

EU 2021/953, 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

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It is of utmost importance to underline that the Regulation (EU) 2021/953, constitutes one of the most significant tools that the European Commission has managed to introduce during the Corona Virus Era. It is directly enforced in all Member States and can be supplemented by the domestic legislation of each Member State, based on the specific needs and standards of each Member State.



Following its introduction, a massive reaction has been observed in many countries of the Union, with respect to the issuance of associated documentation (such as the “Safe Pass” in Cyprus). Specific concerns have been raised as to whether it is legal for a variety of enterprises (e.g. restaurants) to request such documentation to allow access to their premises and, whether such enterprises are permitted, under the GDPR, to process and access the sensitive personal data contained in the document. In a nutshell, allowing or even requiring the use of ‘Safe Pass’ on the part of such enterprises creates a foundation which sets limitations on the exercise of fundamental freedom and on the rights of the individuals. It is, therefore, unsurprising, that the introduction of the “Safe Pass” and its equivalent in other Member States has created many disagreements.

These disagreements, usually include concerns relating to doubts on extent to which the accuracy of such documentation can be relied upon. It is common knowledge that the rapid acceleration of technology has enabled tampering with almost any kind of documents through various editing tools. It is a generally accepted principle therefore, that Governments requiring the use of such documents should invest in and implement the means to properly scan and verify the authenticity of the document.

In addressing this and other concerns, is important to take into consideration the main purpose of Regulation 2021/953. On the one hand, it aims to prepare the ground and facilitate, through the framework for the issuance, verification and acceptance of Digital Certificates, the free movement of all European Citizens across all European Member States without the presence of any obstacles and/or discrimination. However, it also seeks to coordinate the existence of mutual technical requirements between EU Member States so as to facilitate the issuance, verification and acceptance of interoperable COVID-19 Vaccination Certificates between EU Member States (**Principle of Interoperability**).

Giving continuance to what has already been said, the Digital Certificate, nothing more nor less, is the **digital proof** that a natural person, over the age of 12 years, has either:

- i. Been vaccinated against COVID-19, and/or

- ii. Has undertaken the laboratory test with a result that has not detected the Corona Virus, and/or
- iii. Has been rehabilitated from COVID-19.

Therefore, anyone can easily understand that, within Regulation 2021/953, the EU Fundamental Principles such as the 'Purpose Limitation' and 'Data Minimization' are respected to the maximum extent. Real life and practices, especially after the latest rapid enlargement around the EU, show that the legal bases under which the personal data are collected and processed, is the legal obligation (**Article 6 par. 1c of the GDPR**) of the authorities and organizations to comply with governmental decrees issued from time to time. Such decrees are issued with the intent to prevent spreading of the SARS-COV-2 Virus, and to protect the public interest. The collection and processing of the data is, consequently, proportionate to the aim pursued, namely, the safety of the public health (**Article 9 par. 2g GDPR**).

Special attention is given to the fact that Regulation EU 2021/953 is strengthened by Primary and Secondary Legislation of the European Union. Primary Legislation gives extra volume to the **Charter of Fundamental Rights of EU**. Inter alia, Article 7 extols respect for private life, family, communication and residence and Article 8 praises the right to protection of personal data (**Lawfulness of processing**). In addition, Article 45 commends freedom of movement and residence. Notably, however, Article 52 emphasizes, that the individuals' rights are not absolute. Limitations on them can be acceptable provided that the 'Principle of Proportionality' is in place. Specifically, any limitations must always be necessary and proportionate to the aim pursued, namely the establishment of public security and health. The **Treaty on the Functioning of the European Union**, is also of relevance since Article 21 praises the freedom of movement.

Turning now to the Secondary Legislation of the European Union, it is notable to emphasize:

- i. **Regulation EU 2018/1725**, the provisions of which allow that the processing of personal data can be functioned by European Authorities and Organizations, and
- ii. **Regulation EU 2016/679 (EU GDPR)**, the provisions of which acknowledge that processing may occur for purposes which are of double significance, namely, to protect personal data towards their processing and, to allow free movement of the latter.

Consequently, is important to note that the combination of GDPR Article 5, Article 10 of the Charter of Fundamental Rights of EU, GDPR Article 6 and Articles 7 and 8 of Charter of Fundamental Rights of EU constitute the benchmark for Member States wishing to enforce additional measures (supplementary to the Digital Certificate) on a national level. The purpose of such additional measures being prevention of the spread of the coronavirus and the enhancement of public health and safety; at the same time Recitals 1, 22, 48 of the Regulation 2021/953, set forth the legal bases for the processing, issuance, verification and acceptance of interoperable COVID-19 Vaccination Certificates, which are Articles 6 par. 1c and 9 par. 2g of EU GDPR (as explained above).

It also importance to acknowledge Recital 49 of Regulation 2021/953. This emphasizes that where a Member State introduces a system of COVID-19 certificates for domestic purposes, it should ensure that certificates making up the EU Digital COVID Certificate can also be used and be accepted for domestic purposes.

Looking into the provisions of **Article 3 of the EU 2021/953**, it is easily observed that:

- i. The Digital Certificate is not considered to be a travel document (par. 5).
- ii. It is not considered to be a requirement for the exercise of the right for free movement by individuals (par. 6), and

- iii. There is no intent for it to create discrimination. It is stated that the issuance of the Certificate must not lead to any discrimination due to the specific category (i.e. Test/Vaccinated/Recovered patient) of certification presented by an individual (par. 7).

Examining the provisions of **Article 10 of the EU 2021/953**, it is important to stress that it does not facilitate the creation of a united data base for European Citizens since:

- i. Personal data is submitted to processing only for the purpose of access to the information contained in the Digital Certificate (**Limitation of Purpose**) (par.2),
- ii. This personal data is limited to the required needs (**Principle of Minimization**) (par.3), and This personal data is not retained for more than necessary; at all times and according to the purpose of processing (Minimization of Processing and Retention).

Consequently, 'stricto sensu', the right for the protection of personal data, does not tolerate any kind of interference and the permitted processing of personal data is strictly the minimum required.

CYPRUS' POSITION :

Regulation EU 2021/953, on the 31st of March 2021, incorporated the mutual opinion of the European Data Protection Board (including all the Supervisory Authorities' opinion and European Supervisory Authority's opinion). The universal legal basis for its establishment is Article 21 of the Treaty for the Functioning of the EU, which, as mentioned already, promotes the freedom of movement across all the EU Member States.

The Cyprus Commissioner for Personal Data Protection (the 'Commissioner'), has mentioned that European Commission intends to run an assessment, four (4) months after the validation date of Regulation 2021/953 on whether any possible discontinuities exist. For this reason the European Commission, has reserved its position to observe and examine, and where needed, to issue Implementing Acts to discharge any discontinuities. It was also stated that the Cyprus Authorities are considering the possibility of checking Digital Certificates not only upon the arrival of the travelers, but also on their departure.

Further to the latest Decree the Ministry of Health issued on the 8th of July 2021, based on the Law on Infectious Diseases (Cap. 260), a variety of enterprises (e.g. restaurants) were mandated to request the presentation of the EU Digital Covid Certificate in order to allow access to their premises.

Significantly, this caused a wave of conflicting reactions causing the Commissioner for the Protection of Personal Data, to act expeditiously to provide clarifications. Specifically, the Commissioner stated inter alia that "In previous Decrees, the owners/managers/administrators of certain places, such as leisure centers, restaurants, gyms, etc., were not obliged to check their customers' certificates. Now they have the obligation to check them and ask the customers to show their identity card or passport." The Commissioner also added that "in the event that an employee refuses to show the certificate he holds, the employer should take steps to ensure that both he and the employee comply with this Decree".

You may find the clarification provided in the below link:

<http://www.dataprotection.gov.cy/dataprotection/dataprotection.nsf/All/C9A8BAC0B5CCC34FC22587100039F659?OpenDocument>

It is commonly acceptable that to a certain extent, emergency government measures in dealing with the pandemic, cannot possibly be expected to take into account every issue that may arise from their strict implementation and that inevitably some matters may arise which require further clarification.