ERA
Academy of European Law
Brussels 26th November 2012

Predictable market, Regulation and effective right of appeal. The role of the judiciary to contribute to legal certainty

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Appeals against NRAs' decisions in the electronic communications sector: lessons to be learned from appeal procedures in parallel matters([1])

I thank the Organizers of the meeting for this conspicuous occasion,

I am really pleased to be here as a speaker for the second time and enrich the debate among national judges on such common issues, which have a strictly domestic flavour and an authentically European dimension at the same time.
The inner purpose of our forum is not simply to cast a bridge among the national legal systems, judicial proceedings and jurisprudence in the matter of electronic communications so as to render them homologous in the model born in mind by the European legislator; it consists instead and above all in the creation of a stable community of judiciary operators who think about their jurisprudence and try to elaborate a common and possibly shareable doctrine of the national case law on NRAs' decisions.

The Judicial review of the NRA decisions in the electronic communications:
a) proceedings and features. The Italian legislator allocates the review of NRAs' decisions (and namely of Agcom, the Italian Authority for the Guarantees in the Communications) to the Administrative Judge, in his capacity of a specialist having exclusive and excluding jurisdiction on the matter (art. 133 par. 1, lett. l), Legislative Decree 2 July 2010, n. 104, hereinafter *Italian Code of administrative judicial procedure* or *the Code*); and concentrates all the litigation at the first instance into the functional competence of the Administrative Tribunal of Rome (art. 135, par. 1, lett. b), of *the Code*), where I exercise my functions; appeals against decisions of the Tribunal are brought to the cognizance of the Council of State as a second instance judge

The fair trial within a reasonable time is laid down in article 2, para. 2, of *the Code* ("*The judge and the parties cooperate to reach the goal of the reasonable duration of the trial*"); it replicates a fundamental principle set by article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (signed in Rome on November 4th 1950). ([2])

1 Intervention held at the Seminar "Predictable market, Regulation and effective right of appeal. The role of the judiciary to contribute to legal certainty", organized by ERA in Brussels , 26 October 2012, to be published in the Workshop proceedings.

2 As a matter of fact, it must be underlined that in the last 15 years the Italian Parliament has increased the competences of the administrative judges but the increase of competences has not been followed by an increase in the number of judges. As a result, the workload of the judges is heavier than in the past, and this situation can affect the timeliness of

In the matter in hand *the Code* has provided for several measures in order to speed the trials: the halving of deadlines of the proceedings - except for the term for serving claims (art. 119, para. 2, of *the Code*); the duty for the judge – already on deciding on interim measures' requests - to fix the public hearing for a final decision in the merit on the spot (i.e. at the first hearing after 30 days following the deposit of the judicial order) if the prospective outcome of the proceedings is positive and a heavy and irreparable damage is impending; the possibility of defining immediately the dispute in the merit by means of a concise explanation of the pertaining reasons, since the time of evaluation of an interim measures' request, if no further investigation is needed and the right to an adversarial proceedings has been respected (art. 60, of the Code); the publication of the purview of the decision within 7 days from the judgement where requested by a party of the proceedings (art. 119 para 5, of *the Code*).

Witnesses or experts may be heard although it rarely occurs.
The reluctance of the Italian administrative judge to have recourse to an expert in a matter characterized by a high degree of technicality is largely due to the not negligible concern for costs and times of such an intervention of a third party in very delicate controversies whose appreciation on the other hand should be left to the full appreciation of the judiciary panel desirably left free to form its own convincement.
Where a doubt arises on a fact or a technical profile of the matter, the Administration will mostly be ordered to resign a detailed and justified report on it.

According to the special provisions regulating t**he access of private parties to information** held by Agcom (deliberation n. 217/01/Cons) the right of access to documents containing confidential information of personal, commercial, industrial and financial nature concerning persons and undertakings is exercised solely by way of consultation of such documents, as far as it is necessary for the care and defense of legal interests of the applying person (art. 2, para. 3) ; the access to documents containing commercial secrets is however inhibited.
As a consequence parties cannot gain access to sensible data held by the Authority and concerning the commercial policies of a single operator whose dissemination could endanger the market competition, this restriction being aimed at preventing the competing operators from using the right of access not to exercise their own right of defence but only to exploit the specific knowledge held by another operator in order to achieve an undue advantage inside the market.

And so the judge has deemed grounded and legitimate the denial of access to documentation given by Agcom whenever the data under consideration concerned

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the trials. Nevertheless, according to statistical data, in recent years the backlog of Administrative Judiciary as a whole has been reduced significantly, rather than increased. For more details on the situation of the Italian administrative justice system we remand the reader to: R. DE NICTOLIS, *An overview of administrative justice in Italy,* at the Meeting with the President of the European Court of Human Rights, Council of State, Rome, 2 May 2012; R. PERNA, *The Italian system of the administrative justice at a glance*, Meeting with the Committee for the popular instances of the National Assembly of Vietnam, Rome, 28 June 2012.

technical and financial information on market shares, prices and business strategies, and so represented a trade secret of the enterprise which had been disclosed to the Authority in its capacity of a third, impartial and unbiased Regulator, and in the legitimate confidence that it would not have been disclosed to anybody and namely to a competing operator (Tar Lazio, Rome, III-ter, 6.10.2011, n. 7759; id., 3.8.2009, n. 7799). Since the knowledge of such information would originate an information flow conflicting with the principles of antitrust law, the prevalence granted to the protection of confidentiality has been judged reasonable accordingly (Tar Lazio, Rome, III-ter, 12.4.2011, n. 3209).

b) content and limits: lessons to be learned from parallel matters.

And so the Italian legislator entrusts the **exclusive jurisdiction** of the Administrative Judge with the review of all NRAs' decisions. ([3])

Under the conditions of exclusive jurisdiction the administrative judge has jurisdiction not only for the protection of legitimate interests, for which he is ordinarily competent (art. 103 of the Constitution), but also for the tutelage of individual rights.

Legitimate interests, or legally protected interests, can be defined as the advantages granted to an individual who is subject to the administration's public power, and involve the attribution of the possibility of influencing the proper exercise of the administrative power.

Generally speaking, the choice for the exclusive jurisdiction aims at realising the concentration and certainty of the juridical means in matters in which it is hard to define a sure and definite boundary between **rights and legitimate interests** ([4]).

In the E.U. field, the distinction between rights and legitimate interests is unknown. The national qualification of subjective juridical situations however constitutes a matter to which **the E.U.** law system is indifferent, being the target of the latter the **effectiveness of the jurisdictional protection** albeit in the enhancement of the single national models.

Taking into account the similarities between the right of appeal provided for by art 4 of EU Directive 2002/21/EC (as amended by Directive 2009/136/EC) and the Italian action of annulment which can be experienced against the administrative acts ([5]), it follows that the provision for the administrative judge's exclusive jurisdiction in the electronic communications does not constitute any "E.U. contradiction" ([6]).

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[3] On the issue of the exclusive jurisdiction of the administrative judge in appeals against ADRs' decision and on the content and limits of the judicial review, we allow ourselves to remand the reader to *R. PERNA, The role of courts in reconciling competition, non-competition and constitutional imperatives: the Italian experience, in Workshop on "Public policies, regulation and economic distress", European University Institute, Florence, 13-14 July 2012;*

[4] Consult I. MARINO, *Autorità garante della concorrenza e del mercato e giustizia amministrativa*, in Dir. Econ., 1992, 578.

[5] Similarly in the field of competition law, R. CAPONIGRO, *Interessi e regole di tutela negli ambiti nazionale e comunitario,* in the Seminar "L'Europa del diritto: i giudici e gli ordinamenti", Lecce 27-28 aprile 2012 points out the similarities between the appeal of annulment provided for by art. 230 of the Treaty (art. 263 TFEU) and the Italian action of annulment which can be experienced against the administrative acts.

6 We can transpose into the field of electronic communications the acute observations that, having regard to competition law, have already been made in GHIDINI - FALCE, *Giurisdizione antitrust: l'anomalia italiana*, in Merc. Conc. Reg., 1999, 326.

The qualification of individual positions of European derivation in terms of legitimate interest and the assignment of their cognizance to a jurisdictional institution different from the ordinary judge, i.e. the administrative judge, is then proper and justifiable whereas, in accordance with the principles of a full and effective jurisdictional protection of those positions, a contraction of their jurisdictional tutelage would not be admissible (7).

That being stated, it rests to examine the object, **the content and the boundaries of the judicial review** on the NRAs'decisions and namely of Agcom's.
My personal feeling is that the judge has so far shown a shy and reluctant attitude towards the cognizance of the material issues underlying the matter at hand, thus giving the impression of relinquishing his position of "*peritus peritorum*".
The issue presently assigned to me offers a fruitful occasion to reconsider the role of the judge in the electronic communications by enriching his practise with the jurisprudential attainments already registered in other economic sectors where the exercise of power presents similar characters and peculiarities.

We must state in advance that the exclusive jurisdiction of the judge is a **jurisdiction on the legitimacy** of the administrative act and not on the merit of the discretionary choice made in the decision, in the meaning that the judge is not allowed to take a decision in the place of the administrative authority.
This general statement needs specifying in the light of three peculiar aspects recurring in electronic communication cases, i.e. the use of administrative discretion, the use of technical discretion and the use of indeterminate juridical concepts on the part of the Authority, any time the exercise of power depends on an evaluation implying administrative or technical discretion or is otherwise bound to indeterminate juridical concepts, as it occurs in proceedings concerning parallel matters like competition law ([8]).

In case of "**administrative discretion**" the Public Administration aims at a public purpose attributed to its care by law, by means of an activity of selection, acquisition, comparison and evaluation of public and private interests implied in its action
The use of administrative discretion is common to many sectors of the public Administration so that it has been natural for the judge of the electronic communications to make reference to the general attainments of the jurisprudence on the question.

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[7] Ad. Plenaria, Cons. St. 29 luglio 2011, n. 15 admits, as an indefectible inference of the principle of effectiveness of the tutelage, admits the recourse to an atypical action for ascertainment - not provided for by the Italian Code of administrative proceedings – if sustained by an actual and present interest, any time the codified actions do not satisfy properly the need for tutelage, and this in accordance with the constitutional and European precepts recalled by the Code itself under art. 1.

[8] R. CHIEPPA, quot, recalling F. MERUSI, *Giustizia amministrativa and autorità amministrative indipendenti,* in Dir. Amm., 2003, 181 foll. On indeterminate juridical concepts consult R. CAPONIGRO, *quot*., recalling S. VENEZIANO, *Il controllo giurisdizionale sui concetti giuridici a contenuto indeterminato e sulla discrezionalità tecnica in Italia*, in www.giustizia-amministrativa.it, 2005.

According to the traditional and consolidated opinion the judge can verify whether the discretion has been used by the authority in adherence with the spirit of the law or instead the exercise of power has been affected by "*détournement de povoir*" and "*excès de povoir*", as it may be revealed by some signs or "symptoms" of the contested act, such as illogicality, unreasonableness, manifest injustice, inconsistency with previous acts of the same Administration or of the same procedure, disparity in treatment.
In the matter in issue the judge has made a good use of these signs in controversies where the regulatory reasoning underlying the determinations of the prices for wholesale services of termination of fixed-line and mobile phone voice telephony or of the obligations of operators having a significant market power were to be conjugated with the reasons of tutelage of competition ([9]).

But recently the advent of a noticeable change has been registered.
The national judges have progressively become part of the system comprehending the jurisdictions of all member States, a system which uses the case law of the European Union as an indefectible reference frame. And the Court of Justice, on the spur of the German doctrine of the *Verhältnismäßigkeitsprinzip*, has lately departed from paradigm of the "*excés de pouvoir*" of ancient French derivation and elaborated a series of criteria - like as many principles of law - to be followed in the examination of the relationship between the exercise of the administrative power and the protection of the fundamental rights; these criteria are encompassed and summarized by the **principle of proportionality**, which expresses the suitability, adequacy and necessity of the administrative act for achieving the desired end.

In the wake of this evolution the national judge has made convincing and convinced application of the principle of proportionality, clarifying that the concept of proportionality, deriving from the *Verhältnismäßigkeitsprinzip* of the German legal system, is flown into the Italian one, as provided by art. 117, para. 1, of the Constitution, (as modified by art. 3 of the constitutional law 18 October 2001, n. 3) and by art. 1 of Law 7 August 1990 n. 241 (as modified by art. 1 of the law 11 February 2005, n. 15), through the elaboration of general principles of the EU law made by the Court of Justice. (10)
The principle at issue has come to enrich the judicial practise in the electronic communications, too. Some decisions evaluate the proportionality of the contested act in the light of the general objects of the regulation of networks and electronic communication services (art. 4, para.1, of Legislative Decree 1 August 2003, n. 259, hereinafter *the Code of electronic communications* or CCE). ([11])

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[9] Tar Lazio, Rome, III-ter, 11.2..2011, n. 1336; id., 14.12.2011, n. 9739; id., 11.7.2012, n. 6321.
10 See Tar Puglia, sez. III, 13.2.2012, n. 347. The decision recalls the European law cases making application of the principle of proportionality: Regno Unito contro Consiglio, C-84 / 94, 12 November 1996; Buitoni, C-122 / 78, 20 February 1979; Mc Nicholl, C-296/86, 8 March 1988; Werner Faust, C-24/90, 16 October 1991 This principle on the other hand is recalled also by the European Court for Human Rights with reference to the tutelage of property, by requiring that also in the regulation of the mere usage of goods a just balance be made between the needs of general interest and the tutelage of the individuals' rights, so as to avoid excessively heavy consequences for the owner (Sporrong e Lönnroth, 23 settembre 1982; Ayangil, 6 dicembre 2011; Gladysheva, 6 dicembre 2011).
[11] Tar Lazio, Rome, III-ter, 11.7.2012, n. 6321; id, 11.7.2012, n. 6323.

In other cases concerning price control matters the principle of proportionality is considered with reference to such a regulatory obligation. For instance, in a dispute the plaintiff contested the deliberation 667/08 Cons, concerning wholesale services of termination of fixed-line and mobile phone voice telephony, owing to the fact that it imposed a scheduled reduction of tariffs for the operator himself as from 1 July 2010 in order to reach a total symmetry among operators in a reasonable time.
Recalling a previous decision in terms, the judge has stated that the principle of proportionality requires that any means used be adequate and necessary for the attainment of the end that they mean to realize, and that in fact that principle had been fully respected. ([12])
This new jurisprudence is bound to mark the transition from the judicial symptomatical control of the administrative discretion to a direct review of the discretion by raising the principle of proportionality to an elective conceptual tool which the administrative judge utilizes in the age of market economy. (13)

Eliminato:

Coming to the other two aspects under consideration, we observe that in the field of electronic communications juridical, economic and technical knowledge is so intermingled that the judge is required to be legally correct, economically proper and technically precise at the same time. In fact, considering that a distinctive trait of the administrative power performed in the matter is the so called "**technical discretion**" ([14]), the judge has to interpret the rules even in fields where he surely lacks the specific competence.

Needless to say that the lack of technical knowledge on the part of the judge may also occur in other fields, namely in those left to the competence of other independent administrative Authorities ([15]); nevertheless, likewise in the field of competition law, a further difficulty here arises owing to the use, at a legislative and administrative level, of plenty of the so-called "**indeterminate juridical concepts**", since E.U. and national rules give juridical relevance to concepts belonging to economics.
We recall those concepts implied in the definitions of "significant market power" (art. 17, CCE) which remands to the other indeterminate concept of "dominant position" used in competition law (16); "cost orientation" (art. 50 CCE) (17), "ladder of

[12] Tar Lazio, Rome, III-ter, 11.2..2011, n. 1336, recalling id., 16.2.2009, n. 1491.

13 The observation is attributable to G. MONTEDORO, Intervention in the Seminary "Metamorfosi dell'eccesso di potere", Consiglio di Stato, Rome, 20 November 2012.

14 The technical discretion is connoted by the application of rules of a non-exact science having a certain degree of disputability; it therefore differs from the "technical verification", which is founded on the application of an exact science in order to attain a sure outcome.

15 Consult E. GALANTI, Discrezionalità delle Autorità amministrative indipendenti e controllo giudiziale, in Quaderni di Ricerca Giuridica della Consulenza Legale, Banca d'Italia, June 2009.

16 The ascertainment of a dominant position under antitrust law demands a multi-factorial investigation and a complex legal evaluation (TAR Lazio, Rome, I, 30.3.2007, n. 2798).

investment" (art. 13, para. 6bis, CCE, providing that Agcom shall promote "competition based on investment" as well as "efficient investment and innovation").([18])
The category of indeterminate juridical concepts relates to a particular legislative technique – prone to the need of the legal system's flexibility - in which the legal provision, in order to identify a fact as productive of juridical effects, does not describe the fact itself in a precise and exhaustive manner but makes a remand to an integrative operation of the interpreter, by using undetermined concepts that will be completed and specified with extra-juridical elements or criteria to be inserted into the legal paradigm..
As a consequence, the judicial decisions come to hold a supplementary position towards the texts of the law and the electronic communication regulation becomes a *corpus juris* also of jurisprudential source.

But we can take fruitful lessons from appeal procedures in parallel and not so distant matters such as **the field of competition law.**
As for the limits of the national judge's review of the acts of the antitrust authority, it has been pointed out that the administrative judge can with a full cognition check the facts considered in the antitrust proceedings as well as the evaluation process through which the Authority has come to apply the very rule of law, undisputed being however that, where the legitimacy of the action and the correct use of the underlying technical rules have been ascertained, the jurisdictional review cannot go beyond so as to substitute the judge's evaluation to the one already effected by the Administration, who remains the sole subject in charge of the exercised antitrust powers ([19]).

In process of time, the national courts have definitely come to affirm the lawfulness of a stronger, more incisive review of the judge on acts of the antitrust authority, oriented to a full and effective tutelage of the individual juridical situations deducted in litigation. This intrinsic review has lately been deemed as comprehensive of a re-examination of the technical evaluations made by the Authority as well as of the economic principles and the indeterminate juridical concepts applied by the Authority (20), and is to be conducted by the judge by having recourse to rules and technical knowledge belonging to the same disciplines applied by the Administration ([21]).

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17 According to TAR Lazio, Rome, III-ter, 14.12.2011, n. 9740, the principle that the prices must be oriented to costs is one of the obligations that the Authority can impose, and that "orientation" is surely not determined in a precise and binding way.

18 Some decisions apply the criterion of the ladder of investment to be climbed by the alternative operators in order to justify the progressive reduction or elimination of remedies. The difficulty for the judge is to determine precisely the steps of the ladder which is a highly debatable question in the absence of sure and predetermined parameters. It is the case when alternative operators claim that the Authority has illegitimately reduced or eliminated some remedies (Tar Lazio, Rome, III-ter, 11.7.2012, n.6321).

19 Ex multis: Cons. Stato, VI, 12.2.2007, n° 550; Cons. St., VI, 10.3.2006, n° 1271; TAR Lazio, Rome I, 24.8.2010, n° 31278; id., 29.12.2007, n° 14157; id., 30.3.2007, n° 2798; id., 13 March 2006, n° 1898.

20 Cons. Stato, VI, 8.2.2007, n° 515.

21 Cons. Stato, VI, 23.4.2002, n° 2199.

In this way the judge can both reassess the technical choice of the Administration and apply the correct interpretation of the relevant indeterminate juridical concepts to the factual controversy ([22]).
In particular the past distinction between "strong" and "weak" judicial review has been abandoned, while it has been underlined the search for a review aimed at a common model of European level: not that the judge has the task to exercise administrative powers in the first person, but he has the power to verify, without any intrinsic limitation, whether the power attributed to the Authority has been exercised correctly.

Transposing this orientations into our sector we have that the general principles on judicial review of administrative acts eventually finds a proper conjugation with the specialty of controversies in the electronic communications.
On the other hand, the idea of using in our sector the solutions found by the judicial practise in the parallel field of competition law is not only logical and consistent but also justifiable in the light of the circumstance that the value of competition is well present in the electronic communication sector and must be enhanced and preserved, when it doesn't even interfere with it.
In this sector the judge may in fact be confronted with the necessity of reconciling different and conflicting rules, not only when an antitrust decision is contested, but also in the case of a regulatory act being challenged. ([23])

While performing this task the judge can count on a peculiar "tool", i.e. his own "discretionary power" to mould the economic concepts implied in the legal texts; by so doing, the judge can reassess the technical choice of the Administration and apply the correct interpretation of the relevant indeterminate juridical concepts to the factual controversy.
And so, in price control matters, we can once again recall the case n. 1239/09 H3G versus Agcom (24): the plaintiff contested deliberation n. 667/08/Cons of 26 November 2008, concerning wholesale services of termination of fixed-line and mobile phone voice telephony, owing to the fact that it imposed a scheduled reduction of tariffs for the operator in question as from 1 July 2010 in order to reach a total symmetry among operators in a reasonable time.
The 1st instance Court rejected the claim on the basis of the recognized full legitimacy of the contested deliberation, arguing that Agcom had made a correct use of the indicator of the costs borne by an efficient operator (25).

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[22] Cons. Stato, VI, 2.3.2004, n° 926.

23 For a more accurate exam of the issue, see R.PERNA, The role of court, quot.

[24] For a wide review of the Italian case law in the field of electronic communications, we allow ourselves to remand to R. PERNA, *Interim measures and retroactive effect of remedies*, at the Seminar "Implementing the revised regulatory framework in electronic communications" organized by ERA in Bruxelles, 28 November 2011.

[25] Tar Lazio, III ter, 11.2.2011, n° 1336; the decision was also confirmed by the judge of appeal (Cons. Stato, 23 May 2011, n° 3106).

In similar cases, the main issue for the Court is what a cost-oriented price exactly is; a second question which may be prospected to the judge, however, is whether the model of cost adopted by the Authority can exercise an anticompetitive effect on the relevant market.
The first issues raises a problem of filling with content an indeterminate juridical concept; the problem of the extension and scope of the indeterminate concepts is due to the fact that such concepts are first interpreted and applied by the Administration and only later, upon appeal against the administrative act, possibly known by the administrative judge. The second issue raises a pure technical question which admits debatable answers.

As a consequence, by moulding indeterminate juridical concepts and sifting technical evaluations, a judge - when appreciating the consistency of a regulatory act establishing symmetric tariffs with the principles of the competition law - could eventually come to hold that converging to the symmetric prices would be a consistent and logical process only if it could be assumed during an ex ante examination that the development of the operator's market shares might trend towards equalization, so that by the time the termination rates become symmetrical the operator's market share and turnover will be the same as the others'. (26).

This was in effect the focal point of the argument from H3G, the smallest Italian operator, against the symmetric charges.

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Dear colleagues,

while concluding my intervention I feel the urgency to remind you all that we belong to a European regulatory system which looks at us as different and alike at a time.
This having in mind, our intrinsic diversities must be perceived as a spur to the goal of a higher degree of harmonization of our national laws and not as a drawback.
In the light of the saying "*In varietate Concordia*" which the European Parliament has since 2000 given itself, to the achievement of that goal we shall address our best endeavours.

[26] Again G. A. KOVACS, *The assessment of the merits, the appropriate expertise and the deference to NRAs ,* at the Seminar "Implementing the revised regulatory framework in electronic communications" organized by ERA in Bruxelles, 28 November 2011.