

The "digital green certificate": a disproportionate, inefficient and unfair obstacle to the free movement of European citizens

Analysis of the proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (digital green certificate)

Contents

The proposal for a Regulation of the European Parliament and of the Council on the introduction of a digital green certificate is, on the one hand, disproportionate insofar as it adds obstacles to the free movement of European citizens and, on the other hand, inefficient because the measures it puts in place do not guarantee the public health objectives (preventing the transmission of SARS-CoV-2) which constitute its justification. In addition to the fact that the basic premise of the digital green certificate is based on inaccurate and incomplete scientific claims, the proposal, as it stands, violates the fundamental rights of European citizens, in particular the right to free movement within the Union and the right to the protection of personal data.

Summary

The European Commission has formulated a proposal for a European Regulation on the issuance of a digital green certificate to facilitate the free movement of persons within the European Union during the Covid-19 pandemic. Through this certificate, the Commission pursues, according to its own words, a double objective: on the one hand, to facilitate the free movement of European citizens within the European Union and, on the other hand, to pursue the public health objective of preventing the transmission of SARS-CoV-2. Today, when EU citizens wish to travel to another Member State, they face multiple restrictions and requirements imposed by Member States, with significant differences depending on the Member State of destination. With its proposal for a Regulation, the Commission wishes to coordinate national initiatives that restrict the free movement of persons in order to prevent the transmission of SARS-CoV-2.

In order to achieve this double objective, the Commission foresees the requirement of a vaccination certificate or, alternatively, a negative test result for SARS-CoV-2 infection (PCR test or antigenic test) or a certificate of recovery from a previous infection.

Our analysis concluded that the proposed Regulation is neither scientifically nor legally convincing.

Firstly, from a scientific perspective none of the three certificates can guarantee that the risk of transmitting SARS-CoV-2 has been eliminated. With regard to the vaccination certificate, the assumption in Article 5 of the proposal - that (all) COVID-19 vaccines would limit the spread of the virus - is inaccurate and incomplete and not based on scientific evidence. More fundamentally, this demonstrates that, given the current state of science, the very principle of a vaccination certificate is problematic and potentially discriminatory. This problematic nature has been recognised by the WHO, which does not support the introduction of vaccine passports. For the same reasons, several US States have rejected the principle of vaccine passports and the US federal government has announced that it will not issue vaccine passports.

The alternatives envisaged by the proposed Regulation (negative test certificate and certificate of recovery) do not offer any further guarantee against infection or transmission of SARS-CoV-2. On the one hand, negative test certificates merely offer a snapshot of a situation that may already be different a few hours later. A person who tests negative could well be infected and become contagious the day after the test. Furthermore, carrying out PCR tests without taking into account the pre-test probability results in a large number of false positives. An uninfected person could be prevented from travelling on the grounds that the PCR test gives a positive result, merely because that person's body has not yet eliminated all the RNA fragments from an earlier infection. On the other hand, the certificate of recovery does not guarantee that re-infection has not taken place bringing with it the risk of transmission. Nor does the certificate of recovery take into account the fact that immunity gained from a previous infection may go undetected.

None of the alternatives envisaged can therefore guarantee the public health objective of no transmission of SARS-CoV-2. On the other hand, these different certificates require administrative and medical steps that constitute an obstacle to free movement. The cost can, in some cases (PCR test, medical analysis, etc.), be significant, especially for family travel when the whole family must have a certificate (a PCR test costs about 50 euros for one person, for a family with two children, this represents a cost of 200 euros, which will certainly dissuade the less fortunate from travelling and will thus increase inequalities).

More fundamentally, the digital green certificate was presented as "the passport" that would give back the freedom to travel and circulate to European citizens. This claim is contradicted by the text of the proposed Regulation itself, which allows host Member States to continue imposing additional restrictions on holders of the digital green certificate, or even to deny them entry in their territory. Thus, a person in possession of a digital green certificate could still be subject to a testing requirement or quarantine after arrival in the country of destination.

It thus appears that, far from removing the obstacles to free movement which result in particular from the great diversity of national measures, the proposal for a Regulation adds new obstacles to free movement, while leaving the Member States the possibility of retaining those which already exist. Furthermore, from a public health point of view, the digital green

certificate is simply ineffective and therefore useless since, whatever form it takes (vaccination certificate, negative test certificate or certificate of recovery), it cannot guarantee the absence of risk of infection and therefore of transmission of SARS-CoV-2.

In legal terms, the proposed Regulation does not respect the applicable legal framework and violates several fundamental rights. The proposed Regulation puts in place restrictions on the free movement of persons which are justified (even if scientifically questionable) on public health grounds. However, such a restriction must pursue a legitimate objective and be proportionate and necessary to achieve the objective. Furthermore, it cannot violate the principle of non-discrimination. It appears that the proposal is discriminatory in several respects. Firstly, there is discrimination between nationals of Member States where vaccination is free and nationals who have to be tested in countries where testing is not free. Secondly, there is discrimination between people who are no longer infectious but who test positive and those who test negative (only the latter being able to cross borders freely). Third, there is discrimination between residents of countries where a (more expensive, slower) PCR test will be required and residents of countries where an antigenic test will be considered sufficient. Fourthly, there may also be discrimination between nationals of Member States in which certain vaccines are allowed and nationals of Member States, which do not allow the same vaccines. The restriction on free movement is not proportional either. On the one hand, as mentioned above, given the current state of scientific knowledge, it is not possible to say that the restriction makes it possible to achieve, with a reasonable degree of certainty, the public health objective (non-transmission of SARS-CoV-2). On the other hand, insofar as it will be applied massively and systematically to all EU residents, without distinction to the health situation in the country of origin and the health situation in the country of destination, it is clearly disproportionate. A citizen travelling from a green zone to a red zone should therefore carry the digital green certificate, as should a citizen travelling from a red zone to a red zone. Finally, the introduction of the digital green certificate is not time limited (no fixed term) and its scope can be extended to other "similar infectious diseases", which clearly exceeds the requirements of proportionality and necessity.

The proposed Regulation is thus discriminatory (violation of Articles 20 and 21 of the EU Charter of Fundamental Rights) and does not respect the principle of proportionality (violation of Article 21 of the EU Charter of Fundamental Rights and Article 45 of the Treaty on the Functioning of the European Union).

Finally, the introduction of a digital green certificate also involves the processing of medical data, which are considered to be very sensitive data and whose processing is, with certain exceptions, prohibited (Article 9 of the General Data Protection Regulation). The Commission invokes one of the exceptions enshrined in Article 9 to justify the processing and transmission of such data in the context of the introduction of the digital green certificate. Here again, for the same reasons, it must be noted that the proposed processing is not proportional or necessary to achieve the objective. The proposed Regulation also violates Article 9 of the GDPR in that it does not provide for appropriate and specific measures to safeguard

fundamental rights. For example, the proposed Regulation does not contain any indication, nor any list in the annex, of the national authorities to which data on travellers' health may be transmitted and who will have access to these data. Furthermore, it does not provide for any guarantee as to the risk of the use of medical data from the certificates by the Member States in the context of the national restrictions which, under Article 10, the host Member State could still impose on holders of the certificate.

The proposed Regulation violates Article 9 of the GDPR and thus Article 8 of the Charter of Fundamental Rights and Article 16 TFEU.

I. Context

1. The European Commission has formulated a proposal for a European Regulation (hereinafter the "Proposal") on the introduction of a "digital green certificate" (hereinafter the "Certificate"),¹ which follows a Recommendation of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic.² In addition, the Commission is working with the Member States on the eHealth network, a voluntary network of national eHealth authorities, to "support the interoperability of the vaccination certificates"³ and to develop, together with the Health Security Committee⁴, "a common standardised set of data for COVID-19 tests certificates,⁵ guidance on certificates of recovery⁶ and relevant data sets, and an outline on the interoperability of health certificates".

2. On the basis of this work, the Commission proposed to establish an EU-wide framework for the issuance, verification and acceptance of vaccination certificates within the EU, for certificates indicating a negative test result for SARS-CoV-2 infection as well as for certificates confirming the recovery from a previous SARS-CoV-2 infection, with the aim of facilitating the free movement of persons within the Member States. The alternatives to vaccination (negative test certificate and certificate of recovery) have been included so as to avoid the Regulation being interpreted as establishing an obligation or a right to be vaccinated.⁷

1 Proposal of 17 March 2021, COM(2021) 130 final.

2 Council Recommendation (EU) 2020/1475, O.J. L-337 of 14.10.2020.

3 https://ec.europa.eu/health/sites/health/files/ehealth/docs/vaccination-proof_interoperability_guidelines_en.pdf

4 Established by Article 17 of Decision No 1082/2013/EU of the European Parliament and of the Council, O.J. L 293, 5.11.2013, p. 1.

5 https://ec.europa.eu/health/sites/health/files/preparedness_response/docs/covid-19_rat_common-list_en.pdf

6 https://ec.europa.eu/health/sites/health/files/ehealth/docs/trust-framework_interoperability_certificates_en.pdf

7 p. 3 of the Proposal.

II. Purpose and outline of the analysis

3. The purpose of this contribution is to provide a critical analysis of the Proposal for a Regulation with a view to the debate that must take place within the European Parliament and with a view to the complementary measures that the Member States will have to adopt at national level to allow the entry into force of the future Regulation if it is adopted by the European Parliament and the Council. The Proposal raises sensitive questions, both as regards the objectives, purpose and scope of the Certificate, and its conformity with the applicable legal framework, in particular as regards free movement, protection of the right to privacy and personal data.

4. This contribution will therefore address these issues, focusing on the objectives of the Proposal and the measures proposed (III), the analysis of public health objectives in the light of the current state of scientific studies (IV) and the respect of the legal framework and fundamental rights and freedoms (V).

III. The objectives of the Proposal and the proposed measures

5. It appears from the explanatory memorandum of the Proposal that, based on the technical work done so far, the Commission proposes to establish an EU-wide framework for the issuance, verification and acceptance of **vaccination certificates** within the EU, in the context of a "digital green certificate". At the same time, this framework should also cover other certificates issued during the COVID-19 pandemic, namely documents certifying a negative test result for SARS-CoV-2 infection (**test certificates**) **as well as** documents certifying that the person concerned has recovered from a previous SARS-CoV-2 infection (**certificates of recovery**). For the purpose of this analysis, these three types of certificates - which will be detailed below - will be referred to together as the "**digital green certificate**".

6. With regard to the objectives of the digital green certificate, a distinction must be made between the explicit objective put forward by the Commission in its Proposal, namely that of "*facilitating the exercise of freedom of movement*", and the public health objective pursued by this measure, namely that of preventing the spread of the SARS-CoV-2 virus and, consequently, the infection of EU nationals.

7. We will come back to the first objective in detail later, in the context of the legal analysis itself. At this stage, we would like to emphasise the absurdity of the reasoning that consists in asserting that the introduction of a restriction on the free movement of persons can be qualified, *in fine*, as a measure capable of facilitating the exercise of this free movement.

8. With regard to the second objective, the Proposal explicitly states that the Commission's objective is to coordinate national initiatives that restrict the free movement of persons in order to prevent the transmission of SARS-CoV-2.⁸

⁸ Recitals 3 and 6 of the Proposal.

IV. Analysis of public health objectives in the light of the current state of scientific studies

IV.1 Vaccination certificate

9. Article 5 of the Proposal creates a (single) vaccination certificate, based on the assumption that a person vaccinated against SARS-CoV-2 can no longer transmit the virus.

10. However, this assumption is scientifically questionable in the light of the current state of scientific studies.

11. First of all, it should be noted that the (high) degree of effectiveness of the vaccines announced by the various vaccine manufacturers refers only to symptomatic cases.⁹ It remains to be seen to what extent vaccinated people can be infected and asymptomatic, given that an asymptomatic case can transmit the virus and infect others. This is based on the fundamental distinction between immunity that protects a person in that it prevents the development of disease symptoms, and immunity that is also capable of interrupting transmission of the virus. Ignoring this distinction can give a false sense of security to vaccinated people by making them think, erroneously, that they can no longer be infected and therefore no longer risk transmitting the virus to others¹⁰. Thus, parenteral vaccines do not appear to provide strong mucosal immunity to prevent infection or transmission of the virus¹¹. The World Health Organisation (WHO) also explains on its website that the question of whether a vaccinated person can become infected and transmit the virus is still unresolved and remains a source of great uncertainty¹². This is also highlighted in a joint opinion published by the *European Data Protection Board* and the *European Data Protection Supervisor* on 31 March 2021 on the Proposal¹³.

9 Mark Connors, Barney S. Graham, H. Clifford Lane, Anthony S. Fauci, "SARS-CoV-2 vaccines: much accomplished, much to learn", *Annals of Internal Medicine*, 19 January 2021, < <https://www.acpjournals.org/doi/10.7326/M21-0111> >, (as consulted on 8 April 2021).

10 Mark Connors, Barney S. Graham, H. Clifford Lane, Anthony S. Fauci, "SARS-CoV-2 vaccines: much accomplished, much to learn", *Annals of Internal Medicine*, 19 January 2021, < <https://www.acpjournals.org/doi/10.7326/M21-0111> >, (as consulted on 8 April 2021).

11 Russell, M.W., Moldoveanu, Z., Ogra, P.L. et Mestecky, J., "Mucosal Immunity in COVID-19: A Neglected but Critical Aspect of SARS-CoV-2 Infection", *Frontiers in Immunology*, 30 November 2020, < <https://www.frontiersin.org/articles/10.3389/fimmu.2020.611337/full> >, (as consulted on 8 April 2021).

12 OMS, Science in 5, Episode #23 - I am vaccinated, what next ?, < https://www.who.int/emergencies/diseases/novel-coronavirus-2019/media-resources/science-in-5/episode-23---i-am-vaccinated-what-next?gclid=CjwKCAjw07qDBhBxEiwA6pPbHk09GAflqTMYSfp40HwIAi3ayVAueWdQk_pC2SCrcpvygXeDZMbGQhoCtGAQAvD_BwE >, (as consulted on 8 April 2021).

13 "EDPB-EDPS Joint Opinion 04/2021 on the Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (Digital Green Certificate)", version 1.1, 31 March 2021, < https://edps.europa.eu/system/files/2021-04/21-03-31_edpb_edps_joint_opinion_digital_green_certificate_en_0.pdf >, pt. 14 : "We note that, at the time of preparation of this Joint Opinion, there seems to be little scientific evidence supporting the fact that having received a COVID-19 vaccine (...) grants immunity and how long it lasts".

12. While clinical trials of various vaccines suggest that vaccination reduces the risk of transmission of the virus, it appears that at this stage this cannot be stated with reasonable certainty for real-world situations (as distinct from clinical trials). According to the prestigious journal *Nature*, it is extremely difficult to prove that vaccination prevents the transmission of the virus, because this effect can be explained by external factors, on the one hand, and because it is difficult to identify with precision the cases of transmission due to asymptomatic people, on the other¹⁴.

13. Secondly, although the vaccine manufacturers claim that vaccination prevents the transmission of the virus, they admit that this effect only applies to a certain percentage of those vaccinated. For the Moderna vaccine, a two-thirds reduction in asymptomatic cases is reported among those who received the first injection compared to those who received the placebo (although the actual rate of infection may be higher because the people concerned were only tested twice a month). For AstraZeneca's vaccine, the reduction would be 49.3% for vaccinated people compared to an unvaccinated population (tests carried out once a week) and for Pfizer's vaccine, these data are not yet available because Pfizer has only recently begun to test for the possible transmissibility of the virus by vaccinated people¹⁵. In this context, it cannot be ruled out that RNA-messenger vaccines (Pfizer and Moderna) perform better than viral vector vaccines (AstraZeneca and Johnson & Johnson). In order to achieve its objective, a vaccination certificate would have to include a differentiation according to the type of vaccine, which would, however, be a discriminating factor since people cannot, as a rule, choose which vaccine they receive.

14. In limited samples, researchers have been able to observe a lower viral load in vaccinated and infected individuals, but there is no conclusive scientific evidence at this stage that this would also mean a more limited contagiousness¹⁶. The impact of vaccination on possible contamination by "super-contaminants" is also still unknown, as the phenomenon of "super-contaminants" is not yet explained. Since the vaccine does not prevent part of the vaccinated population from being contaminated, the possibility of significant transmission of the virus by a few "super-contaminators" must be taken into account, notwithstanding their vaccination. Finally, the vaccines currently on the market, which have only been conditionally authorised by the European Medicines Agency, still raise many uncertainties, particularly with regard to their effectiveness against certain viral

14"Can covid vaccines stop transmission ? Scientists race to find answers", *Nature*, 19 February 2021, <https://www.nature.com/articles/d41586-021-00450-z?utm_source=Nature+Briefing&utm_campaign=72250739fb-briefing-dy-20210222&utm_medium=email&utm_term=0_c9dfd39373-72250739fb-45689842>, (as consulted on 7 April 2021).

15"Can covid vaccines stop transmission? Scientists race to find answers", *Nature*, 19 February 2021, < https://www.nature.com/articles/d41586-021-00450-z?utm_source=Nature+Briefing&utm_campaign=72250739fb-briefing-dy-20210222&utm_medium=email&utm_term=0_c9dfd39373-72250739fb-45689842>, (accessed 7 April 2021). For a first overview, however, see the results published by the Center for Disease Control, 2 April 2021, < https://www.cdc.gov/mmwr/volumes/70/wr/mm7013e3.htm?s_cid=mm7013e3_w> which reports 80% efficacy for Pfizer (criterion used as endpoint: pcr test) (accessed on 8 April 2021).

16 "Can covid vaccines stop transmission ? Scientists race to find answers", *Nature*, 19 February 2021, < https://www.nature.com/articles/d41586-021-00450-z?utm_source=Nature+Briefing&utm_campaign=72250739fb-briefing-dy-20210222&utm_medium=email&utm_term=0_c9dfd39373-72250739fb-45689842>, (as consulted on 7 April 2021).

variants and the duration of their effectiveness. The characteristics of these vaccines are, moreover, very different but the Proposal does not take into account their particularities.¹⁷¹⁸

15. It follows from the above that the assumption underlying Article 5 of the Proposal - that (all) COVID-19 vaccines would limit the spread of the virus - is inaccurate and incomplete and not based on any definite or substantiated scientific claims.

16. More fundamentally, this demonstrates that, given the current state of science, the very principle of a vaccination certificate is problematic and potentially discriminatory. This problematic nature was acknowledged by WHO spokesperson Ms M. Harris, who stated on 6 April 2021 that WHO does not support the introduction of vaccine passports¹⁹. Several States in the United States have rejected the principle of vaccine passports²⁰. The US federal government has announced that it will not issue vaccine passports²¹.

17. Finally, in support of the above, it should be noted that all official and/or governmental communications recommend that vaccinated persons continue to apply barrier measures (social distancing, mask wearing, etc.) because vaccination against COVID-19 does not protect against infection or transmission of the virus. The Council of the European Union also implicitly recognises this when it suggests including a standard text on the digital green certificate inviting the traveller to carefully check, before travelling, the public health measures and restrictions applicable in the country of destination (Article 3, paragraph 3a)²².

18. At this stage, it is therefore impossible to state with reasonable certainty that the use of the vaccination certificate in the context of the issuance of a digital green certificate will achieve the objectives of this restriction on the free movement of persons that justify the Proposal, namely to prevent the transmission of the virus.

17 < https://www.nature.com/articles/d41586-021-00460-x?utm_source=Nature+Briefing&utm_campaign=d15e33148b-briefing-dy-20210224&utm_medium=email&utm_term=0_c9dfd39373-d15e33148b-45689842>, 23 February 2021 (accessed 7 April 2021)

18 T. Osama, M.S. Razai, A.Majeed, "Covid-19 vaccine passports: access, equity, and ethics", *BMJ* 2021; 373, 1 April 2021, < <https://doi.org/10.1136/bmj.n861>>, (as consulted on 9 April 2021).

19 < https://www.reuters.com/article/us-health-coronavirus-who-vaccines-idUSKBN2BT158?taid=606cbdd0a0a3570001acd819&utm_campaign=trueanthe&utm_medium=trueanthe&utm_source=twitter>, (accessed 7 April 2021).

20 ABC News, "Texas governor bans mandated covid-19 vaccine passports", 7 April 2021, < <https://abcnews.go.com/Health/wireStory/texas-governor-bans-mandated-covid-19-vaccine-passports-76905322> > (as consulted on 8 April 2021); CNN, "Florida governor bans covid-19 'vaccine-passports'", 3 April 2021, < <https://edition.cnn.com/2021/04/03/us/florida-covid-vaccine-passport-ban/index.html>>, (as consulted on 7 April 2021).

21 Los Angeles Times, "White House rejects U.S. vaccine passports, skirting uproar", 7 April 2021, < <https://www.latimes.com/world-nation/story/2021-04-07/white-house-rejects-us-vaccine-passports>>, (accessed on 8 April 2021).

22 Council of the European Union, Proposal for a Regulation, 14 April 2021, 2021/0068(COD), < <https://data.consilium.europa.eu/doc/document/ST-7796-2021-INIT/en/pdf> >.

IV.2 Test and certificates of recovery

19. The Proposal offers two alternatives to the vaccination certificate (Art. 3):
- i. A certificate indicating the holder's result and date of a NAAT or a rapid antigen test listed in the common and updated list of COVID-19 rapid antigen tests established on the basis of Council Recommendation 2021/C 24/01 (hereinafter the "test certificate");
 - ii. A certificate confirming that the holder has recovered from SARS-CoV-2 infection following a positive NAAT test or a positive rapid antigen test listed in the common and updated list of COVID-19 rapid antigen tests established on the basis of recommendation 2021/C 24/01 (hereinafter the "certificate of recovery").

IV.2.1 Negative test certificates

20. The first alternative is therefore a negative test certificate. There are three types of tests: (1) the PCR test, (2) the antigen test or (3) the antibody test.

21. Article 3 of the Proposal refers, first of all, to NAAT tests. A NAAT test is a test based on the amplification of nucleic acids, i.e. RT-PCR. This test detects RNA fragments of the virus. In some people, the body takes several months to eliminate the RNA fragments of the virus, so this test can result in false positives.²³ To address this problem at least in part, it is suggested that the pre-test probability be taken into account: the presence of symptoms, the medical history including the possible presence of antibodies, the fact of having been exposed to the disease to a greater or lesser extent, or alternative diagnoses are likely to influence the pre-test probability. Thus, a low pre-test probability should lead to mistrust of the PCR test results. However, for people who are tested for the sole purpose of travel, the pre-test probability will often be low (unlike people who are tested because they have symptoms).^{24,25}

23 In a report by the French Scientific Council to the French government on 17 November 2020, 20% false positives are reported (Note du Conseil scientifique du 17 novembre 2020, p. 2, < <https://www.datapressepremium.com/rmdiff/2009019/noteconseilscientificueclairagetestsrapides.pdf> >, (accessed 8 April 2021). In a study published in December 2020 based on UK figures, false positives of up to 4% are reported (Surkova, E., Nikolayevskyy, V. and Drobniowski, F., "False positive COVID-19 results: hidden problems and costs", *The Lancet - Respiratory Medicine*, 2020, vol. 8, issue 12, pp. 1167-1168, 1 December 2020, p. 1167, < [https://doi.org/10.1016/S2213-2600\(20\)30453-7](https://doi.org/10.1016/S2213-2600(20)30453-7) >, (accessed 8 April 2021). The differences can be explained by the number of cycles performed during the test. More cycles lead to higher sensitivity and a higher percentage of false positives (see also J. Bullard, K. Dust, D. Funk, J. E. Strong, D. Alexander, L. Garnett, C. Boodman, A. Bello, A. Hedley, Z. Schiffman, K. Doan, N. Bastien, Y. Li, P.G. Van Caesele, G. Poliquin, *Clinical Infectious Diseases*, Volume 71, Issue 10, 15 November 2020, pp. 2663-2666, < <https://doi.org/10.1093/cid/ciaa638> > (accessed 8 April 2021).

24 Surkova, E., Nikolayevskyy, V. and Drobniowski, F., "False positive COVID-19 results: hidden problems and costs", *The Lancet - Respiratory Medicine*, 2020, vol. 8, issue 12, pp. 1167-1168, December 1, 2020, p. 1167, < [https://doi.org/10.1016/S2213-2600\(20\)30453-7](https://doi.org/10.1016/S2213-2600(20)30453-7) >, (accessed on April 8, 2021)

25 *Ibid.*

22. A positive test therefore does not necessarily mean a risk of contagion, but under the system suggested by the proposed Regulation, this situation would nevertheless lead to a ban on crossing the border and travelling within the EU. Moreover, the cost of a PCR test is around EUR 50 (for a family departure, the additional cost would therefore easily exceed EUR 150 or even EUR 200, depending on the age of the children). There is also a waiting period of at least 24 hours for the results (linked to the processing by a laboratory). The requirement for such a test will therefore be an obstacle to travel for many citizens and thus a further restriction on the free movement of citizens.

23. For antigenic tests, a common list of antigenic tests has been established²⁶ for mutual recognition by the Member States of the results of such tests. A well-performed and positive antigen test is the only case where it can be clearly stated that a person is contagious. Antigen tests also have the advantage of being cheaper and faster than PCR tests. However, like PCR tests, antigenic tests cannot be a valid alternative to a vaccination certificate and achieve the Proposal's objective of preventing transmission of the virus. This is because the test is a kind of static photograph of a specific moment in time. A negative test result is therefore no guarantee that a person is not in the incubation phase and will not be positive (and therefore contagious) two days later. In general, it can therefore be concluded that a test does not give any indication of contagiousness one day after it has been performed, and does not even give any indication of possible re-infection and therefore possible transmission.

24. Therefore, the requirement for a negative test, regardless of the type of test (PCR or antigenic), does not contribute to the main objective of the Proposal, namely to prevent contagion and, more generally, the spread of the virus.

25. For this reason, some Member States have already announced their intention to impose a quarantine on persons who have made use of this possibility (negative test certificate). It is, moreover, important to underline that Article 10 of the Proposal allows Member States to require holders of certificates referred to in Article 3 to undergo quarantine, self-isolation or testing after entry into their territory, subject to a simple notification to the European Commission. The same Article allows Member States to deny (!) entry into their territory of nationals of other Member States even if they hold an Article 3 certificate (see below).

IV.2.2 Certificate of recovery

26. The second alternative to the vaccination certificate is a certificate confirming that the holder has recovered from SARS-CoV-2 infection. This certificate of recovery, referred to in Article 3, should attest that a person who has tested positive has recovered (this certificate is valid for 180 days). This certificate of recovery therefore requires a medical visit and a certificate from the treating physician or hospital, which may unnecessarily increase the

²⁶ List approved by the EU Health Safety Committee on 17 February 2021, available here : < https://ec.europa.eu/health/sites/health/files/preparedness_response/docs/covid-19_rat_common-list_en.pdf >

workload of physicians and hospitals. Moreover, obtaining this certificate will therefore involve a significant cost for the persons concerned. Finally, the certificate of recovery would not contribute in any way to the objectives of the Proposal. Immunity, defined here restrictively as the presence of antibodies in the blood, is measured by a serological laboratory analysis or a rapid serology test. If the test shows the presence of antibodies, this indicates that the person tested is probably protected, at least against severe complications, but it does not mean that he or she is no longer re-infectable in the respiratory tract and therefore potentially contagious. The holder of a certificate of recovery as defined in Article 3 of the Proposal may therefore be perfectly contagious. Studies show cases of reinfection even in the presence of an amount of antibody considered to be neutralizing.²⁷ Furthermore, the Proposal is too restrictive in its definition of immunity and does not take into account other forms of immunity, such as that which may result from T-cells ("cellular" immunity). The Proposal as amended by the Council of the European Union specifies that other methods of demonstrating immunity may be added via a delegated act adopted by the European Commission. However, the Council adds that the issuance and acceptance of such certificates will then be optional (which creates additional difficulties).²⁸

27. Finally, there is also a risk that the certificate of recovery, which is to be treated as an immunity passport (rather than a vaccine passport), will encourage some people to abandon barrier measures and attempt to expose themselves to infection, in the hope of acquiring immunity and thus travelling freely within the EU.

* * *

28. **In conclusion, in the light of the current state of scientific studies, test certificates and certificates of recovery are also not effective and appropriate means to achieve the European Commission's objectives. Indeed, as explained above, the requirement of a negative (PCR or antigenic) test does not offer any guarantee that the tested person can no longer be (re-)infected and therefore contagious. As far as certificates of recovery are concerned, they are clearly not able to achieve the desired objectives for several reasons. Firstly, the parameters and duration of post-infection immunity remain undetermined at present. Secondly, testing antibodies is very expensive. Thirdly, the introduction of such certificates and their use to allow free movement within the EU may encourage behaviour whereby some people (especially those not at risk, such as young people) voluntarily expose themselves to COVID-19 infection - the very opposite of the intended effect. Finally, certificates of recovery do**

27 Andrew G. Letizia, Yongchao Ge, Sindhu Vangeti, Carl Goforth, Dawn L Weir, Natalia A. Kuzmina, Hua Wei Chen, Dan Ewing, Alessandra Soares-Schanoski, Mary-Catherine George, William D. Graham, Franca Jones, Preeti Bharaj, Rhonda A. Lizewski, Stephen A. Lizewski, Jan Marayag, Nada Marjanovic, Clare Miller, Sagie Mofsowitz, Venugopalan D. Nair, Edgar Nunez, Danielle M. Parent, Chad K. Porter, Ernesto Santa Ana, Megan Schilling, Daniel Stadlbauer, Victor Sugiharto, Michael Termini, Peifang Sun, Russell. P. Tracy, Florian Krammer, Alexander Bukreyev, Irene Ramos, Stuart C. Sealfon, "SARS-CoV-2 seropositivity and subsequent infection risk in healthy young adults: a prospective cohort study", *medRxiv*, 29 January 2021, < <https://doi.org/10.1101/2021.01.26.21250535>>, (accessed on 9 April 2021).

28 "How 'killer' T cells could boost COVID immunity in face of new variants", *Nature*, 12 February 2021, < https://www.nature.com/articles/d41586-021-00367-7?utm_source=Nature+Briefing&utm_campaign=4dbe30e317-briefing-dy-20210215&utm_medium=email&utm_term=0_c9dfd39373-4dbe30e317-45689842>, as consulted on 9 April 2021).

not address the issue of reinfection with and protection against new variants of the virus ²⁹. For all these reasons, they are not recommended by either the European Center for Disease Prevention and Control (ECDC) or the WHO.

* * *

29. It follows from the above that neither vaccines, nor tests, nor certificates of recovery, for different reasons, can guarantee freedom from infection and thus limit the spread of SARS-CoV-2. The measures put in place by the Proposal, which constitute restrictions on the free movement of persons, therefore do not achieve the stated objective with reasonable certainty and in the light of current scientific knowledge.

30. The Proposal itself seems to recognise the health ineffectiveness of the vaccination, test and certificates of recovery as Article 10 allows Member States to maintain restrictions on entry into their territory, or even prohibit entry into their territory³⁰, despite the presentation by nationals of another Member State of one of these certificates³¹. Implicitly, this provision confirms that the public health objective of limiting the spread of the virus is not guaranteed by the digital green certificate and that host Member States may maintain or add other restrictive measures in order to ensure that nationals of other Member States are not/no longer infectious and thus prevent the spread of the virus.

V. Respect of the legal framework and fundamental rights

V.1 The fundamental right of free movement

1. Preliminary remarks

31. As stated above, the explanatory memorandum of the Proposal indicates that the objective of the certificates contained in the "digital green certificate" is to facilitate the exercise of the right of free movement within the EU during the COVID-19 pandemic by establishing a common framework for the issuance, verification and acceptance of

29 [Patricia Schlagenhauf, Dipti Patel, Alfonso J. Rodriguez-Morales, Philippe Gautret, Martin P. Grobusch, et Karin Lederf](#), "Variants, vaccines and vaccination passports: Challenges and chances for travel medicine in 2021", [Travel Med Infect Dis.](#) 2021 March-April; 40: 101996, <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7899929/>>, (consulté le 9 avril 2021).

30 However, this possibility to prohibit entry has been removed in the Proposal as amended by the Council of the European Union on 14 April 2021 (Article 10.1 and Recital 41 of the Proposal) (2021/0068(COD)).

31 This provision states that "[w]here a Member State requires holders of certificates referred to in Article 3 to undergo, after entry into its territory, quarantine, self-isolation or a test for SARSCoV-2 infection, or if it denies entry to such persons, it shall notify the other Member States and the Commission before the planned introduction of such restrictions. To that end, the Member State shall supply the following information: (a) the reasons for such restrictions, including all relevant epidemiological data supporting such restrictions; (b) the scope of such restrictions, specifying which travellers are subject to or exempt from such restrictions; (c) the date and duration of the restrictions. Where necessary, the Commission may request additional information from the Member State concerned" ..

interoperable vaccination certificates, test certificates and certificates of recovery from COVID-19³². Although presented as a means of limiting the restrictions on free movement imposed by individual Member States, the digital green certificate remains a restriction on the fundamental right of free movement within the Union. The only difference is that instead of being confronted with isolated and disparate restrictions imposed by individual Member States (as has been the case so far), EU citizens will now be confronted with a restriction organised, in a coordinated way, at EU level.

32. However, even this objective - to coordinate and harmonize restrictions at EU level - seems to be undermined by Article 10 of the Proposal, which allows Member States to maintain restrictions on entry into their territory, or even to prohibit entry into their territory (see above). Indeed, in the light of Article 10, it is feared that the landscape of restrictions on the free movement of persons will remain fragmented and that individual Member States will continue to apply their own restrictions on the movement of digital green certificate holders.

33. *Therefore, the fact that the Commission presents the Proposal as "positively affect[ing] the fundamental right of freedom of movement and residence under Article 45 of the Charter of Fundamental Rights of the European Union"³³ is certainly questionable. The digital green certificate is certainly a restriction on free movement coordinated at EU level, but it remains a restriction.*

34. Finally, it is also important to question the scope of the digital green certificate. Indeed, on reading the Proposal, the issuance of a green certificate (or one or more of the certificates included in this digital green certificate) by Member States does not seem to be mandatory.

35. *Indeed, the explanatory memorandum of the Proposal states that "[t]he possession of a 'digital green certificate', in particular a vaccination certificate, should not be a precondition for the exercise of free movement. Persons who are not vaccinated, for example for medical reasons, because they are not part of the target group for which the vaccine is currently recommended, such as children, or because they have not yet had the opportunity to be vaccinated or do not wish to be vaccinated, must be able to continue to exercise their fundamental right of free movement, where necessary subject to limitations such as mandatory testing and quarantine/self-isolation. In particular, this Regulation cannot be interpreted as establishing an obligation or a right to be vaccinated". We understand that a non-vaccinated person could still travel to another Member State provided that he/she complies with a quarantine, for example.*

36. The explanatory memorandum also states that " *t]his Regulation should not be understood as facilitating or encouraging the adoption of restrictions to free movement during the pandemic. Rather, it seeks to provide a harmonised framework for the recognition of COVID-19 health certificates in the event that a Member State applies such restrictions. Any limitations to the freedom of movement within the EU justified on grounds of public policy, public security or public health must be necessary, proportionate and based on*

³² Explanatory Memorandum to the Proposal, point 1 (Background to the Proposal), p. 3 and point 2 (Legal basis, subsidiarity and proportionality), p. 5.

³³ Explanatory Memorandum to the Proposal, point 3 (Results of ex-post evaluations, stakeholder consultations and impact assessments), p. 6.

objective and non-discriminatory criteria. The decision as to whether to introduce restrictions to free movement remains the responsibility of the Member States, which must act in compliance with EU law. Equally, Member States retain the flexibility not to introduce restrictions to free movement ". We conclude that, despite the establishment at European level of a harmonised framework for the digital green certificate, Member States may decide not to make use of this framework and, therefore, not to require a digital green certificate.

2. The rules and principles relating to free movement within the Union

37. The right of free movement of EU citizens is enshrined in Article 45 of the Charter of Fundamental Rights of the European Union. The first paragraph of this article states that *"every citizen of the Union shall have the right to move and reside freely within the territory of the Member States"*³⁴. This is a **fundamental freedom, one of the pillars of European integration**, which is also provided for in Article 21 of the Treaty on the Functioning of the European Union (TFEU). Article 21 TFEU adds, however, that this right is guaranteed *"subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect"*. Article 21(2) further states that *"[i]f action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1 [the rights of free movement and residence]"*³⁵. Articles 45 and 49 of the TFEU provide for the free movement of workers and, respectively, the freedom of establishment of EU citizens. Articles 56 and 57 TFEU guarantee the free movement of services within the Union.

Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States³⁶ implements the freedom of movement of European citizens and regulates, in particular, the derogations that may be made. Article 27 of this Directive 2004/38 provides that *"Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends"*. Article 29 of the Directive, which deals exclusively with derogations on the grounds of public health, provides that *"[t]he only diseases justifying measures restricting freedom of movement shall be the*

34 These rights have also been conferred on third-country nationals legally residing in the territory of a Member State by the Convention implementing the Schengen Agreement. In this case, a second Proposal for a Regulation introducing a digital green certificate for such nationals was tabled on 17 March 2021. See the proposal of 17 March 2021, COM. Proposal of 17 March 2021, COM(2021) 140 final.

35 It is on the basis of this specific provision that the European Parliament and the Council have tabled their Proposal for a Regulation on the green digital certificate. See p. 4 and 5 of the Proposal for a Regulation, *Explanatory Memorandum*.

36 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, O.J., 29.6.2004, L-229

diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases, if they are the subject of protection provisions applying to nationals of the host Member State. [...]Where there are serious indications that it is necessary, Member States may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1. Such medical examinations may not be required as a matter of routine”.

38. Any restrictions on the free movement of persons within the Union must be applied in accordance with the general principles of Union law, in particular **the principles of proportionality** (enshrined in Article 52 of the Charter of Fundamental Rights) **and non-discrimination** (enshrined in Articles 20 and 21 of the Charter of Fundamental Rights)³⁷. The Proposal underlines this in its Recital 6.

39. The principle of non-discrimination is, moreover, considered a corollary of freedom of movement for workers in Article 45(2) TFEU: '*freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment*'. Measures restricting freedom of movement may be directly discriminatory (if they are linked to nationality), indirectly discriminatory (if they are not directly linked to nationality but have the effect of creating discrimination between nationals of different Member States) or non-discriminatory³⁸. This typology will determine the categories of grounds that can be validly invoked to justify interference³⁹.

40. A measure restricting freedom of movement is illegal as it violates Union law unless it is justified by a legitimate objective and the measure is proportionate to that objective⁴⁰. However, it is settled case law that exceptions to a general principle of Union law are to be interpreted strictly⁴¹. The objective of protecting public health is undeniably legitimate since it is expressly enshrined in Articles 27 and 29 of Directive 2004/38. The examination of the proportionality of the restrictive measure is an examination that must be carried out *in concreto*, having regard to the specific circumstances of the case. The proportionality test concerns both the appropriateness and the necessity of the measure in relation to the objective pursued.

41. A measure restricting liberty is **appropriate** when it "*ensur[es] the attainment of the objective in question*"⁴². The Court of Justice also states that the measure can only be

37 C. BARNARD, "Free movement of natural persons and citizenship of the Union", *European Union Law*, Oxford, 2nd edition, 2017, p. 406.

38 N. N. SHUIBHNE, "Exceptions to the free movement rules", *European Union Law*, Oxford, 2nd edition, 2017, p. 482-483.

39 N. N. SHUIBHNE, "Exceptions to the free movement rules", *European Union Law*, Oxford, 2nd edition, 2017, p. 485-487.

40 N. N. SHUIBHNE, "Exceptions to the free movement rules", *European Union Law*, Oxford, 2nd edition, 2017, p. 477.

41 L. DRIGUEZ, M. MORSA and S. RODRIGUES, 'Union Case Law Chronicle: Free movement of persons - Social policy and social security (2015-2017)', *Cahiers droit européen*, 2018/2, 21 December 2018, p. 533.

42 CJEU, 11 March 2010, *Attanasio Group*, C-384/08, pt. 51.

considered appropriate "if it genuinely reflects a concern to attain it in a consistent and systematic manner"⁴³.

42. A measure restricting freedom is **necessary and proportionate** (in the strict sense of the term) when it does not go beyond what is necessary to achieve the objective pursued. "A restriction on movement [...] which, in the absence of nuances, is applied too broadly exceeds what is necessary and is therefore disproportionate"⁴⁴.

43. The proportionality of a measure may thus be examined in the light of the existence of less intrusive alternatives that would enable the objective pursued to be achieved. The Court of Justice thus ruled that "to require [...] that a person applying to take part in a recruitment competition provide evidence of his linguistic knowledge exclusively by means of one particular type of certificate, issued only by one particular Belgian body tasked with conducting language examinations in Belgium for that purpose, appears, in view of the requirements of the freedom of movement for workers, disproportionate to the aim pursued"⁴⁵. Indeed, the measure in question did not allow the applicant to provide proof, by any other means, of the required language knowledge.

3. Application of these rules and principles to the digital green certificate

44. In this case, **the digital green certificate is a restriction on the freedom of movement of European citizens**. The Court of Justice has ruled that "[r]ules which preclude or deter a national of a Member State from leaving his country of origin in order to exercise either his right to freedom of movement or his right to freedom of establishment therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the national concerned"⁴⁶. It is clear that a measure such as the digital green certificate has the purpose and effect of dissuading a European citizen from exercising his or her right of free movement because, in order to do so, he or she must first demonstrate that he or she has a certificate attesting the fact that he or she has been vaccinated or tested negative or has recovered from the disease. However, the presentation of such a certificate implies additional and restrictive prior steps (vaccination, visit to the doctor, screening, etc.) and, in most cases, costs. This is reflected in the terms of Article 1 of the Proposal, which aims to facilitate the exercise of the right of free movement, but only for the holders of the certificates in question. Even for the latter, it is difficult to see how the digital green certificate could facilitate freedom of movement, since Article 10 of the Proposal allows Member States to maintain or impose additional restrictions (quarantine, PCR test, etc.) on entry into their territories, or even to prohibit entry into their territories of holders of one of the certificates referred to in Article 3 of the Proposal (see above, No. 30).

45. As demonstrated above, a restriction on the fundamental right of free movement within the Union may nevertheless be allowed provided that several conditions are met.

43 CJEU, 11 March 2010, *Attanasio Group*, C-384/08, pt. 51.

44 P. GILLIAUX, "Les entraves à la libre circulation des personnes", *C.D.E.*, 2008/3, p. 456.

45 CJEU, 5 February 2015, *Commission v Belgium*, C-317/14.

46 CJEU, 26 October 2006, *Commission v Portuguese Republic*, C-345/05, pt. 16. See also CJEU, 13 November 2003, *Schilling and Fleck-Schilling*, C-209/01, pt. 25 and CJEU, 15 September 2005, *Commission v Denmark*, C-464/02, pt. 35.

46. First, the restriction must be justified by a legitimate public interest objective such as public health. The World Health Organisation has classified COVID-19 as an epidemic disease. The introduction of a digital green certificate would therefore meet a public health objective. This objective is, moreover, provided for in Article 29 of Directive 2004/38/EC.

47. Secondly, it is required that the interference with the right of free movement is proportionate and non-discriminatory. In the *Emir Gül* case, the Court of Justice ruled that "[t]he right to restrict freedom of movement on grounds of public health is intended [...] to permit Member States to refuse access to their territory or residence there to persons whose access or residence would in itself constitute a danger for public health"⁴⁷. In its ruling on a preliminary question, the Court defines in detail the contours of the public health ground. However, the Court of Justice did not rule in this judgment (nor, to our knowledge, in any other judgment) on the proportionality of a measure restricting the freedom of movement of persons with regard to the objective of protecting public health.

48. In this respect, the European Commission recalled in its Communication of 16 March 2020 that Member States should only impose restrictions on the transport of goods and passengers for public health reasons if these restrictions are: "a. transparent, i.e. enshrined in public statements/documents; b. duly motivated, i.e. they need to spell out the reasons and the link to Covid-19. Justifications must be science-based and supported by World Health Organization (WHO) and European Centre for Disease Prevention (ECDC) recommendations; c. proportionate, i.e. not going beyond what is strictly necessary; d. relevant and mode-specific, i.e. restrictions on any of the different transport modes must be adapted to that mode; and e. non-discriminatory"⁴⁸. The Council of the European Union also stressed in its Recommendation 2020/1475: "[w]hen adopting and applying restrictions to free movement, Member States should respect principles of EU law, in particular proportionality and non-discrimination. This Recommendation is intended to facilitate the application of these principles, in a coordinated manner, to the exceptional situation caused by the COVID-19 pandemic. Therefore, the mechanisms put in place by this Recommendation should be strictly limited in scope and time to restrictions adopted in response to this pandemic"⁴⁹.

a) Indirect discrimination caused by the digital green certificate

49. The introduction of a digital green certificate as currently designed in the Proposal may lead to several types of discrimination.

50. For example, the Proposal discriminates between those who are vaccinated free of charge, on the one hand, and those who are not vaccinated and who have to pay for a test in order to travel⁵⁰, and those who have to pay for a doctor's visit to be certified as having

47 CJEU, 7 May 1986, *Emir Gül*, 131.85, pt. 17.

48 Commission Communication of 16 March 2020, COVID-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, COM(2020), 1753 final, point 4.

49 Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, *OJEU*, 14 October 2020, L 337.

50 This discrimination is all the more important depending, for example, on the number of family members involved.

recovered from SARS-CoV-2 infection, on the other hand. This difference in treatment is not justified and cannot be legitimately justified.

51. Another discrimination concerns test certificates, as discrimination is created between people who test positive and are not/no longer contagious and people who test negative and will be able to cross the internal borders of the EU. People in similar situations are then treated differently, which is not justified.

52. Also in relation to test certificates, discrimination may occur in relation to the type of test used/approved. Indeed, the Proposal discriminates between citizens of different Member States since, depending on the types of tests approved and made available in each Member State, some citizens will be obliged to be tested *via* a PCR test while other citizens will have the possibility to undergo an antigen test, which is less expensive and, in principle, faster than the PCR test. This difference in treatment is not justified and cannot be legitimately justified.

53. Finally, the Council of the European Union proposes to amend the text of the Proposal to allow for the recognition by Member States of vaccines other than those that have been granted a marketing authorisation at European level under Regulation 726/2004. Indeed, the Council indicates in a recital 25 a) that Member States are encouraged to accept vaccination certificates received following the administration of a vaccine added to the WHO list of emergency tools. In a recital 25 b), the Council adds that Member States also have the possibility to accept vaccination certificates obtained following the administration of a vaccine that has been granted a national marketing authorisation in accordance with Directive 2001/83/EC, following the administration of a vaccine that has been granted a temporary national marketing authorisation on the basis of Article 5(2) of Directive 2001/83/EC, or following the administration of a vaccine included in the WHO list of emergency tools. Article 10 as amended by the Council therefore provides that Member States shall inform the other Member States and the Commission of the issuance and acceptance of certificates and the conditions for their acceptance as well as the categories of vaccines accepted.

54. In our opinion, this amendment is likely to create further discrimination between EU citizens. Indeed, some EU citizens will be more likely to be granted a vaccination certificate due to the extension of the list of vaccines accepted in their Member State, while other citizens will be limited to vaccines that have been granted a marketing authorisation in the EU.

55. The Proposal therefore violates the fundamental principles of equality and non-discrimination, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union.

b) Disproportionate nature of the digital green certificate

56. Firstly, the issuance of the digital green certificate is not a proportionate measure in view of the objective pursued by the European Union. As explained above, at this stage it cannot be said with reasonable certainty that the use of the vaccination certificate in the context of the issuance of a digital green certificate will achieve the objective of this

restriction on free movement, namely to prevent the transmission of the virus. The same applies to the certificate of recovery or the negative test certificate (for the reasons explained above n° 9 - 30).

57. Secondly, the issuance of a digital green certificate is not a proportionate measure as it will be systematically imposed on all citizens of a Member State wishing to enter another EU Member State. This measure is clearly contrary to the spirit of Article 29 of Directive 2004/38, which provides for a ban on the systematic nature of medical examinations imposed by a Member State on holders of a right of residence. In principle, this prohibition applies to medical examinations carried out in and by the host Member State, but the same conclusion should apply with regard to medical examinations carried out in the Member State of origin but imposed by the host Member State. It should also be stressed that while Article 29 allows, in exceptional cases, for the host Member State to subject nationals of another Member State to medical examinations to enable them to enter and reside on its territory, these examinations must be free of charge. However, as pointed out above, many of the measures envisaged (tests, visits to the doctor, vaccination in some Member States, etc.) involve costs for the person wishing to exercise his or her fundamental right of free movement within the Union. Moreover, the systematic nature goes beyond what is necessary insofar as no distinction is made between countries according to the health situation. The digital green certificate could therefore also be required for travel between two Member States where the health situation is fully under control or where the health situation is under control in the traveller's Member State of origin.

58. The issue of a digital green certificate is, moreover, disproportionate as it is not the least intrusive way to achieve the objective of free movement. While the European Union's objective of facilitating the reopening of the Union's internal borders is laudable, it could be guaranteed in other ways, in particular by ensuring that Member States comply with the provisions of the Schengen Borders Code⁵¹ (in particular Article 28 thereof)⁵².

59. Thirdly, the issuance of a digital green certificate is not a proportionate measure as it is not sufficiently limited in time. Article 15 of the Proposal states that the application of Articles 3, 4, 5, 6 and 10 of the Regulation will be suspended by a Commission delegated act "*once the Director-General of the World Health Organisation has declared, in accordance with the International Health Regulations, that the public health emergency of international concern caused by SARS-CoV-2 has ended*". There is therefore no end date, only a date of suspension of the application of the restrictive measures. The Council of the European Union has also proposed to limit the period of application of the Regulation to 12 months from its entry into force⁵³.

51 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), *O.J.E.*, 23 March 2016, L 77.

52 This article provides that where a serious threat to public policy or internal security in a Member State requires immediate action, the Member State concerned may, exceptionally, immediately reintroduce border control at its internal borders for a limited period not exceeding ten days, which may exceptionally be extended for renewable periods not exceeding twenty days.

53 Council of the European Union, Proposal for a Regulation, 14 April 2021, 2021/0068(COD), Article 15, §2 : "*The Regulation shall apply for 12 months from the date of its entry into force. At the latest 3 months before the end of the application of this Regulation, the Commission shall present a report to the European Parliament and the Council on the application of this Regulation. The report shall contain, in particular, an assessment of the impact of this Regulation on the facilitation of free*

60. Furthermore, the measure is not proportionate as its material scope is too broadly defined. Article 15 provides that “[t]he Commission shall adopt a delegated act in accordance with Article 11 specifying the date from which the application of Articles 3, 4, 5, 6, 7 and 10 is to be suspended once the Director-General of the World Health Organization has declared, [...], that the public health emergency of international concern caused by SARS-CoV-2 has ended”. The potential extension of the application of this Proposal to other diseases similar to SARS-CoV-2 is disproportionate as it goes far beyond the objective pursued by the Proposal, i.e. to facilitate the exercise of the right of free movement of digital green certificates holders during the COVID-19 pandemic (Article 1 of the Proposal). The Council of the European Union has, moreover, in its proposal, deleted these terms in order to restrict the scope of the Regulation to the COVID-19 pandemic.

61. The Proposal therefore constitutes a disproportionate interference with the freedom of movement of European citizens, a fundamental right enshrined in Article 45 of the Charter of Fundamental Rights of the European Union and Article 21 TFEU.

V.2 Protection of personal data

62. The Proposal also raises a number of important issues regarding the protection of personal data. As a reminder, the right to the protection of personal data is directly enshrined in Article 16 TFEU and Article 8 of the Charter of Fundamental Rights of the European Union. This right has been implemented in particular by the General Data Protection Regulation ("GDPR").⁵⁴ To the extent that the Proposal violates the GDPR, it also violates the fundamental right to the protection of personal data.

63. The Proposal provides that the certificates shall contain the following personal data: (1) identification of the holder (for each of the three certificates referred to), (2) information about the vaccine medicinal product administered (in the case of a vaccination certificate), (3) information about the test carried out (in the case of a test certificate), (4) information about past SARS-CoV-2 infection (in the case of a certificate of recovery), and (5) certificate metadata, such as the certificate issuer, or a unique certificate identifier (in the case of all three certificates). It is therefore indisputable that the Proposal involves the processing of so-called sensitive data (medical data). The processing of such data is in principle prohibited by the GDPR, with some exceptions, which must be interpreted strictly.

64. The Commission invokes Article 9(2)(g) (processing of data concerning health necessary on grounds of substantial public interest) and Article 6(1)(c) (processing

movement, including the acceptance of the different types of vaccines, as well as on the protection of personal data during the COVID-19 pandemic. This report may be accompanied with legislative proposals, in particular to extend the date of application of this Regulation, taking into account the evolution of the epidemiological situation on the pandemic".

⁵⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), O.J.E. 4 May 2016, L-119/1.

necessary for compliance with a legal obligation to which the controller is subject) of the GDPR as the legal basis for the processing of the data.⁵⁵

65. Article 9(2)(g) of the GDPR allows, exceptionally, the processing of data concerning health where " *processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject*".

66. It follows from this text that the processing operation must, first of all, be necessary to achieve the purpose of the processing. In the present case, there is nothing to say with reasonable certainty that the processing operation will achieve the objectives (free movement of persons and public health) of the Proposal. Indeed, it appears that there are still many scientific uncertainties as to the effectiveness of vaccination certificates, test certificates or certificates of recovery and that it is in any case not proven, in the current state of science, that such certificates would make it possible to prevent the circulation and transmission of the virus. This point, which has been developed above (see above No. 9 - 30), has been expressly recalled in a joint opinion of the *European Data Protection Board* and the *European Data Protection Supervisor* issued on 31 March 2021 on the Proposal (hereinafter "Joint Opinion")⁵⁶. On the other hand, the ineffectiveness of the above-mentioned certificates is also reflected in Article 10 of the Proposal, which allows Member States to maintain or impose other restrictions (quarantine, PCR test, etc.) on the entry into their territories, or even to prohibit the entry into their territories, of holders of one of the above-mentioned certificates (see above No. 30).

67. Furthermore, as the Joint Opinion points out (§ 29), the purpose of the processing is not sufficiently precise and delimited since Article 15 also allows the Commission, acting by delegation, to declare, in the future, certain provisions of the Proposal applicable to other "*similar infectious diseases*", which also raises a problem in terms of proportionality.

68. It follows from the above that the certificates and the processing of medical data they imply do not make it possible to achieve the health objective (free movement of persons by preventing contamination in the host State), which explains why the host State retains the possibility to maintain or introduce other restrictions for certificate holders. The introduction of the certificates and the processing of medical data that they imply do not therefore contribute to the effective realisation of the right of free movement of persons (see above n° 44 - 60). Article 10, which allows the host state to impose further restrictions on the holder of a certificate (and thus exempts the host state from unconditionally accepting the certificate), is a source of further discrimination.⁵⁷

⁵⁵ Recital 37.

⁵⁶ "EDPB-EDPS Joint Opinion 04/2021 on the Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (Digital Green Certificate)", version 1.1, 31 mars 2021, < https://edps.europa.eu/system/files/2021-04/21-03-31_edpb_edps_joint_opinion_digital_green_certificate_en_0.pdf >.

⁵⁷ See also § 19 of the Joint Opinion.

69. Obtaining a certificate will become one of the conditions (without prejudice to other conditions imposed by the host Member State) for free movement within the European Union. As such, this measure will apply indiscriminately and massively to all citizens, regardless of the Member State of origin or region of origin, and therefore regardless of the health situation in that State/region. Imposing a certificate involving the processing of medical data indiscriminately on travellers from countries where the health situation is under control and on travellers from countries where the number of cases is very high violates not only the principle of non-discrimination, but also the principle of proportionality (see above No. 57). Only more targeted measures, taking into account the situation of the travellers and the respective health situation in the host Member State and in the Member State of origin, would allow the necessary proportionate approach to the processing of personal data and avoid the systematic and massive collection of medical data of European travellers.

70. As also pointed out in the Joint Opinion, proportionality is not respected either due to the possible future extension of the certificates to other similar diseases (Art. 15) and the lack of limitation of the duration of the processing (see *above*). Moreover, the Proposal does not provide for a maximum period of data retention or specific safeguards in this respect (see points 53 and 54 of the Joint Opinion).

71. The Proposal also violates Article 9 of the GDPR in that it does not provide for appropriate and specific measures to safeguard fundamental rights. For example, the Proposal does not contain any indication, nor any list in the Annex, of the national authorities to whom the medical data of travellers may be transmitted and who will have access to these data. This complaint was considered essential in the Joint Opinion (§ 49). Furthermore, the Proposal does not provide for any guarantee as to the risk of the use of medical data from the certificates by Member States in the context of national restrictions that the host Member State could still impose under Article 10 on the certificate holders. For example, there is a concern that such data could be used in the context of a quarantine imposed by the host State or that police services of the host State could have access to such data during a simple roadside check of the traveller. Such use could lead to discriminatory treatment by the host State.

72. **The Proposal does not respect the strict framework set by Article 9 of the GDPR for the processing of medical data by not identifying, through a detailed list, the national authorities that will have access to medical data, nor establishing the purposes for which these authorities can access these data and by not putting in place safeguards to prevent further use of these data or use within the restrictions imposed by the host State under Article 10 of the Proposal.**

Authors :

Erik VAN DEN HAUTE (ULB, Law)
Raluca GHERGHINARU (lawyer)
Alice ASSELBERGHS (lawyer)

With the participation of:

Mélanie DECHAMPS (UCLouvain, Clinique Universitaire St Luc, Intensivist)

Denis FLANDRE (UCLouvain, nano- and bio-electronics)

Pierre-François LATERRE (UCLouvain, Clinique Universitaire St Luc, Intensivist)

Elisabeth PAUL (ULB, public health)

Bernard RENTIER (ULiège, virologist)

The full text of this analysis is also available at www.covidrationnel.be and on the website of the Association of 'Notre Bon Droit' <https://notrebondroit.be>

Covid Rationnel is a Belgian think tank that advocates an interdisciplinary and rational scientific approach to the management of the covid-19 crisis.