

**ART. 6 ECHR: NEW HORIZONS FOR DOMESTIC
ADMINISTRATIVE LAW**

(December 2014)

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1. INTRODUCTION: «FAIR TRIAL» AND ANTITRUST ENFORCEMENT SYSTEM

In 2011, the *Menarini* judgment issued by the European Court of Human Rights (ECtHR) held that a heavy administrative fine, issued by the Italian antitrust authority and sanctioning a pharmaceutical company for an alleged cartel, falls within the criminal-head of Art. 6 of European Convention of Human Rights (ECHR). This provision codifies the right to

a fair trial and in its § 1 provides 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»*.¹

In the above mentioned case, the judges in Strasbourg clarified that article 6 ECHR, in principle, does not preclude a criminal sanction from being imposed by an administrative body, provided that, in such case, *«there is a possibility of appeal before a judicial body with full jurisdiction»*.

The *Menarini* ruling ended a long debate concerning the applicability of the guarantees provided for under art. 6 ECHR to fines applied for antitrust law violations.

This outcome was not unpredictable: on the contrary, it was a well expectable one, especially considering the principles elaborated by the ECtHR case-law (starting from *Engel* judgment of 1976²). In fact, the administrative fine inflicted in the case mainly served for a

¹ See *Menarini Diagnostics s.r.l. v. Italy* (App. no 43509/08) (2011), ECtHR § 42. For a comment on this judgment see T. BOMBOIS, 'L'Arrêt Menarini c. Italie de la Cour Européenne des Droits de l'Homme – Droit antitrust, champ pénale et contrôle de pleine juridiction', 47 Cahiers de Droit Européen, 2011, 541; A.E. BASILICO, 'Il controllo del giudice amministrativo sulle sanzioni antitrust e l'art. 6 CEDU', *Rivista telematica giuridica dell'associazione dei costituzionalisti*, n. 4/2011; M. BONCKERS, A. VALLERY, 'Business as usual after Menarini?', *Mlex Magazine*, 3(1), 2012, 44; M. ABENHAÏM, 'Quel droit au juge en matière de cartels?', *Revue trimestrielle de droit européen*, 2012, 117. Art. 6 ECHR § 1, second part, reads as follows: *«Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice»*. The following paragraphs of this provision, specifically regarding criminal matters, identify a set of principles aiming at ensuring parties that a decision related to them is assumed in accordance with certain procedural guarantees.

² In the leading case *Engel and Others v. the Netherlands* (App. no 5100/71, 5101/71, 5102/71) (1976), ECtHR §§ 81-82, concerning a sanction (inflicted to some members of the armed forces) classified in the Netherlands as disciplinary, the Strasbourg Court identified three criteria in order to establish whether an offence is *«criminal»* in the sense of Art. 6 ECHR: the classification of the offence in the law of the respondent state (however, this

punitive and deterring purpose (although not entirely disjoint from a concrete pursue of public interest) and it was certainly serious as to the possible financial consequences.

Furthermore, another specific precedent was issued in 2010, whereby a fine inflicted by the French Antitrust Authority was classified as «criminal» by the ECtHR.³

Previously, the European Court of Justice (ECJ) had showed to be aware of the case law of the Strasbourg Court and to consider it binding for EU law by virtue of the rank of «*general principles of European Community Law*» of the fundamental rights codified by ECHR: indeed, in the *Spector Photo* case of 2009, the ECJ qualified as «*criminal*», within the meaning given to such word by the convention, an administrative fine applied by the Belgian Commission for Banking, Finance and Insurance.⁴

However, it was only as a result of *Menarini* judgment that the Court of Justice's position became fully clear: in two rulings of 2013, it affirmed, on one side, the criminal nature, pursuant of Art. 6 ECHR, of antitrust fines inflicted by European Commission; and, on the other side (as «*the principle of effective judicial protection is a general principle of*

indication has only a formal and relative value and provides no more than a starting point); the nature of the offence; and the degree of severity of the penalty that the applicant risks incurring. The second and the third criteria are alternative and not necessarily cumulative but a cumulative approach can be adopted where neither criteria by itself is conclusive (see further par. 2).

³ See *Compagnie des gaz de pétrole Primagaz c. France* (App. no 29613/08) (2010), ECtHR §§ 29-32: in the case at stake, Article 6 ECHR was deemed to be applicable to some procedures brought by the Authority responsible for competition consumer affairs and fraud prevention in which the premises of the legal entity suspected of anti-competitive practices were searched for the purpose of verifying a possible antitrust breach. Previously, see *Fortum Corporation v. Finland* (App. no 32559/96) (2003) ECtHR § 40, where the applicability of Art. 6 to an antitrust procedure brought by the Finnish competition office was not challenged by the parties.

⁴ See *Spector Photo Group NV C. Commissie voor het Bank-Financie en Assurantiewezen* (case C-45/08) (2009) § 42, concerning administrative sanctions inflicted by the Belgian Commission for Banking Finance and Insurance to Spector Photo Group SV (and one of his managers) for insider dealings.

European Union law to which expression is now given by Article 47 of the Charter of fundamental rights and which corresponds, in European Union law, to Article 6(1) of the ECHR») it wondered whether its judicial review was in accordance with the canon of «full jurisdiction».⁵

Therefore, these developments confirm the peculiar importance of Art. 6 ECHR and of Strasbourg jurisprudence for the Italian system of administrative justice, as well - as we will explain - in terms of procedural rights that must be secured each time that the exercise of administrative power is directly decisive for the citizens (i.e. it affects their individual sphere).

On this regard, it is worth mentioning that ECHR has been fully “incorporated” into Italian law since 1955, pursuant to Law no. 848 of 1955 which conferred to the Convention the status of a domestic legislative Act. Moreover, in 2007, the Italian Constitutional Court

⁵ See *Kone Oyj v. European Commission* (case C-510/11 P) (2013) § 20 and, in similar terms, *Schindler Holding and Others v. Commission* (case C-501/11 P) (2013) § 36. Last, see *Marián Baláž, Grand Chamber* (case C-60/12) (2013) § 47. It is well known that most of the rights codified by ECHR are reflected by the corresponding rights of the Charter of Nice and, therefore, are already formally part of the EU legal system: for our purposes, suffice it to remember that, according to the «*Explanations relating to the Charter of Fundamental Rights*», the «*Right to an effective remedy and to a fair trial*» enshrined in Art. 47, § 2 of the Charter of Fundamental Rights of the European Union corresponds to the «*Right to a fair trial*», enshrined in Art. 6 CEDU. See further art. 52, § 3 of the Charter of Fundamental Rights according to which: «*so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection*». On this topic, see M. D’Amico, ‘Article 47 - Right to an Effective Remedy and to a Fair Trial’, in W.B.T. Mock, G. Demuro (ed.), *Commentary on the Charter of Fundamental Rights of the European Union*, Carolina Academic Press, 2010, at 289. In general, on the relationships between ECHR and EU Charter of Fundamental Rights see J.P. Costa, ‘The Relationship between the European Convention on Human Rights and European Union Law – A Jurisprudential Dialogue between the European Court of Human Rights and The European Court of Justice’, in <http://www.echr.coe.int>: «*Through Article 52 § 3 the Charter refers explicitly to the substantive provisions of the Convention. The European Convention on Human Rights will determine the minimum level of protection required under the Charter. Thus, the Convention will indirectly become part of European Union law and not just one of the elements of the general principles of that law*».

held that the Convention, as a living instrument, shall be considered as an integration to the Italian legal system and shall therefore be binding for the ordinary legislator, pursuant to art. 117, par. 1, of the Constitution providing that «*The legislative function is exercised by the State and the Regions, in compliance with the Constitution and the international and Community Law obligations*». A State or regional law in contrast with an established case law of the Court of Strasbourg is therefore unconstitutional, as it constitutes a breach of Italy's international obligations.

Nonetheless, ECHR is expected to soon formally become a part of the EU legal system, by virtue of the accession by EU into ECHR. Therefore, ECHR obligations will also assume the specific supremacy-primacy recognized to EU law.⁶

In the following paragraphs, we will focus on Art. 6 ECHR by trying, preliminary, to identify its proper scope of application in the field of administrative law: since, as to public law matters, the relevance of this provision is primarily of a substantive nature, we will explain, with the help of some examples, the extent to which the guarantees of «*fair trial*» can be achieved during the course of administrative procedures; furthermore, given that Art. 6 ECHR is applicable to administrative trials only if the previous administrative procedure does not satisfy said guarantees, we will examine the impact of this provision on administrative trials and, more specifically, on the judicial review performed by administrative judges.

The aim of this report is to provide a summary of the conclusions previously expressed by this Author in a book written in 2012, along with the description of the main developments in the Strasbourg, EU and domestic case law occurred in the meantime.⁷

⁶ See, on this topic, V. ZAGREBELSKY, 'La prevista adesione dell'Unione europea alla Convenzione europea dei diritti dell'uomo', <http://www.europeanrights.eu> (2012); P. MENGOZZI, 'Les caractéristiques spécifiques de l'Union européenne dans la perspective de son adhésion à la CEDH', *Dir. un. eur.* (1910) at 231.

⁷ For further reference see M. Allena, *Art. 6 CEDU. Procedimento e processo amministrativo* (Napoli, 2012) where a more thorough analysis of the ECHR impact on the Italian administrative procedure and trial; see, further,

2. THE PRIMARILY SUBSTANTIVE RELEVANCE OF THE «FAIR TRIAL»'S GUARANTEE IN THE ART. 6 ECHR: differences FROM art. 111 OF ITALIAN CONSTITUTION.

In order to reconstruct the proper scope of art. 6 ECHR it can be useful to make a comparison with art. 111 of the Italian Constitution, which – in the Italian legal system – codifies the so-called “due process of law” principle.

Even though sometimes these two provisions have been deemed equivalent, their purpose is, in fact, very different.

Said differences arise, firstly, as far as their respective subject-matters are concerned: indeed, Art. 111 of Italian Constitution governs only jurisdictional proceedings and its §§ 1 and 2 (whereby «*Jurisdiction is exercised through the due process regulated by law. All Court trials are conducted through adversarial proceedings and the parties are entitled to equal conditions before an impartial judge in third party position*») are applicable to any jurisdiction: either dealing with civil, criminal, administrative, constitutional or tax matters.

On the contrary, the literal interpretation of Art. 6 ECHR confirms that said provision only applies to cases involving «*the determination of civil rights and obligations*» or «*criminal charges*», therefore seemingly excluding administrative, tax and, most of all, public disputes.

M. Pacini, *Diritti umani e amministrazioni pubbliche* (Milano, 2012) and Id., ‘Human rights and public administration’, *www.ius-publicum.com*, 2012. For a later contribution about the conformity of the Italian administrative sanctioning system with the ECHR see F. Goisis, *La tutela del cittadino nei confronti delle sanzioni amministrative tra diritto nazionale ed europeo* (Torino, 2014). On this topic, see also S. Mirate, *Giustizia amministrativa e Convenzione europea dei diritti dell’uomo* (Milano, 2008); C. Focarelli, *Equo processo e Convenzione europea dei diritti dell’uomo: contributo alla determinazione dell’ambito di applicazione dell’art. 6 della Convenzione* (Padova, 2001).

In fact, the drafters of the ECHR probably decided to exclude administrative matters from the sphere of application of the «*fair trial*» rule, their main concern being that excessive guarantees could have jeopardized the efficiency of the administrative action.

However, since the Seventies of the last century, Art. 6 ECHR has gained a fundamental importance also in the field of administrative law and, as we have mentioned, for the administrative procedure (as opposed to administrative trial): this is mainly due to the circumstance that, over the years, the ECtHR has “redefined” the concepts included in Art. 6 ECHR, by adopting an autonomous convention meaning (i.e. independent from the categorizations employed by national legal systems of member States) of «*tribunal*», «*criminal charge*» and «*civil right and obligations*».⁸

For this reason, first of all, the term «*tribunal*» shall be interpreted in a substantive matter, having exclusive regard to the functional profile, i.e. to the powers *de facto* exercised by a public body, rather than to its organizational profiles: in particular, this concept does not necessarily refer to a classical judicial body integrated into the standard judicial machinery of the relevant country (or to a body which might have some features in common with a proper judge, such as, for example, an independent administrative Authority). In this perspective, «*tribunal*» can define any person whose functions are of a public nature and, therefore, also an administrative authority endowed with the power to decide a «*criminal charge*» or to «*determine*» (i.e. to being directly decisive and binding on the subjective situation) «*civil rights and obligations*».

Similarly, the ECtHR held that the notions of «*criminal charge*» and «*civil rights and obligations*» should also be construed in a substantive manner.

⁸ See G. LETSAS, *A theory of interpretation of the European Convention on Human Rights* (Oxford, 2009) and ‘The Truth in autonomous concepts: How to interpret the ECHR’, *Oxford Journ. Intern. Law*, 2004, at 279; F. SUDRE, ‘Le recours aux notions autonomes’, in F. SUDRE (ed.), *L’interprétation de la Convention européenne des droits de l’homme*, Bruxelles, 1998, at 93.

Therefore, the notion of «*criminal charge*» has been extended to certain punitive measures, capable of affecting the subjective sphere of the relevant individuals, irrespective of the classification (whether as criminal or administrative sanctions) given by the law of the contracting parties⁹.

Accordingly, pecuniary administrative fines governed by Italian law no. 689/1981 fall within the criminal head of Art. 6 ECHR: and this is true for both fines imposed in relation to violations of traffic regulations¹⁰ and for the more serious fines imposed by Independent Regulatory Agencies.¹¹

However, even a number of administrative orders of an interdictory nature, commonly classified by domestic law as ordinary administrative decision restricting the legal position of the citizens for the purpose of pursuing the specific public interest can, under certain conditions, fall within the definition of «*criminal*» pursuant to Art. 6 ECHR,¹²

⁹ See *Engel* cited above.

¹⁰ One of the first cases related to traffic regulation was *Öztürk v. Germany* (App. no 8544/79) (1984) ECtHR § 53 ss.; with specific reference to the Italian system see *Varuzza v. Italy* (App. no 35260/97) (1999) ECtHR, where the applicant was fined 62.000 Lire for speeding. It is worth noting that the Strasbourg Court, when called to establish whether an administrative fine should be considered as «*criminal in nature*», considers the gravity of the sanction in relation to the economic situation and to the income of the defendant: for this reason, also a sanction that in absolute terms does not appear particularly severe can fall within the criminal-head of Art. 6 ECHR.

¹¹ The different Acts that regulate Italian independent Regulatory Agencies refer to Law no 689/ that represents the general legislative framework of any administrative fine in Italy.

¹² See, for example, *Matyjec v. Poland* (App. no 38184/03) (2006) where the ECtHR qualified as «*criminal*» the sanction of dismissal from public functions exercised (and the prevention from applying for the posts in question for a period of 10 years) applicable to anyone who had submitted an untrue declaration about his cooperation with the State's security services during the Communist regimes: «*It is true that neither imprisonment nor a fine can be imposed on someone who has been found to have submitted a false declaration. Nevertheless, the Court notes that the prohibition on practising certain professions (political or legal) for a long period of time may have a very serious impact on a person, depriving him or her of the possibility of continuing professional life. This may be well deserved, having regard to the historical context in Poland, but it does not alter the assessment of the seriousness*

because, according to a well established Strasbourg case law, the two requirements of punitive character and seriousness shall be considered as alternative and not necessarily cumulative (even though a cumulative approach can be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a «*criminal charge*»).

As a result, on one side, seriousness is not an essential element, wherever a sanction is in itself punitive and deterrent in nature¹³; and, on the other side, even a sanction without any punitive and deterrent purpose can be «*criminal*» and therefore fall under Art. 6 ECHR in all cases when said sanction has serious consequences on citizens.

In other words, when facing the question as to whether a specific administrative decision can be «*criminal*» within the meaning of Art. 6 ECHR, the Court of Strasbourg decided to completely disregard national (domestic) categories. Indeed, formal qualification that certain acts received in their domestic legal system is conclusive only for the purpose of extending the applicability of ECHR provisions, so to increase the overall set of guaranties for the citizens (since the *Engel* decision the Court has mentioned the idea that «*the autonomy of the concept of “criminal” operates, as it were, one way only*»¹⁴).

of the imposed sanction. This sanction should thus be regarded as having at least partly punitive and deterrent character».

¹³ See *Ziliberg v. Moldova* (App. no. 61821/00) (2005) ECtHR § 34, concerning a fine inflicted to a student who had attended a demonstration unauthorized by public authorities: in this case the ECtHR affirmed the criminal nature of the sanction on the argument that «*the applicant was fined MDL 36 (the equivalent of EUR 3.17 at the time), which constituted over 60% of his monthly income and that he faced a maximum penalty of MDL 90 (the equivalent of EUR 7.94 at the time)*».

¹⁴ As a consequence, if the applicable national law classifies the offence as «*criminal*», it is automatically as such also for the purpose of Art. 6. See *Engel* cited above, § 81: «*The Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the*

By contrast, formal criteria do not have any binding relevance if they lead to a limitation of the application of the Convention (this meaning that no particular relevance may be given to the circumstance that the domestic legal system qualifies certain sanctions as administrative or even does not recognize any nature as sanction to a given administrative order if and to the extent that the measure at issue is punitive in nature).

On the other hand, the same can be said of the wording «*determination of civil rights and obligation*» contained in Art. 6, which can covers any subjective position recognized by domestic legal systems also in cases when, pursuant to said systems, it falls within the administrative sphere: therefore, for example, a «*civil right*» within the meaning of the convention can also define legitimate expectations¹⁵ or, most of all, public law rights¹⁶.

normal exercise of one of the rights that it protects. This is made especially clear by Article 7. Such a choice, which has the effect of rendering applicable Articles 6 and 7, in principle escapes supervision by the Court. The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a “mixed” offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention».

¹⁵ See *Mennitto v. Italy* (App. no 33804/96) (2000) ECtHR § 27, whereby the applicant claimed to receive from the local public health services an allowance recognized by the Regional Law to families taking care of disabled members of their household directly in their own homes.

¹⁶ See *König v. Germany* (App. no 6232/73) (1978) ECtHR § 90, concerning the withdrawal of an authorization to run a medical clinic where the ECtHR said: «*If the case concerns a dispute between an individual and a public authority, whether the latter had acted as a private person or in its sovereign capacity is therefore not conclusive*». See also *Bentham v. the Netherlands* (App. no 8848/80) (1985) ECtHR §§ 34-35 where the ECtHR said: «*The concept of “civil rights and obligations” cannot be interpreted solely by reference to the domestic law of the respondent State. Furthermore, Article 6 does not cover only private-law disputes in the traditional sense that is disputes between individuals or between an individual and the State to the extent that the latter had been acting as a private person, subject to private law and not in its sovereign capacity. Accordingly, the character of the legislation which governs how the matter is to be determined and that of the authority which is invested with jurisdiction in the matter are of little consequence: the latter may be an ordinary court, [an] administrative body,*

In practice, «*civil rights and obligations*» as identified by the ECtHR seem to essentially have a monetary nature, as they mainly refer to pecuniary claim *vis à vis* public administrations or, in any case, regard administrative orders immediately affecting the capability of the recipient to produce income (for example, it is pacific that that the following may be qualified as administrative measures determining «*civil rights*»: permits required to carry out an economic activity and their revocations¹⁷; planning permissions¹⁸, public concessions¹⁹; disciplinary procedure resulting in the suspension from medical or legal practice²⁰).

etc. [...] Only the character of the right at issue is relevant ». On the applicability of Art. 6 of administrative procedures see P. Craig, 'The Human Right Act, Article 6 and Procedural Rights', *Public law*, 2003, 753; C. Forsyth, 'Procedural Justice in Administrative Proceedings and art. 6(1) of European Convention on Human Rights and Fundamental Freedoms', in *Cambridge Law Journ.*, 2003, 244; F.J. Rodriguez Pontón, *Las articulacion de las garantías administrativas y jurisdiccionales en el sistema del CEDH*, Cizur Menor (Navarra), 2005. In Italy, S. Cassese, 'Le basi costituzionali', in Id. (ed.), *Trattato di diritto amministrativo, Diritto amministrativo generale* (Milano, 2003), I, 173, at 239; G. della Cananea, *Al di là dei confini statuali. Principi generali del diritto pubblico globale* (Bologna, 2009) at 27; F. Goisis, 'Garanzie procedimentali e Convenzione europea per la tutela dei diritti dell'uomo', *Dir. proc. amm.*, 2009, 1338; M. Cocconi, 'Il giusto procedimento come banco di prova di un'integrazione delle garanzie procedurali a livello europeo', *Riv. it. dir. pubbl. com.*, 2010, 1127; S. Mirate, 'The right to be heard: equa riparazione e giusto procedimento amministrativo nella giurisprudenza CEDU', *Resp. civ. e previd.*, 2011, 542, at 554 ss.

¹⁷ See *König v. Germany*, cited above; *Pudas v. Sweden* (App. no 10426/83) (1987) ECtHR, concerning the withdrawal of a taxi traffic license to carry passengers on specified interurban routes.

¹⁸ See *Morscher v. Austria* (App. no 54039/00) (2004) ECtHR, concerning a planning permission: in this case the administrative act at issue has been thought to affect a «*civil right*», in particular, the *ius aedificandi*.

¹⁹ See *Tsfayo v. the United Kingdom* (App. no 60860/00) (2006) ECtHR, concerning the withdrawal of an housing accommodation.

²⁰ See *Le Compte, Van Leuven et De Meyere c. Belgique, Grand Chamber* (App. no 6878/75 and 7238/75) (1981) ECtHR, concerning a suspension, for disciplinary reasons, from medical activity.

However, the economic nature of the rights concerned is not always required: there are some cases whereby this profile is only indirectly present (for example, Strasbourg Court held that «civil rights» include (a) the request of a student to be enrolled in the University, although the applicant's action is seeking the setting-aside of public-law regulations²¹; (b) the expectation of the bidder not to be discriminated in a public tender²² and, also, (c) the claim concerning the restrictions to which the applicant was allegedly subjected as a result of his being placed in the special prison regime for membership of a mafia-type criminal organization²³).

In conclusion, the “independent” meaning of «tribunal», «criminal charge» and «civil right and obligations» led the Strasbourg Court to extend the scope of application of Art. 6 ECHR well beyond the formal scope of criminal and civil law, as well as of criminal and civil procedural law: in fact, a large number of administrative procedures (regulated in Italian law by Act n. 241/1990) may be deemed to be covered by this provision. Therefore, it is during the infringement procedure or in any other kind of the administrative procedure that the guarantees descending from the fair trial right are to be enjoyed.²⁴

²¹ See *Emine Araç v. Turkey* (App. no 9907/02) (2008) ECtHR, § 20.

²² See *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom* (App. no. 20390/92, 21322/92) (2008) ECtHR § 62.

²³ See, i.e., ECtHR, *Enea v. Italy, Grand Chamber* (App. no 74912/01) (2009) ECtHR §§ 97-98.

²⁴ In this sense, the ECtHR seems to have put in practice the famous observation of Hans Kelsen, *General Theory of Law and State* (Harvard, 1945) at 278, according to which «there is nothing to prevent us from giving the public administration, insofar as it exercises a judicial function, the same organization and procedure as have the courts. Sanctions are coercive acts, and sanction inflicted upon individuals by administrative organs are certainly encroachments upon the property, freedom, and even life of the citizens. If the constitution prescribes that no interference with the property, freedom or life of the individual may take place except by “due process of law” this does not necessarily entail a monopoly of the courts on the judicial function. The administrative procedure in which a judicial function is exercised can be formed in such a way that it corresponds to the ideal of “due process of law”».

Also in this respect, thus, the scope of application of Art. 6 is not exactly the same as of the Art. 111 of Italian Constitution, this latter being a principle governing just the judicial phase (as opposed to the administrative one)²⁵.

On the contrary, Art. 6 ECHR, although originally deemed not applicable to the administrative law disputes, has started to apply, as a result of a functionalist concept of “jurisdiction”, to substantive administrative matters (i.e. to the procedural phase) and, only ex post, to administrative trial (see *infra* par. 4).

3. ART. 6 ECHR AND ADMINISTRATIVE PROCEDURE: IN PARTICULAR, SANCTIONING PROCEDURES BEFORE INDEPENDENT REGULATORY AGENCIES

The applicability of art. 6 ECHR to administrative procedures is probably the most interesting manifestation of Strasbourg’s case law: the idea that the guarantees of «*fair trial*» should be fully applied whenever the subjective position of a citizen is affected, regardless of the formal qualification of the ongoing proceedings, is really innovative for the Italian law system.

²⁵ This is the established position of the Italian constitutional Court: see, for example, judgment n. 20/2009, § 4 of the reasoning, in which the Court excluded the relevance of Art. 24, 113 and 111 of Constitution (i.e. the provisions regarding the ‘fair trial’) because allegedly applicable only to a trial: the case concerned the legitimacy of the Bar Examinations Act in which was not provided for the duty to give reasons about the result of the bar examination. This position was reaffirmed by the Supreme Court in the judgment 20935/2009 (concerning the same case then decided by the ECtHR in the *Grande Stevens* judgment), § 5.2 of the reasoning: in this case, the Court argued that the administrative sanctioning procedure of the Consob was in line with the standard of fair procedure and the equality of arms because Art. 24 and 111 of the Italian Constitution related exclusively to the trial.

This means that administrative procedures, such as sanctioning procedures, should be adversarial and should guarantee an equality of arms (i.e. the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party), a clear distinction among investigative and adjudicatory functions, the presumption of innocence, the availability for both parties of any relevant materials even where they are in the hands of public administration.

This approach became more evident in some recent decisions of ECtHR concerning fines imposed by French and Italian Independent Regulatory Agencies: those sentences have had, not surprisingly, a strong resonance even in the media.

In 2009, in the *Dubus S.A. v. France* judgment, concerning the conformity of the sanctioning procedure with Art. 6 ECHR, Strasbourg's Court held that the composition of the Banking Commission, even though showing a certain separation between prosecution (the *Secrétariat Général*) and adjudicating organs (the *Commission*), did not achieve / accomplish a clear distinction among them: in fact, the investigative organ appeared to be dependent on the adjudicatory body organ from which it received instructions²⁶.

As a way of implementing this ruling, in 2010, in France, a new Authority was created (the *Autorité de contrôle prudentiel*) with two clearly distinct organs²⁷.

This case is particularly significant, especially if we consider that investigating offices in the Italian Independent Authorities are not more distinct from the adjudicatory body than the offices in the French Banking Commission: as a result, the same objection raised against the latter seems to be equally persuasive in relation to the former.

²⁶ See *Dubus S.A.v. France* (App. no 5242/04) (2009) ECtHR, § 60

²⁷ See *Ordomance* n. 2010-76, 21 of January 2010, Art. L. 612-4.

Moreover, the principle expressed by the ECtHR in the *Dubus* case has been largely reflected in the following French jurisprudence in relation to the meaning of the principle of separations of powers. For example, the *Conseil Constitutionnel* recently declared the unconstitutionality of various provisions of the law on electronic telecommunications based on the argument that those last «*n'assurent pas la séparation au sein de l'Autorité entre, d'une part, les fonctions de poursuite et d'instruction des éventuels manquements et, d'autre part, les fonctions de jugement des mêmes manquements, méconnaissent le principe d'impartialité*»²⁸. Shortly before, the *Conseil Constitutionnel* had considered some provisions concerning the sanctioning procedure of the Antitrust Authority (*Autorité de la concurrence*) as complying with the French Constitution and, after a careful analysis of the relevant discipline, had underlined that «*la saisine de l'Autorité de la concurrence n'opère pas de confusion entre les fonctions de poursuite et d'instruction et les pouvoirs de sanction*»²⁹.

Coming back to the Strasbourg jurisprudence, it is worth noting that in 2011, the Court held that the sanctioning procedure of another Independent Regulatory Agency, the Stock-exchange Supervisory Authority (the *Commission des opérations de bourse* - COB), was not in line with Art. 6 ECHR due to the lack of the public hearing³⁰.

Again in 2011, in the *Messier* case, the ECtHR clarified that the administrative phase of the sanctioning procedure of the COB shall be adversarial and in line with the principle of equality of arms. This means, according to the European judges, not only that the defense must be given the opportunity to have knowledge of and comment on the observation filed and the evidence adduced by the other party, but also that the prosecution authority should

²⁸ *Décision* n. 2013-331 QPC, 5 July 2013.

²⁹ *Décision* n. 2012-280 QPC, 12 October 2012.

³⁰ See 30183/06, *Vernes c. France* (App. no 30183/06) (2011) ECtHR, § 31.

automatically communicate all evidences to the defense, so as to facilitate the participation of the other party and its chance to influence the final decision.³¹

Even though in the specific case the Strasbourg Court did not assess any violation of Art. 6, it established a very important principle: the equality of arms shall already be ensured in the administrative procedure, at least when the sanctions at stake are serious and such to irreversibly affect the interest of the recipient; and this without any exception, i.e. although a judicial appeal is available.

In similar cases, in fact, even a subsequent judgment annulling the sanction would not be able to remove the serious damage inflicted to the recipient and, as a result, the principle of presumption of innocence would be violated³².

In other terms, the immediate enforceability of the administrative acts, typical of our legal system, may be inconsistent with the principle of presumption of innocence whenever a sanction such to potentially create definitive consequences on the citizens is inflicted without any fair trial³³.

The approach taken by the Strasbourg Court in respect of the French Independent Regulatory Agencies has been reiterated, recently (on 4 March 2014), in the case of *Grande Stevens and Others v. Italy*, concerning certain administrative fines imposed by the Italian Companies and Stock Exchange Commission (CONSOB)

³¹ See *Messier v. France* (App. no 25041/07) (2011) ECtHR, § 52.

³² See Art. 6 ECHR, par. 2: «*Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law*».

³³ See, ECtHR, 23 luglio 2002, case 34619/97, *Janosevic v. Sweden*, § 108: «*A system that allows enforcement of considerable amounts of tax surcharges before there has been a court determination of the liability to pay the surcharges is therefore open to criticism and should be subjected to strict scrutiny*».

In this case, again, the ECtHR held that the administrative sanctioning procedure at stake was criminal in nature because of the gravity of the sanction inflicted to the defendants (the maximum penalty is equal to five millions Euros, plus, for the corporations listed in the stock market, the temporary ban of the individuals accused from the office of director) and of the deterrent and punitive purpose of the sanction inflicted.

As to the procedural deficits, the ECtHR unanimously declared that the lack of a proper adversarial procedure (because the sanction was inflicted based on a report not communicated in advance to the accused) the absence of a public hearing and the lack of an independent adjudicator (because investigative as well as adjudicatory powers were assigned to two offices, the Insider Trading Office and the Commission, that, although formally distinct, both belonged to the same Agency, acting under the supervision of the Chairman of CONSOB), clearly violated Art. 6,.

In the light of the above, Strasbourg judges concluded that the deficiencies of the administrative procedure could be “cured” by the possibility for the appellant to challenge CONSOB’s decision before a court of law (the Corte d’Appello of Turin) that could be deemed «*organ of full jurisdiction*». However, no public hearing was available in front of Corte d’Appello and the public hearing in front of Supreme Court (Corte di Cassazione) did not suffice because this judge just deals with issues of law and does not decide on the merits of the case.

The judgment in question appears a bit superficial as to the finding that the Italian Court of Appeal exercised a «*full jurisdiction*» (see on this the dissenting opinion by judges Karakaş e Pinto de Albouquerque³⁴), as well as inadequate as to the undervaluation of the principle of presumption of innocence in relation to a sanction that remains immediately

³⁴ In particular, paragraphs. 8-14.

executive (i.e. that continue to produce effects) once appealed before the Court (but this profile was never raised by the appellants)³⁵.

However, *Grande Stevens* case still represents an important step forward in Italy: in particular, this judgment has definitely consecrated the inadequacy of the Italian inquisitorial system of application of administrative sanctions. Indeed, the structural incompatibility of this inquisitorial system with the requirements of Art. 6 has been clearly declared³⁶.

4. AN ELEMENT OF FLEXIBILITY OF THE SYSTEM: «FULL JURISDICTION» AS A FORM OF EX POST COMPENSATION.

At this stage the magnitude and significance of the consequences triggered by the application of the Art. 6 principles to the administrative procedures should be apparent: strictly speaking, in fact, only a semi-judicial proceedings fully in line with the equality of arms principle and therefore with the adjudication power conferred to a third subject

³⁵ Art. 6(2) provides that a person «*charged with a criminal offence shall be presumed innocent until proved guilty according to the law*». On this topic, with specific regard to the antitrust sanctioning system see M. Bronckers and A. Vallery, 'No longer presumed guilty? The impact of fundamental rights on certain dogmas of EU competition law', *World Competition*, 34, no. 4 (2011), at 535.

³⁶ See, lately, Cons. Stato, ord. 7567/2014, whereby the supreme administrative Court ordered Consob to amend its regulation on administrative fines so to make it consistent with the principles set forth in the *Grande Stevens* judgment. For a comment on this judgment, see M. Ventrizzo, 'Do Market Abuse Rules Violate Human Rights? The *Grande Stevens v. Italy* case', *European Corporate Governance Institute (ECGI) – Law working papers no 269/2014*, October 2014; further, if you like, M. ALLENA, 'Il caso *Grande Stevens c. Italia*: le sanzioni Consob alla prova dei principi convenzionali europei', *Giorn. dir. amm.*, 11 (2014), at 1053.

independent of the executive, could be said to be in compliance with the ECHR's obligations.³⁷

In other terms, we cannot forget that the protection of Art. 6 should start from the time a person is charged with a «*criminal*» offence or affected by other administrative decisions. In other terms, such a protection needs to be afforded already during the administrative procedure.

Nevertheless, such a model is clearly in contrast with the traditional structural features of administrative action, where the administrative procedures are based on the inquisitorial model without any clear distinction between investigatory and adjudicatory offices.

Being well aware of this issue, the ECtHR adopts a very flexible approach based on continuity between the administrative phase and following judicial phase: in few words, the judicial phase is capable of *ex post* curing the deficits of the previous administrative phase.

For example, the independence of the Court (before which administrative decisions can be challenged) is, in this view, capable of compensating the lack of independence on the part of the administrative organ which has issued the administrative decision.³⁸ Similarly,

³⁷ In Italy, the most advanced elaboration of the administrative procedure as an instrument safeguarding the citizens in a semi-judicial way is due to F. Benvenuti, 'Funzione amministrativa, procedimento, processo', *Scritti giuridici*, II, *Articoli e altri scritti (1948/1959)*, Milano, 2006, 1117 ss.) and the fundamental book of G. Pastori, *La procedura amministrativa*, Vicenza, 1964, 12 ss., now in G. Pastori, *Scritti scelti*, I (1962-1991), Napoli, 2010, 81 ss.

³⁸ This approach has got apparent since the *Bryan v. the United Kingdom* judgment (App. no 19178/91, *Grand Chamber*) (1995), concerning an administrative procedure related to a breach of the town planning regulation: some guarantees pursuant to art. 6 ECHR were available being the procedure quasi-judicial, but the Government Commissariat, i.e. the deciding organ, was not independent from the Executive, since the latter could always

whenever defenses' rights (i.e. adversarial procedure and equality of arms between public and private parts) are not ensured during the administrative phase, they can be provided during the judicial phase.

However, as a condition of this curative effect, the judicial phase needs to be (to the extent required by the appellant) a «*full jurisdiction*» one, i.e. one where the judicial review has to address the very “merits” of the administrative decisions. In other terms, the review of the administrative Courts needs to be «*full*» insofar as it is substitutive; otherwise, it would be impossible to provide a real guarantee for the citizens affected by the administrative action.

In fact, it is easy to agree that, from a logical point of view, without a substitutive judicial review, judicial guarantees cannot compensate / balance the deficits of the administrative procedure phase: in other terms, the *ex post* substitution implies, necessarily, the possibility of a re-exercise of a power by the judge; in this way, procedural rights are granted in a phase that, although subsequent, is devoted to a real decision.³⁹

Exceptions to this fullness of jurisdiction are acceptable only in so far as strictly connected to democratic principle or other invincible reasons.⁴⁰

dismiss him. Nonetheless, the Court deemed that such a lack of independence was compensated by the possibility of appealing in front of an independent and impartial Court.

³⁹ See *Kyprianou v. Cyprus* (App. no 73797/01) (2004) ECtHR § 44, whereby the Court explained that, if Art. 6 ECHR guarantees are not afforded in the procedural phase they must be assured in a judicial phase where the judge must have a «*full competence to deal de novo with the case*», ensuring an «*ab initio, independent determination of the criminal charge against the applicant*».

⁴⁰ See, for a clear reference to the democratic principle, *Tsfayo v. The United Kingdom* (App. no 60860/00) (2006) ECtHR, §§ 40-42, whereby «*when the decision turned upon questions of policy or “expediency”, it was not necessary for the appellate court to be able to substitute its own opinion for that of the decision-maker; that would be contrary to the principle of democratic accountability*»; therefore, in these cases the exclusivity of the administrative competence to decide about how to pursue the public interest has to be ensured. By contrast «*when the decision turned upon a question of contested fact, it was necessary either that the appellate Court should have*

In other terms, the approach of the ECtHR is certainly pragmatic and based on the consideration of the whole proceeding (administrative as well as judicial ones): in this view, if the administrative authority meets the requirements of Art. 6 ECHR, a subsequent judicial review may even not be expected.

On the contrary, if a «*criminal*» sanction or another administrative act capable of affecting the subjective sphere of the citizens are adopted without respecting the guarantees of «*fair trial*», it is necessary that such decisions are subject to subsequent control by a judicial body that has «*full jurisdiction*» and provides guarantees of Art. 6 ECHR. This because, as clarified several times by Strasbourg judges, «*where the reviewing court is precluded from determining the central issue in dispute, the scope of review will not be considered sufficient for the purposes of Article 6*»⁴¹.

A fortiori, «*full jurisdiction*» is required in relation to complex technical assessments: this profile has been particularly underlined in two judgments about the supervision of the banking sector.

Among others, in the *Credit and Industrial Bank v. the Czech Republic* case, concerning the subjection of a Bank to an insolvency procedure, the Strasbourg Court held that the administrative judge should have examined the substance of the administrative decision without limiting its role to a review of formal aspects.⁴²

full jurisdiction to review the facts or that the primary decision-making process should be attended with sufficient safeguards as to make it virtually judicial».

⁴¹ See *Sigma Radio Television Ltd v. Cyprus* (App. no 32181/04 and 35122/05) (2011) ECtHR, § 157, concerning administrative sanctions (including fines) inflicted by the Cyprus Telecommunications Authority to a Radio Television company running a TV channel and a radio one.

⁴² See *Credit and Industrial Bank v. the Czech Republic* (App. no 29010/95) (2003) ECtHR, §§ 64-65; see also §§ 71-72, where the Court said that was not in line with Art. 6 ECHR a system in which «*the essential function of the national courts when deciding on matters relating to entries in the Companies Register is to verify that the formal*

In other terms, as better explained in *Družstevní záložna Pria and Others v. the Czech Republic* case, the judge should have examined «point by point» both the relevant elements of fact and of law, in order to establish whether the bank was in a such financial situation to justify the receivership, notwithstanding the technical nature of the issue at stake⁴³.

In a following judgment, still regarding the supervision on the solidity of the banking system, the ECtHR has further clarified its position; by replying to the Bulgarian government's objections on the alleged impossibility for the administrative judge to exercise a «full jurisdiction» on the imposition of the receivership, it explained that the deficit of specialization on the part of the judges can be addressed in two ways: either by appointing technical experts or by inserting in the panel specialized judges.⁴⁴

In sum, the technical nature of a question does not exempt from an in-depth analysis of facts which represents the first and basic meaning of «full jurisdiction».

In other terms, in light of the ECtHR case law, an adversarial procedure on the controversial facts should be accomplished at least in one phase: in the event of non adversarial administrative procedure, violations of art. 6 should be compensated during the

conditions laid down in the relevant legislation for making such entries have been fulfilled » and in which « It is not the role of the courts to examine the substantive reasons for which the compulsory administration has been imposed or subsequently extended».

⁴³ See *Družstevní záložna Pria and Others v. the Czech Republic* (App. no 72034/01) (2008) ECtHR, § 111: «The Court reiterates that, in a given case where full jurisdiction is contested, proceedings might still satisfy requirements of Article 6 § 1 of the Convention if the court deciding on the matter considered all applicant's submissions on their merits, point by point, without ever having to decline jurisdiction in replying to them or ascertaining facts. By way of contrast, the Court found violations of Article 6 § 1 of the Convention in other cases where the domestic courts had considered themselves bound by the prior findings of administrative bodies which were decisive for the outcome of the cases before them, without examining the relevant issues independently».

⁴⁴ See *Capital Bank AD v. Bulgaria* (App. no 49429/99) (2005) ECtHR, § 113.

trial, putting the judge in a position to replace the administration in its controversial choices. In any case, the administration cannot be given an exclusive power of examining complex technical issues.

The above examples do not exhaust the complexity of the concept of «*full jurisdiction*»: other judgments appear to be less courageous and sometimes a bit of a compromise.

On the other hand, this shows that the ECtHR jurisprudence does not ignore the complex issue arising from the principle of substitutive review: indeed, in their defenses member States often recall the necessity of safeguarding the intrinsic “merits” of administrative choices and the democratic foundation of the monopoly by the public administration on the discretionary powers⁴⁵.

Nevertheless, despite the peculiarities of the various judgments, what can be noted is that the very idea of «*full jurisdiction*» implies «*a tribunal having jurisdiction to examine the merits of the matter*».⁴⁶

5. THE MEANING OF «FULL JURISDICTION»: NATIONAL JURISPRUDENCE VERSUS ECJ’S CASE LAW.

As said above, the ECtHR jurisprudence as to the criminal nature of the administrative sanctions (with all its implications on the full access to the facts) has influenced the ECJ case law with specific regard to the antitrust fines inflicted by the

⁴⁵ See, on this topic, J.C. Laguna de Paz, *Understanding the limits of judicial review in European Competition Law*, in *Journal of Antitrust Enforcement*, vol. 2, no.1, 2014, 203 ss.

⁴⁶ See *W. v. United Kingdom* (App. no. 9749/82) ECtHR, § 82.

European Commission pursuant to art. 101 and 102 of the TFEU (previously, Artt. 81 and 82 of EC Treaty) prohibiting cartels and abuse of dominant position.⁴⁷

In the latest judgments, the problem of the significance of Art. 6 for administrative sanctions has been addressed primarily in connection with the implementation of a «*full jurisdiction*» review and on this respect an important evolution can be registered.

To fully understand the problem it is worth noting that, under Art. 263 of the TFEU, the Court is vested with a power of reviewing the legality of acts «*on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers*».⁴⁸ As to administrative sanctions, this review of legitimacy is completed by an «*unlimited jurisdiction*» whose features are explained in Art. 31 of Council Regulation no 1/2003 whereby «*The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed*».

Indeed, in latest years, EU judges seem inclined to a more thorough review of the antitrust sanctions imposed by the European Commission, especially in cases where complex economic facts are involved.⁴⁹

⁴⁷ The sanctioning power of the EU Commission for violation of Artt. 102 and 103 of TFEU is governed by Art. 23, § 2, of Council Regulation (EC) no 1/2003 according to which «*The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently [...] infringe Article 81 or Article 82 of the Treaty*».

⁴⁸ See, on this topic, G.D. FALCON, «*La tutela giurisdizionale*», in M.P. CHITI, G. GRECO (eds.), *Trattato di diritto amministrativo europeo. Parte generale* (2007, Milano), II, 697 ss..

⁴⁹ See, for example, *AstraZeneca AB, e AstraZeneca plc v. European Commission* (case T-321/05) (2010), concerning the definition of the relevant market in relation to an undertaking's abuse of a dominant position, where the Court pointed out (§ 33): «*while the Community judicature recognises that the Commission has a*

In particular, the ECJ has implemented the standard of judicial review required by art. 6 in three recent judgments issued in December 2011.⁵⁰

In these cases, as a reply to the argument raised by the appellants that *«the doctrine of ‘margin of appreciation’ and ‘judicial deference’ should now no longer be applied, since European Union law is now characterized by the huge fines imposed by the Commission, a development which is frequently described as the de facto ‘criminalisation’ of European Union competition law»*, the ECtHR argued that the judge *«cannot use the Commission’s margin of discretion [...] as a basis for dispensing with the conduct of an in-depth review of the law and of the facts»*.⁵¹ In particular, EU Court should never *«refrain from reviewing the Commission’s interpretation of information of an economic nature»*, by establishing, among other things, *«whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in*

margin of assessment in economic or technical matters, that does not mean that it must decline to review the Commission’s interpretation of economic or technical data. In order to take due account of the parties’ arguments, the Community judicature must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it». See also *Aman & Söhne e Cousin Filterie v. Commission* (case T-446/05) (2010), § 54, concerning the definition of the relevant market in order to ascertain the existence of a collusive cartel and the consequent infringement of Art. 81 EC. See on this topic M. Jaeger, ‘L’intensité du contrôle du Tribunal dans les affaires de concurrence soulevant des questions d’appréciation économique complexe’, *European Review of Public Law*, 3/2012 at 975.

⁵⁰ See *KME Germany and Others v. European Commission* (cases C-272/09, C-386/10 and C-389/10) (2011).

⁵¹ See *KME Germany and Others v. European Commission*, cases C-389/10, § 109; C-386/10, par. 62; C-272/09, § 102.

*order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it».*⁵²

Furthermore, in *Schindler Holding Ltd* case (July 2013) and in *Kone* case (October 2013) referred above (§ 1 of the present work) the ECJ stated that the characteristics of a judge with «full jurisdiction» include «*the power to quash in all respects, on questions of fact and law, the decision of the body below. The judicial body must in particular have jurisdiction to examine all questions of fact and law relevant to the dispute before it*».⁵³

Based on these premises (the Commission is an inferior organ on which the Court exercised a full jurisdiction), the ECJ concluded that «*the unlimited jurisdiction which it is afforded by Article 31 of Regulation No 1/2003*» empowers the European judge «*to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or periodic penalty payment imposed*». However, even where a review of pure legitimacy is established, as in the case of judicial review in the leniency program or as regards the assessment of other complex technical facts, the European Union judicature «*cannot use the Commission's margin of discretion as a basis for dispensing with the conduct of an in-depth review of the law and of the facts*».⁵⁴

In short, according to these latest rulings, judicial review on the complex technical assessments by ECJ shall not solely be intended as a means to verify their reliability; on the contrary, the Court is required to analyze the very “shareability” of the Commission assessment, and thus review the Commission’s interpretation of data of an economic nature.

⁵²See *KME Germany and Others v. European Commission*, cases C-389/10, § 121; C-386/10, § 54; C-272/09, § 94.

⁵³ See *Kone Oyj v. European Commission*, cit., § 22 and *Schindler Holding and Others v. Commission*, cit., § 35.

⁵⁴ See *Kone Oyj v. European Commission*, cited above § 24.

In conclusion, these judgments lead to the conclusion that the concept of administrative discretion cannot any longer be instrumental to a limitation of the judicial review of antitrust fines.

Therefore, the judicial review recently developed by ECJ is much more in line with the ECtHR standards of «*full jurisdiction*»: in other terms, administrative discretion does not represent an area of immunity from judicial review any more, but, at least in principle, it is to be viewed as subject to a full judicial review. In fact, it is clearly affirmed that discretionary power cannot prevent European Union judges from carrying out a full access to relevant facts: not only the complex ones but also the disputable ones.

Although, of course, what really matters is the concrete review carried out by the Courts (and not the abstract formulas used), it should be noted that this approach is indubitably correct and represents a real turning point.⁵⁵

However, the Strasbourg judgments and the «*full jurisdiction*» criteria have not had, so far, the same influence on Italian administrative judges.

In particular, in our country, the already mentioned *Menarini* judgment already had a certain resonance: here, Strasbourg judges held that the Italian Council of State exercised a «*full jurisdiction*» review of administrative fines (imposed by Italian antitrust authority sanctioning a pharmaceutical company for an alleged cartel on the ground that the court conducted an independent examination of the relevant facts and evidences gathered by the Italian antitrust authority and, further, evaluated the proportionality between the amount of the penalty and the seriousness of the company's individual contribution in the cartel. In other words, not only the review of the amount of the fine was fully substitutive, but also the judges

⁵⁵ See M. Siragusa, C. Rizza, 'Violazione delle norme antitrust, sindacato giurisdizionale sull'esercizio del potere sanzionatorio da parte dell'autorità di concorrenza e diritto fondamentale a un equo processo: lo "stato dell'arte" dopo le sentenze *Menarini*, *KME e Posten Norge*', *Giur. comm.*, 2013, 408.

directly assessed whether an illegal conduct (i.e. the participation in the cartel) was put in place.⁵⁶

As a result of this case, Italian jurisprudence and some scholars maintained that ECtHR has allegedly recognized the full compliance with art. 6 ECHR of (by) the Italian administrative judge's judicial review as traditionally conceived: in other terms, it was argued that the traditional 'weak review' of administrative action when complex technical assessments are involved was in line with the statement of Strasbourg judges.⁵⁷

Actually, a more thorough examination of the Menarini judgment cannot underestimate the specific material features of the case: a cartel was at stake (not involving

⁵⁶ See *Menarini diagnostic s.r.l. c. Italie*, cited above, §§ 63-67: «La Cour note que dans le cas d'espèce, les juridictions administratives se sont penchées sur les différentes allégations de fait et de droit de la société requérante. Elles ont dès lors examiné les éléments de preuve recueillis par l'AGCM. De plus, le Conseil d'Etat a rappelé que lorsque l'administration dispose d'un pouvoir discrétionnaire, même si le juge administratif n'a pas le pouvoir de se substituer à l'autorité administrative indépendante, il peut toutefois vérifier si l'administration a fait un usage approprié de ses pouvoirs. De ce fait, la Cour note que la compétence des juridictions administratives n'était pas limitée à un simple contrôle de légalité. Les juridictions administratives ont pu vérifier si, par rapport aux circonstances particulières de l'affaire, l'AGCM avait fait un usage approprié de ses pouvoirs. Elles ont pu examiner le bien-fondé et la proportionnalité des choix de l'AGCM et même vérifier ses évaluations d'ordre technique. De plus, le contrôle effectué sur la sanction a été de pleine juridiction dans la mesure où le TAR et le Conseil d'Etat ont pu vérifier l'adéquation de la sanction à l'infraction commise et le cas échéant auraient pu remplacer la sanction (voir, a contrario, *Silvester's Horeca Service c. Belgique*, n° 47650/99, § 28, 4 mars 2004). En particulier, le Conseil d'Etat, en allant au delà d'un contrôle « externe » sur la cohérence logique de la motivation de l'AGCM, s'est livré à une analyse détaillée de l'adéquation de la sanction par rapport aux paramètres pertinents, y compris la proportionnalité de la sanction même. La décision de l'AGCM ayant été soumise au contrôle ultérieur d'organes judiciaires de pleine juridiction, aucune violation de l'article 6 § 1 de la Convention ne saurait être décelée en l'espèce».

⁵⁷ This position is clearly expressed by Cass., sez. un., 17 febbraio 2012, n. 2312, in *Dir. proc. amm.*, 2012. Significantly, also the president of Council of State, Giancarlo Coraggio, in his inauguration speech confirmed his agreement with the interpretation of the Menarini judgment proposed by the Supreme Court (Corte di Cassazione): see *Riv. it. dir. pubbl. comunit.*, 2012, at 253.

technically complex facts) and the administrative court was simply required to assess the degree of participation of an undertaking to the cartel. This type of issues is commonly fully reviewed by Italian administrative judges, since they are deemed as mere factual issues, as opposed to discretionary matters.⁵⁸ Indeed, these factual circumstances relate to the very object of the ascertainment carried out by the antitrust authority (i.e., the verification of the anti-competitive behavior), and therefore, wherever in principle excluded from any review of legitimacy (even where without any technical complexity) such a review would be totally ineffective.

We can well suppose that, on the contrary, in relation to a point really considered as “administrative merits” by the administrative case-law (as, for example, the identification of the relevant market that administrative courts tend to consider as falling within the autonomous assessment of the antitrust authority), conclusions by the ECtHR court would have been different: in such a scenario, in fact, the appellant could have claimed a breach of the full jurisdiction principle.

By contrast, based on the above mentioned judgment of the ECHR court and, most of all, from the concerned national judgments, the relevant facts regarded, essentially, the degree (and perhaps the existence) of cooperation by Menarini to the cartel, as opposed to the existence of anticompetitive effects.

In other words, the issues at stake fully matched the ones commonly reviewed by the judges. For instance, criminal judges commonly address this type of questions whenever a crime is contested to more coauthors.

The restrictive reading of the Menarini judgment, therefore, shows the difficulties that our scholars encounter in accepting the idea of «full jurisdiction».

⁵⁸ For example, see, recently, Cons. Stato, sez. VI, 20 maggio 2011, n. 3013, in *Giustizia-amministrativa.it* (<http://www.giustizia-amministrativa.it>).

Indeed, the leading opinion in Italian case-law and among scholars is that of a significant degree of deference (just consider, for example, the latest judgments issued by Supreme Court).⁵⁹

In particular, in Italy, the very distinction between administrative discretion (*i.e.* the power conferred to public administration to compare the various interests -either public or private- and, finally, decide which of them has to prevail) and, respectively, technical one (that regards complex choices that do not involve public interest) is far from clear, at least in terms of judicial treatment.⁶⁰

⁵⁹ With particular regard to sanctioning procedures, see, lately, Corte di Cassazione, *Grand Chamber*, 20 January 2014, no 1013 according to which the definition of the relevant market (in order to inflict an antitrust fine) is a matter of administrative merits that the judge can know only from the point of view of reasonableness and legitimacy (for a comment on this ruling see B. Gilberti, 'Sulla pienezza del sindacato giurisdizionale sugli atti amministrativi. Annotazioni a Corte di Cassazione, Sezioni Unite, 20 gennaio 2014, n. 1013', *Dir. proc. amm.*, 2014, 1057). More in general, for a complete analysis of the latest judgments, see G. Sigismondi, 'Giudizio amministrativo e valutazioni riservate: alla ricerca di un punto di equilibrio', *Foro it.*, 2014, III, at 177.

⁶⁰ In Italy, the clear distinction between administrative discretion and technical assessments was clarified by M.S. Giannini, *Il potere discrezionale della pubblica amministrazione* (Milano, 1939); on this path see, more recently, V. Cerulli Irelli, 'Note in tema di discrezionalità amministrativa e sindacato di legittimità', *Dir. proc. amm.*, 1984, at 463; F. Ledda, 'Potere, tecnica e sindacato giudiziario sull'amministrazione pubblica', in *Studi in memoria di Vittorio Bachelet*, II, *Amministrazione e garanzie* (Milano, 1987) at 247, 307; F. Benvenuti, 'Introduzione al tema', in V. Parisio (ed.), *Potere discrezionale e controllo giudiziario* (Milano, 1998), at 1; F.G. Scoca, 'Sul trattamento giurisprudenziale della discrezionalità', *ibidem*, at 107, e Id., 'La discrezionalità nel pensiero di Giannini e nella dottrina successiva', *Riv. trim. dir. pubbl.*, 2000, at 1045; N. Paolantonio, *Il sindacato di legittimità sul provvedimento amministrativo* (Padova, 2000) at 319; S. Baccarini, 'Giudice amministrativo e discrezionalità tecnica', *Dir. proc. amm.*, 2001, at 80; A. Police, *Il ricorso di piena giurisdizione davanti al giudice amministrativo. Contributo alla teoria dell'azione nella giurisdizione esclusiva* (Padova, 2001), II, at 408 ss.; A. Travi, 'Il giudice amministrativo e le questioni tecnico-scientifiche: formule nuove e vecchie soluzioni', *Dir. pubbl.*, 2004, at 439; G. D'Angelo, 'Giudice amministrativo e valutazioni tecniche dopo la l. 21 luglio 2000, n. 205', *Dir. amm.*, 2005, at 659.

In both cases, the Courts recognize the existence of an area of administrative (or technical) ‘merits’ which cannot be directly reviewed.⁶¹

For these reasons, the position of the Strasbourg court in the *Grande Stevens* case could be disappointing, where it held that the Corte d’Appello exercised a full jurisdiction review that was capable of curing, *ex post*, the deficits of the previous sanctioning administrative procedure.

In truth, in this case no discretionary powers were actually at stake, and thus the judge was in a position to exercise a complete review of the fine inflicted: nevertheless, as noted in the dissenting opinion by judges Karakaş and Pinto de Albuquerque, the Italian court showed to totally share Consob’s findings.

Anyway, this approach, although not very persuasive and even a bit superficial, is not *per se* in contrast with the «full jurisdiction» canon. «Full jurisdiction», obviously, does not mean that Courts have always to disagree with the administrative findings, but that they need to be really prepared to substitute their view to the one expressed by the administration, whenever they disagree.

Indeed, the intrinsic “shareability” of the outcome of the national judgment is something completely different from the issue of the depths of the judicial review: a «full jurisdiction» may be well exercised even by a court that, erroneously, agreed with the opinion expressed by the administration.

⁶¹ The argument that complex technical assessments can be assimilated to discretionary choices, supported for a long time in the past by both case law and scholars [see O. Ranelletti, *Principi di diritto amministrativo* (Napoli, 1912) at 365, and A. Raselli, *Studi sul potere discrezionale del giudice civile* (Milano, 1975); see further V. Bachelet, *L’attività tecnica della pubblica amministrazione* (Milano, 1967)] has been recently reaffirmed with new considerations by some scholars: see F. Cintioli, *Giudice amministrativo, tecnica e mercato. Poteri tecnici e “giurisdizionalizzazione”* (Milano, 2005); F. Volpe, ‘Discrezionalità tecnica e presupposti dell’atto amministrativo’, *Dir. amm.*, 2008, at 791; G.C. Spattini, ‘Le decisioni tecniche dell’amministrazione e il sindacato giurisdizionale’, *Dir. proc. amm.*, 2011, at 133.

On the contrary, what is unacceptable in a «*full jurisdiction*» perspective is a deferential approach, by which Courts accept that certain profiles of the case are “reserved” to the administration.

In sum, in the light of the above observations, it is time to acknowledge that the principle of effectiveness referred to by art. 1 of the Italian Code of administrative trials, which, significantly, mentions the «*principles descending from the Constitution as well as from the European law*» still needs to be implemented in our system.⁶²

At least, we should start to fully implement the instruments made available by the administrative trial Code. First of all, the ‘jurisdiction of merits’ pursuant to art. 134 of the Code⁶³ that, as already noted by judge *Pinto De Albuquerque* in the *Menarini* case,⁶⁴ can in fact make a «*full jurisdiction*» possible with regard to every pecuniary fine subject to jurisdiction of the administrative courts, therefore, with the only exception of the fines inflicted by Consob and by Banca d’Italia, that are subject to ordinary court jurisdiction as a result of controversial intervention by the Italian Constitutional Court).⁶⁵

⁶² See, lately, E. Follieri, ‘Sulla possibile influenza della giurisprudenza della Corte europea di Strasburgo sulla giustizia amministrativa’, *Dir. proc. amm.*, 2014, at 685.

⁶³ Art. 134, § 1-c), provides that administrative judge must exercise a full review on the amount of the pecuniary administrative sanctions, even those inflicted by Independent Regulatory Agencies.

⁶⁴ *Opinione dissidente*, § 12: «*Une note optimiste pour terminer: l’interprétation « faible » des pouvoirs de contrôle des tribunaux administratifs sur les sanctions appliquées par les autorités administratives a été finalement supprimée par le nouveau code de procédure administrative, qui prévoit explicitement dans son article 134 alinéa c) la “jurisdiction étendue au fond” des tribunaux administratifs sur les sanctions administratives pécuniaires, y compris celles imposées par les autorités administratives indépendantes. Dès l’entrée en vigueur du nouveau code, les juges administratifs italiens pourront contrôler in totum les décisions d’application des sanctions administratives. Le législateur italien a reconnu l’erreur et s’est mis dans le droit chemin.*»

⁶⁵ Cfr., per la Consob, la sentenza della Corte costituzionale 27 giugno 2012, n. 162 e, per la Banca d’Italia, la recentissima sentenza del 9 aprile 2014, n. 4.