VERFASSUNGSGERICHTSHOF
G 37/2022-22, V 173/2022-11
23 June 2022

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,
Sieglinde GAHLEITNER,
Andreas HAUER,
Christoph HERBST,
Michael HOLOUBEK,
Helmut HÖRTENHUBER,
Claudia KAHR,
Georg LIENBACHER,
Michael RAMI and
Ingrid SIESS-SCHERZ

as well as the substitute member
Nikolaus BACHLER

as voting members, in the presence of the recording clerk
Martin DORR

decided today after private deliberations pursuant to Article 139 and Article 140 of the Constitution (*Bundes-Verfassungsgesetz, B-VG*) on the application (including further *in eventu* applications) filed by **********, **********, **** ****, represented by Elisabeth Groß, LL.M., Attorney at Law, Plankengasse 2, 1010 Vienna, to repeal as unconstitutional section 1 paragraph 1 and section 10 paragraph 1 of the Mandatory COVID-19 Vaccination Act (*COVID-19-Impfpflichtgesetz)*, Federal Law Gazette *BGBl. I 4/2022*):

I. The application – insofar as it refers to section 1 paragraph 1, section 4 paragraphs 1 to 4 and section 19 paragraph 2 of the Federal Law on Mandatory Vaccination against COVID-19 (*COVID-19-Impfpflichtgesetz, COVID-19-IG*), Federal Law Gazette *BGBl. I 4/2022*, as well as the Regulation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection on Mandatory Vaccination against COVID-19 (*COVID-19 Impfpflichtverordnung, COVID-19-IV*), Federal Law Gazette *BGBl. II 52/2022* – is dismissed.

II. The application is otherwise rejected.

Reasoning

I. The application

With his application, based on Article 139 paragraph 1 subparagraph 3 and Article 140 paragraph 1 subparagraph 1 point c of the Constitution (*Bundesverfasungsgesetz, B-VG*), the applicant requests that

"[…] section 1 paragraph 1 and section 10 paragraph 1 of the Mandatory COVID-19 Vaccination Act (*COVID-19-Impfpflichtgesetz, COVID-19-IG*), Federal Law Gazette *BGBl. I 4/2022* be repealed as unconstitutional; *in eventu*

[…] section 1, section 2 subparagraphs 6 to 9, section 3, section 4 paragraphs 1 to 4, sections 5 to 15, section 16 paragraph 2 subparagraphs 3 to 6, sections 17 and 18, section 19 paragraph 1 subparagraph 4 and paragraph 2, as well as section 20 paragraph 2 *COVID-19-IG*, Federal Law Gazette *BGBl. I 4/2022,* be repealed as unconstitutional and that the Regulation on Mandatory Vaccination against COVID-19 (*Covid-19 Impfpflichtverordnung, COVID-19-IV*), Federal Law Gazette *BGBl. II 52/2022,* be repealed as unlawful; *in eventu*

[…] *COVID-19-IG*, Federal Law Gazette *BGBl. I 4/2022,* be repealed as unconstitutional and *COVID-19-IV*, Federal Law Gazette *BGBl. II 52/2022,* be repealed as unlawful; *in eventu*

[…] *COVID-19-IG*, Federal Law Gazette *BGBl. I 4/2022,* and section 1 subparagraph 1 of the Act on Vaccination-Induced Adverse Effects (*Impfschadengesetz*), Federal Law Gazette *BGBl. 371/1973*, as amended by Federal Law Gazette *BGBl. I 5/2022*, be repealed as unconstitutional and that *COVID-19-IV*, Federal Law Gazette *BGBl. II 52/2022,* be repealed as unlawful".

II. The Law

…

III. Application and preliminary proceedings

…

IV. Considerations

1. On the admissibility of the application

1.1. Pursuant to Article 139 paragraph 1 subparagraph 3 and Article 140 paragraph 1 subparagraph 1 point c of the Constitution, the Constitutional Court decides on the unlawfulness of regulations and the unconstitutionality of laws upon an application filed by a person claiming to have been directly violated in their rights if the law or regulation has taken effect for this person without a decision rendered by a court or a decision issued by an administrative authority.

As stated by the Constitutional Court in its established case law, beginning with *VfSlg. 8009/1977* and *8058/1977*, an application can be legitimately filed if the law or regulation directly interferes with the legal sphere of the person concerned and – in the event of unconstitutionality or unlawfulness – violates their rights. The Constitutional Court has to use the application submitted as a basis and examines only whether the effects invoked by the applicant are such as required by Article 139 paragraph 1 subparagraph 3 and Article 140 paragraph 1 subparagraph 1 point

c of the Constitution for an admissible application (cf. e.g. *VfSlg. 10.353/1985, 15.306/1998, 16.890/2003*).

1.2. The legal remedy granted to the individual by Article 139 paragraph 1 subparagraph 3 and Article 140 paragraph 1 subparagraph 1 point c of the Constitution is intended to ensure legal protection against unlawful general norms only insofar as there is no other reasonable way for the applicant to take legal action challenging the lawfuness of the norms (e.g. *VfSlg. 16.332/2001*).

1.3. As repeatedly stated by the Constitutional Court in the course of judicial review proceedings initiated either *ex officio* or following an application (*VfSlg. 13.965/1994* with further references, *16.542/2002, 16.911/2003*), the limits to the repeal of a provision to be examined for its lawfulness or its constitutionality have to be drawn in such a way that, on the one hand, the content of the part remaining in force is not completely changed and, on the other hand, the provisions inseparably linked with the part to be repealed are covered as well.

1.3.1. In line with this fundamental position, the Constitutional Court concluded that in judicial review proceedings the scope of the challenge filed against legal provisions, provisions in laws and regulations, must not be too narrow, as the application would otherwise be inadmissible (cf. *VfSlg. 16.212/2001, 16.365/2001, 18.142/2007, 19.496/2011; VfGH 14.3.2017, G 311/2016*). The applicant has to challenge all those legal provisions which form an inseparable unit for the assessment of any unconstitutionality or unlawfulness of the law. It is then the Constitutional Court's task to decide on how such unconstitutionality or unlawfulness – provided the Constitutional Court shares the opinion of the applicant – can be eliminated (VfSlg. *16.756/2002, 19.496/2011, 19.684/2012, 19.903/2014; VfGH 10.3.2015, G 201/2014*).

For example, the application is inadmissible if, in the event of a provision being repealed as applied for, the remaining part of the provision of a regulation or law would be linguistically incomprehensible, devoid of substance and impossible to apply (*VfSlg. 16.279/2001, 19.413/2011, 20.082/2016; VfGH 19.6.2015, G 211/2014; 7.10.2015, G 444/2015*), the scope of the provisions covered by the application for repeal is such that the assumed unlawfulness or unconstitutionality

would not at all be eliminated through the repeal (cf. e.g. *VfSlg. 18.891/2009, 19.933/2014*), or the repeal of mere parts of a regulation would result in the latter obtaining a content not at all in line with what the authors of the regulation or the legislator had in mind (cf. *VfSlg. 18.839/2009, 19.841/2014, 19.972/2015, 20.102/2016*).

Given the fact that the provisions to be examined are inseparably linked, and that the Court is bound to what is alleged in the application, another procedural impediment would be created if the Court had to repeal one isolated part of such a unit which would then lead to problems in applying the remaining parts of the provisions in a way that these provisions would become incomprehensible or even inapplicable. The latter is the case if it is no longer possible to definitely assess whether a case is subject to the remaining provision or not (*VfSlg. 16.869/2003* with further references).

1.3.2. Too wide a scope of the application does not necessarily render it inadmissible. Basically, the scope of an application is not too wide in scope if applicants are challenging legal provisions which actually interfere with their (legally protected) interests and which are inseparably linked with these interests. However, pursuant to section 57 paragraph 1 and section 62 paragraph 1 of the Constitutional Court Act, the questions which provision or which part of a provision is to be repealed in the applicant's view and for what reason must not remain open (see with further references *VfGH 2.3.2015, G 140/2014* and others*;* cf. also *VfGH 10.12.2015, G 639/2015; 15.10.2016, G 103/2016 i.a*.). If such an application is justified on its merits, but the Constitutional Court only repeals a part of the challenged provisions as unconstitutional or unlawful, this results in the partial dismissal of the application, provided the other procedural requirements are met (*VfSlg. 19.746/2013; VfGH 5.3.2014, G 79/2013* and others).

If the application also comprises provisions that do not actually affect the applicant's legally protected interests (being thus too wide in scope) but which are specifically linked to provisions affecting the legally protected interests of the applicant (allegedly forming the core of the unconstitutionality or unlawfulness) against the background of his concerns raised, the following distinction has to be made: If these provisions can be clearly separated from the provisions forming the basis for the applicant's constitutional concerns and actually affecting the (legally

protected) interests of the applicant, this results in the partial rejection of the application. If the application also comprises provisions having such a specific link to those provisions which are actually affecting the (legally protected) applicant's interests so that it cannot be ruled out from the outset that their repeal, should the applicant's concerns be justified, could be required (i.e. if these provisions cannot be clearly separated), the application is admissible as a whole (cf. *VfSlg. 20.111/2016*). However, this does not apply if provisions are co-challenged (e.g. all provisions of a regulation) without raising specific concerns and without stating that the provisions challenged are specifically linked to each other (*VfSlg. 19.894/2014; VfGH 29.9.2015, G 324/2015; 15.10.2016, G 183/2016 and others*).

1.4. The law

With his application, the applicant demands that (specified) provisions of the Mandatory COVID-19 Vaccination Act (*COVID-19-IG*), Federal Law Gazette *BGBl. I 4/2022*, be repealed, which entered into force in its original version pursuant to section 20 paragraph 1 *leg.cit.* on 5 February 2022 and was amended in part by Federal Law Gazette *BGBl. I 22/2022*, effective as of 18 March 2022 (concerning section 1 paragraphs 2 and 3, section 2, subparagraph 5, section 3 paragraphs 2, 3, 5 and 6, section 3a including the heading, section 10 paragraphs 2 and 3, section 11 paragraph 1, section 15 paragraph 1, section 16 paragraph 2 subparagraphs 2, 3 and 6, as well as section 20 paragraphs 2, 5 and 6) and as of 11 April 2022 (concerning section 2 subparagraph 11, section 3b including the heading, and section 7 paragraphs 1, 2a, 2b and 5).

Since the entry into force of the original version, Federal Law Gazette *BGBl. I 4/2022*, section 1 *COVID-19-IG* makes vaccination mandatory for the protection of public health, as defined in this law, for persons above the age of 18 having residence in the Republic of Austria pursuant to section 2 subparagraph 1 leg. cit. This provision has remained unchanged to this day.

Section 3 *COVID-19-IG* regulates exemptions from mandatory vaccination as well as proof thereof and duties of cooperation. Furthermore, pursuant to paragraph 6, details regarding the form and content of medical certificates can be set out in a regulation issued by the Federal Minister in charge of healthcare. Pursuant to

paragraph 7, the Federal Minister is further empowered to regulate the criteria forming the basis for an exemption pursuant to section 3 paragraph 1 subparagraph 2 *COVID-19-IG*. The Federal Minister of Social Affairs, Health, Care and Consumer Protection has already made use of this power in section 2 *COVID-19-IV*, Federal Law Gazette *BGBl. II 52/2022*, which entered into force on 8 February 2022, and defined numerous exemptions.

Section 4 *COVID-19-IG* regulates the scope of the vaccination mandate. Accordingly, this legal obligation is complied with by persons who after 15 March 2022 have achieved an effective state of immunization against COVID-19 through first-time vaccination and, in the case of a vaccine to be administered several times, through further vaccinations administered at intervals laid down in a regulation pursuant to paragraph 4. Pursuant to section 4 paragraphs 3 and 4 *COVID-19-IG*, the Federal Minister responsible for healthcare has to set out the recognized vaccines against COVID-19 and regulate the requirements for compliance with the obligation to be vaccinated. The Federal Minister of Social Affairs, Health, Care and Consumer Protection also made use of this power in sections 1 and 4 *COVID-19-IV*, Federal Law Gazette *BGBl. II 52/2022*, which entered into force on 8 February 2022.

Section 5 *COVID-19-IG* empowers the Federal Government to determine, by way of a regulation, a cut-off date for the identification of persons subject to the vaccination duty for the purpose of issuing a reminder (reminder date) pursuant to section 8 *COVID-19-IG*. However, a corresponding regulation was not issued by the time the decision on this application was rendered.

As of the reminder date (not yet determined), section 6 *COVID-19-IG* obliges the Federal Minister of the Interior and ELGA GmbH (the company administering the electronic healthcare record) to create the necessary conditions for the transfer of data from the Central Register of the Resident Population and the central vaccination register to the Federal Minister responsible for healthcare, so that the latter can compare these data and thus identify those subject to mandatory vaccination. Persons who cannot be identified until the reminder date, have to be informed thereof by the Federal Minister responsible for healthcare pursuant to section 8 *COVID-19-IG* and reminded to have the necessary vaccination administered as soon as possible.

Furthermore, pursuant to section 9 *COVID-19-IG*, the Federal Government can determine a cut-off date for the identification of persons subject to mandatory vaccination for the purpose of initiating criminal proceedings pursuant to section 11 *COVID-19-IG* (vaccination cut-off date), which must be at least four weeks after the reminder date.

Irrespective of these procedural steps, which have not yet been taken and are yet to be specified by way of a regulation, the federal legal provisions introduce a vaccination mandate after 15 March 2022 for every person over the age of 18 being resident in the Republic of Austria. According to the law, non-compliance constitutes an administrative offence pursuant to section 10 *COVID-19-IG* and carries a fine of up to € 3,600.00.

However, following the entry into force of the COVID-19 Non-Application Regulation (*COVID-19-Nichtanwendungsverordnung*), Federal Law Gazette *BGBl. II 103/2022*, on 12 March 2022, the application of non-compliance as a punishable offence, which originally was to commence on 16 March 2022, was suspended. This decision was taken against the background of the "First […] Report on Accompanying Monitoring of Mandatory Vaccination against COVID-19" of 8 March 2022 (hereinafter: First Monitoring Report) by the commission established pursuant to section 19 paragraph 1 *COVID-19-IG*, which recommended a temporary suspension of the vaccination mandate. Based on section 19 paragraph 2 *COVID-19-IG*, a provision granting the competent Federal Minister far-reaching powers to issue regulations, the Federal Minister of Social Affairs, Health, Care and Consumer Protection, acting in agreement with the Main Committee of the National Council (section 18 paragraph 1 *COVID-19-IG*), ordered that sections 1, 4, 10 and 11 *COVID-19-IG* and sections 1 and 4 *COVID-19-IV* be "not applied to facts occurring after the entry into force of this regulation". The regulation was amended by Federal Law Gazette *BGBl. II 198/2022* to the effect that non-application of the aforementioned provisions as well as section 3, 3a and 3b *COVID-19-IG* be prolonged until 31 August 2022.

Hence, the result of this regulation is that (for the time being) in matters that would be subject to the vaccination duty (and punishable as of 16 March 2022) these provisions are no longer to be applied to facts otherwise subject to *COVID-*

19-IG until 31 August 2022, which means that within this "limited" framework the challenged vaccination mandate is deemed not to exist.

1.5. In his main application based on Article 140 paragraph 1 subparagraph 1 point c of the Constitution, the applicant demands that section 1 paragraph 1 and section 10 paragraph 1 *COVID-19-IG*, Federal Law Gazette *BGBl. I 4/2022* be repealed. The applicant has thus determined too narrow a scope for his main application. To achieve the elimination of the alleged unconstitutionality, he would have had to contest other provisions as well (cf. also *VfGH 29.4.2022, G 29/2022*).

1.6. Considering the applicant's concerns against the obligation to be vaccinated against COVID-19 – punishable in the event of non-compliance – the scope of his challenge is not defined too narrow in his first *in eventu* application based on Article 140 paragraph 1 subparagraph 1 point c and Article 139 paragraph 1 point 3 of the Constitution, requesting the repeal of section 1, section 2 subparagraphs 6 to 9, sections 3, section 4 paragraphs 1 to 4, sections 5 to 15, section 16 paragraph 2 subparagraphs 3 to 6, sections 17 and 18, section 19 paragraph 1 subparagraph 4 and paragraph 2, as well as section 20 paragraph 2 *COVID-19-IG*, Federal Law Gazette *BGBl. I 4/2022*, as well as *COVID-19-IV*, Federal Law Gazette *BGBl. II 52/2022* as the provisions of COVID-19-IG are mostly linked in a regulatory context, but not inseparably so.

1.6.1. Section 1 paragraph 1 *COVID-19-IG* imposes a vaccination duty on a defined group of persons. With this provision, the federal legislator decided to impose a general vaccination mandate on persons of age being currently residents in the Republic of Austria, the extent of which is yet to be regulated in detail through section 4 paragraphs 1 to 4 *COVID-19-IG* in conjunction with a regulation to be issued by the Federal Minister responsible for healthcare. The Federal Minister of Social Affairs, Health, Care and Consumer Protection made use of this power by issuing the COVID-19 Regulation (*COVID-19-IV*), Federal Law Gazette *BGBl. II 52/2022*. Given that the obligation to be vaccinated and the details of its implementation constitute the main provisions of *COVID-19-IG*, the scope of the challenge is correct.

With a view to this general vaccination mandate, imposed by a federal law on all persons above the age of 18 being residents in the Republic of Austria (cf. also

COVID-19-IV, Federal Law Gazette *BGBl. II 52/2022*), the legislator – in the event of non-availability of vaccines, a substantial change in scientific knowledge regarding the efficacy of the vaccines, the suitability of mandatory vaccination to prevent overburdening of the healthcare system, especially upon occurrence of new virus variants or changes in the development of infections and the epidemiological situation, or a change regarding the necessity of mandatory vaccination – empowered the competent Federal Minister through section 19 paragraph 2 *COVID-19-IG* to suspend the vaccination duty under certain circumstances, which would otherwise be subject to mandatory vaccination, by way of a regulation. The Federal Minister of Social Affairs, Health, Care and Consumer Protection made use of this power by adopting the COVID-19 Non-Application Regulation, Federal Law Gazette *BGBl. II 103/2022* and through the amendment by Federal Law Gazette *BGBl. II 198/2022* and suspended the vaccination duty, for the time being, for the period from 12 March to 31 August 2022. Thus, the actual scope and the extent of mandatory vaccination regulated by section 1 paragraph 1 *COVID-19-IG* is substantially co-determined by section 19 paragraph 2 *COVID-19-IG*. This provision is therefore inseparably linked to the contested provision and has to be contested as well.

Through the adoption of the COVID-19 Non-Application Regulation, Federal Law Gazette *BGBl. II 103/2022*, and the amendment by Federal Law Gazette *BGBl. II 198/2022*, the vaccination mandate regulated in section 1 paragraph 1 and section 4 paragraphs 1 to 4 *COVID-19-IG* as well as *COVID-19-IV* is currently suspended for all facts otherwise subject to mandatory vaccination and punishable in the event of non-compliance. In this specific and legally relevant situation, the challenge filed against section 19 paragraph 2 *COVID-19-IG* was therefore admissible even before the adoption of the regulation.

With a view to section 1 paragraph 1, section 4 paragraphs 1 to 4 and section 19 paragraph 2 *COVID-19-IG*, Federal Law Gazette *BGBl. I 4/2022*, as well as *COVID-19-IV*, Federal Law Gazette *BGBl. II 52/2022*, the scope of the challenge of the first *in eventu* application is therefore correctly chosen (cf. on the scope of the challenge regarding COVID-19-IV, e.g. *VfGH 3.3.2021, V 75/2019 i.a.*). Within this scope and against the background of the concerns raised, the application allows the elimination of the respective unlawfulness or unconstitutionality through the repeal of the provisions covered by the concerns raised, provided the concerns are found to be justified.

1.6.2. Otherwise, i.e. regarding section 1 paragraph 2, section 2 subparagraphs 6 to 9, section 3, sections 5 to 15, section 16 paragraph 2 subparagraphs 3 to 6, section 17, section 18, section 19 paragraph 1 subparagraph 4 and section 20 paragraph 2 *COVID-19-IG*, *BGBl. I 4/2022*, the first *in eventu* application is to be rejected for the simple reason that no specific concerns under constitutional law were expressed.

1.6.3. This result is not in opposition to the fact that, in the event of section 1 paragraph 1, section 4 paragraphs 1 to 4 and section 19 paragraph 2 *COVID-19-IG*, Federal Law Gazette *BGBl. I 4/2022*, being repealed, the remaining provisions of *COVID-19-IG* and the regulations based thereupon would become inapplicable. The mere circumstance that a provision becomes inapplicable in the event of another provision being repealed does not in itself constitute an inseparable link to this provision (cf. e.g. *VfGH 28.9.2021, V 148/2021* with further references).

1.7. However, another fundamental requirement for the application to be admissible is for the law itself to interfere directly with the legal sphere of the applicant (cf. instead of many others *VfSlg. 9096/1981, 12.447/1990, 12.870/1991, 13.214/1992, 13.397/1993*). In principle, the Constitutional Court holds that the contested legal provisions must still be in effect for the applicant at the time of the Court's decision (cf. *VfSlg. 12.999/1992, 16.621/2002, 16.799/2003, 17.826/2006, 18.151/2007, 20.397/2020*), which, as a rule, is no longer the case when the contested provisions have already been repealed or significantly amended. However, it cannot be ruled out from the outset that even provisions no longer in force still interfere with the legal sphere of the applicant (cf. e.g. *VfSlg. 20.397/2020, 20.399/2020*, each with further references).

1.7.1. The applicant states that he has his residence in Vienna and is above the age of 18. He was neither vaccinated with a vaccine against COVID-19 nor has he recovered from the infection, nor does he present any contraindications pursuant to section 2 *COVID-19-IV*. Hence, he states that pursuant to section 2 *COVID-19-IV* he is "subject to the obligation to be vaccinated after 15 March 2022". Given his age and his domicile, he is therefore subject to mandatory vaccination pursuant to section 1 paragraph 1 *COVID-19-IG* and to the related penal provision. He further states that section 3 paragraph 1 COVID-19-IG does not exempt him from this obligation.

"After 15 March 2022, I am directly subjected to mandatory vaccination pursuant to section 1 paragraph 1 *COVID-19-IG* and the penal provisions applicable in the event of non-compliance. To avoid punishment, I must undergo an irreversible medical intervention before that date or give up my domicile in Austria. In other words: I have to take far-reaching measures. To the extent to which such necessary measures result from publication of a regulation, the latter constitutes a ground for actually being affected (*VfSlg 20.002, 20.065, 20.090*).

Thus, *COVID-19-IG* has produced effects ever since its publication. Neither can I be reasonably expected to provoke criminal proceedings, nor to give up my domicile. I am actually and directly affected by the vaccination mandate."

1.7.2. The Federal Government does not challenge this statement.

1.7.3. *COVID-19-IG*, Federal Law Gazette *BGBl. I 4/2022*, entered into force on 5 February 2022 and is currently in effect as amended by Federal Law Gazette *BGBl. I 22/2022*. Section 1 paragraph 1, section 4 paragraphs 1 to 4 and section 19 paragraph 2 *COVID-19-IG* remain in force in the original version challenged by the applicant. When the application was filed on 8 February 2022, *COVID-19-IG*, pursuant to section 1 paragraph 1 *leg. cit*., imposed mandatory vaccination upon the applicant, non-compliance with which was to be punishable as of 16 March 2022 pursuant to section 10 paragraph 1 *leg. cit*. However, criminal liability for non-compliance with mandatory vaccination was suspended before taking effect on 16 March 2022, as the COVID-19 Non-Application Regulation, issued pursuant to section 19 paragraph 2 *COVID-19-IG,* stipulates that sections 1, 4, 10 and 11 *COVID-19-IG* and sections 1 and 4 *COVID-19-IV* be no longer applied to facts occurring between 12 March 2022 and 31 May 2022. This provision was prolonged by Federal Law Gazette *BGBl. II 198/2022* until 31 August 2022.

1.7.4. Regardless thereof, at the time when he submitted his application on 8 February 2022, the applicant was directly and actually affected by mandatory vaccination entering into force as of 5 February 2022 pursuant to section 1 COVID-19-IG, as such obligation already applied before 16 March 2022. Hence, the applicant was obliged – as of the entry into force of *COVID-19-IV* on 8 February 2022, at the latest – to undergo vaccination in accordance with the vaccination schedule specified in the regulation. This applies regardless of the fact that the legislator did not want (any) administrative offence to be sanctioned up to and including 15 March 2022.

1.8. As rightly stated by the applicant, there is no other reasonable way for him to seize the Constitutional Court with the alleged unlawfulness of the challenged provision. In particular, given the threat of punishment pursuant to section 10 paragraph 1 *COVID-19-IG*, Federal Law Gazette *BGBl. I 4/2022*, he cannot reasonably be expected – nor would it be possible for him for the time being – to have criminal proceedings initiated against him.

1.9. The proceedings did not reveal any reason to doubt that the application meets all procedural requirements. In the absence of any other procedural obstacles, the first *in eventu* application regarding section 1 paragraph 1, sections 4 paragraphs 1 to 4 and section 19 paragraph 2 *COVID-19-IG* and regarding *COVID-19-IV* has been found admissible. Otherwise, it has to be rejected as inadmissible in the absence of any concrete concerns expressed.

1.10. Given this result, it is not necessary to elaborate on the second and third *in eventu* applications, determining even a wider scope of the challenges.

2. **On the merits**

2.1. Background:

After the outbreak of the COVID-19 pandemic towards the end of 2019, Austria imposed entry restrictions and self-isolation measures for the first time in March 2020 in order to contain and prevent the spread of COVID-19 on the basis of the COVID-19 Measures Act (*COVID-19 Maßnahmengesetz*), Federal Law Gazette *BGBl. I 12/2020.* To this end, the Federal Minister of Social Affairs, Health, Care and Consumer Protection issued a regulation regarding preliminary measures to prevent the spread of COVID-19, Federal Law Gazette *BGBl. II 96/2020*, and a regulation pursuant to section 2 subparagraph 1 of the COVID-19 Measures Act, Federal Law Gazette *BGBl. II 98/2020*. In the following months, the epidemiological situation in Austria was characterised primarily by its dynamic development, which was difficult to forecast even by experts. The Federal Minister of Social Affairs, Health, Care and Consumer Protection reacted by imposing measures adapted to the current situation, such as self-isolation, entry bans, the duty to wear a face mask and physical distancing or compulsory antigen or PCR tests [cf. most recently the 6th COVID-19 Protective Measures Regulation (*COVID-19-*

Schutzmaßnahmenverordnung, COVID-19-SchuMaV), which became ineffective as of 31 January 2022, and imposed a lockdown for non-vaccinated persons, and the 4th COVID-19 Measures Regulation (*4. COVID-19-Maßnahmenverordnung*), which, *inter alia*, required physical distancing and the wearing of a face mask, and allowed persons to leave home only for certain purposes]. Recurrent waves of infection and newly emerging variants determined the epidemiological situation of recent years, which has also been marked by vaccination against SARS-CoV-2, available for certain groups of persons since the beginning of 2021 and for the general population since mid-2021. Despite the general availability of centrally approved vaccines, a sufficient rate of vaccination of the population has not yet been reached (cf. e.g. *IA 2173/A 27. GP, 7*). A further exponential increase in the number of infections and the related risk of overburdening of the healthcare system could not be prevented in the autumn of 2021. Consequently, the so-called "lockdown for the non-vaccinated" entered into force on 15 November 2021 through adoption of the 5th COVID-19 Protective Measures Regulation, Federal Law Gazette *BGBl. II 465/2021*. Just a week later (on 22 November 2021), a lockdown was imposed on the entire territory of Austria by way of the 5th COVID-19 Emergency Measures Regulation, Federal Law Gazette *BGBl. II 475/2021*, which remained in force until 11 December 2021. From 12 December 2021, a further lockdown for non-vaccinated persons was introduced by way of the 6th COVID-19 Protective Measures Regulation, Federal Law Gazette *BGBl. II 537/2021*, which remained in force until 31 January 2022. Towards the end of 2021 and at the beginning of 2022, despite the fact that the number of patients in intensive care units was continuously declining, the legislator was confronted with the highest 7-day incidence rate ever recorded in Austria since the beginning of the pandemic as a result of the then dominant Delta variant. All Austrian regions recorded rapidly increasing infection numbers due to the appearance of the Omicron variant, which was classified as a variant of concern by the World Health Organization (WHO) and the European Centre for Disease Prevention and Control (ECDC) and ousted the previously dominant Delta variant within a short time span (cf. *VfGH 29.4.2022, V 23/2022*).

2.2. The legislative process:

Against the background of this pandemic, in particular the threat posed to the healthcare system by the Delta variant, which resulted in a nationwide lockdown

in December 2021, and the uncertain forecast regarding the effect and development of the Omicron variant, a first draft of the COVID-19 Mandatory Vaccination Act (*COVID-19-IG*) was introduced as a Private Members' Bill in the National Council (cf. *IA 2173/A 27. GP*). The objective of this federal law, as stated at the time, was to "increase the rate of vaccination of the population to prevent the spread of COVID-19 and thus to improve the current rate of vaccination", which was considered to be insufficient for an effective fight against the pandemic (cf. *IA 2173/A 27. GP, 7*).

In this original draft, all essential matters relating to the implementation of mandatory vaccination were (still) regulated in the Law itself. At that point in time, far-reaching powers to issue regulations, such as section 19 paragraph 2 *COVID-19-IG* now in force, were not yet included.

After a consultation process, the Health Committee started a public hearing on this Private Members' Bill on 17 January 2022 and invited renowned experts in the fields of law and medicine to present the aspects they regarded as relevant and to answer questions raised by Members of Parliament (see Minutes of Public Expert Hearing in the Health Committee on 17 January 2022: *StenProtGA 27. GP, 21. Sitzung, 2* et seq.; cf. on the importance of the domestic policy-maker from the viewpoint of the European Court of Human Rights, e.g. ECtHR 1.7.2014 [GK], case *S.A.S.*, Appl. 43.835/11, NLMR 4/2014). The participants in the debate – except for those who, as a matter of principle, denied the need for preventive measures, such as vaccination – emphasised that, with a view to potential future developments of the pandemic, the Act on Mandatory Vaccination should provide for a flexible system, so that the requirements of constitutional law could be continuously taken into account. The aim was to "create a forward-looking framework for mandatory vaccination against COVID-19 being subject to constant monitoring and dynamic adaptation to current conditions and state-of-the-art scientific findings". The law was designed to permit a flexible reaction to continuously changing, pandemic-related conditions. Based on the fundamental decision that in light of the objective of the Law vaccination is a proportionate possibility of effectively fighting the pandemic, the Law was considered to constitute the necessary legal basis for the flexible implementation of mandatory vaccination in accordance with the prevailing situation.

After the debate and the hearing in the Health Committee, a motion to amend the entire text was introduced, which still provided for mandatory vaccination to be regulated by COVID-19-IG, but modified the bill *inter alia* by including the power to issue regulations in section 19 paragraph 2 *COVID-19-IG* in order to ensure the highest possible degree of flexibility. For example, it contained the following statement (cf. *AB 1312 BlgNR 27. GP, 16*):

"The adequacy and the appropriateness of less severe means have to be adapted to the respective epidemiological situation, so that after the adoption of this federal Law the situation must be continuously assessed in order to evaluate the suitability and proportionality of mandatory vaccination and thus ensure the conformity of this federal Law with the Constitution. This requirement is met both by comprehensive accompanying monitoring (section 19 paragraph 1) and by the power to issue a regulation contained in section 19 paragraph 2, by which reactions to changing conditions, such as the appearance of new variants or a change in the epidemiological situation, are possible."

On 20 January 2022, the National Council finally adopted the COVID-19 Mandatory Vaccination Act as laid down in Federal Law Gazette *BGBl. I 4/2022*, which was promulgated on 4 February 2022 and entered into force pursuant to section 20 paragraph 1 *leg. cit*. on 5 February 2022.

On 7 February 2022, the Federal Minister of Social Affairs, Health, Care and Consumer Protection issued the COVID-19 Mandatory Vaccination Regulation (*COVID-19 Impfpflichtverordnung, COVID-19-IV*), Federal Law Gazette *BGBl. II 52/2022*, which entered into force on 8 February 2022. This regulation specifies the conditions under which a person is deemed to be "validly vaccinated" (recognised vaccines, vaccination intervals, scope of the vaccination madate) and regulates exemptions from this obligation as well as provisions regarding medical certificates.

As stated above, *COVID-19-IG* entered into force on 5 February 2022, but the initial period of its validity until 15 March 2022 was intended as an "information and running-in phase" without any sanctions imposed for non-compliance with the requirements of section 1 paragraph 1 *COVID-19-IG* (cf. section 1 paragraph 1 and section 10 paragraph 1 *COVID-19-IG*).

Already on 11 March 2022, acting in accordance with section 19 paragraph 2 *COVID-19-IG* and in agreement with the Main Committee of the National Council,

the Federal Minister of Social Affairs, Health, Care and Consumer Protection issued the COVID-19 Non-Application Regulation, Federal Law Gazette *BGBl. II 103/2022*, stipulating that sections 1, 4, 10 and 11 *COVID-19-IG* and sections 1 and 4 *COVID-19-IV* are "not to be applied to facts that have arisen after the entry into force of this regulation", resulting in the suspension of the vaccination mandate. By Federal Law Gazette *BGBl. II 198/2022*, this order issued by the Federal Minister of Social Affairs, Health, Care and Consumer Protection was prolonged until 31 August 2022 in agreement with the Main Committee of the National Council.

This led to the following interim result: For the time being, *COVID-19-IG*, Federal Law Gazette *BGBl. I 4/2022*, as amended by Federal Law Gazette *BGBl. I 22/2022*, and *COVID 19-IV*, Federal Law Gazette *BGBl. II 52/2022*, are in force, but on account of the COVID-19 Non-Application Regulation, Federal Law Gazette *BGBl. II 103/2022*, as amended by Federal Law Gazette *BGBl. II 198/2022*, the vaccination mandate and the provisions regulating the details thereof are not being enforced.

The provisions of COVID-19-IG regarded as unconstitutional by the applicant are to be assessed against the current legal background.

2.3. On the system of *COVID-19-IG*, Federal Law Gazette *BGBl. I 4/2022*:

2.3.1. It is clear that by adopting *COVID-19-IG*, the legislator provided for mandatory vaccination in principle. Hence, it was the legislator's decision that, in respect of interference with the fundamental rights of the individual, the adequacy of mandatory vaccination in the interest of the protection of public health weighs more heavily than the freedom of the individual, provided that mandatory vaccination is appropriate and required in a specific pandemic situation (see also Item IV.2.4.). In assessing the situation, the legislator considered not only the need to protect the healthcare infrastructure, but also the fact that vulnerable persons, as a rule, are not free to ensure the protection of their health through measures taken by themselves, as in many cases they can only rely on limited protection through vaccination. At the same time, it is not desirable to focus exclusively on vulnerable persons at the expense of third parties, without weighing and considering the conflicting interests involved.

2.3.2. Vaccination constitutes a substantial interference with a person's physical integrity, which in principle requires the consent of the person concerned in the exercise of their right of self-determination. The vaccination duty provided for by law therefore qualifies as particularly severe interference. The obligation of vaccination cannot be enforced by direct coercion (cf. section 1 paragraph 3 *COVID-19-IG*, Federal Law Gazette *BGBl. I 4/2022*, as amended by Federal Law Gazette *BGBl. I 22/2022*), but the person addressed by the Law *de facto* has no alternative, the only possibility being to choose a domicile outside the Republic of Austria or to accept the risk of penalty.

As regards the intensity of interference, the scope of *COVID-19-IG* is limited by the fact that pursuant to section 3 *leg. cit.* exemptions for medical contraindications are provided for (cf. *AB 1312 BlgNR 27. GB, 6*), which are to be specified through a regulation to be issued by the Federal Minister responsible for healthcare (cf. section 2 *COVID-19-IV*, Federal Law Gazette *BGBl. II 52/2022*). Pursuant to section 4 *COVID-19-IG*, the Federal Minister responsible for healthcare is also obliged to define the scope of mandatory vaccination by way of a regulation in accordance with state-of-the-art medical expertise (cf. section 4 *COVID-19-IV*, Federal Law Gazette *BGBl. II 52/2022*).

However, the following reasons are invoked to justify the severe interference with a person's physical integrity guaranteed as a fundamental right:

In the *Vavřička* case, the European Court of Human Rights referred to the importance of solidarity in society vis-à-vis persons who are particularly vulnerable and can only be protected through herd immunity. For the protection of these groups of persons who cannot be vaccinated for reasons of health, each individual can be demanded to accept a minor health risk associated with vaccination (ECtHR 8.4.2021 [GK], case of *Vavřička* and Others., Appl. 47.621/13, *NLMR 2021, 156 [Z 279, 306];* cf. also *VfSlg. 11.917/1988*).

This idea of solidarity of society also takes effect in this situation. Vulnerable persons, who cannot be vaccinated for reasons of medical contraindications or reduced efficacy of vaccination, depend on the solidarity of society in order to be able to continue participating in social life (see also the Executive Report of the *GECKO* meeting (COVID Crisis Coordination Body) on 4 February 2022, 6; cf. also

AB 1312 BlgNR 27. GP, 3). The legislator cannot be contradicted when arguing that according to the prevailing scientific opinion *COVID-19-IG* serves to protect (public) health, as vaccinated individuals have a significantly lower risk of severe illness and, as a rule, hospitalisation can be avoided (cf. *AB 1312 BlgNR 27. GP, 2*; cf. also First Monitoring Report and "Second Report on Accompanying Monitoring of Mandatory Vaccination against COVID-19" of 23 May 2022 [in the following: Second Monitoring Report]), which in turn diminishes the burden imposed on the healthcare infrastructure by persons infected with SARS- CoV-2. In *VfSlg. 20.399/2020*, the Constitutional Court held that maintaining the functionality of the healthcare infrastructure during a pandemic lies in the interest of protecting the health of all and therefore needs to be taken into account.

2.3.3 In *COVID-19-IG*, the legislator also laid down the procedure with regard to the commencement of the concrete vaccination duty and its enforcement under administrative penal law and provided for the power to issue regulations containing the necessary details. In addition to the aforementioned definition of the scope of the vaccination duty (section 4 paragraph 4 *COVID-19-IG*), this concerns, for example, the reminder and vaccination deadline (cf. in particular sections 5 and 9 *COVID-19-IG*). In addition, with section 19 paragraph 2 *leg. cit*., the legislator created the basis for enabling the Federal Minister responsible for healthcare, in consultation with the Main Committee of the National Council, to react "without delay to current developments" (cf. *AB 1312 BlgNR 27. GP, 32*). Endowed with this statutory power, the Federal Minister responsible for healthcare always has to take into account not only the non-availability of vaccines, but also the suitability and necessity of mandatory vaccination in the event of a significant change in the state of scientific expertise. With section 19 paragraph 2 *COVID-19-IG*, the legislator permits a flexible response to volatile pandemic and scientific developments, thus ensuring that the requirements in terms of the suitability and necessity of mandatory vaccination are duly taken into account.

As a result, the legal provision does not raise any constitutional concerns, since these regulatory powers, as demonstrated by the currently applicable COVID-19 Non-Application Regulation, Federal Law Gazette *BGBl. II 103/2022*, as amended by Federal Law Gazette *BGBl. II 198/2022*, serve precisely to ensure that the narrow constitutional limits to mandatory vaccination are always observed. This system enables the Federal Minister responsible for healthcare to determine what is

required under constitutional law at any time in accordance with the current state of science and in agreement with the Main Committee of the National Council (section 18 *COVID-19-IG*; cf. *VfSlg. 12.947/1991* on the form of participation by the Main Committee). Given the serious nature of interference through mandatory vaccination, this provision is to be understood, in conformity with the Constitution, as an obligation of the competent Federal Minister to continuously and strictly monitor and react to current developments (cf. section 19 paragraph 2 *COVID-19-IG*: "shall [...] order without delay"; cf. furthermore *AB 1312 BlgNR 27. GP, 14*: section 19 paragraph 2 *COVID-19-IG* includes "the obligation of continuous assessment and regular evaluation").

However, as stated above, the Federal Minister responsible for healthcare is not only empowered, but also obliged, in light of restrictions imposed by constitutional law, to continuously adapt the vaccination duty to constantly changing conditions. If, how and as of when mandatory vaccination applies and who is to be subject to mandatory vaccination as of a certain point in time, is to be determined on the basis of this flexible system (cf. *AB 1312 BlgNR 27. GP*).

From the perspective of Article 18 of the Constitution and the principle of the rule of law, the Constitutional Court has no concerns regarding these far-reaching powers to issue regulations (cf. *VfSlg. 11.632/1988*), as the Law, given its subject matter and the overall context, sets out the essential elements determining its enforcement (cf. e.g. *VfSlg. 4644/1964, 12.947/1991, 16.911/2003*; *Ranacher/Sonntag*, Art. 18 B-VG, in: *Kahl/Khakzadeh/Schmid [Ed.], Kommentar Bundesverfassungsrecht, 2021*, point 26).

In summary, section 19 paragraph 2 *COVID-19-IG*, interpreted in conformity with the Constitution, obliges the minister who issues such a regulation to continuously assess and regularly evaluate the appropriateness and the necessity of mandatory vaccination. In this assessment, the Federal Minister responsible for healthcare has to pay attention, in particular, to the efficacy and risks of the vaccines available, the power to limit the vaccination duty to certain facts, including by limiting the obligation to certain groups of persons and professional groups or persons working for certain institutions. Moreover, he has to verify if the intensive interference with a person’s physical integrity, given the specific need to protect groups of vulnerable persons and to protect the healthcare infrastructure, could be

avoided through other measures with a less restrictive effect on fundamental rights (such as a temporary obligation to wear face masks in gatherings of several people).

In the course of this continuous evaluation of the details of the legal provisions imposing compulsory vaccination in accordance with the requirements of constitutional law, the Federal Minister responsible for healthcare additionally has to consider all other possibilities provided for by the legislator in order to protect public health in times of a pandemic (cf. e.g. *COVID-19-MG*: from the duty to wear a face mask to lockdown). After all, the legislator created the basis for a great variety of measures differing also in terms of intensity of interference. It goes without saying that the assessment must also be accessible to and comprehensible for the Constitutional Court (cf. on the duty of documentation, e.g. *VfSlg. 20.399/2020*).

From the viewpoint of constitutional law, it is important to emphasise that the legislator, by involving the Main Committee of the National Council pursuant to section 18 paragraph 1 *COVID-19-IG*, ensured the latter's participation in such necessarily fact-based decisions.

Hence, the Constitutional Court, considering this point of view, does not express legal concerns regarding section 19 paragraph 2 *COVID-19-IG*.

2.4. Section 19 paragraph 2 *COVID-19-IG* ensures that the vaccination mandate applies only if, in light of its objective, it is both appropriate and necessary. In this context, the limits set by Article 8 of the European Convention on Human Rights must be respected:

Referring to the best way of protecting the health of the population, the European Court of Human Rights stated in the *Vavřička* case that there is no consensus on a single model among the Contracting Parties to the Convention. Rather, there is a spectrum of strategies ranging from a mere recommendation of voluntary vaccination to a legal duty of vaccination (ECtHR, *Vavřička and others*, 278).

The European Court of Human Rights points out that the introduction of a legal vaccination duty is justified under certain conditions to protect the population

against serious diseases: Where the view is taken that a strategy of voluntary vaccination is not sufficient to achieve or maintain herd immunity, or herd immunity is not relevant due to the nature of the disease (e.g. tetanus), domestic authorities may reasonably introduce a strategy of mandatory vaccination in order to achieve an appropriate level of protection against serious diseases (ECtHR, case *Vavřička and others*, 288).

2.4.1. As generally agreed, mandatory vaccination, as imposed in principle pursuant to section 1 paragraph 1 *COVID-19-IG* but not to be enforced for the time being, constitutes an interference with the rights protected under Article 8 of the European Convention of Human Rights.

Against the background of the relevant case law of the European Court of Human Rights, the provisions challenged by the applicant constitute an interference with the right to respect for private and family life pursuant to Article 8, paragraph 1 ECHR, in particular the right to respect for the physical integrity of the applicant (cf. ECtHR, case *Vavřička* and Others, 263; 15.3.2012, case *Solomakhin*, Appl. 24.429/03 [33 et seq.]; 9.7.2002, case *Salvetti*, Appl. 42.197/98; see also *Kopetzki*, Unterbringungsrecht I, 1995, 407 et seq.). This is linked to the person's right to decide for themselves if they want to undergo a certain medical treatment (cf. European Commission on Human Rights 4.10.1989, case *Herczegfalvy*, Appl. 10.533/83, EuGRZ 1992, 588 [Z 257]; European Commission on Human Rights 10.12.1984, case *Acmanne and Others*, Appl. 10.435/83). As the Constitutional Court already stressed in *VfSlg. 20.433/2020*, the legislator attributes greatest importance to the individual's right of self-determination regarding medical treatments, regardless of whether the decision is appropriate from the medical point of view. Even though mandatory vaccination cannot be enforced through direct coercion (cf. section 1 paragraph 3 *COVID-19-IG*, Federal Law Gazette *BGBl. I 4/2022*, as amended by Federal Law Gazette *BGBl. I 22/2022*), the only alternative open to persons subject to the provision is to either move their domicile to a place outside the territory of the Republic of Austria or, after the entry into effect of sanctions pursuant to section 10 paragraph 1 *COVID-19-IG*, to accept the risk of punishment. Against this background, the interference with the individual's physical integrity and the associated right of self-determination is to be qualified as particularly severe (cf. protection guaranteed by Article 8 ECHR in the context of

medical treatments, e.g. *Kopetzki*, reference as above, 407 et seq.; cf. also *Hiersche*/*K. Holzinger*/*Eibl*, Handbuch des Epidemierechts unter besonderer Berücksichtigung der Regelungen betreffend COVID-19, 2020, 50 et seq.).

2.4.2. Pursuant to Article 8 paragraph 1 ECHR, everyone has the right to respect for private and family life. Article 8 paragraph 2 ECHR sets out the conditions under which interference with the rights protected by paragraph 1 is permissible. Pursuant to Article 8 paragraph 2 ECHR, interference with the rights protected by this article is allowed only if such interference is in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Such interference is therefore justified under constitutional law if it is appropriate and necessary to achieve any of the aforementioned legitimate objectives, and if it is proportionate (cf. *VfSlg. 19.653/2012* with further references).

The objective pursued by the legislator in adopting *COVID-19-IG*, i.e. to prevent the spread of COVID-19 through a high vaccination rate among the population for the protection of vulnerable persons who cannot be vaccinated for medical reasons, on the one hand, and to avoid overloading of the healthcare infrastructure through the resultant reduction of the risk of the disease taking a severe or lethal course, on the other hand, serves the very important public interest of protecting human life and health. (cf. *VfSlg. 20.399/2020*; *AB 1312 BlgNR 27. GP, 2*). The development of the pandemic in recent years has been characterised by recurrent waves of infection, which at their peaks represented a heavy burden for the healthcare system and the healthcare infrastructure (cf. for example the expert-based reasoning for the 5th COVID-19 Emergency Measures Regulation (*COVID-19 Notmaßnahmenverordnung, COVID-19-NotMV*) of 19 November 2021). Moreover, according to experts, it is impossible to predict how the SARS-CoV-2 virus will change. It cannot be ruled out that the virus will develop into a variant causing a simple cold, but its mutation into a virus similar to the influenza virus or an even more dangerous one is equally conceivable (cf. opinion expressed by the Federal Government with reference to the First Monitoring Report of the commission set up pursuant to section 19 paragraph 1 *COVID-19-IG* within the Federal Chancellery pursuant to section 8 of the Federal Ministries Act (*Bundesministeriengesetz,*

BMG), Federal Law Gazette *BGBl. 76/1986*: "Based on past experience with COVID-19, it is most likely that a new and possibly massive wave of infections will occur in the autumn of 2022. Even if the pathogenicity of the then dominating variants were not to be higher than that of the Omicron variants, in the absence of preventive measures the virus would encounter a population whose immunity has declined substantially […], and could therefore result in a much higher burden of disease than that caused by the Omicron variants in the winter of 2021. It cannot be excluded that the healthcare system would be overburdened and that drastic interferences with the population's freedom [e.g. lockdowns] would again be necessary." Against the background of this history and on the basis of expertise obtained (cf., in particular, *AB 1312 BlgNR 27. GP* and the and First and Second Monitoring Reports), it is to be expected that a repeated occurrence of such threats caused by the virus cannot be excluded with a significant degree of certainty and that the dangers faced in recent years, especially for vulnerable persons and the healthcare infrastructure, remain. The effects of other measures taken to contain the pandemic (especially longer lockdowns) have to be taken into consideration.

2.4.3. The applicant argues that mandatory vaccination is not necessary, as tests and face masks are not only more effective in preventing contagion, but also represent a less intensive interference with fundamental rights, and that mandatory vaccination can be limited to groups at risk.

In this context, the Federal Government points out, among other arguments, that the practical effect of face masks in preventing contagion, on average, is notably below the effect determined in studies. In the Federal Government's opinion, the risk of the related uncertainties therefore always has to be evaluated against the background of the current epidemiological situation. Moreover, it is to be pointed out that FFP2 masks, unlike vaccination, do not lead to immunity. A valid test certificate diminishes the probability of a person being infectious, but infectiousness during the validity of the test certificate cannot be excluded. As further noted by the Federal Government, the risk of transmission is even higher if the tested person has no immunity, as non-immunised tested persons, regardless of the duration of validity of the test certificate, have no immunological protection against infection or transmission, unlike persons who have recovered from the disease or

have been vaccinated. Should a person be infected with SARS-CoV-2 despite a negative test result and spread the virus in contagious quantities, it cannot be assumed that mechanisms reducing the transmission of the virus by infected persons to other persons become effective, unlike in persons who have either been vaccinated or recovered from the disease. Hence, the effects of these measures are not comparable to protection through immunity. In particular, as pointed out by the Federal Government, these measures are non-sustainable measures of short-term or, at best, medium-term effect for public health protection.

Contrary to the applicant's opinion, the Federal Government states that limiting mandatory vaccination to vulnerable persons cannot be regarded as a less severe measure, as normal hospital wards must also be taken into consideration and the fact that lockdowns were in place has to be factored in when interpreting their occupancy rates. Moreover, statistics clearly show that the majority of persons requiring hospitalization were not or not sufficiently immune to SARS-CoV-2. Furthermore, the Federal Government underlines that reducing infections in younger age groups through vaccination is necessary, as in past pandemic waves the number of infections first increased in younger age groups and then spread to older age groups. According to current knowledge, it is to be assumed that it takes a vaccination rate of over 90 percent to ease the burden on the healthcare system.

The applicant's view can be shared insofar as, given the particularly severe interference with a person's physical integrity inherent in compulsory vaccination, a strict standard must also be applied in examining the necessity of vaccination. In this context, it is important to emphasise that nobody can be forced to undergo compulsory "treatment" (cf. section 1 paragraph 3 *COVID-19-IG*, Federal Law Gazette *BGBl. I 4/2022*, as amended by Federal Law Gazette *BGBl. I 22/2022*). If compulsory vaccination were merely based on the argument of "protecting people from themselves", this could not justify the intervention (cf. *VfSlg. 11.917/1988* on the obligation to wear seat belts in motor vehicles).

Mandatory vaccination is to be qualified as a particularly severe interference with the right of self-determination regarding a person's physical integrity and can only be justified if it is absolutely necessary ("indispensable") in order to achieve the legislator's legitimate objective. In particular, in issuing the corresponding regulation pursuant to section 19 paragraph 2 *COVID-19-IG*, it must be considered if

other, equally effective but less intrusive means are available to achieve the set objectives (e.g. by limiting mandatory vaccination to certain professional groups or groups of persons or persons working for certain institutions). In its specific form, the obligation must (accurately) meet these criteria (cf. e.g. the Executive Report of the GECKO meetings on 21 and 28 January 2022 and 4 February 2022; *VfGH 29.4.2022, V 23/2022*).

As stated above, the Federal Minister responsible for healthcare is called upon, within the framework of the regulatory system created through section 19 *COVID-19-IG*, to continuously evaluate the necessity of mandatory vaccination (cf. on accompanying monitoring, in particular section 19 paragraph 1 *COVID-19-IG* and the First and Second Monitoring Reports) and, if appropriate, suspend the duty of vaccination completely or only in certain situations. The Federal Minister of Social Affairs, Health, Care and Consumer Protection currently fulfilled this obligation derived from section 19 paragraph 2 *COVID-19-IG* by suspending the vaccination duty for the time being through the issue of the COVID-19 Non-Application Regulation, Federal Law Gazette *BGBl. II 103/2022* as amended by Federal Law Gazette *BGBl. II 198/2022*.

With the COVID-19 Non-Application Regulation, Federal Law Gazette *BGBl. II 103/2022,* and the first amendment of Federal Law Gazette *BGBl. II 198/2022*, issued during the "information and running-in phase", i.e. before non-compliance became punishable pursuant to section 10 paragraph 1 *COVID-19-IG*, the Federal Minister of Social Affairs, Health, Care and Consumer Protection made use of the power granted to him in section 19 paragraph 2 *COVID-19-IG* and, continuously supported by scientific expertise, declared the duty of vaccination temporarily non-applicable for the period from 12 March 2022 to 31 August 2022 (cf. First and Second Monitoring Reports).

In view of the COVID-19 Non-Application Regulation currently in effect, Federal Law Gazette *BGBl. II 103/2022*, as amended by Federal Law Gazette *BGBl. II 198/2022*, there are no concerns to be raised under constitutional law against the admissibly challenged provisions (cf. *VfSlg. 15.116/1998*).

2.5. On the principle of equality pursuant to Article 7 of the Constitution and Article 2 of the Basic State Law (*Staatsgrundgesetz, StGG*):

On this point, a reference to the statements on Article 8 of the European Convention on Human Rights is sufficient. Against the background of the regulatory system chosen by the legislator, the vaccination duty laid down in *COVID-19-IG* for persons above the age of 18 residing in Austria does not give rise to any concerns in terms of legal provisions on equal treatment.

V. Result

1. The application, insofar as it refers to section 1 paragraph 1, section 4 paragraphs 1 to 4, and section 19 paragraph 2 COVID-19-IG, Federal Law Gazette *BGBl. I 4/2022*, and *COVID-19-IV*, Federal Law Gazette *BGBl. II 52/2022*, therefore is to be dismissed.

2. The application is otherwise rejected.

3. Pursuant to section 19 paragraph 4 of the Constitutional Court Act, this decision was rendered without an oral hearing in private deliberations.

Vienna, 23 June 2022
The President:
CHRISTOPH GRABENWARTER

Recording clerk: MARTIN DORR