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INFORMATION, COMMUNICATION & TECHNOLOGY

THE PORTUGUESE DPA ISSUES NEW GUIDELINES IN THE CONTEXT OF COVID-19

The Portuguese Data Protection Authority (*Comissão Nacional de Proteção de Dados – CNPD*) issued the [Guidelines on the processing of personal health data under Decree no. 8/2020, of 8 November](#) (Portuguese only), that regulates the application of the State of Emergency decreed by the President of the Portuguese Republic in the context of the COVID-19 pandemic. The abovementioned guidelines aim to guarantee that the processing of personal data resulting from the exceptional and temporary measures concerning the epidemiological situation respects the legal regime for the protection of personal data, while minimising the impact on the privacy of the data subjects.

The CNPD Guidelines – that arose from multiple requests for clarification, namely from data protection officers and citizens – concern three articles of Decree no. 8/2020 (Decree), specifically on their compliance and articulation with the General Data Protection Regulation (GDPR):

BODY TEMPERATURE MEASURING

Article 4.º of the Decree:

- **What does it regulate:** the possibility of the measurement of body temperature.
- **Where/to whom it is applicable:** (i) in the access control to the workplace; (ii) in the access control to public services and institutions, educational establishments and commercial, cultural or sports venues, means of transportation, residential structures, health establishments, prisons or educational centres; (iii) to citizens referred to in article 5º of the Decree, described below in the analysis of that article.
- **Carried out by:** an employee, working in the service of the entity responsible for the place or establishment.
- **Conditions for application:** (i) through non-invasive means; (ii) without any physical contact with the person concerned; and (iii) prohibition to keep records of the body temperature associated with the identity of the person concerned, unless expressly authorised by that person.
- **Consequences:** access to premises may be denied whenever a person (i) refuses to take a body temperature measurement; or (ii) presents a body temperature equal or higher to 38°C, as defined by the Portuguese Health Directorate (*Direção Geral de Saúde – DGS*). Regarding employees, if it is determined that he/she cannot have access to the respective workplace due to his/her body temperature being equal or higher to 38°C, the absence is considered justified.

CNPD Guidelines:

- Body temperature measuring is considered a processing of personal health data, subject to the GDPR, whenever the person is identifiable. This occurs, for example, in the access to the workplace, to educational and teaching institutions or sport academies, and also whenever the establishment or place is equipped with systems of control that use biometric data reading or video surveillance with image recording (which increases the possibility of identifying people).
- Though CNPD analyses several possible legal grounds, it considered that the most adequate in this case would be the necessity of the processing *for reasons of public interest in the area of public health (...) on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy* (article 9.º, no. 2, line i) of the GDPR).
- CNPD considers that the foreseen measures do not safeguard sufficiently the rights and freedoms of the data subjects, in particular regarding the secrecy and confidentiality of information.

Actions to put in place:

CNPD concludes that for article 4.º of the Decree to be applicable in compliance with the GDPR, **data controllers must:**

- Bind the worker carrying out the temperature measurements to a specific duty of confidentiality, either by contract or by an autonomous declaration;
- Define and carry out the procedures following the detection of a case of temperature equal or above 38°C, which guarantees the confidentiality and dignity of the treatment of the person subject to the measurement.

SARS-COV-2 DIAGNOSTIC TESTS

Article 5.º of the Decree:

- **What does it regulate:** the possibility of the head of the respective establishment or service to determine the performance of SARS-CoV-2 diagnostic tests.
- **To whom it is applicable:** (i) to workers, users and visitors of healthcare facilities, residential structures for the elderly, integrated care units of the National Network of Integrated Long-Term Care and other responses dedicated to the elderly as well as to children, young people and people with disabilities; (ii) to workers, students and visitors to education, teaching and higher education establishments; (iii) to workers, users and visitors in the context of prison services and educational centres, as well as the prisoners in prisons or young people in educational centres; (iv) to people wishing to enter or leave the national mainland or the Autonomous Regions by air or sea; and (v) to people who want access to other sites that the DGS may identify in the future.
- **Consequences:** when the result of the carried out test makes it impossible for a worker to have access to the workplace, the absence is considered justified.

CNPD Guidelines:

- Performing tests is considered a processing of personal health data subject to the GDPR.
- According to the CNPD, the provision does not define the circumstances in which diagnostic tests may be imposed by public and private entities, nor does it define who collects the sample for diagnostic purposes and who analyses the test results. Therefore, there are no measures to ensure the privacy of people who are

required to be tested (in this specific context of stigmatisation tendency and discrimination against carriers of the virus).

- CNPD's position does not change due to the type of diagnostic tests carried out, being also applicable to rapid antigen tests.
- Diagnostic tests can only be carried out by healthcare professionals, in accordance with DGS Standard n.º 019/2020, of 26 October 2020 (updated on 6 November 2020) concerning the National Testing Strategy for SARS-CoV-2, where the conditions for the use of the different types of tests are defined.

Actions to put in place:

CNPD concludes that for article 5.º of the Decree to be applicable in compliance with the GDPR, **data controllers must:**

- Ensure that the diagnostic test are performed by a healthcare worker, subject to the obligation of professional secrecy;
- Define and carry out the procedures following the detection of a positive result, which guarantees the confidentiality and dignity of the treatment of the person being tested.

STRENGTHENING OF THE SCREENING CAPACITY BY NON-HEALTHCARE WORKERS

Article 7.º of Decree:

- **What does it regulate:** the possibility of the deployment of human resources for (i) the performance of epidemiological enquiries; (ii) the screening of contacts of COVID-19 patients; and (iii) the performance of the follow-up of people under active surveillance.
- **Carried out by:** those who are not healthcare workers, namely workers in the exercise of public functions, as well as employees of private entities or from the social or cooperative sectors.

CNPD Guidelines:

- The performance of epidemiological enquiries, screening of contacts and follow-up on active surveillance are considered processings of personal data related to health and private life (on a large-scale) subject to the GDPR.
- CNPD considers that by allowing the processing of personal health data by people who are not healthcare workers nor are subject to an obligation of professional secrecy in the field of health, appropriate measures are not foreseen to ensure the confidentiality of information and the avoidance of unequal treatment of data subjects.

Actions to put in place:

CNPD concludes that for article 7.º of the Decree to be applicable in compliance with the GDPR, **data controllers must:**

- Expressly bind the mobilised worker, in the legal act determining the mobilisation or in an autonomous legal declaration, to a specific duty of confidentiality in relation to all the personal data that he/she may come to know in the exercise of these functions.