

Personal data processing during the Covid-19 emergency



Foreword

For several weeks now, privacy protection has been a hot topic for the Government and local authorities as concerns the correct application of the relevant regulation, but discussions are still underway on the appropriateness of talking about privacy in today's emergency contest.

Thus the question arises: Why privacy is perceived as an hindrance to the actions which proved necessary to fight the health emergency?

It is worth clarifying, as already indicated by the European Data Protection Board in the **Statement** on the processing of personal data in the context of the Covid-19 outbreak (hereinafter also the "Statement") adopted on 19 March 2020, that "*data protection rules **do not hinder** measures taken in the fight against the coronavirus pandemic*".

It is quite clear that the current legislative interventions are introducing limitations to our individual sphere which lead to a compression of some rights, among which the protection of personal data, in favour of the primary assets: the right to health set out in art. 32 of the Constitution. This principle is further strengthened by Recital 4 of EU Regulation n. 2016/679, which states that "*[...] The **right to the protection of personal data is not an absolute right**; it must be considered in relation to its function in society and **balanced against other fundamental rights**, in accordance with the principle of proportionality [...]*".

The President of the Italian Data Protection Authority, Mr. Antonello Soro, in an interview released on 19 March 2020 (available on the institutional website) reinstated that "*at exceptional times like this, **there are obvious and due limitations to privacy**. And to our freedom. **All this needs to be considered balancing the limitations with another fundamental personal right and collective interest: public health [...]***". To that effect, the European Data Protection Board in its Statement dated 19 March 2020 also reaffirmed that: "*[...] emergency is a legal condition which may legitimise restrictions of freedoms **provided these restrictions are proportionate and limited to the emergency period***".

As known, the restrictions in force - which are having a significant impact on the socio-economic fabric and giving rise to various interpretative questions - compelled all organisations not falling within the scope of those for which a temporary suspension of the production chain has been provided, to apply the new regulation on health and safety in the workplace, balancing it with data protection. Therefore, it is obvious that the management of the Covid-19 emergency has to deal with personal data protection since new activities or actions - implemented to face the emergency - may imply personal data processing, which must be properly regulated and managed, according to general legal principles of necessity and proportionality.

The Italian Data Protection Authority: no to do-it-yourself initiatives when collecting personal data

As soon as on 2 March 2020, the Italian Data Protection Authority (hereinafter also the “**Authority**”) issued a press release to reply to the various questions asked by public and private entities on the possibility:

- to collect information on visitors/users’ Coronavirus symptoms and news on their recent movements, as a measure to prevent infections
- to acquire a self-declaration from employees on the absence of flu-like symptoms and other matters relevant to their private life.

The Authority invited all data controllers to comply strictly with the indications provided by the Ministry of Health and by the competent authorities, without taking autonomous initiatives concerning the collection of users’ and employees’ health data, which are not normally provided for or required by the competent authorities. In particular, below are some extracts of the press release:

- **“the obligation on the employee to inform the employer of any danger to health and safety at workplace is left unprejudiced.** *In this regard, the Minister for Public Administration recently provided operational instructions concerning the obligation for every civil servant and for those who work in various ways in the public administration to report to the respective administration that they have travelled to a risk area. In this context, the employer may invite their employees to make, where necessary, such communications by facilitating the way they are routed, including through dedicated channels”;*
- **“employers must refrain from collecting, in advance and in a systematic and generalised manner, including through specific requests to the individual worker or unauthorised investigations, information on the presence of any signs of influenza in the worker and his or her closest contacts, or anyhow regarding areas outside the work environment”;**
- **“the investigation into and collection of information on the symptoms typical of Coronavirus and on the recent movements of each individual are the responsibility of healthcare professionals and the civil protection system, which are entities tasked with ensuring compliance with the public health rules that were recently adopted”.**



Decree of the President of the Council of Ministers dated 9 March 2020

Art. 1, point n. 7, letter d) - Urgent measures to contain the spread of Covid-10 on the Italian territory -

In order to fight and contain the spread of the Covid-19 virus, art. 1, point n. 7, letter d) of the Decree of the President of the Council of Ministers provides for that all productive and professional activities “must implement safety protocols to stop the infection and, should it not be possible to maintain a 1 meter interpersonal distance, as the main measure to contain the infection, they must provide personal protection equipment”.

In this sense the Government, implementing art. 1, point n. 9) of the abovementioned Decree (which recommends to reach an agreement between employer organisations and trade unions) promoted a meeting between the parties involved, which led to the ratification of the “Shared protocol regulating the measures to contain and mitigate the spread of the Covid-19 infection on the workplace”, providing guidelines for the companies to follow to safeguard the health of the people present in the company and to guarantee the salubrity of the workplace.

This protocol provides for not only that “taking temperature in real time is to be considered as personal data processing and, therefore, it should be made in compliance with the privacy regulation in force” but it also suggests, as concerns the way to access the workplace, to:

1. **“take temperatures and not to record the acquired datum.** It is possible to identify the person concerned and to record a temperature higher than the established threshold only when this is necessary to provide evidence of the reasons leading to prevent the access to the corporate premises;
2. **provide information on the processing of personal data.** We remind that information already provided to the people concerned

can be omitted in the privacy policy statement, which can also be shared orally. As for the contents of the statement, the prevention of the Covid-19 infection can be indicated as the purpose of the processing, the implementation of security protocols ex art. 1, n. 7, letter d) of the Decree of the President of the Council of Ministers dated 11 March 2020 can be indicated as legal basis and the end of the state of emergency can be indicated as the term for the possible storage of data;

3. **define the adequate security and organisational measures to protect data.** In particular, from an organisational point of view, it is necessary to identify the subjects responsible for the data processing and provide them with the necessary instructions. To this end, we remind that data can be processed solely for the purpose of preventing the spread of the Covid-19 infection and must not be disclosed or communicated to third parties outside the scope of the specific law provisions (e.g. in case of a request by the health authorities to trace back “the closest contacts of an employee who tested positive for the Covid-19”);
4. **in case of temporary isolation due to a higher temperature than the established threshold, ensure discretion and safeguard the employee’s dignity.** Such guarantees shall be ensured also when the employee informs the HR department of having had contacts, besides the working environment, with persons infected by Covid-19 and when the employee – and his/her colleagues – are temporarily suspended as he/she developed fever and symptoms of respiratory infections during the working activity”.

It is also recommended, in case a declaration is required, attesting that a person does not come from the epidemic risk areas and has not had contacts with infected persons for the last 14 days, to pay attention and collect only necessary, proper and relevant data for the purpose of preventing the spread of Covid-19.

Law Decree no. 14 dated 9 March 2020 within the healthcare emergency

Art. 14 – Provisions on the processing of personal data within the emergency

- Art. 14, para. 1, of Law Decree no. 14/2020 identifies those subjects, who – for public interest purposes within public healthcare and, particularly, to ensure safeguard within the cross-border healthcare emergency caused by the spread of Covid-19 through proper preventive measures, as well as to ensure the diagnosis and health service to infected people and to manage the National health service emergency – **can process**, including communicate with each other, personal data (included those relevant to art. 9 and 10 of the EU regulation 2016/679) as necessary in order to pursue the functions assigned within the emergency caused by the spread of Covid-19.

The same article defines those subjects that can process data as mentioned above. In particular:

- subjects operating in the environmental national service, under art. 4 and 13 of legislative decree no. 1 dated 2 January 2018
- implementing parties under art. 1 of the Order of the Head of environmental national service no. 630 dated 3 February 2020
- offices of the Ministry of Health and of the Italian National Institute of Health
- public and private entities operating within the national health service and the persons in charge of monitoring and ensuring the application of the measures provided under art. 3 of Law Decree no. 6 dated 23 February 2020 and turned with amendments into law no. 13 dated 5 March 2020.

Within the current emergency, the above subject can:

- omit the privacy policy statement required under art. 13 of the regulation or provide a simplified statement, prior oral notification of such limitation to data subjects
- grant the authorizations under art. 2-*quaterdecies* of legislative decree no. 196 dated 30 June 2003, through simplified procedures, even orally.

Moreover, **personal data to public and private persons other than those under para. 1**, as well as personal data other than those under art. 9 and 10 of EU Regulation 2016/679 **can be disclosed if it is essential for the performance of the activities related to the management of the current health emergency**.

At the end of the emergency situation, the indicated subject shall adopt proper measures to restore the data processing carried out during the emergency to the ordinary procedures and rules regulating personal data processing.

The European context: Statement of the EDPB

Governments and public organisations throughout Europe are taking measures to contain and mitigate Covid-19 and also the European Data Protection Board (EDPB) issued, on 19 March 2020, the Statement on the processing of personal data in the context of the Covid-19 outbreak.

Specifically, “*the EDPB would like to underline that, even in these exceptional times, **the data controller and processor must ensure the protection of the personal data of the data subjects**. Therefore, a number of considerations should be taken into account to guarantee the lawful processing of personal data and in all cases it should be recalled that any measure taken in this context must respect the general principles of law and must not be irreversible*”.

For this reason, we are hereby providing, as an example and not limited to them, some of the considerations to be taken into account within the processing of personal data:

- EU Regulation n. 2016/679 “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. For example, when processing is necessary for reasons of substantial public interest in the area of public health. Under those circumstances, there is no need to rely on consent of individuals”.
- With regard to the processing of personal data, “including special categories of data by competent public authorities (e.g. public health authorities), the EDPB considers that articles 6 and 9 GDPR enable 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”
- **“In the employment context, the processing of personal data may be necessary for compliance with a legal obligation to which the employer is subject such as obligations relating to health and safety at the workplace, or to the public interest, such as the control of diseases and other threats to health.** The GDPR also foresees derogations to the prohibition of processing of certain special categories of personal data, such as health data, where it is necessary for reasons of substantial public interest in the area of public health (Art. 9.2.i), on the basis of Union or national law, or where there is the need to protect the vital interests of the data subject (Art.9.2.c), as recital 46 explicitly refers to the control of an epidemic”.

- **“Personal data that is necessary to attain the objectives pursued should be processed for specified and explicit purposes. Data subjects should receive transparent information on the processing activities that are being carried out and their main features, including the retention period for collected data and the purposes of the processing. The information provided should be easily accessible and provided in clear and plain language”.**

Moreover, within the employment context, the EDPB specified that the employer:

- should only require visitors or employees to provide health information “to the extent that national law allows it”;
- should “only access and process health data if their own legal obligations requires it”;
- should “inform staff about Covid-19 cases and take protective measures, but should not communicate more information than necessary. In cases where it is necessary to reveal the name of the employee(s) who contracted the virus (e.g. in a preventive context) and the national law allows it, the concerned employees shall be informed in advance and their dignity and integrity shall be protected”;
- may “obtain personal information to fulfil their duties and to organise the work in line with national legislation”.

Our professionals would be pleased to provide you with any further information you may need.

Please refer to Clever Desk on our website - bgt-grantthornton.it - for further details on any issues concerning COVID-19.

