Triage situations II

In an order published today, the First Senate of the Federal Constitutional Court declared void provisions regulating triage situations contained in the Protection Against Infection Act (*Infektionsschutzgesetz* – IfSG) because the Federation lacked the necessary legislative competence for the provisions in question.

In their constitutional complaint, the complainants – medical specialists in the field of emergency and intensive-care medicine – directly challenge the newly introduced § 5c of the Protection Against Infection Act. In this section, the federal legislator lays down, inter alia, which substantive criteria are to be applied when deciding on the allocation of life-sustaining intensive-care treatment resources in situations in which shortages arise – i.e. so called triage situations – when such shortage is caused, at least in part, by a communicable disease.

The constitutional complaints are successful; the interference with occupational freedom is not justified under constitutional law. The Federation lacks the necessary legislative competence to enact the challenged provisions of § 5c of the Protection Against Infection Act.

The decision was taken with 6:2 votes.

Facts of the case:

With the newly enacted rules in § 5c of the Protection Against Infection Act, the legislator introduced a procedure and a (positive) prioritisation criterion to be used in triage situations; it also specified numerous criteria that may not be applied in such situations. The federal legislator enacted these provisions in reaction to the order of the Federal Constitutional Court of 16 December 2021. In this order, the First Senate held that the legislator violated Art. 3(3) second sentence of the Basic Law (*Grundgesetz* – GG) by failing to take measures to ensure that no one is at risk of being disadvantaged on the basis of disability in the allocation of life-sustaining medical treatment if sufficient intensive-care resources cannot be provided to all who need them. The Federal Constitutional Court obligated the legislator to take effective measures in this respect as soon as possible, see Press Release No.109/21.

The defining aspect of triage situations connected to a shortage of intensive-care resources is a dilemma: Any decision on allocating the available intensive-care resources can regularly lead to a loss of human life. There is no allocation of the available resources that can result in a benefit to all patients. The newly enacted provisions in § 5c of the Protection Against Infection Act introduce statutory requirements for this allocation of life-sustaining intensive-care treatment in situations of shortage.

The complainants challenge the provisions in § 5c of the Protection Against Infection Act and assert, inter alia, a violation of their occupational freedom.

Key Considerations of the Senate:

A. The constitutional complaints are admissible and well-founded to the extent that the complainants claim that § 5c(1) through (3) of the Protection Against Infection Act violate their fundamental right guaranteed under Art. 12(1) of the Basic Law.

I. The provisions in question interfere with the scope of protection of occupational freedom. Art. 12(1) of the Basic Law guarantees that physicians may exercise their occupational activities free from any directives as to medical decisions; the fundamental right also protects their decisions on whether and how to conduct curative treatment as long as they remain within the framework of therapeutic responsibility. The rules in § 5c(1) through (3) of the Protection Against Infection Act restrict therapeutic freedom and thus impair the freedom to practice an occupation.

II. The interference is not justified under constitutional law, because the provisions are formally unconstitutional. The Federation does not have the necessary legislative competence to enact the specifically challenged provisions of § 5c(1) through (3) of the Protection Against Infection Act.

1. With regard to the provisions in question, the Federation cannot make use of its legislative competence to regulate measures against communicable diseases under Art. 74(1) no. 19 first alternative of the Basic Law (‘measures to combat human and animal diseases which pose a danger to the public or are communicable’). The competence does not provide a basis for enacting legislation that only pertains to the consequences of pandemic situations. Rather, it requires the measures in question to serve the containment or prevention of a pandemic situation, at least to some extent.

a) The wording of the constitutional provision itself suggests that it does not suffice for its applicability if legislation relates only to the consequences of a pandemic situation without serving the containment or the prevention of a communicable disease as such. Art. 74(1) no. 19 of the Basic Law mentions measures ‘to combat’ communicable ‘human’ diseases and thus expresses that the legislative competence relates to those provisions that serve the containment of communicable diseases occurring within Germany. The history of legislative competence in the area of healthcare law – which over time has been gradually transferred to the *Länder* – also argues in favour of the competence being limited to rules for the containment or combatting of a pandemic situation and thus not extending to rules that only pertain to its consequences.

b) The provisions of § 5c of the Protection Against Infection Act also do not constitute a ‘measure’ within the meaning of Art. 74(1) no. 19 of the Basic Law. The specific design of the rules does not suggest that it is an instrument for the prevention of or combatting communicable diseases. The rules do not reduce the risk of infection. Rather, they only state how physicians are to prioritise patients when there is a shortage of intensive-care treatment resources. Thus, § 5c of the Protection Against Infection Act focuses on ‘who’ may be treated, but does not address ‘how’ this treatment is to take place. The provisions constitute law which only addresses the consequences of a pandemic situation and only relates to shortages resulting from it. They do not serve to combat a pandemic. The wording of the provisions identifies its purpose as providing protection against discrimination and providing legal certainty for the physicians making the decisions in question.

c) Because the rules on handling triage situations are not indispensable for preventing and combatting communicable diseases, the Federation may also not assert a competence based on a substantive connection to the area of regulation or an annexed competence.

2. § 5c(1) through (3) of the Protection Against Infection Act also do not fall into the concurrent legislative competence for public welfare, because this competence is subsidiary to Art. 74(1) nos. 19, 19a of the Basic Law, which constitute the more specific legislative competences.

The rules in § 5c of the Protection Against Infection Act do contain elements of welfare legislation insofar as they are intended to serve the protection of people with disabilities against discrimination. Yet systematic considerations argue against this legislative competence being applicable. § 5c of the Protection Against Infection Act is a provision attributable to the healthcare sector, which lacks a primary welfare element. Although the provision does pursue aims that stem from anti-discrimination legislation, it determines the order in which medical treatment is to be provided in case of triage situations, thus constituting an allocation provision which primarily pertains to the professional conduct of physicians and procedural obligations under hospital law. The decision of the Constitution to allocate only limited substantive legislative powers to the Federation in the field of healthcare law should not be circumvented through an expansive interpretation of the legislative competence for public welfare.

3. Additionally, the challenged rules are neither part of civil law nor of criminal law and are therefore not covered by those legislative competences. In particular, the legislator intended to regulate the allocation of intensive-care resources at a time when they are in short supply due to exceptional circumstances independently of contractual relations under civil law by introducing general standards applicable to the way in which physicians exercise their occupational activities. It is obvious that interpreting the provisions restrictively to limit their applicability to civil law relationships in order to retain their validity would contradict the clear intention of the legislator.

4. Lastly, there is also no federal legislative competence based on inherent grounds.

In pandemic situations, rules on allocation do not necessarily need to be uniform across the state as a whole. It is not ascertainable that only the Federation would be able to effectively handle the risks of discrimination occurring in triage situations – particularly not due to an inability of the *Länder* to act in this regard. The fact that uniform federal legislation may be more appropriate in a pandemic situation of national proportions than the coordination among the *Länder* does not suffice to give rise to legislative power based on inherent grounds. According to the way in which the Basic Law currently distributes legislative competences, the *Länder* bear the main responsibility for enacting allocation standards that take into account discrimination where such provisions deal only with the consequences of pandemic situations; such provisions must allow for making decisions that are viable across multiple *Länder*.

B. The incompatibility of § 5c(1) through (3) of the Protection Against Infection Act with Art. 12(1) of the Basic Law renders these provisions void. The declaration of voidness must be extended to § 5c(4) through (7) of the Protection Against Infection Act, because those provisions are inextricably linked with the statutorily defined allocation decisions and the substantive criteria applicable in this regard and draw their justification solely from those provisions.