

state officials, nominally on the basis of measures designed to counter money laundering, terrorist financing and so on. Akgün comments on the imbalances the episode reveals between individual interests and those of financial institutions, and the impacts of government decrees on individual freedoms.

Two recent decisions of constitutional courts provide the focus of our final two contributions. Kristyan Stoyanov considers the latest decision of the German Federal Constitutional Court (FCC)—the *PSPP*¹ decision—on the extent to which the supremacy of EU law is accommodated within the German Constitution, and the notable finding of the court that the CJEU’s decision in *Weiss*² was not binding on the Federal Republic of Germany. Kershwyn Bassuday writes on the decision of the South African Constitutional Court in *Beadica*³ and the place of constitutional values in the assessment of whether the enforcement of a contract would be contrary to public policy.

Colleagues interested in submitting commentaries on recent international developments for future issues of *Public Law* are encouraged to contact us at public.law@durham.ac.uk.

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Belgium—The Council of State’s control of measures taken in the context of the COVID-19 pandemic

☞ Belgium; Coronavirus; Curfew requirements; Emergency legislation; Fundamental rights; Judicial review; Pandemics; Prostitution; Pubs and bars

In order to combat the spread of COVID-19, Belgium, like so many other states, has had to take a large number of measures since March 2020. Some of these measures are aimed at ensuring the protection of public health: these are the “general administrative police measures”. Others, which may be termed the “accompanying measures”, are intended to reorganise society and mitigate the effects of the crisis.

The Belgian Council of State has been seized of a number of judicial reviews against the measures taken in connection with the pandemic. In these cases, the applicants have claimed that certain measures taken were irregular and should be suspended under the benefit of extreme emergency, without waiting for an examination on the merits by the administrative court.

Nine months after the start of the crisis, it should be noted that most of the reviews lodged before the Council of State have been rejected, failing, according to the Council, to establish the existence of extreme emergency justifying an immediate order to suspend the execution of the act which was the subject of the

¹ BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15 (hereinafter *PSPP* judgment).

² *Proceedings Brought by Weiss* (C-493/17) EU:C:2018:1000; [2019] 2 C.M.L.R. 11.

³ *Beadica 231 CC v Trustees for the time being of the Oregon Trust* (CCT109/19) [2020] ZACC 13.

review.¹ It should be emphasised that, in Belgian law, the condition of extreme emergency is analysed in an identical manner regardless of the legal ground on which the contested act is challenged.² It follows, in particular, that the fact that a fundamental freedom is at issue cannot exempt the Council of State from verifying the existence of extreme emergency or any other condition of this kind.

In some judgments, the Council of State has gone so far as to examine the criticisms of legality submitted to it for assessment, most often inferred from the alleged violation of fundamental rights. In particular, it has found that differences in treatment between certain categories of undertakings or activities have not been discriminatory.³ It has also held that *prima facie* infringements of entrepreneurial freedom resulting from the closure of bars and restaurants were permissible restrictions.⁴

In addition, the Council of State has recognised that curfews affect the free movement of persons and the right to respect for private and family life. However, it has held that, as things stand, the measures in question have not been shown not to pursue a legitimate aim, nor has it been demonstrated that less restrictive measures—such as a ban on gatherings—would have achieved the objective pursued. Accordingly, the curfew could reasonably be considered a necessary measure to achieve that objective.⁵ In this respect, the Council has stated that the Constitution also guarantees the right to protection of health and medical assistance. On the basis of these findings, the Council has refused to order the suspension of federal curfew measures under a procedure of extreme emergency.⁶

It may also be noted that, while rejecting arguments based on alleged violation of the European Convention on Human Rights (ECHR), the Council of State has affirmed that the Belgian Constitution offers, in this context, a higher degree of protection. Whereas art.15 ECHR authorises derogations from the freedoms enshrined therein “in time of war or other public emergency threatening the life of the nation”, the Belgian Constitution prohibits suspension of the exercise of the fundamental freedoms which it guarantees under any circumstances.⁷

¹ See, for example, Belgian Council of State, *Suenens*, n 247.674, 28 May 2020; Belgian Council of State, *SA Sonic*, n 247.939, 26 June 2020; Belgian Council of State, *Vzw Internationale vakkeurs van het meubel Brussel*, n 248.039, 9 July 2020; Belgian Council of State, *Meulemans*, n 248.108 and 248.109, 3 August 2020; Belgian Council of State, *Meulemans*, n 248.124, 5 August 2020; Belgian Council of State, *Bv This is Monaco*, n 248.144, 13 August 2020; Belgian Council of State, *Cherradi Hadi*, n 248.145, 13 August 2020; Belgian Council of State, *Melis*, n 248.141, 13 August 2020; Belgian Council of State, *Melis*, n 248.149, 17 August 2020; Belgian Council of State, *Schoenaerts*, n 248.161 and 248.162, 20 August 2020; Belgian Council of State, *Bourgeois*, n 248.165, 20 August 2020; Belgian Council of State, *Melis*, n 248.167, 21 August 2020; Belgian Council of State, *SRL Deck Travel*, n 248.270, 15 September 2020; Belgian Council of State, *anonymised*, n 248.347, 24 September 2020; Belgian Council of State, *Confederatie van Immobiliënberoepen (CIB) Vlaanderen*, n 248.921, 13 November 2020; Belgian Council of State, *Nobels*, n 248.922, 13 November 2020.

² On the conditions for submitting a request for suspension in extreme emergency proceedings, see notably D. Renders and B. Gors, *Le Conseil d'État* (Bruxelles: Larcier, 2020), pp.409–419.

³ Belgian Council of State, *Nv Andreas Stihl*, n 247.452, 27 April 2020; Belgian Council of State, *Bv The Masters*, n 248.131, 10 August 2020; Belgian Council of State, *Bv Harman*, n 248.132, 10 August 2020; Belgian Council of State, *SPRL Mainego*, n 248.781, 28 October 2020.

⁴ Belgian Council of State (Gen. Ass.), *Bv Brasserie Flandria*, n 248.780, 28 October 2020; Belgian Council of State (Gen. Ass.), *NV Umami*, n 248.818, 30 October 2020. See also Belgian Council of State (Gen. Ass.), *SPRL Mainego*, n 248.781, 28 October 2020; Belgian Council of State, *SPRL Mainego*, n 248.781, 13 November 2020. See, about other activities, Belgian Council of State, *Nv Andreas Stihl*, n 247.452, 27 April 2020; Belgian Council of State, *Bv The Masters*, n 248.131, 10 August 2020; Belgian Council of State, *Bv Harman*, n 248.132, 10 August 2020.

⁵ Belgian Council of State, *Verelst*, n 248.819, 30 October 2020.

⁶ Belgian Council of State, *Verelst*, n 248.819, 30 October 2020.

⁷ Belgian Council of State, *s.r.l. Mainego*, n 248.918, 13 November 2020.

At the time of writing, only three cases have led the Council of State to judge that a measure taken in the context of the fight against COVID-19 is irregular.

In a judgment of 9 October 2020, the Council of State accepted an application for a suspension in extreme emergency proceedings against an order of the Mayor of the City of Brussels prohibiting prostitution on the territory of the City. The applicants—prostitutes—had been able to establish both the irregularity of the measure, inferred from the incompetence of the author of the act, and the extreme emergency required to justify the immediate suspension of the disputed order by the administrative court.⁸

In a judgment of 24 November 2020, the Council of State ruled that the act by which a federated entity—the Walloon Region—had extended, during the health crisis, the deadline for judicial review to the Council of State of its own administrative acts, was irregular in that only the federal authority is competent to adopt such a measure.⁹

Finally, in a judgment of 8 December 2020, the Council of State ordered the competent authority to modify—within five days following the pronouncement of the ruling and at least provisionally—a measure which, among those taken with a view to combating the spread of COVID-19, prohibited, except in three strictly limited cases, the collective exercise of religion.¹⁰ Representatives of the Jewish faith convinced the court that, by relaxing certain containment measures as a result of the decrease in contamination figures in the country, it was disproportionate to disregard them in relation to the exercise of a constitutional freedom “of a special nature”, which “has traditionally occupied an important place in the Constitution”.

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France—COVID-related organic law ruled valid despite breach of constitutional provisions

☞ Constitutionality; Coronavirus; Emergency legislation; France; Pandemics; Parliamentary procedure; Reasons; Rule of law; Time limits

Basing its decision on the “particular circumstances” of the COVID crisis, the French Constitutional Council’s decision n 2020-799 DC of 26 March 2020 ruled valid an emergency law¹ enacted in apparent contravention of art.46 of the French Constitution. Article 46 requires that 15 days pass between the introduction of an organic law (termed “Institutional Acts” in the Constitution’s official translation) and its first discussion in Parliament. The Institutional Act suspended deadlines for the Constitutional Court’s preliminary review of constitutionality.

⁸ Belgian Council of State, *Bou-Oudi et Akhoun*, n 248.541, 9 October 2020.

⁹ Belgian Council of State, *Commune de Morlanwelz*, n 249.019, 24 November 2020.

¹⁰ Belgian Council of State, *Congregation Yetev Lev Dsatmar Antwerp Ltd*, n 249.177, 8 December 2020.

¹ Loi organique n 2020-365 du 30 mars 2020 d’urgence pour faire face à l’épidémie de covid-19, JORF n 0078 30/03/2020.