

Report of the European Ombudsman closing query Q2/2021/OAM by the Catalan Ombudsman concerning the issuing of EU Digital COVID Certificates for those who have recovered from infections confirmed by antigen tests

Decision

Case Q2/2021/OAM - Opened on 03/09/2021 - Decision on 18/11/2021

The background

1. National and regional ombudsmen in the European Network of Ombudsmen may ask the European Ombudsman for written answers to queries about EU law and its interpretation, including those which arise in their handling of specific cases.

2. On 13 July 2021, the Catalan Ombudsman [1] submitted such a query to the European Ombudsman. The query concerns the EU Digital COVID Certificate.

3. The EU Digital COVID Certificate aims to facilitate free movement and travel within the EU for citizens and residents. Many Member States are also using the certificate as a requirement for accessing certain services or venues. The European Parliament and Council adopted rules [2] setting up the framework for the issuance, verification and acceptance of the EU Digital COVID Certificate. The certificate can be issued for those who:

- are fully vaccinated with a vaccine that received an EU marketing authorisation;
- have tested negative for SARS-CoV-2 following a nucleic acid amplification test (NAAT) (such as polymerase chain reaction/PCR tests) within the previous 72 hours or a rapid antigen test within the previous 48 hours;
- have certified proof of recovery, confirming that, following a positive PCR test within the previous six months, the person has recovered from a SARS-CoV-2 infection.

4. The Catalan Ombudsman raised concerns regarding persons that cannot obtain the EU Digital COVID Certificate, even if they have recovered from the COVID-19 disease. This is because their SARS-CoV-2 infection was confirmed based on an rapid antigen test [3], rather than on a PCR test. It also pointed out that the European Commission has the possibility to adopt further rules to allow for the issuance of certificates of recovery following a positive result from a rapid antigen test.



5. The European Ombudsman considered it useful to consult the Commission on the issues raised by the Catalan Ombudsman and requested its reply on 3 September 2021. The Commission replied on 6 October 2021, and the reply was sent to the Catalan Ombudsman for possible comments. The Catalan Ombudsman informed the European Ombudsman that it was satisfied with the outcome.

The questions addressed to the Commission

6. Based on the query, the Ombudsman asked the Commission the following questions:

- Has the Commission adopted any delegated acts allowing for the issuance of EU Digital COVID recovery Certificates on the basis of a positive rapid antigen test or similar (other than a PCR test)? If not, is the Commission envisaging to adopt such delegated acts?
- Has the Commission provided any guidance to the Member States on how to deal with citizens who currently cannot have an EU Digital COVID recovery Certificate because they were diagnosed on the basis of a rapid antigen test (or similar)?

The Commission's reply

7. The Commission explained that the possibility to issue the certificate based on recovery following a positive rapid antigen test was included in its original proposal. However, it was decided by the co-legislators to remove this possibility during the negotiations on the regulation. At that time, the European Centre for Disease Prevention and Control (ECDC) considered that the performance of rapid antigen tests was sufficient for issuing short-lived certificates based on absence of infection but not for issuing long-term certificates based on recovery.

8. The Commission said it continues to monitor the ECDC studies and any other new developments on the use of rapid antigen tests. All this information is being taken into account when considering whether to adopt a delegated act on the issuance of certificates of recovery based on tests other than NAAT.

9. It also pointed out that the current rules provide for different alternatives to obtain the EU Digital COVID Certificate (vaccination, test, recovery).

10. On 18 October 2021, the Commission adopted a report on the EU Digital COVID Certificate and its implementation across the EU. [4] The report includes extensive information on developments regarding the issuance of certificates based on recovery. Based on the guidance from the ECDC, and following consultations with national experts, the Commission concluded that, for the time being, it will not amend the rules on the issuance of certificates based on recovery.

The European Ombudsman's conclusion



11. The Ombudsman notes that the Catalan Ombudsman was satisfied with the reply of the Commission. It pointed out that the context has changed since it submitted its query. Access to vaccines has become much more widespread, so individuals who have recovered from a SARS-CoV-2 infection as confirmed by an antigen test can now easily obtain an EU Digital COVID Certificate following vaccination. However, the Catalan Ombudsman emphasised the need to ensure that people who are infected have access to PCR tests, so they can also obtain a certificate based on the recovery criterion.

In light of this, and the above-mentioned report, the Ombudsman considers that the issues raised in the query have been adequately clarified. The Ombudsman therefore closes the query.

The Catalan Ombudsman and the Commission will be informed of this report.

Rosita Hickey Director of Inquiries

Strasbourg, 18/11/2021

[1] Síndic de Greuges de Catalunya.

[2] 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
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R0953> [Link].

[3] 'Rapid antigen test', that is, a test that relies on detection of viral proteins (antigens) using a lateral flow immunoassay that gives results in less than 30 minutes.

[4] COM(2021) 649 final - Report on a framework for the issuance, verification and acceptance of COVID-19 vaccination, test and recovery certificates; more information is available at:
https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5267 [Link].