



EDPS OPINION ON THE LEGAL BASIS FOR MANUAL CONTACT TRACING OF COVID-19 CASES (Case 2020-0984)

1. INTRODUCTION

- This Opinion relates to the European Banking Authority's ('the EBA') consultation on the legal basis for manual contact tracing of COVID-19 cases.
- The EDPS issues this Opinion in accordance with Articles 57(1)(g) and 58(3)(c) of Regulation (EU) 2018/1725 ('the Regulation'). This Opinion relies on the EDPS Orientations on manual contact tracing by EU Institutions in the context of the COVID-19 crisis ('the Orientations')¹

2. FACTS

The EBA as part of its Crises Respond Team (part of the Operations Section, not linked to the Medical Services) considers for the purpose of protecting the health and to minimize the risk of spread of COVID-19 at the workplace to process the following personal data concerning confirmed and suspected COVID-19 infections of the EBA staff members and members of their household:

- first name
- last name
- place of employment
- medical status (COVID-19 symptoms; info on COVID-19 symptoms of household members – no names)
- result of the test (when the need for testing has been confirmed)
- time of the onset of COVID-19 symptoms
- list of close contacts with the staff member concerned over a period to be determined on a case-by-case basis after appearance of the first symptoms
- floor number in the building and department of the staff member concerned
- necessary time for recovery before resuming work.

The EBA considers to process this data only when they are disclosed by the Staff members. As possible legal basis for such processing the EBA listed Article 10(2)(b) of the Regulation in conjunction with Articles 1e(2) and 59(1) of the Staff Regulations (plus Articles 10 and 16 of the CEOS²), and a consent of the EBA staff members.

¹ [21-02-02 EDPS orientations on manual contact tracing.](#)

² Conditions for Employment of Other Servants of the European Union (see link to [Staff Regulations and CEOS](#)).

The Deputy DPO of the EBA asked the EDPS about applicable legal basis for manual contact tracing of COVID-19 cases.

3. LEGAL ANALYSIS AND RECOMMENDATIONS

The manual contact tracing of the COVID-19 infections in the EBA would involve the processing of health data which is a special category of personal data. Consequently, it must comply with the requirements of Article 5 and Article 10 of the Regulation which foresees limited grounds for lawfulness.

Taking into account the employment context of such contact tracing system, it is unlikely that consent is freely given, thus in majority of cases will not be considered as a valid legal ground for the processing operation³. Therefore, EBA should not rely on consent (Article 10(2)(a) of the Regulation) in this context. The EDPS considers that **Article 10(2)(b) and 10(2)(h) of the Regulation are relevant lawful grounds** for the processing of special categories of personal data for the manual contact tracing of staff and members of the staff's household.

The EDPS understands that the EBA's aim is to provide a safe working environment for its staff in application of the requirements set out in Article 1e (2) of the Staff Regulations⁴. However, in the EDPS opinion, manual contact tracing in this case goes beyond the basic protective and preventive safety measures (i.e. mandatory masks and or the measurement of body temperature) and contributes actively to the medical management of an epidemic, which falls outside the primary role of the EBA as an employer.

In such case, **Article 59 of the Staff Regulations**⁵ related to the management of medical leave **is the relevant legal basis** to allow the processing of COVID-19 medical information. Especially Article 59(5) of the Staff Regulations states “[o]fficial may be required to take leave after examination by the institution's medical officer if his state of health so requires or if a member of his household is suffering from a contagious disease”, therefore the EDPS considers it as a sufficient legal ground for contact tracing. In addition, this Article would also cover the collection of data from members of the staff's household provided that such information is disclosed by the staff member. However, it is the EDPS understanding that Article 59(5) of the Staff Regulations is not applicable to staff members who will not generate a chain of contamination at the office (e.g. members who are exclusively teleworking and have not come to the office at all in the period during which they were contagious).

Article 59(5) of the Staff Regulations clearly indicates that “the institution's medical officer” is playing a critical role in processing the information linked to contact tracing. Therefore, the processing of such health data should remain under the **control and supervision of the medical officer or other medical professionals** who are bound by medical secrecy⁶.

Special care should be applied when communicating health related information non-medical staff in charge of implementing relevant mitigation measures (such as the cleaning of

³ See page 5 of the Orientations and page 9 of [the European Data Protection Board's Guidelines 05/2020 on consent under Regulation 2016/679](#)

⁴ For other servants, Article 10(1) of the CEOS refers to Article 1e of the Staff Regulations.

⁵ For other servants, Article 16 of the CEOS refers to Article 59 of the Staff Regulations

⁶ Article 10(3) of the Regulation. See also pp- 7-8 of the Orientations.

designated offices). EBA must ensure that only the necessary information is provided and **confidentiality** of the medical information is respected. This requirement does not prevent the processing of non-medical or health related data by non-medical staff but in charge of security or relevant measures in order to implement general health and safety measures⁷.

Additionally, given the intrusive nature on data subject's privacy of contact tracing, the implementation of such process by the EBA requires technical and organisational measures to ensure confidentiality⁸, as well as the compliance with the principle of **proportionality**. Only a limited number of persons in close contact with the infected staff member should be traced and monitored and the EBA should regularly review the use of such tool and its proportionality⁹.

As for any data processing operation, **data protection by design and by default** set out in Article 27 of the Regulation and **data minimisation** (as well as the other data protection principles of Article 4 of the Regulation) must be applied. The controller should collect and process only the minimum amount of data and use privacy-friendly technologies at all stages of the process.¹⁰ Also taking into account involved risks, sensitivity of the data and the scale of the processing, a **data protection impact assessment** (DPIA) should be prepared by the controller.¹¹

4. CONCLUSION

In light of the above, the EDPS recognizes a possibility for EBA to set up a manual contact tracing of COVID-19 cases provided that the requirements of Articles 5 and 10 of the Regulation and Article 59 of the Staff Regulations are met, which means primarily that the control and supervision over processing of sensitive data about health should remain with the medical professionals bound by a duty of medical confidentiality.

The Orientations include further guidance on the topic, including on communication of information between EU institutions, data transmission with local authorities, duration of data storage and data subject's rights.

Done at Brussels, 26 February 2021

(e-signed)

Delphine HAROU

⁷ See p. 8 of the Orientations.

⁸ See p. 10 of the Orientations.

⁹ See p. 8 of the Orientations.

¹⁰ See p. 10 of the Orientations.

¹¹ [The EDPS Decision on DPIA lists issued under Article 39\(4\) and \(5\) of the Regulation. See also p. 7 of the Orientations.](#)