

LEGAL DISCUSSIONS REGARDING DIGITAL ENTRY FORM IN ROMANIA

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Abstract

In the current pandemic context, in which modern society is being challenged not only from a socio-medical point of view, but also from a moral and legal perspective, legislators across the world have been confronted with the fact of identifying a series legislative, concrete and coherent solutions, in order to limit the transmission of SARS-CoV virus 2.

From this perspective, it is clear that legislative solutions have been both dissipated as an overview and insufficiently analyzed and publicly debated, arousing a wave of controversy and impugment around the world, an issue that could cause serious concern in the legal world and to really question the citizens' trust in the judicial and constitutional litigation system, which are those designed to resolve legislative inconsistencies, with a direct transposition in the way of resolving various administrative cases before the courts.

The situation is not at all special in Romania, which has adopted during the pandemic a series of normative acts that raised a multitude of legal interpretation issues.

In this regard, we recall the fact that, on several occasions, the Romanian Constitutional Court has declared unconstitutional the legislative approach of the national authorities, just as the courts have invalidated a series of unilateral administrative acts, with normative character.

The GEO no. 129/2021 on the implementation of the digital entry form in Romania also provided heated discussions in the legal field as well as an endless wave of criticism from the recipients of this normative act, which requires a detailed analysis of the issues related to the adoption of this normative act.

Keywords: *pandemic, digital form, procedure, unconstitutionality, predictability, accessibility.*

1. Introduction

The requirement to respect and safeguard public security, the health of citizens and the economic stability of the Member States of the European Union has required legislative and organizational measures, including medical measures, traffic control measures, measures to immunize citizens, to enforce restrictive and coercive measures, unprecedented until now, at least after the Second World War.

The virulence with which this pandemic has hit Europe, as well as the rest of the world, has alerted lawmakers in EU member states in a desperate attempt to find legal, socio-political and coercive instruments to control, within the limits of reasonableness and of endurance, the effects of the SARS-CoV2 pandemic.

Given the non-unitary national practice manifested by the legislative systems of the EU Member States, as well as the urgent need for a unified approach on their part to address the necessary and useful measures to control the pandemic evolution, with the natural consequence of ensuring the necessary means of verifying and easily identifying the flow of passengers, nationals of Member States, within the European space, the European Commission has agreed to adopt a secondary regulatory act regulating this extremely sensitive and volatile area, such as the

process of controlling the spread of the COVID pandemic.

2. The european regulatory framework

In this regard, the European Commission adopted Implementing Decision (EU) 2021/858 of 27 May 2021 amending Implementing Decision (EU) 2017/253 as regards alerts triggered by serious cross-border threats to health and in order to detect the contacts of passengers identified by passenger location forms, document which comes in support of the national authorities, in order to issue legal proceedings and to state the concrete forms of control of the movement of citizens within the European Union.

But this inevitably implies a restriction on the fundamental right of EU citizens to free movement, as enshrined in art. 3 (2) of the Treaty on European Union (TEU) and, in application of this primary regulatory act, by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

This is also acknowledged by the European institutions, which have pointed out that, "*although the Schengen area is generally regarded as one of the main achievements of the European Union, its existence has recently been jeopardized by the COVID-19 pandemic,*

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as Member States closed borders to control the spread of the virus before the EU digital certificate on COVID was introduced in July 2021. Prior to the pandemic, the main challenges were the considerable influx of refugees and migrants into the EU, as well as terrorist attacks”¹.

However, although the exercise of the right to free movement is an essential dimension and a determining factor in the birth of the European Union, it cannot be exercised by the recipients in a discretionary and unlimited manner.

Thus, by the provisions of art. 45 para. 3 and para. 4, related to those of art. 51 and art. 62 of the Treaty on the Functioning of the European Union (TFEU) imposed a series of limitations or obligations related to the right to free movement of citizens, perfectly compatible with the *raison d'être* of this fundamental right².

In objectifying this idea of reasonable and, at the same time, regulated limits of exercise of the right to free movement, which allows for the adoption of vigorous measures in pandemic situations, paragraph 1 of the Preamble to Commission Implementing Decision (EU) 2021/858 of 27 May 2021, shows that „*The identification of a positive case of COVID-19 following a particular cross-border route fulfills the criteria set out in Article 9 (1) of Decision no. 1082/2013/EU, as it may continue to cause a significant mortality rate in humans, may increase rapidly in magnitude, affect several Member States and may require a coordinated response at Union level. In accordance with point 23 of Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to restricting free movement in response to the COVID-19 pandemic, information on COVID-19 cases detected upon arrival of a person in the territory of a Member State Member State should be notified without delay to the public health authorities of the countries in which the person concerned has been located during the previous 14 days, in order to trace contact, using the Early Warning and Rapid Response System (SAPR) established by Article 8 of Decision no. 1082/2013 / EU and operated by the European Center for Disease Prevention and Control ("ECDC")*”.

According to art. 1 (a) of the Commission Decision, the passenger location form means "a completed form at the request of the public health authorities which collects at least the passenger data specified in Annex I and which supports those authorities in managing an event. public health,

enabling them to detect cross-border passengers who may have been exposed to a person infected with SARS-CoV-2”.

Annex I to this Decision mentions the concrete content of the form.

3. Internal rule for implementing the Commission Decision

Commission Implementing Decision (EU) 2021/858 of 27 May 2021 has been translated into national law by the GEO no. 129/2021 on the implementation of the digital entry form in Romania, a normative provision that does not lack imperfections and that gave rise to a series of discussions in the field literature.

However, the inconsistency of the Romanian law giver in the matter of measures to limit and control the SARS-CoV 2 Pandemic has a long history, there are often solutions to criticize the normative provisions issued by the Romanian authorities.

An example in this sense is provided by the Decision of the National Committee for Emergency Situations no. 28/14.05.2021, approving the list and classification of countries / territories of epidemiological risk in order to establish the persons on whom the measure of quarantine of 14 days is established regarding those who arrive in Romania from them, as well as the Decision of the National Committee for Situations Emergency no. 40/17.06.2021, which approved the classification of countries / territories according to the cumulative incidence rate, in order to establish the persons arriving in Romania from them and regarding which the quarantine measure is established, provided in the annex to the decision.

Invested with an action in administrative disputes regarding the validity of these administrative acts, the court was put in the situation of analyzing the sanction that intervenes in case of non-publication in the Official Gazette of Romania of normative administrative acts, that of "non-existence" of the normative act, and not that of its "nullity / illegality".

Taking advantage of the doctrinal opinions particularly grounded and relevant issued in this matter³, the court found the non-existence of art. 1 of HCNSU no. 40/2021 and the related annexes, as well

¹ <https://www.europarl.europa.eu/factsheets/ro/sheet/147/libera-circulatie-a-persoanelor, in the form of 25.01.2022.>

² See the CJEU decision in *Lawrie-Blum v. Land Baden-Württemberg* case, 66/85 of 03.07.1986, and *Reyners*, 2/74 (rec. 1974, p. 631).

³ Marta Claudia Cliza, Constantin Claudiu Ulariu, *Drept administrativ*, Pro Universitaria Publishing House, Bucharest, 2021, pp. 274 et. seq.; Tudor Drăganu, *Actele de drept administrativ*, Științifică Publishing House, Bucharest, 1959, p. 151; Ch. Eisenmann, *Cours de droit administratif*, tome II, L.G.D.J., Paris, 1983, pp. 73 et seq.; Rodica Narcisa Petrescu, *Drept administrativ*, Lumina Lex Publishing House, Bucharest, 2004, p. 346; Antonie Iorgovan, *Tratat de drept administrativ*, vol. II, All Beck Publishing House, Bucharest, 2002, p. 327; V. Vedinaș, *Drept administrativ și instituții politico-administrative, manual practic*, Lumina Lex Publishing House, Bucharest, 2002, p. 121.

as the non-existence of HCNSU no. 28/2021 and its annexes⁴.

Also, the CCR found that the provisions of art. 72 para. (2) of Law no. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic, with reference to art. 42 para. (3) of the Government Emergency Ordinance no. 21/2004 regarding the National Emergency Management System, as well as the legislative solution from art. 72 para. (1) of Law no. 55/2020, according to which the provisions of this law are supplemented with the common law regulations applicable in the matter regarding the settlement of actions filed against Government decisions establishing, prolonging or terminating the state of alert, as well as orders and instructions which establishes the application of measures during the state of alert, are unconstitutional.

According to art. 2 para. 4 of the GEO no. 129/2021, *“the form is completed individually, in digital format, by each person who enters the territory of Romania under the conditions provided in art. 1 para. (1), and for persons who present themselves at border crossing points without holding a form, they have the obligation to complete the form within 24 hours of entering the country ”*, and according to art. 4 of the same normative act, *“Failure by the person entering the territory of Romania of the obligation to complete the Digital Form of entry into Romania within 24 hours of entering the country constitutes a contravention and is sanctioned with a fine from 2,000 lei to 3,000 lei. The finding of the contraventions and the application of the sanctions provided in par. (1) is carried out, based on the data and information provided by SII-FDIR, by the personnel from the county public health directorates or from the Bucharest municipality, empowered to carry out state sanitary inspection activities. The provisions of Government Ordinance no. 2/2001 regarding the legal regime of contraventions, approved with modifications and completions by Law no. 180/2002, with subsequent amendments and completions re applicable to the contravention from para. (1).”*

Finally, according to art. 5 of the mentioned normative act, *“this emergency ordinance enters into force on the date of publication in the Official Gazette of Romania, Part I, except for the provisions of art. 4 para. (1), which shall enter into force within 10 days from its publication in the Official Gazette of Romania”*.

Regarding the limitation of the right to free movement of Romanian citizens through this emergency ordinance, the constitutionality of this approach is questioned in relation to the provisions of art. 53 para. 1 of the Constitution, according to which *“the exercise of certain rights or freedoms may be restricted only by law ... ”*.

In this regard, as rightly noted in the doctrine, the Constitutional Court has shown an undesirable inconsistency, especially with regard to the package of laws on restrictive measures caused by the COVID 19 pandemic.

Thus, it was shown that if by *“Decision no. 150 / 12.03.2020, published in the Official Gazette of Romania no. 215 / 17.03.2020, we would have been tempted to conclude that, finally, CCR has ended its jurisprudential inconsistencies in the matter and ruled for the future in a definitive way, giving a coherent interpretation disp. art. 115 para. (6) of the Constitution, namely this rule does not allow emergency ordinances to be adopted in the field of constitutional law (...) however, by Decision no. 152/6 May 2020, published in the Official Gazette of Romania no. 387/13 May 2020, as well as by the decision pronounced on May 13 [3] regarding the exception of unconstitutionality of GEO no. 21/2004 on the National Emergency Management System [4], CCR returns to its previous jurisprudence, which is also non-unitary, according to which the restriction of the exercise of fundamental rights / freedoms can only be achieved by law, within the meaning of art. 61 para. (4) of the Constitution, and not by emergency ordinances ”*⁵.

Regarding the way of regulating the obligation of Romanian citizens entering the country from abroad, to fill in the form individually, in digital format, and for the persons who present themselves at the border crossing points without holding a form, they have the obligation to complete the form within a maximum of 24 hours from the entry into the country, as well as the sanction for non-fulfillment of this obligation, these seem reasonable, at first sight.

But provided that the mentioned normative act entered into force, a series of problems of accessibility and its predictability arise, as a fundamental pillar of the right to a fair trial regulated by art. 6 para. 1 of the ECHR.

It is true that, pursuant to art. 4 para. 2 of GO no. 2/2001, by derogation from paragraph 1 of the same article, in urgent cases it may be stipulated the entry into force of the contravention law within a period of

⁴ Bucharest Court of Appeal, Section IX Cont. adm. and fisc., sent. no. 1076 / 1 July 2021, published in the Official Gazette of Romania no. 805 of August 23, 2021, available on the website <http://legislatie.just.ro/Public/DetaliiDocument/245450>, in the form of 25.01.2022.

⁵ Lidia Barac, *Inconsecvențe jurisprudențiale relative la posibilitatea restrângerii exercițiului unor drepturi sau libertăți fundamentale. Problematika limitării exercițiului unor drepturi și libertăți fundamentale în contextul instituirii stării de urgență sau a stării de alertă*, <https://www.juridice.ro/683898/inconsecvente-jurisprudentiale-relative-la-posibilitatea-restrangerii-exercitiului-unor-drepturi-sau-libertati-fundamentale-problematika-limitarii-exercitiului-unor-drepturi-si-libertati-fundamentale.html>, in the form of 25.01.2022.

less than 30 days, but not less than 10 days and that by art. 5 of GEO no. 129/2021 it was stipulated that „*This emergency ordinance enters into force on the date of publication in the Official Gazette of Romania, Part I, except for the provisions of art. 4 para. (1), which shall enter into force within 10 days from its publication in the Official Gazette of Romania*”, however, by the specific way in which this last normative act came into force, the Romanian citizens who spent their winter holidays abroad could be deprived of the real and effective possibility to get acquainted with the legal obligation to complete the Digital Entry Form in Romania within 24 hours of entering the country.

Thus, in the conditions in which a citizen was abroad at the date of entry into force of this normative act, not having access to an internet source, corroborated with the fact that the entry into force coincided with the legal winter holidays, as well as taking into account the fact that the Romanian authorities have not taken any concrete steps to publicize this obligation to complete the form, it is obvious that the art. 4 para. 2 of GO no. 2/2001 does not benefit, in this case, from the requirements of accessibility and predictability, which attracts the nullity of the ascertaining act, lacking the requirement of the legal element from the constitutive structure of the contravention.

Regarding the contravention consisting in the fact that the person did not fill in the form within the legal term, we point out that, in the hypothesis iterated above, the Romanian citizen may be in real and effective impossibility to proceed in the sense

specified by law, provided that on the date of entry into the country, he did not find on the Ministry of Foreign Affairs website any information regarding such an obligation incumbent on him, namely to complete the Digital Entry Form in Romania within 24 hours of entering the country.

4. Conclusions

From the summary normative ensemble, but full of significant legal elements, including those regarding a rather severe sanctioning regime, of the GEO no. 129/2021, we note that, in the circumstance in which the legal norms of this ordinance were not in any way publicized, corroborated with the fact that the entry into force of this legal norm, regarding the contravention sanction provided by art. 4 para. 1, was made on 25.12.2022, on Christmas day, taking into account the fact that this ordinance was not published on the website of the Ministry of Foreign Affairs, serious questions can be raised about the effective accessibility of a citizen who was abroad during this period of legal holidays and predictability, from the perspective of the mandatory conduct prescribed by law, of the GEO no. 129/2021.

This inconsistency or negligence on the part of the legislator is likely to lead to burdening the courts with a series of misdemeanor complaints against the sanctioning acts drawn up by the authorities and concerning those who did not complete the form in the first days of the new year.

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