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New (work) environments in the wake of the reform of Articles 9 and 41 of the Italian Constitution: what prospects for the employers' preventive obligations?

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1. New working environments and new risks. 2. Employer's liability and new spatial-temporal coordinates of work performance. 3. Environmental risks and ecological trends in the field of OHS protection. 3.1 Environment and health in the new Articles 9 and 41 of the Italian Constitution. 3.2 Environmental protection, work organisation and workers' participation. 4. External risks and the new "work circumstances". 5. Concluding reflections.

Abstract

Among the most critical issues in the ongoing doctrine and jurisprudence debate, are those that concern *(i)* employer responsibility for occupational health and safety in connection with new jobs and *(ii)* emerging risks associated with new ways of performing work. This debate has recently been amplified by the new concept of 'work environment' which, according to some authors, now also includes the company's external environment due to the reform of Articles 9 and 41 of the Constitution. In fact, in the face of the constitutional reform, it is appropriate to reflect on the possibility of remodelling the prevention obligations and reinterpreting the employers' safety obligation. The paper addresses the issue of the role of the firm in environmental policies: promotion and accountability with the dual perspective of a theoretical analysis and discussion paper. In the wake of the experience gained by collective bargaining and participation techniques in occupational health and safety, the paper will first look at the extension of the preventive obligation and the related criminal liability to the external environment. Then it focuses on the new perspectives of negotiated regulation of this obligation.

Keywords: Environmental Risk Factors; Occupational Health and Safety; Employer's Liability; Workers' Participation.

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1. New working environments and new risks.

The protection of health and safety in the workplace has been characterised by an important regulatory framework brought into the Italian system[1] by Legislative Decree No. 81 of 2008. The *Testo Unico di Salute e Sicurezza* (The Consolidated Occupational Health and Safety Act), however, still suffers from a significant number of implementation measures that have remained on paper, and relatively unsatisfactory effectiveness. In fact, as correctly observed, over the years the doctrine has played an important role in interpreting and systematising the vast legislation in force on the subject, as filtered through case law and collective bargaining applications. Otherwise, the Testo Unico has not yet contributed to the complete rationalisation of the matter, "opening up new profiles of criticality and interpretative uncertainty".[2]

Among the most critical issues around which a wide-ranging debate has been opened for some time is the employer's liability[3] arising from failure to comply with prevention regulations, especially given non-standard employment relationships, new ways of performing work, and emerging risks. More recently, the question links the evolution of the very concept of the 'working environment' following the reform of Articles 9 and 41 of the Constitution,[4] which expressly introduced environmental protection into our legal system.

As is well known, over time, the employer's position of guarantee[5] has led to the adoption of interpretative and regulatory solutions that take new models of work and business organisation as well as new risks into account. On the one hand, this has led to a progressive expansion of employer liability (especially by case law). On the other, this has forced a refinement of regulatory techniques in prevention, given that the effectiveness of the legal standard is indispensable and requires dealing with a constantly evolving risk framework.

Precisely for this reason, fifteen years after the entry into force of the Testo Unico and in light of the regulatory and jurisprudential developments, it is necessary to reflect on regulatory solutions that allow for alignment between regulatory provisions and concrete

[1] For an examination of the evolution of the prevention legislation see *ex multis* Natullo G., *Il quadro normativo dal Codice civile al Codice della sicurezza sul lavoro. Dalla Massima sicurezza (astrattamente) possibile alla Massima sicurezza ragionevolmente (concretamente) applicata?*, in *I Working Papers di Olympus*, 39, 2014; Lepore M., *La nuova normativa: dalla prevenzione tecnologica alla sicurezza di tipo organizzativo*, in Tiraboschi M., Fantini L. (eds.), *Il testo unico della salute e sicurezza nei luoghi di lavoro dopo il correttivo (d. lgs. n. 106/2009)*, Giuffrè, Milan, 2009, 49 ff.; Fantini L., Giuliani A., *Salute e sicurezza nei luoghi di lavoro. Le norme, l'interpretazione e la prassi*, Giuffrè, Milan, 2015, 1 ff.

[2] *Thus* Tiraboschi M. in the introduction to the literature review Corvino A., Giovannone M., Tiraboschi M., *Organizzazione del lavoro e nuove forme di impiego. Partecipazione dei lavoratori e buone pratiche in relazione alla salute e sicurezza sul lavoro*, Centro Studi Internazionali e Comparati "Marco Biagi", 2008.

[3] For a review of the debate between labour law lawyers and criminalists see Giovannone M. (ed.), *La responsabilità civile e penale del datore di lavoro nel contesto dell'emergenza sanitaria*, Conference Proceedings, Aracne Editore, Rome, 2021; Giovannone M., *La responsabilità civile e penale del datore di lavoro nel contesto dell'emergenza sanitaria*, in *Rivista del Diritto della Sicurezza Sociale*, 3, 2021, 577-600.

[4] By Constitutional Law no. 1 of 11 February 2022.

[5] Dovere S., *La sicurezza del lavoro tra prevenzione e repressione*, in Natullo G., Saracini P. (eds.), *Salute e sicurezza sul lavoro. Regole, organizzazione e partecipazione*, in *Quaderni della rivista Diritti Lavori Mercati*, 3, 2017, 85, according to whom the locution "posizione di garanzia" identifies the ownership of tasks to protect a legal asset, either through the control of a source of danger or through the direct protection of the asset.

work dynamics. This, taking into account the new working environments and space-time contexts in which work performance takes place.

The urgency of this reflection has been prompted by several recent and contingent factors: *(i)* the Covid-19[6] pandemic as an exogenous risk factor, *(ii)* the increasing use of agile and highly digitalised work, and *(iii)* the explicit introduction of environmental protection within the Constitution.[7]

Taken as a whole, these dynamics inevitably shift the focus of the subject of prevention[8] from known and surveyed risks (and in any case physically referable to either the company, the production unit or the production cycle), to the external risks of public health, environmental protection and those risk factors that are not directly available to the employer.

Consequently, one must ask oneself to what extent it is possible to extend the preventive obligation to common and not specifically work-related risks. As well as this extension may include risks caused by the performance of services that escape the employer's power of organisation and control in places that are not legally available to him. Similarly, one must ask oneself how far the prevention obligation can be extended into the external environment, beyond the confines of the company organisation.

The boundaries of employer liability must therefore be analysed within the new spatial-temporal coordinates of work performance and beyond the classic perimeter of business activity... Here it becomes important to analyse the progressive extension of the operativeness of Article 2087 of the Civil Code[9] and of the cases of civil and criminal offence to which compliance with the rule is entrusted.

Therefore, the problem that arises is not to over-analyse the balance between the constitutional values at stake (health, work, environment, and freedom of enterprise), but to understand whether and how these changes really affect the management of preventive obligations and the responsibility of the company and the employer.[10]

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[6] On the orientation of the jurisprudence on the subject of civil liability, also with reference to Covid-19,see the comment by Giubboni S., *I presupposti della responsabilità civile del datore per infortunio sul lavoro nella nomofilachia della Suprema Corte (con una chiosa sul risarcimento del danno da Covid-19) (Corte di cassazione, sezione lavoro, 19 giugno 2020, n. 12041)*, in *Rivista del Diritto della Sicurezza Sociale*, 3, 2020, 669-689.

[7] By Constitutional Law 11 February 2022 no. 1, *recante Modifiche agli articoli 9 e 41 della Costituzione in materia di tutela dell'ambiente.*

[8] Natullo G., *La sicurezza del lavoro, oggi. Regole e prassi tra vecchi paradigmi e nuovi modelli organizzativi*, in Natullo G., Saracini P. (eds.) *Salute e sicurezza sul lavoro. Regole, organizzazione e partecipazione*, in *Quaderni della rivista Diritti Lavori Mercati*, 3, 2017, 21, who points out that the central issue is the correct balancing of opposing requirements: of identifying and ascertaining responsibilities for the implementation of prevention obligations on the one hand; of guaranteeing, on the other hand, a reasonable certainty of effective fulfilment of such obligations, with equally reasonable exclusion of forms of "objective" liability in the event of injury to workers' health.

[9] On the general profiles of the safety obligation pursuant to Article 2087 of the Italian Civil Code, Cass. 12 February 1997, no. 3439; Cass. 30 November 2007, no. 44791; Cass. 7 June 2013, no. 14468; Cass. 5 January 2016, no. 34; Cass. 21 April 2017, no. 10145. On Article 2087 c.c. as an accessory obligation, as a collateral provision with respect to the duty of diligence, fairness and good faith that govern the employment relationship, Mesiti D., *L'ambito di applicazione della tutela prevenzionistica ed antinfortunistica e, segnatamente, dell'art. 2087 c.c., p. 322*, in *Il lavoro nella giurisprudenza*, 4, 2017, 322.

[10] One thinks, for example, of the compulsory training activities for employers, workers, RLS, managers and supervisorsgoverned by the State-Regions Agreements on the subject in implementation of Articles 34, 36 and 37 of Legislative Decree No. 81/2008. The national approach is partially outdated, in terms of the formalistic

These new dynamics make it increasingly difficult to maintain the consolidated evidentiary schemes with which judges assess employers' actual performance of their obligation to prevent accidents. These critical issues are relevant both in judicial venues and in the presence of the adoption and effective implementation of an organisation and management model (under Legislative Decree No. 231/2001 or Article 30 of Legislative Decree No. 81/2008). Similarly to what has happened in the past on the subject of asbestos exposure,[11] the time is perhaps ripe to reconsider the effectiveness of the traditional regulatory instruments of employer liability. The objective is to valorise new solutions shared between the parties (including social partners at national and company level), to be subsequently subjected to "validation" in the competent institutional venues.[12] This could ensure a better adaptation of preventive liability to risk factors for which the scientific laws of coverage are not yet able to support the causal link between employer default and occupational injury or disease with absolute certainty, and beyond any reasonable doubt.
The debate on the "maximum safety technologically possible"[13] is in fact not new, but how this principle holds up in the face of the impact of new risks and guarantees the exact fulfilment of the prevention obligation has been a controversial issue for some time. This is all the more so in a work environment that is increasingly larger and more removed from the control and direct legal availability of the employer.

2. Employer's liability and new spatio-temporal coordinates of work.

The phenomena connected to the new organisation of work and the new risks had been discussed at length, showing the need to combine the legal framework with the changed

approach imparted to the teaching methods. It is confirmed by the intent of the Legislator with d. l. no. 146/2021 (converted, with amendments, by Law no. 215/2021) by which it was envisaged that by 30 June 2022, the Permanent Conference for Relations between the State, the Regions and the Autonomous Provinces of Trento and Bolzano should adopt an Agreement with which to merge, revise and amend the implementation agreements on training.

[11] Tullini P., *La responsabilità civile per esposizione lavorativa all'amianto: obbligo di sicurezza, limiti dell'esonero assicurativo e risarcibilità del danno*, in *Rivista del Diritto della Sicurezza Sociale*, 1, 2016, 41-64; Fabiani M., Bonanni E., *Il danno da amianto. Profili risarcitori e tutela medico-legale*, Giuffré, Milan, 2013. See Cass. 25 September 2001, no. 5716; Cass. S.U., 10 July 2002, no. 30328; Cass. civ.n24 January 2014, no. 1477.

[12] Lambertucci L., *L'obbligazione di sicurezza del datore di lavoro tra responsabilità civile e tutela precauzionale: unpossibile ruolo della contrattazione collettiva*, in *Rivista Italiana di Diritto del Lavoro*, 1, 2021, 271-272, according to whom the Legislator discounts the possibility that collective autonomy may intervene in safety matters in two different spheres, achieving a twofold result: accompanying the interpretative effort of jurisprudence in referring to so-called unnamed safety measures; and identifying, at the same time, the scope of application of (civil) liability under the terms of the collective agreement. Natullo G., *La gestione della pandemia nei luoghi di lavoro,* in *Lavoro e diritto*, 1, 2022, 91, for whom collective bargaining can play an important complementary and supplementary role with respect to the sources from which the "mandatory" standards of protection emanate. In fact, at the various levels (national, territorial,company), it can fill spaces left empty by technical standards, in this by complementing (or being productive of) goodpractices and codes of conduct.

[13] Natullo G., nt. (1), 8, according to whom the three parameters (peculiarities of work, experience and technique) assign to art. 2087 c.c. the character of a general clause and a function of permanent adaptation of the system to the underlying socio-economic reality. In fact, the latter has a much more pronounced dynamism than that of the legal system, linked to necessarily complex and slow procedures and schemes of legal production. Cfr. also Buoso S., *Principiodi prevenzione e sicurezza sul lavoro*, Giappichelli, Turin, 2020.

organisational context. This is clearly underlined by numerous writings in the 1980s and 1990s,[14] which later merged into projects to reform the legal framework.[15] From a prevention perspective, it was pointed out that the work organisation has not been given due weight in our legal system because of a misrepresentation of the application of Article 2087 of the Civil Code, given that it was applied to the criminal liability of employers. On the contrary, the active part of the rule requires the employer, as the head of the company, to adopt all the measures that, "according to the particular nature of the work, experience and technique, are necessary to protect the physical integrity and moral personality of the employee". It has remained a dead letter, even through the regulation by collective bargaining for a more exact definition of the safety obligation. However, at a distance of at least twenty years, the overcoming of the Fordist production and prevention model,[16] the dematerialisation of work environments and the entrusting of organisational powers to digitalized systems reintroduce the question of the balance between employer responsibility, the legal availability of workplaces, and the external environment.

In this regard, very useful are the reflections solicited at the time of Covid-19 by Article 29- bis of the so-called *Decreto Liquidità* (Liquidity Decree),[17] as a first attempt to mitigate *ex ante* the employer's personal liability. This was effective in civil law, less so in criminal law. But more systematic solicitations come from the *European Strategic Framework on Health and Safety at Work 2021-2027*,[18] which defines the key actions planned by the Union to improve the health and safety of European workers in the coming years.[19]

The framework is part of the broader implementation plan - announced in 2021[20] - of the European Pillar of Social Rights and outlines three transversal objectives: *(i)* managing changes in the workplace, especially prompted by green, digital and demographic transitions ("*change*"), *(ii)* improving accident and illness prevention ("*prevention*"), *(iii)* and improving responses to possible health crises such as Covid-19 ("*preparedness*").

The first objective takes note of the changes that are taking place in work organisation and business models, under the banner of flexibility and a new conception of the workplace. These changes were particularly driven by the restrictions decided in EU in the darkest

[14] Smuraglia C., *Regulatory framework and implementation experiences in the field of occupational safety and hygiene: new perspectives for coordination and urgent interventions*, in *Rivista giuridica del lavoro e della previdenza sociale*, 2, 2007, 7-14.
[15] Santoni F., *Health protection in atypical work*, in Montuschi L. (ed.), *Environment, health and safety*, Giappichelli, Turin, 1997; Ghera E., *Labor law*, Cacucci, Bari, 1996, 157, and, above all, Montuschi L., *Right to health and work organization*, Franco Angeli, Milan, 1989, 78, are particularly sensitive to the need to combine the regulatory framework with the changed organizational context.
[16] On this topic, see the recent reflections of Tiraboschi M., *Nuovi modelli della organizzazione del lavoro e nuovi rischi*, in *Diritto della sicurezza sul lavoro*, 1, 2021, 136-154 and of Pascucci P., *Note sul futuro del lavoro salubre e sicuro… e sulle norme sulla sicurezza di rider & co,* in *Diritto della sicurezza sul lavoro,* 1, 2019, 37-57 recently taken up in the context of the UGGCI National Conference on 9-11 December 2022, with the report entitled *La salute e la sicurezza sul lavoro tra innovazioni organizzative e sostenibilità.*
[17] Decree-Law No. 23/2020 converted, with amendments, by Law No. 40 of 5 June 2020.
[18] Communication from the Commission to the European Parliament, the Council, the European Economic and SocialCommittee and the Committee of the Regions. EU Strategic Framework for Health and Safety at Work 2021-2027 - Safety and Health at Work in a Changing World of Work of 28 June 2021.
[19] Ales E., *Occupational Health and Safety: a European and Comparative Legal Perspective*, in *WP C.D.S.L.E. "Massimo D'Antona",* 12, 2015.
[20] Following the proclamation of the Pillar in 2017, the 'Action Plan on the European Pillar of Social Rights' was finallypublished in March 2021 with the European Commission's Communication COM(2021) 102 (Brussels, 4.3.2021).

moments of the pandemic and prompted by the green and digital revolution planned in the EU Green New Deal,[21] the EU Digital Strategy[22] and the Industrial Strategy for Europe.[23]

Based on these premises, the project to innovate the European legislative framework on the subject, made up of the framework directive and the twenty-four specific directives derived from it, can be explained. At the heart of the implementation approach of the entire Framework are: *(i)* the use of strong social dialogue, *(ii)* rapid and concrete decision-making, implementation and monitoring processes, and *(iii)* the development of awareness-raising activities and mobilisation of European funds for investments in prevention in the company, including through emergency tools. At the national level, the Commission has invited each Member State to review their internal strategies on health and safety at work for the purpose of aligning themselves with the perspectives of the Framework. Therefore, it could represent a decisive impetus for the definition of a national strategy on the matter which, at the moment, our country does not have.

Moreover, at the 110th International Labour Conference[24] a long-awaited decision was taken to elevate the right to a safe and healthy working environment to the *status* of a fundamental principle and right to work. Specifically, on 10 June 2022, in a plenary session delegates adopted a resolution to add health and safety protection at work among the fundamental rights of workers (so-called *core labour standards*). This is of decisive importance since only "core" rights must be respected by all member states of the Organisation regardless of the ratification of the relevant ILO Conventions.[25] Thus, with the conference decision, protecting health and safety at work will constitute the fifth category of fundamental rights. This new status means that, in turn, the relevant ILO Conventions[26] will become "fundamental".

Therefore, there is no doubt that European and international institutions are directly calling for a widening of the subjective and objective scope of application of preventative legislation and, indirectly, for a revision of the regulatory mechanisms of preventative liability.

[21] Comunication of the Commission (COM(2019) 640 final, Bruxelles, 11.12.2019).
[22] Comunication of the Commission (COM(2020) 67 final, Bruxelles, 19.2.2020).
[23] Comunication of the Commission (COM(2020) 102 final, Bruxelles,10.3.2020).
[24] Held in Geneva from 27 May to 11 June, it is considered one of the most important institutional appointments of the International Labour Organisation (ILO), so much so that it is also referred to as the "World Labour Parliament".
[25] It is recalled that the fundamental rights of workers were adopted in 1998 and, so far, are: freedom of association andthe effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.
[26] Occupational Safety and Health Convention, 1981 (No. 155) and Promotional Framework Convention for Safety andHealth at Work, 2006 (No. 187).

3. Environmental risks and ecological trends in the field of OHS protection.
3.1. Environmental and health in the new Articles 9 and 41 of the Italian Constitution.

As mentioned above, among the most problematic aspects of this debate are those that emerged in the aftermath of the introduction of environmental protection into Articles 9 and 41 of the Constitution.[27]

In particular, the question arose as to whether, and to what extent, the obligation to protect health and safety at work must also concern the environment outside the company organisation. This would transfer the traditional employer preventive obligations also in this sphere completely outside the company organisation. The question arises above all with the new wording of Article 41(2) of the Constitution. It now provides that private economic initiative may not be carried out *"in contrast with social utility or in such a way as to cause damage to health, the environment, safety, freedom and human dignity"*. The following paragraph 3 provides that "*The law shall determine the appropriate programmes and controls so that public and private economic activity may be directed and coordinated for social and environmental purposes*". On the other hand, art. 9, par. 3, strictly connects the environmental protection purposes to the "*interest of the future generations".*

To answer the specific prevention question, it is first necessary to evaluate the legal value impact of the constitutional amendment.

Debate on the appropriateness of explicit inclusion of the pillars of sustainability in the constitutional text is certainly not new,[28] just as climate change has clearly been forcing radical adaptations in many legal spheres on the "Just Transition" track.[29] In particular, after several failed attempts,[30] the constitutional amendment has an historic importance because it was conceived in response to the strong investment made by the European institutions in the ecological transition (Next Generation EU). On the other hand, since the very early nineties many Member States of the United Nations - 67 out of 193 - have made formal changes to their constitutional provisions in order to introject the concept of sustainability. Especially, these adaptations followed the definition of sustainable development introduced in 1987 by the Brundtland Commission's "Our Common Future" report.[31]

It is precisely the labour and trade union community[32] that can be counted among the primary sources of forging ecological consciousness precisely because of its ability to urge

[27] By Constitutional Law No. 1 of 11 February 2022 on *Amendments to Articles 9 and 41 of the Constitution on Environmental Protection.*

[28] On this point, the reconnaissance of both the labour profiles of the debate made by Cagnin V., *Diritto del lavoro e sviluppo sostenibile*, CEDAM, Padova, 2018, and that of the economic profiles developed by Giovannini E., *L'utopia sostenibile*, Laterza, Bari, 2018, is very interesting.

[29] Doorey D. J., *Just Transitions Law: Putting Labour Law to Work on Climate Change*, in *Journal of Environmental Law and Practice*, 30, 2, 201 ff.; Centamore G., *Una just transition per il diritto del lavoro*, in *Lavoro e Diritto*, 1, 2022, 129-145.

[30] Among all, Salvemini L., *Dal cambiamento climatico alla modifica della Costituzione: i passi per la tutela del futuro (non solo nostro)*, in *Federalismi.it*, 20, 2021, 78 ff.

[31] On this topic, Groppi T., *La dimensione costituzionale della sostenibilità: la sfida dell'effettività*, in *Lavoro e Diritto*, 3, 2023, 459-472.

[32] Barca S., *On working-class environmentalism: a historical and transnational overview*, in *Interface*, 4, 2, 61 ff.; Giovannone M., *Le nuove dinamiche della contrattazione collettiva per la Just Transition: prospettive regolative per la convergenza tra interessi economici, sociali e ambientali*, in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 4, 2021, 637-658.

the adoption of forms of regulation to protect the environment inside and outside the workplace.

As a result, sustainable development is progressively affecting the value conception of *social* and *labour standards* to the point that environmental law and labour law are often united by similar aims of protection against the externalisation of the economic activities' costs.[33] The link between productive activity and ecosystem has fueled the economic-legal debate on *Environmental, Social and Governmental Compliance*, as a parameter for measuring the financial reliability of multinational companies. It is assessed taking into account the environmental impact of the respective activities[34] and the adoption of tools of Corporate Social Responsibility[35] in the context traced by the multiple multilevel sources. The reference goes to the European Commission Communication of 2 July 2002 on Corporate Social Responsibility, the United Nations Global Compact, the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.[36]

The new formulation of paragraphs 2 and 3, Article 41 of the Constitution would seem to confirm this. It has been said that the new wording of Article 41 of the Constitution finally implements what has long been anticipated by constitutional jurisprudence[37] and doctrine: a reinterpretation of Article 2087 of the Civil Code to include the obligation to prevent disasters and accidents that may affect communities and the external environment.[38]

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[33] Supiot A., *Homo faber: continuità e rotture*, in Honneth A., Sennet R., Supiot A., *Perché lavoro?*, Feltrinelli, Milan, 2020. According to the Author, the organization of work and the ecological footprint are two sides of the same coin.

[34] For a critical-reconstructive framework of ESG in the economic field, Sychenko E., *Labour Rights and International Labour Standards in the ESG Agenda*, in *Italian Labour Law e-Journal*, 16, 1, 2023, 135-148; Huang D., *Environmental, social and governance (ESG) activity and firm performance: A review and consolidation*, in *Accounting & finance*, 61, 1, 2021, 335-360; Abhayawansa S., Tyagi Sh., *Sustainable Investing: The Black Box of Environmental, Social, and Governance (ESG) Ratings*, in *The Journal of Wealth Management*, 24, 1, 2021, 49-54; Meaney M. E., *Private Corporations and Environmental Social Governance: An Uneven Response, in Fulfilling the Sustainable Development Goals*, Routledge, London, 2021, 437-438.

[35] For a critical-reconstructive framework of CSR in the economic field, Baraibar-Diez E., Odriozola M., *CSR Committees and Their Effect on ESG Performance in UK, France, Germany, and Spain*, in *Sustainability*, 2019, 11, 18, 5077; Gillan S. L., Koch A., Starks L. T., *Firms and social responsibility: A review of ESG and CSR research in corporate finance*, in *Journal of Corporate Finance*, 66, 2021, 101889. For an analysis of the value and the different declinations of CSR in the legal field, Gottardi D., *CSR da scelta unilaterale datoriale a oggetto di negoziazione collettiva: la responsabilità sociale contrattualizzata,* in Guarriello F., Stanzani C. (eds.), *Sindacato e contrattazione nelle multinazionali. Dalla normativa internazionale all'analisi empirica*, Franco Angeli, Milan, 2018, 58-75. Among all, also, Perulli A. (ed.), *La responsabilità sociale delle imprese: idee e prassi*, Il Mulino, Bologna, 2013; Tullini P., *Lavoro e responsabilità sociale dell'impresa*, Zanichelli, Bologna, 2006; Giovannone M., *La tutela dei labour standards nella catena globale del valore*, Aracne editrice, Rome, 2019.

[36] Among all, for a framework, cfr. Brino V., Perulli A., *Diritto Internazionale del Lavoro*, Giappichelli, Turin, 2023.

[37] Corte Cost. 26 July 1993, n. 365; Corte Cost. 20 May 1998, n. 196; Corte Cost. 6 June 2001, n. 190; Corte Cost. 8 March 2006, n. 116; Corte Cost. 9 May 2013, n. 85 and Corte Cost. 23 March 2018, n. 58.

[38] On the possibility of considering the internal and external space of the company as two faces of the same reality, widely, Perulli A., Lyon-Caen A., *Vers un droit du travail écologique*, in *Revue de droit du travail*, Juillet-Août 2022, 91-95; Martelloni F., *I benefici condizionati come tecniche promozionali nel Green New Deal*, in *Lavoro e Diritto*, 2, 2022, 293-310; Buoso S., Lassandari A., Martelloni F., *Presentazione, Il tema. Lavoro e ambiente nell'Antropocene: il problema e il sistema*, in *Lavoro e Diritto*, 2, 2022, 3-6; Lassandari A., *Il lavoro nella crisi ambientale*, in *Lavoro e Diritto*, 10, 2022, 7-27; Tomassetti P., *Diritto del lavoro e ambiente*, ADAPT University Press, Bergamo, 2018, 175; *contra* Buoso S., *Sicurezza sul lavoro, ambiente e prevenzione: disciplina positiva e dilemmi regolativi*, in *Lavoro e diritto*, 2, 2022, 279, according to whom the Art. 2087 c.c., "opening and closing" article of the system, invests it with the

This observation strengthens the thesis according to which the new constitutional provision formally takes note of values already existing in living law: indeed, the new wording of the Article 41 continues to propose an obsolete version of the concept of the environment as an antagonistic interest to economic activity. Otherwise, it misses the opportunity to give a modern twist to the way of understanding the limits that govern the exercise of this activity, and to orient it towards a human-centered production. In this logic, the absence of references to the precautionary principle (well present in EU law) and the lack of an explicit reference to the need to pursue sustainable development should be seen.[39]

Consequently, we wonder about the impact that the reform may have on the work and contents of the rulings of constitutional judges and common judges, in civil and criminal cases. In particular, we refer to their interpretation of the prevention rules to be applied to the case concrete in a way that complies with the new constitutional provisions in Article 41. In fact, it appears necessary to understand how these new formulas affect the guarantee positions and subjective rights of workers, taking into account the very broad and programmatic formulations of the rules dealing with the matter.

Thus, once again, the key rule of Article 2087 c.c. and the assessment of the contractual (and extra-contractual) responsibilities in face of its non-compliance come into play, as well as the assessment of any criminal liability.

Looking at environmental protection as a insurmountable limit to the exercise of free economic initiative appears unpersuasive in light of a careful reading of the provisions of the Testo Unico. Just as the automatic expansion of the interpretative margins of the prevention obligation[40] to the external environment is also unconvincing.

Thus arguing, even the virtuous pairing of environment and work ends up inappropriately extending the field of application of the employer's guarantee position outwards.[41]

There is no doubt that the constitutional amendment emphasizes the "circular health" paradigm already inherent to the prevention system outlined by Legislative Decree no.

arduous task of bringing the custody of environmental assets into the context of the employer's security debt. For the A., the Art. 2087 c.c. still represents a regulatory basis "capable of ensuring automatic adaptation to the prevention system, undermined by technological progress"; however, it remains that its teleological orientation is clearly and literally aimed "to protect the physical integrity and moral personality of the workers": the conversion and recycling of this finalistic orientation for extended purposes of protection of public health and the environment it seems far beyond its potential, risking configuring a non-secondaryinterpretative forcing.

[39] Pinardi R., *Iniziativa economica, lavoro ed ambiente alla luce della recente riforma costituzionale degli artt. 9 e 41 Cost*., in *Diritto della Sicurezza sul Lavoro*, 1, 2023, 21-34. On the topic also Morrone A., *La Costituzione del lavoro e dell'ambiente. Per un nuovo contratto sociale*, in *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 4, 2022, 526.

[40] In these terms Buoso S., nt. (38), 277; Buoso S., nt. (13), 126.

[41] On the appropriateness of such an extension, among many Caruso B., Del Punta R., Treu T., *Manifesto per un diritto del lavoro sostenibile*, «Centre for the Study of European Labour Law» (CSDLE) "Massimo D'Antona", 20 May 2020, p. 37, for whom there is no doubt that the growing sensitivity to environmental issues is causing obsolescence of the distinction between the working environment and the surrounding territory, which only reaffirms the appropriateness of that integrated approach to the three sustainabilities. Pascucci P., *Modelli organizzativi e tutela dell'ambiente interno ed esterno dell'impresa*, in *Lavoro e diritto*, 2, 2022, 339, while not accepting the proposed extension of the prevention obligation, nevertheless notes the "circularity" of risks for workers and for the people who live "around" the company. However, it seems increasingly less credible that labour law can continue to deal only with the specific protection of the internal environment, shirking the more general challenge of environmental sustainability.

81/2008. In fact, this view focuses attention on the permeability between production organization and the environment in a broad sense, urging an integrated and holistic approach to the topic of internal and external risks prevention. Furthermore, this appeal is particularly relevant in new production scenarios in which the very concepts of organization and workplace have become increasingly fluid. Just as it is clear that already in the 1978 Health reform (which established the National Health Service), a global concept of "health" was validated, to be expressed "senza variazioni di sostanza in tutti i luoghi in cui si svolge e si completa la personalità di ogni cittadino".[42] It is no coincidence that the attribution to the local health authorities of the responsibility for supervising workplace safety finds its foundation in the unification of the protection of good health in the natural context of the individual's life and work.

However, evaluating the specific employer responsibilities, it is necessary to carefully read the provisions of the Consolidated Occupational Health and Safety Act which have clear connections with the environmental issue. In particular, it is necessary to evaluate to what extent the "environment – work" combination can project the field of application of the employer's guarantee position outside the organization of the company, and of the contractual safety obligation pursuant to Art. 2087 c.c.[43] In this way, the non-contractual liability of the employer would be extended beyond the limits already crossed by constitutional jurisprudence relating to the art. 2043 c.c. In this sense, it is a question of testing the validity of the principles of specificity and legality of criminal liability with reference to common or totally exogenous risk factors.

In this logic, it is possible to identify "*tracce di tutela comune di salute e ambiente"* (common health and environmental protection traces)[44] in the general framework of Legislative Decree No. 81/2008. But it is not possible to attribute the legal foundation of a punctual integrated prevention system to them.[45] On closer inspection, Article 2(n) of the Consolidation Act defines the concept of prevention as "*il complesso delle disposizioni o misure necessarie anche secondo la particolarità del lavoro, l'esperienza e la tecnica, per evitare o diminuire i rischi professionali nel rispetto della salute della popolazione e dell'integrità dell'ambiente esterno*" (the set of provisions or measures that are also necessary - according to the particular nature of the work, experience and technique – in order to avoid or reduce occupational risks while respecting the health of the population and the integrity of the external environment). However, this norm has introduced a provision that is more programmatic than prescriptive in nature.[46]

[42] "Without substantial changes in all those workplaces in which the workers' personality and dignity is developed" (my translation). Cfr. Pascucci P., Angelini L., Lazzari C., *I "sistemi" di vigilanza e di controllo nel diritto della salute e sicurezza sul lavoro*, in *Lavoro e diritto*, 4, 2015, 621.

[43] On the opportunity, Caruso B., Del Punta R., Treu T., nt. (41), 37; Pascucci P., nt. (41).

[44] References to the relevance of the external environment in Legislative Decree No. 81/2008 are contained in Article2(n), Article 18(1)(q), Article 46(1) and Article 256(3). Interesting, in doctrine is the position of Pascucci P., (43), 338, according to whom the intertwining of the company's internal and external environment is not only found in Legislative Decree no. 81/08, but "in the opposite sense" also in the main legislative decrees dealing with environmental law. For the author, references to protecting workers' health and safety also emerge in Legislative Decree no. 152/06. Furthermore, the circularity between the need to protect the internal and external environment is even more perceptible in Legislative Decree no. 105/15, which implemented directive 2012/18/EU on the control of major-accident hazards involving dangerous substances.

[45] P. Pascucci, nt. (43), 343.

[46] B. Caruso, R. Del Punta, T. Treu, nt. (41), 37; P. Pascucci, nt. (43), 271.

Although more stringent in its literal wording, the same Article 18(1)(q) appears to be less decisive for the purposes of extending the safety obligation. Among the employer's and manager's obligations, it includes "*prendere appropriati provvedimenti per evitare che le misure tecniche adottate possano causare rischi per la salute della popolazione o deteriorare l'ambiente esterno verificando periodicamente la perdurante assenza di rischio*" (taking appropriate measures to prevent the technical measures adopted from causing risks to the health of the population or deterioration of the external environment by periodically verifying the continued absence of risk). The same reflections apply to the subsequent Articles 46, paragraph 1[47] and 256, paragraph 3.[48] These provisions are of a more prescriptive nature and are accompanied by the necessary sanctioning apparatus. However, they do not determine a direct and absolute obligation on the employer to protect the environment in terms of prevention. In fact, these provisions appear designed to prevent the negative externalities of the prevention obligation or to technically coordinate specialised OSH obligations pertaining (fire prevention and those against the dispersion of asbestos in the air) with the protection of the external environment. However, there is a clear awareness of the diversity of the two values at stake.

If the textual provisions of Legislative Decree no. 81/2008 are not sufficient to resolve the issue, once again we must return to thinking about the primordial *ratio* of the Article 2087 c.c. Indeed, it is possible to start from the notion of prevention and protection obligation contained therein, although extensively interpreted in the face of increasingly permeable and uncertain company boundaries.

The active recipients of the Article 2087 c.c. are in fact the workers of the company (and not the citizens). Also, the responsibility for its violation remains primarily of a contractual nature, presupposing the existence of an employment contract. Otherwise, if the company assumes responsibility towards the external environment, the regulatory basis of this responsibility cannot be Article 2087 c.c. and should rather be sought in the specific environmental discipline. Nor does it seem to be possible to envisage an extensive application of the prerequisites of non-contractual preventive liability pursuant to Article 2043 c.c. In fact, in the framework of our prevention system, this rule complements the contractual one and does not operate autonomously and separately.

Furthermore, the use of the precautionary principle through the introduction of safeguards suitable for avoiding crimes could be encouraged, alongside the principle of prevention of "*neminem laedere*" (Article 2043 c.c.). However, even more so, the legal basis of the protections cannot reside in Article 2087 c.c. as such.[49]

[47] According to which "la prevenzione incendi è la funzione di preminente interesse pubblico, di esclusiva competenza statuale, diretta a conseguire, secondo criteri applicativi uniformi sul territorio nazionale, gli obiettivi di sicurezza della vita umana, di incolumità delle persone e di tutela dei beni e dell'ambiente".

[48] With specific reference to the prevention of the risk of exposure from asbestos, it provides that the work plan to be prepared by the employer prior to the commencement of demolition or removal works of buildings, structures, equipment and installations and means of transport must "prevedere le misure necessarie per garantire la sicurezza e la salute dei lavoratori sul luogo di lavoro e la protezione dell'ambiente esterno".

[49] On the paradigm shift in this sense, Brino V., *La "governance societaria sostenibile": un cantiere da esplorare per il diritto del lavoro?*, in *Lavoro e Diritto*, 3, 2023, 437-457, who resumes in a problematic way Onza M., *Gestione sostenibile" dell'impresa, "adeguati assetti" e (una annotazione su) "interesse sociale": spunti di riflessione*, in *Ristrutturazioni aziendali*, 1, 2023.

In fact, the factors to be considered for the purposes of Article 2087 c.c. are still psycho-physical risks of work origin. Otherwise, exogenous factors cannot be considered independently, but at most if they can influence work risks. Therefore, the exogenous factors must be taken into consideration by the employer because they are suitable for affecting professional risks in terms of aggravation, predictability and interference.

Furthermore, in terms of criminal liability, it must deal with the limits imposed by its criminal sanctionability, even in the face of a dynamically selective extension of the risk assessment obligation (Article 28, paragraph 1 and 29, paragraph 1 of Legislative Decree no. 81/2008). Indeed, the criminal sanctionability in turn depends on the link between the organization and risks to the health and safety of workers.[50]

The same argumentative direction suggests the comparison of the new provisions of Article 41 Const. with the constant orientation of the constitutional jurisprudence on the matter, as well as with the principles of specificity of criminal law. Therefore, even in the face of the constitutional novelty, it seems difficult to re-read the Article 2087 c.c. and the prevention legislation in this perspective. The risk is that of an excessive expansion of the safety debt to be paid by the employer.

In fact, a systematic reflection on effective protection techniques to accompany the changes in a path of sustainability[51] cannot imply an automatic remodelling of the prevention obligations, nor even less a reinterpretation of Article 2087 c.c. in terms of environmental sustainability.[52] The relevance of the constitutional reform, therefore, must be sought in the formal consecration of ecological values in the sphere of principles that should guide the action of public and private actors. The latter will have to reconcile production activity and work organization with the environmental dynamics in which the company itself is immersed, with much more limited prerogatives of domination and predetermination. Therefore, there is a clear difference between preventive protection and environmental protection and it is necessary to take into account the inevitable constitutional balance[53] between health, environment and freedom of economic initiative. However, the wording of the Article 41 of the Constitution does not alter the subjective and objective scope of application of the Article 2087 c.c., nor that of Legislative Decree no. 81/2008.

On the other hand, already in the pre-pandemic period the complementarity between the protection of the environment and the protection of workers had emerged in the judicial events (Ilva case in Taranto).[54] But most of all, the health emergency contributed to a

[50] On the topic, Cass. 6 September 2021, n. 32899, which ruled on the well-known Viareggio railway disaster.
[51] Cfr. EU-OSHA, *Workplace Health Promotion, Managing occupational safety and health in a warmer planet*, Bilbao, 2022.
[52] Pascucci P., *Salute pubblica e limiti all'attività di impresa dall'angolo visuale del diritto del lavoro e della sicurezza sul lavoro*, in Zoppoli L. (ed.), *Tutela della salute pubblica e rapporti di lavoro - Quaderno di Diritti Lavori Mercati*, Editoriale Scientifica, Naples, 2021,121; but also Pascucci P., nt. (43), 335-355.
[53] On the issue, Zoppoli L., *Il danno biologico tra principi costituzionali, rigidità civilistiche e tutela previdenziale*, in *Diritto delle Relazioni Industriali*, 3, 2001, 389-395.
[54] Cf. Corte Cost. 2013, n. 85 which, also referring to previous pronouncements, refutes the existence of "tyrant rights", placed in a rigid hierarchy and endowed with absolute prevalence over others. Consequentially, all fundamental rights - even the "primary" and "most fundamental" ones such as health and the environment - are "dynamically" balancing by the Legislator, with the only limit being respect fr proportionality and reasonableness pursuant to Article 3 of the Constitution. In literature, the contributions of Tullini P., *I dilemmi del caso Ilva e i tormenti del giuslavorista*, in *Ius17*, 3, 2012, 163-169; Pascucci P., *La salvaguardia dell'occupazione nel*

generalised unhinging of the boundaries between the "external and internal" workplace and between "public health and health and safety at work". This fuels the risk of including in the judicial-penalistic mechanisms not only the protection of workers' health but also that of the surrounding population and the external environment.[55] The same risk of Covid-19 contagion was in fact the recipient of a 'circular' attention between the protection of both public health and workers' health.[56]

And in fact, compared to other European countries, there is a worrying overuse of criminal law in Italy, both for the protection of health and the protection of the environment.[57] It follows that instances of protection through the instruments of criminal law, as a privileged instrument of action in our legal system, often produce outcomes that are very creative and full of grey areas.[58] Also, for this reason, it is useful to prevent dilation mechanisms to the environmental sphere of the employer's preventive obligation and of the relative criminal sanctions. This need arises especially in the aftermath of the introduction of environmental protection into the Constitution,[59] as part of the new and fundamental structure of collective prevention and public health promoted by the PNRR.[60]

decreto "salva Ilva". Diritto alla salute vs diritto al lavoro?, in *I WP di Olympus,* 27, 2013. More recently, Laforgia S., *Se Taranto è l'Italia*, in *Lavoro e Diritto*, 1, 2022, 30-52.

[55] Also of this opinion is Natullo G., *L'organizzazione delle imprese a tutela dell'integrità psico-fisica dei lavoratori edei cittadini*, in Zoppoli L. (ed.), nt. (52), 130, who points out that precisely with regard to the relationship between the external environment, work environments and company organisation, the 'Covid-19' pandemic has introduced further and new critical elements. These critical issues have strongly challenged arrangements that, in some ways, could have been considered by now consolidated, posing new and delicate problems and requiring obviously urgent and effective responses. In fact, according to the Author, the 2020 health emergency has profoundly accentuated the correlations between the work environment and the "external" environment, with significant repercussions on health and safety in the workplace.

[56] In these terms Buoso S., nt. (38), 282; in the same vein P. Pascucci, nt. (52), 123, according to whom during the Covid-19 pandemic the regulation of health and safety in the workplace became a fundamental element of the broader instrumentation to combat the spread of the virus. Therefore, it was an instrument for the protection of public health. In fact, according to the Author, in such a hypothesis protecting the health of those at work also means protecting that of those outside the production context. Conversely, the risk of contagion for those at work does not only emerge due to its aggravation within the production organisation, but also outside it, given the immanence of the virus everywhere. More restrictive is the interpretation of Maresca A., *Il rischio di contagio da COVID-19 nei luoghi di lavoro: obblighi di sicurezza e art. 2087 c.c. (prime osservazioni sull'art. 29-bis della l. n. 40/2020)*, in *Diritto della sicurezza sul lavoro*, 2, 2020, 8.

[57] Reference is made to the research carried out between 2018 and 2020 as part of a project promoted by the Italian Association of Criminal Law Professors (AIPDP) entitled *La riforma dei delitti contro la persona*. Please refer, in particular, to the comparative outlines contained in the final document drafted by the VIII Group ("Crimes against private and public health and against private and public safety", referee: Donini M.), in particular to Section I: Gargani, Zirulia, Castronuovo, Protection of life and health (in the areas of work safety, food, drugs, etc.); and to Section II: Ruga Riva, Environmental crimes (the document can be consulted at https://www.aipdp.it/aipdp-documenti/La-%20riforma-dei-delitti-contro-la-persona). For more comprehensive comparative analyses, please refer to the preparatory documents available at https://www.aipdp.it/aipdp-documenti/Documenti-per-il-VII-Congresso-La-riforma-dei-reati-contro-la-persona (under "8th Group").

[58] In this sense, Castronuovo D., *Multidirectional Projections of risk: critical issues in the criminal protection of health and the environment*, in *Lavoro e Diritto*, 2, 2022, 375-393.

[59] By Constitutional Law No. 1 of 11 February 2022, *recante Modifiche agli articoli 9 e 41 della Costituzione in materia di tutela dell'ambiente.*

[60] The reference is, specifically, to the establishment of the National System for the Prevention of Environmental and Climate Risks (SNPS), which is part of the interventions financed by the National Plan for Complementary Investments to the NRP. See Chapter II, § 5. In literature, Caruso B., Del Punta R., Treu T., *Il Diritto del lavoro nella giusta transizione. Un contributo "oltre" il manifesto*, in CSDLE "Massimo D'Antona", 2023, 15; Santini G., *Costituzione e ambiente: la riforma degli artt. 9 e 41Cost.*, in *Quaderni Costituzionali*, 2, 2021, 471, for whom

3.2. Environmental protection, work organisation and workers' participation.

Moreover, what has been said so far suggests that it may be useful to carefully evaluate certain ecological fascinations.[61] Without an appropriate comparison with the criminal law apparatus of reference, these lead to superimposing a broader duty to adopt measures to protect the population and the external environment onto the employer's obligation to prevent accidents. In this case, the effect would be to extend extending the relative sanctioning discipline.

In this regard, the constitutionalist doctrine has repeatedly warned practitioners against the risks of overestimating the constitutional reform in the name of a *political correctness* that has little to do with the technical-legal interpretation of the rule.[62] Rather, the value-balancing relationship between health, environment and business activity has remained unchanged. The extraneousness of the constitutional provision to an extensive *ratio* of the preventive obligation is further corroborated by the interpretation of constitutionalists and criminalists. In particular, they deny that it can determine a hierarchy of values between health, environment and business activity, as clarified by the unshakable orientation expressed by the Constitutional Court in its ruling no. 85 of 2013. Ultimately, except for specific cases,[63] the two areas of discipline - preventive and environmental - preserve their autonomy, all the more so for the (civil and criminal) sanctioning profiles.

On the other hand, precisely concerning production activities with a more pronounced environmental impact, there is the interesting contractual practice[64] of establishing the figure of the Workers' Representative for Health, Safety and the Environment (*Rappresentante dei lavoratori per la salute e sicurezza e l'ambiente* - RLSSA). This representative takes over the rights, role, and attributions from the RLS and the bodies delegated to environmental protection. In particular, this figure is recognised as one of the subjects that determine company strategies based on sustainability, in collaboration with trade union representatives and company management.[65] For its part, although outside the field of prevention, the New Skills Fund (*Fondo Nuove Competenze*)[66] itself represents a testing ground in which collective

constitutional intervention is consistent with the principle of "do no significant harm", which inspires the "Next Generation EU" initiatives and the National Recovery and Resilience Plan.

[61] Tomassetti P.,nt. (38).

[62] Among the numerous contributions, very critical on the subject is Cecchetti M., *Virtù e limiti della modifica degliarticoli 9 e 41 della Costituzione*, in *Corti Supreme e salute*, 1, 2022, 127-154.

[63] Regarding installations exposed to the risk of major accidents and the residual activities characterised by the use of asbestos. On both see the reflection of S. Buoso, nt. (13), 123-156.

[64] Among them, Chemical-Pharmaceutical and Allied Ccnl, renewed by the 2019-2022 Agreement; Energy and Oil Ccnl, renewed by the 2019-2021 Agreement; Electricity Ccnl 2019-2021; Rubber and Plastics Ccnl 2015-2018, renewed by the 2020-2022 Agreement.

[65] Pascucci P., nt. (43), 341, who points out that the figure of RLSSA deserves to be strengthened and developed, still confined only to some realities in which it is established at the request of the RSU to play its role in environmental matters. Del Frate M., *La tutela dell'ambiente nel riformato art. 41, co. 2 Cost.: qualcosa di nuovo nell'aria?* in *Diritto delle relazioni industriali*, 3, 2022, 907 ff.

[66] The FNC was established by the decreto Rilancio (Decree-Law No. 34/2020, conv. with amendments by Law No. 77/2020). The first increase in resources was provided for with the Agosto Decree (Decree-Law No. 104/2020), which combined the objective of "favouring outplacement paths for workers" with the improvement of workers' skills to be spent in the company. Law No. 215 of 17 December 2021, converting Law Decree No. 146 of 21 October 2021, subsequently increased the resources allocated to the Fund (Article

bargaining directs public interventions[67] aimed at supporting the green and digital transition of companies.[68] However, both instruments seem to start from the assumption that the company, the workers, and the social partners can positively contribute to the realisation of environmental protection objectives. It is not presupposed a further, and increasingly undefined, prevention obligation on their part.[69]

On a further level, the expansion of the catalogue of offences provided for by Legislative Decree No. 231/2001 has been enriched over time to also include environmental offences. This makes reciprocal integration (and not undue overlap) between environmental protection and prevention protection always feasible when adopting an organisation and management model capable of relieving the company of liability. It follows that, even more so, the company policy for safety at work and protection of the external environment can share the same methodological approach that relies on systemic, planned, and organised prevention: an integration that does not (and cannot) concern specific technical aspects but rather the way by which the company organises prevention with respect to the internal and external environment.[70]

From this last point of view, we observe[71] how environmental crimes (Article 25-undecies of Legislative Decree no. 231/2001) and crimes of homicide and unintentional personal injury committed in violation of prevention legislation (Article 25-septies of Legislative

11-ter). The Fund's operations were then extended for the year 2022 (Article 9, Law Decree No. 228 of 30 December 2021; Article 9, paragraph 8, Law Decree No. 228 of 30 December 2021, converted by Law No. 15/2022). Lastly, the art. 19 of the Legislative Decree n. 48/2023, conv. in L. no. 85/2023 refinanced the Fund for the 2021-2027 programming period. In particular, from 2023, access to the Fund is permitted subject to the signing of collective agreements aimed at support the updating of workers' professionalism following the digital and ecological transition.

[67] Impellizzieri G., *Fondo nuove competenze e contrattazione collettiva: una rassegna ragionata*, in *Diritto delle relazioni industriali*, 3, 2021, 896; Talarico M., *Autonomia collettiva e formazione professionale: il Fondo nuove competenze quale nuovo strumento di politica attiva*, in Ciucciovino S., Garofalo D., Sartori A., Tiraboschi M., Trojsi A., Zoppoli L. (eds.), *Flexicurity e mercati transizionali del lavoro. Per una nuova stagione per il diritto del mercato del lavoro?*, ADAPT University Press, 2021, 343. On critical operational issues, Impellizieri G., Massagli E., *Fondo nuove competenze: funzionamento, elementi di originalità e privi rilievi critici, in Diritto delle relazioni industriali*, 4, 2020, 1191 ff.

[68] See also, Giovannone M., *L'eredità della pandemia: i cambiamenti strutturali in materia di lavoro e welfare*, ASTRIL, Working Paper, 59, 2022.

[69] On the role of trade union representation, at national and international level, Chacartegui C., *Workers' participation and green governance*, in *Comparative Labor Law & Policy Journal,* 40, 1, 2018, 94; Duval A., Moreau M. A., *Social Environmental Justice: From the Concept to Reality*, in Duval A., Moreau M. A. (eds.), *Towards Social Environmental Justice?*, EUI Working Paper LAW, 2, 2012, 2; Peruzzi M., *Il dialogo sociale europeo di fronte alle sfide della digitalizzazione*, in *Diritto delle relazioni industriali*, 4, 2020, 1213 ff.; Giovannone M., nt. (35); Giovannone M., *Safety at work, new risks and employer liability: prospects for post-Covid-19 regulation in Italy*, in *Italian Labour Law e-Journal*, 14, 1, 2021, 138 ff.; Battaglini E., *Ambiente e società nella tarda modernizzazione: le sfide per il sindacato*, in *Quaderni di Rassegna Sindacale*, 2, 2010, 123-136; Tomassetti P., *Statuto dei lavoratori e questione ambientale: dall'autunno caldo ai c.d.* global climate strikes, in *Rivista Quadrimestrale di Diritto dell'Ambiente*, 2, 2020, 162-192; Angelini L., *Rappresentanza e partecipazione nel diritto della salute e sicurezza dei lavoratori in Italia*, in *Diritto della sicurezza sul lavoro*, 1, 2020, 96-116.

[70] Pascucci P., nt. (43), 351-352 also expresses himself in similar terms; Lazzari C., Pascucci P., *La gestione della circolarità dei rischi tra ambiente interno ed esterno all'azienda. Profili giuridici*, in *Diritto della sicurezza sul lavoro*, 1, 2023, 45 ff.

[71] The reference is to the results of the research carried out by the University of Milan – Department of Legal Sciences "Cesare Beccaria", through the «Osservatorio sulla giurisprudenza in materia di responsabilità da reato degli enti ex d.lgs. 231/2001» (coordinated by Prof. Marco Scoletta).

Decree no. 231/2001) are the heart of the system of para-criminal liability of collective bodies.

Nonetheless, the combination of environment and workplace safety present in Legislative Decree no. 231/2001 - and today in the constitutional provisions - is based on a basic regulatory premise that is antithetical, in some ways. In fact, Legislative Decree no. 231/2001 clearly differentiates the issues relating to the protection of the environment and the prevention of accidents at work.[72]

On the other hand, despite some lack of connections in the respective disciplines (for example, in terms of death or injuries as a consequence of environmental pollution), there are important aspects of real interference between the environment and safety within the discipline of Legislative Decree no. 231/2001. In fact, it creates an osmotic tension between the offenses of Articles 25-septies and 25-undecies of Legislative Decree no. 231/2001. This both with reference to the structural conformation of some environmental crimes,[73] both in the "extended" interpretation and the so-called "preventive aggravating circumstance" in relation to the facts committed with the violation of the rules for the prevention of accidents at work (Articles 589, paragraph 2 and 590, paragraph 3 of the criminal code) and for the charge against the entity (Article 25-septies of Legislative Decree no. 231/2001).

In fact, in this regard, the Italian jurisprudence[74] has specified that "workplace" (protected by accident prevention legislation) must be understood as any place which the worker accesses, even only occasionally, to carry out the tasks entrusted to him. The "workplace" includes all the spaces in which the work activity takes place and in which, regardless of the actuality of the activity, *i)* those who are authorized to access the construction site and *ii)* those who access it for reasons related to the work activity can go or stay (even during breaks, rest or suspension of work), including strangers.[75]

Much less obvious – and still debated today - is the question inherent to the extension of the subjective sphere of the preventive aggravating factor, to include harmful events caused to subjects outside the company ("third parties", in the broad sense). These are subjects who, for various reasons, come into contact with it and with the workplace.[76] All this, however, does not change the terms of the question as posed so far. Yet, this criticality enhances the company's opportunity to make use of organizational models integrated in a doubly preventive logic of both prevention and environmental crimes.

[72] Sul tema cfr. Chilois M., Riccardi M., *Profili penalistici dei modelli organizzativi. Ambiente interno e ambiente esterno: interferenze relative al catalogo "231"*, in *Diritto della Sicurezza sul Lavoro*, 1, 2023, 65-94.
[73] More extensively on the topic, Di Landro A., *La responsabilità per l'attività autorizzata nei settori dell'ambiente e del territorio. Strumenti penali ed extrapenali di tutela*, Giappichelli, Turin, 2018.
[74] Cass. 27 gennaio 2011, n. 19553.
[75] Cass. 22 marzo 2016, n. 14775, in *Foro italiano*, 2016, n. 5, 281; Cass. 19 febbraio 2015, n. 18073.
[76] Cass. 1° luglio 2009, n. 37840, in *C.E.D. Cass.*, rv. 245274; Cass. 10 novembre 2005, n. 2383, Losappio, there, rv. 232916. In the same terms, Cass 7 febbraio 2008, n. 10842, in *Cassazione penale*, 2009, 1, 201.

4. External risks and the new "work circumstances".

These conclusions do not change even if one recovers the jurisprudential orientation on the role assumed by exogenous risks in the occupational health and safety system. If these risks are foreseeable and correlated to the specific modalities of performance of the service, they must be considered as environmental risks inseparably connected to the productive activity. For this reason, they fully subject to the discipline of Article 2087 of the Civil Code[77] due to the constitutional importance attributed to the right to health (Article 32 of the Constitution) and the principles of fairness and good faith (Articles 1175 and 1135 of the Civil Code).

Furthermore, this approach has also been extended to insurance obligations to which case law has applied the provisions of Presidential Decree No. 1124 of 1965 "[...] given the constitutional importance of the right to health and the principles of fairness and good faith" (*alla stregua del rilievo costituzionale del diritto alla salute che dei principi di correttezza e buona fede*).[78]

On closer inspection, the impact of these sentences does not affect the environmental issue analysed here. Indeed, they exclusively concern accidents that occurred in sectors of activity (banking, health, private security, activities performed in high-risk geopolitical scenarios, etc.) where the external risks were specific and foreseeable in relation to the work performed. For this reason, they could not be considered as factors external to the production cycle, but as integral parts of the company organisation. However, for prevention purposes, it is difficult to compare with that which occurs in external, non-work environments, removed from the legal availability of the employer and functionally detached from a business organisation.

Moreover, it is possible to move from the prevention profiles (governed by Legislative Decree no. 81/2008) to the insurance profiles (governed by Presidential Decree no. 1124 of 1965). Even in this field, it seems difficult to hypothesise that the notions of "job circumstances" and "work cause" governed therein can justify the extension of INAIL's insurance obligation to the external environment and the people who inhabit it. As reiterated by case law, "work circumstances" are all the conditions (including environmental ones) in which the work activity takes place and in which there is an inherent risk of harm to the worker. This is relevant regardless of whether it comes from the production apparatus, from third parties or the worker's own facts and situations (with the sole limit of the so-called 'elective risk').[79] Accordingly, the employer's liability for events occurring on the "job circumstances" is not to be considered from the point of view of the mere material objectivity of the same. This liability must be examined in relation to all the circumstances of time, place

[77] *Ex plurimis* Cass. 20 April 1998, no. 4012; Cass. 6 September 1988, no. 5048; Cass. 17 July 1999, no. 7768; Cass. 8 April 2013 no. 8486; Cass. 11 April 2013. no. 8855. In doctrine see Giovannone M., *Attività criminosa di terzi e obblighi prevenzionistici: i profili di responsabilità datoriale e il ruolo della security aziendale*, in *Diritto delle relazioni Industriali*, 4, 2013, 1150-1156; Giuliani A., *La sicurezza nel lavoro bancario. Due ipotesi tipiche: il rischio da attività criminose e lavoro a videoterminale*, in Tiraboschi M., Fantini L. (eds.), *Il Testo Unico della salute e sicurezza sul lavoro dopo il correttivo (d.lgs. n. 106/2009)*, Giuffrè, Milan, 2009, 871-883.

[78] As of Cass. 20 April 1998, no. 4012.

[79] Cass. 13 Maggio 2016, no. 9913 as well as, *ex plurimis*, Cass. 27 Febbraio 2002, no. 2942; recently, Cass. 23 Luglio 2012, no. 12779.

and environment connected to the work activity performed. It can take on peculiar connotations such as to qualify it more or less differently from other forms of common liability and make it fall within the scope of the prevention regulations.[80] Therefore, the normality and typicality of the risk take on a decisive value for the purposes of the existence of the prevention obligation and the related liability.

5. Concluding reflections.

In light of what has been said so far, there is no doubt that the environmental issue finds its precise and problematic field of investigation in labour law. It makes it legitimate to ask whether environmental protection thrusts the employer's obligation to protect health and safety at work beyond the confines of the company and the organisation of work.

Consequently, it is necessary to highlight the diversity between preventive safeguards and environmental protection clarified above, as well as the inevitable constitutional balancing[81] of health assets, the environment, and the freedom of economic initiative. Therefore, it is not difficult to deduce that the introduction of environmental protection in Article 41 of the Constitution does not alter the subjective and objective scope of application of the preventive obligation governed by Article 2087 c.c. and Legislative Decree No. 81/2008.

On the other hand, it is worth remembering how, long ago, the company and the workers were called upon to make their contribution to the process of incorporating environmental protection among the collective interests. On the side of regulation techniques, this objective can well be achieved by exploiting the clear link between *i)* the company preventive management, *ii)* the "*green*" reorganisation of the production system and *iii)* the participatory regulation of risk by workers and their representatives.[82]

From this point of view, the prevention discipline can have a "pulling effect" to stimulate the scientific debate and operational practice in two important directions.

From an employer and managerial point of view, the logic of good organisation and corporate social responsibility is imposed. The prevention discipline can urge the adoption of organisation and management models and integrated environmental and safety management systems. Secondly, in the context of the new types of risk and the sustainable transition, it can promote the design of specialist training and information paths for workers, trade union and safety representatives. These plans must be capable of broadening their knowledge and skills and stimulating greater ecological awareness.

On the side of workers' representatives, it is necessary to turn the trade union towards a participatory model in the sustainable management of the enterprise. This objective can be

[80] In this sense, see Cass. 17 Dicembre 1998, no. 12652, and, more recently, Cass. 28 Luglio 2004, no. 14287; Cass. 04 Agosto 2005, no. 16417.
[81] On this theme see Zoppoli L., nt. (53).
[82] On the need to proceed in this direction, Zbyszewska A., *Labor law for warming world: Exploring the interSections of work regulation and environmental sustainability: An introduction*, in *Comparative Labor Law & Policy Journal*, 40, 1, 2018, 2.

achieved through a serious qualification/re-qualification of trade union representatives[83] and the use of (first and second level) collective bargaining, also on these thematic areas that are bound to impact on the company responsibility.

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[83] On the need for strong professionalisation of company representations in general, as well as in health and safety, see Ciucciovino S., *Il quadro italiano*, in Ciucciovino S., Marchiori M. (eds.), *Le pratiche partecipative per la tutela della salute e della sicurezza. Il ruolo del Rappresentante dei Lavoratori per la Sicurezza nel settore dell'igiene ambientale*, Ediesse, 2017, 54. The European scenario offers numerous suggestions on the ability of trade unions to intercept the training needs of representatives underlying the challenges posed by the green transition. Among them, is the guide 'Green Workplaces - a guide for union representatives' published by the ETUC in 2012. In addition, training initiatives on the subject addressed by trade union organisations to their representatives are multiplying. An interesting example is the training event "Greening our workplaces – 'green skills' for trade unionists" organised in 2021 by the British Trade Union Congress – TUC, available at https://www.tuc.org.uk/events/greening-our-workplaces-green-skills-trade-unionists-0.

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