COVID-19 Mini-serie
Episode #4 – Ethical Guidelines: What rules for triage in intensive care units?

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Covid-19 Mini Legal Series

This mini-series aims at providing legal guidance and recommendations to Swiss organizations during the uncertainty relating to the spread of the new coronavirus and the recent decisions from the Swiss authorities. While this public health threat impacts and disrupts numerous businesses and organizations whether private or public, we will provide with regular practical legal advices on specific and selected topics. You can read all our articles on this page.

We are facing dark historic days. Healthcare professionals (HCPs) are experiencing time trial to provide treatment to all patients with or without coronavirus-related respiratory disorders and save as many lives as possible. Where healthcare institutions lack of resources, which may happen under critical circumstances, hospitals may implement care rationing measures. With Covid-19, some patients are experiencing a "bad flu". However, for the most vulnerable population, ventilators are needed in order to recover. The reality shows that this coronavirus pandemic is not sparing, especially for patients with risk factors. In the event hospitals are overloaded, have lack of equipment, of beds or staff, questions on triage criteria for admitting patients to intensive care units (ICU) arise in case of bottleneck and in case not all patients can be treated. Which patients should be selected and prioritized and according to which criteria? The Swiss Academy of Medical Sciences (SAMS) and the Swiss Society of Intensive Care Medicine (SSMI) have updated their joint guidelines called "***Covid-19 pandemic: guidelines for triage in intensive care units***". In this 4th episode of our legal mini-series related to coronavirus, we discuss some basic legal rules and medico-ethical criteria for triage in ICUs.

Q.1 Does Swiss law contain provisions on criteria to admit patients in ICUs?

A.1: Swiss law is based on general principles and therefore does not contain any specific provision on the criteria for triage of patient cases admitted to intensive care units (ICUs) in case of bottleneck. Case law specifies, on a case-by-case basis, whether a medical act complies or violates rules of medical standards. In the absence of such legislation, professional associations play a decisive role in defining those criteria and rules. They recently issued guidelines governing those ethical rules in intensive care units and emergency departments for triage protocols in the event of bottleneck cases.

Q.2 What are the existing ethical rules that apply to intensive care units?

A.2. In June 2013, the SAMS already issued guidelines on "Intensive-care interventions". Chapter 9.3 of those guidelines discusses and provide rules containing triage criteria in the context of limited resources where HCP may have to decide which patients should be prioritized. The SAMS and the SSMI have published online their "guidance" for the implementation of Chapter 9.3 in the context of Covid-19, which specifies the criteria for deciding who to select for receiving treatment in priority.

Q.3 SAMS Guidelines are not considered as law: are they legally binding?

A.3: From a legal point of view, the SAMS guidelines are **not directly binding**, as they are not included in a formal legislative act. However, according to the Swiss Federal Supreme Court: (our unofficial translation) "*SAMS guidelines enshrine the prevailing consensus in scientific medicine on health policy. They also serve as a reference for the courts and legislators (cantonal or federal) for regulating medical conduct*" (ATF 131 V 338, para. 5.4). These guidelines are an integral part of medical ethics; in particular, they are incorporated in the Swiss Medical Code of Ethics ("SMCE" in French) and apply to intensive care measures (Art. 18 SMCE). Therefore, even though the guidelines do not have same level as a law, they are considered as **professional rules and standards**, which the courts may use as a basis for assessing the state of knowledge of medical sciences. Therefore, except if a law or case law say otherwise, a judge may use those guidelines to interpret possible violations of the rules of medical.

Q.4 What are the criteria for triage in ICUs in the event of bottlenecks?

A.4: In the event of care rationing, resources and equipment must be reduced before care is provided. Then the usual medico-ethical principles (autonomy, beneficence, non-maleficence, justice) have to apply to fair and non-discriminatory procedures. In the case of a shortage of resources, three principles must apply: (1) **fairness**; (2) **saving as many lives as possible**; (3) **protection of HCPs**. In the case of limited resources, SAMS guidelines state that, on admission to intensive care, short-term prognosis is the decisive factor for triage. Patients with a favourable prognosis for discharge from hospital with intensive care therapy, but an unfavourable prognosis without intensive care, should receive highest priority. **Age** in itself is not a criteria to use. Neither do the draw or the "first come, first served" criteria apply. In addition, it is necessary to clarify in advance with all patients who are able to do so, their willingness in the event of complications. If intensive care measures are dispensed with, comprehensive palliative care must be guaranteed. Finally, limited resources must not be used on a patient who does not consent to them. Read: Triage in paediatric intensive care (FR).

Q.5 How have other countries resolved and discussed ethical guidelines?

A.5: In **Italy**, the *Società Italiana di Anestesia Analgesia Rianimazione e Terapia Intensiva* issued recommendations (ITA/EN) to give the priority to patients with the greatest chance of therapeutic success, i.e. those with the greatest life expectancy. In **Belgium**, the Belgian Intensive Care Society did not issue national directives. Rather, it suggested that hospitals shall issue their own guidelines. It recommends the decide to admit or refuse cases in ICUs after discussing between 2 or 3 doctors experienced in respiratory distresses. In **Germany**, 7 associations of doctors recommend priority to patients with the best chances of survival in ICUs. In **France**, the Comité Consultatif National d'Ethique (CCNE) has published its contribution on ethical issues in a pandemic situation. Finally, the **Hastings Center** created a HUB with resources and recommendations from various organizations.

Q.6 Are there other rules when admitting patients in intensive care units?

A.6: All principles of medical law apply, even in an emergency situation. Therefore, every physicians have to comply with their duty of care, respectively to respect patient's rights. If an unconscious patient arrives at the emergency room and cannot consent, the physician may administer medical care in accordance with his or her implied consent, meaning in the interest of the person incapable of discernment. Respecting self-determination in medical care becomes sensitive for patients that are unconscious at the time of the treatment. In such cases, physicians must act at all times in the **patient's best interests** and respect the patient's choice for the therapy (freely given and informed choice). The physician will then have to decide to act assuming the patient's choice in it's best interest. An HCP may do so based on the degree of seriousness and the urgency required (art. 379 of the Swiss Civil Code 'CC'). Any **patient decree** must also be respected. The doctor will act according to the rules of medical art and with all the diligence required by the circumstances.