



EUROPEAN DATA PROTECTION SUPERVISOR

EDPS OPINION ON THE COMMISSION DRAFT DECISION REGARDING ADDITIONAL SPECIFIC HEALTH AND SAFETY RULES FOR THE COMMISSION SITE OF ISPRA (‘Super Green Pass’ for workers aged above 50 years) (Case 2022-0168)

1. INTRODUCTION

1. 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) 2018/1725¹ (‘the Regulation’) of its revised draft decision relating to the digital verification of EU Digital COVID certificates (EUDCC) of staff and visitors of the Ispra site of the JRC, submitted to the EDPS on 4 February 2022.
2. In accordance with the EDPS policy on Consultations and Authorisations in the field of Supervision and Enforcement,² the EDPS treats communications under Article 41(1) of the Regulation as requests for consultation.
3. The EDPS issues this Opinion in accordance with Article 58(3)(c) of the Regulation.
4. The EDPS highlights the EDPS Guidance on Return to the Workplace and EUI’s screening of COVID-19 immunity or infection status (‘the EDPS Guidance’).³

2. BACKGROUND INFORMATION

5. The JRC consulted the EDPS on 3 November 2021 on a Commission draft decision laying down the processing of personal data for digital verification of EUDCC (‘the Green Pass’) of staff and visitors for the access to the JRC Ispra site in Italy (EDPS case 2021-1000).

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.

6. On 29 November 2021, the EDPS provided his opinion on the above-mentioned consultation. Following that consultation, the draft decision was adopted by the JRC Director-General on 6 December 2021.
7. On 7 January 2022, the Italian Government issued a law-decree⁴ requiring, inter alia, the presentation of a certificate of vaccination against COVID-19 or a certificate of recovery for the access to workplaces of persons from the age of 50 who are Italian or European Union citizens and residing in Italy or third country nationals in possession of a card from the Italian health system. This obligation will apply as from 15 February 2022 until 15 June 2022.
8. The same decree refers to the obligation of controls laid upon employers by the law-decree n. 127/2021⁵ and it further specifies the obligation of “employers” to verify the possession of a **certificate of vaccination or recovery for workers aged over 50 years** as from 15 February 2022 and until 15 June 2022.
9. The same provision also refers to Article 3-ter of law-decree n.44/2021⁴, establishing the **categories subject to the vaccination obligation**, by which “vaccination” is intended as having received a “booster dose”.
10. The new law-decree does not modify directly any measure of the law-decree n. 127/2021. However, it modifies the requirements to obtain a valid vaccination certificate (i.e. three doses), on the one hand, and sets an obligation upon the employers mentioned, i.a., in Article 9-quinquies of the law-decree n. 127/2021, to verify possession only of a certificate of vaccination or of recovery for persons above 50 years of age. In line with its practice and the legal framework on implementing occupational health and safety rules of its host countries, the JRC intends modifying the conditions of access to workplace that the Commission decided to apply at the Joint Research Centre Site of Ispra by Commission decision C(2021) of 14 October 2021.
11. By letter of 4 February 2022, the JRC informed the EDPS of its new draft decision relating to the digital verification of COVID-19 certificates in the JRC Ispra site, following the changes in this regard in the Italian legislation. The JRC informed the EDPS about
 - the Commission Decision of 6.12.2021 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 (C(2021) 9150 final) - previously assessed in the EDPS Decision 2021-1000 - and
 - the new Draft Commission 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’).
12. Following the recent developments at the national level in Italy, the JRC explained that ‘... the obligation regarding the Green Pass has been modified in such a way that persons residing in Italy aged over 50 will need to show a **‘Super Green Pass’** to

⁴ Decreto-Legge 7 gennaio 2022, n. 1, “Misure urgenti per fronteggiare l'emergenza COVID-19, in particolare nei luoghi di lavoro, nelle scuole e negli istituti della formazione superiore”.

⁵ Decreto-legge 21.9. 2021 n.127, converted into law by L.19 novembre 2021, n. 165 (Gazzetta Ufficiale della Repubblica Italiana of 20.11 2021, n. 277).

access workplaces. The Super Green Pass is issued only to those vaccinated or recovered (as opposed to the simple **Green Pass**, which is issued also following a COVID negative test). These measures apply to workers, external contractors, trainees and visitors acceding the workplaces.⁶

13. The Site agreement concluded by the Commission with Italy on hosting JRC premises in Ispra on 22 July 1959 and the subsequent modalities of execution 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.
14. According to the information received, the JRC intends to adopt rules for its site in Ispra, Italy, continuing the requirement of the staff and visitors to these sites presenting a valid EUDCC (Green Pass) and requiring a Super Green Pass to those aged over 50 years old. Both Green Pass and Super Green Pass are to be checked digitally through the relevant national mobile application ('app'), *VerificaC19*. The Italian authorities are currently modifying the working of the app so that it automatically recognises who needs to show the Green Pass and who needs to show the Super Green Pass

3. LEGAL ANALYSIS AND RECOMMENDATIONS

15. 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.
16. As a preliminary remark, the EDPS highlights that the recommendations⁷ included in his [Opinion](#) on the Decision C(2021)9150, when in draft stage (case 2021-1000), remain valid.

3.1 Lawfulness of the processing as modified by the draft Decision

17. 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.
18. The **Site Agreement** concluded by the Commission with Italy on hosting JRC premises in Ispra on 22 July 1959 and the subsequent modalities⁸ provide for the

⁶ Recital 7 of the draft Decision.

⁷ Reference to national guidance, information notice, sunset clause.

⁸ Article 31 of Annex F of the Site Agreement.

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.

19. 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. 526,⁹ 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 EUDCC (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 EUDCC, 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'.¹⁰ 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 EUDCC to all workers in the private and public sector in order to accede respective workplaces.¹¹ 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 acceding the Ispra site as an additional health and safety measure.¹² The Commission Decision C(2021)9150 of 6 December 2021 provides for the **digital verification** of the EUDCC.
20. Consistent 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, the JRC intends to continue to be aligned with the requirements of the national legislation regarding access to workplaces provided by the Law Decree of 7 January 2022. Even though the Commission decision C(2021)9150 of 6 December 2021 might be interpreted as covering also this new situation, for reasons of legal certainty the draft Decision has been prepared by the JRC. The EDPS welcomes the JRC draft Decision clarifying that the new requirements imposed by the Italian legal framework apply when accessing the JRC Ispra site.
21. Before considering the use of the digital verification of EUDCC at the entrance of its premises, the JRC has to assess whether such measures can be applied in the **national legal setting** of its host Member States, i.e. whether national legislation expressly provides for, or obliges a measure, or whether it is prohibited under the host's national law. Indeed, while Union's institutions, offices, bodies and agencies (EUIs) enjoy certain **privileges and immunities** vis-à-vis the EU Member States

⁹ Published in the Gazzetta Ufficiale della Repubblica Italiana of 22.4.2021, n. 96.

¹⁰ Recital 7.

¹¹ Recital 9.

¹² Recital 11.

(the ‘Protocol’)¹³, those privileges and immunities cover only those areas necessary for the specific functioning of EUs. The Protocol is usually implemented by specific headquarters or establishment agreements concluded with the authorities of the host Member State. Exceptions from Member State law generally do not include rules on health and safety¹⁴.

22. In the present case, the Commission-(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 the Green Pass and the Super Green Pass as means to mitigate the risk of workplace infection.
23. 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 (the latter only for the Green Pass) 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 EUDCC 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 in Ispra.

3.2 Necessity and proportionality of extended verification of the EUDCC and appropriate safeguards

24. The draft Decision requires a special Super Green Pass to individuals who are aged over 50 as a condition to accede the Ispra site of the JRC. This measure applies to JRC staff, staff of other EUs and all visitors in general¹⁵.
25. The Commission has to conduct an assessment of the necessity and proportionality of applying the Decreto-legge 7 January 2022, n. 1 to the JRC Ispra site¹⁶, including as regards. However, by doing so, 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, which depends notably on whether the rules are exactly the same (categories of individuals concerned, possible exceptions for medical reasons to the obligation for individuals above 50 years of age to show a Super Green Pass) and on the specific context of the JRC. The draft Decision does not indicate that the Commission has conducted this assessment.

¹³ Protocol No 7 on the privileges and immunities of the European Union, OJ C 115/266, 9.5.2008.

¹⁴ See Section 2 of the [EDPS Guidance on the Return to the Workplace](#).

¹⁵ Article 2(2) and 2(4) of the draft Decision.

¹⁶ 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.

Recommendation 1: The EDPS recommends that the Commission conduct and document its assessment of the necessity and proportionality of requiring the Super Green Pass to accede the JRC site of Ispra, and include a reference to this assessment in the recitals of the draft Decision.

4. CONCLUSION

26. The EDPS has made one recommendation in this opinion and highlights that previous recommendations put forward on the EDPS Opinion regarding case 2021-1000 remain valid to ensure compliance of the processing with the Regulation.
27. 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 11 February 2022

[e-signed]

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