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, without

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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 administrative law were formulated over the years by the judiciary. While judicial review under the Constitution of Cyprus was founded upon the continental prototype one of the fundamental principles on which the courts in Cyprus proceed is that of *stare decisis*. Therefore, the Supreme Court's decisions are binding on all lower Courts[1]. In this respect, judicial precedent is a legal source of law and an integral part of our legal system.

Nonetheless, in 1999, the general principles of administrative law developed by the judiciary through the case law were codified into a statute to safeguard administrative decision-making by the provision of rules. The legal framework of administrative principles is governed by the **General Principles of Administrative Law, Law of 1999 (L. 158(I)/1999)**. The statute incorporates the principles of fairness, competence, good administration- bona fide and proportionality, legality, representation, natural justice- impartiality and right to be heard, equality, right to judicial review and to an appeal.

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

[1] The *ratio decidendi* of the judgment is binding, unlike *obiter dictum*.

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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:

As aforementioned, the general principles of administrative law have been incorporated into a statute to uphold the interest of the public in sound administration. The legal framework of administrative principles is governed by the **General Principles of Administrative Law, Law of 1999, L. 158(I)/1999**. The principles often provide the legal grounds on which the applicant challenges an administrative decision. In fact, some grounds may even be raised by the court on its own motion as grounds of public order e.g competence, composition.

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:

The **General Principles of Administrative Law, Law of 1999** safeguards administrative decision-making by ensuring that all authorities exercising powers in the domain of public law follow a set of applicable

principles (for example, the principles of good administration, good record keeping (transparency), ultra-vires regulation).

The statute does not, however, preclude the application of other principles which are likewise, entrenched in our legal system.

For instance, the separation of state powers eminent in the structure of the Constitution of Cyprus precludes the *direct or indirect or in any form* inter-institutional mixture. Although not dogmatically inflexible the doctrine is diffused in the entire constitution.

Similarly, the Constitution makes a further distinction in that political or state power and administration are kept separate (*entrenched principle*)[2] to ensure the efficiency of the administration, independent of government-elect.

Likewise, the principle of equality of arms is another principle taken into account. At the pre-trial stage of the judicial review recourse (written statements stage) the aggrieved person can have access to his administrative file and other evidence that affect his legal rights[3]. All parties are entitled to see and challenge all the evidence relied upon before the court and to introduce evidence of their own in rebuttal.

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").

Most of the general principles of EU law applied by the Court of Justice of the European Union when determining the lawfulness of administrative measures such as legal certainty, equal treatment,

[2] President of the Republic v. House of Representatives (2011) 3B C.L.R. 777

[3] Republic v. D. Avlonitis & Sons Ltd (2000) 3 C.L.R. 137

proportionality, good administration and respect for fundamental rights are principles enshrined in national legislation (e.g. the Constitution and statutes). At the same time, they are also safeguarded by the judiciary in settled judicial precedents.

In as far as the principles of environmental law is concern, such as the precautionary principle, the polluter pays principle and the prevention principle reflected in **Article 191 of the TFEU**, they have all been incorporated in relevant national legislation. For instance, **section 23** of the **Waste Law of 2011, L. 185(I)/2011** reflects the polluter pays principle.

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").
For instance, under the principle of procedural autonomy, in the absence of relevant EU law, it is for the national legal system to determine the procedures governing actions based on EU law before the national courts. However, the national procedural autonomy of the EU Member State is restricted by the *dual principles of equivalence and effectiveness*.

In the context of effective judicial protection and while bearing in mind **Article 47 of the Charter of Fundamental Rights of the European Union** which guarantees 'the right to an effective remedy and to fair trial', the dual principles of equivalence and effectiveness are invoked and applied by the Cypriot courts. The principles prohibit:

- discrimination in relation to the procedural circumstances between claims based on national law and claims based on EU law,
- procedural rules applied in actions for the enforcement of EU rights to be less favourable than those governing similar actions based on national law and
- national procedural rules from making the enforcement of EU rights functionally ineffective.

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.

In Cyprus' legal order, legitimate expectation is not a legal right in itself. It is not explicitly stated in the **General Principles of Administration Law (Law 158(I)/99)** for it to be directly applied. Although there is no explicit provision in the statute, the statute nevertheless makes similar provisions often invoked in judicial review cases under the name of legitimate expectation[4]. First, the statute safeguards that the public authority does not act inconsistently, contradictory, in bad faith or in a way that deceives the citizen (*section 50*). Also, it explicitly provides that it is not in any way permissible for a decision issued by a public authority to be contrary to representations or information provided by the said authority if the representations made and the information given is consistent with the law.

Hence, the principle of legitimate expectation is not treated as a legal right of its own. It is closely connected with the doctrine of good faith, which prevents the administrative authority from deviating from its proclaimed policy or practice. The conduct of the administration must be consistent with the faith reposed in them by members of the public. However, in the occasion that a public authority has acted unlawfully in the past, a person is not allowed to invoke the principle of legitimate expectations, unless his or her expectations are legal. People will normally formulate expectations to the extent that such expectations are recognised and protected by the law. As *section 39* of the statute provides there is no equality in unlawfulness since the principle is equality under the law and not outside it.

[4] Η αρχή της δικαιολογημένης εμπιστοσύνης του διοικούμενου

The following extract from the judgment of ***Panayi v. Council of Ministers a.o., Case no. 1250/2012, 19.12.2013*** mirrors the Court's approach: "Specific facts and circumstances of contradictory behaviour on the part of the public authority must be present to the extent that false or erroneous situations have been created. At the same time, proven omissions of the public authority must also exist. Those omissions must have affected the individual and have led him or her to take a certain course of action which the public authority ultimately refuses or deviates from, to the individual's detriment. In this respect, the public authority cannot, under the principle of legitimate expectation, change its behaviour suddenly in an arbitrary and contradictory manner. All of the above fall within the spectrum of a public authority's limits and scrutiny of its discretionary powers, in the sense that both the administration and the state overall are not free from any scrutiny nor can their discretionary power be applied in a manner that releases them from the letter of the law".

Lastly, legitimate expectation is reinforced by the fundamental principle of *stare decisis* on which the courts in Cyprus proceed[5]. The doctrine of precedent law is a fundamental pillar of our law, interlinked with *legal certainty* (predictability) and the *rule of law*[6].

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.

As aforementioned, the doctrine of 'legitimate expectation' has been judicially recognised. It is linked to the right to be treated fairly and in good faith. Case law supports the proposition that where representations are made by a public authority or by past practice or conduct, legitimate

[5] Ronald Watts and others v. Laouri and others, Civil Appeal 319/2008, 7/7/2014 (majority ruling), Republic v. Demetriades (1977) 3 C.L.R. 213, 263-264, Nicolaou and others v. Nicolaou and others (No. 2) (1992) 1B C.L.R. 1338, 1405-1406, Republic and others v. Yiallourou and others (1995) 3 C.L.R. 363, 373-374, Mavrogenis v. House of Representatives and others (No. 3) (1996) 1 C.L.R. 315, 332-337, Koulounti and others v. House of Representatives and others (1997) 1B C.L.R. 1026, 1105, Vironas v. Republic (1999) 3 C.L.R. 77, 85, Christos Hadjikyriakou Properties Ltd v. Republic (2001) 3B C.L.R. 901, 905, Antenna TV Ltd and others v. CY.T.A. and others (2002) 3 C.L.R. 793, 809-811, Panayides Contracting Ltd v. Charalambous (2004) 1A C.L.R. 416, 488 and Investylia Public Company Ltd v. Tseriotis, Civil Appeal 9/2009 and 10/2009, 13/3/2013

[6] Ronald Watts and others v. Laouri and others, Civil Appeal 319/2008, 7/7/2014 (majority ruling), Republic and others v. Yiallourou and others (1995) 3 C.L.R. 363

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expectations of citizens are created who on their part anticipate that the public authority will not act inconsistently with those representations made and that the public authority is able to fulfil them, unless, of course, there is some overriding public interest. A decision adverse to the legitimate expectation of a citizen entitles him or her to bring a recourse for judicial review before the Administrative Court. However, a person who invokes the doctrine of legitimate expectation, has to satisfy that he or she has relied on the representation and that the denial of that expectation has worked to his or her detriment, as explained above. The Court can only interfere if the decision taken by the public authority was found to be arbitrary, unreasonable, in abuse of power or in violation of the principles of natural justice and the decision was not taken in the public interest. A mere reasonable expectation of a citizen may not by itself be a distinct enforceable right, but failure to consider and give due weight to it can render the decision arbitrary.

The court will examine if the infringement of the principle of legitimate expectations amounts to a denial of a right guaranteed or is arbitrary, discriminatory, unfair or biased or amounts to gross abuse of power or violation of principles of natural justice. The Court may only interfere, if the decision was the result of one of the above.

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 'umbrella' principle of good administration as well as the sub-principles contained in it (impartiality, fairness, reasonable time, right to be heard, right of access to one's file, right to give reasons for a decision, right to refer to an institution and receive an answer) are all principles enshrined in domestic law and more specifically, under the **General Principles of Administrative Law, Law of 1999.**

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. ☑**

- 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 court may annul an administrative decision if it concludes that the public authority acted in a manner contrary to good administration. In the case of ***Christofi v. Republic (1992) 4 C.L.R. 939 (SJ)*** the court reiterated that the object of judicial review is to ascertain whether the administration (a) operated within the limits of the law, and (b) exercised its powers in accordance with the rules of good administration.

More specifically, the **General Principles of Administrative Law, Law 158(I)/1999** safeguards a number of principles of administrative justice including the following that relate to the principle of good administration*:*

- Good administration:
  1. *Principle of bona fide/good faith*: A public authority must act in good faith. Measures conflict good faith if taken in bad faith, or in a contradictory or deceiving manner (*Section 51*).
  2. *Proportionality*: The principle of proportionality requires that a public authority's measures including imposition of sanctions must be proportionate (*Section 52*). Adverse effects cannot be disproportionate to the measure taken.
- Natural justice is regarded highly in administrative law. It is enshrined in **Article 30.2 of the Constitution**, which is identical to **Article 6(1) of ECHR**.
  1. *Impartiality- Nemo judex in causa sua*

  An administrative body must act in accordance with the principle of impartiality (*Section 42*).
  2. *Right to be heard- audi alteram partem*

  The right to be heard is enjoyed by any person who will be affected by the administrative act or measure of a disciplinary or sanction-like character or will, in any way, be adversely affected by it (*Section 43*).
- Due reasoning/justification: Administration must justify its decisions. Extent and details given may vary depending on the subject-matter. (Section 26).
- Representation: The right to be heard is exercised either as a litigant in person or via an attorney, either orally or in writing (*Section 43*).
- Exercise of competence within a reasonable time: This right ensures that the decision reached is current to both factual and legal circumstances (*section 10*).

- At the pre-trial stage of the judicial review recourse (written statements stage) the aggrieved person can have access to his administrative file and other evidence that affect his legal rights[7]. All parties are entitled to see and challenge all the evidence relied upon before the court and to introduce evidence of their own in rebuttal.
- Right to write and receive a response: is enshrined in **Article 29 of the Constitution**. Also, under sections 33-36 of the aforementioned statute every person that resides in the Republic has the right to write to the administration and receive a response within the indicative time period of 30 days. Failure to respond may entitle a person to file a recourse under **Articles 29.2**. (right to recourse before the competent court) or **146** of the Constitution (Article that related to the remedy of judicial review).

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 is enshrined in **section 52** of the **General Principles of Administrative Law, Law 158(I)/1999**. It falls under the umbrella of the more general principle of good administration. Proportionality denoted that there must be a correlation between the administrative decision/measure and the legitimate purpose it is designed to serve (necessity).

It applies equally to all areas of administrative decision-making.

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?

[7] Republic v. D. Avlonitis & Sons Ltd (2000) 3 C.L.R. 137

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

Since Cyprus applies, in the sphere of public law, the Greek administrative system it is not unlikely for the Administrative Court and the Supreme Court (when exercising its revisional jurisdiction), to cite judicial precedent of the Hellenic Council of State.

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.

Article 35 of the Constitution, imposes a direct and positive obligation on all state authorities to protect all fundamental rights and liberties safeguarded by the Constitution when exercising their powers as well as secure the "efficient application" of those rights, throughout the field of their action. The Constitution of the Republic of Cyprus, guarantees the protection of all basic human rights protected by the European Convention of Human Rights, and, in some instances, grants even higher protection, such as in the case of the right to property. The case law of the Supreme Court emphasises that respect for human rights must be uppermost in the mind of public bodies.

The right to equality is enshrined in **Article 28 of the Constitution**, which provides that all are equal before the law, the administration and

justice. Also, **section 38** of the **General Principles of Administrative Law, Law 158(I)/1999** determines that a public body must act in accordance with the principle of equality which requires equal and uniform treatment of all civilians who are under the same or similar conditions.

The constitutional right to equality establishes the notion of relative equality, meaning that not every distinction or difference in treatment will amount to discrimination. Any discrepancy must, however, be based on objective criteria and on materially specific reasons that warrant greater protection, for instance, for the protection of women for reasons that relate to maternity, family or other biological differences between the two genders (**section 40 of the Law 158(I)/1999**). Hence, a distinction in the treatment of persons must be justified by differences in their position objectively determinable. Hence, on this basis the right to equality may in certain circumstances require a state to take action in order to diminish or eliminate conditions that cause or help to perpetuate discrimination. Such was the case in the enactment of the law on the **Employment of Persons with Disabilities in the Public Sector of 2009, L. 146(I)/2009**.

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.

Within the national legal system, such protection is mirrored in a number of legal instruments which safeguard against discrimination on grounds of race or ethnic origin, religion or believes, age, gender, social status, financial means, disability or sexual orientation etc. For example:

- **Article 28 of the Constitution** (the right to equality) which provides that all are equal before the law, administration and justice.
- **Section 38 of the General Principles of Administrative Law, L.158(I)/1999** determines that a public body must act in accordance with the principle of equality which requires equal and uniform treatment of all civilians who are under the same or similar conditions. The statute explicitly prohibits equal treatment of persons who are under different conditions.

- **Combating Discrimination Law, L. 42(I)/2004**,
- **Persons with Disabilities Law, L. 127(I)/2000**,
- **Employment of Persons with Disabilities in the Public Sector Law of 2009, L. 146(I)/2009,**
- **Equal Pay between Men and Women for Equal Work L. 177(I)/2002**.

To illustrate the above with an example, in the case of **Tsikkas a.o. v. Republic, Case no. 1519/2010, 3.9.2015** the applicants challenged the decision of the Education Commission to appoint the interested parties as physical education public school teachers instead of them. The interested parties were persons with disabilities listed in the special records kept by the Commission under **section 3** of the **Employment of Persons with Disabilities in the Public Sector Law of 2009, L. 146(I)/2009.** The applicants argued unequal treatment under **Article 28 of the Constitution** and **sections 38-40** of **the General Principles of Administrative Law, L.158(I)/1999**. The Supreme Court in deciding on the constitutionality of **section 3** of the **Employment of Persons with Disabilities in the Public Sector Law of 2009** held that there was an objective justification for the differentiation in treatment at hand since it supported a legitimate purpose. It allowed for persons with disabilities to be assisted and encouraged to enter the employment market and for them to be given equal opportunities for a professional career.

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.
Under **section 26** of the **General Principles of Administrative Law, Law 158(I)/1999** the administration is obliged to give reasons for its decisions. Each decision must indicate, with sufficiency and clarity, the reasons upon which it is founded. The extent of it and the details given may, of course, vary depending on the subject-matter and the circumstances that surround each case (*section 26(2)*).

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It is a statutory requirement that decisions which adversely affect a person must be duly reasoned. In this respect, decisions that affect the rights of individuals must be duly and specifically
reasoned. Due and specific reasoning entails both factual and legal reasoning to ascertain with precision how the public body exercised its discretionary powers. Otherwise, the court will not be able to review the decision, that is to inquire into every aspect of it, its background thereto and its reasoning.

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.
The reality is that the growth and application of these systems was introduced into the public law sphere well before anyone could properly reflect on how these systems interrelate with administrative law principles that underpin a democratic society governed by the rule of law.

Some of these systems which are utilised by public authorities were analysed by the Supreme Court in recent judgments. For instance, «Theseus»; the Customs and Excise Department's automated system which calculates the custom tax to be paid according to the data given by the trader himself. The system does not detect incorrect or false data. For this reason, submitting incorrect or false data constitutes an offence which bears administrative sanctions and criminal responsibility. Moreover, the said Department conducts sample a posteriori investigation for verification. All supporting documents will be checked in order to verify that the trader did not attempt to evade paying the correct custom tax.

Nonetheless, when the Court reviews the legality of a challenged decision which was reached through the means of automated/AI systems, its jurisdiction does not extend to issues of technical nature or issues that require specialised knowledge[8]. The Court will only intervene if after taking into account all the facts of the case, it concludes that the findings

[8] Storey v. Republic (2008) 3 C.L.R. 113, Republic v. C. Kassinos Constructions Ltd (1990) 3 (E) C.L.R. 3835, Lambrou v. Republic (2009) 3 C.L.R. 79, Georghiou v. SALA (2002) 3 C.L.R. 475, Eva Ttousouna v. Republic (2013) 3 C.L.R. 151

of the public body are not reasonably sustainable, or they result from an error of fact or law or are in excess of its discretionary powers[9] or are contrary to the administrative principles enshrined in the **General Principles of Administrative Law, Law 158(I)/1999** or encroach upon constitutional rights (including the right to equality protected by **Article 28 of the Constitution**).

Additionally, a person has the right to have access to his or her administrative file and other evidence that affect his or her legal rights unless the public body refuses, wholly or partially, on grounds relating to the protection of a third party's interest or for the interest of the office. It is settled law that inspection and disclosure of evidence is allowed when the documents are relevant[10]. Relevance might be direct or indirect, one that helps the party requesting disclosure in the advancement of his case or in undermining the opposing party's case or even one that might lead to one of the two said consequences taking effect. Similarly, EU law takes into account the importance of such a right. **Article 41(2) of the Charter of Fundamental Rights of the European Union** includes, inter alia, the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy.

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

[9] Republic v. Georghiades (1972) 3 C.L.R. 594, Yuri Kolomoets v. Republic (1999) 4 A C.L.R. 443
[10] The National Bank of Greece, S.A v. Paraskevas Mitsides (1962) C.L.R. 40, KEAN SOFT DRINKS and others v. Republic, Case No. 1247/05, Date 25/9/2007

- **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:
(a) The right to be heard (*audi alteram partem*), (b) The principle of good faith (bona fide), (c) The principle of proper inquiry, (d) The principle of good record keeping**)**

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.

An administrative sanction, within Cyprus' legal framework and precedent law, is distinguished from a criminal one, in that, a criminal charge is only determinable in accordance with the provisions of the Constitution and hence a criminal sanction, requires a constitutionally acceptable finding of guilt, without which no such penalty could have been imposed (***Republic v. Demand Shipping Co. Ltd (1994) 3 C.L.R. 460***[11]).

It is therefore, settled precedent law that an administrative sanction is one imposed by a competent administrative authority and is distinguished from penal ones imposed by criminal courts. In making the distinction, *Engel criteria* serve as a starting point and as a guideline to Cypriot courts. While the ECtHR's independent interpretation of the notion of 'criminal charge' laid down the foundations for a "progressive extension of the application of the criminal-head guarantees of Article 6", Cyprus' case law takes a rather dominating and constant view that the not so 'hard core' categories of criminal law, should be kept within the administrative law sphere, in line with *Schindler Holding*[12], *Kaserei Champignon Hofmeister*[13], *Lukasz Marcin Bonda*[14]. In such instances, the criminal–head guarantees do not necessarily apply with their full stringency (*Jusila v. Finland*, § 43).

In addition, the principle of legality -*nullum crimen nulla poena* is similarly applied to administrative violations that incur administrative sanctions. Thus, no administrative sanction can be imposed, by a competent public body, without statutory empowerment and subsequent breach or non-compliance by a regulated undertaking/institution/person. Hence, a violation is identified by a competent public body entrustment by law to regulate a group of persons for the public interest. In this way, the public body monitors, enforces the law and imposes administrative sanctions to those in breach. Administrative procedures are safeguarded through

[11] The Supreme Court held by a *majority ruling*, that the imposition of a pecuniary administrative sanction, was not a criminal charge under **Article 12 of the Constitution** but an administrative sanction imposed by a public body for administrative infringements of the relevant statutory provisions.

[12] T-138/07, 13/7/2011

[13] C-210/00, 11/2/2002

[14] C-489/10, 5/6/2012

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similar but not identical principles to those of criminal law, as explained more thoroughly below.

Also, administrative sanctions do not breach **Article 6 of ECHR** since they can be subjected to judicial review that satisfies Article 6.1 of ECHR (*Schindler Holding*[15]).

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?

As aforementioned, administrative procedural requirements are not identical to criminal ones but resemble in practice and effectiveness. The overall legal framework is laid down in **General Principles of Administrative Law Act 158(I)/1999**. The statute safeguards the procedure by encapsulating the principles of fairness, competence, good administration- bona fide and proportionality, legality, representation, natural justice- impartiality and right to be heard, equality, right to judicial review and to an appeal etc.

A concise outline of 158(I)/1999 Law's principles:

- Legality: A public authority does not act unlimitedly nor does it act as it pleases. Its powers and activities derive from statute and are hence determined explicitly and limited to the extent such a statute denotes (*Article 8*). The principle of legality is the most substantive and essential one to a democratic state which respects the rule of law and acts primarily for the public interest.
- Competence: A public authority's competence is determined by the Constitution or by Statute or Statutory Instruments/Regulations, enacted in accordance with the law (*Articles 15 and 17*).
- Proper administration:
  1. Principle of bona fide: A public authority must act in good faith. Measures/Sanctions, conflict good faith if taken in bad faith, or in a contradictory or deceiving manner (*Article 51*, ***Tamassos Tobacco Suppliers and Co. v. Republic***[16]).
  2. Proportionality: The principle of proportionality requires that a public authority's measures including imposition of sanctions must be proportionate (*Article 52*). Adverse effects cannot be disproportionate to the measure taken or sanction imposed (***Andreas Azinas v. Republic (1999) 3 C.L.R 508, Theoti v. Republic (2001) 3 C.L.R 1144, C.Y.T.A. v. Office of Electronic Communications and Postal Regulations (2009) 3 C.L.R. 465***).

[15] (supra)
[16] (1992) 3 C.L.R. 60

- Natural justice is regarded highly in administrative law. It is enshrined in *Article 30.2 of the Constitution*, which is identical to *Article 6(1) of ECHR* (***Sigma Radio T.V. Ltd and others v. Cyprus Radio and Television Authority***[17]).

  1. *Impartiality- Nemo judex in causa sua*

  An administrative body must act in accordance with the principle of impartiality (*Article 42*). In the case of ***Sigma Radio T.V.***[18], the *full bench* of the Supreme Court ruled that the Radio and Television Stations Act which empowers the public authority of Cyprus Radio and Television to impose administrative sanctions for non-compliance to statutory provisions, did not infringe the principle of natural justice. The allegation that the public body was acting as prosecutor, enquirer, witness and judge, were ill-founded[19]. The ruling of the Supreme Court was upheld by the ECtHR on 21/7/2011, in the case of ***Sigma Radio Television Ltd v. Cyprus***[20].

  2. *Right to be heard- audi alteram partem*

  The right to be heard is enjoyed by any person who will be affected by the administrative act or measure of a disciplinary or sanction-like character or will, in any way, be adversely affected by it (*Article 43*).
- Representation: The right to be heard is exercised either as a litigant in person or via an attorney, either orally or in writing (*Article 43*).
- Equality is enshrined in **Article 28 of the Constitution**, which provides that all are equal before the law, administration and justice. Also, ***section 38 of 158(I)/1999* Law** determines that a public body must act in accordance with the principle of equality which requires equal and uniform treatment of all civilians who are under the same or similar conditions.
- Judicial review (**judicial protection**): is a remedy made available by **Article 146 of the Constitution** where the right may be exercised on both points of fact and law with a subsequent right to an appeal to the Supreme Court, on points of law alone (**Law 131/2015**).

[17] (2004) 3 C.L.R. 134

[18] (supra)

[19] Sigma Radio T.V. and others v. Cyprus Radio and Television Authority (2004) 3 C.L.R. 134, Sigma RADIO T.V. and others v. Cyprus Radio and Television Authority (2011) 3 C.L.R. 667

[20] C-32181/2004 and C- 35122/2005

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- The burden of proof for the violation burdens the public body, since the alleged violator does not accept the alleged infringement. The burden consists of both the objective and subjective hypostasis of the violation (if it relates to a non-strict liability violation) as well as the aggravating circumstances that surround the case and ought to be taken into account during mitigation.
- Presumption of innocence is a fundamental principle in Cyprus' legal system for criminal and administrative law and is in direct correlation with the burden of proof. Hence, a person is presumed innocent until proven otherwise.
- Principle against self-incrimination is linked to the aforementioned two principles in that if a person were to self-incriminate himself it would in essence release the public body from proving the violation against him.

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)** ☑

The principle of natural justice is founded upon 'two pillars' of procedural fairness known as "the rule against bias" and the "right to be heard" (*audi alteram partem*). It is enshrined in **Article 30.2 of the Constitution**, which is identical to **Article 6(1) of ECHR**. The right to be heard is enjoyed by any person who will be affected by the administrative act or measure of a disciplinary or sanction-like character or will, in any way, be adversely affected by and may be exercised either as a litigant in person or with an attorney, either orally or in writing.

In as far as legal aid is concern, the legal framework is governed by the **Legal Aid Law of 2002, L. 165(I)/2002**. By virtue of its provisions legal aid is available to eligible applicants under certain conditions and in certain proceedings; judicial review proceedings concerning administrative sanctions are not one of them.

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)** ☑

The jurisprudence of the European Court of Human Rights on this issue is consistent that an administrative body that combines the roles of investigation, prosecution, adjudication and the imposition of penalties cannot be 'independent and impartial' within the meaning of **Article 6 of ECHR**. The applicant could reasonably believe that it was the same persons who prosecuted and judged it. The case law, however, establishes that this defect can be cured where the parties have the right to appeal decisions of such bodies/authorities to judicial bodies, with full

jurisdiction or power to exercise sufficient review, including the power to quash on questions of fact and law, the challenged decision and can render the proceedings as a whole compatible with **Article 6 of the ECHR** (and **Article 30.2 of the Constitution of Cyprus** which is identical to **Article 6 of the Convention**).

In the case of **Sigma Radio Television Ltd v. Cyprus, nos. 32181/04 and 35122/05, 21 July 2011,** the ECtHR found that the combination of different functions of the Cyprus RadioTelevision Authority ('CRTA') gave rise, in the Court's view, to legitimate concerns that the CRTA lacked the necessary structural impartiality to comply with the requirements of **Article 6 of the Convention**. Nonetheless, the ECtHR reiterated that even where an adjudicatory body, including an administrative one as in the present case, which determines disputes over "civil rights and obligations" does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has "full" jurisdiction and does provide the guarantees of Article 6 § 1 (see *Albert and Le Compte, § 29*). In this respect, the ECtHR held that the judicial review proceedings under **Article 146 of the Constitution** were sufficient to comply with **Article 6 of the Convention**.

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

Under the principle of good administration public authorities are bound to conduct a due inquiry and apply the principle of proportionality before reaching their decision.

The principle of due inquiry is governed by **section 45** of the **General Principles of Administrative Law, L. 158(I)/1999**. Holding a due inquiry into the facts of the case is a prerequisite for a valid decision of the administration. Elicitation of the material facts, defined by the requisites of the law and the circumstances of the case, is of the essence. Therefore, the public body must look into the circumstances that surround each case to ascertain why the beneficiary failed to comply, the degree of non-compliance and its extent.

Secondly, it must apply the principle of proportionality. By virtue of **section 52** of the **General Principles of Administrative Law, L. 158(I)/1999** the public authority must take into account all interests involved and adverse effects cannot be disproportionate to the intended purpose, measure taken or sanction imposed. Also, if two or more lawful options are available to it, it must choose the option less burdensome/adverse to the individual/body (***Andreas Azinas v. Republic (1999) 3 C.L.R 508***, ***Theoti v. Republic (2001) 3 C.L.R 1144***).

The same applies for measures imposed for non-compliance with the provisions of the law. For instance, an administrative sanction imposed by a regulatory authority must be proportionate to the nature, severity and duration of the breach (e.g. **section 29(a)** of the statute on the **Protection of Competition, L. 13(I)/2022**, ***C.Y.T.A. v. Office of Electronic Communications and Postal Regulations (2009) 3 C.L.R. 465***).

The principles of due inquiry and proportionality apply to all administrative decisions across all fields of public function, regardless of whether the decision concerns a beneficiary or simply a person or body subject to the authority's administration. The administration is duty-bound by them and if a challenged decision does not abide by the said principles it will be annulled by the court.

(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)

(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)

Principles of equality and generality

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

Principle of progressiveness and its limit: non-confiscatory taxation

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

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

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