



Rivista N°: 2/2021

DATA PUBBLICAZIONE: 22/05/2021

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## **PUBLIC BUDGET, ENVIRONMENT AND ADMINISTRATION: DIFFICULT BALANCES DURING EMERGENCY IN ITALIAN PUBLIC LAW\*\***

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### **1. Introduction To Subject: Unavoidable Need To Find Solid And Permanent Points Of Balance**

Regulatory production and measures of administrative authorities, both at European and national level, during the Covid-19 pandemic risks leaving a trail that goes well beyond regulations' reaction to the known health emergency.

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Probably no area of public law is exempt from this epochal change, whose inheritance can only be assessed over many years, in order to verify the permanence of these legal effects on the normative system of law<sup>1</sup>.

This subject concerns traditional issues that call for a truly innovative rethink of public administrations' role as recipients and protagonists<sup>2</sup>.

In times of difficulty, law is experienced, not as a tool to guarantee social order and peaceful coexistence among citizens<sup>3</sup>, but rather as a source of uncertainty and bewilderment and the cause of incomprehensible and unjustified obstacles<sup>4</sup>, with the risk of making legislative choices whose consequences could be long-lasting, and in this writing, delicate and precarious balance between public spending, climate sustainability and role of public administrations is taken into account.

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\* This paper resumes, expands, and updates upon the keynote address given by the research team at IIAS, International Institute of Administrative Sciences' annual conference, held in Bruxelles, December 15-18, 2020, drawn by Session 'E.2 Crisis Management and Climate Changes: Costs and Effectiveness of Emergency', chairs Prof. Loredana Giani and Aristide Police, whom Authors are grateful to for debate and reflections stimulated during the conference. Although this investigation is a result of shared reflections of Authors, paragraphs § 1 is edited by Giovanna Colombini, paragraphs § 2, 3, 4 are edited by Vanessa Manzetti, paragraphs § 5, 7 are edited by Ferdinando Pinto, paragraphs § 6, 6.1, 6.2 are edited by Vinicio Brigante.

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<sup>1</sup> In this sense, it shares thoughts made by M. RAMAJOLI, *Emergenza, disordine, solidarietà*, 3 Dir. econ. 103 (2020); F. FRACCHIA, *Coronavirus, senso del limite, deglobalizzazione e diritto amministrativo: nulla sarà come prima?*, 3 Dir. econ. 575-581 (2019); G. PELLEGRINO, *Emergenza, pandemia e libertà*, 4 Il Mulino 498 (2020), pandemic is an epochal break and puts an end to traditional categories. From a purely economic perspective, the pandemic could represent a further step for supremacy of forms of capitalism or neoliberalism; on the subject, in a compliant sense, please refer to G. AZZARITI, *Il diritto costituzionale d'eccezione*, (February 2020), <https://www.costituzionalismo.it/wp-content/uploads/0.-Fasc.1-2020.-Azzariti.pdf>; G. GARDINI, *La polarizzazione del dibattito pubblico dinanzi all'emergenza sanitaria*, spec. iss. Ist. fed. 16 (2020), pandemic crisis has emphasized importance of specialists, of technical bodies in general. Politicians, and consequently the administration, have suddenly felt need to make use of technicians, experts with specialized skills; technique and its relationship with law and politics, and how it has been a viaticum for concealing obvious political responsibility, is analysed by F. SPANTIGATI, *Il valore giuridico delle norme tecniche*, 1 Jus 277-281 (2001); in critical terms on the subject of the relationship between technique and public law, with reference to liability, see studies by V. BACHELET, *L'attività di coordinamento nell'amministrazione pubblica dell'economia* 121-126 (1957); on the subject of political responsibility and vaccination campaign, but prior to the pandemic, see ruling Corte Cost., 18 January 2018, no. 5, 1 Giur. cost. 38 (2018), (with a critical note by C. PINELLI); on issue of the controversial relationship between technique and politics and their overlap, cf. W. GIULIETTI, *Tecnica e politica nelle decisioni amministrative composte*, 2 Dir. amm. 327-330 (2018); for a critical reading of this subject, especially in relation to technicalities and public administration activities, see F. MERLONI, *Le attività conoscitive e tecniche delle amministrazioni pubbliche. Profili organizzativi*, 2 Dir. pubbl. 481-520 (2013); on the issue of the need for interinstitutional consultation, an objective to be shared with the polycentric rationalization, cf., *ex multis*, G.C. DE MARTIN, *Lezione introduttiva*, in *Lezioni 1-21* (G. Palma ed., 2011).

<sup>2</sup> Cf. G. BERTI, *Interpretazione costituzionale. Lezioni di diritto pubblico* 5-8 (2001); E. OPOCHER, *Il diritto senza verità*, in *Scritti giuridici in onore di Francesco Carnelutti* 177-191 (1950, vol. 1).

<sup>3</sup> See unsurpassed approach provided by A. ROMANO, *Il cittadino e la pubblica amministrazione*, in *Il diritto amministrativo degli anni '80. Atti del XXX° Convegno di Studi di scienza dell'amministrazione* 155-220 (1987).

<sup>4</sup> Cf., *ex multis*, L. GALATERIA, *Crisi del diritto e pubblica amministrazione*, in *Studi in memoria di Guido Zanobini* 453-470 (1965, vol. 1).

The concrete and in some ways inescapable risk, in such a complex context and subject to such rapid changes as pandemic, is that the priority contrast and all measures that are inherent to the target risk overshadowing other issues, equally sensitive and urgent<sup>5</sup>.

Legislative and administrative choices may be taken with the sole aim of dealing with emergencies in accordance with standards of timeliness<sup>6</sup> and celerity that must govern the management of unforeseeable events, but such choices often risk having consequences for other sectors whose long-term problems are no less important, with reference to the subject under investigation.

Attempts aimed at trying to systematize regulations, consequences, even related to a specific subject are perennially frustrated by continuous legislative changes<sup>7</sup>, which chase each other; here is an attempt to outline the future scenario on central aspects, involving issues of public law, with specific reference to Italian context.

In other words, law enforcement measures related to emerging urgency of such an unpredictable event, risk to concentrate efforts and resources - not only economic - in one direction, sadly necessary than the one that occurred during the Covid-19.

Pandemic has had and will have effects on (almost) all aspects of today's society and according to an accredited interpretation Covid-19 would be a sentinel to alert countries and civil society to an issue that has emerged overwhelmingly in recent years, namely climate change<sup>8</sup>.

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<sup>5</sup> See S. CIVITARESE MATTEUCCI, *2 pensieri riguardo "Chi decide le politiche sanitarie nazionali e internazionali di contrasto alla pandemia?"*, *Orizzonti di diritto pubblico* (January 30, 2021), <https://orizzontideldiritto-pub.com/2021/01/29/212/comment-page-1/#comment-43>; V. MARLETTO, *Cambiamenti climatici e pandemia*, 4 *Il Mulino*, 449, 454 (2020), media coverage given to this pandemic is likely to reduce or eliminate the attention paid to the climate crisis. Shortcomings of Italian administration, economy and society in facing natural crises and especially in preventing them are dramatically evident. The tragic experience of the Coronavirus has once again demonstrated these failings. In some cases, however, the ability to develop environmentalism exceeds that of traditional politics, as demonstrated by the many critical and proactive materials developed; L. BENVENUTI, *Il diritto dell'ambiente nella prospettiva dell'etica applicata*, 3 *Jus* 453-477 (2000); A. CROSETTI, R. FERRARA, F. FRACCHIA, *Introduzione al diritto dell'ambiente* 122 (2018); M. CAFAGNO et al., *Nozione giuridica di ambiente e visione sistemica*, 3 *Dir. proc. amm.* 713-760 (2018),

<sup>6</sup> On the subject of administrative time frames, in general terms, current considerations are those draft by A. ANGIULI, *Studi sulla discrezionalità amministrativa nel quando* 53-59 (1988); recently, the approach offered by L. GIANI, *I tempi (dell'azione e della decisione) dell'amministrazione tra certezza e affidamento*, in *Scritti per Franco Gateano Scoca* 2461-2495 (2021, vol. 3), is appreciated and endorsed; a necessary reference, precisely on the subject of the relationship between time and certainty of action, is to F. CARNELUTTI, *Certezza, autonomia, libertà e diritto*, 3-4 *Dir. econ.* 1185-1190 (1956), notes that it is precisely in times that are constrained by external factors that there is an infringement of certainty and autonomy in the relationship between means and end.

<sup>7</sup> See, *ex multis*, M. FRANCAVIGLIA, *Decretazione d'urgenza, poteri di ordinanza e riserva di legge. La produzione normativa nell'emergenza Covid-19 alla luce del principio di legalità sostanziale*, 1 *Dir pubbl.* 361-384 (2020); S. STAIANO, *Né modello né sistema. La produzione del diritto al cospetto della pandemia*, in *Nel ventesimo anno del terzo millennio. Sistemi politici, istituzioni economiche e produzione del diritto al cospetto della pandemia da Covid-19* 11-20, 39 (S. Staiano ed., 2020).

<sup>8</sup> Harvard University School of Public Health, special item *Harv. Un. Sc. Hea.* (2020), has established a research database (available at <https://www.hsph.harvard.edu/c-change/subtopics/coronavirus-and-climate-change/>) for a detailed analysis of the relationship between Covid-19 and climate change; K.A. JANSE, *Will Europe emerge stronger from the Covid-19 crisis?*, (November 17, 2020), <https://www.esm.europa.eu/speeches-and-presentations/will-europe-emerge-stronger-covid-19-crisis-speech-kalin-anev-janse>, "Europe is committed to solving both crises, immediate Covid-19 pandemic, and the long-term climate change challenge. These global challenges are not national or regional. They are crises for humanity"; C. HEPBURN et al., *Will Covid-19 fiscal recovery*

European policies for multiannual programming of public expenditure and its implementation - and specifically, as far as it is concerned, administrative function - have a role to play in defining and seducing medium-long term objectives to manage climate change, even in the context of an unprecedented emergency situation, such as the pandemic.

Accounting and administrative management of pandemic may degenerate into the realization of dangerous trends towards state of exception, meant as a moment external to democratic governance<sup>9</sup>.

From many parties it has been claimed that facing such a dramatic crisis can be an opportunity to implement a series of structural interventions aimed at enabling the economies of European countries to be placed in a less vulnerable position in front of an increase in global competitiveness, given the impetuous growth of some emerging economies registered in recent years.

In this strictly European context, Member States should preserve their autonomy, in the sense of systemic legal rationality; this is not a matter of expressing scepticism, but of keeping intact and protected individual Member States' dialectical and legal frameworks<sup>10</sup>.

The purpose of this paper is to analyze how, within time constraints imposed by emergency legislation, budgetary mandate<sup>11</sup> and performance of administrative function change<sup>12</sup> in the context of climate change.

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*packages accelerate or retard progress on climate change*, 36 *Oxford Rev. Of Econ. Pol.* 4 (2020), "the climate emergency is like the Covid-19 emergency, just in slow motion and much graver. Both involve market failures, externalities, international cooperation, complex science, questions of system resilience, political leadership, and action that hinges on public support. Decisive state interventions are also required to stabilise the climate, by tipping energy and industrial systems towards newer, cleaner, and ultimately cheaper modes of production that become impossible to outcompete"; C. FIGUERES, B. ZYCHER, *Can we both tackle climate change and build a Covid-19 recovery*, *Financial Times* (May 8, 2020), <https://www.ft.com/content/9e832c8a-8961-11ea-a109-483c62d17528>, "The Covid-19 pandemic has collided with the climate change emergency. We must integrate the solutions to both crises into a coherent response. After immediate health, safety and social protection measures, inclusive recovery programmes must propel the global economy towards sustainable growth and increased resilience"; C. GRANT, *Coronavirus is pushing the EU in new and undesirable directions*, 1 *Centre for European Reform (CER)* 3 (2020), "The Covid-19 pandemic has collided with the climate change emergency. We must integrate the solutions to both crises into a coherent response. After immediate health, safety and social protection measures, inclusive recovery programmes must propel the global economy towards sustainable growth and increased resilience"; CHARALAMPIA V. GELADARI et al., *Is the Covid-19 pandemic linked to climate change?*, 4 *Hell. Soc. Envir. Cli. Med.* 4 (2020); M.-C. PETERSMAN, A.B. SUMAN, *Sensing Covid-19 and climate change*, 1 *Tilb. Env. L.* 11 (2020).

<sup>9</sup> See, in general terms, L. GIANI, *Dalla cultura dell'emergenza alla cultura del rischio: potere pubblico e gestione delle emergenze*, in *Dal diritto dell'emergenza al diritto del rischio* 15-29 (L. Giani, M. D'Orsogna, A. Police eds., 2018); G. SILVESTRI, *Covid-19 e Costituzione* (April 4, 2020), <https://www.unicost.eu/covid-19-e-costituzione/>; P. ONOFRI, *Il difficile futuro dopo la pandemia*, 6 *Il Mulino* 694, 699 (2020); T. EPIDENDIO, *Il diritto nello stato di eccezione ai tempi dell'epidemia da coronavirus* (March 30, 2020), <https://www.giustiziainsieme.it/it/diritto-dell-emergenza-covid-19/957-il-diritto-nello-stato-di-eccezione-ai-tempi-dell-epidemia-da-coronavirus>.

<sup>10</sup> In these terms, cf. A. VON BOGDANDY, *La condizione attuale della scienza giuridica europea alla luce del saggio di Carl Schmitt*, 4 *Riv. trim. dir. pubbl.* 996-1002 (2020), it is noted that national legal sciences cannot express a legal rationality on their own; K. TANNER, *Die fromme Verstaatlichung des Gewissens* 103-134 (2nd ed., 1989).

<sup>11</sup> On this issue, it is necessary to clarify how important a role budgetary transparency plays as a precondition for the implementation of public policies, cf. A. CAROSI, *Il principio di trasparenza nei conti pubblici*, 3 *Rivista AIC* 834-865 (2018).

<sup>12</sup> On this subject, see authoritative account offered by G. BERTI, *Diritto e Stato: riflessioni sul cambiamento* 243-245 (1979), transformation and continuous change finds in administrative and public law the instrument of protection.

Although issues are inseparable from a logical and systemic point of view, they must be dealt with independently, in order to detect different critical issues that emerge, in such a delicate context and subject to such sudden changes.

A first section of this paper analyzes programs and legislative determinations, intended as execution of European and national public policies, in order to evaluate the space dedicated to climate policies within the expenditure forecasts.

In this section of the work, always limited to the emergency period, the impact of the climate-balance and the space devoted to it by European policies are evaluated.

The second section of the analysis aims to analyze in detail the concrete role of the public administration, as the implementer of the EU plans, with particular reference to phases of expenditure planning and external controls to be operated, for the achievement of sustainable spending objectives.

Both aspects, inextricably linked to pandemic evolution and its duration, are analyzed in a peculiar perspective, i.e. of an event still in progress, for which the analysis may assume partial results or in any case subject to change.

## **SECTION ONE: EU WELFARE POLICIES TO DEAL WITH PANDEMIC: MARGINS AND IMPORTANCE OF ECOLOGICAL BALANCE SHEET AND MANDATE ACCOUNTING**

### **2. Instruments To Address Economic Crisis: Synthesis Risks Making The Climate Forgotten**

Economic downturn linked to the well known events of Covid-19 has grafted on to a negative trend already largely underway<sup>13</sup>, which has led to a series of choices, within European context, aimed at the so-called search for profit, which have led to a retreat of public sector, promoting neo-liberal policies - including fiscal compact, spending review strategies - implemented through the continuous reduction of public services and structures.

European awareness has led to statement that a dramatic crisis can be an opportunity for a series of structural interventions aimed at enabling the economies of European countries to be placed in a less vulnerable position facing an increase in global competitiveness<sup>14</sup>.

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<sup>13</sup> See G. COLOMBINI, *Unione Europea e Stati nazionali di fronte alla crisi economica. Riflessioni a margine*, 6 *Federalismi* 4-5 (2016), mandate accounting constitutes a fundamental element of the democratic system, since electoral trust should be conferred, denied or confirmed according to the concrete capacity to propose and implement programs according to sustainable costs, not only from an economic point of view, but also (and above all) from an environmental, territorial and social one; G. COLOMBINI, *Il diritto del bilancio nella dimensione globale della contabilità e della finanza pubblica*, in *La dimensione globale della finanza e della contabilità pubblica* 3-45 (G. Colombini et al. eds., 2020); G. RIVISECCHI, *Amministrazione, governo dell'economia e vincoli di bilancio*, in *Amministrazione e democrazia. Atti della Giornata di studi per il ventennale del Centro Vittorio Bachelet* 141-174, (spec. 166) (G.C. De Martin, D. Morana eds., 2013); F. MERUSI, *L'incubo di Diocleziano. Riflessi della 'convergenza' delle finanze pubbliche dei Paesi Euro sulla giurisdizione amministrativa italiana*, 2 *Dir. soc.* 171-186 (2014), on the structural divergence of certain aspects that make synthesis and convergence of public finances complex and also complicate the role of national Courts.

<sup>14</sup> Please refer to G. CENTURELLI, *Fondi strutturali e misure di contrasto al Covid-19: le azioni per reindirizzare ed accelerare gli investimenti, stato dell'arte e sviluppi futuri*, 2 *Riv. giur. mezz.* 381 (2020), amendments

At European level, there has been an in-depth and intense debate on the outcome of which the European Council agreed on the need for a broad-based manoeuvre capable of using a variety of instruments and committing substantial financial resources.

Pandemic has seemed and still seems to be a challenge - not only of course a health one - but the survival of European balance itself. As underlined by a document drafted by the EU Parliament<sup>15</sup>, "Despite current challenges, the Covid-19 crisis presents an once-in-a-lifetime opportunity for the EU" and in determining if and whether the EU is recovering successfully from Covid-19, EU economic relief measures should be directed to to a sustainable recovery for climate change.

It is all too evident how important a role the Member States play and how autonomous they are in their distribution, including organizational distribution, with a relative and appropriate level of responsibility<sup>16</sup>.

Several factors are relevant to the design of economic recovery packages: the long-run economic multiplier, contributions to the productive asset base and national wealth, speed of implementation, affordability, simplicity, impact on inequality, and various political considerations. A key objective of any recovery package is to stabilise expectations, restore confidence, and to channel surplus desired saving into productive investment. In this context, there is no question that climate can become a compass to guide funding allocation, which should be taken into account.

In this section of the work there is no complete and exhaustive analysis of public policies set up by EU after the declaration of a pandemic - which, however, is impossible, given the amount of documents and measures adopted - but it is assessed, in accordance with different resolutions adopted at European level, the role played by ecological balance sheets and mandate accounting, in the path out of recession<sup>17</sup>.

The day before WHO's historic declaration of a pandemic, it was stated in EU Commission Communication to Parliament<sup>18</sup>, in the definition of a New Industrial Strategy for Europe,

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proposed to respond to emerging needs arising from Covid-19 crisis are along two lines: simplification and flexibility. Therefore, amendments have represented in many ways an epoch-making turning point within the Structural Funds, introducing elements that until some time ago were not even under discussion; C. MARCHESE, *Il ruolo dello stato a fronte dell'emergenza pandemica e le risposte elaborate in sede europea: la garanzia dei diritti ed il rilancio economico alla luce del rapporto tra condizionalità e solidarietà*, 1 *Rivista AIC* 233-267 (2021); M. BRAUSI, *L'emissione dei Coronabond alla luce dei Trattati: una possibile base per il Recovery Fund?* (March 13, 2020), <http://www.federalismi.it>.

<sup>15</sup> *Opportunities of post COVID-19 European recovery funds in transitioning towards a circular and climate neutral economy*, EU Parliament (Policy Department for Economic, Scientific and Quality of Life Policies) (November 12, 2020), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/658186/IPOL\\_BRI\(2020\)658186\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/658186/IPOL_BRI(2020)658186_EN.pdf); K.H. TOFT, M. RÜDIGER, *Mapping corporate climate change ethics*, 59 *En. Rese. Soc. Sci* 286, 291 (2020).

<sup>16</sup> Current reflections on this subject by G. AMATO, *Le prospettive del processo costituzionale europeo*, 16 *Federalismi* 1-7 (2018).

<sup>17</sup> On the delicate trade-off between spending and environmental protection cf. S. VERNILE, *L'autorizzazione integrata ambientale tra obiettivi europei e istanze nazionali: tutela dell'ambiente vs. semplificazione amministrativa e sostenibilità socio-economico*, 6 *Riv. it. dir. pubbl. com.* 1697-1711 (2015).

<sup>18</sup> EU Commission, COM (2020) 102 final, *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, A New Industrial Strategy For Europe* (March 10, 2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0102>

that economic growth had to go hand in hand with climate-neutrality. The transition to this long-term goal must be made through instruments such as the European Green Deal.

In one of the first documents drafted by the European Commission<sup>19</sup> after the WHO declaration of a pandemic, it was found that the EU Solidarity Fund (EUSF) could play an important role in showing EU solidarity to Member States in dealing with emergency situation and it provided that the expense report of each individual State “shall present a report on the implementation of the financial contribution from the Fund with a statement justifying the expenditure, indicating any other source of funding received for the operations concerned”, with details of charges related to “the experience gained from the disaster and the measures taken or proposed to ensure environmental protection and resilience in relation to climate change, natural disasters and public health emergencies”.

The first EU approach was linked to a long-term forecast, in which use of EU Solidarity Fund by States would be linked to achieving measures related to the climate change impact.

In a second stage, there was the awareness of creating a financial protection network to face the global economic crisis, which could have even worse consequences if growth is not achieved with respect to climate issues<sup>20</sup>.

The topic of economic recovery after pandemic and the need to orient funds in a perspective that respects sustainability and climate change are closely interrelated themes; this recovery is a golden opportunity to comply with issues that have been neglected for too long in the financial perspective of the Member States.

In this sense, European Central Bank’s slogan - ‘Never waste a crisis: Covid-19, climate change and monetary policy<sup>21</sup>’ - is a fundamental perspective to guide accounting management and not make climate change a forgotten issue.

### **3. ECB’s Pandemic Emergency Purchase Programme (Pepp): Last Chance To Take Climate Change Seriously**

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<sup>19</sup> EU Commission, COM (2020) 114 final, 2020/0044 (COD), *Proposal for a Regulation Of The European Parliament And Of The Council amending Council Regulation (EC) No 2012/2002 in order to provide financial assistance to Member States and countries negotiating their accession to the Union seriously affected by a major public health emergency* (March 13, 2020), <https://op.europa.eu/en/publication-detail/-/publication/2db2c138-6550-11ea-b735-01aa75ed71a1/language-en>; [https://ec.europa.eu/info/strategy/recovery-plan-europe\\_en#main-elements-of-the-agreement](https://ec.europa.eu/info/strategy/recovery-plan-europe_en#main-elements-of-the-agreement).

<sup>20</sup> Cf. L. D’AMBROSIO, *Progettare per poi spendere: come non ripartire da zero*, Diritto e Conti (November 20, 2020), <https://dirittoeconti.it/progettare-per-poi-spendere-come-non-ripartire-da-zero/>; in a broader perspective, see A. CAROSI, *Interessi finanziari e prestazioni sociali nella dimensione europea e in quella nazionale*, in *La dimensione globale della finanza e della contabilità pubblica* 175, 190-211 (G. Colombini et al. eds., 2020); see also G. DELLA CANANEA, *Indirizzo e controllo della finanza pubblica* 22-51 (1996); in order to guarantee controls, even in the prevailing regulation, and to guide the composition of interests, the outcome of which does not change over years, E. DELFINO, F.P. PUGLIESE, *I controlli come composizione comparativa di interessi pubblici*, in *La ponderazione degli interessi nell’esercizio dei controlli. Atti del XXXIV° Convegno di Studi di scienza dell’amministrazione* 25-40 (1991).

<sup>21</sup> European Central Bank, (I. Schnabel, Member of the Executive Board of the ECB), (July 17, 2020), <https://www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200717~1556b0f988.en.html>.

Within the exceptional spending funds allocated at European level, the ECB's pandemic emergency purchase programme (hereinafter PEPP) and related widening of spending horizon and impact have and will have a nodal importance in the recovery of Member States<sup>22</sup>.

PEPP is a non-standard monetary policy measure, namely a temporary asset purchase programme of private and public sector securities.

For the purchases of public sector securities under the PEPP, the benchmark allocation across jurisdictions will be the capital key of the national central banks. At the same time, purchases will be conducted in a flexible manner. This allows for fluctuations in the distribution of purchase flows over time, across asset classes and among jurisdictions<sup>23</sup>.

The PEPP presents itself as a formidable - and infeasible, given the seriousness of the situation - instrument of recovery, for the wording of items and for proportionality between constraints and financial stability already provided for in the first version of the document<sup>24</sup>.

The risk of vulnerability, in relation to the active involvement of issues such as environment and climate, is raised in relation to a recent ruling of the German Constitutional Court (GCC), in relation to the Eurosystem's Public Sector Purchase Programme (PSPP)<sup>25</sup>, which

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<sup>22</sup> Healthcare - in consideration of emergency situations and the related spending funds to be programmed - is not a specific responsibility within EU, with critical issues that this reflection brings with it, on the point see F. ROLANDO, *La tutela della salute nel diritto dell'Unione Europea in risposta all'emergenza*, in *Nel ventesimo anno del terzo millennio. Sistemi politici, istituzioni economiche e produzione del diritto al cospetto della pandemia da Covid-19* 417-434 (S. Staiano ed., 2020), health system organization, as well as the planning and implementation of a public health crisis management plan, are a matter of national competence, on which Member States retain their decision-making autonomy. However, the European Union has a shared competence on common public health safety issues and a competence to support, coordinate and complement the protection and improvement of human health; cf. P. DE PASQUALE, *Brevi note sull'emergenza sanitaria nell'Unione Europea*, 1 Riv. it. dir. pubbl. com. 37, 43 (2020), Covid 19 pandemic has highlighted how inadequate is the traditional toolkit available to European institutions, especially because length and clumsiness of ordinary procedural process is not compatible with ability to react quickly to an emergency situation that has spread to all economic and social sectors. In spite of this, the institutions have managed to carve out very important spaces for maneuver, based on what was there, but also pushing themselves (a bit) beyond; cf. also A. PAPA, *La tutela multilivello della salute nello spazio europeo: opportunità o illusione*, 4 Federalismi 80 (2018).

<sup>23</sup> See M.P. CHITI, *The new Banking Union. The passage from banking supervision to banking resolution*, 2 Riv. it. dir. pubbl. com. 1-14 (2014).

<sup>24</sup> Decision (EU) 2020/440 of the European Central Bank (March 24, 2020), on a temporary pandemic emergency purchase programme (ECB/2020/17), "Taking into account the exceptional economic and financial circumstances associated with the spread of coronavirus disease 2019 (Covid-19), on 18 March 2020, the Governing Council decided to launch a new temporary pandemic emergency purchase programme including all the asset categories eligible under the APP. The PEPP is established in response to a specific, extraordinary and acute economic crisis, which could jeopardise the objective of price stability and the proper functioning of the monetary policy transmission mechanism. Due to these exceptional, fast-evolving and uncertain circumstances, the PEPP requires a high degree of flexibility in its design and implementation compared with the APP and its monetary policy objectives are not identical to that of the APP",

<sup>25</sup> Bundersverfassungsgericht, Judgment of 05 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 (March 5, 2020), <http://bundesverfassungsgericht.de> (2020), "the Second Senate of the Federal Constitutional Court granted several constitutional complaints directed against the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB). The Court found that the Federal Government and the German Bundestag violated the complainants' rights under Art. 38 (1) first sentence in conjunction with Art. 20 (1) and (2), and Art. 79 (3) of the Basic Law (Grundgesetz – GG) by failing to take steps challenging that the ECB, in its decisions on the adoption and implementation of the PSPP, neither assessed nor substantiated that the measures provided for in these decisions satisfy the principle of proportionality. In its Judgment of 11 December 2018, the Court of Justice of the European Union (CJEU) has taken a different stance in response to the request for a preliminary ruling from the Federal Constitutional Court; however, this does not merit a different conclusion in

would expose the PEPP to same risks, in an economic context and institutional tensions that do not allow a degree of review on climate related issues.

Doubts raised by this case highlight, in a broader sense, questions about how monetary policy in the coming years can complement climate policies, or *vice versa*, given the special funds provided for economic recovery linked to the pandemic.

The German Court's judgment, which focuses on other aspects<sup>26</sup> and has other important arguments related to monetary policy, notes that, in the present case, the PSPP fails the necessity test to be carried out through an analysis of principle of proportionality.

In other words, the ECB's monetary policies (and in the PEPP case study) must take into account, through the proportionality principle mentioned above, other EU policies.

By applying references and cues from the *Bundesverfassungsgericht* ruling to climate change, the PEPP could expose itself to appeals and the German court provides strong incentives to avoid this.

However, two separate warnings should be made on this subject, in relation to this risk and drift.

The first is that the judgment by *Bundesverfassungsgericht* deals with very specific issues and that the risk mentioned may not arise.

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the present proceedings. The review undertaken by the CJEU with regard to whether the ECB's decisions on the PSPP satisfy the principle of proportionality is not comprehensible (*nachvollziehbar*); to this extent, the judgment was thus rendered *ultra vires*. As regards the complainants' challenge that the PSPP effectively circumvents Art. 123 TFEU, the Federal Constitutional Court did not find a violation of the prohibition of monetary financing of Member State budgets. The decision published today does not concern any financial assistance measures taken by the European Union or the ECB in the context of the current coronavirus crisis"; A. SANDULLI, *Le relazioni fra Stato e Unione Europea nella pandemia, con particolare riferimento al golden power*, 2 *Dir. pubbl.* 405-210 (2020), (spec. par. § 3), concept of Europe that comes out of this ruling is instrumental and static, restricted within fixed boundaries, not extensible even through configuration of implicit powers justified by the technicality of the power exercised by independent institutions such as the ECB; M. CLARICH, *Corte Costituzionale tedesca, Corte di giustizia dell'Unione europea e Banca centrale europea, ovvero oportet ut scandala eveniant*, 3 *Riv. it. dir. pubbl. com.* 346-351 (2020), the German Court has at least weakened the ECB's PEPP, because it seems to conflict with main requirements identified for a proportionate decision of ECB, i.e. the early definition of purchase volume, the proportion of purchases with respect to the ECB's capital participation; B. MARCHETTI, *È tutta questione di proporzionalità: la decisione del caso Weiss*, 4 *Giorn. dir. amm.* 489, 495 (2020), according to the Author, the ruling issued by BVerfG represents a closing act, an opportunity of clash because it overturns the rationale that should drive relations between peripheral and central courts in the EU system; A. SOMMA, *Democrazia e mercato ai tempi del coronavirus. La Corte di Karlsruhe e la difesa a senso unico dell'ortodossia neoliberale*, 2 *DPCE* 2 (2020); A. FERRARI ZUMBINI, *La sentenza del Bundesverfassungsgericht del 5 maggio sulla BCE: una decisione contraddittoria*, 4 *DPCE* 2809 (2020), according to which, within an overall European context, this ruling could lead to a variety of aims, with a progressive debasement of the importance of it, which in its most disruptive content is not sustainable at European level. The Bundesverfassungsgericht could therefore find itself isolated in the European context, and the disruptive contents could be reduced in their consequences; on environmental issues, with reference to European issues, cf. G. AMATO, *Dobbiamo qualcosa all'Europa? Il caso dell'ambiente*, 5 *Il Mulino* 821-830 (2018); in general terms about this issue, cf. M. CARTABIA, M. LUCIANI, *Note sul rapporto fra Costituzioni nazionali e integrazione sovranazionale nella giurisprudenza dei tribunali costituzionali europei*, 3 *Dir. pubbl.* 651-660 (1995).

<sup>26</sup> In any case, it should be noted that the Eurosystem has not taken climate change into account when designing and implementing the PSPP. Recent evidence obtained by the Finance and Social Justice confirms that, as of February 23, 2020, this continued to be the case. Although the Eurosystem has purchased green bonds under the PSPP, these purchases are not the result of a balancing exercise between price stability and climate change, as required under the proportionality principle and Art. 11 of the Treaty on the Functioning of the European Union: they are a side effect of the ECB's market neutrality approach. The proportion of green bonds in the PSPP portfolio reflects the proportion of green bonds in the eligible bond universe.

The second is of a general nature and is aimed at criticizing the trend to devalue the National Courts, which, on the contrary, are entrusted with a protective task that cannot be substituted and is fundamental to the balance of the rule of law<sup>27</sup>.

This extraordinary spending plan represented by PEPP must be a benchmarking plan in which the balance of monetary aspects with the other objectives of the EU cannot be lacking, so as not to expose the Plan to the risk of litigation before the Courts of the Member States.

There are at least two ways in which the ECB could integrate climate change into the design and implementation of monetary policy<sup>28</sup>. First, it could begin to use credit assessment information that reflects climate risks in its credit assessment framework. Second, the ECB could set up an internal expert group tasked with evaluating the environmental impact of proposed monetary policy measures whose work could feed in to the discussions at the Governing Council. This expert group could also support the ECB in evaluating how climate risks are incorporated into credit assessment information.

#### **4. Next Generation Eu Plan: A Sustainable Transition And A Duty Not To Repeat Mistakes Made In The Past**

Current agreements and negotiations at European level on Next Generation EU have taken on an even more nodal scope in relation to pandemic emergency and perhaps require tighter deadlines for the preparation of the spending plan. Mistakes referred to relate to the recovery measures following the 2008 crisis, with monetary policies based on austerity and strictness, although documents referred to flexibility and solidarity.

Discussion coincided with discussion for definition of new EU 2021-2027 multi-annual budget on which, before the outbreak of the crisis, very different attitudes were measured: some countries, so-called 'frugal' wanted to limit the overall spending of the EU-27, financing new priorities and sectors that can support more European competitiveness through greater cuts in traditional policies, while other countries, including Italy, albeit with different degrees of gradualness, asked for sufficient resources to adequately finance not only new priorities, but also traditional policies.

Following the crisis, the scenario has changed radically: following a new proposal of the European Commission, presented in May 2020, the European Council of July 2020 agreed a substantial increase in the EU budget 2021-2027 through Next Generation EU (NGEU), the

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<sup>27</sup> Cf. A. BARBERA, *La Carta dei diritti: per un dialogo fra la Corte Italiana e la Corte di Giustizia*, 1 Quad. cost. 149-172 (2018); G. AMATO, *La Convenzione sul futuro dell'Europa e la Carta dei diritti*, 3 Quad. cost. 629-633 (2020); P. GROSSI, *Relazione sulla giurisprudenza costituzionale del 2017*, 2 Iustitia 207-222 (2018).

<sup>28</sup> For an extensive analysis on the subject, see Committee On Economic And Monetary Affairs Monetary Dialogue With C. Lagarde, President Of The European Central Bank (Pursuant To Article 284 (3) TFEU) Brussels, (February 20, 2020), 13, "The ECB is obliged by Article 127 of the Treaty to support the Union's objectives that work without prejudice to price stability, so there are many ways in which the ECB could contribute to the objective of climate neutrality".

new EU instrument that will raise funds on the markets and channel them to schemes designed to promote economic and social recovery<sup>29</sup>.

According to an agreement reached in European Council, the expenditure to finance EU budget will be covered by revenue from the Union's existing own resources and work will be done on a reform of the own resources system, in particular through introducing new own resources, which could, among other things, be used for early repayment of loans taken out under the Next Generation EU.

Strengthened by Next Generation EU, it aims in particular to provide EU with necessary means to cope with impact of the Covid-19 crisis and, at the same time, to transform EU through its main policies, in particular the European Green Deal and the environmental and climate issue<sup>30</sup> - the profile it concerns here - and the digital revolution.

Member States have agreed to use capital market loans to finance NGEUs for the sole purpose of addressing the consequences of the Covid-19 crisis and to allocate at least 30% of total spending to climate action, compared to 20% of the current budget.

In the implementation process, Member States will have to prepare National Recovery and Resilience Plans (NRRPs) to define the national reform and investment programme for the years 2021-23<sup>31</sup>.

Within key principles of National Plans, green transition plays a central role, with a view to achieving climate neutrality by 2050 and a significant reduction of gas emissions by 2030. In each national plan climate related expenditure will have to grow in a progressive form, with reforms and investments in energy, transport, decarbonisation of industry, circular economy, water management and biodiversity. Acceleration about reduction of emissions through rapid distribution of renewable energy and hydrogen, more decisive action on the energy efficiency

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<sup>29</sup> See F. BASSANINI et al., *Quale assetto istituzionale per l'impiego dei fondi Next Generation EU* (November 24, 2020), [http://www.assonime.it/\\_layouts/15/Assonime.CustomAction/GetPdfToUrl.aspx?Path=http://www.assonime.it/assonime/areastampa/Documents/Assonime\\_Quale%20assetto%20istituzionale%20per%20l'impiego%20dei%20fondi%20Next%20Generation%20EU.pdf](http://www.assonime.it/_layouts/15/Assonime.CustomAction/GetPdfToUrl.aspx?Path=http://www.assonime.it/assonime/areastampa/Documents/Assonime_Quale%20assetto%20istituzionale%20per%20l'impiego%20dei%20fondi%20Next%20Generation%20EU.pdf), in order to respect time-scales required for using Next Generation EU resources, it is necessary to ensure rapidity of decision-making processes. To this end, a series of simplification measures are proposed, in the conviction that the main road should not be that of derogations, but that of improving ordinary procedures. Resistance must be overcome, also within the bureaucratic apparatus.

<sup>30</sup> *Ten opportunities for Europe post-coronavirus. Exploring potential for progress in EU policy-making*, in *EU Parliament*, (EPRS - European Parliament Research Service) 4, 10-12 (E. Bassot ed., 2020), among opportunities for the EU there is the need for introducing economic recovery packages to use public funding to kick-start the European Green Deal and accelerate the transition towards a climate-neutral and sustainable economy, and in parallel to efforts to develop vaccines and cures for infectious diseases, encourage like-minded countries to cooperate on breakthroughs in clean energy and carbon removal technologies; S. TAGLIAPIETRA, *La legge europea per il clima alla prova della transizione*, *Il Sole 24 Ore* (November 6, 2020).

<sup>31</sup> Editorial Board, *The Covid-19 fight opens a climate opportunity*, *Financial Times* (May 16, 2020), "The pandemic has shown the lethal folly of ignoring expert warnings about the need to be ready for calamity, no matter how remote or uncertain it may seem. Unlike Covid-19, the world has had ample evidence of the damaging effects of global warming for decades. Governments today still have a chance to mitigate these - they should do so as part of the effort to rebuild after the virus"; G. BARBA NAVARETTI, *C'è troppo Stato nella versione italiana del Next Generation EU*, *Il Sole 24 Ore* (January 12, 2021), naming the program is not just a matter of labeling, but reinforces the perception of a system based on the role and action of the state and its administration. The greater weight of public investment, as opposed to incentives and subsidies, in the latest version of the plan makes this perception even more concrete.

of buildings, investments in sustainable mobility, promotion of environmental infrastructure and protection of biodiversity is urged<sup>32</sup>.

In the context of the Recovery and Resilience Facility, the final plan constitutes a strong basis for Italy to design climate and energy-related aspects of its national recovery and resilience plan, and to deliver on broader European Green Deal objectives.

Italian National Recovery and Resilience Plan was approved in January 2021 and is structured in 2 distinct parts, the first relating to the overall vision and the second establishing the missions and project lines. The plan foresees interventions to increase the production of energy from renewables, improve the energy efficiency of buildings, starting with schools and hospitals. New forms of sustainable local mobility will be promoted as well as major works to complete the country's rail links. The PNRR also contains specific actions to improve air quality in urban centers, promote the circular economy, mitigate the risks of hydrogeological instability and clean up inland and marine waters<sup>33</sup>.

In particular, mature investment projects outlined in the plan, as well as key enabling reforms that address *inter alia*, investment barriers, should be frontloaded as much as possible. The link between investments and reforms is of particular relevance for the national recovery and resilience plans, to ensure a recovery in the short to medium term and strengthening resilience in the longer term. In particular, Member States' recovery and resilience plans should effectively address the policy challenges set out in the country-specific recommendations adopted by the Council.

In addition, the Commission strongly encourages Member States to include in their recovery and resilience plans investment and reforms in a number of 'flagship' areas. In particular, the 'Power up', 'Renovate' and 'Recharge and refuel' flagships are directly related to energy and climate action and to the contents of the final national energy and climate plans. Measures under the 'Reskill and upskill' flagship are also essential to foster the climate and energy transition in all Member States<sup>34</sup>.

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<sup>32</sup> For a detailed analysis on the subject see Servizio Studi di Camera e Senato (XVII leg.), *Principali iniziative dell'Unione Europea per fronteggiare l'impatto economico sociale della pandemia Covid-19*, Study Dossier, 1 Astrid 3 (2020); F. VETRÒ, *Evoluzioni del diritto europeo dell'energia, transizione energetica e sistema istituzionale: il ruolo del GSE s.p.a.*, 1 Dir. econ. 501-537 (2020); F. GASPARI, *Coronavirus, assistenza finanziaria dell'Unione Europea e 'sentieri interrotti della legalità' costituzionale. Per un ritorno alla Costituzione e alla sovranità nazionale*, 1 Dir. econ. 63 (2020).

<sup>33</sup> For a preliminary analysis and possible spin-offs in terms of public administration reforms, see F. MERLONI et al., *Il PNRR e le riforme delle Pubbliche Amministrazioni. Dieci idee per progetti operativi*, *Orizzonti del diritto pubblico* (March 4, 2021), <https://orizzontideldirittopub.com/2021/03/04/il-pnrr-e-le-riforme-delle-pubbliche-amministrazioni-dieci-idee-per-progetti-operativi/>; see also editorial by F. MANGANARO, *Editoriale*, 1 Dir. econ. (2021), early comments on our PNRR range from excessive enthusiasm to scathing criticism. Certainly, the program is highly complex and leads to very different reflections on its realization. There is no debate that this is a very substantial investment, but rather on the spending capacity of our system and, above all, whether these interventions will produce an effect that is not only temporary.

<sup>34</sup> EU Commission, SWD (2020) 911 final, *Commission Staff Working Document Assessment Of The Final National Energy And Climate Plan Of Italy*, 6, 16, "Due to the Covid-19 crisis, the European Semester country-specific recommendations for 2020 addressed Member States' responses to the pandemic and made recommendations to foster economic recovery. In particular, they focused on the need to start mature public investment projects as soon as possible and promote private investment, including through relevant reforms, notably in the digital and green sectors. In this context, Italy received a country-specific recommendation<sup>10</sup> stressing the importance of

The issue of financing linked to the crisis caused by the health emergency must be placed in the system with the control models for public spending.

Monitoring climate expenditure means measuring the financial contribution from different sources to climate targets and, in a context of high expenditure, it cannot be subject to errors and is left to the management of Member States<sup>35</sup>.

## **SECTION TWO: ADMINISTRATIVE ACTIVITY, BUDGETARY CONSTRAINTS AND CLIMATE CHANGE: STARTING POINTS FROM THE ITALIAN CONTEXT DURING PANDEMIC CONDITIONS**

### **5. Performing Administrative Function And Emergency Spending Funds: What Space For Climate And Environment**

Climate issues are becoming significant for a growing number of governments and entities as there are areas where environmental issues could have a significant impact on financial reporting, and this account takes on peculiar connotations if placed in an economic context of measures and actions for economic recovery following the pandemic.

Effective implementation of numerous measures adopted and expected results, at European and Italian level - among other things not always coordinated with each other, but the need to provide quickly brought with it such kinds of hazards - depends on concrete performance at legislative level and, as far as of interest in this section of the analysis, at the level of the exercise of administrative activity<sup>36</sup>.

It is worth pointing out that economic recovery and the need to orient administrative activity recall a classic and controversial theme in Italian public law, made even more

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focusing investment on 'the green and digital transition, in particular on clean and efficient production and use of energy, research and innovation, sustainable public transport [...].' The 2020 Semester Country Report found that energy efficiency of buildings, climate adaptation, prevention of hydrogeological and seismic risks, and water and waste management in some regions remain a challenge, together with air quality and sustainable mobility. Investing in environmental sustainability could be an opportunity for growth. The Governance Regulation requires Member States to ensure that their national energy and climate plans take into consideration the latest country-specific recommendations issued in the context of the European Semester. Italy's national energy and climate plan has the potential to support the implementation of the European Semester recommendations, as it identifies the necessary investments needs and financial resources to meet them", "Italy is invited to continue ongoing efforts on regional cooperation with a view to intensifying exchanges and initiatives that will facilitate the implementation of its national energy and climate plan, in particular for relevant cross-border issues. Italy would also benefit from stepping up regional cooperation with neighbouring countries, in particular by promoting renewable and sustainable projects across the Mediterranean and by further exploring the possibilities within the clean energy for EU islands initiative to advance the clean energy transition on its islands. Italy is also invited to better exploit the potential of the multilevel climate and energy dialogues to actively engage and discuss with regional and local authorities, social partners, civil society organisations, business community, investors and other relevant stakeholders and to discuss with them the different scenarios envisaged for its energy and climate policies".

<sup>35</sup> *UE, Corte Conti: Italia quarto paese contributore, ora può recuperare con Recovery e fondi strutturali*, Corte dei Conti (January 21, 2021).

<sup>36</sup> See L. TORCHIA, *Il sistema amministrativo italiano e il Fondo di ripresa e resilienza*, 2 *Astrid* 11 (2020), the amount of available funds abstractly for Italy and the width of the measures necessary to ensure or at least start recovery after the pandemic crisis will certainly require a long and complex work, in which it is necessary to keep together priorities and political needs and technical analysis capabilities in terms of coherence and feasibility of projects, together with the evaluation of the effects and results to be achieved with them.

articulated by pandemic emergency context, i.e. the relationship between politics and administration, between guidance and public management activities<sup>37</sup>.

The topic may seem obvious, but it is full of problematic charge, because, at least in Italian context, the idea that there can be an administration without politics is gaining ground, and this is a contradiction in terms<sup>38</sup>.

In order to grasp the extent of this distinction between politics and administration, the political degeneration of administrations has made them partial, since a partial administration is an inefficient one, and it has long been believed, therefore, that it is necessary to elevate the separation of politics and administration to a rule<sup>39</sup>.

In this scenario, administrative function seems to be forced among many constraints, almost suffocated, between budgetary constraints and attention to the climate issue, in the context of an emergency regulation subject to sudden changes, often poorly coordinated with each other.

An entry should be made at the beginning of this section of this review; also in this area of the work - as happened in the first section - the reflections move in a context in continuous and sudden evolution, in which public administration function must continuously adapt to internal and European indications, trying not to lose its intimate coherence.

No area of law defined as an autonomous area of study and investigation, not just administrative law, appears to be exempt from the effects of the pandemic, and the way in which the extraordinary funds provided are spent must be guided by Member States but in practice executed by public administrations.

Initially, it is necessary to provide the minimum legislative coordinates, linked to emergency context, which provide special spending constraints related to environment and climate, not to bind the treatment but to make an assessment easier.

Among many legislative measures to contrast the Covid-19 emergency, a central importance and a confidence in provisions contained in it is reserved to the d.l. 16 July 2020, no. 76, later converted into l. 11 September 2020, no. 120, the so-called (nth) simplification

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<sup>37</sup> See L. CASINI, *Politica e amministrazione: the Italian Style*, 1 Riv. trim. dir. pubbl. 13-16, 20 (2019); M. CAMMELLI, *Politica e amministrazione: modelli costituzionali, realizzazioni e problemi aperti*, 2 Lav. P.a. 257-265 (2003); S. PARISI, *La natura del principio di distinzione tra politica e amministrazione e il suo complicato inveroamento nella forma di governo locale*, 6 Le Reg. 1265-1288, 1290 (2010); S. RODOTÀ, *La Corte, la politica, l'organizzazione sociale*, 2 Pol. dir. 171-193 (1982).

<sup>38</sup> See Giorgio Berti, *Stratificazione del potere e crescita del diritto*, 3 Jus 291-309 (2002); M. MAZZAMUTO, *Il fallimento della separazione tra politica e amministrazione e gli sviluppi della forma di governo*, in *La responsabilità dirigenziale tra diritto ed economia* 23-26 (M. Immordino, C. Celone eds., 2020); W. GIULIETTI, M. TRIMARCHI, *Nozione di amministrazione e coordinamento statale nella prospettiva dell'interesse finanziario*, in *L'organizzazione delle pubbliche amministrazioni tra Stato nazionale e integrazione europea* 189-222 (R. Cavallo Perin, A. Police, F. Saitta eds., 2016), in *A 150 anni dall'unificazione amministrativa italiana. Studi*, I (L. Ferrara, D. Sorace eds., 2016); F. MANGANARO, *Editoriale*, cit. at 33, in PNRR there is an awareness of how central the public administration is, called upon to ensure effective implementation of the Plan. It explicitly affirms a need for reform of public administration that improves administrative capacity at central and local level, in order to reinforces processes of selection, training and promotion of civil servants, encourages simplification of administrative procedures, with the aim of a marked reduction in red tape to reduce costs and time currently burdening businesses and citizens; recently, see V. CERULLI IRELLI, *Administration and political power*, 33 Eur. R. Pub. L. 6-11 (2020).

<sup>39</sup> See A.M. SANDULLI, *Governo e amministrazione*, 3 Riv. trim. dir. pubbl. 752-760 (1966); F. MERUSI, *I rapporti tra governo e amministrazione*, in *L'amministrazione e la Costituzione: proposta per la Costituente* 21-33 (S. Cassese ed., 1993).

decree<sup>40</sup>, containing legislative measures in order to address economic fallout from the epidemiological emergency by Covid-19<sup>41</sup>.

This decree contains a provision requiring the Government to identify projects and works necessary for carrying out *Piano Nazionale Integrato per l'Energia e il Clima (PNIEC)*<sup>42</sup>.

But the provision that attracts most attention, in a text of a law designed to simplify, is a rule<sup>43</sup> that modifies certain aspects of administrative and criminal liability of public administration employees.

The intention is to simplify administration by depriving officers of their responsibility, an extreme choice which is nevertheless necessary in order to avoid drifts of defensive administration and the possibility of escaping from signature. It is all too evident that this approach will also have an impact on administrations' actions in extraordinary post-pandemic economic recovery spending.

In addition, there are a series of simplification measures on environmental issues in order to combine environmental and economic needs of the recovery and guide the action of public administrations, in a perspective respectful of issues related to the environment and climate.

However, a final judgment can only be given after the approval of the Budget Law for 2021, whose drafts, however, contain several measures on environmental and climate issues, both in terms of direct resources and in terms of tax relief; it will obviously be up to public administrations to make effective measures adopted, in a context of exceptional and perhaps unrepeatable expenditure.

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<sup>40</sup> For a critical analysis on the law text, see F. LIGUORI et al., *Liberalizzare, semplificare, dialogare. Dall'amministrazione come ostacolo all'amministrazione come alleata* (A.J. Castaldo ed., 2021); cf. G. VESPERINI, *Al decreto semplificazioni manca la semplicità*, 1 *Lavoc.* 4 (2020), d.l. about simplifications lacks a clear, coherent and complete overall design. The regulated subjects are too many and simplification measures are mixed with emergency ones; see, also, M. OCCHIENA, *Il coraggio di semplificare*, 2 *Dir. econ.* 1-4 (2020); on the subject of recovery plans and simplification, G. COLOMBINI, *I decreti semplificazione e rilancio alla luce dei principi generali di contabilità pubblica ovvero dei falsari di parole*, 8 *Federalismi* 21-34 (2021); cf. F. LIGUORI, *Il problema amministrativo in trent'anni di fermento normativo: dalla legge sul procedimento del 1990 al decreto semplificazioni del 2020. Una introduzione*, in *Il problema amministrativo. Aspetti di una trasformazione tentata* 11-35 (F. Liguori ed., 2021).

<sup>41</sup> Regarding a complex relationship between environmental protection and simplification measures, see the recent study conducted by F. LIGUORI, *Tutela dell'ambiente e misure di semplificazione*, 1 *Riv. giur. ed.* 3-14 (2020); L. Torchia, *Il sistema amministrativo italiano e il Fondo di ripresa e resilienza*, 2 *Astrid* 4 (2020), the most recent and least recent experience shows, in fact, that Italian administrative system shows that its management capacity is weak, even when compared to measures that are only disbursed, and these difficulties are multiplied when it comes to managing complex projects or ensuring that significant investments are made in a timely and certain manner, for which resources, although existing, often remain unused or are used to a totally inadequate extent; in another, but related, respect, see F. DE LEONARDIS, *Interventi sostitutivi a tutela dell'ambiente*, 3 *Dir. econ.* 105-111, 124 (2020).

<sup>42</sup> *Energia e Clima 2030*, Ministro dello Sviluppo Economico, (January 22, 2020), <https://www.mise.gov.it/index.php/it/energia/energia-e-clima-2030>, the plan is structured in 5 lines of action, which will be developed in an integrated manner: from decarbonisation to energy efficiency and security, through the development of the internal energy market, research, innovation and competitiveness. The objective is to achieve a new energy policy that ensures full environmental, social and economic sustainability of the national territory and accompany this transition.

<sup>43</sup> An approach described as extravagant by L. TORCHIA, *La responsabilità amministrativa [Analisi della normativa]*, 6 *Giorn. dir. amm.* 763-768 (2020).

## 6. The Uncomfortable Role Of Administrations, Caught Between Spending Constraints, Sustainable Climate And Emergency Funds Management

Public administration's role appears to be strategic in the management of extraordinary funds, evidently linked to expenditure forecasts for economic recovery linked to the consequences of the pandemic, in order to direct administrative action that is respectful of environmental issues and knows how to make good use of funds, in compliance with spending constraints<sup>44</sup>.

Respect for climate sustainability requires administrative action, requires planning of activities in the long term<sup>45</sup>, above all in a context marked by different mechanisms of economic recovery, often not consistent or coordinated with each other.

The main awareness assumed concerns the need to seek this objective of balance in long term, through adoption of flexible administrative choices. Public funding and its effective implementation for the enforcement of public policies in the climate sector is ultimately directed to public administration, which defines expenditure lines and makes the indications of European Institutions.

Such a necessary landing place moves between two essential guidelines, one upstream, planning as a phase extraneous to administrative activity in the strict sense but essential for the concrete realization, and one downstream, monitoring, operated to monitor the actual achievement of objectives set.

In the context of this awareness, the demand for public accountability of people or entities managing public resources has become increasingly evident so that there is an increased need to implement accountability and controls to accept it, including in

In this regard, it seems appropriate to split the analysis of these two phases, i.e. the programming step, also according to limits and indications provided by the EU on funds for recovery from the pandemic, and monitoring step, with a specific reference to the role of the Court of Auditors<sup>46</sup>.

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<sup>44</sup> Please refer to D. SICLARI, *La tutela del diritto ad un ambiente salubre tra attività prestazionale dell'amministrazione e vincoli di bilancio*, 1 Nomos 3 (2017), the task of achieving a fair distribution of resources within the framework of the complexity of public interests is a matter for politics. However, such a process, where it is intended to affect fundamental rights, must necessarily take into due consideration the existence of an impassable limit of these rights, which can be found in respect of an unfailing core of guarantees for those concerned, into which subject under investigation is grafted; on this subject, in a perspective related to the guarantee of individual rights and budgetary issues cf. S. BUSCEMA, *Problemi attuali del bilancio dello Stato in Italia*, in *Contributi italiano al XV Congresso Internazionale di scienze amministrative* 73-81 (1974).

<sup>45</sup> See R. DIPACE, *L'attività di programmazione come presupposto di decisioni amministrative*, 4 Dir. soc. 647-655, 666-678 (2017).

<sup>46</sup> See G. COLOMBINI, *Profili della responsabilità amministrativa nel governo del territorio e dell'ambiente*, 1 Riv. trim. dir. pubbl. 3-9, 12 (1987); V. GIOMI, *Le stagioni della giurisdizione contabile nella reazione al danno all'ambiente. Problemi attuali e prospettive future*, 16 Federalismi 135-144 (2020); W. GIULIETTI, *La sostenibilità dello sviluppo nella prospettiva della responsabilità per danno ambientale*, in *Cittadinanza e diritti delle generazioni future* 97-102 (A. Romano Tassone et al. eds., 2010); M.P. CHITI, *Ambiente e Costituzione europea: alcuni nodi problematici*, 6 Riv. it. dir. pubbl. com. 1417-1422 (1998); A. POLICE, *Ambiente, attività amministrativa e codificazione*, in *Atti del primo colloquio di diritto dell'ambiente* 13-18 (A. Police et al. eds., 2005); G. PERONI, *Crisi e ricerca della stabilità economica nella prospettiva di un nuovo ordine economico internazionale orientato allo sviluppo sostenibile*, 3 Dir. econ. 259-290 (2020), what emerged was a requirement, well expressed in 2030 Agenda, to rethink this

The maintenance of a high level of environmental quality, which is a determining factor for human life, makes it necessary, to provide legal instruments aimed at guaranteeing that collective use does not compromise conservation, or rather the ability to renew environmental resources. In this context, the role of the Court of Auditors<sup>47</sup>, both in control and jurisdictional function<sup>48</sup>, proves to be decisive to guide and operate a syndicate on spending that proves to be compatible with the long-term objectives that post-pandemic spending imposes, from a perspective respectful of environmental and climate values.

### **6.1 Long-Term Planning: Spending Constraints And Flexibility To Adapt Action In Response To Change**

Achieving the climate objectives imposed in various ways by international agreements and documents drawn up by the EU has a transversal importance and has a cost that states - and administrations - must budget; the environment and its protection also have a cost<sup>49</sup>.

Active role of governments in the sustainable management of funds must be oriented to environment (and therefore interest in its protection and, in this context, sustainable climate change and public funding needed to ensure it) as the fourth essential component of the concept of 'three E's' (effectiveness, efficiency and economy) that represent today result indicators of administrative action and define what is called value for money.

A combination that leads to the creation of the concept of the 'four E's' (Economy, Effectiveness, Efficiency, Environment), and therefore the figure of sustainable environmental results. This aspect presents not a few tensions since it requires a shared balance between

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current neo-liberal international economic order, committing various players and actors in international community to come up with solutions to protect, in view of the principle of sustainable development, future generations who, more than anyone else, risk paying the highest costs due to the crisis; cf. also R. DIPACE, *Politiche e strumenti amministrativi per lo sviluppo economico*, 4 Dir. amm. 903-932 (2020); with specific reference to the issue of coordination between Courts, with reference to Court of Auditors, see F. PATRONI GRIFFI, *Corti nazionali e Corti europee: un problema di confini?*, 3 Federalismi 30-36 (2021); A. RUGGERI, *Rapporti tra Corte Costituzionale e Corti Europee, bilanciamenti interordinamentali e controlimiti mobili, a garanzia dei diritti fondamentali*, 1 Rivista AIC 7-8 (2011); from a conflict perspective also at judicial level, see V. DOMINICHELLI, *Responsabilità amministrative e giurisdizione (le confuse linee di confine tra giurisdizioni)*, 3 Dir. soc. 305-315 (2003).

<sup>47</sup> With regard to relations between accounting jurisdiction and the community's administrative moment, the reflections by G. ABBAMONTE, *Corte dei Conti, apparato, comunità*, in *Scritti in onore di Antonio Amorth* 1-22, (spec. 16-18) (1982, vol. 2); regarding relationship between public spending and social rights, an issue that runs through the current tension due to external factors, cf. A. BRANCASI, *Le modalità di finanziamento della spesa pubblica come limitazione al ridimensionamento dello stato sociale*, 1 Dir. pubbl. 39-40 (1996); see also, with specific regard to the issue of deficits and their management, G. DELLA CANANEA, *La pubblicità dei disavanzi eccessivi: tecniche di determinazione e effetti*, 3-4 Riv. it. dir. pubbl. com. 575-584 (2009).

<sup>48</sup> The topic of legality remains central to the judicial function, as pointed out critically by F. SAITTA, *Sulla funzione giurisdizionale della Corte dei Conti*, 1 Jus 279-291 (1998); cf. A. CAROSI, *La Corte dei Conti nell'ordinamento italiano*, 3 Dir. soc. 501-545, (spec. 522-530) (2013); recently, see A. BUSCEMA, *Conti pubblici e nuove generazioni*, 2 Arch. Giur. Filippo Serafini 419-447, (spec. 433-437) (2020).

<sup>49</sup> *Le politiche comunitarie di coesione economica e sociale. Nuovi strumenti di sviluppo territoriale in un approccio multidimensionale* (S. Cimini, M. D'Orsogna eds., 2011); E. DOMORENOK, *Le sfide della politica di coesione europea: la governance multilivello e l'efficacia finanziaria nella gestione dei fondi strutturali in Italia*, 3 Ist. fed. 543-544 (2014), despite the initial optimism regarding potential consolidation of multilevel governance in European regional policies, the trend at both the EU and national levels has been far from homogeneous, characterized by alternating processes of decentralization and re-centralization.

the various often conflicting public interests and these are interest in environmental protection, social development, economic development and healthier public finances.

Achieving these objectives has a cost that single administration must balance with this stringent spending constraints to which it is subject<sup>50</sup>.

In this sense, flexibility mechanisms are provided to allow individual countries, and their public administrations, to achieve their objectives of stabilization and reduction of gas emissions at a lower cost, through the financing of emission reduction projects.

In other words, this challenge arises as to how the administration should act and which instruments to use, in compliance with the political direction, and in achievement of two objectives that are set in an antithetical logic, but have the same rank in relation to the hierarchical value.

The main awareness assumed concerns the need to seek this objective of balance in the long term, through the adoption of flexible administrative choices. Public funding and its effective implementation for the enforcement of public policies in the climate sector is ultimately directed to public administration, which defines expenditure lines and makes the indications of international agreements concrete.

In the context of this awareness, the demand for public accountability of people or entities managing public resources has become increasingly evident so that there is an increased need to implement accountability and controls to accept it, including in environmental sector.

Climate issues are becoming significant for a growing number of governments and entities as there are areas where environmental issues could have a significant impact on financial reporting.

Expenditure planning and related constraints for administrations, in an emergency phase - but the concept is valid across the board and, as such, also applicable to ordinary phases - must revolve around two fundamental guidelines, namely flexibility and long-term vision.

Need to find a long-term balance and the demand to find instruments that are flexible, adaptable and modifiable over time on the basis of responses and updates that climate change proposes to attention of public policies, find the perfect synthesis within planning of interventions and therefore of public spending.

Programming interventions to be carried out is a fundamental factor because, as pointed out by authoritative Italian scholars<sup>51</sup>, planning and scheduling represent the obligatory step when the public administration is faced with problems that have a long-term dimension,

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<sup>50</sup> G. COLOMBINI, *Notazioni a margine del processo di costituzionalizzazione della nozione finanziaria di amministrazione pubblica*, in *Passato e presente del diritto amministrativo* (G. Pizzanelli ed., 2017); G. PESCE, *La sostenibilità del debito pubblico della pubblica amministrazione nella nuova costituzione finanziaria dello stato*, 2 *Riv. it. dir. pubbl. com.* 531-543, 555 (2015); S. CIMINI, *Equilibri di finanza pubblica nella prospettiva del buon andamento delle amministrazioni pubbliche*, in *La dimensione globale della finanza e della contabilità pubblica* 495-503, 505 (G. Colombini et al. eds., 2020), improving mechanisms for quantitative and qualitative control of public spending has been one of the main economic policy objectives in the recent past. For central government administrations, the spending review has been embedded in the budget process, with annual savings targets assigned to individual ministries..

<sup>51</sup> Reference is made to study made by M.S. GIANNINI, *Il pubblico potere* 131, 152-158 (1986); G. BERTI, *Il rapporto amministrativo nella costruzione giuridica dello Stato*, in *Scritti in onore di C. Mortati* 71-77 (1977, vol. 2).

and involve coordination between administrations, public and private bodies and require orderly use of various kinds of resources.

Administrative choices aimed at guaranteeing administrative activity in line with objectives of climate sustainability (in terms of imputation but also in terms of responsibility) must comply with objective of rationalizing strategic choices, within the framework (and within relating limits) of the correct allocation of financial resources that has become primary according to the chronic deficit situation of the public coffers.

The planning activity, in this sense, is an essential factor in identifying the priorities in terms of the activity/sustainability/expenditure *ratio* that the administration must support in long term.

## **6.2 Compliance With The Control System: A Strategic Role In Sustainable Management Of Post-Crisis Funds**

This unprecedented health emergency induced by the Covid-19 pandemic, due to the unpredictability of its outcomes, severity, duration and size, has opened up new scenarios for public sector entities, putting their finances to the test due to its obvious and immediate impact on revenues, expenses, investments and, ultimately, on budget balances.

In order to face the complexity, extension and criticalities of this emergency situation, a significant contribution, under financial and management profile, can be provided by a system of internal control of each administration, in order to strengthen at most, in this period, monitoring processes.

In this context - which has ended up altering all the existing risk management processes - the various components of the integrated internal control system, in fact, are called upon not to rely exclusively on the principles and practices previously in force and followed, as this could lead to a weakening of controls in some areas, increasing the likelihood of new risks occurring in others.

It seems necessary, instead, that these structures are equipped with adequate tools (organizational and methodological) to provide adequate responses to the challenges of the emergency, substantially changing, if necessary, the approach to monitoring in several respects<sup>52</sup>.

Virtuous circularity between acquisition of public revenue with withdrawal from the wealth produced by the national economy - on the one hand - and the allocation and management of financial resources as a result of a planning properly oriented towards fair and sustainable development<sup>53</sup> - on the other hand -, cannot be ensured without an effective and

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<sup>52</sup> G. AMATO, *Dall'idea di Europa alla costruzione europea*, 2 *Federalismi* 1-4 (2019); G. PITRUZZELLA, *L'Europa del mercato e l'Europa dei diritti*, 12 *Federalismi* 4-6 (2019); M.P. CHITI, *La legittimazione per risultati dell'Unione Europea quale comunità di diritto amministrativo*, 2 *Riv. it. dir. pubbl. com.* 397-411, 414 (2016); in a fully conforming sense, see M. CLARICH, *Perché è difficile fare riforme della pubblica amministrazione utili all'economia*, 1 *An. Giur. econ.* 169-182 (2020); cf. G. DELLA CANANEA, *Il nuovo MES: ex crisis Europa oritur*, 1 *Quad. cost.* 207-210 (2021)

<sup>53</sup> See G.F. CARTEI, *Ambiente e mercato nella disciplina delle energie rinnovabili*, 3 *Dir. econ.* 589-597 (2013).

rationally oriented system of controls to ensure good administrative performance, especially if it is unfailingly correlated to a series of recovery objectives linked to economic growth after the health emergency.

In this direction, both the role of the Italian and the European Court of Auditors is moving in this direction, and it is on the latter that it is appropriate to make a final reflection, to understand the direction towards which States - and therefore public administrations - must proceed in order to combine the aspects of public management, which risk being structurally very far away<sup>54</sup>.

European Court of Auditors - regarding the changes made to JTF (Just Transition Fund) in relation to post Covid recovery funds - funding should be more needs-based and performance-oriented in order not to betray the EU's ecological ambitions. The Court notes that the Commission did not carry out an a priori impact assessment to justify the modified amount. A sound needs analysis is essential to ensure a better allocation of EU financial resources and to identify and quantify the objectives to be achieved. This is all the more important as the proposal provides additional funding for regions that have already received support for energy modernisation through other dedicated funds.

## **7. Ministry Of Ecological Transition: Organizational Profiles And Brief Concluding Remarks**

This theme has taken on considerable strategic importance with the establishment of the new Minister of Ecological Transition, assisted by a special inter-ministerial committee, which took place with the advent of 'Draghi' government<sup>55</sup>.

The Ministry for Ecological Transition is entrusted with the functions and tasks incumbent on the State relating to sustainable development and the protection and enhancement of the environment, territory and ecosystem.

The Council of Ministers approved the Ministerial Decree Law, which reorganized competencies and structures of a number of ministries. This decree officially created the Ministry for Ecological Transition (MITE), which replaces the Ministry for the Environment and Protection of Land and Sea. The scope of action of the new ministry is wide, absorbing, in addition to all the competences of the former Ministry for Environment, also some of the key competences in the process of ecological transition, mainly concerning the energy sector. From this point of view, it is foreseen that some departments of the Ministry for Economic Development will be transferred to the new structure.

Obviously, it is not possible here to try to outline the hypothetical expenditure path that will be followed by the new Ministry, but some perplexity is expressed regarding the choice made upstream.

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<sup>54</sup> Cf., on these issues and the associated risks, L. VASQUES, *Golden Power. Alcune note a margine della disciplina emergenziale del controllo governativo sulle acquisizioni in Italia*, 1 Merc. conc. reg. 119-122 (2020),

<sup>55</sup> See B. CARAVITA, *Un tornado silenzioso*, 6 Federalismi IV-VIII (2021), current government has emphasized need to reformulate the Recovery Plan in order to allow a good restart of economic activity with the large amount of money that will flow from Europe, has stressed need to counter the growth of social inequalities, has reiterated the centrality of a development process oriented towards sustainability and ecological transition.

The further complication to an apparatus already often inadequate seems to be a choice not to be shared, especially in relation to the arrival and the need to spend well the extraordinary funds that will arrive from Europe, with attention to the environmental theme.

The theme of administrative reform has certainly been among those most intensely discussed, both in theoretical debate and through specific moments of investigation, often very in-depth. However, that theme comes back to public opinion and to those who govern, almost as if it were unprecedented<sup>56</sup>. Awareness of previous studies and elaborations is generally lacking, as if the Italian administration, traditionally the poor guardian of its own historical memory, were also incapable of drawing from that vast archive of reformist planning<sup>57</sup>.

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<sup>56</sup> In critical terms, cf. A. PAJNO, *Crisi dell'amministrazione e riforme amministrative*, 3-4 Riv. it. dir. pubbl. com. 549-560, 562 (2017), politics and administration are in fact structurally linked, since former elaborates strategic plans and programs necessary for realizing and achieving shared welfare, and the latter is called upon to give shape and substance to these programs. Since they are structurally linked, there is always a relationship between politics and administration: this relationship can be at times one of closeness and almost of identification, at times one of distinction-separation, but in no case can it be lacking. A situation of this kind shows that the administrative system is also evolving in view of the change in the relationship between politics and administration. However, it also highlights elements of complexity, since it introduces at least potential antagonism, or at least profiles of competition between the elements of the relationship; see also C. PINELLI, *Modernizzazione amministrativa, principio di legalità, interpretazione costituzionale*, 1 Dir. pubbl. 83-84, 91-95 (2001), innovations are an opportunity to rethink how principles change, looking in these innovations not only for breaks but also for elements of continuity; S. CASSESE, *Amministrazione pubblica e progresso civile*, 1 Riv. trim. dir. pubbl. 141-151 (2020); on possible impacts, in a general sense, but on aspects related to budgetary constraints, see M. PROTTO, *Il diritto debole. Dal rapporto all'organizzazione: andata e ritorno*, in *L'organizzazione delle pubbliche amministrazioni tra Stato nazionale e integrazione europea* 93-107 (A. Police et al. eds., 2016, vol. 1).

<sup>57</sup> Cf. G. SCIULLO, *La semplificazione dell'organizzazione*, 2 Dir. amm. 413, 420-427 (2009); E. CASSETTA, *La difficoltà di semplificare*, 3 Dir. amm. 335-341 (1998); about similar doctrinal positions, but in a broad perspective, see G. MARONGIU, *Funzione*, XIV Enc. giur. Trec. 14 (1988); A. PIZZORUSSO, *Proposte di semplificazione e riassetto normativo*, 5 Corr. Giur. 597 (2008); G. MORBIDELLI, *Verso un diritto amministrativo meno speciale*, 4 Dir. pubbl. 805-809 (1997), on sudden changes in the organizational structure and balance of administrations; D. VAIANO, *La riserva di funzione amministrativa* 5-6, 41-56 (1996).