

EU-Commission

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OPEN LETTER

**EU Commission Proposal on vaccine passport
Discrimination in violation of EU Charter of Fundamental Rights & ECHR**

Dear Commissioner Reynders,

As a concerned EU citizen I refer to the proposal made yesterday by the Commission on EU-wide vaccine passports.

As much as the economy, in particular tourism in the south of Europe, is suffering, violation of human right convention obligations is not justified.

With this letter (by email) I wish to bring to your attention - and for the record – a number of legal non-compliance issues in violation of the Charter and ECHR.

A not unimportant issue as human rights go and because every EU citizen subjected to illegal discrimination is entitled to financial compensation by the State so doing.

In short:

1. WHO cannot be made the umpire deciding on behalf of EU Member States when to cancel the vaccine passport requirements.
2. Discrimination of citizens in the EU is not allowed and the proposal unfortunately discriminates in an unlawful way.

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First, to ensure that all are on the same page, I venture to assume agreement that the following Convention obligations should be respected:

EU Charter:

Article 21

Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article 45

Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

Article 53

Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

ECHR (via the European Council):

Articles corresponding to the above citations are found in Art. 5 of the main Convention and Art. 2 of the 4th Protocol.

These stipulations are binding EU-law by means of reference in Article 53 of the Charter.

Compliance herewith is a pre-requisite of EU membership.

The Charter is subject to the ECJ.

European Council Resolution 2361:

Not convention text but a notable interpretation advice, the European Council did debate Covid-19 vaccine passports in light of mandatory vaccination and non-discrimination and adopted the following resolution on January 27, 2021:

7.3.1 ensure that citizens are informed that the vaccination is NOT mandatory and that no one is politically, socially, or otherwise pressured to get themselves vaccinated, if they do not wish to do so themselves;

7.3.2 ensure that no one is discriminated against for not having been vaccinated, due to possible health risks or not wanting to be vaccinated;

Moreover,

WHO International Health Regulations (IHR):

Article 42

Implementation of health measures

Health measures taken pursuant to these Regulations shall be initiated and completed without delay, and applied in a transparent and non-discriminatory manner.

Article 35

General rule

No health documents, other than those provided for under these Regulations or in recommendations issued by WHO, shall be required in international traffic, provided however that this Article shall not apply to travellers seeking temporary or permanent residence, nor shall it apply to document requirements concerning the public health status of goods or cargo in international trade pursuant to applicable international agreements. The competent authority may request travellers to complete contact information forms and questionnaires on the health of travellers, provided that they meet the requirements set out in Article 23.

Article 36

Certificates of vaccination or other prophylaxis

1. Vaccines and prophylaxis for travellers administered pursuant to these Regulations, or to recommendations and certificates relating thereto, shall conform to the provisions of Annex 6 and, when applicable, Annex 7 with regard to specific diseases.

2. A traveller in possession of a certificate of vaccination or other prophylaxis issued in conformity with Annex 6 and, when applicable, Annex 7, shall not be denied entry as a consequence of the disease to which the certificate refers, even if coming from an affected area, unless the competent authority has verifiable indications and/or evidence that the vaccination or other prophylaxis was not effective.

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Ad. 1) WHO's role as judge of EU law expiry^{1 2}

The proposed vaccine passport regulations are to become EU-law, thus subject to the ECJ.

Restrictions of a discriminatory manner on the right of free movement, i.e., Charter articles 21 and 45, are only allowed when justified as the absolute last resort for society under e.g. a national health crisis, and only on a nation by nation basis.

Each Member State can be brought before the ECJ for overstretching this concern and/or illegal discrimination. The same applies in regard to the ECHR and the European Court of Human Rights.

Rendering validity of vaccine passport regulations subject to the WHO members' decision is not legal.

Implementing travel restrictions and discrimination (legal if last resort for society) is to be agreed upon by the Member States and ceased immediately prevailing conditions no more exist, determined on a nation by nation basis.

Ad. 2) Discrimination

The proposal and press release proclaims in numerous ways and places that discrimination is not taking place.

Put differently, the Commission would seem to acknowledge that this is not a matter of national crisis and last resort.

Now, allow me to emphasize that very point addressing specific conditions of Denmark as of today:

- Population: 5.800.000
- Number of Covid-19 patients hospitalized: 196
- Number thereof in ICU/intubated: 41/25
- Total Covid-19 deaths without comorbidities, age group 0-60 years: 21

For comparison, yearly deaths in Denmark from smoking tobacco: 14,000.

¹ <https://www.who.int/news-room/articles-detail/interim-position-paper-considerations-regarding-proof-of-covid-19-vaccination-for-international-travellers>

² And what did WHO say about vaccine passports and restriction of free movement? Ref. Interim Position Paper:

At the present time, it is WHO's position that national authorities and conveyance operators should not introduce requirements of proof of COVID-19 vaccination for international travel as a condition for departure or entry, given that there are still critical unknowns regarding the efficacy of vaccination in reducing transmission. In addition, considering that there is limited availability of vaccines, preferential vaccination of travellers could result in inadequate supplies of vaccines for priority populations considered at high risk of severe COVID-19 disease. WHO also recommends that people who are vaccinated should not be exempt from complying with other travel risk-reduction measures.

These Temporary Recommendations are in accordance with the advice that the International Health Regulations Emergency Committee on COVID-19 pandemic formulated at its 6th meeting on 14 January 2021. At this point in the pandemic, there is not enough evidence about the effectiveness of antibody-mediated immunity to guarantee the accuracy of an "immunity passport" or "risk-free certificate." People who assume that they are immune to a second infection because they have received a positive test result may ignore public health advice. The use of such certificates may therefore increase the risks of continued transmission.

If Denmark wanted to call a national crisis and introduce discrimination otherwise illegal, the above stats would not in my opinion in any way, form or shape justify such a decision, which could be brought before the courts and an opinion on the Charter be requested from the ECJ right away as a matter of EU-law before a national court.

The ECJ would by virtue of the aforementioned reference consider the ECHR as EU law and no doubt to some extent be influenced by the resolution adopted by the European Council, i.e., that no discrimination against those deciding not to be vaccinated is allowed.

On the subject of a national crisis and last resort for society it may be worth noting a recent WHO released study showing a median infection fatality rate of 0.04%.³

Now, turning to the matter of discrimination, let's analyse what information is available to allow vaccinated travellers to move freely as per the Charter Article 45 yet not so for the un-vaccinated (in violation of the Charter Article 21).

Vaccine protection: **Unknown** in terms of new strains. Producers are scrambling to modify vaccines to ever new strains but will always be a step behind the virus, and the risk from the experiment of mass vaccination against a virus during a pandemic may cause immune escape and the vaccines soon become pointless. Marek's disease in point.

Vaccine duration: **Not much.** The FDA approval states "at least two months".

Vaccine efficacy: **Not much.** The trials have been used to determine efficacy based on the number of persons with mild symptoms in both cohorts, a total of a few hundred at best for evaluation of 44,000 in the Pfizer study.

Vaccine & transmission: **Nothing.** The FDA approvals state this is not known and not part of the end target. Thus, a vaccinated person may be infected, not show symptoms, yet spread the disease.

Hard to understand is why the proposal puts a vaccine passport duration of 180 days on recovered people with top notch natural immunity but no deadline on vaccinated people, despite the FDA approvals positively stating that nothing can be said to that end.

Next, let's turn to the un-vaccinated.

There is no evidence in literature that an infected person not showing symptoms will spread the disease. A recent study from China⁴ of 10.000.000 persons show no transmission from persons without symptoms, i.e., no asymptomatic transmission.

In conclusion:

1. Allowing the laws on vaccine passport duration to be determined by WHO is not legal.
2. Vaccinated persons should be subject to the same negative test requirements as non-vaccinated persons. Otherwise, this is a clear case of discrimination without a scientific basis and for no reason. And may even be construed as indirect forced vaccination in violation of human rights as well as the Helsinki Convention.
3. Expiry of vaccine passports should be science based, thus, with the same elapse for vaccinated as for recovered persons. Otherwise, this is a clear case of discrimination without a scientific basis and for no reason.

³ https://www.medrxiv.org/content/10.1101/2020.05.13.20101253v3?fbclid=IwAR3w8DlcyarVzzW4BC90vID4znE9Zf-QqkWtf1m9sb1l_Ak80t9Y9hrSr6l&hid=614F932F0BF979B97BC8BFD3C35BA040&page=26&ref=hexometer&utm_campaign=targetingMN&utm_medium=display&utm_source=facebook&wordfence_lh=1

⁴ <https://www.nature.com/articles/s41467-020-19802-w>

4.

Immune persons should be treated equally, no matter how immunity is established, if adequately established.

Hence, immunity established by satisfactorily means into specific T-cell or cross immunity should be permitted.

Otherwise, this is a clear case of discrimination without a scientific basis and for no reason.

- It is the obligation of the EU Commission to be proactive and as fast as possible establish means for adequate demonstration of existing immunity. In particular, considering the de facto waiver of product liability for vaccines, cf. article 14 of the purchase agreement with AstraZeneca, which erroneously has been translated by e.g. the Danish government to be standard, low amount compensation far below individually calculated product liability pay-outs under the Product Liability Directive.

For the sake on non-discrimination, establishing existing immunity should be free of charge for the individual as vaccinations and vaccine passports are to be.

I would appreciate your kind confirmation of receipt and ask you kindly not to hesitate to contact me if you have any questions.

Yours sincerely,

E. A. Sorensen