CONSTITUTIONAL COURT
V 363/2020-25
14 July 2020

Translation in excerpts

IN THE NAME OF THE REPUBLIC!

The Constitutional Court,
chaired by President
Christoph GRABENWARTER,

in the presence of Vice-President
Verena MADNER

and the members
Markus ACHATZ,
Wolfgang BRANDSTETTER,
Sieglinde GAHLEITNER,
Andreas HAUER,
Christoph HERBST,
Michael HOLOUBEK,
Helmut HÖRTENHUBER,
Claudia KAHR,
Georg LIENBACHER,
Michael RAMI,
Johannes SCHNIZER, and
Ingrid SIESS-SCHERZ

as voting members, in the presence of the recording clerk
Hannah GRAFL

has decided today after private deliberations pursuant to Article 139 of the Constitution (*Bundes-Verfassungsgesetz, B-VG*) on the application of **********, **********, **** ********** ********, represented by attorneys-at-law Max Leitner and Mara-Sophie Häusler, Wollzeile 24, 1010 Vienna, to repeal the Regulation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection pursuant to section 2 subparagraph 1 COVID-19 Measures Act, Federal Law Gazette *BGBl. II 98/2020*, as amended by Federal Law Gazette *BGBl. II 108/2020*, as follows:

I. 1. Section 1 of the Regulation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection pursuant to section 2 subparagraph 1 COVID-19 Measures Act, Federal Law Gazette *BGBl. II 98/2020*, section 2 of the Regulation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection pursuant to section 2 subparagraph 1 COVID-19 Measures Act, Federal Law Gazette *BGBl. II 98/2020*, as amended by Federal Law Gazette *BGBl. II 108/2020*, and sections 4 and 6 of the Regulation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection pursuant to section 2 subparagraph 1 COVID-19 Measures Act, Federal Law Gazette *BGBl. II 98/2020*, as amended by Federal Law Gazette *BGBl. II 107/2020*, were unlawful.

2. The provisions found to be unlawful shall no longer be applied.

3. The Federal Minister for Social Affairs, Health, Care and Consumer Protection is obliged to immediately publish these rulings in Federal Law Gazette II.

II. The Federation (Federal Minister of Social Affairs, Health, Care and Consumer Protection) is liable to refund the applicant for the court fees assessed at EUR 2.856, payable to the legal representatives within 14 days, failing which such payment shall be enforced.

Reasoning

I. Application

…

II. The Law

1. The Federal Act concerning temporary measures to prevent the spread of COVID-19 – COVID-19 Measures Act (*Bundesgesetz betreffend vorläufige Maßnahmen zur Verhinderung der Verbreitung von COVID-19 – Covid-19-Maßnahmengesetz*), Federal Law Gazette *BGBl. I 12/2020*, as amended by Federal Law Gazette *BGBl. I 23/2020*, stipulates as follows:

"Entry to business premises for the purpose of acquiring goods and services, and to places of work

Section 1. On occurrence of COVID-19, the Federal Minister for Social Affairs, Health, Care and Consumer Protection may, by way of regulation, impose a ban on entry to business premises, or specific business premises, for the purpose of acquiring goods or services, or to places of work, within the meaning of section 2 paragraph 3 Workers Protection Act (*ArbeitnehmerInnenschutzgesetz*) if such is required to prevent the spread of COVID-19. The regulation may lay down provisions as to how many persons are allowed to enter business premises which are exempted from the ban, and at what time. Moreover, it may stipulate specific conditions or requirements under which business premises may be entered.

Entry to specified places

Section 2. On occurrence of COVID-19, entry to specified places may be banned by way of regulation if such is required to prevent the spread of COVID-19. The regulation shall be issued by the
1. Federal Minister for Social Affairs, Health, Care and Consumer Protection, if its scope of application covers the entire federal territory,
2. Governor, if its scope of application covers the entire region *(Land)* territory, or
3. district administration authority, if its scope of application covers the given political district or parts thereof.
The entry ban may be limited to specific times. Moreover, provisions may be laid down under which conditions or requirements those specified places may be entered.

Participation of law enforcement bodies

Section 2a. (1) The law enforcement bodies shall assist the authorities and bodies responsible under this federal act, at their request, in the exercise of their described tasks and/or in enforcing the envisaged measures, using means of coercion if and when necessary.

(1a) The law enforcement bodies shall assist in the execution of this federal act, and of the regulations issued on the basis of this federal act, by
1. implementing measures to prevent impending administrative offences,
2. implementing measures to initiate and secure administrative penal proceedings, and
3. sanctioning administrative offences by imposing fines (section 50 Administrative Penal Act [*Verwaltungsstrafgesetz, VStG*]).

(2) If, according to the expert assessment of the respective health authority, the participation of law enforcement officers, depending on the nature of the communicable disease and its potential for transmission, carries a risk which can be countered only by special safety precautions, the health authorities are obliged to take adequate safety precautions.

Penal provisions

Section 3. (1) Anyone who enters business premises entry to which is banned pursuant to section 1 commits an administrative offense and shall be fined with up to EUR 3,600.

(2) Anyone who, as the owner of such business premises, fails to ensure that the business premises entry to which is banned pursuant to section 1 are not entered commits an administrative offence and shall be fined with up to EUR 30,000. Anyone who, as the owner of such business premises, fails to ensure that no more than the number of persons stipulated in the regulation enters the premises, commits an administrative offense and shall be fined with up to EUR 3,600.

(3) Anyone who enters a place entry to which is banned pursuant to section 2, commits an administrative offence and shall be fined with up to EUR 3,600.

Entry into force

Section 4. (1) This federal act shall enter into force as per the end of the day it is promulgated and lapse as of 31 December 2020.

(1a) Paragraph 2 in the version of the Federal Act *BGBl. I 16/2020* shall take effect retroactively as of 16 March 2020.

(2) If and when the Federal Minister has issued a regulation pursuant to section 1, the provisions of the Epidemics Act 1950 (*Epidemiegesetz 1950*), Federal Law

Gazette *BGBl. 186/1950*, concerning the closing of business premises within the scope of application of this Regulation shall not be applicable.

(3) The provisions of the Epidemics Act 1950 shall remain unaffected.

(4) Regulations based on this Federal Act may be issued before the act enters into force, but shall not take effect prior to its taking effect.

(5) Sections 1 and 2 and section 2a in the version of the Federal Act *BGBl. I 23/2020* shall enter into force on the day following publication.

Implementation

Section 5. The Federal Minister for Social Affairs, Health, Care and Consumer Protection shall be responsible for implementing this federal act."

2. The Regulation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection pursuant to section 2 subparagraph 1 COVID-19 Measures Act – COVID-19 Measures Regulation-98 (Verordnung des Bundesministers für Soziales, Gesundheit, Pflege und Konsumentenschutz gemäß § 2 Z 1 des COVID-19-Maßnahmengesetzes – COVID-19-Maßnahmenverordnung-98), Federal Law Gazette *BGBl. II 98/2020*, as amended by Federal Law Gazette *BGBl. II 108/2020*, stipulates as follows (the … challenged provisions are highlighted):

"Section 1. Entry to public places shall be banned in order to prevent the spread of COVID-19.

Section 2. Exemptions from the ban as set out in section 1 shall be entry
1. required to avert immediate danger to life and limb, and property;
2. serving to provide care and assistance to persons in need of the same;
3. required to satisfy the essential needs of daily life, provided it is ensured that people stay apart at least one metre from each other at the place where such needs are satisfied, unless the risk of infection can be minimised through adequate safety precautions. This exemption shall also apply to funerals attended only by immediate family;
4. required for work purposes, provided it is ensured that people stay apart at least one metre from each other at the place of work, unless the risk of infection can be minimised through adequate safety precautions. Work activities should preferably take place outside the place of work, where this is possible, and employer and employees should arrive at an agreement on such arrangements;
5. where public outdoor spaces are entered alone, together with persons living in the same household, or with pets, people stay apart at least one metre from others each other.

Section 3. Entry to
1. medicinal spas as defined in section 42a Hospitals and Medicinal Spas Act (*Krankenanstalten- und Kuranstaltengesetz, KAKuG*) is forbidden for medicinal spa patients,
2. facilities that serve the purpose of rehabilitation is forbidden for patients, except for absolutely essential medical rehabilitation measures following acute medical treatment, as well as within the scope of support services for general hospitals.

Section 4. The use of means of mass transport shall be permitted only for types of entry as set out in section 2 paragraphs 1 to 4, a minimum distance of one metre having to be retained from other persons during such use.

Section 5. Entry to sports grounds shall be forbidden.

Section 6. If stopped and questioned by law enforcement officers, persons thus questioned shall provide plausible justification why such entry is permitted under section 2.

Section 7. (1) This Regulation shall enter into force as of 16 March 2020 and lapse at the end of 13 April 2020.

(2) The modifications effected by Amendment Federal Law Gazette *BGBl. II 107/2020* shall enter into force on the day following its publication."

The challenged regulation was amended by Federal Law Gazette BGBl. II 148/2020 and Federal Law Gazette BGBl. II 162/2020 after the present application was received by the Constitutional Court. According to section 13 paragraph 2 subparagraph 2 of the Regulation easing COVID-19 restrictions, Federal Law Gazette *BGBl. II 197/2020*, it ceased to be in force at the end of 30 April 2020.

3. Section 24 of the Epidemics Act 1950 (*Epidemiegesetz 1950)* Federal Law Gazette *BGBl*. 186/1950, as amended by Federal Law Gazette *BGBl. I 114/2006*, stipulates as follows:

"Restrictions of movements for the residents of certain areas.

Section 24. If, given the nature and extent of the occurrence of a notifiable disease, this is absolutely necessary to prevent its further spread, the district administrative authority shall impose restrictions of movements on the residents of epidemic areas. Likewise, restrictions may be imposed on contacts from outside with the inhabitants of such areas. "

III. Application and Preliminary Proceedings

…

IV. Considerations

A. As to the admissability

1. …

3.3.1 It results from the wording of Article 139 paragraph 1 subparagraph 3 of the Constitution (*Bundes-Verfassungsgesetz, B-VG*) ("claiming to have been violated") that the challenged provisions of the regulation must in fact directly and adversely interfere with the applicant's legal sphere at the time the application is filed (see, on behalf of many, for regulation provisions *VfSlg. 12.634/1991, 13.585/1993, 14.033/1995; for legal provisions VfSlg. 9096/1981, 12.447/1990, 12.870/1991, 13.214/1992, 13.397/1993*).

In addition the Constitutional Court takes the view that that the challenged provisions of the regulation must continue to be effective for the applicant at the time it renders its decision (cf. for regulation provisions *VfSlg. 12.413/1990, 12.756/1991, 12.877/1991, 14.712/1996, 14.755/1997, 15.852/2000, 16.139/2001, 19.391/2011*; for legal provisions *VfSlg. 12.999/1992, 16.621/2002, 16.799/2003, 17.826/2006, 18.151/2007; VfGH 6.3.2019, G 318/2018*), which, as a general rule, is no longer the case if the challenged provisions have already lapsed or have been substantially modified and the purpose of Article 139 paragraph 1 subparagraph 3 of the Constitution (*B-VG*) has thus already been achieved (e.g. *VfSlg. 17.653/2005, 18.284/2007, 18.837/2009; 15.491/1999, 19.391/2011*). However, it cannot be precluded *a priori* that even provisions that have already lapsed currently affect the applicant's legal sphere (cf. e.g. *VfSlg. 16.581/2002, 18.235/2007; 10.313/1984, 15.888/2000, 17.798/2006*; in general also e.g. *15.116/1998, 17.826/2006; 12.976/1992*). Such has been assumed by the Constitutional Court in particular when a claim related to individual calendar years (*VfSlg. 16.581/2002*) or when the lapsed provision continued to directly affect the applicant's legal sphere, such as for instance in

relation to agreements under private law, which the contestant concluded while the provision was still applicable (*VfSlg*. *12.976/1992*).

In particular, the Constitutional Court considers, where the given rules refer to a specific period of time, challenged provisions in a regulation to be effective, and the application therefore eligible, regardless of the fact that the regulation has already lapsed, as the provisions continue to be applicable to the respective period (see *VfSlg*. 10.820/1986 and, in particular, the case law on the so-called system charges in energy law *VfSlg*. 15.888/2000, 15.976/2000, 17.094/2003, 17.266/2004, 17.798/2006, 19.840/2013).

3.3.2 As is clearly shown in Article 139 paragraph 4 (as well as in Article 140 paragraph 4) of the Constitution *(B-VG)*, the purpose of legal protection of an application under Article 139 paragraph 1 subparagraph 3 of the Constitution *(B-VG)* can or rather must, in given constellations, also be met by a ruling of the Constitutional Court that the challenged provisions of the regulation were unlawful.

The provisions of the regulation challenged by the applicant are part of a regime of laws and regulations in which, in order to cope with a situation of crisis, to combat the COVID-10 pandemic and its effects, the legislator has issued authorisations for the executive on which regulations are based containing orders and bans directly restricting (constitutionally guaranteed) rights and which penalise non-compliance with such orders and bans. The reason for and the purpose of such a regulatory regime requires the executive to permanently monitor and adjust its measures, which leads to a rapid succession of individual regulations or provisions being in force or being amended.

An application under Article 139 paragraph 1 subparagraph 3 (such as an application under Article 140 paragraph 1 subparagraph 1 point c) of the Constitution *(B-VG)* is to ensure legal protection where such protection from interferences with subjective rights by (statutory or) regulatory provisions cannot be obtained at all, or only through unreasonable means (on the subsidiarity of an individual application cf. *Rohregger*, Article 140 of the Constitution*, in: Korinek/Holoubek et al [ed.], Bundesverfassungsrecht, 6. Lfg. 2003, paragraph 163*). In this regard, the Constitutional Court has repeatedly found that the purpose of the rule-of-law

principle culminates in that all acts of state bodies must be based on the law and, indirectly, ultimately on the Constitution and that a system of legal safeguards provides such guarantee (*VfSlg. 11.196/1986, 16.245/2001*).

The applicant's interest, in terms of legal protection, in clarifying whether the interference with his legal sphere (in terms of fundamental rights) caused by the challenged provisions of the regulation, which he must first tolerate under penalty, was lawful and ultimately constitutional, can only be addressed by proceedings under Article 139 paragraph 1 subparagraph 3 of the Constitution *(B-VG)*, in view of the fact that legal protection could otherwise be (have been) obtained only by committing an offence. Resulting from this interest in legal protection, which extends beyond the short period of time during which the challenged provisions were in force (cf. the regime of complaints against the exercise of direct orders and coercive measures by administrative authorities (*Maßnahmenbeschwerde*) that is inspired by a similar concept of legal protection or the Constitutional Court's case law on the prohibition of gatherings e.g. *VfSlg*. *20.312/2019*), the applicant's legal sphere in the case at hand is affected also at the time the Constitutional Court renders its decision, and does – still (cf. *VfSlg*. *10.819/1986, 11.365/1987*) – give rise to the challenged provisions being effective, even though they have meanwhile lapsed.

3.3.3 While the challenged provisions of the COVID-19 Measures Regulation-98 expired as per the end of 30 April 2020 (sections 1 and 6) or were substantially amended by Regulation Federal Law Gazette *BGBl. II 148/2020* (sections 2 and 4), they still, in light of the above, directly interfere with the applicant's legal sphere and impair his legally protected interests even at the present time. Thus, there is no other reasonable approach open to the applicant for submitting his concerns as to the lawfulness of the challenged provisions to the Constitutional Court.

…

B. On the merits

1. In review proceedings regarding the lawfulness of a regulation according to Article 139 of the Constitution (*B-VG*), the Constitutional Court is limited to

discussing the concerns raised *(cf. VfSlg. 11.580/1987, 14.044/1995, 16.674/2002).* Hence, it must assess only whether the challenged regulation is unlawful on the grounds presented in the application *(VfSlg. 15.644/1999, 17.222/2004)*.

2. As for the concerns regarding the constitutionality of the authorisation to issue regulations as granted in the law:

2.1. First of all the applicant raises concerns regarding the constitutionality of the statutory basis of the challenged provisions of the regulation. Section 2 COVID-19 Measures Act grants authorisation to the issuer of the regulation, hereinafter the "regulator", that is not sufficiently determined with respect to Article 18 paragraph 2 of the Constitution (*B-VG*) and too far-reaching in view of fundamental rights requirements, in particular those arising from the guarantees of freedom of movement as enshrined in Article 2 Protocol 4 of the European Convention of Human Rights (ECHR) and Article 4 paragraph 1 Basic State Law *Staatsgrundgesetz, StGG*), as well as of the fundamental rights to liberty, to the inviolability of property, to engage in a gainful occupation, to respect for private and family life, and to equality.

Where, as in the case at hand, law grants authorisation for serious restrictions of fundamental rights, as allowed by section 2 COVID-19 Measures Act, the content of the regulation must, it is argued by the applicant, when interference is allowed to such extent, already be specifically defined in the law itself. With respect to section 2 COVID-19 Measures Act, the legislator had failed to meet these higher standards in terms of the law being sufficiently determined. The Act, so it is claimed, neither sets a threshold for the spread of COVID-19 starting from which entry bans may be imposed nor provides criteria to be used in assessing the need for such measures. Likewise, no thresholds are set to determine when the occurrence of COVID-19 may be deemed to have ceased. A marginal probability of occurrence – one would have to expect single cases of COVID-19 occurring from time to time over the course of the next years – cannot justify, it is claimed, such far-reaching restrictions. In the applicant's view it is not consistent with constitutional law to grant the regulator the sole prerogative to assess whether such highly interfering measures are necessary.

Section 2 COVID-19 Measures Act grants – depending on the territorial scope of the respective measure – the Federal Minister of Social Affairs, Health, Care and Consumer Protection, the Governor of a region (*Landeshauptmann*) or the district administration authority the right to ban, by way of regulation, entry to specified places if such is required to prevent the spread of COVID-19. This provides an opportunity to severely restrict personal freedom of movement by way of regulation, where deemed necessary. However, in particular in view of the reservation set out in Article 2 paragraph 3 Protocol 4 of the ECHR, such restrictions are lawful only if they comply with the principle of proportionality. While entry bans, even if applicable to large parts of the national territory, may after all, from the perspective of the right to freedom of movement, be proportionate measures to reduce the spread of COVID-19, such serious interferences with fundamental rights can be proportionate only if the legislator provides for additional rule-of-law safeguards.

Such safeguards may be of a substantive or procedural nature. The setting of a time limit for measures might, for example, be deemed a substantive safeguard, but section 2 COVID-19 Measures Act, the applicant argues, does not give rise to any obligation to set a time limit for the entry bans imposed by way of regulation. By contrast, bans imposed pursuant to section 36 paragraph 4 Security Policy Act (*Sicherheitspolizeigesetz, SPG*) must always be limited in time and place, thus meeting the constitutionally required proportionality standards. Without such limitations, the legislator grants the executive a disproportionate margin of appreciation, the applicant argues. On a procedural level, an obligation to evaluate the measures, consultation with other bodies established under the Constitution (for instance the Main Committee of the National Council), other consultation mechanisms or additional access to (effective) legal remedies for those affected could be worth considering. However, section 2 COVID-19 Measures Act does not provide for any such safeguards either. And finally, it is argued, the provision also fails to strike the necessary balance between the interference with fundamental rights on the one hand, and the achievement of the objectives pursued on the other hand. The lack of such guarantees results in section 2 COVID-19 Measures Act affording the regulator the opportunity to disproportionately restrict constitutionally guaranteed rights, such as the right to freedom of movement. Section 2 COVID-19 Measures Act hence grants the regulator, in an inadequate manner, far-reaching powers to restrict fundamental

rights. Consequently, the legal provision equally fails to meet the requirement of objectivity deriving from the principle of equality.

2.2. Responding to these concerns the Federal Minister of Social Affairs, Health, Care and Consumer Protection basically states that the principle of proportionality is fully enshrined in the wording "if such is required to prevent the spread of COVID-19" in section 2 COVID-19 Measures Act. The principle of proportionality ("if such [...]"), so the argument, also includes the safeguard of a time limit for the regulations issued on the basis of section 2 COVID-19 Measures Act. All regulations issued on this basis can be measured against this standard and be evaluated with sufficient precision. Consequently, all the regulations issued on the basis of the COVID-19 Measures Act have short time limits. As far as the applicant is drawing a parallel to the security police provisions in sections 36 and 36a *SPG*, the applicant fails to understand the specific features connected to regulations in the field of epidemic diseases law. The dangers arising from criminal offences, as set out in the *SPG*, are not at all comparable to those threads arising from communicable diseases – as yet unknown, it has to be added – and their pandemic spread.

If, by complaining about the lack of statutory obligations to evaluate measures, consult with other bodies established under the Constitution or comply with other consultation mechanisms, the applicant is addressing the case law on "legitimisation by procedure", according to which particularly strict procedural rules may be used in certain areas to counterbalance a lack of legal precision in determining administrative action, so as to meet the requirements laid down in Article 18 of the Constitution (*B-VG*), the applicant is ignoring the nature of the subject matter being regulated by epidemic diseases law. "Legitimisation by procedure" typically applies to areas where regulation is characterized by final determination, i.e. determination in view of the objectives pursued and aims to be achieved, such as planning law. But not even in such cases the Constitutional Court would qualify a mere formal involvement of external bodies as sufficient. Likewise, procedural rules may have a balancing effect in areas where it is necessary to establish a given state of the art in science. However, none of these areas feature the special urgency and risk that is characteristic of epidemic diseases law. Imposing on the regulator the obligation to consult with other bodies – given a pandemic and exponential spread of the disease – will, so it is

argued, deprive the regulator of the flexibility needed in such circumstances to deal with an outbreak on this scale. This becomes all the more apparent if one takes a look at the epidemiological situation at the time when the two regulations based on sections 1 and 2 COVID-19 Measures Act were issued: a delay of even one day would, after all, have had dramatic effects on the rise in the number of infections.

By enshrining the principle of proportionality ("if such is required to prevent the spread of COVID-19"), the Federal Minister of Social Affairs, Health, Care and Consumer Protection is convinced that the obligation – which has to be respected in the applicant's view – of proceeding on a well-informed scientific basis and of making adequate evaluations has been sufficiently incorporated in the Act. For that matter, all regulations issued by the Federal Minister of Social Affairs, Health, Care and Consumer Protection meet these requirements, all the more so as, being limited in time, they have always been reviewed and evaluated as to their necessity.

2.3. Considering its specific subject matter, section 2 COVID-19 Measures Act meets the constitutional requirements of legal certainty as arising from Article 18 paragraph 2 of the Constitution (*B-VG*):

2.3.1. The challenged provisions of COVID-19 Measures Regulation-98 were issued based on section 2 COVID-19 Measures Act, which, in the view of the Constitutional Court, constitutes a *lex specialis* with regard to section 24, Epidemics Act 1950. Section 2 subparagraph 1 COVID-19 Measures Act authorises the Federal Minister of Social Affairs, Health, Care and Consumer Protection to forbid, by way of regulation, entry to specified places if such is required to prevent the spread of COVID-19, in cases where the scope of the regulation covers the entire federal territory. The entry ban may be limited to specific times. Moreover, provisions may stipulate under which conditions or requirements those specified places may be entered.

Based on this, the challenged section 1 COVID-19 Measures Regulation-98 in a first step prohibits entry to public places in general. Section 2 defines exemptions from the ban pursuant to section 1 for certain types of entry. These challenged provisions of the COVID-19 Measures Regulation-98 (section 1 of the regulation

expired at the end of 30 April 2020, section 2, as challenged, was substantially amended by Regulation Federal Law Gazette *BGBl. II 148/2020*, so that the challenged provision relevant for all further discussion is the one in the version Federal Law Gazette *BGBl. II 108/2020*) are related to section 4 of the Regulation as amended by Federal Law Gazette *BGBl. II 107/2020* (which provision was substantially amended by Federal Law Gazette *BGBl. II 148/2020*) and section 6 of the regulation (which, in turn, expired at the end of 30 April 2020).

2.3.2. The authorisation to issue regulations as stipulated in section 2 COVID-19 Measures Act binds the Federal Minister of Social Affairs, Health, Care and Consumer Protection being the body in charge of issuing regulations in multiple ways:

The COVID-19 Measures Act is the legislator's response to a crisis situation provoked by the corona virus SARS-CoV-2 and the corona virus disease, COVID-19, caused by it. Alongside a number of other government measures in various legal forms and at various levels, entry bans pursuant to section 2 COVID-19 Measures Act aim to protect the health of the population by keeping the healthcare infrastructure functioning.

It is typical of crisis situations like the one at hand that measures to combat the cause, effects and spread of the disease have to be taken under enormous time pressure and, as such, under conditions of uncertainty, as knowledge about the disease can largely be gained only step by step, and both the effects and the spread of COVID-19 are necessarily the subject of forecasts.

Even in such situations, the Constitution will, as always, guide the legislature and the executive in any measures taken to cope with the situation, in particular by means of the principle of legality as enshrined in Article 18 of the Constitution (*B-VG*), as well as by means of a fundamental rights regime consisting of a system of constitutionally guaranteed rights. The principle of legality requires that the executive be bound by law in the measures it takes to combat the crisis. The fundamental rights regime ensures that, in the necessary weighing up against public interests, the interests of the individual considered essential in a liberal constitutional system are taken into account and that the interests involved will be adequately balanced against one another, even if, as

in the current situation, the public interests are based on interests protected by fundamental rights which equally oblige the state to take action.

In accordance with Article 18 paragraph 2 of the Constitution (*B-VG*), the legislator can grant the regulator discretion regarding the balancing of interests as well as forecasting and also leave it to the regulator to adopt more detailed provisions in response to the given situation, as long as the key objectives which should guide any administrative action can be derived, with sufficient clarity, from the authorisation to issue the regulation viewed in its overall context (cf. *VfSlg. 15.765/2000*). Constitutional requirements arising from legal certainty and imposed on the legislator depend on the matter to be regulated and the normative context (*VfSlg. 19.899/2014*, with further references). In this regard, the Constitutional Court has repeatedly ruled that the principle of legality, according to which all action of the executive has to be predetermined by law, must not be applied excessively to cases where prompt action and the taking into account of various different parameters in terms of time and place are inherently necessary to achieve useful and effective regulation, which means it may be allowed to bind the regulator by a determination specified by objectives, based on vague legal terms and blanket-clause-type rules (cf. *VfSlg. 17.348/2004*, with further references). The Constitutional Court has also noted that, in relevant constellations, the objective of a norm may also require that a measure which was urgently needed at the time it was adopted – and may have come about with lower standards being applied – becomes unlawful and has to be repealed once the reason for its adoption ceases to exist (see *VfSlg. 15.765/2000*).

Where the legislator, with a view to certain actual developments, leaves it to the regulator to decide which measures, from among a number of possible measures of varying extent but all entailing significant restrictions of fundamental rights, the regulator, relying on the projections available and weighing the interests affected, considers necessary, the regulator must make such decision based on the information which was objectively available in the given situation of that time (cf. *VfSlg. 15.765/2000*) while considering the relevant circumstances on which the law focuses and after having weighed the interests involved. In doing so, the regulator must identify these circumstances and record them accordingly as and while the regulation is being issued to ensure that the lawfulness of the regulation can be reviewed (a point which the Constitutional Court has already

referred to in multiple contexts, cf. *VfSlg. 11.972/1989, 17.161/2004, 20.095/2016*). If the law fails to determine the regulation in a way that its contents results in significant parts from the law itself, but instead opens up a margin of discretion for the executive to an extent that quite divergent regulation contents may be derived from the law, the regulator must identify the circumstances that are relevant under the law and record such findings in a verifiable manner throughout the regulation procedures in order to enable an ex post review whether the concrete rules laid down in the regulation are in conformity with the law in the concrete situation (this is the core element of the case law according to which the law must be determined to an extent "that the lawfulness of any action taken by the executive power can be measured against the law", see, for instance, *VfSlg. 12.133/1989*). In so far, democratic law-making of the legislative power differs from the generally abstract law making of the executive power by way of regulations under Article 18 paragraph 2 of the Constitution (*B-VG*). The effects of legal certainty and thus, according to Article 18 paragraph 2 of the Constitution (*B-VG*), the principles of the rule of law and democracy address also the regulator and aim at a corresponding binding effect when a regulation is actually being issued.

2.3.3. While section 1 COVID-19 Measures Act provides for bans on entry "to business premises, or specific business premises", for the purpose of acquiring goods or services, or to places of work, section 2 COVID-19 Measures Act (only) authorises the regulator to ban entry "to specified places". The purpose of these entry bans is to reduce personal contacts between people in order to avoid, as far as possible, infection with, and thus the spread of, COVID-19. While the entry bans under section 1 COVID-19 Measures Act focus on those personal contacts which arise when people visit business premises for the purpose of acquiring goods or services, or places of work, and thus those places where people regularly gather in larger numbers, section 2 COVID-19 Measures Act adds to this an authorisation to impose entry bans for those "specified places" where people typically have personal contact in other settings. Section 2 COVID-19 Measures Act thus takes account of the fact that there are not only the business premises and places of work covered by section 1, but also a number of other places where people gather in larger numbers and which therefore present, with respect to COVID-19, similar risks of infection with, and thus of the spread of, this disease. This is also indicated in the explanatory notes to section 2 COVID-19

Measures Act, where it says (Private Members' Bill IA 396/A 27th legislation period, 11):

"It shall also be possible to ban entry to specified places. Such places may include children's playgrounds, sports grounds, lakeside and riverside areas or areas where people spend time without engaging in any type of consumption. Such places can be defined in an abstract manner in the regulation ('children's playgrounds', 'sports grounds') or by indicating a specific areas (for instance with regard to specific areas where people spend time without engaging in any type of consumption, municipal areas, local communities) or a combination of both (children's playgrounds in a specific *Land*)."

This means that the law does not only specify the purpose of an entry ban pursuant to section 2 COVID-19 Measures Act in concrete terms, it also provides guidance as to what the characteristic feature of those "specified places" is for which the regulator can order entry bans.

Consequently, the legal authorisation provided by section 2 COVID-19 Measures Act is, *a priori*, limited insofar as the authorisation to ban entry to specified places can only serve to prevent people from gathering at exactly those specified places referred to by law. Section 2 COVID-19 Measures Act is thus based on the principle of the freedom of movement (see also 2.4 below) authorising the regulator to limit such freedom by banning entry to specified places. At the same time this legal provision clearly describes the features of such places entry to which the regulator can ban for the purpose of preventing COVID-19, which is that the use of such places results in face-to-face gatherings of several people outside their homes.

The regulator can specify the places entry to which is banned for the purpose of preventing the spread of COVID-19 in concrete or abstract terms; the regulator can also, as clearly indicated by the explanatory notes, prohibit outsiders from entering regionally circumscribed areas, such as municipal areas or local communities, but the regulator is not empowered to impose, by generally banning entry to the public space outside one's own home (within the broad meaning of Article 8 ECHR), a curfew per se – even if regionally limited and thus in line with the territorial scope of the regulation according to section 2 subparagraph 2 or subparagraph 3 COVID-19 Measures Act. Therefore the authorisation granted by section 2 COVID-19 Measures Act is limited insofar as

entry to specified places may be banned, but people may not be ordered, on the basis of section 2 COVID-19 Measures Act, to stay at a specified place, including, in particular, their home. Section 2 COVID-19 Measures Act thus grants authorisation to impose rather far-reaching restrictions on people's freedom of movement, but not, in any case, to give orders that would qualify as an interference with the right to liberty (which means that the applicant's concerns in this matter are unfounded *a priori*).

Moreover, the Act stipulates that the regulator must differentiate such entry bans in terms of type and scope with a view to the purpose of the measure, depending on in how far the regulator deems it necessary, weighing all factors, in the effort to prevent the spread of COVID-19, to ban entry to specified places or to impose time limits or specific requirements or conditions for entry. The legislator thus grants the regulator discretion to decide on estimate and forecasts whether and in how far restrictions on fundamental rights, including substantial ones, are deemed necessary to prevent the spread of COVID-19. Therefore the regulator has to base his decision, whether people should be prevented from or restricted in their entry to specified places, on a weighing of the relevant interests of the people which are protected by fundamental rights. Such interests must definitely be weighed when the freedom of movement is at stake and any other fundamental rights affected. The regulator must therefore with regard to the level and spread of COVID-19 and necessarily on the basis of forecasts assess in how far the envisaged entry bans or restrictions are measures that are appropriate (serving the purpose of achieving the objective), necessary (less restrictive for conflicting interests while at the same time being less effective not being a viable option) and adequate (excluding unacceptable restrictions of fundamental rights).

The discretion to decide on estimate and forecasts which is granted to the regulator by section 2 COVID-19 Measures Act thus includes the dimension of time as well, since the authorisation granted by section 2 COVID-19 Measures Act provides for, and even requires, a step-by-step approach where effects that cannot be fully assessed are being monitored and new measures are taken in turn as a response to the outcome of such monitoring.

2.4. There are no concerns regarding the constitutionality of Section 2 COVID-19 Measures Act in the view of the constitutionally guaranteed right to freedom of movement as set out in Article 4 paragraph 1 Basic State Law (*StGG*) and Article 2 Protocol 4 of the ECHR.

2.4.1. Pursuant to Article 4 paragraph 1 Basic State Law (StGG), the freedom of movement of persons is not subject to any restriction within the national territory. This fundamental right protects people from being prevented, by state authority, to go to a specific place or a specific delimited area. Article 2 section 1 Protocol 4 of the ECHR guarantees everyone who lawfully resides in Austria the right to move freely within Austria, offering the possibility "to come and go" as they please (ECHR 22/02/1994, case *Raimondo*, no. 12.954/87, [paragraph 39]; 01/07/2004, case *Vito Sante Santoro*, no. 36.681/97 [paragraph 43]). The freedom to go to, and stay at, any place is a key element of human self-determination. Freedom of movement is also a prerequisite for the enjoyment of a number of other rights and freedoms (see *Pöschl*, Article 2 Protocol 4 of the ECHR, in: *Korinek/Holoubek* et al [ed.], *Bundesverfassungsrecht*, *6. Lfg. 2003, paragraph 6*).

However, freedom of movement is not guaranteed without any restrictions. The Constitutional Court already held in *VfSlg. 3447/1958*, inter alia with a view to officially imposed epidemic disease measures, that such measures were necessary in the public interest and that therefore their substance, as well as their scope of application in terms of place and time, had to be limited to the protection of such interest (later, the Constitutional Court found the reservation inherent in Article 4 paragraph 1 Basic State Law (StGG) limited by the fact that the principle of equality prevents any restrictions of the freedom of movement not necessary in the public interest being effected through arbitrary changes made to the legal order, see *VfSlg. 7379/1974, 7686/1975, 8373/1978*, and, regarding criticism of this case law, with further references, *Pöschl*, Article 4 Basic State Law (*StGG*), in: *Korinek/Holoubek* et al [ed.], *Bundesverfassungsrecht*, *5. Lfg. 2002, paragraph 44 f*.). In accordance with the reservation set out in Article 2 paragraph 3 Protocol 4 of the ECHR – the special reservation set out in Article 2 paragraph 4 Protocol 4 of the ECHR (on its intended effect, see *Pöschl*, Article 2 Protocol 4 of the ECHR, paragraph 67) is not relevant in the context of the measures at hand – restrictions of the freedom of movement must be in

accordance with the law and necessary in a democratic society – inter alia justified by the public interest of health protection. Consequently, restrictions of the freedom of movement as guaranteed in Article 1 paragraph 1 Basic State Law (*StGG*) and Article 2 paragraph 1 Protocol 4 of the ECHR are consistent with constitutional law only if they are provided for by law for the purposes of a legitimate public interest and appropriate for achieving the objective, necessary as well as proportionate, in the narrower sense of the term.

2.4.2. The authorisation to issue regulations as stipulated in section 2 COVID-19 Measures Act meets these requirements. The entry bans which may be imposed according to this statutory provision serve the protection of health within the meaning of Article 2 paragraph 3 Protocol 4 of the EHCR. By specifying in concrete terms that the objective is to prevent the spread of COVID-19, section 2 COVID-19 Measures Act makes it clear that the purpose of the measure of banning entry to specified places is to prevent personal contacts between a large number of people which the use of such places would otherwise entail (see also 2.3.3 above). The law thus provides for more detailed guidance on the examination of proportionality to be performed by the regulator, as to which effects of entry bans are relevant and how they should be weighed, given a certain level and a forecasted development of the spread of COVID-19, with respect to the restrictions of the freedom of movement associated with certain entry bans. Section 2 COVID-19 Measures Act thus contains sufficient statutory requirements which limit the authorisation to restrict the freedom of movement by issuing entry bans to what is constitutionally allowed under Article 1 paragraph 1 Basic State Law (*StGG*) and Article 2 paragraph 3 Protocol 4 of the ECHR.

2.5. As the authorisation granted by section 2 COVID-19 Measures Act remains within the limits defined by Article 1 paragraph 1 Basic State Law (*StGG*) and Article 2 paragraph 3 Protocol 4 of the ECHR, it consequently also meets the requirements of all the other fundamental rights included in the applicant’s line of reasoning, such as, in particular, the right to respect for private and family life pursuant to Article 8 ECHR, the right to gainful activity, the right to property and the principle of equality.

3. However, the provisions of sections 1 and 2 COVID-19 Measures Regulation-98 exceed the limits defined in section 2 subparagraph 1 COVID-19 Measures Act for the Federal Minister of Social Affairs, Health, Care and Consumer Protection as regulator:

3.1. Section 1 of the COVID-19 Measures Regulation-98 issued based on section 2 subparagraph 1 COVID-19 Measures Act, bans, for the purpose of preventing the spread of COVID-19, "entry to public places". Section 2 of this regulation in the version of Federal Law Gazette *BGBl. II 108/2020* provides for certain exemptions from this general ban of entry to public places. These exemptions include entry to public places in certain emergencies (section 2 subparagraph 1 of the regulation), to provide care and assistance to persons in need of the same (subparagraph 2), under certain conditions to satisfy the essential needs of daily life (subparagraph 3), and for work purposes (subparagraph 4). Finally, section 2 subparagraph 5 COVID-19 Measures Regulation-98 exempts situations from the ban pursuant to section 1 of the regulation where public outdoor spaces are to be entered alone, together with persons living in the same household, or with pets, provided that people stay apart at least one metre from each other. Systemically, these provisions are linked with section 4 COVID-19 Measures Regulation-98 in the version – which is relevant here – of Federal Law Gazette *BGBl. II 107/2020*, stipulating that the use of means of mass transport is permitted only for types of entry as set out in section 2 subparagraphs 1 to 4 COVID-19 Measures Regulation-98. Pursuant to section 6 COVID-19 Measures Regulation-98, if stopped and questioned by law enforcement officers, persons thus questioned shall provide plausible justification why such entry is permitted under section 2.

As it is also explained in the written observation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection, sections 1 and 2 COVID-19 Measures Regulation-98 constitute a far-reaching regulatory approach imposing a comprehensive ban with certain exemptions. The purpose of section 1 COVID-19 Measures Regulation-98 is to urge people, through the general entry ban imposed in section 1, to “stay home”. Within this meaning, the “public places” entry to which is banned by section 1 COVID-19 Measures Regulation-98 include in any case the public space, which any individual must necessarily enter to get from home (in the widest sense of Article 8 ECHR) to any other place.

The regulator, however, provides for certain exemptions from this general ban in section 2 COVID-19 Measures Regulation-98. These exemptions, in particular also the one set forth in section 2 subparagraph 5 COVID-19 Measures Regulation-98 which is not directed towards a particular purpose but still limited to specific constellations, do not change anything about the fact that section 1 of the regulation imposes a general entry ban for public places and therefore – contrary to what section 2 COVID-19 Measures Act stipulates – does not ban entry to specified limited places, but entry to all public places, thus imposing in principle, by its very nature, a general curfew. However, if section 2 COVID-19 Measures Act authorises only entry bans for specified places (be they defined in an abstract manner, for instance by means of their purpose of use, or by indicating areas, see Private Members' Bill *IA 396/A* 27th legislation period GP, 11) while freedom of movement is still in effect in principle, the law does not, in fact, authorise a general ban with some defined exemptions.

That does not mean that, in the light of Article 4 paragraph 1 Basic State Law (*StGG*) and Article 2 Protocol 4 of the ECHR, special circumstances might not justify even a curfew, under relevant constraints in terms of time, persons and subject matter, provided such measure, considering the particular severity of its interference, can be proven to be proportionate. A restriction of the freedom of movement that is so far-reaching as to basically abrogate the right to move freely requires in any case a concrete basis in the law and must be defined in more detail.

3.2. Therefore, Sections 1 and 2 COVID-19 Measures Regulation-98, as amended by Federal Law Gazette *BGBl. II 98/2020* and Federal Law *Gazette BGBl. II 108/2020* respectively, exceed the statutory authorisation granted in section 2 COVID-19 Measures Act, which is why the Constitutional Court has to find that these provisions of the regulation were unlawful. Given the inextricable link between the provisions, this ruling also includes sections 4 and 6 COVID-19 Measures Regulation-98, as amended by Federal Law Gazette *BGBl. II 107/2020*, even if these provisions, in particular, with respect to section 4 of the regulation, do not give rise to such concerns.

V. Conclusion

1. Section 1 of the Regulation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection pursuant to section 2 subparagraph 1 COVID-19 Measures Act, Federal Law Gazette *BGBl. II 98/2020*, as well as section 6 of the Regulation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection pursuant to section 2 subparagraph 1 COVID-19 Measures Act, Federal Law Gazette *BGBl. II 98/2020*, as amended by Federal Law Gazette *BGBl. II 107/2020*, expired as per the end of 30 April according to section 13 paragraph 2 subparagraph 2 COVID-19 Regulation easing COVID-19 ristrictions, Federal Law Gazette *BGBl. II 197/2020*. Section 2 of the Regulation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection pursuant to section 2 subparagraph 1 COVID-19 Measures Act, Federal Law Gazette *BGBl. II 98/2020*, as amended by Federal Law Gazette *BGBl. II 108/2020*, and section 4 of the Regulation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection pursuant to section 2 subparagraph 1 COVID-19 Measures Act, Federal Law Gazette *BGBl. II 98/2020*, as amended by Federal Law Gazette *BGBl. II 107/2020*, were substantially amended by the Regulation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection amending the Regulation pursuant to section 2 subparagraph 1 COVID-19 Measures Act, Federal Law Gazette *BGBl. II 148/2020*. Consequently, the Constitutional Court has to limit itself, under the rules of Article 139 paragraph 4 of the Constitution (*B-VG*), to finding that sections 1 (as amended by Federal Law Gazette *BGBl. II 98/2020*), 2 (as amended by Federal Law Gazette *BGBl. II 108/2020*), 4 and 6 (as amended by Federal Law Gazette *BGBl. II 107/2020*) were unlawful.

…

Vienna, 14 July 2020
The President:
GRABENWARTER

Recording clerk:
GRAFL