Essays

Rules on Private Antitrust Enforcement and the Value of the Competition Authority's Decisions: New Limits for Judicial Review?

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Abstract

This paper addresses the issue of the extent of judicial review over the sanctioning measures of the Competition Authority and its possible limitations following the introduction of private antitrust enforcement regulation. The matter is important since it helps to define the position, within the framework of the institutional scenario, of authorities that perform delicate functions in sensitive sectors and operate outside the classic democratic legitimacy circuit. The essay reconstructs the scholarly debate surrounding the sanctioning powers of the Independent Administrative Authorities (IAA) and the evolution in the case law regarding the form of protection guaranteed in their respect. The topic is examined within the more general context of the question of how to properly classify the discretional technical activity of the public administration. Particular attention is given to the decisions of the European Court of Human Rights, which has held that the principle of the fair trial (Art 6 ECHR) applies to the IAAs sanctions and ruled that the full jurisdiction canon must be complied with in the event that the sanctioning procedures do not comply with the necessary guarantees. The paper also analyses certain decisions of the Italian Supreme Court of Cassation on the extent of judicial review that, although adverse, have been transfused into private enforcement antitrust regulation by the decreto legislativo 19 January 2017 no 3. In its conclusions, the essay raises doubts about the compatibility of such a scheme with Art 111 of the Constitution and Art 6 ECHR and suggests an interpretation of the entire regulatory system consistent with the Constitution and the ECHR.

I. Introduction

The creation of a single market and the resulting regulatory instruments to protect competition are at the core of the process of European integration. In the Italian legal system, the fundamental features of public legislation for the protection of competition have been outlined, by legge 10 October 1990 no 287,[1]

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[1] The Competition Authority was established during the so-called 'season of the independent Authorities'. In that period this phenomenon, as defined by A. Predieri, *L'erompere delle Autorità amministrative indipendenti* (Firenze: Passigli Editore, 1997), was the answer to a complex situation that revealed the need of institutions out of politics. Therefore, the North American-based model has been used, but the reasons for their creation-were completely different. Since then the doctrine has never stopped dealing with IAAs, also because of the numerous and complex

which follows the European framework. Such law originally focused on the sanctioning powers attributed to the Italian Competition Authority. Subsequent reforms added multiple different powers to the Authority constituting the current public antitrust enforcement system. Legislative attention was focused exclusively on these aspects.[2] Different from the North American system, private enforcement tools have not received a dedicated regulatory scheme or specific attention from scholarship. The reasons for this are many, but all essentially relate to the belief that private enforcement is not capable of contributing significantly to the success of the antitrust system. At the European level, the gap created by the delay in recognizing that the private enforcement system is complementary in protecting competition was implemented by Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014.[3] This was transposed into the Italian system by the decreto legislativo 19 January 2017 no 3.

This essay looks at the provisions of Art 7 of decreto legislativo no 3/2017, concerning the 'effects of the decisions by the Competition Authority'. This, in implementing the terms under Art 9 of Directive 104/2014, aims to ensure optimal interaction between the private and public enforcement areas, 'in order to ensure the maximum effectiveness of the competition rules', as set out in recital 6. It represents a necessary link between the public and private law dimensions. This is an expected and desirable connection. However, in its formulation, the legislator has gone beyond the connection between public and private judgment, going so far as to define the limits of judicial review of sanction decisions. It is therefore necessary to verify how this provision fits into the controversial issue of the extent of judicial review about antitrust sanctions. In general terms, the question relates to the adequacy of the protection ensured against sanctions imposed by Independent Authorities. This is an aspect extensively debated by the legal doctrine and repeatedly addressed in case law but has recently acquired renewed relevance due to the occurrence of various factors.

First, the decisions of the European Court of Human Rights (ECtHR), which definitively clarified that the sanctions imposed by the IAA must be ascribed to criminal matters. In so doing, the Court affirmed the need to ensure compliance with the guarantees of Art 6 of the European Convention of Human Rights (ECHR), in relation to them.

Second, but in a contradictory sense, some rulings of the Corte di Cassazione on administrative judges' excess of jurisdiction, which have reduced the openings created by legal scholarship and by some trends in administrative case law over the years. This happened in particular in the ruling Corte di Cassazione-Sezioni

compatibility problems that these institutions raise due to their eccentricity *vis-à-vis* the Constitution.

[2] Despite the recognition of the direct applicability to the relationships between private parties as provided for in Arts 2 and 3 of legge 287/1990, such as those in Arts 101 and 102 TFEU.

[3] On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

unite 20 January 2014 no 1013 the contents of which, although considered by many to be a step backward on the path towards the effectiveness of protection, were transfused into the text of Art 7 of the decreto legislativo no 3/2017, which is dealt with below.

In what follows, I will first address the subject of the IAAs' sanctioning power, focusing on the sanctions imposed by the Competition Authority to establish what role a judge must assume in relation to them. The issue involves the more general topic of the limits on judicial review regarding the decisions of the public administration taken on the basis of technical assessments that entail the application of undetermined legal concepts. Once the theoretical and regulatory framework of reference has been reconstructed, I will verify how it has been applied in the case law. In particular, an attempt will be made to clarify how Art 7 should be interpreted in order to overcome doubts of constitutional legitimacy and not conflict with the obligations deriving from Art 6 of the ECHR.

II. The Sanctioning Power of the Independent Authorities and the Regulation of Judicial Review

In the aftermath of determining the IAAs model, the debate regarding the qualification of their juridical nature has been influenced by the attribution of important sanctioning powers to them. In agreeing on the need to deny their jurisdictional or para-jurisdictional nature, most legal scholarship has categorized them as part of the public administration.[4] On this point, which seemed

[4] Upon the emergence of the IAAs, different theses have been formulated by the doctrine on the topic of their juridical nature. In this context it is useful to recall first of all the position of S. Cassese, 'Poteri indipendenti, Stati, relazioni ultrastatuali' *Il Foro Italiano,* V, 9 (1996) who, by placing the authorities among the powers of constitutional law, recognized their nature as a 'fourth power', or that of V. Caianiello, 'Le Autorità indipendenti tra potere politico e Stato civile' *Rassegna giuridica dell'energia elettrica*, 341 (1997), who, always excluding the possibility of bringing the phenomenon of independent authorities back to the traditional tripartition of powers, and relying on the originality and innovativeness inherent in the concept of neutrality, qualifies the authorities as an 'expression of a new relationship between State and Society' which was incompatible 'with the idea of administration in the traditional sense'. On the contrary, other authors such as G. Amato 'Autorità semi-indipendenti ed autorità di garanzia' *Rivista trimestrale di diritto pubblico*, 645 (1997) found their legitimate basis in the first part of the Constitution. Others derived the quasi-jurisdictional nature of the functions exercised from the independence and the tertiary nature of authorities: C. Malinconico, 'Le funzioni amministrative delle autorità indipendenti', in S. Cassese and C. Franchini eds, *I garanti delle regole* (Bologna: il Mulino, 1996), 46; M. Clarich, *Autorità indipendenti: bilancio e prospettive di un modello* (Bologna: il Mulino, 2005), 110-112 and also 151. The majority of legal scholarship agrees in recognizing the administrative nature of the independent authorities. See, in particular: G. Morbidelli, 'Sul regime amministrativo delle Autorità indipendenti', in A. Predieri ed, *Le Autorità indipendenti nei sistemi istituzionali ed economici* (Firenze, 1997), 145; M. Ramajoli, *Attività amministrativa e disciplina antitrust* (Milano: Giuffrè, 1998); N. Longobardi, *Autorità amministrative indipendenti e sistema giuridico istituzionale* (Torino: Giappichelli, 2004), 101; F. Manganaro, 'La giustizia innanzi all'Autorità garante della concorrenza e del mercato',

definitively clarified, the Corte Costituzionale stepped in with Judgment 31 January 2019 no 13. The Court denied the qualification of the Competition Authority as a *judge* and ruled it unqualified to raise an incidental question of constitutionality.

In general terms, with regard to the administrative sanctioning power, there are two opposing approaches: the first one focuses on the punitive value of the sanction, the other emphasises its quality as an instrument aimed at the fulfilment of public interests. Under the first view, administrative penalties are considered measures of particular specificity, especially in the light of the introduction of the decriminalization law of 1981.[5] The sanctions represent the reaction of the system against behaviour qualified as anti-juridical, and to which corresponds a punitive content that pursues general and special preventive purposes.[6] Moreover, in imposing pecuniary sanctions, the nature of which is exclusively afflictive, the public administration is deprived of any margin of discretion. The public administration verifies the existence of an offense which determines, *ex lege*, the application of the same sanction.[7] According to the second (and to a certain extent antithetical) position, the public administration would exercise not only an authoritative but also a discretionary activity, in relation to its sanctioning power.[8]

available at www.giustamm.it, 2009. The case law has tended to agree, since the well-known judgment Corte di Cassazione 20 May 2002 no 7341, *Corriere giuridico*, 1153 (2002) where it was stated that: 'the legal system does not know a tertium genus between administration and jurisdiction, to which the Constitution reserves respectively, in order to distinguish and regulate its activities, Arts 111 and 97. In the constitutional system there is no independent 'parajurism', apart from the two above, but rather this descriptive term is customarily used to indicate public bodies with powers whose place has given rise to doubts'.

[5] There are two ontological characteristics of the administrative sanction: 'the unfavorable impact with respect to a recipient's interest' and 'the relationship with the violation of a precept by the citizen'. These would allow the legal concept of sanction to be identified as a 'penalty in the technical sense' C.E. Paliero and A. Travi, 'Sanzione amministrativa' *Enciclopedia del Diritto* (Milano: Giuffrè, 1989), XLI, 350. Recently on this theme P. Cerbo 'La depenalizzazione fra giudice penale e amministrazione (e giudice dell'opposizione)' *Diritto Amministrativo*, 55 (2018); M. Delsignore 'Le regole di convivenza della sanzione amministrativa' *Diritto Amministrativo,* 235 (2017).

[6] Furthermore, the sanction in its strictest sense is distinguished from the restorative measure. The first one is directed exclusively to ensure compliance with rules designed to protect the public interest, the second one, instead, to pursue the same interest whose violation the law is responsible for.

[7] In the restorative sanctions the pursuit of the public interest comes into consideration. On the absence of discretion in the pecuniary sanctions about *an* see M.A. Sandulli, *Le sanzioni amministrative pecuniarie* (Napoli: Jovene, 1983), 199. On this point, see also: R. Villata, 'Problemi di tutela giurisdizionale nei confronti delle sanzioni amministrative pecuniarie' *Diritto processuale amministrativo*, 398 (1986); G. Serverini, 'Sanzioni amministrative (processo civile)' *Enciclopedia del diritto* (Milano: Giuffrè, 2002), Agg VI, 1005; and, of course, E. Capaccioli, 'Il procedimento di applicazione delle sanzioni amministrative pecuniarie' *Le Sanzioni amministrative*, *Atti del XXVI Convegno di studi di scienza dell'amministrazione* (Milano: Giuffrè, 1982), 87.

[8] These theses have recently been taken up from F. Goisis 'Discrezionalità e autoritatività nelle sanzioni amministrative pecuniarie, tra tradizionali preoccupazioni di sistema e nuove prospettive di diritto europeo' *Rivista italiana di diritto pubblico comunitario*, 79 (2013). From the same author, however, see also the more recent 'Verso una nuova nozione di sanzione amministrativa in senso stretto: il contributo della Convenzione europea dei diritti dell'uomo'

The sanctioning power exercised by independent administrations is also discussed by the scholarship because of the specific characteristics of the parties exercising it and the type of interests involved. In particular, the neutral or discretional nature of the sanctioning powers exercised by Competition Authority[9] is still controversial, as revealed by the judgment of the Corte Costituzionale dated 31 January 2019 no 13.

The original debate on the legal nature of the independent authorities and, in particular, of the Competition Authority, caused initial caution in the exercise of judicial review by courts.[10] On the opposite side, the lack of a constitutional provision legitimising the IAAs, placed outside the democratic circuit, required a strong judicial review. The absence of constitutional coverage has been considered by scholarship to be offset by the legitimacy deriving from European law, as well as the increase in procedural guarantees,[11] which was accompanied

Rivista italiana di diritto pubblico comunitario, 337 (2014) and 'La full Jurisdiction sulle sanzioni amministrative: continuità della funzione sanzionatoria v. separazione dei poteri' *Diritto processuale amministrativo* (2018), in which the need arises, following the impact of the case law of the European Court of Human Rights, to identify a notion of pecuniary sanction in a strict sense in which the exclusively punitive purpose is exalted.

[9] Among the first authors to highlight and enhance the profile of neutrality, as a distinctive and characterizing feature of the IAAs, see V. Caianiello, 'Il difficile equilibrio della Autorità indipendenti' *Il diritto dell'economia*, 239 (1998). Similarly, see: M. Clarich,'Autorità indipendenti' n 4 above, 85; E.L. Camilli and M. Clarich, 'Poteri quasi giudiziali delle autorità amministrative indipendenti', in M. D'Alberti and A. Pajno eds, *Arbitri dei mercati* (Bologna: il Mulino, 2010), 108: 'The same functions exercised by the Authorities have an accentuated degree of *neutrality* that is equidistant between the various interests at stake and a finalization limited to the mere compliance with the rules and the correct functioning of the market'; G.P. Cirillo and R. Chieppa, *Introduzione,* in G.P. Cirillo and R. Chieppa eds, *Le Autorità amministrative indipendenti* (Padova: CEDAM, 2010), 28, which, illustrating the reasons for the creation of the independent authorities, first indicate 'the attribution of neutral, regulatory functions of all the interests at stake, both public and private, without any political conditioning, without any prevalence of the public interest in the classic comparison of the interests proper to the exercise of administrative discretion. The functions assigned to the independent authorities do not or should not fall within the management activity, but in that of regulatory control and sanction for which neutrality is necessary'. With similar contents, see also 63, 67 and 68. A. Pajno, 'Il giudice delle Autorità amministrative indipendenti' *Diritto processuale amministrativo*, 627 and again 640 (2004), also speaks of the exercise of neutral powers. For the critique of this approach, see for all A. Police, *Tutela della concorrenza e pubblici poteri* (Torino: UTET, 2007), 127, 178 and, in particular, 245 et seq, which, in relation to the *antitrust* function, supports the need to recognize the end of the 'myth of neutrality'.

[10] Thus F.G. Scoca, 'I provvedimenti dell'Autorità e il controllo giurisdizionale', in C. Rabitti Bedogni and P. Barucci eds, *20 anni di Antitrust; L'evoluzione dell'Autorità Garante della Concorrenza e del Mercato* (Torino: UTET, 2010), I, 259. However, the hypothesis that their acts could not be subject to judicial review was immediately abandoned. On this subject, R. Villata, 'Giurisdizione esclusiva e amministrazioni indipendenti' *Diritti interessi e Amministrazioni indipendenti* (AIPDA) *Annuario* (Milano: Giuffrè, 2002), 201.

[11] In regulatory procedures, such guarantees consist in an increase of participation in the collaborative function, through systems of notice and comment, whereas the sanctioning procedures strengthen the right to be heard as a guarantee of defence. M. Clarich, *Autorità indipendenti* n 4 above, expecially in chapter IV; M. Ramajoli, 'Procedimento regolatorio e partecipazione', in E. Bruti Liberati and F. Donati eds, *La regolazione dei servizi di interesse*

by the need for judicial review to ensure the effectiveness of the protection.[12]

As for positive regulation, the lack of general legislation on independent authorities affected a corresponding lack of a unified procedural law regulating challenges to their acts, for long time. This gap was filled by the Code of Administrative Procedure, which complies with the preference the legislator showed in the various institute laws for the exclusive jurisdiction of the administrative judge. Art 133, para 1, letter *l*) of the Code assigns review of the decisions of the independent administrative authorities, including sanctions, to the exclusive jurisdiction of administrative judges;[13] Art 134, para 1, letter *c*) provides for the jurisdiction of merit in relation to fines, including those imposed by the independent administrative authorities, the contestation of which is assigned to the jurisdiction of administrative judges; Art 135 establishes the mandatory functional competence of the *Tribunale Amministrativo Regionale* of Lazio, Rome office.[14]

The reasons for this preference are numerous: first, the controversies involving the IAAs involve an 'inextricable interweaving' of subjective legal situations and the objective uncertainty, in many contexts, of the distinction between subjective rights and 'legitimate interests'. This is the chief motivation for the establishment of exclusive jurisdiction.[15] Second, the growing tendency to identify the administrative

economico generale (Torino: UTET, 2010), 189. On the regulatory powers of the IAAs see V. Cerulli Irelli, 'I poteri normativi delle Autorità Amministrative Indipendenti', in M. D'Alberti and A. Pajno eds, *Arbitri dei mercati. Le Autorità indipendenti e l'economia* (Bologna: il Mulino, 2010), 75; F. Merusi, *Democrazia e Autorità indipendenti. Un romanzo «quasi giallo»* (Bologna: il Mulino, 2000), 83; A. Pajno, 'Il giudice delle autorità amministrative indipendenti' *Diritto processuale amministrativo*, 621 (2004); M. Clarich and L. Zanettini, 'Le garanzie del contraddittorio nei procedimenti sanzionatori dinanzi alle Autorità indipendenti' *Giurisprudenza commerciale*, 358 (2013); P. Lazzara 'La regolazione amministrativa: contenuto e regime' *Diritto Amministrativo*, 337 (2018).

[12] F.G. Scoca 'Giudice amministrativo ed esigenze del mercato' *Diritto amministrativo*, 277 (2008); G. Morbidelli, 'Sul regime amministrativo' n 4 above, 251, who says that 'the reliance on the constitutional system of independent authorities requires them to be subject to full judicial review, in the exercise of their subjection to law, whereas there is a lack of administrative control and political control, and constitutional values are at stake'. Along the same lines R. Caranta, 'Il giudice delle decisioni delle Autorità indipendenti', in S. Cassese and C. Franchini eds, *I garanti delle regole* (Bologna: il Mulino, 1996), 167; R. Villata, 'Giurisdizione esclusiva' n 10 above, 729; A. Police, *Tutela della concorrenza* n 9 above, 157; R. Chieppa, 'Le sanzioni delle Autorità indipendenti: la tutela giurisdizionale nazionale' *Giurisprudenza commerciale*, 342 (2013).

[13] In its original form, the reference was also to the sanctioning measures adopted by Consob and the Banca d'Italia before the intervention of the Constitutional Court, for violation of Art 76 of the Constitution. See section IV.

[14] With specific regard to the rite, then, Art 119, para 1, letter *b*) of the *Codice del processo amministrativo* includes disputes relating to the measures adopted by independent authorities (with the exception of those relating to the service relationship with its employees) among those to which the abbreviated procedure is applied.

[15] See M. Clarich, *Autorità indipendenti* n 4 above, 194. On the point, see also F. Merusi, 'Giustizia amministrativa e autorità amministrative indipendenti' and A. Romano Tassone, 'Situazioni giuridiche soggettive e decisioni delle amministrazioni indipendenti' both in (AIPDA) *Annuario*, n 10 above, 175 and 305.

judge as the 'natural' judge of the independent administrative authorities due to the latter's sensitivity to knowing issues involving the public powers connected to economic events and how they are regulated. To these reasons, we must add the emphasis[16] relating to the type of judicial review that was established with regard to these acts, and, in particular, in relation to those issued by the Competition Authority. The purpose was to prevent judges from going beyond the annulment of the administrative measure, and to establish a form of judicial review that would, if necessary, substitute the technical assessments formed in the course of proceedings and considered more convincing than those established by the administration and codified in the administrative measure.[17]

III. The Problem of the Boundaries of Judicial Review on the Discretionary Technical Assessments and the Evolution of Antitrust Sanctions in Case Law

Concerning the type of protection that the legal system must ensure against IAAs sanctions, it bears remembering that some legal scholars[18] have expressed their favor for a full and effective[19] protection and an intrinsic scrutiny on the discretionary technical choices of the administration. These assessments are related to facts and wholly analysable by the judge. In general terms, the scholarly debate[20] on how to frame the discretionary technical activity of the public

[16] F.G. Scoca, 'I provvedimenti dell'Autorità' n 10 above, 264.

[17] ibid 263. The choice of the functional competence of the TAR Lazio and, within it, the assignment of the knowledge of the events in question to the First of the Three Sections, according to the author, responds to the intention of the legislator to implement the concentration of such events in a single judge for both first and second instance. In this regard, although the positive effect of this option is undeniable as regards the ability to guarantee uniformity in the guidelines and increasingly greater competence in judges dealing with the subject constantly, the risks inherent in a non-physiological order can also be determined.

[18] ibid 259.

[19] On the issue of the effectiveness of judicial protection see G. Montedoro, *Il giudice e l'economia* (Roma: Luiss University Press, 2015), 105, which recognizes the undeniable role that it plays in the legal system because it represents 'the same force of substantive law as it results at the end of the procedural events that must guarantee its implementation' and leads, however, an interesting critical reading on the vision of effectiveness as 'myth of the infallibility of the judge'. The author notes the increasingly widespread tendency to place the administration 'under judicial protection, weakened and deprived of its traditional function' and to invest the judge 'of a saving function - with the consequent dismissal of politics and administration deriving from which disappointing results could only be triggered'.

[20] The bibliography on the subject of technical discretion is extensive. See, for a small sample: V. Bachelet, *L'Attività tecnica della pubblica amministrazione* (Milano: Giuffrè, 1967), now in *Scritti giuridici* (Milano: Giuffrè, 1981), I, 237; F. Ledda, 'Potere, tecnica e sindacato giudiziario sull'amministrazione pubblica' *Diritto processuale amministrativo*, 371 (1983); C. Marzuoli, *Potere amministrativo e valutazioni tecniche* (Milano: Giuffrè, 1985); V. Ottaviano, 'Giudice ordinario e Giudice amministrativo di fronte agli apprezzamenti tecnici dell'amministrazione' *Rivista trimestrale di diritto e processo civile* (1986); F. Salvia, 'Attività amministrativa e discrezionalità tecnica' *Diritto processuale amministrativo*, 685 (1992); D. De Pretis, *Valutazioni*

administration has consistently involved scholars of administrative law,[21] both from a substantive and procedural point of view. It is difficult to share the reconstructions that, on various occasions and based on different issues, have proposed identifying technical discretion with the administrative one, or, in any case, attempting to bring the two closer[22] (and advocating a corresponding assimilation by a related judgment). We must then agree with the thesis that considers technical discretion to be unrelated to administrative discretion, if not for a confusion of terminology that should be rectified. This rectification has not taken place only because of the widespread awareness that the two are unrelated.[23] According to this approach, considering the indeterminate legal

amministrative e discrezionalità tecnica (Padova: CEDAM, 1995); Id, 'I vari usi della nozione di discrezionalità tecnica' *Giornale di diritto amministrativo,* 331 (1998); F.G. Scoca, 'Sul trattamento giurisprudenziale della discrezionalità', in V. Parisio ed, *Potere discrezionale e controllo giudiziario* (Milano: Giuffrè, 1998) 107; Id, 'La discrezionalità nel pensiero di Giannini e nella dottrina successiva' *Rivista Trimestrale di diritto pubblico*, 1045 (2000); F. Volpe, 'Discrezionalità tecnica e presupposti dell'atto amministrativo' *Diritto processuale amministrativo*, 791 (2008); G.C. Spattini, 'Le decisioni tecniche dell'amministrazione e il sindacato giurisdizionale' *Diritto processuale amministrativo*, 133 (2011); G. De Rosa, 'La discrezionalità tecnica: natura e sindacabilità da parte dei giudici amministrativi' *Diritto processuale amministrativo*, 513 (2013). S. Cognetti, 'Il controllo giurisdizionale sulla discrezionalità tecnica: indeterminatezza della norma e opinabilità dell'apprezzamento del fatto da sussumere' *Diritto processuale amministrativo*, 349 (2013); as well as the authors cited in the next note.

[21] Even aware of the ontological difference between technical evaluation and the weighing of interests, this area was historically considered reserved to the administration: F. Cammeo, 'La competenza di legittimità della IV sezione e l'apprezzamento dei fatti valutabili secondo criteri tecnici' *Giurisprudenza italiana* (1902). E. Presutti, 'Discrezionalità pura e discrezionalità tecnica' *Giurisprudenza italiana,* IV (1910); Id, *I limiti del sindacato di legittimità* (Milano: Giuffrè, 1911) due to the accessory role of the technical discretion with respect to the evaluation of the interests from which the reserved character has derived O. Ranelletti, *Principi di diritto amministrativo* (Napoli: L. Pierro, 1912), I, 368. The unquestionability of such judgments is then affirmed even more when the idea of the irrelevance of the distinction between the two categories, and of the attribution of technical discretion to the topic of administrative merit, prevails (P. Virga, 'Appunti sulla c.d. discrezionalità tecnica' *Jus*, 101 (1957); A.M. Sandulli, *Manuale di diritto amministrativo* (Napoli: Jovene, since the 1952 edition and recently 1989, 595). Critics of these theories invoke respect for the principles of effectiveness of protection and the possibility of conducting a non-external and formal review in relation to these technical assessments F. Ledda, 'Potere, tecnica' n 20 above, 371.

[22] The idea of the absolute extraneousness of technical discretion to administrative discretion, due to the lack of any assessment concerning the comparative weighting of interests, was already supported by M.S. Giannini, *Corso di diritto amministrativo* (Milano: Giuffrè, 1967) and lastly Id, *Diritto amministrativo* (Milano: Giuffrè, 1993), II, 55.

[23] M.S. Giannini, *Diritto amministrativo* n 22 above, 56: 'Discretion refers in fact to a power, and implies a judgment or a will together; technical discretion refers to a cognitive moment, and implies only a judgment: what pertains to the volition comes later, and may involve or not involve a separate discretionary assessment'.

On the contradictory nature of the notion of technical discretion, again, F.G. Scoca 'Valutazioni automatiche di titoli scientifici' *Il Foro amministrativo Cds*, 2892 (2011) which comes to affirm that it seems to be difficult 'to drive away from the mind the idea that the conceptual ghost of technical discretion is evoked by the judge when he does not intend to go to the bottom of the investigation of the fact'.

concepts present in the rules of reference, the court must also qualify and specify them, and its judicial review cannot be limited to a mere verification that the assessments made by the administration are consistent or not unreasonable. This is an activity that does not imply an evaluation or comparison of interests, nor does it pertain to administrative merit,[24] which is the only area legitimately reserved to the administration.[25] The lack of any legislative anchor of the reservation to the administration about discretionary technical assessments means it is possible to fully verify technical assessments, even if they are questionable, given that they are related to the facts.[26] This complies with the principle of effectiveness of the protection, which is constitutionally guaranteed. So, with specific regard to the topic at hand, the presence of indeterminate legal concepts in Arts 2 and 3 of legge no 287/1990, which the Antitrust Authority must apply, implies the need to carry out an activity of specification, contextualization, and, therefore, definition of the concepts. This activity based on scientific (technical-economic) knowledge does not involve evaluation and weighing of interests. The complexity of the knowledge involved can, therefore, cause difficulties in identifying an incontrovertible option, since it is possible to qualify the same assumption in different ways that are all theoretically legitimate. It is worth repeating that, all of this leads the question to the field of questionability, but not of opportunity.

However, as laid out below, it is precisely because of the importance given to the questionability of the technical assessments that the case law and the majority of scholars have affirmed a reservation to the administration.[27] This

[24] On the concept of merit in specific relation to the themes in question, see: G. Montedoro, 'Processo economico, sindacato giurisdizionale ed autonomia dell'amministrazione: la questione del merito amministrativo', in Id, *Il giudice e l'economia* n 19 above, 145.

[25] On the type of judicial review exercisable over technical assessments, see: F. Ledda, 'Potere, tecnica' n 20 above, 371 et seq; L. Benvenuti, *La discrezionalità amministrativa* (Padova: CEDAM, 1986); A. Travi, 'Il giudice amministrativo e le questioni tecnico-scientifiche: formule nuove e vecchie soluzioni' *Diritto pubblico*, 440 (2004); S. Cognetti, 'Il controllo' n 20 above, 349.

[26] F.G. Scoca, 'La discrezionalità' n 20 above, 1066: 'every area of technical appreciation, which is reserved to the administration, and cannot therefore be verified in court, involves a lesion (or a compression) of the principle of full and general judicial protection, established in principle by Art 24, and reiterated, with precise reference to the action of public administrations, by Art 113 of the Constitution'. In this sense, even in the necessary variety of reconstructions, see: G. Vacirca, 'Riflessioni sui concetti di legittimità e di merito nel processo amministrativo' *Studi per il Centocinquantenario del Consiglio di Stato* (Roma, 1981), III, 1589; N. Paolantonio, 'Interesse pubblico specifico e apprezzamenti amministrativi' *Diritto amministrativo*, 486 (1996); Id, *Il sindacato di legittimità sul provvedimento amministrativo* (Padova: CEDAM, 2000), 319; L.R. Perfetti, 'Ancora sul sindacato giudiziale sulla discrezionalità tecnica' *Il Foro amministrativo*, 422 (2000); G. Morbidelli, *Sul regime amministrativo* n 4 above, 251; A. Travi, 'Il giudice amministrativo' n 25 above, 439; Id, Sindacato debole e giudice deferente: una giustizia 'amministrativa?' *Giornale di diritto amministrativo*, 304 (2006); A. Travi, 'Giurisdizione e Amministrazione', in F. Manganaro et al eds, *Sindacato giurisdizionale e 'sostituzione' della pubblica amministrazione* (Milano: Giuffrè, 2013), 3.

[27] Recognize a reservation in favor of the administration on the technical assessments: C. Marzuoli, *Potere amministrativo e valutazioni tecniche* (Milano: Giuffrè, 1985), 228 which

rationale is all the more valid when such assessments are carried out by the independent authorities, which are generally recognized as being endowed with the very high technical competence that ontologically identifies them.

On this point, it bears recalling that administrative case law has followed a significant evolutionary path[28] to arrive at its current recognition of a strong, full, and effective judicial review in compliance with what is expressed by that scholarship[29] that favours intrinsic judicial review of the discretionary technical choices of the administration.

The first step was the release of technical assessments from the riverbed of 'administrative merit' in favor of their reclassification within the general category of discretion. Thus, courts could carry out the ordinary scrutiny of legitimacy in terms of excess of power. Numerous scholars were signaling the clear underlying error involved in classifying the issue. Only the decision of the Consiglio di Stato 9 April 1999 no 601, which recognized the undeniable difference between opportunity and questionability, did administrative courts find an opening to the correct reconstruction of the problem. Next came the different question of the extent judicial review might have on choices that do not consist of comparative assessment of interests. In relation to this aspect, thanks to specific prompts coming from the scrutiny of the Competition Authority's acts and from legal scholars, administrative case law has made significant progress towards ensuring the fullness and effectiveness of the protection. In fact, overcoming early attempts, which, by exercising 'weak review', denied the courts' ability to scrutinize the logic, congruity, reasonableness, correct motivation and instruction of administrative measures, they have come to recognize the need to carry out judicial review that,

> 'fully verifying the facts and the evaluation process carried out by the Authority on the basis of the technical rules, which are in turn scrutinized, meets the only limit in the impossibility of replacing the Authority in the

reconnects it to the existence of a public interest; V. Cerulli Irelli, 'Note in tema di discrezionalità amministrativa e sindacato di legittimità' *Diritto processuale amministrativo*, 463 (1984) which links it to absolute subjectivity and unrepeatable judgment; D. De Pretis, *Valutazioni amministrative e discrezionalità tecnica* (Padova: CEDAM, 1995), 312, 339 and also 373, which reconnects it to the existence of two competing factors: the suitability of the administrative organizational structure and the unequivocal indication by the law. For a complete reconstruction of these defined theses of subjective unquestionability (as distinct from the older classifications of objective unquestionability), together with a convincing and reasoned criticism see N. Paolantonio, *Il sindacato di legittimità sul provvedimento amministrativo* (Padova: CEDAM, 2000), 319 et seq. More recently, still in favor of the aforementioned reservation: F. Volpe, 'Discrezionalità tecnica e presupposti dell'atto amministrativo' *Diritto processuale amministrativo*, 791 (2008); G.C. Spattini, 'Le decisioni tecniche dell'amministrazione e il sindacato giurisdizionale' *Diritto processuale amministrativo*, 133 (2011).

[28] For an analysis of the case law in relation to the subject of the judicial review of technical discretion, see: G. Sigismondi, 'Il sindacato sulle valutazioni tecniche nella pratica delle corti' *Rivista trimestrale di diritto pubblico,* 705 (2015).

[29] F.G. Scoca, 'I provvedimenti' n 10 above, 259; Id, 'Giudice amministrativo' n 12 above.

exercise of a power reserved to it alone'.[30]

In analysing the evolution of case law in the area of antitrust sanctions, one notes that the decisions of the Consiglio di Stato, certainly pervasive, have been based, for a long time, on the indeterminate concepts implemented by the Authority. With specific regard to the possibility for the court to adopt a different position from the one of the Authority, the judge has always confirmed this form of respect for the 'role of the Authority'. But the option that the conviction of the court is formed in light of the adversarial arguments and of potential technical advice, is nothing but a possible 'physiological' outcome connected to the fullness of its scrutiny.[31] This leads to the dreaded possibility of the 'replacement of the administration by the court', an issue often debated, and which involves the separation of powers. The greatest difficulty concerns the scenario in which the questionability of the technical criterion, specifically examined, allows several theses to be identified, all of which are theoretically viable. On closer inspection, however, what often happens is different. Far from being verified in relation to the individual concrete case, questionability is generally invoked by the case law as a prejudicial barrier, as an insurmountable limit, on the threshold of which judicial review comes to a halt. This is not acceptable if one believes that the court has the ability to make a comparison with the

> 'alternative technical theses brought to trial by the parties, introduced by any technical expert advice, or elaborated by the judge himself in relation to each specific aspect of the matter'.[32]

This allows it to completely and independently reconstruct the facts and pronounce on them, not only verifying that the thesis at the basis of the Authority's decision is convincing but ascertaining that it is 'the most convincing' among those submitted in the judgment.[33] These conclusions are today proposed

[30] Consiglio di Stato 2 March 2004 no 926, available at www.federalismi.it; Consiglio di Stato 20 February 2008 no 597, available at www.giustizia-amministrativa.it.

[31] F.G. Scoca, 'I provvedimenti' n 10 above, 278.

[32] ibid 278.

Moreover, the adversarial representations exchanged before the court can weigh more than those before the Authority. This includes the fact that the court's dabatable idea has benefited from the participative/defensive contributions of the involved subjects. As we will specify in Section 5, this detail takes on fundamental relevance in relation to the compliance with Art 6 ECHR.

[33] F.G. Scoca, 'Giudice amministrativo' n 12 above, 279. Of the same opinion is E. Follieri, 'L'attività amministrativa e la sua disciplina', in F.G. Scoca ed, *Diritto amministrativo* (Torino: Giappichelli, 2015), 197 who maintains that, 'the scrutiny of the judge cannot be excluded in case of administrative measures applying a debatable technical parameter belonging to the regulation to be applied to the individual case'. Strictly similar to what the administration does: in such cases it does not apply any weighting of interests, ie no substantive assessment, thus limiting its action to interpret the regulation, the judge as well does nothing but ascertain the fact through an assessment of the technical data contemplated by the norm. For these reasons

as a way of complying with Art 6 ECHR by the most reliable scholarship.

As mentioned in the introduction, with regard to the issue of the extent of judicial review on the sanctions of the IAAs, some recent events move in contrasting directions. One refers to the aforementioned case law of the European Court of Human Rights, and to the resulting theories, which require the full jurisdiction exercise by the judge in the review on the sanctions imposed by the IAAs. The other refers to the provision of Art 7 of decreto legislativo no 3/2017 which[34] identified in that margin of questionability (that the ECHR does not allow to be reserved to the administration imposing a sanction) the boundary that the judge must not overcome in order not to incur into a possible excess of jurisdictional power.

IV. Jurisdiction with Regard to Sanctions Imposed by Consob and the *Banca d'Italia*

Before analysing the contents and consequences of the rulings of the European Court of Human Rights which classify the sanctions imposed by the Competition Authority and by Consob as penal sanctions in compliance with Art 6 ECHR, it is useful to recall the relevant ruling of the Constitutional Court, holding that transferring exclusive jurisdiction on disputes concerning sanctions imposed by Consob and the Banca d'Italia to administrative judges is unconstitutional.

This was the umpteenth intervention on a question that has been the subject of continuous revisions by the legislator and the Supreme Court about a discipline that was in turn characterized by the singular and persistent duplicity of the judge competent to review sanctions.[35]

The sanctions on credit and securities were, therefore, the protagonists of a period of intense activity (with continuous amendments to the rules on jurisdiction), whose last act seemed to be the approval of the Code of Administrative Procedure. The Code effects an undeniable rationalization of the system, moving in the direction of identifying the administrative courts[36] as the 'natural judge of

'one cannot affirm (therefore) that the judge would issue a judgment reserved to the administrative power'.

[34] Translating itself into a statute of limitations as stated by the Corte di Cassazione in its ruling 1013/2014, available at www.cortedicassazione.it.

[35] In fact, the general jurisdiction of the ordinary judge in relation to pecuniary administrative sanctions (established in Art 22 and subsequent Arts of the legge 24 November 1981 no 689), was specifically foreseen also in relation to the sanctions imposed by *Consob* and the *Banca d'Italia*, while, in the subsequent laws establishing the *Antitrust* Authority and the regulators of public utility services, the legislator assigned the syndicate on sanctions to the exclusive jurisdiction of the administrative judge.

[36] In fact, once the significant differences that characterized the powers of cognition and decision of the administrative judge over the ordinary judge were exceeded, and emphasizing the close link between the supervisory and sanctioning activities, a meeting had been held with

the independent Authorities and even of the entire economic regulation'.[37]

With reference to the sanctions imposed by Consob, the Constitutional Court has stated that in exercising the delegation, the legislator had failed to take into account 'the case law of the Joint Civil Divisions of the Supreme Court of Cassation, formed specifically for the matter'.[38] The same considerations are at the basis of the decision concerning the sanctions imposed by the Banca d'Italia.[39] In both cases, according to the Constitutional Court, the delegated legislator, which intervened in an innovative way on the division of jurisdiction between ordinary judges and administrative judges, should have taken into account 'the case law of the Constitutional Court and the Higher Courts in ensuring the concentration of protections'.[40]

In the judgments referred to above, the subject matter is less linear than the representation made by the Constitutional Court, both because of the long and unresolved debate on the sanctions (and of the subjective legal positions involved) and because of the different approaches held by the same Supreme Court about penalties imposed by (or at the suggestion of) independent authorities.[41] These profound differences in approach do not correspond to substantive differences between the cases considered. The aforementioned ruling of unconstitutionality was pronounced on the grounds that the delegation exercised its power incorrectly. This may change if the attribution of cognition on the credit and securities

a single judicial plexus of sanctions managed by the Independent Authorities which, despite the necessary distinctions, present undeniable features of analogy.

[37] M. Clarich and A. Pisaneschi, 'Le sanzioni amministrative della Consob nel "balletto" delle giurisdizioni: nota a Corte costituzionale 27 giugno 2012, n. 162', available at www.giustizia-amministrativa.it (2013), which reconstruct precisely the alternation of ordinary and administrative jurisdiction on the subject determined by the succession of regulatory measures and the consequent interpretations of jurisprudence.

[38] Corte Costituzionale 27 June 2012 no 162 on which see A. Police and A. Daidone, 'Il conflitto in tema di giurisdizione sulle sanzioni della Consob ed i limiti della Corte costituzionale come giudice del riparto' *Giurisprudenza Italiana*, 3, 684 (2013). In this regard, the Council recalled that 'the Supreme Court of Cassation has in fact always specified that the jurisdiction to hear objections (Art 196 of decreto legislativo 24 February 1998 no 58) against the sanctions imposed by Consob financial promoters, including those of an interdicting nature, are the responsibility of the ordinary judicial authorities, given that these sanctions, not unlike the pecuniary sanctions, must be applied on the basis of the seriousness of the violation and taking into account any recurrence and therefore on the basis of criteria that they cannot be considered an expression of administrative discretion'.

[39] Corte Costituzionale 15 April 2014. In relation to this judgment, see: A Daidone, '*Repetita non iuvant*: la Corte costituzionale torna sulla giurisdizione esclusiva' *Federalismi.it*, 16 (2014).

[40] Corte Costituzionale 27 June 2012 no 162, n 38 above.

[41] Corte di Cassazione-Sezioni unite 29 November 2007 nos 24816, 24817 and 24818, *Giustizia civile Massimario*, 11 (2007), on the subject of sanctions imposed on ISVAP's proposal, and in general terms on the classification of the antitrust sanctions Corte di Cassazione-Sezioni unite 9 November 2009 no 23667, *Foro amministrativo*, 2515 (2009). See F. Goisis, 'Le sanzioni amministrative pecuniarie delle autorità indipendenti come provvedimenti discrezionali ed autoritativi: conseguenze di sistema ed in punto di tutela giurisdizionale', in M. Allena and S. Cimini eds, *Il potere sanzionatorio delle Autorità amministrative indipendenti – Il diritto dell'economia. Approfondimenti*, 368 (2013).

sanctions is carried out through an intervention of the ordinary legislator. There is no reason not to prefer a concentration of protections in the hands of the same court that ensures the equality of guarantees in trial proceedings. Similarly, there is no reason to presume, as a traditional and outdated view would, that administrative courts provide less effective protection than the ordinary courts with reference to economic events. The administrative courts can well assure the full protection of those who complain about illegitimate sanctions imposed by the independent authorities, provided that their decisions push to verify the conditions for applying the sanction by evaluating that the unlawful case to be sanctioned really does exist.[42]

V. The Principle of a Fair Trial Under Article 6 ECHR and the Sanctions of the IAAs as Criminal Sanctions

A further conditioning factor related to the scrutiny exercised by administrative courts over the IAAs' sanctions is supranational case law, specifically, the rulings of the European Court of Human Rights pursuant to Art 6 of the ECHR. Concerning 'fair trials', para 1, Art 6 establishes that,

> 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.

The interpretation of the Court of Strasbourg on this matter have developed over time. After identifying a series of parameters to refer to in order to maintain a *criminal charge*,[43] the Court has repeatedly commented on the specific issue of sanctions imposed by independent authorities. The Court finally concluded that

[42] In this sense, see M. Ramajoli, 'Giurisdizione e sanzioni pecuniarie antitrust dopo la sentenza della Corte costituzionale n. 204 del 2004' *Diritto processuale amministrativo*, 345, (2005) where it is stated that: 'what is lacking in the protection in the sanctioning field is the point of attack, the premise, that is, the possibility of a full review of the application of the sanctions, is defined as a result of the exercise of technical discretion. The problem is not so much to verify the congruity and correctness of the criteria used by the Authority to determine the amount of the sanctions, but rather to actually ascertain the true existence of unlawful conduct that can be sanctioned. Otherwise, it allows the application of a pecuniary sanction, possibly a large one, for conduct deemed unlawful on the basis of a reasoning of economic theory that belongs to the ranks of the 'inaccurate and questionable sciences', through which the Authority would have 'integrated' indeterminate legal concepts'.

[43] Eur. Court H.R., *Engel and Others* v *the Netherlands*, Judgment of 8 June 1976, cases 5100/71, 5101/71, 5102/71, available at www.hudoc.echr.coe.int. In the Engel ruling a principle is established, which later became consolidated, according to which, if a sanction is classified as a penalty in its internal legal system, the Convention automatically applies to it, but non-classification as a penalty does not exclude the application of the Convention. In this circumstance, the existence of the (autonomous) criteria of the punitive character or the severity of the imposed sacrifice must be assessed.

Art 6 of the ECHR applies to the sanctions imposed by the Competition Authority[44] and those imposed by Consob,[45] in line with its decisions concerning the authorities of other countries. Before dwelling on the content of these judgments, it is important to remember that, the case law of Strasbourg progressively expanded the scope of application of Art 6, highlighting its substantial importance.[46] The ECtHR has interpreted the notions of court, criminal prosecution, and civil rights in a completely independent manner with respect to the meanings adopted by them in the legal systems of the acceding States, so as to extend the applicability of the guarantees provided by Art 6 of the ECHR beyond civil and criminal boundaries, therefore reaching the administrative proceedings originally considered alien to it. Thus the case law of Strasbourg determined that the Court could scrutinize the action of a public administration (in light of the parameters of the *fair trial*) every time that its work translates into a *penalty*[47] for the recipient of its measures or affects a good connected to assets profiles, even indirectly.[48] It also clarified that this scrutiny consists in verifying that the rules on the independence of the authority that commits the penalty and its separation from the one that formulates the accusation,[49] the presumption of innocence, the equality of arms and the full fair hearing between the parties[50] have been complied with. Whenever these

[44] Eur. Court H.R., *Menarini* v *Italy*, Judgement of 27 September 2011, case 43509/08, available at www.hudoc.echr.coe.int.

[45] Eur. Court H.R., *Grande Stevens et Autres* v *Italy*, Judgment of 4 March 2014, cases 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, available at www.hudoc.echr.coe.int.

[46] Così M. Allena, 'Art. 6 CEDU: Nuovi orizzonti per il diritto amministrativo nazionale' *ius-publicum.com*, December 2014.

[47] Eur. Court H.R., *Varuzza* v *Italy*, Judgment of 9 November 1999, case 35260/97, available at www.hudoc.echr.coe.int.

[48] Eur. Court H.R., *Morscher* v *Austria*, Judgment of 14 November 2006, case 60860/00, available at www.hudoc.echr.coe.int; Eur. Court H.R., Judgment of 5 February 2004, case 54039/00, available at www.hudoc.echr.coe.int.

[49] Eur. Court H.R., *Dubus S. A.* v *France*, Judgment of 11 June 2009, case 5242/04, available at www.hudoc.echr.coe.int, in which, in relation to the French banking sanctions, there is a lack of sufficient separation between the *Secrétariat Général* and *the Commission*. About M. Allena, n 46 above, 17, recalls that following this ruling in France a reform of the system was carried out with the creation of the *Authority de control prudentiel* in which there is a clear distinction between the investigative - accusing and deciding body. The thing, notes the author, 'is particularly significant, especially when we consider that, in fact, *the Secrétariat Général* was not endowed with a position of minor separateness compared to that which connotes the officials carrying out instructive tasks in the sanctioning proceedings of the various Independent Italian Authorities: so, the complaints made against the internal organization of the *Banking Commission* could, in large part, be transferred to the latter'.

[50] Eur. Court H.R., *Uldozzotteinek* Szovetsege *and Others* v *Hungary*, Judgment of 5 October 2000, case 32367/96 APEH; Eur. Court H.R., *Mattoccia* v *Italy*, Judgment of 25 July 2000, case 23969/94, available at www.hudoc.echr.coe.int. On the incompatibility with the provisions of the ECHR of the provisions on the irrelevance of the formal defects referred to in art 21-*octies*, para 2, of the legge 241/1990 see E. Follieri, 'Sulla possibile influenza della giurisprudenza della Corte europea di Strasburgo sulla giustizia amministrativa' *Diritto processuale amministrativo*, 3, 770 (2014). In the same sense F. Goisis, 'Un'analisi critica delle tutele

guarantees cannot be said to be ensured in the procedure put in place by the administration, the judges of Strasbourg move to consider the subsequent judicial review operated by the national courts, thus welding the substantial phase to the trial phase.[51] The canons of the fair trial are considered satisfied only in the event that any procedural deficiencies found are filled by adequate procedural guarantees consisting in the existence of an impartial judge, a public hearing, a complete adversarial process between the parties and a judicial review that ensures the exercise of a full jurisdiction.

With regard to sanctions imposed by the independent authorities, compliance with Art 6 of the ECHR entails, first of all, verifying the existence of procedural guarantees for their application.[52] The story that concerned the sanctioning regulation of Consob is emblematic on this point. In addition to being subject to censorship by the ECtHR in relation to Art 6, it was also considered illegitimate by the Consiglio di Stato.[53] This could be found in an *obiter dictum* which denied the possibility of establishing its illegitimacy in relation to Art 6 of the ECHR[54] and noted with regard to primary internal legislation (Arts 1887-

procedimentali e giurisdizionali avverso la potestà sanzionatoria della pubblica amministrazione, alla luce dei principi dell'art. 6 della convenzione europea dei diritti dell'uomo. Il caso delle sanzioni per pratiche commerciali scorrette' *Diritto processuale amministrativo*, 669 (2013).

[51] Eur. Court H.R., *Vitrenko and Others* v *Ukraine*, Judgement of 16 December 2008, case 23510/02, available at www.hudoc.echr.coe.int.

[52] Survey clearly stated, in relation to Consob sanctions in the Eur. Court H.R., *Grande Stevens et Autres* v *Italie*, Judgment of 4 March 2014, cases 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10. On the point cf F. Cintioli, 'Giusto processo, Cedu e sanzioni antitrust' *Diritto processuale amministrativo*, 515 (2015), which, scrutinizing the antitrust proceedings in light of the findings raised by the Court of Strasbourg in the procedure for imposing the Consob sanctions, in the Grande Stevens judgment, found several findings. For a reconstruction and an in-depth critical analysis of the various regulations cf M. Clarich and L. Zanettini, 'Le garanzie del contraddittorio nei procedimenti sanzionatori dinanzi alle Autorità indipendenti' n 11 above, 358. Again with regard to the Consob sanctions, the issue was last addressed by Consiglio di Stato 26 March 2015 no 1596, *Giornale di diritto amministrativo*, 511 (2015).

[53] Consiglio di Stato 26 March 2015 no 1596, n 52 above.

[54] The Consiglio di Stato has ruled that the Consob regulation 15086/2005 governing the procedure for the application of the sanctions referred to in Arts 187-ter and 187-quater of the TUF, cannot be considered directly contrary to Art 6, para 1 ECHR. This is because this provision does not require the sanctions imposed by Consob to be implemented in the procedural phase, in compliance with the guarantees set forth in Art 6. According to the judges of Palazzo Spada, therefore, it is not correct to derive 'the necessity of a transformation in an almost-administrative sense of the administrative procedure (and the necessary application of the guarantees of due process, especially the horizontal contradictory between two parties placed in positions of equality before the deciding authority) from the provisions concerning the fair trial'. In the event that such guarantees were already provided for and there was an 'almost-judicial' connotation of the administrative sanction procedure, this would allow the issue to be considered satisfied. But, in the absence of these guarantees at the procedural level, which, it is underlined, happens in many Member States, 'Art 6, para 1, ECHR postulates that the person affected by the sanction has the concrete possibility of submitting the question concerning the merits of the criminal prosecution against him to an independent and impartial body endowed with the power to exercise a full jurisdiction review. According to the European Court of Human Rights, the full jurisdiction review implies the power of the judge to review the validity, accuracy and correctness

septies and 195 of the TU, as amended by Law 63/2005) that it failed to comply with the adversarial principle and full knowledge of the documents. This decision of the Consiglio di Stato determined the intention to also amend the subsequent regulation[55] that Consob, pending those judgments, had adopted, and in relation to which, again, these principles did not appear to be fully ensured.[56]

The lack of the aforementioned guarantees, which, for the ECtHR also implies that the sanction thus imposed may not immediately operate, can only be compensated by a subsequent full review by the judge. It, therefore, becomes crucial first to clarify when the full jurisdiction requirement is satisfied and, for the purpose of the thorough review, to verify whether or not it has concretely taken place with regard to the sanctioning acts of the Authorities.

VI. The Full Jurisdiction Canon

An analysis of the case law of Strasbourg makes clear what should be meant by full jurisdiction. To say that the lack of procedural guarantees will be compensated in court, the citizen must have access to an independent court which, exercising full jurisdiction over the merits of the matter,[57] can examine it by law point by point, both in relation to the facts and to the issues, without limits, and especially without restrictions on the findings previously carried out by the Authority, over whose decision the court exercises its review.[58]

However, it is necessary to underline that such full review must be carried out in relation to the specific dispute and with regard to the main protection claims brought by the party before the national judge. In other words, it is to be ascertained whether that judge has carried out a full examination of the question or only conducted an external review with respect to the object of the claim raised by the party in the internal proceedings and subsequently challenged before the Court of First Instance. Only with regard to such situations is it possible to reconstruct the position of the Court of Strasbourg regarding compliance with the full jurisdiction canon.

For the above reasons, it is clear that the Menarini judgment, which even

of the administrative choices, thus achieving, in fact, a continuum between the administrative procedure and the judicial procedure'. And this, it is said, is what happens in our system.

[55] Delibera 18750/2013.

[56] The Delibera of 29 May 2015 no 19158 which amended Arts 4-8 of the *Regolamento* on the sanction procedure of Consob came into effect, enhancing the guarantees of advertising and contradictory. On the aforementioned *Regolamento*, then occurred the decision of 24 February 2016 no 19521 in implementation of the reform operated by Decreto legislativo 12 May 2015 no 72 of the implementation of Directive 2013/36 / EU.

[57] Eur. Court H.R., *W.* v *United Kingdom*, Judgment of 8 July 1987, case 9749/82; Eur. Court H.R., *Steininger* v *Austria*, Judgement of 17 April 2012, case 2153/07, available at www.hudoc.echr.coe.int.

[58] Eur. Court H.R., *Putter* v *Bulgaria*, Judgment of 2 December 2010, case 38780/02, available at www.hudoc.echr.coe.int.

the Corte di Cassazione[59] has interpreted as demonstrating the European Court of Human Rights' recognition of the 'sufficiency' of the review normally performed by administrative courts of sanctioning acts of the Competition Authority, can be read differently. In that case, the Court was asked to hear complaints exclusively concerning legitimacy and not complex technical issues, which constitute the condition for recognizing the existence of the case to be sanctioned. As mentioned above, the Strasbourg judges have explicitly clarified that the verification of compliance with the full jurisdiction requirement must be conducted in strict relation to the claims raised by the party.[60] In the event that the party does not challenge any grounds related to the 'intrinsic decision'[61] or concerning the qualification of the indeterminate legal concepts (relevant market, abuse of dominant position) as preconditions for the imposition of the sanction, the judicial review normally exercised by our administrative courts is likely to pass the scrutiny of the ECtHR.

The same Court, however, as noted by several legal scholars,[62] called to decide on the sufficiency of such a type of scrutiny, when specifically disputed, has clearly affirmed that the judge cannot simply refer to the assessments of the administrative authority, since this would imply a denial to independently scrutinize a crucial issue for the decision of the dispute. With specific reference to the questionability of technical discretion, the Court has expressly ruled in favor of the reconstruction, by the judge, of the technical question in a completely independent and also substitutive way with respect to that achieved by the administration because, using the conclusions drawn from the administration, whose acts are contested, represents a violation of the principle

[59] Corte di Cassazione-Sezioni unite 17 February 2012 no 2312, on which see the sticky note by F. Volpe,'Il sindacato sulla discrezionalità tecnica tra vecchio e nuovo rito' *Giustamm.it* (2012); but also the critical notes of B. Sassani, 'Sindacato sulla motivazione e giurisdizione: complice la *traslatio*, le Sezioni Unite riscrivono l'art. 111 della Costituzione' *Diritto processuale amministrativo*, 1583 (2012); M. Allena, 'Il sindacato del giudice amministrativo sulle valutazioni tecniche complesse' *Diritto processuale amministrativo*, 1602 (2012).

[60] Eur. Court H.R., *Sigma Radio television ltd.* v *Cyprus*, Judgement of 21 July 2011, cases 32181/04 and 35122/05, available at www.hudoc.echr.coe.int.

[61] M. Allena, 'Il sindacato del giudice amministrativo sulle valutazioni tecniche complesse' n 58 above: 'if the citizen challenges an administrative choice on the basis of legitimacy, it goes without saying that the jurisdiction of legitimacy will, in principle, be adequate. Conversely, it is quite clear that complaints relating to the intrinsic nature of the decision on complex facts instead require a judge capable of entering into the merits of this administrative choice, so that the canon of the 'full jurisdiction' can be said to be respected. Indeed, if, by mere hypothesis, in the Menarini affair some really technically complex issues had come into question, such as, for example, the determination of the relevant market (as generally known, not syndicated, if not in a 'weak' way by the national administrative judge), the conclusions of the Court of Strasbourg, in light of its previous jurisprudence, would have been, it can be considered, very different'.

[62] M. Allena, 'Art. 6 CEDU' n 46 above, 29; E. Follieri, 'Sulla possibile influenza della giurisprudenza della Corte europea di Strasburgo sulla giustizia amministrativa' n 50 above, 702; F. Goisis, 'La full jurisdiction nel contesto della giustizia amministrativa: concetto funzioni e nodi irrisolti' *Diritto processuale amministrativo*, 561 (2015).

of equality of arms.[63]

The positions reached by the Court of Strasbourg are, in conclusion, quite consistent with what is stated in the legal scholarship[64] in relation to the type of review that the administrative judge must conduct on the technical (even complex and questionable) assessments of the administration in general and of the Competition Authority in particular.

The theory that demands thorough judicial review of the IAAs' acts appear to be perfectly in line with the requests raised by the Court of Strasbourg. The judicial review on the technical assessments is expected not only to check their correctness and/or reasonableness but also to verify that they are the most reliable of the technical theses in the trial.[65]

Analysing the subsequent rulings given by the Consiglio di Stato on the subject of antitrust sanctions reveals that the administrative courts' approach has become increasingly in line with the requirements of the ECtHR.[66] In some cases, a certain inconsistency can also be found in the decisions, between statements of principle (which reaffirm the 'limit' of questionability) and the concrete activity of judicial review. However, this is not surprising if we consider the maximally restrictive approach taken on the subject by the Supreme Court of Cassation.

VII. The Decisions of the Supreme Court of Cassation on the Excess of Jurisdictional Power and Article 7 of the Decreto Legislativo 3/2017

With respect to the ECtHR's approach and the evolution of administrative case law in recent years, the position taken by the Supreme Court of Cassation on excess of jurisdictional power has been in stark contrast. In particular, in the aforementioned judgment of the United Sections January 20, 2014, no 1013, the Corte di Cassazione stated that:

> 'the judicial review of the administrative judge entails the direct verification of the facts set at the basis of the disputed provision and also extends to the technical aspects; but when such technical aspects involve assessments and appraisals introducing an objective margin of questionability,

[63] Eur. Court H.R., *Placì* v *Italy*, Judgment of 21 January 2014, case no 48754/11, on which see L. Prudenzano,' Giusto procedimento amministrativo, discrezionalità tecnica ed effettività della tutela giurisdizionale nella giurisprudenza della Corte europea dei diritti dell'uomo' *Rivista dell'associazione italiana dei costituzionalisti*, 1 (2014).

[64] F.G. Scoca, 'I provvedimenti dell'Autorità e il controllo giurisdizionale' n 10 above, 278.

[65] F.G. Scoca, 'Giudice amministrativo' n 12 above, 279; Id, 'I provvedimenti dell'Autorità e il controllo giurisdizionale' n 10 above, 278.

[66] Consiglio di Stato 4 November 2014 no 5423, *Foro amministrativo*, 11 (2014); Consiglio di Stato 15 May 2015 no 2479, available at *giustizia-amministrativa.it*; Consiglio di Stato 30 June 2016 no 2947, available at *giustizia-amministrativa.it*.

> in addition to a control of reasonableness, logic and consistency of the motivation of the disputed provision, the review is limited to verifying that the same provision has not exceeded the margins of questionability referred to above, since the judge cannot substitute his own appreciation for that of the Guarantor Authority if this has remained within the aforementioned margins'.

This approach hardly appears to be compatible with the full jurisdiction canon required by the case law of the ECtHR. Although it cannot be completely superimposed on any of the categories used in the internal system (scrutiny of legitimacy, merit, intrinsic, substitute) it clearly requires the national judge to fully examine, point by point, the grounds that are actually contested, without the possibility to invoke any technical or administrative room for discretion, which is reserved to the administration. At the same time, the Supreme Court of Cassation clearly limits the forms of judicial review that may be exercised to the spheres of the provision that do not go beyond the margins of questionability of the technical assessments made, in this case, by the Competition Authority. By taking this position, the Court establishes the approach that has been previously illustrated, and which takes the aforementioned margins of questionability as the boundary of the scope reserved for the public administration in compliance with a rigid interpretation of the principle of separation of powers.

It is clear that, after the introduction of Art 7 of the decreto legislativo 19 January 2017 no 3, the problem became even more complex, since this provision, in recognizing the binding nature of definitive antitrust decisions (not challenged or defined with final decisions) in the context of civil proceedings for compensation, expressly states that

> 'the judge's review of the appeal involves the direct verification of the facts underlying the contested decision and also extends to the technical profiles that do not present an objective margin of questionability, whose examination is necessary to judge the legitimacy of the decision'.

This rule causes evident ambiguities deriving, in the first place, from the absolute lack of a corresponding provision in the directive which was being implemented. It is necessary to ask whether the provision relating to the effectiveness of a jurisdictional decision in the context of a possible different judgment could be the appropriate forum for introducing regulations concerning the extent of the judicial review exercisable by the administrative courts. If, indeed, the legislator had wanted to take a position on such a controversial issue, it could (or rather needed to) do so when the Code of Administrative Procedure was issued or, in any case, by means of a general rule on the matter. On the other hand, the nature of the possibility of being questioned is one and the same with the technical assessments that the Competition Authority must carry out to verify the consistency between the conduct and the abstract offense. By

literally interpreting the provision, therefore, technical assessments that are, by their nature, debatable should all be considered unquestionable. In order to avoid the unacceptable conclusion that all matters characterized by technical complexity are categorically excluded from the judge's review, it seems that the intent was to reaffirm that the court cannot take, as the foundation of its decision, a different reconstruction from that of the authority, even more reliable.

Nevertheless, even the above interpretation is subject to debate over its compatibility with the canon of full jurisdiction (which, as mentioned, does not allow for areas reserved to the administration in which the theses it adopts are considered prevalent, even if less convincing), and requires compensation for the shortage of appropriate procedural guarantees in the trial in which it is up to the court to rule on all the controversial grounds.

Recently[67] the idea of a judgment of 'greater reliability' consistent with supranational obligations and in line with the role of the administrative judge always committed to ensuring effective protection seemed to gain traction. This form of judgment is not limited to verifying that the evaluation made by the Authority was not unreliable but is capable of identifying the most reliable thesis among those proposed. This rule not only halts this evolutionary path, but also binds other branches (*ea sunt* the civil claims for damages) to the verification of the existence of the offense carried out exclusively by the authority in a procedural context that does not ensure the required guarantees of Art 6 ECHR. It seems credible, as well as desirable, that in the event that the provision in question is applied in the restrictive sense described above, it will be subject to a review of constitutional legitimacy for infringement of Art 111 of the Constitution or in proceedings before the Court of Strasbourg.

VIII. Conclusions

In the light of the above considerations, it can be observed that the IAAs sanctioning regulation needs to be reformulated so as to strengthen the relevant procedural safeguards in order to comply with the provisions of Art 6 ECHR. Until then, however, the administrative courts are charged with covering such shortcomings: for purposes of attaining perfect compliance with them, it will

[67] As repeatedly pointed out above, the theory that the court must assess not the simple reliability but the 'greater reliability' of the technical assessments underlying the determinations of the Authority was first formulated by F.G. Scoca, 'I provvedimenti dell'Autorità' n 10 above, 278; Id, 'Giudice amministrativo' n 12 above, 279. In this direction: R. Giovagnoli et al, 'Judicial Review of Antitrust Decisions: Q&A' *Italian Antitrust Review*, 144 (2015); F. Patroni Griffi, 'Il sindacato del giudice amministrativo sugli atti delle Autorità indipendenti' *giustizia-amministrativa.it* (2017); R. De Nictolis, 'L'eccesso di potere giurisdizionale (tra ricorso per 'i soli motivi inerenti alla giurisdizione' e ricorso per 'violazione di legge')' *Codice del processo amministrativo* (Milano: Hoepli, 2017), 41; R. Chieppa and R. Giovagnoli, *Manuale di diritto amministrativo* (Milano: Giuffrè, 2018), 334.

have to exercise full and effective review powers, if necessary even through the reassessment of the entire matter and a new review of the relevant legal/economic framework.

This review must take place on the basis of the information brought to bear in the proceedings and the arguments of the parties, point by point, without need to refer to the benchmarks adopted by the relevant authority for its own determination. Once again, it will be necessary to refer to the case law of the Consiglio di Stato, which has allowed administrative law to evolve and adapt to the new safeguard requirements.

There seem to be only two possible theoretical alternatives to the sword of Damocles hanging over antitrust sanctions: the first and preferable is to qualify the sanctioning function of the IAAs as a power free from interest evaluation, exclusively consisting in its technical discretional function, and to admit a full review activity, the purpose of which is to identify the most reliable technical solution among those submitted in the proceedings, without need to refer to the jurisdiction of merit.

The second option, which takes into consideration the discretional profiles of the sanction or, in all cases, the possible relevant margins of questionability, encourages respect for the full jurisdiction through the jurisdiction of merit, but interpreted in such a way that the judge is to be allowed not only to modify the amount of a fine, but, above all, to verify the true correspondence between the sanctioned event and the infringed provision. These two different approaches come to the same conclusion which align our legal system the unavoidable needs of protection, which appear not applied today because of the impact of the provisions of Art 7 of the decreto legislativo no 3/2017.