

POLICY BRIEF

DIGITAL GREEN PASS: WHAT SHOULD THE EC AND MEMBER STATES DO TO MAKE GREEN PASS SAFER AND MORE INCLUSIVE



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12 MARCH 2021

On 17 March 2021, the European Commission will present a legislative proposal for the “Digital Green Pass”, a COVID-19 immunity/test result/vaccination certification. The Commission hopes that such a digital certification will ensure a better functioning Single Market by allowing people to travel safely within and outside of the European Union. Some Member State governments also plan to make certain currently inaccessible public and private venues accessible in the near future for holders of such passes.

In the Civil Liberties of Union for Europe’s opinion, introducing a Digital Green Pass at this stage is, at best, premature. Before deciding that the Digital Green Pass is justified, the European Commission and the Member States need to gather scientific evidence showing that its deployment would not endanger public health. They also need to make sure that the new pass is deployed in a way that does not lead to unfair treatment, exacerbated inequalities and privacy violations.

6 Key Recommendations to the EU and Member States

1. Further public resources should not be channelled into developing potentially dangerous digital solutions to problems that we do not understand sufficiently clearly. Instead, invest first in gathering further evidence on what, for how long, and to what extent halts the transmission of COVID-19.
2. Member States need to improve their efforts to make vaccination accessible to all. Necessary measures include simplifying administrative procedures, putting in place vaccination structures able to reach people in rural and marginalised communities, and conducting effective information campaigns on vaccinations to enhance awareness and trust. On its side, the Commission should oversee these efforts, including by making sure they comply with EU rules on public procurement and non-discrimination.
3. If those already vaccinated are granted an easier access to cross-border travelling, there should also be ample and cheap opportunities provided for obtaining test results quickly for those who are not yet vaccinated or cannot be vaccinated.
4. If Member States decide to attach other privileges (such as access to certain services and venues) to vaccination status, they must treat a recent negative test result as equivalent proof. Further, Member States must provide people with accessible, rapid and free testing. These testing facilities should be offered in the long term to ensure that those who cannot or choose not to vaccinate are not excluded from social life.
5. Any Digital Green Pass proposal should provide an obligation on Member States to either provide the necessary hardware for those who do not have smartphones, or analogue alternatives to using the Digital Green Pass.

6. Any Digital Green Pass proposal should be consistent with EU data protection rules. In particular, it should require Member States to conduct a thorough and transparent data protection impact assessment before the roll out of the Digital Green Pass at national level. This should be done in cooperation with their national data protection authorities, and in consultation with relevant stakeholders including civil society organisations. Any potential privacy risk must be mitigated in a careful and proactive manner.

Context

Universal and equitable access to a safe and effective COVID-19 vaccine is key to protect people's health and save lives, protect health workers and safeguard the public health system, ensure children return to school, and enable economies to rebuild and families to make ends meet.

COVID-19 vaccination campaigns have started to be rolled out across the EU. Those viewing the vaccine as the solution that will get us out of the pandemic are criticizing the slow pace of vaccination inoculation in some countries. Others express deep scepticism over the vaccine, due in part to the rapid spread of disinformation and fake news.

Vaccination campaigns and rules on vaccines and certifications are the exclusive competence and responsibility of national governments

and cannot be mandated by the European Union. No Member State has chosen to make the vaccination compulsory and it seems very unlikely that any of them will try to do so in the coming months. While vaccination certifications are the Member States' competence, the European Union has a clear interest in developing a coordinated approach.

On 17 March 2021, the European Commission plans to present a legislative proposal for a digital certificate referred to as the "Digital Green Pass".

The planned European certificate would provide:

- proof that a person has been vaccinated against COVID-19, and/or
- results of recent tests for those who have not been inoculated, and/or
- information on COVID-19 recovery.

According to European Commission President Ursula von der Leyen's announcement on Twitter, the Digital Green Pass will respect data protection, security, and privacy.¹

The aim of the Commission's legislative proposal is to ensure the functioning of the Single Market by gradually enabling Europeans to move safely within and outside the European Union. Whether to allow or require further uses of digital COVID-19 immunity/test

1 <https://twitter.com/vonderleyen/status/1366346729289904128?s=20>, last accessed on 10 March 2021.

result/vaccination certificates is to be decided by Member States.

In the eyes of the public, and several European governments, the Digital Green Pass offers a great way to return to ‘normality’ and to reenergize economies devastated by COVID-19-induced restrictions.

Concerns

While the Civil Liberties of Union for Europe (hereinafter Liberties) recognizes the appeal of introducing digital COVID-19 immunity/test result/vaccination certificates, Liberties calls on both the European Commission and the Member States to be mindful of the risks and dangers such digital passes may bring.

Liberties is of the opinion that the current vision for a legislative proposal on 17 March 2021 is deeply flawed on many levels. The Commission and the Member States should not go forward with any legislative proposal for any such or similar digital certificates before ensuring that ethical and scientific concerns having been addressed.

Scientific concerns

The European Commission is currently preparing new legislation based only on assumptions. First, that the vaccination will be sufficiently effective in reducing transmission. Second, that the risk of transmission from those who have already recovered from COVID-19 is sufficiently low. These assumptions are, however, not yet proven.

According to the World Health Organization, “there are still critical unknowns regarding the efficacy of vaccination in reducing transmission (...). Proof of vaccination should not exempt international travellers from complying with other travel risk reduction measures.”² In addition, “the extent and duration of antibody-mediated immunity to protect against SARS-CoV-2 reinfection have not been scientifically established.”³

As a human rights organization, Liberties is not in a position to provide scientific evidence supporting or questioning the efficacy of the use of digital immunity and/or vaccination certificate passes. Nevertheless, Liberties reminds European governments and the European Commission that measures which

2 Statement on the sixth meeting of the International Health Regulations (2005) Emergency Committee regarding the coronavirus disease (COVID-19) pandemic, downloaded from [https://www.who.int/news/item/15-01-2021-statement-on-the-sixth-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-coronavirus-disease-\(covid-19\)-pandemic](https://www.who.int/news/item/15-01-2021-statement-on-the-sixth-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(covid-19)-pandemic), last accessed on 10 March 2021.

3 T. C. Voo and al., Immunity certification for COVID-19: ethical considerations, Bull World Health Organ 2021;99:155–161| doi: <http://dx.doi.org/10.2471/BLT.20.280701>

may interfere with fundamental rights must be based on evidence that they are necessary and effective. In contrast, introducing the Digital Green Pass without sufficient evidence appears to be a flashy, counter-productive measure that risks our health and our lives for the sake of political gain.

- **Liberties insists that instead of concentrating on developing a proper legal environment for mobile applications through which Europeans could certify their vaccination/recovery status, the Commission and European governments should support the scientific community in coming to a well-grounded understanding on how immunity / SARS-CoV-2 transmission works both in the segments of the population who have already recovered from COVID-19 and also in those who have been vaccinated.**

Ethical and legal concerns

Should scientific evidence suggest that the risk of transmission is very low for those already vaccinated and/or for those already recovered from COVID-19, the Commission and Member States would still need to address ethical and legal concerns in connection with

the deployment of the planned Digital Green Pass.

Certain uses of the Digital Green Pass may lead to unfairness (and, consequently, to mistrust in European institutions), may further exacerbate existing inequalities and may create a two-tier society where some people may enjoy an extensive set of freedoms and rights while others are excluded. In addition, the deployment of the Digital Green Pass may involve an unjustified intrusion into our private lives and may put our personal data at undue risk of misuse.

Freedom of Movement: Unfairness | Mistrust

A digital vaccination pass exclusively linked to the freedom of movement within (and outside) the European Union could lead to the exclusion of people who are not able to have vaccines for medical reasons, such as pregnant women or people with certain preconditions. Apparently, this is why the Commission wants the Digital Green Pass to contain information not only on vaccination status, but also on current test results, and/or on the COVID-19 history of the user.⁴ Liberties supports the intention to avoid the exclusion of certain at-risk groups in society. However, without ensuring cheap and

4 “We will also be looking at other categories of information to avoid discrimination of citizens, such as test results and statements of recovery” Commission spokesman Christian Wigand said on 1 March 2021, see on <https://www.dw.com/en/eu-vaccine-passport-an-ethical-and-legal-minefield/a-56747519>, last accessed on 10 March 2021.

easy access to testing, those without vaccination will still face undue barriers to travel.

As of early March 2021, vaccination is not compulsory in any Member States, nor is it anticipated to become so in the foreseeable future. Further, the vaccine is not generally available to the public. It is not expected that all EU citizens will have access to vaccination before the last quartal of the year. While vaccine rollout may work transparently and fairly (albeit slowly) in several Member States, this is not necessarily true across the board. In a number of countries, the middle class has better access to vaccination and people with social and/or financial capital are jumping the queues.⁵

Granting those who have received a vaccination extra rights, especially if the rollout has been inequitable, while denying these rights to those who are not yet vaccinated, is unfair and should be avoided. If proof of vaccination entitles the holder to relatively easy travel between Member States, proof of a recent negative test should be equally valid. Furthermore, governments should make such tests, with quick result delivery, as widely accessible as possible.⁶

- **Liberties is of the opinion that until access to vaccination is generalized, if governments grant free movement to**

vaccination certificate holders, they should also provide ample and cheap opportunities for obtaining test results quickly for those who are unvaccinated and treat a recent negative test result as equivalent to proof of vaccination.

Access to Private and Public Venues: Exacerbating Inequalities | Social Exclusion

Member States may decide to make access to certain public or private venues conditional on a recent negative test result, or a certain vaccination or recovery status on the Digital Green Pass. Such a move would certainly lead to social exclusion in the short run if widely accessible and quick testing were not available for those who have not yet been vaccinated, those who cannot be vaccinated and those who chose not to be vaccinated.

Even after access to vaccination is generalised, certain segments of the population may well not choose to get vaccinated. These can be expected to be predominantly poorer, less-educated segments of the population, as well as those living far from health services or belonging to minority groups that have been historically discriminated against by the state. These groups may fall prey to misinformation, find it difficult to access vaccination points, or find the administrative process of obtaining a certificate difficult.

⁵ E.g., <https://www.dw.com/en/queue-jumping-celebs-boost-polish-coronavirus-vaccine-interest/a-56364446> last accessed on 11 March 2021.

⁶ For those who cannot be vaccinated this is to be provided even after access to vaccination is generalized.

Member States may be reluctant to offer widely accessible testing in the long term for those who are not vaccinated. However, failure to do so in a situation where this gives them access to certain venues and services could exclude entire communities from social life. Therefore, Member States should first, lower the barriers to vaccination by making sure that the application process is easy, and information campaigns target groups vulnerable to disinformation; and second, maintain widely accessible testing with quick results in the long run.

In addition, governments need to be mindful that the access to certain public and private venues cannot be exclusively conditional on a digital immunity/vaccination/test result pass, unless governments are willing to provide free hardware to those who do not own, or do not own a good enough, smartphone. Leaving people without a smartphone unable to access shops, pubs, stadiums, museums, gyms or governmental offices would create second-class citizens.

- **Member States need to provide members of at-risk groups with the testing opportunities they need to live a socially minimally acceptable life in the long term.**
- **Member States should make the application process for getting the vaccination easy, and conduct information**

campaigns on vaccinations targeting groups vulnerable to disinformation.

- **Member States either need to provide the necessary hardware for those who do not have smartphones, or alternatives to the digital pass.**

Privacy | Surveillance

While currently no information is available on the data protection, security and privacy aspects of the Digital Green Pass, Liberties is concerned about how well digital passports will protect people's privacy. Our health information is confidential and deeply personal. Any digital passport on a smartphone or elsewhere needs to keep that data safe from third parties like companies or government departments.

It is to be noted that many European governments and administrative bodies do not have a good track record in being mindful about the potential risks new technological solutions meant to mitigate the problems caused by the COVID-19 may involve.

The General Data Protection Regulation requires that "when processing would result in a high risk in the absence of measures taken by the controller to mitigate the risk" data protection authorities are consulted. However, such consultations did not take place, or not before the development and deployment of contact-tracing or quarantine-enforcing

applications.⁷ Data Protection Impact Assessments were in many cases simply not carried out,⁸ or at least not performed prior to the deployment of the new apps.⁹

- **Member States should require digital health passport providers to conduct data protection impact assessments in cooperation with their national data protection authorities before/while the different versions of the digital green passes are being developed. Providers ought to mitigate potential privacy risks in a careful and proactive manner.**

7 GDPR, Article 36. See e.g., here: <https://gdpr-info.eu/art-36-gdpr/>

8 GDPR, Article 35. See e.g., here: <https://gdpr-info.eu/art-35-gdpr/>

9 Civil Liberties Union for Europe will publish a report on the first year of COVID-19 technology in April 2021.

Disclaimer

The in-house experts of the Civil Liberties Union for Europe authored this policy brief. It addresses the ethical and legal challenges that the European institutions and national governments need to overcome in order to protect democratic values and human rights regarding a digital green pass. This brief does not take a stand on questions of public health, which health experts, immunologists and virologists must answer.

Liberties believes it is within every European's right to decide not to get vaccinated and that EU Member States have certain obligations to ensure these citizens can still be an integral part of their community.

Liberties does nevertheless believe that, based on available health evidence, vaccinations are safe to use and member states must inform their citizens about the health advantages of getting vaccinated.

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