

## **The contact tracing app to be implemented in Germany: The legal ground and the data protection aspects**

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### **1.) A brief overview of the measures related to the outbreak of the Covid-19 that affect the right to protection of personal data**

The legal ground for the measures adopted to combat Coronavirus lies at the Federal Law - Protection against Infectious Diseases Act (Infektionsschutzgesetz (IfSG), last amended on 1 February 2020<sup>1</sup>. According to paragraphs 16 and 17 of this Act, the relevant authorities (federal states-Länder) are authorized to adopt, if necessary, measures which can limit fundamental rights to bodily integrity, liberty, freedom of movement, freedom of assembly, inviolability of the home and property.

As far as are concerned the implications of German measures on the right to protection of personal data, in particular those regarding the contact tracing program, European Union fundamental Rights Agency (FRA) has reported that on the 17 March the German telecommunications company Deutsche Telekom provided, free of charge, the national health monitoring institute the Robert Koch Institute (RKI) with anonymised mass data from its mobile communications network that can be used to map movement streams and to statistically predict the spread of the Coronavirus.<sup>2</sup> The same document alleges Deutsche Telekom's statement that individuals cannot be tracked and that the individuals cannot be identified using the provided data. In addition, FRA asserts that The Federal Commissioner for Data Protection and Freedom of Information, Ulrich Kelber, agreed with the abovementioned statement pointing out that the action in question is in line with data protection law because individual tracking is not possible. However, data protection expert Constance Kurtz has expressed doubts as to the use of the mass data provided by the Deutsche Telekom to the RKI calling into question irreversibility of the anonymisation and asking the transparency on how the data were anonymised and how the Robert Koch Institute protects them against third party access.<sup>3</sup>

The legal act adopted on the 15 April by the Federal Chancellor and the Presidents of Länder - Restriction in the public life to contain the Epidemic COVID19 ( Restrizioni nella vita pubblica per

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<sup>1</sup> European Union Fundamental Rights Agency: Coronavirus Covid 19 outbreak in the European Union, Fundamental rights Implications in Germany, available at: [https://fra.europa.eu/sites/default/files/fra\\_uploads/germany-report-covid-19-april-2020\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/germany-report-covid-19-april-2020_en.pdf)

<sup>2</sup> ibid, p.16

<sup>3</sup> Ibid,p.17

contenere l'epidemia COVID 2019)–<sup>4</sup> includes the norms related to digital contact tracing and other measures to be applied along with it in order to effectively prevent the further spread of the virus. Article 3 provides for that the additional staff will be hired within German health system as to be ensured effective contact tracing. Article 4 addresses the digital use for the contact tracing based on "Pan-European Privacy-Preserving Proximity Tracing". It states that the digital contact tracing has a central role to support a complete and fast contact tracing. Moreover, it provides for that the app for the contact tracing must be applied on a voluntary base. At the moment of the adoption of this Act the contact tracing app was not available. Article 5 ensures a significant number of tests (650.000 per week) that will be available to be implement along with the contact tracing app.

## **2.) Data protection aspects of the contact tracing app updated after 26/04/2020**

On the 26<sup>th</sup> of April, Germany announced that It turned on to decentralized system for the contact tracing instead of previously planned App based on the PEP-PPT architecture.<sup>5</sup> Contrary to the system based on PEP-PPT that would store pseudonymized proximity data on a server controlled by a national authority, such as a healthcare service, the data gathered using decentralized system are stored on devices.

Due to privacy concerns expressed by the privacy experts regarding the possibility for the state authorities of misusing of the data collected by the system based on the PEP-PPT German has decided eventually to apply decentralized system developed through the protocol called DP-3T by the group of academics. In addition, the European Commission has adopted a recommendation with a toolbox of practical measures calling for the adoption of the decentralized system as a tool which would be capable to increase trust in the contact tracing App and consequently to encourage wider adoption of such an App.<sup>6</sup>

According to data regarding German contact tracing program, published on the 9<sup>th</sup> of May<sup>7</sup>, Germany is successfully implementing the measures provided for within the Act -Restriction in the public life to contain the Epidemic COVID19". The data shows that the foreseen target concerning the additional staffs (contact tracers) has been achieved by most of 16 states. As

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<sup>4</sup> Italian translation available at: <https://www.comparativecovidlaw.it/germany/>

<sup>5</sup> Germany pivots to decentralized contact tracing, available at: <https://privacyinternational.org/examples/3718/germany-pivots-decentralised-contact-tracing>

<sup>6</sup> Contact tracing in Europa, le regole: raccomandazione and toolbox della Comissione: available at: <https://www.agendadigitale.eu/sicurezza/privacy/contact-tracing-e-commissione-europea-tutto-sulle-linee-guida-ue-e-il-toolbox/>

<sup>7</sup> Germany has shared the details of its Coronavirus Contact tracing operation. The UK won't, available at: <https://www.buzzfeed.com/albertonardelli/germany-uk-coronavirus-contact-tracing-compared>

far as are concerned the tests as the important measure to be applied along the digital contact tracing, the same Article brings the data obtained by the Robert Koch Institute (RKI) showing that Germany now has the capacity to run 965.000 tests per week. The same source states that the German experts have estimated that about 60% of the population would need to use a contact tracing app for it to be effective.