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## Sanctions administratives en droit européen

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## Réponses au questionnaire : France

Séminaire et traduction cofinancés par le programme « Justice » de l'Union européenne

***Part I – The notion of administrative sanctions***

***I-Q1 – Are the definitions of administrative sanctions (sanctions for minor offenses) and criminal sanctions precisely regulated at the national level? How is the notion of "administrative sanctions" defined in your administrative practice and case law? How does it differ from the notion of "criminal sanctions"? Is the principle of legality (i.e. the necessity of a legislative act, "no crime without law", etc.) of the incrimination applicable to administrative sanctions?***

Sanctions are not legally defined in French law, regardless of whether they are administrative or criminal.

Criminal sanctions can be defined as sanctions imposed by a criminal court in accordance with the rules of criminal procedure. According to article 130-1 of the Criminal Code, a sentence has the following functions: 1° to punish the offender; 2° to bring about a change in him and to facilitate his integration and re-integration. There are several categories of sentences: custodial sentences, sentences entailing deprivation of liberty and rights, financial penalties and other obligations.

The case law, of both the Council of State and of the Constitutional Council, has defined administrative sanctions. It is a decision by an administrative authority to punish misconduct or breach of rules laid down by the administration.

There is a wide variety of administrative sanctions: the diversity of the categories of persons, whether physical or legal, that may be affected; the diversity of competent authorities to impose them (minister, prefect, mayor, independent administrative authority, or even administrative court); diversity of the sentences and the aims they pursue. There is a significant difference between administrative sanctions and criminal sanctions: administrative sanctions cannot, as opposed to criminal sanctions, impose deprivation of liberty.

Under French law, there is a legal regime common to all forms of repression, both criminal and non-criminal. This common punitive law is largely inspired by criminal law under the twofold effect of the application, to a very large degree, to the administrative repression of the constitutional principles, which are subject to penalties imposed by the criminal courts and apprehension administrative sanctions in the field of "criminal charges" within the meaning of Article 6 of the European Convention on Human Rights.
The Constitutional Council has stated in Decision No. 89-260 DC of 28 July 1989 that *"[no constitutional rule precludes an administrative authority, acting within the scope of public powers, from exercising a power to impose penalties on the one hand, that the penalty likely to be imposed is exclusive of any deprivation of liberty and, on the other hand, that the exercise of the power to impose penalties is accompanied by the law of measures intended to safeguard the rights and freedoms guaranteed under the Constitution".* Thus, administrative sanctions that can in no case involve deprivation of liberty must necessarily respect the same safeguards as criminal sanctions.

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The principles of constitutional value that are imposed in criminal matters are: the presumption of innocence, the principle of the legality of offenses and sentences, the principle of the necessity of sentences, the immediate application of the softer punitive law and the rights of defence. They stem from Articles 8 and 9 of the Declaration of the Rights of Man and the Citizen of 1789.

***Ancillary questions:***

***With respect to the above question, does your administrative practice and jurisprudence follow ECHR case law (Cases Engel, 5101/71, 5354/72, 5102/71, 5370/72, [1976] ECHR 3, 5100/71, (1976), Jussila, 73053/01, Grande Stevens, 18640/10, 18647/19, 18663/10 in 18698/10)? Do you also apply the approach of the CJEU (for instance in the case Schindler Holding, T-138/07)? Are the ECtHR and CJEU jurisprudence (including EU Charter on Fundamental Rights) applied at the same time?***

The ECHR and EU law, in particular the Charter of Fundamental Rights of the EU, may be invoked simultaneously before the French courts against measures that take the form of sanctions: for example, in the decision of the Council of State of 22 October 2014, *Syndicat des médecins d'Aix et région and others*, appl. no. 364384, 365276, 365818, 365822), concerning sanctions against physicians provided for by a medical convention. But the Charter of Fundamental Rights is much more rarely invoked against sanction measures of the ECHR.

For both the ECHR and the CJEU, there is equivalence between the general principle of EU law, reaffirmed in Article 47 of the Charter of Fundamental Rights, which guarantees the right of every individual to a fair trial, and Article 6 of the ECHR.

Both the ECHR and the CJEU admit that entrusting administrative authorities with the task of prosecuting and punishing infringements of rules is not incompatible with the ECHR as long as the person concerned can refer any decision taken against him to a court offering safeguards provided for in Article 6 of the ECHR (ECHR, 2006, Jussila v. Finland, TPIUE, 13 July 2011, Schindler Holding).

Both Courts also accept that the safeguards offered by the criminal section of Article 6 of the ECHR do not all have to be respected during the administrative procedure: a procedure in which an administrative authority adopts a decision identifying an infringement and imposing fines which may subsequently be subject to review by a court does not infringe Article 6 of the ECHR. Compliance with all the requirements of a fair trial is not required at the administrative stage of the sanction procedure.

In general, the influence of the ECHR case law on Article 6 of the Convention has been considerable on the French law on administrative penalties. It has led to the adaptation of numerous sanction procedures (see below).

As regards the ECHR case law on “non bis in idem”, its influence on French law was much later. France signed Protocol No. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms with a reservation to Article 4 which states that “No one may be prosecuted or punished by the courts of the same State for an offence for which he has already been acquitted or convicted by a final judgment in accordance with the law and the criminal procedure of that State”: only offences falling under criminal courts in French law must be regarded as offences within the meaning of Articles 2 to 4 of the protocol

Under French law, the *non bis in idem* principle is not recognised as a constitutional principle: the principles of constitutional value which are imposed in criminal matters are, as has been said, the principle of necessity of offences and sentences and the principle of proportionality of sentences. These principles have led the Constitutional Council to impose limits on the cumulative pronouncement of several sanctions: when an administrative sanction is likely to combine with a criminal sanction, “the principle of proportionality implies that in any case the overall amount of the penalties imposed shall not exceed the highest of the individual penalties incurred”. This condition must also be met in the case of the cumulation of two administrative penalties.

For the Council of State, the “non bis in idem” rule constitutes a general principle of law, the observance of which is binding on the administrative authorities “even in the absence of an express text” (CS, 23 April 1958, Commune of Petit Quevilly, rec.p.383). But it does not apply between administrative and criminal sanctions, which are based on a different purpose and tend to ensure the safeguarding of values or interests which do not merge: there is therefore no obstacle to cumulation of administrative and criminal proceedings.

The Court of Cassation adopts a similar approach: the principle of “ne bis in idem” applies only to criminal offences in the strict sense of the word / the cumulation of prosecution and criminal and administrative sanctions, criminal and disciplinary sanctions, criminal and tax sanctions, criminal and customs sanctions is possible / in criminal matters, the principle is strictly applied.

However, the Grand Chamber judgment of 2014 in the Grande Stevens case led to an evolution of French law, influenced by the case-law of the court (see below).

**Is there any statutory-based solution given in this respect by the national legislator or by the administrative authorities?**

The powers to impose sanctions in administrative matters are necessarily created by law. Whether it is the Council of State or the Constitutional Council, there is a consensus, based on the principle of legality of offences and sentences, on the legal definition of sanctions.

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**Do you have examples in practice or case law where the jurisprudence of the EU law is found to be compatible with jurisprudence of the ECtHR (for instance, cases C-210/00 Käserei Champignon Hofmeister GmbH or C-489/10, Łukasz Marcin Bonda). Do the teachings of the CJEU, and in particular its definition of administrative and criminal sanctions, fit within the framework of ECtHR decisions?**

The ECHR held, in the decision of 30 June 2005 referred to as "*Bosphorus Airways versus Ireland"*", that there was an equivalence of protection between the law under the ECHR and European Union law. This judgment presupposed that the decisions taken within the framework of the Union are in conformity with the requirements of the European Convention on Human Rights. This presumption may, however, be reversed by proof to the contrary.

The ECJ also refers extensively to the case-law of the ECHR, in particular to the case-law on Article 6 of the Convention, even if the ECHR does not constitute, until the Union has acceded to it, a legal instrument formally integrated into the legal order of the Union. But as Article 6 (3) of the TEU confirms, the fundamental rights recognised by the ECHR are part of EU law as general principles.

**How is the EU law requirement -according to which sanctions need to have a deterrent effect- applicable?**

Administrative sanctions are intended to curb breaches of predefined obligations.

The principle of the legality of offences and sentences imposes the predetermination of penalties and therefore implies that the persons liable to be sanctioned are aware of the breaches that can be blamed on them.

A deterrent effect is intrinsically linked to administrative sanctions. There is a dual objective underlying all punishments: retribution and prevention of wrongdoing.

What distinction does your national legal system make between administrative sanctions and other administrative measures to restore compliance with the law? (e.g.: the closure of an exploitation of a waste management facility that was operating without a license v. an administrative fine?)

French law makes a fundamental distinction between administrative and police sanctions.

An administrative sanction is distinguished from a police measure by the aim it pursues (the repression of a wrongdoing), whereas a police measure primarily has a preventive purpose.

This distinction is essential because the legal regime for administrative sanctions and police measures is different: the constitutional principles governing law enforcement are not applicable to police measures; Article 6 of the ECHR does not apply to police measures, even though they are civil in nature within the meaning of that article.

It is the material or finalist criterion that makes it possible to distinguish between the two types of measure.
Despite all this, there are areas that overlap. Some administrative sanctions have a mixed purpose: for example, sanctions imposed in the area of classified installations.

***I-Q2 - Are procedural requirements regarding administrative sanctions equally or similarly regulated in the case of criminal sanctions (how far-reaching is the principle of legality, what is the role of the principle of proportionality)?***

Administrative sanctions are subject to rules of form and procedure, on the one hand, and substantive rules, on the other.

While these rules, inspired by criminal law, are largely common to those applicable to criminal sanctions, it is nevertheless found that they are applied with nuances to administrative penalties:

this is the case with rules of form: example of the absence of a principle of publicity of debates, in the absence of a text;

this is also true of substantive rules: the principle of the legality of offences and sentences is applied in a specific manner: “when it is applied to administrative sanctions, the principle of legality of offences and sentences does not prevent offenses from being defined by reference to the obligations to which a person is subject by virtue of the activity he carries out, the profession to which he belongs or the institution to which he belongs (CS, Section, 12 October 2009 , Mr Petit); this principle also does not prevent, owing to the first application of a rule, the enforcement authority from establishing its scope and applying it to the facts at the origin of the breaches that it penalises.

***Ancillary questions:***

***With respect to the above question, does your national law offer any regulatory solutions and what is the role of direct applicability of the jurisprudence of the ECtHR and the CJEU?***

The sanctions regime is defined by law, and incidentally by regulation.

The case law of the ECHR and the CJEU is not directly applicable, except in cases that involve France. However, this case law has a real power of influence, through the case law of the national courts that take account of the decisions rendered by the two European courts. It has thus been able to lead to changes in the administrative sanctions regime on various points or to strengthen the administrative courts by deepening their control over administrative sanctions.

***What are the administrative procedural requirements that are the closest to the ones applicable to criminal sanctions (e.g.: mandatory representation or assistance by an attorney (Cf. "Salduz-doctrine" Salduz v. Turkey, 36391/02), legal help, procedural time limits (including "reasonable time"), the possibility of requiring an oral hearing, burden of proof, competence of courts, legal remedies, application of the principles of reasonability, equality, presumption of innocence, prescription/prohibition of retroactivity, the principle of « retroactivity in mitius », the prohibition of self-incrimination, the principle of the right to appeal, etc.)?***

As mentioned above, there is a common legal regime for all forms of repression, both criminal and non-criminal. This punitive law is largely inspired by criminal law. It applies to both the legislator and the regulatory authority.

- First of all, there are rules of form and procedure that constitute safeguards for the sanctioned person and that are effective either before the imposition of the sanction or at the stage of its pronouncement.

  The principles and rules are as follows:

  respect for the rights of defence (access to the file, statement of objections and prior information, right to submit observations, right to be assisted by a lawyer of his choice, appeal against sanctions), publicity of proceedings if it is provided for by a text (in the absence of any text to the contrary, the sanctions imposed by an administrative authority are exempt from the requirement of publicity of proceedings), the requirement to state the reasons for the decision, the impartiality of the procedure.

  Depending on the nature of the requirement in question, the subsequent intervention of a court may suffice to ensure that the trial is fair. Thus, for the requirement of publicity of debates, which is required only if it is provided for by a text: admittedly, the public hearing is implicated by the right to a fair trial; but the administrative case law does not require compliance with all fair trial requirements from the administrative phase of the sanction procedure. It is the examination of a full remedy action that ensures compliance with the guarantees of Article 6 of the ECHR, in particular that of publicity of the hearing.

- The principles and substantive rules applicable to administrative sanctions are: the presumption of innocence, the legality of offences and sentences, the need for sentences, the non-retroactivity of the most severe punitive law, the personality of sentences,
  the "*non bis in idem*" rule. o The investigation and search for evidence give full effect to the presumption of innocence. There is a principle of opportunity for criminal proceedings; the decision to launch an investigation or to impose sanctions is discretionary (CS, Sect., July 10, 1995, *Laplace,* appl. no. 141654). o The principle of necessity and proportionality imposes an individualisation of penalties. o The

principle of *non bis in idem* itself involves two rules: the prohibition of cumulative administrative sanctions, the possibility of cumulative criminal and administrative sanctions.

- In the absence of an express text, there is no limitation period for administrative sanctions (CS, 22 November 1989, *Martin,* appl. no. 80147). If the European Court of Human Rights imposes a reasonable time period, the Council of State considers that the length of time between the finding of an irregularity and the imposition of the resulting administrative sanction cannot, by itself, be constitutive, on the grounds that it is excessive, of a breach of the rights of defence resulting in the illegality of the sanction (CS, 19 July 2011, *Lagarde v. Minister for agriculture*, appl. no. 326610).

***I-Q3 Have unwanted consequences ever accrued from the decision of the ECtHR (e.g.: Grande Stevens, No. 18640/10, 18647/19, 18663/10 in 18698/10) (such as decreasing the effectiveness of separated regimes – administrative and criminal- because the administrative sanction, which has the characteristic of criminal sanction, prevents criminal procedure; in line with the principle ne bis in idem)?***

The decision of the Grand Chamber of the ECtHR in the Grande Stevens case, in the area of the repression of market abuse, had a great impact in France because it rejected the reservation made by Italy to Article 4 of Protocol No. 7 on the ground that this reservation was not valid because it was too general, and that the Italian reservation was drafted in the same way as the French reservation.

This European case law led the Constitutional Council to censure, in the context of a priority preliminary ruling on constitutionality, provisions of the Monetary and Financial Code relating to offences and insider trading, allowing prosecution both before the Autorité des marchés financiers and before the judicial authority: decision 2014-453 QPC of 18 March 2015. In that decision, the Constitutional Council changed its case-law on the cumulation of the application of provisions instituting sanctions imposed following different prosecutions and in application of separate rules (which may violate the principle of the necessity of offences and sentences if certain conditions are met) and repealed several legislative provisions.

This decision of the Constitutional Council led to a major reform of the mechanism of repression of market abuse, carried out by the law of 21 June 2016.

Subsequently, the Constitutional Council did not extend its case law on the impossibility of cumulating prosecutions in case of the repression of aggravated tax evasion: decision 2016546 QPC of 24 June 2016.

Similarly, the ECHR did not find, in the judgment of the Grand Chamber A and B v. Norway of 15 November 2016, that there was a breach of the principle of “non bis in idem” in the administrative and criminal proceedings for penalising aggravated tax evasion.

***Ancillary questions:***

***How is the principle ne bis in idem understood in your legal system, taking into account CJEU interpretation (case C-617/10, Fransson) and ECtHR interpretation of Art. 4 of Protocol No. 7 (ECHR (GC) Zolotoukhine/Russia, No. 14939/03)?***

The French system advocates the independence of criminal and administrative sanctions. The two procedures are independent of each other and can be combined (CS, 30 December 2014, *Mr Bonnemaison*, appl. no. 381245).

The Constitutional Council has, however, restricted the cumulation of administrative and criminal sanctions: if such cumulation is possible in principle, it must not have the effect of exceeding the highest penalty incurred for the acts penalised. It also found that certain administrative monetary penalties could not be cumulated with criminal sanctions as they were very high (Constitutional Council, 28 July 1989, 89-260DC).

As has been said, the Constitutional Council recently changed its case law on the cumulation of penalties imposed following different prosecutions and in application of separate rules (see above): they may violate the principle of necessity of offenses and sentences if certain conditions are met (the sanctions make it possible to repress the same facts, they protect the same social interests, they are not different in nature and both fall within the same jurisdiction).

The judgment of the ECJ in the Åklagaren v. *Fransson* case of 26 February 2013 specifies the criteria for qualification of the criminal sanction and indicates that the principle of "non bis in idem", also provided for by EU law, in Article 50 of the Charter of Fundamental Rights, applies only where the sanction provided for by the State is a criminal sanction. It therefore does not prohibit criminal and fiscal penalties as long as the fiscal penalty does not have the characteristics of the criminal sanction.

***Are national courts faced with cases where individuals, subject of administrative sanctions, would like to exclude criminal sanctions and criminal procedures (including in other EU Member states) in order to avoid dual trial? Does your system accept double penalty for non-nationals? (e.g.: criminal punishment for a criminal offense and administrative expulsion at the end of (or during) the sentence (accompanied with a residence ban)?***

The evolution of the case law of the ECHR with the Grand Chamber judgment in the Grand Stevens case has led to a multiplication of the applicants' attempts to invoke a violation of "non bis in idem" in the case of double sanctions, both administrative and criminal. This has been the case with regard to the repression of market abuse, and this has also been the case with regard to the repression of aggravated tax evasion.

These attempts have been successful for the law on repression of market abuse.

Apart from this case, the principle remains that of the possible accumulation of different prosecutions.

***Is it possible, in your legal system, that an individual be sanctioned with both - the administrative and the criminal sanction, and if so, does the criminal sanction take into account the administrative one (i.e. is the administrative sanction considered a part of the criminal sanction)? What role does the EU Charter of Fundamental Rights and the ECHR principle ne bis in idem play in this respect?***

Owing to a reservation to Protocol No. 7, the ECHR has a scope of application limited to criminal sanctions. Regarding the Charter of Fundamental Rights, it applies to criminal penalties, as recalled in the "Fransson" case law.

The principle of independence of sanctions allows for the cumulation of criminal and administrative penalties. When two parallel proceedings are instituted, they do not take account of each other and the administrative sanction is not included in the criminal sanction. However, the Constitutional Council, as stated above, limits the final sanction to the most severe penalty for the penalised offences. The sanctions that are imposed last cannot therefore disregard the first sanction already pronounced.

## *Part II – The system of authorities competent to impose administrative sanctions*

***II-Q1 – Is your legal system "unified" or "dual" when it comes to authorities competent to impose administrative sanctions? More specifically: Are the administrative authorities that are competent to adopt administrative sanctions only responsible for their enforcement? Or is it a system where administrative bodies are competent for both the enforcement and the regulation of certain areas of law? (e.g.: in areas like competition or financial transactions, are the authorities that are competent for the regulation of these areas also competent to adopt administrative sanctions in case the rules are not respected?) Or is it a third, mixed, system in which both solutions coexist? And finally, at enforcement level, can the official who discovers an infringement impose an administrative sanction?***

The French system for the adoption of administrative sanctions is very diverse. Some authorities have a power of sanction as much as a sectoral regulatory power. *Conversely,* local authorities *(see* I-Q2) cannot create sanctions if a national text does not allow it.

Thus, it is almost impossible to adopt a systemic approach to administrative sanctions. It is necessary to study the normative framework specific to each authority, each sector, in order to determine whether the authority has the power to regulate and sanction.

However, the procedural formalisation which has continued to develop under the effect of Article 6 of the ECHR has had repercussions on the organisation and functioning of the administrative authorities vested with sanctioning power, where within the same body, there is cumulation of functions.

The requirements arising from the principle of impartiality, which in view of its importance is necessary from the administrative sanction phase, have led the court and the legislator to regulate the organisation of the regulatory authorities, which have different functions (control, charge, investigation and punishment). It was found that the existence of a functional duality of prosecution/sanction had to lead to organising an organic duplication of the model used for the Autorité des marchés financiers in order to ensure compliance with the principle of impartiality: the organic division of the AMF between a college and a sanctions committee has been an institutional response to the need to preserve the plurality of functions in accordance with procedural requirements.

The creation of the Autorité de contrôle prudentiel to succeed the Banking Commission has addressed the concern to comply with this model. It was also taken up when the Autorité de régulation des jeux en ligne (Online gambling regulatory authority) was established, which also includes a college of the Autorité and a Sanctions Committee.

However, it is not necessary to go so far as to organise such a division once the relevant texts adequately cover the exercise of the various functions. Consequently,
the Constitutional Council admitted that there was no confusion between the functions of prosecution and investigation and the powers of sanction when the matter was referred to the competition authority, since the automatic referral to the AAI college which will then rule on the sanctions is subject to a proposal by the general rapporteur, that this referral does not lead the authority to prejudge the reality of the breaches to be examined, that the investigation is ensured by the general rapporteur and that the college of the competition authority deliberates without the general rapporteur taking part in the deliberations. This is the organisation chosen for the competition authority, for the Conseil supérieur de l'audiovisuel, etc.

The case law of the Constitutional Council thus shows that respect for the principle of impartiality can be complied with without necessarily going so far as to organise an organic distinction.

***II-Q2 – Does your legal system allow for only one, or several levels of jurisdiction in procedures regarding administrative sanctions? What role is given to the national courts (and to the highest administrative court if it is competent to decide issues of fact and not only issues of law, like a court of cassation) when deciding on administrative sanctions? Do courts only have a supervisory role (i.e. a judicial review, a competence to annul) or are they also competent to reform or adopt (alone) the administrative sanctions?***

Any administrative penalty may be appealed before a court of law. Some administrative authorities, by virtue of their activity, see the challenging of their actions as appearing before the judicial and non-administrative courts. Thus, this is a derogation under the law. Essentially, the administrative court has jurisdiction to assess penalties.

Several hypotheses must be distinguished in the imposition of the sanction. If it is purely disciplinary, for the administration officials, an action for annulment will be referred to the court. The trial courts will then exercise control over the materiality of the facts and their faulty character. The matter may be referred to the Council of State only in cassation.

If the sanction is imposed by an administrative authority, the appeal is under full jurisdiction. The judicial circuits are specific to each authority, some sanctions can go directly before the supreme court, while others go before the judicial court.

Also, appeals from specialized courts, such as the Court of Budgetary and Financial Discipline, may be made in cassation before the Council of State.

When hearing cases for annulment, the courts can only review the legality of the decision. This refers to a simple "surveillance". When hearing full remedy actions, they can reform or modify the act pronouncing the sanction. This refers to a more complete control, going beyond the "surveillance" of the activity of the administrative authority.

In limited cases, the administrative court may itself be the authority that imposes the sanction. This applies mainly to highway offences, under the national police.

***II-Q3 – Is the court's judicial review of administrative sanctions based solely on the legality of the decision, or also on factual questions/circumstances? If there is certain discretion given to the administrative authorities? Can the courts review the discretion exercised by the administrative authorities too? (See CJEU C-510/11 P, Kone and others v. Commission, as well as Menarini, No. 43509/08 of the ECtHR).***

Administrative sanctions are subject to two types of judicial review: some are subject to a remedy for abuse of power, while others are subject to full remedy action.

The main difference between these two reviews lies in the powers of the court: in the case of a full remedy action, the court does not merely assesses the legality of the decision but may also substitute a reformed mechanism with that of the contested decision before it. But the nature and the degrees of control, which also differed until recently, are hardly any different today, because the court ensures compliance with a body of rules and principles that are largely common to all administrative sanctions; the administrative case law has evolved constantly in the sense of strengthening the judicial review, regardless of the procedures of the court's intervention.

For sanctions subject to judicial review for excess of power (essentially disciplinary sanctions and sanctions taken by sports federations with respect to their licensees), the court exercises in all cases normal control on the ground of these sanctions (i.e. on the existence of a wrongful breach capable of justifying a sanction). As regards the choice of the sanction imposed, judicial review has continued to increase: since the decision of the Assembly in the Mr Dahan case of 13 November 2013, it has exercised the same control over all the sanctions and reviews the

legal qualification of the facts as to whether the sanction is proportionate to the seriousness of the offences.

For sanctions subject to a full remedy action, it is either a text that entrusts the administrative court with these powers (most texts relating to the independent administrative authorities: AMF, ARCEP, CSA, etc.), or the court that chooses to exercise this type of control (this is the case, since the ATOM decision of the Assembly of 16 February 2009, for the sanctions that the administration imposes on an individual). The tendency is to extend the scope of the full remedy action in relation to that of the recourse for excess of power. The court exercises thorough control over the proportionality of the sanction. To this end, it favours a casuistic approach by focusing on verifying the proportionality of the sanction to the wrongful acts. For assessing the proportionality of the sanction, it shall take into account not only the amount of the penalty but also the financial difficulties that it may cause for the company and its partners.

Taking into account the practical effects of the decision on the person sanctioned is inherent in the exercise of the proportionality review.

***Part III – Specific questions***

***III-Q1 - What kind of liability is provided by your national legal system for administrative sanctions: fault-based liability or strict liability? Does your legal system require a fault of the individual as a condition for the administrative sanction (See: CJEU C-210/00 Käserei Champignon Hofmeister GmbH)?***

The administrative court requires that the sanction pertain to the conduct of the citizen. It is necessary for the sanction to punish wrongful conduct that is in breach of an obligation imposed on him.

Nevertheless, the administrative sanction does not require a moral element, only a materiality constituting the offense. There is no need to prove an intention to commit the offence, only the material existence of the offence.

***III-Q2 – Is it the nature of the administrative act relevant for its judicial review? Is it possible that a judicial review is impeded by the nature of the decision leading to the administrative sanction (when, for example, the act is not considered an administrative act)?***

Any administrative act may be subject to judicial review. Certain acts are not regarded as administrative and therefore are not subject to review. But the case law of the
Council of State (particularly the *Marie* and *Hardouin* judgments of 17 February 1995, appl. no. 97754 and no. 107766 or CS, 15 April 2015, *Pôle emploi*, appl. no. 373893) shows that as long as the decision adversely affects and prejudices the rights of the citizen, the court accepts the act as administrative.

***III-Q3 - What kind of non-financial (non-pecuniary) sanctions are known in your legal system (for instance, the prohibition to pursue one's business or certain professional activities, the deprivation of the ownership, the duty perform certain works, etc.)? More specifically, in matters of urban planning, can an order to restore the site to its original state lead to the demolition of a construction? (case of ECtHR Hamer/Belgium, No. 21861/03).***

The administrative sanctions are extremely diverse, in line with their sectoral scope of application. Attempting to make an exhaustive list would be of no use.

It is possible to state, under administrative sanctions,

- tax sanctions;
- monetary penalties;
- withdrawal of driving license points;
- professional sanctions: withdrawal of authorisation; prohibitions on practice, in particular by the professional associations (specialised administrative courts).

Concerning town planning, Article L.480-5 of the Urban Planning Code stipulates that:
*"In case of a conviction on a natural or legal person for an offence under Articles L. 480-4 and L. 610-1, the court rules, in view of written observations and after hearing the mayor or the competent official and even in the absence of an opinion of the latter, either on compliance of the places or structures with the regulations, the authorisation or the declaration in lieu thereof, or on the demolition of structures or reallocation of the land in order to restore the site to its original state".*
It is therefore possible to issue an injunction to restore a site. However, this sanction comes solely from the jurisdiction of the criminal court; it is not an administrative sanction.

***Ancillary questions:***

***When provided, do non-financial sanctions have to be in causal relation to the (administrative) offence?***

The principle of necessity and proportionality, under Article 8 of the Declaration of the Rights of Man and the Citizen of 1789, of constitutional value, requires any sanction to be necessary. There is therefore a causal link between the nature of the sanction and the sanctioned conduct. This principle also means that the *quantum* of the sentence must be related to the misconduct in question. There is therefore a causal link in the *quantum* and in the definition of the sanction. This indicates a causal link between the sanction, whether financial or not, and the content of the sanction.

Fixed penalties are in principle prohibited (CS, 30 April 1997, *Syndicat national des masseurs-kinésithérapeutes-rééducateurs*, appl. no. 180299). The court controls the modulation of sentences.

Can the sanctions, which are administrative sanctions in their nature, be used in the private law sphere (e.g.: a person not respecting the duty of the alimony: could he/she be sanctioned with the deprivation of his/her car)?

The administrative sanction “by its very nature” includes all the cases in which the penal repression appears, in view of its characteristics, inadequate: too cumbersome for the repressive authority, too foreign to the objective of the criminal court, too defamatory for the sanctioned persons.

The aim pursued by the administrative repression and the modalities of its exercise make it possible to delimit its natural field of intervention. The repression falls within the natural attributions of administrative power when it constitutes the necessary corollary of its prerogatives or the extension of its regulatory power. The main area of the administrative penalty “by nature" is that of regulated professions and activities: the administrative authority called upon to authorise an activity or the practice of a profession, may verify its conditions of practice and suspend or withdraw the authorisations it has issued.

Examples include the Autorité des marchés financiers, the Autorité de régulation des communications électroniques et de la poste, the Autorité de contrôle prudentiel et de résolution, and the Conseil supérieur de l'audiovisuel, all regulatory authorities responsible for issuing authorisations and vested with the power to impose sanctions.

***In your legal system, can administrative sanctions encroach upon ownership rights (Art. 1 of the first protocol ECHR – for instance, freezing of assets, substantive financial penalties, etc.)?***

Administrative sanctions can infringe ownership rights. It is notably possible to impose asset freezes (CS, 15 December 2014, *Banque Populaire Côte-d’Azur,* appl. no. 366640).

There must thus be a text providing for this type of sanction and a necessity, as well as a proportionality, of such a sanction in relation to the fault identified.

***III-Q4 – Are there cases in your national system where the organization of the authorities competent to adopt administrative sanctions is based on EU law requirements? This question could, for instance, refer to the leniency program that exists in EU competition law, which allows for the severity of the administrative sanction to depend on the party’s ability and willingness to produce evidence, and requires a system where the same authority that hears the case also adopts the sanctions.***

In some sectors, particularly those regulated by authorities, practices are based on European law. Thus, the competition authority has set up a specific leniency program based on that of the Commission. There is a total exemption for the first company that disclose cartels and it is the competition authority that will impose the appropriate sanctions.

***III-Q5 – Have your national administrative authorities, or even courts, been faced with the request to apply the jurisprudence of the CJEU and to reopen/change already final administrative decisions on administrative sanctions? Do national rules of administrative procedure (or even rules on court reviews) allow such re-openings of cases?***

The Council of State was hearing a case raising the question of the scope of a judgment of the ECHR in the event of a sanction for a definitive ban on management activity on behalf of third parties, in which the European Court found that there had been a violation of Article 6 of the ECHR (CS Assembly, 30 July 2014, *Vernes,* appl. no. 358564).

It held that when the violation of the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) found by the European Court of Human Rights (ECtHR) in a judgment condemning France concerned an administrative sanction which had become final, the execution of that judgment does not imply, in the absence of an organised procedure for that purpose, that the competent administrative authority re-examines the sanction. Nor can it have the effect of depriving judicial decisions, including those which reform all or part of an administrative sanction in a full remedy action, of their enforceability.

However, the Court's finding of a breach of the rights guaranteed by the Convention constitutes a new element which must be taken into consideration by the authority empowered to impose sanctions. It is therefore incumbent upon that authority, when it receives a request to that effect and the penalty imposed continues to have effect, to assess whether the continued execution of that penalty infringes the requirements of the Convention and, in such case, to end it, in whole or in part, having regard to the interests for which it is responsible, the reasons for the sanction and the severity of its effects as well as the nature and seriousness of the infringements found by the Court.

However, in the same case, on 9 March 2016, the Council of State ruled that if the authority had to re-examine the case on the basis of a change in legal circumstances as a result of the ECHR decision, there was no scope for increase in the sanction in this case (CS, 9 March 2016, *Vernes,* appl. no. 392782).

The Council of State observed that the ECHR's finding of a failure to comply with the requirements of Article 6 (1) of the Convention did not in itself require the authority with the power to sanction the Autorité des marchés financiers to put an end to the execution of the sanction. That authority was entitled to rely on the fact that the irregularities found by the ECHR concerned procedural rights rather than substantive rights and that the new factors did not justify putting an end to the enforcement of the sanction. The Court had, moreover, itself noted in its judgment that the finding of a violation provided in itself a fair satisfaction to the applicant. The violations of the Convention found in the proceedings against the person concerned were not of such severity as to give rise to serious doubts as to the merits of the penalty imposed.

The Council of State also pointed out that the AMF had rightly held that the decisions of the court that the person concerned had been deceived by a third party about the financial situation of the company of which he was a director concerned only one of the complaints against him and that the Council of State had decided that, in spite of the deception of which he had been a victim, his investments had nonetheless resulted in an imprudent management of the interests of his customers.

It concluded that there was no error of assessment and an error of law in holding that the new evidence did not justify terminating the enforcement of the sanction.

***III-Q6 – – Is it possible for the administrative authorities and offenders to negotiate on an administrative sanction (in order to reach a deal), similar to "plea bargaining" in certain criminal procedures? If so, is this a general rule or is it only possible in specific cases? In case a deal is reached, what is its status when a court reviews the case? What is the position and role of the court in such cases?***

There are transactional procedures to negotiate the sanction in exchange for a failure to challenge the complaints. This type of procedure must be created by law, and currently exists only for the Autorité des marchés financiers and for the competition authority.

It should be noted that there are also engagement procedures. These allow an economic operator to engage with the administrative authority, in particular the Competition Authority, avoiding sanctions in return for obligations.

As regards judicial review, the fact that the company does not contest the facts prevents them from being called into question by the court. The only remain concern is the control of proportionality and necessity in relation to the facts.

In the case of judicial proceedings, the alternative means of resolving disputes specific to litigation continue to be effective. They are more common in criminal and civil matters than in the administrative courts.