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:*

3.12 General Principles – **Clarity and precision of legal provisions**

3.13 General Principles – **Legality**

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers**

5.1.5 Fundamental Rights – General questions – **Emergency situations**

5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement**

*Keywords of the alphabetical index:*

Epidemic / Freedom of movement, temporary restriction / Legality.

*Headnotes:*

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

*Summary:*

1. § 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 (hereinafter referred to as "regulation-98"), entry into public places was generally forbidden. § 2 of that regulation included several exceptions to this prohibition; for example, entry of public places was allowed for the purpose of covering necessary basic needs (no. 3), and for professional purposes (no. 4); finally, outdoor public places could be entered alone or with people living in the same household (no. 5). Regulation-98 expired on 30 April 2020.

2. In April 2020, an individual filed a constitutional complaint against that regulation, 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, he had been ordered to do home office by his employer. Therefore, the exception of § 2 no. 4 of the regulation-98 did not apply to him. He was allowed to leave his home to go for a walk according to § 2 no. 5 of the regulation but he could not get to his rented apartment in Vienna because he would need to use public transport. However, pursuant to § 4 of the regulation, this was not permitted for exceptions stipulated in no. 5 of § 2 (only for nos. 1 to 4).

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 the regulation-98 also affected his right to freedom of employment.

3. 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.

3.1. 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 this act provides a sufficiently precise legal basis for any prohibitions on entry and thus corresponds to the principle of legality under Article 18, paragraph 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, paragraph 1, of the Basic Law on the General Rights of the Citizens of 21 December 1867.

3.2. 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) were systematically related to § 4 of the regulation (use of public transport). According to § 6, 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.

The Court pointed out that the purpose of § 1 of regulation-98 was to make people stay at home. Under § 2 of the COVID-19 Measures Act, the competent Minister of Public Health may describe the places which shall not be entered in a specific or abstract way, he or she may also prohibit the entry of regionally limited areas. However, the minister is prohibited from imposing an exit ban as such (albeit regionally limited) through a general ban on entering public places. The legal authorization 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 no. 5 – did not change the fact that § 1 of the regulation 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 authorize such a general prohibition. The Court added 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*, no. 12.954/87, 22.2.1994
* *Vito Sante Santoro*, no. 36.681/97, 1.7.2004

Languages: German.

a) Austria / b) Constitutional Court / c) / d) 14.07.2020 / e) G 202/2020 / f) / g) ECLI:AT:VFGH:2020:G202.2020 / h) CODICES (German).

*Keywords of the systematic thesaurus:*

5.1.5 Fundamental Rights – General questions – **Emergency situations**

5.2 Fundamental Rights – **Equality**

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**

*Keywords of the alphabetical index:*

Epidemic / Right to property, compensation for loss of earnings.

*Headnotes:*

During the COVID-19 crisis, several businesses and shops had to temporarily close due to an entry ban for customer areas. The COVID-19 Measures Act does not provide for compensation for such situations. However, this does not violate the fundamental right to property or the principle of equality since the entry ban was embedded in a comprehensive package of measures to cushion the economic impact of the pandemic.

*Summary:*

1. § 1 of the COVID-19 regulation of 15 March 2020, Federal Law Gazette II No. 96/2020 (hereinafter referred to as "regulation-96"), put a ban on entering customer areas of business premises. Therefore, shops had to close. § 2 of the regulation-96 provided for certain exceptions. According to § 4, paragraph 2, of the COVID-19 Measures Act­ – the legal basis of that administrative regulation – the provisions of the Epidemics Act 1950 on the closure of establishments are not applicable where a regulation under § 1 of the COVID-19 Measures Act has been issued. In contrast to the Epidemics Act 1950 (§ 32), however, the COVID-19 Measures Act does not provide for compensation for loss of earnings incurred by companies affected by measures taken under that act.

2. The applicants, business companies with several branches in Austria, filed a constitutional complaint with the Constitutional Court, alleging, in particular, the violation of their right to property according to Article 5 of the Basic Law on the General Rights of the Citizens of 21 December 1867 (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger – StGG*) and Article 1 First Additional Protocol to the ECHR, as well as a violation of the constitutional principle of equality laid down in Article 7, paragraph 1, of the Federal Constitutional Act and in Article 2 StGG.

3.1. The Constitutional Court held that the lack of a right to compensation does not violate the fundamental right to property or the principle of equality. To begin with, the Court observed that a ban on entry for business premises has the same effect on the affected companies as a ban on operation and thus constitutes a significant interference with the fundamental right to property. However, the ban on entry was and is embedded in an extensive package of measures which aims to cushion the economic impact of the ban on entry on the companies concerned and of the consequences of the COVID-19 pandemic in general. This package is a substitute for the entitlement to compensation according to the Epidemics Act 1950.

3.2. In particular, the Court pointed out that affected companies are legally entitled to financial support such as benefits for short-time work. With regard to these support measures, the ban on entry does not constitute a disproportionate interference with the fundamental right to property. A right to compensation for all companies affected by the ban on entry cannot be derived from the right to property: All companies in trade and service industries with customer areas (apart from the exceptions provided for in § 2 of regulation-96) were affected by the entry ban and the adverse consequences associated therewith. The property restrictions were deemed necessary in order to avoid further spread of the epidemic. Therefore, in the present constellation, no obligation can be derived from the fundamental right to property to provide an additional claim for compensation.

3.3. The Constitutional Court noted that in addition, it does not violate the principle of equality that the COVID-19 Measures Act lacks a right to compensation in the event of a ban on entry, while the Epidemics Act 1950 grants such a right for loss of earnings in the event of the closure of companies. These provisions cannot be compared with each other since the Epidemics Act 1950 is only aimed at fighting the spread of local epidemics, e.g., by closing certain business facilities (especially factories) presenting a specific risk for spreading an epidemic – in contrast to large-scale measures affecting the whole retail economy as laid down in the COVID-19 Measures Act.

3.4. Furthermore, the Court pointed out that the legislator enjoys a wide margin of discretion when combating the economic consequences of the COVID-19 pandemic. The decision to embed the ban on entry into a separate rescue package (instead of resorting to the regime of the Epidemics Act 1950), which essentially pursues the same objective as the right to compensation for loss of earnings under the Epidemics Act 1950, does not run counter the principle of equality.

4. The Constitutional Court concluded that in an overall view, the lack of compensation does not constitute a breach of a constitutional right.

Cross-references:

European Court of Human Rights:

* *Sporrong-Lönnroth*, no. 7151/75 et al., 23.9.1983
* *Phocas*, no. 17.869/91, 23.4.1996

Languages: German.