

“Could you, would you, should you?” Regulating cross-border travel through COVID-19 soft law in Finland

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Abstract: *In the context of the Coronavirus pandemic that has swept the world, the Finnish Government, like many of its peers, has issued policy measures to combat the virus. A significant number of these measures have been implemented by legal acts, including measures taken under the Emergency Powers Act, or otherwise by decisions of ministries and regional and local authorities in their exercise of powers provided by the law. However, some parts of the governmental policy measures have been implemented through non-binding guidelines and recommendations. Using border travel recommendations as a case study, this Article critically evaluates governmental decision-making in relation to non-binding but restrictive measures. The Government's inexperience with what may be thought of as soft law resulted in much confusion among the public and instigated a steep learning curve for the Government. Some of the problems can be explained as resulting from inadequate preparation and the need to act rapidly towards a legitimate aim, in particular in furtherance of the rights to life and health. That said, the debacle over the use of soft law to fight a pandemic in Finland revealed that there are fundamental misunderstandings about the processes and circumstances under which instruments conceived as soft law can be issued, as well as a lack of attention to their effects from a fundamental rights perspective.*

I. Introduction

Faced with a global pandemic of unprecedented proportions that constituted an imminent threat of a health emergency for the country, on 16 March 2020 the Finnish Government, in this case the Cabinet¹ in consultation with the President of the Republic, determined that exceptional conditions prevailed in Finland as per Section 3 of the Emergency Powers Act.² The Cabinet then proceeded to the adoption of decrees that triggered the application of some of the specific powers laid down in said Act for eventual health emergencies, as well as separate decrees in exercise of those powers, both categories of decrees subject to immediate review by Parliament.³ A state of emergency was in force in Finland for three months. The Government assessed on 15 June 2020 that the epidemic could now be managed using the regular powers of the authorities.⁴ The Cabinet, having again consulted the President of the Republic, issued decrees repealing the use of any remaining powers that had been triggered under the Emergency Powers Act, and announced that the current situation in the country no longer constituted exceptional circumstances as defined in that Act.⁵ The repealing decrees came into force on 16 June 2020 – exactly three months after the declaration of emergency conditions. It cannot be excluded that the Government may at some point again resort to the Emergency Powers Act.

During the state of emergency, the Government adopted numerous policy measures to counter the Coronavirus epidemic. A significant number of those measures were implemented through legal acts,

¹ For the present purposes, the ‘Government’ refers to the structure for governmental and administrative matters consisting of the plenary session and the ministries (‘the executive branch’), whereas the ‘Cabinet’ is used more narrowly to refer to a body which convenes for the general governing of the country, consisting of the Prime Minister and other ministers.

² Emergency Powers Act (1552/2011), with the unofficial English-language version available at: <https://www.finlex.fi/fi/laki/kaannokset/1991/en19911080_20030696.pdf> accessed 27 November 2020. See also VNK/2020/31, <<https://valtioneuvosto.fi/paatokset/paatokset?decisionId=0900908f8068ec10>> accessed 27 November 2020.

³ See the information (in Finnish):

<https://www.eduskunta.fi/FI/naineduskuntatoimii/kirjasto/aineistot/kotimainen_oikeus/LATI/valmiuslain-kayttoonottaminen-koronavirustilanteessa/Sivut/kayttoonoton-kasittely-eduskunnassa.aspx> accessed 27 November 2020.

⁴ Note that even during the state of emergency most of the measures were adopted using the regular powers of the authorities. The most important measure taken with reference to the Emergency Powers Act was the cordoning of the Uusimaa region between 28 March and 15 April 2020. Finland's capital Helsinki is contained in the region, which is Finland's most populous one.

⁵ VNK/2020/81, <<https://valtioneuvosto.fi/paatokset/paatokset?decisionId=0900908f806be0bf>> accessed 27 November 2020.

including measures taken under the Emergency Powers Act, or otherwise by decisions of ministries and regional and local authorities in their exercise of powers provided by the law. However, some were non-binding guidelines and recommendations, intended to mould the actions of lower-level authorities as well as individuals. The Government, for instance, instructed that Finnish citizens and persons residing in Finland should refrain from traveling abroad, and, in a similar vein, issued a “general guideline” addressed to those over the age of 70 to stay in quarantine-like conditions.⁶ It also used recommendations to instruct other authorities, creating complex chains of non-binding guidance. For instance, in order to prevent the spread of the virus in nursing homes and places of assisted living, the Ministry of Social Affairs and Health, on the recommendation of the Cabinet, recommended municipalities to instruct care units across the country to restrict external visits. Based on the recommendation from the ministry, care units virtually banned visits from relatives and others to care homes.⁷

These and other non-binding guidance issued during the spring and summer 2020 caused much confusion among the public and prompted many complaints to the Chancellor of Justice and the Parliamentary Ombudsman, both of whom are specifically entrusted with the task of reviewing the legality of actions by the Government and administrative authorities. With regard to the ban to visit care homes, the Deputy Ombudsman held in June 2020 that the expressions used in the guidelines created a picture of the instructions being intended as binding.⁸ The ministry apologised for the confusion, noting that “the guideline issued in March was refined in mid-April, emphasising that visits should be based on individual judgment and that different situations and the elderly living in different situations should be taken into account. It had become clear to the ministry that the guideline had been applied more strictly than intended”.⁹

Against this backdrop, this Article analyses governmental decision-making processes in relation to recommendations and guidelines issued during the first months of the Coronavirus epidemic, focusing in particular on non-binding but restrictive recommendations related to border travel. It asks whether the Government’s soft law-making was based on a clear identification of a legal basis and the respect for legal principles such as legality, transparency, consistency, as well as for fundamental and human rights. We argue that the answer is “no”, with the Government not only being unprepared for the pandemic, but also lacking expertise and experience concerning the proper use of the regulatory tools available. However, there is also a more universal lesson to be learnt from the Finnish experience. So-called COVID-19 soft law has immediate consequences for individuals which means that it, unlike normal non-emergency soft law, risks potential conflicts with human rights. This Article provides insights into the limits of soft law-making from a human rights perspective and offers reflections on what must be taken

⁶ For a summary of the governmental measures, see

<<https://valtioneuvosto.fi/documents/10616/21411573/Hallituksen+linjaamat+toimet+1603.pdf/887504b5-4969-aa37-541e-645e3390f6fc/Hallituksen+linjaamat+toimet+1603.pdf?t=1584446492000>> accessed 27 November 2020.

⁷ The Cabinet issued a recommendation on 12 March 2020 on the need to avoid visits to nursing homes for the elderly. The Ministry of Social Affairs and Health issued on 20 March 2020 the guidelines, which called on municipalities to instruct the heads of the 24-hour care units in their area to impose a ban on visits to the units for non-essential visits. This guide was updated with the guide issued on 16 April 2020. According to the statement of the Ministry of Social Affairs and Health, the decision made by the head of the operational unit to ban visits is based on Section 17 of the Communicable Diseases Act, according to which the health care and operational unit must systematically combat treatment-related infections. The specific references to the recommendations can be found in the decision referred to in 8 below.

⁸ EOA 22.6.2020 dnro 3232/2020, <<https://www.oikeusasiamies.fi/r/fi/ratkaisut/-/eoar/3232/2020>> accessed 27 November 2020.

⁹ Yle, ‘Professori Tuomas Ojanen: Suositukset ja lakiin perustuvat määräykset menivät sekaisin vanhusten hoivakotien vierailuohjeissa’, 25 June 2020, <<https://yle.fi/uutiset/3-11416895>> accessed 27 November 2020 (authors’ translation). Disability organisations have subsequently submitted a collective complaint against Finland under the European Social Charter, <https://validity.ngo/2020/11/27/finland-ngos-seek-legal-recognition-that-locking-people-in-institutions-is-not-a-lawful-response-to-covid-19-epidemic/?fbclid=IwAR3w_hS-o7cC0auvh49P-iWnv7dewx6-Nmb_gWduGm22z0QxYTT89X1MJEA> accessed 27 November 2020.

into account when issuing recommendations that may have effects on the rights and obligations of individuals.

Usually defined as rules of conduct having no legally binding force but producing legal and practical effects,¹⁰ soft law is adopted at many levels of governance. In the EU, the Commission (but sometimes also the Council) issues recommendations and opinions, defined in Article 288 (5) TFEU as instruments with no binding force. This provision makes direct reference only to recommendations and opinions, whereas the real list of instruments issued in practice is much longer: frameworks, communications, guidelines, guidance documents, letters, notices, etc. In most cases, soft law issued by EU institutions is given to provide detailed rules and technical standards for the interpretation and the implementation of legislation. Member States also issue and use soft law, but in most cases national soft law guides administration with no effects for parties outside the administration.¹¹ National constitutions rarely mention or define soft law, and this is the case in Finland, too, where recommendations (*suositus*) or guidelines (*ohjeet*) are not formal legal categories.¹² Finally, soft law is an important category in the context of international law. While relatively few human rights treaties have been adopted at the United Nations level in the last two decades, the number of Declarations, Resolutions, Conclusions, Principles, Recommendations and Guidelines has grown significantly.¹³ These soft sources help fill a void in the absence of law and influence the interpretation of legally binding sources such as treaties.

As a normative phenomenon, the Finnish experience of what is here referred to as COVID-19 soft law is, as noted above, different. Unlike more established usage of soft law in Member States, the EU or at the international level, COVID-19 soft law in Finland is either addressed directly to individuals (travel recommendations), or it instructs lower-level authorities to issue soft law that affects individuals (recommendations in relation to visits to care units). Normal non-emergency soft law in Finland rarely, if ever, *is directly addressed to, or affects*, individuals, and is usually addressed to authorities in charge of interpreting and applying the law, such as EU directives or national legislation. This kind of interpretative soft law is seen to have legal effects in that it is capable of modifying the operation of the law by adding a clarification or contributing to a change in the interpretation of the law. The function of Finnish COVID-19 soft law is different. It is not issued to provide a new or a different interpretation of the law, rather, it appears to be issued to create new rules through a soft source.¹⁴

This article has analysed a rolling and ongoing crisis as a moving target. In keeping in line with other articles of this Special Issue, we have restricted the analysis of the Finnish regulatory response to the Coronavirus to the period between March 2020 – August 2020, that is, to the so-called “first wave”. Adding further methodological complexity, the publication practices of COVID-19 soft law have been unusually varied, and we have resorted to what might be described as normative ‘quilting’, analysing press releases, newspaper articles and official decision materials, making information requests to internal letters, and retrieving archived material through web archives such as the Internet Wayback Machine. The

¹⁰ F Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’ (1993) *Modern Law Review* 64.

¹¹ For different Member States’ practices, see M Eliantonio, E Korkea-aho and O Stefan (eds.), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence*, forthcoming Hart Publishing 2021.

¹² Finnish soft law literature is limited, but some exists. See, eg, M Scheinin, *Ihmisoikeudet Suomen oikeudessa* (Suomalainen Lakimiesyhdistys, 1991), pp. 39–56, M Scheinin, ‘Oikeus, demokratia, informaatio – ajankohtaisia kehityspiirteitä’ in A Rosas (ed.) *Oikeus, demokratia, informaatio: oikeusnormien ja oikeuslähteiden muuttuminen* (Lakimiesliiton Kustannus, 1993) pp. 16–26; or T Määttä, ‘Soft law kansallisen oikeuden oikeuslähteenä. Tutkimus oikeudellisen ratkaisun normipremissin muodostamisen perusteista ympäristöoikeudessa’ (2005) *Oikeustiede – Jurisprudentia*, T Määttä, ‘Näkökulmia sääntelytarkkuuteen: Lainsäädäntölähtöisestä analyysistä elävään oikeuteen’ in J Tala (ed.), *Sääntelytarkkuuden ongelmia* (Helsinki, Hakapaino Oy, 2010).

¹³ S Lagoutte, T Gammeltoft-Hansen, and J Cerone (eds.), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press, 2016).

¹⁴ Finnish COVID-19 soft law resembles decisional soft law in Senden’s classification, see L Senden, *Soft Law in European Community Law* (Hart Publishing, 2004).

compilation of this varied material has allowed us to provide provisional analyses of the regulatory responses to a crisis which is still producing effects.

The Article proceeds as follows. Section 2 looks at the role and status of soft law generally in public law in Finland. Section 3 analyses recommendations related to border travel during the Coronavirus epidemic. Section 4 discusses the process which led to the adoption of recommendations and their effects from a fundamental rights perspective. Section 5 briefly concludes.

II. The role and status of soft law in Finnish public law

The Constitution of Finland does not have a single comprehensive clause on categories of legal acts, unlike, for instance, the EU treaties which specifically mention the types of acts the EU institutions can adopt.¹⁵ The hierarchy of norms is nevertheless clear in that when the Constitution refers to “law” (*laki*) this is understood as a reference to Acts of Parliament (*Eduskunta*), i.e. laws adopted by the sovereign legislative body in the procedure prescribed in Section 72 (or in some cases Section 73, 76 or 95) of the Constitution. The President of the Republic together with the Cabinet, the Cabinet on its own, or Ministries also exercise limited delegated powers to issue by-laws called Decrees (*asetus*). Decrees must have a legal basis in the Constitution or in an Act of Parliament and be compatible with them.¹⁶

The significance of Acts of Parliament is made clear indirectly but unmistakably. Namely, Section 80 of the Constitution requires that certain matters shall be laid down by acts of Parliament.¹⁷ In Finland, a matter is legislative in nature if it affects the rights and obligations of individuals or if the Constitution otherwise requires an Act to be adopted. Further, the Parliament’s Constitutional Law Committee has clarified that a matter is of a legislative nature if it affects the foundations of an individual’s rights or obligations, the same matter is currently regulated in an Act of Parliament, or there is a general understanding that the matter should be regulated by an Act of Parliament.¹⁸ This principle, which concretely means that there is little leeway to lay down non-legislative rules on matters that touch upon the individual’s rights and obligations, is important when assessing the governmental measures during the pandemic. Besides requiring that certain matters shall be laid down by Acts of Parliament, Section 2(3) of the Constitution also requires that those who exercise public power comply with the principle of legality. This principle means that the exercise of public powers shall be based on the law and in all public activity, the law shall be strictly observed. When a fundamental rights provision in Chapter II of the Constitution uses the notion of “law”, this is understood as a reference to Acts of Parliament. Section 2(3) of the Constitution uses the same word as a reference to the legal order as a whole. And so, in addition to national legislation, the term “law” in Section 2(3) should be interpreted broadly to cover EU law, the European Convention on Human Rights as well as other international obligations.¹⁹

There is no mention in the Constitution of other types of regulation than Acts of Parliament and Decrees. Authorities can, however, issue other measures such as internal administrative regulations (*hallinnon sisäinen määräys*) and decisions-in-principle (*periaatepäätös*) or letters of instruction (*ohjauskirje*).

¹⁵ The Constitution of Finland (731/1999), with the English-language version available at: <<https://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf>>.

¹⁶ Section 80.

¹⁷ Opinions of the Constitutional Law Committee 11/2000 vp and 12/2000 vp. See also V-P Viljanen, ‘Onko eduskunnan asema lainsäädäntövallan käyttäjänä muuttunut?’ (2005) *Lakimies* 1050, pp. 1059–1061.

¹⁸ Opinion of the Constitutional Law Committee 11/2000 vp.

¹⁹ Finland is a country of mitigated dualism, which means that a domestic Act (or in some cases Decree) is required for making international obligations as part of the Finnish legal order (incorporation) but such practice is extensive and not exceptional, resulting in what some authors call de facto monism, see M Scheinin, *Ihmisoikeudet Suomen oikeudessa* (supra n 12). For the position of EU law in Finland, see T Ojanen, ‘EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament’ 2007 (52) *Scandinavian Studies In Law*, p. 206.

1. Legally binding internal administrative regulations and decisions-in-principle

According to Section 3(2) of the Constitution, the Cabinet, either independently or jointly with the President of the Republic, exercises executive authority and has general competence in the governmental and administrative matters referred to in Section 65 of the Constitution. However, when exercising this general competence, the Cabinet must take into account the above principle of legality. Pursuant to its general competence and within the framework of the principle of legality, the Cabinet may direct the state administrative machinery and issue internal administrative regulations even if the power to issue them has not been specifically provided by the law. The Cabinet may also adopt decisions-in-principle to guide and organise the tasks and activities of various branches of government. Internal administrative regulations and decisions-in-principle are prepared by Government officials, who also serve as counsel, and adopted by the Cabinet at a plenary session.²⁰

Internal administrative regulations can also be issued by a decision of a ministry. Ministries which, according to Section 68(1) of the Constitution, are responsible for the proper functioning of the administration in their field of activity may, without the express authority provided by law, issue internal administrative regulations in their respective fields of administration.²¹ For instance, the Ministry of Finance issued a decision containing internal administrative guidance to governmental agencies on work arrangements during the Coronavirus epidemic.²²

Internal administrative regulations and decisions-in-principle are legally binding in nature. They cannot, however, lay down legal rules falling within the scope of an Act of Parliament or Decree, but can only contain internal directions for the administration.²³ In other words, under the general competence of the Cabinet, only internal administrative regulations or decisions-in-principle binding on the state authorities may be issued. They cannot apply to private persons or entities or to municipalities whose self-government is provided for in Section 121 of the Constitution. The demarcation between a substantive rule of law requiring an express power to issue Decrees and an administrative regulation or decision-in-principle falling within the general competence of the Cabinet can be difficult to draw in practice. Therefore, Decrees that cause effects outside the state administration should not be issued solely on the basis of the general competence of the Cabinet.²⁴ Furthermore, pursuant to Section 107 of the Constitution, a Decree, an internal administrative regulation or a decision-in-principle as a lower-level provision may not be applied in court or in another authority if it is in conflict with the Constitution or any other Act of Parliament.²⁵

Internal administrative regulations and decisions-in-principle resemble administrative circulars in countries such as Germany, Cyprus, France or Italy.²⁶ They guide the activities of the administration, but do not bind the competence of the administration when it is exercising the powers given to it by legislation. Crucially, they cannot be of direct concern to third parties and have no legally binding effects on individuals' actions.

²⁰ Section 3(11) and (12) of the Government Rules of Procedure.

²¹ If it is necessary to confer on a central administrative agency the power to issue administrative orders concerning public authorities, such a power of the central agency to issue administrative orders must be expressly provided for by law.

²² VN/5733/2020,

<<https://vm.fi/documents/10623/1115054/Ohjeita+virastoille+toiminnasta+koronavirusepidemian+aikana%2C+8.6.2020.pdf/4a083646-81ef-8c67-2cd7-3d59d16b66eb/Ohjeita+virastoille+toiminnasta+koronavirusepidemian+aikana%2C+8.6.2020.pdf>> accessed 27 November 2020.

²³ In some cases, an internal regulation binding on a public authority may also have non-administrative effects with regard to details which are technically or otherwise insignificant. See Lainkirjoittajan opas, <<http://lainkirjoittaja.finlex.fi/13-saadosten-lajit-ja-saadostaso/13-9/>> accessed 27 November 2020.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Supra, note 11 (Eliantonio et al).

2. Non-binding letters of instruction

Another category of measures is a letter of instruction. Ministries and authorities such as the regional state administrative agencies (*aluehallintovirastot*) can issue instructions to their subordinate administrations and share information on good practices. Unlike the measures above, letters of instruction are non-binding measures.

Ministries issue letters of instruction either based on the powers specifically provided by the law or on the basis of Section 68 of the Constitution that makes each ministry, within its purview, responsible for the preparation of matters to be considered by the Government and for the appropriate functioning of administration. For instance, on 15 May 2020, the Ministry of Health and Social Affairs sent a letter of instruction to regional state administrative agencies and also the Government of Åland – which would be a special case but cannot be addressed here – recommending them to adopt measures to prevent the spread of the Coronavirus pursuant to Section 58 of the Communicable Diseases Act.²⁷ Other authorities such as regional state administrative agencies can also issue letters as provided for by law. Usually there is no express basis in the law to do so, and the authority to issue instructions is implied by virtue of a general competence of the respective authority.²⁸ For instance, Section 8 of the Communicable Diseases Act provides that the regional state administrative agencies coordinate and monitor the control of communicable diseases in their respective areas. These agencies also make the administrative decisions laid down in this Act, utilising the expertise of the joint municipal authority for hospital district, the relevant university hospital district, and the National Institute for Health and Welfare.

Letters of instruction are, just as internal administrative regulations and decisions-in-principle, internal measures, and they are not meant to have effects outside the administration. Their normative nature has caused confusion especially with regard to municipalities and the Åland Islands, whose self-government is constitutionally guaranteed. For instance, the Southern Finland State Administrative Agency sent a letter of instruction addressed to municipalities in its area concerning the handling of the epidemic on 22 May 2020. It had to clarify its guidance by emphasising how the letter of instruction is not a binding administrative regulation (*määräys*) but a recommendation (*suositus*).²⁹

Letters of instruction issued by ministries are signed by the minister and counter-signed by counsel. Preparation and presentation for decision are done under official responsibility (*virkevastuu*, liability for acts in office), which creates the conditions for the letters to be drafted in a legally clear manner. The preparation does not preclude them from being discussed before they are adopted by the Government for example in government negotiations or in ministerial committees or working groups.³⁰

3. The Cabinet as generator of soft law?

As explained above, the Cabinet has the right to direct the administrative machinery under its authority based on its general competence. Pursuant to this general competence to act, the Cabinet (and ministries)

²⁷ Communicable Diseases Act (1227/2016) in English:

<<https://www.finlex.fi/en/laki/kaannokset/2016/en20161227.pdf>>. Political control over authorities has been intensely debated. In our view, the regional state administrative agencies are under the authority of the ministry and the minister. Their political control is therefore permissible, unlike central administrative agencies (*keskusvirastot*). The latter are not subject to political control and governed only by normative decisions

²⁸ The Constitutional Law Committee (PeVL 6/2003 vp, p. 4; PeVL 20/2004 vp, p. 4; PeVL 30/2005 vp, p. 6; PeVM 5/2013 vp, p. 3–4) has considered that the provisions of law concerning the adoption of instructions are unnecessary, as the authority may issue instructions in the field of its statutory duties without prior authorisation. According to the Committee, such authorisations are liable to blur the distinction between binding legal rules and non-binding recommendations. This does not preclude the authority from explaining in its decision that it is competent to issue instructions and guidelines in the field of its statutory function.

²⁹ <<https://www.vantaansanomat.fi/paikalliset/2096658>> accessed 27 November 2020.

³⁰ Email from the Chancellor of Justice to the Cabinet and ministries (28 April 2020) (on file with authors).

may issue internal administrative regulations and decisions-in-principle. When exercising its competence, the Government must comply with the requirement of legality. This means, first and foremost, that these measures are to guide and organise the tasks and activities of various levels of government. Their intended audience is another authority, not individuals outside the state administration. Neither internal administrative regulations nor decisions-in-principle are as such soft law, as they are considered legally binding, although with effects limited to the administration. A letter of instruction can instead properly be characterised as a soft law instrument. These non-binding letters of instruction are issued by ministries and lower-level authorities – not by the Cabinet. The conclusion drawn from the above analysis is that the Cabinet, in principle at least, cannot seek to issue non-binding norms that would have legal effects outside the state administration. The Chancellor of Justice has, however, suggested that legally binding decisions-in-principle may contain elements that are best characterised as non-binding recommendations, and these non-binding parts of decisions-in-principle may have effects outside the state administration. Their legal nature as non-binding recommendations must, however, be made clear, and their impact must be assessed from a fundamental rights perspective.³¹

As the next subsection shows, the Cabinet, irrespective of the lack of a legal basis or established constitutional practice, adopted norms that fell outside the normative architecture described above, which makes the Finnish COVID-19 soft law all the more important to study.

III. The Finnish COVID-19 soft law: the case of travel recommendations

Notwithstanding the above-referred uncertainty in relation to the adoption of soft law, the Cabinet, ministries and central authorities have resorted to it to justify some of their actions to tackle the effects of the Coronavirus. Various restrictions and recommendations that have a direct bearing on people's lives began to be listed on the Government's website under the title "Restrictions during the Coronavirus Epidemic" in the end of April 2020.³² The website is regularly modified to reflect the changing epidemiological situation.

One of the most controversial issues relates to the crossing of Finland's territorial borders. On 17 March 2020, the Government first appeared to prohibit any, except indispensable, travel, including for Finnish nationals, and since 14 May 2020, unnecessary travel by non-nationals.³³ As of 15 June 2020, internal border control was suspended for traffic between Finland and Norway, Denmark, Iceland, Estonia, Latvia and Lithuania. From 13 July 2020 the same relaxation of the regime was temporarily extended to almost all Schengen countries but, notably, not Sweden and some other EU Member States where the epidemic was thought to not be convincingly under control.

In this section we will first present a critical analysis of the measures by the Government as to their form, content and legality, and then briefly assess what lawful options the Government might have had at its disposal.

1. The Government's incoherent use of soft law as a direct source of obligations

When the Cabinet adopted the decisions (we return to the legal nature of these decisions below) seemingly prohibiting all travel, the general perception was, understandably, that "borders are closed", and even Finns could only travel for urgent or compelling reasons.³⁴ The right of a Finnish citizen to

³¹ Ibid.

³² <<https://valtioneuvosto.fi/tietoa-koronaviruksesta/rajoitukset-ja-suositukset>> last accessed 27 November 2020.

According to the archived information available on the Wayback Machine, the website became active on 23 April 2020.

³³ Travel recommendations were only subsequently listed as one of the "Restrictions during the Coronavirus epidemic".

³⁴ SM/2020/20, <<https://valtioneuvosto.fi/paatokset/paatokset?decisionId=0900908f8068f44f>> and SM/2020/21, <<https://valtioneuvosto.fi/paatokset/paatokset?decisionId=0900908f8068f450>> both accessed 27 November 2020. One of the first formulations concerning the closing of national borders was probably contained in this summary, see point 16,

return to Finland from abroad was maintained as a promise. This general perception of what the Cabinet had decided seemed, however, to reflect a conflict with Section 9 of the Constitution. Subsection 2 would only seem to allow limited restrictions on the right to leave Finland:

Everyone has the right to leave the country. This right may be subject to such restrictions as may be necessary by law to ensure the progression of a trial or execution of a punishment or to ensure the fulfilment of the obligation to defend the country.

The starting point of the Passport Act (671/2006) is that if a Finnish citizen has a passport, he or she is free to come and go. The Passport Act is written as a general law on the right of a Finnish citizen to leave Finland and enter Finland (Section 1). Obstacles to obtaining a passport (Section 15) and the conditions for revocation (Section 21) are strictly regulated and must respect the content of Section 9 of the Constitution. The Passport Act does not contain any provision under which the right to travel could be denied due to an infectious disease. Neither the Emergency Powers Act nor the Communicable Diseases Act contain any provision on such travel restrictions. The Communicable Diseases Act does however allow individual quarantine (Section 60) and even deprivation of liberty (Section 63) of the infected person, which inevitably leads to a temporary impediment to the right to travel. Section 118 of the Emergency Powers Act, which was used in order to close off the Uusimaa region for three weeks in the spring 2020, creates the ability to deny the right to “stay and move in a certain locality or area or to restrict them”. However, stretching the provision to prohibit individuals from entering the Finnish border or border crossing points would be a dubiously far-reaching interpretation of the wording of the provision. None of these existing provisions of law was used as a legal basis for the so-called “closing” of the borders.

The Finnish Border Guard is the national border authority which has a dual character as an integral part of the Ministry of the Interior and as a structure under its own military command. After the Cabinet adopted its first decision concerning travel, the Finnish Border Guard published “Guidelines for cross-border traffic” on its website. The guidelines state that as of 8 April 2020, “Finnish border authorities *allow* (emphasis added) the return of citizens to Finland at internal borders, i.e. traffic between Finland and another Schengen state” as well as well-defined “essential commuting and other essential traffic”:

health and rescue personnel (including emergency care) and elderly care professionals; freight transport and logistics personnel employees who, on the basis of a permanent employment relationship and assignment, work in a natural area of employment on the border with Sweden or Norway; diplomats, staff of international organisations; military personnel and aid organisation personnel in their duties; persons traveling on compelling family matters (eg child visitation, funeral); persons in need of international protection or otherwise traveling for humanitarian reasons; other necessary and justified transport, such as work important for the functioning of society or security of supply, the performance of which requires the work of a person or persons coming from another country and the work that does not tolerate delays;³⁵

The same guidelines also contained information on various other points, e.g., the 14-day (home) quarantine of those arriving in Finland, the situation of crossing the EU’s external border, the criteria for

<<https://valtioneuvosto.fi/documents/10616/21411573/Hallituksen+linjaamat+toimet+1603.pdf/887504b5-4969-aa37-541e-645e3390f6fc/Hallituksen+linjaamat+toimet+1603.pdf?t=1584446492000>> accessed 27 November 2020.

³⁵ <https://web.archive.org/web/20200501012751/https://www.raja.fi/ajankohtaista/ohjeet_rajanylitykseen> accessed 27 November 2020. A shorter English-language version can be found at:

<https://www.raja.fi/current_issues/facts/news_from_the_border_guard/1/0/new_restrictions_on_border_crossings_79409> accessed 27 November 2020.

essential commuting in the Schengen area (i.e. at the Swedish or Norwegian border), and the exact meaning of “other essential traffic”.³⁶

However, in relation to the Finnish citizen’s constitutional right to leave the country, the Border Guard guidelines are only an information text dressed in a legally binding outfit. There is no legal basis for the list quoted above, not even for the concept of essential traffic. In part it appears that EU-level measures related to *external* borders were presented as applying in respect of any crossing of Finland’s borders, including its internal Schengen borders and its own nationals. As to the actually applicable legal framework, the Border Guard Act, in line with the Schengen acquis, temporarily authorises the reintroduction of *border control* at internal EU borders (Section 15) and the *closing of certain border crossing points* (Section 16).³⁷ The latter provision contains an explicit protection clause for fundamental and human rights:

The closing of a border crossing point must not impede the right of a Finnish citizen to enter or leave the country, nor infringe on the rights of persons covered by European Union legislation on free movement or on anyone’s right to international protection.

The Schengen acquis entitles Finland to temporarily return border control, that is, the systematic control of travel documents to the EU’s internal borders, e.g. for reasons of internal security (Article 25).³⁸ However, this does not affect the right of free movement between EU countries. EU law may be seen to allow Finland to control the right of its own citizens to leave the country. However, this would not remove the need for a legal basis in national law and a decision taken in that order, to implement such restrictions as may be permitted for a Member State by EU law. What would be unconstitutional would remain unconstitutional irrespective of what EU law might allow on this point.

What is then the legal status of the texts published on the Finnish Border Guard’s website as legal norms in Finland? These are at best “instructions” with no legally binding force. In the three months of officially declared exceptional circumstances, the Statute Book of Finland (*Suomen säädöskokoelma*) and the Government’s decision-making material (available online) largely consisted of Decrees issued on the basis of the Emergency Powers Act and other legal acts related to the Coronavirus epidemic but not in respect of the border issue where the Cabinet’s decisions were not issued in the form of a Decree published in the Statute Book. The Cabinet’s decision-making material contains the background material of the Border Guard’s instructions, which shows that the Cabinet has considered the Border Guard’s memoranda and decided not only to close certain border crossing points and introduce controls - which would be lawful measures - but also to “restrict border traffic”.³⁹ These decisions (which were not taken in the form of a Decree or published in the Statute Book) can perhaps be understood as decisions-in-principle that would be legally binding for authorities but, in principle, without legal effect upon individuals. In other words, for individuals these decisions by the Cabinet are not binding, i.e. they are soft law. Problematically, through the measures by the Border Guard, the Cabinet decisions do have effects, even quite drastic ones, upon individuals who may have been persuaded to turn around, or may have been formally denied entry or exit, or even subjected to fines. To increase confusion, the Cabinet communicated to citizens these decisions on travel instructions as “Recommendations”.⁴⁰ Several complaints concerning this ambiguous and amorphous border regime were submitted to the Chancellor of Justice and the Parliamentary Ombudsman.⁴¹

³⁶ Ibid.

³⁷ The Border Guard Act (578/2005).

³⁸ 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).

³⁹ <<https://valtioneuvosto.fi/paatokset/paatokset?decisionId=0900908f8068f450>> accessed 27 November 2020.

⁴⁰ <<https://valtioneuvosto.fi/tietoa-koronaviruksesta/rajoitukset-ja-suositukset>>.

⁴¹ Disclosure: The second author submitted on 28 April 2020 a complaint to the Chancellor of Justice concerning the use of recommendations without a proper legal basis to regulate and restrict the right of Finnish citizens and others to leave the

The Government decided to extend the existing travel instructions on 7 April 2020. Its decision was worded laconically: “The Government approved the proposal”. The proposal thereby approved included:

The Government decides on the extension of the decision on the temporary closure of certain border crossing points and traffic restrictions from 14 April 2020 to 13 May 2020.⁴²

The background memorandum to the original Cabinet decision taken on 17 March 2020 explains what the “traffic restriction” decided by the Government would be. The memorandum explains that the restrictions would not interfere with the fundamental right guaranteed by Article 9 of the Constitution or with the free movement of the EU. Yet the same memorandum states on several occasions that at borders – including the internal Schengen borders – “only essential traffic” would be allowed, a term defined in this context as follows:

Other essential services would include, but are not limited to, cross-border traffic related to ship crews, rescue and medical services and the departure of third-country nationals.⁴³

The memorandum related to the closure of border crossing points and the restriction of border crossing traffic leave it unclear which conditions, restrictions and measures would apply to the EU’s external borders vs. internal borders, or whether they related to EU citizens, Finnish nationals, and/or citizens of other countries. In other words, it is unclear what the Cabinet has actually decided. It appears that the Cabinet exceeded its powers by assuming that it has the power to decide on the “restriction of traffic” in a manner that infringes on individual freedom of movement. What is clear, on the other hand, is that there is no legal basis for the texts that were presented on the Border Guard’s website as if they were legal norms.

On 1 October the Chancellor of Justice and on 12 November 2020 the Deputy Ombudsman issued extensive decisions in respect of complaints they had received. The former addressed the role of the Cabinet and the latter the actions by the Border Guard at general level. However, specific complaints submitted to the Ombudsman remained pending for further consideration, including those that concern the right of members of the indigenous Sámi people freely to cross the land borders between Finland, Sweden and Norway, as they have been able to do since 1751.⁴⁴

The Chancellor of Justice dismissed the complaints, concluding that the Cabinet had acted lawfully, even if insufficient attention had been given to constitutional rights, international human rights and EU law, and even if the provisions of the Border Controls Act had proven themselves “brief and partly open to interpretation” when Finland faced an unprecedented pandemic and would need to be revised. With respect to the theme of this contribution, the use of soft law, he stated that the distinction between recommendations and legal norms should have been kept clear, and emphasised the obligation to use “appropriate and clear, as well as legally precise expressions” and the obligation “to ensure that any communication to the public is understandable, as well as in substance appropriate, also what comes to the reliability of its legal content”.⁴⁵ In our view, rather much was said here between the lines.

country and return there, and on 19 May 2020 another complaint concerning the same phenomenon generally in respect of the crossing of Finland’s internal EU borders.

⁴² SM/2020/27, <<https://valtioneuvosto.fi/paatokset/paatokset?decisionId=0900908f8069b166>> accessed 27 November 2020.

⁴³ The memorandum is available in Finnish: <<https://valtioneuvosto.fi/paatokset/paatokset?decisionId=0900908f8069b166>> accessed 27 November 2020.

⁴⁴ Reference is made to the so-called Lapp Codicill, which was an annex to a border treaty, <<https://lovdata.no/dokument/NL/lov/1751-10-02>> accessed 27 November 2020.

⁴⁵ <https://www.okv.fi/media/filer_public/4d/db/4ddb692c-0871-4542-a018-9c733a978377/okv_61_10_2020.pdf> accessed 27 November 2020.

Conduct by the Border Guard was addressed by the Deputy Ombudsman in his decision concerning travel recommendations and their implementation.⁴⁶ Arguing that an authority's binding order to a citizen must always be based on a power prescribed by the law, he held that the border regime is an example of the situation where recommendations and binding provisions were confused. In his view, the adoption of travel recommendations was justified given the aim to protect the health and safety of citizens. He emphasised that providing guidance on recommended border crossing behaviour in a manner that takes into account constitutional rights has been challenging in exceptional and unforeseen circumstances and under intense pressure to act. Despite these understandable problems, the Deputy Ombudsman concluded that the Border Guard should have ensured that individuals hoping to cross the border knew that leaving the country was not recommended but that they had the right to cross the border without adverse legal consequences and that this was a matter of their freedom of choice.

Some of the language used by the Deputy Ombudsman gives rise to concerns over the ability of the highest independent oversight institutions to address a situation where the chain of authority from Cabinet level to individual border guards has demonstrated more interest in the outcome than in legality:

On the basis of the material available to me it is not possible to conclude without any doubt that the complainants would have been directly prohibited from crossing the border. On the other hand, an instruction seriously to abstain from crossing the border (*kebotus vakavasti pidättäytyä rajanylityksestä*) in fact comes close to such a prohibition. An ordinary citizen will find it difficult to understand the difference between the two – a prohibition and a serious instruction. This is the case in particular when a public authority in no way clarifies the nature and bindingness of its expression of its communicated will. Further, the words chosen may have differed from case to case and I cannot exclude that some exchanges between the border guards and persons seeking to cross the border might have become heated.⁴⁷

Here, it is worth emphasising that during those “exchanges”, one of the parties was wearing a uniform, exercising public authority, and carrying a weapon.

Finally, the institutions also dismissed too quickly the fact that the Cabinet's instructions left individual border guards in an impossible situation. If the problems originate at the Cabinet level, it is unreasonable to expect actors down the chain of authority to fix the problems.

2. Would a better approach have been possible under existing law?

A particular challenge that has been facing Finland during the Coronavirus epidemic is that the epidemic itself and the strategy for coping with it has been drastically different in Sweden which has a long land and water border, extensive contact and a 65-year history of passport-free travel with Finland.⁴⁸ The adoption of a strange and incoherent combination of legal and other measures at Finland's borders can be seen as reflecting the inability to find proper lawful tools to cope with the dramatically different epidemiological situation on the two sides of the border. The matter has been subject to extensive public discussion in the media and on Twitter where some legal experts, including the second author of this article, have presented the use of existing powers under the Communicable Diseases Act as the proper solution: Under the Schengen acquis and its own laws, Finland had the right to introduce border controls at its Schengen borders during a health emergency, and those controls may include medical checks and

⁴⁶ EOAK/3257/2020, <<https://www.oikeusasiamies.fi/r/fi/ratkaisut/-/eoar/3257/2020>> accessed 27 November 2020.

⁴⁷ Ibid. (authors' translation).

⁴⁸ As of 10 July 2020, the European Centre for Disease Prevention and Control reported 74.333 cases, 5.500 deaths and 102 new cases per 100.000 inhabitants over the last 14 days in Sweden (10 million inhabitants), while the same numbers for Finland (5,5 million inhabitants) were 7.273 cases, 329 deaths cumulatively and 1,8 new cases per 100.000 inhabitants, <<https://www.ecdc.europa.eu/en/cases-2019-ncov-eueea>> last accessed 31 August 2020.

interviews by health professionals, including enforced coronavirus swabs, enforced (as compared to self-imposed) quarantine or even detention – but only on the basis of an individual and professional medical assessment that the person – not Sweden or Swedes – constitutes a danger to public health in Finland.⁴⁹

We are not convinced by an argument presented by representatives of the Border Guard that refusing the entry to Finland by Swedish nationals would find its legal basis in the Immigration Act (301/2004) which provides for discretionary “overall consideration” (Section 146) by immigration authorities and has a specific clause allowing restrictions on public health grounds upon the entry and stay by EU nationals (Section 156a).⁵⁰ The latter provision must in our view, both because of its wording and because of its background in the Schengen acquis, be interpreted as relating merely to objectively assessed individual circumstances and therefore not be assessed through discretionary overall consideration. If a person genuinely constitutes a threat to public health in Finland because of carrying the Coronavirus, then returning him or her back to the community in Sweden is not the proper course of action for Finnish authorities, and their conduct could even give rise to State responsibility by Finland in respect of Sweden.⁵¹ Also for this reason we take the view that the Communicable Diseases Act provides the proper legal basis for appropriate measures at the border.

3. The relationship between national recommendations and EU soft law

How does the border regime established by Finland compare to what has been recommended by the EU? On 16 March 2020, the Commission adopted a Communication recommending temporary restriction of all non-essential travel from third countries *into* the EU for one month.⁵² Nationals of all EU Member States were allowed to return to their homes. Although the focus of the Communication was on the EU’s external borders, there was a recognition of the lawfulness of internal border control measures. The Commission explicitly refers to internal border control measures which several Member States had already – prior to its 16 March Communication – reintroduced in an effort to limit the spread of the virus. The Commission notes that “these measures risk having a serious impact on the functioning of the Single Market as the EU and the Schengen area is characterised by a high degree of integration, with millions of people crossing internal borders every day”.⁵³ As a response, the Commission links the establishment of temporary restrictions on external borders to the lifting of internal border control measures. By restricting travel at the EU’s external borders, the Commission is clearly hopeful of being able to persuade Member States to lift internal border *control* measures. The Communication includes no recognition of the lawfulness of eventual more far-reaching measures at internal borders, such as “restrictions” or “closing” of borders.

The Commission nevertheless also recommends that Member States should strongly encourage citizens and residents not to travel outside their territories in order to prevent the further spread of the virus to

⁴⁹ See, for instance, K Hiltula, ‘Voisiko Suomi sulkea länsirajansa, jos Ruotsin koronatilanne karkaa käsistä? Oikeusoppineiden mukaan ei, mutta muita suojauskeinoja on’ (YLE, 24 June 2020), based on interviews with professors Martin Scheinin and Pauli Rautiainen, <<https://yle.fi/uutiset/3-11405895>> accessed 27 November 2020.

⁵⁰ P Juntti, ‘Rajavartiolaitosta arvostellaan toimivaltuuksien ylittämistä – viranomaisen mukaan rajanylityksistä on luovuttu vapaaehtoisesti, mutta moni suomalainen kokee tullessa käännetyksi’ (YLE, 26 May 2020), including comments by professors Martin Scheinin and Markku Suksi, <<https://yle.fi/uutiset/3-11361985>> accessed 27 November 2020.

⁵¹ See also Points 11 and 19 of the Commission guidelines that emphasise that clearly sick people should not be refused entry but should have access to appropriate health care, Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services 2020/C 86 I/01 OJ C 86I, 16.3.2020, p. 1–4.

⁵² Communication from the Commission, ‘COVID-19: Temporary Restriction on Non-Essential Travel to the EU’, COM(2020) 115 final. The European Council endorsed the recommendation on 17 March 2020, <<https://www.consilium.europa.eu/en/press/press-releases/2020/03/17/conclusions-by-the-president-of-the-european-council-following-the-video-conference-with-members-of-the-european-council-on-covid-19/>> accessed 27 November 2020.

⁵³ COM(2020) 115 final, p. 2.

other countries. The travel restriction across external borders was extended for a further month, on 8 April 2020⁵⁴ and then again on 8 May 2020.⁵⁵

On 11 June 2020 the Commission adopted another Communication recommending the further extension of the restriction until 30 June 2020 and setting out an approach for a gradual lifting of the restriction on non-essential travel into the EU as of 1 July 2020.⁵⁶ Just as with the earlier Communication, the focus of this Communication again is on the EU's external borders. Now the assumption that cuts through the Communication is that (the remaining) internal border controls have already been lifted. But in case there are remaining internal border controls, the Commission – highlighting its text with bold letters – **“strongly encourages the remaining Member States to finalise the process of lifting the internal border controls and restrictions to free movement within the EU by 15 June 2020”**.⁵⁷ The Council agreed to the policy outlined in the Communication.⁵⁸ Different Member States have, however, decided on varying criteria to be applied to internal border control management. As of 13 July 2020, Finland, as mentioned above, lifted internal border controls between Finland and 17 new countries, in addition to the earlier announced border openings with Norway, Denmark, Iceland, Estonia, Latvia and Lithuania. According to the Finnish Interior Minister, Finland is following an “emphatically cautious line” with regard to borders.⁵⁹

As to internal borders, EU law (the Schengen acquis) allows for the reintroduction of border control measures (checks) in the event of a crisis, which may involve the refusal or expulsion of an individual EU citizen on grounds of national security or public health.⁶⁰ But the risk must be individualised, as we argued above in relation to border control at the Swedish border. Beyond those narrow circumstances, Member States can institute checks at borders and strongly recommend that citizens refrain from non-essential travel. In our view, the EU recommendations have served as an excuse for the Finnish Government to adopt a legally unsustainable structure that we have described above. Restrictions should only be imposed on external borders, protecting the free movement of EU citizens within the EU. Separately, a strong recommendation could also have been made to avoid intra-EU travel, without thereby creating any new (and non-statutory) powers for the Finnish Border Guard.

At the time of finalising this Article in November 2020, Finland still upholds internal border checks in relation to a number of EU countries, including its border neighbour Sweden. The above-mentioned EU measures, which Finland currently ignores (or only partially follows) are non-binding. Yet it remains to be seen whether the EU would pursue infringement measures against individual Member States for overstretching or not lifting on time their internal border control measures some of which may in fact amount to travel restrictions, although the Commission is clearly annoyed that some Member States acted before it and in a non-coordinated manner, disregarding the basic principle of free movement in the Schengen area.

IV. What, if anything, went wrong?

⁵⁴ COM(2020) 148, 8 April 2020.

⁵⁵ COM(2020) 222, 8 May 2020.

⁵⁶ Communication from the Commission, ‘On the third assessment of the application of the temporary restriction on non-essential travel to the EU’, COM(2020) 399 final.

⁵⁷ Ibid, p. 3.

⁵⁸ <<https://www.consilium.europa.eu/en/press/press-releases/2020/06/30/council-agrees-to-start-lifting-travel-restrictions-for-residents-of-some-third-countries/>> accessed 27 November 2020.

⁵⁹ A Färding, S Varpula, ‘Matkustusrajoitukset kevenevät maanantaina, näistä maista voi pian matkustaa Suomeen – Ohisalon mukaan linja on “korosteisen varovainen”’, (Helsingin Sanomat, 8 July 2020) <<https://www.hs.fi/kotimaa/art-2000006565717.html>> accessed 27 November 2020, (authors’ translation).

⁶⁰ Chapter II on Temporary reintroduction of border control at internal borders of Regulation (EU) 2016/399.

In our view, at least four things went wrong. The first problem is that generally speaking, it has been difficult to find the actual legal basis for Cabinet-issued soft law. The problem is not simply that the Cabinet has not mentioned the legal basis, but also that it appears not to have been able to identify the legal basis. In the specific case of the border regime, it is clear to us that travel recommendations were given without a legal basis. This means that the constitutional right of Finnish citizens to leave the country, as well as the EU law requirement of free movement across internal borders, have been restricted without a proper legal basis. It is often assumed that soft law can be issued ‘freely’ without identifying legal basis. In the EU, it is true that the principle of conferral of powers and the choice of the correct legal basis do not apply to soft law acts. This does not mean, contrary to what sometimes seems to be concluded, that the institutions have an ‘unlimited general competence’ to adopt soft law.⁶¹ Although the principle of conferral of powers is specific to the EU, the idea that authorities are not capable of adopting soft law acts at will also apply nationally. In the Finnish context, the Government has general competence guaranteed in the Constitution but given the constitutional guarantees (including the role of Parliament to which we return below) as well as the principle of legality, the general competence cannot be perceived to include the right to issue recommendations and guidelines at will.

Further under the first problem, the lack of identification of legal basis ‘comes back to bite’ the Government when it undoes or modifies recommendations. On what legal basis are recommendations and guidelines changed or undone?

The second problem is that it was unclear what the Government actually decided and according to which process. In a “pastoral letter” dated 28 April 2020 addressed to the Cabinet and ministries, the Chancellor of Justice criticised the way in which the government decisions were made during the Coronavirus epidemic.⁶² In his view, pursuant to Article 67 of the Constitution, decisions and actions of the Government must be prepared by a Ministry. The requirement of official responsibility provided for in Section 118 of the Constitution applies comprehensively to the activities of the Government. How should these requirements be understood in the context of soft law-making? The preparation, decision-making procedure and rationale of guidelines and recommendations are not documented in the same way as formal decisions of the Cabinet or ministries. The responsibility for preparing them does not necessarily follow the division of labour between ministries otherwise observed in the Government. Nor do guidelines and recommendations oblige authorities to take steps to implement them, although in practice actual implementation is at least largely the case. In addition, guidelines and recommendations do not have a designated counsel who, in accordance with Section 118 of the Constitution, would countersign for their legality and other aspects of appropriateness. With the immediate danger of COVID-19 subsiding, the Chancellor of Justice concluded that it is important to pay attention to the proper and documented preparation of the measures, including their form and clear legal basis and the traditional formal rule of law mechanisms for the publication of norms, judicial review, and accountability.⁶³

One long-standing concern of soft law-making relates to the role of parliaments, as the procedures for the adoption of soft law tend to circumvent more lengthy and costly ways of decision-making, which in turn might enhance the discretion of the Government to the detriment of parliamentary competences and transparency.⁶⁴ In Finland Parliament remained operational during the crisis and is the highest state body even in exceptional circumstances – as reflected in Section 80 of the Constitution. It is understandable that the Government adopted guidelines and recommendations to provide the first rapid

⁶¹ For pointing out the mistaken assumption, see L Senden and A Van den Brink, *Checks and Balances of Soft EU Rule-Making*, Study for the European Parliament, Policy Department C: Citizens’ Rights and Constitutional Affairs, PE 462 (2012) p. 21.

⁶² *Supra*, note 30.

⁶³ *Ibid.*

⁶⁴ O Stefan, ‘COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda’, *European Papers*, European Forum, 3 June 2020, pp. 1–8.

responses to tackle the various consequences of the crisis. But at least some of these guidelines and recommendations became hard law (or at least they did look like they did), when regional state administrative agencies and other authorities such as the Border Guard actually began to guide municipalities and various other actors as well as individuals in complying with the policies as if they were proper legislation. Section 80 of the Constitution requires that, even in exceptional circumstances, matters falling within the scope of the law are generally settled by ordinary parliamentary laws – not unnecessarily using the instruments of the Emergency Powers Act or interfering with rights and obligations protected by law through guidelines and recommendations.

The third problem is that there is confusion as to the intended effects of guidelines and recommendations and what their actual impact would be from the perspective of constitutionally entrenched fundamental rights or free movement rights of EU citizens. The recommendations relating to cross-border travel have addressed individuals' fundamental rights, but no proper assessment of necessity, proportionality or compliance with human rights obligations was apparently carried out. While Parliament and its Constitutional Law Committee reviewed all Decrees issued under the Emergency Powers Act, this was not the case for non-binding but restrictive measures related to the crossing of Finland's borders. Recommendations also affect different groups of people in different ways. It seems that, for example, the effects of the closure of the western and northern borders on the indigenous Sámi people have not been sufficiently understood.⁶⁵ A related concern is the way in which the administration implemented guidelines and recommendations. The guidelines of the Finnish Border Guard provide an example of a situation in which the restrictions arising from Cabinet-issued soft law have been tightened on the authority's own initiative. Recommendations on care home visits offer another example. When apologising for the confusion as to the legal nature of the recommendations, the Ministry for Health and Social Affairs noted that "guidelines" had been applied more strictly than intended by the Ministry. Yet the ministry cannot pass on the responsibility for the unclear legal status of recommendations and guidelines to lower-level authorities.

The fourth and final problem is that the authorities communicated guidelines and recommendations related to border travel as if they were binding, the problem that concerned COVID-19 soft law more generally. The Government struggled to communicate its instructions clearly and to ensure that all recommendations are found in one single place. As a result, individuals were legitimately unsure what they could, would or should do. During the spring of 2020 the Government attempted on several occasions to clarify its message, causing sometimes even more confusion. In late May 2020, the Ministry for Social Affairs and Health together with the National Institute for Health and Welfare 'clarified' the recommendation to those over 70 by emphasising the own judgment of those at risk and making it clearer that it is a recommendation, not a binding regulation. However, it strengthened the message by talking about a "strong recommendation", by adding further unwelcome normative haziness to an already hazy situation.⁶⁶

V. Conclusion

The Coronavirus pandemic has provided many lessons for governments. One of them, learnt the difficult way in Finland, is simply that given the various hard law obligations and the sensitivity of the issue from the perspective of fundamental rights, soft law was not the correct way to regulate borders. The inevitable

⁶⁵ P Rautiainen, 'Katsaus valmiuslain soveltamisen kuudenteen viikkoon', *Perustuslakiblogi*, 27 April 2020, <<https://perustuslakiblogi.wordpress.com/2020/04/27/pauli-rautiainen-katsaus-valmiuslain-soveltamisen-kuudenteen-viikkoon/>> accessed 27 November 2020. Only on 10 December 2020 the Cabinet acknowledged the situation and decided that residents of the border communities and the Sámi could cross the land border between Finland and Sweden and between Finland and Norway (including the lakes) and the border rivers also through other than designated border crossing points, <<https://valtioneuvosto.fi/paatokset/paatos?decisionId=0900908f806f64ed>> accessed 10 December 2020.

⁶⁶ J Strömberg, 'Mitä jokaisen olisi hyvä tietää yli 70-vuotiaiden uusista koronaohjeista' (YLE, 20 May 2020), <<https://yle.fi/uutiset/3-11360835>> accessed 27 November 2020.

ex-post-facto inquiries will surely clarify matters even further. One important universal take-away, which sums up our analysis of the Finnish Government's usage of non-binding policy measures in general and in respect of border actions in particular, is that Coronavirus countermeasures call for attention to legality, precision, consistency, and clarity. None of these were the Government's forte in the first months of the COVID-19 epidemic, but we hope that the Government's 'emphatically cautious line' will also extend to deciding on the form and legality of future measures to combat pandemics.