

# APPEAL, NON-APPLICATION, JUDICIAL REVIEW ON THE ACTS OF THE PUBLIC ADMINISTRATION FOR ANTITRUST PURPOSES (NOTES TO THE *CONSIGLIO DI STATO* - ITALIAN SUPREME ADMINISTRATIVE COURT - JUDGMENT, SEC. VI, NO. 693/2014)

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**Keywords:** Patents, Pharmaceutical Sector, Intellectual Property, Antitrust, Abuse of Regulations and Administrative Measures, Abuse of Right, Non-Application, Judicial Review, Decision on Commitments

**Abstract:** *In the effort of reconcile protection of competition and intellectual property rights, with particular reference to the pharmaceutical sector, the Pfizer case deals with legitimate patent instrumentally exercised for a purpose other than that for which it was granted. What would be a legitimate administrative measure under Italian Patent Law, combined with other conducts, in the context of a complex strategy designed to artificially delay the entry of new generic drugs competitors, is considered an excluding abuse, violating antitrust rules. If the Italian Competition Authority (ICA) explicitly referred to the abuse of regulatory procedure theory applied by the EU Commission in AstraZeneca case and endorsed by ECJ, the Council of State judgment, applying as in the Coop Estense case the broader and disputed category of the “abuse of right”, represents a further development in antitrust enforcement and is expected to bring back as central issue the topic of the judicial review on the exercise of antitrust power and, with it, the recurring fear that the guarantees of defence cannot always be*

*sufficient. The article examines this new frontier of antitrust law, with specific regard to the case of abuse of dominant position by abusing of regulations and administrative measure, showing the different remedies at disposal of the Italian Competition Authority.*

## 1. INTRODUCTION

The judgment of the Italian Supreme Administrative Court (hereinafter “*Consiglio di Stato*”) on the Pfizer case raises the reader's attention at least on two specific topics of interest, here related to each other, and on other issues of a more general nature.

The first topic relates to the protection of competition in the pharmaceutical sector, with particular reference to possible interferences between competition and industrial property. An issue that has been, for some years now, at the centre of investigation by the European Commission and, recently, has had great prominence in the judgment of the Court of Justice, December 6, 2012 in the AstraZeneca case.

The second topic concerns the abuse of a dominant position committed by abusing regulations or administrative procedures and is linked not only to the judicial precedent just mentioned, but also, in the Italian experience, to the case Coop Estense/Esselunga, object of the *Consiglio di Stato* judgment April 8, 2014, no. 1673.

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The general issues and those of a procedural nature which occupy, in the decision here under review, less space but that also need attention, and that will be examined in the second part, relate to the judicial review of the decision to reject the commitments submitted under Art. 14 ter law 287/1990.

## 2. COMPETITION AND OTHER AREAS OF LAW: THE PHARMACEUTICAL SECTOR

Starting with the first point, the attention of the European Commission for the pharmaceutical industry, which involved the preparation of four reports from 2009 to today, moved by fear (not to say by the awareness) that, through strategies variously aimed at broadening the scope and duration of patent protection, the *originator* pharmaceutical companies may delay the entry, or at least the expansion, in the market of the companies manufacturers of generics, all at the expense, of innovation and of consumers too.

It should be noted that, in general, the relationship between the protection of competition and the protection of intellectual property had already been addressed in the past by the Court of Justice, in cases where the holder of patent rights had denied access to third parties, opposing a refusal to contract. By assimilating the intellectual property right to an *essential facility*, obviously immaterial, an abuse of dominant position was found, of an exclusion type, if the refusal, related to necessary product, amounted to an obstacle to the creation of new products for which there

was a potential demand, unjustified and such as to prevent any form of competition<sup>2</sup>.

Bearing in mind these judicial precedents, already at the time of its first report in the pharmaceutical field<sup>3</sup> in 2009, the Commission stressed that the originator companies were using, with exclusion purposes, a variety of instruments: from the presentation of divisional patent applications before the EPO (European Patent Office) to the undertaking of lawsuits against competitors manufacturing generics; from the signing of settlement agreements between litigants to the intervention of the originator companies, for obstructionism purposes, in administrative proceedings before the national authorities undertaken by companies manufacturing generics to obtain the authorizations for the marketing of their new products; up to

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<sup>2</sup> See Court of Justice, judgment April 6, 1995, RTE and TTP vs. Commission (so called "Magill"), consolidated actions C-241/91 P and C-242/ 91 P, points 52-56; judgment April 29, 2004, IMS Health GmbH & Co. OHG vs. NDC Health GmbH & Co. KG, case C-418/01, point 52; Court of first instance, September 17, 2007, Microsoft vs. Commission, case C- 201/04. In the Italian case law see in accordingly, January 29, 2013, no. 548. As to the opinion of academic commentators see, among others, M. RICOLFI, *Diritto d'autore ed abuso di posizione dominante*, in *Riv. dir. ind.*, 2001, I, 149 ; R. PARDOLESI - M. GRANIERI, *Alcune considerazioni sui rapporti tra proprietà intellettuale e concorrenza nel settore farmaceutico*, in *Dir. industriale*, 2002; R. PARDOLESI-M. GRANIERI, *Proprietà intellettuale e concorrenza: convergenza finalistica e «liaisons dangereuses»* - in *Foro it.*, 2003, V, 193; R. NATOLI, *Diritti di proprietà intellettuale e rifiuto di licenza: osservazioni a margine del caso IMS Health*, in *Eur. Dir. Priv.*, 2005, 465 s.; G. GHIDINI, *Collisione? Integrazione? Appunti sulla intersezione tra diritti di proprietà intellettuale e disciplina(e) della concorrenza*, in *Mercato, concorrenza, regole*, 2005, 247; M. GRANIERI, *Alcune considerazioni su inibitoria cautelare, danno e mercato rilevante nell'antitrust farmaceutico*, in *Danno e resp.*, 8-9/2007, 858.

<sup>3</sup> UE Commission, Pharmaceutical Sector Inquiry, Final Report, 2009, in [www.ec.europa.eu](http://www.ec.europa.eu).

attempts to influence the distribution channel and even doctors to whom the prescription of drugs is reserved.

The Report of 2009, which mentioned precedents both of the Commission (Commission Decision of June 15, 2005 in the AstraZeneca case, cited above, on which we will return immediately) and of certain national Authorities, concluded with a commitment to intensify its monitoring in the context of competition law, even against those "defensive patent strategies, which seek to file a patent principally for the purpose of eliminating competitors from the market without pursuing innovative efforts."

In what can be considered the leading case at an European level, the AstraZeneca case, the Commission had charged the pharmaceutical company in a dominant position with two abuses: one linked to the request for a supplementary protection certificate through misleading representations given to the patent offices of various Member States; the other realized through the revocation of marketing authorizations, revocation ordered on the basis of an application without any objective justification and apparently only intended to prevent applicants for similar marketing authorizations for medicines essentially similar, the use of the abridged procedure provided for in Directive 65/65/EEC and, therefore, to hinder or delay the entry into the market of generic products.

If for the first challenge the misleading nature of the statements could make consider the conduct of the company unlawful under the industrial property law too, with reference instead to the (request for) revocation of the marketing authorization, its illegality emerged

only in terms of protection of competition and was due mainly to the anti-competitive effect of the conduct in absence of an objective justification different from the sole intent to exclude competitors, thereby creating a barrier to their entry into the market<sup>4</sup>.

The assessment of the second abuse moves from the known general premise that the company which holds a dominant position is under a "special responsibility" that would prohibit the same to "use regulatory procedures in order to prevent or make it more difficult for competitors to enter the market, in absence of reasons relating to the protection of the legitimate interests of a company engaged in a competition based on the merits or in absence of objective justifications" (see paragraph 134 of the judgment).

The principle of "special responsibility", frequently invoked in the case law of the Court of Justice, although criticized by academic commentators<sup>5</sup>, becomes so an independent source of obligations and prohibitions for the companies in a dominant position; according to a logic of integration, of the typified obligations, and of balancing, of the conflicting interests, which belongs also to other general clauses, first of all, the rule of good faith which, as is well known, occupies a prominent role in the European law of contracts.

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<sup>4</sup> For a wider comment see M. COLANGELO, *Concorrenza e proprietà intellettuale nel settore farmaceutico in Europa dopo il caso astrazeneca*, in *Giur. Commerciale*, 2013, 585.

<sup>5</sup> Starting from Court of Justice November 3, 1983, in C-322/81 Michelin. For a critical viewpoint see for example, A. CORCHO, *Can We finally Say Farewell to the "Special Responsibility" of Dominant Companies?*, in *European Competition Law Annual: 2007 - A Reformed Approach to Article 82 EC*, C.D. Ehlermann and M. Marquis (edited by), Hart Publishing, 2008, p. 320-324

This point deserves emphasis because in the Pfizer case the defences of the company during the proceedings argued that this case would differentiate itself from the AstraZeneca precedent, that therefore could not be usefully invoked, repeatedly pointing out how Pfizer could not be charged with misleading statements of any kind made to the competent administrative authorities.

Instead, in my opinion, the real point of connection between the AstraZeneca case and the Pfizer case is given exactly by the use of an administrative procedure provided for and regulated by the laws on industrial property, in an exclusively anti-competitive way, one would say emulative, except for the fact that the reference to the provisions of art. 833 of our Civil Code could open up more problems than solve them. And it is precisely the use of the administrative procedure<sup>6</sup>, for purposes other

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<sup>6</sup> We move here from the assumption that the patenting activity has a nature of establishing assessment and that the relative application can start an administrative proceeding in the proper sense that, at a national level, the Industrial Property Code regulates now at the legislative level (see Headings IV-VI, art. 147 et seq. of the Legislative decree February 10, 2005, no. 30), whereas previously it was governed by regulations. Against the decision of the Patent and Trademark it is possible to appeal to the Board of Appeal, which is considered as a special judge existing before the entry into force of the Constitution, a procedure which essentially corresponds to that of the administrative proceedings before the Regional Administrative Court (see art. 134).

<sup>7</sup> It should be noted that the Authority had not grounded the anti-competitive nature of Pfizer conduct only on the emulative nature of the divisional patent application but also, within the framework of a single, complex excluding strategy, on the repeated warnings sent to competitors, followed by the undertaking of disputes of various kinds, as well as on the sending of numerous communications to AIFA, with which Pfizer strongly opposed the granting of the marketing authorization of generic products (see points 183 et seq. of the measure).

than those proper of the law, that the Court of Justice and the *Consiglio di Stato* censor, reaching the same conclusions.

In the case under discussion in fact, while the first-instance judgment of the Lazio Regional Administrative Court, upholding the petition of the company, had valued as basis of its decision essentially the fact, occurred after the contested measure, of the ascertained validity of the divisional patent, at the outcome of the proceedings held before the EPO Board of Appeal; the decision of the Appeal Judge ignores instead completely this point of view, and rather focuses on the instrumentality and emulative nature of the patent, as evidenced by the fact that its release was not followed by the marketing of any new pharmaceutical product<sup>7</sup>.

One therefore highlights a case of an administrative measure, the issuance of the patent, valid under the industrial law, but whose legitimacy the Italian Antitrust Authority (hereinafter "Authority or AGCM") and the *Consiglio di Stato*, however, believe they can

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This fact is rightly pointed out, noting in a critical way the decision of the Regional Administrative Court, by E. AREZZO, *Strategic Patenting e diritto della concorrenza: riflessioni a margine della vicenda Ratiopharm-Pfizer*, in *Giur. comm.*, 2014, 404.

<sup>8</sup> Legal concept that has an ancient and troubled history, that is not possible to summarize here (see P. RESCIGNO, *L'abuso del diritto*, Bologna, 1998), and that in the Italian case law is applied, in the last twenty years, more and more, from company law (see H. SIMONETTI, *Abuso al diritto di voto e regola di buona fede nelle società di capitali*, in *Nuova giur. civ. commentata*, 2000, 479) to the law on obligations, from tax law to procedural law (civil and administrative), not without causing recurrent concerns among some academic commentators (see, eg, A. PALMIERI, R. PARDOLESI, *Della serie <a volte ritornano>: l'abuso del diritto alla riscossa*, in *Foro it.*, 2010, I, 95 and M. ORLANDI, *Contro l'abuso del diritto*, in *Riv. dir. civ.*, 2010, II, 149).

criticize under the antitrust viewpoint, on the basis of what the Commission and the Court of Justice had already done in the AstraZeneca case for the revocation of marketing authorizations.

If this convergence, in the abovementioned judgment of the *Consiglio di Stato* no. 1673/2014, in the Coop Estense/Esselunga case, is more evident on a formal level too, in the vocabulary used in the grounds, which is entirely consistent with that used by the European Court, in judgment no. 693/2014 here under comment, the convergence is more in the substance of the decision, since the Collegiate court opted for more conciseness and resorted to a more general motivation, through the reference to the category of the abuse of right<sup>8</sup>.

However, this is a mere formal remark, which might have suggested to explain better the references to the European case law on antitrust or deepen the relationship (genus to species?) between the two clauses of the abuse of right and abuse of dominant position, but it does not move the key terms of the question. Neither would be worth mentioning that the category of abuse of right (as well as the rule of good faith, from which often the first comes from) is an expression of the continental European law and is foreign to the Anglo-Saxon tradition<sup>9</sup>, because the prohibition of

abuse of right is now a cardinal principle of the European Union order, which finds in art. 54 of the Charter of Fundamental Rights its express and solemn recognition and that also appears in the case law of the Court of Justice, especially in tax matters<sup>10</sup>.

The point is, in case, another. Considering well, it is, before that, the relationship between competition law and other areas of law which in Europe has features and variations different from the US experience. While in European law, as already mentioned, the principle that the protection of competition does not stop even in front of behaviours that appear formally legitimate in other areas of law has been established, in US law the refusal to license is traditionally a wholly exceptional antitrust conduct<sup>11</sup>. Although, recently, in the Actavis case<sup>12</sup>, the Supreme Court held, by a majority, that "patent-related settlement agreements can sometimes violate the antitrust laws", thus making a significant step in the direction taken by the Court of Justice of the European Union in recent years.

<sup>9</sup> As pointed out by A. GAMBARO, *Abuso del diritto. II). Diritto comparato e straniero* in *Enc. Giuridica*, Roma, 1988, 2.

<sup>10</sup> See, eg, Court of Justice February 21, 2006, C- 255/02, Halifax, where, however, with regard to VAT, the imposition of a sanction in absence of a legal and unambiguous basis was excluded, stopping at the repayment obligation, by the taxpayer, of any amount improperly deducted by the same.

<sup>11</sup> See, in particular, the Court of Appeals of the United States of America, *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147 (1st Cir. 1994); *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997); *In re Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322 (Fed. Cir. 2000); more generally, in the field of refusal to deal, see also Supreme Court of the United States, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 US 398 (2004); *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 US 438 (2009). Precedents cited by A. ARENA, *Imprese dominanti ed obblighi di condivisione di informazioni essenziali*, in *Giorn. dir. Amministrativo*, in *Giorn. dir. amministrativo*, 2013, 953, nt 43.

<sup>12</sup> Supreme Court of the United States, the *Federal Trade Commission v. Actavis*, June 17, 2013, no. 12-416.

### 3. ABUSE OF A DOMINANT POSITION BY ABUSING OF REGULATIONS OR ADMINISTRATIVE PROCEDURES

It can be observed that, both in the European AstraZeneca case and in the national cases Pfizer and Coop Estense/Esselunga<sup>13</sup>, procedure and/or administrative measure, in the pharmaceutical sector as well as in the town planning one, present themselves as a possible tool for practices of excluding abuse. To these precedent cases a third can be added, in some respects even more "pilot", in the field of passengers rail transport, where against RFI and Trenitalia, the Authority established in July 2012 an excluding abuse consisted in having delayed access to the network, and therefore the entry into market of a new competitor (Arenaways), through the starting of a "procedure" of consultation with the Regions and ministerial bodies that was not necessary and in which would have been provided, to the Office for the regulation of rail services (URSF), a misleading and deceptive representation of the facts, able to mislead a public regulator in obvious distress and - as

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<sup>13</sup> In the Decision of June 6, 2012 the AGCM found that Coop Estense, holder of a dominant position in the markets for distribution through supermarkets and hypermarkets in the province of Modena, had brought into being a unified anticompetitive strategy, in violation of Art. 3 law 287/1990, to exclude or impede the opening of new stores by Esselunga, and that this strategy was also manifested in the intervention, in the key of obstruction, in two cases of urban planning (in one case the adoption a detailed plan, in the other the signing of a town planning agreement) undertaken by the towns of Vignola and Modena, processes that were not concluded in favour of Esselunga. For a comment on the story, with specific reference to the interaction between antitrust and administrative proceedings, see P. KOSTANDIN, *Pianificazione urbanistica e abuso di posizione dominante*, in *Giorn. dir. amm.*, 2014, 39.

stated explicitly in the final measure - with "objective staffing problems"<sup>14</sup>.

In general, as concerns the possible contrariety of general administrative acts, regulations or administrative provisions to the rules on the protection of competition and the market, proved to be aware also the Parliament, when at the end of 2011, with art. 35 of the Decree "Save Italy", assigned to the AGCM the legal capacity to challenge such acts, by introducing into the law 287/1990 the new art. 21 bis and thus filling what, with the passage of time, had seemed more and more like a flaw in the original design for the protection of competition. A flaw related to the underestimation of competitive practices that may be caused by the public bodies, as well as (and not less) by private parties, exacerbated by the gradual reduction of administrative controls and the establishment of a model for autonomy in many ways messy and opaque and prey of avid lobbies<sup>15</sup>.

It is important to remember that the investigations in the Pfizer and Coop Estense cases had started before the introduction of art. 21 bis, when the Authority could not point directly to the removal of the act but only criticize its effects for antitrust purposes. Although in the Pfizer case, it is very difficult to imagine that if it had already been provided

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<sup>14</sup> AGCM, Decision of July 25, 2012, no. 23770 (the quote is at paragraph 337) annulled in the first instance by the Lazio Regional Administrative Court, by judgment of March 27, 2014 no. 3398, on which the appeal before the *Consiglio di Stato* is pending.

<sup>15</sup> On art. 21 bis and the theoretical and practical issues related to it, please make reference, for the first applications by the courts too, to H. SIMONETTI, *L'art. 21 bis della Legge 287/1990 ed il potere di impugnazione dell'Agcm: è ancora il secolo della "giustizia nell'amministrazione"?*, in *www.giustamm.it*, 2014.

at the time with the legal capacity to challenge administrative acts, the Authority would have used it, since from the beginning of the story, when the discussion was still on the validity of the divisional patent, the Authority had stated (at paragraph 203) "the irrelevance in an antitrust perspective, of the grounds behind the decision of nullity ... (which) relates.... only to patent law aspects".

In addition to the powers of direct challenge and review of the administrative act for antitrust purposes, cases of non-application, limited (so far) to the acts of a legislative nature, restricting competition are also known<sup>16</sup>.

It cannot be forgotten, in fact, how in the past, in a famous case of restrictive understandings, the AGCM had claimed for itself the power to non-apply laws (it had been, then, a royal decree and a ministerial decree) that were the basis of anti-competitive behaviour, when deemed contrary to Articles 3, 10 and 81 of the EEC Treaty<sup>17</sup> and that such a solution had been approved by the European court<sup>18</sup>.

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<sup>16</sup> The theme, which cannot be detailed here, is linked to the debate on the pathology of the national administrative act contrary to the law of the European Union, where one compares the two theories of nullity, resulting in the non-application of the act, and in its voidability, to be asserted through the timely appeal of the same. See on this topic, R. DI PACE, *La disapplicazione nel processo amministrativo*, Turin, 2011, esp. 186 et seq.

<sup>17</sup> AGCM, Decision of July 13, 2000. In the following period see also the Decision of March 29, 2006 concerning a ministerial decree of 1999 decided to be of a regulatory type, on this matter see, recently, the decision of Lazio Regional Administrative Court January 9, 2013, no. 125.

<sup>18</sup> Court of Justice September 9, 2003, C- 198/01, Consorzio Industrie Fiammiferi (CIF), noted among other by B. NASCIBENE-S. BASTIANON, *La Corte*

Recently, the Authority, which so far has done a pretty cautious use of the powers under Art. 21 bis, returned to exercise the power to non-apply, this time against the tax rules on VAT, in proceedings brought against the Italian Post Office where the AGCM objected an exclusion abuse carried out by offering on the market services that were part of the universal service (but not reserved) at subsidized prices, since exempt from VAT. An anti-competitive conduct under art. 102 of the Treaty but compliant with art. 10, par. 1, letter 16 of the President of the Republic Decree 633/1972 which provides the exemption from VAT for "the performance of the universal postal service, as well as the assignment of goods and the provision of accessory services, supplied by the parties responsible for ensuring compliance." Hence the need to non-apply the national legislation to assess the abuse and order to Poste the termination of its conduct, but the impossibility to impose any sanction upon the company, just because the past behaviour was "covered by national legislation"<sup>19</sup>.

#### 4. THE ANTITRUST POWER BEFORE ADMINISTRATIVE COURTS

The intensification of control by the Authority, also through new aspects of the abuse of dominant position, is expected to bring as central issue the topic of the judicial review on the exercise of antitrust power and, with it, the recurring fear that the guarantees of defence against such a power cannot always be

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*di giustizia e i poteri dell'Autorità garante della concorrenza*, in *Corriere giur.*, 2003, 1421.

<sup>19</sup> See AGCM Decision March 27, 2013, at paragraph 235 and the decision of Lazio Regional Administrative Court February 7, 2014 which dismissed the appeal by Poste.

sufficient. Partly similar concerns have arisen, however, with reference to the expansion of the category of abuse of right, both in the contracts field, fearing in such case the risk of a super judiciary power<sup>20</sup>, and in the taxation field, where one denounced the fear of too much discretionary power of the offices invested with the function of assessment, feared the most because in the latter case, as in antitrust, this comes with sanctioning powers<sup>21</sup>.

The greater powers of intervention of the Authority are intended to justify the invocation, as a guarantee, of an adequate standard of judicial review. This is a long-debated question, and it is necessary to consider it as well known in its essential terms, limiting ourselves to remember that after an initial, pronounced, "deference" there has been a higher incidence of the judicial review of the administrative judge, even on facts and on complex technical appraisals, thus recovering the original sense of the exclusive jurisdiction wished by the legislator in this "particular" subject and in accordance with the European standard of judicial review<sup>22</sup>.

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<sup>20</sup> See, for example, R. PARDOLESI, *Un nuovo super-potere giudiziario: la buona fede adeguatrice e demolitoria*, in *Foro it.*, 2014, I, 2039.

<sup>21</sup> See, in terms of non-application of the rule, through the category of abuse, and of prevalence of the function, where it is univocal, on the structure, A. GENTILI, *Abuso del diritto, giurisprudenza tributaria e categorie civilistiche*, in *Riv. dir. comm.*, 2009, I, 403.

<sup>22</sup> For a general overview and examination of the main trends see L. TORCHIA, *Competition Law in front of the administrative judge*, in *Mercato, concorrenza, regole*, 2013, 501. Among the most representative judgments concerning this case law evolution, still in the context of a judicial review, see Consiglio di Stato, Sec. VI, March 2, 2004, no. 926 and February 8, 2007, no. 515; Cassazione united sections January 20, 2014, no. 1013. In the sense of hoping, however, that the judicial review, implemented and practiced only for the calculation of the fine, be

More recently, interest has gone rekindling however, over two judgments of the European Court of Human Rights in which the formally administrative nature of the sanctions of some independent authorities - specifically Antitrust and Consob - has been questioned in favour of their attraction in the field of criminal law, from which one makes descend as a logical consequence the submission of the sanctioning proceeding to the principles of due process and to the prohibition of the *bis in idem*<sup>23</sup>.

The discussion, which involves the relationship between antitrust power and fundamental rights, is not immune from some straining and simplifications, and sometimes hides the more "political" intent, however legitimate, to abandon the current system of allocation of jurisdiction, against the acts and conduct of the Public Administration, to return to the model of the single judge, assigning therefore to the civil court all the cases that involve antitrust matters.

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extended to the verification of the illegal behaviour under competition law, all the times that the antitrust decision, by the Commission or by national authorities, applies the sanctions, see M. SIRAGUSA, C. RIZZA, *Violazione delle norme antitrust, sindacato giurisdizione 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.

<sup>23</sup> See, for antitrust sanctions, the European Court of Human Rights of September 27, 2011 Petition no. 43509/08 - A. Menarini Diagnostics LTD v. Repubblica Italiana and, for those of Consob, the European Court of Human Rights of March 4, 2014 Petition no. 18640/10 - Grande Stevens e altri v. Repubblica Italiana. See, among the academic commentators, V.ZAGREBELSKY, *Le sanzioni Consob, l'equo processo e il ne bis in idem della Cedu*, in *Giur.it*, 2014, 5, 1196; F.GOISIS, *Verso una nuova nozione di sanzione amministrativa in senso stretto: il contributo della convenzione europea dei diritti dell'uomo*, in *Riv. italiana di dir. pubbl. comunitario*, 2014, 337.

Aside from the more general issue<sup>24</sup>, it is possible to observe how the standard of judicial review before the Administrative courts is not lower than the allowed one, or more frequently the practiced one, before the Ordinary Judge in cases of economic law, including corporate law<sup>25</sup>, or financial markets law, as most recently the same ECHR case laws appear to show, if it is true, that the major findings concerned, if anything, the proceedings before the Court of Appeal, on the Consob sanctions, and not those before the *Consiglio di Stato*, on the Antitrust Authority sanctions.

Of course, much can still be improved, even in the administrative proceeding, starting from the investigative/preparatory phase<sup>26</sup> and ending with how to conduct public hearings, where a minor load of cases and a greater respect for the synthesis in the preparation of written briefs by the defence would be the best guarantee of a real, and not just recited, respect for the rule of collegiality in the decision.

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<sup>24</sup> On which reference is made to the lucid analysis of F. PATRONI GRIFFI, *Giustizia amministrativa: ostacolo o servizio?* Report at the conference in Milan June 20, 2014, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

<sup>25</sup> The problem of the effectiveness of judicial review is also discussed in company law, especially to protect minority shareholders and investors, with results that often are judged unsatisfactory, as evidenced by C. GAMBA, *Diritto societario e ruolo del giudice*, Padua, 2008. On the relationship between *Entrepreneurial risk and business judge rule* see C. ANGELICI, *La riforma delle società di capitali*, 2nd ed., Padua, 2006, 177 et seq.

<sup>26</sup> See, already in this direction, C. OSTI, *Un giudice a Berlino: equità ed efficienza nel riesame giudiziale dei provvedimenti dell'Autorità della concorrenza*, in *Giur. comm.*, 2008, 873, calling for "a way of organizing the hearings and the preliminary/investigative work that takes greater account of the specific features of competition law, first of all, its strong factual content."

In the matter at issue, attention should also be drawn to the investigative/preparatory activity carried out by the judge, in order to ascertain if indeed the divisional patent had brought into the market a product other than the one already on the market, as a relevant and dominant fact as regards the statement, more of style than substance, on the alleged limits of judicial review, which we read on p. 17 of the judgment grounds.

## 5. JUDICIAL REVIEW AGAINST THE DECISIONS ON COMMITMENTS

To the strengthening of the anti-trust power, even against state regulation, is connected the request, coming from many sides<sup>27</sup>, of a judicial review full and effective not only against the final decisions of the Authority, especially if applying sanctions, but also of certain acts of the preliminary investigation, where they have immediately detrimental impact.

Attention has focused in particular on inspection records and decisions on commitments, against a general approach that in the administrative process, as is well known, always exclude the direct challenge of acts occurring during the course of the proceedings.

The Lazio Regional Administrative Court, while not formally repudiating the general rule, with its case-law has come often to erode the scope, admitting in one case the immediate appeal of the act by which the AGCM had

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<sup>27</sup> See for example, M. CLARICH, L. ZANETTINI, *Le garanzie del contraddittorio nei procedimenti sanzionatori dinanzi alle Autorità indipendenti* in *Giur. comm.*, 2013, 358.

authorized an inspection pursuant to art. 14 of the law 287/1990<sup>28</sup>.

Even in case of "commitments", an instrument introduced in the law 287/1990 with the novel of 2006 deriving from Regulation 1/2003/EC, under which it is possible to arrive at an agreed settlement of the case that serves to remove the anti-competitive aspects, but without the application of sanctions (see art. 14 ter), the Lazio Regional Administrative Court has repeatedly held immediately attackable the act by which the Authority rejects the proposal submitted by the company subject to investigation. Orientation not shared, on the other hand, by the Appeal Judge, in the last precedent case known<sup>29</sup>, in which even the topic of the interest in the voiding of the rejection, on the basis of a renewed chance of acceptance of the commitments, with beneficial effects for the company also as concerns reputation, has made inroad since the *Consiglio di Stato* qualified said interest as one of mere fact.

Beyond the profile regarding the capacity to appeal in an immediate manner, even more important is to determine what is the scope of judicial review in the event of rejection of the commitments, as well as what are the effects of the voiding of the rejecting decision as regards the act through which the sanction was imposed.

One should of course start from the preliminary observation that the settlement

through commitments of the investigation, without the assessment of the abuse, it is not always allowed. The academic commentators noted that decisions with commitments should not be taken in cases where an infringement assessment decision is necessary or even simply more suited to solve the case. So, whenever the Commission or a national authority recognizes the need to specify, in relation to the specific case, the content of Articles 101 and 102 of the Treaty, they should not take a decision with commitments as this does not contain any qualification of the conduct from the point of view of competition. Similarly, when the Commission or the national authority are proposing to impose a sanction because considered necessary to deter similar conducts in the future, they will have to refrain from using the tool of decisions with commitments, since in this case the deterrent effect typical of decisions finding an infringement of antitrust rules would not be realized<sup>30</sup>.

That said, as regards the first issue, seen the case law of the Court of Justice in the precedent case *Alrosa*, it is recognized to the Authority that it cannot change the contents of the proposed commitments without acknowledging the comments made by third parties at the outcome of the market test, a very wide margin of discretionary powers, by limiting judicial review essentially to the aspect of procedural compliance<sup>31</sup>.

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<sup>28</sup> See Lazio Regional Administrative Court January 26, 2012, no. 865.

<sup>29</sup> Consiglio di Stato, VI, July 20, 2011, no. 4393; the judgment is noted critically by B. RABAI *L'atto di rigetto degli impegni antitrust al vaglio del Consiglio di Stato*, *Dir. proc. amm.*, 2012, 1034.

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<sup>30</sup> In these terms A. PERA, *Le decisioni con impegni tra diritto comunitario e diritto nazionale*, G. Bruzzone (edited by), *Poteri e garanzie nel diritto antitrust*, Bologna, 2008, 61 et seq.

<sup>31</sup> See Court of Justice June 29, 2010, C- 441/07. Among the academic commentators, for a discussion of the institute, refer to the monographic work of C. LEONE, *Gli impegni nei procedimenti antitrust*, Milan, 2012.

As for the second issue, it must be held that the voiding of the decision rejecting the commitments takes automatically away the effectiveness of the act imposing the sanction, according to the scheme of lapsing invalidity, downgrading the case to the investigation stage.

In the case under discussion, the Authority had rejected the proposal of commitments under several aspects, including their deemed lateness (also) on the assumption that the divisional patent was invalid, the Lazio Regional Administrative Court had not yet stopped just voiding the rejection of the commitments, for failure to investigate and motivation, but had also examined the validity of the additional grounds brought against the final measure, both because of the case-law of the *Consiglio di Stato*, just recalled, that does not allow the direct challenge of the commitments, failing to recognize their nature of measures; and because in this case the reinstatement effect of the rejection voiding would not be any longer possible, because at that point the commitments had lost their novelty, not being repeatable.

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