

FROM SUSTAINABLE DEVELOPMENT TO GREEN NEW DEAL

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INDEX

- 1. INTRODUCTION**
- 2. FROM SD TO GND: A COMPARISON**
 - 2.1. Development and the environment and development through the environment*
 - 2.2. The binding force of two soft-law principles: the effectiveness of SD and GND in extra-national regulation*
 - 2.3. From global to multi-level governance*
- 3. A NEW REGULATORY PARADIGM?**
- 4. CONCLUSIONS**

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1. INTRODUCTION

The Green New Deal (GND) is an economic policy programme² launched some years ago, recently in great development and still in progress, with the aim of starting, enhancing and consolidating an economy that pursues growth through actions, which do not overcome a series of ecological limits³. It combines public interventionism and private initiatives to ensure that all economic and industrial choices are able to promote economic growth through safeguarding the environment. Hence, the GND aims to: reduce CO₂ emissions and global warming; protecting biodiversity and human, animal and plant health and, at the same time, promote socio-economic development; identify new areas of

² The expression recalls the “New Deal” enacted in the United States by the President Franklin Delano Roosevelt between 1933 and 1939 in order to find remedies to the effect of the economic crisis of 1929-1932. This was based on John Maynard Keynes’ theories and on State intervention, in such a way not to compromise the fundamental principles of the capitalistic system. On the issue, see, among others, K.K. PATEL, *The New Deal: A Global History*, Princeton University, 2016; *Lessons from the New Deal. Hearing before the subcommittee on economic policy of the committee on banking, housing, and urban affairs united states senate one hundred eleventh congress. First session on what lessons can congress learn from the new deal that can help drive our economy today*, MARCH 31, 2009, Printed for the use of the Committee on Banking, Housing, and Urban Affairs, available at: <http://www.access.gpo.gov/congress/senate/senate05sh.html> and J. MILTON CARSON, *The Constitution and the New Deal: Address of James M. Carson of Miami, Florida, Before the Birmingham Forum, Birmingham, Alabama*, December 16, 1935, Together with a Transcript of Forum Proceedings Following Mr. Carson’s Speech.

The reference to Roosevelt’s programme unveils two of the primary features of the GND, which will then be discussed in the rest of the article: State intervention in the economy with a view to reviving it, that is to say to promote growth and development, and the need to identify a meeting point precisely between this economic growth and environmental protection. GND literature is already growing: J. RIFKIN, *The Green New Deal: Why the Fossil Fuel Civilization Will Collapse by 2028, and the Bold Economic Plan to Save Life on Earth*, St. Martin, 2019; N. CHOMSKY E R. POLLIN, *The Climate Crisis and the Global Green New Deal: The Political Economy of Saving the Planet*, Verso Books, 2020; A. PETTIFOR, *The case for the Green New Deal*, Verso Books, 2020.

³ “An economy that sustains life on earth will be a steady state economy and will not exceed the nine ecological boundaries: stratospheric ozone depletion; loss of biosphere integrity (biodiversity loss and extinctions); chemical pollution and the release of novel entities; climate change; ocean acidification; freshwater consumption and the global hydrological cycle; land system change; nitrogen and phosphorus flows to the biosphere and oceans; atmospheric aerosol loading”, *Ibid.*, p. 158. See also [Stockholm Resilience Centre - Stockholm Resilience Centre](#).

investment; increase wealth and general well-being. Notably, it does not follow these objectives by means of a compromise, but integrating and making interdependent the two pillars of growth and environmental sustainability.

The ability of the system to respect ecological limits without compromising development needs can only be considered possible through the use of legal and regulatory instruments, whether of incentive and promotional nature or arranging prohibitions and setting standards. Public policies and measures are necessary tools to bring the GND into force, converting numerous economic and social activities to environmental sustainability, combining the need to reduce pollution with that of fostering growth, limiting economic undertaken and at the same time encouraging it according to innovative aims and paths.

In order to draw the boundaries of public regulation aimed at pursuing the stated objectives and to identify its scope, its peculiar and most important features, as well as the problematic aspects, it is useful to make a comparison with a similar model, born a few decades ago, yet still current in its different evolutions and declinations: Sustainable Development (SD)⁴.

The latter aims to protect the environment and at the same time promote social and economic development and has been defined as “the development that meets the needs of the present without compromising the ability of future generations to meet their own needs”⁵. Recognized as a principle of international law with the Rio Declaration⁶ and with the New

⁴ World Commission On Environment and Development, *Our Common Future*, Oxford Paperbacks, 1990. In future decades the literature on the issue increased. For an idea see, among others, J.A. ELLIOTT, *An Introduction to Sustainable Development*, Routledge, 2013; J.D. SACHS, *The Age of Sustainable Development*, Columbia University Press, 2014; S. E. SAJA, *Systems Thinking for Sustainable Development. Climate Change and the Environment*, Springer, 2018; C. HENRY, J. ROCKSTRÖM, N. STERN, *Standing Up for a Sustainable World. Voices of Change*, Elgar, 2020; N. ROORDA, *Fundamentals of Sustainable Development*, Routledge, 3rd ed., 2020.

⁵ World Commission on Environment and Development, WCED, “Brundtland Report” (Report of the World Commission on Environment and Development: Our Common Future), Transmitted to the General Assembly as an Annex to document A/42/427, 1987, <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>.

⁶ UN General Assembly, *Report of the United Nations Conference on Environment and Development*, adopted by the United Nations International Conference on Environment and Development (UNCED) in 1992, A/CONF.151/26,

Delhi Declaration of Principles of International Law Relating to Sustainable Development⁷, is a much-discussed institute, especially because of its difficult classification from a defining point of view and its actual legal effectivity⁸. Nevertheless, as evidenced by the “2030 Agenda for Sustainable Development” adopted in 2015 by the governments of the 193 Member States of the United Nations⁹, this principle or guiding criterion of public policies is still of fundamental importance¹⁰.

2. FROM SD TO GND: A COMPARISON

The reason for a comparison between Green New Deal and Sustainable Development arises from the many elements in common between the two approaches. Like the second, GND can be a principle of public administration, as it stands as a value and conceptual reference point for the adoption of certain public policies. Still in analogy with SD, activities descended with GND aim to achieve a balance between two objectives of general importance, often in conflict but potentially compatible: environmental protection and the promotion of economic and social development. Finally, both – although the Green

https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.15_L.26_Vol.I_Declaration.pdf.

⁷ International Law Association, *New Delhi Declaration of principles of international law relating to sustainable development*, (August 2002), UN Doc., A/57/329, https://cisdl.org/public/docs/new_delhi_declaration.pdf.

⁸ A critical appraisal is to be found in E. Scotti, *Poteri pubblici, sviluppo sostenibile ed economia circolare*, in *Il diritto dell'economia*, n. 98 (1 2019), p. 495, who criticizes the axiological weakness of SD, its difficulty in finding a balance among social, economic and environmental values, as well as its inefficacy under the legal perspective.

⁹ It is a programme of action for people, the planet and the prosperity, consistent of 17 Sustainable Development Goals, SDGs (<https://www.un.org/sustainabledevelopment/>), with 169 target. See then the commitments to reach such objective in the following 15 years: <https://unric.org/it/agenda-2030/>.

¹⁰ SD appears in several legal acts, not only in international law, but also in domestic and EU law. As for the latter, see for instance all the EU Directives on the energy performance of buildings, such as the number 2010/31/UE.

New Deal with more original features, as will be said – involve a number of innovations in public regulation.

The scope of the GND is not a particular novelty in the field of public governance: the protection of the environment itself, since it has become a subject of regulation, is inevitably connected and balanced with other interests, above all of economic nature¹¹. The environment is a complex, multidimensional and transversal legal institute: a system of relationship among several factors. Therefore, public intervention to protect the environment cannot ignore the necessity to balance the measures adopted with other needs of socio-economic nature (the development of agriculture and industry, the creation or safeguarding of jobs, the protection of the landscape and cultural heritage, the eradication or reduction of poverty, the protection of human, animal and plant health). Nevertheless, the creation of legal concepts as the ones at issue has sought to codify and prioritize the balance between the environment and economic growth, placing it at the heart of general public policies.

The aim of this work is thus to bring out the most interesting features and the most problematic profiles in the governance deriving from the aim to protect the environment through the promotion of growth; with the promise that the ecologic transition cannot prescind from public regulation. The enhancement of the two concepts is not spontaneous neither automatic, despite the new frontiers of gain in green economy, but develops only with

¹¹ In this sense, there is enough convergence in legal doctrine and science, but the assumption can be evinced even by empiric observation. As a confirmation, some decisions of the Italian Constitutional Court are quite emblematic, as they defined the environment as a transversal subject, which implies the protection of a plurality of public interests to be balanced together. See Italian Constitutional Court Decision n. 246/2006: “si deve sottolineare che, accanto al bene giuridico ambiente in senso unitario, possano coesistere altri beni giuridici, aventi ad oggetto componenti o aspetti del bene ambiente, ma concernenti interessi diversi giuridicamente tutelati. Si parla, in proposito, dell’ambiente come “materia trasversale”, nel senso che sullo stesso oggetto insistono interessi diversi: quello alla conservazione dell’ambiente e quelli inerenti alle sue utilizzazioni”. On the issue, Chiara Feliziani, *Industria e ambiente. Il principio di integrazione dalla rivoluzione industriale all’economia circolare*, in *Diritto Amministrativo*, 4, 2020, p. 849 has observed that in international relations the link between resources protection and economic development was noted already by scholars of the XVIII and XIX centuries, such as George Perkins Marsh (*The Earth as Modified by Human Action*, Andesite Press, Milano, 2017 rist.) as well as in some bilateral agreements of those times.

the intervention of public bodies, both beyond national borders – the environment being a subject, by definition, of global importance – and inside national States. In the transition from SD to GND, there are significant paradigm changes, useful to anticipate the challenges for future regulation. These new elements will be investigated, also thanks to the analysis of some case studies, and can be summarized as follows.

Firstly, environment and development are no longer seen in a dialectical conflict that tries to find a balance between the two, but the protection of the former – which plays a prominent and central role – constitutes the economic and legal ground for safeguarding and improving the conditions of the latter (§ 2.1).

Secondly, the GND has, to date, even less preceptive effect than SD, particularly in extra-national law. Nevertheless, it aims to establish itself precisely as a binding principle, at least for the regulatory authorities. In fact, in many legal systems – notably the EU – it develops as an action plan that gives rise to binding rules, supranational and national planning, policy and regulatory initiatives entrusted to the care of public authorities, and new limits for private individuals. If not a binding norm, the GND affirms as the main *rationale* for the adoption of binding regulatory policies (§ 2.2).

Thirdly, while the environment has become a subject of global governance in recent decades – albeit with little success from the point of view of the effectiveness of the public policies adopted – the GND is developing according to a multi-level pattern: Supranational norms, guidelines, directives and standards are surely global, but national measures constitute the central and crucial moment of the regulation in question, which sees States and local administrations as key players (§ 2.3).

Finally, the GND also precludes and inspires a new model of public governance of the economy, which combines various modes of intervention, of which three are particularly significant. The first one consists of the involvement of private actors, in addition to supranational, state and local authorities, with the former assuming a role of co-regulators in a context of horizontal subsidiarity. The second one sees public actors gaining powers to condition, direct and guide or even take place of the economic activities of private enterprises,

so contributing to the ecologic transition through a new kind of public economy. Finally, traditional regulatory functions – such as command and control measures – which recently left the way to market regulation, are increasingly used to restrict individual freedoms and rights in the name of a predominant common good (§ 3).

In the conclusions (§ 4) the sums of the analysis carried out will be drawn, trying to imagine the future perspectives of the outlined framework and identifying the possible advantages, critical elements and open questions of a regulation that aims to safeguard the planet by radically changing the production system through the completion of a third industrial revolution¹².

¹² On the idea of the third industrial revolution, based on the Green New Deal see J. RIFKIN, *The Green New Deal*, cit., p. 17 and ff.

2.1. Development and the environment and development through the environment

In recent years, there have been numerous regulatory initiatives to promote and develop the so-called “green economy”¹³ and, more coherently with GND approach, the “blue economy”, meant as circular economy¹⁴.

¹³ On *green economy* see the UNEP Reports, which launched the *Green economy Initiative* (<https://www.unsystem.org/content/greeneconomy-initiative-gei>) and *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication*, 2011 (www.unep.org/greeneconomy). In legal science literature it is to mention: E. RONCHI, *La transizione alla green economy*, Edizioni Ambiente, Milano, 2018; M. FREY, *La green economy come nuovo modello di sviluppo*, in *Impresa Progetto – Electronic Journal of Management*, 2013, 3 e J. GOODMAN-A. SALLEH, *The ‘Green Economy’: Class Hegemony and Counter-Hegemony*, in *Globalizations*, 2013, 10:3, pp. 411-424; A. MOLITERNI, *La sfida ambientale e il ruolo dei pubblici poteri in campo economico*, in *Rivista Quadrimestrale di Diritto dell’ambiente - Decennale della Rivista (2010-2020)*, n. 2, 2020, pp. 33 and ff.

¹⁴ The EU Parliament defines it as following: “The circular economy is a model of production and consumption, which involves sharing, leasing, reusing, repairing, refurbishing and recycling existing materials and products as long as possible. In this way, the life cycle of products is extended. In practice, it implies reducing waste to a minimum. When a product reaches the end of its life, its materials are kept within the economy wherever possible. These can be productively used again and again, thereby creating further value. This is a departure from the traditional, linear economic model, which is based on a take-make-consume-throw away pattern. This model relies on large quantities of cheap, easily accessible materials and energy. Also part of this model is planned obsolescence, when a product has been designed to have a limited lifespan to encourage consumers to buy it again. The European Parliament has called for measures to tackle this practice” (<https://www.europarl.europa.eu/news/en/headlines/economy/20151201STO05603/circular-economy-definition-importance-and-benefits>). On the issue, see for instance P. LACY, J. LONG, W. SPINDLER, *The Circular Economy Handbook. Realizing the Circular Advantage*, Springer, 2019; M. SILLANPÄÄ, C. NCIBI, *The Circular Economy. Case Studies about the Transition from the Linear Economy*, Elsevier, 2019; G. Pauli, *The Blue Economy 3.0: The marriage of science, innovation and entrepreneurship creates a new business model that transforms society*, Xlibris Corp, 2017. In Italian literature F. DE LEONARDIS, *Il diritto dell’economia circolare e l’art. 41 Cost.*, in *Rivista Quadrimestrale di Diritto dell’ambiente*, n. 1 – 2020, p. 64: “viene, quindi, ad essere superato il modello economico fondato sull’economia lineare ossia su produzione, utilizzo e alla fine abbandono dei beni, disinteressandosi del fine vita (che comporta un elevato spreco di risorse ed un forte impatto ambientale negativo) a favore di un modello diverso, di economia circolare appunto, in cui i materiali e l’energia utilizzati per fabbricare i prodotti mantengono il loro valore il più a lungo possibile, i rifiuti sono ridotti al minimo, si utilizzano quante meno risorse possibili e i prodotti vengono “disegnati” non solo per non inquinare ma addirittura per migliorare l’ambiente”.

In this respect, an example of public intervention in order to produce a paradigm shift from linear to green and circular economy concerns subsidies for energy production. An International Monetary Fund Working Paper¹⁵ reads that in 2017, global annual subsidies for fossil fuel extraction, production and trade amounted to \$ 5.2 trillion, or 6.5% of the global economy. The latter are mostly indirect subsidies, such as taxation mechanisms by which States, by taking on part of the costs of fuels, allow consumers to pay less for petrol or gas for heating¹⁶; or environmental costs deriving from the production¹⁷ that, being carried out by National States, are not charged on private actors operating in the sector.

It is easy to see that if the subsidies mentioned above were to be abolished or, better, if they were to move in favor of alternative energy sources – such as renewable ones – there would also be a revolution in energy production. The initial shock would be considerable, because petrol and heating would cost much more and many companies would face crisis; at the same time, however, if incentives for renewables were just as important, considering the

¹⁵ D. COADY, I. PARRY, N-P. LE, AND B. SHANG, *IMF Working Paper: Global Fossil Fuel Subsidies Remain Large: An Update Based on Country-Level Estimates*, May 2019, p. 4, <file:///C:/Users/Utente/Downloads/WPIEA2019089.pdf>.

¹⁶ “It is helpful to distinguish two different notions of fossil fuel subsidies. One is a narrow measure, termed pre-tax subsidies, reflecting differences between the amount consumers actually pay for fuel use and the corresponding opportunity cost of supplying the fuel. In contrast, a broader measure, termed post-tax subsidies, reflects differences between actual consumer fuel prices and how much consumers would pay if prices fully reflected supply costs plus the taxes needed to reflect environmental costs and revenue requirements”, *Ibid.*, pp. 7-8.

¹⁷ “Global CO₂ emissions from fossil fuel and other industrial sources were 34 billion (metric) tons in 2016.¹⁴ These heat-trapping gases accumulate in the atmosphere (with average residence times of around a century or longer) affecting the global climate system. Economic efficiency requires that individual fuel users are charged for the resulting costs. The most efficient instrument is a charge on fuel supply equal to the fuel’s CO₂ emissions factor (i.e., emissions per unit of fuel combustion) times a CO₂ price—administratively, these charges would be a straightforward extension of (generally well established) fuel tax systems”, *Ibid.*, p. 8. Accordingly, also G. Wagner, *Push Renewables to Spur Carbon Pricing*, in *Nature*, vol. 525, 3 September 2015, p. 27: “Pricing carbon creates broad incentive to cut emissions. Yet the current price of carbon remains much too low relative to the hidden environmental, health and societal costs fo burning a toone of coal or a barrel of oil”.

development of technologies in this sector, the transition would take place without too much difficulty, with the active involvement of businesses, consumers and citizens.

Another concrete example of the ability to direct the ecological transition through public intervention aimed at changing business and industrial choices is to be found in the EU strategy to renew energy production for real estate, published by the Commission in 2020¹⁸, following the initiatives foreseen by the European Green Deal (EGD)¹⁹. By this act, the Union finances and establishes the route and the objectives (§§ 2-3.6), giving priority to three areas: decarbonization of heating and cooling; combating energy poverty and inefficiency; renovation of public buildings such as schools, hospitals and offices. The Commission proposes to remove existing obstacles along the restructuring chain – from the design of the project to its financing to the completion of the work – with a series of policy measures, financing instruments and technical assistance arrangements²⁰.

¹⁸ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Renovation Wave for Europe - greening our buildings, creating jobs, improving lives*, Brussels, 14.10.2020 COM(2020) 662 final, https://ec.europa.eu/energy/sites/ener/files/eu_renovation_wave_strategy.pdf.

¹⁹ The EGD has been started with a Communication of the EU Commission: *Communication from the Commission to The European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of The Regions. The European Green Deal*, Bruxelles, 11.12.2019 COM(2019) 640 final. It is a programme of 116 points, which commits the EU Countries to “transform the EU into a modern, resource-efficient and competitive economy, ensuring: no net emissions of greenhouse gases by 2050; economic growth decoupled from resource use; no person and no place left behind. [...] The European Green Deal provides an action plan to boost the efficient use of resources by moving to a clean, circular economy; restore biodiversity and cut pollution. The plan outlines investments needed and financing tools available. It explains how to ensure a just and inclusive transition. The EU aims to be climate neutral in 2050” (https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en). The single objectives are listed in a table attached to the Communication: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1596443911913&uri=CELEX:52019DC0640#document2>, p. 2.

²⁰ European Commission, *Communication [...] A Renovation Wave for Europe*, cit. The main actions included in this strategy consist of “not only reducing energy bills and cutting down emissions are at stake. Renovation can open up numerous possibilities and generate far-reaching social, environmental and economic benefits. With the same intervention, buildings can be made healthier, greener, interconnected within a neighborhood district, more accessible, resilient to extreme natural events, and equipped with recharging points for e-mobility and bike parking.

The examples are useful in showing both the key role played by the economic viability of some sectors – ecologically compatible – compared to others, and the weight of the public authorities in the choice in favor of this transition. Actually, the current energy production system is based on considerable support from the States, without which the sector would be in crisis, particularly if, in parallel, its energy resources become obsolete and no longer profitable, such as fossil fuel energy, which is becoming a stranded asset²¹, while the renewable energy sources are rapidly enhancing their effectivity.

The path of GND is the inevitable result of economic and market dynamics: it is driven by the market and by the conveniences or losses of economic actors²². Nevertheless, in order for this transition to be carried out effectively – within the rapid time that the current environmental situation requires and with widespread benefits –, and in order to overcome

Smart buildings can provide essential privacy-compliant data for city planning and services. Deep renovation can reduce pressure for greenfield construction, helping preserve nature, biodiversity and fertile agricultural land”.

²¹ This is a fundamental issue. The narrative is no longer focused on whether fossil fuels are bad for health, which would also be an important topic, when you consider that a recent study showed a very high mortality rate due to fossil fuels: more than 8 million in 2018 alone (K. VOHRA, A. VODONOS, J. SCHWARTZ, E.A. MARAIS, M.P. SULPRIZIO, L.J. MICKLEY, *Global mortality from outdoor fine particle pollution generated by fossil fuel combustion: Results from GEOS-Chem, Environmental Research*, 2021, <https://doi.org/10.1016/j.envres.2021.110754>. (<https://www.sciencedirect.com/science/article/pii/S0013935121000487>), but on the fact that fossil fuels no longer convenes. On this, again J. Rifkin, *The Green New Deal*, cit., pp. 11, 55, 107 ff. and *passim*. This fact facilitates ecological transition but still requires public intervention: to inform; to incentivize; to support the economic and social repercussions of the transition (think of the many unemployed people from the fossil fuel sector, who will have to be reused in the renewable energy sector).

²² The confirmation of the strategic importance of these interventions in terms of economic advantages can be found in an international report by the National Bureau of Economic Research in Massachusetts, which shows that a persistent increase in the global average temperature of 0.04 degrees per year, in the absence of mitigation policies, could reduce world GDP per capita by 7.22% in 2100. See M.E. KAHN - K. MOHADDES - R.N.C. NG - M. HASHEM PESARAN - M. JUI-CHUNG YANG, *Long-Term Macroeconomic Effects of Climate Change: A Cross-Country Analysis*, in *NBER Working Paper No. 26167*, August 2019. On the economic disadvantages in persisting with the “brown” economy, instead of a green one, United Nations Economists Network (UNEN), *Thematic Brief. A global green new deal for a sustainable recovery and a resilient future*, 2021, pp. 7-8 and 9-10. For what concerns the increasing cost of extraction for oil, after it reaches its peak, see also S. KOPITS, *Global Oil Market Forecasting: Main Approaches and Key Drivers*, 2014, available at <https://www.energypolicy.columbia.edu/events-calendar/global-oil-market-forecasting-main-approaches-key-drivers>.

ambiguities, risks and inefficiencies of the “green economy”²³, market forces and rules are not enough: There must be public intervention, called upon to promote, incentivize, direct, and correct the new economic approach²⁴.

This is where the core of the new ecological pact is rediscovered: an agreement between the public and private sectors, between limits and incentives to growth, between rules and economic freedoms in order to transform the current economic model – in its many and different sectors (energy, agriculture, construction, transport, etc.) – into a less polluting and environmentally friendly system. That is why GND is based on planning and regulation, but also on public incentives, market mechanisms, economic recovery and public/private

²³ The transition from the green to the blue economy aims to overcome the impasse for which in the former the environment is balanced and made to coexist with economic growth, as a cost, while in the second it becomes the tool through which to produce new wealth and new development. On this see what previously reported in footnotes n. 13 and 14.

²⁴ Other cases similar to that of incentives in the choice of fuels can be found in some national policies. For example, in Germany (but also in other European countries) a feed-in tariff for renewable sources has been introduced by the Federal Government, together with a plan for the elimination of coal with public funding of EUR 40 billion for coal regions. The tariff allows to receive, for green electricity that is resold on the grid, a price higher than the market price and has pushed companies, neighborhoods and individuals to install solar panels and wind turbines, so much so that already in 2018 renewable energy contributed 35.2% of Germany’s total energy production. Of this, 25% was produced by small electrical cooperatives See K. APPUNN, Y. HAAS, J. WETTENGEL, *Germany’s energy consumption and power mix in charts*, in <https://www.cleanenergywire.org/factsheets/germanys-energy-consumption-and-power-mix-charts>; R. Smith, *This is how people in Europe are helping lead the energy charge*, in <https://www.weforum.org/agenda/2018/04/how-europe-s-energy-citizens-are-leading-the-way-to-100-renewable-power/>; S. Amelang, B. Wehrmann e J. Wettengel, *Climate, energy and transport in Germany’s coalition treaty*, in <https://www.cleanenergywire.org/factsheets/climate-and-energy-germanys-government-coalition-draft-treaty>.

Among the measures for the ecological conversion of economic activities, we can also mention the Italian Budget Law for 2020, which provides for numerous investments and incentives aimed at promoting economic activities based on the improvement of environmental conditions. In various provisions, this identifies a series of environmental measures, which mainly revolve around the establishment of a fund to implement a public investment plan for the development of an Italian Green New Deal. To this end, 4.2 billion is allocated for the three-year period. The provisions contained in the Budget Law have three fundamental characteristics: they are in line with the path of the GND, which aims to convert economic activities to environmental sustainability, combining the need to reduce pollution with that of promoting economic and social development; to provide for direct state intervention to boost the economy in certain sectors (it is public administrations – in some cases with the participation of private entities – which, taking advantage of the investment plan provided for by law, must relaunch growth while maintaining the objective of sustainable development); to protect the environment through economic instruments, incentives and investments.

investment. And, significantly, all its regulatory provisions do not merely recommend or even impose to make industrial production greener or less polluting, but intervene in order to transform it radically, in a way in which it can only be ecological-compatible.

These first considerations, on one of the hallmarks of the regulation that flows from the GND, allow a first comparison with sustainable development. In respect to the latter – established as a compromise between developed and developing countries in order not to deny them legitimate expectations of economic growth in front of the necessary actions to protect the environment²⁵ – the pre-eminence and centrality of environmental protection is recorded, as derived from its strategic functionality for the ecological conversion of economic activities²⁶. For this reason, environmental protection becomes a shared aim of all institutional actors in the international community (not just for some OIs and economically more advanced States). Consistently, the “right to develop” is not recognized, *provided* that environmental protection requirements are safeguarded²⁷, but it must be carried out *through* actions to protect the environment, which therefore become instruments for creating new development, new economic growth, moreover in the urgency of the present and no longer only with a view to future generations.

²⁵ About the compromise between environmental protection and legitimate expectations of growth, above all for developing countries, see V. U. JAMES (ed.), *Sustainable Development in Third World Countries. Applied and Theoretical Perspectives*, Preager, 1996, *passim*; C.H. KIRKPATRICK, N. LEE (eds), *Sustainable Development in a Developing World. Integrating Socio-economic Appraisal and Environmental Assessment*, Edward Elgar Publ., 1997; J.A. ELLIOTT, *An Introduction to Sustainable Development*, cit., p. 302 and ff. In Italian literature see S. BATTINI, *Amministrazioni senza stato. Profili di diritto amministrativo internazionale*, Milano, Giuffrè, 2003, p. 220 and ff. and S. NESPOR, *La scoperta dell’ambiente. Una rivoluzione culturale*, Roma, Laterza, 2020, p. 39 and ff. and p. 96 and ff.

²⁶ In the field of sustainable development, it should be noted that environmental policies only meet one of the three types of objectives set out in the 2030 Agenda, which also cover economic growth and the protection of human capital (combating poverty, gender equality, quality education). On the subject, see: <https://unric.org/en/united-nations-sustainable-development-goals/>.

²⁷ The third principle of the *Rio Declaration* of 1992 states: “the right to develop must be fulfilled so as to equitably meet developmental and environmental needs of present and future generation”.

Environmental protection is no more just the aim of public policies, but is the means by which private and public actors can create new well-being. The principle of integration²⁸, the cornerstone of any environmental policy, does not fail, but rather reaches a new landing point: with the GND, the environment is not simply integrated – therefore made compatible, balanced and taken into account – in development activities, but is the necessary and fundamental prerequisite. Consistently, as anticipated, economic activity must not only be green, therefore integrating environmental issues as a cost, but circular, therefore able to produce wealth without consuming exhaustible energies, without producing non-recyclable or reusable waste, without negatively altering ecosystems, climate, biodiversity²⁹. Therefore, the environment is no more a cost, but an opportunity: it is the environment *for* the development, as a synergy³⁰. In this sense, with regard to SD, there is continuity, but also evolution and change: the environment and growth are integrated, but the former is not a cost to be balanced with the needs of the latter, but the instrument for enhancing the latter.

This first characteristic aspect of GND is not without critical points: one of the most relevant problems concerns the legal form and preceptive force of this concept, which to date

²⁸ The principle of integration is one of the main feature of legal protection of the environment, above in the view of sustainable development. In this regard, for instance, the EU Commission has affirmed that “Environmental integration means making sure that environmental concerns are fully considered in the decisions and activities of other sectors. Since 1997, it is a requirement under the EC Treaty. Article 6 of the Treaty states that ‘environmental protection requirements must be integrated into the definition and implementation of the Community policies [...] in particular with a view to promoting sustainable development’. The importance of integration is reaffirmed in the Sixth Environment Action Programme which stipulates that ‘integration of environmental concerns into other policies must be deepened” in order to move towards sustainable development” (<https://ec.europa.eu/environment/integration/integration.htm>). As a confirmation, principle n. 4 of the Rio Declaration of 1992 states: “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it”.

²⁹ In the path of environmental policies, compared to the previous stage, that of the composition of the interest in development with the environmental interest, then of sustainable development (composition phase), we are facing a new step. This consists of the blue or circular economy, which does not simply invest more in environment protection but goes beyond it through regeneration and seeing the environment as a driver for institutional and economic development. In this sense, F. DE LEONARDIS, *Il diritto dell'economia circolare*, cit., p. 65.

³⁰ *Ibidem*, p. 65.

is still seen only as an objective, a guideline to inspire public policies on the environment and economic recovery (therefore a “value”, more than a “matter”³¹) and still inherent in a certain vagueness, which makes it difficult, among other things, to measure and evaluate the actions taken to pursue its ends.

In this respect, it is not always clear whether a given public policy or measure will succeed in promoting new and lasting models of circular economy, whether it will actually succeed in reducing the impact on the environment or whether it will contribute to producing wealth as much or more as the previous models.

2.2. The binding force of two soft-law principles: the effectiveness of SD and GND in extra-national regulation

The European initiative called “20-20-20”, approved by the EU Parliament in December 2008, consists of a package aimed at achieving a set of targets set for 2020³², to date no longer in line with the new parameters, but useful to understand the rationale of the project: reduce greenhouse gas emissions by 20%, increase energy savings to 20% and increase the consumption of renewable sources to 20%.

The package includes measures on the emissions trading scheme and car emission limits. Specifically, these are six acts of a legislative nature combining market instruments,

³¹ P. DELL'ANNO, *La tutela dell'ambiente come “materia” e come valore costituzionale di solidarietà e di elevata protezione*, in *Lexambiente*, 30 Novembre 2008, <https://lexambiente.it/materie/ambiente-in-genere/188-dottrina188/4658-Ambiente%20in%20genere.%20Tutela%20dell'ambiente%20come%20materia%20e%20valore%20costituzionale.html>, *passim*.

³² <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20081208BKG44004+0+DOC+XML+V0//EN>.

economic incentives or moral suasion mechanisms and financing with restrictive measures, which place limits and prohibitions on States or private operators³³.

On the European path to GND, the “20-20-20” proposal is one of the first steps, useful to show the shift from SD to GND. It has now been updated, with more ambitious objectives. In January 2021, in fact, the Commission presented the “Just Transition Fund”³⁴, part of the “Mechanism for a Just Transition”³⁵: a new financial instrument within the framework of cohesion policy, which aims to provide support to States and territories facing serious socio-economic challenges arising from the transition towards climate neutrality³⁶.

In parallel with the actions mentioned above, at global level, the “Sustainable development Goals” initiative was launched. This, like the European Commission

³³ This is a series of legislative measures, all adopted on the same date as 23 April 2009, within the same regulatory package: Directive 2009/29/EC on greenhouse gas emission allowance trading; Decision No 406/2009/EC on Member States' efforts to reduce greenhouse gas emissions from sectors excluded from the emissions trading scheme by 10%; Directive 2009/31/EC establishing a legal framework for the eco-sustainable geological storage of carbon dioxide; Directive 2009/28/EC, which sets mandatory national targets for the consumption of energy from renewable sources; Regulation No 443/2009 setting the average level of CO2 emissions from new cars; Directive 2009/30/EC, which sets technical specifications for fuels and a target of a 6% reduction in greenhouse gas emissions produced during the life cycle of fuels.

³⁴ <https://www.europarl.europa.eu/factsheets/en/sheet/214/just-transition-fund-jtf->. See also the *Proposal for a Regulation of the European Parliament and of the Council establishing the Just Transition Fund*, COM_COM(2020)0022 / FULL / EN15/01/2020 ([https://www.europarl.europa.eu/RegistreWeb/search/simple.htm?references=COM_COM\(2020\)0022&searchLanguages=EN&sortAndOrder=DATE_DOCU_DESC](https://www.europarl.europa.eu/RegistreWeb/search/simple.htm?references=COM_COM(2020)0022&searchLanguages=EN&sortAndOrder=DATE_DOCU_DESC)).

³⁵ https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/actions-being-taken-eu/just-transition-mechanism_en.

³⁶ Of the funds mentioned, EUR 10 billion should come from budgetary appropriations, while the remaining additional resources of EUR 40 billion, for the period 2021 to 2024, will constitute externally-targeting revenues from the European Recovery Instrument, European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing the Just Transition Fund*, Bruxelles, 28.5.2020, COM(2020) 460 final, 2020/0006(COD). The money will come from existing European Structural Funds, state co-financing programmes, loans to interest payments to the European Investment Bank and part of the “InvestEU fund”, a tool put in place by the European Commission to attract private investment(https://europa.eu/investeu/home_en).

Communication on the GDE³⁷, is a programme of action signed in September 2015 by all the UN Member States Governments. It lists and describes 17 Goals for SD³⁸ – that go beyond the mere environmental theme, including economic growth and human capital – divided and declined into a total of 169 “targets”, to be achieved by 2030. It is an instrument of soft law, without sanctions, but with a decent persuasive force, due to the involvement of numerous actors and the effect of moral suasion linked to reputational accountability³⁹. Macro-objectives are common but individual targets differ from country to country, depending on the specificities of the latter, and are measured and evaluated through indicators (quantitative and qualitative). It provides quite effective as a guide for domestic authority, but has the main flaw of not having a defined executive moment: the goals and targets are assigned and assessed, but their implementation – and the way this is performed – is left to the States.

The provisions briefly described are good examples to try to configure the preceptive force of principles, concepts or approaches, such as those of Sustainable Development and the Green New Deal. In both cases, in fact, the latter are mentioned in general guidelines, as shared objectives, or in action programmes, rather weak in terms of legal effectiveness, even if with a strong political value. The aim is to inform and guide the policies adopted by regulators, i.e. mainly national and local institutions. Nonetheless, there is a fairly wide margin of discretion and interpretation on behalf of the latter. Not so much in the objectives to be pursued, but in the choice of the type, the intensity, the methods and

³⁷ See above, footnote n. 18.

³⁸ <https://www.un.org/sustainabledevelopment/>

³⁹ “The category of public reputational accountability is meant to apply to situations in which reputation, widely and publicly known, provides a mechanism for accountability even in the absence of other mechanisms as well as in conjunction with them”, R.W. GRANT E.R.O. KEOHANE, *Accountability and Abuses of Power*, IILJ Working Paper, 7 (Global Administrative Law Series) (<http://www.iilj.org/papers/2004/2004.7%20Grant%20Keohane.pdf>), p. 2 ss., ora in *Accountability and Abuses of Power in World Politics*, in *American Political Science Review*, Vol. 99, No. 1 February 2005, 37.

timing of implementation (with the exception of the long-term deadlines laid down at extra-national level), and the costs (in terms of public money used) of the measures.

However, what said seems to have a different development with regard to GND, particularly in the European-based one. Firstly, this translates into a more limiting supranational regulatory approach for domestic administrative powers, which are part of the implementation phase of policies decided on within the Union. Secondly, the legal force of these provisions is ensured by a significant economic factor, since most of these policies consist of incentives and public investments, and the European funding matrix makes it possible to impose a strict conditionality in order to take advantage of them. Finally, because communications and action programmes are only the starting point for regulatory pathways composed of binding texts, such as directives and regulations.

In this respect, taking up some of the considerations made in the previous paragraph and on the assumption that the principle of Sustainable Development has so far had little preceptive effect⁴⁰, the GND, although not formally recognized as a principle in any legislative text and instead assuming the form of political-regulatory objective – an objective of public policies – may aspire to achieve a greater binding force.

With regard to the latter, in fact, the European Union has not confined itself – as for SD – to including this concept as an objective or a value within legislative acts. On the opposite, it has translated it into a series of legislative and administrative actions with binding effect – for the EU institutions and for the Member States – which are descended only from

⁴⁰ On this see T. TARLOCK, *Ideas without Institutions: The Paradox of Sustainable Development*, in *Indiana Journal of Global Legal Studies*, vol. 9, 2001, p. 38: “critics suggest SD attempted to marry two incompatible ideas, environmental protection and development, the resulting formulation has no consequences”. On SD as a principle, R. EMAS, *The Concept of Sustainable Development: Definition and Defining Principles*, Brief for GSDR 2015, p. 3, establishes a parallel with integration: “The key principle of sustainable development underlying all others is the integration of environmental, social, and economic concerns into all aspects of decision making. All other principles in the SD framework have integrated decision making at their core. It is this deeply fixed concept of integration that distinguishes sustainability from other forms of policy”. See also C. VOIGT, *Sustainable Development as a Principle of International Law. Resolving Conflicts between Climate Measures and WTO Law*, Brill, 2008, pp. 145–186.

it⁴¹. In addition, in order to implement the planned activities, the Commission envisages a series of investments, and identifies ways of finding the funds to be used⁴².

Secondly, GND seems destined to achieve greater luck than SD because, precisely for its ability to go beyond the mere balance between the environment and development, it permeates and conditions numerous heterogeneous public policies all over the world⁴³, which are going to influence with each other in a sort of horizontal exchange of regulatory models.

Finally, as environmental activities become the engine of economic growth and the latter is essential on the political agenda of all the States of the international community, the result is also a necessary public activity characterized by a significant ecological sensitivity. If the political decision to promote, develop and consolidate the circular economy is affirmed, it follows that the various provisions for this to occur will become binding and preceptive, translating the GND not only into incentive instruments, but also into binding rules and limits (for States and private entities).

In conclusion, in view of the growing and significant legal strength of the GND, the effectiveness of the policies adopted to pursue its two fundamental objectives (environment

⁴¹ Among all the measures, some are to be listed: a long-term strategy that the EU will submit to the United Nations Framework Convention on Climate Change; the adoption of “the first European ‘Climate Law’”; presenting “an impact assessed plan to increase the EU’s greenhouse gas emission reductions target for 2030 to at least 50% and towards 55% compared with 1990 levels in a responsible way”; ensure that Member States present their revised energy and climate plans, assessed by the Commission; adopting an EU industrial strategy to address the twin challenge of the green and the digital transformation; a new circular economy action plan; engaging in a ‘renovation wave’ of public and private buildings based on renewable resources; enhance traceability in agri-food production; greening agriculture and protect biodiversity (EU Commission, *Communication [...] The European Green Deal*, cit., pp. 4-17).

⁴² *Ibidem*, p. 17.

⁴³ For instance in USA and China, among others, as reported by J. RIFKIN, *The Green New Deal*, cit., pp. 68 and ff., 85-86, 130-131 and *passim* and A. CROSETTI, R. FERRARA, F. FRACCHIA, N. OLIVETTI RASON, *Introduzione al diritto dell’ambiente*, Roma, Laterza, 2018, p. 62.

protection and economic growth) is still a problematic factor. At time, indeed, such policies could only have an environmental façade – so-called “greenwashing” – and therefore be unable to protect the ecosystems; at the same time, while they are adequate in terms of environmental protection, they may be ineffective, if not harmful, with regard to socio-economic growth. The challenge of how to define and translate a concept that is still so broad and so strongly inherent in political visions and assessments, such as GND, remains open. This aspect also affects the methods of measuring and evaluating the action taken for its implementation that are not yet judicially claimable, and which can only be challenged from a political point of view.

2.3. From global to multi-level governance

The governance system at stance, aiming to balance economic growth, environmental protection and the spread of wealth, intercepts numerous regulatory activities. These relate to several interconnected sectors and can lead to conflicts between the different public interests at stake, exacerbating the problem of competences between the various levels of government involved (International Organizations; supranational bodies; national States; subnational authorities).

Sometimes the various levels are distinct or separate, according to a proper international model, in which national States make their decisions in autonomy, although confronting with the international community. While, at other times, the two levels appear fused together, composite, with national prerogatives strongly conditioned by international limits, with reduced or null discretionary powers. In such cases, the increased development of certain legal mechanisms or sectors related to the environment means that policies on these issues are properly globalized, with a fusion of national and extra-national activity that reduces the room for manoeuvre entrusted to the States.

This brief description confirms the current global disorder, in which at least two patterns coexist: some more properly globalized, therefore common⁴⁴, systems and others, based on multi-level governance, in which states cooperate with each other and with international organizations, but still have sufficient discretion in the choice of policies to be adopted⁴⁵. In this sense, the case of GND seems to accentuate the latter: a multi-level governance, in which national States have greater regulatory powers in respect of global rulemaking.

A valid example is in the field of renovation of buildings. The European Committee of the Regions and the European Commission have entered into cooperation to accelerate the renovation and decarbonization of the EU's housing and estate sector. The partnership aims to support local and regional authorities and builds on the fact that this "renovation wave" of

⁴⁴ As noted in more occasions by Sabino Cassese, global administrative law presents in several respects more as a composite legal order, than as a multi-level system connecting a plurality of legal orders. Following this approach, organizational structure and decision-making procedure are not separated, but fused together, blurring the borders between domestic and global levels: "global regulatory regimes present many peculiar features. [...] they are composite organizations, as they include global bodies, national authorities and personnel, representatives of civil society, transnational networks, members of epistemic communities, and various types of stakeholders, with no clear dividing line or hierarchy between the local and the global; in many ways, they can be compared to the European empires of the seventeenth to nineteenth centuries", S. CASSESE, *The Development of Global Administrative Law*, in Id. (a cura di), *Global Administrative Law Handbook*, Elgar, 2015, p. 9. To confirm this approach some specific sectors of regulation, structured as systems, show an advanced development in terms of global and composite governance, in respect of others, which preserve a multi-level structure. As an example, the sector of food safety is paradigmatic, for which see D. BEVILACQUA, *Introduction to Global Food Safety Law and Regulation*, Groningen, Europa Law Publishing, 2015.

⁴⁵ See, for instance, the premises n. 11 of the EU Commission, *Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2030*, Brussels, 14.10.2020 COM(2020) 652 final 2020/0300 (COD), p. 9: "Environment policy being highly decentralised, action to achieve the priority objectives of the 8th EAP should be taken at different levels of governance, i.e. at the European, the national, the regional and the local level, with a collaborative approach to multi-level governance". On multi-level governance the literature is wide; among others, see: S. PIATTONI, *The theory of multi-level governance: Conceptual, empirical, and normative challenges*, Oxford University Press, 2010; G. MARKS, L. HOOGHE, & K. BLANK, *European integration from the 1980s: State-centric v. multi-level governance*, in *Journal of Common Market Studies*, 34(3), 1996, pp. 341-378; I. PERNICE, *Multilevel constitutionalism and the Treaty of Amsterdam: European Constitution-making revisited*, in *Common Market Law Review*, 1999, vol. 36, n. 4, pp. 703 ss. e Id., *Multilevel constitutionalism in the European Union*, in *European Law Review*, 2002, vol. 27, n. 5, pp. 511 e ss.

EU buildings is a key factor in contributing to the ecological transition project: Relaunching new investments, creating jobs, saving energy and reducing greenhouse gas emissions.

Following the relevant strategy published by the Commission⁴⁶ – not by chance contained in a non-binding text (a Communication) – the European Union finances and establishes the orientation, the objectives and the priorities (§§ 2-3.6) for removing existing obstacles along the restructuring chain, with a series of policy measures, financing instruments and technical assistance arrangements⁴⁷. Then National Member States, together with local and regional authorities, actually carry out the activities of change, presenting projects to obtain the funds and implementing the supranational directives⁴⁸.

While sustainable development and environmental protection have generally been good reasons for promoting the integration and harmonization of national regulations to protect these goods, increasing and accelerating the process of global governance in this area⁴⁹, the GND seems to be following a different path. The scope and the objective remain

⁴⁶ European Commission, *Communication [...] A Renovation Wave for Europe*, cit.

⁴⁷ The levels indicators have been published in January 2021: <https://susproc.jrc.ec.europa.eu/product-bureau/product-groups/412/documents>. In the Communication, the Commission itself announces the adoption of binding legal texts in order to put in place the designed strategy: “Building on such good practices, the Commission will propose mandatory minimum energy performance standards as part of the revision of the Energy Performance of Buildings Directive (EPBD) by the end of 2021, following an impact assessment looking at the scope, timeline and phasing of a progressive implementation of such requirements, including the need for accompanying support policies. Such measures will facilitate linking specific national, regional and local incentives and support compliance with these minimum standards”, European Commission, *Communication [...] A Renovation Wave for Europe*, cit., p. 8.

⁴⁸ Another example of multi-level action within the GND, involving supranational actors and subnational actors, can be found in the Regional legislative Act of Emilia-Romagna n. 16 of 2015, in support of the circular economy. This was adopted in implementation of Decision 1386/2013/EU on a general Union action programme on the environment until 2020 “Living well within the limits of our planet” and of art. 4 of Directive 2008/98/EC on waste, which promotes measures to reduce waste production and its recovery, reuse and recycling also as an energy source.

⁴⁹ In this regard, the affirmation of sustainable development, starting from the Seventies and Eighties of the last Century, initiates a series of intervention programs, of an international nature, aimed at encouraging development – especially in the poorest countries – without compromising the environment. This has fostered international

global or regional, in any case common, but their specific implementation sees the role of domestic administrations strengthened: At state level – where fundamental choices are made in terms of investments, incentives, planning and limits to enterprises –, and at local level – where numerous implementing measures are put in place to enable the GND to be actuated.

In this respect, in a globalized world, not only States are still the main actors in deliberation and execution⁵⁰, but also they gain greater autonomy in the core moment of decision-making. Indeed, despite being linked to common interests and common finalities (enhancing growth while protecting the environment), they are not merely the agents of supranational bodies, but enjoy full discretion, if not in establishing the main purposes, still for what concerns the contents and the procedures of their regulatory measures.

The various countries decide whether to act through investments or incentives, establishing their entities; whether or not to take command and control measures, ensuring their effectiveness and efficacy; whether and how to involve individuals or local authorities and to what extent to delegate functions and services to them. The GND governance system therefore appears more as a “layer cake” than as a “marble cake”⁵¹.

What is more, this multi-level articulation is not only found in the dialectic between national and supranational policies, but also between States and subnational authorities, as well as in relations between institutions and members of civil society, when private legal entities assume an important role in active administration. Although the policies are part of a common design, the polity called upon to implement them in practice – with the most diverse regulatory measures – fragments vertically into a plurality of subjects (inter-state

cooperation, the emergence of international environmental principles (“the polluter pays”; “precaution”; and so on) and the birth of international organizations in the sector.

⁵⁰ S. CASSESE, *Il diritto globale. Giustizia e democrazia oltre lo Stato*, Milano, Einaudi, 2009, p. 5.

⁵¹ *Ibid.*, p. 23, where the author uses the combination of the two definitions with the opposite approach in respect of the text, but referring to the general structure of global governance.

organizations; supranational institutions, national governments, regions, municipalities, civil society organizations, enterprises), often with different legal nature, powers and capacities.

The role of the State – here both regulator both promoter of new economic guidelines and plans – resumes with regard to the market dynamics of globalization. While regional and local institutions and communities as well regain particular importance, because the first condition for the success of the GND is its application by each individual citizen and in the territories.

The regulation that arises from the GND, while pursuing global objectives and while possessing a rationale and a vision common to the various systems, develops according to a predominantly multi-level articulation, in which the competences of the States are still strong, not only in terms of the implementation and enforcement of global measures, but also in terms of policy-making choices, whether they are shared, within the extra-national arena, or exclusive in domestic legal orders. Here, too, there is an evolution in respect of SD, with a significant emphasis on national prerogatives, which in the recent past have been absorbed into global ones, for example by means such as the Kyoto Protocol⁵² or the Aarhus Convention⁵³.

⁵² The Kyoto Protocol created an emission allowance market to keep the total amount of CO₂ within certain limits worldwide. Although it provides for the involvement of states and is in fact ineffective because of the reluctance of some of them to take part, it has been conceived, structured and put in place as a properly global measure, with common rules, aimed at regulating a world-wide market, specially constituted and extended on a global scale. On the subject, see R.G. TARASOFSKY, S. OBERTHÜR, H.E. OTT, *The Kyoto Protocol. International Climate Policy for the 21st Century*, Springer Berlin Heidelberg, 2013; V. HEYVAERT, *Transnational Environmental Regulation and Governance. Purpose, Strategies and Principles*, Cambridge University Press, 2019, p. 59 and *passim*.

⁵³ *Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters*, 25 June 1998 (entered into force on the 30th of October 2001). The Aarhus Convention – adopted in order to protect the environment, promote sustainable development and protect human rights –, while targeting the Member States, it identifies a number of common procedural guarantees (a right of access to information, a right of participation in the environmental decision-making process and a right of action of individuals' claims in the event of infringement of access rights and participation) extended to all and attributable to a judicial body also by private individuals. See S. CASSESE, *Il diritto globale. Giustizia e democrazia oltre lo Stato*, Torino, 72 ss.; M. MACCHIA, *Legality: The Aarhus Convention and the Compliance Committee*, in S. Cassese

From this point of view, the regulatory structure that deals with GND reveals articulated, complex and fragmented. This, while not responding to an orderly organizational design and presenting the characteristics of the *adhococracy*⁵⁴, still reveals original and worthy features of attention. Moreover, in this differentiation and fragmentation, it seems particularly complex and delicate to find a further balance, in addition to that between the environment and economic growth: the one between global prerogatives and local interests and expectations, with the risk of conflicts between regulatory models with different quality and quantitative standards.

This, in fact, produces advantages and disadvantages because the most virtuous States will have fewer supranational limits for the pursuit of objectives useful to the entire global system; while the less virtuous ones, on the other hand, will use regained discretion and their internal sovereignty to operate forms of resistance to change, slowing down their path even beyond state borders. On the other hand, it is true that the ability to promote circular economy activities – producing growth without the cost of pollution or the supply of non-renewable energy – constitutes a competitive stimulus between the States themselves, which can therefore encourage a race to the top and the development of a horizontal accountability, disseminating good practices and intervention programs.

3. A NEW REGULATORY PARADIGM?

As anticipated, GND directly affects the models adopted for public regulation, opening the scenario to a paradigm shift that is based on three fundamental pillars: the widespread, varied and multifaceted involvement of private actors (such as individuals or

- B. Carotti - L. Casini - E. Cavalieri - E. Macdonald (a cura di), *Global administrative law*, cit., III.A.1., 13 ss. <http://www.irpa.eu/wp-content/uploads/2012/08/the-casebook-chapter-3.pdf>.

⁵⁴ On this subject it is to mention S. CASSESE, *Chi governa il mondo? La dimensione globale della democrazia*, Il Mulino, Bologna, 2013, p. 22

associations), who assume a role of co-regulators; the conditioning by public bodies of the choices that characterize the economic activities of companies; the parallel intensification of command and control regulatory powers in the hands of the administrative authorities.

Firstly, GND is based on the bottom-up contribution of private individuals since the beginning. Born from the influence of movements of opinion, lobbying and new visions of public intervention to protect the environment, such approach has been shared by the institutions – at various levels (local, national, supranational) –, which enacted a series of regulatory policies; finally it has gone back to civil society, to citizens involved in active participation⁵⁵.

The latter, in fact, are called to contribute actively, to become actors of change and co-regulators, to adapt their behaviors to make the ecological transition possible. In this sense, the GND stems as a paradigmatic and original model of “glocal” regulation: based on horizontal subsidiarity, it provides for rules and institutions operating at common and supranational level linked and integrated with rules and institutions operating at local and

⁵⁵ As early as 2008, a small group of professionals from various sectors created the *Green New Deal Group* (<https://greennewdealgroup.org/about-the-group/>), publishing the first manifesto of the movement: “*A Green New Deal: Joined-Up Policies to Solve the Triple Crunch of the Credit Crisis, Climate Change and High Oil Prices*”, https://neweconomics.org/uploads/files/8f737ea195fe56db2f_xbm6ihwb1.pdf. This outlined the key elements and steps needed for the paradigm shift towards the third industrial revolution. Other civil organisations and actors have taken on the idea of GND, contributing to the definition of the concept and its dissemination as a public policy. In 2009, the Heinrich Böll Foundation, linked to the German Green Party, published a new document, entitled “*Toward a Transatlantic Green New Deal: Tackling the Climate and Economic Crisis*”, https://us.boell.org/sites/default/files/toward_a_transatlantic_green_new_deal.pdf. The European Green Party put the GND the top of the agenda: http://archive.gef.eu/fileadmin/user_upload/GEF_GND_for_Europe_publication_web.pdf. The *United Nations Environment Programme* (UNEP) published a Report with the same view (“*Rethinking the Economic Recovery: A Global Green New Deal*”, <https://www.cbd.int/development/doc/UNEP-global-green-new-deal.pdf>. Over the years, initiatives in this direction have multiplied: out of all, it is important to point out one, of particular strategic and symbolic importance, because it marks the entry of the GND into the US political agenda. In November 2018, some protesters broke into the US Congress, staging a sit-in calling for a national “Green New Deal”, which led to the establishment of a Committee called upon to draw up an economic plan for the implementation of the GND and the presentation of a resolution to Congress, which has already obtained numerous supporters among US Deputies and Senators (<https://www.sunrisemovement.org/?ms=SunriseMovement>).

subnational level and with constituencies, called upon to play an active role, not as mere recipients, but as actors in the transition to a new way of producing goods and services.

For example, the EU Directive on the promotion of the use of energy from renewable sources⁵⁶, which enhance the energy efficiency of homes, shops or other buildings, allows and encourages the use of production facilities from renewable sources and does so above all by affecting the individual, who can become a “renewables self-consumer” (Art 2, par. 2, n. 14)⁵⁷.

The latter aspect shows how the ecological transition also passes from the choices of each citizen and that these are important both in the pursuit of objectives (reducing the anthropogenic impact on the planet, not polluting, recycling waste, etc.), and in the public management of such dynamics. For instance, as the installation of photovoltaic panels on a housing unit transforms the owner into an energy producer – who may alienate it to a default

⁵⁶ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018, *On the promotion of the use of energy from renewable sources*, in Official EU Journal L 328/82, 21.12.2018.

⁵⁷ “A final customer operating within its premises located within confined boundaries or, where permitted by a Member State, within other premises, who generates renewable electricity for its own consumption, and who may store or sell self-generated renewable electricity, provided that, for a non-household renewables self-consumer, those activities do not constitute its primary commercial or professional activity”. More significantly in this sense, Art. 21 provides: “Member States shall ensure that consumers are entitled to become renewables self-consumers, subject to this Article. 2. Member States shall ensure that renewables self-consumers, individually or through aggregators, are entitled: (a) to generate renewable energy, including for their own consumption, store and sell their excess production of renewable electricity, including through renewables power purchase agreements, electricity suppliers and peer-to-peer trading arrangements, without being subject: (i) in relation to the electricity that they consume from or feed into the grid, to discriminatory or disproportionate procedures and charges, and to network charges that are not cost-reflective; (ii) in relation to their self-generated electricity from renewable sources remaining within their premises, to discriminatory or disproportionate procedures, and to any charges or fees; (b) to install and operate electricity storage systems combined with installations generating renewable electricity for self-consumption without liability for any double charge, including network charges, for stored electricity remaining within their premises; (c) to maintain their rights and obligations as final consumers; (d) to receive remuneration, including, where applicable, through support schemes, for the self-generated renewable electricity that they feed into the grid, which reflects the market value of that electricity and which may take into account its long-term value to the grid, the environment and society.”.

buyer, share it with other people inside the building⁵⁸, or sell it in the market –, also the public regulation of this sector has to adapt, changing tools and approaches.

With Directive No. 2001 of 2018, the EU has defined the discipline to support the development of a national regulatory framework favorable to the new role of citizens gathered in “energy communities” in electricity production⁵⁹. The latter, therefore, play a dual role as consumers and producers, and for both of them they enjoy separate rights and duties. At the same time, Member States are being asked to remove barriers that could slow down the local development of renewable energy communities and to ensure that they have non-discriminatory market access. It follows, therefore, that the public administration is also changing its approach to the phenomenon, having to provide a new regulatory framework to promote distributed energy generation, in a context oriented towards the development of renewable sources, self-consumption and the direct transfer of surplus energy.

The second important innovation that the GND brings to public regulation consists of the compromise between free market and State intervention. It provides for a change of paradigm in the approach followed in the last years: the public policies are not limited to

⁵⁸ The direct exchange of electricity produced in buildings between housing units of the same condominium allows to carry out energy efficiency interventions or the use of renewable sources more effective than interventions for individual homes. Allowing the users of a condominium to connect with each other through a private network such as a closed distribution system contributes to the achievement of the targets defined by the EU, increasing and optimizing self-consumption through the efficient use of resources. In addition, physical management would decongest the national network. However, this implies several changes to the legislation, including that relating to sub-concessions for the management of the condominium distribution network.

⁵⁹ “‘Renewable energy community’ means a legal entity: (a) which, in accordance with the applicable national law, is based on open and voluntary participation, is autonomous, and is effectively controlled by shareholders or members that are located in the proximity of the renewable energy projects that are owned and developed by that legal entity; (b) the shareholders or members of which are natural persons, SMEs or local authorities, including municipalities; (c) the primary purpose of which is to provide environmental, economic or social community benefits for its shareholders or members or for the local areas where it operates, rather than financial profits” (Art 2, lett. 16, Directive 2018/2001).

banning, controlling and punishing, nor they step aside, leaving the market to regulate its actors, but go so far as to promote, encourage, and direct economic activities.

An element of distinction with the past (even recent) lies in the fact that the two moments – that of limits and that of incentives, both coming from the public authorities – are linked and coordinated, according to a shared and coherent plan. According to this, the administrative authorities do not retract to give way to economic and market dynamics, nor are they limited to prohibiting and punishing, but remain present, alongside private actors, conditioning their activities, modifying their objectives and favoring new investments, subordinate to the achievement of certain objectives established by public entities.

In this sense, by recalling what already noted above at paras. 2 and 3 about subsidies to renewable energies and programmes of incentive coming from the EU, the case of GND is emblematic to insist on the idea of a “promoting State”⁶⁰. This is a regulatory model that goes beyond the mere guarantees of a fair market functioning and the formal respect of freedoms and fundamental rights⁶¹, in which all public powers involved (supranational, national and subnational) embody an active role, affecting the economic world: promoting innovation⁶², investing and funding in selected sectors, taking place of private enterprises, acting as risk-taker⁶³. All in accordance to a vision for which a public economic entrepreneurship is able, if well driven, to produce more growth and *help* the market.

⁶⁰ See the *introduction* of the book ASTRID-IRPA, F. BASSANINI, G. NAPOLITANO, L. TORCHIA (eds) *Lo Stato promotore. Indagine sul mutamento degli strumenti di intervento pubblico nell’economia di fronte alle crisi e alle trasformazioni del XXI secolo*, il Mulino, Bologna, 2021 (<https://images.irpa.eu/wp-content/uploads/2021/01/intro-lo-stato-promotore-gn-It-fbdef-Irpa-Working-Paper-1.pdf>).

⁶¹ See W. ROPKE, *The Social Crisis of Our Time*, University of Chicago Press, 1950.

⁶² On the issue, diffusely M. MAZZUCATO, *The Entrepreneurial State: Debunking Public vs. Private Sector Myths*, Anthem Press, 2013, *passim*.

⁶³ *Ibid.*, p. 24 ff. and *passim*.

Therefore, also for the ecologic transition, it is for the public bodies – although together with private companies – to enhance and promote this new approach.

Finally, the task entrusted to the administrative powers to regulate, limit and control economic activities is regained in parallel. The “promoting State” does not take the place of the “censor State”, but is flanked by it. In addition to economic incentives, public investment and public-private partnerships, authorizations, prohibitions, controls and sanctions are being strengthened – albeit with original forms of declension.

Examples include the adoption, dating back to May 2010, of the Directive on energy efficiency in buildings⁶⁴, which was amended in 2012 and 2018⁶⁵, by the European Union. The Commission has adopted a package of legislative measures (implemented by all Member States) which, among other things, require the adoption of an energy performance certificate to measure the efficiency of buildings and which binds the location or sell of buildings if they are below a certain standard⁶⁶.

Such a regulatory approach outlines an intrusive model, based on “*command and control*”, albeit together with incentive measures, which is coherent with the GND *rationale*.

⁶⁴ <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32010L0031&from=EN>.

⁶⁵ <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32012L0027&from=EN> e <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32018L0844&from=EN>.

⁶⁶ “Latterly, the most comprehensive approach can be seen in the European Union (EU). Following the 2010 EU Energy Performance of Building Directive, it is mandatory for all European properties to hold an Energy Performance Certificate and monitor their heating and air conditioning (all 28 Member States signed up to this directive). EPCs have a significant relationship with climate-related stranded assets in real estate. They are a key enabler of building improvement, as they influence decision making in real estate transactions and provide cost-optimal recommendations for energy performance improvement”, K. MULDOON-SMITH, *Understanding climate-related stranded assets in the global real estate sector*, in B Caldecott (ed.), *Stranded Assets and the Environment: Risk, Resilience, and Opportunity*. Routledge Explorations in Environmental Studies, Taylor & Francis, 2018, p. 157. Sul tema si veda altresì l'apposito sito dell'Ue: https://ec.europa.eu/energy/topics/energy-efficiency/energy-efficient-buildings/energy-performance-buildings-directive_en.

What is more, it does not merely prohibit normal business activities (as with construction firms), but also affects individuals, who, if they wish to sell or let an apartment, will have to have an efficient energy system, with a certificate to prove it. The GND here not only promotes and incentivizes, but also prohibits and restricts the freedoms of its members, although always in the name of the public interest in reducing polluting emissions and protecting the environment.

This predominant role for the public authorities is not – or should not be – characterized by its authoritarian strength, but by a vision that we might call “social”, where the authorities significantly restrict economic freedoms but only because they are justified by the protection of collective goods which, for a number of reasons, are now considered hierarchically superior to the others. These include, of course, the protection of the environment in all its forms. In the context of the GND, public administrations have the task of finding instruments capable of compressing, restricting and directing private freedom for the protection of superior legal assets, managing to legitimize them in a multinational arena, to make them effective in results and to give them binding force in the implementation phase.

The three elements characterizing the Green New Deal, just described, mark an evolution with respect to the idea of Sustainable Development, especially in the regulatory models adopted. These are no longer vertical and top-down, but circular and bottom-up, with the increasing involvement of private actors. Moreover, administrations are no longer merely the guarantors of the proper functioning of the market, but they enter the economic system: to direct and encourage it in some cases or to control and limit it in others, always placing environmental protection at the center, as the main and strategic purpose to create development.

4. CONCLUSIONS

The birth and affirmation of the Green New Deal is in continuum with the *rationale* of an existing approach, identified with the principle of Sustainable Development. Yet, as we have seen, the GND, although still in its embryonic phase, also marks a further novelty: a different model of regulation, which has a significant impact on all the sectors that are crossed and integrated by environmental matters⁶⁷.

For these reasons, as mentioned, the GND appears to be an evolution of SD, with which it has many common features. In this respect, both constitute the value and teleological basis for the action of public administrations in regulating economic activities and for the adoption of certain policies. Continuing with this analogy, each measure based on these principles aims to put together environmental protection and promotion of economic and social development. Finally, both involve a number of innovations in regulatory activity, at extra-national, national and local level.

Nevertheless, in the evolution from sustainable development to GND, new elements are also identified. First, environment and development are no longer seen in dialectical opposition in search of a balance, but the former acquires a prominent role and aspires to become the economic and legal driver for the protection and improvement of the latter.

⁶⁷ In this sense, the declination of the GND is consistent with the legal reconstruction that identifies the fundamental principle of solidarity as the constitutional legal basis for environmental protection. On this see F. FRACCHIA, *Sulla configurazione giuridica unitaria dell'ambiente: art. 2 Cost. e doveri di solidarietà ambientale*, in *Dir. ec.*, 2002, pp. 215 and ff. and P. DELL'ANNO, *La tutela dell'ambiente come "materia"*, cit., *passim*. Similarly, the Green New Deal must also be placed among the duties of solidarity and is a prerequisite for the implementation of the constitutional programme relating to the development of the human person, which provides for obligations to be fulfilled and functions to be exercised and indicates a dutiful behavior of all subjects of the legal system, both public and private.

Secondly, the GND, although currently only a political programme, aims to establish itself as a binding principle, at least for regulatory authorities, with a perspective of becoming the main *rationale* of administrative activities.

Thirdly, despite the increasing force of GND and despite it is composed of common aims and approaches on a global scale, it reinforces the multi-level regulatory design. Therefore, supranational guidelines, directives and standards are linked to national and subnational measures, but the latter constitute the central and crucial moment of this regulation, which sees domestic administrations as the main actors.

Finally, a new model of public economic governance is gaining ground, involving private actors significantly, with a role of co-regulators; with greater powers for public actors to condition, target, guide or even take place of the economic activities of private enterprises; with an increase in administrative and regulatory functions that limit and compress rights of economic freedom.

All these features seems to have a red line in the gained role of the national State. It is the latter that promotes economic growth through the environment and it is still the State (although together to regional supranational organizations, as the EU) to make GND a binding principle for all regulating activities. Coherently, States regain decision-making power in respect of the market and of global governance, while national institutions are charged with a regulation that decides how much involving private subjects and how to alternate incentives and command and control measures.

The problems that may arise from these new aspects are numerous and can be summarized with a series of questions, which are currently destined to remain open, with the hope that they will be able to find adequate answers in the short term, with the development of GND legal discipline and thanks to new scientific research on the subject.

How much binding force does the GND have and what are the powers of public administrations to promote this economic and social model? What legal instruments, then, can help to affirm, develop and assess a development grounded on environment protection?

What role, weight and effectiveness can civil societies in the world have in the new regulation that is looming? Therefore, in parallel, how many functions remain on behalf of public institutions?

We are moving towards a model of “promoter” State/public authorities: does it have reason to be only at an early stage or will it be permanent? Will there be a balance between global prerogatives and national activities? Finally, what is the relationship between the governance of incentives/investments and that of command and control: harmony, integration, conflict or overlap?

***Abstract.** The most interesting features and problematic profiles of governance resulting from the objective of protecting the environment by the promotion of growth are discussed in this article, the assumption being that the ecological transition cannot be achieved without public regulation. Starting from a comparison between Green New Deal and Sustainable Development, the article focuses on future prospects of the framework outlined and its possible advantages. Critical elements and open questions about a set of rules meant to safeguard the planet by radically changing the production system through the completion of a third industrial revolution are also addressed.*