Weighing options to improve the European Union's response to large-scale transboundary health crises

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The current coronavirus crisis exposes the challenges the European Union (EU) face in providing joint and timely responses to large-scale pandemics. Although the EU has adopted rather rapidly a series of swift and significant responses to the related economic downturn, its responses to the public health, medical and social crises was slower. Member states unilaterally adopted a series of uncoordinated border closures, varying confinement and testing strategies, and national measures limiting the free circulation of masks point to insufficiencies, that limited the EU's effectiveness in combatting the disease, and created threats to the functioning of the single market and of the Schengen zone.

When a large cross-border crisis hit, the EU faces critical challenges. On the one hand, joint action is necessary to tackle a threat that knows no border and has devastating consequences across European economies and societies; on the other hand, national leaders will be tempted to protect their population and ensure their own security first, resulting in uncoordinated measures that potentially decrease the effectiveness of crisis measures in an integrated economic and free travel zone, and raise threats to EU cohesion and institutions. Crisis management is a fundamental political act about the security and the protection of the population, a 'core state capacity', that needs to be shared between EU states to tackle transboundary crises, but the exercise of which requires legitimacy and accountability that is mostly found at national level.

How can the EU solve this conundrum in the case of pandemics? Below, I discuss four options for improving the EU's response to large-scale transboundary health crises,and consider their benefits and drawbacks.These options are based on existing multi-level transboundary crisis management models in the EU, keeping in mind that the EU's competence in health is only to 'complement member states' actions', except for common health concerns for which the competence is shared (art. 4, and 168, TFEU). I review these proposals in light of current coronavirus crisis.

Table 1: Weighing policy options for improved EU response to transboundary health emergencies

Policy option	*Benefits*	*Drawbacks*
Intergovernmental actions: ad-hoc arrangements for exceptional crises	More politically acceptable for 'subsidiarity' matters, no need for treaty change, can be adopted more rapidly	Risk of inconsistent crisis response, differentiated implementation and unequal resources
Multi-level coordination: improving the EU role in coordinating member states	More flexible, more legitimacy; in line with current Treaty competences.	Persistent risk of inconsistent crisis response
Regulating crisis preparedness (i.e. common rules for health emergencies preparedness and responses)	Strengthen consistency in planning across member states, harmonise stockpiling, and pandemics response measures	Potential legal issues over competence; implementation may vary depending on resources and contexts.
Supra-nationalisation: more crisis decision-making powers for EU institutions	High degree of harmonisation Consistent response	Lack of legitimacy, no existing legal powers to adopt extraordinary measures; not in compliance with subsidiarity and proportionality

		principle

1. Intergovernmental action: ad-hoc arrangements

Intergovernmental action (i.e. getting heads of state around the table, or their webcam for the time-being), would in the short term be the easiest and fastest way to make steps towards an improved joint response. Such discussions are already taking place, in particular to develop common financial resources and support states' budgets to help them mitigate socio-economic effects. These measures are essential, and should be adopted rapidly, to prevent most affected countries from suffering more due to worsening economic and financial conditions, and ensure EU solidarity and cohesion.

Yet they are not sufficient, in particular to mitigate the social, medical and public health aspectof the current crisis. The EU has a duty to 'protect and improve the health of EU citizens.' Health ministers are currently talking daily, but the outcome of their meetings is not clear.

The Council could for example adopt a Recommendation on minimal public health measures and social support, coupled with the mobilisation of EU funds, in particular for social and medical aspects. This will be particularly crucial when it comes to freeing populations from quarantine and confinement. Second, for such a large scale and exceptional crisis, intergovernmental leadership is crucial to maintain coherence between the various sectoral responses (economic, health, social).

This approach is very much needed, but would still raise issues: it leaves scope for differentiated implementation, and more worryingly, it would not to ensure that the EU would be in the best position when the next crisis comes.

2. Multi-level coordination: improving the EU role in coordinating member states

The EU already has in place a series of institutions and mechanisms to prepare and respond to health crises. Several of these mechanisms were this time activated too late or insufficiently. Strengthening multi-level coordination requiresreinforcing the ability of relevant EU institutions to coordinate across levels within the current legal system, with the aim of improving the current and future responses to pandemics.

In the short term,there is first a need for more consistency and joint efforts in confinement, testing, use of medical protective devices, medicines, and vaccine research.A committee of national experts has been meeting since 18th March at the Commission to provide

recommendations on public health and medical countermeasures. The Commission should consider adopting implementing acts – as allowed by Decision 1082/2013/EU on serious cross-border threats – to ensure a consistent implementation of those recommendations. Likewise, the Commission should use joint procurementspreventivelyto tackle the current shortage of masks, medical protective equipment, tests, sanitizers, and ventilators, rather than only seeking to ensure the integrity of the single market and letting member states compete for those vital resources (it only did so on 28 February for masks, and 17 March for most medical equipment, except for medicines which are also at risk of shortage).

In the longer term, the respective role of the European Centre for Disease Control (ECDC) and of the Health Security Committeeshould be reviewed. The coronavirus exposed a great variety of interpretations and counter-measures. The ECDC should step up its role in providing technical guidance and early warning to member states. The Health Security Committee, which coordinates member states in liaison with the Commission, should have a more strategic role in coordination: member states should first seek a common approach, or at least a consistent one, rather than informing the Commission, and letting it sort out ex-post the side effects of their decisions on the single market or the Schengen zone.

Another option would be to systematically activate the Civil Protection Mechanism for pandemics.It is now functioning, but initially Italy faced an absence of response when it called for masks as member states were already worried about their own coping capacity. This calls for reviewing how to organise mutual support in case of a large-scale disaster that has the potential to affect all EU member states;as well as the Commission's Emergency Response Coordination Centre's own role in stockpiling (as suggested by the Council) to support member states.

These ranges of measures are vital to improve coordination, and could be adopted without major difficulties. However, they may not prove sufficient to ensure that pandemics policies are coherently aligned in the first place, and to deter member states from adopting unilateral measures counter to EU's common interests.

3. Regulating member states' pandemic preparedness

Currently, pandemic preparedness is a national competence. The EU Decision 1082/2013/EU on serious cross-border threats only requires member states to share information, and to consult each other and with the Commission to coordinate their preparedness and response. This Decision is insufficient: in 2016 the European Court of Auditors had already warned that information sharing was inadequate due to the sensitive nature of the data, which the current crisis confirms. The Decision 1082/2013/EU should be reviewed to duly regulate member states preparedness efforts, and organise decision-making processes in times of crises.

An interesting model to seek inspiration from is the 2019 Regulation on Risk Preparedness in the Electricity Sector that provides more formal templates for crisis preparedness, as well as organises regional coordination in times of crisis. Such regulation could for example ensure that states stockpile and produce vital items, and that their pandemics plans are in line one with the other. The advantage of such models is to shift from information sharing to streamlining ex ante preparedness, which would ensure more coherence in response, while respecting subsidiarity concerns.

The main issue is that the harmonisation of national laws is excluded from Art. 168, and there would be a debate as to whether such regulation would harmonise, or simply provide a formal template which member states could adapt to their specific context. Second, coordinating decision-making may still prove challenging. The regional model for coordinating crisis managementcould bring a more democratic solution by bringing closer countries with shared characteristics; however, viruses do take planes, so this would be insufficient.

4. A supra-national response to pandemics? Delegating decision-making powers to EU authorities.

Is a supra-nationalisation of response to health emergencies possible and desirable? Proposals for a new EU Health agency or extra-ordinary powers for the Commission raise serious concerns.First of all, the EU only has a ‘complementary’ competence in health; and a shared one when it comes to common and ‘cross-border’ health issues. The EU does not have the power to adopt freedom-infringing measures that can only be adopted by nationally elected governments, and with proper democratic accountability.It is not likely either that a non-elected supranational administrative body (such as the Commission or an Agency) would be more effective in implementing such measures, thus not complying with the proportionality principle. Finally, a serious hurdle comes from theneed to accommodate the diversity of situation, health and legal systems, and to rely on very diverse administrative capacity.

That said, pandemics are extraordinary circumstances, and ask the question of whether more coordination and regulation will be sufficient. Interestingly, there are other domains, such as banking, at the core of national sovereignty, in which supra-national forms of crisis management, that can adopt measures seriously infringing individual (property) rights, do exist, at the price though of a highly convoluted decision-making process, and implementation issues related to differences in administrative capacities, as well as banking and legal systems. Health and freedom are even much more sensitive issues, and considerable concerns are likely to arise.

Legal issues aside, one could imagine a partial delegation of decision-making powers to the ECDC, the Health Security or the Emergency Response Coordination Centre in case of

pandemics, with checks by the Council, and implementation by member states. Such an approach would ensure the highest possible degree of consistency; however, it would still face serious drawbacks that impede the feasibility and effectiveness of such option.

Recommendations

Taking into account legal constraints, and existing models for EU multi-level transboundary crisis management, the following options appear the most desirable to improve the EU's joint response to pandemics:

1 Adopt intergovernmental measures, such as a Recommendation, to ensure consistency in public health responses, mitigate social and medical effects, and ensure consistency of responses across sectors.
2 Review the current institutional set-up to improve the Commission and the ECDC to coordinate member states technical and strategic countermeasures against pandemics; increase the Commission's crisis coordination role through its Civil Protection Mechanism.
3 Review Decision 1082/2013/EU on cross-border health threats, and adopt a regulation to ensure more coherence in pandemic preparedness.

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