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## Part II

# The Interplay of EU Law, EEA Law and Nordic Cooperation: Various Perspectives



# *The Vision and Legal Reality of Regional Integration in the Nordic States*

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## I. INTRODUCTION

THE VISION OF Nordic cooperation and regional integration is a recurrent topic in Denmark, Finland, Iceland, Norway and Sweden. These states form a distinct region in northern Europe, sharing historical, cultural and linguistic bonds. They are normally referred to as the Nordic states, whereas the term ‘Scandinavia’ refers, strictly speaking, only to Denmark, Norway and Sweden.<sup>1</sup> The legal systems of the five states show important similarities in legal traditions and institutional arrangements. Since the 1970s, the most important forms of cooperation take place within the framework of the Nordic Council and the Nordic Council of Ministers as established by agreements under public international law, but with important involvement from the national administrations. The accession of the Nordic states to the EU (Denmark, Finland and Sweden), and the expansion of the internal market through the Agreement on the European Economic Area (EEA) to include the two other Nordic states that are not EU Member States (Iceland and Norway), has changed the scope for formal Nordic cooperation. Over the last century, the status of Nordic regional integration has fluctuated between undeniable successes, such as the common Nordic labour market and the passport union from the 1950s, and clear failures, such as the closure of borders in the Covid-19 crisis of 2020 and 2021. Such developments have a direct impact on the rights to cross-border movement for

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<sup>1</sup>U Bernitz, ‘What is Scandinavian Law?’ (2007) 50 *Scandinavian Studies in Law* 14, 15 f.; H Wenander, ‘Europeanisation of the Proportionality Principle in Denmark, Finland and Sweden’ (2020) 13 *Review of European Administrative Law* 133, 134 f.

individuals, and on the work of the national administrations. This chapter aims at shedding light on these developments.

The main question for the chapter is how, from a legal perspective, visions of Nordic integration and cooperation have developed and played out in practice in the shadow of EU and EEA law. The chapter highlights the particular role of national public administrations as important actors in Nordic cooperation, including legal arrangements, especially concerning Nordic conventions, aiming at integration between the Nordic states.<sup>2</sup> Because the legal developments in focus here are intertwined with political choices and traditions, historical and political developments are also given attention.

As background, it should be noted that comparative legal scholarship often describes the Nordic states as a separate group of legal systems (a ‘legal family’), linked to the Continental legal tradition.<sup>3</sup> Although the national legal systems are by no means identical, they all display certain basic traits, which may justify treating them as a group. As such, these systems focus on democratically legitimised positive law in the form of written national legislation, as the main source of law, rather than relying on judge-made law emanating from the courts. They may be also said to take a pragmatic approach to solving legal problems, seeking practical solutions rather than developing abstract systems of the kind found in legal thinking seen elsewhere in Europe. Generally speaking, general principles of law have been given less weight than legislation and legislative materials as arguments in Nordic legal discourse.<sup>4</sup>

Legal similarities, as well as ideas of legal unity and cooperation, have been most pronounced in the field of private law. In contrast, Nordic states vary in important ways when it comes to the field of public law, in terms of organisation of the public sector. Here, the East Nordic states (Finland and Sweden) feature a system where state administrative authorities are organised as free-standing bodies outside the ministry structures, and with constitutional limitations to ministerial interference in decision-making regarding individual matters. By contrast, the West Nordic states (Denmark, Iceland and Norway) show a more traditional European structure for the executive, with a basis in ministerial rule and direct management of public administration within the ministerial hierarchies.<sup>5</sup> There are, however, no indications that the differences in the organisation of the public sector in the states have limited Nordic cooperation or legal arrangements to any substantial degree. Furthermore, all the Nordic states

<sup>2</sup> See Butler, ch 3 of this volume.

<sup>3</sup> See U Kischel, *Comparative Law* (Oxford University Press 2019) 554 ff; K Zweigert and H Kötz, *An Introduction to Comparative Law*, 3rd edn (Oxford University Press 1998) 273; M Bogdan, *Concise Introduction to Comparative Law* (Europa Law Publishing 2013) 76.

<sup>4</sup> J Husa, ‘Constitutional Mentality’ in P Letto-Vanamo, D Tamm and BO Mortensen (eds), *Nordic Law in European Context* (Springer 2019) 58; H Krunke and B Thorarensen, ‘Introduction’ in H Krunke and B Thorarensen (eds), *The Nordic Constitutions. A Comparative and Contextual Study* (Hart Publishing 2018) 7; Wenander (n 1) 135.

<sup>5</sup> Wenander (n 1) 136.

share a common understanding of the general principles of administrative procedure.<sup>6</sup> These are of importance for the realisation of individual rights of free movement under both Nordic arrangements and EU law.

The historical development of the idea of Nordic integration is outlined in section II as a background to the discussion. In section III, the existing structures for formal Nordic cooperation within the Nordic Council, the Nordic Council of Ministers and associated bodies are described. Furthermore, an overview of national legislation based on Nordic cooperation is given. This is followed by a discussion in section IV of the impact of membership of the EU, and the EEA Agreement, on the scope for Nordic integration. In section V, the prospects for Nordic cooperation and integration are discussed, highlighting both proposals to adapt Nordic cooperation to current realities and the recurrent border restrictions between the Nordic states during the last few years. Section VI concludes that the vision of Nordic integration and cooperation faces serious challenges, but that the formal and informal structures for Nordic cooperation may have a future role in complementing EU law for solving problems of cross-border mobility.

## II. HISTORICAL DEVELOPMENTS

The shared history of the Nordic states goes back to their foundation in medieval times. Denmark, Iceland, Norway and Sweden (including important parts of today's Finland) were gradually established as separate realms in the tenth and eleventh centuries. During the Middle Ages, these states arranged occasional alliances among themselves. In 1262, Iceland was joined with Norway, and in 1397 the Kalmar Union joined all the Nordic states under a Danish monarch in a loosely formed union, in which Denmark, Norway and Sweden maintained their legislation and political institutions. Although the relationships between the states within this union were troubled, and the medieval situation is hardly comparable to today's political and legal world, the Kalmar Union has served in modern times as an example of Nordic cooperation (see section V). In 1523, Sweden left the Kalmar Union, whereas Norway (with Iceland) was to remain in a union with Denmark until 1814 (see below).<sup>7</sup> In the following centuries, the Nordic scene was dominated by the two powers of Sweden and Denmark, as they competed for influence in Northern Europe and waged devastating wars with each other. This was clearly not a time for Nordic integration.<sup>8</sup> In the

<sup>6</sup>O Mäenpää and N Fenger, 'Public Administration and Good Governance' in Letto-Vanamo, Tamm and Mortensen (eds) (n 4) 168 ff.

<sup>7</sup>M Suksi, 'Common Roots of Nordic Constitutional Law? Some Observations on Legal Historical Development and Relations between the Constitutional Systems of Five Nordic Countries' in H Krunke and B Thorarensen (eds), *The Nordic Constitutions: A Comparative and Contextual Study* (Hart Publishing 2018) 9, 13 f.

<sup>8</sup>G Wetterberg, *The United Nordic Federation* (Nordic Council of Ministers 2010) 67 f.

turmoil of the early nineteenth century, Sweden lost Finland to Russia in 1809. Finland would retain a special status as a grand duchy under the Czar, and in principle could continue to apply Swedish legislation. As a kind of compensation for this loss, the Swedish Crown received Norway from Denmark in the post-Napoleonic restorations in 1814.<sup>9</sup> Sweden and Norway were eventually joined in a personal union under a common king, with the two states maintaining separate constitutions and separate legal systems. Iceland remained a part of the Kingdom of Denmark.<sup>10</sup>

With Denmark and Sweden no longer striving for domination in the Nordic area, the preconditions for visions of Nordic integration changed. In the nineteenth century, romantic ideas of ‘Scandinavianism’ emerged, which encompassed visions of unity between the three Scandinavian states (Denmark, Norway and Sweden). However, ideas of a political Scandinavian union that would include Denmark faded, as the geopolitical realities eventually stopped Sweden from supporting Denmark against Prussia in the Second Schleswig War of 1864. From that point, Scandinavianism was primarily a phenomenon in academic and cultural circles.<sup>11</sup>

Nevertheless, certain forms of formal Nordic cooperation took shape in the second half of the nineteenth century. In 1875, the three states joined in a currency union, which was to last until the outbreak of World War I in 1914.<sup>12</sup> As a legacy of this union, the name of the currency in all three states is still ‘crown’ (*krone/krona*). (Neither Denmark nor Sweden as EU states has introduced the euro as their currency.) The late nineteenth century saw the establishment of the Nordic Lawyers’ Meeting (*Nordiska Juristmötet*) in 1872. Inspired by the German Lawyer’s meeting (*Deutscher Juristentag*), this recurrent conference, still in existence, offers high-level legal practitioners and academics from the Nordic states a venue for discussing matters of legislation and judicial practice.<sup>13</sup> Although informal, these discussions contributed in time to the establishment of common Nordic legislation and Nordic conventions, especially in the field of private law (see section III.B). The cooperation in the legal field may therefore account for important components of the common Nordic legal identity.<sup>14</sup> Associations for Nordic contacts and cooperation were also founded in other sectors of society. The most important ones included the national chapters of

<sup>9</sup> Suksi (n 7) 18.

<sup>10</sup> Kischel (n 3) 554 f.

<sup>11</sup> Wetterberg (n 8) 70.

<sup>12</sup> I Cameron, ‘Nordic Cooperation’ *Max Planck Encyclopedia of Public International Law* (November 2020) at [opil.ouplaw.com/home/mpil](http://opil.ouplaw.com/home/mpil) (accessed 17 February 2022), para 2; Wetterberg (n 8) 71.

<sup>13</sup> J Husa, K Nuotio and H Pihjalämäki, ‘Nordic Law – between Tradition and Dynamism’ in J Husa, K Nuotio, and H Pihjalämäki (eds), *Nordic Law – between Tradition and Dynamism* (Intersentia 2007) 20; Kischel (n 3) 562. The proceedings of the meetings are published in print and on the [nordiskjurist.org](http://nordiskjurist.org) website.

<sup>14</sup> P Letto-Vanamo and D Tamm, ‘Cooperation in the field of law’ in J Strang (ed), *Nordic Cooperation. A European region in transition* (Routledge 2016) 96.

the Norden Association (*Föreningen Norden*), non-governmental organisations aimed at deepening cooperation between the states through study visits, town twinning and similar activities. In addition, other Nordic organisations were formed among associations and trade unions, establishing informal networks for promoting Nordic cooperation in everyday life.<sup>15</sup>

In 1905, Norway unilaterally left the union with Sweden; despite considerable tensions, the process was eventually peaceful. Legislative cooperation among the Nordic states was intense during the first decades of the twentieth century. Primarily in the field of private law, the states cooperated in drafting legislation, which was then adopted through separate decisions in the national parliaments (see section III.B regarding this form of coordinated legislation). This method – as opposed to entering into agreements under public international law – was widely used in Nordic arrangements at the time. It has been seen as an indication of the importance attached to national sovereignty.<sup>16</sup>

During World War II, the contacts between the Nordic states were restricted to some degree, but already during the war ideas of Nordic cooperation received renewed interest, now under the label of ‘Nordism’ (as this concept was no longer a matter only for the three Scandinavian states).<sup>17</sup> The most far-reaching political ideas included the founding of a Nordic federation after the War. Post-war realities prevented these ideas (which seemingly never were concretised in legal terms) from being pursued.<sup>18</sup> Nor were the more specific plans for establishing a Nordic defence union realised: the geopolitical situations of the respective Nordic states were very different, placed as they were between the Western powers and the Soviet Union.<sup>19</sup>

Still, intra-Nordic political cooperation in the post-war years was fairly intense. It resulted in the establishment of the Nordic Council (*Nordiska rådet*) in 1952, as a cooperation body for the national parliaments and governments.<sup>20</sup> Consisting of delegations from the national parliaments, the Nordic Council functioned primarily as a politically significant venue for discussions. It could not adopt legally binding measures. This is an indication that formal Nordic cooperation already at the outset was primarily of a political, rather than a legal, character and lacked supranational features. The statute of the Nordic Council was adopted by coordinated decisions (see section III.B) in the five parliaments.<sup>21</sup> However, the states also entered certain important agreements

<sup>15</sup> H Wenander, *Fri rörlighet i Norden* (Juristförlaget i Lund 2014) 16 f.

<sup>16</sup> JA Andersson, *Nordiskt samarbete: Aktörer, idéer och organisering 1919–1953* (Lund University 1984) 193 f.

<sup>17</sup> Wenander (n 15) 20 f; Wetterberg (n 8) 73.

<sup>18</sup> JA Andersson, ‘1950-talet. Tid att så – tid att skörda’ in B Sundelius and C Wiklund (eds), *Norden i sickssack. Tre spårbyten inom nordiskt samarbete* (Santérus 2000) 67, 70 ff.

<sup>19</sup> WC Archer and P Joenniemi, ‘Nordic Security and Defence Cooperation. Northern Policies in a European Perspective’ in Strang (ed) (n 14) 167.

<sup>20</sup> Owing to its relation to the Soviet Union, Finland was not allowed to join until 1955; Wenander (n 15) 17.

<sup>21</sup> SV Anderson, ‘The Nordic Council and the 1962 Helsinki Agreement’ (1964) 34 *Nordic Journal of International Law* 278, 289 ff.



under public international law, most notably on establishing the common Nordic labour market (1954) and the Nordic passport union (1958).<sup>22</sup> These international agreements meant that Nordic nationals were exempted from requirements on work permits and that the passport controls at the intra-Nordic borders were abolished. This scheme was established some 30 years before the Schengen Agreement in Continental Europe. A clear expression of the spirit of cooperation and the high degree of trust that had developed in the post-war era among the states, these realisations of free movement were to remain a central feature of Nordic cooperation.<sup>23</sup> In the early 1980s, it was estimated that over one million people had benefitted from the agreements through working for a longer or shorter time in another Nordic state.<sup>24</sup>

In 1962, Nordic cooperation was codified through an agreement under public international law, the Helsinki Treaty on Nordic cooperation (see section III.A).<sup>25</sup> One reason for this was that some Nordic states had shown an interest in cooperating with the newly founded European Economic Community (EEC, later EU). There was therefore a need to be able to present Nordic cooperation in an understandable way to more formally minded Continental Europeans.<sup>26</sup>

The Helsinki Treaty pointed out areas of cooperation and ambitions, but mostly in the form of broadly phrased political goals and without any supra-national mechanisms (see further section III.A). In the late 1960s, the Nordic governments negotiated to establish the so-called NORDEK plan, a Nordic economic cooperation structure that included a customs union and measures for a common market.<sup>27</sup> This would have been a far-reaching and concrete extension of the ambitions of the Helsinki Treaty in the economic field. Owing to political disagreement between the states and concerns over international relations – especially concerning the planned Danish accession to the then EEC – this plan was eventually abandoned.<sup>28</sup>

<sup>22</sup> Överenskommelse om gemensam nordisk arbetsmarknad (Agreement concerning a common Nordic labour market) (Copenhagen, 22 May 1954), later replaced by a new Agreement concerning a common Nordic labour market (Copenhagen, 6 March 1982); Protokoll angående befrielse för nordiska medborgare från att under uppehåll i annat nordiskt land än hemlandet innehava pass och uppehållstillstånd (Protocol concerning the exemption of Nordic nationals from the obligation to have a passport or residence permit while resident in a country other than their own) (Copenhagen, 22 May 1954); Överenskommelse om upphävande av passkontrollen vid de internordiska gränserna (Convention on the abolition of passport controls at Intra-Nordic borders) (Copenhagen, 12 July 1957). Iceland took part in the passport union from 1966.

<sup>23</sup> H Wenander, 'Recognition of Foreign Administrative Decisions' (2011) 71 *Heidelberg Journal of International Law* 755, 783.

<sup>24</sup> Prop 1982/83:5 *Om godkännande av en ny överenskommelse om nordisk gemensam arbetsmarknad* (Swedish Government Bill on the approval of a new agreement concerning a common Nordic labour market) 6.

<sup>25</sup> Samarbetsöverenskommelsen mellan Danmark, Finland, Island, Norge och Sverige (Treaty of Cooperation between Denmark, Finland, Iceland, Norway and Sweden) (Helsinki, 23 March 1962).

<sup>26</sup> Letto-Vanamo and Tamm (n 14) 102.

<sup>27</sup> A proposal was presented by an expert inquiry, NU (Nordisk utredningsserie) 1969:11 *Utvidet nordisk økonomisk samarbejde. Rapport fra det nordiske embedsmansudvalg*.

<sup>28</sup> Wenander (n 15) 17; C Wiklund, 'Nordek-planen och dess föregångare' in B Sundelius and C Wiklund (eds), *Norden i sicksack. Tre spårbyten inom nordiskt samarbete* (Santérus 2000) 121 ff.

Inspired by the Western European integration and the institutional structure within the EEC, the Helsinki Treaty in 1971 was extended to include a Nordic Council of Ministers, representing the governmental side of Nordic cooperation.<sup>29</sup> Still, however, the Helsinki Treaty primarily laid down goals for cooperation, rather than providing binding rules for actual integration, accompanied by rights and enforcement mechanisms. Notably, Nordic cooperation under the Helsinki Treaty did not include a common court for interpreting Nordic coordinated legislation and conventions, as such a body was not deemed necessary. Any diverging interpretations could instead be adjusted by the legislator.<sup>30</sup> This reflects the Nordic constitutional legal culture of focusing on written national legislation (adopted by the democratically legitimised parliament) as the main source of law. Notably, neither the Helsinki Treaty nor Nordic conventions on various topics relating to cross-border mobility (see section III.B) are generally designed as awarding individual rights that could be enforced in the courts.

The 1970s and the following decades brought serious challenges to the Nordic legislative cooperation that had been important since the early 20th century (see above). In the Nordic lawyers' meeting of 1972, the Swedish Minister of Justice stated that the contemporary (Social Democratic) policy in vital societal fields was not compatible with the liberal ideals underpinning Nordic cooperation.<sup>31</sup> In 1973, Denmark entered the EEC, which was to further limit the scope for Nordic legislative cooperation. These events created unprecedented tensions within Nordic cooperation. When Finland and Sweden joined the EU in 1995 (and with Iceland and Norway being contracting parties to the EEA Agreement coming into effect in 1994), the power of negative integration and positive legislation within the EU took over the former role of Nordic legislative cooperation.<sup>32</sup> Although the pan-Nordic institutions continued to exist, with occasional successes and many activities in various fields, it was clear that the cooperation – from both a political and a legal perspective – entered a period of relative stagnation from the 1990s.<sup>33</sup> In short, broader Europeanisation brought about a shift of focus – and legislative resources – to the EU level, at the expense of Nordic cooperation.<sup>34</sup> As will be seen (section V) various attempts have

<sup>29</sup> Wenander (n 15) 20; Letto-Vanamo and Tamm (n 14) 103.

<sup>30</sup> NU 1961:1 Gemensam lagstiftning i rättstillämpningen 5; L Sevón, 'Tolkning av samnordisk lagstiftning' in *Förhandlingarna vid det 31 nordiska juristmötet i Helsingfors 19–21 augusti 1987*, vol I (De nordiska juristmötena 1988) 20.

<sup>31</sup> C Lidbom, 'Den nordiska rättsenhetens problem idag' [debate point] in *Förhandlingarna vid det tjugosjätte nordiska juristmötet i Helsingfors den 24–26 augusti 1972* (De nordiska juristmötena 1975) 56; Letto-Vanamo and Tamm (n 14) 103 f.

<sup>32</sup> KÅ Modéer, 'Harmonization or Separation? Deep Structures in Nordic Legal Cultures' (2007) 50 *Scandinavian Studies in Law* 179, 182 f; T Wilhelmsson, 'Det bristfälliga nordiska lagstiftningssamarbetet och Helsingforsfördraget' in *Lagstiftningspolitik. Nordiskt seminarium om lagstiftningspolitik* (Nordic Council of Ministers 2005) 117.

<sup>33</sup> Letto-Vanamo and Tamm (n 14) 104.

<sup>34</sup> Cameron (n 12) para 25.

since been made to make Nordic cooperation within the Nordic Council and the Nordic Council of Ministers more politically relevant, notwithstanding the legal challenges involved regarding the relation to EU law (see section IV).

### III. INSTITUTIONS AND DECISION-MAKING

From a legal perspective, Nordic cooperation at the governmental and parliamentary level still takes place to a significant degree under the Helsinki Treaty. This international agreement lays down the basic goals of the formal cooperation within the Nordic Council and the Nordic Council of Ministers, and establishes the framework for these bodies and their associated organs.

#### A. The Helsinki Treaty: Nordic Institutions and Fields of Cooperation

Apart from the provisions on certain Nordic institutions (discussed below), the Helsinki Treaty, for the most part, sets out goals for cooperation in various fields.<sup>35</sup> Somewhat sarcastically, one view has stated that the focus has been ‘as much cooperation as possible – when possible’.<sup>36</sup> As opposed to the EU Treaties and the European Convention on Human Rights (ECHR), the Helsinki Treaty is, as mentioned (section II), not seen as creating rights for individuals. Furthermore, it should be stressed that the Treaty does not constitute a ‘legal basis’ for the Nordic countries to act, for example by entering agreements. The states may enter into international agreements too, without the mentioning of a policy field in the Treaty, for example on tax matters (see section III.B). Since its adoption in 1962, the Helsinki Treaty has been amended several times, most notably in 1971 (with the establishment of the Nordic Council of Ministers, see section II). It was most recently amended in 1995, following the accession of Finland and Sweden to the EU.<sup>37</sup> According to the original 1962 preamble to the Helsinki Treaty, the five states want to ‘promote and strengthen the close ties existing between the Nordic peoples’, ‘extend the scale of cooperation between the Nordic countries’ and ‘attain uniformity of regulation throughout the Nordic countries in as many respects as possible’. The preamble to the 1995 amendment added an ambition, to ‘renew and expand cooperation between the Nordic countries in the light of the greater participation by the Nordic countries in the process of European cooperation’.

All Nordic legal systems take a shared dualistic point of departure in relation to public international law: to be applicable before national courts and

<sup>35</sup> Wenander (n 15) 24.

<sup>36</sup> C Wiklund, ‘Quo vadis, Norden?’ (1982) 63 *Nordisk Administrativ Tidsskrift* 116, 119.

<sup>37</sup> A consolidated English version of the Helsinki Treaty has been published as *The Helsinki Treaty: Treaty of Co-operation between Denmark, Finland, Iceland, Norway and Sweden* (Nordic Council of Ministers 2018).

administrative authorities, international agreements must be incorporated into national law.<sup>38</sup> This also applies to the provisions of the Helsinki Treaty and other Nordic conventions.

The Helsinki Treaty includes provisions on cooperation concerning legal matters, culture, social policy, economic matters, transport and communications, and environmental protection (Article 1). An overview of the provisions of the Treaty is given below. The more specific conventions and other arrangements relating to the provisions are discussed in section III.B.

Concerning cooperation in legal matters (meaning cooperation in the field of private and criminal law), the Helsinki Treaty establishes that the legislation of the states shall treat other Nordic nationals on an equal footing with their own citizens (Article 2). This article is one of the few provisions of the Helsinki Treaty requiring more concrete action by the states. Still, owing to the dualistic point of departure just mentioned, this article would in all likelihood not be regarded as directly applicable before national courts and authorities. Previous requirements of country-specific citizenship for individuals to enjoy rights have now for the most part been abolished through legislation of the Nordic states. However, this may also be ascribed in part to the effects of EU and EEA law.<sup>39</sup> Cooperation in legal matters also includes efforts to facilitate the acquisition of citizenship in another Nordic state for a Nordic-state citizen (Article 3, see further section III.B). Furthermore, the Nordic states 'shall continue their cooperation in the field of law with the aim of attaining the greatest possible uniformity in the field of private law' (Article 5). This provision may be explained by the historical importance of legislative cooperation in the field of private law, going back to the late nineteenth century (see section II). The states 'should seek to establish uniform rules relating to criminal offences and the penalties for such offences' (Article 6). Finally, the states 'shall seek to achieve a coordination of legislation in such areas, other than the aforementioned, as are considered appropriate' (Article 7). Notably, the requirements on the states are most clearly pronounced concerning private law. Although the states have entered certain international agreements in the field during the last few decades, legal scholarship has concluded that in practice, politicians and civil servants have not taken the duty of cooperation in this field seriously.<sup>40</sup>

As to the other fields of cooperation envisaged by the Nordic states, the Helsinki Treaty includes, among other things, provisions on cultural policy relating to strengthening the Nordic dimensions of education and research (Articles 8–12). In the social field, the states shall seek to develop a common Nordic labour market and to make social benefits available to citizens of other Nordic states (Articles 14 and 15). Concerning economic policy, the Helsinki

<sup>38</sup> T Ojanen, 'Human Rights in Nordic Constitutions and the Impact of International Obligations' in Krunke and Thorarensen (eds) (n 7) 151.

<sup>39</sup> Wenander (n 15) 61.

<sup>40</sup> Wilhelmsson (n 32) 117.

Treaty has provisions on joint consultations on economic policy, cooperation concerning 'production and investments', measures to 'ensure the greatest possible freedom of movement of capital', 'coordination of technical and administrative customs' and measures to simplify border trade (Articles 18–24). As the examples in this sector indicate, these provisions have been rendered obsolete to a great extent by EU and EEA law. In relation to transport and communications, the states endeavour to 'maintain and develop further the cooperation that has made their territories into a single passport-control area' (Article 28); and in the field of environmental protection, the states shall 'place the environmental interests of the other High Contracting Parties on an equal footing with their own' and seek to harmonise environmental protection (Articles 30 and 31).

The institutional provisions of the Helsinki Treaty comprise provisions on the Nordic Council, the Nordic Council of Ministers and associated bodies. The Nordic Council consists of representatives from the parliamentary assemblies of the five Nordic states and the three autonomous territories of the Faroe Islands and Greenland (under the Kingdom of Denmark), and the Åland Islands (under Finland) (Article 47). As mentioned (section II), the Nordic Council does not have any formal decision-making power, apart from certain decisions regarding the funding allocated by the five states for the common budget for Nordic cooperation. It primarily serves as a venue for discussions among the participating parliamentarians.<sup>41</sup> The Nordic Council convenes yearly and debates issues of Nordic cooperation. It adopts recommendations and issues other statements to the governments (Article 45). Furthermore, the individual members of the Nordic Council may submit questions to a government or the Council of Ministers (Article 57). The proceedings of the Nordic Council are published on the website for Nordic cooperation, which provides a source of information for current matters of Nordic cooperation.<sup>42</sup> From time to time, the Nordic Council has been criticised for being politically redundant in today's Nordic cooperation, with occasional political proposals to abolish the institution.<sup>43</sup>

The Nordic Council of Ministers consists of governmental ministers of the five states and the three autonomous territories. It is responsible for making decisions under the Helsinki Treaty and other agreements (Article 60). In this way, the Council of Ministers clearly has a central role in formal Nordic cooperation.<sup>44</sup> It convenes in different constellations depending on the subject matter. The Helsinki Treaty allocates responsibility for coordinating matters of Nordic cooperation to the Prime Ministers, who shall be assisted by Ministers for Cooperation (Article 61). Thus, the Treaty presupposes that one minister has this portfolio, but the Treaty does not rule out this person's having other duties in the government. Council of Ministers activities may include discussions on

<sup>41</sup> Cameron (n 12) paras 12 and 13.

<sup>42</sup> See at [www.norden.org/en/information/nordic-council](http://www.norden.org/en/information/nordic-council).

<sup>43</sup> Wenander (n 15) 27; cf. Cameron (n 12) para 24.

<sup>44</sup> Wenander (n 15) 27.

current topics, common declarations, political initiatives on deepening cooperation, budgetary decisions, decisions on economic support for various projects, and responses to recommendations and other statements from the Nordic Council. As is clear from the examples, the activities are for the most part political rather than legal in character. Furthermore, the ministers may approve proposals for international agreements between the states, in so far as they do not conflict with obligations from the states arising under EU and EEA law.

The Council of Ministers is assisted by Committees of Government Officials, which also convene in various constellations (Article 61). One example from the field of legal cooperation is the Committee of Senior Officials for Justice Affairs.<sup>45</sup> These bodies, and associated working groups and expert groups, provide important venues for cross-border administrative contacts, problem solving and knowledge sharing in a variety of fields.<sup>46</sup> Indirectly related to the ambition of the Helsinki Treaty to enhance cooperation, the goal of breaking down so-called border obstacles (*gränshinder*), that is barriers to free movement across Nordic borders, has gained much attention in the Council of Ministers and associated bodies during recent decades. In the political discourse in the Nordic Council and the Nordic Council of Ministers, the concept of free movement has been expanded to include more than just the traditional elements of the passport union and the common labour market. A special Border Obstacle Council (*Gränshinderråd*), consisting of national politicians, has been established under the Nordic Council of Ministers. This kind of organ does not fit in the institutional arrangements of the Helsinki Treaty and may be regarded as a *sui generis* body. It has the task of identifying and suggesting measures to the national political representatives for abolishing border obstacles.<sup>47</sup> The concept of ‘border obstacle’ is not clearly defined in legal terms and could primarily be seen as a political term.<sup>48</sup> It may be understood as a wide term covering various obstacles – legal and non-legal – to mobility across the Nordic borders. In this way, the Nordic institutional structure includes a form of official lobbying group.<sup>49</sup>

Furthermore, a number of Nordic organisations in various fields have been set up separately from the Council of Ministers, in the legal form of public or private entities under national law, and financed through the common budget for Nordic cooperation. Examples include the Nordregio research centre for regional development and planning, the Nordic Innovation body that supports

<sup>45</sup> Letto-Vanamo and Tamm (n 14) 103.

<sup>46</sup> H Wenander, ‘A Tool-box for Administrative Law Cooperation beyond the State’ in AS Lind and J Reichel (eds), *Administrative Law beyond the State – Nordic Perspectives* (Nijhoff/Liber 2013) 55.

<sup>47</sup> *Mandat för Gränshinderrådet 2022–2024* at [www.norden.org/sv/information/mandat-granshinderradet-2022-2024](http://www.norden.org/sv/information/mandat-granshinderradet-2022-2024); Wenander (n 15) 44 ff; T Olesen and J Strang, ‘European Challenge to Nordic institutional cooperation – past, present, and future’ in Strang (ed) (n 14) 38. The Border Obstacle Council was preceded by the Border Obstacle Forum with corresponding tasks.

<sup>48</sup> Wenander (n 15) 39 f.

<sup>49</sup> See further on the activities of the Border Obstacle Council during the Covid-19 pandemic, Neergaard, Paju and Raitio, ch 5 of this volume.

activities to promote innovation and the Nordic House cultural centre in Reykjavik.<sup>50</sup> The Nordic Council of Ministers also supports so-called border committees in border areas, which inform and assist individuals who commute, move or engage in trade across the national borders.<sup>51</sup>

In the bodies mentioned here, as well as in other forms of formal and informal Nordic cooperation, the working languages are for the most part Danish, Norwegian and Swedish (with the support of Finnish and Icelandic translators and interpreters). The three Scandinavian languages are traditionally considered to be mutually intelligible in writing and speech, and have also been used to communicate with Icelanders and Finnish-speaking Finns, who traditionally have learned Danish or Swedish, respectively, at school.<sup>52</sup> However, research suggests that this mutual understanding has deteriorated, at least among younger people.<sup>53</sup> This raises some concerns for Nordic cooperation in general, because one of the pillars of the perceived cultural unity among the countries is a shared linguistic foundation.

## B. Legislation Based on Nordic Cooperation

A rather large number of examples can be given to illustrate legal acts based on Nordic cooperation, in the form either of coordinated legislation or of conventions under public international law. This section examines this kind of integration in various fields. From the very beginning, it should be emphasised that considering such rules as parts of a 'Nordic acquis' of the same legal nature as in EU law would be going too far. Nor has there been any development towards creating any 'general principles of Nordic law' either.<sup>54</sup> In addition, no central Nordic court exists to identify and establish such principles. This state of affairs relates to the relatively inferior argumentative weight of general principles of law and, historically, the predominant role of the national legislator as the source of legal rights and duties.

Over the years, the Nordic states have adopted national legislation based either on Nordic common drafting and adoption of national legislation with the same content ('coordinated legislation'), or on rules in Nordic conventions. It should be noted that a sizable share of these rules must be seen as obsolete,

<sup>50</sup> See at [www.nordregio.se](http://www.nordregio.se); [www.nordicinnovation.org](http://www.nordicinnovation.org); [nordichouse.is/en](http://nordichouse.is/en); see further, eg, *Planer och budget 2021* (Nordic Council of Ministers 2020).

<sup>51</sup> LG Harbo, *Nordic Cross-border Cooperation Committees and Cross-border Authority Integration* (Nordregio 2010) 11 f.

<sup>52</sup> Swedish, spoken by a minority of the citizens of Finland, is one of the two national languages of the country (together with Finnish); the Constitution of Finland 1999 (*Suomen perustuslaki/Finlands grundlag*), Art 17.

<sup>53</sup> LO Delsing and K Lundin Åkesson, *Håller språket ihop i Norden?: En forskningsrapport om ungdomars förståelse av danska, svenska och norska* (Nordic Council of Ministers 2005) 142 ff.

<sup>54</sup> Letto-Vanamo and Tamm (n 14) 103.



because they are either outdated or in conflict with EU or EEA law.<sup>55</sup> Examples of national legislation based on Nordic cooperation are presented below.

In the field of cooperation on legal matters, the Nordic states have entered an international agreement on citizenship. The provisions give Nordic nationals preferential treatment when they apply for naturalisation in another Nordic state, meaning that a shorter period of residence in the state is accepted than for non-Nordic nationals.<sup>56</sup> This clearly indicates a high degree of trust among the Nordic states. As opposed to EU law, the solution has not been to introduce a common 'Nordic citizenship' but to simplify naturalisation. This may be seen as a consequence of the lack of supranational elements in Nordic cooperation. Furthermore, the states have entered an agreement on popular registration, aiming at simplifying formalities for persons – not just citizens of the states – moving between Nordic states.<sup>57</sup>

Furthermore, the Nordic region maintains old traditions of common provisions in private law. Already from the last decades of the nineteenth century, the idea of legislative cooperation was realised in the field of private law (see section II). After coordinated drafting among the countries, the Scandinavian states adopted more or less identical legislation in the 1880s on bills of exchange (a financial instrument for short-term credit).<sup>58</sup> Shortly thereafter, coordinated legislation on commercial registration, registered trademarks, agency and the sale of goods followed. However, there were clearly limits to the spirit of cooperation between the states, and discussions for a common Nordic civil code were never realised.<sup>59</sup> In the field of private international law, the countries entered formal agreements in the first half of the twentieth century. Some of these agreements are still in force.<sup>60</sup> There have also been examples of coordinated legislation and international agreements in the field of criminal law – today most importantly the Convention on the Nordic Arrest Warrant, which simplifies the surrender of persons between the Nordic states, complementing the European Arrest Warrant (see further section IV).<sup>61</sup>

<sup>55</sup> Modéer (n 32) 182 f; Wilhelmsson (n 32) 117; P Leino and L 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 *EL Rev* 295, 304 ff.

<sup>56</sup> Avtal mellan Danmark, Finland, Island, Norge och Sverige om genomförande av vissa bestämmelser om medborgarskap (Agreement between Denmark, Finland, Iceland, Norway and Sweden on implementing certain Provisions on citizenship) (Copenhagen, 14 January 2002).

<sup>57</sup> Överenskommelse mellan Danmark, Finland, Island, Norge och Sverige om folkbokföring (Agreement between Denmark, Finland, Iceland, Norway and Sweden on Popular Registration) (Stockholm, 1 November 2004).

<sup>58</sup> Letto-Vanamo and Tamm (n 14) 100 f.

<sup>59</sup> P Letto-Vanamo and D Tamm, 'Nordic Legal Mind' in Letto-Vanamo, Tamm and Mortensen (eds) (n 4) 1, 14.

<sup>60</sup> M Bogdan, 'Private International Law' in M Bogdan (ed), *Swedish Legal System*, 2nd edn (Norstedts Juridik 2022) 448.

<sup>61</sup> Konvention om överlämnande mellan de nordiska staterna på grund av brott (Nordisk arresteringsorder) (Convention on transfer between the Nordic States owing to Crimes (Nordic Arrest Warrant)) (Copenhagen, 15 December 2005); cf C Wong, 'Nordic cooperation in criminal



In the field of cultural cooperation, a Nordic convention establishes the general framework.<sup>62</sup> More concretely, a Nordic language convention stipulates that the states should aim to make it possible for Nordic nationals to use their languages when making official contact in other states.<sup>63</sup> There are also agreements aiming at cross-border access to upper secondary schools and university education, as well as a declaration on mutual recognition of higher education diplomas.<sup>64</sup>

Concerning social policy, a Nordic international agreement from 1982 on a common labour market aims at making it possible to take employment in other Nordic states.<sup>65</sup> This agreement, however, has been superseded to a great extent by EU and EEA law, and it is in all likelihood for the most part obsolete.<sup>66</sup> Furthermore, an international agreement on social assistance and social services has been concluded among the Nordic states to complement EU law.<sup>67</sup> Given the development of case law, this agreement in part concerns matters now clearly falling under EU law. As some of the provisions may imply possible discrimination against non-Nordic Union citizens, the agreement needs to be updated.<sup>68</sup> Finally, a Nordic Convention on Social Security is intended to complement Regulation (EC) No 883/2004 in certain respects (see section IV).<sup>69</sup>

matters' in U Andersson, C Wong, and H Hansen, *Festschrift till Per Ole Träskman* (Norstedts Juridik 2011) 542, 544 f; for a comparison with the European Arrest Warrant, see G Mathisen, 'Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond' (2010) 79 *Nordic Journal of International Law* 1, 18 ff.

<sup>62</sup> Avtal mellan Danmark, Finland, Island, Norge och Sverige om kulturellt samarbete (Agreement between Denmark, Finland, Iceland, Norway, and Sweden concerning cultural co-operation) (Helsinki, 15 March 1971; last amended 1 June 1990).

<sup>63</sup> Konvention mellan Danmark, Finland, Island, Norge och Sverige, om nordiska medborgares rätt att använda sitt eget språk i annat nordiskt land (Convention between Denmark, Finland, Iceland, Norway and Sweden, on the Right of Nordic nationals to use their own Language in another Nordic Country) (Svaneke Bornholm, 17 June 1981).

<sup>64</sup> Avtal mellan Danmark, Finland, Island, Norge och Sverige om nordisk utbildningsgemenskap på gymnasienivå (teoretiska och yrkesinriktade utbildningar) (Agreement between Denmark, Finland, Iceland, Norway and Sweden on Nordic educational community at upper secondary level (general upper secondary and vocational schools) (Stockholm, 3 November 2004); Överenskommelse mellan Danmark, Finland, Island, Norge och Sverige om tillträde till högre utbildning (Agreement concluded by Denmark, Finland, Iceland, Norway, and Sweden on Admission to Higher Education) (Copenhagen, 3 September 1996; last amended 17 May 2018); Nordisk deklaration om erkännande av bevis avseende högre utbildning (Nordic Declaration on the recognition of qualifications concerning higher education, the Reykjavik Declaration) (Reykjavik, 9 June 2004; revised 2 November 2016).

<sup>65</sup> Överenskommelse om gemensam nordisk arbetsmarknad (Agreement concerning a common Nordic labour market) (Copenhagen, 6 March 1982).

<sup>66</sup> Wenander (n 15) 78 f.

<sup>67</sup> Nordisk konvention om socialt bistånd och sociala tjänster (Nordic convention on social assistance and social services) (Arendal, 14 June 1994).

<sup>68</sup> Leino and Leppävirta (n 55) 309; H Stoor, 'Får Norden vara bättre? – Den nordiska biståndskonventionen och EU-rätten' (2015) 92 (2) *Nordisk Administrativ Tidsskrift* 5, 14 f; Wenander (n 15) 93.

<sup>69</sup> Nordisk konvention om social trygghet (Nordic Convention on Social Security) (Bergen, 12 June 2012); Regulation (EC) No 883/2004 on the coordination of social security systems [2004] OJ L166/1.

Today, cooperation in the economic field is regulated to a great extent by EU law, and there are not many agreements that are relevant today.<sup>70</sup> However, a central treaty in the field of tax law (which is not mentioned as a field of cooperation in the Helsinki Treaty) is the Nordic Convention on double taxation.<sup>71</sup> Arrangements to avoid double taxation and associated problems are of course of crucial importance when it comes to implementing visions of Nordic cross-border mobility in practice.

There are also a few examples concerning transport and communications.<sup>72</sup> Here, the aforementioned Nordic passport union was introduced in the form of coordinated legislation, and is still considered extant, as allowed for under the Schengen rules.<sup>73</sup> In addition, a Nordic Agreement on recognition of driving permits and vehicle registration exists, although several of its provisions no longer seem to be applicable owing to EU law.<sup>74</sup>

Lastly, in the field of environmental protection, a Nordic environmental convention aims at harmonisation of national law and establishing cross-border procedures for exchange of information, as well as the right of access for individuals affected by environmental threats to authorities in other Nordic states.<sup>75</sup> Today, this convention is outdated in several respects because it relates to matters regulated by EU law. Probably of greater interest is the common 'Nordic Swan' environmental labelling scheme, which is widely used in parallel to the EU Ecolabel and similar marking schemes. Applications for use of the label are handled by a body organised under the Nordic Council of Ministers and national secretariats.<sup>76</sup>

#### IV. NORDIC COOPERATION AND EU LAW

Historically, geopolitical aspects have limited the scope for political vision and legal cooperation – today mostly in the form of international agreements – among the Nordic states. Today, the challenges to specific Nordic solutions aiming at regional integration primarily concern the impact of EU law. At the same time, EU law has clearly concretised the Nordic ambitions of simplifying cross-border mobility by providing legally binding rules that are enforceable in court.

<sup>70</sup> cf. Cameron (n 12) para 22.

<sup>71</sup> Avtal mellan de nordiska länderna för att undvika dubbelbeskattning beträffande skatter på inkomst och på förmögenhet (Agreement between the Nordic countries to avoid double taxation with respect to taxes on income and on capital) (Helsinki, 23 September 1996).

<sup>72</sup> cf. Cameron (n 12) para 22.

<sup>73</sup> *ibid* para 17.

<sup>74</sup> Överenskommelse mellan Danmark, Finland, Norge och Sverige om ömsesidigt godkännande av körkort och av registrering av fordon (Agreement on reciprocal recognition of driving permits and vehicle registration certificates) (Mariehamn, 12 November 1985).

<sup>75</sup> Miljöskyddskonventionen mellan Danmark, Finland, Norge och Sverige (Nordic environmental protection convention) (Stockholm, 19 February 1974); Cameron (n 12) para 22.

<sup>76</sup> Wenander (n 15) 111 f; [www.nordic-ecolabel.org](http://www.nordic-ecolabel.org) (accessed 17 February 2022).

The Nordic relationship to EU law is fragmented.<sup>77</sup> All the Nordic states are attached to the EU, either as members (Denmark, Finland and Sweden) or as parties to the EEA Agreement (Iceland and Norway). It should be added that a limited number of opt-outs apply to Denmark, including defence issues within the Common Foreign and Security Policy, the Area of Freedom, Security and Justice, and the third stage of the European Monetary Union (EMU).<sup>78</sup> Sweden has also decided not to introduce the euro currency, but without a legal opt-out akin to that of Denmark.<sup>79</sup> The autonomous territories of the Faroe Islands and Greenland under the Kingdom of Denmark do not have EU law ordinarily applied to them, but they have certain special arrangements on their relations with the EU.<sup>80</sup> By contrast, EU law also applies in principle to the Åland Islands, but certain special provisions apply. Among other things, this means that the Åland Islands are excluded from the VAT Area.<sup>81</sup> As for the Norwegian special territory of Svalbard in the Arctic Ocean, Norway has used an option to exempt it from the scope of the EEA Agreement.<sup>82</sup>

There are no legally binding provisions on Nordic cooperation in the EU Treaties.<sup>83</sup> A Declaration attached to the 1994 Treaty of Accession states:

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.<sup>84</sup>

As is indicated by the wording of the Declaration, it does not provide a legal basis for exceptions from EU law. This was confirmed by the Court of Justice of the European Union (CJEU) in the *C* case, involving coordinated legislation (see section III.B) on the recognition and enforcement of administrative decisions on the taking into care and placement of persons that conflicted with the

<sup>77</sup> Leino and Leppävirta (n 55) 297; Wenander (n 15) 50 f.

<sup>78</sup> Protocol (No 22) on the position of Denmark; H Krunke, 'From Maastricht to Edinburgh – the Danish Solution' (2005) 1 *European Constitutional Law Review* 339.

<sup>79</sup> J Nergelius, 'The Constitution of Sweden and European Influences: The Changing Balance Between Democratic and Judicial Power' in A Albi and S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) 315, 327 f.

<sup>80</sup> Agreement between the European Community, of the one part, and the Government of Denmark and the Home Government of the Faroe Islands, of the other part [1997] OJ L53/2; Arts 198–204 of the Treaty on the Functioning of the European Union (TFEU); Protocol (No 34) on special arrangements for Greenland.

<sup>81</sup> Art 355(4) TFEU; Protocol 2 to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland, and the Kingdom of Sweden.

<sup>82</sup> Protocol No 40 to the EEA Agreement; Norwegian EEA Act 1992 (lov om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (EØS) m.v. (EØS-loven), 1992-11-27 nr 109), s 6.

<sup>83</sup> On Benelux cooperation, cf Art 350 TFEU; Case C-105/83 *Pakvries*, ECLI:EU:C:1984:178; Leino and Leppävirta (n 55) 300.

<sup>84</sup> Declaration (No 28) attached to the 1994 Treaty of Accession of Austria, Finland, and Sweden [1994] OJ C241/392.

Brussels IIa Regulation.<sup>85</sup> The Court noted that the Declaration meant that ‘those States which are members of Nordic Cooperation and members of the Union have undertaken to continue that cooperation, in compliance with Community law’ and concluded ‘Accordingly, that cooperation must respect the principles of the Community legal order.’<sup>86</sup>

By contrast, the EEA Agreement contains a provision on Nordic cooperation. According to Article 121(a), the provisions of the Agreement shall not preclude cooperation within the framework of Nordic cooperation ‘to the extent that such cooperation does not impair the good functioning of this Agreement’. The provision, as far as can be established, has not been discussed in the EFTA Court.<sup>87</sup> The wording of the provision could be seen as providing a wider scope for maintaining Nordic cooperation than under the EU Treaties.<sup>88</sup> Still, the reference to the good functioning of the EEA Agreement means that Nordic cooperation does not have unlimited precedence; rather, the impact of Nordic agreements or coordinated legislation will have to be assessed in relation to the provisions of the EEA Agreement, notably the central and ubiquitous principles on loyalty and non-discrimination.<sup>89</sup> It may be, therefore, that in many situations, EEA law will take precedence over provisions based on Nordic cooperation, just as EU law does over Nordic agreements.

Regarding the general relationship between EU law and older Nordic agreements, Article 351 TFEU provides that agreements pre-dating EU membership continue to apply. However, the Member States are required to ‘take all appropriate steps’ to eliminate incompatibilities with EU law.<sup>90</sup> Such incompatibilities could relate to preferential treatment of Nordic nationals, which used to be a recurrent feature in Nordic agreements. As of yet, neither the CJEU nor the EFTA Court has ruled on such incompatibilities regarding the free movement of persons.<sup>91</sup> Thus, when a dispute arises regarding such less-preferential treatment, given EU law, it will be incumbent upon the relevant national court to make an order for a preliminary reference to the CJEU (or, in Iceland and Norway, a request for an Advisory Opinion to the EFTA Court).

Concerning new Nordic agreements, the Nordic states that are EU Member States must act within the limits of EU law concerning the competence to enter international agreements with third states. Given the development of the CJEU case law on the exclusive competence of the EU to enter certain international

<sup>85</sup> Case C-435/06 C, ECLI:EU:C:2007:714; Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

<sup>86</sup> C (n 85), paras 63 and 64; see also the Opinion by AG Kokott in the case, ECLI:EU:C:2007:543, paras 59–61.

<sup>87</sup> H Ormberg, ‘Article 121’ in F Arnesen et al (eds), *Agreement on the European Economic Area: A Commentary* (Nomos 2018) 924, para 4.

<sup>88</sup> Leino and Leppävirta (n 55) 301.

<sup>89</sup> Ormberg (n 87) para 7.

<sup>90</sup> Leino and Leppävirta (n 55) 298.

<sup>91</sup> Wenander (n 15) 57 f; Leino and Leppävirta (n 55) 304.

agreements, the scope for Nordic agreements may be limited in many fields of law.<sup>92</sup> As regards the EEA Agreement, Iceland and Norway have potential scope for entering agreements with each other (and with Denmark in policy fields where Denmark has exceptions from EU law).<sup>93</sup>

In some instances, the Nordic states that are EU Member States have been able to overcome the obstacles to Nordic cooperation under EU law by successfully proposing special provisions in secondary law. In this way, the continued applicability of the Nordic convention on succession (which was adjusted) has been secured in relation to the EU legislation in the field.<sup>94</sup> Another example is that the Nordic states, as parties to the Schengen *acquis*, have managed to maintain the passport-free, cross-border freedom of movement provided under the Nordic passport union.<sup>95</sup>

Furthermore, the Nordic states may use the scope for agreements available under secondary law. The aforementioned Nordic Arrest Warrant is an example of this.<sup>96</sup> In the field of social security law, the Nordic Convention on Social Security is intended to complement Regulation (EC) No 883/2004, according to the scope for such agreements under that Regulation.<sup>97</sup> The Nordic Convention on Social Security also extends the applicability of the EU coordination rules to the Faroe Islands, Greenland and Svalbard, to which Regulation 883/2004 (or any other EU and EEA provision) does not apply. This extension of the applicability of EU law is problematic in the light of the CJEU case law on the competence to enter international agreements.<sup>98</sup>

#### V. FUTURE PROSPECTS: PROPOSALS FOR DEVELOPING NORDIC INTEGRATION AND CLOSURE OF BORDERS IN TIMES OF CRISIS

In the light of the political difficulties in finding common ground for Nordic integration and political cooperation, and the challenges posed by EU law to specific Nordic legal solutions (see section IV), the states have made various

<sup>92</sup> Leino and Leppävirta (n 55) 299 f, discussing the impact of Opinion 1/13, ECLI:EU:C:2014:2303.

<sup>93</sup> Leino and Leppävirta (n 55) 301.

<sup>94</sup> Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107, Art 75(3); cf Konvention av den 19 november 1934 mellan Danmark, Finland, Island, Norge och Sverige innehållande internationella privaträttsliga bestämmelser om arv, testamente och boutredning (Convention between Denmark, Finland, Iceland, Norway and Sweden comprising private international law provisions on succession, wills and estate administration) (Copenhagen, 19 November 1934); Wenander (n 15) 59; Leino and Leppävirta (n 55) 310.

<sup>95</sup> Protocol (No 19) on the Schengen Acquis Integrated into the Framework of The European Union.

<sup>96</sup> Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, Art 31 (2); Mathisen (n 61) 16 f.

<sup>97</sup> Nordic convention on social security (n 69); Regulation 883/2004 (n 69), Art 8(2).

<sup>98</sup> Leino and Leppävirta (n 55) 309 f.

attempts to adapt Nordic cooperation to current realities. In principle, there seems to be broad popular support for Nordic cooperation.<sup>99</sup> The political question, therefore, is rather ‘how’ rather than ‘whether’ Nordic cooperation should continue. These discussions fluctuate between proposals to downscale obsolete structures, and ideas of realising more ‘Nordist’ ambitions of revitalising and even expanding cooperation. At the same time, events in recent years have brought about recurrent temporary border restrictions and even closures between the Nordic states.

Among the common arguments against the current model for cooperation is criticism of the role of the Nordic Council. Legal scholarship has concluded that this body has lost much of its former position as an important venue for debate on Nordic matters (see section II).<sup>100</sup> Repeated proposals to shut down the Nordic Council have been suggested, and some of these have also recommended that the Nordic Council of Ministers be dissolved. So far, such proposals have not advanced further in the national parliaments.<sup>101</sup> It is clear that the contemporary role of the Nordic Council is very limited, and the institution is by no means parallel to a national parliament or the European Parliament. Concerning the interest of promoting free movement, the discussions in the Nordic Council often highlight limitations to cross-border mobility, which may put political pressure on the Nordic governments.<sup>102</sup>

Since the 1990s, various political initiatives have been taken to improve Nordic political cooperation.<sup>103</sup> This development intensified around 2010, when a report written by a well-known Swedish historian and senior civil servant proposed the establishment of a Nordic federal union in the spirit of the old ‘Nordism’, mentioning the Kalmar Union (see section II) as a historical parallel.<sup>104</sup> Although the proposal did not lead to any formal political initiatives, it spurred public debate on the role of Nordic cooperation and raised awareness of the Nordic dimension of international cooperation.<sup>105</sup> The proposal did not go into detail on the complex matters of the relation to national constitutional law or EU law, which would need to be considered carefully to take such a proposal further.<sup>106</sup>

In spite of these discussions, the 2015 migration crisis prompted Sweden – seemingly without using the framework for cooperation within the Nordic institutions (section III.A) to any substantive extent – to introduce border controls. These included requirements of identification at the border from Denmark, as allowed for under the Schengen rules through invocation of

<sup>99</sup> See, eg, Nordic Council of Ministers, *Støtte og skuffelse. Holdninger till nordisk samarbeid* (Nordic Council of Ministers Analysis nr 03-2021) 27.

<sup>100</sup> Cameron (n 12) para 24; see also from a political perspective Olesen and Strang (n 47) 43.

<sup>101</sup> Wenander (n 15) 27; Olesen and Strang (n 47) 27.

<sup>102</sup> Wenander (n 15) 125.

<sup>103</sup> Olesen and Strang (n 47) 32 ff.

<sup>104</sup> Wetterberg (n 8).

<sup>105</sup> Olesen and Strang (n 47) 36 f.

<sup>106</sup> Wenander (n 15) 21.

temporary derogations.<sup>107</sup> This made the Nordic passport union redundant in practice. At the time of writing, these border controls are still in place.

In 2018, the Norwegian emeritus professor of law and senior civil servant Inge Lorange Backer presented an inquiry on how to develop Nordic legal cooperation. The report was written on the initiative of the Nordic Council of Ministers. Backer pointed out that the informality of Nordic legal cooperation may be seen as a strength; while also concluding that in practice, the national public administrations need to prioritise duties under EU law and other international agreements, because time and resources are limited. He proposed a number of measures, which, among other things, aimed at clarifying and developing the procedures for legal cooperation in the Nordic Council and the Nordic Council of Ministers, preventing ‘border obstacles’ between the states and promoting the knowledge of the existing Nordic legal cooperation.<sup>108</sup> As far as can be established at the time of writing, these proposals have not yet led to any major initiatives in Nordic legal cooperation. One might wonder whether Backer’s observation, that the development of Nordic legal cooperation often is given lower priority than EU and other duties, is also relevant in relation to his own proposal.<sup>109</sup>

In 2019, the Nordic governments adopted a ‘Nordic Vision’, aiming to establish the Nordic states as the most integrated region of the world by 2030.<sup>110</sup> This vision, however, did not stop the Nordic states from continuing to introduce limitations to cross-border freedom of movement. Seemingly, the traditionally political character of Nordic cooperation has meant that the legal aspects for realising visions of Nordic integration are not given enough attention.

After criminals coming from Sweden into Denmark had committed crimes that garnered extensive media coverage in 2019 (a gang shooting and a bomb assault against the Tax Authority, both in Copenhagen), the Danish authorities introduced spot checks for people travelling into Denmark from Sweden. This political package also included measures to reinforce cross-border police cooperation.<sup>111</sup>

<sup>107</sup> Government Decision of 12 November 2015, Ju2015/08659/PO; cf 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 L151/8; 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 L77/1, Art 25.

<sup>108</sup> I Lorange Backer, *Styrket nordisk lovsamarbeid. Muligheter og utfordringer* (Nordic Council of Ministers 2018) 20, 45.

<sup>109</sup> cf J Danelius and K Bynander, ‘Det nordiska lagstiftningsamarbetet’ [2018] *Svensk Juristtidning* 65, 73.

<sup>110</sup> The Nordic Prime Ministers and Ministers for Cooperation, ‘Our Vision 2030’ *Nordic Cooperation* (20 August 2019) at [www.norden.org/en/declaration/our-vision-2030](http://www.norden.org/en/declaration/our-vision-2030) (accessed 17 February 2022); *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).

<sup>111</sup> Ministry of Foreign Affairs (*Udenrigsministeriet*), ‘Orientering samt brev: Forlængelse af den midlertidige grænsekontrol mod Tyskland og indførelse af midlertidig grænsekontrol mod Sverige’



Finally, as in other parts of Europe, the Covid-19 pandemic has had consequences for movement between the Nordic states. All Nordic states restricted cross-border travel at some point, with severe consequences for commuters and others.<sup>112</sup> Such actions are clearly at odds with the spirit of Nordic cooperation based on mutual trust. They serve as an indication that Nordic cooperation must be improved in order to be relevant for the future.

## VI. CONCLUSION

Although Nordic integration has been a success in historical terms and a role model for regional cooperation in the post-war years, things have changed. This was made plain by the closed borders and associated lack of mutual trust displayed in the Nordic states' handling of the Covid-19 pandemic of 2020 and 2021. As clearly shown, the vision of Nordic integration and cooperation now faces serious challenges, owing to the legal reality. Notably, the primarily political character of Nordic cooperation, without supranational features and individual rights that are justiciable before a common court, may account for many of the shortcomings when it comes to realising Nordic visions of cross-border mobility in practice.

The relevance of the institutional cooperation within the Nordic Council and the Nordic Council of Ministers has been questioned. In the light of the Europeanisation and internationalisation that Nordic societies have undergone during the last few decades, the added value of regional cooperation is not as evident as it used to be. Changes in the common understanding of Scandinavian languages in the countries – not least in the non-Scandinavian countries of Finland and Iceland – may be seen as an indicator of this development. The failures of the last few years – the inability to cooperate or to avoid border closures in times of crisis – also show that the Nordic cooperation within the Nordic Council and Nordic Council of Ministers of today suffers from serious deficits.

As to the impact of EU law, a number of challenges have emerged for Nordic legal cooperation in the form of (now less common) coordinated legislation and Nordic conventions. To continue to aim for specific Nordic legal arrangements would seem to require considerable effort, and the results would still be uncertain in relation to the requirements of EU law, as interpreted by the CJEU. Furthermore, in practice, the crafting and implementation of EU law may

(Information to the European Affairs Committee of the *Folketing*) at [www.ft.dk/samling/20191/almdeleu/bilag/34/index.htm](http://www.ft.dk/samling/20191/almdeleu/bilag/34/index.htm) (10 October 2019) (accessed 17 February 2022).

<sup>112</sup>U Neergaard, J Paju and J Raitio, 'Broken Wings: Closure of Borders in the Three Nordic EU Member States during the COVID-19 Pandemic' *EU Law Live – Weekend edition* No 59 (21 May 2021) at <https://eulawlive.com/weekend-edition/weekend-edition-no59> (accessed 9 August 2022); HP Graver, 'Baselining COVID-19. How Do We Assess the Success or Failure of the Responses of Governments to the Pandemic?' in J Grogan and A Donald, *Routledge Handbook of Law and the COVID-19 Pandemic* (Routledge 2022) 214, 222.



require so much time and so many resources from the national civil services that, for practical reasons, Nordic cooperation is not a priority in these terms.

However, there are also elements that may point to a future for the Nordic vision. The existing institutional structures could be seen as an asset – an asset that could be developed to meet the demands of today. Indeed, from the legal and administrative perspectives, this is especially relevant at the civil-service level. The Committees of Government Officials, the working groups and expert groups under the Nordic Council of Ministers, and the border committees in border areas are important networks for exchanging information and best practices, and to provide information to citizens. These kinds of information services may have the important task of explaining the combined effects of national legislations and EU law to individuals engaging in cross-border activities. Perhaps it is in these smaller settings, related to everyday life, that the Nordic cooperation of the future has its most important role to play in the legal field. In such contexts, the Nordic legal culture of finding pragmatic solutions could play a vital part.