

## Information Documents

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**Protection of human rights and the "vaccine pass"**

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For over a year, countries in Europe and around the world have been facing a health crisis linked to the COVID-19 pandemic. The measures taken by the Council of Europe member states to combat this pandemic notably respond to their obligations under the European Convention on Human Rights (ECHR) and the European Social Charter (ESC) to protect the right to life (Article 2 ECHR) and the right to protection of health (Article 11 ESC). These measures have, for example, included restrictions to the right to freedom of movement, as guaranteed by Article 2 of Protocol No. 4 to the ECHR (the right to move freely within the territory of a state and the freedom to leave any country). Several provisions of the ECHR provide that such restrictions on the exercise of certain rights, aimed at the protection of health, are in principle permissible provided that they are prescribed by law, necessary and proportionate. The Council of Europe has undertaken numerous initiatives, in accordance with its mandate, to support its member states in responding to this crisis in a manner fully compatible with their human rights obligations.

The question of "vaccine passes" has arisen in the context of the implementation of vaccination programmes that prioritise certain groups of people over others in accordance with predefined criteria. This "prioritisation" is explained by the limited availability of vaccines and by the difficulties encountered in implementing vaccination campaigns.

"Vaccine passes" raise a number of questions. The human rights standards of the Council of Europe provide fundamental points of reference in responding to these questions. Our member states should take full advantage of them, while taking into account the current state of scientific knowledge, which is increasing but remains limited.

### **Basis for states' obligation to provide access to vaccination**

Vaccines are an essential part of the strategy to combat the pandemic, which states are obliged to implement under international human rights law (see, *inter alia* Article 11.3 of the ESC: "With a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures, *inter alia*, (...) to prevent as far as possible epidemic, endemic and other diseases"). In this context, our member states are implementing strategies designed to ensure, through a high rate of vaccination and particular attention to the emergence of new variants of the virus, a broad immunisation of the population. It is also worth recalling the World Health Organization (WHO) recommendations which aim to promote global solidarity and equitable access to vaccines, as well as collaboration in technology transfer to accelerate vaccine production and deployment.<sup>1</sup>

However, as the Council of Europe's Bioethics Committee recalled in its declaration "COVID-19 and Vaccines" of 22 January 2021<sup>2</sup>, "*Faced with a scarcity of vaccines, there is a need to prioritise groups in relation to the provision of access to vaccination with the aim to minimise deaths and severe illness as well as to reduce transmission*". The principle of equitable access to healthcare established in Article 3 of the Convention on Human Rights and Biomedicine (known as the Oviedo Convention) implies that the measures put in place should aim to protect, as a priority, groups of people at particularly high risk, paying particular attention to persons in vulnerable situations.

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<sup>1</sup> [Statement on the sixth meeting of the international health regulations \(2005\) emergency committee regarding the coronavirus disease \(COVID-19\) pandemic](#).

See also [Resolution 2361 \(2021\)](#) of the Parliamentary Assembly of the Council of Europe, "Vaccines against COVID-19: ethical, legal and practical considerations".

<sup>2</sup> [COVID-19 and vaccines - ensuring equity of access to vaccination during the current and future pandemics](#).

## **Vaccination certificates, passes and their use**

A vaccination certificate provides evidence of the administration of a vaccine to the person for whom it is issued. The use of such certificates for medical purposes is not new, nor is the requirement to carry them when travelling to prevent the spread of epidemics. Its usefulness cannot be questioned in the context of the current health crisis, notably in the implementation of the strategy to combat the pandemic. In order to facilitate co-operation in this context, the work undertaken to harmonise these certificates at European and international level can only be supported.

The same applies in principle to the introduction of "passes" or similar documents, which also contain information on whether the holder has been immunised or has tested negative for COVID-19; such "passes" can only further harmonise and, above all, facilitate the measures which aim at limiting the spread of the pandemic.

On the other hand, the possible use of vaccination certificates, as well as immunisation data, for purposes other than strictly medical, for example to give individuals exclusive access to rights, services or public places, raises numerous human rights questions. It should be considered with the utmost caution. Indeed, such use could prevent the enjoyment of certain fundamental rights by individuals, or even by a large part of the population, who would not hold such a certificate or could not justify immunisation. In addition to the risk of discrimination in relation to the right to freedom of movement, this exclusive access approach could have consequences for the enjoyment of other fundamental rights and freedoms, such as the right to respect for private and family life, the right to freedom of assembly or the right to freedom of religion and it could pose risks of discrimination, or even stigmatisation or arbitrariness, in particular in relation to access to employment, housing or education.

These risks are all the more real as the progress of the vaccination campaign does not yet ensure that everyone has access to vaccinations and there is no guarantee that the situation of people who, for medical or other reasons, cannot be vaccinated will be duly taken into account. Furthermore, as recalled by the WHO in February 2021, we cannot lose sight of the fact that there are still many scientific uncertainties about the ability of COVID-19 vaccines to limit transmission or the duration of protection afforded by vaccination.<sup>3</sup> It is therefore difficult to assess at this stage with sufficient precision the real risks of transmission presented by a vaccinated person.

## **Protection of privacy and personal data**

Vaccination certificates contain sensitive health data. The same applies to other health-related information that would appear on "passes".

Under the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ("Convention 108") and its amending Protocol ("Convention 108+")<sup>4</sup>, as well as the Recommendation of the Committee of Ministers to member States on the protection of health-related data<sup>5</sup>, the processing, including the collection, of such data and information must be subject to a particularly high level of protection. Their use for non-medical purposes raises concerns about the protection of privacy and personal data.

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<sup>3</sup> [Interim position paper: considerations regarding proof of COVID-19 vaccination for international travellers](#). See also [Resolution 2361 \(2021\)](#) of the Parliamentary Assembly; Covid-19 vaccines: ethical, legal and practical considerations.

<sup>4</sup> The Amending Protocol has not yet entered into force ([Details of Treaty No.223](#)).

<sup>5</sup> [Recommendation CM/Rec\(2019\)2 of the Committee of Ministers to member States on the protection of health-related data](#).

The risks associated in particular with the processing of such data by persons who are not subject to the rules of confidentiality appropriate to the sensitivity of these data, their wide circulation and the possible misuse of the purposes of their processing, could undermine the respect of data protection principles. Any processing of such data must meet, in particular, the criteria of necessity and proportionality, both with regard to the type of data processed and exchanged and to the length of time they are kept, as well as the criteria of lawfulness, purpose, security and other criteria laid down in Convention 108+.

### **Risks to public safety and health**

In a context of vaccine scarcity, the greater freedoms that would be granted by a certificate of vaccination to vaccinated persons only, could also, as has already been noted, open the door to the development of a parallel private market for vaccines, as well as to the increase of criminal activities such as counterfeiting of vaccines or the issuing of false certificates, which would seriously compromise public health efforts.

The measures laid down in the Council of Europe Convention on counterfeiting of medical products and similar crimes threatening public health (MEDICRIME Convention), as well as in the Convention on Cybercrime (Budapest Convention), aim in particular at preventing and combating such activities.

### **Conclusion**

Combating the current pandemic depends, above all, on the increased efforts to produce and administer vaccines, with particular attention to people in vulnerable situations, so that restrictions to individual freedoms and constraints imposed can be progressively reviewed as the population enjoys greater immunity, taking into account acquired scientific knowledge.

In these particularly difficult times, which we must all continue to face, it was appropriate to recall these common principles and values which are at the heart of the Council of Europe's action so that all member states can take informed decisions in a way that preserves them.

Any harmonisation or facilitation of the steps necessary to certify a person's vaccination, immunity or non-contamination are certainly useful; they must however be accompanied by strict measures to protect personal data and by increased vigilance against the risks of counterfeiting.

The use of the same certification or immunisation data to grant privileged and exclusive access to rights creates risks of discrimination and arbitrariness.

These issues will be at the heart of the work in these areas initiated in a co-ordinated manner by the Committee on Bioethics (DH-BIO), as well as the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal data (T-PD).

The Council of Europe remains present and active with member states by providing them with the tools and expertise to ensure that the crisis does not undermine the values and principles common to all. This is in particular the aim of the project of multilateral and multidimensional co-operation on human rights in healthcare during health crises, presented to the Committee of Ministers on 20 January 2021 (see also [SG/Inf\(2020\)24](#)) open to all member states and which they are invited to support.