



The Impact of Contractual Energy Sustainability on Vulnerable Persons and on Market Regulation

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Abstract

The relevance of the contract as an effective regulation of the energy market and protection of human rights is being increasingly highlighted. Sustainability is a specific condition that all activities must meet to ensure the equitable development of present and future generations. Consequently, the principle of sustainability is now an essential component of corporate due diligence, negotiating relationships in the market, and consumer behaviour. Therefore, it is imperative to analyse how the contract can facilitate sustainable development, contribute to society, and act as an instrument to support vulnerable people.

Key words

Contract, Energy Market, Sustainability, Vulnerable Consumers.

I. Sustainability between the Protection of the Individual and the Environment. Introduction

The inseparability of protecting the individual and the environment¹ is increasingly evident within the energy market, where contractual models are more and more aligned with the logic of sustainability and social utility² are emerging.

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¹ N. Lipari, 'Introduzione', in M. Pennasilico ed, *Contratto e ambiente. L'analisi "ecologica" del diritto contrattuali* (Napoli: Edizioni Scientifiche Italiane, 2016) 16-17; A. Lepore, 'Principio di solidarietà e autonomia negoziale nel sistema giuridico italiano' *Annali della Facoltà di giurisprudenza dell'Università di Camerino*, 9, 4 (2020).

² A. Camedda, 'Vulnerability and Sustainability in the Electricity Market' *Rivista trimestrale di diritto dell'economia*, 543 (2022); T. Favaro, *Regolare la «transizione energetica»: Stato, Mercato, Innovazione* (Milano: Cedam, 2020), 24; G. Perlingieri, '«Sostenibilità», ordinamento giuridico e «retorica dei diritti». A margine di un recente libro' *Foro napoletano*, 102 (2020).

Sustainability is a specific condition that every public or private activity must meet to ensure development and growth for present and future generations.³

The need then arises to remodel the contract on the basis of the new economic, social and environmental requirements so that the dynamic continuity of its function for the realization of the interest of the parties can be satisfied.⁴

The contract is liable to change due to the variability of relationships and in relation to market-wide events. In this perspective, one can no longer come to identify hypotheses of invalidity of the contract on the basis of a statically determined judgement, but rather in relation to the suitability of its function in realizing the interests underlying the concrete case.⁵

The renewed analysis of the contract, along with the changing energy behaviour of all market players,⁶ requires that every choice is sustainable and fits into a process of energy production and that safeguards people's well-being.

Negotiation agreements must consider various subjective legal situations such as free business, the right of access to energy,⁷ the protection of ecosystems, the dignity of the individual, the right not to be discriminated against, etc.

Therefore, it is essential to create contractual content where the freedom of businesses does not hinder the values of the individual. Instead, it should help rebalance the different positions of the contracting parties and contribute to the proper functioning of the market sector in which the contract functions.⁸

³ A. Jannarelli, 'Principi ambientali e conformazione dell'autonomia negoziale: considerazioni generali', in M. Pennasilico ed, *Contratto e ambiente. L'analisi "ecologica" del diritto contrattuali* (Napoli: Edizioni Scientifiche Italiane, 2016), 25.

⁴ C.M. D'Arrigo, 'Il controllo delle sopravvenienze nei contratti a lungo termine tra eccessiva onerosità e adeguamento del rapporto', in R. Tomassini ed, *Sopravenienze e dinamiche di riequilibrio* (Torino: Giappichelli, 2003), 491.

⁵ A. Jannarelli, n 3 above, 32-33.

⁶ R. Caterina, 'Psicologia della decisione e tutela del consumatore' *Analisi giuridica dell'economia*, 4 (2012); Id, 'Architettura delle scelte e tutela del consumatore' *Consumatori, Diritti e Mercato*, 73-79 (2012).

⁷ The European Pillar of Social Rights Action Plan, no 20 'Access to essential services': 'Everyone has the right to access essential services of good quality, including water, sanitation, energy, transport, financial services and digital communications. Support for access to such services shall be available for those in need', available at <https://op.europa.eu/webpub/empl/european-pillar-of-social-rights/en/> (last visited 21 June 2024).

⁸ On sustainability and human rights, see P. Benedek, K. De Feyter and F. Marrella, *Economic Globalization and Human Right* (Cambridge: Cambridge University Press, 2007), 93; E. Capobianco, 'Globalizzazione, mercato, contratto' *Persona e mercato*, 3, 11-19 (2017); M. Zarro, 'Tutela dell'ambiente e responsabilità dell'impresa nella recente

II. Corporate Sustainability Due Diligence and Sustainable Consumer Choices. The Tightening of Taxation as a Measure for the Implementation of Environmental Policy and Human Rights

By contributing to the regulation of concrete cases, the contract becomes an instrument for realizing both individual and general interests. It merges the open and competitive market structure with justice and solidarity to improve people's well-being.

Directive 2024/1970/EU⁹ introduces due diligence requirements for companies to achieve sustainability goals across all sectors of the economy.

However, the duty of companies to implement due diligence in their operations is not merely a sanction for violating the sustainability principle; it is a requirement to prevent negative environmental outcomes and ensure effective protection for people.

Additionally, the proposal for a European regulation on improving the internal energy market seeks to improve investment conditions for companies pursuing decarbonization paths.¹⁰ At the same time, it gives consumers, who are seen as the pivotal element

proposta di direttiva sulla due diligence aziendale' *Rassegna di diritto civile*, 1219 (2024); A. Beckers, 'The Invisible Networks of Global Production: Re-Imagining the Global Value Chain in Legal Research' 95 *European Review of Contract Law* (2020).

⁹ European Parliament and Council Directive 2024/1760/EU of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L1/58.

¹⁰ See Commission Staff Working Document, 14 March 2023 SWD(2023) 58 final. Among the different forms of support for the installation of plants for the production of energy from renewable sources, see 'Feed-in tariffs (FITs)', Fixed feed-in premiums (FIP), Block Exemption 2014 (GBER), 'Linee Guida sugli aiuti di Stato per la protezione dell'ambiente e l'energia (EEAG)', 'Sliding feed-in premiums o contratti per differenza «unilaterali» (CfD)'. On this point, see C. Regali Costa Do Amaral, 'La feed-in-tariff in UE: la Corte afferma la "non obbligatorietà" dei regimi di sostegno nella promozione delle energie rinnovabili' *DPCEonline*, 4, 3057 (2019); Case C-180/18, C-286/18, C-287/18 *Agrenergy srl, Fusignano Due srl v Ministero dello Sviluppo Economico*, Judgment of 11 July 2019, available at www.curia.europa.eu; M.T. García Alvarez and R.M. Mariz Perez, 'Analysis of the Success of Feed-in Tariff for Renewable Energy Promotion Mechanism in the EU: Lessons from Germany and Spain' *Procedia Social and Behavioral Sciences*, 65, 52 (2012); L. Ruggeri, 'Diritto della transizione e sostenibilità: tra tutela del mercato e protezione della persona', in Id and A.E. Caterini eds, *Produzione e consumo sostenibili tra politiche legislative e prassi adattive* (Napoli: Edizioni Scientifiche Italiane, 2023), 32; OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (Paris: OECD Publishing, 2023), available at <https://doi.org/10.1787/81f92357-en> (last visited 24 June 2024). The OECD *Guidelines for Multinational Enterprises on Responsible Business Conduct* (the *Guidelines*) are recommendations jointly addressed by governments to multinational enterprises to enhance the business contribution to sustainable development and address adverse impacts associated with business activities on people, planet, and society.

of the future productive energy system, a central and increasingly active role rooted in sustainability. This should guide all users towards contractual choices that can be tailored to their specific energy needs. Therefore, specific measures must be taken to tackle economic vulnerability and protect people who are not adequately protected by unsustainable operating practices and excessively high energy prices.

Sustainable business due diligence and consumer behaviour can also be mediated through mechanisms such as specific taxation. Of particular interest in this context is a recent decision of the Court of Justice¹¹ concerning a Spanish company's request for exemption from double taxation on the purchase of coal for energy production and sale to consumers.

The Court noted that the taxation of coal used for energy production, introduced by legislation in domestic law, must always be assessed in relation to environmental sustainability and the protection of persons. In fact, the need to foster the goals of decarbonizing the energy system, protecting human rights, and containing prices to mitigate consumer vulnerability can never allow a reduction in taxation, not even through broad interpretations of each Member State's domestic legislation. To do otherwise would deprive the 'specific purpose' of taxation, which is to promote social, economic, and environmental sustainability.

Drawing on previous judgments, the Court identified the 'specific purpose' not as the economic needs usually underlying taxation, but as the goal of 'encouraging the use of energy that does not harm people or the environment'.

Given this requirement, taxation should be even more stringent if, based on the assessment of the concrete case, there is a direct link between the use of taxation and its 'specific purpose'. The tightening of taxation must therefore be considered correct and should be promoted whenever it contributes to the effective implementation of environmental policy and the protection of the individual.

According to the Court, this effectively steers the behaviour of companies towards more sustainable operating systems. Consequently, consumer behaviour is also directed towards energy consumption choices from renewable sources. Even through taxation, sustainability becomes a fundamental part of corporate

¹¹ Case C-833/21 *Endesa Generación SAU v Tribunal Económico Administrativo Central*, Judgment of 22 June 2023, available at www.curia.eu; J. Tribout, 'Fiscalité, taxation des produits énergétiques et de l'électricité' *Europe*, 8-9, 305 (2023), Comm. (FR).

due diligence in business activities and in the resulting negotiations. If the change in the manner in which businesses produce goods and services is set in the context of raising awareness of sustainable development, every economic activity is transformed to respect human rights and biodiversity.¹²

III. The Contract as a Possible Vehicle for the Realization of Sustainable Development

Art 41 of the Italian Constitution prohibits private economic initiatives that conflict with social utility or that are carried out in such a way as to harm security, freedom, human dignity, health, and the environment.¹³

It is necessary to analyse how the contract becomes a vehicle for the realization of sustainable development, sociality, and an instrument to support vulnerable persons. The interests to be protected are diverse and integrate aspects that tend both towards the smooth functioning of the energy system and the realization of intergenerational well-being.¹⁴

¹² M. Libertini, 'Sulla proposta di Direttiva UE su Dovere dei diligenza e responsabilità delle imprese' *Rivista delle società*, 325-335 (2021); A.M. Paces, 'Sustainable Corporate Governance: The Role of the Law', in D. Busch, G. Ferrarini and S. Grünewald eds, *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets* (London: Palgrave Macmillan, EBI Studies in Banking and Capital Markets Law, 2021), 151-174. On the contractual instrument for human rights and environmental protection as regards business activities and sustainability and corporate social responsibility, see L. Valle and M.C. Marullo, 'Contract as an Instrument Achieving Sustainability and Corporate Social Responsibility Goals' 24 *International Community Law Review*, 100-123 (2022).

¹³ F. Bertelli, *Le dichiarazioni di sostenibilità nella fornitura di beni di consumo* (Torino: Giappichelli, 2022), 2; G. Scarselli, 'I nuovi artt. 9 e 41 Cost.: centralità dell'uomo e limiti di revisione costituzionale', available at www.giustiziainsieme.it (last visited 26 June 2024); D. Bedford, 'Human Dignity in Great Britain and Northern Ireland', in P. Becchi and K. Mathis eds, *Handbook of Human Dignity in Europe* (Cham: Springer, 2018), 8-15; S.G. Clark, E.J. Andrews and A.E. Lambert, 'Human Dignity and Ecological Identity: A Case by Norman Michael Kearney' *Policy Sciences and the Human Dignity Gap. Natural Resource Management and Policy* (Cham: Springer, 2024), 58.

¹⁴ United Nations 1987, Report of the World Commission on Environment and Development. Our Common Future, the so-called Brundtland Report, available at <https://www.are.admin.ch/are/de/home/medien-und-publicationen/publikationen/nachhaltige-entwicklung/brundtland-report.html>; Resolution A/RES76/300, The human right to a clean, healthy and sustainable environment, which recognizes that 'the human rights implications of environmental damage are felt by individuals and communities around the world, the consequences are felt most acutely by women and girls and those segments of the population that are already in vulnerable situations, including indigenous peoples, children, older persons and persons with disabilities'.

According to the principle that ‘no-one is left behind’ introduced by the Next Generation EU,¹⁵ combating environmental degradation is crucial, as its harmful effects affect people and to an even greater extent those in vulnerable situations.

The concept of vulnerability provided for in Art 28, Directive 2019/944/EU, and Art 11, Legislative Decree 2021/210, can be related to individuals’ conditions of hardship. These are not exhausted in predetermined hypotheses but must be identified from time to time by the parties involved in shaping the contractual content.¹⁶

This perspective casts a new light on the negotiation relationship in which the weak condition of the contracting party is traditionally traced back to the consumer’s lack of information, because it is now enriched by different elements pertaining to solidarity and personalism.

Even non-economic aspects, such as solidarity, sustainability and vulnerability, converge into negotiating relationships, overcoming the traditional logic of exchange, and serving as vehicles to safeguard general interests. Environmental sustainability may not be the explicit objective of the contract but it nevertheless informs the underlying purpose of promoting and protecting the values that guide negotiating autonomy.¹⁷

The practice of recourse to bargaining and private autonomy is becoming increasingly prevalent across a diverse range of contexts, to the extent that a ‘contractualization of society’ can be observed. Bargaining is increasingly used to regulate economic activity, justice, labour, the activities of the public administration, etc.

¹⁵ Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions, ‘Europe’s Moment: Repair and Prepare for the Next Generation’ COM(2020) 456 final, 27 May 2020, available at eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52020DC0456&rid=10 (last visited 22 June 2024).

¹⁶ See A. Fusaro, ‘Il negozio della persona vulnerabile e il linguaggio delle invalidità’ *Ars Interpretandi*, 39 (2019). On this point, see L. Ruggeri and M. Giobbi, ‘Vulnerabilità economica tra diritto emergenziale e contrattuale’ *Actualidad Juridica Iberoamericana*, 340 (2020). See also A. Gentili, ‘La vulnerabilità sociale. Un modello teorico per il trattamento legale’ *Rivista critica di diritto privato*, 41 (2019); E. Battelli, ‘I soggetti vulnerabili: prospettive di tutela della persona’ *Diritto della famiglia e delle persone*, 283 (2020), Id, ‘Un contributo alla riflessione sulle situazioni di vulnerabilità e di debolezza contrattuale nella prospettiva dei limiti dell’autonomia privata’, in M. Barcellona et al, *Per i cento anni dalla nascita di Renato Scognamiglio* (Napoli: Jovene, 2022), I, 97; F. Rossi, ‘Forme della vulnerabilità e attuazione del programma costituzionale’ *Rivista AIC*, 1 (2017).

¹⁷ A. Jannarelli, n 3 above, 20.

A different configuration of contractual relationships arising from the market is envisaged to more effectively satisfy the interests of the parties involved. Similarly, the notion of consumer is broadened, which energy market legislation¹⁸ seems to extend to an increasingly diverse, active and dynamic plurality of subjects that must be identified in the context in which they operate,¹⁹ and which goes beyond the vision of the consumer as a 'monolithic' category.²⁰

IV. Private Autonomy, Contract, the Energy Market. Soft Law

One of the increasingly important aspects of the contract is its suitability to generate economic benefits also by means of activities that are not directly patrimonial, but nevertheless compatible with the full development of the person.²¹

If the fundamental values of the person, equality and the social dimension²² come first in energy negotiations,²³ it must also be taken into account that the content is determined by heterogeneous regulation that is no longer only referable to law, but also to so-called soft law. For example, the breadth of the powers delegated to the ARERA authority allows for regulation consisting of the exercise

¹⁸ European Parliament and Council Directive 2024/1760/EU of the of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, n 9 above.

¹⁹ L. Ruggeri, 'Consumatore e prosumerismo energetico nel quadro regolatorio europeo' *Actualidad Jurídica Iberoamericana*, 16 bis, 3292 (2022); N. Reich, H.W. Micklitz, P. Rott and K. Tonner, *European Consumer Law* (Cambridge: Intersentia, 2014), 32-41; V. Rizzo, 'La riforma del codice del consumo nel prisma delle fonti' *Le Corti ombre*, 412 (2015).

²⁰ L. Ruggeri, 'Consumatore e prosumerismo energetico nel quadro regolatorio europeo', n 19 above, 418.

²¹ P. Perlingieri, 'Nuovi profili del contratto', in Id, *Il diritto dei contratti fra persona e mercato* (Napoli: Edizioni Scientifiche Italiane, 2003), 418.

²² On this point, see M. Angelone, 'La modernizzazione delle norme europee sulla protezione dei consumatori: novità e prospettive in materia di clausole vessatorie', in E. Bettini and D. Tondini eds, *Un nuovo rinascimento per l'Europa: il ruolo della ricerca e della formazione. Atti del V Forum internazionale del Gran Sasso* (Teramo: Diocesi di Teramo-Atri, 2023), 621-628; G. Alpa, *Diritto privato europeo* (Milano: Giuffrè: 2016), 502; L. Di Nella, 'La scuola di Friburgo o dell'ordoliberalismo', in N. Irti ed, *Diritto ed economia. Problemi e orientamenti teorici* (Padova: Cedam, 1999), 171; E. Capobianco, n 8 above, 1117, where the author notes that the market is no longer seen merely as a place intended for the realization of profit, but rather as a normative space in which personalistic and solidaristic principles, rules and values, the centrality of the person and the recognition of human rights take on relevance.

²³ See, M. Angelone, n 22 above, 632. On 'sustainable globalisation' and human rights see P. Perlingieri, *Mercato, solidarietà e diritti umani*, in Id ed, *Il diritto dei contratti tra persona e mercato* (Napoli: Edizioni Scientifiche Italiane, 2003), 239.

of regulatory powers, which intervene in different phases of the negotiation agreement.

Thus, the regulation of the energy authority defines the process of contract formation and conclusion, establishing what behavioural obligations or clauses are to be included.²⁴ In addition, the guidelines of leading energy consumer associations and energy service providers also contribute to the content of the contract. These 'operative rules'²⁵ help shape the content of the negotiation relationship and influence the contractual choices of the contracting parties. The inclusion of clauses in contracts that regulate their production and distribution activities has become increasingly common for companies operating internationally. These clauses often refer to the codes of conduct that companies themselves adopt, in accordance with the soft-law rules issued by international organizations or conventions pertaining to specific economic and social sectors.²⁶

When such clauses are included in the contract, they become binding on all parties involved, thereby extending their impact across the entire supply and distribution chain of companies, and the community.

Contracting then assumes the role of filling regulatory gaps in the protection of people and the environment, which still exist in, for example, developing countries.

In this way, the contract serves to regulate legal relationships that transcend the individual legal systems of countries.²⁷ It is in this context that the contractual instrument takes on a precise role in the protection of human rights.²⁸

²⁴ M. Francesca, 'Bene-energia. Abusi di mercato e nuovi domini' *Nuovo diritto civile*, 26 (2023); A. Ciatti Càimi, 'Poteri di regolazione delle Authorities, sopravvenienze normative e rapporti di durata?', in P. Perlingieri, S. Giova And I. Prisco eds, *Conformazione del contratto e Autorità indipendenti nel diritto italo-europeo, Atti del 16° Convegno Nazionale SISDiC* (Napoli: Edizioni Scientifiche Italiane, 2023), 199; P. D'Addino Serravalle, 'Tutela del consumatore e servizi essenziali', in Id ed, *Mercato ed Etica* (Napoli: Edizioni Scientifiche Italiane, 2009), 322.

²⁵ Decreto CACER and TIAD. Regole operative per l'accesso al servizio per l'autoconsumo diffuso e al contributo PNRR, Allegato 1, in gse.it/servizi-per-te/autoconsumo/gruppi-di-autoconsumatori-e-comunita-di-energia-rinnovabile.

²⁶ D.L. Shelton, *Advanced Introduction to International Human Rights Law* (Cheltenham-Northampton: Elgar, 2014), 142; W. Kalin and J. Kunzli, *The Law of International Human Rights Protection* (Oxford: Oxford University Press, 2019).

²⁷ L. Valle, *Il contratto e la realizzazione dei diritti della persona* (Torino: Giappichelli, 2020), 348-383.

²⁸ A. Bonfanti, *Imprese multinazionali, diritti umani e ambiente* (Milano: Giuffrè, 2012), 251.

The contract is no longer just an instrument for regulating the interests of private parties, but also becomes a means of ‘integrating the sources of law’ in all economic and social aspects.

However, even if the ‘second-level regulation’ contributes to the definition of the content of the contract, it does not seem to restrict or limit the negotiating autonomy of the parties. Rather, there is an increasing integration of the will of the parties, of secondary-level legislation and regulation into the content aspects of the contractual agreements.²⁹

In this context, this renewed perspective reshapes the sources that define energy contractual relationships, where negotiating autonomy now plays a crucial role.³⁰ In a globalized market characterized by a plurality of regulatory techniques, contractual relationships increasingly emerge as a synthesis of both negotiating autonomy and heteronomy.³¹ The heteronomy of regulatory techniques, including the judgments of the European Court,³² aims is to guide the behaviour of the parties in diversified energy production towards outcomes that satisfy a wide range of interests.

Thus, the negotiated agreement that contributes to the regulation of concrete situations becomes an instrument designed to meet both individual and general interests.³³

The relationship between contracts and fundamental rights of the individual must be considered not only in the context of the energy market but also in the context of new technologies, access to new utilities arising from technological progress, medical practices,

²⁹ See, C. Solinas, *Il contratto «amministrato». La conformazione dell’operazione economica privata agli interessi generali* (Napoli: Edizioni Scientifiche Italiane, 2018), 59.

³⁰ On this point, see P. Perlingieri, *Diritto dei contratti e dei mercati* (Napoli: Edizioni Scientifiche Italiane, 2003), 878. See also N. Lipari, *Le fonti del diritto*, (Milano: Giuffrè, 2008), 87; G. Parodi, ‘Le fonti del diritto. Linee evolutive’, in A. Cicu et al eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2008), 87; G. Morbidelli, ‘Il principio di legalità e i c.d. poteri impliciti’ *Diritto amministrativo*, 703 (2007); C. Carrera, ‘Autonomia contrattuale e potere regolamentare dell’autorità per l’energia elettrica ed il gas’ *Urbanistica e appalti*, 1120 (2013). On this point, see E. del Prato, ‘Ragionevolezza e bilanciamento’, in F. Manolita, *Diritto comunitario e sistemi nazionali: pluralità delle fonti e unitarietà degli ordinamenti* (Napoli: Edizioni Scientifiche Italiane, 2010), 198; F. Casucci, *Il sistema giuridico «proporzionale» nel diritto privato comunitario* (Napoli: Edizioni Scientifiche Italiane, 2001), 378; S. Polidori, ‘Principio di proporzionalità e disciplina dell’appalto’ *Rassegna di diritto civile*, 686 (2004).

³¹ F. Longobucco, ‘La contrattazione ecologicamente conformata nell’ottica del diritto civile: brevi note’, available at <https://www.ambientediritto.it> (last visited 24 June 2024).

³² Case C-833/21, n 10 above.

³³ See P. Perlingieri, ‘L’incidenza dell’interesse pubblico’ *Rassegna di diritto civile*, 937 (1986); K. Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (New York: Routledge, 2017), 75.

scientific research, etc. Thus, the contractual instrument lends itself to be used more flexibly and for broader regulatory purposes than just the economic aspects of the market.³⁴

To achieve a fair composition of contractual content, it is essential to balance the economic aspects of the market with values such as human dignity, equality, and social cohesion.³⁵ It is crucial to prevent any unfair or discriminatory treatment between contracting parties, whether individually or collectively.

The provisions of European and domestic legislation on the energy market are designed to prevent unfavourable, exclusionary, or restrictive contractual conditions that could undermine the exercise of private autonomy. Such legislation aims to avoid discriminatory effects that could prevent or in any case limit access to energy and energy services to certain categories of consumers.³⁶

The right to non-discrimination is also gradually being included among subjective legal situations and is one of the aspects to be considered in the bargaining process.³⁷ This allows for the identification of not only economic elements in the bargaining process but also aspects pertaining to more flexible management in pursuing the interests of the parties and the community. It also facilitates the implementation of the principle of sustainability but also social and environmental benefits.

³⁴ L. Valle, n 12 above, 357-360; M.R. Marella, 'Diritti della persona', in G. Amadio and F. Macario eds, *Diritto civile, norme, questioni, concetti* (Bologna: Il Mulino, 2014), I, 136; C. Mak, *Fundamental Right in European Contract Law, A Comparison on the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2008); C. Busch and H. Schulte-Nolke, *Fundamental Rights and Private Law* (Munich: European Law Publishers, 2011), 27; E. McKendrick, *Contract Law* (London: Palgrave Macmillan, 2009), 11; G. Resta, *Autonomia privata e diritti della personalità* (Napoli: Jovene, 2005); Id, *Dignità, persone, mercati* (Torino: Giappichelli, 2014); Id, 'Diritti fondamentali e diritto privato nel contesto digitale', in F. Caggia and G. Resta eds, *I diritti fondamentali in Europa e il diritto privato* (Roma: Tre Press, 2019), 117;

³⁵ M. Pennasilico, 'Ambiente e iniziativa economica: quale "bilanciamento"?' *Nuove leggi civili commentate*, 49 (2019).

³⁶ M. Barbera, 'Introduzione. Il nuovo diritto antidiscriminatorio: innovazione e continuità', in Id ed, *Il nuovo diritto antidiscriminatorio, il quadro comunitario e nazionale* (Milano: Giuffrè, 2007), XIX; D. Maffei, 'Il divieto di discriminazione', in G. De Cristofaro ed, *I «principi» del diritto comunitario dei contratti. Acquis communautaire e diritto privato europeo* (Torino: Giappichelli, 2009), 267; M. Grondona, 'Il diritto contrattuale, ovvero il diritto della fiducia. Premesse per una discussione', in A. Marchese ed, «Sul contratto», *Raccolta di scritti di presentazione del volume «Contratto» della collana «I tematici» dell'Enciclopedia del diritto* (Messina: University Press, 2023), 76.

³⁷ G. Carapezza Figlia, 'Il divieto di discriminazione quale limite all'autonomia contrattuale' *Rivista di diritto civile*, 1418 (2015).

These aspects characterize the new energy market context and, together with the objectives of social justice and solidarity, are aimed at enhancing individual and collective well-being.³⁸ This highlights the need to reconcile negotiating autonomy with the right of all consumers or stakeholders to have equal access to the energy market.³⁹

Equal participation in the market must not be affected, ensuring that access to energy is not hindered, particularly for vulnerable populations. It becomes essential to balance the different interests of the parties and to move beyond established production methods, through self-initiative that allows greater cooperation among all market players in the performance of the private and public functions of energy management.

What must be protected at all times are the interests of customers and the market, reflecting both the public and private aspects of regulation.⁴⁰

V. Final Remarks

Precisely for the purpose of market participation, active customers have the possibility of concluding a wide range of

³⁸ M. Angelone, n 22 above, 633; P. Perlingieri 'Le ragioni del mercato e le ragioni del diritto dalla Comunità economica europea all'Unione europea', in E. Caterini ed, *Il diritto dei consumi* (Napoli-Rende: Edizioni Scientifiche Italiane, 2009), IV, 9. See also A. Gambaro, 'I beni', in A. Cicu and F. Messineo eds, *Trattato di diritto civile* (Milano: Giuffrè, 2012), 183; L. Dell'Agli, 'L'accesso all'energia elettrica come diritto umano fondamentale per la dignità della persona umana' *Rivista giuridica dell'ambiente*, 713, (2007).

³⁹ G. Carapezza Figlia, *Il divieto di discriminazione e autonomia contrattuale* (Napoli: Edizioni Scientifiche Italiane, 2013), 1387; P. Femia, *Interessi e conflitti culturali nell'autonomia privata e nella responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 1996), 456; D. Maffei, *Offerta al pubblico e divieto di discriminazione* (Milano: Giuffrè, 2007), 401; Id, 'Il diritto contrattuale antidiscriminatorio nelle indagini dottrinali recenti' *Nuove leggi civili commentate*, 161 (2015); A. Gentili, 'Il principio di non discriminazione nei rapporti civili' *Rivista critica di diritto privato*, 207 (2009); P. Morozzo della Rocca, 'Gli atti discriminatori e lo straniero nel diritto civile', in Id ed, *Principio di uguaglianza e divieto di compiere atti discriminatori* (Napoli: Edizioni Scientifiche Italiane, 2002), 19; B. Troisi, 'Profili civilistici del divieto di discriminazione', in *Il diritto civile oggi. Compiti scientifici e didattici del civilista* (Napoli: Edizioni Scientifiche Italiane, 2006), 295.

⁴⁰ See, O. Cherednychenko, 'The Constitutionalization of Contract Law: Something New Under the Sun?' 3 *Electronic Journal of Comparative Law* (2008); J. Basedow, 'Foreword', in V. Trstenjak and P. Weingerl eds, *The Influence of Human Rights and Basic Rights in Private Law* (Switzerland: Springer, 2016), VI.

contracts,⁴¹ eg, plant leases, power purchase agreements,⁴² etc. Energy sharing can also be achieved through contractual schemes chosen by the parties that align with their shared interests and that may involve, for example, collaboration in production activities, the use of energy services, etc. Such bargaining has content that varies according to the interests that the parties seek to achieve. It is evident that the collective interest often takes precedence over the individual interest.

In this perspective, contracts become vehicles for the implementation of social demands and for safeguarding general interests. Agreements increasingly arise from public and private collaboration to achieve general interest goals.⁴³ For example, environmental protection is increasingly being pursued through contracts such as the Emission Reduction Purchase Agreements, which are designed as a mechanism to assist countries in achieving sustainability goals.⁴⁴

Therefore, contracting is also the main tool in administrative activities between public and private entities and municipalities, with the growing use of public-private partnerships as an example.⁴⁵

⁴¹ See A. Paudel et al, 'Peer to Peer Trading in a Prosumer Based Microgrid: A Game Theoretic Model' 8 *IEEE Transactions on Industrial Electronics*, 6087-6097 (2018); M. Meli, 'Autoconsumo di energia rinnovabile e nuove forme di energy sharing' *Nuove leggi civili commentate*, 655 (2020); T. Favaro, 'Può la tecnologia regolare? Blockchain e «scambio tra pari» di energia rinnovabile' *Rivista della regolazione dei mercati*, 309 (2019), available at <https://rivistadellaregolazioneideimercati.it>. See, V. Palmisano, 'Il Clean Energy Package e gli abilitanti normativi al modello peer to peer e allo smart contract. Un nuovo modello di energia decentrata e partecipata', in E. Bruti Liberati, M. De Focatiis and A. Travi eds, *Il teleriscaldamento, la blockchain e i contratti intelligenti* (Padova: Cedam, 2019), 88.

⁴² Art 15 bis, par 1, letter f, Proposal for a Regulation of the European Parliament and of the Council COM(2023) 148 final, 2023/0077 (COD).

⁴³ See, M. Maltoni, 'La fondazione di partecipazione: natura giuridica e legittimità' *Fondazioni di partecipazione*, I, *Quaderni della Fondazione Italiana per il Notariato*, 25 (2007); M.P. Chiti, 'La presenza degli enti pubblici nelle fondazioni di partecipazione tra diritto nazionale e diritto comunitario' *Quaderni della Fondazione Italiana per il Notariato*, 32 (2007).

⁴⁴ Clean Development Mechanism (CDM), defined in Art 12 of the Protocol, allows a country with an emission-reduction or emission-limitation commitment under the Kyoto Protocol (Annex B Party) to implement an emission-reduction project in developing countries, available at <https://unfccc.int/process-and-meetings/the-kyoto-protocol/mechanisms-under-the-kyoto-protocol/the-clean-development-mechanism> (last visited 24 June 2024).

⁴⁵ See L. Ruggeri, 'Ambiente e tecnologie: nuove sfide per la tutela della persona', 6 (2023), available at <https://ambientediritto.it>, where it is noted that the public-private dichotomy is destined for significant value convergence: the absence of central authorities capable of governing the transactions taking place has led to new ways of implementing legislative policies that may find their most successful prototype in the 2030 Agenda. See G. Fidone, 'Il Green Public Procurement nel diritto comunitario con particolare

Access to direct and shared use of energy for all individuals can thus be realized through negotiation structures that best suit the interests of the parties. The function of these contracts plays a crucial role in their identification and qualification.

A contract is outlined where its content is an expression of the autonomy of the parties, with its legal qualification linked to its intended function and characterized by solidarity purposes. The contract is increasingly characterized by greater complexity and includes elements that go beyond the traditional ones. In fact, new forms of private autonomy are being defined in the context of regulation shaped by a plurality of sources.

Private autonomy takes on a new and complex dimension that does not merely involve the participation of all contracting parties in drafting an agreement aligned with their interests. Instead, increased sharing and cooperation, particularly in access to energy, require contractual agreements that, through an articulated connection of regulatory measures,⁴⁶ take into account subjective, environmental, and societal aspects and that can redefine, in connection with market changes, the effects involving the interests of the parties, including those of future generations.⁴⁷ The heteronomy of contract regulation does not go as far as to undermine negotiating autonomy or to negate it.

More simply, it serves as the means for the formation of negotiation regulation and makes it a vehicle for upholding values such as safety, human rights and environmental protection, as provided for in Art 41, para 2 of the Italian Constitution.⁴⁸

The plurality of regulations and laws that shape and supplement the content of the contract affect the interest of the parties and transform the so-called typical negotiating models. The contract no longer has 'static' regulation but stands as a renewed synthesis of

riferimento alle nuove direttive appalti e concessioni', in G.F. Cartei and M. Ricchi eds, *Finanza di progetto e partenariato pubblico-privato. Temi europei, istituti nazionali e operatività* (Napoli: Edizioni Scientifiche Italiane, 2015), 223; C. Vivani, 'Appalti sostenibili, green public procurement e socially responsible public procurement' *Urbanistica e appalti*, 993 (2016).

⁴⁶ P.G. Biandrino, 'Tipi contrattuali e vincoli regolatori nel settore dell'energia' *rivistaregolazionemercati.it*, 145 (2015); G. De Nova, *Il contratto alieno* (Torino: Giappichelli, 2010), 2.

⁴⁷ See R. Senigallia, 'Per un'«ermeneutica del concetto di causa»: solidarietà «orizzontale» e contratto' *Juscivile*, 507 (2016); N. Lipari, "Spirito di liberalità" e "spirito di solidarietà" *Rivista trimestrale di diritto e procedura civile*, 9 (1997).

⁴⁸ On this point, see S. Zuccarino, *Il contratto «conformato» quale statuto normativo del mercato energetico* (Napoli: Edizioni Scientifiche Italiane, 2021), 186.

self-regulation and hetero-regulation⁴⁹ that must meet the criteria of reasonableness, proportionality, and subsidiarity,⁵⁰ and aspects of solidarity and environmental sustainability.⁵¹ Such bargaining is geared towards regulating the market and delineating the behaviour of the parties.

As a result, negotiating autonomy⁵² takes on a role aimed at satisfying a plurality of interests and also goes beyond the principle

⁴⁹ M. Angelone, *Autorità indipendenti e eteroregolamentazione del contratto* (Napoli: Edizioni Scientifiche Italiane, 2012), 117; P. Perlingieri, 'Economia e diritto', in Id, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 271; S. Polidori, 'Regole dei rapporti e regole del mercato: fra disomogeneità del quadro normativo e responsabilità dell'interprete', in P. D'Addino Serravalle ed, *Mercato ed etica* (Napoli: Edizioni Scientifiche Italiane, 2009), 354.

⁵⁰ G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 4; Id, 'Sul criterio di ragionevolezza', in C. Perlingieri and L. Ruggeri eds, *L'incidenza della dottrina sulla giurisprudenza nel diritto dei contratti* (Napoli: Edizioni Scientifiche Italiane, 2016), 30; G. Villanacci, *La ragionevolezza nella proporzionalità del diritto* (Torino: Giappichelli, 2020) 67; P. Perlingieri, 'Produzione, beni e benessere', in *Benessere e regole dei rapporti civili* (Napoli: Edizioni Scientifiche Italiane, 2015), 518; Id, 'Equilibrio normativo e principio di proporzionalità nei contratti' *Rassegna di diritto civile*, 334 (2001).

⁵¹ Corte costituzionale 20 July 2012 no 200, *Giurisprudenza italiana*, 673 (2013), where it points out that 'the quality of regulation conditions the actions of market operators'. It follows that an unjustifiably intrusive 'regulation' of economic activities, which is therefore unnecessary and disproportionate with respect to the protection of constitutionally protected goods, generates unnecessary obstacles to economic dynamics to the detriment of the interests of economic operators, consumers, and the workers themselves, and therefore ultimately damages social utility itself. On this point, see M. Imbrenda, 'Integrazione e conformazione del contratto: il ruolo delle autorità indipendenti', in E. Caterini et al eds, *Scritti in onore di Vito Rizzo. Persona, mercato, contratto e rapporti di consumo* (Napoli: Edizioni Scientifiche Italiane, 2017), 918.

⁵² See, F. Criscuolo, *Autonomia negoziale ed autonomia contrattuale* (Napoli: Edizioni Scientifiche Italiane, 2008), 43; T. Sica, 'Autorità indipendenti e autonomia privata: le soluzioni del Consiglio di Stato' *Giurisprudenza italiana*, 2501 (2019); M. Imbrenda, 'Asimmetria di posizioni contrattuali, contratto predisposto e ruolo delle Authorities', in P. Sirena et al eds, *I poteri privati e il diritto della regolazione. A quarant'anni da «Le Autorità private» di C.M. Bianca* (Roma; Roma Trepress, 2018), 485; A. Nervi, 'Il contratto come strumento di conformazione dell'assetto di mercato' *Europa e diritto privato*, 509 (2018); E. Capobianco, *Lezioni sul contratto* (Torino: Giappichelli, 2014), 16; M.R. Maugeri, 'Autorità indipendenti e contratto', in E. Del Prato ed, *Scritti in onore di Antonino Cataudella* (Napoli: Edizioni Scientifiche Italiane, 2013), II, 1314; R. Perez, 'Autorità indipendenti e tutela dei diritti' *Rivista trimestrale di diritto pubblico* 1, 118, 115-147 (1996); G. Bellantuono, 'Diritto europeo dei contratti e regolazione delle public utilities', in F. Cafaggi ed, *Quale armonizzazione per il diritto europeo dei contratti?* (Padova: Cedam, 2003), 60; M. Grondona, 'Auto-integrazione ed etero-integrazione: che cosa resta della distinzione?', in F. Volpe ed, *Correzione e integrazione del contratto* (Bologna: Zanichelli, 2016), 258; G. Napolitano and A. Zoppini, 'La regolazione indipendente dei servizi pubblici e la garanzia dei privati', in G. Gitti, *L'autonomia privata e le autorità indipendenti* (Bologna: Il Mulino, 2006), 126; F. Longo, 'Ragioni e modalità dell'istituzione delle Autorità indipendenti', in S. Cassese and C. Franchini eds, *I garanti delle regole* (Bologna: Il Mulino, 1996), 14.

of the relativity of the effects of the contract, which can no longer be configured as an exclusive instrument for regulating the individual interests of the parties. After all, it is on the basis of the principle of subsidiarity under Art 118, para 4 of the Constitution that everyone can take negotiating initiatives to regulate general interests.⁵³

Negotiated agreements thus become an instrument of discipline between the parties and the market, reflecting the bargaining process in contemporary society, which is increasingly permeated by sustainability and the protection of human rights.⁵⁴

⁵³ See P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti. Metodi e tecniche* (Napoli: Edizioni Scientifiche Italiane, 2020), I, 135. Id, '«Controllo» e «conformazione» degli atti di autonomia negoziale' *Rassegna di diritto civile*, 215 (2017); G. Carapezza Figlia, 'I rapporti di utenza dei servizi pubblici tra autonomia negoziale e sussidiarietà orizzontale' *Rassegna di diritto civile*, 462 (2017); P. Perlingieri and P. Femia, *Nozioni introduttive e principi fondamentali del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2004), 70; P. Femia, *Interessi e conflitti*, n 39 above, 134; A. Federico, *Autonomia negoziale e discrezionalità amministrativa. Gli «accordi» tra privati e pubbliche amministrazioni* (Napoli: Edizioni Scientifiche Italiane, 1999), 39; G. Oppo, 'Diritto privato e interessi pubblici' *Rivista di diritto civile*, 25 (1994); L. Ruggeri, n 45 above, 6-7.

⁵⁴ See P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2020), IV, 196. On this point, see C. Solinas, 'Autonomia privata ed eteronomia nel servizio di fornitura di energia elettrica. Forme e strumenti della regolazione del mercato' *Contratto e impresa*, 1369 (2010); A. Federico, 'Integrazione del contratto e poteri regolatori delle Autorità Amministrative Indipendenti. Il ruolo dell'Autorità Nazionale Anticorruzione nella costruzione del regolamento contrattuale' *Rassegna di diritto civile*, 824 (2017); E. Caterini, *Sostenibilità e ordinamento civile. Per una riproposizione della questione sociale* (Napoli: Edizioni Scientifiche Italiane, 2018), 99; C. Prussiani, *La conformazione contrattuale nei settori regolati dalle autorità amministrative indipendenti. Un'ipotesi di studio* (Milano: Giuffrè, 2022), 57.