

# EU Digital Covid Certificate: from a ‘gentle push’ for vaccination to a condition to work? Implications and legacy in the field of employment relationship

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1. The EU Digital Covid Certificate: a soft European strategy to foster Covid-19 vaccination. 2. The French and Italian domestic versions of the EU Digital Covid Certificate extended to workers. 2.1. The France *pass sanitaire* and *pass vaccinal*. 2.2. The Italian *green pass* and *green pass rafforzato*. 3. The certificates dilemma: statutory prerequisites to carry out a job, workplace safety measures, or a *tertium-genus*? 4. Focus: the legacy of the Italian green pass. 5. Conclusions.

## Abstract

The contribution examines the main implications, for employment relationships, of French and Italian national versions of the EU Digital Covid Certificate, utilized as wide-range measures to foster vaccination. First, the Author provides an overview of related strategies adopted in the two countries from mid-2021, and limiting access to workplaces. Furthermore, through a comparative legal analysis aimed to discuss if, in the labour context, French and Italian certificates can be framed as statutory prerequisites to carry out a job, as workplace safety measures, or as a hybrid *tertium genus*, he attempts to let emerge similarities and differences between the two national strategies. Finally, the last part of the contribution focuses on Italy. It examines more in detail the possible legacy of such exceptional measures to contrast the pandemic, emphasizing the risk of a heterogenesis of purposes.

**Keywords:** Covid-19; EU Digital Covid Certificate; Green Pass; Pass Sanitarie; Legacy.

## 1. The EU Digital Covid Certificate: a soft European strategy to foster Covid-19 vaccination.

The Covid-19 pandemic is the worst health crisis in decades. Causing, in less than three years, more than 6,5 million of victims worldwide and around 2 million in the EU.<sup>1</sup>

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<sup>1</sup> World Health Organization, *WHO Coronavirus (COVID-19) Dashboard*, 2022.

In this context, the development of vaccines was a remarkable step forward. Although not ensuring a complete protection against contagion, they strongly contributed to contain the most serious effects of Covid-19, as confirmed by a data confrontation regarding the situation pre- and post-vaccines in the first four EU countries per population and with similar good vaccination trends<sup>2</sup> (Table 1).

*Table 1. Covid-19 impact on population, autumn 2020/ autumn 2021*

	Peak of deaths per millions of people		Peak of ICU patients per millions of people		Peak of case fatality rate	
	2020	2021	2020	2021	2020	2021
Germany	7,3	4,6	61,6	58,9	3,2%	1%
France	9,2	2,4	72,7	45,9	3,8%	0,8%
Italy	12,2	2,1	63,7	16,8	3,6%	1,6%
Spain	9,4	1,2	67,7	31,3	3,1%	2,1%

Source: Author's analysis on data retrieved by Our World in Data.

Vaccines, thus, saved thousands of lives and significantly contributed to lighten the impact of the infection on public health systems. Allowing governments to relax social-distancing measures, and ensuring stable conditions to work and carry out business.

This mutated scenario led EU, from 2021, to switch to a proactive rather than reactive response to the pandemic<sup>3</sup>, that included deploying an energetic vaccination campaign<sup>4</sup> and ensuring safe cross-border travels within Member States, considered a fundamental step towards economic recovery<sup>5</sup>. At the crossroads of these instances, there is the EU Digital Covid Certificate, introduced through Regulation (EU) 2021/953<sup>6</sup> and operative from 1st July 2021.

The EU Digital Covid Certificate (hereinafter also the 'Certificate', or the 'European certificate') is an administrative act, consisting of an interoperable document issued free of charge by national authorities in paper-based or digital format.<sup>7</sup> It is a temporary instrument, with final term set, for the moment, for 30 June 2023<sup>8</sup>.

The Certificate is conceived to be utilised in cross-border movements of people within the EU, and its function is to attest that the holder had, alternatively: (i) received a VALID

<sup>2</sup> Mathieu E., Ritchie H., Ortiz-Ospina E. et al., *A global database of COVID-19 vaccinations*, in *Nature Human Behaviour*, 5, 2, 2021, 947-953.

<sup>3</sup> Antonini M., Eid M.A., Falkenbach M. et al., *An analysis of the COVID-19 vaccination campaigns in France, Israel, Italy and Spain and their impact on health and economic outcomes*, in *Health Policy and Technology*, 24 December 2021, 2.

<sup>4</sup> European Commission, *EU Strategy for COVID-19 vaccines*, 2020, COM/2020/245 final.

<sup>5</sup> European Parliament, *Resolution of 25 March 2021 on Establishing an EU Strategy for Sustainable Tourism*, 2021, 2020/2038(INI).

<sup>6</sup> Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 *on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates to facilitate free movement during the COVID-19 pandemic*.

<sup>7</sup> Article 3 (2) Regulation (EU) 2021/953.

<sup>8</sup> European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2021/953*, 2022, COM(2022) 50 final.

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Covid-19 vaccine; (ii) undergo a negative NAAT test (including PCR tests) or rapid antigen test among those recognised by the EU; (iii) recovered from the Covid-19 infection.<sup>9</sup>

As per Article 11 of Regulation (EU) 2021/953, when Member States deploy anti-pandemic restrictions to cross-border free movement “such as additional travel-related testing” for Covid-19 infection “or travel related quarantine or self-isolation”, people holding an EU Digital Covid Certificate are, in principle, exempted to them.

Thus, while the main aim of the Certificate is to facilitate cross-border movements within the EU when Covid-19-related restrictions are present – a situation quite frequent until early 2022 – it works also as a ‘gentle push’ to get vaccinated: not considering the undesired option to have to recover from the infection, the Covid-19 vaccine indeed is the more straightforward way to get the Certificate. Unlike Covid tests, the vaccine is always free of charge, provides access to a certificate which normally lasts for months, instead of 24-72 hours, and it does not require, in this time frame, further periodical health checks.

However, in some Member States the utilization of the Certificate – as preconised by Recital 49 of Regulation (EU) 2021/593 – went beyond this subtle strategy based on making easier travelling abroad. In the framework of more intense policies to foster vaccination against Covid-19, the Certificate, indeed, soon became a pre-condition to crowded places as well as public transports and, above all, workplaces. This contribution will focus on this proactive strategy and on its implications for labour relationships, in particular regarding dependent work.

The analysis will address France and Italy, two of the forerunner countries in adopting such policies in mid-2021. The contribution will present, first, the main features of the domestic versions of the Certificate applied to the labour context (Section 2). Afterwards (Section 3), it will investigate if these domestic implementations of the EU Digital Covid Certificate made of it a sort of prerequisite to carry out a job, a workplace safety measures, or a hybrid *tertium genus*. Finally, the last section (Section 4) will address the possible legacy of this process, focusing on Italy.

## **2. The French and Italian domestic versions of the EU Digital Covid Certificate extended to workers.**

During summer 2021, both the French and the Italian government adopted similar proactive strategies to protect public health and economic recovery. Aimed at minimizing the circulation of Covid-19, at fostering vaccination and at keeping at the same time economic activities permanently open.

These strategies were mostly based on a gradual broadening of scope of national instruments implementing the EU Digital Covid Certificate. First, to crowded places, and then to workplaces. As well as on the introduction of compulsory vaccination for specific groups of people.

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<sup>9</sup> Article 3 (1), 5, 6 and 7 of Regulation (EU) 2021/953.

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This section will focus on the first aspect, presenting the policies to implement the domestic versions of the EU Digital Covid Certificate on workplaces. The extension of this contribution, instead, does not allow to discuss as well measures for compulsory vaccination. To them are dedicated, when needed, only brief remarks.

## 2.1. The France *pass sanitaire* and *pass vaccinal*.

France implemented two domestic versions of the EU Digital Covid Certificate. The *pass sanitaire*, and the *pass vaccinal*.

The *pass sanitaire* was introduced before Regulation (EU) 2021/593 entered into force, by Article 1 of the Loi n° 2021-689 of 31 May and Article 1 of the Décret n° 2021-724 of 7 June. Afterwards it has been integrated in the European framework. The *pass sanitaire*, like the EU Covid Digital Certificate, consists of a document issued on digital or paper-format, allowing its holders to demonstrate to have been vaccinated, or to have been tested negative for Covid in the last 24 hours or, finally, to have recovered from the infection by not more than 6 months.<sup>10</sup>

After its introduction, the field of application of the *pass sanitaire* has been rapidly enlarged,<sup>11</sup> through Décret n° 2021-955 of 19 July 2021, Loi n° 2021-1040 of 5 August and Décret n° 2021-1059 of 7 August, in a material and a personal direction.

On the material side, the *pass sanitaire* became a prerequisite to access many places, establishments, services and events. The criterion adopted by the French legislator was to make the *pass sanitaire* mandatory only to access places open to public, that included (i) leisure and cultural places; (ii) commercial catering; (iii) health, social and medico-social services; and (iv) malls, fairs and conferences. Furthermore, the *pass sanitaire* became a condition also for interregional displacements, such as for internal flights and high speed or long-distance trains.<sup>12</sup>

Nonetheless, the most relevant novelty of this round of measures extending the *pass sanitaire* was about its personal scope. Until August 2021, the *pass sanitaire* had been a mandatory requirement just for customers or users. From 1 September, its field of application was, instead, enlarged to the other people ‘intervening’ in these places. That is, to workers – including employees working therein, as well as other groups like employers, public servants and self-employed – but only under the condition that they were carrying out their performance in direct contact with public.<sup>13</sup> For instance, were excluded cooks and assistants

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<sup>10</sup> Gouvernement.fr, «*Pass sanitaire*»: toutes les réponses à vos questions, 12 July 2021 :

<https://www.gouvernement.fr/actualite/pass-sanitaire-toutes-les-reponses-a-vos-questions>.

<sup>11</sup> For the initial scope, Favennec-Héry F., *La gestion de la sortie de crise sanitaire: la continuité*, in *Semaine Sociale Lamy*, 1959, 2021.

<sup>12</sup> For a detailed list, Gouvernement.fr, *Où le «pass sanitaire» est-il obligatoire?*, 21 July 2021 :

<https://www.gouvernement.fr/actualite/ou-le-pass-sanitaire-est-il-obligatoire>.

<sup>13</sup> Article 47-1 (IV) of Décret n° 2021-699 of 1 June, as modified by Décret n° 2021-1059 of 7 August.

preparing meals in the kitchen of a restaurant, since it was unlikely that they could have contacts with customers.<sup>14</sup>

The *pass vaccinal*, finally, substituted, for workers, the *pass sanitaire* from 24 January 2022,<sup>15</sup> in reason of the worsening of pandemic indicators.<sup>16</sup> While identical, in its structure, to the *pass sanitaire*, it was available just to people entered in the vaccination process,<sup>17</sup> or that recovered from Covid-19 by less than 6 months. Conversely, a negative covid-test was not accepted anymore to issue this kind of pass. The material and personal scope, instead, remained the same of the *pass sanitaire*.

From March 2022, the improvement of the pandemic situation in Europe allowed the legislator to relax measures. Décret n° 2022-352 of 12 March suspended the *pass vaccinal* from 14 March,<sup>18</sup> while the *pass sanitaire*, that continued to be required to access places like health facilities, has been repealed from 1 August 2022, as per Article 10 of Décret n° 2022-1097 of 30 July. Therefore, all workers, save those subjects to mandatory vaccination, are now free to access workplaces without presenting any certification.

The sanctions for employees not holding a *pass sanitaire* or a *pass vaccinal* were identical, and consisted of atypical measures.<sup>19</sup>

According to Article 1 (II) C1 and C2 of Loi n° 2021-689, employers were obliged to suspend the employment relationship of employees without a *pass sanitaire* or a *pass vaccinal*.<sup>20</sup> During the suspension, employees had, in general, no right to get any remuneration from the employer.<sup>21</sup> Conversely, the law did not include causes of dismissal for employees without a pass, after the *Conseil Constitutionnel* removed those for fixed-term employees, which were still present after the parliamentary discussion of the bill.<sup>22</sup>

After having ordered the suspension, the employer was supposed to set an interview with the employee, within 3 days, to examine viable solutions to overcome the *impasse*, including, beyond getting the pass, adopting arrangements to make employee's tasks compatible with her/his current condition, as well as analysing the option to re-assign the employee to other tasks suitable for her/his status.<sup>23</sup>

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<sup>14</sup> Fabre A., *Les obligations de vaccination et de présentation d'un passe sanitaire*, in *Revue de Droit du Travail*, 9, 2021, 512-518.

<sup>15</sup> Loi n° 2022-46 of 22 January; Décret n° 2022-51 of 22 January.

<sup>16</sup> Vie publique, *Loi du 22 janvier 2022 renforçant les outils de gestion de la crise sanitaire et modifiant le Code de la santé publique*, 23 January 2022.

<sup>17</sup> Gouvernement.fr, *Le «pass vaccinal», mode d'emploi*, 23 January 2022:

<https://www.gouvernement.fr/actualite/le-pass-vaccinal-mode-d-emploi>.

<sup>18</sup> Service-Public.fr, *Fin du pass vaccinal et du port du masque en intérieur à partir du 14 mars 2022*, 14 March 2022.

<sup>19</sup> Jubert-Tomasso, *La mise en œuvre de la politique vaccinale dans l'entreprise au prix d'une altération de droit de la santé et de la sécurité au travail*, in *Revue de Droit du Travail*, 9, 2021, 488-490.

<sup>20</sup> The suspension was supposed to cease when the employee finally presented the required pass; see Milet L., *Loi «Passe vaccinal»: quelles conséquences sur la relation de travail?*, in *Nouvelle Vie Ouvrière*, 7 February 2022.

<sup>21</sup> For further details, Kahn dit Cohen T., *La suspension du contrat de travail: pari (politique) et difficultés (juridiques)*, in *Droit Social*, 2, 2022, 113-118.

<sup>22</sup> Décision n° 2021-824 DC du 5 août 2021 in *Légifrance*; see also Fabre A., (14), pp. 515-517. For an opinion considering possible to dismiss suspended employees in case of long-term and Covid-related absence disrupting the functioning of the enterprise, Dalmaso R., *Traites ou refusniks? Le délicat renvoi des salariés réfractaires au vaccin*, in *Droit Social*, 2, 2022, 119-123.

<sup>23</sup> Kahn dit Cohen T., nt. (21), 116-117.

The inclusion in the interview agenda of these different options than getting a pass emphasizes, indeed, that the *pass sanitaire* and *vaccinal* were aimed to push towards vaccination, in principle, only employees exposed to a specific risk of contagion because their tasks. Furthermore, the suspension could be partial. That is, the employee with part of her/his tasks not falling in the area for which the pass was required, was allowed to keep doing them, receiving the proportional pay. At the same time, the law seemed not to exclude, for employees going to be suspended, the option to switch to telework, partially or totally, when compatible with their tasks.<sup>24</sup> This framework suggests that the prevalent *rationale* of the French passes was to establish protective measures for employees most exposed to risks of contagion, rather than merely ‘punish’ those not compliant with pass regulation.

## 2.2. The Italian *green pass* and *green pass rafforzato*.

Italy, like France, utilised two versions of the EU Digital Covid Certificate in the labour context: the *green pass* and the *green pass rafforzato*.

The *green pass* was introduced through Decreto-Legge n. 52/2021 of 22 April and then integrated in the EU framework. Like the European Certificate and the French *pass sanitaire*, the Italian *green pass* is a document in digital or paper format, including data specifying if the holder (i) has been vaccinated against Covid-19; (ii) tested negative through an admitted covid-test; (iii) or recovered from the illness.

Moreover, also the *green pass* was gradually introduced, first, as an instrument to limit access of users and customers to activities and services, and subsequently extended to workplaces.<sup>25</sup>

On the labour side, after some intermediate steps,<sup>26</sup> the legislator finally extended, through Articles 1-3 of Decreto-Legge n. 127/2021 of 21 September, the request to hold a *green pass* to most of Italian workers.

In this view, from 15 October 2021 the *green pass* was required to all people in order to access workplaces for job-related reasons: private and public employees, but also those not employed therein. Like trainers, volunteers or agency workers.<sup>27</sup> The scope of the obligation went even far beyond dependent work, reaching self-employed as well as domestic workers.<sup>28</sup> Finally, also the option to utilize remote work to avoid the obligation to hold a *green pass* was

<sup>24</sup> Kahn dit Cohen T., nt. (21), 117. *Contra*, regarding telework, Meiffret-Delsanto K., *Obligation vaccinale contre la Covid-19: une protection de la population nocive pour l'entreprise?*, in *Droit Social*, 2, 2022, 107.

<sup>25</sup> *Inter alia*, Sonnati S., *La progressione delle misure di sicurezza e le complessità teoriche e applicative dell'obbligo di certificazione verde Covid-19 nei luoghi di lavoro*, in *Labor. Il lavoro nel diritto*, 1, 2022, 25-54.

<sup>26</sup> They concerned, from 1 September 2021, employees of the national educational system and universities (Article 1 of Decreto-Legge n. 111/2021 of 6 August), and, from 11 September, workers of educational services for children and for workers of the system of vocational and professional training (Article 9-ter.1 of Decreto-Legge n. 122/2021 of 10 September),

<sup>27</sup> Gargiulo U., *Considerazioni “pragmatiche” su green pass e obblighi del lavoratore*, in *Diritto della Sicurezza sul Lavoro*, 2, 2021, 47-48.

<sup>28</sup> Lazzari C., *Obbligo vaccinale, Green pass e rapporto di lavoro*, in *Diritto della Sicurezza sul Lavoro*, 2, 2021, 10.

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excluded for people not already working remotely full-time. The latter would anyway have had to show a valid pass, not to incur in sanctions, to access employer's premises, even once.<sup>29</sup>

The *green pass rafforzato* – a certificate identical to the *green pass*, but issued only to people who had entered in the vaccination process, or recovered from Covid-19, had a scope of application that, instead, followed a personal criterion. Article 1 of Decreto-Legge n. 1/2022 of 7 January made it mandatory only for workers aged 50 years or more, and previously already required to hold a *green pass* while working. In this view, like for the French *pass vaccinal*, people required to hold and show a *green pass rafforzato* were not allowed to access workplaces just on the basis of a recent negative covid-test.

Finally, during spring 2022 also in Italy the pandemic situation improved. As a consequence, Article 8 (6) and Article 6 of Decreto-Legge n. 24/2022 of 24 March removed, respectively, the obligation to hold a *green pass rafforzato* for workers aged 50 years or more (from 25 March), and, as of 1 May 2022, the more general obligation to hold a *green pass* for all workers. Since then, also non-vaccinated people, thus, have been allowed to return to work, without obligation to show specific certificates.<sup>30</sup>

While the two Italian passes were into force, Italian law delegate, in principle, employers to control that employees were holding a valid certificate at the entrance of employers' premises. To ease employers in the control stage, Article 3 of Decreto-Legge n. 139/2021 of 8 October authorised them to ask employees in advance if they had a valid pass, in case of specific organizational reasons.<sup>31</sup>

In case of breach of the employees' obligation to hold a *green pass* or *green pass rafforzato*, the Italian legislator introduced a system of *ad hoc* sanctions.

More specifically, for employees without a valid pass, the technical solution finally adopted by the legislator – from September 2021 – consisted of marking them, *ex lege*, as unauthorised absents.<sup>32</sup> From the first employee's attempt to access workplace without a pass, thus, the employer was requested to prevent the employee to work and to stop paying remuneration. Without any further obligation concerning communication of the measure, interviews or attempts to re-locate the employee in the employer's organization.<sup>33</sup> Furthermore, from January 2022,<sup>34</sup> after 5 days of such unauthorised absence of an employee, the employer was allowed (but not obliged) to suspend the employee for 10 days, renewable once, and corresponding to the duration of the temporary agreement executed with the substitute that was hired. In this way, employers had the possibility to retain substitutes of suspended employees until the former had finished their fixed term contract of 10-20 days,

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<sup>29</sup> Pogliotti G., Tucci C., *Obbligo green pass anche per chi lavora in smart working*, in *Il Sole 24 Ore*, 15 February 2022.

<sup>30</sup> Bottini A., *Dal 1° maggio al lavoro senza esibire green pass*, in *Il Sole 24 Ore*, 28 April 2022; Melis V., *Da Aprile graduale addio al green pass*, in *Quotidiano Lavoro*, 28 March 2022.

<sup>31</sup> Gargiulo U., nt. (27), 49-50.

<sup>32</sup> For the previous solution, consisting of a suspension without compensation, Bottini A., nt. (30). For related case-law, Miscione M., *La giurisprudenza sulla legislazione Covid*, in *Il Lavoro nella Giurisprudenza*, 1, 2022, 101.

<sup>33</sup> Articles 9-*quinquies* (6) and Articles 9-*septies* (6) of Decreto-Legge n. 127/2021.

<sup>34</sup> This was a general extension of a measure initially reserved to small companies (below 15 employees), see Article 3 (1-c) of Decreto-Legge n. 1/2022.

postponing the right of the suspended employee to come back to work although she/he obtained, in the meantime, a valid *green pass* or *green pass rafforzato*.<sup>35</sup>

Finally, for employees caught already on the workplace without a valid pass, it was established an administrative sanction. For this infraction, they were also not exempted from disciplinary measures, that the employer could adopt according to collective agreements and company regulations. This led to consider that, in the most serious cases – like a worker accessing workplace without a pass and with an active Covid-19 infection –, this worker could have been dismissed for disciplinary reasons.<sup>36</sup>

### 3. The certificates dilemma: statutory prerequisites to carry out a job, workplace safety measures, or a *tertium-genus*?

The analysis conducted in Section 2 provides useful information to try to reply to the question that inspired this study. That is, investigating, from a labour perspective, what could be the ‘real nature’ of the French *pass sanitaire/pass vaccinal* and of the Italian *green pass/green pass rafforzato*, which between 2021 and 2022 deeply influenced the condition of a significant part of workers of the two countries – and especially of employees. In particular, discussing if the aforementioned passes could be considered (i) a sort of exceptional prerequisite to carry out a job; (ii) a pandemic-related workplace safety measure; or, even, an (iii) hybrid *tertium genus* between these two options.

An attempt of systematic classification is possible since the relevant areas of the two legal frameworks are very similar. This, also as a consequence of the coordination realised by the EU law in the field of occupational health and safety, through Council Directive 89/391/EEC<sup>37</sup> and the subsequent ‘daughter’ directives.<sup>38</sup>

In this view, a prerequisite to carry out a job can be defined as a burden weighting on people interested to do a specific job.<sup>39</sup> For instance, getting a specific degree or qualification for professionals, like lawyers and engineers. Or, in the health sector, the prerequisite to have received specific vaccinations imposed by law to carry out certain jobs. Like, for doctors, the compulsory vaccination against Covid-19 established in Italy, and that, until 31 October 2022, prevented any not vaccinated doctor to exercise medical practice.<sup>40</sup> Or, in France, mandatory vaccinations established by Articles L. 3111-4 and L. 3112-1 of the Code de la Santé Publique, including vaccination against hepatitis B, diphtheritic and tuberculosis. That,

<sup>35</sup> Mario S., Vella L., *Rientro (quasi) immediato per il dipendente che abbia ottenuto il green pass*, in *Guida al Lavoro*, 12, 2022, 17-20.

<sup>36</sup> Gargiulo U., nt. (27), 56-57.

<sup>37</sup> Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

<sup>38</sup> For an overview, Angelini L., *La sicurezza del lavoro nell'ordinamento europeo*, in *Working Papers Olympus*, 29, 2013, 16-21; see also Véricel M., *La loi Santé au travail du 2 août 2021 renforce-t-elle réellement la prévention en santé au travail?*, in *Revue de Droit du Travail*, 12, 2021, 690-692.

<sup>39</sup> Pisani C., *Il vaccino per gli operatori sanitari obbligatorio per legge è requisito essenziale per la prestazione*, in *Lavoro Diritti Europa*, 2, 2021, 11-12.

<sup>40</sup> Article 4 (4) of Decreto-Legge n. 44/2021 of 1 April, as modified by Decreto-Legge n. 162/2022 of 31 October.



for doctors not vaccinated and not holding a medical justification, are considered a right cause of dismissal.<sup>41</sup>

In this view, a prerequisite to carry out a job is normally established by law. It concerns groups of workers doing specific activities or professions, identified *a priori* by the legislator. Moreover, prerequisites to carry out a job are usually introduced to pursue a public interest not necessarily linked with occupational health and safety. For instance, mandatory vaccination against Covid-19 set for Italian doctors pursued the protection of public health, limiting the number of doctors infected and ensuring the functioning and resilience of the National Health System. While protection of doctors' health and safety at work was even not expressly mentioned by Article 4 (1) Decreto-Legge n. 44/2021.

In this framework, citizens are free not to fulfil a prerequisite to carry out a job, without any legal consequence in their everyday life. Except if they want to do, among many others, exactly the job for which the prerequisite is established. In that case, if they do not fulfill the prerequisite, normally they are prevented to carry out that job.

Instead, workplace safety measures are solutions that employers in France and in Italy are requested to adopt to prevent risks for occupational health and safety concerning their employees, after having conducted a yearly risk-assessment imposed by national laws.<sup>42</sup> In France, with the aim to provide workers exposed to the detected risks with the best level of protection.<sup>43</sup> Or, in Italy, to remove – and if not possible, to minimize – any possible negative consequence for employees' health.<sup>44</sup> These measures can consist of general organizational solutions, as those aimed to reduce the number of workers exposed to a specific risk. Or they can be more specific, like the introduction of personal protective equipment.

On their turn, employees who do not comply with workplace safety measures set by the employer are exposed, normally, to disciplinary and/or criminal sanctions.<sup>45</sup>

Workplace safety measures, thus, are normally introduced by employers, for workers exposed to general or specific job-related risks. Their aim is to ensure employees' occupational health and safety, and they just indirectly contribute to reach other public policy goals, like protection of public health.<sup>46</sup>

In the light of the above, the *pass sanitaire/pass vaccinal* and the *green pass/green pass rafforzato* can be considered hybrid legal institutes. They are, indeed, specific 'prerequisites to access workplaces'.<sup>47</sup> A sort of *tertium genus*, located at a half-way between the aforementioned prerequisites to carry out a job and workplace safety measures.

<sup>41</sup> Pontif V., *Vaccination réglementaire: refus constitutif d'une cause réelle et sérieuse de licenciement*, in *Revue de Droit du Travail*, 2012, 637-638.

<sup>42</sup> In France, Article L. 4161-1 and R. 4121-1ff. Code du Travail; in Italy, Articles 15 and 28ff. of Decreto Legislativo n. 81/2008 of 9 April.

<sup>43</sup> Article L. 4121-3 (3) Code du Travail; see Badel M., Charbonneau A., Lerouge L., *Droit de la santé et de la sécurité au travail*, Gualino, 2018, 71-72.

<sup>44</sup> Article 15 (1-c) Decreto Legislativo n. 81/2008; see also Natullo G., *Ambiente di lavoro e tutela della salute*, Giappichelli, 2021, 44ff.

<sup>45</sup> Del Punta R., *Diritto del Lavoro*, Giuffrè, 2021, 616-617; and Badel M., Charbonneau A., Lerouge L. nt. (43), 66.

<sup>46</sup> On the increasing permeation between occupational health and safety and protection of public health, Peruzzi M., *Covid-19 e sicurezza sul lavoro, tra obbligo vaccinale e green pass*, in *Diritto della Sicurezza sul Lavoro*, 2, 2021, 25-31; and Véricel M., nt. (38), 697.

<sup>47</sup> Mattei A., *Obbligo vaccinale e rapporto di lavoro*, in *WP CSDLE "Massimo D'Antona".IT*, 442, 2021, 29.

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This because the French and Italian passes have some common elements with a prerequisite to carry out a job. They are all statutory measures, introduced by the legislator and not, like workplace safety measures, by employers; furthermore, they are mostly aimed to pursue a general public interest – that is, at the end, encouraging people to get vaccinated. However, the *pass sanitaire/pass vaccinal* and the *green pass/green pass rafforzato* are not properly prerequisites to carry out a job, since the passes are not an essential element for the work performance. Instead, they are needed just to access the locations where the corresponding work performance is usually conducted. For this reason, as already explained in Section 2, both in France and in Italy it seems that a full-time teleworker/remote worker – at least in case she/he was already working remotely when passes were introduced – could continue conducting that activity without getting vaccinated or presenting the results of a covid-test.

As well, the *pass sanitaire/pass vaccinal* and the *green pass/green pass rafforzato* are not properly workplace safety measures. Because, unlike workplace safety measures, the decision to adopt or not the French and Italian pass is not delegated to employers, on the basis of a risk assessment focused on the concrete features of each workplace. Furthermore, at least regarding the *green pass* and the *pass sanitaire*, because they can be obtained also through a negative covid-test which, unlike vaccination, is not a measure that directly increases the protection of individuals against Covid-19 contagion. While increasing – always – direct individuals' protection is a fundamental feature that a workplace safety measure must have.<sup>48</sup>

Although the French and Italian passes are not properly workplace safety measures, this does not exclude they can have, anyway, *also* an occupational health and safety dimension. That is, they contribute to protect the work environment against Covid-19, reducing the possibility that infected people can access it. Nonetheless, from this point of view the strategies followed by the French and the Italian legislator partially diverge.

France imposed the *pass sanitaire* only to workers most exposed to risk of Covid-19 contagion.<sup>49</sup> That is, to workers operating in locations where a high attendance of public was expected, like leisure locations, commercial catering and health facilities. And only if these workers were appointed with tasks putting them into direct contact with the public, so with a large number of people that could have included someone infected. The main *rationale* of the *pass sanitaire*, thus, seems to have been the one of protecting workers most exposed to a specific risk of Covid-19 infection, indirectly encouraging them to get vaccinated.

This assumption seems confirmed also by the system of sanctions linked to the *pass sanitaire*. Employees without a valid *pass sanitaire* had, indeed, right to be moved to tasks not requiring the pass. Or the possibility to start another job, for which the pass was not requested.<sup>50</sup> Prevention to work, through a suspension, was thus conceived as an *extrema ratio*, operating only when an alternative safe solution was unavailable.

The same approach is shared by the French *pass vaccinal* that, as explained above (Section 2), works exactly like the *pass sanitaire*. Save that it cannot be issued just on the basis of a negative covid-test. Thus representing a stronger incentive to vaccination.

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<sup>48</sup> Lazzari C., nt. (28), 20-21.

<sup>49</sup> Gamet L., *En quelle mesure l'employeur peut-il prendre en compte le statut vaccinal du salarié?*, in *Revue de Droit du Travail*, 9, 2021, 484-487.

<sup>50</sup> Kahn dit Cohen T., nt. (20), 117.

Also the Italian *green pass rafforzato*, that like the French *pass vaccinal* was not issued to workers with only a negative covid-test, seems sharing the *rationale* to protect a cohort of workers exposed to a specific risk linked to Covid-19. Although, in this case, the target were workers aged 50 years or more. That is, not those most exposed to a risk of infection in reason of their tasks, but those most likely to experience grave consequences in case of Covid-19 infection.

The fourth instrument analysed – the Italian *green pass* – conversely, seems characterised by a different approach. The Italian legislator, in this case, did not follow the proposals aimed to introduce enhanced measures just to foster vaccination for those workers exposed to a specific risk of Covid-19 contagion.<sup>51</sup> Conversely, it assumed Covid-19 as an omnipresent hazard.<sup>52</sup> And so, as a general, rather than specific, risk for occupational health and safety.

On this line, the *green pass* was extended to all the Italian workers not included in the narrower group of those for which vaccination was compulsory, or for which a *green pass rafforzato* was required. The *green pass* was, hence, imposed to workers – not only private and public employees, but also self-employed – exposed to diverse odds of contagion. Treating, for instance, in the same way people working in crowded places and in contact with public, those working in a room without office-mates, and even self-employed spending most of working time alone. As well as preventing employees from switching to telework after the introduction of the *green pass*, to avoid the obligation to hold it. Furthermore, the scope of application of the *green pass* was not differentiated also regarding the risk of most negative consequences in case of Covid-19 infections.

In the same way, the system of sanctions for not holding a valid *green pass* did not include alternatives from prevention to work, like switching to different tasks or finding another – safer – job. Therefore, without a valid *green pass*, in Italy, from 15 October 2021 to 30 April 2022 was impossible to carry out, substantially, any job.<sup>53</sup> A so radical solution surely contributed to increase occupational health and safety. It lets emerge, anyway, also another underlying strategy.

The introduction of such prerequisite to access all workplaces, irrespectively of the effective risk of contagion for job-related reasons, seems to disclose, indeed, also a public health strategy that is not shared by the *green pass rafforzato* and by the French passes. Mostly aimed, rather than to protect workers more at risk for Covid-19, to force the highest possible number of people to utilise the *green pass*. And so, at the end, to get vaccinated, as the solution with less social and monetary costs to obtain a stable certificate (see *supra*, Section 1). This, although a formal and generalized obligation to get vaccinated was never introduced.<sup>54</sup>

The specificity of the Italian *green pass* deserves an additional reflection on what could be its legacy after the end of the Covid-19 crisis.

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<sup>51</sup> Pisani C., nt. (39), 10-13.

<sup>52</sup> De Matteis A., *Art. 32 della Costituzione: diritti e doveri in tema di vaccinazione anti-Covid*, in *Conversazioni sul lavoro a distanza da agosto 2020 a marzo 2021*, 2021.

<sup>53</sup> For dependent work Gargiulo U., nt. (27), 51. It could be assumed that the only workers excluded from *green pass* were those working remotely full-time when the measure was introduced, and that have not accessed premises for which the pass was required for all the period in which it was into force.

<sup>54</sup> Mostly for political reasons, see Pascucci P., Delogu A., *L'ennesima sfida della pandemia Covid-19: esiste un obbligo vaccinale nei contesti lavorativi?*, in *Diritto della Sicurezza sul Lavoro*, 1, 2021, 107.

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#### 4. Focus: the legacy of the Italian *green pass*.

An underlying strategy like the one of the Italian *green pass* is a powerful instrument.

Abstracting from the pandemic contingency, its novelty consists of conditioning the possibility to do (almost) any job – instead of some specific jobs, like in general do the prerequisites to carry out a job (see *supra*, Section 3) – to relating workers' personal choices aimed to comply with a public policy goal. Choices that formally remain free, but that must be oriented in a specific direction, not to encounter a series of obstacles making the work experience uncertain, uneven and at risk of repeated interruptions. A regulatory scheme, thus, according to which work becomes a generalised leverage to make people assume determined behaviours influencing (also) their personal life, although these are not imposed by law.

From the point of view of public authorities, such a regulatory strategy has relevant advantages. While in the specific case it imposes an implicit obligation to get vaccinated,<sup>55</sup> from a more general perspective it enhances the role of employers as State agents,<sup>56</sup> entrusting them with the obligation to carry out a systematic compliance check concerning most of citizens/residents. Reducing public expenses because controls are delegated to private entities. And increasing their effectiveness, given the important sanctions that could hit employers if they do not carry out punctual verifications.<sup>57</sup>

Despite that, further utilisations of such a broad strategy are limited, first, by the balancing of constitutional rights that the Italian legislator must conduct when passing a bill.<sup>58</sup> In the examined case the sacrifice of some constitutional rights – first of all the one to work –<sup>59</sup> was justified only by the need to protect life and health of people – especially the most fragile – from an extraordinary threaten like Covid-19.<sup>60</sup> So, just another comparable emergency is likely to justify such an intense limitation of other constitutional rights in favour of one of them. Moreover, a further – structural – limit could be the difficulty to adjust a conditioning strategy like the one underlying the *green pass* to other possible emergencies of this age, like climate change or energetic crisis.

The possibility to use work as a leverage to influence personal behaviours of employees is tempting, anyway, also for employers. It lies, for instance, in the idea, expressed by the vice-president of the OTB foundation few days after the extension of the *green pass* to all Italian workers, that in the future:

Each company will have in its DNA a mission to develop – in the green and social domains – a commitment towards sustainability that each employee will undertake to comply by signing the employment agreement. In this way, the commitment will

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<sup>55</sup> Regarding a possible circumvention of Article 32 of Italian Constitution, *inter alia*, Lazzari C., nt. (28), 13.

<sup>56</sup> For French reflections on this point, Meiffret-Delsanto, nt. (24); *see also* Jubert-Tomasso, nt. (19).

<sup>57</sup> Articles 9-*quinquies* (8) and 9-*septies* (9), Decreto-Legge n. 52/2021.

<sup>58</sup> *In argumentum*, Morrone A., *Il bilanciamento nello stato costituzionale*, Giappichelli, Torino, 2014.

<sup>59</sup> Article 4 of Italian Constitution.

<sup>60</sup> This is the so called 'solidarity principle', rooted on Articles 2 and 32 of Italian Constitution, *see inter alia*, Zoppoli L., *Pandemia, lavoro, Costituzione: nuovi equilibri, nuovo bilanciamento?*, in Zoppoli L., (ed.), *Tutela della salute pubblica e rapporti di lavoro*, in *Diritti, Lavori, Mercati*, 11, 2021, 59-66.

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not be only in the labour field, but as well personal, and aimed to share all the targets for the common good.<sup>61</sup>

Nonetheless, it seems at least doubtful that positive obligations like those envisaged above could be lawfully integrated in Italian employment agreements, in reason to the limits set to its object by Articles 2094, 2103 and 2104 Codice Civile, requiring it to be consistent with the category and the professional profile assigned to the employee, and thus preventing a further enlargements of the area of employee's duties in her/his private sphere.<sup>62</sup> Anyway, there might be more subtle methods to functionalize employee's private sphere to employer's interest, that the example of the *green pass* may encourage. Like introducing, in the employment agreement, obligations for the employee aimed to prevent her/him to behave in a specific manner, instead of imposing her/him 'to do' something. Leveraging on Article 2104 Codice Civile – that is, the employee's duty of loyalty – which requests employees not to behave, outside the labour context, in manners contrasting with duties deriving from the integration in the employer's organisation, or anyway not to create conflicts with the employer's interest.<sup>63</sup> An example might be a clause imposing disciplinary sanctions to an employee publishing a picture on social networks in contrast with the company's commercial campaigns aimed to show strong commitment to some social, ethical or civic goals, in order to increase business. In this case the situation is more uncertain, since further case-law seems to exclude relevance for disciplinary reasons of a similar employee's behaviour, but only when it integrates the exercise of constitutional rights.<sup>64</sup>

Finally, another (low risk) way for employers in order to expand the work-related sphere in the employee's personal one, might consist of inviting the employees to 'voluntarily' act as employers' influencers. For instance, accepting to publish, on their social network profiles, some posts in which they express their enthusiasm for the latest achievements of their company.<sup>65</sup> That, although mere invitations, might be difficult to refuse for an employee, for instance precarious, if coming from the employer. While this 'soft pressure' would be also more difficult to demonstrate in a trial, in respect to obligations written in an employment contract.

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<sup>61</sup> Alessi A., Speech realised during the conference '*La forza delle donne*' on 26 October 2021, which extract was reported on the LinkedIn page of the OTB foundation (English translation of the author of this contribution), available at [https://www.linkedin.com/posts/only-the-brave-foundation\\_ariannalessi-laforzadelledonne-lavoro-activity-6863864616787693569--Uwi?utm\\_source=linkedin\\_share&utm\\_medium=member\\_desktop\\_web](https://www.linkedin.com/posts/only-the-brave-foundation_ariannalessi-laforzadelledonne-lavoro-activity-6863864616787693569--Uwi?utm_source=linkedin_share&utm_medium=member_desktop_web).

<sup>62</sup> *Inter alia*, Alessi C., *Articolo 2104 c.c.*, in Del Punta R., Scarpelli F. (eds.), *Codice Commentato del Lavoro*, Ipsoa, 2020, 466-472.

<sup>63</sup> Cass. 14 June 2004, n. 11220, in *Responsabilità Civile e Previdenza*, 2005, 453 ff., nt. Veca.

<sup>64</sup> Cass. 16 February 2011, n. 3822, in *Rivista Italiana di Diritto del Lavoro*, 1, 2012, 29 ff., nt. Casciano.

<sup>65</sup> Financial Times, *The perils of using staff as online influencers*, 30 January 2022: <https://www.ft.com/content/2a72dc23-0926-4c84-b026-a139b0a56d7e>.

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## 5. Conclusions.

The point of departure of this contribution was the EU Digital Covid Certificate. A ‘friendly’ instrument that, allowing its holders to move throughout EU internal borders despite national ‘anti-Covid’ restrictions, addressed them towards vaccination. Since the latter was the option with less material and economic costs to get such certificate.

When implementing at national level this instrument, France and Italy seem to have brought this *rationale* to the extremes. The adoption of national versions of the EU Digital Covid Certificate was indeed accompanied by the introduction of a new and wide series of limitations to access places fundamental for everyday life of people, included workplaces. In this sense, holding the French *pass sanitaire/pass vaccinal*, or the Italian *green pass/green pass rafforzato*, became the only way to overcome these restrictions. Consequently, also the urgency to get vaccinated, as the main gateway to obtain a national pass, became more intense.

In the labour context, the French and Italian passes took the nature of prerequisites to access workplaces. That is, a half-way solution between a prerequisite to carry out a job and a workplace safety measure. Although the passes were not proper workplace safety measures they had, however, also an occupational health and safety dimension. That contributes to mark a significant distinction between them.

For the French *pass sanitaire/pass vaccinal* and the Italian *green pass rafforzato*, indeed, this dimension consisted of targeting people subject to a specific risk linked to Covid-19. That is, a higher exposure to contagion or the possibility to experience worsen consequences if infected. Adopting a specific pass only for them. In order to push especially these groups of people most at risk towards vaccination, and so towards a higher level of protection.

The Italian *green pass* followed a different path. Configuring risk of Covid-19 contagion as a generic and omnipresent hazard, it was adopted in Italy for all private and public workers – including self-employed – and not only for specific groups of workers most at risk. In this sense, the occupational health and safety dimension of the *green pass* was to keep workplaces as much as possible free from presence of people capable to spread the Covid-19 infection. However, the *green pass* became, in this way, as well a prerequisite to access any workplace, unveiling a public health strategy, mostly aimed, rather than to protect workers more at risk for Covid-19, to force the highest possible number of people to utilise the *green pass*. And so, at the end, to get vaccinated.

Abstracting from the pandemic scenario, this underlying strategy seems to consist of conditioning the possibility to do (almost) any job – that is, for most people to have a source of income – to workers’ personal choices aimed to comply with a public policy goal. Although these choices remain formally free, that is not supported by a legal obligation.

Focusing on Italy, nonetheless, it seems unlikely that the legislator would utilise such a strategy outside the pandemic context, given the balancing of constitutional rights that is required to pass similar bills. The most relevant risk, thus, seems an heterogenesis of purposes. That is, that employers could take inspiration from such a strategy, and make extensive use of the work leverage to influence employees’ personal behaviours, for instance on social networks, to align them with company’s commercial campaigns. Or requesting employees to act as a sort of ‘voluntary influencers’, using their social profiles to support

their employer. A trend that shall be carefully monitored, to avoid that the legacy of the pandemic, in a totally different and less commendable context, would result in a further extension of job-related obligations in the personal sphere of employees.

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