



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*

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

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?

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, although generally in a complementary manner, to reinforce challenging arguments based primarily on the interpretation and application of written rules.

**Explain your answer briefly:**

General principles of law are generally invoked in disputes where a matter cannot be decisively determined solely with reference to written laws. In this respect, general principles serve as additional or complementary arguments to aid in the interpretation of law.

4º) 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

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



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There are principles specific to Administrative Law that may be applied in conjunction with other general principles

**Explain your answer briefly:**

In addition to the general principles of law, there are also some general principles of administrative law applicable solely within the sphere of administrative proceedings (e.g., the principle that a judicial body should not substitute an administrative body's decision with its own).

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

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

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”):**

As stated in the answer to a previous question (question 2), general principles have not been positivised, however they are recognised and applied in practice.

**7º) 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?**

No, not generally

**Explain your answer briefly (this question mainly concerns the work of the judiciary, i.e. “judicial practice”):**

The tendency is for general principles of EU law to be considered more in matters where there is regulatory harmonisation and for national general principles to take precedence in areas where there is no harmonisation.



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**8º) 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?**

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)

When such a dispute arises, the resolution is found in the interpretation of national law as much as possible in conformity with EU general principles and EU laws (in terms of the principle of uniform interpretation).

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

Yes, as a transversal principle

**Explain your answer briefly:**

The concept of legitimate expectation is applied to harmonised and non-harmonised areas as it is a general principle of Maltese law that may be applied in all areas.

**10º) 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

**Explain your answer briefly:**

Though not a common occurrence, there have been instances where the Maltese Courts have revoked administrative decisions where applicants successfully established their legitimate expectation.

**11º) 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?**

Not commonly applied



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**Explain your answer briefly:**

Rather than not commonly applied, this is more a matter of the term not being explicitly referred to. The application of good administrative practice is a standard matter in Malta's judicial practice, with the consequence that there is essentially no need to explicitly refer to the principle of good administration in terms of Article 41 of the Charter.

**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.

**Explain your answer briefly.**

Lack of proportionality, unreasonableness, legitimate expectation are all grounds which may result in the annulment of administrative decision.

**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?**

**No**

**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)

On occasions the Maltese courts have adopted principles applied by other European jurisdiction same as Italy and formerly the United Kingdom.

### **III. – GENERAL PRINCIPLES AND FUNDAMENTAL RIGHTS**



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**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

**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

**Explain your answer briefly:**

The principles of non-discrimination and gender equality are, amongst other principles, enshrined in the Maltese Constitution. Article 32 of the Maltese Constitution guarantees that every person in Malta is entitled to the fundamental rights and freedoms set out in the Constitution. Non-discrimination and gender equality are effectively protected under Article 45 of the Constitution which protects against discrimination on various grounds.

**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

**Explain your answer briefly:**

There is no predetermined list of particularly vulnerable groups, however it is recognised that individuals may fall within categories that require additional attention as they run a greater risk of falling victim to economic or social exclusion.

**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



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**Explain your answer briefly:**

Whilst there is recognition and understanding that some cases may require additional attention due the personal circumstances of particular individuals, enhanced reasoning is not explicitly required in these cases.

**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?**

**No**

**Explain your answer briefly:**

There would seem to have been no cases dealing with this issue.

#### **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?**

**Not generally, but in certain areas or sectors**

(in this case, explain your answer briefly)

Due to geographical considerations, most administrative functions are effectively centralised but some decentralised aspects of administration are entrusted to local or regional bodies better suited to the task.

**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



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### **Principle of proportionality**

Yes

### **Principle of impartiality**

Yes

### **Principle of anti-formalism**

Yes

### **Principle of gratuitousness**

Yes

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

Yes

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

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

**22º) 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)**

Only in relation to infractions that can be characterised as “criminal” in accordance with the doctrine of the ECHR

**Explain your answer briefly:**

The prevailing interpretation seems to be that general principles of criminal law only apply in instances where the administrative sanction imposed reaches a threshold



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whereby it can be considered as a criminal sanction. There have been some notable instances in the previous years where administrative sanctions have been challenged on the basis that they provide for criminal sanctions without the additional guarantees given in the context of criminal proceedings.

**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:**

Yes

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

Yes

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

Yes

**Principle of culpability:**

Yes

**Principle of proportionality**

Yes

**Principle of defence and legal assistance:**

Yes

**Principle of hearing:**

Yes



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

Yes

**Principle of reasoning of the sanctioning decision**

Yes

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

Yes

**Principle of judicial protection**

Yes

**Principle of double instance**

Yes

**(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?**

No

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



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**25º) 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.

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

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

**Precautionary principle**

Yes

**“Polluter pays” principle**

Yes

#### ***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

**Principle of economic or contributory capacity**

Yes

**Principles of equality and generality**

Yes



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

Yes

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