

# Lex-Atlas: Covid-19 Country Report: Netherlands

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*No constitutional state of emergency or exception was declared in the Netherlands (more than 17.5 million inhabitants) during the Covid-19 pandemic. Instead, the Dutch State initially deployed the framework of the [Public Health Act 2008](#) (Wet publieke gezondheid), the [Safety Regions Act 2010](#) (Wet veiligheidsregio's), and the [Municipalities Act 1992](#) (Gemeentewet). In case of a supra-local crisis, the chair of the safety region is assigned supreme command, which includes the takeover of the mayor's emergency powers. The Minister of Public Health, Welfare and Sports may, in turn, instruct the chairs to issue public health measures, thereby ensuring that national policy is transformed in legal measures which apply nationally. The Minister did, in fact, heavily use this authority, thus ensuring a centralized legal approach to the pandemic. However, the lack of involvement of Parliament in introducing these legal measures, and the fact that these measures strongly impacted several fundamental rights, became increasingly controversial in the summer and fall of 2020. As a result, the [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#) was adopted (after heated debate and several revisions) and entered into force on 1 December 2020. This Act, and several amendments to it, has since become the legal basis of most, but not all, Covid-19 measures, thereby strengthening their democratic legitimacy and providing a clearer framework for assessing limitations on fundamental rights. Nonetheless, many Covid-19 measures, including a curfew and the closure of premises, have remained highly controversial.*

## **I. Constitutional Framework**

1. The Netherlands is a small parliamentary democracy, with some 17 million inhabitants. It is highly affluent and densely populated. It has a ceremonial monarch as its Head of State.
2. Regarding constitutional norms, two national documents stand out. On the one hand, there is the [Charter of the Kingdom of the Netherlands](#) (1954) and, on the other hand, there is the [Constitution of the Kingdom of the Netherlands](#) (the first version dating back to 1814, with its last major revision in 1983). Of the two, the Charter is the less known. It regulates the relationship between the countries forming the Kingdom, namely the Netherlands, Aruba, Curaçao, and Saint Maarten (the latter three being islands situated in the Caribbean), stating that they are equal partners.
3. The Dutch Parliament, which consists of two Chambers, is in The Hague and is called the States General. The so-called Second Chamber (*Tweede Kamer*), or lower house, is the more political of the two, and consists of 150 members, who are elected once every four years through a system of proportional representation – that is, if there are no new elections because of Government collapse. The fact that the Netherlands is a parliamentary democracy means, among other things, that the existence of the Government, which is formed after parliamentary elections are held, is in principle dependent upon a majority (i.e. the political balance of

power), especially in the lower house. A minority government is however possible, and from October 2010 and April 2012 this was the case.

4. The First Chamber (*Eerste Kamer*), or upper house, also informally called the Senate, consists of 75 members who are elected every four years by the members of the twelve provincial councils. Its election, however, does not coincide with elections for the lower house, but takes place three months after provincial elections. The position of Senator is a part-time one of—formally at least— one day a week, with no parliamentary assistance. Although it has more or less the same powers of governmental oversight as the lower house, (see Part III on this), the upper house has no right of legislative initiative or even amendment, but it nevertheless must approve legislation accepted by the lower house. It can thus veto legislation, just as the lower house.
5. The Second Chamber and the government each have their own place in the constitutional make up of the Netherlands, but there are also relations between the two. The King and the ministers together form the government. Members of the government are appointed by the King after proposals to that end are made by the political parties participating in the government. The parliament controls the government. Ministers are accountable to parliament for their policies. During the formation of the government or cabinet (the cabinet formation), it is customary for agreements to be made about the policy to be pursued by the cabinet. Such agreements are laid down in a coalition agreement. The Second Chamber House also has a supervisory task. Severe criticism of a minister or of the entire cabinet can lead to disapproval: a cabinet minister, or the entire government, must resign if the majority of parliament no longer has ‘confidence’. The ‘confidence rule’ is based on a solid constitutional convention, which has now become one of the most important rules for the functioning of Dutch parliamentary democracy. (See also paragraph III on parliamentary scrutiny of government).
6. The Netherlands is what one might call a decentralized unitary State, made up of mainly provinces and municipalities (next to the water authorities, the so-called Caribbean public bodies, and other public bodies). Article 124[1] of the [Dutch Constitution](#) stipulates that, for provinces and municipalities, the power to regulate and manage related matters is left to their governing bodies. This means that the latter have quite some autonomy and that they can regulate on almost all matters within their territory, as long as this does not intervene with higher rules. Nevertheless, the central Government, pursuant to Article 124[2] of the [Dutch Constitution](#), can demand that the municipalities and provinces implement and enforce the rules and regulations arising from national laws. As far as municipalities, who have played an important role in the combat of Covid, are concerned: the elected municipal council is the head of the municipality. The day-to-day management is formed by the college of mayor and aldermen, consisting of aldermen elected by the council and the mayor appointed by the Crown for a six-

year term. The mayor also has special duties, for example, public order and the representation of the municipality.

7. In response to the outbreak of the virus SARS-Cov-2, the Dutch government took several measures to limit the Covid-19 disease caused by this virus. These measures have their basis in laws, orders in council, temporary regulations, policy rules, and emergency ordinances affecting various policy areas, including public order and safety, public administration, and the administration of justice. Although these measures were taken to combat the impact of a health crisis, almost none of them are of an emergency nature.
8. Legislation about public health in the Netherlands has always been a national competence. However, the implementation of these laws and especially the combat of infectious diseases has traditionally been delegated to local, mainly municipal authorities. In recent times, this was reconfirmed through the [Public Health Act 2008](#) (*Wet publieke gezondheid*), which changed significantly following the outbreak of the Covid-19 crisis.
9. Normally, in the event of a disaster or serious fear of one arising, a mayor may on the basis of Article 175 of the [Municipalities Act 1992](#) (*Gemeentewet*), issue all *orders* she deems necessary to maintain public order or to limit danger. The mayor also has an emergency *ordinance* power on the basis of Article 176 of the [Municipalities Act 1992](#), which means that she may issue general binding regulations whereby statutory regulations – not being constitutional rules – may be deviated from.
10. With regards to Covid-19, the situation was different, and it is necessary here to point out that the Dutch territory is divided into so-called safety regions, established by the [Safety Regions Act 2010](#) (*Wet veiligheidsregio's*). A safety region is a joint arrangement whereby tasks and competencies regarding fire services, disaster response, crisis management, and medical assistance have been transferred to the management of the safety region in order to be able to deal with a supra-local disaster or crisis. The board of a safety region consists of the mayors of the municipalities involved and has a chairperson who is popularly known as the 'super-mayor', and who has supreme command pursuant to Article 5 of the [Safety Regions Act 2010](#). The arrangement of the safety region has been utilized during the pandemic.
11. However, the Minister of Health Affairs, based on Article 7 of the [Public Health Act 2008](#), can nevertheless lead the combat against the epidemic and can instruct the chairperson of the safety region as to how this combat should be organized. The

Dutch Minister of Health Affairs has indeed, to a large extent, taken the lead, and has instructed the safety regions to issue 25 rather far-reaching emergency ordinances, dealing with safe distance, mass meetings, the closure of public places, events, etc. This changed after December 2020 (see Part IV).

12. As far as the judiciary is concerned, in the Netherlands a distinction is made between the 'ordinary' judiciary and the courts that fall outside of it. The ordinary judiciary includes the courts referred to in Article 2 of the [Judicial Organization Act](#) (*Wet op de rechterlijke organisatie*): the Supreme Court (Hoge Raad), courts of appeal (Gerechtshoven) and tribunals (rechtbanken). The Dutch judiciary consists of the judges and public prosecutors, the latter forming the Public Prosecution. In addition to the ordinary judiciary, special courts are distinguished. This concerns the administrative courts: the Administrative Jurisdiction Division of the Council of State, the Central Appeals Board, the Trade and Industry Appeals Tribunal and the Council for the Judiciary. The judiciary in the Netherlands can be seen as independent and separate from the other powers.
13. It is important to note that Constitutional law in the Netherlands occupies a different position when compared to many other countries worldwide, where Acts of Parliament are generally subject to judicial constitutional review. However, Article 120 of the [Dutch Constitution](#) holds that the 'constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts'. So although the [Dutch Constitution](#) is the highest national norm, it may not be used to judicially test acts of parliament or treaties.
14. An important official role in scrutinizing legislation in the Netherlands, also about the constitutional aspects, is therefore attributed to the Dutch Council of State (*Raad van State*), as it is, next to being the highest administrative court in the Netherlands, the most important advisor for Government and Parliament regarding new legislation and policy. The Council of State, the members of which are appointed until retirement age, is constitutionally anchored in Article 73-74 of the [Dutch Constitution](#). The Government is obliged to ask the Council for advice on almost all legislative proposals, be they initiated by (a member of) Government or a member of Parliament. To give its advice, the Council pays attention to the policy, legal and legislative quality of a proposal. Furthermore, the Council of State can also provide unsolicited advice to the government and parliament, ie, without a concrete legislative proposal being submitted. The Council of State does not often provide unsolicited advice. Finally, at the request of the government or the Senate and the House of Representatives, it can also provide information about general matters relating to legislation and governance.
15. The response to the pandemic has not changed the basic constitutional structure of the State, although temporary changes have been introduced (see Part III. A).

## II. Applicable Legal Framework

### A. Constitutional and international law

16. During the Covid-19 pandemic, no constitutional state of emergency or exception was declared in the Netherlands. Instead, the Dutch State initially opted for responding to the pandemic under the existing framework of the [Public Health Act 2008](#) (*Wet publieke gezondheid*), the [Safety Regions Act 2010](#) (*Wet veiligheidsregio's*), and the [Municipality Act 1992](#) (*Gemeentewet*).
17. The [Dutch Constitution](#) (*de Grondwet*) provides for a state of exception that allows limited derogation from constitutional law.<sup>1</sup> The [Act on Coordination of States of Exception](#) (*Coördinatiewet Uitzonderingstoestanden*) gives effect to the constitutional state of exception by acknowledging two levels of exceptions: a limited and a general state of exception. These states are applicable depending on the severity of the emergency.
18. During the limited state of exception, derogation from constitutional governmental powers of local governments is allowed.
19. In the general state of exception, derogation from classic fundamental rights such as the right to manifest one's religion and beliefs, the right to publish thoughts and opinions, and the right to association and assembly, is allowed. However, derogation from fundamental rights is limited: e.g. the right to life and the right against torture and slavery can never be subject to derogation.<sup>2</sup>
20. The declaration of the state of exception allows various emergency laws, emergency regulations, and emergency provisions to enter into force. Emergency laws providing for regulations derogating from constitutional law may enter into force in the context of the limited and general state of exception only and are limited in number. Only the [War Act 1996](#) (*Oorlogswet*) and the [Extraordinary Civilian Powers Act 1996](#) (*Wet buitengewone bevoegdheden burgerlijk gezag*) allow such derogations. However, in certain emergency situations, provisions of the [War Act 1996](#) and the [Extraordinary Civilian Powers Act 1996](#) may be called into force on a stand-alone basis without having to declare the state of exception.

<sup>1</sup> [Dutch Constitution](#), Article 103.

<sup>2</sup> [ECHR](#), Article 15, s 2; [ICCPR](#), Article 4, s 1.



At a later stage in the pandemic, for instance, the Government used Article 8 of the [Extraordinary Civilian Powers Act 1996](#) to enforce a curfew (see Part IV).

21. The EU framework impacted the Dutch State's response in various ways.<sup>3</sup> Decisions of the European Commission regarding the flexibilization of State aid rules<sup>4</sup> resulted in the Commission's approval of various Dutch rescue schemes to safeguard the Dutch economy.<sup>5</sup> Various restrictive measures applied in the Netherlands following EU risk-level mapping, accompanying travel restrictions, and quarantine obligations.<sup>6</sup> The European strategy regarding vaccines applies to the Netherlands.<sup>7</sup>
22. The Netherlands did not take measures derogating from its obligations under the [European Convention of Human Rights](#) (ECHR) or any other international convention protecting human rights.
23. The WHO International Health Regulations (IHR) were incorporated into national law through the [Public Health Act 2008](#). The National Institute for Public Health and the Environment ('*Rijksinstituut voor volksgezondheid en milieu*', RIVM) collaborates with the WHO in various ways and acts as a coordinator between the WHO and the Minister of Public Health, Welfare and Sports. The Centre of Infectious Diseases ('*Centrum Infectieziektenbestrijding*') is a part of the RIVM and is responsible for the preparation of the national medical and epidemiological policy, and resorts to the Outbreak Management Team (OMT) for advice from several scientific angles. National regulations prescribing WHO standards in the course of the Covid-19 pandemic include those pertaining to wearing a face mask<sup>8</sup> and keeping a distance of 1.5 meters (see Part IV below).<sup>9</sup>

<sup>3</sup> The impact of EU law on health measures has been limited, due to limited competences and fragmentation. See A de Ruijter, '[EU health law and policy after Covid-19](#)' Tijdschrift voor Gezondheidsrecht 5, 524.

<sup>4</sup> European Commission, '[Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup](#)' (13 March 2020); European Commission, '[Communication from the Commission on a Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak](#)' (20 March 2020).

<sup>5</sup> See, for example, [State Aid SA.62867 \(2021/N\) – The Netherlands - COVID-19: Regulation on the financing of fixed costs for starting SMEs COVID-19. \(C\(2021\) 3756 final\)](#) (20 March 2021); [State Aid SA.62556 \(2021/N\) – The Netherlands - COVID-19: Soft bridge loans with subsidised interest rates. \(C\(2021\) 3192 final\)](#) (30 April 2021).

<sup>6</sup> European Commission, '[A common approach to travel measures in the EU](#)' (last accessed 30 June 2021); [Council Recommendation on a coordinate approach to the restriction of free movement in response to the COVID-19 pandemic \(EU\) \(2020/1475\) \(13 October 2020\)](#); [Council Recommendation on a coordinate approach to the restriction of free movement in response to the COVID-19 pandemic \(EU\) \(2020/1475\) \(13 October 2020\)](#).

<sup>7</sup> European Commission, '[Commission Decision of 18.6.2020 approving the agreement with Member States on procuring Covid-19 vaccines on behalf of the Member States and related procedures \(COM\(2020\) 4192 final\)](#)' (18 June 2020); European Commission, '[Communication from the Commission to the European Parliament and the Council, Preparedness for Covid-19 vaccination strategies and vaccine deployment. \(COM\(2020\) 680 final\)](#)' (15 October 2020).

<sup>8</sup> [Public Health Act 2008](#) (Stb 2008, 460) (9 October 2008), Article 58j, s1; [Regulation on additional obligations regarding face masks](#) (Stcrt 2020, 62032) (19 November 2020).

<sup>9</sup> [Public Health Act 2008](#) (Stb 2008, 460) (9 October 2008), Article 58, ss 1 and 2; [Temporary decree on safe distance](#) (Stb 2020, 475) (13 November 2020).

## B. Statutory provisions

24. No formal public health emergency was declared. The Government acted in accordance with the WHO declaration of 30 January 2020, stating that the Covid-19 virus qualifies as a public health emergency of international concern (PHEIC), thereby issuing temporary recommendations under the IHR (2005).<sup>10</sup>
25. The pre-pandemic [Public Health Act 2008](#), the [Safety Regions Act 2010](#), and the [Municipality Act 1992](#) form the legal heart of the pandemic crisis management structure. Mayors are assigned emergency powers to issue emergency orders and emergency regulations that allow them to intervene in case of threats to the public order and safety.<sup>11</sup> In case of supra-local crises, the chair of the safety region is assigned the supreme command, which includes the takeover of the mayor's emergency powers.<sup>12</sup> In the case of an epidemic, the Minister of Public Health, Welfare and Sports may instruct the chair of the safety region as to how to combat crisis effects.<sup>13</sup>
26. Furthermore, the [Air Traffic Act 1992](#) ('*Wet luchtvaart*') allowed the Minister of Infrastructure and Environment to introduce a temporary and repeatedly prolonged ban on air traffic from March 2020.<sup>14</sup>
27. At first, new emergency rules were provided for by way of emergency decrees declared and executed at a regional level during the period of March to November 2020. These decrees were issued in accordance with instructions, and on the basis of a model decree of the Minister of Public Health, Safety and Sport.<sup>15</sup> It included orders, prohibitions and/or limitations with regards to gatherings and entrance of designated areas and locations, etc.<sup>16</sup> However, ministerial instructions and regional decrees are not subject to parliamentary - nor municipal - control and their (possible) limitation of constitutional rights did not meet constitutional requirements regarding infringements of fundamental rights. Hence, a new law was introduced in December 2020 by means of the [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#) (*Tijdelijke wet maatregelen Covid-19*), replacing the emergency decrees and providing a proper legal basis for limitations of the fundamental rights involved. Contrary to its crisis management character and

<sup>10</sup> Minister of Health, Wellbeing and Sport, '[Letter to Parliament regarding the Covid-19 virus \(1644215-201572-PG\)](#)' (31 January 2020).

<sup>11</sup> [Municipality Act 1992 \(Stb 1993, 31\) \(14 February 1992\)](#), Articles 175 and 176.

<sup>12</sup> [Safety Regions Act 2010 \(Stb 2010, 252\) \(19 June 2008\)](#), Article 5.

<sup>13</sup> [Public Health Act 2008 \(Stb 2008, 460\) \(9 October 2008\)](#), Article 7.

<sup>14</sup> [Decree entailing a temporary ban on civil air traffic airspace in relation to the virus that causes the disease COVID-19](#) (Strct 2020, 16268) (13 March 2020); [Decree entailing the fourth temporary ban on civil air traffic airspace in relation to the virus that causes the disease COVID-19](#) (Strct 2021, 3768) (20 January 2021).

<sup>15</sup> Minister of Public Health, Safety and Sport, [Model Decree](#) (12 June 2020).

<sup>16</sup> [Public Health Act 2008 \(Stb 2008, 460\) \(9 October 2008\)](#), Article 7, s 1, and Article 8, s1.

temporary nature, the [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#) does not qualify as emergency law but as additional regular law.<sup>17</sup> This Act primarily entails a temporary and ancillary crisis management framework in the field of public health by adding a new chapter (Va) to the [Public Health Act 2008](#), while supplementing other legislation and regulations concerning, amongst others, labour conditions, day care and road traffic with temporary Covid-19 provisions as well. The distinction between regular and emergency law is particularly relevant as emergency law provides for more latitude for intervention than regular law.

28. The Dutch legislative procedure does not provide for a fast-track procedure.<sup>18</sup> Nevertheless, the [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#) was proposed on 13 July 2020 and adopted by the Second Chamber on 13 October 2020, i.e. within just three months, which is exceptional.<sup>19</sup> The [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#) was then adopted by the First Chamber on 27 October 2020<sup>20</sup> and entered into force on 1 December 2020.
29. Article VIII, Section 3 of the [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#) determines that several provisions of Covid-19 related legislation<sup>21</sup> require prolongation, such as provisions commanding a safe distance, prohibiting gatherings, closing public places, prohibiting or limiting public events and prescribing hygiene measures. Certain provisions concerning the investigation and sanctioning of breaches of Covid-19 related regulations, the stopping and prohibiting the execution of works and quality requirements of day care must be prolonged as well.<sup>22</sup>

<sup>17</sup> The [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#) primarily entails a temporary and ancillary crisis management framework in the field of public health by adding a new chapter (Va) to the Public Health Act 2008, while supplementing other legislation and regulations concerning, amongst others, labour conditions, day care and road traffic with temporary Covid-19 provisions as well. See J C J Dute, 'The approach of the COVID-19 epidemic: a legal interim report' *Tijdschrift voor Gezondheidsrecht* 477 (2020); S Daniëls, '[The Constitution - Article 103 – State of Exception](#)' in E H M Hirsch Ballin and G Leenknecht (eds), *Artikelsgewijs commentaar op de Grondwet* (webedition 2021).

<sup>18</sup> See [Dutch Constitution, Articles 81-88](#); [Charter for the Kingdom of the Netherlands \(28 October 1954\)](#); [Act on the Council of State \(9 March 1962\)](#); [Rules of Procedure for the Ministerial Council \(2 March 1994\)](#); [Rules of Procedure for the Second Chamber](#); [Rules of Procedure for the First Chamber \(6 June 1995\)](#); [Rules of Procedure for the Joint Assembly of the States-General \(7 July 1994\)](#); [Publication Act \(4 February 1988\)](#).

<sup>19</sup> Second Chamber, '[Temporary provisions related to measures to combat the Covid-19 epidemic for the longer term](#)' 2019/12, 35 526, No 1 – 2.

<sup>20</sup> [Temporary Act on Measures to Control Covid-19 \(Stb 2020, 441\) \(28 October 2020\)](#).

<sup>21</sup> Such as the [Public Health Act 2008 \(Stb 2008, 460\) \(9 October 2008\)](#), the [Act on Labour Conditions \(Stb 1998, 184\) \(18 March 1999\)](#), the [Act on Labour Safety BES \(Stb 2010, 588\) \(9 September 2010\)](#), and the [Act on Childcare \(Stb 2004, 455\) \(9 July 2004\)](#).

<sup>22</sup> [Public Health Act 2008](#), Article VIII, ss 1 and 3.

30. The Second and First Chamber, as well as the Council of State, must examine the necessity and proportionality of prolongation every three months.<sup>23</sup> The [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#) was prolonged by royal decree in February 2021 and again in May 2021.<sup>24</sup>
31. Other legislation and regulations that were introduced to address the pandemic crisis effects were almost all of a temporary nature and contained sunset clauses.<sup>25</sup>
32. The [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#) was opposed by both left and right-wing parties in the Second Chamber. The opposing parties represented 46 seats out of 74 opposition seats and voted against adoption.<sup>26</sup>
33. The amendments to the proposed [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#) resulted in the narrowing of ministerial powers and expansion of control instruments of the Second Chamber and the municipal councils.<sup>27</sup>
34. The [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#) was critically reflected upon by several civil society organizations, such as the Council for Jurisdiction (*Raad van de Rechtspraak*), the Netherlands Bar (*Orde van Advocaten*), and Virus Truth (*Viruswaarheid*.) Those reflections mostly concerned the legality of the proposed derogation from fundamental rights and proportionality of the [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#), as well as the democratic control of the Parliament.

<sup>23</sup> [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#), Article VIII.

<sup>24</sup> [Decree of 18 February 2021, extending the validity of the Temporary Act on Covid-19 Measures](#) (Stb 2021, 93); [Decree of 18 February 2021, extending the validity of the Temporary Act on Covid-19 Measures](#) (Stb 2021, 232).

<sup>25</sup> Such as the [Regulation on temporary compensation for child care](#) (6 May 2020); [Temporary regulation on bridge financing for independent entrepreneurs](#) (17 April 2020); [Collective emergency law Covid-19 \(Verzamelspoedwet COVID-19\)](#); the [Second collective emergency law Covid-19](#) (8 July 2020) (*Tweede Verzamelspoedwet COVID-19*); [Covid-19 Justice and Security \(Interim Measures\) Act 2020 on Covid-19 SZW and JenV](#) (25 November 2020) (*Tijdelijke wet COVID-19 SZW en JenV*); [Policy rule on compensation for entrepreneurs affected sectors Covid-19](#) (27 March 2020).

<sup>26</sup> Second Chamber, '[Voting results of the Second Chamber on the Covid-19 Justice and Security \(Interim Measures\) Act 2020](#)' (13 October 2020).

<sup>27</sup> Second Chamber, '[Amendment of Members of Parliament \(Second Chamber\) Van Raak and Van der Staaij t v v No 6 on substituting the safety-net clause](#)' 35 526, No 15 (15 September 2020); Second Chamber, '[Amendment of MP Groothuizen c s t v v No 5 on the initial effect of three months](#)' 35 526, No 27 (2 October 2020); Second Chamber, '[Changed amendment of the MP Van Dam cs tvv No 18 on safeguarding the involvement of and accountability to Municipal Councils and the Board of Mayor and Aldermen and municipal councils](#)' 35 526, No 32 (2 October 2020); Second Chamber '[Changed amendment of the MP Buitenweg cs tvv No 9 on a right of consent of the Second Chamber with respect to Ministerial Regulations](#)' 35 526, No 48 (2 October 2020).

### C. Executive rule-making powers

35. At the national level, administrative orders are issued by means of a royal decree that stems from the King and (one of) the Ministers<sup>28</sup> and spells out the abstract provisions of a parliamentary law<sup>29</sup> in a more operative manner. A ministerial regulation can be issued if an administrative order allows the minister to provide further details on the matter involved. Both administrative orders and ministerial regulations entail generally binding provisions.
36. At the regional level, municipalities, provinces, and water authorities can issue generally binding provisions. In case of public order and safety emergencies, general local regulations can be overruled by the chair of the safety region or the Minister of Justice and Safety.<sup>30</sup>
37. The Minister of Justice and Safety issued instructions regarding emergency decrees adopted by the safety regions and executed at regional level. Those decrees were contested in courts of law (see Part IV.A below.) by civil society organization Virus Truth (*Viruswaarheid*), which opposes all Covid-19 measures in the name of democracy and the rule of law. Summary proceedings related to the emergency degrees were unsuccessfully triggered by Virus Truth (see Part IV.A below).<sup>31</sup>
38. Until the [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#) entered into force, emergency degrees at regional level formed the legal backbone of the crisis management structure.<sup>32</sup> The emergency clause of the [Public Health Act 2008](#) was used to set up a local crisis management structure with a top-down steering approach. The Minister instructed the chairs of the safety regions to issue emergency degrees in accordance with a model emergency degree that was provided for by the Safety Consultative Body (*Veiligheidsberaad*), that must be consulted by the Minister on the identification of national objectives regarding disaster and crisis management.<sup>33</sup>

<sup>28</sup> [Dutch Constitution](#), Article 89, ss 1 and Article 47.

<sup>29</sup> [Dutch Constitution](#), Article 81.

<sup>30</sup> [Safety Regions Act 2010](#), Article 39, s 1 and Article 42, s 2.

<sup>31</sup> Viruswaanzin, '[Summons by Jeroen Pils and Willem de Engel](#)'.

<sup>32</sup> Via [Public Health Act 2008](#), Article 7, s 1; [Safety Regions Act 2010](#), Article 39, s 1; [Municipality Act 1992](#), Articles 175 – 176.

<sup>33</sup> See [Public Health Act 2008](#), Articles 38 and 37, s 1.

## D. Guidance

39. The activation of the National Crisis Structure (*Nationale Crisis Structuur*) in March 2020 was the starting point for a jointly coordinated crisis management of the ministerial departments involved.<sup>34</sup> In this context, several non-binding recommendations were publicly announced, such as general hygiene measures and stay-at-home advice.<sup>35</sup> The Government's three weekly press conferences were largely based on findings and recommendations of the RIVM and addressed both soft-law guidance and legislative measures.
40. The measures were announced during press conferences and transformed into emergency orders at the same time. There were no significant divergences between official guidance/recommendations and law.

## III. Institutions and Oversight

### A. The role of legislatures in supervising the executive

41. Dutch Parliament, and especially its lower house, engages in its supervising role mainly through the regular parliamentary supervisory system. Article 68 of the [Dutch Constitution](#) states that ministers and state secretaries are obliged to provide the requested information orally or in writing; an exception can only be made if the provision of information could violate the interest of the state. The weekly question time with Government ministers is also important, as are written questions and interpellations addressed to Ministers and Cabinet, and debate on Covid-19-related bills presented by the Government. The same is true for the debate in various standing committees in Parliament. In addition, Article 70 of the [Dutch Constitution](#) grants a right of inquiry (*'recht van enquête'*) to both Houses of Parliament: each can set up a committee for an official investigation on a certain matter. In such investigations, ministers, members of parliament and civil servants are obliged to answer the House's questions under oath. Although the Second Chamber has regularly made use of this power, the Senate has never made use of it.
42. As far as the legislative role is concerned, Article 81 of the [Dutch Constitution](#) states that 'acts of Parliament shall be enacted jointly by the Government and the States General.' The [Dutch Constitution](#) thus gives expression to the interplay (through checks and balances) between the government and the Parliament, more than simply stating the strict separation between government and Parliament.

<sup>34</sup> Ministry of Justice and Security, '[National Crisis Structure](#)'.

<sup>35</sup> Central Government, '[Coronavirus timeline](#)' (last accessed 30 June 2021).

43. Legislation that is enacted based on Article 81 of the [Dutch Constitution](#) implies that Government and Parliament are co-legislators. Legislation that is enacted in accordance with Article 81 can be recognized by the fact that it bears the word 'Act' in its name. The Parliament can however delegate legislative competence to lower-level regulators (Cabinet, ministers, provinces, or other regulatory entities) which, as a result, entails less or even no parliamentary involvement or scrutiny. Delegation of legislative competence usually happens when the rules concerned are considered to be of lesser importance in terms of parliamentary control (for example implementation rules), or because they deal with situations where the possibility of being able to swiftly change regulation is perceived to be a necessity.
44. While it is possible to scrutinize such delegated legislation through the abovementioned regular parliamentary scrutiny instruments, such scrutiny is often indirect and mostly takes place once the delegated regulation has been published. To prevent Parliament from losing its grip on the adoption of rules by delegation altogether, solutions have been developed, which ensure that Parliament can remain involved in the delegated adoption of generally binding rules. In many cases, this takes the form of Parliament being informed of a draft-delegated regulation in one form or another.
45. During the pandemic, the possibility for Parliament to control or scrutinize Covid-19-related legislation was initially not used. The Minister of Health Affairs, based on Article 7 of the [Public Health Act 2008](#), has led the combat against the pandemic and instructed the chairperson of the safety region as to how this combat should be organized. This competence, although it implied considerable restrictions of some fundamental rights, did not entail any involvement of Parliament. There was, as a result, considerable discussion about the possibilities for Parliament to exercise control over the measures initiated by the Minister.<sup>36</sup> Because of strong criticism regarding the aforementioned emergency ordinances, the Dutch Cabinet came up with the [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#), added as Chapter Va to the [Public Health Act 2008](#) (*Wet publieke gezondheid*) that included the emergency ordinances issued by the safety regions.
46. The idea of the [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#) was to make it possible to scale up or down quickly in response to the pandemic, but also to improve parliamentary control or involvement. As far as the latter is concerned, the [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#) contains an interesting and rather novel system of parliamentary control and involvement.

<sup>36</sup> On this, see J Dute, 'De Wet publieke gezondheid als instrument voor de bestrijding van de Covid-19-Pandemie' [The Public Health Act as an instrument in the combat of the COVID-19 pandemic] (2021) *Gezondheidsrecht in tijden van crisis: de Covid-19-pandemie* 67

47. First, on the basis of Article 58s[1] of the [Public Health Act 2008](#), the Minister has a duty of information. More specifically, she has to provide a monthly, reasoned overview of the measures in force and indicate the expectations regarding the continuation of the measures to the lower and upper houses.
48. Article 58b of the [Public Health Act 2008](#) stipulates that the ‘coronal powers’ are applied only if such application is necessary in view of the seriousness of the threat to public health, and in accordance with the principles of the democratic constitutional State, i.e., the exercise of these powers should be as limited as possible and proportionate to the objective of the coronal powers concerned.
49. Based on Article 58c[2] of the Act, the lower house of the Dutch Parliament can decide not to agree with a proposed ministerial regulation, which has either been submitted for assessment or has already entered into force (due to a very urgent circumstance in which immediate action must be taken to reduce danger, according to Article 58c[3]). As a result, the Dutch Parliament now has a veto on the measures provided by the [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#). In case of veto, the law expires by operation of law. In any event, the [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#), on which Covid-regulations are based, must be approved by the lower House of Parliament once every three months.
50. Article 58s, sections 4 and 5, also an accountability obligation for mayors to the municipal council, and the chairperson of the safety region to the municipal councils concerned.
51. The Dutch Council of State, in an advisory opinion on the [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#), indicated that all this constituted a ‘new type of parliamentary involvement’.<sup>37</sup> This is because ministerial legislation in the Netherlands is usually not controlled by Parliament. If it is occasionally being controlled, it is hardly being done *before* ministerial legislation has been issued. The new procedure in the [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#), however, makes *ex ante* control possible, in addition to *ex post* control. Most importantly, although both houses of Parliament are provided with all relevant information regarding the ministerial legislation with respect to Covid-19, only the lower house of Parliament can use its veto power. The upper house of Parliament is explicitly excluded from this special legislative involvement mechanism. Both houses can of course use the regular scrutiny mechanisms, e.g.,

<sup>37</sup> Council of State, [‘Letter of the Vice-President of the Council of State’](#) (22 October 2020).



during the weekly question time with Government ministers or by written questions and interpellations addressed to Ministers and Cabinet.

**B. The functioning of the legislature where its ordinary business is disrupted**

52. The Dutch Parliament has been able to meet during the Covid-19 crisis. None of the meetings of the lower house of Parliament, nor those of the upper house of Parliament have officially been suspended, neither in plenary session nor in committee meetings. The upper house of Parliament did not meet for a brief period (from 17 March 2020 until April 2020) for neither plenary nor committee meetings.
53. Ordinary recess periods have not been lengthened because of Covid-19, nor has the passage of legislation been suspended since March 2020. There were also no constraints imposed on the process of voting. Many parliamentary meetings, both in plenary session as well as committee meetings, have been held digitally, either fully or in a hybrid form. There have been rules introduced for proceedings in Parliament, for example about when and how to interrupt, and on keeping distance from each other.<sup>38</sup> It is nevertheless fair to say that, for those allowed to participate physically in parliamentary proceedings, there have been no substantial and abnormal constraints on the process of posing questions and offering rejoinders to answers.
54. The chairperson of the upper house has in April 2020 asked for advice from the Dutch Council of State regarding the functioning of Parliament in times of Covid-19. The Council of State, through its vice-president, concluded in an information report that a specific legislative (constitutional) basis – similar to the one that was laid down for provincial and municipal councils in the [Temporary Electronic Meetings and Resolutions Act](#) (*Tijdelijke wet digitale beraadslaging en besluitvorming provincies, gemeenten, waterschappen en openbare lichamen Bonaire, Sint Eustatius en Saba*) – is not necessary for both houses of Parliament.<sup>39</sup> The Council of State stated that, under the exceptional Covid-19 circumstances, the lower and upper houses could deliberate and decide digitally, and that mixed forms of digital and physical meetings were in accordance with the [Dutch Constitution](#). Also, the so-called quorum requirements can according to the Council of State be lived up to digitally, although Article 76[1] of the [Dutch Constitution](#) stipulates that the two Houses of Parliament ‘may deliberate or take

<sup>38</sup> Second Chamber, [‘Debating and social distancing during the Covid-19 crisis’](#) (26 March 2020).

<sup>39</sup> First Chamber, [‘Functioning of the First Chamber during times of crisis’](#) (16 April 2020).

decisions, either separately or in joint session, only if more than half of the members are *present* (emphasis added). Being 'present' has traditionally been interpreted as having physically signed the list of presence and be available in the buildings of Parliament. To be sure, this constitutional provision is not applicable to committee meetings.

55. There have nevertheless been complaints, mainly by academics, about the possibility for Parliament to meet and vote digitally.<sup>40</sup> The opinion of the Council of State, according to these academics, is based on a rather generous interpretation of the [Dutch Constitution](#) and constitutional values. First, because the possibility for mixed forms of digital and physical meetings creates inequality of arms between those being physically present and those being digitally present. Second, this might also result in less scrutiny by Members of Parliament. Moreover, this can lead to the undermining of the so-called free mandate of each individual Member of Parliament. As far as this last point is concerned, the [Dutch Constitution](#), in Article 67[3] states that '[t]he Members (of Parliament) shall not be bound by a mandate or instructions when casting their votes.' This implies that, under all circumstances, there must be an equal opportunity to put forward one's own opinion, both in the debate and in the vote. If the quorum requirement can be met digitally and therefore at a distance, this could, according to the critics, constitute a kind of authorization for spokespersons and/or group chairpersons to deliberate and vote on behalf of the group in the physical meeting.

### C. Role and access to courts

56. On 17 March 2020, all court buildings were closed.<sup>41</sup> On 9 April 2020, the judiciary enacted the Temporary General rules on case handling,<sup>42</sup> containing rules for the handling of cases during the Covid-19 pandemic. Various temporary schemes with rules specific to certain areas of law or courts coexist next to the Temporary General Rules on case handling, such as Temporary rules for administrative cases, criminal cases, insolvency cases at district courts, tax cases at appellate courts.<sup>43</sup>

57. From 17 March 2020 until 6 April 2020 included, 'highly urgent cases' were heard remotely (Phase 1).<sup>44</sup> These were cases that required a prompt court decision.<sup>45</sup>

<sup>40</sup> See D J Elzinga, '[Digital meetings in politics are against our Constitution](#)' De Volkskrant (Online, 27 April 2020); W Voermans, '[Parliament, put an end to this state of exception](#)' NRC (Online, 23 April 2020); P Bovend'Eert, '[Meeting in parliament during the corona crisis](#)' Nederlands Juristenblad (Online, 1 May 2020).

<sup>41</sup> Council for the Judiciary, '[From Tuesday the courts will close, urgent cases will continue](#)' (15 March 2020).

<sup>42</sup> Council for the Judiciary, '[Temporary general rules on case handling](#)' (*Tijdelijke algemene regeling zaaksbehandeling Rechtspraak*) (24 November 2020).

<sup>43</sup> Council for the Judiciary, '[Temporary rules](#)' (*Tijdelijke regelingen*)

<sup>44</sup> [Temporary general rules on case handling](#), Preamble.

<sup>45</sup> [Temporary general rules on case handling](#), [2.1]-[2.5].

Examples include cases about pre-trial detention and searches (criminal law); suspension of payments and bankruptcy in appellate cases (civil law); custodial placements (family law); and immigration detention (administrative law).

58. In addition, from 7 April 2020 until 10 May 2020, ‘urgent cases’ were dealt with by video call or telephone (Phase 2). These were cases with a relatively high priority, but lower than that of the highly urgent cases.<sup>46</sup> Examples include cases about the extension of hospital orders (criminal law); the administration of oaths of lawyers, bailiffs, and sworn translators (civil law); divorces and maintenances (family law); and proceedings against Covid-19 measures (administrative law).
59. Moreover, courts settled a large number of cases in writing during phases 1 and 2.
60. From 11 May 2020 onwards, the judiciary has been in Phase 3. In this phase, hearings may be conducted with participants in the proceedings being physically present.<sup>47</sup> Physical presence is prioritized for cases concerning criminal, juvenile, or family law.<sup>48</sup> Online sessions continue to take place. Courts determine whether cases are heard remotely or with participants physically present.<sup>49</sup> Criteria for determining whether cases are heard online, by phone, or in a physical setting are listed in the various temporary schemes. Relevant factors include the complexity of the case, whether there is a public interest, the impossibility of a remote hearing, the number of parties to the proceeding, and the media-sensitivity of a case.
61. The Temporary General Rules on case handling also contain rules regarding digital communication via e-mail, a temporary measure to transfer documents that would usually be sent by mail or fax.<sup>50</sup>
62. Notwithstanding the efforts made to ensure the ongoing operation of the courts, Covid-19 has caused a significant backlog of cases. For example, in March, April, and May 2020, 16,000 crime cases were postponed due to measures relating to the pandemic. By December 2021, roughly 70% of this backlog had been eliminated and expectations are that the backlog will be processed by the end of 2021 at the latest, according to the Council for the Judiciary (*Raad voor de Rechtspraak*).<sup>51</sup>

<sup>46</sup> [Temporary general rules on case handling](#), [3.1]-[3.6].

<sup>47</sup> [Temporary general rules on case handling, Preamble](#). See also M Malsch, L van Lent & A Smolders, ‘Doet de rechter in de toekomst alleen nog online zittingen? Corona en de openbaarheid van de rechtspraak’ [Will the judge in the future only conduct online court cases? Corona and the publicity of the judiciary], in M Winkler, J W Sap & M Malsch, *Nooit meer dansen? De veilige stad in tijden van de pandemie* [Never dance again? The safe city in times of the pandemic] (2021), 129.

<sup>48</sup> [Temporary general rules on case handling, Preamble](#).

<sup>49</sup> [Temporary general rules on case handling](#), [1.2].

<sup>50</sup> [Temporary general rules on case handling](#), [1.3]; Council for the Judiciary, ‘[Safe Mailing with the Judiciary](#)’.

<sup>51</sup> See Council for the Judiciary, ‘[Annual report 2020](#)’ (*Jaarverslag 2020*), 12.

63. Online proceedings have taken place in both civil and criminal proceedings, especially in the early stages of the pandemic. It is not clear how many proceedings have taken place remotely.
64. Currently, there is no conclusive evidence suggesting a digital divide. Detainees who needed to appear before a court were provided with a remote connection. However, there is evidence that the Covid-19 measures have severely impacted the (constitutionally required)<sup>52</sup> publicity of the administration of justice.<sup>53</sup> A brief survey of 11 court reporters showed grievances over video connections, as well as over contacts with courts in instances of difficulties with digital communication.<sup>54</sup>
65. Currently, there is no conclusive evidence suggesting that taking legal action was considered a risk to health and hence a barrier to access to justice.
66. There have been special provisions in relation to access to courts due to the pandemic. For example, in appellate civil summons cases, requests for postponement of procedural actions were granted in principle from 18 March until 1 July 2020.<sup>55</sup> Case documents for application proceedings at the Supreme Court could be digitally submitted.<sup>56</sup>
67. Courts do not have review powers over declarations of the state of emergency or the state of exception. In Dutch emergency law, the definitions of 'state of exception' and of 'state of emergency' stem respectively from Article 103 of the [Dutch Constitution](#) and the [Act on Coordination of States of Exception 1996](#) (*Coördinatiewet Uitzonderingstoestanden*), that gives effect to Article 103 of the

<sup>52</sup> [Dutch Constitution](#), Article 121

<sup>53</sup> See M Malsch, L van Lent & A Smolders, 'Doet de rechter in de toekomst alleen nog online zittingen? Corona en de openbaarheid van de rechtspraak' ['Will the judge in the future only conduct online court cases? Corona and the publicity of the judiciary'], in M Winkler, J W Sap & M Malsch, *Nooit meer dansen? De veilige stad in tijden van de pandemie* [Never dance again? The safe city in times of the pandemic] (2021), 123-138.

<sup>54</sup> M Malsch, L van Lent & A Smolders, 'Doet de rechter in de toekomst alleen nog online zittingen? Corona en de openbaarheid van de rechtspraak' ['Will the judge in the future only conduct online court cases? Corona and the publicity of the judiciary'], in M Winkler, J W Sap & M Malsch, *Nooit meer dansen? De veilige stad in tijden van de pandemie* [Never dance again? The safe city in times of the pandemic] (2021), 132-133.

<sup>55</sup> [Temporary deviating rules for civil summons cases at the appellate courts because of the special circumstances due to the Covid-19 crisis](#) (25 August 2020), Article 1.

<sup>56</sup> B van der Wiel and L van Garding, '[The corona crisis and terms in civil procedure](#)' (*De coronacrisis en termijnen in de civiele rechtspleging*) *Ondernemingsrecht* (2020), 3-4.

Dutch Constitution. The state of emergency is declared by means of royal decree. Since such a royal decree entails generally binding provisions, it cannot be contested in court.<sup>57</sup>

#### D. Elections

68. The pandemic has not led to the suspension of any national, regional, or local election in the Netherlands.
69. The pandemic affected the procedure of the general election of March 2021, in which the 150 members of the Second Chamber (the lower House of Parliament) were elected. The most important modifications were as follows. Usually, the election is a one-day event.<sup>58</sup> It was intended to take place on 17 March 2021. However, due to the Covid-19 virus, early voting took place on 15 and 16 March 2021, at a limited number of polling stations per municipality.<sup>59</sup> This measure was put in place for groups of voters vulnerable to Covid-19 specifically.
70. Moreover, the practice of proxy voting was expanded. In case a voter is unable or unwilling to vote in person, he or she may authorize a proxy holder. That proxy holder casts the vote for the person issuing the authorization at the same time the proxy holder casts his or her own vote.<sup>60</sup> Under normal circumstances, a proxy holder could cast the vote on behalf of two other persons.<sup>61</sup> However, because of Covid-19,<sup>62</sup> three votes could be cast by proxy.<sup>63</sup>
71. Furthermore, voters aged 70 or older had the option to vote by mail, according to article 7b of the Temporary law on elections Covid-19 2020 (*Tijdelijke wet verkiezingen Covid-19*). About 2.4 million people were eligible to vote by mail.<sup>64</sup>
72. Lastly, typical Covid-19 measures were in force, such as social distancing, a health check, the washing of hands at entry, the wearing of face masks and of protective screens.
73. Of these measures, voting by mail proved to be the most controversial. In order to protect the secrecy of the vote, voters had to put their ballot with their preferred

<sup>57</sup> General Administrative Law Act 1992 (*Algemene wet bestuursrecht*), Article 8[3], s 1, [A].

<sup>58</sup> Elections Act 1989 (*Kieswet*), Article J 1[1].

<sup>59</sup> Temporary law on elections Covid-19 2020 (*Tijdelijke wet verkiezingen Covid-19*), Article 2g.

<sup>60</sup> Elections Act 1989 (*Kieswet*), Article L3.

<sup>61</sup> Elections Act 1989 (*Kieswet*), Article L4.

<sup>62</sup> Elections Act 1989 (*Kieswet*), Article L4.

<sup>63</sup> Temporary law on elections Covid-19 2020 (*Tijdelijke wet verkiezingen Covid-19*), Article 15.

<sup>64</sup> Parliament.com, '400,000 letter votes cast of which 10,000 are invalid' (11 March 2021).

candidate in an envelope and place that envelope within a return envelope with their signed special poll card carrying personal information. This way, the ballot was separated from any information identifying the voter. However, it turned out that voters put the ballot and poll card together in the envelope intended solely for the ballot and put these in the return envelope. Thus, when officials opened the envelope no poll card was present. According to the rules, these envelopes had to be dismissed. The Minister of the Interior and Kingdom Relations stated on 10 March 2021 that approximately 2.5% of the roughly 400.000 votes that were cast by mail up to 8 March were invalid.<sup>65</sup> A news item of 15 March 2020 reported that a number of municipalities set aside relatively large amounts of votes by mail because they were invalid. It was reported that the percentage of invalid votes by mail ranged from 4.6 to 8.5 across the examined municipalities.<sup>66</sup> A remedy regulation was enacted, determining that if the special poll card was valid, the (unexamined) ballot could be put in the ballot box and counted.<sup>67</sup> The Minister of the Interior and Kingdom Relations stated that the percentage of discarded votes by mail would likely be between four and six.<sup>68</sup>

74. There is no conclusive evidence that the Covid-19 measures amplified or hampered electoral access to polling in any significant way. The turnout percentage of the 2021 election was 78.7, which is 3.2 points lower than that of the 2017 general election. Compared to the general elections of 2012 and 2010, the 2021 rate is 4.1 points and 3.4 points respectively higher. The average turnout percentage over the 16 general elections held since 1971 (when compulsory attendance was abolished) is 80.4.<sup>69</sup>

## E. Scientific advice

75. Outbreak management in the Netherlands is regulated by the [Public Health Act 2008](#) (*Wet publieke gezondheid*).<sup>70</sup> Although the Minister of Health, Welfare and Sport formally leads the campaign against Covid-19,<sup>71</sup> the Government relies heavily on advice by medical experts. The most important advisory board to assist the Government is the Outbreak Management Team (OMT). The members of this team are called together by the National Institute for Public Health and the Environment (*Rijksinstituut voor Volksgezondheid en Milieu*, RIVM).<sup>72</sup> The task of

<sup>65</sup> Minister of the Interior and Kingdom Relations, '[Letter of 10 March 2021](#)' (No 2021-0000135806), 2.

<sup>66</sup> NOS, '[Problems with postal voting in several municipalities, ministry investigates 'signals'](#)' (Online, 15 March 2021).

<sup>67</sup> Minister of the Interior and Kingdom Relations, '[Letter of 16 March 2021](#)' (No 2021-0000152511).

<sup>68</sup> Minister of the Interior and Kingdom Relations, '[Answers to parliamentary questions](#)' (No 2021D12356) (9 April 2021).

<sup>69</sup> Parliament.com, '[Turnout in parliamentary elections](#)'.

<sup>70</sup> C Swaan and A Timen, '[Outbreakmanagement in Nederland](#)' *Bijblijven* (2010), 14. See also J Dute, '[De aanpak van de COVID-19-epidemie: een juridische tussenbalans](#)' 44(5) (2020) *Tijdschrift voor Gezondheidsrecht* 478; RIVM, '[Leaflet national advice on infectious disease threats and crises](#)' (21 December 2011), 5.

<sup>71</sup> Article 7, in connection with Article 6[4] of the [Public Health Act 2008](#).

<sup>72</sup> RIVM, '[Outbreak Management Team \(OMT\)](#)' (last updated 2 September 2021).

the OMT is loosely defined as ‘to provide the best possible advice.’<sup>73</sup> The OMT is chaired by the director of the Centre for Infectious Disease Control of the National Institute for Public Health and the Environment and consists of experts from various medical fields, including virology, epidemiology, (modelling of) infectious diseases, intensive care medicine, and general practice.<sup>74</sup>

76. The OMT reports to the Administrative Consultative Committee on Infectious Diseases (BOA, *Bestuurlijk afstemmingsoverleg infectieziektebestrijding*),<sup>75</sup> a body composed of senior civil servants that assess the proposed measures on the grounds of executive feasibility and desirability.<sup>76</sup> This body reports to the Minister of Health, Welfare and Sport.<sup>77</sup> The ratio behind this two-step approach is that, at least formally, expertise and politics are kept separate.<sup>78</sup> First, expert opinion comes about independently, after which the measures proposed from a medical viewpoint are weighed against other social (for example, economic) interests.<sup>79</sup>

77. Although there is no legal obligation to follow advice from medical experts, it is highly influential in practice. This was certainly the case at the beginning of the pandemic. On 16 March 2020, the Prime Minister stated in his address to the nation that expert advice ‘has guided all measures that have been taken in the Netherlands so far’ and that ‘it is important that we continue to rely on [...] scientific knowledge and reliable facts.’<sup>80</sup> A few weeks later, the Prime Minister called the OMT’s advice ‘holy’ and stated that the Government basically adopts the advice as given.<sup>81</sup> However, later on in the pandemic, there have been instances in which the OMT proposed stricter measures than the Government was willing to take. For example, in November 2020, the Government rejected the OMT’s advice to close the upper classes of secondary schools for two weeks and to switch to digital education.

<sup>73</sup> RIVM, ‘[Outbreak Management Team \(OMT\)](#)’ (last updated 2 September 2021); RIVM, ‘[Leaflet national advice on infectious disease threats and crises](#)’ (21 December 2011), 9.

<sup>74</sup> RIVM, ‘[Outbreak Management Team \(OMT\)](#)’ (last updated 2 September 2021).

<sup>75</sup> See RIVM, ‘[Leaflet national advice on infectious disease threats and crises](#)’ (21 December 2011), 7; J Dute, ‘[De Wet publieke gezondheid als instrument voor de bestrijding van de COVID-19-epidemie. Gewogen en te licht bevonden?](#)’ in *Gezondheidsrecht in tijden van crisis: De Covid-19-pandemie* (Vereniging voor Gezondheidsrecht/Association for Health Law) (2021), 74. The BOA is mentioned in Article 7[4] of the [Public Health Act 2008](#).

<sup>76</sup> [Decree on Administrative Consultative Committee on Infectious Diseases 2005](#), Article 2[1].

<sup>77</sup> RIVM, ‘[Leaflet national advice on infectious disease threats and crises](#)’ (21 December 2011), 7.

<sup>78</sup> J Dute, ‘[De Wet publieke gezondheid als instrument voor de bestrijding van de COVID-19-epidemie. Gewogen en te licht bevonden?](#)’ in *Vereniging voor Gezondheidsrecht, Gezondheidsrecht in tijden van crisis: De Covid-19-pandemie* (2021), 75.

<sup>79</sup> J Dute, ‘[De Wet publieke gezondheid als instrument voor de bestrijding van de COVID-19-epidemie. Gewogen en te licht bevonden?](#)’ in *Vereniging voor Gezondheidsrecht, Gezondheidsrecht in tijden van crisis: De Covid-19-pandemie* (2021), 75.

<sup>80</sup> Central Government, ‘[TV speech by Prime Minister Mark Rutte](#)’ (16 March 2020).

<sup>81</sup> Central Government, ‘[Verbatim text press conference Prime Minister Rutte and Minister De Jonge after crisis deliberations cabinet \(7-4-2020\)](#)’ (7 April 2020).

78. The advisory reports are published at the website of the RIVM. As of September 2021, the OMT has issued over 60 advisory reports concerning Covid-19.<sup>82</sup>
79. The National Institute for Public Health and the Environment (NIPHE) is regulated by the [RIVM Act 1996](#). The NIPHE falls under the Ministry of Health, Welfare and Sport and relies on this Ministry for its funding.<sup>83</sup> The Minister of Health, Welfare and Sport is authorized to issue instructions to the National Institute for Public Health and the Environment about the execution of its duties.<sup>84</sup> That being said, the NIPHE is independent with regards to its scientific operations,<sup>85</sup> and the Minister is prohibited by law to give instructions regarding research methods, or the reporting of results.<sup>86</sup>
80. However, the (in)dependency of the medical advisors has been a point of contention during the Covid-19 pandemic. For example, it was reported that the Ministry of Health, Welfare and Sport was involved in drawing up certain guidelines, including on the use of mouth coverings in elderly care.<sup>87</sup> Another example concerns the chairman of the Dutch Association for Intensive Care, Diederik Gommers, a medical expert with a high media profile. It was reported that Gommers, who regularly attends OMT meetings, was at one point pressured by a civil servant to publicly confirm that 1,600 intensive care beds would be available for Covid-19 patients within a week, while Gommers was not at all sure of this.<sup>88</sup> Gommers was reportedly also instructed by the Ministry of Health about what he was allowed to say on talk shows.<sup>89</sup> In an interview of 10 July 2020 with the national newspaper *de Volksrant*, Gommers recalls that he was one day called by a senior employee of the Ministry of Health regarding Gommers' appearances in talk shows. According to Gommers, the Government official told him that he was not allowed to say certain things, because he was in a position of national importance.<sup>90</sup> Another contentious point in the relationship between the OMT and the executive branch has been the regular meetings at the Prime Minister's official residence between the chair of the OMT and the Ministers most involved in the Covid-19 pandemic. As these meetings initially took place prior to the meetings of the OMT, multiple OMT members felt their independence was undermined by this sequence. The *a priori* involvement of politicians upset OMT members. Ultimately,

<sup>82</sup> RIVM, '[Outbreak Management Team \(OMT\)](#)' (last updated 2 September 2021).

<sup>83</sup> [RIVM Act 1996 \(Wet op het RIVM\)](#), Article 2[1]; Second Chamber, 1995-1996, [Parliamentary Paper No 24454 \(3\)](#), 4 (explanatory memorandum).

<sup>84</sup> Second Chamber, 1995-1996, [Parliamentary Paper No 24454 \(3\)](#), 5 (explanatory memorandum).

<sup>85</sup> Second Chamber, 1995-1996, [Parliamentary Paper No 24454 \(3\)](#), 4 (explanatory memorandum).

<sup>86</sup> [RIVM Act 1996 \(Wet op het RIVM\)](#), Article 5.

<sup>87</sup> M Holdert and R van Hest, '[RIVM and the Ministry of Health and the Environment \(RIVM\) and the Ministry were mixed up too much in the Covid-19 crisis](#)' NOS (Online, 17 July 2020).

<sup>88</sup> Y Hofs, '[Why the RIVM is increasingly under attack](#)' De Volkskrant (Online, 21 August 2020).

<sup>89</sup> Y Hofs, '[Why the RIVM is increasingly under attack](#)' De Volkskrant (Online, 21 August 2020).

<sup>90</sup> M Eftting and W Feenstra, '[Why ICU specialist Diederik Gommers \(56\) is less worried about daughter Sophie \(23\) than the other way around](#)' De Volkskrant (Online, 10 July 2020).



the issue was resolved by holding the OMT meetings prior to the meetings between the chair of the OMT and the government officials.<sup>91</sup>

## F. Freedom of the press and freedom of information

81. Although the work of journalists was impacted because of general measures, such as social distancing, the curfew, and limited capacity for some indoor events such as press conferences and court hearings, Dutch authorities have not implemented rules specific to the freedom of the press.
82. On 6 April 2020, the Executive Group of the Media Freedom Coalition, a 'partnership of countries working together to advocate for media freedom and safety of journalists' of which the Netherlands is a member, issued a statement that called on all States to continue to protect access to free media and to support the free exchange of information amidst the Covid-19 pandemic.<sup>92</sup>
83. No freedom of information law has been suspended. However, in the early stages of the pandemic, the Ministry of Health, Welfare and Sport, due to capacity problems, suspended requests for access to Government information relating to Covid-19.<sup>93</sup>

## G. Ombuds and oversight bodies

84. According to Article 73 of the [Dutch Constitution](#), the task of the Advisory Division of the Council of State (*Afdeling Advisering Raad van State*) is to advise the Government and Parliament on legislation. The Advisory Division conducts a policy analysis examines whether proposed legislation fits within national and international law obligations, and legal technicalities.
85. In the context of the Covid-19 pandemic, this Division has issued advisory reports on multiple proposed Covid-19 measures, including on the [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#) (*Tijdelijke wet maatregelen Covid-19*) and the [Temporary Act Notification App 2020](#) (*Tijdelijke wet notificatieapplicatie Covid-19*), which regulates the CoronaMelder, a contact tracing app.
86. Other ombuds and oversight bodies, such as the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*) and the Dutch Data Protection Authority (*Autoriteit Persoonsgegevens*) have issued opinions on Covid-19

<sup>91</sup> See W Feenstra '[A year in the footsteps of five OMT members](#)' De Volkskrant (Online, 25 January 2021).

<sup>92</sup> Central Government, '[Media Freedom Coalition Executive Group statement on COVID-19](#)' (6 April 2020).

<sup>93</sup> See Minister of Health, Welfare and Sport, '[Answers to parliamentary questions regarding the suspension of the request Pieter Klein under the Public Access to Government Information Act](#)' (7 May 2020).

measures as well, including on privacy during remote online education,<sup>94</sup> on privacy in the workplace,<sup>95</sup> and on privacy aspects of a contact tracing app.<sup>96</sup>

87. Moreover, the Netherlands Court of Audit examines, amongst other things, the Government's expenditure on Covid-19 measures as well as the functioning of democratic institutions. With regards to the latter, the Court of Audit observed in May 2021 that the Parliament's information position had been compromised during the pandemic: 'In the Covid-19 year of 2020, in which ministers had to take urgent measures to combat the pandemic, the Second Chamber and the Senate were often faced with *faits accomplis*. The Minister of Health, Welfare and Sport (VWS), for instance, did not inform Parliament that agreements had been signed, the Minister of Economic Affairs and Climate Policy (EZK) and the Minister of Agriculture, Nature and Food Quality (LNV) that business support measures had been introduced, and the Minister of the Interior and Kingdom Relations (BZK) that loans had been awarded to overcome the economic crisis following the collapse of tourism on Aruba, Curacao, and St Maarten due to the pandemic.'<sup>97</sup>
88. There has been no special reviewer of legislation or other public official appointed to monitor the public response to Covid-19.

<sup>94</sup> Dutch Data Protection Authority, '[Education during corona](#)' (*Onderwijs tijdens corona*).

<sup>95</sup> Dutch Data Protection Authority, '[Corona and the workplace](#)' (*Corona op de werkvloer*).

<sup>96</sup> Dutch Data Protection Authority, '[Privacy of corona app users insufficiently guaranteed](#)' (*Privacy gebruikers corona-app nog onvoldoende gewaarborgd*).

<sup>97</sup> Netherlands Court of Audit, '[Covid-19 pandemic putting democratic scrutiny under pressure](#)' (19 May 2021).

## IV. Public Health Measures, Enforcement and Compliance

89. On 28 February 2020, SARS-COVID-2 was qualified an A-disease and thus became an illness which must be reported to the Local Health Service (GGD) (article 22 [Public Health Act 2008](#)). From that moment on, the Minister was in charge of the fight against the pandemic and chairs of the safety regions took over the role of the mayors (Article 7, Article 6[4], Article 39 of the [Safety Regions Act 2010](#)). As explained in Part II above, the Minister of Public Health, Welfare and Sports could, and did extensively, instruct the chairs of the safety regions to adopt public health measures in the form of emergency orders (Article 39 of the [Safety Regions Act 2010](#)). On [13 March 2020](#), the first such legally binding instructions to chairs of safety regions were given (all events with more than 100 persons cancelled; no higher education on location; temporary travel ban for passenger flights from countries with a Covid-19 outbreak), and as will become clear below, many more instructions followed on such matters as public gatherings, domestic travel and visits to care facilities.<sup>98</sup>

90. Almost all public health measures applied nationwide. The Minister of Health, Public Health, Welfare and Sports gave detailed instructions to the 25 chairs of the safety regions to adopt emergency orders, and the chairs, in turn, made extensive use of model emergency orders, which enhanced the uniformity of rules across the Netherlands.<sup>99</sup> Nonetheless, chairs of the safety regions could, and sometimes did, introduce additional measures in the emergency orders. Consequently, there was some variation during some periods in measures adopted at the regional and local level.<sup>100</sup> For example, in April 2020 almost all safety regions allowed markets but there was considerable variation as to whether non-food could be sold.<sup>101</sup> Also, some safety regions with popular destinations adopted special measures to discourage tourism (for example the closure of camping sites and public sanitary facilities).<sup>102</sup> Both measures with nationwide application and measures with

<sup>98</sup> Minister of Healthcare and Sport, Minister of Justice and Safety, [Instruction 1662578-203166-PG](#) (12 March 2020).

<sup>99</sup> A F Vink, 'Het Nederlandse staatsnoodrecht. Wat te doen met de EHBO-trommel die niet op orde is?', in *Nederlands Juristenblad* (2020) 1134, 1308-1316. For an example of a model emergency order, see Central Government, '[Model Emergency Order – Covid-19](#)' (8 December 2020).

<sup>100</sup> J E Esser and G Boogaard, '25 kapiteins, 1 vloot. Differentiatie, deconcentratie en decentralisatie in de Covid-19 noodverordeningen' (2020) 1445 *Nederlands Juristenblad* 2020 1644.

<sup>101</sup> J E Esser and G Boogaard, '25 kapiteins, 1 vloot. Differentiatie, deconcentratie en decentralisatie in de Covid-19 noodverordeningen' (2020) 1445 *Nederlands Juristenblad* 2020 1644.

<sup>102</sup> J E Esser and G Boogaard, '25 kapiteins, 1 vloot. Differentiatie, deconcentratie en decentralisatie in de Covid-19 noodverordeningen' (2020) 1445 *Nederlands Juristenblad* 2020 1644.

regional application were challenged in court.<sup>103</sup> In one case the plaintiffs even requested the court to order the state to withdraw all public health measures.<sup>104</sup> Very few challenges were successful. Courts generally held that the measures had a sufficient legal basis and that they met the tests of subsidiarity and proportionality.

## A. Public health measures

### 1. Individual mobility restrictions on citizens (stay-at-home, curfews, etc)

91. Strict stay-at-home orders (going outside was allowed only for essential shopping, taking care of others, work which cannot be done at home, and getting some fresh air) were issued by the Government several times (from 23 March 2020 to 11 May 2020; from 4 November 2020 to 18 November 2020; from 14 December 2020 to 11 January 2021). These measures did not take a legal form, they were guidance, and as such not enforced by public officials. Of course, the result of several other legal measures which were enforced (see subsections below) was such that there was little that people could do outside their homes.
92. A curfew applied from 23 January 2021 to 28 April 2021 from 9.00 pm and as of 31 March (because of Daylight Saving Time) from 10 pm to 4.30 am. It was established in a separate [Temporary Regulation National Night-Time Curfew](#) (22 January 2021),<sup>105</sup> which, in turn, was based on Article 8[1] and [3] of the [Extraordinary Civilian Powers Act 1996](#), which gives the Minister of Justice and Security the competence to limit staying outdoors.<sup>106</sup> The curfew applied nationally.
93. The civil society organization Virus Truth, which opposes all Covid-19 measures in the name of democracy and the rule of law and initiated 11 cases against Covid-19 measures, sued the State of the Netherlands before the District Court in The Hague. It argued that the curfew regulation was unlawful. The court concurred in an interim proceeding on 16 February 2021: there was no sufficient ground to activate the [Extraordinary Civilian Powers Act 1996](#); hence, the effect of Article 8

<sup>103</sup> K Albers, 'De coronapandemie te lijf. Over een wettelijk instrumentarium in ontwikkeling' [Getting to grips with the corona pandemic. A legal framework in development], in M. Winkler, M. Malsch and J.W. Sap, *Nooit meer dansen? De veilige stad in tijden van pandemie* (Den Haag: Boom Juridische Uitgevers, 2021), 59-88.

<sup>104</sup> District Court The Hague, [ECLI:NL:RBDHA:2020:6856](#) (24 July 2020).

<sup>105</sup> [Temporary Regulation on Curfew to Fight Covid-19 of 22 January 2021](#) (Stcrt 2021, 4191).

<sup>106</sup> This provision had entered into force by ministerial order of 22 January 2021 of the Minister of General Affairs, ie the Prime Minister (*Besluit van 22 January 2021, houdende inwerkingtreding en inwerkingstelling van artikel 8, eerste en derde lid, van de Wet buitengewone bevoegdheden burgerlijk gezag*).

needed to be terminated immediately.<sup>107</sup> The State appealed. The Court of Appeal in The Hague decided in an interim proceeding on 26 February 2021 that the curfew regulation had a proper legal basis after all.<sup>108</sup>

94. Pending the appeal case, and to avoid the termination of the curfew in case the appellate court, too, would decide that the ministerial regulation was unlawful, Parliament assented to a novel legal basis for the curfew on 22 February 2021: the [Temporary Act Limitations on Staying Outdoors 2021](#), an amendment to the [Public Health Act 2008](#).<sup>109</sup>
95. Compliance with the night-time curfew was consistently higher (94%-88%) than support for this measure (76%-62%). When the night-time curfew was introduced, 94% of the Dutch population indicated that they followed the rule. When the curfew was lifted, adherence had dropped to 88%. This was a slow and even process; compliance was never above 94% or below 88%. When the night-time curfew was introduced, 76% supported the measure. When the curfew was lifted, support was at 62%. This, too, was a gradual decline: support was never higher than at the start and never lower than at the end. Adherence to the curfew was therefore consistently higher than support for the curfew. There is also a clear relation between age and support/adherence. Support and adherence were highest in the 70+ age group and lowest in the 16-24 age group. Both support and adherence decrease with every age group (70+; 55-69; 40-54; 25-39; 16-24).
96. There were riots in over 20 cities and towns for the first three nights of the curfew.<sup>110</sup> 407 people were arrested for participating in riots and committing a total of 551 criminal acts; 281 cases were taken to court on such charges as incitement to violence, violence and resisting police officers; on 15 June 2021, 189 cases had been closed with 11 acquittals, 121 prison sentences and 60 other sanctions. The looting and destruction of a tobacco shop in the city of Den Bosch was a major news story for several days and led to a well-publicized and successful (>100,000 euro) crowd-funding action for the shop owners.
97. A violation of the curfew was a minor offence.<sup>111</sup> The Public Prosecution Service decided to impose a fine of EUR 95 for a violation of the curfew.<sup>112</sup> This meant that a violation did not result in a criminal record. The public prosecutor imposed 80419 criminal sanctions for violations of the curfew.

<sup>107</sup> [ECLI:NL:RBDHA:2021:1100](#) (16 February 2021).

<sup>108</sup> [ECLI:NL:GHDHA:2021:252](#) (26 February 2021).

<sup>109</sup> [Temporary Act on Staying Outdoors 2021](#) (*Wet van 22 februari 2021, houdende wijziging van de Wet publieke gezondheid in verband met een tijdelijke bevoegdheid om het vertoeven in de openlucht te beperken teneinde de verspreiding van het SARSCoV-2-virus zoveel mogelijk te belemmeren (Tijdelijke wet beperking vertoeven in de openlucht Covid-19)*) (Stb 2021, 85).

<sup>110</sup> NOS, '[Riots in different cities](#)' (last updated 27 January 2021).

<sup>111</sup> The maximum penalty was EUR 8,700 euro or six months imprisonment (see Article 30 of the [Extraordinary Civilian Powers Act 1996](#)).

<sup>112</sup> [Temporary regulation of national curfew Covid-19](#) (Stcrt 2021, 4191) (22 January 2021).

## 2. Restrictions on international or internal travel

98. There were no nationwide legal measures which prohibited domestic travel (except under the curfew, see Part IV.A.1). However, several legal measures were taken with the stated aim to significantly reduce and discourage domestic travel (see Part IV.A.3 and 4 below). In addition, several measures can be mentioned, such as temporarily limiting or closing public transport (railways, ferries) and the closing of all sanitary facilities in and near holiday parks, camping grounds, recreational areas, beaches.<sup>113</sup> Some regions normally visited by large numbers of foreign and domestic tourists, such as Noord-Holland (Amsterdam and beaches), or Rijnmond and Zeeland, temporarily prohibited the use or renting of second homes (for recreational purposes), holiday homes, sailing boats and the like for overnight stays.<sup>114</sup>
99. The Dutch Government implemented the EU Commission temporary ban on non-essential travel to the EU of 16 March 2020.<sup>115</sup> The Government also implemented the Council Recommendation of 30 June 2020 on lifting these restrictions for travelers from countries on a regularly updated list, and subsequent amendments of this recommendation.<sup>116</sup> In addition, the Government issued four temporary ministerial regulations since March 2020, which banned flights from certain countries to the Netherlands altogether.<sup>117</sup> These were based on Article 5[10] of

<sup>113</sup> Minister of Health, Welfare and Sports, '[Second Amendment to Instruction regarding Covid-19](#)' (30 March 2020).

<sup>114</sup> See for example [Emergency Decree of the Chair of the Safety Region Zeeland of 29 April 2020, Article 2\[5a\]](#); [Emergency Decree of the Chair of the Safety Region Rotterdam-Rijnmond of 27 March 2020, Article 2\[5b\]](#).

<sup>115</sup> European Commission, '[Communication - Covid 19: Temporary Restriction on Non-Essential Travel to the EU](#)' (COM(2020) 115)) (16 March 2020); European Commission, '[Communication – On the assessment of the application of the temporary restriction on non-essential travel to the EU](#)' (COM(2020) 148)) (8 April 2020); European Commission, '[Communication – on the second assessment of the application of the temporary restriction on non-essential travel to the EU](#)'(COM(2020) 222)) (8 May 2020); European Commission, '[Communication – on the third assessment of the application of the temporary restriction on non-essential travel to the EU](#)'(COM(2020) 399)) (11 June 2020).

<sup>116</sup> [Council Recommendation \(EU\) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction \(OJ L 208, 1.7.2020\)](#), 1; [Council Recommendation \(EU\) 2021/132 of 2 February 2021 amending Recommendation \(EU\) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction \(OJ L 41, 4.2.2021\)](#), 1; [Council Recommendation \(EU\) 2021/0119 of 19 May 2021 amending Council Recommendation \(EU\) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction](#).

<sup>117</sup> [Regulation for a temporary ban on civil air traffic in the airspace of the Netherlands in connection with the virus that causes the COVID-19 disease \(Stcrt 2020, 16268\)](#) (13 March 2020); [Regulation for a second temporary ban on civil air traffic in the Netherlands in connection with the virus causing the disease Covid-19 \(20 December 2020\)](#) (Stcrt 2020, 16268); [Regulation for a third temporary ban on civil air traffic in the Netherlands in connection with the virus causing the disease Covid-19 \(21 December 2020\)](#) (Stcrt 2020, 68801); [Regulation for the fourth temporary ban on civil air traffic in the airspace of the Netherlands and BES in connection with the virus that causes the disease caused by COVID-19 \(20 January 2021\)](#) (Stcrt 2021, 3768).

the Aviation Act.<sup>118</sup> The temporary bans ended on 1 June 2021 but were replaced by an obligation for those arriving from high-risk countries to provide the result of a Nucleic Acid Amplification Tests (NAAT) of maximum 72 hours upon arrival and to quarantine for 10 days (or five days after a negative test result taken five days after arrival).<sup>119</sup>

### 3. Limitations on public and private gatherings and events

100. On 13 March 2020, the Minister of Health ordered the prohibition of public gatherings with more than 100 persons.<sup>120</sup> Less than two weeks later, on 24 March 2020, all public gatherings were prohibited, with some exceptions: for instance, not more than 30 persons could attend funerals, weddings, and religious gatherings and not more than 100 persons could attend legally mandatory meetings (such as meetings of Parliament).<sup>121</sup> Groups, defined as an (un)intentional gathering of three persons older than 13 years who kept less than 1.5 meter distance, were prohibited, again with some exceptions, especially families. These measures were gradually relaxed after the first wave and tightened again.

100. On 18 August 2020, rules were introduced for the maximum number of guests people could invite at home on any given day (six at that time).<sup>122</sup> These rules became stricter over time (three, two, one guest)<sup>123</sup> and were accompanied by a limit on the number of visits a person could pay to others (three, then one visitor.)<sup>124</sup>

101. There is no data regarding limits on public gatherings as such, but there is data on the related guideline to avoid busy places (see also IV.5 below). Support for this measure was 96% in late September and remained at 90% or higher. Compliance was 62% in late September and gradually increased to around 75% in January 2021. It stayed at around 73-74% until late April.

<sup>118</sup> [Aviation Act 1992](#).

<sup>119</sup> Minister of Infrastructure and Water Management, '[Letter of 31 May 2021 about the Termination of Regulation 4th Ban Civil Aviation](#)'; [Act of 26 May 2021 to amend the Public Health Act because of the introduction of additional temporary measures for international travel in relation to the fight against the Covid-19 pandemic \(Wet van 26 mei 2021 tot wijziging van de Wet publieke gezondheid vanwege de invoering van aanvullende tijdelijke maatregelen voor het internationaal personenverkeer in verband met de bestrijding van de epidemie van Covid-19\)](#) (Staatsblad 2021, 242).

<sup>120</sup> Minister for Medical Care and Sport, [Instruction 1662578-203166-PG](#) (13 March 2020).

<sup>121</sup> Minister for Medical Care and Sport, '[Designation by the Minister of Health, Welfare and Sport, also on behalf of the Minister of Justice and Security](#)' (24 March 2020).

<sup>122</sup> Central Government, '[Keep corona out of the door](#)' (18 August 2020).

<sup>123</sup> On 29 September 2020, 4 November 2020 and 20 January 2021; Minister for Medical Care and Sport, [Instruction 1775837-213642-PDC19](#) (4 November 2020).

<sup>124</sup> On 14 October 2020, 20 January 2021. For an overview, see the [timeline](#) of the National Institute for Public Health and the Environment.

102. Public support for limitations on the number of people that could be invited at home was 79% in late September and dropped sharply from mid-January onwards to 35% in late April. Compliance with the measure was consistently higher than support for the measure: 97% in late September with a gradual decline from mid-December onwards to 68% in late April.

4. *Closure of premises and facilities (e.g. schools, shops, services, parks, churches, sport facilities)*

103. There were three periods during which almost all premises and facilities were closed.

104. The first started on 15 March 2020, when the Minister of Health ordered the chairs of the regional safety authorities to close down, with immediate effect, all restaurants and bars, fitness and sport facilities, saunas, sex facilities, coffeeshops (soft drugs), theaters, museums, and cinemas.<sup>125</sup> Schools and daycare centers were closed, except for remote education and some exams. On 24 March 2020, casinos, facilities for all contact professions (barbershops, etc.), public sanitary facilities, and all facilities where physical distancing measures could not be complied with were added to the list (camping grounds, beaches, parks, etc.).<sup>126</sup> From 11 May 2020 to 15 June 2020, these measures were gradually lifted under stringent conditions, especially physical distancing, or, if that was impossible (e.g. barbers), protective measures.<sup>127</sup>

105. From 4 to 18 November 2020, almost all facilities mentioned above closed again.<sup>128</sup> Bars and restaurants had already closed on 14 October 2020.<sup>129</sup> There were the usual exceptions, such as shops for food and necessities, funeral centres, but also some unusual exceptions (contrary to the first and third period), such as fitness and sport facilities.

106. From 15 December 2020 to 19 January 2021, almost all facilities (non-essential shops, schools, day-care centres, sport and fitness, etc.) were closed again.<sup>130</sup> All of these measures were prolonged until 7 February 2021.<sup>131</sup> From 8 February 2021 onwards, measures were very slowly relaxed and lifted, starting with primary education and day-care centres on 8 February 2021, secondary

<sup>125</sup> Minister for Medical Care and Sport, [Instruction 1663097-203238-PG](#) (15 March 2020).

<sup>126</sup> Minister for Health, Welfare and Sport, [Instruction 1666478-203555-PG](#) (24 March 2020).

<sup>127</sup> Minister for Health, Welfare and Sport, [Instruction 1686051-204996-PG](#) (8 May 2020); Minister for Health, Welfare and Sport, [Instruction 1693632-205523-PG](#) (26 May 2020).

<sup>128</sup> Minister for Health, Welfare and Sport, [Instruction 1775837-213642-PDC19](#) (4 November 2020).

<sup>129</sup> Minister for Medical Care and Sport, [Instruction 1762562-212713-PDC19](#) (14 October 2020).

<sup>130</sup> Minister of Health, Welfare and Sport, Minister of Justice and Security, Minister of the Interior and Kingdom Relations, [‘Letter to parliament regarding corona measures’](#) (14 December 2020)

<sup>131</sup> [Regulations amending the Temporary Act on Covid-19 measures in connection with extending the package of measures](#) (1810289-216884-WJZ) (12 January 2021)



schools and intermediate vocational education (MBO) on 1 March 2021, some contact professions and non-essential shops (by appointment only and with stringent limitations on numbers) on 3 March 2021, higher education on 26 April 2021, pavement cafes on 28 April 2021, and indoor fitness and sport facilities on 18 May 2021.

## 5. *Physical distancing*

107. On 15 March 2020, the Government introduced a measure imposing/recommending physical distance of 1.5 meters.<sup>132</sup> On 24 March 2020, the Minister gave an order to the regional safety authority to prohibit all social interaction, if necessary by emergency regulation, where a physical distance of 1.5 meter could not be kept, with some exceptions (hairdressers, driving instructors, medical professions, etc.).<sup>133</sup> Thus began the so-called '1.5 meter-society'.<sup>134</sup>

108. Since 1 December 2020, Article 58[f] of the [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#) stipulates that people should keep a safe distance between each other outside of their homes and that the Government determines the precise distance to be kept (by administrative order). The safe distance remains at 1.5 meters.<sup>135</sup> The sanction for a violation of the prohibition is a fine under administrative law (Article 58u). Physical distancing can be regarded as the core of the [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#), since the rationale of many measures in the Act is to ensure that people keep a safe distance.<sup>136</sup>

109. Compliance with physical distancing was 62% in the beginning (29 September to 5 October 2020). It did not drop below that percentage. The peak was 67% from 5 January to 1 February 2021. Support for physical distancing was consistently considerably higher than compliance (90% in the beginning, a peak of 93% from 26 January to 1 February 2021, and a slow decline since then to 87% from 20-26 April).<sup>137</sup> Many people (the 'vast majority' of a total of 43937 penalties for violations of Covid-19 measures other than those related to the curfew) were fined for violating physical distancing rules. These fines were challenged

<sup>132</sup> Minister of Health and Minister of Education, Culture and Science, '[Additional measures for education, hotels and restaurants, sport](#)' (15 March 2020); Central Government, '[Additional measures for education, hotels and restaurants, sport](#)' (15 March 2020).

<sup>133</sup> Minister for Health, Welfare and Sport, [Instruction 1666478-203555-PG](#) (24 March 2020).

<sup>134</sup> The term appears to have been coined in a press conference by the Prime Minister on [7 April 2020](#): 'Together, we shall have to find the new normal in the 1.5 meter society, a society which is will be different from what we were used to until recently'.

<sup>135</sup> [Temporary Decision of 13 November 2020 on Keeping Safe Distance, Article 1 as defined in Public Health Act 2008](#), Article 58f.

<sup>136</sup> JCJ Dute, 'De Wet publieke gezondheid als instrument voor de bestrijding van de COVID-19-epidemie; Gewogen en te licht bevonden?' [The Public Health Act as an Instrument for the fight against the Covid-19 pandemic] in Vereniging voor Gezondheidsrecht, *Gezondheidsrecht in tijden van crisis: de Covid-19-pandemie* (2021), 67-86, 78.

<sup>137</sup> Central Government, '[Following and supporting corona rules](#)' (last accessed 19 August 2021).

unsuccessfully (as far as the legality of the fine was concerned) in several cases in court.<sup>138</sup>

## 6. *Use of face coverings and personal protective equipment (PPE)*

110. Facemasks became mandatory on public transport on 1 June 2020.<sup>139</sup> The fine for violating the obligation was EUR 95. Enforcement was performed by officials and persons who have the competence to enforce rules in public transport.<sup>140</sup> There was a long and heated debate on whether face masks should be mandatory in all indoor public spaces. On 30 September 2020, the Second Chamber finally debated and agreed to the measure.<sup>141</sup> The Government then gave citizens the urgent advice to wear non-medical face masks in public spaces.<sup>142</sup> In the absence of a proper legal basis, face masks did not become mandatory until 1 December 2020.<sup>143</sup> On 26 June 2021, the obligation to wear face masks was abolished, except in airports, public transport, secondary schools, and railway and metro stations.

111. Support for face masks in public indoor spaces was 82% in late October 2020 and remained around that level (with a low point of 79% in early December 2020 and a peak of 87% in late January 2021). Compliance was 61% when the measure was introduced in late October 2020 but increased to 82% in mid-December 2020 and remained in the low eighties ever since. Support for face masks in public transport was 87% in late October 2020 and has more or less remained at that level (the lowest point was 85%). Compliance with face masks in public transport was 98% in early December 2020 and has not dropped below 97%.

## 7. *Isolation of infected individuals and quarantine of individuals suspected of infection*

112. Isolation and quarantine are regulated in Chapter 5 of the [Public Health Act 2008](#). Isolation means the separation of an ill person, or a person suspected on strong grounds to be ill, against his or her will, in a hospital designated by the Minister so as to prevent the spread of infection or contamination (Articles 31-

<sup>138</sup> See for instance 21 cases [decided](#) on 7 October 2020 by the sub-district court Arnhem; Central Government, '[Following and supporting corona rules](#)' (last accessed 19 August 2021).

<sup>139</sup> Minister of Health, Welfare and Sport, [Instruction 1693632-205523-PG](#) (26 May 2020).

<sup>140</sup> [Act on Movement of Persons 2000](#) (*Wet personenvervoer 2000*), Article 87.

<sup>141</sup> Second Chamber, 2020-2021, [nr. 8, item 4](#) (Kamerstukken II, 2020-21, 8, 4).

<sup>142</sup> Central Government, '[Urgent advice to wear face masks](#)' (2 October 2020).

<sup>143</sup> [Regulation on face covering obligations Covid-19](#) (Stcr 2020, 62032) (30 November 2020).

34). Quarantine means the separation from others of healthy persons who have been in contact with ill or suspect persons, against their will, in designated buildings, ships or locations, or, with special permission, at home (Articles 35-36). Quarantine goes hand in hand with medical supervision (Article 35). Shirking isolation or quarantine is a crime (Article 68 [Public Health Act](#)). The imposition of both isolation and quarantine have to meet strict substantive and procedural requirements in view of, *inter alia*, Article 5 ECHR. No isolation and quarantine measures pursuant to Chapter 5 of the [Public Health Act 2008](#) have been taken in the context of Covid-19.<sup>144</sup>

113. Quarantine and isolation were a matter of guidance. From the earliest days of the pandemic in March 2020, self-quarantine was advised for 14 days in case someone in the household had Covid-19 or one had been in contact with someone with Covid-19 (later on, people could be informed about such contacts through a notification in the Covid-19 app) or return from a high risk country (in August 2020 this was reduced to a negative test on the 10th day and on 1 December 2020 on the fifth day).<sup>145</sup> Quarantine meant staying at home, receiving no visitors, keeping 1.5 meter distance from family members, and getting tested. In case of a positive test, persons had to go into isolation, which meant staying at home until Covid-19-symptoms were gone for 24 hours and that seven days had passed since the first symptoms had emerged.<sup>146</sup>

114. The Minister of Health repeatedly noted that compliance with self-quarantine advice was too low; that self-quarantine is unenforceable; that the procedural obstacles to the use of the provisions in Chapter 5 of the [Public Health Act 2008](#) and in criminal law were too formidable; and that he was therefore working on a new, less cumbersome legal basis for quarantine measures, which were to be enforced through administrative law. It did not happen, except that an obligation to self-quarantine for travelers from high-risk countries was introduced on 26 May 2021 (Article 58nb of the [Public Health Act 2008](#)), and the latter can be enforced by means of an administrative sanction (Article 58v of the [Public Health Act 2008](#)).<sup>147</sup>

## 8. Testing, treatment, and vaccination

<sup>144</sup> BJM Frederiks and SM Steen, 'Gezondheidsrechtelijk perspectief: rechten van cliënten in de ouderenzorg en verstandelijk gehandicaptenzorg tijdens de Covid-19-pandemie' in *Vereniging voor gezondheidsrecht, Gezondheidsrecht in tijden van crisis: de Covid-19-pandemie* (2021), 105-131, 112.

<sup>145</sup> RIVM, '[Quarantine and isolation](#)' (last updated 19 August 2021).

<sup>146</sup> NIPHE, '[Information letter for positive tested person](#)' (last updated 18 August 2021).

<sup>147</sup> [Act of 26 May 2021 to amend the Public Health Act because of the introduction of additional temporary measures for international travel in relation to the fight against the Covid-19 pandemic](#) (Wet van 26 mei 2021 tot wijziging van de Wet publieke gezondheid vanwege de invoering van aanvullende tijdelijke maatregelen voor het internationaal personenverkeer in verband met de bestrijding van de epidemie van Covid-19, *Staatsblad* 2021, 242).

115. It took long before sufficient testing capacity was available. Initially, only people with 'vital professions' and patients with serious symptoms and underlying health issues could be tested. On 1 June 2020, everybody with symptoms could be tested. It was only on 1 December 2020 that everybody who had no symptoms but had been in close contact with someone infected could make an appointment for a test.<sup>148</sup>
116. The vaccination campaign had a slow and bumpy start. It was strongly criticized by politicians, experts, health professionals, school teachers, in fact, by almost everyone. The reasons for the initial failure were many, including delivery problems at AstraZeneca, a wobbly and controversial policy about which groups needed to be prioritized, a lack of leadership from the Ministry, and the lack of a clear plan on administering vaccines other than AstraZeneca early on in the vaccination campaign.<sup>149</sup> On 31 January 2021, 349,183 people had received one dose and 2,405 were fully vaccinated; on 28 March 2021, these numbers were 1,802,744 and 667,487, and on 27 June 2021, 9,903,298 and 5,912,120, respectively. On 2 July 2021, vaccination of children of 12 years and older started.<sup>150</sup> In July 2021 the Netherlands had a population of 17 507 126 million.
117. As the prospect of a vaccine and vaccination became real in the autumn and winter of 2020 and early 2021, considerable legal, societal, and political debate arose about whether vaccination should be mandatory (it is voluntary, except that children between 12 and 15 years co-decide with their parents, and that parents decide over children below that age).<sup>151</sup> It was fueled by concerns that there was a significant group among professionals in health care and care facilities and ordinary citizens who would not be willing to be vaccinated as a matter of principle or out of fear or indecision. It was also a continuation of the recent debate in the Netherlands about mandatory vaccination against measles.<sup>152</sup> Concerns about Covid-19 vaccination proved to be unfounded: in June 2021, 94% were

<sup>148</sup> NV Alexandrov and JAR Koot, 'De COVID-19-pandemie: een beknopt overzicht van de feiten' [The Covid-19 pandemic: a brief overview of the facts], *Vereniging voor Gezondheidsrecht, Gezondheidsrecht in tijden van crisis: de COVID-19-pandemie* (2021), 19-41, 30.

<sup>149</sup> NV Alexandrov and JAR Koot, 'De COVID-19-pandemie: een beknopt overzicht van de feiten' [The Covid-19 pandemic: a brief overview of the facts], *Vereniging voor Gezondheidsrecht, Gezondheidsrecht in tijden van crisis: de COVID-19-pandemie* (2021), 19-41, 35-36.

<sup>150</sup> [Rijksoverheid Coronavirus Dashboard](#) (date accessed 2 July 2021).

<sup>151</sup> For a brief discussion, see JCJ Dute, 'De Wet publieke gezondheid als instrument voor de bestrijding van de COVID-19-epidemie; Gewogen en te licht bevonden?' [The Public Health Act as Instrument of fighting the Covid-19 pandemic] *Vereniging voor Gezondheidsrecht, Gezondheidsrecht in tijden van crisis: de COVID-19-pandemie* (2021), 67-86, 82-84.

<sup>152</sup> R. Pierik and M Verweij, 'De rol van meer verplichtende maatregelen in het Nederlandse vaccinatiebeleid. Een kritiek op het Nivel-Rapport' [The role of mandatory measures in Dutch vaccination policy] (2020) 95(8)*Nederlands Juristenblad* 544; R. Pierik, 'Past een vaccinatieplicht binnen het EVRM-regime?' [Is mandatory vaccination in conformity with the ECHR?] (2019) 43(4) *Tijdschrift voor Gezondheidsrecht* 8

(willing to be) vaccinated, while 4% were not yet vaccinated or refused as a matter of principle, and 2% were still undecided.<sup>153</sup>

## 9. Contact tracing procedures

118. The [Public Health Act 2008](#) imposes an obligation on doctors and virological laboratories to immediately notify the Local Health Service (GGD) of a suspected or confirmed disease of a patient in the case of A-diseases such as Covid-19.<sup>154</sup> The National Institute for Public Health and the Environment (RIVM) is competent to process personal health data, provided the data is pseudonymized (coded).<sup>155</sup> In its Covid-19 directive, the RIVM required doctors and laboratories to notify the GGD of confirmed patients only.<sup>156</sup>

119. Notification is the starting point of source and contact tracing investigations. The [Public Health Act 2008](#) did not provide a legal basis for such investigations when the pandemic emerged. It assigned the task to trace the source of infections to the executive of the municipal council (the Board of Burgomaster and Alderman) but did not attribute legal competences to carry out this task.<sup>157</sup> The Covid-19 directive of the RIVM assigned the task to investigate the source and contacts to the GGD.<sup>158</sup> However, few local health services had sufficient staff to carry out this task.<sup>159</sup>

120. On 6 October 2020, the Temporary Act Notification Application added provisions (Articles 6d, 64bis and 67a) to the [Public Health Act 2008](#), which enable the Minister of Health and Local Health Service (GGD) to deploy a digital notification application (CoronaMelder) to trace the spread of infections and warn people of possible infection.<sup>160</sup> The use of the app is voluntary. The Act prohibits making the use of the app a condition for admission to buildings or to the workplace or for participation in any form of interpersonal contact.<sup>161</sup> The Act requires compliance of the notification app with data protection law and provides legal remedies against possible violations of data protection law, as well as enforcement of the prohibition to force people to use the app.<sup>162</sup> The Temporary Act thereby aims to meet fierce criticisms of the notification app by the Dutch Data

<sup>153</sup> RIVM, '[Willingness to vaccinate](#)' (last updated 22 July 2021).

<sup>154</sup> [Public Health Act](#), Article 22[1] and 25.

<sup>155</sup> [Public Health Act](#), Article 6c[2] and 3.

<sup>156</sup> NIPHE, '[Covid-19](#)'.

<sup>157</sup> [Public Health Act](#), Article 6[1c].

<sup>158</sup> See also the [Protocol Source and Contact Tracing for Covid-19](#) (*Protocol bron- en contactonderzoek COVID-19*) which is annexed to the directive.

<sup>159</sup> N V Alexandrov and J A R Koot, 'De COVID-19-pandemie: een beknopt overzicht van de feiten' [The Covid-19 pandemic: a brief overview of the facts], *Vereniging voor Gezondheidsrecht, Gezondheidsrecht in tijden van crisis: de COVID-19-pandemie* (2021), 19-41, 30.

<sup>160</sup> [Temporary Act on Notification App 2020](#) (*Tijdelijke wet notificatieapplicatie Covid-19*) (Staatsblad 2020, 374). *Tijdelijke wet notificatieapplicatie Covid-19* (Staatsblad 2020, 374).

<sup>161</sup> [Public Health Act](#), Article 6 d[8].

<sup>162</sup> [Public Health Act 2008](#), Article 64 bis and 67a.

Protection Authority, Members of Parliament, and the media. The main points of contention had been the effectiveness of the app and compliance with data protection law, not least because of the involvement of commercial parties in the development and operation of the app.<sup>163</sup>

121. In addition, the Ministry of Health, Welfare and Sport (VWS) developed an online Coronavirus Dashboard which shows, *inter alia*, the spread and development of the pandemic in the Netherlands on the basis of data provided by hospitals, local health services (GGD) and the National Institute for Public Health and the Environment (RIVM).<sup>164</sup>

*10. Measures in long-term care facilities or homes for the elderly, restrictions on visitors, etc.*

122. On 20 March 2020, the Minister of Health ordered the chairs of the safety regions to ban visitors and professions who were not essential in providing basic care from all long-term care facilities and small-scale sheltered accommodation.<sup>165</sup> Exceptions could be made (dying residents, voluntary workers, the hearing and assessing of psychogeriatric and mentally challenged patients).<sup>166</sup> The ban was lifted on 25 May 2020, but in practice many facilities kept it intact well into June 2020, even though the ban no longer had a basis in emergency orders.<sup>167</sup> After August 2020, the Government did not impose a general visiting ban on long-term facilities for the elderly. The [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#) gives healthcare service providers the competence to regulate visits within legal limits.

123. The general ban on visitors did not apply to mental health care facilities; a customized approach was called for, given the detrimental effect which a ban can have on the health of inmates.<sup>168</sup> However, the Association of Mental Health Care Facilities (VGN) published a regulation for visitors on 23 March 2020 (last updated 10 May 2021), which essentially stipulated that family and volunteers were not welcome, with some exceptions.<sup>169</sup> The Mental Health Service (GGZ,

<sup>163</sup> MCMC Ploem and TFMTFM Hooghiemstra, '[Corona te lijf via een app](#)' [Fighting corona via an app?] (2020) (2020) Tijdschrift voor Gezondheidsrecht 509.

<sup>164</sup> Central Government, '[The current situation in the Netherlands](#)'

<sup>165</sup> Minister of Health, Welfare and Sport, '[Letter to the House of Representatives of the States General](#)' (24 March 2020)

<sup>166</sup> Minister of Health, Welfare and Sport, [Instruction 1665126-203432-PG](#) (20 March 2020); Minister of Health, Welfare and Sport, [Instruction 1679465-204590-PG](#) (24 April 2020).

<sup>167</sup> N Koffeman and K de Vries, '[Achter gesloten deuren. De bezoekregeling verpleeghuizen en artikel 8 EVRM](#)', [Behind closed doors: visitor regulations in care facilities and article 8 ECHR] (2020) *Nederlands Juristenblad* 1936, 1937.

<sup>168</sup> Second Chamber, [2019/20, 25295, No 199, 11-12](#).

<sup>169</sup> Association of Mental Health Care Facilities, '[Visitor regulation care for the disabled](#)' (23 March 2020).

*Geestelijke Gezondheidszorg*) issued guidance rules on Covid-19 measures, including visitor rights on 27 March 2020.<sup>170</sup> It was revised 14 times to date.<sup>171</sup> The directive states that mental health facilities must make their own assessments on limiting visitors and that a complete ban is an option.<sup>172</sup> In practice, many facilities adopted a ban on visitors from March to June 2020, during the first wave.<sup>173</sup>

124. The ban on visitors limited several fundamental rights of the elderly and mentally challenged, while a sufficient legal basis for these limitations was lacking in the [Public Health Act 2008](#) and the [Care and Compulsion Psychogeriatric and Mentally Challenged Patients Act 2018](#).<sup>174</sup> In addition, the freedom of movement and the right to privacy of inmates were often severely curtailed (eg no shopping, no walks outside, forced stay in rooms in case of infections in the facility). The measures were therefore highly controversial and led to lessons-learned reports by the Ministry with regards to the second wave.<sup>175</sup> The [Covid-19 Justice and Security \(Interim Measures\) Act 2020](#) has improved the legal position of elderly and mentally challenged by requiring a legal basis as well as a proportionality, necessity, and subsidiarity test for measures in care facilities.

125. The directive also suggested that suspected patients who refused to be separated could be forced to comply on the basis of the provision on isolation in the [Public Health Act 2008](#) or crisis measures in the [Compulsory Mental Health Care Act](#).<sup>176</sup> Patients who reside on a voluntary basis could be expelled from the mental health institution. In addition, options for patients to go on leave were seriously restricted.<sup>177</sup>

<sup>170</sup> Mental Health Service, '[Directive](#)' (last accessed 19 August 2021).

<sup>171</sup> For the complete overview, see Mental Health Service, '[Reading Guide](#)' (last accessed 19 August 2021).

<sup>172</sup> Mental Health Service, '[Directive](#)', Article 2[5.1].

<sup>173</sup> TP Widdershoven, 'Coronamaatregelen in de ggz: zorgen over rechtmatigheid en rechtsbescherming' [Coronameasures in the Mental Health Service: concerns about legal protection and lawfulness] (2020) 44 *Tijdschrift voor Gezondheidsrecht* 3, 251.

<sup>174</sup> [Care and Compulsion Psychogeriatric and Mentally Challenged Patients Act](#) (*Wet zorg en dwang psychogeriatrische en verstandelijk gehandicapte cliënten*) (Staatsblad 2018, 37); N Koffeman and K de Vries, '[Achter gesloten deuren. De bezoekenregeling verpleeghuizen en artikel 8 EVRM](#)' [Behind closed doors: visitor regulations in care facilities and article 8 ECHR] (2020) *Nederlands Juristenblad* 1936.

<sup>175</sup> BJM Frederiks and SM Steen, 'Gezondheidsrechtelijk perspectief: rechten van cliënten in de ouderenzorg en verstandelijk gehandicaptenzorg tijdens de COVID-19-pandemie' [A Health Law Perspective: rights of clients in the care for the elderly and mentally challenged during the Covid-19 pandemic] *Vereniging voor gezondheidsrecht, Gezondheidsrecht in tijden van crisis: de COVID-19-pandemie* (2021), 105-131, 116-119; N Koffeman and K de Vries, '[Achter gesloten deuren. De bezoekenregeling verpleeghuizen en artikel 8 EVRM](#)' [Behind closed doors: visitor regulations in care facilities and article 8 ECHR] (2020) *Nederlands Juristenblad* 1936; Ministry of Health, Welfare and Sport, '[Lessons regarding facilities with a view on a possible second wave](#)' (16 July 2020); Ministry of Health, Welfare and Sport, '[Gehandicaptenzorg – motie Van den Berg geleerde lessen, 1 september 2020, Kamerbrief, kenmerk 1739720-209705-LZ](#)'.

<sup>176</sup> [Compulsory Mental Health Care Act](#) (*Wet verplichte geestelijke gezondheidszorg*), Article 8[11]. See also Mental Health Service, Article 2[8], Directive[8].

<sup>177</sup> TP Widdershoven, 'Corona measures in mental health care: concerns about legitimacy and legal protection' 44 *Tijdschrift voor Gezondheidsrecht* 3 (2020), 251-257.

B. Enforcement and compliance

*1. Enforcement*

126. Information concerning enforcement of public health measures is contained in the individual sections of Part IV.A above.

*2. Compliance*

127. Information regarding compliance with public health measures is contained in the individual sections of Part IV.A above.