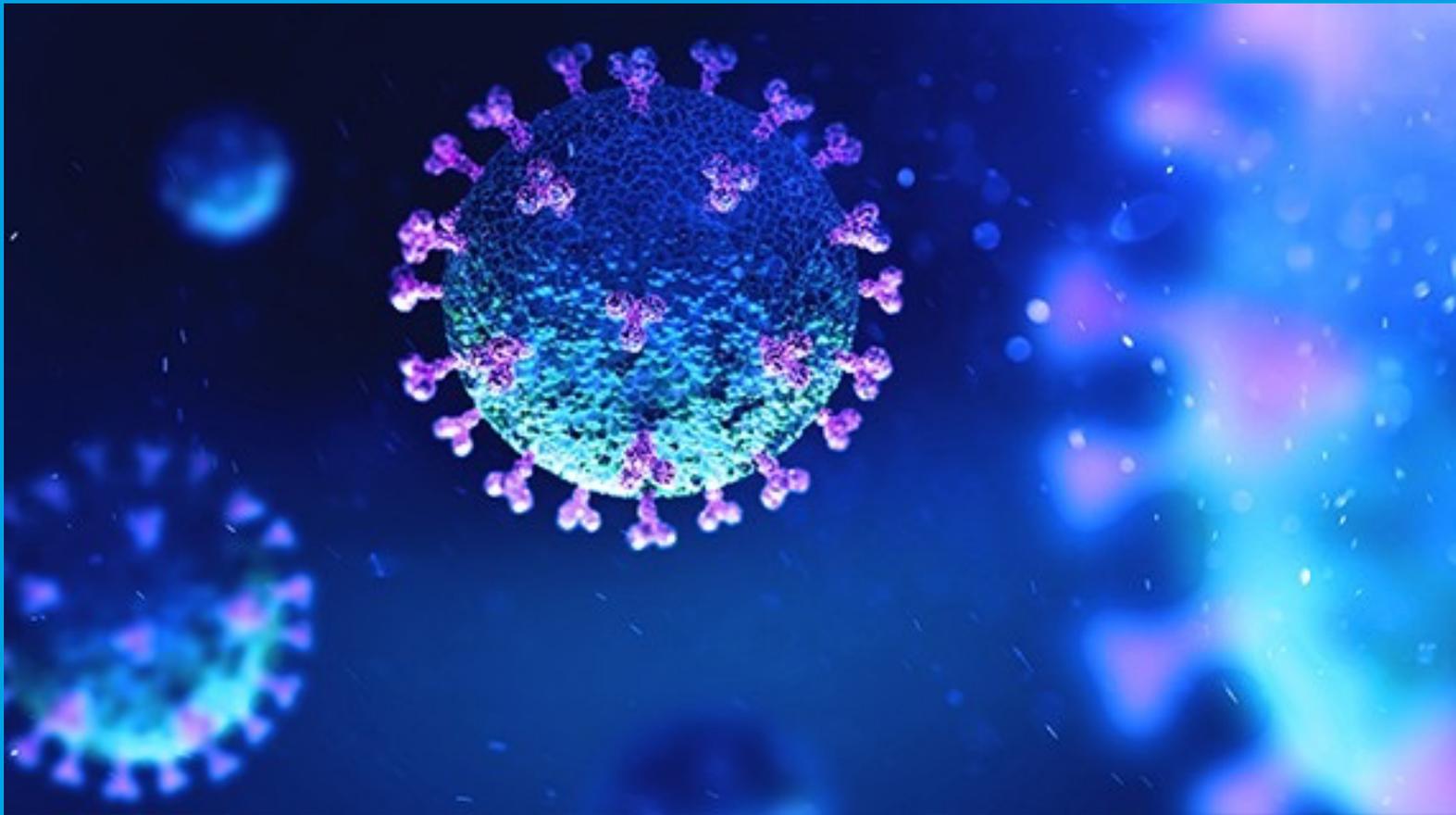


Rule of Law and Good Governance Principles for National Responses to Public Health Emergencies

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The Role of Good Governance and the Rule of Law in Building Public Trust in Data-Driven Responses to Public Health Emergencies

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This project, at the intersection of law, ethics, citizen deliberation, public health and data science, aims to develop a distinct values-based framework to help understand and address the challenges posed by data-driven responses to public health emergencies and the need to build public trust.

In their COVID-19 responses, states have relied on data-driven approaches to justify far-reaching measures, including closing entire business sectors and categories of travel, curtailing personal liberties and requiring compliance with new technologies for contact tracing and social distancing. To be effective, such measures must be internationally co-ordinated, nationally adopted and adhered to by a high proportion of the public. Trust underpins both national adoption and public adherence: trust in international institutions, in the measures adopted, and in their scientific foundations.

This project examines two critical enablers of that trust: good governance and the rule of law. It aims to provide practical guidance on how international and national institutions can build public trust in the processes by which they design and implement data-driven responses to public health emergencies. The research consists of four interconnected work packages which examine:

- (1) International governance frameworks for public health emergencies.
- (2) Values-based principles to guide data-driven responses by national institutions including governments, parliaments, courts and police.
- (3) Reforms that may be needed to data governance (national and international) given the scale of personal data sharing that is required.
- (4) A citizen jury deliberation on the trustworthiness of data-driven measures and what additional safeguards may be needed.

<https://binghamcentre.biiicl.org/projects/the-role-of-good-governance-and-the-rule-of-law-in-building-public-trust-in-data-driven-responses-to-public-health-emergencies>

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Rule of Law and Good Governance Principles for National Responses to Public Health Emergencies

The project that this paper forms part of investigates the hypothesis that good governance and the rule of law enable trust. They do this by creating a perimeter of legitimacy around governments' conduct, ensuring they adhere to their obligations under national and international law, that they conduct their practice in transparent, accountable, and non-arbitrary ways, whilst considering issues such as inequality, and are prevented from disproportionately interfering with rights and liberties.

The aim of this paper is to outline and review the applicable principles to national responses to public health emergencies. It accompanies our paper on *International Law Applicable to Public Health Emergencies and Data Governance*, which provides a mapping of the institutional governance and of international and regional law that applies to PHEs. It builds on previous work by project partners including BIICL/Bingham Centre's research undertaken for Advocates for International Development in the first half of 2020.¹ Rather than providing a comprehensive definition of the rule of law and good governance and their elements, this paper aims to offer a guide to thinking through the rule of law and good governance core principles that should inform government data-driven responses to public health emergencies. The nuanced application of these and other principles to data driven public health response to PHEs will be elaborated across future outputs of this project.

General Understandings of Rule of Law and Good Governance

Whilst both the rule of law and good governance are broad concepts with multiple interpretations and applications, a number of authoritative understandings of the concepts have emerged over time which inform this review and the broader project. This section briefly introduces these understanding before moving to some reflections on the application of some of these principles to PHEs.

On the concept of the rule of law, three authoritative formulations can be found in Lord Bingham's *The Rule of Law* book, the Venice Commission Checklist and the DFID Policy Approach to the Rule of Law. These are summarised below:

¹ See Beqiraj, J., Gauci, J.-P. and Weinberg, N, *Rule of Law in Times of Health Crises*, https://binghamcentre.biicl.org/documents/87_rule_of_law_in_time_of_health_crises_paper.pdf.

Lord Bingham's definition²	Venice Commission³	DFID (now the FCDO)/HMG⁴
Accessibility of laws	Legality (supremacy of the law)	Pre-existing, clear and known Laws binding Public Authorities
Law not discretion	Legal certainty	Equality Before the Law
Equality before the law	Prevention of abuse (misuse) of powers	Protection of human rights
Reasonable exercise of power for the purposes which it was conferred (judicial review)	Access to justice	Access to efficient and predictable justice
Protection of human rights	Respect for human rights	Prevalence of Law and Order
Accessible dispute resolution	Non-discrimination and equality before the law	
Fair trial		
The RoL in the International Legal Order		

The international element of the rule of law is key to national level responses to public health emergencies. "The rule of law requires compliance by the State with its obligations in international law as in national law. It requires laws to be consistent with States' international obligations including, but not limited to, their human rights obligations".⁵ Protection of human rights is increasingly recognised as a core component of the rule of law.

As regards the concept of good governance, its content and core elements have been developed by international organizations such as the World Bank (WB) the United Nations (UN) and the Council of Europe. These are summarised below:

² Bingham, T. (2011). *The Rule of Law*. London: Penguin Books. See also Jowell, J. and O'Conneide, C. (2019). *The Changing Constitution*. Ninth Edition. Oxford: Oxford University Press. Pp. 16; McCorquodale, R. (2010). *The Rule of Law in International and Comparative Context*. London: British Institute of International and Comparative Law.

³ Venice Commission, 'Report on the Rule of Law', April 2011, CDL-AD(2011)003rev <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)003rev-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e)>.

⁴ Department for International Development (2013). 'Policy Approach to Rule of Law'. 12 July 2013. Available here: <https://bit.ly/2XJTxhF>. Pp. 5.

⁵ WHO, *International Health Regulations (2005)* (3rd edn, WHO 2016).

United Nations ⁶	World Bank ⁷	Council of Europe ⁸
Participation	Capacity and efficiency in public sector management	Participation, representation fair conduct of elections
Consensus oriented	Accountability	Responsiveness
Accountability	Legal framework for development	Efficiency and effectiveness
Transparency	Information and transparency	Openness and transparency
Responsiveness		Rule of law
Effective and efficient		Ethical conduct
Equitable and inclusive		Competence and capacity
Follows the rule of law		Innovation and openness to change
		Sustainability and long-term Innovation
		Sound financial management
		Human rights, cultural diversity and social cohesion
		Accountability

Principles of Rule of Law and Good Governance during Public Health Emergencies

Drawing on the sources we have identified above, the following principles emerge as requirements for good governance and rule of law compliant data-driven responses to public health emergencies.

Legality and Legal Certainty	National level measures should have a basis in laws that are in force at the time measures are applied. Measures must be in compliance with constitutional principles and should be authorised by law and subject to parliamentary scrutiny and enforcement and review by the Courts. In particular, derogations from human rights should be authorised in a law approved by parliament or in an emergency decree issued by the Governments that is later subject to parliamentary approval.
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⁶ <https://www.unescap.org/sites/default/d8files/knowledge-products/good-governance.pdf>

⁷ <http://documents.worldbank.org/curated/en/604951468739447676/pdf/multi-page.pdf>

⁸ <https://www.coe.int/en/web/good-governance/12-principles>

	<p>The Venice Commission Checklist includes the following components under the matter of legality:</p> <ul style="list-style-type: none"> - Supremacy of the Law - Compliance with the law - Adherence to obligations under international law - Law-making processes that are transparent, accountable, inclusive and democratic - Exceptions in emergency situations (see below). <p>Closely linked to the question of legality is the principle of legal certainty and clarity. Rules promulgated should be available and accessible and should be clear – written and communicated in plain language.</p> <p>Under legal certainty the Checklist includes:</p> <ul style="list-style-type: none"> - Accessibility of legislation - Accessibility of court decisions - Foreseeability of the applicable law - Legitimate expectations - Non-retroactivity - No crime without a law and no penalty without a law - Claim preclusion <p>Beyond being certain, rules and measures should also be clear. They should be written and communicated in plain language so that members of the public are able to comprehend them without necessitating access to other forms of advice. This has the potential of overcoming the risk of reliance on secondary sources of inaccurate information and of incorrect implementation of the rules. Importantly, rules should be clear and accessible for all and should be delivered in a range of languages and forms to reach the widest possible audiences.</p>
<p>Emergency situations should be limited to what is strictly necessary and legislated for.</p>	<p>A particular component to the question of legality and legal certainty is the question of emergency situations and how these are addressed under legal frameworks. In the context of PHEs some States have declared States of Emergency or similar measures. Whilst permitted under rule of law and good governance, such situations are subject to a series of limitations if they are to be rule of law compliant. The Venice Commission’s Checklist includes a series of practice benchmark questions to be considered in emergency situations to ensure necessary measures, taken to safeguard the nation, are not abused by those in power. These include:</p> <ul style="list-style-type: none"> - Are there specific national provisions applicable to emergency situations? - Are derogations to human rights possible in such situations under national law? - What are the circumstances and criteria required in order to trigger an exception? - Does national law prohibit derogation from certain rights even in emergency situations?

	<ul style="list-style-type: none"> - Are derogations proportionate – that is, limited to the extent strictly required by the exigencies of the situation – in duration, circumstances and scope? - Are the possibilities for the executive to derogate from the normal division of powers in emergency circumstances also limited in duration, circumstance and scope? - What is the procedure for determining an emergency situation? - Is there parliamentary control and judicial review of the existence and duration of an emergency situation, and the scope of any derogation thereunder? <p>The checklist views States of emergency as something to be legislated for in order to ensure that the measures adopted during an emergency are circumscribed by pre-existing legal frameworks.</p> <p>Emergency Situations do not allow <i>carte blanche</i> for States and Governments to ignore the broader principles of the rule of law. The rule of law is not over-ridden by emergency situations but is rather a crucial component to the adoption and implementation of effective measures in responding to such situations.</p>
<p>Derogations should be of an exceptional and temporary nature and circumscribed by various conditions</p>	<p>Emergency situations, including PHEs, allow for derogation from certain human rights obligations. The possibility is accounted for in the main human rights instruments whilst soft law instruments, such as the Siracusa Principles,⁹ further expand on the limitations to the right of States to derogate. Such limitations include adhering to other principles (e.g., necessity and proportionality).</p> <p>To be justifiable, derogations must be:</p> <ul style="list-style-type: none"> - of an exceptional and temporary nature - related to a public emergency which threatens the life of the nation and the existence of which is officially proclaimed - strictly required by the exigencies of the situation (necessity, proportionality and legitimate aim) - consistent with the State’s other obligations under international law - non-discriminatory - immediately communicated to the other parties of the applicable treaty (e.g. through the UN Secretary General for the ICCPR). - of limited duration <p>Critically, derogations should only be resorted to as a matter of last resort. Measures that fall short of outright derogation, such as limitations, should be</p>

⁹ American Association for the International Commission of Jurists (1985). 'Siracusa Principles: on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights'. April 1985. Available at: <https://bit.ly/30lanVZ>

	<p>considered prior to a decision to derogate. This is an extension of the principle of proportionality.</p>
<p>Necessity, Proportionality, Legitimate Aim, and Time Limitations</p>	<p>The requirement of necessity stipulates that restrictions which negatively impact the enjoyment of rights and liberties should only be introduced to the extent that they are necessary. Such necessity must be assessed on the basis of objective criteria established in verified, transparent scientific advice. Availability of, and reliance on, data and scientific information is critical in this regard.</p> <p>Even if the situation necessitates extraordinary measures, any such measures must be a proportionate means of achieving a legitimate aim with respect to addressing the situation at hand.</p> <p>Emergency measures should not be open-ended and should be subject to regular and consistent review as to their necessity and proportionality given evolving realities. Extensions to limitations should be subjected to parliamentary scrutiny and should be based on solid scientific evidence, which should also be shared with and explained to the public.</p>
<p>Equality Before the Law and Non-Discrimination</p>	<p>Any measures implemented must respect the principles of non-discrimination including with respect to the protected characteristics set out in national and international law.</p> <p>Beyond being an element of the rule of law, non-discrimination is a concept within human rights law. For instance: Article 2 of the ICCPR provides that: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Article 2 of the ICESCR similarly provides: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.</p> <p>Critically, non-discrimination does not preclude the application of positive action measures. Such measures may include the prioritisation of certain groups for vaccination depending on the level of risk, and measures that specifically target concerns impacting particular communities. Non-discrimination requires more than addressing current discriminatory practices. The Venice Commission checklist asks: Are positive measures expressly provided for the benefit of particular groups, including national minorities, in order to address structural inequalities?</p>

<p>Compatibility with Other Legal Obligations</p>	<p>Whilst some limitations and derogations can be provided for in times of emergency, States continue to be bound by their other international obligations and in line with international law, must perform their obligations in good faith. Internal laws, including ones relating to emergencies, cannot justify the breach of States’ international obligations.¹⁰</p> <p>Some subject-specific systems of international law have built in mechanisms to allow for protective measures to be taken by States. The WTO, for instance, allows members, under certain circumstances, to adopt restrictive measures that are necessary to protect public health and public welfare (e.g. export bans, quantitative restrictions on exports, subsidies etc). For such measures to be legitimate, they must be temporary, non-discriminatory, and should not constitute a restriction on international trade. In the field of data protection, national responses should comply with the international principles and standards, such as those set out for instance in the CoE instruments and the GDPR.¹¹</p>
<p>Parliamentary Scrutiny</p>	<p>Ensuring effective (even if adjusted) parliamentary scrutiny is key to ensuring that (emergency) measures and their adoption abide by procedural and substantive rules. Parliament should exercise authority over the existence and duration of emergency measures, including the scope of any derogation. It should also provide oversight on Governments measures, especially those implemented on the basis of delegated authority. This is particularly critical in the context of PHEs where measures must be adopted swiftly in response to evolving realities.</p>
<p>Effective Remedy and Judicial Review</p>	<p>Whilst the legislative branch should be involved in scrutinising measures, access to justice for those negatively impacted (or likely to be negatively impacted) by measures must also be secured. Access to justice is a foundational principle of the rule of law and access to a remedy is a key element of every human right.</p> <p>In the words of the UN: ‘Access to justice is a basic principle of the rule of law. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.’¹² It is therefore fundamental that even in times of emergency, effective access to timely justice is secured. Access to justice is about more than having a functioning court system and encompasses for instance, access to legal information, advice and representation.</p>

¹⁰ See Article 26 of the Vienna Convention on the Law of Treaties.

¹¹ For further details see Deliverable 1.1. [link]

¹² <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>

	<p>Access to justice and an ability to challenge decisions must be secured also in times of emergency, including for people who are accused of violations of rules and measures linked to such an emergency.</p>
<p>Access to Information</p>	<p>Access to information is fundamental to good governance and public trust. In the context of hazardous substances, the UNEP and UN-OHCHR Guidelines on Human Rights and Hazardous Substances call for guaranteeing to all persons, access to information about hazardous substances as an extension of Article 19, ICCPR. Information must be available, accessible and adequate, and must be guaranteed to all persons, including those in vulnerable situations. Accessible information also helps address mis(and dis)information, which has been identified as a critical concern in the response to COVID-19.¹³</p>
<p>Transparency and Open-Government</p>	<p>'Transparency is critical for accountability and for public trust'.¹⁴ Transparency on the full impact of a public health emergency, and what is being done to address it, is essential to ensure public trust and support of new policy approaches to such situations.</p> <p>Being transparent in how decisions are made is a key component of good governance. Beyond transparency in the processes, 'effective transparency requires proactive community strategies that reach vulnerable and at-risk populations with the information they need in accessible formats'.¹⁵ Such transparency can also mitigate the spread of mis(and dis)information by providing the public with a trusted avenue to confirm information.¹⁶</p> <p>At the international level, transparency is also critical – to ensure better coordination of responses, sharing of effective and failed practices and policies, and supporting States in tailoring their own responses to public health emergencies. The UN Sustainable Development Agenda recognises</p>

¹³ See for example: James Pammet and others, 'Resist: Counter-Disinformation Toolkit' (Government Communication Service 2019) <https://gcs.civilservice.gov.uk/wp-content/uploads/2019/08/6.5177_CO_RESIST-Disinformation-Toolkit_final-design_accessible-version.pdf>; Julie Posetti and Kalina Bontcheva, 'DISINFODEMIC: Dissecting Responses to COVID-19 Disinformation' (UNESCO 2020) Policy brief 2 <https://en.unesco.org/sites/default/files/disinfodemic_dissecting_responses_covid19_disinformation.pdf>.

¹⁴ UN DESA, 'UN/DESA Policy Brief #74: Resilient Institutions in Times of Crisis: Transparency, Accountability and Participation at the National Level Key to Effective Response to COVID-19' (UN Department of Economic and Social Affairs 2020) 2 <<https://www.un.org/development/desa/dpad/publication/un-desa-policy-brief-74-resilient-institutions-in-times-of-crisis-transparency-accountability-and-participation-at-the-national-level-key-to-effective-response-to-covid-19/>> accessed 25 May 2020.

¹⁵ *ibid.*

¹⁶ Montero, A.G. and Le Blanc D. (2020). 'UN/DESA Policy Brief #74: Resilient Institutions in Times of Crisis: Transparency, Accountability and Participation at the National Level Key to Effective Response to COVID-19'. *United Nations Department of Economic and Social Affairs*, 15 May 2020 [online]. Available at: <https://bit.ly/2Ad9Mul>

	<p>this and sets out as a global target (SDG 16.6) to “Develop effective, accountable and transparent institutions at all levels”.</p>
<p>Anti-Corruption and Public Accountability</p>	<p>Corruption threatens public trust in government and hence the effectiveness of responses to public health emergencies. It must continue to be combatted throughout responses to public health emergencies and efforts in this regard should be increased in order to address the heightened risk of corruption during such times. State responses to PHEs are fraught with opportunities for corruption, and States must be vigilant to ensure corrupt practices do not occur. Even the appearance of impropriety and abuse of power or position will likely negatively impact public trust, especially if such practices are perceived as being ignored or normalised. Legislative, judicial and other institutional oversight (such as public administration commissions, internal and external auditors) can help mitigate some of the associated risks in this regard.</p>
<p>Evidence-Based Policy Making</p>	<p>Whilst the term evidence-based policy making is a mantra of many, good governance requires that any policy measure adopted is based on solid, verifiable evidence. This is particularly critical in responding to public health emergencies, including when public hesitancy towards vaccination efforts is part of the challenge being addressed. Beyond making policy decisions on the basis of evidence, the availability and accessibility of that data and the possibility of expert and public scrutiny thereof is a component of good governance that will contribute to public trust. Translating complex scientific data into plain language that general publics can understand will help the public overcome concerns that arise during PHEs.</p>
<p>Participation, Engagement and Representation</p>	<p>SDG target 16.7 aims to “Ensure responsive, inclusive, participatory and representative decision-making at all levels”. The associated indicators are namely: the proportion of population who believe decision-making is inclusive and responsive, by sex, age, disability and population group. Such participation has proven to be crucial in the response to COVID-19, and can be leveraged by public institutions to ensure effective and inclusive responses to the pandemic and other PHEs.¹⁷</p>
<p>International Cooperation</p>	<p>Whilst the above criteria focus primarily on national level responses, such responses cannot be divorced from the obligations of States towards other States and towards the international community as a whole. Such</p>

¹⁷ Beqiraj and others (n 1) 40.

	<p>international obligations are a clear part of the international dimension of the rule of law, which is described above. This is also part of the UN SDGs, which pledge to “Strengthen relevant national institutions, including through international cooperation (...)” (Target 16.A).</p>
<p>Sustainability</p>	<p>In adopting and monitoring measures to address PHEs, States should consider the longer-term impacts of the measures being instituted, and whether additional measures are needed to address concerns likely to arise in the longer-term as a result of emergency measures implemented in response to PHEs (e.g. unemployment and loss of life due to lockdowns).</p>

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