

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, Article 57 (2) (b), Article 59 (1), (2) and (3) and Article 72 (2), (4) and (5) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised Text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Grand Chamber and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Having deliberated on the appeals of **E.Š and others**, in the case no. **AP 3683/20**, at its session held on 22 December 2020, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeals lodged by **E.Š., Lejla Dragnić, Vesna Hadžović, Slaven Raguž, Ivan Džalto, Dario Hrkać, Muhamed Hundur and Haris Agić** against the Order of the Crisis Staff of the Ministry of Health of the Federation of BiH, no. 01-33-6301/20 of 9 November 2020 and the Order of the Crisis Staff of the Ministry of Health of the Sarajevo Canton, no. 62-20/2020 of 12 October 2020, are partially granted.

A violation of the right to “private life” under 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 concerning the appellant **E.Š.**, and a violation of the right to freedom of movement under Article II (3) (m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the appellants **Lejla Dragnić, Vesna Hadžović, Slaven Raguž, Ivan Džalto, Dario Hrkać, Muhamed Hundur and Haris Agić**, are hereby established.

The appeals are dismissed as ill-founded in the part requesting the repealing of the Order of the Crisis Staff of the Ministry of Health of the Federation of BiH, no. 01-33-6301/20 of 9 November 2020 and of the Order of the Crisis Staff of the Ministry of Health of the Sarajevo Canton, no. 62-20/2020 of 12 October 2020.

Pursuant to Article 72 (4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Parliament of the Federation of Bosnia and Herzegovina and the Government of the Federation of

Bosnia and Herzegovina are ordered to undertake activities forthwith, and not later than 30 days from the day of receiving this Decision, and to harmonize their operation with the standards referred to 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, and with the standards referred to in Article II (3) (m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as stated in this Decision.

Pursuant to Article 72 (5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Parliament of the Federation of Bosnia and Herzegovina and the Government of the Federation of Bosnia and Herzegovina are ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 15 days as from the day of the expiry of the time limit referred to in paragraph 3 of the enacting clause of this Decision, of the enforcement of the order referred to in paragraph 3 of the enacting clause of this Decision.

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

REASONING

I. Introduction

1. On 19 October 2020, E.Š. (“the appellant”) from Sarajevo, represented by Ms. Nina Kisić and Mr. Goran Dragović, lawyers practicing in Sarajevo, lodged an appeal with the Constitutional

Court of Bosnia and Herzegovina (“the Constitutional Court”) against the Order of the Crisis Staff of the Ministry of Health of the Sarajevo Canton (“the Cantonal Crisis Staff”), no. 62-20/2020 of 12 October 2020. This appeal was registered under number AP 3683/20.

2. On 11 November 2020, Ms. Lejla Dragnić and Ms. Vesna Hadžović (“the appellants”) from Sarajevo, represented by Ms. Nina Kisić and Mr. Goran Dragović, lawyers practicing in Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) against the Order of the Crisis Staff of the Ministry of Health of the Federation of BiH (“the FBiH Crisis Staff”), no. 01-33-6301/20 of 9 November 2020. The appellants also requested the Constitutional Court to issue an interim measure to render ineffective the mentioned Order (in paragraph 3) particularly “taking into account that the local elections were set to take place on 15 November 2020”. This appeal was registered under number AP 4072/20.
3. On 11 November 2020, Mr. Slaven Raguž from Mostar, Mr. Ivan Džalto from Čapljina and Mr. Dario Hrkać from Široki Brijeg (“the appellants”) lodged an appeal with the Constitutional Court against the Order of the FBiH Crisis Staff, no. 01-33-6301/20 of 9 November 2020. This appeal was registered under number AP 4076/20.
4. On 13 November 2020, Mr. Muhamed Hundur and Mr. Haris Agić (“the appellants”) from Tešanj lodged an appeal with the Constitutional Court against the Order of the FBiH Crisis Staff, no. 01-33-6301/20 of 9 November 2020. This appeal was registered under number AP 4109/20.

II. Procedure before the Constitutional Court

5. Pursuant to Article 23 of the Rules of the Constitutional Court, the Government of the Federation of Bosnia and Herzegovina (“the Government of FBiH”), the FBiH Ministry of Health, the FBiH Crisis Staff, the Institute for Public Health of the Federation of Bosnia and Herzegovina, the Ministry of Health of the Sarajevo Canton (“the Cantonal Ministry of Health”), the Cantonal Crisis Staff, the Institute for Public Health of the Sarajevo Canton and the Ministry of the Interior of the Sarajevo Canton (“the SC MoI”) were requested in the period from 23 October to 20 November 2020 to submit their respective replies to the appeals.
6. The Government of FBiH (Office for Cooperation and Representation before the Constitutional Court), the FBiH Ministry of Health, the Cantonal Ministry of Health, the Institute for Public Health of the Sarajevo Canton and the SC MoI submitted their respective replies to the appeals in the period from 29 October to 1 December 2020.

7. The Cantonal Crisis Staff and the Institute for Public Health failed to submit their respective replies to the appeals within the given deadline.
8. Given the fact that the mentioned appeals raise the same and similar issue, pursuant to Article 32 (1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (“the Rules of the Constitutional Court”), the Constitutional Court rendered a decision to merge the mentioned appeals nos. AP 3683/20, AP 4072/20, AP 4076/20 and AP 4109/20, in which the Constitutional Court will conduct a single proceeding and take a single decision under number *AP 3683/20*.

III. Facts of the case

9. The facts of the case, as they arise from the appellant’s allegations and the documents submitted to the Constitutional Court, may be summarized as follows:

a) As to AP 3683/20

10. The appellant E.Š. lodged an appeal against the Order of the Cantonal Crisis Staff dated 12 October 2020 and articulated the allegations in the appeal as follows below.
11. The appellant indicates that the challenged Order violated the rights under Article II (3) (b), (f) and (h) of the Constitution of Bosnia and Herzegovina and Articles 3, 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”). First and foremost, it was mentioned that the respective appeal is filed within the meaning of Article 18 (2) of the Rules of the Constitutional Court, since the appellant could obtain a decision of the competent court (within the meaning of Article 18 (2) of the Rules of the Constitutional Court) solely if he/she violated the mentioned challenged Order, and that he/she gets prosecuted for that violation. The aforementioned, according to the appellant, would place an excessive burden on him. Next, it was mentioned that it is obvious that this is a general Act violating the appellant’s human rights and fundamental freedoms. Moreover, the appellant points out that the European Court of Human Rights (“the European Court”) addressed in its case-law the issues covered in this appeal as a violation of Article 3 of the European Convention (prohibition of inhuman and degrading treatment), while the ordinary court in Strasbourg (France) tackled the issue of mandatory face masks wearing in connection a violation of Articles 8 and 10 of the European Convention. Also, the appellant referred to the case-law of the ordinary court in Berlin (Germany), which tackled the issue of proportionality of the new restriction on the working hours of “pubs and bars” as a measure in the fight against COVID-19.

12. According to the appellant's allegations, the mentioned challenged Order was not based on law, it is contrary to the European Convention, whereas the appellant suffers on a daily basis irreparable damage because of it. In that connection it is indicated that the challenged Order contains exceptions, but that they have not been specified, as well as that it is absolutely unspecified and unforeseeable. In that sense it was mentioned that it is not clear what the Cantonal Crisis Staff implies under the term "an athlete training", namely whether this concerns professional athletes training in areas designated for training, or that pertains to ordinary people training for their own health: jogging, speed walking, and how should the SC MoI make a distinction between these categories.
13. Next, it was indicated that the appellant has a physical disorder - obstruction, which makes his breathing difficult even in normal circumstances, particularly in a situation where additional physical barrier is worn. Therefore, the appellant deems that in the present case an excessive burden is placed on him and that the measures are not proportionate to the aim sought to be achieved, whereas it is particularly emphasized that the competent authorities did not previously consider any milder measures (namely obstructions in both sinuses "sinusa-deviatio septi nasi"). In the light of this health condition the appellant alleges that by restricting the inhaling of oxygen a mask on the appellant's face may lead to headaches, dizziness, insufficient oxygen saturation of blood and other consequences. Next, continuous wearing of masks for hours, which is mandatory under a threat of rendering one liable to misdemeanor, as imposed under the challenged Order, according to the appellant's allegations, leads to skin infections, development of micro-organisms in humid and warm atmosphere of both respiratory entrances and exits (mouth and nose). When it comes to the application of Article 3 of the European Convention, the appellant alleges that the said Article extends its protection also to the compulsory medical treatment, deeming that the obligation imposed by the challenged Order in the present case the closest to the compulsory medical treatment - compulsory because it is imposed under a threat of misdemeanor liability (by means of a fine). Therefore, the appellant deems that the obligation to wear a mask in the present, in a situation where no study conducted by experts exists, is an unclear order and exceptions to the order constitute inhuman and degrading treatment, particularly bearing in mind the manner in which it was formulated, as well as the duration thereof.
14. Moreover, the appellant indicates that the challenged order has not been published in the Official Gazette of the Sarajevo Canton, but on the internet and in the media, which "certainly" is not a lawful way to publish a legal act, which non-compliance results in misdemeanor

liability. Also, it was indicated that “at first sight it appears that the adoption of the challenged Order has a legitimate aim – the protection of public health”, whereas it is evident that the adoption thereof is contrary to that aim, namely it is detrimental to the public health, and the consistent application thereof jeopardizes life itself. In that connection, the appellant referred to the document of the World Health Organization (“the WHO”) titled “Advice on the use of masks in the context of COVID-19” (published on 6 April 2020 in the English language), which reads that there is currently no evidence that wearing a mask (whether medical or other types) by healthy persons in the wider community setting, including universal community masking, can prevent them from infection with respiratory viruses, including COVID-19. Therefore, according to the appellant’s allegations, the WHO recommendations make a clear distinction between persons with symptoms and all other persons, thus it is recommended that the first category wears masks, while there is no such recommendation for other persons.

15. Also it was mentioned that the challenged Order leaves an impression of arbitrariness, because no relevant indicators have been taken into account during the adoption thereof (there is no available statistical data on the number of the tested samples in a way as to make it clear how many of the tested samples are retested samples, whether they are tested contacts of persons in whom the presence of COVID-19 has already been established, the number of active COVID-19 cases at any time per 100,000 population, that is to say in percentages), on which basis protective measures may be issued. Also, it was alleged that the challenged Order is implemented under a threat of misdemeanor liability, and that it constitutes an additional financial burden on the citizens of the Sarajevo Canton.
16. Finally, when it comes to the very legal basis for the challenged order, the appellant indicates that the Order was issued by the Cantonal Crisis Staff, on the basis of the Order of the FBiH Crisis Staff no. 01-33-5472/20 of 1 October 2020, that is to say despite clear instructions of the Constitutional Court referred to in the Decision no. AP 1217/20 of 22 April 2020. Therefore, the appellant deems that the reaction of the legislator did not happen, in the present case the reaction of two legislatures (of the FBiH Parliament and of the Cantonal Assembly of the Sarajevo Canton). In that connection, it was indicated that the Government of the Sarajevo Canton and the Cantonal Assembly do not oversee to a sufficient degree the Cantonal Crisis Staff. In view of the aforementioned, the appellant proposes that the Constitutional Court adopts the respective appeal and to quash the challenged Order of the Cantonal Crisis Staff.

b) As to AP 4072/20

17. The appellants Lejla Dragnić and Vesna Hadžović (AP 4072/20) are of the opinion that the challenged Order of the FBiH Crisis Staff dated 9 November 2020 violated their right under Article II (3) (m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention (freedom of movement), and, in that connection, the prohibition of discrimination under Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention. First and foremost, they mentioned that they lodged the respective appeal within the meaning of Article 18 (2) of the Rules of the Constitutional Court, since they could obtain a decision of the competent court solely if they violated the mentioned challenged Order, and that they get prosecuted for that violation. In that connection, they mentioned that it is clear that this manner of establishing the jurisdiction of the Constitutional Court of BiH would constitute an excessive burden on the appellants. Namely, the appellants referred to Paragraph 3 of the mentioned challenged Order, which restricts the movement of the population throughout the entire territory of the Federation of Bosnia and Herzegovina in the period from 23.00 hrs in the evening to 05.00 hrs in the morning of the next day. In that connection, they mentioned that the mentioned Paragraph of the Order contains certain exceptions, however that it jeopardizes the process of the local elections in the Federation of Bosnia and Herzegovina. In that sense, the appellants indicated that both of them are monitors in the local elections and that, therefore, they do not count as one of the exceptions referred to in the challenged Order. It was particularly mentioned that they are not employees who could be possibly issued a permit by their respective employers for movement in the period from 23.00 hrs in the evening to 05.00 hrs in the morning of the next day, as well as that monitors should be present at the polling station before the ballot casting starts, and stay up until the finalization of the ballot counting, which is well after 23.00 hrs in the night.
18. Next, it was mentioned that the challenged Order, in the part pertaining to the restriction of the movement of the population throughout the territory of the Federation of Bosnia and Herzegovina, contains no reasoning whatsoever as to the way in which precisely this restriction should contribute to the resolution of the COVID-19 epidemic, given that “not a single research made known to these representatives or published publicly” mentions that COVID-19 spreads more quickly at a certain time of the day or night. Also, it was indicated that the challenged Order, in Paragraph 13. II, reads that the Order is set to expire after 14 days, which includes the local elections scheduled for 15 November 2020. Likewise, it was mentioned that in the present case no milder measures other than those preventing the appellants from leaving their respective

apartments were considered, that is to say the decision itself is completely arbitrary, as it is not clear on the basis of which criteria the movement is prohibited precisely in the period from 23.00 hrs in the evening to 05.00 hrs in the morning.

19. In view of all the aforementioned, particularly bearing in mind that the local elections were scheduled for 15 November 2020, it was proposed that the Constitutional Court, pursuant to Article 64 of the Rules of the Constitutional Court, adopts an interim measure rendering ineffective the challenged Order in Paragraph 3.

c) As to AP 4076/20

20. The appellants Slaven Raguž, Ivan Džalto and Dario Hrkać are of the opinion that the challenged Order of the FBiH Crisis Staff dated 9 November 2020 violated their rights under Article II (3) (m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention (freedom of movement), and, in that connection, the prohibition of discrimination under Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention.
21. First and foremost, it was mentioned that the respective appeal was lodged within the meaning of Article 18 (2) of the Rules of the Constitutional Court, since “the appeal points to serious violation of the right to freedom of movement within the Federation of Bosnia and Herzegovina by prohibiting the movement in the period from 23.00 hrs in the evening to 05.00 hrs in the morning in the territory of the Federation of Bosnia and Herzegovina, which was introduced by the administration authority that is not authorized to do so, which discriminates against the appellants, as well as against other citizens of this Entity, when compared to other citizens of Bosnia and Herzegovina”. In that connection, the appellants indicate, first and foremost, that as far back as 31 May 2020 the Government of the Federation of Bosnia and Herzegovina rendered a Decision that the state of calamity caused by the outbreak of the coronavirus (COVID-19) was set to cease as of 31 May 2020 in the area of the Federation of Bosnia and Herzegovina. Namely, the appellants indicated that the FBiH Crisis Staff had no constitutional or legal authorizations whatsoever to deprive the appellants of the freedom of movement, and particularly so not to order the cantonal ministries of the interior of the Federation of Bosnia and Herzegovina to oversee the implementation of this Order, as it did unlawfully by issuing this piece of regulation. To that end, it was mentioned that upon the inspection of the challenged Order it is possible to establish that in rendering this Order the FBiH Crisis Staff failed to make references to any single piece of legislation whatsoever, instead it referred solely to bylaws and

internal regulations, which, also, is indicative of the fact that there is none valid legal basis whatsoever, which authorized this demonstration authority to interfere with human rights and fundamental freedoms guaranteed by the Constitution. What is more, the appellants are of the opinion that, even if some legal basis did exist for the issuance of this measure and even if the Crisis Staff did have the authorization to issue such a measure, according to the assessment of the appellants, this measure would remain pointless and disproportionately rigorous, particularly bearing in mind the well-known fact that the movement of population is anyway the least frequent in the period that the Order pertains to (between 23.00 hrs in the evening to 05.00 hrs in the morning). Also, it was indicated that it is not clear why the limit was set specifically at 23.00 hrs in the evening and specifically at 05.00 hrs in the morning (which makes the colloquial expression “that the virus attacks only at night” completely reasonable), and not for a longer period of time.

22. In the light of the aforementioned, the appellants asked the question whether it is necessary that they explain to the public authorities the reasons and motives for which they are outside their homes after 23.00 hrs, namely that they work in private office up until late in the night, that they like to take a walk at the end of their working and family day, that they like to socialize late at night, that they like to walk at 04.00 hrs in the morning, that they like to walk their dog at midnight. To that end, the appellants asked the question as to the provisions which grant the right to the FBiH Crisis Staff to forbid that to the citizens, or to request citizens to provide the mentioned explanations, that is to say “did we abandon the concept of the rule of law???”. Also, the appellants asked the question “whether it sufficed to prepare and read a statistical overview of the number of infected persons in order for the administration authority to assume the absolute power and the right to interfere with the constitutional rights and freedoms of citizens???”. In addition the appellants indicated that, unlike the April this year, the public authority cannot exculpate itself by referring to “the newly developing” situation, rather it had to adopt in such a situation adequate (legal) solutions, and not leave it to the administration authorities (the Ministry of Health) to arbitrarily interfere with the constitutional rights and freedoms, and, on the basis of statistical data (which results are subject to change by their nature), to increase or decrease the degree of interference with the constitutional human rights and fundamental freedoms.
23. Finally, the appellants indicated that the citizens of the other Entity (the Republika Srpska) and of the Brčko District of Bosnia and Herzegovina do not have the mentioned restrictions on the movement, and that it is not clear whether the citizens of the other Entity may move freely in

the territory of the Entity of the Federation of Bosnia and Herzegovina, and *vice versa*, which further opens the question of the quality of this part of the “law”. In view of the aforementioned, the appellants propose that the Constitutional Court establishes the violation of the mentioned rights and that it quashes the challenged Order of the FBiH Crisis Staff dated 9 November 2020.

d) As to AP 4109/20

24. The appellants Muhamed Hundur and Haris Agić are of the opinion that the challenged Order of the FBiH Crisis Staff dated 9 November 2020 violated their right under Article II (3) (m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention (freedom of movement). First and foremost, it was mentioned that the respective appeal was lodged within the meaning of Article 18 (2) of the Rules of the Constitutional Court, since there is no decision of “a competent court”, which they could obtain solely if they were sanctioned for the violation of the mentioned challenged Order, which would constitute an additional burden in the current situation in the Federation of Bosnia and Herzegovina. Next, it was indicated that the challenged Order is “disputable, unconstitutional and unlawful”, thereby referring to the contents thereof, Namely Chapter I General Provisions (Article 3) and Chapter XIII Transitional and Final Provisions (Paragraph 5). According to the appellants, the mentioned provisions interfere with their right to movement. In that connection, it was indicated that the FBiH Crisis Staff “is not authorized, either under the Constitution or under the Law, to issue general orders restricting the freedom of movement of citizens”. By referring to the provision of Article 6, paragraph (5) of the Rulebook on the Organization and Method of Operation of the FBiH Crisis Staff (*Official Gazette of FBiH*, no. 10/12), in the opinion of the appellants, the FBiH Crisis Staff unlawfully expanded its powers. In that connection, it was indicated that the FBiH Crisis Staff has no basis to issue a general order for citizens, but that it issues an order exclusively for healthcare institutions or private healthcare workers when managing and coordinating their work, and that everyone has to adhere to those orders issued for the work of the healthcare institutions and private healthcare workers.
25. Since the FBiH Government did not issue a decision declaring the state of natural disaster, and since the governing authority – the Crisis Staff of the FBiH Administration of Civil Protection, as the sole authority authorized to do so, did not issue an order restricting the freedom of movement, the appellants are of the opinion that their right to freedom of movement was violated. In addition, it was indicated that, on the basis of the statements of the designated officials (Goran Čerkez), it follows that the challenged order was rendered exclusively for the reason that the competent authorities do not exercise their duty in accordance with the law and

powers, and not because other milder measures failed to yield the expected results, that is to say because the challenged order (restricting the movement) was necessary.

e) Reply to the appeal (AP 3683/20)

26. The FBiH Government (Office for Cooperation and Representation before the Constitutional Court) stated that on 12 June 2020 the World Health Organization issued a new document updating the guidelines of 6 April 2020 for the effective prevention of the transmission of COVID-19. It was indicated that these (new) guidelines read that governments should encourage the general public to wear masks in specific situations and settings as part of a comprehensive approach to suppress SARS-CoV-2 transmission, and that masks are a crucial measure in preventing the transmission of the virus and that they reduce potential infection from an infected person with symptoms or without, that is to say that people who wear masks are protected from the infection and that they prevent the spread of the infection further if worn by an infected person. Given the mentioned recommendations, it was indicated that the Federation of BiH and the Sarajevo Canton introduced the restrictive measures for the protection of the health of population, including the measure of an obligation to wear a protective face mask outdoors. Such treatment, according to the assessment of the FBiH Government, is imposed by the European Convention itself in terms of a positive obligation, which arises, for example, from the right to life (Article 2) or the right to private and family life, which includes the protection of health (Article 8), and requires action from the State, for failure to undertake measures or their untimely undertaking (as well as inappropriate and insufficient informing of the general public) could be considered a violation of positive obligations of the State. In that connection, it was indicated that Article 15, paragraph 1 of the European Convention prescribes that in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation. Therefore, it was mentioned that for those reasons imposing an obligation to wear protective face masks indoors and outdoors, with exceptions, is a necessary measure for the purpose of protecting the health of the community and preventing the spread of infectious disease.
27. The FBiH Ministry of Health (on behalf of the FBiH Crisis Staff), first and foremost, pointed to the chronology of developments regarding the epidemic of COVID-19 in the territory of the Federation of Bosnia and Herzegovina and decisions rendered in that respect, mentioning thereby the data on epidemiological situation related to the transmission of COVID-19 in the Federation of Bosnia and Herzegovina for the period up until 14 October 2020. Next it was

indicated that at the time of rendering the challenged Order of the Cantonal Crisis Staff dated 12 October 2020 the Order rendered by the FBiH Crisis Staff dated 1 October 2020 was in force, which permitted, in its Chapter XII (Transitional and Final Provisions) Cantonal Crisis Staffs of the Health Ministries to introduce more restrictive and different measures according to the assessment of the epidemiological situation, which possibility was used precisely by the Cantonal Crisis Staff by rendering the mentioned challenged Order of 12 October 2020 in the conditions of a seriously deteriorating epidemiological situation in the Federation of BiH caused by COVID-19. Next, it was mentioned that the FBiH Crisis Staff was founded in accordance with Article 187 of the Law on Health Protection and Article 60 of the Law on the Protection of Population from Infectious Diseases. In that connection, it was indicated that in the current epidemiological situation caused by the novel coronavirus (COVID-19) actions are taken in accordance with the mentioned provision of Article 187 of the Law on Health Protection for the purpose of managing and coordinating the work of the healthcare sector in the Federation of BiH, through the designated FBiH Crisis Staff, as well as through the designated Crisis Staffs of the Cantonal Health Ministries. Next, it was indicated that the provisions of Article 6, paragraph (5) of the Rulebook on the Organization and Method of Operation of the FBiH Crisis Staff, orders and decisions of that FBiH Crisis Staff shall be binding on the Crisis Staffs of the Cantonal Health Ministries, healthcare institutions, private practice operators, and legal and physical persons, as well as that the FBiH Crisis Staff shall operate until the state of natural or other disaster has been declared.

28. Next, it was indicated that, in conformity with Article 3 of the Law on the Protection of Population from Infectious Diseases, it was governed that the protection from infectious diseases is a duty of the local self-government units - municipalities, cantons and of the Federation of Bosnia and Herzegovina, healthcare institutions, healthcare insurance institutes, private practice operators, companies and other legal and physical persons. Therefore, it was mentioned that Article 70 of the mentioned Law prescribes a misdemeanor committed by a physical person if that person fails to make possible the action under the said Article of the same Law. Also, it was indicated that the Rulebook on the Organization and Method of Operation of the FBiH Crisis Staff establishes that it pertains to the conduct on the part of the FBiH Crisis Staff and the Crisis Staffs of the Cantonal Health Ministries. In that respect, it was mentioned that, in accordance with Article 6 of the mentioned Rulebook, the orders issued shall be binding, and that it was not stipulated that they should be published in official gazettes, but that they are available to the general public on the websites of Crisis Staffs, Governments, as well as of the

Health Ministries in the Federation of BiH, while they are broadcast on a regular basis via media, and via press conferences, as well as via social networks. Therefore, according to the assessment of the FBiH Ministry of Health, the general public is transparently and in entirety familiarized with the orders issued in the context of this serious public health crisis caused by COVID-19 in the Federation of BiH.

29. Furthermore, the FBiH Ministry of Health stated that the allegations reading that the measure prescribing a mandatory wearing of a protective face mask violated Article II (3) (d) of the Constitution of Bosnia and Herzegovina, as well as the provisions of the European Convention, were ill-founded. In that connection, it was indicated, among other things, that the European Convention (Article 15, paragraph 1) stipulates that in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention (including the prohibition of discrimination) to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. On the basis of the aforementioned, it was indicated that the European Convention recognizes a possibility for a State, in a situation as is the current COVID-19 pandemic in the world and the COVID-19 epidemic in the Federation of BiH, to prescribe measures ordering appropriate action among the population such as the mandatory wearing of protective face masks, which has to be regarded as an important preventive and anti-epidemic measure, which has to be implemented together with other measures, such as maintaining a physical distance, frequent hand washing and disinfection, airing the rooms and such like in a situation where such restriction is in the interest of the public health. Also, it was indicated that the threat to life and health due to the outbreak of a completely novel coronavirus carries an immensely great weight when compared to the imposed preventive and anti-epidemic measures of mandatory wearing of protective face masks. Bearing that in mind, in comparison to the threat to life and health, the FBiH Ministry of Health indicated that the mentioned measures, which are of temporary character, in the present circumstances, which are followed by an epidemiological report, have their justification and weight. This particularly being so if taking into account the far-reaching consequences to the protection of life and health, which could have occurred in the event that, for example, these measures had not been undertaken. In that respect, it was indicated that the State, i.e. its competent authorities must not be brought into a position to consciously accept the responsibility for the applicant of more lenient measures, that is to say to exclude the mentioned general measures, as is the obligation to wear a protective face mask, in the circumstances

where there exists an indisputable threat that the implementation thereof, according to all the available knowledge as to the manner and speed of the spread of infection (of a novel coronavirus), would lead to the increased number of the infected, and eventually of the deceased. In that connection, it was mentioned that face masks were the key measure to stopping the transmission of the virus and to preserving life, since they reduce the potential risk of exposure to the virus in the infected persons whether they have symptoms or not, as well as that the persons wearing masks are protected from infection.

30. In the conditions where lives and health of citizens are threatened, including those of the appellants, the FBiH Ministry of Health indicated that the FBiH Crisis Staff issued adequate orders, and that in the present case the principle of proportionality was satisfied, for this aim could not have been achieved by any other more lenient measure at the time when the said measure was imposed. Therefore, it was indicated that not a single measure, including ordering a measure of mandatory wearing of protective face masks indoors and outdoors for general population, while citing certain exceptions defined in the recommendations by the Institute for Public Health of the Federation of BiH, is aimed at preventing or restricting fundamental human rights and freedoms, rather the measures are undertaken exclusively in the interest of the protection of public health of the population of the Federation of BiH.
31. When it comes to the measure of restricting the movement in the present case, it was mentioned that based on the media headlines as well as the inspection findings based on the inspection of the catering facilities, it follows that the measure of restricting work to 23.00 hrs at the latest was not observed, more precisely it was a measure that was subject to mass violations. Among other things, that made the FBiH Crisis Staff establish measures of restriction of movement in the time period from 23.00 hrs in the evening to 05.00 hrs in the morning. Also, it was indicated that the mentioned measure of movement restriction, which is implemented together with other measures, is of exceptional importance in a situation where the SARS-CoV-2 virus is spreading rapidly horizontally in the community. In doing so, it was mentioned that the mentioned measure was issued pursuant to Article 54, paragraph (2), item 2 of the Law on the Protection of Population from Infectious Diseases, which grants the right to the FBiH Ministry of Health to introduce that measure as a special extraordinary protective measure.
32. The Cantonal Ministry of Health stated that the spread of infection with COVID-19 in the Sarajevo Canton required that certain measures be issued necessarily for the purpose of suppression of the spread of the coronavirus and for the protection of the population. Next, it was mentioned that the members of the Cantonal Crisis Staff are topnotch specialists, and that

the challenged Order of the said authority was issued for the purpose of protecting the population from the coronavirus and for the purpose of suppressing the spread thereof. Likewise, it was mentioned that the appellant falls in the special category of people who are sensitive and that he falls in the risk groups who fall ill with COVID-19 with complications that may ensue (with symptoms and complications occurring that may jeopardize one's life), and that it is in the appellant's interest that everyone around him wear protective face masks, for only in that way can 95% certainty against the coronavirus transmission be ensured. According to the assessment of the Ministry of Health of the Sarajevo Canton, the aforementioned was confirmed by the World Health Organization, which was further confirmed by the justification of the challenged Order of the Cantonal Crisis Staff. Also, it was indicated that the appellant submitted medical documentation dated 2011, that is to say that his health condition is unknown as of October 2020. Therefore, it was mentioned that the appellant failed to prove that the challenged order violated any of his human rights. Furthermore, it was indicated that face masks, which were prescribed under the challenged Order, are not the cause for health problems of citizens, and the reduced oxygen amount intake. Additionally, it was indicated that the basic objective for issuing the challenged Order was to protect the population in the territory of the Sarajevo Canton and to suppress the spread of the coronavirus infection, and that the measures referred to in the challenged Order were in conformity with the legitimate aim.

33. Next, it was mentioned that the allegations stated in the appeal were absolutely ill-founded in that they read that the challenged Order was not applicable because it was not published in the Official Gazette. In that connection, it was indicated that in paragraph 3 of the challenged Order the Ministry of the Interior of the Sarajevo Canton was tasked to inform the general public of the new measures. In that respect, the Ministry of Health of the Sarajevo Canton indicated that in the present case the general public was informed, on all websites, in all daily newspapers, of the new orders and measures and of misdemeanor liability in the event of non-compliance with the Order. Informing the general public in such a way as to publish orders in all the media (radio, TV, web portals and daily newspapers, as well as on the website of the Government of the Sarajevo Canton, the Ministry of Health of the Sarajevo Canton and the Ministry of the Interior of the Sarajevo Canton) is the manner which is much more purposeful and comprehensive. The citizens of the Sarajevo Canton follow on a regular basis the media (the press and electronic media), and that is one of the more efficient manners of informing the citizens of the Sarajevo Canton of new orders, measures and responsibilities in the event of non-compliance with the said measures. In one of the aforementioned ways, according to the

allegations of the Ministry of Health of the Sarajevo Canton, the appellant himself was made aware of the Order. Also, it was mentioned that subscribers to the Official Gazette are not and do not have to be citizens of the Sarajevo Canton, and that there is a minor number of citizens (only those whose work is tied to the Official Gazette) who are subscribers to the Official Gazette, and that the data referred to in the Official Gazette are accessible. Therefore, it was mentioned that the accessibility of information to the general public is far greater and more transparent in a way where information gets published in all the media, and not, as wrongly alleged in the appeal, in the Official Gazette.

34. Finally, it was indicated that it was clear that in the times of fighting the COVID-19 pandemic measures were being issued that perhaps partially restrict the Convention rights, and the constitutional rights, and that the European Convention and the European Court of Human Rights do not prohibit *a priori* the introduction of such measures, as well as that the failure to undertake measures and untimely undertaking thereof may be considered a violation of positive obligations of a State. Therefore, it was indicated that the challenged Order of the Cantonal Crisis Staff established a fair balance with the public interest of the protection of public health, namely that it restricted not a single human right of the appellant that he referred to. In that respect, the Ministry of Health of the Sarajevo Canton referred to the Decision of the Constitutional Court no. AP 1844/20, proposing that the respective appeal be rejected as inadmissible or ill-founded.
35. The Institute for Public Health of the Sarajevo Canton stated that the appeal is inadmissible and ill-founded. Namely, it was indicated that the broader picture of the infection spread in the Sarajevo Canton required necessary adoption of certain measures for the purpose of suppressing of the coronavirus spread with a view to protecting the population. Next, it was mentioned that ill-founded was also the allegation stated in the appeal reading that the profession had not been consulted with prior to the adoption of the challenged Order of the Cantonal Crisis Staff. The reply carries the essential allegations, which were previously mentioned in the reply of the Ministry of Health of the Sarajevo Canton.
36. The Sarajevo Canton MoI stated that for the purpose of the realization of the points of the challenged Order of the Cantonal Crisis Staff, which are within the jurisdiction of the Police Administration, in addition to the regularly published text of the Law on Amendments to the Law on Misdemeanors against Public Order and Peace (*Official Gazette of the Sarajevo Canton*, no. 34/20), on 15 October 2020 the Ministry of the Interior of the Sarajevo Canton published on its website a notification for citizens titled Appeal to the citizens to adhere to the orders of the

competent authorities on mandatory wearing of protective face masks, which referred to the relevant provisions of the Law on Misdemeanors against Public Order and Peace, and which cited the mentioned challenged Orders. Next, it was mentioned that it was an obligation of the Police Administration, under point 3 of the challenged Order, to inform the general public in the Sarajevo Canton of the current legislative solutions of the Law on Misdemeanors against Public Order and Peace, and not of the contents of the challenged Order of the Cantonal Crisis Staff. However, it was indicated that the Police Administration published on the website of the Ministry also the text of the Order, as there is a narrow legal and factual link between these two pieces of regulations in order for the general public to be familiarized with them in a high quality and adequate fashion. In that sense, it was indicated that on 15 October 2020 the Police Commissioner sent an instruction reading as follows: “Bearing in mind that the respective Order was issued, namely delivered to the Police Administration of the Sarajevo Canton MoI on the day of the start of its application, and considering the fact that there had been not enough time for the public at large to be familiarized with the contents thereof appropriately and in a timely fashion, it is necessary that on 15 and 16 October 2020 police officers working in the field show an acceptable degree of tolerance and understanding towards citizens, in a sense that they warn citizens that it is mandatory to wear protective face masks, that is to say how to use them correctly (wearing a mask over the nose and mouth).” This is to say that the Police Administration acted in the present case in keeping with the law, administrative decisions or orders issued by the competent authorities, and that no activities have been undertaken whatsoever in any segment that are in contravention of Articles 3, 8 and 10 of the European Convention.

IV. Relevant law

37. The **Constitution of Bosnia and Herzegovina**, in its relevant provisions, reads as follows:

Article X

Amendments

[...]

2. Human Rights and Fundamental Freedoms

No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.

38. **The Law on the Protection of Population from Infectious Diseases** (*Official Gazette of the FBiH*, no. 29/05), in its relevant provisions, reads as follows:

Article 1

This Law regulates infectious diseases the prevention and control of which are in the interest of the Federation of Bosnia and Herzegovina (“the Federation of BiH”) and measures for the protection of the population from infectious diseases.

Article 3

The protection from infectious diseases is a duty of the local self-government units - municipalities, cantons and of the Federation of Bosnia and Herzegovina, healthcare institutions, healthcare insurance institutes, private practice operators, companies and other legal and physical persons.

Article 4

The protection from infectious diseases comprises the organization and implementation of the following:

1. measures aimed at preventing and controlling infectious diseases [...]

Article 6

1. An epidemic of an infectious disease in two or more cantons shall be declared and determined as contaminated or affected area by the FBiH Minister of Health (“the FBiH Minister”) on the basis of an epidemiological report of a healthcare institution and of the Cantonal Institute for Public Health (“the Cantonal Institute”), with an expert opinion of the Institute for Public Health of the Federation of Bosnia and Herzegovina (“the FBiH Institute”).

[...]

3. The declaration of an epidemic referred to in paragraphs 1 and 2 of this Article shall be published in the Official Gazette of the Federation of BiH.

IV- PRECAUTIONS FOR THE PROTECTION OF POPULATION FROM INFECTIOUS DISEASES

Article 54

The measures provided for in this Law and international sanitary conventions and other international treaties shall be taken for the purpose of protecting the

population of the Federation of BiH from the introduction of cholera, plague, viral hemorrhagic fevers, yellow fever, SARS and other infectious diseases.

For the purpose of the prevention and control of infectious diseases referred to in paragraph 1 of this Article, the FBiH Ministry of Health may order special emergency protective measures against these diseases:

[...]

2. prohibition of movement of the population, i.e. restriction of movement in the contaminated or directly affected areas;

[...]

6. other measures in accordance with international regulations.

Article 60

In the event of an exceptionally deteriorated epidemiological situation, the FBiH Minister, or the competent Cantonal Minister, shall appoint the Crisis Staff with a task to organize and coordinate measures aimed at suppressing certain infectious diseases.

39. The Law on Health Protection (*Official Gazette of the Federation of BiH*, nos. 46/10 and 75/13), in so far as relevant, reads as follows:

Article 187

In greater incident situations where no State of Natural and other Disaster referred to in Article 189 of this Law has been declared with the aim of managing and coordinating the work of healthcare institutions and private healthcare workers, a Crisis Staff of the FBiH Ministry or Cantonal Ministry shall be set up (“the Crisis Staff”), which shall operate up until the moment of the declaration of the State of Natural and other Disaster, when the role of managing the actions of protection and rescue in the territory of the Federation of BiH, or in the area of cantons, shall be assumed by the FBiH, or the Cantonal Civil Protection Staff.

A greater incident situation referred to in paragraph 1 of this Article is any event that constitutes a serious threat to the health of people in a given community, and causes or may cause such a number or type of victims who are not possible to be

taken care of in the line of regular organization of the work of healthcare institutions and private healthcare workers.

Members of the Crisis Staff referred to in paragraph 1 of this Article are appointed by the competent Minister of Health.

The FBiH Minister regulates, by virtue of a Rulebook, the organization and method of work of the Crisis Staff within the meaning of this Article.

40. **The Law on the Government of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of BiH*, nos. 1/94, 8/95, 58/02, 19/03, 2/06 and 8/06), in so far as relevant, reads as follows:

Article 19, paragraph (2)

A Decision regulates certain issues or prescribes measures of the Government, grants consent or upholds acts of other authorities or organizations, and renders decisions on other issues not to be decided by a Decree.

41. **The Law on the Organization of Administration Authorities in the Federation of Bosnia and Herzegovina** (*Official Gazette of FBiH*, no. 35/05 of 20 June 2005), in so far as relevant, reads as follows:

Article 66

(1) The FBiH and Cantonal administration authorities and autonomous administrative organizations may adopt bylaws from within the scope of their respective jurisdiction with a view to enabling the enforcement of laws and other regulations that they tasked with.

(2) Administration authorities and administrative organizations referred to in paragraph 1 of this Article may adopt the following bylaws: a Rulebook as an implementation regulation and instruction, an Instruction and an Order as general acts.

(3) Exceptionally, a special law may provide a different title for a bylaw, if that is more adequate considering the nature of the matter to be regulated by the regulation concerned (methodology and such like).

42. **The Law on Misdemeanors against Public Order and Peace** (*Official Gazette of the Sarajevo Canton*, nos. 18/07, 7/08 and 34/20).

Unofficial revised text prepared in the Constitutional Court shall be used for the purpose of this Decision, which reads as follows:

CHAPTER II. MISDEMEANORS AGAINST PUBLIC ORDER AND PEACE AND MISDEMEANOR SANCTIONS

Article 8, paragraph (5), item m)

(Misdemeanors and fines for physical persons)

(5) A fine of between BAM 500.00 and BAM 1,500.00 shall be imposed for a misdemeanor on:

[...]

m) whosoever fails to comply with the Order of a competent authority prescribing measures for the protection of population from infectious diseases.

Article 13a

Police officers of an authorized authority shall perform control of the treatment or implementation of orders referred to in Article 8, paragraph (5), items d) and m) of this Law and shall undertake measures and actions from within the scope of their respective jurisdiction, only if so explicitly articulated in the Order.

43. **The Rulebook on the Organization and Method of Operation of the Crisis Staff of the FBiH Ministry of Health** no. 01-37-419/12 of 23 January 2012 (*Official Gazette of FBiH*, no. 10/12), in so far as relevant, reads as follows:

Pursuant to Article 187, paragraph 4 of the Law on Health Protection (Official Gazette of the Federation of BiH, no. 46/10), the FBiH Minister of Health adopts the following

*RULEBOOK ON THE ORGANIZATION AND METHOD OF OPERATION OF
THE CRISIS STAFF OF THE FBIH MINISTRY OF HEALTH*

I – GENERAL PROVISIONS

Article 1

This Rulebook establishes the organization and method of operation of the Crisis Staff of the FBiH Ministry of Health (“the Ministry”).

The provisions of this Rulebook shall apply accordingly to the organization and method of operation of the Cantonal Crisis Staffs.

Article 2

In greater incident situations where no State of Natural and other Disaster has been declared, a Crisis Staff of the FBiH Ministry of Health, or of the Cantonal Ministry of Health shall be set up (“the Crisis Staff”).

A greater incident situation referred to in paragraph 1 of this Article is any event that constitutes a serious threat to the health of people in a given community, and causes or may cause a large number or types of victims who are not possible to be taken care of in the line of regular organization of the work of healthcare institutions and private healthcare workers.

II – ORGANIZATION AND METHOD OF OPERATION OF THE CRISIS STAFF

[...]

2. Method of operation of the Crisis Staff

Article 6

The Crisis Staff shall manage and coordinate the work of healthcare institutions and private healthcare workers in greater incident situations that constitute a serious threat to the health of people in a given community.

The Crisis Staff shall carry out the activities referred to in paragraph 1 of this Article up until the moment the competent authorities of the Federation of BiH and of the cantons have declared the State of Natural or other Disaster in the territory of the Federation of BiH, or in the area of cantons, when the role of managing the actions of protection and rescue shall be assumed by the FBiH, or the Cantonal Civil Protection Staffs, in accordance with the Law on the Protection and Rescue of People and Material Goods from Natural and other Disasters (Official Gazette of the Federation of BiH, nos. 39/03, 22/06 and 43/10).

The Crisis Staff referred to in paragraph 1 of this Article shall operate in sessions.

The Crisis Staff referred to in paragraph 1 of this Article shall issue Orders and Decisions.

The Orders referred to in paragraph 4 of this Article shall be binding on the Cantonal Crisis Staffs, healthcare institutions and private practice, as well as on other legal and physical persons.

[...]

Article 8

The Crisis Staff shall have a preventive role in its operation with a view to preventing and mitigating the consequences to the health of people in cases of greater incident situations.

[...]

44. **The Rulebook on the Method of Operation and Functioning of the Staffs and Civil Protection Commissioners** (*Official Gazette of the Federation of BiH*, nos. 77/06, 5/07 and 32/14), in so far as relevant, reads as follows:

Article 33

(1) The cessation of the State of Natural or other Disaster shall be established by a Decision.

(2) A Decision on the cessation of the State of Natural or other Disaster shall be passed by the same authority, which passed the Decision declaring the State of Natural or other Disaster. The Decision referred to in paragraph 1 of this Article contains the following:

[...]

4) the need for the Civil Protection Staff to continue operating even after the issuance of the Decision on the cessation of the State of Natural or other Disaster and the deadline for the operation of the Civil Protection Staff, if necessary for the Civil Protection Staff to continue operating,

[...]

6) obligations for the administration authorities, namely the municipal services for administration, to perform, within the scope of their regular operation,

additional tasks relating to the removal of all consequences resulting from a natural or other disaster and the deadline for the performance of such tasks,

[...]

8) other tasks estimated to be necessary.

(3) The Decision referred to in paragraph 1 of this Article shall be communicated forthwith through the media and shall be published in the official gazettes of a municipality, Canton, or the Federation of BiH, while being mandatory to deliver a copy of the Decision to the Civil Protection Staff, which managed in the affected area the actions of protection and rescue for the purpose of the realization of the adopted Decision.

- 45. The Decision Declaring the Cessation of the State of Disaster Caused by the Outbreak of the Coronavirus (COVID-19) in the Territory of the Federation of Bosnia and Herzegovina** no. 701/2020 of 29 May 2020 (*Official Gazette of FBiH*, no. 34/20 of 3 June 2020) reads as follows:

Pursuant to Article 19, paragraph (2) of the Law on the Government of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of BiH, nos. 1/94, 8/95, 58/02, 19/03, 2/06 and 8/06), in connection with Article 33, paragraphs (1) and (2) of the Rulebook on the Method of Operation and Functioning of the Staffs and Civil Protection Commissioners (Official Gazette of the Federation of BiH, nos. 77/06, 5/07 and 32/14), upon the proposal of the FBiH Civil Protection Staff, the Government of the Federation of Bosnia and Herzegovina, at its 176th emergency session, held on 29 May 2020, adopts the following

DECISION DECLARING THE CESSATION OF THE STATE OF DISASTER CAUSED BY THE OUTBREAK OF THE CORONAVIRUS (COVID-19) IN THE TERRITORY OF THE FEDERATION OF BIH

I

This Decision declares the cessation of the State of Disaster caused by the outbreak of the coronavirus (COVID-19) in the territory of the Federation of BiH (“the Federation of BiH”), which was declared by the Decision Declaring the State of Disaster Caused by the Outbreak of the Coronavirus (COVID 19) in the

Territory of the Federation of BiH (Official Gazette of the Federation of BiH, no. 21/2).

II

The State of Disaster referred to in point I of this Decision shall cease as of 31 May 2020.

III

The FBiH Civil Protection Staff and the Crisis Staff of the FBiH Ministry of Health are tasked to continue to follow and estimate the epidemiological situation in the territory of the Federation of BiH and, on the basis thereof, to establish measures and activities aimed at preventing the spread of the coronavirus (COVID -19).

The FBiH Civil Protection Administration is tasked, if necessary, to make available the forces and resources from among the ranks of the relevant FBiH specialized civil protection units and the protection and rescue services of the Federation of Bosnia and Herzegovina.

IV

The managers of administration authorities and of administrative organizations of the Federation of BiH and cantons, and the managers of municipal/city administration services are tasked to perform, as part of their regular operation, additional tasks relating to the removal of consequences resulting from the disaster.

V

The Decision shall enter into force on the day of the adoption thereof and shall be published in the Official Gazette of the Federation of BiH.

This Decision shall be published through the press and electronic media.

46. The Order Declaring the Epidemic of the Infectious Disease COVID-19 no. 01-33-3997/20 of 13 July 2020 (*Official Gazette of FBiH*, no. 48/20 of 17 July 2020) reads as follows:

Pursuant to Article 6, paragraph (1) of the Law on the Protection of Population from Infectious Diseases (Official Gazette of the Federation of BiH, no.29/05) and Article 66, paragraph (2) of the Law on the Organization of Administration

Authorities in the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of BiH, no. 35/05), on the basis of the epidemiological report of the Institute for Public Health of the Sarajevo Canton, the epidemiological report of the Health Center in Tešanj and of the Health Center in Maglaj, the epidemiological report of the Institute for Public Health of Zenica, and the epidemiological report of the Health Center in Živinice and of the Institute for Public Health of the Tuzla Canton, as well as with the expert opinion of the Institute for Public Health of the Federation of Bosnia and Herzegovina, the FBiH Minister of Health issues the following

*ORDER DECLARING THE EPIDEMIC OF THE INFECTIOUS DISEASE
COVID-19*

- 1. The epidemic of the infectious disease COVID-19 is hereby declared for the affected area, the territory of the Federation of Bosnia and Herzegovina.*
- 2. For the duration of the epidemic of the infectious disease COVID-19 the following measures provided under the Law on the Protection of Population from Infectious Diseases (Official Gazette of the Federation of BiH, no.29/05) shall be undertaken, as follows: carrying out sanitary control at border crossings which are located in the territory of the Federation of Bosnia and Herzegovina and implementing measures related to the said control; quarantine; ensuring the necessary vaccines reserves, once vaccines are available; immunization of population, once vaccines are available; as well as implementing other measures as ordered by the FBiH Minister of Health, or the Government of the Federation of Bosnia and Herzegovina.*
- 3. The measures referred to in point 2 of this Order are funded from the funds of the Budget of the Federation of Bosnia and Herzegovina in accordance with financial capacities in the fiscal year.*
- 4. This Order shall enter into force on the day of the publication thereof in the Official Gazette of the Federation of BiH.*

47. The Order of the Crisis Staff of the FBiH Ministry of Health no. 01-33-5472/20 of 1 October 2020 reads as follows:

The Crisis Staff of the FBiH Ministry of Health, with the aim of monitoring the situation and undertaking measures aimed at prevention and early detection of

the cases of the disease caused by the novel coronavirus (COVID -19), which the Conclusion of the Government of the Federation of BiH, V. no. 164/2020 of 31 January 2020, declared the infectious disease, which prevention and control is in the interest of the Federation of BiH, in accordance with point III, paragraph (1) of the Decision Declaring the Cessation of the State of Disaster Caused by the Outbreak of the Coronavirus (COVID-19) in the Territory of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of BiH, no. 34/20), as well as the provisions of Article 6, paragraph (5) the Rulebook on the Organization and Method of Operation of the Crisis Staff of the FBiH Ministry (Official Gazette of the Federation of BiH, no. 10/12), at its 17th session held on 01 October 2020, issued the following

ORDER

I GENERAL ORDERS

1. It is hereby ordered that wearing protective face masks indoors shall be mandatory while respecting a distance of a minimum of 2 meters, as well as outdoors if it is not possible to maintain a physical distance outdoors of 2 meters among persons.

[...]

X. ORDERS FOR COMPETENT INSPECTION AUTHORITIES AND COMPETENT POLICE ADMINISTRATIONS

1. The FBiH Administration for Inspection Affairs, Cantonal Administrations for Inspection Affairs, as well as inspections organized within the competent ministries in cantons, and competent municipal and city inspectors, are hereby tasked to strengthen the inspection control of all inspections, with the aim of controlling the implementation of the measures ordered and preventing the spread of COVID-19 in the area of their respective jurisdiction, as well as the control of this Order.

2. The FBiH MoI – FBiH Police Administration and the Cantonal MoI – Police Administration are hereby tasked, in accordance with point IV of the Decision Declaring the Cessation of the State of Disaster Caused by the Outbreak of the Coronavirus (COVID-19) in the Territory of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of BiH, no. 34/20), to undertake

measures from within their respective jurisdiction as support to the inspection services, with a view to controlling the implementation of the measures ordered and preventing the spread of COVID-19 in the area of their respective jurisdiction.

3. The FBiH Administration for Inspection Affairs, Cantonal Administrations for Inspection Affairs, as well as inspections organized within the competent ministries in cantons, and competent municipal and city inspectors, are hereby tasked to submit to the Crisis Staff of the FBiH Ministry of Health, and to the Crisis Staffs of the Cantonal Ministries of Health, the reports on the strengthened inspection control of all inspections, with a view to controlling the implementation of the measures ordered and preventing the spread of COVID-19 in the area of their respective jurisdiction, and to continue submitting the mentioned reports in continuity every 14 days. The Crisis Staffs of the Cantonal Ministries of Health shall submit the mentioned integrated reports for the area of their respective Canton to the Crisis Staff of the FBiH Ministry of Health.

XII. TRANSITIONAL AND FINAL PROVISIONS

1. The Cantonal Staffs of the Ministries of Health are permitted to introduce more restrictive and different measures depending on the estimate of the epidemiological situation in the Canton, or the Municipality, while notifying on a regular basis the Crisis Staff of the FBiH Ministry of Health.

2. The Order is issued with the date of expiry after 14 days from the day of the start of the application of this Order.

3. After the expiry of the time limit referred to in the Chapter XII, point 2 of this Order, the Crisis Staff of the FBiH Ministry of Health is tasked to consider the overall epidemiological situation concerning COVID-19 in the Federation of BiH and to prepare the risk assessment, for the purpose of considering possibilities and the need to amend the measures established in this Order, and deciding thereafter by way of a new Order on the measures to be undertaken and the deadline for their implementation.

4. This Order shall enter into force on the day of the issuance thereof and shall be applied from the day: .

48. **The Order of the Crisis Staff of the Ministry of Health of the Sarajevo Canton** no. 62-20/2020 of 12 October 2020 reads as follows:

The Crisis Staff of the Ministry of Health of the Sarajevo Canton, with the aim of monitoring the situation and undertaking measures aimed at prevention and early detection of possible cases of the disease caused by the novel coronavirus (COVID -19), which the Conclusion of the Government of the Federation of BiH, V. no. 164/2020 of 31 January 2020, declared the infectious disease, which prevention and control is in the interest of the Federation of BiH, in accordance with point XII (Transitional and final provisions) of the Order of the Crisis Staff of the FBiH Ministry of Health no. 01-33-5472/20 of 1 October 2020, at the session held on 12 October 2020, issues the following

ORDER

1. It is hereby ordered that wearing protective face masks shall be mandatory so as to wear them properly over the mouth and nose for the protection of the respiratory system, indoors and outdoors, with the exceptions of athletes during matches, trainings and sports activities, cyclists, electric scooter riders and motorcyclists, as well as other exceptions in accordance with the recommendations and guidelines issued by the Institute for Public Health of the Federation of Bosnia and Herzegovina and the Institute for Public Health of the Sarajevo Canton.

2. The Police Administration of the Ministry of the Interior of the Sarajevo Canton is tasked with the implementation of this Order, in accordance with the provisions of Article 8, paragraph (5), item m), in connection with Article 13a of the Law on Misdemeanors against Public Order and Peace (Official Gazette of the Sarajevo Canton, nos. 18/07, 7/08 and 34/20).

3. In the event of a failure to comply with point 1 of this Order, the police officers of the Police Administration of the Ministry of the Interior of the Sarajevo Canton will take action in keeping with the relevant provisions of the Law on Misdemeanors against Public Order and Peace referred to in point 2 of this Order. The Police Administration of the Ministry of the Interior of the Sarajevo Canton shall be obliged to inform the general public in the Sarajevo Canton of

the current legal solutions under the Law on Misdemeanors against Public Order and Peace.

4. This Order shall enter into force on the day of its issuance, and it shall be applied in the period from 15 October 2020 to 31 December 2020.

5. During the entire period of the application of this Order, the Crisis Staff of the Ministry of Health of the Sarajevo Canton will consider the overall epidemiological situation (COVID-19) in the Sarajevo Canton and will prepare the risk assessment, for the purpose of considering possibilities and the need to amend the measures established in this Order, and deciding thereafter by way of a new Order on the measures to be undertaken and the deadline for their implementation.

49. The Order of the Crisis Staff of the FBiH Ministry of Health no. 01-33-6301/20 of 9 November 2020, in so far as relevant, reads as follows:

The Crisis Staff of the FBiH Ministry of Health, with the aim of monitoring the situation and undertaking measures aimed at prevention and early detection of the cases of the disease caused by the novel coronavirus (COVID -19), which the Conclusion of the Government of the Federation of BiH, V. no. 164/2020 of 31 January 2020, declared the infectious disease, which prevention and control is in the interest of the Federation of BiH, in accordance with point III, paragraph (1) of the Decision Declaring the Cessation of the State of Disaster Caused by the Outbreak of the Coronavirus (COVID-19) in the Territory of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of BiH, no. 34/20), as well as the provisions of Article 6, paragraph (5) the Rulebook on the Organization and Method of Operation of the Crisis Staff of the FBiH Ministry (Official Gazette of the Federation of BiH, no. 10/12), at its 21st ordinary session held on 9 November 2020, in the conditions of seriously deteriorated situation in the territory of the Federation of BiH, issued the following

ORDER

I. GENERAL PROVISIONS

[...]

3. *The movement of the population throughout the entire territory of the Federation of Bosnia and Herzegovina in the period from 23.00 hrs in the evening to 05.00 hrs in the morning of the next day is hereby restricted.*

Exceptions from paragraph (1) of this point shall be all employees who are involved in the implementation of measures and activities regarding the resolution of the COVID-19 epidemic in the territory of the Federation of BiH, employees who work in shifts, intercity and international passenger transport, taxi service, as well as truck drivers in domestic and international transport.

The employees referred to in paragraph (2) who are involved in the implementation of measures and activities regarding the resolution of the COVID-19 epidemic in the territory of the Federation of BiH, employees who work in shifts, have to have a permit issued by their respective employers for the movement in the period from 23.00 hrs in the evening to 05.00 hrs in the morning of the next day

The following are tasked with the control of point 3 of the Chapter I of “General Order”,

Cantonal Police Administrations of the competent Cantonal Ministries of the Interior, in accordance with the cantonal regulations on public order and peace.

[...]

X. ORDERS FOR COMPETENT INSPECTION AUTHORITIES AND COMPETENT POLICE ADMINISTRATIONS

1. The F BiH Administration for Inspection Affairs, Cantonal Administrations for Inspection Affairs, as well as inspections organized within the competent ministries in cantons, and competent municipal and city inspectors, are hereby tasked to strengthen the inspection control of all inspections, with the aim of controlling the implementation of the measures ordered and preventing the spread of COVID-19 in the area of their respective jurisdiction, as well as the control of this Order.

2. The F BiH MoI – F BiH Police Administration and the Cantonal MoI – Police Administration are hereby tasked, in accordance with point IV of the Decision Declaring the Cessation of the State of Disaster Caused by the Outbreak of the

Coronavirus (COVID-19) in the Territory of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of BiH, no. 34/20), to undertake measures from within their respective jurisdiction as support to the inspection services, with a view to controlling the implementation of the measures ordered and preventing the spread of COVID-19 in the area of their respective jurisdiction.

[...]

XIII TRANSITIONAL AND FINAL PROVISIONS

1. The Cantonal Staffs of the Ministries of Health are permitted to introduce more restrictive and different measures depending on the estimate of the epidemiological situation in the Canton, or the Municipality, while notifying on a regular basis the Crisis Staff of the FBiH Ministry of Health.

2. The Order is issued with the date of expiry after 14 days from the day of the start of the application of this Order.

3. After the expiry of the time limit referred to in the Chapter XII, point 2 of this Order, the Crisis Staff of the FBiH Ministry of Health is tasked to consider the overall epidemiological situation concerning COVID-19 in the Federation of BiH and to prepare the risk assessment, for the purpose of considering possibilities and the need to amend the measures established in this Order, and deciding thereafter by way of a new Order on the measures to be undertaken and the deadline for their implementation.

4. This Order shall render ineffective the Order no. 01-33-6191/20 of 4 November 2020.

5. This Order shall enter into force on the day of the issuance thereof and shall be applicable as of 10 November 2020, with the exception of point 3 of the Chapter I of the “General Order”, which is to become applicable as of 11 November 2020.

V. Admissibility

50. Pursuant to Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any court in Bosnia and Herzegovina.

51. First and foremost, the Constitutional Court indicated that the appellant E. Š. (AP 3683/20) referred to the guarantees under Articles 3, 8 and 10 of the European Convention due to the imposition of the obligation to wear a protective face mask (over the mouth and nose indoors and outdoors) on the basis of the challenged Order of the Cantonal Crisis Staff of 12 October 2020. Bearing in mind the contents of the allegations stated in the appeal, it should be recalled that the Constitutional Court is not bound by the legal qualification referred to in the appeal, and that, in accordance with the rule *iura novit curia*, it is authorized to apply the relevant constitutional and convention law to the facts of the case. Therefore, in the circumstances of the present case, the Constitutional Court deems that, bearing in mind the contents of the imposed measure, the examination of the mentioned challenged decision and all other allegations stated in the appeal should be approached from the aspect, not as proposed by the appellant, of the guarantees comprised in the right to private and family life, home and correspondence under Article II (3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. Namely, the Constitutional Court indicates that the essence of every individual case determines whether a given life aspect may be qualified as “private life”, or “privacy” within the meaning of the European Convention. In that sense, the Constitutional Court recalls the established principles under the case law of the European Court of Human Rights, which, among other things, in a general way indicate that the “private life” comprises a broad range of activities in a personal sphere (*S. and Marper v. The United Kingdom*, paragraph 66), wherefrom it follows that all changes taking place in the society will be taken into consideration. Besides the so-called inner circle within which an individual lives his/her life freely as he/she chooses which absolutely excludes anyone from outside, the right to private life comprises relations that an individual establishes with other human beings, i.e. with the “outside world” in terms of “private social life” (see, *Niemetz v. Germany*, *Bărbulescu v. Romania* [GC], paragraph 71, and *Botta v. Italy*, paragraph 32). Likewise, personal choices as to an individual’s desired appearance (for instance, as regards a haircut, or a choice of clothing), whether in public or in private places, relate to the expression of his or her personality and thus fall within the notion of “private life”. A measure emanating from a public authority which restricts a choice of this kind will therefore, in principle, constitute an interference with the exercise of the right to respect for private life within the meaning of Article 8 of the European Convention (see, *S.A.S. v. France*, Judgment of 1 July 2014, Application no. 43835/11, paragraph 107). In accordance with the aforementioned, the Constitutional Court deems that the imposition of the obligation to wear a protective face mask, in accordance with the challenged Order of the Cantonal Crisis Staff, in the present case falls under Article 8 of the European Convention.

52. Pursuant to Article 18 (1) of the Rules of the Constitutional Court, the Constitutional Court shall examine an appeal only if all effective remedies that are available under the law against a judgment, or decision challenged by the appeal, are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last effective remedy used by the appellant was served on him.
53. Pursuant to Article 18 (2) of the Rules of Constitutional Court, the Constitutional Court indicates that, exceptionally, it may examine an appeal where there is no decision of a competent court, if the appeal points to grave violations of the rights and fundamental freedoms safeguarded by the Constitution, or by the international documents applied in Bosnia and Herzegovina.
54. In the present case, the appellant E.Š. (AP 3683/20) claims that the challenged Decision of the Cantonal Crisis Staff violated his right under Article II (3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, the right under Article 2 of Protocol No. 4 to the European Convention, whereas other appellants (AP 4072/20, AP 4076/20 and AP 4109/20) claim that the challenged Order of the FBiH Crisis Staff violated their right under Article II (3) (m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention (freedom of movement), and, in that connection, some appellants referred also to the prohibition of discrimination under Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention. The Constitutional Court deems that all four lodged appeals indicate serious violations of the rights under the Constitution of Bosnia and Herzegovina and the European Convention, which makes them, according to the case law of the Constitutional Court, admissible within the meaning of Article 18 (2) of the Rules of Constitutional Court (see, the Constitutional Court, *mutatis mutandis, inter alia*, Decision on Admissibility and Merits no. AP 3376/07 of 28 April 2010, available at: www.ustavisud.ba). Finally, the appeal also meets the requirements under Article 18 (3) and (4) of the Rules of the Constitutional Court, because there is neither a formal reason rendering the appeals inadmissible, nor are they manifestly (*prima facie*) ill-founded.
55. Having regard to 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 has established that all three respective appeals meet the admissibility requirements.

VI. Merits

a) As to the allegations on the violations of the rights referred to in Article 8 of the European Convention and Article 2 of Protocol No. 4 to the European Convention.

56. Article II (3) (f) of the Constitution of Bosnia and Herzegovina, in so far as relevant, reads as follows:

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

57. Article 8 of the European Convention, in so far as relevant, reads as follows:

Article 8

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 wellbeing 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.

58. Article II (3) (m) of the Constitution of Bosnia and Herzegovina, in so far as relevant, reads as follows:

m) The right to liberty of movement and residence.

59. Article 2 of Protocol No. 4 to the European Convention, in so far as relevant, reads as follows:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

[...]

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. *The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.*

60. Taking into consideration the allegations stated in the appeal in in the context of the cases at issue, and the conclusions of the Constitutional Court referred to in the part of this Decision - Admissibility, the Constitutional Court deems that the imposition of the obligation to wear a protective face mask constitutes an interference with the right to “private life” within the meaning of Article 8 of the European Convention.
61. Likewise, the Constitutional Court deems that the restriction of movement of the population (throughout the entire territory of the Federation of Bosnia and Herzegovina in the period from 23.00 hrs in the evening to 05.00 hrs in the morning of the next day) on the basis of the Order of the FBiH Crisis Staff dated 9 November 2020 constitutes indubitably an “interference” with the right to liberty of movement under Article 2 of Protocol No. 4 to the European Convention.
62. Considering the circumstances of the cases at issue, the Constitutional Court reiterates, first and foremost, that the protection of population from the COVID-19 threat is a huge and difficult challenge for the authorities in all states. Therefore, it is clear that measures ordered in such a situation undoubtedly restrict a number of rights referred to in the Convention and in the Constitution. The European Convention and the European Court of Human Rights (“the European Court”) do not prohibit *a priori* the introduction of such measures. On the contrary, positive obligations imposed by the European Convention in order to pursue a legitimate aim of the protection of the health of people require that member states demonstrate active care and timely reaction. Therefore, a failure to undertake measures, as well as their untimely undertaking, could be considered a violation of the positive obligations of the State (see Decision on Admissibility and Merits no. *AP 1217/20* of 22 April 2020, paragraph 36, available at: www.ustavnisud.ba).
63. The Constitutional Court recalls that Bosnia and Herzegovina has not informed the Secretary General of the Council of Europe that it has derogated the European Convention pursuant to Article 15 of the European Convention, which is a matter of appreciation of the state authorities, which will not be reviewed either by the European or the Constitutional Court, since that is a possibility but not an obligation. In addition, the Constitutional Court recalls that Article II (2) of the Constitution of Bosnia and Herzegovina sets forth the constitutional status of the European Convention, according to which that act shall have priority over all other law. Also,

Article II (3) of the Constitution of Bosnia and Herzegovina sets forth the catalogue of rights, which are identical to the rights set forth in the European Convention and protocols to the European Convention, while under Article X (2) of the Constitution of Bosnia and Herzegovina no amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.

64. At the same time, it is necessary that every departure has a clear basis in the domestic law in order to ensure the protection against arbitrariness and every departure has to be strictly necessary for the fight against the public threat, which in the circumstances of the present case implies also the fight against the COVID-19 epidemic.
65. Next, the Constitutional Court recalls that the respective appeals raise the issues from within the scope of guarantees of qualified freedoms/rights in the context of which the public authority is allowed to interfere with these rights only in instances provided under the European Convention. There is a well-developed case law of the European Court and that of the Constitutional Court regarding the test that is necessary to employ in these cases in order to reach, by means of the answers to the questions obtained during the test, a conclusion as to whether the specific action on the part of the public authority resulted in the violations of these rights. The Constitutional Court will analyze in the specific circumstances of the given situation all the questions referred to in the mentioned test.
66. When it comes to the “lawfulness” of the challenged decisions, the Constitutional Court recalls that, according to the case law of the European Court, the impugned measure should have some basis in domestic law, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see the case of *Amann v. Switzerland*, paragraph 50). First and foremost, the Constitutional Court notes that the challenged Orders of the crisis staffs within the competent ministries of health were not delivered pursuant to new “laws”, as was done by numerous countries while regulating the newly developing situation in convention with COVID-19, but pursuant to the existing legal framework regulating the issue of healthcare protection in the territory of the Federation of Bosnia and Herzegovina in a situation developing after lifting the state of natural disaster caused by the infectious disease COVID-19 and subsequent declaration of the epidemic. The Constitutional Court observes that the issuers of the impugned orders primarily referred in those decisions to bylaws and decisions delivered pursuant to the Law on Health Protection. Likewise, the Constitutional Court keeps in mind that the FBiH Ministry of Health referred in its reply to the appeal, in addition to the mentioned law, also to the Law on the Protection of Population from Infectious Diseases. Considering a premise

that the issuer of a decision has a task and an obligation (which constitutes interference) to provide and reason the legal basis for the issuance in the light of its very “lawfulness”, the Constitutional Court deems that it is not within its competence to look for a legal basis beyond the impugned decision, since the application and interpretation of the law fall primarily within the jurisdiction of the domestic public authorities, while the role of the Constitutional Court is only to answer whether such application of the law was arbitrary. On the other hand, the Constitutional Court emphasizes that in emergency situations, as is indisputably this one concerning COVID-19, the competent public authorities have a broad margin of appreciation not only when it comes to the selection of measures they undertake in protecting the public health, but also when it comes to the application of law pursuant to which, within the scope of their respective jurisdictions, they impose such measures while fulfilling the obligations referred to in the European Convention. In that connection, the Constitutional Court observes that the existing legal framework for the issuance of the impugned decisions of the crisis staffs of the competent health ministries is general and that it is rather directed towards impacting the health system than towards the measures aimed at population, which is the result also of the fact that the existing laws regulating this area, nevertheless, did not foresee the conditions caused by the COVID-19 pandemic¹. However, despite the mentioned general character, the Constitutional Court accepts that the existing “law” in its broader conventional meaning (regulations specified in more detail in the part of this Decision – Relevant law) did provide a possibility for the issuance of appropriate decisions for the purpose of preventing the spread of infectious diseases. Therefore, the Constitutional Court deems that in the present case (following the adoption of the Decision Declaring the Cessation of the State of Disaster Caused by the Outbreak of COVID-19, dated 3 June 2020, in the Territory of FBiH) the regulations that the public (executive) authorities relied upon are not without complete basis in the “law”.

67. When it comes to the measures undertaken by the public authority (specifically the Crisis Staff within the Ministry of Health), that is to say when it comes to the measures challenged by the appeals at issue, the Constitutional Court deems that they, in principle, do not depart

¹ The Constitutional Court recalls that the Law on the Protection of Population from Infectious Diseases (Article 8, paragraph 1) mentioned the infectious diseases covered under this Law, but that it, also, left a possibility (paragraph 2), if a threat from other infectious diseases which prevention and control are in the interest of the Federation of BiH occurs, for the Government of the Federation of Bosnia and Herzegovina (“the Government”) to be allowed to determine, upon a proposal of the FBiH Minister and with an expert opinion of the FBiH Institute, for the purpose of the protection of population from such diseases that all or some individual measures provided under this Law be applied. The Conclusion of the Government of the Federation of BiH of 31 January 2020 COVID-19 was declared an infectious disease which prevention and control are in the interest of the Federation of BiH.

significantly from the measures undertaken in a number of other states, which are recommended by the World Health Organization. The fact is that they were issued by the profession in the present case, namely the ministries of health, therefore the Constitutional Court does not find itself to have the competence, or to be called upon to assess those measures from that aspect, namely from the professional medical aspect. However, in any case the measures interfering with the fundamental human rights, to such a great degree concerning the entire population, have to be proportionate to the aim sought to be achieved, which implies that they should be applied following a thorough analysis and conclusion, and analysis that other milder measures would not pursue a public aim and that they should be reviewed constantly in order not to last longer than necessary. What is particularly important is that the measures undertaken by the public authorities have to be appropriate in all their segments for a democratic society, that is to say they have to be directed towards the protection of a democratic order from the threats to that order, and it is necessary to invest every effort to protect the values of a democratic society, which, in addition to the primary goal of the protection of the lives of the people in a certain area, include the respect for human rights and freedoms.

68. In the light of the previously mentioned necessity to protect the democratic order, the Constitutional Court recalls that unlimited powers of the executive authority (*de iure* or *de facto*) are one of the main dangers for a democratic order, and that, as such, they constitute a feature of absolutist and dictatorial systems. Namely, contemporary constitutionalism has been built against such systems and, therefore, it ensures supremacy of legislation. On the other hand, the Constitutional Court indicates that the security of the State and its population are vital public and private interests, which deserve the protection and which may lead to temporary departures from certain human rights. Therefore, it is important to have restrictions on duration, circumstances and scope of such powers. Further, the Constitutional Court indicates that the public security may be effectively ensured solely in a democracy which completely abides by the rule of law. That primarily requires parliamentary control, and then a judicial control of the existence and declaration of an emergency in order to avoid abuses. The aforementioned *a priori* corresponds with democracy, i.e. with one of its fundamental principles, namely the principle of the separation of powers. Also, the Constitutional Court recalls that democracy constitutes a fundamental element of “European public order”, While the European Convention itself in its core imposes an obligation of retaining and promoting ideals and values of a democratic society. In other words, democracy is the sole (political) model provided under the European Convention and is compatible in conformity with it. Likewise, the European Court

emphasized also that no one may be authorized to rely on the provisions of the European Convention in order to weaken or destroy the values of a democratic society (see, e.g., *Ždanoka v. Latvia*, Application no. 58278/00, Judgment of 16 March 2006, paragraphs 98 and 99). Also, the Constitutional Court indicates that the separation of powers is a very important matter in a democratic society which the public has a legitimate interest in being informed about (see, *Guja v. Moldova*, Judgment of 12 February 2008, paragraph 88), wherefrom it follows that the separation of powers inevitably affects the determination of the scope of rights under the European Convention.

69. However, in situations concerning mass restrictions on qualified human rights, or in situations where only bodies set up by the executive authorities may undertake measures with a view to protecting the health of people, the Constitutional Court deems that in assessing such measures it does not suffice solely to employ the classical test of examination of such interference. In such situations, according to the opinion of the Constitutional Court, it is necessary to link the analysis of such measures and restrictions, first and foremost, to the protection mechanisms which establish a control over such operations of the executive authorities, in order to ensure the respect for the already mentioned values of a democratic society and the fundamental principles on which it rests. That primarily pertains to the control exercised by the legislative authority over the operation of the executive authority in such situations. When it comes to emergency situations which have an impact on the security and health of people, the Constitutional Court indicates that the parliament has a power and an obligation to reassess the state of emergency in regular intervals and to lift it if necessary. Next, *post hoc* powers of the parliament to be accountable to it, that is to say the right to carry out inquiries and investigations into the implementation of powers in emergency situations are extremely important for the evaluation of the conduct of the government, i.e. the authorities and bodies of the executive branch. The usual practice in democratic systems is for a legislative body in such situations, in the light of the existence of an emergency situation, to transfer in advance its competences to the executive authority, or to approve subsequently such conduct on the part of the executive authority. In any case, the control of the legislative authority has to exist, particularly in an emergency situation which is characterized by an objective inability to know its nature and danger and in which there exists uncertainty as to its very duration. In such cases, it is necessary to have in place such a legal framework, on the basis of which the executive authority will undertake measures (which, in a general and direct fashion, restrict or abolish the rights referred to in the Constitution of Bosnia and Herzegovina and the European Convention), which essentially establishes

restrictions on the executive authority with a view to preventing it from abusing its powers. Consequently, it comes as a necessity to shift an emphasis from the conventional relationship “legislator-citizen” to the relationship “legislator- executive authority” in the context of the assessment of not only whether the executive authority abuses its powers but whether the legislative authority has delegated, or approved to the executive authority such broad powers. Setting adequate and clear restrictions/boundaries (which have to be complied with) practically results in preventing the executive authority from abusing its powers.

70. Next, the Constitutional Court indicates that obstacles to effective law enforcement may occur not only because of unlawful or negligent conduct on the part of the authorities, but also because of the quality of the legislation making it more difficult to apply. Therefore, it is of great importance to assess in the specific circumstances whether the “law” is enforceable in practice, which includes both the stage preceding the passing of the given law, as well as the subsequent examination whether the given law was effectively applied. That means that the evaluation of the legislation has to be conducted, *ex ante* and *ex post*, when it comes to the rule of law. Likewise, the Constitutional Court indicates that the exercise of power which leads to essentially unjust, unreasonable, irrational or oppressive decisions violates the rule of law. As mentioned above, contrary to the rule of law is for the discretionary right of the executive authority to include unrestrained powers. The purpose of both Article 8 of the European Convention and Article 2 of Protocol No. 4 to the European Convention is for a certain protection to exist in a democratic order from arbitrary interference of the public authorities with the mentioned rights.
71. Bearing in mind the aforementioned, the Constitutional Court indicates that the present case concerning the fight against the infectious disease COVID-19 indisputably concerns complex and isolated case law-wise, which the competent authorities of the Federation of Bosnia and Herzegovina, and of all other levels of the government in Bosnia and Herzegovina have not had a chance to encounter before. Also, it is indisputable that it has concerned a situation that threatens the security of the population health-wise, and that the body which was set up by the executive authority delivered the measures in the fight against the COVID-19 pandemic-epidemic, which, in the context of the allegations stated in the respective appeals, are reflected, among other things, in the obligation to wear protective face masks indoors and outdoors, and in the restriction of freedom of movement on a temporary basis. Concerning this, the European Convention emphasizes that the framework of the European Convention was set in such a way as to, among other things, help the states to devise the manner in which to react to crisis

situations. This is to say that neither the European Convention itself, nor the Constitution of Bosnia and Herzegovina cannot be regarded as an obstacle to undertaking measures which primarily protect the lives of individuals, and their health for that matter, rather their objective is to ensure that any measures undertaken with a view to achieving that objective are proportionate. In that connection, the European Convention, first and foremost, notes that, generally speaking, there is no solid and uniform position regarding all the relevant issues relating to the pandemic. Likewise, there is no solid healthcare, scientific position regarding the best practices in suppressing the spread of the mentioned infectious disease. However, the measures that have been uniformly recommended include maintaining a distance among people, wearing a protective face mask and appropriate compliance with hygienic measures. On the other hand, there exists a general positive obligation, which, by all means, includes the public authorities in Bosnia and Herzegovina, to undertake necessary and known measures for the protection of the health of population.

72. When analyzing the situation in Bosnia and Herzegovina, and in the Federation of Bosnia and Herzegovina, since the start of the pandemic (decisions of public authorities), it is clear that the measures challenged by the appeals were not delivered at the outset of the pandemic, for since then sufficient period of time elapsed during which it was necessary to consolidate all segments of the public authority, unlike during the initial stage of the mentioned pandemic. Nevertheless, the impugned measures were imposed pursuant to the orders delivered by the crisis staffs of the health ministries. This is to say that this concerns a educed segment of the executive authority which operation basically, in its nature, is of a temporary character. Indeed, the FBiH Government authorized, by its Decision Declaring the Cessation of the State of Disaster Caused by the Outbreak of the Coronavirus (COVID-19), the Crisis Staff of the FBiH Ministry of Health to, among other things, establish measures for the purpose of preventing the spread of the coronavirus (COVID-19). However, according to the assessment of the Constitutional Court, this legal framework for the operation of crisis staffs was set too broadly and without adequate control, i.e. without the participation of the highest executive authority and the legislative authority alike, which resulted in the imposition of measures (although aimed at the protection of health), which seriously interfere with the fundamental human rights of one segment of the population of the Federation of Bosnia and Herzegovina (Sarajevo Canton – obligation to wear protective face masks), that is to say of the entire population (temporary restriction of movement), i.e. fundamental human rights are being restricted, and even abolished. The aforementioned, which has already been indicated earlier, inevitably brings into question the

very principle of the rule of law which implies the existence of security mechanisms relevant for all the rights referred to in the European Convention, particularly those concerning the relationship between positive and negative obligations of the State. Involving the executive authority bodies in this aspect of the democratic order gives rise to impossibility to make a clear distinction between the obligation of the executive authority to not to interfere with a right referred to in the European Convention, on the one hand, and the responsibility of that same authority to undertake positive measures for the purpose of protecting rights referred to in the European Convention, on the other. In such cases the distinction between positive and negative obligations is not that clear. Certainly, such distinction becomes more pronounced in situations involving a complex pattern of action, or lack of action of the public authorities depending on the formulation of the primary obligation of the public authority, which is reflected in the present case in the protection of the health of population. However, inadequate and untimely action of the public authorities, which primarily pertains to the legislative authority as the highest according to the hierarchy in a democratic order, and in the light of ensuring the balance among different interests-rights, leads, also, to their violations, if that same authority fails to regulate negative effects of the interference of the executive authority with the rights of individuals and population in entirety. When interrelating the requirement for the interreference with human rights to be based on lawfulness and when taking into account these attributes of a democratic society, it is clear that in the present case the necessary role of the legislative and of the highest executive authority failed to materialize, which is the reason why the measures (imposed by means of the impugned decisions) lack these important elements in order to be able to consider in entirety that they are in conformity with the standards of qualified human rights concerned in this case. In a democratic society, such important measures, although directed towards the protection of health, after a prolonged period of time of existence of the threat – pandemic and in a situation where its duration and course still continue to be uncertain in the future, have to be under constant control of the legislative authority with the involvement of the highest body of the executive authority. This is to say that it should evaluate, approve and control the measures continuously. The Constitutional Court has already pointed in the Decision no. *AP 1217/20* to the obligation of (pro)active action of the legislative authority in relation to the crisis caused by the coronavirus COVID-19. The fact that more than nine months elapsed since the declaration of the mentioned epidemic - pandemic, according to the opinion of the Constitutional Court, additionally reinforces the obligation of all levels of the government in these emergency situations in the context of the protection of a democratic principle of the separation of powers and the compliance with the rule of law. The failure to assume

responsibility and demonstrated passivity of the highest legislative body in the Federation of BiH (the FBiH Parliament) in establishing, in a clear and timely fashion within the scope of its respective powers, a framework for the action of the executive authority as a whole throughout the duration of the COVID-19 pandemic – epidemic, inevitably leaves a possibility for upsetting the balance among different interests (rights) that were referred to earlier. According to the assessment of the Constitutional Court, that, too, did not result in necessary minimizing of the risk from possible abuse of powers by one administration authority (the crisis staffs of the health ministries) in the context of the existence of general legal framework for its operation and the degree of powers in such situation. Therefore, the Constitutional Court deems that the (in)action of the public authority, and primarily so of the FBiH Parliament, in the specific circumstances of the present case is contrary to the ensuring of the compliance with guarantees comprised in the right to “private life” and the right to “freedom of movement”, given that in the present case the interference with the constitutional rights does not satisfy the principle comprised in the democratic necessity test.

73. In view of all the aforementioned, the Constitutional Court finds that the constitutional right to “private life” under Article II (3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, and the constitutional right to “freedom of movement” under Article II (3) (m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention were violated in the cases at hand.
74. The Constitutional Court, however, cannot accept the appeals in the segment where the appellants requested that the impugned Orders be revoked, i.e. that they be rendered ineffective, considering the existing health situation in Bosnia and Herzegovina and in the world, and the fact that the introduction of the necessary measures for the protection of population from pandemic, certainly, carries a great public interest, as well as that negative repercussions might set in if the impugned Orders were to be revoked right away.
75. The Constitutional Court indicates that, according to its constitutional role, it acts as a corrector for the remaining segments of the public authority, legislative and executive, in order to ensure the functioning of all in conformity with the Constitution of Bosnia and Herzegovina. Therefore, the Constitutional Court has the competence and obligation to request in the present case from the highest bodies of the legislative and executive authority to undertake forthwith measures from within their respective jurisdiction in order for every possible interference with constitutional rights to be in accordance with the standards referred to in the Constitution of BiH

and in the European Convention, articulated in this decision as well, and to inform thereof the general public and the Constitutional Court in an appropriate fashion.

b) Other allegations

76. Individual appellants also held that the impugned measures relating to the restriction of the “freedom of movement” discriminated against them within the meaning of Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention. Considering the established violation of the right to “freedom of movement” under Article II (3) (m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention, the Constitutional Court deems that there is no need to examine separately the allegations about discrimination.

VII. Conclusion

77. The Constitutional Court concludes that the interference with the fundamental human rights and freedoms guaranteed under the Constitution of BiH and the European Convention, in the present case of the right to private life and to freedom of movement, which was carried out by means of the orders issued by the narrow segments of the executive authority on mandatory wearing of protective face masks and on the restriction of movement, in the present case issued by the crisis staffs of the ministries of health, in a situation where active participation of the highest bodies of the legislative and executive authority failed to materialize concerning the issuance and reevaluation of the ordered measures, constitutes the violation of the mentioned human rights and freedoms.
78. On the other hand, the Constitutional Court concludes that the portion of appeals requesting that the impugned orders be revoked is ill-founded, for the reason that the revoking thereof, given the unquestionable public interest in the introduction of the necessary measures for the protection of population from the pandemic, might result in the negative repercussions before the legislative and the highest executive authority undertake measures within the scope of their respective competence and obligations.
79. Having regard to Article 59 (1), (2) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.
80. Considering the decision of the Constitutional Court in this case, it is not necessary to consider separately the request of some of the appellants for the adoption of an interim measure.

81. According to Article VI (5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina