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Covid passes or certificates: protection of fundamental rights and legal implications

Committee Opinion¹

Committee on Social Affairs, Health and Sustainable Development

Rapporteur: Ms Carmen LEYTE, Spain, Group of the European People's Party

A. Conclusions of the Committee

1. The Committee on Social Affairs, Health and Sustainable Development (“the committee” hereafter) welcomes the report prepared by Mr Damien Cottier (Switzerland, ALDE) for the Committee on Legal Affairs and Human Rights. With some forms of “Covid passes or certificates” already being rolled out in some member States, and others – including the European Union as a whole – planning to follow suit soon, this report is particularly timely.

2. The committee on Social Affairs thus fully understands the interest in “Covid passes” that would allow restrictions to be lifted for people who have been vaccinated, previously infected or tested negative. The Committee on Social Affairs fully agrees with the main thrust of the draft resolution, that the use of such “Covid passes” to allow the resumption of enjoyment of certain rights or freedoms, by partially lifting restrictions, is fraught with legal and human rights complications, and above all depends on a high degree of certainty about medical risks. This degree of certainty has yet to be reached.

3. The committee recalls that, in the middle of a deadly pandemic, the primary duty of member States and the number one public health goal (to safeguard the right to life, on which the enjoyment of all other human rights depends) is effective infection control. The committee thus considers that “Covid passes” should only be used to exempt their holders from restrictions intended to prevent the spread of the SARS-CoV-2 virus when there is clear and well-established scientific evidence that proof of vaccination, past infection or negative test results are effective tools of infection control, namely lower the risk of transmission of the SARS-CoV-2 virus to an acceptable level from a public health point of view.

4. With this in mind, the committee proposes a small number of amendments to further reinforce the text.

B. Proposed amendments to the draft resolution

Amendment A (to the draft resolution)

In paragraph 7, after the words “including whether they will come into contact with people who have no immunity against Covid-19”, add the following words:

“whether those people are at a higher risk of severe illness or death from the illness,”

1. Reference to committee: [Doc. 15257](#), Reference 4574 of 19 April 2021. Reporting committee: Committee on Legal Affairs and Human Rights. See [Doc. 15309](#). Opinion approved by the committee on 17 June 2021.



Amendment B (to the draft resolution)

In paragraph 7, after the words “are locally present”, add the following words:

“or could be introduced by the holder.”

Amendment C (to the draft resolution)

At the end of paragraph 13.1., add the following words:

“and institute Covid pass regimes only when clear and well-established scientific evidence exists that such regimes lower the risk of transmission of the SARS-CoV-2 virus to an acceptable level from a public health point of view;”

Amendment D (to the draft resolution)

In paragraph 13.3.1., replace the words “ability to pay” by the following words:

“gender, race, religion, legal or socio-economic status, ability to pay, location and other factors that often contribute to inequities within the population”

Amendment E (to the draft resolution)

At the end of paragraph 13.3.7., add the following words:

“and whether those people are at a higher risk of severe illness or death from the illness,”

C. Explanatory memorandum by Ms Carmen Leyte, rapporteur for opinion

1. I would like to welcome the timely report by Mr Damien Cottier (Switzerland, ALDE) for the Committee on Legal Affairs and Human Rights. With some forms of “Covid passes” already being rolled out in some member States, and others planning to follow suit soon, it is important for the Assembly to take a clear position on this matter to ensure that our member States protect fundamental human rights – including the most fundamental right of all, the right to life – when “reopening” their economies following 15 months of pandemic-induced crisis. This is particularly important considering that the European Parliament and Council have reached an agreement on the European Commission proposal for an EU Digital COVID Certificate which is due to be formally adopted and enter into force by 1 July 2021, with a phasing-in period of six weeks for the issuance of certificates for those Member States that need additional time.²

2. We are in a difficult situation: This pandemic has turned the world upside down, causing millions of deaths and much suffering. The stress on our health systems is enormous and has even led to their collapse in some countries. We have had to take stringent public health measures for infection control, such as lockdowns and shutdowns. This has led to significant economic damage, in particular in countries such as mine, Spain, where tourism accounts for more than 14% of GDP.

3. It is thus fully understandable that we are all longing for measures which will allow us to open our economies safely again to avert economic catastrophe. The economic crisis sparked by the pandemic is already having its own knock-on effects on public health, since extreme poverty is an even bigger killer than Covid-19 in the long term.

4. We should take care to open our economies in an ethical and human-rights compliant manner. The report of Mr Cottier shows very well how this can be done, and I fully support his vision. Mr Cottier has done an excellent job of evaluating the human rights and legal implications of “Covid passes or certificates”, and I particularly commend his analysis on the issue of discrimination. I do not intend to second-guess any of his conclusions, which are in line with the statements made by various Council of Europe bodies,³ and with which I fully agree.

2. European Commission press release of 20 May 2021: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2593

3. Information document on “Protection of human rights and the ‘vaccine pass’” issued by the Secretary General of the Council of Europe on 31 March 2021, “Statement on human rights considerations relevant to ‘vaccine pass’ and assimilated documents” issued by the DH-BIO on 4 May 2021, the “Statement on Covid-19 vaccination, attestations and

5. However, opening our economies with “Covid pass” regimes needs to be done safely from a public health point of view: we cannot afford a fourth wave of Covid-19 in Europe. The public health dimension is also grounded in human rights, in particular the right to life and the right to the highest attainable standard of health, on which the enjoyment of all other rights effectively depends. In the middle of a deadly pandemic, the primary duty of member States and the number one public health goal are thus infection control.

6. Already in June 2020, the Assembly adopted [Resolution 2329 \(2020\)](#) and [Recommendation 2174 \(2020\)](#) “Lessons for the future from an effective and rights-based response to the Covid-19 pandemic”, based on the report of my colleague Mr Andrej Hunko (Germany, UEL), giving valuable guidance on how to address the ongoing and future public health crises. The Assembly stressed that rapid, evidence-based, effective and human rights-compliant measures are crucial. They should be communicated clearly and applied fairly. Co-ordination of action at national, regional and international levels, and European and international solidarity, is equally important in the face of a global public health crisis.

7. The Assembly’s past analysis and recommendations were vindicated by the report published on 12 May 2021 by the Independent Panel for Pandemic Preparedness and Response.⁴ Indeed, in an accompanying op-ed in the newspaper *The Guardian*, the Panel’s co-chairs, Helen Clark, former prime minister of New Zealand, and Ellen Johnson Sirleaf, former President of Liberia, pointed out: “Simultaneously, every national government must implement proven public health measures to stop the spread of the virus. The rollercoaster of patchy controls and premature lifting of restrictions is not working.”⁵

8. From a public health point of view, “Covid passes” can be problematic precisely because they are not a proven public health measure to stop the spread of the virus and can lead to premature lifting of restrictions. Many countries plan to allow restrictions to be lifted for people who have been vaccinated, previously infected or tested negative. Each of these bases pose their own challenges from a public health point of view.

9. **Regarding vaccination:** as Mr Cottier rightly points out, the vaccines against Covid-19 were developed in order to reduce the likelihood for severe illness or death, not to prevent a person from becoming infected with the SARS-CoV-2 virus, or from transmitting the infection to another person. Their efficacy varies significantly, also in relation to infection by the original virus form, or by different variants. According to the World Health Organization (WHO), there is “limited (although growing) evidence about the performance of vaccines in reducing transmission,”⁶ but its International Health Regulations (2005) Emergency Committee has so far judged this evidence to be too weak to make requiring proof of vaccination as a condition of entry admissible. The European Centre for Disease Prevention and Control (ECDC) evaluated “the risk of developing severe Covid-19 disease for an unvaccinated adult who has been in contact with a fully vaccinated person exposed to SARS-CoV-2 infection (...) moderate in older adults or persons with underlying risk factors (limited evidence so far).”⁷ This translates into ineffective infection control for member States of the Council of Europe with a high share of unvaccinated persons at a higher risk of severe illness or death from Covid-19. Luckily, the vaccination campaigns in most of our member States are currently gathering steam, in particular in the most vulnerable population categories, thus mitigating this risk.

10. The US Centers for Disease Control and Prevention (CDC) is reported to have received 10 262 reports of breakthrough infections after vaccination from 46 states and territories by the end of April 2021, when some 101 million Americans had been vaccinated. This small number is, however, very likely to be a substantial undercount by the CDC’s own admission. Some 995 of those with breakthrough infections are known to have been hospitalised, and 160 died (though not always because of Covid-19, with the median age of those who died at 82).⁸ These numbers suggest that the vaccines in use in the USA (mostly mRNA vaccines) are highly effective at preventing severe illness and death in those fully vaccinated, but that breakthrough infections can occur.⁹ This remains a problem for the health of individuals, but less of a problem for public health, as hospital

data protection” issued by the Council of Europe Consultative Committee on Convention 108 (T-PD) on 3 May 2021, and the “Advice on the application of the MEDICRIME Convention in the context of counterfeit Covid-19 vaccines” issued by the MEDICRIME Committee on 27 April 2021.

4. <https://theindependentpanel.org/mainreport/>

5. www.theguardian.com/global-development/commentisfree/2021/may/12/why-is-the-world-being-hit-by-wave-after-wave-of-covid-when-we-know-how-to-stop-it?

6. “Statement on the seventh meeting of the International Health Regulations (2005) Emergency Committee regarding the coronavirus disease (COVID-19) pandemic”, World Health Organization, 19 April 2021.

7. “Interim guidance on the benefits of full vaccination against COVID-19 for transmission and implications for non-pharmaceutical interventions”, European Centre for Disease Prevention and Control, 21 April 2021.

8. www.nytimes.com/2021/05/25/health/cdc-coronavirus-infections-vaccine.html

strain massively decreases if most breakthrough infections do not lead to severe illness. It is for this reason that on 1 May 2021, the CDC decided to stop systematic surveillance of all breakthrough cases, investigating only the most severe.¹⁰

11. **Regarding past infection:** as Mr Cottier again rightly points out in paragraph 19 of his explanatory memorandum, “The state of scientific knowledge concerning immunity to Covid-19 acquired through past infection, and the potential for such acquired immunity to prevent an individual from acting as a transmission vector, is also uncertain.” Indeed, some variants, such as P-1, have proven very adept at avoiding immunity acquired through infection with the original coronavirus, as the situation in Manaus (Brazil) has demonstrated.¹¹ It is also uncertain how long any immunity lasts, whether acquired through past infection or through vaccination.

12. **Regarding tests:** as Mr Cottier again rightly points out, a negative test result is only indicative of a historical situation, which can change at any moment after the sample is taken. In addition, some tests are more reliable than others (depending not only on the nature of the test, but also on whether they are self-administered or administered by trained professionals, and on which day after exposure the test is taken). Even those considered to be the “gold standard”, PCR tests, can give false negative results in 21% of cases even when taken at the optimal time for testing, eight days after exposure.¹²

13. In short, from a public health point of view, it is clear that we should thus only introduce “vaccine passes” when we have the evidence that they will not pose too high a risk from the public health point of view. I am cautiously optimistic that we will have this evidence before this report is debated in the hemicycle during the June 2021 part-session. In particular, member States (and the European Union) would be well advised to defer to the judgment of WHO – after all, all member States of the Council of Europe are members of WHO, and the International Health Regulations apply to all of our States. With this in mind, I would like to propose the following five amendments to the draft resolution.

14. The truth is that not all situations which may, at one point, require a “Covid pass” are created equal. As pointed out in paragraph 7 of the draft resolution, it could be problematic if the holder comes into contact with people who have no immunity against Covid-19 (for example, young children who have not yet been vaccinated, say, in the context of a concert/theatre play for children). But it could be even more problematic if those people are at a higher risk of severe illness or death from the illness (for example, when visiting an old-people’s or nursing home whose inhabitants have yet to be fully immunised) (**Amendments A and E**).

15. Similarly, it is not only the local presence of easily transmissible or possibly vaccine-resistant variants which matters in such situations, but also whether the holder of the passport could introduce them (for example, if a person from an area where such a variant is rampant visits their unprotected relative in a nursing home in a different part of the country or in another country) (**Amendment B**).

16. This is the most important amendment of all: The first 12 paragraphs of the draft resolution rightly make clear why member States of the Council of Europe should refrain from instituting Covid passport or certificate regimes until clear and well-established scientific evidence exists that such regimes lower the risk of transmission of the SARS-CoV-2 virus to an acceptable level from a public health point of view. This should be pointed out in the operative part of the text, as well, namely in the recommendations made to member States in paragraph 13 (**Amendment C**).

17. The Assembly’s [Resolution 2361 \(2021\)](#) “Covid-19 vaccines: ethical, legal and practical considerations”, laid down how to allocate Covid-19 vaccines in its paragraph 7.2. Of particular relevance with regard to the question of principle of equitable access is sub-paragraph 7.2.1. which urges member States and the European Union to “ensure respect for the principle of equitable access to healthcare, as laid down in Article 3 of the Oviedo Convention, in national vaccine allocation plans, guaranteeing that Covid-19 vaccines are available to the population regardless of gender, race, religion, legal or socio-economic status, ability to

9. A study published in the New England Journal of Medicine documented high viral load (indicating infectiousness) in two women who had been fully vaccinated and had developed robust immune responses but had been infected by a variant.

10. This decision has, however, come in for some criticism as collecting less epidemiological data can impact on the effectiveness of the conclusions drawn, which can negatively ricochet on the public health situation itself.

11. “Resurgence of COVID-19 in Manaus, Brazil, despite high seroprevalence”, Ester C. Sabino et al., The Lancet, Volume 397, Issue 10273, pp. 452-455, 6 February 2021, [https://www.thelancet.com/article/S0140-6736\(21\)00183-5/fulltext](https://www.thelancet.com/article/S0140-6736(21)00183-5/fulltext)

12. “False-Negative Rate of RT-PCR SARS-CoV-2 Tests”, summary by Salim Hayek, American College of Cardiology, 18 May 2020, <https://www.acc.org/latest-in-cardiology/journal-scans/2020/05/18/13/42/variation-in-false-negative-rate-of-reverse>

pay, location and other factors that often contribute to inequities within the population". In other words, simply stipulating that there should be "an objective and reasonable justification, which should not include ability to pay, for prioritising certain groups over others" in sub-paragraph 13.3.1. of the draft resolution, is not enough **(Amendment D)**.

18. I would like to conclude my explanatory memorandum with a call not to prioritise "Covid passes" over international solidarity in overcoming the pandemic everywhere. As has often been pointed out, none of us are safe until all of us are safe. We should thus be ensuring that the Assembly's [Resolution 2361 \(2021\)](#) "Covid-19 vaccines: ethical, legal and practical considerations" is fully applied, including its recommendations with respect to the allocation of Covid-19 vaccines within and between countries, such vaccines being treated as a global public good, and with respect to ensuring a high vaccine uptake.