

Module 3

The new challenges in processing special categories of data



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Data

Legal grounds for processing in the light of the COVID-19 pandemic or social, economic or other factors in emergency situation

EDPB: Emergency is a legal condition which may legitimize restrictions of freedoms provided these restrictions are proportionate and limited to the emergency period

GDPR principles, incl. proportionality, must always be observed!

Lawfulness of processing

- The GDPR allows competent public health authorities and employers to process personal data in the context of an epidemic, in accordance with national law and within the conditions set therein (e.g. if processing is necessary for reasons of substantial public interest in the area of public health)
- Under those circumstances, consent is not always required
- Purpose must be clearly defined !

By the competent public authorities:

- Article 9 GDPR enables the processing of personal data, in particular when it falls under the legal mandate of the public authority provided by national legislation and the conditions enshrined in the GDPR

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With regard to location data in the context of the pandemic

- Location data not sensitive in itself but can become sensitive data
- Geolocation of individuals through mobile phones possible only under exceptional circumstances (e.g. state of emergency) and depending on the specifics of the processing
- Possible for Member States to introduce exceptional legislative measures to safeguard public security which must be necessary, appropriate and proportional
 - e.g. Polish government-backed app “Kwarantanna domowa” for quarantined people using geolocation and face recognition (mandatory app, exemptions apply)
 - e.g. Greek lockdown with SMS authorization for movement

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Voluntary contact tracing apps

Reference to the voluntary basis of the app required

- EDPB: If the operations are strictly necessary for the provision of the service explicitly requested, the processing would not require the user's consent. If not strictly necessary, consent is required
- Processing of health data can be based on:
 - (i) reasons of public interest in the area of public health;
 - (ii) health care purposes;
 - (iii) consent;
 - (iv) scientific research purposes or statistical purposes.
- Information on contacts of infected persons collected only with their consent
- Data minimization, e.g. personal data kept only for the duration of the crisis
- Data protection by design and by default, e.g. information stored shall not be possible for the controller to identify users diagnosed as infected or in contact
- Providing advice on next steps cannot be based solely on automated processing
- Auditable algorithms



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Voluntary contact tracing apps:

Distinction:

- Official apps
 - TousAntiCovid in France by the National Institute for Research in Digital Science and Technology
 - Italy's government-selected app developed by a private software company
 - (!) Corona-Warn-App of the German Federal Government based on Privacy-Preserving contact Tracing etc.
- Third party apps
 - VirusSafe in Bulgaria by a Bulgarian software company



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Employment context:

- Consent is generally not required as far as:
 - compliance with a legal obligation re: health and safety at the workplace;
 - public interest e.g. control of diseases and other threats to health
- Bulgarian regulator: distinction between employees working from home and employees working from the company's premises
- For persons working from home health data can be processed only:
 - If the data subject has made this information available to the public;
 - Based on presented sick note
- Entry checks on premises, incl. temperature checks allowed
- Professional secrecy
- Information on an infected person can be provided to all employees in a manner allow for the person to be identified
- German regulator: lawful disclosure of personal data of people who are proven/suspected of being infected in order to inform contact persons only if knowledge of the identity is exceptionally necessary for the preventive measures
- Dutch regulator: Employer cannot generally register information about the nature or cause of the employee's illness



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Retention of special categories of data

- Retention only as long as strictly necessary
- Retention period taken into account in the assessment of proportionality
e.g. epidemiologically relevant retention period for contact tracing is generally about 2 weeks
- Location data kept for no longer than the duration of the emergency situation
- Information of data subjects on the retention period

