



European  
University  
Institute



DEPARTMENT  
OF LAW

## **General principles and judicial remedies**

### **The interaction between international and domestic courts**

A research project of the CJC in collaboration with Association of  
European Administrative Judges

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## INTRODUCTION

### CONTEXT

The topic of legal remedies is commonly described as falling under the procedural autonomy of Member States. However the exclusive competence of the Member States' legislators over the establishment of domestic legal remedies has been gradually limited by the growing EU legislation and the CJEU's jurisprudential development of the EU general principles of equivalence and effectiveness. These general principles were developed by the Court for the purpose of respecting the procedural margin of discretion of the Member States while at the same time ensuring an effective implementation of EU law. However, over time, the procedural margin of discretion of the Member States shrank under the impact of the development of European Fundamental Rights, requiring, in certain circumstances, also the introduction of new domestic legal remedies specifically designed to ensure respect of EU law. The entry into force of the EU Charter has further reshaped the boundaries of Member States' procedural autonomy over a wide range of substantive fields. Art. 47 of the Charter of Fundamental Rights of the EU has introduced additional procedural safeguards, *inter alia*, requiring an effective judicial remedy for each of the Charter's fundamental rights, unlike a mere legal remedy as required by Art. 13 ECHR.<sup>1</sup> The EU legislator has introduced several legal remedies within its various sectorial policies (e.g. consumer protection, unfair trade practices, environmental law, competition, asylum and migration, etc.). For instance, the EU has adopted as part of its specific policies - more or less precisely defined - legal remedies, as for example the Sales Directive 99/44 and the Consumer Rights Directive 11/83. In addition to these precise legal remedies introduced by EU legislation, national remedies have to respect certain general principles of EU law established by the CJEU, such as: effectiveness, dissuasiveness and proportionality.<sup>2</sup> These are principles that have to be applied by national courts and other Member States' public authorities, when acting within the scope of EU law.<sup>3</sup> This Project explores the implications, of the jurisprudentially developed EU general law principles of effectiveness, proportionality and dissuasiveness, on the domestic case law in the field of administrative sanctions and civil remedies. The Project will assess, in particular, the influence of these principles on the creation of new legal remedies, or on the modification of existing legal remedies by domestic courts. The jurisprudence collected for the Project "European Judicial Cooperation in the fundamental rights practice of national courts" (<http://judcoop.eui.eu/data/?p=data>), has formed the basis of the starting premise of the present Project, namely that judicial interaction supports legal innovation benefiting common values and objectives, such as protection and promotion of fundamental rights.

### OBJECTIVES

The project's main objective is to **analyze the impact of EU general principles of law, on judicial decision-making concerning choice of remedies and their precise application by national courts.** Although effective implementation of CJEU judgments and EU legislation requires concerted efforts of multiple actors, including courts, legislatures, executives and national human rights institutions (NHRIs), there have been cases where the lack of necessary implementing actions from the legislator or executive, have forced courts or NHRIs to take certain measures, thereby filling the gap, and, even on occasions, compelling national legislators to act. The project will explore jurisprudence from the EU Member States for the purpose of identifying the impact of the EU general principles of effectiveness,

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1 This provision of the Charter, should be read in conjunction with art. 19 (1) (2) TEU. Both are attached to this questionnaire. The right to an effective judicial remedy is both a general principle of EU law and a fundamental right provided by the EU Charter, which have a similar scope of application, see CJEU decision in Åkerberg Fransson case.

2 See below.

3 See CJEU decision in Melloni.

dissuasiveness and proportionality on modelling national legal remedies. In order to ensure a comprehensive overview, examples from civil, criminal and administrative judicial adjudication will be selected. Collection of cases with the active contribution of 28 national judiciaries will provide the basis for one handbook and one set of guidelines to be used in training courses especially focused on transnational and comparative methodologies.

### **STRUCTURE OF THE PROJECT**

The project will address these questions by combining desk research, two questionnaires and the elaboration of the data in collaboration with the judge rapporteur and with other judges. The questionnaires will be sent to different bodies of the administrative, criminal, and civil judiciaries for each MS, and to some specialized private enforcers (for example, private dispute mechanisms in the field of advertising, or sport federations, as well as arbitrators).

Hence, the questionnaire is structured in a modular way: A common core of questions and a set of specific questions tailored to specific enforcement's regimes.

In the first stage the questionnaire will be drafted in collaboration with national judiciaries. Thereafter, the accuracy and width of the questionnaire, drafted on the basis of collaboration between academics and judges, will be tested by a significant number of countries selected according to the different legal traditions and system of administrative justices (approximately 10 countries) focusing on the sector specific section. The data coming from the questionnaires will be presented and discussed by the reporting judges with other judges and academics in workshops. The discussion will produce a new draft of the questionnaire which will be sent to the 28 Member States. The material from the questionnaires will then be jointly elaborated and analysed in training sessions that will highlight reasons and solutions to divergences in the practice of application of EU principles to remedies. These training sessions will result in the production of a handbook on the principles of EU concerning remedies in administrative and civil enforcement. Training sessions will take place in different locations in Europe gathering judges from groups of countries selected according to the identified divergences and convergences. The handbook will include a general part with references to relevant case law and national annexes that could be used in training courses for single and multiple countries. The project will include a database where summaries of the relevant national cases will be collected. The project duration will be approximately 2 years (2015/2016).

### **GUIDANCE FOR COUNTRY REPORTERS**

When answering the questionnaire, please describe the current state of case law in your country.

We would be grateful, if in your answers you could provide examples of and references to cases, especially from the following areas of law: environmental law, non-discrimination law, aliens law, competition, and utilities (e.g. telecommunication law). Please also indicate in the information provided if the answer to the questions in the various areas of law differs. Whenever possible, it would be highly useful if you could identify any differences as regards the application of the principles of effectiveness, proportionality and dissuasiveness in each of the aforementioned fields.

## **THE FUNDAMENTAL ASSIGNMENT**

**Whether and how do principle of effectiveness, proportionality and dissuasiveness (or deterrence) impact on the relationship between criminal, civil, administrative and private (e.g. deontological) enforcement regimes?**

### **Critical questions for the cross-sectoral assessment:**

To evaluate and assess this assignment a detailed analysis of the following questions will be required: <sup>4</sup>

- 1) Are the above mentioned principles applied similarly across different enforcement mechanisms or do they differ in civil, criminal and administrative adjudication? From a preliminary analysis, some differences emerge in the case law. Hence how are the principles applied in each enforcement system and how is their application coordinated?
- 2) Do the principles restrict the national legislator's choice for the application of a particular sanctioning regime, in relation to a particular field? For example, does the proportionality system require national legislators, to consider the exclusion or limitation of criminal enforcement, in setting up the enforcement regime in different areas or in respect of specific breaches?
- 3) Do the principles contribute to establishing a hierarchy or priority, of a specific enforcement/sanctioning regime, over other regimes? For example, is there a hierarchy between the criminal and the civil enforcement systems?
- 4) How do general principles set by CJEU, influence judicial choices among remedies within the same enforcement regime? For example, does the principle of effectiveness as applied to remedy (right to an effective remedy) influence the choice between injunctive relief, declarations or damages in civil adjudication?
- 5) How do general principles influence decisions over the severity of each sanction? For example, do the effectiveness and/or proportionality affect the amount of fines in criminal enforcement or the cap to damages in civil enforcement for pain and suffering?
- 6) Does the judicial application of general principles vary across sectors? In particular is there a difference between fundamental rights, consumer protection and competition?

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<sup>4</sup> The rapporteur will not have to address the following questions; however, when replying to the questionnaire they shall bear in mind the overall objective and the research questions.

## BACKGROUND INFORMATION

This questionnaire deals with “remedies”. Remedies, in this context, mean legal consequences of an infringement of a criminal, civil or administrative nature, including fines, compensation, injunctions and declarations applied by administrative bodies. The subject matter of the questionnaire is confined to “remedies”, that is the consequences which follow from the infringements of rules deriving from EU-law or those which have been adopted by Member States in the implementation of EU-law.

“Remedies” include sanctions that punish the violators and measures that contribute to restore the harm or damage suffered by individuals as well as those institutes of procedural law that effect the protection of victims.<sup>5</sup> The focus will be (1) on those cases in which EU law does not provide for a specific type or set of remedies, and therefore leaves Member States with the choice of remedies, stating only that remedies (including penalties) shall be defined at national level according to the principles of proportionality, effectiveness, and dissuasiveness;<sup>6</sup> and (2) on those cases in which EU law provide for general remedies but leaves wide margin of manoeuvre to Member States.<sup>7</sup>

The *Principle of effectiveness* requires national rules not to render ‘virtually impossible’ or ‘excessively difficult’ the exercise of a right granted under EU law,<sup>8</sup> including the right to an effective remedy for EU law infringement.

The *Principle of dissuasiveness* requires national authorities to adopt remedies for the infringement of EU law, which are effective to safeguard the objectives pursued by the EU law provision in question, and which genuinely deter the opposite or offending conduct.<sup>9</sup>

The *Principle of proportionality*, as a general principle of EU law, applicable in the context of national measures imposing remedies for the breach of EU law, mandates that limitations to the exercise of national remedies do not go beyond what is appropriate and necessary to attain the objective prescribed by the EU law provision in question.<sup>10</sup> Moreover, where the national system provides for several available measures, recourse must be given to the least onerous ones, having regard, on the one hand, to the possible disadvantages caused, but also, on the other hand, to the aims being pursued.<sup>11</sup>

Case C-443/13, Reindl, ECLI:EU:C:2014:2370, paras. 38-40:

“38 According to settled case-law, whilst the choice of penalties remains within their discretion, Member States must ensure that infringements of EU law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive (see to that effect, judgment in *Lidl Italia*, C-315/05, EU:C:2006:736, paragraph 58,

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5 Note that other legal institutes may be relevant in terms of effective remedies, such as “*reasonable period of time within which the person concerned may exercise his or her right to effective remedy*” (Art. 27(2) of the Dublin III Regulation) or “*access to legal assistance and, where necessary, to linguistic assistance*” (Art. 27(4) of the Dublin III Regulation) or suspensive effect of the remedy (Art. 27(3) and (4) of the Dublin III Regulation).

6 See ex plurimis Texdata C-418/11 “Member States must ensure in particular that infringements of EU law are penalised under conditions which make the penalty effective, proportionate and dissuasive.”

7 For instance, when an appeal procedure is set by an EU directive, but the time frame is left to the Member States.

8 See Case C-63/01, *Evans v. The Secretary of State for the Environment, Transport and the Regions*, para 45, *infra*.

9 See, Joined Cases C-387/02, C-391/02 and C-403/02, *Silvio Berlusconi and Others*, AG Kokott opinion para. 88-92, *infra*.

10 See Case C-443/13, *Reindl*, paras. 39, *Infra*.

11 *Ibid.*, para. 40. See in the field of competition art. 7 Regulation 1/2003

and *Berlusconi and Others*, C-387/02, C-391/02 and C-403/02, EU:C:2005:270, paragraphs 65 and the case-law cited).

39 In the present case, the measures imposing penalties permitted under the national legislation at issue in the main proceedings must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, judgment in *Urbán*, Case C-210/10, EU:C:2012:64, paragraph 24 and the case-law cited).

40 In order to assess whether a penalty is consistent with the principle of proportionality, account must be taken of, inter alia, the nature and the degree of seriousness of the infringement which the penalty seeks to sanction and of the means of establishing the amount of the penalty (see judgment in *Equoland*, C-272/13, EU:2014:2091, paragraph 35)."

Joined Cases C-387/02, C-391/02 and C-403/02, *Silvio Berlusconi and Others*, AG Kokott opinion para. 88-92

"Rules laying down penalties are effective where they are framed in such a way that they do not make it practically impossible or excessively difficult to impose the penalty provided for (and, therefore, to attain the objectives pursued by Community law). This follows from the principle of effectiveness, which, according to case-law, is applicable wherever a situation exhibits a connection with Community law, but there are no Community rules governing that situation (the appropriate procedure, for example) and the Member States therefore apply provisions of national law. In this regard, the principle of effectiveness obtains not only where an individual asserts his rights under Community law against a Member State but also, conversely, where a Member State transposes the provisions of Community law in relation to an individual.

A penalty is dissuasive where it prevents an individual from infringing the objectives pursued and rules laid down by Community law. What is decisive in this regard is not only the nature and level of the penalty but also the likelihood of its being imposed. Anyone who commits an infringement must fear that the penalty will in fact be imposed on him. There is an overlap here between the criterion of dissuasiveness and that of effectiveness.

A penalty is proportionate where it is appropriate (that is to say, in particular, effective and dissuasive) for attaining the legitimate objectives pursued by it, and also necessary. Where there is a choice between several (equally) appropriate penalties, recourse must be had to the least onerous. Moreover, the effects of the penalty on the person concerned must be proportionate to the aims pursued.

The question whether a provision of national law contains a penalty which is effective, proportionate and dissuasive within the meaning defined above must be analysed by reference to the role of that provision in the legislation as a whole, including the progress and special features of the procedure before the various national authorities, in each case in which that question arises."

Note: One of the tasks of the national court is to evaluate whether domestic expressly provided penalties are effective, proportionate and dissuasive under the guidance of CJEU.<sup>12</sup>

Relevant legal provision:

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12 See Texdata C- 418/11 " 55 It is for the referring court to determine whether, under the system of penalties laid down by Paragraph 283 of the UGB, as amended by the BBG, breach of the obligation to disclose accounting documents is penalised under conditions, both procedural and substantive, which make the penalty effective, proportionate and dissuasive. However, the Court may provide the national court with all guidance on the interpretation of EU law that could be useful for its decision (*Asociația Accept*, paragraph 43 and the case-law cited)."

Art. 47 Charter of Fundamental Rights of the European Union: Its relationship with **the principles of effectiveness and equivalence**:

Text of Article: “**Right to an effective remedy and to a fair trial**”

1. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
3. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

The principle of effectiveness has to be read together with the principle of equivalence, although depending on circumstances each may have an individual application. The latter requires that, where Member States enact national rules to provide effective remedies for breach of EU law, these rules, including procedural ones, must comply with the principle of equivalence.<sup>13</sup> As such, national authorities, including judicial bodies, must ensure that domestic rules on remedies are not less favorable and are applied without distinction, whether the case concerns an EU law infringement or a national law one.<sup>14</sup>

Case C-63/01, *Evans v. The Secretary of State for the Environment, Transport and the Regions*, ECLI:EU:C:2003:650, para. 45.

*“It is settled case-law that in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favorable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness) (see, in particular, Case C-120/97 *Upjohn* [1999] ECR I-223, paragraph 32).”*

C-63/08, *Pontin vT—Comalux SA*, ECLI:EU:C:2009:666, on the restriction of remedies available to women dismissed during pregnancy

*“44 Those requirements of equivalence and effectiveness embody the general obligation on the Member States to ensure judicial protection of an individual’s rights under Community law. They apply both as regards the designation of the courts and tribunals having jurisdiction to hear and determine actions based on Community law and as regards the definition of detailed procedural rules (see *Impact*, paragraphs 47 and 48).*

*45 The principle of equivalence requires that the national rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law, where the purpose and cause of action are similar (Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 41). However, that principle is not to be interpreted as requiring Member States to extend their most favorable rules to all actions brought in the field of employment law (see *Levez*, paragraph 42). In order to establish whether the principle of equivalence has been complied with, it is for the national court, which alone has direct knowledge of the procedural rules governing actions in the field of domestic law, to determine whether the procedural rules intended to ensure that the rights derived by individuals from Community law are safeguarded under domestic law comply with that principle and to consider both the purpose and the essential characteristics of allegedly similar domestic actions (see *Levez*, paragraphs 39 and 43, and*

<sup>13</sup> See Case C-63/01, *Evans*, para 45.

<sup>14</sup> See C-63/08, *Pontin vT—Comalux SA*, paras. 44-47, *infra*.

*Case C-78/98 Preston and Others [2000] ECR I-3201, paragraph 49). For that purpose, the national court must consider whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics (see, to that effect, Preston and Others, paragraph 57).[...]*

*47 As regards the principle of effectiveness, it is apparent from the Court's case-law that cases which raise the question whether a national procedural provision renders the exercise of an individual's rights under the Community legal order practically impossible or excessively difficult must similarly be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national instances. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (see Case C-426/05 Tele2 Telecommunication [2008] ECR I-685, paragraph 55, and case-law cited).[...]*

*49 Lastly, as is apparent from settled case-law, it is not for the Court to rule on the interpretation of national law, that being **exclusively for the national court**, which must, in the present case, determine whether the requirements of equivalence and effectiveness are met by the provisions of the relevant national legislation (see Angelidaki and Others, paragraph 163). However, the Court, when giving a preliminary ruling, may, where appropriate, provide clarification designed to give the national court guidance in its interpretation (see Case C-53/04 Marrosuand Sardino [2006] ECR I-7213, paragraph 54; Case C-180/04 Vassallo [2006] ECR I-7251, paragraph 39; and the order of 12 June 2008 in Case C-364/07 Vassilakis and Others, paragraph 143).*

**Questionnaire prepared by the Centre for Judicial Cooperation (CJC) in collaboration with  
the Association of European Administrative Judges (AEAJ)**

**PART 1  
The role of the national courts**

**Q1:** Are there national legislation or soft law guidelines defined by the executive or by the judiciary itself, concerning the criteria to be followed when choosing:

- between several types of remedies (e.g. the grant of injunctions, the imposition of fines, expulsion or entry bans and detention or other limitation of freedom of movement), and
- when deciding about the severity of the sanction (e.g. the amount of the fine, the temporary or final suspension of the economic activity, the period of entry bans or deprivation of liberty)?

Please give examples (especially in environmental law, non-discrimination law, aliens law, and utilities (e.g. telecommunication law)), drawn from such legislation and such guidelines, if they exist.

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**(a.)** Are soft law guidelines followed by national courts?

- Sometimes
- Always
- Never
- Nearly Never

Please explain.

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**Q2:** Does the legislation/soft law guidelines concerning remedies usually make explicit reference to effectiveness, proportionality and dissuasiveness? If so, do they specify how these principles should be applied?

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**Q3:** What would a national court do if the national legislation, did not provide for a remedy and/or did not indicate specifically how the principles should be applied? See, for instance, on the

application of remedy for breach of EU law, case C- 591/10, *Littlewoods Retail Ltd*<sup>15</sup> and Case C-565/11, *Irimie*<sup>16</sup>)

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**Q4: Gap filling.**

**(a.). When national rules give no guidance on effectiveness, proportionality and dissuasiveness, can the national court fill the gap** (e-g. the judge select the remedy and determines its content) ? If so under which conditions can the court do so and define the criteria used for effectiveness, proportionality and dissuasiveness? What is the allocation of gap filling power between the public administration (including independent regulatory authorities) on the one hand and the court on the other hand? (See Joined cases C-362/13, C-363/13 and C-407/13 *Fiamingo*<sup>17</sup>)

Is the gap filling power limited by the criminal nature of the offence? Please differentiate between areas of law/situations in which the principle “*nulla poena sine lege*” applies and other areas of law where the infringement is not of a criminal nature.

[*Note for the rapporteur:* We assume that when the administrative infringement is of criminal nature the judicial gap filling function is limited or non-existing. But please confirm whether this is so.]

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15 Case C- 591/10, *Littlewoods Retail Ltd and Others*, ECLI:EU:C:2012:478: “26 *It follows from that case-law that the principle of the obligation of Member States to repay with interest amounts of tax levied in breach of EU law follows from that law.*

27 *In the absence of EU legislation, it is for the internal legal order of each Member State to lay down the conditions in which such interest must be paid, particularly the rate of that interest and its method of calculation (simple or ‘compound’ interest). Those conditions must comply with the principles of equivalence and effectiveness; that is to say that they must not be less favourable than those concerning similar claims based on provisions of national law or arranged in such a way as to make the exercise of rights conferred by the EU legal order practically impossible (see, to that effect, San Giorgio, paragraph 12; Weber’s Wine World, paragraph 103; and Case C-291/03 MyTravel [2005] ECR I-8477, paragraph 17)”.*

16 Case C-565/11, *Irimie*, ECLI:EU:C:2013:250:“26 *As regards the principle of effectiveness, that principle requires, in a situation of repayment of a tax levied by a Member State in breach of European Union law, that the national rules referring in particular to the calculation of interest which may be due should not lead to depriving the taxpayer of adequate compensation for the loss sustained through the undue payment of the tax (see Littlewoods Retail and Others, paragraph 29)”*

17 Joined Cases C-362/13, C-363/13 and C-407/13, *Fiamingo v Rete Ferroviaria Italiana SpA*, ECLI:EU:C:2014:2044:“62 *Furthermore, where, as in the present case, EU law does not lay down any specific penalties in the event that instances of abuse are nevertheless established, it is incumbent on the national authorities to adopt measures that are not only proportionate, but also sufficiently effective and a sufficient deterrent to ensure that the measures taken pursuant to the Framework Agreement are fully effective (see, in particular, Angelidaki and Others, EU:C:2009:250, paragraph 158, and the orders in Affatato, C-3/10, EU:C:2010:574, paragraph 45, and Papalia, EU:C:2013:873, paragraph 20).*

63 *While, in the absence of relevant EU rules, the detailed rules for implementing such measures are a matter for the domestic legal order of the Member States, under the principle of their procedural autonomy, they must not, however, be less favourable than those governing similar domestic situations (principle of equivalence) or render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (see, in particular, Angelidaki and Others, EU:C:2009:250, paragraph 159, and the orders in Affatato, EU:C:2010:574, paragraph 46, and Papalia, EU:C:2013:873, paragraph 21).”*

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**(b.) Who should fill the legislative gap according to the national law: the administration or the judiciary?**

- (i) Neither
- (ii) Only the administration
- (iii) Only the judiciary
- (iv) Both the judiciary and the administration.

Please, explain.

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**(c.) Judicial gap filling.** If the reply was (iii) or (iv) in question (b) above, meaning that a judicial gap filling power related to remedies is recognized to courts, what are its limits? In ensuring the principle of effectiveness of EU legislation, would the court take into consideration also the effectiveness of related European fundamental rights? Would a court in your country be able to raise issue of the conformity with the principle of effectiveness and European fundamental rights ex officio? (e.g. inhuman or degrading treatment due to the living conditions in the holding centre of illegal entry migrants).

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**(c.1)** Can the court modify the conditions set out in legislation for access to or content of an existing remedy? E.g. modify the temporal limitation of access to courts, invoke certain factual or legal circumstances that expand access to court or legal aid, modify the effects, the length or the conditions of an injunction.

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**(c.2)** Can the court create a new remedy to fully implement the principle of effectiveness? In the affirmative case, please provide examples of newly created remedies.

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**(c.3)** Are there any other factors limiting the gap filling power of courts, in relation to remedies? E.g. is there a correlation with the possibility to use discretionary power by the administration? How would administrative discretion limit the gap filling judicial power?

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**(d.) Gap filling by the administration.** If the reply was (ii) or (iv) in question (b) above, meaning that the gap filling power is conferred to the administration, do courts make reference to the EU principles when reviewing the exercise of that power?

*Example:* Suppose that legislation does not indicate which measures have to be taken, in order to protect sites adjacent to those which are unlawfully polluted, and the administration conditions the use of those sites on the adoption of precautionary measures. Are these measures subject to the “review of compliance” with the principles of effectiveness, proportionality and dissuasiveness, by national courts?<sup>18</sup>

*Example:* Suppose that remedies against air pollution are not foreseen by legislation despite non-compliance with EU legislation, is the public administration allowed to take measures such as car restriction or ban and what is the control of judges on such measures?

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**Q5. Evaluating the conflicts between national legislation implementing EU law and the principles of effectiveness, proportionality and dissuasiveness.**

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18 See C-379/08 Erg: “78 *In exceptional circumstances, such as those described at paragraphs 72 and 73 above, Directive 2004/35 must be interpreted as allowing the competent authority to require the operators on the land adjacent to the whole shoreline at which the remedial measures are directed to implement those measures themselves.* 79 *Directive 2004/35 does not specify the precise conditions under which the competent authority may require the operators concerned to take the remedial measures identified by the authority. In such circumstances, it is for each Member State to determine those conditions, which must, first, seek to attain the objective of the directive, as set out in Article 1 thereof, namely to prevent and remedy environmental damage and, second, comply with EU law, in particular its general principles.*

83 *As the Italian Government correctly observed, the competent authority has a legitimate right, pending the implementation of environmental remedial measures determined by it, to take any appropriate measures in order to prevent the environmental situation deteriorating further in the area in which such measures are put into effect, or indeed, pursuant to the precautionary principle, to prevent the occurrence or resurgence of further environmental damage in sites adjacent to the areas at which such measures are directed.”*

[*Note for the rapporteur:* Here there is national legislation concerning remedies but it conflicts with the principles. See Case C-81/12, *Asociația ACCEPT*<sup>19</sup> and Case C- 331/13 *Nicula*.<sup>20</sup>]

**(a.1) Assessing the role of EU principles over sanctions: general questions.**

The set of examples above illustrates a potential conflict between national laws and the principles: What are the available techniques which a national judge can use, so as to ensure compliance with EU law?

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Can the national court ‘deviate’ from national legislation?

If yes:

- Would the national judge interpret national law according to the above mentioned principles and thus modify the national remedy?
- Could the national law be dis-applied and if so, could the judge issue an order containing a ‘new remedy’?
- Other hypothesis?

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**(a.2) Assessing the role of effectiveness on sanctions: Penalties have to be effective<sup>21</sup>.**

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19 Case C-81/12, *Asociația ACCEPT*, ECLI:EU:C:2013:275, nyr.: “73 [...] Article 17 of Directive 2000/78 must be interpreted as meaning that it precludes national rules by virtue of which, where there is a finding of discrimination on grounds of sexual orientation within the meaning of that directive, it is possible only to impose a warning such as that at issue in the main proceedings where such a finding is made after the expiry of a limitation period of six months from the date on which the facts occurred where, under those rules, such discrimination is not sanctioned under substantive and procedural conditions that render the sanction effective, proportionate and dissuasive. It is for the national court to ascertain whether such is the case regarding the rules at issue in the main proceedings and, if necessary, to interpret national law as far as possible in light of the wording and the purpose of that directive in order to achieve the result envisaged by it.”

20 See Case C-331/13 *Nicula*, ECLI:EU:C:2012:478, on the remedy system to repay the tax levied in breach of EU law: “37 In addition, the effect of that system is to exempt the national authorities from the requirement to take account of the interest payable to the taxpayer for the period between the date of the undue levying of the pollution tax and the repayment thereof, and, accordingly, does not satisfy the requirement set out in paragraph 29 of the present judgment.”

38 In those circumstances, it is clear that a system of repayment such as that at issue in the main proceedings does not make it possible for individuals effectively to exercise their right under EU law to seek repayment of a tax levied in breach of EU law.”

21 See *Texdata C- 418/11*: “51 In particular, the Court has held that the severity of penalties must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely deterrent effect, while respecting the general principle of proportionality (see, by analogy, Case C-81/12 *Asociația Accept* [2013] ECR I-0000, paragraph 63 and the case-law cited).”

When applying national legislation, if the judge identifies a conflict with the principle of effectiveness and the specific domestic provisions at issue, what are the most common ‘tools’ available to her to address this conflict?

*Example:* A driver causes a traffic accident. Regardless of criminal/civil sanctions, can the court add an additional penalty to those stated by the law, for example the suspension/ withdrawal of the driving licence of a driver, on the basis of effectiveness and dissuasiveness of sanctions?

*Example:* Suppose that administrative fines are foreseen in case of breach of species protection legislation. The level of fines does not provide adequate incentives to adopt precautionary measures. Could judges increase fines in order to ensure compliance?

*Example:* In case of a third country national who has not respected the domestic procedural time limit for lodging an appeal against the first court order of removal, would the court automatically reject the appeal, or on the basis of circumstantial evidence accept the appeal introduced after the expiry of the procedural time limit? What would these circumstances be (e.g. third country national was not informed in a language (s)he understands about the first instance decision, etc.)?

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Does the principle of legality play a role in the decision of the court? If so, how? ( the question is meant to address the problem of judicial discretion over the definition of remedies).

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**(a.3) Assessing the role of proportionality on sanctions: Penalties have to be proportionate.**

When applying national legislation if the judge identifies a conflict between the principle of proportionality and the specific provisions at issue, what are the most common ‘tools’ available to address this conflict? [see for instance, Dublin III Regulation (604/2013), in Art 28 (2)]

*Example:* National law imposes a fine somewhere between €1000 to 3000 (Euro). After scrutinizing the proportionality requirement, the judge reaches the conclusion that even the lesser amount is too high: Can the judge reduce the fine below the minimum threshold established by the law, in accordance with the principle of proportionality?

*Example:* National law defines a time span for the temporary suspension of the activities of a factory, polluting the environment to somewhere between 60 days and 6 months. The judge believes that the minimum closure period violates the principle of proportionality ( too long!). Can the judge decrease the period of suspension below 60 days by applying the principle of proportionality?

Can the court do it directly or does it first have to ask for a preliminary reference from the CJEU? What are the criteria upon which the court has to make the decision?

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Does the principle of legality play a role in the decision of the court? If so, how? ( the question is meant to address the problem of judicial discretion over the definition of remedies).

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**(a.4) Assessing the role of dissuasiveness on sanctions: Penalties have to be dissuasive.**

When assessing the dissuasiveness of a particular sanction what are the criteria to be used by the national court?

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*Example:* National law defines a fine for a violation of food safety law, ranging between €1000 and 3000 (Euro). The judge believes that even the higher threshold is not sufficient to dissuade enterprises from producing/marketing dangerous foodstuff. Can she issue a fine higher than €3000 claiming that national law is not conforming to the principle of dissuasiveness? If not is there any remedy available to her to promote true deterrence.

*Example:* National law defines a time span for the temporary suspension of the activities of a factory polluting the environment to between 30 days and 6 months. The judge believes that even the longest period is too short and that it does not comply with the principle of dissuasiveness. Can the national judge increase the time of suspension beyond 6 months by applying the principle of dissuasiveness?

Can the court modify the sanction directly or does the judge first have to ask for a preliminary reference from the CJEU to assess the conflict of national law with the principle of dissuasiveness?

Does the principle of legality play a role in the decision of the court? If so, how? ( the question is meant to address the problem of judicial discretion over the definition of remedies).

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**(a.5) Is the evaluation of compatibility between national law and EU principles, solved differently if the sanction is criminal in nature, as that term is understood in accordance with the case law of the CJEU and ECtHR? How does the ‘ne bis in idem’ principle play out?**

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**(a.6)** Is the evaluation of compatibility between national law and EU principles solved differently in different fields/areas of administrative law? For instance, is the principle of proportionality or that of deterrence implemented through a different test, in different fields or areas of such law? Please provide examples from your case law.

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**(a.7)** When applying these principles in court, please quantify the relevance of each principle while defining remedies on the basis of the current case law (from 1 to 3)?

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**Part II**

**Choice of remedies and escalation of sanctions.**

**Choice of remedies**

**Q1.** Where the national administrative court can select remedies within a predefined legislative menu, are the principles of effectiveness, proportionality and dissuasiveness considered and applied, or presumed to have been taken already into consideration by the legislator? (See Case C-54/07, *Feyn*<sup>22</sup>, see also Geneva Convention, at Art 31(1))

**(a.)** What are the essential elements to be taken into account in selecting the appropriate remedy?

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**(b.)** How do the principles affect the choice between remedies?<sup>23</sup>

For example is the choice between a fine, an injunction, entry ban or deprivation of liberty influenced by proportionality and/or dissuasiveness? If so explain in what way ( does the judge have to choose the least burdensome sanction first?). [See for instance, Recast Reception Directive (2013/33), at Art. 8 and Art. 9; Recast Qualification Directive (2011/95), at Art. 12].

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**(c.)** Is there a difference in the choice of remedies if the infringement relates to the violation of a fundamental right as distinct from an ordinary right, which is not included in the Charter? What are the main sanctions used by the judge in order to justify the choice of remedies? (e.g. seriousness of the breach, impact on victim recidivism etc.)

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22 Case C-54/07, *Firma Feyn NV*, para.39: “If it appears appropriate to the situation at issue in the main proceedings, those sanctions may, where necessary, include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings.”

23 See *Texdata C-418/11*, para 52: “ In that respect, measures provided for under national legislation must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question: **where there is a choice between several appropriate measures**, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, *Joined Cases C-379/08 and C-380/08 ERG and Others* [2010] ECR I-2007, paragraph 86, and *Case C-210/10 Urbán* [2012] ECR, paragraph 24).”

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**(d.)** Does the identity of the defendant (whether the public administration or a private party, a firm or an individual) affect the choice of remedy by the national court? E.g, is the principle of proportionality applied differently when the State is a defendant? Is the principle of dissuasiveness applied differently in such circumstances?

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**Escalation of remedies**

**Definition of escalation:**

Escalation implies the possibility to use ‘stronger’ remedies when previous remedies have failed. (e.g: A polluter has been fined, but continues polluting so that an injunction to stop polluting or to suspend the activity, might follow the fine; an individual sanctioned for defamatory or discriminatory statements, or conduct related to employment continues this discriminatory conduct, see ACCEPT case).

**Note:** the distinction between two following forms of escalation for the same infringement:

- a. Escalation within the same type of sanction;
- b. Escalation through a combination of different sanctions.

**Q2.** Escalation within the same sanction

**(a.)** When there is a persistent infringement can the judge escalate the sanction in relation to the same violation, where the original sanction has not been complied with (e.g. increase the amount of the fine, transform an injunction that temporarily stops the activity into a permanent injunction closing down the activity, etc.)?

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**(b.)** Can the escalating power be exercised by the court even without an explicit legal statutory provision? Does the power of the judge to escalate apply to every type of sanction in the same way? Or are there differences between fines, injunctions, declarations and other types of remedies?

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(c.) How do the principles of effectiveness, proportionality and dissuasiveness affect the possibility to escalate sanctions?

*Example:* In case of a third country national (TCN) staying illegally in the country, Directive 2008/115 provides for a detailed procedure for the removal of the TCN (in part. Arts 6-8). The different stages of removal vary depending on whether the TCN accepts to be voluntarily returned or not, usually starting with the return decision and culminating with the removal, and possibly accompanied by an entry ban whose length is variable (Art. 11). What are the different stages in the removal procedure established by your country? Do these include coercive measures (e.g. custody or other deprivation of liberty measures)? Do they require gradual escalation? Is the escalation and the choice of the escalation determined by the principle of proportionality? For instance do courts use the principle of proportionality to check if there are alternative measures less coercive than deprivation of liberty ? What elements does the court take into account in the balancing exercise, e.g. risk of absconding, severe crime, terrorism related crimes. In case the national legislation does not define detention/deprivation of liberty as a last resort measure, how do the national courts approach this?

*Example:* In the case of a TCN illegally staying in the country who was taken in custody, being suspect of a severe crime, or terrorism related acts, do the stages in the removal procedure need to be strictly followed? Or can the administration/court, for reasons of effectiveness, bypass a step in the escalating measures?

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**Q3. Escalation between different sanctions within administrative enforcement**

(a.) In case of a persistent infringement can the judge escalate the sanctions in relation to the same violation where the original sanction has not been complied with (e.g. move from a fine to an injunction)

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(b.) Can the escalating power be exercised even without an explicit legal statutory provision? Does the power of the judge to escalate apply to every sanction in the same way? Or is there a difference between fines, injunctions, declarations and other types of remedies?

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(c.) How do the principles of effectiveness, proportionality and dissuasiveness affect this power?

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**(d.)** Can the Rapporteur provide examples of how proportionality has contributed in defining the sequence of remedies modifying that provided by the legal framework? When, for example, has the escalation been considered in violation of proportionality because “progressivity” of sanctions has been lacking?

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**(e.)** Can the Rapporteur provide examples of changes in legislation concerning administrative remedies, to comply with the principle of proportionality that have been favoured by judicial practices?

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**(f.)** Can the Rapporteur provide examples of changes in legislation concerning administrative remedies to comply with the principle of dissuasiveness promoted by judicial practices?

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**Part III**

**Combination or heap of remedies within administrative enforcement.**

In the previous section of this questionnaire choice of remedies by national courts has been analysed. In this section we would like the Rapporteur to examine the possibility (and limits) of combining various remedies within the same type of enforcement.

**(Q.1)** Can different remedies addressing the same infringement be combined/associated?

*Example:* a company produces food potentially dangerous to health. The danger materializes. Is it possible ( at the same time) to fine the company, to suspend the activity and to order a change in the production process? Can these remedies and sanctions be combined in a single case scenario?

*Example:* a company does not comply with the permit delivered by authorities. Do authorities have different escalating remedies? Do authorities have to comply with a specific scale of measures or do they have a large margin of appreciation as regard the level of action (for instance by directly adopt a suspension of the permit or even the cancellation of the permit)?

*Example:* The Return Directive provides that an entry ban should automatically be issued with the removal order; the length of the entry ban has to be established by the national authorities, depending on the circumstances of the case. What are the circumstances commonly considered by the national courts in your country? (Art. 11(2) Return Directive - The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.)

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*Example:* What about in the case of discriminatory conduct of the employer related to the hiring or working environment based on sexual orientation, gender, age criteria?

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**(Q.2)** If remedies can be combined, how do the principles of effectiveness, proportionality, and dissuasiveness, influence the choice of ‘if’ and ‘how’, the court should combine such remedies?

**(a.)** How does effectiveness affect the combination of remedies? For example can an affirmative injunction to clean the site be combined with an order prohibiting the use of certain pollutants? Could injunctions combine suspension of permit and injunction to clean the site or a combination of measures including revision of the permit by judges ?

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(b.) How does proportionality affect the combination of remedies? For example can administrative fines and court injunctions be imposed on the same occasion and/or sequentially in the same case? What are the limits to this type of approach on the basis of national current case law?

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(c.) How does dissuasiveness affect the combination of remedies? What are the limits to this type of approach of the basis of national current case law?

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(Q.3) How does the criminal nature or aspect of the sanction affect the possibility to heap different remedies? Here we assume that the administrative court can also administer criminal sanctions.

*Scenario 1: the fine is criminal in nature but the injunction is not.* Is this type of combination between different remedies possible in your system? Do judges consider the three principles when determining what the combination should be? For example does the principle of proportionality apply differently if the two sanctions are administrative or if one is criminal and the other is administrative?

*Scenario 2: both fine and injunction are of a criminal nature.* Is it then possible for the judge to impose both sanctions? Does the principle 'ne bis in idem' preclude the use of multiple sanctions? What are the limits regarding the principle of ne bis in idem (Art. 4 of Protocol No. 7 of the ECHR)?

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**Part IV**

**Combining multiple enforcement mechanisms**

In the previous part we consider the possibility of combining remedies within one type of enforcement ( civil, criminal, administrative). We now move to a scenario where the potential combination concerns remedies and sanctions based on different enforcement mechanisms e.g. combining a criminal and administrative sanction, or public and private enforcement ( for example in competition law injunctions and damages). The combination of different enforcement mechanisms generally presuppose the operations of different courts. However in some instance the same court can administer remedies based on different enforcement mechanisms.

**(Q.1)** Is it possible that the same infringement has different, multiple consequences in the field of criminal and administrative law? Can multiple enforcement mechanisms be combined? What are the limits, if any?

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**(Q.2)** Does your legal order foresee a combination of remedies to be imposed by criminal courts and administrative remedies of a criminal nature, (as that term is understood according to the case law of the ECtHR) to be imposed by administrative courts? How do the principles affect such combination? For example, does the principle of proportionality induce judges to use administrative rather than criminal sanctions? Fines rather than imprisonment?

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**(Q.3)** When the violation has already been established by a criminal court, does the administrative court have to take that into account, when defining the appropriate remedy? For example would the proportionality principle imply the reduction of a criminal fine if the activity has been suspended by an administrative injunction?

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**Part V**

**Legal innovation through judicial decision making in administrative law:**

**(Q.1)** Have judges created new remedies whilst enforcing administrative law when implementing EU law? (See Unibet C-432/05<sup>24</sup>)

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**(Q.2)** When have the principles of effectiveness, proportionality and dissuasiveness been the drivers of judicial innovation?

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**(Q.3)** What are the principle constraints of judicial innovation? Can the Reporter provide examples where courts have rejected a request for remedies on the grounds of one of these constraints?

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24 Case C-432/05, Unibet, ECLI:EU:C:2007:163, para. 77: “[...] the principle of effective judicial protection of an individual’s rights under Community law must be interpreted as requiring it to be possible in the legal order of a Member State for interim relief to be granted until the competent court has given a ruling on whether national provisions are compatible with Community law, where the grant of such relief is necessary to ensure the full effectiveness of the judgment to be given on the existence of such rights.”