



EDPS OPINION ON THE DRAFT COMMISSION DECISION ON THE VERIFICATION OF COVID-19 CERTIFICATES IN LUXEMBOURG (Case 2021-1197)

1. INTRODUCTION

- This Opinion relates to the European Commission's ('the Commission') request for a formal consultation on its draft internal rules on digital verification of COVID-19 certificates in Luxembourg, submitted on 17 December 2021.
- The request for consultation was submitted to the EDPS pursuant to Art. 41(1) of Regulation (EU) 2018/1725 ('the Regulation')¹. In accordance with the EDPS policy on Consultations and Authorisations in the field of Supervision and Enforcement², the EDPS treats communications under Art. 41(1) of the Regulation as requests for consultation.
- The EDPS issues this Opinion in accordance with Article 58(3)(c) of the Regulation.
- The EDPS highlights the EDPS Guidance on Return to the Workplace and EUIs' screening of COVID immunity or infection status ('the EDPS Guidance')³.

¹ Regulation (EU) 2018/1725 of the European Parliament and the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ, L 295, 21.11.2018, pp. 39-98.

² Policy on Consultations and Authorisations in the Field of Supervision and Enforcement, 8 May 2020, available at: https://edps.europa.eu/sites/edp/files/publication/20-05-08_policy_on_consultations_en.pdf

³ Available on the EDPS website at: https://edps.europa.eu/system/files/2021-08/21-08-09_guidance_return_workplace_en_0.pdf



2. BACKGROUND INFORMATION

By letter of 17 December 2021, the Commission informed the EDPS of its draft internal rules ('draft Decision') on digital verification of COVID-19 certificates for **all persons** who access Commission premises **in Luxembourg**. The draft Decision amends Decision C(2020) 5973 as regards the conditions for access to the Commission premises in Luxembourg.

Commission Decision C(2020) 5973, as amended by Commission Decisions C(2021) 6669 and C(2021) 7699, lays down specific health and safety rules for the Commission sites of Brussels and Luxembourg to prevent the further spread of SARS-CoV-2 and to protect staff, while ensuring business continuity and adopting solutions for staff to enable them to perform their work efficiently and effectively. Together with the draft Decision, the Commission communicated to the EDPS the Commission Decision C(2021)6669 amending Decision C(2020)5973 as regards additional specific health and safety rules for the Commission sites of Brussels and Luxembourg, the Commission Decision C(2021)7699 amending Decision C(2020)5973 as regards the digital verification of COVID-19 certificates, as well as the Protocol on digital scanning of COVID-19 certificates. It is to be noted that the EDPS has issued an [opinion](#) on Decision C(2021)7699, when it was in draft stage.

The Commission intends to amend Decision C(2020)5973 in order to require not only visitors, but also staff members, as well as individuals who are neither staff members of the Commission nor visitors within the meaning of Article 2a of the Decision C(2020)5973 to present a COVID-19 certificate to access the Commission premises in Luxembourg. The draft Decision also includes the possibility for persons to whom the competent national authorities have issued a certificate stating that they have a counter-indication to be vaccinated against COVID-19 to do a **self-diagnostic test** on the spot. Additionally, the draft Decision reduces the duration of the **validity of test certificates**.

This draft Decision is based on the fact that on 16 December 2021, the Luxembourgish authorities adopted a law amending the law of 17 July 2020 on the measures to fight the COVID-19 pandemic⁴. The changes introduced by the draft Decision are in line with the Luxembourgish law.

As regards the verification of the identity of certificate holders, provided for in national law⁵, there is no need to lay down additional measures in this respect in the draft Decision, since such a verification is already laid down in Articles 2c(3) and 2d(2) of Decision C(2020) 5973.

⁴In accordance with Article 3septies, paragraph 1, of the law of 17 July 2020, as amended, all employees must present a COVID-19 certificate in order to access their workplace. Three types of certificates are accepted, namely negative test certificates, recovery certificates or vaccination certificates. According to the same national law, persons to whom the competent Luxembourgish authorities have issued a certificate stating that there is a counter-indication to their vaccination, must present a negative test certificate in order to access their workplace. That negative test may be a molecular nucleic acid amplification test (NAAT), a rapid antigen test (RAT) or a self-diagnostic test done on the spot. An employer may also decide to extend the same obligation to other persons accessing its premises. According to Article 3quater, paragraph 4, of the law of 17 July 2020, as amended, the validity of a test certificate is reduced to 48 hours, in the event of a molecular nucleic acid amplification test (NAAT), and to 24 hours, in the event of a rapid antigen test (RAT).

⁵ Article 3septies, paragraph 7, of the law of 17 July 2020

Additionally, based on the draft Decision, with a view to minimising the risk of fraud, COVID-19 certificates should, to the extent possible, continue to be verified digitally by means of the mobile application covidcheck.lu.

The draft Decision will enter into force on 15 January 2022.

3. LEGAL ANALYSIS AND RECOMMENDATIONS

The processing operation as described above, i.e. digital verification of certificates involving the scanning of a QR code, constitutes processing as defined by Article 2(5) of the Regulation and, therefore, falls within the scope of the Regulation. The EDPS considers that the processing in question interferes with the individuals' fundamental rights of privacy and data protection.

As a preliminary remark, the EDPS highlights that the recommendations included in his opinion on the Decision C(2021)7699, when in draft stage (case 2021-0941), remain valid.

3.1. Lawfulness of the processing

Article 1 of the Decision of the Director-General of Personnel and Administration of 22 April 2008 (D(2008) 3248) provides that the Commission sites of Brussels and Luxembourg should, to the extent that they comply with Union law and the Protocol on Privileges and Immunities, as well as other applicable international instruments, such as Seat Agreements and without prejudice of the adoption of special and more stringent health and safety rules, apply the relevant provisions of national law pertaining to health and safety at work.

The Luxembourgish law adopted on 16 December 2021⁶ amended the law of 17 July 2020 on the measures to fight the COVID-19 pandemic. The amended law provides for additional measures necessary to deal with the latest developments linked to the COVID-19 pandemic.

In line with the additional health and safety measures introduced by the Luxembourgish authorities, the draft Decision amends **Decision C(2020)5973** in order to :

⁶ Journal Officiel du Grand-Duché de Luxembourg N° 875 du 16 décembre 2021.

- require not only visitors, but also staff members and other individuals who access Commission premises in Luxembourg, such as staff members of other Union Institutions in possession of a valid access pass to present a COVID-19 certificate,
- shorten the duration of the validity of test certificates to 48 hours in the event of a molecular nucleic acid amplification test (NAAT), and to 24 hours, in the event of a rapid antigen test (RAT),m

and

- introduce the possibility for persons to whom the competent national authorities have issued a certificate stating that they have a counter-indication to be vaccinated against COVID-19 to do a self-diagnostic test on the spot.

The Protocol on Privileges and immunities⁷ covers only the areas necessary for the specific functioning of EUIs and does not appear to include national health and safety measures, such as those at stake in the present case. The EDPS assumes that the draft Decision is also in line with the Seat Agreement between the Commission and the Luxembourgish authorities. As to their compliance with Articles 7 and 8 of the Charter, and the provisions of the Regulation, the Commission has to conduct an assessment of the necessity and proportionality of applying the additional national rules to its premises in Luxembourg (see also section 3.2). By doing so, the Commission can rely on the assessment conducted by the Luxembourgish authorities. In this respect, the EDPS notes in particular that the draft Decision refers to the assessment of the Luxembourgish data protection authority, which did not raise any concerns as regards the obligation for all employees to present a COVID-19 certificate in order to access their workplaces^{8 9}. Similarly, the draft Decision refers to the opinion of the Council of State of Luxembourg, which stated that the measures laid down in Article 3septies, as amended, do not constitute a disproportionate interference with individual freedoms, since those measures are proportionate to the needs arising from the protection of public health. While aligning to the national rules, the Commission should take into account any recommendations issued at national level that would also be relevant for the digital verification of COVID-19 certificates at the entrance of its premises in Luxembourg.

Recommendation 1: The EDPS recommends that the Commission include in the operative part of the draft Decision, a reference to the applicable grounds for lawfulness under Articles 5 and 10 of the Regulation, as well as to the applicable Union law, for the new conditions for access of staff members, and individuals who are neither staff members, nor visitors, to the Commission premises in Luxembourg.

⁷ Protocol No 7 on the Privileges and immunities of the European Communities, OJ C 115/266, 9.5.2008.

⁸[https://www.chd.lu/wps/PA_RoleDesAffaires/FTSByteServletImpl?path=F3E40EC8D3E1EF74728175173D2038F78209E26D0DB45FB9A4568CBEC50EA14D1A9C9F74AC5CE45F04EDD800EA447AB8\\$7530AFDB3FEE5EDEA8A13F5CEB79C1A7](https://www.chd.lu/wps/PA_RoleDesAffaires/FTSByteServletImpl?path=F3E40EC8D3E1EF74728175173D2038F78209E26D0DB45FB9A4568CBEC50EA14D1A9C9F74AC5CE45F04EDD800EA447AB8$7530AFDB3FEE5EDEA8A13F5CEB79C1A7)

⁹[https://www.chd.lu/wps/PA_RoleDesAffaires/FTSByteServletImpl?path=1227E7A50B56FF93DA6FD8FDDE3E7B3497DFA1D14B742BF8BBEDB9FA3994437AE921DE0398BFCECC4057ABF78F388AE7\\$CD94C3D8C3810BEB5854359619CC9C6](https://www.chd.lu/wps/PA_RoleDesAffaires/FTSByteServletImpl?path=1227E7A50B56FF93DA6FD8FDDE3E7B3497DFA1D14B742BF8BBEDB9FA3994437AE921DE0398BFCECC4057ABF78F388AE7$CD94C3D8C3810BEB5854359619CC9C6)

Recommendation 2: The EDPS recommends that the Commission additionally refer to national health guidance regarding the use of COVID-19 certificates in the employment context, if available.

3.2. Necessity and proportionality of extended verification of the COVID-19 certificate and appropriate safeguards

The draft Decision extends the use of COVID-19 certificates to individuals who are neither staff members of the Commission nor visitors within the meaning of Article 2a of Decision C(2020) 5973, such as staff members of other Union institutions in possession of a valid access pass (Recital 12).

In this respect, the EDPS notes that while verifying COVID-19 certificates of staff members is compulsory in line with the national law, it is up to the employer to decide whether to extend the same obligation to other persons accessing its premises. As a result, the Commission should conduct its own assessment of the necessity and proportionality of this extension compared to other less intrusive controls, such as organisational arrangements to ensure physical distancing and sanitary precautions.

Recommendation 3: The EDPS recommends that the Commission conduct and document its assessment of the necessity and proportionality of extending verification of COVID-19 certificates to individuals who are neither staff members of the Commission nor visitors within the meaning of Article 2a of Decision C(2020)5973, and include a reference to this assessment in the recitals of the draft Decision.

Like the national legislation, the draft Decision includes the possibility for persons to whom the competent national authorities have issued a certificate stating that they have a counter-indication to be vaccinated against COVID-19, to do a self-diagnostic test on the spot.

Recommendation 4: The Commission should include additional information in the draft Decision concerning the applicable appropriate safeguards for carrying out and verifying self-diagnostic tests. Additionally, the Commission should clarify that the verification of the self-diagnostic tests is only visual and that there is no recording or documentation of the results.

4. CONCLUSION

The EDPS has made several recommendations to ensure compliance of the processing with the Regulation.

In light of the accountability principle, the EDPS expects the Commission to implement the above recommendations accordingly and has decided to **close the case**.

Done at Brussels on 07 January 2022

[e-signed]

Wojciech Rafał WIEWIÓROWSKI