

The Commission against the Internal Market and European Union Citizens' Rights: Trying to Shoot Down Sputnik with the "Digital Green Certificate"?

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The Digital Green Certificate (DGC) proposed by the European Commission on the basis of facilitating the free movement rights of European Union (EU) citizens will be capable of effectively serving as a COVID-19 passport. In this contribution, we cast doubt on whether the DGC is fit for purpose, highlighting in particular the potential for the DGC to in fact facilitate greater free movement restrictions for a large number of EU citizens, in particular those who have received non- European Medicines Agency (EMA)-approved vaccines such as Sputnik V in compliance with EU law. Under the proposal as amended by the European Parliament, any destination Member State that accepts proof of vaccination "in order to waive restrictions to free movement" must apply the same waiver to any DGC-holder that has received an EMA-approved vaccine and has the option of doing so for vaccines added to the World Health Organization (WHO) Emergency Use Listing; however, such equal treatment is not available for DGC-holders who have received non-EMA/WHO vaccines. While this measure was alleged to be taken on grounds of public health, a convincing public health case has not been put forward. Instead, the DGC proposal as it stands disregards the promise of the internal market and sets the stage for its fragmentation through geopolitics and bilateralism.

I. A PROPOSED RESTRICTION TO END ALL RESTRICTIONS

The "Digital Green Certificate" (DGC) proposed by the European Commission is foreseen as a "medical requirement"¹ that will "allow for the issuance and cross-border verification and acceptance" of certificates that confirm that the holder (1) has received a specific COVID-19 vaccine in the issuing Member State or has been

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¹ Von der Leyen in an interview with *Lusa*: "EU/Presidency: mutually recognised vaccine certificate important – Von der Leyen" (*Lusa*, 14 January 2021) <<https://www.lusa.pt/article/NgT~5RmvqMXts3lkPDndvjMSZM5iuS11/eu-presidency-mutually-recognised-vaccine-certificate-important-von-der-leyen>> (last accessed 12 April 2021).

verified to have received such a vaccine in a third country (“vaccination certificate”),² (2) has received a negative COVID-19 test result (“test certificate”)³ or (3) has recovered from a positive COVID-19 case (“certificate of recovery”).⁴ However, those who have been vaccinated with the vaccines not (yet) approved by the European Medicines Agency (EMA) are not accorded the same rights under the proposed DGC Regulation. Indeed, since the European Parliament’s amendments,⁵ Member States will not be able to *issue* DGCs to persons that have received vaccines that are not authorised by the EMA or on the World Health Organization’s (WHO) Emergency Use Listing (EUL), and acceptance of such non-EMA or non-WHO vaccines for the purposes of easing free movement restrictions is now also left outside of the scope of the DGC, meaning that such matters will be entirely subject to bilateral relations.

Will the DGC help ensure the smooth functioning of the internal market? The extent to which the DGC reduces rather than facilitates unjustified barriers to free movement is deserving of further scrutiny. What is beyond any doubt is that the proposed Regulation itself introduces an obvious barrier to free movement that is potentially very far-reaching and could hardly be justified. Our focus is on the effects of the DGC on freedom of movement as well as the nature of the material fact that the DGC aims to attest to: why is it not immunisation? In what follows, we share our doubts concerning the proposal: if adopted, it will mark a truly problematic development for the future of the European Union (EU) internal market and EU citizens’ rights.

II. PANACEA OF DOCUMENTS FACING A CLOSED WORLD

Given the national focus of the responses to the pandemic side-lining international cooperation and allowing new cleavages to emerge,⁶ the compartmentalisation of the world into states could never be more articulate as a lived experience than throughout the last year. Even the holders of superb nationalities in terms of the opportunities bestowed upon their holders⁷ – such as that of the USA – have faced sealed borders.⁸ As policymakers contemplate what the “new normal” will look like, it is clear that

² Art 3(a), “Proposal 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 (hereinafter: Commission, “DGC Regulation Proposal”).

³ Art 3(b), *ibid.*

⁴ Art 3(c), *ibid.*

⁵ European Parliament, “Amendments on the proposal 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)” P9_TA(2021)0145 (hereinafter EP, “Amendments on the DGC Regulation Proposal”).

⁶ The COVID-19 pandemic triggered changing immigration regulations and suppression of human rights: see the *Verfassungsblog* symposium convened by Joelle Grogan, “Introduction & List of Country Reports” (*Verfassungsblog*, 2020) <https://intr2dok.vifa-recht.de/receive/mir_mods_00008563> (last accessed 13 April 2021).

⁷ D Kochenov and J Lindeboom, “Empirical assessment of the quality of nationalities” (2017) 4 *European Journal of Comparative Law and Governance* 314–36.

⁸ M Specia, “Travel restrictions on Americans erode a sense of passport privilege” (*The New York Times*, 7 July 2020) <<https://www.nytimes.com/2020/07/07/world/europe/american-passport-privilege-coronavirus.html>> (last accessed 13 April 2021).

the COVID-19 pandemic threatens to redraw the maps of the world via comprehensive restrictions on mobility, potentially marking “an end of an age”,⁹ to agree with Alan Gamlen. To reverse this trend, the idea of certifications attesting to various types of COVID-19 protection is gaining traction across numerous jurisdictions, including regional (eg Bavaria¹⁰), national (eg Denmark, which rolled out the “COVID pass” already in April 2021¹¹), as well as the European Commission’s proposed DGC.

While the DGC has as its legal basis and objective the facilitation of EU citizens’ freedom of movement,¹² the EU’s proposed “certificate” will in fact largely serve as a *passport* to be used by Member States to decide who can enter and under what conditions. Additional documentation of this sort brings new checks that are in direct tension with the promise of the EU internal market, defined in the Treaties as a space *without* internal borders where the freedom of movement of persons is guaranteed.¹³ Under EU law this promise overrides the preferences of the Member States and the exceptions are always interpreted narrowly, frequently amounting to stripping away power, if not “humiliation”.¹⁴ What the Commission is offering now, as we shall show, is to forget the core idea that made the internal market a success and, besides cutting it by law with national borders, also making it subject to bilateralism between the Member States, thus potentially opening the Pandora’s box of self-help that has been closed for more than sixty years.¹⁵

In the world of “passport apartheid”,¹⁶ any new passport – electronic or physical, necessary or “optional” – is always an addition to the list of the grounds of possible exclusion and discrimination. To exclude, in the name of an illusion of control, is among the passport’s main functions.¹⁷ Knowing this, the assessment of any COVID-19 passport, whatever its official name might be, merits critical scrutiny. Much is at stake in terms of the loss of rights when a new boundary is drawn for any reason whatsoever, however “natural” or “necessary”.¹⁸ This is particularly so where the new boundary is offered as a remedy against difficulties, ironically, in crossing borders, which the legal system offering this new DGC boundary to its citizens – the EU – has precisely pledged to abolish decades ago. Broader still, given the far-reaching societal “world-making” impact of any new boundary enforced by law, questioning any new boundary is an imperative starting point

⁹ A Gamlen, “Migration and mobility after the 2020 pandemic: the end of an age?” (2020) WP-20-146 COMPAS, Oxford, 25.

¹⁰ N Cibu, “Altöttinger Impfbescheinigung mit Digitalschranke gesichert” (*BR24*, 25 January 2021) <<https://www.br.de/nachrichten/bayern/landkreis-altoetting-stellt-digitale-impfbescheinigung-aus.SMnsHhp>> (last accessed 13 April 2021).

¹¹ “Denmark among First in Europe to Introduce COVID Pass Scheme” (*Euronews*, 6 April 2021) <<https://www.euronews.com/2021/04/06/covid-19-denmark-launches-coronapas-certificate-to-reopen-economy>> (last accessed 13 April 2021).

¹² Commission, “DGC Regulation Proposal”, supra, note 2, preamble (citing Art 21(2) TFEU as the legal basis).

¹³ Arts 26 TFEU and 3 TEU. Cf. D Kochenov and R Plender, “EU citizenship: from an incipient form to an incipient substance?” (2012) 37 *European Law Review* 369–96.

¹⁴ G Davies, “The humiliation of the state as a constitutional tactic” in F Amtenbrink and P van den Berg (eds), *The Constitutional Integrity of the European Union* (Utrecht, TMC Asser 2010) pp 147–74.

¹⁵ W Phelan, *Great Judgments of the European Court of Justice* (Cambridge, Cambridge University Press 2019) p 2.

¹⁶ D Kochenov, “Ending the Passport Apartheid” (2020) I-CON.

¹⁷ J Torpey, *The Invention of the Passport* (Cambridge, Cambridge University Press 1999).

¹⁸ D Kochenov, *Citizenship* (Cambridge, MA, MIT Press 2019); J Carens, *The Ethics of Immigration* (Oxford, Oxford University Press 2013).

for the assessment of any legal–political initiative capable of creating it, such as the DGC.¹⁹ Although officially temporary, once introduced and proclaimed necessary, the borders to end all borders could be there to stay, betraying EU citizens and what the Union has been created to stand for. Subjecting the new passport to the highest level of scrutiny is indispensable – and we sense that this has not been done as the Regulation was being prepared.

According to the Commission's own proposal, "In view of the urgency, the Commission did not carry out an impact assessment".²⁰ This is despite the fact that numerous Member States have used the pandemic as a pretext to disapply EU law on the free movement of persons and non-discrimination of nationality by either prohibiting travel (Germany, Hungary, Belgium) or creating different sets of rules for own nationals and other Europeans in the absence of any epidemiological justification for breaking the law (Hungary).²¹ As Member States took unilateral measures in clear breach of EU law, Ursula von der Leyen's calls "to end selfishness" largely remained unheeded.²² In the context where the coordinated EU approach, although strong on paper, remains a fiction in reality, any unilateral introduction of free movement restrictions based on vaccination passports by EU Member States is likely to make matters worse – a problem that will ostensibly be amplified by the DGC, which *de facto* authorises precisely that: breaking the law to the detriment of EU citizens' rights.

III. RESTRICTING THE RIGHTS OF EU CITIZENS: ON GROUNDS OF PUBLIC HEALTH OR INTER-STATE POLITICS?

The DGC proposal has the ability to facilitate rather than reduce restrictions of free movement by enabling Member States to distinguish between different categories of EU citizens (as well as their family members²³ and other "third-country nationals legally residing or legally staying in a Member State"²⁴) dependant on their medical status, enabling Member States to (often arbitrarily) determine which categories they deem safe enough to waive restrictions for, with the implication that others pose potential risks to public health. Those persons deemed potential risks can then be subject to greater restrictions of their free movement rights. The DGC scheme does not actually require waiving free movement rights for anyone, but only requires equal treatment of DGC-holders where the destination Member States have free movement restrictions in place and do choose to accept proof of vaccination, require proof of a COVID-19 test or accept proof of recovery in order to waive (some of) these

¹⁹ P Bourdieu, "Social space and symbolic power" (1989) 7 *Sociological Theory* 14, 14–25.

²⁰ Commission, "DGC Regulation Proposal", 5.

²¹ ES Nicolás, "Brussels: six EU states travel restrictions went 'too far'" (*EUobserver*, 24 February 2021) <<https://euobserver.com/coronavirus/151031>> (last accessed 13 April 2021).

²² E Zalan, "Von der Leyen warns 'end selfishness' in virus crisis" (*EUobserver*, 26 March 2020) <<https://euobserver.com/coronavirus/147900>> (last accessed 13 April 2021).

²³ Art 2(1), Commission, "DGC Regulation Proposal".

²⁴ Commission, "Proposal for a Regulation on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to third-country nationals legally staying or legally residing in the territories of Member States during the COVID-19 pandemic" COM (2021) 140 final.

restrictions.²⁵ Thus, some Member States may opt for maintaining free movement restrictions regardless of the possession of a vaccination, test or recovery certificate(s).

Otherwise, where Member States *do* waive certain free movement restrictions for those entering from other Member States or third countries producing a given type of certificate through the DGC, they remain free to continue to impose numerous types of restrictions already observed throughout the pandemic on persons without a DGC-endorsed vaccine or test result; such restrictions include most notably full travel bans or quarantine requirements that make cross-border mobility significantly more difficult or impossible for reasons related to financial cost or time constraints.²⁶ Where the DGC can be used in this way as a mechanism to discriminate by restricting the freedom of movement for some and not others it inevitably may lead to clashes with EU law. While in principle the provisions of the Regulation recognise that Member States may only implement such free movement restrictions insofar as they are “in compliance with Union law”,²⁷ no action has been taken by the EU that suggests that they are actually willing to challenge whether restrictions implemented in the name of “limi[ting] the spread of COVID-19”²⁸ are compatible with the fundamental freedoms of the internal market.

What is more, one of the more glaring features of the DGC is that it explicitly permits further discrimination among those that *are* vaccinated. First, the initial Commission proposal required Member States *issue* DGCs indicating whether an individual has been vaccinated with (1) an EMA-approved vaccine (ie one issued a marketing authorisation (MA) according to the EU’s centralised procedure in Regulation 726/2004) or (2) non-EMA-approved vaccines via Directive 2001/83/EC (granted a national MA or temporarily authorised).²⁹ Article 5(5) also proposed that Member States that *accept* proof of vaccination for waiving free movement restrictions also be obliged to apply those waivers to DGC-holders that have received an EMA-approved vaccine.³⁰ This obligation of equal treatment (by requiring acceptance of EMA-approved vaccines) was not made applicable to individuals inoculated with other vaccines, although under EU law Member States can also choose to authorise and use other vaccines in accordance with the Medicinal Products Directive 2001/83 (MPD).³¹ Initially, the Commission’s proposed version also gave Member States the *option* to accept (for the same purpose of waiving free movement restrictions) DGCs indicating an individual received one of the following non-EMA-approved COVID-19 vaccines: (1) one that was “granted marketing authorisation by the competent authority of a

²⁵ Arts 5(5), 6(5) and 7(5), Commission, “DGC Regulation Proposal”.

²⁶ On travel bans and quarantine requirements as free movement restrictions, see D Thym and J Bornemann, “Schengen and free movement law during the first phase of the COVID-19 pandemic” (2020) 5 European Papers 1143, 1161–69.

²⁷ Arts 5(5), 6(5) and 7(5), EP, “Amendments on the DGC Regulation Proposal”.

²⁸ *ibid.*

²⁹ Recital 21, Commission, “DGC Regulation Proposal”.

³⁰ Regulation 726/2004 [2004] OJ L136/01. At the time of writing, this includes four vaccines (by Pfizer–Biopac, Moderna, AstraZeneca and Janssen) granted conditional marketing authorisations by the EMA: EMA, “COVID-19 vaccines” <<https://www.ema.europa.eu/en/human-regulatory/overview/public-health-threats/coronavirus-disease-covid-19/treatments-vaccines/covid-19-vaccines>> (last accessed 13 April 2021).

³¹ Directive 2001/83/EC [2001] OJ L311/67.

Member State pursuant to Directive 2001/83/EC”, (2) one “whose distribution has been temporarily authorised based on Article 5(2) of Directive 2001/83/EC” or (3) one that “received a WHO Emergency Use Listing”.³²

It was already problematic that the direct result of the Commission’s proposal would have been that the EU law rights of the citizens in question would have become directly subject to the benevolence of each and every Member State other than their own. However, the amendments to the proposal issued during the time of writing by the EU Parliament go much further, such that such benevolence is not even an option. Indeed, vaccinations authorised otherwise based on the MPD that are not on the WHO EUL simply do not count (for the purpose of the DGC),³³ with those amendments eliminating the possibility for Member States to even *issue* a DGC for non-EMA-approved vaccines unless they have received a WHO EUL, thereby effectively punishing Member States for making their own judgment about the best strategy to save the lives of their own citizens in the context of the pandemic in a way that is capable of fully complying with EU law. Given how long it takes to be added to the WHO EUL – which included, until 7 May 2021, *not a single* non-EU (or EU–US)-designed vaccine³⁴ – this is hardly justifiable. Similarly, the proposal eliminates the previous *option* (which was already problematic in terms of its insufficiency) for the destination Member State to mutually recognise the decision of another Member State to nationally authorise or distribute vaccines via the MPD, as it will now be the case that the only category of persons for whom Member States have the additional option of waiving free movement restrictions are those that have received vaccines designated in the WHO’s EUL.³⁵ Thus, important questions now arise as to what types of “certificates” EU citizens and residents will receive if they have been vaccinated with vaccines such as Sputnik V that are neither EMA nor WHO approved if they cannot be issued with DGCs to that effect, or as to how Member States will decide whether to ease free movement restrictions for those who have received these vaccines.

The internal market where the freedom of movement is guaranteed by law thus disappears for a category of persons who may be fully protected against COVID-19 with vaccines issued nationally in full compliance with EU law. Their immunity to the virus and, consequently, the fact that they are presumed not to be a danger to public health (or perhaps more accurately a *lesser* danger, since even those vaccinated might still be able to transmit the virus) do not even enter the picture: the proposal overrules reality and not in favour of either citizens or the internal market. Many vaccines are at different stages of development and introduction in a number of EU Member States, including, most importantly, the Sinopharm and Sputnik V vaccines, which are among the most used in the world. Already the Sputnik V controversy in particular highlights some of the frictions that a vaccination passport can

³² Art 5(5) of the Commission’s proposed Regulation.

³³ Like the Hungarian national authorisation for the use of the Russian Sputnik V vaccine, which is neither EMA nor WHO approved and with which hundreds of thousands of EU citizens have been vaccinated.

³⁴ Recital 23 read in combination with Art 3(1)(a) of EP, “Amendments on the DGC Regulation Proposal”. The WHO added the Chinese Sinopharm vaccine to the EUL (on 7 May 2021), which is not EMA approved and with which hundreds of thousands of EU citizens have been vaccinated.

³⁵ Recital 25 and Art 5(5), EP, “Amendments on the DGC Regulation Proposal”.

create in the social, political, economic and legal domains. Consider, for instance, the free movement and non-discrimination rights of residents of Member States that are currently preparing for or already deploy the Russian Sputnik V vaccine, which can be done entirely lawfully under the MPD – as recognised by the Commission³⁶ – and is particularly understandable in light of the undeniable shortfalls of the Commission's leadership in their failed supranational procurement and vaccination efforts.³⁷ With the slow vaccine rollout in the EU, Hungary issued a temporary authorisation for the Sputnik V and AstraZeneca vaccines, using a temporary authorisation procedure provided for by EU law – Article 5(2) MPD³⁸ – the same procedure that enabled the UK (when it was still subject to such rules) to authorise the Pfizer–BioNTech vaccine when the EMA-level authorisation application was still pending.³⁹ Despite previous concerns, building scientific evidence suggests that Sputnik V is sufficiently effective at ensuring COVID-19 immunity.⁴⁰ The same applies to Sinopharm, which became the first non-EU/US vaccine to receive a WHO EUL. Consequently, from a public health perspective, it appears unlikely that individuals inoculated with these vaccines – including by now a sizable portion of the Hungarian population, as well as all EU citizens permanently residing in the countries of the former Soviet Union – would indeed pose such a greater risk to public health than those vaccinated with EMA-approved vaccines, contrary to the underlying assumption of the DGC.

Health policy aside, vaccination issues – and thus the distributions of DGCs attesting to them – appear to be far from apolitical. While Poland's position is that the Russian vaccine is unacceptable⁴¹ – and would hence be unlikely to waive free movement restrictions for EU citizens inoculated with Sputnik V even if given the option – numerous Member States have been in negotiations for potential purchases of Sputnik V with the Kremlin, with several signalling that they may begin using this vaccine pre-EMA authorisation (eg Austria, Czech Republic, Italy, Slovakia).⁴² Hungary has already vaccinated many of its residents with both the Sputnik V and Sinopharm

³⁶ Eg “Parliamentary questions: answer given by Ms Kyriakides on behalf of the European Commission” (*European Parliament*, 17 February 2021) E-006543/2020 <https://www.europarl.europa.eu/doceo/document/E-9-2020-006543-ASW_EN.html> (last accessed 13 April 2021).

³⁷ On the failures in the leadership response, see, eg, R Hyde, “Von der Leyen admits to COVID-19 vaccine failures” (2021) 397 *Lancet* 655; M Karnitschnig, “Blame von der Leyen” (*POLITICO*, 2 April 2021) <<https://www.politico.eu/article/blame-ursula-von-der-leyen-eu-vaccine-debacle/>> (last accessed 13 April 2021).

³⁸ National Institute of Pharmacy and Nutrition, “OGYÉI issued a temporary authorization for distribution of the product for emergency use” (1 January 2021) <https://ogyei.gov.hu/ogyei_issued_a_temporary_authorization_for_distribution_of_the_product_for_emergency_use> (last accessed 12 April 2021).

³⁹ Medicines & Healthcare Products Regulatory Agency, “Vaccine BNT162b2 – conditions of authorisation” <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975356/Conditions_of_Authorisation_for_Pfizer_BioNTech_vaccine.pdf> (last accessed 13 April 2021); done via Art 174 of the Human Medicines Regulations 2012, SI 2012/1916, which implements Art 5(2) MPD.

⁴⁰ I Jones and P Roy, “Sputnik V COVID-19 vaccine candidate appears safe and effective” (2021) 397 *Lancet* 642, discussing D Logunov et al, “Safety and efficacy of an rAd26 and rAd5 vector-based heterologous prime-boost COVID-19 vaccine” (2021) 397 *Lancet* 371.

⁴¹ Reuters, “Poland does not plan to buy Russian vaccine, says minister” (*Reuters*, 4 March 2021) <<https://www.reuters.com/article/us-health-coronavirus-poland-russia-idUSKBN2AW1WC>> (last accessed 13 April 2021).

⁴² H Collis, “More EU countries eyeing separate deals with Russia for Sputnik vaccine” (*POLITICO*, 2 April 2021) <<https://www.politico.eu/article/more-eu-countries-eyeing-separate-deals-russia-sputnik-vaccine/>> (last accessed 13 April 2021). France and Germany have also been negotiating pre-orders of Sputnik V, conditional, however, on EMA approval.

vaccines.⁴³ Because the DGC proposal does not require (or now with the Parliament's amendments even enable) equal treatment regardless of the vaccination used, this has the potential to result in a situation whereby thousands of individuals from particular Member States as well as those resident in specific third countries who are likely immune from COVID-19 nevertheless have their free movement rights restricted under the guise of being an overriding threat to public health.

It quickly becomes clear upon reading the proposal that the politics of mutual recognition overshadows both health policy concerns and the principles of the internal market. In such a situation, it is doubtful whether it is warranted for the DGC to facilitate denying EU citizens – in particular those vulnerable populations for whom COVID-19 is potentially deadly – the same rights within the internal market merely because their countries of residence sought to evaluate and authorise (in accordance with EU law) a different vaccine from that authorised at the EU level, especially when Member States cannot rely on the Union to ensure the availability of EMA-authorised vaccines through a coordinated approach in a timely fashion. Worse still, to use the DGC scheme to punish Member States for authorising other vaccines in accordance with the MPD in the way suggested by the EU Parliament amendments appears to be nothing but an anti-Russian and anti-Chinese statement paid for with EU citizens' lives.

There is another problematic angle to what has been proposed, however. Given the different speeds of vaccination programmes from Member State to Member State, this is also bound to result in indirect discrimination on the basis of nationality against the citizens of each of the EU nations “lagging behind” in the vaccination drive. Discrimination between EU citizens of different EU nationalities will be as pronounced, thus triggering a direct attack on the non-discrimination on the basis of nationality principle. In a situation where 29.8% of the population received at least one jab in Hungary as opposed to 1.7% in Finland at the time of writing, the DGC would significantly boost indirect discrimination in the EU against the latter's citizens, given that obtaining constant negative COVID-19 tests that expire within seventy-two hours requires the investment of time and money and is thus hardly comparable with the certification of vaccination.

The amended DGC proposal purports to facilitate free movement and states that it is on the “grounds of public health”⁴⁴ (1) that the obligation to apply existing free movement restriction waivers is limited to EMA-approved vaccines and (2) that the possibility of waiving free movement for non-EMA vaccines is limited to those that have received a WHO EUL. However, in light of the above, the DGC system appears to simultaneously facilitate free movement restrictions and nationality-based discrimination in a way that lacks any convincing basis in public health grounds, thus being itself in conflict with EU law and amounting to a political and arbitrary assault on EU citizens' rights. Arguably, to make the DGC more fit for purpose (as a tool designed to facilitate rather than impede freedom of movement while enabling the protection of public health), a better starting point would be – in addition to beginning to scrutinise free movement restrictions

⁴³ *ibid.*

⁴⁴ Recital 25 of the proposed DGC Regulation.

implemented in the first place – for the general rule to at the very least oblige Member States to mutually recognise the vaccine decisions of other Member States, just as this happens with other medicines authorised via national procedures.⁴⁵ A derogation clause could then be inserted requiring Member States that do not wish to recognise the immunity of a DGC-holder vaccinated with a non-EMA-approved vaccine in another Member State to convincingly justify that decision; only if the destination Member State can demonstrate that doing so genuinely presents a risk to public health should they be able to invoke such a clause. Otherwise, the DGC *de facto* designates those that have received non-EMA-approved vaccines as potential public health risks even if they have received a COVID-19 vaccine approved according to an authorisation procedure laid down by EU law, thereby leaving room for the Member States to implement free movement restrictions that are unfounded from a public health perspective and hence would amount to an unjustified restriction of freedom of movement on top of indirect nationality-based discrimination. If politics prevails outright over the declared considerations of medical necessity coupled with scientific rationality, the reasons for the DGC fade away.

IV. UNDERMINING THE INTERNAL MARKET THROUGH GEOPOLITICS AND BILATERALISM

By not obliging or even enabling Member States to recognise the immunity status of EU citizens that have received non-EMA-approved vaccines as a general rule, the DGC is capable of fragmenting the internal market, creating a web of bilateral authorisations based on unclear scientific evidence. Politics of inter-state relations seems to overtake, in practice, the stated public health concerns. The significance of this approach in the context of the internal market is clear: the politicised DGC has the potential to destroy the internal market by subjecting it to what the internal market as a concept pledged to abolish: politicised discriminatory non-facts-based regulation and bilateral approaches to the freedom of movement to be decided between the Member States. The whole point of the internal market is that bilateral relations between EU Member States inside the Union and/or relations between particular EU Member States and third countries – be it Russia, China or any other – cannot possibly have negative consequences for the enjoyment of EU citizenship rights by the citizens of the Union. Similarly, any restrictions to free movement should be strictly limited and rooted in rationality. Consequently, the question arises as to whether a proposal based on such starting assumptions as the legally mandated bilateralism and disconnect from scientific rationality is legally sound. Even more: who will compensate the damage for the destruction of the internal market flowing from the proposal caused to citizens and companies in the Union?

⁴⁵ Eg, non-EMA national procedures in Art 28 MPD allow for the possibility that some medicinal products will be authorised in some Member States but not others (in which an applicant does not lodge an application), and yet it is not as though other Member States are entitled to place free movement restrictions on nationals of EU countries that have been treated with such products.

Beyond the issues of the internal market, the proposal seems to be the betrayal of EU citizens resident in the key parts of the world where vaccination is progressing at a very successful pace but where none of the EMA-certified vaccines are used, be it China, India or the former Soviet Union, where hundreds of thousands of Europeans reside. Proceeding along the same lines, problematic implications for global migration are just as clear: if a vaccine type rather than the fact of immunisation is prioritised, the EU is bound to remain closed to visitors from the parts of the world that do not use the same vaccines as us. Taken together, these considerations make quite clear that the DGC might not be about furthering the principles of the internal market and helping to “open up Europe”, and that geopolitical and bilateralism-infused thinking has replaced giving EU citizens’ rights a priority here, which is yet another reminder of this Commission’s proneness to betray the EU’s founding ideals. What is being proposed is arguably *illegal* from the perspective of EU law, and such a proposal should have never been tabled, should the Commission have been serious about EU citizens’ rights and the values that the EU stands for.

V. CONCLUSION

All in all, this pandemic exposed freedom of movement across the EU as far more fragile than many had assumed: the COVID-19 crisis has demonstrated yet again that the emperor is naked.⁴⁶ To make matters worse, the very premise of *rational* governance of free movement of persons seems to have been forgotten, as Gareth Davies has demonstrated,⁴⁷ at the expense of nationalist proclamations and endless direct and arguably unjustifiable violations of EU law, such as sealing borders or creating different sets of rules for own nationals and other Europeans in the absence of any epidemiological justification.

As free movement of persons crumbled in no time, the lesson learnt is not that we would need another type of document – a DGC-disguised vaccine passport of some sort – in order to cross international borders, but that a crucial component regulating such crossings was effectively missing in action: protection by and enforcement of EU law. Alberto Alemanno is right when he points out that political leaders and the Commission have failed to protect the dream of a better life in the Union, ignoring that Europeans do not need passports in order to cross internal inter-state borders in the Union.⁴⁸

The assumption that the rule of law would somehow return prompted by a DGC disconnected from health protection considerations as much as from the core values of the internal market seems naïve when viewed in light of the fundamental idea of the internal market as a place without internal frontiers, where four types of free

⁴⁶ JHH Weiler and UR Haltern, “The autonomy of the community legal order – through the looking glass” (1996) 37 *Harvard International Law Journal* 411.

⁴⁷ G Davies, “Does evidence-based EU law survive the COVID-19 pandemic?” (2020) *Frontiers in Human Dynamics* <<https://doi.org/10.3389/fhumd.2020.584486>> (last accessed 13 April 2021).

⁴⁸ A Alemanno, “We lived the European dream. Will any politician stand up for open borders?” (*The Guardian*, 22 May 2020) <<https://www.theguardian.com/world/commentisfree/2020/may/22/european-dream-politician-stand-up-for-free-movement>> (last accessed 13 April 2021).

movement are secured. Taking into account the current reality, the DGC will likely have an effect that is opposite to its stated aim of simplifying border crossings: introducing them now, when the driver's seat of the free movement of persons in the internal market is all but vacant, could result in further complications and fragmentations of the Union and further betrayal of EU citizens for no reason in the hands of the dysfunctional von der Leyen Commission.