

To:
European Union
European Parliament



A copy of this letter was sent to:
The Netherlands' Ministry of the Interior and Kingdom Relations, the Ministry of Justice and Security, and the Ministry of Health, Welfare and Sport, Members of Parliament concerned with these ministries

April 9th, 2021

Dear Members of the European Parliament,

The NJCM is writing to you to present our views on the Digital Green Certificate. We are a human rights NGO, representing about 1.100 jurists from the Netherlands, protecting and advocating for human rights since 1974. We are part of the International Commission of Jurists, and a founding member of the Civil Liberties Union for Europe (Liberties).

Fundamental rights concerns about the Regulation establishing Digital Green Certificates

On the 17th of March 2021 the European Commission published a 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) ("the Regulation").

The Regulation is closely connected to Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (Text with EEA relevance).

The Dutch section of the International Commission of Jurists (NJCM) wants to draw the attention of members of the European Parliament to a number of fundamental rights concerns that are posed by the Regulation.

A) Summary of the NJCM's recommendations

- In their deliberation, the Members of the European Parliament should consider the following important questions:
 - What is the long term policy aim with regard to COVID-19? The WHO has already concluded that COVID-19 is likely to be endemic, which means that it will not be eradicated.
 - Do we want to live in a society, in which all risks seem to be controlled by denying people entry (to countries) based on vaccinations or test results? Or are we willing to tolerate a certain level of risk in our lives once the risk posed by COVID-19 to public health is objectively comparable to other risks?
 - Is the aim of the Regulation to protect public health or is it to facilitate tourism? If the first holds true, are there concrete data that demonstrate that a restriction of fundamental rights is justified? And are there alternative and less restrictive means

that can be used? If the latter holds true, consider that restrictions of fundamental rights will be much less likely to be permissible.

- Furthermore, the Regulation should be amended to include a substantial provision that states in more detail than recital 46 that Green Certificates may be used by Member States only if the conditions for the limitation of the affected fundamental rights are fully met.
- The Regulation should be amended with a provision that clearly states that any (mandatory) use of the Green Certificate, be it at borders or on a national level must be non-discriminatory.
- The Regulation should be brought in line with all of the proposals made in the joint statement of the European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS)¹.
- Due to the permanent character of the Regulation, it may serve to restrict the free movement of persons in the long run. Therefore, we doubt that the Regulation can be based upon article 21(2) of the Treaty on the Functioning of the European Union (TFEU), and whether the Regulation positively affects article 45 Charter of Fundamental Rights of the European Union (CFR) as stated in the proposal. We suggest that the Regulation be amended so that it will be in force only temporarily.
- Furthermore, in case that no fixed end date for the Regulation is chosen, it should be the European legislator, including the European Parliament, that has the power/mandate to exercise full democratic control when determining the moment to end the use of Green Certificates. These powers should not be delegated to the Commission.
- The Regulation should be amended with a provision that states that the mandatory use of Green Certificates in a given Member State must end as soon as the epidemiological situation no longer justifies the (large scale) limitation of fundamental rights.

B) The Regulation is not in line with fundamental rights

The Regulation sets up a system of Green Certificates for vaccination, testing or recovery. Technically, the system will be based upon interoperable national databases. The Regulation allows for Green Certificates to be used by the Member States for border control.

Critically, the Regulation does not set out the measures that Member States may take when using the system of Green Certificates. Member States can attach different consequences to the different types of Green Certificates or the absence thereof and even different consequences to the types of vaccines that people have received (EMA approved or not). And the system of Green Certificates easily allows for a much broader use such as entry checks to all sorts of public spaces. Furthermore, the Regulation is silent about the fact that there will be a moment when the use of Green Certificates is no longer justifiable.

From a fundamental rights perspective, the problem with the Regulation is that the mandatory use of Green Certificates may limit a large number of fundamental rights, such as the freedom of movement (article 45 CFR), the right to private life (article 8 ECHR, article 7 CFR), the right to data protection (article 8 CFR), and indirectly the right to the integrity of the person (article 3 of CFR).

Of course, other fundamental rights such as the right to life and the right to health mandate that governments and the EU legislator take measures to protect public health against the threat of COVID-19. Yet, any measure that leads to a large scale limitation of fundamental rights must strike a

¹ EDPB-EDPS Joint opinion 04/2021 of 31 March 2021, https://edps.europa.eu/data-protection/our-work/publications/opinions/edpb-edps-joint-opinion-digital-green-certificate_en.

fair balance between the affected rights and the aim that is pursued. As it is laid down in article 52 CFR, measures restricting fundamental rights must:

1. Effectively serve the purpose of protecting public health;
2. Be subject to the principle of proportionality described in article 52(1) CFR. Therefore, measures need to be:
 - Meeting the objectives of general interest (i.e. the protection of public health)
 - And they must be necessary.

The Regulation mentions fundamental rights in recitals 11 and 46. However, as the Regulation sets up a system that may allow Member States to limit fundamental rights on a large scale, it should be much clearer as to the prerequisites of the use of Green Certificates.

Turning to the present Regulation this means the following:

Using Green Certificates in accordance with fundamental rights

Whereas the Regulation does not spell out the conditions under which Member States can make the use of Green Certificates mandatory, it creates a tool and infrastructure for the large scale limitation of fundamental rights through border controls. In addition, this system of Green Certificates creates a tool and infrastructure for a system on a national level of entry checks in all parts of society, be it workplaces, restaurants, public transport or education facilities.

While we agree that mass-vaccination against COVID-19 is a way which will allow Member States to ease restrictions, we doubt that the system of Green certificates is based on a thorough risk assessment of the public health benefits weighted against the restrictions of fundamental rights. At least, we have not seen one.

Furthermore, it is striking that in recital 46 the Regulation solely states that: *“Member States should comply with the Charter when implementing this Regulation.”* As the use of Green Certificates by Member States can lead to a large scale limitation of fundamental rights, it is vital that the Regulation sets out the conditions under which the use of Green Certificates is permissible. Hence, we recommend the following:

- *The Regulation should be amended to include a substantial provision that states in more detail than recital 46 that Green Certificates may be used by Member States only if the conditions for the limitation of the affected fundamental rights are fully met.*

In his vein, due to the potentially massive impact on the fundamental rights of European citizens, a thorough fundamental rights and privacy impact assessment of this Regulation should have been carried out. Yet, the proposal mentions that due to time constraints no privacy impact assessment could be carried out, moreover the proposal is completely silent about a fundamental rights impact assessment. In addition, the fast tracked legislative procedure leaves little room for discussion of the merits of the Regulation and for amendments. Most strikingly, the purpose of the Regulation is not clearly defined, which makes it difficult to carry out any impact assessment.

In this respect the European legislator should consider a number of important questions such as:

- *What is the long term policy aim with regard to COVID-19? The WHO has already concluded that COVID-19 is likely to be endemic, which means that it will not be eradicated.*

- *Do we want to live in a society, in which all risks seem to be controlled by denying people entry (to countries) based on vaccinations or test results? Or are we willing to tolerate a certain level of risk in our lives once the risk posed by COVID-19 to public health is objectively comparable to other risks?*
- *Is the aim of the Regulation to protect public health or is it to facilitate tourism? If the first holds true, are there concrete data that demonstrate that a restriction of fundamental rights is justified? And are there alternative and less restrictive means that can be used? If the latter holds true, consider that restrictions of fundamental rights will be much less likely to be permissible.*

We urge the Member of the European Parliament as well as national legislators and authorities to take these questions and considerations into account

Non-discrimination

The Regulation leaves it up to the Member States to implement the use of the Green Certificate. This means that it is unclear whether persons who have obtained a vaccination certificate will be treated the same as persons having obtained a test certificate. The Regulation even allows for different treatment of different types of vaccinations, such as EMA approved vaccinations and, for instance, the Sputnik V vaccination that is used in a number of Member States. As a consequence, the Regulation leaves the door wide open for discrimination between those people who have been vaccinated (with and EMA approved vaccine) and those who have not.

This is highly problematic as vaccine distribution is not equal in all Member States of the EU and Member States apply different vaccination regimes that may lead to one group of people, e.g. adolescents, being vaccinated in one Member State, but the same group of people may not be vaccinated in another Member State. Furthermore, there is a group of people that cannot be vaccinated due to medical reasons. Finally, it is our contention that vaccination against COVID-19 should be voluntary and this Regulation should make clear Member States may not unduly discriminate people who have chosen not to be vaccinated. In this context, we also refer to points 7.3.1. and 7.3.2 of Resolution 2361 (2021)¹ of the Council of Europe, stressing the voluntary character of vaccination and the requirement of non-discrimination.²

We therefore recommend that:

- *The Regulation should be amended with a provision that clearly states that any (mandatory) use of the Green Certificate, be it at borders or on a national level must be non-discriminatory.*

Data protection

The Regulation enables and stimulates the creation of a pan-European automated COVID-19 vaccination and test control system that can have an enormous impact on the lives of European citizens. Yet, the Regulation concerns itself solely with the data exchange at European borders and the sort of data that need to be collected. In this respect, it makes reference to the relevant provisions of European law. As the European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS) stated amongst others in their joint statement, the Regulation should

² Council of Europe, Parliamentary Assembly, Resolution 2361 (2021)¹, <https://pace.coe.int/pdf/2e0ee40b5d6c4e2e5df5467478961f7561e651733326667a8259ffe25682ae848428feba12/resolution%202361.pdf>

make clear that any further use of the Green Certificates on a national level must be fully in line with articles 7 and 8 CFR and the GDPR, including Article 6(4) GDPR, that the purpose of the Regulation should be clearly defined, and that the use of data should be prohibited once the pandemic has ended.³

In fact, we suggest that:

- *The Regulation should be brought in line with all of the proposals made in the joint statement of the EDPB and the EDPS.*

C) Article 21(2) TFEU and the permanent character of the Regulation

According to the proposal, the Regulation will be based upon article 21 of the Treaty on the Functioning of the European Union (TFEU). Article 21(1) TFEU grants to every citizen of the European Union a right to free movement. This right is also codified as a fundamental right in article 45 CFU.

Article 21(2) TFEU allows for the EU to take legislative measures in order to obtain the objective of article 21(1) TFEU, the objective being the right of free movement. The Regulation states that it serves to ensure a right of free movement of European citizens against the backdrop of the current restrictions and that the Regulation can be based upon article 2(2) TFEU.

The Regulation will introduce a new travel document or certificate. Citizens of the European Union will need to show this certificate in order to cross European borders. In the short term this may help to harmonize current restrictions that have been put in place by the Member States and thus it may aid in facilitating free movement.

However, in our view the Regulation must not only be viewed against the backdrop of current limitations, since the Regulation establishes a permanent system of Green Certificates that can be “switched on and off” by the Commission under delegated powers of article 15 of the Regulation.

In this sense, the possible restrictions to free movement are likely to be of a permanent nature and will be in place long after the COVID-19 pandemic is over. The fact that current limitations may be ameliorated, does not change this character of the Regulation. This means that the Regulation may run counter to the objective of article 21(1) TFEU, i.e. facilitating free movement. We therefore suggest that the Regulation should be in force only temporarily.

Moreover, the Regulation determines that the Commission has the sole power to end the use of the Green Certificates once “*the Director-General of the WHO has declared, in accordance with the International Health Regulations, that the public health emergency of international concern caused by SARS-CoV-2 has ended*”, and the Commission enjoys the power to reinstate the system of Green Certificates if the WHO declares another public health emergency of international concern.

Since this Regulation may severely impact fundamental rights of European citizens, we suggest that, if a no fixed end date for the Regulation is chosen, the power to end the system of Green Certificates should be in the hands of the European legislator as a whole and not the Commission by itself.

In sum, we suggest the following:

³ EDPB-EDPS Joint opinion 04/2021 of 31 March 2021, https://edps.europa.eu/data-protection/our-work/publications/opinions/edpb-edps-joint-opinion-digital-green-certificate_en, par. 24. and 25.

- *Due to the permanent character of the Regulation we doubt that it can be based upon article 21(2) TFEU, and whether the Regulation positively affects article 45 CFR as stated in the proposal. We suggest that the Regulation be amended so that it will be in force only temporarily.*
- *Furthermore, in case no fixed end date for the Regulation is chosen, it should be the European legislator, including the European Parliament, that should be able to exercise full democratic control when determining the moment to end the use of Green Certificates. These powers should not be delegated to the Commission.*

D) Ending the mandatory use of Green Certificates

Apart from the end date of the Regulation itself, it must be clear that the mandatory use of Green Certificates is not justified indefinitely. Indeed, as stated correctly by Recommendation (EU) 2020/1475, “any restrictions to the free movement of persons within the Union put in place to limit the spread of SARS-CoV2 should be lifted as soon as the epidemiological situation allows”.

Given the preconditions for the large scale limitation of fundamental rights set out above, it is crucial that this moment of lifting the requirement to show a Green Certificate at one of Europe’s borders is determined on the basis of concrete data and a thorough scientific evaluation of the epidemiological situation in a given Member State.

The Regulations solely mentions the pronouncement of the Director General of the WHO about the world-wide situation of COVID-19 as an end date for the use of Green Certificates. However, it is foreseeable that the WHO pronouncement will be made long after the situation in European Member States has improved.

We therefore recommend that:

- *The Regulation should be amended with a provision that states that the mandatory use of Green Certificates in a given Member State must end as soon as the epidemiological situation no longer justifies the (large scale) limitation of fundamental rights.*

Sincerely yours,



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Chair NJCM