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JUDICIAL REVIEW OF TECHNICAL DECISIONS: THE EU DAMAGES DIRECTIVE IN THE CONTEXT OF ITALIAN LAW

ABSTRACT

The main argument of this paper* is that the Italian legal system does not – in its current form – allow adequate judicial review of technical decisions. Yet, taking seriously the interpretation of Article 6, paragraph 1 of the European Convention on Human Rights and Article 24 of the Italian Constitution as key norms establishing the right to a fair trial and the right to a defence as its starting point, I suggest that such legal orders can provide better protection for individuals through a theoretical paradigm shift rather than through positive law.

KEYWORDS: EU Damages Directive; private and public antitrust enforcement systems; judicial review of technical decisions and ECtHR case-law; Articles 6(1) ECHR and 24 of the Italian Constitution.

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1. Introduction

In the Italian legal system, the transposition of Directive 2014/104/EU (the so-called 'Damages Directive'), into Legislative Decree No. 3 of 2017, with a view to improving the effectiveness of both 'follow-on' and 'stand-alone' legal actions in private and public antitrust enforcement, has highlighted the problem of the judicial review of National Competition Authority (from now on 'NCA') technical decisions.

The Damages Directive established its own 'binding effect' in order to increase the effectiveness and procedural efficiency of actions for harms in the Member States[1]. In particular, the binding effect, as envisaged by the European Union seeks to ensure that an infringement of competition law, established by a final decision of the NCA or a court of judicial review, is deemed to be irrefutably acknowledged for the purpose of bringing an action for damages before national courts under Article 101 or 102 TFEU or under national competition law. However, in terms of accomplishing this objective, the prevision introduced into Italian law by Article 9(1) of the Directive becomes problematic when set against the current system of judicial review of NCA decisions in Italy, potentially undermining the effectiveness of the legal protection afforded to the individual.

Within the Italian legal system, a question of constitutional legitimacy emerges in relation to the ability of judicial review to protect the rights of individuals subjected to decisions of the NCA.[2] As for the EU law perspective, we intend to focus on the Damages Directive, which concerns rules governing actions for damages in cases of infringement of competition law under Articles 101 or 102 TFEU. In particular, according to Article 9(1) of the Damages Di-

1 R. Barry et al., *The EU Antitrust Damages Directive: Transposition in the Member States*, 1rd edn., Oxford University Press 2018, 3. For a critical analysis on Directive 2014/104/EU *see also* D.I. Baker, *Revisiting History – What Have We Learned About Private Antitrust Enforcement that We Would Recommend to Others?*, 16 *Loyola Consumer L. Rev.*, 379, 2004.

2 G. Greco, *L'accertamento delle violazioni del diritto della concorrenza e il sindacato del giudice amministrativo* [*The verification of the competition law infringements and the administrative jucicial procedure*], 5 *Riv. it. dir. pubbl. comun.*, 999, 2016.

rective, 'Member States shall ensure that an infringement of competition law established by a final decision of a NCA or by a court for review is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law'.

The legal provisions of the Damages Directive are of particular importance insofar as they state that the NCA's decision cannot not subject to judicial review by a national court if it is not challenged or, should it be challenged, is not annulled. We specifically refer to Chapter III, entitled 'Effect of national decisions, limitation periods, joint and several liability' of Article 9(1) of the Damages Directive, entitled 'Effect of national decisions'.

From the point of view of the Italian legal system, as mentioned above, the Damages Directive has been transposed into Article 7(1) of Legislative Decree No. 3 of 2017. This provision, relating to actions for damages before a national court (*i.e.* a civil court), states that 'for the purposes of an action for damages it is considered that the defendent has been definitively ascertained to have committed a competition law offence as established by a decision of the NCA under Article 10 of law No. 287 of 10 October 1990, and no longer subject to appeal, or else by an appeal court judgment that has become final'.

Moreover, in accordance with the Damages Directive, Article 7(1), the first phrase, of Legislative Decree No. 3 (2017) states that the binding effect of assessment carried out by the NCA during a public antitrust enforcement procedure concerns the nature of the infringement and its material, personal, temporal, and territorial scope.

Thus, the provision introduced to Italian law by Article 9(1) of the Directive has raised several problems concerning the judicial protection of applicants whose interests have been harmed by the NCA's decisions. In transposing the Damages Directive, the Italian legislator affirmed that fact findings and technical assessments can no longer be subjected to the civil court's review in

the context of compensation for damages if the NCA's decisions are not challenged before an administrative court or, if challenged, these are not annulled by the same court. It should be clear that, if the civil court cannot review these kinds of decision, only the administrative court will have the authority to review them.

The problem concerns the judicial review of NCA decisions, which might therefore be addressed by extending the administrative court's review to the NCA's fact findings and technical assessments[3]. However, judicial review of the technical aspects of administrative decisions and – more generally – on 'technical discretion'[4] is rejected by a significant part of Italian case law[5] and scholarship.[6] From this perspective, a severe restriction of the administrative court's judicial authority to review NCA decisions emerges when bodies of the public administration, such as the NCA, exercise discretionary power.[7] In addition, Article 7(1), second phrase, of Legislative Decree No. 3 (2017) now establishes that 'judicial review by the administrative court involves the direct verification of the facts underlying the challenged decision and also extends to the technical aspects that do not present an objective margin of doubt, whose examination is necessary to judge the legitimacy of the decision itself'.

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3 See, recently, the interesting book J. de Poorter, E. Hirsch Ballin, S. Lavrijssen (eds) *Judicial Review of Administrative Discretion in the Administrative State*, Springer 2019.

4 Italian legal scholarship distinguishes between 'administrative discretion' and 'technical discretion' under the influence of M.S. Giannini, *Il Potere Discrezionale della Pubblica Amministrazione* [*The Discretionary power of the administration*], 74-79, Giuffrè 1939. On the difference, see the traditional scholarship, E. Presutti, *Discrezionalità pura e discrezionalità tecnica* [*Discretion and technical discretion*] *IV Giur. it.*, 15, 1910.

5 For example, see the recent *Consiglio di Stato*, 19 February 2019, Case No. 1160; *Consiglio di Stato*, 12 October 2017, Case No. 4733; *Consiglio di Stato*, 14 October 2016, Case No. 4266; *Consiglio di Stato*, 10 December 2014, Case No. 6050.

6 For example, the recent F. Cintioli, *Giusto processo, sindacato sulle decisioni antitrust e accertamento dei fatti (dopo l'effetto vincolante dell'art. 7, d. lg. 19 gennaio 2017, n. 3)* [*Due process of law, judicial review of the antitrust's decisions and fact findings (after binding effect of Article 7, Legislative Decree 19 January, 2017, No 3*], 4 *Dir. proc. amm.*, 1207, 2018.

7 However, regarding the administrative court's full jurisdiction, see L.R. Perfetti, *La full jurisdiction come problema. Pienezza della tutela giurisdizionale e teorie del potere, del processo e della costituzione* [*The full jurisdiction as a problem. Effective judicial protection and theories of public power, judicial process and constitution*], 2 *P.A. Persona e Amministrazione*, 237-261, 2018.

Here, a paradox arises: if the civil court's judicial review of the NCA's decisions is not permitted by law, and the administrative court's judicial review is not recognised either in case law or scholarship, no court will be able to scrutinise the NCA's fact findings and technical assessments. Nevertheless, it should now be clear that this outcome contrasts with the principle of effective judicial protection, as laid down in Article 6(1) of the European Convention on Human Rights (from now on 'ECHR') and Article 24 of the Italian Constitution (from now on 'the Constitution').

Fundamentally, I contend that the Italian system does not in its current form allow adequate judicial review of decisions of the NCA. Hence, taking as its point of departure the interpretation of Articles 6(1) ECHR and 24 of the Constitution as fundamental norms establishing the 'right to a fair trial' and the 'right to a defence', this article seeks to propose a solution to the problem of full judicial review of the NCA's decisions by advocating a strengthening of the administrative court's powers from a theoretical perspective. To be sure, from this standpoint, the article will seek to argue that, by adopting a different stance on the legal powers assigned to administrative courts, the judicial review of expressions of technical discretion in NCA decisions should always be a possibility.

Rethinking the nature and function of the powers of the public authorities in the light of the theory of the sovereignty of the people, the article concludes with a proposal to intensify scrutiny of NCA decisions by the administrative courts through rigorous judicial review, which, *inter alia*, would allow the administrative court to challenge the NCA's fact finding and technical assessments in order to ensure the individual's right to full legal protection.

2. The judicial review system for the protection of rights and legitimate interests in Italy

In doing so, first of all, a brief explanation of the Italian administrative justice system may be in order to clarify the distinction between the roles of

the administrative and civil courts in Italy and examine the powers of review the administrative courts enjoy.[8] Lastly, we explore the options available in the Italian system for the addressees of an infringement ruling to challenge a decision that goes against them.

In the Italian legal system, the court system is divided at macro level between ordinary and administrative branches.[9] Article 113(1) of the Constitution establishes that 'the judicial protection of rights and legitimate interests against acts of the public administration before the organs of ordinary or administrative justice is always permitted'.[10]

Administrative courts aim to ensure that government bodies protect the principle of rule of law and safeguard individual rights and legitimate interests in relations with public powers. Appeals against administrative decisions are examined by the court, with regard to the scope of the complainant's interest and the arguments presented to the court by the claimant. Courts may not introduce new arguments *ex officio* because the purpose of administrative justice is not to verify proper functioning of government bodies in general but to determine whether the alleged abuse of power in fact violated the complainant's rights or interests.

Historically, administrative courts only had the power to quash unlawful and invalid administrative decisions.[11] Since 2000, however, they have also acquired the general power to order government bodies to pay compensation for

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8 May we refer to D. Vese, *La revisione giudiziaria delle decisioni antitrust* [*The judicial review of administrative antitrust measures*], in *Diritto e Processo Amministrativo*, 3, 2019, 687-730.

9 For an historical perspective, see, for example, B.G. Mattarella, *Administrative Law in Italy: An Historical Sketch*, *Riv. Trim. Dir. Pubbl.*, 1009-1053, 2010; F.G. Scoca, *Administrative Justice in Italy: Origins and Evolution*, *1 It. J. of Publ. L.*, 118-161, 2009.

10 For the traditional scholarship see, for example, V. Bachelet, *La giustizia ammnistrativa nella costituzione italiana* [*The Administrative Justice in the Italian Constitution*], Giuffrè 1966.

11 See, for example, F.G. Scoca (ed.), *Giustizia amministrativa* [*Administrative Justice*], Giappichelli 2014; A. Sandulli (ed.), *Diritto processuale amministrativo* [*Administrative Judicial Review*], Giuffrè 2013; C.E. Gallo, *Manuale di giustizia amministrativa* [*Handbook of Administrative Justice*], Giappichelli 2014; A. Travi, *Lezioni di giustizia amministrativa* [*Administrative Justice Lessons*], Giappichelli 2014.

any damage caused.[12] In particular, when administrative courts annul an administrative decision, they do not expressly order the administration to do – or to abstain from doing – something; rather, in the rationale for their decisions they indicate what the body must or must not do during the review process leading to a new administrative decision.[13]

Essentially, it is a consolidated principle that courts cannot take the place of administrative bodies, but they may certainly direct them to ensure full compliance with judgments. Nevertheless, Article 34(1) of Legislative Decree No. 104 (2010) (the so-called 'Code of Administrative Process', from now on CAP)[14] now provides that when an administrative court annuls an act, it can, within the limits of the petition brought before it, specify suitable measures to ensure that the judgment is executed, including the appointment of a provisional administrator, with an *ad acta* commissioner, to implement a given decision. The CAP regulates all aspects pertaining to the range of authority and duties of administrative courts. In addition, partly following some solutions already indicated in case law, it has increased the range of decisions that can be pronounced by administrative courts.

Along with the traditional action of annulment, Article 30 CAP regulates judgments ordering compensation for damage, payments of sums, and actions to be taken. These actions can be filed at the same time as another action, or they may be filed autonomously but only in cases of exclusive jurisdiction. Thus, claimants can seek the annulment of an administrative act as well as re-

12 M. Nigro, *Linee di una riforma necessaria e possibile del processo amministrativo*, [*Horizons of a Necessary and Possible Reform of the Administrative Process*], *Riv. dir. proc.*, 249, 1978; see also M. Clarich, *La riforma del processo amministrativo* [*The Reform of Administrative Process*], *Giorn. dir. amm.*, 1069, 2000; R. Caranta, *La tutela giurisdizionale (italiana, sotto l'influenza comunitaria)* [*The judicial legal protection (in Italy, under the EU influence)*], *Trattato di diritto amministrativo europeo*, parte gen, vol. II, Giuffrè 2007, 1031.

13 R. Dipace, *L'annullamento tra tradizione e innovazione: la problematica flessibilità dei poteri del giudice amministrativo* [*Annulment between Tradition and Innovation: The Problematic Flexibility of Administrative Court Powers*], *Dir. proc. amm.*, 1273-1397 (2012).

14 See, for example, F. Merusi, *Il codice del giusto processo amministrativo* [*The Code of Fair Administrative Trial*], *Dir. proc. amm.*, 1-24, 2001; A. Pajno, *Il codice del processo amministrativo ed il superamento del sistema della giustizia amministrativa* [*The Code of Fair Trial and Overcoming of Administrative Justice*], *Dir. proc. amm.*, 100-132, 2011.

dress for damages, or the restitution of wrongfully paid sums of money all at the same time. The annulment of an administrative decision (e.g. the adjudication of public contracting) may have an indirect effect on a contract that the administrative body has entered into, leading to its nullity or ineffectiveness, subsequently obliging the authority to either enter into a new contract with the petitioner or start the process again from the start, according to Articles 121-124 CAP.

Hence, as we have seen, the Italian system contemplates both ordinary courts (civil and criminal) and administrative courts, with different benches. They are specifically regulated by the Constitution. The ordinary civil and criminal courts and tribunals of first instance are presided over by 'justices of the peace' (lay magistrates), whereas the Appeal Courts, with career magistrates, have jurisdiction at second instance, and the Supreme Court at third (and last) instance.

The Administrative Courts of first instance are the Regional Administrative Tribunals (TARs), operating in each Region.[15] The judicatory body of second and last instance is the Council of State. The Supreme Court has competence in matters of jurisdiction and, only on this matter, may constitute a court of third instance in matters of litigation with the public authorities. The Constitutional Court is empowered to settle disputes not only concerning a law's constitutionality, but also concerning 'conflicts of power' between the various State powers (legislative, jurisdictional, administrative), between the Central Government and the Regions, and between the Regions themselves. In this area, it can adjudicate on administrative decisions that have led to conflict.

In Italy, more specifically, jurisdictional oversight of the work of the public authorities is carried out as follows: in accordance with Article 103 of the Constitution, the Council of State (court of second and last instance pursuant

15 M. Nigro, *L'ordinamento della giurisdizione amministrativa e l'istituzione dei Tribunali amministrativi locali* [*The Organization of Administrative Jurisdiction and the Establishment of Local Administrative Courts*], *Cons. Stato*, ora in *Scritti giuridici*, vol. II, Giuffrè 1996, 743.

to Article 6 CAP and the other administrative courts of first instance, the TARs (pursuant to Article 5 CAP) have jurisdiction over legally protected interests in matters involving public authorities and individual rights in the specific areas laid down by the law.

As a rule, the judicial review of administrative decisions does not fall within the jurisdiction of the ordinary courts but that of the administrative courts pursuant to Article 103 of the Constitution and Article 7 CAP.[16] According to Article 5, Law No. 2248 of 20 March 1865, annexure E,[17] ordinary courts are powerless to quash administrative decisions. This authority belongs to administrative courts only. Ordinary courts may examine administrative acts only incidentally, when pertinent to disputes coming within its authority concerning subjective rights, disapplying them, if unlawful, thus declaring them devoid of effects in the specific case. There are, however, some matters where ordinary courts (*i.e.* civil courts) have jurisdiction over administrative decisions: for example, in the case of administrative monetary sanctions (Law No. 689 of 1981) or denial of asylum and international protection where subjective rights are at stake.

According to Article 103 of the Constitution, administrative courts have jurisdiction over legally protected interests in matters regarding the public authorities and individual rights in the specific areas laid down by the law pursuant to Articles 7 and 133 CAP. They have general jurisdiction regarding appeals against administrative decisions. According to Article 103(1) of the Constitution, administrative courts have jurisdiction over legally protected interests in matters regarding the work of the public authorities and individual rights in the specific areas laid down by the law (*i.e.* exclusive jurisdiction).[18] Legitimate in-

16 A. Romano, *Giurisdizione amministrativa e limiti alla giurisdizione ordinaria* [*Administrative Jurisdiction and Limits to Ordinary Jurisdiction*], Giuffrè 1975, 133.

17 The law of 20 March 1865 No. 2248, annexure E, abolished the boards of review and invested the ordinary courts with jurisdiction over all disputes which concerned public administration and involved private or public subjective rights.

18 L. Mazzarolli, *Sui caratteri e i limiti della giurisdizione esclusiva: la Corte costituzionale ne ridisegna l'ambito* [*On the Characteristics and Limits of Exclusive Jurisdiction: the Constitutional Court Redesigns its Scope*], *Dir. proc. amm.*, 214, 2004.

terests (so-called *interessi legittimi*) may be defined as the subjective situations granted to an individual who is subject to the exercise of power by a public body.[19] Legally protected interests involve the possibility of contesting the improper exercise of administrative power[20] (or the possibility of influencing the proper exercise of administrative power) seeking the invalidity of an act and compensation for damages.[21]

In order to assign jurisdiction to an administrative or an ordinary judge, the CAP follows two criteria: *i*) type of interest; *ii*) type of subject (secondary criterion). In accordance with Article 7(1) CAP, the administrative courts have jurisdiction over the protection of legitimate interests against the public authorities and, in specifc matters laid down by law, such as the protection of subjective rights concerning administrative decisions, acts, agreements or behaviours adopted by public administrations, as long as they are related (even indirectly) to the exercise of a public authority[22]. Administrative courts enjoy exclusive jurisdiction in matters pertaining to public services, urban planning and construction, public proceedings for awarding contracts for public works, supplies and services, competition law, and the actions of independent authorities such as the NCA. The list of areas of exclusive jurisdiction is set out in Article 133 CAP.

Finally, Article 30 CAP establishes that administrative courts can order the authorities to compensate for damage suffered by an individual due to un-

19 E. Cannada Bartoli, *Interesse (diritto amministrativo)* [*Interest (Administrative Law)*], *Enc. Dir.*, vol. XXII, Giuffrè 1972, 1; B. Sordi, *Interesse legittimo* [*Legitimate Interest*], in *Enc. dir., Ann.*, II, 2, (Giuffrè 2008); F.G. Scoca, *Contributo sulla figura dell'interesse legittimo* [Essay on Legitimate Interest], Giuffrè 1990, 2-83; A. Orsi Battaglini, *Alla ricerca dello Stato di diritto – Per una giustizia «non amministrativa»* (sonntagsgedanken), [*In Search of the Rule of Law - For «non-Administrative» Justice*], Giuffrè 2005, 159; F.G. Scoca, *L'interesse legittimo. Storia e teoria* [*The Legitimate Interest: History and Theory*], Giappichelli 2017.

20 G. Sigismondi, *La tutela nei confronti del potere pubblico e dei poteri privati: prospettive comuni e aspetti problematici*, [*Legal Protection against Public and Private Powers: Common Perspectives and Problematic Aspects*], *Dir. pubbl.*, 475 ss., 2003.

21 E. Follieri, *Risarcimento del danno per lesione di interessi legittimi* [*Compensation for Damages for Lesions of Legitimate Interests*], Chieti 1984.

22 G. Pastori, *Per l'unità e l'effettività della giustizia amministrativa* [*For the Unity and Effectiveness of Administrative Justice*], *Riv. trim. dir. pubbl.*, 1815,1972.

lawful administrative activity. Administrative courts can quash illegal or invalid administrative decisions, while ordinary courts can only disapply invalid administrative acts.

3. The private antitrust enforcement in EU legal system and the binding effect of competition authority decisions

We could conceivably argue that Article 9(1) of the Damages Directive constrains the legal scholar to a specific interpretation. It should be borne in mind that this interpretation requires the *acquis européen* to confer upon the NCA's decisions (through which this authority carries out its technical assessments and ascertains fact finding, ascribing to it a specific legal determination) a binding *erga omnes* efficacy with regard to national courts for compensation of damage in the private antitrust enforcement system. This occurs when an administrative decision *i*) is not challenged before an administrative court and becomes incontestable with regard to the fact findings and technical assessments carried out by the NCA, or *ii*) is not annulled, despite having been challenged before an administrative court.[23]

The decision of an administrative court is implicitly tantamount to *res judicata* in relation to the fact findings and technical assessments carried out by the NCA in proceedings that have not been brought before an administrative court. For these reasons, a domestic court can no longer decide the case to hand independently and has to decide exclusively on the basis of the fact findings, technical assessments, and other legal determinations with which the NCA established the infringements of competition law in the first instance.[24] Similarly, in proceedings for compensation for damage caused by breaches of

23 For a detailed exposition, please refer to D. VESE, *On the Administrative Judge's Judicial Review over AGCM's Decisions. Full Jurisdiction and Protection of the Fundamental Rights*, in *Civil Procedure Review*, 11, 2, 2020, 69-144.

24 ECJ (Third Chamber) 13 July 2006, Case C-295/04 *Vincenzo Manfredi* v *Lloyd Adriatico Assicurazioni SpA*. For a comment, *cf.* J. Basedow, *Private Enforcement of EU Competition Law*, 19, Kluwer Law International 2007; *see also* E. DE SMITJER & D. O' SULLIVAN, *The Manfredi Judgement of the ECJ and how it Relates to the Commission's Initiative on EC Antitrust Damage Actions*, 3 *Compet. Policy Newsletter*, 25, 2006.

competition law, the final decisions handed down by administrative courts that have not annulled the NCA's decisions will be binding, so that the fact finding, technical assessments, and other legal determinations will be implicitly confirmed.

However, the situation described above is only one of the angles from which the EU Damages Directive may be critiqued. In fact, there is another point, strictly related to the first, connected with a problem concerning judicial review of NCA decisions in the private antitrust enforcement procedure. This stance suggests assessing the consistency between the binding effect of the NCA's decisions laid down in Article 9(1) of the Damages Directive and the general principle of the applicant's right to a defence from the point of view of temporal considerations. It should be considered that an undertaking accused of breaching competition law does not have one, but a plurality, of interests leading it to challenge the measure adopted by the same authority. Furthermore, it is inconceivable to rule out the possibility that some of the interests of an undertaking could hypothetically come to light successively and therefore at a time that does not correspond to the adoption of an administrative measure by the NCA.

It should be observed that it might be in the interests of an undertaking under NCA investigation in a public antitrust enforcement procedure for anti-competitive agreements pursuant to 101 TFEU or abuse of the dominant position according to 102 TFEU not to challenge any sanctions before an administrative court. In fact, this occurs if the agreement is no longer of strategic interest, or dominant position has no significant economic value for an undertaking. However, although the said undertaking may have no interest in challenging NCA sanctions for the aforementioned reasons, it may well have an interest in not being subjected to claims for damages by injured parties who have disputed the anti-competitive agreement or the abuse of a dominant position in the private antitrust enforcement procedure.

In this case, it is clear that the NCA's decision only regards the interest of an undertaking seeking to challenge an administrative measure with a view to the cancellation of related sanctions; on the other hand, what is not so clear is the interest of an undertaking to dispute the legality of the administrative measures of the NCA in order not to jeopardise its position in a lawsuit. From this point of view, the interest in challenging the NCA's decision is not particularly significant; in fact, it is not a "current" interest because there is no certainty that a civil action will be brought before a domestic court anyway, so such an action may also not be brought by adverse parties hypothetically damaged due to breaches of competition law ascertained during the NCA public antitrust enforcement procedure.

It should now be clear that Article 9(1) of the Damages Directive not only causes a loss of legal protection, as we have attempted to argue above, but also an anticipation of this loss when some interests are only hypothetical. This, in particular, equates temporally non-homogenous interests, in turn creating a problem regarding the right to bring an action before an administrative court. This undermines the principle of legal certainty, representing a risk for undertakings subjected to punitive proceedings in terms of their right to a defence before the administrative court, jeopardising in particular the possibility of bringing an appeal before the administrative court in order to avoid compromising the undertakings' right to a defence in the event of one or more third party claims (by competitors and consumers) in the course of private antitrust enforcement procedures.

Returning to the central issue, we will consider the last European reform concerning relations between the public and private antitrust enforcement systems. EU law, as we have seen with the Damages Directive, affirms that Member States must ensure that an infringement of competition law declared in a final decision from the NCA or a court for review is deemed to be irrefutably established for the purposes of an action for damages brought before national

courts pursuant to Article 101 or 102 TFEU or according to national competition law.[25] Hence, EU law has essentially made the NCA's decision binding on compensation proceedings through which it ascertains an infringement of competition law.[26] In particular, with this reform EU law aims to promote legal certainty, avoid inconsistency in the application of Articles 101 and 102 TFEU[27], increase the effectiveness and procedural efficiency of actions for damages, and to improve the functioning of the internal market for both undertakings and consumers.[28]

This also comes about through the Damages Directive, which highlights the importance of the procedural stability of a decision of the NCA or an administrative court in order to promote legal certainty and to 'increase the effectiveness and procedural efficiency of the actions for damages'.[29] In this sense, the rule of the aforementioned recital provides that the decision with which the NCA or the administrative court establishes an infringement of competition law cannot be questioned in subsequent actions for damages. However, the achievement of efficiency, effectiveness, and legal certainty by the most recent European legislation within the private antitrust enforcement system is not without problems.[30] As we have seen before, this problem concerns the limitation of the right to bring an action and be defended on the part of applicants who seek to demonstrate, using all the procedural tools that the legal systems of Member States offer, that an infringement of competition law

25 For an analysis of the Spanish legal system, see F. Gascon Inchausti, *Procedural issues of antitrust damages claims: Some notes in the light of the 2014 directive and the proposal for its transposition into the Spanish legal system*, 9 *Cuadernos de Derecho Transnacional*, 139 (2017).

26 B. Caravita Di Toritto, *Overview on the Directive 2014/104/EU*, 2 *Italian Antitrust Review*, 48-49, 2015.

27 E.N. Truli, *Will Its Provisions Serve Its Goals? Directive 2014/104/EU on Certain Rules Governing Actions for Damages for Competition Law Infringements*, *SSRN Electronic Journal*, 6-7, 2016.

28 S. Peyer, *Compensation and the Damages Directive*, 12 *European Competition Journal*, 92, 2016.

29 Recital no. 34 of Damages Directive.

30 C. Migani, *Directive 2014/104/EU: In Search of a Balance between the Protection of Leniency Corporate Statements and an Effective Private Competition Law Enforcement*, 7 *Global antitrust Review*, 91, 2014.

has not been committed, contrary to the *prima facie* assertion of the NCA during the public antitrust enforcement procedure.

It must be said that the European legislation does not represent an absolute novelty in this regard. Rather that it seems to represent a point of arrival for a wider and more complex path completed by the European legislator involving some important regulatory steps. One of the most important of these was the approval of Council Regulation No. 1/2003 of 16 December 2002, concerning the application of competition rules pursuant to Articles 101 and 102 TFEU. Article 16(1) of Council Regulation No. 1/2003 on 'Uniform application of Community competition law' provides that national courts, when called upon to rule on an infringement of Article 101 and 102, on which a decision has already been taken by the European Commission, may not reach opposing decisions. Article 16(1) of Council Regulation No. 1 of 2003, concerning the implementation of rules on competition laid down in Articles 101 and 102 TFEU, affirms that national courts 'must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated'. In this sense, we must refer to recital No. 22 of Council Regulation No. 1 of 2003 where the European Council highlights the effectiveness of the decisions and procedures of the European Commission on national courts and the competition authorities of the Member States. This is in order to ensure compliance with the principles of legal certainty and the uniform application of the community competition rules in a system of parallel powers, also in order to avoid conflicting decisions.

4. Rethinking judicial review on the protection of rights in the European and Italian legal order

In the pages to follow, starting from an overview of fundamental norms in EU and Italian law and considering the case law of the European Court of Human Rights,[31] the aim is to demonstrate how full knowledge of the fact

31 E.A. Alkema, *The European Convention as a constitution and its court as a constitutional court*, in *Protecting Human Rights: the European perspective* 41, P. Mahoney, F. Matscher, H. Petzold & L.

findings and technical assessments (*i.e.* technical discretion) constitutes an essential element of the administrative court's full jurisdiction. In doing so, it will be seen that the possibilities for protecting legal entities (individuals and undertakings) in relation to the exercise of administrative power depend on the correct interpretation of the concepts of judicial process and judicial review.[32]

This issue needs to be addressed from a theoretical point of view. Indeed, it is not unreasonable to claim that the problem of full jurisdiction of administrative courts is largely of a theoretical and cultural nature, namely one of defining contents and interpretative perspectives. In order to offer a solution, we must start from positive law, with a view to refuting through the interpretation of legal principles any claim that, with regard to NCA decisions, restricts judicial review and limits the legal protection of individual rights through the exercise of its power.

Before doing so, there is a point requiring brief clarification. With regard to the problem of the protection of legal entities' rights, it is clear that undertakings will be directly affected by the NCA's decisions whereby the public authorities ascertain antitrust infringements, such as anti-competitive practices, agreements and decisions pursuant to Article 101 TFEU or the abuse of a dominant position according to Article 102 TFEU, all of which restrict competition in the EU. The administrative court's judicial review should be thought of as the legal protection of all entities' rights thus safeguarding those of both individuals and private individuals. Consequently, since the issue concerns the legal protection of entities' fundamental rights when the applicant is an undertaking, reduction of legal protection in this case is also not without effects in relation to the statutory rights of individuals (e.g. consumers). This attenuation,

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Wildhaber eds., Carl Heymans Cologne 2000.

32 P. Craig, *Judicial Review, Intensity and Deference in EU Law*, in The Unity of Public Law ch. 13, D. Dyzenhaus ed., Hart 2004; *see also* M. Baran, *The scope of EU Courts' jurisdiction and review of administrative decisions - the problem of intensity control of legality*, in Research handbook on EU administrative law 292-315, C. Harlow, P. Leino & G. della Cananea eds., Edward Elgar 2017.

in itself, derives from limitations to the general principle of the administrative court's judicial review.

Having established the general scope of this article, we turn now to the available normative data to be examined in the next section, starting from the elements found in current EU law. The main regulation governing judicial process and judicial review comes from Articles 6(1) and 13 ECHR, and Article 47 of the Charter of Fundamental Rights of the European Union (Charter). Through Article 47 of the Charter, EU law ensures the right to effective judicial review before an independent and impartial tribunal as well as to a fair trial. In particular, Article 47(1) provides that individuals 'whose rights and freedoms guaranteed by law of the Union have been violated' must have access to an 'effective remedy' before a judge. To this end, Article 47(2) provides that cases must be fairly, publicly, and within a reasonable time examined and judged before an 'independent and impartial tribunal, previously established by law', and each individual may be 'advised, defended and represented'. Article 13 ECHR, entitled 'right to an effective remedy', provides that individuals whose rights and freedoms have been adversely affected have the 'right to an effective remedy before a national authority' also when the infringement has been committed by a person acting in an official capacity. In accord with the two previous rules, the Article 6(1) ECHR provision concerning the 'right to a fair trial' guarantees that 'everyone is entitled to a fair and public hearing within a reasonable time'. Examination of the case regarding an individual must necessarily be submitted to 'an independent and impartial tribunal, established by law' which is called upon to analyse on 'the determination of his civil rights and obligations or of any criminal charge against him'.[33]

In Italian law, the principles concerning concepts of judicial process and judicial review are found in the coordinated reading of the legal provisions re-

33 R. Nazzini, *Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective*, 49 *Common Market L. Rev.*, 971, 2012.

ferred to in Articles 24, 111 and 113 of the Constitution.[34] In particular, the fundamental principle referred to in Article 24(1) of the Constitution affirms that 'anyone may bring a case before a court of law in order to protect their rights under civil and administrative law'. Furthermore, Article 24(2) of the Constitution also provides a right to a defence as 'an inviolable right at every stage and instance of legal proceedings'. Article 111(1) of the Constitution states the principle of 'due process' and the rule on the basis of which 'the jurisdiction shall be implemented through due process regulated by law'. This goes hand in hand with the precept laid down in Article 111(2) of the Constitution whereby 'all court trials shall be conducted with adversary proceedings and parties shall be entitled to equal conditions before a third-party and impartial judge'. In the same way, the norm referred to in Article 113(1) of the Constitution set up 'judicial protection of legitimate interests and rights against acts of the civil service before bodies of ordinary or administrative justice'.

It may be observed, on the basis of an examination of the above-mentioned provisions, that it is not difficult to identify some normative reference points on which to ground a correct interpretation of the concepts of judicial process and judicial review in relation to the administrative court's full jurisdiction.[35] In European law this is true of the right to a fair trial as provided for by *i*) Article 6(1) ECHR, which states that each case must be made public and examined within a reasonable time, *ii*) Article 13 ECHR, which establishes the right to an effective remedy, and Articles 47(1) and 47(2) of the Charter, where it is recognised that everyone has the right to an effective remedy before an independent and impartial court, previously established by law. This is also the case of Italian law, where the right to an effective remedy and defence at trial are laid down in Articles 24(1), 111(1) and 111(2) of the Constitution, where

34 *See English version of the Italian Constitution supervised by the Senate International Affairs Service* (Aug. 30, 2019) www.senato.it/application/xmanager/projects/leg18/file/repository/relazioni/libreria/novita/XVII/COST_INGLESE.pdf.

35 G. Zhu, *Deference to the Administration in Judicial Review. Ius Comparatum - Global Studies in Comparative Law* 3 ss., Springer 2019.

the principle of due process regulated by law is established, as is the reasonable duration of proceedings. Lastly, Article 113 of the Constitution recognises judicial protection before the civil or administrative courts with regard to acts by the public authorities. In reality, Article 24 of the Constitution is sufficient to affirm that the principle of effective judicial protection – understood here as the capacity of judicial process to ensure the rights of an individual to a fair hearing as recognised by law – is already provided for in this principle, which establishes that all are entitled to initiate legal action to uphold their rights. Nevertheless, in my opinion, it would see necessary to refer in any case to the other provisions of the Italian Constitution just mentioned.

It could be argued that the European and Italian norms give a certain legal value to the concepts of judicial process and judicial review. It is reasonably clear by way of contrast that these concepts are in conflict with recent readings significantly limiting the administrative court's jurisdictional powers over the NCA's decisions. This applies in particular to powers that allow the court to have full access to the facts of the case and to review the NCA's decisions, including technical assessments. On the other hand, it would appear to be true that the legal value of the concepts of judicial process and judicial review emerging from the aforementioned norms proves that full knowledge of the fact finding and technical assessments constitutes an essential element in the administrative court's full jurisdiction. This would also appear to be supported by a significant part of European Court of Human rights case law, as we shall see below.

5. Towards better judicial review of technical decisions: the case-law of the European Court of Human Rights

An influential address of the European Court of Human Rights[36] affirmed that, from the perspective of full jurisdiction, a judge must know and re-

36 P. Craig, *The Courts, the Human Rights Act and Judicial Review*, 117 *L. Quart. Rev.*, 589 (2001); L. Wildhaber, *A constitutional future for the European Court of Human Rights?*, 23 *Human Rights L. J.*, 161-165, 2002.

view all the questions of fact and law relevant to the solution of cases.[37] In this sense, we cannot speak of full jurisdiction if the court is considered not to have powers to review administrative decisions in relation to fact finding and technical assessments.[38] According to the case law of the Strasbourg Court, the court would not seem to be assured independence, as required by the ECHR, nor the power to review administrative decisions from the point of view of technical discretion. From this perspective, it has been observed that only an institution with full jurisdiction and able to satisfy a number of requirements, such as the independence with regard to both the Executive and the parties, can to be considered to be a tribunal within the meaning of Article 6(1) ECHR[39]. Furthermore, the full jurisdiction of the administrative courts can be deemed to be in line with the legal precepts of Article 6(1) only if proceedings coming before it are subject to subsequent control by a judicial body with full jurisdiction.[40] This aspect too characterises the theory of full jurisdiction.[41]

A significant body of the Strasbourg Court's case law establishes that in order to be a court with full jurisdiction, an administrative court must always be entitled to review the administration's reconstructions of the fact finding

37 More recently, for example, ECtHR, 11 January 2018, Case No. 38334/08 and 68242/16, *Haralambi Borisov ANCHEV* v *Bulgaria*, para. 131; less recently, *cf.* ECtHR 28 January 1983, Case No. 7299/75, *Albert and Le Compte* v. *Belgium*, para. 29; ECtHR 17 December 1996, Case No. 1996-VI, *Terra Woningen B.V.* v *the Netherlands*, para. 52; ECtHR, 10 July 1998, Case No. 21322/92, *Tinnelly and Sons ltd and others and McElduff and others* v *the UK*, para. 48; ECtHR, 24 November 2005, Case No. 49429/99, *Capital Bank AD* v *Bulgaria*, para. 98; ECtHR, 31 July 2008, Case No. 72034/01, *Družstevní záložna Pria and Others* v *the Czech Republic*, para. 107 and 111; ECtHR, 2 December 2010, Case No. 38780/02, *Putter* v *Bulgaria*, para. 47.

38 The scope of judicial review in administrative decision-making in the UK is set out in the ECtHR, 14 November 2006, Case No. 60860/00, *Tsfayo* v *UK*, paras. 25-33.

39 ECtHR, 16 July 1971, Case No. 13, *Ringeisen* v *Austria*, para 95; ECtHR, 29 April 1988, Case No. 132, *Belilos* v *Switzerland*, para. 64; ECtHR, 24 November 1994, Case No. 296-B, *Beaumartin* v *France*, paras. 38-39; ECtHR, 23 June 1981, Case No. 6878/75 and 7238/75, *Le Compte, Van Leuven and De Meyere* v *Belgium*, para 55; ECtHR, 13 February 2003, *Chevrol* v *France*, Case No. 49636/99, para 76.

40 ECtHR, 17 April 2012, *Steininger* v *Austria*, Case No. 21539/07, para. 49, where the requirement of full jurisdiction 'will be satisfied where it is found that the judicial body in question has exercised sufficient jurisdiction or provided sufficient review in the proceedings before it'; *see also* ECtHR, 21 July 2011, *Sigma Radio Television Ltd* v *Cyprus*, Case No. 32181/04 and 35122/05, paras. 151-152.

41 ECtHR, *Sigma Radio Television Ltd.* v *Cyprus*, *supra* n. 39, para. 157.

and technical assessments. From this point of view, it may be useful to observe that for a court to satisfy Article 6(1) ECHR, on the determination of civil rights and obligations, it must have jurisdiction to examine all questions of fact and law relevant to the dispute.[42] The approach of the Strasbourg Court is significant in that it proves that no obstacles may prevent a court having full jurisdiction over all matters, of fact and law, concerning the dispute. Judgments regarding complex technical evaluations *must* be included; hence a court can review these assessments in an effort to offer a different interpretation of the fact finding and technical assessments forming the basis of the public authority's decision.

As regards judicial review of complex technical assessments, the Strasbourg Court has recognised that, if full jurisdiction is challenged, proceedings might still satisfy the requirements of Article 6(1) ECHR if the court deciding on the matter has considered all the applicant's submissions on their merits, point by point, without having to decline jurisdiction in replying to them or ascertaining facts.[43] This is a rigorous judicial review including verification of the technical discretion that the administrative court will have to review point by point. If it were not so, there would be an evident denial of justice in the form of an infringement of the right of access to a court, which could occur when any individual could not challenge before a court an assessment of facts in a decision adopted by a public authority, even if the same authority acts within its discretionary power.[44]

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42 ECtHR, *Chevrol* v *France*, *supra* n. 38, para 77; ECtHR, *Le Compte, Van Leuven and De Meyere* v *Belgium*, *supra* n. 36, para. 51(b); ECtHR, 26 April 1995, Case No. 312, *Fischer* v *Austria*, para. 29; ECtHR, 17 December 1996, Case No. 2064/92, *Terra Woningen B.V.* v *the Netherlands*, para 52.

43 ECtHR, *Družstevní záložna Pria and Others* v *the Czech Republic*, *supra* n. 36, para 111; ECtHR, 21 September 1993, Case No. 268-A, *Zumtobel* v *Austria*, paras. 31-32; ECtHR, *Fischer* v *Austria*, *supra* n. 37, para 34.

44 ECtHR, *Družstevní záložna Pria and Others* v *the Czech Republic*, *supra* n. 36, para 111; *see also* ECtHR, 10 July 1998, Case No. 1998-IV, *Tinnelly & Sons Ltd and Others and McElduff and Others* v *the UK*, para 74.

From the perspective of full jurisdiction, a significant body of the Strasbourg Court's case law recognises that it will not be possible to speak of full jurisdiction if the court cannot review 'the merits of the case'[45] or carry out 'a review of the facts'[46] by means of a substitute review. To this end, the Court has specified that it is not enough to establish that a public authority's discretionary power[47] 'has been used in a manner compatible with the object and purpose of law',[48] but it is necessary for the administrative court's review to be able to 'verify whether grounds in fact existed'[49] so that this 'should have full jurisdiction to review the facts'.[50] If the court does not have jurisdiction to rehear the evidence or make its own views in relation to facts and technical assessments of the case prevail, full jurisdiction cannot be said to have been realised.[51]

The Menarini judgement,[52] of course, represents a leading case for the theory of full jurisdiction. In the *Menarini*, concerning the NCA's ascertainment of anti-competitive practices in the market of tests for the diagnosis of diabetes by an Italian pharmaceutical company, the Strasbourg Court established some fixed points regarding the administrative court in question of judicial review and thus on its full jurisdiction. First of all, it was recognised that only 'a body enjoying full jurisdiction and meeting a series of requirements such as independence from the executive as parties involved can receive the appellation

45 ECtHR, *Albert and Le Compte* v *Belgium*, *supra* n. 36, para. 36.
46 ECtHR, *Le Compte, Van Leuven and De Meyere* v *Belgium*, *supra* n. 38, para. 60.
47 ECtHR, *Družstevní Záložna Pria and Others* v *the Czech Republic*, *supra* n. 36, para. 111.
48 ECtHR, 28 June 1990, Case No. 11761/85, *Obermeier* v *Austria*, para. 70.
49 ECtHR, *Tsfayo* v *UK*, *supra* n. 37, para. 47.
50 ibid., para. 51.
51 ibid., para. 47.
52 ECtHR, 27 September 201, Case No. 43509/2008, *A. Menarini Diagnostics s.r.l.* v *Italia*. The applicant is an Italian company based in Florence (Italy). In 2001, the Italian NCA (so-called *Autorità Garante della Concorrenza e del Mercato AGCM*), investigated the company for unfair competition. In a decision of 30 April 2003, it fined the company 6 million euros for unfair competition on the diabetes diagnosis test market, stating that the penalty should serve as a deterrent to all pharmaceutical companies. All the company's appeals against that decision were rejected. Relying on Article 6(1) ECHR, the applicant company complains that it had no access to a court with full jurisdiction or to judicial review of the administrative decision of the AGCM.

of tribunal within the meaning of Article 6 (1)'.[53] Secondly, in order to be an authority 'with full jurisdiction', an administrative court must exercise the power of review 'on the different allegations of fact and law'[54] subject to his knowledge, since it cannot limit its activity to 'a simple judicial review of legality'.[55]

More specifically, the administrative court has to: *i*) 'verify whether, in relation to the particular circumstances of the case, the AGCM had made appropriate use of its powers', *ii*) 'examine the merits and proportionality of the choices made by AGCM', and *iii*) 'carry out the judicial review on technical assessments'.[56] By reason of these powers, as configured in the Menarini judgement, the Strasbourg Court ruled that the administrative court's review of the NCA's decisions must be carried out 'going beyond an external judicial review on the logical consistency of the motivation of the NCAs',[57] specifying that 'among the characteristics of a judicial body with full jurisdiction is the power to reform in all points in fact and in law, the decision undertaken'.[58]

With this in mind, it does not seem difficult to see that the recent Italian approach to the question of the limits of the administrative court concerning full jurisdiction of fact finding and technical assessments in NCA decisions clearly contrasts with an influential part of Strasbourg case law. From this perspective, the approach of the Strasbourg Court, together with the legal rules of EU and Italian law, show that full judicial review of technical discretion is an essential component of the administrative court's jurisdiction. If judicial review constitutes an essential feature of jurisdictional function, this is true inso-

53 ibid., para. 61; *see also* ECtHR, 16 July 1971, Case No. 2614/65, *Ringeisen* v *Austria*, para. 95; ECtHR, 29 April 1988, Case No. 10328/83, *Belilos* v *Suisse*, para. 64; ECtHR, 24 November 1994, Case No. 15287/89, *Beaumartin* v *France*, paras. 38-39.

54 ECtHR, *A. Menarini Diagnostics s.r.l.* v *Italia*, *supra* n. 47, para. 63.

55 ibid., para. 64.

56 ibid.

57 ibid., para. 66.

58 ibid., para. 59, 'the decision of an administrative authority which does not itself fulfil the conditions of Article 6 §1 is subject to subsequent review by a judicial body having full jurisdiction'.

far as it is possible to state the need for full review by an administrative court so that its judicial power can extend to overriding a decision by a public authority.

To this end, the pages to follow will be dedicated to the legal provisions of Article 6(1) ECHR and Article 24 of the Constitution, concerning court scrutiny of technical discretion, in order to show that effective judicial review of NCA decisions can only be based on the correct interpretation of these very legal provisions.

The final part of this article argues for the administrative court's review of NCA, based on a different understanding of the nature and function of the powers of public authorities, namely one that, by virtue of the principle of the sovereignty of the people, is directed to accomplishing full realisation of the fundamental rights of the individual.

6. Judicial review of technical decisions in the light of Article 6 of the European Convention on Human Rights and Article 24 of the Italian Constitution

EU law on private antitrust enforcement and especially the Damages Directive, as we have seen in the Italian case, could pose a serious problem as to the judicial review of NCA decisions. It will be clear by now that an element of unconstitutionality emerges with regard to legal protection when no civil or administrative court can be called upon to review the NCA's fact finding and technical assessments (*i.e.* technical discretion). On the one hand, following the transposition of the Damages Directive, we observe that the civil court's review of fact finding and technical assessments is not envisaged in the Italian legal system (pursuant to Legislative Decree 19 January 2017, No. 3), while a significant volume of case law fails to recognise judicial review by the administrative courts. A paradox therefore arises because no court (either civil or administrative) can scrutinise the NCA's technical discretion.

There is no doubt that judicial review of the NCA's decisions will have to come under the jurisdiction of the administrative court, otherwise no court will be able to carry out any similar judicial scrutiny. And here lies the main problem. If no court may be invoked to review the interpretation of the fact finding and technical assessments carried out by the NCA, the 'right of defence' enshrined in EU and Italian law will be eroded. This right is guaranteed, as seen previously, both by Article 6(1) ECHR and Article 24 of the Constitution. Hence, we should refer to these two main norms for a solution to the problem of full judicial review as regards technical discretion in NCA decisions.

The full judicial review of NCA decisions by administrative courts has found confirmation in the context of EU law, above all in Article 6(1) ECHR and its application in Italian law. According to Article 6(1) ECHR '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'. This rule meant to ascribe a criminal nature to the penalties imposed by administrative authorities, including the NCA.[59] From the perspective of full jurisdiction, Article 6(1) of the ECHR requires the decision to apply any sanctions resulting from a procedure that does not satisfy the conditions set out in its first paragraph to be subject to subsequent judicial review by a court with full knowledge of the facts and the law. This approach is based on a holistic conception of the administrative procedure and the subsequent phase of judicial review, for which the proceeding before the administrative court becomes susceptible to the possible correction, even *ex post*, of the potential lack of safeguards: firstly, in terms of the dispute itself; secondly, in terms of the evaluation of the fact finding and technical assessments, and thirdly in terms of sanctions. A similar approach, which would require the administrative authority to exercise its au-

59 The starting point for the assessment of the applicability of the criminal aspect of Article 6 ECHR is based on the criteria outlined in ECtHR, 8 June 1976, Case No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, *Engel and others* v *the Netherlands*, paras. 82-83.

thority a second time in order to ensure procedural rights are guaranteed in the decision-making process, prescribes at least that possibility of the court verifying the correct identification of the sanctionable case, especially when this identification involves complex assessments by the public authority, as often happens in an antitrust procedure with regard to the identification of relevant market.[60]

Article 6(1) ECHR, as we have argued with regard to the interpretation of the concepts of judicial process and judicial review, undoubtedly represents a fundamental point for an elaboration of the administrative court's full jurisdiction of the NCA's decisions in terms of the protection of rights jeopardised by the exercise of the public authority. In general, Article 6(1) ECHR should be interpreted as guaranteeing effective judicial review by the national courts with regard to civil rights and therefore also in relation to the rights jeopardised by NCA decisions. From this point of view, it is clear why a limited review of technical discretion by the civil or administrative courts cannot be considered to be an effective judicial review pursuant to Article 6(1) ECHR.

First and foremost, we should bear in mind that Article 6(1) ECHR establishes 'the principle that a court should exercise full jurisdiction'.[61] For this reason, Article 6(1) ECHR must be considered to be infringed when a court is not able to know the merits of the case in depth and cannot therefore submit to review all the facts and technical assessments as ascertained by a public authority. In the same way, it must be considered an infringement of full jurisdiction when a court has not been allowed to examine the facts and the technical aspects of the case through judicial review but simply verified that the public authority did not act beyond its discretionary power[62].

60 A. Kalintiri, *What's in a name? The marginal standard of review of "complex economic assessments" in EU competition enforcement*, 53 *Common Market L. Rev.*, 1295, 2016.

61 ECtHR, *Chevrol* v *France*, *supra* n. 38, para. 63.

62 A. Fritzsche, *Discretion, scope of judicial review and institutional balance in European law*, 47 *Common Market L. Rev.*, 365, 2010.

From the perspective of full jurisdiction, in advocating a strengthening of the administrative court's powers, scrutiny should not be limited to assessing lawfulness but should be extended to ascertain whether the NCA's fact findings and technical assessments are not contradicted by the evidence of the adverse party. Effective judicial review cannot be achieved by merely assessing whether discretionary power has been used correctly by the NCA on the strength of an 'external' or 'weak' judicial review.[63] On the contrary, as we will see, fact finding and technical assessments need to be reviewed by recourse to rigorous judicial scrutiny.

In the same way, a court's knowledge cannot be reduced, on the basis of an 'external' judicial review, to such an extent as to prevent verification of whether the facts reconstructed by the NCA actually subsisted. It is clear that this reading of Article 6(1) ECHR, starting from what emerges in significant parts of the Strasbourg Court decisions,[64] seems to run counter to interpretative orientations that consider the administrative court structurally incompatible with the rule of law and the system of legal and judicial protection guaranteed by the ECHR and the Italian Constitution. It is no coincidence that Article 6(1) ECHR and Article 24 of the Constitution make the effectiveness of courts' powers contingent on full knowledge of the facts according to an 'internal' and 'rigorous' judicial review.

One of the principles of the Italian Constitution is the right to seek legal redress before a court for the protection of one's subjective legal positions. Indeed, Article 24 of the Constitution affirms that 'anyone may bring cases before a court of law in order to protect his rights under civil and administrative law'. In other words, this rule deals with the right to obtain full and effective legal protection through the exercise of full legal action. In this sense, we might say that Article 24 of the Constitution provides an autonomous constitutional

63 S. Lavrijssen & M. de Visser, *Independent administrative authorities and the standard of judicial review*, 2 *Utrecht L. Rev.*, 111-135, 2006.

64 W. Wils, *The increased level of EU antitrust fines, judicial review and the European Convention on Human Rights*, 33 *World Competition L. & Econ. Rev.*, 5-29, 2010.

concept of legal redress, which constitutes an inviolable fundamental right. In the light of this definition, it is clear that Article 24 of the Constitution has the advantage of conferring a precise role to the administrative process because it requires judicial proceedings for the effective legal protection of rights threatened by the actions of the public authorities. Hence, the effectiveness of judicial review, as a legal instrument safeguarding the rights of an individual to a fair hearing as established by law, is already recognised in Article 24 of the Constitution insofar as this rule states the right to bring legal action in order to 'protect an individual's rights before a civil court and an administrative court'.

The interpretation of this constitutional norm suggests that when a subjective legal position is threatened there can always be a court case to protect it. With this in mind, Article 24 of the Constitution provides an *actio utilis* to the individual for the protection of his or her own legal sphere. Similarly, it is quite clear that administrative courts often use this outline, interpreting the rules relating to judicial review in the light of Article 24 of the Constitution, as well as to the rule of full jurisdiction protected under EU law, in order to afford applicants effective legal redress. Article 24 of the Constitution should therefore be considered to be breached whenever an administrative court does not have full access to the merits of the case through internal and substitutive judicial review. It is not enough to have a 'fair trial' between adverse parties acting in their own interests and as equals so that their subjective legal positions can be protected effectively. On the contrary, in this case, a party must be able to seize an administrative court to seek review of the fact finding stage and technical assessments, and where possible obtain a different interpretation from that of the NCA.

Moreover, a proceeding conducted without the possibility of challenging the fact finding and technical assessments leading to the NCA's decisions cannot to be a 'fair trial'. If, at trial, a party is not permitted to present the court with a different interpretation of the fact finding provided by the NCA, it can-

not be said that there is 'parity' between the private party and the public authority. If nothing regarding the technical assessments of the NCA's decisions is available to the party wishing to demonstrate a different reading of the case before it, we cannot define the right to provide evidence in court 'effective'. Administrative courts cannot limit themselves to a 'weak' or 'external' judicial review, because in this case it fails to exercise the adjudicatory function, thus acting in breach of Article 133 of the CAP, which, pursuant to Article 24 of the Constitution, establishes that 'disputes concerning all measures adopted by the NCA are devolved to the administrative court's exclusive jurisdiction'.

Denying an administrative court, the right to conduct a judicial review of the NCA's fact findings and technical assessments, is tantamount to denying scrutiny of the judgement with regard to the ascertainment of the fundamental elements leading to the decision of the NCA. This in turn implies failure to uphold the individual's right to defence enshrined in Article 24 of the Constitution. The administrative court's judicial review of the fundamental elements leading to a decision of the NCA assumes particular importance with regard to the individual's right to an effective defence in the constitutional legal order. From this point of view, the legal precepts of Article 24 of the Constitution support the principle of the administrative court's full jurisdiction.

Seen in these terms, Article 24 of the Constitution and Articles 6(1) ECHR clearly show a sharp contrast between, on the one hand, positions held in Italian case law concerning 'external' and 'weak' judicial review and, on the other, the principle of the full jurisdiction of the administrative courts grounded in EU and Italian law.

Although the need to invoke some fundamental legal rules such as the European and Italian norms on judicial review is clear, in the background there remains the problem of ensuring the individual's right to full redress against the discretionary power of a public authority, especially when this power is not sufficiently reined in by law.

However, at this point a decisive theoretical problem arises that we will attempt to explain in the final part of the article.

7. Conclusion: A theoretical paradigm shift towards the sovereignty of the people

In Italian legal scholarship, the public administration has long been considered an expression of the State's will imposed on individuals as result of enforcement and the establishment of the public interest.[65] This approach includes the principle of the authorities' political legitimacy through the procedural mechanism of political representation. Therefore, the executive and public authorities more generally can be described as a number of entities embodying the State's authoritative will, implementing legislative power.[66]

Identifying the public authorities with the State's executive power implies that its political connotation is less influential. Instead, what emerges is its institutional role. In the light of this, a public authority is a State institution with its own legal system, according to which the executive power is granted by law in order to achieve legal norms through discretionary decisions, on the basis of an authoritarian will grounded in public interest.[67]

Although it represents an essential element of the people's sovereignty, according to this conception administrative power is still perceived as a legal entity attributed exclusively to the State and, through it, to the authority that exercises this power in accordance with the law. Thus, the authority holds administrative power in a general and abstract way and exercises such power whenever it has to satisfy a need concerning public interest. For this reason, its functions are characterised by an almost inexhaustible reserve of discretionary

65 S. Romano, *Teoria dei diritti pubblici subiettivi*, in *Primo trattato completo di diritto amministrativo italiano* [*Theory of Subjective Public Rights, in First Complete Treatise on Italian Administrative Law*] 111, V.E. Orlando ed., Società Editrice Libraia 1900. We might observe a similar approach on the German administrative law doctrine: e.g. *see* P. Laband, *Das staatsrecht des deutschen reiches*, vol. II, 64-67, Mohr 1901; *see also* C.F. von Gerber, *Über öffentliche Rechte*, 27 (Laupp 1852); G. Jellinek, *System der subjektiven öffentlichen rechte*, 212-233, Laupp 1892.

66 E. Carolan, *The New Separation of Powers: A Theory for the Modern State*, 106, Oxford University Press 2009.

67 The legal sense of public interest will be examined later.

powers. It deals with a conception that, in Italian administrative scholarship, results in a division between two types of subjective legal positions, namely between subjective rights and legitimate interests on the basis of the bound or discretionary nature of the administrative power.

In this way, administrative decisions would be subject to judicial review in relation to discretionary power. On the other hand, with regard to bound power, the authority will enjoy a margin of discretion that expresses a political choice and, as such, is not subjected to any judicial control. In other words, referral to an administrative court to review discretionary powers commonly derives from the idea of the intrinsic indisputability of the merit, as the procedure for assessing the public interest is generally reserved to the public authority.[68] Consequently, everything seems more logical and convincing once the authority has been assigned to the State and, through this, to the administrative body that exercises its power whenever it is in the interest of the public.[69]

According to this approach, it is said that a decision by a public authority cannot be challenged when it is discretionary, and that judicial review will just result in external control since the court's scrutiny will address questions of lawfulness and not merit. Therefore, judicial review will be limited to the examination of the proportionality and reasonableness of the administrative decision as it cannot be replaced by judicial decision-making neither with regard to fact finding nor technical assessments. Examples are, as we have sought to argue, decisions of the NCA, that are subjected only to a decision as to lawfulness by an administrative court.

These decisions are submitted to weak judicial review, unable to overturn the decisions of the authority in relation to technical discretion, because the court may only pronounce on proportionality and reasonableness but not on

68 P. Daly, *A theory of judicial deference in administrative law – basis, application and scope* ch. 5, Cambridge Univ. Press 2012.

69 On the administrative discretion is fundamental D. Galligan, *Discretionary powers. A legal study of official discretion*, 1-55 (Clarendon Press Oxford 1986). Recently, *see also* J. Bell, *Judicial review in administrative state*, in *Judicial review of administrative discretion in the administrative state*, 3-27, J.de Poorter et al. eds., Springer 2019.

the merits. In essence, the power of the administrative court does not include the power to replace administrative discretion with its own judicial discretion. Now, as we might clearly expect, the argument of 'external' and 'weak' judicial review can be widely justified and strengthened by recent European and Italian legislation. This legislation includes the Damages Directive and Legislative Decree No. 3 of 19 January 2017, on the enhancement of the effectiveness and procedural efficiency (in a legal perspective[70]) of actions for damages in the private and public antitrust enforcement systems.

It should be noted that the conception of administrative authority that we have just described is clearly disregarded by the positive law emerging from the Italian Constitution. First and foremost, the hypothesis that administrative authority is not exclusively attributed to the State and, through it, to the public authority itself, is based on Italian constitutional provisions based on the sovereignty of its people. It must be clear, in fact, that according to Article 1(2) of the Constitution 'sovereignty shall belong to the people and be exercised by the people'. Furthermore, the main goal of the administrative power is to 'recognise and protect the individual's fundamental rights' according to Article 2(1) of the Constitution.

From this point of view, the people's sovereignty could therefore be explained in the light of the democratic legitimacy of the public authority, which does not take on institutional forms typical of the State but is more an expression of the exercise of an individual's fundamental rights recognised in Constitutional law.[71] In this explanation, we should consider that the rights of individuals in constitutional law are not the object of the administrative authority; rather, they are the source of that power and their accomplishment, the aim which must be achieved by exercising such power. In this way, the legal meaning of public interest may also need clarification: it will consist of duties and

70 See my book D. Vese, *Sull'efficienza amministrativa in senso giuridico* [*The Legal Foundations of Administrative Efficiency*], Cedam 2018.

71 For this argument, see L.R. Perfetti, *Sull'ordine giuridico della società e la sovranità*, [*On the legal order of society and sovereignty*], in *Scritti per Luigi Lombardi Vallauri*, Cedam, 2016, 1153 ss.

tasks, legally established within the legal system as and when required, through which the State and administration will have to ensure, enforce, and enhance the fundamental rights of the individual through the use of the administrative authority.

It might now be argued that the problem of the nature and function of administrative authority lies at the heart of the issue concerning the effectiveness of the judicial review of administrative decisions. So, if we now try to consider the public administration essentially as an organization based on the sovereignty of the people and, therefore, as a structure accomplishing the fundamental rights of the individual, we could reasonably discuss the possibility that there will no longer be any reason to prevent the full judicial review of administrative decisions. If the legal meaning of administrative authority, as we have tried to demonstrate so far, is to satisfy and promote individual rights, as stated in the Italian Constitution, individuals must be able to ascertain that this purpose is effectively fulfilled by the executive and other public authorities. It is reasonable to assume that this purpose will be achieved first and foremost by full judicial review of any administrative decisions.

In order to ensure that this goal is met, there is no doubt that the decisions of the administration must be subject to rigorous judicial scrutiny by a court, which must be able to verify the merits of the administrative decision and, where necessary, replace it with a judicial decision. In Italian positive law, on the other hand, there are at least three important elements to suggest the full jurisdiction of administrative courts. Firstly, a proceeding defined as a dispute between parties on an equal footing according to Article 111(2) of the Constitution. Secondly, the independence of the court, with the power to guarantee full judicial protection under Article 104(1) of the Constitution. Thirdly, proceedings are based on the principle of evidence in accordance with Article 111(4) of the Constitution.

Nevertheless, as we have seen throughout, the solution to the problem of judicial review of the NCA's decisions is grounded largely in the fundamental legal rules on the 'right to a fair trial' and the 'right to a defence' laid down respectively in Articles 6(1) ECHR and Article 24 of the Constitution. Looking at these two norms, as we have attempted to show, the legal significance of judicial review of the NCA's decisions is clear.

A key understanding of judicial review of NCA decisions by the administrative courts may be summarised as follows: administrative courts may examine the merit and, where necessary, through rigorous judicial scrutiny, override the NCAs fact finding and technical assessments to ensure full legal protection of the applicant's individual rights.