

The Grand Chamber of the Constitutional Court of Bosnia and Herzegovina, composed of:

Mato Tadić, President,  
Miodrag Simović, Vice-President,  
Mirsad Čeman, Vice President,  
Valerija Galić, Judge,  
Seada Palavrić, Judge,  
Zlatko M. Knežević, Judge,

meeting to consider Case No **AP-3932/21** and adjudicate appeals brought by **Muamer Dedić and others**, made, pursuant to Article VI/3(b) of the Constitution of Bosnia and Herzegovina, as well as Article 57(2)(b), Article 59(1) and (2) and Article 72(2), (4) and (5) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Consolidated text (as published in BiH Official Gazette No 94/14), at its meeting held on 23 February 2022, the following

## **DECISION ON ADMISSIBILITY AND MERITS OF THE CASE**

To uphold the appeals by **Muamer Dedić, Ivan Jukić and Mirnes Ajanović**, brought against Conclusions of the Government of Tuzla Canton Nos 02/1-33-36123/21, dated 5 November 2021, 02/1-33-36123-1/21, dated 11 November 2021, and 02/1-33-38244/21, dated 2 December 2021.

To uphold the appeals by **Mina Bećirević, Zlatko Aleksić, Taib Bujak, Mela Mlivo, Emir Garagić, Alma Gavrić, Rešad Kusturica, Mirjana Jovanović and Ognjen Bošnjak**, brought against Conclusions of the Government of Sarajevo Canton No 02-04-79-6/22, dated 6 January 2022.

The Constitutional Court has established breaches of the right to respect for private and family life, as enshrined in Article II/3(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in relation to the Appellants.

Pursuant to Article 72(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Court instructs the Parliament of the Federation of Bosnia and Herzegovina and the Government of the Federation of Bosnia to take action and align their activities, immediately and without delay, with the standards set out in Article II/3(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as set out in this Decision.

Pursuant to Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Constitutional Court instructs the Parliament of the Federation of Bosnia and Herzegovina and the Government of the Federation of Bosnia to inform the Constitutional Court, within 60 days of receipt of this Decision, on action they have taken to implement the instruction from the previous paragraph of the operative part of this decision.

This Decision is to be published in the Official Gazette of Bosnia and Herzegovina, the Official Gazette of the Federation of Bosnia and Herzegovina, the Official Gazette of Republika Srpska and the Official Gazette of the Brčko District of Bosnia and Herzegovina.

# EXPLANATORY STATEMENT

## I. Introduction

1. Muamer Dedić (hereinafter: ‘the Appellant’), a resident of Tuzla, represented by the Tuzla-based lawyer Mirnes Ajanović, brought an appeal on 17 November 2021 before the Constitutional Court of Bosnia and Herzegovina (hereinafter: ‘the Constitutional Court’) against Conclusions of the Government of Tuzla Canton (hereinafter: ‘the TC Government’) No 02/1-33-36123/21 of 5 November 2021. This appeal was filed under number AP-3932/21. The Appellant supplemented his appeal on 3 December 2021.

2. Ivan Jukić (hereinafter: ‘the Appellant’), a resident of Tuzla, represented by the Tuzla-based lawyer Mirnes Ajanović, brought an appeal on 7 December 2021 before the Constitutional Court against Conclusions of the TC Government Nos 02/1-33-36123-1/21 of 11 November 2021 and 02/1-33-38244/21 of 2 December 2021. This appeal was filed under number AP-4172/21.

3. Mirnes Ajanović (hereinafter: ‘the Appellant’), a resident of Tuzla, brought an appeal 29 December 2021 before the Constitutional Court against Conclusions of the TZ Government No 02/1-33-38244/21 of 2 December 2021. This appeal was filed under number AP-4499/21.

4. Mina Bećirević, Zlatko Aleksić, Taib Bujak, Mela Mlivo, Emir Garagić, Alma Gavrić, Rešad Kusturica, Mirjana Jovanović and Ognjen Bošnjak (hereinafter: ‘the Appellants’), represented by the Tuzla-based lawyer Mirnes Ajanović, brought an appeal on 12 January 2022 before the Constitutional Court against Conclusions of the Government of Sarajevo Canton (hereinafter: ‘the SC Government’) No 02-04-79-6/22 of 6 January 2022. This appeal was filed under number AP-117/22.

## II. Proceedings before the Constitutional Court

5. Pursuant to Article 23 of the Rules of the Constitutional Court, on 3 December 2021, the Court invited the TC Government, the Ministry of Health of Tuzla Canton (hereinafter: the TC Ministry of Health), the Ministry of Trade, Tourism and Transport of Tuzla Canton (hereinafter: the TC Ministry of Trade), the Assembly of the Tuzla Canton (hereinafter: the TC Assembly), the Public Health Institute of the Tuzla Canton (hereinafter: the TC Public Health Institute), the Government of the Federation of Bosnia and Herzegovina (hereinafter: the FBiH Government), the Parliament of the Federation of Bosnia and Herzegovina (hereinafter: the FBiH Parliament) and the Public Health Institute of the Federation of Bosnia and Herzegovina (hereinafter: the FBiH Public Health Institute) to submit a response to Appeal No AP-3932/21.

6. The TC Government, the TC Ministry of Health, the TC Assembly, the TC Public Health Institute and the FBiH Government submitted, from 10 to 22 December, responses to Appeal No AP-3932/21, whereas the FBiH Parliament, the TC Ministry of Trade and the FBiH Public Health Institute failed to submit their responses to said appeal within the set deadline.

7. On 29 December 2021, the Constitutional Court submitted to the Appellant's legal representative responses to the appeal in Case No AP-3932/21, inviting him to submit a statement.

8. On 7 January 2022, the Appellant's legal representative in Case No AP-3932/21 submitted a statement to the responses to said appeal.

9. Pursuant to Article 23 of the Rules of the Constitutional Court, the Court invited on 13 January 2021 the FBiH Government, the SC Government, and the Assembly of the Sarajevo Canton (hereinafter: 'the SC Assembly') to submit responses to Appeal No AP-117/22.

10. On 26 January 2022, the FBiH Government submitted a response to Appeal No AP-117/22, whereas the SC Government and the SC Assembly failed to submit responses to the appeal within the set deadline.

11. On 8 February 2022, the Constitutional Court submitted a response to the FBiH Government's appeal in Case No AP-117/22 to the Appellant's legal representative, inviting him to submit a statement.

12. Since the above appeals raise the same or similar issues, the Constitutional Court decided, in accordance with Article 32(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (hereinafter: 'the Constitutional Court's Rules'), to join Appeals Nos AP-3932/21, AP-4172/21, AP-4499/21 and AP-117/22 so as to consider them within a single procedure culminating in a single decision with reference number *AP-3932/21*.

13. Similarly, since Appeals Nos AP-4172/21 and AP-4499/21 raise the same or a similar issue, in terms of the factual background and legal implications, as Case No AP-3932/21, the Constitutional Court decided, in accordance with Article 23(6) of the Constitutional Court's Rules, against eliciting responses to Appeals Nos AP-4172/21 and AP-4499/21 from the aforementioned parties in the proceedings under Case AP-3932/21. Instead, the Court will consider the responses previously submitted in this case.

### **III. Proceedings before the Constitutional Court**

14. The facts of the case, as stated in the Appellants' allegations and the documents submitted to the Constitutional Court, may be summarised as follows.

15. The TC Government adopted Conclusions No 02/1-33-36123/21 on 5 November 2021, Conclusions No 02/1-33-36123-1/21 on 11 November 2021 and Conclusions No 02/1-33-38244/21 on 2 December 2021. Among other things, said conclusions served to transpose orders and recommendations from the Emergency Response Service of the TC Ministry of Health and the Emergency Response Service of the Federal Ministry of Health relating to the operation of hospitality and catering establishments in the Tuzla Canton, i.e. to the restriction on the number of guests indoors and the application of rules commonly referred to as the VTR (vaccinated-tested-recovered) rule.

16. The SC Government adopted Conclusion No 02-04-79-6/22 of 6 January 2022, which, among other things, required *the elderly and carers working in social institutions for the care of the elderly, people aged 60 and over, and people with associated comorbidities to take a third (booster) dose against COVID-19.*

17. The relevant content of the challenged conclusions is presented in detail in Part V of this Decision. Relevant regulations (Sections 36-39).

#### **IV. The Appellants' allegations**

18. The Appellants find that the conclusions of the TC Government and the SC Government, which they challenged, breached their rights under Article II/3(a) of the Constitution of Bosnia and Herzegovina, Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: 'the European Convention'), Article II/3(f) of the Constitution of Bosnia and Herzegovina, Article 8 of the European Convention, Article II/3(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No 4 to the European Convention, as well as the prohibition of discrimination from Article II/4 of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention.

19. Firstly, the Appellants state that they brought the appeals in question in accordance with Article 18(2) of the Rules of the Constitutional Court. The Appellants then point out that the challenged conclusions are contrary to both the Constitution of Bosnia and Herzegovina and the FBiH Patients (Rights, Obligations and Responsibilities) Act, the FBiH Health Care Act, the BiH Personal Data (Protection) Act, the FBiH Police Officers Act and the BiH Prohibition of Discrimination Act. The Appellants refer to the Nuremberg Code (the absolute necessity of obtaining the voluntary consent of a human subject without coercion or extortion), Resolution of the Council of Europe No 2361 (2021) of 27 January 2021 (vaccine taking being optional).

In the light of the above, the Appellants state, inter alia, that the challenged decisions constitute secondary or delegated legislation and that, as such, they rank lower than the Constitution of Bosnia and Herzegovina and said acts. The Appellants go on to argue extensively for the harmfulness of the

challenged conclusions for citizens in the light of preventing the spread of the SARS-CoV-2 virus. In support of their arguments, they refer to medical studies and research, which have been highlighted. The Appellants find that the challenged conclusions unjustifiably put them in an unequal position (unvaccinated versus vaccinated citizens).

20. In the supplement to Appeal No AP-3932/21, the Appellant refers to the statement of the Director-General of the World Health Organization (hereinafter: 'WHO') regarding the transmission of said virus in the case of vaccinated people.

#### **a) Response to Appeal No AP-3932/21**

21. In its extensive response to the appeal, the FBiH Government emphasised activities undertaken in the light of the conclusions of the Constitutional Court's Decision on Admissibility and Merits of Case No *AP-3683/20* of 22 December 2020 (available at [www.ustavnisud.ba](http://www.ustavnisud.ba)) to rectify shortcomings in the process of adopting measures during the coronavirus pandemic, as identified by the Constitutional Court. On 8 January 2021, the FBiH Government adopted Conclusion No 21/2021, which required the implementation of a series of activities to ensure the implementation of said decision of the Constitutional Court. After the above Conclusion (dated 8 January 2021) had been adopted, the FBiH Government pointed out that,

on 14 January 2021, it adopted a decision by which it amended Decision No 61/2021 on the Proclamation of a Health Emergency following the Emergence of coronavirus (COVID-19) in the BiH Federation (published in the FBiH Official Gazette No 5/21). In this context, the FBiH Government emphasised the fact that its conclusions define points from which it is evident that the validity period of orders and recommendations issued by the Emergency Response Service of the Federal Ministry of Health is 14 days. The FBiH Government said it regularly reported to the FBiH Parliament on the epidemiological situation in the Federation and the measures it had been taking to protect the health of citizens and reduce the risk of the virus spreading. The FBiH Government undertook all activities required by the Constitutional Court by Decision No *AP-3683/20*. In other words, it implemented the Decision in full.

22. The FBiH Government went on to say that the challenged decision of the TC Government of 11 November 2021, which amended the latter government's decision of 5 November 2021, was adopted based on the FBiH Government's Conclusions adopting the Information on the COVID-19 Pandemic in the Federation of Bosnia and Herzegovina on 1 November 2021, containing Proposed Orders and Recommendations from the Emergency Response Service of the Federal Ministry of Health (as published in the FBiH Official Gazette No 90/21). In that sense, it called attention to the highlighted content of said conclusions of the FBiH Government (the General Order). This means that the FBiH Government made clear that the VTR rule in the federal order was introduced for

situations in which large gatherings are permitted. Cantonal governments, specifically the emergency response services of cantonal ministries of health, may, as pointed out, adopt measures stricter than those prescribed by the General Order if the risk assessment of an event shows that the epidemiological situation in the canton may deteriorate. In that sense, the FBiH Government stated that the TC Government, acting in line with the FBiH Government's said General Order, adopted the challenged decisions requiring measures that can help combat the coronavirus pandemic. In this regard, it is indeed true that the measures ordered by the FBiH Government and the TC Government, adopted to protect public health, consist of restricting certain human rights guaranteed by the European Convention such as the right to personal liberty, to freedom of movement, to freedom of assembly, and to private and family life. However, the European Convention itself imposes the adoption of emergency measures in crisis situations. In that sense, any failure to take action or to take action in a timely fashion, as well as any inadequate or insufficient information provided to the public, could be considered a breach of the positive responsibilities of the state. Accordingly, the FBiH Government said that the action taken by the authorities of the Federation of Bosnia and Herzegovina and the Tuzla Canton, amounting to restrictions on certain human rights, had to be such as to prevent a further spread of the virus and protect public health. Therefore, it is undeniable that the imposed measures are clearly aimed at preventing further spread of the virus and that, as such, they are legitimate, justified, and consistent with domestic law, the European Convention, WHO positions and the practices of neighbouring countries that have also been affected by the coronavirus pandemic.

23. The TC Assembly said that it had forwarded the appeal in question and its supplement to the TC Government for an opinion, since the latter had issued the challenged decision.

24. In an extensive response, the TC Government wrote that much remained unknown about the pandemic and that certificates confirming recovery from coronavirus and vaccination should be made available to the public for the very reason of preventing further spread of the virus. The TC Government said that the Appellant (AP-3932/21) had completely disregarded the basic regulation concerning 'this issue', namely the Infectious Diseases (Protection of the Public) Act, which applies in this case because COVID-19 is considered a contagious disease. Moreover, it said, on 4 November 2021, that the Emergency Response Service of the Federal Ministry of Health had adopted an order requiring cantonal governments to take more restrictive measures than those outlined in that order. The controversial Order was therefore said to have been adopted on the basis of 'the Order of the Federal Emergency Response Service pertaining to hospitality and catering establishments'. The challenged Conclusions of the TC Government of 5 November 2021 were adopted on the proposal of the Emergency Response Service of the TC Ministry of Health. The TC Government then provided reasons why the relevant section of said challenged conclusions was amended by the challenged TC Conclusions of 11 November 2021. It emphasised the justification and necessity of vaccination in

this particular case. On 9 March 2021, the TC Government adopted Conclusions No 02/1-33-4331/21 requiring the Emergency Response Service of the TC Ministry Health to issue any order or decision in the form of a proposal, to submit it to the TC Government for consideration, and to inform the TC Assembly on the epidemiological situation and measures taken by the Emergency Response Service on a monthly basis. Therefore, the TC Government adopted the challenged measure as the highest executive body in the Tuzla Canton. In fact, the TC Government has the competence to take all positive measures to protect all rights enshrined in the European Convention. In this particular case, that competence is reflected in the protection of public health, a process in which the TC Assembly, as the highest legislative body in the Tuzla Canton, has actively participated. Regarding the supplement to the appeal, the TC Government pointed out that the virus being transmitted in all sections of the population, regardless of the individual's vaccination status, was not a matter of dispute. What was a matter of dispute, however, were the outcomes among those who received the vaccine and those who did not. In this particular case, the principle of proportionality was observed because no other milder measure could have achieved this goal when the measure was imposed. The measures were targeted to the epidemiological situation in the Tuzla Canton, but they also reflected those taken by neighbouring countries and EU Member States.

25. The TC Ministry of Health called all allegations in the appeal arbitrary and unfounded. The TC Government echoed these sentiments by providing identical reasons and arguments on the appeal.

26. The TC Public Health Institute said that it did not consider itself a party to the appeal proceedings, since the decisions and conclusions listed in the appeal were adopted by the TC Government and the Emergency Response Service of the TC Ministry of Health.

### **The Appellant's statement on the responses to Appeal No AP 3932/21**

27. Acting through his legal representative, the Appellant produced a statement to the responses to the appeal in which he essentially reiterated the allegations from the appeal and the supplement thereto, focusing on the (un)justified adoption of the challenged measures regarding the operation of hospitality and catering establishments and the restrictions imposed by the challenged TC Government's conclusions in the context of the spread of COVID-19, a new coronavirus, and the disease caused by it.

### **b) Response to Appeal No AP-117/22**

28. The FBiH Government's primary argument was that, on 24 January 2022, the SC Government had repealed Section 2 of the challenged Conclusions of 6 January 2022. As a result, the section of the conclusions challenged by the Appellants was repealed and it made no sense to discuss the Appellants' claims as the legal circumstances had changed. The FBiH Government took a position on the allegations in the appeal, pointing to arguments it had previously given in its response to

Appeal No AP-3932/21. It also emphasised that the challenged Conclusions of the SC Government had been adopted based on the FBiH Government's Conclusions, in force at the time, to adopt Information on the COVID-19 Pandemic in the Federation of Bosnia and Herzegovina, as published in the FBiH Official Gazette No 106/21).

## V. Relevant regulations

29. The following are relevant provisions of the **Infectious Diseases (Protection of the Public) Act** (as published in FBiH Official Gazette No 29/05):

### *Article 1*

*This Act defines infectious diseases the prevention and control of which is of interest to the Federation of Bosnia and Herzegovina (hereinafter: 'the Federation') and lays down measures to protect the public from infectious diseases.*

### *Article 3*

*Protection against infectious diseases shall be the duty of local self-government units – local authorities, cantons and the Federation, health-care institutions, health insurance institutes, owners or private practices, companies and other legal entities and natural persons.*

### *Article 4*

*Protection against infectious diseases shall consist of organising and implementing:*

*1. measures to prevent and control infectious diseases [...]*

*B. SPECIAL MEASURES TO PREVENT AND CONTROL INFECTIOUS DISEASES*

### *Article 11(8)*

*Special measures to prevent and combat infectious diseases shall be:*

*8. immunisation, immunoprophylaxis, and chemoprophylaxis;*

### *Article 45(1)*

*(1) Regulations laying down Methods of Mandatory Immunisation, Immunoprophylaxis and Chemoprophylaxis against Infectious Diseases and relating to Persons subject to this Requirement shall be laid down by the Federal Minister.*

*IV – PRECAUTIONS TO BE TAKEN TO PROTECT THE PUBLIC FROM INFECTIOUS DISEASES*

### *Article 54*

*To protect the Federation's population from the emergence of cholera, plague, viral haemorrhagic fevers, yellow fever, SARS and other infectious diseases, measures envisaged by this Act, international sanitary conventions and other international agreements shall be taken.*

*To prevent and control infectious diseases referred to in the first paragraph of this article, the Federal Ministry of Health may order special emergency measures to protect against such diseases:*

[...]

*6. other measures prescribed by international regulations.*

**30.** The following are relevant provisions of **the Federation of Bosnia and Herzegovina (Government) Act** (as published in FBiH Official Gazette Nos 1/94, 8/95, 58/02, 19/03, 2/06 and 8/06):

Article 19(2) and (4)

*(2) Individual matters shall be regulated, Government measures taken, consent given, acts issued by other bodies or organisations confirmed, and any matter falling outside a regulation determined on the basis of a decision.*

*(4) Positions on matters of importance for implementing an adopted policy shall be taken, internal relations within the Government regulated, and tasks for federal administrative bodies and Government services entrusted on the basis of a conclusion.*

**31.** The following are relevant provisions of **the Tuzla Canton (Government) Act** (as published in TC Official Gazette Nos 17/2000, 1/2005, 11/2006, 13/2011 and 15/2017):

## *II. THE GOVERNMENT'S COMPETENCE*

*Article 5*

*The Government shall have competence to:*

*(d) perform any other responsibilities entrusted to the Canton by the Federal Government;*

[...]

*(g) to develop conditions for the exercise and protection of human rights and to take action where they have been breached;*

[...]

## *VI. GOVERNMENT ACTS*

*Article 28*

*In exercising its powers, the Government shall issue regulations, decisions and conclusions.*

*Article 29*

[...]

*Positions on matters of importance for implementing an adopted policy shall be taken, internal relations within the Government regulated and tasks for administrative bodies, services and government working bodies entrusted on the basis of a conclusion.*

*A conclusion shall also be used for the making of decisions in other cases where no other acts have been issued.*

**32.** The following are relevant provisions of the **Sarajevo Canton (Government) Act** (as published in SC Official Gazette No 36/14 – New consolidated text and No 37/14 – Corrigendum):

*VII – ACTS OF THE CANTONAL GOVERNMENT*

*Article 26*

*In exercising its constitutional powers, the Government shall issue regulations, decisions and conclusions.*

*Article 28(4)*

*(4) Positions on matters of importance for implementing an adopted policy shall be taken, internal relations within the Cantonal Government regulated and tasks for administrative bodies, services and working bodies of the Cantonal Government entrusted on the basis of a conclusion. A conclusion shall also be used for the making of decisions in other cases where no other acts have been issued.*

**33. Conclusions adopting the Information on the COVID-19 Pandemic in the Federation of Bosnia and Herzegovina on 1 November 2021, containing Proposed Orders and Recommendations from the Emergency Response Service of the Federal Ministry of Health No 1638/2021 of 4 November 2021 (as published in FBiH Official Gazette No 90/21 of 10 November 2021).**

*Pursuant to Article 19(4) of the Federation of Bosnia and Herzegovina (Government) Act (as published in FBiH Official Gazette Nos 1/94, 8/95, 58/02, 19/03, 2/06 and 8/06), the Government of the Federation of Bosnia and Herzegovina has adopted, at its 288th meeting, held on 4 November 2021, the following CONCLUSIONS in response to a proposal of the Emergency Response Service of the Federal Ministry of Health, and with a view to implementing Conclusions of the Government of the Federation of Bosnia and Herzegovina No 21/2021 of 8 January 2021, adopted to implement the Decision on Admissibility and Merits of the Case from the Constitutional Court of Bosnia and Herzegovina in Case E.Š. and Others No AP-3683/20*

*TO ADOPT THE INFORMATION ON THE COVID-19 PANDEMIC IN THE FEDERATION OF BOSNIA AND HERZEGOVINA ON 1 NOVEMBER 2021, CONTAINING PROPOSED ORDERS AND RECOMMENDATIONS FROM THE EMERGENCY RESPONSE SERVICE OF THE FEDERAL MINISTRY OF HEALTH*

[...]

*2. To adopt the Orders of the Emergency Response Service of the Federal Ministry of Health, which form an integral part of these Conclusions (Appendix 1).*

[...]

*4. To order cantonal governments, specifically cantonal emergency response services of the ministries of health, to introduce more restrictive measures based on an assessment of the epidemiological situation in the relevant canton or local authority area, and to regularly notify the Emergency Response Service of the Federal Ministry of Health.*

[...]

*8. In accordance with Section 4 of Conclusion No 21/2021 of 8 January 2021, the Government of the Federation of Bosnia and Herzegovina shall, at its 288th meeting to be held on 4 November 2021, inform the Parliament of the Federation of Bosnia and Herzegovina about the epidemiological situation in the Federation of Bosnia and Herzegovina and any measures taken by the Government of the Federation of Bosnia and Herzegovina to protect the health of citizens.*

[...]

*ORDERS*

*OF THE EMERGENCY RESPONSE SERVICE OF THE FEDERAL MINISTRY OF HEALTH*

*I. GENERAL ORDERS*

*1. Cantonal governments, specifically the emergency response services of cantonal ministries of health, are herewith ordered to take more restrictive measures than those from this order, [...].*

[...]

*5. Notwithstanding Section 3 of this Order, the organisation of large gatherings, of up to no more than 150 people indoors or 300 people outdoors, shall be permitted provided that the size of the space allows the hygienic and epidemiological precautions to be exercised.*

*This shall rest on the caveat that people participating in such gatherings have:*

- a negative rapid antigen or PCR test taken no more than 48 hours before arrival, or*
- a certificate confirming recovery from COVID-19 not older than 6 months, or*
- a certificate of vaccination.*

*The organiser shall be responsible for taking epidemiological precautions and organising the gathering.*

[...]

6. *The recommendations of the Public Health Institute of the Federation of Bosnia and Herzegovina (available at [www.zzjzfbih.ba](http://www.zzjzfbih.ba)) shall be strictly observed by all those to whom they apply for the duration of the coronavirus pandemic in the Federation of Bosnia and Herzegovina, specifically:*

*[...]*

*recommendations for hospitality and catering establishments;*

*[...]*

## *VI. ORDERS FOR HOSPITALITY AND CATERING ESTABLISHMENTS*

*1. The provision of services by hospitality and catering establishments in open and enclosed spaces shall be permitted provided that their guests are seated and that they observe recommendations (hygienic and epidemiological measures) issued by the Public Health Institute of the Federation of BiH under Chapter I. General Orders, Sections 2-6. The provision of services by hospitality and catering establishments shall be permitted for no more than 50 people in an enclosed space or 100 people in an open space provided that the size of the indoor and outdoor areas facilitates compliance with the measures and recommendations of the Public Health Institute of the Federation of BiH.*

*2. Emergency response services of cantonal ministries of health are instructed to define modalities for the operation of hospitality and catering establishments based on a risk analysis and an assessment of the epidemiological situation.*

*[...]*

**34. Conclusions adopting the Information on the COVID-19 Pandemic in the Federation of Bosnia and Herzegovina on 29 December 2021, containing Proposed Orders and Recommendations from the Emergency Response Service of the Federal Ministry of Health of 30 December 2021 (as published in FBiH Official Gazette No 106/21).**

*Pursuant to Article 19(4) of the Federation of Bosnia and Herzegovina (Government) Act (as published in FBiH Official Gazette Nos 1/94, 8/95, 58/02, 19/03, 2/06 and 8/06), the Government of the Federation of Bosnia and Herzegovina has adopted, at its 297th meeting, held on 30 December 2021, the following*

**CONCLUSIONS TO ADOPT THE INFORMATION ON THE COVID-19 PANDEMIC IN THE FEDERATION OF BOSNIA AND HERZEGOVINA ON 27 DECEMBER 2021, CONTAINING PROPOSED ORDERS AND RECOMMENDATIONS FROM THE EMERGENCY RESPONSE SERVICE OF THE FEDERAL MINISTRY OF HEALTH**

*in response to a proposal of the Emergency Response Service of the Federal Ministry of Health and with a view to implementing Conclusions of the Government of the Federation of Bosnia and Herzegovina No 21/2021 of 8 January 2021, adopted to implement the Decision on Admissibility and Merits of the Case from the Constitutional Court of Bosnia and Herzegovina in Case E.Š. and Others No AP-3683/20.*

[...]

*2. To adopt the Orders of the Emergency Response Service of the Federal Ministry of Health, which form an integral part of these Conclusions (Appendix 1).*

[...]

*4. To order cantonal governments, specifically cantonal emergency response services of the ministries of health, to introduce more restrictive measures based on an assessment of the epidemiological situation in the relevant canton or local authority area, and to regularly notify the Emergency Response Service of the Federal Ministry of Health.*

[...]

*7. The Orders and Recommendations of the Emergency Response Service of the Federal Ministry of Health shall take effect on 30 December 2021 and be valid for a period of 14 days.*

[...]

*10. In accordance with Section 4 of Conclusion No 21/2021 of 8 January 2021, the Government of the Federation of Bosnia and Herzegovina shall, at its 297th meeting, to be held on 30 December 2021, inform the Parliament of the Federation of Bosnia and Herzegovina about the epidemiological situation in the Federation of Bosnia and Herzegovina and any measures taken by the Government of the Federation of Bosnia and Herzegovina to protect the health of citizens.*

[...]

#### *Appendix 1*

### *ORDERS OF THE EMERGENCY RESPONSE SERVICE OF THE FEDERAL MINISTRY OF HEALTH*

[...]

#### *III. ORDERS PERTAINING TO THE ORGANISATION AND IMPLEMENTATION OF VACCINATION AGAINST COVID-19*

*1. Competent cantonal bodies and cantonal health institutions are herewith ordered to continuously carry out vaccination against COVID-19 in accordance with the Regulations laying down Methods of Mandatory Immunisation, Immunoprophylaxis and Chemoprophylaxis against Infectious Diseases and relating to Persons subject to this Requirement (as published in FBiH Official Gazette Nos 22/19, 12/21 and 47/21 and 69/21), as well as in accordance with the recommendations of the Expert Advisory Body for Immunisation of the Federal Ministry of Health.*

[...]

35. The following are relevant provisions of the **Regulations laying down Methods of Mandatory Immunisation, Immunoprophylaxis and Chemoprophylaxis against Infectious Diseases and relating to Persons subject to this Requirement** (as published in FBiH Official Gazette Nos 22/19, 12/21, 47/21 and 69/21):

*Article 1*

*(Subject matter)*

*These Regulations lay down methods to be applied to implement mandatory immunisation, immunoprophylaxis and chemoprophylaxis against certain infectious diseases referred to in Articles 40-43 of the Infectious Diseases (Protection of the Public) Act (as published in Official Gazette No 29/05 – hereinafter: ‘the Act’) and identify persons who are subject to said requirement.*

36. The following are relevant provisions of the **Regulations amending the Regulations laying down Methods of Mandatory Immunisation, Immunoprophylaxis and Chemoprophylaxis against Infectious Diseases and relating to Persons subject to this Requirement** of 4 June 2021 (as published in FBiH Official Gazette No 47/21):

*Article 1*

*Article 61a. ‘Immunisation against COVID-19 in the Context of a Declared Pandemic’ of the Regulations laying down Methods of Mandatory Immunisation, Immunoprophylaxis and Chemoprophylaxis against Infectious Diseases and relating to Persons subject to this Requirement (as published in FBiH Official Gazette Nos 22/19 and 12/21) shall be amended to read as follows:*

*Article 61a.*

*Immunisation against COVID-19 in the Context of a Declared Pandemic*

*According to medical and epidemiological indications, immunisation, using an appropriate vaccine against COVID-19 and in keeping with the manufacturer’s instructions, is recommended for:*

*[...]*

- *health-care staff and carers working in institutions for the care of the elderly;*
- *residents of institutions for the care of the elderly;*
- *persons over 75 years of age;*
- *persons aged 60 to 74;*

*[...]*

- *other age groups.*

**37. Conclusions of the Government of the Tuzla Canton No 02/1-35-35723/21 of 5 November 2021**

*Pursuant to Articles 5 and 29 of the Tuzla Canton (Government) Act (as published in TC Official Gazette Nos 17/00, 1/05, 11/06, 13/11 and 15/17), and in connection with Conclusion No 02/1-33-4331/21 of 9 March 2021, the Government of the Tuzla Canton adopted, at its meeting held on 5 November 2021, the following*

#### **CONCLUSIONS**

*To adopt the Order of the Emergency Response Service of the Tuzla Canton Ministry of Health proposed at the Ministry meeting held on 4 November 2021, as follows:*

*[...]*

*4. Pursuant to the Order of the Emergency Response Service of the Ministry of Health of the Federation of Bosnia and Herzegovina, the organisation of large gatherings, of up to no more than 150 people indoors or 300 people outdoors, shall be permitted, provided that the size of the space allows the hygienic and epidemiological precautions to be exercised.*

*This shall rest on the caveat that people participating in such gatherings have:*

- a negative rapid antigen or PCR test taken no more than 48 hours before arrival and issued by a registered institution or laboratory, or*
- a certificate confirming recovery from COVID-19 not older than 6 months, or*
- a certificate of vaccination.*

*The organiser shall be responsible for taking epidemiological precautions and organising the gathering. The organiser referred to in this section shall be required to obtain the prior consent of the Emergency Response Service of the Ministry of Health.*

*5. Working hours shall be limited to 21.00:*

*- for all hospitality and catering establishments [...].*

*[...]*

*22. The orders and recommendations of the Emergency Response Service of the Federal Ministry of Health that are effective during the period of validity of this Order shall be adopted, with the exception of any provisions covered by this Order, and shall apply to the Tuzla Canton.*

*23. This Order shall apply from 5 November 2021 to 19 November 2021.*

*[...]*

#### **38. Conclusions of the Government of the Tuzla Canton No 02/1-33-36123-1/21 of 11 November 2021**

*Pursuant to Articles 5 and 29 of the Tuzla Canton (Government) Act (as published in TC Official Gazette Nos 17/00, 1/05, 11/06, 13/11 and 15/17) and in connection with Conclusions No 02/1-33-4331/21 of 9 March 2021, the Government of the Tuzla Canton adopted, at its meeting held on 11 November 2021, the following CONCLUSIONS*

*after considering the Initiative of the Ministry of Trade, Tourism and Transport to amend the Order of the Emergency Response Service of the Tuzla Canton Ministry of Health and Conclusions of the Tuzla Canton Government No 02/1-33-36123/21 of 5 November 2021:*

*To amend Conclusions No 02/1-33-36123/21 of 5 November 2021*

[...]

## *II*

*Sections 5 and 6 of the Conclusions of the Tuzla Canton Government No 02/1-33-36123/21 of 5 November 2021 shall be amended to read as follows:*

*'5. Working hours shall be limited to 23.00 for:*

- hospitality and catering establishments only [...].*

*After 19.00, all listed facilities shall be required to ensure that all guests on their premises have one of the following:*

- a negative rapid antigen or PCR test taken no more than 48 hours before arrival and issued by a registered institution or laboratory, or*
- a certificate confirming recovery from COVID-19 not older than 6 months, or*
- a certificate of vaccination.*

*Before 19.00, facilities shall be required to comply with the provisions of Sections 1 and 2 of the Conclusions of 5 November 2021.*

[...]

## *III*

*These Conclusions shall apply from 11 November 2021 to 19 November 2021,*

[...]

### **39. Conclusions of the Government of the Tuzla Canton No 02/1-33-38244/21 of 2 December 2021**

*Pursuant to Articles 5 and 29 of the Tuzla Canton (Government) Act (as published in TC Official Gazette Nos 17/00, 1/05, 11/06, 13/11 and 15/17) and in connection with Conclusions No 02/1-33-4331/21 of 9 March 2021, the Government of the Tuzla Canton adopted, at its meeting held on 2 December 2021, the following*

#### *CONCLUSIONS*

*To adopt the Order of the Emergency Response Service of the Tuzla Canton Ministry of Health proposed at the Ministry meeting held on 1 December 2021, as follows:*

[...]

5. Working hours shall be limited to 23.00 for hospitality and catering establishments only [...].

After 19.00, all listed facilities shall be required to ensure that all guests on their premises have one of the following:

- a negative rapid antigen or PCR test taken no more than 48 hours before arrival and issued by a registered institution or laboratory, or
- a certificate confirming recovery from COVID-19 not older than 6 months, or
- a certificate of vaccination.

[...]

19. The orders and recommendations of the Emergency Response Service of the Federal Ministry of Health that are effective during the period of validity of this Order shall be adopted, with the exception of any provisions covered by this Order, and shall apply to the Tuzla Canton.

20. This Order shall apply from 4 December 2021 to 17 December 2021.

[...]

**40. Conclusions of the Government of the Tuzla Canton No 02-04-79-6/22 of 6 January 2022** (as published in the Sarajevo Canton Official Gazette No 2/22 of 13 January 2022).

Pursuant to Articles 26 and 28(4) of the Sarajevo Canton (Government) Act (as published in the Sarajevo Canton Official Gazette No 36/14 – New consolidated text and No 37/14 – Corrigendum), Article 9, in connection with Article 1 of the Regulations on the Organisation and Methods of Work of the Emergency Response Service of the Federal Ministry of Health (as published in FBiH Official Gazette No 10/12), moreover in connection with the Decision of the Constitutional Court of Bosnia and Herzegovina No AP 3683/20 of 22 December 2020 (as published in FBiH Official Gazette No 16/21), the Government of the Sarajevo Canton adopted, at its 58th meeting, held on 6 January 2022, the following

#### CONCLUSIONS

on the proposal of the Emergency Response Service of the Sarajevo Canton Ministry of Health.

2. The elderly and carers working in social institutions for the care of the elderly, people aged 60 and over and people with associated comorbidities shall be required to take a third (booster) dose against COVID-19.

[...]

11. These Conclusions shall take effect on the date when they are adopted. They shall apply from 6 January 2022 to 19 January 2022 and shall be published in the Official Gazette of the Sarajevo Canton.

## VI. Admissibility

41. Pursuant to Article VI.3(b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court also has competence to consider appeals in matters covered by the Constitution when they become the subject of a dispute due to a judgment of any court in Bosnia and Herzegovina.

42. Firstly, the Constitutional Court emphasises the fact that the Appellants invoked the safeguards laid down in Article II/3(a), (f) and (m) of the Constitution of Bosnia and Herzegovina, Articles 2 and 8 of the European Convention and Article 2 of Protocol No 4 to the European Convention, as well as the prohibition of discrimination laid down in Article II/4 of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention. In terms of the allegations made in the appeals, it should be noted that the Constitutional Court is not bound by any legal qualification in the appeals, and that, in keeping with the legal maxim *iura novit curia*, it is authorised to apply relevant constitutional and convention law to the facts of the case. Therefore, in the context of the present case, the Constitutional Court finds that, bearing in mind the content of the measures imposed by the challenged conclusions of the TK Government and the SC Government, any examination of said decisions and all other allegations in the appeals should be approached in the light of the safeguards laid down in Article II/3(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. This approach is consistent with the Constitutional Court's practice hitherto in cases concerning COVID-19 and epidemiological measures as regards the relationship established by an individual with the outside world and their private and social lives (ibid. *AP-3683/20*, paragraph 52, Decision on Admissibility and Merits of the Case No *AP-1239/21* of 16 November 2021, paragraph 21, available at [www.ustavnisud.ba](http://www.ustavnisud.ba)), as it is with the practice of the European Court of Human Rights (hereinafter: the European Court) as regards mandatory vaccination (see Case *Solomakhin v Ukraine*, Application No 24429/03, Judgment of 15 March 2012, paragraph 33 with other references, and Case *Vavříčka and Others v Czech Republic*, Application No 47621/13 and five other applications, Judgment of 8 April 2021, paragraphs 261 and 263). Accordingly, the Constitutional Court finds that prescribing conditions of stay in an enclosed space, a hospitality and catering establishment in this particular case, or prescribing mandatory vaccination in keeping with the challenged conclusions of the TC Government and the SC Government in the specific cases mentioned above, falls under Article 8 of the European Convention.

43. Pursuant to Article 18(1) of the Rules of the Constitutional Court, the Constitutional Court may consider an appeal only if all effective remedies available under the law against a judgment or a decision contested by it have been exhausted and if the appeal is brought within 60 days of the date on which the appellant received the decision letter informing them of the last effective remedy that they used.

44. The Constitutional Court points out that, under Article 18(2) of the Rules of the Constitutional Court, it may exceptionally consider an appeal even without a ruling from the competent court if the appeal indicates material breaches of rights and fundamental freedoms protected by the Constitution

or international instruments applicable in Bosnia and Herzegovina.

45. In the present case, the Appellants claim that the challenged conclusions of the TC Government and the SC Government breached their rights under Article II/3(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. The Constitutional Court finds that all four submitted appeals indicate material breaches of the rights enshrined in the BiH Constitution and the European Convention. In keeping with the Constitutional Court's case-law, they are therefore admissible within the meaning of Article 18(2) (see the Constitutional Court, *mutatis mutandis*, inter alia, Decision on Admissibility and Merits of the Case No AP-3376/07 of 28 April 2010, available at [www.ustavnisud.ba](http://www.ustavnisud.ba)). The above position taken by the Constitutional Court remains unaffected by both the fact that the challenged conclusions ceased to be valid when this Decision was adopted and the fact that the SC Government repealed, at its meeting on 24 January 2022 (extending the validity period of its conclusions, including orders and recommendations, of 6 January 2022), Section 2 of the challenged conclusions of the SC Government of 6 January 2022<sup>1</sup>. Finally, the appeals also meet the requirements of Article 18(3) and (4) of the Rules of the Constitutional Court because there is no formal reason why the appeals should not be admissible or considered manifestly unfounded (from a *prima facie* perspective).

46. Bearing in mind the provisions of Article VI.3(b) of the Constitution of Bosnia and Herzegovina, Article 18(2), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court is satisfied that all four appeals met the admissibility requirements.

## VII. The merits

47. The Appellants find that the conclusions of the TC Government and the SC Government, which they challenged, breached their rights under Article II/3(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

48. The relevant section of Article II/3(f) of the Constitution of Bosnia and Herzegovina reads as follows:

(f) The right to private and family life, home and correspondence.

49. Article 8 of the European Convention reads as follows:

*Article 8*

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<sup>1</sup> <https://vlada.ks.gov.ba/aktuelnosti/novosti-vezane-za-koronu-virus/nove-mjere-u-ks-otvaraju-se-dodatne-covid>

## *Right to respect for private and family life*

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

50. Given the circumstances of the cases at hand and in the light of the COVID-19 pandemic and the mass restrictions on qualified human rights, primarily, the Constitutional Court recalls the positive obligations imposed by the European Convention on the state to achieve the legitimate goal of protecting human health (see Decision on Admissibility and Merits of the Case No *AP-1217/20* of 22 April 2020, paragraph 36, available at [www.ustavnisud.ba](http://www.ustavnisud.ba)). The Constitutional Court takes the view that, in such situations, it is necessary to link an analysis of such measures and restrictions with protection mechanisms that establish legislative scrutiny of such actions of executive bodies so as to ensure respect for the aforementioned values of a democratic society and the fundamental principles on which it rests. At the same time, it is essential that any derogation has a clear basis in domestic law to provide protection against arbitrariness and that any derogation is strictly necessary to ward off a public hazard, which in this particular case includes fighting COVID-19.

51. In the light of the facts of the cases at hand and the requirements of Article 8 of the European Convention, the Constitutional Court notes that the appeals essentially raise two issues. The first issue concerns the ‘lawfulness’ of interference, i.e. the existence of a legal basis and the authority of executive bodies (the TC Government and the SC Government, including the FBiH Government) generally to prescribe with their conclusions, which have been challenged and which amount to delegated acts, to natural persons and legal entities in the Federation of Bosnia and Herzegovina, i.e. cantons, obligations and/or measures of an epidemiological nature (a restriction on gatherings in enclosed spaces and selective mandatory vaccination). The second issue concerns the justification of imposing such obligations as epidemiological measures. These, it is thought by public authorities, prevent the spread of the new coronavirus (SARS-CoV-2) and the disease caused by it (COVID-19).

52. In terms of the ‘lawfulness’ of the challenged decisions, the Constitutional Court notes that, as per the European Court’s case-law, a measure that has been challenged must have some basis in domestic law, requiring it to be accessible to the person concerned and predictable in terms of expected consequences (see Case *Amann v Switzerland*, Judgment of 16 February 2000, Application No 27798/95, paragraph 50). In this connection, the Constitutional Court firstly recalls, as it indeed found from previous decisions made on similar matters relating to the COVID-19 pandemic, that the TC Government and the SC Government failed to adopt their respective conclusions under new ‘laws’ unlike many countries that have done so by regulating the new situation caused by the pandemic. Starting from the premise that the decision-maker’s task and obligation (which amounts to

interference) is to provide and explain the legal basis for the decision they are making from the point of view of its ‘lawfulness’, the Constitutional Court finds that it is not within its competence to find a legal basis beyond the challenged decisions, since the application and interpretation of law is primarily an area of competence for domestic public authorities. Indeed, the role of the Constitutional Court is only to respond to the question of whether such application of the law is arbitrary. In the absence of new legal regulations governing matters pertaining to the COVID-19 pandemic, the Constitutional Court believes that any activity undertaken by the public authorities of the Federation of Bosnia and Herzegovina under a measure adopted with a view to combating the pandemic must be considered through the prism of the existing legal framework regulating protection against infectious diseases, i.e. the Infectious Diseases (Protection of the Public) Act<sup>2</sup>.

53. Having analysed the content of the challenged conclusions, the Constitutional Court notes that the ‘legal basis’ for their adoption consists exclusively of relevant provisions of the acts establishing the governments of the two cantons in question, which establish the general competence of these executive bodies to adopt acts in the form of conclusions within their powers (see Sections 31 and 32 of this Decision). Moreover, it follows from the case file that the matter of dispute is the measures and conditions (referred to in Appeals Nos AP-3932/21, AP-4172/21 and AP-4499/21) that form part of the challenged conclusions of the TC Government, which reflect those defined and prescribed by the Conclusions of the FBiH Government of 4 November 2021 (see Section 33 of this Decision), and that the executive bodies of the Tuzla Canton implemented them by adopting the challenged conclusions. On the other hand, the Constitutional Court points out that the Infectious Diseases (Protection of the Public) Act prescribes measures to prevent and combat infectious diseases of interest to the BiH Federation, which are divided into General Measures, Special Measures and Other Measures. In the context of Appeals Nos AP-3932/21, AP-4172/21 and AP-4499/21, none of these measures pertains to a prohibition or restriction of private or public gatherings<sup>3</sup>. Nor, indeed, does any one of them come with an additional condition requiring guests of hospitality and catering establishments to be in possession of any type of document or certificate in the context of implementation of the VTR rule.

54. Said rule corresponds in essence to an EU instrument called the EU Digital COVID Certificate, something that was indirectly emphasised in responses to one of the appeals from the FBiH Government and the TC Government in the light of the argument that this measure and/or condition

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<sup>2</sup> The Constitutional Court notes that, while Article 8(1) of the Infectious Diseases (Protection of the Public) Act provides a list of infectious diseases, Article 8(2) leaves open the possibility for the Government of the Federation of Bosnia and Herzegovina (hereinafter: ‘the Government’) to decide, on the Federal Minister’s proposal and after obtaining an expert opinion from the Federal Public Health Institute, to apply all or some measures provided by this Act in order to protect the public from such diseases in the case of a risk of other infectious diseases, the prevention and control of which is of interest to the Federation. By its Conclusions of 31 January 2020, the FBiH Government declared COVID-19 an infectious disease and one whose prevention and control is of interest to the BiH Federation.

<sup>3</sup> In Croatia, for example, such safety precautions intended to protect the public from infectious diseases are contained in the Croatian Infectious Diseases (Protection of the Public) Act; see Article 47(2)(10) and (11).

applies in EU Member States (see Sections 22 and 24 of this Decision). The Constitutional Court notes that this instrument was integrated into the EU's legal system through Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic<sup>4</sup>. However, the parties to the Constitutional Court proceedings at hand have failed to submit evidence in support of their view that, by the time the challenged conclusions were adopted, the public authorities of Bosnia and Herzegovina had established any legal framework transposing an (international) obligation on the public authorities of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina to introduce and enforce said EU instrument, i.e. the VTR rule, in the context of preventing the spread of SARS-CoV-2 virus and the concomitant disease (COVID-19). In addition, given the general nature of the challenged measures and the conditions imposed by the challenged conclusions of the TC Government, the Constitutional Court is of the opinion that they cannot be interpreted in terms of the provision of Article 54(6) of the Infectious Diseases (Protection of the Public) Act, which authorises the Federal Ministry of Health to lay down 'other measures consistent with international regulations' (with a view to preventing and controlling infectious diseases). As regards the VTR rule, the Constitutional Court considers it useful to highlight Council of Europe Parliamentary Assembly Resolution No 2383 (2021)<sup>5</sup>, which, among other things, calls on the Member States of the Council of Europe to ensure that each COVID certification system has a clear basis in law (Article 13.4.). Although this resolution is not legally binding on Bosnia and Herzegovina as a member of the Council of Europe in the formal/legal sense (given the enactor's advisory status), the Constitutional Court notes that resolutions of the Parliamentary Assembly of the Council of Europe operate through the strength of their arguments and that they should be taken into consideration when considering cases.

55. On the other hand, when it comes to the challenged mandatory vaccination measure for certain population categories in the Sarajevo Canton, which is contained in the challenged conclusions of the SC Government, the Constitutional Court finds that no such measure (immunisation / mandatory vaccination) against COVID-19 as an infectious disease is explicitly prescribed in said Infectious Diseases (Protection of the Public) Act. Moreover, the case file (the FBiH Government's response to Appeal No AP-117/22) shows that the challenged conclusions of the SC Government (although not explicitly stated therein) were adopted based on the FBiH Government's conclusions of 30 December 2021 (see Sections 22 and 33 of this Decision). However, unlike the challenged conclusions of the TC Government, whose restrictiveness vis-à-vis the conclusions of the FBiH Government (dated

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<sup>4</sup> [https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate\\_en](https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate_en)  
[https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate\\_en](https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate_en)

<sup>5</sup> Text adopted at the 17th session of the Parliamentary Assembly of the Council of Europe on 22 June 2021  
<https://assembly.coe.int/LifeRay/JUR/Pdf/TextesProvisoires/2021/20210519-CovidCertificates-EN.pdf>

4 November 2021) is reflected in the additional condition regarding the time limit for the application of the VRT rule, the more restrictive nature of the SC Government's challenged conclusions is evident through a measure not contained in the Conclusions of the FBiH Government of 30 December 2021 (mandatory vaccination for certain population categories in the Sarajevo Canton). While it is true that said Conclusions of the FBiH Government of 30 December 2021 include orders from the Emergency Response Service of the Federal Ministry of Health regarding the organisation and implementation of vaccination against COVID-19, they do so in a way that is consistent with the Regulations laying down Methods of Mandatory Immunisation, Immunoprophylaxis and Chemoprophylaxis against Infectious Diseases and relating to Persons subject to this Requirement (hereinafter: 'the Regulations laying down Methods of Mandatory Immunisation'), the latter being an implementing act adopted within the meaning of Article 45(1) of the Infectious Diseases (Protection of the Public) Act. The object of said Regulations is to regulate the methods to be used to implement mandatory immunisation and to identify persons who are subject to this requirement. The Constitutional Court notes that the above Regulations were amended twice during 2021 with respect to population categories recommended for vaccination against COVID-19, which ultimately included health-care staff, caregivers working in institutions for the care of the elderly, and people aged 60 years and over (see Section 36 of this Decision). Therefore, unlike the challenged Conclusions of the TC Government, said Regulations, and hence the Conclusions of the FBiH Government of 30 December 2021, do not impose a vaccination requirement for COVID-19. They merely provide recommendations, which are not imperative by their legal nature.

56. In view of the above, the question arises in this case as to whether the executive authorities of the Federation of Bosnia and Herzegovina are permitted to shape, through secondary acts such as decisions, orders and conclusions, new and even stricter legal relations by prescribing and adopting measures and conditions of a general nature that exceed the limits of the existing legal framework (the Infectious Diseases (Protection of the Public) Act). The Constitutional Court reiterates that, in these particular cases, the TC and SC governments adopted the challenged conclusions solely on the basis of the Tuzla Canton (Government) Act and the Sarajevo Canton (Government) Act. At the same time, the Constitutional Court notes that the challenged conclusions of the TC Government (as well as the conclusions of the FBiH Government) did not constitute an amendment to how the Federal Government, as a collective executive body, regulates relationships and legal issues pertaining to fighting COVID-19. In essence, they merely adopted and confirmed the orders of the Emergency Response Service of the Tuzla Canton Ministry of Health, i.e. the orders of the Emergency Response Service of the Federal Ministry of Health, as limited branches of executive. It should be noted, however, that the SC Government did amend its challenged conclusions and aligned them with the existing legal framework, prescribing mandatory vaccination against COVID-19 for certain population categories in the Sarajevo Canton.

57. When it comes to the powers of executive bodies to adopt epidemiological measures in the context of fighting COVID-19, the Constitutional Court notes that the legal issue in question has been guiding in the Court's practice to date in terms of adjudicating the compatibility of measures, or how decisions prescribing them are made (by the competent authorities of Bosnia and Herzegovina and its entities), with the safeguards stemming from qualified human rights, including the rights referred to in Article 8 of the European Convention. The issue of how bodies of executive power act when adopting epidemiological measures of a general nature in the fight against the coronavirus pandemic and the relationship between the legislature and the executive in this regard is one that the Constitutional Court has discussed in Appeal No AP-3683/20 when considering the restriction of qualified human rights (paragraphs 70-73). In this case, the Constitutional Court primarily considered the legal status and capacity of emergency response services of the health ministries in the Federation of Bosnia and Herzegovina to make decisions and take measures that encroach on human rights. The Court concluded that they account for a limited section of the executive and that their actions are essentially of a temporary nature. In examining the allegations in the appeals, the Court focused on the bodies that adopted the challenged orders, not their content. When it comes to the authorisation of the emergency response services of the competent ministries of health (to introduce measures, among other instruments, to prevent the spread of coronavirus), the Constitutional Court found the legal framework of the emergency response services too broad and lacking adequate control (by a legislative body). As a result, they took action that seriously encroached on basic human rights or limited, or even abolished, fundamental human rights. With a view to ensuring respect for the rule of law through the existence of safeguards for all rights under the European Convention, the Court highlighted the inadequate and untimely action of public authorities, primarily the legislature as the highest instance of power in a democratic society, in striking a balance between various interests and rights leading to breaches of the latter if the same authority fails to regulate the negative effects the executive's encroachment on the rights of individuals and the population as a whole. Therefore, when it comes to said decision, the Constitutional Court took the view that *it is clear that the necessary roles of the legislature and the highest executive power was missing in the present case*. Indeed, the Court considered the requirements that any interference with human rights should be based in law and that it should serve the purposes of a democratic society as interlinked. *In a democratic society, such important measures – although aimed at protecting health – must be subject to the continuous scrutiny of the legislature and must see the involvement of the highest executive body since, in future, we could face a situation in which the risk of a pandemic persists for a lengthy period of time or in which its duration or course might be difficult to predict. Such measures should therefore be assessed, approved and continuously monitored*. It was pointed out in the cited decision that the lack of clear and timely action on the part of the FBiH Parliament (as the highest legislative body in the Federation

of BiH) meant questions arose about minimising the risk of a possible abuse of power of one section of administrative power (emergency response services of the health ministries) despite the fact that general legal frameworks for their operation and for establishing degrees of authority in such a situation do exist. Consequently, the cited decision ended with a conclusion that the (lack of) action on the part of public authorities, primarily the FBiH Parliament in this particular case, was contrary to ensuring compliance with the safeguards stemming from the rights enshrined in the BiH Constitution and the European Convention and its protocols. A similar line of approach to considering and examining the constitutionality of epidemiological measures in fighting COVID-19 was followed with respect to decisions made by the executive authorities of Republika Srpska (the BiH Serb entity) (*ibid*, *AP-1239/21*).

58. In Case No AP-3683/20, the Constitutional Court unequivocally concluded that there is, above all, an obligation on the highest legislative body of the Federation of Bosnia and Herzegovina (the FBiH Parliament) to take active participation and that the highest executive body (the FBiH Government) should be second in line. The Constitutional Court therefore finds the FBiH Government's claim, in its response to the appeal that the action taken by that body (after the Constitutional Court had taken its decision) was sufficient to eliminate any shortcomings identified in the process of taking measures that seriously jeopardise the human rights of FBiH citizens, incomplete. Only the provision of information to the FBiH Parliament, without that body being actively involved or taking action, does not, in the Court's view, substantially help to reduce the risk of the executive power (*de jure* or *de facto*) potentially becoming unlimited and open to abuse. This is one of the main risks in a democratic society. The Constitutional Court recalls that legislative control does not brook limitations inherent in judicial proceedings, since the legislature has the ability to address all issues in a systematic fashion, especially the issue of coordinating executive action with a view to ensuring respect for human rights enshrined in the BiH Constitution.

59. In addition, the Constitutional Court points out that democracy requires key decisions, especially those relating to citizens, to be made by members of Parliament (directly elected representatives) in accordance with the law and that the executive can act only on the basis of content produced by Parliament and within the bounds of the law. For this very reason and in the light of the principle of separation of powers, other bodies with public authority may not change or independently address matters covered by law, nor may the executive address any emerging aspects of such matters. Before the legislator authorises the executive to pass an implementing regulation, it must develop a body of content that will form the subject matter of the implementing regulation. Similarly, legislative intentions and value criteria for law enforcement must be clearly expressed in the law or unequivocally derived from it. Before the executive can act in accordance with the principles of the rule of law, the legislator needs to regulate issues that fall within his exclusive competence clearly and precisely. This requirement is even more critical or stringent when it comes to restrictions on

human rights of a general nature, as is the case in the appeals in question. Namely, the purpose of the restriction must clearly be ascertainable in law. The law must specify the type and extent of such a restriction. The law must also specify the reasons or conditions for such a restriction and regulate procedural issues. Therefore, when an act of general application, i.e. an act applicable to an indefinite number of persons, directly infringes on human rights and fundamental freedoms, that act must be rooted in law. A blanket authority of a general nature given to the executive (and one that does not contain material criteria) entails responsibility and, ultimately, results in a failure on the legislator's part in terms of regulating matters that can only be regulated by law. This is contrary to the democratic constitutional order.

60. In any case, legislative scrutiny must exist, especially in an emergency, where the nature and threats of the relevant situation cannot objectively be understood and where its very duration is uncertain. That the coronavirus pandemic is one such emergency was one of the conclusions in the TC Government's response to Appeal No AP-3932/21 (see Section 24 of this Decision). In this particular case, the Constitutional Court believes that the legislator, i.e. the FBiH Parliament, which is responsible for establishing the legal framework for the protection of the (FBiH) population from infectious diseases (including COVID-19), failed to grant powers to the executive bodies of the BiH Federation allowing them to take the measures listed in the challenged conclusions of the TC Government and those of the SC Government. In the specific cases at hand, this resulted in the executive being able to wield unfettered powers, which is contrary to the rule of law and the democratic order. The Constitutional Court has previously called attention to the requirement for the legislator to take (pro)active action in relation to the coronavirus crisis in both its jurisprudence and above Decisions Nos AP-1217/20, AP-3683/20 and AP-1239/21. The Constitutional Court believes that the fact that more than a year and a half has passed from the date when the BiH Government declared COVID-19 a pandemic to the date when the TC Government and the SC Government adopted their controversial conclusions (or approximately two years, if the date of this Decision is taken into account as well) places a further onus on all levels of power to protect the democratic principles of separation of powers and respect for the rule of law in emergencies such as the current one. Any failure to accept responsibility or any overt sign of reluctance by the highest legislative body in the Federation of Bosnia and Herzegovina (the FBiH Parliament) to establish, in a clear and timely fashion and within its powers, a framework for action for all branches of the executive for the full duration of the COVID-19 pandemic will inevitably risk upsetting the balance between the various interests (rights) referred to above.

61. In view of the above, the Constitutional Court has established *a priori* that there was no clear legal basis for the TC Government or the SC Government to adopt the measures and conditions in their challenged conclusions. The existing legal framework regulating the prevention of the spread of COVID-19 in the Federation of Bosnia and Herzegovina (the Infectious Diseases (Protection of the

Public) Act) does not contain any of the controversial measures from the challenged conclusions, nor does it authorise the executive to adopt them. The Constitutional Court therefore finds that, in this particular case, the executive, by shaping new legal relationships that fall under the legislature's exclusive competence, addressed emerging issues at its own discretion and contrary to basic democratic principles. In this particular case, the requirement that any interference by public authorities with the appellants' right under Article 8 of the European Convention must be 'lawful' was not satisfied. In addition, the Constitutional Court finds the action taken by the FBiH Parliament in this particular case – or rather the absence thereof – contrary to ensuring compliance with the safeguards stemming from the right to private and family life enshrined in Article 8 of the European Convention. Neither the action taken by the executive bodies of the Federation of Bosnia and Herzegovina nor the failure of the FBiH Parliament to act in this particular case provided any guarantees against arbitrariness. In view of the above conclusions, the Constitutional Court finds that a continuous examination of the necessity of interference in specific cases is not necessary. In other words, it is unnecessary to continuously assess the proportionality of interference in the context of the effectiveness or suitability of the challenged measures and conditions intended to achieve the stated goals of pandemic control.

62. In view of the foregoing considerations, the Constitutional Court finds that, in this particular case, the right of the appellants to private and family life under Article II/3(f) of the BiH Constitution and Article 8 of the European Convention was breached.

63. The Constitutional Court also points out that, in view of its constitutional role, it serves the purpose of rectifying action taken by the remaining branches of public power (the legislative and the executive) so as to ensure the proper functioning of all the three branches in accordance with the BiH Constitution. Therefore, the Constitutional Court has the competence, and indeed the obligation, to require in this particular case the highest legislative and executive bodies of the BiH Federation to take immediate steps within their spheres of competence to ensure that any possible interference with constitutional rights is consistent with the standards of the BiH Constitution and the European Convention and to inform the public and the Constitutional Court thereof accordingly.

64. Finally, given the short-lived nature of the challenged conclusions, the Constitutional Court finds that, in the cases at hand, it is sufficient to point to breaches of Article 8 of the European Convention. However, the Constitutional Court also finds it necessary to point out that any effort by public bodies to persist with the current controversial scheme for preventing the spread of COVID-19 will raise questions about the 'lawfulness' of their action and will go no way towards protecting the fundamental principles of the rule of law.

## **VIII. Conclusion**

65. The Constitutional Court has found that, in this particular case, the right of the appellants to private and family life under Article II/3(f) of the BiH Constitution and Article 8 of the European Convention was breached because of the absence of a legal basis for taking the challenged anti-pandemic measures vis-à-vis the operation of hospitality and catering establishments (the application of the VTR rule) in the Tuzla Canton area and for the mandatory vaccination of certain population categories in the Sarajevo Canton area.

66. Pursuant to Article 59(1) and (2) of the Rules of the Constitutional Court, the Constitutional Court has made the decision given in the operative part of this Decision.

67. Please note that, under Article VI/5 of the BiH Constitution, decisions made by the Constitutional Court are final and binding.



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To whom it may concern,

I confirm that the translation above:

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Yours faithfully,

Véronique ROSENKRANZ

Director of Translation