constitutional-judgment-5-22-4

S U P R E M E C O U R T

CONSTITUTIONAL REVIEW CHAMBER

JUDGMENT

in the name of the Republic of Estonia

Case number	5?22?4
Date of judgment	31 October 2022
Composition of court:	Chairman: Villu Kõve; members: Hannes Kiris, Heiki Loot, K Pilving
Case	Review of the constitutionality of § 27 subsection (3) and § 2 (5)–(6) and (8) of the Infectious Diseases Prevention and Control A
Basis for proceedings	Tallinn Administrative Court judgment of 31 May 2022 in case No

Participants in the proceedings	Riigikogu Applicants in the administrative case, representatives attorney-a and assistant attorney-at-law Jaanika Reilik?Bakhoff Respondent in the administrative case the Government representatives attorney-at-law Ants Nõmper and assistant att Kilgi Chancellor of Justice
Manner of examination	Written procedure

OPERATIVE PART

1. To dismiss the application by Tallinn Administrative Court.

2. To order the Republic of Estonia to pay the applicants in the administrative case joint compensation for procedural expenses in the amount of 5000 euros.

3. To disclose the judgment without the names of applicants who are natural persons.

FACTS AND COURSE OF PROCEEDINGS

1.On 28 May 2021, the Government of the Republic issued Order No 212 “Imposition of quarantine on persons who have been diagnosed with or have tested positive for COVID-19 and on persons who have had close contact with them”, which entered into force on 1 June 2021. According to the introductory paragraph to the Order, it was established, inter alia, on the basis of § 27(3) of the Infectious Diseases Prevention and Control Act (IDPCA). Under clause 5 sub-clause 1 of the Order, quarantine requirements do not apply to a close contact who has recovered from COVID-19 (hereinafter also the corona disease) and was declared

healthy by a doctor, and no more than six months have passed since the person was declared healthy. As of 19 July 2021, clause 5 sub-clause 1 of the Order set out that “quarantine requirements do not apply to a close contact who has recovered from COVID-19 and no more than 180 days have passed since a SARS-CoV-2 (hereinafter also the coronavirus) antibodies test confirming the diagnosis was carried out or since the date of confirmation of the diagnosis. Under clause 5 sub-clauses 2–3 of the Order, quarantine requirements were also not applicable to persons who had completed their course of vaccination or to persons equated to vaccinated persons. Order No 212 was in force to 30 June 2022.

2. On 23 August 2021, the Government of the Republic issued Order No 305 “Measures and restrictions necessary for preventing the spread of COVID-19”, which entered into force on 26 August 2021. According to the introduction to the Order, it was established, inter alia, on the basis of § 27 subsection (3) and § 28 subsection (2) clauses 1–3 and 5 and subsections (3), (5) and (6) of the IDCPA. Clauses 10, 14, 15, 15^1 and 16 of the Order, which were repeatedly amended while in force, laid down, in combination, inter alia, that to participate in certain activities a so-called corona certificate had to be presented, i.e. proof of recovery from COVID-19, vaccination, being equated to vaccinated persons or relieved of vaccination, or having undertaken a test for the coronavirus. A person responsible for such controlled activities had the duty to check the existence of the certificate while also verifying the identity of its holder. The duty to present a corona certificate and check it applied up to 14 February 2022 for persons up to 18 years of age or attaining the age of 19 years during the academic year 2021/2022, and to 15 March 2022 for all others.

3. /…/, [private limited companies] Paljas Porgand OÜ, Spring Cafe OÜ and Mustamäe Autokool OÜ (applicants in the administrative case) lodged a total of ten actions with Tallinn Administrative Court in autumn 2021 against the corona certificate requirement and the duty to check it as established by the Government orders. By order of 25 January 2022, the court decided to resolve these actions in one set of unified proceedings. After specifying the actions, the claims remaining in the proceedings included a claim for annulment or a declaration of unlawfulness of clause 5 sub-clause 1 of Order No 212, as well as Order No 305 with amendments insofar as it imposed compliance with the requirements set out in clauses 14, 15, 15^1 and 16 as a precondition for participating in activities set out in clause 10 sub-clauses 1–4, 6 and 7.

4. By judgment of 31 May 2022, Tallinn Administrative Court decided to satisfy the actions. The court declared § 27(3) and § 28(2), (5)–(6) and (8) of the IDCPA to be in conflict with the first sentence of § 3(1), § 87 clause 6 of the Constitution as well as the principle of legal clarity arising from § 10 of the Constitution insofar as they enable establishing restrictions based on recovery from the disease and vaccination status, setting the conditions for vaccination against the infectious disease and recovery, and obliging people to undergo health examination and diagnostics as a precondition for participating in activities described in clause 10 of Order No 305. The court invalidated clause 5 sub-clause 1 of Order No 212 in respect of some applicants insofar as it imposed as an additional precondition for relief from quarantine of a close contact recovered from COVID-19 that no more than 180 days had passed since the test confirming the diagnosis was carried out or since the date of confirmation of the diagnosis. The court ascertained that applying Order No 305 with its amendments in respect of some of the applicants was unlawful insofar as it required compliance with the requirements set out in clauses 14, 15, 15^1 and 16 for participation in activities set out in clause 10 sub-clauses 1–4, 6 and 7.

REASONING BY TALLINN ADMINISTRATIVE COURT

5. The following are in dispute:

1) the duty to present a corona certificate for participation in activities listed in clause 10 of Order No 305;
2) the duty of a person responsible for an activity to check the existence of a corona certificate and verify the identity of the person presenting it (clause 16 of Order No 305);
3) imposition of quarantine on a close contact who has recovered but whose certificate has expired (by effect of clause 5 sub-clause 1 of Order No 212).
4) the duty of vaccination and testing established indirectly or essentially as a result of these requirements, except on under-12-year-olds.

6.The Government of the Republic had been delegated (i.e. empowered) by law to set the conditions for recovery from and vaccination against the disease (clause 5 of Order No 305) and oblige people to undergo testing (§ 28(3) IDCPA, including as a precondition for participating in certain activities). The Government was empowered to oblige people to vaccinate, to restrict their possibilities to participate in certain activities if they were unvaccinated (§ 28(2) clause 5 and § 28(5) clause 3 IDCPA) and to impose quarantine on those close contacts whose recovery certificate had expired (§ 27(3) IDCPA).

7. The Government of the Republic was not empowered to oblige people to present a corona certificate to a person responsible for a controlled activity (clause 14 sub-clauses 3 and 4 of Order No 305). Nor was the Government empowered to oblige persons responsible for an activity to check the corona certificate (clause 16 of Order No 305). The orders to this effect are unlawful.

8. The measures are compatible with § 28(2) of the IDCPA. The corona diseases is a “dangerous novel infectious disease” within the meaning of § 2(2) of the IDCPA. Under §28(8) of the IDCPA, this enables use of measures intended for an extremely dangerous infectious disease. However, by the time of the court judgment, the novelty of the disease has become questionable.

9. In respect of different applicants, the restrictions in dispute interfere with freedom of movement under § 34 of the Constitution, freedom of enterprise under § 31 of the Constitution, the fundamental right to health under § 28 of the Constitution, the inviolability of family and private life under § 26 of the Constitution, the right to free self-realisation (in terms of the right to self-determination and self-image) under § 19 of the Constitution, the right to education under § 37 of the Constitution, the right to choose one's area of activity, occupation and employment arising from § 29 of the Constitution, the fundamental right to property under § 32 of the Constitution, the right to remain faithful to one's beliefs under § 41 of the Constitution, the right to human dignity arising from § 10 of the Constitution, the right to life under § 16 of the Constitution and the right to security of the person under § 20 of the Constitution. In addition, the conditions for relief from quarantine and restrictions on participation in controlled activities also cause unjustified unequal treatment, contrary to § 12 of the Constitution.

10. The restrictions in dispute interfere with significant fundamental rights of persons so extensively and seriously that they should have been established by law. In any case, in view of the severity of the restrictions, delegation of power is not sufficiently clear and precise. The delegating norm is extremely general and broad and fails to define the boundaries within which the executive may act. No definition has been given for temporal limits for applying the restrictions, the criteria for hospital treatment capacity based on which restrictions may be imposed, a place with a risk of becoming a disease outbreak site (within the meaning of § 28(3) of the IDCPA), and the conditions for lifting quarantine and its general duration.

11. In case of accepting the legislator's right to delegate to the executive the right to impose the restrictions at issue, then the type of legal act to be issued by the executive as set out in the delegating norm should have been a regulation by the Government of the Republic as a legislative act, but not an order as an administrative act.

12. In view of the original explanatory memorandum to Order No 305 and the definition of control of infectious diseases as set out in § 2(1) clause 6 of the IDCPA, the objective of the restrictions should be seen as, first of all, identifying sick persons, second, preventing the spread of infection to others through them, third, preventing serious illness so as to avoid overburdening the healthcare system, and fourth, preventing contraction of the disease among persons employed in certain occupations so as not to endanger the operational continuity of the state. Achieving the fourth objective takes place through the previous objectives. Restricting fundamental rights in order to achieve these objectives should, in principle, be considered admissible.

13. The measures applied are not adequate for achieving the first or second objectives. In fact, excluding restrictions on vaccinated people contributes to the spread of infection. To avoid serious illness, vaccination is only suitable short-term due to the temporary protection afforded by vaccines and the gradual decline of that protection over time. Hospital workload actually arises from the number of people under hospital treatment. However, the number of vaccinated people under treatment has been even higher than the number of unvaccinated people.

14. The measures in combination and in the manner applied are not necessary in order to achieve the objectives. In any case, it is possible to use measures which are less restrictive of the fundamental rights of persons while contributing more effectively to achieving the objectives. As a precondition for participating in activities, a better alternative to vaccination could be regular testing of all persons, limiting the number of participants in activities instead of completely excluding one group, limiting the possibilities for contact between people in general and limiting the possibilities of communication for all close contacts. Instead of the vaccination obligation, to avoid hospital overload the work of hospitals should have been reorganised. In sum, the measures could have been applied reasonably and in combination. Voluntary vaccination might have been one possibility among several measures.

15. Essentially, the orders impose an obligation to vaccinate with vaccines that were created quickly and received conditional marketing authorisation and where studies on efficacy and safety (including long-term effects) have not yet been completed. Vaccination endangers life and health. The effect of vaccines on a specific person cannot be conclusively foreseen, so that the possibility of compensation for vaccine damage is unlikely. Some people have been removed from many areas of life in society. This also entails various problems for persons excluded from society and for society as a whole, which has not been taken into account. An indirect vaccination obligation is not compatible with human dignity. The human body may not be used as a means of achieving a social objective. In a country constitutionally founded on liberty, justice and law, freedom of vaccination must be protected and people are not forced to vaccinate themselves by citing the duty of solidarity. People may not be placed in a situation where they have to choose between a vitally important benefit and vaccination. Nor may people be forced to subject themselves to medical intervention that may result in death, life-threatening reactions, permanent health problems (including disability) and the need for hospital treatment. Nor is it compatible with the principle of human dignity that the state to a large extent excludes an individual as a social being from society. The requirement to test children is also not proportional in the narrow sense because the costs involved in testing must be borne by children as a prerequisite for participating in activities, whereas the cost of testing is equivalent to or greater than the cost of participating in an activity. In conclusion, in view of the seriousness of the interference, the objectives of the measures and the benefits probably achieved by them cannot be considered sufficiently significant, and the situation amounts to disproportionate interference with fundamental rights of persons.

16. Those recovered from the corona disease are treated – from the aspect of relief from quarantine (clause 5 sub-clause 1 of Order No 212) and participation in various activities – unjustifiably less favourably than those who have been vaccinated. Less favourable treatment is expressed in the fact that, in comparison to those who are vaccinated, their relief from quarantine or possibility of participating in controlled activities is shorter (i.e. those whose recovery is confirmed by a PCR test), or they have no possibility at all to use the advantages available to the vaccinated (in the case of persons wishing to prove their immunity on the basis of an antibodies test). No reasonable or relevant reason exists for such unequal treatment.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

[…]

PROVISIONS DECLARED UNCONSTITUTIONAL

21. The Infectious Diseases Prevention and Control Act (version entering into force on 1 June 2021) lays down as follows:

"**§ 27. Establishment and termination of quarantine**

[…]

Quarantine shall be established by the Health Board by an administrative act. If the establishment of quarantine is accompanied by a significant effect on society or the economy, then quarantine shall be established by an order of the Government of the Republic. The term of quarantine shall be determined in an administrative act. The term of quarantine determined in an administrative act may be extended until the objective established in subsection (5) of this section has been achieved.

§ 28. Prevention of epidemic spread of infectious diseases

[…]

In order to prevent the epidemic spread of an infectious disease, the Health Board may, by an administrative act:

1) order schools, childcare institutions and social service agencies to be closed temporarily or restrict their operation;

2) demand that disinfection, eradication of insect vermin, pest extermination or cleaning be organised;

3) demand that medical examination of people be organised along with diagnosis or organising diagnosis of infectious diseases, taking account of the provisions of subsection (3);

4) require hospitals and social service agencies to establish visiting restrictions;

5) require persons to follow the precautions of safety from infection.

[…]

(5) In addition to the measures and restrictions specified in subsection (2) of this section, in order to prevent the spread of an extremely dangerous infectious disease, the Health Board may, if absolutely necessary, by an administrative act temporarily:

1) close institutions and establishments or restrict their operation;

2) prohibit public meetings and organisation of public events or establish requirements for holding and organising them;

3) establish other restrictions on freedom of movement.

(6) If the application of measures and restrictions provided for in subsections (2) and (5) of this section is accompanied by a significant social or economic effect, these shall be established by an order of the Government of the Republic

[…]

(8) The requirements, measures and restrictions prescribed in a law or on the basis of a law for preventing the spread of an extremely dangerous infectious disease may be applied for prevention of a dangerous novel infectious disease."

OPINION OF THE CHAMBER

22. First, the Chamber will assess the admissibility of the application by the Administrative Court (I). Then the Chamber will explore instances of interference with the fundamental rights of the applicants arising from Government of the Republic orders established on the basis of the relevant norms (II), assess the constitutionality of the norms and resolve the application (III), and decide on compensation of legal expenses (IV).

I

23. Based on an application by a court of first or second instance, the Supreme Court shall invalidate or declare unconstitutional a legislative act or a provision thereof, as well as failure to issue a legislative act which was relevant in adjudicating the case (§ 9(1) and § 14(2) (first sentence) Constitutional Review Court Procedure Act (CRCPA)). In doing so, the Supreme Court does not resolve the legal dispute, which must be dealt with under the provisions of court procedure applicable in administrative, civil or criminal cases (§ 14(2) (second sentence) CRCPA).

24. In order to assess the relevance of the norms, it is necessary to check whether the applicant court has correctly interpreted the provision that was declared unconstitutional, as well as the provisions determining the conditions for applying the provision that was declared unconstitutional (see e.g. Supreme Court Constitutional Review Chamber judgment of 31 December 2014 in case No 3?4?1?50?14, para. 30; order of 12 November 2015 in case No 3?4?1?28?15, para. 34).

25. In the present administrative case, the dispute concerned the lawfulness of disease control measures established by Government of the Republic orders No 212 and No 305 and repeatedly amended during the period of validity of the orders. More specifically, the dispute concerned the following:

1) the requirement for a corona certificate arising from Order No 305, i.e. the duty to present a certificate of vaccination against the coronavirus or a certificate confirming recovery from the corona disease as a precondition for participating in controlled activities;

2) the duty of a person responsible for the controlled activity mentioned in the previous point to check the validity and authenticity of the corona certificate as a precondition for the person’s participation in the activity;

3) the condition arising from Order No 212 for relief from quarantine of a close contact who had recovered from the corona disease, setting out that no more than 180 days may have passed since the coronavirus antibodies test confirming the diagnosis was carried out or since the date of confirmation of the diagnosis.

26. In the opinion of the Administrative Court, the disputed orders were unlawful since, with regard to the part obliging persons to present and check a corona certificate, they had been issued by exceeding the

statutory delegation and, in the remaining part, issued on the basis of unconstitutional delegating norms. At the same time, the Administrative Court found that, regardless of the unconstitutionality of the norms underlying establishment of the orders, the orders contained disproportionate restrictions of fundamental rights and were thus also unlawful in substance. To the extent that Order No 305 had been issued by exceeding the boundaries of the delegating norm, it could also not contain a delegating norm relevant for the constitutional review case (paras 108, 130 and 187 of the Administrative Court judgment).

27. In line with long-standing Supreme Court case-law, a provision is relevant if it is of decisive importance for adjudicating the case (since Supreme Court*en banc* judgment of 22 December 2000 in case No 3?4?1?10?00, para. 10). A provision is relevant if, in the event of its unconstitutionality and invalidity, the court should decide differently in the main case than if the provision were constitutional (since Supreme Court*en banc* judgment of 28 October 2002 in case No 3?4?1?5?02, para. 15).

28. Applicants in the administrative case have found that the present constitutional review proceedings are not admissible because the operative part of the judgment in the administrative case did not depend on the constitutionality of the contested provisions, so that the provisions were not of decisive importance in resolving the administrative case.

29. The contested provisions were not irrelevant for this reason. These were rules of competence and delegating norms which the Government of the Republic applied in issuing the orders in dispute in the administrative case. In assessing the lawfulness of an order, the administrative court must verify whether the order was issued by a competent administrative authority on, and in line with, a valid legal basis (§ 54 Administrative Procedure Act). Thus, the Administrative Court also had to apply the disputed norms when resolving the administrative case and assess their constitutionality on its own initiative (see e.g. Supreme Court Constitutional Review Chamber order of 14 December 2020 No 5?20?8/2, para. 16). The court may disapply a legal provision, including a rule of competence or delegating norm, only if in the court's opinion it contravened the Constitution, an international agreement ratified by the Riigikogu or European Union law. In the event of a finding of unconstitutionality, the court is obliged to initiate constitutional review proceedings (§ 15(2); § 152(1) Constitution). If a provision is unconstitutional, the legal act issued on its basis – including an order or another legislation of specific application for the issuance of which the provision was necessary – cannot be constitutional either. Since the Administrative Court had to apply the disputed norms in order to clarify the competence of the Government and the legal basis of the orders, as well as assess their constitutionality – and this affected assessment of the lawfulness of the disputed orders – these norms are relevant even though the court may also have had other reasons for ascertaining the unlawfulness of or invalidating the orders.

30. In the event of denial of relevance of the disputed norms, a situation would arise where the constitutionality of a delegating norm would have practical significance for a court dispute only with regard to otherwise lawful (including proportionate) acts by the executive. Even when it is clear that the legislator may not delegate resolution of an issue to the executive, the court should first be convinced that the measure is not disproportionate or unlawful for some other reason. At the same time, the proportionality of an order

cannot be assessed without applying the delegating norm. The starting point of the proportionality test is the objective of an order as a measure issued by the governmental authority. This should be identifiable from the norms underlying the order. Thus the court must apply the delegating norm, even to identify the objective.

It should also be kept in mind that different judicial levels may differently assess the lawfulness of administrative activity. The fact that the Administrative Court in its not yet final judgment has considered the order as disproportionate cannot lead to the conclusion that for that reason the administrative act is in any case unlawful. Denying the relevance of the delegating norms due to the disproportionality of restrictions contained in the administrative acts would make admissibility of constitutional review dependent on a fact which has not yet been finally determined in the administrative court proceedings and which the Constitutional Review Chamber itself cannot determine under § 14(2) of the Constitutional Review Court Procedure Act. In conclusion, such an approach to the relevance of delegating norms would be unjustified and would not ensure effective judicial review of the constitutionality of provisions delegating to the executive the power to issue legislative acts.

31. On 12 October 2011, the Supreme Court in the judgment in constitutional review case No 3?4?1?15?11, para. 16, noted that if a decision on removal of a vehicle as an administrative act is void under § 63(2) clause 3 of the Administrative Procedure Act due to absence of competence, then the delegating norm of the regulation related to issuing that act would not be relevant for the administrative dispute. By reference to this opinion, the Administrative Court has found that since neither the underlying provisions of the IDCPA nor any other laws gave rise to the right of the Government of the Republic to establish the requirement for presenting and checking a corona certificate, in this respect these provisions are not relevant for adjudicating the case (paras 85 and 108 of the Administrative Court judgment).

32. The Chamber does not agree with this. First, a distinction must be drawn between rules of competence (i.e. tasking provisions) and delegating norms (i.e. underlying norms). Rules of competence indicate which authority must perform the relevant public function in the state. Delegating norms indicate what public measures the competent authority may take to perform the function. The public function itself does not give rise to the authority's empowerment to implement measures restrictive of persons' rights to perform that function. In line with the principle of legality laid down by § 3(1) of the Constitution, state power is justified to act if legal rules stipulate both competence and delegation of power (e.g. Supreme Court Administrative Law Chamber judgment of 13 October 2010 in case No 3?3?1?44?10, para. 26). In the present case, the rules of competence having decisive importance are § 27(3) (second sentence) and § 28(6) of the IDCPA. In the event of constitutionality, these rules must be followed and in that light the Government of the Republic was clearly competent to establish corona restrictions. But even in the event of unconstitutionality, the orders would not be void because the Government itself cannot disapply rules of competence on considerations of unconstitutionality. Only the court can disapply a rule of competence on account of violation of the Constitution by initiating constitutional review proceedings, deeming the administrative authority to be incompetent and annulling an administrative act issued by the administrative authority. Second, the Supreme Court agrees with the Chancellor of Justice that an administrative act is void only in the event of a clear absence of competence on the part of the administrative authority (e.g. Supreme Court Administrative Law Chamber order of 7 March 2003 in case No 3?3?1?21?03, para. 13). However, arising from § 63 of the Administrative Procedure Act, an administrative act issued without delegation or clearly exceeding the power delegated is not void even in an obvious situation, but is still unlawful and annullable (§ 54 Administrative Procedure Act). Assessment of the substance and extent of delegation often presumes

interpretation of the delegating norm and other related norms.

33. The assertion by the Chancellor of Justice that, arising from the combined effect of § 26(1) and § 30(1) of the Government of the Republic Act, establishing orders of general application within the meaning of § 51(2) of the Administrative Procedure Act in the form of a Government of the Republic order is precluded (see para. 87 et seq. below) does not concern the competence of the Government.

34. The Administrative Court declared that § 27 subsection (3) and § 28 subsections (2), (5)–(6) and (8) of the IDCPA conflict with the Constitution insofar as they enable establishing restrictions based on recovery from the disease and vaccination status as well as setting the conditions for vaccination and recovery.

35. Among these provisions, § 28(2) clauses 2, 4 and 5 cannot be considered relevant since they did not relate to the restrictions in dispute in the administrative case. Inter alia, the disputed measures were not merely precautionary measures but a restriction imposed on one group of people to participate in certain types of activities. There is also no reason to consider these provisions as related to the relevant provisions so that their remaining in force might cause legal uncertainty.

36. The Government of the Republic and the applicants in the administrative case have found that the relevant provision is not § 27(3) of the IDCPA in its entirety. The Chamber finds that this provision determines the body competent to establish the restriction (quarantine) as well as the legal form of the restriction and the temporal frame of establishing the restriction, so that based on the foregoing (paras 29–32) this provision is relevant.

37. Additionally, the Chancellor of Justice has considered to be relevant those provisions of the IDCPA laying down the definitions of a dangerous novel infectious disease (§ 2(2) IDCPA), quarantine (§ 27(1) clauses 2 and 3 IDCPA) and disease outbreak site (§ 27(2) IDCPA), regulating the interconnections between the restrictions established by the Government of the Republic and the Health Board (§ 27(5) (second sentence) and § 28(7) (second sentence) IDCPA) and the restriction specifying the measure obliging people to undergo a health examination or diagnostics (§ 28(3) IDCPA).

38. Among these provisions, § 27(1) clauses 2 and 3 of the IDCPA as the delegating norm laying down the conditions and substance of establishing quarantine should be considered as relevant. The Chamber will not extend its review to the remaining provisions pointed out by the Chancellor of Justice but will take into account the systematic connections arising therefrom in assessing the constitutionality of the norms disputed by the Administrative Court (see also Supreme Court Constitutional Review Chamber order of 18 December

2015 in case No 3?4?1?27?15, para. 33). The presumption of relevance – i.e. the disputed measures remain within the boundaries of the delegating norms under review – is also satisfied (below, paras 52–57).

39. In conclusion, the relevant provisions are § 27 subsection (1) clauses 2 and 3 and subsection (3) of the IDCPA; § 28 subsection (2) clauses 1 and 3; subsections (5)–(6) and subsection (8) of the IDCPA insofar as they enable establishing (1) the requirement of a corona certificate and (2) the duty of a person responsible for a controlled activity to check the validity and authenticity of the certificate as a precondition for an individual's participation in the activity, and (3) the condition for relief from quarantine of a close contact who has recovered from COVID-19, setting out that no more than 180 days may have passed since the antibodies test confirming the diagnosis was carried out or since the date of confirmation of the diagnosis.

II

40. To check the constitutionality of the relevant provisions of the IDCPA, it is first necessary to assess what instances of interference with the fundamental rights of the applicants arose from orders No 212 and 305 disputed in the administrative case. On this basis, it is possible to be satisfied that the restrictions did not go beyond the delegating norms.

41. First of all, the applicants' rights were interfered with due to the fact that under the conditions defined in clause 14 of Order No 305 they – as persons not having a corona certificate – could not participate in controlled activities listed in clause 10 of Order No 305. In the case of persons who, under clauses 15 and 15^1 of Order No 305, during part of the validity period of the Order (in the case of adults from 26 August to 25 October 2021; in the case of 12-18-year-old children and young people from 1 November 2021 to 14 February 2022) could participate in controlled activities by presenting a negative coronavirus test result certificate, their rights were interfered with by the duty of every time having to undergo a test and present a certificate. Although both the definition of a controlled activity as well as the conditions for participating in controlled activities were changed repeatedly during the validity of Order No 305, at least the following activities were covered by it from 26 August 2021 to 15 March 2022: (a) engaging in sports, training, youth work, hobby activities, hobby education, refresher training and further education at the place of business or location of the person organising the activity; (b) participation in sports competitions and sports and exercise events, except if the activity took place outdoors in an unenclosed area; (c) presence or movement at public saunas, spas, pools, water parks and swimming pools; (d) presence at public meetings and events, conferences, theatre performances, concerts, film screenings and entertainment services, except if these took place outdoors in an unenclosed area, or indoors at a public meeting with up to 50 participants; (e) presence or movement at museums and exhibition facilities; (f) presence or movement in the sales or service area of a food establishment.

42. Second, the rights of the applicants who were persons responsible for controlled activities were interfered with by the duty imposed by clause 16 of Order No 305 to check – prior to a person's participation in activity – the existence of a corona certificate or a negative test result and verify the identity of the person presenting it. This duty also gave rise to a prohibition on the responsible person from allowing non-compliant persons to participate in the controlled activity.

43. Third, interference with the rights of the applicants who had recovered from the corona disease but were unvaccinated arose from the fact that, resulting from the combined effect of clauses 3 and 5 of Order No 212, they were under a duty to comply with the ten-day (as of 10 January 2022 seven-day) quarantine requirement as close contacts if more than 180 days had passed since the date of confirmation of their diagnosis.

44. The restrictions under the orders did not uniformly interfere with the rights of all the applicants in the administrative case (52 natural persons and 3 legal persons in private law), but the fundamental rights restricted in each specific case and the seriousness of restriction depended on the substance of the restriction applied to the particular applicant, the applicant's person (a natural or legal person), the age of the applicants who were natural persons (a child or an adult), the applicant's field of activity (a person responsible for an activity or a person wishing to participate in a controlled activity), their way of life, habits, and the like. Assessment of a restriction concerning a specific person also depends on the time of lodging an action with the administrative court because the substance and extent of the restrictions were repeatedly changed during the validity of orders No 212 and 305, and not all the actions were lodged at the same time. Additionally, it should be taken into account that the actual effect of the restrictions on a person is expressed by way of a combination of the restrictions.

45. The Chamber does not consider it possible or necessary to assess the effect of the restrictions individually in respect of each applicant but notes that the restrictions arising both from the quarantine obligation as well as the prohibition on participating in controlled activities first and foremost interfered with the applicants' liberty of movement (§ 34 Constitution) and severely affected their everyday life and access to services and events (§ 19(1) Constitution). The restrictions, at least in respect of some of the applicants, also interfered with the right to education (§ 37 Constitution), freedom of enterprise (§ 31 Constitution), and restricted the right to freely choose one's area of activity, occupation and employment (§ 29(1) Constitution). The restrictions may also have negatively affected the applicants' private and family life (§ 26 Constitution). The prohibition on allowing non-compliant persons to participate in controlled activities also – depending on the circumstances – restricts different freedoms of the responsible person, such as freedom of enterprise, private autonomy, freedom of association (§ 48 Constitution) and the right to artistic self-expression (§ 38(1) Constitution). It is erroneous for the Government of the Republic to assert that no interference with the freedom of enterprise of the responsible persons took place in the present case because even before establishing the restrictions a person themselves decided whether they wanted the services offered by a company. During the validity of the disputed restrictions, the economic activity of companies depended not only on clients' free choice but also on measures taken by the state power. The assertion that freedom of enterprise does not oblige the state to ensure demand on the market is irrelevant. What is in dispute is not ensuring demand but the prohibition on offering a service to certain clients.

46. The restrictions resulted in different treatment of groups of persons and interfered with the general fundamental right to equality under § 12(1) of the Constitution: both in terms of restrictions on participating in controlled activities as well as the quarantine obligation, vaccinated and recovered persons were treated differently from those who were not vaccinated or from whose confirmation of the corona disease diagnosis more than 180 days had passed. The situation of these comparable groups of persons cannot be considered so different as to negate interference with the fundamental right to equality.

47. The Administrative Court was justified in noting that vaccination was set as the condition for the exercise of many fundamental rights. In the present dispute, vaccination was not a condition for obtaining exclusive benefits or advantages over which the state may decide depending on its goodwill as asserted by the Government. The possibility to decide over one's living arrangements falls within the scope of protection of liberties. The fundamental right to liberty also protects the possibility to engage in hobbies and entertain oneself in a manner chosen by oneself and not by the state. The value of many of the controlled activities for persons depends not only on their substance but also on the location where and the manner how they take place, as well as their immediate nature, including the possibility to communicate with other people in the course of an activity. In particular, the importance of the form of activity should be emphasised – and also taken into account by the courts in resolving the main case – from the aspect of activities of schools and hobby schools since this concerns children's development and interests (see clauses 3–5 of Order No 212).

48. An adult person could be relieved of the restrictions only by being vaccinated or having clinical proof of recovery from the disease (apart from exceptions valid for a short term). Although no direct obligation to vaccinate existed under any legal norm, such interference amounted to establishing an indirect vaccination obligation in the case of which it is not possible to speak of a completely free right to decide about one's vaccination (cf. European Court of Human Rights (ECtHR) Grand Chamber judgment in case No 47621/13 *Vav?i?ka and Others v. the Czech Republic*, paras 259–260). An indirect vaccination requirement interferes with a person's physical integrity similarly to a direct vaccination obligation. Physical integrity is protected first and foremost in the frame of inviolability of private life (§ 26 Constitution; Article 8 of the Convention on Human Rights and Fundamental Freedoms; ECtHR Grand Chamber judgment in case No 25358/12 *Paradiso and Campanelli v. Italy*, para. 159). Risks involved in vaccines interfere with the right to protection of health (§ 28(1) Constitution) and in extreme cases may result in death (§ 16 Constitution) (see also Supreme Court Administrative Law Chamber order of 25 November 2021 No 3?21?2241/11, paras 20–22). The seriousness of instances of interference is also not reduced by the fact that, as a side effect, they also protected the addressees of the restrictions themselves. Establishing vaccination requirements in order to protect the health of a person with active legal capacity – without that the requirement affects the rights of others or public interests e.g. through the burden on hospitals – would not be legitimate in a country based on freedom and democracy nor would it comply with the principle of human dignity.

49. Nevertheless, in the light of the data known to date, the seriousness of interference with physical integrity and the right to life is reduced by the small likelihood of death or serious consequences resulting from vaccination against the corona disease. According to the judgment of the Administrative Court, based on the data submitted to the court by the State Agency of Medicines, in the period from 27 December 2020

to 17 April 2022, from reports involving lethal consequences sent to the State Agency of Medicines, the Agency considers that in 7 cases a link to vaccination was possible or could not be ruled out, and in 77 cases a link to serious cardiological and neurological disorders was possible or could not be ruled out. At the same time, as of 17 April 2022 the number of people in Estonia having completed the first course of vaccination was 838 964 (https://www.terviseamet.ee/et/koroonaviirus/koroonaviiruse-andmestik [1]).

50. Nor did the indirect vaccination requirement degrade human dignity (§ 10 Constitution; see also ECtHR judgment in case No 41994/21 *Zambrano v. France*), considering the effect of vaccines in reducing the number of serious cases of disease. In view of the level of knowledge in 2021, the requirement of vaccination against the corona disease cannot be considered as involuntary medical or scientific experiment either (§ 18(2) Constitution, see also Supreme Court Administrative Law Chamber order of 25 November 2021 No 3?21?2241/11, para. 30). By the time of issue of the disputed orders, very extensive data about the desired effects and possible side-effects of the vaccines existed and were available worldwide as well as in Estonia, based on testing as well as practical application (see para. 53 below).

51. In sum, the disputed regulatory provisions in orders No 212 and 305 brought about simultaneous interference with many fundamental rights of the applicants. The Chamber does not agree with the Government's position that interference was of minimum severity.

52. Orders No 212 and 305 had been established on the basis of broadly worded delegating norms containing undefined legal concepts and leaving a wide margin of appreciation to the Government of the Republic. Section 27(1) of the IDCPA, in combination with subsection (3) of the same section, enables the Government of the Republic to impose quarantine to prevent an infectious disease from spreading outside the disease outbreak site or to combat an infectious disease. Quarantine for this purpose may be continued until the spread of the infectious disease has been prevented, the requirements for control of the infectious disease have been fulfilled and the disease outbreak site has been rendered harmless (first sentence of § 27(5) IDCPA). Arising from the combined effect of § 28 subsection (5) clauses 1 and 3, subsections (6) and (8) of the IDCPA, the Government of the Republic could restrict the activities of establishments and companies and establish other restrictions on freedom of movement in order to combat the spread of a dangerous novel infectious disease.

53. Neither the relevant norms nor the norms linked to them gave rise to any delimiting objectives or conditions that would have precluded issuing the disputed orders. The aim of the delegation, in view of the location of the provisions in Chapter 5 of the IDCPA, was prevention of the epidemic spread of infectious diseases. The objective of all the restrictions imposed under the disputed orders was to reduce the risk of infection in the event of a dangerous novel infectious disease within the meaning of § 2(2) of the IDCPA. The underlying premise for this was that the likelihood of infection as well as serious illness is lower among vaccinated or recovered people as compared to unvaccinated people, so that there was no reason to restrict the activities of these persons to the same extent as others (about the effects of vaccination, see also Supreme Court Administrative Law Chamber order of 25 November 2021 No 3?21?2241/11, para. 27). This objective of the disputed restrictions is covered by the provisions of the IDCPA. Also, in line with the requirements

under § 27(3) and § 28(6) of the IDCPA, the restrictions were established in the legal form of an order by the Government of the Republic.

54. The quarantine requirement established by disputed Order No 212 was covered by delegation arising from § 27 subsections (1) and (3) of the IDCPA. Alongside this specific delegation, in the case of a dangerous novel infectious disease the general basis for restricting the freedom of movement of persons suspected of being infected arises from § 28 subsection (5) clause 3 in combination with subsection (8) of the same section of the IDCPA. The restriction on participation in controlled activities for persons without a corona certificate, as established by Order No 305, is covered by § 28 subsection (2) clause 1 and subsection (5) of the IDCPA if that activity takes place in an establishment or company mentioned in subsection (2) clause 1 or subsection (5) clause 1, at an event mentioned in subsection (5) clause 2, or in a location with a restriction on movement imposed under subsection (5) clause 3. The duty of a person responsible for a controlled activity to check the existence of a corona certificate was covered by delegation under § 28)5) clause 1 of the IDCPA to restrict the operation of establishments and companies. Since, in the opinion of the Chamber, clause 12 sub-clauses 3 and 4 of Order No 305 only gave rise to the conditions compliance with which had to be checked by a person responsible for a controlled activity, but not to the duty of a person wishing to participate in a controlled activity to present a corona certificate to the responsible person or prove their identity, then it is irrelevant for resolving the case that the Administrative Court has reached the conclusion of absence of a delegating norm for establishing this duty (para. 108 of the Administrative Court judgment).

55. The indirect vaccination requirement arising from the combined effect of direct restrictions established by the orders (see paras 47–48 above) was covered by the norms providing delegation to establish these direct restrictions. The requirement that only immunised persons participate in certain activities is covered by the general concept of restriction on an activity.

56. In the opinion of the Chamber, the delegation arising from the disputed provisions of the IDCPA also covered the right to differentiate the restrictions between different groups of persons in justified cases, i.e. to restrict only the rights of some groups of persons where establishing restrictions with a broader personal scope was not necessary to prevent the epidemic spread of the infectious disease. Uniform restriction of the rights of all persons would not have enabled guaranteeing the proportionality of the restrictions in respect of those persons the curtailment of whose activities does not equally affect the objective of control measures (§ 11 Constitution).

57. In sum, no reason exists for the conclusion that the Government of the Republic has exceeded the right under the delegating norms to establish the restrictions in dispute in the administrative case. The Chamber agrees with the Chancellor of Justice that, based on the wording of the delegating norms, the establishment of even more extensive restrictions under the same delegating norms cannot be precluded, on the condition that they are appropriate, necessary and proportional in respect to the objective. Thus, the constitutionality of the delegating norms must be checked.

III

58. In line with the principle of legality arising from the first sentence of § 3(1) of the Constitution, state power is exercised solely pursuant to the Constitution and laws in conformity therewith. These principles also apply in a crisis situation. Part of the principle of legality is the non-delegation principle (i.e. the principle of essentiality or statutory reservation) under which, inter alia, with regard to issues concerning fundamental rights and freedoms, all essential decisions must be passed by the legislator. Delegating to the executive an issue within the competence of the legislator, and the executive authority's interference with fundamental rights, is only allowed on the basis of a delegating norm laid down by law and compatible with the Constitution (Supreme Court*en banc* judgment of 15 March 2022 No 5?19?29/38, para. 57). The executive's interference with fundamental rights must have a legal basis regardless of whether generally applicable or specific legislation is being issued or a measure performed (non-regulatory activity). In the case of the Government of the Republic, the special norm expressing the principle of statutory reservation is § 87 clause 6 of the Constitution under which the Government issues regulations and orders on the basis of and for the implementation of laws. The requirement that any administrative activity interfering with fundamental rights or other subjective rights must have a basis in law also arises from the Administrative Procedure Act (§ 3(1); § 107(1)).

59. The Supreme Court in its constitutional review case-law to date has primarily dealt with the constitutionality of norms providing delegation to issue legislation of general application. In line with long-standing Supreme Court case-law, less serious restrictions of fundamental rights may be established by a governmental regulation issued on the basis of a delegating norm which is precise, clear and corresponds to the seriousness of the restriction. The executive may not be granted competence to establish more extensive restrictions than laid down by law (Supreme Court*en banc* judgment of 3 December 2007 in case No 3?3?1?41?06, paras 21 and 22; judgment of 16 March 2010 in case No 3?4?1?8?09, para. 160). The Supreme Court has also found that in order to issue an executive act of general application the law must contain a corresponding delegating norm specifying the administrative authority competent to issue the act and the clear purpose of the regulatory delegation conferred on it (e.g. Supreme Court Constitutional Review Chamber judgment of 2 May 2007 in case No 3?4?1?2?07, para. 20; judgment of 13 February 2007 in case No 3?4?1?16?06, para. 21). An equivalent requirement for a delegating norm to issue regulations also arises from § 90(1) of the Administrative Procedure Act. In the case of norms delegating to the executive the power to enact measures, the Supreme Court has noted that, in line with the principle of essentiality, the more serious the interference with fundamental rights the more precise must be the underlying delegating norm for the executive measure as well as the procedural rules (Supreme Court Constitutional Review Chamber judgment of 20 March 2014 in case No 3?4?1?42?13, para. 41).

60. Constitutional requirements applicable to legal norms delegating the power to establish legislation of general and specific application need not entirely overlap because, unlike in the case of norms delegating the power to issue legislation of general application, in the case of delegation of power to issue legislation of specific application, no delegation of legislative power (§ 59 Constitution) to the executive takes place in substantive terms. When issuing an order as legislation of specific application, the Government of the Republic exercises executive power within the meaning of § 86 of the Constitution. In this regard, the executive may also be justified in resolving, on a case-by-case basis, situations whose general regulation the legislator should not delegate to administrative agencies. However, a norm which delegates to an administrative authority the power to restrict the rights of persons by an order must also be clear and precise and correspond to the seriousness of the restriction. Unjustifiably general delegating norms for issuing legislation of specific application may also violate the principle of the rule of law. In this regard, the more serious the interference that the delegating norm enables and the more general and the broader the nature of an order, the more precisely the substance of delegation must be defined.

61. The Administrative Court and the participants in proceedings have found the disputed norms to be lacking legal clarity and allowing arbitrary determination of their substance first and foremost because they are too general and do not contain sufficient conditions delimiting the restriction, e.g. failing to explicitly set the duration of quarantine or other precautionary infection safety measures, or the permissible objectives of interference. Additionally, both the disputed norms as well as the norms on which determination of the substance of the disputed norms relies contain a large number of undefined legal concepts such as “hospital treatment capacity”, “disease outbreak site”, “place with a risk of becoming a disease outbreak site”, “prevention of the spread of infectious disease has been ensured”, “rendering the disease outbreak site harmless”, “high level of infectiousness”, “rapid and extensive spread of infection”, “serious or life-threatening course of disease”, “lack of effective treatment”, “precautionary infection safety measure”, “temporary”, and so on, whereas reciprocal referencing between norms containing undefined legal concepts leads to determining the substance of one undefined legal concept through another undefined legal concept.

62. Legal clarity means that laws and other legislation must be sufficiently clear and understandable so that a person has a reasonable possibility to anticipate the state’s actions and adjust their behaviour accordingly. Not every lack of clarity leads to unconstitutionality of a law. A situation of lack of legal clarity occurs if questions arising in interpretation of norms cannot be reasonably resolved even by taking into account the purpose and development of the norms, other legislation, general principles of law, and the like, and if this lack of clarity impedes determination and performance of obligations arising from law (Supreme Court Constitutional Review Chamber judgment of 14 October 2015 in case No 3?4?1?23?15, para. 98; judgment of 19 December 2019 No 5?19?38/15, para. 68).

63. The Chamber agrees that extensive use of undefined legal concepts might not always be conducive to the clarity of norms enabling interference with fundamental rights, in particular if the substance of these concepts and the extent of restrictions are made dependent on each other by reciprocal referencing between norms. However, the principle of legal clarity does not preclude the use of undefined legal concepts or conferring the right of discretion on a competent authority, including that the use of undefined legal concepts

and discretion cannot be precluded in the case of delegating norms (e.g. Supreme Court Constitutional Review Chamber judgment of 18 January 2019 No 5?18?4/10, para. 62; judgment of 19 December 2019 No 5?19?38/15, para. 71). In a situation where combating an infectious disease requires the executive to simultaneously take into account several conflicting interests and many circumstances, as is unavoidable in a situation of an extensive crisis, it is complicated to refrain from using discretion and undefined legal concepts without harming legal clarity by non-overarching detailed and excessively rigid norms.

64. Powers arising from the disputed delegating norms in combination with other norms of the IDCPA are not entirely non-delimited despite their general nature. The overall objective of the delegating norms, in view of their location in Chapter 5 of the IDCPA, was prevention of the epidemic spread of infectious diseases. Temporal delimitation of the restrictions to be established arises from § 28 subsection (2) clause 1, subsections (4) and (5) of the IDCPA under which measures are imposed temporarily, and the third sentence of § 27(3) of the IDCPA lays down the duty to set the term of quarantine in the administrative act establishing it. It is unjustified to assert that only laying down a specific term for a restriction by law can be interpreted as a temporal delimitation of delegation. A norm delegating power to establish a temporary restriction requires setting a specific time-limit for the restriction, or if this is impossible due to the unforeseen nature of the situation or its rapid change, then constantly assessing the continued justification for the validity of the restriction. Temporal and personal specification of restrictions follows from the fact that, according to the legislator's idea, preventing the epidemic spread of an infectious disease must take place first and foremost at disease outbreak sites within the meaning of § 27(2) of the IDCPA, i.e. within a delimited territory where persons who are ill or suspected of being infected are located and where the inhabitants are under enhanced supervision by a health protection institution. As well as in an area where a risk of emergence of a disease outbreak site occurs (§ 28(3) IDCPA). In terms of substantive scope, the level of generalisation of restrictions laid down by § 28(2) and (5) of the IDCPA varies. Less delimited is the delegation laid down by §28(5) clause 3 of the IDCPA. According to need and with a view to the state's duties of protection, this should also ensure the possibility to establish restrictions which are not explicitly stipulated in other clauses of the same subsections.

65. Immediately before enactment of the orders in dispute in the administrative case, by a legislative amendment entering into force on 1 June 2021, the legislator remedied the shortcomings found in the earlier stage of the corona epidemic regarding the clarity and precision of the delegating norms laid down by § 28 of the IDCPA (explanatory memorandum to the Act amending the Infectious Diseases Prevention and Control Act (347 SE, Riigikogu XIV composition), page 2). Inter alia, the introductory part of the sentence in § 28(2) of the IDCPA was narrowed down and clause 5 was added to the same subsection, delegating the power to oblige persons to comply with precautionary measures. The substance of delegation laid down by § 28(5) clauses 1 and 2 of the IDCPA was also further specified.

66. The principle that more serious interference with fundamental rights must be matched by a more precise delegating norm also gives rise to the conclusion that from a generally worded delegating norm no legal basis can be derived for a restriction that extremely seriously interferes with fundamental rights (e.g. Supreme Court Administrative Law Chamber judgment of 18 May 2021 in case No 3?19?549/98, para. 20). The implementer of a delegating norm is also required to observe this principle in determining the substance of the disputed delegating norms.

67. In sum, in the opinion of the Chamber, however, the delegating norms, insofar as they concerned the main case, did not restrict the applicants' rights so seriously nor were they so imprecise that the principle of statutory reservation would have precluded establishing the disputed restrictions. The Supreme Court Administrative Law Chamber has also previously found that, in principle, establishing an indirect vaccination requirement by a lower-ranking legal act on the basis of a law cannot be precluded (Supreme Court Administrative Law Chamber order of 25 November 2021 No 3?21?2241/11, para. 24). The above does not mean that the legislator should not try to specify the provisions of the IDCPA in the future, in particular in the context of possible new corona outbreaks. The Chamber agrees with the criticism by the Chancellor of Justice that the definition of a dangerous novel infectious disease in § 2(2) and through subsection (1) clause 3 of the same section in the IDCPA has been unsuccessful in terms of legislative drafting technique. It is not clear whether the idea of the law is to interpret as a dangerous novel infectious disease any disease which spreads rapidly and extensively and for which no effective treatment is available but the course of which is not serious and which at the same time does not exceed hospital treatment capacity (ordinary colds). Nor are all the questions resolved by the overall purpose of Chapter 5 of the IDCPA to prevent the epidemic spread of infectious diseases because, under § 2(1) clause 7 of the IDCPA, an epidemic is defined highly evaluatively as an outbreak of an infectious disease which calls for extensive application of infection control measures. In the present case, these shortcomings are not important since there is no doubt that the legislator's will was to consider COVID-19 as a novel infectious disease, and in the period in question the characteristics mentioned in these provisions were present in the case of that disease. Although it is not clear how long corona can be considered as novel, there is no reason to suspect that the temporal scope of § 2(2) of the IDCPA had been exhausted by the first months of 2022 in the case of corona.

68. The Chamber emphasises that no crisis in itself brings about alleviation of the requirements set for the precision of delegating norms. In some crisis situations, the parliament's role may even increase (Supreme Court Constitutional Review Chamber judgment of 23 December 2021 No 5?21?32/8, para. 49). Nevertheless, in applying the principle of statutory reservation, other constitutional norms and principles must also be taken into account. Under § 13 of the Constitution, everyone is entitled to protection by the state and the law. Section 14 of the Constitution places a duty on the legislative, executive and judiciary as well as on local authorities to guarantee the rights and freedoms of persons. These constitutional provisions give rise to the right to the state's normative and factual action so as to enable everyone to protect themselves and feel secure (Supreme Court *en banc* judgment of 16 May 2008 in case No 3?1?1?86?07, para. 23). Corresponding to this fundamental right is the state's duty to protect persons against threats endangering them, including to create a sufficient and effective legal regulatory framework in the field of control and prevention of infectious diseases and also implement that legislation. Infectious diseases may pose a danger to very significant legal rights. Alongside the state's general duty of protection, the Constitution also gives rise to the duty to protect people's life (§ 16) and health (§ 28(1) Constitution). The need to protect people's life and health is a significant constitutional objective which may provide a basis for restricting other fundamental rights, including fundamental rights not subject to statutory reservation. The Constitution also explicitly mentions isolating an infected person or preventing the spread of infectious diseases as a legitimate objective in restricting several fundamental rights subject to a qualified statutory reservation (§ 20(2) clause 5, § 29(2), § 34 and § 47 Constitution). Under § 87 clause 8 of the Constitution, prevention of the spread of an infectious disease may be the objective and motivation for the Government of the Republic to declare an emergency situation.

69. Since state power is exercised only on the basis of the Constitution and laws, on that basis the state has the duty to preventively create by law an effective and flexible regulatory framework to act even in a situation where a dangerous and epidemically spreading infectious disease is unknown or novel and it may not prove to be possible to foresee all the circumstances necessary for preventing the disease, including detailed foresight of all the necessary possibilities of interference with fundamental rights. The spread of an infectious disease may be very rapid and extensive. Infectious diseases, their various strains and medical and non-medical measures for their control are characterised by great uncertainty and changeability, which may require quick reassessment of the situation and changing the restrictions imposed. Highly specific expert knowledge is required for this. If a disease is novel, making absolutely certain conclusions about its level of threat, ways of spreading, infectiousness, incubation period, course, effective treatment, and so on, is at best possible only as a result of time-consuming scientific research. Such diseases are characterised by the risk of hard-to-foresee or unforeseeable consequences. However, creation of precise legal norms on prevention measures should not wait until an infectious disease has already spread and sufficient knowledge about it exists. The state's reaction to a novel infectious disease must match the level of danger and urgency of the situation.

70. Based on the above considerations, the legislator has created general delegating norms for control of novel or unforeseen risks in other areas of law as well, for example §§ 28 and 29 of the Law Enforcement Act.

71. In conclusion, action following from the state's duty of protection in an exceptional situation in preventing hitherto unknown or novel threats does not relieve the legislator of the duty to regulate most essential issues from the aspect of restriction of fundamental rights by law, but in its activities the legislator must create a balance between the state's duty of protection and the principle of statutory reservation, which in some cases may also mean that more generally worded delegating norms are allowed and some essential issues may be decided by the Government. This balance may change over time. With increased knowledge, the legislator may no longer suffer from impediments to more precise regulation of the control of a disease which in the meanwhile has become more familiar. The objective of establishing restrictions during an epidemic may also be different and unforeseen at the time of enacting a law. This may include the objective of complete prevention of infection or only prevention of serious illness and thus protection of risk groups. Over time, due to increased knowledge or mutation of the disease pathogen a possibility may appear to further specify political objectives. In conditions of a long-term health crisis, a need may also appear to reassess objectives because in the event of long-term validity the seriousness or interference which initially was narrowly proportional may exceed the constitutionally admissible threshold, and other measures for control of the crisis may appear, for instance vaccines (Supreme Court Constitutional Review Chamber judgment of 23 December 2021 No 5?21?32/8, para. 51). Ambiguous delegating norms which may be tolerated in the initial stage of the epidemic might no longer be sufficiently precise in the later stages of a long-lasting crisis.

72. In specific constitutional review proceedings, the Chamber does not assess the conformity of a delegating norm with the principle of statutory reservation in the abstract but only based on the specific conditions at the time of establishment and period of validity of the restrictions in dispute in the administrative case. Although the corona epidemic already began in Estonia in late winter or early spring 2020, it was followed by the spread of the virus strain with different properties (the second and third waves

of the virus), so that scientific knowledge of the properties of the virus remained still uncertain at the time of establishing the orders in dispute in the administrative case. Later research carried out in conditions of the new strains showed a decrease in the efficacy of vaccines in preventing general infection in comparison to the previous period. There was no clear understanding regarding the issue to what extent the new strains cause serious illness and whether any contraction of the disease should be avoided as much as possible in order to ensure performance of the state's vital functions. Although virus strains and the level of vaccination had changed in comparison to the earlier stages of the epidemic, the situation was still characterised by great dynamism, uncertainty of scientific knowledge about the virus and the disease caused by it as well as the possibility of consequences endangering the life and health of many people and vital services. In particular, at the beginning of November 2021 a serious risk existed of overburdening the hospital network.

73. It is true that, in principle, the legislator could have specified the objective of corona control measures and the essential conditions of their implementation, for example, in autumn 2021, including carrying out a debate on whether restrictions may be applied differently in respect of vaccinated and unvaccinated people. Nevertheless, during the period at issue in the present case the legislator did not yet have a constitutional obligation to specify the relevant norms. Unavoidably, in difficult situations the parliament also enjoys a wide margin of appreciation to assess whether to prefer a more flexible or a more detailed law. By way of constitutional review, the court can intervene in that margin of manoeuvre if the parliament has unreasonably failed to make the necessary specifications in the delegating norms. During the period in dispute, the situation did not yet reach that threshold in view of the foregoing.

74. The Administrative Court has found that § 27(3) and § 28(6) of the IDCPA are also incompatible with the Constitution because they enable establishing the disputed restrictions by an order of the Government of the Republic, i.e. legislation of specific application. In the opinion of the Administrative Court, restrictions with such substance should in any case have had to derive from a legislative act of general application.

75. The Supreme Court has previously noted that the form and substance of a legal act must match. In the case of legislation by the Government of the Republic, this requirement relies, inter alia, on § 87 clause 6 of the Constitution and Division 6 of Chapter 1 of the Government of the Republic Act. Protection of a person's rights is different in the case of legislation of specific application and legislation of general application, and a different procedure has been laid down under the Constitution and laws for review of constitutionality of legislation of general application as compared to legislation of specific application (Supreme Court Constitutional Review Chamber order of 22 November 2010 in case No 3?4?1?6?10, para. 43; Supreme Court *en banc* judgment of 31 May 2011 in case No 3?3?1?85?10, para. 23). In the case of legislation of general application as compared to legislation of specific application, the procedure for their issue and the requirements for their legality are also different. Thus, by setting out a form corresponding to legislation of general application for legislation which in substance constitutes legislation of specific application, or the other way round, the legislator might violate the fundamental right of addressees of legislation to organisation and procedure under § 14 of the Constitution and the right under § 15 of the Constitution to judicial appeal against restrictions imposed on them (Supreme Court *en banc* judgment of 31 May 2011 in case No 3?3?1?85?10, para. 23), as well as fail to comply with requirements which according to the substance of legislation should apply to its scope, the procedure for its issue and its legality.

76. At the same time, it should be taken into account that general and specific are not concepts between which a clear borderline exists, so that there is also no clear borderline differentiating legislation of general application from legislation of specific application (Supreme Court *en banc* judgment of 31 May 2011 in case No 3?3?1?85?10, para. 23; Supreme Court Administrative Law Chamber order of 7 May 2003 in case No 3?3?1?31?03, para. 15; order of 5 April 2010 in case No 3?3?1?7?10, para. 9; order of 13 February 2008 in case No 3?3?1?95?07, para. 10). For this reason, a considerable margin of appreciation is left to the legislator in deciding the type of legal act in a delegating norm. Within this margin, it may be compatible with the Constitution to regulate a practical situation involving the same degree of generality in the form of legislation of either general or specific application. When determining the substance of the margin of appreciation, a question of primary importance is whether – by establishing interference with the subjective rights of a specific person through a legal act – the person is sufficiently guaranteed effective protection of their rights that were interfered with. The form of legislation may not become a tool through which an attempt is made to limit a person's possibilities to participate in the procedure for issuance of that legislation or obtain legal protection against the legislation. However, the legislator must also take into account the need to ensure effectiveness of administrative activity, which may justify the choice of the form in which the legislation can be issued via a swifter and simpler procedure, as well as other circumstances having significance in the specific case. If the legislator exceeds the constitutional boundaries on determining the type of legislation, the court can declare the delegating norm for issue of the legislation to be contrary to the Constitution insofar as concerns the type of legislation (Supreme Court *en banc* judgment of 31 May 2011 in case No 3?3?1?85?10, para. 30).

77. In the context of the vaccination requirement imposed for combating the corona disease, the Supreme Court Administrative Law Chamber has found that regulating an individual case within the meaning of § 51 of the Administrative Procedure Act presumes that the case is delimited, first and foremost in spatial, temporal, personal or substantive terms (Supreme Court Administrative Law Chamber order of 25 November 2021 No 3?21?2241/11, para. 23). If a set of cases to be regulated is not specified in terms of any of the above aspects, it must be regulated by legislation of general application.

78. Sections 27 and 28 of the IDCPA are located in Chapter 5 of the IDCPA, which regulates prevention of the epidemic spread of infectious diseases. Control of the epidemic spread of infectious diseases means steps to prevent an outbreak of a specific epidemically spreading infectious disease which has already occurred or is specifically foreseeable at the time of establishing the restrictions. Thus, this means a response to a temporally and spatially delimited actual risk situation arising from an infectious disease which the Health Board constantly assesses based on epidemiological, laboratory and clinical information that it receives (§ 28(1) IDCPA), but not an abstract imaginary case. The epidemic spread of an infectious disease simultaneously constitutes an emergency within the meaning of § 2(1) of the Emergency Act, i.e. a certain event or a chain of events. The spread of an infectious disease may provide a basis for the Government of the Republic to declare an emergency situation (§ 87 clause 8 Constitution, Chapter 4 Emergency Act, § 26 IDCPA) if the emergency cannot be resolved without implementing the command organisation or measures laid down in Chapter 4 of the Emergency Act (§ 19(1) Emergency Act).

79. As already stated above (see para. 64), the disputed delegating norms set at least temporal, spatial and personal limits with regard to the measures to be applied. This proves that the legislator considered the case of actual spread of an infectious disease as a specific situation and its legal regulation as resolving an individual case stipulating the form of an order issued by the Government of the Republic, i.e. legislation of specific application. This choice of form, in turn, imposes limitations on the measures to be applied. Measures established by an order of the Government or the Health Board for a specific disease outbreak may not be left in force permanently – even if the disease does not recede – nor in the abstract for prevention of similar future risks after the current risk disappears.

80. Nor does establishment of restrictions in the form of legislation of specific application run counter to the need to ensure effective legal protection for the applicants in this administrative case or for other persons subjected to restrictions. An order by the Government of the Republic as legislation of specific application can be directly contested in administrative court proceedings by persons whose rights it restricted (§4(1) Code of Administrative Court Procedure) by seeking the legislation or a provision thereof to be invalidated. However, a regulation of the Government of the Republic cannot be contested directly before the administrative court (Supreme Court *en banc* judgment of 31 May 2011 in case No 3?3?1?85?10, para. 31), although it is possible to contest implementation of the regulation, including preventively if necessary (Supreme Court Administrative Law Chamber order of 25 October 2017 No 3?17?749/24, paras 10-11, and judgment of 7 June 2019 No 3?16?1191/66, para. 10.1). Although under the current procedural law the Chancellor of Justice cannot carry out abstract constitutional review in respect of legislation of specific application, the present constitutional review proceedings affirm that the applicants were able to achieve review of constitutionality of delegating norms underlying the disputed legislation of specific application in the form of specific constitutional review (§ 9 Constitutional Review Court Procedure Act). The issue whether under § 142 of the Constitution the Chancellor of Justice should also be able to contest orders of such a degree of generality as those in dispute in the main case does not concern the present case of specific constitutional review.

81. In the case of preventing the epidemic spread of infectious diseases, the choice of form in favour of legislation of specific application is also supported by the nature of infectious diseases and the possibility of a rapid change of situation due to lack or uncertainty of corresponding scientific knowledge, which in turn leads to the need to quickly implement, change or discontinue restrictions. The dynamic circumstances justify applying restrictions attuned precisely to the current situation, rather than universal measures established for a longer term and for abstract cases.

82. The Chamber concedes that, depending on the specificity of a particular infectious disease, an epidemic may acquire a particularly extensive personal or territorial scope or prove to be especially protracted. In that case, legislation of specific application established for control of the epidemic may become more general both in substantive, personal, spatial as well as temporal terms, so that it increasingly begins to resemble legislation of general application. Arising from the state’s duty of protection, such a change in the degree of generality of orders is to a certain extent compatible with the Constitution.

83. The corona disease also constitutes this kind of exceptional situation. Its epidemic spread has already been ongoing since 2020. It has been necessary to control disease outbreaks arising from several different strains of virus. In doing so, dealing with each individual disease outbreak as a separately regulated individual case was not precluded. Restrictions following both from orders No 212 and 305 had extensive substantive scope, covering essentially the territory of the whole country and all persons present in Estonia. The obligation for a corona certificate under Order No 305 was in force for 6 months and 16 days (from 26 August 2021 to 15 March 2022), the quarantine requirements under Order No 212 were in force for 1 year and 1 month (from 1 June 2021 to 30 June 2022). Prior to establishing orders No 212 and 305, similar – or partly even more serious and more extensive – restrictions were in force arising from previous orders by the Government of the Republic.

84. Despite an increased degree of generality of the restrictions, the disputed orders nevertheless did not yet exceed the threshold that would have clearly turned them into legislation of general application in substantive terms. In the latter case, the orders would have overstepped the boundaries of the delegating norms. Despite the longer-term validity of the orders, they were still temporary in nature. The Government of the Republic had the duty to assess the necessity for the restrictions established by Order no 305 at least every two weeks (clause 19 of the Order), and Order no 212 had been established for a term from 1 June 2021 to 30 June 2022 (clause 13 of the Order). In practice, the Government indeed constantly reassessed its orders, alleviated, withdrew and re-enacted measures based on the epidemiological situation and the legal values harmed by the restrictions. In the opinion of the Chamber, the relevant question is not whether the legislator could delegate to the Government the power to control corona by legislation of specific application, but whether the restrictions discussed in the main case remained within the boundaries of the individual delegating norms contained in §§ 27 and 28 of the IDCPA.

85. The conclusion reached in the previous paragraph is supported by the provisions on resolving an emergency situation laid down by the Emergency Act, in the creation of which the legislator has also proceeded from the perception that in the case of a particularly acute and large-scale emergency, including an emergency caused by the spread of an infectious disease covering the territory of the whole country and all persons, having a very broad substantive scope and not being limited in time, the declaration of an emergency situation as well as application of the measures to resolve it also takes place in the form of legislation of specific application (§ 21(1), § 31(3), § 32(1) etc, Emergency Act).

86. However, both the legislator and the executive must keep in mind that if restrictions imposed by legislation of specific application and having a great degree of generality remain in force for a longer unspecified time, then in substantive terms they may acquire the character of legislation of general application. In that case, the legislation is no longer compatible with the delegating norm (see also Supreme Court Administrative Law Chamber judgment of 18 May 2021 No 3?19?549/98, para. 18; order of 25 November 2021 No 3?21?2241/11, para. 23). Following from the principle of non-delegation, establishing some temporally extensive restrictions may instead require the form of a law and not a regulation.

87. The Chancellor of Justice has found that even though the delegating norms enable establishing restrictions by an order of the Government of the Republic, under the Government of the Republic Act the Government is not entitled to establish restrictions by an act which in substance is an order of general application within the meaning of § 51(2) of the Administrative Procedure Act.

88. The Chamber does not agree with this position. Under § 30(1) of the Government of the Republic Act, an order by the Government of the Republic is legislation of specific application. Since, based on the foregoing, no clear borderline exists between specific and abstract regulation, then enacting an order by legislation of specific application does not determine a particular degree of specificity to which regulatory provisions in that order must correspond. The degree of generality of legislation of specific application may vary depending on the issue that is regulated. The Government of the Republic Act only precludes issuing legislation clearly exhibiting characteristics of legislation of general application in the form of a Government order. Based on the combined effect of § 51 subsections (1) and (2) of the Administrative Procedure Act, the legislator has considered an order of general application to be a special type of administrative act whose degree of generality is greater than in the case of an ordinary administrative act (is addressed to a range of persons determined on the basis of general characteristics or aimed at changing the public law status of things), but smaller than in the case of an administrative act of general application (a regulation).

89. The lack of an exhaustively definable degree of specificity is an inherent characteristic of legislation of specific application (including a regulation of the Government of the Republic) and not a characteristic arising from the Administrative Procedure Act. For this reason, in determining the admissible degree of specificity of an order, no decisive role is played by the question whether the definition of an order of general application set out in § 51(2) of the Administrative Procedure Act extends to an order by the Government of the Republic.

90. Interpretation of the norms of the Government of the Republic Act and the Administrative Procedure Act put forward by the Chancellor of Justice would lead to the conclusion that under current law the Government is not entitled to issue orders exhibiting the characteristics of an order of general application. The Chamber does not see any compelling reasons why the legislator in enacting the Government of the Republic Act should have wished to preclude issuance of legislation substantively constituting a Government order of general application while other administrative authorities are not restricted in or precluded from issuing orders of general application. In particular considering that the higher in the administrative hierarchy the executive authority is placed and the broader its substantive and territorial competence, then presumably the higher is its need to issue legislation with a greater degree of generality. No need exists to preclude the right to issue orders of general application merely because the Government is entitled to issue regulations. Eventually, nor is the Government’s lack of competence to issue orders of general application affirmed by the legislator’s current understanding of the degree of generality of legislation to be enacted by Government orders (see e.g. § 31(2) Emergency Act).

91. Finally, the Chamber will deal with the proportionality of the rules of competence and delegating norms arising from the disputed §§ 27 and 28 of the IDCPA. In line with long-standing Supreme Court case-law, a measure is proportionate if it is appropriate, necessary and proportional in the narrow sense for achieving a constitutionally compatible, i.e. a legitimate, objective (e.g. Supreme Court *en banc* judgment of 15 March 2022 No 5?19?29/38, para. 72). The disputed norms were established in order to prevent the epidemic spread of infectious diseases, thereby ensuring protection of people's life and health. Thus, they served a legitimate objective (see paras 52 and 68 above). No reason exists to claim that the restrictions that the disputed norms enable establishing quarantine, temporary closure of schools, establishments and companies or restriction of their operation, and restriction of the freedom of movement – would, in principle, be inappropriate in preventing the epidemic spread of an infectious disease. In this respect, the corona disease is no different from other infectious diseases. Nor is there any reason to consider the restrictions as unnecessary or narrowly disproportional even on the level of the delegating norm. As explained above (see paras 68–69), fulfilling the state's duty of protection in the case of dangerous novel infectious diseases may presume establishing wide-ranging powers. Protection of people's life and health and ensuring the functioning of society as a whole are compelling objectives in the case of which it cannot be precluded that they outweigh the need to guarantee other fundamental rights.

92. The proportionality of a delegating norm does not in itself ensure that an administrative act issued or measure taken on the basis thereof by an administrative authority while exercising its discretion is always proportionate or otherwise lawful. Courts can assess the proportionality of orders in administrative court proceedings.

93. In view of all the foregoing, the Chamber dismisses the application by Tallinn Administrative Court.

IV

94. Under § 63(1) of the Constitutional Review Court Procedure Act, the necessary and justified legal expenses of the participants in proceedings mentioned in § 10(1) clause 3 of the Act shall be compensated in specific constitutional review proceedings (see Supreme Court *en banc* order of 9 April 2020 No 5?18?5/33, para. 16).

95. The applicants submitted a timely application for compensation of legal expenses related to adjudication of the constitutional review case. In total, the applicants seek compensation of the cost of 9654 euros (including VAT). According to the applicants, these legal expenses have been paid by the non-profit association *Eesti Tsiviilallianss* and they are under obligation to repay to this non-profit association all the

procedural expenses compensable by the respondent.

96. Under § 109(5) of the Code of Administrative Court Procedure, compensation of procedural expenses to a participant in proceedings is not precluded by the fact that these expenses were covered by another person on their behalf (e.g. Supreme Court Administrative Law Chamber judgment of 15 December 2015 in case No 3?3?1?63?15, para. 16). By analogy, this rule should also be applied in constitutional review court proceedings. In the opinion of the Chamber, the expenses are necessary and justified to the extent of 5000 euros. In this amount, the Republic of Estonia must be ordered to pay the expenses jointly to the applicants.

(signed digitally)

Links
[1] https://www.terviseamet.ee/et/koroonaviirus/koroonaviiruse-andmestik