

## THE LEGALITY OF HUMAN RIGHTS LIMITATIONS IMPOSED BY COVID-19 GREEN PASSES IN LITHUANIA AND THE CZECH REPUBLIC

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**Abstract.** The aim of this article is to provide a comparative analysis of the regulation of the Opportunity Passport (hereinafter OP – a COVID-19 health status certificate) in Lithuania and an analogous document in the Czech Republic, and the legality of the limitations on human rights that were imposed by such rules. It describes the regulations imposed by the Lithuanian and Czech institutions and their development. Further, the requirement of the legality of limitations on human rights is discussed in the context of its application to the OP regulation, taking into consideration the jurisprudence of the Constitutional Court of Lithuania. The article also analyses the Tečka application, which was used for analogous purposes in the Czech Republic, in terms of its legal basis and problems related to the legality of human rights violations. The critical analytical method allows for an analysis of Lithuanian and Czech legislation on the management of the pandemic, the establishment of so-called green passports, and the relevant jurisprudence of the courts, leading to well-grounded conclusions. This method is also employed in the analysis of scientific literature, which allows concerns to be revealed regarding data protection in the process of the execution of the above-mentioned provisions. The comparative method allows the authors to compare the practice of the selected two states in the management of the pandemic and in the adoption of green passports. The article concludes that both documents regarding health status during the COVID-19 pandemic had similar aims and were introduced at similar times. However, the legal regulation of the Lithuanian OP has not yet been analysed by the courts. In Lithuania, the legality of the OP was questioned based on the fact that the relevant law on the protection of public health contains only succinct provisions on the limitation of human rights in such situations, and the question remains as to whether these provisions were sufficient for such limitations. In the Czech Republic, the concern was raised about the authority of the Ministry of Health to issue such documents as it had no legal basis. Furthermore, questions of privacy in the context of the Czech health passport were also pertinent.

**Keywords:** Green Passport, COVID-19 health status certificate, human rights limitations, the legality of human rights limitations.

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## Introduction

The regulation of the Opportunity Passport (Lith. *Galimybių pasas*) in Lithuania – a COVID-19 health status certificate giving access to certain services and shops during the COVID-19 pandemic if a person was vaccinated or complied with other requirements – raised significant questions about the legality of the limitations that were imposed by such rules. Even though the example was taken from other countries aiming at opening certain activities to the public, such as theatres, concerts, and other events, the regulation raises important legal questions regarding the legal base of the restrictions and the legality of the limitation on human rights. The possession of the Opportunity Passport (hereinafter, OP) could be proven by possession of a printed document, or by a QR code on a phone application. This status could also be proven by providing documents proving immunity or test results, which were not officially called OPs but which served the same purpose. The regulation establishing the OP was outlined by the Government of Lithuania in the same decree where the emergency situation was regulated, and such a document was not foreseen in the laws passed by Parliament.

In the Czech Republic, the Tečka mobile application was introduced, where information about vaccinations, illnesses, or quarantines was uploaded via a central system. This information could be retrieved by the čTečka application, which, when attached to a mobile device, could read QR codes and thus mark an individual infection-free status certificate as either valid or invalid. These certificates had to be presented by individuals in situations where, for example, they wanted to attend a sporting or cultural event, which was limited by the number of participants and the requirement of being infection-free.

The emergency situation brought about by the COVID-19 pandemic is, of course, an important factor in evaluating the justification for the limitations imposed on persons. We remember the beginning of the pandemic, when it was not clear how this virus would behave, how we would treat it, and how we would protect from it. This created a significant burden on the healthcare system. Thus, the sense of urgency might have justified initially strict measures for all citizens, but were these measures still applicable two years after the start of the pandemic? The regulation went from strict measures of quarantine to all citizens, including lockdowns of municipalities, to the distinction of persons who are vaccinated or have had COVID-19 from those who do not have immunity. Were these measures justified in the face of scientific information and pure statistical data? At the same time, some other European states imposed mandatory vaccinations, while some declared the pandemic over. Such variations show that the picture of pandemic containment measures was not as clear-cut as the proponents of the OP in Lithuania presented it to be.

The Czech Republic has often been inspired by neighbouring countries in its approach to the measures it has taken. Measures have been adopted in the form of government regulations or as measures of a general nature. Many have been challenged before administrative courts, and some have even been declared illegal by the courts (both on the grounds of inadequate justification and on the grounds of a lack of competence or an incorrect choice of legal basis).

Therefore, the evaluation of limitations on human rights starts with the question of the legality of human rights limitations imposed by the use of health certificates (the OP in Lithuania and the Tečka in the Czech Republic). The measures taken were based on the conviction that there was a sufficient legal basis for dealing with the COVID-19 crisis, but a more thorough analysis of this conviction is required. Obviously, questions of proportionality also arise, but the question of legality must be addressed prior to the question of proportionality, and is thus the primary focus of this article.

The article aims to provide an analysis of the rules establishing the health certificates used in the context of the COVID-19 pandemic in Lithuania and the Czech Republic in the context of the requirements of the legality of measures restricting human rights.

The critical analytical method allowed an analysis of the Lithuanian and Czech legislation on the management of the pandemic, in particular on the establishment of so-called green passports. The relevant jurisprudence of the courts was also studied, leading to well-grounded conclusions. The critical analytical method was also employed in the analysis of scientific literature, which allowed concerns to be revealed regarding the data protection of persons in the process of the execution of the above-mentioned provisions. The comparative method allowed the

authors to compare the practices of the two selected states in the management of the pandemic and in the adoption of green passports.

Questions surrounding OPs were not extensively discussed in the scientific literature in Lithuania. The legal basis for measures of pandemic containment were analysed by Valutytė et al. (2021), while constitutional aspects of the management of the pandemic were analysed by Birmontienė and Miliuvienė (2022). The OP in Lithuania has, however, been analysed from a different perspective: whether it was an effective measure in encouraging vaccination (Walkowiak et al., 2021). In the Czech Republic, the dynamic development of the situation did not allow for a broad academic debate on the topic. Within the published texts, it is possible to mention papers on the potential consequences of certificate forgery, including criminal law implications. From the point of view of personal data protection, the issue was commented on by the Office for Personal Data Protection (Kuba, 2022). Therefore, the novelty of this paper is in its analysis of the OP as a separate instrument in the pandemic management context, as well as in its use of the comparative perspective from Lithuanian and Czech points of view.

## **1. The Legality of the Opportunity Passport in Lithuania**

### *1.1. Imposed Limitations*

The decree of the Government which established the legal basis for the OP was the 2020 resolution of the Government of Lithuania regarding the declaration of the state-level emergency. The OP was introduced in May 2021, and was presented as a temporary decision during a transitional period intended to open up some of the activities that had been closed due to quarantine (Resolution of the Government of Lithuania, 2021). Publicly, officials stated that the aim of the OP was to learn to live with the COVID-19 pandemic and to enable all persons to participate in various activities without any documents indicating their health status. At that point, the OP was related to a limited number of activities, such as: eating inside the premises of cafes and restaurants; using other services of leisure, such as billiards or bowling; indoor events comprised of up to 500 people, and outdoor events of up to 2,000 people, which were not allowed at the time according to the applicable regime of quarantine (Naprys, 2021); and personal events with no limitations, such as housing services or various other services.

Stricter provisions regarding the use of the OP came into force on 13 September 2021 (Resolution of the Government of Lithuania, 2021). These provisions listed the services that could be provided for persons who did not present certain documents, stating either: their vaccination status; a proven case of COVID-19 (valid for 210 days); an antigen test (valid for 60 days); or a test indicating that a person did not have COVID-19 (valid for 48/72 hours). In practice, this excluded those persons from visiting any cultural or educational event (only allowing them to visit events taking place outside with less than 500 visitors) or visiting shops that sold non-essential goods. For the purchase of essential goods, persons without an OP could visit only smaller supermarkets that had an area of less than 1,500 square metres. Later, an additional limitation was imposed on smaller shops – these shops had to ensure that the area for one customer should be at least 30 square metres; therefore, the flow of customers had to be limited by shop personnel. Persons who did not have an OP could receive services only when the provision of the service was not longer than 15 minutes, excluding any services that took longer (beauty services, consultation services, gyms, etc.). This also prohibited students of higher education institutions who did not have one of the documents mentioned above from attending studies and classes.

It should also be noted that from September 2021 to December 2021, according to the provisions of the legal acts regulating the questions of security during the pandemic, masks and other provisions on personal safety during the pandemic were only recommendatory to holders of an OP, and even the obligation for quarantine after having contact with a person who had COVID-19 was lifted.

The costs of testing to obtain an OP for 24/72 hours for those persons who were not vaccinated or did not have antibodies/proof of illness were borne by individuals, not by the Government. The Government did not provide free testing for persons willing to obtain an OP – in contrast to Denmark, for example, where testing was available for free (Jurčenkaitė, 2021). This is a very important distinction, as in Lithuania if a person did not have antibodies, had not contracted and recently recovered from COVID-19, and was not vaccinated, they could attain the OP only if they took an RT-PCR test, which cost around €70 and was valid for 72 hours from the moment of taking a

sample in a testing centre. Considering that the test only provided an answer after 24 hours, this left only around 48 hours to attend the events or larger shops that the person was previously precluded from visiting.

The provisions governing the OP were abolished by a decision of 2 February 2022, which came into force on 5 February 2022 (Resolution of the Government of Lithuania, 2022). Despite the provisions and prohibitions imposed by the OP, the numbers of persons ill with COVID-19 was significantly larger after the abolition of the OP than at the moment of the establishment of the OP.<sup>5</sup> The provisions on the OP were submitted to the Lithuanian Constitutional Court, but the Court used its discretion to terminate the proceedings due to the abolition of the above-mentioned provisions (Constitutional Court of Lithuania, 2022b). Further decisions of the Court are addressed in Section 1.6. The administrative courts did not raise questions relating to the OP by themselves, as a decision of the Government may be abolished only by a decision of the Constitutional Court of Lithuania. Therefore, the question of the legality of the above-mentioned decision was addressed to the Constitutional Court of the Republic of Lithuania.

### *1.2. The Human Rights Which Were Affected by the Lithuanian Opportunity Passport*

The provisions of the OP imposed limitations on the right to respect for private and family life ensured by Article 8 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter – the ECHR) and Article 22 of the Constitution of Lithuania. These limitations manifested in the limits placed on the choice of a person to choose activities according to their preference and the possibility to take care of their everyday needs. For OP holders, the provisions also limited their right to privacy and to keep information about their health status private. Persons who did not conform to the requirements of the OP had their everyday lives burdened. Moreover, they could not freely receive necessary services – even medical services. They were also unable to freely purchase the necessary everyday commodities, and mostly had to order them online – except for groceries.

Furthermore, the OP limited the right to higher education ensured by Article 2 of the Protocol to the ECHR, which states that “no person shall be denied the right to education” (Council of Europe, 1950). The Constitution of the Republic of Lithuania (1992) guarantees the right to higher education “to every one according to their individual abilities”. Students who did not possess the OP could not access the premises of universities and colleges in Lithuania, and could not attend classes that were conducted in person. Initially, for 1 month (September to October 2021), students were able to take tests that entitled them to receive the OP for free, but they later had to pay for tests themselves if they were not vaccinated or had not had COVID-19. One test allowed them to use the OP for 48/72 hours. Thus, if no remote/online option for joining classes was provided by the teaching institution (the approach varied in different institutions of higher education), then students were in practice barred from studies due to their vaccination/health status.

Furthermore, the question of whether the regulation of the OP was discriminatory also arises. Different treatment based on a person’s health status was established: persons were distinguished based on whether they had been vaccinated, had recovered from COVID-19 illness, or possessed sufficient antibodies in their blood. The medical research showed that both vaccinated and unvaccinated individuals could spread COVID-19; therefore, the question arises as to whether it was correct to treat those two groups differently. The prohibition of discrimination is established in two articles of the ECHR. Article 14 prohibits discrimination in connection with the rights established in the Convention, and states that

The enjoyment of the rights and freedoms outlined in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (Council of Europe, 1950).

Moreover, Article 1 of Protocol No. 12 of the ECHR establishes the general prohibition of discrimination and the prohibition of discrimination against persons, stating that

The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (Council of Europe, 1950).

The Constitution of the Republic of Lithuania (1992) also states that

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<sup>5</sup> On 2 September 2021, 816 COVID-19 cases were established in Lithuania, and on 5 February 2022 – 12,700 COVID-19 cases.

All persons shall be equal before the law, the court, and other State institutions and officials. The rights of the human being may not be restricted, nor may he be granted any privileges on the ground of gender, race, nationality, language, origin, social status, belief, convictions, or views.

### *1.3. The Possibility of the Restriction of Human Rights*

The Constitutional Court of Lithuania (1997a) noted in its ruling of 13 February 1997 that conflicts often arise between personal rights and freedoms on the one hand and public interests on the other. Sometimes contradictions arise, and one way of reconciling interests is to restrict the exercise of individual rights and freedoms. The principle of recognizing the inherent nature of human rights and freedoms does not preclude the exercise of human rights and freedoms from being restricted. According to the Constitution, the exercise of human constitutional rights and freedoms may be restricted if the following conditions are met: this is done by law; restrictions are necessary in a democratic society to protect the rights and freedoms of others and the values enshrined in the Constitution, as well as constitutionally important goals; restrictions do not deny the nature and essence of rights and freedoms; and the constitutional principle of proportionality is observed (Constitutional Court of Lithuania, 2004).

Possible grounds for the limitation of human rights are established in the ECHR and in the Lithuanian Constitution. The method chosen by European states in response to the COVID-19 pandemic was either to rely on the exceptions provided for in the relevant articles or to declare a state of national emergency according to Article 15 of the ECHR.

States which chose the first method relied on the fact that most rights are not absolute in character, and states can limit the exercise of these rights for valid reasons, including public health emergencies. Examples include the rights to freedom of expression, freedom of association, freedom of assembly, and freedom of movement (Pranevičienė & Vasiliauskienė, 2020, p. 150). The second method is to make a derogation under Article 15 of the ECHR, which states 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, provided that such measures are not inconsistent with its other obligations under international law. The examples of exceptional circumstances could be, but are not limited to, armed conflicts, civil and violent unrest, environmental and natural disasters, etc. (Council of Europe, 1950).

In the ECHR system, 10 states notified the Council of Europe regarding the application of such a regime (Council of Europe, 2022), while other countries chose to operate under laws applicable in everyday circumstances when regulating actions in case of a health emergency. Lithuania and the Czech Republic, as well as 35 other states of the Council of Europe, chose the second method and used the derogations foreseen in the laws regarding civil emergencies aimed at coping with the pandemic rather than invoking the regime under Article 15 of the ECHR.

### *1.4. The Legality of the Restrictions Imposed by the Opportunity Passport*

Both international human rights documents as well as the Constitution of the Republic of Lithuania establish the requirement that limitations on human rights have to be established by law.

The legality requirement is established in

the expressions: “in accordance with the law”, “prescribed by law”, and “provided for by law” (§ 2 of Articles 8 to 11 of the Convention; § 1 of Article 1 of Protocol No. 1; § 2 of Article 2 of Protocol No. 4 to the ECHR), and the expression “under national or international law” contained in Article 7 of the Convention. In Articles 2 and 3 of Protocol No. 7, the legality requirement has been set forth using such expressions as “governed by law”, “prescribed by law”, and “according to the law” (Valutytė et al., 2021).

The Lithuanian Constitution (1992) establishes that limitations on human rights must be established by law (Lith. *įstatymas*, a law adopted by Parliament). This is present in all articles listing human rights, either stating that a certain right is “protected by law” (Article 19 “The right to life of a human being shall be protected by law”;

Article 21 “The dignity of the human being shall be protected by law”; Article 23 “The rights of ownership shall be protected by law”) or that the limitations on certain rights may be enacted only according to the law (for example, Article 20 “No one may be deprived of their freedom otherwise than on the grounds and according to the procedures which have been established by law”; Article 22 “Information concerning the private life of a person may be collected only upon a justified court decision and only according to the law”, etc.).

The requirement of legality is established in the jurisprudence of the Constitutional Court of Lithuania. The Court (2004) has stated that

according to the exercise of the constitutional rights and freedoms of a constitutional person it may be restricted if the following conditions are observed: this is done by law; restrictions are necessary in a democratic society to protect the rights and freedoms of others and the values enshrined in the Constitution, as well as constitutionally important goals; restrictions do not deny the nature and essence of rights and freedoms; the constitutional principle of proportionality is observed.

Furthermore, the Constitutional Court of Lithuania (1997a, 1997b) has stressed that the requirement of legality means that restrictions must be imposed only by a law that is made public and that its rules are sufficiently clear. When defining the limits of the exercise of rights by law, it is necessary to take into account the purpose and meaning of the respective right (or freedom) and the possibilities and conditions for its restriction established in the Constitution.

Regarding the ECtHR, there is a difference in this question when it comes to the jurisprudence of the Court. As Valutytė et al. (2021) note:

As a rule, “law” in European practice would usually mean a written and public law adopted by parliament, which decides whether or not a particular restriction should be possible. However, the case law of the ECtHR shows that this may also include unwritten law as interpreted and applied by the courts, public international law, and various forms of delegated legislation. The interference must, of course, be authorized by a rule recognized in the national legal order.

Therefore, the practice of the ECtHR sometimes foresees a legal act of lesser rank as a suitable legal ground for the restriction of a particular human right.

### *1.5. The Jurisprudence of the Constitutional Court of Lithuania Regarding the Possibility of Detailing and Concretising Laws in Governmental Decrees*

The Constitutional Court of Lithuania has developed its jurisprudence on the possibility to detail and concretise the legal regulation established by the law of Parliament. In its rulings of 7 February 2005 and of 5 May 2006, the Constitutional Court formed jurisprudential provisions on the possibility to detail and concretise the legal regulation established by law by governmental decrees.<sup>6</sup> It stipulated that this may be done in cases when this is objectively determined by the necessity of relying on special knowledge or special (professional) competence in legislation.

In its ruling of 7 February 2005, the Constitutional Court emphasised that the legislator has wide discretion in regulating the relations of social security and social assistance, taking into account various factors (*inter alia*, state and public resources, material and financial possibilities), and has wide discretion in regulating said relations accordingly. Legislators of secondary legislation also have some discretion in this area. However, the Constitutional Court noted that this discretion must be based on the powers of the relevant institutions (officials) enshrined in law; it cannot deny the legal regulation established by law. Governmental decrees have to abide by the principle of supremacy of law established in the constitutional doctrine. This principle is derived from the principle of the rule of law, presupposing the hierarchy of laws. This means, *inter alia*: that governmental decrees may not contradict laws, constitutional laws, and the Constitution; that governmental decrees should be adopted in accordance with the provisions of laws; and that a governmental decree is an act of application of laws – whether this act is a one-time (*ad hoc*) or continuous application. A governmental decree may not contradict the law or change the contents of the norms of the law, and there may not be any legal norms that would compete

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<sup>6</sup> Here the term *governmental decree* is used to describe all legal acts that are in the legal hierarchy below the laws of Seimas (Parliament), i.e., adopted by the Government, ministries, or other administrative institutions.



with the norms of the law. Governmental decrees may only establish the order of the implementation of the law; they may establish the procedures of the implementation of the law; and these acts may encompass legal regulation based on the provisions of the law, where the need to concretise and detail the provisions of the law stems from the objective necessity of basing these provisions on special knowledge or special (professional) competence in a certain field. In this ruling, the Constitutional Court emphasised that the conditions for the emergence of a person's right to social assistance, as well as the limits of the scope of this right, may not be established by governmental decrees (Constitutional Court of Lithuania, 2005).

In its ruling of 5 May 2007, the Constitutional Court further developed its doctrinal provisions on the granting of legislative powers to the Government and on the possibility of the sub-delegation of this power to other administrative institutions. The Constitutional Court emphasised in this case that, according to the Constitution, legal regulation related to the definition of the content of human rights and freedoms and the establishment of guarantees for their implementation may be established only by law, but when the Constitution does not require certain relations to be regulated by law, they can also be regulated by governmental decrees (*inter alia*, procedural or processual provisions for the implementation of human rights, etc.). When the need to elaborate and concretise the legal regulation established by law in governmental decrees may be determined by the necessity of relying on special knowledge or special (professional) competence in legislation, **under no circumstances may these governmental decrees establish conditions for the emergence of a human right, or for limitations on said right; furthermore, governmental decrees may not establish such legal regulation related to human rights and their implementation that would compete with the provisions established by law** (Constitutional Court of Lithuania, 2007). Thus, the legislative powers and discretion of the executive can be exercised only within the limits of the principle of separation of powers, in accordance with the requirements of the hierarchy of law and the doctrine of human rights. **The Constitutional Court emphasised that the legislator may also establish in law that certain relations are regulated by the Government or an institution authorised by it only in cases when the Constitution does not require the regulation of certain relations specified therein by law** (Constitutional Court of Lithuania, 2007).

Regarding the conditions of the sub-delegation of legislative power to administrative institutions, the Constitutional Court has underscored that legislative competence may be delegated to the administrative institutions subordinate to the Government only when, in accordance with the Constitution, the regulation of such relations is not attributed to the exclusive competence of other institutions exercising state power – *inter alia*, the Government (Constitutional Court of Lithuania, 2007).

If the legislator establishes in law a provision that certain relations are “regulated by the Government or an institution authorised by it”, this provision means that: the Government has the power to regulate the relations specified in the law itself, or it can indicate by decree which institutions may (and should) regulate the relations indicated in the law. The Government may regulate some of the relations indicated in law by itself, and it may delegate another institution to regulate some relations *expressis verbis* indicated in law and the relations stemming from the relations *expressis verbis* mentioned by law. However, the Government, by authorising any institution to regulate the respective relations, may not instruct it to regulate relations which, in accordance with the Constitution and laws, may be regulated by legal acts of the Government and not by institutions lower in the hierarchy.

During the course of the delegation of the powers of regulation of legal relations to administrative institutions, the constitutional doctrine also requires the presence of special competence in those institutions. If the legislator establishes in the law that certain relations are regulated by the Government or the institution authorised by it, the Government may adopt a decree and delegate regulatory powers only to an institution that carries out functions or has powers related to the relations that are being delegated to it by the Government (or are close to those being delegated). Following the conditions and procedure established by the law, the Government may (if needed) establish an institution and delegate it with the power of regulation of relations foreseen in the law. When the Government delegates powers to regulate specific relations to an institution, this institution must have the special professional competence necessary for such regulation (Constitutional Court of Lithuania, 2007).

### *1.6. The Jurisprudence of the Constitutional Court of Lithuania Regarding Legal Questions Relating to the Management of the COVID-19 Pandemic*

The jurisprudence of the Constitutional Court of Lithuania in the field of the restrictions imposed to counter the pandemic has so far resulted in two decisions on the merits. One of the decisions adopted discussed the ability of the National Public Health Centre to establish a list of employment positions where persons needed to check their health status and complete other indicated procedures to be able to carry out their functions. The Constitutional Court stated that the provisions of the Law on the Prevention and Control of Human Infectious Diseases were detailed enough when indicating the conditions for work that could be established by the National Public Health Centre, as they foresaw that these measures may be taken only in a case where national quarantine was declared due to a contagious disease and in a case where the particular employment place had an outbreak of such a disease (Constitutional Court of Lithuania, 2022a).

The second case where a decision on the merits was taken was the question of the limitation of economic activity at the beginning of the pandemic (March–May 2020). The Supreme Administrative Court of Lithuania argued that the provisions of the decree of the Government that temporarily suspended the activity of beauty service providers and allowed odontology service providers to provide only essential services violated the provisions of the Law on the Prevention and Control of Human Infectious Diseases and the constitutional right to pursue economic activity. The Constitutional Court did not find a violation of the above-mentioned Law, and concluded that the provisions of the Law were detailed enough to allow the restrictions that were imposed (Constitutional Court of Lithuania, 2023). The contested measures, in the opinion of the Court, were part of a set of broader complex measures to counter the threat of COVID-19. Furthermore, the Court indicated that the Government had taken measures to compensate businesses for their losses caused by such restrictions. The Court stated that the aspiration of preventing the spread of infectious human diseases in society, as well as controlling the spread of diseases which create a special situation in the state that threatens the health and life of many people and thus ensures the public interest in health protection, may lead to the need for urgent and effective decisions. Therefore, according to the Constitution, the following legal regulation may be established, according to which the measures for the control of human infectious diseases established in the law of the legislator may be detailed in governmental decrees, which determine the extent and duration of the application of specific selected measures. Such legal regulation, which imposes measures limiting or banning economic activity due to the spread of an infectious disease in society, can also be established in cases where, taking into account the special information available at the time, there is reason to believe that the situation threatens the health and lives of many people, and that it is inevitable that, if effective measures are not taken in time, irreparable damage will be caused to the values enshrined in the Constitution – among other things, to people’s health and lives (Constitutional Court of Lithuania, 2023). The Court concluded that the measures taken were not in contradiction with the Constitution of Lithuania.

In other cases brought against the Constitutional Court regarding the decisions of the Government in the declaration of the state-level emergency and the declaration of quarantine, either the decision was taken to reject the complaint or the cases are still pending. In 2020, a complaint brought to the court by a private individual regarding the restriction of movement in Lithuania was declared inadmissible because the complainant did not show that their rights were infringed (they did not try to challenge this prohibition, either by addressing the State Border Guard Service for travelling abroad or trying to enter a different municipality and being prevented from doing so; Constitutional Court of Lithuania, 2020). Some other complaints were dismissed due to insufficient legal argumentation, as the Law on the Constitutional Court (1993) indicates that this is a mandatory part of the complaint to the Constitutional Court (Constitutional Court of Lithuania, 2022c).

Other cases brought to the Constitutional Court by members of Parliament were dismissed due to the abolishment of the disputed regulation (Constitutional Court of Lithuania, 2022b, 2022d). The Court noted in its decisions that the Constitutional Court had previously stated that in cases where a court or a person addresses the Court with a complaint that a certain legal act is not in conformity with the Constitution or a law of Parliament, the Constitutional Court has the obligation to decide on such a case even though the legal act in question is no longer in force (Constitutional Court of Lithuania, 2022b, para. 17.2). There are two cases regarding the regulation of the OP addressed to the Constitutional Court by the courts in criminal cases, both of which have been accepted but are still pending.



### *1.7. Limitation Set Out by the Lithuanian OP: The Question of Legality*

As mentioned above, the detailed provisions on the types of services that may be provided to persons not having an OP or other document amounting to it are regulated in a decree of the Government of Lithuania. The basis for such measures may be found in the Law on Crisis Management and Civil Protection of the Republic of Lithuania (1998), Article 8 (“The limitations of human rights and freedoms while ensuring civil protection”), which states that

In the performance of rescue, search and emergency works, liquidation of an event, emergency situations and elimination of their consequences, in the cases and following the procedure established by this and other laws, the freedom of movement of a person, the rights to the inviolability of property and housing may be temporarily restricted, and in the event of a state emergency, the freedom of economic activity, the provision of public and administrative services.

Furthermore, Article 9 empowers the Government to enact legislation restricting the freedom of economic activity, to restrict the provision of public and administrative services, and to impose such limitations on citizens, state and municipal institutions, other establishments and subjects of economic activity which are necessary to eliminate the emergency situation and its consequences (Law on Crisis Management and Civil Protection, 1998).

Thus, the provision in the Law on Crisis Management and Civil Protection is very concise, as it establishes only the fact that limitations may be imposed. The mention of the possibility to limit the rights of persons and discriminate against/distinguish between them due to their health status while seeking to contain a pandemic is not mentioned. For a person reading the above-mentioned provision, nothing would be clear: they would not know whether they fell under the category of persons whose rights may be restricted, what types of restrictions may be imposed, nor the cases or public health situations which would invoke these limitations. Therefore, the Law does not provide any details regarding possible limitations of human rights in case of a public health emergency. The legislator does not foresee in the law the conditions for the limitation of human rights. The Constitutional Court has already discussed a somewhat similar situation in the case of the limitations of economic activity by governmental decrees, but here the question is about the limitations imposed on different rights of persons than the right to pursue economic activity. It remains very questionable whether the concise wording of the Law on civil protection conforms to the requirement of legality according to the Lithuanian constitutional doctrine, and whether the decisions taken by the Government in limiting the human rights of persons who did not conform to the requirements of the OP conformed with the requirement of legality.

## **2. Issues Surrounding the Legality of the Green Passport in the Czech Republic**

### *2.1. The Legal Basis of Limitations in the Czech Republic*

Developments in the Czech Republic in this area largely correspond to the Lithuanian situation, and a similar set of problems and legal questions emerged in many areas (Pranevičienė et al., 2021). The Czech Constitution has a polylegal character defined by the constitutional order (Constitution of the Czech Republic, 1992, Art. 112 (1); Gerloch et al., 2022). The fundamental documents are the Constitution and the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the Charter) (Constitution of the Czech Republic, 1992, Art. 3), which complement constitutional laws of equal supreme legal force (Art. 9(1)). The basic rule for the imposition of obligations on citizens by the state is the requirement of constitutional conformity and legality – i.e., strict support in a law or legal regulation of equal legal force. Article 4 of the Charter, which strictly regulates the principle of legality, provides that obligations may be imposed only on the basis of the law and within its limits, and only while preserving fundamental rights and freedoms. Legal restrictions on fundamental rights and freedoms must apply equally to all cases that meet the conditions laid down. The application of the provisions on the limits of fundamental rights and freedoms must respect their nature and meaning. Such limitations may not be abused for purposes other than those for which they were established (Husseini et al., 2021, p. 185).

At the very beginning of the COVID-19 pandemic, in March 2020, when discussing how to proceed with counter-COVID-19 measures, the possibility of using the measures mentioned in Act No. 258/2000 Coll. on the protection of public health was discussed. The second possibility was to apply Constitutional Act (1998) No. 110/1998 Coll. This latter avenue was chosen. It can be noted that the Czech Republic went through the pandemic with a minority

Government, a fact which enhanced public discussions regarding suitable legal grounds and restrictions in general. The chosen legal ground was Constitutional Act (1998) No. 110/1998 Coll. on the Security of the Czech Republic, which was necessary for the management of this unprecedented crisis. A state of emergency, which has been declared in the past in cases of floods or after hurricane-force wind storms, proved to be the most appropriate for managing the COVID-19 pandemic crisis (General Directorate of the Fire and Rescue Service of the Czech Republic, 2022). The declaration of a state of emergency opens up the possibility for the public authorities involved in a crisis to make use of specific limitations on rights for the necessary time and to the necessary extent. In this area, the Government is the dominant authorised entity (Act on Crisis Management, 2000, sec. 5 and 6; Constitutional Act on the Security of the Czech Republic, 1998; Horák et al., 2021, p. 431; Mainclová, 2022, p. 96).

An exhaustive list of fundamental rights and freedoms that can be restricted can be found in Sections 5 and 6 of the Act on Crisis Management (2000; hereinafter – Crisis Act). Although this law was conceived to deal with natural threats, it can be stated that its application to the COVID-19 crisis passed the test successfully, as this pandemic had unimaginable dimensions and a global impact. The principle of proportionality is explicitly contained in Section 39c of the Crisis Act, according to which the crisis management authorities are obliged to act in such a way that any interference with the rights and freedoms of persons does not exceed the necessary degree. Formally, such measures are issued by Government resolutions; materially, according to the Czech Constitutional Court, they may have the nature of a general normative act (Constitutional Court of the Czech Republic, 2020).

The Constitutional Court has commented more generally on the nature of such crisis measures by stating, according to the Crisis Act, that crisis measures that interfere with fundamental rights and freedoms must always be reviewable, depending on their content, either as a legal regulation or as a decision or another act by a public authority (Sova, 2020, p. 298). In order to manage the COVID-19 crisis, the Ministry of Health decided to adopt measures of a general nature (Act on the Protection of Public Health, 2000, Sect. 94a(2)) issued based on the Public Health Protection Act. Emergency measures in the event of an epidemic and the danger of its occurrence are regulated by Section 69 of the Act, where in particular the borderline use (Sivák, 2020) and overuse of a generally and openly formulated measure has been the cause of numerous discussions and annulments by the Czech courts regarding contradictions with the law.<sup>7</sup>

In the context of the COVID-19 crisis, the Czech Republic's legal order provided the executive with relatively limited options for dealing with the crisis management legislation and the existing valid and effective legal regulation in the field of public health protection. For dealing with epidemics and the risk of their occurrence, the legislation allows for a procedure within the framework of the ordinary legal regulation brought about by Act No. 258/2000 Coll. on the protection of public health and on amendments to certain related acts, as amended, which legally regulates emergency measures during an epidemic and the risk of its occurrence. If the legislation does not provide sufficient means to deal with a crisis, it is possible to use special legislation to deal with this situation, which the legislator has created *a posteriori* for situations where the normal mechanisms are insufficient (state of danger in Article 3 of Act No. 240/2000 Coll. on Crisis Management (2000); state of emergency in Articles 5 and 6 of Constitutional Act No. 110/1998 Coll. (1998), state of national emergency in Article 7 of the Constitutional Act No. 110/1998 (1998)).

It is necessary to activate a state of crisis that provides adequate mechanisms, authorisation, and means to resolve the crisis, while at the same time allowing for proportionate restrictions on certain rights defined in exhaustive terms (e.g., the right to the inviolability of the person and the inviolability of the home, the right of ownership and use of the property by legal and natural persons, freedom of movement, the right to assemble peacefully, the right to conduct business, or the right to strike). Following this, the legislator then created Act No. 94/2021 Coll., on emergency measures during the COVID-19 pandemic and on amendments to certain related acts (in force since 27 February 2021), which completes the legal environment so that the pandemic crisis can be effectively managed

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<sup>7</sup> E.g., the judgment of the Municipal Court in Prague of 23 April 2020 was annulled by the judgment of the Supreme Administrative Court Senate (Others) in its decision of 26 February 2021. The judgement of the Municipal Court in Prague of 13 November 2020 was adopted. The judgement of the Municipal Court in Prague of 23 February 2021 was annulled by the judgement of the Supreme Administrative Court of 20 July 2021 (Czech Prague Municipal Court, 2020a, 2020b, 2021; Czech Supreme Administrative Court Senate, 2020).

with the backing of the law. The unprecedented scale of the crisis then opened up space for substantive reflection on the potential possibility of managing simultaneous crises with a multiplier, synergistic, or domino effect using existing crisis management tools, while at the same time raising doubts about the sufficiency of the existing legal solution (Kollert, 2021; Dienstbier, 2022, p. 497).

## *2.2. The EU COVID-19 Pass and the Lack of Czech Legal Regulation*

To begin with, it is necessary to focus on the EU COVID-19 digital certificate (also called the COVID Passport, Digital Green Certificate, Digital COVID Certificate, Certificate, or Digital Green Certificate) and its anchoring in the legal order. The legal basis was established by Regulation (EU) 2021/953 (2021) (hereinafter referred to as the Regulation). In particular, the definitional provision in Article 3(2) of the Regulation, according to which Member States or designated entities acting on behalf of Member States shall issue the certificates referred to in paragraph 1 of this Article in digital or paper format or both formats, is of particular importance. Prospective holders are entitled to obtain a certificate in the format of their choice. Such certificates shall be user-friendly and shall contain an interoperable barcode to allow verification of their authenticity, validity, and integrity. The information contained in the certificates shall also be in a human-readable format, and shall be provided at least in the official language or languages of the issuing Member State and in English.

The Czech Office for Personal Data Protection (2022) also commented comprehensively on the proposal in its annual report for 2021. It described the introduction of COVID-19 passports, or the EU COVID-19 European Digital Certificate, as a significant legislative issue with a data protection dimension in the context of the COVID-19 pandemic, as it aimed to facilitate the exercise of the right to free movement within the EU during the COVID-19 pandemic by creating a common framework for the issuance, verification and recognition of interoperable COVID-19 vaccination and testing certificates. During the preparation of the Regulation, joint comments were received from the European Data Protection Board and the European Data Protection Supervisor (2021) on the draft Regulation, which were incorporated into the text. A digital certificate is seen as a verifiable document that can prove the time of actual vaccine administration by a doctor (using a timestamp) or which contains a person's medical history, and which should facilitate the free movement of EU citizens thanks to a common format in all Member States. The Regulation entered into force on 1 July 2021.

In the Czech Republic, obligations were implemented in the form of a digital certificate with a QR code (Covid Portal, 2022) available on the Citizen's Vaccination Portal set up by the Ministry of Health (<https://ocko.uzis.cz/>). In the Czech Republic, the principle of secure and conclusive proof of certificates is based on two applications: one containing a QR code from the official certificate, called Tečka; and another that reads and displays a code – čTečka or eReader. Both methods show whether the persons concerned have been vaccinated or whether the tests for COVID-19 have been carried out at the required interval, according to the current conditions of entry into shops, establishments, cultural or sporting events, etc. The same shall apply to any history of the disease.

The mobile apps are linked to the Infectious Diseases Information System, where official information about vaccination, passing or testing is stored. Individuals can download them for free to smartphone devices (Covid Portal, 2023). Tečka shows completed vaccination certificates, negative PCR or antigen tests, and disease history. The čTečka application is used by entities verifying compliance with the conditions for individual persons (e.g., for entry into a social event, restaurant, or premises) and can read a QR code from a paper certificate, a certificate downloaded on a mobile phone for example, or from the Tečka application. The QR code of the certificate is equipped with a digital signature that protects it against forgery. When checking the validity of a certificate, the QR code is scanned with the phone's camera to verify the signature – the phone's display lights up green if the certificate is valid, and red if it is invalid. In the details of the certificate, the person's name, date of birth, and the validity of the certificate are displayed (Švihel & Rambousková, 2021).

As correctly pointed out by Jaroslav Kuba (2022; in response to Supreme State Prosecutor's Office, 2021), the only issuer of EU COVID-19 certificates in the Czech Republic is the Ministry of Health, even though there is no legal regulation that explicitly grants such authority to it. Although this situation gives the impression that the

Czech legal order does not have anything like the principle of the enumeration of public law claims,<sup>8</sup> the Constitution of the Czech Republic enshrines in Article 2(3) (together with Article 2(2) of the Charter), at least formally, the rule that state power may be exercised only in cases within the limits and in the manner provided by law. As regards the issue of certificates concerning vaccinations, the legal system is, for the time being, limited to the vaccination certificate, and only the health service provider who administered the vaccination is entitled to make entries in it. **It is therefore questionable whether, in the absence of an implementing regulation expressly conferring the power to issue certificates on the Ministry of Health, the provisions of the EU COVID-19 Regulation can be regarded as a sufficient legal basis in this respect.**

Problems with the Government's bill amending Act No. 258/2000 Coll. on the Protection of Public Health and on Amendments to Certain Related Acts, as amended, also testify to the need for the legal anchoring of EU COVID-19 passports (1231/0 Amendment, 2021). The proposal failed to be adopted in a state of legislative emergency. Due to the nature of European law, the EU COVID-19 Regulation is binding in its entirety, is directly applicable in all Member States of the European Union, and does not need to be implemented in law. However, the Regulation does not cover the whole issue comprehensively and, in particular, the area of procedure and specific competences for public authorities must be accompanied by national law with the force of law conferring competence on a specific public authority. Therefore, it can be concluded that the EU COVID-19 pass is noticeably lacking a separate legal regulation, and no law in the Czech Republic would appropriately implement relevant procedural issues into the legal order. The absence of a basis in national law is, in relation to the principle of the enumerability of public law claims, a violation of the rule of law, and can be found to be constitutionally incompatible.

### 2.3. *The Judgement of the Supreme Administrative Court of the Czech Republic*

Concerning the *čTečka* application, the Ministry of Health's emergency measure No. MHDR 14601/2021-22/MIN/KAN, dated 30 July 2021, was subjected to judicial review. This measure was challenged before the Supreme Administrative Court on 29 December 2021, *inter alia*, on the grounds of the illegality of Article I(13)(a) and (14)(a). These provisions, with reference to the Public Health Protection Act (2000) and the Act on emergency measures during the COVID-19 pandemic (2021; hereinafter – the Pandemic Act), regulated the conditions for the holding of public or private events where there was an accumulation of persons in one place, so that no more than 20 persons could be present at the same time or, subject to other conditions,<sup>9</sup> no more than 1,000 persons if the event was held indoors, or 2,000 persons if the event was held exclusively outdoors.

The contested measure imposed an obligation on the event organiser to check that the conditions for checking infection-free status were met, and the participant was thus obliged to prove infection-free status. These were events at which entry was typically regulated by, for example, using a ticket. In case a person failed to prove compliance with the conditions of infection-free status, the event organiser was prohibited from allowing such a person to attend the event. Another condition of participation was the obligation to maintain a minimum of 2 sq. m spacing. If entry to the event was not regulated, the person had to be prepared to demonstrate compliance on the spot, at least to the public health authority (The Health Ministry of the Czech Republic, 2021, Part II). At the same time, the measure also interfered with the right of assembly, regulated in Act No. 84/1990 Coll. on the Right of Assembly, as it set a limit of 20 participants in assemblies outside the interior spaces of buildings, with mandatory two-metre spacing. From the point of view of this paper, it is crucial that the emergency measure also imposed an obligation on the organisers of group tours or events to check the participants for compliance with the condition of being infection-free using the *čTečka* application.

As regards standing to bring an action before the Supreme Administrative Court, it should be noted that the contested emergency measure was amended by another emergency measure of the Ministry of Health (2022) with effect from 17 January 2022, which no longer contained the contested regulation. Nevertheless, under the provisions of Article 13(4) of the Pandemic Act, if an emergency measure has elapsed during the proceedings for

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<sup>8</sup> The principle allowing the application of public power only *secundum et intra legem*, i.e., only on the basis, in the manner, and within the limits of the law.

<sup>9</sup> The condition was that the participant did not show clinical signs of COVID-19, or had a negative PCR test no more than 7 days ago, or had a negative antigen test no more than 72 hours ago. Another possibility was that the person had been vaccinated against COVID-19, and documented this with a national certificate of vaccination or a national certificate of completed vaccination.

its annulment, that does not preclude further proceedings. Therefore, if the court concludes that the emergency measure or parts of it were contrary to the law, it will state this conclusion in its judgement. It follows from the foregoing that the Supreme Administrative Court had jurisdiction to review the expired emergency measure and to give a declaratory judgement determining its possible illegality.

In its application, the appellant argued that compliance with the obligation under the emergency measure is technically difficult and staff-intensive for organisers of events with larger numbers of visitors. If a visitor did not produce proof of infection-free status, the organiser could not admit them to the event. This would, however, be a breach of the contract that they had previously concluded with the visitor. The appellant itself had organised such events and, according to the appellant, its legal sphere could have been infringed as a result of that obligation. According to the appellant, the control of the infection-free *čTečka* applications by the organiser could have constituted an interference with the exercise of the right to conduct business and economic activity under Article 26(1) of the Charter of Fundamental Rights and Freedoms, since under the conditions set, they would not have been able to actually organise the events or exhibitions in question.

In adopting the measure, the Ministry of Health did not consider whether the imposition of the specific obligation was proportionate to the stated purpose. The fulfilment of the obligations imposed by the emergency measure should therefore have been monitored by the public authorities. The defendant, the Ministry of Health, argued that the *čTečka* application guaranteed reliable verification of the authenticity and validity of the infection-free documents, and can be installed on any smart device. According to the Ministry, the check is simple, reliable and does not impose any significant burden on the person checking.

The appellant responded to this argument with a rejoinder to the effect that employees of social event organisers are not normally equipped with service devices on which the *čTečka* application should be installed. They cannot be forced to use private devices under the current legislation, and the purchase of dozens or hundreds of smart devices would be burdensome for the organisers. The appellant stressed the disproportionality of such regulation to the purpose pursued.

The Ministry of Health responded that it had chosen the obligation to check for infectiousness using the *čTečka* application because it is a method that guarantees reliable verification of the authenticity and validity of the document containing the QR code. This method of control was an attempt by the Ministry to reduce the use of false or fraudulent certificates to prove that a person was free of infection.

In this case, the Supreme Administrative Court confirmed that it did not doubt the legitimacy of the objective that the measure imposed on the organisers of the events was intended to achieve. The documents certifying that the infection-free conditions had been met could be falsified by persons who did not meet those conditions. A simple visual inspection of the document by the event organiser may not have been sufficient to detect the falsification. On the other hand, by checking the document via the *čTečka* application, the validity and authenticity of the document could be verified by scanning and evaluating the QR code on the relevant document. Thus, according to the Supreme Administrative Court, the effective check itself constituted an undoubtedly legitimate aim of the contested regulation. At the same time, the Court did not find that obligation to be disproportionate. The applicant's rejection of that obligation was quite general, and it failed to specify the technical and personnel costs referred to in its application. According to the Court, it was legitimate to expect that the organiser or their employee would have a smartphone or tablet. At the same time, according to the current Labour Code (2006, sec. 190), it is possible to agree with an employee that they will use private devices for control purposes.

### **A Comparative analysis of Lithuanian and Czech Regulation**

A comparative analysis of Lithuanian and Czech legal regulation allows one to state that both Lithuanian and Czech authorities chose a similar legal path for the legal basis of pandemic management measures. The chosen legal basis constituted the laws regulating the protection of public health, as well as the legal acts for civil protection. In the case of health passes, analogous documents (the *Tečka* application in the Czech Republic and the OP in Lithuania) were introduced to the legal systems of both countries at similar times. The main conditions of application of both measures were similar in their content. The list of rights limited by the above-mentioned documents were also similar. Furthermore, similarly, in both states the documents were established by measures

of the executive branch of the Government. However, the Czech Parliament later passed the Pandemic Act, a special act tailored for this specific situation.

The comparative analysis also revealed some differences in the situation in Lithuania and the Czech Republic. The legality of the OP has not yet been analysed in the jurisprudence of Lithuanian courts (neither the administrative courts nor the Constitutional Court), whereas the Czech Courts have ruled on the legality and proportionality of the *čTečka* application and on other measures of pandemic management.

The jurisprudence of the Constitutional Court of Lithuania had already formulated rules on the extent of the delegation of the powers to establish rules for a specific field in executive, governmental decrees as opposed to laws of Parliament, and this doctrine was upheld by the Lithuanian legislative and executive powers. Therefore, it is regrettable that the present pandemic management situation differs from the doctrine formulated by the Constitutional Court of Lithuania and sets out limitations on human rights not foreseen in the legal acts adopted by Parliament. This allows serious doubts to be raised regarding the practice of the Lithuanian authorities in imposing far-reaching limitations on human rights by governmental decrees and the possible infringement of the principle of legality of human rights limitations.

In the Czech Republic, the issue of use of the *čTečka* application has raised important questions regarding the subject issuing the document and its authority to do so. In its review, the Czech Supreme Administrative Court confirmed that checking compliance with infection-free status using the *čTečka* application was proportionate, as it pursued legitimate objectives set by the public authority. Furthermore, the analysis revealed concerns about data protection in the Czech Republic in the context of the right to privacy, and it can be concluded that information about the presence or absence of vaccination against COVID-19 is to be held confidential in any case.

## Conclusions

The analysis of the relevant legal provisions applicable in Lithuania and the Czech Republic regarding health certificates, or so-called green passports, reveals many important issues regarding the legality of said provisions. The urgency of the situation with COVID-19 might have justified far-reaching measures regarding the limitations on human rights during the first days or weeks of the pandemic, limiting the right to movement and to private life, but the limitations imposed later, when knowledge about the disease had increased, must undergo strict scrutiny both at the level of the legality of the measures as well as regarding their proportionality.

The question of legality revealed that, in Lithuania, only a succinct provision in the Law on Crisis Management and Civil Protection would doubtfully amount to a sufficient legal basis for such far-reaching limitations on human rights. Even though the legislative power – the Seimas (Lithuanian parliament) – has the power to delegate certain questions and aspects of any given field to the Government, this does not deny the requirement to set out the basis for human rights limitations in the law adopted by Parliament.

At the moment, the Constitutional Court of Lithuania has ruled on a different question – that is, whether the limitations on economic activity in the beginning of the pandemic were in conformity with the right to pursue economic activity. In this, it concluded that the measures taken by the Government of Lithuania were legal and proportionate. The court has yet to rule on the question of the legality of the OP.

The Constitutional Court of the Czech Republic has commented more generally on the nature of all crisis measures according to the Act on Crisis Management of the Czech Republic, stating that crisis measures that interfere with fundamental rights and freedoms must always be reviewable, depending on their content – either as legal regulation or as a decision or another act by a public authority. Furthermore, the question of the duty to assess whether the *čTečka* application represents possible interference with the exercise of the right to conduct business and economic activity was analysed by the Czech Supreme Administrative Court, which concluded that the contested legislation was legitimate and proportionate. However, questions remain as to whether such documents infringed other rights of persons, especially the rights of those persons who did not obtain a certificate due to their unwillingness to vaccinate.



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