

## Belgian Responses to COVID-19

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**Abstract.** This contribution appraises the most relevant measures adopted in Belgium against the spread of the Covid-19 Pandemic. Moreover, it underscores how the complex Belgian institutional setup has hampered the adoption of prompt and effective responses to the Pandemic. To this end, in Section 1 it fleshes out the structure of the Belgian state, in particular highlighting the tangled division of competences across different levels of government. In Section 2 and 3, it analyses the measures adopted by the Federal, Regional and Local governments amidst the most severe phase of the Pandemic's outbreak. Relevant, the unclear allocation of competences and powers among levels of government as to the adoption of Covid-19 measures led to legal and institutional conflicts. In Section 4, 5 and 6 it skims through the evolution of the emergency regulatory regime following the Covid-19 spread, the measures aimed at contact-tracing and those aimed at supporting economic activities, respectively. In Section 7, it displays the most relevant domestic case law against the adopted Covid-19 measures. Last, in Section 8 it analyses the latest developments towards a new comprehensive legal regimes to tackle the current and future massive health crisis in Belgium.

**Keywords:** COVID-19, Belgium, COVID-19 Measures, COVID-19 Law

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### 1. Introduction

Like many other European countries, the outbreak of the Covid-19 (or Covid-SARS 2) Pandemic in 2020 took Belgium by surprise. To date, more than 22,000 people have died because of Covid-19 and more than 60.000 people have been hospitalized. Hospitals have been repeatedly put under severe pressure as intensive care units were overloaded. To prevent the healthcare system from collapsing, unprecedented measures have been taken by the Belgian federal government in an attempt to curb the spread of the virus. At the same time, plans were and are being made to jump-start the economy also in light of the unprecedented recovery plan launched by the European Commission (NextGenEU).

In this article we will outline the most relevant Belgian responses to Covid-19. To this end, we first focus on the overarching organization of the Belgian State. This is relevant as the peculiar Belgian constitutional and institutional setup has played (and still plays) a prominent role in order to fully understand Belgium's responses to both the

onsetting Covid-19 sanitary and economic crisis. Second, we provide an overview of the main regulatory measures and the case law related to the Covid-19 restrictions. Third, we specifically focus on contact tracing and vaccination measures. Fourth, we address the Belgian adopted Federal, Regional and local measures to support the economy. Last, we conclude by shedding a light on future developments in terms of the adoption of a comprehensive legal framework in Belgium for the Covid-19 Pandemic.

### 2. Belgium is a Federal State

Belgium is a complicated country. It is a federal state, composed of the Federal level, the Regions and the Communities.<sup>1</sup> While from a legal standpoint such entities operate more or less on an equal footing, they are attributed different powers and competences in different fields. These three entities make up the first tier of competences in Belgium.<sup>2</sup>

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<sup>1</sup> Belgian Constitution: <[https://www.dekamer.be/kvvcr/pdf\\_sections/publications/constitution/GrondwetUK.pdf](https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf)> accessed 30 September 2021.

<sup>2</sup> Patricia Popelier and Catherina Van de Heyning, 'The Belgian Constitution: The Efficacy Approach to European

and Global Governance', in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019).

The Federal level retains powers in the area of foreign affairs, national defence, national security and public order enforcement, justice, finance, social security, important parts of national health and domestic affairs.

The three Regions – Flanders, Wallonia and the Brussels Capital Region – enjoy a wide competence with regard to economic matters, including employment, agriculture, water policy, housing, public works, energy, transport (except Belgian Railways), environment, town and country planning and more generally keep oversight (together with the Communities) on the initiatives taken at the local level – i.e. by Provinces, Cities and Municipalities.

The three Communities – the Flemish community, the French community and the German-speaking community – are competent for other aspects related to health, culture, education and some aspects of justice.

Besides this first tier, Belgium comprises 10 Provinces and 581 Cities/municipalities. Cities and Municipalities are competent for local matters, under the oversight of the Regions. For example, Cities retain competence over public order's enforcement at the local level. Last, Provinces are secondary administrations that exercise their powers in autonomy and have extensive powers, e.g., in the fields of education, social and cultural infrastructures, preventive medicine and social policy.

This very short overview of the division of powers in Belgium illustrates the difficulties in dealing with an acute and widespread crisis such as the Covid-19 Pandemic. Indeed, the outbreak of the Pandemic has unfolded a Gordian Knot, insofar as such complex allocation of powers and competences allowed no single entity at a given level to adopt full-fledged response measures. In fact, while comprehensive measures may be adopted at the Federal level, such measures could well be undermined by a lack of measures at the regional levels and even at municipal level. Thus, to ensure effective implementing measures are taken requires close cooperation across all relevant levels of government. In practice, this means establishing a thorough coordination between the Federal Ministers and Parliament, the Regional Ministers and Parliaments, the Provincial Governors, the Mayors, as well as of course all relevant Federal-Regional-Local administrations. Yet overall, this has

proven all but an easy task in the wake of the Covid-19 Pandemic.

In the following paragraphs we will explain the organisational setup adopted in Belgium and the most relevant measures adopted in the fight against Covid-19.

### **3. The Federal Level Took the Lead in the COVID-19 Pandemic**

Against the above institutional setting, the Federal government firmly took the lead in the wake of the outbreak of the Pandemic in early 2020 (the so-called 'federal phase'). Whilst no specific legislation or plan was in place to deal with Pandemic events, the Federal government grounded its response measures on several existing federal laws. In particular, the Civil Safety Act 2007 (*Wet Civiele Veiligheid 2007*) was relied upon. Articles 181 and 182 of the Civil Safety Act allocate specific powers to the Federal government regarding the requisition and evacuation of the public, e.g. by restricting free movement or assigning a temporary residence to parts of the population.

Based on Articles 181 and 182, the Belgian National Security Council decided to take far-reaching measures to fight against the onsetting Covid-19. A state of emergency was declared over the entire country's territory. On March 13, 2020, the federal phase for the coordination and management of the Covid-19 crisis was officially launched in Belgium and hence 'urgent measures' were issued to limit the spread of the virus.<sup>3</sup>

The proclamation of this 'federal phase' had two important legal consequences. First, the Federal government was charged with the responsibility of coordinating the responses to the sanitary crisis. This came as a direct effect of the proclamation of the federal phase, pursuant to an existing Royal Decree regulating emergency planning.<sup>4</sup>

Second, decisions at the Federal government's level, mostly by the Minister of Interior Affairs, were taken under a set of Ministerial Decrees. It is primarily through these decisions that Belgium has implemented restrictive Covid-19 measures. Having established a legal framework, the Belgian Federal government could finally pursue direct measures to halt the spread of Covid-19. Such measures have been iteratively amended, repealed or renewed depending on the virus's spread and with a view prevent the healthcare systems from collapse due to too many patients recovered

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<sup>3</sup> Ministerial Decree of 13 March 2020 declaring the federal phase on the coordination and management of the coronavirus crisis COVID-19, Belgian Official Gazette of 13 March 2020.

<sup>4</sup> Royal Decree of 22 May 2019 on emergency planning and management at te municipal and provincial

level and on the role of mayors and provincial governors in case of crisis events and situations requiring coordination or management at the national level, Belgian Official Gazette of 27 June 2019.

(especially in Intensive Care Units). Below is a list of the most relevant regulatory measures adopted in the federal phase.

Federal level: overview of Ministerial Decrees:

- Ministerial Decrees of 13 and 18 March 2020 taking urgent measures to limit the spread of the coronavirus COVID-19<sup>5</sup>;
- Ministerial Decree of 23 March 2020 taking urgent measures to limit the spread of the coronavirus COVID-19, as amended by the Ministerial Decrees of 24 March, 3, 17 and 30 April, 8, 15, 20, 25 and 30 May and 5 June<sup>6</sup>;
- Ministerial Decree of 30 June 2020 taking urgent measures to limit the spread of the coronavirus COVID-19, as amended by the Ministerial Decrees of 10, 24, 28 July, 22 August, 25 September and 8 October 2020<sup>7</sup>;
- Ministerial Decree of 18 October 2020 taking urgent measures to limit the spread of the coronavirus COVID-19, as amended by the Ministerial Decree of 23 October 2020<sup>8</sup>;
- Ministerial Decree of 28 October 2020 taking urgent measures to limit the spread of the coronavirus COVID-19, as amended by the Ministerial Decrees of 1 and 28 November, 11, 19, 20, 21 and 24 December 2020, 12, 14, 26 and 29 January, 6 February, 6, 20 and 26 March and 24 and 27 April 2021<sup>9</sup>.

The substance of these measures is akin to those adopted by many other countries in the world, particularly in the European Union. Therefore, the essential objective of these measures was (and still is) to ensure social distancing and limit physical contact between persons as much as possible, thereby hopefully preventing the spread of the virus.

In practice, the above regulatory measures established a set of prohibitions limiting the exercise of economic activities and, ultimately, impinging on individuals' freedom. These measures include:

- Closing of restaurants and bars;
- Closing or restricting of (non-essential) shops;
- Closing or restricting music and theatre halls, museums and other public spaces;

- Closing or restricting fitness centres, sports infrastructures, swimming pools, wellness centres, etc.;
- Closing or restricting campsites, amusement parks, etc.;
- Prohibiting or restricting markets and fairs;
- Compliance with (hand) hygiene rules;
- Compliance with social distancing rules;
- Mandatory tele-working;
- Prohibition of worship;
- Prohibition or restriction of cultural, sports, and other outdoor activities;
- Prohibition of (certain) gatherings;
- Obligation to wear a face mask;
- Prohibition of (non-essential) travelling from and to Belgium (travel ban);
- Restricting gatherings in the private sphere ('bubbles');
- Prohibition of non-essential movements;

Yet certainly the most far-reaching measure imposed in Belgium in the fight against the Covid-19 crisis thus far (like in other countries in the initial phase of the Pandemic) was the general obligation for all citizens to remain locked-down at home the whole day with only a few exceptions (for example, to buy essential groceries or for compelling health reasons). This measure was imposed beginning March 18, 2020 right after the outbreak of the Pandemic and lasted until the beginning of June 2020.

Furthermore, besides the above Federal measures, Regional and Local governments adopted additional Covid-19 measures. In fact, Mayors and Province Governors still remain responsible for ensuring 'public order', albeit within the territory of their Municipality or Province. Importantly, this competence is withheld also in case of a national crisis such as the Covid-19 Pandemic. In Belgium, 'public order' is a broad concept that also involves the protection of public health, which is relevant in view of the unfolding Covid-19 crisis. Such powers are grounded primarily in the New Municipality Act (*Nieuwe Gemeentewet*) and the Province Act (*Provinciewet*). These powers have thus been used extensively

<sup>5</sup> Ministerial Decree of 13 and 18 March 2020 on urgent measures to limit the spread of the coronavirus Covid-19, Belgian Official Gazette of 18 March 2020.

<sup>6</sup> Ministerial Decree of 23 March 2020 on urgent measures to limit the spread of the coronavirus Covid-19, Belgian Official Gazette of 23 March 2020, as amended by Ministerial Decrees of 24 March, 3, 17 and 30 April, 8, 15, 20, 25 and 30 May and 5 June.

<sup>7</sup> Ministerial Decree of 30 June 2020 on urgent measures to limit the spread of the coronavirus Covid-19, Belgian Official Gazette of 30 June 2020, as amended by

Ministerial Decrees of 10, 24 en 28 July, 22 August, 25 September and 8 October 2020.

<sup>8</sup> Ministerial Decree of 18 October 2020 on urgent measures to limit the spread of the coronavirus Covid-19, *Belgian Official Gazette* of 18 October 2020, as amended by Ministerial Decree 23 October 2020.

<sup>9</sup> Ministerial Decree of 28 October 2020 on urgent measures to limit the spread of the coronavirus Covid-19, Belgian Official Gazette of 28 October 2020, as amended by Ministerial Decree 1 and 28 November, 11, 19, 20, 21 and 24 December 2020, 12, 14, 26 and 29 January, 6 February, 6, 20 and 26 March and 24 and 27 April 2021.

during the Covid-19 crisis to adopt more restrictive measures at the local level, based on the degree of infection rates. For example, in August 2020 while Federal measures were being relaxed due to the decrease of infections, the Antwerp Province enacted a curfew on its whole territory in light of the local increase of the spread of Covid-19.<sup>10</sup> Notably, this measure anticipated the adoption of a curfew at the Federal level some months later.

As a matter of principle, however, during the federal phase Local authorities must first consult with the higher competent authorities before adopting any additional restrictive measures.<sup>11</sup> Decisions taken without prior consultation and approval of the higher competent authorities can be annulled by those authorities. This has been the case with regard to the municipality of Deinze, where the Mayor mandated the use of face masks in supermarkets within the territory of the Municipality, in absence of such obligation under Federal regulations and without prior consultations with the Province of East-Flanders. This order was thus annulled by the Governor of the province of East-Flanders.<sup>12</sup>

Covid-19 measures have been also adopted at the Regional level (within its sphere of competence). Examples include the adoption of a Statute of 20 March in Flanders on measures to be taken in the event of a public health related civil emergency.<sup>13</sup> This was the basis for subsequent Executive Decrees such as one aimed to extend or suspend the procedural deadlines and procedural requirements set out in immovable heritage legislation, in order to guarantee maximum legal certainty for citizens and recognised actors (including recognised immovable heritage municipalities, intermunicipal immovable heritage services, archaeologists) and one in order to extend the time-limits of the permit proceedings.

After a general relaxation of emergency measures during Summer 2020 and another lockdown declared by the end of October 2020, in the beginning of 2021 a certain relaxation occurred again, albeit that several measures became more restrictive at the same time. Examples of more restrictive measures include the ban on non-essential foreign travel to and from Belgium (coupled by mandatory testing and self-isolation upon entry). During the first lockdown, most Member-States of the EU implemented a strict

travel ban and/or border controls. Currently, however, most Member-States do not hold similar travel bans anymore, which is why the European Commission had subsequently expressed concern about Belgian travel restrictions.

Another evolution of the regulatory responses regards the new guidance issued on face masks. In fact, at the beginning of 2021 the rules became more strict as covering nose and mouth with a scarf or bandana is now no longer deemed sufficient and face masks must be used. At the same time it was stressed that employees should wear masks at their workplace at all times, even if they are more than 1.5 meters away from other colleagues.

As to relaxation measures, examples include the fact that hairdressers in Belgium have been allowed to reopen on 13 February - with other contact professions such as beauty salons and tattoo parlors following on 1 March. Holiday villages and campsites were also reopened on Monday 8 February, and animal parks on 13 February. Furthermore, real estate agents were again allowed to show potential buyers and tenants around properties.

As the third Covid-19 upsurge hit the country in March 2021, a new lockdown was ordered on March 24, albeit in a slightly less restrictive fashion as compared to that imposed during the first outbreak in early 2020. New measures include, for example, the possibility to only shop by appointment taken in advance and the so-called 'window-duty', requiring tourists travelling by train to occupy only places next to a window and requiring hairdressers to once again close their shops.

To take restrictive measures is one thing. Implementing them, however, is another issue. This requires close operational cooperation, concertation and timely implementation of measures and policy. *Discrepancies as to the level of cooperation among different levels of government and uncertainty on competencies have affected the effectiveness of the Covid-19 responses in some parts of the country.* Examples include the discussion on providing face masks to mental health units. Whereas Flanders is competent for regional hospitals and many other regional health institutions (psychiatric nursing homes included), mental health units are excluded.<sup>14</sup> This confusion caused a delay.

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<sup>10</sup> Police Regulation of 29 July 2020 (Politieverordening van de gouverneur van 29 juli 2020 betreffende aanvullende maatregelen in de strijd tegen het coronavirus COVID-19), as amended by the Police Regulations of 5 and 12 August 2020.

<sup>11</sup> See Art. 28 of the Royal Decree of 22 May 2019.

<sup>12</sup> Decision of the Province Governor of East Flanders of 1 July 2020 annulling the decision of the Mayor of

Deinze of 30 June 2020 (Besluit van de gouverneur van de provincie Oost-Vlaanderen van 1 juli 2020 houdende vernietiging van het besluit van de burgemeester van Deinze van 30 juni 2020).

<sup>13</sup> Official Gazette of 24 March 2020.

<sup>14</sup> See <<https://www.vrt.be/vrtnws/nl/2020/05/29/waarom-niet-enkel-de-staatsstructuur-de-belgische-cورونا-aanpak/V>> accessed 25 October 2021.

Enforcement of the measures was also an issue due to the division of powers between the different levels of government. An example is the decision to order obligatory quarantines for certain people. This was a decision of the Federal government, but in order to enforce these quarantines, legislative action from the Regions was required.

Furthermore, there was also discussion on how to best punish offenders. Non-compliance with the corona measures can lead to criminal enforcement, via imprisonment and criminal fines up to € 4000.<sup>15</sup> It should be noted that, during the first wave of Covid-19, the possibility was added to enforce these measures via also (local) administrative fines, based on a Royal Decree.<sup>16</sup> However, this system was open to criticism, e.g. regarding the added value in view of the already existing criminal system, and was not further extended.<sup>17</sup>

#### 4. Overview of Important Case Law

The restrictive measures adopted at the Federal and Local level have had a serious impact on people's lives, rights and freedoms. Hence, as happened also in other countries, several individuals and companies challenged many of the measures adopted by public authorities.

Many of the legal challenges against Covid-19 measures have been filed under the fast-track, "extreme urgency" procedure before the Council of State (located in Brussels), which leads to an accelerated judgment if the claimant can prove an imminent danger, such as a risk of bankruptcy. Yet in most cases, the applicants failed to prove such requirement, thus resulting in a lot of dismissed requests. We report here four relevant cases before the Belgian Council of State.

The first decision (issued on 27 April 2020) rejected a challenge brought to the general imposition adopted during the first federal phase with regard to closure of shops, restaurants and public spaces. In this decision, the Council of State recognised a (very) wide discretion at the disposal of the competent administrative authority considering the ongoing urgent health crisis. Thus, in the Court's view, 'in light of the urgent fight against an unprecedented and most serious (international) health crisis' in Belgium, the Federal ministries entertain the 'widest discretionary power' in

adopting measures also when limiting the exercise of economic activities.<sup>18</sup>

In the second decision (issued on 30 October 2020), a challenge was brought to the curfew imposed over the whole Belgian territory by the Federal government, also regarding the legal grounds under which it has been adopted (i.e., the 2007 Civil Safety Act).<sup>19</sup> The Council of State upheld the aforementioned law as a sufficient legal basis for a curfew measure imposed via a Ministerial Decree. This view has been confirmed in another decision of the Council of State, as well as in other decisions adopted by trial judges.<sup>20</sup>

Interestingly, in another decision (dated 8 December 2020), the Council of State annulled the (then) adopted Covid-19 Federal rule generally prohibiting acts of worship except under limited circumstances (e.g., only spouses, their witnesses and the registrar could then attend weddings).<sup>21</sup> In fact, the Council of State considered this measure to entail a disproportionate restriction of the freedom of religion. However, in a successive case the same Council of State upheld a Federal measure that while generally allowing the collective practice of worship in buildings, though limited such practices to a maximum of 15 people.<sup>22</sup> According to the Council, the competent authority had made it sufficiently plausible that the contested restriction is necessary to protect public health in the context of the corona pandemic. The Council of State also considered that the norm in question did not conflict with, among other things, the freedom of religion, the equality principle and the proportionality principle.

Furthermore, on 2 February 2021, the Council of State annulled a Federal rule imposing the closure of holiday parks and camping areas over the Belgian territory.<sup>23</sup> According to the Court, no sufficient justification was given by the Federal Ministry as to the differential treatment between the kinds of accommodation targeted by the measure and other types of accommodation that were not affected by the measure (e.g. hotel rooms, B&B rooms, etc.).

Last but not least, several civil and criminal courts rendered judgements declaring (some of

<sup>15</sup> See Art. 187 of the Civil Safety Act 2007.

<sup>16</sup> Royal Decree no 1 of 6 April 2020, Belgian Official Gazette of 7 April 2020.

<sup>17</sup> See Liesbeth Todts, 'Corona op lokaal niveau: de juridische mogelijkheden en grenzen van een lokaal coronabeleid' (2020) 4 Tijdschrift voor Wetgeving 292, 300.

<sup>18</sup> Council of State, 27 April 2020, no.247.452.

<sup>19</sup> Council of State, 30 October 2020, no.248.819.

<sup>20</sup> Council of State, no.248.818 of 30 October 2020; see also Correctional Court of Charleroi, 10 February 2021. However, see *contra* (earlier): Police Court of Charleroi, 21 September 2020; *cf.* Correctional Court of Brussels, 28 October 2020.

<sup>21</sup> Council of State, 8 December 2020, no.249.177.

<sup>22</sup> Council of State, 22 December 2020, nos.249.313, 249.314 and 249.315.

<sup>23</sup> Council of State, 2 February 2021, no.249.685.

the) the measures or sanctions illegal.<sup>24</sup> Arguments included the weak legal basis and in criminal/police cases the principle of *nulla poena sine lege*.

## 5. Contact Tracing & Vaccination Campaign

Like many other countries, Belgium organised contact tracing as a measure to track down and limit the spread of the virus. In Eastern countries, very methodical and efficient track & trace-systems were part of the reason that these countries were able to limit the impact of the pandemic.

At first, Belgium established a manual track & trace-system. However, due to the complex federal structure of Belgium this was not an easy task. The Federal level had no competence to organise a nation-wide system and had to let the Region take the initiative. This included enacting three different Regional decrees on contact tracing and setting up cooperation mechanisms among local governments. Finally, at the end of September 2020, Belgium also launched a contact-tracing app, called 'Coronalert'. The Regions have commissioned and outsourced the development of Coronalert. It is a free app for mobile phones. The Coronalert app uses Bluetooth technology to speed up contact detection in Belgium.

Vaccination was also organised by the Regions as this was within their competence. 95 temporary vaccination centres were founded with the help of Provinces and Municipalities, although the Covid-19 vaccination campaign is not proceeding at the adequate pace (as in almost all EU countries) due to several administrative constraints and vaccines delivery setbacks.

## 6. Measures Adopted to Sustain and Support Economic Sectors

Many of the adopted Covid-19 restrictive measures entail severe impacts on certain industries and businesses. Entire industries had to shut down abruptly, while other companies had to reinvent themselves. Therefore, alongside fighting the spread of the Pandemic, like many other countries in the world Belgium enacted specific measures to support the economy in general and certain industries in particular. All levels of government adopted different kind of measures to this aim, within their respective competences. The Federal level eased the procedure to allow workers on temporary unemployment due to *force majeure*, which gives financial breathing room to employers

who do not have to pay their employees while ensuring that the employees do not lose their jobs. It also installed a temporary moratorium on company bankruptcies (which ended in February). Local and Regional authorities granted direct subsidies to support specific economic sectors (e.g., small industries, bars, restaurants) in most financial distress due to the Pandemic.

Overall, a large majority of the measures adopted across all levels of government were tax measures, such as tax reductions, allowing delayed payments, tax credits, a new tax shelter system specifically for Covid-19, etc. Fiscal encouragement is also given to landlords, who forego all or part of rent due for the months of March to May 2020 (i.e., during the first mandatory lockdown) in the form of a 30% tax-reduction for the cancelled rent. In the public sector, public landlords dismissed all or part of the rentals of business that were closed.

Besides the above direct tax measures, Belgium has also adopted a series of indirect measures related to taxation. Examples include:

- Exemption from VAT and import duties for goods needed to combat the effects of the COVID-19 outbreak;
- Reduced VAT rate on the supply, the intra-Community acquisition, and the import of protective equipment;
- Temporary administrative tolerance for VAT deduction on company cars;
- Temporary reduction in the VAT rate on certain restaurant and catering services.

Some social measures were also introduced. An important measure relates to granting parental leave for employees, to allow them to combine work with childcare. The social elections were also postponed.

## 7. Concluding Remarks: A Covid-19 Law in Sight?

Belgium faced and is still facing huge difficulties in managing the Covid-19 crisis. Importantly, most of the issues stem from the complex system of allocation of powers and competences between the Federal level, the Communities and the Regions. In this regard, the Covid-19 outbreak has clearly unfolded the several pitfalls arising when there is a need to ensure coordination amongst different levels of government holding sometime overlapping competences and without a clear-cut hierarchy in place.

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<sup>24</sup> Police Court of Charleroi, 21 September 2020; *cf.* Correctional Court of Brussels, 28 October 2020; Police Court of Charleroi 22 oktober 2020; Correctional Court of Kortrijk 20 July 2020; Tribunal de première instance

francophone de Bruxelles, Section civile, Ordonnance 2021/14/c, March 31, 2021, *Association Ligue des droits humains v. L'État Belge*.

There was also criticism and legal uncertainty related to the legal basis used to overcome this institutional conundrum. The aforementioned Civil Safety Act 2007 ultimately provides for a direct allocation of regulatory powers to (inter alia) the Federal Minister of the Interior, but such concentration of power was subject to a lot of criticism from many public figures. Lawyers' associations from each of Belgium's three language communities have criticised the excessive use of Ministerial Decrees to pass coronavirus measures often entailing severe restrictions on individuals' civil, social and political rights, without the necessary legal scrutiny and democratic approval in parliament. They argue that the rushed implementation of 'coronavirus decrees' leaves the measures, and potential sanctions, open to interpretation.<sup>25</sup> Moreover, experts have also pointed to the risk of the judiciary reversing decisions taken by public authorities (e.g., on sanctions for violation of the existing Covid-19 measures) in the future due to the lack of previous parliamentary scrutiny about the adopted Covid-19 related regulation.

These critics thus begged the question, whether a specific, formal legal basis should be adopted to ground such severe restrictions on fundamental rights like the measures taken during the Pandemic. Numerous possible advantages of such a formal legal basis can be identified, such as:<sup>26</sup>

- No regulatory powers to a one-headed administrative body (i.e., one Minister);
- (More) parliamentary scrutiny;
- A structural legal framework for a more coordinated crisis management;
- A more solid legal basis, with respect for the legality principle and the fundamental rights;
- A list of possible measures *c.q.* restrictions on fundamental rights (foreseeability of the measures);
- More legal certainty;
- A clearly delineated framework within which severe restrictions/measures are (temporarily) possible.

As the same Belgian Prime Minister, Alexander de Croo, commented: "Fighting a pandemic often

requires far-reaching measures". Hence in February 2021, the Belgian Federal government has drafted a proposal for a comprehensive "Pandemic Act". The Pandemic Act draft has been officially approved by the cabinet of Ministers of 26 February 2021 and has now to be approved by the Federal Parliament.<sup>27</sup> If adopted, the pandemic law can be used for the Covid-19 pandemic, as well as for any future health emergencies caused by infectious disease. The Pandemic Act's adoption has now been also fast-tracked in light of a recent judgment by the Brussels Civil Court, which deemed the 2007 Civil Protection Act as not a sufficient legal basis for the adoption of the Covid-19 Ministerial Decrees, and therefore ordered the Belgian State to lift all Covid-19 measures by 30 days (i.e., before April 30, 2021).<sup>28</sup> The Belgian government has announced it will lodge an appeal against the Court's decision.

According to the draft Pandemic Act, a 'Pandemic Emergency' shall be promulgated by the King by Royal Decree for a maximum duration of three months. The decision should be taken on the basis of objective scientific data, after advice from the Minister of Public Health and after consultation in the Council of Ministers and with the Regions. The Royal Decree declaring the Pandemic Emergency must be ratified by law within a period of in principle two, up to maximum five days. When a Pandemic Emergency is declared, the Minister of the Interior, after consultation in the Council of Ministers, shall take the necessary measures in order to prevent or limit the consequences of the pandemic. Those measures must be necessary, appropriate, and proportionate to the objective pursued, as well as limited in time. When local circumstances require, Province Governors and Mayors can take additional measures, in accordance with the instructions of the Minister. The Pandemic Act lists out all the categories of possible concrete measures to be adopted by the Minister - which are similar to those already in place to fight the Covid-19 Pandemic. Last, the Pandemic Act provides for civil and criminal sanctions in case of violation of the measures adopted by the Minister pursuant to the Pandemic Act.

Although this proposal as such is positively received, it is nevertheless open to criticism, inter

<sup>25</sup> The Bulletin, 'Belgium's third wave of coronavirus, February-May 2021', (2021), The Bulletin <<https://www.thebulletin.be/updated-our-practical-guide-how-belgiums-coronavirus-measures-affect-you-0>> accessed 25 October 2021

<sup>26</sup> See, e.g. Patricia Popelier, 'Crisisbeheer per ministerieel besluit' (2010) 4 Tijdschrift voor Wetgeving 282.

<sup>27</sup> The Belgian Council of State, Legislation Section, has given its advice on April 7, 2021 (Conseil d'État,

section de législation, avis no. 68.936/AG du 7 avril 2021 sur un avant-projet de loi 'relative aux mesures de police administrative lors d'une situation d'urgence épidémique').

<sup>28</sup> Tribunal de première instance francophone de Bruxelles, Section civile, Ordonnance 2021/14/c, March 31, 2021, *Association Ligue des droits humains v. L'État Belge*. The judgment also condemns the State to a fine of 5.000 EUR/day should the State not comply timely with the decision.

alia because the new act would still empower one minister (the Minister of Interior Affairs) to decide on the measures to be taken. Whether this will mark a shift towards comprehensiveness, transparency, and legal certainty in the Belgian fight against the current and future major crisis, still has to be seen.