

Irena Barkane, *Dr. iur., Researcher*

University of Latvia, Latvia

Katharina O’Cathaoir, *PhD, Associate Professor*

University of Copenhagen, Denmark

Santa Slokenberga, *LL.D., Senior Lecturer*

Uppsala University, Sweden

Helen Eenmaa, *JSD, Researcher*,

University of Tartu, Estonia

THE LEGAL IMPLICATIONS OF COVID-19 VACCINATION CERTIFICATES: IMPLEMENTATION EXPERIENCES FROM NORDIC AND BALTIC REGION

Keywords: COVID-19 technologies, fundamental rights, necessity, non-discrimination, proportionality, vaccination certificates

Summary

EU Digital green certificates were initially envisaged as a joint EU initiative to facilitate free movement during the pandemic. However, many countries rapidly extended their use in different contexts at the national level, raising serious ethical and legal concerns and questions, in particular, on how to strike a right balance between the interests of the individual and the interests of society. The paper aims to explore the legal implications of using vaccination certificates at the national level, in particular by exploring and comparing practices in selected Nordic and Baltic countries. The article emphasises that, despite COVID-19 crises, the governments should protect fundamental rights and values and when deciding on new restrictions carefully assess their necessity and proportionality. National responses call for a new regulatory framework to ensure responsible use of digital technologies in public interests.

Introduction

Since March 2020, the COVID-19 pandemic has posed unprecedented challenges for healthcare systems as well as dramatic social and economic impacts

in Europe and around the world. Governments all around the world have developed different policy responses to the pandemic, put in place emergency regulations and continue to introduce different measures to fight the pandemic and save lives.

The COVID-19 pandemic has also become a catalyst for digital transformation. Alongside such well known public health measures as vaccination, testing, social distancing, governments have introduced various new digital solutions to tackle the spread of COVID-19, e.g., mobile apps, thermal scans, facial recognition, biometric wearables and drones.¹ European Union (EU) Member States have also introduced a number of coordinated responses to COVID-19. Different new digital solutions have been experimented by public authorities intervening in people's daily life, i.e., contact tracing apps, use of mobility data² and EU digital green certificates. However, the last one has raised the most intense debates.

On 14 June, the European Commission adopted the Regulation on framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital Green Certificate) to facilitate free movement during the COVID-19 pandemic (hereafter – the Regulation).³ EU Digital COVID Certificate means interoperable certificates containing information about the vaccination, test result or recovery of the holder issued in the context of the COVID-19 pandemic (Article 2(2)). COVID-19 digital certificates, also referred to as “vaccination certificates”, “digital health passports”, or “immunity passports”, are digital credentials that, combined with identity verification, allow individuals to prove their health status (such as the results of antigen and antibody tests, and eventually, digital vaccination records).⁴

Although these certificates have been initially introduced to facilitate free movement across the EU and to fulfil international requirements, many countries rapidly extended their use to govern access to socio-economic life.⁵ They are currently used for this purpose within the EU and also third countries.

¹ Vargo D., Zhu L., Benwell B., Yan Z. Digital Technology Use during COVID-19 Pandemic: A Rapid Review. *Human Behavior and Emerging Technologies*, 2020, 3 (1), pp. 13–24, <https://doi.org/10.1002/hbe2.242>.

² Commission Recommendation (EU) 2020/518 of 8 April 2020 on a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data, C/2020/3300, OJ L 114, 14.4.2020.

³ Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 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. OJ L 211, 15.06.2021.

⁴ Beduschi A. Digital Health Passports for COVID-19: Data Privacy and Human Rights Law, 2020, Exeter: University of Exeter. Available: https://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/lawimages/research/Policy_brief_-_Digital_Health_Passports_COVID-19_-_Beduschi.pdf [viewed 08.11.2021.].

⁵ See, e.g., Susi M., Pajuste T. (eds.). Covid-19 “Vaccine Passports”: An Exploratory Study of 23 Countries, Tallinn: Tallinn University, 2021; Chiusi F. Analysis: Digital vaccine certificates – global patchwork, little transparency, 29.03.2021. Available: <https://algorithmwatch.org/en/digital-vaccine-certificates-analysis-march-2021/> [viewed 08.11.2021.].

Paradoxically, the manner they have been applied and expanded in Member States may actually limit travel. The differences in the adoption and use of vaccine certificates in the countries is emblematic of the limited coordination of COVID-19 measures among Member States.

Vaccination certificates may contribute to the management of the COVID-19 pandemic and may play an essential role in reopening societies and restoring civil freedoms. However, their introduction, in particular at the national level, have raised serious ethical and legal concerns, that have been addressed also by the international and European organisations. They have created broad discourse on dilemmas and trade-offs between different rights, i.e. how to ensure compliance with fundamental rights, e.g. privacy, non-discrimination, equality, freedom of movement, while protecting public interests, such as public health.⁶ They have raised new questions about protection of fundamental rights and democratic values, e.g. social justice, non-discrimination, solidarity, the relations between state and citizens, the limits of state power and the rise of digital surveillance.⁷

The article aims to explore legal implications of the use of COVID-19 vaccination certificates at the national level, in particular by examining practices in Denmark, Estonia, Latvia, and Sweden. First of all, it will reveal the main ethical and legal concerns vaccination certificates raise that have been indicated by international and EU institutions. Then, it will examine the implementation of vaccination certificates in different Nordic and Baltic countries – Denmark, Estonia, Latvia and Sweden, as of October 2021. Finally, the article will analyse the conditions for restrictions and limitations of fundamental rights and emphasise that the governments need to ensure compliance with fundamental rights that required carefully assessment of the necessity and proportionality of these restrictive measures.

1. Ethical and legal concerns of vaccination certificates at the national level

Vaccination certificates have been rapidly introduced across Europe, first and foremost, as an obligation arising under EU law. By establishing a common system of interoperable certifications that can be used in all Member States, the Regulation introduces a common system that prevents national authorities from putting in place restrictions on the right of movement in an inconsistent and uneven fashion. This form of COVID-19 passports appears to be justified by the exceptional nature of the current pandemic scenario and fully legitimate

⁶ Beduschi A., 2020.

⁷ Gstrein O. J., Kochenov D., & Zwitter A. A Terrible Great Idea? COVID-19 “Vaccination Passports” in the Spotlight. WP-21-153. 2021. Available: <https://research.rug.nl/en/publications/a-terrible-great-idea-covid-19-vaccination-passports-in-the-spotl> [viewed 08.11.2021.].

to foster free movement, without disproportionately constraining such a right for the sake of health protection.⁸

However, many countries have introduced them nationally to create epidemiologically safer environment and also to serve as an incentive for vaccination. There has been a broad agreement within the global scientific community that the most effective available way to deal with the pandemic is through vaccination.⁹ Vaccination against COVID-19 is essential in order to contain the pandemic, protect healthcare systems, save lives and help restore the global economy.

The countries have used different strategies and measures to persuade people to get vaccinated. One of such strategies is to provide different privileges allowing to get back to normal life those people who have been vaccinated. Thus, vaccination certificates serve the objective to protect public epidemiological security and to prevent the spread of infection as well as to increase the vaccination rates. Although these objectives should be strongly supported, the ethical and legal concerns of different implementation practices should also be addressed.

In June, the UNESCO World Commission for the Ethics of Science and Technology (COMEST) and the International Bioethics Committee (IBC) issued a “Joined statement on the ethics of COVID-19 certificates and vaccine passports”¹⁰ (hereafter – the Statement), that urges governments to take into account a number of ethical considerations.

Firstly, the statement emphasizes the need to respect civil rights and freedoms. While acknowledging that COVID-19 certificates can

contribute to restoring civil rights and freedoms, by making it possible to end or mitigate some of the restrictions on people’s freedom of movement,

at the same time also stressing that

*their societal introduction should not infringe other civil rights and freedoms, such as people’s right to refuse vaccination, for instance for reasons of personal, moral and religious beliefs, age restrictions, medical circumstances, or worries about the reliability and safety of vaccines.*¹¹

⁸ Vergallo G. M., Zaami S., Negro F., Brunetti P., Del Rio A., & Marinelli E. Does the EU COVID Digital Certificate Strike a Reasonable Balance between Mobility Needs and Public Health? *Medicina* (Kaunas, Lithuania), 2021, 57(10), 1077. <https://doi.org/10.3390/medicina57101077>.

⁹ OECD. Enhancing public trust in COVID-19 vaccination. The role of governments. 2021. Available: <https://www.oecd.org/coronavirus/policy-responses/enhancing-public-trust-in-covid-19-vaccination-the-role-of-governments-eae0ec5a/> [viewed 08.11.2021.].

¹⁰ UNESCO. Joint statement of UNESCO’s ethics commissions on ensuring equal access for all to vaccines and therapeutics developed to confront COVID-19: joint statement of the UNESCO International Bioethics Committee (IBC) and UNESCO World Commission for the Ethics of Science and Technology (COMEST). 2021. Available: <https://unesdoc.unesco.org/ark:/48223/pf0000379042> [viewed 08.11.2021.].

¹¹ *Ibid.*; see also Parliamentary Assembly of the Council of Europe. Resolution 2361 (2021). COVID-19 vaccines: Ethical, legal and practical considerations. 2021. Available: <https://pace.coe.int/en/files/29004/html> [viewed 08.11.2021.].

The Statement indicates that, while vaccination should be actively encouraged and despite its importance for ending the pandemic, it is essential to respect the principle of moral and bodily integrity and vaccination against COVID-19 should never be an unconditional obligation.¹²

The Statement also indicates that, in order to respect people's rights, the proof of vaccination should be equalized with the proof of not being infected or the proof of recent recovery from infection. This can be realized by moving away from ‘vaccination passports’ to broader ‘COVID-19 certificates’ that also register recent infections and/or recent negative test results.¹³ The possibility to use test or recovery certificate instead of proof of vaccination is important in order not to exclude and thus not to discriminate against those who cannot get vaccinated, for instance, due to a medical condition. Conversely, it can be also asked whether a negative test is equally effective to vaccination, especially if a test taken several days before the event requiring proof of health status is acceptable. Yet, it has become clear that despite vaccination, breakthrough cases are possible, meaning that vaccination is not a guarantee of safety. In this regard, the Statement also emphasises that certificates need to deal responsibly with the uncertainties regarding the degree of protection provided by specific vaccines and past infections.¹⁴

One of the main concerns is the risk of discrimination arising from the use of vaccination certificates.¹⁵ The Statement stresses that these certificates can bring unjust forms of discrimination and exclusion that should be avoided, they can cause stigmatization and societal divides.¹⁶ If vaccination certificates are required across peoples’ daily lives, they may impact upon the right to equality and non-discrimination as well as many other fundamental rights, including freedom of peaceful assembly, access to employment, access to education.¹⁷

Vaccination certificates should also respect people’s privacy and be safe, secure, and reliable. The EDPB and the EDPS has emphasized the need to ensure consistency of the Regulation with the General Data Protection

¹² Ibid.; see also Parliamentary Assembly of the Council of Europe. Resolution 2361 (2021). COVID-19 vaccines: Ethical, legal and practical considerations. 2021. Available: <https://pace.coe.int/en/files/29004/html> [viewed 08.11.2021.].

¹³ UNESCO, 2021; See also 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 the COVID-19 pandemic (Digital Green Certificate). 2021. Available: https://edpb.europa.eu/our-work-tools/our-documents/edpb-edps-joint-opinion/edpb-edps-joint-opinion-042021-proposal_en [viewed 08.11.2021.].

¹⁴ UNESCO, 2021.

¹⁵ See Susi M., Pajuste T., 2021; Beduschi A. Rethinking digital identity for post-COVID-19 societies: Data privacy and human rights considerations. *Data & Policy*, 2021, 3, E15. doi:10.1017/dap.2021.15.

¹⁶ UNESCO, 2021; see also EDPB-EDPS, 2021.

¹⁷ COVID-19 vaccination certificates: WHO sets minimum demands, governments must do even better. 09.08.2021. Available: <https://privacyinternational.org/advocacy/4607/covid-19-vaccination-certificates-who-sets-minimum-demands-governments-must-do-even> [viewed 08.11.2021.].

Regulation (hereafter – the GDPR).¹⁸ The use of Certificate and personal data related to it at Member States' level must respect the rights to privacy and data protection (Articles 7 and 8 of the EU Charter of Fundamental rights (hereafter – the Charter)¹⁹), and must be in compliance with the GDPR. This implies the need for a proper legal basis in Member State law, complying with the principles of effectiveness, necessity, proportionality and including strong and specific safeguards implemented following a proper impact assessment, in particular, to avoid any risk of discrimination and to prohibit any retention of data in the context of the verification process. The regulation should limit the processing of personal data to the necessary minimum, by only including a limited set of personal data on the certificates to be issued, by setting out that the data obtained when verifying the certificates should not be retained; and by establishing a framework that does not require the setting up and maintenance of a central database.²⁰ These requirements are relevant and should also be complied with within the use of the certificates at national level.

Every state has an obligation to protect public health and public order to ensure compliance with human rights law as well as facilitate its economic survival. These obligations have to be balanced against the potential negative consequences of the introduction of a vaccination certificate. When implementing vaccination certificates at the national level, it is important to carefully assess the impact of certificates on society and public health as well as the risks they bring, in particular to human rights and democratic values.²¹ The practices of Member States call for developing a regulatory framework that would establish monitoring and oversight mechanisms to ensure accountable and transparent use of digital technologies for public interests, such as public health.²² The next chapter will demonstrate such a necessity by exploring the different practices of the use of vaccination certificates in selected Baltic and Nordic countries.

2. Implementation experiences in Nordic and Baltic countries

Each country both in Europe and across the world has implemented vaccination certificates differently. With the increase of COVID-19 infection

¹⁸ European Parliament and Council Regulation (EU) 2016/679 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, 04.05.2016.

¹⁹ Charter of Fundamental Rights of the European Union. OJ C 326, 26.10.2012.

²⁰ EDPB-EDPS, 2021; see also WHO. Digital documentation of COVID-19 certificates: vaccination status: technical specifications and implementation guidance, 2021. Available: <https://apps.who.int/iris/handle/10665/343361> [viewed 08.11.2021.].

²¹ Emmie H., Morley J., Taddeo M., Luciano F., Saving Human Lives and Rights: Recommendations for Protecting Human Rights when Adopting COVID-19 Vaccine Passports. 2021. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3885252 [viewed 08.11.2021.].

²² WHO, 2021.

rates, there is a temptation to extend their use in different national contexts, such as education and employment, calling for a more coordinated approach. It is also apparent when comparing practices among Baltic and Nordic countries.

Denmark was one of the first European countries to deploy vaccination certificates on 21 April 2021. Thus, Denmark introduced the use of vaccine passports domestically prior to the entry into force of the Regulation. In Denmark, such passports were seen as a short-term solution to reopen sectors that had been closed since December 2020.²³ They were required to access services involving close contact, like massages, hairdresser services. From May 2021, a new *Coronapas* app using a QR code was introduced to increase security and privacy. It was available to people over 15 years of age, which follows the Health Act, where under individuals can give consent to treatment from 15 years of age.²⁴ A vaccination certificate was required to enter indoor restaurants or bars, theatres, cinemas, museums, sports games, etc. and further education. A negative test could always be used as an alternative to vaccination (from the first dose) and so could a recovery certificate. *Coronapas* was discontinued on 10 September 2021, when the dangerousness of COVID-19 was downgraded. As more than 75% of the Danish population had been vaccinated, the low infection rate led the government to lift almost all restrictions from September. As the infection rate increased in late autumn, the government reintroduced vaccination certificates on 12 November.²⁵

In contrast to Denmark as well as many other European countries, Sweden has not introduced any requirements for using the vaccination certificates internally as of October 2021. Sweden was one of the few countries not to place their citizens under severe lockdowns, in the hope of reaching herd immunity.²⁶ It removed most of the remaining pandemic restrictions in September 2021.²⁷ Sweden as a part of its EU legal obligations, in order to facilitate free movement of persons, introduced EU Digital COVID Certificates in July. The certificates are available already after receiving the 1st dose of vaccine and can be issued upon the request of the individual. In September, however, a possibility to use the vaccination certificates as infection disease control measure was put on the lawmaker’s agenda.

²³ Rammaeftale om plan for genåbning af Danmark [Framework agreement on plan for reopening of Denmark]. 22.03.2021. Available: <https://www.stm.dk/media/10258/rammeaftale-om-plan-for-genaabning-af-danmark.pdf> [viewed 08.11.2021.].

²⁴ Sundhedsloven [the Health Act]. Consolidated Act 903, 26.08.2019, Section 17 (1).

²⁵ Corona passport in Denmark – where and when? 12.11.2021. Available: https://en.coronasmitte.dk/corona-passport?__cf_chl_rt_tk=0ajhFPXJNbvIhPknM7a2AKkn_ZW1ev0DaXi3AILKA1Y-1637007453-0-gaNycGzNBmU [viewed 08.11.2021.].

²⁶ Wenander H. Sweden: Non-binding Rules against the Pandemic – Formalism, Pragmatism and Some Legal Realism. *European Journal of Risk Regulation*, 2021, 12(1), 127–142. doi:10.1017/err.2021.2

²⁷ Lifting of the restrictions is envisaged in 5 steps. On Sept. 29, 2021 the country lifted restrictions of the 4th step. Regeringens plan för avveckling av restriktioner [The Government’s plan for the abolition of restrictions], 27.05.2021. Available: <https://www.regeringen.se/49bcff/content/assets/986d9a7d3d5348b98a0e0fdd0fd9fdf1/promemoria.-plan-for-avveckling-av-restriktioner-tillganglighetsanpassad.pdf> [viewed 08.11.2021.].

Sweden did not introduce them internally until the end of 2021, and when the use of certificates was introduced, they had limited application.²⁸

Estonia, which has generally reacted to the pandemic with short and relatively mild restrictions, adopted COVID-19 vaccination certificates in April 2021. It did so with the same rationale as Sweden – to facilitate the free movement of persons – but also to set up a management system for handling the population vaccination programme. The technology developed for this, *VaccineGuard*, uses KSI blockchain signatures for attesting vaccine creation, handling, and vaccination.²⁹ While this can, indeed, be used to create vaccination certificates, it is possibly even more valuable because of its ability to help manage a country's vaccination program. Thanks to integration with the Estonian health information system, individuals can generate their digital COVID certificates for themselves via the Patient Portal.³⁰ The digital COVID certificate works alongside the EU's Digital Green Passport and conveys a proof of vaccination (with 1, 2, or 3 doses), recovery from COVID-19, or a negative test result.

As Estonia's epidemiological situation deteriorated in 2021, the government mandated the use of the certificates not only for travel but also for granting access to various venues, e.g., leisure facilities. In August 2021, the Estonian government adopted a regulation which made it easier for employers to ask their employees for a proof of recovery from the COVID-19 illness, proof of a negative test result, or proof of vaccination against COVID-19, if this was a necessary measure considering the risk of the spread of SARS-CoV-2 at the workplace, the employer could not mitigate the risk otherwise, and it was justified based on the nature of work as well as the employer's annual risk analysis.³¹ On 19 October (extended on 28 October), the government introduced temporary restrictions for managing the COVID-19 crisis, particularly with the aim of supporting hospitals and the medical system, and to effectively curb the new wave of COVID-19. The new restrictions concerned also the use of COVID certificates and deemed a negative test result no longer sufficient to gain admission to venues for those 18 and older.

²⁸ See Förordning om ändring i förordningen (2021:8) om särskilda begränsningar för att förhindra spridning av sjukdomen Covid-19 [Ordinance amending the ordinance (2021: 8) on special restrictions to prevent the spread of covid-19 disease]. 17.01.2022. Available: <https://svenskfattningssamling.se/sites/default/files/sfs/2022-01/SFS2022-22.pdf> [viewed 11.03.2021.]. For the norms in force as of March 2021 regarding vaccination certificate, see Chapter 8 in Förordning (2021:8) om särskilda begränsningar för att förhindra spridning av sjukdomen covid-19 [Ordinance (2021: 8) on special restrictions to prevent the spread of covid-19 disease]. 08.01.2021. Available: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-20218-om-sarskilda-begransningar_sfs-2021-8 [viewed 11.03.2021.].

²⁹ Vaccineguard end to end visibility for the pharmaceutical value chain. Available: <https://guardtime.com/vaccineguard> [viewed 08.11.2021.].

³⁰ Digital COVID certificate. Available: <https://www.terviseamet.ee/en/digital-covid-certificate> [viewed 08.11.2021.].

³¹ Bioloogilistest ohuteguritest mõjutatud töökaskonna töötervishoiu ja tööohutuse nõuded [Occupational health and safety requirements for the working environment affected by biological hazards]. 17.08.2021. Available: <https://www.riigiteataja.ee/akt/114082021010?dbNotReadOnly=true%20> [viewed 08.11.2021.].

In Latvia, vaccination certificates were also introduced in June 2021. Like in Estonia, certificates were available to people from the age of 12, as from this age COVID-19 vaccination was approved at this time. The vaccination certificates were used both to facilitate the free movement of persons and grant access to various venues. In Summer 2021, they were required in restaurants and cafes, except outside venues, for attending entertainment and cultural events, such as cinemas, theatre performances, concerts etc. Starting from 11 October, the state of emergency was declared in Latvia for three months, and from 21 October a four-week lockdown was introduced because the healthcare system was on the brink of collapse, as hospitals were overwhelmed. The new rules required verification of certificates to participate in interest education and in the on-site study process at higher education institutions. Vaccination or recovery certificates were required for employees working in public institutions, education institutions, in sectors of critical importance to the public, such as health care.³² On 4 November 2021, the Parliament adopted Amendments of the Law on the Management of the Spread of COVID-19 Infection, which allowed employers to terminate the employment relationship in case when the employee did not have a vaccination or recovery certificate.³³ These new rules were challenged before the court. On 13 November, the Administrative District Court rejected the application of private person challenging the rules requiring that employees and officials of state and local government institutions may perform their duties only if they have a vaccination or recovery certificate finding that the benefit to society of imposing a vaccination obligation outweighs the violation of individual rights.³⁴

Countries should strive to adopt a long-term strategy for the management of the COVID-19 pandemic that does not rely on the continued limitation or restriction of fundamental rights. The governments fail to consider the impact of the imposed restrictions on fundamental rights and the need to carefully assess their necessity and proportionality. The use of vaccination certificates should ensure respect of human rights, as well as protection of values such as public trust.³⁵ The OECD has emphasized that the success of vaccination campaigns is largely influenced by the extent to which people trust the effectiveness and safety of the vaccines, the institutions responsible for vaccination and government, their decisions and actions.³⁶ Governments should implement effective measures to promote public trust in vaccines and vaccination, i.e. through intense information

³² Cabinet of Ministers. Order No. 720 Regarding Declaration of the Emergency Situation. Adopted 09.10.2021. *Latvijas Vēstnesis*, 195A, 09.101.2021.

³³ Amendments of the Law on the Management of the Spread of COVID-19 Infection. Adopted 04.11.2021. *Latvijas Vēstnesis*, 215A, 05.11.2021.

³⁴ Administratīvā rajona tiesa. Tiesa noraida pieteikumu pirmajā izskatītajā lietā par obligāto vakcināciju [Administrative District Court. The court rejects the application in the first case concerning compulsory vaccination]. 13.11.2021. Available: <https://www.tiesas.lv/aktualitates/tiesa-noraida-pieteikumu-pirmaja-izskatitaja-lieta-par-obligato-vakcinaciju-10842> [viewed 08.11.2021.].

³⁵ WHO, 2021.

³⁶ OECD, 2021.

campaigns, in particular targeting prioritized population groups, counter misinformation and disinformation regarding COVID-19 vaccines, not only impose restrictions and limitations of rights. COVID-19 responses raise new questions about the limitations of fundamental rights that will be analysed in the next section.

3. Overarching principles of necessity and proportionality

The measures required to combat the virus will unavoidably restrict fundamental rights. The first section revealed that vaccination certificates may restrict wide range of fundamental rights, including the right to non-discrimination, the right to privacy and data protection, the freedom of assembly and association.

There are absolute rights which cannot be justifiably infringed under any circumstances, such as the right to life that is threatened by the COVID-19 pandemic. However, most human rights, including the right to liberty, the right to privacy, the right to data protection, can be restricted under certain conditions. Such interests as the protection of health and public safety are recognized as grounds for the justification of interference with these rights, yet such limitations are allowed if they are “in accordance with the law” or “prescribed by law” and are “necessary” and “proportionate” to achieve the particular aim. These requirements for the limitations of rights are used in all human rights instruments, including the European Convention of Human Rights³⁷.

States may impose restrictions based on the usual provisions for limitations in the interest for the protection of public interests, such as public health. However, during the times of emergency, states may also adopt measures of exceptional nature that would require derogation from their obligation to respect certain rights under international human rights instruments.³⁸ The Council of Europe has indicated that even such derogations may never justify any action that goes against the paramount requirements of lawfulness and proportionality.³⁹ The principle of legality prescribed that states action must be in accordance with law. The principle of necessity requires that measures must be capable of achieving their purpose with minimal alteration of normal rules. Moreover, any legislation enacted during the times of emergency should also include clear time limits on the duration of these measures.

³⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, Adopted 4 November 1950, ETS 5.

³⁸ Article 15 (1) of the ECHR. See more: Nesterova I. The Global Flood of COVID-19 Contact Tracing Apps: Sailing with Human Rights and Data Protection Standards against the Wind of Mass Surveillance. SHS Web of Conferences 92. 2021.

³⁹ Council of Europe. Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, 2020. Available: <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40> [viewed 08.11.2021.].

Governments should examine the necessity, proportionality and effectiveness of the use of vaccination certificates before their implementation.⁴⁰ The main question is about the necessity and proportionality and how to strike a right balance between the interests of the individual and the interests of society. Although states have an obligation to respect the rights of each individual, they also have a duty to protect society and everyone's life.

The World Health Organisation has also stressed that COVID-19 certificates can be used for a number of purposes, and each Member State that introduces one should be clear about which uses are proposed and that they should not be used for other purposes. The use of COVID-19 certificates to restrict the right to freedom of movement and other human rights is only justified when it supports the pursuit of a legitimate aim during a public health emergency and is provided for by law, proportionate, of limited duration, based on scientific evidence, and is not imposed in an arbitrary, unreasonable or discriminatory manner.⁴¹

In evaluating the proportionality of the restrictions enabled by the use of vaccination certificates, it is important to refer to the case-law of the European Court of Human Rights (hereafter – the ECtHR) in relation to *de facto* mandatory vaccinations.⁴² The ECtHR has recognized the broad freedom of policy in the field of health issues. In April 2021, the ECtHR adopted the judgment in the *Vavříčka and other v the Czech Republic* which ruled that compulsory vaccination, i.e. the imposition of fine on parent and exclusion of children from preschool for refusal to comply with statutory child vaccination, does not violate Article 8 (the right to private life) of the ECHR.⁴³ The ECtHR found the Czech authorities did not exceed the wide discretion (“margin of appreciation”) that they enjoy in this area and that the measures assessed in the context of the national system, were in a reasonable relationship of proportionality to the legitimate aims pursued by the Czech State through the vaccination duty (para. 203).

When assessing the necessity and proportionality of the measures, the ECtHR took into account a number of important aspects:

- there was a pressing social need to protect individual and public health against the diseases well-known to medical science (para. 284);
- necessary precautions were taken, including the monitoring of the safety of the vaccines in use and the checking for possible contraindications in each individual case (para. 301);
- the fine was not excessive and there were no repercussions for the education of school-age children (para. 304, 305);
- effects on child applicants were limited in time, admission to primary school was not affected by vaccine status (para. 307) etc.

⁴⁰ EDPB-EDPS, 2021.

⁴¹ WHO, 2021.

⁴² See Susi M., Pajuste T., 2021.

⁴³ Judgement of the European Court of Human Rights in Case No. 47621/13 and 5 others, *Vavříčka and others v. the Czech Republic*.

The ECtHR also indicated that the compliance with vaccination duty cannot be directly imposed (para. 293).

It is expected that many new cases will be brought both before national and European courts challenging national COVID-19 restrictions, including on the use of vaccination certificates. When deciding on the use of vaccination certificates, the governments need to carefully weigh and balance individual and public interests, and carry out assessment by considering important aspects in each case, for example, the persons to whom the restrictions are imposed (e.g., vulnerable groups such as children), as well as the consequences of these measures to individuals on the one hand, and the public interests at stake on the other hand. The questions to be asked always when new restrictive measures are planned to be introduced are whether they are necessary to achieve the aim, such as protection of public health, and whether there are any other, less rights-infringing ways through which the same aim can be achieved.

Conclusion

1. Vaccination certificates have raised serious concerns about the protection of fundamental rights. While acknowledging that COVID-19 certificates can contribute to restoring civil rights and freedoms, international and European organisations have indicated the need to protect the freedom of choice regarding vaccination and to avoid unjust forms of discrimination. Vaccination certificates should respect the right to privacy and data protection and comply with the GDPR and security standards. When implementing vaccination certificates at the national level, it is important to carefully assess their impacts on society and public health as well as the risks they create, in particular to human rights. There is a need for a regulatory framework that would establish monitoring and oversight mechanisms to ensure responsible and transparent use of digital technologies in public interests.
2. Vaccination certificates were initially introduced as a joint EU initiative to facilitate free movement during the pandemic. However, countries rapidly extended their use in national contexts. Vaccination certificates have also been introduced in selected Nordic and Baltic countries to govern access to socio-economic life. The surveyed Baltic countries have used them in different national contexts, including employment and education, not only for creating an environment that is safer epidemiologically, but also to serve as an incentive for vaccination, in many cases lacking explanation on their justification and careful assessment of compliance with fundamental rights.
3. Although states have an obligation to respect the rights of each individual, they also have the obligation to protect public health and safety. Measures which involve restrictions of fundamental rights must be legitimate, necessary and proportional to the threat posed by COVID-19 pandemic and be limited in time. The governments should carefully assess the necessity, proportionality

and effectiveness of each particular use of vaccination certificates before the implementation thereof, and weigh public interests against individual rights.

BIBLIOGRAPHY

Literature

1. Beduschi A. Digital Health Passports for COVID-19: Data Privacy and Human Rights Law. Exeter: University of Exeter, 2020. Available: https://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/lawimages/research/Policy_brief_-_Digital_Health_Passports_COVID-19_-_Beduschi.pdf [viewed 08.11.2021.].
2. Beduschi A. Rethinking digital identity for post-COVID-19 societies: Data privacy and human rights considerations. *Data & Policy*, 2021, 3, E15. doi:10.1017/dap.2021.15.
3. Emmie H., Morley J., Taddeo M., Luciano F., Saving Human Lives and Rights: Recommendations for Protecting Human Rights when Adopting COVID-19 Vaccine Passports. 2021. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3885252 [viewed 08.11.2021.].
4. Gstrein O. J., Kochenov D., & Zwitter A. A Terrible Great Idea? COVID-19 “Vaccination Passports” in the Spotlight. WP-21-153. 2021. Available: <https://research.rug.nl/en/publications/a-terrible-great-idea-covid-19-vaccination-passports-in-the-spotl> [viewed 08.11.2021.].
5. Nesterova I. The Global Flood of COVID-19 Contact Tracing Apps: Sailing with Human Rights and Data Protection Standards Against the Wind of Mass Surveillance. SHS Web of Conferences, 2021, 92 (2), <https://doi.org/10.1051/shsconf/20219201035>.
6. Susi M., Pajuste T. (eds.). COVID-19 “Vaccine Passports”: An Exploratory Study of 23 Countries, Tallinn: Tallinn University, 2021.
7. Vargo D., Zhu L., Benwell B., Yan Z. Digital Technology Use during COVID-19 Pandemic: A Rapid Review. *Human Behavior and Emerging Technologies*, 2020, 3(1), pp. 13–24, <https://doi.org/10.1002/hbe2.242>.
8. Vergallo G. M., Zaami S., Negro F., Brunetti P., Del Rio A., & Marinelli E. Does the EU COVID Digital Certificate Strike a Reasonable Balance between Mobility Needs and Public Health? *Medicina (Kaunas, Lithuania)*, 2021, 57(10), 1077. <https://doi.org/10.3390/medicina57101077>.
9. Wenander H. Sweden: Non-binding Rules against the Pandemic – Formalism, Pragmatism and Some Legal Realism. *European Journal of Risk Regulation*, 2021, 12(1), pp. 127–142. doi:10.1017/err.2021.2.

Legal acts

10. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14. Adopted 4 November 1950, ETS 5.
11. Charter of Fundamental Rights of the European Union. OJ C 326, 26.10.2012.
12. Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 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. OJ L 211, 15.6.2021.

13. European Parliament and Council Regulation (EU) 2016/679 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., 04.05.2016.
14. Amendments of the Law on the Management of the Spread of COVID-19 Infection. Adopted 04.11.2021. Latvijas Vēstnesis, 215A, 05.11.2021.
15. Cabinet of Ministers. Order No. 720 Regarding Declaration of the Emergency Situation. Adopted 09.10.2021. Latvijas Vēstnesis. 195A, 09.11.2021.
16. Bioloogilistest ohuteguritest mõjutatud töökeskkonna töötervishoiu ja tööohutuse nõuded [Occupational health and safety requirements for the working environment affected by biological hazards]. 17.08.2021. Available: <https://www.riigiteataja.ee/akt/114082021010?dbNotReadOnly=true%20> [viewed 08.11.2021.].
17. Förordning om ändring i förordningen (2021:8) om särskilda begränsningar för att förhindra spridning av sjukdomen covid-19 [Ordinance amending the ordinance (2021:8) on special restrictions to prevent the spread of covid-19 disease]. 17.01.2022. Available: <https://svenskforfattningssamling.se/sites/default/files/sfs/2022-01/SFS2022-22.pdf> [viewed 11.03.2021.].
18. Förordning (2021:8) om särskilda begränsningar för att förhindra spridning av sjukdomen covid-19 [Ordinance (2021:8) on special restrictions to prevent the spread of covid-19 disease]. 08.01.2021. Available: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-20218-om-sarskilda-begransningar_sfs-2021-8 [viewed 11.03.2021.].
19. Sundhedsloven [The Health Act], Consolidated Act 903, 26.08.2019.

Court practice

20. Judgement of the European Court of Human Rights in Case No. 47621/13 and 5 others, Vavříčka and others v. the Czech Republic.

Other materials

21. Administratīvā rajona tiesa. Tiesa noraida pieteikumu pirmajā izskatītājā lietā par obligāto vakcināciju [Administrative District Court. The court rejects the application in the first case concerning compulsory vaccination]. 13.11.2021. Available: <https://www.tiesas.lv/aktualitates/tiesa-noraida-pieteikumu-pirmaja-izskatitaja-lieta-par-obligato-vakcinaciju-10842> [viewed 08.11.2021.].
22. Chiusi F. Analysis: Digital vaccine certificates – global patchwork, little transparency, 29.03.2021. Available: <https://algorithmwatch.org/en/digital-vaccine-certificates-analysis-march-2021/> [viewed 08.11.2021.].
23. Corona passport in Denmark – where and when? 12.11.2021. Available: https://en.coronasmitte.dk/corona-passport?__cf_chl_rt_tk=0ajhFPXJNbvIhPknM7a2AKkn_ZW1ev0DaXi3AILKA1Y-1637007453-0-gaNycGzNBmU [viewed 08.11.2021.].
24. Commission Recommendation (EU) 2020/518 of 8 April 2020 on a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data, C/2020/3300, OJ L 114, 14.4.2020.
25. Council of Europe. Derogations COVID-19. Available: <https://www.coe.int/en/web/conventions/derogations-covid-19> [viewed 08.11.2021.].

26. Council of Europe. Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis. 2020. Available: <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40> [viewed 08.11.2021.].
27. COVID-19 vaccination certificates: WHO sets minimum demands, governments must do even better. 09.08.2021. Available: <https://privacyinternational.org/advocacy/4607/covid-19-vaccination-certificates-who-sets-minimum-demands-governments-must-do-even> [viewed 08.11.2021.].
28. Digital COVID certificate. Available: <https://www.terviseamet.ee/en/digital-covid-certificate> [viewed 08.11.2021.].
29. 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 the COVID-19 pandemic (Digital Green Certificate). 2021. Available: https://edpb.europa.eu/our-work-tools/our-documents/edpb-edps-joint-opinion/edpb-edps-joint-opinion-042021-proposal_en [viewed 08.11.2021.].
30. OECD. Enhancing public trust in COVID-19 vaccination. The role of governments, 2021. Available: <https://www.oecd.org/coronavirus/policy-responses/enhancing-public-trust-in-covid-19-vaccination-the-role-of-governments-eae0ec5a/> [viewed 08.11.2021.].
31. Parliamentary Assembly of the Council of Europe. Resolution 2361. COVID-19 vaccines: ethical, legal and practical considerations. 2021. Available: <https://pace.coe.int/en/files/29004/html> [viewed 08.11.2021.].
32. Rammaeftale om plan for genåbning af Danmark [Framework agreement on plan for reopening of Denmark]. 22.03.2021. Available: <https://www.stm.dk/media/10258/rammaeftale-om-plan-for-genaabning-af-danmark.pdf> [viewed 08.11.2021.].
33. Regeringens plan för avveckling av restriktioner [The Government’s plan for the abolition of restrictions]. 27.05.2021. Available: <https://www.regeringen.se/49bcff/contentassets/986d9a7d3d5348b98a0e0fdd0fd9fdf1/promemoria.-plan-for-avveckling-av-restriktioner-tillganglighetsanpassad.pdf> [viewed 08.11.2021.].
34. UNESCO. Joint statement of UNESCO’s ethics commissions on ensuring equal access for all to vaccines and therapeutics developed to confront COVID-19: joint statement of the UNESCO International Bioethics Committee (IBC) and UNESCO World Commission for the Ethics of Science and Technology (COMEST). 2021. Available: <https://unesdoc.unesco.org/ark:/48223/pf0000379042> [viewed 08.11.2021.].
35. Vaccineguard end to end visibility for the pharmaceutical value chain. Available: <https://guardtime.com/vaccineguard> [viewed 08.11.2021.].
36. WHO. Digital documentation of COVID-19 certificates: vaccination status: technical specifications and implementation guidance. 2021. Available: <https://apps.who.int/iris/handle/10665/343361> [viewed 08.11.2021.].