



Commentary



If Jobless then Jobless? EU Court Refuses to Second-Guess National COVID-19 Vaccination Mandate Contested by Health-Care Worker

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Introduction

During the COVID-19 pandemic, several countries have imposed vaccination as a job-related requirement enforced by sanctions.¹ Some workers have opted for litigation to challenge such policies. Examples include Greek health-care professionals² and French firefighters³ turning to the European Court of Human Rights (ECtHR) seeking the suspension of national vaccination obligations, and US health-care workers seeking to enjoin the enforcement of the State of Maine's vaccination regulation.⁴

This commentary discusses the approach of the Court of Justice of the European Union (CJEU) to disputes concerning compulsory vaccination. The analysis focuses on Case C-765/21, *D.M. v. Azienda Ospedale-Università di Padova*,

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- 1 See for examples, Mária Éva Földes and Csilla Kaposvári, "SARS-CoV-2 Vaccination and Employment: The Legal Framework in the EU and Hungary," *Medicine, Law & Society* 14, no. 2 (2021): 247.
 - 2 Applications no. 43375/21 and no. 43910/21.
 - 3 Application no. 41950/21.
 - 4 US Supreme Court, *Does v. Mills*, 595 U.S. ___ (2021).

a request for preliminary ruling in a dispute revolving around the suspension without pay of a nurse after she refused to get vaccinated against COVID-19. The analysis discusses the CJEU's view on the relevance of EU law for the issue of compulsory vaccination and compares the CJEU's approach with that of the ECtHR. It remarks on the outcomes of litigations challenging vaccination mandates and their relevance for the sphere of labor and employment.

Analysis

The case raised several issues concerning mandatory COVID-19 vaccination. First, the referring court questioned the validity of the conditional marketing authorizations granted for COVID-19 vaccines given that effective COVID-19 treatments had already been approved in several Member States. However, it did not specify how contesting the validity of the authorizations could affect the outcome of D.M.'s case. The CJEU maintained that the outcome depended on the legality of the national rules establishing the vaccination obligation and the related penalties, not on the validity of the conditional authorizations (para. 35). Moreover, granting an authorization did not entail any obligation for the potential recipients to take the vaccine. Although the national court invoked Articles 3 (right to the integrity of the person) and 35 (health care) of the EU Charter, regrettably, it did not clarify their (potential) impact in this context.

Additionally, the referring court asked whether the COVID-19 vaccines approved conditionally could be used for compulsory immunization even if the workers concerned had already acquired natural immunity through previous infection, and whether workers could oppose inoculation in view of the conditionality of the authorization. It also asked whether the penalties for noncompliance were proportionate and in line with Article 41 of the EU Charter (the right to good administration). Given that Article 41 was not addressed to the Member States, the CJEU deemed it irrelevant to this case. Furthermore, the CJEU maintained that Article 168(7) TFEU on public health did not stipulate any requirement for Member States concerning vaccination policies and practices, which fell within national competence. Because the referring court failed to explain the link between the EU rules on conditional authorization and the contested national rules on vaccination, the CJEU deemed the questions inadmissible.

Last, the referring court asked whether Regulation 2021/953 on the EU Digital COVID Certificate, read in conjunction with the proportionality and nondiscrimination principles, precluded national legislation imposing

COVID-19 vaccination. Once again, the national court failed to establish the link between the EU rules and the contested national rules. Reference in broad terms to proportionality and nondiscrimination and to recital 6 of Regulation 2021/953 were deemed by the CJEU insufficient for establishing the required link (paras. 48–49). The CJEU maintained that Regulation 2021/953 did not establish an obligation to be vaccinated (para. 51, referring to recital 36) and it was not intended to assess national vaccination policies. Instead, Regulation 2021/953 aimed to facilitate free movement and implement proportionality and nondiscrimination with that aim (para. 50). Because the CJEU was not convinced about the free movement aspect of the dispute, it ruled that neither Regulation 2021/953 nor the TFEU's free movement provisions were relevant and dismissed the questions referred (paras. 55–60).

It is not for the first time that the CJEU has declined to deliver a preliminary ruling in compulsory vaccination disputes. In *Široká*, the parents of a minor challenged the childhood vaccination duty and related sanctions for noncompliance imposed by the Slovak health authorities.⁵ The Slovak Supreme Court asked whether pursuant to Article 168(1) and 4(c) TFEU, the EU's public health objectives prohibited an individual's refusal to get vaccinated. It also asked whether individuals could rely on Article 35 (health care) of the EU Charter to refuse vaccination, and whether the parental responsibilities under Article 33 (family and professional life) of the Charter, read in conjunction with Article 6(3) TEU, outweighed the public interest to protect health. The national court maintained that immunization of minors, as a measure to prevent infections, had to be dealt with first and foremost in the light of EU law (para. 12). The CJEU disagreed, however, and ruled that it lacked jurisdiction in this case. Article 168 TFEU, it argued, did not impose on the Member States any obligation relating to the immunization of minors that could be used to examine the conformity of national measures with EU law (para. 19).⁶ It also held that the vaccination dispute did not fall within a situation in which EU law was implemented.

The approach of the CJEU can be compared with the one of the ECtHR in similar disputes. Further to the adoption of national laws imposing COVID-19 vaccination duties and penalties for noncompliance, workers in various

5 CJEU, Case C-459/13, *Milica Široká v. Úrad verejného zdravotníctva Slovenskej republiky*, ECLI:EU:C:2014:2120.

6 See also CJEU, Case C-393/08, *Emanuela Sbarigia v. Azienda USL RM/A, Comune di Roma, Assiprofar – Associazione Sindacale Proprietari Farmacia, Ordine dei Farmacisti della Provincia di Roma*, EU: C:2010:388, para. 37; Case C-315/08, *Angelo Grisoli v. Regione Lombardia*, EU:C:2011:618, para. 16.

professions have asked the ECtHR to grant interim measures requiring national governments to disapply those laws. In *Abgrall and 671 others v. France*,⁷ firefighters requested the temporary suspension of a French law⁸ on mandatory COVID-19 vaccination for workers in health care, social care, gendarmerie, and the fire brigade. Noncomplying workers risked suspension from duty and salary stoppage unless a recognized medical impediment existed. The 672 applicants relied on ECHR Articles 2 (the right to life) and 8 (the right to respect for private and family life). One applicant also submitted a separate complaint (*Thevenon v. France*)⁹ but the ECtHR declared it inadmissible for failing to exhaust domestic remedies.¹⁰ Similarly, in *Kakaletri and Others v. Greece*¹¹ and *Theofanopoulou and Others v. Greece*,¹² two groups of health-care workers asked the ECtHR to grant an interim measure for the immediate suspension of a Greek law¹³ establishing COVID-19 vaccination as a condition for exercising the health-care profession. However, the ECtHR dismissed all these applications as falling outside the scope of Rule 39 (interim measures) of the Rules of Court. It argued that requests for interim measures were only granted in exceptional circumstances, where the applicants would otherwise face a “real risk of irreversible harm.” Apparently, the ECtHR considered that these cases entailed no such risk.

Even if such complaints passed the admissibility stage, their success would be doubtful. So far, the ECtHR has emphasized the wide margin of appreciation enjoyed by the states concerning vaccination. In *Solomakhin*,¹⁴ it ruled that although compulsory vaccination constituted an interference with the applicant’s physical integrity, it was nevertheless “justified by the public

7 Application no. 41950/21. See also the press release issued by the ECtHR Registrar, “Requests for interim measures from 672 members of the French fire service concerning the Law on the management of the public health crisis fall outside the scope of Rule 39 of the Rules of Court,” ECHR 243 (2021), 25 August 2021, <https://hudoc.echr.coe.int/eng-press?i=003-7100478-9611768>.

8 Article 12 of Law No. 2021-1040 of 5 August 2021 on the management of the health crisis.

9 Application no. 46061/21. The applicant relied on ECHR Article 8 taken separately and in combination with Article 14 (prohibition of discrimination), and Article 1 of Protocol No. 1 (protection of property).

10 ECtHR Decision, 13 September 2022 [Section v].

11 Application no. 43375/21. See also the press release issued by the ECtHR Registrar, “Refusal of requests for interim measures in respect of the Greek law on compulsory vaccination of health-sector staff against Covid-19,” ECHR 266 (2021), 9 September 2021, <https://hudoc.echr.coe.int/eng-press?i=003-7113391-9633858>.

12 Application no. 43910/21. See also ECtHR Registrar, “Refusal of requests.”

13 Section 206 of Law No. 4820/2021.

14 ECtHR, *Solomakhin v. Ukraine*, Application no. 24429/03, 24 September 2012.

health considerations and necessity to control the spreading of infectious diseases” (para. 36). In *Vavříčka*,¹⁵ the ECtHR found that the Czech authorities had “remained within their wide margin of appreciation” when sanctioning parents’ refusal to vaccinate their children (para. 310). *Vavříčka* indicates that the ECtHR would probably accept the compatibility of a compulsory COVID-19 vaccine mandate with the ECHR unless the measure is clearly disproportionate, such as imposing a blanket obligation without exemptions based on medical contraindication.¹⁶

Conclusions

Workers have repeatedly opted for litigation to oppose mandatory COVID-19 vaccination imposed by national law. In *D.M.*, the national court attempted to obtain the CJEU’s interpretation on EU rules related to vaccination and the possibility of using EU law to assess national vaccination mandates. Although the reference for a preliminary ruling was declared inadmissible, the CJEU clarified several important aspects. Notably, it reiterated that vaccination constituted a national competence. The EU legislation at issue was not intended to assess national vaccination rules, nor did it establish an obligation for individuals to get vaccinated. The *D.M.* case indicates the reluctance of the CJEU to examine the conformity of national vaccination measures with EU law. Alternatively, workers might continue targeting the ECtHR with human rights-based complaints, but the ECtHR’s emphasis on the wide margin of appreciation enjoyed by the states indicates limited chances of success.

15 ECtHR, *Vavříčka and Others v. the Czech Republic*, Application no. 47621/13, 8 April 2021.

16 See also Ignatius Jordan Nugraha, Juncal Montero Regules, and Merel Vrancken, “*Vavříčka and Others v. The Czech Republic*,” *American Journal of International Law*, 116, no. 3 (2022): 579.