



Portuguese supervisor issues guidelines on health data in COVID-19 context

CNPD stresses that body temperature control, diagnosis tests and disease tracing measures in place in the current (partial) lockdown must comply with GDPR.

The Portuguese Data Protection Authority (*Comissão Nacional de Proteção de Dados* – “CNPD”) has recently issued guidelines on the processing of health data following the new (partial) lockdown. CNPD identifies some potential inconsistencies on Decree 8/2020, 8 November 2020, ruling the new lockdown, with the General Data Protection Regulation (GDPR), regarding body temperature control, SARS-CoV-2 diagnosis tests and other measures to strengthen the disease tracing.

Currently, to access workplaces, public transports, public institutions, prisons, etc., body temperature control is allowed only if non-invasive means are used. CNPD clarifies that digital devices controlling the body temperature carry out electronic processing of personal data – body temperature – are subject to GDPR. Although it is forbidden to record body temperature by identifying the person involved, the fact is that such person may be identifiable and hence this processing is not excluded from the application of GDPR.

✉ Contacts

Cláudia Fernandes Martins
cmartins@macedovitorino.com

André Feiteiro
afeiteiro@macedovitorino.com

Débora Dutra
ddutra@macedovitorino.com

Health data is a special category of personal data. To be lawful, the processing of health data must be used in preventive or occupational medicine, to access the working capacity of employees, medical diagnosis by a professional under professional secrecy duty or another person subject to a confidentiality duty.

When stating that the temperature control may be carried out by an employee, the lockdown regulation does not safeguard individuals’ rights, since the employee involved is not subject to a confidentiality duty, says CNPD.

As to the diagnosis tests, CNPD says the test must be carried out by a health professional under professional secrecy. Regarding test results, the privacy of the individuals must also be shielded to avoid stigma and discrimination against who tested positive. It will be crucial to define the procedures following a positive test.

Regarding disease tracing measures, which are reinforced, if the tracing is not carried out by a health professional, CNPD points out the need to bind this person to a specific duty of confidentiality. Otherwise, individuals from whom health data is collected will be treated in a different way, depending on whether the person collecting their data is under a secrecy duty.

The above measures must be implemented in compliance with GDPR, which continues to apply, even if the current situation is exceptional. Otherwise, heavy fines may be applied by the supervisory authority. The only exceptions allowed should be those set out in GDPR.

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