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Coronavirus (COVID-19) and data protection

Sensitive data processing to protect against a pandemic

Introduction

The coronavirus (hereinafter also referred to as COVID-19 or SARS-CoV-2) is currently making headlines. Due to the rapid spread of the coronavirus (COVID-19), the protection of the population has the highest priority. For this purpose, authorities, companies and research institutes must cooperate with each other and also exchange personal data of data subjects. The question therefore arises as to the extent to which the GDPR and special provisions of data protection law regulate the exchange of such data. This article examines the rights and powers of the data processing authorities and sheds light on them from a data protection perspective.

Lawfulness of the processing of health data

In principle, the processing of special categories of personal data (also known as "sensitive data") is prohibited under Art. 9 para. 1 GDPR. The special categories of personal data are listed exhaustively in Art. 9 para. 1 GDPR. This explicitly includes health data. According to

Art. 9 para. 2 GDPR, these data may only be processed under certain conditions. Art. 4 No. 15 GDPR defines data concerning health as follows:

"'data concerning health' means personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status;"

In principle, data controllers will be able to support the processing of health data to meet their legal obligations with regard to protection against infection and occupational safety. Art. 9 para. 2 letter b GDPR regulates this purpose:

"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;".

In this context, §§ 3 para. 1 and 4 no. 4 German Working Conditions Act (ArbSchG) come into consideration. These stipulate that the employer is obliged to take the necessary occupational health and safety measures, taking into account the circumstances affecting the safety and health of employees at work. He must check the effectiveness of the measures and, if necessary, adapt them to changing circumstances. In doing so, the employer shall strive to improve the safety and health protection of employees.

§ 4 No. 4 of the ArbSchG obliges the employer to start from the general principle that occupational health and safety measures should be based on the planning of measures with the aim of properly linking technology, work organization, other working conditions, social relations and the influence of the environment on the workplace.

These two regulations therefore oblige the employer to keep the working environment and the workplaces of the workers clean and safe in order to prevent adverse health effects. It is logical and understandable that this also implies, at least indirectly, a duty on the part of the employer to detect corona infections of his employees in order to protect the entire workforce. This requires the processing of special categories of personal data.

A legal basis on which this processing can be based would therefore be as follows: Art. 9 Para. 2 lit. b GDPR in conjunction with §§ 3 para. 1 ArbSchG, 4 No. 4 ArbSchG.

Art. 9 para. 2 lit. c GDPR covers the case in which a data subject is unable to give his or her consent for physical or legal reasons. In the case of coronavirus, for example, this could be an

acute and terminal inflammation of the respiratory tract. In these cases, where the data subject is no longer able to give his or her consent to the processing of his or her personal data, the controller is allowed to protect the vital interests of the data subject and to process the personal data.

Another legal basis in the case of coronavirus could be Art. 9 para. 2 lit. i GDPR. According to this, data may be processed if there is a public interest in the area of public health, such as protection against serious cross-border health risks. The coronavirus can be classified as such a cross-border health hazard.

Finally, the opening clause from Art. 9 para. 2 lit. g GDPR could also apply here. This allows the national legislator to process special categories of personal data if this is necessary for reasons of substantial public interest and the processing is proportionate to the objective pursued, preserves the substance of data protection law and provides for appropriate and specific measures to safeguard the fundamental rights and interests of the data subject.

The legislator has made use of this opening clause and created a separate regulation in § 22 of the German Data Protection Act (BDSG). Letters a to d of § 22 para. 1 No. 1 BDSG regulate individual cases of permission, the existence of which, in deviation from Art. 9 para. 1 GDPR, allows health data to be processed by public and non-public bodies. The letters c and d are relevant here:

1. *is necessary for reasons of public interest in the field of public health, such as protection against serious cross-border health threats or to ensure high standards of quality and safety of healthcare, medicinal products and medical devices; in addition to the measures referred to in paragraph 2, professional and criminal law requirements relating in particular to professional secrecy shall be respected; or*
2. *is strictly necessary for reasons of substantial public interest*

In particular, the provision in point (c) applies to the current cross-border threat from coronavirus. It should be emphasized that it provides a legal basis for both public bodies, such as public authorities, and non-public bodies, such as companies and research institutes.

Exclusively for public bodies, § 22 para. 1 No. 2 BDSG with its letters a to c provides for further legal bases that could be applied. Letters b and c could be relevant here in connection with the danger posed by the coronavirus. Due to the general content of the provisions, the fact that § 22 para. 1 No. 1 letter c specifically regulates the present case and the restrictive application of the provisions mentioned in No 2 (a) to (c), a case of application with regard to the processing of data by the coronavirus is hardly conceivable.

Furthermore, the interests of the controller in the processing operation outweigh the interests of the data subject in the cases of No 1 (d) and No 2. Accordingly, a balancing of interests must be carried out. In contrast to the weighing of interests for the application of Art. 6 para. 1 lit. f GDPR, the safeguarding of legitimate interests, the controller does not have to demonstrate that any interests of the data subject do not outweigh the interests of the data subject, but must prove that his or her interests in carrying out the processing outweigh the interests of the data subject.

§ 22 para. 2 of the BDSG stipulates the duty of the controller to provide for specific measures to safeguard the interests of the data subject if a legal basis from para. 1 applies. The provision is aimed at the implementation of technical and organizational measures (TOMs) which guarantee a higher level of data protection with regard to the specific processing. In this context, reference is also made to the parameters of the nature, extent, circumstances, and purposes of the processing as well as the factors of probability of occurrence and severity. A multiplication of the latter factors results in the risk in the product.

Examples of such measures are logging (No 2), awareness raising of data processors (No 3), appointment of a data protection officer (No 4) but also encryption (No 7). The fact that the measures from nos. 1 to 10 are not an exhaustive list is made clear by the fact that the provision makes use of the word "in particular". Accordingly, the controller must take appropriate and reasonable measures, taking into account the circumstances of the individual case.

In the following, the different actors and data processing authorities are examined in more detail and their rights and powers are set out.

Border authorities

The German Federal Police, which is subordinate to the Federal Ministry of the Interior, is responsible, among other things, for monitoring the border police. This includes police surveillance of the borders, police control of cross-border traffic, including the checking of border crossing documents and the authorization to cross the border. In international civil aviation, this also includes checks on entry, which must be carried out with particular care, especially in the case of the coronavirus.

Authorities and public bodies are initially not permitted to use the passport to automatically retrieve personal data, unless federal and state police authorities and services, the tax investigation offices of the federal states and the customs authorities use the passport within

the scope of their duties and powers for the purpose of border control in accordance with § 17 para. 1 sentence 2 no. 1 PassG. According to para. 2, no personal data may be stored in files when the passport is read automatically.

According to the Ministry of Health, in addition to the PNR data, border authorities at airports have been asked to collect information in addition to PNR data as part of the attempt to contain the coronavirus. According to the Ministry of Health, travelers from all over China (including the Hong Kong and Macao Special Administrative Regions) should provide information on their flight and whereabouts on exit cards for the 30 days after landing, as well as a self-declaration of their whereabouts in China, contact persons and health conditions. The airlines issue the exit cards and hand the completed cards to the health authorities for safekeeping.

The following 3 questions belong to the self-disclosure:

- *Question 1: Do you or any of your fellow travelers listed overleaf have any of the symptoms of fever, cough, shortness of breath AND have you had contact with a confirmed case of COVID-19 within the last 14 days?*
- *Question 2: Do you or any of your fellow travelers listed overleaf have any of the following symptoms: fever, cough, shortness of breath AND have you had close, household-like contact with a person from a risk area* within the last 14 days?*
- *Question 3: Have you or any of your fellow travelers listed overleaf experienced any of the symptoms of fever, cough, shortness of breath AND have you been in a risk area* in the last 14 days?*

This information is used by the health authorities and the Robert Koch Institute, the central institution of the Federal Government in the field of disease surveillance and prevention, to inform, research and communicate new information.

Health Authorities

The health of the population is the task of the welfare state. This duty is performed by the state through the health authorities. In Germany, each federal state is responsible for this through its own organizational form. The tasks of a health office, which is the lower health authority, include guaranteeing public health and monitoring the hygienic conditions in the facilities of the city or town. The tasks of the health office also include advice on various health issues and general tasks of an administrative authority.

On the federal side, the Robert Koch Institute is available as a competent contact partner. A coordination office has been set up there, where the current situation is closely monitored. The Robert Koch Institute also coordinates and harmonizes with the health authorities of the German states.

The health authorities have far-reaching powers to contain a pandemic caused by the coronavirus and to combat its consequences, which are basically regulated in the German Infection Protection Act (IfSG). In addition to various orders, e.g. isolation in quarantine (§ 30 IfSG), bans on professional activity (§ 31 IfSG) or a ban on the activity of certain groups of people in community facilities (§§ 33, 34 IfSG), the health authorities may also process personal data.

For example, § 3 of the IfSG regulates the notification of illnesses to the public health department. § 6 IfSG first gives an overview of the illnesses that must be reported. In § 6 para. 1 no. 1 lit. t the novel coronavirus (COVID-19) is explicitly mentioned, thus there is an obligation to report it. The other provisions govern the persons obliged to notify, the scope of the notification and the storage and transmission of the notified information. For example, § 8 regulates who is obliged to report a disease. These include, for example, doctors, alternative practitioners, or members of a medical or nursing profession. A company doctor of a company also belongs to the group of persons who are obliged to report.

§ 9 ff. IfSG standardize the information and personal data that must be submitted together with the report. The processing of personal and health data in the context of such a notification is very extensive. For example, in addition to master data on the sick person, such as name, first name, date of birth and address, specific information on the illness, diagnosis and symptoms, the donor for a blood, organ, tissue or cell donation within the last six months and the vaccination status should also be provided.

The health authority may then process this information for its own purposes or transfer it to third parties, such as other health authorities in Germany and abroad.

Companies

Companies may (even have to) process personal and health data of their employees in connection with the coronavirus. For example, § 42 IfSG regulates a ban on employment for persons who work in the production of food and who are ill with certain diseases or are

suspected of being ill. In order to comply with the requirements of this provision, companies have to check their employees.

This review could be carried out, for example, through the following measures:

- Through self-disclosure and questionnaires
- By measuring the body temperature
- Throat swabs for saliva samples
- Admission controls and surveys on specific occasions (e.g. after business trips)
- Other measures by the company doctor

In principle, companies or employers should be allowed to take any measure that is proportionate and aims to take into account the requirements of the Infection Protection Act on the one hand and the protection of their own company and employees on the other. The data and information available as a result of the measures would have to be passed on to the competent authorities. In addition, the employer may also process data of (other) employees who were in contact with the employee concerned.

Furthermore, §§ 33, 34 IfSG indirectly allow certain employers to process personal data. For example, community bodies - regardless of whether they are organized under private or public law - may carry out checks on their employees in order to comply with the legal requirements. This is because persons employed in such institutions are not allowed to carry out their activities in the event of illness or suspected illness. To ensure this, the management of the Community body or the employer would therefore have to take proportionate measures to process the necessary data.

Research institutes

There is also close cooperation in research. Research on a vaccine is already being coordinated through the "Coalition for Epidemic Preparedness Innovations", CEPI for short.

For the exchange of information and personal data, the data controller in Germany, pursuant to § 27 para 1 of the German Data Protection Act (BDSG), has the possibility, in derogation from Art. 9 para. 1 GDPR, to process sensitive data for scientific or historical research purposes even without consent, provided that this is necessary and the interests of the data controller substantially outweigh the interests of the data subject.

The German legislator has made use of the opening clause in Art. 9 para. 2 lit. j GDPR. For the research and production of a vaccine against the coronavirus using personal data of the patients concerned, the balancing of interests could regularly turn out in favor of the responsible research institutes. Nevertheless, the proportionality of the processing must also be maintained here and, if necessary, higher protective measures must be taken so that the available data and samples (if necessary with pathogens) do not fall into the wrong hands.

Quarantine beats fundamental right

According to § 30 IfSG, an order to stay in quarantine can also be issued to contain the coronavirus. If the person opposes this order, this can also be done compulsorily and under restriction of the basic right of freedom of movement according to Article 11 of the Basic Law (GG), according to § 30 para. 2 IfSG. Article 11 para. 2 GG states in this context that this right may be restricted by law and only in the following cases:

- there is no adequate livelihood and the general public would be particularly burdened
- it is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or a Land,
- to combat the **risk of epidemics**, natural disasters or **particularly serious accidents**
- to protect young people from neglect, or
- in order to prevent criminal offences

In addition to the restriction of the freedom of movement, § 30 para. 3 IfSG also includes a restriction in the integrity of the person (Article 2 para. 1 GG), the freedom of the person (Article 2 para. 2 GG) and the secrecy of letters and mail (Article 10 GG), insofar as this is necessary to contain the infectious disease.

We consult you in all data protection questions and provide an external data protection officer for you. Feel free to contact us!

Kind regards, the NOTOS Xperts Team!