



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

**Madrid, 21 November 2022**

***Questionnaire***

***Application of general principles and clauses in the case law of contentious-administrative courts***

In order to deepen the open dialogue between the high administrative jurisdictions of Europe, this seminar will analyse the application, within the administrative legal system, of different general principles or clauses of law.

Given the variety and large number of existing general principles, an effort has first been made to delimit and select, on the basis of their topicality or potential expansion, a series of general principles which, although underlying most legal systems, nevertheless present differences in the various legal systems in terms of their nature, their recognition in legal norms and, in short, with regard to their functionality, with divergences evidenced in particular by their judicial application.

The seminar offers an eminently practical vision. For this reason, the questionnaire primarily takes judicial experience into consideration, suggesting the following perspectives as lines of analysis:

- (i) General principles of law in the system of sources;
- (ii) Common incorporation of general principles of law: European Union and horizontal dialogue;
- (iii) General principles and fundamental rights;
- (iv) General principles in certain sector-specific areas of public law, selecting, in this regard, some of these principles to determine their application and projection in fields such as *administrative organisation and procedure / administrative sanctions / public subsidies or grants / contracting by public bodies / town planning and environment / taxation*.

In short, the aim of the seminar is to find out whether there are convergences in the guidelines of the high jurisdictions of the Member States, by determining the degree of influence of European Union law (e.g. through Directive 2006/123/EC on services in the internal market, or through incorporation of the principle of good administration, recognised in Article 41 of the Charter of Fundamental Rights) in its application,



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

## Answers from the Administrative Jurisdiction Division of the Council of State in the Netherlands

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

1<sup>o</sup>) What place and function do general principles of law have in the system of sources of your country's legal system?

- They are applied where there are gaps in the law.
- **They may be applied directly, even to the extent of displacing the initially applicable written law and prevailing over it.**

**Explain your answer briefly:**

Article 8:77 of the General Administrative Law Act (GALA) states that if the administrative court rules the appeal well-founded, the judgment shall state the written or unwritten rule of law or general principles of law that is considered to have been infringed.

In the Dutch legal system, a distinction is made between general principles of law (*algemene rechtsbegijnen*) and general principles of sound administration (*algemene beginselen van behoorlijk bestuur*). The general principles of law have a more generic function, whilst the more 'specific' general principles of sound administration are geared towards governing the relationship between the administration and the citizens. The function of general principles of good administration is threefold: 1) the principles constitute legal norms to be respected by administrative authorities, 2) the principles serve as legal norms that can be invoked by citizens in judicial proceedings and 3) the principles serve as standards for judicial review of the lawfulness of administrative action.

General principles of law, and in particular the principles of sound administration play an important role in judiciary practice. Historically, the general principles of sound administration have a 'compensatory function' in the system of sources of the Dutch legal system. They have been developed in judicial practice as a response to the increased discretionary powers granted (by the Dutch legislator) to administrative authorities. Indeed, even in the situation where the administrative authorities are granted discretionary powers, they still have to respect and act in accordance with general principles of good administration.



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Hence, in principle, general principles are applied in judicial practice where there are gaps within the law. However, as we will explain below, a large part of general legal principles have been codified into the Dutch GALA, so that they are invoked directly through citation of the provisions in the GALA in which they are enshrined.

Furthermore, general principles may also be applied directly, even to the extent of prevailing over the applicable written law. In the Dutch legal literature this is called the *contra legem* application of general principles. The *contra legem* application of general principles has been accepted by the Supreme Court of the Netherlands since the 1970's. However, there are limitations to the *contra legem* application of general principles of law.

In the first place it has to be noted that art. 120 of the Dutch Constitution prohibits all courts to review the constitutionality of Acts of Parliament or treaties. This prohibition extends to general principles of law which have not been laid down in treaties. This means a general principle of law can only prevail over an Act of Parliament if in an individual case there is a circumstance which has not been taken into consideration by the legislator.<sup>1</sup> The *contra legem* application of general principles law in such cases does not affect the binding effect of the Act of Parliament, because the general principle of law only prevails in those individual cases.

In the second place the *contra legem* application of general principles is according to case law of the Administrative Jurisdiction Division of the Council of State (hereinafter Council of State or AJD) not possible when the interests of a third party are at stake. This is often the case in environmental law cases. The prohibition in article 120 of the Dutch Constitution does not extend to "lower" legislation, meaning legislative acts that do not originate from Parliament (e.g. ministerial regulations or local ordinances). Courts are permitted to review their compliance with "higher" law including the Constitution and general principles of law.

**2<sup>o</sup>) 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**

A number of general principles of administrative law have been positivised in the Dutch General Administrative Law Act (and in particular in section 3.2). These principles include, *inter alia*, the duty of care (article 3:2 GALA), the prohibition *against*

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<sup>1</sup> See the so-called Harmonisatiewet-arrest of 14 april 1989 of the Supreme Court of the Netherlands, ECLI:NL:HR:1989:AD5725





*detournement de pouvoir* (article 3:3 GALA), the principle of proportionality (article 3:4 GALA), and the duty to give reasons (article 3:46 GALA). These 'codified' legal principles, however, do not necessarily constitute the 'most relevant' legal principles. There are other important legal principles that have *not* been codified, such as the principle of legal certainty and the principle of legitimate expectations. The principle of equal treatment (non-discrimination) is codified in article 1 of the Dutch Constitution, yet it has not been positivised in the Dutch General Administrative Law Act.

**3<sup>o</sup>) 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:**

General principles of good administration are frequently invoked and applied, and considered relevant and decisive in the settlement of disputes. The reason for the (increasingly) important role of general principles of law in the judicial administrative practice is threefold. First, the law increasingly leaves room for discretion to administrative authorities (see the answer to question 1). Second, the prominent role of legal principles in judicial decision-making has been strengthened due to the codification of those legal principles in the Dutch GALA (see the answer to question 2). For instance, administrative courts often invoke the duty of care as well as the duty to give reasons, and increasingly also the principle of proportionality. A violation of those principles may lead to the annulment of administrative decisions. Third, the increased role for general principles in (administrative) judicial decision making is considered to be a result of the influence of the application of European general principles of law.

**4<sup>o</sup>) 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)

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



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

**Explain your answer briefly:**

In the Dutch legal system, there are principles specific to administrative law that may be applied in conjunction with other general principles of law. The principles specific to administrative law are referred to as 'general principles of sound administration (see also question 1)'. The general principles of sound administration have a more specific character than general legal principles, as they concern the relationship between the administration and citizens. General principles of law (such as the principle of legality, the principle of equality and the principle of legal certainty) may be relevant for the exercise of defining general principles of administrative law.

Within the broad category of general principles of sound administration a distinction is made between 'procedural' and 'substantive' principles. Procedural principles of sound administration govern the procedural rules for administrative decision-making processes. Examples are (aspects of) the duty of care and the duty to give reasons. Substantive principles of sound administration provide norms for the substance/content of administrative decision. Examples are the principle of legitimate expectations and the principle of proportionality. Nonetheless, in practice, a clear-cut distinction between procedural and substantive legal principles may be hard to make as legal principles of sound administration often encompass both procedural as well substantial aspects of administrative decision-making processes.

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

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

- o Yes, in general
- o **No special or specific incorporation has been necessary, because in general these principles were already recognised and enshrined in the country's legislation and practice.**

**Explain your answer briefly (this question mainly concerns the work of the legislator, i.e. the "legislative system").**





No specific incorporation in legislation has been necessary. Most of the general principles of European Union law were already recognised and enshrined in the Dutch legislation and judicial practice. Nonetheless, EU law and principles may lead to the introduction of new legal principles. An example is the principle of transparency. Influenced by EU legislation and the EU transparency principle, Dutch scholarship (increasingly) recognises the transparency principle as an (independent) legal principle. However, the principle of transparency has not (yet) been given a formal status in Dutch legislation. Dutch courts also have not gone so far as to recognise the principle of transparency as a ‘self-standing legal principle’. (See for instance the *Hommerson* judgment of the Council of State of 2 November 2016, ECLI:NL:RVS:2016:2927).

**7<sup>o</sup>) Is it common in your country’s judicial practice for the specific general principles of European Union law to be invoked and taken into account in areas where there is no regulatory harmonisation?**

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

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

In Dutch judicial practice, general principles of European Union law are invoked and taken into account in cases that fall within the scope of European Union law, even in areas where there is no regulatory harmonisation (by e.g. an EU directive or regulation). Indeed, according to the CJEU’s case law, general principles of EU law are applicable whenever the situation falls within the scope of Union law. An example is the ruling of the Council of State of 19 May 2021, ECLI:NL:RVS:2021:1061. This ruling concerns a situation that falls within the scope of the free movement of services, yet it does not fall within the scope of the Services Directive. The Council of State reasons that, as a result, the EU Charter of Fundamental Rights is applicable (see article 51 par. 2 of the Charter), as well as the principle of defence, as this principle is particularly relevant in this specific case.

**8<sup>o</sup>) 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)





In certain cases, application of a general principle of EU law may indeed lead to the non-application of a national legal principle. Examples can be found in relation to the EU principle of legitimate expectations. As will be explained below (see the answer under question 9) the Dutch principle of legitimate expectation offers more protection than its European counterpart. As a consequence, in situations where the EU general principle of legitimate expectation applies (such as in cases concerning the recovery of EU subsidies), there is no room left for application of the 'Dutch' principle of legitimate expectations.

General principles of EU law may also lead to the non-application of a national rule in the situation where the EU general principle has been incorporated in provisions of European Union law. For instance, national conditions that are part of an authorisation scheme regulating the access to or exercise of service activities may be ruled incompatible with the principle of proportionality as incorporated in article 10 of the Services Directive (2006/123/EC), resulting in the non-application of the national conditions. (See for instance the ruling of the Council of State of 29 August 2018, ECLI:NL:RVS:2018:2856).

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

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

**Explain your answer briefly.**

The principle of legitimate expectations is applied to harmonised and non-harmonised areas because it is a general principle of administrative law in the Netherlands. However, it must be noted that the Dutch version of the principle of legitimate expectations offers more protection than its European equivalent. In the first place, the Dutch principle of legitimate expectations can operate *contra legem*, whereas the European version cannot. In the second place, the Dutch principle is more lenient on individuals relying on an expectation created by erroneous information from administrative authorities (the Dutch standard is the 'prudent man in the street' whilst the European standard is the 'prudent and diligent trader'). The European principle of legitimate expectations is applied, in particular, in the situation where the European principle of legitimate expectations has been codified (so-called direct application of Union law) as well as in cases concerning the recovery of European subsidies.



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**10<sup>o</sup>) 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.**

Violation of the Dutch principle of legitimate expectations may result in the annulment of administrative decisions. However, for the principle of legitimate expectations to be successfully invoked, three conditions need to be met: 1) the act of the administrative authority can be qualified as a commitment (*toezegging*); 2) this commitment can be attributed to the administrative authority; 3) the legitimate expectations should be observed, but the public body does not have to live up to the expectations if the interests of third parties or the general interest outweighs the interest of the party to whom a commitment was made (in which case there might be room for the granting of damages). An example of a case in which the three criteria are fulfilled is 29 May 2019 of the Administrative Jurisdiction Division of the Council of State, ECLI:NL:RVS:2019:1694 (*Amsterdamse dakopbouw*). In the situation where the third criterion is not fulfilled, for instance due to prevailing interests of third parties, there might be an obligation for the administrative authority to provide compensation for violation of the appellant's legitimate expectations.

As explained above (see question 9) application of the European principle of legitimate expectations is less likely to result in the annulment of administrative decisions, as this principle sets higher standards than its Dutch counterpart.

**11<sup>o</sup>) Has the “principle of good administration” referred to in Article 41 of the Charter of Fundamental Rights of the European Union been adopted and applied in your country’s judicial practice?**

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

**Explain your answer briefly.**

In Dutch judicial practice, the principle of good administration laid down in article 41 of the Charter of Fundamental Rights of the European Union is not commonly applied as a transversal principle. In its case law, the Dutch Council of State considers that article



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41 of the Charter addresses the ‘institutions, bodies, offices and agencies of the Union’; it does not directly address the Member States. However, in this respect it is important to keep in mind that the principle of good administration reflects general legal principles of EU law (as is recognised by the Council of State as well). Those principles are applied by Dutch courts when a case falls within the application of Union law. An example is the right to be heard which is an element of the right of defence. The principle of defence is one of the principles reflected by the principle of good administration. The Dutch courts apply this general principle of defence in order to examine whether the right to be heard in a specific case (that is within the scope of EU law) has been violated. See for instance the ruling of the Council of State of 19 May 2021, ECLI:NL:RVS:2021:1061.

**12<sup>o</sup>) Can taking the principle of good administration into account even result in the annulment of administrative decisions that are contrary to or violate that principle?**

- **Yes, in some specific cases.**
- This would never be possible because, among other reasons, this principle applies solely as a guideline for conduct within the Administration and cannot be invoked by the citizen.
- No

**Explain your answer briefly.**

The principle of good administration may lead to the annulment of administrative decisions through the application of other general principles of EU law principles that are reflected by the principle of good administration.

Here again, the right to be heard is worth mentioning. As noted above (see question 11), the right to be heard is an element of the principle of good administration (see article 41(2)(a) of the Charter of Fundamental Rights of the European Union) as well as of the EU principle of defence. In cases where the EU principle of defence applies, Dutch courts assess whether the right to be heard has been respected. Violation of the right to be heard could lead to the annulment of the administrative decision.

Examples can be found in cases concerning the lawfulness of fiscal decisions. In the situation where the EU principle of defence applies, Dutch Courts regularly refer to the CJEU’s judgment *Kamino Datema* (CJEU 3 July 2013, ECLI:EU:C:2014:2041 and the judgment of the Dutch Supreme Court of 9 October 2015, ECLI:NL:HR:2015:2989). In this judgment the CJEU ruled that an infringement of the principle of respect for the rights of defence results in the annulment of the decision in question only if the outcome of the procedure could have been different (par. 80). In purely national cases, a violation of the rules laid down in the GALA concerning the duty to be heard may



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equally result in the annulment of the contested decision (see for instance the judgment of the Supreme Court of 18 January 2019, ECLI:NL:HR:2019:59).

**13<sup>o</sup>) Is it common in judicial practice for the principle of necessity and proportionality of administrative measures that limit or restrict access to or the exercise of an economic activity to be invoked and taken into account?**

- 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 codified in article 3:4 of the Dutch GALA, which provides that the adverse consequences of an order for one or more interested parties may not be disproportionate to the purposes served by the order.

In Dutch judicial practice, the principle of proportionality plays an increasingly significant role. In the recent *Harderwijk* judgement of 2 February 2022, ECLI:NL:RVS:2022:285, the Dutch Council of State rules that the proportionality test encompasses the three elements of suitability, necessity and proportionality *strictu sensu*. To this end, the Council of State draws inspiration from the proportionality test as developed in European Union law. Non-observance of the principle may result in the nullity of the contested decisions or, via indirect review, of the measure or provision of a general nature laid down in a policy rule or in a legally binding act. This also includes administrative measures that limit or restrict access to or the exercise of an economic activity. These cases are generally governed by the EU services directive (2006/123/EC), which means that the European principle of proportionality applies.

**14<sup>o</sup>) With regard to any of the above principles (legitimate expectation, necessity, proportionality or good administration) or other principles, has your country's Supreme Court taken into consideration the interpretation and manner of application of these principles by other European national high jurisdictions?**

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

Generally, the Administrative Jurisdiction Division of the Council of State does not directly refer to the interpretation and application of general principles by other European national high jurisdiction. Nonetheless, there may be an indirect influence



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on Dutch judicial practices of the case law of other European high jurisdictions via the (voluntary) application by Dutch courts of the legal principles as developed by the CJEU and the ECHR. A recent and noteworthy example is the proportionality test for which, as explained above, the AJD of the Council of State draws inspiration from the case law of the CJEU. This proportionality test as developed by the CJEU is largely based on the German proportionality test. Thus, indirectly – via the CJEU’s case law – the Dutch proportionality test has been influenced by the interpretation of this legal principle by the German judiciary.

### III. – GENERAL PRINCIPLES AND FUNDAMENTAL RIGHTS

**15<sup>o</sup>)** According to Article 6, paragraph 3 of the Treaty on European Union, fundamental rights that result from the constitutional traditions common to the Member States shall constitute general principles of the Union's law. Has your country’s Supreme Court identified any of these common constitutional traditions?

- o Yes, especially on the basis of the case law of the Court of Justice or the European Court of Human Rights
- o Yes, especially on the basis of the case law of the Supreme Courts of other Member States.
- o **No such identification has taken place.**

**16<sup>o</sup>)** What status and importance does the principle of non-discrimination and gender equality have in your country's judicial practice?

- o **It is a principle commonly and generally taken into consideration, across all areas**
- o It is a principle that is taken into consideration and applied in certain legal relations and sector-specific areas

**Explain your answer briefly.**

The principle of equal treatment and non-discrimination is laid down in article 1 of the Dutch Constitution. Therefore, it is commonly and generally taken into consideration.

**17<sup>o</sup>)** In the judicial practice of your country, is the principle of protection of particularly vulnerable groups (e.g. minors, women, people with disabilities) invoked and applied?



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- 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.**

In the judicial practice of Dutch administrative courts a principle of protection of particularly vulnerable groups has not been recognised. Nonetheless, the protection of vulnerable groups is taken into account as a relevant factor when taking administrative decisions that (also) affect vulnerable groups. The protection of vulnerable groups then is part of the proportionality assessment and/or of the duty to weigh all interests directly involved (see article 3:4 of the GALA).

To give an example, under article 13b of the Dutch Opium Act, mayors have the power to close down a residential premise if drugs are sold, delivered, supplied for one of these purposes, in or near the premise. The Administrative Jurisdiction Division of the Council of State ruled that the presence of minors living in the house should be taken into account as part of the proportionality assessment. The presence of minors, in other words, needs to be taken into consideration when making the decision whether it can be considered reasonable to close down the house. (See for instance the judgment of the AJD of 28 August 2019, ECLI:NL:RVS:2019:2912).

Vulnerable groups are also protected by specific legislative acts, such as the Youth Care Act (*Wet op de jeugdzorg*), the Equal Treatment Man and Women Act (*Wet gelijke behandeling van mannen en vrouwen*), the Disability Provision Act (*Wet voorzieningen gehandicapten*) and the Act on Equal Treatment on the grounds of disability or chronic disease (*Wet gelijke behandeling op grond van handicap of chronische ziekte*).

**18<sup>o</sup>) Do the judicial bodies demand enhanced reasoning in cases where the contested administrative measure or decision (e.g. eviction from housing, granting of nationality) affects these vulnerable groups (e.g. minors, women, people with disabilities) or has an impact on other constitutional values such as protection of the family?**

- No special grounds are required in these cases
- **Yes, and their absence results in the nullity of the decision**

**Explain your answer briefly.**

When an administrative authority takes a decision that affects vulnerable groups, the reasoning has to demonstrate that those effects have been taken into account.





19<sup>o</sup>) In your judicial practice, have disputes been raised regarding the issue of the principles of transparency, equality and non-discrimination in relation to decisions based on artificial intelligence or predictive data management systems?

- Yes
- These principles are not frequently invoked, but some examples exist**
- No

**Explain your answer briefly.**

In the case law of the AJD the issue of transparency has been raised in relation to decisions based on the software application AERIUS Calculator. This application is used to calculate the amount of nitrogen an development is going to deposit on Nature 2000-gemotareas. For this calculation a lot of data is used. The AJD has addressed the issue to which extent these data have to be available to parties in proceedings in two judgments (ECLI:NL:RVS:2017:1259 and ECLI:NL:RVS:2018:2454). The Council of State did not explicitly point at the principles of transparency and non-discrimination, but it did point at the risk of unequal treatment of process parties: 'In order to avoid this unequal procedural position, in this case the ministers and the State Secretary are obliged to disclose the choices made and the data and assumptions fully, timely and of their own accord in an appropriate manner so that these choices, data and assumptions are made accessible to third parties. This complete, timely and adequate disclosure must make it possible to assess or have assessed the choices made and the data and assumptions used, and if necessary to contest them, so that real legal protection is possible against decisions based on these choices, data and assumptions and whereby the judge is able to review the lawfulness of these decisions.'

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

##### ***IV.1. – ORGANISATION AND ADMINISTRATIVE PROCEDURE***

20<sup>o</sup>) In the administrative organisation, do the principles of decentralisation and subsidiarity apply?

- Yes**
- No
- Not generally, but in certain areas or sectors (in this case, explain your answer briefly)



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21<sup>o</sup>) Are the general principles set out below applicable to the procedure for formulating administrative acts and provisions?

**Principle of publicity and transparency**

- Yes
- 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***

22<sup>o</sup>) 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)



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- 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.**

General principles of law which are specific to criminal law (like the presumption of innocence) are only applied to infractions that can be characterised as “criminal” in accordance with the doctrine of the ECHR. General principles of law which are not specific to criminal law (like the principle of proportionality and the principle of reasoning of the sanctioning decision) are applied to all administrative sanctions.

**23<sup>o</sup>) If you have answered yes to the previous question, could you specify whether or not the following general principles are applied for administrative sanctions, or to what extent?**

**Principle of presumption of innocence and right not to incriminate oneself or plead guilty:**

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

This principle is in general only applied to punitive administrative sanctions.

**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)**

This principle is only applied to punitive administrative sanctions.

### **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)**

In general criminal law cases and detention cases (including temporary custody in immigration cases) the defendant or applicant has a right to legal assistance. In general administrative and civil law cases, every party has to right to defend himself and to be represented by a lawyer, but only parties who have an income below a certain threshold qualify for free legal assistance.

### **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**



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

#### **Principle of judicial protection**

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

#### **Principle of double instance**

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

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

#### ***IV.3. – SUBSIDIES AND PUBLIC AID***

**24<sup>o</sup>) Is the principle of proportionality applied in order to modulate the consequences of non-compliance by a beneficiary of public subsidies, aid or resources, or in the area of regulated sectors?**

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

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

When an administrative authority has a discretionary competence to reclaim subsidies, application of the principle of proportionality can lead to a reduction of the amount which the beneficiary has to pay back. However, when an administrative authority has a duty to reclaim subsidies, the principle of proportionality is not applied. This is for example the case when the duty to reclaim subsidies is based on EU-law.



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

**25<sup>o</sup>) 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**

**26<sup>o</sup>) 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)**





The 'polluter pays' does not qualify as a (general) principle that can be invoked and applied in the judicial practice of the AJD. It is, however, common practice for the legislator and administrative authorities to refer to this 'principle' when formulating legislation and policy.

**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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