

BRIEF CONSIDERATIONS ON THE COMPLIANCE WITH THE RIGHT TO FREE MOVEMENT WITHIN THE EU UNDER THE CONDITIONS OF THE EU DIGITAL COVID CERTIFICATE

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Abstract

The current study aims to bring to reader's attention the arguments of supporting the communitarian initiative in the implementation of the electronic document – the EU Digital COVID Certificate, provided that it fully respects the fundamental rights of citizens, including the protection of personal data. We will thus try to demonstrate that the possession of a green electronic certificate will not be a precondition for free movement, and those who do not hold such a certificate will not be discriminated against in any way. The research methods used in this paper are a) logical-concretized method by using the main legal instruments, opinions, recommendations, regulations; b) comparative method; c) sociological method. The result of the current article can be resumed in the meaning that the green certificate provides a solution for the EU to guarantee the fact that both the communitarian nationals as well as their family members and extra-communitarian citizens but who legally reside within the EU area, shall enjoy a digital instrument created to support free movement with the Union. This Union document transposed at the level of each Member State is the result of a coordinated and predictable “Union institutions – Member States” approach.

Keywords: Covid EU digital certificate, gateway, reference solutions, QR code.

JEL Classification: K32, K33

1. Introduction

Freedom of movement in the communitarian area represents a fundamental right stated by the Maastricht Treaty², provided by the quality as citizen of a EU Member State.

According to Art 45 of the Charter of Fundamental Rights of the European Union, “Every citizen of the Union has the right to move and reside freely within the territory of the Member States”.

Every union national³ has the right to enter and remain (the right to free movement) on the territory of another Member State, other than the one of origin, under the limitations and conditions stated by the Directive 2004/38/EC⁴, namely the limitation of rights for reasons of public health⁵.

Thus, Member States may, in accordance with European Union law, limit the fundamental right to free movement on grounds of public health while respecting the principles of proportionality and non-discrimination.

On January 30, 2020, the General Director of the World Health Organization declared the epidemic caused by the acute respiratory syndrome coronavirus 2 (SARS-COV2) causing COVID 19 to be a public health emergency with an international impact. In this context, the Council adopted two Recommendations⁶ proposing to the Member States a coordinated action regarding the

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² Ioana Nely Militaru, *Protection of Fundamental Rights in the European Union*, „Perspectives of Law and Public Administration” Volume 8, Issue 2, December 2019, p. 352-357.

³ Ioana Nely Militaru, *Dreptul Uniunii Europene. Cronologie. Izvoare. Principii. Institutii. Piata interna a Uniunii Europene. Libertatile fundamentale*, 3rd edition revised and amended, Universul Juridic, Bucharest, 2017, p. 121.

⁴ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance).

⁵ “The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organization and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State”, see in this regard Art 29 Para 1 of the Directive 2004/38/EC.

⁶ Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, JO L 337, 14.10.2020, p. 3; Council Recommendation (EU) 2020/1632 of 30 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic in the Schengen area, JO L 366, 4.11.2020, p. 25.

application of cross-border restrictions, union nationals, their family members, but also to extra-national citizens with a legal residence and their family members. Specifically, on October 13, the Council adopted Recommendation (EU) 2020/1475 which stated a coordinated policy on restricting free movement during the pandemic, in the following key areas:

- introduction of common criteria and thresholds regarding the application of restrictions on freedom of movement;
- mapping of areas at risk of SARS-COV2 transmission, based on a color code;
- coordinated approach of Member States regarding measures applied to individuals coming from risk areas;
- based on the provisions of Recommendation (EU) 2020/1475, the European Center for Disease Prevention and Control (ECDC) publishes a weekly map of EU Member States, with relevant data on test rates and positive test rates, etc.

During the informal videoconferences within the European Council, from February 25 and 26, 2021, the heads of state requested the European Commission to continue the works in order to complete the topic regarding the issuance of electronic certificates regarding the COVID.

Thus, the European Commission is responsible for:

- the elaboration of the proposal of the Union legislative framework regarding the EU digital certificate;
- the creation of the technical-support system, in order to implement the electronic certificate.

On 17 March 2021, the European Commission presented a proposal for a Union regulation on the creation of an EU electronic certificate on COVID (originally called the green electronic certificate) with the aim of facilitating the freedom of movement in the strict conditions generated by the COVID pandemic.

The sole stated purpose of this approach is to provide Union nationals and their family members as well as non-EU nationals with legal residence with an easy, safe and non-discriminatory mechanism in compliance with the values conferred by the EU Charter of Fundamental Rights.

The guiding principles taken into account in the elaboration of the legislative project were:

- the EU electronic certificate is applicable in all EU Member States, including in Iceland, Liechtenstein, Norway and Switzerland starting with July 1, 2021, and for states that need additional time for implementation, an additional time of six weeks shall be granted;
- the application of this interstate mechanism has a temporary character, respectively with applicability until the date when the World Health Organization (WHO) will declare the end of the pandemic generated by COVID 19;
- the certificates are issued free of charge to applicants;
- the certificate contains only essential secure information such as name, date of birth, date of issue, relevant information on the type of vaccine used/test/cure following the disease/unique identification code – QR. We need to mention that these information are verified to establish the *authenticity and validity of the certificate*;
- the certificate respects the principle of non-discrimination in relation to those nationals who refuse vaccination, in the sense that this document is issued not only to vaccinated persons but also to unvaccinated persons who, as the case may be, have undergone illness (but not more than 180 days) or who accept a test for SARS-CoV-2 (RT-PCR tests or rapid antigen tests). All this information is being mentioned in English and in the official language of the issuing state;
- Member States will be technically supported by the European Commission to log in to the Union's electronic portal.

On June 14, 2021, the Union framework rule on the subject of analysis entered into force, namely the Regulation (EU) 2021/953⁷ on the EU digital certificate on COVID 19. Regulation (EU)

⁷ Based on Art 67 Para 3 of the republished Romanian Constitution, as well as of the Protocol No 2 on the application of the principles of subsidiary and proportionality, attached to the Lisbon Treaty modifying the Treaty on the European Union and the Treaty establishing the European Community, signed at Lisbon on December 13, 2007, ratified by the Law no. 13/2008, based on the

2021/954⁸ extends that common framework to nationals of countries third parties who are legally resident or legally resident in the Schengen area.

Specifically, the objective of Regulation (EU) 2021/954 is to facilitate free movement in the EU during the pandemic, to third-country nationals who are not family members of Union nationals but who are legally resident or have a legal residence on their territory and who have the right to travel to other Member States in accordance with Union law.

In the same context, the Romanian legislator, respectively the Romanian Senate regulated by Decision no. 85/2021⁹ the following guidelines regarding the use of the electronic certificate:

- the possession of the electronic certificate does not constitute a premise of the right regarding the free movement in the EU space;
- Union legislation should not affect the ability of Member States to take decisions at national level on public health grounds, in compliance with Union law, depending on the evolution of the epidemiological reality;
- Member States are given the power to manage their own systems for issuing and verifying the authenticity of electronic certificates until such time as the unitary electronic portal becomes operational at the level of each Member State.

In order to implement Regulation (EU) 2021/953, GEO no. 68/2021 on the adoption of measures for the implementation of the European framework for the issuance, verification and acceptance of the European Union digital certificate on COVID was adopted at national level to facilitate free movement during the COVID-19 pandemic¹⁰.

2. Interoperable digital vaccination, testing and cure certificate for COVID-10 (EU digital certificate on COVID) under Regulation (EU) 2021/953

According to the provisions inserted in Art 1, the Union framework norm “provides the legal basis for the processing of personal data necessary for the issuance of such certificates and for the processing of the necessary information in order to verify and confirm the authenticity and validity of such certificates in compliance with the full application of Regulation (EU) 2016/679”.

According to the Regulation, the “EU digital certificate on COVID” refers to “an interoperable certificate containing information on the status of the holder, in terms of vaccination, test result or cure, issued in the context of the COVID pandemic 19”.

The provisions of Article 3 reiterate the guiding principles taken into account by the European Commission with the elaboration of the draft Regulation, in the sense that the digital certificate:

- it is released free of charge¹¹;
- it is not a travel document but provides scientific evidence related to vaccination, testing and cure of COVID-19¹²;
- it is recognized to the nationals of the member states and their family members¹³ as well as

Commission Report for European affairs no LXII/177 of June 9, 2021, the Senate adopts the Decision no. 85/22 June 2021 on the proposal for a Regulation of the European Parliament and of the Council establishing a framework for the verification and acceptance of interoperable certificates for vaccination, testing and cure for the nationals of third-countries whose stay or residence on the territory of EU Member States is legal during the COVID-19 pandemic (electronic green certificate) – COM (2021) 140 final, published in the Official Gazette no. 638/29 June 2021.

⁸ Regulation (EU) 2021/954 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic.

⁹ Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic.

¹⁰ Published in the Official Gazette, No 644/30 June 2021.

¹¹ Art 3 Para 4 of the Regulation (EU) 2021/953.

¹² Art 3 Para 5 of the Regulation (EU) 2021/953.

¹³ The European Commission reserves its right “to adopt implementing acts establishing that COVID-19 certificates issued by a third country with which the Union and the Member States have concluded an agreement on the free movement of persons allowing the contracting parties to restrict such free movement on grounds of public health are equivalent to those issued in accordance with this Regulation”, according to Art 3 Para 10 of Regulation (EU)2021/953.

to the extra-national nationals in conditions of legal residence.

The characteristics of the vaccination certificate are summarized in Art 5 of the Regulation as follows:

- contains personal data, respectively, the identity of the holder, information on the vaccine against COVID-19 and the number of doses administered, the issuer of the certificate. The personal data contained in a certificate issued under this Regulation shall be processed only for the purpose of accessing and verifying the information stored therein;

- it is released in a standardized and interoperable format.

Art 6 of the union norm regulates the variation of the interoperation document attesting the testing of the holder, giving him the freedom of interstate circulation, in the conditions generated by the COVID-19 pandemic. In this case, the incumbent will demonstrate that he/she performed a test for SARS-COV2 infection with a negative result.

Within the generic *digital certificate* title we also identify the third variation regulated in Art 7 and called the “cure certificate” which presents besides the general elements mentioned for the first two categories and the requirement according to which it is issued at the earliest at 11 days on the date on which the person in question performed the first NAAT¹⁴ test which had a positive result”.

Depending on the category of digital certificates, they have a validity, as follows:

- vaccination certificates, until June 30, 2022;
- test certificates for 24 hours for antigen testing and 72 hours for RT-PCR testing;
- healing certificates, for 180 days from the date of the first positive result of the test for SARS-COV2, registered in the “Corona-form” platform.

In order to issue digital certificates, in the case of minors under 14 years of age, depending on the type of certificate, the identification data will be requested, except for the series and number of the identity document, as well as filling in the name and surname of the person exercising parental authority over the minor and confirmation that there is agreement to issue the requested certificate.

When will the provisions of this Regulation become applicable?

The answer is given to us by Art 17 of the framework norm in the matter, according to which the digital certificate is issued starting with July 1, 2021, the provisions being applicable until June 30, 2022.

Last but not least, we believe that the text of the Ordinance fully ensures the protection of individuals with regard to the processing of personal data, in accordance with the provisions of Regulation (EU) 2016/679 and Law no. 190/2018 on the measures for the application of the mentioned Regulation.

3. EU Gateway – the technical pillar of facilitating the unitary verification at communitarian level of the digital certificates

What is the EU Gateway and what does this technical network provides? To answer this question, it is necessary to present the declaration of the European Commissioner for Internal Market, Thierry Breton, who stated that “The Go-Live of the Gateway today is an important step which will allow Member States to start using the Gateway and start issuing EU Digital COVID Certificates... The timely preparation will allow the full system to be up and running by 1 July – when the proposal enters into application and the EU will be on time to open up again this summer”.

The EU Gateway has been developed by T-System and SAP and is hosted by the data center of the European Commission. In other words, connecting the Member States to this union gateway shall be done with the technical and financial support of the European Commission. In this meaning, the communitarian institution has launched a first series of guidelines on technical

¹⁴ “NAAT test” refers to a test amplifying the molecular nucleic acid, used to detect the presence of the ribonucleic acid SARS-COV-2 (ARN).

specifications since January 2, 2021, updated on March 12, 2021.

This connection is based on an open source reference software (reference solutions) that allows all states to develop their own national networks for issuing certificates, scanning and verifying QR codes in a cross-border context, as well as a “reference wallet for storage”. We therefore note that the main competencies of this EU portal are:

- allows the sharing of electronic signature keys, thus facilitating the verification of the authenticity of the electronic certificate throughout the EU;
- provides national programs with a reference application for verifying certificates;
- it gives national programs a model of electronic wallet where citizens can keep the respective certificates.

The access to the EU Gateway has been achieved since May 10, 2021, when 22 Member States successfully tested this mechanism.

Moreover, starting with June 1, 2021, seven Member States, Bulgaria, the Czech Republic, Croatia, Denmark, Germany, Greece, Poland have begun issuing the first digital certificates. Currently, the entire system is operational, so all Member States are connected to the gateway and issue EU digital certificates on COVID.

At national level, the interoperable IT system is regulated in Art 2 of GEO no. 68/2021 on the adoption of measures for the implementation of the European framework for the issuance, verification and acceptance of the European Union digital certificate on COVID to facilitate free movement during the COVID-19 pandemic, in the sense that the “Romanian public authorities and institutions with attributions in fulfilling the provisions of Regulation (EU) 2021/953 and Regulation (EU) 2021/954, use starting with July 1, 2021, the verification of EU digital certificates regarding COVID system hereinafter referred to as SII-CDC, formed by:

- a) a web portal – <https://certificat-covid.gov.ro>;
- b) IT services infrastructure;
- c) the mobile application “CoronaScan” having the role of verifying the authenticity and validity of the certificates by scanning the QR code on the certificates.

SII-CDC is under the operational administration of the Ministry of Health, being technically implemented by the Special Telecommunications Service, the latter having the following attributions:

- the update and maintenance of the SII-CDC;
- the hosting and technical administration of the hardware and software;
- the insurance of cybernetic safety for the SII-CDC;
- technical implementation of a call-center system.

On the Romanian territory, the digital certificate is issued:

- *Electronically*, by accessing the web portal <https://certificat-covid.gov.ro>;
- *On paper*, the holder addressing either the mayor’s office in the area where he resides, or the County Directorate of Public Health, or the Community Public Service for the Evidence of Territorial Competent Persons. Each of these institutions, after receiving the necessary documents from the applicant, shall interrogate the web portal <https://certificat-covid.gov.ro>, print and hand over the certificate to its owner.

The request for issuing the certificate in electronic format must be made:

- for vaccination and cure certificates, at least 5 working days before the moment of using the certificate;
- for test certificates, after the test, but not earlier than 12 hours or 48 hours, depending on the test used, before the certificate is used.

Regarding the role and involvement of the Romanian institutions, GEO no. 68/2021 regulates in article 2, the responsibilities of the Ministry of Health as follows:

- publishes on the official website the union and national legal framework;
- provides assistance through the County Public Health Directorates, respectively the municipality of Bucharest, in order to issue certificates in electronic or paper format;
- it rectifies, at the request of the holders, through the County Public Health Directorates,

respectively of the Bucharest municipality, the data from the computer platform “Coronforms” within maximum four days from the request;

- ensures through the Institute of Public Health, the introduction and rectification of data from the National Electronic Register of Vaccinations;
- prepares and notifies the European Commission, the list of vaccines accepted by Romania;
- provides to the local public administration authorities, access codes on the web portal <https://certificat-covid.gov.ro>, guides for using the portal and technical assistance in order to issue certificates in paper format.

4. Conclusions

We believe that the EU digital certificate on COVID will provide EU citizens as well as non-EU nationals with a legal residence a unique tool on the basis of which free movement is guaranteed. This common mechanism fully respects the values and principles underlying the functioning of Union law: the protection of personal data, inclusion and proportionality.

Nevertheless, we must mention that although we mention the functionality of the interoperable digital certificate system July 1, 2021, no Member State can be prevented from imposing restrictions provided that it informs the European Commission at least 48 hours before these restrictions enter into force.

We can say without error that the European Union has managed to meet its commitments to its citizens, so that the digital certificate on COVID shows a secure Europe, which through the measures provided, proves that it cares about the health of its citizens but also confers gradual opening to free movement inside it.

We also emphasize the opinion that the digital certificate is not discriminatory, but one that certifies that the national is healthy and his circulation in the union space does not endanger the health of others.

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