

V 363/2020: no legal basis for a general ban on admission of public places

§ 2 Covid-19-Measures-Act provides that, in the event of Covid-19, the occurrence of Covid-19 may be prohibited from entering certain places “in so far as this is necessary to prevent the spread of Covid-19”. In addition, it may be specified under which certain conditions or conditions those specific places may be entered.

Pursuant to § 2 Covid-19 Measures Act, the Federal Minister for Health issued the Ordinance published in the Federal Law Gazette number II 98/2020, which declared that entering public places was generally prohibited (§ 1). Section 2 of this Regulation contained several exceptions to this prohibition: for example, entering public places outdoors alone, with persons living in a common household, or with pets, with a distance of at least one meter to other persons (sub para 5). The regulation expired on 30 April 2020.

Against the regulation, a university assistant of a Vienna university resident in Lower Austria had submitted an (individual) application under Art. 139 of the Austrian Constitution challenging these restrictions. In this case, too, the VfGH assumed the admissibility of the request.

According to the CC, there are no constitutional concerns against § 2 Covid-19 Measures Act, because it offers a sufficiently specific legal basis for any prohibitions of entry – to be adopted by decree – and thus complies with the constitutional principle of legality. The decision as to whether or what measures are taken by decree against Covid-19 is transferred by the law to the competent authorities. In this decision, however, the authorities are bound by fundamental rights, in particular the right to personal freedom of movement. Restrictions on this right are only permitted if they serve a legitimate public interest (such as health protection) and are proportionate.

The CC ruled that the provisions of §§ 1, 2, 4 and 6 of the Ordinance were unlawful because the limits set to the competent Federal Minister by § 2 Covid-19 Measures Act were exceeded. The regulation did not merely prohibit the entry of certain restricted places. The exceptions in § 2 of the Ordinance do not alter the fact that § 1 of the Ordinance ‘understands the principle of a general ban on exit.’ However, such a comprehensive prohibition is not covered by the Covid 19 Measures Act. This law does not provide a basis for creating an obligation to stay in a particular place, especially in one’s own home. The ruling of the CC states:

‘The legislator may describe in concrete or abstract terms the places to which it prohibits entering in order to prevent the spread of Covid 19; it may also, as the explanatory notes make it clear, prohibit the entry of regionally limited areas such as local areas or municipalities; however, it is forbidden to impose a ban on the basic principle – albeit in accordance with the spatial extension of the ordinance according to § 2 sub para 2 or 3 Covid-19-Measures-Act which is regionally limited - by means of a general prohibition of admission of public space outside his own home (in the broad sense of Art. 8 ECHR). Thus, the statutory authorisation of § 2 Covid-19-Measures-Act is limited in such a way that the entry of certain places may be prohibited, but not, that people may be advised to remain in a particular place, especially in their homes, on the basis of § 2 Covid-19-Measures-Act.’

‘Although the legislator provided for individual exceptions to this general prohibition of entry in § 2 Covid-19-Measures-Ordinance-98; this exception, in particular the exception of § 2 sub para 5 Covid-19-Measures-Ordinance-98, which is not intended for a particular purpose but is nevertheless limited to certain constellations, does not alter the fact that § 1 of the Ordinance provides for a general

prohibition of entry of public places and thus - contrary to the statutory requirement of § 2 Covid-19-Measures-Act - does not prohibit entering certain, restricted places, but rather by a prohibition of entry from all public places of the case as a general prohibition as a principle. If § 2 Covid-19-Measures Act within the framework of fundamentally existing freedom of movement only prohibits the entry for certain places (may they be abstract, e.g. by their intended use, or locally defined), then the law does not authorise a general legal ban with permits.

This does not mean that, in the event of special circumstances, under appropriate time, personal and factual restrictions, a ban on the starting point cannot be justified if such a measure may prove proportionate in view of its specific intensity of intervention. In any case, such a far-reaching restriction of freedom of movement is needed because this right, in principle, is abolished, but a specific and correspondingly defined basis in the law is required.'

Since the contested provisions already expired on 30 April 2020, the CC stated that these provisions were unlawful. It also stated that these provisions (e.g. in an ongoing administrative criminal procedure) would no longer apply.