

GZ: 2020-0.677.015 from November 11, 2020 (case number: DSB-D213.1117)

[Editor's note: The text of this notification will be sent without pseudonymization

fully published. From the context and the quoted legal provisions

clearly indicates to which state body (Federal Minister) the notice is addressed. One

meaningful and meaningful pseudonymization in this according to § 23 para. 2 DSG

publication decision was therefore not possible.]

NOTICE

S P R U C H

The data protection authority decides

in the official examination procedure against the

Federal Minister for Social Affairs, Health, Care and Consumer Protection as follows:

- The Data Protection Authority issues a warning that the

intended processing operations within the framework of the "electronic vaccination card"

(Section 5, subsection 2 GTelG 2012, Federal Law Gazette I No. 111/2012

as amended by Federal Law Gazette I

No. 115/2020) likely to violate the GDPR.

Legal basis: Art. 4 Z 7, Art. 5, Art. 6, Art. 9, Art. 23, Art. 57 Para. 1 lit. h and Art. 58

Paragraph 2 lit. a of Regulation (EU) 2016/679 (General Data Protection Regulation – GDPR), OJ.

No. L 119 of 04.05.2016, p. 1; Sections 1 and 22 (1) of the Data Protection Act (DSG), Federal Law Gazette I

No. 165/1999 as amended; Art. 8 of the Charter of Fundamental Rights of the European Union (EU-GRC), OJ.

No. C 202 of 7.6.2016, p. 389.

A. Procedure

REASON

1. The Personal Data Protection Authority has drafted a federal law that

Health Telematics Act 2012 (hereinafter: GTelG 2012 or amendment) is changed

(announced in the meantime by Federal Law Gazette I No. 115/2020) and the oral ones

Statements of the informed representatives of the Federal Ministry for Social Affairs, Health,
care and consumer protection

(hereinafter: BMSGPK)

in the session of

Data Protection Council on July 14, 2020, an ex officio examination procedure

in accordance with Article 57 (1) (h) in conjunction with Article 58 (1) (b) GDPR in conjunction with Section 22 (1) DSG in
relation to

initiate the planned introduction of the "electronic vaccination card".

2. With a letter dated July 27, 2020, the BMSGPK was asked to answer numerous questions
with regard to the technical process of using the "Electronic Vaccination Card" and the
with the corresponding data protection implications.

3. In a statement dated August 28, 2020, the BMSGPK announced that not that
Federal Ministry, but the Federal Minister is responsible for data processing.

In addition, the subject of the examination by the data protection authority seems unclear, since the
Amendment to regulate the data processing under review has not yet entered into force and
an additional implementing regulation is also required, which has also not entered into force
may be. This was followed by statements on the "involvement of the DSB in the previous legislative process".
as well as on the "control activities of the DSB in the case in question". In addition, on the
Explanations of the amendment and the data protection impact assessment carried out with the
Reference to the constitutionally required efficiency pointed out, which is why the part of the
Data Protection Authority raised questions,

each with reference to supplementary

remarks in the explanations, have been answered. Attached to the opinion

was ELGA GmbH's statement on the technical process of the application

Explanations on the government bill that is the subject of the proceedings as well as an "Appendix"

designated document regarding the "Statement of the DSB of 17.01.2020 on the

Draft assessment and its consideration in the government bill”.

4. By letter dated September 7, 2020, the data protection authority now requested the Federal Minister for Social Affairs, Health, Care and Consumer Protection (hereinafter: Federal Minister), who is in full operation for the operation of the electronic vaccination card responsible for data protection is designated (§ 24c Para. 1 of the amendment), to answer data protection questions arising from the amendment.

5. The Federal Minister received this request in a letter dated October 13, 2020 (received October 16, 2020). In it, he essentially stated that there can be no doubt about his position as the person responsible for data protection, since he is not only entrusted with the implementation of the law and finances its application, but also provide the tool for data processing. He is therefore more common Responsible with the health service providers. Citizens can, too independently make entries in the electronic vaccination card, but this would do not bear any responsibility under data protection law in this regard, even if it is from the Household exception within the meaning of Article 2 (2) (c) GDPR. The registration through the citizen serves the documentation of the vaccinations for the citizen, have no professional or economic connection and otherwise would have no external legal effect unfold. Regarding the use of ELGA components and the special Access authorizations according to § 24f of the amendment, the Federal Minister stated that the authorized persons are finally listed in the law and these as it were Recipients within the meaning of Art. 4 Z 9 DSGVO. According to the system of However, GTelG 2012 does not include responsibility for the collection and (Further) processing from the central vaccination register stipulated because the local Processing of health data and genetic data outside the scope of the GTelG 2012 and the designation of the responsibility for the collection and

Further processing therefore had to be omitted. Eventually the non-application arises

numerous data subject rights directly and directly from the GDPR and would

Statements on where any data subject rights could be specifically asserted,

nor be determined by a regulation on joint responsibility.

B. Test item

It must be checked whether the intended data processing processes within the framework of the

Electronic vaccination barrel, inserted by the amendment of the GTelG 2012 Federal Law Gazette I No. 115/2020,

expected to comply with the requirements of the GDPR or not.

It should be noted in this regard that the provisions in question, although in the meantime in

BGBl. were announced, but the electronic vaccination card itself - as can be seen from § 27

Paragraph 17 in conjunction with Section 28 Paragraph 2a Z 2 lit. c GTelG 2012 results - not yet in full operation passed.

C. Findings of Facts / Statutory Provisions Under Review

With Federal Law Gazette I No. 115/2020, the GTelG 2012 was amended in such a way that a new

5. Section "5. Section: eHealth Applications" has been added. In a 2nd subsection

Provisions regarding "Electronic Vaccination Card" were added.

The provisions regarding the electronic vaccination card are as follows:

2nd subsection

Electronic vaccination card

Objectives of the Electronic Vaccination Card

Section 24b. The use of the electronic vaccination card fulfills a significant public

Interest according to Art. 9 Para. 2 lit. g to j DSGVO. This significant public interest results

consists in particular of:

a) uniform, comprehensive and complete digital vaccination documentation as well as

1. Optimizing vaccination coverage for the population, primarily through

improved, faster availability of vaccination information,

- b) increasing the quality of the process and results of vaccinations and the effectiveness of public vaccination programs,
- c) increasing vaccination coverage,
- d) increasing drug and patient safety;

2. The availability of digital vaccination information for the control of the public healthcare, especially for

- a) Determination of vaccination status and vaccination rates as well as what can be derived from them need for action,
- b) Improving the ability to respond to outbreaks of vaccines preventable diseases,
- c) Compliance with obligations to track international elimination and eradication targets as well

3. the reduction of expenses for citizens, health service providers and the healthcare system.

Central Vaccination Register

Article 24c. (1) To ensure the goals mentioned in § 24b, the

Health care responsible federal minister as responsible (Art. 4 Z 7 GDPR) the

eHealth application to operate Electronic Vaccination Card. essential part of this

Application is a central vaccination register, which is the electronic documentation of all

vaccinations carried out. The federal minister responsible for health care

can be used for the operation, maintenance and further technical development of the electronic vaccination card use one or more processors (Art. 4 Z 8 GDPR).

(2) In order to fulfill the purposes specified in Section 24d (2), the central vaccination register is used

the point in time pursuant to Article 28 Paragraph 2a Z 2 lit. c and lit. h sublit. ah

for

the

become

met

health telematics

1. by all health service providers according to § 2 Z 2 who carry out vaccinations

are those with the ordinance of the Federal Minister of Health, with the details

regulations

–

Health Telematics Ordinance 2013 (GTeIV 2013), Federal Law Gazette II No. 506/2013, Annex 1

defined roles according to part 1 (roles for people)

- Z 1 (doctor for general medicine),
- Z 2 (licensed doctor),
- Z 3 (specialist),
- Z 4 (specialist in dentistry, oral and maxillofacial medicine) and
- Z 11 (midwife)

as well as part 2 (roles for organizations)

- Z 1 (General Hospital),
- Z 2 (special hospital),
- Z 3 (nursing home),
- Z 4 (sanatorium),
- Z 5 (self-employed outpatient clinic),
- Z 6 (medical group practice),
- Z 8 (enforcement of sentences and measures),
- Z 10 (care facility),
- Z 18 (occupational medicine center) and
- Z 24 (public health service),

2. the information

a) to

Vaccine

(classification, trade name, manufacturer, approval number,

Batch number, expiration date, serialization number, pharmaceutical central number

and anatomical-therapeutic-chemical classification),

b) on the administered vaccination (date of administration, dosage and dose,

applied vaccination scheme, vaccination recommendation and assignment to vaccination programs),

c) to the citizen (name, date of birth, gender, address,

to a possible representation,

Declarations

social security number,

ID number

Health, community code, titer determination, vaccination-related previous illnesses and

special vaccination indications) as well as

for accessibility, information

area specific

d) the vaccinating or storing health service provider (name, role,

professional address and date of storage)

save. Irrespective of existing obligations to document on paper, the

Storage of this information in the central vaccination register is subject to the respective professional regulations

Mandatory documentation (e.g. § 51 Para. 1 ÄrzteG 1998).

(3) Responsible (Art. 4 Z 7 DSGVO) for the storage, updating, cancellation,

The respective health service provider is responsible for entering and verifying the data. Already in

Data stored in central vaccination registers may not be used by health service providers

to be deleted. If circumstances arise which, taking into account the respective

Professional duties (e.g. § 49 para. 1 ÄrzteG 1998) a correction (Art. 16 DSGVO) of the

central

from the

update or access the health service provider who has stored this data

cancel. Should the health service provider storing the data in the central vaccination register

saved will no longer be available, the update or cancellation is on

request of the citizen from the district administrative authorities. The

canceled data must remain accessible to health service providers and citizens.

Updated and canceled dates will be marked as such.

saved

vaccination register

require,

Data

this

are

(3a) The federal minister responsible for the health system (paragraph 1) and the respective

responsible for storing, updating, canceling, adding and revising

Health service providers (paragraph 3) are jointly responsible for processing in

Within the meaning of Art. 26 GDPR. Provided by the person responsible for health care

If a processor is used by the Federal Minister in accordance with paragraph 1, this is also the case

Processor (Art. 4 Z 8 DSGVO) of the respective health service provider

paragraph 3.

(4) Health service providers who are responsible for storing the information pursuant to para. 2 in

central vaccination register are obliged, taking into account the respective

Professional duties (e.g. § 49 para. 1 ÄrzteG 1998) administered and documented in writing,

but not add vaccinations stored in the central vaccination register and according to § 24e

Para. 1 Z 2 verify registered vaccinations. Health service provider according to Z 11 Part 1

Annex 1 to GTeIV 2013 (midwives) may only add and verify such vaccinations,
which they are also allowed to administer due to their professional duties (§ 5 Para. 4 HebG).

(5) Data from existing digital vaccination documentation, especially those of
countries, provided that this data is available in valid quality and
in particular, clear electronic identities (§ 2 Z 2 E-GovG) of citizens
are available, by the federal minister responsible for the health system in the
central vaccination registers are taken over.

(6) The
Vaccination register data are different from that for the
Health care responsible federal minister 10 years after the date of death, at the latest
however, to be deleted 120 years after the birth of the citizen.
in the central

(7) The Federal Minister responsible for the health system has to the in § 24d paragraph 2
Z 2 and 3 mentioned purposes the current vaccination plan Austria in the central
Vaccination register as well as to access the summary of the central
to enable data stored in the vaccination register in accordance with § 24d para. 2 Z 1 in ELGA and ELGA
Applications according to § 2 Z 16 or other eHealth applications according to this section
to support the provision of standardized electronic interfaces.

(8) The data processing to be carried out on the basis of this provision fulfills the
for a lapse of data protection
mentioned

Requirements of Art. 35 Para. 10 GDPR

impact assessment,

in particular

Health service providers do not have to carry out a data protection impact assessment.

so that

paragraph 2

the

in

Principles of vaccination data processing

Section 24d. (1) The processing (Art. 4 Z 2 GDPR) of data in the central vaccination register

according to § 24c paragraphs 2 to 7 and for the purposes mentioned in paragraph 2 is only permissible if

1. clearly identifies the health service providers pursuant to Section 4, Paragraph 4 or Section 4a

became,

2. the confidentiality (§ 6) of the data to be processed is guaranteed,

3. the integrity (§ 7) of the data to be processed is guaranteed,

4. there is a specific access authorization according to § 24f paragraph 4 as well as

5. the citizens, insofar as the purposes in accordance with paragraph 2 nos. 1, 2, no. 5, no. 6 or no. 7 are involved

acts, in accordance with § 18 para. 4 or by comparing data with or querying the

sourcePIN register according to § 2 Z 9 E-GovG. For the

Comparison of data with the sourcePIN register, § 18 Para. 4 Z 5 applies accordingly.

(2) The data stored in the vaccination register may only be used for

the following purposes are processed:

1. Summary of the data stored in the central vaccination register,

2. Presentation of personal vaccination calendars based on documented vaccinations and the

current vaccination plan Austria,

3. Reminder of recommended vaccinations according to the current vaccination schedule

Austria,

4. Statistical evaluations of data stored in the central vaccination register in accordance with

§ 24g,

5. crisis management,

in

connection with notifiable diseases according to § 1 Epidemics Act 1950,

BGBI. No. 186/1950, as well as in the context of pharmacovigilance,

as part of outbreak management

as well as

6. Billing in the context of vaccination programs as well as

7. Exercising the rights of citizens according to § 24e paragraph 1.

Section 24e. (1) Citizens and their legal or authorized representatives

rights of citizens

have the right

1. electronically via the access portal (§ 23) or in writing to the ELGA

Ombudsman (§ 17) Information (Art. 15 in connection with Art. 23 Para. 1 lit. e GDPR)

about the data concerning them stored in the central vaccination register (§ 24d para. 2

Z 1 and Z 2) and log data (§ 24f Para. 5) and to get the in the central

print out the data stored in the vaccination register yourself or obtain information from the ELGA

to have the ombudsman printed out, whereby § 17 paragraphs 2 and 4 apply,

2. Enter vaccinations in the central vaccination register, whereby these are self-entered

Vaccinations are labeled as such and for healthcare providers

according to § 24c para. 2 no. 1 for information only, as well as

3. by the respective vaccinating health service provider according to § 24c para. 2 no. 1 the

Documentation of vaccinations according to Art. 31 of the International Health Regulations

(IGV) in the international vaccination card (International Certificates of Vaccination

and vaccination book of the WHO) to demand.

(2) In case of doubt, the rights mentioned in paragraph 1 can only be exercised upon completion

of 14 years of age (minors of consent) exclusively to citizens.

Use of ELGA components

§ 24f. (1) The ELGA components according to § 24 paragraph 3 are subject to the following

to use paragraphs.

(2) As far as the patient index (§ 18) to check the clear identity of the

Citizens (§ 24d Abs. 1 Z 5, 1st case) is used, the period of § 18 Abs. 6 Z 1 applies to the

Cases according to paragraph 4 no. 1 lit. a to c and no. 4 and the period of § 18 paragraph 6 no. 2 for the cases according to

Para. 4 no. 2.

(3) The health service provider index (§ 19) serves to check the clear

Identity of health service providers according to § 24d Abs. 1 Z 1.

(4) The authorization system

(§ 21) serves the administration of the specific

Access permissions and control of access. A specific access permission to

have the data stored in the central vaccination register

a) for the storage, updating, cancellation and addition of the data specified in § 24c paragraph 2

1. Health service provider according to § 24c Para. 2 Z 1

Z 2 mentioned data in the central vaccination register,

b) to the summary of the data stored in the central vaccination register

Data according to § 24d para. 2 no. 1,

c) on the basis of documented vaccinations and the current vaccination schedule

Austria created personal vaccination calendar according to § 24d Abs. 2 Z 2,

d) for billing within the framework of vaccination programs pursuant to Article 24d para. 2 no. 6 and,

e) if it concerns the public health service within the meaning of Z 6, for

crisis management as part of outbreak management in accordance with Section 24d

Para. 2 no. 5,

2. Pharmacies according to § 1 of the Pharmacy Act, RGBI. No. 5/1907

a) to the summary of those stored in the central vaccination register

Data according to § 24d para. 2 Z 1 and

b) on the basis of documented vaccinations and the current vaccination plan

Austria created personal vaccination calendar according to § 24d Abs. 2 Z 2,

3. Legal or authorized representatives to exercise the rights of

Citizens according to § 24e paragraph 1,

4. Employees of the ELGA ombudsman to exercise the rights of

Citizens according to § 24e Abs. 1 Z 1,

5. the federal minister responsible for the health system for the nationwide

Crisis management in accordance with § 24d para. 2 no. 5,

6. the governor and the district administration authorities in their respective

legal scope

a) for crisis management in accordance with § 24d para. 2 no. 5 and

b) for billing within the framework of vaccination programs according to § 24d para. 2 no. 6 as well as

7. the district administrative authorities to update or cancel in the central

Vaccination register stored data according to § 24c paragraph 3.

(5) The logging system (§ 22) is used for documentation and traceability

the processing of the data stored in the central vaccination register using the

§ 22 paragraphs 3 to 6; are to be logged in accordance with Art. 32 GDPR

1. the data specified in Section 22 (2) nos. 1 to 3, 7 and 8,

2. The unique electronic identity of the healthcare provider providing the

process has triggered

3. the name of the natural person who registered the vaccinations in the central vaccination register

actually processed data,

4. The unique identifier of the data stored in the central vaccination register.

(6) The access portal (§ 23) serves to summarize the information in the central

Vaccination register stored data according to § 24e para. 1 Z 1 and must

1. the verification of the clear identity of the citizens in accordance with § 18 para. 4 no. 2

ensure as well

2. Functions to protect the rights of citizens according to § 24e Para. 1 Z 1 and

offer paragraph 2.

Statistical evaluations

§ 24g.

(1) For statistical evaluations, especially for the determination of

data stored in the vaccination register

Vaccination rates, are those

-month as well

Personal identification, excluding gender, year of birth and

municipality code,

clear

To replace personal identifiers, whereby the identity of the person concerned (Art. 4 Z 1

GDPR) cannot be determined by legally permissible means.

encrypted

in the central

traceable

through

not

a

(2) In order to pursue the goals specified in Section 24b, the data in the central vaccination register may

data stored are linked to data stored in other registers when

in these other registers, the data for personal identification by an untraceable

encrypted unique personal identifiers have been replaced.

(3) Art. 15, 16, 18 and 21 GDPR apply subject to the conditions and guarantees

according to Art. 89 Para. 1 GDPR under the conditions of Art. 89 Para. 2 GDPR on the

Data according to paragraphs 1 and 2 not applicable.

§ 27.

[...]

(17) Responsible (Art. 4 Z 7 DSGVO) for the pilot operation of the electronic vaccination pass is ELGA GmbH. The responsibility of health care responsible federal minister for the eHealth application Electronic Vaccination Card as well as a any transfer of operation, maintenance and technical advancement Electronic vaccination card to one or more possible processors (Art. 4 Z 8 DSGVO) according to § 24c paragraphs 1 and 3a apply from the transition to full operation (§ 28 paragraph 2a Z 2 letter c). ELGA GmbH has to ensure a smooth porting before the transition to full operation of software (application) and data (vaccination register) to for the health care system responsible federal minister. Any processors according to § 24c paragraph 1 and Paragraph 3a are in the course of porting before the transition to full operation Data processing according to § 24b ff GTelG 2012 authorized, insofar as this is to ensure a smooth start of full operation is required. ELGA GmbH and the respective am Pilots participating healthcare providers are jointly responsible for processing Responsible within the meaning of Art. 26 GDPR."

§ 28.

[...]

(2a) The Federal Minister responsible for the health system has, on the basis of 5th section with regulation to specify the following:

1. for the eHealth application "primary care" (§ 24a)
 - a) the standards for content, structure, format and terminologies in accordance with Article 27 Paragraphs 7, 8 and 9 to be used within the scope of this application, being international recognized standards, the economic viability and the status of the technical possibilities with regard to the level of detail of the structures

the respective health service providers are to be taken into account,

b) the respective date from which the technical and organizational specifications

are to be applied in any case according to lit. a, as well as

c) if processor (Art. 4 Z 8 DSGVO) the health service provider

according to § 24a act as the person responsible (Art. 4 Z 7 DSGVO), the details of this

Order processing according to Art. 28 Para. 3 DSGVO, as well as

2. for the eHealth application "Electronic Vaccination Card" (§§ 24b ff)

a) the standards for content, structure, format and terminology used for

aa) the information to be stored in the central vaccination register pursuant to Article 24c, Paragraph 2, Item 2

and

bb) that can be seen in the summary according to § 24d para. 2 no. 1

Data

to be used within the framework of this application, being internationally recognized

Standards, the economic feasibility and the state of the art

Possibilities in terms of the level of detail of the structures in the respective

health service providers should take into account

b) the respective date from which the technical and organizational specifications

are to be applied in any case according to lit. a,

c) the respective time from which the information pursuant to § 24c para. 2 no. 2 of the

to store, update and share relevant health service providers

are canceled and these are processed for the purposes specified in Section 24d (2).

may be allowed to begin, functionally, regionally, temporally and by roles

can be staggered,

d) possibly other, fewer or more according to § 24c Para. 2 Z 1 for storage in

Healthcare providers subject to central immunization registries and specific ones

Access authorizations from health service providers in accordance with Section 24f (4) and

e) possibly other, fewer or more according to § 24c para. 2 no. 2 in the central

Vaccination register detail data types to be stored,

f) one or more processors (Art. 4 Z 8 GDPR) according to § 24c

Paragraphs 1 and 3a,

g) if processor (Art. 4 Z 8 DSGVO) the health service provider

according to § 24c paragraph 3 in connection with paragraph 3a, the details of this

Order processing according to Art. 28 Para. 3 DSGVO

for storage,

Updating, cancellation and addition of the information according to § 24c Para. 2 Z 2

in the central vaccination register,

h) for piloting

aa) the point in time from which the information pursuant to Section 24c (2) no

participating health service providers are to be stored and these for the

in § 24d Abs. 2 may be processed and

bb) the date from which the technical and organizational specifications

lit. a. are to be applied,

cc) the obligation of ELGA GmbH to carry out the porting in accordance with Section 27 (17) directly

any processors in accordance with Section 24c Paragraphs 1 and 3a and in doing so

ensure that a smooth change of processor for the

health service providers participating in the pilot,

i) the date from which the self-registration of vaccinations in the central

vaccination register according to § 24e Abs. 1 Z 2 is possible as well as

j) the details of the joint responsibility according to § 24c paragraph 3a and if applicable

according to § 27 paragraph 17 last sentence.

D. In legal terms it follows that:

1. Legal Bases Requirement

1.1. According to the settled case law of the ECJ, regulations that are part of the rights

Art. 7 (respect for private and family life) or Art. 8 (protection of personal data)

EU-GRC intervene, clear and precise rules for the scope and application of these

Provide a measure and establish minimum requirements so that the people whose

personal data are concerned, have sufficient guarantees that a

effective protection of your data against misuse and against any unauthorized access

this data and any unauthorized use. The requirement of such

Guarantees is all the more significant when the personal data is automatically

processed and there is a significant risk of unauthorized access to them

(cf. ECJ of October 6, 2015, C-362-14, paragraph 91 with further references).

These guarantees are all the more important when data is processed automatically

and if it is sensitive data (cf. ECJ of October 6, 2020, related case C-

511/18, C-512/18 and C-520/18, margin no. 132).

The data to be processed in the central vaccination register are undoubtedly

Health data according to Art. 4 Z 15 GDPR, i.e. "sensitive data" within the meaning of Art. 9

Para. 1, the processing of which is based on Art. 9 Para. 2 DSGVO.

Also the consistent case law of the Constitutional Court on the quality of a

Mandatory norm within the meaning of § 1 para. 2 DSG it can be inferred that this determined

has to meet requirements (see most recently the findings of December 11, 2019,

G 72/2019 and others, and of December 12, 2019, G 164/2019 and others).

The data protection authority expressly makes it clear that it is not (note editor: im

Original due to an obvious editorial oversight: "neither") is their job - and

is also not covered by their competence - to finally determine whether the specified

Provisions are contrary to § 1 Para. 2 DSG or Art. 8 EU-GRC.

However, the data protection authority can check as part of an official examination procedure,

whether a planned - but not yet implemented - data processing is likely to be covered in

the requirements of the GDPR and Art. 8 EU-GRC, because otherwise the right to remedy

Article 58(2)(a) would have no scope. Is a planned data processing

stipulated by law, this inspection competence must also be based on the legal basis

on which data processing should be based.

Irrespective of this, the data protection authority would be obliged to

the

are in manifest contradiction with Union law,

in case of conflict

to leave unused.

The principle of the primacy of Union law over national law applies

(Application priority). This is of particular importance where directly applicable

Union law - such as the GDPR - meets conflicting national law. The

Precedence of application means that in the event of a conflict, the rule of the (directly applicable)

Union law, not that of Austrian law (cf. VfSlg. 15.448/1999,

19.661/2012 with reference; Mayer/Kucsko-Stadlmayer/Stöger, Federal Constitutional Law¹¹

[2015]

Margin no. 246/9).

This principle must be observed by all Austrian authorities, they have it

national law should therefore not be applied in such cases. To the rank of

Austrian law does not matter, Union law also applies to national law in the event of a conflict

constitutional law

before

(see.

VfSlg. 15.427/1999;

17.347/2003; Mayer/Kucsko-

Stadlmayer/Stöger, Federal Constitutional Law¹¹ [2015] Rz 246/9).

1.2. In his statements, the Federal Minister refers to the fact that the scope

the interference with the fundamental right to data protection (according to § 1 DSG and Art. 8 EU-GRC) above all from the explanations and the data protection impact assessment that was carried out.

It must be countered that explanations and data protection impact assessments - in

Contrary to the text of the standard - are not binding and the scope of an intervention is clear

must result from the standard text itself. If that is to determine the meaning of subtle

knowledge of data protection law, qualified legal qualifications and experience and

almost archival diligence - above all through intensive study of legal materials and

Data protection impact assessments - necessary

is

(cf. mutatis mutandis VfSlg.

12.420/1990), it cannot be said that the effects of a planned

Make data processing easy to understand.

However, the (simple) traceability is in turn a prerequisite for those affected to become aware of the

To become aware of the consequences of an intervention and to be able to claim their rights.

This is already set out in Art. 5 Para. 1 lit. a GDPR (principle of legality,

processing in good faith, transparency).

According to the case law of the ECJ, it is not sufficient if data processing is based on a

the

in Art. 6 GDPR - or as here: Art. 9 Para. 2 - finally mentioned

Legality facts can be supported; it must also have all the principles for

the processing of personal data according to Art. 5 DSGVO is complied with (cf.

nor on the legal situation according to Directive 95/46/EC, the judgment of December 11, 2019, C-708/18,

margin no. 36).

The planned data processing according to Section 5, Subsection 2 GTelG 2012 on

Electronic vaccination records should therefore be examined in this light.

2. On the planned data processing in the present case

According to the data protection authority, section 5, subsection 2 GTelG 2012 has three

Areas of defects that

as a result

cause the planned

Data processing operations likely to violate the GDPR:

a) On the distribution of roles under data protection law

i) The clear and unequivocal determination of those responsible is for the

Exercise of data subject rights (Chapter III GDPR) and for compliance with obligations

(Chapter IV GDPR) is relevant.

Those affected need to know against whom they can assert their rights and

Controllers or processors must know whether they are to be considered as such

come because compliance with obligations is linked to it, and their disregard with

is threatened with a fine (Article 83 (4) GDPR).

According to Art. 4 Z 7 GDPR, that natural or legal person, authority, institution or

another entity responsible for processing, alone or jointly with others

decides on the purposes and means of processing personal data. The

The role of the person responsible thus results primarily from the fact that a

certain body has decided to process personal data for its own purposes

process.

essential criterion

is therefore the decision component. The role of

Responsible arises primarily from the fact that a specific body

has decided to process personal data for its own purposes. The

"Purpose" describes an expected result, while "means" describes the way

specify how the expected result is to be achieved (cf. Art. 29 Working Party,

Opinion 1/2010 on the concepts of "controller" and

"Contract processor", WP 169, still in relation to Art. 2 lit. d of Directive 95/46/EC).

Decisive for the allocation of responsibility is therefore who is responsible for the essential

Aspects of the means of processing decides. For the attribution of

Responsible capacity, it is not necessary for the person responsible to provide data himself

processed, is in possession of the processed data or has physical control over it

has. If he decides that data are to be processed, he is entitled to all

Persons and bodies functionally attributable under his supervision or instruction

Carry out data processing steps (auxiliary bodies). As means are not only those

technical and organizational methods, but the "how" of the processing.

This means decisions about how which data is processed, to whom it is sent

are transmitted or when they are deleted. Responsibility may be after

Definition also with several persons responsible

lay. Thus, different

Controllers have joint decision-making powers and can share legal

responsible for data processing. When aligning the definition as

Controller as the person or body responsible for the purpose(s) and means of processing

decides it is one

functionalist view, according to which the

Accountability assigned based on actual influence on the decision

becomes. The responsibility

can

itself

in addition

also

out of

the

factual

result in anticipation of decisions. Meets an actor

actually and

actually the

decision to start data processing, this is the person responsible iSd

DSGVO to be considered (cf. Hödl in Knyrim, DatKomm Art. 4 DSGVO margin number 76ff).

ii) From the (only relevant) standard text it follows that the

for the

Federal minister responsible for the health sector as the person responsible in accordance with Art. 4 Z 7 GDPR

operates the eHealth application of electronic vaccination records (§ 24c Para. 1 GTelG 2012).

In § 24c paragraph 3 leg. cit. are then - in deviation from the previous standardization of the

federal minister

as responsible

—

the health service providers

as

data protection responsible for the storage, updating, cancellation,

Updating and verification of the data in relation to the vaccination register. Also can

the responsible federal minister take over existing vaccination documentation, whereby also

certain health service providers can subsequently record vaccination data (§ 24c Para. 4

and 5 leg.cit.).

In § 24c paragraph 3a leg. cit. will in turn stipulate that of the health care system

responsible federal minister and the respective health service provider jointly for the

are responsible for processing within the meaning of Art. 26 GDPR.

Already these contradictory statements on the responsible property are with the

Principle of transparency according to Art. 5 Para. 1 lit. a DSGVO and ultimately with the Art. 8 EU

GRC case law of the ECJ with regard to the degree of precision of a

not to reconcile intervention norms.

In this respect, the argument put forward by the Federal Minister, according to which the exact

Allocation of roles will be determined in a separate regulation. Such a

Ordinance can only be based on a law that is already - at least in outline -

build up the defined distribution of roles and specify them in more detail. But it's already the

If the legally mandated distribution of roles is unclear or contradictory, this can be done by a

ordinance cannot be rehabilitated.

iii) The amendment can also be seen that district administrative authorities - albeit

at the request of the citizens - have to carry out processing (§ 24c Para. 3 in conjunction with § 24f

Para. 4 Z 7), which means a position as a controller (or at least as a processor)

indicated.

iv) With regard to the self-entry of citizens in the central vaccination register is on it

to point out that in the present constellation Art. 2 Para. 2 lit. c GDPR (see above

mentioned "household exemption") cannot be applied:

According to the settled case law of the ECJ, there are exceptions to the scope of application

of Directive 95/46/EC (now GDPR) to be interpreted narrowly (cf. the judgment of July 10, 2018,

C-25/17, margin no. 37).

Art. 3 para. 2 second indent of Directive 95/46/EC (now Art. 2 para. 2 lit. c GDPR)

is therefore to be interpreted in such a way that it only affects activities that are for private or

family life of private individuals.

In this respect, an activity cannot be considered

be considered exclusively personal or family within the meaning of this provision if

its object is personal data of an unlimited number of persons

to make them accessible, or if they relate even partially to public space

extended and thereby directed to an area outside the private sphere of that person

who processes the data (see again the judgment of July 10, 2018, margin no. 42 with further references).

Art. 2 Para. 2 lit. c GDPR is to be seen as an outgrowth of Art. 7 EU-GRC (Art. 8 ECHR), which

privacy from intrusion, be it by the state, a corporation or a

private individual to protect. A data processing for the exercise of exclusively personal

or family activities requires that the processor exclusively personal or

pursues family purposes (cf. Zukinc, The scope of the household exception of the GDPR

using the example of social online networks and image recordings, in Jähnel, data protection law,

Yearbook 2019, 61).

With the amendment of the GTeIG 2012, citizens should be able to get vaccinations themselves in the

Enter vaccination register (§ 24e Abs. 1 Z 2), whereby these vaccinations are marked as such

and for health service providers according to § 24c para. 2 Z 1 only for information

serve.

An entry is to be regarded as processing according to Art. 4 Z 2 DSGVO.

It is already clear from this that the self-registration - measured against the cited case law

of the ECJ - not exclusively personal and family purposes, but the so

entered data is also accessible to other persons (here: health service providers).

be made.

In this respect, also in this case, a position of the self-registering citizen as

Responsible according to Art. 4 Z 7 DSGVO indicated.

v) As a result, it is not clear from the text of the standard who

Responsible or processor for which data processing is. This contradicts

Article 5 paragraph 1 lit. a GDPR.

b) Rights of data subjects

i) The rights of the persons concerned are set out under "Rights of citizens" in § 24e

GTeIG 2012 regulated, whereby statements on the right to correction according to Art. 16

DSGVO also in § 24c paragraph 3 leg. cit. find. Regarding the deletion (Article 17 GDPR)

finds itself

in § 24c paragraph 3

leg.cit. the indication that such through the

health service providers must not be carried out.

In his statement, dated October 13, 2020, the Federal Minister

Restriction or exclusion of certain data subject rights essentially from,

that such an exclusion already results “immediately and directly” from the GDPR.

None of the rights under Articles 14, 17, 18, 20 and 21 are granted by the national legislature

limited or even excluded in accordance with Art. 23 GDPR, but result from this

Exclusion from the GDPR. The Federal Minister essentially referred to Art. 14

Paragraph 5 letters c and d, 17 paragraph 3, 18 paragraph 2, 20 paragraph 3 and 21 paragraph 1 sentence 2 GDPR.

The data protection authority cannot agree with these statements:

ii) At the outset, it should be noted that this argument alone does not work as in § 24g

Para. 3 certain data subject rights are expressly excluded, provided that it is about the

statistical evaluation works. Such an express limitation would not be necessary

if the GDPR ex lege the non-applicability of certain rights in certain cases

would provide.

In response to the Federal Minister's objection, it should be pointed out that the provisions he cited

not cause certain data subject rights not to apply and therefore

not required by law to be restricted. Rather, these provisions serve the purpose

the supervisory authority or the courts (cf. Articles 77 and 79 GDPR) in the event of their

to enable an examination of whether, in individual cases, one is granted by the GDPR

was rightly not complied with.

If, on the other hand, a legal restriction of the rights of the data subject is intended to

that certain rights do not apply or apply only to a limited extent from the outset

should, such a restriction must be based on Art. 23 GDPR. This allows Member States and the Union to grant exceptions to data subject rights create. However, these restrictions are only enforced by legislation "by the way of Legislative measures" are possible that pursue specific goals and a minimum content ("in particular, if applicable") must have. From the legal text must subject and scope of the restriction; beyond that compensatory protective measures are provided. The necessary scope and The degree of detail of the legal basis then depends on the level of risk and on the concrete limited right of data subjects (cf. Haidinger in Knyrim, DatKomm Art. 23 GDPR, para. 25).

iii) A reference to the exceptions in each provision of rights of the data subject are not suitable to bring about such an exclusion. This would have a clear and precise legal order and sufficient safeguards for protection to contain the persons concerned in order to protect their data against misuse. Since the Federal Minister, as the person responsible, assumes that certain rights of those affected do not apply from the outset and therefore do not require any restriction, these Acceptance, however, neither in the legal text nor in the GDPR, but only in the explanations, it cannot be said that they are sufficiently clear and precise requirements are created that allow the average person subject to the law enables the scope of the limitation of their rights to be recognized.

In this respect, this contradicts Article 5 (1) (a) GDPR.

c) For naming transmission recipients in the context of statistical

Evaluation

§ 24g para. 2 GTelG 2012 determines that in order to pursue the goals mentioned in § 24b, data stored in central vaccination registers with data stored in other registers may be linked if

in these other registers the data for

personal identification

through

a

not

traceable

encrypted

clear

Personal identifiers have been replaced.

According to § 24g paragraph 3 leg. cit. Art. 15 GDPR (right to information), 16 (right to rectification), 18 (right to restriction of processing) and 21 (right to object) excluded.

As is clear from the legal text, it is therefore not intended to work with data

which have no personal reference at all, but with pseudonymised data

(cf. Art. 4 Z 5 GDPR). Pseudonymised data are (entirely) subject to the GDPR.

For this reason, § 24g Para. 3 GTelG 2012 also excludes certain rights

standardized, which would not be necessary if it were not personal data

act.

In the judgment of May 7, 2018, C-553/07, the ECJ ruled on the legal situation after the

RL 95/46/EG, states that the right to information is of particular importance

accrues when that right enables a data subject to be assured that

their data are processed without errors, the processing is permissible that their basic data

are accurate and are addressed to recipients authorized to process them.

The right to information also serves as a "basic right" for the person responsible to

to request the correction, deletion or blocking of data or to oblige him to do so

Correction, deletion or blocking of the third parties to whom this data has been transmitted

are to be communicated, unless this proves impossible and not disproportionate effort is involved (margin nos. 49 to 51).

In the present case, a data subject can, based on the wording in § 24g para. 2

GTelG 2012, according to which the personal data processed in the central vaccination register is marked with "in other registers" linked to your personal data stored and evaluated

cannot understand which specific other registers come into question for this.

Especially in a case where rights of a data subject, in particular the right to

Information, be limited, comes with the principle of transparency according to Article 5 Paragraph 1 lit

GDPR is of particular importance because data subjects are, at least in general terms,

need to be able to know which specific other registers in which

Personal data processed is used for statistical evaluations

may be. Otherwise it would be at the sole discretion of the statistician

carries out evaluations, to determine which registers are used for this purpose.

In this respect, this contradicts the principle of transparency according to Article 5 (1) (a) GDPR,

and it is also an inadmissible limitation of the fundamental right to data protection

to go out

(see.

in addition

again

the

already

mentioned knowledge

of

Constitutional Court of December 12, 2019, with which a similarly defective

determined provision was repealed due to incompatibility with Section 1 (2) DSG).

3. Summary

The provisions on the electronic vaccination card are mainly with regard to the distribution of roles under data protection law, the rights to which the data subject is (or are not) entitled as well as statistical evaluations does not meet the requirements of the GDPR.

In the

Result

results

itself

out of

to the

5th section,

2nd subsection

of

legal text that is the subject of the proceedings, to what extent and by whom

the right to data protection is being interfered with or to what extent restrictions are being imposed take place.

II. Remedial powers pursuant to Art. 58 (2) GDPR

The activity of the data protection authority is based on those set out in Art. 57 GDPR

Tasks and the corresponding powers in Art. 58 GDPR, whereby you

Tasks and powers also apply to the highest executive bodies (§ 35

Para. 2 DSG).

According to § 24c para. 1 GTelG 2012, the Federal Minister is responsible according to Art. 4 Z 7

GDPR as soon as full operation is guaranteed.

To ensure effective oversight of application and enforcement

it must be possible for the data protection authority to identify potential violations of the

GDPR in good time and to act accordingly.

Therefore, according to Article 58 (2) (a) GDPR, the person responsible had to be warned that the intended processing operations are likely to violate the GDPR.

It was therefore to be decided accordingly.