Jurisdictional control over the decisions of the antitrust Authorities

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(*This report was written in 2004; in the meantime, Act n. 1034/1971 and Act n. 205/2000 have been replaced by Legislative Decree n. 104/2010 (code of administrative judicial procedure); therefore the reference herein made to articles 21 and 23-bis, Act n. 1034/1071 has to be read as made to articles 119, 133, 134 e 135, Legislative Decree n. 104/2010; besides, the judicial decisions herein mentioned, are updated till to year 2004; subsequent judgments are not taken into account).*

1. Introduction

Antitrust control has not had an easy development. Even in other legal systems which, unlike the Italian one, have the advantage of a consolidated experience in this sector, the antitrust rules have not always been effective means of economic democracy and freedom for citizens over the years.[1]
In the Italian law system, as in other western countries, antitrust regulations are certainly more and more at the centre of attention of scholars of law and of economics, as well as under the scrutiny of public opinion and it is not an "unknown policy" as it was critically called in the past.[2]
Nevertheless, the fulfillment of the antitrust law continues to suffer, in the Italian law system as well as in others, from the tensions caused by "basic philosophies" which inspire the intervention of various players, called on, directly or indirectly, to guard the correct development of the competitive game.
While on the way to the liberalization of some sectors of the market the difficulty was to attain a balance between the responsibilities of the Government and the ones of the antitrust Authority, and/or for the many Authorities in this field, one of the aspects which was most criticized in each antitrust system was the attainment of a correct balance in power of the roles and responsibilities among the Authorities and the Magistrature.
The problem is not only to be able to give an answer to the famous question "*Who guards the guardians?*"[3] but moreover, to establish how correct it is to review (with unlimited jurisdiction), in the law courts, a particularly complicated activity, characterized by aspects which are highly specialized and technical, as is the one carried out by the antitrust Authorities.[4]
Even in this case the answer and solution to the former famous question runs the risk of being influenced either by the "basic philosophy" of antitrust legislation on which one leans, or by the confidence that in the various rules and historical periods antitrust authorities and the magistrature have been capable of conquering.
One of the "basic philosophies" is certainly well summarized in a reflection: "If the independent authorities in Italy are not created in opposition to the judges one could ask, nevertheless, why the task of deciding matters of collective interest should be given to independent authorities, whose members are chosen with particularly selective criteria and subordinated to a much higher incompatibility compared to the judges' ones, to submit then their own activity to the ordinary jurisdictional control".[5]

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[*] Council of State, Rome.
[1] In the sense intended by G. ROSSI, *Antitrust e teoria della giustizia*, in Riv. Soc., 1995, p. 1.
[2] "*Antitrust should not be permitted to remain an unknown policy*" sentenced in 1978 by a great critic of our branch of law, R.H. BORK, *The Antitrust Paradox*, New York, 1978, p. 11. And finally ten years later even in Italy it does not seem to be an "*unknown policy*" any more, G. ROSSI confirms, *Governo, Magistratura, Autorità Garante: tre diverse filosofie dell'antitrust*, in Riv. Soc., 2000, p. 1081.
[3] M. SHAPIRO, *Who guards the guardians?*, Athens (GA), University of Georgia Press 1988.
[4] The problem is about the scope of the judicial review.
[5] S. CASSESE, *Le autorità indipendenti: origini storiche e problemi odierni*, in S. CASSESE C. FRANCHINI, *I garanti delle regole*, Bologna 1996, p. 221.

It deals with a formulation which explicitly reflects, and reminds us of, the solution found to the problem of *unelected administrators legitimacy* by James Landis in 1938, who in his lessons held in the *Yale Law School* had explained the phenomenon of the independent authorities with "the need of expertness", stressing that "*the art of regulating an industry requires knowledge of details of its operation*".

On the other hand a danger of technocratic drifting has been felt, dominated by what Carl Schmitt defined as "the gloomy religion of technicality" and it has been reckoned advisable to reinforce the guarantor institutions and the relentlessness of an effective judicial control on the acts of independent authorities.[6]

In the Italian legal system, as in other European countries, the prevailing theory is the one which denies the judicial type, or the quasi-judicial type to the independent Authorities with the consequent subordination of their activities to the jurisdictional control. Every rule has its own judge and it is to this rule, because of its generality, that the independent authorities can't escape; among them is the antitrust authority.[7]

In this context we can insert the judge's control who, specifically in the Italian legal system where the antitrust regulations are relatively new, has had to "specialize" in this subject in a short time running the risk of letting himself be conditioned by the "basic philosophies" of antitrust legislation or by his own independent philosophy, a thought sometimes characterized by diffidence towards the proceedings of an authority which can hardly be placed in the organization of the State and could be seen as a "new competitor" by the judge himself[8].Or the judge may be affected by a certain deference in controlling acts founded on a high level of technicality and adopted by better qualified courts, under the technical profile, as regards to the judge.

We must keep in mind that in the European antitrust system, under the guidance of the Commission and with the increasing growth of the competences of national Authorities, the involvement of judges in the carrying out of the regulations of the competition has come about mainly in the field of the jurisdictional control of the measures of the Authorities and not in the field of disputes between individuals.[9]

It is well known that the antitrust control wields its effects in two distinct ways: on the one hand it attributes to the individuals subjective rights directly tenable before the judge, on the other hand it confers an Authority the power to make decisions which protect public interests from the free game of competition.

In this context public interest has a specific form and is characterized by the protection of competition itself and the close relationship with the interests of private citizens, without having the presumption of directing their activity; the protection of competition itself is distinguished from the protection of single competitors.[10]

To be protect public interest a system of sanctions has been created and one or more public institutions delegated to verify and sanction illicit behavior, whilst private rights are controlled and protected through the traditional system, where individuals can react through the intervention of a judge against anticompetitive behaviours deemed damaging to them. In the former case we speak of *public enforcement* and in the latter of *private enforcement*.

Whilst in the U.S. model the efficiency of *enforcement* seems to be found in the incentives to *private actions*[11] and in the subsequent control widespread in the *private enforcement*, in Europe the

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[6] Consult CAIANIELLO, *Le autorità indipendenti tra potere politico e società civile*, in Foro Amm., 1997, II, 368.

[7] R. CARANTA, *Il giudice delle decisioni delle autorità indipendenti*, in S. CASSESE C. FRANCHINI, *I garanti delle regole*, Bologna 1996, p. 165, reminds us that in France, where voices about the inadequacy of the judge to control the acts of the *autorités administratives indépendantes* are not lacking, the *Conseil Constitutionel* has reaffirmed in many occasions the necessity to submit those authorities to the jurisdictional syndicate.

[8] May the reader forgive the compulsive use of an improper expression suggested by the subject under examination.

[9] Referring to the reasons of that phenomenon, see further on.

[10] RAMAJOLI, *Attività amministrativa e disciplina antitrust*, Milano, 1998. 356.

[11] As the *treble damages*, *contigency fees* and the institution of *class actions*.

system is based, almost exclusively, on *public enforcement*, whilst few are the actions undertaken directly by private individuals into law courts.[12]
Consequently, in Europe, the experience of the judges in antitrust matters has matured essentially through the filters of the activity of the antitrust Authorities and has ended up suffering historically from major or minor authoritativeness conquered by single Authorities and by their major or minor tendency to intervene for the protection of competition.
This does not mean a supremacy of the protection of the competitive structure over the protection of private interests[13]; both perspectives are complementary and they must coexist, and so it is a mere fact whether a system registers more recourse to one form of protection rather than to another.
The fact may be relevant for the legislators having to draw facts to reinforce, in the Italian legal system and more generally in the European one, the *private enforcement* with the introduction of those specific actions aimed at protecting the consumers, as found in the U.S. example.

2. Suggestions from overseas for reflections on the judicial review.

The analysis of the kind of the judicial review on the acts of an antitrust Authority proves to be limited if it is carried out exclusively regarding a single legal system.
The process of harmonization of E.U. law of competition, which had already started in the past and has had a decisive impulse today following the ratification of the E.C. n° 1/2003 regulation, includes the jurisdictions as well; beside its true real network, made up of the commission and of the national authorities guarantors of competition, the judges, although in a different role, are part much more today than in the past of a whole system including the jurisdictions of all member States and which uses the jurisdictional courts of the European Union as a landmark.
By further expanding the scene, the demands of a globalise world market determine the necessity to harmonize or to reach a convergence of the policies of competition as it is shown by the constitution of the *International Competition Network.*[14]
Nowadays the differences and difficulties in the convergence with the U.S. antitrust model are evident as it is well exemplified by recent and not so recent lawsuits.[15]

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[12] To find the reasons for the failure of *private actions* in the European context see par. 3.
[13] RAMAJOLI, *Attività amministrativa e disciplina antitrust*, quot., 356 and 378, points out that the protection of private interests must not be considered absorbing compared to the complex order of the market, as the theory does which equalizes the antitrust to a judge, not considering that the limit to economic freedom are also placed in everybody's interest and not only in the interests of a particular private individual, on the other hand, again Ramajoli underlines the fact that the protection of the competitive order cannot condition the protection of the single individual, which would happen if the layout of the intervention of the Authority as a condition in the proceedings of eventual lawsuits before the ordinary judge.
[14] The process of a progressive adjustement of the action of the Authority at an international level has had as its final achievement the constitution of a world net of antitrust Authority: the *International Competition Network*. The network is made up of the *antitrust* Authorities of about eighty countries therewith including the seven most industrialized countries. At least at the initial stage the network should work as a centre of exchange of experiences in the vigilance among the Authorities taking part. In this place there should be a dialogue regarding the two profiles. First, the discussion of basic matters on the policy of competition, with particular regards to the identification of the international problems, stemming from the application of the multiplicity of the *antitrust* regulations. Secondly, it concerns the definition of the standard of actions harmonized on behalf of the Authority. The purpose of that activity should be the attainment of the "*maximum convergence … among the participants, through dialogue and the exchange of experiences on policies and on the process of application of the regulations. The agreement should stem from a common understanding of the best methods to solve basic economic problems as well as the matters concerning the application of the rules*" (EC Commission, XXX Return about EC Commission competition policy, 63). On this theme, consult D. IELO, *L'internazionalizzazione del controllo antitrust: dalla Rete Internazionale della Concorrenza al Regolamento n. 1/2003*, in Diritto e formazione, 2003, 1537 (1st part) e 1693 (2nd part).
[15] G. PRIEST, *L'antitrust negli Stati Uniti e in Europa. Analisi e psicoanalisi di una divergenza*, in Merc conc. Reg., 2002, 151, illustrating how in the recent past the convergence between the policies of competition in the U.S. and in

In the overseas system the development of *private enforcement* and the attribution of mainly inquiring powers to the antitrust authority[16] made the judicial power the real protagonist of the formation of the U.S. antitrust law, so much so that the theories in which it found its most sophisticated elaboration answer to the name of influential judges of the Supreme Court, from Pekham to Taft, from Holmes to Hughes, from White to Brandes, from Hand to Warren, whose theses are still today matter of discussion.[17]

Nevertheless, even in the U.S. system, next to the role held by the judges for the so called activity of *adjudication*, a judicial review is registered not as much intense for the activity of *rule making*. The attempt of causing a more effective jurisdictional protection towards the acts of the regulatory agencies has been conclusively slowed down by the well known sentence in the Chevron lawsuit[18], with which the Supreme Court substantially called the judges to order to a major compliance towards the *agencies*, confirming that the judges can disregard the interpretation that an agency has given to a law of which it has the task of guarding the application, only when this interpretation is against the clear will expressed by the legislature or when it is unreasonable.[19]

Even though it deals with a decision relative to the judicial review not on the acts of an authority, such as the antitrust one, but on the interpretation of the law carried out by an authority endowed with regulating powers, it is important to see that even in the U.S. system the particular technical competences of an authority are a limit for the judicial review, applicable specifically to those fields more congenial in the eyes of the judge (interpretation of the law).

With the decision regarding the Chevron case the Supreme Court has in substance reserved for the judge the management of the certain nucleus in the interpretation of the law (the so called cone of light according to Hart's famous metaphor) and for the agencies the spaces of unclear interpretation (the zone of shade).[20]

The Chevron decision presupposes, therefore, that the legislator has implicitly delegated to the independent authorities the decision of all lawsuits included in their competence, on which the legislator didn't openly express himself addressing their precise solutions.

The thesis of the implicit delegation does not appear convincing in itself[21] and is downright dangerous if it is transferred to the problems discussed in our system of technical discretion and of indefinite juridical concepts, contained, as it is better explained later, in numerous provisions of the antitrust law.

Europe is far from being complete: the merging GE/Honeywell was approved in the U.S. yet blocked by the European Commission; Microsoft judicial inquiries led to different results; IMS Health cas has been solved by the European Commission in a way diverging from a previous decision from the U.S. judge in the Intel suit.

[16] The antitrust division of the Department of Justice – DOJ and the *Federal Trade Commission* manage the necessary enquiries, but they turn to a judge for the definitive measures, those of a penal character too, and for the application of the laws, having actually a role of public prosecutor. Even the *cease and desist order*, which FTC can emit, holds a role of moral suasion and it becomes executive only after the intervention of the Federal Court in the form of civil law. Consult P. AQUILANTI, *Potere dell'Autorità in materia di intesa restrittiva della libertà di concorrenza e di abuso di posizione dominante*, in *Diritto antitrust italiano*, volume II, Bologna, 1993, 815.

[17] Consult G. ROSSI, *Governo, Magistratura, Autorità garante: tre differenti filosofie dell' antitrust*, quot. which draws attention to the conclusions of the aforementioned survey of BORK, according to whom: "*The central institution in making antitrust law has been the Supreme Court*."

[18] Chevron USA Inc. vs. Natural Resources Defense Council, 104, S CT., 1984, 2778.

[19] With regards to the matter, refer to F. DENOZZA, *Discrezione e deferenza: il controllo giudiziario sugli atti delle autorità indipendenti regolatrici*, in Merc. Conc. Reg., 2000, 469 and M. ARGENTATI, *Il sindacato giurisdizionale sulle autorità indipendenti nell'esperienza statunitense*, in Diritti, interessi and amministrazioni indipendenti (atti del Convegno – Siena 31 maggio e 1 giugno 2003), Milano, 2003, 185. In particolar, Denozza sheds light on how the criteria addressed by the Court (clarity of the law / not unreasonableness of the interpretation) are susceptible of wide manipulation and characterized by an uncertain range.

[20] Always consult F. DENOZZA, *Discrezione e deferenza: il controllo giudiziario sugli atti delle autorità indipendenti regolatrici*, quot., adopting Hart's metaphor.

[21] We continue to take notes from DENOZZA's sharp observations, distinguishing between the power to create new rules and the power to interpret a rule.

Every judge knows perfectly well that the rules are not very often susceptible to univocal interpretation and that beside the "cones of light" there are many "zones of shade". The task of a judge has never been only to apply the rules mechanically, but to interpret the rules even in fields where he lacks the specific competence; in his role he must continually assess all the facts that must be taken into consideration with the aim of establishing the validity of a determinate solution under the profiles of the compatibility with the law and out of respect of the general principles, of reasonableness, of the proportionality of the consequences.
The independent authority must use all its own technical competences with the purpose of a decision, which will be fit to resist the eventual judicial control, not meaning the latter to be as a overlapping of the judge's (minor) technical competences over the ones of the authority, but as the verification in the trial of the good application of the technical competences and of the consequent correctness of the decision taken.[22]
These considerations lead us to disagree with the Chevron case doctrine, by referring to the *rule making* activity, in relation to which it has been formed and being even less applicable to the "zone of shade" existing in the *adjudication* activity, typical of the antitrust law.
In the U.S. law system too, notwithstanding the leading role taken on by the judges in the creation of antitrust law, there is a trend to limit the judicial review towards the independent authorities based on a thesis, the acceptance of which could have effects on the limits of matter of the judge's control in the European antitrust system.

3. The jurisdictional control over the decisions of the Commission and of the antitrust authorities in the E.U. and other members States law.

Compared to the U.S. model the E.U. antitrust system is characterized by the concentration at the top of the Commission of the triple role of executive of the Union, of a guarding of the applications of the rules and of holder of the power of lawmaking.
The jurisdictional control was entrusted to the Court of Justice, to which it was added the Court of First Instance starting from 1988.[23]
The interaction between the Commission and the European Court of Justice in the *antitrust* sector has been tested by now and has contributed to increase the prestige of both courts, creating what has been defined as a progressive and alternate "relay race" in which an extensive application of the precept by the Commission acts as a counterpart the statement of a hermeneutic precedent by the E.U. judges who, when declaring the Commission fair, give it in the meantime reflection for further steps ahead.[24]
The Commission and Court of Justice have constituted a guiding light up to today which has guided the growth of the antitrust authorities and the relative jurisdictions within the member States.
The E.U. institutions have in their way set off a process of decentralization of the E.U. law of competition, which found full legal recognition and further impulse too in the regulation n° 1/2003.
The "testimony of the relay race" has then today passed onto the authority and the jurisdictions of the member States as well.
Furthermore, this process of harmonization fits into the wider phenomenon of the Europeanisation of the national legal administrative law, intended not so much as the export and import of law institutes from one system to another, but as a *cross-fertilization* that is to say permeability of the various systems to stimulations and exchanges with the others.[25] The Court, on the one side, obtains

[22] Consult, F. DENOZZA, *Discrezione e deferenza: il controllo giudiziario sugli atti delle autorità indipendenti regolatrici*, quot..
[23] With the decision 88/591/ECSC of 24-10-1998, application of the article 168A of the Institutional Treaty of the European Commission.
[24] CONSULT. G. ROSSI, *Governo, Magistratura, Autorità garante: tre differenti filosofie dell' antitrust*, quot., who confirms the fact that, really, it is through this sort of judicial minuet that the E.C. law has been built down the years.
[25] Refer to D. DE PRETIS, *La tutela giurisdizionale amministrativa europea e i principi del processo*, in Riv. Trim. dir. Pub., 2002, pag 683 and following, where it is underlined that hardly a legal order holds a binary system, with the

principles from the particular laws attributing them a European rank; on the other side, the Court projects these principles on the different systems which in turn tend to make them their own.
So a process of integration, or even better of harmonization is triggered, of a "circular" kind, where the comparison between the different models of the member States contributes in creating the E.U. rule, which in turn affects the interpretation of home rules.
The phenomenon, even if mainly regarding the E.U. lawsuit, on the one side, and the national administrative lawsuit on the other one, appears as an allocation between the former and the national ordinary lawsuit, when the state law assigns the matter to the ordinary jurisdiction.[26]
The last consideration gains particular importance particularly in the antitrust sector where the jurisdictional competence is differently distributed in the various member states, the specification of different judges (administrative or ordinary) being completely irrelevant to the aims of the functioning of the system.
We ought to remember that, for constant E.C. case law, it is up to the juridical home law of each member State to assign the competent judges and to establish the procedural conditions of the jurisdictional appeals aimed at protecting the individuals' rights based on the E.U. precepts, as long as these conditions are not less favourable than those concerning analogous internal appeals (principle of equivalence and not discrimination), and that they don't they make impossible or excessively difficult the wielding of the rights conferred by E.U. law (principle of effectuality).[27]
Even under the profile of the jurisdictional control the system of various member countries has recently undergone a reorganization and it appears characterized by a demand of specialization of the judges, which leaves out of consideration the type of judicial authority prescribed by the legislators as being competent for the syndicate on the acts of the antitrust authority.
In France the decisional powers are concentrated at the top of the *Conseil de la concurrence* and only on the control of concentrations the decisional powers are conferred to the Ministry of Finance.
In the case of a private lawsuit in the jurisdictional Court, the Conseil can be consulted by the ordinary judicial authority, to which both the competences for the actions of damage compensation and for the appeals against unfavourable resolutions of the *Conseil de la concurrence* (Paris Court of Appeal and no longer the *Conseil d'Etat* in the latest controversies) are attributed.[28]

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application of two different procedural rules according to the law (being it national or European); as a consequence the home law tends to adapt itself permanently to the European standard. So much so that the process of unification derived from it has recently caused people talk of a unitarian system of European jurisdiction. On the europeization of the administrative procedural rights, the author quotes: M. FROMONT, *Las convergence des sistèmes de justice administratives in Europe*, in Riv. Trim. dir. Pub, 2000, 125; E. GARCIA DE ENTERRIA, *Perspectivas de las justicias administrativas nacionales en el ambito de la Uniòn Europea*, in *Revista espanola de derecho administrativo* in Riv. trim. dir. pubbl., 1999, 1, 1; G. FALCON, *Dal diritto amministrativo nazionale al diritto amministrativo comunitario*, in *Riv. It. dir. pubbl. com.* 1991, 353, as well as ID., *Giustizia comunitaria e giustizia amministrativa*, in L. VANDELLI, C. BOTTARI, D. DONATI, *Diritto amministrativo comunitario*, Rimini, 1991, p. 271; C. D. CLASSEN, *Die Europäisierung der Verwaltungsgerichtsbarkeit*, J. C. Mohr (Paul Siebeck), Tubingen, 1996, with an analysis moving from the comparison between the German and French models of administrative justice facing the influence of E.C. law. With particolar attention to the effects on administrative justice in our country, consult M. P. CHITI, *L'effettività della tutela giurisdizionale tra riforme nazionali e tutela del diritto comunitario*, in Dir. proc. amm. 1998, 499; M. GNES, *Giudice ammnistrativo e diritto comunitario*, in *Riv. trim. dir.pubbl.* 1999, 331; F. ASTONE, *Integrazione europea e giustizia amministrativa*, Napoli, 1999. L. TORCHIA, *Developments in Italian Administrative Law through cross-fertilization*, in J. Beatson – T. TRIDIMAS, *New directions in European public law*, Hart Publishing, Oxford, 1998, p. 137.

[26] Consult R. CHIEPPA, *Viaggio di andata e ritorno dalle fattispecie di responsabilità della pubblica amministrazione alla natura della responsabilità per i danni arrecati nell'esercizio dell'autorità amministrativa*, in Dir. Proc. Amm., 2003, 683, regarding this circular process and the parallelism between responsibility of national systems for violations of E.C. laws.

[27] Consult, among all, Corte Giust., 21-1-1999, C-120/97, Upjohn Ltd vs The Licensins Authority established by the Medicines Act, commented by R. CARANTA, *Tutela giurisdizionale effettiva delle situazioni giuridiche soggettive di origine comunitaria and incisività del sindacato del giudice nazionale (Kontolldichte)*, in Riv. It. Dir. Pubbl. com., 1999, p.503.

[28] In France, the ord. N° 86-1243 of 12-1-1986 originally disposed that against the provisional measures and the decisions of the *Conseil de la Concurrence* the *Conseil d'Etat* one could start legal proceedings with an appeal *de pleine*

In the French law the *Conseil Constitutionnel*, besides having expressely stated the character of administrative organism of the *Conseil de la concurrence,* has underlined that it constitutes a fundamental principle is that it is the duty of the administrative jurisdiction the cancellation and the reform of acts adopted by the authority when exercising public pregoratives and power. Nevertheless, when the application of a specific legislation or regulation might bring forth different disputes likely to be divided between the ordinary and administrative jurisdictions,
the legislator can legitimately, in the interest of a good administration of justice, decide to unite the contentions to the advantage of the most involved jurisdictional order.[29]
It is to be noted, however, that the *Conseil d'Etat* retains the jurisdiction on appeals against sanctions taken against concentration practices, the measures of which are adopted by the Minister of Finance, with occasional intervention of the council of competition; on challenges of the ministerial exemption decrees, on the basis of which anticompetitive practices can be authorized and on controversies over the invalidity of administrative contracts.[30]
In Germany the antitrust authority is the Bundeskartellamt if the restrictive practice causes it effects in more than one *Bundesland*, or the *Landeskartellämter* are competent, antitrust authorities of the *Bundesländer*. Decisions from Bundeskartellamt are controlled by the Berlin Court of Appeal (Kammergericht), whose decisions can be challenged only because of reasons of legitimacy to the Supreme Federal Court (*Bundesgerichtshof*, at which the *Kartellsenat* is instituted); while the decisions of other antitrust authorities are challengeable before the Oberlandesgericht, Courts of Appeal competent to the territory where the *Kartellsenat* is instituted.[31]
In Great Britain a complex system of competence was in force in antitrust matters, which has been modified by the Competition Act of 1988 and with the substitution of the old *Monopolies and mergers Commission* with the *Competition Commission* starting from 1-4-1999 and with the *Enterprise Act* of 2002, through which real decisional powers were assigned to the Commission not

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jurisdiction. Immediately after the definite approval of the ord. 86-1243 on 20-12-1986 an amendment was approved which provided the appeal to the Paris Court of Appeal. But this was deemed incontitutional by the *Conseil Constitutionnel* by the decision 23-1-1987, in that while the *Conseil d'Etat* has the power to suspend the execution of the challenged measures, this was not provided by the law, which gave the competence to the Paris Court of Appeal with limitations to an essential defensive guarantee. Nevertheless, the Parliament with the order n° 87/499 of 6-7-1987 reformulated the law maintaining the competence of the Court of Appeal, but disposing that the First President of the Court could order the suspension of the execution of the challenged act. The appeal to the Court of Appeal can be presented even by the Minister of Finance, within a month from the notification of the measure (ten days if it deals with a provisional measure) and it can bring about the cancellation or the reform of the decisions of the competitive Council. It is also proposable an incidental appeal and the decision of the judge is published in *Bulletin officiel de la concurrence, da la consommation et de la repression des fraudes.* Consult S. LICCIARDELLO, *"Sulle sanzioni a tutela della concorrenza e del mercato. Italia e Francia a confronto", in Riv. It. Dir. Pubbl. comunitario, 1993, 91*.

[29] Quoted decision 86/224 DC of 23-1-1987, published in L. FAVOREU and L. PHILIP, *Les grandes décision du Conseil Constitutionel*, Paris, 1993 (consult *considerant* 15 and 16). On the problem consult R. MAIA, *Le Autorités administratives indépendant tra vincoli costituzionali e potere politico*, in Amministrare, 2000, 157 and G. DE MINICO, *Spunti per una riflessione in merito al sindacato giurisdizionale sugli atti dell'Antitrust e della CONSOB*, in *Pol. Diritto*, 1998, 250, which underlines also that according to the French Constitutional Court, which may be the judge is a problem to be solved by considering either the authority emanating the decisions, thus preferring the attribution to the administrative judge, or the matter object of the controversy; according to this criterion the French legislator opted for the ordinary judge, already endowed with the competence of knowing actions of nullity and of responsibility based on the law of competition.

[30] For a reconstruction of the French antitrust system, consult D. AMIRANTE, *Le autorità di tutela della concorrenza in Francia. Profili organizzativi*, in L. AMMANATI, *La concorrenza in Europa*, Padova 1998, 61, where it is stressed how the administrative French judge has not really been excluded from the contention of competition, considering the aformentioned hypotheses still part of his jurisdiction.

[31] In some specific cases the appeal has a suspending effect while the authority of the trusts in such cases can direct the immediate suspension of the order, be this respondent to the public interest or to the prevalent interest of participants. Consult L. AMMANATI, *Il sistema tedesco della concorrenza. Un modello alla prova dei tempi*, in L. AMMANATI, *La concorrenza in Europa*, Padova 1998, 13. M. MELI, *Il sistema sanzionatorio delle intese restrittive della concorrenza nell'law system tedesco*, in Riv. Critica dir. Privato, 1997, 259. On the harmonization of German antitrust law, consult U. M. GASSNER, *L'europeizzazione del Kertellrecht tedesco*, in Riv. Soc., 1999, 1199, followed by the article of G.GIUDICI, *Alcune note sulla storia del diritto antitrust in Germania*.

only as a mere proposal to the *Secretary of State*, as happened in the past.[32] Under the profile of judicial review it was observed that English judges kept an attitude of *self restraint*, as it is proved by the high percentage of lawsuits solved favourably to the Commission.[33]
In Spain two are the national institutions to manage the protection of the competition: the *Servicio de Defensa de la Competencia*, with preliminary and vigilance functions and the *Tribunal de Defensa de la Competencia*, with decisive functions for illicit conducts and consultative functions for the operations of concentration; against the actions of the *Tribunal de Defensa de la Competencia* a *recurso contencioso-administrativo* is provided.[34]
From the analysis of the various antitrust law, in force in the member States, it results that the even relevant differences between the various systems are progressively being toned down by means of a process of convergence on the E.U. model.
The jurisdictions have had a role in the development of antitrust law particularly in the seat of judicial review on the acts of authorities, having the *private enforcement* not been developing as it has done in the U.S., a fact proved by the scarcity of intersubjective disputes in the matter.
The controversies, of a contractual or compensating kind, around matters of competition are numerically few, notwithstanding that, since its thirteenth relation on competition in 1983 and then ten years later in 1993, the Commission had invited the participants to turn directly to their national judges, relying on the E.U. case law as well, which had legitimated the filing of a case lacking E.U. interest and if that the appealer was able to have tutelage before the national judge.[35]
One of the causes could also have been the attribution of the exclusive competence for the enforcement of the art. 81.3 of the Treaty up to the Commission, that is for the possibility of allowing individual exemptions in relation with agreements encompassed by the art. 81; therefore, this is a cause already removed after a change from a notifying system with preventive authorization of the agreements to a system of legal exception with an *ex post* control, based on the straightforward enforcement of the whole article 81 of the Treaty by the national authorities and by the national judges, according to the regulation EC n° 1/2003.
However, it is to be noted that the *private enforcement* has not been successful even when considering violation of the national rules of competition; the firms take up lawsuits before the ordinary judge mostly to claim damages after the intervention of the national authority, in that those who hold themselves damaged by an anticompetitive conduct prefer to notify the national authority or the commission, instead of taking up judicial action.[36]
The mere notifying has the advantages of being inexpensive, of the guarantee of the complainer's anonymity, in order to avoid commercial retortions, of exploiting the greater investigative powers of the authority compared to the probative onus the plaintiffs have to bear in a civil judgement.[37]

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[32] In the past the *Monopolies and mergers Commission* had investigative roles in the matter of monopolies, acquisitions, merging and *restrictive trade practices*, after impulse of the *Office of Fair Trading*. The investigation ended with a *monopoly report* in which the possibility of a *formal action* (ministerail order, presupposing sanction for the forbidde practices) could be foreshadowed or of an *informal action* with final decision deferred to the competence of the *Secretary of State*.
[33] S. CASSESE, *Poteri indipendenti, Stati, relazioni ultrastatali*, in Foro It., 1996, V, 12. The deference of the British judges (and even of the French ones) towards the independent authorities is at times defined ceremonious in M. D'ALBERTI, Autorità indipendenti (dir. Amm.), voice in Enc. Giur., 1995. On the prudent use of the procedures of *judicial review*, consult A. BIONDI, *Chi regola i regulators? – Privatizzazione delle public utilities e controllo giudiziario: recenti sviluppi nella giurisprudenza inglese* in Riv. Dir. Civ., 1998, I, 85.
[34] It is to be remembered that in Spain, within the range of one jurisdiction, the action of administrative law is ascribed, through a procedure with also partly different rules, to the *Sala Tercera* of the *Tribunal Supremo*.
[35] Court I EC, 17-9-92, Automec, T-24/90.
[36] Consult on this point F. GHEZZI, *La cooperazione tra giudici nazionali e Commissione CEE in materi antitrust*, in Riv. Soc., 1993, 685.
[37] Moreover, the intervention of the authority has a deterrent effect on the conduct of the counterpart, even before a formal decision and it can be thought that the charger has the chance to contest, before the administrative judge, the dismissal of the case (on this aspect see par. 6). The possibility of obtaining just the compensation of civil damges (the lack both of *multiple damages* and of *exemplary damages*) and the absence of an institution like that of *class actions* are further facts to keep in mind when explaining the failed development of *private enforcement*.

The jurisdictions have therefore taken on a role above all in the seat of the judicial review on the acts of the antitrust authority.
In the variety of the European systems, we meet the common demand of a specialization of the judges meant not so much as a formal creation of specialized sections[38], but as a specific shaping of the individual judges dealing with competition.
It is not by chance that in Germany the aim pursued by the legislator has concentrated the competence on all the matters concerning the antitrust law in the hands of the so called Kartellgerichten[39]; that in France the good functioning of the new law introduced in 1987 depended also by the initiatives of the President of the Paris Court of Appeal, who decided to assign a small group of judges to the re-examination of the decisions of the Council, so that those judges were able to acquire a specific competence in the matter of competition, dealing wholly with antitrust law[40]; that in Italy, too, in the first section of the Tar (Regional Administrative Tribunal) of Lazio and in the sixth section of the Council of State, having competence on the appeals against the acts of the antitrust authority, has been created a nucleus of judges, at the top of which it has been concentrated the assignment of appeals (a progressively enlarging nucleus).[41]
It seems that the judges endowed with competence in the antitrust law, are aware of the difficulty of their task, having to be at the same time legally correct and economically proper in their judgements, and that they account for the twofold kind, juridical and economic, of the enforcement of antitrust law and the related need of merging juridical and economical knowledge in order to adequately enforce the antitrust law.[42]
It has been noted that the lack of technical knowledge of the matters on which a judge has to express it is not a feature of only the antitrust law.[43] In the case of antitrust law, anyway, a further difficulty is added: not only the economic reality (that is the object) is complex to understand, but the meaning of the law as well, written in general and abstract terms through the so called

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[38] Regarding this, see the observations by M. E. SCHINAIA, *Il giudice e le Autorità indipendenti*, in Il Cons. Stato, 2002, II, 1861, who, adopting a concept dear to economists, stresses how a special judge would risk being "captured" by the authority or, on the contrary, of substituting himself to it.
[39] Denomination currently used, although not by the legislator, as M. MELI, quot., 276 notes.
[40] Consult F. JENNY, *Autorità amministrative indipendenti e tutela della concorrenza: l'esperienza del Conseil de la Concurrence*, in Atti del Convegno Internazionale (Roma, 20/21 novembre 1995), in www.agcm.it, who underlines that the President of the Paris Court of Appeal has also fostered the knowledge of an economic culture for this judges (through seminars held by economists on themes concerning the enforcement of the law on competition, such as the definition of the market, the consumer's surplus, the economy of vertical integration, and so forth). Moreover, under a statistical aspect, between 1987 and the end of 1994 the Council for the Competition has taken 551 resolutions, concerning 186 of which appeals were advanced before the Paris Court of Appeal. Within March 1994, the Paris Court of Appeal had confirmed the judgement of the Council in 138 of the 166 resolutions it has studied (83%), though having lessened or increased the entity of the sanctions inflicted by the Council in 29 instances. Since the institution of the Council the Court annulled 13 decisions and amended 15 of them.
[41] A. POMELLI, *Il giudice e l'Antitrust. Quanto self restraint?*, in Merc. Conc. Reg., 2003, 239, evidencing how in the first section of the Tar of Lazio only ten judges have been chairmen of antitrust lawsuits, with a percentage of controversies higher than 50% instituted by only two judges and the fact is shared also by the sixth section of the Council of State, even if there has been a major rotation of the eight chairmen. It is also underlined that the defensive courts of the appellants are often made up by the same professionals, proportionally limited if compared with the total number of defensing counsels theoretically available on the market.
[42] One has to fully subscribe the ideas, already appeared (Consult A. FRIGNANI, E. GENTILE, G. ROSSI, *La devolution dell'antitrust*, in Merc. Conc., 2000, 197) regarding periods of professional training shared between judges and functionaries of the national authorities. Regarding that it is not a secondary requirement giving to the national Authorities the means, financial as well, to maintain within the system the raised professionalities. Consult, F. GHEZZI, *Il libro bianco della Commissione sulla modernizzazione del diritto della concorrenza comunitario*, in Conc. e Merc., n° 8/2000, 175, about the need of having sufficient staff resources. In the U.S., although in a deeply different system, the *Federal Judicial Center* offers training programs to the judges; in the European environment enterprises are already on the way such as the European network for juridical training. Concerning the competition these initiatives have to be extended to the State lawyers as well and to the lawyers and consultants of corporations.
[43] Consult F. JENNY, *Autorità amministrative indipendenti e tutela della concorrenza: l'esperienza del Conseil de la Concurrence* quot., evidencing that e.g. the judges face decisions on personal responsibility concerning the acts of doctors even if they do not know the medical science.

indeterminate juridical concepts, such as "restricting the competition" or "abuse of dominant postion", "relevant market", lacking an univocal meaning.
It concerns something similar to those zones of shade previously described.
The methods of the control on such areas of shade have not obviously been the same in all the systems, just as the scope of judicial review has not been the same.
Probably, the standard of judicial review present in the French and German systems is stricter as for the direct access to the fact and for the verification of the evaluation of the fact, even of that of a technical kind; while the control brought by the British judges seems to have had only recently a fostering towards a sharper control.[44]
In particular, in French legal system the Paris Court of Appeal have a full jurisdiction control over the acts of the *Conseil de la concurrence* and the French judges can, after an annulment, rule on the entirety of the case and are allowed to substituted the decision of the *Conseil* without sending back the case to the Authority.[45]
The author doesn't consider himself the best person to make a comparative judgement concerning the control of the Italian administrative judge.
Up to now the guiding role for internal judges has been carried out by the Court of Justice, but from now on it is not to be excluded that the decentralization of the law of competition, ensuing from the EC n° 1/2003 regulation, can lead to a major contribution from the bottom in the development of the matter of antitrust law within that circular process of formation of the law previously described.
Now I will examine the modalities of the judicial review by the Court of Justice and from the Court of First Instance on the acts of the Commission.
The E.U. jurisdictional institutions perform a control of legality on the orders of the Commission, which is extended to the merit for the fines.[46]
It has been noted that the attribution of a competence even of merits to the Court means that this very competence adds to the control of legality and it does not substitute it entirely; therefore the part of the challenged decision regarding the investigation of the violation is still under the traditional control of legality, while the appeal becomes of full jurisdiction for the only part concerning the sanction.[47]
In every case the appeal is subject to a forfeiture of two months, starting from the notification of the decision.
Under the profile of incisiveness, the control of the Court of Justice, performed on the complex economic evaluations carried out by the Commission, has been expressly limited to verifying the conformity to the rules of procedure and motivation, as well as of the material exactness of items, of the inexistence of palpable error in the evaluation and of a misuse of power.[48]
The Court of Justice denied the possibility of a substitutive control of the judge on complex technical evaluations (specifically the economic ones) carried out by the Commission.[49]

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[44] In this sense consult R CARANTA, *Tutela giurisdizionale effettiva delle situazioni soggettive di origine comunitaria and incisività del sindacato del giudice nazionale (Kontrolldichte)*, quot. 517 and D. DE PRETIS, *Valutazione amministrativa e discrezionalità tecnica*, Padova 1995.
[45] Consult, J. Riffault Silk, Jurisdictional control over the acts of antitrust authorities under French experience, Treviso Conference 2004.
[46] The art. 229 of the Treaty orders that "the regulations established by the Council on account of the provisions of the present Treaty can attributed to the Court of Justice a jurisdictional competence even of merit as regards the sanctions ordered by the very regulations". The art. 17 of reg. 17/1962 and the art. 16 of the Reg. 4064 on the control of concentrations have provided such competence of merit. Today the art. 31 of the reg. n° 1/2003 instructs that "The Court of Justice has jurisdictional competence even of merit to rule on the filed appeals against the directions with which the Commission orders a fine or a default penalty. It can extinguish, decrease or increase the fine or the penalty inflicted".
[47] In this sense, A. FRIGNANI – M. WAELBROECK, *Disciplina della concorrenza nella CE*, Torino, 1996, 441.
[48] Consult decisions of the Court of Justice 11-7-1985, C-42/84, Remia, point 34, and 17-11-1987, C- 142/84 and 156/84, BAT and Reynolds, point 62; 28-5-1998, C- 7/95, John Deere, point 34 and, at last, 7-1-2004, C- 204/00 and 219/00, Aalborg, point 279 and First Instance Court EC, 21-3-2002, T -231/99, Joynson).
[49] Court of Justice, decisions of 15-6-1993, C-225/91, *Matra*, in *Racc.* 1993, I-3203, and 5-5-1998, C-157/96, *National*

Such orientation of the E.U. judge has attracted the criticism of the academic literature, which has specifically stressed that "the quality of the economic analysis offered by the Court of Justice leaves much to be desired if compared to the brilliant performances the U.S. Supreme Court brought forth in the last decades".[50]

The aforementioned trend finds further corroboration in recent decisions of the Court of First Instance, today the only judge of the facts in the European system, and it does therefore seem consolidated at the E.U. level[51], although it has been noted that the Court had been instituted also to make possible a deeper control on the factual ascertaining of the E.U. institutions[52]. It is also true that, beyond the previously described statements of principle, in reality the E.C. judges have very often accurately analysed the economic studies carried out by the Commission.[53]

In a few recent sentences, the Court of First Instance has performed the control operating a substantial evaluation of the content of antitrust measures, e.g. cancelling the decision of the Commission Airtours/First Choice[54], reputing it affected by a set of errors made in the assessment of important items for the individuation of the eventual creation of collective dominant position; or cancelling the Tetra Laval/Sidel decision, affected by a palpable error of estimation made by the Commission in the evaluation of the anticompetitive effects of the operation.[55]

Farmer's Union, 1998, I-2211,where it is stated how even in verifying the substantial exactness of the facts and of their juridical qualification worked out by the E.C. authority, the European judge performs the usual controls (even pervasive but always of an extrinsic type) on the discretionary factor. First Instance Court, sent. 12-12-2000, T-296/97 *Alitalia*; where concerning the complex economic evaluation needed for the performance of the so called criterion "of the private investor", it is stated the Commission holding a wide discretionary power, whence the jurisdictional syndicate on it cannot entail a substitution of the evaluation of the Commission with the judge's one.

[50] M. RICOLFI, *Antitrust,* in N. ABRIANI - G. COTTINO - M. RICOLFI, *Diritto industriale,* in *Trattato di diritto commerciale*, voI. II, Padova, 2001, p. 785.

[51] The recalled precedents of the Court of Justice are the basis e.g. of Court of First Instance E.C., 21-3-2002 (T-131/99), *Shaw and Falla* vs *Commissione;* Court of First Instance E.C., 21-3-2002 (T-231/99), *Joynson* vs *Commissione,* 38 and 36; *adde* Court of First Instance E.C., 28-2-2002 (T-395/94), *Atlantic Container Line AB and other* vs *Commissione,* point 257 of the motivation.

[52] R. CARANTA, *I limiti del sindacato del giudice amministrativo sui provvedimenti dell'Autorità garante della concorrenza e del mercato,* in Giur. Comm., 2003, 170 underlines that the decision 88/591/CECA, E.E.C., Euratom of the Council of 24-10-1988 instituting a Court of First Instance of the European Communities, in *G. U. E.C.* 25-11-1988 n° L 319/1, literally told in the foreword: "considered that, for the controversies requiring a close examination of complex facts, the institution of a two instances of jurisdictions is aimed at improving the jurisdictional protection of the subjects; that, in order to maintain the quality and efficiency of the jurisdictional protection in the E.C. law system, the Court must be allowed to concentrate its activity on the main task, which is the guarantee of the homogeneous interpretation of E.C. law; considered that it is therefore necessary to make use of the authorization conferred by the art. 32 quinquies of the CECA Treaty, by the art. 168 A of the E.E.C. Treaty and by the art. 140 A of the CECA Treaty, and transferring to the Court the competence of knowing in first instance some categories of appeals often requiring the examination of complex facts, that is the appeals by the agents of the institutions, as well as – regarding the CECA Treaty – the appeals filed by firms or associations in the matter of withdrawals, of production, of prices, of agreements and concentrations and – regarding the E.E.C. Treaty – the appeals filed by physical or juridical persons in matter of competition"; the author also recalls L. RITTER - W.D. BRAUN - F. RAWLINSON, *European Competion Law: A Practitioner's Guide,* 2nd and., The Hague et al. (Kluwer), 2000, p. 908, who consequently think that: "changes are likely in the lower court's procedure, expecially since the Court of First Instance has been charged with the task of scrutinizing the Commission's fact-finding more closely"; these very authors lately state that: "In the Court of First Instance, it is likely that further enquiries, hearing of witnesses and expert testimony, and perhaps the oral hearing of counsel, will assume a more important role than in the Court of Justice" (p. 909).

[53] Again M. RICOLFI, *Antitrust,* quot., p. 784; in the sense that "The Court of First Instance has generally been more rigorous than the Court of Justice in scrutiny of […] the Commission's economic reasoning" consult also R. LANE, *EC Competition Law,* Harlow (Longman), 2000, p. 191.

[54] First instance Court E.C., 6-6-2002, T-342/99, Airtours PLC, Foro It., 2003, IV, 35.

[55] First instance Court E.C., 25-10-2002, T-5/02, Tetra LavaI BV, in Foro It., 2003, IV, 123. This decision and the one in the previous note are indicated as instances of a sharper control by the Court in A. POMELLI, *Il giudice e l'Antitrust. Quanto self restraint?,* quot., 275 and in F. SCIANDONE, *Il sindacato del giudice amministrativo in materia antitrust: eventuali asimmetrie con gli orientamenti comunitari,* in Foro Amm. TAR, /2003, 1963. The decision Tetra Laval has been challenged by the Commission before the Court of Justice under the profile of the scope of the judicial review. The Commission contests to the Court of not having limited itself to control whether it had done an "evident assessment

Notwithstanding such jurisdictional openings, part of the academical literature holds anyway that the degree of incisiveness required at the E.U. level is very likely inferior to that of some national systems (e.g. the French and German ones), referring not so much to the matter of direct access to the facts and, therefore, of the inquiring powers of the judge, provided that the Court has never contested, at least theoretically (and even rarely using it), its power of direct knowledge of the items pertinent to the lawsuit; but referring to the eventuality that the judge may verify the assessments of the fact (even of a technical type) performed by the administration.[56]

This school of thought stresses how the Court of Justice has expressly affirmed that E.U. law does not prescribe standard of incisiveness of judicial review on the administrative evaluation of technical elements, and chiefly it does not provide jurisdictional remedies allowing the judge the substitution of his own evaluation of the factual items to the pertinent administrative authority's one.[57]

With regard to the judge's powers, it is registered that the European judges make seldom use of their investigative powers: the documental proof remains to them the main tool for understanding the controversy. It is meaningful that the Court of Justice have reputed admissible court experts in the judgement of competition, yet later adopting that tool with extreme caution.[58]

Academic literature has also shown that appeals to the Court over competition entail the re-examination of the contested decision, but not the re-making of the whole procedure carried out by the Commission and that, therefore, the Court can take into consideration new items or documents if and only if they can confirm the facts contained in the decision, while entirely new argumentations cannot be accepted, not having been debated in the administrative proceedings and because a proof could exist characterizing the motivation of the decision as insufficient.[59]

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errror" and then to verify whether the facts on which its assessment was based were correct and the conlcusions were plainly incorrect and flawed and whether all the relevants factors had been taken into account. According to the Commission instead the Court would have exercised a more incisive control, furthering to verify whether the conclusions reached by the Commission were upheld by proofs or "convincing" elements. The Court had thus erroneously performed a control, that if literally construed, would have imposed on the Commission the acceptance of its own assessments and consequently it would have allowed to such a judge to encroach upon the merits of the questions swapping their viewpoint with that of the Commission. At the time being only the opinion of the General Advocate have been published, who expressed himself over the refusal of the appeal although acknowledging that in some passages of the decision the Court, trespassing the limits of its own jurisdictional control, has erroneously exchanged its own viewpoint to that of the Commission holding some autonomous opinions. According to the General Advocate the E.C. judges besides controlling the respect of the rules of law and especially those relating to the procedure and the obligation of motivation, exercise a different control depending on the fact that it deals with the ascertainment of the factual correctness or with the economic assessments by the Commission. With reference to the factual ascertainment, the control is clearly more intense, dealing with the objective verification the exactness of determinate items in their existence and the correctness of the inferences performed to establish whether determinate known facts might allow the proof of other facts to be ascertained. As regards to the complex economic evaluations performed by the Commission, the control of the E.C. judges is less ample, having to respect the wide discretionary power within such evaluations and they cannot swap their viewpoint with that of the court to which they are institutionally deferred (C-12/03 P, Commissione vs Tetra Laval, Opinion of the *Adv. Gen.* Tizzano of 25-5-2004). Consult the the absolute analogy with the principles affirmed by the Italian Council of State.

[56] D. DE PRETIS, *La tutela giurisdizionale amministrativa europea e i principi del processo,* quot., who expresses her considerations in general terms and not limiting her reference to antitrust law.

[57] Always consult D. DE PRETIS, quot., recalling Court of Just., decision 21-1-1999, C-120/97, *Upjohn,* in *Riv. it. dir. pubbl. com.* 1999, 495, with note by R. CARANTA, *Tutela giurisdizionale effettiva delle situazioni soggettive di origine comunitaria and incisività del sindacato del giudice nazionale (Kontrolldichte),* 503, stressing how in that way the Court has lost the chance created by the prejudicial postponment worked out by the British judge, a chance for facing more properly the themes of substantial right concerning the discretionary activity of the public administration and the related problems of the grade of judicial review.

[58] For a case of utilization, consult Court of Just., E.C., C - 89/85, 31-3-93, Woodpulp, where it has been assigned to experts the task of ascertaining some facts contested to firms and peculiar features of the market under examination. On the poor utilization of the inquiring powers in general by the Court of Justice, consult the data registered in G. FALCON, *La tutela giurisdizionale*, in M. CHITI – G. GRECO, *Trattato di diritto amministrativo europeo*, Milano, 1997, Parte Generale, p. 387, nota 159.

[59] Consult FRIGNANI – WAELBROECK, quot., 449.

We can conclude that, apart from in some instances, E.U. case law has opted for a type of judicial review on the acts of the Commission which, without limiting itself to formal verification of the adherence to the procedures, as it could also be inferred from some statements it goes on to a full verification of the fact, reconsidering the evaluation of it performed by the Commission, but without substituting the judge's evaluation.

4. The control performed by the Italian administrative judge.

In the Italian law system the legislator has attributed to the administrative judge, in the field of exclusive jurisdiction, the appeals against measures of antitrust authority, with functional competence in first instance of the Tar of Lazio[60], while the actions in contract and of compensation of damages[61] must be brought before the ordinary judge (to the Court of Appeal competent in the territory); it has been opted, thus, for two different jurisdictions, administrative and ordinary, competent respectively for the *public* and the *private enforcement*.
The Italian legislator's choice, favouring the exclusive jurisdiction of the administrative judge over the appeals against the measures of the antitrust, has been, and it still is, the object of criticism and of ample debate within the academic literature.
As it is known, in the Italian system, under the conditions of exclusive jurisdiction, the administrative judge can be called upon not only for the protection of legitimate interests, for which he is ordinarily competent according to the art. 103 of the Constitution, but also for individual rights.
Generally the choice for the exclusive jurisdiction is motivated with demands of certainty, of concentration and of economy of the juridical means before matters in which it is not easy to distinguish between rights and legitimate interests, even if part of the academic publications justified this choice for the measures of antitrust Authority with functional reasons, as these are the particular attitude of the administrative judge in evaluating the work of the administration on the whole.[62]
Academic literature appears even more partitioned on the shaping of rights or legitimate interests in the relationships between firms and antitrust Authorities.
On the one hand, it is thought that in the absence of moments of a discretionary kind, the activity of provisions shows a deficit of any degradatory effect on the juridical positions of those responsible of infractions, thus surely qualifiable as rights, the knowledge of which should be attributed to the ordinary judge, the latter being the natural judge of the rights[63].It should be noted that we deal with individual rights often of a constitutional rank, before which rights the authority can only ascertain the illicit actions and enforce the law, without any evaluation of political convenience, which can never be brought into the field when performing a neutral function.[64]
On the other hand, it is shown that we deal with legitimate interests, being applicable not only before a proper discretionary power, but every time that the satisfaction of a material interest depends on another's authoritative act[65]; in particular, it is reconsidered the abstract compatibility of

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[60] The thesis of functional competence, that cannot be derogated and that can be formally relieved, by the Tar of Lazio according to art. 33 of law n° 287/1990 is shared by M. TAVASSl - M. SCUFFFI, *Diritto processuale antitrust,* Milano, 1998, 152 and by Consiglio Stato, sez. VI, l-2-1993, n. 132, in Giust. civ. 1993, I, 1124.
[61] Be remembered that the requests of damage compensation proposed towards the authority fall under the exclusive jurisdiction of the administrative judge.
[62] Consult I. MARINO, *Autorità garante della concorrenza e del mercato e giustizia amministrativa,* in Dir. Econ., 1992, 578.
[63] GHIDINI - FALCE, *Giurisdizione antitrust: l'anomalia italiana,* in Merc. Conc. Reg., 1999,317 foll..
[64] G. SCARSELLI, *Brevi note sui procedimenti amministrativi che si svolgono dinanzi alle autorità garanti e sui loro controlli giurisdizionali,* in Foro It., 2002, III, 488.
[65] M. LIBERTINI, *Il ruolo del giudice nell'applicazione delle norme antitrust,* in Giur. Comm., 1998, p. 649. M. CLARICH, *Per uno studio sui poteri dell'Autorità garante della concorrenza e del mercato,* in Dir. Amm., 1993, 99.

the legitimate interest with formally restricted structures of power, yet conditioned as a result of an evaluation according technical discretion.[66]
The subject has been deepened by Merusi, who, although pointing out that before fundamental rights (such as the freedom of economic initiative) a discretionary power of the public administration cannot exist, holds that the legitimate interest is not incompatible with the notion of fundamental right and it is even recognizable when it is a matter of tutelage of a fundamental right on behalf of the exercising of power (power which in the antitrust proceedings is bound to the so called indeterminate juridical concepts).[67]
Another school of thought has further emphasized how, although some subjective situations, involved with the power of antitrust authorities, can be qualified as individual rights, the freedom of economic initiative and of competition the individuals have the right to, does not exist on its own and it must harmonize with the general interest to the competition, the protection of which is institutionally deferred to the Authority; the latter comes to establish a relation with private individuals, subjecting them to a set of obligations, reflecting on their entrepreneur autonomy and in relation to which there could be a coexistence of rights and legitimate interests.[68]
Adding to the considerations of academic publications, it must be observed that at times the antitrust Authority exercises real discretionary powers, as in the case of measures of operations for forbidden concentrations, adoptable by the antitrust Authority for relevant interests in the national economy according to the art. 25 of the law n° 287/1990, provided they do not entail the termination of the competition in the market or restrictions to the competition not fully justified by the aforementioned general interests.[69]
This item confirms, at least in such cases, the possibility of configurating positions of legitimate interests and it enhances the validity of the choice favouring the exclusive jurisdiction of the administrative judge, as otherwise there could have been, for such measures, the traditional jurisdiction of legality, always by the administrative judge.
Furthermore, referring to the complainant's situation, there are certainly positions of legitimate interest, the former being counterinterested towards the anticompetitive conduct and contesting the

[66] Consult G. DE MINICO, quot., 249.
[67] F. MERUSI, *Giustizia amministrativa and autorità amministrative indipendenti,* in Dir. Amm., 2003, 181 foll. Who also points out that in the exercise of the functions deferred to the antitrust Authority the sequence rule – power – fact is outlined, at times even accompanied by the simple relation rule – fact. The doubt on the compatibility between the notion of fundamental right and the notion of legitimate interest led the legislator to provide for a more generalized exclusive jurisdiction of the administrative judge. Merusi's observations are shared and deepened by M.E. SCHINAIA, *Il controllo giurisdizionale sulle autorità amministrative indipendenti,* in Foro amm. Cds, 2003, 3160, containing a wide review of the case - law of the administrative judge in antitrust matter and of the positions of the academic literature.
[68] RAMAJOLl, quot., 364 foll., who points out that the firm holder of a subjective right in the exercise of its activity, ends up in claiming also legitimate interests in cases in which it comes to relation with the antitrust Authority, like under the condition of inhibitory or re-establishing measures adopted in its behalf. Ramajoli does not expressly speak about a weakening of the subjective right but of the coexistence of subjective interests and legitimate interests, being the reason for the provision of the exclusive jurisdiction of the administrative judge, called on to understand a set of juridical situations, which makes no sense in being partitioned, because of the difficulty and mostly of the uselessness of such an operation. As regards to the objective protection of free market, not limited to the guarantee of the individual positions of the economic operators, consult M.E. SCHINAIA, *Il giudice e le Autorità indipendenti,* in Il Cons. Stato, 2002, II, 1861.
[69] The academical literature acknowledges the existence of dicretionary powers in this hypothesis and in the one referred to in the art. 4 of law n° 287/1990 decision of exceptions from the prohibition of restrictive competition's agreements; consult M. ANTONIOLI, *Giudice amministrativo e diritto antitrust: un dibattito ancora aperto,* in *Giust. Civ.*, 2001. 97, who emphasizes that the full cognizance of the ordinary judge on the measuers of antitrust Authority would require not the mere repealing of the art. 33, par. l, of law n° 287/1990, but the acknowledgement to the ordinary judge of an exclusive jurisdiction, with the assignment of the protection of legitimate interest, too (with eventual contrasts with the arts. 103 and 113 of the Constitution). In the sense of the discretonary kind of the power by the antitrust Authority in the two previosly described hypotheses, consult also, Cons. Stato, VI, n° 2199/2002 (point 1.3.1.), in Foro it., 2002, III, 482.

unaccomplished enforcement of repressive powers by the Authority (inertia, the dismissal of a lawsuit or the authorization of a concentration).[70]
The partitions of academics on the qualification as rights or as legitimate interests about the positions of the subjects the antitrust Authority deals with, confirms the legislator's choice of not turning this purely theoretical problem into a relevant one, above all in a sector, such as the antitrust one, affected by a strong requirement for harmonization in the E.U. field, where the distinction between rights and legitimate interests is not known.
Besides, the national qualification of subjective juridical situations constitutes a matter to which the E.U. law system is indifferent, being the target of the latter not the flattening of the juridical identities of each member State into a single system, but the guarantee of the effectiveness of the jurisdictional protection, although in the enhancement of the individual national models.[71]
Thus, what is relevant is neither the jurisdiction targeted by the legislator for the appeals against antitrust measures, nor the juridical qualification of the subjective positions involved, but the quality of the protection offered by the single systems.
The provision of the administrative judge's exclusive jurisdiction does not constitute therefore any "E.U. contradiction"[72], considered that the appeal of annulment as well, which is provided by the art. 230 of the Treaty, is modelled after the constitutive action of annulment which can be experienced against the administrative acts, with clear affinities between the Italian and the E.U. administrative proceedings[73] and having taken into account the full consistence with the E.U. system of an unavoidable forfeiture for the challenge of antitrust measures, which is ordered even in the E.U. context (two months) and on the basis of exigencies of certainty, leaving out of consideration the juridical qualification of subjective positions.[74]
It is not by chance, then, that Italian administrative case law has had till now small consideration for the juridical qualification of the subjective positions involved by the antitrust measures, having on the contrary be attentive towards the kind and the modalities of the judicial review.
The problem dwells right in this aspect: individuating a kind of control apt for creating an effective protection, consistent with the control carried out by the Court of Justice and by the court of First Instance on the acts of the Commission.
In relation to such problem the individuation of the judge does not appear definitive, as it is proved by the fact that the transferring of the jurisdiction to the ordinary judge is desirable by some in order to allow a full control on the merits of decisions of antitrust Authority[75] and by others, because this judge would be more able to preserve the limits of the judgement on the acts of the independent authorities without risks of overstepping his own limits.[76]
From the examination of the case law of the Council of State about the matter of the judicial review over the acts of antitrust Authority it clearly comes out how the administrative judge, although following the same interpretative line, has progressively deepened the subject and has been moved by the search for a balance among the opposed requirements of the guarantee of the effectiveness of

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[70] On the point see the following par. 6.
[71] In this sense, consult also L. MASSELLI, *Alcune riflessioni in tema di "conflict of jurisdiction" tra Autorità garante, giudice amministrativo e Commissione nella disciplina della concorrenza*, in Dir. Proc. Amm., 1999, 695.
[72] In this sense, GHIDINI - FALCE, quot., 326.
[73] In this sense, GRECO, *Profili di diritto pubblico italo-comunitario*, in Argomenti di diritto pubblico italo-comunitario, Milano, 1989, 85 and M. ANTONIOLI, *Giudice amministrativo e diritto antitrust: un dibattito ancora aperto* quot., 100.
[74] Even in the range of exclusive jurisdiction the importance of the distinction between subjective rights and legitimate interests is reaffirmed under the profile of the applicability of the forfeiture as provided for the challenge of the administrative measures only before legitimate interests, being otherwise applicable the forfeiture. In antitrust law, leaving aside this qualification, it seems impossible to renounce to a forfeiture for the appeal of the measures ordered by the antitrust Authority, because of those requirements of certainty characterizing complex economic relationships, in which those measures are inserted.
[75] GHIDINI - FALCE, quot., 323; SCARSELLI, *Brevi note sui procedimenti amministrativi che si svolgono dinanzi alle autorità garanti e sui loro controlli giurisdizionali* quot., 492.
[76] M. RESCIGNO, *Autorità indipendenti e controllo giurisdizionale: un rapporto difficult*, in Le Società, 2001, 533.

the jurisdictional protection and of the avoiding the fact that the judge may be able to enforce a power which in the antitrust matter is assigned to the antitrust Authority, whose correct conduct must be verified by the judge.
In the first decisions on the matter the statement of principle is frequent according to which the measures of the Antitrust Authority are subject to control, within the lawsuit, because of legitimacy flaws and not because of flaws of merit. Although within the range of legal flaws, the judicial control does not meet limitations, being applicable even to the abuse of power in all its forms, other than the incompetence flaws and violation of law. When, anyhow, it is inferred, through the measures of the Authority, the "ultra vires" action flaw, the judge, within the range of his own syndicate limited to the only legality of the act and not extended to the administrative choices, can verify whether the challenged provision should appear to be logical, congruous, reasonable; correctly motivated and instituted, but he cannot also replace his/her own assessments of merit to those of the Authority, and to this latter deferred.[77]
Successively, the Council of State[78] has reconfirmed this trend, giving few further specifications pointing out that the measures of the antitrust Authority have an atypical nature, being articulated in various parts, corresponding to the stages of the control performed by the Authority: a) a first stage of ascertaining the facts; b) a second one of "contextualization" of the rule set for the protection of the competition, which, referring to the "indeterminate juridical concepts" (such as the relevant market, the abuse of dominant position, the restrictive agreements of the competition), needs an exact individuation of the items constituting the contested illicit act (the rules in the matter of competition are not of "narrow interpretation", but they hit the substantial fact of those collusive conducts between the firms, not identifiable a priori, having an anticompetitive object or effect[79]); c) a third phase of compairing the ascertained facts with the "contextualized" rule; d) the last phase of application of the sanctions, provided by the law in force.
That being premised, the Council of State excludes that the control of legitimacy can preclude the administrative judge from verifying the truth of the fact which is the grounding of the measures of the Authority, in that after the progressive shifting of the object of the administrative judgement from the act to the controversial relationship (claim made good, according to some) it is now out of date that orientation denying to the administrative judge the direct access to the fact, except when the factual items are found excluded or existing as a consequence of the proceedings' assessments.
On the basis of that orientation, therefore, the facts at the foundation of the measures enforced by the antitrust Authority can with no doubt be completely verified by the administrative judge according to their truth; this event presumes the assessment of the items of proof gathered by the Authority and of the proofs in defence offered by the firms without the judge's access to the fact may undergo any limitation.
With regards to the above mentioned stages sub b) and c), consisting in the individuation of the normative criteria and in the comparison with the ascertained facts, in relation to which the Authority holds at least in part a discretionary activity of a technical character and not of an administrative type, relying not on scientific rules, exact and not disputable, but on inexact and opinable sciences (mainly of an economic kind) by means of which the "indeterminate juridical concepts" are precised, the jurisdictional protection, in order to be effective, cannot be limited to a merely extrinsic control, but it must consent the judge an intrinsic control, making also use of rules and technical knowledge belonging to the same specialistic science applied to the Authority.
The passage to an intrinsic control takes on great importance and leads the administrative judge to control the very economic analysis done by the Authority, even with a few limitations, which in the decisions are qualified in terms of "control of a weak type", meaning that it does not allow a

[77] Consult, amongst all, Cons. Stato, VI, 14-3-2000, n° 1348, Italcementi, in *Foro amm. 2000*, 933.
[78] Cons. Stato, VI, 23-4-2002, n° 2199, Rc Auto, quot.
[79] Consult on the point Cons. Stato, VI, n° 1189/2001, Rischi Comune Milano, in Cons. Stato, 2001, I, 554.

substitutive power of the judge such as to overlap his own technical assessment or his own logical model of creation of the "indeterminate concept" to the work of the Authority.[80]
In another decision, immediately subsequent, the Council of State[81] has reaffirmed the full access to the fact by the judge and it has confirmed that the complex[82] assessment in function of the application of indeterminate juridical concepts, caused by the Authority, is subject to the "weak" control.
The described limits of control have been justified even because of the particular relevance of the interests deferred, for their importance, to the protection of the antitrust Authority, court characterized by a specific technical composition, placed in a position of particular independence and which exercises neutral powers, beyond the circuit of political concern.
The quality of judicial review like the "weak" type has been object of numerous criticisms by academics, who deemed the intervention of the Council of State as one with a mainly conservative character, of substantial confirmation of backward orientations, in which to few abstract openings a correct application has not followed, but the refusal of appreciating technical knowledge.[83]
The qualification of the control as being weak has been held incompatible with the position of subjective right involved in the wielding of the powers of the Authority, which would enforce the jurisdictional control to invest the entire juridical relationship interwoven between the parties and not to be limited to the mere assessment of the legality of the challenged act.[84]
Recently the path of the administrative case law seems to have found a definite landing in another decision, with which further clearings have been released to the stated aim of "dissipating doubts on the effectiveness of the jurisdictional protection".[85]
The Council of State has pointed out that, notwithstanding the qualification as being exclusive of the jurisdiction of the G.A., this remains a "jurisdiction acting as an instance of appeal", according to the definition in the regulation EC n° 1/2003, where it is up to the judge to verify whether the power of the antitrust Authority has been correctly wielded.
This being premised, the highest institution of Italian administrative justice, too, hastens in specifying how even in the pattern of challenging the jurisdictional control is today particularly effective and in the controversies in antitrust matters it stretches to the control of economic analysis carried out by the Authority (being able either to re-evaluate its technical choices, or to apply the correct interpretation of indeterminate juridical concepts to the case under examination).
Watching over the fact that the definition of judicial review "of a weak type" could be interpreted as limiting the effectiveness of the jurisdictional protection, the Council of State points out that with this expression its aim was not restricting its own power of full knowledge of the facts subject to inquiry and the assessment process, by means of which the Authority applies to the case under observation the focused rule, but it only wanted to establish a final limit to the judge's statement, who, after having fully ascertained the facts and verified the process as done by the Authority

[80] In the decision it is stated that the administrative judge cannot, therefore, replace the Authority's assessments with his own; e.g. the judge cannot substitute the independence of the relevant market effected by the Authority, but can verify its correctness according what has been said; similarly the judge cannot replace the specification of the violated legal parameter to the one of the Authority, nor can modify the general lines of the inquiry and consequently of the measure but only to verify its legitimacy. The general lines followed by the Authority in preforming a specific inquiry, and in the subsequent assessments up to it, cannot be thus modified by the judge, whose only duty is verifying its legitimacy, even under the profile of the applied technical regulations.
[81] Cons. Stato, VI, 1-10-2002, n° 5156, Enel/Infostrada, in *Foro amm. CDS 2002, 2505.*
[82] The category of complex assessments, mostly aimed at the application of independent juridical concepts, is made up by those evaluations in which it is often registered a chronological contextuality and a partial logical overlapping between the moment of the technical assessment and the consideration of public interest and more generally the merging of the two moments in a whole logical process.
[83] R. CARANTA, *I limiti del sindacato del giudice amministrativo sui provvedimenti dell'Autorità garante della concorrenza e del mercato,* in Giur. Comm., 2003, 170
[84] G. SCARSELLI, *Brevi note sui procedimenti amministrativi che si svolgono dinanzi alle autorità garanti e sui loro controlli giurisdizionali*, in Foro It., 2002, III, 488.
[85] Cons. Stato, VI, 2 marzo 2004 n° 926, Buoni pasto Consip, in www.lexfor.it.

according to technical rules, these latter having been syndicated too, if he thinks the Authority's assessments are correct, reasonable, proportionate and reliable, he must not push further into expressing his own choices, because otherwise he would be taking on a role of power. The judge cannot substitute himself for an already exercised power, but only has to assess whether the complex evaluation performed in wielding the power should be considered correct under the technical profile, either in the stage of "contextualization" of the rule provided for the protection of competiton either in the phase of comparison between the ascertained facts and the "contextualized" parameter.[86]

The Council of State seems therefore to have the intention of getting over the terminology "strong or weak control", to redirect the attention uniquely on the quest for "control headed to a common model at the E.U. level, in which the principle of effectiveness of jurisdictional protection would be united with the proper character of controversies, where the task is ascribed to the judge not of wielding the power in matters of antitrust, but of verifying – with no limitations whatsoever - if the power, to that purpose ascribed to the antitrust Authority, has been properly wielded."

One observes that in a perspective of harmonization with the E.U. system (nowadays following the process of decentralized application of the E.U. law of competition, started by the quoted EC n° 1/2003 regulation), it appears preferable to compare not the institutes or the juridical terminologies (syndicate "weak" or "strong"; legitimate interest/ right), but to compare the ways the problems are solved.

The described evolutive path of the administrative case law has led the Italian administrative judge to face the questions of jurisdictional control on the acts of Authority with formulations which appear very similar to those of the E.U. judge previously described and which are lined up with the standard of protection recognized at the E.U. level.

It is also true that, as we were previously reminded, beyond the affirmation of principle previously mentioned, the E.U. judges have in reality very often analysed in an accurate way the economic analysis carried out by the Commission; but this is what the administrative judge has also started to do.[87]

So even regarding antitrust, the so called "E.U.-isation" of the administrative judgement has been started, for a long time foreshadowed by the academic literature.[88]

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[86] What is precluded to an appeal jurisdiction is the modification of the general lines followed by the Authority in carrying out a determinate investigation and in the consequent assessments remitted to it; this preclusion constitutes a guarantee for the very firms, not running the risk of seeing the confirmation of a measure taken on a basis other than the one against which they have been defending in the administrative proceedings. Whenever the judge holds the assessment as inexact and that this flaw has an invalidating effect on the entire provision, he will cancel the challenged provision. The absence of substitutive powers entails, therefore, only the impossibility of a different setting carried out by the Authority and of ascertaining in the jurisdcitional court whether this different setting might be compatible with the infractions ascertained by the Authority and, in the positive case, lead anyway to the enforcing of the sanctions. If the proofs, e.g., acquired by the Authority within the investigation are insufficient to prove the existence of the agreement, further probatory items cannot be acquired by the judge in order to confirm the enforced sanction.

[87] For instance, in the quoted decision n° 5156/2002 (Enel/Wind-Infostrada), the Council of State examined the economic analysis carried out by the Authority, cancelling the corrective measures of the anticompetitive effects of a determinate operation of concentration on the basis of a "penetrant" judicial review on the lack of proportionality and adequacy of the measures in respect to need to avoid the negative consequences on the competitive level of the operation. In that case, the Council of State has concretely shown itself not facing any limitation in the wielding of its own jurisdictional syndicate and the absence of substitutive powers has only entailed that it was not the judge to state anew the prescriptions under which the approval of the operation was to be subjected, but that the definition of the substantial case targeted by the challenged provision was to be ascribed to the Authority, in the field of the re-exercise of the power and with the boundaries deriving from the decision to the Authority to which the legislator deferred the wielding of such delicate powers (within an administrative proceeding, affected by particular guarantees for the debate).

[88] GRECO, quot., 86, who notes that through the pattern of the judgement of the cancellation of the act, the E.C. jurisdiction goes straight into the substance of the relation between the parties. Even if it has been noted that the configuration of a lawsuit over an act instead the one over a relation is less satisfactory for the protection of legitimate interests of a claiming type and not also of the opposing type, among which are included those that can be ascribed to the firms undergoing the activity of the antitrust Authority (M. ANTONIOLI, quot. 101).

The aforementioned specifications provided by the case law of the Council of State exclude limits to the jurisdictional protection of the subjects involved by the activity of the antitrust Authority, focusing as the only preclusion the impossibility for the judge to directly wield the power deferred by the legislator to the Authority.
Moreover, it must be pointed out how by now in the administrative judgement (either of legitimacy or in the field of exclusive jurisdiction) the judge has no more trial limitation, the existence of which was in the past claimed to justify the control limitation of the administrative judge.
As repeatedly stated in the quoted decisions of the Council of State, in the practice of the syndicate over the acts of the antitrust Authority the use of the court experts is allowed in theory, but through this probatory means can be deferred to the expert the technical ascertainment of a well assessed presupposition of the fact or assistance can be requested aimed at extending the judge's knowledge by means of technical-specialistic contributions (well defined in the question) belonging to fields of knowledge marked by objective difficulties.
Part of the academic writings has not failed in evidencing how in reality, notwithstanding the statements of principle, the technical advice has not been ordered by the administrative judge in judgements an antitrust nature.[89]
As regards to this, it is important that the Court of Justice held admissible the court experts in the range of judgements in cases of competition, having then used that tool with extreme caution, as already previously stressed.
Furthermore, it cannot be ignored that the minimal use of technical advice, which the judges practice, probably also depends on the fact that the judges have often raised the practical problem of finding, before relevant cases, an expert with adequate guarantees under the aspect of autonomy.
It is to be further noted that the problem of the judges' lack of necessary competences in the economic field and of the verification of the existence of adequate tools have been faced in different ways: before innovating proposals, such as the introduction of an economic consultant for the judge (as provided in Scotland) or the integration of courts by economic experts[90], at times the so called *adversary system*, based on the opposition of the economic consultancy of the parts, works well and it turns out adequate to evidence eventual distortions caused by incorrect analysis, as it happens in the U.S. where often the chance of availing of experts is not taken by the judge.[91]
Eventually, the efforts of the administrative case law appear today to be heading towards a control over the acts of the antitrust Authority that may be effective and homogeneous with the one activated by the Court of Justice. The debate on the type of this control appears sometimes affected by the quest for juridical qualifications and categories, not always right considering the atypical character of the powers wielded by the Authority.
The lamented lack of a control of merit on the inquiries carried out by the Authority neglects that the latter has to compare the ascertained facts with a parameter not fully described by the law and, on another hand, it does not wield any power of merit, of evaluation of the opportuneness of a certain behavior, having considered the firms on the market.[92]

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[89] R. CARANTA, *I limiti del sindacato del giudice amministrativo sui provvedimenti dell'Autorità garante della concorrenza e del mercato,* quot. For an opposing view F. MERUSI, *Giustizia amministrativa and autorità indipendenti,* quot., 191 points out that before the emphasis of the role of court experts in the administrative lawsuit and, especially, in those judgements on the acts of the independent authorities, it is natural to notice how the Italian ordinary judge, endowed with "special jurisdiction" towards analogous acts (bank sanctions) has never accepted, always stating as unnecessary, a request of technical avdice for over half a century (as much as the jurisdiction of the Rome Court of Appeal on these controversies lasted).

[90] The integration of the judging court on appeals against the acts of the independent authorities with economic experts is contained in one of the versions of the bill about the reform of Independent Authorities, not yet approved by the Council of Ministers.

[91] Consult on that F. GHEZZI, *Il libro bianco della Commissione sulla modernizzazione del diritto della concorrenza comunitario,* quot., note 164, recalling the Microsoft and Visa / Mastercard cases and further academical literature on the matter.

[92] P. LAZZARA, *Discrezionalità tecnica e risarcimento del danno, in Diritti, interessi and amministrazioni indipendenti (atti del Convegno - Siena 31 maggio e 1 giugno 2003),* Milano, 2003, 163 considers as reducing the

Even when measures from the Authority are enforced aiming at the elimination of distorting effects caused by certain behavior on the market, there is no need to control such measures with regard to opportunity, because the judge will be asked to evaluate the functional effectiveness of the measure and the administrative judge can well verify whether the act would be apt at restoring the lawfulness and also whether the proposed sacrifice is proportional to the desired aim, or if, on the contrary, this could be achieved through another provision with minor impact.
The excessiveness of the measure will bring about a diversion of power from its proper function and therefore one of the classic flaws traditionally controlled by the administrative judge: the misuse of power.[93]
For instance, the antitrust Authority would be guilty of misuse of power if, while *adjudicating*, it was tempted to enforce prescriptions, with the misguided aim of introducing administratively those measures suggested, yet not allowed by those making the rules.[94]
The case law of the administrative judge, therefore, does not acknowledge today any space of activity "reserved" to the Authority and not subject to control by the judge; what is reserved to the Authority, to which the judge cannot substitute, is the direct exercise of power, concerning which the judge's task is evaluating its correctness, in all facets, the economic analysis as well.

5. The control over antitrust sanctions.

The antitrust Authorities can enforce to the firms either restoring sanctions or afflictive sanctions.[95]
As it is known, differently from the afflictive sanctions, aimed at punishing immediately the illicit conduct of the subject, the so called re-establishing sanctions do not assume a sanctioning character, because, more than punishing the author of the illicit action, they aim at satisfying public interests[96].
The re-establishing measure provided by the *antitrust* law takes effect in the notice to remove the infraction (whose effectiveness is strengthened by pecuniary sanctions in the case of seriousness and continuation of the illicit action[97]).
The afflictive sanctions provided by the law n° 287/1990 have effects, on their side, as fines and bans. The first ones concern: the cases of infraction of the law on agreements and on abuse of dominant position; the non-observation of the notification by the Authority; the omission or refusal of providing the required information or of exhibiting documents or, further, the production or exhibition of false documents (art. 14, par. 5); the non-observation of bans on concentration or the obligation of notification. The bans, consisting in the suspension of the activity of the firm, applies, rather, in cases of repeated non-observation.
In the Italian law system according to the distinction between afflictive sanctions and re-establishing sanctions there is a jurisdictional division between ordinary and administrative justice

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opposition between legitimacy and merit and anyway not adequate to solve the problem of the jurisdictional syndicate over the acts of the antitrust Authority

[93] F. MERUSI, *Giustizia amministrativa and autorità amministrative indipendenti*, in Dir. Amm., 2003, 198 advances a hypothesis of revivifying the flaw of diversion of power.

[94] When authorizing operations of concentration on markets on the way to liberalization, it can happen that between the prescriptions affecting the operation, those measures could be taken into consideration provided by the very Authority to the legislator and by this latter not received. On the need of maintaining the distinction between the activities of decision and the regulating one see F. DENOZZA, *Discrezione e deferenza: il controllo giudiziario sugli atti delle autorità indipendenti regolatrici*, quot., 486.

[95] The sanctions that antitrust Authority can enforce are directed by the art. 14 and 15 of the law 287/90. These rules provide either re-establishnig or inflictive sanctions (rectius measures), within a complex proces shaped by a progressive temporal criterion aimed at obtaining through successive intimating-repressing approximations, the ceasing of the forbidden conduct (consult P. AQUILANTI, *Poteri dell'Autorità in materia di intese restrittive della libertà di concorrenza e di abuso di posizione dominante*, in *Diritto antitrust italiano,* volume II, Bologna, 1993,890.).

[96] E. CASETTA, *Sanzione amministrativa*, in *Digesto delle discipline pubblicistiche*, XIII, Torino, 1997, 598.

[97] For the configuration of the intimation by the antitrust Authority as a re-establishing sanction consult Cons. di Stato, sezione VI, 23 aprile 2002 n° 2199, in *Foro it., 2002, III*, 482.

(an administrative judge for the re-establishing sanctions and an ordinary judge for the afflictive sanctions[98]).
As regards to the sanctions provided by the antitrust law, the problem of the difficult cooperation between the art. 33 of the law 10-10-1990 n° 287 was raised in the past, which devolved to the exclusive jurisdiction of the administrative judge the appeals against the measures of the antitrust Authority and the art. 31 of the same law, including a recall to the law 24-11-1981, n° 689[99], attributing to the ordinary judge the controversies in opposition to those orders inflicting administrative and pecuniary sanctions.
The matter has already been clarified towards the direction of a prevailing exclusive jurisdiction of the administrative judge since the sentence of the *Cassazione* Court on 5-1-1994, n° 52, evidencing how the petition to the law 689/81 is only limited to the substantial dispositions, and not to the rules in matter of jurisdiction[100].
An ulterior problem of interpretation was represented by the limits of the judicial review and, in particular, by the applicability of the art. 23, par. 11, of the law n° 689/1981, directing the judge's power of annulling the whole or a part (of the order) or of modifying it even limitedly to the extent of due sanction.
The Council of State followed the thesis of the applicability of the quoted art. 23 and of the consequent jurisdiction of merits on the pecuniary sanctions enforced by the Authority, recalling either the principle of legality, protecting the right of the private individual not to undergo patrimonial impositions other than in the cases provided by the law (art. 23 Cost.), either the compatibility with the principles of the law n° 287/1990 of the art. 23 of the law n° 689/1981, and finally the difference of the power enforced by the Authority for the application of a typically punitive administrative sanction, such as the pecuniary one.
In a few decisions, the Council of State deemed the illicit action committed by the firms to be not serious enough and therefore not sanctionable with a fine, while in other cases it has censored the entity of the enforced sanction, modifying its amount.[101]

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[98] The different partition of jurisdiction is based on the so called administrative restoring sanctions aiming at realizing the same legitimate interest which the administrative function is set for supported by the sanction; in such cases the subjective position has the nature and substance of the legitimate interest. The administrative afflictive or punitive sanctions are rather aimed at the guarantee of the respect of the law protecting the public interest and – being excluded every discretionary assessment regarding their enforcement but for the measure – the intimated's claim ends up in inferring its own right of not undergoing the imposition of pecuniary sanctions beyond those cases expressly provided by the law; this configure positions of right, to be protected before the ordinary judge (consult Cass. sez. un., 3-2-1989, n° 660, in Foro it., 1989, I, 1076; Consiglio di Stato, sez. IV, 5-2-1999, n° 112, in Foro amm. 1999,314).

[99] The law literally states: "For the administrative pecuniary sanctions caused by the violation of herein law they are to be followed, as applicabile, the dispositions in the par. I, parts I and II, of the law 24-11-1981, n° 689".

[100] Cass., sez. un., 5-1-1994, n° 52, in *Foro it.,* 1994, I, 732, with note by A. BARONE. In the decision it is also evidenced that in the law n° 287 of 1990 the act with which the Authority enforces the pecuniary sanctions is textually named with the expression "provision" (consult art. 14, par. 5), and which in the cases of more relevant illicit actions the very act is not of mere application of the sanction, aimed at the quantifying and the collection of a credit raised *ex lege* as a consequence of the forbidden operation, but having a complex content, which confers it the features of the properly administrative provision, with the exercise of authoritative discretionary powers by the Authority for the care of the pubblic interests. On the question and more generally on the problem of the sanctions, consult E. BANI, *Il potere sanzionatorio delle Autorità indipendenti*, Torino, 2000.

[101] In the Rc Auto case, the Council of State deemed not serious an exchange of information, performed between the minor insurance companies, a limited one compared to that performed by the greater companies, thus cancelling the fine enforced by the antitrust Authority (Cons Stato, n° 2199/2002, quot.); while in the Rai case it has modified the sanction enforced by the Authority, curtailing it of the third part (Cons. Stato, VI, n° 2869 del 24-5-2002). Recently, the Council of State has again exercised its powers of modification of the amount of the sanction curtailing from 4% to 2% of the turnover a sanction enforced to Italgas because of the not observation of a previous provision by the same Authority (Cons. Stato, VI, disp. n° 185/2004 del 12-3-2004). A reduction of the sanction from 3% to 1% of the invoice of the firms has been done by Tar Lazio, 2-8-2002, n° 6929, in Foro amm. Tar, 2002, 2903, with note by M. BONINI, *Potere sanzionatorio dell'autorità antitrust e giudizio amministrativo.*It states the possibility of the judge of reducing the sanction, under conditions of illegitimacy or of not opportuniy of the action by the administrative authority, which is thus subject to syndicate by the administrative judge in the case of violation, illogicality, alteration of the facts and

In this case, too, the acknowledgement of this type of jurisdictional syndicate is consistent with the principles affirmed in the matter by E.U. case law, which has always deemed existent a judge's competence of merit, allowing also the modification of those sanctions enforced by the Commission[102]; and it is also consistent with the harmonizing perspectives around the law of competition, as previously quoted, considering that the art. 31 of the reg. E.C. n° 1/2003 provides that the Court of Justice may end, decrease or increase the sanctions enforced by the Commission, characterizing this jurisdictional competence as "of merit ".[103]

As regards to this, it is to be pointed out the singularity of the disposition of the part providing the chance of an increase of the sanction, which literally taken would contrast with the principle of the claim and of the correspondence between what is demanded and what has been decided. The only possibility of making this rule compatible with said principle is referring it to the eventual claim of another part of the judgement, with difficulty may be the Commission, which has established the entity of the amount, while we could assume such a claim by counterinterested subjects, who deem the inflicted sanction scarce.[104]

The acknowledged possibility (both for the E.U. judge and for the internal judges) of modifying the amount of the sanction raises the need that the judicial review, although extended to the merits, be performed trough the verification of the fairness and of the correctness of the criteria adopted by the Authority to assess the amount of the sanctions.

E.U. case law is known, according to which in a decision of infliction of penalties to various firms for an infraction of the E.U. rules concerning competition, the obligation of motivation does not entail the release of a bounding or exhaustive list of the adopted criteria[105]; besides, in fixing the amount of each fine, the Commission has a range of discretionality and it cannot be deemed compelled to apply, for this purpose, an exact mathematical formula.[106]

Nevertheless, in the quoted cases the E.U. courts also esteemed that, being desirable, the involved firms and, where needed, the Court may be put in the position of controlling that the calculating method used and the passages followed by the Commission are error-free and compatible with the dispositions and the principles applicable in matter of penalties within the judgement, especially with the prohibition of discriminations, must nevertheless be allowed the explanations of the criteria utilized by the Commission. In any case, the lack of an adequate motivation on quantifying of the sanction does not entail its cancellation, but the verification of its fairness by the judge, who on the fact carries out a full syndicate, as previously described.

In the E.U. field and on the basis of the Italian law as well, the ranges of discretion in determining the entity of the sanction to enforce are today greater, considering the ruling law identifying only a maximum of the sanction (10 % of the total turnover).[107]

The new dispositions entail the necessity of a more adequate motivation of the quantifying of fines,

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iniquty as well (Cons. Stato, VI, 20-3-2001, n° 1671, Caldaie, point. 12.3.1, in *Dir. e Giust. 2001,* 81). Referring to a syndicate of merit: Cons. Stato, VI, 30 agosto 2002, n° 4362, in *Foro amm. CDS 2002, 1837*. The correlation between the difference of the syndicate and the difference of the powers of the Authority in antitrust proceedings is stressed by A. LALLI, *Il sindacato giurisdizionale sui provvedimenti dell 'Autorità garante della concorrenza e del mercato,* in Giorn. Dir. Amm., 2003, 358.

[102] Consult, First Instance Court. Ce, 11-3-99, T-141/94, Thyssen Stahl AG, par. 646 and 674 and Court Of Just. E.C., 16-11-2000, C-291/98" Sarriò - Cartoncino, par. 70-71.

[103] Besides, even in the French system it is provided the chance of reforming the pecuniary sanctions enforced by the *Conseil de la concurrence*. Consult S. LICCIARDELLO, quot 119.

[104] In this sense, G. FALCON, *La tutela giurisdizionale,* quot., 363, note 84. A. FRIGNANI - M. W AELBROECK, *Disciplina della concorrenza nella CE,* quot., 440, evidence the general recall of the power to modify a sanction even towards an increase, never have the Court of Justice and the Court of First Instance followed that way, referring also the doubts about the possibility of a *reformatio in peius.*

[105] Court of Just Ce, ord. 25-3-1996, C-137/95 P, SPO, point 54.

[106] First Instance Court. Ce, 6–4-1995, T-150/89, Martinelli, point 59; 11-3-99 Thyssen Stah1 quot. points 605 and foll.

[107] As known, the art. 15 of the law n° 287/90 has been modified by the art. 11, par. 4 of the law n° 57/2001, enlarging the range of discretionary power of the Authority through the elimination of a minimum percentage of the sanction, now referred to the whole invoice of the firm. Analogous disposition in the art. 23 del Reg. E.C. n° 1/2003.

by means of more general criteria, as it is done by the Commission or else through specific and deepened explanations related with the single cases, also in comparison with already enforced sanctions. The recently begun process of harmonization of E.U. law of the competition and the creation of a "network" made up by the Commission and by the single national Authorities increases the requirement for a uniformity in the whole system even in the criteria quantifying the sanctions in order to avoid the presence of wider meshes in the network and that the quantifying be assessed case after case with the judge's subsequent intervention, this latter lacking uniformity. [108]
Moreover, having set as a limit the 10% of the total turnover entails wide ranges of quantifying, especially for the major firms; the said criteria should include the needed correctives when the anticompetitive conduct happens in marginal activities of big corporations.[109]
In the Italian law system this uniformity must also concern the requirements of the seriousness of the illicit actions, ordered by the art. 15 of the law n° 287/1990 for the applicability of the pecuniary sanctions.
We must not forget, the need for the certainty of every subject operating in the market about the relative lawfulness of certain behavior, bearing in mind the difficulty of categorizing the said indeterminate juridical concepts and of the acknowledged possibility of not applying the internal law contrasting with the rules of protection of the competition[110]; Commission and national Authorities should therefore evaluate the possibility of deeming not serious at least those cases where objectively there was not certainty about the anticompetitive character of a certain behavior of the firms in the market and this is even more important after the passage from a system of notification and preventive authorization of the agreements to a system of legal exception with an *ex post* control, grounded on the direct application of the whole art. 81 of the Treaty by the national Authorities and of the national judges.[111]

6. Other questions on the subject of jurisdictional control: challenging acts, the right to appeal, the measures of dismissal and the inertia of the Authority.

As regards to the judicial control over the acts of the antitrust Authority further questions are issued, the first being the individuation of challengeable acts.
The problem obviously is not raised for the sanctionatory measures or for prohibitions of operations of concentration, considering the evident damage in behalf of the addressee of the acts.
The acts of opening and closing of the cognitive inquiries, carried out by the Italian guarantor Authority are not deemed as being disputable, according the art. 12, par. 2, of the law 287/1990, those inquiries being merely fore-cognitive lacking influence on the juridical positions of the operators of the market.[112]
Referring to the endoprocedural acts, notwithstanding some decisions favouring the disputability, it

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[108] Let it be remembered that the Commission has adopted Guide-lines for the pecuniary sanction in application by the art. 15, par. 2 of the regulation n° 17 and of the art.65, par. 5, of the CECA Treaty" in GUCE n° 9 of the 14-1-98.
[109] Consult R. CHIEPPA, *Il ruolo dei giudici nazionali nell'applicazione decentrata del diritto comunitario della concorrenza,* in Il Cons. Stato, 2003, II, 1121.
[110] Court of Justice, 9-9-2003, C-198/01, *Consorzio Industrie Fiammiferi.*
[111] M. LIBERTINI, *La prospettiva giuridica: caratteristiche della normativa antitrust e sistema giuridico italiano,* in Concorrenza e Autorità Antitrust. Un bilancio a 10 anni dalla legge - Atti del Convegno Roma 9-10 Ottobre 2000, in www.agcm.it, evidences that in the application of the last years, the judgement of the seriousness of the infraction, according to the art. 15 of the law n° 287/90, leans towards a generalization and that this line affects the antitrust proceedings, orienting them ever more towards punitive proceedings: hence the need for longer and deeper inquries and the lack of incentives for the firms in correcting their conducts. The author asks himself whether, for the general effectiveness of the intervention, a stricter interpretation of the art. 15 would be more productive. It could lead to exclude the fine in those cases in which the illicit action has only been foreshadowed or it had just a short existence. Which confirmed, a quicker ending of the proceedings would be easier, even with the engagement by the firms. The punitive intent could rather be focused on those great trusts and on the cases of aware and voluntary violation of the law, among which are the case of recidivousness and the violations of the engagements on behalf of the Authority.
[112] In this sense, M. TAVASSI - M. SCUFFI, *Diritto processuale antitrust,* quot. 161.

is generally held that the acts having only a preparatory character in relation to the definitive measure are not disputable, in that even in such a case they lack the requirement of damaging.
This conclusion is applicable as well to the act of the opening of the proceedings, even if disputability of the act has been allowed to the subject contesting "at the root the applicability of the antitrust law in its own regards".[113]
The disputability of the procedural acts which are damaging to the right of defence, such as the refusal of admitting an expert from a part to follow some stages of the proceedings, or allowing proofs deemed illegitimate in the substance or in the form.[114]
As regards to the acts of clearance regarding agreements, the silence maintained by the Authority on the petitions or on the complaints by third parties and above all the measures of dismissal of cases, the question is not so much verifying the disputability of those acts, but rather recognizing, or not, the right to appeal by the third counterinterested subjects.
This inertia of the Authority, in fact, does not affect unfavourably those firms that have carried out the conduct under consideration, because its lawfulness is acknowledged expressly or implicitly omitting the intervention, but they can affect the positions of third subjects who can assume the role of counterinterested in relation to the allowed conduct.
In relation to these subjects a case law orientation has been forming opposed to the acknowledgement of the right to appeal, a trend with which I do not agree.
This orientation is grounded on the statement, according to which the appeals filed by third plaintiffs, other than those directly cited, against the measures adopted by the antitrust Authority, are inadmissible, being the powers said in the l. n° 287 of 1990 exclusively set to the objective protection of the right of economic initiative in the field of free market and not to the guarantee of positions, individual or associate ones, of subjects availing themselves of the market. Before the enforcement of said powers, all the subjects, therefore, other than those directly affected are considered holders of a mere interest, not differentiated from the general citizen's one, whose purpose is that the authorities created for the repression of illicit conducts might exercise correctly and timely the powers to them deferred.[115]
Before proceeding to a critical examination of the quoted case law, it is to be firstly premised that certainly the complainant, as such, is not holder of an interest qualifying a correct examination of his lawsuit, but he becomes so only when proving to be holder of a particular and differentiated interest, which he assumes as having been damaged by the non-accomplishment of the repressive measure; the legitimacy derives not from the quality of the complainant but from the quality of the counterinterested one.[116]
The possibility of forwarding complaints to the Authority by "anyone holding an interest in them, therein included the representative boards of consumers" (art. 12, par. l, of the L. n° 287/1990) does not determine the acknowledgement of the right to appeal for the complainants.
Besides, the rules directing the inquiry before the antitrust Authority limit the participation to the proceedings to the "subjects holders of public or private interests, as well as the representative

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[113] Tar Lazio, 2-11-1993, n° 1549. A. FRIGNANI - M. W AELBROECK, *Disciplina della concorrenza nella CE*, quot., 439, points out that in the E.C. field it is not reputed as automatically challengeable the communication of imputations. However, it is thought existing the interest of the firms to contest the act of opening of the investigation, in that the subjection to the powers of the Authority weighs heavily on the status of the firms either for the set of duties on behalf of the Authority either for the effects deriving on the functional autonomy, M. RAMAJOLI, quot., 365

[114] M. LIBERTINI, *Il ruolo del giudice nell'applicazione delle norme antitrust*, quot., 655.

[115] Granitical case law especially by Tar of Lazio in the case of appeal of the measures of dismissal of the lawsuits issued by the Authority, as well as in the case of appeal against the measures of authorization to operations of concentration. Consult amongst all Tar Lazio, sez. I, 1-8-1995, D. 174 in Tar, 1995, I 3456; TAR. Lazio, sez. I, 5-5-2003, n° 3861 in Foro amm. TAR 2003, 1942. In the same sense, Cons. Stato, VI, 30-12-1996, n° 1792, in Foro amm. 1996, 3383. In opposition it has recently expressed Tar Lazio, I, 24-2-2004, n° 1715, having acknowledged the right to appeal to a firm contesting a measure according to which a voluntarily communicated agreement has been deemed not restrictive of the competition. The admitted thesis needs, however, a consolidation by the Council of State, that now seems be arrived wuth the decision Cons. Stato, VI, no. 3865/04, 14-6-2004 (consult. footnote no. 121).

[116] In this sense, M. LIBERTINI, quot., 656.

boards of consumers, to which a direct, immediate and present detriment may derive, from the infractions object of the inquiry or from the measures adopted after it, subjects who may advance motivated request of intervening within thirty days since the publication in the bulletin of the starting of the inquiry" (art. 7, par. 1, lett. b), DPR n° 217/1998); the same rules direct the notification of the starting of the inquiry "to the subjects who according to the art. 12, par. 1, of the law, having a direct immediate and present interest, have filed lawsuits useful to the starting of the inquiry" (art. , par. 4, quot. DPR n°271/98).

Hence it follows that in the stage of receiving a complaint the Authority is not bound to a further verification of the interest of the complainant, having instead to assess the relevance and the groundings of the issued facts; once the inquiry has been opened, the obligation of notifying the beginning and of allowing the participation to the proceedings do not concern every complainant without discrimination, but only the one holder of a direct, immediate and present interest, who suffers a detriment due to the infractions which are object of the inquiry or by the measures to be adopted.

Nevertheless, the distinction does not solve the problem of the right to appeal, because in case law it does not follow that procedural legitimacy automatically acknowledges the right to appeal[117], limiting itself to acknowledging the legitimacy of the complainant to act in the court for the damage to his rights, as part of the administrative proceeding, like the right of access. [118]

According to the recalled case law, the position of the subject damaged by the anticompetitive conduct of another firm does not assume autonomous juridical relevance with respect to the enforcing of the powers of the Antitrust Auhtority, being these powers ordered for an objective protection of the competition and not for the protection of individual positions of the subjects availing themselves of the market; moreover, referring to repressive powers given to an administrative authority, specific protected situations could never be recognized, other than those of the subjects affected by the applicationof the power.

Academic literature has criticized that orientation, emphasizing, on the second aspect, that in reality the very administrative case law is constant in acknowledging to the third party, damaged by another's intervention the possession of an interest different from the correct application of the repressive power by the authority ordered to the guarding and the right to contest the act with which the administration, expressly and implicitly, refuses to enforce its powers and emphasizing that the criterion to follow is the one of the damaged substantial interest to determine the sphere of the holders the right to appeal.[119]

The case law under examination starts from the noble intent of finding objective limits to the right in the appealability of a matter involving interests, more or less qualified, of a plurality of subjects with the purpose of avoiding the proposition of inadmissible popular lawsuits.

Nevertheless the conferring to the Authority of an "objective protection of competition" does not exclude that the protection of the general interest aimed at maintaining a competitive structure of the market could be translated, concretely, in measures adopted for the protection even of single individuals or consumers who have been damaged by the anticompetitive conduct placed under the examination of the Authority.

This is the differentiated position that makes challengeable the holder of a direct and present interest in the application of repressive power, an interest which is distinguished from the one of the community which also in general terms benefits from the enforcement of these powers.

For example, that interest seems obvious, and the consequent legitimacy to appeal, of a firm complaining of the lack of the enforcement of the repressive powers on behalf of other competitors responsible for an illicit anticompetitive agreement with the aim of sharing the market with evident prejudice against other firms of the sector; or, even more, the appeal of the only competitor on

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[117] Consult Cons. Stato, VI, 12-4-2000, n° 2185, in Giur. It., 2000, 1945.

[118] T.A.R. Lazio, sez. II, 10-3-2001, n° 1834, in *Foro amm*. 2001, 1310.

[119] A.SCOGNAMIGLIO, *Profili della legittimazione a ricorrere*, in *Diritti, interessi and amministrazioni indipendenti* (atti del Convegno - Siena 31 maggio e 1 giugno 2003), Milano, 2003, 170.

behalf of a measure of the Authority which authorizes a firm already in dominant position to form a concentration.[120]

Above all, regarding the measures of authorization of concentrations, but also for those of dismissal of the complaints, it is desirable that in case law that the Italian administrative judge reconsider the question of the right to appeal, developing that "shy" precedent, with which on the matter of deceptive publicity it has been affirmed that the firm or the board of the category complaining of a specific damage caused by deceptive publicity is legitimated to contest the resolutions of the authority before an administrative judge, assuming its damaging character existent.[121]

Furthermore in the recalled precedent the right to the appeal has been acknowledged on behalf of a board of category; the above mentioned considerations should lead to consider the widening of the right to include also the boards of consumers whenever there is a direct effect of the contested anticompetitive conduct against the consumers, represented by the board.

Further, the modification of the described case law orientation is imposed nowadays by the need of a setting with the E.U. case law and even with that of a few member States. According to E.U. case law the letters of dismissal which definitively reject a charge and close the case are challengeable, as they bear the content of the decision and they produce its effects, in that they put an end to the investigations, they have an assessment of the agreements and they prevent the complainants from asking for the reopening of the investigations unless they could bring new items. [122]

Again regarding the possibility of impugning the letters of dismissal of the charges in the matter of competition academic literature has expressed itself, emphasizing how the so called comfort letters have anyhow the effect of ending the proceedings of the trial as well as the formal rejection of the lawsuit.[123]

The same E.U. case law, though, has pointed out that the control carried out by the judge on the Commission wielding its discretionary powers must not lead to substitute his own assessment of the E.U. interest to the one of the Commission, but to verify if the controversial decision is not based on materially inexact facts and is not affected by flaws of law, by evident errors of assessment and by the misuse of power. [124]

In particular, from this case law it results that the Commission, when deciding to set different levels of priority to the lawsuits it is facing, can not only establish the order in which the complaints will be examined, but also refuse a lawsuit for lack of E.U. interest sufficient to the perpetuation of the examination of the file. Anyhow, the discretionary power of the Commission is not without limits. In this sense the Commission is bound by an obligation of motivation when it decides of not

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[120] The last example is referred to, upholding the thesis of the persistence of right to appeal, by A. POMELLI, *Il giudice e l'Antitrust. Quanto self restraint* ?, quot. 274., who evidences that from the authorization to concentration ensues a direct damage of the positon of the firm on the market which has remained not involved in the concentration, a damage different from the one any other third part could suffer. On such considerations Pomelli criticizes the decision of Tar of Lazio 26-9-2001 n° 7797, with which it has been declared inadmissible the appeal issued by Pagine Italia s.p.a. against the provision by the antitrust Authority granting the conditioned authorization to the concentration between Telecom Italia spa and Seat Pagine Gialle spa, notwithstanding Pagine Italia was the only competitor of Pagine Gialle. In the end the Author underlines how the right to challenge the provision authorizing a concentration is also supported by that academical literature which has mostly given value to the link between the powers conferred to the Authority and the tutelage of the general interest for a competitive structure of the market (M RAMAJOLI, *Attività amministrativa e disciplina antitrust*, quot., 356).

[121] Consiglio Stato, sez. VI, 1-3-2002, n° 1258, in *Foro amm*. CDS 202, 703. After the drafting of this paper, it is been published the decision of Council of State, VI, no. 3865, 14-6-2004, Motorola, in which the Italian judge has recognized the right to appeal by third party the antitrust decision of clearance of an agreement notified.

[122] Decisions of the Court Of Justice 11-10-1983, C-210/81, Demo-Studio Schmidtl Commissione, Racc. pag. 3045, points 14 and 15, 28-3-1985, C-298/83, CICCE/Commissione, Racc. pag. 1105, point 18 and 17-11-1987, BAT and Reynolds, C- 142/84 and 156/84, pag. 4487, point 12; decision of the Court (Fourth Section), 17-2-2000, T-241/97, Stork Amsterdam BV, point 53.

[123] A. FRIGNAN1- M. WAELBROECK, *Disciplina della concorrenza nella CE,* quot., 434.

[124] Consult decisions of the First Istance Court 18-9-1992, T-24/90, Automec/Commissione, Racc. pag. 11-2223, point 80, and 13-12-1999, T-9/96 and T-211/96, Européenne automobile/Commissione, Racc. pag. 11-3639, point 29); 14-2-2001, T-115/99, Système européen promotion (SEP) SARL.

continuing the examination of the complaint and this motivation must be sufficiently precise and detailed in such a way as to consent to the Court to carry out an effective control on the application by the Commission of its discretionary power of defining specific priorities. [125]

The complainants have then the right to obtain that the result of their complaint is fixed with decision of the Commission, which might constitute the object of an appeal and the Commission, although it can establish the order of priority in the treatment of the charges it is called onto, cannot consider as excluded a priori from its sphere of action those particular situations encompassed by the role given it by the Treaty, but it has the obligation to assess in each case the seriousness of the asserted violations of the competition and of the permanence of their effects. [126]

In the end, E.U. case law has affirmed that the diligent and impartial treatment of a complaint finds expression in the right to a good administration which is included among the general principles of the State of right, principles common to the constitutional traditions of the member States. As a matter of fact, the art. 41, n°1 of the Charter of fundamental rights of the European Union filed in Nice December 7th 2000 confirms that "each individual has the right to have the matters which regard him/her be treated in an impartial, equal way and within a reasonable time by the institutions and by the courts of the Union". [127]

For the sake of completeness, it is remembered that E.U. case law has orientated towards the acknowledgement of the right to appeal against a measure of authorization of concentration for a competitor firm, giving value not so much (or better not only) to the element of the participation of the firm to the administrative proceedings, but above all to the effect of the authorized operation of concentration on the position in the market of the appellant. [128]

Once it has been recognized, at E.U. level and hopely at internal level too, the right to appeal against the measures dismissing the complaints of the "counterinterested" subjects in relation with the anticompetitive conduct, an ulterior consequence will have to be the possibility of contesting not only the acts, with which the intervention of the Authority or of the Commission, is expressly denied but also the silence by those kept. Obviously with the modalities provided in the Italian system by the special process for the appeals over the silence of the adminstration, according to the art. 21 bis of the law n° 1034/1971, introduced by the art. 2 of the law n° 205/2000[129] and in the E.U. law system by means of the tool of appeal against the lack of response.

On the E.U side, it has been stated that when the Commission delays in working on a complaint, the Commission can be asked to provide the statement of a position on the complaint and in the case of further silence the appeal against the lack of response (art. 232 Treaty) can be used. [130]

E.U. case law deems admissible the use of the appeal against the lack of response, when the

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[125] Consult decision of the First Istance Court 24-1-1995, T-5/93, Tremblay and a./Commissione, Racc. pag. 11-185, point 60; 14-2-2001, T-26/99, Trabisco SA, point 30.

[126] Consult decision of the Court 18-3-1997, C-282/95 P, Guérin Automobiles/Commissione, Racc. pag. 1-1503, point 36; 4-3-1999, C-119/97 P, Ufex, points 86 foll.

[127] Decision of the First Istance Court, 30-1-2002, T-54/99, max.mobil Telekommunikation Service GmbH, point 48 and foll., with which for the first time it is acknowledged the fundamental right to the diligent treatement of the charges of violations of the art. 90, n° 1 of the Treaty. Regarding this, consult the comment by V. RAPELLI, *In margine alla sentenza max.mobil Telekommunikation Service: il diritto all'esame diligente delle denunce*, in Riv. Dir. Pubbl. Com, 2003, 235.

[128] Consult decision of the First Istance Court, 30-9-2003, T-158/00, ARD, having as object the claim of cancellation of the decision of the Commission 21-3-2000, SG (2000) D/102552 declaring compatible with the common market and with the agreement on the European economic space the concentration with which BSkyB gained the common control of KirchPayTV, according to the art. 6, n° 1, lett. b), of the regulation (EC) of the Council 21-12-1989, n° 4064, relative to the control of concentrations of firms. The right to appeal has been acknowledged to a tv channel in Germany on the market of free television, for a concentration related the sector of the pay tv, yet able to have effects even on the market of free television.

[129] With such an appeal, it can be obtained the mere declaratory judgement of the obligation by the administration – the Authority in this case – of providing expressly about the private citizen's claim. On the silence by the antitrust Authority, vedi M. TAVASSI - M. SCUFFI, *Diritto processuale antitrust*, quot., 154.

[130] A. FRIGNANI - M. WAELBROECK, *Disciplina della concorrenza nella CE*, quot., 435.

Commission before a complaint refrains from starting proceedings against the firm object of the complaint or from adopting a definitive decision of dismissal of such a complaint, in that a firm which complained to the Commission of being victim of practices by other firms in violation of the rules of the competition has the right, after a reasonable time from the instance of the complaint, to obtain from the Commission a provisional communication according to the art. 6 of the regulation n° 99/63, so that if despite the sending of the letter of intimation from acting, it would not receive such a communication, it could appeal against the lack of response.[131]

In Germany and in France, too, it is acknowledged the right to challenge the decisions of the antitrust Authority by third subjects with respect to the contested illicit: in Germany the right is linked to the procedural participation[132], while in France those parts having presented the case to the attention of the Council (a private or the Minister endorsed with the economic duties) have the right of issuing appeal to the Paris Court of Appeal, besides the parts undergoing the investigations.[133]

Such opportunities on the right to contest the failed exercise of the sanctionatory powers in the antitrust matter do not determine any risk under the profile of compromising the efficiency of the action of the Authority, "compelled" to deal with every instance thus deprived of the chance of concentrating energies and resources on those facts of major anticompetitive interest.

In fact, E.U. case law has limited the judge's control over the verification of obvious errors either of right or of evaluation, of the facts too, or of the existence of the flaw of misuse of power, pointing out that the judge must not replace the Commission's assessment of the E.U.'s interest with his own.

It will remain, therefore, in the faculty of the Commission and of the national Authorities to establish priorities in the utilization of their inquiring abilities, provided the necessity of an indication of the reasons for the not continuation of a particular complaint.

The control of these reasons in the court completes the system of tutelage, giving the necessary tools for reaction even in the case of an Authority not so careful in sanctioning anticompetitive conduct. [134]

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[131] Consult decisions of the First Instance Court, 18-9-1992, -28/90, Asia Motor France I and 9-9-1999, T-127198, UPS Europe SA. In such last decision for instance the appeal against the lack of response has been accepted, after verification of the inertia of the Commission following the issuing by the charger of the observations on behalf of the communication sent according to the art. 6 of the regulation n° 99/63 (inertia beyond a reasonable time). It is remembered, as noticed by the Court in the decision 10-7-1990, T-64/89, Automec/Commissione (Racc. pag. II-367, 45-47), the procedure of examination of a lawsuit is articulated in three successive stages. In the first stage, following the issuing of the lawsuit, the Commission gets the items allowing it to assess the continuation of the proceedings. This stage can include an informal exchange of opinions between the Commission and the appellant, aimed at ponting out the elements of fact and of right constituting the object of the lawsuit, and at giving to the appellant tha chance of expounding its arguments,in case even in the light of a reaction by Commission. During the second stage, in a communication provided by the art. 6 of the regulation n° 99/63, the Commission address the complainant the reasons because of which it does not deem proper to continue the lawsuit allowing it the chance of issuing, within a period by the Commission decided, its eventual observations. In the third stage, the Commission analyzes the complainant's observations. Although the act 6 of the regulation n° 99 does not openly provide this possibility, at the end of this stage, the Commission must start proceedings against the person object of the lawsuit or to adopt a final decision of dismissal of the case, that can constitute object of an appeal of cancellation before the E.C. judge.

[132] Consult P. AQUILANTI, *Poteri dell'Autorità in materia di intese restrittive della libertà di concorrenza e di abuso di posizione dominante,* in *Diritto antitrust italiano*, volume II, Bologna, 1993, 824.

[133] F. JENNY, *Autorità amministrative Indipendenti e tutela della concorrenza: l'esperienza del Conseil de la Concurrence*, quot., shows that in France the transparence of the system originates from the fact that, as soon as a case is put under the examination of the Council, the latter must take a decision, public and appealable before the Paris Court of Appeal. Thus, it cannot avoid the investigation on a particular case for opportunity reasons. The certainty that every lawsuit will lead to a decision after a proper debate has been criticized by some because it burdens a great work for cases of limited importance. Nevertheless this has greatly contributed to clarify that the Council does not use an administrative discretionary power to decide whether to investigate or not on pertinent cases.

[134] The fact that in Italy the antitrust Authority has been working well up to today, drawing respect and appreciation by the experts of the field can prove that nowadays there is not a real need of the judge's intervention aimed at fostering the attributed powers, but it is not a reason to exclude, as the current law - case of the administrative judge does, the right to the action of the complainants, or better of the counterinterested firms with respect to the anticompetitive

7. *Conclusions.*

The analysis carried out on the various problems related to the jurisdictional control over the acts of the antitrust Authority leads to some conclusive reflections.
Firstly, there is today a greater need that the national judges feel themselves sharing a complex system of protection of competition, built on different levels: the "network" system cannot be limited to the cooperation between the national Authorities and between these and the Commission, but it must be completed with devices of jurisdictional protection, effective and unvarying for all member States.
To achieve this aim, many of the theoretical debates going on in the various law systems are completely irrelevant: e.g. the forming of the network is irrelevant which judge might be chosen for the antitrust controversies within the member States[135], also unimportant are the juridical qualifications to the different subjective positions.
It is on the other hand fundamental that the different forms of jurisdictional protection are able to guarantee three fundamental principles: the effectiveness of the protection, the certainty of the law and the reasonable length of the trial.
Around these three principles the reliability of the jurisdiction is at stake.
The principle of effectiveness of the jurisdictional protection imposes that the exercise of the rights in the antitrust matter is guaranteed in a uniform way and it is not made excessively difficult or even impossible. To this aim the level of protection, indicated by the E.U. case law, will have to be thought of as a minimum level to be assured by the jurisdictions of the member States. The process of decentralization of the E.U. law of the competition will allow, from today onward, in that process previously defined as “circular harmonization”, that the national jurisdictions might push the E.U. judges towards even higher levels of effectiveness of protection.
The effectiveness of the protection would however be weakened without the certainty of the law. The last *whereas* of the regulation n° 1/2003 (n° 38) is certainly among the most important, because it adds value to the certainty of the law as an element fostering the innovation and of the investments for the firms working in the context of the rules of competition. [136]
The certainty of the law is therefore more than ever an index of reliability of a system and the interpreter (firstly the judge) must always lean towards a certain and uniform interpretation. [137]
The risk of opposing interpretations must definitely be avoided, even because within a network

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conduct. Further, it cannot be a priori excluded that in the future it will be also concretely felt the necessity of such a form of jurisdictional protection.

[135] The debates, previously pointed out, about the deferring to the ordinary judge or to the Italian administrative judge of the controversies in matter of competition, seem to belong to a limited sight and not extended to a "network" system, in which the uniformity is not ensured by the individuation of a unique judge (which moreover would not exclude the risk of conflicts between the individual controversies and the appeals against the measures of the Authority), but it is ensured by inserting the judge, or some internal judges, within a unitary system of jurisdictions, in which the guiding role is performed by the Court of Justice.

[136] It is literally quoted the *whereas* n° 38: *"Legal certainty for undertakings operating under the Community competition rules contributes to the promotion of innovation and investment. Where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of these rules, individual undertakings may wish to seek informal guidance from the Commission. This Regulation is without prejudice to the ability of the Commission to issue such informal guidance"*.

[137] Accidentally, we note the problem of the certainty of the law to be especially actual in the Italian law system, after the shaking to the system of the partition of competences between center and periphery by the reform of the title V of the Constitution and the subsequent interpretative difficulties which are originating a period of uncertainty and of extreme conflicts, where the Constitutional Court becomes arbitrator between State and Regions. Everyone suffers from the consequences of the delay of a period of unncertainty: the citizens lacking certainty in relation with primary goods, the firms penalized as well and our juridical-economic system that in the age of globalization, besides the growing European integration, will be considered less reliable by the market, right because of the juridical uncertainties and of the time spent to solve them. All this must be avoided in the antitrust sector in which such consequences would be amplified.

system, if there are weaker meshes of the network, these will weaken the entire network running the risk of many attempting to force the network where the meshes are weaker; which is translated, referring to the jurisdictions, with the expression *forum shopping*.
Amongst the remedies to avoid such a risk, surely the guiding role of the E.U. jurisdictional institutions is the best and the use of preliminary ruling (art. 234 Treaty) by the internal judges will allow the persistence of an interpretative uniformity.[138]
Nevertheless, it seems necessary to further a major harmonization of the national rules of protection of the competition and to clearly receive the provisions of the regulation n° 1/2003[139]; it could be dangerous, about the certainty of the law, leaving to the interpreter the solution of the many questions of the new regulation, and a clarifying intervention by the legislator would be auspicious.
Besides, under the aspect of uniformity, it must not be neglected the already stressed need of individuating orientative criteria for the quantifying of the sanctions uniform both in the E.C. field and in national one.
The effectiveness of the protection and the certainty of the law is meaningless if the decision of the judge comes beyond a reasonable length of time.
In the antitrust field and, in particular during the application of the antitrust principles to the *new economy*, the so called *"mismatch"* between "juridical time" and "real time" is a relevant problem, provided that the antitrust intervention through corrective measures and their modification or confirmation in the jurisdictional court risk at times of coming "out of maximum time", when the innovation has made obsolete the incriminated conducts or it has already radically modified the market, in which the aim was restoring the competition.[140]
It is therefore absolutely necessary that the Authorities take into account the problem of the reasonable length of the proceedings and that the judges succeed in making reasonable and compatible with the "real time" the length of the lawsuit.
In Italy, for instance, before urgent problems of excessive length of the civil, penal and administrative lawsuits, it cannot be denied that, up to today, the administrative jurisdiction has been capable guaranteeing in the antitrust sector that reasonable length of the process, even before complex controversies, whether under the quality feature or under the quantitative one of the parts involved, succeeding in carrying out the two orders of instances for this more complex

[138] The regulation n° 1/2003 strengthens also the standardizing action of the Commission, which, having to deal no more with requests of exemption, will be able to dedicate itself more to the function of guide through bounding regulations of exemption, formal communications, the annual relations on the policy of the competition. The possibility of asking informations and opinions from the Commission, already in the past foreshadowed (by the Communication related to the cooperation between the national judges and the Commission in application of the articles 85 and 86 of the E.E.C. Treaty, in GUCE C-039, of 13-2-1993), is today strengthened by the art. 15 of the new regulation, which introduces the powers of the Commission and of the national authority of issuing observations, also verbally if authorized, to the jurisdictions. This will entail not only the obligation of communicating to the Commission the decisions, as expressly directed by the same art. 15, but also the duty of the jurisdictions of communicating to the national authorities and to the Commission the pending suit, being otherwise forbidden the allowing of the exercise of raising observations. Clearly, for the antitrust autorithy this affects only the proceedings before the ordinary judge, being already part before the administrative judge. Regarding the intervention of the Commission as *amicus curiae* some considerations are needed. Since the quoted communication of 1993, the Commission stated that as such it had to respect the neutrality and the judicial objectivity. Today, once a formal power of intervention is introduced, it will be necessary that the internal legislator clarify the modalities of such intervention, in that leaving it to the procedures provided by the c.p.c. (intervention *ad adiuvandum* or *ad opponendum*) we run the risk such function of neutrality of an institution might be lacking, to which the judge can turn to ask an opinion and which can then choose one plaintiff's field, with evident damage of the principle, today constitutionalized, of the fair trial. It will be necessary the Commission to take action on the matters of right only, not also supplying informations on the facts.
[139] One reason of the success of the Italian law in the antitrust matter has been to have started in full tuning with the E.C. rules and today after the approval of the regulation n° 1/2003 it appears necessary to introduce some modifications.
[140] Considerations carried out, referring to the Microsoft lawsuit in the U.S.A., by G. COLANGELO, *Microsoft e i vecchi dilemmi del nuovo antitrust*, in Foro It., 2001, IV, 380.

controversies within about a year and a half.[141]
The Italian administrative judge has thus accomplished that legislator's indication about creating a "preferential track" for more relevant controversies, listed in the art. 23 bis of the law n° 1034/1971, introduced by the art. 4 of the law n° 205/2000 and has opted for a quick definition in the merits of such judgements, with extremely rare cases of utilization of provisional remedies.
In the future, the eventual use of provisional remedies by the Authority could be a reason for the examination on behalf of the judge of relevant questions, even if it appears preferable that both the Authority, and in the second stage the appeal jurisdiction may target a definitive decision in shorter periods of time, instead of a provisional setting of the interests at stake.
The effectiveness of the protection, certainty of the law and reasonable length of the lawsuit are therefore the three principles around which the "network" of the jurisdictions dealing with antitrust must develop.
They are principles, linked to one another, because the protection is not effective if it comes "out of maximum time" and the interpretation of the rules does not contribute to the certainty of the law if it is released when the market is then changed and the contested conducts are left behind.
In reality, one of the difficulties resides in that the antitrust badly fits being "caged" in a static model, economic or normative; the antitrust has been defined as an expression of the economic democracy, one of the very tool of the democratic process[142], to the development of which everyone should participate: from enterpreneurs to consumers, from members of the Authority to the corporation lawyers, up to the very judges.
The natural dialectic between the antitrust Authority and the Judiciary can appear particularly complex because of the enmeshment between law and economics in the shaping of the principles disciplining the antitrust, but the problem will be simplified if one focuses on the citizen's rights: the freedom of enterprise and the freedom of consumers through an approach giving value, in the European field as well, to that rule of reason on which the overseas antitrust developed.[143]

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[141] Taking for instance some among the more complex and relevant cases examined by the antitrust Authority one finds that: for the case Carburanti the decision of the Authority dates to 18-6-2000; the decision of the Tar to 18-1-2001 and the one of the Council of State to 20-7-2001; for the case Rc Auto, in which there were about 35 parties to the case, the provision dates to 27-7-2000, the decision of the Tar to 5-7-2001 and the one of the Council of State of the 26-2-2002 (publication of the disposition, followed by motivations on 23-4-2002); for the case Enel-Infostrada the appeal against the order of 28-2-2001 has been resolved by Tar with decision of 14-11-2001 and by the Council of State the 18-6-2002 session with publication of the disposition, then followed by motivations on 1-10-2002; eventually, in the more recent case Consip-Buoni pasto the provision of the Authority dates to 13-6-2002, the decision of the Tar of 10-3-2003 and the one of the Council of State has been published in the disposition on 27-1-2004 and in the motivations on 2-3-2004.
[142] G. ROSSI, *Antitrust e teoria della giustizia,* in Riv. Soc., 1995, 14, whence it is also taken the necessity of a development "from the base" of the antitrust, as described further on.
[143] The principle of reasonableness finds, as it is known, a historical grounding in the so called *"rule of reason"*, developed in the U.S. antitrust law, according to which only those agreements causing an unreasonable restriction of the competition would be illicit. For a trend favouring a greater use of the rule of reason, consult F. GHEZZI, *Il libro bianco della Commissione sulla modernizzazione del diritto della concorrenza comunitario*, in Conc. e Merc, n. 8/2000, 175. Right in Italy the legislator has introduced between the internal rules of protection of the competition the requirement of consistent restriction of the agreements; this has allowed a more versatile interpretation of the rules, also in respect to the *de minimis* rule developed by the E.C. institutions. In a recent decision of the Council of State the requirement of the consistence has been identified as a legal reference properly of the principle of the rule of reason. Consult Cons. Stato, VI, n° 4362/2002, in www.giustizia-amministrativa.it, in which the administrative judge, even though not deepening the existence of a so called *"comunitarian rule of reason"*, observes that the application, in the E.C. field, of a model of efficient competition *("workable")* allows not the enforcement of the antitrust prohibitions to restrictive agreements lacking relevant external effects. It is then underlined that differently from the E.C. system, which has developed a series of guidelines on the minor agreements *("de minimis")* which do not fall under the prohibitions, the Italian legislator has provided the further requirement of the "consistent" restriction, whose range of application appears broader in relation to the *"de minimis"* rule developed by the E.C. institutions. Thus, according to the Council of State, the appreciation of the principle of reasonableness finds in our law system also a direct legal reference constituted by the requirement of the consistence and applicabile mainly before not objectively anticompetitive agreements . Although part of the academical literature has read in some statements of the Court of Justice the recourse to the principle of reasonableness (Consult KORAH, *The future of vertical agreements under E.C.*

The role of the judge, either jurisdictional or of appeal, or judge of intersubjective controversies, is not the one imposing from the top a closed system of interpretation of the antitrust law, but that of giving voice to those requests which "from the base" are the foundation of antitrust.
Development "from the base" of the antitrust requires a process of maturation of the associationism, the introduction of tools apt at strengthening the so called *private enforcement*, like the *class actions* and, more generally, a more widely spread perception of the restrictive competitive effects of certain conduct.
In the past, for instance, the system of preventive notification contributed in lessening the liability of the firms; today, on the contrary, the firms will have to self-evaluate whether their agreements or their initiatives are susceptible of restricting the competition.[144]
This will not be welcomed by many because of the greater engagement in responsibility that will weigh on the firms' consultants, but it must be deemed that the self-analysis the firms have to do will instead contribute to create the right environment for the empowerment of a culture of competition.
Today in order to strengthen this culture of competition, even the internal judges are called on to play a leading role.

Competition Law, 19 E.C.L.R., 506), other authors doubt about the real application of the *rule of reason*, at least of the one developed in the U.S. (consult F. GHEZZI, *Il libro bianco della Commissione sulla modernizzazione del diritto della concorrenza comunitario*, quot.).

[144] This has already been sharply noted by the academical literature. Consult, in particular, A. FRIGNANI, E. GENTILE, G. ROSSI *La devolution dell'antitrust.* in Merc. Conc. Reg., 2000, 184.