

## **‘Sustainable Public Order’ and Private Contract Law**

The concept of sustainable development, initially linked to environmental preservation, has evolved over time. It currently encompasses a wider set of principles revealing an evolution of the relationship between ‘person’ and ‘market’. The Sustainable Development Goals of the UN 2030 Agenda impose rational use of shared resources, stimulating all economic actors to contribute to the process of sustainable development. Art. 3 TUE establishes an European internal market based on sustainable development and according to Art. 41 of the Italian Constitution private economic initiative cannot threaten health and environment. In this context, Art. 41 requires to the legislator to establish appropriate programs and controls so that public and private economic activity can be directed and coordinated to achieve social and environmental goals. However, public-private partnership and the private sector overall can help in fostering the green transition.

In the field of private contract law, under the new regulatory framework, some scholars are discussing about the possibility of functionalizing contractual autonomy in order to achieve “environmental sustainability” goals, through Article 1323 (2) of Civil Code. According to these scholars, a contract could be considered not ‘deserving’ of protection by the legal system when it does not achieve the objectives of sustainable development.

This approach may have some flaws. Indeed, it obstructs the traditional view of the contract as an instrument of exchange. Additionally, it affirms a model of negotiation that is always functional to the satisfaction of social and environmental needs, whereas individual economic interests can not be neglected. Furthermore, recent rulings by the Supreme Court actually show that Article 1322 (2) of the Italian Civil Code is not an instrument for ‘functionalizing’ the contract. Rather, it represents a tool for the judges to sanction the party’s abusive behavior during the prodromal phase of the agreement.

Consequently, it would be appropriate to offer another perspective that is suitable for enhancing the principles of sustainability within private contract law.

It is necessary to start from the observation that the principle of sustainable development, as outlined by the European and Italian legislator, has also shaped the structure of the market. The new principle of sustainable development has created a new system based on new values.

The regulations on consumer law, for example, provides new content in coordination with the demands of sustainability, implementing circularity in the production cycle, and, most importantly, implementing a consumption that respects the need for recovery and recycling of the good (EU dirr. 2019/770 and 2019/771). The EU legislation also incentivizes companies to offer financial products linked to sustainability rating (ESG). The goal is to strengthen investor confidence. The European Union is working to integrate sustainability considerations into the regulatory framework through the creation of a common rating system for sustainable economic activities and through the creation of a “common language” to clearly define what can be considered sustainable activities.

Even the regulation of certain contracts (deriving from European Union law) shows that the principle of sustainable development is reshaping the system. For example, regarding Green Public Procurement, the new rules require that the evaluation of the offer must no longer be based on purely economic criteria, but also on qualitative aspects, including environmental and social ones. In addition, regarding the Green Franchising, the regulation requires the franchisors to make their know-how available to affiliate in terms of reducing pollutant emissions and foresee compliance by affiliates with certain ecological standards in the codes of conduct. Finally, the recent European Commission proposal to amend Directive 2005/29/EC confirms the will of the legislator to create a new economic

system based on the principle of sustainability. The objective is to update the legislation on unfair commercial practices by strengthening consumer rights and, at the same time, empowering them in the green transaction, allowing them to make informed and environmentally friendly purchasing choices.

In general terms, the evolution of legislative policy shows a weakening of liberal principles (like competition and contractual freedom) in favor of the introduction of new rules that are aimed at implementing the principle sustainable development. This transition posits sustainability as a central paradigm within the market.

For civil law scholars the concept of “sustainable market” means that the legislator has no longer the (only) objective of removing obstacles to the free functioning of the market, but also has the purpose to build a sustainable economy.

The ‘sustainable’ market requires scholars of civil law to research the tools that can safeguard the entire system without suppressing the traditional objectives of the European legislator (promotion of competition and freedom of trade).

In this scenario, ‘economic public order’ can be used an efficient tool to balance the different principles of the new system. This instrument could make it possible to harmonize economic activities with sustainability, preventing economic relations from undermining the fundamental values of the new political system.

Indeed, ‘Public order’ is usually used as an ‘external’ limit to contractual autonomy. Using this tool it would possible for the Courts to prevent agreements from subverting the fundamental values of the new social order, without necessarily ‘functionalizing’ contracts.

This proposal would promote a concept of ‘public order’ rooted in legal reasoning and historical references, such as the Napoleonic Code, which emphasized “law’s reason that limits contractual freedom”. This approach would not seek to undermine private initiative but would only aim to prevent it from violating the sustainability values recognized by the legal system as essential for contemporary society. In an era of reduced state intervention, ‘economic public order’ would become essential to protect sustainable development principles while allowing economic initiative to flourish within predetermined constraints. It ensures private relationships respect the values deemed essential for society’s functioning by the State.

Ultimately, these reflections would encourage to consider the principle. Of sustainable development not merely as a merit benchmark but as a limit on individual autonomy in an economic sector where full freedom of action is acknowledged. This approach could demonstrate private contract law adaptation to evolving social demands through the institution of ‘economic public order’, ensuring alignment with sustainability principles.