FRANCESCO GOISIS
Full Professor of Administrative Law, University of Milan

*Judicial Review of Administrative Technical Complex Assessments: Italian and EU Experiences Compared**

1. Introduction.

Denis Galligan in his book about discretionary powers, addressing the topic of the intensity of review of discretionary powers by the courts of common law, observes that "*the historical development of judicial review is a fine example of incrementalism, of the piecemeal evolution of a body of doctrine in response to changing political and social factors*". Then, in summing up the common law experience, he notes that "*The Courts in practice shift between the different levels in accordance with the kinds of factors that are by now familiar: the constitutional doctrines, the nature of the instititution and its powers, the interest at issue. It seems also that judicial review is bound to fluctuate in this way for those kinds of reasons, and that few benefits are to be gained from uniform, rigid approach*"[1].

In my presentation, I will try to discuss two main points:

a. whether the fluctuations that, similarly, Italian jurisprudence shows express any clear rationale, or, on the contrary, are just signs of theoretical and practical confusion;

b. whether a significant incrementation of the intensity of judicial scrutiny is predictable. In this respect, I will especially examine the development in course in the context of European Union jurisprudence, which is trying to make the intensity of its judicial review on antitrust fines in line with the doctrine of full jurisdiction, as elaborated by the European Court of Human rights.

2. General Principles Governing Judicial Review of Administrative Action in Italy.

Following the French model, the Italian system of judicial review of administrative action is almost entirely established around a separate judiciary, whose highest court is the

* Presentation delivered on the 22nd of August 2014 at the *Oxford Fermo Summer Symposium - At the Boundaries of Law and Society* , jointly organized by the Department of Socio-Legal Studies of the University of Oxford and by the University of Macerata.

[1] GALLIGAN, *Discretionary Powers. A Legal Study of Official Discretion*, Oxford, 1990, 220 and 324.

Council of State. As in France, one of the main historical reasons of this organizational choice is to be found in the principle of separation of powers: the administrative judiciary, when established in 1889, was considered as a part of the executive. Therefore the power to quash administrative acts assigned to the Council was perceived as perfectly in line with the separation between executive and judiciary. At the very beginning, it was even controversial whether the Council of State was due to exercise a real judicial power, or, on the contrary, just a particular administrative power of internal annulment of administrative action, in the general interest of legality (i.e., an interest that belongs at first to the State)[2].

Coming to the present days, the Italian Constitution, enacted in 1947, does not expressly codify the principle of separation of powers, and in any case, allows the legislator to vest ordinary courts with the power of quashing administrative acts (art. 113, last par.[3]). As a result, now, ordinary courts have, for example, jurisdiction on a great part of administrative fines. No doubts, however, that the vast majority of the administrative acts are still to be challenged before Administrative Courts (which represent, according the Constitutional Court, "*the natural judge of the lawfulness of the exercise of the public function*"[4]).

Under art. 113, pars. 1 and 2[5], judicial review is constitutionally guaranteed only in terms of review of legality-lawfulness: all and any kind of violations of laws (either substantive ore procedural) as well as of general principles of administrative action can, in principle, trigger the annulment of any type of administrative act by the competent court. More in details, unlawfulness is a quite inclusive concept, for it covers any kind of unreasonableness and lack of proportionality, as well as the failure from properly examining the facts in the administrative phase and to pursuit the specific public law interest for which the power has been conferred (so called *eccesso di potere*, excess of power). In other terms, under the scrutiny of *eccesso di potere* a substantial (as opposed to an only formalistic and external) judicial review is made available. A law aiming at restricting the general right to challenge any administrative act for any reason of illegality-unlawfulness would be unconstitutional. However, no constitutional protection exists as to the possibility of challenging the so called "administrative merits" (i.e., the merits of the administrative

[2] See for example ORLANDO, *Giustizia amministrativa, in Primo trattato completo di Diritto amministrativo*, III, Milano, 1901, 728 and following.

[3] " *The law determines which judicial bodies are empowered to annul acts of public administration in the cases and with the consequences provided for by the law itself*".

[4] Constitutional Court, 11 May 2006, no. 196, e, in the same exact terms, Constitutional Court, 27 April 2007, no. 140.

[5] "*The judicial protection of rights and legitimate interests before the organs of ordinary or administrative justice is always permitted against acts of the public administration. Such judicial protection may not be excluded or limited to particular kinds of appeal or for particular categories of acts.* "

decision). The Constitution allows (but does not impose) the legislator to vest Courts with the power to substitute their own decision for the one taken by the Administration. Consistently, art. 100, par. 1, of Constitution defines the Council of State as an organ aimed at ensuring the justice within the Administration ("*Il Consiglio di Stato è organo….di tutela della giustizia nell'amministrazione*"), and this seems to suggest that no rigid distinction exist between administrative function and judicial function of the administrative courts. In other terms, the distribution of competence between the Courts and the Administration is a matter primarily left to the discretion of the ordinary legislator, without particular constitutional restraints .

More in details, the current Italian administrative justice system is based on the distinction between two main areas of competence:

- the so called jurisdiction of lawfulness (*giurisdizione di legittimità*) of the Administrative Courts and,

- the so called jurisdiction on the merits (*giurisdizione di merito*) of the Administrative Courts.

The former is a general competence (in the sense that it may be exercised in relation to any type of administrative decision, consistently with art. 113, par. 2, Constitution). The latter may be exercised only in the specific matters for which it is expressly provided for by the legislator (currently, art. 134 of Administrative Trial Code.). This distinction is of central importance for the purpose of this presentation: in fact, as suggested by its name, in the *giurisdizione di merito* the Administrative Court is vested with the power to directly address the very merits of the administrative decision, even where fully discretionary, and, thus, to replace it with its own decision (see in particular art. 7, par. 6, of Administrative Trial Code: "*the Administrative judge exercises a jurisdiction with cognizance extended to the merits in the cases indicated by the law or by art. 134…in exercising such jurisdiction…it can substitute for the administration*"). On the contrary, the administrative merits represent a barrier to the judicial review exercised in the context of the general *giurisdizione di legittimità*.

To really understand the boundaries of the administrative merits (and therefore of the *giurisdizione di legittimità*) we need now to examine two essential concepts, i.e. the concepts of administrative discretion and that of technical discretion.

According to the prevailing opinion , the administrative discretion may be defined as a power of choice conferred by the legislator to the Public Administration on how better pursuing the public interest in deciding on those features and contents of an administrative act,

which are not already pre-determined by the law[6]. This decision is to be taken based on all the interests, whether public or private, which are involved in the administrative action. In particular, these interest are to be compared among one to another and with the primary interest (i.e., the public interest for the protection of which the administrative power is mainly conferred by law), so to eventually identify the so called concrete public interest, which is due to guide the final determination on which decision is to be taken.

This definition makes it possible (at least in principle) a clear distinction between administrative discretion and the so called technical discretion. The latter, as the former, relates to complex choices, but, unlike administrative discretion, regards choices which do not involve public interest assessments, but just technical assessments, to be conducted based on a specific technical and scientific knowledge. An example: whether an academic can be qualified to be a full university professor is not a choice due to be based on a public interests assessments, but only on an assessment of his scientific preparation. It is an highly controversial assessment (whose outcome is far from being easily predictable in advance), and this explains the use of the term discretion, but it is logically different from a power of administrative discretion.

Anyway, traditionally both the administrative and technical discretions have been considered as falling, in their hardcore, within the realm of administrative merits, and, as consequence, to be subject only to a scrutiny in terms of excess of powers, without any capacity for the administrative courts (except where vested with a competence on merits) to directly examine the intrinsic appropriateness and shareability of the choice. The scholars who have supported the assimilation between administrative and technical discretions have noted that wherever a choice is, in its hardcore, controversial, would be inappropriate for the Courts to replace the administrative choice with their one for two main reasons: *a.* the Administration is subject to the democratic principle, as accountable to democratically elected organs, whilst, by contrast, the Courts are, by definition, independent from any democratic control and guidelines[7], since subject exclusively to the law (art. 101, par. 2, Constitution[8]); *b.* the public administration, pursuant to art. 97 Constitution (which codifies the principle of administrative efficiency and effectiveness), is due to be (and usually is) technically specialized, whilst Courts are inevitably much less prepared in (and reluctant to) dealing with complex technical choices that, as a consequence, eventually, would be left to

[6] GIANNINI, *Il potere discrezionale della pubblica amministrazione*, Milano, 1939.
[7] MARZUOLI, *Potere amministrativo e valutazioni tecniche*, Milano, 1985, in part. 220 and followings.
[8] "*I giudici sono soggetti soltanto alla legge*".

technical experts appointed by the Court[9]. But such experts do not offer any better guarantee of efficacy than a specialized administration.

In any case, at present probably the majority of the scholars deems that technical discretion should be fully and intrinsically (re)examined by the Court[10], although, according to a significant number of them, only up to a limit beyond which it is absolutely impossibly to identify a better solution, i.e. up to the limit of a clear and unavoidably controversiality of the assessment.

As we will see more analytically in the next paragraph, the prevailing jurisprudence tends to show a quite deferential approach vis-à-vis technical discretion, and in particular, vis-à-vis administrative discretion. Apart from the cases of *giurisdizione di merito,* it is well established the principle according to which the administrative merits cannot be fully reviewed, i.e, that the administrative discretion cannot be examined, other than externally, in terms of *eccesso di potere*. As to the technical discretion, there is a high degree of confusion, although it is still well represented the idea that also in this kind of administrative powers only an external review is allowed.

The position of the European Court of Human Rights is different. For example, in 2005, it made it clear that wherever an administrative act is based on a complex technical assessment (such as the financial conditions of a bank), this does not exempt the national administrative court from exercising a full jurisdiction: either the administrative judges should appoint a technical expert, or a specialized court should be set up[11]. Indeed, in the view of Strasbourg judges, there is "*a violation of the right to access to a court where the applicant could not challenge before a court an assessment of facts in a decision adopted by*

[9] DE PRETIS, *Valutazione amministrativa e discrezionalità tecnica*, Padova, 1995, in part. 356 and followings.

[10] See in particular Cerulli Irelli, *Note in tema di discrezionalità amministrativa e sindacato di legittimità*, in *Dir. proc. amm.*, 1984, 463 and following; SCOCA, *La discrezionalità nel pensiero di Giannini e nella dottrina successiva*, in *Riv. trim. dir. pubbl.*, 2000, 1045 and following, 1046; PAOLANTONIO, *Il sindacato di legittimità sul provvedimento amministrativo*, Padova, 2000, chapt. V; POLICE, *Il ricorso di piena giurisdizione davanti al giudice amministrativo. Contributo alla teoria dell'azione nella giurisdizione esclusiva*, Padova, 2001, II, 408 and following.

[11] Eur. Court of Human Rights, sect. V, 24 November 2005, caso no. 49429/99, *Capital Bank AD* v. *Bulgaria*, § 113: "*The Court, for its part, is prepared to accept that the BNB's opinion on this issue carries significant weight because of its special expertise in this area. However, it is not persuaded that the domestic courts, if need be with the assistance of expert opinion, could not themselves ascertain whether the applicant bank was insolvent or not. The difficulties encountered in this respect could also be overcome through the provision of a right of appeal against the BNB's decision to an adjudicatory body other than a traditional court integrated within the standard judicial machinery of the country, but which otherwise fully complies with all the requirements of Article 6 § 1, or whose decision is subject to review by a judicial*".

an administrative authority acting within its discretionary power […]. It that case, the judicial review never led to a full scrutiny of the factual basis of such a decision"[12].

As a general principle, national Courts of full jurisdiction are not allowed " *to have a determination of questions of both fact and law […] be displaced by the ipse dixit of the executive*" [13].

Recently, in the *Placì* judgment of 2014, the European Court took a specific position about the Italian model of judicial review of technical discretion. In a dispute related to the request of ascertaining that a mental illness had been caused by the compulsory service in the army (i.e., a complex technical assessment based on the medical sciences), the Court found Italy in breach of art. 6 ECHR. The Council of State, in fact - expressly on the ground of its limited powers of review in the jurisdiction of lawfulness - fully relied on the findings of an (directly interested) administrative body, without independently examining the central point at stake in the case, i.e. the alleged causal link between the military service and the illness. This (highly deferential) approach was expressly criticized: "*the Court observes that the importance of the report in the applicant's case is highlighted by the fact that on appeal the CS considered that it was indeed necessary for the determination of the case [...]. There is also no doubt as to the reliance of the CS on the Medical Board's report, the findings of which it endorsed without hesitation or further assessment. Indeed, while adopting the report's conclusions, the CS noted that in its limited powers of judicial review of administrative acts (sede di legittimità) it could not examine the merits of that report (despite a contrasting report having been produced by the applicant's expert), irrespective of the fact*

[12] Eur. Court of Human Rights, sect. V, 31 July 2008, case no. 72034/01, *Družstevní záložna Pria and Others* v. *the Czech Republic*, § 111

[13] Eur. Court of Human Rights, Chamber, 10 July 1998, case no. 62/1997/846/1052-1053, *Tinnelly & Sons*, § 77, that, in relation to the exclusion from a tender in connection to an assessment based on considerations of national security, observes that: "*[…] the conclusive nature of the section 42 certificates had the effect of preventing a judicial determination of the merits of the applicants' complaints that they were victims of unlawful discrimination. The Court would observe that such a complaint can properly be submitted for an independent judicial determination even if national security considerations are present and constitute a highly material aspect of the case. The right guaranteed to an applicant under Article 6, § 1 of the Convention to submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be displaced by the ipse dixit of the executive […]*".

In the same line, Court of Human Rights, sect. III, 30 October 2001, case no. 29545/95, *Devlin* v. *The United Kingdom*, § 31 and Court of Human Rights, sect. II, 19 March 2002, case no. 24265/94, *Devenney* v. *United Kingdom*, § 28: "*The Court observes moreover that the Government have failed to identify any new elements which could lead it to depart from its conclusion in the Tinnelly case that the severity of the restriction imposed by the conclusive section 42 certificate, which was tantamount to removal of the courts' jurisdiction by executive ipse dixit, was not mitigated by other available mechanisms of complaint, and that the situation in Northern Ireland did not exclude the introduction of special judicial procedures more apt to provide the individual with procedural justice*", and, finally, Court of Human Rights, 10 February 2004, case no. 18905/02, *John Carnduff* v. *United Kingdom*: "*The Court further observes that the decision to strike out the case was taken by independent judges upon careful examination of the issues involved. The present case is therefore not one in which the applicant's right of access to a court was "displaced by the ipse dixit of the executive*"".

that the report had only been submitted at the appeal stage. The CS thus rejected the challenge raised by the applicant to the report based on the findings of his own expert […]. It follows that the relevant aspects of the judgment adopted were entirely based on the Medical Board's findings"[14].

More in details, the intensity of review showed by the Council of State in the *Placì* case (and in many other similar judgments) is, at the same time, not in line with:

a. the doctrine of full jurisdiction (that, in order to *ex post* cure the deficits of the administrative procedure at the result of which a criminal sanction has been inflicted or a civil rights has been determined, imposes a model of administrative justice in which the Court considers the submissions of the appellant "*on their merits, point by point, without ever having to decline jurisdiction when replying to them or ascertaining various facts*"[15])

b. the principle of equality of arms (that requires that each party is given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent): in other terms, wherever the Administration enjoys in a certain dispute a privileged position, in the sense that its ascertainment of fact is fully or partially undisputable and binding for the judge, not only full jurisdiction is not afforded, but, most of all, the private party, the appellant, is in a much weaker position than the Administration.

In sum, wherever complex technical assessment of the Administration are, fully or partially binding for the Court, art. 6 results to be infringed from two standpoints:

a. because lacking a full jurisdiction, no *ex post* compensation of the deficits of the administrative procedure is possible;

b. because even in the judicial phase, no equality of arms is afforded and therefore no fair trial is achieved.

3. Trends in the Italian jurisprudence.

But let's examine closer the prevailing positions within Italian administrative jurisprudence.

[14]Eur. Court of Human Rights, sect. II, 21 January 2014, case no. 48754/11, *Placì v. Italy*, §§ 1 and 79:

[15] Eur. Court of Human Rights, sect. I, 17 April 2012, case no. 21539/07, *Steininger v. Austria*, §50.

As anticipated Italian Courts are strongly convinced that the merits of an administrative discretionary choice is reserved to the public administration, unless differently provided for the legislator (in other terms, unless a case of jurisdiction on merits is established by law).

By contrast, there is no similar level of clarity and consistency as to the treatment of technical discretion.

Since 1999, Council of State has started to question the traditional idea of a full equivalence in their respective judicial treatments between administrative and technical discretion. In an important judgment[16] related to the retirement treatment of a judge claiming the causal link between his illness (an heart attack) and his official duties (allegedly particularly stressing and demanding), the administrative judges abandoned the traditional doctrine of deference. In particular, they recalled that technical discretion and administrative discretion are two different concepts: the latter relates to assessment of public interest, the former does not. The Council of State observed that "*the question of fact, related to a pre-requisiste of lawfulness of the administrative act, does not change - just because controversial - on a question of expediency, even where precedent or subsequent to a choice of expediency*"[17].

The clear (and unexplained) distance between this reasoning and that showed in the *Placì* case exempts us from mentioning other several cases that, similarly, reveal the high level of inconsistency within the administrative courts' jurisprudence. Just let's further note that in the *Placì* judgment, the Council of State observed that "*the opinion above examined is free from contradictions, clear illogicity or failure from considering relevant facts, with the consequence that in present jurisdiction of lawfulness in which no review on merits as to the technical assessment of the medical commission is allowed, there is no room to uphold the challenges proposed by the appellant*"[18], while in the 1999 judgment, the same Court expressly rejected the idea that the controversiality of a certain administrative choice may, *per se*, justify a deferential approach. But, for examples, in the field of appeals against the results of bar examinations or in relation to certain profiles of the litigation on public tenders,

[16] Council of State, sect. IV, 9 April 1999 no. 601.

[17] "*La questione di fatto, che attiene ad un presupposto di legittimità del provvedimento amministrativo, non si trasforma - soltanto perché opinabile - in una questione di opportunità, anche se è antecedente o successiva ad una scelta di merito*"

[18] Council of State, sect. IV, 4 February 2011, no. 801: "*Quanto precede ad avviso del collegio pone in evidenza che il parere sopra esaminato è immune da contraddizioni, palesi illogicità o disconoscimento di fatti rilevanti, con la conseguenza che nella presente sede di legittimità ove non sono consentite, come è noto, valutazioni di merito in ordine agli accertamenti tecnici eseguiti dalla Commissioni mediche, non ricorrono le condizioni per ritenere fondate le censure avanzate dall'appellante*".

Administrative Courts are often totally unconditional in denying any real possibility of review of the technical discretionary choices, except in cases of "*clear irrationality, absolute incongruence or macroscopic impropriety*"[19], i.e. in case of unreasonableness in the extreme, probably comparable to the British concept of *Wednesbury* unreasonableness.

A final remark: in the latest years, the Court of Cassation (which, in its capacity of supreme court, is competent to ultimately decide whether a certain question belong to administrative merits or may be directly examined by the administrative Court) seems oriented to support a more deferential approach: for example in 2012[20], it held that the assessment as to the professional reliability of a bidder in a public tenders represents a question of administrative merits, and, finally, in 2014, that the definition of the relevant market for the purpose of imposing an antitrust fine[21] is as well a matter of administrative merits, notwithstanding they are both questions that, although controversial, do not entail evaluation of public interest.

Judging from these latest trends in the Cassation'jurisprudence, it seems therefore that the approach by the Administrative Court is not at all likely due to become less deferential.

4. Trends in the jurisprudence of the European Court of justice.

Still in 2010, the Court of Justice of the European Union held that the General Court was prevented from expressing "*its own differing assessment of the capability of the joint commitments to eliminate the competition problems identified by the Commission*"; as, in doing so, the General Court "*put forward its own assessment of complex economic circumstances and thus substituted its own assessment for that of the Commission, thereby encroaching on the discretion enjoyed by the Commission instead of reviewing the lawfulness of its assessment*"[22]. In other terms, a rigid deferential approach was imposed on the grounds of the theorization of an authoritative power of "technical discretion" conferred to EU administrative bodies (such as the EU Commission).

---

[19]Council of State, sect. V, 28 July 2014, no. 3998.

[20]Court of Cassation, Grand Chamber, 17 February 2012, no. 2312,

[21]Court of Cassation, Grand Chamber, 20 January 2014, no. 1013: "*Il sindacato di legittimità del giudice amministrativo sui provvedimenti dell'Autorità Garante della Concorrenza e del Mercato comporta la verifica diretta dei fatti posti a fondamento del provvedimento impugnato e si estende anche ai profili tecnici, il cui esame sia necessario per giudicarne della legittimità, salvo non includano valutazioni ed apprezzamenti che presentano un oggettivo margine di opinabilità (come nel caso della definizione di mercato rilevante nell'accertamento di intese restrittive della concorrenza), nel qual caso il sindacato, oltre che in un controllo di ragionevolezza, logicità e coerenza della motivazione del provvedimento impugnato, è limitato alla verifica della non esorbitanza dai suddetti margini di opinabilità, non potendo il giudice sostituire il proprio apprezzamento a quello dell' Autorità Garante*".

[22] Eur. Court of Justice., Grand Chamber, 29 June 2010, case C-441/07 P, *Commissione v Alrosa*, § 67.

After the *Menarini* case (that has recognized that administrative antitrust fines are of a criminal nature and therefore at least a full jurisdiction has to be afforded in the judicial phase of review of the sanction), the EU Court of Justice, as a way to reply to the ground of appeal according to which " *the doctrine of 'margin of appreciation' and 'judicial deference' should now no longer be applied, since European Union law is now characterised by the huge fines imposed by the Commission, a development which is frequently described as the de facto 'criminalisation' of European Union competition law*", started to state that even in its review of legality, " *the Courts cannot use the Commission's margin of discretion – either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts*"[23].

By now, this doctrine seems well established. In particularly, lately, in 2014, the Court re-affirmed that " *It is also apparent from the case-law of the European Court of Human Rights that the characteristics of a judicial body endowed with unlimited jurisdiction include the power to quash in all respects, on questions of fact and law, the decision at issue. Such a body must in particular have jurisdiction to examine all questions of fact and law relevant to the dispute before it*" and, consistently, stated that " *The EU judicature must, among other things, not only establish whether the evidence put forward is factually accurate, reliable and consistent, but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it*". Therefore, a review on the existence of "*manifest errors of assessment*" does not suffice, but it is required "*an in-depth review, as regards questions of both fact and law, of the contested decision in the light of the pleas in law put forward by the appellants, thus satisfying the requirements of an unrestricted review for the purpose of Article 47 of the Charter* "[24]

More in general, the standard of full jurisdiction pursuant to art. 6 ECHR seems to increasingly being assigned the role of a general canon of minimal effectiveness of judicial remedies that needs to be guaranteed in EU, pursuant to art. 47 of the Charter of Nice. In fact,

---

[23] Eur. Court of Justice, sect. II, 8 December 2011, case C-389/10 P, *KME Germany AG* v. *Commissione Europea*, apr. 129.

See the comments by SIBONY, in *Comm. Mark. Law Rev.*, 49, 2012, 1977 and following. and VAN CLEYNENBREUGEL, *Constitutionalizing Comprehensively Tailored Judicial Review in EU Competition Law*, in *Colum. Journ. Eur. Law*, 18, 2012, 519 and following.

[24] See also WESSELING - VAN DER WOUDE, *The lawfulness and Acceptability of Enforcement of European Cartel Law*, in *World Comp.*, 35, 2012, 573 and following, 580, who, based on cases *KME* e *Chalkor*, noted that: " *The Court of Justice no longer stated [….] that the General Court must limit its review to manifest errors of assessment*".

the right to an effective remedy and, respectively to a fair trial codified by arts. 47 of the Charter of Nice and 6 ECHR fully correspond and, therefore, pursuant to art. 52, par. 2, of the Charter. art. 47 is to be construed in the light of the Convention and the Strasbourg jurisprudence[25].

For example, in November 2013, the EU Court of Justice, in order to construe the right to have a case tried before a court having jurisdiction in particular in criminal matters as required by the Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties as a precondition for the recognition, held that, after a pre-litigation administrative procedure, the administrative decision needs to challengeable in front of a court that has full jurisdiction to examine the case as regards both the legal assessment and the factual circumstances[26]. In other terms, at least in the field of administrative fines, the right to a judicial remedy means a right to a court of full jurisdiction, in the ECHR's meaning.

But also as to administrative action involving the determination of civil rights, in 2013 the EU Court of justice stated that art. 47 of the Charter of Fundamental Rights of the European Union represents the canon of minimal effectiveness of judicial protection.[27].

In any case, ECHR is expected to become soon a formal part of the EU legal system, thanks to the accession of EU into ECHR, and, as a result, the ECHR obligations are due to assume, in any respect, the specific supremacy-primacy to be recognized to EU law[28].

In sum, a clear trend in favor of a less deferential approach in relation to technical discretion can be identified and this trend is explicitly driven by the necessity of reconciling the EU system of administrative enforcement of various regulations with the full jurisdiction doctrine developed by the European Court of Human Rights.

Although it is still of essence to carefully considering whether and to what extent further to these (important) affirmation of principles, an actual change of the judicial practice

[25] "*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention*"

[26] Eur. Court of Justice, Grand Chamber, 14 November 2013, case C-60/12, *Marián Baláž.*

[27] Eur. Court of Justice, sect. III, 27 June 2013, case C-93/12, *ET Agrokonsulting-04-Velko Stoyanov v. Izpalnitelen direktor na Darzhaven fond «Zemedelie» – Razplashtatelna agentsia*

[28] Eur. Court of Justice, Grand Chamber, 26 February 2013, case C-617/10, *Åklagaren* c. *Hans Åkerberg Fransson*, § 44: "*fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law*".

will really follow, these developments, according to influential commentators, are realizing «a significant and promising progress of the concerned EU Court jurisprudence»[29]. I

Conclusions.

In relation to technical discretion, Italian Administrative Courts seem to be moved by two opposite considerations, that, on a case by case basis and quite unpredictably, may prevail one over the other:

a. on one side, they consider too demanding and time consuming a direct examination of the technical merits of the administrative decisions. They are much more used (and skilled) to analyzing pure legal issues, and the general reasonableness of the choice. They feel to not been prepared to directly address technical issues. To overcome this obstacle, Court could in theory appoint technical experts. But this power of appointment, formally introduced in 2000 (Law no. 205 of 2000) and confirmed by art. 19 of the Administrative Trial Code, has been used only very few times, as felt incompatible with the very nature of the jurisdiction of lawfulness;

b. on the other side, Administrative Courts want to be in a position to exercise a deeper scrutiny wherever, for a number of reasons, they consider appropriate a similar interventionism. In other terms, although in a minority of cases, Courts want to defend their institutional role.

However, from a legal standpoint, it is increasingly clear, especially after the *Placì* case, that Courts cannot any longer affirm (either expressly or *de facto*) a sort of automatic equivalence between technical discretion and an area of (total or partial) immunity from judicial review. Technical discretion directly concerns central factual points of the controversy and, as such, needs to be fully reviewable.

As well said by the EU Court of Justice, "*margin of discretion"* (especially if of technical nature) cannot any longer play the role of "*basis for dispensing with the conduct of an in-depth review of the law and of the facts*"[30].

---

[29] SIRAGUSA - RIZZA, *Violazione delle norme antitrust, sindacato giurisdizionale sull'esercizio del potere sanzionatorio da parte dell'autorità di concorrenza e diritto fondamentale* a *un equo processo: lo "stato dell'arte" dopo* le *sentenze Menarini, KME, e* Posten Norge, in *Giur. comm.*, 2013, 408 and follows, 454.

On the evolution in course in EU, see JAEGER, *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review*, in *Journ. Eur. Comp. Law & Practice*, 2, 2011, 295 and follows; WESSELING - VAN DER WOUDE, *The lawfulness and Acceptability of Enforcement of European Cartel Law*, in *World Comp.*, 35, 2012, 573 and follows.

[30] Eur. Court of Justice., sect. II, 8 December 2011, case C-389/10 P, *KME Germany AG* v. *Commissione Europea*, § 129.

This approach by the EU judges suggests a critical reflection: in Italy we tend to address the issues of judicial review of technical discretion as a problem of conceptual distinction among administrative discretion and, respectively, technical one. Yet, it cannot be denied the existence and significant extension of a grey area in which choices of interests and technical complex assessments are so interconnected, to make very difficult the practical application of a distinction that is in abstract terms may seem persuasive. The way in which EU Court addresses the issue is probably more effective: any discretionary choice (regardless its distance from the classical model of administrative discretion) cannot represents a barrier to the full jurisdiction. In other terms, even accepting the idea that a technical decision may represent a power not substantially different from a decision of interest, the conclusion cannot change: in any case, the discretion (either technical or administrative) cannot limit the effectiveness of judicial review, i.e. the right to a full jurisdiction.

Moreover, our Courts should metabolize the fact that the ECHR Court looks at the substance of the judicial case and, therefore, to the review really exercised, with the consequence that it is not any longer acceptable the strategy to pretend to carry out an effective review, without actually doing it. In fact, "*Article 6 § 1 is intended to guarantee rights that are not theoretical or illusory, but practical and effective [....]* "[31]..

We would like to conclude with a note of optimism. In January 2014, the Court of Cassation showed a certain awareness on how ECHR requires essential innovation. Although in an *obiter dictum*, it observed that "*also thanks to the European Community innovative suggestions, the boundaries between administrative discretion, not reviewable, and jurisdiction, are by now definitely open to an evolution in line with the two fundamental principles of full jurisdiction (arts. 6 ECHR and 47 of the Nice Charter) and of proportionality, intended to restrict the area of unreviewable administrative merits*"[32].

In other terms, judging from this statement, the canon of full jurisdiction is starting to acquire, either directly or through art. 47 of the Nice Charter, the role of fundamental

---

See the comments by SIBONY, in *Comm. Mark. Law Rev.*, 49, 2012, 1977 and following. and VAN CLEYNENBREUGEL, *Constitutionalizing Comprehensively Tailored Judicial Review in EU Competition Law*, in *Colum. Journ. Eur. Law*, 18, 2012, 519 and following.

[31]Eur Court of Human Rights, Grand Chamber, 18 February 2009, case no. 55707/00, *Andrejeva v. Latvia*, § 98:

[32]Court of Cassation, Grand Chamber, 16 January 2014, no. 774: «*anche sulla spinta evolutiva dell'ordinamento comunitario i confini tra limiti della discrezionalità amministrativa, non sindacabile, e limiti della giurisdizione, si sono ormai definitivamente aperti ad un cammino improntato al rispetto dei due principii fondamentali: della pienezza della tutela giurisdizionale (full jurisdiction. Art. 6 CEDU e art. 47 dei diritti fondamentali dell'Unione) e dei limiti di proporzionalità, finalizzati a restringere l'area del merito amministrativo, insindacabile*».

principle of effectiveness of judicial protection vis-à-vis the administrative actions and, therefore, of general rule based on which the traditional issue of judicial review of technical discretion has to be addressed.