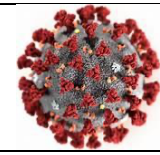


National COVID-19 Science Task Force (NCS-TF)



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Comment on planned updates:

Title: Masks as an essential good?

Summary of request/problem:

Masks are recommended where social distancing cannot be respected, and mandatory in certain enclosed spaces such as public transport, as well as schools, and shops in certain cantons. They are protective of the wearer and especially of others, and as such are part of the bundle of measures needed to keep the COVID19 pandemic under control.

Since they are required for the protection of life, and mandatory for certain parts of life, should masks be considered an essential good? They are free for healthcare professionals on the grounds that they are required to protect them and others. Should they be free at the point of use for citizens, and if so for whom and how?

Zusammenfassung

Das obligatorische Tragen von Masken setzt deren Verfügbarkeit voraus. Gemäß dem COVID19-Gesetz werden medizinische Hilfsgüter, die als Reaktion auf die COVID-19-Pandemie benötigt werden - eine Definition, die Masken einschließt - als ein essentielles Gut behandelt. Dieses Gesetz erlaubt die direkte Verteilung dieser Güter durch die Kantone oder, zumindest subsidiär, durch den Bund.

Personen, die auf Sozialhilfe oder Zusatzbeiträge angewiesen sind, haben das Recht, die Kosten für Masken vom Staat übernehmen zu lassen oder auf die kostenlose Verteilung von Masken. Insbesondere müssen die staatlichen Behörden dafür sorgen, dass die Kinder die Masken haben, die sie für den Schulbesuch benötigen (gegebenenfalls durch Verteilung der Masken an die Kinder).

Für Personen, die keinen Zugang zur Sozialhilfe haben (Personen in einer irregulären Situation, Personen, die von den Sozialbehörden sanktioniert werden, usw.), ist die verfassungsrechtliche Garantie eines staatlichen Beitrags wesentlich geringer als die der Sozialhilfe und umfasst nur Wohnung, Nahrung, Kleidung, Hygiene und medizinische Grundversorgung. In der gegenwärtigen Situation gehören Masken jedoch zu den Mindestmitteln, auf die jede Person, die im Land lebt oder sich vorübergehend dort aufhält, Anspruch hat.

Executive summary

The applicability of mask mandates requires their accessibility. According to the COVID19 Act, medical supplies necessary to face the COVID-19 pandemic - a definition which includes masks - are treated as an essential good. This Act allows direct distribution of such goods by the Cantons or, at least subsidiarily, by the Confederation.

People depending on social aid contributions (Sozialhilfe) or supplementary contributions (Ergänzungsleistungen) have a right that the cost of masks be covered by the state, or to the distribution of free masks. In particular, State authorities must ensure that children have access to the masks they need to go to school (if necessary by handing the masks out to them).

For people with no access to social aid (people in irregular situations, people sanctioned by the social authorities, etc.) the constitutional guarantee for a contribution of the state is much lower than what is provided for by social aid and includes merely shelter, food, clothing, hygiene and basic health care. In the current situation, however, masks are part of the minimum means each person living or temporarily staying in this country has a right to.

Résumé

Le port obligatoire du masque exige sa disponibilité. Selon la loi COVID19, les fournitures médicales nécessaires pour faire face à la pandémie COVID-19 - une définition qui inclut les masques - sont traitées comme un bien essentiel. Cette loi permet la distribution directe de ces biens par les cantons ou, au moins à titre subsidiaire, par la Confédération.

Les personnes dépendantes de l'aide sociale ou des contributions complémentaires ont le droit que le coût des masques soit pris en charge par l'État, ou à la distribution de masques gratuits. En particulier, les autorités de l'État doivent veiller à ce que les enfants disposent des masques dont ils ont besoin pour aller à l'école (si nécessaire en leur distribuant les masques).

Pour les personnes n'ayant pas accès à l'aide sociale (personnes en situation irrégulière, personnes sanctionnées par les autorités sociales, etc.), la garantie constitutionnelle d'une contribution de l'État est bien inférieure à ce qui est prévu par l'aide sociale et ne comprend que le logement, la nourriture, les vêtements, l'hygiène et les soins de santé de base. Dans la situation actuelle, cependant, les masques font partie des moyens minimaux auxquels a droit toute personne vivant ou séjournant temporairement dans ce pays.

Masks as an essential good?

Masks are an essential good

Masks are needed to protect oneself and others (family members, clients, co-passengers, etc.) and mandatory in public transports as well as shops and schools (depending on cantons).

Many people need masks to work or go to work (or to go to school, etc.). On this basis, it can be argued that masks have become essential goods: they are required for essential parts of life. Moreover, the applicability of mask mandates requires their accessibility.

The new COVID-19 Act (Federal Act on the legal bases of the Federal Council Ordinances to overcome the COVID-19 epidemic), adopted by the Federal Parliament on September 25, 2020, and which came into force with immediate (and retroactive) effect on September 17, 2020 (RO 2020 3835-3844), prescribes that in order to supply the population with important medical goods, the Federal Council can “acquire significant medical goods itself; in this case, it settles the financing of the acquisition and reimbursement of costs by the cantons and the establishments to which the goods are delivered” and can “provide for the allocation, delivery and distribution of important medical goods” (Art. 3 para. 2 let. e and f; paragraph 3 specifies that the Federal Council may not take the measures referred to in para. 2, let. e and f only to the extent that the supply cannot be guaranteed by the cantons and private individuals). These goods are defined in Art. 3 para. 1 as therapeutic products, protective equipment and other medical goods important for the maintenance of public health capacity. This is confirmed by the Federal Council message (FF 2020 6363-6420). This disposition is explicitly grounded in Art. 118, para. 2, let. b of the Federal Constitution which provides that «1. The Confederation shall, within the limits of its powers, take measures for the protection of health ...; b. the combating of communicable, widespread or particularly dangerous human and animal diseases» (FF 2020 6417). According to the Federal Council message, this disposition in Art. 3 of the COVID-19 Act (= Art. 2 of the COVID-19 Bill) reformulates dispositions already present in the 3rd COVID-19 Ordinance of June 19th 2020: Art. 16, para. 1 of this Ordinance stipulates that «The Confederation or third parties which it mandates ensure the delivery of important medical goods acquired in conformity with art. 14 to the central cantonal delivery services. In exceptional cases, the Confederation can, in agreement with the cantons, deliver such goods directly to establishments and organizations which have a right to them.»

Medical supplies necessary to face the COVID-19 pandemic - a definition which includes masks - are therefore treated as an essential good. The COVID-19 Act allows direct distribution by the Cantons or, at least subsidiarily, by the Confederation.

Masks should be treated as an essential good in social aid

The Swiss Conference on Social Aid has issued a directive according to which masks are, in general, not part of the basic but of the situational special needs. People in need therefore must not use the minimum amount paid by the social aid services to cover the cost of the masks but must receive an extra amount for this purpose. When municipal or cantonal social services calculate their contribution, they must therefore add the cost of masks for all persons above the age of 12. Alternatively, they can pay for four textile masks of sufficient quality per person. According to the Conference, the handing out of masks is an option (see [link](#)).

People depending on social aid contributions (Sozialhilfe) or supplementary contributions (Ergänzungsleistungen) have a right that the cost of masks be covered by the state. The state authorities can fulfill their duty by adding an extra amount or by handing out free masks. As they have a duty of care, they must opt for the distribution of free masks whenever they have reason to fear that people in need and their families will otherwise end up without masks. In particular, they must ensure that children have the masks they need in order to go to school (if necessary by handing the masks out to them).

Those without access to social aid should have access to masks

People with no access to social aid (people in irregular situations, people sanctioned by the social authorities, etc.) have a fundamental human right to assistance and care when in need (emergency aid). This social right, guaranteed by the Federal Constitution (Article 12), obliges the cantons and the communes to provide the “means required for a decent standard of living”. The financial or in kind contribution of the state based on Art. 12 is much lower than what is provided for by social aid - it is a bare minimum, not a social minimum - and includes

merely shelter, food, clothing, hygiene and basic health care (BGE 138 V 310, E. 2.3). In the current situation, however, masks are part of the minimum means each person living or temporarily staying in this country has a right to. In addition to being part of the bare minimum, masks in this context are also a means to fulfill the duty of the state to take measures to address the risk of an epidemic.

Who should pay?

As masks are essential - from a human rights perspective and from an epidemiological perspective - measures must be taken to ensure that they are available to all people in need. Social aid or assistance authorities play a crucial role in this regard. However, they must cooperate with civil society actors which have (better) access to people outside of the formal aid system (such as homeless people).

Some NGOs have already taken useful measures. Caritas, for instance, distributes free masks at the entrance of its shops. As only people with special badges have access to these shops, the masks (which have been sponsored) are distributed to economically vulnerable individuals.

Private initiatives are most welcome. The Confederation, the Cantons, and the communes are, however, obliged to complement these initiatives - each actor within its sphere of competences (Art. 41 para. 1 lit. c of the Federal Constitution). The constitutional duty is complemented by an international one. The UN Covenant on economic, social and cultural rights obliges all state actors to take steps for the "prevention, treatment and control of epidemic, endemic, occupational and other diseases" (Art. 12 para. 2 lit. c).

As a rule, the cantons and communes are responsible for social aid and emergency aid and bear the cost of it. The Confederation, however, is also involved, for instance in regard to people in federal asylum centres. In addition, Confederation and cantons owe each other cooperation and support (Art. 44 para. 2 of the Federal Constitution). This duty is most important when masks are scarce, but it applies in all situations.

As outlined above, the COVID-19 Act also allows the Confederation, at least subsidiarily, to directly distribute important medical goods.

A right to the mask in the context of compulsory public school?

Beyond these reflections on social assistance, another question that arises is whether a right to the free distribution of protective masks does not result, for all students attending compulsory schooling, from the fundamental right to free, public basic education under Article 19 of the Federal Constitution. According to the case law of the Federal Supreme Court, the "right to free education includes all means necessary and directly serving the purpose of education" (ATF 144 I 1). Free education means covering the costs of transport, particularly when the way to school is particularly long or dangerous (JAAC 2000, Nos. 1 and 56) and in principle also extends to teaching materials (the question is somewhat discussed in literature). However, the Court has thus ruled, for example, that since participation in excursions and other school camps (such as ski camps) is compulsory, these should be considered part of the necessary basic education. Participation must therefore be free of charge, and only the costs that the pupils and their parents save as a result of the absence of their child(ren), i.e. the cost of meals, may be charged to them (ATF 144 I 1; see also, more generally, ATF 145 I 142, and ATF 141 I 9).

Therefore, insofar as the wearing of masks is declared compulsory in public schools at the level of compulsory schooling, the distribution of masks in these schools should also be part of the services that the school must provide free of charge.

References

ATF 141 I 9, AA. und Mitb. g. *Schulpflege V. und Regierungsrat des Kantons Aargau*, of December 4th, 2014

ATF 144 I 1, A. und Mitb. g. *Grosser Rat des Kantons Thurgau*, of December 7th, 2017

ATF 145 I 142, A.X. c. *Département de l'instruction publique, de la culture et du sport*, of October 29th, 2018