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Policymaking regarding measures to control the SARS-CoV-2 pandemic: ethical foundations

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Preliminary remarks

Under Art. 28 of the Reproductive Medicine Act, the Swiss National Advisory Commission on Biomedical Ethics (NCE) is required to “monitor developments in assisted reproductive techniques and gene technology in the area of human medicine and comment from an ethical perspective, in an advisory capacity, on associated social, scientific and legal issues.” More generally, it is tasked with monitoring the development of the sciences of human health and disease, and their applications, and – on request – providing advice to the Federal Assembly, the Federal Council and the cantons (Art. 1 of the Ordinance on the National Advisory Commission on Biomedical Ethics, SR 810.113).

In a letter dated 23 February 2021, the Federal Council requested the NCE to comment from an ethical perspective on various aspects of the question to what extent the strategy pursued to date by the Federal Council and the measures taken to deal with the COVID-19 pandemic are justifiable, and where improvements may need to be made. The mandate covers ethical questions of a general nature. As they relate to a crisis in which matters of health are particularly prominent, these questions concern the general part of the NCE’s remit. The Commission thanks the Federal Council for its mandate and responds to its enquiries below, thus fulfilling its responsibilities in the area of social policy.

The Commission emphasises, however, that it sees its role as involving the discussion of ethical aspects and general requirements for past and future decision-making situations, rather than the evaluation of specific political choices. Such decisions can and must be based on ethical foundations – to which the present paper is dedicated. In addition, however, they must always also take account of numerous pragmatic, political and scientific considerations and have regard to the needs and views of the public.

Summary

In the view of the NCE, decisions concerning management of the pandemic should take account of the following fundamental considerations:

- 1) **Proportionality:** The principle of proportionality requires that general restrictions on freedom must be justifiable in terms of the public interest. Such measures are only legitimate for a limited period, and their proportionality is to be continuously reviewed. As the pandemic persists, with a consequent increase in knowledge and growing experience, it becomes ever more important to select measures that are as specific as possible in their scope and effects. The goal should be to provide specific protection for those groups identified as being particularly vulnerable. In this regard – thanks to the availability (in principle) of vaccines, widely accessible (rapid) tests and straightforward control measures (masks and social distancing), as well as increased knowledge of infection risks – the essential conditions have changed substantially compared to the situation a year ago. In accordance with the principle of proportionality, these changes are to be taken into account.

- 2) **Weighing of goods:** In questions involving the weighing of goods, their differing nature is to be taken into consideration. Certain goods (e.g. life, health, social relations) are a prerequisite for the enjoyment of other goods (e.g. income, property, food). Tensions which arise when individual goods are weighted cannot be resolved independently of the specific context. Controversies arising in this connection should be conducted as openly as possible and, depending on the goods at stake and the particular decision-making context, a renewed weighing of goods may need to be undertaken.
- 3) **Justice:** Protection of the right to life, personal freedoms and health – given their importance in enabling a good life – are central duties and goals of the state. Measures restricting freedom so as to combat the pandemic can only be justified in the light of these duties and goals. In the medium to long term, such measures may themselves, however, pose risks to health and even life, since self-determination, social integration and participation are indispensable for a healthy life, understood in a broader sense. Against this background, political decision-making and public communication should not be based on a narrow, purely medical view and the resultant epidemiological conception of the pandemic. Sufficient account must also be taken of questions of intergenerational solidarity and of the medium- and long-term societal, social, economic and psychological consequences of pandemic control measures, particularly also with regard to intergenerational justice. Consideration is also to be given to the fact that the pandemic, and measures taken by the state to combat it, not only significantly exacerbate existing social inequalities but also give rise to new ones. Not least, there is a need to ensure a commitment to international and intergovernmental solidarity, since ultimately a global pandemic can only be effectively combated at the global level. The evaluation of measures adopted in terms of justice should be undertaken with greater attention to this perspective.
- 4) **Vulnerability:** Under the heading of justice, the effects of pandemic control measures on different social groups should not only be discussed with regard to potential conflicts arising between the legitimate claims of the various groups. Rather, the vulnerability of these groups should be perceived as of equal importance and be addressed both in equal measure and – if possible – at the same time. Thus, a strategy is to be pursued which makes it possible, for example, not only to provide adequate protection for risk groups but also to take account of the specific needs of children and adolescents, who are particularly hard hit by the current restrictions. A nuanced view should be taken of the vulnerability of the groups affected by the measures.
- 5) **Action under uncertainty and communication:** In many respects, state action involves acting under uncertainty. However, in the case of a pandemic, the implications of this fact are considerably more serious. Here, lack of knowledge as to the *consequences* of political action is exacerbated by uncertainty as to the *conditions* for future decisions and action. In the absence of established knowledge, it often only becomes apparent when decisions are put into practice whether they are based on adequate foundations, and whether the criteria for their assessment have been appropriately defined. This will not change for the foreseeable future. It is therefore all the more important that decision-making continues to be scientifically informed, and that all the foundations for decisions are transparently communicated. As part of an open error culture, it is important to evaluate misjudgements

and the need for adjustment of decisions, as well as the achievement of goals, and to indicate how knowledge gained will feed into future decisions – both during and beyond the pandemic. Of course, uncertainties and controversies are also part and parcel of science. They should be managed in an open, critical and constructive manner, which makes it possible for decision-making foundations and criteria to be communicated comprehensively and appropriately – with due acknowledgement of their provisional nature – to all interested parties, policymakers at all levels and the public. The goals to be achieved by pandemic control measures must thus be continuously reviewed on the basis of available scientific evidence concerning the epidemiological situation and the development of the virus or its mutations, and the strategies adopted must be made generally comprehensible in the light of the goals pursued.

1. Background

The present ethical considerations of the NCE are based on an assessment of the key measures taken to date by the Federal Council and the federal authorities in the course of the SARS-CoV-2 pandemic. An overview of the past year's most important events and published decisions, from the Commission's perspective, can be found in the annex.

With regard to the course of the pandemic in Switzerland to date, four phases can be distinguished: (1) the so-called first wave in winter/spring 2020; (2) the decline in infection and mortality rates seen in summer 2020; (3) the larger second wave in autumn/winter 2020; and (4) the current phase, in which the first vaccines are being administered, but at the same time challenges are posed by the spread of mutated strains of the virus and delays in vaccine deliveries. The political measures adopted during the first two waves of the pandemic in winter/spring and autumn/winter 2020 pursued the strategies of *containment* and *mitigation*. The central elements were *general restrictions on freedom* (curtailments of freedom of movement and assembly, restrictions on occupational, sporting and cultural activities), individual *self-restraint* (social distancing, contact tracing, face coverings, safety plans, homeworking, etc.), measures designed to *protect particularly vulnerable persons and groups* (e.g. in long-term care), and *structural safeguards* particularly with a view to the maintenance of healthcare provision during peak infection rates (expansion of intensive care capacity, SAMS triage guidelines, etc.). For the currently planned transitional phase – unlike in the first transitional phase during summer 2020 – an effective medical preventive measure is now available to combat the virus, thanks to the launch of vaccination campaigns at the end of 2020.

On 28 February 2020, under Art. 6 of the Epidemics Act (SR 818.101), the Federal Council declared a “special situation”. In view of the rapid development of the pandemic, this was followed by the declaration of an “extraordinary situation” (Art. 7, Epidemics Act) from 16 March to 19 April, subsequently extended until 26 April 2020. During this extraordinary political situation, the measures adopted did not essentially differ from those taken elsewhere in Europe. Countries were guided by the measures taken in other countries, in some cases

implementing measures that were not necessarily subjected – or, for lack of knowledge, could not be subjected – to a critical examination of their appropriateness.

The measures adopted during the second wave of the pandemic in autumn/winter 2020 differed in two respects from those of spring 2020: firstly, even though the consequences of the pandemic had become much more serious, the Federal Council did not once again switch from a “special” to an “extraordinary situation”, thus essentially leaving ultimate authority for decision-making and action with the cantons. Secondly, during the second wave, this country – unlike neighbouring countries – did not impose (1) stay-at-home orders, (2) curfews, (3) regional restrictions on movement, (4) school closures, or (5) restrictions on personal services (including hotel closures). Even when case numbers and mortality in Switzerland exceeded the levels seen during the first wave, and the number of deaths reported as a proportion of the population was very high, no additional restrictions on freedom were introduced, and the primary goal pursued was that of preventing the health system from being overwhelmed. Thus, in striking a balance between freedom and safety, or assessing the acceptability of control measures, Switzerland – as compared to many other European countries – accorded greater weight to personal freedoms (with an associated increase in risk) than to protection through collective safety measures.

2. Foundations

2.1 *The ethical perspective*

Action taken by the *state*, as such, is based on and bound by current law. At the same time, as *action*, in the sense of a rule-guided form of intentional practice, it has an ethical dimension. Ethics is not concerned – like law – with the *legality* of action (i.e. its compliance with law), but with its *legitimacy*. A practice is legitimate if it can be justified by rational argument and in terms of a generally recognised system of ethical norms. Law and ethics both make reference to and complement each other.

From an ethical perspective, any action or collective practice – including making political judgements – is characterised *inter alia* by four aspects: it is (1) bound by principles (deontology), (2) guided by consequences (consequentialism), (3) directed towards goods (teleology, ethics of goods) and (4) subject to certain demands on the agents (virtue ethics). In medical and bioethics, an approach which has been particularly influential for many years focuses on four principles, namely (1) *respect for autonomy*, (2) *non-maleficence*, (3) *beneficence* and (4) *justice*. These principles – which are to be understood as *prima facie* (i.e. non-absolute) principles and may thus conflict with one another – mediate between respect for (personal) freedom, the avoidance of adverse consequences of decisions and action, a positive orientation towards purposes and goods, and justice as appropriateness, proportionality and reciprocity vis-à-vis public concerns and interests. The priority accorded to freedom in a liberal, law-governed state creates a requirement not only to guarantee and protect personal freedom, but also to ensure that every person can make use of this freedom and is enabled to lead a free and self-determined life. In view of the differing backgrounds and

needs of the members of society, the resources required for this purpose must be appropriately and fairly distributed.

The four *prima facie* principles, essentially of equal weight, formulate unavoidable – but often mutually conflicting – ethical demands, which need to be reconciled in a specific situation of judgement, decision-making or action. From a liberal perspective, the primary aim will be to guarantee the freedom of the individual and the associated opportunities for fulfilment, while also seeking to guarantee all other individuals' freedoms and opportunities for fulfilment.

2.2 Decision and action under uncertainty

The SARS-CoV-2 pandemic confronts policymakers, society, science and medicine with massive unpredictabilities and uncertainties. As regards management of the pandemic, the officials and institutions concerned lack both knowledge that is sufficiently sound and scientifically established and practical experience that has been evaluated and validated. To an extent rarely experienced by policymakers in this country in the past, judgements and decisions have to be made, and action taken, under conditions of uncertainty and unpredictability. For our society, however, it is difficult to admit and acknowledge the limits to our capacity for knowledge and action in the COVID-19 pandemic – all too ingrained is the cultural presupposition that every aspect of nature can be adequately controlled by humankind, particularly by technoscientific means. The challenges involved in having to operate without fundamental (empirically based) data and forecasts for decision-making based on knowledge and experience are also reflected, not least, in the diversity of views and assessments of the (justification of) the measures ordered. At the same time, the fact that it is *not possible not* to make a decision, and that measures adopted may in retrospect be considered too strict precisely because they were effective, remains an unavoidable dilemma. This arises just as much for individual members of the public as it does for policymakers and political and social institutions.

Moreover, as a result of continuous and rapid changes in the situation, political judgements and decisions have to be made under considerable time pressure. Forms and courses of infection may change significantly within a short period. Lack of knowledge as to the *consequences* of political action is exacerbated by uncertainty as to the *conditions* for future decisions and action. The extremely limited virological and epidemiological predictability of the spread of mutations, and of the effects of medical measures under existing conditions, is compounded by the difficulties involved in predicting the consequences for the health system, the population and social, societal and economic conditions. In addition, in view of globalised real-time communication via the media, *the public's reactions* to political measures may change in a rapid and unforeseen manner, making them difficult to predict. Further complicating matters are the differing risks of infection associated with different social situations. What is particularly required and important in this context are elements which cannot readily be politically “demanded”, such as the capacity to tolerate ambivalence, or respect for skilful handling of the state's discretion. Also important is an open error culture: action under uncertainty leads to misjudgements and decisions that need to be reviewed. A culture of discussion and communication which openly addresses such developments and

seeks to ensure that future decisions are informed by the lessons learned from previous misjudgements will lead to those decisions being more widely accepted.

More specifically, this means that, like the authorisation of vaccines, the state's pandemic control measures are also subject to an iterative process, which can be understood as "learning by doing". As state actors lack an adequate knowledge and experience base, evaluation and decision-making criteria can only be obtained in the course of implementation. Scientific support for and evaluation of state measures is therefore essential – in particular, systematic data collection and analysis, decision-theoretical processing and outcome research. Knowledge gained must be transparently explained and communicated to society and policymakers and operationalised for practical decision-making.

The dynamics of state pandemic control measures pose challenges for political and scientific communication. The typically established relationship between continuity and trust, or change and mistrust, is clearly apparent in the public's reactions. Contrary to the unrealistic prospect of the pandemic being overcome without any long-term social and economic consequences, society and policymakers find themselves in a comprehensive learning process, in which the dynamics of change need to be anticipated and integrated in people's daily lives. Changes affecting everyday attitudes, expectations and resources for cohesion and confidence call for particular information and communication efforts, and social and societal resources need to be mobilised accordingly. Sustained political efforts to promote public understanding and acceptance of the measures adopted are thus of central importance. For, ultimately, the social behaviour of the population is crucial for an effective containment of the pandemic.

2.3 *Weighing of goods*

From the perspective of the liberal state, there is a twofold relationship between safety and freedom. Expressed in negative terms, restrictions on freedom are only permissible to safeguard general freedoms. In positive terms, safety serves to guarantee and promote people's ability to exercise and enjoy their freedoms. For state action in the SARS-Cov-2 pandemic, ethical tensions arise between the objectives of *freedom* and *safety* or *risk*, but there is also a permanent need to weigh up different risks and the associated timeframes.

In a liberal, law-governed state, politics aims to enable the population to lead a free, socially integrated and good life based on individual responsibility. Key requirements for this are the *protection of life, physical integrity, freedom, health and social integration (participation)*. The special duties of the state to protect these goods arise from the fact that they are necessary conditions for the realisation of individual and shared life plans. For this reason, life and health are classified as so-called conditional goods. From the perspective of the *ethics of goods*, the priority accorded by the state during the pandemic to the protection of health – over, for example, the protection of freedom – can be justified in terms of the paramount importance of life and health, as conditional goods, in this specific situation. Restriction of freedom is, however, only justified for as long as and insofar as the exercise of personal freedoms is seriously jeopardised by the health risks to which society as a whole is exposed. Precedence is temporarily given to the protection of health with a view to enabling individuals to make use of their freedoms in the future.

For individuals, the value of the goods of life and (a minimum degree of) health does not exist independently of the life goals and opportunities which these goods enable them to realise. The realisation thereof essentially depends on the material conditions and resources available, above all the societal goods of a functioning economy and political community, an appropriate institutional infrastructure, education and culture. In a specific situation, disagreement may exist not only as to the ranking of the various goods, but also as to the evaluation of the goods affected by a measure and the weighting thereof. The results of the weighing of goods are therefore to be continuously reviewed, to determine whether the restriction of one good for the sake of another remains ethically justified and legally proportionate.

3. Ethical considerations

3.1 Ethical discussion of the SARS-CoV-2 pandemic

Since the beginning of the SARS-CoV-2 pandemic, the NCE has expressed its views, in various contexts, on ethical questions concerning measures adopted by the state to contain and combat the pandemic:

- 27 March 2020: Press release (only available in French/German): Coronavirus pandemic: protection of life and solidarity are of central ethical importance;
- 6 April 2020: Opinion no. 33/2020: Contact tracing as an instrument for pandemic control. Central considerations from an ethical perspective;
- 8 May 2020: Opinion no. 34/2020 (only available in French/German): Protection of personality rights in long-term care institutions. Ethical considerations in the context of the coronavirus pandemic;
- 22 December 2020: Press release (only available in French/German/Italian): Coronavirus vaccination: the National Advisory Commission supports the vaccination strategy developed by the FOPH and the Federal Vaccination Commission (EKIF/CFV);
- 11 February 2021: Summary and recommendations (only available in French/German): COVID-19 vaccination. Ethical considerations on fundamental questions and specific application areas;
- Cf. also: “Ethical issues” section in: FOPH, Swiss Influenza Pandemic Plan. Strategies and measures to prepare for an influenza pandemic, Bern 2018, pp. 92-99.

Against the background of the preliminary factual and methodological considerations, three central questions arise in the ethical discussion of the pandemic control measures adopted by the state: (1) *How much safety is worth pursuing at the expense of freedom or conversely How much risk is acceptable for the sake of freedom?* (2) *What risks are the public and policymakers prepared to accept with regard to their own or group interests before the state intervenes, and conversely, What risks are unacceptable for society and policymakers, so that regulatory measures – including measures detrimental to particular interests – become indispensable?* And (3) *How is the weighing of goods to be conducted so as to ensure an equitable distribution of burdens and opportunities among all actors and groups within society?*

3.2 Protection of life and health

The special importance of the protection of life and health is based on the right to life, as enshrined in the constitution and human rights law. Irrespective of its individual subjective

value, life is objectively protected by law. The state's responsibilities to protect health and provide healthcare are a function of the right to life and the good life as a "good", which accounts for their particular weight. As noted by the NCE: "Health is conceived as a *transcendental* or *conditional good* because the presence of health is a condition for the possibility of realising many other goods in life [...]. This means that, in the hierarchy of goods to be promoted through political efforts, health should be accorded a special status for reasons of consistency. This becomes particularly clear during a pandemic, for example, when even the temporary curtailment of fundamental rights is considered politically acceptable in the interests of safeguarding public health."¹

Protection of the right to life, protection of health and protection of personal freedoms as the foundations of a good life are central duties and goals of the state. They are irreplaceable, cannot be offset against one another, but may come into conflict in specific situations. With regard to the protection of health in a pandemic situation, the NCE comments: "Public health is a classic case of a public interest which can justify restrictions on the fundamental rights of individuals, provided that certain other requirements – a legal basis and proportionality – are met (Art. 36 Federal Constitution). When such rights are weighed against opposing rights, it should be borne in mind that public health ultimately also serves to protect fundamental rights – in particular, the rights to life and physical integrity (Art. 10 para. 1 and 2 FC). [...] Personal freedom is, in this context, a central good deserving protection, while the maintenance of a functioning economy, public institutions and healthcare facilities are central instrumental goods ensuring the protection of the fundamental goods."²

In the ethical assessment of control measures, the time dimension is a crucial factor. In a press release issued in March 2020, the NCE emphasised: "From an ethical perspective, the protection of life, justice, freedom, responsibility and solidarity are also of central importance in a pandemic situation." In the current situation, it noted, there was a need for careful weighing "between the protection of health, on the one hand, and, on the other hand, the long-term consequences (including health effects) which, as a result of the economic damage associated with the measures adopted, could affect the weakest members of society in particular." The current restrictions were justified for the purpose of "preventing further restrictions on freedom [...], or keeping the measures in place for as short a time as possible. Such further restrictions on public and private life would exacerbate the already increasing resultant problems of social isolation, economic anxieties and lack of exercise – for example, domestic violence and mental and somatic disorders – thus intensifying the health and economic damage caused by the pandemic."³

In the medium to long term, measures restricting freedom so as to ensure the protection of life and health not only have political, social, economic and cultural effects, but may also themselves pose risks to health and even life, since self-determination, social integration and participation are indispensable for a healthy life, understood in a broader sense. The

¹ NCE, Drug prices. Considerations on the equitable management of expensive new medicines. Opinion no. 35/2020, Bern, 2 July 2020, p. 18.

² NCE, Contact tracing as an instrument for pandemic control. Central considerations from an ethical perspective. Opinion no. 33/2020, Bern, 6 April 2020, p. 9.

³ NCE, Coronavirus pandemic: protection of life and solidarity are of central ethical importance. Press release, Bern, 27 March 2020.

responsibility and solidarity emphasised by the NCE and also publicly called for by policymakers presuppose the personal freedom *to exercise* responsibility and solidarity.

The problematic duration of the restrictions on freedom was partly due to the fact that, during the first wave of the pandemic, policymakers became increasingly dependent on virological and epidemiological assessments and forecasts. Not only the political evaluation of the situation and decision-making but also the measures adopted by the state followed a narrow medical logic. Consequently, important social policy aspects were given inadequate consideration or left out of account altogether. But attention needs to be paid at every stage not only to the public's ability and readiness to understand and implement measures ordered by the state, but also to questions of intergenerational solidarity and the medium- and long-term societal, social, economic and psychological consequences of pandemic control measures. In crisis mode, however, there is a tendency to focus on short-term consequences and not to take into account the medium- and long-term consequences for the fabric of society. This becomes all the more problematic the longer the crisis lasts or even threatens to become permanent. Finally, it should be pointed out that giving due consideration to the goods of life and health must also mean ensuring that the criteria for political decisions are primarily based on the prevention of deaths and serious illness (mortality and morbidity).

3.3 *Who requires and merits special protection?*

Art. 10b and annex 6 of the COVID-19 Ordinance 2⁴ specified categories of “persons at high risk” and requirements for the management of high-risk employees. The Federal Council thus adopted medical definitions and criteria which were then used as the basis for extensive restrictions on freedom; as these curtail fundamental rights, they stand in particular need of justification. The fact that *political* decision and action was guided by exclusively *medical* categories had profound consequences: the original intention of the concept of vulnerability, deriving from social medicine – i.e. the determination of special claims to recognition, care and solidarity – was largely forgotten. Vulnerability was primarily identified with the risk of severe COVID-19 and thus designated the (precarious) condition of persons helplessly exposed to state measures. To make matters worse, support and solidarity from relatives and friends was severely restricted or made impossible by the rigid restrictions on contacts and freedoms. Those who – given their vulnerable situation – would have required the most support became the most intensely isolated social group. Considering the example of people living in long-term care institutions, the NCE commented:

“During the pandemic, people living in institutions have to comply with the institutions’ rules for the sake of their own safety and that of all residents and staff – with regard to fundamental personal decisions, they are denied self-determination in the context of the pandemic. [...] Particularly in cases where capacity is lacking, access to the person concerned should be guaranteed for close relatives, legally authorised representatives or members of authorities, as they exercise strictly personal rights for the individuals concerned. This may relate to consent for medical interventions, transfers, information on unavoidable measures restricting

⁴ Ordinance 2 of 13 March 2020 on Measures to Combat the Coronavirus (COVID-19) (COVID-19 Ordinance 2). The Ordinance 2 was abrogated on June 19 2020 and is no longer in force. See: www.fedlex.admin.ch/eli/cc/2020/141/en

freedom, the reasons for and extent of such measures, and – particularly in the case of compulsory treatment – information on rights of appeal. In such cases, personal contact is often necessary – for example, if important decisions are to be made and the representative needs to evaluate the resident’s situation at first hand in order to be able to decide. [...] Also in the case of persons with capacity, it should be possible for an ethical and legal weighing of goods to be conducted between a visiting ban and social participation within the familiar close family system. Respect for personality rights also means allowing people who live in institutions to be involved in decisions concerning the extent to which they are prepared to accept risks arising from contacts with close family members, friends and therapists. If they are to be able to make such a decision autonomously, residents must firstly be given a transparent explanation of the situation within the institution and, secondly, be informed about the various options available to them. From an ethical perspective, it is essential to distinguish between behaviour which puts the individuals themselves at risk from that which represents a risk for others.”⁵

At the beginning of the pandemic, it proved difficult in some cases to ensure that the state’s pandemic control policy gave adequate consideration to the “well-being of the weakest” (thus meeting the aspiration expressed in the constitution). But the adoption of the medical definition had another problematic effect: it almost completely shifted attention away from other vulnerable social groups which were particularly hard hit by the pandemic situation – children, adolescents, single parents, families in precarious socioeconomic circumstances and in difficult psychosocial conditions, but also people with chronic illnesses experiencing sometimes serious treatment delays. Because of the one-sided, restricted political focus, the equal importance of the various vulnerable groups within society was largely overlooked. Rather than highlighting conflicts between these groups, the aim should be to address their vulnerability essentially in equal measure and – if possible – at the same time. In practice, this means not only providing special protection for risk groups and (as planned) according them top priority for vaccination but also – by way of example – making provision for justified exemptions from general restrictions for adolescents (e.g. with regard to sporting activities) or for certain businesses especially hard hit by the restrictions.

The epidemiological conception of the pandemic thus does not provide an adequate basis for medium- and long-term political action. Politics is not medicine, and society is not a hospital ward which can be left again once the health crisis has been overcome. The criteria for political decisions must be more comprehensive than those applicable for decisions in medicine and public health. Experience from previous pandemics and initial research findings on the SARS-CoV-2 pandemic show that infections affect people in highly unequal ways. Social conditions correlate with the risk of infection and the severity of disease. In addition, there is an association between infection, disease course, concomitant illnesses and socioeconomic status. The pandemic and the control measures adopted by the state are significantly exacerbating existing social inequalities. Persons in precarious social and employment conditions are doubly disadvantaged: they are less able to protect themselves against infection, and they also lack opportunities and resources to cope with or compensate for the social and economic consequences of the pandemic.

⁵ NCE, Opinion no. 34/2020, pp. 6f.

3.4 The meta-principle of proportionality

Proportionality means “that [a] measure is indeed aimed at the protection of highly ranked goods and is suitable, necessary and reasonable for this purpose. The more it is directly designed to avert a proven, serious and immediate danger, the more it is likely to be justified. However, even if a measure is effective and restrictions are limited as far as possible, it may nonetheless be disproportionate, if the restrictions are still excessive in relation to the intended effects. Proportionality must therefore always be evaluated in the specific context in which the measure is employed.”⁶ The principle of proportionality evaluates the aims and effects of decisions and measures in relation to other rights and goods. Such assessments concern both legal and political/ethical aspects.

From a legal perspective, measures adopted by the state require more than merely a basis in legislation. The political choice of an option provided for by law also requires a rational justification, essentially comprehensible for all members of the public, not least with regard to the alternatives rejected. In a liberal, law-governed state, personal freedoms are the norm and any restrictions, as a matter of principle, need to be justified vis-à-vis all those affected. For this reason, general restrictions on freedom which concern everyone and do not serve to protect everyone’s freedom must be justified by the robust criterion of public interest. From this, three principles follow for the weighing of goods in relation to action by the state: (1) Fundamental rights are not to be curtailed or – if this cannot be avoided – then only as little and for as short a period as possible. (2) Pandemic control measures should be as specific as possible in their scope and effects, in order to ensure targeted protection of groups identified as being particularly vulnerable. (3) Measures restricting freedom require a continuous review of their proportionality and are to be limited to a justifiable duration. Among the practical implications of these considerations, it follows that strategies to control the spread of the virus which focus on testing and vaccination are preferable to general restrictions on freedom. For such strategies are specifically based on individual self-protection and prevention of disease transmission. Accordingly, the Commission has commented: “In the view of the NCE, against the background of all the balancing of individual freedoms against the interests of society as a whole which is also required in relation to the COVID-19 vaccination, the efforts by public bodies to promote the greatest possible acceptance of vaccination – and, ultimately, herd immunity – are justified.”⁷

The political/ethical requirement for the proportionality of state pandemic control measures arises in particular in view of inequalities within society. These concern, firstly, the effects of such measures on certain population groups and, secondly, the opportunities and resources available to the various groups for coping with the pandemic and its socioeconomic consequences. Questions of justice arise not only with regard to the protection and assurance of conditional goods but also with regard to the distribution of and access to other goods, the use or enjoyment of which is dependent on conditional goods. This applies in particular in relation to the as yet scarcely investigated long-term effects of the pandemic on individual

⁶ NCE, Opinion no. 33/2020, p. 13.

⁷ NCE, Summary and recommendations: COVID-19 vaccination. Ethical considerations on fundamental questions and specific application areas, Bern, 11 February 2021, p. 2.

sectors of society and society as a whole, and to the effects of long COVID, about whose incidence, course and permanent consequences little is known to date.

3.5 International solidarity

The particular importance of social solidarity, which has become apparent during the pandemic, will not decline whenever it is over – on the contrary. This is all too evident in the international context: like the climate and migration crises, the SARS-CoV-2 pandemic has dramatically confirmed the interconnected nature of our globalised world. The problem of the pandemic has to be tackled by states around the world. As the virus does not recognise national borders, it cannot be combated at the national level. But the capacity of individual states to combat the virus varies widely – often according to the strength of their economy. This is exemplified by the distribution of and access to vaccines. Given the value of international solidarity and Switzerland's humanitarian tradition, efforts by our country to combat the pandemic at the global level are all the more justified. This is, of course, also the case because, from a Swiss perspective, global trade, international exchanges in the economic, scientific and cultural sectors, and worldwide tourism all depend to a substantial extent on the success of global pandemic control efforts. It is thus also a matter of immediate *national* interest to combat the pandemic at the *global* level. An increased federal commitment to global virus control is therefore to be supported both in the country's own interest and for reasons of ethical responsibility.

This document was approved by the NCE on 15 March 2021, with one abstention.

Annex: Chronology of measures adopted and decisions taken since the beginning of 2020

- 23 January 2020: Establishment of an internal Coronavirus Task Force at the FOPH;
- 31 January 2020: Introduction by the FDHA of mandatory reporting of the “2019 novel coronavirus (2019-nCoV)” (amendment of the FDHA Ordinance on the Reporting of Observations of Communicable Human Diseases, SR 818.101.126);
- 28 February 2020: Federal Council declares that a “special situation” exists in Switzerland (under Art. 6 of the Epidemics Act, SR 818.101) and adopts the Ordinance on Measures to Combat the Coronavirus (COVID-19) (on the basis of Art. 6 para. 2 let. b of the Epidemics Act);
- 1 March 2020: FOPH launches the campaign “Protect Yourself and Others” (including a website) and establishes the “Infoline Coronavirus”;
- 13 March 2020: Federal Council adopts the Ordinance 2 on Measures to Combat the Coronavirus (COVID-19) (COVID-19 Ordinance 2) (concerning border controls, measures applying to the population, reporting requirements and healthcare provision);
- 16 March 2020: Federal Council declares an “extraordinary situation” (under Art. 7 of the Epidemics Act), to last until 19 April 2020 (on 8 April 2020 extended until 26 April 2020);
- 18 March 2020: Federal Council cancels the popular vote scheduled for 17 May 2020;
- 20 March 2020: on the basis of the Directives on Crisis Management in the Federal Administration, the Federal Council convenes the ad hoc Coronavirus Crisis Unit (KSBC, as requested by the FDHA on 17 March 2020), and it also decides on measures to mitigate the economic consequences of the state’s coronavirus control measures;
- 27 March/3 April 2020: Federal Council adapts the Ordinance 2 on Measures to Combat the Coronavirus (COVID-19) (concerning exceptions for cantons in special risk situations, measures to guarantee the provision of essential medical goods, improvement of coordination and other amendments);
- 16 April - 6 July 2020: Federal Council decides on successive relaxations of the coronavirus measures, amending the COVID-19 Ordinance 2 accordingly;
- 28 April 2020: FOPH factsheet: COVID-19: information and recommendations for institutions such as old people’s and care homes and facilities for people with disabilities (revision of the version dated 2 April 2020; most recent version dated 26 October 2020);
- 30 April 2020: Federal Council makes CHF 400 million available for global pandemic control efforts;
- 4–6 May 2020: extraordinary session of Swiss Parliament held in Bern;
- 13/20 May 2020: Federal Council adopts the Ordinance on the Proximity Tracing Pilot Trial and a Dispatch on an urgent amendment to the Epidemics Act required for this purpose;
- 19 June 2020: Federal Council downgrades the “extraordinary” to a “special situation”; the KSBC, automatically dissolved as a result, is replaced by the COVID-19 successor organisation, the central component being the FOPH’s Swiss National COVID-19 Science Task Force;
- 6 July 2020: Federal Council introduces mandatory face coverings for public transport; the FOPH issues a list of “countries with an increased risk of infection” (updated monthly);
- 7–25 September 2020: Autumn session of Swiss Parliament held in Bern;
- 18/29 October; 2 November; 4/11 December 2020: Federal Council decides on new pandemic control measures applicable throughout Switzerland (extended requirement to wear masks; numerical limits on gatherings; capacity restrictions for shops and restaurants; closing times; closures of leisure facilities; ban on face-to-face teaching at higher education institutions/universities;

expansion of quarantine rules for people entering the country); use of rapid antigen tests as well as the PCR tests previously used;

- 18/21/28 December 2020: Federal Council decides on closures of restaurants, sports clubs, cultural and leisure facilities, and more stringent quarantine requirements;
- 6 January 2021: Federal Council decides that the measures are to be extended until the end of February and, by amending the COVID-19 Ordinance, prevents cantons from easing restrictions if the epidemiological situation is favourable;
- 13 January 2021: Federal Council decides on a requirement to work from home and the closure of shops selling non-essential goods;
- 27 January 2021: Federal Council decides on coverage of the costs of coronavirus tests for persons without symptoms and relaxation of the quarantine rules;
- 17 February 2021: Federal Council proposes a “cautious, gradual easing of measures” from 1 March 2021.

This document was approved by the National Advisory Commission on Biomedical Ethics on 15 March 2021, with one abstention.

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