CONSTITUTIONAL COURT
G 202/2020-20,
V 408/2020-20*
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
Barbara HOFKO

has decided today after private deliberations pursuant to Article 139 and Article 140 of the Constitution (*Bundes-Verfassungsgesetz, B-VG*) on the applications filed by 1. **********, **********, **** ***** **********, recorded under G 202/2020, V 408/2020, 2. **********, ********** **********, ********, recorded under G 212/2020, V 414/2020 and 3. **********, **********, **** ****, recorded under G 213/2020, V 415/2020, all represented by e/n/w/c Natlacen Walderdorff Cancola Rechtsanwälte GmbH, Schwarzenbergplatz 7, 1030 Vienna, to repeal as unlawful the wording specified in section 2 paragraph 1 subparagraph 2 and the wording specified in section 2 paragraph 4 of the Regulation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection concerning temporary measures to prevent the spread of COVID-19, Federal Law Gazette *BGBl. II 96/2020*, as amended by Federal Law Gazette *BGBl. II 151/2020*, and to repeal as unconstitutional section 4 paragraph 2 COVID-19 Measures Act, Federal Law Gazette *BGBl. I 12/2020*, as amended by Federal Law Gazette *BGBl. I 16/2020*, as follows:

I. 1. The wording "if the indoor customer area does not exceed 400 m^2"as well as clause four – "Modifications of the size of the customer area carried out after 7 April 2020 shall not be taken into account when calculating the size of the customer area." – of section 2 paragraph 4 of the Regulation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection concerning temporary measures to prevent the spread of COVID-19, Federal Law Gazette *BGBl. II 96/2020*, as amended by Federal Law Gazette *BGBl. II 151/2020*, were unlawful.

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

II. The applications to repeal section 4 paragraph 2 of the Federal Act concerning temporary measures to prevent the spread of COVID-19, Federal Law Gazette *BGBl*. I 12/2020, as amended by Federal Law Gazette *BGBl. I 16/2020*, and to find that section 1 and section 2 paragraph 4, third clause, of the Regulation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection concerning temporary measures to prevent the spread of COVID-19, Federal Law Gazette *BGBl. II 96/2020*, as amended by Federal Law Gazette *BGBl. 151/2020*, were unlawful, are dismissed.

III. The applications are otherwise rejected as inadmissible.

IV. The Federation (Federal Minister of Social Affairs, Health, Care and Consumer Protection) is liable to refund the applicants for the court fees assessed at EUR 1,744.20, payable to their legal representatives within 14 days, failing which such payment shall be enforced.

Reasoning

I. Applications and Preliminary Proceedings

…

II. The Law

1. …

2. 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 (the … challenged provision is highlighted):

"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 public 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 published 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."

3. The Regulation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection concerning temporary measures to prevent the spread of COVID-19 (*Verordnung des Bundesministers für Soziales, Gesundheit, Pflege und Konsumentenschutz betreffend vorläufige Maßnahmen zur Verhinderung der Verbreitung von COVID-19*), Federal Law Gazette *BGBl. II 96/2020*, as amended by Federal Law Gazette *BGBl. II 151/2020*, stipulates as follows (the … challenged provisions are highlighted):

"Section 1. It is forbidden to enter the customer area of business premises of retail establishments and service companies and of recreational and sports facilities for the purpose of buying goods or using services, or for using recreational and sports facilities.

Section 2. (1) Section 1 shall not apply to:
1. Public pharmacies,
2. Food retailers (including sales outlets of food producers) and agricultural on-farm sellers,
3. Chemists and drugstores,
4. Sale of medical products and sanitary articles, therapeutic and medical aids,
5. Health and nursing care services,
6. Services for disabled persons provided by the regions *(Länder)* under disabled assistance, social welfare, participation and equal opportunities legislation,
7. Veterinary services,
8. Sale of animal feed,
9. Sale and maintenance of safety and emergency products,
10. Emergency services,
11. Agricultural trade including slaughter cattle auctions as well as horticulture and trade in seeds, fodder and fertilizers,
12. Petrol stations including car wash facilities,
13. Banks,
14. Postal services providers, including post partners, insofar as these post partners are covered by the exemptions of section 2 and postal service points within the meaning of section 3 paragraph 7 Postal Market Act (*Postmarktgesetz, PMG*), which are operated by a local authority or are located in municipalities in which no other postal service point covered by section 2 can provide service, however, only for the provision of postal services and the activities permitted under section 2, and telecommunications,
15. Services in the context of judicial administration,
16. Delivery services,
17. Public transport,
18. Tobacconists and newsstands,
19. Hygiene and cleaning services,
20. Waste disposal operations,
21. Motor vehicle and bicycle repair shops,
22. Building material, iron and wood retailers, DIY and garden centres,
23. Pawnshops and trade in precious materials.

(2) The exceptions pursuant to paragraph 1 subparagraphs 3, 4, 8, 9, 11, 22 and 23 and paragraph 4 apply on work days from 7:40 a.m. to no longer than 7:00 p.m. More restrictive rules governing opening hours pursuant to other legal provisions remain unaffected.

(3) The exceptions pursuant to paragraph 1 subparagraph 2 apply on work days from 7:40 a.m. to no longer than 7:00 p.m., not, however, to sales outlets of food producers. More restrictive rules governing opening hours pursuant to other legal provisions remain unaffected.

(4) Without prejudice to the provisions of paragraph 1, section 1 shall not apply to the customer area of other retail business premises if the indoor customer area does not exceed 400 m². Other retail business premises are deemed to

include business premises used for the sale, manufacture, repair or processing of goods. If other business premises are structurally connected (e.g. shopping mall), the customer areas of the business premises must be added up if the customer area is entered via the connecting structure. Modifications of the size of the customer area carried out after 7 April 2020 shall be disregarded when calculating the size of the customer area.

(5) Paragraph 1 applies only if the following is complied with:
1. Staff in contact with customers and customers wear a mechanical protection device that adequately covers the areas of mouth and nose as a barrier against airborne droplets; this does not apply to children under six years of age;
2. A distance of at least one metre is kept from others.

(6) Paragraph 4 applies only if, in addition to the requirements of paragraph 5, the operator ensures, by putting appropriate measures in place, that only such a number of customers is allowed in the customer area at any one time that 20 m² of the entire sales area is available for each customer; if the customer area is less than 20 m², only one customer at a time is allowed to enter the business premises.

(7) 1. Derogating from paragraph 5 subparagraph 1, the relevant requirements and recommendations specific to the sector and type of work, and
2. paragraph 5 subparagraphs 2 and 3
do not apply in the areas as set out in paragraph 1 subparagraphs 5 and 6.

Section 3. (1) It is forbidden to enter the business premises of all types of food and drink businesses and guest accommodation businesses.

(2) Paragraph 1 does not apply to food and drink businesses and guest accommodation businesses which are operated within the following establishments and facilities:
1. Hospitals and medicinal spas;
2. Nursing homes and homes for the elderly;
3. Institutions providing care and accommodation for children and adolescents, including schools and kindergartens;
4. Business companies, if they are reserved for the exclusive use of the employees of that company.

(3) Paragraph 1 does not apply to accommodation facilities if food and drink at the business premises is served only to guests staying at the accommodation facility.

(4) Paragraph 1 does not apply to camping sites and to means of public transport if food and drink is served there exclusively to guests staying at the camping site or to users of public transport.

(5) Paragraph 1 does not apply to delivery services.

(6) Pick-up of pre-ordered food is allowed if not consumed on-site and if it is ensured that a minimum distance of one metre is kept from others.

Section 4. (1) It is forbidden to enter accommodation facilities for the purpose of recreation and leisure purposes.

(2) Accommodation facilities are businesses which are managed or supervised by a host or any of their agents and which serve to accommodate guests, against a charge or for free, on a temporary basis. Managed camping or caravan sites and mountain shelters are classified as accommodation facilities.

(3) Paragraph 1 does not apply where accommodation is provided
1. to persons who are already staying at the accommodation facility at the time this provision enters into force, for the duration of stay previously agreed with the accommodation facility,
2. for the purpose of providing care and assistance to persons in need of assistance,
3. for work-related reasons, or
4. to meet an urgent housing need.

Section 5. (1) This regulation expires at the end of 30 April 2020.

(2) The amendments to this Regulation introduced by Regulation Federal Law Gazette *BGBl. II 112/2020* enter into force on the day following its publication.

(3) Section 4 of this Regulation in the version of Federal Law Gazette *BGBl. II 130/2020* enters into force on the end of 3 April 2020. Regulations which may have been issued by a governor (*Landeshauptmann)* or a district administration authority concerning bans on entry to accommodation facilities in force at the time this provision enters into force shall remain unaffected.

(4) Sections 1 to 3 cease to be in force at the end of 30 April 2020.

(5) Section 4 ceases to be in force at the end of 30 April 2020.

(6) The amendments to this Regulation introduced by Regulation Federal Law Gazette *BGBl. II 151/2020* enter into force at the end of 13 April 2020."

4. The relevant provisions of the Epidemics Act 1950 (*Epidemiegesetz 1950)* Federal Law Gazette *BGBl*. 186/1950 (republished), as amended by *BGBl. I 63/2016*, are as follows:

"CHAPTER II.
Precautions for preventing and controlling notifiable diseases.

[…]

Segregation of infected persons.

Section 7. (1) Notifiable diseases in the case of which infected persons, and persons suspected of being infected or infectious, may be ordered to segregate are defined by way of regulation.

(1a) Infected persons, and persons suspected of being infected or infectious, may be detained or restricted in their movements in order to prevent the further spread of a notifiable disease listed in a regulation pursuant to paragraph 1, if, given the nature of the disease and the behaviour of the person concerned, there is a serious or substantial risk to the health of others which cannot be remedied by less severe means. The person detained may apply to the district court in whose jurisdiction the place of detention is located for a review of the admissibility and for the lifting of the restriction of liberty in accordance with section 2 of the Tuberculosis Act (*Tuberkulosegesetz*). Every detention must be notified to the district court by the district administrative authority that ordered it. Unless detention was lifted earlier, the district court shall review *ex officio* the admissibility of detention by analogous application of section 17 of the Tuberculosis Act at intervals of no more than three months from detention or the last review.

(2) Where it is not possible to adequately segregate a patient at his/her home in accordance with the instructions given, or if such segregation is not performed, the patient shall be accommodated in a hospital or any other suitable place, provided that transfer can be ensured without endangering the patient.

(3) Where this appears necessary in view of the local conditions, suitable rooms and means of transport recognized as eligible shall be made available in good time for the purpose of segregation, or field hospitals equipped with the necessary facilities and personnel shall be set up.

(4) Apart from the cases where a patient is segregated within the meaning of paragraph 2, patients may only be transferred from their home with official authorisation and in strict compliance with the precautions to be imposed by the authorities.

(5) Such authorisation shall be granted only if public safety is not jeopardized thereby and if the patient is either to be transferred to a facility designed for the admission of such patients, or the transfer appears absolutely necessary under the circumstances.

[…]

Restriction of food sale.

Section 11. The sale of food from sales outlets, buildings or, if necessary, distinct local areas where scarlet fever, diphtheria, abdominal typhoid fever, paratyphoid fever, dysentery, typhoid fever, smallpox, Asian cholera, plague or Egyptian eye inflammation have occurred, may be forbidden or made contingent on certain precautions. […]

Surveillance of certain persons.

Section 17. (1) Persons who are considered to be carriers of pathogens of a notifiable disease may be subject to special sanitary police surveillance or monitoring. They must not, by specific order of the district administrative authority (public health department), be involved in the production or processing of food in a way that causes a risk of pathogens being transmitted to other persons or to food. A special duty to report, periodic medical examination and, if necessary, disinfection and segregation at home may be ordered for such persons; if segregation at home is not practicable in an appropriate manner, segregation and the provision of food in separate premises may be ordered. […]

(2) If a suspicion of infection is related to the transmission of typhoid fever, smallpox, Asian cholera or plague, health surveillance and monitoring of the person suspected of being infected shall at any rate be carried out by sanitary police in accordance with the foregoing paragraph.

(3) Persons who, by their profession, are involved in medical treatment, nursing or the disposal of the dead and midwives, shall be ordered to comply with special precautions. For such persons, movement and occupational restrictions as well as protective measures, especially vaccinations, may be ordered. […]

(4) The district administrative authority may, in individual cases, order vaccinations or prophylactics being administered to certain persons at risk, if such measures are strictly necessary given the nature and extent of the occurrence of a notifiable disease so as to prevent its further spread.

[…]

Operating restrictions or closing of commercial enterprises.

Section 20. (1) On the occurrence of scarlet fever, diphtheria, abdominal typhoid, paratyphoid fever, bacterial food poisoning, epidemic typhus, smallpox, Asian cholera, plague or anthrax, business premises in which certain trades are exercised and whose operation presents a specific risk of spreading the disease may be ordered to close in areas to be specifically designated if and to the extent that, given the conditions prevailing at the business, maintaining its operations would give rise to an immediate and severe risk to the employees themselves, as well as to the public at large, because of the further spread of the disease. […]

(2) On occurrence of one of the diseases listed in paragraph one above, and given the conditions specified there, the operation of individual commercial enterprises with permanent business premises may be restricted or the closing of the business premises may be ordered, and individual persons who come into contact with sick persons may be banned from entering the business premises.

(3) Business premises shall be ordered to close if such a measure is deemed strictly necessary in cases of exceptional threats.

(4) To what extent the precautions described in paragraphs 1 to 3 may be taken when other notifiable diseases occur will be determined by way of regulation.

[…]

Evacuation of homes.

Section 22. (1) The district administrative authority shall order the evacuation of homes and buildings if, depending on the nature of the occurrence of a notifiable disease, such measures are absolutely necessary to prevent its further spread.

(2) The residents affected shall, at their request, and free of charge if they are destitute, be provided with appropriate accommodation and food.

[…]

Restrictions of movements for the residents of certain areas.

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

[…]

CHAPTER III.
Compensation and defrayal of costs.

[…]

Compensation for loss of earnings.

Section 32. (1) Compensation shall be paid to natural persons and legal entities as well as to partnerships under commercial law for any pecuniary loss sustained by the restriction of their gainful activities if and when they
1. had to be segregated pursuant to sections 7 or 17, or
2. were forbidden to sell food pursuant to section 11, or
3. were banned from exercising an gainful activity pursuant to section 17, or

4. are employed in a business or company the operations of which were restricted or which was closed pursuant to section 20, or
5. run a company the operations of which were restricted or which was closed pursuant to section 20; or
6. live in homes or buildings evacuation of which was ordered pursuant to section 22, or
7. live or work in an area for which restrictions of movements were imposed pursuant to section 2,
and thereby sustained a loss of earnings.

(2) Compensation shall be paid for each day covered by the official order stated in paragraph 1.

(3) Compensation for persons in employment shall be calculated based on their regular earnings within the meaning of the Continued Payment of Remuneration Act (*Entgeltfortzahlungsgesetz*), Federal Law Gazette *BGBl. 399/1974*. Employers shall pay the remuneration due to them on the company's customary dates for the payment of remuneration. The right to compensation from the Federation shall pass to the employer at the time of payment. The employer's contribution to statutory social insurance shall be paid by the employer for the period employees were prevented from working, and the supplement pursuant to section 21 of the 1972 Construction Workers' Leave Act (*Bauarbeiterurlaubsgesetz 1972*), Federal Law Gazette *BGBl*. *414*, shall be reimbursed by the Federation.

(4) For self-employed persons and companies, compensation shall be calculated by comparison of the year-on-year earnings.

(5) Amounts to which beneficiaries are entitled on the same grounds under other provisions or agreements, and amounts earned from other gainful work taken up during the time they were prevented from working, shall be offset against the amount of due compensation."

5. The relevant provisions of the Epidemics Act 1950 (*Epidemiegesetz 1950*), Federal Law Gazette *BGBl*. *186/1950* (republished), as amended by Federal Law Gazette *BGBl*. *I 43/2020* read as follows:

"CHAPTER II.
Precautions for preventing and controlling notifiable diseases.
[…]

Segregation of infected persons.

Section 7. (1) Notifiable diseases in the case of which infected persons, and persons suspected of being infected or infectious, may be ordered to segregate are defined by way of regulation.

(1a) Infected persons, and persons suspected of being infected or infectious, may be detained or restricted in their movements in order to prevent the further spread of a notifiable disease listed in a regulation pursuant to paragraph 1, if, given the nature of the disease and the behaviour of the person concerned, there is a serious or substantial risk to the health of others which cannot be remedied by less severe means. The person detained may apply to the district court in whose jurisdiction the place of detention is located for a review of the admissibility and for the lifting of the restriction of liberty in accordance with section 2 of the Tuberculosis Act (*Tuberkulosegesetz*). Every detention must be notified to the district court by the district administrative authority that ordered it. Unless detention was lifted earlier, the district court shall review *ex officio* the admissibility of detention by analogous application of section 17 of the Tuberculosis Act at intervals of no more than three months from detention or the last review.

(2) Where it is not possible to adequately segregate a patient at their home in accordance with the instructions given, or if such segregation is not performed, the patient shall be accommodated in a hospital or any other suitable place, provided that transfer can be ensured without endangering the patient.

(3) Where this appears necessary in view of the local conditions, suitable rooms and means of transport recognized as eligible shall be made available in good time for the purpose of segregation, or field hospitals equipped with the necessary facilities and personnel shall be set up.

(4) Apart from the cases where a patient is segregated within the meaning of paragraph 2, patients may only be transferred from their home with official authorisation and in strict compliance with the precautions to be imposed by the authorities.

(5) Such authorisation shall be granted only if public safety is not jeopardized thereby and if the patient is either to be transferred to a facility designed for the admission of such patients, or the transfer appears absolutely necessary in the circumstances.

[…]

Restriction of food sale.

Section 11. The sale of food from sales outlets, buildings or, if necessary, distinct local areas where scarlet fever, diphtheria, abdominal typhoid fever, paratyphoid fever, dysentery, typhoid fever, smallpox, Asian cholera, plague or Egyptian eye inflammation have occurred, may be forbidden or made contingent on certain precautions. […]

Surveillance of certain persons.

Section 17. (1) Persons who are considered to be carriers of pathogens of a notifiable disease may be subject to special sanitary police surveillance or monitoring. They must not, by specific order of the district administrative authority (public health department), be involved in the production or processing of food in a way that causes a risk of pathogens being transmitted to other persons or to food. A special duty to report, periodic medical examination and, if necessary, disinfection and segregation at home may be ordered for such persons; if segregation at home is not practicable in an appropriate manner, segregation and the provision of food in separate premises may be ordered. […]

(2) If a suspicion of infection is related to the transmission of typhoid fever, smallpox, Asian cholera or plague, health surveillance and monitoring of the person suspected of being infected shall at any rate be carried out by sanitary police in accordance with the foregoing paragraph.

(3) Persons who, by their profession, are involved in medical treatment, nursing or the disposal of the dead and midwives, shall be ordered to comply with special precautions. For such persons, movement and occupational restrictions as well as protective measures, especially vaccinations, may be ordered. […]

(4) The district administrative authority may, in individual cases, order vaccinations or prophylactics being administered to certain persons at risk, if such measures are strictly necessary given the nature and extent of the occurrence of a notifiable disease so as to prevent its further spread.

[…]

Operating restrictions or closing of commercial enterprises.

Section 20. (1) On the occurrence of scarlet fever, diphtheria, abdominal typhoid, paratyphoid fever, bacterial food poisoning, epidemic typhus, smallpox, Asian cholera, plague or anthrax, business premises in which certain trades are exer-

cised and whose operation presents a specific risk of spreading the disease may be ordered to close in areas to be specifically designated if and to the extent that, given the conditions prevailing at the business, maintaining its operations would give rise to an immediate and severe risk to the employees themselves, as well as to the public at large, because of the further spread of the disease. […]

(2) On occurrence of one of the diseases listed in paragraph one above, and given the conditions specified there, the operation of individual commercial enterprises with permanent business premises may be restricted or the closing of the business premises may be ordered, and individual persons who come into contact with sick persons may be banned from entering the business premises.

(3) Business premises shall be ordered to close only if such a measure is deemed strictly necessary in cases of exceptional threats.

(4) To what extent the precautions described in paragraphs 1 to 3 may be taken when other notifiable diseases occur will be determined by way of regulation.

[…]

Evacuation of homes.

Section 22. (1) The district administrative authority shall order the evacuation of homes and buildings if, depending on the nature of the occurrence of a notifiable disease, such measures are absolutely necessary to prevent its further spread.

(2) The residents affected shall, at their request, and free of charge if they are destitute, be provided with appropriate accommodation and food.

[…]

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.

[…]

CHAPTER III.

Compensation and defrayal of costs.

[…]

Compensation for loss of earnings.

Section 32. (1) Compensation shall be paid to natural persons and legal entities as well as to partnerships under commercial law for any pecuniary loss sustained by the restriction of their gainful activities if and when they
1. had to be segregated pursuant to sections 7 or 17, or
2. were forbidden to sell food pursuant to section 11, or
3. were banned from exercising a gainful activity pursuant to section 17, or
4. are employed in a business or company the operations of which were restricted or which was closed pursuant to section 20, or
5. run a company the operations of which were restricted or which was closed pursuant to section 20; or
6. live in homes or buildings evacuation of which was ordered pursuant to section 22, or
7. live or work in an area for which restrictions of movements were imposed pursuant to section 2,
and thereby sustained a loss of earnings.

(2) Compensation shall be paid for each day covered by the official order stated in paragraph 1.

(3) Compensation for persons in employment shall be calculated based on their regular earnings within the meaning of the Continued Payment of Remuneration Act (*Entgeltfortzahlungsgesetz*), Federal Law Gazette *BGBl*. *399/1974*. Employers shall pay the remuneration due to them on the company's customary dates for the payment of remuneration. The right to compensation from the Federation shall pass to the employer at the time of payment. The employer's contribution to statutory social insurance shall be paid by the employer for the period employees were prevented from working, and the supplement pursuant to section 21 of the Construction Workers' Leave Act 1972 (*Bauarbeiterurlaubsgesetz 1972*), Federal Law Gazette *BGBl*. *414*, shall be reimbursed by the Federation.

(4) For self-employed persons and companies, compensation shall be calculated by comparison of the year-on-year earnings.

(5) Amounts to which beneficiaries are entitled on the same grounds under other provisions or agreements, and amounts earned from other gainful work taken up

during the time they were prevented from working, shall be offset against the amount of due compensation.

(6) The Federal Minister responsible for health may, if and to the extent such is necessary to ensure uniform administration, issue specific provisions by way of regulations to calculate the amount of indemnification or compensation for loss of earnings."

6. Section 1 of the Regulation of the Federal Minister for Social Affairs, Health, Care and Consumer Protection of 28 February 2020 enacting the Regulation on the restriction of operations or closing of commercial businesses upon the occurrence of SARS-CoV-2 infections ("2019 novel coronavirus") and amending the Regulation of the Federal Ministry for Social Administration of 26 June 1957 on the transport of persons carrying or being suspected of carrying communicable diseases, Federal Law Gazette *BGBl. II 74/2020*, reads as follows:

"Based on section 20 paragraph 4, Epidemics Act 1950 (*Epidemiegesetz 1950*), Federal Law Gazette *BGBl. 186/1950*, last amended by Federal Law Gazette *I 37/2018*, and on the 2020 Amendment to the Federal Ministries Act (*Bundesministeriengesetz-Novelle*), Federal Law Gazette *BGBl. I 8/2020*, it is ordered that:

The precautions set forth in section 20 paragraphs 1 to 3 of the Epidemics Act 1950, as amended, may also be taken in the event of an infection with SARS-CoV-2 ('2019 novel coronavirus')."

III. Considerations

Applying sections 187 and 404 of the Code of Civil Procedure (*Zivilprozessordnung, ZPO*) in conjunction with section 35 paragraph 1 Constitutional Court Act (*Verfassungsgerichtshofgesetz, VfGG*) *mutatis mutandis*, the Constitutional Court joined the applications for joint deliberation and ruling.

1. As to the admissability

1.1. In their (main) claims based on Article 139 paragraph 1 subparagraph 3 and Article 140 paragraph 1 subparagraph 1 point c) of the Constitution (*Bundes-Verfassungsgesetz, B-VG*), the applicants request to repeal specified phrases in

section 2 paragraph 1 subparagraph 2 and specified phrases in section 2 paragraph 4 of the COVID-19 Measures Regulation-96, Federal Law Gazette *BGBl. II 96/2020*, as amended by Federal Law Gazette *BGBl. II 151/2020*, as unlawful. Moreover, the applicants seek that section 4 paragraph 2 COVID-19 Measures Act be repealed as unconstitutional. In addition to their main applications, applicants filed several *in eventu* claims.

At the time their applications were filed with the Constitutional Court, i.e. on 27 and 30 April 2020 respectively, the said provisions of the COVID-19 Measures Regulation-96, as amended by Federal Law Gazette *BGBl. II 151/2020*, were in force. According to section 13 paragraph 2 subparagraph 1 of the Regulation of the Federal Minister for Social Affairs, Health, Care and Consumer Protection concerning the easing of measures taken to combat the spread of COVID-19 (Regulation easing COVID-19 restrictions), Federal Law Gazette *BGBl. II 197/2020*, the COVID-19 Measures Regulation-96 and, hence, the challenged provisions of this regulation, expired at the end of 30 April 2020. Section 4 paragraph 2 COVID-19 Measures Act continues to be in force.

1.2. Pursuant to Article 139 paragraph 1 subparagraph 3 and Article 140 paragraph 1 subparagraph 1 point (c) of the Constitution (*B-VG*), the Constitutional Court decides on the unlawfulness of regulations and the unconstitutionality of laws upon application by an individual claiming that their rights were directly violated by such unlawfulness or unconstitutionality, if this regulation or law took effect for that individual without a court decision having been rendered or an administrative ruling having been issued.

The Constitutional Court has held in its established case law, starting with *VfSlg. 8009/1977 and 8058/1977*, that the basic requirement for an application to be admissible hence is that the law or regulation directly interferes with, and, if found unconstitutional or unlawful, violates, the legal sphere of the person. In any such case, the Constitutional Court must base itself on what is submitted in the application and merely review whether the effects maintained by the applicant are such which are required by Article 139 paragraph 1 subparagraph 3 and Article 140 paragraph 1 subparagraph 1 point (c) of the Constitution (*B-VG*) (cf. e.g. *VfSlg. 10.353/1985, 15.306/1998, 16.890/2003*).

1.3. The normative context of the provisions of section 4 paragraph 2 COVID-19 Measures Act and of sections 1 and 2 of the COVID-19 Measures Regulation-96 is as follows:

According to section 1 COVID-19 Measures Act, Federal Law Gazette *BGBl. I 12/2020*, as amended by Federal Law Gazette *BGBl. I 23/2020* – taking effect on 5 April 2020 (see section 4 paragraph 5 COVID-19 Measures Act) and limited until 31 December 2020 (see section 4 paragraph 1 COVID-19 Measures Act) – the Federal Minister for Social Affairs, Health, Care and Consumer Protection may, by way of regulation, impose a ban, inter alia, on "entry to business premises, or specified business premises, for the purpose of acquiring goods or services", to the extent necessary 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. Pursuant to section 4 paragraph 3 COVID-19 Measures Act, its provisions do not affect the provisions of the Epidemics Act 1950. If, however, the Federal Minister has issued a regulation pursuant to section 1 of the COVID-19 Measures Act, the provisions laid down in the Epidemics Act 1950 concerning the closing of business premises within the scope of application of this Regulation shall not be applicable (section 4 paragraph 2 COVID-19 Measures Act).

Issuing the COVID-19 Measures Regulation-96 being based on section 1 of the COVID-19 Measures Act, the Federal Minister for Social Affairs, Health, Care and Consumer Protection imposed a ban, with effect from 16 March 2020 and first limited until the end of 22 March 2020 (section 4 paragraph 1 and paragraph 3 COVID-19 Measures Regulation-96, as amended by Federal Law Gazette *BGBl. II 96/2020*) on entry to the customer area of business premises of retail establishments and service companies and of recreational and sports facilities. This ban on entry has applied to the purpose of acquiring goods or services, or using recreational and sports facilities.

Section 2 COVID-19 Measures Regulation-96, in its original version Federal Law Gazette *BGBl. II 96/2020*, lays down a number of exemptions from the general ban on entry, basically for so-called "system-relevant" businesses such as public pharmacies, food retailers or petrol stations, banks and postal services (for

details see section 2 COVID-19 Measures Regulation-96 in the quoted version). After that, the Federal Minister for Social Affairs, Health, Care and Consumer Protection then amended the COVID-19 Measures Regulation several times and – regularly limiting its application to short periods of time (see section 4 paragraph 3 COVID-19 Measures Regulation-96, as amended by Federal Law Gazette *BGBl. II 110/2020*, which postponed the expiry of the Regulation from 22 March 2020 to 13 April 2020; section 4 paragraph 1 COVID-19 Measures Regulation-96, as amended by Federal Law Gazette *BGBl. II 112/2020*, once again set its expiry date as per the end of 13 April 2020; section 5 paragraphs 4 und 5 COVID-19 Measures Regulation-96, as amended by Federal Law Gazette *BGBl. II 130/2020*, set the expiry date for sections 1 to 3 again as per the end of 13 April 2020, and for section 4 as per the end of 24 April 2020) – left it in continued force and effect. Finally, the Federal Minister for Social Affairs, Health, Care and Consumer Protection, by way of regulation which took effect as per the end of 13 April 2020 (section 5 paragraph 6 COVID-19 Measures Regulation-96, as amended by Federal Law Gazette *BGBl. II 151/2020*), put the COVID-19 Measures Regulation-96 into force until the end of 30 April 2020 (section 5 paragraph 1 COVID-19 Measures Regulation-96, as amended by Federal Law Gazette *BGBl. II 151/2020*; the most recent changes of the COVID-19 Measures Regulation-96, as amended by Federal Law Gazette *BGBl. II 162/2020*, did not amend the provisions on expiry). By way of the Regulation easing COVID-19 restrictions, Federal Law Gazette *BGBl. II 197/2020*, the Federal Minister for Social Affairs, Health, Care and Consumer Protection ultimately ordered once again that the COVID-19 Measures Regulation-96 was to expire as per the end of 30 April 2020.

By issuing the Regulation Federal Law Gazette *BGBl. II 151/2020*, the Federal Minister for Social Affairs, Health, Care and Consumer Protection amended the COVID-19 Measures Regulation-96 regarding its original version amongst other things, to the effect, that, first, building material, iron and wood retailers, DIY and garden centres and others now became exempt as system-relevant businesses from the general ban on entry to retail business premises pursuant to section 1 of this Regulation (section 2 paragraph 1 subparagraph 22 COVID-19 Measures Regulation-96). Second, a newly inserted paragraph 4 in section 2 generally exempted other retail business premises from the ban on entry pursuant to section 1 COVID-19 Measures Regulation-96 provided that the indoor customer area did not exceed 400 m². Business premises used for the sale,

manufacture, repair or processing of goods are qualified as other retail business premises. If other business premises are structurally connected (e.g. shopping malls), the customer area of the business premises must be added up if the customer area is entered via the connecting structure (section 2 paragraph 4 third clause, COVID-19 Measures Regulation-96). Modifications of the size of the customer area carried out after 7 April 2020 – i.e. two days prior to the publication of Regulation Federal Law Gazette *BGBl. II 151/2020* – shall be disregarded when calculating the size of the customer area (section 2 paragraph 4 clause four, COVID-19 Measures Regulation-96). Furthermore, section 2 paragraphs 5 and 6 COVID-19 Measures Regulation-96 stipulated additional requirements to be complied with when customers enter other retail business premises. Pursuant to section 5 paragraph 6 COVID-19 Measures Regulation-96, as amended by Federal Law Gazette *BGBl. II 151/2020*, these additional exemptions from the general ban on entry to retail business premises and service companies took effect as per the end of 13 April 2020.

1.4. Hence, the applicants' business premises had been subject to a ban on entry by customers since 16 March 2020 (date when the original version of the COVID-19 Measures Regulation-96 Federal Law Gazette *BGBl. II 96/2020* took effect). Regulation Federal Law Gazette *BGBl. II 151/2020* changed the applicants' legal situation in as far as retailers whose indoor customer area did not exceed 400 m² were exempted, as per the end of 13 April 2020, from the ban on entry under section 1 COVID-19 Measures Regulation-96. The ban on entry continued to apply – until 30 April 2020 – to some of the applicants' business premises, under section 1 COVID-19 Measures Regulation-96, which was equally challenged by way of an *in eventu* claim to the second (supplementary) main claim, as these business premises had indoor customer areas exceeding 400 m².

The applicants consider their constitutionally guaranteed rights to the freedom to engage in economic activity, the protection of their property, and equality before the law, violated by the restriction laid down in section 2 paragraph 4 COVID-19 Measures Regulation-96, as amended by Federal Law Gazette *BGBl. II 151/2020*, according to which only other retail business premises were exempted from the general ban on entry pursuant to section 1 of the Regulation if their indoor customer area does not exceed 400 m². There is, they claim, no other reasonable way to submit the matter of the unlawfulness of the challenged

provisions to the Constitutional Court, in particular they could not be reasonably expected to provoke the institution of penal (administrative) proceedings by violating a law-imposed ban. As the legislator had set 30 April 2020 as expiry date for the regulation, effective legal protection was otherwise *a priori* impossible to obtain.

1.5. According to Article 139 paragraph 1 subparagraph 3 of the Constitution *(B-VG)*, the Constitutional Court decides on the unlawfulness of regulations upon application of an individual claiming that their rights were directly violated by such unlawfulness, if this regulation took effect for that individual without a court decision having been rendered or an administrative ruling having been issued. For the application to be admissible, the regulation must directly interfere with, and, if found unlawful, violate, the applicant's legal sphere.

Moreover, the regulation must, in actual fact, directly interfere with the applicant's legal sphere. Such interference may be assumed only if such interference is, by its nature and extent, clearly determined by the regulation itself, impairs the applicant's interests (protected by law) not only hypothetically, but actually, and if there is no reasonable recourse open to the applicant as defence against the – allegedly – unlawful interference (*VfSlg*. *13.944/1994, 15.234/1998, 15.947/2000*).

Pursuant to Article 57 paragraph 1 Constitutional Court Act *(Verfassungsgerichtshofgesetz, VfGG)*, an application to repeal a regulation as unlawful must seek that the regulation be repealed either in its entirety, or that specific parts be repealed as unlawful.

1.6. Neither are – in a constellation like the one at hand, and contrary to the view held by the Federal Government and the Federal Minister for Social Affairs, Health, Care and Consumer Protection – the applications inadmissible on the ground that the applicants are not currently being affected, given that the challenged provisions have already lapsed when the Constitutional Court renders its decision:

1.7. By virtue of the challenged provision of section 2 paragraph 4 first clause, second part of the clause, COVID-19 Measures Regulation-96, the applicants

continue to be subject to a ban, under section 1 COVID-19 Measures Regulation-96, on customers entering their business premises for the purpose of acquiring goods or using services, i.e. beyond 13 April 2020. This ban directly interferes with the applicants' legal sphere and there is no other reasonable approach open to them for submitting the alleged unlawfulness of the interference to the Constitutional Court, given the fact that section 3 paragraph 2 of the COVID-19 Measures Act penalises, with an administrative fine of up to EUR 30,000, owners of business premises who fail to prevent persons from entering their premises when there is a ban on doing so.

1.7.1. It results from the wording of Article 139 paragraph 1 subparagraph 3 of the Constitution *(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*).

1.7.2. 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 applicants 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 applicants' interest, in terms of legal protection, in clarifying whether the interference with their legal sphere (in terms of fundamental rights) caused by the challenged provisions of the regulation, which they 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 applicants' 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.

1.8. While the challenged provisions of the COVID-19 Measures Regulation-96 expired as per the end of 30 April 2020, they still, in light of the above, directly interfere with the applicants' legal sphere and impair their legally protected interests even at the present time. Thus, there is no other reasonable approach open to the applicants for submitting their concerns as to the lawfulness of the challenged provisions to the Constitutional Court.

1.9. …

2. On the merits

2.1. In review proceedings regarding the lawfulness of a regulation pursuant to Article 139 of the Constitution *(B-VG)*, or the constitutionality of an act of law pursuant to Article 140 of the Constitution *(B-VG)*, the Constitutional Court must limit itself to discussing the questions raised (cf. *VfSlg*. *12.691/1991,*

13.471/1993, 14.895/1997, 16.824/2003). Hence, it must assess only whether the challenged provisions are unlawful or unconstitutional on the grounds set out in the application (*VfSlg*. *15.193/1998, 16.374/2001, 16.538/2002*).

2.2. Mainly, the applicants are submitting the same concerns regarding Article 2 paragraph 4 COVID-19 Measures Regulation-96 as were filed by the applicant in the proceedings before the Constitutional Court recorded under number *V 411/2020*. In today's decision, the Constitutional Court can therefore refer to its considerations on the unlawfulness of the challenged provisions under that case number (see IV.B.5. to IV.B.10. of today's decision regarding *V 411/2020*).

2.3. As regards the alleged violation of the right to protection of property pursuant to Article 5 Basic State Law (*Staatsgrundgesetz, StGG*) and Article 1 of Protocol 1 of the European Convention of Human Rights (ECHR), and the "special sacrifices" which allegedly violate the principle of equality:

2.3.1. The applicants hold the view that section 4 paragraph 2 COVID-19 Measures Act (in conjunction with section 1 COVID-19 Measures Regulation-96) violates the right to the protection of property pursuant to Article 5 Basic State Law (*StGG*) and Article 1 of Protocol 1 of the ECHR, as these provisions (in conjunction with section 1 COVID-19 Measures Act) do not foresee any compensation for the ban on entry effected by section 1 COVID-19 Measures Regulation-96.

Exemption from applicability of the Epidemics Act 1950 does not serve to attain the public goal of containing the spread of COVID-19. Business premises could have been closed also under the Epidemics Act 1950; in that case, however, section 32 paragraph 1 subparagraph 5 of the Epidemics Act 1950 would have provided for compensation to be calculated by comparison of year-on-year earnings. In that the provisions of the Epidemics Act 1950 were exempted from applicability, the applicants argued, they were fully deprived of their claims to compensation for loss of earnings pursuant to section 32 of the Epidemics Act 1950, without being afforded recourse to any alternative claims. Section 4 paragraph 2 COVID-19-Measures Act merely pursues the aim of curtailing claims to compensation.

2.3.2. Every private right deemed equivalent to an asset is protected pursuant to Article 5 Basic State Law (cf. e.g. *VfSlg*. *8201/1977, 9887/1983, 10.322/1985 and 16.636/2002*). Following established case law of the Constitutional Court (cf. *VfSlg*. *6780/1972* and the earlier case law stated there; *VfSlg. 12.227/1989, 15.367/1998, 15.771/2000*) Article 5 Basic State Law (*StGG*), first clause, applies also to restrictions on property rights. However, in view of the reservation set out in Article 1 of Protocol 1 of the ECHR that the state can impose laws controlling the use of property, the legislator may order restrictions on property rights, provided that this does not affect, in essence, the fundamental right to the protection of property or in any other way breach a constitutional principle by which it is also bound, (cf. *VfSlg. 9189/1981, 10.981/1986 and 15.577/1999*), if such restriction is in the public interest (cf. e.g. *VfSlg. 9911/1983, 14.535/1996, 15.577/1999 and 17.071/2003*) and is not disproportionate (cf. e.g. *VfSlg*. *13.587/1993, 14.500/1996, 14.679/1996, 15.367/1998 and 15.753/2000*).

Section 1 COVID-19 Measures Regulation-96 imposed a ban on entry to retail customer areas for the purpose of acquiring goods. Even though, by its wording, the ban was addressed to the customers of such businesses, it was largely tantamount to a ban on operations for such businesses and thus interfered with the constitutionally guaranteed right to property pursuant to Article 5 Basic State Law and Article 1 of Protocol 1 of the ECHR. As the right to property under civil law remained unaffected and there was no transfer of assets, section 1 COVID-19 Measures Regulation-96 did not lead to expropriation in a formal sense (cf. *VfSlg. 9911/1983, 20.186/2017*). Given the short applicability of the ban on entry, one cannot say that it would have constituted a formal expropriation (so-called substantive expropriation). The ban on entry constitutes a severe restriction of property rights which the companies affected had to tolerate.

2.3.3. In these proceedings, it is not for the Constitutional Court to assess whether section 1 COVID-19 Measures Regulation-96 complied with the requirements of section 1 COVID-19 Measures Act in all respects, in particular whether the ban on entry to business premises was in the public interest, suitable to attain the objectives and proportionate. In light of the concerns raised in the submissions at hand, the Constitutional Court merely has to answer the question as to whether the restriction of property rights caused by the ban on entry as set out in section 1 COVID-19 Measures Regulation-96 (in conjunction

with section 1 COVID-19 Measures Act) could have been imposed without providing for compensation or whether the companies affected would have to be granted a claim to compensation on constitutional grounds.

The provisions of the COVID-19 Measures Act, in conjunction with section 1 of the COVID-19 Measures Regulation-96, resulted in businesses not being ordered to close pursuant to section 20, Epidemics Act 1950, which is why, in particular, claims to compensation for loss of earnings under section 32 paragraph 1 sub-paragraph 5 Epidemics Act 1950 are precluded.

2.3.4. When it comes to restrictions of property rights, the Constitutional Court has held repeatedly that, in any such case, the legislator is not necessarily held to provide for compensation (e.g. *VfSlg*. *2572/1953, 2680/1954; VfGH 4/10/2018, E 1818/2018*). However, it must always check whether the property rights restriction in the specific case at hand complies with the principle of proportionality (cf. e.g. *VfSlg*. *13.587/1993*).

Moreover, and in accordance with its established case the Constitutional Court considers law that compensation may be due on constitutional grounds whenever an objectively unjustified "special sacrifice" is imposed on an individual or a group of persons. Case law on indemnifiable “special sacrifices” initially concerned cases where a single planning measure affected owners differently without objective justification (cf. in particular *VfSlg*. *13.006/1992*). Moreover, severe and disproportionate property rights restrictions may, in specific individual cases, give rise to an obligation for compensation (cf. *VfSlg.* 16.636/2002).

2.3.5. The European Court of Human Rights considers that, with other interferences with the fundamental right to property pursuant to Article 1 of Protocol 1 of the ECHR, there must be a fair balance between the requirements of the public and the general common interest on the one hand, and the requirements of protecting the fundamental rights of the individual on the other (cf. ECtHR 23/09/1983 [GC], case *Sporrong-Lönnroth*, no. 7151/75 et. al., *EuGRZ 1983, 523*). Such balance is not achieved if excessive burden is imposed on the individual (cf. for instance ECtHR 23/04/1996, case *Phocas*, no. 17.869/91, NL 1996, 84).

2.3.6. Non-compensation for the restriction of property right effected by section 1 and section 4 paragraph 2 COVID-19 Measures Act in conjunction with section 1 COVID-19 Measures Regulation-96 does not constitute a disproportionate interference with the fundamental right to property for the following reasons:

2.3.6.1. The applicants point out in a plausible manner that the ban on entry to customer areas of retail establishments, service companies, as well as of recreational and sports facilities effected by section 1 COVID-19 Measures Regulation-96 massively interferes with their legal position, which is protected as a fundamental right. The Constitutional Court does not fail to see that the ban on entry has entailed (and still entails) partly severe economic consequences for the businesses concerned.

2.3.6.2. In the case at hand, the question remains open whether the order of a time-limited ban on entry as imposed by section 1 of the COVID-19 Measures Regulation-96 constitutes such a severe restriction of property rights as to be indemnifiable per se, as the legislator did not impose the ban on entry as an isolated measure, but embedded it in a comprehensive set of measures and rescue package the intended function of which is to cushion the economic impact of the ban on entry for the businesses concerned and in general the consequences of the COVID-19 pandemic, and therefore, in essence, pursues an objective comparable to the granting of claims to compensation for loss of earnings under section 32 of the Epidemics Act 1950.

2.3.6.3 Specifically, the businesses concerned were and are able to receive financial aids for short-time work pursuant to section 37b Labour Market Service Act (*Arbeitsmarktservicegesetz, AMSG*). Short-time work was first intended for a limited period of three months starting 1 March 2020, but was then extended by a further three months effective as of 1 June 2020. Short-time work means that working hours are temporarily reduced to no less than 10% and no more than 90% of the standard working time. Employees continue to receive up to 90% (apprentices up to 100%) of their net pay, with the employer being compensated for the cost of hours not worked, provided that the statutory requirements are met. If they are met, there is an enforceable legal claim to allowances for short-time working pursuant to section 37b *AMSG*.

The legislator has made available further support and incentive measures as part of its private-sector activities (Article 17 of the Constitution – *B-VG).* One example is the Federal Act on the Establishment of a Hardship Fund (*Bundesgesetz über die Errichtung eines Härtefallfonds*), Federal Law Gazette *BGBl. I 16/2020*, as amended by Federal Law Gazette *BGBl. I 36/2020*, which set up the Hardship Fund and endowed it with EUR 2 billion pursuant to section 1 paragraph 3 of this act. Moreover, the COVID-19 Crisis Fund was set up by the Federal Act on the Establishment of the COVID-19 Crisis Management Fund *(Bundesgesetz über die Errichtung des COVID-19-Krisenbewältigungsfonds)*, Federal Law Gazette *BGBl. I 12/2020*, as amended by Federal Law Gazette *BGBl. I 23/2020*. Pursuant to section 2 of said act, the fund is endowed with up to EUR 28 billion, which amount serves to fund support measures under its private-sector administration regime, as well as allowances for short-time work pursuant to section 37b *AMSG*.

Another measure to cushion the economic impact of the ban on entry under section 1 COVID-19 Measures Act in conjunction with the COVID-19 Measures Regulation-96 is the so-called fixed-costs grant (*Fixkostenzuschuss)* (cf. Regulation of the Federal Minister of Finance, pursuant to section 3b paragraph 3 of the Act (*ABBAG-Gesetz)*, on guidelines for the adoption of financial measures required to maintain financial solvency and to bridge liquidity problems of companies in the context of the spread of the SARS-CoV-2 virus and its economic consequences, Federal Law Gazette *BGBl. II 143/2020*, as amended by Federal Law Gazette *BGBl. II 267/2020*), which provides for a non-refundable grant as a percentage rate of eligible costs to companies for specified periods, depending on the extent of the decline in their sales.

2.3.6.4. In addition to this financial support, the legislator took other action as well, ordering, for instance, in section 1155 paragraph 3 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*), that employees who are unable to perform service on account of measures under the COVID-19 Measures Act are obliged, under certain conditions and on their employer's request, to take annual leave and consume time credits during that period. Another provision worth mentioning here – albeit applicable in this version since 1916 – is section 1104 *ABGB*, which stipulates that no rent shall be payable for rented or leased properties which cannot be used due to an epidemic.

2.3.6.5. The fact that the ban on entry (and the related adverse effects) affected all retail establishments and service companies equally – apart from the exemptions provided for by section 2 of the COVID-19 Measures Regulation – is also particularly relevant for this assessment. With property rights restrictions deemed necessary in the face of an acute situation of crisis – which massively impacts the macroeconomic situation and affects (virtually) all economic sectors (cf. in this context also the other provisions laid down in the COVID-19 Measures Regulation-96) – to prevent the further spread of a disease, one cannot – given the circumstances at hand – invoke the fundamental right to property to derive an obligation to provide for a further claim to compensation for all companies affected by the ban on entry.

2.3.7. The Constitutional Court hence does not find any unconstitutionality, as maintained by the applicants, in light of the fundamental right to property according to Article 5 Basic State Law (*StGG*) and Article 1 of Protocol 1 of the ECHR, and on account of a "special sacrifice" that is in breach of the principle of equality pursuant to Article 2 Basic State Law (*StGG*) and Article 7 of the Constitution *(B-VG)*.

2.4. On the alleged breach of the principle of equality:

2.4.1. The applicants moreover hold the view that section 4 paragraph 2 COVID-19 Measures Act violates the principle of equality pursuant to Article 2 Basic State Law (*StGG*) and Article 7 of the Constitution *(B-VG)*. When the pandemic started, they argue, numerous businesses were officially ordered to close on the basis of the Epidemics Act 1950. It was only by the end of March that the Federal Minister for Social Affairs, Health, Care and Consumer Protection issued a regulation pursuant to section 1 COVID-19 Measures Act which precluded claims to compensation under the Epidemics Act 1950 pursuant to section 4 paragraph 2 COVID-19 Measures Act. Businesses which had been closed by virtue of the provisions of the Epidemics Act 1950 were entitled to full compensation for loss of earnings, while the applicants were not entitled to any compensation. Such unequal treatment, they argue, is objectively unjustified, since the closing of businesses under the Epidemics Act 1950 is equivalent to the ban on entry under the COVID-19 Measures Act. The applicants could therefore, they argue, have relied on being granted compensation under the Epidemics Act 1950. Section 1

paragraph 1 of the Epidemics Act 1950 mentions, among others, MERS-CoV and SARS; in their opinion, there is no reason why COVID-19 should be treated differently in terms of compensation.

2.4.2. The Constitutional Court does not share the legal concerns expressed by the applicants regarding the principle of equality:

2.4.2.1. The principle of equality is binding also for the legislator (see e.g. *VfSlg*. *13.327/1993, 16.407/2001*) limiting his margin of appreciation by forbidding the enactment of provisions which are objectively unjustified (cf. e.g. *VfSlg*. *14.039/1995, 16.407/2001*). Within those limits, however, the principle of equality does not deny the legislator the right, on constitutional grounds, to pursue its political objectives in a manner that is considered appropriate (see e.g. *VfSlg*. *16.176/2001, 16.504/2002*). Whether a provision is adequate and whether the result is perceived as satisfactory in all cases is not to be measured by the standard of the principle of equality (e.g. *VfSlg*. *14.301/1995, 15.980/2000 and 16.814/2003*).

2.4.2.2. Even before the COVID-19 Measures Act came into force, the possibility (already) existed under section 20 of the Epidemics Act 1950 to order the restriction of operations or closure of commercial enterprises by way of regulation upon the occurrence of notifiable diseases. Section 32 paragraph 1 subparagraph 5 Epidemics Act 1950 stipulates that natural persons and legal entities, as well as partnerships under commercial law, if and to the extent they run a company the operations of which had to be limited or closed pursuant to section 20 Epidemics Act 1950, shall be compensated for the pecuniary loss sustained by the restriction of their gainful activities.

With the COVID-19 Measures Act, the legislator created the basis for ordering measures by way of regulation to combat COVID-19 (section 1 and 2 COVID-19 Measures Act). The COVID-19 Measures Act does not provide for a claim to compensation by anyone affected by any such measure.

It emerges from the preparatory documents on the original version of the COVID-19 Measures Act that the legislator's legal policy was to adopt effective measures to combat the "corona crisis" (Explanatory Notes on Private Member's

Bill 396/A 27th legislation period, 11). The legislator considered that the provisions of the Epidemics Act 1950 were insufficient and "overly detailed" to contain the further spread of COVID-19.

Businesses affected by the ban on entry to their premises as ordered by section 1 COVID-19 Measures Act in the wake of COVID-19 are not eligible for compensation for the loss of earnings sustained pursuant to section 32 Epidemics Act 1950. The legislator precluded the applicability of the provisions of the Epidemics Act 1950 on measures regarding the closing of business premises pursuant to section 1 COVID-19 Measures Act. Enacting the COVID-19 Measures Act, the legislator had apparently (also) intended to preclude claims to compensation under the Epidemics Act 1950, specifically pursuant to section 20 in conjunction with section 32 Epidemics Act 1950, if business premises were closed.

2.4.2.3. It has also been elaborated in 2.3.6. that the legislator did not impose the ban on entry pursuant to section 1 COVID-19 Measures Regulation-96 as an isolated measure, but embedded it in a comprehensive package of measures.

In the Constitutional Court's view the legislator enjoys a wide margin of appreciation when combating the economic consequences of the COVID-19 pandemic. If, hence, the legislator decides not to apply the existing regime of section 20 in conjunction with section 32 Epidemics Act 1950 as regards the bans on entry pursuant to section 1 COVID-19 Measures Act in conjunction with section 1 COVID-19 Measures Regulation-96, but to come up with an alternative programme of measures and rescue package instead (cf. 2.3.6. above), this cannot be held against it from the perspective of the principle of equality as set out in Article 2 Basic State Law (*StGG*) and Article 7 of the Constitution *(B-VG)*.

In this context one must specifically take into account that while the financial aids provided by the legislator are (partly) provided within the scope of its private-sector administration regime (Article 17 of the Constitution – *B-VG*), the fact that fundamental rights are binding also in contexts outside the exercise of the state's sovereign powers (c.f. e.g. Supreme Court *OGH 23/12/2014, 1 Ob 218/14m; 23/5/2018, 3 Ob 83/18d*) implies that affected individuals – just as all other aid applicants – have a judicially enforceable claim to being granted aid in adherence to the principle of equality and to objectively justified criteria.

2.4.2.4. A difference in treatment that is not based on objective differences cannot arise because the ban on entry concerns all business premises listed in section 1 COVID-19 Measures Regulation-96 equally. The fact that, based on section 20 Epidemics Act 1950, businesses closed due to COVID-19 would, as the case may be, have had a claim to compensation for loss of earnings under section 32 Epidemics Act 1950, does not indicate that an objectively unjustified difference in treatment was made.

2.4.2.5. Contrary to the view held by the applicants, the fact that a claim to compensation for loss of earnings exists pursuant to section 32 Epidemics Act 1950 for notifiable diseases (such as MERS-CoV and SARS), unlike for bans on entry due to COVID-19, does not lead to an objectively unjustified difference in treatment. Besides the arguments set out under 2.4.2.3., there is no unequal treatment that would violate the principle of equality also because the closing of businesses under section 20 Epidemics Act 1950 is not directly comparable to the measures imposed due to the COVID-19 pandemic:

In the Constitutional Court's view, sections 20 and 32 of the Epidemics Act 1950 do not take account of the need for a wide-scale closure of all – or at least a large number – of customer areas of businesses in the wake of a pandemic. By contrast, the legislator of the Epidemics Act 1950 assumed that – in a locally contained epidemic – some business premises that presented a specific risk (explicitly stated in section 20 paragraph 1 Epidemics Act 1950) would have to be closed to prevent the spread of the disease to other parts of the country. The detriment sustained by these (few) businesses on account of being closed is to be compensated by a claim to compensation for loss of earnings pursuant to section 32 Epidemics Act 1950. However, the legislator did not anticipate business premises having to be closed on a wide scale when enacting the Epidemics Act 1950 (cf. Explanatory Notes on the government bill *ErläutRV 22 BlgHH 21. Session, 26* on the earlier provision of section 20 of the Law of 14 April 1913 – comparable in this respect – regarding the prevention and control of communicable diseases). This argument, as well, does not provide evidence of any objectively unjustified difference in treatment.

2.4.2.6. Therefore, the principle of equality as set out in Article 2 Basic State Law (*StGG*) and Article 7 of the Constitution *(B-VG)* was not, as maintained by the applicants, violated.

2.4.3. As far as the applicants maintain that the constitutionally guaranteed protection of legitimate expectations was violated, this argument also is not to be followed:

2.4.3.1. In its established case law, the Constitutional Court has held that mere reliance on the unchanged continued existence of the applicable legal situation is not constitutionally protected per se (see, on behalf of many others, *VfSlg*. *13.657/1993; 16.687/2002* with further references; *19.933/2014*). Rather, the legislator, enjoying a wide margin of appreciation, is generally free to amend the legal situation also to the detriment of those concerned (e.g. *VfSlg*. *18.010/2006* with further references; *16.754/2002* with further references).

2.4.3.2. In special circumstances, the protection of legitimate expectations sets constitutional limits for the legislator, specifically if the individual concerned must be allowed to prepare for the new legal situation in good time so as to prevent non-objective results. Following to the Constitutional Court's established case law, circumstances which give rise to the protection of legitimate expectations may be that different legal consequences (adverse for the legal subject) are retroactively linked to facts that were established in the past (e.g. *VfSlg*. *13.020/1992, 16.850/2003*) or that the legislator, abruptly and substantively, interferes with the legal entitlements which the legal subject could rightly rely on given their intended purpose (such as pension benefits of a certain amount; *cf. VfSlg. 11.288/1987, 16.764/2002, 17.254/2004*). This aside, frustrating the trust of the legal subjects in the continued existence of the legal order may, in some situations, not be objectively justified if the legislator first caused a given behaviour and this behaviour, once adopted in reliance on the legal situation, was then frustrated or denied its effect by a later amendment of the law (cf. *VfSlg*. *12.944/1991, 13.655/1993, 16.452/2002*).

2.4.3.3. The provisions challenged are not based on any such constellation which would contradict the constitutional protection of legitimate expectations:

There has been no *ex post* impairment of a right covered by the constitutional protection of legitimate expectations, as alleged, for the mere fact that compensation for loss of earnings provided for by section 32 Epidemics Act 1950 is not a legal entitlement (a so-called "vested right"); any such claim to compensation for loss of earnings pursuant to section 32, Epidemics Act 1950, is not balanced by any payment or contribution made by the beneficiary (cf. *Holoubek*, Article 7 of the Constitution, in: *Korinek/Holoubek et al [ed.], Österreichisches Bundesverfassungsrecht, 14. Lfg., 2018, paragraph 395*).

The retroactive entry into force as per 16 March 2020 provided for by section 4 paragraph 1a COVID-19 Measures Act, as amended by Federal Law Gazette BGBl*. I 16/2020*, likewise does not raise any doubts as to the constitutionally guaranteed protection of legitimate expectations: The non-applicability of the provisions of the Epidemics Act 1950 concerning the closing of business premises was already foreseen in the original version of section 4 paragraph 2 COVID-19 Measures Act Federal Law Gazette *BGBl*. *I 12/2020* – which entered into force on 16 March 2020. The amendment Federal Law Gazette *BGBl*. *I 16/2020* merely clarified this provision in that the provisions of the Epidemics Act 1950 concerning the closing of business premises do not apply pursuant to section 1 COVID-19 Measures Act "within the scope of this Regulation". The Constitutional Court does not see any retrospective impairment of a vested right so far.

Furthermore, the applicants did not argue that a legal situation existed prior to the COVID-19 Measures Act where the legislator had practically encouraged or incited operators of commercial businesses within the meaning of section 20 Epidemics Act 1950, to engage in certain arrangements – such as "considerable investments" (cf. *VfSlg*. *12.944/1991*) or any other (now frustrated) behaviours (cf. *VfSlg. 13.655/1993* concerning the setting up of reserves, or *VfSlg*. *15.739/2000* concerning the preparatory acquisition of shares) – which would have proven detrimental once the COVID-19 Measures Act entered into force.

Considering the applicants' concerns as to the lack of compensation for the ban on entry effected by section 1 COVID-19 Measures Regulation-96, the Constitutional Court does not see a reason to review *ex officio* the legal bases underlying the challenged regulation.

IV. Result

1. Section 2 paragraph 4 of the Regulation of the Federal Minister for Social Affairs, Health, Care and Consumer Protection concerning temporary measures to prevent the spread of COVID-19 expired as per the end of 30 April according to section 13 paragraph 2 subparagraph 1 of the Regulation easing COVID-19 restrictions, Federal Law Gazette *BGBl. II 197/2020*. Pursuant to Article 139 paragraph 4 of the Constitution *(B-VG),* the Constitutional Court only finds that the wording "if the indoor customer area does not exceed 400 m^2" and clause four – "Modifications of the size of the customer area carried out after 7 April 2020 shall be disregarded when calculating the size of the customer area." – in section 2 paragraph 4 of the Regulation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection concerning temporary measures to prevent the spread of COVID-19, Federal Law Gazette *BGBl. II 96/2020*, as amended by Federal Law Gazette *BGBl. II 151/2020*, was unlawful.

2. As the wording set out under 1 and clause four in section 2 paragraph 4 of the Regulation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection has been found unlawful the Court has taken account of the applicants' claims and is therefore able to restrict itself to these sentences only. Thus, the applications to find also clause three of the quoted provision unlawful had to be dismissed.

3. The ruling that the wording under point 1 and clause four in section 2 paragraph 4 of the Regulation of the Federal Minister for Social Affairs, Health, Care and Consumer Protection concerning temporary measures to prevent the spread of COVID-19 is no longer applicable is based on Article 139 paragraph 6, second clause, of the Constitution *(B-VG).*

4. The ruling that the Federal Minister for Social Affairs, Health, Care and Consumer Protection is obliged to immediately publish the fact that it was found unlawful and the related ruling can be dispensed with, as this obligation is already contained in today's decision on *V 411/2020*.

5. The applicants' arguments that section 1 of the Regulation of the Federal Minister for Social Affairs, Health, Care and Consumer Protection concerning

temporary measures to prevent the spread of COVID-19, Federal Law Gazette *BGBl*. *II 96/2020*, as amended by Federal Law Gazette *BGBl*. *II 151/2020*, violates the constitutionally guaranteed right to property pursuant to Article 5 Basic State Law (*StGG*) and Article 1 of Protocol 1 of the ECHR, and the principle of equality pursuant to Article 2 Basic State Law (*StGG*) and Article 7 of the Constitution *(B-VG)*, as the provision (in conjunction with section 1 COVID-19 Measures Act) does not provide for compensation, are unfounded. The applications to find that this provision was unlawful therefore had to be dismissed.

6. For the same reason, the applications to repeal section 4 paragraph 2 of the Federal Act concerning temporary measures to prevent the spread of COVID-19, Federal Law Gazette *BGBl. I 12/2020*, as amended by Federal Law Gazette *BGBl*. *I 16/2020*, as being unconstitutional had to be dismissed.

…

Vienna, 14 July 2020
The President:
GRABENWARTER

Recording clerk:
HOFKO

* Further case numbers settled: G 212/2020-15, V 414/2020-15, G 213/2020-15, V 415/2020-15.