

Policy Brief for the Triologue Negotiations on the Digital Green Certificate / EU COVID-19 Certificate

5. May 2021

Background

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, DGC)”¹ and a twin proposal for regulating the access of third-country nationals legally residing in the EU to said interoperable certificates.²

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

Next, on 13 April, the European Council published³ its proposed amendments to the legislative texts. The Council's amendments seek to make sure that Member States can decide what kinds of proof of recovery and what kinds of vaccination they accept at their verification points and to make sure that possession of a Digital Green Certificate is not a precondition to exercise free movement rights.

Lastly, on April 28, the European Parliament adopted⁴ its position on the “EU COVID-19 Certificate” (their preferred alternative name to “Digital Green Certificate”) and the inter-institutional negotiations moved to the Triologue phase.

From the point of view of the human and digital rights organisations Liberties and epicenter.works are working with, the Commission's proposals show good intentions, but they do not prevent possible surveillance of certificate holders by the issuing authority and may exacerbate inequalities and social exclusion. For the most part, the Council's text suffers from the same problems. The version adopted by the Parliament contains vital improvements to the original proposals, especially in its emphasis on the non-discrimination of the unvaccinated and in its emphasis on privacy-by-design.

Both the Council's and the Parliament's positions include a clear sunset clause of 12 months after the regulation enters into force. This is an important clarification to ensure the temporary nature and specific purpose of the DGC.

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0130>

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0140>

³ <https://data.consilium.europa.eu/doc/document/ST-7796-2021-INIT/en/pdf>

⁴ https://www.europarl.europa.eu/doceo/document/TA-9-2021-0145_EN.html#title2

In the below analysis we will compare the positions of the Council and the Parliament on points we take to be of utmost importance and assess the extent to which proposed texts uphold or violate the rights the European Union is committed to defend.

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Issue 1 – Preventing surveillance by issuing authority

Parliament position:	Council position:
Article 8. [...] <i>The trust framework shall be based on a public key infrastructure to verify the integrity of the EU COVID-19 Certificates and the authenticity of the electronic seals. The trust framework shall allow for detection against fraud, in particular forgery, and shall ensure that the verification of EU COVID-19 Certificates and electronic seals does not inform the issuer about the verification.</i> ⁵	
Recital 39. <i>For the purposes of this Regulation, personal data do not need to be transmitted/exchanged across borders. In line with the public-key infrastructure approach, only the public keys of the issuers need to be transferred or accessed across borders, which will be ensured by an interoperability gateway set up and maintained by the Commission. In particular, the presence of the certificate combined with the public key of the issuer should allow for the verification of the authenticity and integrity of the certificate and for the detection of fraud. In line with the principle of data protection by default, verification techniques not requiring transmission of personal data should be employed.</i>	Recital 39. <i>For the purposes of this Regulation, personal data may be transmitted/exchanged across borders with the sole purpose of obtaining the information necessary to confirm and verify the holder's vaccination, testing or recovery status. In particular, it should allow for the verification of the authenticity of the certificate.</i>
	Recital 20a. <i>If the technical solution chosen for verification requires a Member State to transfer personal data to a recipient in a third country to confirm and verify the vaccination, testing or recovery status of the holder of a certificate issued by a third country, such transfer should be limited to the data necessary for the verification of the authenticity, validity and integrity of the certificate and may only be carried out in compliance with the conditions set out in Chapter V of Regulation (EU) 2016/679.</i>

Analysis:

From a privacy perspective, the most important amendment in the Parliament's position is the last paragraph of Article 8 together with the changes to Recital 38. With this clarification, the majority of the data protection problems that might arise from the Commission's proposal can be avoided.

⁵ Unless otherwise indicated, all emphases are ours.

Contrarily, the Council's text lacks this clarity and the conditional formulation in the first sentence proves the danger of cross-border data transfers.

The online verification the Commission's and Council's versions of the proposal make possible would give notice to the authority that issued the DGC whenever a DGC is verified. This would effectively create a record of the certificate holders' movement in the server logs of the issuing country. This is the opposite of privacy-by-design and is clearly to be avoided. The alternative to online verification, i.e. offline verification, achieves the same level of authenticity and protection against fraud as online verification can.

Without the Parliament's amendment, DGC can easily be used for surveillance of the movement of citizens and track their preferences with regards to places of worship or business. There only needs to be one Member State misusing the data collected by the central issuing infrastructure to erode trust in the whole European project.

Issue 2 – Citizens need to be in control of their health data

Parliament position:	Council position:
Article 9 (2). <i>The personal data included in the certificates referred to in Article 3 shall be processed by the competent authorities of the Member State of destination, or by the cross-border passenger transport services operators required by national law to implement certain public health measures during the COVID-19 pandemic, only to confirm and verify the holder's vaccination, testing or recovery status. For this purpose, the personal data shall be limited to what is strictly necessary. The personal data accessed pursuant to this paragraph shall not be retained or processed by the verifier for other purposes. A separate independent certificate shall be issued for each vaccination, test or recovery, and no history of the previous certificates of the holder shall be stored on the certificate.</i>	Article 9 (2). <i>The personal data included in the certificates referred to in Article 3 shall be processed by the competent authorities of the Member State of destination or transit, or by the cross-border passenger transport services operators required by national law to implement certain public health measures during the COVID-19 pandemic, to confirm and verify the holder's vaccination, testing or recovery status. For this purpose, the personal data shall be limited to what is strictly necessary. The personal data accessed pursuant to this paragraph shall not be retained.</i>

Analysis:

Certificates for recovery or vaccination might reveal a permanent health condition of the certification holder. A recovery certificate in particular might in light of the long-term consequences of the COVID-19 disease (long COVID) be a life-long stigma for the affected person. It's reasonable to assume negative consequences from employers, countries one travels to or private health insurers in countries where the scope of the regulation is extended to include private companies as verifiers.

The amendment of the Parliament ensures that users are in control of their health information and can choose not to show their recovery certificate, in case Sars-Cov-2 tests are available and such a certificate is accepted by the verifier.

Issue 3 – Avoiding the discrimination of the unvaccinated

Parliament position:	Council position:
Recital 14. (...) <i>To avoid obstacles to free movement, the certificates should be issued free of charge, and persons should have a right to have them issued. (...)</i>	Recital 14. (...) <i>To avoid obstacles to free movement, and although there may be a charge for related services, such as for tests, the certificates themselves should be issued free of charge, and citizens should have a right to have them issued. (...)</i>
Recital 26. <i>It is necessary to prevent any kind of discrimination (direct or indirect) against persons who are not vaccinated, for example because of medical reasons, because they are not part of the target group for which the vaccine is currently administered, or</i>	Recital 26. <i>It is necessary to prevent discrimination against persons who are not vaccinated, for example because of medical reasons, because they are not part of the target group for which the vaccine is currently recommended or allowed, such as</i>

<p><i>because they have not yet had the opportunity or chose not to be vaccinated, or where there is no vaccine available yet for certain age categories, like children.</i></p> <p><i>Therefore, possession of a vaccination certificate, or the possession of a vaccination certificate indicating a specific vaccine medicinal product, should not be a precondition to exercise free movement rights and cannot be a precondition to free movement within the Union and to use cross-border passenger transport services such as airlines, trains, coaches, ferries or any other means of transport.</i></p>	<p><i>children, or because they have not yet had the opportunity or chose not to be vaccinated. Therefore, possession of a vaccination certificate, or the possession of a vaccination certificate indicating a specific vaccine medicinal product, should not be a precondition to exercise free movement rights, in particular where those persons are, by other means, able to show compliance with lawful, public-health-related requirements, and cannot be a pre-condition to use cross-border passenger transport services such as airlines, trains, coaches or ferries.</i></p>
<p>Article 3c. <i>Issuance of certificates pursuant to paragraph 1 shall not lead to differential treatment and discrimination based on vaccination status or the possession of a specific certificate referred to in Articles 5, 6 and 7. Member States shall ensure universal, accessible, timely and free of charge testing possibilities in order to guarantee the right to free movement inside the Union without discrimination on grounds of economic or financial possibilities.</i></p>	<p>No such article. Recital 14 shows that the Council foresees that there may be a charge for tests. No intention to ensure that Member States provide universal, accessible, timely and free of charge testing possibilities can be found in the Council's version of the text.</p>

Analysis:

A digital vaccination certificate exclusively linked to the freedom of movement within (and outside) the European Union would 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, minorities who have difficulty accessing health services or parts of the population vulnerable to misinformation.

The Commission has stated that one of its aims with DGC is to prevent discrimination against people who have not been vaccinated. For this reason, DGC 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 Commission's 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 justified to the extent that scientific evidence proves that someone who has been vaccinated has a significantly lower statistical risk of transmitting the virus than someone with a recent negative test result.

While such differential treatment may be justifiable, the regulation could and should 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.

The Council's proposal intends to ensure that vaccination certificates do not become a precondition for free movement and holders can show that they do not pose significant risk to public health by other means. However, the Council's proposal does not recognize that for certain segments of society other ways of proving compliance are not readily available in practice, meaning that the right to free movement becomes possible only in theory. Ensuring (at a minimum) cheap and easy access to testing is needed to avoid discrimination against those who are unvaccinated. Therefore, the Parliament's version offers effective protection against discrimination, unlike both the original proposal and the Council's text, and is to be supported.

It also needs to be noted that the regulation should require EU and national authorities to assiduously verify that restrictions on free movement for those who hold only a recent negative test result do not go beyond what is strictly necessary to protect public health.

Issue 4 – Ensuring equal access

Parliament position:	Council position:
Recital 14. <i>To ensure interoperability and equal access, including for vulnerable persons such as persons with disabilities and for persons with limited access to digital technologies, Member States should issue the certificates making up the EU COVID-19 Certificate in a digital or paper-based format, as chosen by the holder. This should allow the prospective holder to request and receive a paper copy of the certificate and/or to store and display the certificate on a mobile device. (...)</i>	Recital 14. <i>To ensure interoperability and equal access, including for persons with disabilities, Member States should issue the certificates making up the Digital Green Certificate in a digital or paper-based format, or both, depending on the choice of the prospective holder. This should allow the prospective holder to request and receive a paper copy of the certificate or to store and display the certificate on a mobile device. (...)</i>
Recital 14. (...) <i>To avoid obstacles to free movement, the certificates should be issued free of charge, and persons should have a right to have them issued. Member States should automatically issue the certificates making up the EU COVID-19 Certificate, or in the case of the certificate of recovery only upon request, ensuring that they can be obtained easily and swiftly and providing, where needed, the necessary support to ensure for equal access by all persons.</i>	Recital 14. (...) <i>To avoid obstacles to free movement, and although there may be a charge for related services, such as for tests, the certificates themselves should be issued free of charge, and citizens should have a right to have them issued. Member States should issue the certificates making up the Digital Green Certificate automatically or upon request, ensuring that they can be obtained easily and providing, where needed, the necessary support to allow for equal access by all citizens.</i>
Article 3 (2). <i>Member States shall issue the certificates referred to in paragraph 1 in a digital and a paper-based format. The prospective holders shall be entitled to receive the certificates in the format of their choice. (...) The information contained in the certificates shall also be shown in human-readable form, shall be accessible to persons with disabilities, and shall be, at least, in the official language or languages of the issuing Member State and English.</i>	Article 3 (2). <i>Member States, or designated bodies acting on behalf of Member States, shall issue the certificates referred to in paragraph 1 in a digital or paper-based format, or both. (...) The information contained in the certificates shall also be shown in human-readable form and shall be, at least, in the official language or languages of the issuing Member State and English.</i>
Article 5 (1). <i>Each Member State shall automatically issue vaccination certificates as referred to in Article 3(1)(a) to a person to whom a COVID-19 vaccine has been administered.</i>	Article 5 (1). <i>Each Member State shall issue vaccination certificates as referred to in Article 3(1)(a) to a person to whom a COVID-19 vaccine has been administered, either automatically or upon request by that person.</i>
Article 6 (1). <i>Each Member State shall automatically issue test certificates as referred to in Article 3(1)(b) to persons tested for COVID-19.</i>	Article 6 (1). <i>Each Member State shall issue test certificates as referred to in Article 3(1)(b) to persons tested for COVID-19, either automatically or upon request by that person.</i>
Article 7 (1). <i>Each Member State shall issue, upon request, certificates of recovery as referred to in Article 3(1)(c) at the earliest from the eleventh day after a person has received his or her first positive test for SARS-CoV-2 infection, or after submission of a subsequent negative NAAT test. It shall also be possible to issue a certificate of recovery through the detection of antibodies by a serological test.</i>	Article 7 (1). <i>Each Member State shall issue, upon request, certificates of recovery as referred to in Article 3(1)(c) at the earliest from the eleventh day after a person has received his or her first positive test for SARS-CoV-2 infection.</i>

Analysis:

Article 25 of the Charter of Fundamental Rights of the European Union recognises the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life. Article 26 “recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community”.⁶

From the viewpoint of the Charter, the Council's version shows a clear improvement to the Commission's original proposal as it ensures that prospective holders can choose whether they want to receive the certificate in a paper-based or digital format, and it is not the Member States' choice which format to issue the certificates in. This is important as the paper-based format allows those who

⁶ https://eur-lex.europa.eu/eli/treaty/char_2012/o

do not have a smartphone, cannot use smartphones or lack the necessary technological literacy to use them, can still enjoy the same rights as the less vulnerable segments of society.

However, the Council's proposal does not go far enough as it allows Member States to issue certificates either automatically or upon request. The Parliament understands that in order to avoid discriminating against the less educated and the poorer segments of society, passes need to be automatically issued. This removes a potential obstacle to obtaining vaccination certificates, namely, further bureaucratic requirements. (The fact that certificates of recovery are only provided on request is clearly justified to safeguard the right to privacy.) Therefore, the Parliament's amendment better facilitates equal enjoyment of the right to freedom of movement and should be preferred.

Issue 5 – Issuance and citizenship

Parliament position:	Council position:
Recital 16. <i>Pursuant to this Regulation, any of the certificates making up the EU COVID-19 Certificate should be issued to persons as referred to in Article 3 of Directive 2004/38/EC, that is, Union citizens and their family members, including citizens from Overseas Countries and Territories as referred to in Article 355.2 Treaty on the functioning of European Union (TFEU), whatever their nationality, by the Member State of vaccination or test, or where the recovered person is located. Where relevant or appropriate, the certificates should be issued to another person on behalf of the vaccinated, tested or recovered person, for example to the legal guardian on behalf of legally incapacitated persons or to parents on behalf of their children. The certificates should not require legalisation or any other similar formalities.</i>	Recital 16. <i>Pursuant to this Regulation, the certificates making up the Digital Green Certificate should be issued to beneficiaries as referred to in Article 3 of Directive 2004/38/EC, that is, Union citizens and their family members, by the Member State of vaccination or test, or where the recovered person is located. Where reference is made to issuance by Member States, this should be understood as also covering issuance by designated bodies on behalf of Member States, including when they are issued in Overseas Countries and Territories or the Faroe Islands on behalf of a Member State. Where relevant or appropriate, the certificates should be issued on behalf of the vaccinated, tested or recovered person, for example on behalf of legally incapacitated persons or to parents on behalf of their children. The certificates should not require legalisation or other similar formalities.</i>
Article 5 (1). <i>Each Member State shall automatically issue vaccination certificates as referred to in Article 3(1)(a) to a person to whom a COVID-19 vaccine has been administered.</i>	Article 5 (1). <i>Each Member State shall issue vaccination certificates as referred to in Article 3(1)(a) to a person to whom a COVID-19 vaccine has been administered, either automatically or upon request by that person.</i>
Article 6 (1). <i>Each Member State shall automatically issue test certificates as referred to in Article 3(1)(b) to persons tested for COVID-19.</i>	Article 6 (1). <i>Each Member State shall issue test certificates as referred to in Article 3(1)(b) to persons tested for COVID-19, either automatically or upon request by that person.</i>
Article 7 (1). <i>Each Member State shall issue, upon request, certificates of recovery as referred to in Article 3(1)(c) at the earliest from the eleventh day after a person has received his or her first positive test for SARS-CoV-2 infection, or after submission of a subsequent negative NAAT test. It shall also be possible to issue a certificate of recovery through the detection of antibodies by a serological test.</i>	Article 7 (1). <i>Each Member State shall issue, upon request, certificates of recovery as referred to in Article 3(1)(c) at the earliest from the eleventh day after a person has received his or her first positive test for SARS-CoV-2 infection.</i>
Twin regulation ⁷ Article 1. <i>Member States shall apply the rules laid down in Regulation (EU) 2021/XXXX [Regulation on a EU COVID-19 Certificate] to those third country nationals who do not fall within the scope of that Regulation but who reside or stay legally in their territory and are entitled to travel to other Member States in accordance with Union law.</i>	Twin regulation ⁸ Article 1. <i>Member States shall apply the rules laid down in Regulation (EU) 2021/XXXX [Regulation on a Digital Green Certificate] to those third country nationals who do not fall within the scope of that Regulation but who reside or stay legally in their territory and are entitled to travel to other Member States in accordance with Union law.</i>

⁷ https://www.europarl.europa.eu/doceo/document/TA-9-2021-0146_EN.html

⁸ <https://data.consilium.europa.eu/doc/document/ST-7796-2021-INIT/en/pdf>

Analysis:

Both the Parliament and (for the most part) the Council removed the references to “Union citizens and their family members” from the Commission's original proposal and referred simply to “persons”. However, a recital in both the Council's and the Parliament's versions of the regulation does make it clear that the legislators believe that holders are “Union citizens and their family members” and both accept a twin regulation according to which third-country nationals legally staying in the territory of Member States can also become holders. This potentially leaves those residing legally in the EU who do not fall under these categories unable to benefit from the DGC. For example, individuals awaiting decisions on asylum claims or those without a residence permit who cannot be deported.

The text of the recital should be revised to be consistent with the operative part of the regulation and state that certificates are to be issued to anyone residing in the Union. Member States are obliged to respect and protect the rights of all persons in their jurisdiction, regardless of their legal status. The current amendment potentially allows national authorities to deny DGC to individuals who lack legal documentation. However, in many cases the reason these individuals lack the necessary documents is that the Member State in question has failed to provide them or not done so promptly. Allowing Member States to exclude these persons effectively condones national authorities' failings, violates human dignity protected by Article 1 of the Charter of Fundamental Rights of the European Union and further punishes individuals placed in legal limbo.

Issue 6 – Necessary Data Protection Improvements

Parliament position:	Council position:
<p>Article 9 (1). <i>Regulation (EU) 2016/679 shall apply to the processing of personal data carried out when implementing this Regulation. The personal data contained in the certificates issued in accordance with this Regulation shall be processed only for the purpose of verifying the information included in the certificate in order to facilitate the exercise of the right of free movement within the Union as provided for in this Regulation and until it ceases to apply.</i></p> <p>(2). <i>The personal data included in the certificates referred to in Article 3 shall be processed by the competent authorities of the Member State of destination, or by the cross-border passenger transport services operators required by national law to implement certain public health measures during the COVID-19 pandemic, only to confirm and verify the holder's vaccination, testing or recovery status. For this purpose, the personal data shall be limited to what is strictly necessary. The personal data accessed pursuant to this paragraph shall not be retained or processed by the verifier for other purposes. A separate independent certificate shall be issued for each vaccination, test or recovery, and no history of the previous certificates of the holder shall be stored on the certificate.</i></p> <p>(3). <i>The personal data processed for the purpose of issuing the certificates referred to in Article 3, including the issuance of a new certificate, shall not be retained by the issuer longer than is strictly necessary for its purpose and in no case longer than the period for which the certificates may be used to exercise the right to free movement, after which the personal data shall be erased immediately and irrevocably. There shall be no centralised processing or retention of the personal data included in the certificate at Member State or Union level.</i></p> <p>(4). <i>The authorities or other designated bodies responsible for issuing the certificates referred to in Article 3 shall be considered as</i></p>	<p>Article 9 (0). <i>Regulation (EU) 2016/679 shall apply to the processing of personal data carried out when implementing this Regulation.</i></p> <p>(1). <i>The personal data contained in the certificates issued in accordance with this Regulation shall be processed only for the purpose of accessing and verifying the information included in the certificate in order to facilitate the exercise of the right of free movement within the Union during the COVID-19 pandemic.</i></p> <p>(2). <i>The personal data included in the certificates referred to in Article 3 shall be processed by the competent authorities of the Member State of destination or transit, or by the cross-border passenger transport services operators required by national law to implement certain public health measures during the COVID-19 pandemic, to confirm and verify the holder's vaccination, testing or recovery status. For this purpose, the personal data shall be limited to what is strictly necessary. The personal data accessed pursuant to this paragraph shall not be retained.</i></p> <p>(3). <i>The personal data processed for the purpose of issuing the certificates referred to in Article 3, including the issuance of a new certificate, shall not be retained longer than is necessary for its purpose and in no case longer than the period for which the certificates may be used to exercise the right to free movement.</i></p> <p>(4). <i>The authorities or other designated bodies responsible for issuing the certificates referred to in Article 3 shall be considered as controllers referred to in Article 4(7) of Regulation (EU) 2016/679.</i></p> <p>(4a). <i>The natural or legal person, public authority, agency or other body that has administered the vaccine or carried out the test for which a certificate is to be issued shall transmit to the authorities or other designated bodies responsible for issuing the certificates the categories of data referred to in Articles 5(2), 6(2) and 7(2)</i></p>

<p><i>controllers referred to in Article 4(7) of Regulation (EU) 2016/679. By ... [one month after the date of entry into force of this Regulation], the Member States shall make public the entities foreseen to be acting as controllers, processors and recipients of the data and communicate this information to the Commission and any modifications thereto regularly after that date. By ... [two months after the date of entry into force of this Regulation], the Commission shall publish the collected information in a publicly accessible list and keep that public list up to date.</i></p> <p><i>(5). The data controllers and processors shall take adequate technical and organisational measures to ensure a level of security appropriate to the risk of the processing.</i></p> <p><i>(6). Where a controller referred to in paragraph 4 enlists a processor, in application of Article 28(3) of Regulation (EU) 2016/679, no transfer of personal data by the processor to a third country may take place.</i></p>	<p><i>necessary to complete the data fields set out in the Annex.</i></p>
<p><i>Recital 40. This Regulation prohibits retention of personal data obtained from the certificate by the Member State of destination or by cross-border passenger transport services operators. This Regulation does not create a legal basis for the establishment of any repository of data base at Member State or Union level or through the trust framework digital infrastructure.</i></p>	

Analysis:

We welcome the data protection clarifications in Article 9 and would strongly argue in favour of the version of the European Parliament. A clear purpose limitation that also ends with the sunset clause of this regulation is required to ensure the trust of citizens. For our position on the last sentence of paragraph 2, see issue 2 about citizens needing to be in control of their health data.

We very much welcome the Parliament’s suggested amendments in paragraphs 4-6. This brings much needed clarity for the data subjects. Such collected information empowers citizens to exercise their rights under the GDPR and creates the trust necessary to restart international travel within the Union.

With regards to Paragraph 4a of the Council’s proposal and in light of Recital 40 of the Parliament’s proposal, we would encourage Member States to establish all necessary databases for the issuing of COVID certificates in national law. Following the subsidiarity principle, the provisions to establish such databases should be laid down with the necessary safeguards specific to the Member State.

Issue 7 – Domestic use of COVID-19 Digital Certificates

<p>Parliament position:</p>	<p>Council position:</p>
<p><i>Article 8a. National digital certificates and interoperability with the EU COVID-19 Certificate trust framework Where a Member State has adopted or adopts a national digital certificate for purely domestic purposes, it shall ensure that it is fully interoperable with the EU COVID-19 Certificate trust framework. The same safeguards as in this Regulation shall apply.</i></p>	<p><i>Recital 42a. A transitional period should be provided to give Member States the possibility to continue issuing certificates which are not yet in compliance with this Regulation. During the transitional period, such certificates as well as certificates issued before the entry into force of this Regulation should be accepted by Member States provided they contain the necessary data.</i></p>
<p><i>Article 8b. Further use of the EU COVID-19 Certificate framework Where a Member State seeks to implement the EU COVID-19 Certificate for any possible use other than the intended purpose of facilitating free movement between Member States, that Member State shall create a legal basis under national law, complying with the principles of effectiveness, necessity, and proportionality,</i></p>	<p>-</p>

<i>including specific provisions clearly identifying the scope and extent of the processing, the specific purpose involved, the categories of entities that can verify the certificate as well as the relevant safeguards to prevent discrimination and abuse, taking into account the risks to the rights and freedoms of data subjects. No data shall be retained in the context of the verification process.</i>	
<i>Recital 46a. As far as Member States decide to require national digital certificates for other purposes than free movement at a national level, those should be interoperable with the EU COVID-19 Certificate and respect its safeguards as defined in this Regulation, in particular to ensure non-discrimination between different nationalities, non-discrimination between different certificates, high standards of data protection and to avoid fragmentation.</i>	-
<i>Recital 46b. Member States should not introduce restrictions to access to public services with respect to those who do not hold the certificates covered by this Regulation.</i>	-

Analysis:

We welcome Article 8a from the European Parliament, which ensures interoperability and prevents fragmentation with potentially dozens of national digital certificates. Sadly, Recital 42a of the Council is demonstrating the need for Article 8a and the real danger of fragmentation by an uncontrollable amount of national certificates with potentially lower safeguards for data protection or against fraud. The need for the EU to regulate in this field demonstrates the requirement for a harmonized cross-border solution to enable tourism and free movement.

Additionally, we would encourage a recital clarifying that Article 8a does not prohibit the use of national certificates that are derived from the DGC with a reduced subset of personal information and that offer a higher level of privacy protection specifically tailored for purely domestic use. For example, the Netherlands currently develops a system based on daily red/green certificates that exposes no sensitive health information to the verifier. Such systems are particularly tailored to domestic requirements in which exact vaccine names or recovery information don't need to be exposed to private businesses verifying the certificate within national regulatory frameworks.

We also welcome Article 8b, which strengthens the data protection safeguards of this system in situations where a Member State decides to extend the scope beyond the EU proposal. This article should further clarify that use of the DGC can not be extended by member states for purposes other than fighting the COVID-19 pandemic. This article should also clarify that any use of DGC beyond the purpose of facilitating free movement must cease in accordance with the sunset clause in Article 15.

Issue 8 – Sunset Clause

Parliament position:	Council position:
Article 15 (2). <i>The Regulation shall cease to apply 12 months from ... [date of entry into force of this Regulation].</i>	Article 15 (2). <i>The Regulation shall apply for 12 months from the date of its entry into force.</i> <i>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.</i>

Analysis:

We welcome the clear sunset clause in both the Parliament's and the Council's positions, as well as the updated timeline for the reporting obligation of the Commission. We disagree with the wording of the Council, which appears to apply a presumption that the regulation will be extended. In comparison, the Parliament's proposal places the burden on the EU institutions to show that the regulation needs to be extended, or otherwise it will cease to apply.

Issue 9 – Reporting obligation

Parliament position:	Council position:
<p>Article 14 ((1). <i>By ... [4 months after the date of entry into force of this Regulation], the Commission shall present a report to the European Parliament and the Council on the application of this Regulation.</i></p> <p>(2). <i>The report shall include an assessment of the impact of this Regulation on free movement, including on travel and tourism, on fundamental rights and in particular non-discrimination, on the protection of personal data, as well as information on the most up to date vaccine and testing technologies, based, inter alia, on information provided by the ECDC. The report shall also include an assessment of uses by the Member States of the EU COVID-19 Certificate for purposes, based on national law, not provided for in this Regulation.</i></p> <p>(3). <i>At the latest three 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. This report shall carry out an assessment in accordance with paragraph 2. It may be accompanied by legislative proposals, in particular to extend the date of application of this Regulation, taking into account the evolution of the epidemiological situation and based on the principles of necessity, proportionality and effectiveness.</i></p>	
	<p>Article 15 (2). [...] <i>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.</i></p> <p><i>The report shall contain, in particular, an assessment of the impact of this Regulation on the facilitation of free movement, including the acceptance of the different types of vaccines, as well as on the protection of personal data during the COVID-19 pandemic.</i></p> <p><i>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.</i></p>
<p>Recital 11. <i>This Regulation is intended to facilitate the application of the principles of proportionality and non-discrimination with regard to possible restrictions to free movement and other fundamental rights as a result of the COVID-19 pandemic, while pursuing a high level of public health protection and should not be understood as facilitating or encouraging the adoption of restrictions to free movement, or other fundamental rights, in response to the pandemic. The exemptions to the restriction of free movement in response to the COVID-19 pandemic referred to in Recommendation (EU) 2020/1475 should continue to apply. Any need for verification of certificates established by this Regulation should not be able as such to justify the temporary reintroduction</i></p>	

<i>of border controls at internal borders. Checks at internal borders should remain a measure of last resort, subject to specific rules set out in Regulation (EU) 2016/399.</i>	
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Analysis:

We welcome the clarifications of the Parliament with regards to the reporting obligation of the European Commission. As this proposal was not accompanied by an impact assessment and other due diligence measures for initiatives of this significance, such as public consultations, it is even more important that this report is thoroughly looking at the fundamental rights impact of this legislation ex-post.

Contact Details

epicenter.works - for digital rights
Thomas Lohninger
thomas.lohninger@epicenter.works

Civil Liberties Union for Europe (Liberties.eu)
Orsolya Reich
o.reich@liberties.eu