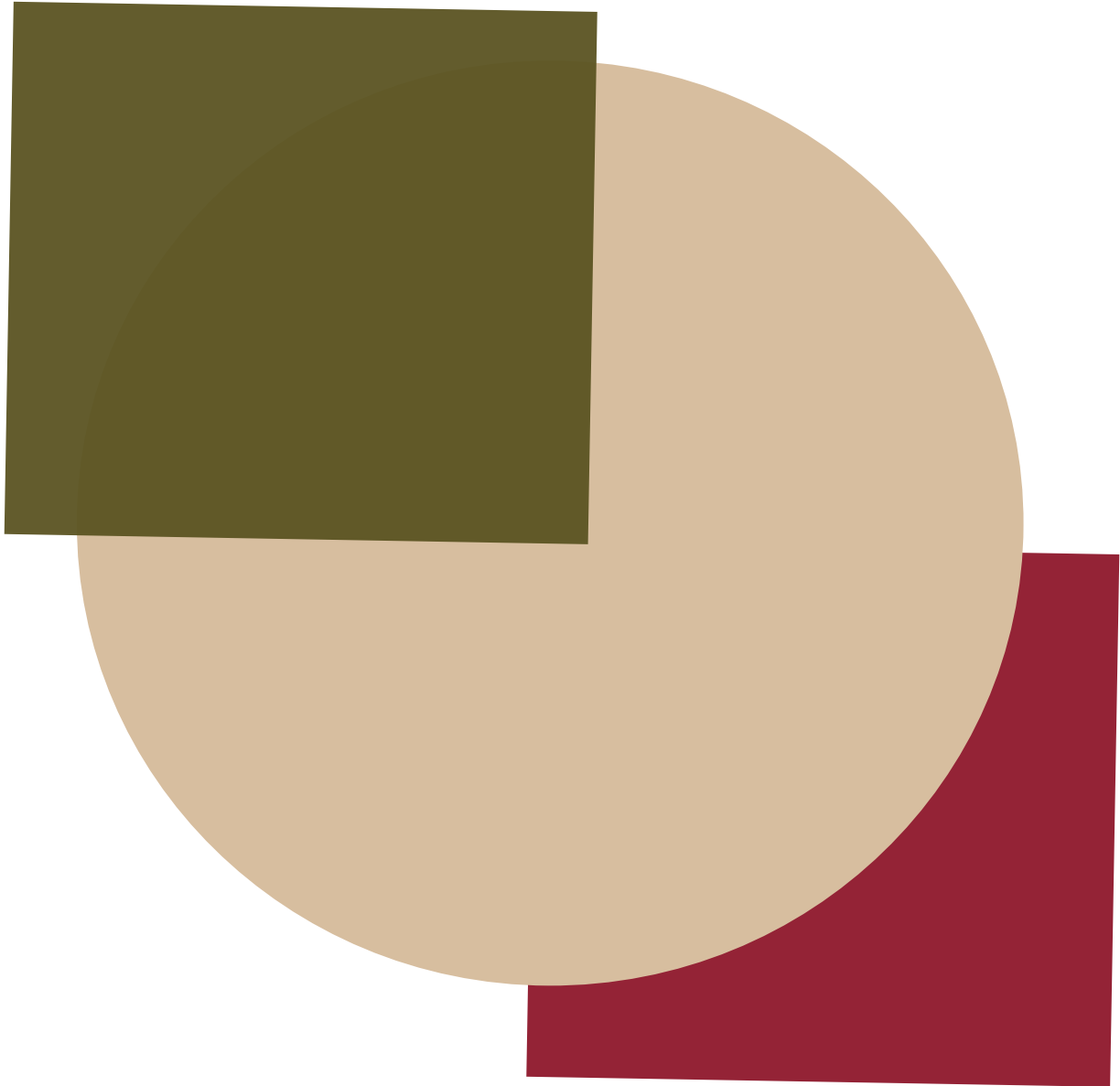# Subsidiary crisis management in the COVID-19 pandemic. Germany's federalist experiment in transborder perspective

Groupe d'études géopolitiques

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Subsidiary crisis management in the COVID-19 pandemic. Germany's federalist experiment in transborder perspective

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Foreword

It is a pleasure for me to preface this publication of Groupe d'études géopolitiques on the management of the COVID-19 crisis in European regions, with a particular focus on border regions.

While it is precisely in these regions that Europe is lived on a daily basis, cross-border communities are particularly affected by the consequences of the pandemic. In addition to the dramatic impact of the disease itself, border regions have faced multiple challenges due to restrictive measures affecting cross-border travel. After a first phase, which saw the return of border closures and controls, a second phase was characterized by the introduction of restrictions of a more indirect nature, such as quarantine obligations.

The pandemic has provided numerous opportunities for concrete solidarity. Gestures of generosity between states, such as the admission of French patients in clinics of Luxembourg and several other European countries, have literally saved lives. However, we regret that, in many areas, the quality of cross-border coordination did not live up to expectations. Since they were signed 35 years ago, the Schengen agreements have been synonymous of free movement and the abolition of border controls in Europe. In 2020, however, controls were suddenly reintroduced on Schengen's border bridge between Luxembourg and Germany. The European spirit itself is at stake when obstacles to the free movement of people, services and goods are reintroduced, sometimes causing scenes of discord and mistrust that Europe had not seen for decades. The very foundation of our Union is challenged when borders reappear in our regions and minds. When this foundation is undermined, border regions are most negatively affected. One example is the "Greater Region" composed of Luxembourg and its neighboring regions: the flow of 200,000 border commuters crossing the border of the Grand Duchy every day is symptomatic of the high interdependence of our border areas.

We must make sure that the right to free movement enshrined in European treaties is always preserved. I will never tire of repeating that a virus cannot be stopped at the border. In the fight against the pandemic, national isolationism is not a viable option. On the contrary, the closest possible cooperation must be established, especially in border regions, in order to avoid unilateral measures and design specific regulations that preserve mobility and trade in cross-border areas. In the context of these reflections, this GEG study is of great value since it highlights the importance of fully involving the local, regional and Euroregional levels in crisis management in order to take cross-border realities into account.

In border areas, the European idea is lived on a daily basis. Free movement of people is an absolute prerequisite for cross-border communities to thrive. Although this fundamental principle has been challenged in the last months, I remain optimistic that the European spirit will be able to recover. Let us work together so that the European Union will emerge not only unscathed but strengthened from this crisis. The present work of Groupe d'études géopolitiques is a contribution towards this endeavor.

Executive Summary

Contrary to the centralizing tendencies observed in many European states, Germany dealt with the COVID-19 pandemic in a fully subsidiary manner. The health and administrative response was deployed almost exclusively at the level of the Länder, with the Conference of Minister-Presidents providing political coordination between the federal and regional executives. This organization, unique in Europe, has led to better informed, more proportional and more transparent decision-making, allowing for comparison between approaches and fostering political action closer to the field.

Elsewhere in Europe, and especially in border regions, crisis management has often been negatively affected by uncoordinated and overly centralized actions taken by national governments. However, the structure of the pandemic was mainly regional or local. Vertical and homogeneous political action thus often resulted in a false dilemma between inefficiency and disproportionate public action, which led to strong tensions between national capitals and regions.

In cross-border areas, unilateral closures of internal EU borders have greatly disrupted the daily lives of the population and fostered a strong sense of injustice. After thirty to sixty years of uninterrupted freedom of movement, these decisions have come as a shock. For lack of sufficient consultation, member states were not fully aware of the concrete consequences of their policy decisions. National resentment and arbitrary spatial divisions reemerged as a consequence of the implementation of policies which seemed out of touch with reality; confidence in the European project was greatly undermined.

This situation is not inescapable. Drawing inspiration from the German, but also Belgian or Swiss institutional models, we suggest a subsidiary approach to crisis management in which local, regional and Euroregional levels would be fully involved. This approach would ensure greater proportionality and strengthen citizens' control over their territories.

In particular, the COVID-19 pandemic reveals the need for a paradigm shift in cross-border cooperation. Today, Euroregions, which mainly serve as platforms for long-term projects, deserve to be fully integrated in operational coordination and planning, as close as possible to the reality of cross-border living areas and the daily life of the population. Thanks to a broad coalition of regional and local actors as well as targeted initiatives, such a development could be driven from the bottom up.

Our work builds on twenty interviews conducted with local, regional and Euro-regional officials from a dozen European countries. In order to rebuild interregional cooperation in Europe on a more solid foundation and draw comprehensive institutional lessons from the pandemic, we propose four concrete measures:

1. Local, regional and national actors should adopt a charter enshrining the need for a subsidiary approach to crisis management, making it possible to federate political will as close as possible to the citizens and to launch a continental political movement.

2. A campaign to systematically map existing living areas should be launched in order to determine the most appropriate scale for decision-making and crisis management.

3. A directive making it mandatory to set up European Groupings for Territorial Cooperation (EGTC) in border areas, and requiring their consultation prior to any border closure measures, should be adopted.

4. The EU's active coordination role should be formalized through the creation of a new configuration of the Council of the European Union, in charge of the coordination of interregional policies and crisis management.

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Subsidiary Crisis Management in the COVID-19 pandemic. Germany's federalist experiment in transborder perspective

Since the Black Death in the 14th century, the context in which the management of pandemics by governments unfolds has been profoundly modified. The development of the modern State and the resulting national borders, globalization, the recognition of fundamental rights and freedoms and the emergence of transnational living areas have not, however, led to a profound change in the primary response provided by many governments to the spread of pandemics such as COVID-19: quarantines and lockdowns are a constant throughout history.

In fact, the management of the health crisis has transcended the divide between democratic and authoritarian countries, rich and poor. Governments throughout Continental Europe responded very differently to the coronavirus crisis. France went to «war» against the disease in a unified and centralized manner, quickly enacting strong measures at the national level to stop the spread of the virus, and striving to limit the congestion of a health system whose organization and resources could not cope with an epidemic development of this magnitude. Germany, for its part, saw the virus as a "test that challenges our humanity", in which everyone had a chance to "show the best" of themselves. Through its model of administrative federalism, Germany has implemented a differentiated response which acknowledges territorial disparities and seeks to take the local evolution of the pandemic into account.

The application of German-style subsidiarity at the national level seems to have proved its worth if we believe the figures on mortality of coronavirus patients, the resilience of the health system or the rates of contami-

nation. However, most of the current crisis management approaches performed badly in cross-border areas, which have constantly been gaining in importance since the beginning of the European integration process.

European unification, the need for increased subsidiarity and the emergence of fully integrated cross-border regions are a unique opportunity to suggest a new method for apprehending crises that go beyond the nation-state.

I. Germany's subsidiary crisis management: federalism in pandemics times

Germany's federal system in the coronavirus pandemic: who does what?

German constitutional law is organized around the concept of federalism, which, unlike in other federal systems, is to be understood as a division of executive power rather than a division of legislative power[2]. Although the Länder formally remain the holders of legislative power, this power is to a very large extent exercised by the federal level under Articles 73 and 74 of the Basic Law.

The core of regional competence lies in the enforcement of federal laws by local institutions[3], with the federal administration mostly focussing on foreign policy, defense and justice.

In the context of the coronavirus pandemic, Germany's political response follows this pattern: laws are passed by the Bundestag at the federal level, and implemented autonomously by the Länder.

Since 2000, the issue of communicable diseases has been governed by the Infection Protection Act (Infektionsschutzgesetz - IfsG)[4]. This law was passed by the Bundestag as part of the shared legislative competence for issues related to the control of human diseases[5]. This means that as long as the federal level has not intervened, the Länder are free to legislate on the issue, but as soon as the Bundestag takes ownership of the issue, it remains the only body with the power to change the legislation[6]. In this case, with the IfsG, legislative competence has become an entirely federal matter. This law was slightly amended by the Law for the Protection of the Population in Epidemic Situations of National Importance of 27 March 2020, allowing for greater executive coordination.

Regarding the response to the coronavirus, the health response took place almost exclusively at the regional level, with each Land being free to take decentralized measures to respond to the pandemic. Indeed, the IfSG grants

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2. Art. 70 § 1 Basic Law.
3. Art. 83-85 BL.
4. Infektionsschutzgesetz from July 20, 2000 (BGBl. I p. 1045).
5. Art. 74 § 1 n°19 BL.
6. Art. 72 BL.

competence to the Länder to issue ordinances to enforce the various measures provided for by federal law (such as isolation measures, medical examinations, measures restricting physical contact, etc.)[7], while at the federal level, executive competence is granted to the Robert Koch Institute for the coordination of local responses through directives and suggestions[8].

Beyond this minimum mandatory coordination, the Minister-Presidents of each Land have agreed to further voluntary coordination also involving the federal government. This coordination has led to the introduction of common rules, for example on entry conditions into Germany from a risk area or the introduction of the mandatory mask in all businesses.

These coordinated measures and those taken unilaterally by the regional executives have thus taken the form of ordinances under the delegation granted to them by law, which are implemented by the regional administrations under their own administrative competence (eigene Angelegenheit)[9], over which the federal government has no right of supervision.

According to the Basic Law, border management is an exclusively federal competence[10]. The Federal Minister of the Interior, Horst Seehofer, was entitled to single-handedly decide to establish border controls with all countries bordering Germany except Belgium and the Netherlands. This exception is the result of negotiations led by the Minister-President of North Rhine-Westphalia[11], who, in order to take into account the specificities of the cross-border area, reached a purely political agreement in an area where he had no formal competence.

However, since the 2015 refugee crisis, the Länder's participation in border management has been under debate. Under German law, law enforcement is primarily a competence of regional governments. In 2018, the federal state of Bavaria created its own regional border police force, designed to handle future migration waves. The Bavarian Constitutional Court ruled in August 2020 that the force's existence did not break constitutional law as long as it only performs tasks normally assigned to the regional police; therefore, it cannot be employed for border police missions, which are the exclusive responsibility of the federal police.

Regional-federal coordination: the pivotal role of the Conference of Minister-Presidents

The Länder are involved in federal policy through two organs: the Bundesrat, a constitutional body through which they intervene in certain legislative procedures, and the Conference of Minister-Presidents (Ministerpräsidentenkonferenz, MPK), a gathering of the heads of the 16 regional governments, created on Bavaria's initiative in 1954 to increase the political weight of regions.

The purpose of the MPK's coordination is manifold. It stimulates federalism by allowing for common problems to be addressed in a concerted manner without transferring competences to the federal level. Whether it is adopting a common position on constitutional reform, defending the interests of the Länder before federal institutions, or coordinating measures to combat the coronavirus pandemic, the MPK helps to build a consensus that is transparent and close to local realities. The MPK is headed by the Minister-President of one of the Länder under a rotating presidency. The mediation role of the presidency is key, since deliberations are subject to almost unanimous approval (the majority is set at 13 out of 16 Länder).

In the coronavirus crisis, the MPK enabled the Länder to adopt a common roadmap that took into account both the good practices and the failures of individual local policies, and played a role in the harmonization of regional approaches. From then on, a consensus oriented dynamic, adapted to field realities, could be obtained without unnecessary intervention from the federal level, which did not have the competence to act, despite the presence of Chancellor Angela Merkel at the MPK as observers.

Administrative federalism is key to a decentralized crisis response

On April 6, two cities, Jena in Thuringia (Germany) and Sceaux in Hauts-de-Seine (France), decided to issue municipal by-laws which made it mandatory to wear face masks in their municipalities under certain circumstances, thus derogating from rules set by higher administrative levels.

The decision of the German commune was taken as an example of good practice by a number of other communes, subsequently adopted by all the Länder in a coordinated manner between 27 and 29 April, and finally praised for its effectiveness in the fight against the coronavirus in a study conducted by the Gutenberg University of Mainz[12].

The order of the mayor of Sceaux has been suspended by an order of the relief judge at the Administrative Court of Cergy-Pontoise dated April 9, confirmed on appeal by the Council of State on April 17[13], following the summary

7. § 32 IfSG.
8. § 4 IfSG.
9. MESSLING Miriam, Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite vom 27.3.2020, Neue Zeitschrift für Sozialrecht, 2020, p. 321.
10. Art. 73 § 1 n°5 and Art. 87 § 1, 2) LF.
11. NRW-Grenze zu den Niederlanden und Belgien bleibt offen, Aachener Zeitung, April 6, 2020.

12. MITZE Timo et al., Face Masks Considerably Reduce Covid-19 Cases in Germany: A Synthetic Control Method Approach, IZA DP n° 13319, June 2020.
13. Conseil d'État, Ordonnance du 17 avril 2020, Commune de Sceaux, n° 440 057.

proceedings initiated by the French League for Human Rights, because of the intensity of the limitation on the freedom of movement observed and of the lack of competence by the mayor for issuing special administrative orders in response to the pandemic, a policy domain in which the Prime Minister has exclusive jurisdiction according to the law establishing the State of Health Emergency[14].

With its administrative federalism, Germany has been able to test the effectiveness of measures at different levels using different models in each Land in order to identify empirically effective measures to reduce the spread of the coronavirus. The decentralized model revealed that the measures taken in North Rhine-Westphalia did not reduce transmission as much as those taken in Bavaria, for example. Thanks to this, public policies could be re-evaluated more quickly, proposing examples to be followed and identifying approaches that were ineffective. Beyond this decentralized normative creativity, local adaptability has also been a determinant factor for the success of Germany's crisis management approach.

One example of decentralized management in order to fight the pandemic effectively at the most appropriate level is the decision of the municipality of Munich on August 27 to regulate the sale and consumption of alcohol. In order to reduce the health consequences of large festive events which took place in the city's squares and parks, the consumption of alcohol in public was banned from 9 p.m. onwards and the sale was restricted to restaurants and Biergärten. The legality of such a measure has already been confirmed for the Bavarian city of Bamberg by the Administrative Court of Justice of Bavaria[15].

Bavarian administrative law stipulates that the competent level for the enforcement of the Federal Infection Protection Act (IfSG) is the district (Kreis)[16]. The regional administration has the right to intervene only when several districts are affected, or in case of emergency. The regional health agency is also competent to enact health standards, in particular in order to apply the recommendations of the Robert Koch Institute. Even when the Bavarian government intervenes, the districts are still allowed to tighten these rules on a local basis[17].

This subsidiarity is taken even further in the State of Baden-Württemberg's Coronavirus Control Regulation, which states that "the implementation of measures is on the one hand the responsibility of each individual and on the other hand the public power exercised by the competent authorities"[18]. The second peculiarity of this text is its provisional character, in order to guarantee a better efficiency in time but also a better proportionality of policy measures restricting civil liberties. The regulation will therefore come to an end after a period of time already known to all[19].

Thus, the German administrative response to the coronavirus pandemic is based on four different levels: the federal level (decisions of the Robert Koch Institute), the regional level (regulations of the state governments), the local administrative level (districts and municipalities), and finally the individual level, in order to seek, each time, the most appropriate level to deal with the different developments of the pandemic. This subsidiarity has created differences of treatment between groups of German citizens: for example, the mask is only compulsory in the hallways of Berlin schools, while other pupils have to wear it all day long; on the other hand, it has allowed a faster and better targeted adaptation in the fight against the coronavirus.

Today, however, several political and business circles are denouncing this patchwork of differentiated measures that could penalize the resumption of business.

Subsidiarity, a key factor for the success of Germany in the "first wave"?

Local management of the coronavirus pandemics appears to have been successful for several reasons. By allowing differentiated measures in different territories, Germany was able to take measures that were more proportionate to the evolution of the pandemic, which was not uniform in time and space. In addition, a significant gain in time was achieved through the competition of local policies. The Länder tested different solutions, which made it possible to quickly identify territories in which they were effective or not. On the other hand, centralized policies, as observed in France, did not allow this gain in experience within the same timeframe. This competitive process has also brought gains in terms of transparency and control of public action. Since the Länder reacted in different ways to find solutions, alternative models were presented to the public, no measures were felt to be strictly inevitable and necessary, and the debate was therefore maintained. With the action of the Conference of Minister-Presidents, coordination took place in order to guarantee the population protection against the coronavirus through good practices previously discovered and tested at the local level.

To illustrate this with the issue of masks, Länder like Thuringia and Saxony-Anhalt had introduced regulations

14.   Loi n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de COVID-19.
15.   VGH München, 13.08.2020, BeckRS 2020, 19555; ECLI:DE:BAY-VGH:2020:0813.20CS20.1821.0A.
16.   § 65 ZuständigkeitsVO Bayerns.
17.   § 23, 6. Bayerische Infektionsschutzmaßnahmenverordnung (BayIfSMV).

18.   § 1 CoronaVO BW.
19.   § 21 CoronaVO BW.

relatively early that made wearing face masks mandatory in certain contexts, while the Berlin Senate long refused to do so. By putting these models out to tender, the effectiveness of the proposed measure was quickly and transparently demonstrated, and later generalized through voluntary coordination among the states. At about the same date, such a measure was still deemed unnecessary by the French government. French officials based themselves on the recommendations of the Scientific Council advising the President of the Republic and the government without any point of comparison being available. A comparative approach, however, would have provided for greater transparency in the debate and reduced the dependence of governmental action upon arguments of authority by unelected experts[20].

A change of course was announced on July 31 by the Minister of Health, Olivier Véran, who authorized prefects to put in place decrees making masks mandatory in outdoor public places. However, contrary to the German model delegating implementation to the Länder according to a principle of subsidiarity, Véran's move only led to a deconcentrated central administration of the crisis. Only the prefect, i.e. the local representative of the central government, is competent to take measures without being constrained by local elected officials, who are, however, consulted. This deconcentrated organization has developed over the summer through information transfers. Nevertheless, the Minister of Health is still the main decision-maker, asking prefects, department by department, to tighten or ease restrictions in order to combat the spread of the coronavirus. The flexibility of the local level can thus be taken advantage of by the French central government. However, it has not benefited from creative decentralization, due to the lack of autonomy of this localized management, nor from increased legitimacy through real delegation to local elected officials. These weaknesses have fuelled hostility towards local measures, which were perceived as unfair, discriminatory and out of touch "Parisian" decisions, both by local populations and by local politicians, particularly in the Bouches-du-Rhône (Marseilles) or in Corsica.

With the arrival of the «second wave» of coronavirus, some Länder such as Schleswig-Holstein and Rhineland-Palatinate decided to introduce quarantine measures for people from the Kreise declared at risk by the Robert Koch Institute, thus rejecting the national framework as the most appropriate one for distinguishing between areas of contamination.

However, German-style subsidiarity has led to more questionables outcomes as regards the management of the country's borders. Between exclusive federal competence and contradictory informal negotiations conducted by the Länder, sub-regional authorities in border areas were insufficiently involved in decision-making, leading, for example, to the closure of the border with Luxembourg under the pressure of the regional government of Saarland, which hoped to stop infections at the border, despite opposition from the border municipalities and the Luxembourg government. At the same time, the Belgian border remained open at the request of North Rhine-Westphalia in order to guarantee the continuity of the cross-border living area.

II. The coronavirus crisis: a regional crisis and a crisis of subsidiarity

Regional and continental epidemics vs. national measures

The response of European countries to the new challenges of a health crisis has been mostly national. Even states with a long federal tradition (think of Switzerland or Spain, for example) have partially suspended federalism by imposing a sanitary state of emergency[21]. The desire of central governments to introduce strong, uniform and efficient regulations to bring the situation under control as quickly as possible is understandable. It is unclear, however, to what extent these centralized approaches are better capable of achieving their objectives than subsidiary ones, especially in light of the significant regional and local differences in infection incidence.

Since the onset of the pandemic in February, national territories have almost never been the best level at which to analyze the epidemiological situation. Rather, regional and local outbreaks as well as complex transnational infection chains shaped the spatial structure of the epidemic. The "Italian epidemic" in March and April 2020 was primarily a Northern Italian epidemic. In the province of Lombardy alone, around 17,000 people had died by mid-July - almost half of all Italian victims of the coronavirus. In the southern provinces, on the other hand, the number of deaths in relation to the population is lower than in most French, Spanish or even Romanian regions.

In France, the east of the country (following a major evangelical gathering in Mulhouse) as well as the greater Paris area were particularly affected. However, even this regional perspective does not provide a complete picture of the situation in the country: in the Haut-Rhin, for example, there were twice as many COVID deaths per inhabitant as in the Bas-Rhin. Municipal or district data from various states reveal a variety of complex local patterns that are influenced by the respective geographical, demographic and social conditions. We examined this in grea-

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20. See also ROSPARS Théophile, Le Centrisme intégral, voie d'un pluralisme para-démocratique, Le Grand continent, September 3, 2019.

21. Coronavirus: Bundesrat erklärt die «ausserordentliche Lage» und verschärft die Massnahmen, Bundesrat, March 16, 2020.

ter detail in a previous study that focussed on the example of the Swiss canton of Grisons, a moderately affected, largely rural mountain region away from major European communication routes. However, there is absolutely no doubt that such structures could also be exhibited in most European regions.

In addition to major domestic differences, there exist a number of transnational tendencies that have so far been addressed primarily through border closures, entry bans, and mandatory quarantine measures. For instance, the densely connected "blue banana" from Milan to Rotterdam and London has experienced particularly high infection rates, while peripheral regions of the same Western European countries have been widely spared. Tourism and migration have also contributed to spread the virus along a north-south and a west-east axis, as well as through "bridges" linking sometimes surprisingly distant regions, such as Norway and Tyrol or Switzerland and Serbia. This "long-distance effect" should be clearly distinguished from the diffusion of the epidemic in border regions, which are already constituted as uniform social living spaces with intensive commuting and a high prevalence of cross-border activity. Nevertheless, in both cases, transnational coordination appears necessary in order to prevent the risks of infection in a targeted and efficient, but also proportionate manner, while respecting the European principle of free movement.

Given the internal homogeneity of the epidemic, the question of the right level of decision-making also arises with regard to the internal distribution of responsibilities. Due to the strong differences already outlined, nationwide approaches necessarily lead to a dilemma between disproportionality in less affected regions and inefficiency in heavily affected regions, which could easily be avoided by giving regional and local authorities more leeway.

Of course, the central state can also try to create a regionally differentiated response through appropriate indicators, local "traffic light" systems and the mobilization of its own local and regional bureaucracy. But the ability of a bureaucratic apparatus to systematically, efficiently and quickly identify the specific needs of individual levels and to consult the right people on the ground before decisions are made is limited. In addition, such a vertical crisis management style often lacks the transparency and proximity to citizens that are necessary to create greater acceptance and trust in politics. We shall come back to this later.

EU: two major contributions and a big question mark

The European Union has contributed to alleviating the consequences of the coronavirus pandemic in three main areas. At the economic level, among other measures, the historic recovery plan agreed by the Heads of State and Government of the member states on 21 July 2020 is intended to facilitate the solidarity-based cushioning of the economic impact of the pandemic. As regards health policy, the two European agencies ECDC and EMA support the health authorities and governments of the member states, while the EU budget provides extensive funding for medical research in Europe and the European Commission negotiates with public and private actors worldwide on behalf of the member states. As far as fundamental rights are concerned, since May 2020 the Commission and Parliament have been advocating a proportionate, coordinated and secure handling of the restrictions on freedom of movement provided for by the Treaties to protect public health, which should lead to a gradual normalization of border regimes. While much has already been achieved in the first two areas, European institutions have been struggling with member states' unilateral border closures and new nationalist reflexes since the very beginning of the pandemic. Although the Commission, for political reasons, has not demanded clarification of the situation by the ECJ, the legality of such border closures remains debated,

On 4 September 2020, the Commission submitted to the Council a proposal for a recommendation[22] defining a uniform "traffic light" system and recommending that restrictions on entry (exclusively in the form of quarantine or testing) should only be imposed if the "traffic light" is red in a given area or if no data is available. The recommendation was adopted by the European Council on 12 October[23]. The draft provides for the ECDC to publish a weekly updated map of the EU and EEA at regional level on which member states have to base their decisions. Thus, this recommendation takes into account the relevance of the regional level for the analysis of the infection situation. However, it does not indicate at which level (federal state, county or municipality) this analysis should take place, nor does it offer a concrete answer to the particular problems of border regions beyond the recommendation to pay "special attention to [their] specificities". The main decision-making and coordination capacities will remain with member states.

It may come as a surprise that the European Union is dependent on the goodwill of mostly uncoordinated nation states in precisely the area in which it has achieved one of its most symbolic achievements - the free movement of persons. There seems to be no way out of this paradoxical situation without some institutional restructuring at the internal borders.

22. Proposal for a Council recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, Europäische Kommission, September 4, 2020.
23. COVID-19: Rat verabschiedet Empfehlung zur Koordinierung von Maßnahmen mit Auswirkungen auf die Freizügigkeit, Council of the European Union, October 13, 2020.

March-June 2020: Europe hiding behind close borders

In mid-March 2020, as the number of COVID-19 infections skyrocketed, the European states reacted with massive border closures, the scope of which was unprecedented in post-WW2 Europe. Slovenia was the first EU member to close its border with Italy on March 11. Only two days later, on March 13, EU citizens without a residence permit were no longer allowed to enter Slovakia. On March 14, Denmark imposed a similar regulation. In the following two weeks, all other EU states except Luxembourg, Ireland, the Netherlands and Sweden introduced drastic entry restrictions at the Schengen internal borders, which primarily affected citizens of other EU countries. Even Angela Merkel, who on March 11 had still clearly opposed border closures, gave in in the following days under the pressure of regional governments. As early as March 16, a border regime came into force in the Federal Republic that proved to be one of the strictest in Western Europe during the first phase of the pandemic. On the other side of the Rhine, the French government never supported this approach, but it applied a reciprocity principle in border controls, which, coupled with a strict lockdown strategy, led to drastic restrictions in border areas. Luxembourg alone refrained from reintroducing border controls and publicly protested against the actions of its neighbors; the European flag hung at half-mast in Schengen - without success at first. It was not until three months later, on June 15, a few days before the thirtieth anniversary of the Schengen Agreement, that barriers at most of Europe's internal borders were raised again, this time in a concerted effort. But even then, the national governments' main focus was not primarily on the border regions, but rather on the tourism industry.

In March, the largely uncoordinated action took place mainly out of fear of foreign clusters. German politicians, for example, looked with concern at the dramatic situation in the Lombardy cities of Palermo and Milan, from which cases had already been "imported", and at the major outbreak in Mulhouse near the border. This also explains why German federalism favored rather than slowed down border closures: because of a lack of cross-border communication, and also not infrequently because of a lack of confidence in the ability of their foreign counterparts to bring the situation under control, regional politicians demanded the only thing that seemed to promise a certain protection for their own people: isolation. Local politicians and representatives of Euroregions, whose areas were directly affected, were of course of a different opinion: at this level, however, neither the principle of subsidiarity nor that of being affected was consistently applied.

The extent of the restrictions at the German borders seemed to depend primarily on the political will in individual states. This sometimes resulted in strong regional contrasts: North Rhine-Westphalia committed very early on to closer cooperation[24] with its Belgian and Dutch neighbors and opted for open borders by setting up a joint task force. The proximity of the state capital Düsseldorf to the Dutch border may have increased awareness of border issues: In Hannover, the capital city in Lower Saxony which is far from the border area, authorities acted less proactively. The situation was similar in Finland, where cooperation with the Estonian capital Tallinn, located less than a hundred kilometers from Helsinki, was initially given more attention than the situation in the twin cities of Tornio and Haparanda on the Finnish-Swedish border. Thanks to the very good cooperation, there were few incidents between North Rhine-Westphalia and the eastern Netherlands; controls were comparatively rare, and the border was practically never closed. The opposite happened on the German-French border, where resentment resurfaced surprisingly quickly on both sides. German regional politicians there - the reasons for this are not yet entirely clear - were initially less open than their NRW colleagues. For example, in an official letter in mid-July, the government of the Saarland continued to defend the initial border closures by claiming that border controls in the pandemic were "not contrary to the European idea".

This makes it clear that federalism at home is no guarantee of openness at the borders. Even in centralist France, where the lockdown ordered in Paris ignored the heterogeneity of regional situations, the prefect of the Hauts-de-France region in the extreme north of the country was praised for acting very early in favor of an effective interregional dialogue.

Divided living environments: European Border regions in the COVID pandemic

The European border regions were most directly and severely affected by the persistent restrictions on entry and exit (on which they had not been consulted), as well as by the lack of coordination between national and regional actors. In transnational living areas, these measures impacted not only the economy, but also the everyday and social life of many citizens to an extent that would have been deemed unacceptable in non-border areas. It is true that their fellow citizens in the rest of the country were also confronted with drastic restrictions in their everyday lives. But in most EU countries, they were at least allowed to shop, work, or see their doctor more or less normally; social interactions with parents and close friends often remained possible, though under restrictive conditions. The people in the border regions, on the other hand, experienced a complete upheaval in their everyday lives as a result of the "renationalization"[25] of the border

24. Ministerpräsident Laschet initiiert eine „Cross-Border Task Force Corona", State of North Rhine-Westphalia, March 20, 2020.
25. Regarding everyday life in border regions and the meaning of borders in the

regions. After decades of almost complete disappearance of all national borders, the brutal division of everyday space appeared arbitrary and ruthless to many citizens. Individuals and organizations had to comply not only with one, but two, sometimes three different sets of rules at the same time, which were subject to abrupt changes of course. Restrictions which in less integrated areas mostly led to disrupted border and commuter traffic were experienced by many people in the most integrated living spaces, such as the region in and around Luxembourg with its approximately 250,000 cross-border commuters[26], the Swedish-Finnish twin cities of Tornio/Haparanda or Tyrol, as a real shock. Images of divided cities, of closed roads and "friendship bridges"[27] awaken painful memories in Europe, and caused outrage among many border crossers. It would be wrong, however, to regard them as only symbolically disturbing: For these pictures bear witness to months of alienating restrictions in the everyday life of many citizens whose basic rights were curtailed much more harshly than those of their fellow citizens living in other parts of the country, on the sole ground that part of their everyday life took place in another state. This trauma will remain. Its consequences for the future of the European idea in the border regions are still unclear, but the great uncertainty of recent months is already casting doubt on Europe in many areas. Anyone who had moved their life to the other side of the border and invested part of their assets there experienced the sudden closure of the border as a serious breach of trust. This precedent could deter the next generations of border citizens from following their example.

The economic consequences of this inconsiderate border management are manifold[28]. They not only hit classic "shopping tourism" stores or areas experiencing large price gaps. In fact, they destabilized all economic activities taking place in the immediate vicinity of the border. For example, farmers on both sides of the German-Danish border were forced to take very long detours to cultivate their fields on the other side of the border. Retailers and service providers located near border crossings that were closed lost most of their income, while those working at crossings that remained open benefitted from the measures. The broader border population not only had to contend with an increase in the price of some products

as a result of the sudden prohibition of border shopping, but also had to cope with increased travel and waiting times, difficulties in posting employees, long traffic jams at crossings, etc. In the first weeks following the border closure, even essential foreign workers such as medical personnel were prevented from going to work in some regions, for example at the German-Czech border. Some of them were asked to move their residence or to give up work. As a result, many workers from various sectors of the economy lost their jobs because their own national government refused to allow them to cross the border, not to mention seasonal and temporary workers who never arrived at their planned places of work. Many border commuters, for example on the French-Spanish border, were not entitled to short-time work. The problem of the cross-border home office, which is not provided for in the European treaties, has yet to be solved across the board.

On the social level, too, border closures led to critical situations for the border population. German patients living in Alsace who usually received treatment in Germany experienced serious difficulties whenever they needed to be transported across the border for medical reasons. French employees of German nurseries were no longer allowed to take their own children with them. Visits to doctors across the border, which are very common e.g. between Switzerland and Germany, were not allowed. Cross-border exchanges of students were brutally interrupted. One daughter was not allowed to say goodbye to her dying mother because the border regulations between East Belgium and Aachen did not allow it. Baby food from one country could no longer be given to a citizens' initiative from another. Unmarried partners were not entitled to family visits. This destabilized people and society in border areas considerably and fuelled insecurity, especially since the geographical distance remained small in most cases despite the impossibility of meeting.

Actors of cross-border cooperation were particularly worried to see how quickly nationalistic resentment was rekindled by border closures after years of peaceful coexistence. At first, it was primarily the anger over stricter border regimes that caused tension; with growing concern over the epidemiological situation and the risk of infection at the borders, citizens of the neighboring country - even those who were permanent residents - soon became suspicious. In German cities near the border, French people experienced insults and hostile behavior[29] in the streets, in stores and in the workplace. Foreign nursing staff in particular suffered from this tension. In western Czechia, during the Bavarian school vacations, the mood was stirred up against Germans for fear of infection. It is manifest that border closures encouraged a logic of suspicion and mistrust. On the one hand, the citizens of neighboring countries were not infrequently

coronavirus pandemic, cf. WILLE Christian und KANESU Rebekka (Hrsg.), Bordering in Pandemic Times. Insights into the COVID-19 Lockdown. Borders in Perspective, Vol. 4, UniGR-Center for Border Studies, 2020.

26. Die Arbeitsmarktsituation in der Großregion, 11. Bericht der Interregionale Arbeitsmarktbeobachtungsstelle an den 16. Gipfel der Exekutiven der Großregion, January 2019.

27. Cf. WILLE Christian und WEBER Florian, Analyzing border geographies in times of COVID-19. In: Mein, Georg / Pause, Johannes (Eds.): Self and Society in the Corona Crisis. Perspectives from the Humanities and Social Sciences (The Ends of Humanities, Vol. 2). Esch-sur-Alzette, Melusina Press (online, preprint), 2020.

28. Regarding the economic and social consequences of the coronavirus pandemic in the French border regions, cf. La crise du covid-19 aux frontières : retours d'expérience du réseau de la MOT, Mission opérationnelle transfrontalière, June 2020.

29. Grenzgänger berichten von Diskriminierungen, SR3, March 27, 2020.

portrayed as a latent threat to public health; on the other hand, domestic hotspots were not always consistently sealed off and politicians demonstratively appealed to solidarity with their own compatriots.

The first border closures provided exceptions for nationals - even for those who no longer lived in the country - but not for those inhabitants of the border area who happened to have the "wrong" passport. Closures were often accompanied by a quasi-martial rhetoric that overemphasized the unity of a Nation having to defend itself alone against the outside world. Parts of the population perceived this as confirming their own prejudices. At the same time, the severity with which neighboring states treated one's own fellow citizens aroused resentment among many border crossers, a trend which could only strengthen isolationist tendencies on both sides of the border. For example, the ban on shopping for French border commuters in Baden-Württemberg was met with incomprehension on both sides. On the other hand, areas where such tensions did not arise were often those where the border regime was more relaxed or coordinated, such as on the Swiss-French or German-Dutch border.

But intransigent centralism also fueled conflicts within various EU states: From Northern Finland to Corsica via Marseilles and South Tyrol, the impression dominated that national governments took no account of local circumstances and wanted to push their own, uncoordinated strategy through at all costs.

The decisive contribution of Euroregions

Various Euroregions responded to central governments' lack of consideration for the border situation by launching their own transregional coordination initiatives. Regional executives met in regular joint videoconferences[30] which were actively supported by the Euroregions. Crisis teams or task forces were set up, among others, on the German-Belgian, German-Dutch, German-French, French-Belgian, Austrian-Italian border and in the Grande Région around the Grand Duchy of Luxembourg. Where it was part of the regions' own competences, common modalities for the regulation of border traffic could thus be defined and adapted, and material, laboratories as well as beds could be shared transregionally whenever one of the regions would reach its capacity limits. Parliamentary representations in the Euroregions published joint resolutions calling for a rapid end to restrictions on entry and exit[31]. Parliamentarians also wrote to the national heads of state and government to draw their attention to the situation in border regions.

Joint plans were drawn up to facilitate cooperation in the months following the "first wave" and to avoid further border closures as often as possible. Protests were voiced in many directly affected border communities[32], in spite (or perhaps because) of the helplessness these communities felt in the face of central government decisions. Some mayors, especially in Luxembourg, mobilized against the border closures. Solidarity rallies and peaceful demonstrations took place all over Europe at the internal borders. In most cases, close coordination within existing transregional structures, followed by parallel lobbying on both sides of the border, proved to be the safest and most efficient strategy for achieving improvements. The diplomatic route via the embassies and foreign ministries, on the other hand, proved to be less successful. The feeling that the capital was not moving despite all efforts was bitter for border communities affected, especially since it was unclear to what extent this lack of reaction was due to a lack of time and personnel or to a lack of political will on the part of national governments.

Until this day, the dominant feeling in most border regions is that national politics has shown very limited understanding or interest in the special position of border regions. Border measures were adopted in the capitals without consideration of local conditions or practical challenges by governments that, after thirty to seventy years of open borders, were probably not fully aware of the consequences of such action. The enormous disadvantage this created for the border population was not a political issue at the time, and it is still not widely echoed in most national public spheres today. Federal states such as Belgium, Germany or Switzerland have a higher potential for adaptation, because representatives of (border) regions participate in the most important coordination committees: For example, the Belgian "Comité de concertation"[33] also includes representatives of the German Community, who, due to the special geographical location of their region, play a pioneering role in border issues. In Switzerland, the Canton of Geneva maintains particularly close contacts with the neighboring French departments of Ain and Haute-Savoie, on the territory of which a large part of the Geneva metropolitan area (Genevois Français) is located. Since the end of the "extraordinary situation" in mid-June, the cantons have regained their sovereignty in health policy and, as members of various bodies, contribute to shape the federal corona strategy. In centralized states, on the other hand, no paradigm shift seems in sight. There, local and regional players have no other solution than to join forces and work on solutions on the ground within the bounds of their possibilities. But even this is not without danger. For example, the Italian government left it open whether it could challenge special regional laws, with potentially serious personal conse-

30. S. z.B. Die Großregion - Gemeinsam gegen Corona, April 30, 2020.

31. Die Großregion als europäisches Labor in der Corona-Pandemie: Gemeinsam aus der Krise kommen und die richtigen Lehren für die Zukunft ziehen, Resolution des Interregionalen Parlamentierrates (IPR), 62. Plenum, 5. Juni 2020; Grenzüberschreitende Zusammenarbeit hinsichtlich der COVID-19-Pandemie, Board resolution of the Council of the Upper Rhine, April 24, 2020.

32. Cf. WILLE Christian und WEBER Florian, op. cit.

33. Comité de concertation, Prime minister of the Kingdom of Belgium, consulted on October 29, 2020.

quences for the regional politicians in charge. Similarly, the French government in Paris rejected all demands by the Corsican regional government, which is dominated by autonomists, for more autonomy in crisis management, including the idea of a "green pass" for tourists with compulsory testing. The regional government was only able to prevent the early reopening of schools by not sending the technical staff of the schools (for which it is directly responsible) to work.

On the planning and information level, the Euroregions have been able to make a strong and efficient contribution in recent months. This primarily concerns commuter advice and the establishment of central citizen information points or "border info points" (EDR), but also, for example, joint concepts for the regulation of winter tourism (Tyrol), extensive field studies on the situation in the border regions (Euskadi) or a separate aid fund (Pyrénées-Méditerranée). Thanks to their dense network of contacts and their longstanding mediation practice, Euroregions also acted as a link between the various institutional units, identifying the right contacts and providing them with linguistic and cultural support when needed. As an institution close to the citizens, they have collected, summarized and translated information from various authorities and made it available to the border population online or in the regional press. Where representatives of the Euroregions sat on coordination committees, they were also able to report difficulties, inconsistencies and grievances, and to ensure that the legitimate interests of citizens in the border areas were better taken into account. Occasionally the Euroregions were also consulted by national constitutional bodies. Depending on their statutes and structure, they could also act as spokespersons for border communities in inter-institutional exchanges, which had organized themselves into task forces. At the level of the Association of European Border Regions (AEBR), exchanges of experience on this topic have already been organized.

Where possible, careful cross-border contingency planning should create more security and remove the incentive for central governments to resort to radical measures such as border closures. If nation states have so far failed with their crisis management in border regions, regional and transregional institutions should see this as an opportunity to gain their own legitimacy in future crises through independent planning and coordination initiatives. This is in the interest of their populations and is in line with the logic of a lived subsidiarity which would be functionally developed at the level of the living areas. Integrated crisis concepts that regard these areas as basic units could later be sanctioned by international treaties and thus serve as legal safeguards against unilateral national moves. However, this first requires solid and well-coordinated concepts that can count on the support of a broad majority on the ground. This could become a new priority for cross-border cooperation in Europe.

Will the second wave be different? (June-November 2020)

Since the spring of 2020, European capitals have partially reconsidered their positions in light of their own crisis experiences. For example, at the end of September 2020, the head of the German Chancellery[34], Helge Braun, admitted that they had "not had good experiences with border closures". Already in July, the Prime Ministers of Rhineland-Palatinate and Saarland made it clear[35] that they no longer considered such measures to be appropriate. After a meeting in Bern, the Swiss Federal President Simonetta Sommaruga and the Austrian Federal Chancellor Sebastian Kurz spoke out against renewed border closures in the event of a "second wave".

Even if massive border closures are no longer on the table as of November 2020, it is still to be feared that the general quarantine obligation that applies throughout Europe to returnees from various major European regions will durably complicate the situation in border areas. Where there are no exceptions for border population or for short stays, the quarantine obligation is even tantamount to a "hard" border closure, as experienced by Europe in the spring of this year. For example, at the beginning of October 2020, the German Robert Koch Institute declared the whole of Belgium a risk area, although in the eastern border cantons, where these measures restrict everyday mobility the most, the number of cases was relatively low. Since the spring of this year, the Swedish-Finnish border has been completely free of controls for just one week (in August). In contrast, the Swiss Confederation adopted a flexible system: the Federal Council has so far not included any border regions in its quarantine list, even if the numbers in these regions are above the defined risk thresholds. However, this attitude of Swiss authorities is an exception in Europe, which should be understood in the light of the successful lobbying of border cantons, but also of the considerable economic and social relevance of commuting for the country. As a result, Switzerland, a non-EU country, acknowledges the societal, economic and social reality of shared living areas much more consistently and unbureaucratically than most EU members. In most other European states, however, quarantine measures for entire regions or countries continue to be adopted in a relatively undifferentiated manner, with no particular respect for transnational areas. The situation is changing from one day to another, which increases the organizational complexity of cross-border project planning even further. Moreover, it cannot be excluded that national reflexes would reassert

34. WELZ Franka, «Überlegen, ob Reisen im Winter sein muss», Tagesschau, September 22, 2020.
35. Dreyer und Hans wollen keine Grenzschließung zu Luxemburg, Süddeutsche Zeitung/DPA, July 14, 2020.

themselves in the event of a renewed rapid increase in the number of infections or the emergence of large hotspots in neighboring countries. As long as (possibly cross-border) living areas are not considered the primary level for epidemiological activity analysis and no joint crisis management concepts are available, this cannot be ruled out. In mid-October, for example, Bavaria's Interior Minister Herrmann considered the possibility to reintroduce border controls if epidemiological situations abroad were to deteriorate drastically[36], while Markus Söder advocated a transfer of competence to the federal government in the area of disease control. Even the French Secretary of State for European Affairs, Clément Beaune, who in July clearly spoke out against border closures, did not want to rule them out as a tool «of last resort"[37].

As a result of this crisis, local and regional actors have been able to establish new cross-border contacts and deepen old ones. After the shock of the border closures in spring, the relevance of borderless exchange and joint crisis management has become blatant in the affected areas. They have shown the sense of the political project of Europe, but also the enormous gap between the ideal image and contemporary reality. They have highlighted the existence of a multitude of trans- and post-national areas of life and have brought to life a drama of arbitrariness and division, which has unfortunately been reported on too seldom.

The confidence crisis

The German Chancellor recently described the political response to the coronavirus pandemic as a "democratic challenge"[38]. This is particularly true with regard to the serious encroachments on basic civil liberties that most EU countries have decided to take to combat the pandemic. In emergency situations, maintaining the balance between proportionality and efficiency is a challenge for governments at all levels.

Another fundamental difficulty concerns the acceptance of the measures among citizens. A lack of trust in governments leads to a loss of both efficiency and democratic legitimacy; even where such a lack of legitimacy has no immediate legal consequences, it poses a serious threat to social cohesion in the long term. Regional and local decision-making levels that are in direct contact with the reality on the ground and with citizens can in most instances be considered more efficient than the central state at assessing the situation. For Germany, Forsa found that trust towards all political levels has increased with the Corona crisis[39]; the highest approval ratings continue

to be given to state and local government, with larger municipalities - where the distance between representatives and voters is apparently the greatest - performing worse on average than smaller ones.

According to the last Eurobarometer of December 2019[40], before the pandemic, only 34% of EU citizens trusted their national governments and parliaments, while 53% trusted their regional or local authorities. In Germany, Corona is said to have done little to change the structural satisfaction bonus of the state executives compared to the federal government. Despite huge fluctuations in absolute approval ratings, in all 27 EU countries more trust is placed in regional and local authorities than in central government. Contrary to the widespread model of an emergency law enacted by the central government, this higher level of trust argues for a strengthening of the role of the lower political levels in times of crisis.

This strengthening of the regional and local levels would be all the more beneficial to those states in which the corona-related increase in approval for central government is drowned out by a long-lasting, deep crisis of confidence. In a six-country study[41], think tank More in Common found that there are considerable interstate differences in the satisfaction of citizens with the actions of their national governments in the corona crisis: while in Poland and France a majority (54% to 60%) of respondents described government action as "undemocratic", "incompetent" and "unfair", 60% to 72% of Germans and Dutch consider crisis management in their countries to be "democratic", "competent" and "fair". Countries where confidence in the central government was particularly weak before the pandemic (24% in France, 35% in Poland) are, as expected, also those where citizens are least satisfied with crisis management. In these countries, trust in regional and local authorities is often significantly higher (60% in France, 53% in Poland), which gives these levels a legitimacy that the central government lacks even in times of crisis.

III. Crisis-proof subsidiarity: an alternative transnational model for Europe

Subsidiarity in Europe: a legal reality and a normative principle

In the words of the President of the European Commission Jacques Santer in his address to the European Parliament of May 1998, the principle of subsidiarity enshrined in European law since Maastricht would make it possible "to act less in order to act better"[42]. This phrase

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36. Söder: Corona-App ein «zahnloser Tiger», ZDF, October 2020, 2020.
37. Clément Beaune : «Les mesures de fermeture des frontières sont à éviter autant que possible en Europe», France Inter, July 29, 2020.
38. Pressekonferenz von Bundeskanzlerin Merkel am 28. August 2020.
39. GÜLLNER Manfred, Deutsche vertrauen Kommunen und ihren Institutionen, Kommunal, June 2, 2020.

40. Public opinion in the European Union, Standard Eurobarometer 92, Europäische Kommission, Dec. 2019.
41. KRAUSE Laura-Kristine et al., Vertrauen, Demokratie, Zusammenhalt: wie unterschiedlich Menschen in Deutschland die Corona-Pandemie erleben, More in Common e.V., 2020.
42. SANTER Jacques, Perspectives pour le Conseil européen de Cardiff: des idées

emphasizes the efficiency gains allowed by subsidiarity. Perceived as a safeguard against ever-deepening European integration, Article 5 TEU underlines the secondary character of European policy-making in relation to national policy-making. In 2007, the Lisbon Treaty established it as one of the fundamental principles of the Union, following the example of the principles of proportionality and attribution, to which it is closely linked.

Thus, in accordance with the principle of proximity, set out in Article 10 TEU, the principle of subsidiarity aims to bring citizens as close as possible to decision-making. It applies only to shared competences, i.e. those for which both the European Union and member states have the power to legislate. The main objective of subsidiarity is to grant the highest degree of independence to the lower institutions from the higher institutions, in this case the national parliaments from the European Parliament. This proximity is said to generate a gain in efficiency. However, the articulation of European subsidiarity around national and European levels alone, in contrast to a multiscalar "German-style" model of subsidiarity, considerably diminishes its effect. Far from the promised ideal of proximity, adaptability and efficiency, the principle of subsidiarity as enshrined in the treaties merely arbitrates between two possible levels, the national and the European, neither of which is adequate to manage a multiscalar crisis such as that of COVID-19.

Revising our principle of subsidiarity at the European level to put public policies in place that are better adapted to daily realities and territorial specificities therefore appears indispensable. To this end, taking a greater interest in the Union's regional policy is an interesting avenue. Regional policy, whose budget is the second largest of all EU programs, and which acts via specific action funds (CF, ERDF, etc.), is one of its main levers for concrete action. Between 2008 and 2011, the European Commission's 2017 report[43] states that more than one million jobs have been directly created thanks to the cohesion policy. Similarly, many European citizens have benefited from it, particularly in the areas of health, wastewater treatment and protection in the event of natural disasters.

This mode of operation could inspire a new way of looking at the principle of subsidiarity, making the Union the guarantor of its application not only vis-à-vis the member states, but also within the States themselves, with particular attention paid to the regional level. Once the boundaries of its application have been redefined, it could become a genuine principle of general policy. But rather than creating a new notion of subsidiarity, we need to return to its initial definition. For before being a binding legal norm, subsidiarity is above all a normative

political concept. In his Politica methodice digesta (1603), Althaus, a Calvinist philosopher and syndicus of the city-state of Emden, proposed a political regime based on a pyramid of increasingly large human groups, proceeding by ascending delegation. Convinced that the citizens of a city or province benefit from allying themselves with those of neighboring cities or provinces to guarantee their prosperity and security, he defends the idea that a human group always needs the superior group. However, the help of the superior group should in no way substitute for all the activities of the first group, but only make up for its shortcomings with its agreement.

Finally, in a context of mistrust of the Union, but also of many national governments, reviewing our approach to the principle of subsidiarity would further legitimize the policies undertaken at all levels. In a truly subsidiary political system, the greater proximity of citizens to decision-making centers increases the acceptability of the measures taken; at the same time, its adaptability to territorial realities favors a better proportionality of political action.

Towards territorialized, decentralized and transborder crisis management

In the context of a health crisis, an essential challenge consists in identifying the most relevant territory on which restrictive measures (mandatory protective measures, quarantine or traffic restrictions) should be put in place; these measures should enable governments to contain the spread of the pathogen while preserving fundamental freedoms as much as possible. However, in a fully integrated transnational living area, such as the Lake Geneva region or Luxembourg, restrictions that take national borders as a reference point and apply indiscriminately to residents of each of the states concerned, regardless of their residence in the living area itself, cannot fulfil either of these two functions.

Indeed, if it is now widely accepted that the COVID-19 epidemic has spread in Europe along the main international transport routes[44], particularly by air, it seems questionable whether closing borders within a highly integrated living area could be a sufficiently effective measure to justify the extremely high cost it imposes on the local population. In the absence of traffic restrictions, the spread of the disease within such a living area can indeed be considered relatively homogeneous, due to the permanent contacts between different zones. However, the logic of government-imposed movement restrictions (border closures or quarantines) is to isolate areas of high epidemic activity from areas of much lower epidemic activity in order to prevent the spread of the virus.

pour l'avenir, European Parliament, May 27, 1998.

43.   My region, My Europe, Our future: The seventh report on economic, social and territorial cohesion, European Commission, October 9, 2017.

44.   LINKA Kevin et al., Outbreak dynamics of COVID-19 in Europe and the effect of travel restrictions, Computer Methods in Biomechanics and Biomedical Engineering, 23:11, 2020, p. 710-717.

Since this condition is not met within a constituted living area, whether transnational or not, the relevance of such a measure appears uncertain. Furthermore, in the case where one of the territories is already subject to containment measures (for example at the French-German border in March 2020), introducing border controls has only an extremely minor effect on movement, since movement within one of the two zones is already largely constrained. The closure of the borders in this case causes major economic and social damage and maintains distrust between communities, even though its effect is nil or negligible in epidemiological terms.

While it may be justified to isolate one infectious area from the others, introducing divisions within an already fully integrated space is of questionable utility, and leads to considerable restrictions in the daily life of the population. For example, 40% of Thionville's inhabitants cross the Franco-Luxembourg border every day on their way to work. In order to be fully effective and legitimate, restrictive measures must therefore be deployed at the level of living areas.

The management of a health crisis, in order to be effective, must therefore be subsidiary and transnational. In certain specific contexts, subsidiary and transnational management tools have already been developed. This is particularly the case for river basin districts whose delimitation follows the natural geography of the basins. Almost half of them (for example, those of the Rhine, Meuse or Danube) are transnational[45]. Adopted in 2000, the European Water Framework Directive (WFD) obliges member states to draw up joint management plans for river basin districts. It therefore emphasizes the need to manage these territories on the most appropriate scale without taking into account national boundaries.

Following a similar approach, the rehabilitation project of the Fessenheim nuclear power plant, whose dismantling was completed in June 2020, associates economic players, associations, local authorities and public services on both sides of the Rhine[46]. The Franco-German project aims to make this bi-national territory a European example of economic and energy conversion. The project is led by a Franco-German semi-public company whose largest shareholder is the Grand Est Region[47], making it a fully-fledged transnational and regional program. Interregional cooperation also exists in the environmental field, such as Interreg TransfAir on the French-Belgian border.

During the Covid-19 crisis, the closure of the majority of the internal borders of the Schengen area, by decision of its member states, made it impossible to create such common decision-making areas. Faced with the empirical need to set up cross-border crisis management, however, local and regional initiatives have emerged. Thus, under the aegis of the ORCA (Organization and Coordination of Relief in the Event of Major Accidents or Disasters), a Swiss organization, the Greater Geneva agglomeration organized meetings to which representatives of the prefectures of Ain and Haute-Savoie as well as representatives of the cantons of Geneva and Vaud were invited. The purpose of these meetings was to attempt to harmonize health, safety and economic measures throughout the cross-border territory[48]. While Greater Geneva attempted to organize itself spontaneously, many cross-border regions had neither the structures nor the means to do so.

In view of the preceding observations, it seems obvious that crisis management must be thought of in a flexible, territorial and cross-border manner. In order to best respond to the situations encountered, regions, local authorities and local actors need to engage in close cooperation and adapt their policies to the specificities of their territories.

From the municipal to the continental level: a multiscalar approach

In view of these elements, the need to manage crises in a territorialized, flexible and cross-border manner seems obvious. The role of the European Union, member states, regions and municipalities must be reconsidered, both in political terms and with regards to the distribution of executive powers, so that they can organize crisis management from below.

In a multiscalar crisis, the distribution of competences between the local, national and supranational levels must be based on the model of effective, rather than symbolic, subsidiarity. The effectiveness of public policies as a whole is at stake - given that centralism is accompanied by very high coordination costs while presenting risks of significant loss of information - as well as their proportionality and their concrete adaptation to local realities, which are essential to ensure their democratic legitimacy. The observation of the German subsidiarity model provides a certain number of keys to thinking about this new transnational organization. One of its main lessons is that the higher echelons benefit from seeing their role as one of active coordination and normative framework rather than as that of an executive body. Transposed to the European context, it would be a matter of the Union and the States coordinating the actions of the regions, while leaving them greater freedom in the execution of the measures

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45.   La Directive-cadre européenne sur l'eau, European Commission, 2014 et Report from the Commission to the European Parliament and the Council on the implementation of the Water Framework Directive (2000/60/EC) and the Floods Directive (2007/60/EC), European Commission, February 26, 2019.

46.   Avancement du projet de territoire de Fessenheim, Ministère de la transition écologique et solidaire, dossier de presse, September 26, 2019.

47.   Une société mixte franco-allemande va piloter la reconversion du territoire autour de Fessenheim, Le Figaro/AFP, Janvier 17, 2020.

48.   See the Grand Genève webpage, accessed October 29, 2020.

provided for by the legislator. While it seems unrealistic, in view of the heterogeneity of practices, to call for a full delegation of crisis management powers to the regional and local levels, the progressive implementation of territorialized crisis plans, adopted in consultation with the competent national authorities and under the impetus of local elected officials, would make it possible to limit the need for «vertical» decision-making and to protect certain delegations of powers from the outset.

The coordinating role of the Union and its member states is also essential with regard to the institutionalization of transnational crisis planning in border regions. Indeed, these regions, whose role is particularly fundamental in the "Blue Banana" region, constitute unified economic groupings and living areas that are extremely negatively affected by border closures. In areas where the border seemed to have been permanently erased, the brutal division of living areas constitutes, for the population, a form of social and economic arbitrariness that would have been considered unacceptable in any internal territory. In order to avoid the repetition of such a situation, it therefore seems indispensable to put decision-making structures and (trans)regional agreements in place that take into account the particularities of regions that cannot function within a single national framework. This logic is a natural extension of the approach adopted since the 1960s with the creation of cross-border cooperation areas independent of the Union, known as Euroregions[49], such as the Regio Basiliensis (1963, DE-FR-CH) or the Meuse-Rhine region (1976, BE-DE-NL)[50]. The Association of European Border Regions enumerates more than a hundred of such cooperation projects[51]. However, most of these Euroregions are still built on a vision of cross-border cooperation that focuses on medium- and long-term multilateral projects, and does not allow for a common organization in the face of emergency situations. In emergency situations, this exclusively long-term view of cross-border cooperation leads regional actors to prioritize internal crisis management over transregional cooperation. However, this alternative between dealing with urgent issues and taking cross-border problems into account is only apparent, because the emergency, which is established on the scale of the living area - a fortiori of a living area that has been brutally cut in two - is also cross-border. It is therefore important to imagine an operational vision of cross-border cooperation that can be envisioned in the form of strengthened and institutionalized coordination of the various regional actors in the event of a crisis. Where the structures and scales of action - those of the living areas - are clearly identified, the experience of the

COVID-19 epidemic calls for a deepening and formalization of cooperation within current bodies rather than a total overhaul of existing structures.

In border regions, the management of the pandemic by national governments has fed concerns about the future of the European idea, and has highlighted the imbalances and inconsistencies of an often excessive centralism. At the same time, the experience of the "first wave", revealing the importance and complexity of transnational living areas, constitutes a unique opportunity for the regional and Euroregional levels to highlight the relevance of their action and the need for territorialized crisis management. As the "laboratories" of everyday Europe, border regions will play a key role in the debates that will open up in the aftermath of the pandemic. The following proposals are intended to encourage local communities, regions and States to seize this historic opportunity.

49.   WASSENBERG Birte et al., La coopération territoriale en Europe - Une perspective historique, Office des publications de l'Union, 2015.
50.   Site internet de la Conférence franco-germano-suisse du Rhin supérieur, accessed October 29, 2020.
51.   HERMAND Marie-Hélène, La fabrique discursive des eurorégions : créer un environnement spatial par l'incitation, L'Espace géographique, tome 45(2), 97-111.

Our policy proposals

1. Adopting a European charter expressing the need for a subsidiary approach in crisis management

Through a European charter reaffirming the importance of subsidiarity and of taking into account the regional level in emergency situations, a strong signal will be sent out in favor of a flexible, territorialized and proportional approach to crises, and in particular to health crises.

Although non-binding, the adoption of such a charter would mark a major political step forward by enhancing the decision-making power of regional bodies, while allowing non-national actors to unite around a common platform. Taking into account cross-border regions and the difficulties associated with centralism would thus be greatly facilitated, and the European debate on these issues would be strengthened.

Institutions responsible for cross-border and regional cooperation such as the Association of European Border Regions (AEBR) could initiate the elaboration of this charter and encourage the different national and regional bodies as well as cross-border organisations to sign it. In particular, this charter would encourage local initiatives to be taken upstream (territorialized crisis plans, consultation bodies) to prevent the implementation of state actions that are unsuited to heterogeneous regional realities. It would also promote the formation of interregional operational coordination platforms based on the model of the German Conference of Minister-Presidents. In the long term, this "coalition from below" could facilitate the adoption of ad hoc treaties, such as the bilateral treaty of Aachen concerning the rehabilitation of the Fessenheim site.

Moreover, the Union, while supporting this approach, should make a concrete commitment through appropriate bodies to increase regional and local autonomy and thus create a counterweight to the centralizing tendencies of certain member states. If, since the first Interreg (1989), the Union has considerably strengthened its cohesion policy, which is above all an economic and social development policy (ERDF, Cohesion Fund), it is now a matter of intensifying these efforts towards a better political consideration of the regional and Euroregional scale, especially in the event of crisis. The European Committee of the Regions (CoR) is already working in this direction[52]. It would therefore be appropriate to provide it with additional resources so that it can fully fulfil its mission.

2. Identifying and organizing the living areas to allow for a subsidiary, transparent and democratic management of crises and flows

Thanks to systematic studies of the daily flows of people in all European regions - and particularly in border areas - existing living areas will be identified according to objective criteria. These living areas will serve as a basic unit for crisis management, allowing the scale of deliberation and the scale at which measures are deployed to coincide (all-affected principle)[53].

Existing administrative units are particularly ill-suited for analyzing epidemic dynamics and implementing targeted, effective and proportionate measures. Cross-border living areas are inevitably cut into two or even three distinct parts by the regional or sub-regional levels employed, whereas very remote living areas (e.g. the Strasbourg conurbation and the Reims conurbation for the Grand-Est region) are grouped together in vast administrative entities with no relevance in terms of flows. However, it is only by taking into account the scale of real social relations that a truly objective and subsidiary approach to these issues can be

52. Website of the European Committee of the Regions (CoR), accessed November 3, 2020.
53. NÄSSTRÖM Sofia, The Challenge of the All-Affected Principle, Political Studies vol. 59, 2011, p. 116-134.

developed. Datasets measuring the interconnection between different geographical areas in the context of everyday travel already exist for several countries[54]. A detailed study of these data would make it possible to establish an objective mapping of living territories, according to precise quantitative criteria. Crisis management plans, not limited to health issues, could then be deployed at the scale of these territories.

Risk analysis and the response of authorities (mandatory quarantine measures, activity restrictions, telecommuting) would then be implemented on the same scale. In this way, coherent cross-border or transregional territories would form, seen from the outside, a single entity (notably as a "risk zone") which would no longer be distributed, as it is today, among several administrative areas. These territories would be invited to equip themselves with common crisis planning and management tools to organize their local response, while at the same time being guaranteed non-discriminatory and unified treatment in the event of a crisis. Any measures to isolate a targeted geographic area should take place at the borders of these territories, in order to limit the consequences of restrictions on the daily lives of the population while ensuring better proportionality of public action. Beyond health issues alone, a systematic identification of these territories would make it possible to become aware of the real boundaries of social groups and to take them into account, e.g. in the form of citizen consultations or through gradual institutionalization of living areas.

3. Giving cross-border territories a central place in the management of Europe's internal borders

The Euroregions, having adopted the status of European Groupings for Territorial Cooperation (EGTC), will be involved in all government policies that have an impact on the free crossing of borders in their infectious area, through an advisory opinion or assent, or even a partially or totally delegated management of this sovereign competence.

Today, many cross-border living areas are structured and institutionalized within the framework of Euroregions. These organizations between territorial authorities on either side of borders are based on various statutes (public establishment, institution resulting from an international treaty, or even private law association) whereas the status of EGTC is offered to them by European Union law. This status is governed by Regulation (EC) No 1082/2006 of 5 July 2006, as part of the European cohesion policy. However, its only purpose is to provide a single legal framework for all groupings voluntarily formed by the public authorities concerned. Drawing inspiration from the Water Framework Directive (2000/60/EC), which makes it mandatory to set up river basin districts resulting from water basins, whether or not they are transboundary (Art. 3 § 1), a directive would complement the EGTC Regulation by making it mandatory to set up Euroregions and adopt the status of EGTC for all transboundary areas, and thus provide institutional and local support for the dynamics of these living areas.

Depending on the degree of integration chosen by these Euroregions in their constituent conventions and statutes, as defined by Articles 8 and 9 of the EGTC Regulation, the Directive will establish a procedure to make it compulsory for member states to consult them in the event of any partial or total closure of borders beyond a certain period. In order to maintain the speed necessary for the effective application of the Schengen Borders Code (EU Regulation 2016/399), the closure of borders would be decided by the national executive concerned. However, beyond a sufficient period of time to allow the EGTC to meet, the maintenance of the border closure would, depending on the degree of integration, be subject to an advisory opinion or assent of the EGTC's deliberative body, which would take the form of an institutionalized meeting of local executives and representatives of the Euroregion. Territories with a high degree of cultural, economic and institutional integration could eventually be delegated border powers.

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54. *Logements, individus, activité, mobilités scolaires et professionnelles, migrations résidentielles en 2017*, INSEE, October 29, 2020.

4. Using the European level as an active coordination tool for interregional and cross-border crisis management

The Council of the European Union will set up a new configuration dedicated to cross-border issues and transborder risk management; this new European tool will allow for active coordination between member states on these issues.

Based on the model of the German Ministerpräsidentenkonferenz, a deliberative body bringing together the leaders of the Länder[55], the European Council should adopt by qualified majority a decision establishing an eleventh configuration of the Council of the European Union according to the terms of Article 236 TFEU, entrusted with the role of coordinating cross-border and interregional policies, particularly in times of crisis. Alongside the representatives of national governments, the Committee of the Regions will send a delegate with a consultative role, enabling the positions of the territories to be conveyed, particularly those involved in the framework of Euroregions.

According to art. 16 § 1 of the TEU, the Council is competent to represent member states in the EU legislative procedure but also to exercise coordination functions. Acting on behalf of member states, the Council could take up the coordination of policies falling within national competence, in order to decide on common positions which would be debated on a case-by-case basis and would seek to guarantee the continuity of cross-border living areas and to deal with multiscalar crises The choice of the Council, rather than the European Commission, would guarantee a greater subsidiarity of responses. Indeed, benefiting from the direct expertise of national administrations, the Council will be able to make decisions more quickly that will be better adapted to the realities on the ground, while immediately benefiting from the support of all local and territorial administrations as a transmission channel for decisions taken.

55. See part I.