

V 411/2020: differentiation between construction- and garden-markets and other large commercial enterprises in the Covid 19 Measures Ordinance violates the law

According to § 1 Covid-19 Measures Act, the competent Federal Minister for Social Affairs, Health, Care and Consumer Protection may prohibit (also) entering permanent establishments or certain permanent establishments for the purpose of acquiring goods and services, insofar as this is necessary to prevent the spread of Covid-19.

Based on § 1 Covid-19 Measures Act, § 1 of the COVID-19-Mesures-Ordinance of the Minister of Health published in the Federal Law Gazette number II 96/2020 prohibits, among other things, entering the customer area of commercial establishments. As a result, this prohibition of entry means that the establishments concerned had to be closed. Initially, only so-called systemic establishments such as public pharmacies, the food trade or petrol stations were excluded from this prohibition (§ 2). As of 14 April 2020, other commercial establishments were excluded, such as construction- and garden markets. However, other establishments could only be entered if the customer area inside did not exceed 400 m<sup>2</sup> (§ 2 para. 4). The prohibition expired on 30 April 2020. Several trading companies challenged this restriction before the CC.

In developing its case law on the admissibility of individual complaints, the CC held that the underlying (individual) application was admissible, although the contested provisions were already out of force at the time of its decision. The applicant's legal interest in obtaining a binding decision on the legality of those provisions extends beyond the relatively short period during which the contested provisions came into force. From the point of view of constitutional certainty, the CC had no constitutional objections to the statutory authorisation of the Covid 19 measures. The CC holds:

'The regulatory context in particular with § 2 Covid-19-Measures Act shows the fundamental objective of the legislator to curb the personal contacts of people associated with it when people visit the establishments for the purpose of purchasing goods and services by prohibiting entry for establishments. Thus, the law specifies the purpose of the prohibitions of entry. Furthermore, the law stipulates that the legislator must differentiate these prohibitions in relation to the purpose of the measure according to the nature and extent of the measure, depending on the extent to which it considers it necessary, in an overall balance to prevent the spread of Covid-19, to prohibit the entry of permanent establishments or only from certain establishments, or to impose their entry under certain conditions or conditions. In this way, the legislator grants the Federal Minister for Social Affairs, Health, Care and Consumer Protection a margin of assessment and forecasting whether and to what extent it considers that significant restrictions on fundamental rights are necessary to prevent the spread of Covid-19, whereby the legislator must take its decision as a result of a balance with the relevant interests of the companies concerned, their employees and customers that are protected under fundamental law.'

On the other hand, the CC finds parts of § 2 para 4 (in particular the requirement "if the customer area inside the interior not exceeding 400 m<sup>2</sup>") of the Ordinance of the Minister for Health, as it applied from 14 April 2020 on, unlawful, for the following reasons: On the one hand, the Minister for Health – responsible in this case – must make it clear on the basis of the information on the basis of which he made the regulation decision and the legally prescribed balance between the public interest and the fundamentally protected interests of the parties concerned. However, it is not clear from the act of regulation which circumstances led the Minister of Health in his decision with regard to what

developments in Covid-19. A corresponding documentation, however, is decisive for the fact that the CC can assess whether the regulation complies with the legal requirements.

The contested scheme, on the other hand, represented an unequal treatment of businesses with more than 400 m<sup>2</sup> compared to comparable establishments, in particular construction- and garden markets. These were excluded from the prohibition of entry, regardless of the size of their customer area. A factual justification for this unequal treatment is not identifiable for the CC; literally, the ruling states:

‘Even if, as the Federal Minister for Health points out in its submission, in the course of a gradual easing in view of a certain development of the spread of Covid 19 it may be perfectly compatible with § 1 Covid-19-Measures-Act, establishments of the trade, whose customer area in the interior exceeds 400 m<sup>2</sup>, therefore, unlike such establishments with a customer area of less than 400 m<sup>2</sup>, do not (yet) apply to such establishments, in particular because of the likelihood of such establishments being treated in this respect by such facilities, and therefore, contrary to such establishments with a customer area of less than 400 m<sup>2</sup>, (yet) they do not need to be excluded from the request of traffic, because they do not have access to such premises in such a way because they are not subject to such requirements.[...] The CC is also unable to recognise that garden-markets, for example, have a similar importance for daily activities, as they are referred to by the Minister, which have areas of sale and maintenance of security and emergency products referred to in § 2 para 1 sub para 9 of the Ordinance. Finally, no circumstances can be seen that, for the construction and garden markets referred to the Ordinance, restrictions on entry in order to ensure a distance requirement, as provided for in § 2 para 6 of the Ordinance, would trigger in the population almost the opposite effect of a customer arrangement.’

Since the provision expired on 30 April 2020, the CC had to limit itself to the finding that this provision was unlawful. The CC also stated that the rule is no longer applicable.