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The necessary and reasonable balance of interests between the principle of efficiency of the Public Administration and the principle of budget balance and its justiciability: an analysis in Environmental Matter in Italy.

Relatore	**Correlatore**
Prof. Aristide Police	**Prof. Giuliano Fonderico**

N.1457373
Francesco Simon Artibani

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ABSTRACT

This study supports that the Public Administration can exercise discretion legitimately only amongst actions that are efficient. Thus, PA budget scarcity as a corollary of the principle of budget balance cannot justify, when it is due per se to PA inefficiency, the failure to act upon its duties. This withstanding, the judiciary should have the competence to review PA failure to act and inefficient organization and the power to enforce efficiency compliance. This analysis is applied to a specific case, the organizational and operational inefficiency of the Italian Ministry for the Environment and its failure to organize open competitions for staff recruitment provided by law. The study is divided in an ex-ante and an ex-post analysis: a) PA efficiency standards and parameters; b) the possibility of judicial review, powers, and possible procedural solutions. To meet Italy's RRP obligations, the Ministry of the Environment's efficiency is crucial.

INTRODUCTION

Foremost, I wish to thank my Tutors Professor Aristide Police and Professor Marco Macchia, as well as my Co-Tutor Professor Giuliano Fonderico. Their help was essential for the completion of this study. I also wish to thank the Court of Accounts and the Central Library of the Court A. De Stefano, for letting me use the library and for their very helpful librarians.

Research question:

What are the legal efficiency standards for the Public Administration and are they justiciable?

Research Methodology:

The analysis of data, law, jurisprudence, reports and studies (legal and economical). First, for the completion of this study it shall be necessary to review and study Italian Administrative Law in general. Second, it shall be necessary to review and identify the relevant sources of the most important academia on the topic of this study, such as Professors Santi Romano, Pajno, Scoca, and Giannini. To this end the Central Library of the Italian Court of Accounts A. De Stefano will be of great aid. Furthermore, Reports – particularly those of the Court of Accounts – shall be essential for an in-depth analysis of the object of this study.

Project Outline:

Foremost, the research must define how these concepts treated are to be interpreted: the principle of good administration[1], efficiency[2] and effectiveness and the principle of budget balance[3].

According to the data presented in the Italy's "Report of National Accounts 2021" by the Italian Court of Auditors, in the European Commission's "2022 Environmental Implementation Review[4]", one of the main issues of the Ministry for the Environment can be identified as: 1) The non-organization of open competitions for staff recruitment[5] provided by law and relying on the assistance of in-house Company SOGESID.

These data suggests that a possible cause of both the issues stated above lies in organizational inefficiency (of which issue 1 is also considered amongst the main causes, creating a vicious cycle), resource allocation and a lack of spending capacity (the so-called Eco-Budget of 12,5 with a residual balance[6] of 5.2bn; the Italian Ministry of the Environment's

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[1] J. 123/1968, 9 and 47/1959, 234/1985, 404/1997, and 40/1998 in Ufficio Studi Corte Cost. *Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale*. 2009.

[2] Cf. - G. Pedrini. Il Principio Di Efficienza Pubblica Sotto Il Profilo Economico. *Amministrare* no. 3 (2009): 475-476; M. Avagliano. *L'efficienza della pubblica amministrazione: misure e parametri*. 2001.

[3] Ufficio Studi Corte Cost. *Diritti Sociali e Vincoli di Bilancio*. 2015.

[4] European Commission. *Environmental Implementation Review Country Report – Italy*. 2022: p. 44-50.

[5] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 2 Tomo 2 p. 2-3-4.

[6] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 1 Tomo 1 p.489; Volume 2 Tomo 2 p. 3.

2021 budget 5.024,25m. with a spending capacity of 88%, but inefficient resource allocation). Comparative studies show that at equal financial resources the Italian PA remains the most inefficient[7]. Thus, the Ministry of the Environment's failure to act upon both above-mentioned duties cannot be justified by the balanced budget principle. Italy's RRP devolves 37.5% of the plan to climate objectives, in order to comply with obligations towards the EU the Ministry's efficiency is therefore crucial. A possible solution to these issues is the judicial review of PA inefficiency, with the power to enforce compliance.

For the justiciability of both the above-mentioned issues a possible solution is Italy's Law 198/2009, the "Public Class Action"[8]. Judgment parameters and standards are inferable from primary and fundamental law, soft law, and studies.

- Relevant Law: Art. 81, 97, 3 of the Italian Constitution, Art. 2bis 241/90, Art. 1. CPA, Art. 41 of the European Charter of Fundamental Rights and art. 298 TUE, Art. 3,6,7,8, 9 of the Aarhus Convention, and EU Regulation 2020/2092[9].

I argue that a restrictive interpretation (of locus standi and admissibility) of Law 198/2009 is illegitimate, considering the

[7] F. Cerase. La «performance» e l'Efficienza Del Settore Pubblico in Chiave Comparata. *Amministrare* no. 1 (2017): 95-138.

[8] G. Fidone. *L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività*. 2012.

[9] Arguably, for C-156/21 and C-157/21: Par. 10 pt.(59) "sound financial management means implementation of the budget in accordance with the principles of economy, efficiency and effectiveness"; Par. 18 pt.(3) "effective judicial protection, including access to justice" in https://european-union.europa.eu/institutions-law-budget/law/find-case-law_en. 1/2022.

jurisprudence of: the Italian Supreme Administrative Court[10] on the Public Class Action, the CJEU[11]/[12] on environmental access to justice, and the Italy's Constitutional Court[13] regarding PA efficiency and tenders.

To conclude the study, other[14] procedural paths[15] for justiciability are to be researched. (e.g., devolving judicial competence in inefficiency to the Italian Court of Accounts, that has a public prosecutor.)

[10] Ufficio Studi C. di S. *Rassegna di Giurisprudenza – La Class Action Pubblica.* 2018.

[11] C-240/09 in A. Altmayer - European Parliament. *"Implementing the Aarhus Convention Access to justice in environmental matters".* 2017

[12] C-166/22; C-613/22 in https://european-union.europa.eu/institutions-law-budget/law/find-case-law_en. 1/2022.

[13] J. 406/1995, 29/1995, 470/1997, 81 and 205/2006 Ufficio Studi Corte Cost. *Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale*. 2009.

[14] A. Giuffrida. *Il Diritto Ad Una Buona Amministrazione Pubblica e Profili Sulla Sua Giustiziabilità. Vol. 26*. 2012.

[15] G. Scaccia. *"La Giustiziabilità Della Regola Del Pareggio Di Bilancio."* 2012.

CHAPTER 1

Defining the principle of efficiency and that of balanced budget for the purposes of this study

1. Premises and starting points.

Before delving in the core subject of this study it is necessary to clearly define the essential concepts that shall be used in the analysis. All the other concepts we shall treat, including that of a balanced public budget, stem from the concept of the efficiency of the Public Administration (P.A.). The principle is the subject to ample academic literature and was subject to a conceptual evolution that resulted from debate within academia and jurisprudence. The principle of efficiency is cross border, cross national state and global, as are the various principles born from the economic realm. This chapter's analysis will concentrate on the definition and clarification of the principle of efficiency and its corollaries within the common legal framework of the European Union and the Italian national framework of the principle. The principle of public efficiency within Italian national Law, as we shall see, has its own national constitutional wording and juridical tradition. This withstanding matters strictly related to the principle of efficiency and the principle per se fall within EU law competence and is subject to stringent harmonization, regulations as well as to the EU Treaty of Niece, where it is regulated. This topic shall be analyzed in detail further in this chapter and within the following.

To simplify the definition of P.A. efficiency for the purpose of this study the analysis shall commence from three starting points[16]

[16] "Il Principio Di Efficienza Pubblica Sotto Il Profilo Economico: Aspetti Salienti Ed Evoluzioni Possibili." *Amministrare* no. 3 (2009): 453-484.

1. The principle of a balanced budget has become a (if not the main) limit for State Action, particularly following the crisis regulation that stemmed from the 2008 financial crisis. This is particularly true within the European Union with the constitutionalizing of the principle by MS.
2. The principle of efficiency and its corollaries, such as the principle of a balanced budget, are a legal transplant of economic principles.
3. This legal transplant, like all transplants, is not without its issues. For economic principles to be applied within the State and P.A certain adjustments must be made. Furthermore, depending on the context within the concept of efficiency is used it may have different meanings or at least lead to unclear conceptual boarders.

In economic terms, efficiency can be defined as a situation where available resources (i.e., budget) are satisfactory for the finality sought and vice versa. In other terms, it is defined in literature as "a general term for making the maximum use of available resources"[17]. The principle of efficiency is declined in different concepts within the economic theory. To find a definition for the purposes of this paper, the analysis shall first briefly review the main economic declinations of the concept of efficiency and later concentrate on how they are transposed in legal theory, particularly in the Administrative legal theory.

Preliminarily, an important distinction must be made between the principle of efficiency and that of effectiveness. This distinction

[17]Efficiency in the Hashimzade, Nigar, Gareth D. Myles, J. Black, and Gareth Myles. *A Dictionary of Economics*. 5th ed. Oxford, England: Oxford University Press, 2017.

inevitably bears a complex question with it: which one concept comprises the other. Finding the answer is a matter for philosophical theory and certainly not for this study. Although, for the purpose of a clear analysis in this study the concept of efficacy shall be considered as an element, an essential part of, efficiency. This, following the consideration that an action cannot be considered truly efficient unless it is also effective. As we shall see how one considers the relationship between the two concepts has important implications. Regardless, what is particularly relevant for this study is the distinction to be made between the two concepts: affirming the fact that the concepts differ in content.

While in terms of the territorial scope of this study shall mainly concentrate on the Italian and EU legal systems. In terms of the objective scope of the Public Administration that shall be analyzed the study shall concentrate on the regulatory side and function of Public Administration. In other words: "The public administration includes all those activities directed at policymaking, legislation, and management of the public sector. Activities producing individual services for citizens, like health care and education, are not the domain of public administration[18]". This study shall concentrate on the analysis of "policymaking, legislation, and management of the public sector".

2. Efficiency in Economics

[18] S. Van de Walle, M. Sterck, W. Van Dooren, G. Bouckaert, E. Pommer, *Public administration*, in Social and Cultural Planning Office, *Public Sector Performance An international comparison of education, health care, law and order and public administration*, The Hague, 2004, p. 235.

2.1. Allocative efficiency or Pareto efficiency

An allocation is Pareto efficient when "there is no feasible reallocation that can raise the welfare of one economic agent without lowering that of another"[19]. In Welfare Economics the first theorem states that the equilibrium of a competitive economy is Pareto efficient.[20] This can be considered as an (or the) objective for society.[21] Although, pareto efficiency has some limits (due to various implicit factors) specifically that of the so-called market failures. These are situations where competition on the market and its influence on prices does not satisfy all societal needs, particularly those that do not make it into the market. Classic examples of these unsatisfied societal needs are; public healthcare, the environment, public education, and social welfare. In synthesis, the issue is that societal needs that are not profitable and could lead to business losses, shall not be object of business endeavor specifically because allocatively inefficient.

It is mainly due to 'market failures' that economic theorists[22] introduce and justify State economic intervention. This is where the role of the State and of P.A. is introduced and where economical concepts start to enter within the legal realm. The complexity of such a conceptual transplant can be here easily considered with the following conundrum: State intervention is justified by economists when there is a failure in allocative efficiency, but concurrently legislative principles apply

[19] Pareto efficiency in the Hashimzade, Nigar, Gareth D. Myles, J. Black, and Gareth Myles. *A Dictionary of Economics*. 5th ed. Oxford, England: Oxford University Press, 2017.

[20] Idem

[21] Vernengo, Matias, Esteban Perez Caldentey, Barkley J. Rosser Jr, and Esteban Pérez Caldentey. *The New Palgrave Dictionary of Economics.* London: Palgrave Macmillan, 2008.

[22] Inter alios G. Akerlof, M. Spence, J. Stiglitz, J. Mirrlees, W. Vickrey, O. Hart, J. Tirole, E. Maskin, O. Williamson.

allocative efficiency to the State.[23] The following analysis shall slowly try and unravel such complexities.

2.2.Technical efficiency

Technical efficiency is a necessary precondition of allocative efficiency. It can be defined as the minimal level of input for maximum input[24]. It is important to underline that technical efficiency can withstands without allocative efficiency, but this is not true vice versa[25]. This element will be important further-on in the study. Important elements that influence technical efficiency are the so-called 'economies of scale'[26] and the 'most productive scale size'. These elements are marginally relevant for our study as the scale size of P.A.s must be born in mind when evaluating their overall efficiency. In this perspective the theory of 'X-efficiency' by Leibenstein[27] adds useful additional means of analysis. The theory, which is the root of behavioral economics, contradicts one of the main assumptions of economics, that of perfect information and rationality through the introduction of 'bound rationality'. Thus, ethics, culture, and irrational motives as well as corruption and nepotism are considered and added as factors (amongst other elements, i.e., so-called 'sunk costs') within economic

[23] "Il Principio Di Efficienza Pubblica Sotto Il Profilo Economico: Aspetti Salienti Ed Evoluzioni Possibili." *Amministrare* no. 3 (2009): 458.
[24] Technical efficiency in the Hashimzade, Nigar, Gareth D. Myles, J. Black, and Gareth Myles. *A Dictionary of Economics*. 5th ed. Oxford, England: Oxford University Press, 2017.
[25] "Il Principio Di Efficienza Pubblica Sotto Il Profilo Economico: Aspetti Salienti Ed Evoluzioni Possibili." *Amministrare* no. 3 (2009): 458.
[26] Economies of Scale in the Hashimzade, Nigar, Gareth D. Myles, J. Black, and Gareth Myles. *A Dictionary of Economics*. 5th ed. Oxford, England: Oxford University Press, 2017.
[27] Frantz, Roger S. and Morris Altman. *The Beginnings of Behavioral Economics: Katona, Simon, and Leibenstein's X-Efficiency Theory*. London, England: Academic Press, 2020.

analysis. In evaluating the efficiency of P.A. this concept is born in mind by most contemporary academic literature that analyses public administrations. Furthermore, considering factors of bound rationality is particularly useful to understand why comparatively at equal budgets (allocative resources) different States have opposite results[28]. We shall come back to this comparative perspective at the end of this chapter.

2.3. Efficiency and efficacy

The concept of efficacy is a concept taken from business economics. It can be defined as successfully producing the result or finality sought. Efficacy can be distinguished in internal (related to technical efficiency) and external (related to allocative efficiency and efficiency as a whole). The concept of efficacy implies many others, amongst these those which are most prominent are that of innovation and sustainable development.

Efficacy, alongside the concept of balanced budget, is amongst the most relevant concepts that form that of efficiency. How can anything be defined as efficient if it is not effective, one cannot define a car as the most efficient on the market unless it is also effective, as in it works as it is supposed to.

3. Public efficiency

Foremost, efficiency at State and P.A. level is provided for in the law. For the purpose of this chapter, relevant law at EU and at Italian National level mut be reviewed, but briefly, while the next Chapter on

[28] "Performance» Ed Efficienza Del Settore Pubblico Italiano: Comparazione Con Francia, Germania, Giappone, Regno Unito (1980-2010)." Amministrare no. 1 (2015): 33-74.

legal efficiency parameters and standards shall provide a more in-depth analysis of relevant law.

Starting at European Union Law, efficiency is provided in constitutional and primary law within; articles 41 of the European Charter of Fundamental Rights (ECFR)[29], 298 of the Treaty on the Functioning of the European Union (TFUE)[30], in the Preamble of the Treaty of the European Union (TUE)[31], and within EU Regulation 2020/2092[32]. Efficiency is provided for across most of the EU Soft Law; from the EU Code for Good Administrative Behavior[33], the EU Better Regulation Guidelines[34] and Toolbox[35], to sectorial recommendations and reports such as the Environmental Implementation Review (EIR)[36], and the Report for the development of a framework for the assessment of environmental governance[37].

In the Italian legal system, the Constitution in article 97 co 2 refers to the principle of good administration and impartiality (*"buon andamento ed imparzialità delle amministrazioni"*). Through this principle the Italian Constitutional Court has, in its jurisprudence, recognized the principle of public efficiency[38]. Art. 97 co 1 Const. dictates the principle

[29] European Commission. Charter of Fundamental Rights of the European Union 2016/C 202/02. Brussels: Official Journal of the European Union, 2016.
[30] Id. Consolidated Version of the Treaty on the Functioning of the European Union C 202/1. Brussels: Official Journal of the European Union, 2016.
[31] Id. Consolidated Version of the Treaty of the European Union C 202/1. Brussels: Official Journal of the European Union, 2016.
[32] European Parliament and Council. Regulation (EU, Euratom) 2020/2092 L 433 I/1. Brussels: Official Journal of the European Union, 2016.
[33] European Commission. Code of Good Administrative Behavior. Brussels: Official Journal of the European Union, 2000.
[34]Id. Better Regulation Guidelines. Brussels, 2021.
[35] Id. Better Regulation Toolbox. Brussels, 2021.
[36] European Commission. Environmental Implementation Review Country Report – Italy. Brussels: 2022.
[37] Id. The development assessment framework on environmental governance in the EU Member States Final report. Brussels: 2019.
[38] J. 123/1968, 9 and 47/1959, 234/1985, 404/1997, and 40/1998 in Ufficio Studi Corte Cost. *Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale*. Roma: 2009.

of a balanced budget for Public Administrations as well as that of coherence in its spending with EU law. Art 81 Const. provides for the principle of balanced budget at State/National level. Art 41 Cost. provides for the right of free private economic initiative and its limits. These limits are particularly relevant for this study. Economical initiative cannot be in contrast with or damage society, public health, the environment[39], human dignity, security, and freedom. Furthermore, the article entrusts primary sources of law the power and duty to provide compliance controls and programs for the political direction of both private and public economic activity towards social and environmental objectives[40](the word 'objectives' are particularly relevant in public administrative efficiency, as they give both instructions for ex ante administrative action and standards for ex post review, thus, as shall see further in this chapter and in the study as a whole the word is consequently also of particular relevance for this study). Art 9 Const. is particularly relevant in such context as it expressly provides that the Italian Republic shall protect the environment, biodiversity, and ecosystems, also in the interest of future generations.[41] Finally, art. 54 co 2 Const. provides that citizens who are entrusted with public offices must fulfill their duties with honor and discipline. This last article is not often recalled, and many argue has remained legally unimplemented, although it gives a glimpse of how the principle of efficiency (or rather of efficacy) has always had a prominent value since the very birth of States through rigid constitutions. One may consider the article as one

[39] The Article was modified, together with art 9 of the Italian Constitution, by Constitutional Law 11th of February 1/2022. The amendment Law has provided an explicit reference to the fundamental right to environmental protection and the need of a balance between economic initiatives and the public interest in the environment.
[40] Servizio Studi Senato. *Dossier - Modifiche agli articoli 9 e 41 della Costituzione in materia di tutela dell'ambiente - A.C. 3156-B.* Roma:2022.
[41] As mentioned in note 23, Constitutional article 9 was amended by Constitutional Law 11th of February 1/2022.

final example within the Italian constitutional system that completes a system of standards for a good (i.e., efficient) state and P.A. action. Furthermore, this article and its disregard are an example of how the justiciability of efficiency and efficacy in public administration are needed more than ever.

In terms of primary sources of many Italian laws can be deemed relevant. Foremost amongst these is Law 241/90 on the Administrative Procedures, with general articles 1 and 3 being particularly relevant in terms of setting a general efficiency standard provided for by law. On the other side of the spectrum, that of litigation, Law 104/2010 (i.e., the Code of Administrative Procedure CPA) refers to efficiency and effectiveness of judicial review and providing the plaintiff and the judge with means necessary for an effective judicial review and for compliance. Finally, Law D.Lgs. 198/2009 on the Action for the efficiency of the Public Administration (the so-called 'Public Class Action') underlines the legal weight efficiency has as a rule, standard and limit within the Italian legal system. Following the Latin brocade *"Ubi ius ibi rimedio"* one can say that there where there is a remedy there certainly is a law, or standard, and vice versa.

As mentioned above the transplant of the economic concept of efficiency within the legal system is not a straightforward task. Particularly, within the legal system the principle must be balanced with many other (often conflicting) constitutionally relevant interests. Particularly, within the Italian Constitutional system art 3, as interpreted by the Constitutional Court[42], provides for the need of a rational and necessary balance between different constitutional principles and rights. In this perspective a reasonable balance is

[42] Ufficio Studi Corte Cost. *Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale*. 2009.

necessary between the principle of efficiency and that of balanced budget. The issue shall be analyzed in depth further in the chapter.

4. A conflictual definition

Having spoken a great deal of economic efficiency the following questions naturally occur: How well do market economies – free, competitive economies - deal with environmental problems? How well would it perform on its own? Do we need an additional notion of efficiency, why is the notion of public efficiency needed?[43]

As we have mentioned, under certain conditions market outcomes are pareto efficient: in other words, the production and consumption of goods is allocated in a way that maximizes societal benefits. Adam Smith's invisible hand represents such mechanism on the free market. Without any intervention, particularly by the State, the interactions of self-interested individual consumers and producers find an equilibrium to the advantage of the common interest. Although, this is not always the case: the market does have failures. For example, the environmental matter is an area where market failure is almost obliquitous[44]. Thus, competitive markets are unlikely to provide adequate levels of environmental quality and protection without some state intervention. According to traditional economics, 3 conditions need to be met for a market to regulate itself through competition and reach its equilibrium level of efficiency (where social benefits are maximized)[45]. When all these 3 conditions are not met there are market failures. The 3 conditions are the following: "1. The market is competitive, meaning

[43] N. Keohane, S. Olmstead. *"Markets and the Environment – Second- Edition"*. London, 2007.
[44] Ibidem, p. 69.
[45] N. Keohane, S. Olmstead. *"Markets and the Environment – Second- Edition"*. London, 2007. P. 78

that firms and consumers take prices as given 2. Firms and consumers both have good information about the quality of the good or service being traded 3. The market is complete, in the sense that all relevant costs and benefit are borne by the market participants (the firms and consumers involved in transactions)."[46] The problem when it comes to the environmental realm most often regards the second and third condition, resulting in market failures**.** So, while in general free markets are sociably where there are failures it shall not be so.[47] Market failures not only do not benefit to society, but they may also harm it**.** Market failure is prevalent in the environment because the costs and benefits of environmental protection and resource management are often left out by individuals and firms, as these do not impact them directly, but rather indirectly through general societal costs. Furthermore, it would be unfair to burden the private sector and businesses with such calculations, unfair and unnatural as the failing of competitive markets in such area demonstrates.

In economic terms, individuals, and firm "if we accept economic efficiency as a goal for society then the optimal level of pollution will in general be greater than zero"[48]. As, while there are benefits in, for example, cutting down on pollution completely the cost of doing so, in terms of opportunity cost etc., would be much higher in monetary and profit terms. As the destructive costs of global warming are a general problem that spans across territories and generations and does not impact all equally, although if these costs were considered effectively then probably the outcome of a cost-benefit analysis would be different. We shall speak of the difficulties of this 'effective' consideration of environmental costs further in the paragraph. Such difficulties and shortsightedness we shall see are considered 'blind spots' of economic

[46] N. Keohane, S. Olmstead. *"Markets and the Environment – Second- Edition"*. London, 2007.
[47] Ibidem, p. 79.
[48] Ibidem, p. 12.

efficiency and are a reason for not using it as the sole criterion for public choice. These elements already give a glimpse of an answer to why the different concept of public efficiency is needed.

Economic efficiency corresponds to comparing benefits and. What economic efficiency looks for is achieving the greatest possible benefit, maximizing benefits. To do so one must define the costs and benefits of each alternative option. So, is economic efficiency to be used for policy and particularly environmental policy? What are the benefits and costs of environmental protection? Measuring environmental benefits and costs in economic terms takes an extra effort. In economic terms costs are measured through opportunity costs[49]– these are the alternative opportunities one must sacrifice when making a choice -. To understand the difficulties in calculating the cost of environmental protection one can make the example of evaluating the damages of climate change and the social cost of carbon dioxide emissions. "The result is the social cost of carbon (SCC) in short, the SCC represents the present value of the marginal damages of carbon dioxide emissions that are equivalent to the marginal social benefit from emissions abatement"[50]. Estimating the SCC is a challenge. How does one consider the impact, in terms of costs, that pollution has on public health etc.? How can one consider the myriads of elements that are impacted and insert translate them within the analysis?

To evaluate the benefits of environmental protection, or of any other intangible non-monetary good or service, economists use the concept of willingness to pay. The value of a good is equals to how much one is ready to pay or give up, potentially, for it. Although, willingness to pay depends on the values and preferences of individuals "value is in the

[49] N. Keohane, S. Olmstead. *"Markets and the Environment – Second- Edition"*. London, 2007. P. 35.
[50] Ibidem, p. 40.

eye of the beholder".[51] Economic theory is rigorously neutral to preferences and values. Individuals do not necessarily take all information into account and being well informed may in some cases even be a real challenge, if not impossible, one cannot be expected to have knowledge in all possible fields, even willingly it would be impossible. Environmental goods are not tradable in markets, think of clean air, endangered species etc. Thus, economic efficiency may well not be the best of outcomes. Although, there are alternative uses of benefit cost analysis: cost benefit analyses are useful to compare alternatives, even if they do not necessarily maximize benefits. Sometime maximizing benefits cannot be done and one must choose between the best possible alternative, based on the values one chooses and the chosen balance amongst them. The systematic comparison of benefits and costs greatly aids government policy choice.

In the US[52]major environmental statues differ in the emphasis they give benefit cost analysis. For example, the Clean Air Act forbids considering costs in setting national air quality standards. Nevertheless, in the US some of the most significant benefit cost analyses have focused on Clean Air Act regulations. The Act the consideration of data regarding costs in setting standards but does not forbid an economic efficiency analysis (i.e., a benefit cost analyses). Such analyses have been required in the US since the Nixon administration. They have become a consuetudinary administrative procedural obligation for regulations that are expected to have significant costs. Such requirement has been deemed necessary by different administrations across both political parties. (The sole amendment to the consuetudinary law being introduced by the Reagan administration, that

[51] N. Keohane, S. Olmstead. *"Markets and the Environment – Second- Edition"*. London, 2007. P. 46.
[52] Ibidem, p. 55.

envisaged the analyses requitement as triggered when the expected cost of a regulation is of 100 million a year). Not dissimilarly to fiduciary duties for administrative bodies of private businesses, what is relevant procedural rules are met. The US Public Administration can decide to disregard the analyses and exceed the monetized benefits, by enacting regulations if they are in the best interest of the Nation: that are economically efficient but publicly efficient. Continuing with the business analogy, to apply a rule such as the business judgment rule to public administrations, such a procedural standard answer to simple common sense.

The main critiques of benefit cost analyses are 4 arguments[53]: 1."Considering if benefits outweigh costs omits important moral considerations such as fundamental rights and duties. 2. The benefits of future generations will likely be discounted from the current. 3. The environment will probably be devaluated and cheapened having its worth expressed in monetary terms. 4. Efficiency obscures a consideration of distributional equity." The solution and answer to such critiques can be synthesized as follows: economic efficiency analysis should not be the sole criterion for decision-making and rulemaking. This is clear to most economists; benefit cost analyses should be viewed as a means of improving available information to decision makers. Nobel Laureate Kenneth Arrow's words clearly enounce such position: "Although formal benefit-cost analyses should not be viewed as either necessary or sufficient for designing sensible public policy, it can provide an exceptionally useful framework for consistently organizing

[53] N. Keohane, S. Olmstead. *"Markets and the Environment"* – Second- Edition. London, 2007. P. 57.

disproportionate information, and in this way, it can greatly improve the process and, hence the outcome of policy analysis."[54]

Adding moral imperatives and conflicting values to the equation of economic efficiency, such as fundamental rights and duties, leads to the concept of public efficiency. Policy making and administration should use cost-benefit analyses, to make informed decisions and choose amongst the alternatives that are the best possible (i.e., publicly efficient). Thus, the best public choice, the most efficient, is the one that is the intersect between an economically efficient and a publicly efficient choice. The US Clean Air Act is a perfect example of this. As shown in such Law, public efficiency has a predominant role over economic efficiency. Although, as we have seen, in the EU legal system an overall State balanced public budget must be respected. In this perspective, public efficiency has a growing and essential relevance within the EU legal and administrative system, particularly in environmental matters. Constitutions come to aid in rigidly setting which societal values may predominate. Constitutions set out the values a certain society decided to put above all others, those that are considered fundamental and non-bargainable if not with other values of equal importance[55]. The environment certainly is part of these values, what must be found is the proper equilibrium with other conflicting fundamental rights and duties, particularly the right to work, that to economic initiative and that of a balanced budget. In Italy the recent,

[54] K. J. Arrow, M. L. Cropper, G. C. Robert, W Hahn, L. B. Lave, R. G. Noll, P. R. Portney, M. Russel, R. Schmalensee, V. K. Smith, R. N. Stavins. *"Is there a role for Benfit Cost Analysys in Environmental, Health and Safety Regulation?"*. Policy Forum, Science. 1996.

[55] Cfr. J. Italian Constitutional Court 85/2013 and 58/2018 – that shall be further analyzed in the following chapters.

above mentioned, environmental Constitutional reforms[56] have – arguably [57] - changed the legitimate equilibrium that administrations must find between environmental and other conflicting fundamental rights. Consequentially, a publicly efficient administration of the environment is becoming implicit, essential, and necessary as environmental protection becomes ever more pressing and societies request an ever-growing protection of such right, which is intrinsically linked to human rights – such as the right to life and health – as the third wave of climate litigation is highlighting. Unless public finances are used in the various alternatives of publicly and economically efficient administrative choices, budget constraints cannot be upheld as an excuse for poor environmental administrative efficiency or maladministration. Not only is public inefficiency illegitimate, as it has been since it has been given constitutional standing, but now with the increase of the constitutional environmental protection, inefficiency is ever more unacceptable being efficiency strictly instrumental and necessary for effective environmental action.

So, economic efficiency and its analysis through the evaluation of costs and benefits does have some 'blind spots'[58]. Nevertheless, if one does keep such blind spots in mind such an analysis gives vital and necessary information for decision making, but there is a caveat, one must know that a single-minded focus on the criterion of efficiency can lead to deeply unfair solutions. The main value efficiency analyses can add to decision making is to clarify and envisage different alternatives and amidst these the ones that are the most efficient. (These conclusions shall be analyzed further later in the chapter, when considering the influence of behavioral economics on the concept of efficiency).

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[56] Servizio Studi Senato. *Dossier - Modifiche agli articoli 9 e 41 della Costituzione in materia di tutela dell'ambiente - A.C. 3156-B.* Roma:2022.

[57] J. Consiglio di Stato 8167/2022 – that shall be further analyzed in the following chapters.

[58] N. Keohane, S. Olmstead. *"Markets and the Environment – Second- Edition"*. London, 2007. P. 68.

To answer the last of our starting question: why do we need an additional notion of efficiency, why is the notion of public efficiency needed?
Public efficiency has to consider economic efficiency, it is a necessary part of the concept as something cannot be efficient if it is not informed in an economical sense, but public efficiency has a '*quid pluris'*, an additional element, that it must take into account, that represents and gives meaning to the word 'public', which is societal values (or rights and interests) which are set in stone in the fundamental law of modern Constitutions.
In Italy, state and P.A. efficiency has had a conflictual journey within the Italian legal system. Foremost, the principle was implicit within article 97 co 2 Cost. as mentioned above and was provided for through the interpretation of the Constitutional Court. Within the Court's jurisprudence the principle was defined over the course of decades[59]. The main issues regarding the definition of the principle of efficiency within the public sector are those of conflicting public interests (as stated above, such as public health) as well as the challenge in finding a standard to assess P.A. action. Particularly, P.A. objectives vary with different political views. Furthermore, in some instances State action cannot be even deemed economically sound in terms of market evaluations. As mentioned above State intervention is provided and considered legitimate where the market fails in regulating itself (i.e., where there are market failures). So, one cannot expect state efficiency to be identical in definition to economic efficiency or the principle of economy. Profits are not the main aim of State action, that rather is that of public interest. Often State intervention is needed when costs are higher than profits, such as in environmental matters, and thus in

[59] Ufficio Studi Corte Cost. *Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale*. 2009.

unattractive areas for private business endeavors. Furthermore, in the environmental matter particularly P.A. efficiency has more complex and ample standards: for example, States should not only consider present interests for an efficient choice, but also those of future generations. This makes a publicly efficient choice very different from that of an efficient choice for a business that answers mainly to the market.

5. The 2 main concepts of public efficiency

There are 2 main concepts of public efficiency, one broader and one more narrow.[60] In the broader definition efficiency is viewed as the capacity of the P.A. to satisfy societal needs within its given budget[61] by following the priority standards set out by democratically legitimized institutions. In this perspective an effective P.A. is one that mostly satisfies the societal needs and interests it is responsible to administer. Due to the broadness of this definition, several authors further divided the concept in internal and external efficiency.[62]The assumption in such a definition are legal standards of administration, an assessment framework, for review, accountability, and responsibility. Furthermore, in a business-like perspective, P.A. need internal evaluation systems such as legal benchmarks, objectives, a hierarchical system, and independent bodies for review. Many reforms have gone in this direction within the Italian administrative legal system. Amongst

[60] "Il Principio Di Efficienza Pubblica Sotto Il Profilo Economico: Aspetti Salienti Ed Evoluzioni Possibili." *Amministrare* no. 3 (2009): 471-474.
[61] G.M. Salerno, *L'efficienza dei pubblici apparati nell'ordinamento costituzionale*, Tori- no, 2002, pp. 87 ss.
[62] M. Landau, *Ridondanza, razionalità e il problema delle duplicazioni e sovrapposizioni*, in «Rivista trimestrale di scienza dell'amministrazione», 1982, 1, pp. 3-27; A. Cimmino, *La programmazione organizzativa*, Milano, 1964, p. 194; Salerno, *L'efficienza dei pubblici apparati*, cit., pp. 25 ss.

the most relevant there is Law D.Lgs. 150/2009 (such law and other previous fundamental Laws, such as the 241/90, shall be analyzed in depth in Chapter 2).

The second conceptual definition of P.A. efficiency is that of 'organizational choice'. The difference from the previous definition being relating efficiency mainly to the organizational structure chosen. The 'organizational choice' must be one that can potentially effectively satisfy the societal interest the P.A. is responsible for, within given legal standards. Thus, the difference of the two perspectives pertains to the concept of effectiveness, that is specified in this second definition in 'internal, organizational effectiveness'. In this second perspective, the principle of efficiency is respected when amongst the various possible alternatives of 'organizational choices' the P.A. chooses the most efficient (i.e., within the available budget the choice that best accomplishes the legal standards for the public interests the P.A. is entrusted with). Furthermore, this perspective is very close to that of technical efficiency, rather than that of the first definition where that concentrates more on objectives and ways of external action and there is a clearer distinction between efficiency and effectiveness. Here what matters is 'organizational efficiency' and the resulting administrative performance, that is the synthesis of an economical (i.e., efficient) management and of an effective administrative action, in terms of maximizing results in the public interest entrusted to the P.A.

Thus, while a P.A. that is efficient may not be effective, the same is not true vice versa. Only a P.A. that is organizationally efficient can be effective.

6. Issues and characteristics of Public Efficiency

To go towards giving the definition of the principle of efficiency, efficacy and of a balanced budget for the purposes of this study. The specific issues and departures of public efficiency from that of the economic sector are now to be analyzed. Starting from the legal standards of public efficiency, these are inherently different from economical standards. P.A. standards are typically non-monetary, at times anti-economical. This, as stated above, can be grasped well when considering that State intervention within the market is justified by its failure to autoregulate itself through prices and competition. This means that the area where State intervention is needed is, at least, non-profitable for a private business on the market, at least for the 'relative' short term (i.e., compared to the possibility for the state to spread fixed costs over a longer lap of time before earning enough to cover them). Most legal standards for an efficient P.A. shall regard minimum levels of a service (e.g., in the case of national tele-communication or postal services), or of regulation (i.e., protection, e.g., environmental protection). For example, the protection of an area through the legal provision of a protected national park or of a national trust. A national park economically speaking is not the most efficient of choices, a mall or a parking lot even may have more monetary economics worth, nevertheless the societal value of a national park may be considered enormous even incalculable. Here, the benefit of public intervention is inherently non-monetary or at least not in a direct manner (one may think of the indirect revenue from less public health issues due to diminished pollution in the area, or the secondary revenue from tourism). What must be borne in mind when considering the public administration of public interests is that differently from the private

sector profit is not the main aim. Profit is a secondary issue and is at most instrumental to the main objective, that is protecting and managing a public interest – the societal value - in the best possible manner. The issue in legal efficiency standards resides within this 'best possible manner'. Regardless, this choice is for the political power democratically legitimized political power. What is not political up for political bargain but rather is a legal limit to political decision making is that the choice be amongst the efficient. In this perspective, the division of the area of competence for the political power and the administrative is particularly difficult. What can be said in synthesis, to be further developed in the following Chapters (when considering the judicial review of administrative acts and discretion), is that the task for the administrative power should be technical, scientific, and objective. Instead, the tasks of the political task are those of the way to tackle an issue, choosing the priorities of the political agenda, and overall finding a course of action for the public administration. As we shall see in environmental matters scientific issues can, unfortunately, fall within the realm of political competence and debate. There are many gray areas, where it is hard to distinguish the political power from the administrative. A particularly relevant example of this is climate change and global warming mitigation strategies. This withstanding, supranational EU law as well as international law and conventions greatly help in defining and identifying the legal standards regardless of national political uncertainty or violations. This is particularly relevant for this study. So, when considering public budget constraints (i.e., the principle of a balanced budget) for the administration of public interests, non-economic societal costs as well as the non-monetary standards are to be considered. As written above, the principle of a balanced budget has now become a legal standard within the EU, and most Member States, such as Italy, have integrated such provision in

national constitutions. Thus, departing or violating public budget is now not an option, unless there are specific or extreme issues, such as market fluctuations or natural disasters. The principle of a balanced budget is strictly intertwined with the principle of efficiency. The principle of a balanced budget is the limit for the public management of public interests. Although there is an important caveat, the budget must be used efficiently. The Public Administration can exercise discretion legitimately only amongst actions that are efficient. Thus, PA budget scarcity as a corollary of the principle of budget balance cannot justify, when it is due per se to PA inefficiency, the failure to act upon its duties. This is the rational and necessary balance of the principle of efficiency and that of a balanced budget. This is particularly important for judicial review. Because of the principle the judiciary should have the competence to review PA failure to act and inefficient organization and the power to enforce efficiency compliance. (The issue shall be treated in Chapter 3). Thus, the respect of the principle of public efficiency depends on both an efficient and an effective action, to be reviewed upon the non-monetary legal standards.

7. The predominance of technical/organizational public efficiency

Academic literature[63] as well as relevant law and legal reforms on public efficiency have mainly concentrated on public technical/organizational efficiency and efficacy. This, arguably, as a

[63] P. Negro, *Economicità delle azioni pubbliche: problemi di valutazione*, Milano, 1992; D. Fabbri, R. Fazioli, M. Filippini, *L'intervento pubblico e l'efficienza possibile. Strumenti di analisi e politiche economiche per una burocrazia più efficiente*, Bologna,1996; *L'efficienza della pubblica amministrazione: misure e parametri*, a cura di M. Lupò Avagliano, Milano, 2001.

response[64] to the complexity of applying the economical perspective of the principle of efficiency (particularly that of pareto efficiency) to Public Institutions, due to the issues stated above (par. 9). In terms of legislation, Law 241/90, on the administrative procedure (which is a fundamental law for Italian administrative Law) refers to the criteria of efficacy and of economic management. These references implicitly underline the how the legislator's perspective is that of technical administrative efficiency. Law D.Lgs. 150/2009, with its important reforms in public administrative efficiency, further underlines this point of view as it concentrated on reforming technical and organizational efficiency issues, particularly regarding civil servants.

Furthermore, the predominance of the concept of technical/organizational efficiency can be considered to stem from the complexity of reconciling pareto or allocative efficiency with the principle of efficiency of Public Administrations. As mentioned above, the State intervenes where there are market failures, where allocative efficiency fails in regulating the market through prices. Thus, it is particularly hard to reconcile such principle to public efficiency. Pareto efficiency is mainly intended as a theory applicable to dynamics regulated by private law.

The consequence of this conceptual predominance is that measuring and assessing technical and organizational efficiency is simpler (studies, legal standards, as well as data can be easily found) compared to that of the alternative concept of public efficiency. This is particularly relevant for the proposes of this study as well as for judicial review. As such instruments help in identifying relevant legal standards

[64] "Il Principio Di Efficienza Pubblica Sotto Il Profilo Economico: Aspetti Salienti Ed Evoluzioni Possibili." *Amministrare* no. 3 (2009): 471-474.

for public efficiency as well as a uniform assessment framework for political accountability and judicial responsibility or review.

8. The definition of the principle of efficiency for the purposes of this study

This study supports that the Public Administration can exercise discretion legitimately only amongst alternatives that are efficient. Thus, PA budget scarcity as a corollary of the principle of budget balance cannot justify, when it is due per se to PA inefficiency, the failure to act upon its duties. In this perspective, for the purposes of this study, both the traditional main concepts of efficiency are to be considered: on the one hand, the broader definition of efficiency (i.e., the capacity of the P.A. to satisfy societal needs within the given budget[65] by following the priority standards set out by democratic institutions), on the other hand, that of 'technical or organizational efficiency' (i.e., organizational structure choice, that must be one that can potentially effectively satisfy the societal interest the P.A. is responsible for, within legal standards). As mentioned above, the main difference of the two perspectives pertains to the concept of effectiveness. That, in the second definition is specified in 'internal, organizational effectiveness', while in the first pertains to the effectiveness of P.A. action as a whole (thus, causing the possible conceptual overlap with efficiency, as above mentioned). Having considered above, that while an efficient P.A. may not be effective, the same is not true vice versa now we shall take such reasoning a step further (and, thus, that only a P.A. that is organizationally efficient can be effective). One can say that the second traditional concept of

[65] G.M. Salerno, *L'efficienza dei pubblici apparati nell'ordinamento costituzionale*, Torino, 2002, pp. 87 ss.

efficiency, "organizational or technical efficiency" is inevitably a pre-requisite to the first concept of efficiency. How could a general P.A. action be efficient if it is not elaborated through an efficiently organized P.A.?

So, for the purposes of this study, public efficiency is to be defined as, both, an organizational (or technical) choice and a public action that are amongst the limited number of alternatives that can be considered efficient and effective in achieving the public interest the P.A. is responsible for. In this perspective both organizational and action standards are vital for an efficient administrative action, that is the only that can be considered legitimate.

Such definition needs further explanation, specifically what can be considered an efficient and effective alternative? The answer is two folded. From the more general perspective, that of efficient administrative action as a whole, P.A. action shall be efficient when it respects and achieves the standards set out by legal parameters (soft, secondary, primary and constitutional, E.U. and international law, as well as jurisprudence). From the organizational efficiency perspective, there are more parameters of relevance: both, legal and economical parameters are to be considered. Furthermore, in both perspectives some additional concepts help us in better defining efficiency. These are mainly the concepts of efficient public budget allocation and of spending capacity. Public budget allocation refers how the governing institutions decide to invest and organize public spending. In the Italian legal system public budget spending is firstly given a political direction (i.e., *"un indirizzo politico"*) and then is further divided into missions and programs that are specific for each Ministry. This political direction and its further ramifications in missions and programs are public budget allocation choices. Regardless of the different political perspectives, for

the choices of budget allocation to be efficient they must follow relevant economical and legal parameters.[66] Public spending capacity refers primarily to the ability of individual P.A.s to spend effectively whilst pursuing the missions and programs it is responsible for.[67]

9. The influx of behavioral economics; irrationality, biases

As stated above, the assumptions made by neoclassical economics, particularly those of the absolute rationality of market actors and the utilitarian perspective, have been and are being challenged by modern economics. Authors such as Simon[68] and Leibeinstein, that are considered as being amongst the founders of the behavioral economics theory, in challenging these major classic economic assumptions added a very different and useful perspective to the study of public efficiency. Thus, ethics, morals, culture, biases, and irrationality are to be considered within the evaluation of the public administration. Furthermore, the standards for such an evaluation are to be found in law, where a balance of interests must be made.

For simplicity and clarity all the above stated parameters (ethics, morals, culture, and other irrationalities) can be synthesized into biases. It has been studied that biases reside not only within administrative action but also in policy and law making themselves. This is a major issue, as the legal parameters, that should set the standards to review potential biases in administrative action, are in themselves biased. Authors have underlined how biases can reside within the attempts of

[66] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. Roma, 2021. Volume 1 Tomo 2. Premessa.
[67] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. Roma, 2021. Volume 2 Tomo 2. P. 10.
[68] Simon, *Il comportamento amministrativo*, cit., pp. 7 ss.

making a law efficient through the cost/benefits analysis. One example can be found in efficient laws that discriminate poor communities, so-called rich-biased policies. One may feel discouraged by biases and the role they play within policy making and administrative action. Although, acknowledging their presence is in-itself a solution. One action that is debated for by authors is to combat the biases of efficient policies through equity. So, in the case of rich-biased policies through redistribution.[69]

In environmental Matters authors [70]prospect other solutions for such biases. Koehane, that referrers to the limitations of efficiency analyses (i.e., cost/benefits analyses) as their 'blind spots', underlines how the cost/benefits analysis is not a perfect method per-se to produce law and policy but nonetheless is useful. The author debates that if the issue of blind spots is borne in mind they can be overcome with scientific and gnoseological methods. The argument is presented with some caveats; in some cases, aiming for a policy that can be considered economically efficient is not desirable, but rather the cost/benefits approach is to be used for the collection of relevant information and data for a reasoned policy decision. In this perspective, the cost/benefits analysis at its heart has the invaluable use of showing the legislator the alternative routes he can choose amongst in policy making. One may argue that it is exactly this possibility of a choice amongst alternative policies that makes the end decision legitimate and juridically efficient.

Bearing in mind the above given definition of public efficiency or juridical efficiency, one must remember that what is economically efficient may not be juridically. As mentioned, regulation intervenes

[69] Z. Liscow. *"Is Efficiency Biased?"*. Yale Law School, 2018.
[70] N. Keohane, S. Olmstead. *"Markets and the Environment - Second Edition"*. London, 2007.

there where economics and the markets fail in regulating themselves, this is where economic efficiency fails. Thus, it is only natural that what can be considered as an efficient environmental policy, that respects, enhances and protects conflicting constitutional rights and interests, may be from the economic point of view inefficient.

In terms of moral, ethical, and cultural biases modern rigid national Constitutions pave the path to be followed both for the legislator and the public administrator. The Italian Constitution, as analyzed above, gives a number of strict parameters to follow, that are further specified and defined by the jurisprudence of the Constitutional Court. Moral and cultural biases may be present, but the Constitution clearly states the path that is to be followed and what actions (or inactions) are to be considered legitimate. For example, the argument that the Italian Administration is inefficient due to cultural reasons, particularly when compared with other European States' Public Administrations, under the Italian Constitution is irrelevant. In Italy and the EU there is a right to a good administration, the means to get there or the obstacles in the course are irrelevant, each Member State shall find its own way, each shall find how to overcome biases. This study argues that for Italy one very effective way to solve environmental administrative inefficiency may be through the judiciary. In Chapter 2, on the basis of national and supranational data, one of the main cases of such P.A. environmental inefficiency shall be analyzed and following this analysis Chapter 3 shall try and envisage some possible solutions.

Although, before proceeding into Chapter 2 to complete the preliminary analysis of this first chapter a comparative perspective of European national administrative efficiency must be given. This is particularly useful as we have just mentioned biases and cultural biases. Furthermore, this data will show how Italian administrative inefficiency is not due to a lower level of budgetary resources. At equal budget levels

the Italian P.A. remains the most inefficient amongst the nations compared.

10. P.A. efficiency comparison amongst Italy, France, Germany, and the U.K.

Within the private sector the comparative study of efficiency is a well-known practice. Market actors are in a continuous competition, so business compare themselves to better understand and plan how to improve their efficiency to make greater profits. In the public sector, as we have mentioned, there are different aims; profit and economic efficiency are swapped with achieving legal standards and public efficiency. Nevertheless, comparative analyses are still used as a tool to better obtain these goals. For this study such comparative view is extremely useful and greatly aids the analysis of the inefficiency of the Italian environmental public administration.

The efficiency comparison has already entered within the realm of the P.A. within the area of State Aids. The well-known Altmark test[71] (with its 4 cumulative standards) is used by the EU Commission and Courts to test whether state aids are to be considered as unfair competition and infringing EU competition Law. The 4 Altmark criteria[72] are the following: a. the benefitting business must be effectively given the responsibility of fulfilling public service obligations and such obligations are to be clearly defined. b. the parameters used to calculate the state aid or compensation must be previously, transparently, and objectively defined. c. the compensation cannot be more than necessary

[71] Judgment C-280/00. In: https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A62000CJ0280.

[72] Definitions in: https://www.politicheeuropee.gov.it/it/attivita/aiuti-di-stato/approfondimento-aiuti-di-stato/aiuti-di-stato-sotto-forma-di-compensazione-degli-oneri-di-servizio-pubblico/#:~:text=Con%20la%20sentenza%20Altmark%20del,107%2C%20par.

to, totally or partially, cover the costs due to the fulfillment of the public service obligation. d. when the choice of the business to entrust with such fulfillment of public service obligations is not made by public tender procedure - that permits to select the business that can fulfill such obligations at the lowest cost for society- the level of necessary compensation is to be determined based on a cost analysis of the costs that a meanly efficient business would have. The Altmark test and the legal framework of state aid are beyond the matter treated in this study. Although, the Atlmark criteria are particularly useful, as they set efficiency standards, that through analogy can be applied to determine public efficiency standards, as well as giving us a reasoning that can be used for the comparison of different national public administrations (that is specifically useful for this comparative paragraph). The 4th criterion, the so-called 'private investor' criterion, is the one that is of particular use for this study as it can be applied, by analogy, to compare the efficiency of different national public administrations and to find a standard of a 'meanly' efficient public administration. Furthermore, the Altmark criteria may also be useful as standards for judicial review to help national and supranational judges in reviewing the legitimacy of P.A. organizational efficiency (we shall further discuss this issue in Chapter 3).

The studies[73] we shall use for this compared analysis can be considered amongst the wave of academic literature that concentrates upon

[73]Cfr. F. Cerase. *"La «performance» e l'Efficienza Del Settore Pubblico in Chiave Comparata"*. *Amministrare* no. 1 (2017): 95-138.; S. Van de Walle, M. Sterck, W. Van Dooren, G. Bouckaert, E. Pommer. "*Public administration*, in Social and Cultural Planning Office, *Public Sector Performance An international comparison of education, health care, law and order and public administration"*. The Hague, 2004, p. 235.; C. Pollitt, C. e G. Bouckaert. "*Public Management Reform: A Comparative Analysis"*. Oxford, 2004 (2° ed.).; in European Commission. "*Modernizing Public Administration. Initiatives to Improve the Efficiency and Effectiveness of Public Spending". Brussels, 2017.;* S. Deroose e Ch. Kastrop (ed.). "*The Quality of Public*

organizational/technical efficiency. We shall use the resulting data and considerations of Cerase's study, that summarizes and reviews previous studies and compares the efficiency of the P.A.s of: Italy, France, Germany, the United Kingdom, and Japan. Cerase underlines how according to the World Bank Group's data (2014-2016) on governance[74], Italy is considerably behind, in comparison to the above-mentioned nations. Specifically, Italy ran behind on 5 of the 6 indicators of the WBG data: voice and accountability, government effectiveness, regulatory quality, rule of law and control of corruption (the only indicator without a negative outcome being political stability and absence of violence). Government effectiveness is the indicator that concentrates the most on P.A. action. Such statistical values vary between -2.5 and 2.5, regarding such indicator Italy (0.38) is very far behind in comparison with Japan (1.82), Germany (1.73), the UK (1.62), and France (1.40).[75]

The factors considered to calculate the value of such indicator are on the one side personnel competence, decision making capacity and exercise of the responsibility and objectives entrusted to the P.A.s, on the other their ability to work synergically, and the time needed for the execution of administrative functions.

The indicator on control of corruption is where Italy is the most behind (-0.11) compared to the other above-mentioned nations; Germany (1.83), UK and Japan (1.73), and France (1.27).

For the indicators of regulatory quality and the rule of law the values for Italy are also considerably behind in comparison to the other States'.

Finances. Findings of the Economic Policy Committee-Working Group (2004-2007)". European Communities, 2008.

[74] D. Kaufmann, A. Kraay, M. Mastruzzi. "*The Worldwide Governance Indicators. Methodology and Analytical Issues - Policy Research Working Paper 5430".* The World Bank, 2010, p. 4.

[75] *World Bank Group*. "*The Worldwide Governance Indicators, 2015 Update*". www.go- vindicators.org.

(Regulatory quality: Italy 0.66, UK 1.83, Germany 1.70, Japan 1.14, and France 1.47; rule of law: Italy 0.34, UK 1.89, Germany 1.85, Japan 1.60, and France 1.47).[76]

Is this lack of Italian P.A., in comparison to the other States, due to an inferior commitment of economic resources?[77] In other words, could this inefficiency be due to an inferior national public budget? (i.e., could this inefficiency be due to the balancing of the principle of public efficiency with its public interest standards and the principle of a balanced budget?).

The answer is complex but can be summarized with a no, there is not an issue of budget scarcity. In terms of the percentile of GDP spent in State Public Administration's budget, in comparison with the States considered Italy spends the most.[78] Nevertheless, the States compared have a larger population, thus the public budget can be larger in absolute terms. This withstanding, the Italian public budget pro-capita remains higher than that of the UK and of Japan, while lower than that of France and Germany. The true difference between Italy and the other States is found in public budget allocation choices. The budget allocated for education, healthcare, social security, and research, is comparatively inferior in Italy, whilst the general expenditure is considerably higher.[79] Thus, only partially may one can consider the inferior public budget issue as a reason for Italian administrative inefficiency when compared

[76] Such indicators have since fluctuated since 2015, but nevertheless, the relationship and distance of the various values remain unaltered.
[77] F. Cerase. *"La «performance» e l'Efficienza Del Settore Pubblico in Chiave Comparata"*. *Amministrare* no. 1 (2017): p.100.
[78] For data: F. Cerase. *"La «performance» e l'Efficienza Del Settore Pubblico in Chiave Comparata"*. *Amministrare* no. 1 (2017): p. 102 Tab 1.
[79] Ibidem.

to France and Germany, but not in comparison with the UK (which we shall see is very relevant) or Japan.

Cerase's study principally analyses Public Administration intended as the bodies that regulate and administer public interest issues, rather than those PA that produce and provide services or goods (such as education or health care). Thus, perfectly coinciding with the scope of this study. His study is part of and bases its positions on the above-mentioned academic literature[80] that analyses organizational/technical public efficiency, that has become the predominant field in the research of public efficiency. Furthermore, Cerase uses an additional method to that used by the WBG to compare Italy's public administration efficiency with the other states, that of public sector performance values (PSP). According to this second methodology also the Italian PA is comparatively behind the mentioned States.

Coming to the causes of such inefficiency the academic literature has, as mentioned in the previous paragraph, recently turned to behavioral factors. Specifically, many turn to cultural and behavioral issues. What has led to this behavioral approach, is that Italian P.A. inefficiency was not impacted and persisted to several legal reforms and interventions in PA. This has also led literature to analyze spending efficiency, (i.e., the above mentioned, allocation of public budget resources) and the effectiveness of legal reforms. For decades, all States have been facing

[80] Crf. V. Tanzi e L. Schuknecht. "*The Growth of Government and the Reform of the State in Industrial Countries*". Imf Working Paper, 1995.; "*Public Spending in the 20th Century: A Global Perspective*". Cambridge, 2000.; ECB A. Afonso, L. Schuknecht and V. Tanzi. "*Public Sector Efficiency: An International Comparison*, European Central Bank, Working Paper Series, 2003". No. 242; A. Afonso, L. Schuknecht and V. Tanzi. "*Public Sector Efficiency: An International Comparison*, in Public Choice". 2005, 123 (3/4), pp. 321-347; European Central Bank, A. Afonso, L. Schuknecht and V. Tanzi. "*Public Sector Efficiency. Evidence for New EU Member States and Emerging Markets Working Paper*." 2006, No. 581.

growing public interests and needs that are to be balanced with a limited public budget that has led for a growing need of an efficient use of public budgets. (This is particularly true for Member States of the EU, as mentioned above, where the principle of a balanced budget is constitutionalized). For the efficient use of the public budget, it has been clarified by research that the organizational efficiency of public administrations is a major factor[81]. Efficiency and effectiveness of public administration is deemed as the necessary precondition for efficiency and effectiveness of public spending. Such conclusions of prominent academia and of the EU institutions further clarify the definition of efficiency for the purposes of this study. Organizational/technical efficiency of P.A.s is a prerequisite for P.A. efficiency intended in broader terms. Organizational efficiency is what this study shall concentrate on, analyzing the possible jurisdictional solutions for a specific, actual, and concrete case of inefficiency in environmental public administration. (That shall be described, analyzed, and drawn by national and supra national data in Chapter 2).

To tackle efficiency in public spending and consequently PA organizational efficiency, since the 80's the majority of national states has undergone a wave of reforms (that are very similar across states).[82] Confronting the different reforms across different nations, abundant academic literature[83] analyzed the following areas as common ground: «*i*) Focusing on performance (budgetary reform); *ii*) Streamlining roles and responsibilities (organizational changes); *iii*) Improved human

[81] Cfr. European Commission. "*Modernising Public Administration. Initiatives to Improve the Efficiency and Effectiveness of Public Spending*".; S. Deroose e Ch. Kastrop. "*The Quality of Public Finances. Findings of the Economic Policy Committee-Working Group (2004-2007)*". European Communities, 2008.
[82] F. Cerase. "La «performance» e l'Efficienza Del Settore Pubblico in Chiave Comparata". *Amministrare* no. 1 (2017): p.109.
[83] C. Pollitt, C. e G. Bouckaert, *Public Management Reform: A Comparative Analysis*, Oxford, 2004 (2° ed.).

resource management (personnel changes); *iv*) Using information and communication technologies and optimizing internal processes (technological changes)» [84]. In terms of the Italian legal system, above-mentioned, Law D.Lgs. 150/2009 (the so-called *'Riforma Brunetta'*), can be included within such 'common' reforms of public administration efficiency. The reform aimed at improving the productivity of civil servants as well as implementing public efficiency and transparency.

Although, the results obtained through such reforms were not the same across nations. Thus, academia and institutions have asked themselves and analyzed the reasons for this disparity in PA reform effectiveness. For Italy, the answer to this question can be synthesized, according to Cerase, with the following statement of the EU Commission: "Experience shows that the design of appropriate reform strategies needs to be based on a good understanding of the dynamics of the national public administration system. Additionally, gathering broad support, maintaining the reform momentum, and guaranteeing the government-wide commitment at all stages of the reform process needs to be ensured as these are crucial success factors. A failure to do so could result in unintended effects making administrative processes less effective. This might occur in particular when the changes of rules, procedures and structures have not led to changes in behavior and culture"[85].

Thus, importance is to be given not solely to nation specific institutional structures and mechanisms but also to cultural and behavioral issues. So, on the one hand, several authors consider the difference in administrative tradition as the cause for the different performances of

[84] European Commission, *Modernizing Public Administration*, cit., p. 212.
[85] European Commission, *Modernising Public Administration*, cit., p. 210.

public administrations in Italian, French, German, and the UK.[86] On the other hand, authors consider cultural and behavioral factors as the cause for different administrative performances across nations.[87]

Cerase underlines how both the views reach the conclusion that states, and their public administration cannot be considered uniformly and having the same characteristic, using a "one size fits all" standard. The specific characteristics of each state greatly impact the effectiveness of what seem, similar public administration reforms.

In such a perspective and considering the specific characteristic of the Italian system, this study envisages judicial review as a possible solution for Italian PA inefficiency. Italy has a very strong jurisdictional tradition and specifically in the public administration sector jurisdictional bodies, before the changes of independence and impartiality od the judicial power that came after the introduction of the rigid Italian constitution in 1947, were an essential part of public administrations. In other terms, the apex institutional jurisdictional bodies such as the Council of State were once a fundamental part of the executive power, where they acted as para-judicial bodies (with similar functions as bodies such as the Ombudsman in other European legal traditions). Consequently, it is only natural that in as system that for centuries relied on such organs for administrative functions (such as dispute resolution and further defining administrative action objectives)

[86]Netherlands Social and Cultural Planning Office. *Public Sector Perfomance, An international comparison of education, health care, law and order and public administration*. The Hague, 2004.
[87] Cfr. European Central Bank (ECB) Afonso *et al*. *Public Sector Efficiency. Evidence for New EU Member States and Emerging Markets*. Frankfurt, 2006.; F.P. Cerase, *Un'amministrazione bloccata. Pubblica amministrazione e società nell'Italia di oggi*, Milano, 1990; in *Organizzazio- ne e cultura nella pubblica amministrazione italiana*, in «Rassegna italiana di sociologia», 1992, XXXIII (4), pp. 507-534.

such bodies today are central for solving problems such as administrative inefficiency. Thus, this study shall analyze and argument for stronger, more pervasive, and effective powers to such organs, particularly in 'new', and delicate public interest sectors, such as the environmental.

Coming back to Cerase's study, his thesis is that the cause of Italian PA inefficiency is to be found on the ones side in organizational and regulatory issues but on the other and predominantly in behavioral and cultural issues. Specifically, he argues, the absence of personnel responsibility as the main issue of P.A. inefficiency. This study shall not treat the issue of personnel responsibility specifically, concentrating mainly on the jurisdictional review of organizational inefficiency. Nevertheless, for completeness a future study on such issue would be extremely useful. What can be said within this study is that, regardless of finding the culprit with the sole finality of condemning administrative personnel (which many argue may lead to ever more inertia in civil servants) which has little use in terms of improving administrative performance, the power of intervention jurisdictional administrative bodies if used to surpass beyond administrative inertia can have a major impact on the effectiveness of administrative action. Having an impartial and independent judicial body intervene helps to overcome frictions and obstacles that should not be present within the executive bodies and are pathological to its physiology, that is, when the realm of the purely political illegitimately enters within the administrative. Judges have the power and duty (as watchdog in States that follow the tripartition of powers) to bring back the administrative and political powers within their respective realms. The public administration us and must remain within its competence that is that of administrating a nation, within this competence there is place for

discretionary powers, ranging from technical (less political) to more political discretion (where a choice can be made between alternatives and this choice follows the political path and agenda decided by the executive), but such political choice must never become the sole purpose of the body. Judges and their intervention bring back administrative action to the realm of scientific and technical choices and outside of the purely political realm, that is outside the competence of the PA.

Crease's position is that there are 2 necessary elements that are needed and that are the cause of PA inefficiency: 1. personnel competence and knowledge of their tasks 2. That they are concretely willing to perform their task. This study shall show how both elements, particularly the first, can be positively and effectively impacted by judicial review and/or by the judicial power, thus strongly and positively impacting PA efficacy. Specifically, the first necessary element Cerase refers to can be retraced to the need of open competitions for staff recruitment within PA. A need that is not only reasonable but is also a national and EU legal obligations. The non-organization of such competitions provided by law by the Italian Environmental Ministry shall be the concrete case this study shall analyze (Chapter 2 and 3).

The UK is the Nation that since the 1980's up to 2010 and beyond has had the most improvement in terms of public administrative performance and efficiency, at the same time – unsurprisingly – amidst other EU Member states it is the one that has aimed its reforms the most

on personnel. UK PA reforms in such areas aim at civil servants' competences and on independent review of their performance.[88]

According to Cerase these areas of reform are also those where in Italy[89] there is more resistance and unwillingness to change. [90] Unsurprisingly, Italy is also the least efficient in terms of P.A. within the study as mentioned above. In such a prospective this study's thesis is that rather than innovative and complex independent organs of review, the use of traditional jurisdiction organs of control[91], that already have all the power and expertise needed is the most prompt, simple and effective solution to the problem. Furthermore, in the classical tripartition of powers this external control of the legislative and executive power is without doubt the core and essential responsibility, duty, and prerogative of the Judicial power. This, above all considering, the above mentioned, role of administrative jurisdiction. Thus, there is a necessity of a legal interpretation that allows such intervention, in line with the growth in importance of concepts such as efficiency and technical evolution[92].

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[88] S. Horton, *I modelli di competenze per la gestione delle risorse umane nell'amministrazione statale britannica: continuità e cambiamento*, in «Amministrare», 2010, 1, pp. 91-119.

[89] Corte dei Conti. *"Pubblica Amministrazione e Pubblico Impego Prospettive di riforma nel quadro delle iniziative di ripresa del Paese – Atti di Convegno.* Madonna di Campiglio, 2021. P.27- 33, 57-79.

[90] F. Cerase. "La «performance» e l'Efficienza Del Settore Pubblico in Chiave Comparata". *Amministrare* no. 1 (2017): p.125.

[91] *"Pubblica Amministrazione e Pubblico Impiego Prospettive di riforma nel quadro delle iniziative di ripresa del Paese – Atti di Convegno.* Madonna di Campiglio, 2021. P.137.

[92] L. Tria. "Il possibile contributo della giurisprudenza per una Pubblica Amministrazione all'altezza del c.d. Recovery Fund". Questione Giustizia, 2021.

CHAPTER 2

Ex Ante Analysis

Data, Standards and Parameters of Public Environmental Administration efficiency

1. Data and its use for this study; the specific case of inefficiency to be analyzed.

The research methodology adopted for this study and, for this chapter is the use of data, law, jurisprudence, reports, and studies, to find and define the standards and parameters of PA efficiency. Furthermore, a specific, current, and concrete case of structural inefficiency in the Italian environmental PA shall be analyzed and together with its possible judicial solutions.

For clarity, the analysis shall start by analyzing this specific case and later analyze remaining data, such as Italy's public balance and the state of its environmental governance. Thus, data shall be analyzed following the prospective of a possible cause and solution' to the concrete inefficiency case.

According to the data presented in Italy's "Report of National Accounts 2021"[93] by the Italian Court of Accounts and in the European Commission's "2022 Environmental Implementation Review[94]", one main structural issue of the Ministry for the Environment can be identified as: 1) The non-organization of open competitions for staff recruitment[95] provided by law and relying on the assistance of in-house Company SOGESID.

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[93] Corte dei conti. *Relazione sul Rendiconto Generale dello Stato*. Roma,2021.

[94] European Commission. *Environmental Implementation Review Country Report – Italy*. 2022: p. 44-50.

[95] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 2 Tomo 2 p. 2-3-4: *"Tra le criticità segnalate anche negli anni precedenti, la capacità assunzionale resta, anche nel 2021, uno dei fattori di debolezza del Ministero. Infatti,*

In Section 6 of the EIR, on "Environmental Governance", regarding "Effectiveness of Environmental administration" Italy's "2022 Priority Actions" are set out as: "improve overall national environmental governance, in particular administrative capacity and coordination at regional and local level between enforcing authorities."[96]

While in 2019 EIR Italy*:* "had two priority actions. One was to improve overall environmental governance and the other to better address fragmented implementation of environmental policy. Italy had made limited progress on both fronts."

Furthermore, in the EIR the Commission points out that: "those involved in implementing environmental legislation at EU, national, regional, and local levels need to have the knowledge tools and capacity to ensure that the legislation and the governance of the enforcement process bring about the intended benefits".

As mentioned above, analyzing the same issue, Italy's Court of Accounts' National Accounts Report points out that amongst the main structural issues, that it had also highlighted in previsions reports, that of low hiring capacity and non-organization of open competitions for staff recruitment provided by law stands out. Law 145/2018, that provided for the Ministry of the Environment to recruit 400 civil

il reclutamento delle 20 unità dirigenziali e le 400 unità di personale non dirigenziale, disposto dall'art.1, comma 317, della legge n. 145/2018 resta in buona parte inattuato." … *"inoltre, l'art. 17-quinquies, comma 1, del d.l. 9 giugno 2021 n. 80, come modificato dalla legge di conversione n. 113 del 6 agosto 2021, aveva autorizzato il MITE ad assumere, con procedure concorsuali pubbliche, ulteriori n. 218 unità di personale non dirigenziale ad elevata specializzazione tecnica "al fine di consentire l'attuazione delle politiche di transizione ecologica anche nell'ambito del PNRR e di supportare le funzioni della Commissione tecnica PNRR- PNIEC, per il biennio 2021/2022. A dicembre del 2021 il Ministero ha proceduto, all'esito di una specifica procedura concorsuale, all'assunzione di 16 delle 50 unità di personale a tempo determinato destinate al PNRR."*

[96] European Commission. *Environmental Implementation Review Country Report – Italy*. 2022: p.49.

servants is for the most part left not executed, as is Law 80/2021 that provided for an additional 218 units of personnel - specifically for the PNRR execution tasks -.

Furthermore, both reports[97] underline how the Ministry for the Environment greatly relies on the in-house company it constituted itself: Sogesid SPA[98]. Such company, as all those created under the in-house procedure are exempt from the application of rules on open competitions for staff recruitment and tenders. In Italy such forms of companies are often used and create many issues[99] in terms of respecting EU Law on tenders and recruitment. Sogesid specifically, in the Court of Accounts' last relation on its financial control, has been considered at risk of losing its conformity to in-house laws.[100]

In such a perspective it is important to remember and state that relying on in-house companies rather than following general recruitment and tender laws, should be an exception and not the norm[101]. Unfortunately, in Italy this is not the case and in-house companies are very common. Italy's Administrative Code on Public Tenders[102] only requires a specific, rigid, and analytical motivation on the necessity for relying on such form of administration. Nevertheless, the use of in-house companies remains an issue, as they can be used to circumvent EU law

[97]European Commission. *Environmental Implementation Review Country Report – Italy*. 2022: p.49.
[98]Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 2 Tomo 2 p. 3.
[99]H. Bonura M. Villani. *Ancora sull'eccezionalità del ricorso alla in-house: una possibile rilettura alla luce della giurisprudenza più recente.* Rivista Corte dei Conti n 3/2020.
[100]Corte dei Conti – Sezione del Controllo sugli Enti. *Determinazione e relazione sul risultato del controllo eseguito sulla gestione finanziaria della Sogesid SPA*. 2020.
[101] M. Atelli. *Essere, non essere, apparire: l'in-house providing fra modello organizzativo predicato e modello organizzativo praticato*. Rivista Corte dei Conti n. 2/2020.
[102]D. Lgs. 50/2016 *"Codice degli* Appalti": Art. 192.

and can strongly impact on efficiency[103]. Currently, Soegsid SPA is annually allocated 29,7 million.[104]

In terms of "overall financing compared to the needs" of environmental administration, Italy's EIR[105] points out that: "In absolute amounts, the annual environmental investments (EU plus national) amounted to an estimated EUR 8.1 billion on average in 2014-2020. The identified annual needs (not comprehensive) are estimated to reach EUR 11.9 billion in the coming period, suggesting the need to increase financing levels for environmental compliance and sustainability". (The 8 billion average covers the Eco-budget too, that is not of direct competence of the Ministry of the Environment, but is a cross ministerial fund, and as such shall be analyzed in p.2 on auxiliary data).

Among its 2019[106] EIR environmental financing priority actions Italy had: "to improve the capacity of environmental administrations at national, regional, and local level to ensure programmed expenditure takes place; the evaluation here will depend very much on the programming for the 2021-2027 period, and hence is deferred to a future EIR.

2022's environmental financing priority action[107] instead was: "Italy is invited to devise an environmental financing strategy to maximize opportunities to close the environmental implementation gaps, bringing together all ministries and tiers of the administration."

Italy's 2021 Court of Accounts national budget review specifies that the ministry of the environments budget was of 5.438 million. 20% of the

[103]M. Colistro. *Le società in house e le figure "di confine": problematiche e prospettive di un modello in ontinua evoluzione*. Diritto Amministrativo, 2021.
[104] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 2 Tomo 2 p. 3.
[105] European Commission. *Environmental Implementation Review Country Report – Italy*. 2022: p. 44.
[106]Ibidem.
[107]Ibidem.

budget is part of the PNRR first financial help allocations[108]. Here the Court of Accounts the repeats[109] the importance, in such a scenario, of the satisfaction by the Ministry of the Environment of its RRP obligations with the EU. This, it underlines, implies an even stronger need to overcome the structural issues. Amongst these, first in line is the, above mentioned, issue of non-organization of open competitions for staff recruitment provided for by law.

For 2021 74% of the budget was spent in "*spesa corrente*"[110], which are the expenses for the functioning and production of public administrations, such as staff recruitment and wages[111]. The overall spending capacity of the Ministry is of 68,3%.[112]

The use of Sogesid S.p.A. was justified by the Administration with the lack of civil servants with technical competences, also in regard to the new obligations of the PNRR. Regarding this, in such section of the Report, the Court writes, that as it has mentioned many times, such issue is related to the non-organization of open competitions for staff recruitment provided for by law since 2018, and later in 2021 (laws that are mentioned above). Furthermore, the Court underlines how this is

[108] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 2 Tomo 2 p. 4.
[109] *Idem: "In tale scenario, il raggiungimento degli importanti traguardi che vedono il MITE tra i protagonisti principali del PNRR e delle nuove sfide legate alla realizzazione della transizione ecologica, implica ancor più il superamento delle criticità strutturali del Ministero (capacità assunzionale, complesse procedure autorizzative e concertative con le amministrazioni nazionali e locali che producono in molti casi l'effetto di differire ad esercizi successivi la realizzazione degli interventi, l'attuale frammentazione dei controlli e dei monitoraggi, il frequente ricorso alle gestioni commissariali)."*
[110] Ragioneria di Stato. *Glossario del Bilancio di Stato*. 2019
[111] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 2 Tomo 2 p. 6.
[112] Ibidem. P 10.

jeopardizing the goal set for 2026 for the Ministry to stop relying on Sogesid.[113]

Such issues are further envisaged, explained, and declared in the final Section where the Report compares the resource allocation of the public budget between 2021 and 2022[114]. The Court underlines that to achieve the goals set and to comply with the structural reforms it is vital and necessary to prioritize the overcoming the issue of non-organization of open competitions for staff recruitment provided for by law. The Court explains that the budget allocated to the 'political priorities' - set out in the Explanatory Notes of the 2022 State Budget – is of 4.956 million, the 82% of the total budget (above mentioned). Although, within these 'political priorities', the execution of PNRR obligations is not considered nor is the recruitment of staff and the consequent organization of open competitions provided by law.

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[113] Ibidem. P 14: *"ll ricorso a SOGESID S.p.A. è stato giustificato dall'Amministrazione per la carenza di ruoli tecnici, anche in relazione ai nuovi compiti connessi all'attuazione del PNRR. Come è stato più volte sottolineato, il ritardo accumulato dall'Amministrazione nelle assunzioni a partire dal 2018 e che anche nel 2021 non ha fatto registrare significativi passi in avanti, sta rendendo difficile raggiungere l'obiettivo del ridimensionamento, a partire dal 2026, del volume di attività svolte dalla Società a beneficio del MITE*."

[114] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 2 Tomo 2. P. 37-38-39: *"4. L'allocazione delle risorse nelle leggi di bilancio 2021 e 2022: un confronto. Pertanto, per raggiungere gli importanti traguardi programmati dal Ministero e compiere le riforme strutturali previste, occorre prioritariamente superare le criticità emerse (capacità assunzionale, complesse procedure autorizzative e concertative, molteplicità di accordi quadro con la stessa Regione sui diversi temi di competenza del Ministero, frequente ricorso alle gestioni commissariali, la frammentazione dei monitoraggi). Il totale delle risorse collegate alle priorità politiche dalle Note integrative alla legge di bilancio per l'anno 2022 sono pari a 4.956,4 milioni, rappresentando l'82 delle risorse previste per il Ministero pari a 6.023 milioni, rispetto a quelle attribuite nel 2021 e pari a 1.566,7 milioni (di cui 1.383,7 milioni collegate alle priorità politiche). Sebbene le Note integrative non abbiano previsto risorse collegate alla priorità 1, questa merita una menzione, in quanto si occupa dell'attuazione del Piano Nazionale di Ripresa e Resilienza (PNRR) e del Piano per la transizione ecologica, che rappresentano una priorità trasversale per il Ministero. Rientra nella priorità la necessità di integrare l'organico del MITE con risorse di personale aggiuntivo."*

As stated in chapter 1, within academia and PA it is well known and now common knowledge that organizational efficiency, that also comprises staff recruitment and competence, is the precondition of overall PA efficiency. Given this scenario, it is no surprise that Italy lacks greatly in PA efficiency compared to neighboring states[115], specifically if one considered that the UK greatly improved its PA efficiency and became amongst the most efficient doing exactly what is not being done in the Italian Ministry of the Environment: by prioritizing the recruitment of highly competent, independent, and fairly chosen civil servants.

To complete the financial picture of the Ministry of the environment both the EIR and the Italian Court of Accounts' Report mention the problem of EU infringement procedures. Italy pays very high sanctions for its infringements. The number of infringement procedures of which the Environmental Ministry is charged of are 26, out of the total 110 for Italy as a whole.[116] ("Total fines related to waste and water issued by the CJEU have exceeded EUR 620 million since 2015"[117]).

The EIR states[118]: "Italy is one of the Member States with the highest number of ongoing environmental infringement procedures (21 in March 2022). It must step up its efforts to ensure compliance with EU environmental rules. The lack of enforcement of court judgements issued under Article 260 of the Treaty on the functioning of the

[115]F. Cerase. "La «performance» e l'Efficienza Del Settore Pubblico in Chiave Comparata". *Amministrare* no. 1 (2017): p.125.
[116]Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 2 Tomo 2. P. 3: *"In tema di contenzioso comunitario, nel 2021, il numero delle procedure di infrazione a carico del Ministero (26 su 110) resta ancora molto elevato e a cui si aggiungono 7 EU Pilot. A tale proposito si segnala che, per tre procedure d'infrazione ambientali relative alle discariche abusive, ai rifiuti in Campania e alle acque reflue urbane, l'Italia continua a pagare sanzioni monetarie molto elevate."*
[117] European Commission. *Environmental Implementation Review Country Report – Italy*. 2022: p.3.
[118] European Commission. *Environmental Implementation Review Country Report – Italy*. 2022: p. 48-49.

European Union is highly problematic and results in significant fines being paid to the EU budget." Most importantly in the perspective of this study and paragraph the EIR declares: "This shows that a timely and coherent approach to environmental infrastructure investments is crucial. Another major issue of concern is the lack of an effective enforcement system that ensures that all administrative or judicial decisions are readily put into force."

What is needed, clearly, is a "timely and coherent approach to environmental infrastructure investments", which is the organization of the open competitions for the recruitment of civil servants and thus the overcoming of the Environmental Ministry's main structural problem. In other word, what is needed is Ministerial compliance of the principle of efficiency and specifically organization efficiency compliance. Furthermore, the Ministry of the Environment's failure to act upon both above-mentioned duties cannot be justified by the balanced budget principle. As we have seen the problem lies in allocative choices, in the so-called 'political priorities', the issue is not in a lack of budget but in how it is used, the issue regards resource allocation efficiency.

When one considers that Italy's RRP devolves 37.5%[119] of the plan to environmental objectives, it is clear that to comply with obligations set out in Italy's RRP towards the EU the Ministry of the Environment's efficiency is crucial. In the EIR's words: "Italy is due to receive over EUR 190 billion from its RRP (2021- 2026) in grants and loans and EUR 42 billion from cohesion policy (2021-2027). Italy's overall environmental financing for investments is estimated to reach 0.48% of GDP a year (less than the EU average of 0.7%) in 2014-2020, with 80% coming from national sources. Overall environmental investment needs

[119]Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 1 Tomo 1 p.489.

for the coming period are estimated to reach at least 0.67% of Italy's GDP a year, suggesting an environmental investment gap of over 0.19% of GDP to be addressed by focusing on the country's environmental implementation priorities."[120]

In the following chapter we shall envisage the current possible judicial solutions that can help solve this issue.

2. Other, Auxiliary Data

Auxiliary data shall now be analyzed, to have a clearer picture of the financial context within the, above mentioned, civil servant structural issue is collocated. We shall start from the Eco-budget and then analyze several relevant reports and studies.

The eco-budget is a very important additional source of financial resources for the Italian Ministry of the Environment. Furthermore, it explains the discrepancy found in p.1 between the median 8 billion the EIR describes as the budget of this Ministry, in comparison to the 5 billion described by the Court of Accounts. The eco-budget is an additional, cross ministerial, public budget that by law must be allocated to environmental protection and the use of natural resources.

In 2021 the Eco-budget was of 12,9 billion[121], 3,8 billion more than in 2020. The 2021 budget corresponded to 1,4 % of Italy's public budget. The majority – 61 %- of the 2021 eco-budget expenditure was divided amongst the Ministry of the Environment (25%), the Ministry of the Economy and Finances (24,7%) and the Ministry for Economic Growth

[120]European Commission. *Environmental Implementation Review Country Report – Italy*. 2022: p.3.
[121] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 1 Tomo 1 p.489.

(24,7%). The remaining 31% of the eco-budget expenditure was divided amongst the Ministry of Infrastructures (15,8%), the Ministry of Interior Affairs (8%), the Ministry for Agriculture and Forests (3,1%), the Ministry of Defense (2,9%), and the Ministry for Education (1,2%).

Of the 12,9 billion, 80% was spent in primary expenditure and 20% in *"spesa corrente"*[122], which are the expenses for the functioning and production of public administrations, such as staff recruitment and wages.

In terms of the management of the budget there is a trend in accumulating 'final budget residues' that shows structural issues in payment capacity.[123] The environmental sectors that are mostly affected are those of environmental research, management of wastewater, and management of natural resources. The Court of Accounts highlights how these sectors are part of those covered by PNRR obligations and thus envisages the need of a strict scrutiny of the management of such financial resources. The fulfillment of PNRR obligations shall depend on the spending capacity of the EU funds that shall be devolved to Italy.[124] The Eco budget final budget residue is of 5.2 billion.[125]

Furthermore, during the last 5 years there was a decline in the management of the eco-budget in comparison to that of the national public budget. While the general spending capacity pf the national public budget spanned from 75,6% in 2017 to 78% in 2020, the Eco-budget spending capacity goes from a minimum of 53% in 2018 and a

[122]Ragioneria di Stato. *Glossario del Bilancio di Stato*. 2019.
[123] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 1 Tomo 1 p.489.
[124] Ibidem.
[125] Ibidem.

maximum of 58,6 in 2019, with a small improvement of 2,2 percentile points for the eco-spending capacity between 2020 and 2021.

Going onto other relevant data, the EU Commission's "The costs of not implementing EU environmental law"[126] gives additional interesting insight. "The effectiveness of EU environmental law depends on its implementation at Member State, regional and local levels. Implementation gaps are costly to society and materialize in various forms, such as reduced amenity values of surface waters with poor ecologic quality, and increased illness due to air and noise pollution."
The purpose of such study is to estimate an average cost and "foregone benefits for the EU from not achieving the environmental targets specified in the EU environmental legislation". This is done by "deriving the environmental targets provided for by EU Directives and Regulations – with a focus on the targets to be achieved by 2018 – and comparing these targets with the respective environmental conditions. The impacts of any differences, i.e., implementation gaps, are then assessed and quantified in monetary terms." The study estimates "the costs and foregone benefits for the EU to be around[127] EUR 55 bn per year (in 2018) from not achieving the environmental targets specified in the EU environmental."[128]
Another set of relevant auxiliary data consists of studies[129] of the EU Commission's Economical and Financial Affairs Committee[130]. These studies shall give the insight needed to introduce the next paragraph. Both these studies, underline the need to detect sources of inefficiency

[126] European Commission. *Study: The costs of not implementing EU environmental law - Final Report*. Brussels, 2019.
[127] The study estimated the cost ranges between 29.7 – 79.6 bn per year.
[128] "A similar estimate of EUR 50 bn per year was determined for 2011 in a previous study conducted by COWI (2011)."
[129]EU Commission Economical and Financial Affairs Committee. *"The effectiveness and efficiency of public spending"*. Brussels, 2008.
[130] Id. *"The quality of Public Finances (2004-2007)".* Brussels, 2008.

by setting standards of efficiency and measuring the performance of public administration. Furthermore, the importance of accountability and transparency is greatly highlighted. One of the major issues of structural efficiency reforms of public administration is, as above mentioned, highlighted as being that of human resources numbers and competences. In addition to this, as mentioned in Chapter 1, a highlight is given to environmental conditions, as in culture, in the cause of public inefficiency. What is central is the concept of efficiency in public resource allocation and the use of the tool of spending review to improve the planning of the public budget.[131] Rational planning and rational 'political priorities'[132] are essential for efficient public spending. Particularly in Italy, where the public sector constitutes up to 50% of Italy's economy.[133] The Committee stated – in 2008 - that what Italy needed to improve on was: "More specifically, it is necessary to improve the transparency of the budget, the full financial accountability of public spending decision-making centers…"[134]. Almost fifteen years later accountability is still not effectively obtained. Nevertheless, the issue is not an absence of bodies and mechanisms of redress, as mentioned in Chapter 1. Italy has a complex and competent Administrative and Account Judicial structure. The issue lies in the difficulty of the justiciability of efficiency. First, such difficulties can be found in setting common standards and legal parameters for accountability and redress. This paper argues that such standards are ample and sufficient, and all that is needed is their practical administrative and judicial implementation.

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[131] EU Commission Economical and Financial Affairs Committee. *"The quality of Public Finances (2004-2007)".* Brussels, 2008. P. 433.
[132] EU Commission Economical and Financial Affairs Committee*. "Italy's spending Maze Runner – An analysis of the structure and evolution of public expenditure in Italy."* Brussels, 2015.
[133] Idem.
[134] Idem. P. 442.

So, what is the framework to assess efficiency in environmental governance? Before specifying analyzing such efficiency standards and parameters on the next paragraph a recent EU Commission study must be referred to, as it sets the assessment framework on environmental governance[135]. The study is first (and regardless of the factors it specifically chose to analyze which are not strictly relevant to the realm of civil servants and understaffing issues) an example of how comparison can and must be used to program, administer, and judge member state environmental governance. What is relevant of the study is the analyses of the efficiency and effectiveness of EU Member States in environmental governance, and consequently the setting of what the standard of a meanly efficient environmental governance in the EU area. In the EU particularly, the assessment of a Member State's environmental governance cannot be truly done without comparing itself to others within the EU environmental law and regulatory framework. This comparison per-se sets a standard of mean efficiency in environmental governance. Such a comparison is an important addition to the standards and legal parameters that shall be analyzed. The aim is that of removing the definition of environmental governance efficiency from the realm of ample discretionality and, rather, anchoring it in that of technical and bound discretionality – i.e., amongst the alternative efficient choices-. The 2019 study/report aims to develop an assessment framework on environmental governance for EU Member States. In the words of the Commission: "This report arises from the Commission's Environmental Implementation Review process, a biennial assessment of Member State performance on implementation of EU environmental law and policy. It addresses an

[135] EU Commission. *Development of an assessment framework on environmental governance in the Eu Member States*. Brussels, 2019.

issue identified in the 2017 review as a root cause of implementation weaknesses: poor environmental governance. The report outlines the development of, and the rationale for, a standard assessment template, the Environmental Governance Assessment (EGA)"[136]. "In order to help in identifying patterns of approaches to environmental governance, and to compare performance between Member States in broad terms, the project developed an approach to categorization of performance"[137] … "based on assigning a simple numerical value to categories of performance in respect of individual questions." The dimensions of environmental governance addressed by the EGA are transparency; public participation; access to justice; compliance assurance and accountability; and effectiveness and efficiency. This last dimension and the analysis and standards set by the study is specifically relevant to this paragraph. The effectiveness and efficiency dimension of environmental governance covers "a wide variety of issues and is also relevant to a number of the other dimensions; in it, we looked at how well resources (financial, material, and human) are used in delivering environmental objectives, including by considering mechanisms for ensuring that environmental issues are addressed in other areas of administration and policy."[138] The findings of the study as well as the standard set under the section on efficiency and effectiveness of environmental governance are the following: "France, Denmark, the Netherlands, and Sweden were assessed as having the highest overall performance in the areas of effectiveness and efficiency addressed by the questions categorized. These countries have generally good frameworks for the absorption of funds and show high levels of

[136] EU Commission. *Development of an assessment framework on environmental governance in the Eu Member States*. Brussels, 2019. P. Abstract.
[137] Idem. P. 8.
[138] Idem. P. 90.

integration and coordination in the environmental field. Cyprus, Malta, and Romania are facing bigger challenges in this area."[139] The study highlights that Italy's public budget for environmental matters meets the average of other EU Member States.[140] Although, such data read jointly with the, above mentioned, data from the EIR highlight and Cerase's comparative studies[141], highlight how the issue is not one of scarce resources and funding, but quite the opposite, one of inefficiency and ineffectiveness. In environmental governance we have seen that this inefficacy is specifically related to the non-organization of open competitions for staff recruitment[142] provided by law.

The study concluded that although "The general organizational and environmental governance set up in the Member States is very complex and diverse"[143] … "In comparison to other policy domains or other parts of the world, environmental governance in European Member States is reinforced by the broad framework of EU environmental legislation, and by specific governance aspects of that legislation (notably in terms

[139] EU Commission. *Development of an assessment framework on environmental governance in the Eu Member States*. Brussels, 2019. P. 102.
[140] EU Commission. *Development of an assessment framework on environmental governance in the Eu Member States*. Brussels, 2019. Annex 5 P.14.
[141] See Chapter 1.
[142] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 2 Tomo 2 p. 2-3-4: *"Tra le criticità segnalate anche negli anni precedenti, la capacità assunzionale resta, anche nel 2021, uno dei fattori di debolezza del Ministero. Infatti, il reclutamento delle 20 unità dirigenziali e le 400 unità di personale non dirigenziale, disposto dall'art.1, comma 317, della legge n. 145/2018 resta in buona parte inattuato*." … *"inoltre, l'art. 17-quinquies, comma 1, del d.l. 9 giugno 2021 n. 80, come modificato dalla legge di conversione n. 113 del 6 agosto 2021, aveva autorizzato il MITE ad assumere, con procedure concorsuali pubbliche, ulteriori n. 218 unità di personale non dirigenziale ad elevata specializzazione tecnica "al fine di consentire l'attuazione delle politiche di transizione ecologica anche nell'ambito del PNRR e di supportare le funzioni della Commissione tecnica PNRR- PNIEC, per il biennio 2021/2022. A dicembre del 2021 il Ministero ha proceduto, all'esito di una specifica procedura concorsuale, all'assunzione di 16 delle 50 unità di personale a tempo determinato destinate al PNRR."*
[143] EU Commission. *Development of an assessment framework on environmental governance in the Eu Member States*. Brussels, 2019. P. 124.

of environmental impact assessment, public participation and transparency). In turn, both the EU and individual Member States are signatories to the Aarhus Convention, which specifies rights in terms of access to environmental information, public participation, and access to justice in environmental matters. There are a number of areas where the governance arrangements in Member States have been adapted in order to ensure compliance with the EU and Aarhus requirements, creating in effect a special set of rights and practice on environmental issues." Not surprisingly the impact of the EU environmental law framework as well as that of the Aarhus Convention – that shall be analyzed specifically within the next paragraphs of this chapter – are the anchors to find standards and parameters for environmental administrative review. While the numerical findings and values of environmental governance are not specifically of use to this study, the overreaching conclusions on efficiency and efficacy in environmental governance of the paper are. These findings are: "While it is clear that general restrictions on public expenditure following public expenditure policy decisions in the wake of the 2008 financial crisis have had an impact on environmental authorities, we have not sought to identify if the impact on environmental authorities is greater than in other sectors. Some evidence suggests that, unsurprisingly, resource cuts in environmental administrations have made it more difficult for some Member States to close their implementation gap. Given the increasing urgency of issues such as climate change, biodiversity protection, water management and resource efficiency, and the rapid approach of planetary boundaries, austerity measures should as far as possible spare environmental regulators."[144] What must be taken from this extract is the relevance and

[144] EU Commission. *Development of an assessment framework on environmental governance in the Eu Member States*. Brussels, 2019. P. 128-129.

centrality that efficiency has gained in environmental governance starting from the 2008 crisis and how, contemporarily environmental matter is an area of prominent public interest that is incompatible with strict economic efficiency, but rather with a more flexible, legal, and public interest-oriented concept of public efficacy[145]. In other words, public spending and efficiency in environmental matter is a crucial topic, one the one hand it should not be affected by public funding cuts (as other areas such as health etc.), on the other hand an equilibrium must be found with the principle of a balanced budget. For both these issues efficiency is key. "More specifically, the assessment revealed that the following efforts at Member State level could be valuable to increase effectiveness and efficiency, in particular:" … "3. Analysis of administrative capacities and resources in the field of environmental protection, and their adequacy for delivering environmental obligations;" … "4 Review and, where necessary, improve coordination mechanisms;"[146]. "At EU level, there is increasing awareness that structural reforms and public administration excellence are essential for delivering EU policies and legislation."[147] A final overarching observation of the paper which is particularly useful to this study is the following: "based on our assessments" … "Allowing individual citizens and NGOs to act as a proxy for its interests provides collective benefits. In general, however, the approach adopted by Governments has been to deliver compliance with the legal obligations of EU legislation and the Aarhus Convention, often at a minimum level."[148] Efficiency as we have seen is vital for effective environmental governance, thus, its justiciability, particularly in environmental

[145] Regarding which see Chapter 1.
[146] Idem. P. 129.
[147] EU Commission. *Development of an assessment framework on environmental governance in the Eu Member States*. Brussels, 2019. P. 129.
[148] Idem. P. 130.

matters, should be interpreted broadly. We shall now analyze the standards and parameters for such justiciability of inefficiency.

3. Standards and Legal Parameters.

"The promotion of efficiency and the respect for legality are two of the most important principles for those engaged in the study of public administration"[149]. This citation highlights the strong and necessary bond there is between legality and efficiency within Public Administration. Bond that is at the core of this study. Unfortunately, setting standards and finding legal parameters of PA efficiency is not a straightforward task. Administrative powers are embedded in the law, the PA pursues the general interest it is entrusted with, as defined by law[150] (*norma attributive di potere*[151]). Furthermore, the PA is organized according to Law and must follow such legal prescriptions in its organization[152] (principle which is particularly relevant for this study). The PA and its action are developed according to the principle of competency and conferral, it depends on the powers that the law

[149] J. Figueiredo, Portughese for SIGMA a joint initiative of the OECD and the European Union, principally financed by the EU. *Efficiency and legality in the performance of the public administration – conference on public administration reform and European integration*. Montenegro, 2009. P.1.
[150] Idem. P. 2-6: "The public administration, under the primacy of the law, therefore, pursues the public interest as defined by the public or under its terms, takes its decisions and acts in compliance with the law according to legally fixed procedures and in keeping with the legitimate rights and interests of citizens. Moreover, its action must be inspired by the principles of "good administration" in which the values of effectiveness and efficiency are integrated." (And enshrined).
[151] M. Clarich. Manuale di diritto amministrativo. Il Mulino. Roma, 2017. P. 71.
[152] J. Figueiredo, Portuguese for SIGMA a joint initiative of the OECD and the European Union, principally financed by the EU. Op. Ult. Cit.: "The function of the law as a framework of the administrative action is essential: public institutions are created by law, their competencies are defined by law, the rules that govern their actions and their decisions are established by law, their duties regarding respect for the legitimate rights and interests of citizens are prescribed by law. The law is therefore the fundamental framework in which the administration is organized".

confers to it[153]. Furthermore, the PA acts according to the principle of accountability and that of responsibility. The principle of accountability refers to the democratic and political legitimacy of the PA, that is expression of the executive power and the political party that was voted to govern it. The principle of accountability expresses itself in the circuit of political responsibility, in such a circuit maladministration is to be 'punished' through the vote (that is: the vote for another party). Instead, PA responsibility refers to the circuit of jurisdictional responsibility, where an independent and impartial body reviews its actions. Judicial review of administrative actions is one of the expressions of the classical tripartition of powers that can be found in some form in all modern constitutions. Thus, this mechanism is a natural and physiological part of a democracy. Nevertheless, there are delicate issues that may emerge within administrative judicial review. Specifically, the issue relates to the division of powers[154]; to assure that the judicial power does not violate its constitutional mandate and fall within the executive administrative power. Thus, the powers of administrative judges or rather of judges which deal with administrative matters, are strictly enunciated by law.

The issue particularly arises where the PA must exercise a discretionary choice. "When exercising discretionary powers, public authorities are bound to pursue the public interest but once this requirement has been met, they must look for the best solution to each case. This brings us to a situation where efficiency concerns may have a wide scope."[155] In this perspective administrative responsibility/imputability is not always

[153] M. Clarich. Op. Ult. Cit.
[154] J. Figueiredo, Portughese for SIGMA a joint initiative of the OECD and the European Union, principally financed by the EU. *Efficiency and legality in the performance of the public administration – conference on public administration reform and European integration*. Montenegro, 2009. P. 11.
[155] Idem.

straight forward. In certain areas of the law administrative responsibility through judicial review is more straightforward, set in stone by old norms and juridical tradition. Other areas, such as efficiency and efficacy that are modern concept do not fall within the realm of traditional administrative responsibility. Thus, such review is less straight forward and bears a number of problems, spanning from finding the parameters and standards for review to procedural issues (that shall be analyzed in chapter 3).

Where administrative responsibility does not reach, the softer and less incisive administrative accountability does, or is supposed to. Unfortunately, accountability is not always sufficient nor effective, this is particularly true for complex issues (such as efficiency and efficacy) that slip through the circuit of political responsibility. Efficiency is not a political concept nor a democratic concept: PA organizational efficiency is not an issue of simple comprehension: people who are not part of legal academia know little about it and rightly so.

It must be born in mind that the "European administrative space" has led to compliance with the principles of effectiveness and efficiency[156]. Thus: EU Member States must ensure effective and efficient PA organization for the implementation of Union law -in force and to be approved-; and the PAs of EU candidate states must ensure the effective and efficient PA organization for the reception of the *acquis communautaire*.[157] In the words of Pajno[158] - former President of the

[156] H.C.H. Hofmann and A. Turk. The development of integrated administration in the EU and its consequences - European law journal. Oxford, 2007.
[157] J. Figueiredo, Portuguese for SIGMA a joint initiative of the OECD and the European Union, principally financed by the EU. *Efficiency and legality in the performance of the public administration – conference on public administration reform and European integration*. Montenegro, 2009. P. 5.
[158] A. Pajno. Il giudice amministrativo italiano come giudice europeo. Diritto Processuale amministrativo p585 fasc.2. Roma, 2018 P. 15.

Italian Council of State and of the Parliamentary Commission for the drafting of the Italian Administrative Procedural Law Code (Law D. Lgs. 104/2010) – the process of 'European integration', beyond achieving a harmonization of national systems of administrative justice, has led Italian administrative law to the 'deconstruction'[159] of its main concepts and to the removal of its 'original authoritarian encrustation'[160]. This has led to the rewriting of Italian administrative justice into an instrument of effective protection of the claims of citizens.[161]

The evolution of Italian administrative justice is divided by Pajno in 4 national and 2 supranational fazes[162]. The national fazes are the following: firstly, the birth of the protection of citizens before the public authority; the second with the establishment of the administrative judge; the third with the birth of the Italian Republican Constitution and the institution of Regional Administrative Tribunals (TAR); and the fourth when the administrative judge is deemed as the ordinary judge for matters regarding public attributions. The 2 supranational fazes are: the changing of the European system of jurisdictional protection and the decisive role of the EU Court of Justice (ECJ) and the European Court of Human Rights (ECtHR). This evolution has led the national administrative judge to become a judge of common European law.[163] This had brought about a change in the role and powers of the national

[159] A. Pajno. *La specialità del diritto e della giustizia amministrativa*. P 136.
[160] B. Sord. *Decostruzioni e ricostruzioni: le ultime fatiche della scienza del diritto amministrativo.* Riv. trim. dir. pubbl. com., 2017, 31 ss ; A. Pajno, *Diritto europeo e trasformazioni del diritto amministrativo - Alcune provvisorie osservazioni*. 467 ss.
[161] A. Pajno. Il giudice amministrativo italiano come giudice europeo. Diritto Processuale amministrativo p585 fasc.2. Roma, 2018 P. 15.
[162] A. Pajno. Il giudice amministrativo italiano come giudice europeo. Diritto Processuale amministrativo p585 fasc.2. Roma, 2018. P. 3
[163] A. Pajno. Il giudice amministrativo italiano come giudice europeo. Diritto Processuale amministrativo p585 fasc.2. Roma, 2018. P. 4..

administrative judge and justice system. Thus, additional administrative judicial remedies were formed alongside the traditional remedies of annulment: those that can bind administrations to execute certain behaviors and forms of jurisdictional remedies for damages.

The European Convention of Human Rights and the Jurisprudence of the Court of Strasburg influenced the process of convergence between the European administrative justice systems and of national administrative rights. This is due both to the weight that the case law of the Strasburg Court has for national courts and to the explicit reference by art 6 of the Treaty of the European Union (TEU) to the European Convention of Human Rights (ECHR), that calls upon the ECJ to apply the legal parameters used by the ECtHR.[164] Specifically, the principle of a fair trial was the starting point from which the ECtHR elaborated the right of access to justice and the right to an effective judicial protection. This, as an expression of a fundamental general EU principle, common to the Member states' constitutional traditions, enshrined in art 6 and 13 of the ECHR (expressed in judgment 222/84 so-called Johnston judgment)[165]. Thus, the role of general principles of law is, not only filling in voids in the legal systema and solving contrasts, but also that of answering to the EU Law need of elasticity. The ECJ as we have seen is where such general principles of law are development and its jurisprudence where they are enshrined. National judges are then called-upon to consolidate such principles by applying them to specific national cases. These general EU principles limit and add to the framework of national legal systems. This specifically happened in Italy, first with the recalling of EU general principles within substantial law administrative law in art 1 of Law 241/1990

[164] Idem. P. 6.
[165] Idem. P 7.

(under the general primary legal principles of PA action), and subsequently with their enshrinement in the whole first Chapter of the Italian Administrative Procedural Law Code (Law D. Lgs. 104/2010).[166] The most revolutionary element of this last legal prevision is highlighted by Pajno as being the enshrinement within the CPA of the principle of an effective remedy. This principle determines the need for an adequate judicial remedy as a result of the establishment of a citizens 'substantive legal position' (i.e., *posizione giuridca sostanziale*). This principle used as the legal parameter for the review of the effectiveness of a judicial remedy "maybe constitutes of the principal evolutionary factor of the Italian administrative judicial process".[167] To further highlight the importance and revolutionary implications of the principle of effectiveness of judicial remedies, the principle is the one used by the CEJ to conform national provisions of Member States to a higher degree of judicial protection of rights. The use of the principle of effectiveness to by-pass the competing EU general principle of Member State procedural autonomy just shows the practical, positive impact it has in improving the protection of 'substantive legal position'. This is particularly true when considering that while it is the law that establishes the rights of citizens, the PA is one of, if not the, prominent for the exercise of such rights. "Such rights may be fully exercised if the administration follows the principles of effectiveness and efficiency. It is not sufficient for the law to establish these rights; the necessary conditions for the exercise of these rights must exist."[168] The rights and public interest Pas are entrusted with are

[166] A. Pajno. Il giudice amministrativo italiano come giudice europeo. Diritto Processuale amministrativo p585 fasc.2. Roma, 2018. P 10.
[167]Idem*.: "costituisce forse il principale fattore evolutivo del processo amministrativo italiano."*
[168]J. Figueiredo, Portuguese for SIGMA a joint initiative of the OECD and the European Union, principally financed by the EU. *Efficiency and legality in the*

fundamental rights enshrined in national constitutions. These rights are often conflicting and need a balance to be struck. Particularly, in the European Union public efficiency and the right to a good administration must be balanced with the duty and right of a balanced budget[169]. The latter specifically rising after the 2007 financial crisis, in the attempts by states to reign in and prevent future crises. "the law that determines which functions the administration is entrusted with, which collective needs it must satisfy, and which public interests must prevail."[170] In this chapter we shall analyze; how the Italian constitutions sets the above mentioned rights and the environmental; what balance has been struck between the principles of efficiency, that of a balanced budget and their relationship and impact on the right to the environment and environmental protection. Legal choices on the attribution of administrative powers and functions are greatly related to efficiency. These choices regard issues such as the privatization[171]of public services that are extremely relevant and regulated in EU law[172]. Privatization and the use of the market are deemed to be the best choice to achieve economic efficiency in the single EU market. Thus, the attribution of a function to the State is an exception that can be said to follow this test: "If an administrative function of the state requires a particular concern for the respect of legality, it may be assumed that

performance of the public administration – conference on public administration reform and European integration. Montenegro, 2009. P 7.

[169]G. della Cananea in M. M. P Chiti. Diritto Amministrativo Europeo. Giuffrè. Milano, 2018. P. 301-330.

[170]J. Figueiredo, Portuguese for SIGMA a joint initiative of the OECD and the European Union, principally financed by the EU. Ult. Op. Cit. P 8.

[171] M. P Chiti. Diritto Amministrativo Europeo. Giuffre. Milano, 2018. P. 219.

[172] J. Figueiredo, Portuguese for SIGMA a joint initiative of the OECD and the European Union, principally financed by the EU. *Efficiency and legality in the performance of the public administration – conference on public administration reform and European integration*. Montenegro, 2009. P. 8.

such a function should remain in the public administration."[173] Nevertheless, since State functions are prone to inefficiency as they are subtracted from the natural effect of competition on the market, if a particular function is deemed to be public control, evaluation and, review mechanisms by public institutions must be introduced.[174] Specifically, PAs have a legal duty "good administration", that as we shall see in the next paragraphs is the legal parameter to which EU and Italian national jurisprudence refer the principle of efficiency to. "As the administration is entrusted with the duty of compliance with the principle of pursuing the public interest, there is consequently a duty of "good administration", which is the duty of the administration to pursue the common good as efficiently as possible."[175] While this duty may be legally established, it may be deemed an 'imperfect legal duty, because as above mentioned its violation may not be subject to legal sanctions but only to political accountability and/or administrative sanctions. However, there is a progressive emergence of juridical control mechanisms and sanctions.

3.1.Legality and efficiency in public financial management

As we have seen, public efficiency is strictly related to economic efficiency, or the principle of economicity, that are enshrined in the principle of a balanced budget**.** The two principles converge in the law, in the European area particularly, where it provides that resources are managed following public purposes and criteria. Such relationship is enshrined in constitutional, primary and secondary norm within the

[173] J. Figueiredo, Portuguese for SIGMA a joint initiative of the OECD and the European Union, principally financed by the EU. *Efficiency and legality in the performance of the public administration – conference on public administration reform and European integration*. Montenegro, 2009. P. 8.
[174] Idem.
[175] Idem.

Italian law – that shall be analyzed in the following paragraphs-. Furthermore, in the PA such principle is expressed in the Italian system in the clause of 'budget invariability' **"***invarianza finanziaria*"[176]. Such clause, which expresses the principle of a balanced budget must practically be balanced in specific administrative choices and actions with the principle of public efficiency. This relationship can be expressed in synthesis as expressed by Portuguese law: "no expenditure may be authorized or paid without simultaneously respecting the legal applicable norms, placed within the framework of an approved budget or satisfying the principle of "economy, efficiency and effectiveness."[177] These are the above mentioned 'classical three e's'[178] that are at the heart of the legality of financial management, in which the first, efficiency, is to be interpretated, as we have seen, in a broad sense, in the sense of public efficiency.

3.2. Legality and efficiency and control mechanisms

Control mechanisms are essential in terms of both legality and efficiency, mainly in public administrations where broad discretionary powers are exercised. The control mechanisms chose by each Member State, following the principle of member state procedural autonomy[179], can be various and are cumulative: political accountability mechanisms

[176] Such clause can be found in all mechanisms for efficiency review, see: A. Police. *Antidoti alla cattiva amministrazione: una sfida per le riforme. Unresponsive Administration e rimedi: una nuova dimensione per il dovere di provvedere della P.A*. AIPDA Roma, 2016.; Ufficio Studi Consiglio di Stato - M. Maddalena. "*Rassegna Monotematica di Giurisprudenza – La Class Action Pubblica"*. 2018. Par. 8.
[177] J. Figueiredo, Portuguese for SIGMA a joint initiative of the OECD and the European Union, principally financed by the EU. *Efficiency and legality in the performance of the public administration – conference on public administration reform and European integration*. Montenegro, 2009. P 9.
[178] Idem.
[179] A. Pajno. Il giudice amministrativo italiano come giudice europeo. Diritto Processuale amministrativo p585 fasc.2. Roma, 2018. P.10.

such as the spoils system[180]; administrative mechanisms by independent administrative bodies such as inspections and audits; judicial mechanisms, that can be broad mechanisms of review promoted by citizens, or strict systems of review that are promoted directly by national judicial bodies with control power over the legality of administrative acts and over the economy, efficiency and effectiveness of public management.

Such control mechanisms of efficiency can therefore be internal or external to the PA, may be of strict legality or relative to management. In some cases, citizens allowed to review decisions that affect them, in others control mechanisms for protecting individuals' legitimate interests are devolved to public prosecutors. In Italy we have both mechanisms[181], the unfortunate limited efficacy[182] of such mechanisms shall be treated in chapter 3. What can be said here, in the words of

[180] L.Torchia. *"L'efficienza della pubblica amministrazione fra ipertrofia legislativa e atrofia dei risultati".* Istituto di Ricerche sulla Pubblica Amministrazione (2019). P. 12.

[181]Cfr: Court of Accounts' Public Prosecutor (i.e., *Procura Contabile*) Codice di Giustizia Contabile D.Lgs 2016, n. 174 Crf. G. Fidone. *L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività*. Torino, Giappichelli, 2012.; M.; Interlandi. *Danno da disservizio e tutela della persona.* Edizioni scientifiche italiane, Napoli, 2013; M. Nunziata. *Azione amministrativa e danno da disservizio. Un'analisi della giurisprudenza*. Torino, Giappichelli, 2018.; A. Police. *Antidoti alla cattiva amministrazione: una sfida per le riforme. Unresponsive Administration e rimedi: una nuova dimensione per il dovere di provvedere della P.A*. AIPDA Roma, 2016.; W. Berruti. Uno strumento di lotta a corruzione a malamministrazione dall'esperienza anglosassone: il forensic audit. 2020.;

[182] A. Police. *Antidoti alla cattiva amministrazione: una sfida per le riforme. Unresponsive Administration e rimedi: una nuova dimensione per il dovere di provvedere della P.A*. AIPDA Roma, 2016 P.1. : *"Il fatto che si tratti di un tema classico per gli studi giuridici induce a ritenere frutto di evidente ingenuità l'insistenza del legislatore nel ricercare proprio nel diritto e nei suoi strumenti (istituti di accelerazione o semplificazione, poteri di sostituzione, garanzie giurisdizionali di tipo sollecitatorio, risarcitorio o indennitario) un'efficace soluzione a tali significativi ostacoli alla "buona amministrazione" ed allo sviluppo economico." ... "Una significativa testimonianza di impotenza a fronte di questi fenomeni di maladministration, del resto, è risuonato anche nelle Conclusioni della Relazione di inaugurazione dell'anno giudiziario 2017 del Presidente del Consiglio di Stato."*

Police, is that as maladministration and its remedies are a classical theme for administrative law it can be said that there is a certain ingenuity in seeking a solution to ineffectiveness and maladministration in legal instruments.

Nevertheless, in a European perspective in 2009 it was said that: "imperfect legal duty starts to show an improvement and becomes more perfect"[183]. This study deems, certainly with some ingenuity, that a possible way towards effective Italian PA judicial review of efficiency may be European Administrative Law and, specifically, EU Courts' jurisprudence. In particular, an EU jurisprudence-oriented interpretation by national Italian judges in the application of national mechanisms of efficiency review could bring a great push towards efficacy of such mechanisms. This is particularly true in environmental matters where EU jurisprudence and law are particularly incisive and present, pushing the boundaries of its jurisprudence and interfering[184] with the principle of MS procedural autonomy, specifically in the realm of the access to justice, legal standing, and the principle of a fair and effective trail[185]. This study shall analyze the importance judicial mechanisms of PA efficiency review for the implementation of efficiency in the Italian environmental administration, in line with the third wave of climate litigation.[186]

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[183] J. Figueiredo, Portughese. Efficiency and legality in the performance of the public administration – conference on public administration reform and European integration. Montenegro, 2009. P 11.

[184] A. Pajno. Il giudice amministrativo italiano come giudice europeo. Diritto Processuale amministrativo p585 fasc.2. Roma, 2018. P 11-12.

[185] A good example of this can be found in the landmark Slovak Brown Bear case (C-240/09) on locus standi and procedural autonomy, in: European Parliament - A. Altmayer. *"Implementing the Aarhus Convention Access to justice in environmental matters"*. 2017.

[186] Third wave of climate litigation in: J. Setzer, H. Narulla, C. Higham and E. Bradeen – LSE University. Climate litigation in Europe a summary report for the European

In this perspective and after having demonstrated the current, vital, and growing necessity for efficient environmental administration, the standards and parameters for an efficient environmental administration must be sought and set.

4. Relevant National Law.

As introduced in the previous paragraph the relevant law for this study can be found in national, EU law, and in the ECHR.

In terms of the relevant Italian constitutional law, we shall now set and briefly review the relevant articles for the purposes of this study. Constitutional jurisprudence shall be analyzed in depth in Chapter 3. The articles that are strictly related to the object of this research are articles: 3, 9, 41, 81, and 97, Cost.[187]

Articles 81 and 97 both set the principle of a balanced budget as provided in EU Law.[188] Although, the two articles refer to different dimensions, the former regarding the State in its whole, the latter regarding the principle of a balanced budget within PA budgets. Article 97 co 2 and 3 set the principle of good administration, of administrative

union forum of judges for the environment. Grantham research institute on climate change and the environment – LSE, London, 2022. P.9.

[187] Cfr. Ufficio Studi Corte Cost. *Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale*. 2009; Ufficio Studi Corte Cost. *Diritti Sociali e Vincoli di Bilancio*. 2015; G. Scaccia. *"La Giustiziabilità Della Regola Del Pareggio Di Bilancio."* 2012; Servizio Studi del Senato. *"Modifiche agli articoli 9 e 41 della Costituzione in materia di tutela dell'ambiente".* Roma, 2022. ; R. Ursi, Questione Giustizia. La giuridificazione del canone dell'efficienza della pubblica amministrazione. Roma, 2017; P. Dell'Anno, E. Picozza. Trattato di diritto dell'ambiente. 2012; A.Crosetti, R. Ferrara F. Fracchia, N. O. Rason. Introduzione al diritto dell'ambiente. Laterza, 2018; A. Giuffrida, F. G Scoca*. "Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012.

[188] A. Giuffrida, F. G Scoca*. "Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012. P. 72.

responsibility, and set the principle of the rule of law within the PA.[189] Article 97 co 4 sets the rule of open competitions as the rule for the recruiting of civil servants. The principle of efficiency, as in EU fundamental law (Art. 41 ECFR)[190] is not expressly provided for in the Italian Constitution, but it is enshrined within the principle of a good administration in article 97. The principle of a good administration enshrines two linked and sometimes conflicting principles: the principle of efficiency and that of the rule of law within PAs.[191]

Article 3 of the Italian Constitution sets the principle of equality, but through such article Constitutional jurisprudence has set the fundamental parameter of the principle of reason and of a reasonable balance.[192] Article 3 binds the legislator as well as the executive power and the administrative to the principle of the reasonable balance between conflicting rights and principles that have equal constitutional dignity and value. In this perspective articles 9 and 41 set the Italian constitutional framework in terms of Environmental matters. Both articles where recently modified[193], the reform has already born its fruits in terms of the reasonable balance of the principle of environmental protection with other fundamental principles such as that of free economic enterprise or of the protection of cultural heritage.[194] Article 9 co 3, as reformed in February 2022, enshrines the principle of the protection of the environment, of sustainable growth, and of

[189] Ufficio Studi Corte Cost. *Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale*. 2009.
[190] A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità"*. Giappichelli. Torino, 2012.
[191] A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità"*. Giappichelli. Torino, 2012. Chpt. 1
[192] Ufficio Studi Corte Cost. *Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale*. 2009.
[193] Servizio Studi del Senato. *"Modifiche agli articoli 9 e 41 della Costituzione in materia di tutela dell'ambiente"*. Roma, 2022.
[194]See the recent Judgment Consiglio di Stato n. 8167/2022.

generational equality. Article 41 co 2 and 3 set the necessary and non-derogable limit of environmental protection and human health to the principle of free private enterprise and also sets the principle of the coordination of economic growth towards an improvement of social[195] and environmental wellbeing[196].

In regard to primary law of the Italian legal system, the aspiration of an efficient PA has always been a constant element of debate for scholars, politicians and legal practitioners. This debate was transposed into a number of different and sometimes conflicting laws, political programs and regulatory tendencies.[197] This issue shall now be analyzed as a whole, while in later paragraphs the most relevant laws and jurisprudence for this study shall be specifically treated.

The issue of organizational efficiency in the PA was first treated in modern terms in 1979 when the Giannini (who at the time was Minister of Public Functions) presented the 'Report on the main issues of the National Public Administration'[198] to the Italian Parliament. The Report focused on administration techniques such as ways of taking administrative choices, time limits, productivity and, the use of digital technologies (which was here spoken of for the first time). This is where the idea of a constant control of the modality, time, and ways of administrative activity originated.[199] This is further developed around 10 years later in the 'Report on the conditions of Public

[195] A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012. Chpt. 3.
[196] Servizio Studi del Senato. *"Modifiche agli articoli 9 e 41 della Costituzione in materia di tutela dell'ambiente".* Roma, 2022.
[197] L.Torchia. *"L'efficienza della pubblica amministrazione fra ipertrofia legislativa e atrofia dei risultati".* Istituto di Ricerche sulla Pubblica Amministrazione (2019).
[198] M.S. Giannini, Rapporto sui principali problemi dell'Amministrazione dello Stato, Rivista trimestrale di diritto pubblico, 1982, pp. 722 ss.
[199] L.Torchia. *"L'efficienza della pubblica amministrazione fra ipertrofia legislativa e atrofia dei risultati".* Istituto di Ricerche sulla Pubblica Amministrazione (2019).

Administrations' presented to Parliament by the Cassese, who was at the time Minister of Public Functions[200]. The focus of the reform was that of an administration at the service of citizens. Thus, it not only regarded the organization of PAs and their civil servants, but also and mostly about the relationship between PAs and citizens. Emblematically and for the first time, the reform spoke of PA service charters (*carta dei servizi pubblici*), it tried to shift from an administration focused on procedures to one focused on results, to shift from external to internal review mechanisms, and introduced new controls on economicity and management. The reform transformed the institutions of review, attributing the Court of Accounts with the power of second-degree reviews – such as that of controlling the functioning of internal review mechanisms –, as well as ex-post general review powers on PA results and management.[201]

A few years later, the then Minister of the Public Function, Bassanini introduced a number of new reforms with law d.lgs n 268/99. This time the focus was on review mechanisms. The reform organized and set the principles of the system of internal review mechanisms, distinguished the various types (such as the review on management, strategy, and the evaluation of leadership).

Between the end of the 1900s and the start of the 2000s the Italian system was hit by regulatory wave of reforms[202] aimed at extending

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[200] S. Cassese, *Indirizzi per la modernizzazione delle amministrazioni Pubbliche*. Roma, 1993.
[201] L.Torchia. *"L'efficienza della pubblica amministrazione fra ipertrofia legislativa e atrofia dei risultati"*. Istituto di Ricerche sulla Pubblica Amministrazione (2019). P 4 .
[202] R. Ursi, Questione Giustizia. La giuridificazione del canone dell'efficienza della pubblica amministrazione. Roma, 2017. P.14 "Dal 1990 sino al 2009 il nostro ordinamento amministrativo conosce una lunga e quasi inesauribile stagione di riforme".

controls, reviews and administrative responsibilities, as a result of an ineffective implementation and of a limited commitment to the above-mentioned reforms on PA efficiency.[203] The perspective of such wave of reforms was that of a PA organized following the aims of productivity and maximizing performance. The most relevant of such reforms was Law D.Lgs 150/2009, named after the then Minister for the Public Administration Brunetta. The reforms focused on the notion of 'performance' and to maximize it envisaged a complex system of procedures made of plans, programs, and reports. Although, the content and objectives of PA performance were largely left undefined and so were the methods of measurement.[204] Unfortunately, the reform did not truly impact the efficiency of the PA, the efficacy and practical implementation of regulations and reforms remaining the problem.[205] In this season of Italian administration efficiency is sought not within effective implementation but rather in a succession of reforms and laws, mainly aimed at 'punishing' inefficiency (alhtough without managing to do so effectively either).

Albeit in a patchwork of norms and ineffectively, efficiency was clearly established in primary Italian law since the 80's, thus executing the constitutional mandate of good administration and, later (since 2012), of a balanced public budget. In other words, primary Italian Law determines a duty of efficiency[206]. Duty that started to be protected judicially in the 80's by the Court of Accounts through PA liability by

[203] L.Torchia. *"L'efficienza della pubblica amministrazione fra ipertrofia legislativa e atrofia dei risultati".* Istituto di Ricerche sulla Pubblica Amministrazione (2019). P. 5.
[204] Idem.
[205] Idem.
[206]R. Ursi, Questione Giustizia. La giuridificazione del canone dell'efficienza della pubblica amministrazione. Roma, 2017. P. 13; Corte Conti, sez. II, 13 marzo 1989, n. 54, in *Riv. Corte Conti*, 1989, I:.

recognizing the institution of public damages[207] through that of damages to the good functioning of the PA (i.e., to the right of good administration) through the inefficient use of the public budget. Thus, such responsibility/liability through the Court of Accounts becomes one of the judicial mechanisms of review of the principle of good administration and derivatively of efficiency.[208] While in judicial review mechanisms before the Administrative Judges the damage to the principle of efficiency is only mediated through the direct damage of the plaintiff/claimant, before the Court of Accounts the parameter of efficiency and its damage are used directly as a response to the damage of the inefficient use of the public budget.[209] Furthermore, efficiency is used by the Court of Accounts as parameter of the general conduct of civil servants and of the PA. (in this regard ì, more shall be said in Chapter 3, and specifically in regard to the central Public prosecutor of the Court of Accounts in the justiciability of public efficiency, specifically in regards to the specific case of the non-organization of open competitions for staff recruitment by the Ministry of the Environment.)

Furthermore, as mentioned above efficiency is enshrined in the fundamental primary source of the Italian administrative legal framework: Law D.Lgs. 241/1990[210] (under the general primary legal principles of PA action). The law is still today at the basis of the system, and this should suffice to determine that in the myriad of reforms that succeeded one another the legal duty of efficiency is nevertheless clearly stated and defined. The issue is rather to find how to measure

[207] Corte Conti, sez. II, 17 luglio1982, n. 106, in *Riv. Corte Conti*, 1982, I: 960.
[208] Corte Conti, sez. II, 23 maggio 1983, n. 56, in *Riv. Corte Conti*, 1983, I: 437.
[209] R. Ursi, Questione Giustizia. La giuridificazione del canone dell'efficienza della pubblica amministrazione. Roma, 2017. P. 13.
[210] A. Pajno. Il giudice amministrativo italiano come giudice europeo. Diritto Processuale amministrativo p585 fasc.2. Roma, 2018. P 10.

efficiency on a case-to-case basis. Although, even in this respect the issue is not a lack of parameters and standards but rather the opposite: having to manage and choose amongst a myriad of sources. Although, we cannot let the difficulty of a task discourage the application of the above-mentioned fundamental EU general principle of an effective remedy, nor would it be legitimate or legal. This paper argues, as pointed out at the end of Chapter 1, that the reforms were not in principle going in the wrong direction. The issue being that on ineffective implementation rather than in the legislation per-se. For instance, the use of judicial review as a means of overcoming maladministration is a physiological dynamic, the sole and very political aim of punishment is not. Instead, this paper argues that Administrative and Accounts judges can have a greater and more useful role in enacting efficiency reforms and in overcoming obstacles to efficiency and efficacy. The conceptual paradigm of the above-mentioned legal framework of administration is that of 'New public Management'[211], which is common to the European evolution of administrative regulation since the 1980s. This concept relies on and is originated in traditional economics, and it bears its assumptions, that as seen in Chapter 1 are criticized by Behavioral Economists. In line with such positions part of Italian legal academia has also strongly criticized such conceptual approach[212], particularly in the wake of the unsuccess of the above-mentioned legal framework in assuring efficiency within Italian PA.

[211]Cfr. L.Torchia. *"L'efficienza della pubblica amministrazione fra ipertrofia legislativa e atrofia dei risultati"*. Istituto di Ricerche sulla Pubblica Amministrazione (2019).; J. Figueiredo, Portughese. Efficiency and legality in the performance of the public administration – conference on public administration reform and European integration. Montenegro, 2009.

[212] L. Torchia. *"L'efficienza della pubblica amministrazione fra ipertrofia legislativa e atrofia dei risultati".* Istituto di Ricerche sulla Pubblica Amministrazione (2019).

Nevertheless, the above-mentioned laws have established efficiency as a parameter of substantive law and also paired it with general procedural rights for the public – i.e., the action for the efficiency of the Public Administration and that for damages due to disservices[213]. Specifically, the former action – the so-called 'public class-action- shall be thoroughly discussed in chapter 3 when analyzing the justiciability of PA inefficiency. The actions try to give a general mechanism of redress for citizens affected by PA inefficiency. Unfortunately, as we shall see in Chapter 3, the action has not been used as much as it could have. Regardless, as we shall see, besides being enshrined in law efficiency is also enclosed within Italy's jurisprudence, of the Cassation and Council of State as well as the Constitutional Court. But as uncommon use of the public action show, some problems do remain in the justiciability of PA efficiency. Specifically, the issue is that of choosing amid the myriad of legal parameters[214] and standards of efficiency, finding the parameter for the specific case and successfully overcoming procedural hurdles in court. To find some order in this meander of legal parameters the next paragraphs shall select and define those that this paper deems as being the relevant parameters for the analysis it aims at. Specifically, the parameters for the solution of the above-mentioned concrete case of the non-organization by the Ministry of the Environment of open competitions for staff recruitment provided by law.

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[213] G. Fidone. *L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività*. Torino, Giappichelli, 2012.; M. Interlandi. *Danno da disservizio e tutela della persona.* Edizioni scientifiche italiane, Napoli, 2013; M. Nunziata. *Azione amministrativa e danno da disservizio. Un'analisi della giurisprudenza*. Torino, Giappichelli, 2018.

[214] L. Torchia. *"L'efficienza della pubblica amministrazione fra ipertrofia legislativa e atrofia dei risultati".* Istituto di Ricerche sulla Pubblica Amministrazione (2019).P 13-14.

5. Relevant EU Law

5.1. Principle of good administration

For the purposes of this study, in line with the origin of the principle of good administration, efficiency and of a balanced budget, EU Law is the starting point. Furthermore, interdependently from this perspective, if not the starting point, EU law is certainly the start of an effective and concrete application of the principle of good administration[215] and, thus, of efficiency. Thus, we shall now analyze the parameters in EU Law for the justiciability of efficiency.

The 'right'[216] to efficiency finds its origin in a number of EU provisions. The first of these provisions, for importance as well as in a systematic perspective is article 41 of the ECFR. As is the case in Italian National law, the word of 'efficiency' and the related principle are not expressly provided for within art 41 of the EU fundamental law but is found within the principle of a good administration and by the combined study of EU laws. The EU Charter of fundamental rights was ratified on the 7th of December 2000, initially having the force of soft law, limiting itself to a code of systematic recognition, in 2007 with the ratification of the Treaty of Lisbon it was recognized the force of law by art 6 TUE.

Article 41 titled "Right to a good administration" provides that: "1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices,

[215] As stated by prominent Italian administrative law academia, inter alios: A. Pajno. *Il giudice amministrativo italiano come giudice europeo*. Diritto Processuale amministrativo p585 fasc.2. Roma, 2018; B. G. Mattarella in M. P. Chiti. *"Diritto Amministrativo Europeo"*. Giuffrè Editore. Roma, 2018; A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità"*. Giappichelli. Torino, 2012.

[216] As we shall see defining the subjective juridical position a right has important consequences, also in terms of the application of the principle in national Italian law.

and agencies of the Union. 2. This right includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions. 3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. 4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language."

The article provides for a "right" that is recognized to "every person". Thus, the principle of good administration is not envisaged as a principle for the internal organization of PAs but as a subjective juridical position[217]. This means that article 41 provides for a right that is actionable by individuals before a court, it provides a right to access to justice and for judicial review. This gives article 41 a strict connection to the following article 47 which provides for the right to an effective remedy and fair trial that we shall analyze in a moment. Another important element provided for in article 41 is the recognition of the right of a good administration to "every person". The article does not mention EU citizenship, or MS citizenship, rather it connects a right to the mere relationship that may occur between a person and a PA.[218]Another extremely relevant point regards the collocation of art

[217] A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012. P 62.
[218] A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012. P 62.

41 within the ECFR.[219] Art 41 is collocated amongst classical political rights that citizens are recognized to have. This shows the political connotation that is given by the Charter to the relationship between the public and the PA, and particularly this shows the democratic connotation that is now given to such relationship. All the rights provided for article 41's paragraphs delineate a general legal constraint for PAs that they cannot and must not remain inert in the exercise of the public function they are entrusted with (in other words they must not do the opposite of what is provided for in article 41: maladminister.) Thus, Art 41 defines the exercise of the functions of PAs as a duty for the public interest, a duty before citizens.[220] This perspective has largely impacted MS, which had to enshrine such principles within National law in execution to EU Law. As we shall see National Italian reforms have been going towards this direction, and now more than ever must in the implementation of the NRRP. Coming to why art 41 provides for good administration and not directly for the principle or right to efficiency. The wording of the article shows the primary importance that is given to the balance of interests, that me exercised reasonably, impartially, and effectively. In other words Art 41 provides for what this study has called 'public efficiency', that public interests and objectives set out by the law must prevail over strict economic efficiency, over the principle of economicity, that are a necessary element to be considered for an efficient public choice but not the predominant element.[221] This means that the principle of good administration first of all originates in the rule of law and is then declined within the criteria of efficiency, effectiveness and

[219] Idem. P. 63-64.
[220] Idem P. 66.
[221] Idem P. 67.

economicity, that assure the respect of the right to a good administration in the action and organization of PAs.

As we have seen Art 41 provides for a 'right' and since the dawn of law: "*ubi ius ibi rimedium",* where there is a right there is a remedy. The ECFR provides for an effective judicial remedy for PA good administration. Art 47 (which not by chance is subsequent and close to art 41) provides for the "right to an effective remedy and a fair trial": "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. 2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. 3. Everyone shall have the possibility of being advised, defended, and represented. 4. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice." Thus, it is certainly true that such rights are to be assured for EU citizens and to "all people" when in relationship with EU PAs, but more-so such rights must be effectively assured within the legal systems of each member State. [222] Specifically, ECJ case law has in time and since many years, established the principle that domestic remedies themselves must be effective. This principle, as mentioned above when referring to Pajno's work, was enshrined first in the Jhonston Judgment in 1986 (C-22/84), in the Heylens Judgment in 1987 (C-222/86), and later in the Francovich case (C-6 and 9/90).[223]

[222] A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012. P. 68.
[223] Cfr: M. P. Chiti. *"Diritto Amministrativo Europeo".* Giuffrè Editore. Roma, 2018; A. Pajno. *Il giudice amministrativo italiano come giudice europeo*. Diritto Processuale amministrativo p585 fasc.2. Roma, 2018; A. Giuffrida, F. G Scoca. *"Il*

The TUE and TFUE frequently refer or expressly provide for efficiency in norms. The TUE starts to envisage the primacy and importance of efficiency and its links to an effective democracy in its preamble: "DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them".[224] The importance and primacy of the principle of public and economic effiecny can be grasped completely only when considering art 3 TUE[225] and the importance such concepts have in the establishment of the economic and monetary Union, and when considering art 4 p.3 and the principle of loyal cooperation as enshrined in within it. "The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives." Furthermore, as mentioned, - in 2007 with the ratification of the Treaty of Lisbon – with Art 6 TUE "1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties." … "3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." Furthermore, Art 6 provides that: "2.

diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità". Giappichelli. Torino, 2012 p 68.

[224] Preamble TUE.

[225] "The Union shall establish an economic and monetary union" TUE.

The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties." Both the legal value recognized to the ECFR and to the ECHR[226], as mentioned above[227] in paragraph 3, have important implications in terms of PA efficiency as specifically that of the efficiency of environmental administration.

The TFUE expressly referrers to efficiency and particularly underlines its importance within the EU coadministration system, withstanding but regardless the principle of procedural member state internal autonomy. Art 197 TFUE and the entire Title XXIV are dedicated to the EU coadministration system.[228]Article 197 provides that "1. Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest. 2. The Union may support the efforts of Member States to improve their administrative capacity to implement Union law." By underlying the centrality of administrative capacity, the Article states the importance of PA organizational efficiency for the effective implementation of Union law by MS. Administrative capacity that is expressly stated as a priority action for the Italian Environmental Ministry by both the National Court of Accounts and by the European Commission[229], as mentioned above. The importance of organization efficiency and administrative capacity can be further grasped when

[226]A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità"*. Giappichelli. Torino, 2012 p. 61.
[227] A. Pajno. *Il giudice amministrativo italiano come giudice europeo*. Diritto Processuale amministrativo p585 fasc.2. Roma, 2018.
[228] A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità"*. Giappichelli. Torino, 2012 p. 69.
[229] Corte dei Conti. "*Relazione sul Rendiconto Generale dello Stato"*. Roma, 2021.; European Commission. Environmental Implementation Review Country Report – Italy. Brussels: 2022.

considering that EU PAs are not clearly distinct[230] from national administrations, but rather work in a network in a common synergetic struggle[231]. In this perspective MS PA organization is not only necessary for the implementation of Union Law but also for the effectiveness of EU administration per-se (as the word coadministration implies).[232] Article 298 goes one step further, expressly referring to PA efficiency: "In carrying out their missions, the institutions, bodies , offices and agencies of the Union shall have the support of an open, efficient and independent European administration."[233]National MS Administrative organization is characterized by the principle of internal procedural autonomy.[234] *Article 291 states: "*1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts." Direct implementation by the EU, as proved for in p. 2 of art 291, is the exception, MS internal procedural autonomy is the norm. "2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council." Nevertheless, as mentioned in P. 3, the principle of MS internal procedural autonomy has been derogated in specific cases (such as the environmental) by ECJ case law when internal national measures jeopardized the effective implementation of EU Law.

The principle and right to a good administration are further envisaged within EU soft law. There are various sources that set standards for

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[230] M. P. Chiti. *"Diritto Amministrativo Europeo".* Giuffrè. Roma, 2018. P.155.
[231] H.C.H. Hofmann and A. Turk. *The development of integrated administration in the EU and its consequences - European law journal*. Oxford, 2007.
[232] A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012. P. 69.
[233] M. P. Chiti. *"Diritto Amministrativo Europeo".* Giuffrè. Roma, 2018. P. 153.
[234] Idem p. 154.

good administration and public efficiency; that span from the EU Code of Good Administrative Behavior to EU Commission Guidelines and Toolboxes.[235] Such instruments although not bearing the binding effect of law are nevertheless great instruments for judicial review, as they complete the framework of norms and principles with more specific in-depth provisions.[236] Together with soft law regarding efficiency there are many regarding the principle of balanced budget[237] (that is strictly linked to that of public efficiency) as well as the principle of environmental protection[238].

In this perspective it is hard not to object against the assertion that there are none, or few, parameters and standards set for the judicial review of

[235] European Commission. Code of Good Administrative Behavior. Brussels: Official Journal of the European Union, 2000.
Id. Better Regulation Guidelines. Brussels: Official Journal of the European Union, 2021.
Id. Better Regulation Toolbox. Brussels: Official Journal of the European Union, 2021.
Id. Quality of public administration a toolbox for practitioners. Brussels, 2017.
[236] European University Institute EUI Department of Law. Good administration in EU law and the European code of good administrative behavior. Fiesole, 2009.
M. Batalli, A. Fejzullahu. "*Principles of Good Administration under the European Code of Good Administrative Behavior"*. University of Pecs - Journal of International and European Law – (2018/I); Sigma, support for improvement in governance and management for the EU Commission. Good administration through a system of administrative procedures. 2012.
[237]EU Commission, C. B. Manescu, E. Bova. National Expenditure Rules in the EU: An analysis of Effectiveness and Compliance. Brussels, 2020.
U. Mandl, A. Dierx, F. Ilxkovitz, European Commission, economic and financial affairs. European economy economic papers, the effectiveness and efficiency of public spending. 2008.
Id. The quality of public finances findings of the economic policy committee- working group. 204-2007.
[238] European Commission. Environmental Implementation Review Country Report – Italy. Brussels: 2022.
Id. The development assessment framework on environmental governance in the EU Member States Final report. Brussels, 2019.
Id. Study: The costs of not implementing EU environmental law - Final Report. Brussels, 2019.
Id. Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters - final report. Milieu policy and law consulting, Brussels, 2019.

public efficiency. Rather, as argued above, the issue is that of finding and choosing those to be applied to a single specific case.

5.2.Principle of a balanced budget

The principle of a balanced budget has always been key for the EU project, it was borne in EU Law since the birth of the Community with the Treaty of Rome signed in 1957; the principle of sound financial management was enshrined in art 248.2, while the principle of good financial management in 274.1.[239]

Later the principle of a balanced budget and more in general the EU budgetary and financial legal framework, came to life since the end of the 1900's as European states came to realize the ever-growing cost of public administration had to be paired with the impossibly for public finances and budgets to keep up the ever-growing pace.[240] Thus, having come to terms with the fact that the public balance is limited while the public interests to administer are potentially infinite European Nations understood it was time for a legal framework that aimed at public efficiency, thus using public finances soundly to achieve public interests after having balanced how and where to invest resources.

The EU regulatory framework of public finances, since its birth, was enacted in a binary system made by the Treaties and Regulations. The framework encompassing encompasses the system of rules on EU

[239] A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012. P. 72.
[240] G. Della Cananea, M. P. Chiti. *"Diritto Amministrativo Europeo".* Giuffrè. Roma, 2018. P. 302.

funding, that of the Economic and Monetary Union, as well as rules regarding MS budgets and budgetary procedures. [241]

The 90's start with the signing of the Treaty of Maastricht that confers the EU with a strong competence in financial policy. Art 3. binds MS to have sound public finances and the principle is further enshrined in art 104 C that prohibits public budget imbalances. Art 205 enshrined the principle of good budget management that was previously provided for in art 2 of Financial Regulation 1977 as modified by Regulation 610/1990. This last principle provides for the use of budgetary funds in line with the principles of a sound management of financial resources, specifically those of economicity and of the of the cost/effectiveness ratio.[242]

In other words, with the Treaty of Maastricht the principle of a balanced budget and of economic efficiency are enshrined as legal parameter for the review of PA management. As we have seen since the birth of the European Community the principle of a balanced budget and of efficiency were central, with the Treaty of Amsterdam the principle was enshrined as a fundamental principle of EU law and, additionally, paved the way for the affirming of the principle of public efficiency by Union Courts.[243]

Thus, National Pas must conform to EU budgetary procedures. A duty that not only comes from the Union financial regulatory framework but also from the application of the principle of loyal cooperation that

[241] G. Della Cananea, M. P. Chiti. *"Diritto Amministrativo Europeo"*. Giuffrè. Roma, 2018. P. 303.
[242] R. Ursi, Questione Giustizia. La giuridificazione del canone dell'efficienza della pubblica amministrazione. Roma, 2017. P. 457.
[243] R. Ursi, Questione Giustizia. La giuridificazione del canone dell'efficienza della pubblica amministrazione. Roma, 2017. P. 458.

precludes MS from adopting any measure that may jeopardize the obtainment of the EU objectives. In this perspective art 2 of the above-mentioned Regulation bound MS to adequately organize national PAs for the obtainment of EU objectives.[244] With the Treaty of Amsterdam of 1997 economic efficiency is expressly provided, in art 274, as a shared responsibility of MS that had to guarantee the use of public budgets following the principles of a good financial management.

This perspective, as described above, not only bound MS to the 'rehabilitation' to sound public finances, but also to the improvement and modernization of national PA.[245]

In 1997 the Stability and Growth Pact (SGP) was approved together with two Regulations, that provided that MS had to strictly respect the principle of a balanced budget.[246] The Pact was later reformed first in 2005 and later in 2011 in the wake of the financial crisis of 2007/2008.

Before this number of reforms in 2007 the Treaty of Lisbon was ratified, and within it MS enshrined the principles above mentioned and paved the way for the those that were yet to come. (121, 126, 197, TFUE)

The Economic and Monetary Union (EMU) was expressly consolidated in articles 121, 126, and 197 TFUE[247]: "Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council, in accordance with the provisions of Article 120."; "Member States shall avoid excessive government deficits."; "Effective implementation of Union law by the Member

[244] Idem.
[245] Idem.
[246] G. Della Cananea, M. P. Chiti. *"Diritto Amministrativo Europeo"*. Giuffrè. Roma, 2018. P. 321.
[247] R. Ursi, Questione Giustizia. La giuridificazione del canone dell'efficienza della pubblica amministrazione. Roma, 2017. P. 458.

States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest".

Meanwhile, art 310 set out the standards and instructions to be followed for the sound management of EU finances, but the article is also used by EU Courts to judge Member States as it sets a general principle of EU law.[248] The article sets out that MS and the Union must cooperste so that financial resoucrces are used following such principle. The conseuqencs that have decended from the application of the principle are not only in terms of economic effieicnby, the principle of sound economic management weighs hard in terms of the criteria of merit of MS, criteria that competes with that of MS financial need, in the awarding of EU funds[249]. Art 310 also provides for the principle of the planning of public budgets, principle that may seem implicit, but is expressly provided for in the Article. As mentioned above the principles provided in Article 310 are relevant and influence both the Institutions of the Union and the PAs of MS, this is particularly clear when considering that the Italian Court of Accounts uses such parameters for the review of the management of EU funds awarded to Italy.[250] Review mechanisms of budgetary management are central within the EU financial and budgetary regulatory framework. The review must be ex post and aims at controlling the efficient, effective, and economic use of financial resources by MS PAs. The Italian Court of Accounts is the judicial body that exercises such budget management review within the Italian legal and administrative system.

[248] G. Della Cananea, M. P. Chiti. *"Diritto Amministrativo Europeo"*. Giuffrè. Roma, 2018. P. 311.
[249] Idem.
[250] G. Della Cananea, M. P. Chiti. *"Diritto Amministrativo Europeo"*. Giuffrè. Roma, 2018. P. 312.

Following the principle of subsidiarity, it is the MS that discretionally decide their budget and its management. Nevertheless, such discretionality is to be exercised within the EU regulatory framework.[251] the principle of a sound finances is set by art 119 p 3 TFUE: "These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments." The prohibition of budget deficit is set out by art 126 TFEU as mentioned above, while the prohibition of bailing- out is set out by art 124 TFEU.

In other words, the EU is to be considered as an organization founded upon the Rule of Law and the principle of financial stability, as the German Constitutional Court considered in the judgment where it recognized constitutional legitimacy of the European Stability Mechanism (MES).[252]

As mentioned above, in the wake of the 2007/2008 global financial crisis the EU answered with a new set of financial and budgetary norms: the so-called Fiscal Compact, that reformed the Stability and Growth Pact (SGP) in a stricter perspective. The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union was signed in 2012 by all MS, apart from the UK and the Czech Republic. The common EU objectives the Treaty aimed at where: the progressive reduction of public budgetary debt, the balancing of budgets, and the convergence of long and mid-term EU goals. In other

[251] Idem P. 316.
[252] Idem.

words, the aim of the Treaty was to protect and consolidate the Economic and Monetary Union (EMU).[253]

The most impactful and revolutionary rule introduces by the Treaty was the provision that bound MS to introduce the principle of a balanced budget within their National Constitutions. Not only is this duty of MS justiciable, equally so acts and omission related to the execution of economic policies are justiciable.[254] In other words, but the principle of a balanced budget is also of public interest, and it is – at least in theory – justiciable. Specifically, Art 3 p 2 of the Fiscal Compact Treaty, provides that: "The rules set out in paragraph 1 shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes. The Contracting Parties shall put in place at national level the correction mechanism referred to in paragraph 1(e) on the basis of common principles to be proposed by the European Commission…"

In Italy the Constitution was modified in 2012, with the introduction of the principle of a balanced budget within articles 81 and 97. Furthermore, art 117 was modified to provide exclusive State competence in regulating the matter of public balance harmonization. In the Italian system since 1994 with Law 20/1994 the Court of Accounts is competent for budgetary – and EU funds - control mechanisms in line with EU legislation, and in cooperation with the

[253] R. Ursi, Questione Giustizia. La giuridificazione del canone dell'efficienza della pubblica amministrazione. Roma, 2017. P. 458.
[254] Idem.

European Court of Accounts.[255] The Fiscal Compact Treaty also enshrined a number of additional necessary review mechanisms of the principle of a balanced budget. These mechanisms encompass the so-called Spending review and all the laws that give powers of judicial review for budgetary imbalances. In line with the EU regulatory framework through the Italian Court of Accounts the national budget is annually reviewed and, following the principle of transparency, published for citizens to see. One of these Reports is the fundamental data used for this study.[256] Furthermore, the Italian Court of Accounts and its Public Prosecutor are competent for the judicial review of budget imbalance as we all – although as we shall see in Chapter 3 with an unclear scope – issues regarding public efficiency.

Unfortunately, in practice there are a number of issues that remain unaltered within the EU budgetary and financial regulatory framework. Various MS have found ways to elude such EU Laws[257]and in such a perspective the focus undoubtably has to shift towards the effectiveness of control mechanisms. Chapter 3 of this study shall analyze possible options of control mechanisms, their effectiveness, and possible ways forward in line with a legal interpretation in light of EU and National constitutional law.

What is clear from the regulatory framework is that a balance between the principle of a balanced budget and that of public efficiency is legally necessary. In other words, spending cuts that do not consider the efficiency of National PA organization, nor the alternative efficient

[255] G. Della Cananea, M. P. Chiti. *"Diritto Amministrativo Europeo"*. Giuffrè. Roma, 2018. P. 330.
[256] Corte dei Conti. "*Relazione sul Rendiconto Generale dello Stato"*. Roma, 2021.
[257] G. Della Cananea, M. P. Chiti. *"Diritto Amministrativo Europeo"*. Giuffrè. Roma, 2018. P. 324-325.

alternatives to obtain the better public good, are far from being in line with EU Law – or national constitutional law for that matter-.[258]Furthermore, there is an additional risk in the inefficient use of the public budget, that now more than ever with EU funds of the NRRP is at risk of occurring in Italy: that of losing funds that are needed and necessary for the Nation. An example of such risk is that of the European Fund for Regional Development of 2007-2013.[259] The risk is that funds that are not used efficiently by Italian PAs are revoked by the EU, causing an incredible damage to the Italian citizens, European citizens, and to the Union overall. Furthermore, recent issues regarding the Fiscal Compact and the suspension – or rather less strict - of the of the quantitative and qualitative limits[260] of budget debt do not in any way derogate the principle of a balanced budget, nor that of public efficiency. The principles remain fundamental to the EU framework, as analyzed above.[261]

A more recent but extremely relevant Regulation for the purposes of this study is EU Regulation 2020/2092. Titled "On a general regime of conditionality for the protection of the Union budget", the Regulation aims at setting a procedure for the suspension, reduction, or interruption of EU funding (art 5) - amongst other measures – for the violation by MS of the Rule of Law as enshrined in art 2 TEU. As stated in the Preamble of the Regulation: "Whenever Member States implement the Union budget, including resources allocated through the European

[258] R. Ursi, Questione Giustizia. La giuridificazione del canone dell'efficienza della pubblica amministrazione. Roma, 2017. P. 467.
[259] G. Della Cananea, M. P. Chiti. *"Diritto Amministrativo Europeo"*. Giuffrè. Roma, 2018. P. 330.
[260] G. Della Cananea, M. P. Chiti. *"Diritto Amministrativo Europeo"*. Giuffrè. Roma, 2018. P. 318.
[261] G. Della Cananea, M. P. Chiti. *"Diritto Amministrativo Europeo"*. Giuffrè. Roma, 2018. P. 316.

Union Recovery Instrument established pursuant to Council Regulation (EU) 2020/2094 (the so-called Next Generation EU funds), and through loans and other instruments guaranteed by the Union budget, and whatever method of implementation they use, respect for the rule of law is an essential precondition for compliance with the principles of sound financial management enshrined in Article 317 of the Treaty on the Functioning of the European Union (TFEU)."[262] To fully grasp the application of the Regulation one has to understand the broad interpretation it gives to article 2 TEU and the rule of law. The Regulation firmly links the respect of the principle of a balanced budget and that of public efficiency to the respect of the rule of law. "Sound financial management can only be ensured by Member States if public authorities act in accordance with the law, if cases of fraud, including tax fraud, tax evasion, corruption, conflict of interest or other breaches of the law are effectively pursued by investigative and prosecution services, and if arbitrary or unlawful decisions of public authorities, including law-enforcement authorities, can be subject to effective judicial review by independent courts and by the Court of Justice of the European Union."[263] The non-organization by the Italian Ministry of the Environment of open competitions for staff recruitment[264] provided

[262] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the European Council On a general regime of conditionality for the protection of the Union budget. Official Journal of the European Union. P. 2.

[263] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the European Council On a general regime of conditionality for the protection of the Union budget. Official Journal of the European Union. P. 2.

[264] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 2 Tomo 2 p. 2-3-4: *"Tra le criticità segnalate anche negli anni precedenti, la capacità assunzionale resta, anche nel 2021, uno dei fattori di debolezza del Ministero. Infatti, il reclutamento delle 20 unità dirigenziali e le 400 unità di personale non dirigenziale, disposto dall'art.1, comma 317, della legge n. 145/2018 resta in buona parte inattuato*." … *"inoltre, l'art. 17-quinquies, comma 1, del d.l. 9 giugno 2021 n. 80, come modificato dalla legge di conversione n. 113 del 6 agosto 2021, aveva autorizzato il MITE ad assumere, con procedure concorsuali pubbliche, ulteriori n. 218 unità di personale non dirigenziale ad elevata specializzazione tecnica "al fine di consentire l'attuazione delle politiche di transizione ecologica anche nell'ambito*

by law, analyzed in paragraph 1, is a clear case of authorities not acting in accordance with the law – national or EU –, in other words a clear case of the violation of the rule of law as intended by the Regulation. Furthermore, if national judicial law was interpreted restrictively there would certainly be an additional violation of the rule of law and the Regulation as it would not guarantee an effective judicial review by independent courts and by the Court of Justice of the European Union. The Regulation goes a step further, underlying how the guarantee of a judicial review of the principle of a balanced budget and of efficiency are a prerequisite to act in accordance with art 2 TEU. "Article 19 TEU, which gives concrete expression to the value of the rule of law set out in Article 2 TEU, requires Member States to provide effective judicial protection in the fields covered by Union law, including those relating to the implementation of the Union budget."[265] Thus, the Regulation clearly states that "There is therefore a clear relationship between respect for the rule of law and the efficient implementation of the Union budget in accordance with the principles of sound financial management.".[266] Article 2 of the Regulation states that for there not to be a violation of the rule of law (i.e., art 2 TEU) justiciability of the principle of efficiency and of a balanced budget must be an: "effective judicial protection, including access to justice"[267]. In terms of the breaches that consist in the violation of the rule of law the Regulation aids by giving an analytical definition of such breaches under article 3, of which letter b and c are of particular use for this study: "(b) failing

del PNRR e di supportare le funzioni della Commissione tecnica PNRR- PNIEC, per il biennio 2021/2022. A dicembre del 2021 il Ministero ha proceduto, all'esito di una specifica procedura concorsuale, all'assunzione di 16 delle 50 unità di personale a tempo determinato destinate al PNRR."

[265] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the European Council On a general regime of conditionality for the protection of the Union budget. Official Journal of the European Union. P. 3.

[266] Idem.

[267] Idem p. 6.

to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law- enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest; (c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law."[268] The wording "withholding financial and human resources" as well as "limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules" are both issues that regard the concrete case that this study analyses (i.e., the non-organization of open competitions for staff recruitment provided). Furthermore, under article 4, that determines the "Conditions for the adoption of measures", the breaches of the principles of the rule of law may concern one or more of the following: "(a) the proper functioning of the authorities implementing the Union budget" … "(b) … "and the proper functioning of effective and transparent financial management and accountability systems;" "(d) the effective judicial review by independent courts of actions or omissions by the authorities referred to in points (a),(b) and (c);"[269]

The Regulation was also confirmed as being lawful by two 'twin' judgments by the ECJ in cases C-157/21 and C-156/21. Both judgments deemed the Regulation to have been legitimately written under article 322 TFUE. Additionally, Judgment C-156/21 went a step further by providing the financial regulatory framework within which the Regulation is introduced, together with the definitions of the core

[268] Idem.
[269] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the European Council On a general regime of conditionality for the protection of the Union budget. Official Journal of the European Union. P. 6.

principles that connotate such legal framework: "As set out in Article 2 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU)" … "(OJ 2018 L 193, p. 1, 'the Financial Regulation'), entitled 'Definitions': 'For the purposes of this Regulation the following definitions apply: 'Budget implementation' means the carrying out of activities relating to the management, monitoring, control and auditing of budget appropriations in accordance with the methods provided for in Article 62; 'Member State organization' means an entity established in a Member State as a public law body, or as a body governed by private law entrusted with a public service mission and provided with adequate financial guarantees from the Member State; 'Sound financial management' means implementation of the budget in accordance with the principles of economy, efficiency, and effectiveness;"[270].

In addition, the Judgment also provides the duties that MS must follow when implementing their budgets, as well as EU funds: "Article 63 of that regulation, entitled 'Shared management with Member States', provides in paragraphs 2 and 8: When executing tasks relating to budget implementation, Member States shall take all the necessary measures, including legislative, regulatory and administrative measures, to protect the financial interests of the Union, namely by: (a)ensuring that actions financed from the budget are implemented correctly and effectively and in accordance with the applicable sector-specific rules; (b) designating bodies responsible for the management

[270]C-156/21 in https://curia.europa.eu/juris/document/document.jsf?docid=254061&mode=req&pageIndex=6&dir=&occ=first&part=1&text=Efficiency&doclang=EN&cid=5168#ctx. Par 10 .

and control of Union funds in accordance with paragraph 3, and supervising such bodies; (c) preventing, detecting and correcting irregularities and fraud;"[271].

Thus, it is clear that, as mentioned above and more so in light of Regulation 2020/2092, not to incur in sanctions such as suspensive measures of EU NRRP fund the organization by the Italian Ministry of the Environment of open competitions for staff recruitment, or their implementation through judicial review, are vital, in the interest of the Italian, EU citizens, and the Union itself. Furthermore, the organization of such tenders is necessary for the respect of the rule of law, the principle of public efficiency and that of a balanced budget.

6. Environmental Law

We shall now analyze the relevant EU environmental law for the purposes of this study of the analyses of the justiciability of public efficiency in environmental matter.

We shall start form the Aarhus Convention. Articles 1, 3, 6, 7, 8, and 9 of the Convention are of particular relevance.

Starting from article 1 that sets the objective of the Convention: "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and

[271] C-156/21 in https://curia.europa.eu/juris/document/document.jsf?docid=254061&mode=req&pageIndex=6&dir=&occ=first&part=1&text=Efficiency&doclang=EN&cid=5168#ctx1. Par. 13.

access to justice in environmental matters in accordance with the provisions of this Convention."[272]

Article 3 underlines the general direction and acts that the parties of the convention must take in line with its provisions.

"Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention."[273]

Both article 1 and 3 are of extreme importance to set the regulatory framework within the following specific articles of the convention are a part of.

Art 6 of the Convention is not applicable to the specific case of the non-organization by the Italian Ministry of the Environment of open competitions for staff recruitment that this study is analyzing. This is so because the Article regards the right to public participation in decisions on specific activities and sets administrative procedural rules of participation and consequential judicial rights. Instead, articles 7 and 8 are those that are applicable to the specific case.

In regard to article 7 titled "Public participation concerning plans, programmes and policies relating to the environment, it is relevant as it

[272] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Denmark, 1998.
[273] Idem.

provides that: “Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public.”[274] Similarly, article 8 titled “public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments” is relevant as it provides that: “Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.”[275] Their relevance withstanding, unfortunately these articles have been found to not have been effectively applied within Italy[276] and other EU MS.[277]

Nevertheless, article 9 of the Convention on access to justice provides that: “ “3.In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. 4.In addition and without prejudice to

[274] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Denmark, 1998.
[275] Idem.
[276] UNECE. Aarhus Convention - Excerpts from National Implementation Reports (NIRs)- Italy. 2022.
[277] UNECE. Synthesis report on the status of implementation of the Aarhus Convention. Geneva, 2021.

paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies…".[278]

Thus, article 7 p 3 provides for the right to environmental judicial remedies and access to justice regardless the application of articles 7 and 8. Moreover, as we shall analyze in depth in Chapter 3, the ECJ has underlines how access to justice must not be precluded by strict procedural rules or judicial interpterion, but rather guaranteed by an extensive interpretation, regardless of the principle of MS internal autonomy ex art 291 TFUE.[279]

Regarding the TUE and TFUE various norms apply to the Environment and set environmental standards. Starting from the Preamble of the TUE it states the principle of environmental protection and of sustainable development as a prerequisite, as part of the preamble, for the participation and signing of the Treaty. Furthermore, the Preamble states the principle of parallel progress of other fields alongside the advance of economic integration, in other words it envisages the improvement of environmental matters alongside and driven by economic improvement: "DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in

[278] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Denmark, 1998.
[279] European Parliament - A. Altmayer. *"Implementing the Aarhus Convention Access to justice in environmental matters"*. 2017.; For the Commission's DG Environment by Milieu Consulting Sprl. Study on Eu implementation of the Aarhus Convention in the area of access to justice in environmental matters – Final Report. Brussels, 2019.

economic integration are accompanied by parallel progress in other fields…"[280]

Article 2 of the TEU on the principle of the Rule of Law in the Union establishes that: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."[281]

Furthermore, Article 3 TEU p 3 established a high level of protection of the environment as a fundamental principle of the Union, as well ass the principle of sustainable development in consideration of generation justice and equality: "3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child."[282]

It is not per-chance that the principle of the protection of the environment – and the principle of a balanced economic growth and budget – are enshrined within article 3 of the TEU, right after article 2. The fact that the right to the environment – and arguably 'of' the

[280] Preamble TUE

[281] Art 2 TEU

[282] Art 3 TEU

environment- is a fundamental human right has slowly but surely crept within the European and Global legal framework. [283] As we shall see in the next Paragraph the fundamental human right to the environment is particularly relevant for this study.

The TFEU also bears relevant environmental law. Art 191 under Title XX "Environment" provides that: "Union policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilization of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change."[284] The fact that the rule underlines the importance of the protection and the improvement of the quality of the environment, human health, as well as the mitigation and combating of climate change underlines the extremely wide scope and ripples such legal framework can and must have within MS. Furthermore, "2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at

[283] J. Setzer, H. Narulla, C. Higham and E. Bradeen – LSE University. Climate litigation in Europe a summary report for the European union forum of judges for the environment. Grantham research institute on climate change and the environment – LSE, London, 2022.
[284] Art 191 TFEU

source and that the polluter should pay."[285] Within this legal framework, and particularly when considering the principle of precaution and of preventive action, it is extremely hard to understand how maladministration and inefficient organization of environmental public administration within Italy may be legitimate. Not only is an inefficient organization illegitimate per-se, but it also is evidently unable to obtain the high standards and goals set by union law. In this perspective it is undeniably necessary that a minimum action such as staff recruitment be met by the Italian Ministry of the Environment. Before years of inertia in the non-organization by the Italian Ministry of the Environment of open competitions for staff recruitment[286] provided by law it is now clear that the issue should be solved by the judiciary, the body that is institutionally in the position to find solutions to such pathologies.

7. ECHR

When speaking of Environmental rights within the European legal framework the ECHR must necessarily be mentioned. Specifically, as climate litigation has now globally started to argue cases in terms of

[285] Idem

[286] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 2 Tomo 2 p. 2-3-4: *"Tra le criticità segnalate anche negli anni precedenti, la capacità assunzionale resta, anche nel 2021, uno dei fattori di debolezza del Ministero. Infatti, il reclutamento delle 20 unità dirigenziali e le 400 unità di personale non dirigenziale, disposto dall'art.1, comma 317, della legge n. 145/2018 resta in buona parte inattuato*." … *"inoltre, l'art. 17-quinquies, comma 1, del d.l. 9 giugno 2021 n. 80, come modificato dalla legge di conversione n. 113 del 6 agosto 2021, aveva autorizzato il MITE ad assumere, con procedure concorsuali pubbliche, ulteriori n. 218 unità di personale non dirigenziale ad elevata specializzazione tecnica "al fine di consentire l'attuazione delle politiche di transizione ecologica anche nell'ambito del PNRR e di supportare le funzioni della Commissione tecnica PNRR- PNIEC, per il biennio 2021/2022. A dicembre del 2021 il Ministero ha proceduto, all'esito di una specifica procedura concorsuale, all'assunzione di 16 delle 50 unità di personale a tempo determinato destinate al PNRR."*

fundamental rights[287]. While the relevant judicial elements that are bore from such a statement are going to be analyzed in Chapter 3, this Paragraph shall analyze the relevant ECHR parameters used in environmental litigation. These parameters are extremely useful for the purposes of this study and are instrumental and necessary for Chapter 3. The ECHR parameters that are mostly used to argue climate litigation and environmental rights are articles 2,6,8,13, and 14.[288] Article 2 that enshrines the right to life, together with article 8 the establishes the right to respect for private and family life are the parameters used more recently also in overseas cases[289].

The articles that have a more impact in terms of juridical review within the EU system are certainly article 13, the right to an effective remedy and article 14, the prohibition of discrimination. Art 13 provides that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."[290] The article adds an impactful element to the right to an effective remedy, which is the fact that official acts, such as those of PA's, are expressly deemed as illegitimate if they violate fundamental human rights.

Finally, article 14 sets an extremely important principle in the protection of fundamental rights, the principle of non-discrimination

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[287] *Urgenda Foundation v. State of the Netherlands, Royal Dutch Schell PLC 2021, Neubauer, et al. v. Germany, Juliana vs United States c.d. Youth v. Gov Duarte Agostinho and Others v Portugal and 32 other States (ECHR) In Columbia University's Climate School Sabin Center Database:* http://climatecasechart.com/

[288] J. Setzer, H. Narulla, C. Higham and E. Bradeen – LSE University. Climate litigation in Europe a summary report for the European union forum of judges for the environment. Grantham research institute on climate change and the environment – LSE, London, 2022.

[289] Crf. Juliana vs United States c.d. Youth v. Gov Duarte Agostinho and Others v Portugal and 32 other States (ECHR)

[290] European Convention of Human Rights (ECHR) - Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 1950.

between different rights. This principle has an important impact on environmental rights that are often time overbalanced by other constitutional rights[291], such as the right to economic enterprise, such issues shall be analyzed in the following paragraphs when considering Italian constitutional law and its recent environmental reform.[292]

CHAPTER 3

Ex Post Analysis

Paths for the justiciability of environmental administrative inefficiency

1. The principle of public efficiency

This chapter must necessarily start by considering the jurisprudence of the Italian National Courts (Constitutional as well as of the *Consiglio di Stato*, the Italian Supreme Administrative Court) regarding the right to a good administration and efficiency, to be read in correlation of that of the European Court of Justice on the matter. After this, having analyzed and discussed such constitutional topics, this paragraph shall

[291] Servizio Studi Corte costituzionale. I diritti fondamentali nell'ordinamento giuridico comunitario e negli ordinamenti nazionali. 2017.
[292] Servizio Studi del Senato. *"Modifiche agli articoli 9 e 41 della Costituzione in materia di tutela dell'ambiente"*. Roma, 2022.; Judgment Consiglio di Stato n. 8167/2022

then continue the analysis regarding the most recent laws on good administration and efficiency: Law 150/2009 D.Lgs 150/2009 (the so-called Brunetta reform), as well as from the set of PA reforms that have been programmed with the Italian NRRP and are due.

First of all within the Italian Constitutional jurisprudence the principle of good administration is to be correlated to the 'principle of legality', or rather to principle of the rule of law.[293] The respect of the rule of law by the PA is an essential fragment of the principle of good administration ex art 97 cost co 2. Although, in traditional academia the two principles have been deemed as in conflict, this can first of all be found when analyzing administrative law. For example, within the fundamental Italian law on the administrative procedure 241/90.[294] Specifically, there can be a conflict between the principle of economic efficiency (as provided implicitly in the principle of good administration and that of a balanced budget) and the rule of law.[295] In other words issues can occur when the financial constraints and efficiency effect rights or organization PA provisions provided for in the law.[296] Although, such conflict is clearly overcome when considering the more modern concept of good administration and efficiency, where the rule of law is but a fragment within the principle of good administration.[297] In other words, it is the necessary and reasonable balance, that is struck on a case-to-case basis, between the principle of public efficiency (i.e., of good administration) with the principle of a balanced budget that assures and guarantees the

[293] A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012. P 20.
[294] Idem p. 24.
[295] Idem p. 27.
[296] Ufficio Studi Corte Cost – C. Marchese. *Diritti Sociali e Vincoli di Bilancio*. 2015
[297] A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012. P 20.

cooperation, rather than the conflict, of the principle of good administration and the rule of law. When a balance is struck, and the public interest objectives reasonably set, the principle of legality shall be respected when within the limit of a balanced budget the most efficient of the alternative public choices shall be chosen. Indeed, the principle of reasonableness is in a strict relationship with the principle of good administration and is necessary across the whole legal system.[298] Furthermore, as mentioned in Chapter 1, the principle of good administration enshrined in article 97 co 2 is strictly related to the principles of administrative responsibility, access to justice and effective judicial review as enshrined in articles 24, 100, 103, and 113 of the Italian Constitution.[299] The consequence of the principle of responsibility is the fundamental and non-waivable right of the citizen in regard to the organization and action of the PA, as is revolutionarily stated by part of the administrative legal doctrine.[300] The right of the citizen consists in the expectation that the organization of the PA follows the rule of law. Thus, there is a clear case of maladministration when the PA does not follow what is provided for in primary, and more so, in connotational, and EU Law. A clear case of the violation of both the principle of good administration as well as the rule of law is the concrete case that this study analyses: the non-organization by the Ministry of the Environment of open competitions for staff recruitment[301] provided by law and relying on the assistance of in-house

[298] Idem p. 34.
[299] Idem.
[300] Idem p. 35.
[301] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 2 Tomo 2 p. 2-3-4: *"Tra le criticità segnalate anche negli anni precedenti, la capacità assunzionale resta, anche nel 2021, uno dei fattori di debolezza del Ministero. Infatti, il reclutamento delle 20 unità dirigenziali e le 400 unità di personale non dirigenziale, disposto dall'art.1, comma 317, della legge n. 145/2018 resta in buona parte inattuato*." … *"inoltre, l'art. 17-quinquies, comma 1, del d.l. 9 giugno 2021 n. 80, come modificato dalla legge di conversione n. 113 del 6 agosto 2021, aveva*

Company SOGESID. The case is a violation not only of primary Laws 145/2018 and 113/2021 that provide for the open competitions for staff, and of the Italian NRRP with its obligations before the EU, but foremost it is a violation of article 97 co 1, 2, and 3 and of article 41 of the ECFR. In the next paragraphs, as the parameters and standards have and are being set, the practicable means of the justiciability of the case shall be discussed.

1.1. In the Italian Constitutional Court's jurisprudence

The analysis of the development of the principle of good administration within the jurisprudence of the Italian Constitutional Court is a necessary and fundamental prerequisite for the analysis of the principle of public efficiency As stated above, the principle of public efficiency is not expressly provided for in the Italian Constitution but it is rather found via interpretation within article 97 co 2 which states the principle of good administration, as is also the case in EU Law with art 41 ECFR. The Italian Constitutional Court has stated that the principle of good administration is the true backbone of administration and, thus, a primary condition for a civil society.[302] Furthermore, the Court recognizes the principle of good administration as the parameter for the review of the legitimacy of the discretionary choices made by the

autorizzato il MITE ad assumere, con procedure concorsuali pubbliche, ulteriori n. 218 unità di personale non dirigenziale ad elevata specializzazione tecnica "al fine di consentire l'attuazione delle politiche di transizione ecologica anche nell'ambito del PNRR e di supportare le funzioni della Commissione tecnica PNRR- PNIEC, per il biennio 2021/2022. A dicembre del 2021 il Ministero ha proceduto, all'esito di una specifica procedura concorsuale, all'assunzione di 16 delle 50 unità di personale a tempo determinato destinate al PNRR."

[302] Judgment 123/1968 Italian Consitutional Court in Studi e Ricerche Corte Costituzionale - L. Iannuccilli. "*Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale"*. 2009: "Al principio di buon andamento dell'amministrazione – «vero cardine della vita amministrativa e quindi condizione dello svolgimento ordinato della vita sociale»"

legislator on the organization and activity of the PA.[303] Although, the Court deems it can review legislative choices with strict control on the basis of the principle of good administration only in regards to the choices that derogate the principle of public tenders and open competitions ex art 97 co 4.[304] Nevertheless, the application of the principle of good administration as parameter of review by the Court is vast, with the exclusion of a few matters, such as: legislative procedural choices[305] and the exercise of jurisdictional functions.[306] All remaining matters of the sector that fall within the sector of public administration can be said to be reviewable by the Constitutional Court under the principle of good administration.[307] The scope of the principle of good administration goes beyond a restrictive interpretation of administrative action[308] and also goes beyond the initial phase of administrative organization[309], it regards the whole functioning of the PA, administrative powers, and procedures. Most importantly, the principle of good administration regards the overall organization of the Public Administration as the jurisprudence of Court states an inextricable bond

[303]in Studi e Ricerche Corte Costituzionale - L. Iannuccilli. "*Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale"*. 2009

[304] J 363/2006 Italian Constitutional Court in Studi e Ricerche Corte Costituzionale - L. Iannuccilli. "*Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale"*. 2009

[305] J. 241/2008 and 372/2008 Italian Consitutional Court in Idem.

[306] J. 300/2000 Italian Constitutional Court in Idem.

[307] Studi e Ricerche Corte Costituzionale - L. Iannuccilli. "*Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale"*. 2009. P. 2

[308]J. 44/1977 and 86/1982 in Studi e Ricerche Corte Costituzionale - L. Iannuccilli. "*Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale"*. 2009.

[309] J 22/1966, 51/1980, and 40/1998 Italian Consitutional Court in Studi e Ricerche Corte Costituzionale - L. Iannuccilli. "*Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale"*. 2009.

between PA organization and citizens' rights.[310] Judgment 383/1998 of the Constitutional Court states that administrative organization and rights are specular aspects of the same matter, that interfere and condition each other, and that a right is the purpose of any administrative organization. Consequently, as provided in article 97 co 4[311], the legal framework of public employment and recruitment must follow the principle of good administration, as stated in many judgments by Constitutional Court.[312]

In terms of the balancing of interests, firstly, the principle of good administration must be balanced with the other principles within the same article 97, which are the principle of a balanced budget, of impartiality, of proportionality, of open public competitions, and the tule of law in administrative organization. Second, the principle of good administration must be balanced with the right to health[313], environmental rights, and with the control by the Court of Accounts.[314] Regarding the meaning that the Court has given to the principle of good

[310] J. 383/1998 Corte Costituzionale: *«Organizzazione e diritti sono aspetti speculari della stessa materia, l'una e gli altri implicandosi e condizionandosi reciprocamente. Non c'è organizzazione che, direttamente o almeno indirettamente, non sia finalizzata a diritti, così come non c'è diritto a prestazione che non condizioni l'organizzazione».*
[311] Italian Constitution article 97 co 3: *"Agli impieghi nelle pubbliche amministrazioni si accede mediante concorso, salvo i casi stabiliti dalla legge."*
[312] J. 124/1968, 68/1980, 52/1981,205/1996, 59/153, and n. 191/1997 Italian Consitutional Court in Studi e Ricerche Corte Costituzionale - L. Iannuccilli. "*Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale"*. 2009.

[313] J. 212/1983, 167/1986, and 1143/1988 Italian Consitutional Court in Studi e Ricerche Corte Costituzionale - L. Iannuccilli. "*Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale"*. 2009. P. 2-3
[314] Studi e Ricerche Corte Costituzionale - L. Iannuccilli. "*Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale"*. 2009. P. 2-3.

administration, these change in correlation to the application of the principle. On a case-to-case basis the Court interprets the principle of good administration as that of organizational/technical efficiency[315]; as that of a timely administrative action[316]; as that of the general efficiency of PA action[317]; and as that of economic efficiency intended as the application of cost/benefit analyses[318]. As mentioned above, a constant and fundamental interpretation of the principle of good administration by the Court regards the application of the principle in the recruiting of civil servants: open competitions are to be the rule ex art 97 co 4. Open competitions are the rule as they are instrumental to the principle of good administration and only exceptional[319] or peculiar[320] situations can justify a departure from such general rule. Such point was stated in many of the Court's judgments and is a jurisprudence that is set in stone as a corollary of the principle of good administration, of impartiality, and ultimately of the rule of law[321]. Such considerations underline how

[315] J.234/1985.
[316] J.404/1997 and 40/1998.
[317] J.104/2007.
[318] J.60/1991 and 356/1992.
[319] J.159,190, and 407/2005, 81 and 205/2006.
[320] J.363/2006.
[321] J. 333/1993 on open competitions and 453/1990: *"Questa Corte ha costantemente sottolineato che il principio di imparzialità stabilito dall'art. 97 della Costituzione - unito quasi in endiadi con quelli della legalità e del buon andamento dell'azione amministrativa - costituisce un valore essenziale cui deve informarsi, in tutte le sue diverse articolazioni, l'organizzazione dei pubblici uffici. La stessa Corte, riprendendo peraltro la chiara volontà espressa nel medesimo senso dai Costituenti, ha affermato come il principio di imparzialità, enunciato solennemente nel ricordato art. 97, si riflette immediatamente in altre norme costituzionali, quali l'art. 51 (tutti i cittadini possono accedere agli uffici pubblici in condizioni di eguaglianza, secondo i requisiti stabiliti dalla legge) e 98 (i pubblici impiegati sono al servizio esclusivo della Nazione) della Costituzione, attraverso cui si mira a garantire l'amministrazione pubblica e i suoi dipendenti da influenze politiche o, comunque, di parte, in relazione al complesso delle fasi concernenti l'impiego pubblico (accesso all'ufficio e svolgimento della carriera)."* in Studi e Ricerche Corte Costituzionale -

the concrete case analyzed in this study, of the non-execution of open competitions for staff recruitment by the Ministry of the Environment, is amongst the typical and most blatant cases of maladministration.

Lastly, the most recent jurisprudence of the Constitutional Court has set a strict correlation between the principle of good administration and that of impartiality, that is the explication of the principle of separation between the political and administrative power, between the government and the administration.[322] This has lead the Court to considerably restrict the applicability of the spoils system within the Italian legal system, restricting its application to the hierarchically higher positions within the Public Administration.

1.2. Legitimate discretion between alternative publicly efficient choices in the Constitutional Court's Jurisprudence, judgment: 135/1998, 40/1998, and 103/1993

Some of the most important ruling of the Italian Constitutional Court of the purposes of this study shall now be specifically analyzed. The thesis argued by this study is set by Judgments 135/1998, judgment 40/1998 and 103 del 1993 which argue that the Public Administration can exercise discretion legitimately only amongst actions that are publicly efficient.[323] Thus, the legislator and public administrator still have

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L. Iannuccilli. "*Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale"*. 2009.

[322] J. 453/1990, 333/1993, 193/2002,103 and 104/2007, and 390/2008.

[323] J. 40/1998: *"i relativi procedimenti debbono essere idonei a perseguire la migliore realizzazione dell'interesse pubblico nel rispetto dei diritti e degli interessi legittimi dei soggetti coinvolti nell'attività amministrativa"*. in Studi e Ricerche Corte Costituzionale - L. Iannuccilli. "*Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale"*. 2009.

discretionality in the choice among the alternative publicly efficient possibilities, but within the limit of the principle of reasonability.[324] Judgments 266/1993 and 95/1966 define the pool of alternative publicly efficient choice amongst which the legislator and public administrator can legitimately exercise their discretionary powers. These are to be circumscribed to those that procedurally respect the principle of effieicnt administrative action and achieve the objectives of public interest that are set by the law.[325]

1.3. The necessary and reasonable balance between the principle of public efficiency and of a balanced budget in the Constitutional Court's Jurisprudence

The issue of legitimate alternative publicly efficient choices bears a consequential question: what is publicly efficient, or in other words, how does the principle of public efficiency relate to that of economic efficiency? The answer to such question is to be sought in the principle of a balanced budget, that within the Italian constitutional system can be found within the same article that sets the principle of good administration: article 97, as well as in article 81 as reformed in 2012 following the obligation of such reform for MS provided for in the

[324] J. 103/1993 "*L'obiettivo del buon andamento della Amministrazione può essere tuttavia perseguito e realizzato con strumenti e modalità diversi, parimenti efficaci, la cui scelta è rimessa alla discrezionalità del legislatore, naturalmente nei limiti della ragionevolezza*". in Studi e Ricerche Corte Costituzionale - L. Iannuccilli. "*Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale"*. 2009.

[325] J. 95/1966: *"Il procedimento disegnato, in questa fattispecie, dal legislatore per il perseguimento del pubblico interesse non appare pertanto incongruo, perché si basa su strumenti e modalità applicative che appaiono adeguati sia al canone di efficienza dell'azione amministrativa (sentenza n. 266 del 1993), sia al raggiungimento degli obiettivi prefissati; d'altra parte, procedere ad un esame più penetrante delle ragioni di questa opzione legislativa quasi inevitabilmente "comporterebbe un controllo delle scelte, lato sensu politiche, del legislatore, che è sottratto alle competenze della Corte"*. in idem.

Fiscal Compact Treaty[326]. While article 97 regards the principle of a balanced budget within each PA, article 81 regards the principle of a balanced budget of the State. Before the reform article 81 provided that every law that provided for new public spending had to also provide the financial means for it to be covered.[327] Some authors argued that such previous wording already implied the principle of a balanced budget, but such thesis was contradicted by the Constitutional Court in its jurisprudence.[328] Thus, the previous wording of article 81 provided for the covering of public costs but did not provide the prohibition of public debt which is an essential element of the principle of a balanced budget.

The reform of article 81 bound the State to the principle of a balanced budget, it prohibited public debt, but left the State with a certain autonomy in public financial choices and economic policies. In other words the allocation of public resources and its efficiency are left to the discretion of each Member State.[329] Although not entirely, the principle of State autonomy of financial allocation is tempered with the mechanisms that are determined within the legal framework of the Fiscal compact, such as the so-called 'European semester'[330], as well as the principle that the choices made by Member States must not jeopardize Union Law (i.e., all Union Law and particularly its

[326] Regarding which see Chapter 2
[327] Studi e Ricerche Corte Costituzionale - C. Marchese. "*Diritti Sociali e Vincoli di Bilancio"*. 2015. P. 10: *"Rispetto all'odierna disciplina, i principali limiti che si riscontravano nella previgente normativa erano quelli secondo cui «con la legge di approvazione del bilancio non si potevano stabilire nuovi tributi e nuove spese» e «ogni legge che importasse nuove o maggiori spese doveva indicare i mezzi per farvi fronte»"*
[328] Amongst many see J. 1/1966.
[329] Studi e Ricerche Corte Costituzionale - C. Marchese. "*Diritti Sociali e Vincoli di Bilancio"*. 2015. P. 12.
[330] G. Pitruzzella. *Crisi economica e decisioni di governo*. in *Quad. cost.,* 1/2012. P. 35 «*le politiche pubbliche nazionali devono muoversi nell'ambito di un quadrilatero i cui lati sono la lealtà dei cittadini, la fiducia dei mercati finanziari, il rispetto dei vincoli europei e l'impegno nelle sedi sovranazionali*».

fundamental rights, amongst which - as we saw - are the principle of good administration and of the rule of law). Member States must respect and follow the political economical direction that was co-decided during the European semester, with their own intervention and positions, at EU political tables.[331] Although, this is not the only limit MS must respect, they must guarantee the obtainment of EU objectives as provided in EU law, objectives that they are bound to by deciding to be parties of the Union. Amongst these objectives the most prominent are certainly those that decent from fundamental rights enshrined in the ECFR. Although, after the introduction of the principle of a balanced budget the satisfaction of such rights is conditional to their affordability.[332] This has led to the need of a political choice of which right to prioritize. When the Italian Constitutional Court was called upon to review such prioritization of rights (or political priotities) in the national economic policy answered with a number of principles: the principle of graduality and proportionality, as well as that of reason.[333] Now the question is how the European Court of Justice and Union as a whole answer to when there are asked to review the balance of rights and priorities given by Member States in their national economic policies. First of all, an answer to such question can be found within the legal framework of the Fiscal Compat, that binds States to the respect and guarantee of fundamental rights and EU Law. The European Court of Justice's jurisprudence also goes in this direction, as we shall see in the next paragraph. The case law of the ECJ regarding this issue in

[331] Idem.
[332] Studi e Ricerche Corte Costituzionale - C. Marchese. "*Diritti Sociali e Vincoli di Bilancio"*. 2015. P. 14.
[333] J. 356/1992, 243/1993, 240/1994, 99/1995, 205/1995, 218/1995, 416/1996, 125/1998, 30/2004 in Studi e Ricerche Corte Costituzionale - C. Marchese. "*Diritti Sociali e Vincoli di Bilancio"*. 2015. P. 16.

relation to the fiscal compact is next to none[334], this due mainly to issues regarding the admissibility of the questions as well as the competence of the court. Nevertheless, the position of the ECJ in terms of fundamental rights and their balancing with the principle of a balanced budget can be, in some way, construed by analyzing its case law regarding the principle of good administration and public efficiency, which shall be done in the next paragraph. What can be said here is that the position of the Union is certainly clearer in regard to the respect of fundamental rights and budget issues after the introduction of Regulation 2020/2093[335], that was analyzed in Chapter 2 paragraph 5. The regulation does not directly regard the issue of the balancing of rights and the priorities chosen in economic policy but certainly sets the principle of a necessary baalcne between the pricniple of a balnced budget, fundamental rights (i.e., the rule of law), and the principle of public efficiency (as enshrined in the principle of a good administration). In other words, what is necessary is a reasonable balance and an efficient allocation of public resources, in addition to a minimum standard of guarantee for fundamental rights. In this perspective, organizational efficiency is a minimum requirement in terms of the guarantee of the right to a good administration. As proven in Chapter 1 organizational/technical efficiency is the prerequisite of public efficiency. If, as stated by the ECJ, the Italian Constitutional Court, and by the Law (National and EU) the principle of good administration is a fundamental right, then organizational efficiency is the minimum standard of guarantee that must be respected in economic

[334] Studi e Ricerche Corte Costituzionale - C. Marchese. "*Diritti Sociali e Vincoli di Bilancio"*. 2015. P.33-34-35.
[335] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the European Council On a general regime of conditionality for the protection of the Union budget. Official Journal of the European Union.

policy, it is the minimum standard of legitimacy and efficiency of choices in public budget allocation. Inefficiency cannot justify the limitation of a fundamental right. In other words, the limitation of the guarantee fundamental rights by PAs cannot be justified by the principle of a balanced budget due to a lack of economic resources if these are due to organizational inefficiency of the PA itself. The principle of a balanced budget must necessarily be balanced with the principle of public efficiency, particularly that of organization efficiency. Thus**,** the non-organization by the Ministry of the Environment of open competitions for staff recruitment[336] (i.e., the concrete case analyzed in this study) is inexcusable. As we have seen, in terms of affordability, the national budget has the financial resources needed for such organization. Rather, the issue here regards financial allocation. This study argues that the political priorities in economic policy regarding public budget allocation that led to the non-organization of such tenders and to prioritize spending in other matters of administrative environmental management are illegitimate. The illegitimacy regards both national law and EU Law, and violates primary and fundamental rules, amongst these first of all the rule of law and good administration. Furthermore, such illegitimate public budget allocative choice also jeopardizes the obtainment of EU objectives,

[336] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 2 Tomo 2 p. 2-3-4: *"Tra le criticità segnalate anche negli anni precedenti, la capacità assunzionale resta, anche nel 2021, uno dei fattori di debolezza del Ministero. Infatti, il reclutamento delle 20 unità dirigenziali e le 400 unità di personale non dirigenziale, disposto dall'art.1, comma 317, della legge n. 145/2018 resta in buona parte inattuato*." … *"inoltre, l'art. 17-quinquies, comma 1, del d.l. 9 giugno 2021 n. 80, come modificato dalla legge di conversione n. 113 del 6 agosto 2021, aveva autorizzato il MITE ad assumere, con procedure concorsuali pubbliche, ulteriori n. 218 unità di personale non dirigenziale ad elevata specializzazione tecnica "al fine di consentire l'attuazione delle politiche di transizione ecologica anche nell'ambito del PNRR e di supportare le funzioni della Commissione tecnica PNRR- PNIEC, per il biennio 2021/2022. A dicembre del 2021 il Ministero ha proceduto, all'esito di una specifica procedura concorsuale, all'assunzione di 16 delle 50 unità di personale a tempo determinato destinate al PNRR."*

amongst which those that descend from the NRRP and the Next Gen EU Fund. In terms of the fundamental rights that such choice violates these are: the right of a good administration, sound financial management, economic growth, a high level of environmental protection, sustainable growth, social improvement, and the right to human health.

PA organizational efficiency as stated by the Italian Constitutional Court in J. 383/1998, twenty years ago, is inextricably bonded to fundamental rights. Considering that art 41 ECFR states the fundamental right to a good administration, one may say that as organizational efficiency is a fundamental right, as it is the prerequisite to good administration.

1.4. Public organization/technical efficiency as the prerequisite of the principle of good administration and of public efficiency in general and currently in the NRRP. A connection with the jurisprudence of the European Court of Justice.

Judgment 60/1991[337] of the Italian Constitutional Court states that organizational efficiency, particularly in regard to human resources is essential for the guarantee of the principle of good administration. A previous ruling, judgment 234/1985, states that organizational efficiency is the precondition of a good administration, as we have argued. This judgment goes beyond such argument and states that

[337] Judgment 60/1991 in Studi e Ricerche Corte Costituzionale - L. Iannuccilli. "*Il principio di buon andamento dell'amministrazione nella giurisprudenza della Corte Costituzionale"*. 2009.: *"Ciò posto, si deve riconoscere che l'efficienza e il contenimento dei costi dei servizi pubblici - che sono a carico della collettività - attengono al concetto di buon andamento della pubblica amministrazione e come tali assumono rilevanza sotto il profilo costituzionale. Certamente il riordino della situazione degli organici costituisce un dato di rilievo essenziale ai fini di razionalizzare…"*

organizational efficiency comes before the principle of a good administrative procedure, that can be considered an "additional"[338] guarantee of the principle of good administration.

Judgment 8/1967 regarding the irrational distribution of personnel, applies a EU Directive, at specifically the objectives it sets, independently from its direct effect, within the national organization of a PA, stating that National PAs must follow and is bound by EU law in its organization when such law gives it administrative powers[339]. In this perspective, it would be interesting to consider nowadays, mutatis mutandis, what implications Italy's NRRP has in terms of the direct applicability within PAs of EU reformative objectives. This specifically, considering the NRRP's devolution of funds and correlated obligations/powers of PAs for administrative reform. The

[338] J. 234/1985 Italian Constitutional Court: *"Invero, il disposto dell'art. 97 si prefigge - nella direttiva costituzionale per la regolamentazione delle pubbliche attività, obiettivate a conseguire buon andamento ed imparzialità - la predisposizione di strutture e di moduli d'organizzazione, volti ad assicurare, appunto, ed attraverso questa, un'ottimale funzionalità. Il che non esclude che il legislatore ordinario possa indirizzarsi anche verso altri (e in aggiunta) canoni di garanzia, oltre quello della organizzazione, la più corretta: fra questi, la cosiddetta procedimentalizzazione dell'amministrazione, giusta modelli contenziosi o paracontenziosi cui, in effetti, sembrano tendere concretamente le richieste in causa."* In idem.

[339] Judgment 8/1967 Italian Constitutional Court: *"…norme comunitarie dalle quali derivino obblighi per lo Stato incidenti sull'organizzazione degli studi universitari." … "Vengono in considerazione, a questo proposito, e hanno valore decisivo varie direttive…". "Alla stregua dell'art. 189 del Trattato CEE, le direttive vincolano gli Stati membri cui sono rivolte per quanto riguarda il risultato da raggiungere, salva restando la competenza degli organi nazionali in merito alla forma e ai mezzi. Esse richiedono dunque attuazione, da parte del legislatore e dell'amministrazione, secondo le regole costituzionali che ne configurano i poteri e ne disciplinano i rapporti. Tali obiettivi, obbligatori per lo Stato in forza dell'art. 189 del Trattato CEE, valgono per dettato legislativo - indipendentemente dalla loro forza cogente diretta - nei confronti dell'amministrazione, comportando che i poteri di cui essa sia dotata, nella materia oggetto di direttive, sono da esercitare secondo gli obblighi di risultato che la normativa comunitaria impone, non rilevando poi la circostanza che tali poteri siano definiti in occasione della attuazione delle direttive medesime o siano legislativamente previsti - come é nella specie - altrimenti."*

EIR[340], the Report by the Court of Accounts[341], Italy's NRRP and the correlated Laws that provide for the organization of open competitions for the recruiting of civil servants for its execution, all consider the reform of organizational efficiency through the recruitment of human resources essential objectives. Thus, EU and National objectives are clear and the increase in the number of civil servants[342] together with the improvement of administrative efficiency are first in line.

[340] European Commission. *Environmental Implementation Review Country Report – Italy*. 2022: p. 44-50

[341] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 2 Tomo 2 p. 2-3-4: *"Tra le criticità segnalate anche negli anni precedenti, la capacità assunzionale resta, anche nel 2021, uno dei fattori di debolezza del Ministero. Infatti, il reclutamento delle 20 unità dirigenziali e le 400 unità di personale non dirigenziale, disposto dall'art.1, comma 317, della legge n. 145/2018 resta in buona parte inattuato*." … *"inoltre, l'art. 17-quinquies, comma 1, del d.l. 9 giugno 2021 n. 80, come modificato dalla legge di conversione n. 113 del 6 agosto 2021, aveva autorizzato il MITE ad assumere, con procedure concorsuali pubbliche, ulteriori n. 218 unità di personale non dirigenziale ad elevata specializzazione tecnica "al fine di consentire l'attuazione delle politiche di transizione ecologica anche nell'ambito del PNRR e di supportare le funzioni della Commissione tecnica PNRR- PNIEC, per il biennio 2021/2022. A dicembre del 2021 il Ministero ha proceduto, all'esito di una specifica procedura concorsuale, all'assunzione di 16 delle 50 unità di personale a tempo determinato destinate al PNRR."*

[342]Piano Nazionale di Ripresa e Resilienza (NRRP) in https://www.governo.it/it/approfondimento/pnrr-gli-obiettivi-e-la-struttura/16702 P. 48: *"La debole capacità amministrativa del settore pubblico italiano ha rappresentato un ostacolo al miglioramento dei servizi offerti e agli investimenti pubblici negli ultimi anni. Il PNRR affronta questa rigidità e promuove un'ambiziosa agenda di riforme per la Pubblica Amministrazione. Questa è a sua volta rafforzata dalla digitalizzazione dei processi e dei servizi, dal rafforzamento della capacità gestionale e dalla fornitura dell'assistenza tecnica necessaria alle amministrazioni centrali e locali, che sono fondamentali per promuovere un utilizzo rapido ed efficiente delle risorse pubbliche. Uno dei lasciti più preziosi del PNRR deve essere l'aumento permanente dell'efficienza della Pubblica Amministrazione e della sua capacità di decidere e mettere a punto progetti innovativi, per accompagnarli dalla selezione e progettazione fino alla realizzazione finale. LA RIFORMA DELLA PA Nell'ultimo decennio l'evoluzione della spesa pubblica, con il blocco del turnover, ha generato una significativa riduzione del numero dei dipendenti pubblici in Italia. La Pubblica Amministrazione italiana registra oggi un numero di dipendenti (circa 3,2 milioni in valore assoluto) inferiore alla media OCSE (13,4 per cento dell'occupazione totale, contro il 17,7 per cento della media OCSE, secondo i dati del 2017)."*

1.5. European Court of Justice's jurisprudence on the principle of good administration and public efficiency.

Article 41 of the ECFR as we have seen enshrines the fundamental right to a good administration, in such regard "each Member State of the European Union should concern itself with identifying and promoting the most adequate measures for ensuring good governance and good administration"[343]. Furthermore, in the words of Friedery, "the common principles applicable to public administration are recognized and promoted especially by national and European courts." "The Court of Justice's role in this field is of utmost importance" … "in unfolding principles". Moreso if one considers that the wording of article 41 ECFR results from case law[344]. As stated above, article 41 stands upon the principle of the rule of law. What must be noted in such regard, and is of utmost importance to grasp the strict bond between the rule of law and the principle of a good administration is that the characteristic of the EU principle of the rule of law itself where developed in the case law that formed the principle of goo administration.[345] In other words, the principle of good administration is a corollary of the principle of the rule of law.

The ECJ states that while the principle enshrined in article 41 is first of all applicable to EU institutions and administration, although not

[343] R. friedery, Bratislava University - Institute for legal studies. *Good administration through the lens of the CJEU: direction for the administrative bodie*s. 2018.
[344] Court of Justice judgment 222/86 Heylens, judgment 374/87 Orkem, judgment C-269/90 TU München, Court of First Instance judgments T-450/93 Lisrestal, judgement T-167/94 Nölle in R. friedery, Bratislava University - Institute for legal studies. *Good administration through the lens of the CJEU: direction for the administrative bodies*. 2018.
[345] Court of Justice judgment C-255/90 P, Burban; Court of First Instance judgments T-167/94 Nölle and T-231/97 New Europe Consulting and others in R. friedery, Bratislava University - Institute for legal studies. *Good administration through the lens of the CJEU: direction for the administrative bodies*. 2018.

directly invokable within Member States[346], it is still applicable through the application of the general EU principle of good administration. As stated by the ECJ: "It is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (see, to that effect, the judgment in *Cicala*, C-482/10, EU:C:2011:868, paragraph 28). Consequently, an applicant for a resident permit cannot derive from Article 41(2)(b) of the Charter a right to access the national file relating to his application. It is true that the right to good administration, enshrined in that provision, reflects a general principle of EU law (judgment in *HN*, C-604/12, EU:C:2014:302, paragraph 49). However, by their questions in the present cases, the referring courts are not seeking an interpretation of that general principle, but ask whether Article 41 of the Charter may, in itself, apply to the Member States of the European Union." Thus, while article 41 ECFR may not be directly applicable, does not have direct effect, the principle of good administration as enshrined in article 41 is still applicable and must be applied within Member States. The application of the principle of good administration within Member States must be further analyzed. Starting from the analysis of article 41 ECFR in comparison with article 97 of the Italian Constitution, the former states that: "Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union."[347] Art 97 co 2 and following of the Italian Constitution as translated by the Senate states that: "Public offices are organized

[346] Court of Justice Joint Cases C-141/12 and C-372/12, YS v. Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v. M. S., par.s 66 – 69, in Idem https://curia.europa.eu/juris/document/document.jsf?docid=155114&doclang=EN

[347] Article 41 Charter of the Fundamental Rights of the European Union (ECFR) (2016/C 202/02). Official Journal of the European Union.

according to the provisions of law, so as to ensure the efficiency and impartiality of administration[348]. The regulations of the offices lay down the areas of competence, the duties, and the responsibilities of the officials. Employment in public administration is accessed through competitive examinations, except in the cases established by law."[349] Amongst the "provisions of the law" that co 2 of article 97 referrers to Law 241/1990 is certainly first in line, as it is the fundamental primary law on the administrative procedure. Article 1 of such Law states that: "1. Administrative action shall pursue the objectives established by law and shall be founded on criteria of economy of action, effectiveness, impartiality, publicity and transparency, in accordance with the modes of action provided for both by the present Law and by the other provisions governing individual procedures, as well as by the principles underpinning the Community's legal order."[350] Furthermore, the subsequent articles of the law state all the remaining principles stated in article 41 hat are missing in the express wording of article 97 Cost (i.e., the right to have affairs handled fairly and within a reasonable time). As is clear from the combined analysis of article 97 Cost (as integrated by primary law) and article 41 ECFR it is clear that the principle of good administration as enshrined in in the latter article is provided with the exact same wording in national law, that in addition

[348] For a more recent transaltion, but with a controversial wording of co 2 "Public offices shall be organised under the law and so as to ensure smooth and impartial operation" see Senato della Repubblica Costitutione Italiana Edizione in Lingua Inglese in https://www.senato.it/sites/default/files/media-documents/Costituzione_INGLESE_2023.pdf

[349] Senato della Republica. Costitution of the Italian Republic in https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf

[350] Catherine de Rienzo (nèe Everett-Heath) A.I.T.I. English Translation of Legge 7 Agosto 1990 n. 241 – The Italian Administrative Procedure Act – translation of the Law's orginal text, as subsequently amended up to 1 July 2010.

– to avoid any doubt - refers to the direct application of "the principles underpinning the Community's legal order".

Having discussed the issues regarding the applicability of article 41 within the Italian Legal system we shall now analyze the ruling where the ECJ establishes the principle of good administration as enshrined in article 41 as a fundamental principle of EU law. The ECJ states that: "…where, in the main proceedings, a Member State implements EU law, the requirements pertaining to the right to good administration, including the right of any person to have his or her affairs handled impartially and within a reasonable period of time, are applicable in a procedure for granting subsidiary protection … which is conducted by the competent national authorities."[351] Thus, it is clear that the pricniple of good administration is applicable and must always be applied to guarantee the rule of law, within each EU member State, in addition to this when implementing EU Law the principle of good administration can be even applied within national procedures to grant a subsidiary protection. In other words, the EU general principle of good administration is particularly invasive within MS national legal systems, particularly so when EU Law is to be implemented. This study argues that such is the case today, in the application of the objectives set in the NRRP and consequently in the specific case of non-organization of open, public competitions for the recruiting of civile servants by the Ministry of the Environment that this study is analyzing.

[351] European Court of Justice Case C-604/12, H.N v Minister for Justice, Equality and Law Reform, Ireland. Par. 50 in https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0604.

In terms of the content of the principle of good administration various judgments of the ECJ comes to aid. In ruling C-265/80 the ECJ explains the application of the principle of proportionality for the purposes of good administration. Proportionality requires that any measure of the EU administration be based on the law, be appropriate for the meeting of the objectives set, and that it is the less onerous measure.[352] In case C-308/07 the Opinion of Advocate General Trstenjack[353] states that the principle of good administration includes all the principles of administrative law, that are then specified and articulated according to a case-to-case basis. What is certain is that the principle implies an extended obligation of diligence. In the words of Trstenjack: " According to the predominant view in legal doctrine, (46) the principle of sound administration, on which the appellant relies in connection with his sixth ground of appeal, is not an individual principle of administrative law, but a combination of several principles, or a kind of collective term for some or all the principles of administrative law. Sometimes it is used as a synonym for those principles which make up administrative procedure based on the rule of law. For example, the principle of sound administration requires that the authorities repair faults or omissions, (47) that proceedings are conducted impartially and objectively (48) and that a decision is taken within a reasonable period. (49) In addition, it implies a comprehensive duty of care and regard for welfare on the part of the authorities, (50) and the right to a fair hearing, that is the obligation on officials, before taking a decision, to place those affected in a position in which they

[352] The European Court of Justice C-265/87 in R. friedery, Bratislava University - Institute for legal studies. Good administration through the lens of the CJEU: direction for the administrative bodies. 2018.

[353] C-308/07 P par. 89 – 91 in https://curia.europa.eu/juris/document/document.jsf?text=&docid=68004&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=15463207 in Idem.

may make known their views, (51) and the obligation to state reasons for the decision. (52) 90. However, which principles may actually be subsumed under the notion 'principle of sound administration' varies and cannot always be defined precisely. In addition, it is difficult to establish whether it encompasses principles which the administration merely has to take into account or in fact rights which accord the individual a subjective right to demand a specific action or omission from the administration. (53) The relevant factors are, first of all, the legal character of the source and, secondly, the normative content of the relevant provisions. 91. Expressions of the principle of sound administration can be found in the Community legal order in numerous provisions of primary and secondary law, in Article 41 of the Charter of Fundamental Rights, in the Code of Good Administrative Behavior of the European Ombudsman and in the procedural rules adopted by each of the Community institutions to implement that code. There is a similar variation in its binding character for the Community institutions and bodies in the context of the direct enforcement of Community law. However, the main source of inspiration in drafting Article 41 of the Charter of Fundamental Rights, which has now refined the principle of sound administration into a fundamental right of the individual, has from the beginning been the case-law of the Court of Justice. (54)".[354] particularly relevant for the purposes of this study are the considerations of the Advocate General regarding individual subjective rights and consequential demands of action or omission to the administration. To this end, according to the AG the relevant factors to be considered are "the legal character of the source and "… "the normative content of the relevant provisions". In other words, as provided in national Italian

[354] C-308/07 P par. 89 – 91 in https://curia.europa.eu/juris/document/document.jsf?text=&docid=68004&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=15463207.

Law, following the principle of the rule of law, one has to look at the law that confreres the powers and obligations to the considered PA, alongside the judicial norms that legitimate and guarantee the citizen the judicial review of his right. This analysis shall be carried out in depth in the next paragraphs, when analyzing review mechanisms of public efficiency.

1.6. the jurisprudence of the Italian Supreme Administrative Court (*Consiglio di Stato*) and of the Court of Cassation on the principle of good administration and public efficiency.

Within the Italian legal system, the Administrative Supreme Court (*Consiglio di Stato)* as well as the Court of Cassation in their jurisprudence have specified the content of the principle of good administration in that of the principle of public and economic efficiency.[355]

In judgment 7024/2006 the Italian Court of Cassation in Joint Chambers (i.e., *Sezioni Unite della Cassazione*) stated that the principle of economy and efficacy are to be applied as legal norms for the legitimacy of administrative action. The Court goes on to state that the observance of such norms can be the object of judicial review, that can review their concrete application. Furthermore, the Court states that the application of the 'norms' of economy and efficacy by the PA are not

[355] L.Torchia. *"L'efficienza della pubblica amministrazione fra ipertrofia legislativa e atrofia dei risultati".* Istituto di Ricerche sulla Pubblica Amministrazione (2019) : *"Su questa strada si è incamminata anche la giurisprudenza amministrativa e ordinaria, che ha, ad esempio, cercato di ricondurre il principio di efficienza nella cosiddetta legalità "sostanziale" ... "oppure ha cercato di trasformare i principi di economicità ed efficacia in regole giuridiche connesse alla legittimità dell'azione amministrativa, estranee alla sfera discrezionale e quindi sindacabili o, ancora, ha tratto dalla dignità normativa dei principi la possibilità di verificare la loro violazione sul piano della legittimità, con esclusione della natura discrezionale."*

to be considered as subject to PA discretionary powers and choice.[356] Later, the same Court in Joint Chambers in judgment 12902/2011 stated that the legitimacy of PA action cannot be unbound from the assessment of the objectives it obtained and the costs it undertook.[357] As stated in judgment 157/2003 of the same Court, such jurisprudence descends from the norms found in Law 241/90 that sets the principles of efficiency and economy as juridical parameters of general application, together with the general principles of EU Law.[358]

The Supreme Administrative Court's jurisprudence in such regard is ample, amongst such multitude judgments 4873/2012 and 2302/2014 are emblematic. The former stated that[359] regarding technical assessments of indetermined juridical concepts for an effective judicial review, the cognition of the review must be full and not solely 'extrinsic'. The judge must in such a case have intrinsic powers of review, eventually also by using and applying the specialistic sciences used by the PA.

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[356]J. 7024/2006 Italian Court of Cassation in Joint Chambers: *"la cui osservanza può essere oggetto di sindacato giurisdizionale, nel senso che lo stesso comporta il controllo della loro concreta applicazione, essendo lo stesso estraneo alla sfera propriamente discrezionale"*. In L.Torchia. *"L'efficienza della pubblica amministrazione fra ipertrofia legislativa e atrofia dei risultati".* Istituto di Ricerche sulla Pubblica Amministrazione (2019).

[357] J. 12902/2011 Italian Court of Cassation in Joint Chambers: *"prescindere dalla valutazione del rapporto tra gli obiettivi conseguiti e i costi sostenuti*". In L.Torchia. *"L'efficienza della pubblica amministrazione fra ipertrofia legislativa e atrofia dei risultati".* Istituto di Ricerche sulla Pubblica Amministrazione (2019).

[358] Judgment 157/2003 Italian Court of Cassation: *"con la l. n. 24 del 1990 i principi di efficienza, di economicità e di partecipazione del privato al procedimento amministrativo sono diventati criteri giuridici positivi"*. In Idem.

[359] Jugment 4873/2012 Consiglio di Stato: *"Ed, invero, "con rapporto alle valutazioni tecniche, anche quando riferite ai c.d. "concetti giuridici indeterminati", la tutela giurisdizionale, per essere effettiva, non può limitarsi ad un sindacato meramente estrinseco, ma deve consentire al giudice un controllo intrinseco, avvalendosi eventualmente anche di regole e conoscenze tecniche appartenenti alla medesima scienza specialistica applicata dall'Autorità".*

Judgment 2302/2014 stated that the review of the administrative judge extends to the review of the economical assessment exercised by the PA. The Court affirmed that beyond the concepts of 'strong' and 'weak' judicial review, attention must solely be given to judicial powers of review according to a common EU model. In such model, according to the Court, the principle of effectiveness of judicial review is to be articulated on a case-to-case basis, so that the judge be assured to have the power to review that the Public Administration has correctly exercised the powers it is entrusted with.[360]

In other words, the jurisprudence of the Italian Supreme Courts established that the right to a good administration unfolds into the principle of efficiency and efficacy. These are part of the concrete content of the principle of good administration.

In such regard the Italian Constitutional Court in judgment 29/1995 set an important jurisprudence in terms of mechanisms of judicial review of good administration and public efficiency. Specifically, the ruling underlines that the Italian Constitution does not preclude the institution by the legislator of a mechanism of judicial review that regards concrete PA activity as a whole. Furthermore, the Constitution allows for such mechanism of judicial review to use parameters that go beyond those

[360]Judgment 2302/2014 Consiglio di Stato: *"Il sindacato del giudice amministrativo è, quindi, pieno e particolarmente penetrante e può estendersi sino al controllo dell'analisi (economica o di altro tipo) compiuta dall'Autorità, e, in superamento della distinzione tra sindacato "forte" o "debole", va posta l'attenzione unicamente sulla ricerca di un sindacato, certamente non debole, tendente ad un modello comune a livello comunitario, in cui il principio di effettività della tutela giurisdizionale sia coniugato con la specificità di controversie, in cui è attribuito al giudice il compito non di esercitare un potere in materia antitrust, ma di verificare – senza alcuna limitazione – se il potere a tal fine attribuito all'Autorità sia stato correttamente esercitato.Tale orientamento esclude limiti alla tutela giurisdizionale dei soggetti coinvolti dall'attività dell'A.g.c.m, individuando quale unica preclusione l'impossibilità per il giudice di esercitare direttamente il potere rimesso dal legislatore all'Autorità".*

of strict legality, such as objectives and standards set in law or in the public budget and the evaluation of the means concretely used by the PA for their obtainment.[361]

The jurisprudence analyzed above is of particular use at this stage of the study, as it underlines how the so-called public class action (that we are about to analyze) does not need strictly set objectives and standards to be actioned and its claims reviewed. As we have seen up to now, the principle of good administration per se can be used as a parameter or review through its articulation on a case-to-case basis.

Law D.Lgs. 150/2009, the so-called Brunetta Reform, as we have seen introduced a number of administrative reforms with the purpose of improving overall PA efficiency and efficacy. Furthermore, the Law introduced the so-called public class action, or technically, the action for the efficiency of the public administration.

An extremely important issue regarding Law 150/2009 is that of the setting of standards of efficiency and performance.[362] These standards are supposed to be both qualitative and economical/quantitative, the Law established that they were to be set in additional regulatory acts. These regulatory acts were to be implemented by the Commission for

[361] J. 29/1995 Italian Constitutional Court *"Più precisamente, anche se l'art. 125 della Costituzione e le corrispondenti disposizioni contenute negli Statuti speciali esprimono implicitamente un'opzione generale a favore del controllo di legittimità sui singoli atti amministrativi regionali, gli stessi articoli non precludono che possa essere istituito dal legislatore un tipo di controllo, come quello previsto dalle disposizioni contestate, che abbia ad oggetto, non già i singoli atti amministrativi, ma l'attività amministrativa, considerata nel suo concreto e complessivo svolgimento, e che debba essere eseguito, non già in rapporto a parametri di stretta legalità, ma in riferimento ai risultati effettivamente raggiunti collegati agli obiettivi programmati nelle leggi o nel bilancio, tenuto conto delle procedure e dei mezzi utilizzati per il loro raggiungimento."*

[362] A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012. P 131.

the Evaluation, Transparency, and Integrity of the Public Administration (CVIT). Unfortunately, CIVIT only implemented guidelines, that are generical and do not set specific standards as they were initially intended by the Reform.[363]

These standards are essential for the effective use of the class action [364] consequently the above-mentioned general guidelines and no implementation of specific standards led to a number of uncertainties in its application. Nevertheless, the predominant doctrine and the little jurisprudence regarding the action (that has not been used often as we shall see), in line with the above mentioned national and EU jurisprudence, deemed that the action did not need strictly set standards, as the constitutional parameter of article 97 and the general EU principle of good administration sufficed.[365] Specifically, such doctrine underlines how the action is to be applied mostly to the organization of the PA rather than to single actions, as it is the true center of administrative efficiency or inefficiency.[366]

In such regard an important modern administrative doctrine is of relevance: the doctrine of the connection between then quality of life of citizens and good administration. [367] according to Giuffrida and Scoca the two elements are certainly connected and correlated, and PA efficiency has a strong influence on quality of life.

The standing point to set what quality of life is made of is that of context. In a set moment in history different elements influence the

[363] Idem P. 132.
[364] Idem P. 142.
[365] A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012. P 150.
[366] A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012. P. 150.
[367] Idem p. 78.

quality of life. In modern society there are many elements that impact the quality of life in positive or negative terms. For example, industrialization and fast economic growth helped improve our wealth but also impacted negatively on our health and on the environment. What can be said is that modern societies have set the concept of the public quality of life.[368] A concept that encompasses a number of rights that are to be balanced amongst each other and that are provided for within national Constitutions. As we have seen such rights and values are common amongst the legal systems of EU Member States and are enshrined within the Treaties and the Charter of Fundamental rights.

Another important coordinate to understand the relationship between the quality of life and PA efficiency is the concept of risk society.[369] According to Romano a crisis is the result of the inadequacy of public institutions and the State in keeping up with the changes that bring to the destruction of the State.[370] Thus, as the State and politics frantically run after each different moment of crisis inevitably this scattered effort culminates in an inadequate tackling of the most pressing of emergencies.

The right to health is without any doubt amongst the fundamental rights, as is the environment albeit for some on its own for others in relation to the right to a healthy environment, but nevertheless a fundamental right it is. Now more than ever as the state of climate emergency and environmental issues are being alarmed all over the globe the State has to step up and be adequate to tackle the issue efficiently. The issue may

[368] Idem p. 81.
[369] R. Ferrara. La protezione dell'ambiente e il procedimento amminsitrativo nella societa del rishcio. In Diritto e Societa, 2006, 507 ss.
[370] S. ROMANO. *La crisi dello Stato*. Milano, 1969, 23. in Ufficio Study Corte Costituzionale - C. Marchese. "*Diritti Sociali e Vincoli di Bilancio"*. 2015.

seem of the most abstract but unfortunately it is not. The impacts of environmental damages are ever increasingly finishing under the scrutiny of judicial review across the globe, some examples of which have been given across this study. Slowly the role of the judicial power in tackling the climate crisis as well as environmental crises in general has taken foot and since the end of the last century the concept of climate litigation has strongly imposed itself within societies.[371]

1.7.Climate Litigation and its role within this study

To have a complete framework of climate litigation this study shall use the 2022 Report by LSE University for the EU Commission on "Climate litigation in Europe a summary report for the European union forum of judges for the environment".

The report draws from three sources of information: " (i) the national reports provided by EUFJE members summarizing developments in their domestic jurisdictions; (ii) the annual Global Trends in Climate Litigation reports published by the Grantham Research Institute on Climate Change and the Environment at the London School of Economics and Political Science; and (iii) the global climate change litigation databases maintained by the Sabin Center for Climate Change Law at Columbia University with support from the Grantham Research Institute and others."[372]

[371] EU Commission, LSE University - J. Setzer, H. Narulla, C. Higham and E. Bradeen. Climate litigation in Europe a summary report for the European union forum of judges for the environment. Grantham research institute on climate change and the environment – LSE, London, 2022.
[372] Idem.

Climate change litigation originates in the United States, that was "the epicenter of the climate change litigation phenomenon"[373]. For many years US cases were "a prototype, a source of inspiration, an opportunity to analyze benefits and limitations of courts".[374]

Climate litigation boomed in the EU in the mid 2000s together with EU climate policy and legislation with the introduction of the European Union Emissions Trading System (EU ETS). Around 2015 EU climate litigation met the global trend, with an increasing number and diversity of climate cases before EU courts. They have now been filed in around half of all EU Countries. [375]

"More than 60 cases have now been filed before the Courts of the European Union and at least 10 cases are pending before the European Court of Human Rights (ECtHR)."[376] Although, numbers are not evenly distributed, the UK, France, Germany, and Spain are the jurisdictions with the most cases. Trends show that the following decades will see an increase in filing of climate litigation in other EU Nations. The variation of the costs of litigation appears to be a significant reason of the uneven distribution of climate litigation between countries.

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[373] Peel J and Osofsky H M (2015) *Climate change litigation: Regulatory pathways to cleaner energy*. Cambridge, England: Cambridge University Press. In EU Commission, LSE University - J. Setzer, H. Narulla, C. Higham and E. Bradeen. Climate litigation in Europe a summary report for the European union forum of judges for the environment. Grantham research institute on climate change and the environment – LSE, London, 2022.

[374] Idem.

[375] EU Commission, LSE University - J. Setzer, H. Narulla, C. Higham and E. Bradeen. Climate litigation in Europe a summary report for the European union forum of judges for the environment. Grantham research institute on climate change and the environment – LSE, London, 2022.

[376] EU Commission, LSE University - J. Setzer, H. Narulla, C. Higham and E. Bradeen. Climate litigation in Europe a summary report for the European union forum of judges for the environment. Grantham research institute on climate change and the environment – LSE, London, 2022. P. 6.

In terms of claimants, defendants, and the courts of climate litigation, most are filed against governments, although those against corporations are on a rise. [377] "Globally, more than 70% of all climate cases have been filed against governments. This trend is also seen in the European context, where around 75% of cases have been filed against a wide variety of government actors, including both national and subnational governments and other public institutions such as export credit agencies and central banks."[378] 50% of climate case claimants in Europe are individuals or organizations, or both acting together. Different levels of governments at different levels have brought around 15% of cases, and 30% of cases have been filed by corporations.

In terms of the courts before climate litigation can be filed. A common feature of the national reports used in the study is the wide range of options for legal action concerning climate change issues.

1.8. Administrative Courts as the courts that guarantee environmental rights. The three waves of climate litigation.

Administrative courts were referenced as the most likely to see climate action and were in some cases the only types of court considered. According to the study[379], overall, the body of EU climate cases is highly diverse. The evolution of the filing of cases sees that over time, these went from "a narrower set of cases grounded primarily in administrative law to a more diverse group of cases involving

[377] Idem p 7-8.
[378] Idem p 7.
[379] EU Commission, LSE University - J. Setzer, H. Narulla, C. Higham and E. Bradeen. Climate litigation in Europe a summary report for the European union forum of judges for the environment. Grantham research institute on climate change and the environment – LSE, London, 2022. P. 8.

arguments based in many areas of law, including human rights, contracts, tort, and corporate law."[380]

The study uses the categorization used by environmental law scholars[381] of climate litigation evolution: 'three waves' of litigation. The first wave, that goes from the mid-1980s to the mid-2000s, consisted of administrative challenges to the process of individual policies and the fact greenhouse gas emissions and climate change had not been assessed and considered. The second wave of climate litigation is of the mid-2000s, with more variety of administrative law challenges to policies, particularly by environmental groups. The distinctive feature is the use of litigation to "fill in the gaps"[382] of climate/environmental legislation[383]. Other features are the diversity of the institutions targeted by the cases.

In terms of the strategies used two are particularly relevant for the purposes of this study, as they seem to regard the same topic treated.[384] The first, the 'government framework' strategy challenges the

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[380] Idem.

[381] Peel J, Osofsky H M and Foerster A (2020) "'Next Generation' climate change litigation in Australia", Chapter in *Climate Change Litigation in the Asia Pacific*, ed Jolene Lin and Douglas A Kysar, 175- 206. Cambridge: Cambridge University Press.; Golnaraghi M, Setzer J, Brook N, Lawrence W and Williams L (2021) *Climate Change Litigation – Insights into the evolving global landscape.* Geneva Association. ; Ganguly G, Setzer J and Heyvaert V (2018) If at First You Don't Succeed: Suing Corporations for Climate Change*. Oxford Journal of Legal Studies* 38(4): 841–868.

[382] EU Commission, LSE University - J. Setzer, H. Narulla, C. Higham and E. Bradeen. Climate litigation in Europe a summary report for the European union forum of judges for the environment. Grantham research institute on climate change and the environment – LSE, London, 2022. P. 9.

[383] See *Urgenda Foundation v. State of the Netherlands, Royal Dutch Schell PLC 2021, Neubauer, et al. v. Germany, Juliana vs United States c.d. Youth v. Gov Duarte Agostinho and Others v Portugal and 32 other States (ECHR) In Columbia University's Climate School Sabin Center Database: http://climatecasechart.com/*

[384] For the complete list of strategies see: EU Commission, LSE University - J. Setzer, H. Narulla, C. Higham and E. Bradeen. Climate litigation in Europe a summary report for the European union forum of judges for the environment. Grantham research institute on climate change and the environment – LSE, London, 2022. P. 13.

implementation of climate targets and policies and affect the whole country's economy and society (e.g., the Urgenda case). A subgroup of such cases is comprised of those that challenge subnational governments/policies. The study calculated that 39 of these cases have been filed so far in the EU, while 80 have been identified world-wide.[385] The second relevant strategy is the 'public finance' strategy. These cases challenge the flow of public money as not aligned with climate and environmental action (e.g. *ClientEarth v. Belgian National Bank; Friends of the Earth v. UK Export Finance*).[386] The study has calculated that only 4 of such cases have been filed, in the EU while there are none to be identified across the world.[387] Probably because it is a recent strategy.

In terms of the outcomes of climate litigation: "Earlier this year, the Intergovernmental Panel on Climate Change (IPCC), the UN body for assessing the science related to climate change, recognized the importance of litigation in climate governance in its *Summary for Policymakers."*[388] The summary underlined the influence and critical role that courts are playing in how the environment and climate change are managed. An important point that must be stressed, that can have important impacts for the purposes of this study, and thus shall be analyzed in the following paragraphs regards the barriers to climate litigation in legislation and legal practice. The Italian report of the LSE study stated: "Access to justice should see a greater openness on the

[385] Idem.
[386] *ClientEarth v. Belgian National Bank* 21/38/C 2021; *Friends of the Earth v. UK Export Finance* Claim no. [2022] EWHC 568 (Admin) 2020
[387] EU Commission, LSE University - J. Setzer, H. Narulla, C. Higham and E. Bradeen. Climate litigation in Europe a summary report for the European union forum of judges for the environment. Grantham research institute on climate change and the environment – LSE, London, 2022. P 14.
[388] Idem p. 15.

part of the courts ... for a universal interest that touches primary human rights such as life and health, and even the health of the planet itself, it seems appropriate to broaden personal and social legitimacy for justice at all levels in matters of climate change."[389] Furthermore, within the Italian system, as is the case in many EU MS legal systems (such as the German)[390] locus standing for environmental cases is provided mainly to environmental associations with a minimal room left to individual claimants. This may well be the case also in the so-called climate class action provided for in Law D.Lgs. 150/2009, that shall be analyzed in the next chapters. In such regard "the German national report noted that the exclusion of subjective rights and actionable legal positions under the Federal Climate Change Act may be incompatible with Article 9(3) of the Aarhus Convention and the decision of the CJEU in the *Protect* case. The report also outlines that the landmark decision in the *Neubauer, et al. v. Germany* case has implications for standing: it recognizes an individual right to protection by the state against irreversible and serious, imminent impairments in the future, as well as a future- oriented defensive protection of basic rights."[391]

In terms of landmark cases the LSE study refers to the 2006 case where the Commission succeeded an action filed against Italy in Commission of the European Communities v. Italian Republic for failing to adopt all

[389] Italian Report p. 6 in EU Commission, LSE University - J. Setzer, H. Narulla, C. Higham and E. Bradeen. Climate litigation in Europe a summary report for the European union forum of judges for the environment. Grantham research institute on climate change and the environment – LSE, London, 2022.
[390] EU Commission, LSE University - J. Setzer, H. Narulla, C. Higham and E. Bradeen. Climate litigation in Europe a summary report for the European union forum of judges for the environment. Grantham research institute on climate change and the environment – LSE, London, 2022. P. 15.
[391] EU Commission, LSE University - J. Setzer, H. Narulla, C. Higham and E. Bradeen. Climate litigation in Europe a summary report for the European union forum of judges for the environment. Grantham research institute on climate change and the environment – LSE, London, 2022. P. 15.

laws, regulations and administrative provisions necessary to comply with its obligations under Article 31(1) of the EU ETS Directive 203/87/EC.[392] This case certainly sets an interesting precedent for the purposes of this study in relation to the obligations Italy is bound to under its NRRP, specifically those of organization efficiency reform of the Ministry of the Environment and the recruiting of civil servants.

Recently EU Courts are at the forefront of the 'third wave' of climate litigation. Judgments have been influencing jurisprudence around the world. According to the study, this is likely due to the transnational exchange between lawyers, judges, and scholars within the EU. Recently there has been a surge in cases before the ECtHR. Ten cases have been filed since 2020[393]. Furthermore, the EHtRC seems to prioritize climate cases: three cases have been conferred to the Grand Chamber in two months in 2022: Duarte Agostinho and Others v. Portugal and 32 Other States; Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others; and Carême v. France.

This study and the specific case it sets out to analyze inserts itself in the third wave of climate litigation, as – this study argues that – PA organizational inefficiency of the Ministry of the Environment jeopardizes the obtainment of the Green Deal[394] objectives on cutting

[392] Commission of the European Communities v. Italian Republic in http://climatecasechart.com/non-us-case/commission-of-the-european-communities-v-italian-republic/.

[393] EU Commission, LSE University - J. Setzer, H. Narulla, C. Higham and E. Bradeen. *Climate litigation in Europe a summary report for the European union forum of judges for the environment.* Grantham research institute on climate change and the environment – LSE, London, 2022. P. 25.

[394]European Commission. The European Green Deal - 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. Brussels, 2019.

emissions, alongside the objectives of the NRRP and of the Union as a whole.

Italy is not new to the balancing of the principle of environmental protection and the principle of efficiency. The two constitutional, so-called, ILVA cases regard such issue, albeit regarding a private business of 'national strategic relevance' and within which, with various oscillations, the Italian State holds relevant stocks. The ILVA case is emblematic of the evolution within the Italian System of the right to environmental protection and its balance with contraposing right, particularly those regarding the realm of industrial production and economic growth.

The ILVA case was brought before the Italian Constitutional court in 2 instances, first in 2013 and alter in 2018. Both cases were incidental constitutional reviews to the court by criminal judges. in both instances the cases before the criminal judge regarding environmental and health damages caused by the metallurgical company ILVA Spa (from now onwards ILVA). Although, the two constitutional judicial reviews had opposed conclusions. In case 85/2013[395] the Constitutional Court found that the legislator had reasonably (ex art. 3 Cost) balanced the principle of environmental and health protection and those of free economic enterprise ex art 41 cost. Specifically, this is because in law 231/2012 the legislator had provided that the production of metals could continua conditionally on the condition of the compliance with the Integrated Environmental Authorization (IEA) the same law provided for, in accordance with Directive 2010/75 UE. The case was particularly debated, particularly by the criminal judge that remitted the case for

[395] J. 85/2013 Corte Costituzionale in R. Ferrara, F. Fonderico, A. Milone. *Casi di diritto dell'ambiente*. Giappichelli, 2019.

constitutional review, in regard to the effectiveness of the balance struck between the fundamental rights to environmental and health protection and those of economic enterprise and growth. Law 231/2012 defined ILVA as an 'industry of strategical national interest' – due to its relevance in terms of occupation and economic production- and provided for particular *ad hoc* environmental conditions for the prosecution of its production, and also went so far as to permit the selling of products confiscated before a criminal court. Nevertheless, the constitutional court deemed the balance reasonable and efficient specifically in regard to the fact that the *a quo* judge, nor any judge for that matter, in the Constitutional Court's opinion had the competence to review the sufficiency or future effectiveness of the IEA.[396] Furthermore, in the Constitutional Courts opinion the past inefficiency of the PA in striking a reasonable balance in the ILVA case was not sufficient to determine the non-reasonableness of the current balance struck, nor was it sufficient to found the competence of the judicial body in such review.[397] Such positions of the Italian Constitutional Court were disproven in the near future by the insufficiency of the IAE and by the inefficiency of the management of ILVA, that led to a new criminal and constitutional judicial review. In 2018 the ILVA case was again brought before the Constitutional Judge by a criminal judge. This time ruling 58/2018[398] concluded by annulling law 92/2015 as it did not strike a reasonable balance, particularly as it did not provide for the condition of an IEA – possibly also in violation of EU Law. Nevertheless, the ruling was not a true victory for the protection of the right to the environment. The Court never once referred to the

[396] J. 85/2013 Corte Costituzionale in R. Ferrara, F. Fonderico, A. Milone. *Casi di diritto dell'ambiente*. Giappichelli, 2019. P 144.
[397] Idem p 150.
[398] J. 58/2018 Italian Constitutional Court.

environment in its ruling and only deemed the right to health and that to free enterprise as those to be balanced. This is particularly relevant when considering that the ECtHR in 2019 condemned Italy for the 2012 issues on the grounds of the violation of health and environmental fundamental rights.[399]

The recent reform of Constitutional articles 9 and 41 – thanks to the constant lobbying of environmental groups - have luckily changed such carelessness towards the environment.[400]Now the protection of the environment is expressly provided for in the Italian Constitution. The consequences of such reform have already born results as proven by ruling 8167/2022 of the Supreme Administrative Court.[401] The judge clearly stated that the environment is an 'urgent' and important current matter, and referred to the ecological transition as an non-deferable issue.[402] The ruling goes as far as stating that the ecological transition is so essential as to oblige to the transformation of our industrial system as well as people life-stiles.[403] Furthermore, the judgment clearly expresses that an unreasonable balance of conflicting constitutional

[399] Joint Judgments 54414/13 and 54264 ECtHR Cordella and Others v Italy
[400]Cfr. Servizio Studi del Senato. *"Modifiche agli articoli 9 e 41 della Costituzione in materia di tutela dell'ambiente".* Roma, 2022.; Servizio Studi del Senato. La tutela dell'ambiente in costituzione. 2021 n. 396.
[401] Judgment 8167/2022 of the Supreme Administrative Court *(Consilgio di Stato*): *"La primarietà di valori come la tutela del patrimonio culturale o dell'ambiente implica che gli stessi non possono essere interamente sacrificati al cospetto di altri interessi (ancorché costituzionalmente tutelati) e che di essi si tenga necessariamente conto nei complessi processi decisionali pubblici, ma non ne legittima una concezione 'totalizzante' come fossero posti alla sommità di un ordine gerarchico assoluto. Il punto di equilibrio, necessariamente mobile e dinamico, deve essere ricercato – dal legislatore nella statuizione delle norme, dall'Amministrazione in sede procedimentale, e dal giudice in sede di controllo – secondo principi di proporzionalità e di ragionevolezza."* P. 20-22
[402] Idem: *"L'interesse pubblico alla tutela del patrimonio culturale non ha, nel caso concreto, il peso e l'urgenza per sacrificare interamente l'interesse ambientale indifferibile della transizione ecologica"* … P. 24.
[403] Idem: … *"la quale comporta la trasformazione del sistema produttivo in un modello più sostenibile che renda meno dannosi per l'ambiente la produzione di energia, la produzione industriale e, in generale, lo stile di vita delle persone."* P. 24.

rights and environmental rights is a violation of both national and EU law (specifically Directive CEE 2001/77 in this specific case).[404] The ruling also expressly refers to the violation of the principle of environmental integration within administrative procedures' and decisions in accordance with EU and national Law (art. 11 TFUE and art. 3- quater d.lgs. 152/2006) expressive of the principle of sustainable development.[405]The revolutionary ruling is concluded with the statement that in the specific case the PA misused its functions to elude EU and national law and priorities other rights over that of environmental protection.[406]

The ruling clearly refers to the defining effect the reform of articles 9 and 41 had on the balancing of conflicting interests within the Italian constitutional system. According to the Court the reform established an evolution in the reasonable balancing of environmental interests with

[404] Judgment 8167/2022 of the Supreme Administrative Court *(Consilgio di Stato)*: "*La posizione 'totalizzante' così espressa dall'Amministrazione dei beni culturali si pone in contrasto con l'indirizzo politico europeo (Direttiva CEE n. 2001/77) e nazionale che riconosce agli impianti per la produzione di energia da fonti rinnovabili importanza fondamentale, dichiarandoli opere di pubblico interesse proprio ai fini di tutela dell'ambiente."* Judgment 8167/2022 of the Supreme Administrative Court *(Consilgio di Stato)*: P. 24.

[405] Idem: *"Gli atti impugnati risultano violativi anche del principio di integrazione delle tutele – riconosciuto, sia a livello europeo (art. 11 del TFUE), sia nazionale (art. 3- quater del d.lgs. n. 152 del 2006, sia pure con una formulazione ellittica che lo sottintende) – in virtù del quale le esigenze di tutela dell'ambiente devono essere integrate nella definizione e nell'attuazione delle altre pertinenti politiche pubbliche, in particolare al fine di promuovere lo sviluppo sostenibile."* P.24-25.

[406] Idem: *"Su queste basi, le prescrizioni di tutela indiretta apposte dall'Amministrazione dei beni culturali costituiscono un metodo, non solo incongruo (in quanto operata al di fuori della delicata operazione di valutazione e comparazione degli interessi), ma anche surrettizio – in tal senso è ravvisabile lo sviamento della funzione – per 'disapplicare' gli esiti della conferenza di servizi cui aveva preso parte la stessa Soprintendenza molisana, a danno dei soggetti che avevano già conseguito le autorizzazioni uniche da parte della Regione per la realizzazione degli impianti eolici."* P. 25.

other contraposing interests, first of all that of free economic enterprise.[407]

In a similar perspective were the words of Bianchi[408], who is the Director of the stocks of ILVA owned by the Italian Government through the INVITALIA Agency, that stated the fundamental role of regulation and the PA and the compliance with environmental legislation for the competitivity of 'industries of strategical interest' such as ILVA. Bianchi stated that the balance of environmental interests is fundamental also for the competitiveness of national industries and is a great opportunity to this end. The NRRP according to Bianchi is a great opportunity for Italy in this direction but, in his opinion, the role of Pas will be essential in fully using such opportunity. To this end Bianchi underlined the fundamental role that the efficiency, specifically organizational, of Italian PAs shall play, particularly Bianchi referred to the importance of an appropriate number of competent civil servants within the PA workforce.

I this perspective, this study analyses the necessary and reasonable balancing of public efficiency, the principle of a balanced budget, and the right ton environmental protection.

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[407] Idem: "*Il principio si impone non solo nei rapporti tra ambiente e attività produttive – rispetto al quale la recente legge di riforma costituzionale 11 febbraio 2022 n. 1, nell'accostare dialetticamente la tutela dell'ambiente con il valore dell'iniziativa economica privata (art. 41 Cost.), segna il superamento del bilanciamento tra valori contrapposti all'insegna di una nuova assiologia compositiva – ma anche al fine di individuare un adeguato equilibrio tra ambiente e patrimonio culturale, nel senso che l'esigenza di tutelare il secondo deve integrarsi con la necessità di preservare il primo."* P. 25

[408] A. Bianchi. *"Convegno - Il ruolo della regolazione nella crisi delle grandi imprese: Il caso Ilva"*. LUISS. Roma, 18/4/23.

Of such balancing we shall now analyze the possible mechanisms of judicial review.

2. Mechanisms of review of public efficiency

Before delving within the different mechanisms for the review of the public efficiency a fore note is necessary.

As put by Police[409] in his work the issue regarding the "antidotes to maladministration" is that it is a recurring and classical theme within the Italian administrative system. Police's work exemplifies and argues such position by referring to the fact that Cassese[410] spoke about the issue of maladministration and its remedies in the beginning of the 90s, and now thirty years later the issue is still under scrutiny. Specifically, the issue of an Unresponsive Administration is one of the most ancient and, apparently, uncurable pathologies of the Italian legal system. This very fact unboundedly highlights the ingenuity in insisting to find a solution to this problem within the law and its mechanisms. Thus, in the words of Police, this prelude helps us to approach the following mechanisms of review in a more realistic manner. Furthermore, such perspective helps to grasp the importance of the 'helping hand' EU Law and its institutions can give to the Italian legal system and jurisprudence in such unresolved matters, particularly considering the central role efficiency and budget law play within the EU framework.

We shall now briefly review three of the many mechanisms of judicial review of good administration that were introduced in the Italian system. Some are more effective than others, as we shall see. After

[409] A. Police - AIPDA. *Antidoti alla cattiva amministrazione: una sfida per le riforme. Unresponsive Administration e rimedi: una nuova dimensione per il dovere di provvedere della PA*. Rome, 2016.
[410] S Cassese. *"Maladministration" e rimedi*. Foro It., 1992. V, 243 ss.

having shortly reviewed such mechanisms this study shall proceed in analyzing the applicability of the so-called public class action to the concrete case it has chosen to analyze of the non-organization of open competitions for civil servant recruitment provided by law.

As mentioned before in this study, the so-called public class action was introduced within the so-called Brunetta Refrom (D.lgs 150/2009). The true name of the mechanism of judicial review is action for the efficiency of the PA (*azione per l'efficienza della pubblica amminisrtazione*) Law D.Lgs. 198/2009[411]. Enabling act 15/2009 set the following rules and requests for the setting of the action by the delegated law[412]: 1. The action can be foiled also by associations; 2. The competence of the judicial procedure is exclusively of the Administrative Judge that is to review the merits of the issue 3. Admissibility is conditional to a previous filing of an order to desist or act by the applicant to the PA, for the purposes of the satisfaction of his interests 4. If the PA is condemned by the Administrative Judge, he orders the PA to take the actions it should have, if the PA doesn't comply the Judge may nominate an *ad acta* commissioner, although damages are excluded 5. The final judgment must activate the procedures for a disciplinary review 6. The procedure must be publicly communicated 7. The delegated law must envisage instruments to avoid the proposition or prosecution of the action if another contextual mechanism of review by public organism of review is activated. The delegated law strictly followed such instructions under almost all

[411] Decreto Legislativo 20 Dicembre 2009, n. 198 – Attuazione dell'Art. 4 della legge 4 marzo 2009 n. 15 in materia di ricorso per l'efficienza delle amministrazioni e dei concessionari pubblici. Gazzetta Ufficiale della Repubblica Italiana, 2009.
[412] A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012. P 182.

aspects, apart from minimal differences.[413] The action is made of 8 articles, that shall be analyzed in depth in the following paragraphs.

The second mechanism of judicial review of administrative efficiency we shall analyze is the public prosecutor of the Court of Accounts. The mechanisms was clearly reviewed by Canale the General Public Prosecutor of the Court, in 2021 during cooperation agreement CATONE with the EU anti-fraud office (OLAF)[414]. The public prosecutor of the Italian court of accounts has two distinct functions: the first regards powers within the court of appeal (powers of appealing judgments of first instance as well as powers of necessary intervention); the second function – the one relevant to this paragraph – regards that of independent and autonomous investigation and actions before regional Courts of Accounts in matters regarding the national treasury. the action of the prosecutor of the court of accounts is an action for damages and art the same time against maladministration. The role of the public prosecutor of the court of accounts together with the powers of anticipatory non judicial administrative control make the court an important national and, importantly, EU asset for the guarantee of the rule of law[415]. The action of the public prosecutor is based upon the concept of damages to the treasury of the State, and its end is that of reintegrating such losses. The juridical concept is not fixed, but rather dynamically changes in time and on a case-to-case basis.

[413] See Idem p 186 ss.
[414] A. Canale. *Il ruolo della Procura Generale della Corte dei Conti nel campo della lotta alle frodi a danno del bilancio UE: il rapporto tra la giurisdizione contabile, l'OLAF e la giursidizione penale in casi specifici*. P 37-44 In Corte dei Conti, Olaf. Progetto C.A.T.O.N.E: cooperation agreemtns and training on objectives and new expriences – conferenza internazionale. Roma, 2021. Biblioteca centrale Corte dei Conti A. De Stefano. P 37.
[415]Idem P 38.

Emblematic in this sense, is the devolution of environmental damages to the competence of the administrative judge with law 349/1986 – that also instituted the Ministry for the Environment – and the conferral of the standing in such cases exclusively to the State. Before such reform the Court of Accounts' jurisprudence considered environmental damages as to the treasury. Thus, the Court was competent in the judicial review and in the investigation through its independent Public Prosecutor. This framework was particularly successful, but its success also determined its downfall as the costs to the public budget of such actions was deemed too high, ultimately leading to the above-mentioned reform. This case not only demonstrates the dynamicity of the concept of treasury damages, but also underlines how the Court of Accounts, since the start of environmental litigation in the 80s, - as mentioned above when analyzing climate litigation-, has been in the forefront in the protection of the environment. Furthermore, the jurisprudence of the court of accounts is granitic in affirming that the concept of damages to the treasury of the State also regards dagames to the treasury of the European Union, following an interpretation that is in lune with article 325 TFEU – according to which MS must use the same mechanism they use for the combating the fraud of the rule of law and national financial interests for EU matters- .[416] in this regard the jurisprudence of the court[417] affirms that the dagames directly done to the EU commission and thus for the costs directly to the EU the court of accounts is competent[418]. Thus, the court of accounts guarantees the

[416] A. Canale. *Il ruolo della Procura Generale della Corte dei Conti nel campo della lotta alle frodi a danno del bilancio UE: il rapporto tra la giurisdizione contabile, l'OLAF e la giursidizione penale in casi specifici*. P 37-44 In Corte dei Conti, Olaf. Progetto C.A.T.O.N.E: cooperation agreemtns and training on objectives and new expriences – conferenza internazionale. Roma, 2021. Biblioteca centrale Corte dei Conti A. De Stefano. P 39.
[417] Idem P 40.
[418] See also Cass ord. 10 sett 2013.

rights of both national and EU taxpayers. Indeed, in regard to the NRRP of which at EU Regulation n. 241/2021 (Next gen EU), the General Public Prosecutor gave the instructions to the regional prosecutors of the proprietary action of the investigation and combat against frauds related to the funds of the Recovery Fund.[419] (in such regard we shall talk further in the last paragraph of this study.[420])

The last mechanism of judicial review of pa efficiency this paragraph shall analyze it the action for administrative compliance. The action has been object of turmoil and extremely active academic discussion within the Italian administrative system.[421] Emblematic of such turmoil is the fact that the action of compliance together with the action of ascertainment, although provided for in the draft text written by the Commission for the formation of the code, were left out of the code of administrative justice (CPA) D.lgs. 104/2010 Furthermore, this exclusion went against the instructions provided for in law 69/2009 that delegated the formation of the code.[422] Within the Italian judicial system article 112 of the code of civil justice (CPC) provides the principle that the content of a judge's ruling of acceptance must correspond to what requests (principle of correspondence between asked and decided). Art 34 of the code of administrative justice (CPA)

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[419] A. Canale. *Il ruolo della Procura Generale della Corte dei Conti nel campo della lotta alle frodi a danno del bilancio UE: il rapporto tra la giurisdizione contabile, l'OLAF e la giurisdizione penale in casi specifici*. P 37-44 In Corte dei Conti, Olaf. Progetto C.A.T.O.N.E: cooperation agreements and training on objectives and new experiences – conferenza internazionale. Roma, 2021. Biblioteca centrale Corte dei Conti A. De Stefano. P 41.

[420] O. Porchia. Giurisdizione della Corte di Giustizia dell'Unione Europea in materia di finanziamenti e rettifiche finanziarie. P 72 ss. In Corte dei Conti, Olaf. Progetto C.A.T.O.N.E: cooperation agreements and training on objectives and new experiences – conferenza internazionale. Roma, 2021. Biblioteca centrale Corte dei Conti A. De Stefano.

[421] G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P. 287.

[422] idem. par 5.3 chap 1.

provides for the same principle articulated differently - in the so-called principle of the requested -. As a consequence of these two principles the Italian judicial system is held by the principle that judicial actions reflect the content of a ruling of acceptance. Such principle of particular importance to grasp the issue regarding the action for administrative compliance. The rulings provided for by the CPA are various and of different nature, according to article 34 CPA the judge can: a. annul; b. order the PA to act within a time limit; c. condemn the PA to pay a sum in compensation for damages, or to the adoption of suitable measures to guarantee the subjective juridical position filed as well as the compensation in a specific form. After the introduction of such norm within the CPA part of the doctrine claimed that what had gone out the door had come back through the window[423]. In other words, the action for administrative compliance had been in one way or another – implicitly - been introduced within the Italian legal system. Thereafter, administrative jurisprudence intervened on the issue. The Council of State in Plenary in judgment 3/2011[424] affirmed, in *obiter dictum,* that the action for administrative compliance is legitimate and can be ruled by the judge, but only if the issue dose not regard PA technical or administrative discretion. Thus, although not expressly provided for in the CPA the action was now a part of the legal system[425]. Indeed, in other extremely similar legal systems to the Italian the action of compliance was expressly provided for in law a long time ago.

[423] M. Clarich. Commento all'art 29 del Codice del Processo Amministrativo – Azione di annulemnto, sul sito insituzionale della Giustizia amministrativa, www.giustizia-amministrativa.it and TAR Lazio 472/2011 in Fidone p 298.
[424] Judgment 3/2011 Consiglio di Stato in Adunznza Plenaria.
[425]G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P. 290.

Specifically, the German administrative legal system expressly provides for the action. [426]

The action for administrative compliance's objective is that of satisfying a subjective juridical position with a pretensive connotation, that had the PA operated legitimately would have been satisfied. This kind of action goes beyond the classical administrative jurisdiction on an administrative act and its annulment. The action of compliance regards the relationship between the citizen and the PA.[427] Thus, the transformation of the administrative judicial system in this direction is the precondition to the introduction of such an action within the legal system[428]. What can be drawn by the issues regarding the action of compliance is the fact that, together with the evolution of administrative judicial review into a review of the relationship between a citizen and the public power, it seems an inexorable force and direction for the legal system. Actions of the same family of that of compliance can be found scattered across the Italian legal system, succeeding each other or cumulating. An example is provided by articles 2 and 25 of law 241/90[429]. Furthermore, the inexorability of the action of compliance can be grasped when considering that administrative justice has now opened itself, in light of the principle that judicial actions reflect the content of a ruling of acceptance, to 'atypical administrative actions'.[430]

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[426] Idem.
[427] G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P. 291.
[428]See A. Pajno. Il giudice amministrativo italiano come giudice europeo. Diritto Processuale amministrativo p585 fasc.2. Roma, 2018. and Cons Stato Ad Plenaria 3/2011.
[429] For a more in debth analys sof such exampes see G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P 292.
[430]M. Clarich. Forum di discussione sull'azione di adempimento nel processo amministrativo, nell'osservatorio sul codice del processo amministrativo. LUISS Guida al diritto. Roma, 2011.

Such perspective is also the only possible when considering the principle of an effective judicial remedy[431], envisaged - *inter alios* – in art. 1 CPA, that also referrers to the general principles of EU Law. Nevertheless, there are some additional limits to the action of compliance, beyond that of discretionality. This additional limit is the jurisdiction of merit (*giudizio di merito*), as contraposed to that of legitimacy.[432] Such issues, as well as other additional elements shall be analyzed in the following paragraphs.

The action for the efficiency of the PA can be considered as part of the *genus* of the action for administrative compliance and confirms the evolution of the Italian legal system towards a more effective judicial remedy.[433] The so-called public class action though has some distinctive and peculiar characteristics, that make it unique. Article 4 of D.Lgs. 198/2009 that provides the legal framework for rulings that uphold the action (*sentenza di accoglimento*) states that the judge upholds if he detects (*accerta*) a violation, an omission, or non-compliance in violation of article 1 of the same law. In other words, the action is upheld if the PA violates or is non-compliant, in action or inaction, with the rules set for administrative efficiency.[434] Thus, the judge must decide the action according to the standards set within Law 150/2009, the so-called Brunetta Reform. Although, as we have analyzed above in the previous paragraphs, such standards have not been appropriately set jurisprudence and doctrine have deemed the

[431]A. Pajno. Il giudice amministrativo italiano come giudice europeo. Diritto Processuale amministrativo p585 fasc.2. Roma, 2018.
[432] J. 3338/2002 Consiglio di Stato in G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P. 292.
[433] G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P. 296.
[434] Idem.

principle of good administration as enshrined in the Constitution and in EU Law (specifically in the ECFR) to suffice as the parameter for the decision. Nevertheless, such issue leaves the action crippled as it is left to the uncertainty of a case-to-case broad judicial interpretation.[435] Anyway, the application of such parameters diversifies the public class action from other actions of compliance. Neither the administrative act nor the relationship is reviewed, but rather the good administration of a cerain public body.[436] Following a judgment of compliance the definition of the concrete measures necessary for the respect of the standards of good administration are left to the discretionality of the condemned PA. This is because the legislator decided to exclude the recognition of powers of merit (*poteri di merito*) – that although were provided for in the delegating act - to the judge in terms of the organizational efficiency of the PA. thus, the judge does not have substitutive powers, he has the power/duty to meticulously instruct the final result the PA must obtain for it to comply with the ruling.[437]

2.1. Legitimate interest and rights: articles 41 ECFR and 97 Italian Constitution

Before further analyzing the action for the efficiency of the PA, in order to fully grasp and truly understand the judicial issues that arise with its application, the concept of legitimate interest must be analyzed. As is well known certain legal systems such as the Italian and the German

[435] A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012.
[436] G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. p 297.
[437] Idem p. 298.

provide additional subjective juridical positions alongside rights: specifically, these are legitimate interests. The concept is totally alien to EU Law. The relevance of the peculiarity of such a judicial position for the purposes of this study is clear when considering that whilst article 41 ECFR provides for the right to a good administration, article 97 of the Italian Constitution provides a legitimate interest. Usually, within the Italian constitution fundamental rights are defined as so: rights. This led to a number of legal doubts that inevitably impact the justiciability and the 'right' to a good administration. In Italian administrative law legitimate interests have had a complicated evolution, now the question is if in regard to the principle of good administration the distinction between a right and a legitimate interest is of any practical value. According to Giuffrida as the State evolved into the modern Welfare State and shed its authoritarian aspects the differences between rights and legitimate interests, following suit, decreased.[438] Indeed, together with others[439], he argues that today the distinction in nothing more than an 'archeological ruin'. Thus, according to such doctrine a legitimate interest is nothing more than the form a right takes when it is touched the exercise of administrative directionality, that although doesn't separate it from other rights. The paradigm power-subjection is today substituted by that of social function-right of the person.[440] The State is obliged to exercise the social functions it is entrusted with according to the principle of good administration, so to improve the quality of citizens life.

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[438] A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012. P. 87.
[439] F. Benevenuti. *Il nuovo cittadino*. Padova, 1993. P 78 in A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012. P. 88.
[440] A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012. 88.

Of course, such concepts are the ideal, utopic, model modern States strive for, rather than a realistic and obtainable reality. Nevertheless, it is useful in the setting of a standard. According to Giuffrida such a perspective and its protection are enshrined within the Italian Constitution in article 111 and the right to fair trial, and more-so in the ECHR in article 6 and in the concept of 'full-jurisdiction'[441]. The concept envisages a necessary continuity between the administrative procedure and the judicial administrative review, so that in one or the other the rights of citizens are fully guaranteed.

Giuffrida argues that the Italian legal system following the reform of the code of administrative judicial procedure and the introduction of the so-called public class action is undoubtably moving towards such utopia as it seeks to combat maladministration and promote a more efficient and effective PA.

This study is more skeptical in line with Police in regard to the public class action[442], specifically so-far as national law is not interpreted in line with EU principles.

3. Law 189/2009: action for the efficiency of the Public Administration

We shall now analyze the public class action and if it can be used for the review of the concrete case this study chose to analyze: the non-

[441] For an in-depth analysis of the concept see: A. Giuffrida, F. G Scoca. *"Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità"*. Giappichelli. Torino, 2012. P 91.

[442] A. Police - AIPDA. *Antidoti alla cattiva amministrazione: una sfida per le riforme. Unresponsive Administration e rimedi: una nuova dimensione per il dovere di provvedere della PA*. Rome , 2016.

organization by the Ministry of the Environment of open competitions for staff recruitment[443] provided by law and relying on the assistance of in-house Company SOGESID.

The Law is composed by 8 articles: articles 1 and 2 regard the prerequisites and locus standi, article 3 and 4 the proceeding and the judgment, article 5 the judgment in case of non-compliance with the ruling (*ottemperanza*), article 6 and 7 regard the monitoring and transitional norms, finally article 8 regards the clause of financial invariance (*clausula di invarianza finanziaria*).

This study shall concentrate on articles 1,2,3,4, and 8. Article 5 would need a more in-depth analysis, which is postponed to a future study. A preliminary, necessary, comment on the action for the efficiency of the public administration regards the name it is given in practice 'the public class action'. The action is not technically neither a class action nor a public action[444].

Furthermore, a quick reference to constitutional law is essential in the perspective of properly interpreting the following articles. Within the

[443] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 2 Tomo 2 p. 2-3-4: *"Tra le criticità segnalate anche negli anni precedenti, la capacità assunzionale resta, anche nel 2021, uno dei fattori di debolezza del Ministero. Infatti, il reclutamento delle 20 unità dirigenziali e le 400 unità di personale non dirigenziale, disposto dall'art.1, comma 317, della legge n. 145/2018 resta in buona parte inattuato*." … *"inoltre, l'art. 17-quinquies, comma 1, del d.l. 9 giugno 2021 n. 80, come modificato dalla legge di conversione n. 113 del 6 agosto 2021, aveva autorizzato il MITE ad assumere, con procedure concorsuali pubbliche, ulteriori n. 218 unità di personale non dirigenziale ad elevata specializzazione tecnica "al fine di consentire l'attuazione delle politiche di transizione ecologica anche nell'ambito del PNRR e di supportare le funzioni della Commissione tecnica PNRR- PNIEC, per il biennio 2021/2022. A dicembre del 2021 il Ministero ha proceduto, all'esito di una specifica procedura concorsuale, all'assunzione di 16 delle 50 unità di personale a tempo determinato destinate al PNRR."*

[444] Please see the vast reconstruction of such statement in doctrine: A. Giuffrida, F. G Scoca*. "Il diritto ad una buona amministrazione pubblica e profili sulla sua giustiziabilità".* Giappichelli. Torino, 2012. P. 2015-206; G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012; A. Travi. "*Lezioni di Giustizia Amministrativa"*. Giappichelli. Torino, 2019. P. 222 ss.

preamble of the Law an explicit reference[445] is made – amongst others – to article 3 (principle of reasonableness), article 24 (principles of a fair trial and judicial effective remedy), article 87 and 97 (principles of a balanced budget and good administration). These principles and fundamental rights are to be born in mind for an effective interpretation of the Law.

In terms of the object of the review, it is the activity as a whole of the PA that is under scrutiny. This kind of review is different from the traditional review on a single act of a PA and is also from the more modern review of the relationship between the PA and a citizen.[446] The first normative parameter for such a review is certainly article 1 of law 241/90 that binds the PA to an activity that is efficient, effective, and economical.

According to prominent scholars[447] such a review in general – beyond the action for PA efficiency - of administrative activity as a whole would have no logical impediment within our legal system. Although, the normative framework of our legal system does not provide for the legal parameters for such a review. Indeed, the principle of legality leads to a such a conclusion, a law must be set before an activity can be reviewed.[448]

Nevertheless, as the law evolves, together with the improvement of the PA through its reform, the fact that our legal system does not provide for the legal parameters for such a review a general review of PA activity is not totally certain. In 2009 in the wake of the introduction of

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[445] Law 198/2009 Preamble: "*IL PRESIDENTE DELLA REPUBBLICA Visti gli articoli 3, 24, 76, 87, 97, 103, 113 e 117…*"

[446] G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P. 98.

[447] F. G. Scoca. *Voce Attività Amministrativa in Enc. Dir*. Aggiornamento Vol. VI. Milano, 2002.

[448] G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P. 104.

reform 150/2009 the Council of State commented that while once legitimate PA activity was good PA activity, after the 2009 reform good PA activity is legitimate activity[449]. In other words, as this study supports in its abstract, the Public Administration can exercise discretion legitimately only amongst actions that are efficient.

In regard to the action for the efficiency of the PA the rule of law is respected as the parameters of the review are previously provided for. Although, as we have mentioned above, there is an issue regarding the setting of standards devolved to CIVIT as provided for in law 150/2009. Such standards are lacking and are hard to use as parameters for judicial review. Nevertheless, as mentioned above, a prerequisite for the making and legitimacy of standards is their respect of general principles, the Constitution, and EU Law. Thus, when a parameter cannot be found within the set standards it certainly can be sought within this 'multilevel' legal system.[450]

3.1.Legal standing and general prerequisites of the action

According to article 1 of the Law[451] the purpose of the action is to reestablish the correct exercise of the function/ service entrusted to the

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[449] Consiglio di Stato Sezione Consultiva per gli atti normativi, adunanza 9 giugno 2009, n. 1943.

[450] G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P. 154.

[451] Law 198/2009 Article 1:" Presupposti *dell'azione e legittimazione ad agire 1. Al fine di ripristinare il corretto svolgimento della funzione o la corretta erogazione di un servizio, i titolari di interessi giuridicamente rilevanti ed omogenei per una pluralita' di utenti e consumatori possono agire in giudizio, con le modalita' stabilite nel presente decreto, nei confronti delle amministrazioni pubbliche e dei concessionari di servizi pubblici, se derivi una lesione diretta, concreta ed attuale dei propri interessi, dalla violazione di termini o dalla mancata emanazione di atti amministrativi generali obbligatori e non aventi contenuto normativo da emanarsi obbligatoriamente entro e non oltre un termine fissato da una legge o da un regolamento, dalla violazione degli obblighi contenuti nelle carte di servizi ovvero dalla violazione di standard qualitativi ed economici stabiliti, per i concessionari di servizi pubblici, dalle autorita' preposte alla regolazione ed al controllo del settore*

Public Administration. The action can be filed by those who hold a relevant juridical interest (i.e., legitimate interest) that additionally must be homogeneous for a plurality of subjects. Furthermore, for there to be *locus standi* the plaintiff must have suffered a damage of interests that is direct, concrete, and current. The damage may be the consequence of: the violation of time limits; the lack of emanation of general administrative acts that do not have a normative content and are to be emanated within a certain time frame determine by law or regulation; the violation of duties indicated in charters of services or of qualitative and economical standards as defined by Law D.Lgs. 150/2009. The

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e, per le pubbliche amministrazioni, definiti dalle stesse in conformita' alle disposizioni in materia di performance contenute nel decreto legislativo 27 ottobre 2009, n. 150, coerentemente con le linee guida definite dalla Commissione per la valutazione, la trasparenza e l'integrita' delle amministrazioni pubbliche di cui all'articolo 13 del medesimo decreto e secondo le scadenze temporali definite dal decreto legislativo 27 ottobre 2009, n. 150.

1-bis. Nel giudizio di sussistenza della lesione di cui al comma 1 il giudice tiene conto delle risorse strumentali, finanziarie, e umane concretamente a disposizione delle parti intimate.

1-ter. Sono escluse dall'applicazione del presente decreto le autorita' amministrative indipendenti, gli organi giurisdizionali, le assemblee legislative e gli altri organi costituzionali nonche' la Presidenza del Consiglio dei Ministri.

2. Del ricorso e' data immediatamente notizia sul sito istituzionale dell'amministrazione o del concessionario intimati; il ricorso e' altresi' comunicato al Ministro per la pubblica amministrazione e l'innovazione.

3. I soggetti che si trovano nella medesima situazione giuridica del ricorrente possono intervenire nel termine di venti giorni liberi prima dell'udienza di discussione del ricorso che viene fissata d'ufficio, in una data compresa tra il novantesimo ed il centoventesimo giorno dal deposito del ricorso.

4. Ricorrendo i presupposti di cui al comma 1, il ricorso puo' essere proposto anche da associazioni o comitati a tutela degli interessi dei propri associati, appartenenti alla pluralita' di utenti e consumatori di cui al comma 1.

5. Il ricorso e' proposto nei confronti degli enti i cui organi sono competenti a esercitare le funzioni o a gestire i servizi cui sono riferite le violazioni e le omissioni di cui al comma 1. Gli enti intimati informano immediatamente della proposizione del ricorso il dirigente responsabile di ciascun ufficio coinvolto, il quale puo' intervenire nel giudizio. Il giudice, nella prima udienza, se ritiene che le violazioni o le omissioni sono ascrivibili ad enti ulteriori o diversi da quelli intimati, ordina l'integrazione del contraddittorio.

6. Il ricorso non consente di ottenere il risarcimento del danno cagionato dagli atti e dai comportamenti di cui al comma 1; a tal fine, restano fermi i rimedi ordinari.

7. Il ricorso e' devoluto alla giurisdizione esclusiva del giudice amministrativo e le questioni di competenza sono rilevabili anche d'ufficio."

application of the action is excluded for independent administrative authorities, jurisdictional organs, legislative assemblies, and constitutional organs. The action can also be proposed by associations and NGOs.

The action does not consent compensation for damages. The administrative has exclusive jurisdiction for the action.

Article 2[452] of the Law provides that the action cannot be filed if another review mechanism proposed by an institutional body of control (such as the Court of Accounts) is pending on the same matter.

Article 3[453] of the Law provides for a necessary preventive letter of formal notice to the PA to comply with its duties within a 90-day deadline. After the expiry of the deadline the action may be proposed.

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[452] Art. 2: *1. Il ricorso di cui all'articolo 1 non puo' essere proposto se unorganismo con funzione di regolazione e di controllo istituito con legge statale o regionale e preposto al settore interessato ha instaurato e non ancora definito un procedimento volto ad accertare le medesime condotte oggetto dell'azione di cui all'articolo 1, ne' se, in relazione alle medesime condotte, sia stato instaurato un giudizio ai sensi degli articoli 139, 140 e 140-bis del codice del consumo, di cui al decreto legislativo 6 settembre 2005, n. 206.*

2. Nell'ipotesi in cui il procedimento di cui al comma 1 o un giudizio instaurato ai sensi degli articoli 139 e 140 del codice del consumo, di cui al decreto legislativo 6 settembre 2005, n. 206, sono iniziati dopo la proposizione del ricorso di cui all'articolo 1, il giudice di quest'ultimo ne dispone la sospensione fino alla definizione dei predetti procedimenti o giudizi. A seguito del passaggio in giudicato della sentenza che definisce nel merito il giudizio instaurato ai sensi dei citati articoli 139 e 140, il ricorsi di cui all'articolo 1 diviene improcedibile. In ogni altro caso, quest'ultimo deve essere riassunto entro centoventi giorni dalla definizione del procedimento di cui al comma 1, ovvero dalla definizione con pronuncia non di merito sui giudizi instaurati ai sensi degli stessi articoli 139 e 140, altrimenti e' perento. 3. Il soggetto contro cui e' stato proposto il ricorso giurisdizionale di cui all'articolo 1 comunica immediatamente al giudice l'eventuale pendenza o la successiva instaurazione del procedimento di cui ai commi 1 e 2, ovvero di alcuno dei giudizi ivi indicati, per l'adozione dei conseguenti provvedimenti rispettivamente previsti dagli stessi commi 1 e 2."

[453] Article 3: "*1. Il ricorrente notifica preventivamente una diffida all'amministrazione o concessionario ad effettuare, entro il termine di novanta giorni, gli interventi utili alla soddisfazione degli interessati. La diffida è notificata all'organo di vertice*

dell'amministrazione o del concessionario, che assume senza ritardo le iniziative ritenute opportune, individua il settore in cui si e' verificata la violazione, l'omissione o il mancato adempimento di cui all'articolo 1, comma 1, e cura che il dirigente

From the analysis of the articles there are three issues to be analyzed: the legitimate interest, the interest, and the acts that can be reviewed through the action.[454]

3.2.Acts that can be reviewed

We shall start our analysis from the acts that can be reviewed and the configurability of the action for the specific case this study analyses. As noted above the plaintiffs must be damaged by the lack of emanation of general administrative acts that do not have a normative content and are to be emanated within a certain time frame determine by law or regulation.

General administrative acts are those that have a general content and a plurality of undetermined recipients.[455] These acts are normally not challengeable before a judge for the fact that they do not directly

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competente provveda a rimuoverne le cause. Tutte le iniziative assunte sono comunicate all'autore della diffida. Le pubbliche amministrazioni determinano, per ciascun settore di propria competenza, il procedimento da seguire a seguito di una diffida notificata ai sensi del presente comma. L'amministrazione o il concessionario destinatari della diffida, se ritengono che la violazione, l'omissione o il mancato adempimento sono imputabili altresi' ad altre amministrazioni o concessionari, invitano il privato a notificare la diffida anche a questi ultimi.

2. Il ricorso e' proponibile se, decorso il termine di cui al primo periodo del comma 1, l'amministrazione o il concessionario non ha provveduto, o ha provveduto in modo parziale, ad eliminare la situazione denunciata. Il ricorso puo' essere proposto entro il termine perentorio di un anno dalla scadenza del termine di cui al primo periodo del comma 1. Il ricorrente ha l'onere di comprovare la notifica della diffida di cui al comma 1 e la scadenza del termine assegnato per provvedere, nonche' di dichiarare nel ricorso la persistenza, totale o parziale, della situazione denunciata.

3. In luogo della diffida di cui al comma 1, il ricorrente, se ne ricorrono i presupposti, puo' promuovere la risoluzione non giurisdizionale della controversia ai sensi dell'articolo 30 della legge 18 giugno 2009, n. 69; in tal caso, se non si raggiunge la conciliazione delle parti, il ricorso e' proponibile entro un anno dall'esito di tali procedure."

[454] A. Travi. "*Lezioni di Giustizia Amministrativa"*. Giappichelli. Torino, 2019. P. 222 ss.

[455] G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P 168.

address a legal subject in particular. Open competitions for the recruiting of civil servants are part of such category.

The issue with the application of the action to our case - the non-organization of open competitions for staff recruitment[456] provided by law - regards the characteristic that in order to fall within the applicability of the action for efficiency general administrative acts need to be acts to be emanated within a certain time frame determine by law or regulation. [457] Usually, open competitions for staff recruitment are acts that the PA is bound by to organize by law but without a deadline. Thus, possibly our specific case may not fall within the applicability of the action for efficiency. The PA in the case of open competitions usually has discretion in choosing when and how, as in the number to be recruited, organize such competitions. For a complete analysis of the applicability of the action to our case a closer analysis of laws 145/2018 and 113/2021 would be necessary, although such an analysis shall have to be the object of future studies. Nevertheless, a solution may be found regardless of the provision of a deadline within such Laws. Specifically, in our case as we have seen the necessity of the organization of such tenders is impellent, such urgent necessity is provided both by National and EU bodies of review. Furthermore, the

[456] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 2 Tomo 2 p. 2-3-4: *"Tra le criticità segnalate anche negli anni precedenti, la capacità assunzionale resta, anche nel 2021, uno dei fattori di debolezza del Ministero. Infatti, il reclutamento delle 20 unità dirigenziali e le 400 unità di personale non dirigenziale, disposto dall'art.1, comma 317, della legge n. 145/2018 resta in buona parte inattuato*." … *"inoltre, l'art. 17-quinquies, comma 1, del d.l. 9 giugno 2021 n. 80, come modificato dalla legge di conversione n. 113 del 6 agosto 2021, aveva autorizzato il MITE ad assumere, con procedure concorsuali pubbliche, ulteriori n. 218 unità di personale non dirigenziale ad elevata specializzazione tecnica "al fine di consentire l'attuazione delle politiche di transizione ecologica anche nell'ambito del PNRR e di supportare le funzioni della Commissione tecnica PNRR- PNIEC, per il biennio 2021/2022. A dicembre del 2021 il Ministero ha proceduto, all'esito di una specifica procedura concorsuale, all'assunzione di 16 delle 50 unità di personale a tempo determinato destinate al PNRR."*

[457] G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P 170.

NRRP certainly does set a timeframe and deadlines for the reforms of the PA that arguably are applicable to the above-mentioned tenders provided by the two Laws. Indeed, it would be paradoxical that the NRRP deadlines were to be respected by all PA reforms a part from those that are – as analyzed in the course of this whole study- the most essential for the efficiency of the PA. Reforms of organizational/technical efficiency are the prerequisite of general PA efficiency, and the recruiting of civil servants is the exact measure EU and national control organisms denied as essential in the case of the Ministry of the Environment to improve its organizational efficiency. The possibility that the deadlines, necessary for the application of the action for PA efficiency, be provided for in laws different than that which provides for the duty the PA is to exercise – in our case the organization of the open competitions – has been envisaged by academia.[458] Such an interpretation is only logical and possibly the only in-line with the principle of the rule of law, to avoid paradoxical situations of maladministration. Furthermore, as we have seen article 97 co 3 of the Italian Constitution states that open tenders for public competitions are the only legitimate way, a part for exceptional cases, for the recruiting of civil servants. The fact that the ministry of the Environment has, according to Court of Accounts Report analyzed in Chapter 2, increased its payments to the in-house SOGESID SPA for support and consulting work is indicative of the fact that the Ministry of the Environment is in fact in need of more human resources. Furthermore, this need is made more than clear both by the EU Commission and the Italian Court of Accounts, alongside the empirical evidence provided by the inefficient and ineffective exercise by the

[458] G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P 177.

Ministry of the tasks it is entrusted with. Furthermore, there are cases in which open competitions do have time constraints and deadlines[459], in this specific case it would be only logical that as a consequence of the deadlines provided for in the NRRP the judge applied them.

3.3.Locus standi: a specific analysis

The action can be filed by those who hold a relevant juridical interest (i.e., legitimate interest) that additionally must be homogeneous for a plurality of subjects. Furthermore, for there to be *locus standi* the plaintiff must have suffered a damage of interests that is direct, concrete, and current. Furthermore, the Law provides that the action can be proposed only after the expiry of the 90-day deadline after the preventive letter of compliance to the PA.

In the specific case analyzed by this study it is hard to understand who would have the individual locus standi. It is more probable that the locus standi to propose the action were deemed present by a judge if the action were proposed by an association as in such a case the issues regarding the homogeneity of the legitimate interest would be solved.[460] The issue regarding the homogeneity of the legitimate interest regards a very practical issue: the judgment following the filing of the action for PA efficiency inevitably produces its effects *ultra partes*.[461] Such issues can be resolved when considering the interest of the party to file the action. The plaintiff must have had a damage of interests that is direct, concrete, and current. As we are analyzing the specific case of the non-

[459] Idem P. 193.
[460] G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P 200 ss.
[461] G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P. 216.

organization of tenders, the damage here is determined by the lack of emanation of general administrative acts that do not have a normative content and are to be emanated within a certain time frame determine by law. So when is a damage direct, concrete, and current?[462] Considering that the damage in question when considering the action of efficiency is the incorrect exercise of the function/ service of the PA – which is also the end result sought by the plaintiff with the action – arguably anyone than can prove that the non-organization of the tender caused him a damage may have interest to file suit. For example, a possible candidate who decided to study for the competition when he read the Law that provided it in the official gazette, an association that is not guaranteed its right to access to documents due to the lack of staff, or, even a person who is damaged by environmental catastrophes such as a flood due to the lack of the necessary environmental controls and interventions. Regardless of the concrete case, the direct, concrete, and current damages are to be interpreted broadly. Potentially, even damages caused by climate change may give locus standi to file the action. Indeed, this concrete case regards environmental matter and the interpretation of locus standi according to EU Law and the Aarhus Convention have to necessarily be interpreted broadly to guarantee access to justice.[463] Specifically, the ECJ derogated to the principle of MS procedural autonomy in regard to environmental cases. In the Slovak brown Bear case[464] the Court clearly states that "Procedural rules at national level therefore 'must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law

[462] Idem P. 233.
[463] European Parliament - A. Altmayer. *"Implementing the Aarhus Convention Access to justice in environmental matters"*. 2017.; For the Commission's DG Environment by Milieu Consulting Sprl. Study on Eu implementation of the Aarhus Convention in the area of access to justice in environmental matters – Final Report. Brussels, 2019.
[464] C 987/2017 in European Parliament - A. Altmayer. *"Implementing the Aarhus Convention Access to justice in environmental matters"*. 2017.

(principle of effectiveness)"[465]. Thus, while it is certainly possible for judges to restrictively interpret the locus standi in actions for PA efficiency in matters other than the environment, this is certainly not the case in environmental matters, particularly considering the urgency of the ecological transition and the combating of climate change. More recent ECJ cases have also applied such jurisprudence in Environmental Matter[466] in regard to a broad interpretation of locus standi. Where the national judge to restrict his interpretation of locus standi it would only be reasonable that he did so respecting the current legislation on environmental cases which determines that environmental associations have a privileged access to justice. Thus, when balancing such principle of broad access to justice in environmental matters and the issue of the inflation of cases due to a too broad of an interpretation of locus standi, the judge must certainly consider such EU jurisprudence. Furthermore, if basic cases regarding essential issues such as the inefficient organization of a Ministry entrusted with the protection of fundamental human rights is not deemed admissible for the protection of the abstract concept of the inflation of the justice system we would once again be facing a paradox. It is clearly a paradox if access to justice is not guaranteed because doing so would impeach the effectiveness of its exercise. The justice system's function is at its core that of providing justice, norms, procedure, and their interpretation should only be instrumental to an effective judicial remedy.

[465] C 987/2017 in European Parliament - A. Altmayer. *"Implementing the Aarhus Convention Access to justice in environmental matters"*. 2017.
[466] C-166/22; C-613/22 in https://european-union.europa.eu/institutions-law-budget/law/find-case-law-en.

3.4.Clause of financial invariability

Article 8 of law 189/2009[467] provides that the application of the action for PA efficiency must not cause new and additional costs to the public budget. such a clause is a corollary of the principle of a balanced budget.

The clause may seem like a limit to the effectiveness of the action, but if interpreted correctly it is exactly the opposite. The clause of financial invariability provides that an issue of maladministration cannot be lamented when the reason for such an issue is due to a lack of financial or human resources. This kind of clause bears an important caveat, it is applicable only when the PA has an utmost level of efficiency. If the PA is not efficient then lack of financial or human resources is probably due to such reason, and this cannot excuse the PA for its maladministration. In other words, maladministration cannot excuse maladministration. In such instances the judge is called upon to evaluate if the organization of the PA is efficient or lacking, and in this second case he will have to decide the case and provide for the necessary measures to solve such organizational inefficiency.[468] As written in the abstract of this study: PA budget scarcity as a corollary of the principle of budget balance cannot justify, when it is due per se to PA inefficiency, the failure to act upon its duties. This withstanding, the judiciary should have the competence to review PA failure to act and inefficient organization and the power to enforce efficiency compliance.

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[467] Art. 8 D.Lgs 189/2009: "*Invarianza finanziaria 1. Dall'attuazione del presente provvedimento non devono derivare nuovi o maggiori oneri a carico della finanza pubblica. Il presente decreto, munito del sigillo dello Stato, sara' inserito nella Raccolta ufficiale degli atti normativi della Repubblica italiana. E' fatto obbligo a chiunque spetti di osservarlo e di farlo osservare".*

[468] G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P 152ss, 321ss.

4. Jurisdiction of merit, judicial powers, and administrative discretion.

The distinction between the jurisdiction of merit and the jurisdiction of legitimacy within the Italian administrative judicial system is the first historical distinction regarding the different types of guarantees of legitimate interests.[469] The distinction is still relevant in the current legal system. The jurisdiction of merit the main issue in regard to the debated action for administrative compliance[470]. The concept of jurisdiction of merit regards the powers devolved to the judge, if the judge can know the merits of PA activity, then he can substitute himself directly and personally exercise the discretionary powers of the administration. The issue in such respect is that of the division of powers between the judiciary and the executive/administrative power. Such issues regard the very foundation of modern states and the interpretation, be it strict or broader, of the division of powers. Within the Italian legal system, the jurisdiction of merit is only provided in specific cases strictly provided for in article 134 of the Italian code of administrative justice (CPA) [471].According to article 7 co 3 of the CPA states that the administrative jurisdiction is articulated in jurisdiction of legitimacy, of merit, and exclusive jurisdiction. Co 7 of the same article states that when the judge can review the merits, he can substitute himself to the PA. article 34 of the CPA co 6 and 7 states that in the exercise of the jurisdiction of merit the judge may adopt a new act or directly modified the controversial act. Currently, the issue of the

[469] A. Travi. "*Lezioni di Giustizia Amministrativa"*. Giappichelli. Torino, 2019. P. 189.
[470] G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P. 299.
[471] D.Lgs. 104/2010.

jurisdiction of merit within the Italian legal system is only relevant in regard to the judicial procedure for administrative compliance.[472] The remaining cases provided by article 134 of the CPA are not relevant for the purposes of this study. This study shall not specifically analyze the possibility of a judicial procedure for administrative compliance in the specific case analyzed, this will be the subject of further studies.

Law D.Lgs. 198/2009 did not provide the action for public efficiency amongst the list of the matters the judge may review within the merit.[473] Article 4[474] of law 198/2009 regards the norms for the judgment. It provides that if the judge accepts the request if he ascertains the violation, omission or noncompliance with the standards set by law 150/2009, he orders the PA to remedy within a set time within the limits

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[472] A. Travi. "*Lezioni di Giustizia Amministrativa"*. Giappichelli. Torino, 2019. P. 191.

[473] G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P. 299.

[474] Art. 4: " *Sentenza 1. Il giudice accoglie la domanda se accerta la violazione, l'omissione o l'inadempimento di cui all'articolo 1, comma 1, ordinando alla pubblica amministrazione o al concessionario di porvi rimedio entro un congruo termine, nei limiti delle risorse strumentali, finanziarie ed umane gia' assegnate in via ordinaria e senza nuovi o maggiori oneri per la finanza pubblica.*

2. Della sentenza che definisce il giudizio e' data notizia con le stesse modalita' previste per il ricorso dall'articolo 1, comma 2.

3. La sentenza che accoglie la domanda nei confronti di una pubblica amministrazione e' comunicata, dopo il passaggio in giudicato, agli organismi con funzione di regolazione e di controllo preposti al settore interessato, alla Commissione e all'Organismo di cui agli articoli 13 e 14 del decreto legislativo 27 ottobre 2009, n.150, alla procura regionale della Corte dei conti per i casi in cui emergono profili di responsabilita' erariale, nonche' agli organi preposti all'avvio del giudizio disciplinare e a quelli deputati alla valutazione dei dirigenti coinvolti, per l'eventuale adozione dei provvedimenti di rispettiva competenza.

4. La sentenza che accoglie la domanda nei confronti di un concessionario di pubblici servizi e' comunicata all'amministrazione vigilante per le valutazioni di competenza in ordine all'esatto adempimento degli obblighi scaturenti dalla concessione e dalla convenzione che la disciplina.

5. L'amministrazione individua i soggetti che hanno concorso a cagionare le situazioni di cui all'articolo 1, comma 1, e adotta i conseguenti provvedimenti di propria competenza.

6. Le misure adottate in ottemperanza alla sentenza sono pubblicate sul sito istituzionale del Ministro per la pubblica amministrazione e l'innovazione e sul sito istituzionale dell'amministrazione o del concessionario soccombente in giudizio."

of the human and financial resources of the body and without additional costs on the public budget. So, what are the limits of the power of the judge? Whilst previously administrative jurisprudence set that the judge could not review neither the discretion (as in the quasi-political choice between two alternatives) nor the technical discretion (as in a choice that is bound by technical/scientific considerations) of the PA, today the jurisprudence provides the judge with broader powers.[475] Specifically, the judge may review the technical discretion of PA, whilst the review of broad PA discretion remains debated. In regard to the powers of the administrative judge judgment 8167/2012 of the Italian Supreme Administrative Court is particularly enlightening.[476] The judgment clearly defines the issues regarding the powers of the judge and the differences between technical and broad discretionary powers of the PA.[477] the court states that in administrative/political discretionary choices the administrative judge is called upon to review the

[475] G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P. 300.
[476] Judgment 8167/2022 Consiglio di Stato.
[477]Id: *"In considerazione della natura delle contestazioni mosse avverso la decisione di vincolo, connotata da un'ampia discrezionalità tecnico-valutativa, è bene fare una precisazione preliminare. 1.1.– A differenza delle scelte politico-amministrative (c.d. «discrezionalità amministrativa») – dove il sindacato giurisdizionale è incentrato sulla 'ragionevole' ponderazione degli interessi, pubblici e privati, non previamente selezionati e graduati dalle norme – le valutazioni dei fatti complessi richiedenti particolari competenze (c.d. «discrezionalità tecnica») vanno vagliate al lume del diverso e più severo parametro della 'attendibilità' tecnico-scientifica. Quando la valutazione del fatto complesso viene preso in considerazione dalla norma attributiva del potere, non nella dimensione oggettiva di fatto 'storico', bensì di fatto 'mediato' dalla valutazione casistica e concreta delegata all'Amministrazione, il giudice non è chiamato, sempre e comunque, a 'definire' la fattispecie sostanziale. Difettando parametri normativi a priori che possano fungere da premessa del ragionamento sillogistico, il giudice non 'deduce' ma 'valuta' se la decisione pubblica rientri o meno nella (ristretta) gamma delle risposte maggiormente plausibili e convincenti alla luce delle scienze rilevanti e di tutti gli altri elementi del caso concreto. È ben possibile per l'interessato – oltre a far valere il rispetto delle garanzie formali e procedimentali strumentali alla tutela della propria posizione giuridica e gli indici di eccesso di potere – contestare ab intrinseco il nucleo dell'apprezzamento complesso, ma in tal caso egli ha l'onere di metterne seriamente in discussione l'attendibilità tecnico-scientifica*." P. 8.

reasonableness of the balancing of conflicting interests not previously provided for in the law. Instead, in the review technical/scientific discretional PA choices the judge is called to evaluate the reliability of the data used. Nevertheless, the judicial powers of the administrative judge are still under debate on a case-to-case basis in regard to administrative/political discretionary powers as the non-reasonableness of a choice is not a set concept but is rather dynamic.

Thus were the judge to ascertain a violation following the filing of an action for PA efficiency in the case this study set out to analyze, he would certainly have the power to order the Ministry of the Environment to comply and organize the open competitions. Then, if the Ministry were not to comply a judicial procedure for compliance could ensue, but as mentioned above this issue is to be treated in depth in a future study.

CONCLUSION

This study tried to prove the importance of a reasonable balance of interests between the principle of public efficiency, of a balanced budget, and of environmental protection. Furthermore, this study tried to envisage a practical way for the contribution of the judiciary power in environmental matters within the Italian legal system. The analysis was carried out through a specific case, the organizational and operational inefficiency of Italy's Ministry for the Environment and its failure to organize open competitions for staff recruitment provided by law.

There are issues that were treated in this paper that certainly need a more in-depth study in future studies, namely: the relationship between the action for administrative compliance and the action for public efficiency[478], the analysis of the procedure for administrative compliance (*giudizio di ottempernaza*) within the action for public efficiency, the relationship between the action for public efficiency and the EU Directive 1828/2020 on CRs and internal compliance, a closer analysis of the issue regarding legitimate interests and rights when contraposing article 41 ECFR and article 97 of the Italian Constitution, and finally the analysis of alternative mechanisms of judicial review for the specific case analyzed by this study, specifically the mechanisms of the Public Prosecutor of the Court of Accounts.

In regard to this last topic, withstanding the complexity of the issue, such a study should first of all find news regarding a specific and concrete damage to the state treasury as a consequence of the non-

[478] G. Fidone, F. G. Scoca. "*L'azione per l'efficienza nel processo amministrativo: dal giudizio sull'atto a quello sull'attività"*. Roma, 2012. P. 317.

organization of open competitions for staff recruitment[479] provided by law by the Ministry of the Environment. Secondarily, such a study should concentrate on the proof of such a damage to the state treasury, that could consist of the assertion of high costs for specific external consultancy work, or of the non-enacting of specific projects and the consequent loss in EU funds. The issue regarding proof is one the most complicated in regard to these types of studies and necessitate of many hours or many hands for a well-rounded, in-depth work.

Unfortunately, Italy has been known for an inefficient, ineffective, and at times illegitimate use of EU Funds. In this perspective, the role of the Court of Accounts[480] is certainly essential in permitting Italian citizens to be truly guaranteed the correct use of such important funds. As Canale, the General Public Prosecutor of the Italian Court of Accounts, stated in regard to the NRRP he has given instructions to the regional prosecutors of the priority of the investigation and combat against frauds related to the funds of the Recovery Fund. The Public Prosecutors of the Court of Accounts have always played an essential

[479] Corte dei Conti. *Relazione sul Rendiconto Generale dello Stato*. 2021: Volume 2 Tomo 2 p. 2-3-4: *"Tra le criticità segnalate anche negli anni precedenti, la capacità assunzionale resta, anche nel 2021, uno dei fattori di debolezza del Ministero. Infatti, il reclutamento delle 20 unità dirigenziali e le 400 unità di personale non dirigenziale, disposto dall'art.1, comma 317, della legge n. 145/2018 resta in buona parte inattuato*." … *"inoltre, l'art. 17-quinquies, comma 1, del d.l. 9 giugno 2021 n. 80, come modificato dalla legge di conversione n. 113 del 6 agosto 2021, aveva autorizzato il MITE ad assumere, con procedure concorsuali pubbliche, ulteriori n. 218 unità di personale non dirigenziale ad elevata specializzazione tecnica "al fine di consentire l'attuazione delle politiche di transizione ecologica anche nell'ambito del PNRR e di supportare le funzioni della Commissione tecnica PNRR- PNIEC, per il biennio 2021/2022. A dicembre del 2021 il Ministero ha proceduto, all'esito di una specifica procedura concorsuale, all'assunzione di 16 delle 50 unità di personale a tempo determinato destinate al PNRR."*

[480] A. Canale. *Il ruolo della Procura Generale della Corte dei Conti nel campo della lotta alle frodi a danno del bilancio UE: il rapporto tra la giurisdizione contabile, l'OLAF e la giursidizione penale in casi specifici*. P 37-44 In Corte dei Conti, Olaf. Progetto C.A.T.O.N.E: cooperation agreemtns and training on objectives and new expriences – conferenza internazionale. Roma, 2021. Biblioteca centrale Corte dei Conti A. De Stefano.

role within the Italian legal and social system and certainly will also in regard to the compliance with Italy's NRRP obligations towards the Union and its citizens. Emblematic in this sense is how the Court of Accounts and its prosecutors played a central role in the protection of the environment and the combat against climate change through climate litigation in the 80s - at the very start of the climate litigation movement, as mentioned above when analyzing climate litigation- up to when their competence in environmental damages was removed with Law 349/1986. In such regard a future study could consider how the effectiveness of the action for environmental damages changed after the competence of the Court of Accounts was removed.

The quality of Public Administration has been shown to be measurable through its human resources and its capacity to improve the quality of life of citizens.[481] Within the Italian legal system all recent reforms of the Public Administration have had these objectives, unfortunately with little effectiveness. Now with the Recovery Fund and the Next Generation EU fund Italy has the opportunity to step up its efforts by complying with its NRRP obligations and using the funds in the best way possible. For this purpose, the contribution of the judicial power will be essential.[482] Italy must aim at an administrative action that improves environmental protection, health, and the dignity of workers:

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[481] L.Tria. *"Il possibile contributo della giurisprudenza per una pubblica amministrazione all'altezza del cd. Recovery Fund".* Questione Giustizia, 2021.

[482] L.Tria. *"Il possibile contributo della giurisprudenza per una pubblica amministrazione all'altezza del cd. Recovery Fund".* Questione Giustizia, 2021: *"Da tempo in ambito Ue si afferma che gli elementi principali per misurare la qualità delle amministrazioni pubbliche degli Stati membri sono il capitale umano e la capacità di creare "benessere sociale". Nel nostro ordinamento, le quattro importanti riforme della p.a. varate nell'ultimo trentennio avevano tutte i suddetti obiettivi, il cui raggiungimento però non può dirsi pienamente ottenuto, perché "le leggi camminano sulle gambe degli uomini". Ora tale raggiungimento è improcrastinabile e per la sua realizzazione può essere utile anche il contributo della giurisprudenza".*

a sustainable and just development and growth.[483] For this purpose this study argues that the role of the judicial power is essential.

[483] Idem: *"Si deve, cioè, puntare al trinomio ambiente-salute-lavoro dignitoso, che è essenziale per ottenere uno sviluppo equo e sostenibile."*

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