

Briefing Update as of 6 April 2020

COVID-19: Emergency Measures and their Limits

The COVID-19 (coronavirus) pandemic has led the authorities – after initially rather cautious reactions – to take various measures at an unprecedented rate, particularly at the federal level, but also in the cantons. These measures involve major interventions affecting the population and companies. This briefing provides an overview of existing and possible future measures to combat the pandemic in Switzerland, their legal ramifications as well as legal options for those affected to defend themselves against the measures imposed or to demand compensation for the loss or damage they have suffered.

Existing Measures

At the Federal Level

On 25 February 2020, the new coronavirus Sars-CoV-2 was first detected in Switzerland in a person from the Canton of Ticino. At its extraordinary meeting of 28 February 2020, the Federal Council classified what was happening in Switzerland as a so-called special situation in accordance with art. 6 of the Epidemics Act (EpG). This allows the Federal Council, after consultation with the cantons, to order measures which are normally the responsibility of the cantons. In particular, the Federal Council placed an immediate ban on major events with more than 1'000 people in attendance.

On 13 March 2020, the Federal Council issued the COVID-19-Ordinance 2 (COVID-19-Vo II) on the basis of the EpG, which has since been revised twelve times and is currently in force under the version dated 4 April 2020 up to and including 13 September 2020 (unless withdrawn or modified beforehand). On 16 March 2020, the Federal Council

also reclassified developments in Switzerland as an extraordinary situation pursuant to art. 7 EpG. This provision is a concretisation of the constitutional emergency powers according to art. 185 para. 3 of the Federal Constitution (BV). It allows the Federal Council to order uniform measures for the entire country or for parts of the country.

The COVID-19-Vo II includes various measures to reduce the risk of transmission and to combat COVID-19, in particular:

- General **ban on entry into Switzerland** for persons without Swiss citizenship or other residence titles (e.g. residence permit, cross-border commuter permit or freedom of movement entitlement and professional reasons for entry);
- Channelling **air traffic** for the transport of passengers from abroad at the three major national airports and closure of small border crossings at the discretion of the Federal Customs Administration;

- Requirement of a SECO export licence for certain protective equipment (e.g. protective goggles, masks and clothing) and important medical goods (e.g. anaesthetics and muscle relaxants), except, in particular, for exports (i) to EU member states, Norway, Iceland, the United Kingdom and certain other countries, provided reciprocity is granted; or (ii) for personal use;
 - Various measures to ensure the supply of essential medical goods (certain active substances such as insulin or morphine, medical devices such as respirators or COVID-19 tests, and personal protective equipment and other equipment such as hygiene masks or hand disinfectants), in particular:
 - **Obligation** of the cantons **to report** their current stocks;
 - **Procurement** and **pre-financing** of important medical goods by the federal government to support the supply of the cantons, non-profit organisations and third parties (e.g. laboratories and pharmacies);
 - **Allocation** of important medical goods to the cantons at their request;
 - **Confiscation** of important medical goods from cantons, public health facilities or companies in return for payment of the purchase price if procurement cannot be guaranteed;
 - **Production orders** for important medical goods, if procurement cannot be guaranteed otherwise;
 - Certain **exemptions** from the **licensing requirements for drugs** manufactured for the treatment of COVID-19 (e.g. Remdesivir) or containing certain active ingredients (e.g. insulin or morphine); exemptions from the **import requirements of drugs** for the treatment of COVID-19;
 - **Exceptional authorisations** for the placing on the market and putting into service of **medical devices without conformity assessment**, provided that they serve (in conjunction with other conditions) to prevent and combat coronavirus.
 - Prohibition of all **face-to-face events** at schools, universities and other educational establishments;
 - General ban on public and private **events** and closure of publicly accessible **facilities** (with the exception of grocery stores, post offices, banks and other important institutions);
 - Prohibition of **gatherings** of more than five people in public places;
 - Prohibition directed at health care facilities (in particular hospitals, medical practices and dental practices) from carrying out non-urgent **medical examinations and treatments**;
 - Instruction to **particularly vulnerable persons** (i.e. over 65 years of age or with certain pre-existing health issues) to stay at home and avoid crowds;
 - **Criminal sanctions**: (i) imprisonment of up to three years or a fine for deliberate violation of the ban on public or private events, (ii) fines for violation of the ban on gatherings of more than five persons, for violation of the ban on the export of protective equipment and important medical goods without a licence, and for crossing a border at a closed border crossing.
- In addition, on 20 March 2020, the Federal Council adopted a comprehensive **set of measures** totalling over CHF 40 billion by means of numerous ordinances to counter the economic consequences of the spread of the coronavirus and other measures such as the suspension of deadlines in civil and administrative proceedings.
- ### In the Cantons
- Besides the measures taken by the Federal Government, various cantons have taken their own additional measures. For example, the local government of the Canton of Zurich has adopted a **set of measures to support the Zurich economy** based on the emergency article in the Zurich Cantonal Constitution, which was unanimously approved by the Zurich

Cantonal Parliament on 30 March 2020. These measures are to be implemented where the instruments of the Federal Government are not applicable. The measures adopted by the Canton of Ticino on 20 March 2020 are particularly far-reaching. For example, there is an explicit ban preventing older and vulnerable people from going shopping. In addition, all private commercial and manufacturing activities have been stopped and construction has been halted immediately.

Possible Future Measures and their Limits

In view of the fact that federal and cantonal measures are increasingly intrusive across all areas of life, the question arises as to what additional measures are possible and where their limits are.

The declaration of an extraordinary situation allows the Federal Council to order the necessary measures for the entire country or for parts of the country in accordance with art. 7 EpG. In terms of legal requirements and conditions, this provision is similar to the constitutional emergency powers under art. 185 para. 3 BV. It is therefore required that there is such a high degree of urgency making it impossible to react quickly enough by means of ordinary legislation. Furthermore, all other means based on the regular legal bases must first be exhausted.

In this context, it is worth paying particular attention to the possible **measures to ensure the supply of essential goods and services in Switzerland** at a time of severe shortages in accordance with the Federal Law on National Economic Supply (LVG). In the event of an imminent or actual serious shortage, the Federal Council can therefore take temporary economic intervention measures. In particular, it may issue regulations on processing and the adjustment of production or the restriction of exports (cf. art. 31 para. 1 and para. 2 lit. c and i LVG) and decree an obligation to provide vital services (e.g. transport of goods) (cf. art. 32 para. 2 lit. c LVG).

Emergency ordinances must always be limited in time and generally expire after six months at the latest if the Federal Council has not submitted a draft federal

law or an ordinance to the Federal Assembly by then (cf. art. 7d para. 2 of the Government and Administration Organisation Act).

Within the framework of the above-mentioned requirements, the law does not set any limits on the **content of the measures** and gives the Federal Council very broad discretion. Possible measures include, for example, orders for assistance, bans, seizures, release orders, rescue packages, etc.

Emergency measures, however, must fully respect the general **constitutional requirements**. In any case, the measures must comply with the general principles of the rule of law (cf. art. 5 BV):

- They must pursue a **public interest**, i.e. serve to avert danger,
- respect the **principle of proportionality**, i.e. be suitable, necessary and reasonable in terms of time, place as well as personal and material scope,
- and the principles of **equality of rights** and **good faith**.

Furthermore, the Federal Council is bound by **fundamental rights**, in particular **economic** and **personal freedom**. Interference with these rights must always be in the public interest and must be proportionate (cf. art. 36 BV).

Distinction Between Federal and Cantonal Competences

In special and extraordinary situations, the EpG generally delegates the authority to order measures to the Federal Council (cf. art. 6 para. 2 and art. 7 EpG). COVID-19-Vo II explicitly states that the cantons retain their competences unless the ordinance provides otherwise. Accordingly, it is necessary to distinguish between two constellations: If the Federal Council has made an explicit regulation, this is in principle conclusive and the cantons may not issue any provisions that contradict the federal ordinance. If this is nevertheless the case, the respective cantonal acts are ineffective. If, on the other hand, the Federal Council has *not* made an

explicit regulation, it depends on whether the Federal Council did not regulate in order to give the cantons the power to regulate, or whether it decided, in the sense of qualified silence, that the area in question should not be regulated in the extraordinary situation at all, not even by the cantons. In the latter case, the respective cantonal acts are again ineffective. Which of these constellations applies has to be answered by interpretation, which is not always easy as the sources for interpretation are very limited.

However, if a conclusive regulation exists at the federal level in a given area, cantons where the epidemiological situation poses a particular threat to public health may submit an application to the Federal Council to be allowed to order the restriction or cessation of the activity of certain economic sectors for a limited period of time and for certain regions (Art. 7e COVID-19-Vo II). Such applications may be approved in whole or in part by the Federal Council. Within the scope of an approved application, the cantons are authorised to take further measures. However, if the measures taken by a canton go beyond the authorisation of the Federal Council, the federal government's compensation for short-time working will not apply to that canton.

In any case, different cantonal measures, i.e. measures not aimed at immediate disease control, remain permissible within the framework of existing cantonal powers. If necessary, the cantons may also take such measures in parallel with the emergency measures taken by the federal government, for example in the area of economic help.

Legal Protection

In connection with the measures to combat COVID-19, the question of legal protection against measures taken at a federal and cantonal level also arises.

At Federal Level

Acts of the Federal Council may generally not be appealed (art. 189 para. 4 BV), and *per se*, federal laws cannot be appealed at all. Therefore, the Federal Administrative Court did not consider an appeal raised directly against COVID-19-Vo II (see decision C-1624/2020 of 25 March 2020). However,

orders of other authorities that are based on ordinances of the Federal Council, in particular police orders or criminal sanctions, can be appealed in principle. Within the framework of such an appeal procedure, it is also possible to scrutinise ordinances such as COVID-19-Vo II to verify their conformity with higher-ranking law (see also the aforementioned decision of the Federal Administrative Court). However, the courts will still respect the Federal Council's broad discretion in this respect and will also be cautious in the way they monitor the proportionality of the measures.

In the Cantons

Cantonal ordinances may be appealed directly to the Federal Supreme Court. However, where a cantonal appeal right exists, the cantonal courts must first be addressed, as in the Canton of Zurich, where ordinances issued by the government council must be appealed before the cantonal Administrative Court. In addition, the cantonal and federal courts of appeal are generally also competent to decide on appeals against orders issued on the basis of emergency ordinances.

Responsibility of the State

Based on the Epidemics Act

According to art. 63 EpG, the authority which orders **measures aimed at individuals** can compensate these persons, taking into account their financial circumstances, if they suffer a loss or damage as a result of such measures which are not otherwise covered. The EpG does not, however, provide for an obligation to compensate for a loss or damage caused in connection with **measures aimed at the population** (e.g. bans on events, closure of schools, etc.). Private organisers or companies affected by bans, closures or other restrictions can only demand compensation from the state for any such losses or damage if the conditions of state liability are met.

Based on State Liability

In general, the state (confederation, cantons or municipalities; direct claims for damages against government officials are generally excluded) is only liable for any loss or damage caused by a **violation of the law**.

The proper exercise of government authority does not violate the law. It is crucial that the exercise of power was carried out within the limits of discretion and that the principle of proportionality was observed. If a decision or order is amended or revoked in appeal proceedings, its unlawfulness has been established, but this does not necessarily give rise to a claim for damages. Such a claim is only possible if there has been a major breach of duty, namely an **inexcusable error**, which a compliant official would not have committed.

The hurdles for state liability are therefore set at a very high level. Damage caused by lawful state acts (or omissions) is usually borne by those affected, unless a law provides for a duty of compensation (such as art. 63 EpG; see above). A general obligation to pay compensation for lawfully inflicted damage exists only if state intervention is tantamount to **expropriation**, i.e. if the impairment is so severe that an economic resource can no longer be used for its intended purpose on a permanent basis and if no economically viable alternative exists. The hurdles for proving such a so-called "material expropriation" are also particularly high, and there is no precedent in the area of emergency orders so far.

Conclusion

The Swiss population and economy are currently confronted with heavy restrictions, and the ordering of even more far-reaching measures is legally admissible. The ordinary political processes have been largely eliminated. This applies in particular to parliamentary participation, although certain budgetary powers of the Federal Assembly must be respected retrospectively in accordance with the Federal Budget Act (FHG). The Federal Council has a very large, but not unlimited, discretion. Within the legal ramifications, it must make full use of its powers, always respecting the principle of proportionality and considering all interests at stake.

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