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

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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:
General principles of law can be applied in administrative and judicial decision-making only in the absence of specific legal rules or as a guide to their interpretation in the case, where legal norms allow a wider margin of understanding. The administration or administrative court is acting based on the (written) legal rules laid down by law, but these rules are interpreted and enforced in conformity with European, constitutional and other legal principles.
General principles of law are important limitations of legislative powers, both at the level of parliamentary legislation and by-laws. Constitutional principles are especially important here, which must be respected by institutions adopting all laws and other legal acts (for example the principle of equality before the law). In addition, they are important interpretative guides for the implementation of general legal acts. As legal guidelines they serve as a tool for teleological interpretation of legal norms, as well as for filling legal gaps when applying the law.

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.

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- **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 majority of the most relevant general principles of law are positivised, having been incorporated into the Constitution, or in different general and/or sector-specific legislation. The application of such principles is usually done by referring to the written rules that contain and protect them. Also, in administrative procedural law fundamental principles ensure minimum procedural standards and serve as guidelines and interpretative tools valid throughout the administrative procedure. Their aim is to resolve procedural dilemmas in cases where law does not precisely define certain real-life situations and does not give straight answers and solutions to certain procedural questions.

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**
- 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?

- 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:

Among specific principles of Administrative Law that may be applied in conjunction with other general principles the principles of administrative effectiveness and efficiency, protection of the rights of the parties to administrative procedures and the protection of public interests can be seen as the most important. The basic principles of the administrative decision-making that form the basis for correct application of abstract substantive administrative law are covered by the first chapter of the General Administrative Procedure Act.

Administrative authorities and of course Administrative Courts must respect all constitutional provisions and constitutional principles contained therein, both those protected as fundamental human rights and freedoms as well as others, regulated in any another part of the Constitution. This has also been confirmed on several occasions by the Constitutional Court of Slovenia in its established constitutional jurisprudence. The principle of legality of administrative action therefore excludes several principles valid in other areas of law (e. g. civil, commercial), such as the principle of freedom of contract and private autonomy (*Privatautonomie*).
It should also be noted in Slovenia the Constitution provides a legal basis for recognition of all human rights as well as equivalent legal principles that can be found in international agreements ratified by the national parliament (Art. 15). This of course applies in particular to the European union (Art. 3a). Consequently, the TEU, TFEU, Charter of Fundamental Rights of the European Union, ECHR and all fundamental principles that have been developed in practices of the ECtHR and CJEU bind both the legislator and the administrative authorities when applying Administrative 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?

- **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").

Already during the preparations for full membership of Slovenia in the European Union, activities have taken place to harmonize Slovenian legislation with the law of the European Union. To be able to apply legal acts and decisions of the European Union in accordance with its legal regulations and requirements, it was necessary to amend the Constitution of the Republic of Slovenia with a new Article 3a for this purpose. This provision gives direct applicability to European union law and recognizes the partial transferral of execution of sovereign rights to the institutions of the Union. This means that Slovenian legislator is prevented to adopt laws and regulations which are contrary to the European Union law and empowers the judges to disapply norms of the domestic law if they are in conflict with it (direct effect and supremacy principles). This is also valid for all general principles recognized in European Union Law that therefore are a part of the legal order of Slovenia.

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?

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

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

Given that European Union law also recognizes many principles related to fundamental rights and the rule of law, these principles are often considered in non-harmonized areas, such as administrative procedural law or (non-harmonized) tax law. Administrative courts in Slovenia frequently apply European Union law in their judicial practice and are therefore familiar with general principles of European Union law. It is thus not uncommon to use them also in other areas of administrative law as a generally accepted part of legal reasoning of the court. Might be that the principle is not mentioned in the judgement (neither as rationes decidendi nor as obiter dicta) but it still does not lessen its meaning as it leads the judge to his decision.
This can happen in certain areas even more often, e. g. in non-harmonised taxation (direct taxes) cases, because of the conceptual proximity of general tax law to European Union tax law (VAT, etc.). This means that also in non-harmonized taxation cases general principles of European Union Law, developed by the CJEU (relating to the freedom of capital and the proportionality of the measures adopted etc.) are applied by the administrative courts.

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?

- o **Yes**
- o 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?

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

Explain your answer briefly.

The principle of legitimate expectation is founded as a part of rule of law principle. It is protected under Art. 2 of the Constitution of Slovenia. This article sets forth that Slovenia is a state where the rule of law shall be respected. Parts of this principle, interpreted by the jurisprudence, are (also) the protection of legitimate expectations and the principle of legal certainty. Apart from that, a principle of good governance and good faith can be found, at least indirectly, in some other constitutional provisions, like Art. 26, which regulates the liability of the public administration and other authorities for illegal actions. The principle of legitimate expectation, as described above, being a part of the rule of law and the principle of legality of administrative action, has certain tradition in administrative law of Slovenia. Actually, it is one of the main principles of the General Administrative Procedure Act (Art. 1), prohibiting arbitrary decision-making by public authorities.

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.

The plaintiff can invoke the violation of this principle as a violation of Art. 2. of the Constitution in administrative dispute. This means that the Court will evaluate his claim in relation to this principle and interpret the law in the way that protects his legitimate expectations. If such an interpretation is not possible the Court can disapply the violating provisions of a by-law (secondary legislation can be subjected to *exceptio illegalis*) or in the case of an act of parliament refer the case to the Constitutional Court, demanding that the law be repealed. In both cases the administrative act could be annulled in the judicial proceedings. Depending on the circumstances of the case the plaintiff can also claim compensatory measures.

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?

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

Explain your answer briefly.

The purpose of the right to good administration (Article 41 of the EU Charter of Fundamental Rights) is to guarantee every person or every legal entity the right to have their affairs handled impartially, fairly and within a reasonable time, whereby they must have the right to be heard and to have access to their files, while the administration must give reasons for its decision. This principle is often invoked and applied transversally because, although it is not included under this name in the Slovenian Constitution, it is recognized in national legislation, especially in General Administrative Procedure Act that determines the general rules and basic principles of the administrative procedure, as well as in several other specific areas of administrative law. Thus they guarantee that everyone is treated as a subject, not just as an object of administrative decision-making.

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?

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.

Also in that case, a person can invoke specific aspects of the principle of good administration as they are determined by procedural legislation in administrative dispute, claiming that there was a violation of procedural law (together with the general principle). This principle is therefore supported by explicit norms of legislation that guarantee its respect for any person and its infringements are given legal protection. For example, the right to be heard is protected by Article 9 of General Administrative Procedure Act, the right to access to one's files is regulated by Article 82 of General Administrative Procedure Act, duty to state reasons is protected through the

right to appeal against delivered and reasoned decision in Articles 13 and 214 of General Administrative Procedure Act etc.
It means that in the case of violations of the principle of good administration the legality of the challenged administrative act is evaluated in relation to the established violations of law: if the administrative act has no reasons (motivation), this is a violation that leads to direct annulment of the act in question (Art. 37 of Administrative Dispute Act); if there was a violation of the right to be heard it is both a violation of Art. 9 of General Administrative Procedure Act and Article 22 of Slovenian Constitution, so it will be annulled, etc. If the legislation would not protect against the violations of this principle (that is also recognized as a right under Article 41 of the Charter of Fundamental Rights), that could lead to further procedures in Constitutional Court and CJEU.

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 general principle of proportionality means the prohibition of excessive interference, which is binding on all state, local and other public authorities. The general principle of proportionality can be found both in the Constitution, as a criterion for assessing interference with an individual human right (protected right to private property, free economic initiative, etc). These aspects can be raised in administrative dispute directly based on the Constitution; just recently this has been the case before the Supreme Court regarding regulation of fees for public advertising (placing billboards) in a public area. The question was whether the amount is limited by the general constitutional principle of proportionality (Article 2 of the Constitution) and, if so, what is the content of the said restriction.
The principle of proportionality is often also a legal criterion that both the administration and the administrative court must take into account in its decision-making. E. g. the tax administration has to take into account both the necessity and proportionality of the adopted measures (Art. 6 Act on Tax Procedure), which means also their impact on economic activity of the person involved. Also, the Administrative court, when making a decision about a temporary injunction, must together with evaluation of potential consequences suffered by the plaintiff, also take into account the potential harm to the public interest and the interests of the opposing parties, in accordance with the principle of proportionality.

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

As Slovenia is a relatively small jurisdiction the Supreme Court is in practice quite often relying on good reasoning of decisions of other high jurisdictions that have taken into consideration common legal principles (Federal Administrative Court of Germany, Conseil d'Etat of France, Supreme Court of Ireland, Administrative Court of Luxembourg, etc.). Just in the recent case, already mentioned above, which concerned the regulation of fees for advertising facilities in public areas in relation to the principle of equivalence, the Supreme Court referred to the case law of the Federal Administrative Court of Germany (e.g. judgment BVerwG 4 C 14/88 of 2.12.1988, judgment 7 C 5.87 of 15.7.1988, decision 9 B 85.14 of 30.6.2015 and others). It ruled that the principle of equivalence requires that there should be no unjustified disproportion between the benefit obtained by the taxpayer and the amount of a certain fee, which would impose an unreasonable burden on the taxpayer as already established in German Law. With regard to the requirement of high legal certainty in tax regulation the Supreme Court also referred to case law of the Constitutional Court of France (e.g. no. 2013-351 QPC of 25.10.2013).

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.

Explicitly protected as an aspect of the fundamental right to equality and non-discrimination (Art. 14 of the Constitution), the principle of non-discrimination and gender equality has multiple applications and is generally applied transversally in different areas of administrative activities and subsequent judicial review by administrative courts. Specific recognition of this principle can be found in the Act on Equal Opportunities for Women and Men. The aim of the act is to determine common grounds for the improvement of the situation of women and the creation of equal opportunities for women and men in political, economic, social and educational fields as well as other fields of social life. The act prohibits direct and indirect discrimination and allows for the implementation of general and special measures required for achieving equal treatment of and equal opportunities for women and men.

In practice, everyone can invoke protection against discrimination and other forms of violation of principle of equality before the law by the administration in judicial review (administrative dispute). If this fact can be relevant to the matter dealt with by the court in a certain case, it will be closely examined and in the case that such a violation is established, there will be measures taken by the court to remedy the situation, including the referral to the Constitutional Court (for the annulment of the act of parliament, violating this principle) or CJEU (to clarify the meaning of this principle in European Union law, including non-discrimination based on nationality).

In addition to that it has to be mentioned that certain groups are guaranteed special protection under the Constitution, for example the Hungarian and Italian national communities and the Roma community (Article 65 of the Constitution).

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.

Respecting the universal character of human rights, the courts in Slovenia are well aware of the necessity to guarantee human rights to vulnerable groups and they firmly support the basic principle that all human beings are born free and equal in their dignity and rights. In administrative law this is most often a question in asylum cases, in relation to assessing whether an applicant belongs to a group of particularly vulnerable asylum seekers, because of his youth, old age, illness, past persecution or harassment.

In several of its decisions, the Supreme Court of the Republic of Slovenia also dealt with cases regarding the right of the people with disabilities to exercise their right to vote. It has emphasized that the active right to vote is protected by the Constitution of the Republic of Slovenia and international conventions, and its implementation and all tasks and procedures related to elections are regulated by the relevant legislation.

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.
No specific legal requirements demand enhanced reasoning in cases where a measure can affect a vulnerable group. But it is quite often that the requirements of special protection of vulnerable groups exist in substantive legislation, regulating certain administrative actions (e. g. in asylum law cases). Therefore, the administration must examine these legal aspects and give reasons in relation to them.

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**

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Explain your answer briefly.
No, no such dispute hasn't been raised yet.

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

(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 Slovenian legal system traditionally all violations of law that must be sanctioned fall within the scope of criminal and not administrative law and jurisdiction. Therefore, "criminal sanctions" and "sanctions for minor offences" are both regulated precisely as sanctions for different criminal acts. System of criminal sanctions is regulated in Criminal Code and covers "penalties", "warnings" and "security measures". Sanctions for minor offences, which are less serious criminal acts, are numerous, for instance "fine", "warning", "deportation of non-citizens from the country", "seizure of objects" etc. and are all systematically regulated in Minor Offences Act.

"Administrative sanctions" is a rather new legal (statutory) term in Slovenian law. But this does not mean they do not exist. The systemic regulation (Minor Offences Act) refers to potential regulation of imposition of sanctions on legal entities for administrative violations. Thus, administrative sanctions shall be regulated precisely in different (lex specialis) statutes outside Minor Offences Act but have not yet been adopted. Administrative sanctions and applicable principles are not (yet) defined as

such in legislation, administrative practice and case law. Therefore, the only legal basis for the application of principles of criminal law in administrative matters is currently ECHR.

Having regard to the already mentioned fact that administrative sanctions are not yet a general phenomenon in Slovenian legal order and the fact that conducts that will in the future presumably be sanctioned with administrative sanctions are for now regarded as minor offences, it can be firstly explained that the Slovenian legal system for minor offences could regarded as a sort of mixed system. The administrative authorities are, on one hand, competent to supervise the correct implementation of the regulations (law), typical conducting inspection proceedings, and on the other hand, function as minor offence authorities (in first instance). There is no prohibition for an official of the administrative authority acting as minor offence authority who discovers an infringement of the law cannot initiate or even conclude the minor offence procedure. But it has to be noted that the judicial review of imposed sanctions is done by criminal and not administrative courts.

Strictly taking into consideration only administrative sanctions (de lege ferenda) the outlook of the system differs only slightly. If the administrative authority decides or will decide on administrative sanction, the decision will be regarded as an administrative decision. Therefore, the jurisdiction would change, giving the affected individual (natural or a legal person) the right to initiate an administrative dispute procedure and not a judicial review in criminal (minor offences) courts. According to ADA (Art. 2) in an administrative dispute the court shall rule on the legality of final administrative acts interfering with the legal status of the plaintiff; on the legality of other acts the court shall adjudicate only if stipulated so by the law. Since imposing an administrative sanction clearly interferes with the legal status of the plaintiff (and therefore the legal position of the party would be improved by granting their claim) the administrative dispute procedure against decisions on administrative sanctions will always be possible.

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)

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

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?

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

The Supreme Court has taken several decisions in which it confirmed that the general principle of proportionality is also to be applied in these cases; it has also referred to the principles of the subsidy system established by European Union law (e. g. in Agriculture).

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

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.
- **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

26º) 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)

"Polluter pays" principle

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

In its practice also the Supreme Court has emphasized the precautionary and preventive principles, which are defined as fundamental principles in environmental

matters by the second paragraph of Article 191 of the Treaty on the Functioning of the European Union and Articles 8 and 7 of the Act on Environmental Protection.

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

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)

For example, by decision No. X Ips 367/2015, dated 30. 8. 2017 the Supreme Court decided that income tax must be based on an objective net principle that ensures tax fairness. It requires that the costs necessary to obtain an income be deducted, as only the (positive) difference is what actually means an increase in the taxpayer's assets (economic power).

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)

By Decision No. U-I-113/17, dated 30 September 2020 (Official Gazette RS, No. 145/20), the Constitutional Court decided on a request of the Administrative Court to review the constitutionality of Article 68a of the Tax Procedure Act, which determined that a 70% tax rate shall apply to undeclared income. The regulation of the tax assessment of undeclared income that was in force prior to the challenged regulation made the tax rate that was applicable for these taxes dependant on the tax rates that follow from the law regulating income tax (that law determines a 50% rate as the highest income tax rate for the highest income tax class). Therefore, the Constitutional Court proceeded from the assessment that, by determining a 70% tax rate, the legislature substantively enacted, in addition to tax assessed in accordance with the income tax rate otherwise in force, also an increase, i.e. a surcharge on the regular income tax rate. The surcharge serves to dissuade taxable persons from violating tax law obligations and to encourage them to observe these obligations. The Constitutional Court assessed that by enacting a surcharge, the legislature did not pursue the objective of financing public spending or any socio-political objective (within the framework of social or economic policy), which, in accordance with the constitutional determination of taxes and the case law of the Constitutional Court, are admissible objectives of taxes. Therefore, it concluded that, in a constitutional sense, the surcharge is not a tax but a measure intended to either 1) remedy the damage sustained by public finances and its incomes due to a violation of the obligation to declare income; 2) nullify the benefits that the taxable persons had as a result of such violations (i.e. a restitutive measure); or 3) punish the taxable persons for such violations (i.e. a punitive measure). Constitutional Court abrogated this provision insofar as the 70% tax rate determined therein exceeded the tax rate that was prescribed by the regulation previously in force for the taxation of undeclared income.

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

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