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DEMOCRACY REPORTING INTERNATIONAL

Extraordinary or extralegal responses? The rule of law and the COVID-19 crisis

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re:constitution Exchange and Analysis on Democracy and the Rule of Law in Europe

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Author: Joelle Grogan (with contributions from Jakub Jaraczewski and Jil Prillwitz)

We would also like to express our thanks to all the country experts who contributed to this report. You can find a full list on page 24.

May 2021

Contents

Executive summary

On 11 March 2020, the World Health Organization (WHO) declared the outbreak of the SARS-CoV-2, the virus that causes coronavirus disease 2019 (COVID-19), to be a global pandemic. Over the year that followed, EU Member States have been among those most negatively impacted, initially suffering some of the world's highest mortality rates. Amid successive waves of infection and the (re)introduction of highly restrictive measures by national authorities, the responses to the pandemic have exposed critical issues for the rule of law in EU Member States. National governments have primarily led the COVID-19 responses, with relatively minimal coordination at the EU level.

The important legal questions this has raised are intricate and specific to each and every EU Member State. This report is based, therefore, on in-depth assessments carried out by 35 national experts covering all EU Member States. This third report by DRI on COVID-19 and the rule of law follows those published in May 2020 and July 2020, respectively, and covers measures by the Member States in the period from October 2020 to February 2021. The comparative evaluation and analysis of Member States' responses is further supported by research by the 2021 "Power and the COVID-19 Pandemic" symposium, a global database of countries' responses to the COVID-19 pandemic, which was launched in February 2021 and will run through May 2021.

This report identifies five critical areas of concern for the rule of law across EU Member States and provides recommendations on how to address them.

1. **Many COVID-19 measures introduced by governments using executive powers do not have a clear basis in law.**

   RECOMMENDATION: In responding to the epidemic, governments should clearly identify the legal authority for their measures. Any reform of existing or introduction of new health emergency laws, including in preparation for future pandemics, should set explicit limits, conditions and checks on government power.

2. **Many COVID-19 rules are vague or change too quickly for people and implementing authorities to keep track of and to adapt their behaviour.**

   RECOMMENDATION: Policies and rules should be as clear as possible and be made public in a timely and consistent manner. They should also include an evidence-based rationale.

3. **Oversight over executive action is insufficient.**

   RECOMMENDATION: States should ensure effective oversight of COVID-19 measures, through dedicated parliamentary scrutiny, continued public access to impartial courts and engagement with national human rights institutions.

4. **There has been little or no public consultation on COVID-19 measures.**

   RECOMMENDATION: To the extent possible, states should provide opportunities for structured feedback from the public, the expert community and civil society as part of drafting and reviewing COVID-19 measures.

5. **Governments have not provided clear exit strategies on how restrictive measures will be rolled back and, eventually, eliminated.**

   RECOMMENDATION: As a matter of priority, governments should develop and disseminate a staged and sequenced exit plan for the reduction of COVID-19 measures, which should be updated as new information becomes available, including the possibility that measures will need to be reintroduced if the prevalence of the virus risks exponential growth.

Introduction

The COVID-19 pandemic has presented unprecedented challenges for life – personal, social and economic – within the European Union. In the year since the declaration of a global pandemic by the WHO, the limitations of movement and activity that have been placed on individuals, as well as those on educational and commercial activity, have been among the most restrictive in recent European history. While far more is now known about viral transmission and effective measures to lower risks, the inherent unpredictability of viruses, including the appearance of new and more transmissible variants, means that the design of effective measures to mitigate risk will continue to be a challenge.

Action in response to the health emergency has primarily been taken at a national level, and the European Union has played a limited role in supporting coordination efforts across the Union. As health and social policy is a national competence and, thus, exclusively the responsibility of the Member States, the EU has limited powers to take action in response to this pan-European health crisis. One consequence of this lack of centralised coordination and response has been that national responses to COVID-19 have varied significantly across the EU, both in terms of the severity of restrictions and of the forms and means by which governments and legal systems have reacted.

Measures to reduce infection rates are only effective when the majority of the population follow them. Public compliance requires more than the creation of rules, however. Instead, compliance primarily rests on public trust in the legitimacy and efficacy of government action. Against mounting personal and economic costs, COVID-19 measures that lack a clear legal basis for their authority are uncertain in their meaning, lack oversight in their design and application, are unspecific about their rationale (beyond “bringing down the numbers”), and that are based on little public input, undermine both public trust and public compliance, thus undercutting the efficacy of rules. The rule of law values of legality, certainty, and accountability are not only foundational values of the EU and its Member States, but are also essential to effective management of the COVID-19 pandemic emergency.

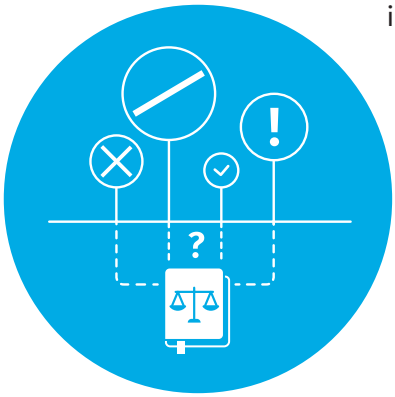
This report provides a comparative evaluation of European Union Member States' legal responses to the rising infection rates between October 2020 and February 2021 from a rule of law perspective. Drawing from the responses of in-country experts in the 27 EU member states, this report identifies five critical areas of concern identified across the Union that can undermine governmental efforts to support public compliance with COVID-19 measures and public trust in the efficacy of government action. The report also offers simple and actionable recommendations on how these may best be resolved quickly and effectively.

Key issues: What's wrong with EU Member States' responses to the pandemic?

Five critical issues were raised consistently in the survey of the EU-27 responses during October 2020 and February 2021:

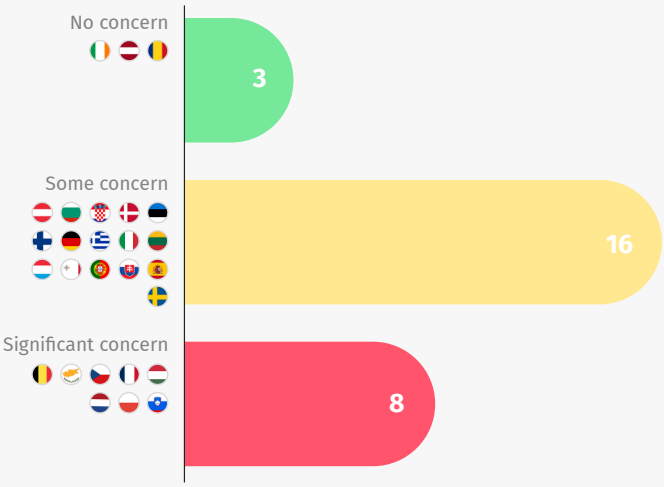
1. Many COVID-19 measures do not have a clear basis in law.
2. Rules are too vague or change too quickly to allow people and authorities to adjust.
3. There is insufficient oversight of government action.
4. The public was not consulted enough on the measures.
5. There is no clear exit strategy.

1. Is this legal? Many COVID-19 measures do not have a clear basis in law



Across the EU, a majority of governments have relied on executive powers to introduce restrictive measures to respond to the COVID-19 health crisis. Such measures can be introduced more quickly using government powers than through the lengthier process of introducing, debating, amending and passing legislation through national parliaments. However, all such government powers are necessarily limited by the laws providing them with this authority. National constitutions and ordinary laws passed by national parliaments provide the framework that regulates which powers governments have and which actions they can and cannot take in any given situation, including when and to what extent they may limit the exercise of certain human rights. This brake on the arbitrary use of power is an essential part of any democracy.

Experts from **24** of the 27 countries identified at least **some concern** regarding the **legality** of **COVID-19 measures**.



Concern has been raised in the majority of EU Member States that government actions in response to the pandemic have not fallen clearly within their legal powers – the experts from all but three EU countries (Ireland, Latvia and Romania) raised this issue. Among the problematic and, often, largely unchecked executive emergency responses to the pandemic have been the following:

1. Extended states of emergency and governance by decree that may be unconstitutional (e.g., Czech Republic, Hungary)

In Hungary, the government passed a series of bills in parliament allowing it to rule by decree and without judicial review, along with a constitutional amendment effectively removing parliamentary scrutiny. These decrees may suspend or diverge from the law, and only the prime minister may determine when the use of these emergency powers will no longer be necessary. In the Czech Republic, the government had tried to request the sixth extension of its state of emergency, and when this was refused by the lower house of Parliament, sought to declare it anyway. In the end, the lower house annulled this unconstitutional overreach as well, and opted for the introduction of the Pandemic Act to address the health crisis without the recourse to extended states of emergency.

2. Governments exercising existing powers granted by national constitutions or ordinary legislation beyond their intended use (e.g., Austria, Slovenia)

In Austria, although amendments in September 2020 to the related statutory provisions extended executive powers, ordinances enacted on this basis to limit what people could do in private living spaces arguably still did not comply with all aspects of the statute. Judicial review of these measures in Austria is ongoing. In Slovenia, legal experts argue that the almost exclusive use of executive power to enact rules related to the health emergency has gone beyond an "acceptable legal interpretation" of pre-pandemic legislation.

3. Governments relying on ordinary legislation that was not designed for this use (e.g., Belgium), or that is outdated in relation to modern democratic standards and constitutional requirements (e.g., Cyprus)

In Belgium, significant concern has been raised over long-term reliance on ministerial decrees severely restricting citizens' freedom of movement in a manner that was not clearly provided for in the underlying 2007 Law on Civil Security. In Cyprus, the government has relied on the colonial era Quarantine Law, which removes all parliamentary competence and oversight and delegates significant power to the executive to adopt a wide range of restrictive measures. The constitutionality of the "ambiguous and outdated" law has been questioned, as has been the significant degree to which the Administrative Court has limited its own competence in related cases, wherein no further cases systematically challenging COVID-19 measures have been heard. In Lithuania, challenges before the courts against COVID-19 measures continue, arguing that the relevant law provides only for the "limitation" of, rather than an outright ban on certain types of commercial activity.

4. The lack of an appropriate legal basis or authority for government action at the point it was undertaken (e.g., Denmark, Estonia, Finland, Slovenia)

While the EU Member States have not seen any major incidents of governments taking action without any legal basis, for some states, specific actions have raised particular concerns. For example, the order by the Danish government in November 2020 for all mink to be culled was taken without legal basis. While the

government acknowledged the lack of legal basis and took steps to provide it while the cull was ongoing, it did not halt the extermination of animals until the necessary changes to the law could be made. In Estonia, actions by the local self-government to place additional restrictions on movement have also been criticised for lacking a legal basis, but few orders of the central government have been challenged in the courts, owing to relatively moderate and reasonable character of the measures. In Finland, the government and Border Control Agency were criticised for drafting misleading communications on border closures that appeared to be legally binding but, without supporting legal amendments, were in fact only recommendations. In Slovenia, the Constitutional Court declared void government measures extending school closures, as they had not been published in the Official Gazette, as required by law.

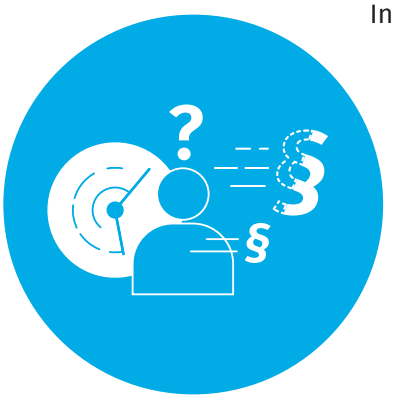
5. Certain restrictions on rights by governments may not be lawful under either constitutional or international human rights provisions (e.g., France, Poland)

In France, concerns have been expressed over the government's choice to forgo the existing legal provisions as the base for tackling the emergency and, instead, to introduce and extend the "state of medical emergency". There have also been concerns about the appropriateness, necessity and proportionality of measures adopted by the government on its basis. In Poland, the use of secondary legislation, in the form of governmental decrees that limit human rights and fundamental freedoms, is not permitted under the Constitution, which requires that such restrictions be introduced by the parliament, and not by the government.

Recommendations

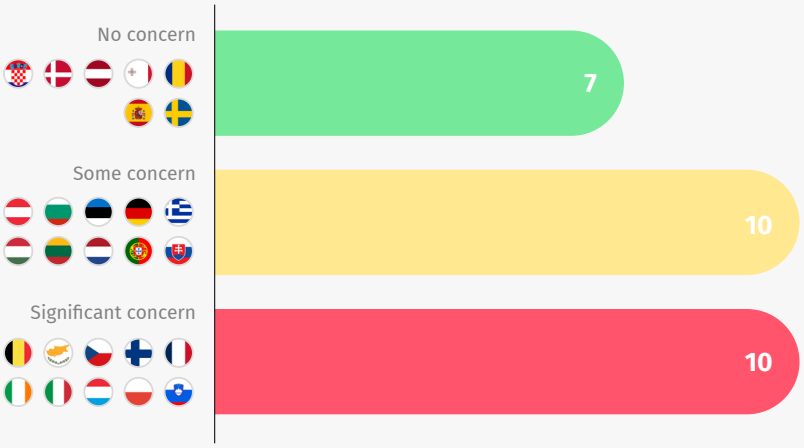
- In all measures, governments must clearly identify the basis for the authority of their actions.
- In the reform, amendment or introduction of laws and regulations in response to the emergency, states should provide a clear basis for executive action, which should include:
  - > the circumstances under which an action can be taken;
  - > the forms of action that may be taken;
  - > time limits on both the use of power and the duration of measures adopted; and
  - > explicit provisions for the parliamentary scrutiny and judicial review of the proportionality of measures and their compliance with domestic and international human rights standards. (This should also apply where emergency powers and/or derogations from human rights are introduced.)

2. COVID-19 confusion: Rules are too vague or change too quickly to allow people and authorities to adjust

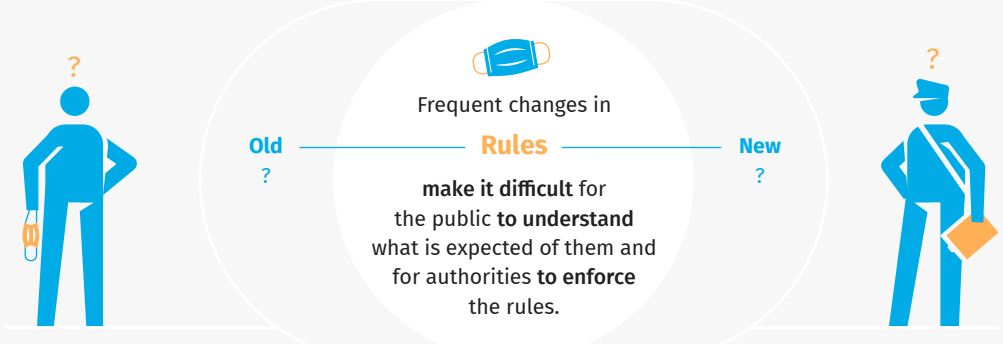


In an emergency there is heightened risk and uncertainty, and the public relies on government and state authorities for clear direction as to what they may or may not legally do. Particularly during a fast-changing situation like a pandemic, where responses might entail significant limitations of human rights, it is essential that information about the rules is as clear, timely and accessible as possible if the public is going to be able to follow them. Legal measures must not be vague or open to different interpretations by state actors. They must also be introduced with sufficient notice for the public to prepare accordingly.

Experts from **20** of the 27 countries identified at least **some concern** regarding the **certainty** of **COVID-19 measures**.



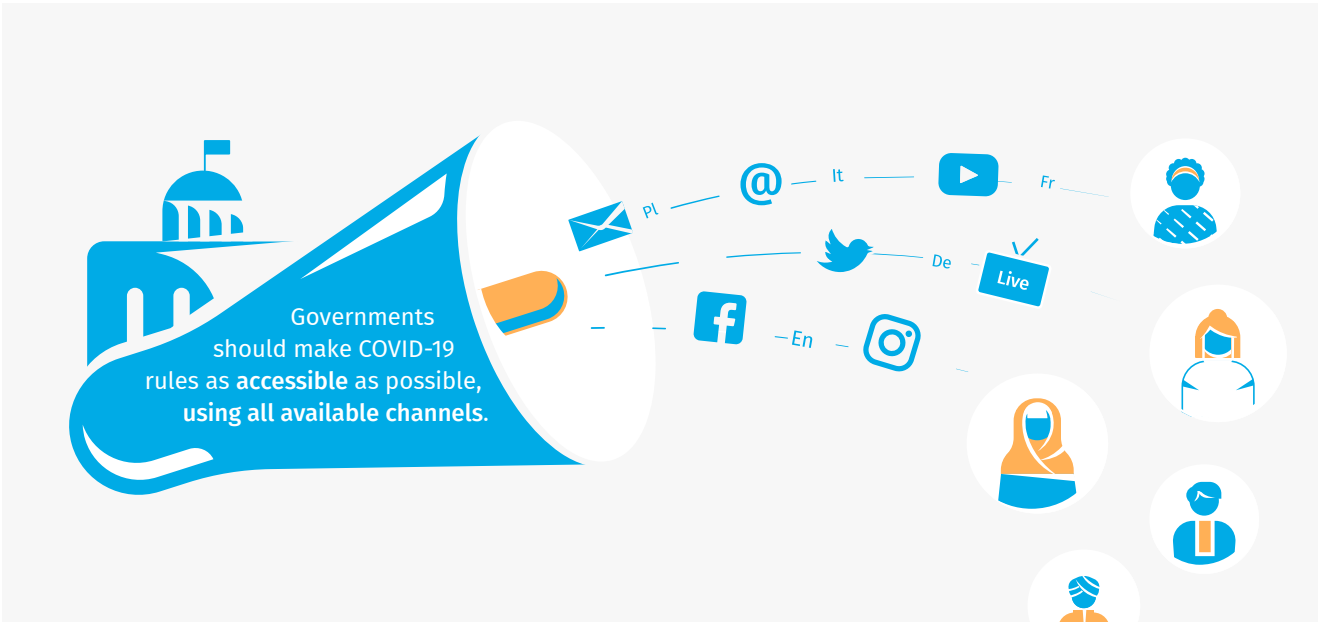
This has not been the case in all instances in the EU. Expert authors from 10 countries (Belgium, Cyprus, the Czech Republic, Finland, France, Ireland, Italy, Luxembourg, Poland and Slovenia) identified "significant concern" with regard to the certainty of measures, while those from 10 additional countries (Austria, Bulgaria, Estonia, Germany, Greece, Hungary, Lithuania, the Netherlands, Portugal and Slovakia) identified at least "some concern". Experts from just seven states (Croatia, Denmark, Latvia, Malta, Romania, Spain and Sweden) identified no issues with the certainty of COVID-19 measures adopted by governments.



Frequent changes in rules also pose significant challenges for both the public, in understanding what is expected of them, and for authorities, in enforcing the measures. Criticism of vague and unclear provisions introduced by the government were made by both the *Conseil d'Etat* and the *Commission consultative des droits de l'Homme* in Luxembourg. The ambiguous meaning of the phrase "reasonable excuse" in the Irish regulations meant it was difficult for people in the country to know whether they were committing a criminal offence by leaving their homes. Heightening confusion, in a number of countries the rules were introduced with little or no notice, and sometimes with retrospective application. Little or no notice of frequently changing rules was reported in Italy, while the uncertainty on the meaning of legal definitions used in legislation caused uncertainty of application in Belgium. In Austria, the use of ambiguous terms (for example, relating to the exemption from the ban on leaving a residence to meet "individual important reference persons") further compounded confusion where official announcements of measures and explanations in press conferences differed, or where they were implemented at short notice and without coordination by the relevant ministries.

Since the declaration of the state of public health emergency in France in October 2020, there has been a proliferation of multi-layered measures, which have been subject to frequent (sometimes weekly) amendment and modification. There have been similar concerns about the frequency of new and changing measures in Cyprus. In Poland, repeated U-turns in policy, sometimes within days and hours of the announcement of new rules, have intensified confusion and uncertainty. This has also been the case more recently in Germany. The speed of changes was of similar concern in Slovenia, where this meant there was little time for the consistent provision of guidance or interpretation, forcing the public to rely on ministerial explanations at press conferences, which ultimately led to contradictory interpretations of ordinances by the implementing authorities. In the Czech Republic, explanations of measures have been both lengthy and sometimes contradictory and, on occasion, the ministers responsible have failed to clarify which specific activities were legal or illegal.

While the Finnish government's response could be described as "more communicative than regulatory", nevertheless, there have been concerns raised over the ambiguous drafting of and misleading communications about decisions that, while appearing to be legally binding regulations, have in fact only been recommendations.



To ensure public compliance, measures must not only be understandable but also be made accessible through a broad variety of channels (e.g., broadcast media, social media, informational materials distributed by post, information from local authorities, etc.), with account being made for vulnerable populations and different language groups. In Austria, Bulgaria and Ireland, commentators have highlighted that rules were sometimes so complex that they would require legal training to navigate. A specialised COVID-19 website was created by the government in Bulgaria, but the content is only in Bulgarian, leaving linguistic minority groups, including the Roma and ethnic Turks, unable to access this information. Other marginalised communities with limited access to the Internet and low literacy rates have also struggled in gaining access to information on COVID-19 and measures in place to address the emergency.

Why is an accessible rationale important

Clear and accessible scientific, economic and/or social explanations of the reasoning behind legal and policy responses to the COVID-19 crisis can promote citizens' trust in government action and their compliance with the measures.

An important means for promoting understanding and enhancing public trust and compliance is publishing and making accessible information on the underlying rationale for all relevant COVID-19 measures, and particularly those that are most restrictive. Some concerns in this regard were raised by a majority of the experts – from 15 of the 27 Member States.

In six countries (the Czech Republic, Cyprus, Hungary, Luxembourg, Portugal, Slovakia and Slovenia), these concerns were rated as significant. In Luxembourg, the *Conseil d'Etat* has called upon the government to provide the "objective criteria" justifying restrictive action, but the government continues to publish no data or any scientific rationale supporting measures adopted. In Cyprus, beyond the statement that measures are introduced with the aim of preventing the spread of disease and to protect public health and services, no further evidence, justification or rationale has been offered to support the proportionality and necessity of measures. Clear and accessible scientific, economic and/or social explanations of the reasoning behind legal and policy responses to the COVID-19 crisis can promote citizens' sense of responsibility both to themselves and to others.

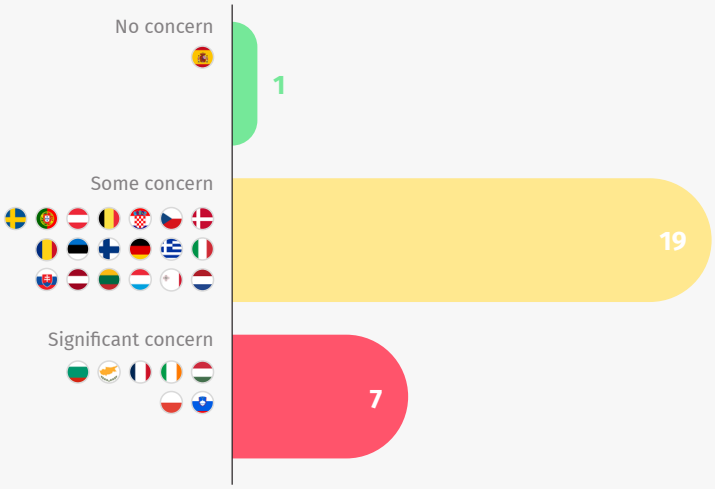
Recommendation

- Rules and policies related to COVID-19 should be clear, with information about them provided in a timely and consistent manner and including an evidence-based rationale. Efforts should be made to ensure this information is accessible to both vulnerable populations and minority language groups. Where changes in policy need to be made, these should be announced sufficiently in advance through a variety of official and public channels, to give people time to prepare.

3. Unsupervised: Insufficient oversight and review of government action

Parliamentary oversight and judicial review, as well as the work of independent monitoring bodies, fulfil an essential function in every democracy, guarding against the potential misuse or abuse of powers by the government, ensuring democratic legitimacy and protecting individual rights. Given how invasive on ordinary life action taken in response to the pandemic has been, this oversight and review is all the more vital. Unfortunately, oversight has continued to be weak across the EU during the second and third COVID-19 waves.

Experts from **26** of the 27 countries identified at least **some concern** regarding **parliamentary** and **judicial oversight** of the government's **COVID-19 response**.



While all experts, with the exception of those reporting on Spain, raised overall concerns for the quality of accountability through parliamentary and judicial oversight, experts in seven states (Bulgaria, Cyprus, France, Ireland, Hungary, Poland and Slovenia) raised significant concerns.

Parliamentary oversight

While emergencies demand urgent action, and this is typically undertaken by executive, ongoing review by parliaments is essential, along with legislative reform where this is necessary. Parliamentary oversight can improve both the quality and the effectiveness of measures. Despite the fact that 25 of the national parliaments (except for Belgium and Bulgaria) were fully operational during the surveyed period, there was still a common concern about the lack of legislative review identified across the EU.

Less than half of the EU's countries established specialised parliamentary committees, published reports or regularly scheduled debates on COVID-19 measures, and in less than one-third were measures identified as having either been scrutinised (e.g., through a debate or vote in parliament) or amended by parliaments. Only the Austrian, Czech, Estonian, and German parliaments were identified as bringing significant levels of scrutiny to COVID-19 measures that severely restrict human rights. Deference to government decisions during

an emergency may play a role in this, as in Cyprus, where executive reliance on pre-independence legislation has concentrated power within the government, to the exclusion of both parliamentary law-making and oversight. The parliament has exercised no substantive scrutiny or oversight of government measures.

There has been significant criticism in Sweden of the lack of legislative oversight on the impact of government strategy (or the lack of strategy) to protect the country's elderly population. The Swedish response has been built on recommendations (rather than regulations) and the decisions of semi-autonomous administrative agencies, which has raised questions of electoral accountability for measures adopted.

In France, despite the creation of bodies to examine the government's management of the pandemic, effective scrutiny was weak, reflecting the consequence of 2008 reforms, which gave the executive increased control over parliamentary business. In Ireland and Slovenia, where provisions for scrutiny by the legislatures do exist – for example, in the forms of debate, parliamentary questions or inquiries – these have not been used. In Italy, where the legislative process has been "sped up" for some decree-laws, which have often passed in days, or even hours, with little or no scrutiny, efforts to improve Parliament's access to evidence from advisory bodies might improve the quality of scrutiny. Governing parties' majorities have allowed them, in the case of Hungary, to have their parliaments effectively rubber-stamp the actions of the government or, in the case of Poland, to limit the scope of oversight and influence of the opposition. By contrast, the newly elected parliament in Lithuania has increased scrutiny of COVID-19 measures, and particularly those related to economic matters and the use of EU funds in fighting the pandemic. In Romania, the Parliament has both reviewed and adopted new legislation in response to the pandemic, in addition to exercising its control function over the declaration of a state of emergency.

An example of good practice can be found in Finland, where both constitutional provisions and the Emergency Powers Act require real-time constitutional and parliamentary scrutiny of government regulations. In effect, this means that the Constitutional Law Committee of the Parliament exercises continuous scrutiny over both the constitutionality and the human rights compliance of legislative bills and government regulations. Further good practice can be identified in Sweden, where a commission of inquiry constituted of independent experts was established to review action taken at the national, regional and local levels of government, along with a cross-party parliamentary commission to review the actions of parliament during the pandemic.

Judicial review

Access to courts is essential in order for citizens to challenge the legitimacy and proportionality of measures that affect them. This is especially important during a period when fundamental rights and freedoms may be severely restricted.

During the period under review, courts continued to function normally in most EU Member States, with 19 experts reporting that their national court systems were fully operational. Legal action for the review of COVID-19-related measures was underway in 17 states, and measures had been partially or fully overturned by judicial decisions in 14 countries. Courts in Cyprus, the Czech Republic and Hungary, however, have denied they have jurisdiction over COVID-19 measures, thus abdicating their roles as essential safeguards against governmental overreach.

In the Czech Republic, after a series of restrained rulings, the Constitutional Court annulled a crisis-related government measure, citing a lack of justification. In Slovenia, the Constitutional Court has so far limited its review to formal legality and constitutionality requirements, rather than focusing on substance, and has applied only weakened proportionality tests in reviewing measures. In part due to a heavy workload, court decisions have also been issued after the measure in question had already been changed or revoked by the government. By contrast, in Slovakia, the Constitutional Court has often provided effective and swift review of the constitutionality of emergency measures, particularly where parliamentary scrutiny was lacking. However, the latest decision of the Slovak Constitutional Court, permitting the prolongation of the state of emergency, has been criticized, particularly in the three dissenting judgments highlighting the absence of justifications offered.

How do courts uphold the rule of law

Judicial review is the process in which courts make sure that governments act lawfully. This is especially important during a crisis when fundamental rights are being restricted.

To fulfil this central function, courts must be independent of governmental influence. The decline of **judicial independence** is an issue in a growing number of European countries.

Courts must not only be functional but must also be independent in order to provide effective review. Judicial independence from political influence is essential to functional democracies founded on the rule of law. Eight experts identified concerns over judicial independence in their countries – a worrying trend that goes beyond oft-mentioned Poland and Hungary and includes Austria, Croatia and Romania. In Denmark, concern arose over the separation of powers, where it was uncertain whether the courts had reduced their activity of their own accord or as a result of a government order. The government did make a recommendation to the parliament that it reduce its activity, but this was rejected. In Poland, ongoing concerns regarding the independence of the judiciary, including over continued efforts by the government and the ruling party to gain greater control over the courts, cast doubt on the courts' ability to effectively review government measures. Lower-level courts have, however, ruled against some measures and struck down punishments/fines on a number of occasions, citing a lack of adequate legal basis, although this may be more the exception than the rule. In Hungary, only the Constitutional Court is empowered to review laws and government decrees. The Court has not to rule any government decrees as constitutional, and its lack of independence makes it unlikely it would do so in the foreseeable future.

Decisions by higher national courts have raised concern even where their independence is not under question. One such decision, by the Constitutional Court in Bulgaria, all but eliminated the possibility of judicial and parliamentary review of COVID-19-related measures taken under the hastily adopted amendments to the Law on Health. The amendments created a new state of "extraordinary epidemiological conditions" that served as the basis for government action. In their dissenting opinions, three judges argued that these amendments were uncertain in meaning and undermined the separation of powers and the rule

of law. They described the Law on Health as a disguised "state of emergency", which should properly be declared by the Bulgarian parliament, and not by the government.

Independent bodies

Independent bodies, such as national human rights institutions (NHRIs), can serve as additional checks on the application of restrictive measures and can highlight where laws and guidance are unclear or open to misinterpretation. Independent bodies across the EU have taken a largely proactive stance on reviewing the impact of COVID-19-related measures, issuing reports and recommendations in 18 countries, undertaking the review of specific measures and/or their impact in 15 countries, and investigating complaints in eight countries. Good practice may be observed in Portugal, where the NHRI played a proactive role in responding swiftly to a number of cases arising from measures related to the pandemic, although, as with the courts, the speed of response by the government has sometimes been hampered by lengthy decision-making procedures.

Recommendations

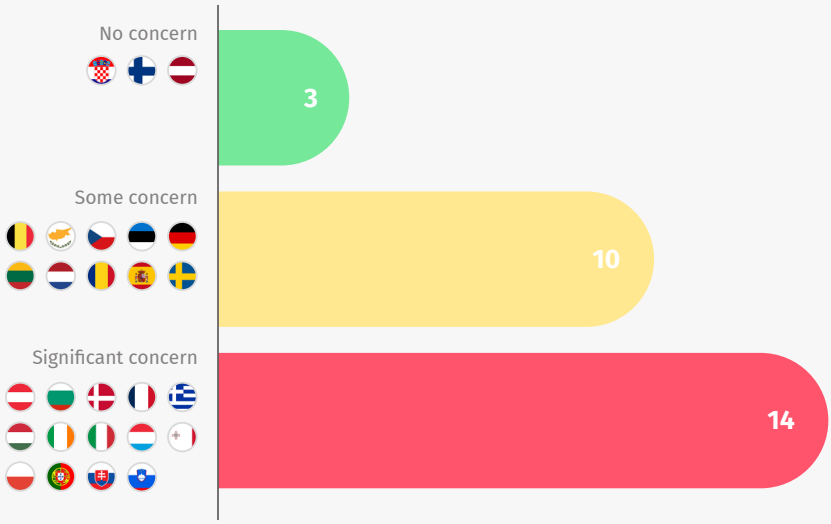
- Member States' parliaments should establish committees, commissions or groups to scrutinise COVID-19 measures and provide regular reports to parliaments. Parliamentary debate on these reports and responses by the government should be required.
- States should ensure access to justice through guaranteeing an independent judiciary and enabling online and remote work by the courts.
- States should support the work of NHRIs through active engagement with their reporting and investigation.

4. Opportunities missed: Poor public consultation

Public participation is a key factor in quality regulation. It can bring new solutions, align government actions with citizens' needs, and help build ownership and buy-in to improve compliance. Where public debate or consultation is lacking, there is a greater chance of errors in the design of measures, particularly in how they impact on underrepresented groups or marginalised communities. Public participation in political and public affairs is, however, not only a matter of efficacy – it is a well-established right within the European Union and in international law, including under the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

The longer the pandemic continues, the more proper and systematic consultation should be carried out, drawing on many different fields of expertise and based upon open consultations with all stakeholders. Instead, to date, the process of decision-making in many EU states continues to be opaque, and it is often unclear who has been involved in the decision-making process. This lack of structured consultation also heightens the risk that the interests of those who are the most vocal, who have the greatest resources at their disposal or who have the greatest access to decision-making bodies will be served best, at the expense of underrepresented or disadvantaged groups (which, globally, have been the most negatively impacted by pandemic measures). After more than a year, it is difficult to sustain the justification on the limitation of the right to participation on the premise that there is no capacity for formalised processes of citizen or stakeholder feedback and consultation.

> Experts from **24** of the 27 countries identified at least **some concern** regarding **public consultation** on the **COVID-19 response**.



Across the EU, there has been a critical lack of public consultation, as key stakeholders, including the broader public, have not been given the opportunity to provide structured input in the design of COVID-19-related measures. Experts from 24 Member States identified at least some concern in this regard, with those from 14 countries (Austria, Bulgaria, Denmark, France, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, Poland, Portugal, Slovakia and Slovenia) identifying it as a matter of "significant concern" – the worst performance for any indicator in the study. Only in Finland, Latvia and Croatia did the experts raise no concerns.

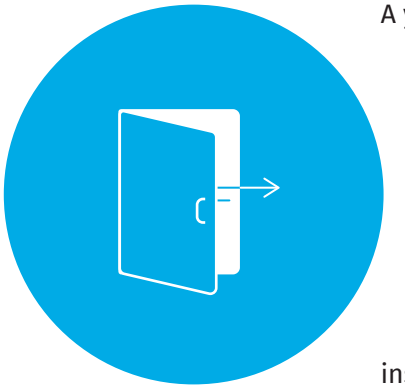
In this instance, it might serve best to highlight good practice with regard to public input and consultation. In Finland, significant dimensions of the pandemic response have been determined by Parliament and have been subject to scrutiny by the Constitutional Law Committee, which regularly engages in public consultation and calls on external constitutional law experts to provide expertise. In Croatia, a national e-consultation web portal, in operation since 2015, allows citizens to directly comment on any legal proposals, including on those related to the pandemic, with all comments also being immediately visible to the general public. More limited promising practice can be identified in Sweden, where the government consulted on its draft pandemic law with a large group of stakeholders – principally government agencies, municipalities and certain business interests. A number of prominent civil society groups were not, however, invited to contribute, and there was no opportunity for input from the broader public or from interested experts.

The COVID-19 pandemic and the measures adopted in response have had wide-ranging and varied impacts across society. Where the epidemiological situation is rapidly changing, involving complex, context-specific and rapidly evolving policies, it might seem unlikely that normal mechanisms can ensure stakeholder engagement. This is a false assumption. The past year has brought increased knowledge of the most effective interventions, heightened awareness of the disparate impacts of measures on different populations, and a wide range of adaptations in communication and engagement across both the public and private sectors. As such, public consultation and participation should both be welcomed and supported.

Recommendation

- States should invite the general public, relevant stakeholder groups and external experts to provide feedback on and constructive criticism of measures, both as part of the drafting process and as part of ongoing review and reform efforts, through standing committees and open calls for evidence.

5. No way out? A lack of clear exit strategies



A year after declarations of emergency in a succession of EU states in response to the COVID-19 outbreak, 12 EU Member States are still relying on official emergency powers and provisions in their pandemic response, while others remain in a de facto state of emergency. Notably, not all governments relied on official emergency powers at the outset of the pandemic; some states were constitutionally unable to declare states of emergency during a health crisis (e.g., Ireland), while others chose not to do so for political reasons, and thus avoided higher levels of scrutiny applied for the use of emergency powers (e.g., Poland). These states, instead, have relied on powers within ordinary legislation.

While emergency powers with proper limitations (i.e., the powers are based on law, time-limited, proportionate, serve a legitimate purpose and are not used for arbitrary or discriminatory reasons) are not inherently problematic from a rule of law perspective, they are unsuitable for long-term use. By their design, emergency powers are suitable for situations calling for immediate action and a fast response, or to rapidly changing situations, where it is not possible to go through ordinary legislative or governance processes. Inevitably, and as evidenced by the findings of the expert survey, emergency powers are subject to less scrutiny by Parliaments – often by design (e.g. Hungary). Courts also tend to be more deferential to the decision of governments during emergencies (e.g. France). The situations that call for the use of emergency powers can also be cited to justify actions that would not ordinarily be condoned. For this reason, the extended use of emergency powers that are not subject to scrutiny and review creates a higher risk of abuse or misuse. From a democratic and rule of law perspective, it is always preferable to return to legislative and judicial scrutiny through the ordinary operation of law and governance as soon as possible (see, e.g., Denmark, the Czech Republic, Bulgaria).

Why is an exit strategy important

Seeing no way out of the emergency can erode the public's patience with the limitations on their rights and their willingness to follow the rules. This can lead to a crisis of trust and undermine the road to recovery.

The extended use of emergency powers and the "extraordinary" use of ordinary powers to introduce severe limitations on rights both carry the risk of "normalising" the emergency. Experts have commented on concerns about "emergency creep" – the introduction of aggrandized executive emergency powers into ordinary legislation without the safeguards that such powers would normally require. The phenomenon of "creeping states of emergency" leading to gradual inclusion of "extraordinary" measures into a "normal" situation has been well-documented in wide-scale emergencies. No country has been able to combine the long-term use of states of emergency with standards of democratic governance and the rule of law. While long-term management of a pandemic through public health policy interventions can be normalised, the long-term use of emergency powers, to the exclusion of standard practices in line with democracy and the rule of law should not be.

In terms of the ongoing challenge posed by the pandemic, progress towards ordinary democratic governance is best achieved through a planned and executed "exit strategy" – a policy framework provided by governments that gives guidance on how and under what conditions restrictive COVID-19-related measures will be changed, reduced or removed. It provides a roadmap for countries to exit from governance based on emergency. An exit strategy provides a phased approach to the reopening of businesses and educational institutions and to the lifting of restrictions on public gatherings. Such strategies should provide the underlying scientific, social and economic reasoning for the plan of action and be supported by a clear underlying legislative framework that provides for ongoing management of the virus (particularly if it becomes endemic to the population, rather than a pandemic), in order to avoid a state of "permanent emergency". As a precaution, and particularly given that a new viral strain may emerge, both governments and populations must be aware that restrictions may need to be re-introduced. Some hold that it is still premature to consider exit or de-escalation strategies where the existing situation of risk still requires restrictions, and public pressure to reduce these may itself be premature. Seeing no clear way out of the emergency (even where the timing of the reduction of measures may change) can, however, ultimately erode the public's willingness to follow restrictive measures and undermine the road to recovery; governments may appear not to be in control of the situation, but only responding to it. More critically, the public must be confident that there is a foreseeable and relatively predictable end to the substantial restrictions of their rights.

So far, EU countries have fared poorly in this essential aspect of navigating the emergency. Only in five EU Member States (the Czech Republic, France, Lithuania, the Netherlands and Portugal) experts identified their states as having put in place an exit strategy during the period under review.

The Czech Parliament's adoption of a Pandemic Act in February 2021, by which it sought to move from near-exclusive reliance on successive states of emergency and executive measures to parliament-led management of the crisis, can be seen as an example of good practice. Examples of good practice in exit strategies can also be found beyond the EU, such as in England's four-step "roadmap out of lockdown". While it does not preclude the need to adapt if the situation changes rapidly (for example, the reintroduction of restrictive measures in the face of a sudden spike in infections, or the appearance of a novel strain), such a system can provide both clarity and confidence in government. In late February 2021, the Portuguese government also published an exit plan.

While a national exit strategy will be essential to ongoing pandemic management, effective pan-EU management will require a common strategy and coordination at the Union level. Groundwork has been laid for this; in February 2021, the Council of the EU adopted an updated recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic. It calls on the Member States to adopt a joint strategy concerning coordinated colour-coded mapping, common criteria for the introduction of travel restrictions, clarity on measures for travel to/from high-risk areas, and the provision of information to the public. Common and coordinated strategies across the EU can support the safe return of free movement and the long-term recovery of the Union and its Member States.

Beyond this, looking at international experience for successful practices improves the quality of domestic law and policy. Examining the experiences of other states, particularly those with similar demographic and economic profiles, and discerning the most effective pharmaceutical and non-pharmaceutical interventions has become a key part of a successful policy and legal response to the pandemic.

Recommendation

- Governments should develop and disseminate a staged and sequenced exit plan for the evidence-based reduction of COVID-19 measures. This should indicate what individuals and businesses may and may not do and under what conditions these rules may change, and it should be updated as new information becomes available. It should also include the indication that measures may need to be reintroduced if the increasing prevalence of the virus risks exponential growth. This must be supported by the relevant legislative framework.

Country contributors

Austria	Konrad Lachmayer, Professor of Public Law and European Law at the Sigmund Freud University Vienna. Susanne Gstöttner, Research Assistant at the Chair of Public and European Law (Prof. Dr. Konrad Lachmayer) at the Sigmund Freud University Vienna.
Belgium	Maaike De Ridder, Doctoral Researcher at the Leuven Centre for Global Governance at KU Leuven University in Belgium.
Bulgaria	Radosveta Vassileva, Teaching Fellow at the UCL Faculty of Law, London.
Croatia	Nika Bačić Selanec, Senior Lecturer in European Public Law at the University of Zagreb - Faculty of Law.
Cyprus	Constantinos Kombos, Associate Professor of Public and EU Law at the Law Department of the University of Cyprus.
Czech Republic	Ondrej Dostal, Lecturer of Health Law at Charles University in Prague and practicising lawyer. Analysis drawn also from a contribution by Zuzana Vikarská, Lecturer of Constitutional Law at the Masaryk University in Brno and EU Law at the Palacký University in Olomouc.
Denmark	Kristian Cedervall Lauta, Professor and Associate Dean of Education at the Faculty of Law, University of Copenhagen, Denmark.
Estonia	Päivi Margna, Lawyer at the Law Firm LMP.
Finland	Martin Scheinin, British Academy Global Professor, Bonavero Institute of Human Rights, University of Oxford; part-time Professor, European University Institute, Florence; Collaborator of the PluriCourts Centre of Excellence, University of Oslo; Member of the Scientific Committee of the EU Fundamental Rights Agency.
France	Marie-Laure Basilien-Gainche, Professor of Law at University Jean Moulin Lyon III and Honorarium member of the Institut Universitaire de France. Stéphanie Renard, Senior Lecturer in Law, Université Bretagne Sud.

Germany	Anna Katharina Mangold, LL.M., Professor for European Law at the Europa-Universität Flensburg.
Greece	George Karavokyris, Assistant Professor of Constitutional Law at the Law School of the Aristotle University of Thessaloniki.
Hungary	Kriszta Kovács, Marie Skłodowska-Curie Fellow at the Center for Global Constitutionalism, Wissenschaftszentrum Berlin.
Ireland	Oran Doyle, Professor in Law at Trinity College Dublin and director of the COVID-19 Law and Human Rights Observatory.
Italy	Cristina Fasone, Assistant Professor of Comparative Public Law at the Department of Political Science of LUISS Guido Carli in Rome.
Latvia	Beatrice Monciunskaite, Doctoral Researcher at Dublin City University, Ireland.
Lithuania	Eglė Dagilytė, Senior Lecturer in Law at Anglia Ruskin University, UK. Aušra Padskočimaitė, PhD Candidate in Public International Law at IRES Center for Russian and Eurasian Studies and Department of Law, Uppsala University, Sweden.
Luxembourg	Edoardo Stoppioni, Professor of Public Law at the University of Strasbourg.
Malta	Jean-Pierre Gauci, and Beth Archer, People for Change Foundation.
Netherlands	Adriaan J. Wierenga, Researcher specialising in emergency law at the University of Groningen, Netherlands.
Poland	Jakub Jaraczewski, Research Coordinator at Democracy Reporting International (Berlin, Germany).
Portugal	Teresa Violante, Research Fellow at the "Transnational Solidarity Conflicts" Project at the Friedrich Alexander University of Erlangen-Nürnberg and a visiting researcher at the Max Planck Institute for Comparative Public Law and International Law.

	Rui T. Lanceiro, Assistant Professor at the University of Lisbon Law School and a Senior Research Fellow at the Lisbon Centre for Research in Public Law. He is also a law clerk at the Portuguese Constitutional Court.
Romania	Bianca Selejan-Gutan, Professor of Constitutional Law and Human Rights Law at the Lucian Blaga University of Sibiu, Romania.
Slovakia	Max Steuer, Assistant Professor at the O.P. Jindal Global University, Jindal Global Law School, Indiay.
Slovenia	Samo Bardutzky, Assistant Professor of Constitutional Law, University of Ljubljana. Saša Zagorc, Professor at the Faculty of Law, University of Ljubljana, where he teaches Constitutional Law, European Constitutional Law and European Human Rights Law.
Spain	Elvira Dominguez Redondo, Associate Professor of International Law at Middlesex University (UK). Alicia Cebada Romero, Professor of International Law and International Relations at Universidad Carlos II Madrid (Spain).
Sweden	Iain Cameron, Professor in International Law, Uppsala University, Sweden. Anna Jonsson-Cornell, Professor in Comparative Constitutional Law, Uppsala University, Sweden.

Methodology

The survey on which this report is based consisted of 22 questions designed to examine the response of EU Member States to the period identified as the "second wave" of COVID-19, between October 2020 and February 2021. It was divided into three thematic parts: (I) restrictive measures adopted against COVID-19 and compliance with the rule of law and democratic safeguards; (II) strategies for exiting emergency; and (III) state responses to protest. This report provides findings and analysis of the first two parts. A further report and recommendations on state responses to protest will be forthcoming.

The survey involved both multiple-choice questions and sections for additional commentary to provide further context or qualification to the answers given. The multiple-choice questions allowed for contributors to grade their countries' responses to the pandemic from a rule of law perspective – from "no concern" to "some concern" to "significant concern". Contributors were encouraged to provide additional information in instances where they graded a country's response as concerning.

All 27 EU Member States were surveyed, involving the contribution of 35 academics with relevant national legal expertise. Contributors were invited based on their previous academic publications on matters of the rule of law and/or the impact of COVID-19 on legal systems; or as contributors to the 2020 "States of Emergency" Symposium, hosted by the Verfassungsblog and supported by Democracy Reporting International under the re:constitution programme, and/or the 2021 "Power and the COVID-19 Pandemic" Symposium, hosted by the Verfassungsblog and supported by Democracy Reporting International and the Horizon-2020 RECONNECT project.

To identify transversal issues regarding pandemic governance and restrictive measures adopted by EU Member States, the survey tested across a range of rule of law measures.

The level of concern identified was then coded as follows:

No concern – 0 Some concern – 1 Significant concern – 2

The scores provided by the country experts have been moderated. By calculating the average concern across EU Member States (see column "Average Concern"), the most pressing issues of concern were identified through transversal scoring of the rule of law indicators. Additional analysis relevant to transversal concerns indicated was drawn from the country reports to the "Power and the COVID-19 Pandemic" Symposium.

Evaluated dimensions

- **Legality:** There is a sound basis in law for the measures/restriction of the right.
- **Certainty:** The measures are clear, certain and possible to follow.
- **Accessible:** The measures are understandable and available via a wide variety of means (e.g., broadcast media, social media, information received by post, via local authorities, etc.), with account made for vulnerable populations and different language groups.

- **Rationalised:** The rationale underlying the measures is published.
- **Transparent:** The decision-making processes and the decision-makers are known.
- **Necessary:** The measures are necessary to the legitimate aim(s) they pursue.
- **Connected:** The measures are directly connected with the aim(s) they pursue.
- **Proportionate:** The measures are in proportion to the aim(s) they pursue.
- **Compliant with domestic human rights provisions, including non-discrimination**.
- **Compliant with international human rights obligations**.
- **Subject to public consultation**: Key stakeholders and/or the public have been given the opportunity to provide input in the design of the measures.

Form of governance index

Emergency response
The state is still in a "state of emergency" (de facto or de jure) and/or primarily reliant on the use of emergency powers or legal frameworks.

Crisis management
The state is utilising adaptive urgent procedures where necessary but moving towards ordinary processes where possible.

Ordinary operation
The state is largely operating under ordinary processes and functions, with some adaptation to COVID-19 requirements.

Other
Some other form of governance than listed above is being utilised by the government.

Exit strategy asks whether the state has set out an "exiting emergency" framework for reducing or removing restrictive measures, and/or reducing reliance on emergency powers.

Country	Legality	Certainty	Accessibility	Rationality	Trans-parency	Necessity	Connec-tedness	Propor-tionality	Domestic Human Rights Compliance	International Human Rights Compliance	Public Input	Overall Oversight	Form of Governance	Exit Strategy
AT														
BE														
BG														
HR														
CY														
CZ														
DK														
EE														
FI														
FR														
DE														
GR														
HU														
IE														
IT														
LV														
LT														
LU														
MT														
NL														
PL														
PT														
RO														
SK														
SI														
ES														
SE														
Average Concern	1.2	1.1	0.8	1	1	0.8	0.5	1	0.9	0.9	1.4	1.2		

The level of concern

- No concern - 0
- Some concern - 1
- Significant concern - 2

Form of Governance Index

- Emergency Response
- Crisis Management
- Ordinary Operation
- Other

Exit Strategy Index

- The state has ✓
- The state has not ✗ set out an "exiting emergency" framework.
- It is uncertain whether the state has ?

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