



## **Coronavirus (Covid-19)**

### **What Organizations must consider with regard to data protection (EU/EEA)?**

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**EY Law**

The impact of the Covid-19 pandemic on the everyday life of companies is dramatic. Protecting employees, customers and business partners from infection is a new urgent challenge for many companies.

With the further progression of the dissemination, the question arises more and more frequently how data protection can be guaranteed despite this exceptional situation. The fear of infections and paralysis of the business is great, many companies act quickly and make important decisions, which, especially because of health data of employees, also require an assessment under data protection laws. After all, violations of data protection law cannot be justified even by the Covid-19 pandemic. Once this crisis is over, the authorities may also consider and investigate these issues.

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Covid-19 - The most important facts regarding data protection

### ► Does the Covid-19 "state of emergency" override data protection law?

No, the GDPR (General Data Protection Regulation) expressly addressed cases of epidemics and provides that processing of personal data may be justified for "*monitoring epidemics and their spread*" (pursuant to recital 46 of the GDPR). The European Data Protection Board (hereinafter "**EDPB**") on a communication dated 19<sup>th</sup> March states that "*even in these exceptional times, the data controller must ensure the protection of the personal data of the data subjects*". Hence, data protection rules do not hinder measures taken in the fight against the coronavirus pandemic, and the lawful processing of personal data must still be guaranteed.

Nevertheless, Supervisory Authorities, such as the ICO (UK Supervisory Authority), have indicated that they will be flexible regarding the situation, and not penalize organizations that need to prioritize resources (finance or people) during this extraordinary period. This flexibility will take place within the current framework, without overriding data protection provisions or statutory timescale.

### ► How to deal with the processing of health data?

According to the French Supervisory Authority (hereinafter the "**CNIL**"), companies should not take the place of health authorities and collect health data that would go beyond the management of suspected exposure to the virus and hence violate privacy of individuals. In this context, minimization principle should be specially observed.

The CNIL reminds companies that health data is subject to special protection provided both by the GDPR and by local law provisions (i.e. the French Public Health Code).

Due to the urgent health risk of Covid-19, companies can justify data processing under Article 9.2 (i) GDPR or Article 9.2 (c) for instance depending on the situation and, if applicable, local laws. However, due to the high level of sensitivity of health data, relevant company processes must be carefully examined in terms of data protection law. In order that companies can prove the lawfulness of data processing to Supervisory Authorities retrospectively, they should fulfil their accountability under Article 5 (2) GDPR. In particular, decisions with relevance to data protection law must be justified and documented.

### ► What employers can do in the Covid-19 context regarding processing of personal data?

Employers have an obligation to protect employees' health, but this does not justify gathering excessive information about them.

According to the CNIL's guidelines, the employer may sensitize employees to report possible exposure to the employer or to the competent health authorities. In the event of an internal report, it may record the date and identity of the individual suspected of having been exposed and, where appropriate, the nature of the exposure and the measures taken (such as containment, homeworking, etc.). Moreover, the employer should facilitate the communication of data through dedicated channels.

For example, to minimize data, the ICO recommends asking visitors to consider government advice before deciding to come in an organization, and advice employees to call emergency number if they are experiencing symptoms or return from specific countries.



### ► Are companies allowed to inform their employees about infected colleagues by naming them?

On one hand, the (even if only company-internal) communication of infected employees by name is a very intensive intrusion into the rights of the affected employees and must be carefully assessed in each individual case. On the other hand, major risks for other employees and especially their older family members must also be considered. Failure to mention the risk of infection can indirectly lead to the infection of older family members whose mortality rate is particularly high with Covid-19. These health risks should be taken into account in data protection assessments (especially in Article 9.2 (i) GDPR or local laws). The involvement of data protection officers and the due regard to the principle of proportionality is urgently required. The requirement of data minimization can also become relevant in the sense of restricting the information recipients.

### ► Do employees have to be informed about data processing concerning Covid-19?

Yes, if companies introduce new data processing activities or adapt existing ones, the data subjects or employees must be informed accordingly. Covid-19 is no exception. It is possible, for example, that a new data processing activity could be carried out by collecting residence or travel data. To strengthen transparency, it is also recommended that a specific internal communication be addressed to employees and other data subjects, in addition to the usual information notice.

### ► To what extent must companies adapt their data protection documentation?

The adaptation of the processes due to Covid-19 also entails the updating of the data protection documentation, in particular the data protection impact assessment (DPIA) and the register of processing activities, by introducing for example a record called "follow up of Covid-19 cases". At the end of the crisis, the personal data must be deleted in accordance with the needs for the company and for non-excessive retention period.

### ► Are companies allowed to check employees' temperatures?

From a data protection point of view, the CNIL has expressed that companies must avoid general and systematic collection of personal data regarding Covid-19 symptoms, and, in particular, that companies should not implement mandatory reporting of body temperature of employees and visitors. The implementation of such measures has also to be verified from a labor law perspective.

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### ► What should be observed regarding the processing of electronic communication data?

The ePrivacy Directive and national law implementing this Directive provide for the principle that location data can only be used by public communication network providers and electronic communication service providers when made anonymous, or with the consent of the individuals. According to EDPB communication mentioned above: *"When it is not possible to only process anonymous data, Art. 15 of the ePrivacy Directive enables the member states to introduce legislative measures pursuing national security and public security. This emergency legislation is possible under the condition that it constitutes a necessary, appropriate and proportionate measure within a democratic society. If such measures are introduced, Member States are obliged to put in place adequate safeguards, such as granting individuals the right to judicial remedy"*.

Whereas the French public authorities explore the possibility to create a tracking application, the EDPB will issue soon specific guidance regarding geolocation and other tracking tools in the context of the COVID-19.

## Are you prepared?

In many respects, dealing with Covid-19 cannot be distinguished from dealing with other disease waves such as the annual wave of influenza. However, due to the expected extent and the possible economic and data protection consequences, more far-reaching measures may be necessary.

The data of your employees is a valuable asset that must be protected. In this respect, precautions should be taken to ensure that your company can master the data protection challenges of the Covid-19 with confidence.

## How can you best respond to Covid-19 on an ongoing basis?

- Strengthen Information to data subjects and assure the lawfulness of the processing.
- The risks posed by Covid-19 may justify unusual / exceptional data processing activities as long as they protect the health of individuals and they are implemented in compliance with the legal framework.
- Be sensitized to changes in standard processes. In general, every deviation requires an assessment under data protection law.

### ► What are the personal data protection aspects to be considered in homeworking?

During the Covid-19 pandemic, employees have the ability to work from home and can use their own device or communications equipment ("Bring Your Own Device" or "BYOD" practice). If employees process personal data from home, they should comply with the company's internal technical and organizational measures (TOMs). For example, documents containing personal data must be kept confidential, i.e. out of reach of life partners, children or visitors. It is the duty of every company to inform its employees accordingly and to oblige them to comply with TOMs. Employers must also be careful to respect the privacy of employees when using their own devices and not monitor employee use (such as communications) on their personal devices.

## Why EY Law is also your partner for support in the Covid-19 crisis

### We would be pleased to discuss with you in a personal meeting

- how data protection requirements for the processing of highly sensitive personal data (health data) can be implemented in your company in individual cases & in the different locations where your organization has locations worldwide.
- how we can help you to prepare all important notification/information notices for your employees, any data protection statements as well as data protection documentation regarding Covid-19 (ROPA, DPIA ...) in the different locations where your organization has locations worldwide.
- how we can legally support you in conducting or updating data protection impact assessments (DPIA).
- how we can help you with possible procedures initiated by the authorities in terms of data protection.
- how we can help you to adapt processes to the Covid-19 risks in accordance with data protection regulations.
- how can we support you in case of data breaches due for instance to extensive use of online communications and homeworking.

Feel free to contact us at any time!

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