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**Covid-19 vaccination status checks on employees in the
context of the rights to privacy in Germany and The
Netherlands**

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CHAPTER 1: INTRODUCTION

1.1-Problem Statement

General digital surveillance technologies have allowed governments and employers around the world to monitor almost everyone, almost everywhere, almost all the time. The public has broadly accepted such measures as necessary in the fight against the Coronavirus¹. Several nations have already begun to prepare the introduction of "vaccine passports"—accessible documents verifying Covid-19 vaccination linked to the identity of the holder—as millions of people around the world have already received the Covid-19 vaccine². Governments assert that the goal of vaccine passports is to permit people to travel, attend big meetings, enter public areas, and go back to work without endangering their safety or the health of the public. However, there are still a lot of practical and legal obstacles in the way of their implementation³. The adoption of the vaccination and any digital health passport raises several legal issues with Covid-19, human rights, data privacy, and other laws. It is a fact that Covid-19 vaccine passports use personal information that can be used to separate people based on their health. This carries the risk that one day they be used to gauge a person's level of freedom or rights⁴.

During the Corona-pandemic, many employers wanted their employees to be vaccinated against Covid-19 to prevent the spread of the virus⁵. Because employers want to reassure employees and customers that the premises are safe, avoid potential liability for the transmission of the virus and advance public health. In this regard, violation of the privacy of personal movement, discrimination against unvaccinated persons, and collection of personal data for non-medical purposes are legal and ethical concerns⁶. These concerns cause difficulties in making vaccination programs and contact tracing methods available. It is confusing (and practically problematic for EU citizens) that the Covid-19 rules are different throughout the EU member states, particularly Germany and the Netherlands.

¹ Bradly John Condon, Tapen Sinha (2010). Who is that masked person: The use of face masks on Mexico City public transportation during the Influenza A (H1N1) outbreak. *Health Policy*, 95(1), pp 50–56.

² Tasnime Osama, Mohammad S Razai, Azeem Majeed (2021). Covid-19 vaccine passports: access, equity, and ethics. pp 1-2.

³ “Ethical Issues of Immunity Passports (Humanitarian News)” (May 2021) <https://cdn.wabip.com/downloads/newsletter/WABIP_Newsletter_2021_Issue2.pdf> accessed May 7, 2023

⁴ Royal Society (Great Britain). (2021). Twelve criteria for the development and use of COVID-19 vaccine passports, pp.10 Available at: <<https://royalsociety.org/-/media/policy/projects/set-c/set-c-vaccine-passports.pdf>>

⁵ Mark A. Rothstein, Wendy E. Parmet, Dorit Rubinstein Reiss, (2021) “Employer-Mandated Vaccination for COVID-19”, *American Journal of Public Health* 111, no. 6: pp. 1061-1064.

⁶ Erika Statkienė, Renata Šliažienė (2021). Compliance of Legal Regulation of the Republic of Lithuania with the EU Resolution on COVID-19 Vaccines. *Electronic Scientific Journal of Law Socrates*, 3 (21). pp 53–69.

Namely, at the end of January 2020, the first diagnoses of Covid-19 were discovered in Germany, and by mid-March 2020, the number of identified cases had grown initially slowly and then exponentially⁷. The German government enacted a series of legislations and regulations to stop the infection's exponential expansion in response to the rising case numbers. The Covid-19 vaccination of healthcare professionals is now required by the German Supreme Court. According to the court, any violation of the rights of health workers is outweighed by the importance of safeguarding vulnerable patients in hospitals and nursing homes⁸. The obligation for health workers to receive the coronavirus vaccine was upheld by the court⁹. The law mandates that all workers in nursing homes, hospitals, doctors' offices, and outpatient centres provide documentation of their Covid-19 vaccination. An urgent motion sought to put off its application. According to certain healthcare authorities, it will be exceedingly challenging and time-consuming to investigate specific cases when no proof has been provided. According to these German authorities, the mandate may also cause a lot of people to quit their jobs to avoid following the Covid-19 immunization requirements, creating a lack of staff in a field that is already under a lot of pressure¹⁰.

In contrast, in the Netherlands, it must be clear that other, less invasive approaches cannot be implemented before the introduction of mandatory vaccines can even be debated¹¹. Everyone in the Netherlands has the unalienable right to determine what happens to their own body, according to Article 11 of the Constitution. Due to this, companies are unable to mandate that their staff members have Covid-19 immunization before reporting back to work¹². Trade unions FNV and CNV as well as the employers' umbrella group VNO-NCW indicated that

⁷ Moritz Bruno Petzold, et al (2020). Risk, resilience, psychological distress, and anxiety at the beginning of the COVID-19 pandemic in Germany. *Brain Behavior*. pp 2.

⁸ “Germany's top court approves vaccine mandate for Health Workers.” (euronews May 19, 2022) <<https://www.euronews.com/2022/05/19/germany-s-top-court-approves-vaccine-mandate-for-health-workers>> accessed 7 April, 2023

⁹ “German Court Rules Coronavirus Vaccine Mandate for Health Workers Can Proceed: DW: 11.02.2022” (DW.COM) <<https://www.dw.com/en/german-court-rules-coronavirus-vaccine-mandate-for-health-workers-can-proceed/a-60740138>> accessed April 3, 2022

¹⁰ Antonia Bendau et al. (2021). Associations between COVID-19 related media consumption and symptoms of anxiety, depression and COVID-19 related fear in the general population in Germany. *Eur Arch Psychiatry Clin Neurosci* 271, 283–291 <https://doi.org/10.1007/s00406-020-01171-6>

¹¹ “Could the Dutch Government Make Covid-19 Vaccinations Compulsory?” (Erasmus University Rotterdam) <<https://www.eur.nl/en/news/could-dutch-government-make-covid-19-vaccinations-compulsory>> accessed April 3, 2022

¹² “Mandatory Covid-19 Vaccination for Employees Is Legally Not Possible in the Netherlands” (NL Times July 29, 2021) <<https://nltimes.nl/2021/07/29/mandatory-covid-19-vaccination-employees-legally-possible-netherlands>> accessed April 3, 2022

businesses in the Netherlands must comply by Dutch law unless the government issues an emergency decree. The government may pass an emergency bill, claims FNV (Federation of Dutch Trade Unions). However, both the prime minister and the minister of health have stated that they do not want to make vaccinations mandatory¹³.

Businesses are challenged with concerns over the extent to which they are lawfully allowed to inquire about individuals regarding their immunization records and how that data might be utilized when Covid-19 vaccination programs are implemented across the EU¹⁴. To fulfil the liability to provide a safe workplace and reduce the danger of Covid-19 exposure in the EU, employers may choose to ask their staff members about their vaccination status¹⁵. Vaccination immunization status is a unique type of private information that relates to people's welfare, this presents privacy concerns under the GDPR (Article 9(1)). Due to the sensitive and private nature of the data, this category is subject to stricter data protection regulations and can only be processed under extremely specific conditions (Art. 9(2)).

Considering the information above about these two countries, it is evident that ethical or legal concerns regarding mandated vaccinations and checks are based on the intrusion of personal privacy, restriction of movement, discrimination towards unvaccinated people, and the collection of personal data for non-medical purposes¹⁶. These concerns pose challenges to the roll-out of vaccination programs and contact tracing methods in the EU. The issue of requiring employees to show proof of their Covid-19 vaccination status is relatively new, and the only information available relates to potential possible privacy issues that are unfortunately not discussed in depth.

1.2-Scope

This thesis focuses on the Covid-19 vaccination status checks by employers and their impact on the rights to privacy and non-discrimination as guaranteed by the General Data

¹³ Ibid.

¹⁴ Daniel P Cooper and others, "Covid-19: Processing of Vaccination Data by Employers in Europe" (Lexology July 19, 2021) <<https://www.lexology.com/library/detail.aspx?g=15981144-b067-480e-a3dd-07ec1e131b3e>> accessed November 23, 2022

¹⁵ "Protecting Workers: Guidance on Mitigating and Preventing the Spread of Covid-19 in the Workplace" (Occupational Safety and Health Administration January 29, 2021) <www.osha.gov/coronavirus/safework> accessed June 7, 2023

¹⁶ Kelvin K F Tsoi and others, "The Way Forward after COVID-19 Vaccination: Vaccine Passports with Blockchain to Protect Personal Privacy" (BMJ Innovations April 1, 2021) <<https://innovations.bmj.com/content/7/2/337>> accessed April 3, 2022

Protection Regulation and art. 8 of the European Convention on Human Rights. The thesis aims to evaluate existing legal standards to assess whether they provide adequate legal protection for individuals. The thesis will focus on Covid-19 vaccination status checks by employers and different Covid-19 rules that are implemented by employers as the main case study. In addition, the scope of the thesis will be the European Union, focusing on the national laws of Germany and the Netherlands, article 8 of the ECHR, and the General Data Protection Regulation. The aim is to see if they offer protection against Covid-19 measures implemented by employers to check the vaccination status of their employees. Although these two countries are both EU member states, these countries deal with this issue entirely differently. It is an issue in Germany that employers can request vaccination status or register cases of Covid-19 of their employees, while in the Netherlands, this is still prohibited. It is puzzling and practically problematic for EU citizens that the Covid-19 rules differ in the EU member states, particularly in Germany and the Netherlands.

1.3-Research Questions

From the given above, the following main research question is derived:

‘To what extent are the Covid-19 status checks on employees in Germany and The Netherlands compliant with privacy rights?’

This research question will be unpacked into the following sub-questions:

- 1-** How do Germany and The Netherlands address privacy rights in their Covid-19 vaccination status checking practices?
- 2-** What are the similarities and differences between Germany and the Netherlands in terms of employers checking their employees’ Covid-19 vaccination status?
- 3-** How do such various Covid-19 vaccination status checks impact on employees’ privacy rights?
- 4-** Are the Covid-19 vaccination status checking practices lawful under German and Dutch law, the GDPR, and article 8 of the ECHR?

1.4-Literature Review

The literature on Covid-19 vaccination status checks on employees is marked by contradiction and debate. There are some contrasting opinions regarding the privacy and non-discrimination aspects of the Netherlands and Germany. For example, according to Mbunge, Fashoto, and Batani (2021), digital vaccine certificates can aid in the reopening of society and industry¹⁷. Nevertheless, given that the vaccination data will be viewed and shared with regulatory authorities in different jurisdictions, privacy cannot be totally guaranteed.

A vaccine passport is a document or digital record attesting to the holder's immunity to a specific infectious illness, allowing them to travel to and from other countries, as well as visit public places like events. But these passports may be also use in a workplace, by employers checking Covid-19 or vaccination status and this may cause infringement to rights to privacy of an individual. Gstrein, Kochenov, and Zwitter (2021) discuss the key advantages and disadvantages of the "passportization" strategy for managing the present health emergency. They illustrate the complexity of the notion of "vaccination passports" the organizational and technological challenges anticipated during implementation, as well as its terrible allure¹⁸. They give a thorough review of the current debate and analyse the issues from the ethical, social, and legal perspective. They also argue that vaccination passports won't take over as the primary weapon in the war against the Covid-19 epidemic and are unlikely to have a significant impact on reducing its effects. Although there isn't a direct and obvious link between safety and security, its quick adoption could have adverse effects including unleashing stigmatization and discrimination.

Zeinalipour-Yazti and Claramunt (2020) further stipulate that governments aim to slow the spread of diseases like Covid-19. When new technologies are developed to foster this, there are significant privacy concerns that will result in a sizeable worldwide monitoring infrastructure that will remain even after a Covid-19 vaccine has been created¹⁹. Moreover, Guidi, Romano, and Sotis (2022) argue that vaccine passports are the most recent contentious and divisive global issue. They are viewed by many experts as a critical instrument for reviving the economy safely

¹⁷ Elliot Mbunge, Stephen Fashoto, John Batani (2021), "Covid-19 Digital Vaccination Certificates and Digital Technologies: Lessons from Digital Contact Tracing Apps" pp. 6 <<https://ssrn.com/abstract=3805803>>

¹⁸ Oskar Josef Gstrein, Dimitry Kochenov, Andrej Zwitter (2021), "A Terrible Great Idea? Covid-19 'Vaccination Passports' in the Spotlight" pp 25-26 <<https://ssrn.com/abstract=3802154>>

¹⁹ Demetrios Zeinalipour-Yazti, Christophe Claramunt (2020), "Covid-19 Mobile Contact Tracing Apps (MCTA): a Digital Vaccine or a Privacy Demolition?" pp 1-2 <DOI:10.1109/MDM48529.2020.00020>

and boosting vaccination rates²⁰. However, a similar number of people believe that vaccine passports are unfair and a threat to people's privacy and rights²¹. Vaccine passports are not, however, as recent as some pundits claim. For many years, both participation in certain activities within a country and overseas travel have required proof of immunization. According to Zhang, Weissinger, Himmelreich, and McMurry (2021), the rapid development of a Covid-19 vaccine offers hope that the pandemic may be stopped. Still, as societies introduce vaccines and become more open, policymakers must deal with challenging issues about the best way to confirm people's vaccination histories²². Reopening of businesses, educational institutions, and travel will be dependent on the development of reliable and moral vaccine record verification (VRV) procedures. Governments have historically used such systems, which rely on paper records, but today, a number of non-profit organizations, businesses, and academic scholars are creating digital verification systems. VRV systems offer both advantages and disadvantages for combating the Covid-19 pandemic. They give rise to the possibility of a more precise verification of vaccination status. Still, they also carry the danger of escalating current health and economic disparities and creating severe security and privacy vulnerabilities. On the other hand, Wilson (2020) suggests that vaccines should be digitised before new identification systems are introduced, as the lack of formal identification is clearly not prohibitive today. Wilson argues for a new digital Covid-19 check application that can be used on most standard mobile phones and uses public key certificates to represent vaccination records and other credentials that have been attested to by authorities or field personnel²³. The design has practical advantages for persons' online privacy and engagement. Additionally, it demonstrates how conventionally hierarchical public critical infrastructure can be implemented without imposing prescriptive identification methods on communities, so avoiding some of the problems that beset this technology.

As mentioned above, the discussion gives an insight into existing Covid-19 mandates but does not discuss the privacy or discrimination issues. When a pandemic or other virus emerges in the modern world, it is still a question of how new technologies such as 2G rules or QR codes

²⁰ Sebastian Guidi, Alessandro Romano, Chiara Sotis (2022), "Depolarizing the Covid-19 Vaccine Passport" pp 907-908 <<https://ssrn.com/abstract=3850152>>

²¹ Kristin Voigt (2022). COVID-19 Vaccination Passports: Are They a Threat to Equality?, Public Health Ethics, Volume 15, Issue 1, April 2022, Pages 51–63

²² Baobao Zhang et al (2021) "Building robust and ethical vaccination verification systems" pp 1-2 <<https://ssrn.com/abstract=3782749>>

²³ Stephen Wilson (2020) "A digital 'Yellow Card' for Securely Recording Vaccinations Using Community PKI Certificates" pp 1-2 <<https://ssrn.com/abstract=3767208>>

affect our rights to privacy. Additionally, employers or authorities are able to request vaccination status or register cases of Covid-19 and this can cause a problematic view because this is still prohibited in one of the other member states. Moreover, what legal or ethical concerns may exist in the different approaches of EU member states regarding Covid-19 vaccination status checks on employees in the context of the right to privacy and non-discrimination, is a question that I will consider in this research.

This thesis adopts the view that noticeable legal concerns are founded on intrusions of personal privacy and discrimination towards those who aren't vaccinated, and the gathering of personal data for non-medical uses. By offering a thorough analysis of two countries, the Netherlands and Germany, this thesis seeks to go further and fill the gap in relation to the other existing work on privacy and covid checks, specific in the employer and employee context and the focus on diverging regimes within two EU countries. This analysis aims to illustrate how these two countries have addressed discrimination and privacy issues and whether this complies with EU privacy, data protection, and non-discrimination legislation.

1.5-Methodology and Structure

The research will predominately focus on two research methodologies, legal doctrinal research, and comparative analysis. The first methodology, legal doctrinal research, focuses on studying existing laws, case law, and authoritative materials analytically as the primary sources of the research²⁴. Therefore, the thesis will include a descriptive analysis of how in two EU countries, Germany and the Netherlands, employers have different approaches to requiring proof of the Covid-19 vaccination status of their employees and how this is supported in law and case law. The second methodology, the comparative analysis, focuses on the similarities and differences between these two countries and their legal bases that regulate employers' access to employees' health status/data. An analysis is also made of the discretion that member states have within the existing EU framework to have differing Covid-19 status checks on employees, characterized by references to practices in a few other EU countries.

The primary focus of this thesis is to answer the question of how different Covid-19 vaccination status checks on employees in Germany and The Netherlands affect the rights to privacy and non-discrimination. Four sub-questions are constructed to correspond to the four

²⁴ Amrit Kharel (2018). Doctrinal Legal Research. SSRN Electronic Journal. 10.2139/ssrn.3130525.

major chapters of this thesis to produce accurate and useful results. The methodology used for the goals of this thesis was chosen in accordance with the function that each chapter fulfils and based on the requirements of each of the formulated sub-questions.

In the second chapter, similar Dutch and German secondary sources are examined to understand how Germany and The Netherlands manage non-discrimination and privacy rights when assessing Covid-19 status checks on employees. In this chapter, legal research is conducted by using case law, books, journal articles, interviews, and websites. In the third chapter, the comparative analysis is conducted using secondary sources, such as papers, journal articles, and recommendations, to identify the similarities and differences between Germany and the Netherlands in terms of employers' checking their employees' status of the Covid-19 vaccine. This chapter will also discuss how these different Covid-19 vaccination status checks on employees' impact privacy and non-discrimination rights. In the fourth chapter, legal research is conducted by using Charter of Fundamental Rights of the European Union, European Convention on Human Rights), GDPR, Dutch law and German law. This chapter is exclusively devoted to the legal analysis of the legal basis for Covid-19 vaccination checks of employees.

CHAPTER 2: THE NEW NORMAL IN OUR LIVES WITH COVID-19 MEASURES

2.1. Introduction

This chapter addresses the first research sub-question, namely:

“How do Germany and The Netherlands address privacy rights in their Covid-19 vaccination status-checking practices?”

In doing so, it discusses separately how Germany, and the Netherlands deal with Covid-19 vaccine status checks and how they address privacy and non-discrimination rights. This chapter is split into two parts, each zooming in on each of the two Covid-19 status check systems. Each part considers the main characteristics of the checks and the official narrative behind the implementation. In this chapter, I will discuss the measures taken in relation to Covid-19 vaccination status checks, what is their legal basis and if, and if so how, were these deployed, and how were in this process issues of privacy and discrimination addressed? In the next chapter, I will examine the comparison between Germany and the Netherlands after explaining the characteristics of the checks in this chapter separately.

2.2 Covid-19 status checks in the Netherlands

In this section I will discuss how The Netherlands deal with corona measures. I will go into depth not only about status checks by employers, but also about corona measures such as corona tracing apps. This will help to understand how The Netherlands deal with Covid-19 checks in the following chapters.

Five weeks after the initial occurrences in other areas of Europe, the first case of Covid-19 was identified in the Netherlands on February 27, 2020²⁵. Since that time, the number of people with the condition has been significantly rising, particularly in the southern parts of the nation. The Dutch government published an emergency law to stop the spread of the Covid-19 virus four weeks after the viral outbreak in the country. The law restricted (planned) meetings and contact between people in groups of three or more who are not members of the same home within a distance of fewer than 1.5 meters, with the exception of minors under the age of 12²⁶. Schools, day-cares, pubs, bars, fitness centres, saunas, and other establishments were shut down due to the emergency law. Apart from those in healthcare, professionals who work closely with

²⁵ “Covid19 In the Netherlands: A Timeline” (Timeline: COVID-19 in The Netherlands) <<https://www.containmentnu.nl/articles/timeline?lang=en>> accessed October 10, 2022

²⁶ Ibid.

clients were forced to stop working. Citizens were required to immediately follow any directions given by law enforcement personnel under the emergency ordinance. On April 24 and May 11, 2020, the ordinance was partially modified and expanded. The government could not control the coronavirus by itself, and thus called out to society "Only together can we control corona." By (re)defining the police and special investigating officers as members of the community and their work as a public benefit, the police were mandated to promote the "health of us all" and to enforce the corona measures. The enforcement plan was laid out in three steps: "First, we initiate a dialogue, second (if that doesn't work), we issue a warning, and third (if people's behavior hasn't changed by then), we may take action."²⁷ The Dutch government also intended to launch apps that encouraged self-control. If a user had contact with someone who was coronavirus-infected, a smartphone app ought to be able to alert them. After that, they should spend at least two weeks at home²⁸. This proposal received a lot of backlashes because it was thought to be an unjustified invasion of citizens' privacy by the government²⁹. Understanding the Dutch strategy requires realizing that the corona crisis checks go beyond technical instrumentalism and logic; they also have significant symbolic implications. These checks' interpretations are often compared to how government representatives attempt to convey their opinions on the state's position during times of crisis in the context of their interactions with the public³⁰.

On April 18 and April 19, 2020, an Appathon was held by the Ministry of Health, Welfare, and Sport (VWS) to evaluate and enhance the functionality of Corona apps³¹. The intention was that these apps would be used to trace new infections and/or report the health status to a doctor in the region. However, the Dutch Data Protection Authority reacted critically to the

²⁷ Ministerie van Algemene Zaken, "Campagne-Effectmonitor Alleen Samen 8 Juli 2020" (*Rapport / Rijksoverheid.nl* April 14, 2022) <<https://www.rijksoverheid.nl/documenten/rapporten/2020/07/08/campagne-effectmonitor-alleen-samen>> accessed January 3, 2023

²⁸ Ministerie van Algemene Zaken, "Letterlijke Tekst Persconferentie Minister-President Rutte En Minister De Jonge Na Afloop Van Crisisberaad Kabinet (7-4-2020)" (Mediatekst | Rijksoverheid.nl December 23, 2020) <<https://www.rijksoverheid.nl/documenten/mediateksten/2020/04/07/letterlijke-tekst-persconferentie-minister-president-rutte-en-minister-de-jonge-na-afloop-van-crisisberaad-kabinet>> accessed September 23, 2022

²⁹ Crew DR, "Coronavirus in the Netherlands: All You Need to Know [Updated]" (DutchReview September 20, 2022) <<https://dutchreview.com/news/coronavirus-netherlands/>> accessed October 10, 2022

³⁰ Jan Terpstra, Jacques de Maillard, Sebastian Roché, Renze Salet (2021). Policing the corona crisis: A comparison between France and the Netherlands. *International Journal of Police Science & Management*, 23(2), 168–181. <<https://doi.org/10.1177/1461355720980772>>

³¹ Ministerie van Algemene Zaken, "Health Ministry to Hold Digital Event to Test Coronavirus Apps" (News item | Government.nl April 17, 2020) <<https://www.government.nl/latest/news/2020/04/15/health-ministry-to-hold-digital-event-to-test-coronavirus-apps>> accessed September 23, 2022

use of such apps and assessed on 20 April 2020 whether the apps met the requirements of the General Data Protection Regulation (GDPR)³². Ultimately, the authority indicated that it could not proceed with a substantive assessment because, in its view, the ministry had not formulated the frameworks for the apps clearly enough³³. Subsequently, on April 21, 2020, in response to the Covid-19 outbreak, the European Data Protection Board (EDPB) developed new guidelines regulating the use of location data for contact tracing³⁴.

The Dutch government itself worked on an app that could help the GGD (Public Health Service) with contact investigations. So, this app only tracks new infections and is not an app to report health status. In addition, the government shared the interim results of the app research with all citizens³⁵. According to the product definition, formulated by the government, it is the intention that a Bluetooth Low Energy (BLE) connection will keep track of which smartphones have been nearby³⁶. Users of the app who have been near the smartphone of a user who tested positive for Covid-19 during the previous 14 days, will be notified. When (government) organizations want to use new technologies that can lead to high privacy risks, they are required to carry out a “Data Protection Impact Assessment” (DPIA) beforehand³⁷. This is particularly the case if special categories of personal data, such as health data, will be processed on a large scale. If no measures are taken to limit the risks, the Dutch Data Protection Authority must be consulted about this. When performing a DPIA, it will have to be assessed, among other things, whether there is a valid basis for the data processing. Without a legal basis, no personal data may be processed at all. In addition to ordinary personal data (including location data), special

³² “AP Toetst Opzet Corona-Apps” (Autoriteit Persoonsgegevens April 17, 2020)

<<https://www.autoriteitpersoonsgegevens.nl/nl/nieuws/ap-toetst-opzet-corona-apps>> accessed September 23, 2022

³³ “AP: Privacy Corona-Apps Niet Aangehouden” (Autoriteit Persoonsgegevens April 20, 2020)

<<https://autoriteitpersoonsgegevens.nl/nl/nieuws/ap-privacy-corona-apps-niet-aangehouden>> accessed September 23, 2022

³⁴ “Guidelines 04/2020 on the Use of Location Data and Contact Tracing Tools in the Context of the COVID-19 Outbreak” (Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak | European Data Protection Board April 21, 2020) <https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-042020-use-location-data-and-contact-tracing_en> accessed October 10, 2022

³⁵ Minvws, “Minvws/NL-covid19-Notification-App-Design: Design Documentatie Rndom Covid19 Notificatie App” (GitHub) <<https://github.com/minvws/nl-covid19-notification-app-design>> accessed September 23, 2022

³⁶ Minvws, “NL-Covid19-Notification-App-Design/Product-Definitie.md at Main · Minvws/NL-covid19-Notification-App-Design” (GitHub May 28, 2020) <<https://github.com/minvws/nl-covid19-notification-app-design/blob/main/product-definitie.md>> accessed September 23, 2022

³⁷ “Recital 91 - Necessity of a Data Protection Impact Assessment” (General Data Protection Regulation (GDPR) September 3, 2019) <<https://gdpr-info.eu/recitals/no-91/>> accessed October 10, 2022

categories of personal data (including health data) will be processed via the corona app³⁸.

Processing special personal data is in principle prohibited. In principle, so the GDPR does offer options for processing this data.

The basis on which the data processing can take place is 'consent' and 'explicit consent'. Article 7 of the GDPR does impose some requirements for consent to be legally valid. Namely that the consent is given freely, for specifically formulated purposes; that the data subject is informed in advance about the way in which the data will be processed and that the consent has been given unambiguously. This means that the user of the corona app must explicitly agree to the processing of his health data via an active action. All this on a voluntary basis³⁹.

Even when the use of the corona app is laid down in legislation, providing for a legal basis for the corona app, the use takes place on a voluntary basis. Another basis that the GDPR offers is to use the corona app because this is necessary for the performance of a task of general interest. As an example of this, the GDPR cites protection against serious cross-border health hazards, i.e. the Covid-19 pandemic. In this context, there is also talk of national emergency law in which this is laid down⁴⁰. In this situation, too, the use of the app is voluntary.

The CoronaMelder trial launch in the Netherlands began in August 2020 as another Covid-19 Vaccine check⁴¹. The CoronaMelder depends on the Google/Apple expose alert application programming interface (API), which expresses concern about business interference in the process of creating the framework for handling public health-related issues⁴². One of the social aspects of this app that stands out the most is the attention given to privacy issues, which were discussed in-depth in ad hoc forums with professionals and locals. The app wasn't formally released until October 2020 as a result of a number of regulatory flaws and complications with The Dutch Data Protection Authority. The Dutch "CoronaMelder" contact tracing app still does not adequately ensure the privacy of its users, according to the authority. The Dutch Data

³⁸ "Art. 9 GDPR – Processing of Special Categories of Personal Data" (General Data Protection Regulation (GDPR) August 30, 2016) <<https://gdpr-info.eu/art-9-gdpr/>> accessed October 10, 2022

³⁹ "Verzekeringsrecht, Aansprakelijkheid, Schade En Toezicht" (VAST) <<https://www.vast-online.nl/art/3776/kan-gebruik-van-corona-apps-worden-verplicht>> accessed September 23, 2022

⁴⁰ Ibid 28.

⁴¹ Wedia, "Everything You Need to Know about the Coronamelder App" (IamExpat October 6, 2020) <<https://www.iamexpat.nl/expat-info/dutch-expat-news/everything-you-need-know-about-coronamelder-app>> accessed September 26, 2022

⁴² "Exposure Notifications - FAQ v1.2 Finalbetter - Centers for Disease ..." <<https://covid19-static.cdn-apple.com/applications/covid19/current/static/contact-tracing/pdf/ExposureNotification-FAQv1.2.pdf>> accessed September 26, 2022

Protection Authority (DPA) considers that the minister of health could negotiate terms with Google and Apple on the app's software, develop guidelines to properly regulate how the application is used, and make it apparent that the application's servers are secure⁴³.

2.3 Covid-19 status checks in Germany:

Germany has taken Covid-19 measures at two levels: at federal level and partly by sovereign states. By the end of January 2020, Germany has already experienced its first Covid-19 cases⁴⁴. Germany had one of the largest numbers of infections in Europe as of May 19 with a total of 175 210 RT-PCR-confirmed infections, including 8007 fatalities⁴⁵. On March 22, a partial lockdown was initiated and generally observed throughout Germany due to the quickly increasing caseload and the high case fatality rate in neighbouring countries. The lockdown was initially in effect until April 19. The German government declared on April 15 that the partial lockdown will be extended until May 3 with a variety of softening measures to mitigate the psychosocial effects and economic harm while there were still a few thousand new Covid-19 illnesses being reported daily⁴⁶. At both ends of the range, Germany had to decide on a plan of action that would probably fall somewhere between two possibilities; the aim should therefore be to keep infection rates extremely low until a vaccine is developed. At one extreme, it may follow China's lead and maintain the lockdown until the number of Covid-19 infections is nearly zero⁴⁷. This was most likely be accomplished by combining stepped-up population testing for Covid-19 with stepped-up contact tracing, followed by methodical isolation and quarantine procedures.

⁴³ “DPA: Privacy of Coronavirus App Users Not Yet Sufficiently Guaranteed” (Autoriteit Persoonsgegevens August 17, 2020) <<https://autoriteitpersoonsgegevens.nl/en/news/dpa-privacy-coronavirus-app-users-not-yet-sufficiently-guaranteed>> accessed September 27, 2022

⁴⁴ Gianfranco Spiteri and others, “First Cases of Coronavirus Disease 2019 (Covid-19) in the WHO European Region, 24 January to 21 February 2020” (Eurosurveillance March 5, 2020) <<https://www.eurosurveillance.org/content/10.2807/1560-7917.ES.2020.25.9.2000178>> accessed September 27, 2022

⁴⁵ “Covid-19: European Centre for Disease Prevention and Control” (COVID-19 | European Centre for Disease Prevention and Control) <<https://gap.ecdc.europa.eu/public/extensions/COVID-19/COVID-19.html#eu-eea-daily-tab>> accessed September 27, 2022

⁴⁶ Matthias an der Heiden and Osamah Hamouda (2020), “Schätzung Der Aktuellen Entwicklung Der SARS-COV-2- Epidemie in Deutschland – Nowcasting” (edoc Startseite April 22, 2020) <<https://edoc.rki.de/handle/176904/6650.4>> accessed September 27, 2022

⁴⁷ The Lancet, “Sustaining Containment of Covid-19 in China” (The Lancet April 18, 2020) <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30864-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30864-3/fulltext)> accessed September 27, 2022

As another measure in Germany, after extensive discussion, a law was adopted mandating face masks in public spaces, including buildings and transportation. FFP2/3 masks and medical masks should still only be used by trained medical personnel, although fabric masks might be simply created for widespread use during the pandemic⁴⁸.

As another measure, smartphone applications to aid in disease management were used by the German government during the Covid-19 pandemic. According to the German government, the need for mass acceptance of various "corona apps" has spurred discussions in the German public regarding the privacy of government-backed health applications⁴⁹. It is not surprising that the general public is interested in the operational and technological specifics of these "corona apps". Many of these corona apps were suggested for widespread adoption by governments and health authorities because their effectiveness may depend on extensive voluntary acceptance of these apps⁵⁰. Thus, the overall success of smartphone apps in the fight against the pandemic may depend on user approval and their willingness to utilize these apps. The notion of "privacy as contextual integrity," which recognizes that variables other than the technological implementation, such as societal norms and expectations, influence perceptions of privacy violations, contains many of the much discussed and criticized aspects⁵¹.

Numerous Corona Tracing applications have been created throughout the pandemic using various architectures. The German government's open-source contact tracing tool is called Corona-Warn-App⁵². It is founded on the Exposure Notification API (ENA), which Apple and Google collaboratively created⁵³. To protect privacy, the method is built on a decentralized architecture. In order to prevent the transmission of the virus, the German government launched

⁴⁸ Kar Keung Cheng, Tai Hing Lam and Chi Chiu Leung (2020), "Wearing Face Masks in the Community during the COVID-19 Pandemic: Altruism and Solidarity" (The Lancet April 16, 2020) <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30918-1/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30918-1/fulltext)> accessed September 27, 2022

⁴⁹ Cristina Criddle, Leo Kelion (2020), "Coronavirus Contact-Tracing: World Split between Two Types of APP" (BBC News May 7, 2020) <<https://www.bbc.com/news/technology-52355028>> accessed September 27, 2022

⁵⁰ Luca Ferretti et al (2020), "Quantifying Sars-COV-2 Transmission Suggests Epidemic Control With Digital Contact Tracing" (Science March 31, 2020) <<https://www.science.org/doi/10.1126/science.abb6936>> accessed September 27, 2022

⁵¹ Helen Nissenbaum (2004), "Privacy as Contextual Integrity" (NYU Scholars) <<https://nyuscholars.nyu.edu/en/publications/privacy-as-contextual-integrity>> accessed September 27, 2022

⁵² "Corona-Warn-App: Bundesregierung" (Webseite der Bundesregierung | Startseite) <<https://www.bundesregierung.de/breg-de/themen/corona-warn-app/corona-warn-app-englisch>> accessed October 12, 2022

⁵³ Layer O and Jaeger B, "Corona Warn-App – Design, Development and Privacy Considerations" (May 2020) <https://www.net.in.tum.de/fileadmin/TUM/NET/NET-2021-05-1/NET-2021-05-1_11.pdf> accessed September 27, 2022

the "Corona-Warn-App," a mobile app that notifies users if they have come into contact with other account holders who have tested positive for Covid-19⁵⁴. Understanding who uses (and doesn't use) the "Corona-Warn-App" and why is important because it is a behaviour that is significant to one's health if the app works. In many nations, the government's strategy for halting the spread of Covid-19 focuses on persuading individuals to adopt healthier habits. It is advised to often wash your hands, cover your mouth and nose, maintain social distancing, and in some regions, use applications that monitor contacts. For instance, the tracing software "Corona-Warn-App" is a smartphone application accessible as of 16 June 2020 in Germany⁵⁵. The Tech community has proposed proximity detection apps to assist warn those who may have been exposed to the coronavirus in order to help combat the Covid-19 pandemic. Both in academic settings and with the general public, there has been discussion of the privacy issues of these apps⁵⁶. The debate in Germany centred on the benefits and drawbacks of using a decentralized or centralized system to collect and analyse data. The main topic of discussion in the public regarding the proposed "Corona-Warn-App" was privacy⁵⁷.

The German government enacted many laws and regulations to prevent the illness from spreading exponentially in response to the rising case numbers. Such actions included, for instance, the shutdown of the cultural centres, educational institutions, and day-care centres⁵⁸. The first lockdown began at this point. On March 22, 2020, further mandatory social distancing regulations, such as maintaining a distance of at least 1.5 meters from others, and a restriction on meetings of more than two persons from different families were introduced. These measures served to further tighten the lockdown. All non-essential businesses, including restaurants and

⁵⁴ "Open-Source Project Corona-Warn-App" (Warn) <<https://www.coronawarn.app/en/>> accessed September 27, 2022

⁵⁵ Kai T Horstmann et al (2021) "Who Does or Does Not Use the 'Corona-Warn-App' and Why?" (European journal of public health) <<https://pubmed.ncbi.nlm.nih.gov/33340328/>> accessed September 27, 2022

⁵⁶ Judith Simon and Gernot Rieder (2021), "Trusting the Corona-Warn-App? Contemplations on Trust and Trustworthiness at the Intersection of Technology, Politics and Public Debate" (August 4, 2021) <<https://journals.sagepub.com/doi/epub/10.1177/02673231211028377>> accessed October 12, 2022

⁵⁷ "Never Ever or No Matter What: Investigating Adoption ... - Usenix" <<https://www.usenix.org/system/files/soups2021-haring.pdf>> accessed September 27, 2022

⁵⁸ Karl Lauterbach and others, "Chronik Zum Coronavirus SARS-COV-2" (zurück zur Startseite von BMG) <<https://www.bundesgesundheitsministerium.de/coronavirus/chronik-coronavirus.html>> accessed September 27, 2022

hair salons, were also closed⁵⁹. Germany was under this lockdown rule until April 19th⁶⁰. After this date, however, not all restrictions were completely lifted, particularly in areas with high infection rates⁶¹.

As lockdown measures to stop the virus' spread have severely compromised privacy and data protection, governments like those in Germany and the Netherlands are looking into the potential of vaccination passports to offer greater domestic freedom of movement and eventually permit international travel⁶². However, several difficulties and alleged ethical problems, and privacy concerns have raised doubts about this decision⁶³. Despite these, numerous governments were looking into ways to strike a compromise between maintaining the public's health and getting things back to almost normal⁶⁴.

This chapter touched upon how Germany and the Netherlands deal with Covid-19 vaccine status checks in general side and how these address privacy and non-discrimination rights. To illustrate this each section considers the key traits of the checks and measures as well as the official justification for their implementation. It is important to know how Germany and the Netherlands deal with Covid-19 checks before moving towards to employee – employer relationship because the purpose of this chapter is to create a view of what are the Covid-19 checks and in the next chapter I will further analyse how these checks affect the rights of privacy of employee and employer relationship.

⁵⁹ Nick Modersitzki et al (2020), “Who Is Impacted? Personality Predicts Individual Differences in Psychological Consequences of the COVID-19 Pandemic in Germany”
<<https://journals.sagepub.com/doi/full/10.1177/1948550620952576>> accessed September 27, 2022

⁶⁰ Gollwitzer M and others, “Public Acceptance of Covid-19 Lockdown Scenarios - Wiley Online Library”
<<https://onlinelibrary.wiley.com/doi/epdf/10.1002/ijop.12721>> accessed September 27, 2022

⁶¹ “Konferenz Der Bundeskanzlerin Mit Den Regierungschefinnen Und Regierungschefs Der L'ander Am” (October 14, 2020)
<<https://www.bundesregierung.de/resource/blob/974430/1798920/9448da53f1fa442c24c37abc8b0b2048/2020-10-14-beschluss-mpk-data.pdf?download=1>> accessed September 27, 2022

⁶² Kumanan Wilson and Colleen M Flood (2021), “Implementing Digital Passports for SARS-COV-2 Immunization in Canada” (CMAJ April 6, 2021) <<https://www.cmaj.ca/content/193/14/E486>> accessed September 27, 2022

⁶³ Ibid [2].

⁶⁴ Kristin Voigt, Evrard Nahimana, Anat Rosenthal (2021), “Flashing Red Lights: The Global Implications of Covid-19 Vaccination Passports” (BMJ Global Health May 1, 2021) <<https://gh.bmj.com/content/6/5/e006209>> accessed September 27, 2022

CHAPTER 3: LEGAL PERSPECTIVE: GERMANY vs THE NETHERLANDS

3.1. Introduction

This chapter addresses the second and third research sub-questions, namely:

“What are the similarities and differences between Germany and the Netherlands in terms of employers checking their employees’ Covid-19 vaccination status?

How do such various Covid-19 vaccination status checks on employees’ impact privacy rights?”

This chapter outlines an attempt to understand the similarities and contrasts that are behind the adoption of Covid-19 checks in Germany and the Netherlands. This chapter is divided into two sections, each of which focuses on one of the two nations. Each section takes into account the primary attributes of the checking system and the official justification for its adoption. Moreover, this chapter tries to highlight what Germany and the Netherlands created the legal basis for the Covid-19 checks. This chapter concludes with a discussion of the additional goals that have helped to design the checking system, some comparison observations, and a preliminary assessment of similarities and differences.

3.2. Germany

In this part, the German checks are described at both the federal and the lander levels, giving some insight into the German state structure and the division of powers over the federal and lander level. It will be focused on only 3 landers which have more differences than the other landers and the federal level. This aims to illustrate some specific differences between the COVID-19 checks in Germany.

3.2.1. Federal level

The DSK decision was released on March 2021⁶⁵. In fact, the decision specifies that an individual’s immunization history is regarded as medical data, subject to the GDPR’s extra strict protections, and only permitted to be processed under very specific circumstances. A resolution regarding how employers should handle employees’ Covid-19 vaccination status was also

⁶⁵ “Coronavirus: Impfnachweis, Nachweis Negativen Testergebnisses Und Genesungsnachweis in Der Privatwirtschaft Und Im Beschäftigungsverhältnis Gehören Gesetzlich Geregelt!”
<https://www.datenschutzkonferenz-online.de/media/en/20210331_entschliessung_impfdatenverarbeitung.pdf>
accessed October 4, 2022

released by the DSK on October 19, 2021⁶⁶. The DSK specifically emphasized that, even in the case of the Covid-19 pandemic, in general, businesses are prohibited from processing their employees' immunization records unless they have explicit consent. However, the DSK did observe that in specific circumstances, handling an employee's vaccine status may be allowed in accordance with legislative rules. For example, specific health businesses can collect their workers' immunization records in accordance with the sections 23 and 23(3) of the Federal Infection Protection Act's legal obligations (the "IfSG")⁶⁷. The DSK further mentioned that, within the terms outlined in Section 36(3) of the IfSG, some businesses that provide day-care centres might check their employees' Corona immunization records.

Furthermore, the DSK stated that given one of the requirements for a complaint, if there was an option of immunization, businesses could assess the immunization records of that person who raises a complaint for financial compensation on their behalf in accordance with IfSG. The DSK also pointed out that companies may handle employee vaccination records if required to do so by laws to fight the Coronavirus pandemic based on the IfSG. The DSK noted it was because of the connection of dominance and subordination that exists between bosses and their staff. The DSK stated that for the handling of a worker's immunization record based on authorization to be possible and lawful, consent must be voluntarily provided. The DSK also noted that processing related to vaccination status must adhere to other GDPR principles, including data minimization, storage limitation, the right to erasure, and accountability. On August 18, 2021, the Federal Commissioner for Data Protection and Freedom of Information (the "BfDI") issued a statement about the use of Covid-19 testing and vaccination records in business relationships⁶⁸. According to the BfDI, the situation legally is as follows:

- Except in a few exceptional circumstances, such as the health industry, employers are not permitted to process an employee's vaccination status or impose or enforce any form of testing requirement.

⁶⁶ "Verarbeitungen Des Datums „Impfstatus‘Von Beschäftigten Durch Die Arbeitgeberin Oder Den Arbeitgeber" (October 19, 2021) <https://www.datenschutzkonferenz-online.de/media/dskb/20211025_DSK_Beschluss_Impfstatus_von_Besch%C3%A4ftigten.pdf> accessed November 10, 2022

⁶⁷ "Protection against Infection Act (Infektionsschutzgesetz, IfSG)" <<https://www.gesetze-im-internet.de/ifsg/IfSG.pdf>> accessed November 10, 2022

⁶⁸ "Der Bfdi - Stellungnahme Zu Impfstatus Und Testungen Im Dienst- Oder Arbeitsverhältnis" (BfDI) <https://www.bfdi.bund.de/SharedDocs/Downloads/DE/DokumenteBfDI/Stellungnahmen/2021/StgN_Impfstatus-Abfrage-Arbeitgeber.html> accessed October 4, 2022

- Even if rigorous testing requirements are written into statutory documents to extent of the most recent decisions of the Federal Chancellor, this does not, by itself, give employers a legal justification for handling vaccinations in-house.
- In conjunction with occupational health and safety requirements, Sections 26(1) and (3) (implementing the GDPR) of the Federal Data Protection Act are not applicable⁶⁹. Due to the fact that the SARS-CoV-2 Occupational Health and Safety Ordinance explicitly states whatever is needed to operate prevention towards viruses in the context of the Corona crisis. As a result, the Opinion claims that it gives employers no power or mandate to process employees' immunization records or subject them to any kind of testing.

3.2.2. Hamburg

The Hamburg Commissioner for Data Protection and Freedom of Information (the “HmbBfDI”) released its most recent Covid-19 Employment Relationship rules in October 2021⁷⁰. In particular, these rules state that Article 9(2)(h) and (i) of the GDPR cannot be used as a legitimate justification for queries concerning an individual’s immunization history. However, the HmbBfDI has utilized its power to promulgate regulations through article 28c of the IfSG and has established a data process control foundation for workers, according to the Updated Corona Guidelines⁷¹. Even though it’s not often necessary for workers to reveal their immunization history, the upgraded Corona guidelines make clear that they do not provide for a legal basis. However, employers may utilize this information about vaccination status when developing the company’s occupational safety ideas, provided they are aware of whose employees have had vaccinations. According to the upgraded Corona guidelines;

- The upgraded Corona guidelines state that greater occupational safety requirements must be followed because it might be considered, in accordance with the law, that personnel

⁶⁹ “German Federal Data Protection Act (BDSG)” <https://www.gesetze-im-internet.de/englisch_bdsg/englisch_bdsg.pdf > accessed June 08, 2023

⁷⁰ HmbBfDI, “Datenschutzinzeitenvoncovid-19” (Datenschutz in Zeiten von Covid- 19) <<https://datenschutz-hamburg.de/pages/corona-faq>> accessed October 4, 2022

⁷¹ “Corona: Aktuelle Verordnung Zur Eindämmung” (hamburg.de) <<https://www.hamburg.de/verordnung/>> accessed October 4, 2022

have not been fully vaccinated or have recovered if there is no information about their vaccination status⁷².

- Additionally, the upgraded Corona guidelines state that, insofar as employers handle employees' immunization status, only a notation regarding the presence of the immunization record and the current immunization prevention would be added to the employee file.
- The upgraded Corona guidelines additionally state that processing the vaccination status is subject to the criterion of data minimization. In this regard, employers are only permitted to keep track of an employee's immunization history for as long as it is required for the fulfilment of their tasks.

3.2.3. Bavaria

Guidelines for the use of individual information by businesses associated with the corona epidemic were published by the Bavarian data protection authority (the "BayLfD") on August 5, 2021⁷³. According to the guidelines, data can be gathered and used for a variety of purposes, such as containing the Corona virus pandemic or protecting employees, even though the handling of medical information is typically permitted in a minimal way. However, the legislative framework and the proportionate criterion should be followed. Additionally, according to the rules, the steps below can be considered legal in accordance with data protection law to control and fight the Corona crisis:

- Collecting and handling of personal information, including health information, from workers by companies to block or limit the disease's transmission through workers as much as possible.
- Collecting and handling of personal information, including health information, from visitors with guests, specifically to ascertain if they are at risk for infection

⁷² "Der Hessische Beauftragte Für Datenschutz Und Informationsfreiheit" (August 2021) <https://datenschutz.hessen.de/sites/datenschutz.hessen.de/files/Handreichung%20-%20Verarbeitung%20des%20Impf-und%20Genesenstatus%20von%20Besch%C3%A4ftigten%20durch%20Arbeitgeber_0.pdf> accessed November 10, 2022

⁷³ "Datenschutzrechtliche Informationen Zur Verarbeitung Von Personenbezogenen Daten Durch Arbeitgeber Und Dienstherren Im Zusammenhang Mit Der Corona-Pandemie" (Bayerisches Staatswappen) <<https://www.datenschutz-bayern.de/corona/arbeitgeber.html>> accessed October 4, 2022

themselves, have come into contact with an infected person, or have stayed in a region designated as a risk area.

- Contrarily, it is only legal to reveal personal information about individuals who have been identified as infected by the corona virus, or who are presumed to be affected by the corona virus, to contact persons to alert them—but only if doing so is absolutely required for these persons to take preventive action.

The guidelines also state that the data must be immediately removed once the processing is no longer needed for its purpose (often at the end of the pandemic).

On September 22 of 2021, the Bavarian Private Sector Data Protection Authority (“BayLDA”) published guidelines regarding employees’ immunization status⁷⁴. The Bavarian Regulations indicate that a company does not inquire their workers about their Corona immunization records in deciding to conduct employee engagement, except in the few circumstances explicitly authorized by law, including in the context of healthcare.

3.2.4. Baden/Württemberg

In October 2021, the Baden-Württemberg authorities declared that they had published a position paper on continuing to pay wages in the event of quarantine⁷⁵. In accordance with Section 56 of the IfSG, the paper specifies that businesses can ask about the employees’ immunization records while giving compensation. The employee is not required to inform the employer of their immunization history or any medical information, for instance, the information about being pregnant or ill. The guideline also states that while the employer’s processing authority is covered, the data subject’s obligation to submit information is not⁷⁶. Considering this, if an employer legally receives such information regarding vaccination status, the business owner is permitted to utilize it and disclose it to the authorities. Moreover, according to the guideline, a responsibility to share information cannot be justified by an employee’s employment agreement with their company. Even though there is undoubtedly an additional liability on the

⁷⁴ BayLDA (Erfragen des impfstatus bei beschäftigten) <https://www.lida.bayern.de/de/thema_impfstatus.html>accessed October 4, 2022

⁷⁵ (Lohnfortzahlung, Corona und Datenschutz September 30, 2021) <https://www.baden-wuerttemberg.datenschutz.de/wp-content/uploads/2021/10/Positionspapier_Lohnfortzahlung_Rechtslage.pdf> accessed October 5, 2022

⁷⁶ Ibid 75.

part of employees to assist the employers in bringing compensation claims towards the authority within the bounds of what is fair, and this might also involve providing the employee's individual Covid-19 status information. But most definitely not when it comes to the disclosure of the special categories of data as per Section 9 of the GDPR.

Additionally, the LfDI Baden-Württemberg released a statement on October 15, 2021, stating that it had not made any comments regarding the prospect of individual employees disclosing their vaccination status to their employer⁷⁷. According to the LfDI Baden-Württemberg, everyone has right to share their vaccination status. This applies also to the employer, and that is relevant to the employment relationship. Because it's crucial to prevent undue pressure to make this choice, employers are typically not authorized to request the health information of their employees.

3.3. The Netherlands

According to art. 8 of the ECHR, the corona vaccine is optional for anyone in the Netherlands. Both testing and vaccination cannot be made mandatory for employees, according to the government's guidance to employers⁷⁸. In addition, an employer is not authorized to collect their employees' health information and, as a result, an employer is not authorized to inquire about the medical situation of their workforce, according to the issued guidelines of the Dutch data protection authority⁷⁹. However, the guideline states that an employer is allowed to inquire about employees' vaccination status if there is a "legitimate basis" for doing so, such as if an individual interacts with people who are in a risk group. The guideline states that companies are not allowed to conduct tests on their staff; alternatively, the examination may be carried out by a company healthcare professional, who will only provide the information to the employee. The guidance emphasizes the necessity for businesses to create a plan for handling workers who are not vaccinated or who refuse to provide proof of the same in terms of corporate policies.

⁷⁷ "Lockerung Der Maskenpflicht Für Beschäftigte Scheitert Nicht Am Datenschutz" (Der Landesbeauftragte für den Datenschutz und die Informationsfreiheit Baden-Württemberg October 15, 2021) <<https://www.baden-wuerttemberg.datenschutz.de/lockerung-der-maskenpflicht-fuer-beschaefigte-scheitert-nicht-am-datenschutz/>> accessed October 5, 2022

⁷⁸ "Employers and Corona" (business.gov.nl) <<https://business.gov.nl/corona/situations/employers-and-corona/>> accessed October 5, 2022

⁷⁹ "Corona Op De Werkvloer" (Autoriteit Persoonsgegevens) <<https://autoriteitpersoonsgegevens.nl/nl/onderwerpen/corona/corona-op-de-werkvloer>> accessed October 5, 2022

Additionally, privacy issues like data storage are covered in the Government's Q&A on vaccines in the workplace, which specifically states that companies are not permitted to monitor their staff members' immunization history⁸⁰. Additionally, the Q&A mentions that because medical information falls under a particular type of personal information under the GDPR, processing it without a legal exception is prohibited. The guidelines further provide that if it is considered necessary, employers that are in charge of providing workers with a safe workplace might urge people who actually exhibit Corona signs to work remotely and shut down the offices completely. However, the guidance makes clear that employers cannot insist that their employees take unpaid time off. The guidelines state that customization of a job is possible with choices like remote work or an altered time frame if the business is aware that an employed person has not received the required vaccinations or if the individual does not wish to disclose this for whatever reason. The employee must agree to the alternative if it is practical, and the employer makes a convincing argument for it. According to the instructions, if an employee rejects such arrangements and an agreement cannot be made on how the work will be performed in order to safeguard against Covid-19, the company and the employee may choose to pursue a lawsuit. Finally, employers are prohibited from requiring vaccinations of their workers in the Netherlands⁸¹. Employers are not permitted by privacy rules (GDPR) to keep track of an employee's vaccination status. This rule also applies if an employee willingly discloses to their employer whether they have received vaccinations. Since employers are not permitted to keep track of their workers' vaccination status, this information cannot be utilized to impose penalties for an employee's refusal to receive the vaccination⁸². This information is not supposed to be known to the employer. Employees cannot, therefore, be denied entry to the workplace due to this reason.

⁸⁰ Ministerie van Algemene Zaken, "Mag Een Werkgever Vragen of Een Werknemer Is Gevaccineerd?" (Rijksoverheid.nl November 23, 2021) <<https://www.rijksoverheid.nl/onderwerpen/coronavirus-vaccinatie/vragen-antwoord/mag-ik-een-werknemer-verplichten-zich-te-laten-vaccineren>> accessed October 5, 2022

⁸¹ Ibid 79.

⁸² Soo-Ja Schijf and Laura Poolman (2021) "Can the Employer (Directly or Indirectly) Oblige Employees to Get Vaccinated against the Coronavirus?" (Kennedy Van der Laan) <<https://kvdl.com/en/articles/can-the-employer-oblige-employees-to-get-vaccinated-against-the-coronavirus>> accessed October 7, 2022

3.4. Discussion

3.4.1. Privacy Concerns

There was an urgent need for widespread and quick vaccine development because of the COVID-19 pandemic⁸³. Governments across the world are creating thorough rules for vaccine distribution and monitoring as numerous vaccines have recently been authorized for human use or are in various stages of development. In this thesis, I addressed privacy issues connected to disease-related, personal, societal, economic, and discrimination repercussions.

For example, in Germany, as explained above, ‘DSK’, published a resolution. The resolution specifically stipulates that information regarding a person’s immunization history is regarded as medical information, which is entitled to the GDPR’s extra severe safeguards and can only be handled within specific circumstances. Moreover, it is also noted that in specific circumstances, processing an employee’s vaccination status may be permitted in accordance with statutory rules. For example, vaccine information may be processed by some businesses in the medical industry in accordance with the legal requirements outlined in the Federal Infection Protection Act (or “IfSG”). This shows that Germany is, at least under certain circumstances, allowed to process vaccination status.

In contrast, in the Netherlands, when it comes to a work environment, the guidelines state that there are several options available, including remote work or an altered time frame if the employer is aware that the employee has not received the required vaccinations or if the employee does not want to disclose this information for any reason. The employee will be required to accept that alternative if it is feasible, and the employer makes a convincing argument. According to the guidelines, if an employed person rejects such provisions and the employees and the employer are unable to reach a settlement over how to do the task in order to safeguard against Covid-19, then the matter may be taken to court.

The GDPR is a comprehensive piece of law that establishes the guidelines for the handling of personal data when addressing issues like Covid-19. In fact, the GDPR gives employers the legal justification they need to process personal data during a pandemic. However, contact-tracing technologies and Covid-19 measures are expected to develop without clear direction due to the GDPR's convoluted and ambiguous laws around consent, which could

⁸³ Joseph Bae J and others (2020), “Challenges of Equitable Vaccine Distribution in the COVID-19 Pandemic” (arXiv.org April 27, 2022) <<https://arxiv.org/abs/2012.12263>> accessed November 15, 2022

eventually worsen safeguards of individuals' confidentiality. Individuals and businesses would be advantageous from a definite strategy for contact tracing in the workplace once the Covid-19 crisis is over and work environments start to return to normal⁸⁴. Due to the unequal power between employers and employees, national laws are required to give workers more power to refuse downloading contact-tracing apps or other similar technologies, as well as to establish clear guidelines if these technologies are still in use after the Covid-19 pandemic. Regulations and instructions should stop future harm and employer exploitation of technology once the actual necessity for it to keep workers safe has passed.

3.4.2. Discriminatory Concerns

Although most of these vaccination programs have been presented as providing "benefits" to individuals who have received the entire Covid-19 immunization series, a considerable segment of the population sees this practice as inherently coercive, discriminatory, and punishing⁸⁵. Non-vaccinated but already infected individuals might commonly be at lower risk of getting the virus than people who have received two vaccinations but are infection-naive, undermining many rights of healthy individuals⁸⁶. Vaccine passports run the risk of codifying discriminatory practices against healthy people's rights depending on their anticipated medical status⁸⁷.

Even when employees have the option of working remotely, employer-imposed regulations that do not make reasonable accommodations—such as those requiring testing, relocation, or reassignment of duties—or that demand vaccination after a prior infection may

⁸⁴ Marta Otto (2022). 'Protection of Employee Privacy in the Digital Workplace': Arguments and Comments Presented during the Defence of Seili Suder's Doctoral Thesis. *Juridica International*, 31, pp.66-67. <https://doi.org/10.12697/JI.2022.31.11>

⁸⁵ Christina Marie Juen, Michael Jankowski, Robert A Huber, Torren Frank, Leena Maaß, Markus Tepe (2021). Who wants COVID-19 vaccination to be compulsory? The impact of party cues, left-right ideology, and populism. *Politics*, 0(0). <<https://doi.org/10.1177/02633957211061999>>

⁸⁶ Sivan Gazit, et al (2022) Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) Naturally Acquired Immunity versus Vaccine-induced Immunity, Reinfections versus Breakthrough Infections: A Retrospective Cohort Study, *Clinical Infectious Diseases*, Volume 75, Issue 1, 1 July 2022, Pages e545–e551, <<https://doi.org/10.1093/cid/ciac262>>

⁸⁷ "Human Rights Considerations for Vaccine Passports and Certificates" (The Australian Human Rights Commission) <<https://humanrights.gov.au/our-work/rights-and-freedoms/human-rights-considerations-vaccine-passports-and-certificates>> accessed November 10, 2022

nonetheless be considered an excessive imposition of a health intervention⁸⁸. The capacity to request religious, medical, or philosophical exemptions has also been restricted in many nations, leaving it vulnerable to arbitrary rulings and political intervention⁸⁹. The expulsion of Novak Djokovic, a male tennis player, at one of the biggest tennis championships, although he had given a medical waiver due to a previously identified infection—may be the most well-known case to date⁹⁰. The Ministry of Migration acknowledged that his laboratory results were accurate and that he presented only an "extremely minimal" danger to Australian citizens' safety, despite media outlets' early suggestions that there were issues with his formal submission⁹¹. However, the court agreed with the Minister's assessment that the participation of Novak Djokovic might promote an "anti-vaccine mentality" and harm immunization and renewal shots⁹². The case highlights concern about passports and vaccine mandates in Germany, as the use of these tools for an excessive policy undermines standard civil freedoms and procedures.

⁸⁸ Prof Alan Bogg, Prof Nicola Countouris "Mandatory Vaccinations in the Workplace: Constitutionalising the Managerial Prerogative" (Lex June 1, 2021) <<https://lexatlas-c19.org/mandatory-vaccinations-in-the-workplace-constitutionalising-the-managerial-prerogative/>> accessed October 7, 2022

⁸⁹ Tom Hals (2021), "Maine Can Bar Religious Exemptions to Covid-19 Vaccine Mandate, Judge Rules" (Reuters October 13, 2021) <<https://www.reuters.com/world/us/maine-can-bar-religious-exemptions-covid-vaccine-mandate-judge-rules-2021-10-13/>> accessed October 7, 2022

⁹⁰ Chip Le Grand (2022), "Australia Declares Djokovic a Risk to Civil Order and Public Health" (The Age January 14, 2022) <<https://www.theage.com.au/sport/australia-declares-djokovic-a-risk-to-civil-order-and-public-health-20220114-p59oex.html>> accessed October 7, 2022

⁹¹ Djokovic v Minister for Immigration, Federal Court of Australia [54]

⁹² Ibid.

CHAPTER 4: LEGAL COMPATIBILITY

4.1. Introduction

This chapter addresses the fourth research sub-question, namely:

“Are the Covid-19 vaccination status checking practices lawful under German and Dutch law, the GDPR, and article 8 of the ECHR?”

The chapter aims to show if the Covid-19 checks/mandates are permitted by German and Dutch law, the GDPR, and article 8 of the ECHR. This chapter ends with an analysis of whether German or Dutch law provides a legal basis in employment relations.

4.2. GDPR

The General Data Protection Regulation (GDPR) is intended to safeguard the privacy and data protection rights and freedoms of the people of the European Union (EU) and the protection of natural persons with regard to the processing of personal data and on the free movement of such data. All parties processing personal data of EU individuals are required to adhere to the GDPR⁹³. This section will focus on the German and Dutch situation regarding corona status checks by employers and how to comply with the GPDR. All the requirements of the GDPR need to be complied with, but the most important question concerns the GDPR requiring a legal basis. One of the bases mentioned in art. 6 of the GDPR is consent of the data subject. However, in case of an employer-employee situation this may not be a valid legal basis. Because there is a power relationship between the employer and employee, this is an issue to indicate the legal basis and the fact that there is a processing of sensitive data. These two issues combine and create a difficult situation to see the relevant legal basis as a starting point. Consent defined in the GDPR as: “any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.” In this case the given freely consent by the employee might be an issue in an employer-employee relationship. Article 9 of the GDPR offers even less possibilities and consent often being the only possibility, the next sections I will address these issues further.

⁹³ AKM Bahalul Haque and others (2021) “Towards a GDPR-Compliant Blockchain-Based COVID Vaccination Passport” (MDPI July 1, 2021) <<https://www.mdpi.com/2076-3417/11/13/6132/htm>> accessed November 2, 2022

4.2.1. Personal Data

In article 4(1) of the GDPR, personal data is defined as “The data subjects are identifiable if they can be directly or indirectly identified, especially by reference to an identifier such as a name, an identification number, location data... of these natural persons...” So, any information that can be used to identify or contact a living person is considered personal data. Personal data also refers to many pieces of information that, when put together, can identify a specific person.

4.2.2. Legitimate Processing Ground of Personal Data under Article 6 GDPR

In this section I will not focus on the entire GDPR but just only the legal basis. Because the GDPR provides for exceptions to the prohibition on the processing of specific special categories of personal data, such as health data, in cases where it is required for reasons of substantial public interest in the area of public health, on the basis of Union or national law, or where it is necessary to protect the vital interests of the data subject, as recital 46 expressly mentions the control of an epidemic⁹⁴.

Data processing is only allowed if compliant with the GDPR, meaning adhering to the foundational principles and having a legal processing ground and more strict rules for health data as a starting point for the debate on covid-status checks. The GDPR is a comprehensive piece of law with strict rules that must be obeyed that also apply to the handling of personal data in situations like the one involving Covid-19. In accordance with national legislation and subject to its restrictions, the GDPR permits competent public health agencies and employers to process personal data in the event of an epidemic. In this case, the GDPR permits the processing of personal data on several provisions. Article 6(1)(d) permits the processing of personal data when it is necessary for the protection of the vital interests of the data subject or of another natural person. This provision could apply in the context of an epidemic, such as Covid-19 pandemic, as processing personal data about vaccination could be necessary to protect public health. Article 9(2)(i) of the GDPR also permits the processing of health data if it is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of healthcare. In addition, Article 9(2)(j) of the GDPR permits the processing of personal data for reasons of public interest in the

⁹⁴ Nicholas Vollmer, “Recital 46 EU General Data Protection Regulation (EU-GDPR)” (Recital 46 EU General Data Protection Regulation (EU-GDPR). Privacy/Privazny according to plan August 22, 2022) <<https://www.privacy-regulation.eu/en/recital-46-GDPR.htm>> accessed November 2, 2022

area of public health, such as monitoring and preventing the spread of infectious diseases. For instance, processing may be required when it is in the public's best interest or pertains to public health. The EDPB claims that articles 6 and 9 of the GDPR allow for processing personal data, including special categories of data, by competent public authorities (such as public health authorities)⁹⁵. In the context of employment, the processing of personal data may be required to meet an employer's legal duties, such as those pertaining to workplace health and safety, or to further a legitimate public purpose, such as the prevention of illness and other health concerns.

4.2.3. Sensitive Data

In article 9(1) of the GDPR, sensitive personal data is defined as the “Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation shall be prohibited.” When we consider Covid-19 covid checks, this is considered as sensitive data.

4.2.4. Legitimate Processing Ground of Special Categories of Personal Data under GDPR 9

Employers must also be able to meet one of the requirements of Article 9 GDPR when processing special categories of personal data, such as information about an employee's health⁹⁶. Most processing procedures involving employee data in the workplace are unlikely to have consent as an acceptable legal basis. When an employee has no real choice because, for instance, his or her personal data will be processed in connection with a measure implemented to comply with a legal obligation or for public health reasons, consent is not an appropriate legal basis for the processing in question because the employee is not able to refuse it⁹⁷.

To fulfil their general commitment to guarantee a safe workplace and reduce the danger of exposure to Covid-19, employers may choose to ask their staff about their vaccination status.

⁹⁵ “Statement by the EDPB Chair on the Processing of Personal Data in the Context of the COVID-19 Outbreak” (Statement by the EDPB Chair on the processing of personal data in the context of the COVID-19 outbreak | European Data Protection Board March 16, 2020) <https://edpb.europa.eu/news/news/2020/statement-edpb-chair-processing-personal-data-context-covid-19-outbreak_en> accessed February 12, 2023

⁹⁶ Ibid [38]

⁹⁷ Nicholas Vollmer, “Recital 43 EU General Data Protection Regulation (EU-GDPR)” (Recital 43 EU General Data Protection Regulation (EU-GDPR). Privacy/Privazy according to plan August 22, 2022) <<https://www.privacy-regulation.eu/en/recital-43-GDPR.htm>> accessed June 8, 2023

Given that employees' vaccination status falls under a particular category of personal data that concerns individuals' health (Art. 9(1)), this presents privacy concerns. Due to the sensitive and personal nature of the data, this category is subject to stricter data protection regulations and can only be handled in very specific situations (Art. 9(2)). Potential exceptions to the GDPR's Article 9 restriction on processing specific categories of personal data for the processing of vaccination data include permission and the requirement for the safety of professions. An employer may be able to rely on Article 9(2)(b) GDPR to support the processing of special category data where the execution of a measure needs it, but only if the processing is required to fulfil the employer's duties in the area of employment. Article 9(2)(b) of the GDPR states that: “processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorised by Union or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject.” Employers should keep in mind that any processing of personal data should be limited to that which is required to achieve the objective being pursued when determining whether Article 6(1)(b) and/or Article 9(2)(b) might provide a suitable legal basis for the processing of personal data in a health and safety context.

In this case, in the German and Dutch situation, most of the processing in an employer-employee relationship cannot be based on consent because the GDPR requires consent to be freely given. But Article 6(1)(d) and Article 9(2)(i) of the GDPR allow the processing of personal data, including health data, when it is deemed both necessary and proportionate and after suitable safeguards have been put in place and employers are acting under the direction of public health authorities or other relevant authorities to protect against Covid-19. Access to the data may be restricted, time limitations for deletion may be enforced, and other precautions, such as proper staff training to protect employees' data protection rights, may be used⁹⁸.

4.3. ECHR

Article 8 of the Convention states that – Right to respect for private and family life;

⁹⁸ “Data Protection Implications of the Return to Work Safely Protocol”
<<https://www.dataprotection.ie/sites/default/files/uploads/2020-07/Data%20Protection%20implications%20of%20the%20Return%20to%20Work%20Safely%20Protocol.pdf>>
accessed November 2, 2022

“1. Everyone has the right to respect for his private and family life, his home, and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary for a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

In this section, even though there is a legal ground under the GDPR that makes the data processing activities work for Covid-19 checks, there is still an issue with privacy. Because it should be questioned whether there is a violation of privacy and if it can be justified. This section will further discuss and answer these questions with the criteria of necessity in a democratic society and foreseeability by law. I will discuss further whether the mandatory Covid-19 vaccinations or checks are compatible with Article 8 of the ECHR and if the vaccination requirements for Covid-19 are in line with the ECtHR's "evolutive interpretation" of the ECHR.

4.3.1. Necessary in a Democratic Society

According to the Court, the word "necessary" falls somewhere between "indispensable" and words like "admissible," "ordinary," "helpful," "reasonable," or "desirable," and it is obvious that mere practicality is insufficient⁹⁹. A "pressing social need" pertaining to one or more of the legitimate goals must be used to support the intervention¹⁰⁰. The case's specific facts and the target nation's current conditions must be considered when deciding whether such a necessity exists¹⁰¹. Additionally, the state's decision must be supported by "an appropriate assessment of the relevant facts"¹⁰².

As the Covid-19 pandemic swept through all factors of civilization and shocked the planet. The way we used to ‘normally approach’ life and situations that came up in daily life changed. To address the massive public health crisis, new norms, perspectives, and regulations evolved. These developments had an impact on recognized freedoms and rights protected by the

⁹⁹ “The Exceptions to Articles 8-11 of the European Convention on Human Rights” <[https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15\(1997\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf)> accessed November 28, 2022

¹⁰⁰ See the case of *OBSERVER AND GUARDIAN v. UK* (Application no 13585/88)

¹⁰¹ See the case of *LINGENS v. AUSTRIA* (Application no 9815/82)

¹⁰² See the case of *OBERSCHLICK v. AUSTRIA* (Application no 11662/85)

ECHR. The limitations we are committed to in reaction to the Corona threat involve several ECHR-protected rights, despite the evident necessity for extraordinary actions during the pandemic. Even in times of emergency, people have a right to protection of their fundamental rights.

Mandates and checks for the Covid-19 vaccination to protect against Covid-19 appear to be consistent with the ECHR's text and its interpretation. Regarding the Convention's plain language, everyone has the right to respect their personal and familial relationships, homes, and communication, according to Art. 8 of the ECHR¹⁰³. In addition, Art. 8 specifically identifies two circumstances in which public agencies may inhibit "the exercise of the right," including a procedural circumstance and two substantive circumstances. First, only restrictions "in accordance with the law" may be made on the right to "respect for private and family life". Second, the conflict with Art. 8, must be justified by a legitimate interest. The third requirement is that the intervention has to be "necessary in a democratic society." Because there isn't any case law in Germany and the Netherlands yet, the analysis will focus on France and Greece. These are also member states of the EU, and thus the decisions will affect Germany and the Netherlands too. In Germany and the Netherlands there so far have not been cases regarding privacy and Corona status checks. However, both in France and Greece such cases were presented before the courts. As these countries are bound by the same EU laws as Germany and the Netherlands, the outcome of these cases is relevant to analyse in this thesis.

The ECtHR has already dismissed three claims for temporary restraining orders against France's and Greece's Covid-19 mandatory immunization regulations. The EctHR received a complaint from 672 French firefighters in August 2021, opposing the Covid-19 vaccine obligation¹⁰⁴. In Greece, 30 Greek healthcare professionals filed two very similar cases with the EctHR on September 2, 2021, contesting the legality of the Greek government's decision to require their mandatory immunization against Covid-19¹⁰⁵. The Court denied these applications, claiming that they did not fall under its guidelines for interim injunctions. The Court noted that it

¹⁰³ "Article 8 ECHR - Right to Private Life, Family Life, Correspondence and Home" (Hembach Legal March 27, 2018) <<https://human-rights-law.eu/echr/article-8-echr-right-to-private-life-family-life-correspondence-and-home/>> accessed November 4, 2022

¹⁰⁴ See the case of 672 French firefighters v France (2022), "European Court of Human Rights" <<https://hudoc.echr.coe.int/eng-press#%20>> accessed November 7, 2022

¹⁰⁵ See the case of 30 Greek healthcare professionals v Greece (2022), "European Court of Human Rights" <[https://hudoc.echr.coe.int/eng-press#{%22sort%22:\[%22kpdate%20Descending%22\],%22itemid%22:\[%22003-7113391-9633858%22\]}](https://hudoc.echr.coe.int/eng-press#{%22sort%22:[%22kpdate%20Descending%22],%22itemid%22:[%22003-7113391-9633858%22]}>)> accessed November 7, 2022

allows such petitions on an “extraordinary basis” where “the applicants would otherwise face a serious risk of permanent injury.”¹⁰⁶ This keeps the possibility open for the Court to approve similar motions to suspend vaccine requirements in cases where petitioners can show that they would suffer such harm.

4.3.2. Foreseeability by Law

When it comes to the foreseeability element, the phrase “in accordance with the law” implies, among other things, that national legislation must be adequately foreseeable in its aspects to give people an appropriate clue as to the circumstances and conditions under which the officials are obligated to use metrics that impact their rights under the Convention¹⁰⁷. Foreseeability needs to be absolute¹⁰⁸. An individual must have been able to reasonably anticipate that they would be protected by the law, at the very least with the assistance of legal professionals¹⁰⁹. In this situation, absolute certainty cannot be anticipated. It should be emphasized that the person’s line of work may also be considered because it indicates whether they can anticipate the legal repercussions of their decisions¹¹⁰. The Court might be confronted with a circumstance where there are differences in the case-law of various courts with the same level of jurisdiction when determining whether the applicable law could be considered as foreseeable in its outcomes and as allowing the person to start regulating his conduct in his case¹¹¹.

Any steps taken to ensure workplace safety must be essential and reasonable, and they must not be less intrusive than other options to achieve the same goal. Regarding the original intent of the provision, at the time the ECHR was adopted, vaccine mandates were a well-

¹⁰⁶ Ruaridh Owens (2021) “European Court of Human Rights Rejects Requests to Suspend Mandatory Covid-19 Vaccinations” (Human Rights Pulse November 4, 2021)

<<https://www.humanrightspulse.com/mastercontentblog/european-court-of-human-rights-rejects-requests-to-suspend-mandatory-covid-19-vaccinations>> accessed November 7, 2022

¹⁰⁷ “Guide on Article 8 of the European Convention on Human Rights” (August 31, 2022)

<https://www.echr.coe.int/documents/guide_art_8_eng.pdf> accessed November 28, 2022

¹⁰⁸ See the case of *SLIVENKO v. LATVIA* (Application no. 48321/99)

¹⁰⁹ See the case of *DUBSKÁ AND KREJZOVÁ v. THE CZECH REPUBLIC* (Applications nos. 28859/11 and 28473/12)

¹¹⁰ See the case of *VERSINI-CAMPINCHI AND CRASNIANSKI v. FRANCE* (Application no 49176/11)

¹¹¹ See the case of *KLAUS MÜLLER v. GERMANY* (Application no. 24173/18)

established practice in every Council of Europe (CoE) member state¹¹². It is unclear how one could contend that, given the original intent of Article 8, there would be something in the provision that would make vaccines a human rights violation at this time when there isn't a particular discussion of it. Whether or not vaccine mandates are a violation of Art. 8 depends on the circumstances that need to be checked based on the privacy test, as explained above, foreseen by law and necessary in a democratic society will be the main criteria for this assessment, as it is probably fairly easily in line with one of the interests of art. 8 (2)). In the following section, I will apply this test to the Dutch and German situation regarding Covid-19 checks by employers.

4.4. German Law

A demand for an employee data protection law was released on May 4th, 2022, by the DSK¹¹³. As a reminder, data protection in Germany is divided up by state. Each of the 16 German states has a state data protection authority, and Bavaria has two, one for public data controllers and one for private data controllers. The ruling parties of Germany agreed to form an employee privacy act in their agreement in November 2021, a measure needed to stay in power until 2025¹¹⁴. The DSK refers to this when they call for a specific employee data protection act.

The German Data Protection Conference's (DSK) ruling on the processing of employees' Corona vaccine records by their employers was released by BfDI on October 2021¹¹⁵. The DSK specifically emphasized that under section 4 of the GDPR, an individual's immunization record is to be deemed medical information and is, therefore, a special category of data under Article 9 of the GDPR, handling of personal information is not allowed unless an exemption applies. As a result, the DSK made it clear that absent specific legal consent, companies are typically not permitted to handle the immunization record of their employees. The DSK also suggested in certain circumstances, the collecting of an individual's immunization records might be allowed

¹¹² Ilaria Barberis, Puja Myles, Steven Kenyon Ault, Nicola Bragazzi, Mariano Martini (2016) History and evolution of influenza control through vaccination: from the first monovalent vaccine to universal vaccines. <<https://pubmed.ncbi.nlm.nih.gov/27980374/>>

¹¹³ "Germany: DSK Issues Resolution Calling for Employee Data Protection Law" (DataGuidance May 5, 2022) <<https://www.dataguidance.com/news/germany-dsk-issues-resolution-calling-employee-data>> accessed November 1, 2022

¹¹⁴ Jessica Jacobi Laboris (2022), "German Authorities Have Called for a Data Protection Law for Employees" (SHRM August 15, 2022) <<https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/germany-call-for-data-protection-law.aspx>> accessed November 1, 2022

¹¹⁵ "Data Protection Conference" (BfDI) <https://www.bfdi.bund.de/EN/Fachthemen/Gremienarbeit/Datenschutzkonferenz/datenschutzkonferenz_node.html> accessed November 1, 2022

in accordance with statutory regulations¹¹⁶. For example, the DSK suggested that certain employers in the healthcare industry may process their employees' vaccination statuses in accordance with the legal requirements outlined in Section 23 of the Infection Protection Act. The DSK further emphasized that this is typically not the case because of the connection of dominance and subordination that exists between bosses and their staff; this is often not the reality in the working place. It is also stated that in order for the handling of a worker's immunization records based on authorization to be possible and lawfully efficient, consent must be voluntarily provided¹¹⁷. The DSK further noted that the processing must adhere to additional GDPR principles, including accountability (Article 5(2)), data minimization (Article 5(1)(c)), and storage restriction¹¹⁸.

On April 13, 2022, the DSK issued its ruling regarding how healthcare facilities and businesses should process personal data related to Covid-19¹¹⁹. The DSK specifically mentioned that beginning on March 15, 2022, anyone employed by one of the facilities or businesses listed under Section 20a(1) of the Infection Protection Act of July 20, 2000, as amended (the "IfSG") will need to show documentation of their Covid-19 vaccination, exemption from the requirement, or recovery from the disease. Additionally, the DSK offered instructions on how to process personal data with respect to such a need¹²⁰. The DSK specifically clarified, among other things, that while Section 20a(2) of the IfSG stipulates that management of the pertinent facilities or companies must be presented with proof of immunization, exemption, or recovery, the management frequently delegates such role to other employees, such as those from the human resources department. The DSK explained that while, in theory, this is permissible under data protection law, special care must be taken to ensure that the proof of vaccine records, exemption,

¹¹⁶ "Germany: BfDI Publishes DSK Decision on Processing of Employees' Covid-19 Vaccination Status" (DataGuidance October 26, 2021) <<https://www.dataguidance.com/news/germany-bfdi-publishes-dsk-decision-processing>> accessed November 1, 2022

¹¹⁷ Ibid 90.

¹¹⁸ Vollmer N, "Article 5 EU General Data Protection Regulation (EU-GDPR)" (Article 5 EU General Data Protection Regulation (EU-GDPR). Privacy/Pri vazy according to plan. August 22, 2022) <<https://www.privacy-regulation.eu/en/article-5-principles-relating-to-processing-of-personal-data-GDPR.htm>> accessed November 1, 2022

¹¹⁹ Kristof Van Quathem LL, "German Supervisory Authorities Publish Paper on Scientific Research and Data Protection" (Inside Privacy April 5, 2022) <<https://www.insideprivacy.com/eu-data-protection/german-supervisory-authorities-publish-paper-on-scientific-research-and-data-protection/>> accessed November 1, 2022

¹²⁰ "Beschluss Der Konferenz Der Unabhängigen Datenschutzaufsichtsbehörden Des Bundes Und Der Länder" <https://datenschutzkonferenz-online.de/media/dskb/2022_13_04_beschluss_DSK_20a_IfSG.pdf> accessed November 1, 2022

or recovery is only viewed by the employees designated for this purpose and that they are made aware of their obligation to maintain confidentiality. A contract would need to be made with external third parties in such cases in accordance with Article 28 of the GDPR, according to DSK¹²¹. Alternatively, the management of the facilities or businesses stipulated in Section 20a(1) IfSG may entrust the catalogue of the proof of vaccination, exemption, or recovery to external third parties.

4.5. Dutch Law

The GDPR, along with the Dutch GDPR Execution Act¹²², establishes the legal foundation for the use of personal data¹²³. According to Dutch labour legislation, an employer is accountable for the employee's physical, mental, and emotional health and safety at work (including the environment for working from home), and in this regard, is obligated to provide guidance and implement safety measures¹²⁴. Employers cannot mandate vaccinations for workers in the Netherlands at this time since doing so would violate their right to privacy and/or physical integrity. Additionally, due to privacy concerns, employees cannot be forced to inform their employer that they have had a vaccination. Employers are prohibited by the GDPR from processing employee vaccination information if it is not provided voluntarily¹²⁵. Any processing of health-related data is forbidden by GDPR Article 9(1). This implies, among other things, that your employer is not permitted to inquire about your immunization history or the illness you are currently experiencing. The Dutch Data Protection Authority (DPA) has made it plain that a

¹²¹ “Germany: DSK Publishes Decision on Personal Data Processing Regarding Compulsory Healthcare Sector COVID-19 Vaccine” (DataGuidance April 19, 2022) <<https://www.dataguidance.com/news/germany-dsk-publishes-decision-personal-data-processing>> accessed November 1, 2022

¹²² “The Dutch GDPR Execution Act (Uitvoeringswet Algemene Verordening Gegevensbescherming)” <<https://wetten.overheid.nl/BWBR0040940/2021-07-01>> accessed May 7, 2023

¹²³ “Rights of the Data Subjects” (RIVM) <<https://www.rivm.nl/en/covid-19-vaccination/privacy/rights>> accessed November 1, 2022

¹²⁴ Sutherland E, “Coronavirus - Employment Law Update - The Netherlands” (Coronavirus - Employment law update - the Netherlands - Eversheds Sutherland) <<https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en%2Fcoronavirus%2FCo-VID-19-Netherlands#:~:text=In%20January%202022%2C%20the%20Netherlands,required%20to%20stay%20in%20quarantine.>>> accessed November 1, 2022

¹²⁵ Ministerie van Algemene Zaken, “Mag Een Werkgever Vragen of Een Werknemer Is Gevaccineerd?” (Rijksoverheid.nl November 23, 2021) <<https://www.rijksoverheid.nl/onderwerpen/coronavirus-vaccinatie/vraag-en-antwoord/mag-ik-een-werknemer-verplichten-zich-te-laten-vaccineren>> accessed November 29, 2022

worker cannot be questioned about their corona status or required to get tested for confirmation¹²⁶.

4.6. Analysis of the compatibility of the German and Dutch practice

This analysis is limited to identifying whether German or Dutch law provides a legal basis according to the GDPR and ECHR for mandatory Covid-19 status checks in employment relations. This study shows that Germany and the Netherlands have had to deal with the question of the legality of the stringent Covid-19 checks taken to combat the pandemic. Most of the issues are connected to constitutional protections limiting the executive's regulatory discretion.

Potential exceptions for Germany and the Netherlands to the GDPR's Article 9 restriction on processing specific categories of personal data for processing vaccination data include permission and the requirement for the safety of professions. There are certain employment settings where an employer may lawfully process vaccination data based on need, according to various nations, including Germany. For instance, immunizations may be regarded as a crucial safety precaution for personnel working in hospitals, clinics, emergency rooms, or any other front-line healthcare facility¹²⁷.

4.6.1. Germany

As mentioned in the third chapter; as part of the Covid-19 pandemic response, section 23a and 36(3) of the German Infection Protection Act (IfSG) were introduced in April 2021¹²⁸. The sections outline the legal basis for national limitations and regulations in relation to the pandemic to be issued by the federal government. In this regard, employers in Germany may decide to inquire about their employees' vaccination status in order to uphold their general obligation to ensure a safe workplace and lessen the risk of Covid-19 exposure.

From the GDPR perspective, employees' vaccination status falls under a specific class of personal data that pertains to people's health (Article 9(1)), which raises privacy issues. This kind of data is subject to tougher data protection laws and can only be processed in very restricted circumstances due to the sensitive and personal nature of the data (Article 9(2)). Because of the

¹²⁶ Wigman R, "Corona Vaccinations and the GDPR" (Versteeg Wigman Sprey October 25, 2021) <<https://www.vwsadvocaten.nl/en/corona-privacy/>> accessed November 1, 2022

¹²⁷ Dan Cooper and others (2021), "Covid-19: Processing of Vaccination Data by Employers in Europe" (Inside Privacy July 19, 2021) <<https://www.insideprivacy.com/covid-19/covid-19-processing-of-vaccination-data-by-employers/>> accessed November 2, 2022

¹²⁸ Ibid [67]

unbalanced relationship between the employer and the employee, consent will not be the best choice to use as a legal ground. Therefore, The GDPR's Article 9(2)(i) permits the handling of personal information, which includes health information, when it is deemed both necessary and proportionate after adequate safeguards have been put in place and when employers are acting as directed by public health authorities or other pertinent authorities to ward off Covid-19 in Germany.

On the other hand, from the ECHR perspective, the elements of Art. 8 of the ECHR should be discussed. Foreseeability is the first criterion that the Court lays out in the context of 'quality of the law'. First of all, access to the law must be sufficient. Secondly, a norm must be formulated precisely enough to allow the subject to control his behaviour. This condition means that a person must be able to anticipate the effects of a given conduct to the extent that it is reasonable in the specific circumstances, whether alone or with adequate advice¹²⁹. According to the Court, "the quality of law" in this sense entails that domestic law must be understandable and foreseeable and also ensure that Covid-19 checks are used when "necessary in a democratic society," in particular by establishing sufficient and effective safeguards¹³⁰.

In this case the intervention must be permitted by a rule recognized by the national legal system, but there is also a qualitative need for the law to be accessible and foreseeable¹³¹. Foreseeability by law needs to be absolute and transparent. A person must have known or reasonably should have known that they would be regarded to be protected by the law, at the very least, with the aid of a legal representative. Foreseeability is also aimed at persons knowing that their right to privacy may be infringed, so e.g. there needs to be a clear legal basis on which law enforcement may carry out certain competencies that invade privacy. In our case, the German citizens must be able to know that there may be a mandatory vaccine status check by employers and under which circumstances they may be mandated the Covid-19 checks.

Germany's Covid-19 status checks, in order to be in compliance with article 8 of the ECHR, any interference with an individual's right to privacy must be in accordance with law, have a legitimate aim and be necessary in a democratic society. This means that the checks must

¹²⁹ See the case of *THE SUNDAY TIMES v. UK* (Application no 6538/74) (ECtHR, 26 April 1979) paragraphs 47–49;

¹³⁰ *Ibid* 128.

¹³¹ Regina Valutytė, Danute Jočienė, Rima Ažubalytė (2021) "Legality of Human Rights Restrictions During the COVID-19 Pandemic Under the European Convention on Human Rights" (*Tilburg Law Review* December 1, 2021) <<https://doaj.org/article/9bb402c55fe6453eafa81a074d2b2b91>> accessed November 29, 2022

be proportionate, and the infringement of privacy rights must be justified by a compelling public interest.

Foreseeability test (quality of law): As it mentioned in the third chapter, Germany created the legal basis for the Covid-19 checks with section 23a and 36(3) of the German Infection Protection Act. The section 23a of the act states that: “ *In so far, as it is necessary to fulfil obligations under Section 23 Paragraph 3 in relation to communicable diseases, the employer may process an employee's personal data about his vaccination and serostatus in order to decide on the establishment of an employment relationship or on the type of employment.... The provisions of general data protection law remain unaffected.*” Additionally, section 36(3) of the act clarifies that: “*To the extent necessary to prevent the spread of Covid-19, process personal data of an employee regarding their vaccination and serological status in relation to Covid-19 disease in the institutions and companies....in order to decide on the establishment of an employment relationship or the manner of employment. The provision of general data protection law applies in all other respects.*” From the quality of the law perspective, it is important the law should be for the German citizens understandable, and they should be aware that their employers may require the personal data from them to show proof of vaccinations, and they should understand the specific situations in which such a requirement may be mandatory. Understandability and foreseeability of the law must also ensure that the Covid-19 checks are only mandated when it is necessary and when sufficient/effective safeguards for privacy have been put in place.

Necessary in a democratic society test: Besides quality of the law, necessary in a democratic society test should apply in assessing compliance with art. 8 of ECHR. Interferences with ECHR-protected rights can only be tolerated, according to the ECHR, if there is a proportionate relationship between the interference and its legitimate goals, thus, if they are "necessary in a democratic society." By creating criteria like the existence of a "pressing social need" and of "relevant and sufficient" reasons, the Court gave shape to this test¹³². The criteria of a "pressing social need" appears to relate to the significance and weight of the objectives pursued: it is not enough that the interests served by a limitation of a Convention right are "legitimate," they also need to be "pressing." Furthermore, the justifications for implementing a

¹³² Janneke Gerards (2013) “How to improve the necessity test of the European Court of Human Rights”, *International Journal of Constitutional Law*, Volume 11, Issue 2, April 2013, pp 466–490, <<https://doi.org/10.1093/icon/mot004>>

policy will likely not be "relevant and sufficient" if it does not significantly aid in the accomplishment of a particular aim. In our case the checks are properly stipulated, and this does not remain open to the interoperation of the employer, and there is not any other guidance on the type of professions and or other circumstances. Checking of mandatory Covid-19 vaccinations raise questions about access to and exchange of personal data under the right to privacy (Article 8 ECHR)¹³³. Privacy rights are not absolute. If it is mandated by law and required in a democratic society, a proportionate means of meeting an urgent social need, a restriction of rights may be justifiable. The European Court of Human Rights (ECtHR) acknowledged that preventing the spread of an infectious disease is a justifiable goal before the COVID-19 pandemic¹³⁴. Since the general community was compelled to accept a little risk in the form of a vaccination check in order to prevent harm to individuals who could not be immunized, the checks in Germany were thus seen as encapsulating the value of social solidarity¹³⁵.

In my opinion, in the German situation if we read the law, it is understandable for an average German citizen. The lawmaker put there also proper safeguards with mentioning respect to the Data Protection law. The concept of foreseeability is considered to mean that citizens should be able to know whatever activities are or are not prohibited rather than that they should be able to predict how, when, and to whom the executive branch would exercise its powers. And the mandatory checks only in situations for which it is necessary in a democratic society.

4.6.2. The Netherlands

In the Netherlands, employers are not allowed to require employees to check if they received the vaccination against Covid-19, because doing so would be against their right to privacy and/or physical integrity. Due to privacy issues, employees cannot be compelled to disclose their immunization history to their employers. The GDPR forbids employers from processing employee vaccination data if it is not given willingly. Additionally, it has been made

¹³³ See the case of VAVŘIČKA AND OTHERS V. THE CZECH REPUBLIC (Applications nos. 47621/13 and 5 others)

¹³⁴ Joelle Grogan (2022) "Impact of Covid-19 measures on democracy and fundamental rights" (European Parliament November 2022)
<[https://www.europarl.europa.eu/RegData/etudes/STUD/2022/734010/IPOL_STU\(2022\)734010_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/734010/IPOL_STU(2022)734010_EN.pdf)>
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¹³⁵ Maria Diaz Crego and others (2022) "Legal issues surrounding compulsory Covid-19 vaccination" (European Parliament March 2022)
<[https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729309/EPRS_BRI\(2022\)729309_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729309/EPRS_BRI(2022)729309_EN.pdf)> accessed May 13, 2023

clear by the Dutch Data Protection Authority (DPA) that a worker cannot be questioned about corona or forced to undergo testing for confirmation. A corporate doctor may perform Covid-19 tests, however, it is not spelled out. Doctor can only share the data with the employee but not the employer¹³⁶. It seems this is voluntary to share this personal data by the employee with the employer.

¹³⁶ Ibid [79]

CHAPTER 5: Conclusion

This thesis aims to address the following main research question: *'To what extent are the Covid-19 vaccination status checks on employees in Germany and The Netherlands compliant with privacy rights?'*

This thesis discussed several issues with the Covid-19 checks regarding privacy and non-discrimination. The EU legal framework is applicable to Germany and the Netherlands, and in both countries, companies are faced with the question whether they are legally permitted to ask employees about their vaccination status and, if so, how that information may be used. As EU law leaves the member states a certain margin of appreciation and allows national legislation as a basis to conduct such checks, there may be room for employers to inquire about their employees' vaccination status in order to uphold their responsibility to offer a safe workplace and lessen the risk of Covid-19 exposure. As the research has shown, employees' vaccination status must be labelled as health data and thus falls under a specific category of personal data under the GDPR.

As there is no obligation in the Netherlands as a mandatory Covid-19 check we need to be aware of the fact that when an employer relies on consent, consent might not be freely given because the power relationship between the employee and employer is very questionable. On the other hand, with the German situation, there is a legal basis created by Germany with publishing section 23a and 36(3) of the German Infection Protection Act (IfSG) introduced in April 2021, so from the GDPR perspective there is a stronger legal basis than consent. As it is analysed above, the created legal basis by Germany is understandable and foreseeable from a German citizen perspective and the law is necessary in the democratic society. Thus, in Germany, there exists a legal basis of sufficient quality of the law, which has been developed through the testing of the law's quality by the ECHR.

In conclusion, to the extent this thesis has illustrated that, even though both bound by the same EU legal frameworks, EU member states can have very diverging rules on Covid-19 vaccine status checks by employers. This has led Germany to check the Covid-19 vaccination status of employees and the Netherlands to abstain from mandatory checks as Covid-19 status checks by employers carry risks for the rights of employees. These risks are infringement of the rights to privacy and non-discrimination. In Germany this is the case, even though the GDPR allows the processing of sensitive data on a legal basis, this still means on the basis, this still means on the basis of the rights to privacy (art. 8 ECHR) the infringement of privacy Germany's

making must be compliant to the requirements of art. 8. This means in this case mainly a test of quality of law and whether the infringement of privacy is necessary in a democratic society. And in Germany the enacted law offers a solid legal basis, complying with the requirements of quality of law and the requirement of necessary in a democratic society, so the privacy infringement is justified by law. On the other hand, in the Netherlands there is no mandatory Covid-19 checks but if the employers rely on consent, the power imbalance that often exists between employers and employees means that relying on consent as a legal basis may not result in truly voluntary consent. In my opinion, for the Netherlands there is no privacy issue because the Covid-19 checks are not mandatory. The goal of this research is to investigate the Covid-19 checks in the Netherlands and Germany and determine if the infringement of privacy rights justified because there are two completely different ways of to check the personal data of the employees. My conclusion is that Germany has a solid legal basis that covers all the criterions of the “quality by law” and “necessary in a democratic society” tests. And even there is mandatory checks, the German citizens are still able to see the circumstances, and this is by means of a democratic process that society accepted. I believe that German system is preferable because in the Netherlands, in common, the employers relying on the consent may be problematic because of the consent of in employee is questionable due to employer-employee relationship.

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