



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



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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:

In Portugal, the law general principles play an auxiliary role in the interpretation of administrative law, helping to clarify the meaning of the rule in seeking fair solutions to each conflict.

The gaps in the law should be overcome, firstly, by analogy, and, secondly, by its general principles. In case of doubts, regarding the interpretation of a legal norm or loophole, the general principles (such as the principles of legality; pursuit of the public interest; impartiality; proportionality; good faith, legitimate expectations' protection; justice; responsibility, etc.), provides a path towards the correct interpretation and/or integration of the most appropriate decision, in the terms of article 266, no. 2, Constitution of the Portuguese Republic (CPR) and articles 3-19, Code of Administrative Procedure (CAP).

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:

The general principles have a justificatory value, providing the judge with material criteria for consideration and are, also, a systematizing element of dispersed positive material. Portuguese case law is profuse in the use of law general principles, namely in Administrative Law, Labour Law, Criminal Law, as well as, in Civil Law itself.





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?

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

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

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

Explain your answer briefly:

The Portuguese CAP¹ enshrines specific principles of administrative law - "principle of good administration" (article 5); "principle of collaboration with the private" (article 11); "principle of participation" (article 12); "principles applicable to electronic administration" (article 14), "principle of open administration" (article 17); "principle of loyal cooperation with the European Union" (article 19) - that can be applied combined with other general principles of law.

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?

- X Yes, in general
- o 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").

The Portuguese legal system incorporates general principles of the European and international law. And, sometimes, there may be more or less broad legal understandings on the same subject, such as the European understanding of the principle of gender equality, more demanding than the one existing in the national legal order, which may influence the national legislator, and also the Portuguese administrative authorities' practice.

On the other hand, the role of the national legislator is also relevant in the transposition of European (EU) directives by adopting a transposition act or an "execution national measure", adapting national law to the objectives set by the directives (article 112, no. 8 of the CPR). In this regard, as an example, the Law no. 93/2021 of December 20, which approves the general regime

¹ Approved by Decree-Law no. 4/2015, with the last amendment introduced by Law no. 72/2020, of November 16.





for protection of whistleblowers, transposing the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

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?

- Yes, for certain matters
- No, not generally

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

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?

- 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)

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
- Yes, but only in certain sector-specific matters and areas harmonised by Union law (please indicate what these are)
- No

Explain your answer briefly.

The principle of legitimate expectations is a constitutional principle innate to the rule of law and is invoked, and applied, in many judicial decisions.

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
 - 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.

Please, see the previous explanation.

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?



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- 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.

The Charter of Fundamental Rights of the European Union, which binds Portugal through the Treaty of Lisbon of 2009, broadly, enshrines the "principle of good administration" in its article 41, whose content comprises a very broad range of substantial, formal and procedural elements. In the internal legal order, this principle is expressly provided by article 5 of the CAP, but in a more restricted manner, based on considerations of efficiency, economy and celerity.

12º) 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.

The principle of good administration has difficulty in affirming itself, *per se*, as a cause of invalidities, since courts only control standards of strict legality.

13º) 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.

The principle of proportionality, enshrined in articles 18, no. 2 of the CPR and 7 of the CAP, functions as a general criteria limiting administrative discretionary and related freedoms. The restrictive legal means and the ends obtained must be situated in a "fair proportion" regarding the weighing of cost/benefit. As the Supreme Administrative Court (SAC) has already had the occasion to emphasise "... freedom of economic initiative, both in general and in the health domain, in particular, does not (...) claim an unconditioned or unlimited right to freely install any health establishments in any space (...) without having to respect or be subject to the requirements and/or conditions arising from other principles, as well as, constitutional and legal values in the matter" (cf. SAC decision of 9 November 2012 (Proc. 00382/07.3BECBR)².

² Accessible at <http://www.dgsi.pt/jsta.nsf?OpenDatabase>





14º) 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

The jurisprudence usage from other countries, albeit less frequent, has intensified in the last years. It is possible to demonstrate the influence, from other European courts, in the reasoning of some of the decisions rendered by Portuguese Courts. As an example, the recent decision from the Portuguese Constitutional Court (CC) about the violation of the principle of proportionality in the case of the «metadata law», analyses the constitutional German jurisprudence on the subject (cf. CC Decision no. 2688/2022, of 19 April 2022)³.

III. – GENERAL PRINCIPLES AND FUNDAMENTAL RIGHTS

15º) 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.

16º) 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.

The principle of equality, which incorporates the right to non-discrimination, legally enshrined in article 13 of the CPR and article 6 of the CAP, is one of the structural principles of the Rule of Law, binding all State functions, but also private and collective entities. Portuguese courts have analysed the principle of non-discrimination and the principle of gender equality on several occasions. In this regard, the following constitutional case-law should be mentioned: the CC decision no. 186/90, of June 6 (Proc. 533/88), states that the "principle of equality binds public powers directly, whether they have legislative, administrative or jurisdictional competence"⁴;

³ Accessible at <https://www.tribunalconstitucional.pt/tc/acordaos/20220268.html>

⁴ Accessible at <https://acordaosv22.tribunalconstitucional.pt/>



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the CC decision no. 412/02, of October 10 (Case no. 124/2002)⁵, states that the prohibition of discrimination "points to the illegitimacy of any differentiation of treatment based on subjective criteria (v.g., ancestry, sex, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation or social condition"; and the CC decision no. 424/2021, of July 23 (Case no. 303/2021)⁶, analyses the right to self-determination of gender identity and expression, and the protection of each person's sexual characteristics.

17º) 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.

The "multicultural jurisprudence" of the Portuguese courts, refers to the courts practice in multicultural contexts, which involves any element different from the defined by the majority culture, and is originated by the fact that the parts belong to an ethnic-racial, religious or linguistic minority, have foreign nationality, do not speak or understand the language of the proceedings, or invoke cultural reasons to justify behaviours or certain claims. The "InclusiveCourts" project, created in 2017, analyses the courts relationship with a minority. This project was designed to map and critically evaluate the multicultural jurisprudence of the Portuguese courts in light of international human rights standards, comparing the European and US state courts experiences, and the academic debates on defence culture, multiculturalism and human rights.

18º) 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.

Notwithstanding the general rule concerning the duty to state reasons, in specific cases, in particular due to the decision discretionary nature, may requires a special obligation to state reasons, which the courts have been recognising.

⁵ Accessible at <https://acordaosv22.tribunalconstitucional.pt/>

⁶ Accessible at <https://acordaosv22.tribunalconstitucional.pt/>





19º) 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.

In Portugal, there is no projects implementing advanced artificial intelligence systems operating in the decision-making process and/or in the decision preparation.

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

IV.1. – ORGANISATION AND ADMINISTRATIVE PROCEDURE

20º) 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)

21º) 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

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

- Yes
- No



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(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)

- 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

In Portugal, the concept of an administrative sanction can be defined as a measure of punitive nature applied in administrative relations, upon the commitment of an administrative infraction. Thus, the sanction takes the form of a sanctioning administrative act, combining the pursuit of the public interest and the punitive facet. In turn, the criminal sanction, as a basic expression of public punishment, protects the "primary interests", *i.e.*, the legal values and goods which are essential to community living, such as personal integrity, life, freedom, material and immaterial heritage.

The transposition of criminal law principles to administrative sanctioning law does not happen automatically, but in the necessary extent in order to preserve the essential values that are at the basis of the constitutional rule and are compatible with the administrative sanctioning procedure' nature. Regarding to the direct and global non-applicability of the constitutional principles of criminal proceedings to misdemeanour proceedings, we refer to the CC' decision no. 595/2012, of 6 December 2012 (Proc. 442/12) ⁷.

23º) 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
- 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)

⁷ Accessible at <http://www.tribunalconstitucional.pt/tc/acordaos/20120595.html>





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 defense and legal assistance

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

According with the General Regime of Administrative Offences (GRAO)⁸, the accused has the right to be accompanied by a lawyer, chosen at any stage of the process. Furthermore, the administrative authority will appoint a defence counsel for the accused, automatically or at his or her request, under the terms of the legal aid legislation, whenever the circumstances of the case reveal the need or convenience for the accused to be assisted.

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)

⁸ Approved by Decree-Law no. 433/82, of October 27, with the last amendment introduced by Law no. 109/2001, December 24.





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)

Amongst the principles of administrative sanctioning law, in addition to those mentioned above, are the following: (i) the inquisitorial principle; (ii) the principle of law reservation; (iii) the principle of due process; and (iv) the principle of the prohibition of analogy.

IV.3. – SUBSIDIES AND PUBLIC AID

24º) 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?

In Portugal, the legal framework applicable to the award of public grants refers the existence of non-compliance' penalties, concerning the provision of a general service, by entities receiving grants, defined in the contract with the State (article 5, no. 2, paragraph i)). Thus, given that public grants are subject to the administrative activity' general principles, under the terms of article 2, if there is an obligation' breach, it is admissible that the criteria for defining the sanction' objective value be subordinated to public interest ponderation and to a case-by-case analysis as to the exercise of proportionality and adequacy in light of the possible economic benefit resulting from the infringing conduct.

Within the regulated market, specifically the electricity sector, the Regulation on Commercial Relations of Electric and Gas Sectors⁹ states that the failure to comply with the clause regarding the loyalty period constitutes to the defaulting party's the obligation to indemnify the other party, under the terms stipulated. In this context, "the compensation due shall be proportionate and shall not exceed the direct economic loss to the supplier or market participant involved in the aggregation from the contract termination, including the costs of any investments or bundled services that have already been provided under the contract" (article 19, no. 6 and 7).

IV.4. – CONTRACTING BY PUBLIC BODIES

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.

⁹ Approved by the Regulation no. 1129/2020, of December 30.





- X 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.
- o 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)

According with the Code of Public Procurement¹⁰, in the preparation and execution of public contracts, the CPR and CAP general principles must be respected, as well as the principles of competition; publicity; comparability and intangibility of bids (articles 1-A; 4, no.1; 72, 56 and 70).

IV.5. – TOWN PLANNING AND ENVIRONMENT

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

Precautionary principle

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

“Polluter pays” principle

- X Yes
- o No
- o 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)

According with the Framework Law on the Environment¹¹, besides the principles already mentioned, other may be invoked, namely: the principle of sustainable development; the principle of intra and intergenerational responsibility; and the principle of environmental education (articles 3, point *a*) and *d*) and 4, point *d*)).

IV.6. – TAXATION

27^o) 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.

- X Yes
- o No

¹⁰ Approved by Decree-Law no. 18/2008, of January 29, with the rectification no. 25/2021, of July 21.

¹¹ Approved by Law no. 19/2014, of April 14.





- 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)

According with the CPR and the General Tax Law¹², and besides those already mentioned, other principles can be invoked, namely: the principle of the prohibition of tax retroactivity (article 103 of the CPR); the principle of the law reserve (article 165, no. 1, paragraph *i*) of the CPR); and the principle of participation (article 60 of the General Tax Law).

¹² Approved by Decree-Law no. 398/98, of December 17, with the last amendment introduces by Law no. 7/2021, of September 26.





List of abbreviations and institutional designations

Português (designação completa)	Português (sigla)	English (full name)	English (abbreviation)
Constituição da República Portuguesa	CRP	Constitution of the Portuguese Republic	CPR
Código do Procedimento Administrativo	CPA	Code of Administrative Procedure	CAP
Supremo Tribunal Administrativo	STA	Supreme Administrative Court	SAC
Tribunal Constitucional	TC	Constitutional Court	CC
Regime Geral das Contraordenações	RGCO	General Regime of Administrative Offences	GRAO
Código do Processo dos Tribunais Administrativos	CPTA	Procedure Code of the Administrative Courts	PCAC
Regulamento sobre obrigações declarativas		Regulation on reporting obligations	
Regulamento das Relações Comerciais dos Setores Elétrico e do Gás		Regulation on Commercial Relations of Electric and Gas Sectors	
Código dos Contratos Públicos		Code of Public Procurement	

