JUDICIAL REVIEW OF ANTITRUST DECISIONS: Q&A

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Abstract: Several experts give their opinion on the Italian system of judicial review of antitrust decisions and its compatibility with art. 6 of the ECHR following a set of common questions.

1. FIRST QUESTION: Considering the requirements of “full jurisdiction” established in Menarini, do you think that the Italian system for judicial review of antitrust authority decisions setting a fine is compatible with the right of fair trial established by article 6(1) ECHR?

1.1 Roberto Giovagnoli

The concept of «full jurisdiction», introduced into the case law of the European Court on Human Rights through the interpretation of art. 6(1) of the Convention, is a complex concept that cannot be entirely made to coincide with one of the national categories we are most accustomed to (scrutiny of legitimacy, of the merits, intrinsic, substitute). It entails that the national judge should thoroughly examine, point by point, the concretely disputed aspects, without the possibility of invoking discretionary areas, technical or administrative, reserved for the administration.

The full jurisdiction includes, therefore, even the judge’s power to rule on the validity, exactness and correctness of the administrative choices, since only such a scrutiny realizes that continuum between administrative process and judicial process which, according to the viewpoint of the European Court on Human Rights, enables the judicial scrutiny in the form of full jurisdiction to compensate the lack of independence and cross-examination which characterizes the administrative phase of imposition of the sanction.

As it is known, the State Council, in defining the standard of judicial scrutiny of antitrust sanctions, has highlighted the fact that the decisions by the Italian Competition Authority (ICA) are structured in more than one part, corresponding to the phases of the control undertaken by the Authority: a) a first phase of ascertainment of the facts; b) a second phase of “contextualization” of the norm aimed at protecting competition which, by making reference to “indeterminate juridical concepts” (such as the relevant market, the abuse of a dominant position, the agreements that restrict
competition), necessitates a precise identification of the constituent elements of the disputed offence; c) a third phase in which the ascertained facts are gauged by the likewise “contextualized” parameter”; d) a last phase of application of the sanctions envisaged by the rules in force.

On the basis of the dominant jurisprudential approaches, a different level of intensity of the judicial scrutiny corresponds to each such phase.

The first phase control is certainly full: according to the principles elaborated by the national case law, the facts grounding the Authority’s decisions might be fully ascertained from the viewpoint of their truthfulness; that implies an assessment of the probative elements gathered by the Authority and by the gainsaying elements produced by the parties, without the administrative judge’s access to the fact being subjected to any limitation. From such a viewpoint, it appears therefore that there is correspondence with the full jurisdiction standard.

Even the control over the application of the sanction (understood as a method of calculating the sanction and resultant quantification) occurs, at least in a principled sense, in a manner corresponding to the full jurisdiction standard. In terms of article 134 of the Code of Administrative Procedure, the administrative judge exercises a jurisdiction on the merits of the sanctions. The jurisdiction on the merits enables the judge to substitute for the ICA in calculating the sanction, in the process not only controlling the correctness of the calculation method applied, but also, if need be, resorting to a different method of calculation. The control on the sanction implies that the judge should analyze and ascertain in detail its appropriateness in relation to the infringement committed, taking into account its proportionality and the other pertinent parameters, and should if need be replace the sanction in question with another one. If, as a matter of principle, this type of scrutiny extended to the merits appears to conform to the concept of full jurisdiction, one might nevertheless detect some critical elements when it comes to the praxis of its application. An analysis of case law shows in fact that, on some occasions, the judicial scrutiny only focuses on some elements for calculating the fine, and is aimed at determining no more than the possible existence of patent errors in the sphere of the choice or the grading of parameters to be taken into consideration.

The aspect which traditionally discloses a greater number of critical elements – as regards due compliance with the full jurisdiction standard prescribed by article 6(1) – concerns the judicial scrutiny of the complex economic assessments which the Authority makes during phases b) and c) of the sanctioning order. With regard to that aspect, according to the teachings of the national case law, the administrative judge exercises an intrinsic, but not a substitute power of scrutiny. It means therefore that he can control from within (by reutilizing, that is, the same technical rules utilized by the Authority) the technical reliability of the assessment made by the ICA, without being however able to substitute for it. Having stated in the premises that the indeterminate juridical concept which the ICA applies is compatible with a plurality of
technical solutions, all of them reliable and all of them subjective, the choice between these technical assessments is the prerogative of the ICA, while the judge must only control whether the choice has fallen within the margin of flexibility offered by the technical rule which is applied.

He cannot hold that a different solution (likewise reliable, but also likewise subjective) deserves to be given preference over the one selected by the ICA, otherwise he would be substituting for the ICA.

The administrative judge, therefore, limits himself to ascertaining whether the economic assessment set out in the Authority’s decision is reliable or not. If the “choice” by the Competition and Market Guarantor Authority is reliable, it should be upheld, even if, in the course of the proceedings, alternative technical assessments emerge which are equally reliable or (ex hypothesi) more reliable than one founding the decision in which it has been adopted.

This type of scrutiny shows some critical elements when compared with the full jurisdiction model.

It is undoubtedly true that the Menarini judgment has held that the scrutiny exercised by the administrative judge is compatible with article 6 (1) of the European Convention on Human Rights (and that is certainly an element which cannot be overlooked). It is similarly true, however, that the full jurisdiction model delineated by the European Court on Human Rights (as one might evince from a comprehensive analysis of its case law, including pronouncements which do not directly relate to antitrust sanctions) seems to demand that the preferable context in which to ascertain the validity of the penal charge (including any possible complex technical assessment) is the trial, at least in those instances where the sanctioning proceedings do not offer full procedural guarantees on the effectiveness of cross-examination.

From this perspective, article 6 (1) might occasion (in those instances where no sufficient scope for cross-examination exists at the administrative stage) the move from an intrinsic scrutiny of reliability (the one more generally practiced at present) to a type of scrutiny one might possibly define as a scrutiny of greater reliability. The judge should ascertain whether the choice made by the Authority is found to be the more reliable among the proposed ones: with the possibility, therefore, to rule that the Administration's assessment, though intrinsically reliable, does not merit endorsement, in that it is less reliable than the one put forward by the sanctioned business. Had that not been the case, the validity of the charge which results in the application of a “penal” sanction would be ascertained in the course of the administrative proceedings, and thus outside the guarantees of a due process of law.

Such an extension, as previously stated, is necessary (in the light of the case law of the European Court on Human Rights) only in those instances where the administrative process does not offer enough guarantees to the right of defence and the right to cross-examination. It is in fact well-known that the European Court on Human Rights interprets article 6 (1) in the sense of holding that the
guarantee of the “independent and impartial” “tribunal” might be fulfilled not only by formally judicial organs, but also by any public authority, even one of an administrative nature, so long as it is able to ensure, from a substantial and functional viewpoint, independence of judgment and an effective right to cross-questioning.

In the event of the ICA, one cannot seriously doubt the fact that it ensures independence from Government and a particularly high level of dissertation of the dispute by both parties during the course of the proceedings (no doubt comparable to the one occurring at a trial). The only critical element might rather be represented by the formal separation between investigative and decisional functions, both of which, though essentially separate, are at present nevertheless embodied in a single subject: it is indeed only in respect of such an aspect that, compared with the antitrust sanctions, there might be a need for the so-called procedural compensation through a full jurisdiction scrutiny.

1.2 Marina Tavassi

As it is known, the administrative jurisdiction is characterized by the fact that is the expression of a judgment on the legitimacy of administrative acts, one however devoid of any concrete examination of the “merits” of the administrative decision. Such a judgment is in fact always found to be embodied in the typical categories of defects of legitimacy, such as lack of competence, breach of the law, and the various classes of abuses of power. In this sense, the control exercised by the Administrative Judge has always configured itself – and still appears to configure itself, regardless of the incentives to innovation emanating from the European Convention on Human Rights (ECHR) – as an ascertainment of the logicality and reasonableness of the choices made by the Administration, while halting, by contrast, before the discreional aspect (the so-called administrative merits) of the actual choices made by the Administration. The same holds true of the sanctioning decisions adopted by the Antitrust Authority.

After all, it is known that the administrative judge’s scrutiny of the choices imbued with technical assessments that are made by the independent administrative Authorities has always been understood as a “weak intrinsic” control, one essentially not different from the “typical external control on abuse of power”.

In the light, however, of the teachings arising out of the pronouncements by the European Court on Human Rights (EctHR), it should be held that mere scrutiny by the Administrative Judge, expressed in the judicial practice purely as a judgment on the legitimacy of the administrative decision (as lately confirmed by the pronouncement of the Court of Cassation no. 1013 of 20 January 2014, albeit one extended even to an assessment of the factual premises grounding the sanctioning decision), does not allow a full (re)examination of the “merits” of the dispute, inasmuch as the suitable reconsiderations of the discreional choices and those on the merits made by the administrative Authority, contrary to the concept of full jurisdiction expressed by the Court are in fact excluded.

Put it differently, the Italian Administrative Judge still happens to be tied, due to historical
and juristic reasons, to an analysis of the dispute which excludes the judgment on the merits made by the Authority in its sanctioning decisions; all of that in spite of the fact that the national Legislator has for some time vested the Administrative Judge with jurisdiction to examine on the merits the administrative sanctions of a pecuniary nature imposed by the independent Authorities (art. 134(1)(c) of the Code of Administrative Procedure), which might abstractively allocate greater powers to the Judge himself to become thoroughly acquainted with the disputed events resulting from any act by the Authority.

Without derogating from the aforesaid, it should be borne in mind that the concrete ascertainment of the “powers” wielded by the Italian Administrative Judge cannot overlook the analysis, in each specific case, of the concrete scenario submitted to his scrutiny: all of that from a strictly procedural perspective as well. Reference is in particular made to the fact that the Judge’s full cognizance (and thus the possibility of rectifying in any part, factually and legally, the sanctioning decision, as indicated by the ECHR in the Menarini judgment) might be hampered (if not actually precluded), not only by the concrete value judgment expressed by the Administrative Judge within the aforesaid limits, but also by the procedural conduct of the parties to the proceedings, specifically by the lack of customary introduction in the proceedings, by them, of all the requests aimed at activating the procedural instruments which are capable of enabling the Judge to become fully acquainted with the matter, so as to be able to thoroughly exercise a judicial protection.

To that end, it might be useful to contemplate more precise and clearly demarcated procedural rules, which are such as to offer the parties a clear and detailed picture about what can be requested from the allocated Judge, how and within which limits.

Beyond that, one might hypothesize the conferment on the Judge of more incisive investigative powers, to be exercised if need be autonomously given the substantial disparity between the parties (Public Administration and private subject).

1.3 Aristide Police

The answer to the question cannot be unequivocal.

Generally and theoretically speaking, during the last fifteen years, the evolution of the Italian administrative judge's judicial review has been deeply matured. Such change is not limited to the judicial review of the independent authorities' decisions. The progress has been so significant as to influence the choices of the legislator in terms of increment of the available remedies and means of evidence which are admissible in the administrative proceedings (the latest example is the consolidation of the procedural rules through the adoption of the Code of Administrative Procedure).

This evolution undoubtedly implied that the proceedings taking place before the Italian administrative judge could ensure the procedural and technical tools to achieve the standard of "full jurisdiction" provided by the Menarini judgment.

Also from the structural point of view, the so-called functional competence arising with
regard to disputes relating to the decisions of the Italian Competition Authority ensures that disputes are assigned, already in the first instance, to a specific section of the regional Administrative Court of Lazio whose judges took on a specific role (in line with an unavoidable turnover of the judges) and developed significant experience in the field of antitrust and competition law.

If the analysis shifts from a general and abstract assessment of suitability of procedural tools, techniques and structural guarantees of the independence and professional skills of judges to a specific assessment, on the one hand, the conclusions above can be confirmed but, on the other, there are some significant and striking differences.

Basically, should we carry out a case study analysis, in accordance with the unique methodology that seems to be suitable for the assessment of the degree of effectiveness of each standard of judicial review, there is a concern that the conclusions above might lose clarity. In particular, it seems that theoretically speaking the judicial review is always qualified as "inherent" and "strong", but in practice is to be considered inherent and strong only from time to time. It should be taken into account that such "variable depth" of the judicial review is the most critical issue facing the definition of a uniform standard of "full jurisdiction".

It is not easy to find, and indeed it is useless to seek, any legal solution. A practical solution should be sought in connection with a widespread awareness of judicial practice – mainly having regard to the Council of State that is the Supreme Administrative Court – to apply a unique relevant standard on a mandatory and uniform basis. In this regard it should be mentioned the approach developed by French judges in the eighties of the last century (S. Rials, Le juge administratif français et la technique du standard (Essai sur le traitement juridictionnel de l'idée de normalité, Paris, 1980).

1.4 Mario Libertini

Preliminarily, I observe that the ECHR jurisprudence (cases Menarini and Grande Stevens) clearly defined the standard of “full jurisdiction” and the principle that this standard can be achieved considering as a whole the first administrative phase of the proceedings (before the NCA) e the subsequent judiciary phase.

Unfortunately, the ECHR did not define the minimum set of guarantees which are necessary in the first administrative phase of the proceedings. Nevertheless, it stated that an absolute independence of the inquiring office, in relation to the central power of the NCA, is not necessary. So this point is overcome.

Therefore, I think there is no cause for concern with regard to the compatibility of Italian administrative proceedings law with Art. 6.1 ECHR. The same for the subsequent judicial review: the State Council and the Cassation Court by now agree that the judge can check the entire administrative inquiry and the completeness of the motivation.

In sum, I think that the Italian system satisfies the requirements of full jurisdiction established by the ECHR. I agree with TAR Lazio decision n. 11886/2014.
1.5 Mario Siragusa

There is inherent tension between the standard of review used by Italian courts and the requirements of full jurisdiction established in Menarini.2 As a matter of principle, the European Court of Human Rights (ECtHR) has held that antitrust fines may be imposed by administrative bodies, provided that their decisions are subject to subsequent control by an independent and impartial court that exercises “full jurisdiction”. However, the question remains as to whether the review carried out by administrative courts complies with the full jurisdiction requirement.

Pursuant to Article 134 of the Code of Administrative Procedure, in disputes concerning fines imposed by independent administrative authorities, administrative courts are empowered to carry out a review of the merits of the case. However, according to the traditional view, decisions of the Italian Competition Authority (ICA) are subject to a review on the merits with respect to fines, but not also with respect to substantive findings. In principle, substantive findings of antitrust decisions are subject to a control of legality.3

Italian administrative courts have clarified that the judicial review of substantive findings is full and effective, and it covers also the technical criteria and methods employed by the ICA in its economic assessment.4 Administrative courts may establish whether the evidence relied upon is accurate, reliable and consistent, whether it contains all the information that must be taken into account, and whether it is capable of substantiating the conclusions drawn. However, according to Italian case law, judicial review of complex technical and economic assessments is still limited. When complex assessments carried out by the ICA are debatable, administrative courts cannot substitute their own assessment for that of the ICA.4

It is at least open to question whether a strong legality review complies with the “full jurisdiction” requirement. The notion of full jurisdiction entails “the power to reform in any way, in fact and in law, the decision taken by a lower body”.5 A control of legality is, by its nature, a more limited form of review than full jurisdiction.

Furthermore, in light of the principle of nullum crimen sine lege enshrined in Article 7 of the European Convention on Human Rights (ECHR) and Article 49(1) of the Charter of Fundamental Rights of the EU, a finding of infringement in a decision to fine should not depend on something that is beyond legal assessment.

The legal notion of technical discretion in complex economic assessments does not provide a sufficient basis for administrative

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2 Judgment of September 29, 2011, Case No. 43509/08, A. Menarini Diagnostics/Italy.
5 Judgment of September 29, 2011, A. Menarini Diagnostics/Italy, supra note 1, para. 59.
courts to limit their review. Judicial review “by an independent and impartial tribunal” is only effective if it is able to identify and remove any trace of partiality from the decision under review, including the prosecutorial bias that may be inherent in an administrative enforcement system. Complex economic assessments are not immune to the risk of prosecutorial bias.

Limiting judicial review cannot be justified by a deference to specialistic or technical competences of the ICA. Competition rules are commonly applied not only by antitrust authorities, but also by courts. Civil courts in Italy and other legal systems have the power to adjudicate all aspects of antitrust infringements. No legal, factual or economic issue involved in antitrust cases falls outside the scope of assessment that can be carried out by the courts.

The entry into force of Directive 2014/104/EU on antitrust damages actions renders it even more necessary to ensure an unlimited review of antitrust decisions. Under Article 9 of the Directive, an infringement found by a final decision of a national antitrust authority or a review court is deemed to be irrefutably established for the purposes of an action for damages brought before national courts under EU or national competition rules. It is at least open to question whether, in our legal system, civil courts can be bound by a finding of infringement of the ICA, if such finding cannot be subject to unlimited judicial review. The binding effect of decisions subject to a mere legality review could give rise to delicate issues concerning the protection of the rights of defense, the limits of the interference between administrative and judicial functions, and the compatibility of the antitrust system with the constitutional principle of separation of powers. Moreover, possible flaws of the decision not established by administrative judges because of some form of judicial deference would also determine the outcome of damages actions before civil courts, thus increasing the harm suffered by the firms concerned.

Even assuming that, in principle, a strong legality review of substantive findings, coupled with a review on the merits with respect to fines, may comply with the full jurisdiction requirement, the question remains as to whether the review actually carried out by administrative courts ensures the required degree of control. In Menarini, the ECtHR held that the Italian administrative enforcement system can be deemed compatible with Article 6(1) ECHR, but only to the extent that the administrative court exercises in practice full jurisdiction. The approach of Italian administrative courts in the review of antitrust decisions seems to be erratic. In some cases, they have engaged in an in-depth review of the decision, taking into account also grounds of appeal raising complex economic issues. In other cases, the administrative courts seemed to limit themselves to reiterating the views of the ICA, also through extensive references to the contested decision, or simply overlooked some of the arguments put forward by the parties, without providing adequate explanations as to why they should be dismissed.

The only way to make our system fully compatible with Article 6(1) ECHR is to
remove any ambiguities and to ensure that the review of antitrust decisions is not limited by any residual form of judicial deference. A system of judicial review of administrative decisions imposing sanctions of a criminal nature may guarantee full compliance with the right of fair trial established by Article 6(1) ECHR only if the competent court is able to exercise, and actually carries out, an unlimited review of the decision in its entirety, including both the substantive findings and the fine.

Other adjustments to the current system could also contribute to improving the effectiveness of judicial review. First, the establishment of a specialized court or section in charge of all the appeals against decisions of antitrust and regulatory authorities would increase the degree of specialization and expertise of our judges. The specialized judges should be given the staff and resources needed to carry out a full review of the decision in light of the documents of the file. This would ensure that decisions based on sophisticated legal and economic arguments are subject to an effective and full review by a court having the necessary resources, expertise and degree of specialization.

Jurisdiction on appeals against ICA decisions could be conferred upon civil courts, namely the sections specialized in business law. Indeed, civil courts could be more suited to carry out the review required by Menarini, since they already adjudicate all aspects of antitrust disputes, without any limitation. Following the modernization of the EU enforcement system, civil courts directly apply all competition rules, including Article 101(3) TFEU. Moreover, in light of the binding effect of antitrust decisions in damages actions pursuant to Article 9 of the Directive on private enforcement, it would be preferable to concentrate the jurisdiction in antitrust matters in the same courts.

The introduction of specific procedural rules would also be advisable. The current structure of the administrative process is not adequate for the assessment of cases that may be extremely complex. In particular, oral hearings before national administrative courts generally have very limited scope and duration. The Italian practice contrasts with oral hearings before EU courts, which last significantly longer and allow for a much greater degree of depth. Extensive oral hearings may be necessary because antitrust disputes typically involve complex factual, legal and economic issues. Procedural rules should be adjusted to take into account the characteristics of antitrust disputes. During oral hearings, the parties should have the possibility to carry out a detailed analysis and explanation of the facts, to illustrate the content of relevant documents, and to discuss in depth their legal and economic arguments. The participation of ICA’s officials and private experts appointed by the parties in oral hearings before national courts could also contribute to a better understanding and assessment of relevant facts and economic evidence by administrative courts.

Finally, the rules on fines should be amended. As the compatibility of an administrative enforcement system with the ECHR is conditioned on the existence and actual exercise of full jurisdiction by the competent review courts, the obligation to pay a fine should be suspended until a decision has become definitive. This would avoid exposing
firms to a potentially huge financial burden before a full review of the infringement decision is carried out by an independent and impartial tribunal. Moreover, the suspension of the sanction would allow firms to exercise fully their rights of defense in antitrust proceedings and the subsequent judicial phase, as it would alleviate the pressure they may feel to offer commitments not considered necessary or proportionate in order to avoid the consequences of an infringement decision.

1.6 Roberto Chieppa

After the Menarini judgment by the European Court on Human Rights (EctHR, 27 September 2011, no. 43509/08, A. Menarini Diagnostics S.R.L. v. Italy), the compatibility between the European Court on Human Rights and the scrutiny exercised on the antitrust decisions by the Italian administrative judge, especially by the State Council, does not represent “an opinion”, but the actual outcome of that judgment, in which the European Court on Human Rights has held that the control concretely exercised by the State Council is a full jurisdiction control (both from the viewpoint of ascertaining the appropriateness and proportionality of the measure adopted by the Authority and with regard to the control over the assessments of a technical character); that excludes any breach of article 6 of the European Convention on Human Rights. It should in any event be noted that the dissenting opinion expressed in the judgment appears to be founded on a misunderstanding of the relevant Italian jurisprudence; the dissenting judge, Pinto de Albuquerque, concludes by stressing that the “weak” scrutiny had been abolished by the new art. 134(c) of the Code of Administrative Procedure, which envisages “a jurisdiction extended to the merits” in respect of the sanctions inflicted by the independent Authorities; such a norm, however, limited itself to consolidating an interpretation that had prevailed for some time in administrative case law, and, accordingly, the “solution to the problem” (in the words of the dissenting opinion) had already existed for some time in the Italian system, proof of the fact that the problem did not exist, as underlined by the European Court on Human Rights.

There is, therefore, no issue of a conflict between the methods of exercising the scrutiny as regulated by the Italian legal system and the European Convention on Human Rights, though margins for improvement remain.

After all, the approach of the State Council examined by the Menarini judgment is the fruit of an evolutionary path traced by the administrative case law, in the course of which the administrative judge had progressively deepened the analysis of the issue, urged in so doing by the search for a median point between the conflicting needs of ensuring the effectiveness of the judicial protection and avoiding the risk that the judge might directly exercise a power in fields entrusted to the decision-making of Guarantor Authorities, the correctness of whose conduct must be ascertained by the judge.

Having transcended the weak type of scrutiny, targeted by a former approach, the State Council has defined the “strong, full and effective scrutiny” by focusing attention solely on the quest for a scrutiny tending to a common model at EC level, one in which the
principle of effective judicial protection is combined with the specificity of disputes, in which the judge is vested with the task, not of exercising a power, but rather of ascertaining – without any limitation – whether the power conferred for that purpose on the Antitrust Authority has been correctly exercised» (beginning with State Council, VI, 20 February 2008 no. 597, Jetfuel).

Ultimately, the State Council’s case law excludes any limits on the judicial protection of the subjects affected by the activity of the independent authorities, identifying the only preclusion as the judge’s impossibility to directly exercise the power remitted by the legislator to the Guarantor Authority.

The control exercised by the State Council is in any event fully in line with the one exercised by the Court of Justice, and certain theses aimed at asserting a conflict with the European Convention on Human Rights would result in postulating the unreasonable conclusion that even the modalities of scrutiny exercised by the EC judge are in conflict with European Convention on Human Rights. Which is not the case.

It does not therefore appear necessary to introduce any correction so as to bring the scrutiny in line with the principles of the European Convention on Human Rights, for what is needed, instead, is to ensure that the scrutiny should always operate at those levels of judicial protection examined by the European Court on Human Rights in Menarini’s case, that no steps are taken backwards, and that hopefully steps are taken forward.

It is necessary, for the sake of concretely training the judges on the subject of competition, to “specialize them” in disputes having some peculiar elements when compared with ordinary disputes examined by judges, be they administrative or civil. The main peculiarity lies in the fact that the antitrust decisions entail economic analyses underlying a juridical assessment, and accordingly necessitate a judge who is prepared to tackle such issues.

A tool in that sense might consist in utilizing the actual system of procurement of higher jurisdictions by drawing on professionals well-versed in the antitrust sector (reference is for instance made to the government appointment of a quota of state councillors, within the scope of which it might be possible to draw from university lecturers having expertise in antitrust law).

A further improvement of the techniques of judicial scrutiny might derive from an activity of drafting and simplification which proceeds from the antitrust decisions, through the use of a clear and comprehensible language which makes it possible to reach a less complex and more synthetic final product, out of which the key points in the logical process followed might clearly and effectively emerge.

Such a simplification should be followed even by the advocates in preparing the written statements for the defence, and lastly by the judge in drawing up the judgment.

It should not be forgotten that the decisions of the Antitrust Authority consist in a single articulate and complex order, which reflects the outcome of an extensive investigation phase in
which the Authority’s offices have confronted themselves, in full compliance with the audi alteram partem principle, with groups of advocates or economic or technical consultants called by the parties; the outcome of such a confrontation (the final decision, often founded on hundreds of documents) is examined by a single judge, albeit one belonging to a panel, and for that reason it is necessary from the Authority and the advocates that they facilitate that task without pouring onto the judge such a quantity of documents and pages as to render the control exercise uselessly complex.

2. **SECOND QUESTION:** What do you think is the correct balance between the judicial review standard defined by the ECHR in Menarini and the one established by the Italian Joined Chambers of the Court of Cassation in case no. 1013, January 20th, 2014?

2.1 Roberto Giovagnoli

The limit placed by the Joint Appeals Division on the administrative judge’s judicial scrutiny of the complex economic assessments made by the ICA – though reproducing for the most part the thesis of the intrinsic non-substitute scrutiny (formerly termed “weak”), already received some time back by the administrative as well as by the EC case law – does not appear to be fully in line with the full jurisdiction standard delineated by the European Court on Human Rights. After all, the most striking element in the Joint Appeals Division’s decision no. 1013/2014 is the absence of any references to the judicial precedents of the European Court on Human Rights, particularly the Menarini judgment.

The discrepancy between the conclusions of the Joint Appeals Division and that of the European Court on Human Rights is a source of potentially critical aspects.

The administrative judge called upon to scrutinize a sanction inflicted by the ICA finds himself at present between “the frying pan and the pot”. On the one hand, he risks to position himself at the threshold of too “timid” and deferential a scrutiny, one conforming to the national and EC tradition yet out of line with what is demanded by article 6(1) of the European Convention on Human Rights. On the other hand, he risks that a more intense scrutiny (one of full jurisdiction, indeed) might earn, according to the principles laid down by judgment no. 1013/2014, the censure of exceeding the jurisdictional power.

A median point might be reached by holding that the scrutiny of reliability (or plausibility) advocated by the Joint Appeals Division should take place in terms that are not absolute but relative, in other words, through a timely confrontation with the alternative technical solutions that have emerged in the course of the proceedings. The outcome of that confrontation (to be carried out “point by point”, as demanded by the European Court on Human Rights) should lead to the conclusion that the assessment made by the ICA ought to be deemed not plausible or unreliable not just in those cases where it is already so in itself, but also in those cases where, while falling in an absolute sense within the margins of subjectivity evoked by the
indeterminate concept, it nevertheless proves to be significantly less plausible compared to the alternative technical solutions.

From this perspective, the more plausible, punctual and reliable the alternative technical solutions put forward by the sanctioned business might be, the tighter will be the margins of subjectivity evoked by the Joint Appeals Division as criterion for delimiting the intensity of the scrutiny permitted to the administrative judge.

2.2 Marina Tavassi

First through the Menarini judgment, and then through the Grande Stevens one, the European Court on Human Rights has clarified that the concept of full jurisdiction must take account, in particular, of the possibility that the allocated judicial Authority might rectify in any part, factually or legally, the decision issued by the administrative Authority.

Faced with such precise interpretative criteria, the very concept of “administrative merits”, as historically construed by the national case law, cannot but be extensively reconsidered.

By contrast, the position put forward by judgment no. 1013 of 20 January 2014, issued by the Joint Appeals Division, though located in an intermediate and somewhat innovative position when viewed against the previous judicial pronouncements, which had qualified as “weak” the Administrative Judge’s scrutiny of the decisions taken by the ICA, nevertheless explicitly upholds the exclusion from judicial scrutiny of the choices on “the merits” made by the administration, wherever the same are characterized by objective margins of subjectivity.

It is however clear that retaining such margins, within which the administrative act is excluded from the scope of judicial scrutiny, would factually preclude the pursuit of the objectives identified by the European Convention on Human Rights in the pronouncements often quoted above.

It is accordingly desirable that – consonantly with the objectives set out by the European Court, and also in the light of the special impact which some of the sanctions inflicted by the ICA have on the market – the Administrative Judge might succeed in becoming fully acquainted with the dispute entrusted to his determination, without the obstacle represented by the impossibility of scrutinizing the merits of the assessments made by the Administration.

2.3 Aristide Police

It is thought that it could not be even assumed a balance between the standard developed by the ECHR judicial review in Menarini case and the one provided by the Plenary Section of the Supreme Court of Cassation in the judgment n. 1013 of 20 January 2014.

Thus, the Supreme Court of Cassation did not provide any standard but merely emphasized a need for a standard to exist, holding that it could not be developed in the framework of the competence of the Court which is limited to the issue of conflicts of jurisdictions.

Since the competence to define a standard is of the trial court, it would be appropriate for the Council of State to take charge of this task, even through its Research Department (Ufficio Studi). Thus, in accordance with this approach, the Supreme Court of Cassation underlined
that its jurisdictional review is limited in its nature (limits to the interpretability of the performed evaluation) and, therefore, the trial court should define the standards avoiding a "variable depth" of their application time by time.

2.4 Mario Libertini

I don’t believe that there are actual differences between the standards defined by the two Courts.

Indeed, on some points different interpretations are still possible. One of these is considered in the following n. 3.

In particular, it is clear that the concept of full jurisdiction is compatible with annulment remedies, without the power of the judge to substitute the administration in the adoption of the final act.

2.5 Mario Siragusa

In the judgment of January 20, 2014, No. 1013, the Joint Chambers of the Court of Cassation confirmed the view that the judicial review of antitrust decisions by administrative courts is subject to certain limits. When complex economic and technical assessments carried out by the ICA are debatable, the role of administrative courts is limited to checking whether the ICA based its conclusions on reasonable, logical and coherent grounds, without exercising a full review of the merits of the case. Administrative judges should not substitute their own assessment for that of the ICA.

As noted above, there is inherent tension between the legality review standard and the requirements of full jurisdiction established in Menarini. Furthermore, the erratic approach of administrative courts in the review of antitrust decisions increases the risk that the scrutiny actually exercised by national judges does not comply with the required standard of protection of fundamental rights. Only a system of unlimited jurisdiction would ensure full compliance with Article 6(1) ECHR.

In any case, it is clear from Italian case law that administrative courts should carry out, in principle, an extensive and detailed review of all factual, legal and economic issues raised by a decision. To this end, they should directly examine the documents in the file, review the economic evidence and address specifically all the grounds of appeal. A strong and pervasive review is required by both the principles established by the ECtHR in Menarini and the above-mentioned ruling of the Joint Chambers of the Court of Cassation. In Menarini, the ECtHR held that the review exercised by an administrative court could meet the required degree of control, but only on the assumption that such scrutiny is not materially different from that carried out by a court with unlimited jurisdiction. Similarly, the Joint Chambers of the Court of Cassation stated that administrative courts “cannot abstain from verifying whether technical rules have been violated by the public administration”, and noted that there is no “significant difference between the degree of protection of individual rights by the exclusive jurisdiction of administrative judges and that ensured by civil judges”.

See paras. 4.1 and 4.5 of the judgment of the Court of Cassation (Joint Chambers), of January 20, 2014, No.
Thus, it is submitted that:

(i) the questionability of complex technical and economic assessments does not dispense the court from directly examining the economic evidence and addressing all the factual, legal and economic issues raised by the grounds of appeal;

(ii) the judicial deference still allowed by the Supreme Court should be restricted to very limited circumstances, where the finding of the ICA is based on solid and convincing evidence and economic reasoning, and there is no reason to believe that the alternative view put forward by private parties is more persuasive in light of actual market conditions and dynamics.

2.6 Roberto Chieppa

The limit of judgment no. 1013 of the Court of Cassation dated 20 January 2014 is that it fails to cite the Menarini judgment by the European Court on Human Rights and, therefore, it fails to address the problem of the conclusions reached by European case law.

The Cassation has stated that in the presence of “technical assessments with a significant margin for subjectivity (…), the jurisdictional scrutiny cannot stretch until the point of preferring a different solution than the one likely to have been selected by the Guarantor Authority”, since that would mean to “disavow the very same reason for which it has been established.” In the presence of complex technical evaluations, judicial control must in fact limit itself to ascertaining due compliance with the rules on procedure and motivation, as well as ascertaining the material correctness of the facts, the lack of manifest errors of assessment and misuse of power, and also, when assessments and value judgments displaying objective margins for subjectivity are involved, it must limit itself to ascertaining whether the decision has not stepped out of the said margins.

The impression is that there is not a significant distance from the approach of the State Council, deemed in the Menarini judgment to be compatible with the European Convention on Human Rights.

In that judgment, in fact, the European Court on Human Rights ascertained the lack of any infringement of article 6 of the European Convention on Human Rights, while acknowledging that the Italian administrative judge is not allowed to substitute for the Antitrust Authority, inasmuch as he can only check whether the Authority has made appropriate use of its powers.

It is hoped that the Cassation does not end up censuring judgments by the administrative judge due to a breach of the external jurisdictional limits, and that, further, the risk is avoided of the administrative judge being sandwiched between the need of complying with the principles of the European Court on Human Rights and the need not to exercise an “excessively intense” scrutiny open to the Cassation’s censure.

One should try and consolidate the achievements of the administrative case law on the issue of jurisdictional scrutiny of the Antitrust Authority’s acts, without taking any
step backward on the effectiveness of the jurisdictional protection.

The novelty represented by the binding character of the conclusive antitrust decisions (not appealed against or finalized as res judicata) in the civil judgments on compensation, as set out in the directive on private enforcement about to be received into law (Directive 2014/104/EU), should induce the Cassation to avoid any such steps backward so as to ensure that the finality of the antitrust decisions ensues from a full jurisdictional control by the administrative judge (which is what the control is at present, precisely due to the Menarini judgment by the European Court on Human Rights).

3. **Third Question:** It is well known that the substantive finding of an antitrust infringement may also involve complex economic and technical assessments (e.g. in abuse cases). In this respect, would you consider that the Administrative Courts exercise sufficient jurisdiction when reviewing Antitrust Authority decisions? Are Administrative Courts provided with appropriate instruments by the law to exercise such review (e.g. technical consultancy)?

3.1 Roberto Giovagnoli

The investigative scenario put forward by the Code of Administrative Procedure proves to suit the exercise of a full scrutiny of the complex economic assessments.

In the first place, the administrative judge is the natural judge of public interest in the economy, as he has been discharging for years the role of “guarantor of the guarantors” of competition and economic regulation within the essential productive sectors. In the course of exercising this type of “economic” jurisdiction, the administrative judge has gained and developed a precious patrimony of knowledge making him undoubtedly capable, probably more so than any other judge, of “fathoming” the complex economic assessment made by the ICA.

Besides, the possibility of resorting to an independent technical consultant enables the introduction in the proceedings of any additional technical-specialized know-how which might prove necessary for ascertaining the validity of the grounds for review, even in those instances where such grounds aim at disputing the technical assessment made by the Authority.

The administrative judge is, accordingly, no doubt equipped to exercise the more intense scrutiny which might be deemed necessary as a result of acknowledging the “penal” nature of the antitrust sanctions.

It would however be impossible not to ask whether the adoption of a standard of full jurisdiction scrutiny (especially if it is deemed to entail the allocation of substitute powers) is consistent with the nature and functions of the ICA (and the other Authorities called upon to inflict, similarly to it, sanctions of an essentially penal nature).

The traditional remark that the Authorities are borne, legitimized to that end by regulatory
foundations of constitutional and EC relevance, even as an alternative to the judicial authority (based on the postulation of their greater aptness to effectively exercise some functions of a quasi-judicial nature, such as the sanctioning one) is hardly consistent with this extension of the judicial scrutiny as demanded by the European Court on Human Rights, which appears in fact to contradict the rationale on which the very establishment of many independent Authorities is founded.

It is precisely by valorizing the features and the nature of the ICA (held by many to be even “quasi judicial”), with regard to the sanctions imposed by it, that one might come to a conclusion in the sense that the legislator wanted to confer upon it ownership of the sanctioning power, deeming it the subject best placed to ascertain and assess the existence of the specific offence.

Especially with regard to the ICA, the remarks that tend to favour a basically full and substitute scrutiny of the technical-discretionary assessments do not appear to be entirely transposable. As regards sanctions imposed by the ICA, in fact, it ought to be excluded that the allocated administrative judge, at the stage of an appeal against the sanctioning order, re-appropriates for himself, during the judicial proceedings, of a punitive power he has full ownership of, which has only been provisionally “delegated” to the Administration (we are dealing here with the well-known “loan theory”, often invoked with reference to common administrative sanctions).

In this instance, by contrast, the sanctioning power is attributed to the independent Authority as a function specific to it, which attribution is justified precisely in the name of the characteristics of technicality, independence and neutrality characterizing such a subject.

What has happened at a judicial level consists, therefore, in the traditional scrutiny of the correct exercise of a “third-party’s” power, which should accordingly unfold itself, even in the light of the constitutional principles on the relationships between judicial authority and administration, without substituting for the subject vested with the power, but rather exploiting as best as possible (if need by adopting the scrutiny of the greater reliability) the powers conferred on the administrative judge within the scope of the traditional judgment on legitimacy.

3.2 Marina Tavassi

Going back to what has been set out in the reply to the first question, it should be held that, at present, the Administrative Judge’s scrutiny is actually circumscribed to an assessment of the legitimacy of the decision taken by the Antitrust Authority, thereby excluding the possibility that the opinions entertained by the Judge himself might substitute for the different assessments of the independent Authority, especially in the event that such assessments disclose an objective margin of subjectivity (as is, for instance, the case of defining what is a significant market).

As for the procedural tools, it ought to be stressed in the premises that the Administrative Judge is not traditionally equipped with tools which are apt to assess the technical evaluations of the Administration: that in turn affects at present the selfsame Judges’ “attitude” towards the utilization of such tools.
Anyway, Law no. 205 of 2000 and the subsequent codification of the administrative process have expanded the possibility for the Judge to activate a complete investigative phase, particularly as regards recourse to an independently appointed technical consultant: art. 63 of the new Code of Administrative Procedure expressly contemplates that "whenever he deems it necessary to ascertain the facts or make assessments calling for specific technical skills, the Judge might order that a verification exercise be conducted, or even, wherever essential, that a technical consultancy be provided".

Moreover, art. 63(5) of the Code of Administrative Procedure confers on the Administrative Judge the power to even order recourse to the other probative means envisaged by the Code of Civil Procedure, thereby opening up the administrative process to the investigative instruments not specifically enunciated in the new Code, which the administrative case law was reluctant to introduce in the administrative process.

By means of the new legislative developments, the Administrative Judge has been granted direct access to the scrutinized event, unlike the previous scenario, with the result that, even from that viewpoint, there exist in theory the technical – procedural means enabling the Judge himself to attain full knowledge and possibly substitute his assessments for those made by the Administration.

Nevertheless, as previously highlighted, such abstract possibilities concretely clash with the stated impossibility, on the part of the Administrative Judge, to substitute his own decision for the one adopted by the Authority, unlike what is allowed to a Civil Judge with regard to the decisions of the lower courts which are appealed against before the selfsame Judge. Such a different solution is undoubtedly grounded on the different nature of the ICA compared to the ultimate jurisdictional organs.

3.3 Aristide Police

The answer to this question can only be a summary of the answers provided above:

i) generally and theoretically speaking, there is no doubt that the Italian legal system provides procedural tools and techniques suitable for the exercise of "full" jurisdiction, as well as extensive structural guarantees relating to the independence and specific professional skills of judges;

ii) as to the effective exercise of the judicial review, there is a critical issue relating to the homogeneity of the applicable standard rather than the one relating to the extension of the exercised judicial review. Hence, it is necessary to ensure the homogeneity of the judicial review as well as acceptable limits relating to the possibility to challenge discretionary and technical powers.

3.4 Mario Libertini

This point is frequently misunderstood. Many scholars (and judges) think that “complex assessments” are a matter of fact. Therefore, a judicial control of the NCA’s decision would be precluded, provided that the research and the scrutiny of the facts were completed. On the contrary, I think that the judicial choice of the standard to be applied in “complex assessments” (f.i.: a certain concept of relevant market) is a matter of law and it has to be...
motivated in relation to the principles and the goals of antitrust law.

Therefore, the notion of full jurisdiction includes the judicial check of the legal grounds of the standards chosen by the NCA.

3.5 Mario Siragusa

As already mentioned, in many cases the administrative courts did not seem to carry out a comprehensive review of the factual, legal and economic issues raised by ICA decisions in light of all grounds of appeal.

Establishing a specialized court or section and extending the scope and duration of oral hearings could contribute to improving the review of economic and technical assessments by administrative courts.

Technical consultancy may also be a useful tool. In principle, courts possess the competences required to assess most economic and technical issues involved in antitrust disputes. However, in some cases, consultants’ specialized knowledge and skills may assist judges in verifying and evaluating the economic evidence. This may be the case, for instance, when some of the charges are based also on sophisticated econometric analyses.

However, pursuant to Article 63(4) of the Code of Administrative Procedure, a court may appoint a technical advisor only if his/her contribution is “indispensable”. This requirement seems to be excessively restrictive and may have negatively affected the use of technical consultancy in the past. Technical consultancy should be allowed whenever it is deemed useful or appropriate to evaluate economic and technical evidence.

3.6 Roberto Chieppa

On the intensity of the scrutiny, reference is made to what has been stated earlier.

The Italian administrative judge is equipped with all the tools for exercising that full jurisdictional control which is deemed necessary by the European Court on Human Rights.

One of these tools also consists in independent technical consultancy; especially after the Code of Administrative Procedure has come into force, there is no longer, in administrative proceedings, any procedural limitation on the judge, and art. 63 of the new Code expressly envisages both the ascertainment process and the technical consultancy (the requirement of indispensability laid down by art. 63(4) of the Code for the judge’s appointment of an independent consultant has not been understood in case law as in any way limiting the possibility of arranging for a consultancy whenever such an instrument is found to be useful for the determination of the dispute).

As stressed more than once by administrative case law, in exercising judicial scrutiny over the decisions of independent authorities, it is admissible to make use of a technical consultancy: through such probative means, it might be possible to delegate to the consultant the task of ascertaining from a technical perspective a duly identified factual premise, plus in any event he might be asked to provide assistance with a view to broadening the judge’s knowledge through technical-specialized contributions (as suitably defined in the question) belonging to fields of knowledge characterized by an objective difficulty.
It has been highlighted that, in reality, despite the statements of principle, a technical consultancy has never been arranged by the administrative judge in the field of antitrust; in this regard, even within a European Community context, it is significant that the Court of Justice had deemed the judicial appointment of a technical consultant admissible in the sphere of judgments relating to competition, though it exercised great caution in the actual use of the instrument (Court of Justice, European Community, C – 89/85, 31-3-93, Woodpulp – Pasta di legno).

Moreover, it cannot be ignored that the extreme parsimony by which Judges resort to the tool of technical consultancy also depends on the fact that the judges have likely given thought to the practical problem of how to find, in the presence of relevant cases, a consultant capable of providing adequate guarantees in terms of autonomy.

It should be observed that the problem of judges lacking the necessary skills in the economic field, and ascertaining the existence of suitable tools to make up for that shortcoming, is not only an Italian problem but one actually representing a bone of contention in the main legal systems, a problem for which different answers have been provided: apart from innovative proposals, such as the introduction of an economic advisor to the judge (envisaged in Scotland) or supplementing judicial panels through economic experts, sometimes the so-called adversary system, based on the contraposition between the economic consultants called by the parties, works well and proves adequate in revealing possible distortions due to incorrect analyses, as is the case in the United States where the possibility of appointing experts is often left unutilized by the judge.

A few short conclusive remarks: the debate on the adequacy of the judicial scrutiny exercised in the field of antitrust is a moot one in various European legal systems.

Such a debate is welcomed if the aim is to improve the system, including the methods of judicial control. What must however be avoided is the risk of transforming the scientific debate into a specious attempt to try and seek before the European Court on Human Rights an additional level of judgment in the more significant cases (relating to antitrust or to other sectors). The Italian legal system has certainly no need of a further level of judgment, whereas it is in need of certainty in the application of the law and in the time frames for the enforcement of justice.