

Ms Ďuriš Nicholsonová
Member of the European Parliament

17.07.2020

by e-mail only

Ref: OUT-2020-0089

Dear Ms Ďuriš Nicholsonová,

Thank you very much for following up on the recent EDPB letter with regard to the need for common guidance on the application of the General Data Protection Regulation (GDPR), and other relevant legal instruments of the EU in matters of data protection, in the fight against the COVID-19 pandemics.

You now address the EDPB, asking additional questions on the use of contact tracing as part of a comprehensive approach to address the COVID-19 health related crisis. More specifically, your concerns span over four issues broadly related to potential discrepancies in the various measures envisaged in the Member States, the applicability of those measures in connection with the duration of the emergency, the implementation of DPIAs for contact tracing solutions and the use of similar technical tools to enforce social distancing where this requirement is in place.

Let me preliminarily clarify that the GDPR does not envisage the suspension of data protection principles and individuals' rights in case of emergencies; in fact, it explicitly mentions (rec. 46) the relevance of processing personal data for humanitarian purposes, including epidemics, within the framework of legal conditions such as the necessity to protect the vital interests of the data subject or of another natural person, or the performance of a task carried out in the public interest. Both are applicable legal bases for the processing, in compliance with art. 6(1)d and art. 6(1)e respectively. Also, the GDPR in art. 23 allows Member States to restrict, by way of a legislative measure, the scope of a number of specific obligations and rights when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society¹. Similarly, the e-privacy Directive in art 15 allows Member States to adopt legislative measures to restrict the scope of the rights and obligations with respect to the processing of personal data in the electronic communication sector, for a limited number of purposes in the public interest and with the same caveat in terms of necessity and proportionality of the said legislative measures.

Regarding more specifically your questions, the EDPB is aware that multiple stakeholders believe a harmonized approach within the EU in contact tracing applications may help de-escalation of the epidemics. Its Members are monitoring the situation at national level, surveying both the legal instruments that are being enacted and the technical implementation of the contact tracing apps.

¹ The EDPB has recently adopted a statement on data subject rights restrictions in connection to the state of emergency in Member States (2 June 2020)
<https://edpb.europa.eu/our-work-tools/our-documents/ine/statement-restrictions-data-subject-rights-connection-state>

Further, the EDPB has very recently issued a statement on the issue of interoperability of contact tracing applications².

As for your second question, it is very difficult to make any prediction on the duration of this emergency and to modulate the actions depending on the severity, or any potential new rise of the epidemics. Nevertheless, respect of the general principles of effectiveness, necessity, and proportionality remains paramount in all cases. The EDPB has repeatedly stated that the data processed in the context of contact tracing applications should be limited to the bare minimum when the implementation of such apps is useful, and that once such applications are not deemed anymore necessary for the original purpose, these systems should not remain in use, and as a general rule, the collected data should be erased or anonymised. Practically, this can be done also in an asynchronous way when “return to normal” is decided by the competent public authorities, with a procedure that terminates the collection of identifiers and activates the deletion of all collected data from all databases.

In your letter, you put forward the argument that having to go through a mandatory data protection impact assessment (DPIA) might delay the implementation of contact tracing applications at national level. The EDPB has clarified that the DPIA is a crucial step in addressing high risk situations as well as an integral part of the overall design of any technical solution³. The assessment of risks to individuals’ rights and freedoms, and the strategies to mitigate those risks cannot be separated from the technical implementation: they jointly make up the privacy by design approach promoted by the GDPR. This is the norm, and the EDPB has provided criteria to arrange a DPIA⁴ in many contexts that can be usefully considered by data controllers in this phase to enhance the efficiency and effectiveness of contact tracing solutions. National DPAs are also available as always to provide advice and guidance quickly and effectively, in the light of those common criteria but taking account of the specificities of the individual solutions.

Finally, you refer to Member States’ possible intention to launch additional tracking applications for enforcing home quarantine or social distancing restrictions. To the knowledge of the EDPB, this is not the scope of the current contact tracing applications, which are only aimed at detecting potential contacts with COVID-19-positive persons in order to facilitate the delivery of the appropriate information to the concerned persons, and to increase the effectiveness of the subsequent health care procedures. Should other tools be developed at national level for those different enforcement purposes, they should be regulated in compliance with the EU and national data protection legal framework on the basis of a thorough legal and technical analysis and in line with the general data protection by design approach mentioned above.

² https://edpb.europa.eu/our-work-tools/our-documents/drugo/statement-data-protection-impact-interoperability-contact-tracing_en

³ This DPIA may be performed in the context of the adoption of the legal basis used for the processing in line with Art 35 (10) GDPR.

⁴ See WP29 guidelines (adopted by the EDPB) on Data Protection Impact Assessment (DPIA) and determining whether processing is “likely to result in a high risk” for the purposes of Regulation 2016/679

I would like to thank you for your continued interest in the work of the EDPB. The EDPB will continue to proactively monitor the situation and provide Guidance when necessary.

Yours sincerely,



Andrea Jelinek