Giovanni Martini*

Procedural and Judicial Guarantees Against the Punitive Power of Public Bodies

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Abstract: The scope of this analysis is to reconstruct, with a brief look to the Italian case, the 'frame of reference' within which the rulings of the ECtHR on the Art. 6 of the ECHR, due to the particular strength that Article 46 of the Convention attributes to them, are made, to understand, at the outcome, how, and to what extent, the sanctioning activity of public bodies can be influenced by the principles of the ECHR as enforced by the Judges of Strasbourg. To this aim the focus will be addressed on the following, and more complex, profiles: (a) independence, impartiality and separation of functions; (b) sanctioning activity and discretionary powers; (c) sufficient judicial review and full jurisdiction, to conclude the investigation trying to verify, in the light of the latest directions taken by the ECtHR; (d) whether, and how, the types of sanctions can affect the conditions of the judicial protection.

Keywords: administrative sanctions, ECHR, procedural and judicial guarantees

1 Preliminary Contents

As the examination of ECtHR's decisions will clearly highlight, in the activity of reconstructing the principles enshrined in the ECHR, the path of their argument does not always proceed in a linear and coherent manner. Not infrequently, in some decisions, Judges openly disavow the principles established in previous,

***Corresponding author: Giovanni Martini**, Università degli Studi della Campania Luigi Vanvitelli - Dipartimento di Giurisprudenza, Santa Maria Capua Vetere (CE), Italy,
E-mail: giovanni.martini@unicampania.it

even recent, rulings.[1] Other times new principles are immediately abandoned through the express reference to those previously elaborated.[2] Additionally, in cases while claiming to apply one or more general principles they seem to disregard the founding reasons behind them.[3]

Faced with such a heterogeneous framework, it seems really difficult not to adhere to the opinion of Lord Phillips, which, to represent the poor linearity in the decision of the ECtHR, observed: «some of these decisions are mutually inconsistent and it is not always easy to identify the principle underlying others».[4]

Of course, due to the particular strength that Article 46 of the Convention attributes to them, the rulings of the ECtHR, despite their poor linearity, cannot be ignored, so, with a brief look to the Italian case, the scope of this analysis is to reconstruct the 'frame of reference' within which these decisions are made, to understand, at the outcome, how, and to what extent, the sanctioning activity of public bodies can be influenced by the principles of the ECHR as enforced by the Judges of Strasbourg.

To this aim the focus will be addressed on the following, and more complex, profiles: (a) independence, impartiality and separation of functions; (b) sanctioning activity and discretionary powers; (c) sufficient judicial review and full jurisdiction, to conclude the investigation trying to verify, in the light of the latest directions taken by the ECtHR; (d) whether, and how, the types of sanctions can affect the conditions of the judicial protection.

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1 In this regard of particular significance is the application that the ECtHR did of the principle, enshrined in art. 6, co. 1, of the ECHR, of presumption of innocence, whose operativity is affirmed when the person acquitted of a criminal charge requests to the State the compensation for the damages suffered, and, unexpectedly excluded, when the claim for compensation is proposed by those who (victim and/or his family) assume to have received damage as a result of the criminal actions of the acquitted person. See Sekanina v. Austria, 25 August 1993 (Appl. n. 13126/87), and Rushiti v. Austria, 21/3/2000 (Appl. n. 28389/95) and Y v. Norway, 11/2/2003 (Appl. n. 56568/00) or Ringvold v. Norway, 11/2/2003 (Appl. n. 34964/97), in *https://hudoc.echr.coe.int*. See also R. KITAI, *Protecting the Guilty*, in *Buffalo Criminal Law Review*, 2003, 6, pp. 1169 ss.

2 That's what happened with regard to the 'cloudy choice' of the ECtHR in identifying the criteria to identify the criminal (in nature) value of the tax surcharges. For example, Janosevic v. Sweden, 21/5/2003 (Appl. 34619/97) and Jussila v. Finland, 23/11/2006 (Appl. n. 73053/01), in *https://hudoc.echr.coe.int*.

3 It is sufficient to recall the incongruity that arises from the comparison between a decision that declares the character penal in nature of a road fine of a few Euros (in Öztürk v. Germany, 21/2/1974, Appl. n. 8544/79), and another that excludes it in the much more afflictive hypothesis of a confiscation of a huge property (M. v. Italy, 15/4/1991, Appl. n. 12386/86).

4 Opinion expressed in Gale v. Serious Organized Crime Agency, [2011] UKSC 49, in *https://www.supremecourt.uk/cases/uksc-2010-0190.html*.

2 The Application of the Engel Criteria by the Successive Decisions of the ECtHR

If it is of no doubt that the *Engel decision* represents the leading case on the topic of the administrative sanctions, the successive step, according to the scope of this analysis, is to verify how the legal principles expressed in this decision have been applied by the successive decisions to define the sphere of influence of art. 6 ECHR, and then the possible effects on the exercise of the sanctioning power in the contracting States' legal systems.

2.1 The Legal Classification of the Offence Under National Law

The legal classification of the offence under national law represents nothing more than a mere indication because, in ECtHR's view, the legal qualification made by the contracting States' legal systems cannot be interpreted as a tool to narrow the extent of CEDU guarantee.

In this sense the ECtHR affirmed that «it must be remembered that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective"».[5]

To examine that requirement the ECtHR goes over the qualification of the sanction under national law, founding every evaluation on the effective process and its legal regime. Therefore, in Valico s.r.l. v. Italia, concerning a sanction for infringement of landscape legislation, the Court begins examining «whether the measure in question is imposed following conviction for a "criminal offence"», pointing out that further issues to consider are «its characterization under national law [and] the procedures involved in the making and implementation of the measure».[6]

In Escoubet v. Belgium, instead, the reference to the process under domestic law was not deemed adequate to ascertain the very nature of the penalty.[7] The case

5 Micallef v. Malta, 15/10/2009 (Appl. n. 17056/06), par. 81, in *https://hudoc.echr.coe.int*.

6 Judgment 21/3/2006 (Appl. n. 7007/01), par. A2, in *https://hudoc.echr.coe.int*.

7 This would overcome the argument followed at par. 81 of the decision Engel. As observes R. NAZZINI, *Administrative Enforcement, Judicial Review and Effective Judicial Protection in EU Competition Law: A Comparative Contextual-Functionalist Perspective*, in *Common Market Law Review*, 49, 2012, pp. 971 ss., in *http:/ssrn.com/abstract=2117187*, the approach of the decision Engel is unidirectional, «If an offence is criminal under national law, it is also criminal under Art. 6. But if an offence is not criminal under national law, the domestic classification of the offence is 'no more than a starting point'. It provides an indication carrying 'a formal and relative value'» (p. 16).

is about the withdrawal of a driving license as consequence of a car crash. The ECtHR states that: «The fact that a measure is provided for in a criminal statute of a respondent State does not in itself signify that it falls within the scope of Article 6 of the Convention», this provision is to be applied just when «there is a "criminal charge" against a particular person, that is, after the individual has received the "official notification by the competent authority of an allegation that he has committed a criminal offence"».[8]

In that case from the lack of a formal charge, the ECtHR derives the non-penal nature of the measure at hand, ignoring (or pretending not to hear) the fact that the sanctions (the disqualification) was ordered by the Prosecutor during the investigations. Sure enough, the Court identified this measure as «part of a criminal investigation before bringing a "criminal charge"».[9]

2.2 The Very Nature of the Offence

The very nature of the offence, the second Engel criteria, is the most considered by ECtHR, to investigate on the real nature of a sanction. The review of the law cases shows, however, an indication not always coherent of the elements from which to deduce the existence of this requirement.

To this aim the Court investigates the purpose of sanction, considering them penal in nature if it has a dissuasive and punitive character.[10]

8 Par. 34.

9 Par. 34. This aim is *hereby confirmed* in Hangl v. Austria, 20/3/2001 (Appl. n. 38716/97), in *https://hudoc.echr.coe.int*., where the ECtHR affirms that «Therefore it cannot be said that in the proceedings for the withdrawal of the driving license the applicant had been tried or punished again for an offence for which he had already been finally convicted, within the meaning of Article 4 of Protocol No. 7. Consequently, this provision does not apply to the proceedings at issue».

10 In Grande Stevens and Others c. Italy, 4/3/2014 (Appl. nn. 18640/10, 18647/10, 18663/10, 18668/10 e 18698/10), in *https://hudoc.echr.coe.int*., the ECtHR observes, at par. 96, that «As to the nature of the offence, it appears that the provisions which the applicants were accused of breaching were intended to guarantee the integrity of the financial markets and to maintain public confidence in the security of transactions. […] These are general interests of society, usually protected by criminal law (see, mutatis mutandis, Menarini Diagnostics S.r.l., cited above, § 40; see also Société Stenuit v. France, report of the European Commission of Human Rights, 30 May 1991, § 62, Series A no. 232-A). In addition, the Court considers that the fines imposed were essentially intended to punish, in order to prevent repeat offending. They had therefore been based on rules whose purpose was both deterrent, namely to dissuade the applicants from resuming the activity in question, and punitive, since they punished unlawful conduct (see, mutatis mutandis, Jussila, cited above, § 38)».

On this line it has considered penal in nature the surcharge for tax fraud,[11] the fine for reckless driving,[12] a measure of confiscation of assets,[13] and the financial penalty for infringement of landscape legislation.[14]

In other cases, however, the ECtHR, has set aside this approach, affirming the penal nature of a sanction considering its potential general application only. Therefore, in a case regarding the seizure of offensive publications it stated that: «On the question of the nature of the offence committed by the applicant, the Court recalls that […] The latter provision regulates administrative law offences against the established order of administration. Accordingly, this legal rule is directed towards all citizens and not towards a given group possessing a special status. […] It follows that the legal norm in question is of general effect and therefore falls under the second Engel criterion».[15]

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11 Si v. Paulow v. Finland, 14/2/2006 (Appl. n. 53434/99), in *https://hudoc.echr.coe.int*, where it's affirmed: «For the purposes of the present case, the Court will proceed on the assumption that Article 6, in its criminal aspect, may be regarded as applicable to the proceedings by which the applicant was required to pay a substantial surcharge under provisions intended to be of deterrent and punitive effect».

12 See Öztürk v. Germany, 21/2/1984 (Appl. n. 8544/79), par. 53, in *https://hudoc.echr.coe.int*, where the ECtHR states that «Indeed, the sanction - and this the Government did not contest - seeks to punish as well as to deter. It matters little whether the legal provision contravened by Mr. Öztürk is aimed at protecting the rights and interests of others or solely at meeting the demands of road traffic. These two ends are not mutually exclusive. Above all, the general character of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of Article 6 (art. 6) of the Convention, criminal in nature».

13 Welch v. The United Kingdom, 9/2/1995 (Appl. n. 17440/90), in *https://hudoc.echr.coe.int*., where, at par. 30, the Court points out that «However it cannot be excluded that legislation which confers such broad powers of confiscation on the courts also pursues the aim of punishing the offender. Indeed, the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment».

14 See Valico v. Italia, 21/3/2006 (Appl. 7007/01), in *https://hudoc.echr.coe.int*., in which it's affirmed: «In this connection, it observes that the penalty provided for by section 16(5) of Regional Law no. 20 of 1989 does not seek to afford pecuniary reparation for damage but essentially to inflict punishment in order to prevent the repetition of breaches of the building conditions laid down by the Regional Authority (see, mutatis mutandis and in relation to the notion of a "criminal charge", Bendenoun v. France, 24 February 1994, § 47, Series A no. 284). Further support for this conclusion is to be found in the findings of the Consiglio di Stato, which in its judgment of 4 July 2000 stated that the absence of damage to the landscape did not prevent a fine being imposed. The penalty was therefore both deterrent and punitive, the latter being the characteristic that ordinarily serves to distinguish criminal penalties (see Öztürk v. Germany, 21 February 1984, § 53, Series A no. 73)».

15 Balsytė-Lideikienė v. Lithuania, 4/11/2008 (Appl. n. 72596/01), par. 56. On the same line see: Ezeh and Connors v. The United Kingdom, 9/10/2003 (Appl. nn. 39665/98 e 40086/98), par. 104, in *https://hudoc.echr.coe.int*.

The study of these decisions restores the idea of non-linearity in ECtHR's opinion about the verification of the *very nature of the offence*. A quick glance could suggest that the penal nature is proper for the sanctions having a punitive purpose, with the exclusion of the ones principally directed to the pursuit of public interests.

That conclusion, however, does not seem to be persuasive for at least two reasons.

Firstly, the intent of law it is not the only requirement the ECtHR uses. In addition to this, in other cases, the Judges have also considered the effect of the rule, excluding penal nature when the sanction, while having punitive purpose, is directed to a limited group of persons for the particular status to which they are entitled.

And also, as the Court stated in many decisions, «the second and third criteria are alternative and not necessarily cumulative»,[16] so that the lack of punitive nature could always be overtaken looking at the *degree of severity of the penalty* (the third Engel criterion).

2.3 The Degree of Severity of the Penalty

The same argumentative non-linearity is found in the decisions regarding the last of the Engel criteria.

Regarding this profile, in the opinion of ECtHR, the sanction that can be imposed abstractly and within the specific context must be investigated. In this respect it states that: «The Court considers that significant weight should be attached to the severity of the penalty, both potential and actual».[17] If that approach could appear acceptable, it is in the identification of the *degree of severity* that from the ECtHR's decisions no strong indications can be found.

This requirement was recognized in cases concerning fines of over one million Euro,[18] when no limits to the fine amount are set,[19] or even there is deprivation of freedom. In other cases, the Court provides non-linear indications.

In a controversy regarding the penalty points endorsement for traffic violation, the severity of sanction is recognized examining its dissuasive nature more than its

16 Balsytė-Lideikienė v. Lithuania cit. par. 55.

17 Valico c. Italia cit., par. 47.

18 Grande Stevens and Others v. Italia cit., and Valico v. Italia cit.

19 Janosevic v. Sweden, 21/5/2003 (Appl. 34619/97), par. 69, in *https://hudoc.echr.coe.int*, where the ECtHR states that «Swedish tax surcharges are imposed in proportion to the amount of the tax avoided by the provision of incorrect or inadequate information. The surcharges, normally fixed at 20 or 40% of the tax avoided, depending on the type of tax involved, have no upper limit and may come to very large amounts». To this case the ECtHR connects the situation in which non-payment of fines, penalties or surcharges can be converted in arrest, see Balsytė-Lideikienė v. Lithuania cit.

degree. In fact, the Court observes that «It is indisputable that the right to drive a motor vehicle is very useful in everyday life and for carrying on an occupation.[20] The Court, like the Commission, accordingly, infers that, although the deduction of points has a preventive character, *it also has a punitive and deterrent character and is accordingly similar to a secondary penalty*».[21]

As the analysis carried out demonstrates, there is an evident difficulty to harmonize the juridical categories stated by the ECtHR with the ones typical of the national legal systems (of every contracting State).

3 The Independence and Impartiality of the Body Imposing the Sanction

Among the most relevant guarantees enshrined in art. 6 of the ECHR there are those of the independence and impartiality of the body called to impose a sanction (of a criminal nature).

The Judges, in order to ascertain the independence of an adjudicative body, identify four, interesting criteria: (a) the manner of appointment of its members; (b) the duration of their office; (c) the existence of guarantees against pressures from outside; and (d) the (general) appearance of independence of the body.[22]

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20 In Ezeh and Connors v. The United Kingdom cit., where the sanction was the exclusion of the early release, the ECtHR states that «given the deprivations of liberty liable to be and actually imposed on the present applicants, there is a presumption that the charges against them were criminal within the meaning of Article 6, a presumption which could be rebutted entirely exceptionally, and only if those deprivations of liberty could not be considered "appreciably detrimental" given their nature, duration or manner of execution». With regard to the overcoming of this presumption, the Judges only check how the additional penalty is served, observing that « there was nothing before the Chamber, and nothing was submitted to the Grand Chamber, to suggest that awards of additional days would be served other than in prison and under the same prison regime as would apply until the normal release date set by section 33 of the 1991 Act».

21 Malige v. France, 23/9/1998 (Appl. nn. 68/1997/852/1059), par. 39, in *https://hudoc.echr.coe.int* (my italics).

22 Court (Chamber), Campbell and Fell v. The United Kingdom, 28/6/1984 (Appl. n. 7819/77; 7878/77), par. 78, in *https://hudoc.echr.coe.int*. The Court affirmed that «In determining whether a body can be considered to be "independent" - notably of the executive and of the parties to the case (see, inter alia, the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 24, para. 55) – , the Court has had regard to the manner of appointment of its members and the duration of their term of office (ibid., pp. 24–25, para. 57), the existence of guarantees against outside pressures (see the Piersack judgment of 1 October 1982, Series A no. 53, p. 13, para. 27) and the question whether the body presents an appearance of independence (see the Delcourt judgment of 17 January 1970, Series A no. 11, p. 17, para. 31)».

All those elements are easy to find among (most of) the administrative bodies, and, even if the concepts of independence and impartiality «are closely linked and, depending on the circumstances, may require joint examination»,[23] it seems more useful to focus on the problem of the impartiality, because it appears more difficult to ascertain and more numerous are the rulings of the ECtHR concerning it.

In Micallef v. Malta, the ECtHR, reiterating what was expressed in its previous rulings, clarifies that according to art. 6, co. 1, of the ECHR, the impartiality of the judicial body, as well as the subjective bias of a single judge, can be assessed using a two-pronged approach. The first, of a subjective nature (*subjective test*), concerning the personal convictions and, more generally, the behavior of a particular judge, who manifested personal prejudice, or bias, in a given controversy.[24] The second, of an objective nature (*objective test*), concerning the structure and composition of the judicial body itself, to verify the presence of sufficient guarantees to exclude any legitimate doubt about its impartiality.[25]

Even if the there's non watertight division between these two criteria, in most cases, however,[26] it could be not easy for the applicant to prove the existence of reasons of hostility or bad faith for the specific judge, and therefore his bias. For this very reason the ECtHR, more and more frequently, has preferred to focus its attention on the objective test.[27] In doing so, observes the ECtHR, it is necessary to evaluate the existence of circumstances capable of injecting a certain doubt about the impartiality of the body called to take the decision,[28] in this sense to assume

23 Grand Chamber, Ramos Nunes de Carvalho e Sá v. Portugal, 6/11/2018 (Appl. n. 55391/13, 57728/13, and 74041/13), par. 150, in *https://hudoc.echr.coe.int*.

24 With regard to the judge's personal convictions (subjective criterion), following the previous law cases, the ECtHR states that his impartiality must be presumed until proven otherwise, as happens when he has openly manifested a particular hostility towards one of the parties. See Kyprianou v. Cyprus, 15/12/2005 (Appl. n. 73797/01), par. 119, in *https://hudoc.echr.coe.int*. In addition, see also Olujić v. Croatia, 5/2/2009 (Appl. n. 22330/05), par. 58, where the Court states that «In applying the subjective test the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary (see Hauschildt v. Denmark, 24 May 1989, § 47, Series A no. 154). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill-will or has arranged to have a case assigned to himself for personal reasons».

25 See Fey v. Austria, 24/2/1993 (Appl. n. 14396/88), par. 27–28; Wettstein v. Switzerland, 21/12/2000 (Appl. 33958/96), par. 42, in *https://hudoc.echr.coe.int*.

26 See Ramos Nunes de Carvalho e Sá v. Portugal cit., par. 146.

27 Olujić v. Croatia cit., par. 58.

28 This can happen, according to the Court when there are hierarchical relationships between the judge and other parties, as well as when this relationship is such as to indicate a clear loss of impartiality by the judge. See Miller and Others v. the United Kingdom, 26/10/2004 (Appl. nn. 45825/99, 45826/99 e 45827/99); Pullar v. the United Kingdom, 10/6/1996 (Appl. n. 22399/93), in *https://hudoc.echr.coe.int*.

relevance is not the fear of the subjects interested, but that this is objectively justified.[29]

So still, in Olujić v. Croatia the ECtHR adds that anyone who is entrusted with adjudicative functions should use them using the utmost discretion avoiding, in order to preserve his own impartial figure, making statements to the press even when expressly requested to do so.[30] This is because «justice must not only be done: it must also be seen to be done», and in fact, appearances also have a considerable importance, since relevancy is the confidence that every Court, in a democratic society, must generate in the community.[31]

So, in the decision Grande Stevens and others c. Italy, is the impartiality of Consob (the Italian supervisory authority for Companies and Stock Exchange) to be challenged, with regard to the dual role of the President. In fact, in addition to presiding over the body responsible for pronouncing the sanction, the latter also has the task of supervising the preliminary investigation carried out by the offices, preventing the separation between the preliminary and the decisional phase of the proceeding.

For these reasons, the ECtHR accepts the lodged claim, noting that, although there is a formal separation between the bodies responsible for carrying out the investigation and the body responsible for applying the sanction, nevertheless «the Directorate and the Commission are merely branches of the same administrative body, acting under the authority and supervision of a single chairman. In the Court's opinion, this amounts to the consecutive exercise of investigative and judicial functions within one body; in criminal matters such a combination of

29 In the par. 69 the Corte EDU observes that «As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see Wettstein, cited above, § 44, and Reports 1996-III)». Referred to in the same decision, see also Ferrantelli and Santangelo v. Italy, 7/8/1996 (Appl. n. 19874/92), par. 58, in *https://hudoc.echr.coe.int*.

30 See Olujić v. Croatia cit., par 59, in *https://hudoc.echr.coe.int*.

31 In Micallef v. Malta cit., par. 98, the ECtHR pointed out that «In this respect even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see De Cubber, cited above, § 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw». See even, Castillo Algar v. Spain, 28/10/1998 (Appl. n. 28194/95), in *https://hudoc.echr.coe.int*.

functions is not compatible with the requirements of impartiality set out in Article 6 § 1 of the Convention».[32]

4 Sanctioning Activity and Discretionary Powers

The issue of administrative sanctions discretion has always been controversial in the context of law studies.

The doubt concerns the possibility of conferring to the administrations the power to evaluate the opportunity of imposing the sanctions, legitimately allowing it to decide or to omit its application where it is so required, in the individual case, by evaluations concerning public interests.

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32 See Second Section, Grande Stevens v. Italy, 4/3/2014 (Appl. nn. 18640/10, 18647/10, 18663/10, 18668/10 e 18698/10), par. 137, in *https://hudoc.echr.coe.int*. For an in-depth study of the ruling see M. ALLENA, *Il caso* Grande Stevens *c. Italia: le sanzioni Consob alla prova dei principi Cedu, in Giorn. dir. amm.*, 2014, pp. 1053 ss., and, in addition, ID., *Garanzie procedimentali e giurisdizionali alla luce dell'art. 6 della Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali*, in *www.giustamm.it.*, n. 12/2011, where it's been obeserved «è significativo che, nel nostro ordinamento, si sia cercato di dare attuazione agli obblighi convenzionali già nel 2005, tramite la legge n. 262, sulla tutela del risparmio e la disciplina dei mercati finanziari, il cui art. 24 introduce, con riguardo ai procedimenti della Banca d'Italia, della CONSOB, dell'ISVAP e della COVIP, il principio di separazione tra funzioni istruttorie e funzioni decisorie nell'irrogazione delle sanzioni. Alla luce di questa previsione, si può allora ritenere che, anche con riguardo ai procedimenti amministrativi diversi da quelli sanzionatori, debba essere attuato pienamente quel principio di separazione tra organo istruttorio e organo competente all'adozione del provvedimento finale, già invocato da una parte della dottrina al fine di garantire la realizzazione di un'azione amministrativa davvero imparziale: la necessità di tale distinzione, del resto in qualche misura già abbozzata (sia pure in forma di mera possibilità) dal legislatore della legge n. 241 del 1990 nelle norme dedicate alla figura del responsabile del procedimento, trova dunque nei principi CEDU un nuovo ancoraggio di diritto positivo (o, meglio, costituzionale)». See also: F. FRACCHIA, *Il giudice amministrativo, crisi finanziaria globale e mercati*, in *Riv. it. dir. pubbl. com.*, 2010, pp. 451 ss. ; R. VILLATA - F. GOISIS, *Procedimenti per l'adozione di provvedimenti individuali*, in L. DE ANGELIS – N. RONDINONE (a cura di), *La tutela del risparmio nella riforma dell'ordinamento finanziario*, Giappichelli, Torino, 2008, pp. 541 ss., spec. pp. 543 ss.; B.G. MATTARELLA, *Artt. 23–24*, in A. NIGRO – V. SANTORO (a cura di), *La tutela del risparmio. Commentario della legge 28 dicembre 2005, n. 262, e del d.lgs. 29 dicembre 2006, n. 303*, Giappichelli, Torino, 2007, pp. 438 ss.; A. TONETTI, *Il nuovo procedimento sanzionatorio della CONSOB*, in *Giorn. dir. amm.*, 2005, pp. 1227 ss. With regard to the separation between organs with preliminary and with decision-making functions, see: M. RENNA, *Il responsabile del procedimento a (quasi) dieci anni dall'entrata in vigore della legge n. 241*, in *Dir. amm.*, 2000, pp. 505 ss.; U. ALLEGRETTI, *Legge generale sui procedimenti e moralizzazione amministrativa*, in *Scritti in onore di Massimo Severo Giannini*, vol. III, Giuffrè, Milano, 1988, pp. 1. ss.

The focus on this very sensitive topic, actually easy to understand, is influenced by the debate on the assimilation, as for its legal basis, with criminal sanctions, whose application is normally a duty and not a choice.

And in fact, the thesis of the compulsory exercise of punitive power by the Administrations could be supported on the basis of multiple arguments.

Sanctioning proceedings go to the heart of the rule of law forcing the legislator to set out the conditions of the sanction without leaving any margin of choice, in the application, to the administration. In this respect, the law, when setting the conditions of the sanction, would exhaust all the profiles related to its convenience, thus depriving the administration of every power of assessment on the matter.[33]

The same conclusion could also be reached by reasoning that the 'principle of equality' would require the regulation of exclusions from the application of the sanction to be reserved only to the general provisions, and especially to the law, regardless of any assessment of opportunities for the Administration.[34]

As a consequence, it is possible to achieve the same outcomes by reasoning on the role of the administrations, since, with respect to sanctioning power, to the effects of this principle their tasks are an equal treatment of all the individuals administered, and therefore, anyone is found to be in the conditions laid down by the sanctioning legislation, and for this only, will have to suffer the application

33 As observed by E. CAPACCIOLI, *Principi in tema di sanzioni amministrative: considerazioni introduttive*, in AA.VV., *Le sanzioni in materia tributaria*, Giuffrè, Milano, 1979, pp. 125 ss., 139, «non sta all'Amministrazione di valutare se convenga piuttosto omettere l'applicazione della pena pecuniaria». This conclusion is confirmed in Id., *Il procedimento di applicazione delle sanzioni amministrative*, in AA.VV., *Le sanzioni amministrative* (Atti del XXVI Convegno di studi di Scienza dell'Amministrazione, Varenna 18–20 settembre 1980), Giuffrè, Milano, 1982, pp. 57 ss., 118, in which he affirmed that : «Quando la legge stabilisce le condizioni perché la sanzione sia applicabile, fissa il tipo di sanzione, ne determina la misura, sia pure fra un minimo ed un massimo, non c'è spazio per la discrezionalità amministrativa. Semmai c'è spazio per valutazioni tecnico-empiriche, che nulla hanno a che vedere con la discrezionalità amministrativa». On the same line U. BORSI, *L'esecutorietà degli atti amministrativi*, in *Scritti di diritto pubblico*, I, Cedam, Padova, 1976, pp. 139 ss., 140, observing that wherever «il disobbediente si affretti a tornare all'osservanza dei propri obblighi nonostante che la disobbedienza […] siasi già verificata, può l'Autorità amministrativa dispensarsi dal punirlo o dal farlo punire».

34 See on this point C.E. PALIERO – A. TRAVI, voce *Sanzioni amministrative*, in *Enc. dir.*, vol. XLI, 1989, pp. 345 ss., 374, according to which the sactioning rules «"debbono osservare i principi di imparzialità e ragionevolezza", non soltanto sotto il profilo sostanziale – di adeguatezza della misura della sanzione alla gravità dell'illecito – ma anche sotto il profilo formale – di 'indiscriminatezza' dell'irrogazione –, senza ammettere condizionamenti di 'opportunità', né oggettiva (interessi amministrativi particolari), né, tantomeno soggettiva (persona del trasgressore)». See also M.A. SANDULLI, *Le sanzioni amministrative pecuniarie. Principi sostanziali e procedimentali*, Jovene, Napoli, 1983, pp. 199 ss.

without any further margin for assessment.[35] With the conclusion that, from administrative proceedings, discretionary powers are excluded.[36]

In this sense they have disposed of the legislations of many contracting States. For example, the Italian Act n. 689/1981 supports this view stipulating, in Articles 14 and 17, respectively, that any infringement «*must* be immediately contested», and, where this is not possible «the seeds of violation *must* be notified to the to the parties concerned» and, in addition, that, if «the reduced payment is not made, the officer who ascertained the violation *must* submit report»,[37] thus providing, the Italian law would seem to outline a system that does not allow any power of choice for the administration which, verified the existence of the unlawful conduct, in the same way as the judicial investigating body, must initiate the repressive (administrative) procedure.

The same conclusions also seems to point out the text of art. 18 of Act n. 689/1981, as it provides that the sanction proceedings *must* be concluded with a payment order to the offender (to pay a financial penalty), or with an order to close the proceeding when there is no ground for investigations This means that, once the knowledge of the infringement has been acquired, the Administration has no place for further considerations on the opportunity to sanction or not the offender.[38]

Instead, a different approach is followed by those who concluded in favor of the compatibility between sanctioning power and discretion, claiming that the

35 See C.E. PALIERO – A. TRAVI, voce *Sanzioni amministrative* cit., p. 374, where they observ that «Vi è pertanto lo spazio per desumere dall'art. 97 Cost. una garanzia più pregnante, di trattamenti eguali a parità di (pre)condizioni («chiunque trasgredisce deve essere punito»). See even R. RODORF, *Sanzioni amministrative e tutela dei diritti nei mercati finanziari*, in *Le Società*, 2010, pp. 981 ss., 985. The Italian Courts are of the same opinion, see Consiglio di Stato, Sez. V, 27/6/2012, n. 3787, in *www.giustizia-amministrativa.it*, which points out that «l'amministrazione, al pari del giudice penale, ha l'obbligo di esercitare l'azione e di concludere il procedimento: il principio di officialità deriva dalla vigenza, in materia di sanzioni punitive, del principio di legalità sostanziale ricavato dagli artt. 23 e 97 Cost., in virtù del quale il privato è titolare di un diritto soggettivo perfetto a non subire imposizioni patrimoniali al di fuori dei casi espressamente previsti dalla legge».

36 C.E. PALIERO – A. TRAVI, *La sanzione amministrativa. Profili sistematici*, Giuffrè, Milano, 1988, p. 255.

37 Emphasis added by the author.

38 On this point see M.A. SANDULLI, voce *Sanzione* cit., pp. 15–16, according to which «Atteso che l'archiviazione costituisce nel procedimento amministrativo l'unico possibile sbocco della decisione di non applicazione della pena pecuniaria, ne discende che, in ogni caso, l'autorità adita dovrà emettere ordinanza motivata sulle ragioni di fatto e di diritto, soggettive ed oggettive, che abbiano determinato il proprio giudizio. Siamo quindi sicuramente in presenza, almeno in questa ipotesi, di una positiva enunciazione del principio di obbligatorietà della sanzione amministrativa».

sanctioning power is a tool designed for achieving public interest, the same interest for which the law attributes tasks to administrative bodies.[39]

As it is an expression of administrative activity, under this approach, there will be no obstacle to the configuration of the sanctioning power as discretionary, this depending on the legislative choice made when this power is attributed to the Administration. It is also alleged, in the light of this reconstruction of the sanctioning power, the existence of a presumption of discretionary power, which can be overcome only when it is the law to exclude it.[40]

This is also the conclusion that could result from the study of the sanctioning powers of the independent Agencies.

It has been noted that the relevant regulation only lays down generically the detrimental conduct, using phrases with indeterminate content, which means that the same Authorities are called to define their actual content. This allows us to affirm that the legislation attributes to the Agencies broad discretionary powers to determine the substance of the rule, and, in this way, the definition of the forms of protection in a given sector.[41]

An additional element, from which to infer the compatibility between discretion and sanctioning power, is found in the context of the competition law. The initiation of sanctioning proceedings by the antitrust Authority may, in fact, be interrupted through the assumption of "commitments" by the undertaking that has implemented the unlawful conduct, that, if deemed suitable and made compulsory by the Authority, may lead to a decision to close the proceedings instead of imposing the sanction.[42] This would allow us to deduce, in these cases, the existence of a wide discretion for the antitrust authority, which, as remarkably observed, when assessing the suitability of the commitments to remove the continuation of the anti-competitive situation can choose, through an evaluation

39 See G. PAGLIARI, *Profili teorici della sanzione amministrativa*, Cedam, Padova, 1988, p. 196, who pointed out that «l'"autonoma valenza funzionale" la misura sanzionatoria amministrativa […] si caratterizza per attuare il diritto attraverso (la ricostruzione delle condizioni per) il perseguimento dell'interesse pubblico primario, per la cui cura è stata conferita la competenza di amministrazione attiva, della quale il potere sanzionatorio costituisce esplicazione».

40 In the opinion of G. PAGLIARI, (cited work) p. 238, «dalla tesi proposta si può dedurre in via consequenziale esattamente il principio contrario e, con esso, una presunzione di discrezionalità nella sua dimensione più ampia, ogniqualvolta la norma di diritto positivo non escluda la discrezionalità o non la limiti a taluno degli elementi che la caratterizzano e la cui, anche individua, presenza notoriamente è sufficiente a dimostrare la natura discrezionale del potere conferito».

41 A. POLICE, *Il potere discrezionale dell'Autorità Garante della Concorrenza e del Mercato*, in C. RABITTI BEDOGNI – P. BARUCCI (edited by), *20 anni di antitrust. L'evoluzione dell'Autorità Garante della Concorrenza e del Mercato*, Tomo I, Giappichelli, Torino, 2010, pp. 369 ss., 380.

42 See art. 14-ter, Italian Act n. 287/2000 and the Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11).

of expediency, if accepting the commitments or go on with the sanctioning proceeding.[43]

It is worth-noticing that there are good reasons to support the subordination of the sanctioning power to discretionary choices of the Administrations, that's what happens, for example, when law entrusts to them the definition of the conditions to proceed with the imposition.

To find a solution to this very delicate question concerning how to exercise the sanctioning power, it seems more profitable to start from the conclusions reached, on the basis of the analysis about the identification of different types of sanctions with regard to the purpose they are designed to pursue.[44]

In the framework of the unitary sanctioning activity, intended as a reaction of each legal system to the breach of a rule, it is possible to distinguish, in relation to the purpose that the law attributes to them, between punitive sanctions, which, as the penal ones, aim to disincentive the commission of the prohibited conducts; sanctions directed to the implementation of public interest, and, finally, disciplinary sanctions, which instead require a particular relationship with the Administration.

For the sanctions belonging to the first category, having an eminent punitive function to characterize their exercise should be of necessity, the exercise of the punitive function not tolerating interruptions in its application as well as evaluations that are not directed to verify the existence of the harmful conduct.

On the other hand, a different argument should be used with regards to sanctions that aim to the realization of the public interest.

Once intended as a tool (maybe even of secondary nature) to achieve public tasks, its most relevant profile it seems to be the one of the duty (of care), which represents the typical character of the administrative activity. Administrative power finds at its base the duty of care of the public interest, and does not aim to a generic achievement of the purpose for which is attributed, but to realize the

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43 S. CIMINI, *Il potere sanzionatorio delle amministrazioni pubbliche. Uno studio critico*, Editoriale Scientifica, Napoli, 2017, p. 110 (in a footnote). The Author calls attention to the hypothesis of the leniency programmes which consent to the antitrust Agency to decrease the amount of the penalties or «rinunciare a concludere il procedimento […] nei confronti di una impresa coinvolta in un cartello che, dissociandosi dallo stesso e denunciando gli altri componenti dell'operazione illecita, fa venire allo scoperto con la sua autodenuncia queste intese» (p. 113).

44 The same approach is found, in V. ANGIOLINI, *Principi costituzionali e sanzioni amministrative*, in *Jus*, 1996, pp. 227 ss., 232, which, while orienting the analysis towards different targets, claims that «Ciò che preme mettere in rilievo è, però, che il giostrare i principi degli artt. 23 e 97 Cost. o anche le regole e i principi concernenti libertà costituzionalmente tutelate sul metro della "ragionevolezza" postula, comunque, un preventivo chiarimento sulla nozione o sulle nozioni di sanzione amministrativa, il quale dia conto delle finalità perseguite dalla pubblica amministrazione nell'attività sanzionatoria».

most suitable activity in order to guarantee the highest level of its satisfaction.[45] Satisfaction that, in some cases, could consist in the maintenance of the *status quo*.

The notion of duty (and dutifulness) comes from Jurisprudence and evokes the relationship between prescription and (administrative) measure, relationship designed as necessity of the (administrative) action.[46] In this sense, the duty of the administration is only to exercise power by ensuring the highest achievement of the public interest.

With regard to the relationship between sanction and public interest, when the law constitutes the sanctioning power of an administrative body as discretionary, it is possible to imagine different solutions. The discretion of the administration may be limited to the mere determination of the penalty, depending on the most appropriate conditions to pursue public interest.[47] Or the administration can be attributed the choice about the *conditions* of the sanction, either explicitly, through an express legal provision, or even implicitly, as happens when the faculty to integrate with its own provisions the components of the rule, or to lay down the conditions for the application of the sanction, is left to the administration.[48]

It is obvious, therefore, that in the latter hypothesis, the outcome of the assessment made by the administration may also be a decision not to proceed, the

45 See F. GOGGIAMANNI, *La doverosità della pubblica amministrazione*, Giappichelli, Torino, 2005, p. 76, according to which «sottolineare il rapporto di derivazione del potere dal dovere sembra prefigurare, quindi, un avanzamento rispetto all'ottica del potere funzionalizzato implicando l'incidenza sulle modalità di esercizio del primo ed un controllo più pregnante sull'adeguatezza del risultato raggiunto rispetto all'interesse perseguito».

46 See again F. GOGGIAMANNI, *La doverosità della pubblica amministrazione* cit., p. 57.

47 As observed by S. CIMINI, *Il potere sanzionatorio delle amministrazioni pubbliche* cit., p. 113, «nello specifico settore del diritto *antitrust*, sono previsti anche i c.d. programmi di clemenza (*leniency programmes*), già richiamati sopra, in virtù dei quali l'AGCM può rinunciare a concludere il procedimento sanzionatorio (ovvero può ridurre l'entità della sanzione) nei confronti dell'impresa coinvolta in un cartello che, dissociandosi dallo stesso e denunciando gli altri componenti dell'operazione illecita fa venire allo scoperto con la sua auto-denuncia queste intese (che ovviamente hanno natura segreta), fornendo così un contributo decisivo per l'accertamento dell'infrazione e, in tal modo, facendo cessare l'operazione anticoncorrenziale».

48 See again S. CIMINI, (cited work) p. 108, which observes that «nel procedimento sanzionatorio *antitrust* la discrezionalità nell'*an* si può chiaramente desumere dalla circostanza che la fattispecie illecita in questo settore è individuata dalla legge con una nozione del tutto indeterminata, come quella di "infrazioni gravi", che lascia ampio spazio di scelta in capo all'Autorità sanzionatrice».

choice not to adopt any sanction strengthens the idea of the functionality of it in the pursuit of the public interest.[49]

Finally, as regards disciplinary sanctions, considering the particular relationship that exists with the interests of the administration, the general rule could well be that of the widest discretion of it.

On the other hand, this reconstruction does not seem to conflict with the ECHR, given that the provisions contained in art. 6 of the Convention no constraint is imposed on the States about the manner in which to exercise of sanctioning power.[50]

5 The Full Jurisdiction

As pointed out in Menarini, in the opinion of the ECtHR, a due process of full jurisdiction can 'cure' an eventual loss of conventional guarantees by the administrations.

Particularly, it serves as remedy in all cases where a sanction, as well as the definition of a civil right, is made by a public body with a lack of impartiality, which happens when the same subject or authority is appointed by law to conduct the investigation and to adopt the final decision.[51]

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49 In this regard see F. BASSI, *Sanzioni amministrative edilizie e interesse pubblico*, in *Riv. trim. di dir. pubbl.*, 1981, pp. 480 ss., 484, according to which it can happen that a public body decides «di non emanare alcun ordine repressivo qualora l'attenta ponderazione degli interessi in gioco lo convinca che il modo migliore di tutelare l'interesse pubblico turbato sia quello di non immutare la situazione di fatto creatasi con la perpetrazione dell'abuso». See, in addition, G. PAGLIARI, (cited work) p. 237, which claims that «la circostanza che la rimessione all'organo attributario della competenza renda eventuale l'applicazione della sanzione non diminuisce, ma rafforza la funzione attuativa perché la ricollega in termini meno formali all'esigenza di effettività dell'ordinamento giuridico».

50 In Escuobet v. Belgium, 28/10/1999 (Appl. n. 26780/95), in *https://hudoc.echr.coe.int*, the ECtHR states that art. 6 of the Convention «is not applicable unless there is a "criminal charge" against a particular person».

51 The rulings concerning the lack of impartiality by a public body are truly manifold. Is it possible to recall, particularly: Piersack v. Belgium, 1/10/1982 (Appl. n. 8692/79), par. 31; De Cubber v. Belgium, 26/10/1984 (Appl. n. 9186/80), par. 29; Fey v. Austria, 24/2/1993 (Appl. n. 14396/88), par. 27-28; Pullar v. the United Kingdom, 10/6/1996 (Appl. n. 22399/93); Ferrantelli and Santangelo v. Italy, 7/8/1996 (Appl. n. 19874/92), par. 58; Castillo Algar v. Spain, 28/10/1998 (Appl. n. 28194/95); Wettstein v. Switzerland, 21/12/2000 (Appl. 33958/96), par. 42; Miller and Others v. the United Kingdom, 26/10/2004 (Appl. nn. 45825/99, 45826/99 e 45827/99); Kyprianou v. Cyprus, 15/12/2005 (Appl. n. 73797/01), par. 119; Olujic v. Croatia, 5/2/2009 (Appl. n. 22330/05), par. 58; Micallef v. Malta, 15/10/2009 (Appl. n. 17056/06); Franz v. Germany, 30/1/2020 (Appl. n. 29295/16); Ali Riza and Others v. Turkey, 28/1/2020 (Appl. n. 30226/10). All the decisions are in https://hudoc.echr.coe.int.

That approach underpins the fundamental idea, put forward by the ECtHR, to consider the process as single, secondary, step of a unitary function aimed to define the level of a sanction or civil rights. This point of view has its roots in the thought, which comes from the medieval legal experience,[52] that an administrative decision has the same value of a judgment to determine nature and consistency of a right because both are an application of the law in the single cases.

Otto Mayer, while examining the notion of administrative measure, observed that: «*l'acte administratif saisit donc le cas individual à la manière du jugement du tribunal civil*»,[53] in this way the administrations could be assimilated to the Courts, both having the task to enforce the legal provisions. On the same line Kelsen deemed that if «the Constitution prescribes that no interferences with property, freedom, or life of the individuals can take place except by the "due process of law", this does not necessarily entail a monopoly of the courts on the judicial functions».[54] The fundamental idea is that, in the modern States, «There are not three but two basic functions […]: creation and applications (execution) of Law»,[55] because both administration and jurisdiction have an executive function, which consists in the application of norms, then what ought be relevant are that the guarantees do not decrease in connection with the organ appointed to exercise the function in the individual case.

Moreover, if administration and jurisdiction represent, unitarily, forms of execution of law, there are no reasons to exclude that the Courts can substitute their evaluations to the ones made by the Administrations.

In so doing, the ECtHR shows an approach that does not take into account the evident differences of contracting States' legal systems, to build a system founded on the fundamental right enshrined in the Convention, that could be enforced in every contracting State superceding the differences between them. This is a trend line that is well known in many continental legal systems, where the protection of fundamental rights provided by Constitutions can cause the harmonization of

52 Although in this period the differences between jurisdiction and administration were cloudy. On that point see L. MANNORI, B. SORDI, *Storia del diritto amministrativo*, Laterza, Bari-Roma, 2001, pp. 201 ss.

53 O. MAYER, *Le droit administrative allemand*, Tome Premiere (Partie Générale), V. Giard & E. Brière Libraires-Éditeurs, Paris, 1903, p. 129. The Author observes in addition that «Pourvu qu'il n'ait pas à produire son effet comme une régle de droit, il peut s'attaquer, de différentes manières, au cas individuel qu'il vise».

54 H. KELSEN, *General Theory of Law and State*, Cambridge, 1945, p. 278 ss.

55 H. KELSEN, *General Theory of Law and State* cit., p. 269.

different prerogatives that, in the generality of cases, are expression of different and separated powers of the States.[56]

From the point of view of individual states, the 'spreading' of conventional guarantees between Administrations and Court is mainly a domestic issue. The judicial review on the administrations depends on the structure of public powers as defined in each constitution or fundamental norm,[57] and not just from the level of protection that the ECtHR recognizes for such conventional right. It falls outside the powers of the ECtHR to re-built, in every contracting state, the balance of the respective roles between Courts and Administration,[58] and to adhere to a different perspective which consents to harmonize a not theorical protection of the fundamental (conventional) rights with the prerogative of each legal system (of each contracting state).

In this regard, it should be accepted with deference the words of Lord Bingham in Ullah, describing the 'dialogue' between ECtHR and the domestic courts, according to which «the duty of the national courts is to keep pace with Strasbourg jurisprudence as it evolves over time: no more but certainly no less».[59]

It is evident that no particular problems arise when the administration has just to adapt the law provision to the single case, as it happens when all the relevant facts are well fixed by law and can be ascertained by an Agency without any doubt. The real problem is if the review of discretionary powers should be discretionary as well.[60]

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56 See for this profile M. ALLENA, *Art. 6 of the ECHT and the continuity between administrative proceedings and judicial process*, in B. GILIBERTI (edited by), *The control of full jurisdiction on administrative measures*¸ Giapeto editore, Napoli, 2019, pp.163 ss.

57 For example, the 'combination' between administration and jurisdiction is a traditional part of the English legal system. From the Middle Ages to the XVI century the executive justice (King's Council and Star Chamber) had predominance on the judicial justice (King's Courts of Law). The HRA, art. 6(3-b), sets out «In this section "public authority" includes — (a) a court or tribunal, (b) any person certain of whose functions are functions of a public nature». See M. D'ALBERTI, *Diritto amministrativo comparato*, Il Mulino, Bologna, 2019, pp. 81 ss.

58 Particularly significant, on this point, is the approach followed by the English Parliament when it enacted the Human Right Act (1998), whose art. 6 sets forth: «It is unlawful for a public authority to act in a way which is incompatible with a Convention right» (1), and immediately clarify that «Subsection (1) does not apply to an act if – (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions».

59 See Regina v. Special Adjudicator (Respondent) ex parte Ullah (FC) (Appellant), [2004] UKHL 26, par. 20.

60 See J. KAHN, *Pouvoir Discretionnaire et le Juge Administratif*, in *Le Pouvoir Discretionnaire et le Juge Administratif*, ed. Cujas, Paris, 1978.

A valid answer to that doubt should involve a second question concerning the role of the Courts (and more generally of the *judiciary*) in the modern States, namely if the Judges, as the Administrations, maybe even in particular cases, have to ensure public tasks or if that goals instead are typical of Agency, Local Authorities, Ombudsman, and so forth. In other words, it does not seem fair to let fall on the shoulders of the Courts the evaluation of the consistency of public needs even in a specific situation.

To clarify that conclusion, it could be useful to have recourse to a figurative example. Comparing the State to the human body, the role of the national administration can be possibly compared to the one of the clinician, whose job it is to make the choices aimed to guarantee the good health of the entire system. Instead the Courts are like the surgeon, which have a shorter perspective focalized on the single problem to remove without more general consideration regarding all the body. And to this difference of roles corresponds the different structure of the respective decisional procedure, and the different way of their investiture.

Coherently, in Alconbury,[61] Lord Nolan wrote: «To substitute for the Secretary of State an independent and impartial body with no central electoral accountability would not only be a recipe for chaos: it would be profoundly undemocratic»,[62] here it seems clear that the stringency of the review should depend not only on the level of guarantees afforded by an Agency, but even the level of policy it expressed.[63]

Now the problem is to ascertain if these conclusions are coherent with the notion of full jurisdiction, as *point by point* review, set forth by ECtHR.

That question arises because the definition of the notion of «civil rights and obligations», as wells as the one of «criminal charge», could entail evaluations of expediency related with the exercise of discretionary powers to be performed by Administrations.

That is mostly evident with regard to the civil rights, whose definition can be so connected with policy decisions to be difficult in the single case to ascertain when a civil right, then an obligation owned to individuals, has been determined, and to this aim a brief reference to some judicial decisions may be helpful.

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61 The decision is in *https://publications.parliament.uk/pa/ld200001/ldjudgmt/jd010509/alcon-1.htm*.

62 Par. 60.

63 See P. CRAIG, *The Human Rights Act, Article 6 and Procedural Rights* cit., p. 763, according to which: «The sufficiency of judicial review […] depends not on safeguards, but on respect for the ministerial decision on matters of policy or expediency».

So, in *Husain*,[64] which involved a complaint against the decision of the Secretary of State to stop providing the claimant with support, the English High Court stressed that while civil rights and «Obligations give rise to rights; discretionary payments and discretionary support do not»,[65] and anyway «The principle behind the distinction between decisions determinative of rights and those made in the exercise of a discretion is not hard to see. […] A right by definition is something to which the citizen is entitled, to which he has an enforceable claim. A discretionary benefit, one that a government may give or refuse as it wishes, cannot be the subject of a right».[66] But yet, the Court concludes that «The line between a discretionary benefit and one to which the citizen may be entitled may not be an easy one».[67]

Likewise, in *Tomlinson and Other*,[68] a judgment regarding a decision of the local housing authority, the Supreme Court deemed that «There is a considerable area of administrative discretion as to how that accommodation is to be provided by the authority in any given case».[69] And more recently, in *Poshteh*,[70] a law case concerning the refusal of permanent accommodation by the appellant. On this specific profile Lord Carnwath (with whom Lord Neuberger, Lord Clarke, Lord Reed and Lord Hughes agree) affirms that although «Our duty under the Human Rights Act 1998 section 2 is "take account of" the decision of the court. […] In my view, this is a case in which, without disrespect to the Chamber, we should not regard its decision as a sufficient reason to depart from the fully considered and unanimous conclusion of the court in Ali. It is appropriate that we should await a full consideration by a Grand Chamber before considering whether (and if so how) to modify our own position».[71]

A similar argument can be used on the field of the criminal charges yet, because, beside the sanctions with a punitive purpose, which have the same scope

64 Hamid Ali Husain v. Asylum Support Adjudicator, [2001] EWHC Admin 852, in https://www.refworld.org/pdfid/3dec98bf4.pdf.

65 Par. 26.

66 Par. 27.

67 Par. 28. See even Begum v. London Borough of Tower Hamlets, [2003] UKHL 5, in *https://publications.parliament.uk/pa/ld200203/ldjudgmt/jd030213/begum-1.htm*, where the House of Lords reiterates that «In this case the subject matter of the decision was the suitability of accommodation for occupation by Runa Begum; the kind of decision which the Strasbourg court has on several occasions called a "classic exercise of an administrative discretion"» (par. 52).

68 Tomlinson and others v. Birmingham City Council, [2010] UKSC 8, in *https://www.supremecourt.uk/cases/docs/uksc-2009-0050-judgment.pdf*. See also, Ali v. Birmingham City Council [2010] UKSC 8.

69 Par. 36.

70 Poshteh v. Royal Borough of Kensington and Chelsea, [2017] UKSC 36, in *https://www.supremecourt.uk/cases/docs/uksc-2015-0219-judgment.pdf*.

71 Par. 36–37.

as the penal ones, and often are the product of legislative dispositions aimed to decriminalize minor offence, there are others which represent an important tool, in the hand normally of an Agency (but even of an administration), to 'guide' a particular field of the national economy or social life.

To this regard an example could be useful.

If we consider the review of European Judges (Tribunal and Court of Justice) on the sanction decisions taken by the Commission on the matters of the competition law, we can observe a deferential approach by the European Courts towards these decision on the ground that «the fining system is an important question of policy».[72] As stressed by EU Tribunal: «it must be borne in mind that the Commission has a margin of discretion when setting the amount of fines, since fines constitute an instrument of competition policy. That margin of discretion extends, necessarily, to deciding whether or not it is appropriate to impose a fine».[73]

The Courts are less sensitive to appreciate the changes that have occurred in society, and in fact, unlike the administrative procedure, the process is not the most appropriate place for gathering and knowing all the interests involved in a given case, the judge being bound by only the facts deduced from the parties.[74]

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72 R. NAZZINI, *Administrative Enforcement, Judicial Review and Effective Judicial Protection in EU Competition Law: A Comparative Contextual-Functionalist Perspective*, in *Common Market Law Review, 2012*, n. 49, Issue 3, pp. 971 ss., 32 (of the electronic copy), in *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117187*. See even CGUE, Sez. II, 8/2/2007, C-3/06, par., 37, in *https://curia.europa.eu/jcms/jcms/j_6/it/*, according to which «That appraisal by the Court of First Instance is consistent with the law. In accordance with settled case-law, the Commission has a particularly wide discretion as regards the choice of factors to be taken into account for the purposes of determining the amount of fines, such as, inter alia, the particular circumstances of the case, its context and the dissuasive effect of fines, without the need to refer to a binding or exhaustive list of the criteria which must be taken into account (see, inter alia, order in Case C-137/95 P SPO and Others v Commission [1996] ECR I-1611, paragraph 54, and judgment in Case C-219/95 P. Ferriere Nord v Commission [1997] ECR I-4411, paragraph 33)».

73 Trib. UE, 6/4/1995, T-150/89, par. 59; Trib. UE 22/10/1997, T-213/95 e T-18/96, par. 239, in https://curia.europa.eu/jcms/jcms/j_6/it/. As observed by P. CRAIG, *EU Administrative Law*, Oxford, 2012, p. 592 «The administrative/political arm of government makes policy choices, and it is generally recognized that the courts should not overturn these merely because they believe that a different way of doing things would have been better. They should not substitute their judgment for that of the administration».

74 K. LENAERTS – J.A. GUTIÉRREZ-FONZ, *A Constitutional Perspective*, in R. SCHÜTZE – T. TRIDIMAS (editors), *Oxford Principles of European Union Law. The European Union Legal Order*, vol. I, Oxford University Press, 2018, pp. 126-127, «The EU political institution enjoy discretionary power where they are called upon to weight different interest and EU policies; where the adoption of EU measures is based on technical and expert knowledge that the UE Courts lack, and where the policy choices made by the EU political institutions involve complex economic assessment. This shows that discretion may arise where the EU Courts recognize the higher institutional capacity of the EU political process to adopt certain policy decision».

This conclusion also appears to comply with the provisions of the Council Regulation n. 1/2003 (on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty), which states: «When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated». And even if this provision is directed only to the national Courts, and not to the Administrations, nevertheless it recognizes the predominant role of the Commission in making competition decisions.

In cases of decisions both on the fields of civil rights or criminal charges, when questions of expediency, connected to public choices, are involved, the stringency of the judicial review should normally decrease to respect the single sector policies, so that «The wider the margin of discretion enjoyed by an EU institution is, the less intense judicial scrutiny will be».[75] Therefore, to clarify, the intensity of the judicial review should be measured as inversely proportional to the evaluation of expediency connected to the definition of a civil right or a criminal charge.

But as stated above: do these conclusions, consistent with the constitutional traditions of all ECHR contracting States, comply with the notion of full jurisdiction set forth by ECtHR?

To answer this question, it is necessary to briefly examine the ECtHR rulings that address this delicate issue, while being aware that «The principle of effective judicial protection is better safeguarded, in a democratic society, by a legal test which complies with it and is clear and certain in advance rather than by courts departing from a test which is not compliant with such a principle on a case-by-case basis and, more worryingly, without providing reasons for the departure from the noncompliant test but, on the contrary, purporting to apply it».[76]

In *Sigma Radio Television Ltd*, the ECtHR stressed that «Both the Commission and the Court have acknowledged in their case-law that the requirement that a court or tribunal should have "full jurisdiction" will be satisfied where it is found that the judicial body in question has exercised "sufficient jurisdiction" or provided "sufficient review" in the proceedings before it»,[77], but when, or under what conditions, can a judicial review be said to be 'sufficient'?

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75 K. LENAERTS – J.A. GUTIÉRREZ-FONZ, *A Constitutional Perspective* cit., p. 126.

76 R. NAZZINI, *Administrative Enforcement, Judicial Review and Effective Judicial Protection in EU Competition Law: A Comparative Contextual-Functionalist Perspective*, p. 35.

77 Sigma Radio Television Ltd. v. Cyprus, Fifth Section (Appl. nn. 32181/04 and 35122/05), 21/7/2011, par. 152, in *https://hudoc.echr.coe.int/eng*. See even: Zumtobel v. Austria, 21/9/1993, Series A no. 268-A, par. 31-32; Müller and others v. Austria (dec.), 23/11/1999 (Appl. n. 26507/95); and Crompton v. the United Kingdom, 27/10/2009 (Appl. n. 42509/05), parr. 71 and 79.

Just to answer this question the Section clarify that «it is not the role of Article 6 of the Convention to give access to a level of jurisdiction which can substitute its opinion for that of the administrative authorities. In this regard, particular emphasis has been placed on the respect which must be accorded to decisions taken by the administrative authorities on grounds of "expediency" and which often involve specialized areas of law».[78]Consequently, the Court continues, a judicial review would be considered sufficient with regard «to the powers of the judicial body in question, and to such factors as (a) the subject-matter of the decision appealed against, in particular, whether or not it concerned a specialized issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and if, so, to what extent; (b) the manner in which that decision was arrived at, in particular, the procedural guarantees available in the proceedings before the adjudicatory body; and (c) the content of the dispute, including the desired and actual grounds of appeal».[79]

These conclusions, for more reasons, could appear consistent with the assumption that the area of the administrative discretion remains in the domain of the administration, protected from the 'interference' by the Courts. First of all, the reference to the procedural guarantees available in the proceedings before the adjudicatory body, looking at the normal lack of impartiality of the administrations, makes really difficult to comply with the indication of the ECtHR.

Secondly, it must be distinguished that cases concerning the definition of civil rights and obligations from those concerning criminal charges, because «in its case law the Court followed a different approach as regards the scope of review of criminal sanctions imposed by administrative authorities».[80] To respect the conventional guarantees «Parmi les caractéristiques d'un organe judiciaire de pleine juridiction figure le pouvoir de réformer en tous points, en fait comme en droit, la décision entreprise, rendue par l'organe inférieur. Il doit notamment avoir compétence pour se pencher sur toutes les questions de fait et de droit pertinentes pour le litige dont il se trouve saisi».[81]

So, according to the words of the Court, the cases in which a judicial review of non-stringency will be admissible seem to be really few.

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78 Par. 153.

79 Par. 154. In Fazia Ali v. The United Kingdom, Fourth Section, 20/01/2016 (Appl. 40378/10), par. 84, *https://hudoc.echr.coe.int/eng*., the ECtHR requires, in addition, to verify «the nature of the "civil rights and obligations" at stake and the nature of the policy objective pursued by the underlying domestic law».

80 Steininger v. Austria, First Section, 17/4/2012 (Appl. n. 21539/07).

81 Affaire Silvester's Horeca Service c. Belgique, Première Section, 4/3/2004 (Req. n. 47650/99), par. 27.

Obviously, as clarified by Lord Carnwath in Poshteh: «That is a possible view, but one which should not readily be adopted without full consideration of its practical implications for the working of the domestic regime».[82]

By adopting this point of view, it is possible to try to carry out a further examination of the ECtHR's decisions in order to verify, in concrete terms, whether and to what extent to reconcile the conventional guarantees with the protection of the sphere of administrative discretion.

6 The Full Jurisdiction in the ECtHR's Decisions

In order to understand the exact meaning of full jurisdiction, it is useful to examine the most significant ECtHR's rulings, separating those relating to criminal charges from those relating to civil rights.

Starting from the latter, five decisions appear particularly relevant.

In *Albert and Le Compte v. Belgium*,[83] a case concerning disciplinary sanctions imposed on medical practitioners, who complained that they had not a fair and public hearing because all publicity before the Appeal Council was forbidden (both for hearings and for pronouncement of the decision), the Plenary stressed that «The public character of the cassation proceedings does not suffice to remedy the defect found to exist at the stage of the disciplinary proceedings». And the reasons for this conclusion is in the fact that «The Court of Cassation does not take cognisance of the merits of the case, which means that many aspects of "contestations" (disputes) concerning "civil rights and obligations", including review of the facts and assessment of the proportionality between the fault and the sanction, fall outside its jurisdiction».[84]

In a similar way, the Court rules in *Obermeier v. Austria*,[85] about the suspension and ensuing dismissal of a worker in the form of 'administrative retirement'. The Court observed that «The Provincial Governor's decisions may, however, be the subject of an appeal to the Administrative Court. This appeal can be considered sufficient under Article 6 § 1 (art. 6-1) only if the Administrative Court could be described as "a judicial body that has full jurisdiction" within the meaning of the Albert and Le Compte judgment of 10 February 1983». And because «the Austrian Administrative Court has itself inferred that the Administrative Court can only determine whether the discretion enjoyed by the administrative authorities has

82 Poshteh v. Royal Borough of Kensington and Chelsea cit., par 36.

83 Plenary, 10/2/1983 (Appl. n. 7299/75 and 7496/76), in *https://hudoc.echr.coe.int/eng*.

84 Par. 36.

85 Chamber, 28/6/1990 (Appl. n. 11761/85), in *https://hudoc.echr.coe.int/eng*.

been used in a manner compatible with the object and purpose of the law. This means, in the final result, that the decision taken by the administrative authorities […] remains in the majority of cases, including the present one, without any effective review exercised by the courts».[86]

Likewise, in *Tinnelly & Sons Ltd and Others and McElduff and Others v. The United Kingdom*,[87] concerning the loss of contracts (and subcontracts) on security grounds. The Court observes that «the judicial review proceedings in the High Court of Northern Ireland in the Tinnelly case never led to a full scrutiny of the factual basis of the Secretary of State's certificate affirming that NIE's decision to refuse Tinnelly the Ballylumford contract was an act done for the safeguarding of national security». To conclusively stress: «Having accepted that the assessment of the security risk […] was exclusively a matter for the Secretary of State, Mr Justice McCollum had to decline jurisdiction to assess whether there was indeed any sound factual basis for withholding the contract on valid security grounds […]. His hands were tied by the conclusive nature of the certificate and the Secretary of State's invocation of national security considerations».[88]

And similarly, in *Tsfayo v. The United Kingdom*,[89] concerning the failure to submit a benefit renewal form because of the applicant's lack of familiarity with the benefits system and poor English, the Court considered that «in the instant case, the HBRB was deciding a simple question of fact, namely whether there was "good cause" for the applicant's delay in making a claim […]. The HBRB found her explanation to be unconvincing and rejected her claim for back-payment of benefit essentially on the basis of their assessment of her credibility»,[90] and concluded that the inadequacy of review was because «Whilst the High Court had the power to quash the decision if it considered, *inter alia*, that there was no evidence to support the HBRB's factual findings, or that its findings were plainly untenable, or that the HBRB had misunderstood or been ignorant of an established and relevant fact, it did not have jurisdiction to rehear the evidence or substitute its own views as to the applicant's credibility».[91]

Ultimately, in *Družstevní Záložna Pria and Others v. The Czech Republic*,[92] where a credit union was put in receivership for a period of six months for contravening the relevant legislation as a result of engaging in activities outside its purview without authorization. In this case the Section observed that «the Czech

86 Par. 70.
87 ECtHR, 10/7/1998 (Appl. 62/1997/846/1052–1053), in *https://hudoc.echr.coe.int/eng*.
88 Par. 74.
89 Fourth Section, 14/11/2006 (Appl. 60860/00), in *https://hudoc.echr.coe.int/eng*.
90 Par. 46.
91 Par. 48.
92 Fifth Section, 31/7/2008 (Appl. n. 72034/01), in *https://hudoc.echr.coe.int/eng*.

administrative courts did not have full jurisdiction to review administrative acts, their scrutiny being limited [...] to the examination of issues of legality»,[93] for these reasons «The Court notes that due to its jurisdiction limited to review of legality, the Prague High Court when dealing with the second limb of the appeal, abstained, as it is apparent from its reasoning, from conducting its own examination of whether the applicant credit union was in fact in a situation justifying the imposition of receivership».[94]

Before drawing some conclusions from the examination of the reported decisions, it seems useful to examine some judgments in which the Court considered sufficient the review exercised by the national judge.

For example, in *Zumtobel v. Austria*,[95] concerning an expropriation proceeding, the ECtHR held sufficient the review exercised by the Administrative Court for two reasons, first of all: «because Article 44 para. 1 of the Provincial Highways Law makes the lawfulness of such a measure subject to a condition: the impossibility "of constructing or retaining a section of highway which is more suitable from the point of view of traffic requirements, environmental protection and the financial implications"»;[96] and then because, consequently, «The Administrative Court in fact considered these submissions on their merits, point by point, without ever having to decline jurisdiction in replying to them or in ascertaining various facts».[97]

In the same way the ECtHR decided in *Fazia Ali v The United Kingdom*,[98] concerning the refusal of accommodation of a homeless individual (with consequent declaration, by the City Council, that its duty to her had been nevertheless discharged), observing that «Although the County Court did not have jurisdiction to conduct a full rehearing of the facts, the appeal available to the applicant did permit it to carry out a certain review of both the facts and the procedure by which the factual findings of the Officer were arrived at».[99]

In the light of the judgments examined, two partial conclusions can be reached.

In the first place, in order to deem sufficient the review of the national Courts, the ECtHR does not require them to re-examine the situation on the merits, replacing their own assessments with those of the Administrations. It considers the conventional guarantees to be satisfied with full access, and control, to facts relevant for the judgment.

93 Par. 109.
94 Par. 112.
95 Chamber, 21/9/1993 (Appl. n. 12235/86), in *https://hudoc.echr.coe.int/eng*.
96 Par. 31.
97 Par. 32.
98 Fourth Section, 20/10/2015 (Appl. n. 40378/10), *https://hudoc.echr.coe.int/eng*.
99 Par. 83.

It is therefore sufficient that the administrative Court has the power, not to substitute its evaluations for that of the administration, but to review the correctness and proportionality of the choices, made by the administrations, and to quash its decisions in the light of the factual elements on which it is based.

In fact, to confirm this point of view, in *Zumtobel*, the ECtHR, after verifying that the domestic Court had «considered these submissions on their merits, point by point», a statement that would refer to the Court's power to replace his own assessments with those of the administration, states that respect «must be accorded to decisions taken by the administrative authorities on grounds of expediency».[100]

Considering, in this way, the review of the domestic Courts, it follows that, although the range of choices left to the administrations is reduced, political decisions aimed at shaping the address lines of the administrative action are still excluded from judicial control.

On the other hand, the intention of the ECtHR not to impose a jurisdiction aimed at substituting its own evaluation to that of the administrations, whenever arises a question on ground of civil rights or criminal charges, is also demonstrated by the fact that, as stated «The European Court should confine itself as far as possible to examining the question raised by the case before it. Accordingly, it should only decide whether, in the circumstances of the case, the scope of the competence of the Administrative Court satisfied the requirements of Article 6 para. 1 (art. 6-1)».[101]

This last statement readily allows the examination of the rulings concerning cases of applicability of art. 6 par. 1 under its criminal head, in order to verify if the conclusions reached can be also extended to this additional area.

For this purpose, in addition to a brief reference to *Menarini*, the *Sigma Radio Television Ltd*[102] case, previously mentioned, will also be examined.

100 Zumtobel cit., par. 32.

101 Zumtobel cit., par. 32.

102 The controversy concerned the application of numerous fines imposed to a company which operates a television station, and «Notwithstanding, the applicant argued, that the fines imposed by CRTA were in fact of a criminal nature and that therefore their complaints could also be examined under the criminal head» (par. 124), if the art. 6 of the Convention is applied under its civil head, it's just because «Having regard to the applicant's complaints, the Court does not find it necessary to determine whether the criminal limb of Article 6 § 1 is applicable as paragraph 1 of Article 6, violation of which is alleged by the applicant, applies in civil matters as well as in the criminal sphere. As the parties do not dispute the applicability to the proceedings at issue of Article 6 § 1 under its "civil" head, the Court, seeing no reason to differ, shall examine the present case under that head» (pars. 126-127).

In *Menarini*, by confirming that explained above, the ECtHR concludes the sufficiency of the Italian Administrative Court's review because «Les juridictions administratives ont pu vérifier si, par rapport aux circonstances particulières de l'affaire, l'AGCM avait fait un usage approprié de ses pouvoirs. Elles ont pu examiner le bien-fondé et la proportionnalité des choix de l'AGCM et même vérifier ses évaluations d'ordre technique».[103] It particularly observes that «le Conseil d'Etat […] s'est livré à une analyse détaillée de l'adéquation de la sanction par rapport aux paramètres pertinents, y compris la proportionnalité de la sanction même».[104]

Furthermore, the statements of the ECtHR in *Sigma Radio Television* are particularly significant, while noting that «the power of review of the Supreme Court under Article 146 of the Constitution was not capable of embracing all aspects of the CRTA's decisions»,[105] it concludes that, «the Supreme Court could not substitute its own decision for that of the CRTA and its jurisdiction over the facts was limited. […] Such an approach by an appeal tribunal conducting the review of a decision of an administrative body can reasonably be expected, having regard to the nature of review proceedings and the respect which must be given to decisions taken by administrative authorities on grounds of "expediency"».[106]

Neither it seems correct to argue otherwise referring to the case *Silvester's Horeca Service c. Belgique*, deriving from this decision the necessity, for national Courts, to exercise a review of full jurisdiction, that should be able, not only to quash the sanction, but also to replace its own assessments to those of the administration.[107] Looking at this ruling, some room for doubt can arise considering that the ECtHR, while reiterating that «Parmi les caractéristiques d'un organe judiciaire de pleine juridiction figure le pouvoir de réformer en tous points, en fait comme en droit, la décision entreprise, rendue par l'organe inférieur», with specific reference to the case at hand, declaring insufficient the review exercised by Belgian Courts stating: «la cour d'appel de Bruxelles estima en effet qu'elle était uniquement appelée à examiner la réalité des infractions au code de la TVA et à contrôler la légalité des amendes fiscales réclamées, sans être compétente pour apprécier l'opportunité ou accorder une remise complète ou partielle de cellesci».

103 Menarini cit., par. 64.

104 Par. 66.

105 Sigma Radio Television Ltd cit., par. 159.

106 Par. 159-160.

107 Première Section, 4/3/2004 (Req. n. 47650/99), *https://hudoc.echr.coe.int/eng*. For a different point of view see F. GOISIS, *The canon of full jurisdiction, between proteiformity and full scrutiny of complex technical assessments. Critical reflections on art. 7, par. 1, Legislative Decree 19 January 2017, n. 3*, in B. GILIBERTI (a cura di), *The control of full jurisdiction on administrative measures*, Giapeto editore, Napoli, 2019, pp. 317 ss., 332.

Even if the assumptions of the Court lend themselves to different interpretations, it does not seem necessary to draw from them a resolute argument capable of disavowing the conclusions previously reached.

Actually, the real reason why the Court of Strasbourg considers insufficient the review exercised by the Belgian Supreme Court does not seem to depend on the inability of this Judge to replace the administration in the determination of the penalty, but by its inability or the impossibility of ascertaining the proportionality of the sanction (in relationship to the facts of this case).

Therefore, in the ECtHR view, even in the case of sanctions criminal in nature, a review of full stringency on relevance of the facts and on the proportionality of the decision can be considered sufficient, while leaving to contracting State's legal systems the decision that the Courts may impose their evaluations to the administration, or if they have to be limited to quashing the administrative decision with or without referring the case back.[108]

This seems to be the reason why in Menarini the Judges of Strasbourg considered the Italian system of administrative justice suitable to remedy the lack of the conventional guarantees during the administrative procedure.[109] Although the Council of State affirmed that it cannot review the core of the Italian antitrust Agency decision, full control over the facts and circumstances, and on the proportionality of the sanction, convinced the Court on the existence of a syndicate of full jurisdiction.

6.1 The Latest Directions Taken by the ECtHR

The conclusions reached by the outcome of this scrutiny about the characters of the sufficient review can be summarized as follows.

The duty of the Courts to respect the evaluations of the relevant facts made by the administration certainly does not conform with conventional guarantees. An external review limited to verifying only the logic of the decision taken by the

108 In Grande Stevens v. Italy, Second Section, 4/3/2014 (Appl. n. 18640/10), in https://hudoc.echr.coe.int/eng, the Court so stated: «The characteristics of a judicial body with full jurisdiction include the power to quash in all respects, on questions of fact and law, the decision of the body below. It must have jurisdiction to examine all questions of fact and law relevant to the dispute before it (see Chevrol v. France, no. 49636/99, § 77, ECHR 2003-III; Silvester's Horeca Service v. Belgium, no. 47650/99, § 27, 4 March 2004; and Menarini Diagnostics S.r.l., cited above, § 59)».

109 See R. VILLATA – M. RAMAJOLI, *Il provvedimento amministrativo*, II ed. Giappichelli, Torino, 2017, p. 153, according to which «la Corte EDU, con la nota sentenza Menarini, ha ritenuto conforme all'art. 6, par 1, Cedu, e quindi ai dettami dell'"equo processo", il modello di sindacato offerto dal nostro ordinamento nei riguardi dell'Autorità garante della concorrenza e mercato».

administrations, without the possibility of directly accessing the facts in order to re-examine the matter, including the proportionality of the sanction imposed, must certainly be considered a review (*deferential*) not in line with the Court's rulings.

In this respect, the ECtHR affirmed that «The right guaranteed to an applicant under Article 6 § 1 of the Convention to submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be displaced by the *ipse dixit* of the executive».[110]

On the other hand, an effective and stringent judicial review, capable of examining the relevant issues independently, departing from the conclusion achieved by an administrative body, may well be considered sufficient.

What's more, the substantial correctness of such an approach, not only by the coherence with the decisions of the Court, but also derives from the fact that it has the clear advantage of leaving any further profile to the discipline of each individual jurisdiction. And in fact, once the necessary tools of judicial control on the relevant facts and issues have been identified, what remains is only the profile relating to the powers of courts deciding on appeal against a measure adopted by an administration. This is a profile that must necessarily be left to the determination of the single contracting States, since it represents a direct derivation of the relations between the powers of State as configured in each legal system, which can take on a different meaning dependently on the legal traditions and times.

Therefore, within these limits, the legislation of each contracting State will be able to decide whether it entrusts the Courts with the power to replace its own decisions to these of the administrations, so that the discipline of the individual case will find the source of its regulation directly in the judgment. In this way, the ruling will immediately establish "*an*" and "*quantum*" of the sanction, or determine the content of a civil right and the object of an obligation. Furthermore, it is possible to require the power of the Courts only to quash the administrative measure, with or without a subsequent referral of the matter to the administration in order to obtain a new assessment in accordance with the principles stressed by the Courts.

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110 Tinnelly & Sons Ltd and others and Mcelduff and others v. The United Kingdom, 10/7/1998 (62/1997/846/1052–1053), par. 77. In addition, see Družstevní Záložna Pria and others v. the Czech Republic, Fifth Section (Appl. n. 72034/01), par. 111, in *https://hudoc.echr.coe.int*, «the Court found violations of Article 6 § 1 of the Convention in other cases where the domestic courts had considered themselves bound by the prior findings of administrative bodies which were decisive for the outcome of the cases before them, without examining the relevant issues independently (see Obermeier v. Austria, judgment of 28 June 1990, Series A no. 179, pp. 22-23, §§ 69-70; Terra Woningen B.V., cited above, pp. 2122-23, §§ 52-55; I.D., cited above, §§ 46 and 50-55; and Capital Bank AD v. Bulgaria, cited above §§ 99-108».

At this point, the next and final step is to verify the stability of these conclusions even in the light of recent decisions of the Court of Strasbourg in the matter of full jurisdiction, by which it returned to examining, once again, to this sensitive issue. On the other hand, because of its particular object, the European Convention, as stated by the ECtHR «that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions».[111]

This first decision arises from a case that is interesting to describe, concerning three sets of disciplinary proceedings against a Portuguese judge opened by the High Council of Judiciary.

The first, concerning the disrespectful remarks toward a colleague (accused of inertia, lack of diligence, and characterised as being a liar), she made during a telephone conversation with him around the time of her performance appraisal (at that moment the applicant judge was in maternity leave).

The second one regarding the use of a false testimony in the first proceeding acting in breach of her duty of honesty.

Finally, the third set of disciplinary proceedings having as subject matter the attempt of the applicant to persuade the judicial investigator, during a private conversation, not to institute a disciplinary proceeding against the (false) witness she bore in the first set of disciplinary proceedings.

The applicant alleged the violation of her right to an independent tribunal with full jurisdiction and to a public hearing.

The applicant alleged a violation of art. 6 of the Convention since the national Court (the Judicial division of the Supreme Court), with regard to all the three appeals she lodged, took a review of lawfulness rather than an appeal of full jurisdiction, always considering being bound by the finding of facts made by the administrative body. She complained also, during the administrative proceedings and before the Judicial division of the Supreme Court, of the lack of a public hearing she requested in order to obtain a fresh ruling on the facts on which there were dispute.

The ECtHR begins the examination of the case from the conclusion taken in Sigma Radio Television, examined above, about the notion of full jurisdiction within the meaning of the Convention. Thus, it decides to conduct a combined examination of the alleged complaints concerning the extent of the review which was empowered the Supreme Court and the lack of public hearing. And with regard to the latter the ECtHR observes that a public hearing held on appeal could not necessarily remedy its lack at the lower level when the national Court's review

111 Chamber, Tyrer v. The United Kingdom, 25/4/1978 (Appl. n. 5856/72), par. 31, in *https://hudoc.echr.coe.int*.

cannot rehear all the administrative assessment concerning relevant facts; questions of law and the proportionality of a sanction in respect to such conduct.

Shifting the focus on the controversy at stake, the Court displays the principles on which it carries out its considerations.

First of all, it clarifies that in the present case the disciplinary sanctions imposed do not require exercise of administrative discretion, and that the review could come within the jurisdiction of any Court. In addition, the proceedings at stake, since they concern a judge, even if they do not come within the scope of art. 6 of the Convention under its criminal limb, nevertheless can entail, for their seriousness of the consequence, a significant grade of *stigma*. Consequently, the review must be adequate to the subject-matter to be considered sufficient in the meaning of the Convention.

Considering that the proceedings before the Council of Judiciary were concluded without a hearing being held, and moreover that, during the third set of proceedings, an express request of the applicant was refused, the ECtHR, to verify if this lack of hearing could be remedied by the one held before the Judicial Division of the Supreme Court, decided to take into account: (a) the issues submitted for judicial review; (b) the method of judicial review; (c) the decision making powers of the domestic Court.

With regard to the issues submitted, three were the complaints alleged by the applicant having as their subject the facts (she denied), the breach of professional duties and the proportionality of the sanction.

To the extent of the review carried out on the relevant facts, considering the limits imposed by law to the review of domestic Judge, the ECtHR aims to determine if a review of lawfulness was sufficient for the purpose of art. 6 CEDU. Just with respect to these limits the Supreme Court, in the third set of proceedings, refused the request of a hearing. On this point, the judges of Strasbourg, to justify the importance of holding a hearing, observe that is was not a task of Supreme Court to rehear the evidences «it nevertheless had a duty to ascertain whether the factual basis for the decisions taken by the CSM was sufficient to support the latter's conclusions».[112]

This is because, considering the decision-making powers, the Supreme Court can always set aside a decision «in the event of a "gross, manifest error"»,[113] with the conclusion that it failed to exercise a sufficient review because «the lack of a hearing in respect of the decisive factual evidence […] prevented it from including in its reasoning considerations relating to the assessment of those issues».[114]

112 Ramos Nunes de Carvalho e Sá v. Portugal cit., par. 211.
113 Par. 212.
114 Par. 213.

This decision presents profiles of particular interest, developing certain principles already present in previous decisions.

First of all, the Court rules that, to establish the extent of a judicial body jurisdiction, the level of guarantee afforded to the administrative body has to take into account;[115] and furthermore that a sufficient review will depend not only on the discretionary power exercised, or the technical nature of the questions at stake, but generally «on the nature of the "civil rights and obligations"» as well as to the policy objective to which the national law aimed.[116]

In particular, this last statement was confirmed, to a large extent, in two successive pronouncements. In both decisions it was stated that a sufficient review by a judicial body, as seen in a substantive sense, depends on «subject matter of the proceedings and the content of the dispute».[117]

Leaving aside the first observation that looks like a reminder of the freedom of contracting States to modulate their justice systems in order to distribute the guarantees provided by the Convention between proceeding and process, so as to respect the letter of the Convention without overturning the shape of public powers within each internal legal system. It seems clear that «it is not the role of Article 6, in principle, to guarantee access to a court which can substitute its own assessment or opinion for that of the administrative authorities», even considering the regard which must be accorded to decisions taken «on grounds of expediency and which often involve specialised areas of law».[118]

This last statement, by the way, overcomes the opinion of those who used the reference to art. 6 of the Convention, as interpreted by the ECtHR, to support the power of national judges to replace their own decisions to the ones of the administration, at least where the judgment concerned sanctions (having a substantive criminal nature), as well as the definition of civil rights and obligations, and then calling for a subsequent extension of such a power to the whole sphere of its jurisdiction.[119]

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115 Par. 133.

116 Par. 180.

117 Fifth Section, Franz v. Germany, 30/1/2020 (Appl. 29295/16), par. 82. Along the same line is the Second Section, Ali Riza and Others v. Turkey, 28/1/2020 (Appl. 30226/10), par 195, which states that the procedure before a tribunal «it must ensure the "determination of the matters in dispute" as required by Article 6 § 1».

118 Ramos Nunes de Carvalho e Sá v. Portugal cit., par. 178. See even Sigma Radio Television Ltd, cited above, § 153.

119 This is, in particular, the opinion of F. GOISIS, *The canon of full jurisdiction, between proteiformity and full scrutiny of complex technical assessment. Critical reflections on art. 7, par. 1, legislative decree 19 January 2017, no. 3,* in B. GILIBERTI (cited work), pp. 317 ss.

In any case, it's possible to reach some quick conclusions, to overcome the uncertainties that emerge, particularly, with reference to the second of the principles sanctioned by the ECtHR.

7 Conclusion

From the reading of the decisions of the ECtHR there does not emerge a well-defined criterion capable of giving evidence, in every individual case, what the correct way of considering the level of sufficient review is. The one mentioned above, relating to the nature of the "civil rights and obligations", as well as to the policy pursued by domestic laws, is very vague, and in fact is the same Court to hold that «whether the review carried out was sufficient will thus depend on the circumstances of a given case»[120] without providing further references.

In view of the above and following the opinion expressed before, it's possible to define, in conclusion, a reconstruction that can explain away the different modulation of the criteria used by the ECtHR to describe the full jurisdiction of the national Courts, and therefore the level of sufficient review, overcoming the excessive uncertainty that emerges from the last rulings examined.

Giving a look to the categories of sanctions, on which the ECtHR has over the years focused, three types can be isolated.

As noted above,[121] it's possible to identify sanctions having an eminently punitive purpose, that, regardless of their nature according to national legal systems as criminal or administrative, have an eminently deterrent function, with respect to which the public interest, at most, remains in the background. Then there are sanctions whose main purpose is the realization of a public interest, in a such a way as they present a clear function of policy definition, and finally, disciplinary sanctions whose purpose seems to be the protection of interests related to the administrative organization, since they are connected to the employment relationship that exists between the administration and its employees.

This distinction seems relevant to reconstructing the level of stringency of the judicial review when the sanctions are applied to the outcome of an administrative proceeding not able to fulfill all the guarantees imposed by art. 6 of the ECHR.

Closely considered, when the purpose of a sanction is the punishment of behavior constituting a damage, for purposes of deterrence and (general and particular) prevention, so that they can't be distinguished, with regard to the

120 Ramos Nunes de Carvalho e Sá v. Portugal cit., par. 181.

121 See par. 4.

function, from those laid down by national penal law, it is necessary to think about a particularly stringent control by the national Courts, not limited to a *deferent* review of the administrative procedure lawfulness, or aimed to ascertain the sufficiency of the evidentiary material used by the administrations, but that proceed to rehear the evidences, or to acquire new ones even at the request of the accused, in order to verify, in depth, the responsibility of an offender.

These are cases in which it is possible even to doubt the possibility to entrust an administrative body the imposition of such sanctions. As observed by the judge Pinto de Albuquerque in his dissenting opinion in the case Menarini «According to these principles, the imposition of publicly enforceable penalties goes beyond the traditional remit of the administrative authorities and should be a matter for the courts».[122]

This conclusion is not farfetched, since it can be clearly identified – as it's been correctly observed with regard to the relations between the sanctioning power of the European Commission and the scope of the jurisdiction of EU Courts – «fines, which fall within the criminal sphere protected by Article 6 ECHR, from other decisions», in respect of which «no room would be left for any particular discretion in the […] decision-making».[123]

Conversely, the case of disciplinary sanctions and of those designed for the care of a specific sector of administration is completely different. In both cases these sanctions appear to be more properly directed to assume a policy-making function with respect to which the judge's review will have to submit a greater level of *deference*. Furthermore, evidence of the correctness of this assumption is found once again by examining the dynamics of the relations between the sanctioning power of the European Commission and the review of EU Courts.

In this respect, the words of Lord Nolan in the Alcombury decision, referred before, appear entirely acceptable:[124] «To substitute for the Secretary of State an independent and impartial body with no central electoral accountability would not

122 Par. 9 of his *dissenting opinion* in Menarini Diagnostics S.R.L. v. Italy, 27/9/2011 (Appl. n. 43509/08), in *https://hudoc.echr.coe.int/eng*. In addition, he affirmed that «The moves towards decriminalization, although welcome, must not result in a blank cheque being handed to the administrative authorities. When the procedure for imposing an administrative sanction has concluded, there needs to be a court to which members of the public can turn, without any restriction, in order to seek justice».

123 M. BRONCKERS – A. VALLERY, *Fair and effective competition policy in the EU: which role for authorities and which role for the courts after Menarini?*, in *European Competition Journal*, 2012, pp. 283 ss., 295.

124 The text is available on *https://publications.parliament.uk/pa/ld200001/ldjudgmt/jd010509/alcon-1.htm*.

only be a recipe for chaos: it would be profoundly undemocratic».[125] so that, with respect to decisions having, *lato sensu*, a policy content «The sufficiency of judicial review […] depends not on safeguards, but on respect for the ministerial decision on matters of policy or expediency».[126]

In such cases, a judicial review aimed at verifying the reliability of the choices made by the administration may well be performed, not to replace with their decisions the ones of the administration, but to verify that the choice made is the most reliable even in comparison with other possible choices,[127] all this in order to quash the sanction without having to go into the substance of issue that its underlying.

125 Par. 60. In the same vein, Lord Hoffman, as referred to in par. 117, pointed out that «If, therefore, the question is one of policy or expediency, the "safeguards" are irrelevant».

126 P. CRAIG, *The Human Rights Act, Article 6 and Procedural Rights* cit., p. 763. That opinion is shared by Lord Hoffman, which stated «It is only when one comes to findings of fact, or the evaluation of facts, such as arise on the question of whether there has been a breach of planning control, that the safeguards are essential for the acceptance of a limited review of fact by the appellate tribunal» (par. 117).

127 M. MIDIRI, *Sanzioni antitrust e giudice amministrativo, prima e dopo Menarini*, in *www.dirittifondamentali.it*, n. 1/2018, p. 15. See even G. CLEMENTE DI SAN LUCA, *Lezioni di giustizia amministrativa*, IV ed., Editoriale Scientifica, Napoli, 2017, p. 364, according to which «Il giudice, invece, dovrebbe poter ricorrere alla C.T.U. soltanto laddove sia chiamato a decidere sulla sussistenza di un fatto, ovvero sulla correttezza di una decisione amministrativa, la cui rilevazione, o assunzione, presentano margini (più o meno ampi) di opinabilità tecnico-scientifica: in tali casi, infatti, il mezzo istruttorio dovrebbe corrispondere alla sola esigenza di 'illuminarlo' su una disciplina estranea alla sua cognizione professionale, allo scopo, per ciò, di consentirgli la (altrimenti impossibile) intelligenza della plausibilità tecnico-scientifica del criterio assunto dalla P.A. per acclarare la sussistenza del fatto presupposto, avvero per definire il contenuto, del provvedimento impugnato».