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The administrative capacity to manage the effects of the COVID-19 pandemic in schools: legality of personal data processing concerning the staff vaccination status in order to resume courses with physical presence or online*

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Abstract

The administrative capacity of public authorities and bodies, as well as of the institutions under their subordination/in their coordination, includes, not only all material, institutional and human resources, but also the actions they carry out for the exercise of the competencies established by law. In the context of the COVID-19 pandemic, the Minister of Education together with the Minister of Health issued Joint Order no. 5558/2389/2021 which provided that, starting with 8 November 2021, the resumption of courses with physical presence is to take place in all pre-university education units in which a minimum percentage of 60% of the staff is vaccinated, otherwise the resumption of courses will be done online, and the Boards of Directors of the pre-university education units issue the decision on how to resume the courses. Therefore, this study will analyse, in the light of data protection legislation, if, in view of the competencies established by law, the pre-university education units had the necessary administrative capacity to issue an informed decision on how to resume the courses. The main conclusion after analysing the legal framework is that the legitimate basis for personal data processing concerning the staff vaccination status can only be point (c) of Article 6 (1) and point (g) of Article 9 (2) of Regulation (EU) 2016/679, but the Joint Order no. 5558/2389/2021 does not fall into either of these two legal basis for the processing, with the consequence that the Boards of Directors were in fact deprived of the necessary administrative capacity to issue the decision on how to resume the courses.

Keywords: fight against the COVID-19 pandemic; schools; personal data; staff vaccination status: legality of processing

Introduction

The Framework Law on decentralisation[1] establishes the meaning of certain terms and expressions. The term *administrative capacity* is defined in Article 2 (b) as being "all the material, institutional and human resources available to an administrative-territorial unit, as well as the actions it carries out to exercise the powers established by law". As can be seen, in this definition of *administrative capacity* there are several terms of different natures, economic, legal and sociological, and the resources of the

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[1] *Framework Law no. 195 of 22 May 2006* on decentralisation, published in The Official Journal of Romania, Part I, no. 453 from 25 May 2006.

administrative-territorial unit are put on an equal footing with the activities it carries out, according to the law[2].

Likewise, currently the Administrative Code[3] defines in Article 5 (o) the *administrative capacity* as „all the material, financial, institutional and human resources available to an administrative-territorial unit, the legal framework that regulates the field of activity, as well as the way in which they are capitalized in their own activity according to the competence established by law".

Thus, the administrative capacity, in the sense of the Administrative Code, includes *the legal framework that regulates the field of activity* and also the way in which it is capitalized in its own activity according to the competence established by law. By extension we can speak of the administrative capacity of any public authorities and bodies, as well as of the institutions under their subordination / in their coordination, such as educational institutions.

Joint Order of the Minister of Education and the Minister of Health no. 5.558/2.389 from 5 November 2021[4]

Towards the end of 2021, the Joint Order of the Minister of Education and the Minister of Health no. 5.338/2.015 of 1 October 2021 for the approval of *measures within educational units / institutions to organize the activity in epidemiological safety conditions for the prevention of SARS-CoV-2 virus diseases*[5] was supplemented with an Article 3^1 by the Joint Order of the Minister of Education and the Minister of Health no. 5.558/2.389 from 5 November 2021 that reads as follows:

"(1) Starting with 8 November 2021, the resumption of courses with physical attendance is carried out for all pre-university education units in which a percentage of at least 60% of the staff is vaccinated.

(2) As of 8 November 2021, the resumption of courses is done online for all pre-university education units in which less than 60% of staff is vaccinated.

(3) The boards of directors of the pre-university education units issue the decision on the manner of resuming the courses, in accordance with par. (1) and (2) […].

(4) The transition from the online scenario to the scenario with physical presence is made by the decision of the boards of directors of the pre-university education units, […] in the situation of reaching the 60% percentage mentioned in par. (1)."

Although the above provisions have only been applied for a short period of time, as later the physical attendance at classes was linked to the occupancy rate of hospital beds for the care of patients infected with the SARS-CoV-2 virus[6], the Joint Order of the

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[2] For an analysis of the definition, see Rodica Narcisa Petrescu, *Capacitatea şi competenţa administrativă în concepţia profesorului Ilie Iovănaş*, in "Studia Universitatis Babes Bolyai – Iurisprudentia" vol. (64), no. 2/2009, p. 159.

[3] *Government Emergency Ordinance no. 57 of 3 July 2019* on the Administrative Code, published in The Official Journal of Romania, Part I, no. 555 from 5 July 2019.

[4] Published in The Official Journal of Romania, Part I, no. 1064 from 5 November 2021.

[5] Published in The Official Journal of Romania, Part I, no. 942 from 1 October 2021.

[6] See *Joint Order of the Minister of Education and the Minister of Health no. 3.030/82/2022* on the amendment of Joint Order no. 5.338/2.015 of 1 October 2021, published in The Official Journal of Romania, Part I, no. 44 from 14 January 2022.

Minister of Education and the Minister of Health no. 5.558/2.389 from 5 November 2021 is of great interest for the protection of natural persons with regard to the processing of personal data.

Regarding the board of directors, the National Education Law[7] provides in Article 96 (1) that „pre-university education units with legal personality shall be headed by *boards of directors*, principals and deputy principals, as appropriate" and in the next paragraph it states that „in state education units the board of directors is the governing body". Also, according to Article 96 (7) (l), it "fulfills any other duties established by orders and methodologies of the Minister of Education and Research, respectively of the Ministry of Education and Research".

In the light of the above, especially the competencies established by law, *had the pre-university education units, namely the board of directors, the necessary administrative capacity to issue an informed decision on how to resume the courses?* Of course we have in mind the administrative capacity in its dimension regarding the competence established by law. While it is clear that they had the competence to issue the decision to resume courses with physical presence or online, the same cannot be said about the data processing necessary for the issuance of those decisions, all the more so as it concerns data on health status, i.e. sensitive data.

The Staff Vaccination Status as Processing of (Sensitive) Data

First of all we must remember that the General Data Protection Regulation (GDPR)[8] emphasizes in Recital (41) that "(w)here this Regulation refers to a legal basis or a legislative measure, this does not necessarily require a legislative act adopted by a parliament, *without prejudice to requirements pursuant to the constitutional order of the Member State concerned*. However, such a legal basis or legislative measure should be *clear* and *precise* and its application should be *foreseeable* to persons subject to it, in accordance with the case-law of the Court of Justice of the European Union (the 'Court of Justice') and the European Court of Human Rights".

Any processing, and even more so that of sensitive data, affects the right to the protection of personal data and implicitly the right to privacy and according to the Romanian Constitutional Court "from the corroboration of the constitutional norms contained in Article 53 (1) and in Article 115 (6) it results that *the affectation / restriction of the fundamental rights or freedoms can be achieved only by law, as a formal act of the Parliament*".

The Joint Order of the Minister of Education and the Minister of Health no. 5.558/2.389 from 5 November 2021, a normative administrative act, was issued in execution of Article 2 of the Government Emergency Ordinance no. 141 of 19 August 2020[9], according to

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[7] *Law no. 1 of 5 January 2011* on national education, published in The Official Journal of Romania, Part I, no. 18 from 10 January 2011, with subsequent amendments.

[8] *Regulation (EU) 2016/679* of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, published in The Official Journal of the European Union L 119 from 4 May 2016.

[9] *Government Emergency Ordinance no. 141 of 19 August 2020* on the establishment of measures for the proper functioning of the education system and for amending and supplementing the National Education

which "measures for the organization of work in educational establishments and institutions in conditions of epidemiological safety for the prevention of SARS-CoV-2 diseases shall be approved by joint order of the Minister of Health and the Minister of Education and Research within 5 days of the date of entry into force of this Emergency Ordinance".

However, the wording of Article 2 of the Government Emergency Ordinance no. 141 of 19 August 2020 is neither clear, nor precise or foreseeable as to warrant a processing of sensitive data such as the one of staff vaccination status. As a consequence it cannot be said that such processing was provided by law, as a formal act of the Parliament. So, the Joint Order doesn't meet the requirements pursuant to the Romanian constitutional order and therefore it cannot be considered as a valid legal basis or legislative measure for the processing.

For a clear view on the matter, one has to have in mind Recital (48) of Regulation (EU) 2021/953[10] which expressly provides that "(t)his Regulation establishes the legal ground for the processing of personal data within the meaning of point (c) of Article 6 (1) and point (g) of Article 9 (2) of Regulation (EU) 2016/679, necessary" for the issuance and verification of the EU Digital COVID Certificate. Article 6 (1) (c) GDPR concerns the processing necessary for compliance with a *legal obligation to which the controller is subject*, while Article 9 (2) (g) GDPR considers the case where the processing is necessary for *reasons of substantial public interest*, on the basis of Union or Member State law. Whereas the legislator must refer to regulations which are a benchmark of clarity, precision and predictability, one cannot help but notice that, compared to Regulation (EU) 2021/953, the application of the Romanian legislation is anything but foreseeable.

Also, as the Court of Justice of the European Union stated "(i)n order to satisfy the requirement of proportionality, the legislation must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards, so that the persons whose personal data is affected have sufficient guarantees that data will be effectively protected against the risk of abuse. […] Those considerations apply especially where the protection of the particular category of personal data that is sensitive data is at stake"[11]. These minimum safeguards are missing from both the Joint Order and the Government Emergency Ordinance, so the Romanian does not meet the requirement of proportionality either. The legislator had the obligation to regulate the guarantees associated with the right to private life and this obligation should have materialized by law, as *instrumentum*[12], but the adequate and effective guarantees against

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Law no. 1/2011, published in The Official Journal of Romania, Part I, no. 767 from 21 August 2020, and approved with amendments by Law no. 87 of 16 April 2021, published in The Official Journal of Romania, Part I, no. 767 from 403 din 16 April 2021.

[10] *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, published in The Official.

[11] Court of Justice of the European Union (Grand Chamber), *Judgment of 6 October 2020*, ECLI:EU:C:2020:791, La Quadrature du Net and Others v Premier ministre and Others, Joined Cases C-511/18, C-512/18 and C-520/18, para. 132, not yet published (Court Reports - general).

[12] *Mutatis mutandis* see Constitutional Court, *decision no. 498 of 17 July 2018*, para. 52, published in The Official Journal of Romania, Part I, no. 650 from 26 July 2018.

abuse were overlooked, although "data protection does not constitute an obstacle for fighting the current pandemic" and compliance with data protection law would help citizens' trust[13].

Conclusions

The main conclusion after analysing the legal framework is that, while the legitimate basis for personal data processing concerning the staff vaccination status can only be Article 6 (1) (c) and Article 9 (2) (g) of Regulation (EU) 2016/679, the Joint Order no. 5558/2389/2021 does not fall into either of these two legal basis for the processing, with the consequence that the Boards of Directors were in fact deprived of the necessary administrative capacity, in its dimension regarding the competence established by law, to issue the decision on how to resume the courses. Although the legality presumption of the Joint Order created an appearance of legality for the processing, it was only a smoke screen meant to dissimulate the absence of a regulation provided by law, as a formal act of the Parliament, the only one capable of restricting fundamental rights such as the right to privacy and the protection of personal data.

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[13] See EDPB-EDPS, *Joint Opinion 04/2021*, Version 1.1, 8 April 2021, para. 12, p. 6, document available at https://edpb.europa.eu/system/files/2021-04/edpb_edps_joint_opinion_dgc_en.pdf.

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Capacitatea administrativă de a gestiona efectele pandemiei de COVID-19 în școli: legalitatea prelucrării datelor cu caracter personal privind vaccinarea personalului în vederea reluării cursurilor cu prezența fizică sau în regim online

Rezumat

Capacitatea administrativă a autorităților și organismelor publice, precum și a instituțiilor din subordinea/coordonarea acestora, include nu numai ansamblul resurselor materiale, instituționale și umane, ci și acțiunile pe care le desfășoară aceasta pentru exercitarea competențelor stabilite prin lege. În contextul pandemiei COVID-19, ministrul educației împreună cu ministrul sănătății au emis Ordinul comun nr. 5.558/2.389/2021 care prevedea că, începând cu data de 8 noiembrie 2021, reluarea cursurilor cu prezența fizică se realizează pentru toate unitățile de învățământ preuniversitar în cadrul cărora un procent de minimum 60% din personal este vaccinat, în caz contrar reluarea cursurilor se face în regim online iar Consiliile de administrație ale unităților de învățământ preuniversitar emit decizia privind modalitatea de reluare a cursurilor. Astfel, în cadrul acestui studiu vom analiza, în lumina legislației privind protecția datelor, dacă, având în vedere competențele stabilite prin lege, unitățile de învățământ preuniversitar au avut capacitatea administrativă necesară să emită o decizie în cunoștință de cauză privind modalitatea de reluare a cursurilor. Principala concluzie după analiza cadrului legislativ este aceea că temeiul juridic care asigură legalitatea prelucrării datelor privind vaccinarea personalului poate fi numai art. 6 (1) (c) și art. 9 (2) (g) din Regulamentul (UE) 2016/679, însă Ordinul comun nr. 5.558/2.389/2021 nu se încadrează în niciunul dintre aceste două temeiuri legale ale prelucrării, astfel încât Consiliile de Administrație au fost de fapt lipsite de capacitatea administrativă necesară emiterii deciziei privind modalitatea de reluare a cursurilor.