

ELI Principles for the COVID-19 Crisis

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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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;
 - i) higher risk because of lack of access to healthcare;
 - i) 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;
 - ii) systematic contact with ill and vulnerable persons, as well as key individuals for the functioning of the Public State.
 - a) 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.
 - b) 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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