Vaccination for Vacation

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“Jab and Go” – this was Ryanair’s controversial advert published in December 2020. Its intention was to attract more customers to buy plane tickets to different European sunny destinations, such as Spain and Portugal, with the underlying message that vaccinations will enable cross-border travel around Europe. The advert received 2,370 complaints and was soon removed, after the UK Advertising Standards Authority declared that it was “misleading and irresponsible”.

In the meantime, there have been plenty of developments related to the possibility of using vaccination as a method to promote cross-border travel in Europe and beyond. The European Commission president Ursula von der Leyen announced on 1 March that the Commission will put forward a proposal for a “digital green pass” on 17 March, which would enable safe cross-border movement – for purposes of work and tourism – of three categories of individuals: those who have been vaccinated, those who have developed antibodies after recovering from COVID-19 and those who can produce a negative PCR test. Considering the length of the EU decision-making process and the technical work that will need to be done, the “digital green pass” will not be ready to be used before late June or July this year.

EU Member States’ reactions to this initiative have been diverse. While some Member States – particularly those dependent on tourism – such as Cyprus, Greece, Italy, Portugal, Iceland, Denmark, and Spain – support the initiative, others – like Belgium, France, Germany and the Netherlands –express concerns. In the meantime, both Greece and Cyprus have reached agreements with Israel that should enable their citizens who have been vaccinated to travel between these two EU Member States and Israel without the need to quarantine.

However, EU vaccination certificates, where only the proof of vaccination would enable individuals to travel across the EU, are non-compliant with EU law, both at the time when there are not sufficient vaccines and later on, when they become widely available. This is due to their discriminatory effect on certain categories of Union citizens and, possibly, even on certain EU nationalities during the time when they are scarce. By contrast, digital green passes have a wider scope and could avoid the shortcomings of vaccination certificates, but only once vaccines become widely available and only provided vaccination actually prevents or minimises the chances of transmission of the coronavirus.

EU vaccination certificates would regulate unrestricted cross-border movement exclusively to vaccinated individuals, while leaving to each Member State to set additional requirements for the entry to its territory of those who have not been vaccinated. This means that the host Member State could set much stricter entry requirements, such as quarantines or even a complete entry ban, for the non-vaccinated individuals. An EU digital green passes would prevent such an all-or-nothing approach. They would regulate and enable free cross-border movement

not only of those who have been vaccinated, but also of those with a negative PCR test and those who have antibodies after recovering from COVID-19. This difference between vaccination certificates and digital green passes is crucial for understanding why the former could not comply with EU law, whereas the latter could, provided they satisfy the conditions explained further below.

Discriminatory effects and ethics of vaccination certificates and digital green passes

COVID-19 vaccination certificates and digital green passes raise important questions of discrimination, ethics and fairness. Reserving free cross-border travel only for those who have been vaccinated against COVID-19 would have a discriminatory effect by dividing individuals into two groups: the privileged, vaccinated ones and the ones who, due to the shortage of vaccines (in the current stage of vaccination), or due to their belonging to a certain category of individuals (in the later stage, once vaccination becomes widely available in the EU), cannot or do not want to get vaccinated. For example, it is still not clear whether COVID-19 vaccines are safe for children, pregnant women and people with weakened immune systems and autoimmune conditions. On top of this, certain EU Member States have managed to vaccinate a higher percentage of their citizens than others. This means that reserving free cross-border movement for vaccinated EU citizens, whereas completely banning such travel to non-vaccinated individuals or allowing them to travel only by fulfilling additional requirements, such as quarantines or negative PCR tests, would have a discriminatory effect on all those who have not been vaccinated. They would also discriminate based on nationality, due to the fact that some Member states are progressing faster with vaccination than others. By contrast, once vaccines become widely available, vaccination certificates would continue to discriminate based on age, gender and vulnerability, as certain categories of individuals could still not get vaccinated.

Generally speaking, EU law does not tolerate discrimination based on nationality, as stipulated by Article 18 TFEU. Neither does Article 21 of the EU Charter allow EU institutions and Member States (when implementing Union law) to discriminate based on sex, age or disability. Limitations of these rights and freedoms can only be made provided they are proportionate, meaning that they are necessary and that they genuinely serve the objective of protecting public health. The issue of proportionality will be discussed later in the post. At this point, it should be pointed out that vaccination certificates – due to their all-or-nothing approach, which does not include an alternative – would have a disproportionately discriminatory impact on everybody who is not vaccinated.

EU digital green passes would prevent such an exclusive approach by regulating free movement not only of those who have been vaccinated, but also of those with a negative PCR test and those who have antibodies after recovering from COVID-19. This way, digital green passes would promote individualised risk assessment when relying on public health justifications, instead of more generalised and systematic restrictions, such as entry bans, quarantines or PCR tests for everybody. Even

though the non-vaccinated individuals would not be in an entirely equal position – as they would have to get a negative PCR test or a proof of immunity, whereas the vaccinated individuals would not have to do that – provided the non-vaccinated individuals did this extra effort, they would be able to travel cross-border without depending on the host Member State's restrictions, such as quarantines or even complete entry bans. Consequently, digital green passes would neither amount to indirect vaccine compulsion nor create second-class citizenry, as they would offer acceptable alternative requirements for those who could not or would not be willing to get vaccinated. However, this would apply only once vaccines become widely available across the EU. Up until then, digital green passes should not be used, in order to avoid creating a dividing line between the vaccinated individuals and all those who would like to get vaccinated but have not yet managed to do so.

For these reasons, it is paramount that future EU passes start to apply only once vaccines become widely available in the EU, and that they regulate free movement rights not only of those who have been vaccinated, but of all the three categories, as envisaged by the digital green pass. Considering the high rate of contagiousness and transmissibility of COVID-19 (R0), scientists have been raising their estimates to up to 90 percent as the percentage of population that would need to be immune to stop the spread of coronavirus (herd immunity). The WHO's position has been that the percentage of the population that would need to be vaccinated to induce herd immunity is not yet known. For this reason, EU digital green passes should continue to regulate EU free movement of all those who are not infectious even once everybody who wants to get vaccinated gets a chance to do so, as long as this does not amount to herd immunity. Only once herd immunity is created, could digital green passes be viewed as redundant and unnecessary hurdles to free movement.

Finally, the argument that it is better to treat everybody completely equally, by tolerating only a negative PCR test for travel purposes, no matter whether one has been vaccinated or not, instead of allowing a proof of vaccination, as an alternative, cannot be upheld. Such an absolute level playing field for the vaccinated and non-vaccinated individuals would be neither fair, nor economically and socially beneficial. Requiring a vaccinated person to get tested would be completely unnecessary, provided vaccination minimises the risk of transmission. Vaccinated individuals would perceive this extra requirement as a pointless burden or even a punishment, instead of being rewarded for the decision to get vaccinated by enabling smoother travel. On top of this, allowing several reliable options for cross-border travel would be economically and socially beneficial, as it would reduce the need for testing for the vaccinated individuals, who would not have to invest time and money for taking the PCR tests. For this reason, accepting vaccination, and not only PCR tests, as a requirement to cross intra-EU borders would facilitate free movement and promote tourism.

Proportionality of vaccination certificates and digital green passes

Once vaccines become widely available, digital green passes will be acceptable only provided they are proportionate. The first step in the proportionality analysis is the suitability test, i.e. the fulfilment of the requirement that vaccination protects public health, not only by creating immunity of the vaccinated individual, but also by preventing or significantly reducing the transmission of the virus to all those who have not been vaccinated. This is consistent with the central aim of public health, which is to protect and increase the health of the entire population, rather than focusing solely on individuals, which is the role of medicine.

Based on current scientific findings, there are still no firm data certifying that vaccination prevents or minimises the chances of transmission of the coronavirus from the vaccinated individuals to those who have not been vaccinated. In its interim position paper from 5 February, the World Health Organization (WHO) opposes the idea of introducing the requirement of the proof of COVID-19 vaccination as a condition for departures or entry into another country, “given that there are still critical unknowns regarding the efficacy of vaccination in reducing transmission” and recommends that “people who are vaccinated should not be exempt from complying with other travel risk-reduction measures”.

This position calls into question the suitability of relying on the proof of vaccination for the purpose of facilitating safe cross-border travel without any additional precautionary requirements. Only once there are sound scientific data confirming that the vaccinated individuals are at a significantly reduced risk of transmitting coronavirus to the non-vaccinated ones, can vaccination be considered reliable and suitable evidence for preventing or reducing transmission. As long as this is not the case, the satisfaction of the suitability test remains the weakest link of digital green passes or any other document relying on vaccination as a guarantee of safe travel. Most recent scientific findings are promising, as they start to point towards a “meaningful reduction” in transmission.

In this context, scientific research will also need to consider whether all the different vaccines, that are being used in the EU and worldwide, provide equally good and sufficient protection against transmission. This could be particularly problematic with regard to those vaccines that have been bought and used in some Member States without being approved by the European Medicines Agency (EMA), such as the Russian and Chinese vaccines. Finally, evidence will need to establish the duration of immunity and protection from transmission of the vaccinated individual. Once this is established, the EU, its Member States and/or the WHO will need to establish reliable procedures for the renewal of vaccination documents.

Presuming that it becomes scientifically established that vaccination is a reliable method for safe travel, without a risk of transmission, digital green passes still need to be necessary. However, when responding to the question whether there is a less restrictive method of enabling free movement, while achieving the same level of public health protection, one should acknowledge that, in the COVID-19 world,

the alternative to digital green passes is not unrestricted free movement, but even more restrictions. Digital green passes should be evaluated against more restrictive alternatives, such as quarantines and/or PCR tests for everybody, or even against complete entry bans. While it is evident that entry bans and quarantines are more restrictive than digital green passes, requiring PCR tests from everybody would also be a more restrictive alternative for those who have been vaccinated. It would set unnecessary requirements on those who have been vaccinated and could, thus be viewed as a “race to the bottom”. For this reason, digital green passes will be the least restrictive option for safe cross-border movement, as long as herd immunity is not created. However, adopting digital green passes before vaccines become widely available across the EU would not be reasonable and proportionate, considering other social interests (proportionality *stricto sensu*), as it would create a disproportionate social disadvantage – which could be perceived as second-class citizenry – to a major part of EU population who could not yet get vaccinated, but would like to do so.

Unlike digital green passes, vaccination certificates, offered on their own – without enabling cross-border movement of those who have antibodies or a negative PCR test – would not pass the test of necessity as the proof of vaccination would be a less restrictive alternative to PCR testing for those who have been vaccinated, provided vaccines prevent transmission. For this reason, EU decision-makers should not regulate vaccination certificates, on their own, without simultaneously regulating alternative options for those who have not been vaccinated, once vaccines become widely available in the EU.

Finally, whereas EU free movement law should accept all evidence of non-infection for the purpose of cross-border travel, there are certain situations – which could be within the scope of EU law, provided there is a cross-border element – where outright discrimination between the vaccinated and non-vaccinated individuals would be both ethical and legal, once everybody gets a chance to be vaccinated. In other words, in these situations – applicable to access to employment, self-employment and provision of services – it would be legitimate to require vaccination certificates without alternatives or exceptions. This would primarily apply to certain high-risk jobs, such as those in hospitals and nursing homes, where it would be legitimate to require the proof of vaccination as one of the requirements for getting employed, even in cases where an individual could not get vaccinated due to objective reasons, just like it is legitimate to require the proof of excellent eyesight from pilots and air traffic controllers. Discrimination would, in these instances, be justified by three facts, the first being that no less restrictive alternative would protect public health in these high-risk jobs equally successfully, the second, that public health benefits outweigh limiting individual rights in these situations, and the third, that this type of discrimination would be generally perceived as ethical by the society and would improve public trust in hospitals and nursing homes.
