



**SEMINAR ORGANISED BY THE SUPREME COURT OF SPAIN IN COOPERATION WITH ACA-  
EUROPE**

**Madrid, 21 November 2022**

***Questionnaire***

***Application of general principles and clauses in the case law of contentious-administrative courts***

In order to deepen the open dialogue between the high administrative jurisdictions of Europe, this seminar will analyse the application, within the administrative legal system, of different general principles or clauses of law.

Given the variety and large number of existing general principles, an effort has first been made to delimit and select, on the basis of their topicality or potential expansion, a series of general principles which, although underlying most legal systems, nevertheless present differences in the various legal systems in terms of their nature, their recognition in legal norms and, in short, with regard to their functionality, with divergences evidenced in particular by their judicial application.

The seminar offers an eminently practical vision. For this reason, the questionnaire primarily takes judicial experience into consideration, suggesting the following perspectives as lines of analysis:

- (i) General principles of law in the system of sources;
- (ii) Common incorporation of general principles of law: European Union and horizontal dialogue;
- (iii) General principles and fundamental rights;
- (iv) General principles in certain sector-specific areas of public law, selecting, in this regard, some of these principles to determine their application and projection in fields such as *administrative organisation and procedure / administrative sanctions / public subsidies or grants / contracting by public bodies / town planning and environment / taxation*.

In short, the aim of the seminar is to find out whether there are convergences in the guidelines of the high jurisdictions of the Member States, by determining the degree of influence of European Union law (e.g. through Directive 2006/123/EC on services in the internal market, or through incorporation of the principle of good administration, recognised in Article 41 of the Charter of Fundamental Rights) in its application,



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without losing sight of the effects of the horizontal dialogue between the high national jurisdictions, which we hope the seminar can continue to stimulate.

## I. – GENERAL PRINCIPLES OF LAW IN THE SYSTEM OF SOURCES

**1º) What place and function do general principles of law have in the system of sources of your country's legal system?**

- **They are applied where there are gaps in the law**
- They may be applied directly, even to the extent of displacing the initially applicable written law and prevailing over it.

**Explain your answer briefly:** Overall, as agreed by the academia, it is possible to distinguish four main functions attributed to general principles of law in our legal system – it varies from regulatory to interpretative to gap filling function and one can also resort to principles in case a conflict of applicable norms arises. Moreover, as per the Constitutional Court's doctrine, courts shall apply general principles of law when a legal loophole emerges (though it is often done together with certain norms of the Constitution). General principles are important guiding precepts that mostly arise directly from the Constitution and not only help to steer legislative initiatives but can be significant in interpretation of applicable codified norms as well.

**2º) Can it be said that the most relevant general principles of law in your culture and legal tradition have been positivised, i.e. enshrined with legal status in your country's judicial system?**

- **Yes**
- Yes, the most relevant ones (please indicate briefly the most notable of these)
- No

**3º) In the judicial practice of Public Law, are general principles of law frequently invoked and applied as a basis for decisions?**

- They are frequently invoked and applied, and are also relevant and decisive in the settlement of disputes.
- **They are frequently invoked and applied, although generally in a complementary manner, to reinforce challenging arguments based primarily on the interpretation and application of written rules.**
- They are not frequently invoked and applied as a basis for decisions.

**Explain your answer briefly:** It is not uncommon for a judicial ruling to contain references to various general principles (e. g. proportionality, fairness), but in most



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cases it comes as a reinforcement together with an applied written rule (or constitutional norm), not a stand-alone reasoning. As most of the general principles can be directly traced back to the Constitution and legal acts are (or at least are supposed to be) drafted with a sight of such precepts, it is rarely needed to resort to principles only in justification of judicial decisions.

**4<sup>o</sup>) If you have answered yes to the previous question, can it be said that the invocation and application of general principles of law is done in a general and transverse way, in all areas or matters of Public Law?**

- **Yes**
- Especially or particularly in certain matters, or in certain sector-specific areas (in this case, explain your answer briefly)

**5<sup>o</sup>) In your country's legal system, are there general principles specific to Administrative Law, independent of other general principles of law?**

- There are no general principles specific to Administrative Law
- **There are principles specific to Administrative Law that may be applied in conjunction with other general principles**
- There are principles specific to Administrative Law that exclude and displace the application of the other general principles

**Explain your answer briefly:** There is a number of principles (though there is no uniform and exhaustive list of them) prescribed specifically to Administrative law, although often applied together with other general principles (e. g. Law on Public Administration foresees that activities of entities of public administration shall be based on such principles as efficiency, novelty, transparency and openness to change, operations be carried out through the so-called 'single-desk' ('one-stop-shop') principle etc. (Art. 3)). There are also certain principles not directly enshrined in administrative legal acts, yet derived directly from the Constitution (e. g. principle of good administration).

## **II. – COMMON INCORPORATION OF GENERAL PRINCIPLES OF LAW: EUROPEAN UNION AND HORIZONTAL DIALOGUE**

**6<sup>o</sup>) Has your country's administrative legal system patently incorporated the general principles of European Union law?**

- **Yes, in general**



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- No special or specific incorporation has been necessary, because in general these principles were already recognised and enshrined in the country's legislation and practice.

**Explain your answer briefly (this question mainly concerns the work of the legislator, i.e. the “legislative system”).** General legal principles enshrined in the EU law are recognized and frequently applied in our legal system. Also, a number of them coincide with legal principles derived from our own Constitution (e. g. protection of legitimate expectations, *lex retro non agit*, legal certainty, proportionality etc.).

**7<sup>o</sup>) Is it common in your country’s judicial practice for the specific general principles of European Union law to be invoked and taken into account in areas where there is no regulatory harmonisation?**

- **Yes, for certain matters**
- No, not generally

**Explain your answer briefly (this question mainly concerns the work of the judiciary, i.e. “judicial practice”).** Sometimes general principles of the EU law are resorted to even when there is no direct obligation to apply the EU law itself – e. g. in competition cases that do not directly fall under the articles 101 and 102 of the TFEU, both principles of the EU law and practice of its courts are still taken into consideration when interpreting and applying our own national rules. Same can be said about principles of public procurement or principle of free movement (e. g. when evaluating person’s right to be crossed out of a national tax registry after moving to another country).

**8<sup>o</sup>) When applying the general principles set out in European Union law, and when it is found that the general European principle applicable to the dispute in question conflicts in some way with national law, has the dispute been resolved through a solution involving the displacement and non-application of the national rule in order to give way to the general European principle?**

- **Yes**
- This solution has been chosen in some cases, while in others different solutions or answers have been used (in this case, explain your answer briefly)

**9<sup>o</sup>) Is it common in judicial practice for the principle of legitimate expectation to be invoked and taken into account?**

- **Yes, as a transversal principle**
- Yes, but only in certain sector-specific matters and areas harmonised by Union law (please indicate what these are)



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No

**Explain your answer briefly.** Principle of legitimate expectations is one of the fundamental principles not only in the EU law, but Lithuania's national law as well, therefore it is applied in both harmonised and non-harmonised areas and frequently taken into consideration.

**10<sup>o</sup>) Can taking the principle of legitimate expectation into account even result in the annulment of administrative decisions that are contrary to or violate those principles?**

- Yes**
- No, these principles are applied only in order to provide for compensation or reparation when they are violated in some way by the decisions of the Administration.

**Explain your answer briefly.** Yes, it can. And while it is true that this principle is often invoked in cases relating to unlawful damages inflicted upon someone, it is not limited to it. One can see the prominence of legitimate expectations concept in areas relating to civil service (especially in calculating time of service of such civil servants as police officers, firefighters etc.), social security and, generally, situations where an individual relied on (or trusted) the state. However, there are two important elements to fulfil when relying on this principle, one being an establishment of a clear legal basis (i. e. certain commitments taken by institution) and person's own good faith.

**11<sup>o</sup>) Has the "principle of good administration" referred to in Article 41 of the Charter of Fundamental Rights of the European Union been adopted and applied in your country's judicial practice?**

- Yes, as a transversal principle**
- Yes, but only in certain sector-specific matters and areas harmonised by Union law (please indicate what these are)
- Not commonly applied

**Explain your answer briefly.** Principle of good administration is one of the key principles of both the European Union and the Republic of Lithuania legal systems. Even though this principle is not directly mentioned in Lithuania's Law on Public Administration, it is nevertheless derived directly from the Constitution (Art. 5(3)). Its prevalence in case-law is omnipresent as the variety of elements can be attributed to it (such as obligation to state reasons, specify the appeal procedure or cooperation of the parties).



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**12<sup>o</sup>) Can taking the principle of good administration into account even result in the annulment of administrative decisions that are contrary to or violate that principle?**

- Yes, in some specific cases.**
- This would never be possible because, among other reasons, this principle applies solely as a guideline for conduct within the Administration and cannot be invoked by the citizen.
- No

**Explain your answer briefly.** There are examples in case law where the Supreme Administrative Court annulled decisions that substantially deviated from the aforementioned principle (e. g. where administrative bodies did not in adequate detail explain legal norms and circumstances, taken into account for making a decision, or where the appeal procedure has not been disclosed and explained to the other party). As this is a binding and one of the most prevalent principles, it is not uncommon for courts to evaluate administrative decisions in the light of this principle.

**13<sup>o</sup>) Is it common in judicial practice for the principle of necessity and proportionality of administrative measures that limit or restrict access to or the exercise of an economic activity to be invoked and taken into account?**

- Yes, this is a positivised principle whose non-observance results in the nullity of the measure or provision of a general nature.**
- Yes, in certain matters and to different extents
- No

**Explain your answer briefly.** As it has been mentioned before, principle of proportionality is one of the most important and ubiquitous principles of our legal system, therefore courts take it into consideration when evaluating measures applied to entities (including when such measures restrict exercise of an economic activity, e. g. revoking entity's licence to sell alcohol, barring an individual from undertaking certain duties after competition rules breach etc.).

**14<sup>o</sup>) With regard to any of the above principles (legitimate expectation, necessity, proportionality or good administration) or other principles, has your country's Supreme Court taken into consideration the interpretation and manner of application of these principles by other European national high jurisdictions?**

- Yes, on some occasions (in this case, explain your answer briefly)
- Never**



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### III. – GENERAL PRINCIPLES AND FUNDAMENTAL RIGHTS

15<sup>o</sup>) According to Article 6, paragraph 3 of the Treaty on European Union, fundamental rights that result from the constitutional traditions common to the Member States shall constitute general principles of the Union's law. Has your country's Supreme Court identified any of these common constitutional traditions?

- Yes, especially on the basis of the case law of the Court of Justice or the European Court of Human Rights**
- Yes, especially on the basis of the case law of the Supreme Courts of other Member States.
- No such identification has taken place.

16<sup>o</sup>) What status and importance does the principle of non-discrimination and gender equality have in your country's judicial practice?

- It is a principle commonly and generally taken into consideration, across all areas
- It is a principle that is taken into consideration and applied in certain legal relations and sector-specific areas**

**Explain your answer briefly.** Though principle of gender equality (as such) has not yet been widely applied in our court's practice (rather a more general fundamental principle of equality of treatment would be resorted to in cases where it is necessary), principle of non-discrimination is omnipresent in various areas and is invoked frequently (especially in public procurement cases and supervision of entity's activities).

17<sup>o</sup>) In the judicial practice of your country, is the principle of protection of particularly vulnerable groups (e.g. minors, women, people with disabilities) invoked and applied?

- Yes, in a general, open and transversal manner
- Yes, for certain groups that are predetermined and identified in the different sector-specific rules (give a significant example)
- No**

**Explain your answer briefly.** As there is no fixed list of types of people that might be identified as vulnerable group, such principle as described in the question above is not widely applied in our judicial system. However, it does not mean that where it is necessary special status of people possessing some of the aforementioned characteristics is not taken into consideration while applying positive norms (e. g.



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there have even been cases where the Supreme Administrative Court of Lithuania followed Parliamentary Assembly of the Council of Europe resolution on the situation of Roma in Europe No. 1740(2010) and jurisprudence of the ECHR and took into account vulnerable status of those people in determining damage inflicted upon them through removal of their buildings. Same has been done in certain instances where party's age (whether old or young) or health condition have been considered as relevant in determining damages). Thus a precept of taking into consideration certain characteristics exists even if it is not named in the same way as it is formulated in this question.

**18<sup>o</sup>) Do the judicial bodies demand enhanced reasoning in cases where the contested administrative measure or decision (e.g. eviction from housing, granting of nationality) affects these vulnerable groups (e.g. minors, women, people with disabilities) or has an impact on other constitutional values such as protection of the family?**

- No special grounds are required in these cases
- Yes, and their absence results in the nullity of the decision**

**Explain your answer briefly.** Even though there is not a particular principle of protection of vulnerable groups (such as named in this question) enshrined in our legal system, that does not mean those circumstances are not taken into consideration not only when an administrative measure is being evaluated by a judge, but also during the decision-making process of an authority. Such characteristics as described in this question definitely have an impact on weighing the appropriateness of a measure and are evaluated. That is especially true now while dealing with cases of apprehended foreign nationals that wish to stay in our country (many of the sensitive details may sway a decision one way or the other).

**19<sup>o</sup>) In your judicial practice, have disputes been raised regarding the issue of the principles of transparency, equality and non-discrimination in relation to decisions based on artificial intelligence or predictive data management systems?**

- Yes
- These principles are not frequently invoked, but some examples exist
- No**

**Explain your answer briefly.** There have not yet been such type of cases where these principles would have been relied on.





## IV. – GENERAL PRINCIPLES IN CERTAIN SECTOR-SPECIFIC AREAS OF PUBLIC LAW

### IV.1. – ORGANISATION AND ADMINISTRATIVE PROCEDURE

20<sup>o</sup>) In the administrative organisation, do the principles of decentralisation and subsidiarity apply?

- Yes
- No
- Not generally, but in certain areas or sectors (in this case, explain your answer briefly)

21<sup>o</sup>) Are the general principles set out below applicable to the procedure for formulating administrative acts and provisions?

Principle of publicity and transparency

- Yes
- No

Principle of proportionality

- Yes
- No

Principle of impartiality

- Yes
- No

Principle of anti-formalism

- Yes
- No

Principle of gratuitousness

- Yes
- No



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Principle of self-correction (executory decision, without the need for judicial assistance).

- Yes
- No**

(If you consider it appropriate, please indicate any other general principles of administrative procedure different from the above)

#### **IV.2. – ADMINISTRATIVE SANCTIONS**

**22<sup>o</sup>) Are the general principles of criminal law applied or projected in the area of administrative sanctions law? (Indicate the answer that you consider best reflects your legislation and practice)**

- Yes**
- Yes, although with nuances arising from the different natures of criminal offences and administrative offences
- Not in respect of minor, lesser or trivial infractions
- Only in relation to infractions that can be characterised as “criminal” in accordance with the doctrine of the ECHR

**Explain your answer briefly.** The Constitutional Court has explained that constitutional principles must be adhered to when the legislator establishes administrative liability for breaches of law. The entire legal system is based on the rule law which among other things presupposes proportionality of the sanction. As per doctrine of the Constitutional Court, the measures adopted not only have to be proportional, but also have to reflect lawful and generally important goals and individual’s rights shall not be restricted more than necessary to achieve them. There also must be a chance to individualize a sanction. It is important to note that the Constitutional Court has emphasized situations when the sanction applied in its nature (e. g. strictness) matches criminal punishment – in such cases the procedural rights conferred to person must be the same as those foreseen in the Constitution (i. e. those constitutional rights are not reserved to those that are persecuted in a criminal trial only). This applies even if the sanction is called an economic one in the law that establishes it.

**23<sup>o</sup>) If you have answered yes to the previous question, could you specify whether or not the following general principles are applied for administrative sanctions, or to what extent?**

**Principle of presumption of innocence and right not to incriminate oneself or plead guilty:**



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- Yes**
- No
- With nuances (in this case, explain your answer briefly)

**Principles of legality and definition of the constituent elements of the offence:**

- Yes**
- No
- With nuances (in this case, explain your answer briefly)

**Principle of non-retroactivity of sanctioning provisions:**

- Yes**
- No
- With nuances (in this case, explain your answer briefly)

**Principle of culpability:**

- Yes**
- No
- With nuances (in this case, explain your answer briefly)

**Principle of proportionality**

- Yes**
- No
- With nuances (in this case, explain your answer briefly)

**Principle of defence and legal assistance:**

- Yes**
- No
- With nuances (in this case, explain your answer briefly)

**Principle of hearing:**

- Yes**
- No
- With nuances (in this case, explain your answer briefly)

**Principle of separation between investigating authority and decision-making authority**

- Yes





- No**
- With nuances (in this case, explain your answer briefly)

#### **Principle of reasoning of the sanctioning decision**

- Yes**
- No
- With nuances (in this case, explain your answer briefly)

#### **Principle of time-barring of administrative offences and sanctions**

- Yes**
- No
- With nuances (in this case, explain your answer briefly)

#### **Principle of judicial protection**

- Yes**
- No
- With nuances (in this case, explain your answer briefly)

#### **Principle of double instance**

- Yes**
- No
- With nuances (in this case, explain your answer briefly)

**(If you consider it appropriate, please indicate any other general principles of administrative sanctions law different from the above)**

### ***IV.3. – SUBSIDIES AND PUBLIC AID***

**24<sup>o</sup>) Is the principle of proportionality applied in order to modulate the consequences of non-compliance by a beneficiary of public subsidies, aid or resources, or in the area of regulated sectors?**

- Yes (in this case, explain briefly in what areas and with what consequences or effects)
- No**

**(If you consider it appropriate, please indicate any other general principles of subsidies or public aid different from the above)**



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#### **IV.4. – CONTRACTING BY PUBLIC BODIES**

**25<sup>o</sup>) Is contracting by public bodies governed by different principles from contracting between private individuals and entities?**

- Yes. Although based on a common foundation, administrative contracting is governed by different principles from civil or private contracting.
- **There are specific principles applicable to contracting by public bodies as regards the procedure for advertising and selecting contractors and the award of the contract, but the performance, execution and effects of the contract are governed by principles substantially the same as those applicable to private contracting.**
- No, public and private contracting are essentially governed by the same rules and principles.

**(If you consider it appropriate, please indicate any other general principles of contracting by public bodies different from the above)**

#### **IV.5. – TOWN PLANNING AND ENVIRONMENT**

**26<sup>o</sup>) Could you say whether the following principles of environmental law are invoked and applied in your judicial practice?**

**Precautionary principle**

- Yes
- No
- **Occasionally, or on a limited basis (in this case, explain your answer briefly)**  
There have only been several cases where such principle was relied on (in particular relating to hazardous waste management).

**“Polluter pays” principle**

- **Yes**
- No
- Occasionally, or on a limited basis (in this case, explain your answer briefly)

**(If you consider it appropriate, please indicate any other general town planning or environmental principles different from the above)**



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#### **IV.6. – TAXATION**

**27º) In tax matters, are the following principles applied in your legislation and judicial practice?**

**Principle of legality: Tax liability can be established only by rules with legal status.**

- Yes**
- No
- With nuances (in this case, explain your answer briefly)

**Principle of economic or contributory capacity**

- Yes
- No**
- With nuances (in this case, explain your answer briefly)

**Principles of equality and generality**

- Yes**
- No
- With nuances (in this case, explain your answer briefly)

**Principle of progressiveness and its limit: non-confiscatory taxation**

- Yes
- No**
- With nuances (in this case, explain your answer briefly)

**(If you consider it appropriate, please indicate any other general principles of tax law different from the above)**

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