

PRESS RELEASE

Decision No 2021-824 DC of 5 August 2021

(Law on managing the public health state of emergency)

The Constitutional Council censured the provisions of the law on managing the public health state of emergency organising the early termination of certain employment contracts and the "automatic" placement in isolation, which it deemed contrary to the Constitution, but considered the provisions concerning the "health pass" as conforming to the Constitution

In its Decision No 2021-824 DC of 5 August 2021, which has 125 paragraphs, the Constitutional Council ruled on several provisions of the law on managing the public health state of emergency. It received the referral from the Prime Minister, with an appeal from more than sixty Members of Parliament, as well as two other appeals, each from more than sixty Senators.

* Among the provisions criticised in Article 1 of the law referred for review were those making a health pass obligatory in order to access to certain places, establishments, services or events.

One of the criticisms of these provisions was that they made access to department stores, shopping centres and public transport subject to showing a "health pass", which would be irrelevant in the fight against the epidemic. It was stated that, moreover, these provisions would have disproportionate effects on the objective pursued, resulting in an infringement of the freedom of movement, the right to personal privacy and the right of collective expression of ideas and opinions.

With this decision, the Constitutional Council notes that it is the legislator's responsibility to ensure that the objective of constitutional value of the protection of health is reconciled with respect for constitutionally guaranteed rights and freedoms. These rights and freedoms include the freedom of movement, a part of individual freedom protected by Articles 2 and 4 of the Declaration of Human and

Civic Rights of 1789, the right to personal privacy guaranteed by this Article 2, as well as the right of collective expression of ideas and opinions that comes from Article 11 of this Declaration.

In this regard, the Constitutional Council notes that the disputed provisions provide that the Prime Minister may make public access to certain places, establishments, services or events where certain activities take place subject to presenting one of the following: i) the results of a viral screening test that does not conclude that the person is infected with Covid-19, ii) proof of vaccination status with regard to Covid-19, or iii) a certificate of recovery following infection with Covid-19. The provisions also provide that, from 30 August 2021, such a measure may be made applicable to persons who intervene in such places, establishments, services or events.

The Constitutional Council esteems that these provisions, which are likely to restrict access to certain places, infringe the freedom of movement and that they are likely to restrict the freedom of assembly, and the right of collective expression of ideas and opinions.

Firstly, however, the legislator considered that, in the light of the scientific knowledge available to them, the risks of circulation of the Covid-19 virus are greatly reduced between people who have been vaccinated, recovered or who have just undergone a screening test with a negative result. By adopting the disputed provisions, the legislator sought to allow public powers to take measures to limit the spread of the Covid-19 epidemic. As such, the legislator has pursued the objective of constitutional value of the protection of health.

Secondly, these measures can only be imposed for the period from the entry into force of the law referred for review until 15 November 2021, a period during which the legislator considered that there was a significant risk of the epidemic spreading because of the appearance of new, more contagious variants of the virus.

Thirdly, the legislator has limited the application of these measures to places where the activity carried out presents, by its very nature, a particular risk of spreading the virus. Moreover, the legislator has provided several guarantees for the application of these measures. Thus, with regard to their application to health, social and medico-social services and establishments, the legislator reserved the requirement of presenting a "*health pass*" solely for persons accompanying or visiting persons admitted to these services and establishments, as well as for those

admitted for scheduled care. As such, this measure, which applies to emergency situations, does not have the effect of limiting access to care. With regard to their application to department stores and shopping centres, the legislator stipulated that they should guarantee people's access to essential goods and services as well as to accessible means of transport within these shops and centres. With regard to long-distance travel by inter-regional public transport, the legislator has excluded the application of these measures *"in cases of emergency that prevent the required proof from being obtained"*. Moreover, as the Constitutional Council ruled, in its above-mentioned decision of 31 May 2021, that the notion of *"leisure activity"* excludes, inter alia, political, trade union or religious activity. The disputed measures must be strictly proportionate to the public health risks faced, and appropriate for the circumstances of time and place. The state of emergency is ended without delay when the measures are no longer necessary.

Fourthly, the disputed provisions provide that the obligations imposed on the public may be met by presenting proof of vaccination status, the results of a viral screening test that does not show infection, or a certificate of recovery following infection. Thus, these provisions do not, in any case, introduce either an obligation to provide care or an obligation to vaccinate. Moreover, the legislator provided for the determination by decree, issued after the opinion of the French high authority for health (Haute Autorité de Santé), of the cases of medical contraindication preventing vaccination and issuing a document to the persons concerned that they can present in places, services or establishments where the presentation of a *"health pass"* is required.

Fifthly, verifying if a person has one of the documents necessary to access a place, establishment, service or event can only be carried out by law enforcement officials or by the operators of such places, establishments, services or events. Furthermore, when a person presents one of these documents, it is in a form that does not allow the *"nature of the document held to be known"* and is only accompanied by the presentation of identity documents when these are required by law enforcement officials.

From all these reasons the Constitutional Council deduces that the disputed provisions form a balanced reconciliation between the above-mentioned constitutional requirements.

The provisions of Article 1 of the law referred for review relating to the verification obligations imposed on operators and professionals and the penalties

they incur in the event of failure to comply with these obligations were also criticised.

On the one hand, they were criticised for infringing freedom of enterprise by imposing the obligation that economic operators control access to the premises they operate, which would require them to mobilise significant human and material resources and, secondly, for providing for penalties that were disproportionate to the breaches of which these operators could be accused.

The Constitutional Council noted that the legislator has the liberty to limit the freedom of enterprise, which derives from Article 4 of the Declaration of Human and Civic Rights of 1789, related to the constitutional requirements or requirements that are justified by the public interest, on condition that this does not result in disproportionate infringements in relation to the pursued objective.

In this regard, it considers that, by authorising the Prime Minister to make access to certain places, establishments, services or events subject to the presentation of a "*health pass*", the legislator intended to enable the public authorities to take measures to limit the spread of the Covid-19 epidemic and to ensure effective control of compliance. In this way, the legislator has pursued the objective of constitutional value of the protection of health.

Moreover, the disputed provisions are limited to requiring the operator of a place or establishment or the professional responsible for an event to verify that their clients have a "*health pass*", in paper or digital form. While this may result in an additional burden on operators, the verification of each client's situation can be put in place in a short time.

In response to the criticism that the principle of proportionality of penalties resulting from Article 8 of the Declaration of Human and Civic Rights of 1789 had been infringed, the Constitutional Council ruled that the disputed provisions provide that, when there is a breach of duty, which has been the subject of a formal notice, is found on more than three occasions during a period of 45 (forty-five) days, the operator or professional may be sentenced to one year's imprisonment and to a fine of €9,000. Concerning the type of behaviour that is punished, the penalties instituted are not disproportionate to the offence.

* On the other hand, the Constitutional Council censured the provisions of Article 1 of the law referred for review, which stipulate that the fixed-term or assignment

contract of an employee who does not present the documents, certificate or results required to obtain the "health pass" may be terminated before the end of the contract, at the employer's initiative.

According to Article 6 of the Declaration of Human and Civic Rights of 1789, the law "*must be the same for all, whether it protects or punishes.*" The principle of equality does not preclude the legislator from regulating different situations differently, or from derogating from equality on grounds of the public interest, provided that, in either case, the resulting difference in treatment is directly related to the purpose of the law establishing it.

In this respect, the Constitutional Council notes that it follows from the preparatory work that the legislator intended to exclude that failure to comply with the obligation to present the above-mentioned documents, certificates or results could constitute a true and genuine reason for dismissal of an employee with an open-ended contract.

It considers that employees on open-ended contracts and those on fixed-term or assignment contracts are in different situations. However, by introducing an obligation to present a "*health pass*" for employees working in certain places and establishments, the legislator intended to limit the spread of the Covid-19 epidemic. However, employees, whether they are on open-ended contracts, fixed-term contracts or assignment contracts, are all exposed to the same risk of infection with or transmission of the virus.

Therefore, by providing that the failure to present a "*health pass*" constitutes a reason for the early termination of fixed-term or assignment contracts only, the legislator has instituted a difference in treatment between employees according to the nature of their employment contract which is unrelated to the pursued objective.

* The Constitutional Council also censures Article 9 of the law referred for review creating an isolation measure applicable as of right to persons testing positive for Covid-19.

The Constitutional Council notes that, according to Article 66 of the Constitution: "*No one shall be arbitrarily detained. - The Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute.*" Individual freedom, which the judicial authority

is charged with protecting, should not be impeded by unnecessary rigour. The infringement to the exercise of this freedom must be appropriate, necessary, and proportional to the pursued objectives.

In this respect, it finds that the contested provisions provide that, until 15 November 2021 and for the sole purpose of combating the spread of the Covid-19 epidemic, any person testing positive for Covid-19 must isolate themselves for a non-renewable period of ten days. In this context, the person is forbidden to leave their accommodation, under threat of a criminal penalty.

The Constitutional Council finds that this placement in isolation applies, except between 10 a.m. and 12 p.m., in case of emergency or for strictly necessary travel, and constitutes a deprivation of liberty.

By adopting these provisions, the legislator has pursued the objective of constitutional value of the protection of health.

However, the disputed provisions provide that, under threat of a criminal penalty, any person who receives a positive Covid-19 test result must isolate themselves for a period of ten days, without providing for carrying out any assessment of his or her personal situation.

However, on the one hand, he or she only receives this information at the time of the test. On the other hand, the objective pursued by the disputed provisions is not such as to justify the application of such a custodial measure without an individual decision based on an assessment by the administrative or judicial authority.

Consequently, the Constitutional Council finds that, while the person isolating themselves can request an adjustment of the conditions of their self-isolation *a posteriori* from the representative of the State in the department, or request its release before the judge for liberties and detention, the disputed provisions do not guarantee that the custodial measure they institute is necessary, appropriate and proportionate.