



CATOLICA
FACULDADE DE DIREITO

ESCOLA DE LISBOA



CATOLICA
Global
School of
Law

UNIVERSIDADE CATÓLICA PORTUGUESA- UCP-
FACULDADE DE DIREITO- ESCOLA DE LISBOA- CATÓLICA
GLOBAL SCHOOL OF LAW

Inspecting freedom:
EU cross-border mobility politics, health borders and
the impact of the EU Covid Digital Certificate

Master Dissertation for the Master in Transnational Law
Under the supervision of Professor Patrícia Frago Martins

Salomé de Melo Osório

March 2022

In an age where public health has never been better provided for, and medical men enjoy a respect formerly reserved for the aristocracy and the clergy, millions of people are unwell, or merely feel unwell, or in dread lest at some future time they may become unwell.

-Robertson Davies
(A Voice from the Attic, 1960)

TABLE OF CONTENTS:

<u>ABBREVIATIONS LIST:</u>	<u>6</u>
<u>I. INTRODUCTION:</u>	<u>7</u>
<u>II. EU AND HEALTH: THE IMPACT OF THE COVID-19 OUTBREAK</u>	<u>10</u>
<u>III. THE COVID CERTIFICATE</u>	<u>14</u>
<u>IV. YOU TOO SHALL (NOT) PASS: DISCUSSING FREE MOVEMENT OF PERSONS IN A PANDEMIC</u>	<u>19</u>
<u>V. THE NEW HEALTH WALL AND THE EU COVID DIGITAL CERTIFICATE:</u>	<u>21</u>
<u>I) BIOMETRIC BORDERS FOR THE INVISIBLE VIRUS- A PURITY CRITERIA?</u>	<u>23</u>
<u>II) BORDERS TRAFFIC LIGHTS: PROPORTIONALITY AND SUITABILITY OF THE EU COVID DIGITAL CERTIFICATE</u>	<u>27</u>
<u>VI. LOOKING FORWARD: WHERE IS THE “NEW NORMAL” HEADED?.....</u>	<u>35</u>
<u>VII. CONCLUSION</u>	<u>37</u>
<u>BIBLIOGRAPHY.....</u>	<u>ERROR! BOOKMARK NOT DEFINED.</u>

Acknowledgments

This thesis represents a turning point in my life. In it, it is a compilation of long lecture and study hours, academic papers and exams that occupied my days for 23 years. It is the ending of a challenging academic life and an opportunity to embrace a professional path still to be fully disclosed. It is a time to say goodbye to an university that in two years has become a second home. I walk away with a grateful smile, hope of better times and faith in myself and others. It is the closing of a chapter that made me realize my potential, that reaching for the moon and stars isn't pushing too far away and that, more important than anything else, showed me that even when all seems pitched black, a bit of faith can go a long way. In this sense, I would like to thank my family and friends for the unconditional support throughout my academic life.

First, it is with a warm heart that I thank my parents who gave me every opportunity, encouraged me into new adventures with enthusiasm and advised me to follow my dreams without fear. There aren't enough words that can fully grasp my appreciation for them.

Second, I would like to thank my brother, João, Ti Jã and Tali for their support, humor, and positivity, making me not forget that balance is not a privilege but a necessity for a well-lived life.

Third, I would like to thank my friends, Beatriz Ferreira, Catarina Branco, Catarina Oliveira, Daniela Silvestre, Daniela Oliveira, Diva Gonçalves, Laura Dias, Maria Inês Rodrigues, Margarida Costa, Mariana Marques, Sofia Nobre, Sofia Henriques, Sofia Venturinha, Sthefanye Araújo and Suzana Madeira for their constant encouragement, laughter, patience, faith in my dreams and abilities and for being there in my highest and lowest moments. A special thanks to my friend Sthefanye for proof-reading my thesis with careful insights and recommendations.

Fourth, I would like to thank Professor Patrícia Fragoso Martins for agreeing to supervise me and meet with me on a continuous basis, for her kindness, guidance and careful insight that made this project possible.

Finally, I would like to disclose the profound privilege that was studying in Universidade Católica Portuguesa, especially in Católica Global School of Law, since it brings an insightful out of the box program that nourishes creative thought and dreams bigger than life itself. I would like to particularly highlight Tânia Abreu Godinho e Susana Baltazar, for their generosity and concern with all LL.M student's wellbeing, Professor Matej Acetto, Professor Armando Rocha, and, finally, Professor Paula Bordalo Faustino with whom I discussed my ideas in the preliminary times of this project, helping me focus on what I truly wanted to write about.

Now that I close this chapter in my life, I grow stronger, knowing that sensibility and kindness are not weaknesses, that resilience is not my lack and that hard work pays off.

Abbreviations List:

EU: European Union

TEU: Treaty on European Union

TFEU: Treaty on the Functioning of the European Union

SBC: Schengen Borders Code

CFR: Charter of Fundamental Rights of the European Union

SURE Program: Temporary Support to mitigate Unemployment Risks in an Emergency

EC: European Commission

EMA: European Medicines Agency

WHO: World Health Organization

ECDC: European Centre for Disease Prevention and Control

EMA: European Medicines Agency

HaDEA: European Health and Digital Executive Agency

HERA: European Health Emergency Preparedness and Response Authority

I. Introduction:

Key words: free movement, borders, Sars-Cov-2, Certificate, vaccination, restrictions, proportionality, future, digital, new normal, EU, health borders.

With the spread of the severe acute respiratory syndrome coronavirus 2 (SARS-coV-2) an unparalleled crisis has emerged. Suddenly, the EU is called out to assure a rapid response that can mitigate the devastating effects on socio-economic conditions of its citizens and dynamize national public health sectors' response, admitting special and extraordinary circumstances that defy the core principles of its existence. Hence, the EU steps out as a "single voice"¹, coordinating its efforts in hopes of winning the fight against a deadly new virus.

Two of the biggest EU conquests so far are the effective rollout of new vaccines and medical equipment such as masks and other medical equipment, in campaigns such as the Vaccination Strategy, adopted in October 2020 and the Global Vaccination Partnership with the United States to boost vaccine rollout and production up to a 70% worldwide goal, and the creation of a Digital EU Covid Certificate, under the Parliament and Council Joint Regulation 2021/953 of 14 June 2021², a digital, free proof of vaccination, recovery or negative test result that is valid in all EU countries. The Certificate unfolds itself in three different types: the vaccination Certificate, which is issued after the administration of a dose of a vaccine approved by the European Union, stating whether the vaccination scheme is complete or not, the test Certificate which is issued after the notification by the competent authorities of a negative test result (PCR) and the recovery Certificate, which is issued between 11 and 180 days after a laboratory test attesting the recovery status³.

¹ Joaquim Freitas da Rocha, *The Reaction of the EU to Covid-19 crisis*, (Universidade do Minho, 2020).

² Regulation (EU) 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 (2021) PE/25/2021.

³ SRS Newsletter, *EU Digital Covid Certificate*, 22 June 2021; Regulation (EU) 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, PE/25/2021/REV/1.

Hence, the EU Digital Covid Certificate targets, first and foremost, the anxious mind of an EU that prides itself of promoting free movement between its Member States and, by extension, aims to solve other issues of health safety even within national borders. As a result of an imminent pressure to re-open the EU, a proposal for a Certificate that would safely lift common restrictions came into light. The development of the Certificate was in the works for several months until its approval on July 1st 2021⁴, set to be available in all Member States. In January 2021⁵, guidelines for the proper development and usage of the certificate were adopted in line with the cross-border healthcare, also known as “eHealth Network”, established with the Commission Implementing decision of 22 October 2019⁶. On 17th March 2021, the Commission submitted a proposal and on the 14th of April, the Council initiated negotiations and an agreement on the basic guidelines of such Certificate was reached on the 22nd of April. Afterwards, and following the first rehearsal on the EU Gateway, the infrastructure that would allow the authentication of the certificate, the Parliament and the Council agreed upon the content of the Certificate. Hence, deemed as revolutionary, the EU Covid Certificate was advertised as a crucial tool to ease, in a safe manner, restrictions in commercial travel between Member States but also being used for the access to restaurants and other commercial places, workplaces and big events.

As an introductory note, it is important to say that the usage of medical or vaccine proof when crossing international borders is not a 2020 novelty. Hence, for example, when travelling to some non-EU countries or even in an effort to induce medical professionals’ international movement⁷, the protection of public health as a partial condition to entry in a

⁴ The certificate was introduced in a cautionary manner aware of possible technical difficulties. Hence, if, in this first phase, the Member State couldn’t issue a certificate, the Member State could continue with old measures, such as viral testing or quarantine, without any distress from other Member States.

⁵ 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 (2021) COM/2021/ Final.

⁶ Commission Implementing Decision 2019/1765 of 22 October 2019 providing the rules for the establishment, the management and the functioning of the network of national authorities responsible for eHealth, and repealing Implementing Decision 2011/890/EU and repealing Implementing Decision 2011/890/EU. See also Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011.

⁷ Sue Ineson, Stephen S. Seeling, *The Medical Passport*, (The Journal of Continuing Education in the Health Professions, Vol. 25).

country has been a priority for several decades. Yet, the EU Digital Covid Certificate, distinguishes itself by the broadness of its application, the usage of technological advances, for its practicability and by the person- based approach scoping all relevant medical history in a database, where, if a person exhibits proof of a certain condition of health or status of vaccination, it seems to treat in a different manner those who do not have that same proof, whether it is because of religious beliefs, impossibility of having the vaccine because of a medical condition or simply because they do not want to. Not only because it was developed in a tight deadline, which some associate with potential overlooked fractures in its functioning, but also because of its long-term implication on societal acceptable conducts on restricting personal liberties, the Certificate has not escaped criticism relating to their scientific, practical, equitable and legal challenges⁸, even by international organizations such as the WHO that on April 24, 2020, advised against approval since there was no time to acknowledge the long-term effects of an infection and the validity of the concept of group immunity⁹.

Thus, the Certificate presents itself as a rich and riveting legal piece that is worth a closer look. The impact on the free circulation of persons, one of the core principles of the EU living space, is one of the most highlighted and delicate areas we can focus on. Under article 45 (3) TFEU, article 27 to 33 of the Directive 2004/38 and Annex V, Part B of the Schengen Borders Code, when denying entry, public health constitutes a valid exception for the interruption of free movement, but only diseases with an epidemic potential and other infectious diseases, if “they are the subject of protection provisions applying to nationals of the host Member State”, as mentioned in article 28 of the Directive¹⁰, for a period of no longer than 30 days or “for the foreseeable duration of the threat”, are a valid exception. Hence, they must be measures of ultimate resort, temporary and seen as necessary and proportionate.

⁸ Alexandra L.Phelan, *Covid-19 immunity passports and vaccination certificates: scientific, equitable, and legal challenges*, (Georgetown University press, 2020).

⁹ Paul Fine, Ken Eames, L. David Heymann, *Herd Immunity: a rough guide*, (Oxford University Press on behalf of the Infectious Diseases Society of America, 911, 2011).

¹⁰ Directive 2004/38/EC of the European Parliament and of the Commission on the right of citizens and their family members to move and reside freely within the territory of Member States (2004) OJ 1158.30.4.2004.

However, border controls have become a standard practice unfolding a complex web of social implications and several questions about the legitimacy of these policies.

In this project we will focus on the problematic of admitting a new (and possible everlasting) inter-member state control in the EU mobility sphere and its impact on the right of free movement of persons, protected by article 15 and 45 CFR. Hence, in the chapter “EU and Health: the impact of the Covid-19 outbreak”, I will analyze the status of EU’s health protection before and after the pandemic, highlighting some key accomplishments and recent changes due to the new coronavirus. Afterwards, in the next two chapters, I will explore what the Covid Certificate entails and its regulatory changes over the time and, in the following chapter, I will explore the free movement and its relation with the Certificate, namely what exactly was affected and meant to be protected with the Certificate. In the following chapter, “The New Health Wall and the EU Covid Digital Certificate”, subdivided in two subchapters, I will analyze the underline question of discrimination between vaccinated and unvaccinated individuals and, in the following subchapter, the question of whether the Certificate obeys and respects to the principle of proportionality. Finally, I will present my conclusions in the final two chapters.

Discrimination, data privacy, impact on private and family life are all matters that are worth a broader development but in this project, I propose that the focus should be the linkage with the right to free movement since the main objective of the Certificate is the return to its normalcy. Will the Certificate fundamentally change mobility within the EU?

II. EU and Health: the impact of the covid-19 outbreak

It is important to note that the EU’s intention to expand the cooperation in matters of health is not completely new.

The pandemic has unpeeled the social fragilities and cultural blind spots that we have grown accustomed to, highlighting the importance of the EU institutions and national governments as active and attentive mechanisms in our day to day lives¹¹. Yet, despite the EU

¹¹ Alex Villas Boas, *A cegueira pandémica Saramaguiana como Metáfora da Época*, (Estudos de Religião, v. 34, n. 3, 2020).

appraisal and concern with health conducts, the relationship between EU and Health has not always been evident.

As said in article 168 TFEU and article 35 of the Charter of Fundamental Rights of the European Union, it is imperative that everyone has access to a “high level of human health protection” in all EU activities. Traditionally, public health has been seen as a joint competence under the principle of conferral, in article 5 TUE¹², and of supplementary competence, as seen in article 5 (3) TEU, 6 a) TFEU and article 2 (2), 4 k) TFEU. Its protection was first included in the 1957 European Economic Community Treaty (EEC), but only acknowledging that trade could be restricted to a certain level if health was threatened, permitting restrictions on imports and exports to protect the health of animals, humans, and plants in a proportional manner. Furthermore, the Treaty establishing the European Atomic Energy Community has put in place provisions concerning radiation safety and research and, in 1992, the Maastricht Treaty introduced an explicit consideration on a broad view of public health in article 129, now article 152, promoting measures that can improve human health. However, it was established that there is no similar standard of health care in the EU and that the Member States have the liberty to organize their own health care systems. Hence, it still remains a minimum standard where Member States are obliged to comply with Community law and ensure that no financial obstacle is imposed to a patient seeking medical care in another Member State¹³. Overall, the

¹² Number 2 and 3 of article 5 TEU clearly refer that the Union can only act within the limits of the competence given and to obtain the objectives set on the Treaties, not exceeding the principle of proportionality. In the German Federal Constitutional Court judgment, it was understood that the EU does not, however, require the principle of Kompetenz- Kompetenz to be in place and that, in order to achieve the desired integration, the EU must respect the Member State national identity, as stated in Czech Constitutional Court Judgment of 26 November 2009 and in the stance taken by the Polish Constitutional Court in the Judgment of 24 November 2010. The principle of subsidiarity, on another hand, theorizes that the Union, to achieve its objectives, shall only act in the smallest way possible without overstepping or using unnecessary means to do so. This principle is only applicable in non-exclusive competences as seen in article 5 (3) TEU, although, if a better result can be achieved, reach further into those resources. See Hermann-Josef Blank, Stelio Mangiameli, *The Treaty on European Union- A commentary*, (Springer Publisher, 2013)

¹³ Martin Mckee, Laura Maclehorse, Ellen Nolte, *Health Policy And European Union Enlargement*, (European Observatory On Health Systems And Policies Series, Open University Press, 2004),

administration of public health remains almost exclusively in the hands of the Member States¹⁴, except for common safety concerns such as the protection of the internal market. However, and amidst a dangerous pandemic, the EU has shifted gears and introduced itself as a more active player in the health sphere.

When the pandemic hit, the European Commission presented a proposal for a Common European Response that makes it clear the need to communicate, coordinate timely responses and make sure that the decision-making process is based on science and not fear. Hence, a common framework that highlights caution and a risk base system is drawn where circulation between Member States, inherently linked to the concept of EU citizenship, seems far from free. As facilitating freedom of movement is “one of the conditions for starting economic recovery”¹⁵, the EU Digital Covid Certificate was developed under a “common understanding of the conditions which vaccinated people should be exempted from travel restrictions”. However, it is not the first time that the EU has focused its efforts on transmissible diseases. Since the 1980s, the EU has begun funding in research and monitoring networks, exploding in its significance with the anthrax alerts of 2001 and the global spreads of the SARS virus in 2003, followed by initiatives such as European Medical Corps Global and the Civil Protection Mechanism.

Additionally, following some initiatives such as the International Sanitary Conference in 1851 or the International Health Regulations in 1969, several revisions, under article 129 of the Maastricht Treaty, were introduced in EU safeguards on health in order to develop common surveillance agreements that would not only rely on national structures. In this sense, the European Working Group on Legionella Infection in 1999 and more recent communications on bioterrorism threats are examples of the benefits of an European structure of communication for an effective response to the initial detection or control of an outbreak. Nowadays, the structure of communication is based on two pillars: the Council for the European State Epidemiologists for Communicable Disease, and the Network Community, that combines

¹⁴Annette Bongardt, Francisco Torres, *Europe's Vaccine Paradox: From Supply to Demand issues*, (InterEconomics, 2021).

¹⁵ Council Recommendation (EU) 2021/961 of 14 June 2021 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, Point 6.

national surveillance structures with two experts from each Member State¹⁶. Hence, since 2018, the creation of an European Vaccination Information Sharing system and the creation of a virtual European Data Warehouse on vaccine needs in the Member States have been in the works¹⁷. In terms of disease communication and surveillance on disease control, it was established its importance to balance the interests of health and international trade since the beginning.

The EU, on 11 November 2020, has established the need to harmonize European, national and regional preparedness and response plans, complimented by an EU emergency system to ensure rapid action. More recently, on 3rd March 2022, the Council has adopted a decision that authorizes the opening of negotiations for the creation of an International Pandemic treaty, that focus on the prevention and on a common framework to deal with future pandemics. Additionally, the EU has accelerated its efforts in establishing a cohesive health partnership since the beginning of the pandemic with the help of agencies such as the European Centre for Disease Prevention and Control (ECDC), that monitors the epidemiological situation, the European Medicines Agency (EMA), that covers the safety of medicines, clinical trials and medical devices, and the most recent additions, in January and February 2021, of the new European and Digital Executive Agency (HaDEA) to help implement funding schemes for the EU4Health Program and the European Health Emergency Preparedness and Response Authority (HERA)¹⁸.

While practical measures have been advised, such as lockdowns, remote schooling and work and the use of masks and other social queues, the EU has focused its efforts on three main areas¹⁹: health and emergency response, economic relief and research funding on medical areas. From supplying medical equipment, funding health systems in need, ensuring a recovering plan with initiatives such as the Coronavirus Response Investment Initiative, Next Generation EU, amounting to 750 billion, the 540 billion of the SURE Program and a long-term collective budget of 1100 billion euros, or even by promoting private investment and

¹⁶ Martin Mckee, Laura Maclehorse, Ellen Nolte, *Health Policy and European Union Enlargement*, (European Observatory on Health Systems and Policies Series, Open University Press, 2004), pp.194.

¹⁷ European Commission, Roadmap for the Implementation of Actions by the European Commission based on the Commission communication and the Council recommendation on strengthening cooperation against vaccines preventable diseases, (2019).

¹⁸ Christoph Klika, *Health Crisis and the Growth of EU Agencies: The Response to the Covid Pandemic* (EIPA, European Institute of Public Administration, 2021).

¹⁹ European Commission, *The EU response to the coronavirus crisis*, 2020.

supporting small businesses and workers, the EU relies on solidarity and a coordinated action plan focused on the future on the EU.

In short, and as we will be developing further, the EU highlights the need to ensure free mobility with safety and caution. As one of the greatest appeals of EU living, free movement in all its shapes and forms has been replaced with careful guidelines that distraught daily routines. In this sense, although Member States have the right to control the entry and residence, limitations come with any given privilege and Member States must be held accountable for any transgression or exaggeration when pursuing this right. In this regard, the EU has taken a stand to ensure more clarity and predictability²⁰, advising common and timely effective measures that are meant to be a balance between protecting health and the internal market.

III. The EU Covid Certificate

The new coronavirus has triggered a global health emergency that has taken the lives of more than 6,064, 733 people, in a total of 456, 791,643 in 225 countries as of March 2022²¹.

Due to the nefarious effects of this new health crisis, the EU has, since the beginning, been pressured to take a more imminent action to protect the health of its citizens but also assuring that the economic and social constraints would not develop into a global and decadent crisis. Hence, and although the EU has allowed the Member States to introduce some restrictive measures on free movement to stop the spread of the virus²², the EU has focused on finding a solution that would ensure the gradual return to free movement while taking in consideration public health concerns and the evolution of the pandemic crisis. Therefore, on 13 May 2020, the Commission issued a communication attesting to the commitment to restore, in a phased and coordinated approach, the freedom of movement, while assuring some degree of flexibility

²⁰ European Commission, Coronavirus: Commission Proposes More Clarity and Predictability of Any Measures Restricting Free Movement in the European Union, (4 September 2020).

²¹ New York Times, *Coronavirus World Map: Tracking the Global Outbreak*, update of March 13 2022.

²² Proposal for a Council Recommendation on a coordinated approach to the restriction of free movement in response to the Covid 19 Pandemic of 4th September 2020. See also Communication from the Commission to the European Parliament, The European Council and the Council, *A common path to safe and sustained re-opening* of 17 March 2021.

to reintroduce previous restrictive measures if deemed as necessary. On 11 June 2020²³ and on 15 June 2020²⁴, the Commission reaffirmed this commitment, advising Member States to finalize the process of lifting restrictions to free movement as soon as possible and issuing a communication on short-term EU health preparedness for Covid-19 Outbreaks. Following these initiatives and lengthy negotiations between Member States, the EU Covid Certificate was born.

On 14th June 2021²⁵, the European Parliament and Council adopted the Regulation on the EU Digital Covid Certificate, set to be in force by 1st July 2021 and last for one year with the possibility of its renewal if deemed as appropriate²⁶. After the trial period or phase in period, from 1 July to 12 August, in which the Member State could chose to adopt other methods if the Certificate wasn't ready to be issued, the Certificate entered into force, being recognized by all Member States. The European Parliament requested, on April 2021, amid negotiations, that the name "Digital Green Certificate" would be replaced by the "EU Digital Covid Certificate", that the EU Member States that chose to adopt this initiative would not impose additional travel restrictions and that it's access would be universal, timely and free of charge. The Commission, however, has been careful to highlight that the domestic use of the Certificate continues to be a Member State competence, only recommending certain practices that could serve as a guideline for interested Member States. Hence, the Certificate can also be used for

²³ Communication from the Commission towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls — COVID-19 2020/C 169/03, C/2020/3250.

²⁴ Communication from the Commission to the European Parliament, the European Council and the Council on the third assessment of the application of the temporary restriction on non-essential travel to the EU, COM/2020/399 final.

²⁵ See Council Recommendation (EU) 2021/953 of 14 June 2021 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic and Regulation (EU) 2021/954 of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable Covid 19 vaccination, test and recovery certificates with regard to their country nationals legally staying and residing in the territories of the Member States during the Covid 19 Pandemic. See also Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the Covid 19 Pandemic.

²⁶ The Commission's work was develop by Commissioner Didier Reynders, Thierry Breton, Stella Kyriakides and Yiva Johanson in cooperation with Vice President Vera Jourová and Margaritis Schinas. On the same day, a second update to the Council Recommendation was issued establishing for vaccinated and recovered persons exemptions when travelling. See Council Recommendation (EU) 2021/961 of 14 June 2021 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the Covid 19 Pandemic.

domestic purposes but are entirely dependent on the will of the Member State, since the EU only predisposed the Certificate in order to facilitate free movement between the Member States.

Deemed as a digital, accessible, universal and free of charge document²⁷, the EU Certificate, to ensure that those who chose to not participate in vaccination initiatives would be included, unfolds into three different paths, either by recognizing the vaccination status of its holder, the negative result of an approved testing scheme²⁸ or a status of recovery²⁹ from Covid 19, which is valid for 180 days. The Certificate is designed to be a tool to facilitate movements within the European Union, preventing that Member States put in place restrictive and discriminatory measures. It is accompanied by a QR Code which attests to its authenticity and a gateway where the Certificates can be verified³⁰. As stated in point 14 of the Regulation 2021/953, the Certificate does not correspond to a travel document, as stated in article 3, nor does “ facilitate or encourage restrictions to free movements or (...) to other fundamental rights or should it replace health measures. Instead, the Certificate intends to help EU citizens and

²⁷ Iris Goldner Lang, *EU Covid Certificates- A Critical Analysis*, (Article in SSRN Electronic Journal, January 2021), page 4; Point 17 of Council Recommendation (EU) 2021/961 of 14 June 2021 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic and Regulation (EU) 2021/954 of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable Covid 19 vaccination, test and recovery certificates with regard to their country nationals legally staying and residing in the territories of the Member States during the Covid 19 Pandemic. Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic.

²⁸ The NAAT Tests (Nucleic acid amplification test), including RT-PCR tests and rapid antigen tests are, as of March 2022, the only tests approved on the Council Recommendation 2021/C 24/01 for the emission of an EU Digital Covid Certificate. However, the admission of both or neither are the choice of the Member State that issues the Certificate. The test result is admissible for no more than 72 hours before travelling and a negative antigen test is valid if emitted for no more than 24 hours before travelling. The Council Recommendation of 21 January 2021 has admitted a common framework for the usage of antigen tests, set on a common list of admissible tests produced by the Health Security Committee of 18 February 2021 Recommendation and the mutual recognition of Covid-19 tests.

²⁹ For the recovery Certificate, the NAAT (Nucleic acid amplification test) such as the RT-PCR test are the only ones admissible and can be issued 11 days after the date of the initial test.

³⁰ Regulation (EU) 2021/953 of the European Parliament and 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, point 18.

residents to move more easily, avoiding some restrictions that the Member States may choose to impose, such a quarantine or additional testing.

On October 2021³¹, the Commission issued a first report on the effects and success of the EU Digital Covid Certificate, stating that the Certificate has helped to mitigate the effects of the economic effect benefiting from a new “innovative, privacy-friendly global standard”³². On 25th November 2021³³, the Commission proposed to update the EU Regulation of 14th June due to the increase of the vaccines distributed and the use of booster vaccines, proposing a focus on a person base approach to travel measures, not being subject to additional restrictions and a nine month acceptance period of vaccination certificates. These initiatives were followed by a the monitorization of the effects of booster vaccines. and a simplified emergency procedure, deemed to be more operational and combined with the updates of the EU traffic light that highlights a region’s vaccine uptake. On 21 December 2021³⁴, the Commission introduced some new rules for its usage for the purpose of cross-border travel. It was established a binding acceptance period of 9 months (or 270 days) of vaccination Certificates since the completion of the first shot, adding 270 days for the second shot if recommended by the vaccination strategy in force, but not included in the standard acceptance period the booster doses³⁵.

On January 2022, the Council agreed to update the rules, stating that the holders of a valid Certificate should not be subject to other restrictions when travelling to other EU Member

³¹ See also Draft Council Recommendation on a coordinated approach to the restriction of free movement in response to the Covid 19 pandemic 11689/1/20.

³² Press Release of 18 October 2021, *The EU Digital Covid Certificate: a global standard with more than 591 million certificates*.

³³ Press Release, *Coronavirus: Commission proposes to strengthen coordination of safe travel in the EU* (2020).

³⁴ Commission Delegated Regulation (EU) 2021/953 of the European Parliament and of the Council as regards the acceptance period of vaccination certificates issued in the EU Digital Covid Certificate format indicated the completion of the primary vaccination series.

³⁵ See point 5.2 “Booster doses” of Commission Implementing Decision (EU) 2021/2301 amending the implementing Decision (EU) 2021/1073 laying down technical specifications and rules for the implementation framework for the EU. According to this section, for each vaccine dose a new EU Digital Covid Certificate must be included, being recorded as: 3/3 for a booster dose after the primary 2 dose vaccination scheme, 2/1 for a booster dose following a single dose of a vaccination scheme or, in the case of a recovered patient of a 2 dose or a one dose of the vaccine.

State. As of February 2022,³⁶ the European Commission proposed several changes in the light of the recent evolution of the pandemic situation. In its proposal, the European Commission recommends the extension of the EU digital Certificate for an additional year, until 30th June 2023, while also recommending the inclusion of antigen tests conducted in laboratories, the verification that the Certificate is correctly portraying the correct amount of doses of vaccines administered, even if one or more is received in a different Member State, and finally pushing forward to a new type of Certificate for those who have participated in the vaccine trials. The aim is to further facilitate travel since non-EU travelers who are vaccinated with an EU or WHO vaccine should be able to travel to the EU, if they have received the last dose of the recommended vaccination scheme at least 14 days and no more than 270 days before arrival, or if they have received a booster dose. In addition, a recovered patient of Covid can travel if, within 180 days prior to the travel, they can prove their recovery with an EU Covid Certificate or similar document.

The Commission, however, has been careful to highlight that the domestic use of the Certificate continues to be a Member State competence, only recommending certain practices that could serve as a guideline for interested Member States.

Hence, and as Thierry Breton³⁷ has said, “With more than 1.2 billion certificates issued and sixty countries connected, the EU Digital Covid Certificate has become a global standard “(...) and an important enabler of free movement and travel even in times of uncertainty”. The focus is, therefore, to reestablish and facilitate cross border movement while minimizing the risk of transmission, relying heavily on clear and permanent communication between Member States and on the technological innovations that facilitate the rapid interchange of (sensitive) information, accessible to everyone and everywhere in a safe manner. However, some concerns have emerged about its practicability and validity.

³⁶ European Commission Press Release of 3 February 2022, *Coronavirus: Commission proposes to extend the EU Digital Covid Certificate by one year*; Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2021/954 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic; Regulation amending Regulation (EU) 2021/953 on a Framework for the issuance, verification and acceptance of interoperable Covid-19 vaccination, test and recovery certificate of 3 February 2022.

³⁷ European Commission Press Release of 3 February 2022, *Coronavirus: Commission proposes to extend the EU Digital Covid Certificate by one year* (2022).

IV. You too shall (not) pass: discussing free movement of persons in a pandemic

The Covid-19 pandemic has made an undeniable global mark, reshaping the way we interact, the way we think and the way we move. As Ursula von der Leyen highlights, the EU has vowed “to protect the health of all European citizens (...) We are changing the way we address cross-border health threats”³⁸ and the pandemic has highlighted the need for more coordination in the EU, more resilient health systems and better preparation for future crisis.

Freedom of movement is undeniably one of the biggest conquests of the EU project, promoting worry-free and cordial relations in a well-functioning internal market, as set in article 26 TFEU, cultural interchange, legal migration and borderless job and living opportunities. In particular, the free movement of persons, mentioned on article 3(2) TEU, article 4(2) a), 20, 21, 26 and 45 to 49 TFEU, Protocol n°4 article 2 of the ECHR and article 15 and 45 CFR, covers the right to enter and move within the territory of another Member State as well as the right to stay, work and live in that Member State³⁹. Initially developed having in mind workers⁴⁰ and other economic active persons, it has since broadened, attaching itself directly with the concept of EU citizenship, in article 18 to 25 TFEU⁴¹, including in its scope individuals that are not economically active⁴². The free movement of persons is linked to the concept of EU citizenship, set in article 9 TUE, 18 to 25 TFEU, Directive 2004/38 and article 39 to 46 of CFR, that signifies the possibility to benefit from freedom of circulation as a sign of supranationality⁴³. As mentioned in article 20 n°2 TFEU, an European citizen has the right

³⁸ Directive 2004/38/EC of the European Parliament and of the Commission on the right of citizens and their family members to move and reside freely within the territory of Member States (2004) OJ 1158.30.4.2004.

³⁹ Hana Horak, Rajko Kenz, *Law Of The European Union: A Textbook For Master Students*, (Publishing House, 2016).

⁴⁰ The definition of worker, mentioned in article 45 TFEU, was developed by ECJ case law in a broad, inclusive and impartial way in cases such as *Lawrie Blum* and *Trojani*. See Armin Cuyvers, *Free Movement of Persons in the EU*, (Chapter 11A, Leiden University, 2017).

⁴¹ Yuriy Voloshyn, Nataliia Mushak, *Impact of Covid-19 on the Realization of freedom of movement in the European Union and its Member States*, (Atlantis Press, Advances in Economics, Business and Management Research, volume 170, 2021).

⁴² Armin Cuyvers, *Free Movement of Persons in the EU*, (Chapter 11A, Leiden University, 2017), page 9.

⁴³ Miguel Gorjão-Henriques, *Direito da União- História, Direito, Cidadania, Mercado Interno e Concorrência*, Almedina Editores, 9ª Edição, 2020.

to reside, stay and move freely within the Member States territory and in the Schengen area. However, and as set in article 21 TFEU and article 45 n°3 TFEU, reasons of public policy, health and safety can serve as a justification for the suppression of such right. The Covid 19 pandemic disrupted the core functioning of the Schengen area⁴⁴, limiting the freedom of transit within the EU.

Therefore, amid covid times, new restrictions have clouded earlier practices of limitless traveling and threaten the future of movement unity. New guidelines for both leisure and professional traveling have emerged, which are subject to constant update due to the development of new variations of the virus and increased levels of risk. The reintroduction of border controls, as seen in article 25 of the Regulation (EU) 2016/399, Article 12 of the International Covenant on Civil and Political Rights, article 28 of the SBC, article 45 (3) TFEU and article 27 of the Citizen Rights Directive, are admissible in exceptional terms and obeying specific procedural safeguards such as notifying the Commission and other institutions that can evaluate the necessity and adequacy of those measures. All restrictions must, therefore, be necessary, proportionate, objective and non-discriminatory⁴⁵. Additionally, and under article 27 and 29 of the Free Movement Directive 2004/38/EC, the measures that rely in public health concerns must be in place to fight diseases with epidemic potential, being non-discriminatory between Member state's own nationals and other resident EU citizens either when admitting entry, seeking residence or wanting to return home. Hence, the pandemic crisis that we face today has been included as a serious threat to public policy since it interferes in one of the fundamental interests of society⁴⁶.

To seek a solution, under Regulation (EU) 2021/953⁴⁷, complemented by Regulation (EU) 2021/954, it was established a common framework for an EU digital Covid Certificate

⁴⁴ When the pandemic erupted, the European Commission published a practical guide to ensure free movement of workers that provide services and goods that live in one Member State and need to cross to another, and therefore are considered to occupy critical positions, since Member States started creating border controls.

⁴⁵ Elspeth Guild, *EU Fundamental Rights, Human Rights and Free Movements in times of Covid19* (Queen Mary University of London, School of Law, 24 July 2020).

⁴⁶ Daniel Thym, Jonas Bornemann, *Schengen and Free Movement Law during the first phase of the Covid-19 Pandemic of Symbolism, Law And Politics*, (European Papers, Volume 5, 2020).

⁴⁷ Other pieces of legislation were emitted, although later updated. This is the case of Council Recommendation (EU) 2020/1475, later replaced by Council Recommendation (EU) 2021/119, which highlighted the need to an increased coordination when adopting measures regarding free movement and the prevention of the spread of the

that covered not only the vaccination status of the holder, but also the testing and recovery of the Covid-19 virus. This new document, although not singular in existence, has been polarizing and exhibits the unpreparedness and imminent division between the Member States. As further analyzed, the EU certificate has been promoted as a new pathway that ensures a safe return to free movement. However, some doubts have emerged about its legitimacy and ability to reach that goal.

V. The New Health Wall and the EU Covid Digital Certificate:

The pandemic has exposed the fragilities of the utopia of a borderless EU. The right to free movement across the EU has turned, therefore, into a fragile and crumbling concept that seems to be replaced by a new health wall. As European Commission President, Ursula Von der Leyen pointed out⁴⁸, “internal border controls do not stop the virus but are nevertheless a necessary and obvious measure to protect public health”. In article 6 CFR, it is established that no one should be deprived of liberty in an arbitrary manner and without recourse to judicial counter measures, but some restrictions, for instance in the name of public health, in article 35 CFR, can be justified⁴⁹.

The right to health is defined in the 1946 Constitution of the World Health Organization being perceived as a “complete physical, mental and social well-being and not merely the absence of disease or infirmity”⁵⁰ and presumes the complete enjoyment at the highest standards in all its aspects, such as medical care, the right to be free from non-consensual or degrading medical treatment, experiments or torturous behavior, without succumbing to any

virus. Alongside, the EC announced on June 1st the activation of the technical system that supports the emission and validation of the Certificates and the Implementing Decision 2021/1073 that laid down technical specifications for the trust framework of the Certificate. Also relevant is the EC Guidelines for border management measures to protect health and ensure the availability of goods and essential services C (2020) 1753 and Council Recommendation on a coordinated approach to the restriction of free movement in response to the Covid pandemic.

⁴⁸ Communication from the Commission to the European Parliament and the Council, *The European Economic and Social Committee and the Committee of the Regions, Building a European Health Union: Reinforcing the EU's resilience for cross-border threats*, 11.2020, COM (2020)724.

⁴⁹ Mariana Canotilho, Alessandra Silveira, *Carta dos Direitos Fundamentais da União Europeia Comentada*, Almedina Editores, 2014.

⁵⁰ World Health Organization, Office of the United Nations High Commissioner for Human Rights, *Right to Health*, Fact Sheet n°31.

type of discrimination, in a health system that promotes access to essential medicines and services, the prevention and treatment of diseases and the participation in health decision-making.

As Covid is without a doubt a disease with epidemic potential, included as a measure worthy of being a travel restriction under article 29 of the Free Movement Directive, the EU does not have a wide and unrestricted pathway where any restriction can be implemented without a proper procedure. Hence, in the name of the highest level of protection of health, or rather public health, in article 35 CFR, some restrictions may be imposed but in accordance with the law, proportionate and with a legitimate aim in mind.

The Schengen agreements, in article 26 and 29 SBC, resemble this line of thought since temporary border checks can be reintroduced if seen as a last resort measure in the face of a health measure, if the border check is not seen as an external border⁵¹ and if they are justified by reasons of public safety, public order or public health. These restrictions are, however, meant to be considered on an individual manner, based on specific and limited public grounds and in accordance with general principles of EU Law, such as proportionality and non-discrimination, as stated in point 6 of the Regulation 2021/953⁵². As seen in the number of Regulations and Directives that came into light, public health is a justifiable restriction when the danger of a contagious disease that has a level of transmissibility can be considered equivalent to a threat to public policy or internal security⁵³ and that, when assuring such restriction, no particular disadvantage to other nationals of Member States is proposed. Although, as set in article 21 SBC, the protection of human health is a primary responsibility of the State, the EU has supplementary competences, namely to reintroduce borders if seen as necessary, as set in article 29 (1). There is not an existing requirement that forces the Member States to establish a uniform response in the face of a crisis, since, the Member States are responsible for the administration of their health resources. However, the EU can interfere. Numerous health requirements have come to light and have become predominant. Symptom

⁵¹ Costica Dumbrava, European Parliament, *Briefing: Free movement within the EU*, (European Parliamentary Research Service Ideas Paper, Towards a more resilient EU September 2020).

⁵² Regulation (EU) 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 (Text with EEA relevance) PE/25/2021/REV/1.

⁵³ Veronika Sudar, Dunja Duic, *The impact of covid-19 on the free movement of persons in the EU*, (EU and Comparative Law Issues and Challenges Series, Eclis – Issue 530 UDK, 2021).

screenings, health forms, location surveillance, temperature checks have become part of a strategic framework that relies on a constant surveillance. The four main border measures used are typically the temporary border closures, with one of the main criteria the risk of transmissibility of new variants and the number of infections, the quarantine tracking and enforcement mechanisms, that could, as an example, be the usage of passenger locator forms or imposing quarantine for a limited period, the imposing on testing either on the departure, arrival or both and the imposition of proof of vaccination or recovery.

In the EU, Member States have presented the Covid Digital Vaccination as a solution to bend over the restrictions imposed to ease the spread of the new virus. However, some believe that the promise of European Standardization cannot be achieved by allowing Member States to choose the type of document and where it can be applied leading to even further difficulties in accessing how free movement should be managed⁵⁴.

The effects of the new health wall are highly demanding to supply chains and because of that the “Green Lanes” initiative was created to guarantee the smooth flow of medicines and medical equipment. As seen, urgency and the importance of solidarity have led the way when building a (temporary) health wall. The crucial concept of neutral freedom⁵⁵ has been replaced by a scheme of inter-state circulation do’s and don’ts that interferes directly with fundamental rights, and, because of that, any intervention must be evaluated under strict criteria that privileges proportionality and necessity over any financial gain. As we will be discussing further, the new health restrictions such as the EU Covid Certificate have introduced new and important questions regarding the future of the EU.

I) Biometric borders for the invisible virus- a purity criteria?

As the health crisis continues to develop, some restrictions have been lifted but not entirely. Whether to guarantee traveling exclusively for work and study purposes, essential trade and

⁵⁴ Pietro Brunetti, Francesca Negro, Simona Zaami, Enrico Marinelli, Alessandra Del Rio, Ginaluca Montanari Vergallo, *Does the EU Covid Digital Health Certificate strike a reasonable balance between mobility needs*, (Medicina 2021).

⁵⁵ Sophie Robin-Olivier, *Free Movement of Workers in the Light of the Covid-19 Sanitary crisis: from Restrictive Selection to Selective Mobility*, (European Papers, A journal on Law and Integration, Vol.5, 2020, N°1, European Forum).

business⁵⁶, the Member States have been engaging in all sorts of measures to fight the spread of the virus.

Being integrated in the legal framework of the internal market, the principles of prohibition of non-discrimination, mutual recognition, appraisal for community legislation and harmonization have influenced the way that the institutions have acted in pandemic times and have guided the way in which the Certificate, promised as a revolutionary and indispensable tool for these new times, should be issued. As mentioned in the introductory chapter, the discrimination issue is too broad to fully develop in this project, but a significant note can be highlighted in terms of its impact on free movement.

Although discrimination is usually linked to nationality, the Certificate raises criticism for the potential two tier society that discriminates the non-vaccinated individuals⁵⁷. Hence, in point 36 of the Regulation 2021/953 it is established that direct or indirect discrimination should be prevented and, in order for that to happen, the Certificate and, by analogy, the biometric data within, should not be a “condition for the exercise of the right of free movement or for the use of cross- border passenger transport services and (...) in addition, this Regulation cannot be interpreted as establishing a right or obligation to be vaccinated”. However, some doubts about the practicability of these claims have come into the spotlight.

First and foremost, the Certificate concerns individuals in three different categories⁵⁸. First, it concerns EU citizens and third country nationals that have been vaccinated, second, those who have recovered from the virus and, finally, those who can produce a negative result. By default, the introduction of these three categories seems to widen the range of the Certificate coverage, but it also highlights the fact that discriminatory patterns can be an underlying disease on its application. In article 21 CFR, article 26 of the International Covenant on Civil and Political Rights, article 20 (2) TFEU, it is highlighted that any discrimination based “on any ground such as sex, race, color (...) and genetic features” is not allowed to foresee those individuals are treated and receive equal and fair opportunities when navigating in the society. This principle, therefore, means that no group of individuals should be treated less favorably or be subject to a disadvantage that directly or indirectly links to their predisposed and

⁵⁶ Council Recommendation (EU) 2021/961 of 14 June 2021 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic.

⁵⁷ Paul Dolan, Steve Baker, *Vaccine Passports will create a two-tier society*, (The Sunday Times UK, September 6 2021).

⁵⁸ Iris Goldner Lang, *EU Covid-19 Certificates: a critical analysis*, (Article in SSRN Electronic Journal- January 2021, European Journal of Risk Regulation, I-10).

unchangeable features. In this sense, the use of a Certificate that distinguishes between vaccinated and unvaccinated individuals, has been questioned as a potential threat to this principle since the request of a proof of a certain genetic or biological disposition that, subsequently can produce an advantage or disadvantage, can lead to the conclusion that one individual, either by choice or impossibility by physical condition, is less important than other.

In this sense, the classification of unvaccinated individuals in a different category, as the “living dead”⁵⁹, could lead to a deeper socio-political cleavage based whether on a moral or political driven rhetoric⁶⁰. Hence, mistrust, stigmatization, and exclusion of participation in some social activities could dominate everyday interactions, such as employment or access to public events or locations and create social barricades that compromise freedom of thought and mutual respect. Therefore, the fact that the Certificate is only viable for vaccines approved by the European Medicines Agency (EMA) could ultimately unfairly exclude non-EU residents that got another vaccine not included in the approved list could constitute an unjustified measure that discriminates even before two vaccinated individuals.

Some⁶¹ believe that a distinction between seropositive and seronegative and, in connection vaccinated and unvaccinated people, is inevitable. The Certificate has, therefore, been accused of supplying an underlying message that the vaccines equal economic and social benefits, unfolding on social cues that translate a negative implication of the option or impossibility to be vaccinated. Hence, even in the cases where a possible immunity can be uncovered by infection or vaccine coverage some discriminatory behavior is visible mainly because of the uncertainty surrounding the virus and the concept of immunity itself. Underlying the discrimination issue, there is a problem of distributive justice, especially relevant when considering the case of developing countries, that should not deprive anyone of their fundamental rights. To avoid phenomena such as free riding or voluntary exposure to the virus to obtain immunity and avoid financial setbacks, it is important to ensure that any distinction between vaccinated and unvaccinated individuals remains solely for public health reasons and

⁵⁹ A. Kayum Ahmed, *The Human Rights to Vaccines: Preventing Discrimination Against the Unvaccinated*, (HHrJournal.org, 15 February 2021).

⁶⁰ Alexander Bor, Frederik Jorgensen, Michael Bang Petersen, *Prejudice Against the Vaccinated and the Unvaccinated During the Covid-19 Pandemic: A Global Conjoint Experiment*, Department of Political Science, Aarhus University, 18 February 2022.

⁶¹ Inigo De Miguel Beriain, Jon Rueda, *Immunity passports, fundamental rights and public health hazards: a reply to Brown et al.* (Med Ethics, October 2020).

does not translate into an unlawful or overly demanding pressure to be vaccinated. Hence, some indirect discriminatory measures could be justified if they correspond with a real necessity, are appropriate and necessary towards that end, and if the discriminatory measure is based on objective and ethically justified grounds⁶².

At the same time, it has been discussed the need to ensure that individual sensibility⁶³, where every person reacts in a different way to the same viral aggression, linked to the genetic property, should be considered when approving measures that limit, in any way, the right to free movement. Even if we admit that some differentiation can be in place because of risk assessments and high pressure societal environments⁶⁴, the introduction of a purity criteria based on the existence of a vaccination status can be a highly disrupting measure of rule of law and fundamental rights, since the introduction of an incentive, even if indirect, to obtain a financial or social gain, can enforce the building of a binding legal framework that ultimately denies any consideration for special situations where one must not be subjected to a fairly new and experimental vaccine. Therefore, a consideration for the variety of situations should be discussed.

Hence, introducing the certificate as a way of pushing forward a purity criterion that unlocks all sorts of economical and societal gains and does not take in consideration even the fact that not all vaccine types and certificates are accepted and recognized globally can ultimately lead to policies of exclusion that undermine the rule of law and core principles of a democratic society. In this sense, if not careful, the vaccine certificate as a binding legal instrument could even lead to a legal requirement to discriminate⁶⁵, particularly when border closures signify a wall towards migrants and foreigners. However, it is also important to note that although non-vaccinated people are not in an equal footing that does not necessarily mean

⁶² Alberto Giubilini, *Why Covid Passes are not discriminatory (in the way you think they are)*, (The Conversation, 2021).

⁶³ Jean Charles Sournia, Jacques Ruffie, *As epidemias na História do Homem, Perspetivas do Homem*, (edições 70 LDA, Flammarion, 1984).

⁶⁴ Oskar Josef Gstrein, Dimitry Vladimirovich Kochenov, Andrej Zwitter, *A terrible Great Idea? Covid-19 Vaccination Passports in the Spotlight*, (Working Paper n°153, March 2021, University of Oxford, Centre on Migration, Policy & Society).

⁶⁵ Oskar Josef Gstrein, Dimitry Vladimirovich Kochenov, Andrej Zwitter, *A Terrible Great Idea? Covid-19 Vaccination Passports in the Spotlight*, (Working Paper n153, March 2021, University of Oxford, Centre on Migration, Policy & Society).

that discrimination is the only possible occurrence. If offered alternative requirements the Certificate can accomplish the goal of non-discrimination with flying colors. What is not acceptable is the idea that, first, those who are vaccinated are in a spectrum of privilege and first-class citizenship⁶⁶, and second, that no difference is better than any difference at all, since that would both be social and economic illogical. In this sense, although discriminatory behavior can be a reality, the use of the Certificate while in dialogue with other types of proof of a health status, seems enough self-aware to miss falling in the trap of a highly controversial discriminatory behavior that wouldn't be acceptable.

II) Borders traffic lights: proportionality and suitability of the EU Covid Digital Certificate

Since the beginning of the pandemic, many suggestions have been tested to guarantee a safe return to free movement. In March 2021, two regulation proposals were proposed by the EC that followed the Council Recommendation 2020⁶⁷, where it was established the need to apply the same rules to both EU and non-EU nationals residing in a member state, providing for standardization measures that could ensure a safe return to travel and the safety of all concerned.

Taking as a mold the yellow fever certificate, the only vaccination system established under the International Health Regulations, and other vaccine requirements on African and South African countries, the Certificate takes as a main goal to facilitate safe cross-border movement, ensure a less restrictive measure, coordination and non-discriminatory standards when addressing future practices in the times of pandemic while complying with public health requirements. As Commissioner for Justice, Didier Reynders⁶⁸ has established, “our right to move freely in the EU has been heavily impacted by the pandemic. For the many citizens who rely on frictionless travel every day, the cacophony of national rules in the EU is overwhelming. We want to simplify things. We are proposing a straightforward criterion, applicable without

⁶⁶ Iris Goldner Lang, *EU Covid-19 Certificates: a critical analysis*, (Article in SSRN Electronic Journal- January 2021, European Journal of Risk Regulation, I-10).

⁶⁷ 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.

⁶⁸ European Commission, *Coronavirus: Commission Proposes More Clarity and Predictability of Any Measures Restricting Free Movement in the European Union*(4 September 2020).

discrimination, which are easy to follow by Member States and allows to inform Europeans properly”, and the Certificate is the product of such necessity.

In essence, the Certificate is a tool designed to facilitate and ease in to the new normal and cannot be held as a travel document. Some argue, however, that the Certificate may be more of a problem-creator than a problem-solver⁶⁹. Evenimentul Zilei warns about the construction of a health apartheid⁷⁰, built around the pretext of protecting an individual and societal health that prioritizes common health standards in detriment of personal liberties. In fact, some mixed reactions have brought forward the potential risks of its over-enthusiastic usage that, when adding low resources and insufficient scientific resources leading to a false sense of security, could result in more harm than good. As an upside, the usage of an interoperable system of certification on the state of immunity allows for a cohesive approach towards freedom of movement, where one national of a Member State, in theory, will not have different conditions of entry in different Member States. As a downside, some⁷¹ believe that there is an illegitimate coercion towards vaccination to get an economic or social benefit that diminishes the rule of law and corrupts the idea of science itself.

In this sense, we can ask several different questions: does the Certificate keep its promise of allowing a safety cross border movement? Is it sufficient, efficient, and necessary to comply with that objective? Are there any other measures, such as testing or even travel bans, that can achieve that objective at a lower cost?

When addressing free movement, the European Parliament urged the Member States to adopt only necessary, coordinated, and proportionate measures especially when restricting travel and establishing cross-border movement, having in mind the return of “a fully functioning Schengen Area as a part of a crisis exit strategy”⁷². In Point 33 of the Regulation

⁶⁹ Grigoris Sarlidis, *EU: Digital Green Certificates- problem- solver or problem-creator?*, (One Trust Data Guidance, 2021).

⁷⁰ European Roundup, *EU Covid-19 Certificates: tough luck for the unvaccinated?*(April 2021).

⁷¹ Pietro Brunetti, Francesca Negro, Simona Zaami, Enrico Marinelli, Alessandra Del Rio, Ginaluca Montanari Vergallo, *Does the EU Covid Digital Health Certificate strike a reasonable balance between mobility needs*, (Medicina 2021).

⁷² Ottavio Marzocchi, *The Impact of Covid-19 Measures on Democracy, the Rule of Law and Fundamental Rights in the EU*, (Policy Department for Citizen’s Rights and Constitutional Affairs, 23 April 2020); European Parliament Resolution of 17 April 2020 on EU coordinated action to combat the Covid 19 pandemic and its consequences (2020/2616(RSP)).

(EU) 2021/953⁷³ it is established that waiving certain restrictions of free movement are possible but should always be based on the latest available scientific evidence and never discriminatory, waiving in on the importance of the precautionary principle as a standard of practice. Hence, the assessment of a measure as proportional must consider the impact on free movement. Of course, it is arguable that even the most restrictive measure can be proportionate by scientific knowledge at the time available and some justification can be achieved at a certain level, but when considering if it surpasses the reasonable take on what is proportional it must be deemed as unsuitable.

When discussing this topic, it is crucial to address the thematic of the principle of proportionality to assess its suitability and balance between the potential to mitigate the risks of the virus and the intrusion on fundamental human rights. As a primary doctrinal tool for the resolution of conflicts between a right and a competing right or interest⁷⁴, the principle of proportionality, set in article 5 (4) TUE, was introduced to ensure that the exercise of political powers that pursue a legitimate goal is done in such manner that it didn't unnecessarily interfere with goals such as competition and free movement, assessing the manner in which the EU institutions exercise their powers in relation to the Member States and individuals⁷⁵. In this sense⁷⁶, the ECJ has established that any intrusion on the rights of an EU citizen must be limited to what is strictly necessary to achieve a certain goal and must require a minimal sacrifice by those affected.

As Bernard Schlink⁷⁷ suggests, any balancing of rights, interests or values is unavoidably subjective and requires the seriousness of any rights-infringement to be matched by the importance of a competing right or public interest⁷⁸, which ultimately means that any

⁷³ Regulation (EU) 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 (2021).

⁷⁴ Kai Moller, *Proportionality: Challenging the Critics*, (Oxford University Press and New York University School of Law, 2012).

⁷⁵ Joanna Dlugosz, Adam Mickiewicz, *The principle of proportionality in European Union Law as a Prerequisite for Penalization*, (2017).

⁷⁶ Ana Maria Guerra Martins, *Manual de Direito da União Europeia*, (Almedina Editores, 2018).

⁷⁷ Francisco J. Urbina, *A Critique Of Proportionality And Balancing*, (Cambridge University Press, 2017), page 210.

⁷⁸ *Ibid*, page 157.

restriction must be justified in terms of the gains of some other interest⁷⁹. In this sense, the ECJ when assessing the proportionality in the four freedoms of the EU must assess whether it falls within one of the exceptions and does not go beyond what is considered as proportional. The ECJ uses the three requirements previously referred by scholars such as Alexy, evaluating if the measure can be considered as suitable, necessary, and proportional *strictu sensu*, the latter being a balancing test that weighs conflicting interests against each other⁸⁰. The proportionality test can be divided into three tests: suitability, necessity, and proportionality *strictu sensu*, set by Alexy⁸¹ as the expression of the optimization concepts. As optimization concepts, they must be used as optimal as possible in terms of factual possibilities, in the necessity and suitability requirement, and in terms of juridical possibility, in the test of proportionality *strictu sensu*, allied with the legitimacy of governmental aims and purposes.

Therefore, the principle of proportionality requires that a legitimate goal is being pursued, usually linked to the protection of a person's physical or psychological well-being, that a rational connection between the means and the goal can be established and that the law in question must be necessary and less intrusive than other alternative effective measures that does not present itself as a disproportional burden and an unnecessary interference. When it comes to measures by the EU, the principle of proportionality is only violated when the action is set as manifestly inappropriate, but where it is the case of an action by a Member State the Court is stricter, evaluating if there are alternative measures less restrictive. In this manner, the Certificate, to oblige to the principle of proportionality, must be considered appropriate and necessary to achieve a certain goal, namely the safe return to cross-border movement, both in leisure and professional matters.

⁷⁹ Ibid, page 106. The concept of balancing is not unanimous. Mathias Klatt and Moritz Meister propose, following the premise that there are no absolute rights, that it is impossible to balance principles abstractly and we must refer to only concrete cases. Stravos Tsakyrakis defends that there is a risk of neglecting moral evaluation and distort the value of fundamental individual rights, which could ultimately lead to quick and wrong decisions.

⁸⁰ Ibid, pp.23.

⁸¹ Robert Alexy, *Ensayos Sobre La Teoria De Los Principios Y El Juicio De Proporcionalidade*, (Palestra Editores, Lima, 2019). Robert Alexy establishes a difference between rules and principles that is yet consensual. Alexy's assumes that balancing or, rather, an attempt of balance is only possible, because the rights discussed are set as principles and not rules, the later defined as definitive commands. By contrast, principles are set as optimization commands that can be fulfilled at "the greatest extent possible given the legal and factual possibilities" and its proper extent can be brought by balancing, a complex and controversial method.

The legality of the Certificate relies on whether the deprivation of liberty is the only way to safeguard public interest⁸², deemed as a legitimate purpose that should be accounted for by law and based on the assumption that the holder of the Certificate does not represent a public health threat or, at least, minimize substantially the risk of transmission⁸³. In this sense, it is of utmost importance to respect the right to physical integrity and that any restrictions to this right must observe the principle of proportionality specially when confronted with other fundamental rights in conflict⁸⁴. The right to promote public health aims to translate the relevance of public health as an EU principle in a way that it can demand the defense and promotion of communal health but cannot demand it in the private sphere⁸⁵. In this sense, any restrictions to free movement must be based on specific and limited public interest grounds that follow the general principles of EU law and do not unnecessarily compromise the scope of a person's freedom in an unnecessary and undignified manner⁸⁶. Additionally, to safeguard the suitability of the Certificate, it is always necessary to provide evidence that its usage would lead to the desired outcome.

In this sense, for the test of suitability, the first step is to see if the Certificate accomplishes its goal. As mentioned in point 12, 13, 14 and 29 of Regulation 2021/953⁸⁷ the aim of the Certificate is to facilitate the exercise of free movement between the Member States, ensuring a common framework that lifts restrictions in a coordinated matter that complies with recent public health concerns. The suitability analyses the relationship between the means and the end of a certain measure, which to be consider as such, the means must contribute in a real manner to achieve the measure's goal. Hence, as a point of comparison, the suitability test

⁸² Inigo De Miguel Beriain, Jon Rueda, *Immunity passports, fundamental rights and public health hazards: a reply to Brown et al.* (Med Ethics, October 2020).

⁸³ Iris Goldner Lang, *Are Covid Certificates the Answer to Safe EU travel during the pandemic?*, (The Petrie-Flom Center Staff, Harvard Law, 2021).

⁸⁴ Mariana Canotilho, Alessandra Silveira, *Carta dos Direitos Fundamentais da União Europeia*, (Almedina Editores, 2014), page 77.

⁸⁵ João Carlos Carvalho Godinho, *A (Re)discussão dos Fundamentos da vacinação obrigatória* (Almedina Editora, 2022).

⁸⁶ Council Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the Covid-19 pandemic of 13 October 2020.

⁸⁷ Regulation (EU) 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 (Text with EEA relevance) PE/25/2021/REV/1.

applied by the ECJ is not as strict as it could be since it seeks primarily in its analysis administrative and legislative decision-making that can be deemed as irrational or erroneous⁸⁸. Although the vaccine does not eliminate the transmission of the virus but rather prevents serious illness, hospitalization and death⁸⁹ and there is no firm scientific data that can assure the suitability of the Certificate in its full capacity, its introduction has certainly helped to recover the normality of cross border movement while assuring that health precautions are still in place. Because of this uncertainty, many have recommended that additional precautionary requirements still must be in place and only in that way the suitability requirement would be properly achieved. Nonetheless, to the goal of enhancing and facilitating cross border movement, as set in Regulation 2021/953⁹⁰, we can consider that the Certificate can achieve that aim because its holder can in fact benefit and travel with more ease, serving as a proof of a certain protection against the virus.

For the second test, the test of necessity examines if the Certificate is the most reasonable and less intrusive way to reach its purpose. This test is crucial since even if a measure can be considered as suitable, it can still be considered as too harsh or restrictive when comparing to other available options. Of course, and because the legislator has a certain margin of discretion, and if, in a foreseeable future the certificate is considered as less than necessary, the legislator must reconsider this selection. The ECJ has interpreted that necessity test implies that where there is a choice between several appropriate measures, the measure chosen must be the one that infringes less in individuals' freedoms⁹¹. In this line of thought, the Certificate must be the less restrictive and cause the minimum harm to the other interests at stake. Hence, when considering the option of introducing travel bans, or general lockdowns the Certificate can be, without a doubt, a powerful tool to curtail those measures that ultimately seem to interfere more with fundamental rights exercised in our day to day. However, when comparing to testing,

⁸⁸ Tor- Inge Harbo, *The Function Of Proportionality Analysis In European Law*, (Vol. 8, Brill Nijhoff Studies, 2015), page 105.

⁸⁹ Gabor David Kelen, Lisa Maragakis, *Covid-19 Vaccine: What you need to know* (John Hopkins Medicine, 2021).

⁹⁰ Regulation (EU) 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.

⁹¹ Tor- Inge Harbo, *The Function Of Proportionality Analysis In European Law*, (Vol. 8, Brill Nijhoff Studies, 2015).

in alternative to a global requirement to be vaccinated, the Certificate can seem as a more restrictive measure, but it is still, as seen by the WHO recommendation against the sole use of antibody testing⁹², the best possible option. The sole use of testing poses three main challenges, namely the economic cost that is implied by mass testing, the differential impact on low- and middle-income countries and isolated areas where testing could not be available and, finally, the fact that false negatives in the phase of incubation of the virus could lead to a false sense of security that ultimately would disrupt the good that comes with testing. Assuming that tests have sufficient accuracy and reliability, we must consider that testing as an independent alternative must give the same level of comfort that certificates do and admit a less intrusive way to the same pathway. As an example, if an employee has to be tested every other day of the week⁹³ or a routine traveler must be submitted to a test every time to cross the border, testing becomes a burden and additional step that could cause even more disruption to a daily routine. Hence, arguments against its scientific liability are also presented, since a negative test only represents a status of health that can rapidly change and lead to a sense of false security. Additionally, access to testing tools has to remain disconnected from personal wealth⁹⁴ but admitting that reality in the long run seems to be a challenge due to the economic pressure and high demand. In order to be a real and feasible alternative to the Certificate, it's utility would have to guarantee economic sufficiency, efficiency and equality in application, which seems to be a challenge.

Finally, regarding the principle of proportionality *strictu sensu*, it is analyzed whether there is a proper balancing between the damage made and the gain for the community, avoiding unnecessary costs, being, as mentioned by Paul Craig⁹⁵, a safety valve in which the negative consequences to the interests of the individual must be considered. As Alexy⁹⁶ mentions, costs in any confrontation of human rights are, until a certain extent, unavoidable but a rule of ponderation, where when a greater interference is made to a right, the great the importance of

⁹² HD Gunnarsdóttir, M S Sinha, S Gerke, T Minssen, *Applying the proportionality principle to Covid-19 antibody testing*, (Journal of Law and the Biosciences, Volume 7, Issue 1, January- June 2020).

⁹³ Ibid, page 6.

⁹⁴ Inigo De Miguel Beriain, Jon Rueda, *Immunity passports, fundamental rights and public health hazards: a reply to Brown et al.*, (Med Ethics, October 2020).

⁹⁵ Tor- Inge Harbo, *The Function Of Proportionality Analysis In European Law*, (Vol. 8, Brill Nijhoff Studies, 2015).

⁹⁶ Robert Alexy, *Ensayos Sobre La Teoria De Los Principios y El Juicio De Proporcionalidade*, (Palestra Editores, Lima, 2019).

protecting the other must be. Additionally, Danwitz⁹⁷ has referred that this test serves three main purposes, namely, to protect the interest of the individual, as a counter-assessment to the other tests that guarantees that the proportionality analysis will not merely rely in an assessment of efficiency in the relationship between the means and, finally, requires the identification of relevant legal interests and the fair balance that must be established between them. The test can be subdivided in two sides⁹⁸, in which, firstly, it is a balancing test, where the advantage given by the legislative measure must weighed against the disadvantages, in an equal footing, and, on another hand, an excessive burden test, in which it is assessed whether the disadvantage is not an excessive burden to the individual. In this matter, we can see if the intrusion on the person's right to free movement is significantly harmed in such way that cannot be tolerated.

The Certificate claims to ease the interference in the citizen's rights, displaying a concern with discriminatory behavior between vaccinated and non-vaccinated people, while maintaining itself as a non-mandatory document that is, otherwise, recommended. In this sense, the interference in the right to move freely of the individual seems to maintain itself as little as possible, requesting only the necessary medical information and pursues the goal to ease the way into regain some freedom when travelling in the EU. In terms of balance, and considering other (more restrictive) measures, the Certificate seems to strike a reasonable balance between the protection of public health and the interference in the individual rights and routine, in expectancy of regaining a daily ease when navigating social and economic spectrums. In this way, although subjecting medical history and personal data to a public eye, that interference does not go beyond what would be expected and seems to be self-limited. Hence, the Certificate does not force vaccination but, if that is the choice of the holder, it demonstrates that information to get a certain benefit.

In this sense, some have advised that for the creation of trust in the Certificate and its success, information campaigns that highlight the reasons, conditions and opportunities that justify the Certificate at the eyes of the public are necessary⁹⁹. In a more moderate stance, others believe that combining the two, where testing is available for those who are not eligible for the

⁹⁷ Tor- Inge Harbo, *The Function Of Proportionality Analysis In European Law*, (Vol. 8, Brill Nijhoff Studies, 2015).

⁹⁸ Ibid, page 98.

⁹⁹ Pietro Brunetti, Francesca Negro, Simona Zaami, Enrico Marinelli, Alessandra Del Rio, Ginaluca Montanari Vergallo, *Does the EU Covid Digital Health Certificate strike a reasonable balance between mobility needs*,(Medicina, 2021).

Certificate, can create the perfect system. Hence, an objective selection of requirements is, in itself, rational and acceptable in the same way that air force, military, high risk jobs select their elements in the name of security or health guidelines. In this sense, the requirement of a proof of recovery and/or testing covers the need to ensure that a minimal standard in health is achieved and not necessarily that the individual, because of its choices, is being neglected or punished. The Certificate grabs a solution that proposes to mute the “social panic button”¹⁰⁰ and the rush towards, as Agamben¹⁰¹ suggests, “irrational, disproportional” measures that “create a panic background” where everything is allowed. The Certificate, by remaining, in theory, as a choice stands in the edge of the proportional banner, open to its articulation with other elements that aim to protect the public health.

VI. Looking forward: where is the “new normal” headed?

A few years ago, designing a multilateral strategy to reintroduce EU internal borders would have been unthinkable¹⁰². Today, border checks, travel bans, sudden reintroductions of contention measures have become an accepted part of our reality that develops at the pace that the virus allows us too. As Stella Kyriakides¹⁰³, Commissioner for Health and Food Safety highlights “Health is more than ever an essential concern for our citizens. In times of crisis, citizens rightfully expect the EU to take a more active role. (...) The European Health Union is all about preparing for and facing up to common health threats together, as a Union”.

Global and European interdependence is a reality that is more than likely to persist and that means improving coordination of borders and learning from each other and from past mistakes. The crisis has demonstrated how crucial all the four freedoms are to the good health of the EU¹⁰⁴. The polarization and unequal stand towards internal and external borders have highly affected the understanding of the EU as a united front and has intimidated public perception into believing that the strongest element of the EU foundation is the most fragile. The “new

¹⁰⁰ Slavoj Žižek, *A pandemia que abalou o mundo*, Relógio d’Água, 2020.

¹⁰¹ Ibid, page 89.

¹⁰² Hanne Beirens, Susan Fratzke, Lena Krainz, *When emergency measures become the norm: post-coronavirus prospects for the Schengen Zone* (Migration Policy Institute, August 2020).

¹⁰³ European Commission, Press release, *Building a European Health Union: stronger crisis preparedness and response for Europe*, Brussels, 11 November 2020.

¹⁰⁴ Sophia Russack, *Report EU crisis response in tackling Covid-19: views from the Member States*, European Policy Institutes Network, 20 April 2020).

normal” represents an opportunity to do better, to challenge economic orthodoxies and to pursue sustainability and global economic growth. It represents a rupture with old tendencies to place individual interests before global needs, benefiting from digital innovations that have now taken center stage.

Hence, future initiatives to fight and eventually live with the virus must be inclusive, equitable and universal. No matter the status of vaccination, of economic and social placing, the usage of the Certificate must ensure, at the same time, that everyone is protected, which can require a special attention for particular groups that are most at risk for disproportionate impact¹⁰⁵. However, and because the inoculation progress stands at a different pace, equal grounds in order to return to normalcy are still an utopian idea that requires a great deal of work, where the Certificate can ultimately be a conductor to reinforce already forgotten practices that violate fundamental rights. It is expected that the Euroscepticism common in Czech Republic and Slovakia will continue to be the standard default regarding social and economic issues,¹⁰⁶ while some, as in the case of Sweden and Germany, remain with a general sentiment that profoundly rely and trust on the EU ability to take appropriate measures and that solidarity and cohesion will help go beyond damage control¹⁰⁷.

As the vaccine is one of the strongest and safest weapons when confronted with threats against public health, the “new normal” could signify the introduction of additional measures in the name of public health. In this sense, every State has the right and duty to protect the fundamental right to public health possibly by means of mandatory vaccination laws. Although the Certificate does not demand vaccination, it makes it appealing and recommends it at the highest level, which could ultimately open the door to national mandatory vaccination programs¹⁰⁸ that can ultimately be deemed as necessary, proportional and lawful. However, there is still no indication that the Certificate will necessarily mean that national schemes of mandatory vaccination will be in place, but only that, if deemed as necessary, there is a space to do so, taking into account that consent or any medical liability should be analyzed¹⁰⁹.

¹⁰⁵ United Nations Report, *Covid 19 and Human Rights: We are all in this together*, (April 2020).

¹⁰⁶ *Ibid*, page 3.

¹⁰⁷ *Ibid*, page 12.

¹⁰⁸ João Carlos Carvalho Godinho, *A discussão dos Fundamentos da Vacinação Obrigatória*, (Almedina Editores, 2022), pp. 126.

¹⁰⁹ *Ibid*, page 131.

As Thomas Piketty¹¹⁰ observes, it matters how we change our economic and social system. Member States should focus on common standards to assess risks to public health, that prioritizes harmonization rather than illustrating nationalist fears of loss of power. The new normal should be an opportunity to level the playing field: governments should be focused on common solutions, strong leadership, effective action and innovation. Going forward, the EU must be careful and support measures based on long-term initiatives of reciprocity and solidarity that prepares more thoroughly for humanitarian crisis.

VII. Conclusion

Outbreaks, epidemics and pandemics are a reoccurring fact of nature that is nonetheless taken by surprise and unpreparedness¹¹¹. In this sense, the current pandemic, although certainly not the first in human history, has opened the floor to the discussion of what to look forward in future pandemics or similar events.

As stated by Ulrich Beck¹¹², “we live in a risk society, the essence of all is uncertainty and therefore, we need a new political mobilization since risk is not transparent or equal to everyone (...)”, which ultimately needs a Europe that relies in unity and transparency”. Free movement has ceased to exist in the mold prior to 2020 and the EU must acknowledge that. In a way, the very same prerogative of having free movement between Member States without any state of control helped to spread the virus quickly. One thing is for sure, solving a health crisis cannot solely rely on established borders that are heavier with time and ultimately will do more harm than good. As an important step to solve the current health crisis, an effective joint management of external borders, namely by coordinating efforts between national and institutional authorities¹¹³, as well as information sharing, can help, alongside the Certificate, to reintroduce or, better yet, improve the way free movement is established. For the future, perhaps the EU mechanism, on article 222 TFEU, could be structured more efficiently and until there is sufficient evidence that the Certificate by itself can surpass these new challenges, other

¹¹⁰ Slavoj Zizek, *A pandemia que abalou o mundo*, (Relógio d'Água, 2020).

¹¹¹ Who Director- General, *Opening remarks at the Special Session of the World Health Association*, November 2021.

¹¹² António Covas, *A Contingência Europeia, As Linhas De Fratura E A Transição Para A União Política*, (Lisboa, Silabo Editores, 2016).

¹¹³ Hanne Beirens, Susan Fratzke, Lena Krainz, *When emergency measures become the norm: post-coronavirus prospects for the Schengen Zone*, (Migration Policy Institute, August 2020).

measures such as physical distancing or individual measures of protection should not be abandoned. Will the Certificate change the mobility in the EU? So far, the Certificate seems to be only an additional tool to gain some sense of security in this new age, powering through side by side with other measures. With consciousness that freedom of movement was taken from granted, the Certificate will certainly be a crucial part of this new societal design that is just now taking shape.

At the same time, an important link must be established between the economic crisis and the future of EU mobility. The level of debt, the crisis on supply chains and unemployment are direct consequences of the health crisis that we know live in. The long-term economic effects are still uncertain it is important to assure that the way forward is made with good conscience and good practices, where self-reliance meets cooperation. The Certificate means borderless solidarity and opens a path to a new route where pre-pandemic tendencies are not welcomed. The world is changing with every lockdown, every vaccine shot and every initiative to look forward and not back. Although not perfectly build, we can see the Certificate as a new version of an old tool¹¹⁴, taking as examples the requirement for proof of vaccination for the yellow fever or requirements for vaccines such as Hepatitis A or Cholera for North and West Africa travels, that has lingered and guided international traveling for decades¹¹⁵. The introduction of the Certificate with such a large spectrum cannot forget the urgency of proportionality, time limits and should always take in consideration that essential travel and commerce and the good functioning of the internal market are as high as a priority as any health crisis. Additionally, it is important to safeguard against a false sense of security, establish an internationally accepted framework and monitor closely the ethical issues that may occur with an unregulated usage of the Certificate. The Certificate is a product of extraordinary consequences and therefore should never be disconnected of its social implications and necessity¹¹⁶. Hence, as Dr David Nabarro mentions, if there is a strong possibility of implementing a system where “those with antibodies

¹¹⁴ Ahmed Sarif, Roslin Botlero, Nazmul Hoque, Nazmul Karim, Sheikh Mohammed Sariful Islam, Sheikh M Alif, *A pragmatic approach to Covid-19 vaccine passport*, (Vol. 6, Issue 10, 2021).

¹¹⁵ Similar initiatives to the EU certificate have emerged all around the world such as Gavi- the Vaccine Alliance and the Eastern Africa common pass or even the IATA travel pass.

¹¹⁶ Ahmed Sarif, Roslin Botlero, Nazmul Hoque, Nazmul Karim, Sheikh Mohammed Sariful Islam, Sheikh M Alif, *A pragmatic approach to Covid-19 vaccine passport*, (Vol. 6, Issue 10, 2021).

will be able to travel and work, and the rest will be discriminated against”¹¹⁷ such introduction should be reevaluated.

In conclusion, certificates should be temporary and used only if scientifically whole, essential, proportional and adequate to manage the pandemic. A Certificate should not equal a demand or force vaccination, nor should be a steppingstone towards a system where individual fundamental rights will be automatically diminished or ignored. Therefore, the Certificate should not be the only measure in place and should be accompanied by other resources that diminish the possibility of any discriminatory account.¹¹⁸

Bibliography

OFFICIAL DOCUMENTS:

Charter of Fundamental Rights of the European Union [2012] OJ C 326/02.

Consolidated Version of the Treaty of the European Union [2012] OJ C 326/26.

Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/44.

Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

Convention for the Protection of Human Rights and Fundamental Freedoms.

Communication from the Commission of 15 May 2020 Communication to the Commission Towards a Phased and Coordinated Approach for Restoring Freedom of Movement and Lifting Internal Border Controls – COVID-19 [2020] OJC 169/30.

Directive of the European Parliament and the Council 2004/38/EC of 30 May 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing

¹¹⁷ Ibid, page 6.

¹¹⁸ Iris Goldner Lang, *EU Covid-19 Certificates: a critical analysis*, (Article in SSRN Electronic Journal- January European Journal of Risk Regulation, I-10, 2021).

Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

Regulation 492/2011 of 5 April on the freedom of workers within Union and conditions of employment, L 141/1.

Directive 2014/54 on measures facilitating the exercise of right conferred on workers in the context of freedom of movement of workers, OJ L 128, 30.4.2014, p. 8–14.

Directive 90/364/CEE on the right of residence, L180, 13/07/1990 P. 0026 – 0027.

Directive 90/365/ CEE of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, L 180 , 13/07/1990 P. 0028 – 0029.

European Commission ‘Coronavirus: Commission Proposes More Clarity and Predictability of Any Measures Restricting Free Movement in the European Union’ (4 September 2020) available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1555

Council Recommendation (EU) 2021/961 of 14 June 2021 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021H0961>

European Commission, “eHealth Network- Guidelines on Value Sets for Digital Green Certificates” (2021), available at: https://ec.europa.eu/health/sites/default/files/ehealth/docs/digital-green-certificates_dt-specifications_en.pdf

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.

Health Security Committee of 18 February 2021 Recommendation setting a common list of admissible antigen tests.

European Commission Press Release of 3 February 2022, Coronavirus: Commission proposes to extend the EU Digital Covid Certificate by one year.

Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2021/954 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test, and recovery certificates (EU Digital COVID Certificate) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic.

Regulation amending Regulation (EU) 2021/953 on a Framework for the issuance, verification and acceptance of interoperable Covid-19 vaccination, test, and recovery certificate of 3 February 2022.

Commission Implementing Decision (EU) 2021/2301, amending the implementing Decision (EU) 2021/1073 laying down technical specifications and rules for the implementation framework for the EU.

Constitution of the World Health Organization (1946).

Communication from the Commission Guidelines concerning the exercise of the free movement workers during Covid 19 Outbreak 2020/C 102 I/03 OJ C 120I.

European Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, Building a European Health Union: Reinforcing the EU's resilience for cross-border threats, 11.2020, COM (2020)724 < https://ec.europa.eu/info/sites/default/files/communication-european-health-union-resilience_en.pdf> accessed 1 December 2021

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) COM/2021/130 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0130>

Protocol (N°19) on the Schengen Acquis integrated into the Framework of the European Union, C202/290, OJ C 202,7.6.2016.

European Commission, 'Roadmap for the Implementation of Actions by the European Commission based on the Commission communication and the Council recommendation on strengthening cooperation against vaccines preventable diseases', (2019), available at: https://ec.europa.eu/health/sites/default/files/vaccination/docs/2019-2022_roadmap_en.pdf

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

European Parliament resolution of 17 April 2020 on EU coordinated action to combat the Covid 19 pandemic and its consequences (2020/2616(RSP)).

Communication from the Commission Guidelines concerning the exercise of the free movement of workers during the COVID-19 outbreak 2020/C 102 I/03, (2020), C/2020/2051, 30.03.2020.

Joint European Roadmap towards lifting Covid-19 measures, European Council, European Commission, 17-04-2020, Official Journal of European Union, C 126/1.

BOOKS:

Jean Charles Sournia, Jacques Ruffie, *As Epidemias Na História Do Homem, Perspetivas Do Homem*, (Edições 70 LDA, Flammarion, 1984).

Lammy Betten, David John Harris, *The Future Of The Protection Of Social Rights*, (Springer Netherlands, 1989).

A.P Van Der Mei, *Free Movement Of Persons In The European Community, Cross-Border Access To Public Benefits*, (Hart Publish, 2003).

Martin Mckee, Laura Maclehose, Ellen Nolte, *Health Policy And European Union Enlargement*, (European Observatory On Health Systems And Policies Series, Open University Press, 2004), ISBN 0335 21353 7.

Paul Craig, Gráinne De Búrca, *EU Law: Text, Cases And Materials*, (5th Edition, Oxford University Press, 2011), ISBN 978-0-19-957699-9 .

Peter Hulsroj, *The Principle Of Proportionality*, (Springer Briefs, 2013), ISSN 2192-8568.

Robert Schutze, *An Introduction To European Law*, (Cambridge University Press, 2012), ISBN 978-1-107-02510-3.

Josef-Hermann Blank, Stelio Mangiameli, *The Treaty On The European Union (TEU)- A Commentary*, (Springer Publisher, 2013), ISBN 978-3-642-31705-7, DOI 10.1007/978-3-642-31706-4.

Mariana Canotilho, Alessandra Silveira, *Carta dos Direitos Fundamentais da União Europeia Comentada*, Almedina Editores, 2014.

Tor- Inge Harbo, *The Function Of Proportionality Analysis In European Law*, (Vol. 8, Brillijhoff Studies, 2015), ISSN 2210-9765.

António Covas, *A Contingência Europeia, As Linhas De Fratura E A Transição Para A União Política*, (Lisboa, Silabo Editores, 2016).

Hana Horak, Rajko Kenz, *Law Of The European Union: A Textbook For Master Students*, (Publishing House, 2016), ISBN 978-5-9273-2333-3.

Alina Kaczorowska-Ireland, *European Union Law*, (4th Edition, Routledge Press, 2016), ISBN: 978-1-138-84587-9.

Francisco J.Urbina, *A Critique Of Proportionality And Balancing*, (Cambridge University Press, 2017), ISBN 978-1-107-17506-8.

Vicki C. Jackson, Mark Tushnet, *Proportionality, New Frontiers, New Challenges*, (Cambridge University Press, 2017), ISBN 978-1-107-16556-4.

Ana Maria Guerra Martins, *Manual De Direito Da União Europeia*, Almedina Editores, 2018.

Robert Alexy, *Ensayos Sobre La Teoria De Los Principios Y El Juicio De Proporcionalidade*, (Palestra Editores, Lima, 2019), ISBN: 978-612-325-090-4.

Scott L. Greer, Nick Fahy, Sarah Rozemblum, Holly Jarman, Willy Palm, Heather A. Elliot, Matthias Wismar, *Everything You Always Wanted To Know About European Union Health Policies But Were To Afraid To Ask*, (Second Edition, European Observatory On Health Systems And Policies, 2019), ISSBN 978 92 890 51 767

Takis Tridimas, Nebbia Paolisa, *European Union Law For The Twenty-First Century- Rethinking The New Legal Order*, (Volume 1, Hart Publishing, 2019), ISBN 1-84113-456-2.

Slavoj Zizek, *A pandemia que abalou o mundo*, (Relógio d'Água, 2020), ISBN 978-989-783-020-4.

Lars Oxelheim, Niklas Brember, Anna Michalski, Antonina Bakardjieva Engelbrekt, *The European Union In A Changing World Order*, (Palgrave Mcmillan, 2020), ISBN 978-3-030-18001-0.

Miguel Gorjão Henriques, *Direito da União: História, Direito. Cidadania, Mercado Interno e Concorrência, 9ª Edição*, 2021, Almedina Editora.

João Carlos Carvalho Godinho, *A (Re)discussão dos Fundamentos da Vacinação Obrigatória*, (Almedina Editora, 2022), ISBN 978-989-40-0277-2.

WORKING PAPERS AND INVESTIGATION ARTICLES:

Fabian Zuleeg, *Economic Impact of Covid-19 on the EU: from the frying pan into the fire*, discussing paper, Europe's Political Programme, European Policy Centre, 23 April 2020

<http://aei.pitt.edu/102736/1/Economic_impact_of_COVID19_on_EU.pdf> accessed 21 October 2021

Sophie Robin-Olivier, *Free Movement of Workers in the Light of the Covid-19 Sanitary crisis: from Restrictive Selection to Selective Mobility*, European Papers, A journal on Law and Integration, Vol.5, 2020, N°1, European Forum, Insight of 16 May 2020, pp. 613-619, ISSN [2499-8249](https://www.europeanpapers.eu/en/europeanforum/free-movement-of-workers-covid-19-sanitary-crisis) - doi: [10.15166/2499-8249/357](https://www.europeanpapers.eu/en/europeanforum/free-movement-of-workers-covid-19-sanitary-crisis), <<https://www.europeanpapers.eu/en/europeanforum/free-movement-of-workers-covid-19-sanitary-crisis>> accessed 21 October 2021

Cristof Roos, Laura Westerveen, *The Conditionality of freedom of movement: normative change in the discourse of EU institutions*, Journal of European Social Policy, 2020, <<https://www.semanticscholar.org/paper/The-conditionality-of-EU-freedom-of-movement%3A-in-of-Roos-Westerveen/b21f2e7d2d7fa1a29b3560b37070983567a5aca1>> accessed 21 October 2021

Chee H. Liew, Gerard T. Flaherty, *Immunity passports to travel during the Covid 19 pandemic: controversies and public health risks*, Journal of Public Health, pp. 1-2, Volume 43, Issue 1, March 2021, <<https://academic.oup.com/jpubhealth/article/43/1/e135/5880641?login=true>> accessed 22 October 2021

Sue Ineson, Stephen S. Seeling, *The Medical Passport*, The Journal of Continuing Education in the Health Professions, Vol. 25, pp.25-30, 2005 <<https://pubmed.ncbi.nlm.nih.gov/16078800/>> accessed 22 October 2021

Peter Neussl, *European Citizenship and Human Rights: an interactive European concept, 24 legal issues of European Integration*, Kluwer Law International, 2007 <<https://heinonline.org/HOL/LandingPage?handle=hein.kluwer/liei0024&div=11&id=&page=>> accessed 22 October 2021.

Katrina A. Bramstedt, *Antibodies as currency: Covid 19's Golden Passport*, Journal of Bioethical Inquiry, 8 May 2020, <<https://link.springer.com/article/10.1007%2Fs11673-020-09996-5>> accessed 22 October 2021

Iris Goldner Lang, *EU Covid-19 Certificates: a critical analysis*, Article in SSRN Electronic Journal- January 2021, European Journal of Risk Regulation, I-10 <https://www.researchgate.net/publication/353951080_EU_COVID-19_Certificates_A_Critical_Analysis > accessed 22 October 2021

Iris Goldner Lang, *EU Covid 19 Certificates: a critical analysis*, Article in SSRN Electronic Journal, January 2021, < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3932327> accessed 13 December 2021

Veronika Sudar, Dunja Duic, *The impact of covid-19 on the free movement of persons in the EU*, EU and Comparative Law Issues and Challenges Series (eclic) – Issue 530 UDK 342.737(4-67EU):614.4 <<https://hrcak.srce.hr/ojs/index.php/eclic/article/view/18298/10043> > accessed 25 October 2021

José Castro Caldas, Ana Alves Da Silva, Frederico Cantante, *As consequências socio-económicas e a sua desigual distribuição*- Colabor Ebooks, July 2020,< <https://colabor.pt/wp-content/uploads/2020/07/As-consequencias-socioeconomicas-da-COVID-19-e-sua-desigual-distribuicao.pdf> > accessed 25 October 2021

Annette Bongardt, Francisco Torres, *Lessons from the Coronavirus Crisis of European Integration*, Intereconomics, Review of European Economics Policy, volume 55, 2020, pp. 130-131. <<https://www.intereconomics.eu/contents/year/2020/number/3/article/lessons-from-the-coronavirus-crisis-for-european-integration.html> > accessed 25 October 2021

Annette Bongardt, Francisco Torres, *Europe's Vaccine Paradox: From Supply to Demand issues*, InterEconomics, pp. 130-131, 2021, < <https://pubmed.ncbi.nlm.nih.gov/34103757/> > accessed 29 October 2021

Sandro Mezzadra, Maurice Stierl, *Can Europe make it? What happens to freedom of movement during a pandemic?*, Open democracy 2020, 24 March 2020, < <http://trinitamonti.org/2020/09/30/the-eu-and-the-freedom-of-movement-during-the-covid-19-pandemic/> > accessed 29 October 2021

Orsolya Reich, , *Policy Brief, Digital Green Certificate: concerns with the European Commission's proposal for a regulation and suggestions for amendment*, Civil liberties Union

for Europe, 22 March 2021,
<https://dq4n3btxmr8c9.cloudfront.net/files/3UNqy8/Liberties_Digital_Green_Certificate_PolicyBrief.pdf> accessed 29 October 2021

Célia Belin, *Travel is resuming, but not for everyone*, Brookings, 8 November 2021,
<https://www.brookings.edu/blog/order-from-chaos/2021/11/08/travel-is-resuming-but-not-for-everyone/> > accessed 29 October 2021

Gabor David Kelen, Lisa Maragakis, Covid-19 Vaccine: What you need to know, John Hopkins Medicine, 2021 < <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/covid-19-vaccine-what-you-need-to-know>> accessed 30 October 2021

Christian Bluth, Jonas Brendebach, Roberto Caranta, Roberto Castaldi, Carlos Closa, Renaud Dehousse, Benjamin Hartmann, Ellen Hartman, Ellen Immergut, Daniel Innerarity, Brigid Laffan, David Levine, Miguel Maduro, Kalypso Nicolaidis, Georgiospapaconstantinou, Claudio Radaelli, Walter Ricciardi, Alexander Stubb, Fabrizio Tassinari, *The EU Response to the covid-19 pandemic, school of transnational governance*, European University Institute, 2020,
<https://cadmus.eui.eu/bitstream/handle/1814/66789/PB_2020_01_STG.pdf?sequence=1 >
accessed 29 October 2021

Michael O' Flaherty, *Coronavirus pandemic in the EU- Fundamental rights implications*, Bulletin 1, European Union Agency for Fundamental Rights, 2020, <https://www.paced-paloptl.com/uploads/publicacoes_ficheiros/coronavirus_pandemic_in_the_eu_fundamental-rights_implications%5B35547%5D.pdf> accessed 29 October 2021

Alexandra L.Phelan, *Covid-19 Immunity Passports and Vaccination Certificates: scientific and Legal Challenges*, Center for Global Health Science and Security, University Medical Center, Washington, Georgetown University Law Center, 2020 < <https://pubmed.ncbi.nlm.nih.gov/32380041/> > accessed 29 October 2021

Alexandra L. Phelan, *Covid-19 immunity passports and vaccination certificates: scientific, equitable, and legal challenges*, Center for Global Health Science and Security, University Medical Center, Washington, Georgetown University Law Center, 2020,
<<https://pubmed.ncbi.nlm.nih.gov/32380041/>> accessed 29 October 2021

Elise Muir, *The Essence of the Fundamental Right to Equal Treatment: Back to the Origins*, German Law Journal (20), pp.817-839, Cambridge University Press, 2019

Elise Muir, *The Fundamental Rights Implications of EU legislation: some constitutional challenges*, Common Market Law Review, 51: 219-246, 2014, Kluwer Law Institute <https://plu.mx/ssrn/a/?ssrn_id=3782555> accessed 29 October 2021

António Jacomo, *Public Health Ethics and conflict of interests*, Acta Med Port, Jan; 30(1): 5-6, Revista Científica da Ordem dos Médicos, 2017

Ricarte Élmano, *A expansão do processo de digitalização durante a pandemia de Covid 19*, 2020 Finisterra, LV (115), pp.53-60, ISSN: 0430-5027, doi: 10.18055/Finis 20350, Centro de Estudos Geográficos, 2020

Krista Kiuru, et. Al. *Europe and Vaccines for Effective Vaccination Policies in Europe*, The European Files, nº60, 2019- ISSN 1636-6085 <<https://www.europeanfiles.eu/wp-content/uploads/2019/11/Europe-Vaccines-For-effective-vaccination-policies-in-Europe-issue-60.pdf>> accessed 29 October 2021

Rebecca Ch Brown, Julian Savulescu, Bridget Williams, Dominic Wilkinson, *Passport to freedom? Immunity passports for Covid-19*, Med Ethics 2020;0:1–8. doi:10.1136/medethics-2020-106365 < <https://search.bvsalud.org/global-literature-on-novel-coronavirus-2019-ncov/resource/pt/covidwho-724109> > accessed 29 October 2021

Alex Villas Boas, *A cegueira pandémica Saramaguiana como Metáfora da Época*, Estudos de Religião, v. 34, n. 3, pages 109-134, set.-dez. 2020, ISSN Impresso: 0103-801X – Eletrônico: 2176-1078, Universidade Católica Portuguesa

Armin Cuyvers, *Free Movement of Persons in the EU*, Chapter 11A, 2017, Leiden University, DOI: 10.1163/9789004322073_023

Silvio Roberto Vincetti, *Covid-19 Compulsory Vaccination and the European Court of Human Rights*, Acta Biomed 2021, Vol. 92, Supplement 6: e2021472, Mattioli 1885

<<https://mattioli1885journals.com/index.php/actabiomedica/article/view/12333/10206> >
accessed 29 October 2021

Hester Kroeze, *Distinguishing between use and abuse of EU free movement law: evaluating use of the “Europe-Route” for family reunification to overcome reverse discrimination*, European Papers- Special Section- EU Citizenship, Federalism and Rights, Volume 3, 2018. N°3, PP-1209-1243, ISSN 2499-8249, <https://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2018_3_10_SS1_Articles_Hester_Kroeze_00267.pdf > accessed 29 October 2021

Jonas Brendebach, Miguel Poiares Maduro, Fabrizio Tassinari, *Policy Brief: The EU response to the Covid-19 pandemic, achieving relevance, mobilising solidarity and preparing for the future*, European University Institute, School of Transnational Governance, Issue 2020/01, April 2020, <https://cadmus.eui.eu/bitstream/handle/1814/66789/PB_2020_01_STG.pdf?sequence=1 > accessed 29 October 2021

Joaquim Freitas Da Rocha, *The Reaction of the EU to Covid 19 crisis*, Universidade do Minho, School of Law 2020, <<http://repositorium.sdum.uminho.pt/bitstream/1822/67555/1/Reaction%20EU%20COVID-19.pdf> > accessed 29 October 2021

Paul Dolan, Steve Baker, *Vaccine Passports will create a two-tier society*, The Sunday Times UK, September 6 2021 < <https://www.thetimes.co.uk/article/vaccine-passports-will-create-a-two-tier-society-x38dznwrm> > accessed 29 October 2021

Pietro Brunetti, Francesca Negro, Simona Zaami, Enrico Marinelli, Alessandra Del Rio, Ginaluca Montanari Vergallo, *Does the EU Covid Digital Health Certificate strike a reasonable balance between mobility needs*, Medicina 2021, 57 (10), 1077 < <https://www.mdpi.com/1648-9144/57/10/1077> > accessed 29 October 2021

Patrícia Jerónimo, *Covid-19 related travel restrictions and mobility rights: a test for international human rights standards and EU citizenship*, UNIO- EU law journal, Vol.6, N°2, July 2020, pp.3-14.

Oskar Josef Gstrein, Dimitry Vladimirovich Kochenov, Andrej Zwitter, *A terrible Great Idea? Covid-19 Vaccination Passports in the Spotlight*, Working Paper n153, March 2021, University of Oxford, Centre on Migration, Policy & Society <<https://www.compas.ox.ac.uk/wp-content/uploads/WP-2021-153-Gstrein-Kochenov-Zwitter-A-Terrible-Great-Idea-Vaccination-Passports.pdf>> accessed 29 October 2021

Valentyn Zolka, Olha Tsarenko, Iryna Kushnir, Serhii Tsarenko, Roman Havrik, *The impact of the Pandemic Covid 19 on the Human Right to Freedom of Movement*, European Journal of Sustainable Development (2021), 10, 1, 376-388, Doi: 10.14207/pn10n1p376, ISSN: 2239-5938, 2021 < <https://ecsdev.org/ojs/index.php/ejsd/article/view/1177/1160> > accessed 4 November 2021

Jaya Ramji-Nogales, Iris Goldner Lang, *Freedom of movement, migration and borders*, Temple University and University of Zagreb, Journal of Human Rights, , Vol.19, N°5, 593-602, Routledge Taylor & Francis Group, 2020<<https://www.tandfonline.com/doi/epub/10.1080/14754835.2020.1830045?needAccess=true>> accessed 4 November 2021

Iris Goldner Lang, *Are Covid Certificates the Answer to Safe EU travel during the pandemic?*, The Petrie-Flom Center Staff, April 26, Harvard Law, 2021 <<https://blog.petrieflom.law.harvard.edu/2021/04/26/are-covid-certificates-the-answer-to-safe-eu-travel-during-the-pandemic/>> Accessed 4 November 2021

Joanna Dlugosz, Adam Mickiewicz, *The principle of proportionality in European Union Law as a Prerequisite for Penalization*, DOI 10.14746/ppuam.2017.7.17, (2017) <<http://ppuam.amu.edu.pl/uploads/PPUAM%20vol.%207/Dlugosz.pdf> > Accessed 4 November 2021

Kai Moller, *Proportionality: Challenging the Critics*, Oxford University Press and New York University School of Law, 2012 <<https://www.corteidh.or.cr/tablas/r30064.pdf>> Accessed 13 November 2021

Meghan Benton, Milica Petrovic, *How Free is free movement? Dynamics and drivers of mobility within the European Union*, Migration Policy Institute, 2013 <<https://www.migrationpolicy.org/pubs/MPIEurope-FreeMovement-Drivers.pdf> > Accessed 13 November 2021

Erik Dahlberg, *Legal Obstacles in Member States to Single Market Rules*, Study European Parliament, Policy Department for Economic, Scientific and Quality of Life Policies, November 2020, < https://www.bruegel.org/wp-content/uploads/2020/11/IPOL_STU2020658189_EN.pdf > Accessed 13 November 2021

Pepjn Bergsen, Alice Billon-Galland, Hans Kundnani, Vassilis Ntousas, Thomas Raines, *Europe after Coronavirus: the EU and a New Political Economy*, , Chatham House, June 2020 <https://www.chathamhouse.org/sites/default/files/2020-06-08-europe-after-coronavirus-bergsen-et-al_0.pdf > Accessed 13 November 2021

Tarik T. Yazicilar, Busra Nur Tokis Kus, Hatice Arslan, *Applicability of Digital Covid 19 Passports in the Context of Two related Judgements of the European Court of Human Rights*, English article, Popular Science, July 6 2021, Digicrimjus. <<https://www.digicrimjus.com/2021/07/06/applicability-of-digital-covid-19-vaccine-passports-in-the-context-of-two-related-judgments-of-the-european-court-of-human-rights/> > Accessed 13 November 2021

Ahmed Sarif, Roslin Botlero, Nazmul Hoque, Nazmul Karim, Sheikh Mohammed Sariful Islam, Sheikh M Alif, *A pragmatic approach to Covid-19 vaccine passport*, Vol. 6, Issue 10, 2021, <<https://gh.bmj.com/content/6/10/e006956> > Accessed 13 November 2021

Philippe Delivet, *The Free Movement of people: principle, stakes and challenges*, January European Issues and Interviews, Foundation Robert Schuman, 2017, <<https://www.robert-schuman.eu/en/european-issues/0419-the-free-movement-of-people-principle-stakes-and-challenges> > Accessed 13 November 2021

Phillipe Delivet, *The Free movement of people: Principle, Stakes and Challenges*, European Issues, n°419, 31st Foundation Robert Schuman, January 2017, < <https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-419-en.pdf> > Accessed 13 November 2021

H D Gunnarsdóttir, M S Sinha, S Gerke, T Minssen, *Applying the proportionality principle to Covid-19 antibody testing*, Journal of Law and the Biosciences, Volume 7, Issue 1, January-June 2020, <<https://academic.oup.com/jlb/article/7/1/lsaa058/5878809> > Accessed 13 November 2021

Saara Koikkalainen, *Borderless Europe: Seven Decades of Free Movement*, Migration Policy Institute, 2021, <<https://www.migrationpolicy.org/article/borderless-europe-free-movement> > Accessed 13 November 2021

H. Van Eijken, J.J. Rijpma, *Stopping a Virus from moving freely: border controls and travel restrictions in times of Corona*, Utrecht Law Review, 2021, <<https://www.utrechtlawreview.org/articles/10.36633/ulr.686/>> Accessed 13 November 2021

Daniel Thym, *Travel Bans in Europe: a legal appraisal*, Global Citizenship Observatory, Robert Schuman Centre, 2020, <<https://globalcit.eu/travel-bans-in-europe-a-legal-appraisal/> > Accessed 13 November 2021

Gareth Davies, *Does Evidence-Based EU law survive the Covid-19 Pandemic? Considering the Status in EU law of Lockdown measures which Affect Free Movement*, Frontiers in Human Dynamics, 2020, <<https://www.frontiersin.org/articles/10.3389/fhumd.2020.584486/full> > Accessed 14 November 2021

Yuriy Voloshyn, Natalia Mushak, *Impact of Covid-19 on the Realization of freedom of movement in the European Union and its Member States*, Advances in Economics, Business and Management Research, volume 170, proceeding of the International Conference on Economics, Law and Education Research, Atlantis Press ELER 2021, <<https://www.atlantispress.com/proceedings/eler-21/125954397>> Accessed 14 November 2021

Iris Goldner Lang: *Vaccination for Vacation: Should the EU Have a “Digital Green Pass”, “Vaccination Certificate” or Better Nothing?*, VerfBlog, 2021/3/16, <<https://verfassungsblog.de/vaccination-for-vacation/>> Accessed 14 November 2021

Assya Kavrakova, *Upholding freedom of movement in a post-lockdown world*, Friends of Europe, 2 June 2020, <https://www.friendsofeurope.org/insights/upholding-freedom-of-movement-in-a-post-lockdown-world/>

Ayelet Shachar, *Borders in the time of Covid-19*, Max Planck Institute for the Study of Religious and Ethnic Diversity, 2020 < <https://www.mpg.de/14650555/borders-in-the-time-of-covid-19> > accessed 19 November 2021

Sergio Carrera, Ngo Chun Luk, *In the name of Covid-19: Schengen Internal Border Controls and Travel Restrictions in the EU*, 2020, European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, <https://www.ceps.eu/wp-content/uploads/2020/10/IPOL_STU2020659506_EN.pdf> accessed 19 November 2021

Sergio Carrera, Ngo Chun Luk, *Love thy neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen area*, n°2020-04, April 2020, CEPS Paper in Liberty and Security in Europe, <https://www.ceps.eu/wp-content/uploads/2020/04/LSE2020-04_Love-thy-neighbour.pdf> accessed 20 November 2021

Damien Cottier, *Covid Passes or Certificates: protection of fundamental rights and legal implications*, Committee on Legal Affairs and Human Rights.

Iris Goldner Lang, *Vaccination for Vacation: Should the EU Have a “Digital Green Pass”, “Vaccination Certificate” or Better Nothing?*, 16 March 2021, Verfassungsblog on Matters Constitutional, Verfblog, < <https://verfassungsblog.de/vaccination-for-vacation/> > accessed 20 November 2021

European Commission, *The Health Benefits of Vaccination*, 2020, ISBN 978-92-76-26508-5, doi: 102775/527469

Daniel Thym, Jonas Bornemann, *Schengen and Free Movement Law during the first phase of the Covid-19 Pandemic of Symbolism*, Law And Politics, European Papers, Volume 5, 2020, n°3, pp. 1134-1170, ISSN 2499-8249 <https://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2020_3_4_Articles_Daniel_Thym_Jonas_Bornemann_00420_0.pdf> accessed 20 November 2021

Paul Fine, Ken Eames, L. David Heymann, *“Herd Immunity”: a rough guide* Published by Oxford University Press on behalf of the Infectious Diseases Society of America, 911, 2011 <<https://academic.oup.com/cid/article/52/7/911/299077>>. accessed 20 November 2021

Christoph Klika, *Health Crisis and the Growth of EU Agencies: The Response to the Covid Pandemic*, EIPA, European Institute of Public Administration, June 2021 <<https://www.eipa.eu/publications/briefing/health-crises-and-the-growth-of-eu-agencies-the-response-to-the-covid-19-pandemic/>> 2 January 2022

World Health Organization, Office of the United Nations High Commissioner for Human Rights, *Right to Health*, Fact Sheet n°31, ISSN 1014-5567 <<https://www.ohchr.org/documents/publications/factsheet31.pdf> > Accessed 14 November 2021

European Roundup, *EU Covid-19 Certificates: tough luck for the unvaccinated?*, April 2021, <<https://www.eurotopics.net/en/260480/eu-covid-19-certificates-tough-luck-for-the-unvaccinated> > Accessed 14 November 2021

Giulia Notaristefano, *The EU and the Freedom of Movement during the Covid 19 Pandemic*, 30 September 2020, <<http://trinitamonti.org/2020/09/30/the-eu-and-the-freedom-of-movement-during-the-covid-19-pandemic/> > Accessed 14 November 2021

European Commission ‘Coronavirus: Commission Proposes More Clarity and Predictability of Any Measures Restricting Free Movement in the European Union’ (4 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1555 > accessed 14 November 2021

Sandro Mezzadra, Maurice Stierl, *What happens to free movement during a pandemic?*, Open democracy, 24 March 2020, <<https://www.opendemocracy.net/en/can-europe-make-it/what-happens-freedom-movement-during-pandemic/> > Accessed 14 November 2021

Savvas Savvides, *The green pass and freedom of movement for European citizens*, 28 June 2021, <<https://www.citywealthmag.com/news/green-pass-and-freedom-movement-european-citizens>> Accessed 14 November 2021

European Movement International, *An European Union Response to Covid- 19*, 2020, <<https://europeanmovement.eu/wp-content/uploads/2020/06/EMI-Policy-Position-Covid19-2020.pdf>> Accessed 14 November 2021

United Nations, *Covid-19 and Human Rights, We are all in this together*, April 2020 <https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf> Accessed 14 November 2021

The World Bank Group, *Workshop 2: Re-opening safely- Policymaker's toolkit for re-opening safely*, May 2021- <<https://thedocs.worldbank.org/en/doc/008d509da4c384bca4ae8e91ebae7dc4-0070012021/original/Workshop-2-ConsoDeck-vUpload.pdf>> Accessed 14 November 2021

European Commission, *'European Health Union'*, 2021), <https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/european-health-union_en> accessed 17 November 2021

European Commission, *Overview of the Commission's Response*, 2021, <https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/overview-commissions-response_en#public-health> accessed 18 November 2021

Anja Radjenovic, Gianna Eckert, *European Parliament, Briefing: Upholding human rights in Europe during the pandemic*, September 2020, <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652085/EPRS_BRI\(2020\)652085_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652085/EPRS_BRI(2020)652085_EN.pdf)> accessed 18 November 2021

European Parliament, *The Citizens of the Union and their rights*, Fact Sheets of the European Union, 2021, < https://www.europarl.europa.eu/ftu/pdf/en/FTU_4.1.1.pdf> accessed 19 November 2021

Costica Dumbrava, European Parliament, *Briefing: Free movement within the EU*, European Parliamentary Research Service, Ideas Paper, Towards a more resilient EU, PE 652.062, September 2020, <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652062/EPRS_BRI\(2020\)652062_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652062/EPRS_BRI(2020)652062_EN.pdf)> accessed 19 November 2021

Eu3doms Project, *The Four Freedoms of the European Union, Briefings*, Debate on the Future of the Four Freedoms of the European Union, EU3doms, supported by the Europe for Citizenship Program, November 2017, <https://www.bos.rs/ei-eng/uploaded/EU3_ENG_webre_1.pdf> accessed 19 November 2021

Grigoris Sarlidis, *EU: Digital Green Certificates- problem- solver or problem-creator?*, One Trust Data Guidance, 2021 < <https://www.dataguidance.com/opinion/eu-digital-green-certificates-%E2%80%93-problem-solver-or>> accessed 19 November 2021

Eva Houtave, *Passports curtailing freedom*, KU leuven, Center for IT&IP law, October 2021, <<https://www.law.kuleuven.be/citip/blog/passports-curtailing-freedom/>> accessed 19 November 2021

Erol Yayboke, *Five ways Covid-19 is changing global migration*, Center for Strategic and International studies, 2020, <<https://www.csis.org/analysis/five-ways-covid-19-changing-global-migration>> accessed 19 November 2021

Etias.Info, *The EU is reopening its borders for internal travel*,< <https://www.etias.info/eu-reopening-borders-internal-travel/>> accessed 19 November 2021

Caroline De Gruyter, ForeignPolicy.com, *Europe needed borders. The Coronavirus built them*, December 2020. <<https://foreignpolicy.com/2020/12/04/europe-needed-borders-coronavirus-built-them/>> accessed 19 November 2021

Sascha Marschang, *Nothing to declare? EU vaccine certificates, mobility and vulnerable groups*, European Public health alliance, 2021 < <https://epha.org/nothing-to-declare-eu-vaccine-certificates-mobility-and-vulnerable-groups/>> accessed 19 November 2021

Sophia Russack, , *Report EU crisis response in tacking Covid-19: views from the Member States*, European Policy Institutes Network, 20 April 2020, <https://www.clingendael.org/sites/default/files/2020-04/Report_EU_crisis_response_April_2020.pdf> accessed 19 November 2021

Vladimir Vardanyan, *The impact of Covid-19 pandemic on human rights and the rule of law*, AS/JUR, Committee on Legal Affairs and Human Rights, Council of Europe, 2020. <<http://www.assembly.coe.int/LifeRay/JUR/Pdf/TextesProvisoires/2020/20200702-CovidImpact-EN.pdf>> accessed 19 November 2021

United Nations Report, *Covid 19 and Human Rights: We are all in this together*, April 2020, <https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf> accessed 19 November 2021

Nicolas Blain, *Covid 19 Crisis and Mobility: what lessons have we learnt? And what of the future?*, European Issues, n°604 ,Foundation Robert Schuman, 20th July 2021 <<https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-604-en.pdf> > accessed 23 November 2021

Raphael Bossong, *EU border Security in a Time of Pandemic, Restoring the Schengen Regime in the face of old conflicts and new requirements for public health*, 2020, SWP Comment, <https://www.swp-berlin.org/publications/products/comments/2020C28_Schengen.pdf > accessed 23 November 2021

Meghan Benton, Jeanne Batalova, Samuel Davidoff-Gore, Timo Schmidt, *COVID-19 and the State of Global Mobility in 2020*. Washington, D.C., and Geneva: Migration Policy Institute and International Organization for Migration. ISBN 978-92-9068-950-8 (PDF) <<https://publications.iom.int/system/files/pdf/covid-19-and-the-state-of-global.pdf> > accessed 23 November 2021

European Court of Human Rights, *Covid-19 Health crisis*, Press Report <https://www.echr.coe.int/Documents/FS_Covid_ENG.pdf> accessed 23 November 2021

Ottavio Marzocchi, *The Impact of Covid-19 Measures on Democracy, the Rule of Law and Fundamental Rights in the EU*, Policy Department for Citizen's Rights and Constitutional Affairs, 23 April 2020

<[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651343/IPOL_BRI\(2020\)651343_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651343/IPOL_BRI(2020)651343_EN.pdf)> accessed 23 November 2021

European Commission, *The EU response to the coronavirus crisis*, 2020 <<https://www.unescap.org/sites/default/files/5.2%20EU%20.pdf>> accessed 23 November 2021

Livia Milana, *The European Green Certificate: restoring free movement in the EU*, Centro di Ricerca sulle Organizzazioni Internazionali de Europe, <<https://croie.luiss.it/2021/04/11/the-european-digital-green-certificate-restoring-free-movement-in-the-eu/>> accessed 23 November 2021

Úria Menéndez, Proença De Carvalho, *Guide to Key Legal Matters relating to the Covid-19 outbreak*, 3 June 2020, <https://www.uria.com/documentos/galerias/5145/documento/9230/guia_COVID_UMPC_ENG.pdf> accessed 23 November 2021

Inigo De Miguel Beriain, Jon Rueda, *Immunity passports, fundamental rights and public health hazards: a reply to Brown et al.*, *Med Ethics*, October 2020, <<https://addi.ehu.es/bitstream/handle/10810/50200/660.full.pdf?sequence=1>> accessed 23 November 2021

Martina Menghi, Jérôme Quéré, *Free Movement of Europeans, Taking Stock of a Misunderstood Right*, Jacques Delors Institute, November 2016 <http://www.europeanmigrationlaw.eu/documents/Free_movement-Menghi_Quere-jdi-nov16.pdf> accessed 23 November 2021

Hanne Beirens, Susan Fratzke, Lena Krainz, *When emergency measures become the norm: post-coronavirus prospects for the Schengen Zone*, Migration Policy Institute, August 2020, <<https://www.migrationpolicy.org/news/post-covid-prospects-border-free-schengen-zone>> accessed 23 November 2021

European Commission, Press release, *Building a European Health Union: stronger crisis preparedness and response for Europe*, Brussels, 11 November 2020 <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_20_2041/IP_20_2041_EN.pdf> accessed 23 November 2021

Who Director- General, *Opening remarks at the Special Session of the World Health Association*, November 2021, <<https://www.who.int/directorgeneral/speeches/detail/who-director-general-s-opening-remarks-at-the-special-session-of-the-world-health-assembly---29-november-2021>> accessed 23 November 2021

European Commission, *Completing the Internal Market*, White Paper (Com85) 310 final of 14 June 1985 < <https://op.europa.eu/en/publication-detail/-/publication/4ff490f3-dbb6-4331-a2ea-a3ca59f974a8/language-en>> accessed 1 December 2021

SRS Newsletter, *EU Digital Covid Certificate*, 22 June 2021 < https://www.srslegal.pt/xms/files/Newsletter_EU_DIGITAL_COVID_CERTIFICATE_ING.pdf> accessed 17 February 2022

A.Kayum Ahmed, *The Human Rights to Vaccines: Preventing Discrimination Against the Unvaccinated*, HHRJournal.org, 15 February 2021 < <https://www.hhrjournal.org/2021/02/the-human-right-to-vaccines-preventing-discrimination-against-the-unvaccinated/>> accessed 21 February 2022

Alexander Bor, Frederik Jorgensen, *Michael Bang Petersen, Prejudice Against the Vaccinated and the Unvaccinated During the Covid-19 Pandemic: A Global Conjoint Experiment*, Department of Political Science, Aarhus University, 21 February 2022.

Alberto Giubilini, *Why Covid Passes are not discriminatory (in the way you think they are)*, The Conversation, 2021 < <https://theconversation.com/why-covid-passes-are-not-discriminatory-in-the-way-you-think-they-are-171641>> accessed 21 February 2022

Philippe Vlaemminck, *Covid 19: What is a “proportionate restriction” on the free movement of persons within the EU? Towards sanctions against Member States maintaining disproportionate restrictions?*, Pharumlegal, March 5 2021, <

<https://www.pharumlegal.eu/blog/covid-19-what-is-a-proportionate-restriction-on-the-free-movement-of-persons-within-the-eu-towards-sanctions-against-member-states-maintaining-disproportionate-restrictions/>> accessed 21 February 2022

Elsbeth Guild, *EU Fundamental Rights, Human Rights and Free Movements in times of Covid19*, Queen Mary University of London, School of Law, 24 July 2020 < <https://www.qmul.ac.uk/law/news/responding-to-covid-19/items/eu-fundamental-rights-human-rights-and-free-movement-in-times-of-covid19.html>> accessed 21 February 2022