

ELI Principles for the COVID-19 Crisis

Consolidated Version of the 2020 ELI Principles for
the COVID-19 Crisis and the 2021 Supplement





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The European Law Institute

The European Law Institute (ELI) is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such, its work covers all branches of the law: substantive and procedural; private and public.

ELI is committed to the principles of comprehensiveness and collaborative working, thus striving to bridge the oft-perceived gap between the different legal cultures, between public and private law, as well as between scholarship and practice. To further that commitment it seeks to involve a diverse range of personalities, reflecting the richness of the legal traditions, legal disciplines and vocational frameworks found throughout Europe. ELI is also open to the use of different methodological approaches and to canvassing insights and perspectives from as wide an audience as possible of those who share its vision.

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Acknowledgment is due to the University of Vienna which has generously hosted the ELI Secretariat under successive Framework Cooperation Agreements since 2011.



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PREAMBLE

The outbreak of COVID-19 has brought immense suffering and death to a considerable number of people around the world. It has impacted fundamentally the functioning of States, their democratic institutions and legal systems. Therefore, it is understandable that governments have and are continuing to resort to exceptional measures in seeking to get control over the spread of COVID-19. These exceptional measures inevitably restrict the fundamental rights of citizens in ways that can be justified only in these extraordinary circumstances. It is in the greatest interest of society that these measures against COVID-19 are imposed and enforced within the framework of established democratic principles, the international legal order and the rule of law.

Therefore, although the spread of COVID-19 justifies limitations on the functioning of institutions such as Parliaments and courts, these limitations must be subject to democratic control, must not be misused and not applied for purposes other than measures related directly to the COVID-19 crisis.

The measures taken by governments such as mandatory quarantine, the closure of borders, restrictions in mobility, are also having a dramatic impact on business, trade and employment. It is essential that the legal measures taken to address the hardship and other difficulties caused by COVID-19 take into account principles of solidarity and fairness as well as the need for co-ordinated action between States at an international or EU level as appropriate.

In these circumstances, the European Law Institute (ELI), an entirely independent non-profit organisation established to provide practical guidance in relation to European legal development, puts forward a summary of some of the important legal issues that arise in relation to the COVID-19 crisis.

Its summary, made from an independent non-governmental perspective with due consideration of what has been published by other bodies, is set out in 15 principles. These are addressed to all European States (whether or not Member States of the EU), and are intended to guide European States, EU institutions and other bodies with the object of ensuring that everything that is done accords with the rule of law and democratic values.

Principle 1

FUNDAMENTAL VALUES, PRINCIPLES AND FREEDOMS

- 1) Despite the unprecedented situation due to the COVID-19 outbreak the fundamental values, principles and freedoms enshrined not only in primary EU legislative rules, such as the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Charter on Fundamental Rights and Freedoms (CFREU), but also in the European Convention on Human Rights (ECHR) and in the constitutions of States throughout Europe, must be preserved and maintained.
- 2) States may legitimately restrict particular fundamental principles or freedoms by way of exceptional measures in order to protect human life and health, on condition that such measures are limited to what is strictly necessary and proportionate, are temporary solely for the duration of the crisis and its immediate aftermath and subject to regular scrutiny by Parliaments and the courts.
- 3) Fundamental principles relating to freedom of expression, access to public information, the freedom of the press and access to justice through the courts should be fully respected.

Principle 2

NON- DISCRIMINATION

- 1) The COVID-19 crisis does not justify any kind of discrimination based on nationality or any of the other criteria and in the situations recognised as unacceptable under anti-discrimination laws in Europe. Any measures taken by States as a response to the COVID-19 crisis must be applied in a non-discriminatory manner and scrutinised for any unintended discriminatory effects.
- 2) The prohibition of discrimination applies, in particular, to medical assistance and to the supply of goods, services or residential housing that is usually available to the public and may become scarce due to the crisis. Assistance offered for returning home in the COVID-19 crisis, such as State-organised re-patriation flights, should not differentiate between a Member State's own nationals and others lawfully resident in that State or individuals enjoying a comparable legal status.

Principle 3

DEMOCRACY

- 1) The unprecedented situation due to the COVID-19 outbreak should, in no case and for no reason, legitimise measures that, irrespective of their intention, might result in a repressive or authoritarian course of action, undermine democratic public institutions and/or impede the citizens' entitlement to democratic government, either permanently or temporarily.
- 2) Parliaments must not be deprived of their powers by the state of emergency, and should, wherever possible, take the most important decisions themselves (through the use of technology, where desirable), which will then be further implemented by governments. Parliaments must in any case be provided with the opportunity to decide when the state of emergency has come to an end, and to review and undo steps taken by the government during the state of emergency.
- 3) During the COVID-19 crisis, elections should be organised only if there is a guarantee that all requirements for free, equal and democratic election procedures can be observed. If the requirements are not met, then every effort should be made to put them in place, but in the meantime elections should be postponed.

Principle 4

LAWMAKING

- 1) Governments must not abuse the crisis by utilising the curtailment of regular Parliamentary debate and processes to promote measures and policies unrelated to the COVID-19 crisis. Ordinary Parliamentary processes and legislation must be used for such measures. The crisis must not be used to adopt emergency laws that may secure privileges for governments in enhancing their powers during the COVID-19 crisis or thereafter in cases unrelated to the COVID-19 crisis.
- 2) If possible, legislation responding to the COVID-19 crisis that was passed under accelerated or curtailed procedures should be enacted separately and should automatically cease to remain in force at a date when the COVID-19 crisis is over. Where such legislation seems to be useful in the longer term it should be revisited and approved through ordinary procedures.
- 3) Even in a state of emergency and under accelerated or curtailed procedures, all due efforts must be made to make sure legislation is in conformity with the constitution, EU law and any other law higher in rank, in particular as far as fundamental rights are concerned. Reasonable efforts must be made to correct deficiencies even during the COVID-19 crisis, duly taking into account the need for stability.

Principle 5

JUSTICE SYSTEM

- 1) The judiciary should do all that is reasonably practicable to continue to conduct proceedings and trials, particularly through the use of secure video and other remote links where available to the courts. In any case, the judicial system should maintain a minimum level of operations to deal with urgent matters, safeguard the rule of law and provide proper remedies to litigants, provided that the right to a fair trial, including the right to defence, is not infringed. The restrictions on the operation of the judiciary must be immediately removed when the COVID-19 emergency permits.
- 2) States should take appropriate measures to suspend or extend, where necessary, deadlines or time periods (whether fixed by statute or by courts) so that the rights of parties are not prejudiced by the emergency.
- 3) Measures must be taken to provide appropriate protection for those held in prisons. Where this is not possible, consideration should be given by the appropriate authority to granting temporary release to prisoners who are not considered to be a danger to society and particularly to the elderly and those with serious underlying health conditions.
- 4) Administrative sanctions and fines imposed on citizens for the violation of COVID-19 emergency legislation must have sufficient foundation in the law and they must be subjected to effective judicial review.

Principle 6

PRIVACY AND DATA PROTECTION

- 1) States should ensure that, in accordance with the General Data Protection Regulation (GDPR), other data protection law, and the CFREU, public authorities and employers are allowed to process personal data (including telecom data) insofar as this is necessary to mitigate the COVID-19 pandemic. However, such processing of personal data should be minimised and the least intrusive solutions should always be preferred, in accordance with the proportionality principle.
- 2) Processing of particularly sensitive data, such as health data, or particularly intrusive forms of processing, such as the use of geo-tracing and geo-tracking, should be submitted to data protection authorities for approval and the source code of any applications should be disclosed at least to a broad range of independent non-governmental organisations for scrutiny. Use of such applications should be based on free consent or, if compulsory, on a parliamentary act which clearly sets out the conditions in line with the relevant law. All actions taken by States should follow a pan-European approach, particularly with regard to mobile applications.
- 3) In any case, data collected on the basis of such extraordinary measures must be either fully anonymised or erased as soon as practicable after the COVID-19 crisis has come to an end, and any software allowing the collection of data must be disabled. This is without prejudice to data being used for research, such as under Article 89 GDPR, with appropriate safeguards.

Principle 7

BORDERS AND FREEDOM OF MOVEMENT

- 1) Borders within the EU should as far as possible remain open for Union citizens and their family members, and every EU Member State must allow its own residents to enter, irrespective of nationality, and should facilitate transit of individuals returning to their homes. Schengen principles as well as bilateral and multilateral agreements should remain in place also for States that are non-EU Member States, but which are party to those agreements.

services, in particular in critical sectors such as health care, care for persons in need, or agriculture.
- 2) Total closing of borders for individuals enjoying freedom of movement should generally be considered a disproportionate response where less intrusive measures, such as quarantine and testing, are feasible. States may wish to consider restricting mandatory quarantine to cases where:
 - a) there is scientific evidence that a person coming from the State to which borders have been closed has a significantly higher risk of being infected than its own population and the Member State imposes the same quarantine on its nationals when returning from the relevant State; or
 - b) it is a necessary measure to reduce overall mobility and is accompanied by corresponding restrictions on freedom of movement within the relevant State's own territory.

In any case, quarantine must be dispensable for urgent cases, including for strong humanitarian reasons.

- 3) Member States should facilitate the entry and exit of frontier workers and providers of cross- border

Principle 8

FREE MOVEMENT OF GOODS AND SERVICES

- 1) EU Member States should take all possible measures so as to avoid obstacles to cross-border movement of goods and services within the EU, prioritising urgent transport services, such as supply of food, medical supplies and other essential goods (eg via 'green lanes'). Bilateral and multilateral agreements dealing with the free movement of goods and services should also remain fully in place under the same conditions with non-EU Member States that are party to those agreements.
- 2) The COVID-19 crisis does not justify bans on particular goods being exported, or particular services being provided, to other EU Member States if they are to be used within the EU unless allowing the exporting of goods or the provision of services would cause a state of emergency for the relevant State's own population.
- 3) Member States should not apply quarantine requirements to transport workers whose crossing of borders is required for the application of this Principle, and deny entry to foreign transport workers only if they have been tested positive for or show symptoms of COVID-19. Member States may, however, impose safety conditions, including mandatory health certificates, provided these conditions are science-based, proportionate, applied in a non-discriminatory manner and duly published.

Principle 9

EMPLOYMENT AND THE ECONOMY

- 1) Where businesses or employees suffer economic detriment resulting from measures taken by the State, such as lockdowns, reasonable efforts should be taken to mitigate the negative economic effects by way of State aid, in conformity with EU State aid policy, and preferably based on a joint policy of EU Member States to avoid competition distortion between EU Member States. Particular efforts should be made to minimise loss of employment.
- 2) States should ensure that they provide employers and employees with sufficient and updated information about COVID-19 contamination. All employees should be provided with the highest standards of health and safety protection appropriate to their work, or if that is not possible be allowed to work from home.
- 3) A State's decisions concerning the lockdown of particular industries should have a legitimate purpose, be evidence based, reasonable, proportionate and subject to regular scrutiny.
- 4) States should consider ensuring that businesses receiving public subsidies on an EU or national level re-evaluate their financial planning in the light of the economic disruption expected from the outbreak of COVID-19 and refrain under the present circumstances from payments of dividends, bonuses and other financial contributions to shareholders and management.

Principle 10

CONTINUITY OF RELATIONSHIPS AT A DISTANCE

- 1) States should ensure that contracts can be concluded, management decisions can be made, and all other legal steps can be taken at a distance, including notarisation and other participation by notaries.
- 2) States should ensure that measures taken due to the COVID-19 outbreak should not prevent the performance of ongoing contracts and other relationships to an extent that is more than necessary and, where possible, should permit performance at a distance.

Principle 11

EDUCATION

- 1) States should make sure that schoolchildren, apprentices, students and all other individuals undergoing programmes of education that are essential for their future career do not suffer any lasting detriment from the COVID-19 crisis, and in particular that solutions are found to provide distance teaching and examinations, so that individuals can graduate without significant delay.
- 2) In the field of education, particular attention should be paid to measures avoiding discrimination linked to distance teaching, such as by providing extra support to families with poor technical skills or equipment, or to those suffering for other reasons from suboptimal learning environments.

Principle 12

MORATORIUM ON REGULAR PAYMENTS

- 1) In order to mitigate the economic disruption expected from the outbreak of COVID-19, States should provide, if necessary, for a moratorium on some regular payments, particularly on taxes, rents, and loans. Such measure should be based on the general principle that the final maturity date is extended for the duration of the moratorium and that neither the calculation of the amount due, nor that of other taxes or instalments subsequently due, are in any way increased. Statutory period of limitations should likewise be suspended for the same period.
- 2) In accordance with their laws and legal systems, States should make special provisions for debt collection and insolvency proceedings to avoid some of the adverse consequences caused by COVID-19 measures on cash flow and liquidity, including a temporary stay on these proceedings and a postponement of the duties of board of directors to alert the insolvency authorities.
- 3) Furthermore, in conformity with the principle of solidarity, States should favour partial or full release of certain types of matured debts, either on public policy grounds or by mutual consent between the parties.

Principle 13

FORCE MAJEURE AND HARDSHIP

- 1) Where performance of a contract is temporarily or definitively prevented directly or indirectly due to the COVID-19 outbreak or States' decisions taken in relation to the COVID-19 outbreak, States should ensure that existing law on impossibility or force majeure applies in an effective way, and provides reasonable solutions. In particular, the contractual allocation of risk in these instances should be evaluated in the light of existing contracts, background legal regimes and the principle of good faith.
- 2) Where, as a consequence of the COVID-19 crisis and the measures taken during the pandemic, performance has become excessively difficult (hardship principle), including where the cost of performance has risen significantly, States should ensure that, in accordance with the principle of good faith, parties enter into renegotiations even if this has not been provided for in a contract or in existing legislation.
- 3) In conformity with the principle of solidarity, States should ensure that the consequences of the disruption of contractual relationships, such as the cancellation of travel arrangements, should not be at the sole risk of one party, in particular of a consumer or SME.

Principle 14

EXEMPTION FROM LIABILITY FOR SIMPLE NEGLIGENCE

- 1) Given the urgent and dramatic circumstances in which doctors, healthcare professionals, and other providers in the medical sector have to provide services, States should ensure that these professionals are not held liable for adverse events related to the COVID-19, except in the case of at least gross negligence.
- 2) The same applies with respect to other professionals and holders of public offices who had to take quick and difficult decisions directly related to the COVID-19 crisis.
- 3) These exemptions from liability do not apply to the liability of the State, which remains liable pursuant to the existing specific regime of liability.

Principle 15

RETURN TO NORMALITY

- 1) National governments should publish as soon as is practicable plans for an exit from the emergency and, in accordance with the rule of law, a return to normality and the ending of the emergency measures imposed for the crisis.
- 2) The ending of emergency measures and a return to normality should be monitored by EU institutions.



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2021 Supplement

Introduction to the 2021 Supplement

After more than a year since its start, the COVID-19 pandemic still generates a lot of legal concerns. The everyday legal issues have evolved to some degree, but new issues have arisen in 2021. With large scale testing and vaccinations, states face new challenges, both in dealing with the proportionality of measures to be taken in where there is a low epidemiological risk and in ensuring the equitable distribution of vaccines. The European Commission published, on 17 March 2021, a strategy for a common path to Europe's safe re-opening, which includes, inter alia, the basis for a Europe-wide Digital Green Certificate. However, important decisions, including which restrictions to lift under which circumstances, remain with the individual States. The same holds true for vaccine rollout within the individual States, including issues of prioritisation. In the same vein as the existing (2020) ELI Principles for the COVID-19 Crisis, the ELI wishes to provide further guidance on these issues by way of supplementing these Principles with two new Principles.

Principle 16

PROPORTIONALITY OF MEASURES IN CASES OF LOW EPIDEMIOLOGICAL RISK

- 1) Restrictions of movement and activities imposed on the population during the COVID-19 crisis must not be imposed on an individual beyond what is necessary and proportionate in the light of the fundamental rights at stake and the epidemiological risk posed by that individual. This means that restrictions may have to be lifted for an individual if
 - a) the epidemiological risk posed by that individual is low, and/or
 - b) there are no compelling reasons of public interest to apply the restrictions to all individuals in an equal manner irrespective of the actual risk.
- 2) An individual poses a low epidemiological risk within the meaning of paragraph 1) a) where there is, in the light of the facts of the individual case and scientific evidence, sufficient reason to believe that the individual will not spread any variants of the virus currently in circulation. Particular regard must be had to whether that individual
 - a) has been vaccinated; or
 - a) has, within a defined period in the past, recovered from COVID-19; or
 - b) has just been negatively tested.
- 3) Compelling reasons within the meaning of paragraph 1) b) may include, in particular, practical difficulties in checking any relevant certificates in the circumstances, a possible demoralising or disturbing effect on other individuals, or a particularly high need for safety.
- 4) Parties from the private sector should be allowed to restrict sale of goods or provision of services, or any other transaction, to individuals with a low epidemiological risk within the meaning of paragraph 2), provided that this
 - a) is within the limits set by applicable law on non-discrimination; and
 - b) does not in fact deprive individuals who cannot produce a certificate of low epidemiological risk from goods or services of essential significance.

Scientific evidence must be regularly evaluated, including having regard to the types of vaccination or testing methods, timespans, and other relevant criteria. Significant changes in scientific evidence should lead to dynamic adjustment of certificates issued.

Principle 17

EQUITABLE DISTRIBUTION OF VACCINES

- 1) The administration of vaccines should comply with the principles of fairness and equality in design and in impact. This means in particular that
 - a) The order of priority, during the gradual build-up of vaccination capacities, should be assessed generally according to four criteria:
 - i) vulnerability with regard to the acute effects of COVID-19 and its variants;
 - ii) higher risk because of lack of access to healthcare;
 - iii) a necessarily higher risk of spreading and multiplying factor and/or systematic contact with ill and vulnerable persons, to the extent that vaccination prevents vaccinated persons from spreading the virus;
 - iv) systematic contact with ill and vulnerable persons, as well as key individuals for the functioning of the Public State.
 - b) Registration for vaccination should be designed and implemented in a non-discriminatory way, avoiding discrimination including any based on disabilities, age, economic or social capacities.
 - c) Vaccination should be offered in a safe and non-threatening environment, with appropriately trained staff and under a close monitoring and assessment system which ensures a zero waste approach.
- 2) Both principles of precaution and efficiency should determine the administration of a second injection, if two injections are needed.
 - a) This means in particular that an assessment of risks should determine whether public health imposes a second injection to those already vaccinated with a first injection or whether it is better to have a larger range of people vaccinated with a first injection.
 - b) The decision should be documented, transparent and rely on thorough scientific analysis.
- 3) If COVID-19 variants require vaccinating afresh the principle of precaution and efficiency should be applied, which may mean vaccinating first unvaccinated persons instead of following the principle set out under paragraph 1.
- 4) Within the EU, procurement and distribution of vaccines should be based on the foundational value of solidarity between EU Member States, which implies setting up coordinated mechanisms between them, including fostering respect of the principles set above. The EU Vaccine Sharing Mechanism is part of this endeavour.
- 5) As there is a need to ensure wide vaccination across the Globe to hasten the general reduction of the pandemic, EU Member States should find a fair and effective balance between domestic vaccinations and support of the COVAX Facility to share vaccines with all low and middle income countries.

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