Headnotes

to the Order of the First Senate of 19 November 2021

- 1 BvR 781/21 -

- 1 BvR 798/21 -

- 1 BvR 805/21 -

- 1 BvR 820/21 -

- 1 BvR 854/21 -

- 1 BvR 860/21 -

- 1 BvR 889/21 -

Federal pandemic emergency brake I (curfews and contact restrictions)

1. **Curfews and contact restrictions imposed as measures to combat a pandemic must satisfy the general constitutional standards applicable to restrictions of fundamental rights in every respect.**

2. **The fundamental right to the free development of one's personality (Art. 2(1) of the Basic Law) also protects close family-like ties outside the scope of protection afforded to marriage and the family. In its manifestation as a comprehensive general freedom of action, this fundamental right protects the freedom to meet any person of one's choosing. In its manifestation as a general right of personality, it guarantees that meeting other people is not entirely prohibited and that the individual is not forced into loneliness; simply being able to meet other people is of foundational importance for personality development.**

3. **Art. 2(2) second sentence in conjunction with Art. 104(1) of the Basic Law protects the freedom of actual physical movement. In objective terms, this freedom depends on the possibility of being actually and legally able to make use of it; as to the subjective side, this freedom requires merely the natural will to do so.**

a. **Coercion of an entirely psychological nature can also constitute interference with the freedom of physical movement. The coercive effect must be comparable in extent and impact to direct physical coercion.**

b. **Parliamentary legislation that directly interferes with the freedom of physical movement without any further act of execution may satisfy the limitation clauses in Art. 2(2) third sentence and Art. 104(1) first sentence of the Basic Law.**

c. **Overall, extensive curfews may only be envisaged in situations involving extreme danger.**

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 781/21 -

- 1 BvR 798/21 -

- 1 BvR 805/21 -

- 1 BvR 820/21 -

- 1 BvR 854/21 -

- 1 BvR 860/21 -

- 1 BvR 889/21 -

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaints

I. of [3 complainants]

– authorised representatives: HÄRTING Rechtsanwälte PartGmbB,
Chausseestraße 13, 10115 Berlin -

against § 28b(1) no. 2 of the Protection Against Infection Act (*Infektionsschutzgesetz*) as amended by the Fourth Act to Protect the Population During an Epidemic Situation of National Significance (*Viertes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite*) of 22 April 2021 (Federal Law Gazette I, *Bundesgesetzblatt I* – BGBl I, p. 802)

- 1 BvR 781/21 -,

II. of Mr (…),

against the Fourth Act to Protect the Population During an Epidemic Situation of National Significance of 22 April 2021 (BGBl I, p. 802), in particular against § 28b(1) first sentence nos. 1 to 10, § 28b(7), § 28c and § 73(1a) no. 11 letters (b) to (m) of the Protection Against Infection Act

- 1 BvR 798/21 -,

III. of [10 complainants]

– authorised representatives: (…) -

against § 28b(1) first sentence no. 2 and § 73(1a) no. 11c of the Protection Against Infection Act as amended by the Fourth Act to Protect the Population During an Epidemic Situation of National Significance of 22 April 2021 (BGBl I, p. 802)

- 1 BvR 805/21 -,

IV. of Mr (…),

against § 28b(1) second sentence of the Protection Against Infection Act as amended by the Fourth Act to Protect the Population During an Epidemic Situation of National Significance of 22 April 2021 (BGBl I, p. 802)

- 1 BvR 820/21 -,

V. of Mr (…),

against § 28b(1) first sentence no. 2 and § 73(1a) no. 11c of the Protection Against Infection Act as amended by the Fourth Act to Protect the Population During an Epidemic Situation of National Significance of 22 April 2021 (BGBl I, p. 802)

- 1 BvR 854/21 -,

VI. of [80 complainants]

– authorised representative: (…) -

against § 28b(1) first sentence nos. 1 and 2 as well as § 73(1a) nos. 11b and 11c of the Protection Against Infection Act as amended by the Fourth Act to Protect the Population During an Epidemic Situation of National Significance of 22 April 2021 (BGBl I, p. 802)

- 1 BvR 860/21 -,

VII. 1. of Mr (…),

2. of Mr (…),

– authorised representatives: (…) -

against § 28b(1) no. 2 and § 73(1a) no. 11c of the Protection Against Infection Act as amended by the Fourth Act to Protect the Population During an Epidemic Situation of National Significance of 22 April 2021 (BGBl I, p. 802)

- 1 BvR 889/21 -

the Federal Constitutional Court – First Senate –

with the participation of Justices

President Harbarth,

Paulus,

Baer,

Britz,

Ott,

Christ,

Radtke,

Härtel

held on 19 November 2021:

[…] The constitutional complaints [are] rejected.

Table of contents

R e a s o n s :

A.

The constitutional complaints are directed against certain provisions inserted into the Protection Against Infection Act (*Infektionsschutzgesetz* – IfSG) by the Fourth Act to Protect the Population During an Epidemic Situation of National Significance (*Viertes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite*) of 22 April 2021 (Federal Law Gazette I, *Bundesgesetzblatt I* – BGBl I, p. 802), which came into effect on 23 April 2021. All the complainants chal- 1

lenge the curfew set out in § 28b(1) first sentence no. 2 IfSG and the corresponding administrative offence [...]. They consider several of their fundamental rights to be violated, including their right to liberty of the person under Art. 2(2) second sentence of the Basic Law (*Grundgesetz* – GG), their general freedom of action under Art. 2(1) GG and their general right of personality under Art. 2(1) in conjunction with Art. 1(1) GG. Some of the complainants also claim a violation of their fundamental right to the protection of marriage and the family under Art. 6(1) GG. The complainants in proceedings 1 BvR 798/21 and 1 BvR 860/21 additionally challenge the contact restrictions set out under § 28b(1) first sentence no. 1 IfSG as well as the provision subjecting non-compliance with the restrictions to a fine [...]. They regard these provisions as interfering with their fundamental rights under Art. 6(1) GG and with their general right of personality. The complainant in proceedings 1 BvR 798/21 furthermore objects to the restrictions imposed on recreational and cultural facilities, shops, sports, bars and restaurants, as well as to the authorisation to issue ordinances regulating the situation of vaccinated and recovered persons [...]. Pursuant to § 28b(10) IfSG, the challenged provisions were limited to remain applicable until no later than 30 June 2021.

I.

[*Excerpt from Press Release No. 101/2021 of 30 November 2021*

The Fourth Act to Protect the Population During an Epidemic Situation of National Significance of 22 April 2021, which came into effect on 23 April 2021, contains a range of pandemic containment measures that were inserted into the Act on the Prevention and Control of Infectious Diseases in Humans (*Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen*), also known by its shorter title of the Protection Against Infection Act. The measures challenged here were linked to a seven-day incidence rate of 100 (§ 28b(1) IfSG). If the number of new SARS-CoV-2 infections per 100,000 inhabitants within the last seven days (seven-day incidence rate) exceeded the threshold of 100 in a given city or district on three consecutive days, the measures specified in § 28b IfSG (the "*Bundesnotbremse*" or "federal pandemic emergency brake") became applicable in that locality with effect from the second day thereafter.

For example, under § 28b(1) first sentence no. 2 IfSG, persons were prohibited from going outside residential accommodation between 10 p.m. and 5 a.m. This provision also contained various exemptions. Going outside alone between 10 p.m. and midnight for the purpose of physical outdoor exercise was exempt, for instance, as was going outside in order to avert a medical or veterinary emergency, to exercise one's profession, to exercise rights of custody or contact with regard to minor children, or for similarly weighty purposes. Under § 28b(1) first sentence no. 2 IfSG, meeting privately in public or private spaces was only permitted if no more than the members of one household plus one other person were involved, including any children under the age of 14 belonging to that person's household.

In cases where *Land* law was stricter, the provisions of *Land* law remained applicable. If the seven-day incidence rate in a city or district fell below 100 new infections per 100,000 inhabitants on five consecutive working days, the “emergency brake” ceased to apply in that locality with effect from the second day thereafter (§ 28b(2) IfSG). Pursuant to § 28b(10) IfSG, the challenged provisions were limited to remain applicable until no later than 30 June 2021. Based on the authorisation granted in § 28c IfSG, the Federal Government adopted the Ordinance on Alleviations and Exemptions from Protective Measures to Prevent the Spread of COVID-19 (*Verordnung zur Regelung von Erleichterungen und Ausnahmen von Schutzmaßnahmen zur Verhinderung der Verbreitung von COVID-19* – SchAusnahmV) of 8 May 2021 with the consent of the German *Bundestag* and the *Bundesrat*. The ordinance set out exemptions for vaccinated and recovered persons from, in particular, the restrictions imposed on meeting privately, the curfew and sports.

End of Excerpt]

[…] 2-4

II.

III.

All the constitutional complaints object to the night-time curfew, non-compliance with which was subject to a fine [...]. [Some of them] also challenge the contact restrictions, non-compliance with which was likewise subject to a fine [...]. [One] complainant [...] furthermore objects to the restrictions imposed on recreational and cultural facilities, shops, sports, bars and restaurants. Here too, non-compliance with the restrictions was subject to a fine [...]. 15

1. The complainants regard the challenged provisions introduced to combat the COVID-19 pandemic as unconstitutional and, in particular, disproportionate. 16

[…] 17-50

2. The German *Bundestag*, the *Bundesrat*, the Federal Chancellery, the Federal Ministry of the Interior, Building and Community, the Federal Ministry of Justice and Consumer Protection, the Federal Ministry of Health as well as all *Land* governments were notified of the constitutional complaints and of the opportunity to submit statements in the proceedings. 51

[…] 52-80

3. On the basis of § 27a of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), the Court invited expert third parties to submit statements in response to the following questions: 81

Topic I: Places, modes and times of transmission

Question I.1:*What knowledge is available about the places/conditions, modes and*

times (meaning certain periods during the day) of SARS-CoV-2 transmission – including with reference to the currently known virus mutations? Is there any evidence that transmission is especially frequent in particular areas or at particular times (within the meaning of the previous sentence)? What conclusions can be drawn with regard to measures that would be effective in containing virus transmission?

Question I.2:*If no reliable knowledge about the circumstances of virus transmission (within the meaning of I.1) is available due to a lack of sufficiently valid data and information, what are the reasons for this lack of data and information? How could this be rectified?*

Topic II: Contact restrictions

Question II.1:*Do any measures exist that can curb the spread of the virus to the same extent as contact reductions, either directly or indirectly (such as curfews aimed at reducing contacts during the evening and night hours)?*

Question II.2:*Taking the effectiveness of the different options addressed under II.1 into account, are the following restrictions suitable for reducing contacts and containing the spread of the virus (including variants of concern): restrictions on private meetings pursuant to § 28b(1) first sentence no. 1 IfSG, curfews pursuant to § 28b(1) first sentence no. 2 IfSG, restrictions on the opening of recreational facilities pursuant to § 28b(1) first sentence no. 3 IfSG, restrictions on the opening of shops and markets with on-site customer traffic pursuant to § 28b(1) first sentence no. 4 IfSG, restrictions on the opening of cultural facilities pursuant to § 28b(1) first sentence no. 5 IfSG, restrictions on sports activities pursuant to § 28b(1) first sentence no. 6 IfSG, restrictions on the opening of bars and restaurants pursuant to § 28b(1) first sentence no. 7 IfSG, restrictions on services involving close physical proximity pursuant to § 28b(1) first sentence no. 8 IfSG, restrictions on public transport pursuant to § 28b(1) first sentence no. 9 IfSG and restrictions on the provision of overnight accommodation pursuant to § 28b(1) first sentence no. 10 IfSG?*

Topic III: Seven-day incidence rate

Question III.1:*Is the number of new SARS-CoV-2 infections per 100,000 inhabitants within seven days (seven-day incidence rate) in a given city or district – as published by the Robert Koch Institute – a suitable indicator for depicting the spread of the virus and its progression in that particular locality? Are there any other indicators that reliably depict the spread of the virus and its progression?*

Question III.2:*a) Are the seven-day incidence rate in general, and the threshold value of 100 in particular, suitable for indicating whether the healthcare system is in danger of being overwhelmed? Do any other suitable warning indicators exist?*

b) Is linking the measures to a threshold of 100 (or some other figure) a suitable way of indicating that the spread of the virus can no longer by contained via contact tracing if the threshold figure is exceeded? Are there any other suitable criteria to which

the measures could be linked?

The following made use of the opportunity to submit a statement: the German Medical Association (*Bundesärztekammer*), the Federal Association of Physicians of German Public Health Departments (*Bundesverband der Ärztinnen und Ärzte des Öffentlichen Gesundheitsdienstes e.V.* – BVÖGD), the German Society for Epidemiology (*Deutsche Gesellschaft für Epidemiologie e.V.* – DGEpi), the German Society for Infectious Diseases (*Deutsche Gesellschaft für Infektiologie* – dgi), the German Society for Medical Informatics, Biometry and Epidemiology (*Deutsche Gesellschaft für Medizinische Informatik, Biometrie und Epidemiologie e.V.* – GMDS), the German Interdisciplinary Association for Intensive and Emergency Medicine (*Deutsche Interdisziplinäre Vereinigung für Intensiv- und Notfallmedizin e.V.* – DIVI), the Association for Aerosol Research (*Gesellschaft für Aerosolforschung e.V.* – GAeF), the Society of Virology (*Gesellschaft für Virologie e.V.* – GfV), the Helmholtz Centre for Infection Research (*Helmholtz-Zentrum für Infektionsforschung GmbH*), the Institute of Land and Sea Transport Systems (*Institut für Land- und Seeverkehr*) at the *Technische Universität Berlin* for the MODUS-COVID team, the Max Planck Institute for Dynamics and Self-Organization (*Max-Planck-Institut für Dynamik und Selbstorganisation*) and the Robert Koch Institute (*Robert Koch-Institut*). The German National Academy of Sciences Leopoldina (*Deutsche Akademie der Naturforscher Leopoldina e.V.*) refrained from submitting a statement. The Professional Association of Medical Specialists in Microbiology, Virology and Infection Epidemiology (*Berufsverband der Ärzte für Mikrobiologie, Virologie und Infektionsepidemiologie*) did not comment. 82

B.

The constitutional complaints are in part admissible. While not all the complainants have substantiated their standing to lodge a constitutional complaint in every respect (see I. below), they do have the necessary legal interest in bringing constitutional complaint proceedings, despite the fact that the provisions at issue have expired in the meantime (see II. below). The constitutional complaints also satisfy the admissibility requirements regarding exhaustion of remedies and subsidiarity in the broader sense (see III. below). 83

I.

The complainants have to some extent failed to sufficiently demonstrate their standing to lodge a constitutional complaint. 84

1. The complainants were all personally and directly affected, at least insofar as their constitutional complaints challenge the curfew [...] or the contact restrictions [...], the applicability of which did not require any further act of execution. The restrictions applied to everyone in Germany at the time. 85

[…] 86-87

2. In some cases and with respect to some of the fundamental rights allegedly violated by the challenged provisions, the constitutional complaints fail to satisfy the requirements arising from § 23(1) second sentence and § 92 BVerfGG which require complainants to demonstrate that their fundamental rights, or rights equivalent to fundamental rights, may have been violated by the challenged provisions. [...] 88

[…] 89-96

II.

The fact that even stricter measures [...] were in some cases applicable under *Land* law does not prevent the complainants from having a general recognised legal interest in bringing constitutional complaint proceedings, which is a prerequisite for the admissibility of their constitutional complaints (cf. Federal Constitutional Court, *Bundesverfassungsgericht* – BVerfG, Order of the First Senate of 5 May 2021 - 1 BvR 781/21 inter alia -, para. 25). Nor was their legal interest in bringing proceedings subsequently extinguished by the fact that the challenged provisions ceased to be applicable due to the incidence rates in the respective localities dropping below the critical threshold [...] or because the provisions expired on 30 June 2021 [...]. 97

It is true that, in principle, complainants must have a recognised legal interest in bringing constitutional complaint proceedings at the time when the Federal Constitutional Court renders its decision (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 81, 138 <140>). However, this legal interest may remain even after the measure addressed by a constitutional complaint has come to an end if there would otherwise be no opportunity to clarify a fundamentally important question of constitutional law and the alleged interference with fundamental rights appears particularly severe, or if there is reason to fear some repetition of the challenged measure, or if the measure that has been revoked or has become inapplicable continues to adversely affect the complainants (cf. BVerfGE 81, 138 <140>). 98

By these standards, the complainants' recognised legal interest in bringing constitutional complaint proceedings has not been extinguished. The dangers associated with the outbreak of SARS-CoV-2 are still present. Pandemic containment measures designed along the lines of the provisions challenged here – in terms of the legislative technique used and the areas regulated – could therefore be taken again in future. The recognised legal interest of the complainants in bringing constitutional complaint proceedings thus remains current despite the fact that the challenged provisions have expired. 99

III.

The constitutional complaints satisfy the requirements regarding exhaustion of remedies and subsidiarity in the broader sense. The complainants were not required to first seek legal protection against the challenged provisions before the ordinary courts. 100

1. […] 101

2. […] 102

The challenged provisions, which were part of an overall strategy to contain the COVID-19 pandemic, had direct and Germany-wide effect without requiring any further act of execution. The applicability of the restrictions set out under § 28b(1) first sentence IfSG was directly linked to whether certain statutorily defined criteria were met – in particular to whether the seven-day incidence rate in a given reference area, city or district reached the critical threshold. Designed in the form of self-executing legislation with an exceptionally broad ambit, the provisions had a substantial impact on the social life of virtually everyone in Germany at the time. This legislative technique is a major source of the criticism levelled by the complainants at the challenged provisions. [...] Whether self-executing legislation that orders direct interference with fundamental rights unconstitutionally curtails the legal protection afforded to affected persons or violates the principle of the separation of powers (Art. 20(2) second sentence GG) does not depend on the specific form of the interference. It depends entirely on questions of constitutional law. 103

C.

Insofar as the constitutional complaints were lodged in an admissible manner, they are unsuccessful on the merits. The fundamental rights of the complainants were not violated by the contact restrictions [...] and the provision subjecting non-compliance to a fine (see I. below), nor were they violated by the curfew [...] and the corresponding administrative offence (see II. below). 104

I.

The contact restrictions set out in § 28b(1) first sentence no. 1 IfSG did interfere with the right to family life and the freedom to shape one’s marriage under Art. 6(1) GG and with the right to the free development of one’s personality (Art. 2(1) GG). The provision under § 73(1a) no. 11b IfSG subjecting non-compliance with the contact restrictions further interfered with the fundamental right arising from Art. 2(1) GG (see 1. below). However, these interferences satisfied constitutional requirements both formally (see 2. below) and substantively (see 3. below) and were therefore justified under constitutional law. 105

1. Contact restrictions as set out in § 28b(1) first sentence no. 1 IfSG interfered with the right to family life and the freedom to shape one’s marriage (Art. 6(1) GG), as well as with the right to the free development of one’s personality both in its manifestation as a general right of personality (Art. 2(1) in conjunction with Art. 1(1) GG), and in its manifestation as a general freedom of action (Art. 2(1) GG) (see a) below). The latter was also impaired by the provision under § 73(1a) no. 11b IfSG subjecting non-compliance with the contact restrictions to a fine (see b) below). These interferences required justification under constitutional law (see c) below). 106

a) § 28b(1) first sentence no. 1 IfSG interfered with the right to family life, the right to marriage and the right to the free development of one's personality. 107

aa) (1) The protection afforded to the family under Art. 6(1) GG covers the actual community of parents living with and bringing up children (cf. BVerfGE 108, 82 <112>; 151, 101 <124 para. 56> with further references), irrespective of whether or not the parents are married to one another. This protection also covers other specific family ties such as those that may exist between adult family members and between close relatives, including across several generations (cf. BVerfGE 136, 382 <388 ff. para. 22 ff.>; see also BVerfGE 151, 101 <124 para. 56>). The right to family life guarantees the freedom of family members to decide for themselves how to shape their family life (cf. BVerfGE 151, 101 <124 f. para. 56> with further references). Art. 6(1) GG similarly gives spouses the right to decide freely on how to shape their life together (cf. BVerfGE 103, 89 <101>; 105, 313 <345>; 107, 27 <53>). These fundamental rights guarantee the right to meet one's relatives or spouse in the manner and frequency of one's choosing and to cultivate family relationships. 108

(2) The contact restrictions [...] interfered with these rights. The legislation set down enforceable rules for private meetings in both public and private spaces. The contact restrictions thereby narrowed the possibilities for people to freely decide for themselves how to shape their family and marital life. For example, family members or spouses living in different households were, in principle, prohibited from meeting a third person together. Children living in different households were prohibited by the legislation from visiting their parents together. Larger gatherings of more than three persons afforded protection by Art. 6(1) were, of course, entirely ruled out. In such cases, telecommunication offered the only permissible form of contact. 109

bb) The curtailment of personal contacts [...] also interfered in various ways with the fundamental right to the free development of one's personality (Art. 2(1) GG), including in its manifestations as a general freedom of action and a general right of personality. 110

(1) This fundamental right also protects close family-like ties outside the scope of protection afforded to marriage and the family (cf. also BVerfGE 128, 109 <125>), thereby taking account of the diverse forms of partnerships and personal relationships found in contemporary society, not all of which fit into the traditional categories of family law ([...]). The freedom to actually cultivate such family-like ties was interfered with by § 28b(1) first sentence no. 1 IfSG. For example, couples who lived apart were prohibited by the contact restrictions from meeting relatives together, from meeting other couples together, or from accompanying their partner to appointments with third parties. 111

(2) Beyond the sphere of family-like ties, the fundamental right to the free development of one's personality (Art. 2(1) GG) also protects the freedom to meet any person of one's choosing. Such meetings are protected under Art. 2(1) GG, at least in its manifestation as a comprehensive general freedom of action (cf. foundationally 112

BVerfGE 6, 32 <36>). Every form of human activity is protected, irrespective of its importance for personality development (BVerfGE 91, 335 <338>). This naturally also includes meeting any person of one's choosing. Yet the challenged contact restrictions curtailed such meetings and thereby interfered – even beyond the infringement of Art. 6(1) GG – with the general freedom of action.

(3) In certain situations, the restrictions [...] also interfered with the general right of personality (Art. 2(1) in conjunction with Art. 1(1) GG) in its dimension as an additional manifestation of the free development of one's personality. The general right of personality protects those aspects of personality development which – without already being covered by the specific freedoms guaranteed under the Basic Law – are equal to these freedoms in terms of their foundational importance for one's personality (cf. BVerfGE 141, 186 <201 f. para. 32>; established case-law). Although the general right of personality does not protect every possible type of meeting with any person of one's choosing, it does guarantee that meeting other people is not entirely prohibited and that the individual is not forced into loneliness. Simply being able to meet other people is of foundational importance for personality development. 113

The challenged contact restrictions had the potential to significantly exacerbate levels of isolation in certain situations. Those who were single and lived alone were particularly affected. During periods when the restrictions were applicable, it could be difficult for them to meet other people at all. The exemptions under § 28b(1) first sentence no. 1 second half-sentence IfSG did not help in this regard. Since they were oriented around family relationships, these exemptions were unable to prevent singles from potentially having to experience a period of particular isolation. Singles had to rely on finding someone who was willing to meet with them rather than with anyone else at a given time. For singles and persons living alone, this could make meeting other people so difficult that it needed to be justified in view of their general right of personality. 114

b) The general freedom of action was also interfered with by the fact that non-compliance with the contact restrictions [...] was subject to a fine [...] (cf. BVerfGE 153, 182 <307 para. 333> with further references). 115

c) These interferences required justification under constitutional law. In principle, interferences with all the fundamental rights affected here can be justified – including interferences with the right to family life and the freedom to shape one's marriage as protected under Art. 6(1) GG. While the fundamental rights contained in Art. 6(1) GG are guaranteed without reservation, they are subject to limitations that derive directly from the Basic Law itself ([...]). In order to be justified under constitutional law, the challenged provisions must be formally (see 2. below) and substantively (see 3. below) constitutional (cf. foundationally BVerfGE 6, 32 <41>). 116

2. The contact restrictions' interference [...] with the complainants' aforementioned fundamental rights was formally constitutional. So too was the further interference with the general freedom of action (Art. 2(1) GG) that resulted from subjecting non- 117

compliance with the restrictions to a fine [...]. The Federation had the necessary legislative competence here [...]. The challenged Fourth Act to Protect the Population During an Epidemic Situation of National Significance of 22 April 2021 did not require the consent of the *Bundesrat* [...].

[…] 118-133

3. The contact restrictions' interference [...] with the right to family life and the freedom to shape one's marriage under Art. 6(1) GG as well as with the right to the free development of one's personality was also compatible with the Basic Law in substantive terms. The interference resulting from subjecting non-compliance with the restrictions to a fine [...] was likewise compatible with the Basic Law in substantive terms, although only the general freedom of action was affected here. The design of the challenged restrictions as self-executing parliamentary legislation did not impair the affected persons' constitutionally guaranteed right to individual legal protection (see a) below), nor did it contravene the limits – resulting from the principle of the separation of powers or from individual fundamental rights – on the legislator's discretion to choose the form of legislative action (see b) below), nor did it violate the requirement of general applicability (*Allgemeinheitsgebot*) arising from Art. 19(1) first sentence GG (see c) below). Furthermore, the contact restrictions and the corresponding administrative offence were sufficiently specific (see d) below). Taking all the resulting burdens into account, they were also justified in accordance with the principle of proportionality (see e) below). 134

a) The technique chosen by the legislator when designing the contact restrictions [...] and the other restrictions – namely the legislative technique of using self-executing parliamentary legislation that bypassed the need for the respective measures to be ordered by the administrative authorities – did not impair the right of affected persons to effective legal protection as rooted in their substantive fundamental rights and as expressly guaranteed under Art. 19(4) first sentence GG. 135

The provision of Art. 19(4) first sentence GG contains the fundamental right to legal protection against acts of public authority – protection that must be effective and as comprehensive as possible (cf. BVerfGE 96, 27 <39>; 104, 220 <231>; established case-law). Public authority in this sense includes all acts of the executive authorities but not those of the parliamentary legislator (cf. BVerfGE 24, 33 <49>; 24, 367 <401>; established case-law; see also BVerfGE 75, 108 <165>; 122, 248 <270 f.> with further references). The task of reviewing the constitutionality of legislation is performed by the Federal Constitutional Court, which has the power to set laws aside where necessary. 136

[…] 137

b) Nor did any other reasons of constitutional law preclude the legislator from designing the challenged restrictions as self-executing parliamentary legislation. In choosing this form of legislative action, the legislator did not overstep the boundaries 138

directly resulting from the principle of the separation of powers (Art. 20(2) second sentence GG) (see aa) below), nor did it contravene the limits on its choice that exist to protect individual fundamental rights (see bb) below).

aa) § 28b(1) first sentence no. 1 IfSG did not violate the principle of the separation of powers. The separation of powers is one of the core precepts and general constitutional principles of the Basic Law. Compliance with these principles is a prerequisite for being able to justify interference with affected fundamental rights under constitutional law (cf. foundationally BVerfGE 6, 32 <41>; established case-law). 139

(1) The principle of the separation of powers is one of the fundamental principles informing the order and functions set out under the Basic Law (cf. BVerfGE 147, 50 <126 para. 196>; BVerfG, Order of the Second Senate of 20 July 2021 - 2 BvE 4/20 inter alia -, para. 22; established case-law). Its purpose, among other things, is to distribute political power and to have the three branches of government interact via a system of checks and balances, thereby moderating state authority. Beyond that, it aims to ensure that state decisions are taken by those organs which – on account of their organisation, remit and operational processes – are best positioned to reach the most sound decisions possible about the subject matter in question. The distribution of power between the three branches must be maintained so that no branch assumes more weight than the others in a manner not envisaged by the Basic Law. Furthermore, none of the branches may be deprived of the competences necessary to perform their constitutional functions; the core area of their respective decision-making powers is inviolable (cf. BVerfGE 95, 1 <15>; 139, 321 <362 para. 125> with further references). 140

Under the Basic Law, the constitutional function of lawmaking is primarily assigned to parliament, which is democratically legitimated for this purpose. Executive tasks largely fall to the government and administration, although this does not preclude parliament from exerting influence on administrative activity in individual cases. Isolated shifts of weight in parliament's favour are compatible with the principle of the separation of powers as long as the executive's core area is not encroached upon (cf. BVerfGE 95, 1 <15 f.>; 139, 321 <363 para. 126> with further references). 141

The principle of the separation of powers also serves to limit any shifting of weight from the executive to the legislative branch insofar as it requires the state organs to check and moderate one another. It thus also safeguards rule-of-law standards that serve to protect fundamental rights. Decisions based on the straightforward application and execution of legislative provisions are, in functional terms, typically reserved to the administration, which has the necessary apparatus and expertise to perform this role (on the further aspect of legal protection, see para. 147 ff.). If parliament takes control of such administrative tasks, there must be sufficient factual reasons to justify this in the individual case (cf. BVerfGE 95, 1 <17>; 134, 33 <88 para. 128>; 139, 321 <363 para. 127>). If the law in question is a so-called "single-person law" (*Einzelpersonengesetz*), i.e. legislation which from the outset is directed at one or 142

more specific persons and which limits their fundamental rights, the legislator will face a more rigorous test of its justifications. The legislator will only be found to have authority to legislate if there is a compelling need to regulate the individual situation (BVerfGE 139, 321 <363 para. 127>). As to whether sufficient reasons justifying legislative activity are present, the legislator has a margin of appreciation and assessment in this regard (cf. BVerfGE 95, 1 <17>; see also BVerfGE 43, 291 <347>).

(2) By these standards, the provision chosen in § 28b(1) first sentence IfSG was compatible with the principle of the separation of powers. The legislator did not encroach upon the executive's core area of competences in its choice of the form of legislative action (see (a) below), and the choice was in any case justified by sufficient factual reasons (see (b) below). 143

(a) The design of the measures in § 28b(1) first sentence IfSG did result in a certain shift in weight between the legislative and executive branches. But this clearly did not entail any interference with the core area of competences assigned to the executive by the Basic Law. The self-executing restrictions [...] were abstract and general provisions that applied to virtually everyone in Germany at the time and which covered a broad range of potential scenarios. Although the restrictions did not require execution by the administrative authorities in order to take effect in the individual case, this did not deprive the administration of any of its assigned areas of competence. The administrative authorities retained their competence for interpreting the provisions – including the exemptions and implementation requirements – and for applying them to specific cases. In addition, they were responsible for monitoring compliance with the restrictions, enforcing them if necessary and penalising acts of non-compliance as administrative offences. Thus the executive's inherent role of applying the law in specific individual cases was left largely undisturbed by the self-executing restrictions set out in § 28b(1) first sentence IfSG. 144

(b) The design of the challenged restrictions as self-executing provisions was also justified by sufficient factual reasons. The legislator's assumption that it would be much harder to achieve the legislative objectives of protecting life and health and maintaining the proper functioning of the healthcare system if the decentralised approach involving different *Land* ordinances continued to be pursued (see *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 19/28444, pp. 1 and 8 f.) was based on sound factual evidence. At the time when the challenged provisions came into force, the federal legislator could tenably assume that the virus outbreak would not be confined to isolated regions and that the overall situation would involve the emergence of new, more dangerous variants, rising infection rates, and the increasing occupation of intensive care units by COVID-19 patients (cf. BTDrucks 19/28444, p. 8). The legislator's further assumption that gaps in protection were the result of nationwide inconsistencies in the interpretation and implementation of the decisions adopted by the Conference of Minister Presidents and that uniform federal legislation was therefore required (cf. BTDrucks 19/28444, p. 8 f.) was within its margin of appreciation and assessment with regard to factual reasons. [...] 145

Under these circumstances, no compelling need (cf. BVerfGE 139, 321 <363 f. para. 127>) was necessary in order for uniform nationwide restrictions in the form of self-executing provisions to be introduced to contain the spread of the virus. The challenged statutory provisions did not amount to “single-person legislation” but rather were formulated in abstract and general terms to cover an extremely broad scope of people and situations. 146

bb) The design of the restrictions in § 28b(1) first sentence IfSG as self-executing provisions also did not contravene any of the requirements concerning individual legal protection that follow from the principle of the separation of powers. It is true that by generally reserving the task of decision-making in individual cases to the executive, Art. 20(2) second sentence GG guarantees that affected persons can effectively defend themselves against state interference with their constitutionally protected interests and thereby assert their fundamental rights (cf. BVerfGE 139, 321 <364 para. 128>). By contrast, if the state chooses to take action through legislation rather than through the – similarly available – framework of administrative decision-making, this will generally have the effect of reducing the possibilities for the judicial review of individual cases (cf. BVerfGE 139, 321 <364 para. 130>). Furthermore, the rights of participation that exist prior to parliamentary legislation being adopted and which also serve to protect fundamental rights – such as the rights of affected persons to be heard and to express their views - only play a minimal role at best when compared to the situation in corresponding administrative proceedings (cf. BVerfGE 139, 321 <364 f. para. 130>). Overall, where the state takes action through parliamentary legislation rather than by having administrative authorities enforce the law in each specific case, there is in principle less opportunity to take the particularities of the individual case into account. 147

Nevertheless, this aspect of fundamental rights protection does not rule out the option of using self-executing provisions. Self-executing provisions generally fall within the legislator’s leeway to choose the form of legislative action, whereas “single-person laws” generally do not (cf. BVerfGE 139, 321 <364 f. para. 130>). But then the legislator never designed the challenged contact restrictions in order to address a single case. Rather, it created abstract and general provisions with an exceptionally broad scope of application. 148

Nor did the self-executing provisions under review here entail any loss in individual legal protection before the ordinary courts of the kind that would normally arise with laws that merely address single persons or single cases. Individuals were not excluded from the outset from seeking recourse against the restrictions [...] before the ordinary courts. The past decisions of the Federal Administrative Court (*Bundesverwaltungsgericht*) make it clear that actions for a declaratory judgment (*Feststellungsklage*) seeking to establish the non-existence of a legal relationship with other parties (§ 43 of the Code of Administrative Court Procedure, *Verwaltungsgerichtsordnung* - VwGO) are admissible on the grounds of a legal provision’s invalidity or inapplicability. This also applies to self-executing legal provisions, i.e. provi- 149

sions that require no act of execution (cf. Decisions of the Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts* – BVerwGE 166, 265 <268 ff. para. 12 ff.> with further references). For persons affected, a declaratory action to establish whether they were subject to certain restrictions [...] or whether – in the case of the curfew – they might benefit from any [statutory] exemptions [...] would likewise have been admissible.

Nor was the chosen form of legislative action inadmissible on the grounds of its limited sensitivity to individual cases or a lack of procedural safeguards protecting fundamental rights, especially since the alternative form of legislative action here would have been for the executive to legislate by way of an ordinance. This would hardly have resulted in stronger safeguards. It lies in the nature of an epidemic that the state does not protect the population by taking isolated measures in individual administrative proceedings, but rather that large-scale protective measures need to be taken in order to avert the danger. Under such circumstances, the executive's main alternative to parliamentary legislation is the ordinance and not the individual administrative act. However, ordinances do not necessarily address the particularities of the individual case any more precisely than parliamentary legislation. And like parliamentary legislation, the procedural safeguards in place when creating ordinances – especially the safeguards involving participation in the overall process – tend to fall short of those offered by administrative proceedings dealing with individual cases. In this respect, not much would have been gained in terms of legal protection by choosing an ordinance as the form of legislative action. 150

c) The challenged provisions were also compatible with the requirement of general applicability (*Allgemeinheitsgebot*) arising from Art. 19(1) first sentence GG. This requirement is generally satisfied if the elements of a statutory provision are formulated in sufficiently abstract terms so that it is not possible to predict how many and which particular cases the law will be applied to (cf. BVerfGE 121, 30 <49>; 139, 321 <365 para. 132> with further references). The requirement was satisfied here due to the broad scope of persons and circumstances to which the restrictions applied (para. 103). 151

d) The administrative offence created in the form of a "blank" provision (*Blankettnorm*) under § 73(1a) no. 11b IfSG and the provision "filling in" that blank provision under § 28b(1) first sentence no. 1 IfSG satisfied the specificity requirements arising from Art. 103(2) GG (see aa) below). The contact restrictions set out in § 28b(1) first sentence no. 1 IfSG also met the general requirements of clarity and specificity applicable to provisions that entail interference with fundamental rights (see bb) below). 152

aa) § 73a(1a) no. 11b and § 28b(1) first sentence no. 1 IfSG satisfied the requirement of specificity arising from Art. 103(2) GG. 153

(1) (a) Art. 103(2) GG, which guarantees that an act may be punished only if it was defined as a criminal offence before the act was committed, is also applicable to administrative offences (cf. BVerfGE 81, 132 <135>; 87, 399 <411>; established case- 154

law). Its meaning extends beyond merely prohibiting punishments based on customary or retroactive laws. It encompasses a strict requirement of specificity for legislation as well as a corresponding prohibition – aimed at the courts – on inventing new crimes based on analogies to existing ones. It thus serves to safeguard freedom by ensuring that all participants in legal relationships should be able to foresee what conduct is prohibited and punishable (cf. BVerfGE 143, 38 <52 f. para. 35 f.; 153, 310 <339 f. para. 71, 73>).

In its function as a requirement of specificity, Art. 103(2) GG includes the obligation that essential questions on whether specific conduct should be punishable or exempt from punishment be clarified via the democratic parliamentary process of forming the political will, and that the legislator define the elements of a criminal offence with sufficient specificity so that the scope and limits of the activity covered by the criminal provision can be recognised and determined by interpretation. The general rule-of-law principles that require all essential decisions affecting the exercise of fundamental rights to be taken by the legislator itself, and that require legislation to be drafted as precisely as possible given the particular nature of the underlying subject matter and the purposes pursued, therefore apply with particular stringency to the area of substantive criminal law with its potentially acute impact on fundamental rights. The requirement of specificity under Art. 103(2) GG therefore means that the wording of criminal legislation must be formulated in such a way that persons addressed by a provision can generally foresee from the text whether specific conduct is punishable or not (cf. BVerfGE 143, 38 <53 f. para. 38>; 153, 310 <340 para. 74>, each with further references). 155

But in criminal law, as in other areas, the legislator must remain capable of addressing the diversity of situations that occur in everyday life. If it had to describe every criminal offence down to the last detail instead of confining itself to essential determinations regarding the constituent elements of the offence and the form and degree of punishment, there is a danger that the laws would become too rigid or too concerned with the minutiae of specific examples and would no longer be capable of dealing with changes in the overall situation or with the unique features of each new case (BVerfGE 143, 38 <54 f. para. 40>; 153, 310 <341 para. 76>, each with further references). Thus Art. 103(2) GG does not preclude the use of indeterminate terms that require specification, blanket clauses included. It does however require that a reliable basis for interpreting and applying the provision in question be obtainable via the conventional methods of interpretation, taking the settled jurisprudence into consideration. The degree of specificity required for any given provision cannot be determined according to abstract criteria, but depends on the particularities of the offence in question, including the circumstances that led to the provision being introduced in the first place (cf. BVerfGE 143, 38 <55 para. 41>; 153, 310 <341 f. para. 77>, each with further references). That being said, the more severe the punishment foreseen by the legislator is, the more precisely the legislator must define the elements of the offence. The set of persons addressed by the provision is also of importance (cf. BVerfGE 156

153, 310 <341 f. para. 77> with further references).

(b) The specificity requirements arising from Art. 103(2) GG do not oblige the legislator to always include a comprehensive description of the offence in the criminal provision itself. The legislator also has the option of making reference to other provisions. However, such a referring provision must clearly indicate which provisions are to be applicable in the specific case (cf. BVerfGE 143, 38 <55 para. 42>; 153, 310 <342 para. 78>). Accordingly, Art. 103(2) GG does not prevent the legislator from creating even “blank” criminal offences. In a blank criminal provision, instead of describing the activity covered by the offence, the legislator makes reference to an additional provision in the same statute or in another statute or ordinance. The use of this legislative technique is not objectionable under constitutional law, provided that the blank provision is sufficiently clear in identifying what it is referring to. This includes the requirement that the blank criminal provision be sufficiently clear in identifying and delimiting the provisions that may serve to “fill it in” and upon which it then imposes sanctions, as well as the possible content and subject matter of those provisions (cf. BVerfGE 143, 38 <56 para. 44>; 153, 310 <343 para. 80>; each with further references). 157

However, blank criminal provisions only satisfy the requirement of specificity under Art. 103(2) GG if the possible instances of criminal conduct are already foreseeable on the basis of the provision, i.e. if the elements of the crime and the form of punishment are described with sufficient clarity either in the blank criminal provision itself or in a provision to which it refers. Aside from the blank criminal provision itself, any provisions that serve to fill in the blank provision must also satisfy the requirements arising from Art. 103(2) GG (cf. BVerfGE 143, 38 <57 para. 46>; 153, 310 <344 para. 82>; each with further references). 158

(2) Thus, while the specificity requirements for provisions carrying fines are stricter than the general requirements applicable to the specificity of provisions that entail interference with fundamental rights, they are not generally as high as the level of specificity required for provisions in the area of substantive criminal law with its particularly acute potential impact on fundamental rights. The blank provision under § 73(1a) no. 11b IfSG (see (a) below) satisfied the aforementioned requirements of the principle of specificity arising from Art. 103(2) GG, as did the contact restrictions under § 28b(1) first sentence no. 1 IfSG that served to fill in that blank provision (see (b) below). 159

(a) […] 160

(b) […] 161-162

The fact that the applicability of the restrictions and the related fines for non-compliance depended on whether the seven-day incidence rate in a given locality reached the critical threshold did not call the sufficient specificity of the provisions [...] into question. Persons affected were able to foresee with sufficient certainty when and 163

where the prohibitions would be applicable. Irrespective of the Robert Koch Institute's obligation [...] to publish regular updates of the seven-day incidence rate on its website, the competent authorities under *Land* law [...] were obliged to notify the public in a suitable manner of the days on which the measures would become applicable. The same was true in respect of notifying the public of the date on which measures would be lifted ([...]). Persons affected could thus inform themselves with sufficient legal certainty about the legal situation and any expected changes. [...]

[…] 164

bb) […] 165

e) The contact restrictions' interference with the complainants' fundamental rights under Art. 6(1) GG and with the right to the free development of one's personality (Art. 2(1) GG) in its manifestations as a general right of personality and a general freedom of action was proportionate (see aa) below); the further interference with the general freedom of action resulting from subjecting non-compliance with the contact restrictions to a fine under § 73(1a) no. 11b IfSG was also proportionate (see bb) below). 166

aa) The contact restrictions set out in § 28b(1) first sentence no. 1 IfSG were proportionate. They served constitutionally legitimate purposes which the legislator pursued in order to fulfil its duties of protection arising from fundamental rights (see (1) below), and they were suitable (see (2) below) and necessary (see (3) below) under constitutional law to achieve these purposes. They did not impose an inappropriate burden on the affected fundamental rights holders (see (4) below). 167

(1) [They] served constitutionally legitimate purposes which the legislator pursued in order to fulfil its duties of protection arising from Art. 2(2) first sentence GG. 168

(a) Where statutory provisions result in interference with fundamental rights, such interference may only be justified if the legislator is pursuing constitutionally legitimate purposes. Whether this is the case is subject to review by the Federal Constitutional Court (cf. BVerfGE 153, 182 <268 para. 233>; see also BVerfGE 152, 68 <127 para. 156>). In this respect, the Court is not limited to considering only the purposes expressly named by the legislator itself (cf. BVerfGE 151, 101 <136 para. 89>). 169

For statutes that the legislator adopts with the aim of tackling situations of danger either in respect of the general public or the legally protected interests of individuals, the review conducted by the Federal Constitutional Court will include an examination of whether the respective assumption made by the legislator has a sufficiently sound basis (cf. BVerfGE 121, 317 <350> with further references; 153, 182 <272 f. para. 236 ff.>). The constitutional review bears both upon the legislator's assessment of such a situation of danger and the reliability of the basis from which this assessment was or could be derived. 170

However, the Basic Law also gives the legislator a certain leeway with regard to 171

both questions, which limits judicial review (cf. BVerfGE 121, 317 <350>; 153, 182 <272 para. 237>). In such cases, the Court must review whether the legislator's assessment and prognosis of the dangers to the individual or to the general public are based on sufficiently reliable foundations. Depending on the nature of the subject matter in question, the significance of the affected legal interests, and the legislator's possibilities to draw sufficiently reliable conclusions, the Court's review can range from a mere review of evident errors to a review of reasonableness and even to a more comprehensive substantive review (cf. BVerfGE 153, 182 <272 para. 237> with further references; on courts limiting themselves to a mere review of evident errors, see by contrast Conseil constitutionnel, Decision no. 2020-808 DC of 13 November 2020, para. 6; Decision no. 2020-811 DC of 21 December 2020, para. 4; Decision no. 2021-824 DC of 5 August 2021, para. 29). Where measures entail serious interference with fundamental rights, it is not in principle permissible for uncertainties in the assessment of the factual situation to simply be interpreted to the detriment of fundamental rights holders. However, the state's duty of protection can be guided by "urgent needs for constitutional protection" – as is the case here. Where scientific knowledge is tentative and the legislator's possibilities to draw sufficiently reliable conclusions are therefore limited, it is enough for the legislator to proceed on the basis of a context-appropriate and tenable assessment of the available information and evidence (cf. BVerfGE 153, 182 <272 f. para. 238> with further references). This leeway stems from the fact that the Basic Law makes it incumbent upon the legislator, with its strong level of democratic legitimation, to resolve conflicts between high-ranking and highest-ranking interests despite uncertainties.

(b) Measured by this standard, the legislator pursued constitutionally legitimate purposes with the contact restrictions set out in § 28b(1) first sentence no. 1 IfSG – both in respect of the individual restrictions and in light of the overall protection strategy involving all the measures taken (see (aa) below). The legislator's assumption that there was considerable danger to various legally protected interests, making it necessary to take legislative action, was based on sufficiently sound findings (see (bb) below). 172

(aa) In adopting the wide range of measures contained in § 28b IfSG, including the contact restrictions in public and private spaces set out under § 28b(1) first sentence no. 1 IfSG, the legislator intended to pursue several different purposes. The explanatory memorandum to the draft act and the chosen legislative strategy make it clear that these purposes were not unrelated. Rather, they were designed to complement one another. 173

With the Fourth Act to Protect the Population During an Epidemic Situation of National Significance, the legislator – according to the explanatory memorandum to the draft act – was pursuing the purpose of protecting life and health and of ensuring the proper functioning of the healthcare system as an exceptionally significant interest of the common good, thereby guaranteeing the best possible medical care (cf. BT-Drucks 19/28444, p. 1 and 8). These objectives were to be achieved through effec- 174

tive measures for reducing personal contacts (cf. BTDrucks 19/28444, p. 1 and 8). The paramount goals were to slow down the further spread of the virus and to interrupt its exponential growth in order to avoid overwhelming the healthcare system as a whole, thereby safeguarding the provision of medical care nationwide. The legislator's declared intention here was to fulfil its duty of protection arising from Art. 2(2) first sentence GG (cf. BTDrucks 19/28444, p. 8). This duty includes affording protection against all risks to life and health associated with a SARS-CoV-2 infection, including against severe illness and long-term effects (long COVID).

Both the explanatory memorandum to the draft act and the legislative strategy itself suggest that maintaining the proper functioning of the healthcare system (cf. BT-Drucks 19/28444, p. 1 and 8) was to be understood as an intermediate step towards the greater objective of protecting health and life. This step was necessary in order to protect the lives and health of patients who became infected and ill with COVID-19 despite the fact that protective measures were already in place to contain the virus and were further supplemented by the legislation. Without a properly functioning healthcare system, it would moreover have been difficult to protect the lives and health of patients suffering not from COVID-19 but from other conditions requiring treatment, some of whom needed intensive care. If intensive care resources had been largely diverted to the treatment of COVID-19 patients, the lives and health of other patients requiring intensive care would have been placed at considerable risk. 175

Protecting life and health and maintaining the proper functioning of the healthcare system are both exceptionally significant interests of the common good in their own right, and are thus constitutionally legitimate legislative purposes (cf. BVerfGE 7, 377 <414>; 121, 317 <349>). Art. 2(2) GG, which protects the individual against impairment of their physical integrity and health (cf. BVerfGE 142, 313 <337 para. 69> with further references), can also impose a duty of protection on the state that encompasses a duty to take precautionary measures to prevent health impairments (cf. BVerfGE 56, 54 <78>; 121, 317 <356>). 176

(bb) The legislator's assessment at the time when the legislation was adopted – namely that there was a danger to life and health and a danger of the healthcare system being overwhelmed – was based on findings which it evaluated as being sufficiently sound. According to the requirements applicable here, this was a tenable evaluation. 177

In this context, one key aspect of maintaining a factually sound approach when dealing with a novel global pandemic is to ensure that the scientific findings underpinning any measures which give rise to interference with fundamental rights continue to be obtained, processed and corrected on an ongoing basis. By assigning tasks to the Robert Koch Institute in accordance with § 4(1) IfSG, the legislator did in principle take the necessary institutional steps to ensure that the information required for the assessment of measures to combat communicable diseases is collected and evaluated. One of the Robert Koch Institute's tasks is to continuously update the findings 178

on such diseases by analysing and publishing data on infection rates in Germany and by evaluating any relevant studies that appear worldwide, processing them for the Federal Government and the general public. At the time when the Fourth Act to Protect the Population During an Epidemic Situation of National Significance was adopted, the Robert Koch Institute – according to its situation report of 22 April 2021 (available at https://www.rki.de) – assessed the overall risk to the health of the population in Germany as being very high due to the persistently high number of cases. [...] Over the preceding weeks, the number of COVID-19 cases had started rising again in all age groups, younger age groups in particular. In the group of over 80-year-olds, the steady decline in numbers over the preceding weeks had also halted. In most cases, the place of infection was unknown and no longer ascertainable. The high nationwide case numbers were driven by exposure scenarios of a largely diffuse nature, with infection frequently occurring in households, at work, and in child day-care centres and after-school facilities.

179 The proportion of positive test results similarly began rising again during this period and reached over 12%. At the time, three of the known virus mutations – lineage B.1.1.7 (Alpha variant), lineage B.1.351 (Beta variant) and lineage P.1 (Gamma variant) – were categorised by the World Health Organisation (WHO) as variants of concern. Of these, the Alpha variant was dominant. The Robert Koch Institute similarly categorised Alpha as a variant of concern because “based on current findings, it is clearly more transmissible and is presumed to cause more severe outcomes than other variants”. Furthermore, there was reason to assume that the increasing spread and dominance of this variant would considerably reduce the effectiveness of the infection control measures already in place.

180 The rise in overall cases and in the number of infections caused by the Alpha variant (B.1.1.7) led to an increasing number of patients being hospitalised and requiring intensive care. The surveillance of severe acute respiratory infections (SARI) in hospitals showed an increase in SARI cases, with cases in the group of 35 to 59-year-olds rising sharply to very high levels. The proportion of COVID-19 cases among the overall SARI cases also continued to rise. 66% of all SARI cases were in hospital with COVID-19. At the same time, there was a drop in the median age of COVID-SARI patients. The drop in median age over the preceding months was attributable to a steady decline in the number of COVID-SARI cases in the group of over 80-year-olds, presumably resulting from the vaccination programme’s prioritisation of the elderly at a time when just 6.9% of the overall population had been double-vaccinated. On 22 April 2021, there were 5,049 COVID-19 patients in intensive care. Since the previous day, 581 new COVID-19 patients had been admitted to intensive care and 111 COVID-19 intensive care patients had died. According to the Robert Koch Institute’s Epidemiological Fact Sheet of 14 July 2021, a study on the mortality rates of COVID-19 patients requiring intensive care showed the fatality rate to be 30% or above.

The legislator also made use of expert hearings in the competent committee of the German *Bundestag* in order to address the underlying research findings. [...] 181

Expert opinions on all the relevant issues were furthermore publicly available and widely discussed while the legislative process was underway. There were differences of opinion in terms of how the danger was assessed, how the pandemic was expected to evolve and what steps should be taken to contain it. But at no point were reliable findings put forward suggesting that the danger to life and health from infection was minimal or non-existent or that there was only a minimal or non-existent danger of the healthcare system being overwhelmed. 182

(2) The restrictions on contacts in private and public spaces [...] were suitable under constitutional law for achieving the legislative objectives. [...] 183

[…] 184

(a) (aa) The requirement of suitability is already satisfied under constitutional law if there is a possibility of achieving the legislative objectives through the statutory provisions (cf. BVerfGE 152, 68 <130 f. para. 166>; 155, 238 <279 para. 102>; 156, 63 <116 para. 192>; established case-law). In assessing whether a provision is suitable, the legislator has a certain leeway to evaluate the factual situation, make any necessary prognoses and choose the means by which the legislative objectives are to be achieved (cf. BVerfGE 109, 279 <336> with further references; 152, 68 <131 para. 166>; see also BVerfGE 156, 63 <116 para. 192>). The extent of this leeway is not always the same. Rather, its scope depends on factors relevant to the individual case such as the nature of the subject matter in question, the possibilities to draw sufficiently reliable conclusions and the significance of the affected legal interests (cf. BVerfGE 109, 279 <336>). In respect of the latter, the specific right affected by the interference (cf. BVerfGE 152, 68 <131 para. 166>) and the weight of the interference may also play a role (cf. BVerfGE 156, 63 <116 f. para. 192>). Here too, where measures entail serious interference with fundamental rights, it is not in principle permissible for factual uncertainties to simply be interpreted to the detriment of fundamental rights holders. But if the interference is carried out in order to protect important constitutional interests and if the legislator's possibilities to draw sufficiently reliable conclusions are limited in view of the factual uncertainties, the Federal Constitutional Court's review is in turn limited to assessing whether the legislator's prognosis of suitability was tenable (cf. BVerfGE 153, 182 <272 f. para. 238> with further references; see also para. 171 above). 185

Where statutory provisions are based on prognoses, the suitability of these provisions cannot be measured against subsequent actual developments, but only in terms of whether the legislator could have assumed from its viewpoint at the time that the measure was suitable for achieving the set objective, i.e. whether the legislator's prognosis was factually accurate and tenable. If a prognosis subsequently proves to be inaccurate, this does not undermine the legislation's original suitability (cf. BVerfGE 113, 167 <234> with further references). Thus the suitability of legislation does 186

not depend on the existence of unequivocal empirical evidence demonstrating the effectivity or effectiveness of the measure in question (cf. BVerfGE 156, 63 <140 para. 264>). It is however possible for a provision that is initially in conformity with the Constitution to subsequently become unconstitutional with future effect if the legislator's original assumptions no longer hold up (cf. BVerfGE 143, 216 <245 para. 71> with further references; see also Swiss Federal Supreme Court, Judgment of 8 July 2021 - 2C_941/2020 - 3.2.6. f.).

(bb) Accordingly, the legislator had a margin of assessment as to the suitability of the contact restrictions and the further restrictions reinforcing and supplementing them in § 28b(1) first sentence IfSG. The legislator's prognosis as to the effectivity of these restrictions is therefore subject to a review of reasonableness by the Federal Constitutional Court. This includes a review of whether the legislator's prognosis was sufficiently reliable (cf. BVerfGE 152, 68 <119 para. 134>). There is no reason to conduct any stricter review of suitability beyond this. 187

It is true that the contact restrictions amount to interference of quite considerable weight with the right to family life and the freedom to shape one's marriage under Art. 6(1) GG and with the right to the free development of one's personality (Art. 2(1) GG) in its different manifestations. It must also be taken into account that significant restrictions affected the entire population on a blanket, Germany-wide basis and were furthermore applicable in all areas of life due to other statutorily imposed measures. However, in adopting the restrictions under § 28b(1) first sentence IfSG – the contact restrictions in particular – the legislator was pursuing the purposes of protecting life and health and maintaining the proper functioning of the healthcare system, and was thereby protecting exceptionally significant legal interests and interests of the common good. 188

The fact that, in the relevant period before the legislation was adopted, no comprehensively validated scientific findings were available on the spread of SARS-CoV-2 and the specific effectiveness of individual measures for containing further transmission does not give rise to stricter requirements with regard to suitability. Here again, the tentative nature of scientific knowledge did not result in any subsequent restriction of the legislator's margin of appreciation. Certainly, if circumstances relevant to a proportionality assessment change after legislation has come into force, the legislator's margin of appreciation may at some point no longer be capable of justifying the legislation (also BVerfGE 143, 216 <245 para. 71>; see also Swiss Federal Supreme Court, Judgment of 8 July 2021 - 2C_941/2020 - 3.2.4. ff.). But this was not an issue here due to the short period of time during which the challenged provisions were valid. 189

Nor was the soundness of the legislator's initial assessment called into question by the legislator having failed to improve the available data. It is true that if reliable findings on the functioning and effectiveness of statutory measures are lacking, the legislator's margin of assessment as to the suitability of such measures may be restrict- 190

ed over time if it fails to take sufficient steps to ensure advances in its knowledge. The longer a measure that was designed using the legislator's margin for prognosis remains in force, the less permissible it becomes for the legislator to rely on an original, uncertain prognosis – provided the legislator could in fact obtain sounder findings (cf. BVerfGE 152, 68 <119 para. 134>).

But this was not the case here, at least not in the period during which the challenged restrictions [...] were valid (cf. also BVerfG, Order of the First Senate of 19 November 2021 - 1 BvR 971/21 -, para. 180 ff.). By assigning tasks to the Robert Koch Institute in accordance with § 4(1) IfSG, the necessary institutional steps were in principle taken to ensure that the information required for the assessment of measures to combat communicable diseases was collected and evaluated. Especially in light of the unpredictable course of the pandemic and the emergence of several virus variants, there is nothing to indicate that the legislator might have fulfilled its duties inadequately in this regard, which would have constituted grounds for restricting its margin of appreciation and assessment. Given that the challenged measures have since expired, there is no need to decide whether – in the event of a prolonged pandemic – stricter standards would need to be applied to the type and extent of data relied upon by the legislator regarding the effectivity of measures for containing the virus. 191

(b) Measured by these standards, the contact restrictions [...] were a suitable means both of directly protecting human life and health from the dangers of COVID-19 and of preventing the healthcare system from being overwhelmed which, had it occurred, would in turn have posed considerable risks to the life and health of COVID-19 patients and of patients requiring in-patient treatment or even intensive care for other reasons. [...] 192

(aa) The legislator could tenably assume that the [...] restriction of contacts between people could contribute towards protecting life and health. [...] 193

[…] 194

[The] expert third parties largely [agree] that any restriction of contacts between people significantly contributes towards curbing transmission of the virus. In order to cause infection, the virus requires new hosts and finds them when people come into direct and indirect contact. Although the German Medical Association, the Federal Association of Physicians of German Public Health Departments and the Helmholtz Centre for Infection Research emphasise that scientific knowledge is still limited with regard to the places, modes and times of virus transmission, there is broad scientific consensus at least with regard to certain modalities of infection and the effectiveness of particular measures. For example, nobody seriously disputes that direct transmission of SARS-CoV-2 between humans is caused by droplets and aerosols, while indirect transmission is caused by aerosols, and that the contact restrictions set out under § 28b(1) first sentence no. 1 IfSG curb infections from both modes of transmission. Regardless of the uncertainties on other issues, the expert third parties unanimously agree that restricting contacts between people is an effective means of re- 195

ducing the infection rate because the virus needs new hosts in order to spread and only finds them via direct or indirect contact between people.

Since the virus can be directly transmitted both indoors and outdoors, and it makes no difference to transmission whether a person is exposed to infectious particles in a public or private space – findings that were already available at the time when the legislation was adopted – it was tenable for the legislator to assume that any restriction on people meeting in public or private spaces would contribute by no means insignificantly towards curbing transmission of the virus and would thus be suitable for protecting life and health. 196

(bb) There is similarly no doubt about the suitability of contact restrictions for preventing the healthcare system from being overwhelmed. Reductions in the number of infections are correlated to decreases in the overall number of COVID-19 patients and in the number of patients requiring intensive care. 197

(cc) The fact that the applicability of the contact restrictions [...] was automatically linked to whether the seven-day incidence rate of 100 was reached in a given city or district does not call the suitability of the provisions into question. The legislator was acting within its margin of appreciation both when deciding to link the measure to the incidence rate and when setting the actual threshold value. The legislator's assessment of suitability was based on findings that were sound at the relevant time when the legislation was adopted. 198

The legislator regarded the regionally specific seven-day incidence rate as a suitable benchmark for triggering nationwide pandemic control measures because it provided the earliest warning of rising infection rates. After factoring in the characteristics of the currently dominant virus variant, the incidence rate furthermore provided the legislator with an early indication of the burden soon to be faced by the healthcare system as well as the anticipated number of deaths. The seven-day incidence rate also provided the general public with an easily accessible and readily understandable indicator as it was compiled and published on a daily basis by the Robert Koch Institute (cf. BTDrucks 19/28444, p. 9). The scientific findings available during the relevant period offered a sufficient basis for this. [...] 199

It was likewise within the legislator's margin of appreciation to select a threshold value of 100 as the critical level for triggering the applicability of the restrictions. [...] 200

(dd) The legislator could also tenably assume at the time of their coming into force that the challenged contact restrictions would help towards achieving its objectives even where they also applied to persons assumed to be immunised within the meaning of the authorisation under § 28c first sentence IfSG. At the time, no sufficiently sound findings were available on whether fully vaccinated or recovered persons still posed a risk of infection to others. Yet through § 28c IfSG, the legislator ensured that the Federal Government could issue ordinances in swift response to new scientific findings on the risk of infection from vaccinated or recovered persons. The Federal 201

Government did precisely this on 8 May 2021 in adopting the Ordinance on Alleviations and Exemptions from Protective Measures to Prevent the Spread of COVID-19 (*Verordnung zur Regelung von Erleichterungen und Ausnahmen von Schutzmaßnahmen zur Verhinderung der Verbreitung von COVID-19* – SchAusnahmV [...]), in particular §§ 3 to 6 of that ordinance.

(3) As measures to protect life and health and to maintain the proper functioning of the healthcare system, the challenged contact restrictions were also necessary under constitutional law. In consideration of the fact that the legislator has a margin of appreciation here too (see (a) below), no other means were available that would have been as clearly effective as the contact restrictions in their specific form while at the same time restricting the affected fundamental rights to a lesser extent (see (b) below). 202

(a) Interference with fundamental rights may not go beyond what is necessary to protect the common good (cf. BVerfGE 100, 226 <241>; 110, 1 <28>). A measure falls short of this standard if an equally effective means of protecting the common good is available that would be less intrusive for the fundamental rights holder and would not impose greater burdens on third parties or the general public (cf. BVerfGE 148, 40 <57 para. 47> with further references; established case-law). In this regard, it must be clearly established that the alternative measure is equally effective for achieving the desired objective in every respect (cf. BVerfGE 81, 70 <91> with further references). 203

In principle, the legislator is also afforded a margin of appreciation in assessing the necessity of a measure (cf. BVerfGE 152, 68 <136 para. 179>; 155, 238 <280 para. 105>; established case-law; cf. also BVerfG, Order of the First Senate of 19 November 2021 - 1 BvR 971/21 inter alia -, para. 123; regarding the recognition of similar margins cf. Conseil constitutionnel, Decision no. 2020-808 DC of 13 November 2020, para. 28 f.; Constitutional Court of Austria, Decision of 10 March 2021 - V 583/2020 inter alia -, para. 28 f. with further references; Constitutional Court of the Czech Republic, Decision of 9 February 2021 - PI. ÚS 106/20 -, para. 76). This margin of appreciation concerns, among other things, projecting the effects of the chosen measures, also in comparison with other, less intrusive measures. The margin may become narrower depending on the affected fundamental right or the severity of interference (cf. BVerfGE 152, 68 <119 para. 134>). Conversely, the margin is broader the more complex the matter addressed by the legislator is (cf. BVerfGE 122, 1 <34>; 150, 1 <89 para. 173> with further references). Here too, where measures entail serious interference with fundamental rights, it is not in principle permissible for uncertainties in the assessment of facts to simply be interpreted to the detriment of fundamental rights holders. But if the interference is carried out in order to protect significant constitutional interests and if the legislator's possibilities to draw sufficiently reliable conclusions are limited in view of the factual uncertainties, the Federal Constitutional Court's review is in turn limited to assessing whether the legislator's prognosis of suitability was tenable (cf. BVerfGE 153, 182 <272 f. para. 238>). 204

(b) It follows that the legislator's margin of appreciation in this case was broad, since the overall pandemic situation is characterised by its dangerous and unpredictable nature, making for a complex factual environment. Furthermore, even though the blanket, Germany-wide restrictions affecting all areas of life constitute a burden of considerable weight, this had to be set against the need to protect life and prevent extremely serious physical impairments. Based on the information about the transmissibility of the virus and the possibilities for curbing its spread that was available at the time when the legislation was adopted, it is not objectionable under constitutional law that the legislator assumed there were no other means available that would certainly have been as effective as the imposed contact restrictions in achieving the desired objective. This applies both to protection conferred by vaccination (see (aa) below) and to other methods of regulating personal contacts apart from the contact restrictions (see (bb) below). It is true that fewer interferences with fundamental rights would have arisen if the applicability of the restrictions had been linked to incidence rates in areas smaller than whole cities or districts. However, this would not have been as effective (see (cc) below). 205

(aa) Vaccination could not be expected to provide equally effective protection against the spread of the virus during the relevant period. At the time when the challenged provisions came into effect, only 6.9% of the population had been double-vaccinated (para. 180). Due to the time required to produce the vaccine, shortages in supply, and the necessary interval between the first and second doses, it was not possible to reach vaccination levels that would have protected the majority of the population, or even just all the highly vulnerable, from severe illness – at least not during the period when the challenged provisions were valid. [...] 206

(bb) Based on the information available at the relevant time, it is not apparent how – by enacting a different legal framework or by designing the challenged contact restrictions in a different manner – the legislator could have achieved its objective of reducing contacts in a way that would have been equally effective but with fewer restrictions to fundamental rights. 207

Applying the restrictions only to meetings in public spaces would not have been equally effective. According to the Helmholtz Institute for Infection Research, among others, the virus is transmitted when people meet in both public and private spaces, both indoors and outdoors. Contacts in all these settings therefore had to be effectively reduced in order to contain the spread of the virus. While specific aspects of the places and modes of transmission were not yet fully understood, the expert third parties did essentially agree that meeting privately, including in private spaces, accounted for a significant proportion of the overall rise in infection rates. 208

However, it was within the legislator's margin of appreciation and prognosis to extend the ambit of the general contact restrictions to also include meetings in public spaces and outdoors in order to thereby curb the infection rate more effectively than if the rules were only applicable to meetings in private spaces. Here too, the legislator 209

was acting on a sound basis. While the probability of indirect infection via aerosols is considerably lower in outdoor settings, it is widely believed within the scientific community that there is still a risk of direct infection outdoors […].

Likewise, introducing rules of conduct while not putting in place any other contact restrictions did not represent an equally effective means of curbing the infection rate. It is well established that certain precautions can be taken to minimise the risk of infection when meeting other people. The proper wearing of a mask covering the mouth and nose can reduce [...] the risk of infection. However, there is no reliable evidence to suggest that adhering to such rules lowers the risk of infection to the same extent as preventing people from meeting altogether. Even where such rules of conduct are fully complied with, the risk of infection is not neutralised to the same degree as with the complete avoidance of personal contact. Furthermore, the risk of the rules being followed incorrectly, whether deliberately or inadvertently, is still present. The legislator's assessment that measures to reduce the risk of transmission such as physical distancing, ventilation requirements and mask-wearing are less strictly implemented when people meet privately than during interactions in, say, business or work-related settings (cf. BTDrucks 19/28444, p. 12) had a sufficiently sound basis in the form of reliable evidence showing that private meetings accounted for a significant proportion of the rise in infection rates. 210

Beyond that, it was within the legislator's margin of appreciation to view the exemption of vaccinated and recovered persons from the contact restrictions – as provided for from the outset in § 28b IfSG – not as a less intrusive measure but as an equally effective one. At the time when the challenged provisions were adopted, there was still uncertainty as to how long immunity would last and what the likelihood would be of vaccinated or recovered persons becoming reinfected. With § 28c IfSG, the legislator furthermore took steps to ensure that action could be taken in response to new findings on these issues. 211

Contrary to what some of the complainants believe, the principle of necessity did not require that certain areas of life, such as the working environment, be more strictly regulated than was actually the case. This would have shifted burdens onto third parties and would not therefore have qualified as a less intrusive means under constitutional law of curbing the infection rate (cf. BVerfGE 123, 186 <243>; 148, 40 <57 para. 47>). [...] 212

(cc) […] 213-214

(4) Measured against the information available at the relevant time when the legislation was adopted, the contact restrictions [...] were proportionate in the strict sense (appropriateness). 215

(a) For a measure to be appropriate and thus proportionate in the strict sense, the purpose pursued by a measure and the likelihood of its achieving that purpose may not be disproportionate to the severity of the interference (cf. BVerfGE 155, 119 <178 216

para. 128>; established case-law). It is for the legislator to strike a balance between the extent and severity of the interference with fundamental rights, on the one hand, and the provision's importance for achieving legitimate objectives on the other (cf. BVerfGE 156, 11 <48 para. 95>). The prohibition of excessive measures (*Übermaßverbot*) requires that the more severely individual freedom is restricted, the more significant the pursued interests of the common good must be (cf. BVerfGE 36, 47 <59>; 40, 196 <227>; established case-law). Conversely, the need to take legislative action becomes more urgent, the greater the potential dangers and adverse effects are that could potentially arise if fundamental rights were to be freely enjoyed with no restriction whatsoever (cf. BVerfGE 7, 377 <404 f.>).

When assessing whether a measure is appropriate, too, the legislator in principle has a margin of appreciation (cf. BVerfGE 68, 193 <219 f.>; 121, 317 <356 f.>; 152, 68 <137 para. 183>; for a stricter view cf. BVerfGE 153, 182 <283 f. para. 266>; cf. also BVerfG, Order of the First Senate of 19 November 2021 - 1 BvR 971/21 inter alia -, para. 135). In this respect, the Federal Constitutional Court reviews whether the legislator has taken tenable decisions within its margin of appreciation (regarding such margins cf. Conseil constitutionnel, Decision no. 2020-808 DC of 13 November 2020, para. 28 f.; Constitutional Court of Austria, Decision of 10 March 2021 - V 583/2020 inter alia -, para. 28 f. with further references; Constitutional Court of the Czech Republic, Decision of 9 February 2021 - PI. ÚS 106/20 -, para. 76). With regard to prognostic decisions, this requires that the legislator's prognosis be based on sufficiently reliable foundations (cf. BVerfGE 68, 193 <220>; cf. also BVerfGE 153, 182 <272 para. 237>). 217

(b) Thus, when adopting the legislation in question, the legislator was obliged to take account of the fact that the contact restrictions set out in § 28b(1) first sentence no. 1 IfSG would interfere significantly with fundamental rights – also in light of the prohibitions that were in some cases already in force under *Land* law and other restrictions that had been imposed to combat the pandemic (see (aa) below). At the same time, the legislator could assume without objection under constitutional law that the restrictions would serve to protect exceptionally significant interests of the common good (see (bb) below). In balancing these conflicting interests, the legislator reached an appropriate compromise for the limited period in question, reconciling the interests of the common good pursued by the contact restrictions on the one hand, with the impairment of fundamental rights on the other (see (cc) below). During the period when the contact restrictions under § 28b(1) first sentence no. 1 IfSG were valid, the legislator was not required to conduct a renewed examination of their appropriateness in order to uphold the prohibition of excessive measures (see (dd) below). 218

(aa) The contact restrictions [...] gave rise to considerable interference with the right to family life and the freedom to shape one's marriage under Art. 6(1) GG, as well as with the right to the free development of one's personality and the general freedom of action under Art. 2(1) GG. 219

(α) By essentially restricting social contacts to members of the same household plus one other person from a different household, the provision in § 28b(1) first sentence no. 1 IfSG gave rise to acute interference with family and marital life. During periods when the contact restrictions were applicable, those affected were prevented from meeting others in the manner of their own choosing. By introducing the one-household rule, the contact restrictions also prevented meetings between people connected by the particularly close family ties that are protected under Art. 6(1) GG and which are typically found in parent-child relationships involving children over the age of 14. The restrictions on meeting privately also applied to situations in which the maintenance of personal contact between close family members living in different households generally holds special importance – such as the maintenance of personal contact between adult children and their parents. For example, under § 28b(1) first sentence no. 1 IfSG, adult siblings who live in separate households were not allowed to simultaneously visit a parent living in a different household. 220

With comparable severity, the contact restrictions also interfered with the possibilities for personal contact protected not under Art. 6(1) GG but under the right to the free development of one's personality – possibilities that are of foundational importance for personality development. This importance can stem from the special relevance that certain relationships might have for an individual's personality, or from the fact that people risk becoming physically isolated without the possibility of meeting anyone. For persons living in households on their own, private meetings were limited to the members of one other household. And yet the ability to cultivate social contacts is especially important for such persons because no personal interaction takes place within the household itself (see para. 114 above). On account of the other restrictions imposed on public life, including those at the workplace, only a minimal amount of social interaction was possible for this group, resulting in a risk of loneliness. This made the interference particularly severe. 221

Furthermore, the legislator's chosen technique of using self-executing legislation of uniform nationwide applicability added weight to the interference. During the period when the legislation was valid, the interference affected everyone in a city or district [...] where the seven-day incidence rate exceeded the statutory threshold. It was practically impossible for anyone to avoid the restrictions by making individual arrangements, reorganising their lives or adopting their own protective measures. Furthermore, the loss of freedom resulting from the contact restrictions could not and cannot be compensated for during hours when the restrictions did not apply or once the challenged provisions expired. Any meetings prevented while the measures were applicable are lost opportunities that can never be recovered (cf. BVerfG, Order of the First Senate of 5 May 2021 - 1 BvR 781/21 inter alia -, para. 47). The impairment of freedom resulting from the general contact restrictions was furthermore exacerbated by the provision under § 73(1a) no. 11b IfSG subjecting non-compliance with the restrictions to sanctions. 222

In terms of the weight of the interference with affected fundamental rights, the legislator was not entitled to view the contact restrictions in isolation. The overall weight of interference during the relevant period also resulted from similar measures that had already been introduced under *Land* law, as well as other fundamental rights interferences resulting from further restrictions that had been imposed at the same time to combat the pandemic. Almost all the *Länder* made use of the possibility [...] to enact contact restrictions under *Land* law. Accordingly, many people's interactions with close personal contacts and other social contacts were curtailed for longer than just the period when the challenged provisions were valid. 223

In addition, the consequences of the impairments to private life resulting from the contact restrictions were exacerbated by the simultaneous application of other measures to contain the pandemic. From a broader evaluative perspective, however, this exacerbating effect was in turn limited by the fact that it resulted from the overall legislative strategy of taking measures to combat the pandemic across numerous areas of life in order to spread the burden as widely as possible, thereby preventing excessive demands being placed on any one specific group in any one particular area of life. 224

(β) The legislator itself did, however, take steps to mitigate the effect of the interference. 225

The severity of the interference with the right to family life and with the freedom to shape one's marriage was mitigated by circumstances provided for within the legislator's overall statutory framework [...]. For example, members of the same household could still go about their activities together in both public and private spaces. They could be joined by one additional person along with an unlimited number of children from that person's household. This went some way towards easing the situation of single parents. Contacts necessary to exercise rights of custody with regard to minor children were never restricted in the first place [...]. This reflects the special importance of the right to family life for parent-child relationships under Art. 6(2) GG. Thus, there were still numerous possible constellations in which family members could meet. In light of the freedom to shape one's marriage, it was reasonable to interpret the phrase "meetings exclusively involving [...] spouses or partners [...] remain unaffected" in § 28b(1) first sentence no. 1 IfSG as meaning that couples, even if they did not live in the same household, were allowed to meet with another person from a different household as well as with the other members of their own partner's household (such as any children living with them). In general, the severity of the interference was considerably mitigated both by the limited duration of the legislation and by the fact that § 28b IfSG was adaptable to changing circumstances in the pandemic and allowed for regional distinctions […]. In practice, the restrictions were not applied anywhere after 11 June 2021. 226

(bb) At the same time, the legislator could tenably assume that the contact restrictions' serious interference [...] with the aforementioned fundamental rights would be 227

set against exceptionally significant interests of the common good – namely the interests of protecting life and health and maintaining the proper functioning of the healthcare system, the safeguarding of which necessitated urgent action at the time when the challenged legislation was adopted.

All the measures set out in § 28b(1) first sentence IfSG were geared towards protecting the population against the dangers to life and health associated with the SARS-CoV-2 virus and the resulting COVID-19 illness. Under the legislator's tenable protection strategy, contact restrictions played a central role as a means of achieving the desired objectives. Since the vaccination programme offered insufficient protection, and since medication for treating COVID-19 was largely non-existent, the only promising way to protect life and health and maintain a properly functioning healthcare system was to minimise the number of infections. According to reliable scientific findings, contact restrictions were and still are a highly effective means of doing this. Ensuring the proper functioning of the healthcare system was an intermediate step towards being able to guarantee that all infected persons, especially those with severe illness, received proper medical care (see para. 175 above). The objective was to curb the number of infections in order to keep hospital capacities available, including for patients who needed to be hospitalised for reasons other than COVID-19. The restriction of contacts was both the starting point for the measures set out in § 28b(1) IfSG and the higher-order purpose which they all served. 228

The legislation was adopted in April 2021 amid highly volatile transmission dynamics (see para. 178 ff. above). Based on the sound information at its disposal, the legislator could tenably assume that the lives and health of large numbers of patients nationwide were in considerable immediate danger and that the proper functioning of the healthcare system was also at risk. The legislative process coincided with an exponential rise in infection rates across the entire country. The proportion of cases attributable to the Alpha variant – a variant of concern – increased dramatically. Hospitals, doctors and expert organisations in the field of intensive care drew attention to the massive strain being placed on intensive care units and to the risk of the entire intensive care system being overwhelmed if the pandemic continued unabated (see para. 180 f. above). The picture in neighbouring countries, some of which were more seriously affected by the pandemic, fed fears that the situation could escalate further. It was not therefore unreasonable to assume that the number of people requiring intensive care would soon clearly exceed clinical capacities and that patients would no longer receive optimal treatment. At the same time, the measures adopted at the regularly held conferences between the Federal Chancellor and the *Länder* Heads of Government were perceived as being interpreted and implemented in an inconsistent and insufficiently effective manner. 229

In this situation, the legislator could tenably assume that it was crucial to curb infections as widely and swiftly as possible to protect the population from dangers to life and limb that would be caused if the virus spiralled out of control and the healthcare system therefore could no longer maintain its proper functioning. Given that the pos- 230

sibility of protection through vaccines or effective medication for treating COVID-19 patients was lacking, the legislator's assessment that the interests of the common good would best be served by imposing comprehensive and effective contact restrictions at all the relevant places of contact is not objectionable under constitutional law.

The legislator pursued exceptionally significant aims of the common good with the contact restrictions [...]. Health and life, which the legislator is obliged to protect under Art. 2(2) first sentence GG, are exceptionally significant legal interests in their own right (cf. BVerfGE 126, 112 <140>; established case-law). Given the factual situation at the time when the legislation was adopted, the legislator could assume – without overstepping its margin of appreciation – that there was a need to take action with particular urgency in order to protect those interests. 231

(cc) In the weighing process, the legislator reached a constitutionally sound balancing for the limited period in question, reconciling the particularly significant interests of the common good pursued by the contact restrictions on the one hand, with the considerable impairment of fundamental rights on the other. There is nothing to indicate that the legislator, in fulfilling its responsibility to strike a balance between these conflicting interests, one-sidedly gave precedence to the aforementioned interests of the common good, or failed to give proper regard to fundamental rights. Rather, when designing the contact restrictions, it introduced various safeguards to limit the extent of the interference with the affected fundamental rights – Art. 6(1) and (2) GG and the right to the free development of one's personality in particular – without jeopardising the protection of life and health. For the reasons set out above, its prognostic assumptions regarding the further spread of the variants of concern and the resulting danger to the interests of the common good were based on sound findings (para. 178 ff.) and fell within its margin of appreciation. 232

In particular, there were mechanisms in the legislation itself to limit any adverse impacts on fundamental rights. Both the limited duration of the legislation, and the fact that § 28b IfSG was adaptable to changing circumstances in the pandemic and allowed for regional distinctions, had a limiting effect in this sense. [...] It should be noted here that impairments of freedom [...] are in principle of lesser severity, the shorter their duration. [...] 233

Another mechanism serving to balance individual interests with the conflicting interests of the common good was the specific design of the contact restrictions themselves. Within the scope of meetings that were still permitted, members of one household were always allowed to meet with at least one other person. Although this essentially ruled out larger gatherings, it did not exclude all forms of personal interaction. Furthermore, because children under the age of 14 were not counted and other exemptions were contained in § 28b(1) first sentence no. 1 second half-sentence IfSG, it was in fact possible for more people to meet. Compared to the isolation or quarantine measures conventionally used to fight communicable diseases ([...]), the contact restrictions allowed a greater degree of social interaction, even if they did af- 234

fect a much larger group of people.

In the weighing process, the legislator took account of the specific interests of persons who had recovered from COVID-19 or were fully vaccinated at the time when the legislation was adopted by authorising the issuance of ordinances [...]. The Federal Government promptly made use of this authorisation. It was not therefore necessary for the legislator to exempt this group from the contact restrictions from the outset in order to satisfy the prohibition of excessive measures. In light of findings that were sound at the time, the legislator's decision here was tenable (see para. 201 above). 235

(dd) Furthermore, changes in available knowledge or in the factual situation during the period of the provisions' validity did not render them unconstitutional. During the period when the contact restrictions [...] were applicable as the central instrument for containing further infection, the legislator was not obliged to conduct a renewed balancing between individual interests on the one hand, and the conflicting interests of the common good on the other. Due *inter alia* to the unpredictable nature of the infection rate and the evolving and deepening scientific knowledge on the virus and its transmission, it is true that the weight originally accorded to the common good was subject to change pending further developments, thereby affecting the overall balancing of interests (cf. BVerfG, Order of the First Senate of 19 November 2021 - 1 BvR 971/21 inter alia -, para. 193 ff.). The increased proportion of persons who were fully vaccinated assumed critical importance in this regard due to the impact this was expected to have on infection rates and disease outcomes. However, by authorising the enactment of ordinances in respect of this group ([...]), the legislator had already taken this into account for the contact restrictions. Given that the COVID-19 Exemptions from Protective Measures Ordinance was enacted shortly thereafter, there was no need to conduct a renewed balancing with regard to the contact restrictions still applicable to persons who had neither recovered from COVID-19 nor were fully vaccinated. 236

bb) The interference with the general freedom of action (Art. 2(1) GG) resulting from subjecting non-compliance with the contact restrictions to a fine [...] is justified. There is no doubt as to the proportionality of the sanctions designed to promote compliance with the imposed contact restrictions [...]. 237

II.

The curfew set out in § 28b(1) first sentence no. 2 IfSG interfered with several fundamental rights (see 1. below). But here too, the interference satisfied constitutional requirements both formally (see 2. below) and substantively (see 3. below) and was thus ultimately justified under constitutional law. 238

1. The curfew [...] interfered with the fundamental right to liberty of the person under Art. 2(2) second sentence in conjunction with Art. 104(1) GG (a) and with the general right of personality (Art. 2(1) in conjunction with Art. 1(1) GG). For some of the com- 239

plainants, the curfew also interfered with their right to family life and with the freedom to shape their marriage as guaranteed under Art. 6(1) GG (b). A further interference with the fundamental right under Art. 2(1) GG resulted – like in respect of the contact restrictions – from the fact that non-compliance with the curfew was subject to a fine [...] (c).

a) The night-time curfew ordered by § 28b(1) first sentence no. 2 IfSG infringed, during the period of that provision's validity, upon the fundamental right to liberty of the person as guaranteed under Art. 2(2) second sentence in conjunction with Art. 104(1) GG (see aa) below), resulting in interference that amounted to a restriction of liberty (see bb) below); the challenged curfew did not, however, entail a deprivation of liberty (see cc) below). 240

aa) Art. 2(2) second sentence in conjunction with Art. 104(1) GG protects the freedom of actual physical movement, as provided for in the general legal order, against state interference (cf. BVerfGE 149, 293 <318 para. 65> with further references; 156, 63 <127 para. 222>). Yet this fundamental right does not provide *a priori* permission for a person to go anywhere without limitation (cf. BVerfGE 94, 166 <198>; 156, 63 <127 para. 222>; established case-law). In objective terms, the freedom of actual physical movement (*Fortbewegungsfreiheit*) depends on the possibility of being actually and legally able to make use of it. As to the subjective side, this freedom requires merely the natural will to do so (on this latter point, see BVerfGE 149, 293 <318 para. 66>). It is evident from the right's designation as "inviolable", from the permissible limitations in Art. 2(2) third sentence and Art. 104(1) GG, and from the procedural safeguards contained in Art. 104(2) to (4) GG that this is a fundamental right of high rank (cf. BVerfGE 156, 63 <127 para. 221> with further references) and that any interference can only be justified by compelling reasons (cf. BVerfGE 149, 293 <318 para. 65> with further references). 241

bb) The curfew, which was directly set out in parliamentary legislation [...], interfered with the complainants' freedom of physical movement in a manner amounting to a restriction of liberty (on deprivation of liberty, see para. 250 below). Interference with Art. 2(2) second sentence in conjunction with Art. 104(1) GG is not confined to measures involving direct physical coercion (see (1) below). State measures involving coercion of an entirely psychological nature can also interfere with this fundamental right if their coercive effect is comparable in extent and impact to direct physical coercion (see (2) below). This was the case with the challenged curfew, which interfered with the scope of protection of this fundamental right as a restriction of liberty (see (3) below). 242

(1) Since the scope of protection is limited to the freedom of actual physical movement as provided for in the existing general legal order, a measure only amounts to interference if persons are prevented by public authority against their will from entering, remaining in or leaving a site or space that is actually and legally open to them (cf. BVerfGE 149, 293 <319 para. 67>; 156, 63 <127 para. 222>). This is most cer- 243

tainly the case with state interference in the form of arrest, detention and other directly coercive measures of a similar nature (cf. BVerfGE 149, 293 <318 para. 65> with further references).

However, interference with Art. 2(2) second sentence GG is not limited to cases – such as arrest for instance – in which the use of direct, physical coercion is an inherent part of the state measure itself. The Federal Constitutional Court, in giving advance effect to the protection afforded by the freedom of physical movement, has always extended its review here to include an examination of those acts of public authority ordering interference that are enforceable using direct coercion. This includes acts such as the imposition of a prison sentence (cf. BVerfGE 14, 174 <186>), the issuing of a warrant for remand detention or the revocation of its suspension (cf. BVerfGE 53, 152 <158>). Beyond that, the Court will also review legislative measures in light of Art. 2(2) second sentence GG if they provide a statutory basis for ordering interference with the freedom of physical movement in individual cases, without themselves having any direct link to this freedom. Thus, where a criminal offence carries a custodial sentence, the Court will subject not only the threat of imprisonment to review under Art. 2(2) second sentence GG (cf. BVerfGE 90, 145 <171 f.>), but also the actual conduct prohibited by the provision (cf. BVerfGE 153, 182 <307 para. 332>), even if it has no direct link to the freedom of physical movement. Thus, the protection afforded under Art. 2(2) second sentence in conjunction with Art. 104(1) GG extends beyond interferences involving direct physical coercion. 244

[…] 245

(2) For a measure to constitute interference with Art. 2(2) second sentence GG, persons must be prevented by public authority against their will from entering, remaining in or leaving a site or space that is actually and legally open to them. Where direct physical coercion aimed at restricting the freedom of physical movement is applied, threatened or facilitated, this will be found to have been against a person's will (cf. BVerfGE 53, 152 <159 f.>). However, in a necessary distinction from the general freedom of action (cf. Bavarian Constitutional Court, *Bayerischer Verfassungsgerichtshof* – Bay.VerfGH, Decision of 9 February 2021 - Vf. 6-VII-20 -, para. 63), where state measures affect the will to exercise this freedom in a manner comparable to direct coercion, this can also constitute interference with the freedom of physical movement. Where state-imposed physical coercion eliminates the possibility of actually and legally making use of the freedom of physical movement, this always constitutes interference with Art. 2(2) second sentence in conjunction with Art. 104(1) GG. But as a rule, it suffices that such coercion be threatened, or that an act of public authority creates the legal basis for the application of such coercion (cf. BVerfGE 90, 145 <171 f.>; 153, 182 <307 para. 332>). Accordingly, coercion of an entirely psychological nature can also interfere with the freedom of physical movement. For a finding of state interference with the will to exercise the freedom of physical movement, the measure in question must have a coercive effect comparable in extent and impact to direct physical coercion (cf. Bay.VerfGH, Decision of 9 February 2021 - Vf. 246

6-VII-20 -, para. 63), which in turn will depend on the specific factual and legal circumstances. State-imposed prohibitions on leaving certain places or areas without permission may qualify as interference (cf. BVerfGE 156, 63 <159 para. 322>).

(3) Measured in light of the specific factual and legal circumstances in question, the self-executing curfew [...] did interfere with the fundamental right under Art. 2(2) second sentence in conjunction with Art. 104(1) GG. It is true that the prospect of merely being fined [...] is not sufficient to support a finding of coercion, unlike if the prohibited conduct had carried the prospect of imprisonment (cf. BVerfGE 153, 182 <307 para. 332>). However, the curfew exerted a psychological form of coercion, namely the coercion to comply with its conditions and to abstain from making use of the freedom of physical movement. This was certainly comparable in effect to the possible use of physical coercion. 247

The curfew was enforceable by public authority. [...] 248

The prohibited conduct itself furthermore has a clear link to the freedom of physical movement. The curfew essentially banned people from being outside residential accommodation for seven hours a day – i.e. almost one third of the time. The fact that the ban covered the night hours, a period of generally reduced mobility, does not affect the finding of interference as such, but is significant in respect of the weight to be attributed to it. Moreover, the fact that it was easy to monitor compliance with the curfew had a bearing on the extent of the resulting psychological coercion. Viewed in its entirety, the curfew thus qualified as an interference amounting to a restriction of liberty. 249

cc) However, it did not constitute a deprivation of liberty within the meaning of Art. 104(2) GG. A measure only constitutes a deprivation of liberty – the most serious form of restriction of liberty – if it eliminates the freedom of physical movement in every respect. Deprivation of liberty is characterised by the particular severity of the interference and by the measure, in principle, being of more than just short-term duration (cf. BVerfGE 149, 293 <319 para. 67> with further references). In view of the specific design of the restrictions under § 28b(1) first sentence no. 2 IfSG, there is no evidence here of particular severity. The restrictions were limited to a certain part of the day, covering a period in which mobility is generally reduced. People were not required to be in a specific location. They were free – at least within the scope allowed by the contact restrictions ([...]) – to choose where to stay (as long as it was residential accommodation). Furthermore, the weight of the interference was considerably mitigated by the statutory exemptions. The interference resulting from the challenged curfew thus clearly differed from house arrest (cf. European Court of Human Rights, Terhe? c. Roumanie, Decision of 20 May 2021 - no. 49933/20 -, § 43 with further references). 250

b) The curfew also interfered with the right to family life and the freedom to shape one’s marriage under Art. 6(1) GG and with the right to the free development of one’s personality under Art. 2(1) GG. The complainants protected under these fundamental 251

rights were prevented by the curfew – even more than by the contact restrictions – from freely arranging meetings with family members and partners. For example, in the hours that the curfew applied, spouses or partners who lived apart were prevented by § 28b(1) first sentence no. 2 IfSG from visiting one another if the journey between them could not be completed without breaking the curfew, even though such visits were not restricted under § 28b(1) first sentence no. 1 IfSG.

c) By attaching sanctions, the […] corresponding provision that subjected non-compliance with the curfew to a fine […] furthermore interfered with the general freedom of action arising from Art. 2(1) GG (cf. para. 115). 252

2. The formal constitutionality of [the provision setting out the night-time curfew] and [the corresponding provision subjecting non-compliance to a fine] can be deduced from the reasons set out above in respect of the contact restrictions [...] and the corresponding provision subjecting non-compliance to a fine [...] (para. 117 ff.). 253

3. The night-time curfew [...] and the corresponding provision subjecting non-compliance to a fine [...] were also constitutional in substantive terms. The fact that the legislator chose to take action in the form of self-executing provisions is unobjectionable under constitutional law in this respect too (see a) below). Like the contact restrictions, the curfew and the related fine satisfied the requirements of legal clarity and specificity in legislation (see b) below). The requirements arising from the limitation clauses in Art. 2(2) third sentence and Art. 104(1) first sentence GG were met (see c) below) and the curfew satisfied the principle of proportionality (see d) below). The provision subjecting non-compliance to a fine [...] was likewise constitutional in substantive terms (see e) below). 254

a) The fact that the curfew [...] was designed in the form of self-executing provisions embedded in a formal parliamentary law did not affect the fundamental right to effective legal protection under Art. 19(4) first sentence GG (para. 135 ff.). Nor were the legal protection requirements resulting from the principle of the separation of powers (Art. 20(2) GG) disregarded (para. 138 ff.). Since it was impossible to predict how many times the curfew would be applied in practice, the provisions [...] did not amount to legislation addressing a single person or a single case (see para. 151 above). 255

b) The “blank” provision subjecting non-compliance with the curfew to a fine [...] satisfies the requirement of specificity arising from Art. 103(2) GG, as does the provision under § 28b(1) first sentence no. 1 IfSG filling in that blank provision [...]. It also satisfies the general requirements of clarity and specificity applicable to provisions that interfere with fundamental rights [...]. 256

[…] 257-266

c) To the extent that there was interference with liberty of the person as guaranteed under Art. 2(2) second sentence in conjunction with Art. 104(1) GG, such interference was not rendered substantively unconstitutional by any incompatibility of the legislation with the limitation clauses in Art. 2(2) third sentence and Art. 104(1) first sen- 267

tence GG.

The fact that the curfew was ordered directly by a law without requiring any further act of execution by the administrative authorities does not lead to a finding that § 28b(1) first sentence no. 2 IfSG violated the freedom of physical movement arising from Art. 2(2) second sentence in conjunction with Art. 104(1) GG. The fact that the freedom of physical movement was interfered with “by a law” did not contravene the limitation clauses of Art. 2(2) third sentence and Art. 104(1) first sentence GG. While the wording of these clauses only allows the fundamental right in question to be interfered with “pursuant to a law” (Art. 2(2) third sentence GG) or “pursuant to a formal law” (Art. 104(1) first sentence GG), these requirements may also be satisfied where the interference directly results from a parliamentary law. The limitation clauses do not rule out that interference with the freedom of physical movement may be ordered by a law itself. Although the constitutional text does suggest that the limitations can also be understood as implying a division of competences, the legislative history of the various limitation clauses in the Basic Law does not support this view (see aa) below). If, however, Art. 2(2) second sentence GG is also to apply to self-executing measures introduced by the legislator, even though such measures have no direct physical coercive effect themselves, it is only logical that such legislative interferences with fundamental rights may also satisfy the limitation clause in Art. 2(2) third sentence GG (see bb) below). 268

aa) Since restricting the freedom of physical movement “by a law” is not how the limitation clauses in Art. 2(2) third sentence and Art. 104(1) first sentence GG are worded, this might suggest that the parliamentary legislator is barred from directly interfering with such freedom by a law. But this is not the only possible reading of the text. Nor is it the meaning that the Federal Constitutional Court has attributed to the largely identical wording of the limitation clause in Art. 10(2) first sentence GG. In a case where a law directly interfered with Art. 10(1) GG, the Court found the interference to be compatible with the limitation clause (cf. BVerfGE 125, 260 <313>). 269

The legislative history offers no clear indication as to whether a limitation clause that only permits interference “pursuant to a law” gives rise to a requirement that measures constituting interference be carried out by the administrative authorities (*Verwaltungsvorbehalt*) ([...]). [...] 270

bb) Irrespective of this, Art. 2(2) second and third sentence and Art. 104(1) first sentence GG are themselves informed by an underlying constitutional design that clearly envisages liberty-restricting measures being executed by the administrative authorities, along with the legislative and judicial requirements that must be observed as a result. This impression is reinforced by the other requirements formulated in Art. 104(1) first sentence GG concerning restrictions of liberty of the person. That provision sets out the proper legal procedure for restrictions of liberty, establishing both formal and substantive requirements in this regard. If the severity of an interference reaches the level of a deprivation of liberty (cf. BVerfGE 149, 293 <319 para. 271

67>), the additional procedural requirements in the following sections become applicable. Accordingly, Art. 104(2) fourth sentence GG obliges the legislator to ensure that proper effect is given to the requirement of prior judicial authorisation (*Richtervorbehalt*) by creating a procedural regime that gives consideration to the different contexts in which liberty-depriving measures are applied and that is tailored to examining the specific case in question. The legislator must also ensure that before persons are deprived of their liberty, they are afforded all the rule-of-law safeguards that are provided in judicial proceedings (cf. BVerfGE 149, 293 <323 f. para. 76 ff., 332 ff. para. 93 ff.>). The procedural protection of fundamental rights thus activated can only be comprehensively guaranteed if restrictions of liberty are carried out by the executive.

272 Both the underlying constitutional design informing the limitation clauses and their protective approach are thus fundamentally tailored towards measures that interfere with the freedom of physical movement either by constituting direct physical coercion themselves or by authorising it in individual cases. The procedural and substantive safeguards contained in Art. 104(1) GG are necessary in cases where state authority has direct physical control over a person. However, the fact that even legislative measures – which are never capable of having physical coercive effect themselves – can now amount to interference if they have effects similar to physical coercion (see para. 246 above) has implications for how the limitation clauses are understood. There is nothing to suggest that the purpose of Art. 2(2) second sentence and Art. 104(1) GG is to establish an absolute or unlimited right vis-à-vis the legislator. If the legislator itself is directly bound by this fundamental right, it must conversely also be able to make use of the expressly stated possibility for restricting it. The limitation clauses do not preclude this. Where the freedom of physical movement is directly interfered with by a law, this does not entail any loss of legal protection that would be incompatible with the protective purpose of the limitation clauses. Where interference with liberty is ordered by legislation, this does not create a situation that would necessarily trigger the protective mechanisms in Art. 104(1) first sentence (second half-sentence) and second sentence GG. Thus, with interference understood in the broader sense, teleological reasons appear to rule out interpreting the limitation clauses in Art. 2(2) third sentence and Art. 104(1) first sentence GG as giving rise to a requirement that measures constituting interference be carried out by the administrative authorities.

273 The limitations contained in Art. 2(2) third sentence and Art. 104(1) GG did not therefore prevent the curfew [...] from being set out as self-executing formal parliamentary law.

274 d) The challenged curfew was also proportionate. As part of an overall protection strategy, it served constitutionally legitimate purposes which the legislator pursued in order to fulfil its duties of protection arising from fundamental rights (see aa) below) and it was suitable (see bb) below), necessary (see cc) below) and appropriate (see dd) below) under constitutional law.

aa) The […] night-time curfew served constitutionally legitimate purposes. As part of the overall legislative strategy, it was designed to work alongside the contact restrictions in protecting the population against the health risks associated with the SARS-CoV-2 virus. Within this strategy, the placing of restrictions on the use of public space was intended to limit people's ability to meet privately in the evening hours – including in private spaces – because according to the legislator's assessment based on sufficiently sound scientific findings, such meetings were regarded as posing a considerable risk of infection (see para. 208 ff. above for more details). The curfew was devised as an instrument for monitoring and promoting compliance with the contact restrictions which, at the relevant time, were considered key (cf. BTDrucks 19/28444, p. 12). Like the contact restrictions, the curfew thus served exceptionally significant interests of the common good by protecting life and health and by maintaining the proper functioning of the healthcare system. 275

bb) Based on the knowledge of virus transmission available at the time when the legislation was adopted, the legislator could tenably assume that the night-time curfew could help achieve the purposes of the legislation by reinforcing compliance with the contact restrictions. The legislator had a sufficiently sound basis for this. 276

The legislator's assumption that it would be able to reduce the number of COVID-19 cases by means of the curfew [...] (cf. BTDrucks 19/28444, p. 12) was within its margin of appreciation. Above all, there was no indication that the curfew might be entirely ineffective or even counterproductive in terms of achieving the legislative objectives (cf. BVerfGE 149, 222 <257 f. para. 72>; on the relevant standard, see para. 185 f. above). There were comprehensible reasons for the legislator to assume that the night-time curfew would perform its given function of helping to increase compliance with the general contact restrictions [...] and other protective measures, especially in indoor settings (cf. BTDrucks 19/28444, p. 12). The same applies to the legislator's assessment of the factual situation to the effect that the night-time curfew would indirectly serve to reduce and shorten private meetings (cf. BTDrucks 19/28444, p. 12). People journeying to and from private meetings generally have to cross public space. If venturing into public space is prohibited, private meetings cannot be reached at night. Since return journeys have to be completed in time, it was reasonable to predict that meetings would either not take place at all or would finish earlier than usual. The legislator's prognosis that the general contact restrictions and other protective measures would be virtually impossible to enforce effectively without the night-time curfew was furthermore within its prerogative to assess the suitability of a measure (cf. BTDrucks 19/28444, p. 12). The same applies to its assessment that the night-time curfew would have such a strong impact on containing the pandemic that any tendency for people to relocate from outdoor to indoor settings because of the curfew would not entirely negate this effect. 277

At the time when the legislation was adopted, the legislator had a sufficiently sound basis upon which to make these assessments and prognoses regarding the suitability of the night-time curfew. There was and still is widespread agreement among ex- 278

perts that infections mainly occur indoors, where protective measures such as physical distancing, mask-wearing, proper ventilation and general sanitary measures can only prevent transmission of the virus to a limited degree. Furthermore, these measures can only be enforced to a limited extent during the evening, at night and in private spaces (see para. 208 ff. above). The fact that the legislator – based on its premise that the evening and night hours are periods of relaxed and sociable behaviour and that people feel less observed in private spaces – decided to reduce such meetings from the outset by means of a comparatively easy-to-monitor curfew was not objectionable under constitutional law in view of the knowledge available at the time.

Regardless of the fact that the expert community has yet to conclusively determine the precise role of curfews in containing the pandemic, the scientific studies explicitly cited by the legislator on the effects of night-time curfews (cf. BTDrucks 19/28444, p. 12) do not suggest that the measure is manifestly ineffective or even counterproductive. [...] 279

[…] 280

On the basis of these findings, the legislator could tenably assume – especially given its margin of appreciation – that the curfew would contribute towards reducing the infection rate and would thus help to protect life and health and prevent the healthcare system from being overwhelmed. 281

cc) The interference with fundamental rights resulting from § 28b(1) first sentence no. 2 IfSG was necessary under constitutional law. The night-time curfew was part of the overall pandemic containment strategy pursued under § 28b(1) IfSG. The decisive questions under constitutional law are whether the curfew could have been dispensed with without jeopardising the higher-order objective pursued by the contact restrictions (see (1) below), and whether the legislator's related assessments and prognoses had a sound basis (see (2) below). 282

(1) In April 2021, it was tenable for the legislator to assume that the night-time curfew – as a measure aimed primarily at reinforcing compliance with the contact restrictions – could not be dispensed with without jeopardising the legitimate and high-ranking purposes of its overall strategy, namely to protect life and health and to maintain the proper functioning of the healthcare system. 283

The complainants contend that imposing the curfew was not necessary, arguing that the authorities responsible for implementing other protective measures should have first done everything possible and reasonable to ensure compliance with the existing measures. Yet these arguments cannot call into question the necessity of imposing the curfew under constitutional law. In practice, the interpretation and application of the measures jointly agreed upon by the *Länder* in the regularly held Conferences of Minister-Presidents (cf. BTDrucks 19/28444, p. 8 f.) differed widely across the *Länder*, and it was precisely the nationwide inconsistencies that the federal legislator cit- 284

ed as justifying the legislative intervention in the first place. The federal legislator does not have the competence to resolve implementation deficits that may arise in how other existing protective measures introduced at the *Land* level are complied with and, if necessary, enforced by the administrative authorities. The protective measures enacted on the basis of §§ 28, 28a IfSG were enforced by the *Länder* in their own right within the meaning of Art. 83 and Art. 84 GG ([…]).

One equally suitable means would have been to dispense with the curfew and to instead carry out checks on private meetings during the night hours. But since the available scientific findings show that indoor meetings posed and still pose a risk of infection even when protective measures are complied with, it would have been necessary to introduce a blanket, Germany-wide regime of statutory checks (see para. 210 above) in order for this measure to be as effective as the curfew [...]. Moreover, the only way for the authorities to check compliance with the contact restrictions in private spaces would have been for them to enter the spaces in question. This would have entailed serious interference with personality rights and with the sphere protected under Art. 13 GG and would therefore not have softened the impact on fundamental rights to any greater extent. Comparatively speaking, compliance with a curfew – imposed as a supplementary measure to support the contact restrictions – can be monitored and enforced in a less intrusive manner. 285

(2) Based on the available scientific findings, the legislator could tenably assume that enacting a different legal framework or designing the [...] curfew in a different manner would not have achieved its objective of reducing contacts in a way that would have been equally effective but with fewer restrictions. 286

[…] 287

The legislator's assessment that it would be impossible to properly enforce the general contact restrictions and other protective measures without the night-time curfew was furthermore based on reliable scientific findings. It is well established that most infections occur indoors where protective measures, despite being potentially effective, are ultimately less reliable (see para. 208 ff. above). The legislator's assessment that proper compliance with the protective measures was less likely to occur when people took part in the relaxed and sociable behaviour typical of the evening and night hours and when they felt unobserved in private spaces than during interactions in settings such as the working environment (cf. BTDrucks 19/28444, p. 12) therefore had a sufficiently sound basis. This also made it tenable for the legislator to conclude that it could reduce such meetings from the outset by means of a comparatively easy-to-monitor curfew. 288

dd) § 28b(1) first sentence no. 2 IfSG also satisfies the requirement of proportionality in the strict sense (appropriateness). Regardless of the fact that the curfew entailed interference of considerable severity, the resulting disadvantages for those affected did not outweigh the curfew's importance for protecting life and health and maintaining the proper functioning of the healthcare system, which are exceptionally 289

significant interests of the common good. The legislator struck a constitutionally sound balance between individual interests and interests of the common good.

(1) In order to assess whether it was appropriate, the curfew must be viewed in terms of its significance within the legislator's overall protection strategy for tackling the COVID-19 pandemic as formulated in § 28b(1) IfSG. Taken as a whole, this range of measures curtailed people's freedom in various respects with the ultimate aim of containing the spread of the virus. The curfew's proportionality can only be evaluated within the context of this overall strategy. While some interferences with fundamental rights might seem appropriate and reasonable when viewed in isolation, the combined effect of several interferences can lead to serious impairments of the protected rights. The overall effect might then exceed the severity of interference that is tolerable under the rule of law. Cumulative or "additive" interferences with fundamental rights (cf. BVerfGE 112, 304 <319 f.>; 123, 186 <265 f.>; 141, 220 <280 f. para. 130>) have their own inherent potential to jeopardise freedoms protected by fundamental rights (cf. BVerfGE 112, 304 <319 f.>). Whether a cumulative interference with fundamental rights is still within the limits of severity deemed tolerable under the rule of law depends on a weighing of all the circumstances – a process which must also take conflicting constitutional interests into account (cf. BVerfGE 130, 372 <392>). At the same time, when reviewing the proportionality of the overall strategy, the Federal Constitutional Court must consider the margin of appreciation, assessment and manoeuvre afforded to the legislator when it comes to designing complex measures aimed at achieving higher-order objectives such as the purpose of combating significant danger (see para. 216 f. above). By these standards, the night-time curfew in its specific form was appropriate. 290

(2) Nonetheless, the night-time curfew did give rise to interference that was of considerable weight in itself. 291

a) During periods when the curfew was applicable, it profoundly interfered with the lives of vast numbers of people throughout the country. Apart from restricting the possibilities to spend time outside – i.e. outside residential accommodation and the associated property – whenever and however one so desired and to take part in diverse activities in public space, § 28b(1) first sentence no. 2 IfSG also gave rise to massive upheaval in the everyday routines of all those who were unable to continue going about their lives in the same manner as before while the curfew was applicable. As most of the complainants have described, it had an impact on the individual's ability to shape the entire spectrum of their private activities, including activities of a social nature. The effects of the curfew intruded upon virtually every aspect of private, family and social relationships. Under the conditions of the night-time curfew, anyone wishing to maintain their full range of social and especially family contacts while also dealing with the demands placed on their time by official or professional commitments was confronted with quite considerable difficulties (cf. BVerfG, Order of the First Senate of 5 May 2021 - 1 BvR 781/21 inter alia -, para. 44). The curfew's restrictions on private arrangements even went as far as preventing people from going outside in 292

order to meet members of their own family – as permitted under § 28b(1) first sentence no. 1 IfSG – insofar as the family members in question did not live in the same household, and insofar as they themselves were not exercising custody and contact rights or providing care in accordance with the requirements under § 28b(1) first sentence no. 2 letters (c) or (d) IfSG. The curfew's interference with personal relationships protected under both Art. 6(1) and Art. 2(1) GG thus assumed considerable weight.

Adding to the impact of the general contact restrictions, the curfew impaired the exercise of freedom in ways that were impossible to compensate for during periods when the restrictions did not apply or after the challenged provisions had expired (see para. 222 above). 293

With its linkage to the reaching of a critical threshold and its self-executing design, the curfew had a largely indiscriminate effect – something it shared with the other measures under § 28b(1) IfSG (see para. 222 above). If the relevant criteria were satisfied, the complainants were subject to the curfew's requirements wherever they went. The related administrative offence [...] further intensified the weight of interference. 294

Furthermore, the weight of interference with Art. 6(1) GG in particular and with the right to the free development of one's personality under Art. 2(1) GG was aggravated by cumulative effects. The curfew [...] operated alongside the other restrictions in § 28b IfSG. Cumulative effects likewise resulted from similar restrictions under *Land* law that were imposed prior to § 28b(1) IfSG becoming valid (see para. 223 above). 295

(b) On the other hand, the weight of interference with fundamental rights was mitigated by numerous exemptions [...]. The legislator gave particular consideration here to the major burdens faced by single parents. For example, § 28b(1) first sentence no. 2 second half-sentence letter (c) IfSG made an exception for the purpose of exercising custody and contact rights with regard to minor children, meaning among other things that children could be transferred between primary and secondary caregiving parents at any time without restriction. Beyond that, the exemption under letter (d) allowed people to spend unlimited periods of time outside for the purpose of providing urgent care to minors. The particular burdens faced by single parents were thereby lessened, at least to some extent. Combined with the exemption under letter (b) concerning the exercise of mandates and professions, single parents were thus enabled to continue performing their childcare responsibilities [...]. This gave effect to the protection guaranteed by the right to family life, in particular. Furthermore, § 28b(1) first sentence no. 2 letter (f) IfSG contained a general clause according to which the curfew was not applicable to anyone who was outside for similarly weighty and urgent reasons as the reasons in the other exemptions. This clause was amenable to being interpreted and applied in ways that gave room to fundamental rights, thereby allowing the interest in protecting life and health to be balanced against other legitimate concerns in the individual case. 296

The interference was additionally mitigated by the curfew's restriction to certain hours of the day (see para. 301 below). The severity of the interference was also lessened by the fact that the measure's overall duration was limited to around two months, and by the fact that § 28b IfSG was adaptable to changing circumstances in the pandemic and allowed for regional distinctions (see para. 302 below). 297

(3) At the relevant time when the challenged legislation was adopted, the legislator could also tenably assume that the serious interference resulting from the curfew [...] with the aforementioned fundamental rights would be set against exceptionally significant interests of the common good – namely the interests of protecting life and health and maintaining the proper functioning of the healthcare system, the safeguarding of which necessitated urgent action (see para. 227 ff. for more details). 298

(4) In the necessary process of balancing all the relevant interests, the legislator reached a constitutionally sound compromise for the period in question, reconciling the particularly significant interests of the common good pursued by the curfew on the one hand, with the considerable impairment of fundamental rights resulting from the curfew on the other. Within the framework of its protection strategy, the legislator did not one-sidedly give precedence to the interests of protecting life and health and of maintaining the proper functioning of the healthcare system. Like with the contact restrictions, the curfew's design incorporated safeguards that limited the severity of the interference and ensured an appropriate balancing of interests. The legislator's appraisal that the burdens associated with the curfew would be offset by the curfew's contribution towards achieving the desired objectives was within its margin of appreciation. That margin was broad due to the uncertainties surrounding the effectiveness of night-time curfews and given the danger that the pandemic represented (see para. 216 f. above). It covered the legislator's assessment of the pandemic-related risks posed by certain types of meeting and certain places. 299

The legislator took account of conflicting interests protected by fundamental rights and struck a balance, in particular by setting out specific exemptions from the curfew in § 28b(1) first sentence no. 2 letters (a) to (g) IfSG. These exemptions dealt with numerous areas of life and reflected the scope of protection afforded by various fundamental rights. For example, the exemption allowing the exercise of mandates and professions under letter (b) enabled media representatives to work during night-time curfews. The legislator thus recognised the fundamental rights under Art. 12(1) and Art. 5(1) second sentence GG. The exemptions under letter (c) allowing the exercise of custody and contact rights and under letter (d) enabling urgent care to be provided to persons in need of support and minors served to mitigate the severity of interference with the fundamental rights under Art. 6(1) and (2) first sentence GG in particular. The combined effect of these exemptions also helped single parents in coping with the stress of their particular situation (see para. 296 above). The exemptions under letter (a) allowing persons to venture outside during the night in order to avert any of the listed dangers (e.g. in a medical emergency) and under letter (e) for the purpose of tending to animals also helped lessen the interference. All the exemptions 300

served to mitigate the weight of interference with individual fundamental rights. The severity of interference with fundamental rights was furthermore limited by the blanket-type exemption in § 28b(1) first sentence no. 2 letter (f) IfSG.

The individual interests of affected persons were also taken into account by the curfew's timeframe which in principle lasted from 10 p.m. to 5 a.m. the next day. The restrictions thus took effect in a period usually characterised by rest and sleep (cf. BTDrucks 19/28444, p. 12), a period when activities outside the home play a relatively insignificant role in quantitative terms for the majority of people. The legislator's underlying evaluation here was unobjectionable. The curfew furthermore made allowance for taking outdoor physical exercise until midnight. 301

Beyond that, both the limited duration of the legislation and the fact that § 28b IfSG was adaptable to changing circumstances in the pandemic and allowed for regional distinctions served to ensure an appropriate balancing of interests (see para. 233 for more details). By enacting the authorisation to issue ordinances in § 28c IfSG, the legislator also took account of the specific interests of persons who had recovered from COVID-19 or were fully vaccinated (para. 235). 302

The appropriateness of the curfew is not undermined by the fact that according to the findings available when the legislation was adopted and confirmed by expert third parties in these proceedings, the effects of night-time curfews could not be entirely distinguished from the effects of other measures that were applicable at the same time. It was for the legislator to assess the importance of night-time curfews for achieving its chosen higher-order objective of restricting personal contacts. Guided by the tenable assumption that most infections occur in the private sphere and that people are less likely to comply with the contact restrictions and other protective measures during the evening and at night, the legislator concluded that the effectiveness of its overall strategy would be at risk if the relevant measures were not imposed. In this situation, it could tenably assume that the number of people requiring treatment would significantly exceed the available capacities in intensive care if no effective countermeasures were taken, and that the effectiveness of these measures could depend on whether or not the contact restrictions were reinforced by additional precautions during the evening and at night. It was tenable for the legislator to conclude that the night-time curfew would play an important role, both in quantitative and qualitative terms, within the legislator's protection strategy aimed at reducing the risk of severe illness and death. Since the legislator took conflicting and weighty individual interests into account when designing both its overall protection strategy and the particular measure of the curfew, its balancing of interests was constitutional. 303

e) The interference with the general freedom of action (Art. 2(1) GG) arising from subjecting non-compliance to a fine [...] is also justified. 304

III.

Overall, extensive curfews may only be envisaged in situations involving extreme 305

danger. In light of the knowledge regarding the effectiveness of the measures and the considerable danger to life and health – knowledge confirmed by expert third parties in these proceedings – the legislator's decision to choose the measures challenged here under the specific circumstances of the pandemic was based on sound reasons and was compatible with the Basic Law.

D.

The decision is unanimous. 306

Harbarth Paulus Baer

Britz Ott Christ

Radtke Härtel

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 19. November 2021 - 1 BvR 781/21, 1 BvR 889/21, 1 BvR 860/21, 1 BvR 854/21, 1 BvR 820/21, 1 BvR 805/21, 1 BvR 798/21

Zitiervorschlag BVerfG, Beschluss des Ersten Senats vom 19. November 2021 - 1 BvR 781/21, 1 BvR 889/21, 1 BvR 860/21, 1 BvR 854/21, 1 BvR 820/21, 1 BvR 805/21, 1 BvR 798/21 - Rn. (1 - 306), http://www.bverfg.de/e/rs20211119_1bvr078121en.html

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