

AUT-2020-2-002

a) Austria / b) [Constitutional Court](#) / c) / d) 14-07-2020 / e) V 363/2020 / f) / g) ECLI:AT:VFGH:2020:V363.2020 / h) CODICES ([German](#)).

Keywords of the systematic thesaurus:

[01.04.03](#) Constitutional Justice - Procedure - Time-limits for instituting proceedings.

[01.04.06.01](#) Constitutional Justice - Procedure - Grounds - Time-limits.

[01.04.09.02](#) Constitutional Justice - Procedure - Parties - Interest.

[03.12](#) General Principles - Clarity and precision of legal provisions.

[03.13](#) General Principles - Legality.

[04.06.03.02](#) Institutions - Executive bodies - Application of laws - Delegated rule-making powers.

[05.01.05](#) Fundamental Rights - General questions - Emergency situations.

[05.03.06](#) Fundamental Rights - Civil and political rights - Freedom of movement.

[05.04.19](#) Fundamental Rights - Economic, social and cultural rights - Right to health.

Keywords of the alphabetical index:

[COVID-19](#), [epidemic](#), pandemic. / [Public place](#), access, restriction, entry ban, exception, professional duties, necessary basic needs / [Public place](#), outdoors, indoors / [Household](#), same, different / [Employment](#), home office / [University](#), professional duties, access, library / [Freedom of movement](#), [temporary restriction](#), access, second residence / Expired legislation, temporal applicability, short, challenge, legal interest.

Headnotes:

COVID-19 regulation of 15 March 2020, Federal Law Gazette II no. 98/2020 (as amended), according to which the entry into public places was generally forbidden for the purpose of preventing the spread of COVID-19, was unlawful because it lacked a clear legal authorisation expressly providing for such a far-reaching interference with the right to free movement.

The legal interest of an applicant to obtain a binding decision on the constitutionality of a provision can extend beyond the short application span of the challenged provision, if a breach of that provision would be punishable by law.

Summary:

I. § 2 of the COVID-19 Measures Act provides that entering certain locations may be forbidden by administrative regulation in order to prevent the spread of the pandemic. As per § 1 of the COVID-19 regulation of 15 March 2020, Federal Law Gazette II no. 98/2020, as amended (hereinafter, the "Regulation-98"), entry into public places was generally forbidden. § 2 of Regulation-98 included several exceptions to this prohibition; for example, entering public places was allowed for the purpose of covering necessary basic needs (§ 2.3), and for professional purposes (§ 2.4); finally, outdoor public places could be entered alone or with people living in the same household (§ 2.5). Regulation-98 expired on 30 April 2020.

In April 2020, an individual filed a constitutional complaint against Regulation-98, alleging, in particular, the violation of his right to free movement and to freedom of property. He claimed that due to the COVID-19 situation, his employer had ordered him to work from home. Therefore, the exception of § 2.4 of Regulation-98 did not apply to him. He was allowed to leave his home to go for a walk according to § 2.5 of Regulation-98 but he could not access his rented apartment in Vienna because he would have needed to use public transport to get there. According to § 4 of Regulation-98, the use of public transport was only permitted for the exceptions provided in § 2.1 to 2.4, excluding § 2.5.

The applicant, a university assistant, also claimed that he could only fulfil his professional duties, which include writing a dissertation, to a very limited extent – in particular because he was denied the use of the university's library. Therefore, § 1, § 2 and § 4 of Regulation-98 also affected his right to freedom of employment.

II. At the time of the Constitutional Court's judgment, the measures under Regulation-98 had already expired. However, the Constitutional Court, developing its case law, found that the legal interest of an applicant to obtain a binding decision on the constitutionality of a provision can extend beyond the relatively short period in which the provision has been in force if a breach of that provision would be punishable by law.

The Constitutional Court held that there are no objections to the constitutionality of § 2 of the COVID-19 Measures Act, on which Regulation-98 had been based. § 2 of the COVID-19 Measures Act provides a sufficiently precise legal basis for any prohibitions on entry and thus corresponds to the principle of legality under Article 18.2 of the Federal Constitutional Act and – with a view to the right to freedom of movement – under [Article 2 Protocol 4 ECHR](#) and Article 4.1 of the Basic Law on the General Rights of the Citizens of 21 December 1867.

Yet, the Constitutional Court decided that Regulation-98 was unlawful because its provisions exceeded the limits set by § 2 of the COVID-19 Measures Act. § 1 (ban on entry) and § 2 (exceptions) of Regulation-98 were systematically related to § 4 of Regulation-98, regulating the use of public transport. According to § 6 of Regulation-98, every person entering a public place had to demonstrate, in case of police control, that such entry was covered by the exceptions set out in § 2 of Regulation-98.

The Constitutional Court pointed out that the purpose of § 1 of Regulation-98 was to make people stay at home. The Constitutional Court further detailed that under § 2 of the COVID-19 Measures Act, the competent Minister of Public Health (hereinafter, the "Health Minister") may describe, in a specific or abstract way, the places which shall not be entered, and may also prohibit the entry of regionally limited areas. However, the Health Minister is prohibited from imposing an exit ban as such (albeit regionally limited) through a general ban on entering public places. The legal authorisation is limited to the extent that people cannot be forced to stay in a certain place, especially in their homes.

The Constitutional Court observed that Regulation-98 had provided for exceptions to the general ban on entry. However, these exceptions – in particular § 2.5 of Regulation-98– did not change the fact that § 1 of Regulation-98 did not only prohibit the entry of certain places but rather constituted a general exit ban. This contradicted § 2 of the COVID-19 Measures Act, which does not authorise such a general prohibition. The Constitutional Court highlighted that this does not mean that an exit ban could not be justified in specific circumstances if such a measure can be proved to be proportionate. In any case, such a far-reaching restriction of free movement, which in principle abrogates this right, would require a specific statutory authorisation.

The Constitutional Court therefore concluded that Regulation-98 was unlawful because it lacked a sufficient legal authorisation.

Cross-references:

European Court of Human Rights:

- *Raimondo v. Italy*, no. 12.954/87, 22.02.1994;

- *Vito Sante Santoro v. Italy*, no. 36.681/97, 01.07.2004.

Languages:

German.