

Pre-closure letter for a multiple complaint on an alleged breach by Italy of general principles of EU law and fundamental rights relating to the state of emergency and other measures - CHAP (2022)00121

In 2022, the European Commission received a large number of complaints concerning an alleged breach by Italy of general principles of EU law and fundamental rights relating to the state of emergency and other measures. These complaints were registered under the reference CHAP(2022)00121.

The complainants essentially claim that Italy would have failed to fulfil its obligation under Article 2 of the Treaty on European Union (TEU), in particular the respect of the legality principle and the rule of law, by declaring a national state of emergency without a proper legal basis and depriving the Italian Parliament of its prerogatives.

The COVID-19 pandemic is an unprecedented challenge, with far-reaching impacts on public health and all aspects of our life. The Commission continues to work closely with the EU Member States, supported by the European Centre for Disease Prevention and Control (ECDC).

The Commission notes that in all Member States the COVID-19 pandemic has put the institutional checks and balances on which the Rule of Law is based to a test.

The Commission has insisted from the outset that responses to the COVID-19 pandemic must respect the fundamental principles and values, as set out in the European Treaties. In particular, close scrutiny is required to ensure that the emergency powers used in response to the COVID-19 pandemic do not lead to a more permanent change in the balance of powers at national level.

The Commission has been closely monitoring the measures taken by Member States in the fight against COVID-19. The results of this monitoring have been reflected, where relevant, in the 2020 and 2021 Rule of Law Reports. As reflected in these Reports, national systems showed considerable resilience.

While initially much of the reaction to the crisis came from the executive, over time, oversight by parliaments, courts and other independent authorities have increased.

Regarding parliamentary oversight, it appears that Italy has maintained Parliament's responsibility for legislative scrutiny on pandemic-related measures (e.g. decree-laws immediately effective have been converted by Parliament into law) while the Government has implemented principles set in the decree-laws by administrative acts to counter the health emergency in respect of the legal framework, as recently stated by the Italian Constitutional Court on the issue (Decision No. 198 of 23 September 2021).

The scrutiny of the legality, justification and proportionality of COVID-19 measures by the Constitutional Court (and other national courts) has been an essential counterweight to government powers to take decisions.

The Commission's monitoring shows many positive developments and examples to draw on in order to improve the legal and political response at times of crisis, to strengthen the rule of law and democratic resilience.

However, it is important to recall that, as soon as the epidemiological situation allows, Member State must return to a normal balance of power, and citizens must fully enjoy their rights.

Therefore, the Commission's monitoring will continue until all emergency measures are lifted. As far as Italy is concerned, the Government has announced the end of the state of emergency by 31 March 2022.

The complainants also raise the domestic use of the EU Digital COVID Certificate (whose Italian version is called "green pass") to regulate access to public transport.

On 14 June 2021, the European Parliament and the Council adopted the EU Digital COVID Certificate, which sets out a common framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic¹.

The EU Digital COVID Certificate Regulation seeks to facilitate free movement within the EU by providing citizens with interoperable and mutually accepted certificates on COVID-19 vaccination, testing and recovery that they can use when travelling. Where Member States waive certain restrictions on free movement for persons in the possession of proof of vaccination, test or recovery, they are obliged to accept the EU Digital COVID certificates issued by other Member States under the same conditions. It is important to underline that the EU Digital COVID Certificate Regulation does not oblige Member States to require that travellers are in a possession of a certificate when travelling.

The EU Digital COVID Certificate Regulation covers the use of the certificate to facilitate travel within the EU during the COVID-19 pandemic. The domestic use of EU Digital COVID Certificates remains a matter for Member States to decide. EU law neither prescribes nor prohibits the domestic use of EU Digital COVID Certificate (such as for access to events or restaurants).

It is up to Member States to determine which public health protection measures they consider most appropriate in the context of accessing, for example, the workplace, events, public transportation, etc.

If a Member State uses COVID-19 certificates for domestic purposes, it should provide for a legal basis in national law that must comply, among others, with data protection requirements. It should also ensure that the EU Digital COVID Certificate is fully accepted to make sure that travellers going to this Member State (in this case, Italy) do not have to obtain an additional national COVID certificate.

In addition, the Commission also underlines that, in line with Article 168(7) of the Treaty on the Functioning of the European Union, Member States are responsible for defining their national health policy as well as the organisation and delivery of health services and medical care. National governments thus decide on the specific measures based on each country's national epidemiological and social situation. In particular, the responsibility for vaccination policies, programmes and services lies with Member States. This also applies to legislation on vaccination, including whether this should be mandatory or not. Any queries regarding Member States' policies in this regard should thus be addressed to the responsible national authorities.

In addition, it is important to highlight that, under the Treaties on which the European Union is based², the European Commission has no general powers to intervene with the Member States in the area of fundamental rights. It can only do so if an issue of European Union law is involved. The Charter of Fundamental Rights of the European Union does not apply to every situation of an alleged violation of fundamental rights. According to its Article 51(1), the Charter applies to

¹ 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 (available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021R0953>).

² Treaty on European Union and Treaty on the Functioning of the European Union.

Member States only when they are implementing European Union law.

Where this is not the case, it is for Member States to ensure that fundamental rights are effectively respected and protected in accordance with their national law and international human rights obligations. Therefore, the Commission is not competent to intervene in that regard.

In addition, there is no EU law prohibiting differences in treatment at the workplace on the grounds that a person has been vaccinated or not. In particular, there are no EU Occupational Safety and Health ('OSH') provisions, which would concern access to the workplace depending on one's vaccination. Therefore, it is up to Member States to legislate, should it be necessary, in this area.

Consequently, the Commission has concluded that there are no grounds for pursuing this case further and that this case should be closed.

However, if the complainants have any new information suggesting that Italy has committed an infringement of Union law not covered by the above assessment and that might warrant further examination of the complaint, they are invited to submit this new information to the European Commission within four weeks from the publication of this notice. If no new information is received within four weeks, or if the new information received does not lead to a different conclusion, the Commission may close the case.