Applying the Proportionality Principle to COVID-19 Certificates

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With the SARS-CoV-2 pandemic entering its second year, public and private actors alike grow eager to achieve some semblance of normality. In this context, the idea of "vaccination passports" or "immunity certificates" as a means of resuming social and economic activity has been gaining momentum all around the world. This article aims to provide a legal analysis of this initiative through the lens of the proportionality principle. A proportionality test is conducted in order to determine whether the degree of infringement of the human rights implicated is balanced by the potential of a certification system to mitigate the risks of the virus. The results from this analysis show that the targeted aims can be achieved through already existing measures with a lesser impact on civil and fundamental human rights. Moreover, in a context of uncertainty around the immunopathology of COVID-19, the introduction of these certificates presents ethical and scientific challenges, which lead us to believe that this measure is unlikely to play a central role in stopping the spread of the disease, and it could set the pace for a dangerous precedent, allowing for extensive discrimination and exacerbating already existing inequalities and disparities.

I. Introduction

On 11 March 2020, the World Health Organization (WHO) declared the novel severe acute respiratory syndrome coronavirus (SARS-CoV-2) outbreak a global pandemic. The year to follow was characterised by unprecedented measures of lockdowns, curfews, the closure of businesses and schools, worldwide non-essential travel restrictions and access bans, in an attempt to slow down the spread of COVID-19, on the grounds of preserving public health in response to the pandemic.

It was a year equally marked by more than 162 million cases of infection worldwide, more than 3 million COVID-19-related fatalities[1] and a race against the clock to develop a vaccine that might mark the end of the pandemic. Yet, in the years to come, the impact of the pandemic will not only be measured in terms of the challenges posed to public health policy and practice, but also in terms of its far-reaching effects on human rights, as well as

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[1] As of 16 May 2021, the Johns Hopkins Coronavirus Resource Center reports 162,564,670 cases of COVID-19 registered globally and 3,370,617 global deaths in relation to COVID-19. Johns Hopkins University, "COVID-19 Dashboard by the Center of System Science and Engineering" <https://coronavirus.jhu.edu/map.html> (last accessed 16 May 2021).

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numerous domains that impact the practice of politics, organisational structures, as well as individuals' daily lives. Talks about immunity certificates[2] as a means of lifting restrictions on individuals who have recovered from COVID-19 started in the early months of the pandemic,[3] but as of today, with ten different vaccines available and others currently under development, vaccination certificates as a precondition for travel and/or access to economic and social activities have also been gaining momentum.[4] Although the WHO has already advised against both immunity certificates[5] and vaccination certificates[6] in the context of international travel, countries whose economies rely heavily on tourism have been pushing towards the adoption of a unified form of certification at the international or European Union (EU) level, in an attempt to rekindle the economy and support international travel ahead of summer; while several EU and non-EU countries have already announced the introduction of various types of COVID-19 certificates that impact multiple activities and implicate a range of individual rights and liberties. Iceland started issuing vaccination certificates at the beginning of the year, Denmark and Sweden announced that they were working on a digital system of vaccination certification, whose main purpose would be to allow travel abroad, but hinted that the system might also be used in order to allow access to restaurants and cultural venues,[7] while Israel has already deployed a domestic "Green Pass" that allows people who have been vaccinated or who have recovered from COVID-19 to have access to various venues and activities, including indoor dining and social, cultural and sports events.[8] On 17 March 2021, the European Commission also announced its proposal for a Digital Green Certificate[9] that would encompass three different types of COVID-19

[2] Even though the terms "immunity certificate" and "vaccination certificate" have become interchangeable in journalistic writing, for the purpose of this article we will refer to "immunity certificates" or "recovery certificates" as the official documents attesting "that an individual has been infected and is purportedly immune to SARS-CoV-2", per the definition employed by AL Phelan, "COVID-19 immunity passports and vaccination certificates: scientific, equitable and legal challenges" (2020) 395(10236) The Lancet <https://doi.org/10.1016/S0140-6736(20)31034-5> (all electronic resources, unless specified otherwise, were last accessed on 12 April 2021); while "vaccination certificates" will solely refer to official documents providing proof that an individual has been fully vaccinated against COVID-19.

[3] Chile was amongst the first countries to issue "release certificates" to patients having recovered from COVID-19, while countries such as Germany, Finland, Italy, the USA and the UK showed interest in the use of immunity passports in the first months of the pandemic.

[4] Countries such as Greece started issuing "green passes" to all of their vaccinated citizens as early as February 2021 and pushed for the adoption of a common measure at the EU level to facilitate free movement. The International Air Transport Association (IATA) has also been one of the early supporters of the measure. Euronews, "Greece issues COVID vaccine certificates to those who have had both doses" (23 February 2021) <https://www.euronews.com/travel/2021/02/23/greece-issues-covid-vaccine-certificates-to-those-who-have-had-both-doses>.

[5] WHO, "Immunity passports in the context of COVID-19" (24 April 2020) <https://www.who.int/news-room/commentaries/detail/immunity-passports-in-the-context-of-covid-19>.

[6] WHO, "Interim position paper: considerations regarding proof of COVID-19 vaccination for international travellers" (5 February 2021) <https://www.who.int/news-room/articles-detail/interim-position-paper-considerations-regarding-proof-of-covid-19-vaccination-for-international-travellers>.

[7] SR Kelleher, "These European countries are launching vaccine passports" (*Forbes*, 5 February 2021) <https://www.forbes.com/sites/suzannerowankelleher/2021/02/05/these-european-countries-are-launching-vaccine-passports/?sh=7e2a81a777a5>.

[8] R Wilf-Miron, V Myers and M Saban, "Incentivizing vaccination uptake. The "Green Pass" proposal in Israel" (2021) JAMA <https://jamanetwork.com/journals/jama/fullarticle/2777686>.

[9] European Commission, COM(2021) 130 final (17 February 2021) and European Commission, COM(2021) 140 final (17 February 2021).

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certificates: a vaccination certificate, a test certificate and a certificate of recovery, with the promise to facilitate free movement. On 29 April 2021, the European Parliament adopted its negotiation position[10] on this proposal, formulating a set of requirements that would mitigate the discriminatory potential of this certificate. With both Parliament and Council ready to engage in negotiations, the aim is to reach an agreement before the end of May, so that the certificate can be operational during the touristic season.

We argue that we should be sceptical of any measure that directly or indirectly conditions the exercise of fundamental rights and liberties, civil rights and human rights on health status, particularly due to the absence of an international or European legal framework that would contain sufficient provisions to govern the issuance, verification and acceptance of such certificates based on the individual's health status, all while providing the necessary safeguards to ensure the protection of individual rights and liberties. Due to the potential perpetuation of the use of such certificates, both by State actors and private actors, individuals might face long-lasting restrictions of some of their rights and freedoms, both at the national and international level. Thus, this article focuses on the legal analysis of the vaccination and immunity certificates proposals, as well as on the specific case of the European Digital Green Certificate, from the perspective of the proportionality principle. Specifically, this article points out that any restriction of liberty and any measure that can directly or indirectly infringe upon individual rights should be the object of a constant and thorough review of proportionality.

Regardless of the different forms it takes and the extent to which it is applied in different jurisdictions, the principle of proportionality aims to assess the interferences with fundamental rights in light of the legitimate objective pursued. The goal is to assess the suitability and necessity of the measure with regards to the objective pursued and to operate a balance between the importance of the infringement of the rights implicated and the importance of satisfying the aim pursued through the introduction of certificates (proportionality *stricto sensu*). A case-by-case assessment of each type of certificate proposed is necessary in order to ensure that the impact on the rights implicated is properly mitigated.

II. The rights implicated and the need for proportionality

Since the beginning of the pandemic, States' responses to the public health threat posed by the spread of COVID-19 have included a series of measures with serious impacts on fundamental rights. With immunity and vaccination certificates entering the array of measures envisaged or already being deployed in the fight against COVID-19, further

[10] According to the European Parliament, the certificate, which shall be called "EU COVID-19 Certificate", as opposed to the "Digital Green Certificate", should have its use limited in time to a maximum of twelve months and should "neither serve as a travel document nor become a precondition to exercise the right to free movement". Moreover, according to the European Parliament, the measure should ensure that holders of the certificate are not subject to additional travel restrictions and the EU should ensure universal, free-of-charge testing. European Parliament, "EU COVID-19 certificate must facilitate free movement without discrimination" (29 April 2021) <https://www.europarl.europa.eu/news/en/press-room/20210422IPR02606/eu-covid-19-certificate-must-facilitate-free-movement-without-discrimination> (last accessed 16 May 2021).

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derogations from fundamental rights can be expected. For example, depending on their use, COVID-19 certificates could interfere with individual liberties and civil rights such as the freedom of movement, the freedom of association and the freedom of assembly, protected by the International Covenant on Civil and Political Rights (ICCPR). The ICCPR also provides for the right to privacy. Subordinating access to the workplace, to school and to cultural and leisure activities to the possession of a vaccination or immunity certificate would also implicate the right to work, the right to an education or the right to participate in cultural life, all protected under the International Covenant on Economic, Social and Cultural Rights (ICESCR). European human rights frameworks, such as the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union, also protect the right to liberty and the right to privacy and the protection of personal data, whereas the Treaty on the Functioning of the European Union (TFEU) provides that every EU citizen has the right to move and reside freely within the territory of the Member States. Furthermore, in the EU, the General Data Protection Regulation (GDPR) provides a high standard of data protection, which should be upheld by the certificates proposed.

Most of the aforementioned individual rights have already been largely restricted by the measures implemented thus far in the response to the pandemic. While fundamental, these rights do not have an absolute character and can be subject to derogation in case of public emergency, as per the provisions of the respective treaties that establish them. Nevertheless, derogations to fundamental rights must respect the principle of proportionality enshrined in international law, European human rights frameworks and the constitutional traditions of a number of States.[11]

Proportionality as an instrument of substantive legal balancing between competing principles exists to a certain extent in all European countries, but it is most explicitly consecrated in EU law and the ECHR.[12] In its second paragraph of Articles 8, 9, 10 and 11, the ECHR[13] expressly states the possibility of limiting the exercise of these rights when such limitations are "prescribed by law" and "are necessary in a democratic society" in the interest of public health, among others. These stipulations express a principle of conciliation, allowing for the balancing of fundamental rights and the objectives of general interest followed by the States. In EU law, the proportionality principle applies to both the actions of the European institutions and those of the Members States when applying EU law, thus it is particularly pertinent to the case of the introduction of COVID-19 certificates in the context of free movement within the Union. The case Internationale Handelsgesellschaft[14] is recognised as the

[11] The proportionality principle can be traced back to the Supreme Administrative Court of Prussia, in its 1882 Case Kreuzberg, cited by Conseil d'Etat, "Le Principe de proportionnalité, protecter des libertés" (17 March 2017) <https://www.conseil-etat.fr/actualites/discours-et-interventions/le-principe-de-proportionnalite-protecteur-des-libertes>.

[12] ibid.

[13] Art 8 of the ECHR states the right to respect for one's "privacy and family life, his home and his correspondence", Art 9 provides a right to "freedom of thought, conscience and religion", Art 10 consecrates the "freedom of expression", while Art 11 states the "freedom of assembly and association". Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

[14] Case 11/70 "Internationale Handelsgesellschaft, bH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel" (1970) ECR 1125.

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first application of the proportionality principle, which was further consecrated by the European Court of Justice (ECJ) as a general principle of EU law, before being enshrined in the Treaty on European Union (TEU)[15] under Article 5. A framework is provided by the ECJ in its 1990 case "Fedesa",[16] which contains conditions on which the proportionality of a measure can be established. In practice, when reviewing the proportionality of a measure, the Court of Justice of the European Union applies one or more of the following sub-tests[17]: a test of suitability, a test of necessity and a third test of balance, which is frequently referred to in academic writing as "proportionality *stricto sensu*".[18]

III. Applying the proportionality principle to COVID-19 certificates

When applying the proportionality principle to COVID-19 certificates, we will discuss the declared (or sometimes implied) aims of the measure, before analysing the previously mentioned components of the proportionality review. In regards to the aims put forward by the authors of the proposals, the most frequently cited are: facilitating international travel, resuming socio-economic activities and containing the spread of the virus. Critics of COVID-19 certificates have frequently highlighted the uncertainty and ambiguity surrounding the aims of this measure. All of the previously cited objectives imply an assumption that the holders of the certificates no longer pose a public health threat to themselves or the others and, as such, further restricting their rights and liberties would not be justified. In the case of the European Commission's proposal for a Digital Green Certificate, the declared aim is that of facilitating the exercise of the right to free movement during the COVID-19 pandemic, and the press release highlights the objective of "*safe free movement*" within the EU. Issuing certificates to ensure that both socio-economic activity and cross-border travel resume *safely* would mean that there should be sufficient scientific evidence and understanding of the immunopathology of COVID-19 to rule out the possibility of infection or transmission of the virus by the holders of the certificates. Thus, when reviewing the

[15] Consolidated version of the Treaty on European Union (2008) OJ C115/13.

[16] Case C-331/88, "The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others" (1990) ECR I4057: "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".

[17] While the application of the principle appears to vary in different cases (based on, for example, whether the measure concerned is an act of EU institutions or an act of Member States), it is generally acknowledged that the three sub-tests can be recognised in the application of the proportionality review by the Court, even when not explicitly referred to as such. See G de Búrca, "The principle of proportionality and its application in EC law" (1993) 13(1) Yearbook of European Law 105 <https://doi.org/10.1093/yel/13.1.105>; F Jacobs, "Recent developments in the principle of proportionality in European community law", in E Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (London, Hart Publishing 1999); T Tridimas, "Proportionality in community law: searching for the appropriate standard of scrutiny", in E Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (London, Hart Publishing 1999).

[18] W Van Gerven, "The effect of proportionality on the actions of Member States of the European community: national viewpoints from Continental Europe", in E Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (London, Hart Publishing 1999).

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suitability and the necessity of COVID-19 certificates, the public health component of the measure (promoting the *safe* exercise of rights and liberties) is key for the assessment of the validity of the underlying assumption on which COVID-19 certificates are based and for confirming a clear relationship between the means and the objectives pursued.

We shall further discuss the three components of the proportionality review. First, the measure should be appropriate and suitable to the aim pursued (the test of suitability). Thus, it should be determined whether vaccination and immunity certificates are appropriate, science-backed measures for attaining their declared objectives. Second, it should be determined whether the measure is necessary to achieve the legitimate objective pursued (the necessity test) or, in other words, whether among the existing appropriate measures it constitutes the least restrictive measure (LRM). It should be established whether less restrictive measures in terms of rights and liberties exist and can achieve the same objective as the certificates, and if so, the choice should lean in favour of the LRM.[19] This is also in line with the principle of least infringement in public health policy,[20] which states that when confronted with several measures, the option that least infringes on individual liberties should be chosen. Lastly, per proportionality *stricto sensu*, the measure must not be manifestly disproportionate in terms of the costs and benefits balance.[21] That is, the fundamental rights implicated should not be disproportionately affected in regards to the aim pursued.[22]

Applying the proportionality principles implies a case-by-case evaluation and balancing based on the specific implications of the policy in cause. Thereafter, the proportionality principle will be discussed in consideration of the implications and circumstances of vaccination certificates, immunity or recovery certificates and the Digital Green Certificate/EU COVID-19 Certificate.

1. The case of vaccination certificates

As of February 2021, the WHO published an interim position paper advising against the introduction of vaccination certificates for international travel as a condition for departure or entry because of key scientific unknowns about the capacity of vaccines to protect against the transmission of COVID-19.[23] Moreover, the suitability of vaccine certificates is also challenged by the variable efficacy by vaccine type, the unknowns surrounding the duration of immunity following vaccination and the apparition of variants.[24] Requiring proof of vaccination either for international travel or at the domestic level in order to allow access to certain privileges is not a novel concept.

[19] W Sauter, "Proportionality in EU law: a balancing act?" (2013) TILEC Discussion Paper 2013-003 <https://ssrn.com/abstract=2208467>.

[20] REG Upshur, "Principles for the justification of public health intervention" (2002) 93(2) Canadian Journal of Public Health <https://link.springer.com/article/10.1007%2FBF03404547>.

[21] The "law of balancing" described by Alexy "requires the increasing intensity of interference with liberty to be matched by an increasing weight of reasons justifying the interference". R Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press 2002).

[22] Sauter, supra, note 19.

[23] WHO, supra, note 6.

[24] L Gostin, G Cohen and J Shaw, "Digital health passes in the age of COVID-19: are "vaccine passports" lawful and ethical?" (2021) JAMA <https://jamanetwork.com/journals/jama/fullarticle/2778526>.

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Supporters of COVID-19 vaccination certificates have cited the existence of international vaccination certificates such as "Carte Jeune" for yellow fever. Indeed, international health regulations contain provisions for yellow fever as the only disease for which countries can require proof of vaccination and, in the context of the public health emergency posed by the spread of poliovirus, the WHO issues Temporary Recommendations that allow certain countries to require proof of polio vaccination for international travellers.[25] Others also draw a comparison between the incentive that a COVID-19 vaccination certificate would give people to get vaccinated and other mandatory vaccination requirements for children that exist in certain States. Recently, in its first judgment on the topic of childhood vaccination, the European Court of Human Rights found that a general legal duty to vaccinate children is not in violation of Article 8 of the Convention (right to respect for private life) and that this measure could be deemed as "necessary in a democratic society".[26]

Whilst the WHO's position is susceptible to evolve as new evidence about vaccine efficacy emerges and vaccination campaigns progress worldwide, for the time being comparing the proposal of COVID-19 vaccination certificates and existing mandatory vaccination requirements for other diseases is premature due to a series of reasons, such as unequal access to vaccines, disparities between the efficacy rates of the different vaccines and key unknowns regarding the immunity acquired through vaccines, which would prevent this measure from passing a proportionality test, as shown below.

First, it should be assessed whether the introduction of COVID-19 vaccination certificates represents an appropriate and suitable measure to contain the spread of the virus in the context of international travel and for domestic use, in conditioning access to certain activities and places to holders of the certificates (suitability test). Whilst the legitimate objective of containing a risk to public health can justify measures that restrict rights and liberties both domestically and in the context of international travel, without further proof of the lack of contagiousness of vaccinated individuals, we cannot rule in favour of the appropriateness of the measure. Adopting vaccination certificates as a precondition for access to certain privileges would amount to a vaccination obligation, which can only be proportionate and legally acceptable if supported by strong scientific evidence of the efficacy of the vaccines. Currently, the existing vaccines against COVID-19 have an overall efficacy that ranges between 65.5% and 94.6%[27] in preventing symptomatic COVID-19 based on clinical trial data. The effectiveness of the vaccines against the spread of the virus is to be determined, which means that a vaccinated individual could potentially still pose a health threat to unvaccinated populations. Thus, possessing a vaccination certificate would not be sufficient in itself, as already existing measures of social distancing and wearing facemasks would still be necessary and are less restrictive

[25] WHO, supra, note 6.

[26] In its discussion on the proportionality of the measure, the Court made the choice of assessing whether the measure was disproportionate to the legitimate aim of protecting against diseases that could pose a serious risk to public health rather than determining whether a less prescriptive measure might have been adopted. Case of VAVŘIČKA AND OTHERS v. THE CZECH REPUBLIC (2021) ECHR.

[27] Gostin et al, supra, note 24.

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(necessity test). In the context of the apparition of multiple variants of SARS-CoV-2, the available vaccines could have different efficacy rates against these variants, which means that there is a potential for discrimination of individuals based on the access to a certain type of vaccine. The question of general access to vaccination is also one of paramount importance. According to the Economist Intelligence Unit, poor countries might have to wait for 2023 before having widespread access to vaccination against COVID-19.[28] This means that at this point in time the introduction of vaccination certificates would result in disproportionate restrictions of fundamental rights and liberties of those who want to get vaccinated but who currently do not have access to vaccination (proportionality *stricto sensu*). Imposing vaccination certificates as a precondition for international travel will disproportionately impact medium- and low-income countries,[29] whereas requiring them in order to allow for the participation in socio-economic life would automatically exclude those who are yet to be vaccinated. The key scientific unknowns surrounding the efficacy of the vaccines, as well as their scarcity, make it hard to establish that vaccination certificates would be appropriate, suitable and necessary in order to fulfil the objective of protecting public health at this point in time.

Furthermore, even if vaccination became widely available, as compliance cannot be directly imposed, legal and procedural safeguards should exist to protect the rights of the individuals who cannot be vaccinated due to pre-existing medical conditions. However, at the current state of knowledge and rate of vaccine deployment, restricting an individual's access to work or education, cultural and leisure activities and limiting free movement would be an unreasonable and disproportionate measure to the aim pursued. Vaccination certificates could become an important tool in the fight against COVID-19 in the years to come, but at this stage the choice should lean towards already existing less restrictive measures such as social distancing and wearing facemasks.

2. The case of immunity certificates or recovery certificates

Immunity or recovery certificates pose similar issues to vaccination certificates; however, due to the different type of incentive that they provide, they might be even more untenable from a legal and ethical standpoint. In a scientific brief published on 24 April 2020, the WHO advised against the introduction of immunity passports for those who have recovered from the disease, highlighting the lack of evidence "about the effectiveness of antibody-mediated immunity to guarantee the accuracy"[30] of such a measure. Since a few cases of secondary infection have been documented, it is unclear what is the duration of the immunity acquired following infection with SARS-CoV-2 and what level of antibodies should be observed in order to establish an individual's immunity. Depending on the type of serological test used, testing positive for antibodies might not be sufficient to rule out active infection. Thus, the questions that still surround the immunopathology of COVID-19 lead us to believe that restricting the individual

[28] EIU, "More than 85 poor countries will not have widespread access to coronavirus vaccines before 2023" (27 January 2021) <https://www.eiu.com/n/85-poor-countries-will-not-have-access-to-coronavirus-vaccines/>.

[29] Gostin et al, supra, note 24.

[30] WHO, supra, note 5.

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rights and liberties of those who have not acquired immunity would not be an appropriate and necessary measure to contain the virus, which means that it is not likely to pass a proportionality test. Once again, as in the case of vaccination certificates, at this point in time the balance of costs and benefits is unlikely to lean in favour of this measure. Even if the conditions for the scientific acceptability of immunity certificates[31] were to be met, from a behavioural point of view immunity certificates could incentivise individuals to seek infection if their access to socio-economic life and freedom of movement depended on their immunity status.[32] Moreover, it has been pointed out that in the context of international travel, "less restrictive suitable alternatives [to antibody testing or immunity certificates] with similar public health outcomes have been established",[33] whereas in regards to civil, economic, social and cultural rights, immunity certificates infringe on individuals' rights more than other suitable measures such as social distancing.

3. The case of the European Digital Green Certificate/EU COVID-19 Certificate[34]

The proposal for a Digital Green Certificate introduced by the European Commission on 17 March 2021 aims to mitigate the human rights impact of the previously analysed certificates by creating an interoperable framework that would include a vaccination certificate, a recovery certificate and a test certificate to account for the different conditions faced by EU citizens and legal third-country residents in the context of exercising their right to free movement. However, as the European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS) highlight, the Commission should clarify that the Member States should accept all three types of certificates contained within the Digital Green Certificate,[35] otherwise this will result in discrimination based on health status.

As previously mentioned, this certificate is presented by the Commission as a means of facilitating the exercise of *safe* free movement during the COVID-19 pandemic. As in the case of the previously analysed certificates, the proposal is based on the assumption that vaccinated and recovered individuals, as well as individuals who test negative for infection, do not pose a public health threat in the context of free movement within the EU. However, the Commission's proposal for a Digital Green Certificate does not include a detailed account of the objectives pursued through its introduction, nor has an impact assessment been conducted. As EDPB and EDPS note in their joint

[31] TC Voo et al establish three preconditions: the extent of the protection of the immune responses must be well understood, the minimum length of protection must be established and the tests must be sufficiently accurate and reliable. TC Voo et al, "Immunity certification for COVID-19: ethical considerations" (2021) Bulletin of the World Health Organisation <https://www.who.int/bulletin/volumes/99/2/20-280701/en/>.

[32] ibid. Also see Phelan, supra, note 2.

[33] HD Gunnarsdottir, MS Sinha, S Gerke and T Minssen, "Applying the proportionality principle to COVID-19 antibody testing" (2020) 7(1) Journal of Law and the Biosciences <https://doi.org/10.1093/jlb/lsaa058>.

[34] Both terms "Digital Green Certificates" (used by the European Commission) and "EU COVID-19 Certificates" (used by the European Parliament) are used interchangeably in this section as they refer to the same instrument.

[35] EDPB-EDPS Joint Opinion 04/2021 (31 March 2021) <https://edpb.europa.eu/our-work-tools/our-documents/publication-type/edpbedps-joint-opinion_fr>.

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opinion that a clear description of the purposes of the measure is not only a prerequisite for the proportionality test, but also is necessary to ensure the legality principle as required by the Charter of Fundamental Rights of the European Union.[36]

In regards to the first sub-test of proportionality, as in the case of vaccination certificates and immunity certificates analysed separately, it is unclear how the introduction of the Digital Green Certificate can qualify as a suitable and appropriate measure for the containment of the pandemic with the current state of scientific knowledge and rate of vaccination. As scientific knowledge evolves, if a sufficient degree of protection against transmission in the case of vaccinated and recovered individuals is demonstrated, then the suitability of the measure will be validated. For this to be achieved, it should be considered whether all of the vaccines available to European citizens provide a sufficient level of protection, especially in the context of the apparition of different variants of the virus. For EU COVID-19 Certificates to ensure safe free movement, scientific evidence will also have to establish the duration of protection against infection and transmission in vaccinated and recovered individuals, and the measure should also include a mechanism of renewal of the certificates. However, at the present time, only the test certificate contained in the Digital Green Certificate can rule out active infection and can justify restrictive measures in regards to the individuals who test positive for COVID-19.

Secondly, when evaluating necessity, we should remember that free movement is one of the pillars of the EU. Whereas the Digital Green Certificate has been presented by the Commission as a means of facilitating free movement during the pandemic, any system – albeit harmonised – that seeks to establish rules on cross-border travel within the Union should be recognised as a limitation of the right to free movement. The question that arises when establishing whether EU COVID-19 Certificates represent the LRM is whether we should compare them to unrestricted free movement or to the different restrictive practices and rules that are currently employed by Member States (quarantine requirements for all travellers, polymerase chain reaction (PCR) tests or even complete entry bans). Necessity is also conditioned by proof that cross-border travel promotes the spread of the virus, as well as solid scientific evidence regarding the curtailment of transmission by holders of the certificates.

What is more, an unnecessary additional burden will be placed on some of the EU's citizens by the fact that the Digital Green Certificate will only accept proof of vaccination for the vaccines approved by the European Medicines Agency (EMA). As some citizens in the EU have received jabs of Sputnik-V and Sinopharm, the proposal will inevitably result in an uneven application of the right to free movement. This will also be the case for those EU citizens who are yet to be vaccinated. Thus, it is questionable whether the measure would pass the balancing test in terms of costs and benefits (proportionality *stricto sensu*).

[36] ibid. Art 52 of the Charter of Fundamental Rights of the European Union, cited by the EDPB-EDPS Joint Opinion 04/2021, states that: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

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Even though the certificates will cease to exist at the EU level after the pandemic is over, Member States could still make use of the certificates, based on domestic law, with other purposes than that of facilitating free movement, as some have already expressed their intention to do. In the absence of adequate safeguards, creating this framework that would allow Member States to use EU COVID-19 Certificates in order to restrict access to certain places and activities could result in a disproportionate impact on the fundamental rights to privacy, data protection and non-discrimination, as well as other fundamental rights and freedoms. This could be an opportunity for some States to create a system in which fundamental rights are conditioned by health status, which would inevitably exacerbate existing inequalities and create further division and stratification based on immunological status. This concern has also been raised for other types of certificates.[37] It might also set a dangerous precedent allowing subsequent access to and use of sensitive health data after the pandemic is over and enlarging the use of the framework to other infectious diseases under Member States' national law.

IV. Conclusion

The different types of COVID-19 certificates and the different uses that can be made for each of them raise various legal and ethical considerations based on the fundamental rights and liberties implicated. If it can be shown that vaccinated or recovered individuals are neither at risk of contracting the virus nor present a risk of transmitting it, then the case could be made in favour of these certificates. However, the COVID-19 pandemic poses unprecedented legal, scientific and ethical challenges and, as it has been shown, currently the introduction of vaccination certificates, immunity certificates or the Digital Green Certificate is not sufficiently backed by scientific evidence, which makes it difficult to satisfy the principle of proportionality. The potential of a certification system to mitigate the public health risks posed by COVID-19 is currently outweighed by the burdens that would be placed on the individuals who do not yet have access to vaccination or who cannot prove their immunity status, as well as by the risk of infringement of the rights to privacy and data protection for all individuals. Given the degree of infringement of the fundamental rights implicated, we believe that at this point in time COVID-19 certificates do not present the potential of playing a key role in the containment of the virus, and existing measures that have proven their efficacy (such as accompanying the reopening of the economy by testing at large scale) and least infringe on fundamental human rights and liberties should be favoured.

[37] N Kofler and F Baylis, "Ten reasons why immunity passports are a bad idea" (2020) 581(7809) Nature <https://www.nature.com/articles/d41586-020-01451-0>.

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