quarantine and/or taking a COVID-19 test upon

39 Finnish Ministry of the Interior, *Muistio 10.7.2020: Rajavalvonnan väliaikaisesta palauttamisesta sisärajalle tehdyn päätöksen muuuttaminen ja päätöksen voimassaolon jatkaminen*, 10 July 2020.

40 Parliamentary Ombudsman of Finland, *Sisärajavalvonnan käynnistäminen ja alkuperäiskansa saamelaisten oikeudet*, 30 August 2021.

41 See e.g., P. Lantto, ‘Borders, Citizenship and Change: The Case of the Sami People, 1751–2008’, 14:5 *Citizenship Studies* (2010) pp. 543–556.

departure or arrival”.⁴² The same was reiterated in a Council Recommendation agreed by the member states on 13 October 2020.⁴³ Although continuing to refuse entry, Finland, Norway and Denmark appeared to follow the Council recommendation on assessing the epidemiological situation when considering the need for border restrictions.⁴⁴ Sweden was the only country that before February 2021 did not refuse people travelling from other EU countries, and a negative Covid-19 test alone sufficed for entry even after February 2020. Norway and Denmark also started to require a negative test result at their borders in late 2020 and early 2021, respectively.⁴⁵ Sweden determined a negative test alone as an eligible criteria for entry, but Finland started to require a negative test, comprehensive obligatory testing and quarantine requirement at its borders only after entry restrictions were lifted in July 2021.

Although none of the Nordic countries explicitly violated the Free Movement Directive, which allows restrictions based on public health, the different restrictions disrupted free movement in the region. People were treated differentially, based on e.g. their citizenship, their place of residence, family relations and the work they did. This is a radical change considering the fact that Nordic citizens were able to move from one country to another before the pandemic, regardless of work or family relations. Even though free movement in the Nordic countries may have been regarded as a fundamental right before the pandemic, in crisis situations, it was set aside under national determinations of what a weighty enough reason to enter should constitute.

42 European Commission, *Letter to MS regarding COVID restrictions*, 7 August 2020.

43 European Council, ‘Council recommendation (EU) 2020/1632 of 30 October 2020 On a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic in the Schengen area’, OJ L 366, 4 November 2020.

44 For example, the Norwegian government decided that in the past two weeks, there must be less than 20 infections in a population of 100,000 people, less than 0,5 new people in intensive care in 100,000 people, and the share of positive test results must be less than 5 per cent. Denmark took into use similar criteria on 27 June 2020, where up to 20 infections in a population of 100,000 people would mean that entry is possible. Finland similarly took into use a system on 13 July 2020, where the figure needs to be below 25 infections in 100,000 people.

45 Danish Ministry of Health, *Bekendtgørelse om krav om test og isolation efter indrejse i Danmark i forbindelse med håndtering af covid-19 nr 182 (2021) 2021; Forskrift om endring i covid-19-forskriften 08112020 nr 2262*, 13 April 2021. It should be noted that the situation is different for Norway, which is not an EU member states and thus the EU recommendations are less binding.

3 Problems in the Control of the Free Movement Restrictions Under EU Law: Internal Border Controls in the Nordic Countries

In the Covid-19 pandemic, internal border controls were put in place in order to control that people entering the countries fulfilled the established criteria. The Schengen Borders Code (SBC, Regulation 399/2016) provides for the possibility to reintroduce internal border control up to six months in the event of a threat towards public policy and the internal security of a state. When making a decision on internal border control, Article 26 requires that the member state “shall assess the proportionality of the measure in relation to that threat”, taking into account the impact of the threat and the impact on free movement of persons. In the early phase of the Covid-19 pandemic in March 2020, the Commission also provided guidelines on border management measures, stating that border controls can be reintroduced in the Covid-19 pandemic, but emphasises once again that free movement restrictions need to be “proportionate, i.e., not going beyond what is strictly necessary”.⁴⁶

Internal border controls were in use in three Nordic countries already once the pandemic started. For years, the situation had been contrary to the Schengen Borders Code in Sweden, Norway and Denmark, as the legal bases for internal border control were exhausted in these and three other Schengen states (Germany, France and Austria). The countries continue their internal border control based on secondary movements of third-country nationals and/or a terrorist threat since the so-called refugee crisis in autumn 2015. However, although violating the maximum duration stipulated in the Schengen Borders Code, the security and immigration-based internal border controls might be considered more justified from the free movement perspective, since they do not hinder the movement of EU citizens. The silent approval for the pre-Covid or post-2015 border controls also illustrate that controlling the movement of third-country nationals within the Union is tolerated more than restricting the movement of EU citizens.⁴⁷ Indeed, the Commission urged the member states to lift their Covid-based internal border controls already after two months.⁴⁸

The Nordic countries seem to approach the obligation to notify their internal border controls differently. Unlike the other Nordic countries, Sweden has not provided a notification of reintroducing Covid-19-based internal border

46 European Commission, *COVID-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, C(2020) 1753 final, 16 March 2020.

47 On pre-Covid restrictions, see S. Casella Colombeau, ‘Crisis of Schengen? The Effect of Two “Migrant Crises” (2011 and 2015) on the Free Movement of People at an Internal Schengen Border’, 46:11 *Journal of Ethnic and Migration Studies* (2020) pp. 2258–2274.

48 European Commission, *supra* note 19.

control even though it has had EU entry bans into the country since December 2020. The reason may be that the government considers it sufficient that Sweden had announced the terrorism-based internal border controls until 11 May 2021, stating that they may concern all internal borders. It therefore appears implicit that Sweden justifies its Covid-based border controls under the cover of the previous mobility restrictions. This conflation seems more peculiar when considering that both Norway and Denmark also have similar internal border controls in place, but continue to separately announce border controls based on Covid-19. Denmark announced already in April 2020 that it would continue internal border control until November 2020 due to both terrorist threat and Covid-19.⁴⁹ Norway, in turn, has provided separate notification every six months based on terrorist threat and once a month based on Covid-19.

It is also noteworthy that Finland, Norway and Denmark have prolonged their border control beyond the six-month limit in the Covid-19 pandemic. Indeed, these Nordic countries have been the only countries that have violated the six-month limit of the Covid-19 related border controls, as all the other countries lifted their controls during summer 2020 and most countries reintroduced them only in 2021 due to the spread of the UK variant.⁵⁰ Article 28 of the Schengen Borders Code requires that the proportionality of the controls is regularly reassessed, but this was not explicit in the decisions or notifications.

In their Covid-19-related notifications on internal border controls to the EU institutions, the states seem to only formally report their proportionality assessment as required in the Schengen Borders Code, if they have conducted it at all. Norwegian authorities balanced between “restoring the integrity of the Schengen area and protecting the lives and health of our citizens”, thus emphasising the rights of their own citizens over Schengen rules.⁵¹ The Danish

49 Danish Delegation, ‘Prolongation of the Temporary Reintroduction of Border Controls at the Danish Internal Borders in Accordance with Articles 25 and 27 of Regulation (EU) 2016/399 on a Union Code on the Rules Governing the Movement of Persons across Borders (Schengen Borders Code)’, 7272/20, 14 October 2020.

50 European Commission, ‘Member States’ notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and 28 et seq. of the Schengen Borders Code’, 2021.

51 Norwegian Mission, ‘Temporary Reintroduction of Border Controls at the Norwegian Internal Borders in Accordance with Article 28 of Regulation (EU) 2016/399 on a Union Code on the Rules Governing the Movement of Persons across Borders (Schengen Borders Code)’, 6850/20, 16 March 2020; Norwegian Delegation, ‘Prolongation of the Temporary Reintroduction of Border Controls at the Norwegian Internal Borders in Accordance with Articles 25(3) and 27 of Regulation (EU) 2016/399 on a Union Code on the Rules Governing the Movement of Persons across Borders’, 10138/20, 17 August 2020.

authorities, however, only describe Covid-19 as a threat, and its spread needs to be limited with the internal border controls.⁵² Finland, in turn, does not justify the restrictions in their notifications to the EU institutions,⁵³ but does that in the national decisions to reintroduce or prolong the border controls discussed above. Sweden, in turn, only provided notifications on continuing internal border control for another six months due to a terrorist threat, without even mentioning Covid-19 in the prolongation notifications.⁵⁴

Finland was the only country where the government explicitly mentioned that the country violates the six-month limit of internal border control. Exceeding the time limit of a regulation that had previously been violated by several other countries seemed to reassure Finnish politicians that infringement proceedings would not be launched. Indeed, “since the proposed restrictions in internal travel are meant to be temporary before replacing them with other measures, it is not considered to be very likely that official infringement proceedings were launched”.⁵⁵ The government did not even try to cover that its actions were contrary to EU law. For example, the Minister of the Interior admitted in November 2020 that “we have an illegal state of affairs” with regard to the prolonged internal border controls.⁵⁶ No infringement proceedings have been launched by the Commission despite years of uninterrupted internal border controls in Europe. Controlling national borders may be considered such a sovereignty-sensitive issue that the Commission does not want to use its own measures. Without enforcement, it seems that the rules on internal border control in the Schengen Borders Code have become partly void, and, as illustrated above, countries have little incentive in complying with the provisions.

It seems that internal border controls have become normalised in Europe and especially in the Nordic countries, all of which except Finland had internal

52 Danish Delegation, ‘Temporary Reintroduction of Border Controls at the Danish Internal Borders in Accordance with Regulation (EU) 2016/399 on a Union Code on the Rules Governing the Movement of Persons across Borders (Schengen Borders Code) Delegations’, 6846/20, 16 March 2020.

53 Finnish Delegation, ‘Temporary Reintroduction of Border Controls at the Finnish Internal Borders in Accordance with Article 25 and 27 of Regulation (EU) 2016/399 on a Union Code on the Rules Governing the Movement of Persons across Borders (Schengen Borders Code)’, 6906/20, 18 March 2020.

54 See Swedish Delegation, ‘Prolongation of the Temporary Reintroduction of Border Controls at the Swedish Internal Borders in Accordance with Article 25 of Regulation (EU) 2016/399 on a Union Code on the Rules Governing the Movement of Persons across Borders (Schengen Borders Code)’, 7273/20, 14 April 2020.

55 Finnish Ministry of the Interior, *Muistio 10.9.2020: Rajavärvönnän väliaikainen palauttaminen sisärajoille*, 10 September 2020.

56 Televised interview on *Uutisextra*, 7 November 2020.

border controls in place already before Covid-19. The refugee crisis may thus have opened the path also for restricting the movement of EU citizens, as internal border controls had already become part of everyday life at some Nordic borders. The most radical change in the Covid-19 crisis has probably concerned the Northern borders of Sweden, Finland, and Norway, where state borders played little role before the pandemic.

Whereas the Nordic countries had more variation in the application of the Free Movement Directive, the approach towards the Schengen Borders Code seems more uniform in the sense that all countries have surpassed the stipulated maximum period of controls. If the Nordic countries appeared a nest of freedom some years ago, now the Nordic countries appear more ready to control each individual who crosses the state border. It may be that the perception of the uncontrollability of the refugee crisis traumatised the Nordic leaders and provided an image to the public that border controls hold the situation under control. The internal border controls thus appear as an apt symbolic tool that serves to 1) send a message to the public that this is a serious threat that can enter our country from outside, 2) send a message to neighbouring countries to keep their Covid-19 situation under control in order to restore free movement, and 3) send a message to the European Union that this is a crisis serious enough to legitimize a deviation from EU rules. Therefore, the internal border controls keep citizens alert and push Nordic and European neighbours to tackle the spread of the virus. At the time of writing, in autumn 2021, Norway and Denmark still also have their Covid-19-related border control in place, while Sweden continues the terrorist-based controls. Even though entry restrictions for EU citizens have been lifted, the countries still retain their Covid-19- and terrorism-based crisis modalities at the cost of free movement in the Nordic countries.

4 Problem of Enforcement of the Free Movement Restrictions: Criminal Law Measures Applied at the Finnish Border

We have illustrated above that there was variation in the Nordic countries' entry restrictions and internal border controls. On the practical level of enforcement, the following question has created problems: how should restrictions and their control be *in concreto* implemented at the Nordic borders? For example, it would be clearly disproportionate to impose a prison sentence for crossing the Finnish-Swedish border contrary to the Covid-19 provisions,⁵⁷ but

57 See also V. Hinkkanen and T. Lappi-Seppälä, 'Sentencing Theory, Policy, and Research in the Nordic Countries', 40:1 *Crime and Justice* (2011) p. 356.

it would also be (according to EU legal praxis) disproportionate to restrict free movement with too severe fines,⁵⁸ which has also been recognised, for example, in the legal praxis of the Finnish Supreme Court.⁵⁹ It can be considered that in the European legal tradition, the proportionality principle also requires the legislator to consider whether it would be justified to react to the breaches of restrictions with administrative rather than criminal law measures; the principle thus has clear connections to the *ultima ratio* principle important in criminal law.⁶⁰ Free movement should be primarily restricted with administrative measures, such as instructions, guidance and calls. In contrast, one should have a more reserved approach to using criminal law sanctions, especially when it comes to a treaty-based fundamental right in the EU.

When assessing the legitimacy of free movement restrictions in the Nordic countries, a problem arose: it was not considered how behaviour contrary to the restrictions should be dealt with when setting restrictions. It remains unclear whether the intention has been to eventually react to unwelcome behaviour with criminal sanctions. Since the disregard of free movement restrictions has not been clearly sanctioned in all Nordic countries, it must be primarily interpreted that the governments have wanted to enforce the compliance with the restrictions through administrative measures. It is therefore natural that the Nordic authorities (in practice, the border guards) have aimed to ensure compliance with guidance and calls for the enforcement of the free movement restrictions, which can be considered the most justified approach in light of the proportionality principle and also the *ultima ratio* principle.

From a Nordic perspective, it is therefore noteworthy that the Finnish Border Guard also imposed criminal sanctions not only for Finnish but also for foreign citizens, on the basis of crossing the state border in contrary to the government decision. In practice, the act may have been punished as a minor state border offence stipulated in Section 71 of Chapter 17 of the Finnish Criminal

58 *E.g.*, CJEU Case C-378/97, *Wijsenbeek*, EU:C:1999:439, 21 September 1999, para. 44; Case C-265/88 *Messner*, ECR 4209 12 December 1989, para. 14; Case C-193/94 *Skanavi and Chrysanthakopoulos*, ECR I-929, 29 February 1996, para. 36.

59 For the problems related to free movement and criminal law, see preliminary ruling proceedings from the Court of Justice of the European Union (CJEU) requested by the Finnish Supreme Court on 21 January 2020 concerning minor state border offence R 2018/618. The proceedings refer to the requirement in Articles 27(2) and 5(5) of the Free Movement Directive that restrictions to free movement must be proportionate, and to the fact that member states cannot impose a punishment that is not proportionate, such as imprisonment, when restricting free movement.

60 See also E. Billis, N. Knust and J. P. Rui, 'The Typology of Proportionality', in E. Billis, N. Knust and J. P. Rui (eds.), *Proportionality in Crime Control and Criminal Justice* (Hart Publishing, Oxford, 2021) p.7.

Code. Indeed, the Finnish Border Guard informed the media in April 2021 that there have been 110 minor state border offences and approximately 40 state border offences at the Finnish-Swedish border, and there have been offenders from Sweden, Finland and other countries.⁶¹ Thus, a situation could arise where a Finnish citizen momentarily crossed the border between Finland and Sweden, without a justified reason and at a border-crossing point that was not allowed in the Covid-19 restrictions. This sanctioning has a major symbolical value; what was previously a self-evident fundamental right of all Nordic citizens has become a punishable criminal activity.

Since criminal sanctions also have a large symbolic value, it is unsatisfactory that the sanctioning has not been explicit in the Finnish government decision. The normative legitimacy of the sanctions has thus been questionable. Simply put, the Finnish Border Guard imposed criminal law sanctions, even though the government decision on the mobility restrictions had not taken a stance on sanctions. The government decision only defines the free movement restrictions; it does not state that disregarding them can be punishable under the Criminal Code. The Constitutional Committee of the Finnish Parliament has maintained that a norm including a ban must state that a punishment follows from violation thereof.⁶² In practice, this means that it must be visible in the norm that acting contrary to the norm is punishable (so-called *Blankettstrafgesetz*).⁶³ The government decision includes no mention that actions violating the decision could be punishment as a state border offence. From the legality principle of criminal law, these imposed criminal law punishments are thus problematic.

These problems related to the Finnish case described above also go beyond a discussion of free movement restrictions, as they are telling of deeper legal-philosophical problems related to Covid-19 measures. To what extent is it legitimate to compromise the central principles of a *Rechtsstaat*, if the intentions are good? During a state of exception, the Finnish authorities may have unconsciously taken a more flexible approach to the legality principle of criminal law (*nulla poena sine lege*). However, in light of the human rights doctrine,

61 T. Haapakangas, 'Ruotsalaismedia: Suomen ja Ruotsin rajalla kirjattu korona-aikana 150 valtionrajarikosta – vakavimmissa tapauksissa uhkana vuosi vankeutta', *Lapin Kansa* (15 April 2021).

62 Report of the Constitutional Committee of the Finnish Parliament PeVM 25/1994, p. 8.

63 See also H. Korkka-Knuts, D. Helenius and Frände, *Yleinen rikosoikeus* (Edita Publishing, Helsinki, 2020) pp. 55–56; J. Tapani, M. Tolvanen and Hyttinen, *Rikosoikeuden yleinen osa: vastuuoppi* (Alma Talent, Helsinki, 2019) p. 123; S. Melander, *Rikosvastuun yleiset edellytykset* (Tietosanoma, Helsinki, 2016) p. 53.

this rule should not be compromised even during a state of emergency.⁶⁴ The fact that all the other countries have not made recourse to such measures suggests that there may be even these sorts of more profound legal-philosophical differences between the Nordic countries.

5 Conclusion: Mobility Restrictions and Nordic Disunity

In terms of EU law, free movement is obviously not an absolute right without limitations. It can be restricted for legitimate reasons, and it is thus a question of a relative fundamental right. The pandemic has also relativised free movement between the Nordic countries – and demonstrated that the common labour market and passport union in the Nordic countries are vulnerable.

In this article, we have shown how Nordic countries have utilised diverse tools to restrict free movement during the Covid-19 pandemic. There was little coordination between the countries, and all have made independent decisions on entry restrictions. In the Finnish assessment, for example, the deliberate decision to continue internal border controls beyond the six-month limit was justified with the constitutional rights of Finnish citizens, which were considered to trump the mobility rights of EU citizens. The lives and health of national citizens were also mentioned in the documents of the other Nordic governments, and human lives and health may indeed be considered more important than mobility rights, as public health allows restricting free movement also based on the Free Movement Directive. However, the disregard for EU law and having different criteria for EU citizens to enter reveals that EU free movement law is differently assessed in the countries. These findings show that in addition to confirming previous research on the lack of a common approach to the EU regime, national concerns also override the Nordic free movement legacy. Despite some relief for border communities testifying to the importance of Nordic free movement, Nordic citizens have also been punished for attempting to cross Nordic borders.

It is interesting to note that even though the Nordic countries share a mutual conception of the importance of Nordic free movement and they share similarities in terms of the political and legal culture, their approaches to free movement restrictions vary greatly. We have shown how they imposed entry

64 This is visible in the fact that international human rights conventions do not include a possibility to deviate from the legality principle in criminal law even in crisis situations. See the *European Human Rights Convention*, 4 November 1950, ETS 5, Art. 7 and the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Art. 15.

bans with diverse legal measures and defined exceptions differently. What is common to the countries is that all have ignored the six-month limit to internal border controls, but as far as we are aware, only the Finnish authorities have imposed criminal sanctions for border offences at Nordic borders.

Our findings illustrate that the rights of Nordic and EU citizens can be overruled easily on the basis of national considerations, even if the free movement regime spans more than half a century. Since free movement is a core principle of the European Union, it is striking that it is restricted with an announcement in a press conference (Denmark) or as a sidenote in a government decision reintroducing internal border control (Finland), regardless of how good the intentions were. Whereas Norwegian and Swedish governments utilised government decrees for introducing the entry restrictions, even these measures can be criticised for the seemingly random inclusion of different exceptions to the entry ban lacking cross-border harmonisation. It is clear that the situation was unprecedented and there were no guidebooks to deal with such a situation requiring urgent action, but the lack of coordination could have been rectified in the course of the pandemic. Now that free movement restrictions between Nordic countries have in principle ended, the countries should prepare a coordination mechanism for similar situations in the future in order to prevent variable measures that are problematic in light of their legal assessment and the mutual trust between the Nordic countries. The latter may have even more permanent effects on Nordic cooperation rather than temporary legal incompatibilities, however serious they are.

The future of Nordic cooperation in light of the free movement restrictions is not, however, completely bleak. The restrictions have not been silently approved but widely criticised by minorities (e.g. Sámi), municipal actors (e.g. Tornedals Council), and state actors (especially the Swedish Parliament).⁶⁵ In addition to its practical value for people living in the border regions, free movement in the Nordic countries has major symbolic value for Nordic citizens. Border closures served to create a sense of crisis at the national level, but the restored right to free movement may be appreciated even more in the Nordic region in the future.

⁶⁵ There was an appeal to the Parliamentary Ombudsman of Finland concerning Sámi rights, see Parliamentary Ombudsman of Finland, *supra* note 40; Tornedalsrådet, *Ställningstagande från Tornedalsrådets styrelse till Inrikesministerierna i Finland, Sverige och Norge*, 13 May 2020; Swedish Parliament, *Riksdagens Protokoll 2020/21:94*, 16 March 2021.