

Constitutional Court overrules COVID-19 restrictions

02 September 2020 | Contributed by [Preslmayr Attorneys at Law](#)

Introduction

Facts

Decision

Comment

Introduction

In March 2020 the legislature enacted the COVID-19 Measures Act,⁽¹⁾ which authorised the Federal Ministry for Social Affairs, Health, Care and Consumer Protection to enact regulations prohibiting access to business premises to the extent necessary to prevent the spread of COVID-19. Further, the act allowed the ministry to enact regulations prohibiting "access to particular locations". Based on this provision, the ministry enacted the COVID-19 Measures Regulation.⁽²⁾

Section 1 of the regulation prohibited access to public places, while Section 2 provided for the following exemptions thereto:

- preventing immediate danger to life, health or property;
- caring for and supporting people in need;
- procuring everyday essentials provided that people kept one metre apart unless other precautions minimise the risk of infection; and
- accessing outdoor public places alone or with someone from the same household or a pet provided that people keep one metre apart.

The regulation permitted the use of public transport in the above circumstances (except for the last one) provided that people kept one metre apart. According to Section 6 of the regulation, anyone requiring access to areas controlled by the public authorities would be required to provide evidence of such a need.

Under Austrian law, parties can challenge acts on the grounds of unconstitutionality and regulations on the grounds of unlawfulness before the Constitutional Court if the act or regulation imminently concerns the applicant and the applicant has no other reasonable possibility to involve the Constitutional Court. Where the only alternative to an application is the infringement of the regulation and the challenge of the fine, the Constitutional Court considers the alternative to be unreasonable.

Facts

An applicant based in Vienna was at his mother's home in Graz when the COVID-19 Measures Regulation was enacted. He argued that the regulation made it impossible for him to return to his apartment in Vienna because only the last exemption applied to him, but this exemption did not allow the use of public transport.

Decision

In its decision of 14 July 2020 the Constitutional Court accepted the application because the regulation principally prevented the applicant from accessing public places unless he was otherwise exempted.⁽³⁾ The use of public transport was prohibited where an individual or more than one person from the same household sought access to a public space.

The Constitutional Court held that the COVID-19 Measures Act complies with the constitutional requirements of determination. The act authorises the ministry to prohibit access to particular locations to the extent necessary to prevent the spread of the virus. Based on this provision, Section 2 of the regulation principally prohibits access to public places and provides for certain exemptions. The power to issue statutory instruments determines the ministry in several respects. The act is the legislature's response to a critical situation caused by

AUTHOR

Rainer
Herzig



COVID-19. The purpose of restricting access to certain locations is the protection of public health and the health infrastructure. The Constitution provides the regulator with a certain scope of evaluation and prognosis. Therefore, the regulator must evaluate and record the existing circumstances when issuing a regulation to allow for an assessment of whether said regulation corresponds to the law thereunder (notwithstanding the fact that democratic legislation differs from administrative regulations).

Although Section 1 of the COVID-19 Measures Act provides for restricted access to "business premises or certain business premises for the purpose of acquisition of goods and services", Section 2 of the act allows the regulator to prohibit access only to "particular locations". Such limited access aims to reduce personal contact between persons and prevent further infection and spread of COVID-19. On the one hand, the limited access under Section 1 extends to personal contact which occurs when business premises and regularly visited places are accessed; on the other hand, Section 2 intends to limit access to "particular locations" where people typically need to interact. The recitals to the act specifically mention (for example) playgrounds, sports grounds, riverbanks and lakesides.

The authority of the regulator is therefore limited to prohibiting access to "particular locations" only for the purpose of preventing social gatherings at such sites. Thus, the regulator is entitled to specifically or more abstractly describe these locations but cannot impose a general prohibition on access to public places beyond the home.

The legal entitlement under Section 2 of the COVID-19 Measures Act is limited to prohibiting access to particular locations and does not extend to warning people to remain at a particular location, particularly their home. The legislature provides the regulator with certain scope of evaluation and prognosis of the necessity to prevent the spread of COVID-19, but this evaluation must respect the freedom of movement guaranteed by the Constitution and other civil rights. However, the freedom of movement is not guaranteed without limits. The Constitutional Court has already accepted limitations with regard to epidemic-related controls.⁽⁴⁾ The power to regulate according to Section 2 of the COVID-19 Measures Act complies with these requirements. The law provides guidelines for the regulator.

Sections 1 and 2 of the COVID-19 Measures Regulation contravene these limits. While Section 1 prohibits access to public places, Section 2 provides for exceptions to this general prohibition in the following cases of emergency:

- supporting persons in need;
- procuring everyday essentials;
- fulfilling professional duties; and
- accessing outdoor public places alone or with someone from the same household provided that people keep one metre apart.

Section 4 of the regulation permits the use of public transport only for the above exemptions. This general prohibition, with exemptions, will warn people "to stay at home". Therefore, the regulation does not prohibit access to "particular locations" as per Section 2 of the COVID-19 Measures Act, but rather provides for a general prohibition on accessing public places. The act does not provide for such a general prohibition with exemptions; however, this does not mean that in particular circumstances and under appropriate temporary, personal and objective limits a general curfew can be justified if it is considered reasonable.

The Constitutional Court therefore overruled Sections 1, 2, 4 and 6 of the COVID-19 Measures Regulation.

Comment

In March 2020 the legal literature had criticised the COVID-19 Measures Regulation's non-compliance with the COVID-19 Measures Act; however, the legislature did not circulate a draft amendment to the act until 17 August 2020.

The draft amendment provides that Section 1 of a new regulation would allow access to business premises to acquire goods or perform services, workplaces and public transport where necessary to prevent the spread of COVID-19. Further, Section 2 would provide for access to particular locations or public places. A new regulation would also set out the number of people who could access said locations, as well as the duration, preconditions and restrictions under which these locations can be accessed, according to the present state of the pandemic. The restrictions may comprise, in particular, rules on social distancing and protective and preventative measures. Moreover, access to public places could be completely prohibited if more moderate measures do not suffice.

An amendment regulation would therefore allow the restrictions imposed by the overruled regulation. However, it is doubtful whether a general prohibition on access public places would comply with the freedom of

movement, because the Constitutional Court expressly noted that such a limitation would be permitted only under appropriate temporary, personal and objective limitations. The phrase "if more moderate measures do not suffice" does not establish such specific criteria as requested by the Constitutional Court. Moreover, as the COVID-19 Measures Act distinguishes between "particular locations" and "public places", a new regulation could arguably limit access even to rooms in private households; however, this would likely infringe the fundamental right to respect private and family life.

For further information on this topic please contact [Rainer Herzig](#) at Preslmayr Attorneys at Law by telephone (+43 1 533 16 95) or email (herzig@preslmayr.at). The Preslmayr Attorneys at Law website can be accessed at www.preslmayr.at.

Endnotes

(1) COVID-19-Maßnahmengesetz, *Federal Law Gazette* I 12/2020, as amended.

(2) COVID-19-Maßnahmenverordnung, *BGBl* II 98/2020, as amended.

(3) V 363/2020.

(4) VfSlg 3447/1958.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).