



EDPB-EDPS Joint Opinion

**1/2022 on the Proposal
for a Regulation of the
European Parliament and of
the Council amending
Regulation (EU) 2021/953 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**

14 March 2022

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The European Data Protection Board and the European Data Protection Supervisor

Having regard to Article 42(2) of the Regulation 2018/1725 of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC,

Having regard to the EEA Agreement and in particular to Annex XI and Protocol 37 thereof, as amended by the Decision of the EEA joint Committee No 154/2018 of 6 July 2018,

Having regard to the request for a Joint Opinion of the European Data Protection Supervisor and of the European Data Protection Board of 3 February 2022 regarding a Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2021/953 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 as well as regarding a 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,

HAVE ADOPTED THE FOLLOWING JOINT OPINION

1 BACKGROUND

1. On 3 February 2022, the Commission adopted a Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2021/953 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 (the “First Proposal”). The Commission proposes to base the first Proposal on Article 21(2) of the Treaty on the Functioning of the European Union (the “TFEU”) according to which every EU citizen has the right to move and reside freely within the territory of the Member States¹, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.
2. On 3 February 2022, the Commission also adopted a 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 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 (the “Second

¹ References to “Member States” made throughout this document should be understood as references to “EEA Member States”, and references to the “EU” should be understood as references to the “EEA”.

Proposal”, and together with the First Proposal, the “Proposals”). The Commission proposes to base the Second Proposal on Article 77(2)(c) TFEU, according to which the Union shall develop policies setting out the conditions under which nationals of third countries shall have the freedom to travel within the Union.

3. The European Data Protection Board (the “EDPB”) and the European Data Protection Supervisor (the “EDPS”) note that the Proposals seek to extend the application of Regulation 2021/953 (EU Digital COVID Certificate) and, by extension, of Regulation 2021/954 by 12 months, as well as prolong for the same time the power of the Commission to adopt delegated acts pursuant to Regulation (EU) 2021/953 (the “Regulation”).
4. In addition to extending the application of the EU Digital COVID Certificate, the Proposals aim to amend certain provisions of the Regulation:
 - 1) A broadening of the definition of SARS-CoV-2 tests that rely on the detection of viral proteins (antigens) to include immunoassays performed in a laboratory setting and not only rapid antigen tests that give results in less than 30 minutes;
 - 2) An explicit clarification that vaccination certificates are to contain the number of doses administered to the holder, regardless of the Member State in which they have been administered, to make sure that the overall number actually administered is accurately reflected;
 - 3) The inclusion of vaccination certificates issued for a COVID-19 vaccine undergoing clinical trials among those certificates that may be accepted by Member States in order to waive restrictions to free movement; and
 - 4) The correction of a wrong cross-reference in Article 13(2) of Regulation (EU) 2021/953.
5. On 3 February 2022, the Commission requested a Joint Opinion of the EDPB and the EDPS on the basis of Article 42(2) of Regulation (EU) 2018/1725 (the “EUDPR”)² on the Proposals.

2 SCOPE OF THE OPINION

6. The Proposals are of particular importance due to their major impact on the protection of individuals’ rights and freedoms with regard to the processing of their personal data. The scope of this Joint Opinion is limited to the aspects of the Proposals relating to the protection of personal data, which represent a fundamental aspect of the Proposals.
7. For the sake of clarity, as the Second Proposal is limited to ensuring that Member States apply the rules laid down in the First Proposal to third country nationals who reside or stay legally in their territory and are entitled to travel to other Member States in accordance with Union law, the EDPB and the EDPS will provide their recommendations with a focus on the First Proposal. This being said,

² Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

the general comments and considerations made in this Joint Opinion are fully applicable to both Proposals.

8. Not entering into other important ethical and societal aspects on which the Proposals may have an impact in terms of compliance with fundamental rights, the EDPB and the EDPS highlight that it is essential that the Proposals are consistent and do not conflict in any manner with the application of the General Data Protection Regulation (the “GDPR”)³. This is not only for the sake of legal certainty, but also to avoid that the Proposals have the effect of directly or indirectly jeopardizing the fundamental right to the protection of personal data, as established under Article 16 TFEU and Article 8 of the Charter of Fundamental Rights of the European Union (the “Charter”).
9. The EDPB and the EDPS are aware of the ongoing legislative process of the Proposals and stress their availability to the co-legislators to provide further advice and recommendations throughout this process and to ensure in particular legal certainty for natural persons and due protection of personal data for data subjects in line with the TFEU, the Charter and EU data protection legislation.

3 COMMENTS

3.1 General comments

10. The EDPB and the EDPS recall that compliance with data protection rules does not constitute an obstacle for fighting the COVID-19 pandemic and that, at the same time, the general principles of effectiveness, necessity and proportionality must guide any measure adopted by Member States or EU institutions that involve processing of personal data to fight COVID-19⁴. A regular assessment on any measures to fight the COVID-19 pandemic should take place, having regard to the relevant scientific evidence and additional measures in place, in order to continuously evaluate which actions remain effective, necessary and proportionate. Additionally, the EDPB and EDPS also recall the principles relating to processing of personal data laid down in Article 5 of the GDPR, more specifically the principles of storage limitation, purpose limitation, as well as the principle of transparency.
11. Given the ongoing threat posed by SARS-CoV-2, including by its variant ‘Omicron’, whose increased infectiousness has resulted in very high case notification rates across the European Union and places considerable strain on healthcare systems and society; the impossibility to predict the impact of a possible increase in infections in the second half of 2022; and the risk of a prolongation of the pandemic as a result of the emergence of new SARS-CoV-2 variants, the EDPB and the EDPS understand the need to extend the applicability of the Regulation.
12. However, the EDPB and the EDPS underline that any restriction to the free movement of persons within the European Union put in place to limit the spread of SARS-CoV-2, including the requirement to present EU Digital COVID Certificates, should be lifted as soon as the epidemiological situation

³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

⁴ See also EDPB Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak, para. 4; EDPB’s Statement on the processing of personal data in the context of the COVID-19 outbreak. Adopted on 19 March 2020.

allows. Moreover, the EDPB and EDPS will pay special attention to the evolution of the COVID-19 pandemic and in particular to the use of personal data following the end of the pandemic.

13. The EDPB and the EDPS take note that the First Proposal does not alter substantially the existing provisions of the Regulation with regard to the processing of personal data.
14. The EDPB and the EDPS thus welcome that the GDPR will continue to apply to the processing of personal data carried out when implementing the Regulation.

3.2 Specific comments

3.2.1 Lack of an evidential basis for the assessment of the necessity and proportionality of the Proposal

15. **The EDPB and the EDPS take note that the Commission did not carry out an impact assessment for the Proposals.** According to the Commission, this is due to the urgency and the limited scope of the Proposals themselves⁵.
16. The EDPB and the EDPS recall that the original proposal for the Regulation was not accompanied by an impact assessment. In their comments made in the Joint Opinion 04/2021 on the Digital Green Certificate, the EDPB and the EDPS underlined the lack of an impact assessment accompanying the original proposal and pointed out that such an impact assessment would have provided substantiation as to the impact of the measures being adopted as well as to the effectiveness of already existing less intrusive measures⁶.
17. The EDPB and the EDPS take note of the urgency of the First Proposal, given that, in the absence of an extension of the applicability of the Regulation, the latter would cease to apply on 30 June 2022.
18. Nevertheless, also given the epidemiological developments in relation to COVID-19 in recent months, the need for an extension of the applicability of the Regulation, and by extension to Regulation 2021/954 regarding third-country nationals, could have been anticipated, and a more thorough assessment of the impact on fundamental rights, including on the right to data protection, should have been carried out.
19. In addition, the EDPB and the EDPS also highlight that, in line with Article 16 (2) of the Regulation, the Commission shall submit, by 31 March 2022, a report to the European Parliament and the Council on the application of the Regulation, containing in particular an assessment of the impact of the Regulation on the facilitation of free movement, fundamental rights and non-discrimination, as well as on the protection of personal data during the COVID-19 pandemic. **The EDPB and the EDPS strongly consider that the Proposal should be accompanied by the abovementioned report, as foreseen in the same Article of the Regulation, in order to provide a clear justification on the necessity and proportionality of the First Proposal, taking into account, amongst other things, the evolution of the epidemiological situation with regard to the COVID-19 pandemic together with the impact on**

⁵ See e.g. Explanatory Memorandum of the draft Proposal.

⁶ EDPB-EDPS Joint Opinion 04/2021 on the Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during COVID-19 pandemic (Digital Green Certificate), para. 16.

fundamental rights and non-discrimination notably on the basis of the possession of a specific category of a medical certificate⁷. In addition, the EDPB and the EDPS are of the view that the report should also address other technical issues such as the security of personal data related to the use of the certificates that have arisen when applying the Regulation in practice.

20. As mentioned above, **the EDPB and the EDPS**, in this regard, **stress the need to continuously evaluate which measures remain effective, necessary and proportionate as regards the purpose of the fight against the COVID-19 pandemic**. Moreover, **the EDPB and the EDPS recall the legal imperative for the data protection principles under Article 5 GDPR to be continuously applied and integrated in any personal data processing operation**.

3.2.2 Modifications to current data fields

21. The First Proposal contains an explicit clarification that vaccination certificates are to contain the number of doses administered to the holder, regardless of the Member State in which each dose has been administered, to accurately reflect the overall number of doses administered.
22. To this end, the First Proposal seeks to amend paragraph 2, point (b) of Article 5 of the Regulation as follows [proposed changes highlighted]: “information about the COVID-19 vaccine and the number of doses administered to the holder, **regardless of the Member State in which they have been administered**”.
23. In the specific case described above, the EDPB and the EDPS understand that the proposed change seeks to address situations where individuals have received vaccination doses in different Member States. Therefore, the proposed change seems to be limited to what is strictly necessary and does not raise particular concerns from a data protection perspective.
24. This would however be different should the Commission seek to substantially modify the current data fields. In this context, **the EDPB and the EDPS recall their previous position that any modification of data fields might require a re-evaluation of the risks to fundamental rights and that only more detailed data fields (sub-categories of data) falling under the already defined categories of data should be added through the adoption of delegated acts**⁸.
25. Additionally, the EDPB and the EDPS note that the First Proposal provides that persons participating in clinical trials for the development of COVID-19 vaccines are also eligible to receive a COVID-19 vaccination certificate (EUDCC). For the sake of legal certainty, **the EDPB and the EDPS consider that the First Proposal should clarify whether the information that a data subject has participated in a clinical trial would or would not be added to the categories of data listed in Article 5(2) of the Regulation**. Should such category of data be added, the EDPB and the EDPS refer to the recommendations put forward in paragraph 41 of the EDPB-EDPS Joint Opinion 04/2021 and recalled in paragraph 23 of the current Opinion.
26. The EDPB and the EDPS further recall paragraph 39 of the Joint Opinion, in which the EDPB and the EDPS note that “(...) an approach supporting differently comprehensive data sets and QR codes can improve data minimisation in different use cases.” Should the Digital COVID Certificate recording the three doses, or any further possible doses, be used for purposes other than freedom of movement,

⁷ See Article 3(7) of the Regulation.

⁸ EDPB-EDPS Joint Opinion 04/2021, para. 41.

the necessary categories of personal data included in the QR code must be reassessed and different technical solutions improving data minimisation in different use cases may be needed. **The EDPB and the EDPS therefore invite the Commission to assist the Member States in developing such technical specifications⁹.**

Brussels, 14 March 2022

For the European Data Protection Supervisor

For the European Data Protection Board

The European Data Protection Supervisor

The Chair

(Wojciech Wiewiorowski)

(Andrea Jelinek)

⁹ See Formal Comments of the EDPS on the draft Commission Implementing Decision (EU) amending Implementing Decision (EU) 2021/1073 laying down technical specifications and rules for the implementation of the trust framework for the EU Digital COVID Certificate established by Regulation (EU) 2021/953 of the European Parliament and of the Council, 18 October 2021 https://edps.europa.eu/system/files/2021-10/2021-0943%20Formal_comments_EUDCC_en.pdf