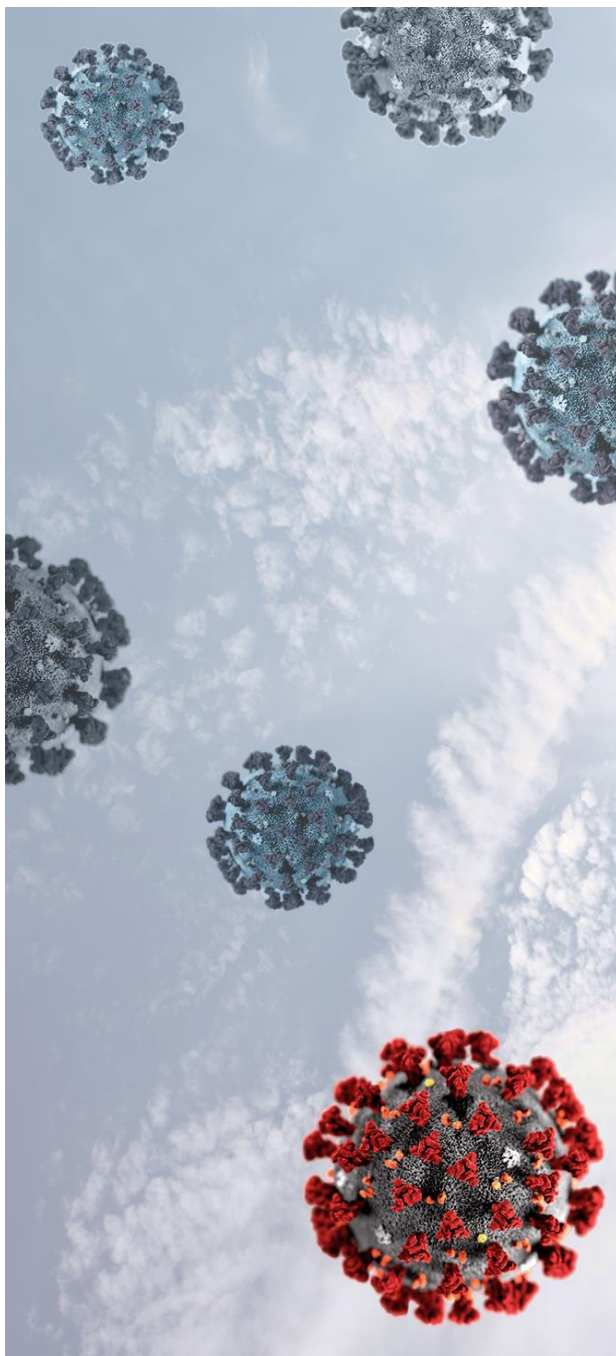

COVID-19: Data protection during the pandemic

Newsletter | Portugal

March 30, 2020



- > **COVID-19 – Exceptional permission to process health data**



I. COVID-19 – Exceptional permission to process health data

On March 11, 2020, the World Health Organization ("WHO") declared the COVID-19 disease a pandemic, leading all countries to deploy measures to contain the virus.

Employers face the challenge of keeping their activity running smoothly while fulfilling their duty of care to employees. They have raised questions about how to act, including what personal data processing actions they can legitimately take.

On the other hand, several technology companies work in the development of applications and software using health data, which aim to provide answers to the current challenges.

In these cases, the data protection rules set out in the General Data Protection Regulation (the "GDPR") (EU Regulation 2016/679) apply, and health data processing can only be carried out under strict conditions.

According to the European Data Protection Board ("EDPB"), the GDPR is flexible enough to allow health data to be processed during an epidemic or pandemic without the data subject's consent. Recital (46) considers that the processing of data could "serve both important grounds of public interest and the vital interests of the data subject as for instance when processing is necessary for humanitarian purposes, including for monitoring epidemics and their spread or in situations of humanitarian emergencies, in particular in situations of natural and man-made disasters."

The EDPB views articles 6 and 9 of the GDPR as allowing public health authorities and employers to process health data to pursue the public interest in the areas of health, to protect data subjects' vital interests, and to comply with legal obligations.

Point (i) of article 9, on situations in which sensitive data may be processed, states, "processing necessary for reasons of public interest in the field of public health, such as protection against serious cross-border health threats," is permitted.

In the EDPB's view, under the principles of data minimization and proportionality, employers should only require the submission of health data or perform medical examinations if permitted by national law. The EDPB considers that, generally, employers should not disclose the names of employees infected with COVID-19, even if the communication has a preventive purpose. If employers do disclose this information, they should inform the infected employee in advance.

Regarding the processing of electronic communication data (e.g., location data), under the ePrivacy Directive and national laws, unless the data subject consents to data being processed for that purpose, only anonymized data may be used. According to the EDPB,



based on this approach, Member States will be able to map data subjects' positions (i.e., anonymously identify outbreaks and concentrations of people, without invading citizens' privacy).

When the public authorities are unable to fight the pandemic through anonymized data, the ePrivacy Directive allows Member States to introduce new legislation on public and national security that aims to provide adequate guarantees to protect data subjects' subjective rights.

Member States should also process data proportionally, seeking to achieve the ends with the least intrusive means. In exceptional circumstances, the EDPB admits the admissibility of Member States tracking their citizens.

The EDPB also recalls the need to comply with the fundamental principles of data protection, namely to (i) collect and process data only for the intended purposes; (ii) inform data subjects (especially employees) about the processing of their data; and (iii) check that the appropriate technical and organizational measures have been adopted relating to the nature and volume of the data.

II. European supervisory authorities' statements

The supervisory authorities of the Member States have recently published their positions on the above topics, namely on how to act when employees are suspected to be infected with COVID-19. We summarize below some positions of these supervisory authorities:

Country	Can the employer collect travel-related data from employees?	Can the employer collect data on COVID-19 symptoms from employees?	Can the employer collect data on the infection with COVID-19 from employees?	Can the employer disclose data concerning an infected person within the company?
Portugal	N/A	N/A	N/A	N/A
Austria	Yes.	May be justified in case of reasonable concerns; prior information regarding purpose and extent of data processing may be necessary.	Yes, prior information regarding purpose and extent of data processing may be necessary.	N.A.; however, disclosure seems possible if the information is necessary for further precautionary measures (e.g., regarding persons who



				have had personal contact with someone infected with COVID-19).
Belgium	No.	No.	No.	Identity must not be disclosed; the fact that there is a COVID-19 case in the company may be disclosed.
Denmark	Yes.	Yes; however, it is limited to the necessary scope; prior information regarding purpose and extent of data processing may be necessary.	Yes, prior information regarding purpose and extent of data processing may be necessary.	Only if the information is necessary for preventive measures (e.g., regarding persons who have had personal contact with someone infected with COVID-19). The identity of the infected persons should not be disclosed.
Finland	No, unless the employee has provided the information voluntarily.	No, unless the employee has provided the information voluntarily.	No, unless the employee has provided the information voluntarily.	Identity must not be disclosed; the fact that there is a COVID-19 case in the company may be disclosed.
France	Yes.	No, this is the responsibility of the health authorities.	Yes, prior information regarding purpose and extent of data processing may be necessary.	Yes; however, the data processing must be limited to the necessary scope.



Germany	Yes.	May be justified in individual cases; prior information regarding purpose and extent of data processing may be necessary.	Yes, prior information regarding purpose and extent of data processing may be necessary.	Only if the information is necessary for preventive measures (e.g., regarding persons who have had personal contact with someone infected with COVID-19).
Hungary	No; exceptionally, questionnaires can be used if the employer has a reason to believe that an employee might be infected with COVID-19.	No; exceptionally, questionnaires can be used if the employer has a reason to believe that an employee might be infected with COVID-19.	If the employer has a reason to believe that an employee is infected with COVID-19, it can collect information on the result of a COVID-19 test; further health data may not be processed.	N.A.; however, disclosure of the identity seems prohibited.
Iceland	Yes.	Yes, prior information regarding purpose and extent of data processing may be necessary.	Yes, prior information regarding purpose and extent of data processing may be necessary.	Only if the information is necessary for preventive measures (e.g., regarding persons who have had personal contact with someone infected with COVID-19).
Ireland	Employer may ask employees to give notice if they have traveled to areas considered high risk. Questionnaires can only be used in case of increased risk.	Employer may ask employees to report symptoms. Questionnaires can only be used in case of increased risk.	Yes, prior information regarding purpose and extent of data processing may be necessary.	Identity must not be disclosed; the fact that there is a COVID-19 case in the company may be disclosed if necessary for the health authorities' ability to work.



Italy	No, unless the employee has provided the information voluntarily.	No, unless the employee has provided the information voluntarily.	No, unless the employee has provided the information voluntarily.	Only if the information is necessary for preventive measures (e.g., regarding persons who have had personal contact with someone infected with COVID-19).
Lithuania	Yes.	Yes, prior information regarding purpose and extent of data processing may be necessary.	Yes, prior information regarding purpose and extent of data processing may be necessary.	Identity must not be disclosed; the fact that there is a COVID-19 case in the company may be disclosed.
Luxembourg	Yes.	No; systematic processing (e.g., questionnaires) or individual requests are prohibited.	Yes, prior information regarding purpose and extent of data processing may be necessary.	Identity must not be disclosed; the fact that there is a COVID-19 case in the company may be disclosed.
Netherlands	No, unless the employee has provided the information voluntarily.	No, unless the employee has provided the information voluntarily.	No, unless the employee has provided the information voluntarily.	Identity must not be disclosed; the fact that there is a COVID-19 case in the company may be disclosed.
Norway	Yes, employees can ask questions related to COVID-19.	Yes, employees can ask questions related to COVID-19; prior information regarding purpose and extent of data processing may be necessary.	Yes, employees can ask questions related to COVID-19; prior information regarding purpose and extent of data processing may be necessary.	Only if disclosure is necessary to ensure "a safe working environment"; disclosure to third parties is not permitted.



Poland	Yes.	Yes, prior information regarding purpose and extent of data processing may be necessary.	Yes, prior information regarding purpose and extent of data processing may be necessary.	N.A.; however, disclosure seems possible if the information is necessary for further precautionary measures (e.g., regarding persons who have had personal contact with someone infected with COVID-19).
Spain	Yes.	Only if no other measures (e.g., teleworking) are considered.	Yes, prior information regarding purpose and extent of data processing may be necessary.	Only if the information is necessary for preventive measures (e.g., regarding persons who have had personal contact with someone infected with COVID-19).
United Kingdom	Yes.	May be justified in individual cases; prior information regarding purpose and extent of data processing may be necessary.	Yes, prior information regarding purpose and extent of data processing may be necessary.	Only if the information is necessary for preventive measures (e.g., regarding persons who have had personal contact with someone infected with COVID-19).

III. Importance of complying with personal data protection obligations

Although companies are currently facing concerns that they consider to be a priority (i.e., economic concerns and the continuity of their business), the state of emergency has not



suspended the application of the law to personal data protection and the fundamental right to privacy.

However, the supervisory authorities can continue to exercise their supervisory rights and data subjects can continue to complain about possible violations of their rights.

Therefore, keeping privacy and personal data protection obligations in mind is important, as relegating them to the background poses substantial risks and liabilities.



Contact

Cuatrecasas, Gonçalves Pereira & Associados
Sociedade de Advogados, SP, RL
Sociedade profissional de responsabilidade limitada

Lisbon

Praça Marquês de Pombal, 2 (e 1-8º) | 1250-160 Lisboa, Portugal
Tel.: (351) 21 355 3800 | Fax: (351) 21 353 2362
cuatrecasasportugal@cuatrecasas.com | www.cuatrecasas.com

Oporto

Avenida da Boavista, 3265 - 5.1 | 4100-137 Porto, Portugal
Tel.: (351) 22 616 6920 | Fax: (351) 22 616 6949
cuatrecasasporto@cuatrecasas.com | www.cuatrecasas.com

Cuatrecasas has set up a Coronavirus Task Force, a multidisciplinary team that constantly analyses the situation emerging from the COVID-19 pandemic. For additional information, please contact our taskforce by email TFcoronavirusPT@cuatrecasas.com or through your usual contact at Cuatrecasas. You can read our publications or attend our webinars on our [website](#).

© Cuatrecasas, Gonçalves Pereira & Associados, Sociedade de Advogados, SP, RL 2020.

The total or partial reproduction is forbidden. All rights reserved. This communication is a selection of the news and legislation considered to be relevant on reference topics and it is not intended to be an exhaustive compilation of all the news of the reporting period. The information contained on this page does not constitute legal advice in any field of our professional activity.

Information about the processing of your personal data

Data Controller: Cuatrecasas, Gonçalves Pereira & Associados, Sociedade de Advogados, SP, RL (“Cuatrecasas Portugal”).

Purposes: management of the use of the website, of the applications and/or of your relationship with Cuatrecasas Portugal, including the sending of information on legislative news and events promoted by Cuatrecasas Portugal.

Legitimacy: the legitimate interest of Cuatrecasas Portugal and/or, where applicable, the consent of the data subject.

Recipients: third parties to whom Cuatrecasas Portugal is contractually or legally obliged to communicate data, as well as to companies in its group.

Rights: access, rectify, erase, oppose, request the portability of your data and/or restrict its processing, as described in the additional information.

For more detailed information on how we process your data, please go to our [data protection policy](#).

If you have any questions about how we process your data, or if you do not wish to continue receiving communications from Cuatrecasas Portugal, we kindly ask you to notify us by sending a message to data.protection.officer@cuatrecasas.com.