

POLICY BRIEF

DIGITAL GREEN CERTIFICATE: CONCERNS WITH THE EUROPEAN COMMISSION'S PROPOSAL FOR A REGULATION AND SUGGESTIONS FOR AMENDMENT



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Summary

On 17 March 2021, the European Commission presented a proposal for a Digital Green Certificate (hereinafter Proposal). The Proposal raises a number of concerns regarding compliance with the Charter of fundamental Rights. This paper sets out six concerns and recommendations as to how the proposal could be amended to address these.

1

Concern:

Once the proposed interoperable digital health certificates exist, the political pressure on governments to allow vaccinated people to travel across borders within the EU without subjecting them to further requirements such as testing and quarantining will increase. It is entirely foreseeable that several Member States, especially those whose economies are highly dependent on tourism, will not be able to resist this pressure.

Recommended amendment:

The proposal should provide that Member States must maintain the same restrictions on free movement applied to persons who have not been vaccinated or recovered from COVID-19 as for persons who have been vaccinated or have recovered from COVID-19, until the Commission has determined, on the basis of scientific evidence, that vaccinated people and those who have already recovered from COVID-19

have a reasonably low likelihood of transmitting the virus.

2

Concern:

Should scientific evidence later demonstrate that those who are already vaccinated do not endanger public health, there will indeed be no justification to restrict their right to free movement. However, since vaccination is currently not readily accessible for all, this could lead to a two-tier society, with the vaccinated enjoying unrestricted free movement while others face restrictions that render their right to free movement difficult or impossible to exercise in practice.

Recommended amendment:

The preamble to the proposal should make clear that failure to make testing easily accessible (both geographically and financially) to those who are not vaccinated constitutes undue interference with the right to free movement.

3

Concern:

According to the Proposal, Member States may issue the “certificates making up the Digital Green Certificate in a digital or paper-based format, or both”. The digital format is meant to be displayed and stored on mobile devices. Member States issuing only

digital certificates may exacerbate inequalities and social exclusion.

Recommended amendment:

The proposal should require Member States to issue the certificates in both formats, or, if they wish to issue the certificate in digital format only, to ensure that everyone has the necessary device needed to store and display them.

4

Concern:

According to the Proposal, certificates will be issued to “Union citizens and their family members”. If certificates become (legally or practically) a condition for travelling or for having access to services, those who are not Union citizens and not family members of Union citizens may face undue problems in trying to partake in social life.

Recommended amendment:

The proposal should require certificates to be issued (upon request) to anyone residing in the Union.

5

Concern:

On paper, the Proposal intends to facilitate “the exercise of the right to free movement within the Union during the COVID-19 pandemic” and not to introduce a formal identity document we will have to keep with ourselves for the rest of our lives. The Digital Green Certificate, however,

will never be revoked. It will simply be suspended, once and to the extent there is no “public health emergency of international concern”.

Recommendation:

The proposal should be amended to establish conditions under which the use of certifications will end definitively. An obligation to prove our health status when moving inside Europe cannot become a normal part of life.

6

Concern:

The Proposal does not flesh out the technical details of the Digital Green Certificate. So far, Member States do not have a good track record in being sufficiently mindful about the risks that introducing new technology to control the COVID-19 pandemic may pose.

Recommended amendment:

The proposal should clearly recognise that the type of data processing, in particular the use of new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, and to create an obligation on data controllers to consult their national data protection supervisory authorities prior to processing any data.

Context

Universal and equitable access to a safe and effective COVID-19 vaccine is key to protect people's health and save lives, protect health workers and safeguard the public health system, ensure children return to school, and enable economies to rebuild and families to make ends meet.

COVID-19 vaccination campaigns have started to be rolled out across the EU. Those viewing the vaccine as the solution that will get us out of the pandemic are criticizing the slow pace of vaccination in some countries. Others express deep scepticism over the vaccine, due in part to the rapid spread of disinformation and fake news.

Vaccination campaigns and rules on vaccines and certifications are the exclusive competence and responsibility of national governments and cannot be mandated by the European Union. No Member State has chosen to make the vaccination compulsory and it seems very unlikely that any of them will try to do so in the coming months.

On 17 March 2021, the European Commission presented 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)".¹

The planned European certificate would provide:

- proof that a person has been vaccinated against COVID-19, and/or
- results of recent tests for those who have not been vaccinated, and/or
- information on COVID-19 recovery,

while respecting fundamental rights, including privacy and non-discrimination.²

The aim of the proposal is "to facilitate free movement, and to ensure that restrictions of free movement currently in place during the COVID-19 pandemic can be lifted in a

1 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); Brussels, 17.3.2021; COM(2021) 130 final; 2021/0068 (COD), available from: https://ec.europa.eu/info/sites/info/files/en_green_certif_just_reg130_final.pdf, last accessed on 21 March 2021.

2 Preamble, para. 46.

coordinated manner based on the latest scientific evidence available”.³

According to the proposal, Member States may continue to put restrictions on free movement in place insofar as they are necessary to protect public health, such as quarantine or test requirements.⁴ It is for each Member State to decide whether it accepts certification of immunity, a recent negative test result or proof of vaccination to allow the holder to bypass such restrictions. If a Member State accepts one or more of these certifications issued by its own authorities to allow the holder to bypass restrictions, it must accept the equivalent certification issued by other Member States.⁵ The proposal sets out a single standard that certification issued by Member States should meet.⁶

Concerns

While the Civil Liberties of Union for Europe (Liberties) recognises the appeal of introducing digital COVID-19 immunity/test result/vaccination certificates, Liberties calls on the European institutions and the Member States to be mindful of the risks and dangers such digital passes may bring. The following paper

sets out a number of concerns with the proposal as well as recommendations for how these might be addressed through amendments.

1

Concern:

Once the proposed interoperable digital health certificates exist, the political pressure on governments to allow vaccinated people to travel across borders within the EU without subjecting them to further requirements such as testing and quarantining will increase. It is entirely foreseeable that several Member States, especially those whose economies are highly dependent on tourism, will not be able to resist this pressure.

In the eyes of the public, and several European governments, the Digital Green Certificate offers a great way to return to ‘normality’ and to reenergize economies devastated by COVID-19-induced restrictions.

The proposal does not oblige Member States to waive restrictions on free movement (insofar as they are necessary to protect public health) for travellers with proof of vaccination. However, it authorises Member States to do so. The

3 Preamble, para. 32.

4 Preamble, para. 3-6.

5 See Preamble, paras. 25, 31, 33 and Articles 5(5), 6(5), 7(5).

6 Articles 3, 5, 6-8.

proposal appears to apply a presumption that Member States will lift restrictions for certificate holders by requiring them to inform other Member States and the Commission if they continue to impose restrictions on or deny entry to certificate holders.⁷

This is of concern because, according to the World Health Organization, “there are still critical unknowns regarding the efficacy of vaccination in reducing transmission (...). Proof of vaccination should not exempt international travellers from complying with other travel risk reduction measures.”⁸ In addition, “the extent and duration of antibody-mediated immunity to protect against SARS-CoV-2 reinfection have not been scientifically established.”⁹

Liberties reminds Member States and the European Commission that measures that may interfere with fundamental rights must be based on evidence that they are necessary and effective. Creating a regime that authorises Member States to lift or reduce restrictions on free movement (which help to contain the spread of the virus) based on proof of vaccination and/or recovery status, without

sufficient evidence that they appropriately reduce the chances of transmission, poses a real risk to people’s health and lives (recognised by Articles 2 and 35 of the Charter of Fundamental Rights).

The EU should use its powers to ensure that the right to free movement is not exercised in a way that undermines the right to health and the right to life. Article 21 of the Treaty on the Functioning of the European Union states that citizens of the Union shall enjoy the right to free movement subject to the “limitations and conditions” laid down in the Treaties and secondary legislation. This gives the EU power not just to facilitate the right to free movement, but also to curtail it. Accordingly, the EU could oblige Member States to apply the same restrictions on free movement to people who have been vaccinated or have recovered from COVID-19 as apply to all other travellers, until there is evidence to prove that vaccination and recovery do in fact lower the likelihood of transmission.

7 See Preamble, paras. 7, 41 and Article 10.

8 Statement on the sixth meeting of the International Health Regulations (2005) Emergency Committee regarding the coronavirus disease (COVID-19) pandemic, downloaded from [https://www.who.int/news/item/15-01-2021-statement-on-the-sixth-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-coronavirus-disease-\(covid-19\)-pandemic](https://www.who.int/news/item/15-01-2021-statement-on-the-sixth-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(covid-19)-pandemic), last accessed on 10 March 2021.

9 T. C. Voo and al., Immunity certification for COVID-19: ethical considerations, *Bull World Health Organ* 2021;99:155–161| doi: <http://dx.doi.org/10.2471/BLT.20.280701>, last accessed on 10 March 2021.

Recommended amendment:

The proposal should provide that Member States must maintain the same restrictions on free movement applied to persons who have not been vaccinated or recovered from COVID-19 as for persons who have been vaccinated or have recovered from COVID-19, until the Commission has determined, on the basis of scientific evidence, that vaccinated people and those who have already recovered from COVID-19 have a reasonably low likelihood of transmitting the virus.¹⁰

2

Concern:

Should scientific evidence later demonstrate that those who are already vaccinated do not endanger public health, there will indeed be no justification to restrict their right to free movement. However, since vaccination is currently not readily accessible for all, this could lead to a two-tier society with the vaccinated enjoying unrestricted free movement while others face restrictions that render their right to free movement difficult or impossible to exercise in practice.

As of late March 2021, vaccination is not compulsory in any Member State, nor is it anticipated to become so in the foreseeable future. Further, the vaccine is not generally available to the public. It is not expected that all EU citizens will have access to vaccination before

the last quarter of the year. While vaccine roll-out may work transparently and fairly (albeit slowly) in several Member States, this is not necessarily true across the board. In a number of countries, the middle class has better access to vaccination and people with social and/or financial capital are jumping the queue.

A digital vaccination certificate exclusively linked to the freedom of movement within (and outside) the European Union could lead to the exclusion of or discrimination against people who have not yet had the chance to get vaccinated, those who are not able to have vaccines for medical reasons, such as pregnant women or people with certain preconditions, minorities who have difficulty accessing health services or parts of the population vulnerable to misinformation.

The Commission states that one of its aims with the Digital Green Certificate is to prevent discrimination against people who have not been vaccinated. For this reason, the certificate contains information not only on vaccination status, but also on recent test results, and/or on the COVID-19 history of the user. However, the proposal would allow a Member State to pick vaccination as the only proof it will accept to allow an individual to bypass some or all free movement restrictions. The proposal would also allow that same Member State to continue to impose restrictions on individuals who travel only with proof of a recent negative test. Such differential treatment may be

10 Liberties is of the opinion that Article 21 of the Treaty on the Functioning of the European Union allows for this amendment.

justified to the extent that scientific evidence proves that someone who has been vaccinated has a lower risk of transmitting the virus than someone with a recent negative test result.

While such differential treatment may be justifiable, the proposal could do more to mitigate the risk it creates of a two-tier society. Granting those who have received a vaccination an easy and free way to enjoy their rights, while not providing the unvaccinated population with an accessible alternative, is unfair and should be avoided.

In particular, ensuring cheap and easy access to testing, would help to lower the barriers to free movement for those who have not been vaccinated. Furthermore, the Commission should assiduously verify that restrictions on free movement facing those who hold only a recent negative test result do not go beyond what is strictly necessary to protect public health.

Recommended amendment:

The preamble to the proposal should make clear that failure to make testing easily accessible (both geographically and financially) to those who are not vaccinated constitutes undue interference with the right to free movement.

3

Concern:

According to the Proposal, Member States may issue the “certificates making up the Digital Green Certificate in a digital or paper-based format, or both”. The digital format is meant to be displayed and stored on mobile devices. Member States issuing only digital certificates may exacerbate inequalities and social exclusion.

Member State governments need to be mindful that access to certain public and private venues cannot be exclusively conditional on a digital immunity/vaccination/test result certificate, unless they are willing to provide free hardware to those who do not own, or do not own a good enough, smartphone. Leaving people without a relatively new smartphone unable to move freely within the Union or to access shops, pubs or stadiums is discriminatory and is to be avoided.

Recommended amendment:

The proposal should require Member States to issue the certificates in both formats, or, if they wish to issue the certificate in digital format only, to ensure that everyone has the necessary device needed to store and display them.

4**Concern:**

According to the Proposal, certificates will be issued to “Union citizens and their family members”. If certificates become (legally or practically) a condition for travelling or for having access to services, those who are not Union citizens and not family members of Union citizens may face undue problems in trying to partake in social life.

The Proposal does not provide for non-EU nationals staying and residing in the Member States being issued a Digital Green Certificate. This may, on the one hand, create the very same confusion and delay at the borders authorities are facing these days (as presumably they would use certificates, but not the standard version everyone else is using). On the other hand, this would make some already vulnerable and excluded communities, like asylum-seekers, even more vulnerable.

Recommended amendment:

The proposal should require certificates to be issued (upon request) to anyone residing in the Union.

5**Concern:**

On paper, the Proposal intends to facilitate “the exercise of the right to free movement within the Union during the COVID-19 pandemic” and not to introduce a formal identity document we will have to keep with ourselves for the rest of our lives. The Digital Green Certificate, however, will never be revoked. It will simply be suspended, once and to the extent there is no “public health emergency of international concern”.¹¹

Our health information is confidential and deeply personal. Measures limiting the right to free movement consisting “of restrictions on entry or other specific requirements applicable to cross-border travellers, such as to undergo quarantine or self-isolation or to be tested for SARS-CoV-2 infection prior to and/or after arrival”¹² may be justified under certain conditions. However, history shows that emergency measures tend to stay and limit our freedoms long after the situation invoking their use is gone. The Commission, in consultation with public health experts, needs to commit that the Digital Green Certificate will not be one of those measures.

Recommendation:

The proposal should be amended to establish conditions under which the use of certifications

11 Article 15(2).

12 Preamble para. 3.

will end definitively. An obligation to prove our health status when moving inside Europe cannot become a normal part of life.

the rights and freedoms of natural persons, and to create an obligation on data controllers to consult their national data protection supervisory authorities prior to processing any data.

6

Concern:

The Proposal does not flesh out the technical details of the Digital Green Certificate. So far, Member States do not have a good track record in being sufficiently mindful about the risks that introducing new technology to control the COVID-19 pandemic may pose.

The General Data Protection Regulation requires that “when processing would result in a high risk in the absence of measures taken by the controller to mitigate the risk” data protection authorities should be consulted. However, in several Member States such consultations did not take place. In a number of cases, Data Protection Impact Assessments were either not carried out at all, or were not performed prior to the deployment of the new apps.

While currently not much information is available on the data protection, security and privacy aspects of the Digital Green Certificate, Liberties is concerned about how well these digital certificates will protect people’s privacy.

Recommended amendment:

The proposal should clearly recognise that the type of data processing, in particular the use of new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to

Disclaimer

This brief addresses the ethical and legal challenges that the European institutions and national governments need to overcome in order to protect democratic values and human rights regarding a Digital Green Certificate. This brief does not take a stand on questions health experts, immunologists and virologists must answer.

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