Belgium

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Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Question 1

The concepts of situations of "emergency," "necessity" and "crisis" are occasionally referred to in Belgian law but are often used as synonyms and used interchangeably. For example, the COVID-19 pandemic was indistinctly regarded by the public authorities as a health crisis,[1] a state of necessity,[2] or an epidemic emergency situation.[3] However, it is worth noting that the Legislation Section of the Council of State provided a specific interpretation of the notion of "state of necessity," emphasising that it "is not a creation of the will of the State; the competent authority can only acknowledge its existence and decide on appropriate measures to address it in concrete terms."[4]

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[1] Royal Decree of 22 April 2020, on Special Measures for Members of the Federal Public Service in the Context of the COVID-19 Health Crisis, *Moniteur Belge*, 24/04/2020, p. 28717.

[2] Ordinance of 14 October 2021, on the Extension of the COVID Safe Ticket in Case of Necessity Arising from a Particular Epidemiological Situation, *Moniteur Belge*, 14/10/2021, p. 107237.

[3] See: The Law of 14 August 2021 on Administrative Police Measures in the Event of an Epidemic Emergency Situation, *Moniteur Belge*, 20/08/2021, p. 90047.

[4] Opinion of the Council of State n° 172 on a draft law on the attribution to the King of extraordinary powers in time of war, 9 June 1952. The Council of State added that it is in the nature of laws based on the state of necessity to be temporary and to disappear once that necessity itself no longer exists.

Wartime is another relevant concept in Belgian emergency law, as it has particular implications on the functioning of the State.[5] According to a decree-law (*arrêté-loi*) of 11 October 1916, there are three types of exceptional regimes: the "state of war," the "state of siege" and the "enhanced state of war." These regimes involve derogation rules, primarily resulting in the potential transfer of authority from civilian to military authorities.[6] The state of war and the state of siege should not be confused with the notion of "war period" which was established by a 1994 law to create a new period of availability for the Belgian armed forces in the context of Belgium's participation in an international conflict.[7]

While it does not provide any emergency framework (see Question 2), the Belgian Constitution also recognizes the existence of a "state of war," which can be declared by the King according to Article 167, § 1, al. 2, of the Belgian Constitution, as revised in 1993.[8]

Question 2

The Belgian Constitution does not recognize any state of emergency that would trigger an exceptional legal framework in time of peace. Article 187 explicitly prohibits any legal state of emergency, providing that "the Constitution cannot be wholly or partially suspended." It relies on the fact that fundamental rights and rules governing the State must be upheld even in exceptional circumstances.

Despite this constitutional prohibition, emergency situations evidently do arise in practice. While some crisis situations can be managed within the existing constitutional framework (such as deploying the fire brigade or civil protection during natural disasters, or providing shelter to the homeless in winter), certain circumstances have required actions beyond those provided for in the Constitution. Article 187 only prohibits the suspension of the Constitu-

[5] For a detailed analysis, see: Behrendt, "Le commandement de l'armée et la notion d'état de guerre," in Genart (ed.), *De Grondwet en Jan Velaers*, die Keure, 2022, pp. 517–530.

[6] Ergec and Watthée, "Les dérogations aux droits constitutionnels," in Verdussen and Bonbled (eds.), *Les droits constitutionnels en Belgique*, Bruylant, 2011, pp. 398–399.

[7] Law of 20 May 1994 on the periods and positions of military personnel in the reserve framework and on the implementation and conditioning of the Armed Forces, *Moniteur belge*, 21 June 1994.

[8] Before 1993, Article 167 referred to the competence to "declare war." According to Gerits, the constitutional concept of a "state of war" does not have the same meaning as the legal concept of a "state of war." The Constitution refers to the factual finding that our country is involved in a war, while the decree-law of 1916 refers to the period between the mobilisation and demobilisation of the army, see: Gerits, "De staat van oorlog en de staat van beleg: uitzonderingsregimes die aan een herziening toe zijn," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, p. 73.

tion by any authority's decision, but it does not rule out *force majeure*. When constitutional provisions cannot be enforced, an exceptional framework may be necessary to address the situation of *force majeure*. In principle, such measures are only permissible when there is an absolute impossibility to respect the Constitution,[9] although there have been instances where circumstances have been invoked to neutralise some constitutional provisions in practice.[10] As a result, creative techniques have been employed to address crises, often justified within the existing constitutional framework, both in times of war and in times of peace.

As previously noted, situations of war have led to the application of specific rules that suspend several fundamental rights and modify the exercise of public powers. Among the consequences prescribed by the Constitution of recognizing a state of war are the prohibition of constitutional revision (Article 196), the possibility of establishing military courts (Article 157) and the enforcement of various military regulations.[11] Recognition of a state of war also implies the application of unique legal acts. During the two World Wars, Belgian authorities were unable to exercise their powers as provided by the Constitution due to the impossibility of convening Parliament. Wartime decrees-laws were therefore adopted by the King and his government, some of which remain in force today.[12] That is, for instance, the case of the decree-law of 11 October 1916, establishing a mechanism of suspension of rights and liberties, and the decree-law of 12 October 1918, empowering the Minister of Justice to intern individuals suspected of having ties with the enemy.[13] This method was later upheld by the Court of Cassation, based on an imperative to protect the continuity of legislative power and the independence of the State.[14]

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[9] The Legislation Section of the Council of State considered that the state of necessity was not a creation of the State will, but a factual situation the competent authorities could only notice the existence of and take measures to fight against (avis n° 172, 9 juin 1952, rendu sur un projet de loi relatif à l'attribution au Roi de pouvoirs extraordinaires en temps de guerre).

[10] This is the case of the two World Wars. See: Van Drooghenbroeck and Velaers, "L'article 187 de la Constitution et la problématique de la protection des droits et libertés dans les états d'exception," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, p. 12.

[11] Behrendt, "Le commandement de l'armée et la notion d'état de guerre," in Genart (ed.), *De Grondwet en Jan Velaers*, die Keure, 2022, p. 524.

[12] During World War II, the King was declared unable to reign by the government, which then exercised legislative power alone. The sequence was not expressly settled by Article 93 of the Belgian Constitution, which provides that the Houses are convened if the King is unable to reign.

[13] Bouhon, Jousten, and Miny, *Droit d'exception, une perspective de droit comparé – Belgique : Entre absence d'état d'exception, pouvoirs de police et pouvoirs spéciaux*, Service de recherche du Parlement européen, 2021, p. 7.

[14] Cass. 11 February 1919, Pas. 1919, I, 9. See also: Cass. 4 March 1940. For a commentary on these rulings and of their doctrinal critics, see: Van Haegenborgh and Verrijdt, "De noodtoestand in het Belgische publiekrecht," *Preadviezen 2016*, La Haye, Boom, pp. 42–43. As can be seen, the deviation from the constitutional provisions regarding the normal functioning of institutions was justified without departing from the framework of Article 187 of the Constitution.

However, the constitutionality of these exceptional regimes related to wartime situations remains a subject of debate in legal doctrine today.[15]

Despite the apparent clear language of Article 187, this is even true for any scenario involving the suspension of the Constitution. Some scholars consider that Article 187 provides itself a constitutional basis for measures derogating to the Constitution, since it should be interpreted in light of the principles of state independence and continuity.[16] Others reject this analysis, arguing that only an extra-constitutional justification, based notably on a pre-constitutional decree of 1830 concerning the independence of the Belgian State, can serve as the basis for the existence of an exceptional framework.[17]

The use of extraordinary powers is another technique employed during wartime to derogate from common rules.[18] Under laws passed in 1939 and 1944, the King was granted extraordinary powers for the duration of the state of war, allowing him to adopt legislative provisions through royal decrees discussed in the Council of Ministers in cases of urgency and necessity. These extraordinary powers are characterised by their broad purpose and scope, as well as the fact that they are not granted for a predetermined period.[19] After World War II, extraordinary powers were no longer used in Belgium.[20]
Even in peacetime, creative techniques exist to address various crises. The most common of these is known as the "special powers" technique,[21] which involves legislative delegation to the Executive to take all the necessary measures to overcome an emergency situation. As per the Council of State, "The special powers law differs from the ordinary enabling law mainly in that the objectives to be achieved by the measures to be taken are formulated in such a general manner that the determination of the concrete outlines of the objective is left, for a specific period, to the discretion of the King [...], which amounts to

[15] See: Van Haegenborgh and Verrijdt, "De noodtoestand in het Belgische publiekrecht," *Preadviezen 2016*, La Haye, Boom, p. 23. Some argue that the Constitution is only intended for peacetime and does not apply in times of war. This is, however, contradicted by the fact that the framers of the Constitution did expressly consider the situation of war. See: Van Drooghenbroeck and Velaers, "L'article 187 de la Constitution et la problématique de la protection des droits et libertés dans les états d'exception," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, p. 18.

[16] Van Haegenborgh and Verrijdt, "De noodtoestand in het Belgische publiekrecht," *Preadviezen 2016*, La Haye, Boom, p. 33.

[17] Van Drooghenbroeck and Velaers, "L'article 187 de la Constitution et la problématique de la protection des droits et libertés dans les états d'exception," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, pp. 22–23.

[18] Van Haegenborgh and Verrijdt, "De noodtoestand in het Belgische publiekrecht," *Preadviezen 2016*, La Haye, Boom, pp. 46–53.

[19] Moonen, "Bijzondere machten als oplossing voor een crisis. Of zelf in een midlifecrisis?," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, p. 187.

[20] Uyttendaele, *Trente leçons de droit constitutionnel*, Anthemis, 2020, p. 549.

[21] On special powers, see also: answers to questions 1 and 2 in Section 2.

giving the King the ability to establish, in place of the legislator, the guiding principles that govern governmental policy."[22] The legislator adopts a "special powers" law that authorises the government to issue decrees that may amend, repeal, complete, or replace existing laws, granting broad discretionary power.[23] The Council of State has established several conditions to the recognition and exercise of special powers:

> 1° Certain factual circumstances, generally described as exceptional circumstances or crisis situations, must be present, which determine the limits of the period during which special powers may be granted;
> 2° Special powers can only be granted for a limited period;
> 3° The powers granted to the King must be precisely defined, both in terms of the goals and objectives as well as the matters where measures can be taken and their scope;
> 4° When granting special powers, the legislator must respect both supranational and international rules, as well as the constitutional rules concerning the distribution of competences.[24]

Special power measures adopted by the government cannot be considered as formal laws until they have been confirmed by the Parliament.[25] This technique is not grounded in the "state of necessity,"[26] but rather in Article 105 of the Belgian Constitution, which provides that "the King has no powers other than those formally attributed to him by the Constitution and by specific laws." Some emergency situations are also governed by policy-specific sectors. This is now the case for managing sanitary crises, which is governed by a Law of 14 August 2021 on Administrative Police Measures in the Event of an Epidemic Emergency Situation.[27] This law was adopted during the COVID-19 pandemic as a response to the lack of a specific legal framework, which had previously forced the authorities to rely on general laws.[28]

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[22] Opinion of the Council of State n° 18.648/1 on a draft law on the safeguarding of competitiveness, 14 July 1988, p. 38.

[23] Moonen, "Bijzondere machten als oplossing voor een crisis. Of zelf in een midlifecrisis?," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, pp. 178–179.

[24] Opinion of the Council of State n° 25.167/1 on the promotion of employment and the preventive safeguarding of competitiveness, 4 June 1996, pp. 45–46. See also: Opinion of the Council of State n° 70.402/4 on a draft decree of the Walloon Region on the gas and electricity markets following the floods of July 2021, 1 December 2021, p. 6.

[25] Decrees adopted in areas expressly reserved to the law by the Constitution need a confirmation in any event. See: Constitutional Court, 27 May 2008, n° 83/2008, B.16.3.

[26] Early on, it was argued that "state of necessity" justifications could be invoked to derogate from the Constitution, but Belgian legal doctrine finally preferred an interpretation compatible with the Constitution. See: Moonen, "Bijzondere machten als oplossing voor een crisis. Of zelf in een midlifecrisis?," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, pp. 181–182.

[27] See: *supra* fn 8.

[28] In 2020, the Federal authority – through decisions of its minister of the Interior alone – first relied on provisions in the law of 31 December 1963 with regard to civil protection, the law of

Question 3

The activation of special powers can be justified by a wide range of events, provided they involve exceptional circumstances. Special powers were initially recognized primarily in the context of socio-economic and financial crises. In practice, the legislator has the discretion to determine whether the socio-economic context qualifies as a crisis and justifies the granting of special powers.[29] Over the years, situations that were not genuine crises have nonetheless been considered exceptional circumstances, such as when Belgium faced challenges in meeting the criteria for joining the European Economic and Monetary Union.[30] The purpose of these powers is to enable the government to take the necessary measures to protect the population as swiftly as possible. The underlying rationale is that in such situations, it would be impractical to follow the standard legislative process. In principle, exceptional circumstances must be present at the time the authorization is granted.[31]

The special powers technique has also been employed to address threats to the country and its citizens, such as during wartime or pandemics. For instance, special powers were attributed to manage the H1N1 and COVID-19 health emergencies, at both the federal and federated levels.[32] However, it must be noted that special powers were not used to adopt sanitary measures during the COVID-19 crisis, but "to take measures to mitigate economic and other consequences that follow from these health measures."[33]

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5 August 1992 with regard to the police function and the law of 15 May 2007 with regard to civil security to adopt emergency measures (closure of most shops, prohibition of gatherings and several activities, suspension of school…) to limit the spread of COVID-19.

[29] Moonen, "Bijzondere machten als oplossing voor een crisis. Of zelf in een midlifecrisis?," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, p. 191.

[30] Moonen, "Bijzondere machten als oplossing voor een crisis. Of zelf in een midlifecrisis?," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, p. 193.

[31] See, for example: Belgian Constitution Court, ruling of 27 May 2008, n° 83/2008.

[32] See: for the first wave of Covid-19 – Walloon Decrees of 17 March 2020, *Moniteur Belge*, 18/03/2020, p. 16045 & 16048; Decree of the French-speaking Community of 17 March 2020, *Moniteur Belge*, 20/03/2020, p. 16420; Brussels ordinance of 19 March 2020, *Moniteur Belge*, 20/03/2020, p. 16607; Brussels Decree of 23 March 2020, *Moniteur Belge*, 03/04/2020, p. 24640; Federal Laws of 27 March 2020, *Moniteur Belge*, 30/03/2020, p. 22054 & 22056, and Decree of the German-speaking Community of 6 April 2020, *Moniteur Belge*, 14/04/2020, p. 26047. Only Flanders has not made use of this technique. For a summary of all the law granting special powers during the COVID-19 period, see: Bourgaux and Gaudin, "(In)competence des Parlements belges en période de confinement," in Bouhon, Slautsky, and Wattier (eds.), *Le droit public belge face à la crise du COVID-19 – Quelles leçons pour l'avenir?*, Larcier, 2022, pp. 184–185.

[33] Popelier, "COVID-19 legislation in Belgium at the crossroads of a political and a health crisis," *The Theory and Practice of Legislation*, vol. 8, 2020/1–2, p. 140.

Question 4

The activation of a specific framework governing situations of emergency depends on the techniques involved, with two types of constraints based on whether the Parliament is involved or not.
On the one hand, the federal Parliament is entirely excluded from any role in activating the "state of war." The power to state the existence of a war is vested with the King. This royal decree does not require deliberation by the Council of Ministers, though it must be countersigned by a minister.

On the other hand, Parliament plays a crucial role in the activation and oversight of special powers. First, Parliament must consent to the granting of special powers by adopting the enabling law. Second, Parliament continues to monitor the government's actions during the period of special powers and can revoke these powers at any time. Third, Parliament is usually invited to validate the special powers decrees issued by the government. However, this oversight role is somewhat limited in practice, as challenging these decrees could undermine legal certainty.[34]

In response to criticism regarding the limited role Parliament played in managing the COVID-19 crisis, a so-called pandemic law was introduced to clearly define Parliament's role in such situations. The law of 14 August 2021 on Administrative Police Measures in the Event of an Epidemic Emergency Situation sets out several conditions for its application. According to Article 3, the King states the existence of an epidemic emergency situation for a specified period (a maximum of three months, with the possibility of extensions), through a decree deliberated in the Council of Ministers. This process mirrors the procedure used in war situations. However, unlike the state of war, this law seeks to involve Parliament in the declaration process. Article 3 requires that the royal decree declaring the epidemic emergency be confirmed by law after considering the scientific data on which the emergency situation is based. If the royal decree is not confirmed within 15 days of its entry into force, it ceases to produce effect. Additionally, Article 9 mandates that the federal government reports monthly to the House of Representatives on the declaration or continuation of the epidemic emergency situation and the administrative police measures taken on this basis. Finally, the government must submit an evaluation report to the House of Representatives within three months after the end of each epidemic emergency situation, to determine whether this pandemic law should be repealed, supplemented, amended, or replaced.[35]

[34] Leroy, "Les pouvoirs spéciaux en Belgique," *A.P.*, 2014/4, p. 500.

[35] The initial draft law actually went further in imposing an evaluation obligation on Parliament, but this constraint was in conflict with the principle of parliamentary autonomy. For an analysis of this draft and the opinion of the Council of State on it, see: El Berhoumi, Rizcallah, Belleflamme et al., "Le Conseil d'État et l'avant-projet de loi dit pandémie: expiation du passé ou balises pour l'avenir ?," *A.P.*, 2021/4, pp. 633–677.

Question 5

As developed under question 2 in this report, Article 187 of the Belgian Constitution precludes the suspension of the Constitution, in full or in part.[36] There being no general state of emergency, it is difficult to find instances where EU law would have influenced general situations of emergency in the Belgian legal order. However, this does not mean that EU emergency law cannot result in structural changes in the Belgian legal order. Examples of such specific but structural reverberations are presumably manifold, but two examples (one pre-pandemic, the other post-pandemic) may serve to illustrate.

When the EU sets up coordination mechanisms to deal with emergencies, these will typically take the form of networks where Member States are required to designate national authorities.[37]
To allow Belgium to properly participate in such networks and mechanisms, and given that the competences involved will internally be allocated to different levels in the Belgian federation, specific structures will need to be set up, often requiring a formal agreement between the levels concerned,[38] arguably (further) forcing Belgium into a cooperative federalism. This is of course generally true for many developments at EU level (which treats its Member States as black boxes), but emergency mechanisms arguably put the threshold higher (than, for instance, the requirement of Points of Single Contact under the Services Directive),[39] since they depend on an effective and swift cooperation of authorities in emergency contexts.

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[36] See: Opinion of the Council of State n° 68.936/AG/AV, § 8.

[37] See: Article 9 of Decision 2119/98/EC of the European Parliament and of the Council of 24 September 1998 setting up a network for the epidemiological surveillance and control of communicable diseases in the Community, OJ [1998] L 268/1. This Decision has been replaced by Decision 1082/2013 of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health, OJ [2013] L 293/1 (currently in force); Article 3 of Council Decision 2001/792 of 23 October 2001 establishing a Community mechanism to facilitate reinforced cooperation in civil protection assistance interventions, OJ [2001] L 297/7. The relevant Decision currently in force is Decision 1313/2013 of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, OJ [2013] L 347/924.

[38] See, for example, Arrêté royal portant fixation du plan d'urgence pour les événements et situations de crise nécessitant une coordination ou une gestion à l'échelon national/Koninklijk besluit tot vaststelling van het noodplan voor de crisisgebeurtenissen en -situaties die een coördinatie of een beheer op nationaal niveau vereisen, 31/01/2003, Moniteur belge/Belgisch Staatsblad, 21/02/2003, p. 8619; Protocole d'accord conclu entre le Gouvernement fédéral et les autorités visées aux articles 128, 130, 135 et 138 de la Constitution concernant l'organisation et le financement d'un point de contact national concernant les soins de santé transfrontaliers, Moniteur belge, 16/01/2019, p. 3439; Projet de loi/Wetsontwerp relatif aux mesures de police administrative lors d'une situation d'urgence épidémique/betreffende de maatregelen van bestuurlijke politie tijdens een epidemische noodsituatie, *Doc. parl.*, Chambre/*Parl.St.* Kamer, 2020-21, n° 1951/1, p. 16.

[39] See: Article 6 of Directive 2006/123 of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ [2006] L 376/36.

A specific example of such EU initiatives that force Belgium into internal cooperative federalism was provided by the EU's response to the COVID-pandemic with the introduction of the EU Digital COVID Certificate.[40] Since the vaccination and issuance of certificates come under competences of different levels of government in Belgium, a cooperation agreement between the different entities was needed to allow for the equivalence and compatibility between Belgian certificates, their use within Belgium (rather than cross-border in an EU context) and to establish sufficient safeguards for the protection of personal data.[41]

In so far as pushing the Belgian make of federalism more towards one of *co-operative* federalism is viewed as positive development, it would be a mistake to conclude that EU emergency law only has virtuous effects on the Belgian legal order. A final example, that is more *ad hoc*, can be drawn from the energy crisis measures.

Thus, in order to ensure the proper application and implementation of the regulation on an emergency intervention to address high energy prices,[42] the federal Belgian legislator adopted a new law relating to the organization of the electricity market and introducing a ceiling on revenues from the electricity producers' market.[43] In Article 22ter, §9, the amended law delegates a power to the federal government to adopt *any measure necessary* to ensure the implementation of the Regulation in case it is being amended.[44] While these executive measures need to be confirmed by a formal law within 12 months,

[40] Regulation 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, OJ [2021] L 211/1.

[41] Accord de coopération entre l'État fédéral, la Communauté flamande, la Communauté française, la Communauté germanophone, la Commission communautaire commune, la Région wallonne et la Commission communautaire française concernant le traitement des données liées au certificat COVID numérique de l'UE et au COVID Safe Ticket, le PLF et le traitement des données à caractère personnel des travailleurs salariés et des travailleurs indépendants vivant ou résidant à l'étranger qui effectuent des activités en Belgique / Samenwerkingsakkoord tussen de Federale Staat, de Vlaamse Gemeenschap, de Franse Gemeenschap, de Duitstalige Gemeenschap, de Gemeenschappelijke Gemeenschapscommissie, het Waalse Gewest en de Franse Gemeenschapscommissie betreffende de verwerking van gegevens met betrekking tot het digitaal EU-COVID-certificaat, het COVID Safe Ticket, het PLF en de verwerking van persoonsgegevens van in het buitenland wonende of verblijvende werknemers en zelfstandigen die activiteiten uitvoeren in België, Monit*eur belge/Belgisch Staatsblad*, 23/07/2021, p. 76170.

[42] See: Council Regulation 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, OJ [2022] L 261I/1.

[43] Loi modifiant la loi du 29 avril 1999 relative à l'organisation du marché de l'électricité et introduisant un plafond sur les recettes issues du marché des producteurs d'électricité/Wet tot wijziging van de wet van 29 april 1999 betreffende de organisatie van de elektriciteitsmarkt en tot invoering van een plafond op marktinkomsten van elektriciteitsproducenten, 16/12/2022, *Moniteur belge/Belgisch Staatsblad*, 22/12/2022, p. 98819.

[44] See: Article 5 of the Law of 16/12/2022..

in absence of which they are deemed to be never adopted, and while the EU regulation itself was a temporary measure (that is not in force anymore), it constitutes a significant empowerment. As the Council of State in its advice on the draft law noted, it would allow the executive to decide on essential elements reserved to the legislator.[45] While this is not entirely excluded under Belgian constitutional law, the Council of State still advised to circumscribe the empowerment better. The relevant provision of the law as adopted was amended slightly in the light of this advice but remains remarkably open-ended, referring to "any measure necessary." In addition, under the case law of the Belgian Constitutional Court, this option is in any event only available when it would be impossible for the legislator to act in time, respecting the ordinary parliamentary proceedings, to realize an objective of general interest.[46] The Council of State did not make any observations in this respect but the empowerment in the law implies that the legislator believed this condition to be met, regardless of the precise modification made to the EU regulation (by the EU Council). However, accepting such a presumption appears problematic and would seem to turn an exceptional executive empowerment to determine the essential elements of legislation into the rule.

Question 6

Without being exhaustive,[47] we can indeed mention a number of instances where EU and national legal frameworks and administrative authorities interact to deal with crisis situations and ensure coordinated responses.

One such instance is that of civil protection measures in cases of natural disasters. While civil protection remains a national competence, the EU, relying on its supplementary powers in the field (Article 196 TFEU), and drawing upon the solidarity clause of Article 222 TFEU, has set up a general cooperation and mutual assistance framework known as the "EU Civil Protection Mechanism."[48] The Mechanism enables Member States faced with a natural disaster to request and receive assistance from their national counterparts, under a joint action

[45] Avis/Advies 72.460/3 sur un avant-projet de loi modifiant la loi du 29 avril 1999 relative à l'organisation du marché de l'électricité et introduisant un plafond sur les recettes issues du marché des producteurs d'électricité/over een voorontwerp van Wet tot wijziging van de wet van 29 april 1999 betreffende de organisatie van de elektriciteitsmarkt en tot invoering van een plafond op marktinkomsten van elektriciteitsproducenten, 14/11/2022, para. 11.

[46] Belgian Constitutional Court, ruling of 7 July 2016, n° 107/2016, B.4.2.

[47] The COVID-19 pandemic has led to the activation of a number of mechanisms which have triggered various forms of co-management between the EU and the Member States (on health matters, fiscal and economic matters, free movement matters, […]). For the sake of diversification, we focus on other instances in this section.

[48] Initially set up by Council Decision 2001/792/CE, it was widely reformed and reorganised in 2013 by Decision 1313/2013 of the Council and the European Parliament, OJ [2013] L 347/924.

framework coordinated by the EU and its Emergency Response Coordination Center, and with supranational financial support (most notably through the RescEU fund). The Mechanism was activated by Belgian authorities in July 2021, when the country faced historic floods, and enabled the country to benefit from the support of French, Austrian and Italian rescue teams, whose intervention was funded by the EU.[49]

Another example might be that of food crisis management. The EU is endowed with an integrated food safety crisis mechanism, which enables swift and coordinated response in the EU. The mechanism, known as the Rapid Alert System for Food and Feed, is formally part of the General Food Law Regulation since 2002.[50] It sets up a governance network closely intertwining national administrations with the European Commission and the European Food Safety Authority. The system enables national administrations to notify problematic situations to the EU, thereby prompting coordinated emergency response at EU and national level. In a rather famous instance, that of the fipronil crisis of 2017, Belgium notified the results of home investigations about the presence of fipronil in eggs to the European Commission, triggering the adoption of coordinated emergency measures, such as the blocking of affected farms, or the tracing, recalling and destruction of affected products, at EU and national level. Next to sanitary measures, additional economic measures were adopted by Belgian authorities to deal with the fallout of the crisis and financially support affected farmers, in good agreement with EU authorities, and with due regard for EU state aid law.[51]

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

As noted above, Article 187 of the Belgian Constitution dictates that "[t]he Constitution cannot be suspended, neither in whole or in part." This means

[49] See: European Commission, Press Release – EU supporting Belgium with flood response, 15 July 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3721.

[50] See: Regulation 178/2002 of the European Parliament and of the Council, OJ [2002] L 31/1, Articles 50–57.

[51] See, for example, the Flemish "Besluit van de Vlaamse Regering houdende nadere regels betreffende de betaling van de materiële kosten voor de verwijdering van met fipronil verontreinigde pluimveemest, veroorzaakt door de fipronilcrisis," which explicitly identifies the situation as one of urgent necessity, and asserts that the crisis at issue is covered by the notion of exceptional occurrence of Article 107(2)(b) TFEU, as clarified by the Commission Guidelines on state aid in the agricultural sector (2014/C 204/01). The aid regime was later validated by the EU Commission (Decision SA.49812, 2 March 2018). See also: the Federal law of 21 November 2017 "relative à des compensations en faveur d'entreprises touchées par la crise du fipronil," *Moniteur belge*, 15/12/2017, p. 112418, whose Article 4 explicitly refers to compliance with Article 107 and EU state aid law.

that the Belgian Constitution, as opposed to many other Constitutions, in principle does not allow for any *de jure* or *de facto* state of emergency.[52] This provision, which has been enshrined in the Constitution from its conception in 1831, and has never been amended since,[53] makes clear that the Belgian Constitution is intended to be a constitution "for all seasons." Given the absolute wording of the provision, even the existence of a *de facto* state of emergency does not justify an exception.[54] This means that crises and emergencies must in principle be tackled within the normal constitutional framework. The laudable aim behind Article 187 of the Constitution has, however, not been able to stop the Belgian government from being confronted with various crises and emergencies throughout the years. Given the absolute phrasing of Article 187 of the Constitution, the Belgian legal literature, and especially the judiciary, have shown some flexibility and lenience in order to allow the government to tackle those emergencies.

As also noted in the answer to Question 2, one clear example of that can be found in the so-called decree-laws that were issued during the two World Wars. During those years, (part of) the Belgian territory had been occupied and it was no longer possible to convene the legislative chambers of Parliament. This meant that the legislative power could not function as intended by the Constitution, which states in Article 36 that the legislative power is exercised by the King, the Chamber of Representatives and the Senate. In those circumstances, the council of ministers and the King – and during World War II only the council of ministers,[55] as the only remaining branch of the legislative power, issued decree-laws. In those decree-laws, mention was made of the impossibility to convene the legislative chambers. After the war, the validity of those decree-laws was challenged, but their legality was confirmed by the Court of Cassation. The Court accepted that the King, as the only remaining branch of the legislative power, could take legislative action via the decree-laws in order to protect the territory and the vital interests of the state.[56]

A different legislative technique which is often used in Belgium to tackle crises or emergencies are the special powers laws and the extraordinary powers laws. Those types of laws, which are discussed in more detail under question 8, find their constitutional foundation in Article 105 of the Belgian Constitution. In general, in those laws, Parliament attributes part of its power to the executive

[52] See on this further: Delforge, Romainville, Van Drooghenbroeck, and Verdussen, "Absence d'état d'urgence en droit constitutionnel belge," in Bouhon, Slautsky, and Wattier (eds.), *Le droit public belge face à la crise du COVID-19*, Larcier, 2022, pp. 25–82.

[53] In the last century, the provision has been declared open for amendment a handful of times but was never subsequently amended.

[54] Van Haegenborgh and Verrijdt, "De noodtoestand in het Belgische publiekrecht," *Preadviezen 2016*, La Haye, Boom, p. 82. See also: the answer to question 2.

[55] During World War II, the King was in captivity and was not allowed to leave the castle.

[56] Court of Cassation 11 February 1919, Pas. 1919, I, 9 (for WWI); Court of Cassation 11 December 1944, Arr. Verbr. 1945, 60.

and empowers it to take far-reaching decisions, that may even modify, cancel, supplement or replace existing formal legislation.[57] The last time such a special powers law was enacted, was at the beginning of the COVID-19 outbreak.[58]

One last piece of legislation that is mentioned here is the decree-law of 11 October 1916, concerning the state of war and martial law. While this law was enacted during WWI, the Court of Cassation has ruled that it is a law with perpetual force, which offers a permanent legal framework that becomes applicable automatically when the Kingdom of Belgium is at war.[59] The law significantly expands the power of the government in wartime or when martial law is declared. The constitutionality of this law is debated, since it allows for very far-reaching and preventive limitations on several fundamental rights and freedoms.[60]

Finally, it should be mentioned here that there have been several calls in legal literature in the past to amend the Constitution and provide a constitutional framework for emergency situations.[61] However, Article 187 of the Constitution has not been declared open for amendment at the end of the previous legislative term, which means that this provision cannot be amended during this legislative term (2024–2029).

Question 2

As mentioned in the answer to the previous question, the Belgian Constitution in principle does not allow for any *de jure* or *de facto* state of emergency. That means that even during crises or emergencies, the normal distribution of power should in principle be respected.

In order to deal with the specific challenges that times of emergency bring forth, the concept of special powers laws has been developed. This specific type of law confers wide powers to the government, so that for a certain period of time and for those areas indicated by the legislature, all necessary measures can be taken by the federal executive, which has wide discretionary powers in this regard.[62] The decrees that are taken by the government on the basis of

[57] Moonen, "Bijzondere machten als oplossing voor een crisis. Of zelf in een midlifecrisis?," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, p. 178.

[58] Law of 27 March 2020, Act authorizing the King to take measures in the fight against the spread of the coronavirus COVID-19, *Moniteur Belge*, 30/03/2020, p. 22054 & 22056.

[59] Court of Cassation 4 March 1940, Pas. 1946, I, 493.

[60] Van Haegenborgh and Verrijdt, "De noodtoestand in het Belgische publiekrecht," *Preadviezen 2016*, La Haye, Boom, p. 30.

[61] With further references: Delforge, Romainville, Van Drooghenbroeck, and Verdussen, "Absence d'état d'urgence en droit constitutionnel belge," in Bouhon, Slautsky, and Wattier (eds.), *Le droit public belge face à la crise du COVID-19*, Larcier, 2022, pp. 76–82.

[62] Alen and Muylle, *Handboek van het Belgisch Staatsrecht*, Kluwer, 2011, p. 730.

these special powers law, can modify, cancel, supplement or replace existing parliamentary laws.

It is by now commonly accepted that the special powers laws are based on Article 105 of the Constitution, which reads: "The King has no other power than that which the Constitution and particular laws, enacted pursuant to the Constitution itself, expressly grant him."[63] That provision is understood to provide a constitutional basis for the legislature to attribute the executive branch with some of its powers. Given that these special powers laws deviate from the normal division of powers between the legislative and executive branches, the Belgian judiciary has established that four conditions must be met for recourse to this type of laws. First, there must be extraordinary or crisis circumstances present.[64] Second, the special powers can only be attributed to the executive branch for a limited time period. Third, special powers that are attributed should be clearly delineated. Fourth, the fundamental rights and division of competences in the federal Belgian state must be respected.[65]

Beyond the special powers laws, the Belgian legal system has also developed the concept of extraordinary powers law. The difference between the two is not watertight and is mostly one of gradation. In an extraordinary powers law, the legislature vests the executive with even more far-reaching powers, which can be attributed for a longer period than special powers laws. So far, this type of laws has only been used right before and right after WWII.

In Belgium, the special powers laws have become the standard way in practice to tackle crisis or emergency situations. The last time this type of legislation was used was at the start of the COVID-19 pandemic. The law allowed the government to take measures that would, among others, help to stop the spread of the virus, including the enforcement of public health and safety, to ensure the necessary logistical and reception capacity, and to ensure the continuity of the economy, the country's financial stability and market functioning as well as protect consumers. Despite this broad mandate offered by the legislature, the government did not take any sanitary measures on the basis of this law.[66]

It should be clear that the special powers laws significantly alter the normal distribution of powers between the legislative and executive branches. As a consequence of such a law, the legislature empowers the executive at its own expense. Via special powers laws, a big part of the primary decision-making

[63] The Court of Cassation has accepted this as well, see: Court of Cassation 3 May 1974, *RW* 1974–75, 78.

[64] Whether there are such extraordinary or crisis circumstances present is primarily a political decision, which the courts barely verify.

[65] See, for example, Council of State, advies over een ontwerp van wet strekkende tot realisatie van de budgettaire voorwaarden tot deelname van België aan de Europese Monetaire Unie, *Parl.St.* K 1995-96, n° 608/1, 21.

[66] Article 5 of the law of 27 March 2020, Act authorizing the King to take measures in the fight against the spread of the coronavirus COVID-19 (II), *Moniteur Belge*, 30/03/2020, p. 22056.

power, as well as the power to decide on general policy, is temporarily shifted from the parliament to the government.[67]
Even when special powers laws are used, the Belgian judiciary can offer judicial protection. The royal decrees, issued on the basis of a special powers law, constitute measures by the executive, which can be reviewed by the ordinary courts and tribunals, as well as by the Council of State.[68] The Belgian courts and tribunals will nevertheless be rather restrained in their review, given the fact that special powers laws are adopted when there is some kind of crisis or emergency.[69] If the measure by the executive is subsequently ratified by the legislature in a formal law – as is sometimes required by the special powers law itself – that formal law can still be challenged before the Constitutional Court.[70]

Question 3

Belgium is a federal state. The system of division of competences is premised on the idea that any matter in principle falls within the exclusive competence of one level of government.[71] During a crisis or emergency situation, every level of government in principle remains empowered to take those measures that fall within its respective competences.[72]
The general role that the local authorities can play during an emergency situation is laid down in the Royal Decree of 22 May 2019.[73] Article 23 of that decree states that during an emergency situation, the policy coordination can take place on three different levels: a municipal level, a provincial level and a federal level. The decision of which level applies, should be based on the following parameters: the geographical extent of the (possible) harmful con-

[67] Bouhon, Jousten, and Miny, "Droit d'exception, une perspective de droit comparé. Belgique: entre absence d'état d'exception, pouvoirs de police et pouvoirs spéciaux," 14, https://www.europarl.europa.eu/RegData/etudes/STUD/2021/690581/EPRS_STU(2021)690581_FR.pdf

[68] In Belgium, the courts and tribunals are required to verify whether a measure by the executive complies with higher norms of national or international law and to disapply the measure in question if it does not comply. The Council of State is competent to annul measures by the executive *erga omnes* if a measure by the executive breaches a higher norm. See on this also: the response to Section 4, Question 1.

[69] See: on the role of courts during the COVID-19 pandemic: Verlinden, De Raeymacker, and Bultheel, "De bijzondere rol van rechtscolleges tijdens de COVID-19-crisis," *Rechtskundig Weekblad*, 2023–24, pp. 1162–1175. See further: the questions in Section 4, particularly Questions 3 and 4.

[70] See, for example, Belgian Constitutional Court, ruling of 21 December 1988, n° 71/88.

[71] See, for example, Belgian Constitutional Court, ruling of 17 December 2020, n° 165/2020, B.11.1.

[72] Unsurprisingly, this may lead to disputes about which level of government is competent to take which exact measures. See: Reybrouck and Van Nieuwenhove, "Het Belgische federalisme tijdens een noodsituatie: de COVID-19-pandemie als stresstest voor de bevoegdheidsverdeling," in Reybrouck, Rochtus, Spinoy, and Verrijdt (eds.), *De Belgische Grondwet en noodsituaties*, Intersentia, 2024, pp. 283–310.

[73] See: *Moniteur Belge*, 27/06/2019, p. 65933.

sequences; the resources to be used; the actual or potential number of people affected; the need for coordination; the extent, severity and/or social impact of the events; the nature of the events and mainly their technical complexity; the population's need for information; the evolution of events; the applicable regulations. Which level is triggered depends on the direct and indirect consequences of the emergency situation in question. When a higher level (meaning the provincial or the federal level) is promulgated, intervention at the lower level will automatically be cancelled.[74] This means that whether the local authorities have a role to play in combating a specific emergency situation is governed by the principle of subsidiarity.[75]

Beyond that general framework, specific legislation can also assign a particular role to the local authorities. The pandemic law states, for example, that the provincial and municipal authorities, each for their specific territory, can take more severe measures than the federal level.[76]

Question 4

The Belgian Constitution does not govern the situation of how a conflict between the implementation of constitutional provisions and EU or international law should be resolved in case of a situation of emergency. Because of this, we fall back on the general principles within the constitutional framework of the hierarchy between constitutional and international law. On this point as well, the Belgian Constitution remains rather silent. Article 34 of the Constitution holds that the exercise of certain powers may be entrusted by treaty or by law to institutions of international law.[77] This provision provides a constitutional basis for the fact that international or supranational organizations exert power within the Belgian legal system. It is also considered by the Belgian judiciary as an argument for the primacy of international and EU law over Belgian (constitutional) law.[78] The Belgian judiciary has since long accepted that EU law in principle has primacy over domestic law.[79]

In 2016, the Constitutional Court nevertheless made clear that Article 34 of the Constitution does not allow that the national identity, which is embedded in the political and constitutional structure, or the fundamental values of the

[74] Articles 27 and 28 of the Royal Decree of 22 May 2019.

[75] Keyaerts, "Lokale bestuursniveaus en hun verantwoordelijke overheden als beheerders van crisissituaties," in Reybrouck, Rochtus, Spinoy, and Verrijdt (eds.), *De Belgische Grondwet en noodsituaties*, Intersentia, 2024, p. 345.

[76] Article 4(2) of the Law of 14 August 2021 on administrative police measures during an epidemic emergency, *Moniteur Belge*, 20/08/2021, p. 90047.

[77] See on this also: the response to Section 5, Question 1.

[78] See more in detail: Velaers, *De Grondwet: een artikelsgewijze commentaar*, II, die Keure, 2019, pp. 20–39.

[79] For example, Court of Cassation 2 June 2003, S.02.0039.N.

protection that the Constitution offers to the people are impaired. In other words, the Constitutional Court made clear that Article 34 of the Constitution does not offer a blank check.[80] Despite the theoretical importance of that statement, the Court has so far never found a measure of international law to reach that threshold.

Question 5

There is no explicit provision in the Belgian Constitution that governs how fundamental rights are protected during a national emergency, despite past recommendations to introduce such a provision.[81] On top of that, it is generally accepted that, since Article 187 of the Constitution precludes any suspension of the Constitution, the Belgian government is also not allowed to rely on the emergency provisions in human rights treaties, such as Article 15 ECHR or Article 4 of the ICCPR.[82] This means that, when it comes to fundamental rights protection, the constitutional framework of fundamental rights protection continues to apply as normal, even in emergency situations.

In general, the protection of fundamental rights is primarily the responsibility of the courts and tribunals. The Belgian courts are very open to international law and interpret the fundamental rights in the Belgian Constitution in light of the European and international human rights framework.[83] Via this technique, the Belgian courts introduce a proportionality requirement when fundamental rights are limited, even though the Belgian Constitution does not contain such a requirement.[84]

Even though the protection of fundamental rights is primarily the responsibility of the courts, at times domestic emergency legislation explicitly instructs the government to respect fundamental rights. For example, Article 4(3) of the law on administrative police measures during an epidemic emergency, also known as the pandemic law,[85] states that all measures that are taken within the framework of that law must be necessary, appropriate and proportionate to the pursued aim.

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[80] Belgian Constitutional Court, ruling of 28 April 2016, n° 62/2016, B.8.7.

[81] Velaers and Van Drooghenbroeck, "Invoeging van een transversale bepaling in de Grondwet over het afwijken van rechten en vrijheden," Parl.St. K 2005-06, n° 51-2304/001, 93–94.

[82] Rochtus, "Het schorsingsverbod van artikel 187 van de Grondwet: een analyse in het licht van de COVID-19-pandemie," in Reybrouck, Rochtus, Spinoy, and Verrijdt (eds.), *De Belgische Grondwet en noodsituaties*, Intersentia, 2024, p. 421.

[83] Lambrecht, "Belgium: The EU Charter in a tradition of openness," in Bobek and Adams-Prassl (eds.), *The EU Charter of Fundamental Rights in the Member States*, Hart, 2022, p. 87.

[84] See on this also: Section 4.

[85] Law of 14 August 2021 on administrative police measures during an epidemic emergency, *Moniteur Belge*, 20/08/2021, p. 90047.

Question 6

During the COVID-19 pandemic, the Belgian government – like governments in all other countries – had to take far-reaching measures in order to slow the spread of the virus. These measures had a significant impact on a wide range of fundamental rights of the citizens, such as the right to respect for private and family life, the freedom of religion, the right to demonstrate. These measures also conflicted with more specific EU rights, most notably the rights enshrined by the GDPR. In general, when these measures were challenged before the Belgian courts, no violation of those fundamental rights was found.[86]
One measure that was introduced by the Belgian government gave rise to an important case before the ECJ concerning the freedom of movement. In July 2020, the government prohibited non-essential travel between Belgium and the other Schengen countries, if those countries had been designated as a red zone in light of their epidemiological situation. This measure was challenged before the Brussels court of first instance, which asked the ECJ via a preliminary reference whether the measure was in compliance with EU law. In its *Nordic Info* judgment, the Grand Chamber of the ECJ ruled that such a measure was not prohibited by Union law, provided that the measure complied with all the conditions and safeguards referred to in Article 30–32 of Directive 2004/38/EC, and the fundamental rights and principles of the Charter, in particular the principle of the prohibition of discrimination and the principle of proportionality.[87]

Section 3: Statutory/executive emergency law in the Member States

Question 1

When an epidemic emergency situation is declared, the "pandemic law"[88] allows the federal government to adopt, by decree deliberated in the Council of Ministers, the necessary administrative police measures to prevent or mitigate the consequences of the epidemic on public health. These measures may include restrictions on entry into Belgian territory, the closure of establishments, limitations and prohibitions on gatherings and movements. Such measures can only be implemented after consultation with the competent expert bodies involved in crisis management.

[86] For example, the so-called COVID-safe ticket. See: Belgian Constitutional Court, ruling of 27 April 2023, n° 68/2023.

[87] CJEU, Case C-128/22, *Nordic Info*, ECLI:EU:C:2023:951.

[88] Law of 14 August 2021 on Administrative Police Measures in the Event of an Epidemic Emergency Situation, *Moniteur Belge*, 20/08/2021, p. 90047.

Question 2

As previously noted, the absence of a constitutional framework for managing emergency situations in peace time does not prevent federal and federated legislators from establishing specific legal frameworks. The only restriction is the prohibition against wholly or partially suspending the Constitution in Article 187 of the Constitution. This means that any limitations to laws and liberties, even permitted by emergency legislation, must comply with the traditional conditions of legality, legitimacy and proportionality. The Legislation Section of the Council of State affirmed this position in its opinion on the draft "pandemic law."[89]

However, the question remains whether the courts conduct the same review when the restrictive measures that are scrutinised are adopted in the context of emergency situations. Certain restrictive measures adopted to fight COVID-19 could have seemed incompatible with the essence of fundamental rights (like the freedom of religion or the freedom to conduct a business).[90] Moreover, the (formal and material) legality of these restrictions has been contested by several scholars.[91] In practice, some decisions have resulted in findings of unconstitutionality by courts, and even by the Council of State.[92] The administrative high court notably suspended a communal ordinance banning prostitution in the territory of the city of Brussels adopted to limit the spread of the COVID-19 pandemic, because of the city's lack of competence to regulate prostitution for public health reasons.[93] In general however, the constitutionality review of supreme courts found no invalidity of the adopted measures.[94]

[89] "Given that Article 187 of the Constitution prohibits its suspension in whole or in part and that, according to Article 53 of the European Convention on Human Rights, it is also impossible to derogate from the fundamental rights guaranteed by the ECHR based on Article 15 of the ECHR, all limitations on fundamental rights must be assessed in light of the usual limitations criteria outlined in Title II of the Constitution and the ECHR" (Opinion of the Council of State n° 68.936/1, p. 8).

[90] Delforge, Romainville, Van Drooghenbroeck, and Verdussen, "Absence d'état d'urgence en droit constitutionnel belge," in Bouhon, Slautsky, Wattier (eds.), *Le droit public belge face à la crise du COVID-19*, Larcier, 2022, pp. 61–75.

[91] See, for instance, Velaers, "Constitutionele lessen uit de COVID-19-crisis," *T.B.P.*, 2021/9, pp. 541–546; Clarenne and Romainville, "Le droit constitutionnel belge à l'épreuve du Covid-19," in Baranger, Beaud, and Guérin-Bargues (eds.), *Les démocraties face au Covid*, Editions Panthéon-Assas, 2023, pp. 226–228.

[92] For an overview of all the important court's decisions in this period, see: Bouhon, Jousten, and Miny, "Droit d'exception, une perspective de droit comparé. Belgique: entre absence d'état d'exception, pouvoirs de police et pouvoirs spéciaux," pp. 124–134. https://www.europarl.europa.eu/RegData/etudes/STUD/2021/690581/EPRS_STU(2021)690581_FR.pdf

[93] Council of State, 9 October 2020, *Bou-oudi et Akhoun*, n° 248.541.

[94] Cass., 28 septembre 2021; Constitutional Court, ruling of 22 December 2022, n° 170/2022; Council of State, 30 October 2020, *nv Umami*, n° 248.818.

Question 3

The role of the Parliament is often diminished by law during emergency situations, even though there is no explicit constitutional framework governing this limitation of powers. Additionally, many Belgian parliamentary assemblies have revised their rules of procedure to address exceptional situations. In response to the unprecedented lockdown imposed by the COVID-19 pandemic, several assemblies implemented internal rules to regulate their organisation and functioning in the event they are unable to convene in person. When an exceptional situation threatening public health prevents MPs from being physically present, most assemblies now provide for virtual procedures for debate and voting.[95] Some assemblies – such as the Parliament of the French Community – even allow for the possibility of an extended adjournment of Parliament.[96]

Question 4

Emergencies impact systems of government in various ways. Most notably, they tend to empower executive branches and sideline parliaments. Throughout the recent crises, this risk has materialized in Belgium as well.[97] We observe that the involvement of the EU in the management of an emergency or crisis has, overall, contributed to further strengthening and exacerbating these trends. Belgium's participation in the NextGenerationEU initiative, the Union's post-pandemic macroeconomic recovery plan, is a good example of this phenomenon. Both the drafting of Belgium's "national recovery and resilience plan" and its subsequent implementation have been dominated by executive actors, that is, the federal government (both in its capacity of recipient of a portion of the funds, and as the coordinator of the entire Belgian plan) and regional executives.[98]

[95] See: Jousten and Behrendt, "Fonctionnement des parlements belges en période de confinement et de distanciation sociale," Bouhon, Slautsky, and Wattier (eds.), *Le droit public belge face à la crise du COVID-19*, Larcier, 2022, pp. 225–256.

[96] See: Article 37.2 of its Rules of Procedure: "By way of derogation from the first paragraph, and if, due to a crisis revealing a major risk to human health, the Conference of Presidents decides to adjourn the work of Parliament for a period it defines—and which cannot exceed three months—the Bureau shall record this adjournment and notify the government of this decision."

[97] See, for example, Verdussen, "Le Parlement au temps du coronavirus – Belgique," *Fondation Robert Schuman*, October 2020; Bourgaux and Gaudin, "(In)compétences des parlements belges en période de confinement et de distanciation sociale," in Bouhon, Slautsky, and Wattier (eds.), *Le droit public belge face à la crise du COVID-19 – Quelles leçons pour l'avenir?*, Larcier, 2022, pp. 179–224.

[98] On the drafting and implementation of the Belgian plan, see: Zeitlin, Bokhorst, and Eihmanis, "Governing the RRF – drafting, implementing and monitoring national recovery and resilience plans as an interactive multilevel process," *Recovery Watch Policy Study*, June 2023, pp. 22–23, 35, 39. More generally, on executive dominance, parliamentary sidelining and NGEU, see: Fromage and Markakis, "The European Parliament in the EMU after COVID – towards a slow empowerment?,"

In federal systems, emergencies generally act as a centripetal force, strengthening the central government at the expense of regional and decentralized entities, and putting the competence allocation logic under strain.[99] The Union's involvement in the management of the emergency tends to consolidate the trend. For example, it has been widely documented that EU initiatives adopted in the context of the COVID-19, starting with NGEU,[100] have contributed to strengthening the centralization of authority and decision-making within national governments. Interestingly, Belgium partly defies this trend, and EU emergency measures do not seem to have significantly weakened the federated entities (communities and regions) vis-à-vis the federal level. Turning again to the example of NGEU, the Belgian plan[101] has indeed primarily consisted in a compilation of various plans and sets of investment and reform projects drawn up by the relevant power levels (namely the Federal State and the three Regions, that is, Flanders, Wallonia and Brussels) on the basis of their allotted part of funding, coordinated by a dedicated federal secretariat of State, primarily acting as single contact point with the EU, and validated by the so-called Concertation Committee.[102] During both the drafting and the implementation phases, the Union, through the Commission, has sought to pressure Belgium, mainly through informal means, to act as a unitary actor, represented by a single interlocutor. If it has boosted the Federal State's coordinating role, this has not meaningfully impacted the order of competences and powers in Federal Belgium, nor the concrete prerogatives and autonomy of federated entities. The same observations can certainly be made vis-à-vis the management of the Ukrainian crisis, both in its humanitarian and energy dimensions. This continued involvement of federated entities, and the overall preservation of their prerogatives, in emergency situations, can be best explained by Belgium's complex and intricate system of competence allocation. As touched upon in the answer to Section 5, Question 1, it also creates a certain number of challenges of its own, most notably for the consistency

The Journal of Legislative Studies, 2022, pp. 389–397; Leino-Sandberg and Raunio, "From bad to worse – the continuous dilemma facing parliaments in European economic and fiscal governance," *Government and Opposition*, 2023, pp. 7–11.

[99] For an in-depth assessment of the COVID-19 crisis' impact on Belgium competence system, see: El Behroumi, Van Drooghenbroeck, and Losseau, "Le fédéralisme belge ne connaît pas la crise: la gestion de la pandémie de COVID-19 à l'épreuve de la répartition de compétences," in Bouhon, Slautsky, and Wattier (eds.), *Le droit public belge face à la crise du COVID-19 – Quelles leçons pour l'avenir?*, Larcier, 2022, pp. 83–140.

[100] Bokhorst and Corti, "Governing Europe's Recovery and Resilience Facility – between discipline and discretion," *Government & Opposition*, 2023, 1–17; Zeitlin, Bokhorst, and Eihmanis, *supra* fn 102, p. 42.

[101] The Belgian plan, in its submitted version from July 2021, can be consulted here: https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility/country-pages/belgiums-recovery-and-resilience-plan_en#documents

[102] The Concertation Committee, set up by Article 31 of the "loi ordinaire de réformes institutions du 8 août 1980," brings together representatives from all levels of government, and ensures the necessary cooperation and coordination between the various entities of the Belgian federal system.

and speediness of political action, and complicated Belgium's relationship vis-à-vis the EU.

Section 4: Judicial review of emergency powers in the Member States

Question 1

In situations of crisis, the judiciary is constitutionally entitled to adjudicate as usual. Consequently, every legal act, action or omission falls within the scope of judicial review provided that the rules surrounding merits, admissibility and competence are met.

Depending on their legal nature, norms can be challenged before three different types of courts: the judiciary headed by the Court of cassation, the administrative courts, headed by the Council of State and the Constitutional court.[103] The relevant question pertains thus to the kind of measures adopted to address situations of emergency, no matter their political salience, context or policy field.

The Constitutional Court can review federal and federated acts of Parliament. If the Court considers that the act under review breaches the Constitution, EU law or any international agreement that is binding for Belgium, it annuls it.[104] As a matter of example, during the COVID-19 pandemic, the Constitutional Court delivered no less than five cases dealing with crisis management.[105] As emphasised earlier, "special powers" laws are particularly used in a context of emergency. They aim at delegating substantial legislative power to the executive, which arguably allows for a quicker answer to address the detrimental effects of a crisis. The Constitutional Court is competent to review the parliamentary laws that provide the Executive with the legal bases for acting. Downstream, the Constitutional court can also review the sanctioning parliamentary law that provides for parliamentary approval to royal decrees. The adoption of such a law is compulsory when essential aspects in reserved matters had been delegated to the Executive.

More often than not, legal acts adopted to tackle a crisis are executive in nature. They can be Royal decrees – adopted under the framework of an ordinary law or a special powers law – or ministerial decrees. They can also be executive acts adopted at community or regional level. At a lower

[103] Popelier and Lemmens, *The Constitution of Belgium. A contextual analysis*, Hart, 2015, pp. 181–186.

[104] See: Art. 1 of the Special act of 6 January 1989 on the Constitutional court. It is worth noting that Ordinary courts must also put a parliamentary law aside if it contradicts international law with direct effect, see Brucher and Verdussen, "La jurisprudence Le Ski: des lendemains qui chantent ou qui déchantent?," *Journal des tribunaux*, 2021, pp. 643–648.

[105] Belgian Constitutional Court, rulings of 9 June 2022, 22 September 2022, 22 December 2022, 2 March 2023 and 29 June 2023.

level, the mayor or the governor of the province can adopt executive acts which are also relevant in case of emergency. Given the role the Executive is called to play in times of crisis, judicial review of its acts and decisions is paramount.

Executive acts and decisions are subject to judicial review following three main avenues. First, they can be legally challenged before the administrative branch of the Council of State. The abstract review it conducts can lead to annulment of the acts and decisions under review with binding effect towards all (*erga omnes*) and with retroactive effect. Second, various specialised administrative courts can hear claims pertaining to the legality of administrative acts in specific policy fields. An appeal against the decisions of those specialised administrative courts before the Council of State is always possible. Third, every court and tribunal has to declare an act or decision of the executive inapplicable should it contradict written or unwritten law pursuant to Article 159 of the Belgian Constitution. In last instance, the Supreme Court can overrule such a decision if needed.

In addition to the power to discard an act or decision of the Executive, the ordinary courts can adjudicate cases pertaining to State liability. Emergency does not prevent the State from repairing the damage caused by its illegal action. This is true for the three branches of government (the executive, the legislature and the judiciary). When unforeseen and urgent situations arise, deficient prevention or deficient measures to fight against the crisis might lead to damage. If this happens and the causal link is proven, tort liability requires the State to provide for legal redress. The flooding in Ruisbroek in 1976[106] and the dioxin crisis in the 1990's[107] are cases in point.

On top of this, strict responsibility can force the State to repair damages caused to another person, although it does not commit any tort. The Council of State is competent to adjudicate such cases.[108] As an example, in the context of the dioxin crisis, the question arose whether individuals could claim compensation from the Belgian State for the damage they had suffered as a result of decisions that the Belgian government took to fight against the crisis under request from the Commission.[109]

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[106] Interestingly, two different cases related to the same legal question were brought to different courts and led to different results, one Court condemning the Belgian State and the other not. Compare judgments Rb. Mechelen 24 oktober 1978, *Tijdschrift voor aannemingsrecht,* 1983, p. 203, and Antwerpen 30 juni 1980, *Tijdschrift voor aannemingsrecht*, 1983, p. 195. On these cases, see: Van Oevelen, "Overheidsaansprakelijkheid bij de bestrijding van rampen," in Lust and Luypaers (eds.), *Rampen, noodsituaties, crisis [...] Voorkoming, beheersing en bestrijding. Bevoegdheden, verantwoordelijkheden en aansprakelijkheden*, die Keure, 2006, p. 112.

[107] Rb. Gent 23 juni 2003, *Nieuw juridisch weekblad*, 2003, p. 1410. The tribunal condemned the Belgian State to repair the damage it had caused.

[108] Art. 11 of the Coordinated Laws on the Council of State.

[109] See: Van Oevelen, "Overheidsaansprakelijkheid bij de bestrijding van rampen," in Lust and Luypaers (eds.), *Rampen, noodsituaties, crisis [...] Voorkoming, beheersing en bestrijding. Bevoegdheden, verantwoordelijkheden en aansprakelijkheden*, die Keure, 2006, p. 125.

In short, even in emergency situations, a comprehensive system of jurisdictional protection exists which ensures that no act from the public authorities escape judicial review. Given the various judicial means of adjudicating on state action in emergency situations, the judiciary is seen as a key player in the overall assessment of crisis management and the allocation of accountability. Judges are seen as watchdogs, whose main task is to protect the rule of law, individual freedoms and human rights.[110] Therefore, in the heat of the COVID-19 pandemic, the government passed a law adding the judiciary to the list of vital services.[111] Consequently, Courts had to implement a whole array of resilience measures in order to keep working during the COVID-19 crisis.[112]

Question 2

Specificities applicable to the courts in situations of emergency can be either procedural or organizational in nature.

On a *procedural level*, when certain conditions are met, emergencies can trigger specific procedures that allow for a quicker judicial review, albeit provisional in most cases. The purpose of summary proceedings is to allow that further proceedings hold meaningful effects. Therefore, applicants can ask for a faster procedure, generally on the condition that they can prove that waiting for a longer time would cause irreparable harm. Every time a claimant convincingly argues that normal judicial delays might lead to irrevocable damage, they can require a specific procedure instead of the regular ones. The potential damage that triggers an emergency has to be personal, direct and meets a certain level of gravity.

Given the pluralistic jurisdictional system in Belgium, different provisions apply to the Constitutional court, the administrative courts and the ordinary courts.

At the suit of the petitioning party, the Constitutional Court can entirely or partially suspend a statute before delivering its judgment on the annulment action.[113] Before the Council of State, two procedures can be triggered depending on whether the claimant faces "mere emergency" or "extreme emergency."[114] They enable the claimant to ask for preliminary measures and a temporary

[110] Verlinden, De Raeymaecker, and Bultheel, "De bijzondere rol van rechtscolleges tijdens de COVID-19 crisis," *Rechtskundig Weekblad*, 2023–2024, pp. 1172–1173.

[111] See: Ministerial Decree of 18 March 2020 on emergency measures to limit the spread of the COVID-19 coronavirus, *Moniteur Belge*, 18/03/2020, p. 16037.

[112] OECD, "Evaluation of Belgium's COVID-19 Responses. Fostering Trust for a More Resilient Society," OECD Publishing, 2023, https://doi.org/10.1787/990b14aa-en, pp. 77–78.

[113] See: Art. 9 and following of the Special Law on the Constitutional Court.

[114] See: Donnay and Pâques, *Contentieux administrative*, Brussels, Larcier, 2023, pp. 637–656.

suspension of the decision.[115] In case of extreme emergency, the procedure differs widely from the usual rules, narrowing down the rights of defence of the parties. Therefore, this procedure is limited to exceptional cases only.[116]

As to the judiciary, the President of every ordinary Court is empowered to issue interim injunctions whenever they recognise urgency.[117] They enjoy a broad room for interpretation provided that two criteria are met. The first one is factual and pertains to the urgency of the situation as such. An emergency exists when there is a serious fear of serious harm or inconvenience. The second is jurisdictional: given the urgency, summary proceedings are required because the ordinary procedure would be unable to avoid the harm or inconvenience to occur.[118] Summary orders can be very effective. They are enforceable provisionally, notwithstanding opposition or appeal.[119]

Such procedures do not apply only in situations of crisis. On the contrary, there are many circumstances in everyday life where cases have to be tried quickly, whereas no crisis or sense of emergency exists on a collective level. However, whenever a crisis breaks out, chances that justice has to be done urgently are likely to rise. This is so because most of the time governmental measures are adopted quickly, with immediate effect and in an unusual context, as evidenced during the COVID-19 pandemic.[120] However, during the first wave of COVID-19, most cases brought to the Council of State were dismissed because one (or several) of these requirements was not met.[121] The same holds true for cases brought before the ordinary courts.[122]

In the different procedures highlighted, the mere lodging of the application does not have any suspensive effect. However, delays are shortened as much as possible in order to speed up the jurisdictional process.

On an *organisational* level, the COVID-19 pandemic revealed a lack of preparedness of the judiciary to deal with situations of crisis. No emergency plan existed and scarced resources made the task of ensuring the continuity of public service a challenging one. Furthermore, previous deficiencies such as

[115] See: art. 17, §§ 1–4, Coordinated Laws on the Council of State and art. 16 with regard to summary proceedings.

[116] See: art. 17, § 4, Coordinated Laws on the Council of State and art. 16 of the procedure with regard to summary proceedings.

[117] Summary jurisdiction is dealt with in art. 1035 to 1041 of the Judicial Code.

[118] See: De Leval, *Droit judiciaire,* t. II: Procédure civile, vol. 1 : Principes directeurs du procès civil – Compétence – Action – Instance – Jugement, Brussels, Larcier, 2021, pp. 203–227.

[119] See: art. 1039, § 2, of the Judicial Code.

[120] For example: the Royal decree that acknowledges the state of epidemic emergency and triggers a specific regime allowing for several limitations to fundamental rights comes into force with immediate effect, under Art. 3, § 2, *in fine* of the parliamentary law of 14 August 2021 on administrative police measures during an epidemic emergency.

[121] Renders et al., "La gestion de la pandémie de Covid-19 dans l'Etat fédéral belge: chronique d'une vie dénoncée ou d'une mort annoncée," in Fougerouse (ed.), *La gestion de la pandémie de Covid par les Etats. Les institutions publiques à l'épreuve*, Bruylant, 2023, p. 224.

[122] Verlinden, De Raeymaecker, and Bultheel, "De bijzondere rol van rechtscolleges tijdens de COVID-19 crisis," *Rechtskundig Weekblad*, 2023–2024, p. 1170.

lack of human resources and delays in digitalization of procedures aggravated the impact of the pandemic on the usual judicial work.[123]
Despite these shortcomings, an audit of the High Council of Justice conducted from July 2020 to June 2021 showed that the judiciary managed to fulfil its tasks during the COVID-19 crisis.[124] This was made possible thanks to procedural novelties such as pleading through video-conferences or written proceedings.[125] A sense of flexibility also helped to ensure continuity of justice. For example, in the most critical moments, extension of deadlines allowed lawyers to compensate for the waste of time caused by the general lack of information on how to adapt to the pandemic.[126] As for the future, the High Council of Justice highly recommends that the judiciary is allocated better human and material resources. It also strongly encourages the judiciary to adopt guidelines and procedures to share responsibilities among all stakeholders and allow for a smooth judicial process even under exceptional circumstances.

Question 3

It is generally accepted that the political question doctrine does not exist in Belgium, contrary to other countries such as France, the United States or the United Kingdom.[127] In other words, no specific doctrine prevents the judiciary from trying a case because its subject-matter would be committed to other constitutional powers or would be too sensitive politically. Under the same line, unforeseen and urgent situations do not preclude judicial review. Consequently, legal acts adopted to address situations of emergency can be challenged before courts like any others.

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[123] High Council of Justice, *Audit report on the covid-19 crisis: the impact on litigants and the approach of the judiciary*, 30 June 2021, pp. 75–76.

[124] High Council of Justice, *Audit report on the covid-19 crisis: the impact on litigants and the approach of the judiciary*, 30 June 2021, pp. 75–76.

[125] See: the Royal Decree No. 3 of 9 April 2020. Some these novelties have triggered severe criticism in terms of rights of defence and right to a fair trial, see: Chevalier, De Coninck, Hoc et al., "La procédure civile en période de Covid-19 – Commentaires et analyses de l'arrêté royal n°2 du 9 avril 2020," *Journal des Tribunaux*, 2020, p. 330.

[126] See, for example, the special powers Royal Decree No. 2 of 9 April 2020 as amended on 28 April 2020; Royal Decree No. 12 concerning the extension of the time limits for proceedings before the Council of State and the written procedure (21 April 2020); Royal Decree No. 19 concerning the extension of the time limits for proceedings before the Aliens Litigation Council and the written procedure (5 May 2020); Constitutional Court, Directive on special procedural measures taken by the Constitutional Court in the context of the coronavirus crisis of 18 March 2020 (18 March 2020).

[127] Velaers, *De Grondwet – Een artikelsgewijze commentaar*, 2019, die Keure, p. 371. On the political question doctrine in France, the United States and the United Kingdom, see: Saunier, *La doctrine des « questions politiques ». Etude comparée: Angleterre, Etats-Unis, France*, LGDJ, 2023. On Italy, see: Giomi, *L'atto politico e il suo Giudice. Tra qualificazioni sostanziali e prospettive di tutela,* FrancoAngeli, 2022.

However, the principle of separation of powers implies that the judiciary is not allowed to assess the political appropriateness of acts and actions adopted by the parliament and/or the executive. It is settled case law that judicial review stops at the edge of political decision-making. Otherwise, there would be too great a risk of the judge – a counter majoritarian power – substituting themselves to political power.[128] In that respect, one can convincingly argue that the judiciary shows a higher sense of self-restraint in cases of emergency.[129]

The reasons for this cautious stance are manifold. First, situations of emergency are more often than not uncharted territories for public authorities. They have to address an unknown situation under time constraint and without every relevant information at their disposal. Second, the legal framework surrounding situations of emergency in Belgium leaves higher room for manoeuvre for the executive than in normal times.[130] Third, emergency usually triggers situations labelled as "conflicts of rights," where competing fundamental rights are at stake. In such situations, elected powers are given precedence to strike the right balance between competing rights and interests that are equally valued.[131] For instance, when deciding whether to close premises such as schools or public transportation as a matter of emergency, the government has to assess the right to education or to free movement in light of the competing rights it seeks to protect with such measures (be it the right to health and to life in the case of a pandemic or the right to life and to security in the case of the fight against terrorism). Fourth, when assessing the government's course of action *ex post-factum*, the judiciary has to remember what was the situation at the time the government took the disputed measures. Its role is to ensure that the government remains within the limits of the rule of law, and not to second-guess how it could have done better in optimal circumstances.

The fight against the COVID-19 pandemic is once again a good case in point. Since the beginning of the pandemic, a whole range of cases reviewing the management of the crisis has been delivered at a rapid pace. Provided that procedural requirements pertaining to standing, admissibility and competence were met, the judiciary tried the merits of the cases, assessing the

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[128] Bombois, "Conditions et limites du pouvoir judiciaire face à l'autorité publique: vol au-dessus d'un nid de vipères ?," *CDPK,* 2005, pp. 24–49.

[129] See: Ginsburg and Versteeg, "The bound executive: emergency powers during the pandemic," *International Journal of Constitutional Law*, 2021, pp. 1498–1535; Golia, Hering, Moser, and Sparks, "Constitutions and Contagion – European Constitutional Systems and the COVID-19 Pandemic," *Heidelberg Journal of International Law*, 2021, pp. 147–234.

[130] The Constitutional court rules that such a wide room for manoeuvre was justified given the wide diversity of emergency situations the Executive might possibly face, see: C.C., 22 September 2022, n° 109/2022, B.8.2.; C.C., 22 December 2022, n° 170/2022, B.8.2. and C.C., 29 June 2023, n° 104/2023, B.8.2 and Verlinden, De Raeymacker and Bultheel, "De bijzondere rol van rechtscolleges tijdens de COVID-19-crisis," *Rechtskundig Weekblad,* 2023–24, p. 1167.

[131] Velaers, "Constitutionele lessen uit de COVID-19-crisis," *T.B.P.,* 2021/9, pp. 546–547.

legality of the measures but also their effects on the subjective rights of claimants. In some (rather exceptional) cases, the judiciary annulled the decisions taken to tackle the crisis.[132] The legal basis and pleas argued by petitionners were diverse, ranging from violations of freedom of religion[133] to breach of the principle of equality and non-discrimination.[134] Nevertheless, the judiciary overall upheld government decisions,[135] an orientation some authors criticised.[136]

Overall, the Constitutional Court, the Council of State and the ordinary judges relied heavily on the wide room for manoeuvre which the Parliament left to the Executive according to the laws governing crisis management.[137] In addition to this, the judiciary acknowledged the very specific circumstances surrounding the health crisis. COVID-19, an ever-evolving, rapidly spreading and highly contagious virus required quick public response. Therefore, the government had to make decisions while it did not possess all relevant information.[138] To take due account of this, the judiciary put special emphasis on procedural requirements. In the first stage of the crisis, experts' consultation was particularly valued and showed, in the judiciary's eye, that the government took the most up-to-date state of knowledge into account. As the pandemic was evolving and public demands changed, not only medical experts' opinions were valued but also concerns voiced by civil society, such as fundamental rights agencies, representatives of socioeconomic life or experts in mental health.[139] Under the same procedural token, upstream deliberations in the Council of Ministers or within the so-called Concertation Committee played a special role in the legal reasoning leading the judiciary to uphold executive acts.[140] Such attention dedicated to the deliberative and procedural quality of the decision-making

[132] For an overview, see: Verlinden, De Raeymacker, and Bultheel, "De bijzondere rol van rechtscolleges tijdens de COVID-19-crisis," *Rechtskundig Weekblad*, 2023–24, pp. 1172–1173.

[133] See, for example, Council of State, 8 December 2020, n° 249.177 and Council of State, 17 June 2022, n° 254.041 (ban to collective worship).

[134] See, for example, Council of State, 2 February 2021, n° 249.685.

[135] Slautsky et al., "Belgium: Legal Response to Covid-19," *The Oxford Compendium of National Legal Responses to Covid-19*, Oxford, OUP, 2022.

[136] See, for example, Meeusen, "De terughoudendheid van de Raad van State bij de beoordeling van maatregelen genomen in het kader van de coronacrisis," *CDPK,* 2020, pp. 33–50.

[137] See: Civil Protection Act of 31 December 1963, art 4; Police Force Act of 5 August 1992, arts 11, 42; Civil Security Act of 15 May 2007, arts 181, 182, 187. Federal Special Powers Act of 27 March 2020 (I); Federal Special Powers Act of 27 March 2020 (II). In a later stage, see: Statute of 14 august 2021 on administrative police measures during an epidemic emergency.

[138] See, for example, Belgian Constitutional Court, ruling of 2 March 2023, n° 33/2023, B.69.

[139] Popelier et al., "Health crisis measures and standards for fair decision-making: a normative and empirical-based account of the interplay between science, politics and courts", *European Journal of Risk Regulation*, 2021, vol. 12, n° 3, pp. 1–20; PVerrijdt, "Blijf in uw kot! De kwalificatie en de evenredigheidstoets van noodmaatregelen die de bewegingsvrijheid beperken," in Reybrouck, Rochtus, Spinoy, and Verrijdt (eds.), *De Belgische Grondwet en noodsituaties*, Intersentia, 2024, pp. 159–165.

[140] As exemplified in Council of State, 2 February 2021, n° 249.685, § 21. On this, see: Velaers, "Constitutionele lessen uit de COVID-19-crisis," *T.B.P.,* 2021/9, pp. 550–551.

process, although not a new phenomenon[141], was particularly relied on in judicial reasoning pertaining to the pandemic management.

Question 4

The Belgian Constitution was designed in the 19th century, a time where there was a lot of faith in parliament. The catalogue of fundamental rights has not changed dramatically in the meantime, which means that it does not say a word about the principle of proportionality. Roughly speaking, according to constitutional wording, the fact that limitations are imposed by parliament is seen as enough to protect fundamental rights.

In spite of that, proportionality is paramount to judicial review, be it in situations of emergency or in ordinary situations. It plays a role in assessing whether a legal norm breaches the principle of equality and non-discrimination or any other fundamental rights. Because of the outdated wording of the Constitution, both in terms of fundamental rights itself as in the way they can be limited, the Belgian courts have started to apply the principle of proportionality inherent to the European Convention on Human Rights and the EU Charter of fundamental rights, in line with the principle of the highest protection of fundamental rights. Consequently, any limitation to a fundamental right or to the principle of equality and non-discrimination must be prescribed by a legal act, have a legitimate aim and be necessary in a democratic society. This last requirement implies proportionality, something that some legislations, such as the pandemic law, explicitly express.[142]

To be proportionate, any interference with a fundamental right has to be *adequate*, which means that it is able to achieve the legitimate aim it pursues. In a second step, the interference with a fundamental right also has to be *necessary*, in the sense that no other less intrusive means could achieve the same aim. Lastly, the interference with the fundamental right has to be assessed in the light of the legitimate aim it follows. In other words, the interference should not be so detrimental to specific fundamental rights that it outweighs the beneficial impact it aims at – be it the safeguard of the public order or another fundamental right. This third criteria, understood as *proportionality in the narrow sense*, triggers a certain leeway for the judiciary as it touches upon the appropriateness of an act.[143]

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[141] For an early illustration, see: Belgian Constitutional Court, ruling of 30 April 2003, n° 51/2003. On this: Popelier, "Evidence-Based Lawmaking: Influences, Obstacles and the Role of the European Court of Human Rights", in Gerards and Brems (ed.), *Procedural Review in European Fundamental Rights Cases,* Cambridge University Press, 2017, 91; Popelier and Van De Heyning, "Procedural Rationality: Giving Teeth to the Proportionality Analysis", *European Constitutional Law Review*, 2013, vol. 9, n° 2, 255–256.

[142] See: art. 4(3) of the Pandemic law, *supra* fn 8.

[143] Rosoux, *Contentieux constitutionnel*, Larcier, 2021, p. 343.

The scope of judicial review when assessing the proportionality of actions taken by public authorities depends on the circumstances of each case. As highlighted above,[144] a situation of emergency or a sense of crisis usually limits the margin of appreciation of the judiciary and widens the Executive's room for manoeuvre accordingly. Two reasons underly such a finding.
First, it is settled case-law of the European Court of Human Rights that when a conflict of rights emerges, the judiciary has to adopt a restraining stance in assessing the proportionality of legal acts.[145] Second, as the same Court recently noted, the judiciary must consider the exceptional and unforeseeable context when determining whether the challenged Executive's measures are proportionate.[146] In this context, the principle of precaution is becoming increasingly significant. It enables the judiciary to appropriately account for uncertainty and risk management when assessing legal acts, actions and omissions from the government. In sum, since in emergency cases uncertainty is the rule and quick responses are needed, the evidential threshold of what is required from the government in terms of proportionality is somewhat lowered. It must suffice to show that, in light of the scientific knowledge available, its policy is not manifestly unreasonable to avert a likely serious harm.[147]

Section 5: Implementation of EU emergency law in the Member States

Question 1

Two very relevant principles here are the principles of division of competences within the Belgian federal setup and the doctrine of constitutional identity.

As to the first, it plays an important role in two main phases. First, when the EU adopts EU measures and where this involves decision-making on the part of the Council of the European Union, whether Belgium will be able to properly engage in this decision-making will first depend on the (internal) competence at issue. Afterall, in the case that the issue discussed touches on competences not exclusively coming under the competence of the federal government, the representative of Belgium in the Council can only take a position for or against measures deliberated in Council when the relevant federal entities in Belgium unanimously agree on the position to be taken. Where disagreements persist (between the federal entities), Belgium will have to abstain in the Council.[148]

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[144] See Answer to Section 4, Question 3.

[145] See: Smets and Brems (eds.), *When human rights clash at the European Court of Human Rights. Conflict or Harmony?*, OUP, 2017.

[146] See: European Court of Human Rights (first section), *Pasquinelli and others v. San Marino*, 29 August 2024, §§ 97–108.

[147] Velaers, "Constitutionele lessen uit de COVID-19-crisis," *T.B.P.,* 2021/9, pp. 548–550.

[148] See: Cooperation Agreement of 8 March 1994, *Moniteur belge*, 17/11/1994.

This impacts EU-decision making since abstentions are effectively "votes against" when the decision-making rule is qualified majority voting.

Conversely, during the implementation phase, an EU measure falling within the competences of the regions or communities (within the Belgian federal setup) cannot be implemented by the federal Belgian government for the entire Belgian territory. Instead, it will require separate implementing measures by the Regions and Communities concerned. The cases of food and migration emergencies are a case in point. Food safety, migration and asylum are federal matters, and the federal government will implement measures. However, other necessary measures to manage crises in these areas might touch on competences of the regions. For instance, where food scares result in food products that need to be destroyed, these become waste, which triggers a regional competence, requiring regional action to, for example, provide financial assistance to manage the resulting waste. Similarly, when temporary protection for Ukrainians is granted in Belgium based on Council Decision 2022/382, the status is granted by the federal government, but further measures such as housing and job placement constitute regional competences,[149] while measures facilitating the integration of Ukrainians in the educational system are community competences.[150]

The implementation of NGEU and the adoption of Belgium's national recovery and resilience plan, which has already been evoked in the above, has closely involved the Federal government and the three Regions, typically in the concertation committee, and is another case in point. Along similar lines, although in a more distant context, the national climate and energy plan, as provided by Regulation 2018/1199 (the so-called Governance Regulation), covers different areas of competence in Belgium, and its adoption and updating has required the involvement of both the Federal government and regional executives, further complicating the process and causing tensions, coordination issues and ultimately, delays, which have been deplored by the EU.

The second important principle is a direct result of an EU (*sensu lato*) emergency measure. When during the eurocrisis, the eurozone Member States concluded the Treaty on Stability, Coordination and Governance, the Belgian Constitutional Court was asked to assess this international agreement in light

[149] See, for example, Decreet of 18 maart 2022 tot regeling van de tijdelijke huisvesting van gezinnen of alleenstaanden die dakloos zijn of dreigen te worden naar aanleiding van de oorlog in Oekraïne.

[150] See, for example, Arrêté du Gouvernement de la Communauté française du 27 octobre 2022 établissant la reconnaissance temporaire du Certificate of Complete General Secondary Education et de l'Attestat of Complete General Secondary Education délivrés par le Ministère ukrainien de l'éducation et des sciences et le certificat homologué d'enseignement secondaire supérieur donnant accès à l'enseignement supérieur de type court.

of the Belgian Constitution. The general approach under Belgian Constitutional Law regarding the relation between international and EU law and the Belgian constitution has been to accept the primacy of international and EU law over the Belgian constitution. This primacy found its basis in EU law itself (according to the *Le Ski* jurisprudence of the Court of Cassation), or in the Belgian Constitution, since Article 34 allows the conferral of powers to bodies under public international law (according to the jurisprudence of the Supreme Administrative Court and the Constitutional Court).

Beyond those divergences on the source of primacy, Belgian courts had never established any limits or reservations to the principle of primacy, the same way its Italian or German counterparts, for example, had done. In 2016, however, when the Constitutional Court reviewed the Fiscal Compact, it held that this primacy, enabled through Article 34 of the Belgian Constitution, could not "allow (discriminatory) interference with the national identity embedded in the basic political and constitutional structures or with the core values of protection the Constitution confers on the subjects of law."[151] So far this test has never been met by an EU measure, but in theory, where an EU measure interferes with Belgium's national identity, Belgian authorities would be barred from implementing them. The reference to the discriminatory nature of such interferences seems less relevant here. This is so because the Belgian Constitutional Court's jurisdiction hinges on Articles 10 and 11 of the Belgian Constitution laying down the principle of non-discrimination. The prism through which the Court reviews measures will therefore typically be non-discrimination.

Question 2

There are not many instances of problematic implementation of EU emergency measures. The main one is fairly recent and relates to the implementation of Regulation 2022/1854 on an emergency intervention to address high energy prices, one of the instruments adopted to face the energy crisis prompted by the war in Ukraine. Most notably,[152] Articles 14 to 18 of that Regulation required Member States to subject surplus profits generated by fossil fuel companies to a mandatory temporary solidarity contribution. In Belgium, this contribution

[151] On this judgment, see: the special issue in (2017) *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 6, pp. 294–377; Rosoux, "L'ambivalence ou la double vocation de l'identité nationale – Réflexions au départ de l'arrêt n° 62/2016 de la Cour constitutionnelle belge," *Cahiers de droit européen*, 2019, pp. 91–148.

[152] Other provisions of this Regulation have also been subject to litigation in Belgium. Most notably, measures capping or limiting market revenues (Articles 6 to 8 of Regulation No. 2022/1854) are at the heart of litigation pending before the Court of Appeal of Brussels, which has referred questions to the CJUE (C-633/23).

was set up by a federal law of 16 December 2022.[153] This law, which severely affected the benefits of oil and gas companies, was challenged before the Belgian Constitutional Court in the framework of an action for annulment.[154] One of the main arguments of the parties relates to the legal basis of the EU Regulation from which the Belgian law derived. Parties argue that Regulation 2022/1854 could not validly be based on Article 122(1) TFEU. More specifically, they consider that the solidarity contribution constitutes a direct tax, which could not have been adopted on the basis of Article 122(1) TFEU but should have been based on Article 115 TFEU, the proper legal basis, in their view, for fiscal legislation. The Constitutional Court, having observed that the Court of Justice had not yet ruled on the validity of Regulation No. 2022/1854,[155] decided to send a preliminary ruling request and question the Court about the mobilization of Article 122(1) to set up the solidarity contribution.[156] The Court also decided to refer other questions concerning the scope of application of the solidarity contribution (and its potentially discriminatory nature), about its compatibility with internal market law, state aid law and the Charter of Fundamental Rights.

[153] Loi du 16 décembre 2022 instaurant une contribution de solidarité temporaire à charge du secteur pétrolier, *Moniteur belge*, 22/12/2022, p. 98819.

[154] Suspension requests were also introduced, but rejected by the Court, for lack of a risk of serious and irreparable harm (*risque de préjudice grave difficilement réparable*): Belgian Constitutional Court, ruling 97/2023, 15 June 2024, B.3.1-B.4.

[155] Several annulment actions, making similar claims about the improper use of Article 122 TFEU, are currently pending before the General Court (T-759/22, T-775/22, T-802/22, T-803/22 but will in all likelihood be found inadmissible.

[156] Belgian Constitutional Court, ruling of 25 April 2024, n° 46/2024, B.5-B.8.3.