



EDPS  
EUROPEAN DATA PROTECTION SUPERVISOR

# EDPS OPINION ON THE COMMISSION DRAFT DECISION AMENDING THE DECISION OF THE JRC DIRECTOR-GENERAL OF 18 AUGUST 2017 AS REGARDS ADDITIONAL SPECIFIC HEALTH AND SAFETY RULES FOR THE COMMISSION SITE OF ISPRA (Case 2021-1000)

## INTRODUCTION

- This Opinion relates to the Joint Research Centre of the European Commission (‘the JRC’) communication of information pursuant to Article 41(1) of Regulation (EU) 2018/1725<sup>1</sup> (‘the Regulation’) of its draft decision relating to the digital verification of Covid-19 certificates of staff and visitors of the Ispra site of the JRC, submitted to the EDPS on 3 November 2021.
- In accordance with the EDPS policy on Consultations and Authorisations in the field of Supervision and Enforcement,<sup>2</sup> the EDPS treats communications under Article 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 EUI’s screening of COVID immunity or infection status (‘the EDPS Guidance’).<sup>3</sup>

<sup>1</sup> 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.

<sup>2</sup> 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](https://edps.europa.eu/sites/edp/files/publication/20-05-08_policy_on_consultations_en.pdf).

<sup>3</sup> Available on the EDPS website at [https://edps.europa.eu/system/files/2021-08/21-08-09\\_guidance\\_return\\_workplace\\_en\\_0.pdf](https://edps.europa.eu/system/files/2021-08/21-08-09_guidance_return_workplace_en_0.pdf).

## BACKGROUND INFORMATION

By letter of 3 November 2021, the JRC informed the EDPS of its draft decision relating to the digital verification of Covid-19 certificates of staff and visitors of the JRC Ispra site. The JRC communicated to the EDPS the Commission Decision C(2021) 7522 of 14 October 2021, the draft decision amending the Decision of the JRC Director-General of 18 August 2017 as regards additional specific health and safety rules for the Commission site of Ispra ('the draft decision'), and the JRC Decision establishing a harmonised policy for health and safety at work for Commission staff working on JRC sites outside Brussels.

According to the information received, the JRC intends to adopt rules for its site in Ispra, Italy, requiring the staff and visitors to these sites to present a valid digital EU Covid-19 certificate, to be checked digitally through the relevant national mobile application ('app'), *VerificaC19*.

This decision, is based on the fact that on 21 September 2021, the Italian government issues a law-decree<sup>4</sup> requiring the possession of a form of the EU Covid-19 certificate to access workplaces in the public and private sector as from 15 October 2021.

By Decision C(2021) 7522, the JRC implemented this requirement as of 15 October 2021, in line with its practice and the legal framework on implementing occupational health and safety rules of its host countries, as compatible with EU law, in particular with the Protocol on Privileges and Immunities. According to the JRC, due to the specific nature of this obligation and the short timeframe for its implementation, this requirement was implemented through a Commission Decision C(2021) 7522 of 14.10.2021 only as a purely visual check of the certificates, without any retention or further processing of any personal data.

In order to increase the efficiency of the entry procedures, to reduce the risk of fraud and to implement a more privacy-friendly solution in checking the compliance with the above-mentioned obligation, the JRC intends to apply digital verification of the certificates, hence the draft decision. This will be done through the mobile application *VerificaC19*, made available by the Italian authorities to check the validity of the certificate. This app has been positively reviewed by the Italian National Data Protection Authority and only displays a green/valid or red/not valid result, without displaying the reason (test/recovery/vaccination status) for the validity and with no data retention. Manual verification of the certificates is foreseen in cases of technical problems with the digital verification.

## LEGAL ANALYSIS AND RECOMMENDATIONS

### Lawfulness of the processing

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

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<sup>4</sup> Paragraphs 1 to 4 of Article 9 quinquies of the Decreto-legge of 22 April 2021, n. 526, as introduced by the Decreto-legge of 21 September 2021 n.127: "Misure urgenti per assicurare lo svolgimento in sicurezza del lavoro pubblico e privato mediante l'estensione dell'ambito applicativo della certificazione verde COVID-19 e il rafforzamento del sistema di screening

processing in question interferes with the individuals' fundamental rights of privacy and data protection.

By **Decision of 18 August 2017** establishing a Harmonised Policy for Health and Safety at Work for Commission Staff working on JRC sites outside Brussels, the Director-General of JRC adopted for all JRC sites outside Brussels the laws and regulations of national law in force, in conformity with Union and Euratom law and as far as compatible with the respect of the privileges and immunities guaranteed to the Commission by the Protocol on the privileges and immunities of the European Union and Euratom and other applicable international instruments, such as the site agreements. Article 2 of that Decision provides for the adoption of specific detailed rules on health and safety for the personnel for each JRC site outside Brussels. The **Site Agreement** concluded by the Commission with Italy on hosting JRC premises in Ispra on 22 July 1959 and the subsequent modalities<sup>5</sup> provide for the application of **Italian legislation on health and safety at work** to the Ispra Site (EUR/C/4199/1/66) under the Commission's sole responsibility.

By **Decision C(2021) 7522 of 14 October 2021**, the Commission amended the Decision of the JRC Director-General of 18 August 2017 as regards additional specific health and safety rules for the Commission site of Ispra ('the main decision'), so that it implements paragraphs 1 to 4 of Article 9-quinquies of the Italian law-decree of 22 April 2021, n. 526,<sup>6</sup> as introduced by the law-decree of 21 September 2021 n. 127 (the 'Decreto-legge 2021/127'). The latter extends the requirement of possession of the COVID-19 certificate (certifying vaccination, recovery or a negative test result as described in the decree) issued by the Italian authorities by means of a national dedicated platform to all workers in the private and public sector in order to access respective workplaces as from 15 October 2021. By Decision C(2021) 7522, the JRC adopted the measure of manual verification of Covid-19 certificates, by means of **visual check**, of JRC staff and visitors in the Ispra site. Decision C(2021) 7522 states that the **Decreto-legge 2021/127** 'does not complement, modify or implement the national measures implementing occupational health and safety legislation or other acts adopted under the Treaties. It thus does not form part of the national occupational health and safety legislation referred to in the specific detailed rules applicable to the Ispra site'.<sup>7</sup> Nevertheless, the Decision highlights that the measures introduced by the Italian authorities aim at ensuring a higher level of safety as concerns the spreading of Covid-19 both in public and private workplaces by extending the obligation to be in possession of the Italian Covid-19 certificate to all workers in the private and public sector in order to accede respective workplaces.<sup>8</sup> In view of the high number of external contractors (subject to the Decreto-legge 2021/127) on the Ispra site, and in order to ensure the same level of protection to staff and external contractors, Decision C(2021) 7522 applies the Decreto-legge 2021/127 to any person accessing the Ispra site as an **additional health and safety measure**.<sup>9</sup>

The **draft decision** further amends the main decision replacing manual verification of Covid-19 certificates (currently applicable) with digital verification, by means of a check by the VerificaC19 app, provided by the Italian government.

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<sup>5</sup> Article 31 of Annex F of the Site Agreement.

<sup>6</sup> Published in the Gazzetta Ufficiale della Repubblica Italiana of 22.4.2021, n. 96.

<sup>7</sup> Recital 7.

<sup>8</sup> Recital 9.

<sup>9</sup> Recital 11.

In line with the EDPS Guidance for return to the workplace,<sup>10</sup> if a European Institution intends to deviate from the host's national legal regime, it should first assess whether a divergence is permitted according to the specific headquarters or establishment agreements concluded with the Member State. In the present case, the JRC (Ispra site) refers to the national legislation of its host Member State, Italy, to ascertain whether the legal basis for the implementation of the system at national level permits the use of certificates as means to mitigate the risk of workplace infection.

Article 31 of Annex F to the Site Agreement provides in broad terms that the Commission shall 'apply national legislation on health and safety at work under its exclusive responsibility'. From the information provided to the EDPS, we understand that the Commission (JRC Ispra) drew up a list of 'Terms of reference in the field of occupational health and safety on the Ispra site', which can be found in an internal note dated in July 2016<sup>11</sup>, i.e. way before the pandemic.

The addition of some provisions of the Decreto-legge 2021/127 to this list is the result of an autonomous decision of the Commission (JRC -Ispra site). The Commission has to conduct an assessment of the necessity and proportionality of applying the Decreto-legge 2021/127 to the JRC Ispra site<sup>12</sup>. However, by so doing, the Commission can rely on the assessment conducted by the Italian authorities to the extent it is also relevant to the JRC site in Ispra. The recitals of Decision C(2021) 7522, reiterated in the draft Decision, indicate that the Commission has conducted this assessment. As regards the digital verification by means of the VerificaC19 app, the EDPS notes in particular that the draft Decision refers to the assessment of the Italian Data Protection Authority, which considers that this application conforms to the national legislation implementing the GDPR, at certain conditions, including the exclusive use of the approved VerificaC19 app<sup>13</sup>.

The draft Decision bases such processing on Article 5(1)(a) of the Regulation, it being necessary for the performance of a task carried out in the public interest. Pursuant to Article 5(2) of the Regulation, the basis for such processing shall be laid down in Union law, which the draft Decision provides. Even though the digital verification at stake will *a priori* only display a green/valid or red/not valid result, the processing in question may reveal personal data concerning health, such as data relating to the vaccination status, test results or recovery from a COVID-19 infection. Health data is considered a special category of personal data, the processing of which is in principle prohibited under Article 10(1) of the Regulation. The processing of such data for the purpose of digital verification of COVID-19 certificates on the basis of the draft decision falls under the exceptions of Articles 10(2)(b), (g) and (i) of the Regulation. Furthermore, processing is also based on Article 1e(2) of the Staff Regulations, since the Commission acts as the data controller in the field of employment and social security and is obliged to draw measures intended to protect the health and safety of its staff members. This legal basis can equally apply to processing of personal data of staff and non-staff members of the JRC.

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<sup>10</sup> Page 4. Available at [https://edps.europa.eu/system/files/2021-08/21-08-09\\_guidance\\_return\\_workplace\\_en\\_0.pdf](https://edps.europa.eu/system/files/2021-08/21-08-09_guidance_return_workplace_en_0.pdf)

<sup>11</sup> Appendix 2 to the Note of the Director-General of the JRC of 1 July 2016 regarding the sub-delegation and assignment of responsibility in the field of (...) Protection of the Health and Safety at Work of Commission Staff and persons working on the JRC-Ispra Site (ARES (2016)3153839).

<sup>12</sup> As indicated in the EDPS Guidance (p. 4), EUs that would like to deviate from the host's national legal regime, should first assess whether a divergence is permitted according to the specific headquarters or establishment agreements concluded with the Host Member State.

<sup>13</sup> Recital 11.

**Recommendation 1:** The Commission (JRC - Ispra) should additionally refer to national health guidance regarding the use of COVID-19 certificates in the employment context, in case such guidance is available.

## Appropriate safeguards

In line with the principle of transparency, information about the processing should be given to the individual before the processing starts, and it should also be readily accessible to them during the processing.

**Recommendation 2:** In order to facilitate data subjects' right to information regarding the processing of their personal data, the Commission needs to include data protection notices in the transit zone, where staff and visitors will be having their certificates checked, for e.g. by means of posters on the walls or any other surface, visible to them. This will allow visitors to know in advance how verification will take place, what data will be processed, who will have access to it, and where to direct any queries or objections regarding the processing. The obligation to provide the relevant information to the data subjects should be reflected in the draft decision.

Since the envisaged processing is of an exceptional, temporary nature, the draft decision should include a sunset clause requiring its regular, compulsory review.

**Recommendation 3:** The JRC should include in the draft decision reference a sunset clause, taking into account the national legislation, which shall be subject to periodic review and determine such review period.

## CONCLUSION

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

Done at Brussels on 29 November 2021

*(e-signed)*

Wojciech Rafał WIEWIÓROWSKI