THE STANDARD OF JUDICIAL REVIEW OF THE ICA’S DECISIONS: THE ITALIAN SUPREME COURT RULES ON THE ACEA CASE

Laura Brancaccio

Keywords: Italian Competition Authority, Standard of Judicial Review, European Competition Law, Right to an Effective Judicial Review, Menarini, Margin of Discretion

1. INTRODUCTION

The standard of judicial review of antitrust decisions in the European and national systems has been extensively discussed by both scholars and case-law. In the EU and Italian legal systems, the review of the legality of decisions is supplemented by unlimited jurisdiction as regards the amount of fines. However, the huge fines imposed by European Competition Authorities in recent years suggest a possible de facto ‘criminalisation’ of European competition law (within the meaning of the European Convention on Human Rights, “ECHR”). Therefore, the legitimacy of the legal systems based on a mere review of the legality of antitrust decisions and their consistency with the principle of the right to an effective judicial review under the meaning of Article 6 of the ECHR has been debated.1

The most important case relating to this issue at the European Court of Human Rights, the Menarini case, concerned the Italian system of judicial review.2 The European Court in Strasbourg stated that the system adopted by national court to define the scope of their own review is not relevant. As long as, in practice, said review is full and extends to both legal and factual issues, then it is consistent with the principle of the right to an effective and full judicial review under the ECHR.3

---


2 See judgment of the ECtHR of September 27, 2011, A. Menarini Diagnostics S.R.L. v Italy, Application No. 43509/08.

3 See, also on the topic, the judgment of the ECtHR of March 4, 2014, Grande Stevens and Others v. Italy, Application No. 18640/10.
The relevant case-law of the European Court of Justice rules that the review of legality, including in areas giving rise to complex economic assessments where the European Commission has a margin of discretion, cannot exempt the courts from conducting an in-depth assessment of the law and of the facts on which the appealed Antitrust decisions rely. Interpreted in this way, the review of legality, supplemented by unlimited jurisdiction as regards the amount of the fine, is consistent with Article 6 of the ECHR and Article 47 of the European Charter of Fundamental Rights.\[^4\]

The Joint Chambers of the Italian Supreme Court (Corte di Cassazione, in hereinafter the “Supreme Court”), with judgment n. 1013 of 20th January 2014, the “Acea” case, confirmed that the review of legality of the decisions of the Italian Competition Authority (“ICA”) is not in conflict with the principle of the right to an effective judicial review.

2. THE DISPUTE

In November 2007, the ICA, pursuant to Article 81 [101] EC, found Acea s.p.a. (“Acea”) and Suez Environnement s.a. (“Suez”) guilty of bid rigging in a tender to acquire 40% of the shares of a mixed public-private company managing the public water utility of the Municipality of Florence and that they had illegally agreed to cooperate in their responses to invitations in other tenders as regards public water utility management in Italy (“the decision at issue”).\[^5\] Consequently, the ICA imposed on said undertakings fines of 8,300,000 and 3,000,000 euros.

The Italian Administrative Tribunal of First Instance (“TAR”) upheld the appeals of Acea and Suez and quashed the ICA’s decision.\[^6\]

In 2012, the Italian Administrative Court of Appeal (“Council of State”) reversed the TAR ruling,\[^7\] finding that the ICA’s reasoning was correct with regard to the decision at issue, in particular as regards the definition of the relevant product and geographical market and the consistency of the agreement between two of the main operators in the sector, which, having as its object the restriction of competition, could not benefit from the safe harbour of the de minimis notice.

Acea and Suez appealed the Council of State’s ruling to the Supreme Court, putting forward several pleas in law. In particular, the main complaint was an alleged infringement of the right to an effective judicial review.


\[^6\] TAR judgment n. 149 of May 7, 2008.

\[^7\] Council of State judgement n. 5067 of September 24, 2012.
The Supreme Court rejected all pleas and dismissed the action in its entirety, mainly on the grounds described in the following paragraph.


The appellants essentially claimed that the Council of State had infringed the fundamental right to a full and effective judicial review by failing to examine their arguments closely and thoroughly, and relying on the ICA’s discretion to an excessive and unreasonable extent. In particular, they alleged that art. 33 of Law 287/90 (the Italian Competition Act) should be interpreted in accordance with the principle of effective judicial review, thus enabling the judges to carry out an in-depth review of the law and facts.

The Supreme Court ruled that these grounds for appeal were unfounded.

As for the review of the legality of ICA’s decisions, the Supreme Court held that, according to consolidated case-law, not only must courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent, but also whether the statement of reasons contains all the information which must be taken into account in order to assess a complex situation, and whether it is capable of supporting the conclusions.

The Supreme Court stated that the courts’ review of legality does not empower them to substitute the ICA’s decision with their own appraisal. Nevertheless, in carrying out said review, the courts cannot rely on the ICA’s margin of discretion as a basis for avoiding an in-depth review of the law and of the facts, as required by the principle of a full and effective judicial review.

According to the Supreme Court this is consistent with the principle according to which the review of the ICA’s complex economic and factual assessments – which in practice may lead to different solutions – through its “technical discretion” must necessarily be confined to verifying whether the rules of law have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers. In this regard, in fact, the courts may also employ the services of technical consultants. Conversely, it is not for the court to substitute its economic assessment for that of the technical institution, specifically constituted for the purpose, which adopted the decision whose legality it is requested to review. Otherwise, it would negate the reasons for which the legislator found it convenient in the first place to institute a technical Authority for the purpose.

---

8 By contrast, in the Italian system, the Administrative Courts have unlimited jurisdiction as regards the penalty inflicted by the ICA. In fact, according to Article 134 of Law n. 104/2010, the courts, in addition to carrying out a mere review of the lawfulness of the penalty, may substitute their own appraisal and, consequently, cancel, reduce or increase the fine or penalty payment imposed by the ICA.
The Supreme Court ruled that the standard described above is consistent with European case-law establishing the principles and criteria governing its review of the decisions of the European Commission (Court of Justice, 3 May 2012, C-285/11, Legris Industries and 6 October 2009, C-501, 513, 515, 519/06 P., GlaxoSmithKline) and that the latter can be transposed at national level, given the broad correspondence between the competences of the European and the National Competition Authorities.

In particular, concerning the plea at issue relating to the definition of the relevant market and the argument relating to the inappropriate standard of judicial review of the Council of State, the Supreme Court held that this is precisely one of those complex factual and economic concepts that may in practice lead to different results, even within theoretically defined parameters (as described in the Commission’s Notice on the definition of Relevant Market, 97/C 372/03).

On the basis of the above mentioned considerations, the Supreme Court stated that “the review of legality of the ICA’s decisions by administrative judges empowers them to verify whether the evidence relied upon by the ICA in the appealed decision are factually accurate, including the technical assessments that are necessary to verify the legitimacy of the decision. However, in areas giving rise to complex economic assessments that may lead to different results – as with regard to the definition of the relevant market – in addition to checking for the reasonableness, logic and coherence of the statement of reasons of the appealed decision, the review of legality must be limited to verifying that the ICA’s margin of discretion has been confined within the appropriate above described limits, since the judge cannot substitute its opinion for that of the ICA.” According to the Supreme Court, in the case at issue, the judgment of the Council of State was consistent with the standard of review specified above. The Supreme Court confirmed that, according to the interpretation set out above, the review of legality of the ICA’s decisions is not in conflict with the principle of the right to an effective judicial review.