JUDGMENT NO 15 YEAR 2023

In this case the Constitutional Court heard numerous referral orders concerning provisions on COVID vaccination in relation to the workplace, providing *inter alia* that workers in certain sectors who refused to be vaccinated could be suspended without pay or any other compensation, whereas those who could not be vaccinated due to medical reasons could be assigned to alternative duties without any reduction in pay. The referral orders were joined as they all concerned the legislation applicable to mandatory vaccination, and the resulting implications for employment relationships in the event of the failure to comply with that obligation by, *inter alia*, workers employed in hospitals, care homes and schools.

The Court started by recalling its three-part test when considering the constitutionality of any mandatory healthcare treatment: the treatment must pursue a public health goal; the treatment must not cause adverse effects, save those that are low in severity and/or ephemeral; and arrangements have been made to provide "fair compensation" if any harm is caused to a person receiving compulsory medical treatment. The Court held that it was unreasonable to require with regard to head one of the test – as had been argued by one of the referring courts – that there must be a guarantee of 100% vaccine efficacy.

Overall, it fell to the Court to assess whether the legislation on mandatory vaccination was consistent with medical and scientific knowledge at the time of its enactment. As regards this assessment, the Court has the power to review whether the legislation was reasonable and proportionate in view of the underlying scientific evidence.

The Court held that, in the face of the highly contagious respiratory virus, spreading throughout the world, which could be contracted by any person, it was not unreasonable to impose vaccination on certain categories of workers, and that there was a reasonable causal link between vaccination and the reduction of virus in circulation. Moreover, the requirement of vaccination was not rendered unreasonable by the potential alternative option of requiring frequent testing, as this would have done nothing to prevent serious illness amongst unvaccinated workers, thereby impairing the proper operation of medical and care facilities, and also creating an additional cost burden for the national health service.

The measure was also not disproportionate as the sacrifice of the worker's own rights did not have the nature or effect of a sanction, did not go any further than was necessary in order to achieve the public goals of reducing the circulation of the virus, was constantly adjusted in line with changes in the healthcare situation and was also appropriate and necessary for the respective purpose.

As regards the consequence (suspension from work without pay), the Court held that the constitutional right to work does not necessarily imply a right to work where this would entail a risk for public health. Moreover, out of respect for the right to self-determination of those who chose not to be vaccinated, the legislation provided for a no-fault suspension only, and solely until the worker was vaccinated or until the requirement was dispensed with, and not stipulate any disciplinary measures. The difference in treatment between voluntarily unvaccinated healthcare workers and workers in other sectors was justified by the need to reduce as far as possible the risk of infection for the infirm people assisted by the former workers. In addition, the difference in treatment between

voluntarily unvaccinated healthcare workers and healthcare workers who could not be vaccinated on health grounds was justified on solidarity grounds.

The refusal to pay remuneration for the duration of suspension was justified on the grounds that the inability to work resulted from an individual choice by the worker, and not objective circumstances beyond the control of the worker. It was unreasonable to impose the burden associated with the consequences of that choice on the employer.

The Court thus rejected the questions as unfounded. A question referred by an administrative court was ruled inadmissible on jurisdictional grounds, and numerous interventions by parties affected by the legislation were ruled inadmissible.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 4(1), (4), (5) and (7); 4-*bis*(1) and 4-*ter*(2) and (3) of Decree-Law No 44 of 1 April 2021 (Urgent measures to contain the COVID-19 epidemic, on vaccination against SARS-CoV-2, on the administration of justice and on public competitions), converted with amendments into Law No 76 of 28 May 2021, as respectively adopted and amended, as well as Articles 4-*bis* and 4-*ter* and Article 2(1) of Decree-Law No 172 of 26 November 2021 (Urgent measures to contain the COVID-19 epidemic and concerning the safe conduct of economic and social activities), converted with amendments into Law No 3 of 21 January 2022, as amended by Article 2(1)(c) of Decree-Law No 1 of 7 January 2022 (Urgent measures to deal with the COVID-19 emergency, in particular in workplaces, schools and higher education establishments), converted with amendments into Law No 18 of 4 March 2022, as subsequently amended by Decree-Law No 24 of 24 March 2022 (Urgent provisions concerning the cessation of measures to combat the spread of the COVID-19 epidemic, as a consequence of the cessation of the state of emergency, and other provisions on health), converted with amendments into Law No 52 of 19 May 2022, initiated by the Ordinary Court of Brescia (*Tribunale ordinario di Brescia*), sitting as an employment court, by seven referral orders of 22 March 2022, 9 May 2022, 31 May 2022, 22-23 July 2022, and 22 and 16 August 2022, by the Ordinary Court of Catania (*Tribunale ordinario di Catania*), sitting as an employment court, by the referral order of 14 March 2022, by the Ordinary Court of Padua (*Tribunale ordinario di Padova*), sitting as an employment court, by the referral order of 28 April 2022, and by the Regional Administrative Court for Lombardy Region (*Tribunale amministrativo regionale per la Lombardia*) by the referral order of 16 June 2022, registered respectively as numbers 47, 71, 77, 101, 102, 107, 108, 70, 76 and 86 in the 2022 Register of Referral Orders and published in the *Official Journal of the Italian Republic*, numbers 19, 25, 27, 34, 39 and 40, first special series 2022.

Considering the entries of appearance by E. B. and others, M. Z., G. B., O.P.S.A., E. C. and others, M. M. and C. B., as well as the interventions by the President of the Council of Ministers, and those by D. T. and others, A. R., D. D.P. and others, M. A. and others, V. B. and others, L. B., I. D. and C. M., P. C. and others and Berica Local Health Board (*Azienda unità locale socio sanitaria*, ULSS) No 8;

having heard the Judge Rapporteur Stefano Petitti at the public hearing and in

chambers on 30 November 2022;

having heard Counsel Gabriele Fantin and Counsel Orsola Costanza for D. D.P. and others, M. A. and others and V. B. and others, Counsel Nicolò Fiorentin for L. B., Counsel Paola Chiandotto for P. C. and others, Counsel Antonio Ferdinando De Simone for A. R., Counsel Antonio Verdone for I. D. and C. M., Counsel Mauro Sandri for E. B. and others, Counsel Beatrice Spitoni, Counsel Luca Iuliano and Counsel Susanna Cavallina for M. Z. and C. B., Counsel Luca Viggiano for G. B., Counsel Samanta Forasassi for M. M., Counsel Giovanni Onofri and Counsel Ugo Mattei for E. C. and others, Counsel Carlo Cester and Counsel Chiara Tomiola for O.P.S.A. and the State Counsel (*Avvocati dello Stato*) Enrico De Giovanni, Beatrice Gaia Fiduccia and Federico Basilica for the President of the Council of Ministers;

having deliberated in chambers on 1 December 2022.

[omitted]

Conclusions on points of law

1.– The Ordinary Court of Brescia, sitting as an employment court (within the proceedings registered under numbers 47, 71, 77, 101, 102, 107 and 108 in the 2022 Register of Referral Orders), the Ordinary Court of Catania, sitting as an employment court (within the proceedings registered under number 70 in the 2022 Register of Referral Orders), the Ordinary Court of Padua, sitting as an employment court (within the proceedings registered under number 76 in the 2022 Register of Referral Orders), and the Regional Administrative Court for Lombardy Region (within the proceedings registered under number 86 in the 2022 Register of Referral Orders) have raised, with reference to the provisions invoked in the respective referral orders, which overall pertain to Articles 2, 3, 4, 32(2) and 35 of the Constitution, identical or similar questions of constitutionality:

a) concerning Article 4(7) and Article 4-*ter*(2) of Decree-Law No 44/2021, as converted into law, insofar as, with regard to healthcare professionals and healthcare sector workers as well as workers at healthcare and socio-sanitary facilities, they limit assignment, where appropriate, to alternative duties without any reduction in salary solely to persons for whom vaccination may be dispensed with or delayed in order to avoid the risk of infection with SARS-CoV-2, and do not provide that the same option should also be available to workers who have not been vaccinated due to a free individual choice;

b) concerning Article 4(5) and Article 4-*ter*(3) of Decree-Law No 44/2021, as converted into law, insofar as it provides that "neither any remuneration nor any other compensation or emolument, irrespective of its designation, is due throughout the period of suspension", providing that healthcare professionals and healthcare sector workers as well as workers falling under letter *a*) (schools staff) and letter *c*) (workers at facilities falling under Article 8-*ter* of Legislative Decree No 502/1992) of Article 4-*ter*(1) must not be paid the maintenance allowance provided for by law or under sectoral collective bargaining arrangements in the event of suspension on precautionary or disciplinary grounds for the duration of the period of suspension of the right to perform employment due to the failure to comply with the requirement of mandatory vaccination against SARS-CoV-2.

The referral order received from the Court of Padua (registered as No 76 in the 2022 Register of Referral Orders) also concerns Articles 4-*bis*(1) and 4(1), (4) and (5) of Decree-Law No 44/2021, as converted into law, amended first by Decree-Law No 172/2021, as converted into law, and subsequently by Decree-Law No 24/2022, as

converted into law, insofar as they provide for mandatory vaccination for workers employed in residential, socio-welfare and socio-sanitary facilities, rather than an obligation to take – at their choice – a PCR test, an antigen test to be carried out in a laboratory, or a latest-generation rapid antigen test in order to detect SARS-CoV-2.

2.– Since the questions raised and the provisions invoked largely coincide with one another, the ten proceedings may be joined and decided on in one single judgment.

3.– As a preliminary matter, it is necessary to confirm the order made during the oral proceedings, which is annexed to this judgment, ruling inadmissible the interventions by D. T. and five others, A. R., D. D.P. and eight others, L. B., M. A. and twenty-eight others, V. B. and forty-nine others, I. D. and C. M., P. C. and five others, and Berica Local Health Board No 8 within the constitutionality proceedings registered as No 76 in the 2022 Register of Referral Orders.

Moreover, it is not possible to accept the request submitted in the alternative by some of the interveners that their respective interventions be assessed as written opinions pursuant to Article 4-*ter* of the Supplementary Rules applicable *ratione temporis*: first of all, according to that provision status as *amici curiae* may only be granted to non-profit entities and institutional bodies that represent collective or widespread interests pertaining to the question of constitutionality; secondly, two mechanisms (intervention and submission of an opinion by an *amicus curiae*) that differ significantly in terms of their prerequisites and procedural arrangements cannot be used together in the same submission, either as alternatives or on a subordinate basis.

Besides, this Court has already stressed on several occasions that the rationale for intervention within constitutional proceedings is radically different, *inter alia* in terms of the aspect of standing, from the rationale for opinions submitted by *amici curiae*, and that the deadlines for joining the proceedings as a party and the respective procedural rights are also different (Judgments Nos 259/2022, 221/2022 and 121/2022).

4.– The objections of inadmissibility made within the interventions filed by the President of the Council of Ministers are unfounded.

The referral orders are adequately supported by reasons, as regards the issue of non-manifest groundlessness, as regards the questions of constitutionality raised, and state why the provisions mentioned in each instance have been invoked.

The referring courts have also concluded that it is not possible to interpret the contested provisions in a manner that is consistent with the Constitution on account of their unequivocal literal wording, which is sufficient to establish the admissibility of the incidental questions raised. On the other hand, the issue as to whether or not the line of argumentation proposed is correct pertains to the merits, and hence the subsequent examination as to whether the questions are well-founded (amongst many, Judgments Nos 219/2022, 174/2022, 204/2021, 172/2021, 150/2020 and 189/2019).

Finally, it is not possible to accept the objections raised that the questions are inadmissible due to the absence of a solution required under the Constitution as regards the provision on mandatory vaccination for certain categories of worker as well as the consequences that the contested provisions stipulate in the event of the failure to comply with that obligation. Such consequences include in particular the refusal to pay a maintenance allowance to any worker who has been suspended and the refusal to assign them, where appropriate, to different duties without any reduction of pay. Indeed, the referring courts have asked to fill the gaps that would arise in the event that the questions were accepted, recognising those rights to workers who have been suspended due to the failure to comply with the mandatory vaccination requirement, whereas the

question as to whether it is correct to recognise those rights relates to the merits (amongst many, Judgment No 233/2018).

5.– The questions of constitutionality raised by the Regional Administrative Court for Lombardy by the referral order registered as No 86 in the 2022 Register of Referral Orders are inadmissible.

Specifically, disregarding the objection raised by the respondents, the referring court held that the administrative courts had jurisdiction on the grounds that, notwithstanding that the employment relationship at stake within the proceedings before it fell within the scope of public sector employment governed by private law, the substantive remedy sought within the dispute was the termination of the automatic legal effect of the exercise of the 'power constrained by an obligation to achieve a particular outcome' [*potere vincolato*] following a finding that a person had failed to comply with the requirement of mandatory vaccination. This outcome was specifically the immediate suspension from work without provision for any remuneration, even on a reduced scale, and without providing adequate measures to ensure support. Accordingly, in the view of the Regional Administrative Court, even in a case involving administrative action that lacks any scope for discretionary assessment, such as that set out by the legislation concerned (which was enacted in order to protect the public interest), the resulting subjective situation engages a legitimate interest of the private party, which is sufficient to establish the jurisdiction of the administrative courts.

5.1.– According to the settled case law of this court, where the referring court lacks jurisdiction this has the effect of rendering the questions inadmissible on the grounds of irrelevance, as is clear and readily apparent (amongst many, Judgments Nos 79/2022, 65/2021, 57/2021, 267/2020, 99/2020, 189/2018, 106/2013 and 179/1999).

If there is an indication of such a flaw, or if specific objections regarding the matter have been raised within proceedings before the referring court, as occurred in this case, the referring court must provide explicit reasons (Judgments Nos 65/2021 and 267/2020), whereupon it then falls to this Court to carry out its own review of the relevance of the questions (Judgments Nos 24/2020, 52/2018 and 269/2016).

However, the argument used by the referring court in order to reject the objection that the administrative courts lack jurisdiction does not pass muster in terms of the review of its plausibility, which this Court must carry out when considering the relevance of questions of constitutionality raised on an incidental basis.

Indeed, the main proceedings concern a request to annul official findings by a public health board concerning a failure by a socio-sanitary worker to comply with the requirement of mandatory vaccination and imposing a suspension from work. As is acknowledged by the referring Regional Administrative Court itself, the measures in question were issued within the context of a public law employment relationship governed by private law, jurisdiction over which is vested as a general matter in the ordinary courts. In particular, the ordinary courts have jurisdiction where the public sector employee's claim, identified on the basis of the substantive remedy sought having regard to the basis in law for that remedy, aims to protect individual legal rights pertaining to the employment relationship, which are alleged to have been violated through unlawful acts, including an order concerning suspension from service.

Moreover, by order No 28429 of 29 September 2022, the Joint Civil Divisions of the Court of Cassation held in a similar case to that under examination in these proceedings that the ordinary courts had jurisdiction over a dispute concerning the annulment of an order concerning suspension from service in the healthcare profession

due to the failure to comply with the requirement of mandatory vaccination introduced by Article 4 of Decree-Law No 44/2021, as converted into law, as the primary consideration was the individual right to continue to practise the healthcare profession.

In accordance with that ruling, since the referring court evidently lacks jurisdiction, the questions raised by the Regional Administrative Court for Lombardy must be ruled inadmissible.

6.– For the purpose of establishing as a preliminary issue the matter to be decided in these proceedings, it is necessary to refer to the settled case law of this Court according to which the subject matter of incidental constitutionality proceedings is limited to the rules and provisions mentioned in the referral orders, there being no scope to expand that reach in order to embrace questions formulated by the parties (amongst many, Judgments Nos 198/2022, 230/2021, 203/2021, 147/2021, 49/2021, 186/2020 and 7/2019).

As such, it is not possible to examine the self-standing question raised by the party that entered an appearance within the proceedings registered as No 76 in the 2022 Register of Referral Orders, which argues that Article 4-*bis* of Decree-Law No 44/2021, as amended by Decree-Law No 172/2021, as converted into law, violates Article 52 (or, more correctly, Article 53) of the Charter of Fundamental Rights of the European Union (CFREU). Similarly, there is no basis for considering the requests made by ANIEF, an *amicus curiae* within the proceedings registered as No 47 in the 2022 Register of Referral Orders, that the constitutionality of Article 4-*ter*(2) of Decree-Law No 44/2021, as converted into law, introduced by Decree-Law No 24/2022, be reviewed with reference to Articles 2, 3, 11 and 117(1) of the Constitution, the last-mentioned provision in relation to Articles 20 and 21 CFREU.

7.– Before proceeding to an examination of the merits of the questions, it is appropriate to provide an albeit summary account of the legislative framework, which has been characterised by its rapidly changing nature in line with developments in the COVID-19 pandemic and the progressive acquisition of scientific knowledge validated by the competent technical bodies.

7.1.– The provisions subject to constitutional review are contained in the measures for the protection of health adopted in order to combat the COVID-19 epidemiological emergency, which was classified by the World Health Organisation (WHO) as a "pandemic" on 11 March 2020, in view of the level of spread and degree of severity at global level. Decree-Law No 44/2021, as converted into law, was intended in particular, *inter alia*, to establish uniform rules applicable throughout the entire country to regulate activities designed to contain the pandemic and to reduce public health risks, especially for the most infirm classes of people, also in the light of medical and scientific data and the knowledge acquired.

7.2.– The report on Decree-Law No 44/2021 thus stated that "in consideration of the data concerning the spread of SARS-CoV-2 throughout the country, in terms of case numbers and the rate of transmissibility of infection, and having regard to occupancy rates in hospitals and intensive care units, it is now clear that vaccination constitutes an indispensable weapon in the fight against the pandemic, providing an essential opportunity for individual and collective protection". The report went on to state that: "the imposition of this obligation on the categories of workers concerned results from the finding that the vaccination of healthcare workers, in conjunction with other individual and collective protective measures to prevent the spread of infectious agents within healthcare facilities and professional practices, has a multiple effect: it enables

the worker to be safeguarded against the risk of occupational infection; it helps to protect patients from infection whilst receiving care; it helps to maintain the operational status of healthcare services by guaranteeing the quality of the care provided; and it helps to pursue public health objectives".

Article 4 of Decree-Law No 44/2021, as converted into law, "in consideration of the emergency epidemiological situation resulting from SARS-CoV-2", introduced the requirement of mandatory vaccination for healthcare professionals and healthcare sector workers "for the purpose of protecting public health and maintaining adequate conditions of safety in the provision of care and assistance".

Paragraph 1 provides that "vaccination is an essential prerequisite for the practice of the profession and for the performance of work by obliged persons".

Paragraph 2 provides that vaccination may be dispensed with or delayed where it would constitute an established risk for health on account of specific documented clinical conditions attested by a family doctor.

Article 4(6) as initially worded provided that "making of a finding by the local health authority [concerning non-compliance with the requirement of mandatory vaccination] shall result in the suspension of the right to perform certain duties or tasks involving interpersonal contact or that otherwise entail any risk of the spread of SARS-CoV-2". Paragraph 8 obliged the employer to make arrangements to assign "the worker, where possible, to tasks, including tasks with a lower level of authority, different from those referred to in paragraph 6, paying remuneration commensurate with the tasks actually performed". As such, remuneration or "any other compensation or emolument, irrespective of its designation" was not payable only in the event that it was not possible to assign the worker to different tasks that did not involve a risk of infection.

On the other hand, Article 4(10) as originally enacted, concerning persons for whom vaccination should be dispensed with or delayed, obliged employers in any case to assign workers, where appropriate, to different duties, thereby avoiding the risk of the spread of SARS-CoV-2, "without any reduction in remuneration".

Decree-Law No 172/2021, as converted into law, extended the duration of mandatory vaccination for a period of six months from 15 December 2021; expanded the categories of persons who were subject to mandatory vaccination; altered competences and procedures for establishing any failure to comply with the requirement of mandatory vaccination; provided that any finding concerning non-compliance by the professional order with competence *ratione loci* "shall have declaratory and not disciplinary status"; stipulated that such a finding will result in "immediate suspension of the right to practise healthcare professions"; provided that "neither any remuneration nor any other compensation or emolument, irrespective of its designation, is due throughout the period of suspension" (Article 4(5)); and limited the employer's obligation in any case to assign, where appropriate, to different duties only those workers for whom vaccination should be dispensed with or delayed on account of an established risk for health (Article 5(7)).

The requirement of mandatory vaccination was then extended:

– to workers employed in any manner in residential, socio-welfare and socio-sanitary facilities (Article 4-*bis* of Decree-Law No 44/2021, introduced by Decree-Law No 122/2021, subsequently replaced by Law No 133/2021, converting Decree-Law No 111/2021, subsequently amended by Decree-Law No 172/2021 and Decree-Law No 24/2022 and the respective conversion laws); for such workers, by virtue of the reference to Article 4-*ter*(3), Article 4-*bis*(4) again provided that the finding concerning

non-compliance with the requirement of mandatory vaccination must result in the immediate suspension of the right to work, without any disciplinary consequences and with the right to maintain the employment relationship; and that neither any remuneration nor any other compensation or emolument, irrespective of its designation, is due throughout the period of suspension; no obligation was imposed on the employer to assign to different duties any worker who refused to be vaccinated;

– to workers at healthcare and socio-sanitary facilities falling under Article 8-*ter* of Legislative Decree No 502/1992 (Article 4-*ter* of Decree-Law No 44/2021, introduced by Decree-Law No 172/2021, as converted into law); for these workers Article 4-*ter*(3) again provided that the finding concerning non-compliance with the requirement of mandatory vaccination must result in the immediate suspension of the right to work, without any disciplinary consequences and with the right to maintain the employment relationship; and that neither any remuneration nor any other compensation or emolument, irrespective of its designation, is due throughout the period of suspension; no obligation was imposed on the employer to assign to different duties any worker who refused to be vaccinated;

– to schools staff within the national education system, non-accredited private schools, infant education services pursuant to Article 2 of Legislative Decree No 65 of 13 April 2017 (Establishment of the integrated education and teaching system from birth until the age of six, adopted pursuant to Article 1(180) and (181)(e) of Law No 107 of 13 July 2015), provincial adult education centres, regional vocational education and training schemes and regional schemes for the provision of advanced technical education and training courses (Article 4-*ter*(1)(a) of Decree-Law No 44/2021, as converted into law, introduced by Article 1 of Decree-Law No 172/2021, as converted into law). For these workers, Article 4-*ter*(3) provided that the finding concerning non-compliance with the requirement of mandatory vaccination must result in the immediate suspension of the right to work, without any disciplinary consequences and with the right to maintain the employment relationship, and that neither any remuneration nor any other compensation or emolument, irrespective of its designation, is due throughout the period of suspension. Article 4-*ter*(1) went on to provide that headteachers and officials in charge of such institutions should arrange for any suspended teaching, educational, administrative, technical or auxiliary staff to be replaced by the award of fixed-term contracts, which should terminate automatically at such time when the staff replaced were able to resume work, having in the meantime complied with the requirement of mandatory vaccination. During a regressive phase of the pandemic (see the report to the draft conversion bill for the Decree-Law), Article 8(4) of Decree-Law No 24/2022, as converted into law, introduced Article 4-*ter*.1, which no longer provided for a prohibition on the conduct of work, as well as Article 4-*ter*.2, which by contrast laid down specific provision concerning teaching and educational staff in schools, requiring headteachers to assign teachers to supporting roles within the educational institution in the event of failure to comply with the requirement of mandatory vaccination; these activities, it should be added, were provided for under sectoral collective bargaining agreements;

– to personnel in the defence, security and public assistance segment, the local police, bodies provided for under Law No 124 of 3 August 2007 establishing the "Information system to ensure the security of the Republic and new provisions governing official secrets" (Article 4-*ter*(1)(b) of Decree-Law No 44/2021, as converted into law, introduced by Article 2 of Decree-Law No 172/2021, as converted into law).

For these workers, Article 4-*ter*(3) again provided that the finding concerning non-compliance with the requirement of mandatory vaccination must result in the immediate suspension of the right to work, without any disciplinary consequences and with the right to maintain the employment relationship, and that neither any remuneration nor any other compensation or emolument, irrespective of its designation, is due throughout the period of suspension; no obligation was imposed on the employer to assign to different duties any worker who refused to be vaccinated. These workers too were subsequently subject to the provisions laid down by Article 4-*ter*.1;

– to staff working on any basis as employees of the Prisons Administration Department or within adult or juvenile prisons (Article 4-*ter*(1)(c) of Decree-Law No 44/2021, as converted into law, introduced by Article 2 of Decree-Law No 172/2021, as converted into law, and subsequently Article 4-*ter*.1;

– to workers at universities, advanced artistic, musical and dance training institutions, advanced technical institutes, and the forestry corps of the regions governed by special statute (Article 2(1)(a) of Decree-Law No 1/2022, as converted into law); in consideration of the legislative technique used (the introduction of paragraph 1-*bis* into Article 4-*ter* of Decree-Law No 44/2021, as converted into law), who also become subject to the above-mentioned Article 4-*ter*(3), and were later subject to Article 4-*ter*.1;

– to students attending degree courses completing practical-assessment placements leading to the award of a licence to practise the healthcare professions (Article 4(1-*bis*) of Decree-Law No 44/2021, introduced by Law No 3/2022, converting Decree-Law No 172/2021); for this class of persons, the provision establishing a requirement of mandatory vaccination by virtue of inclusion within the scope of Article 4 of Decree-Law No 44/2021, as converted into law, resulted in those provisions that stipulate vaccination as an essential prerequisite for the practice of the profession becoming applicable to such persons, with any finding concerning the failure to comply with the requirement resulting in the immediate suspension of the right to practise healthcare professions and neither any remuneration nor any other compensation or emolument, irrespective of its designation, is due throughout the period of suspension;

– to persons over the age of fifty (Article 4-*quater* of Decree-Law No 44/2021, introduced by Decree-Law No 1/2022, converted with amendments into Law No 18/2022); Article 4-*sexies* of Decree-Law No 44/2021, introduced by Decree-Law No 1/2022, provided for the application of an administrative fine of one hundred euros in the event of the failure to comply with the requirement of mandatory vaccination imposed by Article 4-*quater* as well as Articles 4, 4-*bis* and 4-*ter*, within the respective applicable time limits, and this sanction was subsequently extended by Decree-Law No 24/2022 to any failure to comply with the obligation laid down by 4-*ter*.1 and 4-*ter*.2.

7.3.– As regards the duration of the requirement of mandatory vaccination, it was originally stipulated to apply until the vaccination plan provided for under Article 1(457) of Law No 178/2020 had been implemented in full (which plan had designated both public and private healthcare and socio-sanitary workers as priority categories in consideration of the higher risk of exposure to infection with COVID-19 and of infecting sensitive and vulnerable patients within healthcare and social settings), and under all circumstances not beyond 31 December 2021. It was subsequently extended until 15 June 2022 in accordance with Article 1(1) of Decree-Law No 172/2021, as converted into law, and later until 31 December 2022; this time limit was finally brought forward to 1 November 2022 by Decree-Law No 162 of 31 October 2022 (Urgent measures on the prohibition of the grant of prison benefits to prisoners or

detainees who refuse to cooperate with the judicial authorities, and on the entry into force of Legislative Decree No 150 of 10 October 2022 concerning the requirement of vaccination against SARS-COV-2 and the prevention and combatting of unlawful gatherings), converted with amendments into Law No 199 of 30 December 2022 in consideration, as is stated in its preamble, of developments in the epidemiological situation that has seen a reduction in the levels of infection with COVID-19 and a stabilisation in transmissibility, albeit still higher than the threshold for an epidemic, and also in consideration of the need to embark upon a progressive return to normality during the current post-pandemic phase, in which the objective to be pursued is effective control of the endemic virus".

8.– The questions of constitutionality set out in section 1 above thus concern the legislation applicable to mandatory vaccination, and the resulting implications for employment relationships in the event of the failure to comply with that obligation by healthcare professionals and healthcare sector workers, workers employed in residential, socio-welfare and socio-sanitary facilities or in facilities provided for under Article 8-*ter* of Legislative Decree No 502/1992 and schools staff.

9.– Owing to their logically preliminary status, in that they concern the introduction of the requirement of mandatory vaccination as such for the respective categories of worker in the healthcare sector, the questions raised by the Court of Padua in relation to Article 4-*bis*(1) and Article 4(1), (4) and (5) of Decree-Law No 44/2021, as converted into law, amended first by Decree-Law No 172/2021, as converted into law, and subsequently by Decree-Law No 24/2022, as converted into law, challenged with reference to Articles 3, 4, 32 and 35 of the Constitution, must be reviewed first.

10.– These questions are unfounded with regard to all of the constitutional provisions allegedly violated.

10.1.– It must first be pointed out that these provisions cannot include those resulting from Regulation (EU) 2021/953 and the proportionality principle laid down by Article 52(3) CFREU. There is in fact no reference, either within the operative part of the referral order or in the reasons provided, to Article 117(1) of the Constitution, as the case may be invoked alongside Article 11 of the Constitution, as the linking provisions through which the violation of European law by a provision of national law may be asserted within constitutionality proceedings (Order No 215/2022).

It must therefore be concluded that the references to legislation contained in the referral order have no status other than to assist in delineating the scope and meaning of the constitutional provisions invoked.

10.2.– It must be recalled as a preliminary matter that, according to settled constitutional case law, a stipulation requiring healthcare treatment, and mandatory vaccination in particular, may be deemed to be compatible with Article 32 of the Constitution if three prerequisites are met: "a) 'whether the treatment is intended not only to improve or safeguard the health of the person who receives it, but also to preserve the health of others, with the result that it is precisely this additional purpose pertaining to the interest of society at large that justifies the interference with each individual's self-determination, which is inherent to each person's right to health as a fundamental right' (cf. Judgment No 307/1990); b) whether there is any 'stipulation that it must not adversely affect the health of the person who receives it, except exclusively those consequences that, on account of their ephemeral nature and low level of severity, are a normal feature of any medical treatment, and hence tolerable" (ibid); c) whether in the event of any further harm to the health of the person receiving compulsory treatment

– including any infectious disease contracted as a result of prophylactic vaccination – provision has been made under all circumstances for 'fair compensation' to the injured party (cf. Judgment No. 307 cited above, and now Law No 210/1992)" (Judgment No 258/1994; see also Judgment No 5/2018).

10.2.1.– The Court of Padua doubts that the first of these prerequisites is met, that is specifically that the treatment consisting in mandatory vaccination is intended to improve or maintain the health of the individual who receives it and also that of others.

In contrast to the Council of Administrative Justice of Sicily Region (*Consiglio di giustizia amministrativa per la Regione Siciliana*) (Referral Order No 38 in the 2022 Register of Referral Orders, also discussed at the public hearing held on 30 November, on which this Court ruled by Judgment No 14/2023), the Court of Padua does not raise any doubts concerning the constitutionality of the legislation in terms of the negative impact on the health of the person who receives the compulsory medical treatment.

Indeed, as regards the fact that the medical treatment was imposed for the persons subject to the requirement of mandatory vaccination (in this case, workers at residential, socio-welfare and socio-sanitary facilities) in order to protect not the health of workers but rather the health of residents receiving care and assistance in those facilities, the referral order argues that this obligation is not suited to achieving the purpose of maintaining the health of residents, as it is common knowledge that a person who has been fully vaccinated can still contract the virus and thereafter infect others. The data furnished by the Italian National Institute of Health (*Istituto Superiore di Sanità*, ISS) in the reports concerning infection trends and vaccine efficacy published on 21 January and 6 April 2022 indicate a progressive decline in vaccine efficacy. The referring court argues that, within this context, there is absolutely zero guarantee that a worker who has been vaccinated will not subsequently become infected and cannot thereafter infect anybody else; on the contrary, the presentation of a negative COVID test would provide a guarantee certainly greater than zero, albeit for a limited period of time, that a person is not infected and is hence incapable of infecting others.

It is therefore argued that the infringement of the right to health, as a sub species of the right to self-determination in respect of medical treatment, cannot be justified by the need to protect the wider public interest, and specifically the interest of the residents of the facilities concerned in their own good health, with the result that the provision violates Article 32 of the Constitution and is unreasonable.

The referring court has thus placed before this Court a question concerning the constitutionality of the provision introducing the requirement of mandatory vaccination for healthcare workers, thereby privileging the protection of health as an interest of the public at large, to the detriment of the protection of the health of the individual.

10.3.– According to the settled case law of this Court, the balance struck between the right to health of each individual (including in negative terms the right not to receive healthcare treatment that has not been requested or that is not accepted) and the interest of the public at large is the core content of Article 32 of the Constitution (Judgments Nos 5/2018, 258/1994 and 307/1990) and represents a specific manifestation of the duties of solidarity laid down by Article 2 of the Constitution, as a manifestation of "the basis for social cohabitation, as envisaged under the framework of rules adopted by the Constituent Assembly" (Judgment No 75/1992).

Moreover, Judgment No 218/1994 held that the protection of health also implies a "duty for the individual to refrain from harming or putting at risk the health of other people through their own actions, in accordance with the general principle that the right

of each person is subject to a limit consisting in reciprocal recognition of and equal protection for the parallel rights of others. The parallel rights of individuals are further balanced against the essential interests of the community. This may require individuals to be subjected to compulsory medical treatment, which may also be administered in the interest of individuals themselves, or may provide for their subjection to particular obligations".

10.3.1.– The measures put in place by the legislator must be assessed in this case taking account of the situation caused by "a healthcare emergency with highly specific features" (Judgment No 37/2021).

It must be added that these special features result also and above all from the indications formulated by the competent international bodies.

Indeed, by a declaration of 30 January 2020, the WHO classified the COVID-19 epidemic as a Public Health Emergency of International Concern.

Subsequently, in view of the level of spread and degree of severity at global level, the WHO classified the healthcare situation as a "pandemic" on 11 March 2020.

The WHO, the European Commission and other international bodies started taking immediate action to coordinate scientific research and the subsequent administration of vaccines.

As early as 20 April 2020, the United Nations General Assembly adopted a resolution aimed at enabling States to act jointly and in a coordinated manner to combat the pandemic, calling for a reinforcement of international cooperation concerning in particular research into specific pharmacological treatments.

On 19 May 2020, the WHO Assembly invited member countries to promote research with a view to developing a vaccine that could be made available to the peoples of all countries.

The European Commission subsequently developed a common strategy on the usages of vaccines in the Communications of 17 June 2020 (EU Vaccines Strategy) and 15 October 2020 (Preparedness for COVID-19 vaccination strategies and vaccine deployment).

The Council of Europe subsequently approved Resolution No 2361/2021 of 27 January 2021 on the deployment and administration of vaccines, stressing the need for the utmost cooperation between States in order to ensure an efficient vaccine campaign.

In Italy, by a resolution of 31 January 2020, the Council of Ministers declared a healthcare emergency throughout the entire country solely for the purposes of Article 7(1)(c) and Article 24(1) of Legislative Decree No 1 of 2 January 2018 (Civil Protection Code) for a period of six months, specifically on account of the risk associated with the emergence of diseases caused by transmissible viral agents.

The state of emergency was subsequently extended by various measures until 31 March 2022, and was only brought to an end by Decree-Law No 24/2022, as converted into law.

A number of vaccines designed to combat the spread of the virus were developed – within particularly short timescales – precisely as a result of the public initiative and the support provided to scientific research. Once these became available, the focus thus shifted to the preparation of a specific national strategy for vaccination against SARS-CoV-2 (decrees of the Minister of Health of 2 January and 12 March 2021, adopted pursuant to Article 1(457) of Law No 178/2020), and the requirement of mandatory vaccination under discussion here was only introduced in April 2021.

It is important to stress from the outset that the requirement of mandatory

vaccination was only introduced gradually by the legislator starting several months after the vaccination campaign under the above-mentioned plan had been launched, taking account evidently of the fact that the relevant categories of people had not all been vaccinated. The legislator thus considered it necessary to impose the requirement "for the purpose of protecting public health and maintaining adequate conditions of safety in the provision of care and assistance" (Article 4(1) of Decree-Law No 44/2021, as converted into law).

In view of the above, this Court has been called upon to assess whether the requirement of mandatory vaccination was compatible with constitutional principles.

10.3.2.– Within this perspective – which is examined overall not only in this judgment but also more broadly in Judgment No 14/2023 – the development of scientific research and the findings made by supranational and national authorities charged with the protection of health take on particular significance. In fact, it is a settled position within the case law of the Constitutional Court that the review to ensure that the choice made by the legislator to encroach upon the fundamental right to health was not unreasonable, including with reference to the issue of self-determination, must be carried out having regard to the specific ongoing medical and epidemiological situation. Indeed, in the event of a conflict between rights contemplated under Article 32 of the Constitution, legislative discretion "must be exercised in light of the various health and epidemiological conditions, as ascertained by the responsible authorities (Judgment No 5/2018)" (Judgments Nos 5/2018 and 268/2017). Moreover, the "constantly changing progress in medical research, which must guide the legislator when making its choices in this area (according to the settled case law of this Court since the leading Judgment No 282/2002)" is also significant (Judgment No 5/2018).

Thus, any intervention in these areas "cannot result from decisions made by the legislator on the basis of pure political discretion, but must rather provide for the consideration of approaches based on a review of the state of scientific knowledge and experimental evidence acquired by institutions and bodies – normally national or supranational – charged with obtaining such knowledge and evidence, given the 'essential significance' that 'technical-scientific bodies' take on in this regard (cf. Judgment No 185/1998); alternatively, it should in any case constitute the result of such a review" (Judgment No 282/2002).

Moreover, the competent authority in this area was fully aware of these preconditions. In fact, the National Vaccination Plan approved by the above-mentioned ministerial decree of 12 March 2021 states that "the recommendations concerning the target groups to which the vaccine is to be offered will be liable to change and will be updated in line with knowledge acquired and information concerning vaccine efficacy and/or immunogenicity in various age cohorts, vaccination safety for various age cohorts and at-risk groups, the effect of the vaccine on susceptibility to infection, and transmission or protection from serious forms of the disease […]".

10.3.3.– However, the fact that the legislator made its choices on the basis of assessments and medical and scientific data is not sufficient to render such choices immune to review by this Court; on the contrary, it means that the review must involve an assessment as to whether the legislation is not unreasonable and that it is proportionate in view of the underlying scientific facts.

Indeed, as was clarified in Judgment No 114/1998, where the legislative choice is based on scientific considerations, "the legislation may only be declared unconstitutional if the data on which the law was based are incontrovertibly incorrect or

are so indeterminate as not to enable any rational interpretation and application by the courts".

10.3.4.– It is therefore necessary to assess whether the choice made by the legislator to introduce a requirement of mandatory vaccination for healthcare workers, in the light also of the prevailing circumstances of the pandemic, was consistent with medical and scientific knowledge at the relevant time (Judgment No 5/2018), as set out in the findings and studies of the (national and supranational) bodies competent in this field, including in particular the Italian Pharmaceuticals Agency (*Agenzia italiana del farmaco*, AIFA), the ISS and the European Medicines Agency (EMA).

The importance attributed to scientific research aimed at creating effective vaccines against the virus SARS-CoV-2 and the usage of supranational bodies in facilitating as broad as possible vaccination of the population have already been recalled, albeit in summary form (section 10.3.1. above). It is also important to stress that the reduced initial availability of doses made it necessary to implement the vaccine plan by providing for the vaccination of healthcare workers on a priority basis (the possibility of extremely limited supply of vaccine doses at the start of the vaccine rollout plan is noted in the National Vaccination Plan mentioned above). The introduction of the requirement of mandatory vaccination for healthcare workers must therefore be identified as having occurred at a point in time when the legislator was first required to take account of the effective availability of vaccines, and thereafter to extend the obligation in question to additional categories, according to considerations based on a necessary balancing of costs and benefits.

The legislation introduced by Article 4 of Decree-Law No 44/2021, as converted into law, was then amended on several occasions as regards the categories of persons to which the requirement of mandatory vaccination was to be extended, the consequences of non-compliance and finally its duration. This was done based on the general premise – recalled above – that any legislative initiatives aimed at reducing the circulation of the virus should be adapted to take account of any changes in the healthcare situation and any scientific knowledge acquired.

In particular, the contested provision as originally adopted provided for a precise expiry date for the requirement of mandatory vaccination on 31 December 2021.

The subjective scope was limited by Article 4(1) of Decree-Law No 44/2021 to "healthcare professionals and healthcare sector workers working in public or private healthcare, socio-sanitary and socio-welfare facilities, pharmacies, 'para-pharmacies' [i.e. shops selling non-prescription medicines and healthcare products] and professional practices". Upon conversion, the obligation was applied to "healthcare professionals and healthcare sector workers provided for under Article 1(2) of Law No 43 of 1 February 2006, working in public or private healthcare, socio-sanitary and socio-welfare facilities, pharmacies, 'para-pharmacies' and professional practices". Over time, in line with developments in the pandemic and well as choices resulting from data obtained regarding in-person attendance at schools, it was also extended to the categories of persons referred to in section 7.2. above.

The duration of that obligation was altered on various occasions, in each instance taking account specifically of infection trends and the evolution of the pandemic, and was subjected to various extensions until 31 December 2022, until it was finally brought forward, as mentioned above, to 1 November 2022.

11.– In view of the above, it is now possible to examine the challenges brought by the Court of Padua.

11.1.– Contrary to the assertions of the referring court, far from establishing that vaccines are useless, the very same data set out in the ISS reports mentioned in the referral order demonstrate that vaccine efficacy – understood as a reduction in the percentage risk as compared to the unvaccinated – above all during the initial stages of the vaccination campaign played a highly significant role not only in preventing infection with SARS-CoV-2 but also in avoiding instances of severe disease, and moreover that this efficacy increased following completion of the vaccine regimen.

"When confronted with 'a highly contagious respiratory virus, spreading throughout the world, which could be contracted by any person' (Judgment No 127/2022)", the decision taken by the legislator to introduce the requirement of mandatory vaccination under examination (in accordance with the subjective and temporal limits mentioned above) cannot therefore be deemed to be unreasonable as it was based on indications provided by the competent national and supranational authorities in the light of the severity of the situation that vaccination was intended to address.

The choice was also reasonably related to the goal being pursued of reducing the virus in circulation through the administration of vaccines.

The very fact, highlighted by the referring court, that the Ministry of Health declared "absolutely false the assertion that, if one has been vaccinated against SARS-CoV-2 and also received a third booster dose, one cannot contract Covid-19 and cannot pass on the infection to others" is not sufficient to undermine the choice made by the legislator in requiring mandatory vaccination for various categories of healthcare workers. On the contrary, its sole aim was to inform vaccinated persons that it would inevitably be impossible to remain entirely immune from the disease, and even more so from infection. First of all, the assertion that a vaccine is only effective if it generates immunity amongst 100 percent of those vaccinated has not been adequately demonstrated according to scientific standards. Moreover, this assertion by no means suggests that, against the backdrop of high rates of virus circulation, vaccines were incapable of significantly reducing the rate of circulation, which would have a particularly positive effect in settings or places designed for people with infirmities or otherwise requiring assistance.

As has been noted by the ISS, "although vaccine efficacy is not equal to 100 percent (as is moreover the case for all other vaccines), due to the high rate of circulation of the SARS CoV-2 virus, in any case a significant number of cases can be prevented through vaccination" (regarding this issue, and more generally the medical and scientific data available to the legislator, see also Judgment No 14/2023, sections 10 et seq).

On the basis of these considerations, the imposition of a selective requirement of mandatory vaccination as a precondition for eligibility to perform activities that place workers at a potential risk of infection, and thus in order to protect the health of third parties and society at large, is a measure with sufficient scientific backing.

11.2.– It can therefore be asserted that the contested provisions struck a balance between the right to freedom of medical treatment of the individual and the parallel, reciprocal right of others and the interest of society at large. Within this perspective, the extension of the requirement of mandatory vaccination to workers employed within residential, socio-welfare and socio-sanitary facilities (which are relevant within the proceedings before the referring court, as the same consideration can in any case apply to all types of public and private healthcare facilities) gave effect to Article 32 of the

Constitution, which is taken to include also a duty for each individual to avoid harming or putting at risk the health of others through their own actions, by preventing the risk of infection with SARS-CoV-2 to the detriment of the most infirm.

This decision was consistent with the objective that the legislator had set itself, as the requirement of mandatory vaccination for healthcare workers not only protects the health of one of the categories of people most exposed to infection, but also makes it possible to pursue "the twofold purpose of protecting those who enter into contact with them and avoiding an interruption of services that are essential for the collectivity" (Judgment No 268/2017).

In particular, it was necessary to take action that, considered overall, enabled the health of individuals to be protected, and at the same time to shelter healthcare facilities from the risk of being unable to perform their indispensable function due to a lack of healthcare operators. In this regard, it can readily be appreciated that the infection of healthcare workers has implications not only for the health of individuals but could also result in the impaired operation of the national health service during a period in which, as was seen, it was essential to be able to rely on it in order to ensure appropriate care for an unpredictable number of patients.

Moreover, – when examining a regional law that granted power to a regional government to designate specific wards, access to which was permitted only to workers who had complied with the requirements laid down in the National Vaccine Prevention Plan applicable to persons at risk of occupational exposure – this Court has already been able to assess, with reference to the vaccination of healthcare workers, the "purpose of preventing and protecting the health of persons attending healthcare facilities: first and foremost that of patients, who are often infirm and at serious risk of infection, as well as that of their family members, other workers, and only by extension society at large. That purpose […] has moreover been considered with particular attention by medical and scientific companies, which report the urgent need to put in place procedures that are capable of preventing hospital outbreaks, calling in particular for appropriate conduct on the part of healthcare workers in order to guarantee safe care for patients" (Judgment No 137/2019).

11.3.– There is certainly no basis for arguing that, since workers at residential, socio-welfare and socio-sanitary facilities could be placed under an obligation to take frequent COVID tests rather than vaccinating themselves, the existence of this alternative establishes as unreasonable or disproportionate the solution chosen by the legislator.

Indeed, the alternative solution proposed by the referring court has been used in more general areas in order for people who do not fall under any of the categories that are subject to a requirement of mandatory vaccination to gain access to public places. However, one cannot overlook the fact, first and foremost, that for healthcare workers themselves this solution would have been entirely inappropriate to prevent illness (especially severe illness), which would entail a risk of compromising the proper operation of the national health service. In addition, the taking of regular antigen tests at particularly short intervals (i.e. once every two or three days) would have had unsustainable costs and would have entailed a burden that the national health service would have found difficult to bear, as it was already committed to dealing with the pandemic (see regarding this aspect also the considerations set out in Judgment No 14/2023).

The fact – highlighted by the referring court – that tests could also be taken at pharmacies and that the cost would be borne by the workers concerned does not take account of the fact that the national health service must bear the full burden for processing tests (see in this regard Judgment No 171/2022, which held that the choice made by the national legislator not to allow para-pharmacies to administer COVID tests was not unreasonable specifically on account of the fact that the system of pharmacies, and only pharmacies, was incorporated into the national health service).

Accordingly, the legislative choice to extend mandatory vaccination to workers at residential, socio-welfare and socio-sanitary facilities, and in general to workers in the healthcare sector does not therefore appear to be unreasonable on the grounds that it unduly and disproportionately sacrificed free individual self-determination in order to protect the other constitutional interests at stake and avoided any consideration of the alternative option (proposed by the Court of Padua) of requiring workers in that sector to take regular PCR or antigen COVID tests.

11.4.– The legislator's decision was also not disproportionate.

The consequence of the failure to comply with the obligation was the suspension of the right to practise healthcare professions, which would subsequently lapse in the event of compliance with the requirement of mandatory vaccination, or otherwise at the time when the epidemiological crisis ended. The related sacrifice of the healthcare worker's own rights does not have the nature or effect of a sanction (as will be clarified below in sections 12.1. and 14.4.), does not go beyond that which is necessary in order to achieve the public goals of reducing the circulation of the virus, was constantly adjusted in line with changes in the healthcare situation and was also appropriate and necessary for this purpose.

11.5.– Based on the considerations set out above, the question concerning the constitutionality of Articles 4-*bis*(1) and 4(1), (4) and (5) of Decree-Law No 44/2021, as converted into law and subsequently amended, must be declared unfounded with reference to Articles 3 and 32 of the Constitution.

12.– The question is also unfounded with reference to Articles 4 and 35 of the Constitution.

12.1.– The law establishing the requirement of mandatory vaccination provides that any failure to comply with that requirement only has relevance in terms of the reciprocal relationship (i.e. only as regards the rights and obligations arising under the employment contract) as an event causing the supervening and temporary inability for the employee to perform any work that could entail, in any other form and in consideration of the needs of the care setting, the risk of infection with SARS-CoV-2.

Since vaccination has been elevated by law to an essential prerequisite for the practice of the profession and for the performance of work by persons covered by the obligation, once the employer becomes aware of any established failure by the worker to comply with the requirement of mandatory vaccination, it is obliged to suspend the worker and to stop making salary payments until the requirement of mandatory vaccination has been complied with, or until the National Vaccination Plan has been completed, or otherwise until the expiry date specified by law.

In this regard, the suspension of an unvaccinated worker provided for under the contested provision is in keeping with the duty to ensure a safe working environment imposed on employers by Article 2087 of the Civil Code and Article 18 of Legislative Decree No 81 of 9 April 2008 (Implementation of Article 1 of Law No 123 of 3 August 2007 on the protection of health and safety in workplaces), and has the effect of

supplementing the reciprocal terms of the individual employment contract. Having regard to the status of workers, vaccination against SARS-CoV-2 has in turn expanded the scope of the health and safety obligations laid down by Article 20 of Legislative Decree No 81/2008, as well as the prevention and control obligations established by Article 279 for workers assigned to particular activities.

12.2.– With specific regard to an employee who has chosen not to comply with the requirement of mandatory vaccination by virtue of the exercise of the right to individual self-determination for decisions concerning healthcare treatment (which is protected by Article 32 of the Constitution), the fundamental right to work (which is guaranteed within the principles laid down by Articles 4 and 35 of the Constitution) does not necessarily imply a right to work where this would constitute a risk factor for the protection of public health and for the maintenance of adequate conditions of safety in the provision of care and assistance.

Therefore, the right to work of a worker practising a healthcare profession, a healthcare sector worker or a worker in a residential, socio-welfare and socio-sanitary facility who has not complied with the requirement of mandatory vaccination is not at stake. It is rather necessary to verify whether, in ordering the suspension of any worker until that obligation has been complied with or until the National Vaccination Plan has been completed, or until the time limit specified in the legislation itself, albeit subject to the broad margin of appreciation available when establishing timescales as well as the balance struck among the values underpinning Articles 4, 32 and 35 of the Constitution, the legislator failed to comply with the principles of equality and reasonableness (Judgments Nos 125/2022, 59/2021 and 194/2018).

For the reasons set out (above, sections 11.1. et seq), it must be concluded that this did not occur.

13.– It is now necessary to consider the questions concerning Article 4(7) and Article 4-*ter*(2) of Decree-Law No 44/2021, as converted into law, raised with reference, overall, to Articles 3, 4, 32 and 35 of the Constitution within the proceedings registered under numbers 71, 76, 77, 107 and 108 in the 2022 Register of Referral Orders, insofar as, with regard to healthcare professionals and healthcare sector workers as well as workers at healthcare and socio-sanitary facilities, they limit assignment, where appropriate, to alternative duties without any reduction in salary to persons for whom vaccination may be dispensed with or delayed in order to avoid the risk of infection with SARS-CoV-2, and do not provide that the same option should also be available to workers who have not been vaccinated due to a free individual choice.

13.1.– The referring courts note that the contested provisions discriminate without any justification, for the purposes of reassignment, against those who have chosen not to be vaccinated, in contrast to the arrangements put in place for persons for whom vaccination may be dispensed with or delayed, or for teaching and educational staff in schools, where the headteacher is required to allocate any worker in breach of the requirement of mandatory vaccination to support activities for the educational institution.

13.2.– Also these questions must be ruled unfounded.

13.3.– Section 7 above sets out the defining characteristics of Decree-Law No 44/2021, as converted into law, according to which the legislator temporarily imposed a selective requirement of vaccination on workers operating in certain sectors characterised by a percentage risk of infection with SARS-CoV-2, in consideration of the SARS-CoV-2 epidemiological emergency and for the purpose also of maintaining

adequate conditions of safety in the provision of care and assistance. As vaccination is classified as an "essential prerequisite for the practice of the profession and for the performance of work by obliged persons", the failure to be vaccinated resulted in a supervening, provisional inability for the employee to perform any work entailing a risk of the spread of infection. Any employer who became aware of any failure by a worker to comply with the requirement of mandatory vaccination was obliged to suspend the worker.

13.4.– In view of the initial solution chosen in the original version of Article 4(8) of Decree-Law No 44/2021, as converted into law, which obliged the employer to assign "the worker, where possible, to tasks, including tasks with a lower level of authority", as long as they were different from those involving interpersonal contact or entailing a risk of the spread of SARS-CoV-2, following the amendment introduced by Decree-Law No 172/2021, as converted into law, on the basis of the data presented by ISS in November 2021, the legislator chose that it would no longer require employers of healthcare professionals, healthcare sector workers or workers at residential, socio-welfare and socio-sanitary facilities (in contrast to the position established for teaching and educational staff in schools) to cooperate by assigning any staff in breach of the requirement to other duties by putting in place different arrangements for the performance of their respective employment duties.

The contested legislation is thus based on the evident prerequisite that, for the sectors of employment mentioned, for which the law considered there to be a special need to maintain adequate conditions of safety in the provision of care and assistance, i.e. services involving contact with persons with infirmities, the employer could not be obliged to assign those persons who did not intend to be vaccinated to tasks that were in any case appropriate to avoid a risk of the spread of infection with SARS-CoV-2, as is by contrast required under Article 4(7) of Decree-Law No 44/2021, as converted into law, for persons for whom vaccination had to be dispensed with or delayed in view of an established danger to health.

The contested provision is based on the consideration that a broader duty for the employer involving so-called *repêchage* (as is called for by the referring courts) would not be compatible with the specific circumstances of these public sector businesses, save at the risk of jeopardising the health of the workers themselves, of other workers and of third parties vested with constitutional interests that prevail over the employee's interest in being able to receive remuneration. The contested provisions thus considered that it was not appropriate to subject employers to a general obligation to make organisational adjustments on a general scale. This is because it did not consider an unvaccinated worker to be fungible or as having any even partial residual capacity to work within the context of the professional categories under examination. In the event that the performance of work subsequently becomes impossible, both of these conditions must be met in order to justify the continuing existence of an appreciable interest of the employer in the performance of different duties.

13.5.– It is moreover the case that any temporary inability to work affecting an employee who has failed to comply with the requirement of mandatory vaccination still results from an individual choice and not any objective circumstances. Nonetheless, specifically out of respect for any choice by the worker not to comply with the requirement of mandatory vaccination, the legislator limited its action to providing for the suspension of the employment relationship, regulating the situation as one involving temporary impossibility not resulting from fault. Consequently, since the services

offered by an employee who has not complied with the requirement of mandatory vaccination are not compliant with contractual requirements, as supplemented by the law, the employer is certainly justified to refuse to pay remuneration and the freezing of the overall relationship is simply a means of conserving the legal and economic balance provided for under the contract.

Similarly, since the employer may object to the failure by the employee to comply with the obligation to ensure safety, and hence refuse to receive the employee's services until the latter has been vaccinated, the employer has not been forced by the legislator to adjust its organisation in order to allocate the employee to duties that do not entail a risk of infection with SARS-CoV-2; this is even more understandable within the context of those specific segments identified by law due to the particular impact of the aim of protecting public health and the maintenance of adequate conditions of safety in the provision of their respective services, which involve contact with persons with infirmities.

By virtue of Decree-Law No 172/2021, as converted into law, which removed the employer's duty of *repêchage* to available duties that do not entail a risk of infection (except for persons who are exempt from the requirement of vaccination on health grounds), any employer that refuses to receive the services of an employee does not accordingly default on its obligation to receive the services due to it; on the contrary, that refusal is engaged by the failure to comply with an essential health-related prerequisite for the performance of the respective duties.

13.6.– The balance among the principles underpinning Articles 4, 32 and 35 of the Constitution struck by the legislator in identifying the timescale and arrangements for vaccination within Articles 4(7) and 4-*ter*(3) of Decree-Law No 44/2021, as converted into law, was not unreasonable.

The choice not to oblige the employer to assign, where appropriate, to alternative duties any workers, healthcare professionals, healthcare sector workers or workers at residential, socio-welfare and socio-sanitary facilities who decided not to be vaccinated, in contrast to the position stipulated for those for whom vaccination must be dispensed with or delayed on account of an established risk for health or for teaching and educational staff in schools, does not violate the principles of equality and reasonableness. As it is related to the suitability conditions required in order to perform specific employment activities, that choice rather appears to result from the need to take provisional measures, which are indispensably related to the development of scientific knowledge. This results in a balance being struck between the employee's fundamental right to work, individual freedom of self-determination with regard to decisions pertaining to medical treatment and the protection of public health, which engages the requirement to maintain adequate conditions of safety in the provision of care and assistance.

The difference in treatment provided for by law for healthcare professionals, healthcare sector workers or workers at residential, socio-welfare and socio-sanitary facilities is justified by the greater risk of infection, both to themselves and to people who are particularly infirm on account of their state of health or advanced age. This is a sufficient reason to make different provision concerning the consequences of the failure to be vaccinated as compared to workers such as those working in schools, who work under circumstances that are not homogeneous, as well as compared to workers who are exempt from the requirement of vaccination on health grounds.

It is likely that the choice made by the legislator was not unaffected by the consideration that the duty of *repêchage* establishes significant organisational rigidity for the employer, which facilities providing healthcare and assistance not unreasonably wished to avoid, as those most exposed to the impact of the pandemic.

13.7.– Besides, it must be considered that the assignment to different tasks, which is required by contrast under Article 4(7) of Decree-Law No 44/2021, as converted into law, of people who have been forced to dispense with or delay vaccination on health grounds amounts to an exceptional measure rooted in solidarity, which is imposed by law on the employer even where no appropriate positions are specifically available within the business that can avoid the risk of infection with SARS-CoV-2, thereby upholding the worker's right to remuneration, even where the latter does not actually perform any work.

Also these questions must accordingly be declared unfounded.

14.– Finally, it is necessary to examine the questions relating to Article 4(5) and Article 4-*ter*(3) of Decree-Law No 44/2021, as converted into law, raised with reference overall to Articles 2, 3 and 32(2) of the Constitution within the proceedings registered under numbers 47, 70, 71, 101, 102, 107 and 108 in the 2022 Register of Referral Orders, insofar as, in providing that "neither any remuneration nor any other compensation or emolument, irrespective of its designation, is due throughout the period of suspension", those provisions preclude the payment of the maintenance allowance provided for by law or under sectoral collective bargaining arrangements to workers provided for under paragraph 1 of the above-mentioned provision as well as to workers provided for under Article 4-*ter*(1)(a) and (c) in the event of the suspension of the right to perform employment due to the failure to comply with the requirement of mandatory vaccination against SARS-CoV-2.

The referring courts argued that this legislative choice violated the requirements of reasonableness and the prohibition on discrimination.

14.1.– On the basis of the considerations set out above, it is appropriate to conclude that also these questions are unfounded.

14.2.– It has already been pointed out that, according to the mechanism established under Articles 4, 4-*bis* and 4-*ter* of Decree-Law No 44/2021, as converted into law, and as subsequently amended, the failure to be vaccinated resulted in the supervening and temporary inability for the employee to perform their duties, and the employee's suspension entailed the compliance by the employer with a specific duty to ensure safety, incorporated into the reciprocal contractual relationship.

The effect brought about by the contested provisions, whereby an employer who decides not to be vaccinated is not owed "either any remuneration or any other compensation or emolument, irrespective of its designation" for the duration of the suspension, thus also justifies the failure to pay a maintenance allowance to the suspended worker (in an amount not exceeding one half of the salary, as is provided for instance for State civil servants under Article 82 of Decree of the President of the Republic No 3/1957, and in other cases under collective bargaining), in view of the fact that the worker decided not to be vaccinated as a free choice, which could be reviewed at any time.

14.3.– Essentially, since notwithstanding the formal existence of the relationship throughout the period of suspension of an unvaccinated employee, the functional reciprocal relationship under the contract no longer obtains during this period, the refusal of the right to the payment of a maintenance allowance to a worker who fails to

comply with the requirement of mandatory vaccination (which the referring courts identify as a consequence of the application of the contested provisions) is justified as a consequence of the general principle of reciprocity of obligations. This is because the right to remuneration, as is the case for any other compensation or emolument, is in any case dependent upon the performance of work, except under circumstances in which the employer's duty to pay remuneration in any case subsists on the grounds that work is no longer being performed as a consequence of an unlawful refusal by the employer.

14.4.– The interpretation of the provisions under examination chosen by the referring courts focuses on the all-inclusive scope of the literal reference to any emolument understood as any income or benefit grounded in the employment relationship, thereby also excluding the right to the maintenance allowance of an unvaccinated worker. However, this interpretation cannot be considered to be unconstitutional as regards the difference in treatment reserved for workers who have been suspended as a consequence of being subjected to criminal or disciplinary procedures pursuant to Article 82 of Decree of the President of the Republic No 3/1957 or to a subsequently adopted sectoral collective bargaining agreement as provided for under Article 59 of Legislative Decree No 29 of 3 February 1993 (Rationalisation of the organisation of the public administrations and amendment of the provisions governing public sector employment, adopted pursuant to Article 2 of Law No 421 of 23 October 1992) and later under Article 55 of Legislative Decree No 165 of 30 March 2001 (General provisions on the regulation of employment in the public administrations).

The provisions applicable to the maintenance allowance invoked in the referral orders, as scenarios with which the contested provisions should be compared in order to assess their reasonableness, provide that suspension is a provisional measure without any punitive status and is rather ordered on a precautionary basis in the public interest (Orders Nos 541/1988 and 258/1988), and comes to an end upon the completion of the parallel procedures. As such, the comparison is misconstrued. Indeed, the choice made by the legislator to establish an equivalence between such periods of inactivity and the performance of work is justified by the social need to provide temporary support to the worker for the time necessary in order to complete the respective proceedings and to assess their actual responsibility, which has not yet been established.

Accordingly, whereas in such cases the payment of the maintenance allowance is justified in the light of the need to ensure support to the worker where the temporary inability to work is the result of a unilateral decision by the employer not to accept that work or of acts or conduct that need to be assessed with a view to deciding whether to continue the relationship, the position is entirely different in situations where it is the worker who decides unilaterally, due to the failure to comply with the requirement of mandatory vaccination, not to adhere to those safety conditions that ensure that their work can be lawfully performed, in the manner described above.

14.5.– The referring courts also rely on the argument that, according to the widespread interpretation followed within the case law, the maintenance allowance granted pursuant to Article 82 of Decree of the President of the Republic No 3/1957 or provided for under collective bargaining agreements does not have the status of remuneration but rather of welfare support, as it does not constitute consideration for work performed, but is rather based in the need to ensure the everyday living requirements of those persons who are still employees. Since the purpose of the maintenance allowance is to provide a source of income to public sector employees and their families on a temporary basis, as it is limited to the duration of suspension from

work, it is considered by the referring courts that it should be payable automatically according to law, irrespective of the specific provision made in the suspension order. Within this perspective, the maintenance allowance paid to a suspended worker constitutes an individual right that is automatically available, despite the temporary interruption of the worker's own obligation under the reciprocal relationship to perform their duties.

However, even if this interpretation is accepted, it cannot be concluded that the solution mandated under constitutional law is to require the employer to make these payments rooted in solidarity to a worker who has decided not to be vaccinated, and who is hence only temporarily ineligible to perform their duties, as a welfare benefit that extends beyond the confines of employment law, which is intended to ensure that the everyday living requirements of the employee and their family are satisfied.

Accordingly, considering that the payment of the maintenance allowance represents a net cost for the employer, for which no consideration is furnished, it is not unreasonable for the legislator to force it to bear this cost where the preclusive factor is objective in nature, but not also when that factor by contrast reflects a choice – albeit a legitimate choice – by the employee.

Also these questions must accordingly be declared unfounded.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

having joined the proceedings, hereby,

1) *declares* that the questions concerning the constitutionality of Article 4(5) of Decree-Law No 44 of 1 April 2021 (Urgent measures to contain the COVID-19 epidemic, on vaccination against SARS-CoV-2, on the administration of justice and on public competitions), converted with amendments into Law No 76 of 28 May 2021 – as replaced by Article l(1)(b) of Decree-Law No 172 of 26 November 2021 (Urgent measures to contain the COVID-19 epidemic and concerning the safe conduct of economic and social activities), converted with amendments into Law No 3 of 21 January 2022 – raised with reference to Articles 2 and 3 of the Constitution by the Regional Administrative Court for Lombardy by the referral order registered as No 86 in the 2022 Register of Referral Orders – are inadmissible;

2) *declares* that the questions concerning the constitutionality of Article 4-*bis*(1) and Article 4(1), (4) and (5) of Decree-Law No 44/2021, as converted into law – as amended by Decree-Law No 172/2021, as converted into law, and by Decree-Law No 24 of 24 March 2022 (Urgent provisions concerning the cessation of measures to combat the spread of the COVID-19 epidemic, as a consequence of the cessation of the state of emergency, and other provisions on health), converted with amendments into Law No 52 of 19 May 2022 – raised with reference to Articles 3, 4, 32 and 35 of the Constitution by the Ordinary Court of Padua, sitting as an employment court, by the referral order registered as No 76 in the 2022 Register of Referral Orders – are unfounded;

3) *declares* that the questions concerning the constitutionality of Article 4(7) of Decree-Law No 44/2021, as converted into law – as amended by Article 1(1)(b) of Decree-Law No 172/2021, as converted into law, and as referred to by Article 4-*ter*(2) of Decree-Law No 44/2021 – raised with reference to Articles 3, 4, 32 and 35 of the Constitution by the Ordinary Court of Brescia and by the Ordinary Court of Padua, both sitting as employment courts, by the referral orders registered as numbers 71, 76, 77, 107 and 108 in the 2022 Register of Referral Orders – are unfounded;

4) *declares* that the questions concerning the constitutionality of Articles 4-*ter*(4) and 4(5) of Decree-Law No 44/2021, as converted into law, the latter as amended by Article 1(1)(b) of Decree-Law No 172/2021 – raised with reference to Articles 2, 3 and 32(2) of the Constitution by the Ordinary Court of Brescia and by the Ordinary Court of Catania, both sitting as employment courts, by the referral orders registered as numbers 47, 70, 71, 101, 102, 107 and 108 in the 2022 Register of Referral Orders – are unfounded.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 1 December 2022.

Signed:

Silvana SCIARRA, President

Stefano PETITTI, Judge Rapporteur