4

MANAGING THE COVID-19 PANDEMIC IN AUSTRIA

From national unity to
a de facto unitary state?

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4.1 Introduction

After several months into the Covid-19 pandemic, few things are certain. But one of the key insights for any government response is the importance of demographic features. As of 2020, Austria had a population of 8.9 million, with 19.3 per cent of its inhabitants between 0 and 19 years of age, 61.6 per cent between 20 and 64 years, and 19 per cent over 65 years of age. Besides age, the degree of urbanisation is another relevant factor in pandemic management, and here Austria probably benefits from being characterised mostly by villages and small towns. As of 2018, 52 per cent of its population lived in municipalities with less than 10,000 inhabitants and 48 per cent in only 86 towns and cities with larger population sizes. Apart from the capital, Vienna, which has 1.9 million inhabitants, no other city reaches a population size of 300,000.

In terms of its legal and political system, Austria is, under its Constitution of 1920, a federal country, though a highly centralised one. The federal constitutional make-up was, of course, not the only factor influencing the response to the pandemic. A relevant political factor was the composition of government both at the federal level and in the nine *Länder*. Since January 2020, shortly before the onset of the pandemic, the federal coalition brought together the conservative Austrian People's Party (ÖVP) and centre-left Green Party as a junior partner. Although the ÖVP chancellor, Sebastian Kurz, assumed a prominent role in communicating the response to Covid-19, a key cabinet member – Rudolf Anschober, the Minister of Health was from the Green Party. While the *Länder* had been ruled for decades either by the ÖVP or the Social Democratic Party (SPÖ), all but one were ruled by coalitions and thus included various smaller parties in their governments.

Another crucial factor in addressing the pandemic was the presence of a well-developed public health-care system; this holds true despite an increasing

number of private profit-oriented providers. With 5.1 physicians and 7.6 hospital beds per 1,000 inhabitants (OECD 2020), Austria's medical-service capacity is among the strongest in the world. In view of Covid-19, it is also important that the country has a relatively high number of beds in ICU units, that is, 28.9 per 100,000 persons.

Due to Austria's closeness to Italy, it is hardly surprising that when it reported its first ascertained cases of Covid-19 on 25 February 2020, the patients were a young couple from Lombardy living in Innsbruck in the *Land* Tyrol. However, the real epicentre of the outbreak in Austria became the Tyrolean ski resort of Ischgl. As many ski tourists from Northern European countries were tested positive upon their return from this alpine village, authorities from these countries – starting with Iceland on 5 March – began to classify it as a high-risk area. An indication of the size of the outbreak in Ischgl is that as many as 42 per cent of the village's inhabitants already had antibodies by the end of April. As a result, Tyrol was Austria's initial epicentre, with 3,352 coronavirus cases until 15 April (in a population of approximately 758,000) compared to only 2,101 in Vienna (with a population of 1.9 million).

Over time, the spread of infection tended to even out across the *Länder*, a development that prompted them to align themselves closely with the national government, at least initially. The central argument of this chapter is that – after early national unity – Austria's brand of 'pandemic federalism' oscillated between attempts towards autonomy and differentiation, on the one hand, and, on the other, the dynamics of a de facto unitary state.

4.2 The federal constitutional and legislative framework

4.2.1 Constitutional distribution of powers

Unlike subnational entities in other federal systems (Palermo and Kössler 2017), Austria's *Länder* do not have extensive legislative competences in health care. In fact, article 10(1)(12) of the 1920 Constitution stipulates that public health is in principle a federal responsibility in regard to both its legislative and executive dimension. However, the same provision also foresees certain exceptions, such as municipal sanitation and, importantly for Covid-19, hospitals and nursing homes, even if these are under federal health supervision. Article 12(1)(1) specifies that, in relation to the latter health facilities, the federal government is limited to passing basic legislation on principles, whereas the implementation of laws falls within the jurisdiction of the *Länder*.

Thus, while *Länder* authorities execute federal and own laws concerning hospitals and nursing homes autonomously, the execution of federal public health legislation, based on article 10(1)(12), falls within what is called 'indirect federal administration' (Constitution, articles 102–5). This means *Länder* officials execute federal law not as their own prerogative but as delegates of the federal government. The *Land* governor is subject to instructions from the competent

federal minister, with his or her autonomy confined mainly to organisational considerations of how to achieve the goals determined by the minister (VfSlg 9507/1982). Instructions may be disregarded only for the reasons exhaustively listed in article 20(1) – that is, instructions issued by a minister without authority and infringing the criminal code (VfSlg 10510/1985) – with the result that the *Land* governor is barred from weighing up different legal interests autonomously and making his or her own decision. In case of non-compliance with instructions, he or she may even be charged before the Constitutional Court under article 142(2)(e) of the Constitution. While this is the legal situation, indirect federal administration makes the federal minister politically dependent on implementation by the *Land* governor and thus forces both government levels to cooperate and compromise.

Regarding the executive sphere, the district administrative authorities also play an important role. They comprise Austria's 15 cities, each of which has its own city statute¹ and 79 unelected district commissions (*Bezirkshauptmannschaften*) with a district commissioner appointed by the *Land* government. As subordinate units, these authorities carry out administrative tasks on behalf of their *Land* and – upon the instructions of the *Land* governor – tasks falling under indirect federal administration. Concerning health care, a district medical officer is, for example, responsible for health matters and supervision of the hygiene of hospitals located in the district. In comparison, the municipalities play a lesser administrative role, one focused mainly on health and hygiene inspections, and in view of their small size, often carry out their functions jointly with each other.

Importantly, health care is not an exclusive domain of the various government levels mentioned so far; rather, it includes other actors within a corporatist scheme of governance relations, as is typical of a Bismarckian welfare-state system based largely on mandatory health insurance through payroll contributions (Trukeschitz et al. 2013: 154). Whereas one category of employees is insured via medical aid funds based on occupation (e.g., railway workers, farmers, or civil servants), most employees are covered by the nine *Länder* medical aid funds (one fund per *Land*). This makes the medical aid funds key players, especially in corporatist negotiations regarding outpatient care. Concerning inpatient care, on the other hand, the *Länder* are, given their abovementioned responsibility for hospitals, the main actors (ibid: 158). Consequently, the Minister of Health lacks (in normal times) direct control over much of the country's health care.

In terms of policy-making, the separation of powers outlined above is complemented by intergovernmental agreements on health care based on article 15(a) of the Constitution. Since 1974, this provision has enabled both vertical as well as horizontal accords which are binding though not self-executing (VfSlg 9581/1982; 9886/1983), inasmuch as their content still needs to be adopted formally by Parliament. Agreements under article 15(a) concerning hospitals first appeared in 1978, and since the late-1980s became a primary tool for regulating an extremely complex financing system that involves contributions from the federal government, *Länder*, municipalities and medical aid funds. A key agreement

in 1997 introduced a binding general hospital plan and gave rise to health funds at the federal level and in the *Länder* for the sake of better coordinating inpatient and outpatient care. Austria pressed ahead with these reforms because the separation between two areas of care is, together with the complex financing arrangements, often seen as responsible for an overly fragmented health-care system (Kostera 2013: 151).

4.2.2 *Constitutional emergency powers*

A key question is whether the ordinary distribution of functions, as outlined, also prevails in the extraordinary circumstances of a pandemic. In fact, even though there has been much talk of ‘emergency ordinances’ issued by the federal and *Länder* governments, no one has ever declared a state of emergency in Austria due to Covid-19.

Article 18(3) of the Constitution grants the Austrian President (upon proposal by the federal government) the power to issue ordinances ‘necessary to prevent obvious and irreparable damage to the general public’ at a time when the first chamber of Parliament is not assembled, cannot meet, or cannot act as a result of *force majeure*. Yet, during the pandemic in 2020, the chamber did actually meet and play some role, albeit a very limited one (see [section 4.2](#)). Importantly, a presidential ordinance may change ordinary law but not constitutional law; nor may it entail a ‘permanent financial burden’ for the federal government or a ‘financial burden’ for the *Länder* or municipalities (article 18(5)), which is obviously an illusion in times of a pandemic. In short, there are several reasons why the presidential emergency power is of no practical use in such circumstances.

Another avenue for ushering in a period of emergency would be article 15 of the European Convention on Human Rights, which has been incorporated into Austria’s legal order constitutional rank that is above ordinary legislation. This article provides a possibility to derogate certain rights ‘[i]n time of war or other public emergency threatening the life of the nation’. However, the Austrian government, unlike others,² did not invoke this right of derogation (Lachmayer 2020), which would have required keeping the Secretary-General of the Council of Europe informed about the emergency measures taken and the reasons for them.

4.2.3 *The legislative framework for addressing Covid-19*

As for ordinary legislation, the Epidemic Diseases Act was most relevant at the outset of the Covid-19 pandemic. A key problem, however, was that this piece of legislation dates back to 1950 (and is based largely on an even older law passed in 1913), which makes it less than ideal for contending with an emergency in the 21st century.

Several of its anachronistic features were identified, among them the obligation to report a case of infection to the authorities only within 24 hours.³ In today’s highly mobile world, this time span is short enough for an infectious

disease to spread from *Land* to *Land*, or even to another country. Naturally, this old law also fails to pay adequate attention to more contemporary issues such as data protection, a dimension that was introduced only when the Act was amended during the pandemic in 2020 (BGBl. I Nr. 16/2020). Another aspect of the law that improved in response to Covid-19 was its harsh rules on gatherings and events. An amendment made it clear that, apart from outright prohibition, there are less intrusive measures that can be taken, such as limitations applicable to specific groups of persons, or stipulations in regard to physical distancing, face masks, and sanitary requirements (BGBl. I Nr. 43/2020).

4.3 Preparedness for a national disaster: The institutional framework

Instead of specific institutions for public health emergencies, Austria has several general health-care bodies on which the Minister of Health can rely for advice. The Health Austria Company (*Gesundheit Österreich GmbH*), owned by the Austrian government, is an applied research institute in charge of, among other things, health-care capacity planning, which is a matter of vital importance in pandemic management. Another institution, the Supreme Health Board (*Oberster Sanitätsrat*), brings together more than 40 health experts and provides, as do the *Länder* health boards (*Landessanitätsräte*) at the subnational level, technical support and guidance on major medical issues. However, the Minister of Health, allegedly due to the need to focus on the pandemic, failed to re-nominate the members of the Supreme Health Board, which is an unlawful state of affairs. Instead, he relied for advice on an ad hoc ‘coronavirus taskforce’. For coordination with the *Länder* and local governments, the federal government utilised general mechanisms of intergovernmental relations.

4.4 Rolling out measures to contain the pandemic

4.4.1 Taking the initiative

Although Austria recorded its first two cases of Covid-19 in Innsbruck on 25 February 2020, a comprehensive response was triggered only later on by the events in Ischgl. On 4 March, Icelandic authorities sent an e-mail to Austrian colleagues warning that eight of their positive cases had travelled to the ski resort, information which the Ministry of Health forwarded to Tyrol’s health authorities. However, it was only on 12 March that tourists were informed that ski resorts would be closed, and even so, not immediately but two days hence. On 13 March, the national government placed the valley around Ischgl under quarantine.

Reconstructing these events – in particular, determining who acted first, acted at all or failed to act – takes on a legal dimension which is highly interesting from a federalism perspective. This is because more than 6,000 Ischgl

tourists joined the Austrian Consumer Protection Association in its efforts to claim damages, while over a thousand of them were joined as private parties in criminal charges against the relevant authorities, charges that were ongoing at the time of this writing.

The main claim is that the authorities knew, or should have known, about the risk of mass infection but responded too slowly out of greed and the priority given to the interests of the tourism industry (Consumer Protection Association 2020). The significance of tourism becomes evident from the facts that roughly one-fourth of jobs in Tyrol are tied to this sector and that a village like Ischgl, with 1,600 inhabitants, hosts as many as 10,000 tourists in the skiing season. Article 23(1) of the Constitution stipulates that authorities are, under civil law, liable for injuries inflicted in executing laws through illegal and culpable behaviour. As the potential wrongdoing would have occurred within the scope of indirect federal administration (see [section 2.1](#)), the claim goes against the Republic of Austria for alleged mistakes made by both the national as well as Tyrolean authorities.

4.4.2 Federal action

As part of a dual strategy, the federal government amended the Epidemic Diseases Act to make it fit for the 21st century and adopted ad hoc legislation. Although measures during the first few days of the federal response from 10 March onwards – for example, restrictions on travel and events, the closure of schools and universities, and the ending of the skiing season – were still based on the Epidemic Diseases Act, 15 March witnessed a rather extraordinary episode in Austrian parliamentarism.

On this Sunday, a set of bills, among them the Covid-19 Measures Act, was adopted by both chambers of Parliament within less than 24 hours, authenticated by the President and published in the law gazette. The Covid-19 Measures Act, which contains a sunset clause providing for its termination at the end of 2020, was since then at the core of efforts to combat the pandemic. It was this Act which allowed for the closure of businesses except for shops providing basic services, imposed limitations on entering public places, and made it obligatory to wear face masks. Some restrictions, especially those regarding access to public places, expired on 30 April 2020, after which a new ordinance came into force, the so-called easing ordinance (*Lockerungsverordnung*) (BGBl. II Nr. 197/2020).

In terms of institutions that shaped federal action, a key body was a newly established ‘coronavirus taskforce’. It was curious that this taskforce, nominated and chaired by the Minister of Health, included national authorities and experts such as health professionals and mathematicians but had no representatives of the *Länder*.

Among the first federal measures were business closures affecting in particular hotels and cable-car businesses in Tyrol. These measures, as noted, were based on the 1950 Epidemic Diseases Act, which promised full compensation for losses in

the amount of ‘comparable extrapolated earnings’. To avoid such costly compensation, the Covid-19 Measures Act of 15 March not only enabled the Minister of Health to prohibit, through an ordinance, customers, and economic operators from entering business premises, but also simply excluded, once this ordinance was in force, the applicability of the compensation rules under the old law of 1950.

In a seminal judgment, the Constitutional Court held that this provision is no violation of the right to equality but is proportionate, given that the Covid-19 Measures Act established a substantial crisis management fund for the compensation of businesses closed after the ordinance (VfGH 14.07.2020, G 202/2020). This was not the only aspect of business closure that raised legal concerns. Shops with a sales area of less than 400 m² were allowed to reopen on 14 April 2020 and others only on 1 May. The Constitutional Court ruled that the relevant ordinance of the Minister of Health was against the law, as it had failed to justify this differentiation (VfGH 14.07.2020, V 411/2020).

The Covid-19 Measures Act did not allow for bans on entering business premises but enabled more far-reaching restrictions of freedom of movement. By means of an ordinance, entering public places may be prohibited by the Minister of Health throughout the country, by a governor for the territory of the respective *Land*, and by a district administrative authority for its district or parts thereof. The crux of the matter was that the relevant [section 2](#) of the law explicitly referred to banning access to ‘specific public places’. However, [section 1](#) of the ‘entry ordinance’ (*Betretungsverordnung*) of the Minister of Health (BGBl. II Nr. 98/2020), which like the Covid-19 Measures Act came into force on 16 March, decreed a *general* curfew with only few exceptions, such as movement for covering the basic needs of daily life or for professional purposes. The Constitutional Court did not agree with the argument that the Act was unconstitutional due to a violation of article 18(1), which stipulates that ‘[t]he entire public administration shall be based on law’. It did hold, however, that the ‘entry ordinance’ was partly unlawful because its *general* prohibition was indeed too extensive to be covered by the Covid-19 Measures Act (VfGH 14.07.2020, V 363/2020).

A third controversial area of the federal response to the pandemic was the obligation to wear face masks. With effect from 15 June, masks were required only for public transport and in health-care facilities such as pharmacies, and no longer in shops, schools and restaurants. However, this easing of measures would not last for long. The fact that the duty to wear masks was broadened on 24 July to include postal offices, banks, and grocery stores – but not, for example, clothes shops and restaurants – again ignited public debate. A point of controversy was whether this differentiation was objectively justifiable and if the ordinance provided a credible explanation – all of which was exactly the same as what the Constitutional Court had demanded a little more than a week before then in its ruling (mentioned above) on the privileged reopening of smaller businesses.

The federal actions described above illustrate a double centralisation of decision-making, that is, an accumulation of power vertically at the national government level and horizontally in the hands of the executive branch. Indeed,

conventional wisdom has it that emergency situations lead to a predominance of the (national) executive because the latter can respond speedily and decisively to a sudden crisis. This ‘Schmittian’ or ‘post-Madisonian’ view of emergency governance has been opposed by a study based on data on Covid-19 responses from more than a hundred countries (Ginsburg and Versteeg 2020). The authors claim that the conventional wisdom applies only to a specific kind of emergency, namely a national security crisis. Other kinds of emergencies, such as the Covid-19 pandemic, which are characterised by a dispersal of information with effective implementation depending to a much greater extent on local governments, the (national) executive would be structurally bound rather than unbound.

In Austria, the mostly unbound national executive was only occasionally challenged by the *Länder*, with the pushback again coming from the executive, only in this instance the subnational executive. The finding that Germany’s Covid-19 governance entailed a ‘self-disempowerment of parliament’ (*Selbstentmächtigung des Parlaments*) (Möllers 2020) applies in Austria to both the national and subnational levels of government. While the speaker of the first chamber from day one explicitly emphasised the continuity of parliamentary activities, Parliament had few high moments in resisting the executive, one of them being the opposition’s success in introducing a sunset clause to the Covid-19 Measures Act. However, the hasty enactment of complex omnibus bills and the, at best, ambivalent role of the second chamber, supposedly representing *Länder* interests, testify to the diminished role of parliamentarism.

Only in few instances did the Federal Council (*Bundesrat*) apply its tool of a suspensive veto (Constitution, article 42(1–4)). However, to see this as an expression of *Länder* influence would be a misrepresentation of the real circumstances. First, there was a strong partisan element, as two opposition parties, the social democratic SPÖ and the right-wing FPÖ, held a majority in the Federal Council (Palermo 2020). Secondly, the stated reasons for the veto were feared infringements of fundamental rights and a reduction of parliamentary scrutiny due to the hasty legislative process (Gamper 2020). Instead of federalism grounds, the vetoes were prompted by the traditional rationale of bicameralism as an opportunity to give bills a second thought, a line of argument key to the thinking of George Washington and other framers of the US Constitution. The broader problem of the concentration of power in the (national) executive (Lachmayer 2020) is best illustrated by the federal government’s use of *internal* administrative orders to public officials (*Erlässe*) to regulate matters with *external* effects (which ought to be regulated through ordinances). Such a practice deprives people of legal remedies because internal orders are not subject to judicial review.

In response to mounting criticism, the Minister of Health promised to avoid legal missteps in the future, while the Chancellor’s reaction was rather nonchalant. He called on lawyers not to engage in ‘legal sophistry’ (*juristische Spitzfindigkeiten*) and pointed to the fact that, at the next session of the Constitutional Court in June 2020, the legal measures would no longer be in force anyway, which was not necessarily true.⁴ This prompted observers to ask sarcastically whether

constitutional law is ‘for the Court only’ (Somek 2020) and emphasise that a ‘good legislator’ would be obliged *ex ante* to weigh up the proportionality of measures in an effort to avoid unconstitutionality. Compared to earlier legal measures, the ‘easing ordinance’ (*Lockerungsverordnung*), entering into force on 1 May, was indeed viewed positively by legal experts as ‘more differentiated and precise’ (Bernd-Christian Funk, quoted in Kroisleitner and Scherndl 2020).

Besides horizontal concentration of power in the hands of the executive, double centralisation also entails – in its vertical dimension – the predominance of the national government. This is exemplified, in particular, by national Covid-19 legislation regulating, on the basis of the competence for public health under article 10(1)(12) of the Constitution, a number of issues that normally fall within the responsibilities of the *Länder*. This continues to be the case even though some *Länder* demanded, in the run-up to the ‘easing ordinance’ of 1 May, more decentralisation and differentiation regarding the roll-back of restrictions. However, this ordinance regulates, for example, the entry to sports facilities and the organisation of events, matters usually falling within *Länder* responsibilities. As the federal competence for public health allows it in times of emergency to take measures otherwise reserved to the *Länder*, the competences of the latter are pushed into the background. When they would come to the fore again thus depends on the return to ‘normality’.

In this light, the comprehensive reform of both the 2020 Covid-19 Measures Act and the 1950 Epidemic Diseases Act, which the Austrian parliament passed on 25 September (BGBl. I Nr. 104/2020), had the declared aim of partially reducing centralisation (see [section 4.4.4](#)). In contrast to earlier, hasty legislation during the pandemic, a comprehensive evaluation procedure took place, with some of the several thousand comments on the bill by private individuals and organisations leading to genuine improvement. Yet it was correctly observed, in a critical vein, that a thorough amendment of the two acts took as long as seven months since the start of the pandemic (Bußjäger, quoted in Marchart and Weißensteiner 2020).

Overall, the reform provided a legal basis for pandemic governance which is firmer, more precise, and in line with the proportionality principle. Importantly, [sections 3–5](#) of the Covid-19 Measures Act now determine the modalities for restrictions on freedom of movement by ordinance more extensively and precisely and thus seek to remedy the problem of the ‘entry ordinance’ being declared unlawful. Another welcome change in regard to the rule of law is procedural, as an ordinance decreeing a future lockdown would have to be discussed with the Main Committee of the first parliamentary chamber and thus with all parties represented there. However, as the aim is to avoid countrywide lockdowns, more autonomy is henceforth granted to the *Länder*.

4.4.3 *Länder action*

The *Länder* adopted several measures, partly through ordinary legislation but above all through ordinances, to combat the pandemic. However, this did not

materially alter the predominance of the centralist approach. At the outset, Tyrol had lockdown rules that deviated for several weeks from those of the rest of the country, in addition to which it prohibited entry to other *Länder*. But as Covid-19 spread more evenly across the country, subnational governments tended to align themselves with the national government. When restrictions began to be eased in a staggered way in mid-April and early May 2020, greater differentiation was demanded by some *Länder* and academic observers in the interests of economic recovery and greater acceptance of the restrictions by the population. Still, Austria's Covid-19 response largely remained uniform, even though infection clusters in some areas prompted certain subnational governments to take special measures, with school closures and stricter face mask regulations in early July in Upper Austria being a case in point.

The debate about greater *Länder* autonomy regained momentum as infection numbers grew in early September and coincided with the introduction of the abovementioned 'coronavirus traffic light system' (*Corona-Ampel*). Based on weekly risk assessments by a commission that assigned one of four colours – green, yellow, orange, or red – to each district, it was up to federal, *Länder*, and district authorities to adopt recommendations or legally binding measures. Local differentiation between districts was thus key to this plan.

However, the plan was derailed by two problems. First, the mixed composition of the commission – that is, five experts nominated by the national government, five civil servants from national ministries, and one representative from each of the nine *Länder* – resulted inevitably in tensions between scientific and political rationales for the risk assessments. While it was mostly the representatives of the federal and *Länder* governments within the commission that attempted to wield influence, one member suggested at the start of one of the first crucial meetings that the chief of staff of the Chancellor, without being part of the commission, briefly join in order to read out a declaration. This was rejected by the commission, on the argument that, to preserve its air of technocratic probity, political interventions should be avoided (even though political representatives outnumbered experts 14 to 5!). However, the *Länder* and local governments also tried to exert pressure on the commission. Whereas Vienna initially demanded a stricter risk assessment, the Mayor of Linz was outraged that his city was in the yellow and not green column and lambasted the 'coronavirus traffic light system' as arbitrary and a failure.

The second problem was that a sharp increase in infection numbers precisely at the time of the new system's introduction prompted the federal government to throw regional differentiation overboard. On 12 September 2020, it resorted to countrywide measures by issuing another amendment, already the 10th, of the 'easing ordinance' (BGBl. II Nr. 398/2020). Thus, the assignment of colours to the single districts became rather symbolic and at most useful for risk-awareness raising because the new uniform rules, which were lying – depending on the issue – between those districts initially categorised as yellow or orange, also entered into force in the many green districts. For example, the maximum

number of persons for indoor events was reduced to 50, as opposed to the 200 initially foreseen for green and 100 for yellow, and a few days later was lowered further to 10.

Issues of autonomy and differentiation also emerged on another occasion, namely in late September 2020 during the reform mentioned above of federal Covid-19 legislation. The Minister of Health himself underlined that the reform was aimed at increasing *Länder* competences to enable them to co-define locally the measures that would best contain the pandemic (APA 2020). The new [section 7](#) of the Covid-19 Measures Act clarifies the power to issue ordinances based on this law at the federal, *Land*, and district levels and envisages regional differentiation. A *Land* Governor may act, if there is no federal ordinance or decree, to provide additional measures, and a district administrative authority may act, if there is neither a federal nor a *Land* ordinance, to introduce additional measures.

Such autonomous decision-making runs into certain limits. First, *Land* and district ordinances that prevent people (with exceptions) from leaving their private living spaces need the approval of, respectively, the Minister of Health and the *Land* governor. Secondly, the minister must be informed about both the *Länder* and district ordinances before they enter into force. Thirdly, legal hierarchy is reflected in the provision that *Länder* ordinances may repeal district ordinances and that both can be repealed by ordinances from the Minister of Health. In practice, these hard instruments for restraining autonomy were not used during the period under review. Instead, the federal government merely expressed its misgivings when, for example, Vienna in September 2020 decided to go its own way by introducing guest registration in pubs and restaurants rather than following other *Länder* in setting closing hours at 22:00.

4.4.4 Local government action

Under the Constitution, district administrative authorities do not have the scope of autonomy comparable to that of the *Länder*, as they are merely subordinate units. Nevertheless, as instructions from the *Land* or federal governments cannot and/or do not determine, even more so in a complex emergency situation, all district actions, the leeway they give to local governments is significant in practice. In fact, it is the health departments of the districts that decide in concrete cases whom to quarantine or which businesses to close. Inasmuch as the implementation of numerous competences, both federal and from the *Länder*, is concentrated in the district authorities, the role they play in the state machinery is undramatic and often even unacknowledged, yet for all that, crucial (Bußjäger et al. 2018).

In the context of Covid-19, the extent to which they made a difference depended critically on the staff capacities each *Land* assigned to them and their approach to tackling the pandemic. For example, Innsbruck's authorities – which were in charge of dealing with the couple from Lombardy who were Austria's first identified Covid-19 cases – were far more efficient in testing and quarantining

contact persons than the district commission of Landeck was in regard to the cases in Ischgl. Indeed, this comparison contributed to accusations that business interests hindered interventions by the authorities in Landeck. Precisely because they were so pivotal in implementing Covid-19 measures on the ground, district commissioners complained to the Minister of Health about ever-changing, unrealistic rules that were difficult to put into practice and criticised a lack of communication by the federal government (Wiener Zeitung 2020). The minister reacted by inviting them to a direct exchange but also pointed to his intensive talks with the health boards of the *Länder* and their duty – within indirect federal administration – to keep the districts informed.

While the Constitution generally accords municipalities a lesser role in health care than it does the districts, they were of course still critical in the fight against Covid-19, for instance in their efforts to provide information and coordinate the activities of local stakeholders, including volunteers. With local governments at the forefront of providing basic services, they were key to keeping crucial public sector activities running during the lockdown. There were urgent needs, for example, to switch to digitalised services and to reorganise child care and public transportation to suit the conditions dictated by the pandemic. Quite often municipalities came to the rescue of crisis-ridden local companies by deferring the payment of fees or even availing direct financial assistance. The role of municipalities was thus less concerned with the health emergency itself than with its impact, not least of all its economic impact.

4.4.5 Intergovernmental relations

Relations between governments were marked on the whole, especially in the early stages of the pandemic, by a high level of cooperation. However, this was not collaboration on an equal footing, as the *Länder* long felt comfortable with letting the federal government take the lead. Given the lack of significant pre-existing institutions of emergency management (see [section 4.3](#)), cooperative governance took place by means of general mechanisms of intergovernmental relations. Informal contacts as well as the Conference of the *Länder* Governors (*Landeshauptleutekonferenz*) played a role. At a gathering on 15 May 2020 of this conference, which is much more powerful in representing subnational interests than the second chamber (Kössler 2016: 363f), the governors expressly referred to ‘successful federalism’ as the recipe for making Austria ‘healthy and strong again’.

This relatively harmonious picture does not mean, of course, that relations were devoid of failures of cooperation or outright conflict; indeed, intergovernmental tension increased over time. Early examples concerning restrictions of free movement included an internal order (*Erläss*) issued by the Minister of Health shortly before Easter to the *Länder* governors that they prohibit ‘all meetings in a closed room attended by more than five persons not living in the same household’. Even though the federal government retracted the order, explaining that it had meant only to ban ‘corona parties’ and not families’ Easter celebrations,

there was a time lag during which district administrative authorities upheld the ordinances based on this order. The resultant confusion could have been avoided by more efficient intergovernmental communication.

Another controversy revolved around an ordinance in which Burgenland's governor stipulated that this *Land's* most popular lake could be visited only by people who resided within 15 km of it. This was to avoid large crowds and thus a higher risk of infection. While [section 2](#) of the Covid-19 Measures Act certainly allowed the governor to regulate access to a specific public place such as a lake, the federal government demanded uniform rules regarding swimming lakes. This episode is emblematic of how relations between single *Länder* and the national government differed because they showed different levels of subnational activism. For example, whereas Burgenland pushed to have its own solution, the *Land* Carinthia called for the national government to act and establish countrywide rules.

Subsequent conflicts related to measures imposed at Austria's borders when fears that holiday returnees would 'import' the virus led to the introduction of health checks. While the health departments of the districts carried out fever measurements and, where necessary, a coronavirus test, they were, from an organisational perspective, subject to their *Land* government and assisted by military troops sent by the federal government.⁵ With traffic jams of several hours occurring at certain border crossings, the intergovernmental blame game would soon start. The Minister of Health stated that this *Land* had misinterpreted the relevant ordinance by performing more than just random checks, but Carinthia complained about a lack of clear communication.

When infection numbers increased rapidly in early September 2020 (despite the border checks), another field of intergovernmental friction came to the fore. The federal government accused certain *Länder* and the health departments of their districts of being too slow regarding so-called TTI ('testing, tracing, and isolating'). In turn, Vienna not only blamed everything on the allegedly premature lifting of the federal lockdown but also frantically started to increase staff capacity dedicated to these tasks. The *Länder* had been free to find different solutions. Indeed, some supported understaffed district health departments with civil servants from other departments or other districts, or with military troops provided by the federal government, while others relied primarily on hiring (medical) students on a short-term basis.

4.4.6 Intergovernmental fiscal relations

In Austria, most of the revenue at all levels of government is generated as part of a shared taxation system, and fiscal resources depend, in the absence of extensive constitutional regulations,⁶ on an ordinary federal law, that is, the Financial Equalisation Law, which is adopted every four years and determines for each single tax the revenue portions of the various government levels. Even if the legislative process involves tripartite talks, negotiators are in fact not on an equal footing, and *Länder* and municipalities 'really have no legal alternative but to

accept the determination of fiscal relations by the federal government' (Bußjäger 2005: 61). Eighty-four per cent of the total revenue raised in Austria falls within this shared taxation system, and from these funds 68 per cent have gone since 2018 to the federal government, 20 per cent to the *Länder*, and 12 per cent to the municipalities (Federal Ministry of Finance n.d.). The fact that virtually all lucrative sources are shared taxes entails that the economic downturn in the wake of Covid-19 would have an equal impact on all three government levels, especially due to diminishing receipts from corporate and personal income taxes.

However, revenue shortages from joint taxes are, in relative terms, particularly damaging for the *Länder* because they do not enjoy much fiscal autonomy. Admittedly, they are allowed to 'invent' taxes not mentioned in the Financial Equalisation Law. But the latter is so comprehensive that it does not leave much space for this. Despite perennial discussions (or sham fights), increased tax autonomy has never been realised due to a certain reluctance on the part of the *Länder* and to the fact that the federal government offers them only marginal taxes with limited revenue.

As for Austria's municipalities, they faced significant income losses in shared taxes, which in 2018 accounted for 39 per cent of their revenues,⁷ as well as in certain exclusive local taxes. Receipts from a municipal tax (*Kommunalsteuer*) that employers have to pay based on the gross income of their employees were expected to shrink by 20–40 per cent. Reduced payments due to rising unemployment and a widely used partial furlough scheme (*Kurzarbeit*) account for that. Tight municipal budgets were also the result of reduced income from tourist taxes or fees for public services, such as child care. At the same time, municipalities are responsible for many basic services, such as water supply, so their room for manoeuvre in cutting costs was limited. Clearly, the financial impact of the pandemic on municipalities was highly differentiated, with those reliant on tourism or other businesses hard-hit by Covid-19 bearing the brunt.

As early as 15 March 2020, when the Austrian parliament passed the first pandemic-related bills, a support package was announced, including direct emergency help, credit guarantees, and tax deferments. For municipalities, EUR 1 billion was to be provided to cover local investments under a 50 per cent co-financing scheme. However, it was likely that some municipalities would fail to reach the co-financing quota. Moreover, the aid received was forecast to be in effect equalised by EUR 1.1 billion that municipalities would lose in revenue due to tax cuts envisaged in Austria's recovery package to stimulate the economy (Mitterer 2020). In view of shrinking resources, it was certain that intergovernmental fiscal relations would remain tense.

4.5 Findings and policy implications

When it comes to health care and federalism, it has been a mantra of critics, especially health economists (Trukeschitz et al. 2013: 174) but so too the Austrian Court of Auditors (Rechnungshof 2010), that far-reaching *Länder* competences

have resulted in fragmentation and an inefficient proliferation of hospitals with more beds than are actually needed. The irony is that the high numbers of hospital beds, not least of all in ICU units, turned out to be a major asset in Austria's Covid-19 response. There is a good chance that decentralised service provision will come to be appreciated again and that the creed of efficiency, often idolised as an undisputed guiding principle within mindsets strongly inclined towards centralisation, will be re-assessed. A question, then, is whether this will be limited to the era of Covid-19 or lead to lasting long-term change.

This same question of permanent or merely temporary change is also key when it comes to considering the centralisation that the Covid-19 emergency brought about. There can be little doubt that a double centralisation of decision-making occurred in the early stages through an accumulation of power horizontally in the hands of the executive branch and vertically at the national government level. In May 2020, it was claimed, for good reason, that Covid-19 turned Austria into a 'decentralized de facto unitary state' (Bußjäger 2020b). Nevertheless, these tendencies – set in motion without using constitutional emergency powers – do not reflect a profound change but rather re-emphasise trends towards centralisation that were already in existence in 'normal times'. To be sure, there were certain cautious efforts to reduce centralisation for the sake of more autonomy and differentiation in autumn 2020, namely the 'coronavirus traffic light system' and the new rules for ordinances under the reformed federal Covid-19 legislation. But the sustainability of these efforts is in doubt and they are unlikely to alter the underlying centralist tendencies.

It is therefore nearly impossible to assess whether Austria's federal dispensation has been a boon or bane in managing the pandemic. The truth is that federalism has hardly been noticeable in the making of key decisions at the time of this writing. It is thus somewhat misleading to argue that the country 'fared surprisingly well in the current crisis' despite its 'strong federalism' (Czypionka 2020). First, the largely centralised management of the pandemic follows from the fact that the public health competence of the national government under article 10(1)(12) of the Constitution overshadows for the duration of the emergency the *Länder* competences and enables it to intervene in what are otherwise subnational prerogatives. Second, this key provision envisages public health as a matter for indirect federal administration. On the one hand, this form of mixed administration compels all authorities to cooperate; on the other, the federal government has legal instruments to enforce its will vis-à-vis the state governors, even if their power of instruction meets factual limits, for example in the staff capacities of the subordinated authorities (Bußjäger 2020a). While district administrative authorities have considerable functions in practice, even more so in a complex emergency like Covid-19, and the *Land* Governor is central because of his or her instructions to the districts and other members of the *Land* government, one person remains at the top of the legal hierarchy: the Minister of Health. Politically, of course, he is also dependent on these subordinate authorities for implementation and is thus to some extent forced to compromise.

It is true that the Minister of Health came to be challenged more and more and that intergovernmental relations suffered increasingly from disputes as the pandemic dragged on. However, these conflicts were not as numerous and fundamental as they were in many other countries. To some extent, this is linked to the well-known argument that Austria, due to its societal homogeneity, has a higher tolerance for centralism than other countries because there is, compared to multinational federations with territorially based distinctiveness, clearly less pressure towards decentralisation (Erk 2004). On closer inspection, many of what appear to be intergovernmental conflicts are skirmishes following the logic of party politics. Several of the disputes in autumn 2020 concerned Vienna and have to be seen in the context of tensions between the conservatives leading the national government and the Social Democrats ruling the capital which were further amplified in the run-up to elections in Vienna on 11 October. True intergovernmental conflicts based on ambitions of the *Länder* to go their own way remained relatively limited compared to other countries. Nonetheless, the onset of a second wave of infection saw increasing tension, with subnational governments being more proactive in some instances and the national government explicitly urging them to be more active and adopt stricter measures in other instances. Austria therefore still oscillates between, on the one hand, cautious attempts towards greater autonomy and differentiation and, on the other, the move from national unity to a de facto unitary state, one which has characterised the country's particular brand of 'pandemic federalism'.

Notes

- 1 From a legal point of view, these are, at one and the same time, municipalities and district administrative authorities. On their role, see Kössler and Kress (2021).
- 2 Several countries made use of this right in spring 2020, among them, for instance, Estonia, Romania and Serbia.
- 3 The constitutional lawyer Bernd-Christian Funk quoted in Brickner (2020).
- 4 The Constitutional Court could also have decided to hold an extra session until 30 April 2020 when the legal measures were still in force. Moreover, even legal acts not in force anymore in June could still have had legal effects and thus have been far from irrelevant. For instance, the ordinance regulating entry to public places was the basis for fines challenged in ongoing administrative penalty proceedings; the fact that the Court invalidated parts of this ordinance meant that these fines were not payable anymore.
- 5 The involvement of the army might seem odd to an external observer. But beyond military defence (Constitution, article 79(1)), the civilian administration may assign to the Austrian army several additional tasks, among them 'to render assistance in the case of natural catastrophes and disasters of exceptional magnitude' (article 79(2)(2)).
- 6 Article 13 of the Constitution merely refers to the Financial Constitutional Law of 1948, which provides only general principles for tax allocation and abstract types of taxes and itself authorises the federal legislator to assign taxes concretely through the Financial Equalisation Law.
- 7 For an examination of the shares of various municipal income components and how they are affected by Covid-19, see Biwald and Mitterer (2020).

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