



**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

1^o) 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:

Article 142, par. 2 of the Constitution of the Republic of Serbia stipulates that courts are separated and independent in their work, they perform their duties in accordance with the Constitution, laws and other general acts, as stipulated by the law, generally accepted rules of international law and ratified international contracts, and case-law of the European Court of Human Rights in Strasbourg is being observed and practiced in accordance with them.

In accordance with the Law on Organization of Courts, courts decide in compliance with the Constitution, other general acts, as stipulated by the law, generally accepted rules of international law and ratified international contracts.

The Republic of Serbia has not yet become the full-fledged member of the EU, so the EU law will be legally binding for our country once its membership is accepted. Regardless of that, one portion of general principles of the EU law has already been incorporated in the Constitution of the Republic of Serbia and they are being applied as such.

General legal principles are defined by the Constitution, laws and other general acts and regulations.

2^o) 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

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



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- 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:

Same as answer to question 1.

4^o) 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)

EU law principles which are incorporated in positive regulations are being applied through the enforcement of these regulations.

5^o) 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:

All general principles incorporated in the Constitution, Law on Administrative Disputes, Law on State Administration, Law on General Administrative Procedures and laws regulating specific administrative matter.

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

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



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- Yes, in general
- 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”).

Same as answer to question 1.

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”).

General principles of the EU law contained in decisions of the European Court of Human Rights are being applied in the process of decision making and they are incorporated in reasoning of decisions.

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, in case it is consisted in the decision of the European Court of Human Rights.
- 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)

Same as answer to question 7.

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



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

Explain your answer briefly.

Principle of legitimate expectation is incorporated in individual laws, such as principle of predictability contained in Article 5, par. 3 of the Law on General Administrative Procedure, stipulates that, when deciding in administrative matter, state authority observes prior decisions made in same or similar administrative matters. It is also incorporated in the instrument of warranty act, so Article 18 of the Law on General Administrative Procedure stipulates that warranty act is written act which obliges the authority to issue administrative act with specific content upon corresponding request of the party. Warranty act is issued when it is provided by specific law. Also, the principle of legitimate expectation referred to in Article 31 of Law on Inspection Oversight which provides the possibility to issue an act on the enforcement of regulations by the authority which also publishes the act on its website, that is organisation or organisational unit, by its own initiative or upon the request of natural or legal person, within the deadline prescribed for stating the opinion which is determined by the law regulating state administration.

10^o) 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.

For instance, in case the administrative authority does not provide reasons for deviation from legal position given in previous decisions and in case it does not issue administrative act in accordance with the warranty act.

11^o) 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)



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- o Not commonly applied

Explain your answer briefly.

YES

Rights provided by the principle of the right to good governance in accordance with Article 41 of the Charter on Fundamental Rights of the EU are incorporated in laws and other regulations of the Republic of Serbia, such as the right of each individual to hearing through the principle of the right of party to make a statement, in Article 11 of the Law on General Administrative Procedure, which stipulates that each party should be given opportunity to make a statement on the facts which are significant for deciding in administrative matter. A decision can be made without a party's prior statement only when the law permits that.

The right which implies obligation of administration to provide reasoning for its decisions is stipulated by the provision of the Article 141 of the Law on General Administrative Procedure.

Since the Administrative Court which evaluates the legality of acts issued by the authorities can annul the act of the authority, for instance in case the authority has not observed the principle of the right of party to make a statement or in case the authority has not fulfilled its obligation to provide reasoning for its decision. Also, the Republic of Serbia is a signatory to the European Convention on Human Rights, and consequently, the Administrative Court has the obligation to apply and enforce the Article 6 of the European Convention on Human Rights, which prescribes the right to trial within a reasonable time.

12^o) 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?

- o Yes, in some specific cases.
- o 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.
- o No

Explain your answer briefly.

Yes. Same as answer to question 11.

13^o) 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?



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- 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.

This principle is incorporated in the principle of reciprocity in accordance with Article 6 of the Law on Administrative Dispute, which prescribes that the authority may limit the right of party or impact its legal interest only by acting which is deemed necessary for the attainment of the purpose of regulations and only if such purpose cannot be achieved in different manner which would limit the rights to a smaller extent or would influence the legal interest of the party in a lesser degree. When there is an obligation imposed on a party or other participant in the procedure, the authority is obliged to apply provided measures which are more beneficial for the party, provided the purpose of regulation is achieved by those measures.

14^o) 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

Through the case law of the European Court of Human Rights

III. – GENERAL PRINCIPLES AND FUNDAMENTAL RIGHTS

15^o) 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.

Yes, through decisions of the European Court of Human Rights.



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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.

Article 21 of the Constitution of the Republic of Serbia prescribes prohibition of discrimination.

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.

Constitution of the Republic of Serbia and specific laws.

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 annulment of the decision**

Explain your answer briefly.

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



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- No

Explain your answer briefly.

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



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- Yes
- No

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^o) 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.

Legal system of the Republic of Serbia provides an opportunity to issue and determine administrative measures of penal nature, which are provided by laws regulating specific administrative matters. Administrative measures are those which are determined by the Commission for Protection of Competition aimed at specifying obligation for the participant in the market to pay certain amount of money, not higher than 10% of total annual income achieved in the territory of the Republic of Serbia, if, for instance, it abuses the dominant position.

The Law on Protection of Competition also provides a procedural penalty measure amounting from EUR 500 to EUR 5000 for each day of acting contrary to the order issued by the Commission for the Protection of Competition during the procedure, that is failing to act in accordance with that order in certain circumstances. Procedural penalties cannot amount to more than 10% of total annual income calculated in accordance with Article 7 of the Law on Protection of Competition.



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Measures aimed at protection of competition, as well as procedural penalty measure, are of punitive nature, but their application is in accordance with the EU Law owing to the passing of the Law on Protection of Competition.

Also, according to the Law on Protection of Competition there are also measures aimed at elimination of harm to competition which are implemented through issuance of orders to perform certain actions or prohibit certain behaviours, the so called behavioural measures.

Administrative measures are otherwise determined by separate laws, which regulate specific administrative fields regardless of whether there are misdemeanours prescribed for these specific administrative fields.

Disciplinary procedure against prosecutors is conducted in accordance with the Law on Public Prosecution and Rules on Disciplinary Procedure and Disciplinary Liability of Public Prosecutors and Deputy Public Prosecutors. Questions which are not determined by regulations from the Article 1 of this Law, provisions of the Criminal Code are being applied accordingly.

23^o) 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)

Principle of non-retroactivity of sanctioning provisions:

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

Principle of culpability:



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- 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^o) 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)

Article 52 of the Law on State Legal Aid Control stipulates administrative measures issued by the Commission. In the procedure of subsequent supervision, the Commission may determine behavioural measure, which imposes the return of state aid or other administrative measure in accordance with this Law. The Commission may determine measure which aims at elimination of inconsistencies, that is prevention of state aid provision, which specifically implies temporary or permanent suspension of the provision of state aid (behavioural measure). In case it determines inconsistency, the Commission issues order for the providers of state aid to take appropriate measures without delay in order to return given amount of state aid, increased by the statutory default interest, starting from the day of the usage of that aid until the day of return of used amount, and also to suspend further provision of unused amount of state aid without delay (measure of return). Exceptionally, the Commission may waiver the return of the default interest, contrary to the par. 3 of this Article, provided the provider proves that such action would lead to bankruptcy or cessation of the business activity of the user. The Commission informs on the adopted measures from the Par. 1 of this article the authority competent for state auditing activities, that is the budget inspection.



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IV.4. – CONTRACTING BY PUBLIC BODIES

25^o) 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)

Provisions of articles 22–26 provide the instrument of administrative contract.

Administrative contract is a mutually obligatory written act which, when it is stipulated by separate law, is being signed by the authority and the party, and which creates, alters or abolishes legal relationship in administrative matter. The contents of the administrative contract should not oppose to the public interest nor the legal interest of third parties. If, due to circumstances occurring after the conclusion of administrative contract which could not be foreseen at the moment of conclusion of administrative contract, fulfilment of obligation for one contracting party becomes significantly more difficult, they can demand from the other contracting party to amend the contract and adjust it to the new circumstances. The authority dismisses the request of the party by issuing a decision in case the conditions for the amendment to the contract are not fulfilled or if such amendment to the contract would cause damage to the public interest which would be greater than the damage the party would suffer. Public authority terminates the contract by issuing a decision with precise reference and clear explanation of reasons for termination. In case the authority does not fulfil its contractual obligation, a party is not given option to terminate the administrative contract, but they can raise objection.

Application of this law and laws regulating contracts and torts.

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



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

“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)

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.

- 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)



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

According to the Law on Tax Procedure and Tax Administration of the Republic of Serbia, the following principles of tax procedure are prescribed: principle of legality, principle of time limit of tax regulations, principle of enabling insight in facts, principle of protection of secret data in the tax procedure, principle of acting in good faith, principle of facticity.

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