

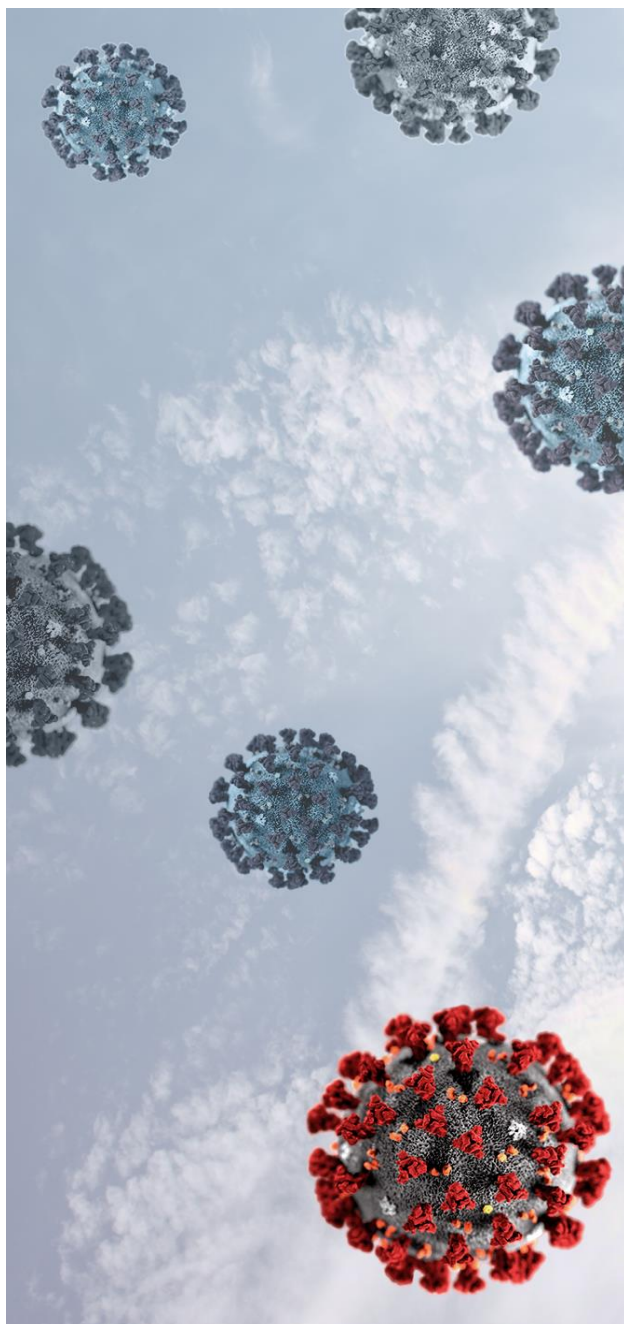
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# COVID-19: New CNPD guidelines on processing personal data in the context of measures to fight the pandemic

Newsletter | Portugal

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- > **New CNPD guidelines on processing personal data in the context of measures to fight the pandemic under Decree 8/2020 of November 8.**



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## New CNPD guidelines on processing personal data in the context of measures to fight the pandemic under Decree 8/2020 of November 8

Decree 8/2020 of November 8, which regulated the application of the state of emergency decreed by the President of the Republic (“Decree 8/2020”), established in articles 4, 5, and 7 the implementation of certain measures to fight the pandemic, involving the processing of personal health data. It relates to (i) granting permission to take the body temperature of individuals accessing certain facilities and establishments; (ii) imposing SARS-CoV-2 diagnostic tests in certain situations; and (iii) having non-health professionals perform epidemiological surveys and tracking.

The Portuguese National Data Protection Authority (“CNPD”) gave a statement on these new measures and their impact on the privacy of individuals, giving guidelines for implementing provisions on personal data processing under Decree 8/2020 of November 8, and their compatibility with the General Data Protection Regulation (“GDPR”).

This is not the first time in this epidemiological crisis that the CNPD has given statements on rules affecting personal data protection. It has already provided guidelines on the processing of health data in the fight against the pandemic, as we reported in our COVID-19 Newsletter: New developments in data protection (of May 20), which can be read [here](#).

### BODY TEMPERATURE

Article 4 of Decree 8/2020 establishes the taking of body temperature non-invasively for access to the workplace, transportation, public services and institutions, commercial, cultural, and sports areas, educational establishments, as well as residential structures, health establishments, and prisons and education centers. It also establishes the possibility for the citizens identified in article 5 of the Decree to have their body temperature taken, including individuals who intend to enter or exit mainland Portugal or the autonomous regions by air or sea.

Decree Law 10-A/2020 of March 16 established, after its amendment by Decree Law 20/2020 of May 1, the possibility of taking workers’ body temperature to access and stay in their workplace, prohibiting the recording of body temperature associated with an individual's identity, unless expressly authorized by the individual. Decree 8/2020 maintains the prohibition on recording temperatures associated with individuals’ identity, unless previously authorized, but extends the possibility of this control to establishments and facilities other than the workplace, and allows temperatures to be taken by workers employed by the entity in charge of the facilities or establishments; that is, workers who are not, or are not under, a health professional's responsibility and, therefore, not necessarily subject to professional secrecy. Decree 8/2020 also establishes that, if the temperature taken is 38°C or higher, the individual may be prevented from entering or remaining in the facilities or establishments and that, when a worker is prevented from entering the workplace, the absence should be considered justified.



Considering these rules, the CNPD starts by rejecting the position taken by the European Data Protection Supervisor (EDPS), under which taking the temperature with an analogical or digital thermometer is not an automated data processing operation, so the GDPR rules do not apply, as computation technologies are not used. For the CNPD, taking the temperature non-invasively with a digital thermometer implies data processing by totally or partially automated means, so, to this extent, it is a personal data processing operation, subject to GDPR.

The CNPD also states that taking a temperature is only a personal data processing operation subject to the GDPR when the data subjects can be identified. According to the CNPD, this is the case in access to establishments in which the data subject is known or is identified, as in the case of a worker's access to the workplace or a student's access to the learning institution; generally, this will be the case in facilities with biometric control systems or video surveillance with image recording. Whether taking the body temperature is a processing of health data subject to the GDPR system must be decided on a case by case basis, depending on the degree to which the data subject whose temperature is taken can be identified.

According to the CNPD, the Portuguese State did not use the power of temporary restriction or suspend the implementation of some of the GDPR rules, so the Portuguese control authority understands that all the legal criteria for data processing remain in force, particularly those pertaining to the legal bases established in articles 6 and 9 of the GDPR, which cannot be restricted by the State.

The CNPD considers that Decree 8/2020 may be the legal basis for taking temperatures, to the extent that it is a processing required *"by the public interest in the field of public health, based on EU or Member State domestic law."* However, it believes that the legislator did not establish appropriate and specific measures to protect data subjects' rights and freedoms, specifically professional secrecy, which is mandatory in the processing of health data, given that it limited itself to stating that the equipment used to take the temperature may not include any memory or record of the measurements taken.

Therefore, without ruling on the admissibility of other workers being able to take the body temperature without being under a health professional's direct responsibility, the CNPD argues that article 4 of Decree 8/2020 must be interpreted in a way that is compatible with the provisions in the GDPR, and thus states it is necessary for these workers to be bound to duties of confidentiality, through a contract or independent declaration, and that a procedure should be established, to be implemented after a temperature of 38°C or higher has been detected, to guarantee the confidentiality of that information.

### **SARS-COV-2 DIAGNOSTIC TESTS**

Article 5 of Decree 8/2020 allows several public and private entities, most of which are not part of the national health service, or which do not provide health care, to carry out SARS-CoV-2 diagnostic



tests on a large set of individuals, such as workers, users, visitors, and prisoners in educational, health, prison, and other services and establishments.

However, the legislator does not specify the circumstances to consider to impose these tests. Likewise, the decree does not establish the competence, procedures, and guarantees to be implemented to impose SARS-CoV-2 diagnostic tests, as it does not establish who may collect the sample to perform the test or who will analyze its results.

In its analysis, the CNPD understands, in line with its position on taking the temperature, that carrying out these tests implies a health data processing subject to the GDPR system, so here it is also necessary to interpret article 5 of Decree 8/2020 in light of the Portuguese Constitution and Union Law. The CNPD argues that, as the current law has not been repealed, these SARS-CoV-2 diagnostic tests may only be done by health professionals, protecting the duty of professional secrecy.

But it will also be necessary for entities imposing the tests to establish the procedure to implement in the event of a positive result, so the data subject's confidentiality, discretion and dignity are guaranteed.

### EPIDEMIOLOGICAL TRACKING

Decree 8/2020 establishes in article 7 that human resources may be mobilized to reinforce the public health authorities' and services' tracking capacity, particularly for epidemiological surveys, to track the contacts of COVID-19 patients, and to monitor individuals under active surveillance. It also establishes that non-health professionals may carry out these tasks.

The CNPD states that these activities involve collecting, recording, and viewing a large number of individuals' private data, and that, under this provision, the data may be processed by non-health professionals not bound by the duty of professional confidentiality.

To make the decree compatible with EU law, the CNPD recommends that professionals who are mobilized to perform these duties should be formally and expressly bound by a specific duty of confidentiality in performing these duties, through the order for their mobilization or through an individual declaration.

In answer to the CNPD's concerns, Order 11418-A/2020 of November 18 was issued, reinforcing the public health authorities' and services' tracking capacity to conduct epidemiological surveys, track the contacts of COVID-19 patients, and monitor individuals under active surveillance. Article 10 establishes that workers who are mobilized under Decree 8/2020 of November 8 are bound by the duty of confidentiality, guaranteeing the confidentiality of any information to which they have access when performing these duties.

In conclusion, according to the CNPD, the only way to make the data processing under Decree 8/2020 fall in line with EU law, namely the GDPR, is to ensure that the workers and public servants taking body temperatures, and performing SARS-COV-2 diagnostic tests, epidemiological surveys



and tracking are bound by the duties of confidentiality. Also, measures and procedures to guarantee the data subjects' rights and dignity should be implemented.

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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 Task Force by email [TFcoronavirusPT@cuatrecasas.com](mailto:TFcoronavirusPT@cuatrecasas.com) or through your usual contact at Cuatrecasas. You can read our publications or attend our webinars on our [website](#).

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