

SECTION II – LITIGATION

COVID-19 and Freedom to Conduct a Business

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Abstract. The present survey is meant to offer a general overview concerning the different approach that courts in several jurisdictions on a global scale adopted to deal with the potential and actual conflicts between Covid-19 related emergency measures (justified by public health interests) and the freedom to conduct a business. Such conflicts encompass either situations where business activities were closed down or limited due to the pandemic or situations in which closed businesses requested compensation or questioned the appropriateness of the relief schemes designed by public authorities.

The relation between public health and economic freedoms in times of pandemic is a complex one, which is also deeply affected by how the interactions between the principles of the economic constitutions are shaped and function in different legal systems. The issue, therefore, necessarily requires the assessment of the critical connection between law and economic policy.

The analysis carried out in the survey mainly revolves around case law and places great emphasis on the use of general legal principles such as proportionality, reasonableness, precaution, and non-discrimination to carry out a balancing of conflicting rights and interests.

At the same time, given the factual complexity of the concrete situations triggering such conflicts, the analysis also highlights how the specific features of the “legal emergency”, such as the declaration of a state of emergency or the reliance on scientific evidence concerning the evolution of the pandemic, may affect the courts’ reasoning.

The goal of the survey is to provide a general comparative landscape of the different approaches chosen by courts to deal with some of the economic consequences of the pandemic.

Keywords: *COVID-19, Economic Freedoms, Right to do Business, Balancing of Rights, Emergency*

1. Introduction and Structure of the Survey

This survey provides a general overview of some of the most relevant judicial decisions issued by courts from several different countries concerning the impact of Covid-19-related emergency measures on the regular functioning of business and trade activities.

All over the world, lockdown measures as well as relief measures have deeply affected economies, raising potential conflicts between economic freedoms – either explicitly protected or enshrined in the legal texture of modern countries – and other rights and interests, namely the interest in public health, and inherently connected with the right to health as the object of positive state actions.

In a relatively brief time-period, the courts have been called upon to solve some of these conflicts. In doing so, they have carried out a balancing of interests, applied general legal principles, and employed different remedies in order to tackle not only the legal issues of the conflict between interests, but also the economic issues associated with the losses suffered by business operators hit by the lockdowns.

Furthermore, the emergency measures, though often similar in their general content, are framed within legal systems, or even legal traditions, different from each other¹. Such differences may imply a variety in the approaches chosen by courts in multiple

¹ It is therefore for the comparative analysis, and the comparative lawyers, to trace both convergent and divergent patterns in the management of the emergency, also with regard to the relation between law, politics and science. On the issue see Arianna Vidaschi and Lorenzo Cuocolo, ‘L'emergenza sanitaria nel diritto comparato: il caso del Covid-19’ (2020) DPCE Online 43(2) 1449; Kim

Barker and Enrique Uribe-Jongbloed, Tobias Scholz, ‘COVID-19 and the “Myriad”’: A Comparative Assessment of Emergency Responses from Europe and South America’ (2021) *Legalities* 1(1), 116; Peter Yeoh, ‘COVID-19 Legal-Economic Implications of a Pandemic’ (2020) *Business Law Review* 41(3), 74.

countries in assessing, applying and interpreting the measures. The following survey sketches the courts' trends, within a conceptual framework based on the legal principles deployed. The work is mainly based on the analysis of case law and is carried out within the context of a Project coordinated by the University of Trento and relying on a wide network of judges and legal scholars. The contact points of the network, together with the project staff, collected the decisions analyzed. The specific focus of the project – namely, the (potentially conflictual) connections between health and other fundamental rights and interests – inspires the logic of this work, which strongly emphasizes the perspective of interests' balancing in the assessment of Covid-19-related emergency economic measures.

The survey is structured in eight sections. Section 2 will sketch a general overview of the conflicts addressed in the selected cases, properly framed within the correspondent legal systems and traditions, while section 3 will carry out an analysis of the different models of adjudication with a special focus on balancing. Section 4 will address the different principles used by courts and section 5 will review the determination of remedies, while section 6, also with a particular emphasis on remedies, will address some decisions from India that are deemed particularly relevant. Section 7 will assess how the courts considered the issue of economic losses suffered by business operators in their reasoning and, finally, section 8 will draw some general conclusions.

² On the restrictions upon economic freedoms brought by the pandemic see, among others, Judith Bueno de Mesquita, Anuj Kapilashrami and Benjamin Mason Meier, 'Human Rights Dimensions of the COVID-19 Pandemic' (2021) Independent Panel for Pandemic Preparedness and Response, Background Paper no. 11 <<https://theindependentpanel.org/wp-content/uploads/2021/05/Background-paper-11-Human-rights.pdf>> accessed 21 October 2021; Billie Bell, 'Fundamental rights and freedoms during the COVID-19 crisis' (2020) EAP CSF Covid-19 Briefing Paper <<https://eap-csf.eu/wp-content/uploads/COVID19-Briefing-Paper-Fundamental-rights-and-freedoms-during-covid19-crisis.pdf>> accessed 21 October 2021; Fabrizio Cafaggi and Paola Iamiceli, 'Uncertainty, Administrative Decision-Making and Judicial Review: The Courts' Perspectives' (2021) *European Journal of Risk Regulation* 0(0) 1.

³ On the general notion of economic constitution see Tony Prosser, *The Economic Constitution* (OUP 2014);

2. General overview. The significance of economic freedoms in different legal traditions

The notion of economic freedom is a complex one. Its significance, for the present analysis, stems from its role in the judicial review of emergency measures, in particular as a concept against which to balance public health interests used to justify lockdown provisions.²

As such, the "economic freedom" we are interested in is that integrated in the "economic constitutions" of the legal systems considered.³ It is this notion that the comparative analysis must use as a criterion to measure to what extent judges adhered to or distanced themselves from the general features of the system in order to assess the legitimacy of the challenged emergency measures.

The pandemic led to lockdowns and limitations of business activities in vastly divergent economic contexts, embracing different philosophies of business development, shifting from liberal, to social-democratic to socialist systems. In each of these models, business freedom is enshrined in different legal sources and implies varying roles played by public policies.

In U.S. law, as confirmed by the selected cases, economic freedoms are mainly channeled through the general due process clause (14th Amendment of the U.S. Constitution) with specific regard to the protection of property rights.⁴ One foundation of economic freedom, the freedom of trade, is further protected by the commerce clause, enshrined in Art. 1 Sec. 8 of the Constitution.

Ngoc Son Bui, 'Economic Constitutions in the Developing World' (2019) *Law and Development Review* 12(3) 669; Paola Bilancia, 'L'effettività della Costituzione economica nel contesto dell'integrazione sovranazionale e della globalizzazione' (2019) 5 *federalismi.it* <<https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=40500>> accessed 21 October 2021; Eugenio De Marco, "Costituzione economica" e integrazione sovranazionale', (2019) 5 *federalismi.it* <<https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=40505>> accessed 21 October 2021.

⁴ Ryan C. Williams, 'The One and Only Substantive Due Process Clause' (2010) *The Yale Law Journal* 120 408; Kurt T. Lash, 'Enforcing the Rights of Due Process: The Original Relationship between the Fourteenth Amendment and the 1866 Civil Rights Act' (2018) *The Georgetown Law Journal* 106, 1389.

A more complex landscape is that sketched by European law. Such complexity is essentially due to the (sometimes difficult) interaction between the constitutional traditions of the Member States – often emphasizing the social function of both property rights and private economic initiative⁵ – the fundamental economic freedoms which the common market relies on and the effective protection of fundamental rights, already part of the *acquis communautaire* and today integrated within the treaties and the Charter of Fundamental Rights of the European Union.⁶ It is in order to manage the interaction among these elements and to set a standard of legitimacy for public powers' action that the Court of Justice of the European Union referred to the general principle of effectiveness and proportionality, while avoiding at the same time the definition of a general hierarchy between economic freedoms and other fundamental rights.⁷

Furthermore, public health interests, which have indeed long been recognized as justifiable causes for limitations to economic freedoms⁸, are also interpreted in light of the principle of precaution, thus designing a particularly "strategic" role for the scientific assessment of risks connected to certain business activities in times of pandemic.

As we move outside the Euro-American sphere, and its typically neoliberal economic law model, we observe a greater variety and even

fragmentation in the constitutional status of economic freedoms. Although recognized as fundamental, they are necessarily balanced against tendencies conferring law a particularly strong role in the composition of social conflicts.⁹ Such a view effectively empowers the courts, in absence of clear interventions by public authorities, to not only question the legitimacy of emergency measures but also to design specific remedies targeted for particular situations of socio-economic distress.¹⁰ From this perspective, moreover, the very notion of economic freedom is put in relation with other fundamental rights, such as the right to work.¹¹

Lastly, a peculiar approach to the protection and regulation of economic freedom is embraced by those systems, such as the Chinese system, founded on the doctrine of market socialism. In such cases, the widespread recognition of property rights and economic freedoms is inherently functional to the pursuit of socio-economic development goals set by the state.¹² As such, regardless of the "weight" of private economy, the issue of hierarchies among economic freedoms and public interests is not only resolved *ex ante* in favor of the latter, but is also directly dependent on the interpretation of public interests given by authorities and official policy acts. The scope of the judge's review is therefore vastly limited and relies solely on the principle of legality, narrowly interpreted as a check over the respect of formal procedures. It

⁵ The social function of property, as derived from the constitutional traditions of the Member States, was already recognized and embraced by the Court of Justice in Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 03727. On the issue, see Valbona Alikaj, 'The Right Of Ownership In The European Law' (2016) *European Scientific Journal* 12(22) 26.

⁶ Sybe A. de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) *Utrecht Law Review* 9(1) 169.

⁷ *Ibidem*. On the role of the principles of effectiveness and proportionality in EU Law, albeit from the specific perspective of consumer law, see Fabrizio Cafaggi and Paola Iamiceli, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions' (2017) *Eur. Rev. Priv. L.* 3 575.

⁸ See Court of Justice of the European Economic Community, Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 00649.

⁹ This is, for instance, the case concerning India. This is also the case in the Latin American legal systems, whose notion of economic law (*derecho económico*), even if deeply affected by neoliberal views, maintained

interventionist tendencies justified on the basis of developmental aims of the state. See, on the issue, Jorge Witker, *Introducción al Derecho Económico* (McGraw-Hill 1999). See also Luis F. Sabogal Bernal, 'Nociones generales de la libertad de empresa en Colombia' (2005) *Revist@ e – Mercatoria* 4(1) 1.

¹⁰ Such active role of the courts is connected, in some cases, to specific traits of the different legal traditions. In Latin America, for instance, the 'humanist' tendency of courts, not only with regard to the composition of economic conflicts but, in general to the adjudication of disputes, has been regarded as a peculiar feature of a 'Latin American' legal system. On the issue see Ignazio Castellucci, 'Sistema jurídico latinoamericano' (Giappichelli 2011).

¹¹ Tribunal of first instance for administrative and tributary disputes no. 2 of the city of Buenos Aires, secretaria no. 4, *S.M.I. Y otros contra Gcba sobre otros procesos incidentales – Amparo*, 29 May 2020.

¹² For general references on the issue see Angelo Rinella and Iolanda Piccinini (eds), 'La costituzione economica cinese' (il Mulino 2010); Gianmatteo Sabatino, 'Legal Features of Chinese Economic Planning', in Ignazio Castellucci (ed), 'Saggi di diritto economico e commerciale cinese' (Editoriale Scientifica 2019) 33.

should also be considered that the ability to apply constitutional review principles is limited as well, since in these systems the constitution itself cannot be invoked in judicial disputes nor directly applied by judges, but rather serves instead as reference for the action of public powers.¹³

2.1 The Different Levels of Complexity of Analysis

The values underlying the notion of economic freedom in the different legal systems, as noted, deal with potential conflicts between such freedoms and other rights and interests, arising from multiple perspectives and involving different socio-economic actors. The analysis we have carried out displays, therefore, several levels of complexity which inevitably affect the way courts have interpreted emergency measures and applied general principles when balancing rights and freedoms.

In the first place, the elaboration of emergency measures implies a connection between their legal and scientific foundations. In other words, the administrative power at the basis of such measures is both justified and limited by scientific evidence concerning the risks of certain activities and the effects that lockdown measures may produce on the evolution of the pandemic. In the legal systems where there is no predetermined hierarchy between economic freedoms and public interests, the reference to scientific evidence affects the application of the general principles of reasonableness, proportionality and, with special regard to European countries, precaution.¹⁴

Indeed, even in countries – such as China – where public interests, as expressed by the political leadership, are inherently superior to private economic freedoms, the legal doctrine embraces the use of necessity (*biyao xing*), appropriateness (*shidang xing*) and

proportionality (*bili xing*) to ensure that the limitations of rights are founded in concrete protection of citizens' health.¹⁵ The difference is in the extent of the judicial review, which in the Chinese case law never scrutinizes the reasonableness or the proportionality of the public policy choices, nor the technical and factual basis on which the policy and the corresponding prioritization of public health over private rights and interests rely.¹⁶

Second, measures affecting business activities have an impact not only on the rights and interests of business owners but also on those of workers and customers/consumers. It could be expected that courts in legal systems which emphasize the social dimension of private economic initiative take into greater account the variety of social actors affected by emergency measures, whereas courts focusing on the relation between challenged measure and individual property rights of business owners could be less interested in a comprehensive analysis of the measures' social impact. The assessment of the case law, in comparative perspective, could either confirm or overturn such view.

Third, the specific issues triggering potential conflicts between economic freedoms and other rights and interests represent a further level of complexity, due to their variety. In particular, while the majority of the challenged measures concerned lockdown provisions ordering closure of business activities, in other cases courts have addressed more circumscribed or targeted interventions, such as limitation of business hours, imposition of safety requirements to resume activities, and suspension of certain fees or terms of a business activity¹⁷. The following analysis will assess how such differences in concrete situations affected the courts' reasoning not only in evaluating the measures' legitimacy but also in addressing the issue of economic losses sustained by business operators.

¹³ Jianfu Chen, 'Chinese Law: Context and Transformation', (Martinus Nijhoff 2008) 135 ff.

¹⁴ Fabrizio Cafaggi and Paola Iamiceli, 'Uncertainty, Administrative Decision-Making and Judicial Review' (n. 2).

¹⁵ Liu Changqiu (刘长秋), Zhao Zhiyi (赵之奕), 论紧急状态下公民健康权的克减及其限度 (On the derogation and limitation of citizens' right to health during the state of emergency) (2020) *fa xue lun tan* 9 2020 30.

¹⁶ The standard of the judicial review in times of emergency is, by the way, an issue acknowledged by legal scholars. See, for instance, Yin Qin (殷勤), 应急行政合法

性审查理念的转变 (The change in the concept of administrative legality review in emergency) (2020) *ren min si fa* 16 52.

¹⁷ See, for instance, the decision of the Administrative Court of Karlsruhe (Germany), 3 K 4418/20, 30 October 2020; the decision of the High Court of Zimbabwe, 'The Zimbabwe Chamber for Informal Workers & 2 Others v Minister of Health and Child Care & 6 Others'; the decision of the Haryana High Court (India), *Independent Schools Association ... vs State Of Punjab And Ors*, 30th June 2020, Writ Petition no. 7409/2020.

2.2 Decisions Upholding the Challenged Measures

The following table presents a set of decisions which rejected the plaintiffs' claims, therefore upholding the legitimacy of the challenged measures.

The decisions are classified according to their factual backgrounds, the types of measure and remedies involved and the reasoning embraced by the judge in rejecting the claims.¹⁸

| Decision | Economic sector | Measure challenged | Remedy sought | Outcome |
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| <i>Argentina: Appeal Chamber in Administrative Disputes, Córdoba, Unión de Trabajadores del Turismo, Hoteleros y Gastronómicos de la República Argentina UTHGRA c/ Gobierno de la Provincia de Córdoba, 14 August 2020</i> | Tourism, hotel and gastronomic sector | Closure of business | Unconstitutionality of the challenged measure (via Amparo); reopening of business | Claim rejected: The challenged measure does not appear arbitrary or clearly unconstitutional and is also viewed in light of the complex technical assessment concerning the elaboration of restrictive measures. However, the court encourages the parties to implement concertation mechanisms to address the issues arising from the lockdown measures. |
| <i>Belgium: Council of State, 24 February 2021, no. 249.904</i> | Betting shops | Closure of business | Annulment of the measure | Claim rejected: The challenged measure pursues a legitimate objective. The Interior Minister has wide discretionary power to strike a balance between conflicting interests. |
| <i>Belgium: Council of State, 28 October 2020, no. 248.781</i> | Restaurants | Closure of business | Annulment of the measure | Claim rejected: The challenged measure pursues a legitimate objective. The Interior Minister has wide discretionary power to strike a balance between conflicting interests. The challenged measure provides for reasonable distinctions between activities and relies on scientific evidence and opinions. |

¹⁸ Not all the decisions addressed in this survey are included in this table (or in the one in § 2.3): indeed, the main purpose of the table is to offer a general overview taking into account as many jurisdictions as possible and highlighting relevant differences and analogies both in the factual background of the cases and in their outcome.

Therefore, some decisions whose content is quite similar have not been included in the table. They will be, however, referred to in the footnotes when relevant for the paper. For a complete list of the cases addressed see the Appendix.

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| Belgium: <i>Council of State, 29 October 2020, no. 248.798</i> | Restaurants and bars | Closure of business | Collective action for interim relief, asking for suspension of the challenged measure | Claim rejected: The plaintiffs did not demonstrate in concrete terms the damage suffered by each establishment, in relation to their economic capacity. The general reference to the hardships endured by the economic sector does not suffice to justify interim relief. |
| Belgium: <i>Council of State, 13 November 2020, no. 248.918</i> | Hotels, bars, restaurants | Closure of business | Interim relief: request for suspension of the challenged measure | Claim rejected: The challenged measure is appropriate and proportionate with relation to its purpose (i.e. reduction of infections). The freedom of business is not absolute. |
| Canada: <i>Superior Court of Quebec, 19 March 2021 Entrepreneurs en action du Québec c. Procureur général du Québec</i> | Various businesses | Closure of business | Declaration of nullity of restrictive measures | Claim rejected: The challenged decrees are meant to tackle an emergency. There is still scientific uncertainty regarding transmission of the virus and therefore the measures cannot be considered unjustified. |
| Croatia: <i>Croatian Constitutional Court, decision no. U-I-2162/2020 of 14 September 2020</i> | Hospitality and catering activities | Closure of business | Unconstitutionality of the challenged measures | Claim rejected: When exceptional circumstances occur, public authorities are authorized to issue provisions regarding closure of businesses. |
| France: <i>Council of State, 27 January 2021, no. 448732</i> | Fairs | Closure of business | Urgency request for suspension of the challenged order (interim relief); as a subsidiary measure, enjoin the prime minister to adopt relief measures for business operators | Claim rejected: The infringement upon business freedom is outweighed by the necessity to protect public health. In addition, business operators may accede to different kinds of assistance under the regulatory framework. |
| France: <i>Council of State, decision no. 445102 of 16 October 2020</i> | Sporting activities | Prohibition of sporting activities | Urgency request for suspension of challenged measures (interim relief) | Claim rejected: Sporting activities are particularly dangerous in terms of the risk of spreading the virus. Business freedom must be balanced with public health. |
| France: <i>Council of State, decision no. 440439 of 11 June 2020</i> | Amateur football championships | Prohibition of activity | Request for suspension of the measure (interim relief) | Claim rejected: The decision is justified in light of the health crisis and the fact that most of the matches had already been played. |

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| France: <i>Council of State, decision no. 447208 of 11 December 2020</i> | Ski lifts | Closure of business | Urgency request for suspension of the challenged measure (interim relief) | Claim rejected: There is a need to implement all possible measures to avoid higher numbers of infections. Such necessity outweighs the impacts of limitations on business freedom. Moreover, the government has announced stronger support measures for the sector. |
| France: <i>Council of State, decision no. 451085 of 14 April 2021</i> | Art galleries | Closure of business | Suspension of the challenged measure | Claim rejected: The state of emergency justifies wider discretionary powers of authorities in determining restrictions. |
| Germany: <i>Administrative Court of Karlsruhe, 3 K 4418/20, 30 October 2020</i> | Restaurants and bars | Limitation of business hours | Request for interim relief – suspension of the challenged measure | Claim rejected: The measures are necessary to reduce the impact of the virus, also given the impossibility to identify specific breeding grounds for the virus and the risk of gatherings in bars and restaurants. The limitation is an appropriate and proportional means to achieve the objective. |
| Germany: <i>Federal Constitutional Court 1 BvQ 47/20, 29 April 2020</i> | Shops with shopping areas exceeding 800 square meters | Closure of business | Unconstitutionality claim, request for interim relief (suspension of the measures) | Claim rejected: The rights to life, health and bodily integrity outweigh business freedom. Claim also rejected in light of the fact that the challenged measure is temporary and that shops are allowed to be open provided they install physical barriers. |
| Germany: <i>Federal Constitutional Court 1 BvR 2530/20, 11 November 2020</i> | Cinemas and restaurants | Closure of business | Preliminary injunction suspending measures | Claim rejected: In light of the dangers that unrestrained infections could pose to human life, business freedom is outweighed by public health necessity. |
| Germany: <i>High Administrative Court of Thüringen 3 EN 105/21, 9 March 2021</i> | Gyms | Closure of business | Annulment of the measure; suspension of its efficacy (as interim relief) | Claim rejected: The challenged measure is based on a proper scientific risk assessment and is necessary to reach the legitimate aim of reduction of infections. In gyms there is also a higher risk of infections. |

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| | | | | Furthermore, the challenged measure lays out support schemes for economic operators hit by the pandemic. |
| Italy: <i>Advisory Opinion of the Council of State, no. 00850/2021, 28 April 2021</i> | Restaurants | Closure of business | Annulment of the challenged measure | Claim rejected: The measure is reasonable and based on a set of scientific opinions; it does not unjustifiably discriminate among economic activities. The legal form of the measure (Decree of the President of the Council of Ministers) complies with the constitution and is appropriate to tackle the rapidly changing circumstances of the pandemic. |
| Italy: <i>Decree of the Council of State, no. 884, 22 February 2021</i> | Betting halls, amusement arcades, bingo halls | Closure of business | Annulment and interim suspension of the challenged measure | Claim rejected: The measure is based on a scientific risk assessment. Protection of public health outweighs the prevention of economic damage. |
| Italy: <i>Administrative Regional Tribunal of Trentino Alto-Adige, decision of 23 December 2020</i> | Tender procedures | Withdrawal of tender procedure in light of changing necessities for public authorities due to the pandemic | Annulment of the impugned decision | Claim rejected: The administration can, on grounds of opportunity, revert its decisions concerning the tender. The appearance of the pandemic raises new necessities and requires performances not foreseen in the original tender procedure. |
| Italy: <i>Administrative Regional Tribunal of Campania, decision of 18 November 2020</i> | Tender procedures | Exclusion of an offer from a tender procedure | Request for annulment of the Decision to exclude an offer from a tender procedure for sanitary masks, claiming that timing of the request for clarifications made it impossible to respond | Claim rejected: The timing was not unreasonable given the urgency of ensuring the continued supply of masks. |
| Scotland: <i>[2020] CSOH 98 P1043/20</i> | Various businesses (decision placing an area in Level 3 of restrictions, therefore leading to stricter restrictions to business activities) | Stricter restrictions to business | Request for interim suspension of the measure | Claim rejected: The decision was based on the assessment of the trend of the pandemic and is rational. Moreover, the restrictions are temporary and periodically reviewed. |
| Spain: <i>Superior Court of Justice of the Valencian Community,</i> | Recreational and gambling establishments | Closure of business | Reopening of business facilities (interim relief) | Claim rejected: The challenged measure is taken pursuant to the precautionary principle |

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| <i>Administrative Chamber, 94/2021 of 17 March 2021</i> | | | | in light of the potential health risks related to the opening of gambling and recreational activities. |
| Spain: <i>Superior Court of Justice of the Valencian Community, Administrative chamber 59/2021, 25 February 2021</i> | Bars and restaurants | Closure of business | Reopening of business (interim relief) | Claim rejected: The activities limited by the challenged measure are particularly dangerous and there is not enough evidence concerning risk reduction connected to the use of safety measures. |
| South Africa: <i>High Court of South Africa (Gauteng Division), Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR 68 (GP)</i> | Tobacco products | Prohibition of sale | Annulment of the challenged measures | Claim rejected: There is a reasonable connection between the ban on tobacco products and the necessity to reduce Covid-19 infections, the ban was enacted in light of public health necessities. |
| United States: <i>United States District Court for the Northern District of California, Altman v. County of Santa Clara, 464 F.Supp.3d 1106 (N.D. Cal. 2020) 227 A.3d 872 (Pa. 2020)</i> | Firearms retailers | Closure of business | Request for preliminary injunction suspending the measure | Claim rejected: The county had legitimate public health goals in preventing the spread of Covid-19 and protecting public health resources, plaintiffs' Second Amendment rights were not plainly, palpably invaded by the closure order because it is not the equivalent of a firearms ban, is temporary, and is facially neutral, and that closing businesses was reasonable to prevent transmission of Covid-19. |
| United States: <i>United States District Court, Western District of Michigan, Southern Restaurant and Lodging Association v. Gordon, 1:20-cv-1104, 20 November 2020</i> | Restaurants | Closure of business | Request for injunction reopening business facilities | Claim rejected: The public authority had valid reasons to target restaurants and to lay out specific restrictive measures for them. The impact on interstate commerce (Art. 1 Sec. 8 U.S. Const.) is outweighed by the benefits of the lockdown. |
| United States: <i>Supreme Court of Pennsylvania, Friends of Danny</i> | Various businesses ("non-essential businesses") | Closure of business | Request for extraordinary relief (i.e. suspension of closure) | Claim rejected: The court stated that the Governor of Pennsylvania has |

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| <p><i>DeVito v. Wolf</i>, 227 A.3d 872 (Pa. 2020)</p> | | | | <p>expansive emergency management powers upon declaration of a disaster emergency under the state's Emergency Code. The protection of the lives and health of Pennsylvania citizens by closing non-life-sustaining businesses was the proper exercise of police power and was not unduly oppressive.</p> |
| <p>United States: <i>Texas, U.S. District Court for the Western District of Texas, 6th Street Business Partners LLC v. Abbott</i></p> | <p>Bars obtaining more than 51% of revenues from liquors</p> | <p>Closure of business</p> | <p>Unconstitutionality, injunction (reopening of business); monetary damages</p> | <p>Claim rejected: The challenged measure is not traceable to the defendant (Governor of Texas). The Governor has the power to issue executive orders but not the power to enforce them. In any case, the claim for monetary damages would be quashed because of the sovereign immunity.</p> |
| <p>Zimbabwe: <i>High Court of Zimbabwe, The Zimbabwe Chamber for informal Workers & 2 Others v Minister of Health and Child Care & 6 Others</i></p> | <p>Transport sector; informal sector</p> | <p>Restrictions to business activities (transport sector); closure of business (informal sector)</p> | <p>Interim relief: removal of restrictions and reopening of businesses</p> | <p>Claim rejected: Limitations imposed on business freedom are proportionate to the aim pursued. They serve to protect the rights of every citizen to life, dignity and a safe environment. If the transport sector and the informal sector were to reopen, such activities could not be properly traced, and the risk of infections would rise.</p> |

The table proves a certain degree of uniformity among the decisions, especially with regard to the type of measure challenged and the remedies sought. In total, 21 of the 29 selected decisions deal solely with measures closing down business premises; 4 other decisions deal also with limitations to business activities, concerning business hours, the sale of specific products or working conditions; 2 decisions concern measures prohibiting certain activities, with subsequent impacts on businesses involving those activities (e.g. sports); and 2 decisions concern tender procedures and, specifically, termination or amendments to the procedure due to emergency circumstances.

Regarding the claims, they concern either a request for annulment of the challenged measures or a request (in form of interim relief) for suspension of their efficacy. The concrete aim pursued is, obviously, the reopening of business premises and the removal of limitations. In cases directly brought before constitutional courts, the removal of the challenged measure derives from a claim of unconstitutionality. A similar degree of uniformity is found in the specific rights and interests claimed by plaintiffs and evaluated by judges against public health interests; all of the selected decisions refer to a general notion of business freedom. However, in American case law the plaintiffs mentioned other rights and interests found in the

United States constitution, such as the right to bear arms – with regard to the closure of firearms retailers¹⁹ – and the freedom of interstate commerce, albeit in connection with business freedom.²⁰

It should be mentioned that a group of Chinese cases, though involving business activities, do not take into account freedom of business; in order to determine the legitimacy of the restrictions, they instead solely focus on the duty of all citizens to respect the emergency measures²¹. At the same time, they emphasize that emergency regulations in economic matters are issued also to ensure consumer protection and market order, albeit from a public economic management perspective.²²

The specific connotations of these decisions are also related to the social function of the judge in the legal order of the People’s Republic of China, which strongly emphasized the pedagogic dimension of the judicial decision, meant as an instrument to direct the conduct of private citizens in light of common interests and public needs, especially in times of emergency such those caused by the pandemic.²³

It is worth noting that courts, depending on the specific arguments put forward by parties, emphasized in some cases public health interests

and in other cases individual fundamental rights (e.g. to life, to health, to bodily integrity) as counterparts to economic freedoms in the balancing equation. Whereas, as also displayed in the table, references to public health were greater in number, references to individual fundamental rights were also quite “scattered” among different legal systems, not allowing to draw sufficiently grounded comparative remarks.

However, an interesting point is raised by a decision from Zimbabwe, where the judge specified that the limitations imposed on business freedom ensure the protection of the individual fundamental rights to life, dignity and to a safe environment²⁴. In this case, the reasonableness of the challenged measure is entirely justified on the basis of civil rights, prevailing over economic rights, instead of public interests.

2.3 Decisions Quashing the Challenged Measures

The following table points out both the main reasoning followed by the court and the remedy issued in some relevant decisions quashing emergency provisions.

| Decision | Economic sector | Measure challenged | Reasoning | Finding/Remedy |
|--|--|--|--|---|
| Austria: <i>Constitutional Court, decision no. V392/2020 of 1 October 2020; decisions no. V405/2020 and V429/2020 of 1 October 2020</i> | Restaurants and similar establishments | Prohibition to enter business premises/Closure of business | The legal basis of the restrictive measure does not provide for sufficient information concerning the distinction between activities to be closed down and activities to be kept open. | Unconstitutionality of the challenged measure |
| Brazil: <i>Federal Court - 1st Region, 1013225-</i> | Purchase and | Measures introducing | Introducing restrictive criteria for private | Unconstitutionality of the |

¹⁹ United States, District Court for the Northern District of California, *Altman v. County of Santa Clara*, 464 F.Supp.3d 1106 (N.D. Cal. 2020); District Court for the District of Connecticut, *Connecticut Citizens Defense League v. Lamont*, 465 F.Supp.3d 56 (D. Conn. 2020); District Court for the Central District of California, *McDougall v. County of Ventura*, no. 2:20-cv-02927-CBM-AS, 2020 WL 6532871 (C.D. Cal. Oct. 21, 2020).

²⁰ United States, District Court, Western District of Michigan, Southern Division, *Mich. Rest. & Lodging Ass’n v. Gordon*, 504 F. Supp. 3d 717 (W.D. Mich. 2020).

²¹ Intermediate People’s Court of Tianjin, Final Decision n. 166, 12 May 2020; Wugang Primary People’s Court (Hunan Province), 18 September 2020.

²² Primary People’s Court of Kenli District, Dongying City, 2 June 2020, Administrative decision no. 57.; Xishui Primary People’s Court, 16 September 2020; Intermediate People’s Court of Chengde City, 30 November 2020 – Appeal Decision no. 207; Wugang Primary People’s Court (Hunan Province), 18 September 2020; Intermediate People’s Court of Tianjin, Final Decision n. 166, 12 May 2020.

²³ On the pedagogic role of the courts in the People’s Republic of China see Ignazio Castellucci, ‘Rule of Law and Legal Complexity in the People’s Republic of China’ (Università di Trento 2012).

²⁴ Zimbabwe, High Court of Zimbabwe, ‘The Zimbabwe Chamber for informal Workers & 2 Others v Minister of Health and Child Care & 6 Others’.

| | | | | |
|--|--|---|---|--|
| <i>55.2021.4.01.3400 Federal Court, 21^a Vara Federal Cível, decision reached on the 25/03/2021</i> | distribution of vaccines by private establishments | restrictive criteria for the purchase of vaccines | establishments to purchase, distribute and administer vaccines conflicts with both the freedom of business and the right to health. | challenged measure |
| China: <i>Wugang Primary People's Court (Hunan Province), 18th September 2020, First Instance Decision (Administrative) no. 127</i> | Private education | Order to cease business | Public authorities, in times of emergency, may close down facilities or prohibiting activities in absence of the safety requirements prescribed. However, they may not impose sanctions not provided by law. The specific sanction imposed in the case is not laid out in the applicable laws and does therefore violate the principle of legality. | Annulment of the challenged measure (on grounds of legality) |
| France: <i>Council of State, 30 December 2020, no. 448201</i> | Various businesses | Local measures introducing stricter lockdown provisions than what is provided for at the national level | The challenged measure does not have proper justification to introduce different lockdown provisions than at the national level. | Quashing of the first instance decision, order to the mayor to rectify lockdown requirements |
| France: <i>Council of State, 9 June 2020, no. 440809</i> | Football Leagues | Suspension of <i>Ligue 1</i> , with relegation of two teams at the bottom (at the moment of the suspension) in <i>Ligue 2</i> . | The decision is likely to have a serious and immediate impact on the interests of the clubs concerned. Therefore, a further review on the conditions necessary to resume the games should be carried out. | Suspension of the implementation of the challenged measure, the football league must carry out a review on the condition to resume the games |
| Germany: <i>Thuringian High Administrative Court, 3 EN 254/20, 29 April 2020</i> | Social integration activities for mentally disabled people | Prohibition to perform activities | The prohibition is disproportionate since it does not achieve its objective (i.e. reduction of infections) and introduces an unreasonable distinction between disabled adults and children/teenagers, who are not subjected to the ban. | Suspension of the challenged measure (interim relief) |
| India: <i>Haryana High Court, Independent</i> | Private education | Prohibition to charge fees | The decision to prevent private schools from | Private schools may charge fees, |

| | | | | |
|--|--|--|---|---|
| <i>Schools Association ... vs State Of Punjab And Ors, 30th June 2020, Writ Petition no. 7409/2020</i> | | during the pandemic | collecting fees must be assessed in light of the different interests (of schools and families) affected by the pandemic | provided that they are meant to cover only actual expenditure incurred in during the lockdowns. |
| Israel: <i>Supreme Court of Israel, HCJ 6939/20 Idan Mercaz Dimona Ltd.v. Government of Israel, decision of 2 February 2021</i> | Sale of toys | Closure of business | The challenged measure is unlawful since it allows essential stores to sell non-essential products while prohibiting other sellers of those non-essential products from opening. | The court instructed the respondent public authority to amend the challenged measure within a prescribed time limit (a week). |
| Italy: <i>Regional Administrative Tribunal of Lazio, 26 October 2020, no. 10933</i> | Various businesses | Prohibition for private establishments to conduct Covid-19 tests | The prohibition is unjustified as well as conflicting with the necessity to maximize tests. | Annulment of the challenged measure |
| Italy: <i>Administrative Regional Tribunal of Lazio, 16 February 2021, no. 1862</i> | Beauty centres | Closure of business | The legal basis of the restrictive measure does not rely on a proper factual inquiry and a proper explanation to justify the closure of beauty centres in “red zones” while hair salons could remain open. | Annulment of the challenged measure |
| Italy: <i>Administrative Regional Tribunal of Campania, 4 February 2021, no. 789</i> | Wholesale retailers of electric components | Closure of business | The activity is “essential” pursuant to national emergency measures and the local government’s decision to close it down is unlawful. The impugned measure had already expired, but the plaintiff was entitled to monetary compensation given the causal link between the challenged measure and the economic damage sustained. | Monetary compensation |
| Spain: <i>Administrative Chamber of the Superior Court of Justice of Catalonia, Resolution of 29 July 2020</i> | Sport activities | Closure of business | The decision to close down all sports facilities is not proportional since other viable alternatives exist to achieve the same objective (i.e. reduction of infections). | Grant of the precautionary measures requested (reopening of facilities) |

| | | | | |
|--|---|----------------------------------|---|---|
| <p>Spain: <i>Superior Court of Justice of Zaragoza, no. 286/2020, decision of 14th September 2020</i></p> | <p>Gatherings – parties and ceremonies</p> | <p>Prohibition of gatherings</p> | <p>Gatherings for occasions such as parties or ceremonies have been restricted while other types of gatherings and meetings as well as the transport sector have not, without any justifiable basis for distinctions.</p> | <p>Grant of the precautionary measures requested by a confederation of entrepreneurs in the hotel and tourism sector (suspension of ordinance prohibiting gatherings)</p> |
| <p>United States: <i>Court of Common Pleas of Lake County, Ohio, Rock House Fitness, Inc. v. Acton, Case no. 20CV000631, 20 May 2020</i></p> | <p>Gyms</p> | <p>Closure of business</p> | <p>The state cannot impose penalties on gyms for being open during the lockdown, as long as they adhere to safety requirements. The state's department of health has no legal grounds to close down all businesses for several months. To do so is unreasonable and unjustified and violates the fundamental right to property.</p> | <p>Grant of the injunction requested (i.e. no bond or 0 \$ bond for businesses which stay open during the lockdown)</p> |
| <p>United States: <i>Court of Common Pleas of Erie County, Ohio, LMV DEV SPE, LLC, DBA Kalahari Resorts & Conventions, et al., 2020-CV -020 1, 12 June 2020</i></p> | <p>Holidays-related activities (resort)</p> | <p>Closure of business</p> | <p>The state's department of health has no legal grounds to close down all businesses. The decision is also discriminatory since it focuses on the identity of the business (i.e. non-essential activity) rather than on its capability of providing a safe environment.</p> | <p>Grant of the injunction requested (reopening of business facilities)</p> |
| <p>United States: <i>Michigan Supreme Court, Department of Health and Human Services v. Karl Manke, 161394 & (27)(37)(38)</i></p> | <p>Barbershops</p> | <p>Closure of business</p> | <p>The appellate court failed to hold a full briefing or an oral argument; furthermore, it issued a preliminary injunction without the prescribed unanimity.</p> | <p>The case is remanded to the Court of Appeals for additional considerations. Decision quashed on grounds of legality</p> |

Among these decisions, we may observe less uniform features in terms of both measures challenged and legal reasoning followed by courts. There were 9 out of 16 selected decisions which dealt with the closure of business premises or, in one case, an order to cease the activity. In 3 cases, the concrete issue was the prohibition of certain activities, causing impact on specific business sectors. In 2 specific cases, courts addressed prohibitions for private establishments to manage Covid-19-related health services (i.e. swabs and vaccines). One case concerned a general measure imposing a stricter lockdown at the local level, while another case concerned a suspension of fees for students at private schools, which is not strictly a measure aimed at limiting the spread of the pandemic, but rather a measure to address its economic consequences.

With regard to remedies, in the majority of cases courts either annulled the challenged measures (4), declared them unconstitutional (2) or suspended their efficacy as a means of interim or injunctive relief, thus reopening facilities and authorizing activities (5). In one case, the judge did not address the efficacy of the emergency measure (i.e. suspension of football leagues) but of its practical consequence (i.e. relegation of two teams in *Ligue 2*), ordering, at the same time, a further review on the conditions to resume games. In another case, the judge considered the possible negative outcomes of an outright quashing or suspension of the measure challenged and instead ordered the public authority to amend it within a prescribed time limit.

Finally, the Indian decision concerning school fees quashed the challenged measure, thus allowing collection of fees, but at the same time imposed specific limitations on such activity in light of the interest of both the private schools and the students (and their families). This type of complex balancing, deeply affected by considerations on the social impact of the Courts' decision, is a recurring trait of Indian jurisprudence and will be further assessed below.²⁵

2.4 Other General Criteria

Apart from the distinctions outlined, the selected decisions also employ some specific criteria to assess the legitimacy of the challenged measures, often directly connecting them with general principles used as balancing techniques, such as proportionality and reasonableness. While referring to the following paragraphs for a more thorough analysis on the use of such techniques, it is useful to immediately point out some of the factual criteria used by courts.

2.4.1 Distinction Among Economic Activities

Courts take into account the distinctions among economic activities with regard to the socio-economic interests they satisfy. Such distinction is indeed laid out by the legislature in the emergency measures, in order to set up different lockdown regimes for economic activities having a different impact on the daily necessities of people, as it happens with the distinctions between "essential" and "non-essential" activities. What courts do is assess whether the legislature had solid grounds to introduce distinctions and to classify, for instance, certain activities or goods as "essential" or not.

As such, the character of the economic activity scrutinized is relevant since it concerns the reasonableness and proportionality of the challenged measure, meaning that distinctions not properly justified could be deemed unlawful.²⁶ A decision from the Campania Regional Administrative Tribunal, from this perspective, held that a wholesale retailer of electric components which engages in trade with businesses providing essential goods (such as electricity) is part of an essential supply chain and is therefore to be regarded as an essential business, whose closure is unreasonable.²⁷

On the other hand, similar activities could in concrete form serve varying interests, thus justifying differentiated treatments. The advice of the Italian Council of State held, for example, that while from a broad point of view restaurant services may be grouped under one category, in concrete some distinctions may be

²⁵ See § 6.

²⁶ Administrative Regional Tribunal of Lazio, 16 February 2021, no. 1862.

²⁷ Italy, Administrative Regional Tribunal of Campania, 4 February 2021, no. 789.

reasonably laid out by authorities.²⁸ In particular, restaurant services provided in hospitals, hotels or along highways are aimed at offering necessary services in specific contexts which are different from the activity of restaurants operating as a mainly “leisure” activity.

Again, a set of decisions from the Italian administrative courts instead focused on the non-essential nature of bingo halls, betting halls, amusement arcades and casinos to uphold the legitimacy of the challenged measures which suspended such activities²⁹. Another decision, on the other hand, pointed out that hair salons and beauty centers mostly satisfy the same needs. To distinguish between these two activities (allowing the first and prohibiting the second) without a proper inquiry and a thorough explanation from the authority, is unlawful.³⁰

In several instances, courts focused on whether the distinctions introduced were unjustifiably discriminatory against some economic activities, therefore referring to a general principle of non-discrimination or equal treatment.³¹ We therefore refer to the correspondent paragraph (4.2) for a further analysis.

2.4.2 The State of Emergency

The state of emergency is a concept which, as might be expected, is often found in the courts’ reasoning. It is therefore important to discern its concrete impact on the assessment of restrictive measures.

²⁸ Italy, Advisory Opinion of the Council of State, 28 April 2021, no. 00850/2021.

²⁹ Ordinance of the Regional Administrative Tribunal of Lazio, 12 February 2021, no. 827; Decree of the Council of State, 22 February 2021, no. 884.

³⁰ Administrative Regional Tribunal of Lazio, 16 February 2021, no. 1862.

³¹ Supreme Court of Israel, *Idan Center Dimona Ltd. v Government of Israel* [2020] 6939/20 HCJ (HCJ); High Court of Zimbabwe, ‘The Zimbabwe Chamber for informal Workers & 2 Others v Minister of Health and Child Care & 6 Others’; Belgian Council of State, 24 February 2021, no. 249.904; Constitutional Court of the Republic of Latvia, decision of 11 December 2020, no. 2020-26-0106; for Spain see Superior Court of Justice of the Valencian Community, Administrative Chamber, no. 94/2021 of 17 March 2021; United States Court of Appeal of the Sixth Circuit, *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, no. 20-Civ-1581, (6th Cir. 2020); United States, United States Court of Appeal for the Fifth Circuit, *Big Tyme Investments, LLC v. Edwards*, No. 20-30526 (5th Cir.

In principle, the emergency, and the subsequent need for constantly evolving measures, rapidly adapting to the changing reality of the pandemic, raises issues from two different perspectives. From a formal point of view, emergency affects the “allocation of regulatory powers” among different institutions and among local and central authorities.³² From the substantive perspective, it affects the way the balancing between conflicting instances is developed, altering the standards of reasonableness and legitimacy of public interventions.³³

Some countries have formally declared the state of emergency, while in others the courts have made circumstantial references to it although their states have not made such a declaration. The emergency requires making decisions in a state of urgency and limited knowledge³⁴. Uncertainty may modify the balancing between health protection and economic activities. From a formalistic and constitutional point of view, the emergency affects the choice of the legal instruments designed to fight the pandemic.

In American case law, the judge’s evaluation takes into great account the presence of a formal declaration of the state of emergency.³⁵ These cases link the expanded powers of public authorities in limiting businesses to the official declaration of a state of emergency, pursuant to the relevant legislation.³⁶ In such cases, the state of emergency is not only a principle justifying wider margins of discretion in balancing rights, but also an official and formal circumstance legitimizing public interventions and reducing the scope of the judicial review.³⁷

Jan. 13, 2021); Austrian Constitutional Court, decision no. V392/2020 of 1 October 2020.

³² See, in this issue of the journal, Fabrizio Cafaggi and Paola Iamiceli, ‘Global Pandemic and the role of courts’.

³³ *Ibidem*.

³⁴ Fabrizio Cafaggi and Paola Iamiceli, Uncertainty, Administrative Decision-Making and Judicial Review (n. 2).

³⁵ United States, Supreme Court of Pennsylvania, *Friends of Danny Devito v. Wolf*, 227 A.3d 872 (Pa. 2020); United States District Court – Eastern District of Washington, *Slidewaters v. Washington State Department of Labor and Industries*, no. 2:20-CV-0210-TOR; Court of Appeals of the State of Minnesota, *Free Minnesota Small Business Coalition v. Walz*, no. A20-0641.

³⁶ *Ibidem*.; see also Ramsey County District Court, *Free Minnesota Small Business Coalition v. Walz*, 1 September 2020.

³⁷ *Ibidem*.

In a Belgian decision, the Council of State held that the emergency and the urgency surrounding the proceeding prevented the Council itself from seeking the opinion of its legislative section before delivering the judgment.³⁸

The Italian Council of State, instead, referred to the changing circumstances during a health emergency to assess the appropriateness of the legal instrument used to regulate the lockdown (i.e. a Decree of the President of the Council of Ministers), the proportionality, the scientific evolution of knowledge about the pandemic and its consequences.³⁹ The court pointed out that, while complying with the principle of legality, the use of such Decree is also an appropriate means to tackle issues whose features rapidly change due to the evolution of the pandemic. Italian courts also recognized that emergency, implying urgency of interventions, justifies the withdrawal of the public administration from a tendering procedure as well as particularly stringent timelines in tender procedures⁴⁰. In other words, the unilateral intervention on tender procedures which would have been, under ordinary circumstances, arbitrary and unlawful, is instead upheld due to the necessity to adjust even public procurement procedures to the new priorities and demands of public offices (such as more stringent health requirements when performing activities).

From a more substantive perspective, the state of emergency – declared or not – is essentially viewed by the courts as a circumstance which widens discretionary powers of authorities in issuing measures which are constantly amended⁴¹ and introduce distinctions among economic activities.⁴²

In justifying the imposition of limitations on business activities – and especially the closure of business premises – courts often

emphasized the peculiar circumstances surrounding the adoption of the challenged measures.⁴³ A Scottish decision, for example, points out that the emergency justifies a wide margin of discretion for authorities in order to issue the most effective measure against the pandemic.⁴⁴ The effectiveness of the protection is, according to the court, the criterion that, when balancing public interests and economic freedoms, orients the assessment of the measures' reasonableness.

Another decision, from Zimbabwe, connected the consideration of the state of emergency and the principle of non-discrimination, evaluating the different risks which could arise from the business of the informal sector compared with the formal one, where activities may be tracked and registered.⁴⁵

Even from this perspective, some decisions seem to emphasize the formal declaration of the state of emergency. The French Council of State, for instance, on the basis of the declared state of emergency, justified the imposition of differentiated measures which are constantly adjusted on the basis of the pandemic's evolution.⁴⁶ An Argentinian court indicated that the fact that emergency measures were taken pursuant to a declaration of emergency and to the subsequent laws and decrees empowering authorities to issue measures upheld the non-arbitrariness of the measures themselves.⁴⁷

These three decisions prove how the state of emergency affects, in concrete, the interpretation and application of general principles governing balancing of rights and interests, such as non-discrimination and reasonableness. This general relation is, however, viewed differently by courts. On the one hand, a French decision identified the emergency as an element directly orienting the

³⁸ Council of State, 24 February 2021, no. 249.904.

³⁹ Italy, Advisory Opinion of the Council of State, 28 April 2021, no. 00850/2021.

⁴⁰ Italy, Administrative Regional Tribunal of Trentino Alto-Adige, decision of 23 December 2020; Administrative Regional Tribunal of Campania, decision of 18 November 2020.

⁴¹ France, Council of State, decision of 14 April 2021, no. 451085.

⁴² High Court of Zimbabwe, 'The Zimbabwe Chamber for informal Workers & 2 Others v Minister of Health and Child Care & 6 Others'.

⁴³ Scotland, *KLR & RCR International Ltd. E al. v The Scottish Ministers* [2020] CSOH 98 P1043/20 of 11 December 2020; High Court of Zimbabwe, 'The Zimbabwe Chamber for informal Workers & 2 Others v

Minister of Health and Child Care & 6 Others'; Canada, Superior Court of Quebec, *Entrepreneurs en action du Québec c. Procureur général du Québec*.

⁴⁴ Scotland, *KLR & RCR International Ltd. E al. v The Scottish Ministers* [2020] CSOH 98 P1043/20 of 11 December 2020.

⁴⁵ High Court of Zimbabwe, 'The Zimbabwe Chamber for informal Workers & 2 Others v Minister of Health and Child Care & 6 Others'.

⁴⁶ Council of State, decision of 14 April 2021 no. 451085.

⁴⁷ Appeal Chamber in Administrative Disputes, *Córdoba, Unión de Trabajadores del Turismo, Hoteleros y Gastronómicos de la República Argentina UTHGRA c/ Gobierno de la Provincia de Córdoba*, 14 August 2020.

application of a proportionality test.⁴⁸ On the other hand, a Spanish decision held that the state of emergency, though justifying restrictive measures, may not prevent the application of a thorough proportionality test.⁴⁹

Two decisions concern the same sector (i.e. sports' activities) but reach different conclusions: the French court upheld a ban on the activities, while the Spanish court judged the ban disproportionate.

It is significant that in both cases the notion of state of emergency was substantiated by reference to scientific knowledge.⁵⁰ Regardless of the outcome of the dispute, such aspect seems to indicate how, when the state of emergency is considered, through the application of general legal principles, its content is derived from the assessment of scientific knowledge, so as to avoid excessively abstract references to the notion of emergency.

Finally, it is worth noting that sometimes courts emphasize a specific connection between emergency measures and economic and health policies in order to assess the scope and limits of the judicial review. Some decisions highlighted that the public authorities, when pursuing policy objectives during a health emergency, have a wide discretionary power in balancing conflicting interests, for example economic freedoms and public health.⁵¹ In another decisions, the judge refrained from "second guess policy choices", favoring one method of preventing the spread of the disease over another, provided that such method was reasonable.⁵²

⁴⁸ Council of State, decision of 16 October 2020 no. 445102.

⁴⁹ Administrative Chamber of the Superior Court of Justice of Catalonia, Resolution of 29 July 2020.

⁵⁰ See § 2.4.3.

⁵¹ Austrian Constitutional Court, V411/2020, V395/2020 et.al., V 396/2020 et.al., decision of 14 July 2020; for Belgium, see Council of State, 24 February 2021, no. 249.904.

⁵² United States District Court for the District of Maryland, *Antietam Battlefield KOA, et al. v. Lawrence J. Hogan, et al.*, 461 F. Supp. 3d 214 (D. Md. 2020).

⁵³ For this second 'group', see Superior Court of Justice of the Valencian Community, Administrative Chamber, 94/2021 of 17 March 2021; High Court of South Africa (Gauteng Division), *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR 68 (GP).

⁵⁴ See, for instance, Arizona Superior Court, *Maricopa County, Aguila v. Ducey*, CV 2020-010282, 8 September 2020 which explicitates how the

2.4.3 The Role of Scientific Knowledge

Courts rely on scientific knowledge to a different extent depending on the concrete issues addressed. Scientific knowledge may be referred to in a broad way, as a form of common knowledge regarding the development of the pandemic and the lack of conclusive scientific evidence. It may also be founded on institutional reports from national or international bodies, such as the WHO.⁵³ Scientific knowledge, in the courts' reasoning, is often used to evaluate the appropriateness of the measure challenged as a reasonable mean to achieve public health objectives.⁵⁴

Courts may refer to scientific information regarding Covid-19 transmission in order to point out the risks connected to the exercise of certain economic activities (i.e., those activities involving continuous communication and exchange between individuals, such as gambling activities, bars or certain sports)⁵⁵ or the sale of specific products (i.e., tobacco products).⁵⁶ The reference to scientific knowledge directly serves the proportionality test, since it justifies the necessity and appropriateness of a certain measure (such as the closure of business) when compared to other possible, but not equally effective, protection measures.⁵⁷

A decision from Spain assesses the risks of certain activities in light of the previous "wave" of infections. In particular, the judge noted how, after the first "wave", the zones whose bars and restaurants had the most customers later experienced a sharp rise in infections,

restrictions are based on experts data and suggestions concerning the containment of the Covid-19.

⁵⁵ French Council of State, 16 October 2020 no. 445102; for Spain see Superior Court of Justice of the Valencian Community, Administrative Chamber, 94/2021 of 17 March 2021; Superior Court of Justice of the Valencian Community, Administrative chamber 59/2021, 25 February 2021; Superior Court of Justice of the Asturias, Administrative Chamber, 93/2021, 23 February 2021. See also United States District Court – Eastern District of Louisiana, *4 Aces enterprises, LLC, et al. v. Edwards*, civil action no. 20-2150, which referred to scientific opinions to assess the risk of keeping bars open compared to restaurants.

⁵⁶ South Africa, High Court of South Africa (Gauteng Division), *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR 68 (GP).

⁵⁷ French Council of State, 16 October 2020 no. 445102; Council of State, 27 January 2021, no. 448732; High Administrative Court of Thüringen, decision no. 3 EN 105/21 of 9 March 2020.

thus confirming the inherent danger connected to certain activities, albeit carried out with safety measures.⁵⁸

Among decisions quashing emergency measures, scientific knowledge may also be the criterion to assess the distinctions among different economic activities, meaning that public authorities cannot adopt inconsistent measures for different activities without any scientific information suggesting that one activity is more dangerous than another.⁵⁹

2.4.3.1 Scientific Knowledge and Scientific Uncertainty

Scientific knowledge plays a role in the courts' assessment even when it is inconclusive or lacking. Courts are aware of the incompleteness of scientific awareness concerning the spread of Covid-19 and take it into account when evaluating the legitimacy of challenged restrictions.⁶⁰ However, these same courts adopt different approaches to the issue.

Some decisions referred to scientific uncertainty to uphold the challenged measures. Given that there is no sufficient scientific basis or consensus among the scientists concerning the exact transmission channels for Covid-19, a Canadian court held that emergency measures are constantly evolving and aimed at tackling issues as they arise, on the basis of an ongoing process of scientific discovery, thus adapting to the changing circumstances.⁶¹ The uncontrolled and still partly understood spread of the virus founds a presumption that the measures adopted serve at best public health interest in light of the epidemiological situation.⁶²

Following this perspective, a German court argued that the available scientific knowledge was not enough to determine breeding places for viruses which are more dangerous than others.⁶³ As a result, the limitation of business

hours for bars and restaurants aims at tackling the risks connected to gatherings and is therefore an appropriate response to the health emergency.

Scientific uncertainty – and the subsequent impossibility to determine, in the emergency measures' rationale, the specific justifications for limiting certain business activities – may also imply the unreasonableness of the lockdown provisions, due to a lack of certain factual basis. This reasoning is clearly embraced by the Austrian Constitutional Court, which referred to the lack of knowledge regarding the pandemic to quash an emergency measure, which was judged void of sufficiently detailed scientific background.

In a case concerning governmental bans on entering any kind of restaurant-establishment, the Constitutional Court held the unlawfulness of such bans due to the lack of sufficient scientific documentation as the basis for decision-making.⁶⁴ In other decisions, courts referred to the lack of scientific knowledge to hold that it was not apparent, from the legislative measure challenged, which circumstances had led the administration to set the conditions for entering in trading establishments.⁶⁵ Moreover, in another instance, a court stated that it was not apparent, from the legislative measure, which circumstances concerning the possible developments of Covid-19 led the administration to set the conditions for entering in trading establishments.⁶⁶ All these cases appear to question the reasonableness of the challenged measures, given that its factual justification is missing or incomplete.

Lastly, it should be noted how the degree of scientific (un)certainty guides the scrutiny of the reasonableness of the impugned measures also in light of the principle of precaution, as framed within the EU legal system. For an in-depth analysis of the issue we refer to § 4.3.

⁵⁸ Superior Court of Justice of the Valencian Community, Administrative chamber 59/2021, 25 February 2021.

⁵⁹ Italy, Administrative Regional Tribunal of Lazio, 16 February 2021, no. 1862.

⁶⁰ Fabrizio Cafaggi and Paola Iamiceli, 'Uncertainty, Administrative Decision-Making and Judicial Review' (n. 2).

⁶¹ Canada, Superior Court of Quebec, *Entrepreneurs en action du Québec vs. Procureur général du Québec*, 19 March 2021.

⁶² This reasoning parallels the one used by courts which judged the emergency measure lawful also because limited in time and subjected to constant

review, so to be amended according to the development of the pandemic (Germany, Federal Constitutional Court 1 BvQ 47/20, 29 April 2020; Scotland, *KLR & RCR International Ltd. E al. v The Scottish Ministers* [2020] CSOH 98 P1043/20 of 11 December 2020).

⁶³ Administrative Court of Karlsruhe, decision no. 3 K 4418/20 of 30 October 2020.

⁶⁴ Decisions no. V405/2020 and V429/2020 of 1 October 2020.

⁶⁵ Decisions no. V411/2020, V395/2020 et.al., V 396/2020 et.al. of 14 July 2020.

⁶⁶ Austrian Constitutional Court V411/2020, V395/2020 et.al., V 396/2020 et.al. 14 July 2020.

3. Models of Adjudication in Comparative Perspective

The grounds to assess the relationship between economic freedoms and public health vary according to the legal systems. The US case law mostly draws its reasoning from the landmark case *Jacobson v. Massachusetts* (1905) which affirmed the legitimacy of restrictions to individual liberty on the basis of public health necessities which empower the state to issue police measures.⁶⁷ As a result, in several cases US federal court judges focused on the assessment of the expansion of police powers derived from the state of emergency declaration at the state level as well as on the respect for the principles of rule of law and nondelegation, without questioning the technical discretion of the authorities or verifying the factual basis for the balancing of different interests to occur within the context of emergency measures.

At the same time, the reference to a wide notion of appropriateness/reasonableness, in place of a more thorough proportionality check, as the only tool to scrutiny the merit of the challenged measures, tends to polarize the results of judicial evaluation, especially in cases where the court quashes the challenged measures. The motivations given tended to question the general power of the state to restrict individual liberties and to set up distinctions among activities, creating, for example, an allegation of violation of the 14th amendment of the US Constitution.

The general landscape appears to be different in Europe. As a general matter, and especially examining the case law on economic freedoms from Belgium, France, Germany and Italy, it can be observed that such freedoms were outweighed by public health necessities.⁶⁸ This trend is different, for example, with regard to

other fundamental rights and freedoms, such as the freedom of association, which courts appeared more eager to protect even in light of the dangers of the pandemic.

The main concern of courts, especially in Italy and France, was of ensuring that public authorities (both local and national) preserved a degree of coherence in the emergency regulations in the differentiations among activities and geographical “zones” subjected to different restrictions.⁶⁹ Even constitutional courts focus on the factual basis of the challenged measures, declaring them unconstitutional when such basis is not complete enough.⁷⁰ Both constitutional and administrative courts refer to the state of scientific knowledge when carrying out this level of scrutiny.

From a broad point of view, the main approach chosen by European courts, often relying on principle derived from EU law (such as proportionality or precaution⁷¹), marks a difference between the European notion of economic freedoms and the US one, with special regard to the framing of business freedom within a social dimension which not only helps interpreting the fundamental right to property but also sets the criteria for its limitations.⁷²

In the U.S., the courts, in most cases, upheld the challenged measures by refraining from questioning their concrete reasonableness or the grounds for the prioritization of certain interests over others, displaying therefore a more deferential attitude toward the emergency policy powers of the governments.⁷³ A partial exception in Europe is represented by Spain, where the courts displayed a higher degree of variety, especially in interim relief proceedings which, in more than one instance, ordered the reopening of business on account of the

⁶⁷ Wendy E. Parmet, ‘Rediscovering Jacobson in the Era of Covid-19’ (2020) *Boston University Law Review Online* 100 117; Daniel Farber, ‘The Long Shadow of *Jacobson v. Massachusetts*: Public Health, Fundamental Rights, and the Courts’ *San Diego Law Review* 57 833.

⁶⁸ Arnaud Sée, ‘Les libertés économiques en période de crise sanitaire: un premier état des lieux’ (2020) *Droit et Coronavirus. Le droit face aux circonstances sanitaires exceptionnelles (Dossier) RDLF 21* <<http://www.revuedlf.com/droit-administratif/les-libertes-economiques-en-periode-de-crise-sanitaire-un-premier-etat-des-lieux/>> accessed 25 October 2021.

⁶⁹ France, Council of State, 30 December 2020, no. 448201; Italy: Administrative Regional Tribunal of Lazio, 16 February 2021, no. 1862.

⁷⁰ Austria, Constitutional Court, decision no. V392/2020 of 1 October 2020; decisions no. V405/2020 and V429/2020 of 1 October 2020.

⁷¹ See § 4.

⁷² Court of Justice of the European Economic Community, Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 03727.

⁷³ See, for instance, Supreme Court of Pennsylvania, *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020); Texas, U.S. District Court for the Western District of Texas, *6th Street Business Partners LLC v. Abbott*.

disproportionateness of the challenged measure (in relation with other viable alternatives) or the lack of grounds to differentiate among different activities.⁷⁴

This approach by Spanish courts marks the difference, for instance, from that of French courts, which is, in general, more deferential to the state. Even with regard to the same concrete issues, for example the ban on sports activities, while the French Council of State focused solely on the danger connected to sports activities and upheld the ban, the Superior Court of Justice of Catalonia considered less restrictive alternatives to a comprehensive ban and allowed activities to be resumed provided they complied with prescribed safety requirements.⁷⁵

In comparative perspective, we may further observe that while Italian courts tend to align to the French approach, German courts differentiate themselves by attaching great importance to the coherence of the logic path followed by the legislature in determining restrictions, but generally upholding emergency measures and quashing them only when manifestly illogical, for instance, in distinguishing among activities.⁷⁶ In other legal traditions (e.g. the Chinese legal system), deference toward the government's political will and the focus on the principle of legality reflects a certain evolution of the notion of rule of law.

Beyond the general comparative classifications, there is a division based on the factual context of the decisions. It is possible to observe two main groups. On the one hand, decisions focusing on the legality of the administrative decision-making process and the respect of the principle of rule of law. This group comprises mostly Chinese and American decisions.⁷⁷ In this last case, the reasoning is consistent with U.S. law, which interprets the rule of law in light of the due process clause as laid out in the U.S. constitution.⁷⁸ On the

other hand, there are decisions outlining a specific relation between economic freedoms and public health, thus carrying out either a balancing (in case of conflict) or an interpretative harmonization between the two. This group mostly comprises European and South American decisions.⁷⁹ A particularly dynamic approach, also grounded on the domestic legal tradition, is displayed by Indian decisions, which deserve further consideration and will therefore be assessed below.

3.1 The Legality of the Administrative Decision-Making Process and the Rule of Law

In some instances, courts focused on the legality of the administrative decision-making process leading to the enactment of the challenged measure. In these cases, a direct reference is made to the principle of rule of law. In practice, however, such principle has been interpreted differently.

In Chinese case law, the principle of rule of law is the only ground on which courts based their adjudication. Their attention was solely focused on the legitimacy of the procedures followed by authorities to issue measures restricting business activities.⁸⁰

In such cases, the issue of balancing is not raised since it is resolved *ex ante* through the consideration that public authorities enjoy full authority to enact restrictive measures in order to pursue public interests.⁸¹ The limit to their action is in the obligation to follow the procedures prescribed by the relevant laws and regulations. When such procedures had not been followed, the court quashed the challenged measures.⁸²

Incidentally, it is worth noting that such approach from Chinese courts is common to other countries in the Eurasian context, such as the Russian Federation, whose courts also refrained from any balancing and instead

⁷⁴ Administrative Chamber of the Superior Court of Justice of Catalonia, Resolution of 29 July 2020; Superior Court of Justice of Zaragoza, no. 286/2020, decision of 14th September 2020.

⁷⁵ See France, Council of State, decision of 16 October 2020 no. 445102; Spain, Administrative Chamber of the Superior Court of Justice of Catalonia, Resolution of 29 July 2020.

⁷⁶ Thuringian High Administrative Court, 3 EN 254/20, 29 April 2020.

⁷⁷ See § 3.1.

⁷⁸ See footnote no. 4.

⁷⁹ See § 3.2.

⁸⁰ Intermediate People's Court of Chengde City, 30 November 2020 – Appeal Decision no. 207; Primary People's Court of Kenli District, Dongying City, Decision of 2 June 2020, Administrative decision no. 57.; Wugang Primary People's Court (Hunan Province), 18 September 2020, First Instance Decision (Administrative) no. 127.

⁸¹ *Ibidem*.

⁸² Wugang Primary People's Court (Hunan Province), 18 September 2020, First Instance Decision (Administrative) no. 127.

focused on the respect of decision-making procedures laid out by law.⁸³

In other jurisdictions, potential conflicts between economic freedoms and other fundamental rights are not resolved *ex ante*; however, regarding compliance with the rule of law is a preliminary level of scrutiny which may lead the judge to solve the dispute without even assessing the concrete content of the measure challenged or using such assessment as a supplementary argument.

In U.S. legal system (both at the federal and at the state level), courts used scrutiny to review the legitimacy of emergency measures issued by administrative or executive authorities and therefore not subjected to formal legislative or review procedures. The potential conflict between such measures and the rule of law principle stems from the narrow interpretation of the principle of separation of powers or nondelegation. From this perspective, two American decisions declared lockdown restrictions unlawful and in violation of the economic fundamental rights, especially the right to property. In such cases, the judge pointed out that the state director of the health department did not have any authority to impose state-wide restrictions on business.⁸⁴ The power to close businesses on the basis of administrative orders (and not legislative statutes or regulations) could not be derived by any norm. According to such reasoning, the challenged measures were in violation of the principle of separation of powers. With regard to the principle of nondelegation, a Minnesota county court upheld the challenged measure, considering that subjecting emergency actions to extensive decision-making processes would be unreasonable and that the legitimacy of the measures could be traced back to the power, founded in law, given to the governor to declare a state of emergency.⁸⁵

The Supreme Court of Michigan, instead, focused on procedural guarantees concerning the issuance of a preliminary injunction, pointing out that a decision from the Court of Appeals imposing closure to a barbershop

⁸³See, for instance, Kemerovo Regional Court, decision of 29 June 2020, Case No. 12-239 / 20. In this case, which does not strictly concern business freedom, a business owner was fined for not equipping the store with disinfectants for customers. The court upheld the sanction issued.

⁸⁴Court of Common Pleas of Erie Country, Ohio, *LMV DEV SPE, LLC, DBA Kalahari Resorts & Conventions, et.. al.*, 2020-CV -020 I, 12 June 2020; Court of Common

owner who had kept the business open during the lockdown had been taken without the prescribed unanimity among judges and without respecting procedural guarantees.⁸⁶

In a French case, the Council of State addressed an issue of potential logic conflict between general provisions and special provisions. In particular, while the General Code of Local and Regional Authorities lays out a general power for mayors to take police measures during an emergency, the legal regime enacted by the legislature to fight the Covid-19 pandemic prevents mayors from taking measures unless there are compelling reasons linked to local circumstances. Therefore, a local measure instituting a stricter lockdown than provided for at the national level, in absence of exceptional local circumstances, is illegal and in violation of the freedom of trade.⁸⁷

In summary, the assessment of the compliance of emergency measures with the principle of rule of law, in all the legal systems involved in the analysis, has been scrutinized mainly with regard to procedural features of the administrative decision-making and the separation of powers. The latter issues, especially in the U.S. legal system, dealt with the relation between separation of powers and state of emergency, with the courts acknowledging that the formal declaration of a state of emergency partially reframes the interactions among different powers, imposing a different interpretation of the general principle.

3.2 Economic Freedoms and Public Health

As courts moved beyond the assessment of procedural and formal requirements of challenged measures and instead scrutinized their merit, the core issue was the relation (and potential conflict) between economic freedoms and public health. With regard to the concrete management of the pandemic, the two notions aim at different purposes: on the one hand, economic freedoms protect the autonomy of each business operator to carry out its own

Pleas of Lake County, Ohio, *Rock House Fitness, Inc. v. Acton*, Case no. 20CV000631, 20 May 2020.

⁸⁵ Ramsey County District Court, *Free Minnesota Small Business Coalition v. Walz*, 1 September 2020.

⁸⁶ Michigan Supreme Court, *Department of Health and Human Services v. Karl Manke*, 161394 & (27)(37)(38).

⁸⁷ France, Council of State, 30 December 2020, no. 448201.

activity according to its private interests, thus clashing, in principle, with emergency measures imposing closures or limitations to businesses and economic activities. On the other hand, public health pursues the maximum possible degree of collective protection against the pandemic, not only as a policy objective, but also as implementation of the fundamental right to health of each individual and the whole community. Therefore, public health, in principle, justifies the enactment of strict lockdown measures.

The analysis of case law, though generally in accordance with these premises, offers a landscape dotted with specifications, targeted upon the specific facts of the case examined.

3.2.1 Absence of Conflict Between Economic Freedoms and Public Health

Two decisions, one from Brazil and one from Italy, concern private management of health services, including vaccine distribution and Covid-19 swabs administration.

The Brazilian judge allowed private establishments to purchase and administer vaccines even without following the specific criteria prescribed by the challenged measure, donation to the public health system and immunization of priority groups⁸⁸. In this case, the right to health and the freedom of business were considered by the Court not in conflict but in harmony, calling for the widest vaccine coverage possible, including through vaccines administered by private establishments⁸⁹. Similarly, the Italian court quashed the measure prohibiting certain private establishments from conducting Covid-19 tests, considering that private establishments offer sufficient guarantees for correct performance of the service, as well as the necessity to maximize Covid-19 tests for tracing purposes.⁹⁰

Therefore, in these cases, the potential conflict between fundamental rights does not occur in practice, since private interests align

with public ones in pursuing the widest possible coverage for health services.

Such an alignment, however, might also be due to the specific dimension of the business freedom under scrutiny. In such cases, courts do not deal with businesses which want to keep their premises open or carry on offering services to customers; the debate revolves, instead, around private establishments which, in light of their economic autonomy, want to provide health services to their employees. Therefore, while customers may be in danger when entering a shop in times of pandemic, workers, at least in principle, are certainly not deprived of their right to health when receiving a vaccine from their employer, thus favoring alignment of interests.

3.2.2 Conflict Between Business Freedom and Public Health

In the majority of the selected cases, courts acknowledged a conflict between business freedoms and public health interests at the basis of the challenged measure. Therefore, they deemed it necessary to balance the two elements. From a general point of view, courts recognized that business freedom is not absolute and, as such, it may be limited by public powers in light of public interests and other fundamental rights.⁹¹ However, courts also referred to a wide array of specific circumstances that affected balancing. In other words, the concrete circumstances surrounding the case examined determined the “weight” of the rights and interested balanced.

The most relevant example is that of infection risk, related to specific economic activities, which heightens the importance of public health interests *vis-à-vis* economic freedoms.⁹² Such risk is not necessarily inherent in the activity, but it may also depend on the practical difficulty, for authorities, to monitor certain business fields (such as the transport sector or the informal sector) and

⁸⁸ Brazil, Federal Court - 1st Region, 1013225-55.2021.4.01.3400 Federal Court, 21^a Vara Federal Cível.

⁸⁹ *Ibidem*.

⁹⁰ Italy, Regional Administrative Tribunal of Lazio, 26 October 2020, no. 10933.

⁹¹ Italy, Council of State, decision of 27 April 2020, no. 3380.

⁹² France, Council of State, decision of 16 October 2020 no. 445102; Council of State, decision of 26 March

2021 no. 450411; Germany, High Administrative Court of Thüringen 3 EN 105/21, 9 March 2021; Italy, Decree of the Council of State, 22 February 2021 no. 884; Spain, Superior Court of Justice of the Valencian Community, Administrative Chamber, 94/2021 of 17 March 2021; South Africa, High Court of South Africa (Gauteng Division), *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR 68 (GP).

trace possible infection chains.⁹³ Furthermore, the assessment of the risk could also be affected by a general evaluation of the death toll imposed by the pandemic.⁹⁴

In other cases, the balancing is affected by the nature or by the specific conditions of some activities. Therefore, the business freedom of a non-essential activity (such as a leisure place as a town restaurant) is easily outweighed by public health, whereas catering activities in “sensitive” places like hospitals or highways enjoy a stronger protection and may therefore be allowed to stay open.⁹⁵ Again, where a shop is closed down but retains the possibility to carry out at least part of its services (e.g. delivery, pick and collect operations, etc.) its business freedom has been considered not excessively impaired by public health interests motivating lockdown measures.⁹⁶

In a French case, the judge emphasized that the suspension of amateur football championships could not find a claim for interim relief, given that most of the matches had been played at the time of the lockdown and, therefore, the “portion” of economic freedom affected was outweighed by public health.⁹⁷

Among the decisions quashing challenged measures, in some cases the judge focused on the factual basis of the measure (i.e. scientific and epidemiological assessment), deeming it insufficient to justify the distinctions among different activities.⁹⁸ Other decisions instead deemed the challenged measures unjustified because they were in violation of the principle of proportionality, given that other less restrictive alternatives were viable⁹⁹ or that the distinctions established among different activities were unreasonable and not appropriate with regard to the aim pursued.¹⁰⁰

⁹³ Zimbabwe, High Court of Zimbabwe, “The Zimbabwe Chamber for Informal Workers & 2 Others v Minister of Health and Child Care & 6 Others”.

⁹⁴ Superior Court of Justice of the Asturias, Administrative Chamber, 93/2021, 23 February 2021.

⁹⁵ Italy, Advisory Opinion of the Council of State, 28 April 2021 no. 00850/2021.

⁹⁶ French Council of State decisions of 13 November 2020, no. 445883, 445886 and 445899.

⁹⁷ French Council of State, decision of 11 June 2020 no. 440439.

⁹⁸ Austria, Constitutional Court, decision no. V392/2020 of 1 October 2020; decisions no. V405/2020 and V429/2020 of 1 October 2020; Italy, Administrative Regional Tribunal of Lazio, 16 February 2021, no. 1862.

⁹⁹ Spain, Administrative Chamber of the Superior Court of Justice of Catalonia, Resolution of 29 July

2020; Israel, Supreme Court of Israel, *Idan Center Dimona Ltd. v Government of Israel* [2020] 6939/20 HCJ (HCJ).

4. *Following. Principles Applied*

In other cases, the relevance of economic freedoms within the balancing was heightened by the consideration of the economic impact of the restrictions upon certain sectors.¹⁰¹ The specific features of such issue will be addressed in section 7, to which we refer.

As noted in the previous paragraph, given the ever-changing circumstances surrounding the development of the pandemic, courts, while addressing potential conflicts between rights and interests, tend to use the concrete circumstances of the case as a starting point to assess which interests should prevail. However, such reference to the facts is complementary to the application of different principles which may orient the balancing or even absorb it.

We have already encountered several of these principles and one, the rule of law, which was in some the courts’ reasoning and even prevents the balancing, by solving the dispute on preliminary formal-procedural grounds. In the Chinese context, the use of the principle of rule of law even amounts to a systemic trait, since it represents the main scrutiny “tool” for judges, giving the *ex ante* solution of any conflict in favor of the public authority’s right to impose restrictions and the citizens’ duty to respect them.¹⁰² In the majority of cases, however, the courts actually assessed the merits of the case as well as the content of the challenged measures. To do so, they referred to a wide array of principles. We will offer a brief overview of the main ones.

¹⁰⁰ Germany, Thuringian High Administrative Court, 3 EN 254/20, 29 April 2020.

¹⁰¹ France, Council of State, 9 June 2020, no. 440809; India, Haryana High Court, *Independent Schools Association ... vs State Of Punjab And Ors*, 30 June 2020, Writ Petition no. 7409/2020; Spain, Superior Court of Justice of Zaragoza, no. 286/2020, decision of 14 September 2020.

¹⁰² It is furthermore worth noting that economic relations and freedoms mentioned in the Chinese constitution cannot be directly invoked before the courts; therefore, none of the parties could raise the issue of a possible conflict.

4.1 Proportionality and Reasonableness

This section outlines how courts applied the proportionality principle and the general notion of reasonableness when assessing emergency measures.

In most cases, references to reasonableness are connected to those to proportionality. However, there are also examples of references to a general notion of reasonableness.¹⁰³ Of particular interest is a Polish decision of the District Court of Olsztyn, which, by employing the notion of reasonableness, echoes the idea of the rationality of the lawmaker in order to provide the plaintiff compensation even if her business did not fulfil all the requirements prescribed by law.¹⁰⁴

A substantial part of the selected decisions carries out a thorough proportionality test, modelled after the tripartite test developed by German courts. As such, the assessment of the adherence to the principle of proportionality implies three different evaluations: first, the lockdown measures should be suitable to achieve a legitimate aim; second, they should be necessary to achieve such aim, so that no less invasive means exist to pursue the same objective; and third, the measures should comply with the criterion of strict proportionality, meaning that they may not, even if appropriate and necessary, excessively hinder conflicting fundamental rights and interests.¹⁰⁵

Indeed, the conceptual distinctions among the three “steps” are not always clear in the decisions selected, thus confirming some of the long-lasting issues in the application of the tripartite test.¹⁰⁶ However, particular attention is reserved by some decisions to the search for less invasive or less demanding containment measures against Covid-19. Most of such decisions are “located” within the European Union, confirming the familiarity of European countries’ judges with the tripartite test, also embraced by the CJEU.¹⁰⁷

The disproportionate character of the challenged measures has been traced back to different factual circumstances. A German court judged a ban on integration assistance activities for mentally disabled people disproportionate since it did not add any protection in addition to that already ensured by the ban on external visits in facilities.¹⁰⁸ A Spanish court, on the other hand, suspended a ban on activities in sporting facilities, suggesting that the facilities could resume activities in compliance with safety requirements laid out by the regional Council of Sport in an Action Plan.¹⁰⁹

In these two cases, the focus of the court was not on the limitation itself, but on its comprehensiveness, which was judged unnecessary and not appropriate in light of the infection risk and the alternative measures available to safely resume activities. The Spanish judge refers to the scientific

¹⁰³ High Court of South Africa (Gauteng Division), *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR 68 (GP); Order of the Regional Administrative Tribunal of Lazio, 15 June 2020, No. 3832; Decree of the Council of State, 26 June 2020, No. 5013; Order of the Council of State, 17 July 2020, No. 5013.

¹⁰⁴ Wyrok Sądu Okręgowego w Olsztynie z dnia 02 września 2020 r. (sygn. akt IV U 1195/20), decision of 2 September 2020.

¹⁰⁵ On the tripartite proportionality test see Benedikt Pirker, ‘Proportionality Analysis and Models of Judicial Review’ (Europa Law Publishing 2013) 13 ff. and, for a specific focus on the German system, 105 ff.; Takis Tridimas, ‘Proportionality in European Community Law: Searching for the Appropriate Standard of Scrutiny’, in Evelyn Ellis, ‘The Principle of Proportionality in the Laws of Europe’ (Hart Publishing 1999) 65-84.

¹⁰⁶ *Ibidem*.

¹⁰⁷ Belgium, Council of State, 24 February 2021, no. 249.904; France, Council of State, 16 October 2020 no. 445102, Council of State, 27 January 2021, no. 448732; Germany, Administrative Court of Karlsruhe, 3 K 4418/20, 30 October 2020, Federal Constitutional

Court 1 BvQ 47/20, 29 April 2020, Federal Constitutional Court 1 BvR 2530/20, 11 November 2020, High Administrative Court of Berlin-Brandenburg, decisions no. S 22/21 and S 23/21 of 3 March 2021, High Administrative Court of Berlin-Brandenburg 11 S 17/21, 5 March 2021, High Administrative Court of Thüringen 3 EN 105/21, 9 March 2021, Thuringian High Administrative Court, 3 EN 254/20, 29 April 2020; Italy, Council of State, 13 November 2020, no. 248.918; Ordinance of the Regional Administrative Tribunal of Lazio, 12 February 2021 no. 827, Decree of the Council of State, 22 February 2021 no. 884; Ordinance of the Council of State, 5 March 2021 no. 1061; Latvia, Constitutional Court of the Republic of Latvia, decision of 11 December 2020, no. 2020-26-0106; Spain, Administrative Chamber of the Superior Court of Justice of Catalonia, Resolution of 29 July 2020. On the role of the principle of proportionality in European case law see Tor-Inge Harbo, ‘The Function of the Proportionality Principle in EU Law’ (2010) European Law Journal 16(2) 158.

¹⁰⁸ Thuringian High Administrative Court, 3 EN 254/20, 29 April 2020.

¹⁰⁹ Administrative Chamber of the Superior Court of Justice of Catalonia, Resolution of 29 July 2020.

knowledge incorporated in the Council of Sport's Action Plan to determine the existence of a viable alternative to the challenged measures¹¹⁰; on the other hand, the German judge focuses solely on the inner rationality of the ban, considering that, since the facilities' staff had already been in contact with the patients, further activities could not represent an additional source of risk.¹¹¹

Proof of the use of proportionality tests also comes from Israel, where it is put in relation with the principle of equality. In particular, the Israeli judge, while not referring to the standard tripartite test as known in the EU, mentions that proportionality imposes on the state the obligation to consider, when issuing a restrictive measure, the alternative which least hinders the equal treatment of business activities.¹¹² Such approach confirms a trend already identified by comparative studies and which sees the Israeli judiciary increasingly employing proportionality (and especially the necessity and appropriateness tests) to scrutiny public policies.¹¹³

Other decisions trace a connection between proportionality and reasonableness. Courts, rather than carrying out a complete proportionality test, mostly focus on its second element, i.e. the appropriateness of the measure challenged, linking it with the wider criterion of reasonableness. In these cases, reasonableness becomes, indeed, part of a "partial" proportionality test. Such appropriateness is often related to the consideration of emergency circumstances.¹¹⁴

An Italian case discusses the logical relation between the emergency circumstances and the

principles of proportionality and reasonableness with regard to the specific public health interests underlying the challenged measure. In particular, the court stated that preventing private establishments from doing Covid-19 testing was inconsistent with the necessity to maximize tracing.¹¹⁵ The decision further applies proportionality pointing out that, while the public "monopoly" over Covid-19 testing could in principle be justified due to the necessity of ensuring an appropriate level of safety and a correct transmission and registration of results, such circumstances could change over time. Therefore, the principle of proportionality imposes a constant review of the measures adopted in order to avoid excessive penalizations of the different interests involved.

Two other Italian decisions connected reasonableness to the urgency of the need for protective equipment (i.e. masks), which justifies a quick and flexible procurement procedure¹¹⁶, as well as the withdrawal of a procurement procedure, due to new necessities arisen during the pandemic.¹¹⁷ In two other decisions, European courts highlighted that the reasonableness and proportionality of the restrictions stemmed from their limitedness, given that the challenged measures were temporary and constantly reviewed¹¹⁸, that such measures only obliged shops to adopt certain precautions to stay open¹¹⁹ or that the restrictions intervened at a time when the involved activity (i.e. a football league) was mostly finished.¹²⁰

¹¹⁰ *Ibidem*.

¹¹¹ Thuringian High Administrative Court, 3 EN 254/20, 29 April 2020.

¹¹² Supreme Court of Israel, *Idan Center Dimona Ltd. v Government of Israel* [2020] 6939/20 HCJ (HCJ).

¹¹³ Talya Steiner, 'Proportionality Analysis by the Israeli Supreme Court', in Mordechai Kremnitzer, Talya Steiner, Andrej Lang, *Proportionality in Action. Comparative and Empirical Perspectives on the Judicial Practice* (Cambridge University Press 2020) 285-384.

¹¹⁴ Italy, Advisory Opinion of the Council of State, 28 April 2021 no. 00850/2021; United States District Court for the Northern District of California, *Altman v. County of Santa Clara*, 464 F.Supp.3d 1106 (N.D. Cal. 2020); United States District Court for the District of Connecticut, *Connecticut Citizens Defense League v. Lamont*, 465 F.Supp.3d 56 (D. Conn. 2020); United States District Court for the Central District of California, *McDougall v. County of Ventura*, No. 2:20-cv-02927-CBM-AS, 2020 WL 6532871 (C.D. Cal. Oct. 21, 2020); Supreme Court of New Mexico, *Grisham v. Reeb*,

No. S-1-SC-38336, 2020 WL 6538329 (N.M. Nov. 5, 2020); *Supreme Court of Pennsylvania, Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020); see also Austrian Constitutional Court, decision no. V392/2020 of 1 October 2020.

¹¹⁵ From this perspective, see Italy, Regional Administrative Tribunal of Lazio, 26 October 2020, no. 10933, which, however, also mentions proportionality.

¹¹⁶ Administrative Regional Tribunal of Campania, decision of 18 November 2020.

¹¹⁷ Administrative Regional Tribunal of Trentino Alto-Adige, decision of 23 December 2020.

¹¹⁸ Germany, Federal Constitutional Court 1 BvQ 47/20, 29 April 2020; Scotland, *KLR & RCR International Ltd. E al. v The Scottish Ministers* [2020] CSOH 98 P1043/20 of 11 December 2020.

¹¹⁹ Germany, Federal Constitutional Court 1 BvQ 47/20, 29 April 2020.

¹²⁰ France, Council of State, decision of 11 June 2020 no. 440439.

4.2 Non-Discrimination

As previously mentioned, courts refer to the principle of non-discrimination especially when assessing the legitimacy of criteria introducing distinctions among economic activities in lockdown measures, imposing different restrictions upon various sectors. At the same time, in some cases courts used non-discrimination as a criterion to assess the reasonableness and proportionality of the challenged measures.¹²¹ Where distinctions among activities were deemed to be grounded on objective differences concerning the impact of the activities on the health crisis, the measures were upheld.¹²²

In other cases, discrimination among activities affected the judgment of proportionality. For instance, a German court held that different restrictions for integration activities with children and with mentally disabled people were not related to any objective difference in their impact on the epidemiological situation.¹²³ The harsher restrictions on activities with mentally disabled people were therefore deemed disproportionate. In several cases, high risks of virus transmission associated with certain activities justified the distinctions laid out in the emergency regulations.¹²⁴ For instance, a Spanish court upheld the legitimacy of a measure which opened restaurants but kept gambling establishments closed, considering that the risk of spreading a virus in a gambling establishment is higher than in a restaurant and therefore the two economic activities cannot be treated equally.¹²⁵ Similarly, a U.S.

court justified restrictive measures for restaurants on the basis of the specific risks associated with the activity of eating and drinking in public places.¹²⁶

Another U.S. decision pointed out that bars serve primarily as a place for people to socialize, whereas in restaurants people mostly eat in small groups.¹²⁷ Therefore, according to the court, a different treatment for bars and restaurants (i.e. allowing consumption of foods and alcohol in restaurants while prohibiting them in bars) does not violate the principle of equality¹²⁸. In another relevant decision, the Austrian Constitutional Court ruled that a measure banning entrance to a stand-alone car wash plant but allowing entrance to a plant attached to a gas station violated the principle of equality, since it did not provide any reason justifying the distinction between stand-alone plants and plants attached to gas stations.¹²⁹

Of particular interest is a set of French cases concerning the closure of bookshops during lockdowns.¹³⁰ The Council of State pointed out that bookshops contribute to the effective exercise of freedom of speech and to the free communication of ideas and opinions, and that books – although not first level necessity goods like food products – have an essential character which must be taken into consideration by the government. However, when assessing the specific measure, the court noted that bookshops were allowed to stay open for delivering, pick-up and collection activities and that book selling in supermarkets had been forbidden in order to protect bookshops. Therefore, the court stated that the closure of

League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, No. 20-Civ-1581, (6th Cir. 2020).

¹²⁵ Superior Court of Justice of the Valencian Community, Administrative Chamber, 94/2021 of 17 March 2021.

¹²⁶ United States, United States District Court, Western District of Michigan, Southern Division, *Michigan Restaurant and Lodging Association v. Gordon*, 1:20-cv-1104, 20 November 2020.

¹²⁷ United States Court of Appeal for the Fifth Circuit, *Big Tyme Investments, LLC v. Edwards*, No. 20-30526 (5th Cir. Jan. 13, 2021).

¹²⁸ *Ibid.* Along the same line of reasoning, with regard to movie theaters and performance venues see also United States District Court, Western District of Michigan, Southern Division, *CH Royal Oak, LLC v. Whitmer*, 472 F.3d 410 (W.D. Mich. 2020).

¹²⁹ Constitutional Court, decision no. V392/2020 of 1 October 2020.

¹³⁰ Council of State decisions of 13 November 2020 no. 445883, 445886 and 445899.

¹²¹ Belgium, Council of State, 28 October 2020, no. 248.781; Council of State, 13 November 2020, No. 248.918; France, Council of State, 11 June 2020, no. 440439; Germany, Thuringian High Administrative Court, 3 EN 254/20, decision of 29 April 2020; Spain, Superior Court of Justice of the Valencian Community, Administrative Chamber, 94/2021 of 17 March 2021; Spain, Superior Court of Justice of Zaragoza, no. 286/2020, decision of 14 September 2020.

¹²² See, for instance, Belgium, Council of State, 28 October 2020, no. 248.781.

¹²³ Thuringian High Administrative Court, 3 EN 254/20, decision of 29 April 2020.

¹²⁴ Zimbabwe, High Court of Zimbabwe, 'The Zimbabwe Chamber for informal Workers & 2 Others v Minister of Health and Child Care & 6 Others'; Belgian Council of State, 24 February 2021, no. 249.904; Constitutional Court of the Republic of Latvia, decision of 11 December 2020, no. 2020-26-0106; for Spain see Superior Court of Justice of the Valencian Community, Administrative Chamber, 94/2021 of 17 March 2021; United States Court of Appeal of the Sixth Circuit,

bookshop, as required by public health interests, did not harm the freedom to conduct a business and the right to non-discrimination.

We already noted that the notion of non-discrimination is referred to by courts to assess the legitimacy of the distinctions between essential and non-essential activities. In particular, an Israeli decision deals with emergency regulations which, while allowing only essential stores to be open during the lockdown, does not distinguish between essential and non-essential products to be sold, with the consequence that those essential stores sold non-essential goods as well whereas the petitioners (some toy stores) could not sell their products since they were not essential stores.¹³¹ The court argued that such a mechanism was unjustifiably discriminatory against non-essential stores and that the respondent public authority had to amend the measures in order to prevent essential stores from selling non-essential goods.¹³²

A peculiar approach is adopted in a U.S. decision concerning a request for injunction ordering the reopening of business facilities. The judge asserted that acting upon the distinction between essential and non-essential businesses is discriminatory since it does not focus on the capability of the business operators to provide a safe environment but rather on the “identity” of the business itself¹³³. Furthermore, the judge noted, in other U.S. states the very same business operator had been allowed to reopen according to safety requirements. This decision is particularly relevant since it uses non-discrimination as a conceptual tool to question the legitimacy of the very distinctions between “essential” and “non-essential” activities, from a general and systemic point of view.

The comparative analysis puts on display the dynamic nature of the principle of non-discrimination, reflecting different concrete forms of discrimination which may be caused by emergency measures. The most relevant

one, in quantitative terms, on the basis of the selected cases, is that among different business owners, directly connected to fundamental economic freedoms.

Lockdown measures, however, have an impact on customers as well. In the German case concerning limitations on integration activities for mentally disabled people, for example, the court noted how the challenged measure produced an unjustified discrimination between mentally disabled people and children, thus harming the former’s fundamental rights. Such aspect, however, does not clearly emerge from the selected decisions, which, apart from the aforementioned German exception, focused mainly on the potential discrimination involving the plaintiff, namely the business owner.

4.3 Precautionary Principle

The decision of the Superior Court of Justice of the Valencian Community referred to the precautionary principle to uphold the legitimacy of the challenged measure.¹³⁴ In particular, the court pointed out that, based on this principle, the public authority, in order to protect public health, may take protective measures (such as restrictions on business activities) not only when there is an actual danger, but also in the presence of a potential risk.¹³⁵ Once again, the court referred to the scientific knowledge available in order to assess the potential risks, mentioning a report by the Deputy Director General for Epidemiology, Health Surveillance and Environmental Health which had pointed out how, even when complying with strict safety requirements, the economic activity involved (i.e. gambling establishments) were a high-risk environment due to the frequent sharing of gaming elements by customers.

A general reference to the precautionary principle also led a Spanish court to justify a wide discretion of public powers in

¹³¹ Supreme Court of Israel, *Idan Center Dimona Ltd. v Government of Israel* [2020] 6939/20 HCJ (HCJ).

¹³² Although it is not explicit in the decision, it seems that the Israeli judge confirmed the fundamental connection which must exist between, on the one hand, the distinction between essential and non-essential activities and, on the other hand, the concrete interests and necessities of the people or the consumers. In times of emergency, therefore, only goods which

satisfy fundamental needs of the consumers may be sold.

¹³³ United States, Court of Common Pleas of Erie County, Ohio, *LMV DEV SPE, LLC, DBA Kalahari Resorts & Conventions, et .. al.*, 2020-CV -020 I, 12 June 2020.

¹³⁴ Administrative Chamber, 94/2021, decision of 17 March.

¹³⁵ See also Superior Court of Justice of the Asturias, Administrative Chamber, 93/2021, 23 February 2021.

determining the criteria for the restrictions.¹³⁶ Other decisions of the Italian courts, refer to the precautionary principle just to outline the common purpose of all protective measures taken by authorities during the pandemic.¹³⁷ One of the decisions, however, refers to the principle to emphasize that its application must be reasonable and proportional and cannot be the legal ground for unjustifiable discrimination between different economic activities.¹³⁸

The precautionary principle is recognized by European law and, as such, is referred to by courts of EU Member States. However, even within Europe, it can be observed that relatively few decisions applied it, compared to the higher number of cases mentioning reasonableness or proportionality.

Indeed, even without referring to precaution, these two principles allowed courts to inquire as to the factual justification of challenged measures in light of the risks (both actual and potential) connected to certain activities. The same pattern, as already noted, was replicated by courts outside Europe.

5. The Determination of Remedies

As far as remedies are concerned, the selected decisions may be roughly grouped under three main categories.

In the first group, we have decisions granting interim relief or injunctive relief in urgency/interim procedures, in the form of suspension of the challenged measures, thus, in most cases, allowing business owners to reopen¹³⁹. As already noted, there is at least one decision that does not suspend the efficacy of the challenged measure (in that case, a

decision to terminate football championships) but only one of its consequences (i.e. relegation of two teams in the lower league), ordering a supplementary review of the conditions for resuming games.¹⁴⁰

In the second group, there are decisions which annul the challenged measures or declare them unconstitutional, therefore quashing them.¹⁴¹ It should be noted that some of these decisions quashed the measures on preliminary grounds concerning the respect of the principles of legality and rule of law. A decision from the Israeli Supreme Court, while finding the challenged measure unlawful, did not directly quash it, but rather gave the applicable public authority a term to amend it, in light of the adverse consequences of an outright cancellation of the measure.¹⁴²

A third group of decisions concerns monetary compensation, sought by plaintiffs on account of allegedly unlawful closures. In an Italian case, the plaintiff specifically asked for compensation, but the court rejected the claim, while also upholding the challenged measure.¹⁴³ In another case, the Campania Regional Administrative Tribunal awarded monetary damages to an essential business activity (a wholesale retailer of electric components) which had been unlawfully closed down by the local government.¹⁴⁴ The court verified that a causal link existed between the closure of the business and the loss of income sustained in the time-period considered.

Of particular interest is a decision from the U.S. which offered two grounds for the rejection of the compensatory claim: first, the lack of *locus standi* of the defendant (the State governor), and second, the defendant would be protected by sovereign immunity and could not be liable for damages.¹⁴⁵

¹³⁶ Superior Court of Justice of the Asturias, Administrative Chamber, 93/2021, 23 February 2021.

¹³⁷ Decree of the Council of State, 26 June 2020, No. 5013; Regional Administrative Tribunal of Lazio, 26 October 2020, no. 10933.

¹³⁸ Administrative Regional Tribunal of Lazio, 16 February 2021, no. 1862.

¹³⁹ Please refer to table in § 2.2 and to the subsequent analysis for exact quotation of such decisions.

¹⁴⁰ French Council of State, 9 June 2020, no. 440809.

¹⁴¹ See § 2.2.

¹⁴² Supreme Court of Israel, *Idan Center Dimona Ltd. v Government of Israel* [2020] 6939/20 HCJ (HCJ).

¹⁴³ Advisory Opinion of the Council of State, 28 April 2021 no. 00850/2021.

¹⁴⁴ Italy, Administrative Regional Tribunal of Campania, 4 February 2021, no. 789.

¹⁴⁵ United States, Texas, U.S. District Court for the Western District of Texas, *6th Street Business Partners LLC v. Abbott* (1:20-cv-00706). The court discusses in depth the *Ex parte Young* doctrine (from the landmark case of the U.S. Supreme Court in 1908) which allows suits in federal courts against states' officials. Such doctrine allows suits against state officials attempting to enforce unconstitutional provisions, even if founded on state legislation. In particular, the Supreme Court held that attempts to enforce unconstitutional law are not protected by sovereign immunity. The doctrine was based on the legal fiction that lawsuits concerning such matters were not against the state but against the state officials in their individual capacity, as such not protected by immunity. However, in present case, the

6. *Following. A Focus on Some Indian Decisions*

A separate analysis of a further set of Indian decisions provides insights into means of judicial assessment of socio-economic conflicts arising from the pandemic. Such features are framed within the peculiar character of the Indian economic constitution, which designs an active role for the State in order to tackle social inequality and foster balanced development. At the same time, however, the Indian judiciary, mostly modelled upon the common law and thus employing remedies such as writs of *mandamus* and prohibition¹⁴⁶, directly carries out important functions of social engineering when implementing socio-economic rights enshrined in the Constitution.

It is indeed relevant that decisions from the High Court of Manipur referred to the Directive principles of State policy, enshrined in the Indian constitution, as general principles to justify an order, addressed to public authorities, to take support and relief measures for school students' transporters, a category which were greatly damaged by the lockdown and the suspension of "on-site" education activities.¹⁴⁷

Such Directive Principles are a set of policy clauses contained in the Indian Constitution which created requirements for positive actions to be taken by the State in pursuit of development and welfare objectives. Their specific legal status is controversial, as is their legal force and effect¹⁴⁸. However, during the pandemic, Indian courts often referred to that

concept in order to justify specific orders issued to give public authorities command to take positive actions. From a broader perspective, their recognized function as interpretative criteria represents, for the courts, a useful tool to adjudicate complex social conflicts.

Apart from the reference to general principles, the dynamic character of Indian case law is displayed by diversity of the remedies issued to face the socio-economic consequences of the pandemic, in light of a proper balancing not only between business freedom and public health, but also between economic freedom in the sense of freedom to manage business according to private interests and economic freedom as a justification for support and relief measures issued to tackle economic hardships caused by the pandemic.

As a brief overview focusing on such issues, three decisions have been selected, covering vastly different practical issues. The first originates from a dispute between a hotel owner and two financial institutions concerning repayment of loans. The business owner decided to file a petition in order to be granted a moratorium on payment on the basis of a circular of the Indian Central Bank. The second decision concerns a request for positive actions to be taken in support of the transport sector, severely hit by the pandemic. The third decision concerns the payment of wages during the lockdown when business are closed and workers stay at home.

court pointed out that none of the requirements of such doctrine were satisfied. In particular, the court highlighted that, while the state official (Governor Abbott) did promulgate the challenged measure, he does not have, under the applicable law, any power to enforce it, which is instead vested in another authority. The *Ex parte Young* doctrine, therefore, may not be applied and the governor is protected by immunity according to the 11th amendment of the U.S. constitution.

¹⁴⁶ S.N. Jain, 'Judicial System and Legal Remedies', in Joseph Minattur (ed), *Indian Legal System* (Tripathi 1978) 133-147. In the legal terminology of common law legal systems, a writ of *mandamus* (or of mandate)

is, in essence, an order compelling someone (usually a public authority) to carry out an action or execute a duty on the basis of a legal obligation. A writ of prohibition is instead issued by superior courts to prevent lower courts from deciding cases exceeding their jurisdiction or taking actions contrary to justice.

¹⁴⁷ High Court of Manipur, *All Manipur School Student Transporter Association v. The State of Manipur and Ors.*, - WP (C) No. 459 of 2020.

¹⁴⁸ See Gautam Bhatia, 'Directive Principles of State Policy', in Sujit Choudry, Madhav Khosla, Pratap B. Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016).

| Decision | Reasoning | Remedy |
|--|---|---|
| <p>High Court of Karnataka, <i>Velankani Information Systems Limited v. Secretary, Home Affairs, Government of India</i>, WP No. 6775 of 2020, MANU/KA/2455/2020</p> | <p>The regulatory policies of the Reserve Bank of India cannot, with binding force, order a bank to issue a moratorium; however, it is mandatory for the bank to ensure the continuity of viable businesses.</p> | <p>Where the denial of such moratorium hinders the survival of a business, the court may grant a proper remedy ordering the bank to issue the moratorium.</p> |
| <p>High Court of Manipur, <i>All Manipur School Student Transporter Association v. The State of Manipur and Ors.</i>, - WP (C) No. 459 of 2020</p> | <p>The lack of support actions for school students' transportation drivers during the lockdown is unconstitutional.</p> | <p>Order to the state government to take an appropriate decision for providing financial help within a month and to constitute a committee to verify the genuineness of the claims and submit a report to state government.</p> |
| <p>Supreme Court of India, <i>Ficus Pax Private Limited vs Union of India</i>, 12th June, 2020, Writ Petition no. 10983/2020</p> | <p>The Court recognized that paying wages during the lockdown could negatively impact on the financial situation of certain operators; at the same time, it stated that the workers' interests should be protected.</p> | <p>The Court called for negotiations between employers and employees in order to regulate the issues concerning wages during the lockdown period. If an agreement could not be reached, the Court then called for the parties to submit a request to the concerned labour authorities who are entrusted with the obligation to conciliate the dispute between the parties. In case an agreement was reached, the Court declared that it should be applied regardless of the provisions contained in the challenged measure.</p> |

The common approach displayed by such decisions focuses on the social and economic consequences of the pandemic, incorporating them not only in the assessment of the legitimacy of the challenged measures, but also in the determination of the specific remedy. In the first decision, for instance, the Court focused on the one hand on the discretion enjoyed by the bank in its lending policies as derived from a general freedom of business and, on the other hand, on the duty to ensure the survival of viable businesses during the pandemic.¹⁴⁹

In the second decision, the Court pointed out that the lack of support actions for school students' transportation drivers during the lockdown was unconstitutional since it violated, among others, the freedom to conduct a business by depriving the workers of a chance to earn income. As a consequence, the Court ordered the state government to take an appropriate decision for providing financial help within a month and to constitute a committee to verify the genuineness of the claims and submit a report to state government. The Court also ruled that, if necessary, the state government could approach the central government for grant of a financial package so that it could extend help to students' transportation's drivers, at least on humanitarian grounds.¹⁵⁰

In the third decision, the Court recognized that paying wages during the lockdown could negatively impact on the financial situation of certain operators; at the same time, it stated that the workers' interests should be protected. As a solution, the Court did not openly question the legitimacy of the measure challenged (it had already expired at the time of the decision). Instead, it called for negotiations to initiate between employers and employees in order to regulate the issues concerning wages during the lockdown period. If an agreement could not be reached, the Court then called for the parties to submit a request to the concerned labour authorities who are entrusted with the obligation to conciliate the dispute between the parties. In case an agreement was reached, the court declared that it should be applied regardless of the

provisions contained in the challenged measure.¹⁵¹

7. The Assessment of Economic Losses Suffered by Business Operators and the Determination of Correspondent Remedies

The pandemic itself implied extensive economic consequences for the business operators (or workers and consumers) involved, either in form of losses or in form of relief measures.

In the selected cases, the issue is considered by courts from two different perspectives. First, the impact of existing relief measures on the assessment of the challenged restrictions' legitimacy, especially from the perspective of their proportionality and reasonableness. Second, the consideration of economic losses as grounds to issue specific remedies or grant, by order of the court, monetary relief for closed activities.

7.1 Relief Measures as Counterbalancing Forces in the Balancing Judgment

In several European decisions the consideration of economic losses and corresponding recovery measures for business activities which were closed was linked with the assessment of proportionality and reasonableness.

The fact that a business operator could have access to support and recovery measures, especially in terms of economic assistance, led courts to find the restrictive measures reasonable and/or proportional, since their negative impact was counterbalanced (at least partially) by positive actions of support.

In a French decision, even the mere announcement of compensatory measures for ski lifts closed during the lockdown was used to uphold the legitimacy of the challenged restrictions, given the prospective support enjoyed by business owners.¹⁵² In similar cases, the existence of support schemes for fair operators and gyms was referred to by judges as an element counterbalancing the adverse impact of the challenged restrictions, therefore rendering such restrictions proportional.¹⁵³

¹⁴⁹ High Court of Karnataka, *Velankani Information Systems Limited v. Secretary, Home Affairs, Government of India*, WP No. 6775 of 2020, MANU/KA/2455/2020.

¹⁵⁰ High Court of Manipur, *All Manipur School Student Transporter Association v. The State of Manipur and Ors.*, - WP (C) No. 459 of 2020.

¹⁵¹ Supreme Court of India, *Ficus Pax Private Limited vs Union of India*, 12 June, 2020, Writ Petition no. 10983/2020.

¹⁵² France, Council of State, decision of 11 December 2020 no. 447208.

¹⁵³ France, Council of State, 27 January 2021, no. 448732; Council of State, decision of 1 April 2020, no. 439762; Germany, High Administrative Court of Thüringen 3 EN 105/21, 9 March 2021; Italy, Regional Administrative Tribunal of Rome, decision of 19 August 2020 no. 5408; see also the decision of the Latvian Constitutional Court, No. 2020-26-0106, of 11 December 2020.

It is not explicitly mentioned in such decisions what could have happened if the compensatory measures had not been in place. It seems implied, however, that, in absence of support schemes, the judge should have carried out a more thorough proportionality test, verifying, in particular, viable alternatives to prevent the concrete economic damage sustained by the economic operator involved.

7.2 Economic Losses as Grounds for Issue Specific Remedies. Interim Relief Claims Requesting Suspension

Other European decisions addressed the issue of economic losses when judging requests for interim relief, especially with regard to the requisite of urgency.

An Italian court rejected a request for interim relief, holding that the nature of the damages alleged in the complaint in principle permits their subsequent monetary compensation, in the event that the judgment is favorable to the plaintiff.¹⁵⁴ The Belgian Council of State held that the necessity to limit an economic loss deriving from an emergency measure during the pandemic may not ground a request for interim relief, since it does not integrate the element of urgency.¹⁵⁵

Another Belgian decision, in rejecting a request of suspension of emergency measures, focused on economic loss as an autonomous element, stating that, while it is known that several business activities suffered losses during the pandemic, a specific request may not be founded on the allegation of such losses.¹⁵⁶ The Belgian judge stated that there must instead be the proof of specific damages and losses suffered by the establishment putting forward the claim, and that these damages must be different from the “general” losses widespread among the economic operators. Similarly, the French Council of State rejected a request for interim relief on account of the lack of specific elements to assess the financial hardships alleged.¹⁵⁷

A Spanish decision considered economic losses in an urgency procedure concluded with the suspension of the challenged measure. The Court, on the basis of the materials submitted for the

dispute, analyzed in detail the losses suffered by three restaurants, which are not specifically identified and do not correspond with the plaintiffs, but represent a plausible example of how the economic sector was affected by the lockdown¹⁵⁸. First, the Court considered the losses derived from the expenses borne to organize events then cancelled, and second, it considered personal and moral damages suffered by the plaintiffs as a consequence of the cancellation of such events, albeit not quantifying them. The reference to economic losses, however, mainly served the purpose of justifying the criterion of urgency of the request, while the assessment of the reasonableness of the challenged decisions relied on other considerations.

The French Council of State, instead, took account of the prospective losses suffered by teams relegated to the second division of the football championship due to such championship’s early termination on account of the pandemic.¹⁵⁹ Regarding the request for interim relief, the Court decided to suspend the implementation of the decision to terminate championships early, given the immediate and significant losses faced by some football clubs. The decision to terminate, however, was not in itself scrutinized. The Court merely ordered the football association to carry out another review on the conditions to orderly resume the games.

Some U.S. courts, once again regarding injunctive relief, also took into account the issue of economic losses when granting injunctions upholding the reopening of closed businesses. They assessed the concrete harm, in terms of economic losses, suffered by the plaintiffs on account of the lockdown requirements.¹⁶⁰ Even when injunctions were denied, the court referred to economic losses in order to determine that private interests were at stake and a balancing had to be carried out.¹⁶¹

7.3 Following. Monetary Compensation, Relief Measures and Economic Terms and Conditions of Business

The reasonableness of the emergency measures also implies that they do not cause unjustified

¹⁵⁴ Italy, Regional Administrative Tribunal of Rome, decision of 19 August 2020 no. 5408.

¹⁵⁵ Belgian Council of State, decision of 15 September 2020 no. 248270.

¹⁵⁶ Belgium, Council of State, 29 October 2020, no. 248.798.

¹⁵⁷ Council of State, 23 February 2021, no. 449577.

¹⁵⁸ Spain, Superior Court of Justice of Zaragoza, no. 286/2020, decision of 14 September 2020.

¹⁵⁹ France, Council of State, 9 June 2020, no. 440809.

¹⁶⁰ United States, Court of Common Pleas of Erie County, Ohio, *LMV DEV SPE, LLC, DBA Kalahari Resorts & Conventions, et. al.*, 2020-CV -020 I; Court of Common Pleas of Lake County, Ohio, *Rock House Fitness, Inc. v. Acton*, Case no. 20CV000631.

¹⁶¹ United State District Court – Southern District of New York, *The Cloister East, Inc., et al. v. New York State Liquor Authority*, 20-cv-6545 (LAK).

losses to certain business activities and provide rational relief schemes to business owners. When the consequences of the lockdown create imbalances in the economic interests of the different actors involved, court may design appropriate remedies.

The most “classic” of such remedies, monetary compensation, was used in the Italian decision awarding damages to a wholesale retailer unlawfully closed during the pandemic.¹⁶² After acknowledging the causal link between the challenged measure and the damages sustained, the court determined the compensation in light of the loss of income suffered.¹⁶³ Indeed, the court considered that the ordinary income of the plaintiff could be taken as criterion to determine damages, since the exceptional circumstances of the pandemic, even if the activity had not been closed, would have reduced the trade volume. Given the general reduction in goods’ demand and the technical difficulties of an exact ascertainment of the prospective income lost, the Court awarded damages on the basis of equity, according to Art. 1226 of the Italian Civil Code.¹⁶⁴

In some cases, the courts assessed the criteria chosen by the legislature to award monetary relief. A Polish decision held that a business operator in the fitness sector whose activity had been closed was entitled to obtain “stoppage compensation” even though she did not meet all the conditions literally specified in the Covid Act.¹⁶⁵ In particular, Article 15zq of the Act of March 2, 2020 – on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and the emergencies caused by them – provided that “stoppage compensation” (*świadczenie postojowe*) should be given to all business whose revenue in May 2020 was at least 15% lower than the revenue of April 2020.¹⁶⁶ However, in this case, the business owner had no revenue in both April and May 2020, therefore, according to a narrow interpretation of the law, was not qualified to access the relief measure. The Court stated that such an interpretation would render the rule unreasonable and declared that the plaintiff was entitled to obtain relief.¹⁶⁷

A Scottish decision dealt with the criteria to issue relief grants according to a legislative measure to support the hotel sector. The plaintiff

claimed that the decision not to grant the maximum amount of relief provided by the law (£25,000) for each one of his properties was irrational. The Court held instead that grants could be provided “up to” the maximum amount and thus the law did not create specific legitimate expectations so to justify claims from an economic operator receiving less money than what he expected.¹⁶⁸

Outside the European context, courts appeared even more proactive in using the assessment of economic losses as a ground to issue specific remedies, not refraining from designing innovative and targeted remedies.

For example, the innovation of the remedy sought by parties was explicitly discussed in an Argentinian interim proceeding, where several manual workers and artisans asked for monetary compensation as interim relief, given the precarious economic circumstances brought about by the lockdown.¹⁶⁹ The Court first found that the government had enacted support schemes for closed businesses but that the plaintiff could not access to them due to lack of the ability to meet different requirements. However, the Court also noted that for the plaintiffs (i.e. manual workers and artisans) the sale of manufactured products was the only source of revenue and, as such, embodied their right to work, as protected by Article 14 of the Argentinian constitution.¹⁷⁰ The exceptionality of the measure requested clearly reflects, according to the Court, the unusual circumstances brought about by the pandemic which require the protection of both the public health, by limiting risk of infection, and the rights and interests of the business and workers impacted by the lockdown. The Court decided, therefore, to grant the plaintiffs interim relief as requested, in the form of monetary compensation both for the past period of closure and for the future, until the lockdown measures are lifted.

Of interest here is the approach taken by some Indian courts, in particular, the decision of the Haryana High Court which emphasized economic losses in connection with the necessity to balance conflicting interests coming from different social groups. Therefore, the court allowed the economic operators to charge fees, but pointed out that such fees should be limited to the actual expenditures

¹⁶² Italy, Administrative Regional Tribunal of Campania, 4 February 2021, no. 789.

¹⁶³ *Ibidem*.

¹⁶⁴ *Ibidem*.

¹⁶⁵ Poland, Olsztyn District Court, Wyrok Sądu Okręgowego w Olsztynie z dnia 02 września 2020 r. (sygn. akt IV U 1195/20).

¹⁶⁶ *Ibidem*.

¹⁶⁷ *Ibidem*.

¹⁶⁸ Scotland, *Jon Sharp v The Scottish Ministers* [2020] CSOH 74 P352/20 of 23 July 2020.

¹⁶⁹ Tribunal of first instance for administrative and tributary disputes no. 2 of the city of Buenos Aires, secretaria no. 4, *S.M.I. Y otros contra Gcha sobre otros procesos incidentales* – Amparo, 29 May 2020.

¹⁷⁰ *Ibidem*.

incurred in during the lockdowns.¹⁷¹ The court specifically focused on the necessity to take into account the interests of both the schools and the families of students.

In another Indian decision, the petitioner, a charitable education society running government-supported schools, asked for a suspension of certain financial obligations toward the State, namely deposits for distribution of teachers' salary, due to the pandemic.¹⁷² The Court fully considered the economic losses suffered by the petitioner during the pandemic, but also noted that the petitioner itself had already submitted a request for relief to the Delhi government. Therefore, the Court decided to dispose of the petition and wait for the relief measures to be issued by the public authorities.¹⁷³ At the same time, however, it reserved the petitioner's rights to obtain a remedy after such measures are issued, in case they do not grant relief to the petitioner and are challenged.¹⁷⁴ In a similar case, the High Court of Patna held instead that, since the demand for the performance must precede the application for a remedy and the petitioner did not issue such demand nor was met with a refusal from the school, the Court may not grant an issue. Anyway, the Court states, the petitioner must approach the authority concerned and ask for the appropriate solution and the authority concerned must consider the matter and decide it expeditiously in light of the principles of natural justice and of the opportunity of hearing afforded to the parties.¹⁷⁵

7.4 Some Comparative Remarks

In the above decisions, courts acknowledged the relevance of economic losses caused by the lockdown. However, their concrete response to the issue was different depending on the legal systems.

In Europe, most of the decisions dealt solely or primarily with requests of annulment of interim suspension of the challenged measures. Therefore, they mostly referred to economic losses as complementary elements in their reasoning, to assess the reasonableness and proportionality of the emergency provisions or to assess the existence of the requirements for the issuance of interim relief, especially urgency.

¹⁷¹ India, Haryana High Court, Independent Schools Association ... vs State Of Punjab And Ors, 30th June 2020, Writ Petition no. 7409/2020.

¹⁷² India, Delhi High Court, *Raisina Bengali School Society vs Directorate Of Education Govt. Of NCT of Delhi & ANR*, WP 3267/2020.

¹⁷³ *Ibidem*.

¹⁷⁴ *Ibidem*.

With regard to monetary compensation, there were different approaches. The lack of a necessary connection between lockdown measures and compensation to business activities, at the general level, adversely affected by the restrictions was clearly pointed out by the Austrian Constitutional Court.¹⁷⁶ However, the above-mentioned decision of the Campania Regional Administrative Tribunal found that, in presence of a causal link between an unlawful restriction and a loss of income sustained by a business activity, the public administration should be held liable and pay compensation.¹⁷⁷ Furthermore, European courts did not refrain from scrutinizing the reasonableness of the relief schemes enacted by authorities, also granting certain economic operators access to schemes from which they had been previously excluded.

A second group of decisions, composed by the Argentinian and Indian rulings clearly reflects a more "interventionist" approach by courts, which at the request of the plaintiffs also designed specific remedies not necessarily linked to existing relief schemes but rather aimed at solving concrete economic imbalances. Significantly, the complex socio-economic conflicts caused by lockdown measures were assessed not only in light of economic freedoms but also in light of other fundamental rights (such as the right to work) or general instances of social harmony.

From this perspective the decisions selected, albeit relatively few, seem to confirm the general interpretations of business freedom enshrined in the economic constitutions of the different legal systems.

8. Conclusions

This survey has described the wide array of legal problems faced by courts when dealing with emergency measures concerning businesses. At the same time, it has shown how judges have addressed these issues and the types of remedies they have provided. In so doing, it has attempted to provide, or at least outline, some comparative remarks concerning different approaches developed by courts of different legal systems, more often than not connected to values and concepts enshrined in the respective legal traditions.

¹⁷⁵ *Rajnikanth Pathak v. The State of Bihar and Others*, Civil Writ Jurisdiction Case No.11940, 5 July 2021.

¹⁷⁶ Austria, Constitutional Court, decision of 14 July 2020, no. G202/2020.

¹⁷⁷ Italy, Administrative Regional Tribunal of Campania, 4 February 2021, no. 789.

Surely, the analysis of the litigation suggests that courts are well aware that the protection of public health should, in general, prevail over economic freedoms, which may therefore be restricted. At the same time, such restrictions must adhere to some criteria, implying rational distinctions among economic activities and prescribed limitations. At the same time, restrictions must be interpreted in light of the emergency (regardless of its formal declaration), a sometimes abstract notion which is specified by references to scientific information concerning the evolution of the pandemic.

Courts also widely employ specific legal principles to balancing between different rights or to assess, in practice, the legitimacy of the challenged measures. The specific content of such principles may depend on the legal traditions in different models, as has happened with the principles of proportionality and precaution in the European decisions. On the other hand, courts may also refer to more general concepts, such as reasonableness, either in connection with a specific principle or by itself, interpreting it in light of factual circumstances. Sometimes, as noted, the courts had to deal with a further level of complexity represented by the balancing, in concrete, of different and potentially conflicting economic interests of social groups hit by the pandemic.

This is the area where future litigation may therefore offer new and interesting conclusions about possible applications for some general principles, such as proportionality. In particular, the problems related to compensation of losses caused by lockdowns or the issues related to the criteria to deliver mitigation measures have already been the object of some interesting decisions and could further lead judges to assess proper and effective remedies for businesses suffering economic hardships. Such considerations also refer to an underlying background concerning the positive duty of the state to formulate proper economic policies to support economic operators harmed by the emergency measures. From this perspective, the notion of balancing and the logical hierarchy of public health interests may also be linked with an issue of substantial equality in the post-Covid societies. It remains to be seen whether the courts will address these topics.

It is, obviously, for future surveys to assess the viability and concrete usefulness of such considerations in light of future case law. Considering that the pandemic is still ongoing and that case law trends will further evolve, it might be difficult to derive, from the previous analysis,

general considerations concerning convergences and divergences between legal models of judicial decision making. From a very broad point of view, we may conclude, for instance, that European courts rely on established principles of EU law such as proportionality and precaution, to carry out balancing or to assess the legitimacy of challenged measures. In European decisions, even the reference to reasonableness seems to be mostly referred to the appropriateness as laid out in the proportionality test.

American and African courts, on the other hand, referred to proportionality and reasonableness without employing specific tests or implying a decades-long interpretative background concerning these concepts. Their approach was somewhat more concrete. Chinese courts, while refraining from any kind of balancing and fully upholding the prevalence of public health interests over private ones, insisted on the respect of the principle of legality. Indian courts developed a very dynamic approach, laying out remedies containing positive actions with a special emphasis on the composition of social conflicts. Such approach was to some extent mirrored by Argentinian courts.

Beyond the possible distinctions, however, it is evident that certain considerations, such as those related to scientific knowledge or those related to the state of emergency or the essentiality of business activities, were common to different jurisdictions. These are not intended as definitive assumptions, but only as a preliminary sketch of the judicial landscape emerging from selective case law analysis related to the relationship between health protection and economic freedoms. From this perspective, future research should also assess how different trends of Covid-related case law could connect with the development of the relevant legal systems and families of comparative law.

**APPENDIX
TABLE OF CASES**

| DECISIONS | |
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| Africa | |
| South Africa , High Court of South Africa (Gauteng Division), Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR 68 (GP) ¹⁷⁸ | Claim rejected |
| Zimbabwe , High Court of Zimbabwe, The Zimbabwe Chamber for informal Workers & 2 Others v Minister of Health and Child Care & 6 Others | Claim rejected |
| Asia | |
| China , Wugang Primary People's Court (Hunan Province), 18th September 2020, First Instance Decision (Administrative) no. 127 | Claim upheld, administrative sanction quashed on purely procedural grounds |
| China , Chengde City Intermediate People's Court, 30th November 2020 – Appeal Decision no. 207 | Claim rejected |
| China , Primary People's Court of Kenli District, Dongying City, Decision of 2nd June 2020, Administrative decision no. 57 | Claim rejected |
| India , Haryana High Court, Independent Schools Association ... vs State Of Punjab And Ors, 30th June 2020, Writ Petition no. 7409/2020 ¹⁷⁹ | Claim upheld, decision partly quashed – schools are allowed to charge fees but only within the limits of actual expenditures |
| India , High Court of Karnataka, Velankani Information Systems Limited v. Secretary, Home Affairs, Government of India, WP No. 6775 of 2020, MANU/KA/2455/2020 ¹⁸⁰ | Claim upheld, grant of a moratorium on bank loans |

¹⁷⁸ Available (in English) at: <<http://www.saflii.org/za/cases/ZAGPPHC/2020/>> accessed 5 July 2021.

¹⁷⁹ Available (in English) at: <<https://indiankanoon.org/doc/189693756/>> accessed 5 July 2021.

¹⁸⁰ Available (in English) at: <<https://indiankanoon.org/doc/130747696/>> accessed 5 July 2021.

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| India , High Court of Manipur, All Manipur School Student Transporter Ass. v. The State of Manipur and Ors., WP (C) No. 459 of 2020 ¹⁸¹ | Order to the government to provide financial help |
| India , Supreme Court of India, Ficus Pax Private Limited vs Union Of India, 12th June, 2020, Writ Petition no. 10983/2020 ¹⁸² | Order for negotiations between conflicting parties to be held |
| India , Delhi High Court, Raisina Bengali School Society vs Directorate Of Education Govt. Of NCT of Delhi & ANR ¹⁸³ | Claim rejected |
| India , High Court of Patna, <i>Rajnikanth Pathak v. The State of Bihar and Others</i> , Civil Writ Jurisdiction Case No.11940, 5 July 2021. | Claim rejected |
| Israel , Supreme Court of Israel, HCJ 6939/20 Idan Mercaz Dimona Ltd.v. Government of Israel, decision of 2 February 2021 | Claim upheld, grant of a time period for the government to amend the challenged measure |
| Europe | |
| Austria , Constitutional Court, decision no. V392/2020 of 1 October 2020; decisions no. V405/2020 and V429/2020 of 1 October 2020 ¹⁸⁴ | Claim upheld, unconstitutionality of the challenged measure |
| Austria , Constitutional Court V411/2020, V395/2020 et.al., V 396/2020 et.al. 14 July 2020 ¹⁸⁵ | Claim upheld, unconstitutionality of the challenged measure |
| Austria , Constitutional Court, decision of 14 July 2020, no. G202/2020 ¹⁸⁶ | Effectiveness of the challenged measure already expired at the time of the judgment |
| Belgium , Council of State, 24 February 2021, no. 249.904 ¹⁸⁷ | Claim rejected |

¹⁸¹ Available (in English) at: <<https://indiankanoon.org/doc/150681730/>> accessed 5 July 2021.

¹⁸² Available (in English) at: <<https://indiankanoon.org/doc/7216703/>> accessed 5 July 2021.

¹⁸³ Available (in English) at: <<https://indiankanoon.org/doc/186058257/>> accessed 5 July 2021.

¹⁸⁴ Available (in German) at: <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&Dokumentnummer=JFT_20201001_20V00392_00> accessed 5 July 2021; <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&Dokumentnummer=JFT_20201001_20V00405_00> accessed 5 July 2021.

¹⁸⁵ Available (in German) at: <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&Dokumentnummer=JFT_20200714_20V00411_00> accessed 5 July 2021.

¹⁸⁶ Available (in German) at: <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&Dokumentnummer=JFT_20200714_20G00202_00> accessed 5 July 2021.

¹⁸⁷ Available (in French) at: <<http://www.raadvst-consetat.be/Arrets/249000/900/249904.pdf#xml=http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=38650&Index=c%3a%5csoftware%5cdtsearch%5cindex%5ccarrets%5ffr%5c&HitCount=2&hits=1a+1b+&041010202198>> accessed 5 July 2021.

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| Belgium , Council of State, 28 October 2020, no. 248.781 ¹⁸⁸ | Claim rejected |
| Belgium , Council of State, 29 October 2020, no. 248.798 ¹⁸⁹ | Claim rejected |
| Belgium , Council of State, 13 November 2020, no. 248.918 ¹⁹⁰ | Claim rejected |
| Croatia , Croatian Constitutional Court, decision No. U-I-2162/2020 of 14 September 2020 | Claim rejected |
| France , Council of State, 27 January 2021, no. 448732 ¹⁹¹ | Claim rejected |
| France : Council of State, decision no. 445102 of 16 October 2020 ¹⁹² | Claim rejected |
| France , Council of State, decision no. 440439 of 11 June 2020 ¹⁹³ | Claim rejected |
| France , Council of State, decision no. 447208 of 11 December 2020 ¹⁹⁴ | Claim rejected |
| France , Council of State, decision no. 451085 of 14 April 2021 | Claim rejected |
| France , Council of State, 30 December 2020, no. 448201 ¹⁹⁵ | Claim upheld, reversal of the first instance decision |

¹⁸⁸ Available (in French) at: <<http://www.raadvst-consetat.be/Arrets/248000/700/248781.pdf#xml=http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=38081&Index=c%3a%5csoftware%5cdtsearch%5cindex%5carrets%5ffr%5c&HitCount=2&hits=15+16+&0431482021814>> accessed 5 July 2021.

¹⁸⁹ Available (in French) at: <<http://www.raadvst-consetat.be/Arrets/248000/700/248798.pdf#xml=http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=38083&Index=c%3a%5csoftware%5cdtsearch%5cindex%5carrets%5ffr%5c&HitCount=2&hits=20+21+&0418262021912>> accessed 5 July 2021.

¹⁹⁰ Available (in French) at: <<http://www.raadvst-consetat.be/?page=news&lang=fr&newsitem=638>> accessed 5 July 2021.

¹⁹¹ Available (in French) at: <<http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-01-27/448732>> accessed 5 July 2021.

¹⁹² Available (in French) at: <<https://www.conseil-etat.fr/Media/actualites/documents/2020/10-octobre/445102-445186-445224-445225-salles-de-sport.pdf>> accessed 5 July 2021.

¹⁹³ Available (in French) at: <<http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-06-11/440439>> accessed 5 July 2021.

¹⁹⁴ Available (in French) at: <<http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-12-11/447208>> accessed 5 July 2021.

¹⁹⁵ Available (in French) at: <<http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-12-30/448201>> accessed 5 July 2021.

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| France , Council of State, 9 June 2020, no. 440809 ¹⁹⁶ | Claim upheld, suspension of the implementation of the challenged measure |
| France , Council of State decisions no. 445883, 445886 and 445899 of 13 November 2020 | Claim upheld, annulment of the challenged measure |
| France , Council of State, 23 February 2021, no. 449577 | Claim rejected |
| Germany , Administrative Court of Karlsruhe, 3 K 4418/20, 30 October 2020 ¹⁹⁷ | Claim rejected |
| Germany , Federal Constitutional Court 1 BvQ 47/20, 29 April 2020 ¹⁹⁸ | Claim rejected |
| Germany , Federal Constitutional Court 1 BvR 2530/20, 11 November 2020 ¹⁹⁹ | Claim rejected |
| Germany , High Administrative Court of Thüringen 3 EN 105/21, 9 March 2021 ²⁰⁰ | Claim rejected |
| Germany , Thuringian High Administrative Court, 3 EN 254/20, 29 April 2020 ²⁰¹ | Claim upheld, interim suspension of the challenged measure |
| Germany , High Administrative Court of Berlin-Brandenburg, decisions no. S 22/21 and S 23/21 of 3 March 2021 ²⁰² | Claim rejected |
| Germany , High Administrative Court of Berlin-Brandenburg 11 S 17/21 ²⁰³ | Claim rejected |
| Italy , Advisory Opinion of the Council of State, no. 00850/2021, 28 April 2021 ²⁰⁴ | Claim rejected |

¹⁹⁶ Available (in French) at: <<http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-06-09/440809>> accessed 5 July 2021.

¹⁹⁷ Available (in German) at: <http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&GerichtAuswahl=Verwaltungsgerichte&Art=en&Datum=2020-10&nr=32841&pos=2&anz=65> accessed 5 July 2021.

¹⁹⁸ Available (in German) at: <http://www.bverfg.de/e/qk20200429_1bvq004720.html> accessed 5 July 2021.

¹⁹⁹ Available (in German) at: <http://www.bverfg.de/e/rk20201111_1bvr253020.html> accessed 5 July 2021.

²⁰⁰ Available (in German) at: <[http://www.thovg.thueringen.de/webthfj/webthfj.nsf/6DAA484FDFFED13CC125869600262263/\\$File/21-3EN-00105-B-A.pdf?OpenElement](http://www.thovg.thueringen.de/webthfj/webthfj.nsf/6DAA484FDFFED13CC125869600262263/$File/21-3EN-00105-B-A.pdf?OpenElement)> accessed 5 July 2021.

²⁰¹ Available (in German) at: <<https://landesrecht.thueringen.de/perma?d=MWRE200001674>> (accessed 5 July 2021).

²⁰² Available (in German) at: <<https://gesetze.berlin.de/perma?d=JURE210003805>; <<https://gesetze.berlin.de/perma?d=JURE210003812>> accessed 5 July 2021.

²⁰³ Available (in German) at: <<https://gesetze.berlin.de/bsbe/document/JURE210004133>> accessed 5 July 2021.

²⁰⁴ Available (in Italian) at: <https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=consul&nrng=202100115&nomeFile=202100850_27.html&subDir=Provvedimenti> accessed 5 July 2021.

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| Italy , Decree of the Council of State, No. 884, 22 February 2021 ²⁰⁵ | Claim rejected |
| Italy , Administrative Regional Tribunal of Trentino Alto-Adige, decision of 23 December 2020 ²⁰⁶ | Claim rejected |
| Italy , Administrative Regional Tribunal of Campania, decision of 18 November 2020 ²⁰⁷ | Claim rejected |
| Italy , Regional Administrative Tribunal of Lazio, 26 October 2020, no. 10933 ²⁰⁸ | Claim upheld, annulment of the challenged measure |
| Italy , Administrative Regional Tribunal of Lazio, 16 February 2021, no. 1862 | Claim upheld, annulment of the challenged measure |
| Italy , Administrative Regional Tribunal of Campania, 4 February 2021, no. 789 | Claim upheld, monetary compensation |
| Italy , Ordinance of the Regional Administrative Tribunal of Lazio, No. 827, 12 February 2021 | Claim rejected |
| Italy , Decree of the Council of State, 26 June 2020, No. 5013 ²⁰⁹ | Reversal of the first instance decision, rejection of the suspension of the challenged measure |
| Italy , Regional Administrative Tribunal of Rome, decision no. 5408, of 19 August 2020 | Claim rejected |
| Italy , Council of State, decision of 27 April 2020, no. 3380 ²¹⁰ | Claim rejected |
| Latvia , Constitutional Court of the Republic of Latvia, decision of 11 December 2020, no. 2020-26-0106 ²¹¹ | Claim partially upheld, partial unconstitutionality |

²⁰⁵ Available (in Italian) at: <https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=cds&nrg=202101551&nomeFile=202100884_16.html&subDir=Provvedimenti> accessed 5 July 2021.

²⁰⁶ Available (in Italian) at: <https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=tar_tn&nrg=202000139&nomeFile=202000213_01.html&subDir=Provvedimenti> accessed 5 July 2021.

²⁰⁷ Available (in Italian) at: <https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=tar_na&nrg=202001827&nomeFile=202005307_01.html&subDir=Provvedimenti> accessed 6 July 2021.

²⁰⁸ Available (in Italian) at: <<https://www.giustizia-amministrativa.it/web/guest/dcsnpr>> accessed 5 July 2021.

²⁰⁹ Available (in Italian) at: <<https://www.giustizia-amministrativa.it/en/dcsnpr>> accessed 5 July 2021.

²¹⁰ Available (in Italian) at: <<https://www.giustizia-amministrativa.it/web/guest/dcsnpr>> accessed 6 July 2021.

²¹¹ Available (in Latvian) at: <https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-26-0106_Spriedums.pdf#search=2020-26-0106> accessed 6 July 2021.

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| Scotland , Outer House Court of Session, [2020] CSOH 98 P1043/20 of 11 December 2020 | Claim rejected |
| Scotland , Outer House, Court of Session, decision [2020] CSOH 74 P352/20 of 23 July 2020 | Claim rejected |
| Spain , Superior Court of Justice of the Valencian Community, Administrative Chamber, 94/2021 of 17 March 2021 | Claim rejected |
| Spain , Superior Court of Justice of the Valencian Community, Administrative chamber 59/2021, 25 February 2021 | Claim rejected |
| Spain , Administrative Chamber of the Superior Court of Justice of Catalonia, Resolution of 29 July 2020 ²¹² | Claim upheld, suspension of the challenged measure |
| Spain , Superior Court of Justice of Zaragoza, no. 286/2020, decision of 14 September 2020 | Claim upheld, suspension of the challenged measure |
| North America | |
| Canada , Superior Court of Quebec, Entrepreneurs en action du Québec c. Procureur général du Québec | Claim rejected |
| United States , United States District Court for the Northern District of California, Altman v. County of Santa Clara, 464 F.Supp.3d 1106 (N.D. Cal. 2020) 227 A.3d 872 (Pa. 2020) ²¹³ | Claim rejected |
| United States , United States District Court, Western District of Michigan, Southern Division, Michigan Restaurant and Lodging Association v. Gordon, 1:20-cv-1104, 20 November 2020 | Claim rejected |
| United States , United States District Court, Western District of Michigan, Southern Division, CH Royal Oak, LLC v. Whitmer, 472 F.3d 410 (W.D. Mich. 2020) . | Claim rejected |

²¹² Available (in Spanish) at: <http://www.gencat.cat/eapc/revistes/RCDP/dossier/RCDP_covid/Sentencies/ATSJ_225_2020.pdf> accessed 6 July 2021.

²¹³ Available (in English) at: <<https://casetext.com/case/altman-v-cnty-of-santa-clara-1>> accessed 6 July 2021.

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| United States , Supreme Court of Pennsylvania, Friends of Danny DeVito v. Wolf, 227 A.3d 872 (Pa. 2020) ²¹⁴ | Claim rejected |
| United States , Texas, U.S. District Court for the Western District of Texas, 6th Street Business Partners LLC v. Abbott | Claim rejected |
| United States , Court of Common Pleas of Lake County, Ohio, Rock House Fitness, Inc. v. Acton, Case no. 20CV000631, 20 May 2020 | Claim upheld, injunction given (\$ 0 bond for reopening of business during lockdown) |
| United States , Court of Common Pleas of Erie Country, Ohio, LMV DEV SPE, LLC, DBA Kalahari Resorts & Conventions, et al., 2020-CV -020 I, 12 June 2020 | Claim upheld, reopening of business facilities |
| United States , Michigan Supreme Court, Department of Health and Human Services v. Karl Manke, 161394 & (27)(37)(38) | Decision quashed on procedural grounds |
| United States , United States Court of Appeal of the Sixth Circuit, League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, No. 20-Civ-1581, (6th Cir. 2020) ²¹⁵ | Claim rejected |
| United States , United States Court of Appeal for the Fifth Circuit, Big Tyme Investments, LLC v. Edwards, No. 20-30526 (5th Cir. Jan. 13, 2021) ²¹⁶ | Claim rejected |
| United States , United States District Court – Eastern District of Washington, Slidewaters v. Washington State Department of Labor and Industries, no. 2:20-CV-0210-TOR, 14 July 2020 | Claim rejected |
| United States , Court of Appeals of the State of Minnesota, Free Minnesota Small Business Coalition v. Walz, no. A20-0641, 26 May 2020 | Claim rejected |
| United States , United States District Court for the District of Maryland, Antietam Battlefield KOA, et al. v. Lawrence J. Hogan, et al., 461 F. Supp. 3d 214 (D. Md. 2020) ²¹⁷ | Claim rejected |

²¹⁴ Available (in English) at: <<https://law.justia.com/cases/pennsylvania/supreme-court/2020/68-mm-2020.html>> accessed 6 July 2021.

²¹⁵ Available (in English) at: <<https://ij.org/wp-content/uploads/2020/06/Document.pdf>> accessed 6 July 2021.

²¹⁶ Available (in English) at: <<https://law.justia.com/cases/federal/appellate-courts/ca5/20-30526/20-30526-2021-01-13.html>> accessed 6 July 2021.

²¹⁷ Available (in English) at: <https://casetext.com/case/antietam-battlefield-koa-v-hogan?_cf_chl_jschl_tk_=451176fa73c29cee9dcdce3f835fc5e556da2ec4-1625563066-0-AdflopNXCWIKraX4aPv99HG3mSEenxcuqJEo82Jcvii5>

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| United States , Arizona Superior Court, Maricopa County, <i>Aguila v. Ducey</i> , 8 September 2020 | Claim rejected |
| United States , United States District Court – Eastern District of Louisiana, civil action no. 20-2150, <i>4 Aces enterprises, LLC, et al. v. Edwards</i> ²¹⁸ | Claim rejected |
| United States , United States District Court for the District of Connecticut, <i>Connecticut Citizens Defense League v. Lamont</i> , 465 F.Supp.3d 56 (D. Conn. 2020) ²¹⁹ | Claim upheld, suspension of the challenged measure |
| United States , United States District Court for the Central District of California, <i>McDougall v. County of Ventura</i> , No. 2:20-cv-02927-CBM-AS, 2020 WL 6532871 (C.D. Cal. Oct. 21, 2020) | Claim rejected |
| United States , Supreme Court of New Mexico, <i>Grisham v. Reeb</i> , No. S-1-SC-38336, 2020 WL 6538329 (N.M. Nov. 5, 2020) ²²⁰ | Grant of a writ of superintending control, emergency restrictions upheld |
| United States , United State District Court – Southern District of New York, <i>The Cloister East, Inc., et al. v. New York State Liquor Authority</i> , 20-cv-6545 (LAK) | Claim rejected |
| South America | |
| Argentina , Appeal Chamber in Administrative Disputes, Córdoba, <i>Unión de Trabajadores del Turismo, Hoteleros y Gastronómicos de la República Argentina UTHGRA c/ Gobierno de la Provincia de Córdoba</i> , 14 August 2020 ²²¹ | Claim rejected |

9tT-ya6uXSyJ1iWLZzZQK5e2zbrtu04yn4bs09Q8Is2lWvkQ13Nw-kj8kZCDUvT4tuvqgGT-BluR57esEuvjwWrq9f2JhZty9e_1oM8lTcHqzvuS1KdkSGyIKCb86RiBYPzmrLwvpm8SXVbj-JduMSD5g84cyKIDSyw6bc9MV9wmrJrJdsUVNXKbKC3ktW6fjqVlc0tmjVFcZv8HhQxdd3YBuyE940FO6WYR2JEYE7uXNzsoytFKsyArMw50e6oZJ2fgUT14pdCMiVzzDKBvyI3kuvbUItYThfquAG-dEnAD2XvvGvsRMa_uMESBgOB8HxFdwYqBgBO7IS4fm7BAUYAuEnsLJy54RfPw71ZCzIaYxdfIM-iBVyjoYrXZcgtlElxGA0nnQJlEDQPP9xB9sqLb0Q2zjA3TB4M52P85JjZ0uXo6jLZPr10q_VFsNSCZ6umZImVRpqrk5_DzeVA> accessed 6 July 2021.

²¹⁸ Available (in English) at: <<https://law.justia.com/cases/federal/district-courts/louisiana/laedce/2:2020cv02150/246700/50/>> accessed 6 July 2021.

²¹⁹ Available (in English) at: <https://ecf.ctd.uscourts.gov/cgi-bin/show_public_doc?2020cv0646-70> accessed 6 July 2021.

²²⁰ Available (in English) at: <<https://nmonesource.com/nmos/nmsc/en/488119/1/document.do>> accessed 6 July 2021.

²²¹ Available (in Spanish) at: <<http://www.saij.gob.ar/camara-apelaciones-contencioso-administrativa-1ra-nom-local-cordoba-union-trabajadores-turismo-hoteleros-gastronomicos-republica-argentina-uthgra-gobierno-provincia-cordoba-amparo-ley-4915-fa20160043-2020-08-14/123456789-340-0610-2ots-eupmocsollaf?>> (accessed 5 July 2021).

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| <p>Argentina, Tribunal of first instance for administrative and tributary disputes no. 2 of the city of Buenos Aires, secretaría no. 4, S.M.I. Y otros contra Gcba sobre otros procesos incidentales – Amparo, 29 May 2020²²²</p> | <p>Claim upheld, interim relief (monetary compensation) given</p> |
| <p>Brazil, Federal Court - 1st Region, 1013225-55.2021.4.01.3400 Federal Court, 21^a Vara Federal Cível, decision reached on the 25/03/2021</p> | <p>Claim upheld, unconstitutionality of the challenged measure</p> |

²²² Available (in Spanish) at: <https://cijur.mpba.gov.ar/files/articles/1891/S.M.I.y_otros_contra_GCBA_-_amparo.pdf> accessed 5 July 2021.

