

The Impact of Covid-19 Measures on Democracy, the Rule of Law and Fundamental Rights in the EU

This Briefing was prepared by the Policy Department for Citizens' Rights and Constitutional Affairs upon request of the LIBE committee Monitoring Group on Democracy, Rule of Law and Fundamental Rights. It focuses on the impact of the measures adopted to fight Covid-19 by EU Member States on democracy, the rule of law and fundamental rights in the EU. The Policy Department has monitored such measures - through the production and update of an internal overview based on open sources and covering the 27 EU Member States, the UK and international and EU institutions - and examined their impact, from an institutional/constitutional and fundamental rights and freedoms point of view, on the following areas of relevance: state of emergency and exceptional powers, the functioning of national parliaments and of the judiciary; freedom of movement; freedom of expression and of the media; freedom of assembly; privacy and data protection; asylum; prisons; discrimination and vulnerable groups; other issues of relevance for Art. 2 TEU. The monitoring exercise reveals a series of areas of possible concern for the EU and the European Parliament, notably in relation to the protection of the European values enshrined in Article 2 TEU, the Article 7 TEU procedures, and more in general the application of EU law. The outcome of this work is furthermore particularly worthwhile as the EP prepares for the first annual inter-institutional monitoring exercise in the framework of the new European mechanism on the Rule of Law.

Introduction

The dramatic spread of the **COVID-19 pandemic** in Europe has led Member States to adopt a series of **emergency measures** in an effort to contain the virus as quickly and effectively as possible. A wide majority of EU governments have resorted to "**emergency powers**" to radically limit internal and international travels, carry out sanitary controls, close schools and universities, shops and public places, confine persons at home, hereby drastically limiting individual freedom of movement and assembly. Contact tracing, location tracking and data analysis measures having an impact on privacy and data protection standards are



being developed and implemented through apps and big data processing. Fines and prison sanctions are introduced, increased and applied against persons for violation of restrictive measures. The right to apply for asylum is suspended all over Europe, detained persons suffer restrictive measures in relation to visits, while vulnerable categories are exposed to risks of discriminations and violence. The justice systems are suspended in many countries, with deadlines postponed. According to critics, some governments have used the emergency situation as an excuse to propose and approve controversial pieces of legislation that jeopardise freedom of expression, or are unrelated with the fight against Covid-19.

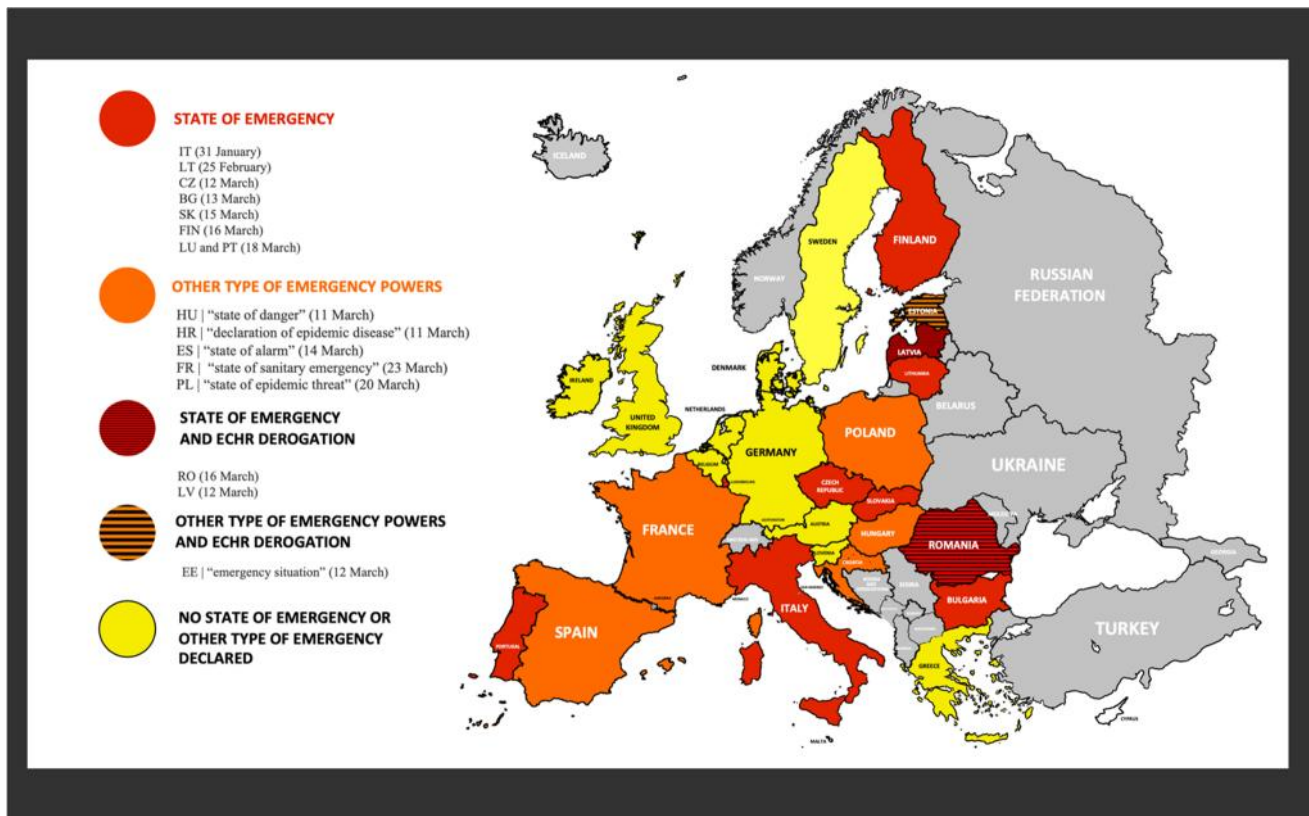
Aware that these developments represent fundamental challenges to democracy, the rule of law and fundamental rights in the EU, the EP Committee on Civil Liberties, Justice and Home Affairs (LIBE) Monitoring Group on Democracy, Rule of Law and Fundamental Rights (DRF MG) decided to closely monitor the measures adopted by the EU Member States in the fight against Covid-19. It resolved to meet weekly and tasked the Policy Department for Citizens' Rights and Constitutional Affairs to produce and update an overview of measures adopted by the EU and its 27 Member States, as well as the UK. Such monitoring exercise examines the impact of emergency measures in the following areas of relevance from an institutional/constitutional, and fundamental rights and freedoms, point of view. These areas are: state of emergency and exceptional powers, the functioning of national parliaments and of the judiciary; freedom of movement; freedom of expression, of information and of media; freedom of assembly; privacy and data protection; asylum; prisons; discrimination and vulnerable groups; other issues of relevance for Art. 2 TEU. The information is drawn from open sources like international, European and national press, academic articles, documents produced by international organisations and their bodies (UN, OSCE, Council of Europe), EU institutions, civil society. The present briefing is a summary of some of the main findings of such exercise.

State of emergency, exceptional powers for the governments, measures adopted, role of parliament and of the judiciary

In order to adopt measures to contrast the Covid-19 pandemic as rapidly and efficiently as possible, the wide majority of Member States have resorted to "**emergency powers**" and have declared a "**state of emergency**". These are special regimes developed to face exceptional crisis situations, where the emergency, urgency and necessity of the measures to be taken require rapid procedures that derogate the normal functioning of the democratic state based on checks and balances and the full enjoyment of fundamental rights and freedoms. By their very nature, such regimes pose an inherent risk to DRF, and European history demonstrates that a state of emergency can transform a democracy based on rule of law and fundamental rights into a totalitarian, oppressive and aggressive regime.

Such **emergency regimes** are often regulated in the **Constitutions, and/or in laws of constitutional or special nature**, often in parallel to other regimes like "state of war", "state of siege", "martial law", etc. "State of emergency" regimes are often considered the lowest level of emergency among the various legal figures foreseen. Some Member States make use of laws specifically addressing **health or epidemic emergencies**, having in substance a very similar nature and effects. When looking at EU Member States (see Map 1), it can be noted that a "State of emergency" was declared in ten Member States, among which Italy (31 January), Lithuania (25 February), the Czech Republic, Latvia (12 March), Bulgaria (13 March), Slovakia (15 March), Romania and Finland (16 March), Luxembourg and Portugal (18 March). Six more Member States have declared similar regimes: Hungary declared a "state of danger" (11 March), Croatia issued a "declaration of epidemic disease" (11 March), Estonia declared an "emergency situation" (12 March), Spain a "state of alarm" (14 March), France a "state of sanitary emergency" (23 March), Poland a "state of epidemic threat" (20 March). Other Member States have none of the legal figures above and simply use **normal legislation or decrees** to adopt restrictive measures. As this quick overview demonstrates, EU Member States

constitutional and legal set ups differ considerably in relation to emergency powers, and different categorisations can be made depending on the criteria adopted¹.



Map 1: States having declared a state of emergency, using other types of emergency powers, and having tabled an ECHR derogation declaration. Sources: ECPRD data as of 20 April 2020, Council of Europe

State of emergency and similar regimes importantly imply an increase of the powers of the government (sometimes also of the police and the army) and a diminishing of the powers of Parliaments and of the judiciary, with a serious blurring of the lines separating executive, legislative and judicial powers and causing a disbalance in the system of checks and balances that are at the basis of democracy. Human rights and fundamental freedoms are also restricted, within the limitations provided by international, European and Constitutional law. Some Member States (Estonia, Romania and Latvia) have tabled a declaration to the Council of Europe to derogate from the ECHR as shown in Map 1².

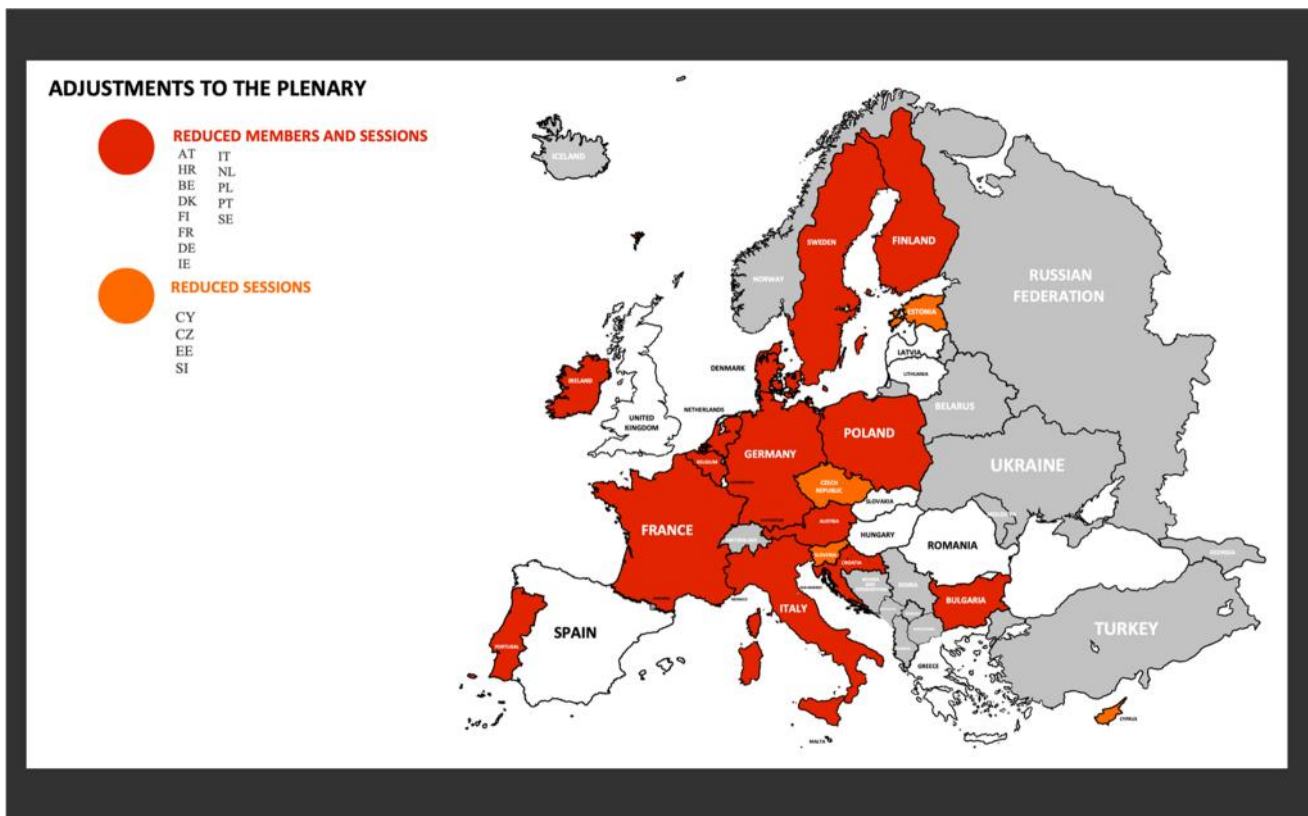
Constitutions and laws normally foresee guarantees to ensure that emergency powers are not abused, in good or bad faith. For instance, Member States Constitutions or laws provide for some of the following guarantees for **Parliaments**: Parliaments are immediately informed of the decision to declare the state of emergency, and/or of the main acts or decrees adopted under the state of emergency; vote ex ante and/or ex post; vote on each measure adopted by the government; scrutinise the government emergency activities and measures' implementation; the government decision to extend the state of emergency needs to be re-approved by Parliament, etc. Furthermore, a typical guarantee foreseen by Constitutions against the indeterminate prolongation of the state of emergency is the fact that the state of emergency and the related

¹ It is interesting to note that: Croatia and Poland Constitutions foresee a "state of emergency" but the governments decided not to make use of it and preferred other "lighter" regimes, while Slovakia moved from "exceptional situation" to "emergency" to face a worsening situation. And also that regardless of their constitutional and legal differences in relation to the regulation of emergency powers, all Member States have adopted very similar restrictive measures.

² According to some commentators, this decision is a logical consequence of the type of emergency measures adopted and the rights derogated, while others remarked that the ECHR already leaves enough margin of manoeuvre for State Parties to enact Covid-19 measures without the need to table such derogations.

measures are temporary in duration and often have a sunset clause. Another guarantee is that the possibility for the **judiciary** to scrutinize the necessity and proportionality of the decision in order to declare the state of emergency and/or of the related measures.

Parliaments had to **reorganize their activities** not only due to the declaration of a state of emergency, but also for sanitary reasons, by postponing their sessions or reducing or suspending their works, resorting to videoconferencing and remote voting. Map 2 shows that a wide majority of Parliaments reduced both the sessions and the presence of Members, while Map 3 shows that the majority of Parliaments did not take measures for remote sessions and voting, and some others did so only for committee meetings.

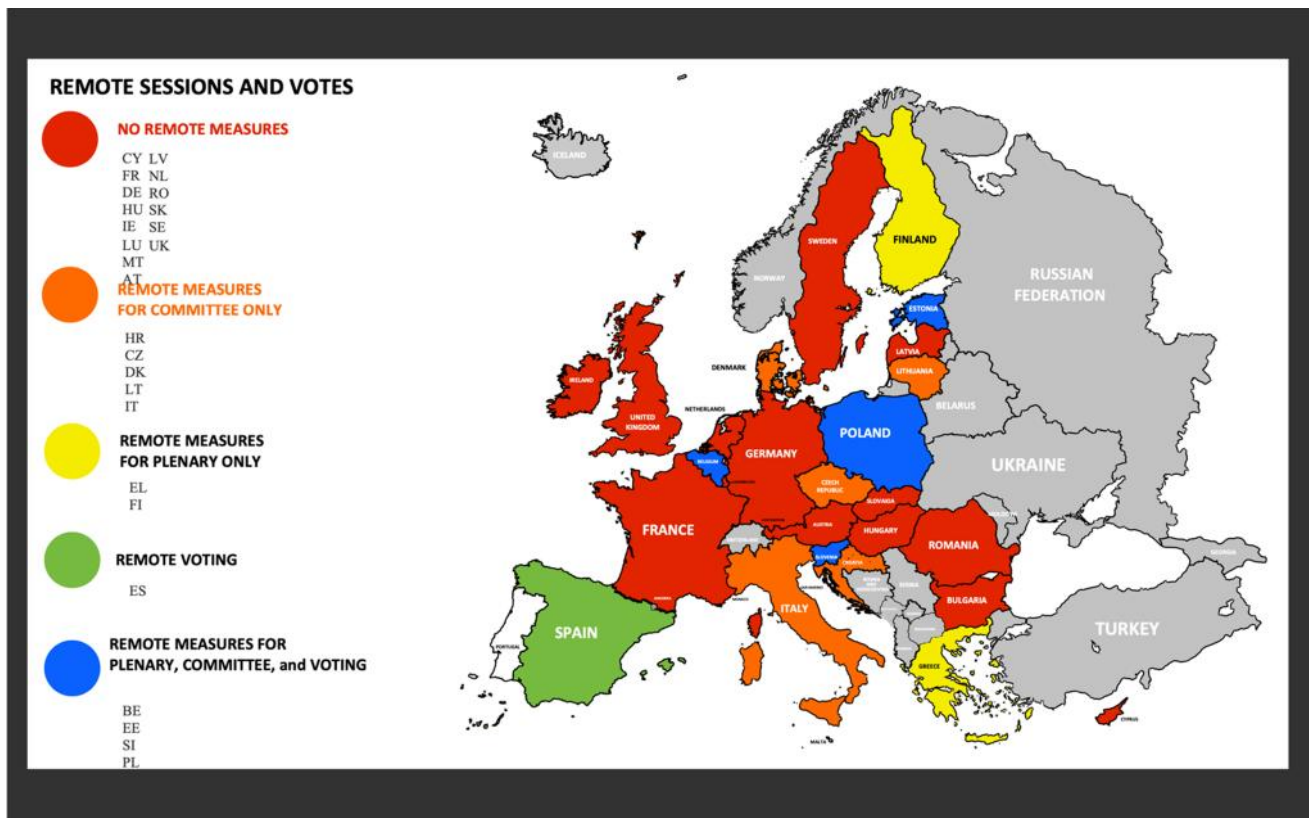


Map 2: Parliaments' adjustments to the plenary. Source: ECPRD data as of 20 April 2020

Against this backdrop, the **European Parliament** reaffirmed these guarantees and limitations to emergency powers in its [resolution](#) of 17 April 2020 on the EU coordinated action to combat the COVID-19 pandemic and its consequences, that "all measures taken at national and/or EU level must be in line with the rule of law, strictly proportionate to the exigencies of the situation, clearly related to the ongoing health crisis, limited in time and subjected to regular scrutiny". It then called the Commission "to urgently assess whether the emergency measures are in conformity with the Treaties and to make full use of all available EU tools and sanctions to address this serious and persistent breach, including budgetary ones, underlining once again the imminent need for an EU mechanism on democracy, the rule of law and fundamental rights".

In almost all Member States the decision to declare a state of emergency, as well as the adoption of subsequent measures (including on the holding or postponing of elections), was highly **consensual** (often unanimous) and taken with the involvement and support of the opposition, in consideration of the exceptional relevance of the decision to take. On the contrary, in few other Member States dialogue and consensus were not achieved and **tensions** emerged on the content of the declaration and on the measures adopted, leading to national (and international) debates. The cases of Hungary and Poland were very recently mentioned by the European Parliament in its recent [resolution](#) of April 17, where it affirmed that it "deems it totally incompatible with European values both the decision from the Hungarian Government to

prolong the state of emergency indefinitely, to authorise the Government to rule by decree without time limit, and to weaken the emergency oversight of the Parliament, and the steps taken by the Polish Government – namely changing the electoral code against the judgment of Constitutional Tribunal and provisions laid by law – to hold Presidential elections in the middle of a pandemic, which may endanger the lives of Polish citizens and undermine the concept of free, equal, direct and secret elections as enshrined in the Polish Constitution¹³.



Map 3: Parliaments' adjustments: remote sessions and votes. Source: ECPRD data as of 20 April 2020

In other Member States, the government, the President of the Republic and the Parliament negotiated some modifications to the acts proposed by the government: for instance, in Bulgaria a proposal to punish misinformation was vetoed by the President and consequently scrapped by the Parliament.

Concerning the impact of COVID-19 measures on the **judiciary**, a large number of MSs have suspended judicial procedures and postponed deadlines or changed their working methods by resorting to written procedures and electronic means like video-conferences. International and European judicial cooperation instruments (like EAW and EIO) are also suspended, at least in their execution. The Council has organised an informal video-conference of Justice Ministers on 6 April 2020 on the matter, while the Commission decided to set up a “crisis management group” on the EAW.

³ 19 Member States reacted to the approval of the Hungarian emergency law by issuing a [Statement](#) now supported by 19 MSs (Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, joined by Bulgaria, Cyprus, Estonia, Latvia, Lithuania, Romania) affirming: “In this unprecedented situation, it is legitimate that Member States adopt extraordinary measures to protect their citizens and overcome the crisis. We are however deeply concerned about the risk of violations of the principles of rule of law, democracy and fundamental rights arising from the adoption of certain emergency measures”.

Freedom of movement

A wide majority of Member States have reintroduced **temporary controls at their borders, with a dramatic impact on Schengen and free movement**. As the Commission reported in its [information note of 8 April](#), "as of 7 April, Ireland is still the only Member State that has not introduced border restrictions or border closures. Eleven Member States have fully closed their borders and a further fifteen Member States have partially closed their borders. Airports are currently open in nine Member States, while the remaining Member States have implemented restrictions on arrivals and flights. No Member State has introduced a ban on freight, land-based supply chains, particularly roads that today account for 75% of freight transport, and delays at border crossings have been reduced since the last report as more green lanes have been introduced to ease congestion. There are punctual difficulties at specific (and recurring) border crossings, with waiting times exceeding the recommended 15 minutes". The legality of cross-border mobility restrictions introduced in the name of COVID-19 is put in doubt by some analysts⁴. The Commission is working to ensure a coordinated approach in relation to EU external borders and has invited the Schengen Member States and Associated States to prolong the application of the travel restriction on non-essential travel from third countries into the EU+ area by another 30 days, expiring on 15 May 2020.

Citizens' freedom of movement has been restricted radically at local, regional, national level by measures adopted to fight Covid-19, as movement of persons raise the risks of contagion. The Commission reports in the same information note that "in terms of movement restrictions on citizens, there are currently national lockdowns in force in twenty-six Member States, with varying degrees of severity. Schools and kindergartens are closed in all Member States bar Sweden, while universities are closed in all Member States. Shops, restaurants and bars are closed in twenty-six Member States, either voluntarily or through decree, with Sweden being the only Member State that has no restrictions in place"⁵.

The **proportionality of the sanctions** imposed for violation of the restrictive measures remains an issue to be followed, as most Member States used, increased or introduced a wide range of fines and prison sentences to punish violations of the new restrictions. Italy enforced a harsh policy of controls, fines and sentences, but subsequently decided to decriminalise some behaviors.

The **European Parliament**, in its [resolution](#) of 17 April 2020, urged "the Member States to adopt only necessary, coordinated and proportionate measures when restricting travel or introducing and prolonging internal border controls, after careful evaluation of their effectiveness to address the public health issue and based on existing legal provisions, namely the Schengen Borders Code and the Freedom of Movement Directive and in full observance of the Charter of Fundamental Rights of the European Union". Parliament stressed that border controls and restrictions must be proportionate and exceptional and emphasised "the need to get back to a fully functioning Schengen Area of free movement with no internal border controls as part of a crisis exit strategy".

In the last weeks, many governments have announced or gradually implemented a relaxation of restrictions (among others, Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Italy; the date of 3 May has been indicated as a turning point in time in many countries). The Commission is working to coordinate MSs exit strategies through a [Joint European Roadmap towards lifting COVID-19 containment measures](#).

⁴ See CEPS, "Love thy neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen Area", https://www.ceps.eu/wp-content/uploads/2020/04/LSE2020-04_Love-thy-neighbour.pdf

⁵ See also "Europe's coronavirus lockdown measures compared", <https://www.politico.eu/article/europes-coronavirus-lockdown-measures-compared/>

Freedom of expression, media freedom, freedom of information

While the core of the European approach on countering **fake news and disinformation campaigns** (often sponsored by foreign powers, with reports pointing at Russia and China) remains the close **collaboration** with private companies, concerns have been raised in relation to some national initiatives aimed at **criminalising** "fake news". Hungary has recently approved a similar provision, which is widely criticised by international organisations for violating freedom of expression and having a chilling effect on journalists. In Romania, a decree allows the authorities to remove content and block websites where such content provides "false information" regarding the evolution of COVID-19 and the prevention measures, without the possibility to appeal against the decision. Both measures have been criticised by the [Commissioner for Human Rights of the Council of Europe](#), who also reported that in Italy and Czech Republic journalists were prevented from obtaining information from health authorities or information documenting law enforcement operations. [Death threats](#) were received by an investigative journalist in Slovenia, after he made a request for access to information to the government and was attacked by certain media. In Estonia the Interior Minister publicly [trivialized](#) coronavirus during a governmental press conference. Recently, the Danish and Italian governments had to defend press freedom against **foreign interferences**, respectively from [China](#) and Russia. The Italian government issued a statement in defence of press freedom in reaction to the uproar caused by threats by Russian authorities against a journalist enquiring on the Russian aid mission deployed in Italy. Commissioner Jourova condemned the event by stating that "threats against journalists are [unacceptable](#)".

Freedom of assembly

All Member States have adopted strict measures drastically limiting freedom of assembly, with the exception of Sweden that initially issued only recommendations destined to their citizens, but no binding restrictive measures. In Member States there difficulties in enforcing lockdown measures have been reported, with a considerable number of fines being made by law enforcement personnel and campaigns by authorities to ensure public awareness and compliance by citizens⁶. In this context, the issue of the necessity and the proportionality of sanctions is relevant, as citizens might contest in courts their legality.

In the last weeks, some governments have started relaxing some of the restrictions, while others have announced it (among others, Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Italy; the date of **3 May** has been indicated as a turning point in time in many countries). The Commission is also involved in trying to coordinate Member States exit strategies through a [Joint European Roadmap towards lifting COVID-19 containment measures](#).

Privacy and data protection

In an effort to contain the spread of the disease, a wide range of measures having an impact on citizens' right to privacy and to data protection have been taken or are being discussed in the Member States, with the EU trying to ensure a harmonised approach in the field⁷.

Bulgaria, Czech Republic, Slovakia and Spain have adopted new **laws** obliging providers to share data with state authorities, with Bulgaria and Slovakia emergency legislation specifically obliging telecoms operators to provide **personal data such as location data** to public authorities upon request, while for the Czech Republic user consent is required.

⁶ In few Member States ([Poland](#), [Greece](#), [Bulgaria](#)), some religious authorities have initially resisted the enforcement of the restrictive rules.

⁷ the information presented in this section is drawn from a large number of European and national press articles.

In Austria, Belgium, France, Germany and Italy, it was announced that mobile operators were sharing **anonymised location data** with public authorities, in order to map movements and/or concentrations of individuals.

Poland has developed a **compulsory app locating persons in quarantine**, who are required to send a selfie of themselves. Cyprus has developed an app for persons working outside of home. In France, Germany, Ireland, Italy, Spain and the United Kingdom, research to develop AI solutions to limit the spread of the virus is on-going, with **tracking apps** most probably of a voluntary nature expected in France, Ireland and Italy. It remains to be seen clearly if these apps will be based on consent, or if they will be compulsory, and which data they will use. Romania also has reportedly developed a compulsory tracking app.

Research is also focusing on methods that do not imply central tracking and use Bluetooth. The Commission is sponsoring with the Joint Research Center a project dealing with data related to Coronavirus, while EDPS called for a [pan-European](#) model "COVID-19 mobile application", coordinated at EU level. The Commission has issued on 8 April a [recommendation](#) to Member States on data protection and apps and on 15 April a Common EU [Toolbox](#) for Member States, as well as [Guidance](#) on Apps supporting the fight against COVID 19 pandemic in relation to data protection.

Drones are being used in Belgium, France and Italy to inform the population and monitor respect of social distancing rules.

The information provided by governments is not always very clear and transparent and the debate seems to happen mostly behind closed doors, with some Member States having involved also their Data Protection Authorities. The **European Parliament** in its [resolution](#) on Covid-19 (Par.s 52 and 53) called on "the Commission and the Member States to publish the details of these schemes and allow for public scrutiny and full oversight by data protection authorities (DPA)", noted that "mobile location data can only be processed in compliance with the ePrivacy Directive and the GDPR" and stressed "that national and EU authorities must fully comply with data protection and privacy legislation, and national DPA oversight and guidance". Parliament called for systems that are voluntary, decentralised, transparent, temporary, and based on data protection by design and data minimisation.

Asylum

Most Member States have **suspended asylum procedures, Dublin transfers and returns**. Concern remains on the situation in centres across the EU, and some governments are actively addressing the situation. The situation in Greece remains under observation, with the Commission supporting national authorities in addressing the Covid-19 emergency, and the EP scrutinising the developments. Portugal has decided to temporarily treat migrants and asylum seekers [as citizens](#), to make sure they can access health services, and France decided to [extend](#) for 3 months the validity of foreigners' residence documents.

The European Parliament expressed its concern on the situation of asylum seekers also in its 17 April [resolution](#) (par. 50), where it pointed out that "appropriate sanitary conditions and medical support" must be provided and expressed deep concern "at the situation of refugees and asylum-seekers arriving at the Greek islands, and in hotspots and detention centres, who do not have access to adequate health care and who are particularly at risk". Parliament considered "that necessary solutions, including the preventive evacuation and relocation of the population at high risk, must be found to ensure the appropriate material conditions and social distancing to avoid contamination".

Prisons

Tensions emerged in some prisons notably in the initial phase of implementation of the stricter Covid-19 measures, notably in Italy. Among the measures implemented were the suspension of visits and the limitation of air time due to health security measures. Some Member States are reported to have released certain categories of prisoners. The Council of Europe bodies are particularly active on this issue, while Justice Commissioner Reynders recently [wrote](#) to Member States to call them to take appropriate measures for detainees' health in relation to Covid-19 on the basis of international guidelines.

Discrimination

Discrimination against persons of a certain race (Asians), nationality (for instance, Italians), or health condition (persons affected or thought to be affected by Covid-19) emerged, notably in the first phases of the contagion. Governments shall take measures to protect vulnerable categories in general, including persons with Covid-19 that could be victims of discriminations in the access to services, notably health services. Vulnerable groups like homeless persons, Roma, persons with disabilities, women and LGBTI+ persons at risk of domestic violence due to the lockdown, aged persons, need specific action by governments to protect their life, health and in general to make sure they can enjoy their rights. The Fundamental Rights Agency is closely monitoring the situation in the Member States through its network and monthly [reports](#) on fundamental rights implications of Covid-19.

Other issues relevant for Art. 2 TEU

Some controversial measures proposed or adopted by some Member States in this period of emergency have raised serious questions in relation to their opportunity and timing, as the possibilities for a true democratic debate are today restricted: Parliaments' works and powers are limited, while citizens cannot meet publicly to express, debate or demonstrate their point of view. Restrictions notably limit the possibilities of the opposition and those holding alternative views to be heard and have an influence on the decisions made. Media reported about a series of controversial measures that raised national, European and international debates, among which: the [umbrella law](#) in Slovenia; measures on the [Social dialogue council](#) in Poland; the role and powers given to the police and the army, which was or is a matter of debate in some Member States, among which Bulgaria, Denmark and Slovenia; the Polish laws on banning abortion in cases of severe foetal anomaly, and on the limitation of sexual education, providing for up to 3 years in prison for offenders (that were sent to committee) and the Hungarian government draft law impeding legal gender recognition; the holding of Presidential elections during the coronavirus crisis on the 10th of May in Poland, as well as the recent proposal in the Polish Parliament to extend to 7 years the duration of the President mandate.

The latter Polish and Hungarian measures were criticised by the European Parliament, in its [resolution](#) of 17 April 2020, as Parliament strongly rejected "any attempts to backtrack on SRHR and LGBTI rights, and in this context condemns the attempts to further criminalise abortion care, stigmatise HIV positive people, and undermine young people's access to sexuality education in Poland, as well as the attack on transgender and intersex people's rights in Hungary" and called on "the Member States to effectively guarantee safe and timely access to sexual and reproductive health and rights (SRHR) and the necessary healthcare services for all women and girls during the COVID-19 pandemic, especially access to contraception, including emergency contraception, and to abortion care".

Conclusions

There is a wide consensus among Member States, EU institutions and European and international institutions, that exceptional measures adopted in the fight against Covid-19 have to respect democracy, rule of law and fundamental rights. This has been affirmed at UN, Council of Europe and EU level, including most recently on 22 April at the informal video-conference of the General Affairs Council. The Commission is monitoring national measures, also in the framework of the new EU mechanism on the Rule of Law. The European Parliament is doing the same and the LIBE committee and its DRF MG are instrumental in this exercise. It is important for the EP to equip itself with the necessary and appropriate internal and external resources and channels of information and research to continue the monitoring activity on Covid-19 measures in EU Member States, and by doing so be fully prepared to play its role in defence of citizens' rights in the framework of the EU mechanism on DRF and assure that through better monitoring, problematic situations are detected, addressed and that enforcement is ensured.

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