

# Health Crisis Measures and Standards for Fair Decision-Making: A Normative and Empirical-Based Account of the Interplay Between Science, Politics and Courts

Patricia POPELIER\*      Carolyn DECLERCK      Monika GLAVINA  
Bjorn KLEIZEN      Wouter VAN DOOREN

## Abstract

This paper examines, in the light of the COVID-19 crisis, the room for judicial oversight of health crisis measures based on the public's expectations of how governments should act in the interplay with experts. The paper explains how trust theory and procedural rationality review help to address concerns related to legitimacy and expertise. The paper argues that courts should distinguish between two stages. In the initial stage, fear as a driver for government support based on expertise justifies that the proportionality test is limited to the question of whether measures were based on virologist expert advice. In the next stage, people expect the government to take expert-informed decisions, but also require that the government takes into account societal needs. Procedural rationality review in this stage demands that courts examine whether the decision was based on an informed balance of rights and interests.

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\*All authors; University of Antwerp, GOVTRUST centre of excellence

## Judicial oversight in times of health crises

Lockdown, quarantine, social distancing, facemask policies, and contact tracing protect the right to life and health during the corona-crisis. They also drastically limit fundamental rights and freedoms<sup>1</sup> and come with high social and economic costs. Governments have to use discretion to balance these rights and interests.

Several scholars emphasized the essential role of courts in controlling governments in the fight against the pandemic. Ginsburg and Versteeg describe how courts worldwide have interfered with the governments' responses to the pandemic.<sup>2</sup> Not all courts, however, actively scrutinize the government. In France and Belgium, the Council of State was criticized for deferring cases and neglecting its monitoring role.<sup>3</sup> The central question in this paper is therefore what room there is for the judicial scrutiny of crisis measures.

Scholars have argued that courts should assess whether governments use public health expertise when limiting fundamental rights.<sup>4</sup> This view seems to reduce governments to the rubber-stamp of medical and virologist experts. This may have been appropriate in the first stage of the pandemic outbreak. Still, in later stages, fundamental rights concerns and societal and economic costs demand a more nuanced interplay between science and politics.<sup>5</sup>

This paper examines what room there is for judicial supervision of the health crisis measures based on the public's expectations of how governments should act in the interplay with experts. It does so in light of the current COVID-19 crisis. The paper argues that the reasons for deference, far from justifying an abdication of judicial scrutiny, call for procedural rationality review that, after the initial stage, cannot rely on the consideration of expert advice alone. It holds that the room for legitimate judicial scrutiny is inversely proportional to the government's discretion defined in terms of public trust, and that within the boundaries of legitimate judicial scrutiny, a procedural rationality check overcomes the expertise concern. On this basis, the paper distinguishes between two phases. In the first phase, the assumption is that the public expects the government to firmly respond to the crisis, no matter what, which leaves little room for judicial scrutiny of health crisis measures. In the second phase, when trust starts to wane, the assumption is made that the public expects the government to balance safety against fundamental rights and social needs. The first assumption is based on the well-documented 'Rally-around-the-flag' effect. The paper therefore concentrates on the second assumption, for which a vignette-experiment provides provisional evidence. Moreover, a case study provides anecdotal evidence for the assumption that as a result, the court's stance shifts in a second phase.

The paper is organized as follows. Section 2 explains how trust theory and procedural rationality review help to justify deference of courts. This leads to a theoretical framework with a hypothesis on the relation between science and politics in the second phase of the crisis. Next, the assumption that the phases that characterize a crisis affect the courts' room for legitimate scrutiny is backed by anecdotal evidence using the Belgian case study (section 3). The Belgian case is selected because Belgium was hit hard by the COVID-19 virus and the Council of State showed an unusually high level of deference. Finally, a vignette-experiment tests the hypothesis regarding the second phase. Section 4 presents the experiment's research design and

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<sup>1</sup>Alessandra Spadaro, 'COVID-19: Testing the Limits of Human Rights' (2020) 11 *European Journal of Risk Regulation* 317.

<sup>2</sup>Tom Ginsburg and Mila Versteeg, 'Binding the Unbound Executive: Checks and Balances in Times of Pandemic' (2020) Available at SSRN 3608974.

<sup>3</sup>For France, see Liberté Libertés Chéries, 'Liberté, Libertés Chéries: Covid-19: Le Président de La Section Du Contentieux En Chevalier Blanc' (*Liberté, Libertés chéries*, 12 April 2020) <<https://libertescheries.blogspot.com/2020/04/covid-19-le-president-de-la-section-du.html>> accessed 15 February 2021; Paul Cassia, 'Le Conseil d'Etat et l'état d'urgence Sanitaire: Bas Les Masques!' *Club de Mediapart* (15 February 2021) <<https://blogs.mediapart.fr/paul-cassia/blog/100420/le-conseil-d-etat-et-l-etat-d-urgence-sanitaire-bas-les-masques>> accessed 15 February 2021; Sébastien Platon, 'Reinventing the Wheel... and Rolling over Fundamental Freedoms? The Covid-19 Epidemic in France and the 'State of Health Emergency'' (2020) 8 *The Theory and Practice of Legislation* 293. For Belgium, see the opinion piece by 25 constitutionalists, 'Haal het parlement uit quarantaine en maak een coronawet' *De Standaard* (2 November 2020) <[https://www.standaard.be/cnt/dmf20201102\\_93300225](https://www.standaard.be/cnt/dmf20201102_93300225)> accessed 15 February 2021; and 'Carte Blanche: «Sortez Le Parlement de La Quarantaine!»' *Le Soir Plus* (2 November 2020) <<https://plus.lesoir.be/335482/article/2020-11-02/carte-blanche-sortez-le-parlement-de-la-quarantaine>> accessed 15 February 2021.

<sup>4</sup>Spadaro (n 1); Jan Petrov, 'The COVID-19 Emergency in the Age of Executive Aggrandizement: What Role for Legislative and Judicial Checks?' (2020) 8 *The Theory and Practice of Legislation* 71.

<sup>5</sup>Alberto Alemanno, 'Taming COVID-19 by Regulation: An Opportunity for Self-Reflection' (2020) 11 *European Journal of Risk Regulation* 187.

discusses the results before answering the research question in the concluding section.

## Trust theory and procedural rationality review as aides for judicial oversight

Judicial deference to governments is typically based on democratic legitimacy concerns and the notion of expertise. The legitimacy argument has extra weight when parliamentary acts are at stake, coined as the counter-majoritarian difficulty.<sup>6</sup> The argument points out that unelected courts lack the legitimacy to second-guess the outcome of balancing exercises that belong to the political sphere. The argument of expertise insulates evidence-based administrative action from judicial review and is used in particular concerning regulatory agencies established to act as expert bodies.<sup>7</sup> Empirical studies revealed that for this reason, generalist courts show a higher degree of deference towards regulators' technical decisions than specialized courts.<sup>8</sup>

Both legitimacy and expert arguments have a specific meaning in the case of the coronavirus crisis. First, responses have mainly relied on executive action but were usually backed by specific statutory empowerments, or at least implicitly endorsed by Parliament.<sup>9</sup> Second, the reflex for decision-makers to reduce uncertainty through scientific assessment, typical for risk regulation, also characterized the global government responses to the corona pandemic.<sup>10</sup> Moreover, it seems all the more appropriate for courts to take a deferential stance during emergencies because they cannot act with the required speed and flexibility.<sup>11</sup> Judicial deference enables governments to deal with crises effectively while remaining within legal confines.

Yet, the unprecedented impact of health measures on fundamental rights, on the societal and economic organization and on state budgets, call for judicial monitoring. A counterweight is needed, especially in times when parliamentary oversight is easily reduced.<sup>12</sup> It is argued here that the notions of trust and procedural rationality review provide avenues to overcome the legitimacy and expertise obstacles.

### The legitimacy obstacle and the notion of trust

A reply to the counter-majoritarian difficulty relies on an alternative form of democratic legitimacy: the assumption that courts in their own way voice the public's sentiment, after and in-between elections.<sup>13</sup> Empirical studies have confirmed positive relationships between aggregate public opinion and courts' collective decisions.<sup>14</sup> This is also a matter of strategy: courts depend on both the government and public support

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<sup>6</sup>Coined by Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1st ed, Yale University Press 1962).

<sup>7</sup>Catherine Donnelly, 'Participation and expertise: judicial attitudes in comparative perspective', in Susan Rose-Ackerman and Peter Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2010) 357; Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press 2009) 311; Tony Prosser, 'Regulation and legitimacy', in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford University Press 2011) 241, 250.

<sup>8</sup>Luis E Mejía, 'Judicial Review of Regulatory Decisions: Decoding the Contents of Appeals against Agencies in Spain and the United Kingdom' (2020) *Regulation & Governance*.

<sup>9</sup>Ittai Bar-Siman-Tov, 'Covid-19 Meets Politics: The Novel Coronavirus as a Novel Challenge for Legislatures' (2020) 8 *The Theory and Practice of Legislation* 11; Elena Griglio, 'Parliamentary Oversight under the Covid-19 Emergency: Striving against Executive Dominance' (2020) 8 *The Theory and Practice of Legislation* 49.

<sup>10</sup>Alemanno (n 5) 191.

<sup>11</sup>Eric A Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford University Press on Demand 2007) 5.

<sup>12</sup>Bar-Siman-Tov (n 9).

<sup>13</sup>Luís Roberto Barroso, 'Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies' (2019) 67 *The American Journal of Comparative Law* 109; Armen Mazmanyan, 'Majoritarianism, Deliberation and Accountability as Institutional Instincts of Constitutional Courts' in Patricia Popelier, Armen Mazmanyan and Werner Vandenberghe (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013).

<sup>14</sup>William Mishler and Reginald S Sheehan, 'The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions' (1993) *American Political Science Review* 87; William Mishler and Reginald S Sheehan, 'Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective' (1996) 58 *the journal of politics* 169; Christopher J Casillas, Peter K Enns and Patrick C Wohlfarth, 'How Public Opinion Constrains the US Supreme Court' (2011) 55 *American Journal of Political Science* 74.

for the implementation of their decisions.<sup>15</sup> Usually, this corresponds to the courts' bonding with the government. In politically turbulent times with uncertain outcomes of electoral processes, the court may also align with the public.<sup>16</sup> The question remains how courts find out what the public actually expects in times of health crises characterized by extreme uncertainty, and whether the alignment of policy decision and public sentiment can still be assumed when measures affect the public in general rather than specific individuals and minority groups. This is where trust theory comes in.

When facing a crisis or confronting a foreign threat, citizens tend to exhibit higher support for their political leaders. This phenomenon is known as the Rally-Round-the-Flag-Effect and has been intensively studied in the United States during the Cold War<sup>17</sup> and the 9/11 terrorist attacks in 2001,<sup>18</sup> and in Europe in the aftermath of Charlie Hebdo attacks in France,<sup>19</sup> 11 March 2004 terrorist attacks in Madrid,<sup>20</sup> and in light of growing tensions between Russia and the West.<sup>21</sup>

Recent surveys conducted during the COVID-19 crisis also reveal an increase of citizens' trust in the governing party, the prime minister, or the president in the initial stage of the crisis as well as an increase in their satisfaction with the country's democracy and a greater interest in politics.<sup>22</sup>

The trust literature, unrelated to crisis governance, reveals some of the drivers for citizens' trust in government. In general, governments are deemed trustworthy if they are perceived as competent, fair, and integer.<sup>23</sup> The quality of the decision-making process matters, but no agreement is found as to what these standards actually involve, and the perception of fairness depends on whether the outcome fulfils one's substantial preferences.<sup>24</sup>

In the initial stage, when lockdown measures affected the entire population, health stakes were higher for groups at risk. The impact of COVID-19 is asymmetrical, making older people and people with chronic diseases more likely to be severely affected by the symptoms of the virus.<sup>25</sup> But generally, the whole population suffered from a loss of individual freedom and benefitted from quick and firm action to contain

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<sup>15</sup>Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge University Press 2004); James L Gibson and Gregory A Caldeira, 'The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice' (1995) *American Journal of Political Science* 459; Clifford J Carrubba, Matthew Gabel and Charles Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) *American Political Science Review* 435; Alec Stone Sweet and Thomas L Brunell, 'The European Court of Justice, State Noncompliance, and the Politics of Override' (2012) *American Political Science Review* 204; Olof Larsson and Daniel Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU' (2016) *International Organization* 377.

<sup>16</sup>Mazmany (n 13) 177.

<sup>17</sup>Richard A Brody and Catherine R Shapiro, 'Policy Failure and Public Support: The Iran-Contra Affair and Public Assessment of President Reagan' (1989) 11 *Political Behavior* 353; Jong R Lee, 'Rallying around the Flag: Foreign Policy Events and Presidential Popularity' (1977) 7 *Presidential Studies Quarterly* 252; John E Mueller, 'Presidential Popularity from Truman to Johnson' (1970) 64 *The American Political Science Review* 18; Suzanne L Parker, 'Towards an Understanding of "Rally" Effects: Public Opinion in the Persian Gulf War' (1995) 59 *Public opinion quarterly* 526.

<sup>18</sup>Andrew J Perrin and Sondra J Smolek, 'Who Trusts? Race, Gender, and the September 11 Rally Effect among Young Adults' (2009) 38 *Social science research* 134; Brooke Barnett and Laura Roselle, 'Patriotism in the News: "Rally Round the Flag"' (2008) 2 *Electronic News* 10.

<sup>19</sup>Pavlos Vasilopoulos, George E Marcus and Martial Foucault, 'Emotional Responses to the Charlie Hebdo Attacks: Addressing the Authoritarianism Puzzle' (2018) 39 *Political Psychology* 557.

<sup>20</sup>Peter Thisted Dinesen and Mads Meier Jæger, 'The Effect of Terror on Institutional Trust: New Evidence from the 3/11 Madrid Terrorist Attack' (2013) 34 *Political Psychology* 917.

<sup>21</sup>Thomas Sherlock, 'Russian Society and Foreign Policy: Mass and Elite Orientations After Crimea' (2020) 67 *Problems of Post-Communism* 1; Anastasia Kazun, 'Framing Sanctions in the Russian Media: The Rally Effect and Putin's Enduring Popularity' (2016) 24 *Demokratizatsiya: The Journal of Post-Soviet Democratization* 327; Anastasia Kazun, 'Rally-Around-The-Flag and the Media: Case of Economic Sanctions in Russia' (2016) 9 *National Research University Higher School of Economics*.

<sup>22</sup>Daniel Devine and others, 'Covid19? Trust and the Coronavirus Pandemic: What Are the Consequences of and for Trust? An Early Review of the Literature' (2020) *Political Studies Review*; Martin Baekgaard and others, 'Rallying around the Flag in Times of COVID-19: Societal Lockdown and Trust in Democratic Institutions' (2020) 3 *Journal of Behavioral Public Administration*; Peter Esaiasson and others, 'How the Coronavirus Crisis Affects Citizen Trust in Institutions and in Unknown Others: Evidence from "the Swedish Experiment"' (2020) *European Journal of Political Research*; Dominik Schraff, 'Political Trust during the Covid-19 Pandemic: Rally around the Flag or Lockdown Effects?' (2020) *European journal of political research*.

<sup>23</sup>Roger C Mayer, James Davis H and FD Schoorman, 'An Organizational Model of Organizational Trust' (1995) 20 *Academy of Management Review* 709.

<sup>24</sup>Peter Esaiasson and Patrik Öhberg, 'The Moment You Decide, You Divide: How Politicians Assess Procedural Fairness' (2020) 59 *European Journal of Political Research* 714.

<sup>25</sup>Rachel E Jordan, Peymane Adab and KK Cheng, 'Covid-19: Risk Factors for Severe Disease and Death' (2020) 368 *BMJ*.

the spread of the virus. At this stage, survey data indicate that trust in government was high, but trust in experts, who took on a very visible role in decision-making, was even higher.<sup>26</sup> This strengthens the assumption that, in times of crisis, expertise plays a prominent role as a standard for fair decision-making and that trust in crisis governance relied on the perception that decisions were based on expert advice. This aligns with the theoretical and empirical studies that show that even in ordinary times, expertise, as a token of competence, is a trust-enhancing factor.<sup>27</sup>

All this indicates that the courts' reaction to give wide deference to the government when it comes to expert-based safety measures, is justified from a legitimacy perspective. With an overly stringent attitude that is not backed by the public, the courts would risk overplaying their hand.

Recent surveys, however, show that after this initial surge of trust, public trust drops again in later stages of the crisis, even below the pre-corona level.<sup>28</sup> This suggests that a crisis comes in different stages, and expectations as to government action and the role of courts shift with every stage. As the crisis develops, the measures begin to reveal a heterogeneous impact. The social and economic effects of lockdown measures are harder on socio-economically vulnerable groups. Exit measures to open up economic and social activities were implemented only gradually, which is easily perceived as unfair. In the Belgian case study, this was the moment when acts were being challenged before the court. From then on, personal needs and preferences play a more important role. This means that standards for fair decision-making no longer rely on expertise alone. Indeed, from other survey data, it appears that, with the drop in trust in government, trust in experts also declined.<sup>29</sup>

On this basis, we argue that the public expects the government to take firm action, which leaves little room for judicial supervision. This is based on the well-documented 'Rally-Round-The-Flag' effect. We further hypothesize that *the public does not expect the government to rubber-stamp expert advice in the later stages of a health crisis but allows some political space to weigh safety against social needs and preferences*. In section 4, the paper seeks preliminary evidence for this hypothesis through a case study and a vignette-experiment. First, in section 3, we seek anecdotal evidence for the distinction between phases through a case study.

## The expertise obstacle and procedural rationality review

So far, we argued that the public expects the government to strictly rely on medical and virologists' expertise in the first stage of the crisis, but that it expects the government to weigh virological safety against social needs in a later stage. This, in turn, widens the room for judicial scrutiny of crisis measures. The expertise obstacle further delineates the room for judicial scrutiny, where it questions the courts' training and knowledge to second-guess the necessity and adequacy of crisis measures. This means that even if courts have the legitimacy to review crisis measures, the expertise obstacle refrains them from using that room.

Procedural rationality review may overcome the expertise obstacle. This is a technique that enables a combination of deference and scrutiny. It entails that courts consider the quality of the decision-making procedure at the legislative or administrative stage, to assess whether government interference in fundamental rights was proportional.<sup>30</sup> In expert-based decision-making, deference is based on the expectation that the

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<sup>26</sup>GOVTRUST Centre of Excellence, University of Antwerp, 'Research Note on Trust in COVID-19 Government Policies' (2020) <<https://www.uantwerpen.be/en/research-groups/govtrust/blog/updated-research-note-trust/>> accessed 8 October 2020; Francesc Amat and others, 'Pandemics Meet Democracy. Experimental Evidence from the COVID-19 Crisis in Spain'.

<sup>27</sup>Scott R Weaver and others, 'Worldviews and Trust of Sources for Health Information on Electronic Nicotine Delivery Systems: Effects on Risk Perceptions and Use' (2017) 3 SSM-population health 787; Amira Osman and others, 'Information to Improve Public Perceptions of the Food and Drug Administration (FDA's) Tobacco Regulatory Role' (2018) 15 International journal of environmental research and public health 753; Aaron Martin and others, 'Enlisting the Support of Trusted Sources to Tackle Policy Problems: The Case of Antimicrobial Resistance' (2019) 14 PloS one e0212993; Rebecca M Bratspies, 'Regulatory Trust' (2009) 51 Ariz. L. Rev. 575.

<sup>28</sup>F Six, S de Vadder, M Glavina and K Verhoest, 'How the effect of trust and other factors on rule compliance changes over time during the COVID-19 crisis', Paper presented at the online EGPA conference, 4 September, 2020; GOVTRUST Centre of Excellence, University of Antwerp (n 26).

<sup>29</sup>Amat and others (n 26); Six *et al* (n 28).

<sup>30</sup>See, apart from stand-alone papers, the many monographs, edited volumes and special issues Janneke Gerards and Eva Brems, *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017); Leonie M Huijbers, *Process-based fundamental rights review: practice, concept, and theory* (2019); Roland Ismer and Klaus Meßerschmidt,

decision under review relied on evidence and knowledge rather than mere assumptions.<sup>31</sup> It is, then, for the court to test whether the government was indeed better placed to make an informed decision. To this end, the court examines whether safeguards were built in the process to enable informed decision making.

In the first phase, when trust in experts' solutions is high, and before the public has experienced too many discomfiting consequences, 'informed decision-making' refers in particular to 'expert-based' decision-making. The court's main task, in this case, is to check whether the decision was indeed based on expert advice. The court will most likely defer from assessing the quality of the scientific evidence that was used, safe in the presence of strong indications that the evidence is flawed, given the fact that they often lack the capacity to do so.<sup>32</sup> Especially under the circumstances of the coronavirus crisis, where even experts disagree on important issues,<sup>33</sup> it is not for the court to take sides.

However, if in later stages the public expects politicians to weigh safety against fundamental rights and social needs, judicial oversight cannot be simply a matter of checking whether decisions were based on medical and virologist evidence. This would mean that the government may deviate from expert advice to accommodate opposing rights and interests. It would also mean that medical and virologist advice alone can no longer justify crisis measures that heavily impact fundamental rights and societal interests. Instead, procedural rationality review leads the court to investigate whether procedural safeguards were in place to make an informed and balanced decision, taking into account more than virological considerations alone. Implications are that the government is expected to assess the impact of its measures and identify the groups that are affected. To this end, the government cannot simply refer to medical and virologist expert advice but will have to seek additional information through consultations or mixed panels, including social and human science experts and representatives of affected sectors.

Later stages of the crisis saw a shift from expert-*based* to expert-*informed* decision-making in crisis management.<sup>34</sup> More often than not, expertise in itself is contested and uncertain. In the first crisis response, scientists were expected to lead the country out of the crisis. In later stages, uncertainty and the contestation of evidence resurfaced. Virologists were challenged by other virologists and other disciplines. As a result, politicians could no longer solely rely on science to argue for interventions. This justifies a shift in the attitude of the court, implying that expert-informed decision making is not simply a device for effective crisis management but a legal duty.

## Theoretical framework

Based on the legitimacy obstacle, the room for judicial supervision of crisis measures depends on the public support for and expectations of the government, measured in terms of trust. Empirical studies show that the level of trust evolves over time. In the first phase, trust is unusually high; in next phases, trust wanes again.

In the first phase, the 'Rally-Round-The-Flag' effect shows that the public expects firm government action. When dealing with health crises, there is high trust in the government, and even higher trust in experts. This suggests that the government has wide discretion, provided that it is guided by expert advice to ensure effective safety measures. At the same time, this means that the room for legitimate judicial scrutiny of crisis measures is very limited. Within these limits, the expertise obstacle allows for a procedural rationality check to make sure that government action is based on (virological) expert advice.

In the next phase, public trust in the government decreases, which gives less room for government discretion, and more room for judicial supervision. We hypothesize that from then on, the public expects the government to balance safety measures against fundamental rights and social needs. This hypothesis is tested in section

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'Evidence-Based Judicial Review of Legislation: Some Introductory Remarks' (2016) 4 *The Theory and Practice of Legislation* 91; Susan Rose-Ackerman, Stefanie Egidy and James Fowkes, *Due Process of Lawmaking* (Cambridge University Press 2015).

<sup>31</sup>Patricia Popelier and Catherine Van de Heyning, 'Subsidiarity Post-Brighton: Procedural Rationality as Answer' (2017) 30 *LJIL* 5.

<sup>32</sup>Elaine Mak, 'Judicial Review of Regulatory Instruments: The Least Imperfect Alternative?' (2012) 6 *Legisprudence* 301.

<sup>33</sup>Roland Bal and others, 'Practicing Corona—Towards a Research Agenda of Health Policies' (2020) *Health Policy*.

<sup>34</sup>Wouter Van Dooren and Mirko Noordegraaf, 'Staging Science: Authoritativeness and Fragility of Models and Measurement in the COVID-19 Crisis' (2020) 80 *Public Administration Review* 610.

4. If the hypothesis is confirmed, this implies that it is legitimate for courts to test whether the government lives up to the public's expectations. In that case, the expertise-obstacle requires courts to take a procedural rationality approach, by testing whether the decision-making procedure has enabled an informed balancing of safety and other concerns, for example through expert advice, stakeholder advice, or consultations.

The problem remains how to distinguish the different phases. The level of trust indicates public support for the government, which in turns determines the room for judicial scrutiny. Therefore, the drop of public trust indicates the passage to a new phase. In practice, this will probably take place in the case of reduced danger, which decreases the level of fear and makes room for exit measures. But even if the danger subsists, or if it increases again in later stages, this is still different from the first phase, because the effects of safety measures will take their toll.

## The Belgian case

In this section, we look for anecdotal evidence that the phases that distinguish the crisis cycle based on the level of trust also impact on the stance that courts take towards crisis measures. For this, the Belgian case is used.

COVID-19 hit Belgium very hard. By mid-April, Belgium was at the top of the corona deaths per capita worldwide, with a death rate of 359 per million residents.<sup>35</sup> The government, in the middle of a political crisis,<sup>36</sup> was slow to react. Public concern arose at end of February when the number of infections rose. It took until 13 March 2020, two days after the coronavirus made its first fatality in Belgium, before an official health crisis was announced, and the first measures were taken. A more drastic nation-wide lockdown took effect on 18 March. The infection rates and hospitalization numbers started to decline after 3 April.

A survey dated 7 April showed that the public's trust in government was unusually high, and the public trust in experts was even higher. But three weeks later, on April 28, the public's trust had dropped to a level that was lower than what was observed in normal times.<sup>37</sup> This means that the passage from the first to the second phase is situated somewhere towards the end of April. This aligns with the gradual decrease of covid-related infections, hospitalizations and deaths, as shown in Figure 1. Also around this time, the government policy shifted. On April 17, the first relaxation measure was taken to keep the people motivated. Actual exit measures out of the lockdown were introduced two weeks later, on April, 30 and followed in quick succession. By the end of July, the government's advisory committee CELEVAL reported the beginning of the second wave of COVID-19 infections.<sup>38</sup> Further relaxations measures – e.g. events for a large public – were put on hold, and new restrictions were introduced, including the mandate to wear face masks in specific places. This time, room was given to local governments to adopt stricter measures if the epidemiologist situation required so. In Antwerp, the duty to wear face masks was generalized, and a curfew was imposed.

Until October 2020, when a new government was formed, all national measures were decided by the National Security Council, consisting of the Prime Minister, the Vice-Ministers and the relevant federal Ministers, to which the Minister-Presidents of the federated entities were added. The Council was supported by the National Crisis Center with three advisory bodies: the Risk Management Group (RMG), the Risk Assessment Group (RAG) and a Scientific Committee Coronavirus. They were mainly composed of representatives of health ministries, epidemiologists of the Belgian Institute for Health (Sciensano), and invited medical scientists. In addition, on April 6, a group of experts was established to advise on an exit strategy (GEES) consisting of medical, statistical, and financial experts, one legal expert, and representatives of the economic sector.

The Council of State is the judicial body that is competent to annul administrative acts, including the

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<sup>35</sup>For epidemiological data, see Sciensano, 'COVID-19 – Epidemiologisch Bulletin van 14 July 2020' (2020) <[https://covid-19.sciensano.be/sites/default/files/Covid19/COVID-19\\_Daily%20report\\_20200714%20-%20NL.pdf](https://covid-19.sciensano.be/sites/default/files/Covid19/COVID-19_Daily%20report_20200714%20-%20NL.pdf)> accessed 18 August 2020.

<sup>36</sup>Patricia Popelier, 'COVID-19 Legislation in Belgium at the Crossroads of a Political and a Health Crisis' (2020) 8 *The Theory and Practice of Legislation* 131.

<sup>37</sup>GOVTRUST Centre of Excellence, University of Antwerp (n 26).

<sup>38</sup>CELEVAL, 'Celeval Advice 64' (2020) <[https://d34j62pqlfm3rr.cloudfront.net/celeval/64\\_20200726\\_Celeval-adviezen\\_NL-FR\\_Sch%C3%A9masSciensano.pdf](https://d34j62pqlfm3rr.cloudfront.net/celeval/64_20200726_Celeval-adviezen_NL-FR_Sch%C3%A9masSciensano.pdf)> accessed 15 February 2021.

ministerial decrees and local acts that contained the preventative and exit measures regarding the crisis. Between March 13, when the first measure was adopted, and October 31, the Council of State delivered 32 judgments on the legality of coronavirus crisis measures and invalidated only one – the Brussels’ mayor order to prohibit prostitution was deemed *ultra vires*.<sup>39</sup>

Interestingly, the first ministerial decrees, with the most stringent restrictions, remained unchallenged. The first petition concerned an act, adopted on 17 April, that allowed for the reopening of specific businesses. This suggests that the public does not see a role for the court to act as a guardian of fundamental rights in the middle of the first phase, but only starts litigating towards the passage to the second phase.

Most petitions were rejected for lack of urgent serious harm. With this strict procedural stance, the Council of State missed the opportunity to give the government guidance concerning infringements on fundamental rights. This changed by the end of October: it now more often discussed the arguments of a case instead of rejecting the cases for procedural reasons.<sup>40</sup> A few examples show how deferential the Council of State was, even where it did assess the merits of the case, and how, based on the precautionary principle,<sup>41</sup> it prioritized safety concerns based on expert advice .

In the first case brought before the Council of State, the petitioners claimed that the reopening of gardening centres and do-it-yourself (DIY) stores with a general assortment was discriminatory and would lead to unfair competition. As mentioned, the timeline situates this in the passage from the first to the second phase. The second phase was not yet established, so we can expect that the Council would still be hesitant. The Council did not qualify the measure as an exit measure, but emphasized that the reopening had the purpose of motivating the people to respect the lockdown measures by enabling them to work in the house and the garden. This supports the idea that according to the Council, the second phase was in sight, but not yet there.

The Council was clear about its position towards crisis government: it gave ‘the widest possible discretion’ to protect the public health and safety in this ‘unseen and most serious’ health crisis.<sup>42</sup> The court cited CELEVAL’s advice extensively to conclude that the government’s decision was reasonable. The petitioners argued that the exclusion of other retail businesses, especially shops with similar products in their assortment, was unnecessary because safety could be secured through social distance measures. Considering the wide discretion granted to the government, the Council refused to examine the availability of less drastic measures. It did, however, emphasize that the measure heavily relied on virological expert advice. This confirms our theoretical assumption that courts, in the first phase of the crisis, find little room for judicial supervision of crisis measures, and are mainly concerned with the question of whether preventative health measures rely on expert advice.

Subsequent cases were situated in phase 2. This time, the term ‘widest possible discretion’ was replaced by ‘wide discretion’. The Council stressed that it has jurisdiction to examine whether crisis measures depart from actual and relevant facts, established with care, and are weighed against all interests at stake.<sup>43</sup> This confirms that the Council of State sees more room for judicial scrutiny in the second phase, and that it turns to procedural rationality review to overcome the expertise obstacle discussed in section 2. In this phase, it requires informed decision-making taking account of all interests, which implies a balancing of safety and other rights and interests.

However, in practice, the Council did not impose additional obligations on the part of the government but shifted the burden of proof to the petitioners. For example, petitioning fairground stallholders argued that the limitations were disconnected from the capacity of the actual fairground and proposed a solution similar to what applied to markets. The Council reminded that the government was advised by expert committees. It did not examine the type of expertise included in these committees or notice the absence of representatives of fairground stallholders. Instead, it expected the petitioners to give scientific evidence for its own claims.

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<sup>39</sup>CoS, *Bou-Oudi*, No 248.541, 9 October 2020. Not included are the cases where the individual enforcement decisions were challenged without criticizing the underlying ministerial decree.

<sup>40</sup>Since CoS, *bvba Brasserie Flandria* No 248.780, 28 October 2020.

<sup>41</sup>CoS, *Schoenaerts*, No 248.162, 20 August 2020.

<sup>42</sup>CoS, *Stihl and Fedagril*, No 247.452, 27 April 2020.

<sup>43</sup>Since CoS, *The Masters*, No 248.131, 10 August 2020.



In other cases, the early closing time – 10 pm – for night shops was challenged. The purpose of this measure was to prevent people from buying alcohol to continue social meetings after the closing of the bars at 1 am. The petitioners argued that alcohol was still available in gas station shops, and that CELEVAL’s advice did not go as far as to recommend closure three hours before the closing time for bars and restaurants. Although the measure formed part of an exit strategy, bringing some sectors in a more advantageous position than others, the Council again refused to compare alternative measures and held that it was not unreasonable for the government to take an even stricter position than was recommended by experts.<sup>44</sup>

When measures such as a generalized duty to wear face masks or the closure of bars and restaurants were challenged, the Council made clear that it would not assess the effectiveness of government measures to contain the spread of the COVID-19 virus, let alone settle scientific controversies as to the usefulness of specific measures, such as the wearing of face masks, through a court order.<sup>45</sup>

Interestingly, the Council of State referred to consultations to uphold exit measures concerning the resuming of public activities. These measures were challenged, because they first excluded religious ceremonies, and thereafter made them conditional on the wearing of face masks. The Council of State pointed out that the planning and scripts for religious ceremonies were developed in consultation with the different religious communities.<sup>46</sup>

This overview shows that the Council distinguished between phases. In phase 1, the government has ‘the widest possible discretion’ and judicial scrutiny is confined to procedural rationality review concentrated on expert advice. In phase 2, it gave ‘wide’ discretion to the government but emphasized a duty of due care, giving room for a more encompassing procedural rationality review. In practice, however, the Council of State still showed extreme reluctance. For example, expert advice and consultations were invoked, but only as an aide to support the crisis measures. The following sections will examine whether such reluctance was justified from a legitimacy perspective.

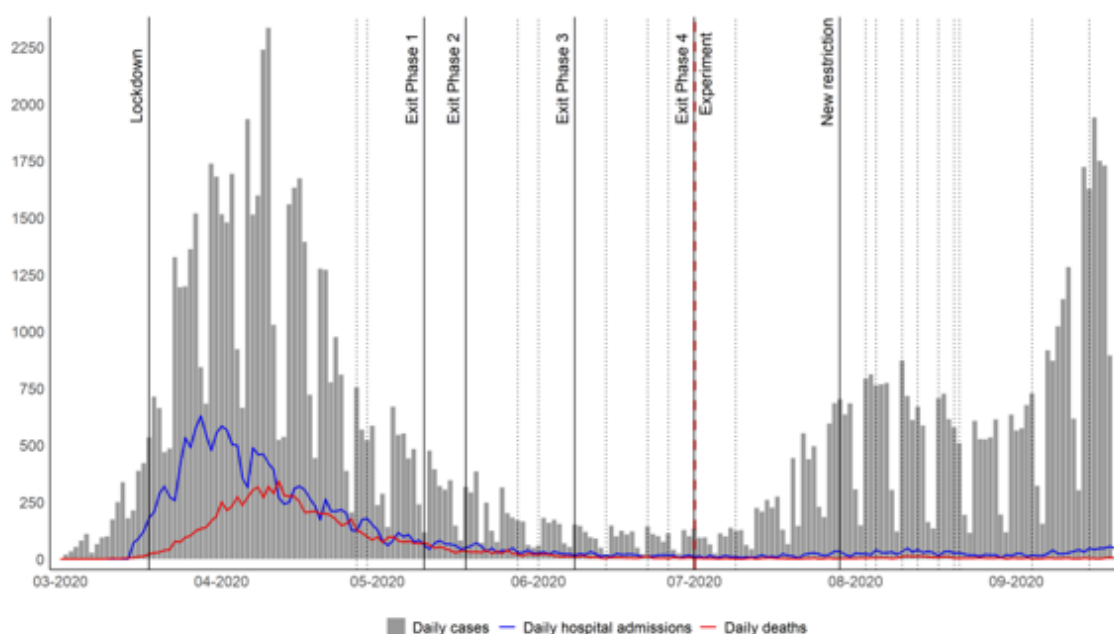
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<sup>44</sup>CoS, *BV The Masters*, No 248.131, 10 August 2020; *BV Harman*, No 248.132, 10 August 2020.

<sup>45</sup>CoS, *Schoenaerts*, Nos 248.161 and 248.162, 20 August 2020; Council of State, No 248.818, 30 October 2020.

<sup>46</sup>CoS, *Suenens*, No 247.674, 28 May 2020.

Figure 1. Overview of the COVID-Belgium cases with judgment dates



Source: [Sciensano: The Belgium-based institute for health, 'COVID-19 monitoring'](https://epistat.wiv-isp.be/covid/) available at <<https://epistat.wiv-isp.be/covid/>> accessed 30 September, 2020.

Data frame: 1 March to 30 September, 2020.

Dotted vertical lines represented the dates when court judgments were issued. A red dotted vertical line represented the date when the experimental vignette survey was launched.

## Public expectations regarding standards of fair decision making: an experimental vignette study

We have proposed that, as the health crisis progresses into later stages, the public no longer expects the government to rubber-stamp expert advice. Based on theories of trust and procedural rationality, we theorized that public opinion would favour politics that weigh safety against social needs and preferences. We therefore expect public support for a measure to rise when it is backed up by advisory councils that take general interests into account as well as the recommendations of health experts. When, instead, a proposed measure appears to be deficient in one or the other type of information, additional enticements may be necessary for the measure to gain acceptance.

To test this general hypothesis, we set up a vignette experiment and collected survey data.<sup>47</sup> The vignette experiment did not examine what the public expects from the judiciary. Instead, the focus is on the respondents' support of government decisions as the outcome of a balancing exercise. Two reasons explain this choice, of which the second is the most important one. First, we do not expect the respondents to be familiar with the role of courts and with legal analysis, especially if they have not been involved in litigation. Garoupa and Magalhães confirm that courts tend to be less visible or salient for people than elected political institutions.<sup>48</sup> This is all the more true for the Council of State, which is an administrative court with which

<sup>47</sup>The study, part of a wider BOF Covid-19 project, is approved by the Social Science Ethics Commission of the University of XX.

<sup>48</sup>Nuno Garoupa and Pedro C Magalhães, 'Public Trust in the European Legal Systems: Independence, Accountability and

the public is not familiarized through criminal news reports and tv series . More importantly, the purpose of the survey was not to examine whether the respondents expected the court to either support or invalidate the proposed measures . Instead, based on the problem setting in section 2, we try to delineate the space for legitimate judicial scrutiny of crisis measures, by delimiting the discretionary space for the government . It was held that the legitimacy of courts to sanction government behaviour depends on the public’s support of concrete government action . This means that the public’s expectations of how the government should act, also determine to which point courts find legitimacy to scrutinize government action . Therefore, the purpose of the vignettes is to reveal if, and to what extent, the public expects that safety measures are balanced against other interests .

We analyzed a number of interrelated indicators. The first and most direct test is to assess citizen self-reported *support* for the policy, a variable that directly taps attitudes towards citizens’ agreement with a certain policy measure. However, to triangulate findings, it is also useful to examine a number of related constructs. We therefore include *trust in government* as a second variable. This widely-used, multi-item measure captures citizens’ beliefs that the government is able to deal with the crisis without violating their interests.<sup>49</sup> Previous contributions have shown that trust in government and related variables, such as confidence in government, are consistent predictors of levels of policy support and adherence to government policies, which further supports the variable’s relevance in our context.<sup>50</sup> Third, we also take into account the perceived effectiveness of the measures proposed in addressing the COVID-19 crisis . We reason that the self-reported effectiveness of the government’s COVID-19 measures provides a construct related to but distinct from support for the policy .<sup>51</sup> Effectiveness in combating the crisis does not necessarily take into account aspects of distributive or procedural fairness and is less likely to encompass affective components of support . Together, support, trust in government, and perceived effectiveness will provide a comprehensive test of the degree to which governmental actions in specific policy areas conform to the expectations of citizens.

The vignettes, depicting plausible scenarios for the exit strategy to gradually relax the crisis measures that were in order from 1 July 2020, are the main independent variable of interest. They vary in the type of information that support(s) the exit measure. We include three types of advisory information, and these were given to three distinct groups of participants (i.e., the type of information is a between-factor in the experimental design). The first group of participants received only the advice of the *health experts* (World Health Organization, GEES, and virologists). Vignettes, with this type of expert advice, served as the reference category. For the second group, this advice was replaced with basic information regarding the *social needs* of specific economic sectors or those of the broader public. The third group received *social needs information combined with health expert information*, thereby nudging the respondents to balance both.

## Methods

Three different vignettes were developed. Each contained an exit measure that was fictional but closely linked with planned schemes. These vignettes were shown to all survey participants (i.e., the different measures were a within factor in the experimental design).<sup>52</sup>

The first vignette described demonstrations in the open air, impacting the freedom of assembly and expression. Experts’ recommendation was to limit large-scale outdoor gatherings to 200 persons. Social needs information referred to social organizations’ requests for exceptions to enable peaceful expressions of opinion. The proposed exit measure of the vignette was formulated as a balance between both advisory councils; it was somewhat looser than the expert advice, allowing for demonstration in open-air conditional to a limit of 400 persons, a static course, and social distancing.

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Awareness’ (2021) 44 West European Politics 690, 694.

<sup>49</sup>Stephan Grimmekhuijsen and Eva Knies, ‘Validating a Scale for Citizen Trust in Government Organizations’ (2017) 83 International Review of Administrative Sciences 583.

<sup>50</sup>Joseph GL Lee and others, ‘Raising the Legal Age of Tobacco Sales: Policy Support and Trust in Government, 2014–2015, US’ (2016) 51 American journal of preventive medicine 910; Alvaro Forteza and Cecilia Noboa, ‘Perceptions of Institutional Quality and Justification of Tax Evasion’ (2019) 30 Constitutional Political Economy 367.

<sup>51</sup>Robert A Huber, Michael L Wicki and Thomas Bernauer, ‘Public Support for Environmental Policy Depends on Beliefs Concerning Effectiveness, Intrusiveness, and Fairness’ (2019) Environmental Politics.

<sup>52</sup>The exact wording of the vignettes can be obtained from the authors.

The second vignette concerned the wearing of facemasks, affecting the right to personal integrity. Information on expert advice referred to the WHO recommendations to wear face masks in specific situations and places, as well as to the GEES advice to wear them in crowded places and to virologists' insistence on making this mandatory in shops. Information regarding social needs refers to the prevailing ambiguity: it pointed out that many people spontaneously wear face masks, but that it can cause discomfort to people who have to spend a long time in public places. The proposed measure entailed the mandatory wearing of face masks in public places. In this case, the proposed measure of the vignette was stricter than the experts' advice, but not unrealistic: only a month later, the governor of the Province of Antwerp would introduce a general duty to wear face masks in public and publicly available places.

The third vignette described restrictions on cultural events that affected the right to cultural development and the freedom of enterprise. The GEES expert commission recommended to allow concerts with up to 100 seated attendees, and conditional on social distancing. It was also pointed out that, in the case of singing, social distancing should be extended from 1,5 to 5 m. Social needs information made reference to the requisites of the music sector (including technicians, organizers and caterers) and the public's longing to enjoy cultural activities. The proposed vignette measure was again somewhat looser than the experts' advice, allowing the organization of concerts for 200 persons indoors and 400 persons outdoors, conditional on the public being seated, and everyone's respect of 1,5 m social distancing.

The vignettes were embedded in the survey and presented in random order. The description of each vignette was followed by a number of questions from which the dependent variables were derived. The first dependent variable, *public support*, reflects the extent to which respondents agree with the proposed measure. The second dependent variable, *perceived effectiveness*, assesses agreement with the statement: "I believe the measure to be effective to confine the spread of the COVID-19 virus." For the third dependent variable, *trust in government*, we used a validated scale comprising three questions: "I believe the measure has been developed in a professional way", "I believe the government tried its best to develop a good measure" and "I believe that, with this measure, the government addresses the interests of the entire population."<sup>53</sup> All statements were rated on a 7-point Likert scale ranging from "completely disagree" to "completely agree." Because all three dependent variables are – in all likelihood – highly dependent on an individual's dispositional trust level, we control for this by assessing each individual's *general trust level* with a widely used single-item measure: "Do you believe that, in general, other people can be trusted or that you can never be too careful when dealing with others?" Thus, in the analysis, we test how the type of information affects individuals' responses to a measure above and beyond their own dispositional level of trust.

We also add *covid-related stress* as a potential moderator because, in general, stress levels are bound to be higher during crises. It is assessed with three items scored on a 7-point scale: "How dangerous do you think the Coronavirus is to the population at this moment?", "I worry a lot about the current Corona situation, also when I am busy with other things", and "I find the current Corona situation very stressful." Intuitively, we would expect that increased stress would render people more self-centred, focusing on their own safety and disregarding other information, which would lead them to overvalue health experts' advice. However, there is increasing evidence that stress can also stimulate people's concern for others and, accordingly, increase their prosocial behaviour,<sup>54</sup> in which case respondents with high Covid-related stress might be more inclined to support measures that also emphasize the social needs of others and/or balance different types of information that affect the self as well as others.

Finally, the survey contained demographic queries, included in our analyses as control variables, as they may independently affect how people support and perceive various measures. While random assignment should prevent endogeneity affecting variables capturing our experimental conditions, neglecting to add control variables may still result in endogenous results for our perceptual moderators of interest, i.e., covid-related stress and generalized trust. We, therefore, include a number of personal characteristics as controls: age, gender, level of education, news interest,<sup>55</sup> and household composition. As the Covid-19 crisis was still

<sup>53</sup>Grimmelikhuijsen and Knies (n 49).

<sup>54</sup>Shelley E Taylor and others, 'Biobehavioral Responses to Stress in Females: Tend-and-Befriend, Not Fight-or-Flight.' (2000) 107 Psychological review 411; L Tomova and others, 'Acute Stress Alters Neural Patterns of Value Representation for Others' (2020) 209 NeuroImage 116497; L Tomova and others, 'Is Stress Affecting Our Ability to Tune into Others? Evidence for Gender Differences in the Effects of Stress on Self-Other Distinction' (2014) 43 Psychoneuroendocrinology 95.

<sup>55</sup>Response categories for news interest varied from daily to less than once per week. Because the responses were strongly

evolving rapidly, we took into account the time of response as a potential source of model misspecification. As the bulk of responses were concentrated on the first two days of the survey (30 June - 2 July) and the first days after the reminder (7 July - 9 July) we generate a dummy variable *day of response*.

The survey was distributed through the University of XX's '*Burgerpanel*' (Citizen panel) in the period 30 June-18 July using Qualtrics.<sup>56</sup> The survey targeted a respondent group of 2000 citizens, resulting in a response of 1059 (52,95%), of whom 980 respondents completed the survey, and 79 respondents submitted an incomplete survey. Item non-response from such incomplete submissions slightly reduced the number of usable responses, with total usable observations for our final analyses ranging from 955 to 975.

The Burgerpanel uses self-selection as its primary recruitment method, with interested citizens being able to sign up to the panel, after which they receive invitations to participate in surveys several times per year. Thus, the Burgerpanel recruits volunteers who are typically engaged citizens interested in socio-political issues and may therefore not be unbiased. Moreover, once a survey invitation is sent, invitees have the choice to self-select into the survey, which may skew responses towards citizens with interest in the subject of the survey. Nevertheless, there were sufficient observations in all categories for education, age, gender, household composition, and political interest to control for these factors appropriately.<sup>57</sup> The survey data also showed reasonable variation across the employment sector, with respondents engaged in education, politics, and administration, legal and security issues, social and (bio)medical care, arts & entertainment, media, catering, and other occupations. Combined with the random assignment process generating exogenous intervention variables, the data obtained from the Burgerpanel allows for a valid examination of our hypotheses. Demographic information on the age and gender distribution of the population, along with education level, household composition, and political interest, can be found in Table 1.

**Table 1: descriptive statistics and correlation table**

Variable	Obs.	Mean	Std. dev.	Min.	Max.	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)	(17)	(18)	
effectiveness demonstrations (1)	984	2,357	1,799	0	6	1,000																		
effectiveness masks (2)	976	4,292	1,604	0	6	0,006	1,000																	
effectiveness concerts (3)	966	2,883	1,641	0	6	0,404	0,174	1,000																
support demonstrations (4)	984	2,633	1,903	0	6	0,605	0,027	0,408	1,000															
support masks (5)	976	3,997	1,856	0	6	-0,029	0,711	0,090	0,010	1,000														
support concerts (6)	966	3,490	1,629	0	6	0,301	0,129	0,686	0,377	0,110	1,000													
trust in government demonstrations (7)	982	0,000	0,958	-1,844	1,989	0,646	0,091	0,464	0,666	0,058	0,392	1,000												
trust in government masks (8)	976	0,000	0,965	-2,701	1,341	0,096	0,633	0,253	0,128	0,626	0,244	0,319	1,000											
trust in government concerts (9)	965	0,000	0,969	-2,331	1,984	0,314	0,222	0,618	0,337	0,174	0,628	0,565	0,482	1,000										
Covid-related stress (10)	996	0,000	0,887	-2,309	2,219	-0,023	0,108	0,010	-0,073	0,127	-0,006	-0,078	-0,023	-0,021	1,000									
Generalized trust (11)	1002	3,420	1,547	0	6	0,136	0,033	0,161	0,182	-0,009	0,145	0,263	0,146	0,219	-0,221	1,000								
Age (12)	1007	4,136	1,508	1	7	0,008	0,002	-0,017	-0,002	0,012	-0,046	-0,060	-0,056	-0,085	0,097	-0,054	1,000							
Gender (1=female) (13)	1006	0,312	0,464	0	1	-0,083	0,033	-0,019	-0,067	0,031	0,009	-0,038	-0,013	-0,017	0,078	0,044	-0,192	1,000						
Education (14)	1007	1,645	0,594	0	2	-0,044	-0,010	0,045	0,046	-0,019	0,093	0,073	0,089	0,093	-0,102	0,172	-0,132	0,117	1,000					
Time of response (15)	1059	0,223	0,416	0	1	-0,021	0,079	0,025	-0,051	0,126	0,010	-0,032	0,117	0,025	0,015	0,016	-0,042	0,063	-0,004	1,000				
household composition (16)	1005	1,569	1,036	0	3	0,019	0,003	0,041	-0,018	-0,001	0,039	-0,032	-0,024	-0,006	0,039	0,022	0,117	-0,066	-0,008	-0,051	1,000			
Interest in news (17)	1006	0,848	0,359	0	1	0,068	0,075	0,051	0,056	0,053	0,034	0,037	-0,006	-0,014	0,037	0,027	0,257	-0,120	-0,043	-0,032	0,060	1,000		
Interest in politics (18)	1004	2,444	0,948	0	4	0,061	0,024	0,026	0,033	-0,016	-0,001	0,055	0,025	0,001	-0,006	0,068	0,063	-0,196	0,018	-0,034	-0,006	0,309	1,000	

## Results

Table 1 shows the descriptive values and correlation coefficients of all variables of interests used in subsequent analyses. To assess the effect of the advisory Council (or the type of information) on the public response (support, perceived effectiveness, and trust in government) to our three fictitious measures, we first conduct regression analyses on panel data, meaning that we analyze the total number of responses (N = 2926) clustered over 984 individuals. We entered the predictors (health experts, social information, or the combination of both) as fixed effects in the regression model to control for unobserved heterogeneity across individuals, as

right-skewed towards the daily category, the choice was made to recode the variable into daily versus less than daily.

<sup>56</sup>See also: <https://www.ua-burgerpanel.be/wat/>

<sup>57</sup>But see fn 55.

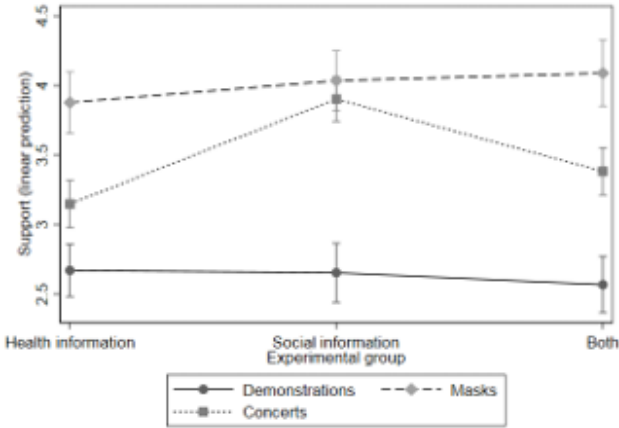
a Hausman test indicated that the independent variables are not exogenous. This indicates that their effect on public response may be influenced by other factors in the model that may not be randomly distributed among individual's responses to the different vignettes. To control for the possibility that the response level may vary significantly between the three vignettes, we add them as dummies in the model, with demonstrations being the reference category. The regression coefficients B, along with standard errors and significance levels, are summarized in Table 2.

A first inference we can make from Table 2 is that the concerts and masks scenarios exert a significant main effect in the model and that they elicited significantly more public support, perceived effectiveness, and trust in government relative to the demonstrations (models 1, 3, and 5). From the B coefficients and Figure 2, it is furthermore apparent that the facemasks consistently elicited more response than the concert measure, which is surprising considering that this fictitious measure was more stringent than the concomitant expert advice, while the concerts and demonstration measures were less so.

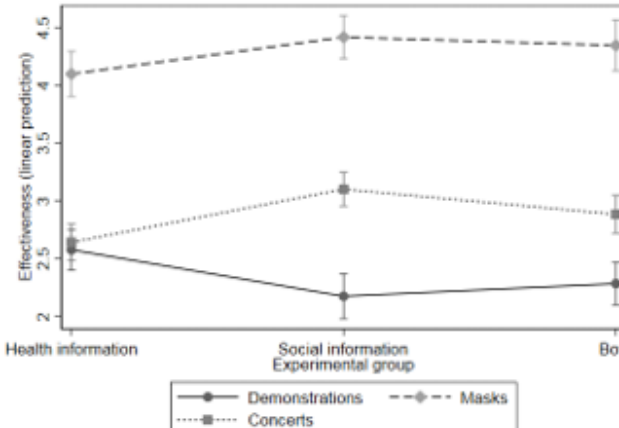
Second, when examining the main effect of the advisory council, we see that substituting health experts' advice with social information significantly increases public support (model 1) and trust in government (model 5, model 3). Giving social information (by itself) also influences the perceived effectiveness, but in opposite directions for the masks and concerts on the one hand, and demonstrations on the other hand: again, we see an increase in the perceived effectiveness of the masks (model 4) and the concert measures (model 4), but this time a significant decrease for the perceived effectiveness of the demonstrations measure (the reference category in model 4). Moreover, the combination of expert advice and social information shows the same trend with respect to perceived effectiveness, exerting a positive influence on the masks- and concerts measures, yet a negative influence on the demonstrations measure (model 4). Unlike expected, we observe no effect of combining health experts' advice and social information on either public support or trust in government (models 1 and 5). These results are graphically illustrated in Figure 2.

**Figure 2.** The effect of the advisory Council (expert advice, social information, or both) on public response to three fictitious vignettes. A. Public support; B. Perceived effectiveness; C. Trust in government.

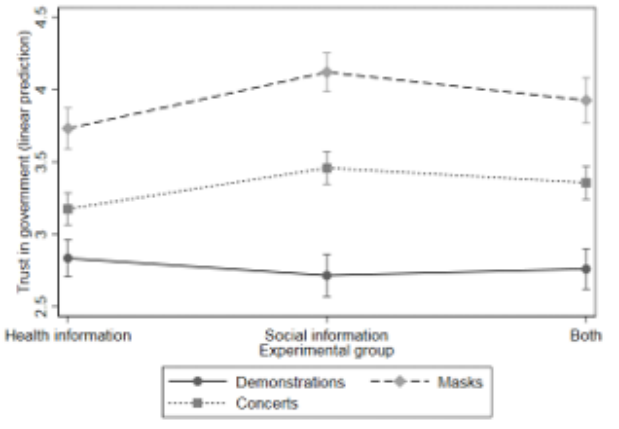
**A. Public Support**



**B. Perceived effectiveness**



**C. Trust in government**



**Table 2: Results of a regression analysis with fixed effects. Reference categories are Health Experts' advice and Demonstrations**

	Public Support B (robust SE)		Perceived Effectiveness B (robust SE)		Trust in government B (robust SE)	
	Model 1	Model 2	Model 3	Model 4	Model 5	
Social information	0.298** (0.09)	-0.017 (0.16)	0.135 (0.08)	-0.401** (0.15)	0.192** (0.06)	-0.119 (0.11)
All information	0.104 (0.09)	-0.103 (0.16)	0.056 (0.08)	-0.292* (0.15)	0.097 (0.06)	-0.075 (0.11)
Masks	1.353*** (0.09)	1.206*** (0.16)	1.929*** (0.08)	1.522*** (0.14)	1.152*** (0.06)	0.896*** (0.10)
Concerts	0.847*** (0.06)	0.477*** (0.13)	0.522*** (0.06)	0.066 (0.12)	0.553*** (0.05)	0.340*** (0.09)
Social information*Masks		0.174 (0.23)		0.721*** (0.21)		0.508*** (0.15)
Social information*Concerts		0.771*** (0.20)		0.861*** (0.19)		0.403** (0.14)
All information*Masks		0.314 (0.24)		0.540* (0.22)		0.269† (0.16)
All information*Concerts		0.338 (0.21)		0.535** (0.19)		0.256† (0.14)
Constant	2.504*** (0.07)	2.670*** (0.10)	2.296*** (0.06)	2.578*** (0.09)	2.681*** (0.05)	2.835*** (0.06)
Observations	2926	2926	2926	2926	2925	2925
Groups	984	984	984	984	984	984
F-statistic	77.04313	42.74831	168.5127	88.62441	111.6022	58.0347
Within R <sup>2</sup>	.1539068	.160705	.3069234	.3148302	.2226306	.2280507
Between R <sup>2</sup>	.0073542	.006661	.0057081	.0120726	.0016843	.0018298
Overall R <sup>2</sup>	.095417	.0990441	.1926492	.1990534	.0966986	.0984466

† p<0.10, \* p<0.05, \*\* p<0.01, \*\*\* p<0.001

To test if these findings hold when we take into account participants' base-line level of generalized trust, covid-related stress, and demographic control variables, we next analyze each vignette separately. We conduct Ordered Logistic regressions on the scalar variables (*public support* and *perceived effectiveness*) and report odds ratios and robust standard errors in Table 3.<sup>58</sup> Because the variable *trust in government* consists of a continuous variable (the Z-score computed on the basis of multiple items),<sup>59</sup> we analyze this model with OLS regressions. Table 3A reports on public support. These results corroborate the results of the fixed effect analyses, with a main positive effect of adding (for the masks measure) or substituting social information (for masks and concerts). In addition, we see that generalized trust significantly boosts support for demonstrations (model 2) and concerts (model 8), but not for masks. Support for masks, on the other hand, appears to be enhanced by covid-related stress (model 5), and even more so when social information is added or substituted into the descriptive vignette (model 6). This finding is especially relevant to our hypothesis that the general public does not expect the government to rubber-stamp health measures: even during the heat of a crisis that threatens personal well-being, participants in our survey were more likely to endorse a health measure when it takes into consideration the need of others.

Table 3B reports on perceived effectiveness. The pattern for masks and concerts is identical to that of public support, including the main and moderating effects of generalized trust and Covid-related stress, but with one important difference: substituting expert advice with only social information significantly reduces perceived effectiveness for the demonstrations measure (model 1, note that the odds ratios are smaller than

<sup>58</sup>While OLS estimation with robust standard errors yielded the same results, OLS does not take into account the ordinal nature of the dependent. We therefore present Ordered logistic results here, with OLS results being available upon request.

<sup>59</sup>Using exploratory factor analyses with oblique promax(3) rotation (as factors are likely to be correlated). Factor loadings were used to generate regression-based indices.



1 for the effect of social information as well as for all information, indicating a negative effect). Thus, while our participants supported the demonstration-measure regardless of the type of information they received, they tend to perceive the measure to be more effective when it is purely based on expert advice.

Table 3C reports on trust in government. The results corroborate the fixed-effect analysis showing that substituting expert advice with social information is superior at eliciting trust for the masks (model 4) and to a slightly lesser extent, the concert measures (model 9). We see again that generalized trust boosts trust in government when confronted with the demonstrations and concerts measures (models 2 and 8), while the Covid-related stress is more effective at eliciting trust in government with the mask measures (model 5), especially when the measure is based on social or all information (model 6).

These results also take into account a number of other control variables whose effects are not reported in Table 3. Some of these effects, however, were significant and are noteworthy. In particular for the masks measure, which was an acutely debated topic during the time the survey was conducted, we observe that later responses increased support, effectiveness, and trust in government (see the variable “*day of response*” in Tables 3A-C). This is a surprising and interesting result in and of itself, as it suggests that the very announcement of an obligation to wear masks in public spaces on 9 July (during the time the survey was open) had a significant and sizeable positive effect on citizen attitudes towards such an obligation.<sup>60</sup> Masks are furthermore found to be more effective by respondents who indicated an interest in current events (reading the news at least daily, see Table 3B, model 4). Finally, women (coded 1 in the regression analysis) perceive the demonstrations measure to be less effective, while household members who have children living with them find it more effective.

**Table 3. Results of regression analyses testing the influence of the advisory council on public response. Reference category: health experts’ advice**

A. Ordered Logistic regressions on Public Support

	Demonstrations Odds Ratio (robust SE)			Masks Odds Ratio (robust SE)			Concerts Odds Ratio (robust SE)		
	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8	Model 9
Social information	1.056 (0.15)	1.105 (0.16)	1.109 (0.16)	1.454** (0.20)	1.429** (0.20)	1.481** (0.21)	2.037*** (0.29)	2.076*** (0.29)	2.094*** (0.30)
All information	0.949 (0.13)	0.958 (0.13)	0.981 (0.14)	1.583** (0.23)	1.550** (0.23)	1.584** (0.23)	1.205 (0.17)	1.209 (0.17)	1.216 (0.17)
Generalized trust		1.254*** (0.05)	1.260*** (0.05)		0.979 (0.04)	0.973 (0.04)		1.188*** (0.05)	1.189*** (0.05)
Covid-related stress		0.930 (0.07)	0.893 (0.10)		1.317*** (0.10)	0.900 (0.12)		1.092 (0.08)	1.043 (0.14)
Social information*Covid-related stress			0.917 (0.16)			1.611** (0.28)			1.158 (0.20)
All information*Covid-related stress			1.248 (0.21)			2.018*** (0.37)			0.978 (0.17)
Day of response	0.834 (0.11)	0.820 (0.11)	0.825 (0.11)	1.724*** (0.24)	1.716*** (0.23)	1.706*** (0.23)	1.014 (0.15)	0.997 (0.14)	0.995 (0.14)
<i>Control variables</i>	Included	Included	Included	Included	Included	Included	Included	Included	Included
Observations	975	973	973	967	965	965	958	956	956
$\chi^2$ statistic	14.37184	45.48209	47.77636	32.10171	50.62036	68.3167	46.4305	68.98613	68.84853
McFadden’s pseudo-R <sup>2</sup>	.0037031	.0142148	.0152492	.0089507	.0143512	.0197064	.0130006	.0185248	.0189144

† p<0.10, \* p<0.05, \*\* p<0.01, \*\*\* p<0.001

<sup>60</sup>‘Vanaf Zaterdag Mondmaskers Verplicht in Alle Winkels, Biosco...’ *Het Nieuwsblad* (9 July 2020) <[https://www.nieuwsblad.be/cnt/dmf20200709\\_97177091](https://www.nieuwsblad.be/cnt/dmf20200709_97177091)> accessed 15 February 2021.

B. Ordered Logistic regressions on Perceived effectiveness

	Demonstrations Odds Ratio (robust SE)			Masks Odds Ratio (robust SE)			Concerts Odds Ratio (robust SE)		
	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8	Model 9
Social information	0.704*	0.725*	0.727*	1.626***	1.615***	1.668***	1.669***	1.749***	1.748***
	(0.10)	(0.11)	(0.11)	(0.22)	(0.22)	(0.23)	(0.22)	(0.24)	(0.24)
All information	0.886	0.901	0.910	1.613**	1.602**	1.643**	1.274†	1.305†	1.311†
	(0.12)	(0.12)	(0.12)	(0.24)	(0.24)	(0.25)	(0.18)	(0.19)	(0.19)
Generalized trust		1.203***	1.206***		1.021	1.016		1.222***	1.223***
		(0.05)	(0.05)		(0.05)	(0.05)		(0.05)	(0.05)
Covid-related stress		1.027	0.989		1.341***	1.010		1.118	1.215
		(0.07)	(0.11)		(0.10)	(0.13)		(0.08)	(0.16)
Social information*Covid-related stress			0.991			1.462*			0.936
			(0.16)			(0.24)			(0.16)
All information*Covid-related stress			1.136			1.681**			0.837
			(0.18)			(0.33)			(0.15)
Day of response	0.916	0.900	0.903	1.445*	1.443*	1.445*	1.146	1.128	1.126
	(0.13)	(0.13)	(0.13)	(0.21)	(0.21)	(0.21)	(0.16)	(0.16)	(0.16)
<i>Control variables</i>	Included	Included	Included	Included	Included	Included	Included	Included	Included
Observations	975	973	973	967	965	965	958	956	956
χ <sup>2</sup> statistic	23.56297	41.54304	42.51884	34.58328	50.33925	57.20251	27.17509	50.49692	51.29666
McFadden's pseudo-R <sup>2</sup>	.0068779	.0130656	.0133115	.0104351	.016097	.019243	.007826	.0152962	.0156279

† p<0.10, \* p<0.05, \*\* p<0.01, \*\*\* p<0.001

C. Ordinary Least Squares (OLS) regressions on Trust in Government

	Demonstrations B (robust SE)			Masks B (robust SE)			Concerts B (robust SE)		
	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8	Model 9
Social information	-0.029	-0.001	0.000	0.276***	0.281***	0.287***	0.131†	0.151*	0.152*
	(0.08)	(0.07)	(0.07)	(0.07)	(0.07)	(0.07)	(0.07)	(0.07)	(0.07)
All information	-0.021	-0.012	-0.008	0.151†	0.170*	0.171*	0.023	0.038	0.044
	(0.07)	(0.07)	(0.07)	(0.08)	(0.08)	(0.08)	(0.08)	(0.08)	(0.08)
Generalized trust		0.154***	0.155***		0.086***	0.082***		0.138***	0.138***
		(0.02)	(0.02)		(0.02)	(0.02)		(0.02)	(0.02)
Covid-related stress		-0.005	-0.003		0.025	-0.128†		0.053	0.094
		(0.04)	(0.06)		(0.04)	(0.07)		(0.04)	(0.07)
Social information*Covid-related stress			-0.062			0.232*			0.003
			(0.09)			(0.09)			(0.09)
All information*Covid-related stress			0.065			0.229*			-0.125
			(0.09)			(0.10)			(0.10)
Day of response	-0.088	-0.103	-0.100	0.251***	0.244***	0.244***	0.050	0.042	0.042
	(0.07)	(0.07)	(0.07)	(0.07)	(0.07)	(0.07)	(0.08)	(0.07)	(0.07)
<i>Control variables</i>	Included	Included	Included	Included	Included	Included	Included	Included	Included
Constant	0.043	-0.364	-0.356	-0.176	-0.414†	-0.404†	0.086	-0.266	-0.254
	(0.22)	(0.22)	(0.22)	(0.21)	(0.23)	(0.23)	(0.22)	(0.22)	(0.22)
Observations	973	971	971	967	965	965	957	955	955
F-statistic	1.989711	5.610285	5.054363	3.239329	3.601863	3.570228	1.770597	4.416382	4.049533
R <sup>2</sup>	.021693	.0810578	.0833118	.0404605	.0573463	.0673874	.0223578	.0666078	.06958
Adjusted R <sup>2</sup>	.0094642	.0676004	.0679376	.0283908	.0434546	.0516471	.0099302	.0527062	.0537093

† p<0.10, \* p<0.05, \*\* p<0.01, \*\*\* p<0.001

## Discussion

The vignette experiment was intended to test the hypothesis that the public expects the government to balance safety against fundamental rights and social needs in a second phase of the crisis, and that covid-related measures would therefore receive more endorsement than those based solely on health expert advice. Given the confines of the current population sample, some particular conclusions can be drawn from the dataset.

First, it appears that the three different measures that were presented – limiting participation in demonstrations, restrictions on concert attendance, and obligatory mask protection – elicit substantially different responses. Especially for the demonstrations measure, public support and trust in government were significantly lower than for the other measures, which may possibly reflect that respondents in our sample were less interested in active involvement in demonstrations.

Second, despite the substantial differences between the measures, the data corroborate the importance of providing social information to elicit public support for policy measures (Figure 1a and Table 2, model 1) and enhance trust in government (Figure 1c and Table 2, model 5 and 3 respectively).

Third, the extent to which people rely on social information to support measures and foster trust in government does not necessarily translate into perceived effectiveness. This suggests that the public accepts that measures lose some of their effectiveness, if necessary to accommodate social needs. We furthermore deduce from Figure 1b and Table 2 (model 4), that social information has a divergent effect on the perceived effectiveness of masks and concerts on the one hand, and demonstrations on the other. For the latter, effectiveness was perceived to be less when social information was included, which adds to our suspicion that the surveyed sample did not attach personal interest in demonstrations. (Figure 1b and Table 3, model 1).

Finally, an unexpected finding is that the combination of both social information and health experts' advice is no more effective than social information by itself. At first sight, this seems to contradict the dictum that failing to give balanced information about governmental policy would have negative connotations. Then again, it may indicate that the general public implicitly assumes that the measures are backed up by expert advice.

To sum up, in two out of the three vignettes, providing social or balanced information appears to elicit a more favourable public response than expert advice alone. This supports the hypothesis that the government is not expected to merely rubber-stamp health expert advice, but rather to balance safety against fundamental rights and social needs the extent of which may vary depending on the specific measure, or rather the specific right or interest at stake. Simultaneously, our results also show that deviating substantially from public health advice without providing context on the socio-economic reasons for such a deviation may reduce trust, support and perceived effectiveness in the second stage of a pandemic, as was visible in particular in our concerts experiment.

Extending our theoretical argument that courts should take into account public preferences in their evolving review of governmental crisis measures, these results suggest that the second stage of the Covid-19 crisis provided some leeway for courts to strike a more nuanced balance between public health concerns and socio-economic needs. Thus, it appears that the Belgian Council of State had more space for scrutiny than it was prepared to use. These findings have implications for stages of the Covid-19 crisis in which infections are declining considerably, suggesting both a basis and a need for courts to scrutinize the appropriateness of governmental decision-making based on principles that safeguard the socio-economic positions of citizens. These findings are of interest to future macro-level crises as well, suggesting that trust in and support for measures may require a different stance from governments and courts once the dust from the initial crisis-response stages settles.

At the same time, these results require further scrutiny through additional research. Our study was limited to three vignette experiments, with the demonstrations experiment showing a different pattern than the two other experiments. We speculate this is likely due to the strong normative aspects concerned with demonstrations during the pandemic. Nevertheless, future research, for instance using experiments that incorporate other subject matters, countries and recruitment methods, remains necessary to verify the evidence presented here.

## Conclusion

The research question for this paper was what room there is for judicial supervision of health crisis measures. The theoretical framework argued that judicial deference is based on legitimacy and expertise concerns. Trust literature and procedural rationality review were invoked to overcome these concerns, concluding for a minimum threshold for judicial supervision. Both strands of scholarship connect where they invoke standards for 'fair' or 'rational' decision-making. In the interplay between science and politics, the question is what these standards involve exactly.

The normative conclusion is that courts should distinguish between two phases of the crisis. In the initial stage, fear is a high driver for government support based on expertise, which justifies a deferential stance towards safety measures that drastically limit fundamental rights. Procedural rationality review implies that courts examine whether government measures were based on (medical and virologist) expert advice and indulge measures that are stricter than experts recommend if this is motivated by safety concerns. This changes, however, over time. In the next stage, people expect the government to take expert-informed decisions, but at the same time require that the government takes into account societal needs. The Belgian case confirmed that the Council of State indeed shifted the intensity of its scrutiny from one phase to the other. The experimental vignette confirmed that, for two of the three measures, there is more support if the government is believed to have taken social needs into account.

This means that courts can no longer be satisfied if they establish that crisis measures were based on expert advice. If they shy away from full substantive fundamental rights review, procedural rationality review demands that they at least examine whether the decision was based on an informed balance of rights and interests, for example, by checking whether stakeholders participated in advising expert commissions or were consulted separately. In Belgium, the Council of State took this position in theory, but showed more reluctance in practice. The results of a vignette study presented in this paper are consistent with the view that the Council would have remained within legitimacy bounds were it could practice a more intense procedural rationality review.