

# COVID-19 TRAVEL CERTIFICATES: BALANCING THE FREEDOM OF MOVEMENT AND PROTECTION OF PUBLIC HEALTH

## CESTOVNÉ CERTIFIKÁTY V SÚVISLOSTI S COVID-19: VYVÁŽENIE SLOBODY POHYBU A OCHRANY VEREJNÉHO ZDRAVIA

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<https://doi.org/10.33542/SIC2022-1-08>

### ABSTRACT

*COVID-19 pandemic evolved into an unprecedented public health threat, in response to which States have introduced COVID-19 travel certificates. The article analyses the compatibility of such measures with internationally protected human rights, especially the right to freedom of movement. Although protecting public health is an obligation of each sovereign State, they must conduct a three-step proportionality test and demonstrate the legality of any restriction of human rights, while considering their international legal obligations. COVID-19 travel certificates may be compatible with existent international law as public health is a legitimate aim to limit the freedom of movement. However, the requirements of necessity and proportionality must also be proven. In spite of recognizable benefits, considerations regarding certificates' efficacy and related costs remain to be subject of further scrutiny.*

### ABSTRAKT

*Pandémia COVID-19 sa vyvinula do bezprecedentnej hrozby pre verejné zdravie, v reakcii na ktorú štáty okrem mnohých iných opatrení zaviedli cestovné certifikáty v súvislosti s COVID-19. Článok analyzuje zlučiteľnosť takýchto osvedčení na účely cestovania s medzinárodne chránenými ľudskými právami, najmä s právom na slobodu pohybu. Hoci ochrana verejného zdravia je povinnosťou každého suverénneho štátu, akékoľvek opatrenia na jeho ochranu, ktoré obmedzujú iné ľudské práva, musia nasledovať po predchádzajúcom posúdení na základe trojstupňového testu proporcionality a musia preukázať nevyhnutnosť a zákonnosť akýchkoľvek takýchto obmedzení ľudských práv pred a počas ich vykonávania. Cestovné certifikáty v súvislosti s COVID-19 môžu byť v súlade s existujúcim medzinárodným právom, keďže verejné zdravie je legitímnym cieľom obmedziť slobodu pohybu, ale štáty by mali pravidelne posudzovať požiadavky nevyhnutnosti a proporcionality za akýchkoľvek daných okolností. Napokon, napriek rozpoznateľným výhodám, úvahy týkajúce sa „účinnosti“ osvedčení a súvisiacich nákladov musia byť predmetom ďalšieho skúmania.*

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## I. INTRODUCTION

The end of 2019 saw the emergence of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), which caused an ongoing worldwide pandemic of COVID-19.<sup>5</sup> In response, States adopted restrictive physical distancing measures to control the spread of SARS-CoV-2, including travel restrictions and border closures.<sup>6</sup> Strategies, aimed at easing restrictive measures, involved introduction of COVID-19 travel certificates,<sup>7</sup> with the purpose of facilitating cross-border travel, while protecting public health.<sup>8</sup>

Many imposed measures, including COVID-19 travel certificates (*e.g.* EU Digital COVID Certificate), highlighted a number of challenges in ensuring fundamental human rights.<sup>9</sup> International organisations,<sup>10</sup> such as the World Health Organization (WHO),<sup>11</sup> United Nations (UN),<sup>12</sup> European regional organisations,<sup>13</sup> as well as national human rights mechanisms<sup>14</sup>, have warned States to ensure respect for well-established human rights standards.

The main argument of this article is that public health considerations necessitating the introduction of COVID-19 travel certificates, although legitimate in given circumstances, must not disproportionately affect other internationally protected human rights in order to pass the

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<sup>5</sup> SISAY T., TOLESSA T., *COVID-19 pandemic: a compressive review on gender, herd immunity, and physiological mechanisms*, Risk management and healthcare policy, Vol. 13, 2021::2963-74, DOI: <https://doi.org/10.2147/RMHP.S276342>; SAUER ML.: What is coronavirus?, online: <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus> (visited May 31, 2021).

<sup>6</sup> The territorial impact of COVID-19: managing the crisis across levels of government, online: [https://read.oecd-ilibrary.org/view/?ref=128\\_128287-5agkkojaaa&title=The-territorial-impact-of-COVID-19-managing-the-crisis-across-levels-of-government](https://read.oecd-ilibrary.org/view/?ref=128_128287-5agkkojaaa&title=The-territorial-impact-of-COVID-19-managing-the-crisis-across-levels-of-government) (visited May 31, 2021).

<sup>7</sup> For the purposes of this article, the notion of COVID-19 travel certificates includes immunity certificates, vaccination passports, including the EU Digital COVID Certificate, or any other required document, which enables travelling abroad, in times of the COVID-19. See also VOO C T., REIS A A., THOME B., HO WL C., TAM C C., KELLY-CIRINO C., et al. *Immunity certification for COVID-19: ethical considerations*, Bull World Health Organ, Vol. 99, 2021:155-161. DOI: <http://dx.doi.org/10.2471/BLT.20.28070>; Patricia SCHLAGENHAUT P., PATEL D., RODRIGUEZ-MORALES J. A., GAUTRET P., GROBUSCH P M., LEDER K., *Variants, vaccines and vaccination passports: challenges and chances for travel medicine in 2021*, Travel Medicine and Infectious Disease, Vol. 40:101996, 2021. DOI: <https://doi.org/10.1016/j.tmaid.2021.101996>; Questions and answers—digital green certificate, online: [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_21\\_1187](https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_1187) (visited June 6, 2021);

<sup>8</sup> The territorial impact of COVID-19: managing the crisis across levels of government, online: [https://read.oecd-ilibrary.org/view/?ref=128\\_128287-5agkkojaaa&title=The-territorial-impact-of-COVID-19-managing-the-crisis-across-levels-of-government](https://read.oecd-ilibrary.org/view/?ref=128_128287-5agkkojaaa&title=The-territorial-impact-of-COVID-19-managing-the-crisis-across-levels-of-government) (visited May 31, 2021); Vlada sprejela sklep o izvedbi aktivnosti za lažji dostop prebivalcev do storitev zaupanja, online: <https://www.gov.si/novice/2021-05-21-vlada-sprejela-sklep-o-izvedbi-aktivnosti-za-lazji-dostop-prebivalcev-do-storitev-zaupanja/> (visited June 3, 2021).

<sup>9</sup> COVID-19, surveillance and threat to your rights, online, <https://www.amnesty.org/en/latest/news/2020/04/COVID-19-surveillance-threat-to-your-rights/> (visited April 23, 2021).

<sup>10</sup> Vaccine passports 'essential' for resumption of international travel, <https://www.theguardian.com/travel/2021/jan/22/vaccine-passports-essential-for-resumption-of-international-travel-says-world-tourism-organisation> (visited November 15, 2021);, *Clarity still needed on effectiveness of COVID-19 vaccine passports*, says UN health agency, online: <https://news.un.org/en/story/2021/04/1089082> (visited April 22, 2021); COMMITTEE ON THE ADMINISTRATION OF JUSTICE (CAJ), *Are vaccination or immunity 'passports' lawful under the human rights act? An analysis by the committee on the administration of justice (S522)*, online: <https://caj.org.uk/wp-content/uploads/2021/04/Are-vaccination-or-immunity-passports-lawful-under-the-Human-Rights-Act-An-analysis-by-CAJ-Apr-21.pdf> (visited April 21, 2021).

<sup>11</sup> Statement on the seventh meeting of the international health regulations (2005) emergency committee regarding the coronavirus disease (COVID-19) pandemic, online: [https://www.who.int/news/item/19-04-2021-statement-on-the-seventh-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-coronavirus-disease-\(COVID-19\)-pandemic](https://www.who.int/news/item/19-04-2021-statement-on-the-seventh-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(COVID-19)-pandemic) (visited April 21, 2021).

<sup>12</sup> OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights*, UN Doc. E/C.12/2020/1, 2020, §3.

<sup>13</sup> COUNCIL OF EUROPE, *Protection of human rights and the "vaccine pass"*, online: <https://rm.coe.int/protection-of-human-rights-and-the-vaccine-pass/1680a1fac4> (visited April 21, 2021).

<sup>14</sup> Passe sanitaire: la CNIL appelle à la vigilance sur la conservation des données personnelles lors des contrôles, online: [https://www.lemonde.fr/pixels/article/2021/04/28/passe-sanitaire-la-cnil-appelle-a-la-vigilance-sur-la-conservation-des-donnees-personnelles-lors-des-contrôles\\_6078337\\_4408996.html](https://www.lemonde.fr/pixels/article/2021/04/28/passe-sanitaire-la-cnil-appelle-a-la-vigilance-sur-la-conservation-des-donnees-personnelles-lors-des-contrôles_6078337_4408996.html) (visited June 3, 2021); Belgium Data Protection Authority, *Opinion n° 138/2020*, online: <https://www.autoriteprotectiondonnees.be/publications/avis-n-138-2020-du-18-decembre-2020.pdf> (visited June 3, 2021).

test of legality and any such measures should be properly assessed prior to their introduction and regularly monitored during their implementation in any given circumstances.

The article first lays out the contours of relevant international legal framework for regulating crossing of States' borders, while ensuring fundamental human rights. In light of COVID-19 pandemic, it addresses the responses from competent international organisations and mechanisms, particularly the UN human rights bodies and WHO. It then turns to the analysis of recent developments within the European regional organisations, particularly the Council of Europe (CoE) and the European Union (EU), including the EU Digital COVID Certificate, which was introduced to facilitate safe free movement of EU citizens during the COVID-19 pandemic. The article concludes with a legal assessment of the introduction of the COVID-19 travel certificates through a prism of balancing legitimate public health considerations against guaranteeing a basic human right to freedom of movement.

## II. CORE INTERNATIONAL LEGAL FRAMEWORK REGULATING THE FREEDOM OF MOVEMENT AND PROTECTION OF PUBLIC HEALTH

Analysis of the issues raised by the introduction of COVID-19 travel certificates from the human rights perspective for the purposes of this article is embedded in the core human rights treaties (part I./1.), relevant regulation within the WHO (part II./2.) and developments within the regional organisations, particularly the CoE and the EU (part II./3.).

### 1. The freedom of movement and protection of public health in international human rights law

Every sovereign State has an inherent right to exercise its territorial sovereignty<sup>15</sup> and protect its essential interests<sup>16</sup> – including public health, which has already been recognized as a State's pivotal interest – determined in the light of each particular case<sup>17</sup>. However, State's sovereignty is curtailed by its international legal obligations,<sup>18</sup> including in the field of human rights. COVID-19 pandemic, as an essential global health threat,<sup>19</sup> raises States' positive due diligence obligation to protect people.<sup>20</sup> However, State's protection actions may have multiple implications for the enjoyment of a number of fundamental human rights,<sup>21</sup> including those protected by the core multilateral human rights treaties, particularly, the 1966 International Covenant on Civil and Political Rights (ICCPR)<sup>22</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>23</sup>.

Even prior to the adoption of the two Covenants, the 1948 Universal Declaration of Human Rights (UDHR)<sup>24</sup> determined in its Article 13 that everyone has the right to freedom of movement and residence within the States' borders, as well as the right to leave any country, including his own, and to return to it. Although the UDHR, adopted as a UN General Assembly

<sup>15</sup> Charter of the United Nations, 1945, 1 U.N.T.S. 16, Art. 2(1).

<sup>16</sup> *Gabčíkovo-Nagymaros project*, Hungary/Slovakia, I.C.J. Rep. 7, adopted 1997, §53.

<sup>17</sup> Appellate Body Report, *European Communities — Measures concerning meat and meat products*, WTO Doc. WT/DS26/AB/R, adopted 1998, §177.

<sup>18</sup> *S.S. Wimbledon*, United Kingdom, France, Italy and Japan v. Germany, P.C.I.J. Series A. No. 1, adopted 1923, §23.

<sup>19</sup> BROWN CH R., KELLY D., WILKINSON D., SAVULESCU J., *The scientific and ethical feasibility of immunity passports*, *Lancet Infectious Disease*, Vol. 21, 2021. DOI: [https://doi.org/10.1016/S1473-3099\(20\)30766-0](https://doi.org/10.1016/S1473-3099(20)30766-0).

<sup>20</sup> International covenant on economic, social and cultural rights, 1966, 933 U.N.T.S. 3, Art. 12.

<sup>21</sup> BROWN CH R., KELLY D., WILKINSON D., SAVULESCU J., *The scientific and ethical feasibility of immunity passports*, *Lancet Infect Disease*, Vol. 21, 2021. DOI: [https://doi.org/10.1016/S1473-3099\(20\)30766-0](https://doi.org/10.1016/S1473-3099(20)30766-0).

<sup>22</sup> International Covenant on Civil and Political Rights, 1966, 999 U.N.T.S. 171, Art. 12.

<sup>23</sup> OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *General Comment 14, Art. 12: The Right to the Highest Attainable Standard of Health*, UN Doc.E/C.12/2000/4, 2000, §3.

<sup>24</sup> G. A. Res. 217 A (III), Universal declaration of human rights, 1948.

resolution, is not legally binding as such, its content has subsequently become part of customary international law and thus binding on all States.<sup>25</sup>

Under both Covenants, State Parties (SPs) have the obligation to respect, protect and fulfil core human rights.<sup>26</sup> Under the ICESCR, SPs are bound to ensure, among others, the right to health, which includes also the obligation to prevent, treat and control epidemics and is closely related to and dependent upon the realisation of other human rights.<sup>27</sup> Ensuring the right to health thus presents a legitimate aim to potentially interfere with other human rights, including the freedom of movement.<sup>28</sup> Nevertheless, it is essential that any States' measures are necessary and proportionate to justify the limitations or restrictions of other human rights.<sup>29</sup>

Pursuant to Article 12 of the ICCPR, SPs are entitled to decide whom they admit to their territory, since the non-citizens do not have the right to enter or reside in another State's territory.<sup>30</sup> However, the Human Rights Committee considers that there are few circumstances in which deprivation of the right to enter one's own country, at least for the nationals, could be reasonable, and public health concerns are not among those.<sup>31</sup> Nonetheless, this applies if SPs do not derogate from certain of their obligations under the ICCPR to the extent strictly required by the exigencies of the public emergency which threatens the life of the nation and the existence of which is officially proclaimed and notified to the UN Secretary-General, as per Article 4 of the ICCPR. In any case, prohibiting entrance to non-citizens seems to be *prima facie* consistent with international law, except for refugees and individuals entitled to the subsidiary protection, where denial of entry due to the lack of COVID-19 travel certificate would present a violation of a non-derogable *jus cogens* principle of non-refoulement.<sup>32</sup>

The right to leave any country, including one's own, can be limited within the exhaustively enumerated legitimate reasons, one of which is public health.<sup>33</sup> Since this right covers travelling abroad, SPs must issue necessary travel documents to comply with mentioned provision,<sup>34</sup> which seems to apply also to COVID-19 travel certificates. As latter might impose a barrier to the right to leave, as well as to enter any country, such measures must be consistent with the three-step proportionality test, meaning that the measure must be provided by law, necessary to protect a legitimate aim (i.e. public health), the least invasive possible to achieve legitimate aim,<sup>35</sup> and consistent with other guaranteed rights.<sup>36</sup>

## 2. World Health Organization's response to introduction of COVID-19 travel certificates

The WHO's main purpose is to promote and protect health.<sup>37</sup> According to its legally binding International Health Regulations (IHR), when faced with public health risk, SPs may require

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<sup>25</sup> *Corfu Channel*, United Kingdom of Great Britain and Northern Ireland v. Albania, I.C.J. Rep. 4, adopted 1949, pp. 4, 22; SHAW M, *International law*, 8th edition, 2017.

<sup>26</sup> SHELTON S, *The Oxford handbook of international human rights law*, 2013.

<sup>27</sup> OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *General Comment 14, Art. 12: The Right to the Highest Attainable Standard of Health*, UN Doc.E/C.12/2000/4, 2000, §3; Pūras D., de Mesquita J. B., Cabal L., Maleche A., Meier B. M., The right to health must guide responses to COVID-19, *The Lancet*, Vol. 395(10241), 2020. DOI:[https://doi.org/10.1016/S0140-6736\(20\)31255-1](https://doi.org/10.1016/S0140-6736(20)31255-1).

<sup>28</sup> International covenant on civil and political rights, 1966, 999 U.N.T.S. 171, Art. 12.

<sup>29</sup> *Vavřička and others v. The Czech Republic*, ECtHR app. no. 47621/13[GC], adopted 2021, §§173-186.

<sup>30</sup> OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *General Comment 15, The Position of Aliens Under the Covenant*, 1986, §5.

<sup>31</sup> NOWAK M, U.N. Covenant on civil and political rights - CCPR commentary, 2nd Revised Edition, 2011.

<sup>32</sup> NICOLOSI S., *Non-refoulement during a health emergency*, EJIL:Talk!, 2020.

<sup>33</sup> ICCPR, Art. 12.

<sup>34</sup> OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *General Comment 27, Art. 12: Freedom of movement*, UN Doc. CCPR/C/21/Rev.1/Add.9, 1999, §14.

<sup>35</sup> *Ibid.*, §§20-21.

<sup>36</sup> ICCPR, Art. 12.

<sup>37</sup> International health conference, Constitution of the World health organisation, 1946, Bulletin of the World Health Organisation, preamble.

medical examination, vaccination or prophylaxis to allow entry into their territory.<sup>38</sup> If travellers fail to consent to such measures, or refuse to provide necessary documents, their entry to a State can be denied.<sup>39</sup> However, while protecting public health, SPs shall avoid unnecessary interference with international traffic and trade, and their measures shall be applied with full respect to human rights, which in turn must reflect the principles of legitimacy, necessity, and proportionality.<sup>40</sup>

Requirement of possessing COVID-19 travel certificates, could potentially result in unnecessary interference with traffic and trade and the WHO stated that such travel interferences (i.e. measures that deny entrance to the State or delay travel for more than 24 hours) may only be justified at the beginning of a pandemic outbreak to allow countries to gain time and rapidly implement other effective measures.<sup>41</sup> They must be based on a careful risk assessment, proportional to the public health risk, short in duration, and reconsidered regularly.<sup>42</sup> Moreover, the WHO in principle opposed many States' additional health measures restricting entrance to people coming from COVID-19 affected areas due to the limited effectiveness in preventing the importation of cases, their significant economic and social impact, and advised that States rather provide recommendations on how to prevent the spread of the virus, and collect health declarations with travellers' contact details, which allow proper risk assessment.<sup>43</sup>

Similarly, the WHO disputed requiring vaccination proof upon entry, since there are still critical unknowns regarding the efficacy of vaccination and limited availability of vaccines, especially in developing countries.<sup>44</sup> The WHO Emergency Committee warned against possible inequities due to the global vaccine distribution that could promote differential freedom of movement.<sup>45</sup> Moreover, yellow fever is currently the only disease mentioned in IHR for which countries can require vaccination proof for international travellers.<sup>46</sup> Additionally, no charge shall be made by SPs to travellers at State' entry regarding public health considerations.<sup>47</sup>

### **3. European regional organisations regulation of freedom of movement and introduction of COVID-19 travel certificates**

#### **i. Council of Europe**

As the main organisation protecting human rights in Europe, the CoE also aims at ensuring public health. Namely, the right of movement, protected under the European Convention on

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<sup>38</sup> International Health Regulations, 2005, 2509 U.N.T.S. 79, Art. 31.

<sup>39</sup> Ibid.

<sup>40</sup> HABIBI R., BURCI G. L., DE CAMPOS C T., CHIRWA D., CINA M., DAGRON S., et. al., *Do not violate the International health regulations during the COVID-19 outbreak*, The Lancet; 395(10225), 2020; IHR, Arts. 2-3, 42-43, DOI: [https://doi.org/10.1016/S0140-6736\(20\)30373-1](https://doi.org/10.1016/S0140-6736(20)30373-1).

<sup>41</sup> Interim position paper: considerations regarding proof of COVID-19 vaccination for international travellers, COVID-19 travel advice, online: <https://www.who.int/news-room/articles-detail/interim-position-paper-considerations-regarding-proof-of-COVID-19-vaccination-for-international-travellers> (visited April 21, 2021).

<sup>42</sup> HABIBI R., BURCI G. L., DE CAMPOS C T., CHIRWA D., CINA M., DAGRON S., et. al., *Do not violate the International health regulations during the COVID-19 outbreak*, The Lancet; 395(10225), 2020. DOI: [https://doi.org/10.1016/S0140-6736\(20\)30373-1](https://doi.org/10.1016/S0140-6736(20)30373-1).

<sup>43</sup> Interim position paper: considerations regarding proof of COVID-19 vaccination for international travellers, COVID-19 travel advice, online: <https://www.who.int/news-room/articles-detail/interim-position-paper-considerations-regarding-proof-of-COVID-19-vaccination-for-international-travellers> (visited April 21, 2021).

<sup>44</sup> Interim position paper: considerations regarding proof of COVID-19 vaccination for international travellers, COVID-19 travel advice, online: <https://www.who.int/news-room/articles-detail/interim-position-paper-considerations-regarding-proof-of-COVID-19-vaccination-for-international-travellers> (visited April 21, 2021).

<sup>45</sup> Statement on the seventh meeting of the international health regulations (2005) emergency committee regarding the coronavirus disease (COVID-19) pandemic, online: [https://www.who.int/news/item/19-04-2021-statement-on-the-seventh-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-coronavirus-disease-\(COVID-19\)-pandemic](https://www.who.int/news/item/19-04-2021-statement-on-the-seventh-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(COVID-19)-pandemic) (visited April 21, 2021).

<sup>46</sup> IHR, annex 7.

<sup>47</sup> Ibid., Art. 40.

Human Rights (ECHR), according to which “everyone shall be free to leave any country, including his own”, can be restricted to protect health.<sup>48</sup> Nonetheless, the CoE stated that the use of vaccination certificates for purposes other than strictly medical, raises numerous human rights questions.<sup>49</sup>

In this context, it is particularly relevant to emphasise the 2021 judgement, *Vavříčka and Others v. The Czech Republic*, in which the European Court of Human Rights (ECtHR) ruled that the State did not violate the ECHR by imposing a vaccination mandate on children.<sup>50</sup> The Applicants alleged, in particular, the incompatibility of consequences of non-compliance with the statutory duty of vaccination with their right to private life under Article 8 of the ECHR.<sup>51</sup> The Applicants also claimed violations of Articles 2, 6, 9, 13, 14 and Article 2 of Protocol No. 1 of the ECHR. The Czech legislation required preschool facilities to only accept vaccinated children, or those having been certified as immune by other means or as being unable to undergo vaccination on health grounds.<sup>52</sup> The Applicants disputed arbitrarily imposed fine and refusal of their children’s admission to nursery school as a consequence of the failure to comply with the vaccination schedule.<sup>53</sup> Additionally, they invoked their right to personal autonomy in making decisions concerning their health and the health of their children, along with their right to personal development in the context of attending nursery school, alleged the authorities’ failure to provide sufficient information of necessary and justified compulsory vaccinations, and considered interference in their private life as unnecessary in a democratic society.<sup>54</sup>

The ECtHR considered that the intensity of alleged interferences, including possible consequent health risks, were proportionate to the legitimate aim, since the Applicants’ right to private life was outweighed by protecting those who cannot be vaccinated.<sup>55</sup> The fact that no vaccinations were administered against the will of the Applicants and considering general consensus among SPs on high effectiveness of vaccination, but not its specific model, leaves SPs with a wider margin of appreciation.<sup>56</sup> Thus, it found that the public health interest in achieving herd immunity from contagious diseases outweighed the Applicants’ rights.<sup>57</sup>

This judgement could also be relevant for COVID-19 pandemic, although the ECtHR finding on compulsory vaccination was not a generalised one, but based on the standard and routine vaccination of children against diseases that are well known to medical science<sup>58</sup>. While Czech case presents wide consensus on efficacy of vaccination, as recognized by the country itself,<sup>59</sup> the situation with vaccination against COVID-19 is different. It would be extremely difficult to claim that medical professionals have reached the same level of understanding of COVID-19 as of diseases concerned in the case of *Vavříčka*.<sup>60</sup> The only ECHR SP for now that plans the

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<sup>48</sup> Protocol no. 4 to the European convention on human rights and fundamental freedoms, as amended by protocols no. 11 and 14, 1963, ETS 46, Art. 2.

<sup>49</sup> Council of Europe. Protection of human rights and the “vaccine pass”, online: <https://rm.coe.int/protection-of-human-rights-and-the-vaccine-pass/1680a1fac4> (visited April 21, 2021).

<sup>50</sup> CHAPPELL B, *European court backs mandatory vaccinations for children*, online: <https://www.npr.org/sections/coronavirus-live-updates/2021/04/08/985318387/european-court-backs-mandatory-vaccinations-laws-for-children?t=1621947334562> (visited May 26, 2021).

<sup>51</sup> *Vavříčka and others v. The Czech Republic*, ECtHR app. no. 47621/13[GC], adopted 2021, §3.

<sup>52</sup> *Ibid.*, §§11-15.

<sup>53</sup> *Ibid.*, §160.

<sup>54</sup> *Ibid.*, §§173-186.

<sup>55</sup> *Ibid.*, §272.

<sup>56</sup> *Ibid.*, §§135, 267-280, 285-311.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*, §158.

<sup>59</sup> *Ibid.*, §285.

<sup>60</sup> CHIA A., *Is Compulsory COVID-19 Vaccination a Violation of Human Rights?*, HHR Journal, online: [https://www.hhrjournal.org/2021/07/student-essay-is-compulsory-covid-19-vaccination-a-violation-of-human-rights/#\\_edn45](https://www.hhrjournal.org/2021/07/student-essay-is-compulsory-covid-19-vaccination-a-violation-of-human-rights/#_edn45) (visited November 28, 2021).

introduction of mandatory vaccination is Austria.<sup>61</sup> This indicates that vaccination is a measure that falls within the States margin of appreciation sphere.<sup>62</sup> Moreover, vaccination against COVID-19 could be consistent with ECHR only if the scientific evidence regarding the vaccine would be as precise as they are regarding the children's vaccination, including its efficacy, exceptions and necessary precautions.<sup>63</sup>

What should be additionally considered is that in the *Vavrička case*, the sanctions imposed consisted of a fine equivalent to 110€ for M. Vavrička and denial of admission to nursery schools for the children of the other Applicants.<sup>64</sup> In contrast, failing to comply with requirements of COVID-19 travel certificates may consequently constitute a serious limitation of free movement (part I./1.).

## ii. European Union and the EU Digital COVID Certificate

The EU is the only supranational organisation to date, to which Member States (MSs) have ceded the exercise of part of their sovereign rights,<sup>65</sup> which suggests the capacity to provide a timely and coordinated response capable of curbing the pandemic's disastrous effects on public health, economic and social situation in the EU.<sup>66</sup> Under the Treaty on the Functioning of the EU, competences in the field of public health are shared between the EU and MSs,<sup>67</sup> meaning that the EU complements national policies, amongst others, to deal with cross-border threats,<sup>68</sup> such as COVID-19 pandemic.

Since the outbreak of the pandemic, the majority of MSs have adopted restrictions in order to limit the spread of COVID-19, some of which have had a significant impact on citizens' rights, especially on the freedom of movement, "one of the EU's most cherished achievements".<sup>69</sup>

In the absence of any mutual agreement among MSs and with a view to prevent fragmentation and not interoperable divergent approaches in EU, the EC has proposed to establish a common framework - *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 COVID-19 pandemic*. This regulation has laid down the legal foundation for the Digital Green Certificate, now called the EU Digital COVID Certificate (DCC), proof that a person has either been vaccinated, received a negative test result or recovered from COVID-19.<sup>70</sup>

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<sup>61</sup> Austria plans compulsory Covid vaccination for all, The Guardian, online: <https://www.theguardian.com/world/2021/nov/19/austria-plans-compulsory-covid-vaccination-for-all> (visited November 19, 2021).

<sup>62</sup> SPYRIDOULA K., *What Does the Vavrička Judgement Tell Us About the Compatibility of Compulsory COVID-19 Vaccinations with the ECHR?*, *Völkerrechtsblog*, 2021. DOI: 10.17176/20210421-100920-0.

<sup>63</sup> Ibid.

<sup>64</sup> *Vavrička and others v. The Czech Republic*, ECtHR app. no. 47621/13[GC], adopted 2021, §293.

<sup>65</sup> The constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia, no. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13 and 75/16, 1991, Art. 3.a.

<sup>66</sup> SALVATI E., *Crisis and intergovernmental retrenchment in the European Union? Framing the EU's answer to the COVID-19 pandemic*, *Chinese Political Science Review*, Vol. 6, 2021: 1-19. DOI: <https://doi.org/10.1007/s41111-020-00171-0>.

<sup>67</sup> Consolidated version of the Treaty on the functioning of the European Union (TFEU), OJ C202/1, 2016, Art. 168.

<sup>68</sup> Glossary of summaries-EUR-Lex, online: [https://eur-lex.europa.eu/summary/glossary/public\\_health.html?locale=en](https://eur-lex.europa.eu/summary/glossary/public_health.html?locale=en) (visited June 6, 2021).

<sup>69</sup> Proposal for a regulation of the European parliament and the council, R 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, 2021, Arts. 5, 9, 15(2).

<sup>70</sup> Ibid.

The Regulation on the DCC was adopted on 14 June 2021, entered into force the following day,<sup>71</sup> and the certificates are being applied from 1 July 2021 for twelve months,<sup>72</sup> although extension of this period, taking into account the evolution of the epidemiological situation, is not excluded.

MSs initial reactions to this initiative have been diverse, while some of them, mostly those dependent on tourism, such as Austria, Cyprus, Greece, Italy, Portugal and Spain, supported the initiative, others (such as Belgium, France, Germany and the Netherlands) expressed concerns.<sup>73</sup> For instance, technological and organisational implementation is essentially left to MSs, who have already started to develop their own tracing and identification systems.<sup>74</sup> Similarly, the Regulation preserves the option to adopt additional travel restrictions, although the European Parliament (EP) insisted that DCC should not allow MSs to impose such measures.<sup>75</sup>

Nevertheless, there are already some European countries that have adopted such additional measures. For instance, Portugal has imposed, starting from December 1, 2021, new testing rules. Every passenger, wanting to enter the country, will be required to present a negative COVID-19 test result and this obligation will apply also to fully vaccinated and immunised travellers.<sup>76</sup> France imposed an obligation of providing a travel document additional to the proof of vaccination. Namely, a sworn declaration stating that you have no symptoms of COVID-19 and that, to your knowledge, you have not been in contact with a confirmed case of COVID-19 in the 14 days prior to your journey.<sup>77</sup> Whereas travellers eligible to enter Greece remain obliged to fill in the Passenger Locator Form.<sup>78</sup>

Such considerations have led some commentators to argue that DCC could pose limitations on the freedom of movement, which is the very same right that constitutes the legal basis of the Regulation.<sup>79</sup> In addition, critics claim that the proposed regulation is also questionable regarding other freedoms protected by international and EU law; most notably the principles of equality and non-discrimination, respect of private life and protection of personal data.<sup>80</sup> In order to comply with EU's primary legislation, interferences justified on the grounds of public health, must be necessary and proportionate, in order to be permissible.<sup>81</sup>

The principles of equality and non-discrimination are among the most fundamental principles included in all international human rights documents as well as in the EU's primary legislation.<sup>82</sup> Correspondingly, the EU has emphasized that the DCC cannot be interpreted as

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<sup>71</sup> Regulation 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, 15 June 2021, L 211/1.

<sup>72</sup> Regulation, Art. 17.

<sup>73</sup> LANG GOLDEN I., *EU COVID-19 Certificates: A Critical Analysis*, European Journal of Risk Regulation, 2021: 1-10.

<sup>74</sup> GATREIN J O., *The EU Digital COVID Certificate: A Preliminary Data Protection Impact Assessment*, European Journal of Risk Regulation, Vol. 12(2), 2021. DOI: <https://doi.org/10.1017/err.2021.29>.

<sup>75</sup> Regulation, Art. 11.

<sup>76</sup> Portugal Announces New COVID-19 Measures – Imposes Testing Rules Even for Vaccinated Travellers, online: <https://www.schengenvisainfo.com/news/portugal-announces-new-covid-19-measures-imposes-testing-rules-even-for-vaccinated-travellers/> (visited November 27, 2021).

<sup>77</sup> Coronavirus – Advice for Foreign Nationals in France, online: [https://www.diplomatie.gouv.fr/en/coming-to-france/coronavirus-advice-for-foreign-nationals-in-france/#sommaire\\_1](https://www.diplomatie.gouv.fr/en/coming-to-france/coronavirus-advice-for-foreign-nationals-in-france/#sommaire_1) (visited November 27, 2021).

<sup>78</sup> Greece Extends Travel Restrictions Until December 3, online: <https://www.schengenvisainfo.com/news/greece-extends-travel-restrictions-until-december-3/> (visited November 27, 2021).

<sup>79</sup> Proposal for a regulation of the European parliament and the council, R 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, 2021, Arts. 5, 9, 15(2).

<sup>80</sup> EDPB-EDPS, Joint opinion 04/2021 on the proposal for a regulation of the European parliament and of the council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (digital green certificate), 2021.

<sup>81</sup> Charter of fundamental rights of the European Union, 2012, OJ C326, Arts. 7, 20-21, 45, 52.

<sup>82</sup> Consolidated version of the Treaty on European Union, 2008, OJ C115/13, Arts. 2-3, 10, 18.



establishing an obligation to be vaccinated, since such a measure would be discriminatory in its very nature.<sup>83</sup> As vaccination cannot be a prerequisite for free movement, the DCC additionally covers test and recovery certificates.<sup>84</sup>

However, there are several other aspects that need to be considered in order to ensure that the implementation of the DCC in practice complies with the principle of equal treatment. Accordingly, the EP advocated for the provision of universal and free-of-charge COVID-19 testing as a precondition for the imposition of the DCC as a prerequisite to travel.<sup>85</sup>

Besides ensuring non-discrimination, fundamental right to privacy and data protection<sup>86</sup> should also be fully respected. Since the DCC implies personal data processing, including collection, access and use of health data, there are potential impacts on these individuals' fundamental rights,<sup>87</sup> which the EU justifies with several safeguards, such as by limiting the information contained in the DCC, establishing decentralised verification with EC' gateway, through which personal data does not pass, as well as ensuring compliance with the General Data Protection Regulation (GDPR).<sup>88</sup> In any case, the implementation of the DCC needs to comply with the three-step proportionality test.<sup>89</sup>

On 18 October 2021 the Commission adopted a report on the EU Digital COVID Certificate in which it reported that since its implementation more than 591 million DCC from 43 countries across four continents have been issued. By 31 March 2022, at latest, the Commission plans to submit another report, which may be accompanied by a legislative proposal to extend the period of the application of the Regulation.<sup>90</sup>

### III. RECONCILING HUMAN RIGHTS OBLIGATIONS WITH IMPLEMENTING COVID-19 TRAVEL CERTIFICATES TO DEAL WITH PUBLIC HEALTH CRISIS

Implementation of COVID-19 travel certificates raises significant issues concerning fundamental human rights, especially regarding the freedom of movement.<sup>91</sup> As stated above, States must conduct a thorough three-step proportionality test analysis prior to their implementation, which means that, firstly, they must ensure such certificates pursue a legitimate aim, secondly, measures must be necessary to achieve such aim, and thirdly, they must be proportionate to it. Additionally, restrictions introduced, shall be consistent with all other guaranteed human rights.

Addressing the first step of three-step proportionality test, States can interfere with certain human rights when following their positive obligation to protect public health,<sup>92</sup> with the latter

<sup>83</sup> Proposal for a regulation of the European parliament and the council, R 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, 2021, Arts. 5, 9, 15(2).

<sup>84</sup> Questions and answers—digital green certificate, online: [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_21\\_1187](https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_1187) (visited June 6, 2021).

<sup>85</sup> Euroconsumers, EU digital COVID certificate: we will be able to travel again, online: <http://www.euroconsumers.org/Activities/eu-digital-covid-certificate-will-be-able-travel-again> (visited June 17, 2021).

<sup>86</sup> MASSE E., *Two years under the EU GDPR: an implementation progress report*, Access Now, 2020.

<sup>87</sup> Such as re-uses of COVID-19 data for law enforcement purposes. See, e.g. MOLLDREM S., HUSSAIN M.I., MCCLELLAND A., Alternatives to sharing COVID-19 data with law enforcement: Recommendations for stakeholders. *Health Policy*, Vol. 125(2), 2021. DOI: <https://doi.org/10.1016/j.healthpol.2020.10.015>.

<sup>88</sup> Ibid.

<sup>89</sup> Charter of fundamental rights of the European Union, 2012, OJ C326, Arts. 7-8.

<sup>90</sup> The EU Digital COVID Certificate: a global standard with more than 591 million certificates, online: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_5267](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5267) (visited November 13, 2021).

<sup>91</sup> Sekalala S., Forman L., Habibi R., Meier B. M., Health and human rights are inextricably linked in the COVID-19 response, *BMJ Global Health*, 2020. DOI:10.1136/bmjgh-2020-003359.

<sup>92</sup> Office of the High Commissioner for Human Rights, *General Comment 14, Art. 12: The Right to the Highest Attainable Standard of Health*, UN Doc.E/C.12/2000/4, 2000, §3.

being a legitimate aim specified in human rights treaties.<sup>93</sup> However, to satisfy pursuit of legitimate aim, such interference must be provided by law, examined in each particular case and only temporary in nature. States should therefore in addition to adopting necessary domestic legislation, which in case of the EU is resolved by the effects of regulations in MSs domestic legal order, also carefully consider establishing reliable procedures for the renewal of travel certificates.<sup>94</sup> When doing so it is important to take into account all relevant information, including WHO officials' opinion, that it is unlikely to eradicate the virus at all.<sup>95</sup>

Further, in the second step, States must assess what is necessary in a democratic society to achieve legitimate aims.<sup>96</sup> What differentiates *Vavrička* from COVID-19 situation is the fact that standard vaccination of children is required for the well-known diseases in medical science. Yet, there are still many ambiguities concerning COVID-19<sup>97</sup> and no evidence of existence as well as duration of natural immunity<sup>98</sup> from COVID-19, particularly regarding different virus variants, exist.<sup>99</sup> However, most recent scientific findings are starting to point towards confirmation that vaccinated individuals are at a significantly reduced risk of transmitting COVID-19.<sup>100</sup> For that, it is necessary to consider scientific information whether all of the different vaccines that are being used provide sufficient protection against the transmission of different existing COVID-19 strains, keeping in mind the possible emergence of new variants.<sup>101</sup> Challenges in this regard are the fact that some of the vaccines have been bought and used in some MSs without being approved by the European Medicines Agency (EMA) in the first place, such as the Russian and Chinese vaccines,<sup>102</sup> and uncertainties surrounding the accuracy of COVID-19 tests, because some of them are too sensitive, while others are not enough to indicate whether the person is infected and capable of spreading the virus.<sup>103</sup> All of these raise a question whether such certificates serve their primary purpose, which is to achieve public health protection.

Considering the effectiveness of the certificates, it is worth mentioning the possible leakage of the digital key that is used to sign and verify the DCC, since in October 2021 there were several codes of counterfeited COVID-19 certificates circulating around the internet, allowing

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<sup>93</sup> *Solomakhin v. Ukraine*, ECtHR app.no. 24429/03, adopted 2012, §35; OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *General Comment 27, Art. 12: Freedom of movement*, UN Doc.CCPR/C/21/Rev.1/Add.9, 1999, §§8-9.

<sup>94</sup> LANG GOLDNER I., *EU COVID-19 Certificates: A Critical Analysis*, European Journal of Risk Regulation, 2021:1-10.

<sup>95</sup> CNBC, WHO says Covid will mutate like the flu and is likely here to stay, online: <https://www.cnbc.com/2021/09/07/who-says-covid-is-here-to-stay-as-hopes-for-eradicating-the-virus-diminish.html> (visited November 13, 2021).

<sup>96</sup> Necessity&proportionality, online: [https://edps.europa.eu/data-protection/our-work/subjects/necessity-proportionality\\_en](https://edps.europa.eu/data-protection/our-work/subjects/necessity-proportionality_en) (visited June 7, 2021).

<sup>97</sup> COFONE I., *Immunity passports and contact tracing surveillance*, Stanford Technology Law Review, Vol. 24, 2021. DOI: <https://doi.org/10.2139/ssrn.3767301>. KREGAR VELIKONJA N., ERJAVEC K., VERDENIK I., HUSSEIN M., VELIKONJA G V., *Preventivno vodenje in njegova povezanost z anksioznostjo v začetni fazi epidemije SARS-CoV-2 v Sloveniji*, Zdravstveno varstvo, Vol. 60(1), 2021:17-24. DOI: <https://doi.org/10.2478/sjph-2021-0004>; Phelan A. L., COVID-19 immunity passports and vaccination certificates: scientific, equitable, and legal challenges, *The Lancet*, Vol. 395(10237), 2020: 1595-1598. DOI: [https://doi.org/10.1016/S0140-6736\(20\)31034-5](https://doi.org/10.1016/S0140-6736(20)31034-5).

<sup>98</sup> GREEN R., BIDDLESTONE M., DOUGLAS K., *A call for caution regarding infection-acquired COVID-19 immunity: The potentially unintended effects of "immunity passports" and how to mitigate them*, Journal of Applied Social Psychology Vol. 51(7), 2021: 720-729. DOI: 10.1111/jasp.12779.

<sup>99</sup> Protocol for exclusion: Why COVID-19 vaccine "passports" threaten human rights, online: <https://www.accessnow.org/cms/assets/uploads/2021/04/Covid-Vaccine-Passports-Threaten-Human-Rights.pdf> (visited June 3, 2021).

<sup>100</sup> KUCHLER H., *Vaccine recipients wait to learn if they can still pass on Covid*, Financial Times, online: <https://www.ft.com/content/b5a40a72-1c85-46a1-a754-80ba0ef83851> (visited October 30, 2021).

<sup>101</sup> LANG GOLDNER I., *EU COVID-19 Certificates: A Critical Analysis*. European Journal of Risk Regulation, 2021: 1-10.

<sup>102</sup> Ibid.

<sup>103</sup> BÖGER B., FACHI M M., O VILHENIA R., COBRE F A., TONIN S F., PONTAROLO R., *Systematic review with meta-analysis of the accuracy of diagnostic tests for COVID-19*, American journal of infection control, Vol. 49(1), 2021: 21-29.

public access to the information they held.<sup>104</sup> In addition, several EU countries have identified illegal actions related to the issuance of fake DCCs. Mentioned developments undoubtedly raise concerns about the credibility of the certificates as well as their effectiveness.

Within the third step of the test, proportionality assessment must be done to justify the measure. Here, the balance between the protected interests affected by the COVID-19 travel certificates - on the one hand pursuing public health interests and on the other ensuring the freedom of movement - shall be found.<sup>105</sup> Balancing between those interests should include analysis of scientific evidence or at least of information from relevant bodies such as WHO, concerning relevant measures where clearer evidence is insufficient in order to determine what is necessary to achieve public health.<sup>106</sup> While some measures in other spheres f. ex. in environmental and trade law can be taken as precautionary measures, human rights cannot be limited just in precaution. However, it should be noted that protecting public health can be seen as a precondition for ensuring other human rights, including freedom of movement.<sup>107</sup> Namely, COVID-19 can also cause death and the duty to protect life implies that States take appropriate measures to address the general conditions in society that may present direct threats to life or prevent individuals from enjoying their right to life with dignity, which includes prevalence of life-threatening diseases.<sup>108</sup> However, in the light of proportionality assessment, States should find an appropriate balance between endangered rights and required measures to protect them to the highest possible extent.<sup>109</sup>

Possible concern regarding the proportionality test is also the question of vaccine and tests availability and accessibility,<sup>110</sup> that could result in discrimination. In order to ensure equal treatment, such measures should be voluntary, as various reasons might prevent certain individuals from obtaining such travel certificates (e.g. due to religious or other beliefs). Furthermore, according to the current regulation within the WHO, States requiring only a proof of COVID-19 vaccination as a precondition for travelling, would depart from established international legal framework.<sup>111</sup> However, even the current plan of allowing a negative test as a sufficient precondition for travel, raises additional concerns due to considerable costs of such tests in certain countries, which could exacerbate structural disadvantages of already marginalised groups.<sup>112</sup>

Additional requirement of the proportionality test, for the measure to be fully consistent with international human rights law, is compliance with other rights<sup>113</sup>, such as the right to privacy. The EU bodies emphasise the necessity of compliance with the GDPR and three-step

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<sup>104</sup> EU Investigates Hacking of COVID Digital Certificates Gateway, After 'Adolf Hitler Certificate' Was Generated, online: <https://www.schengenvisa.info/news/eu-investigates-hacking-of-covid-digital-certificates-gateway-after-adolf-hitler-certificate-was-generated/> (visited November 13, 2021).

<sup>105</sup> Consolidated version of the Treaty on the functioning of the European Union, 2016, OJ C202/1, Arts. 18, 21(2); Updated WHO recommendations for international traffic in relation to COVID-19 outbreak: COVID-19 travel advice, online: <https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak> (visited May 31, 2021).

<sup>106</sup> IHR, Art. 43.

<sup>107</sup> Raposo V. L., Quarantines: Between Precaution and Necessity. A Look at COVID-19, *Public Health Ethics*, Vol. 14(1), 2021: 35–46. DOI: <https://doi.org/10.1093/phe/phaa037>.

<sup>108</sup> CCPR, *General Comment No. 36*, CCPR/C/GC/35, §26.

<sup>109</sup> CIANCARDO J., *The Principle of Proportionality: The Challenges of Human Rights*, *Journal of Civil Law Studies*, Vol. 3, 2010: 177-186, p. 180.

<sup>110</sup> WOUTERS J O., SHADLEN C K., SALCHER-KONRAD M., POLLARD J A., LARSON J H., TEERAWATTANANON Y, et. al., *Challenges in ensuring global access to COVID-19 vaccines: production, affordability, allocation, and deployment*. *Health Policy*, Vol. 397(10278), 2021: 1023-1024. DOI: [https://doi.org/10.1016/S0140-6736\(21\)00306-8](https://doi.org/10.1016/S0140-6736(21)00306-8).

<sup>111</sup> IHR, Art. 31.

<sup>112</sup> JORDAN L., *COVID-19, immunoprivilege and structural inequalities*, *History of Philosophy and Life Sciences*, Vol. 43(1), 2021, p. 19. DOI: <https://doi.org/10.1007/s40656-020-00356-5>; Ohlbrecht, H., Jellen, J., *Unequal tensions: the effects of the coronavirus pandemic in light of subjective health and social inequality dimensions in Germany*, Vol. 23:S1, 2021: 905-922. DOI: 10.1080/14616696.2020.1852440.

<sup>113</sup> International covenant on civil and political rights, 999 UNTS 171, 1966, Art. 12.

proportionality test, including the temporary nature of relevant and adequate processed data storage.<sup>114</sup> Given that some MSs generally encounter serious challenges in effectively implementing GDPR,<sup>115</sup> this poses additional concern in the context of the rollout of COVID-19 contact tracing and exposure notifications, and even more so in managing of the COVID-19 travel certificates.<sup>116</sup>

Despite the intent of the EC to harmonise travel measures across EU, the DCC will not necessarily guarantee the right to travel, as its holders might be subjected to additional requirements introduced by individual MSs in cases of the evolution of COVID-19 pandemic, such as the spread of new variants.<sup>117</sup> In the current development of the pandemic, we could see that some States, f. ex. Denmark, Sweden, Norway, have abandoned restrictive measures, including on travel, when they achieved satisfactory standard of public health through vaccination.<sup>118</sup> However, when infections started to grow again, they imposed restrictions such as prohibiting entrance to the people coming from affected areas.<sup>119</sup> However, prohibiting entrance based on nationality rather than on travel history would in essence present a violation of prohibition of discrimination, because inherently virus does not spread easier due to the nationality. The new variant of the virus, omicron, is once again bringing back travel bans, since the EU is already trying to stop air travel, at least for the non-essential arrivals, from the southern African region,<sup>120</sup> even though the WHO warned against sudden travel measures<sup>121</sup>, whereas Japan will close its borders for foreigners completely<sup>122</sup>. Introduction of COVID-19 passports in fact poses limitations on the freedom of movement. In the case of DCC across the EU, it consequently minimises the crucial advantage of the Schengen Union.<sup>123</sup> On 30 June 2020 the Council of the EU adopted a recommendation on the gradual lifting of the temporary restrictions on non-essential travel into the EU.<sup>124</sup> This recommendation included an initial list of countries for which MSs should start lifting travel restrictions at the external borders that is

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<sup>114</sup> GRANDE A., *Vaccine passport plans can't ignore web of privacy laws*, online: <https://www.law360.com/articles/1377404/vaccine-passport-plans-can-t-ignore-web-of-privacy-laws> (visited April 24, 2021). The European commission's digital green certificate, online: <https://ihsmarkit.com/research-analysis/the-european-commissions-digital-green-certificate.html> (visited June 6, 2021).

EU vaccine passport: an ethical and legal minefield?, online: <https://www.dw.com/en/eu-vaccine-passport-an-ethical-and-legal-minefield/a-56747519> (visited June 4, 2021).

<sup>115</sup> MASSE E., *Two years under the EU GDPR: an implementation progress report*, Access Now, 2020.

<sup>116</sup> ERŽEN I., KAMENŠEK T., FOŠNARIČ M., ŽIBERT J., *Key challenges in modelling an epidemic – what have we learned from the COVID-19 epidemic so far*, *Zdravstveno Varstvo*, Vol. 59(3), 2020:117–119. DOI: <https://doi.org/10.2478/sjph-2020-0015>.

<sup>117</sup> Euobserver, *The EU's COVID-19 certificate - how it will work?*, online: <https://euobserver.com/coronavirus/152082> (visited June 9, 2021).

<sup>118</sup> Fact Check-Posts misconstrue lifting of COVID-19 restrictions in Denmark, Sweden and Norway, Reuters, online: <https://www.reuters.com/article/factcheck-scandinavia-covidrestrictions-idUSL1N2R41JP> (visited 8 October 2021).

<sup>119</sup> Quartz Africa, *The WHO cautions against a »knee-jerk« response to the new omicron variant*, online: <https://qz.com/africa/2095177/who-cautions-against-knee-jerk-response-to-b-1-1-529-variant/> (visited November 27, 2021).

<sup>120</sup> Schengenvisainfo news, *EU Tells Member States to Suspend All Travel From Southern African Countries Due to New COVID Variant*, online: <https://www.schengenvisainfo.com/news/eu-tells-member-states-to-suspend-all-travel-from-southern-african-countries-due-to-new-covid-variant/> (visited November 27, 2021).

<sup>121</sup> Quartz Africa, *The WHO cautions against a »knee-jerk« response to the new omicron variant*, online: <https://qz.com/africa/2095177/who-cautions-against-knee-jerk-response-to-b-1-1-529-variant/> (visited November 27, 2021).

<sup>122</sup> Japan reverses border easing, bars foreign visitors due to Omicron, online: <https://www.reuters.com/world/asia-pacific/japan-pm-kishida-says-foreign-visitors-be-barred-entry-nov-30-2021-11-29/> (visited November 29, 2021).

<sup>123</sup> *The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*, Official Journal L 239, 22/09/2000 P. 0013 - 0018, Ar. 6.

<sup>124</sup> Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction, 2020, OJ L 208I.

reviewed regularly and, if possible, updated.<sup>125</sup> The list was again updated on 18 November 2021.<sup>126</sup>

Another possible fragmentation of approaches in practice might arise out of States' acceptance of different vaccines and different types of tests.<sup>127</sup> This has already been the case in Europe, where some people were in a worse position just because they did not have different available vaccines or tests in their States. Some of them, due to the lack of vaccines or its limited accessibility in their home State, got vaccinated in other States, for example in Serbia, but are now not allowed to travel, because some States do not recognize certain types of vaccines. At present, the vaccines recognized by EMA are Pfizer-BioNTech, Johnson & Johnson, Moderna and AstraZeneca. Consequently, some countries decided to only accept the use of those, for example France<sup>128</sup>, whereas there are more vaccines approved by some other countries, for example in Hungary, where they also recognize vaccines Sputnik V, Sinopharm, Sinovac, CanSinoBio and CoviShield<sup>129</sup>. Each MS can decide if it wants to permit the entry of passengers vaccinated with vaccines that EMA does not approve, which poses another concern on legality of COVID-19 travel certificates.

#### IV. CONCLUSION

The discussion demonstrated that although public health considerations are indeed legitimate aims allowing limitations or restrictions on internationally protected human rights, States' actions must comply with their international legal obligations, including by satisfying the three-step proportionality test when introducing and throughout the implementation of any adopted measures with the potential to affect other human rights. The implementation of COVID-19 travel certificates, including the DCC, must thus be necessary and proportionate to achieve a legitimate aim of appropriate standard of public health in any given circumstances and should be kept in place only as long as such necessity exists, which implies it is most likely only a temporary measure.

Although the DCC, if the MSs ensure compliance with the presented international legal framework, could be considered a welcoming initiative, its full effectiveness remains to be assessed, when the data on efficiency of COVID-19 vaccinations and tests, possibilities of subsequent – after the vaccination – infections, as well as a cost-benefit analysis of its implementation, becomes available.

In conclusion, legitimate public health considerations justify the introduction of additional restrictive measures for travelling only if these comply with existing international legal framework, including relevant human rights standards. Thus, it is of utmost importance that States conduct a thorough analysis prior to introduction of any COVID-19 travel certificates, continuously monitor their proper implementation and regularly assess their impact, in order to ensure that these are truly facilitating travel and better recovery of States, rather than imposing a serious barrier to full implementation of fundamental human rights, including the freedom of movement.

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<sup>125</sup> Re-open EU, online: <https://reopen.europa.eu/en/> (visited November 27, 2021).

<sup>126</sup> Re-open EU, online: <https://reopen.europa.eu/en/> (visited November 27, 2021).

<sup>127</sup> Euobserver, The EU's COVID-19 certificate - how it will work?, online: <https://euobserver.com/coronavirus/152082> (visited June 9, 2021).

<sup>128</sup> Demande de passe sanitaire en cas de vaccination à l'étranger : procédure pour les ressortissants étrangers de passage en France et les étudiants, hors pays européens, online: <https://www.diplomatie.gouv.fr/fr/le-ministere-et-son-reseau/actualites-du-ministere/informations-coronavirus-covid-19/demande-de-passe-sanitaire-en-cas-de-vaccination-a-l-etranger-procedure-pour-64244/> (visited November 27, 2021).

<sup>129</sup> Travelling to Hungary: What You Need to Know Before You Go, online: <https://www.schengenvisainfo.com/news/travelling-to-hungary-amid-covid-19-rules-restrictions-explained/> (visited November 27, 2021).

**KEYWORDS**

COVID-19, EU Digital COVID Certificate, freedom of movement, human rights, public health.

**KLÚČOVÉ SLOVÁ**

COVID-19, európsky digitálny Covid certifikát, sloboda pohybu, ľudské práva, verejné zdravie

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