The COVID-19 Case Law of the Belgian Constitutional Court

Paper presented at the 20th Meeting of the Joint Council on Constitutional Justice, held in Sofia on 24-25 April 2023

Jan THEUNIS

Law Clerk at the Belgian Constitutional Court

Professor Constitutional Law at Hasselt University

1. Introduction

1. As most other countries, Belgium was taken by surprise by the COVID-19 pandemic. There was no ready-made law available to deal decisively with a crisis of such magnitude. As a result, the federal government mostly relied on the Civil Security Act of 2007, which grants powers to the Minister of the Interior to take protectionary measures in case of a*cute and temporary emergencies* (such as fires, explosions or the release of radioactive materials).[1] Only in August 2021, the Pandemic Act was passed, introducing a solid legal basis for vigorous government action in case of an 'epidemic emergency'. Both legal grounds were submitted to the Constitutional Court, either by preliminary rulings (Civil Security Act) or by actions for annulment (Pandemic Act). As the Court only has jurisdiction to review primary legislation, the secondary legislation taken under these laws, including the curfew, the rules on social distancing or the obligation to wear a face mask, belong to the jurisdiction of the ordinary courts and tribunals and of the Council of State.[2] Both the Court of Cassation and the Council of State demonstrate substantial deference towards these administrative measures. That case law is covered only occasionally in this overview.

2. Soon after the virus outbreak the federal government was granted special powers by two Acts of 27 March 2020. In these acts, the federal parliament temporarily attributed part of its legislative powers to the (minority) government, allowing it to adopt collateral measures to cope with the COVID-19 crisis, in addition to the core measures described above. In particular, the special

[1] L. Lavrysen, J. Theunis, J. Goossens, T. Moonen, S. Devriendt, B. Meeusen and V. Meersschaert, 'Belgium. Developments in Belgian Constitutional Law', in *2021 Global Review of Constitutional Law* (I·CONnect/Clough Center 2022) 33.

[2] The judicial review of administrative acts (both of individual and general scope) is exercised by the ordinary law courts and the Council of State, see J. Theunis, S. Van Garsse and E. Vleugels, 'Balancing legality and legal certainty. The plea of illegality in Belgian public law and the role of the Council of State and other judicial bodies', in M. Eliantonio and D.C. Dragos (eds), *Indirect Judicial Review in Administrative Law* (Routledge 2022) 13-28.

powers enabled the government to take necessary social, economic and financial measures and also to guarantee a proper administration of justice, for example, by suspending time-limits. The royal decrees[3] taken in application of these special power Acts must be ratified by parliament within one year of their entry into force. From that ratification they fall under the jurisdiction of the Constitutional Court. In its first COVID-19 judgment, on 4 June 2020, the Court declined jurisdiction to rule on such royal decree that was not ratified yet at that time.[4] Three years later, the Court has decided about 60 pandemic-related cases and rendered about 30 judgments.[5] In what follows, a selection of that case law (updated to July 2023) is summarised.

2. No State of Emergency

3. From the outset, it should be noted that the Belgian Constitution, adopted in 1831, was not designed to deal with crisis situations.[6] More so, the possibility of deviating from constitutional provisions, for example in a crisis situation, is explicitly prohibited by the Constitution. According to Article 187, the Constitution cannot be suspended in part nor in full. Consequently, no state of emergency can be proclaimed to permit a suspension of rights and freedoms protected by the Constitution.[7]

In its COVID-19 case law, the Constitutional Court repeatedly stated that the safeguard of Article 187 is closely linked with the fundamental rights guaranteed in Title II of the Constitution. However, it does not oppose a set of constraining measures by which the competent legislature responds in a comprehensive and far-reaching manner to an actual emergency such as the COVID-19 pandemic.[8] A mere limitation of a fundamental right does not in itself violate Article 187 of the Constitution, as long as the judicial review provided for in the Constitution remains unaffected.[9]

---

[3] Royal decrees are regulations, issued by the federal government and signed by the King.

[4] Constitutional Court (4 June 2020) ECLI:BE:GHCC:2020:ARR.083, B.1.1-B.4.

[5] Similar cases are often examined jointly in one judgment; on the other hand, some cases result in two judgments (one on the suspension request, another on the merits). All judgments are available at the Court's website (www.const-court.be), in French, Dutch and German (official languages in Belgium). Occasionally, the Court also provides an English translation (or summary).

[6] M. Verdussen, 'The impact on parliamentary assemblies: the crisis triggered by the Covid-19 pandemic in Belgium. Restricting parliamentary control over the government and limiting democratic debate', in *The Parliament in the time of coronavirus – Belgium* (Study Robert Schuman Foundation 2020) 2,

[7] A. Alen and D. Haljan, *Constitutional Law in Belgium* (Kluwer 2020) 330.

[8] Constitutional Court (16 February 2023) ECLI:BE:GHCC:2023:ARR.026, B.31.2.

[9] Constitutional Court (2 March 2023) ECLI:BE:GHCC:2023:ARR.033, B.19.1-B.20.4; Constitutional Court (27 April 2023) ECLI:BE:GHCC:2023:ARR.068, B.19.2-B.19.3; Constitutional Court (17 May 2023) ECLI:BE:GHCC:2023:ARR.076, B.20.2-B.20.3. See, in the same sense, ECtHR (21 March 2023) Telek and Others v. Türkiye, ECLI:CE:ECHR:2023:0321JUD006676317, § 124: "Pour la Cour, même lorsque des considérations de sécurité nationale entrent en ligne de compte dans le contexte d'un état d'urgence, les principes de légalité et de la prééminence du droit applicables dans une société démocratique exigent que toute mesure touchant les droits fondamentaux de la personne puisse être soumise à une forme de procédure contradictoire devant un organe indépendant compétent pour examiner les motifs de la décision en question et les preuves pertinentes."

3. The Civil Security Act

4. As mentioned above (*supra* no. 1), the urgent measures in response to the pandemic were primarily taken by ministerial decree, based on the Civil Security Act. More than once, the Constitutional Court had to recall that these ministerial decrees are beyond its jurisdiction which is limited to Acts of parliament (primary legislation), as opposed to administrative acts and regulations, including royal and ministerial decrees (secondary legislation).[10] The latter can be challenged before the Council of State (directly, through an action for annulment)[11] and by the ordinary courts and tribunals, including the Court of Cassation (indirectly, through a plea of illegality). However, any question on the constitutionality of the legal basis of secondary legislation that may rise before the ordinary and administrative courts should be referred to the Constitutional Court.

Whereas the Court of Cassation refused to do so,[12] a police tribunal did refer some questions, following the prosecution of individuals for violating the ministerial measures. In judgment 109/2022 the Constitutional Court ruled that the power delegated to the Minister of the Interior does not violate the principle of legality in criminal matters. Since various risk and emergency situations are involved which cannot be described in full and in detail, the legislature was entitled to adopt broad wording so that appropriate action could be taken in respect of those risks. Moreover, the Minister does not have unfettered power, since it is sufficiently circumscribed by the Civil Security Act. More specifically, the Act clearly defines the essential elements of the offence, consisting of the refusal or failure to comply with the ministerial measures ordered under that Act.[13] By contrast, the Court considers it unjustified to prohibit the courts and tribunals from taking account of mitigating circumstances when assessing violations of those measures.[14]

Incidentally, the Court also settled an issue that was highly debated among legal scholars: exceptionally, direct delegation to the minister, rather than to the government,[15] may be justified if, as in this case, objective reasons exist that require urgent action by the executive branch, and only to the extent that any delay may aggravate the existing risk or emergency situation.[16]

---

[10] Constitutional Court (26 November 2020) ECLI:BE:GHCC:2020:ARR.161, B.2-B.3; Constitutional Court (1 July 2021) ECLI:BE:GHCC:2021:ARR.101, B.2-B.3.
[11] E.g. Council of State (30 October 2020), No. 248.819 (on the curfew).
[12] Court of Cassation (28 September 2021), ECLI:BE:CASS:2021:CONC.20210928.2N.16.
[13] Constitutional Court (22 September 2022) ECLI:BE:GHCC:2022:ARR.109, B.2-B.8.4.
[14] Constitutional Court (22 September 2022) ECLI:BE:GHCC:2022:ARR.109, B.20-B.26.
[15] According to Article 108 of the Constitution regulatory powers should be exercised by royal decree.
[16] Constitutional Court (22 September 2022) ECLI:BE:GHCC:2022:ARR.109, B.8.2.

5. Both the Court of Cassation and the Council of State had previously accepted the Civil Security Act as a valid legal basis for the ministerial measures.[17] By its judgment 109/2022, repeated in judgment 170/2022[18] and judgment 104/2023[19] the Constitutional Court thus confirmed that case law.

4. The Pandemic Act

6. In response to growing criticism of governing by ministerial decrees, federal parliament finally passed the Pandemic Act of 14 August 2021, designed to effectively address epidemic emergencies. The Act allows the King to declare the pandemic state of emergency for up to three months, renewable for up to three months at a time. Parliament must ratify each declaration and prolongation within 15 days. From now it is clearly stated that administrative police measures necessary to prevent or limit the consequences of the emergency for public health should be taken by royal decree and are thus a collective decision of the government. However, in case of imminent danger the Minister of the Interior can exercise these powers alone and take all necessary administrative police measures that "do not tolerate any delay". These measures must be submitted to the Council of Ministers for consultation. Moreover, in the event local circumstances require so, the governors and mayors can take – in accordance with possible instructions of the Minister of the Interior – measures applicable to their own territory that are stricter than the royal or ministerial decrees.[20]

By judgment 33/2023, the Constitutional Court dismissed the ten actions for annulment of the Pandemic Act, lodged by a number of citizens, four members of parliament and some non-profit organisations. The above delegations fall within the constitutional limits outlined in judgment 109/2022 (*supra* no. 4). Apart from their limitation in time, the emergency measures must be necessary, appropriate and proportionate to the intended purpose. Article 5 of the Pandemic Act provides a list of possible categories of measures that can be taken (such as social distancing, restrictions for gatherings, etc.). It is clear from the general design of the Act that the legislator intended to establish a reasonable balance between, on the one hand, the protection of individual fundamental rights and freedoms and, on the other, the public interest pursued by the restrictions. However, since the Act leaves it up to the King, the Minister of the Interior and governors and mayors to concretely determine what administrative police measures should be taken, the Court

---

[17] Court of Cassation (28 September 2021), ECLI:BE:CASS:2021:CONC.20210928.2N.16; Council of State (30 October 2020), No. 248.819.

[18] Constitutional Court (22 December 2022) ECLI:BE:GHCC:2022:ARR.170.

[19] Constitutional Court (29 June 2022) ECLI:BE:GHCC:2023:ARR.104.

[20] L. Lavrysen, J. Theunis, J. Goossens, T. Moonen, S. Devriendt, B. Meeusen and V. Meersschaert, 'Belgium. Developments in Belgian Constitutional Law', in *2021 Global Review of Constitutional Law* (I·CONnect/Clough Center 2022) 34.

does not review the authorised measures but only the delegations granted by the Act. It is up to the Council of State and the ordinary courts and tribunals to verify in concrete cases whether a specific measure taken under the Act complies with the repartition of competences and the constitutional guarantees and fundamental freedoms. These judicial bodies will decide whether the measures comply with the principles of legality, legitimacy and proportionality. That judicial review also includes verifying whether the conditions for delegation have been met.[21]

5. Quarantine Measures

7. In July 2020, after a period of so-called "lockdown light", restrictions on physical contact between individuals were relaxed and travelling became possible again. In light of this new phase in the COVID-19 crisis, measures were taken to counter the associated risks of further spread of the virus, including quarantine measures and contact tracing, introduced by two Acts of the Flemish Parliament (decrees) of 10 July 2020 and 18 December 2020 and an Act of the Common Community Commission (ordinance) of 17 July 2020 (for the bilingual Brussels-Capital region).

More specifically, these measures concern mandatory isolation and self-isolation, medical examination and medical testing, the compliance of which is monitored and non-compliance is punishable. Other measures relate to data processing of certain categories of persons in the context of enforcement and contact tracing. Several actions for annulment were filed against those rules, by both individuals and a non-profit organisation aiming to promote human rights.[22] Judgment 26/2023 of the Constitutional Court rules is of particular importance on three issues.

Firstly, the Court confirmed that the Flemish Community and the Common Community Commission are competent for preventive health care activities and services, covering the detection and control of infectious diseases. However, the communities are also competent to establish a data protection authority in the matters for which they are competent. If they do so, as the Flemish Community did, a decree concerning personal data should be submitted to the advisory opinion of the Flemish data protection authority, instead of the federal data protection authority. Yet, the Flemish authority was not notified to the European Union, as required by the GDPR. As a result, the Court annulled the relevant articles 2 of the decree of 18 December 2020 that relate to data processing, but it maintains the effects of those provisions until the entry into force of a decree that is GDPR-proof and until 31 December 2023 at the latest.[23]

---

[21] Constitutional Court (2 March 2023) ECLI:BE:GHCC:2023:ARR.033, B.16, B.50.1-B.62. A suspension request by some applicants was dismissed (due to expiry of time limit), Constitutional Court (9 June 2022) ECLI:BE:GHCC:2022:ARR.080.

[22] A suspension request by some applicants was dismissed (due to lack of proof of urgency), Constitutional Court (10 June 2021) ECLI:BE:GHCC:2021:ARR.088 and ECLI:BE:GHCC:2021:ARR.089.

[23] Constitutional Court (16 February 2023) ECLI:BE:GHCC:2023:ARR.026, B.17-B.30.15.

Secondly, the Court considers the measures of mandatory isolation and self-isolation. Referring to the case-law of the European Court of Human Rights (ECtHR), it does not qualify these measure as a deprivation of liberty within the meaning of Article 5(1) of the European Convention on Human Rights (ECHR), but as a restriction of freedom of movement within the meaning of Article 2 of Protocol 4 to the ECHR. Such restriction is, furthermore, justified and proportionate given that, in light of the infectiousness of COVID-19, (self-)isolation is a measure necessary for the protection of public health and the health of others. The Court does note, however, that such a restriction of freedom must be subject to judicial review, which is indeed available.[24]

Thirdly, the Court finds a violation of the principle of legality in criminal matters. For a criminal law to be foreseeable and precise, the elements that determine the scope of the criminalisation must be set out in an official text, which is published in a way that allows any person to take cognisance of it at any time. In principle, such publication is done in the Belgian Official Gazette. For the interpretation of the terms "high-risk area" and "red zone", the Decree of 18 December 2020 and the Ordinance of 17 July 2020 refer to the places designated by the Foreign Affairs Administration. However, neither the decree nor the ordinance contain the link to the website "www.info coronavirus.be" where the lists of high-risk areas and red zones are published. In relation to those terms, therefore, the Court finds a breach of the principle of legality.[25]

6. Contact Tracing

8. Because of the close connection between the federal competences and the community competences affected by the measures, the federal government and several federated entities concluded a cooperation agreement that regulates the manual and digital detection of persons (suspected to be) infected with COVID-19 and their contacts. To this end, the cooperation agreement of 25 August 2020 establishes a number of databases (previously regulated by royal decree) and provides for the collection of numerous personal data, including sensitive health information. A political party, three members of parliament and a non-profit organisation lodged an action for annulment of the various acts of parliament ratifying that agreement. They alleged a violation of the right to respect for private life and of the protection of personal data, guaranteed by Article 22 of the Constitution, by Article 8 of the European Convention on Human Rights, by Articles 7 and 8 of the EU Charter of Fundamental Rights, which have analogous scope, and by the General Data Protection Regulation.

---

[24] Constitutional Court (16 February 2023) ECLI:BE:GHCC:2023:ARR.026, B.32-B.48.
[25] Constitutional Court (16 February 2023) ECLI:BE:GHCC:2023:ARR.026, B.49-B.55.

By judgment 110/2020 the Constitutional Court rejected most of the challenges. In doing so, it took into account the review framework resulting from the case law of the ECtHR and the Court of Justice of the EU. The cooperation agreement aims to protect public health, which is a legitimate objective, and the centralisation of data is justified for reasons of security and data integrity and of expediency in the manual detection of potentially infected persons. However, the Court does consider unconstitutional: (1) the failure to designate bodies at the level of the federated entities as joint controllers of the central database and (2) the absence of a maximum retention period for personal data stored in another database. The Court annuls the provisions in question but provisionally maintains their effects. In addition, the Court annuls the authorisation granted to the Information Security Committee allowing the communication of personal data to third parties for the purpose of scientific research.[26]

7. COVID Safe Ticket

9. On 14 July 2021, the federal State and various federated entities concluded a cooperation agreement on the use of the COVID Safe Ticket, which was amended on 27 September and 28 October 2021, thus providing a legal basis for the domestic use of the EU digital COVID certificate. This certificate contains information about the vaccination, test result or recovery of the holder issued in the context of the COVID-19 pandemic, from which the COVID Safe Ticket is generated (via the COVID-Scan application). A cooperation agreement was necessary because the communities are competent for preventive health care, while the federal government is competent for the enforcement of public order (including public health). The cooperation agreement sets out the rules on the use of the COVID Safe Ticket for gaining access to certain places or events during the COVID-19 pandemic. The federated entities subsequently introduced the COVID Safe Ticket and regulate data processing in that regard.

By judgment 68/2023 the Constitutional Court ruled on multiple actions for annulment against the COVID Safe Ticket legislation.[27] The Court observed inter alia that the legislation has not introduced a mandatory vaccination. Indeed, the COVID Safe Ticket can be obtained not only on the basis of a vaccination certificate, but also on the basis of a test and recovery certificate. The validity period of the COVID Safe Ticket is significantly shorter when it is obtained pursuant to a negative diagnostic test, that has a validity period of 24 or 48 hours depending on the type of test, than when it is obtained pursuant to the administration of a vaccine or obtaining a recovery certificate. However, that difference in treatment is based on an objective and pertinent criterion

[26] Constitutional Court (22 September 2022) ECLI:BE:GHCC:2022:ARR.110.

[27] Two cases were decided by the reduced chamber (panel of three, consisting of one president and two judges), because of manifest inadmissibility (Constitutional Court, 3 February 2022, ECLI:BE:GHCC:2022:ARR.020) or lack of jurisdiction (Constitutional Court, 31 March 2022, ECLI:BE:GHCC:2022:ARR.053).

with regard to the aim being pursued, which is to limit the spread of the coronavirus. Indeed, unlike the vaccination certificate or the recovery certificate, a negative diagnostic test does not show that the person has developed immunity to COVID-19. It only allows to establish that the person was not a vector of the coronavirus at the time the test was taken. Accordingly, the Court considers the difference in treatment between vaccinated and non-vaccinated individuals reasonably justified.[28]

Furthermore, the Court finds that the contested provisions do not fall within the ambit of Article 12 of the Constitution and Article 2 of Protocol 4 to the ECHR. The freedom of movement guaranteed by those provisions ensures that anyone lawfully on the territory is not arbitrarily restricted in his freedom of movement by an individual measure such as house arrest or street ban. However, those provisions do not prevent access to certain places from being subject to generally applicable conditions, such as purchasing an entrance ticket or presenting a COVID Safe Ticket.[29]

While the contested provisions do not interfere with freedom of movement, they do fall within the scope of the right to private life. Overall, the Constitutional Court considers the COVID Safe Ticket legislation necessary to protect the life and health of the people concerned and of other people in society, as well as to avoid the need to once again restrict activities or close certain industries. In that regard, the Court points to the positive obligation, by virtue of Articles 2 and 8 of the ECHR, to take appropriate measures to protect the life and health of those within their jurisdiction.[30] However, the Court does note that in particular the Flemish Decree of 29 October 2021, as part of the COVID Safe Ticket legislation, did not develop clear criteria for the optional use of the COVID Safe Ticket in hospitals, residential care centers, rehabilitation hospitals and facilities for persons with disabilities. Consequently, for visitors to those residential care facilities for vulnerable people, it was not sufficiently foreseeable whether the use of the COVID Safe Ticket was mandatory or not. On that point the legislation violates the right to private and family life.[31]

Judgment 68/2023 was followed by three similar rulings on 17 May 2023.[32] In judgment 76/2023 the Court adds that Article 7 of the International Covenant on Civil and Political Rights has not been violated as the persons concerned by the use of the COVID Safe Ticket are not subjected without their free consent to medical or scientific experimentation. Also the contested measures,

---

[28] Constitutional Court (27 April 2023), ECLI:BE:GHCC:2023:ARR.068, B.23.2-B.24.4.

[29] Constitutional Court (27 April 2023), ECLI:BE:GHCC:2023:ARR.068, B.40.

[30] With reference to ECtHR (Grand Chamber, 21 April 2021) Vavřička and Others v. Czech Republic, ECLI:CE:ECHR:2021:0408JUD004762113, § 282.

[31] Constitutional Court (27 April 2023), ECLI:BE:GHCC:2023:ARR.068, B.42-B.47.

[32] Constitutional Court (17 May 2023), ECLI:BE:GHCC:2023:ARR.075; Constitutional Court (17 May 2023), ECLI:BE:GHCC:2023:ARR.076; Constitutional Court (17 May 2023), ECLI:BE:GHCC:2023:ARR.077. A suspension request by some applicants was dismissed (due to lack of proof of urgency), Constitutional Court (20 January 2022), ECLI:BE:GHCC:2022:ARR.010 and Constitutional Court (3 February 2022), ECLI:BE:GHCC:2022:ARR.021.

including the wearing of the mouth mask and the social distancing rules, are not so severe as to constitute inhuman and degrading treatment within the meaning of that Article.[33]

8. Vaccination Registration

10. The federal government and the sub-entities collaborated in order to launch a massive, voluntary and free vaccination campaign against COVID-19. On 12 March 2021 they concluded a cooperation agreement on the processing of data related to vaccinations against COVID-19. A citizen sought annulment of the various acts of parliament consenting to that cooperation agreement. She argued that the agreement violated the right to protection of private life, the right to protection of personal data and the principle of non-retroactivity.

By judgment 84/2023 the Constitutional Court considered that the contested acts may directly and adversely affect the applicant's decision to be vaccinated.[34] The Court rejected however most of her arguments. Firstly, it found that all the specific purposes of registration in Vaccinnet – such as high-quality healthcare, pharmacovigilance, vaccine traceability, scientific research, etc. – are directly related to the vaccination campaign, are sufficiently precise and are limited to what is strictly necessary.[35]

Secondly, regarding the retention period of the data in Vaccinnet, the Court considered a period of at least 30 years to be standard for health data. Taking into account the particular pandemic circumstances, the Court approved the need to keep vaccination records until the decease of the vaccinated person.[36]

Thirdly, the Court ruled that the retroactive effect of the cooperation agreement of 12 March 2021 is justified. While the cooperation agreement of 12 March 2021 has effect from 24 December 2020 for some provisions and from 11 February 2021 for others, the content of those provisions corresponds to the previous regulation of vaccination data in a royal decree of 24 December 2020 (entered into force on 24 December 2020) and in a protocol agreement of 27 January 2021 (entered into force on 11 February 2021). Therefore, the retroactive effect does not compromise legal certainty and legitimate expectations.[37]

---

33 Constitutional Court (17 May 2023), ECLI:BE:GHCC:2023:ARR.076, B.23.1.
34 Constitutional Court (1 June 2023) ECLI:BE:GHCC:2023:ARR.084, B.14.2.
35 Constitutional Court (1 June 2023) ECLI:BE:GHCC:2023:ARR.084, B.23.3.
36 Constitutional Court (1 June 2023) ECLI:BE:GHCC:2023:ARR.084, B.37.1-B.37.4.
37 Constitutional Court (1 June 2023) ECLI:BE:GHCC:2023:ARR.084, B.49.1-B.49.3.

Finally, however, the Court annulled the provision authorising the Information Security Committee to allow the disclosure of vaccination data registered in Vaccinnet to third parties in certain circumstances. The decisions of that Committee, which are binding, are subject to jurisdictional control yet not to parliamentary control. The persons concerned are thus denied the guarantee of parliamentary control, while European Union law does not impose such independence.[38]

11. In another case the Court decided that the preliminary question on the rules of the same cooperation agreement were not of use for the referring judge.[39]

9. Good Administration of Justice

12. Two judgments concerned the rules on internment, as a special method of detention. As a rule, such detainees (internees) are heard in person by the judge deciding on their situation of internment. The opportunity to be heard in person is considered to be crucial to the judge's assessment of the personal, mental or psychological condition of internees. However, the federal Act of 20 December 2020, containing various temporary and structural provisions on justice in the context of the fight against the spread of COVID-19, temporarily lifted that rule. According to Article 46 of the Act, only the internee's lawyer and the public prosecutor are heard. With judgment 32/2021 the Constitutional Court suspended that provision. In order to protect public health during a viral pandemic by minimising physical contact between people, less restrictive measures are possible. These include an appearance by videoconference or in a sufficiently spacious, well-ventilated courtroom, or even a hearing in the institution in which the internee is staying. With judgment 76/2021, the Court annulled the provision for the same reasons. In both judgments the Court expressly relied on case law of the ECtHR on Article 5 (4) of the ECHR.[40]

13. More rapidly than the federal parliament (*supra* no. 2), the Walloon parliament, by a Region Act (decree) of 17 March 2020, granted special powers to the Walloon government for a limited period of time, allowing it to tackle the COVID-19 pandemic. On this ground, the Walloon Government adopted on 18 March 2020 a regulation temporarily suspending the time limits for bringing an action for annulment before the Council of State against Walloon administrative acts or regulations. Article 2 of the Decree of 3 December 2020 ratified this temporary suspension. An action for annulment was brought by a company involved in an appeal before the Council of State. The Constitutional Court has

---

[38] Constitutional Court (1 June 2023) ECLI:BE:GHCC:2023:ARR.084, B.30.1-B.32.

[39] Constitutional Court (16 March 2023) ECLI:BE:GHCC:2023:ARR.045.

[40] Constitutional Court (25 February 2021) ECLI:BE:GHCC:2021:ARR.032, B.6-B.8.5; Constitutional Court (20 May 2021) ECLI:BE:GHCC:2021:ARR.076, B.4-B.6.5.

jurisdiction to review that article, which has appropriated the ratified regulation. By judgment 69/2022, the Court annulled the contested article for violation of the rules on repartition of competences. In determining the rules of procedure for the Council of State, it infringes federal competence.[41] However, the Court upheld the effects of the measure in order to avoid legal uncertainty over admissibility issues before the Council of State.[42]

14. Royal decree no. 3, taken in application of one of the two federal special power Acts (*supra* no. 2), suspended the limitation period for criminal proceedings for a total of four months (18 April 2020 to 17 July 2020). The regulation was ratified by the Act of 24 December 2020. In three cases, the Court of Cassation and a court of first instance referred preliminary questions to the Constitutional Court on the possible violation of the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) because the suspension applies in general, without excluding those proceedings whose verdict was delayed for reasons other than the health crisis.

In judgments 2/2023, 34/2023 and 108/2023 the Constitutional Court recalls that the measure was aimed at ensuring the effective application of criminal laws, protecting society and safeguarding the rule of law, as the crisis caused by the COVID-19 pandemic forced the courts to drastically limit their activities to the most urgent and important cases. In those circumstances, the Court ruled that it was neither necessary nor feasible to require courts to determine on a case-by-case basis whether the pandemic had a concrete impact on the treatment of a case. Therefore, equal treatment was justified.[43]

15. Royal decree no. 2 on the other hand, ratified by the same federal Act of 24 December 2020, was found to be discriminatory for not including certain procedures in the automatic extension of the limitation period to bring an action before a civil court, without any justification. Therefore, the Constitutional Court ruled a violation of Articles 10 and 11 of the Constitution.[44]

---

[41] A federal special powers Royal Decree of 21 April 2020 also prolonged the time limits before the State Council.

[42] Constitutional Court (19 May 2022) ECLI:BE:GHCC:2022:ARR.069, B.7-B.28. See also Constitutional Court (10 November 2022) ECLI:BE:GHCC:2022:ARR.146, B.7-B.8.

[43] Constitutional Court (12 January 2023) ECLI:BE:GHCC:2023:ARR.002, B.8-B.12; Constitutional Court (2 March 2023) ECLI:BE:GHCC:2023:ARR.034, B.8-B.11; Constitutional Court (6 July 2023) ECLI:BE:GHCC:2023:ARR.108, B.7-B.10.

[44] Constitutional Court (16 February 2023) ECLI:BE:GHCC:2023:ARR.031, B.8-B.12. See also Constitutional Court (10 November 2022) ECLI:BE:GHCC:2022:ARR.146, B.5-B.7.

10. Protection of Tenants

16. By a Region Act (ordinance) of 19 March 2020 also the parliament of the Brussels-Capital Region granted special powers to the Brussels government. By Order of 20 May 2020, the government imposed a moratorium on evictions until 31 August 2020 to prevent the most vulnerable people from being left without housing or stable accommodation in the context of the COVID-19 pandemic. By Ordinance of 4 December 2020, the Parliament of the Brussels-Capital Region confirmed the order. Two homeowners and a homeowners' interest group sought the repeal of this ordinance.

In judgment 97/2022, the Constitutional Court first of all found that such measure falls within the competence of the regions. That power does not extend to impeding the enforcement of court decisions as such, which would be contrary both to the fundamental principle of the Belgian legal order that court decisions may be altered only by the use of legal remedies and to the rules governing the repartition of competences. In exceptional circumstances, however, a temporary postponement of the enforcement of court decisions ordering evictions, as provided for in the impugned provision, does not fundamentally undermine that principle and those rules.[45]

As regards the alleged infringement of the right to peaceful enjoyment of property, the Court found that the moratorium on evictions could fall within the scope of 'use of property in accordance with the general interest' within the meaning of Article 1.2 of Protocol 1 to the ECHR, and consequently, within the scope of that treaty provision read in conjunction with Article 16 of the Constitution. The measure pursued a legitimate objective in the public interest and struck a fair balance between, on the one hand, the interests of tenants of immovable property whose eviction was prohibited and, on the other hand, the interests of owner-landlords.

The Court took into account, in particular, the measure's temporary nature and limited duration, as well as the competent legislature's broad discretion to take appropriate measures to protect the rights to health and shelter of a segment of the population which, even under normal circumstances, faces hardship. Moreover, the rent was still due, payable and recoverable during the period in question and it was for the ordinary courts to assess whether compensation on the basis of the principle of equality for public burdens was warranted and to determine the amount of compensation.[46]

---

[45] Constitutional Court (14 July 2022) ECLI:BE:GHCC:2022:ARR.097, B.6-B.14.

[46] Constitutional Court (14 July 2022) ECLI:BE:GHCC:2022:ARR.097, B.21-B.29 (summary from CODICES-database, www.codices.coe.int BEL-2022-2-004; this database, initiated by the Venice Commission, contains the full text of over 10,000 judgments from over 100 courts mainly in English and in French, but also in other languages, as well as summaries of these judgments in English and in French).

11. COVID-19 Discriminations

17. A Flemish Region Act (decree) of 15 May 2020 suspended the start date of certain sustainable energy projects, in order to avoid that, because of the COVID-19 pandemic, they would not be operational in time and therefore would not be eligible for green certificates. The Region Act differentiates between projects that have a start date expiring in 2020 or 2021 and projects with a start date expiring in 2022 or later. The start date of the first category of projects is automatically suspended from 20 March 2020 to 17 July 2020. The start date of the second category of projects is only suspended, for the same period, 'if it is evidenced that the project cannot be realised within the original period of validity due to COVID-19'. In judgment 2/2022 the Constitutional Court ruled that this distinction was reasonably justified because the latter projects had more time to recover any delay incurred by COVID-19 and because a suspension of the start date remained possible in all cases.[47]

18. In midst of the second COVID-19 wave, the federal parliament passed an Act to allow nursing activities to be carried out in the pandemic by persons not legally qualified for that purpose. The Act of 6 November 2020 was in force until 1 April 2021, but the King could extend its application for up to six months. By judgment 169/2020 the Constitutional Court dismissed the suspension claim.[48] In a second judgment, on the merits, the Court ruled that neither the principle of equality nor the fundamental right to health protection were violated. The Act imposed a strict set of cumulative conditions for non-nursing staff (shortage of nurses, complexity of the activities, supervision of a coordinating nurse…), so there is no equal treatment of different situations as the applicants argued. Furthermore, the contested Act aimed to relieve the overburdened healthcare staff during the pandemic, for a limited period of time. As to the right to health protection, the Court concluded that the Act enhances rather than diminishes that right. By judgment 56/2021 the action for annulment was rejected.[49]

At a later stage of the pandemic, by an Act of 28 February 2022, the legislator allowed the pharmacists to administer COVID-19 vaccinations. The action for annulment of that law, brought by the Belgian association of physicians, is still pending.[50]

19. Very soon after the virus outbreak, on 23 March 2020, the federal parliament adopted temporary measures in favour of self-employed persons forced to partially or completely interrupt

---

47 Constitutional Court (13 January 2022) ECLI:BE:GHCC:2022:ARR.002, B.9-B.14.
48 Constitutional Court (17 December 2020) ECLI:BE:GHCC:2020:ARR.169, B.2-B.5.5.
49 Constitutional Court (1 April 2021) ECLI:BE:GHCC:2021:ARR.056, B.4-B.16.
50 Case no. 7855.

their activities as a result of COVID-19. In judgment 43/2023 the Constitutional Court considered it discriminatory that a certain category of self-employed persons was excluded from these measures, more specifically the beneficiaries of incapacity or disability benefits who are self-employed in main occupation with the authorisation of their medical doctor. According to the Court, there is no reasonable justification as to why their loss of income due to the enforced interruption of their self-employment is not compensated.[51]

20. The federal parliament also adopted an Act of 20 December 2020 'containing various temporary and structural provisions on the administration of justice in the context of the fight against the spread of the coronavirus COVID-19'. One of the measures temporarily relaxed the unanimity requirement for the general meeting of co-owners using the written procedure. Asked whether that provision infringes Articles 10, 11 and 23 of the Constitution, judgment 45/2022 holds that the question is based on a manifestly incorrect interpretation of that provision.[52]

21. In judgment 57/2023, the Constitutional Court ruled on a difference in treatment regarding the possibility of obtaining a reduction in the property tax. One of the parties wished to obtain such reduction because it was unable to receive guests (or a significantly lower amount of guests) at its hotel during a certain period due to the COVID-19 pandemic. The Court dismissed that complaint, noting that both the federal and the regional authorities adopted several specific measures to mitigate the impact of that pandemic on businesses, including the hotel and restaurant sector.[53]

12. Pending cases

22. Finally, two cases concerning preventive healthcare related to COVID-19 are still pending. They involve an authorisation to the executive, by the Walloon Parliament (case no. 7829) and the competent Brussels legislature (case no. 7830), to take specific sanitary measures in case of a pandemic state of emergency. The first case also covers the collection and processing of health data. Those issues have already been raised in earlier cases, in particular judgments 33/2023 (*supra* no. 6) and 26/2023 (*supra* no. 7). Beyond that, the individual right to refuse treatment is at stake in the first case. Both judgments will be handed down by the end of 2023.

---

[51] Constitutional Court (16 March 2023) ECLI:BE:GHCC:2023:ARR.043, B.6.1-B.6.5.
[52] Constitutional Court (17 March 2022) ECLI:BE:GHCC:2022:ARR.045, B.3-B.6.
[53] Constitutional Court (30 March 2023) ECLI:BE:GHCC:2023:ARR.057, B.11.