



**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,



**Co-funded by  
the European Union**



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

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

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

**X They are applied where there are gaps in the law**

- They may be applied directly, even to the extent of displacing the initially applicable written law and prevailing over it.

**Explain your answer briefly:**

In Romanian law, general principles play an important role in the administration of justice, ensuring complementarity between the practical applicability of the legal rule and the application of the law in its spirit.

In specific situations, legal principles can take the place of a regulatory norm when there is a legislative gap or when they complement legal norms when such a regulation exists.

However, in the Romanian legal system, general principles of law cannot be applied in situations where it would lead to the replacement or removal from application of an originally existing written legal rule.

In fact, the Romanian legislator states in Article 1 of the Civil Code as follows:

*Art. 1 -(1) The sources of civil law are the law, customary law and general principles of law.*

*(2) In cases not provided for by law, customary law shall apply, and in their absence, legal provisions concerning similar situations, and when there are no such provisions, general principles of law.*

Also, by Art. 5 para. (3) of the Code of Civil Procedure, the Romanian legislator has established that: *"if a case cannot be resolved either on the basis of the law or of customary law, or in the absence of the latter, on the basis of legal provisions concerning similar situations, it shall be judged on the basis of general principles of law, taking into account all the circumstances and taking into account the requirements of equity."*

**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?**



**Co-funded by  
the European Union**



- Yes
- Yes, the most relevant ones (please indicate briefly the most notable of these)**
- No

The following general principles of law enshrined in legal status may be indicated for example:

- (i) **Principle of legality** - Art. 6 of the Administrative Code
  - Art. 1 paragraph 5 of the Constitution of Romania
  - Art. 7 of the Code of Civil procedure
- (ii) **Principle of equality** - Art. 7 of the Administrative Code
  - Art. 4 of the Constitution of Romania
- (iii) **Principle of equality in the exercise of procedural rights**- Art. 8 of the Code of Civil procedure
- (iv) **Principle of impartiality** - Art. 11 of the Administrative Code
  - Article 124 paragraph 2 of the Constitution of Romania
- (v) **Principle of separation of powers in the State** - Article 1 paragraph 4 of the Constitution of Romania
- (vi) **Right to a fair trial, in an optimal and foreseeable manner**- Art. 6 of the Code of Civil procedure
- (vii) **Principle of good faith** - Art. 12 of the Code of Civil procedure

**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:**

Thus, as stated in the answer to Question 1, general principles of law in the Romanian legal system play an important role in the administration of justice in specific situations, and principles of law can take the place of a regulatory norm when it does not exist.

However, in the Romanian legal system, including in the field of public law, disputes are not settled exclusively on the basis of the principles of law invoked by the parties, but by assessing them in a manner complementary to the legal provisions consolidated by written rules.



**Co-funded by  
the European Union**



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?

- 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:**

By way of example, the following principles specific to administrative law can be mentioned:

**Principle of opportunity** - This is the prerogative conferred on the public administration, a prerogative according to which it has the right and the obligation to assess, at the time of issuing an administrative act, the conformity between the rule of law and the factual situation, an assessment which the public administration makes on the basis of a single criterion: the interests of the community it represents.

**Principle of good administration** - This principle establishes the right to good administration. Everyone has the right to be heard before a decision which might adversely affect them is taken; the administration is obliged to give reasoning for its decisions. The right to good administration also implies an obligation on the administration to consider citizens' complaints.

**Principle of subsidiarity** - This principle is defined by the European Charter of Local Self-Government, adopted in Strasbourg in 1985 by the Council of Europe and ratified by Romania through Law no. 199/1997. The principle of subsidiarity consists in the exercise of powers by the local public administration authority located at the administrative level closest to the citizen and which has the necessary administrative capacity. The principle aims to bring decision-making as close as possible to the citizens, raising the issue of distribution, of transferring powers to local community authorities through the decentralisation process.

**Principle of transparency of decision-making in public administration** - This principle refers to the transparency of decision-making and involves ensuring full access of citizens and other stakeholders to information on the process of elaboration and implementation of decisions of public administration authorities, including the process of revenue collection and execution of accounts of local public administration



Co-funded by  
the European Union



authorities at all levels. In national law, the principle is enshrined in Law No 52/2003 on Transparency in Public Administration.

## 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”).**

Administrative Code which states: *"The forms of activity of public administration authorities must be appropriate to the satisfaction of a public interest and balanced in terms of their effects on individuals. Regulations or measures of public administration authorities and institutions shall be initiated, adopted, issued, as the case may be, only after assessment of public interest needs or problems, as the case may be, risks and impact of the proposed solutions."*

**Principle of satisfying the public interest** - regulated in domestic law by Article 10 of the Administrative Code which states - Authorities and institutions of public administration, as well as their staff, are obliged to pursue the satisfaction of the public interest before the individual or group interest. The national public interest has priority over the local public interest.

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

**Yes, for certain matters**

- No, not generally

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

In the judicial practice of the High Court of Cassation and Justice, general principles specific to both national law and European Union law are often invoked, and these are



Co-funded by  
the European Union



taken into account by the national judge when giving rulings, often in addition to the written rules.

In this respect, we can point to the field of administrative law or tax law with regard to the application of **the principle of the security of legal relationships**, even if the implementation of this principle did not require the application of a procedure to harmonise national regulations with EU law.

Also, **the principle of legitimate trust or legitimate expectation** has often been taken into account by the national judge in settling disputes such as those related to access to European Funds, contesting tax claims, or even in disputes concerning the salary rights of staff paid from public funds.

**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 deciding such cases, the national court shall have regard to **the principle of the supremacy of European law**, established as a general principle of European Union law by the judgment of the Court of 15 July 1964 in *Flaminio Costa v. E.N.E.L.*, which established, as a general principle of European Union law, its superiority over the national laws of the Member States.

In national law, the principle of supremacy of Community law is governed by Article 148 of the Romanian Constitution.

Given that the general principles of European Union law are, together with primary and secondary legislation, one of the sources of European law, we can conclude that, in the event of a conflict between national rules and a general principle of European law, the national judge must give effect to the principle of supremacy of Community law.

However, at the level of the High Court of Cassation and Justice (H.C.C.J.), when the court finds a possible conflict between a national legal rule and a rule or principle of European law, the mechanism of the preliminary question, referred to the CJEU under Article 267 TFEU, is activated.

In this regard, by Decision No 45/2016 (published in the Official Gazette No 386 of 23/05/2017), the H.C.C.J. - The Panel for Preliminary Ruling on Questions of Law held that: *"The interpretative decisions of the CJEU form a common body with the rule interpreted and are applicable in all situations in which interpreted European law applies, that is also to legal relationships which have arisen/amended/ended prior to*



**Co-funded by  
the European Union**



*the delivery of the decisions and which are not yet final (i.e. are the subject of pending litigation)."* [paragraph 66 of the decision].

**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 trust has been invoked by the parties and analysed by the national judge in disputes in the field of tax law and tax procedural law (*HCCJ Decision no. 2079 of 31 March 2021*) but mainly in disputes concerning the use and access to European funds (*HCCJ Decision no. 149 of 15 January 2021, HCCJ Decision no. 241 of 20 January 2021*).

**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.**

The principle of legitimate expectations establishes, on the one hand, the obligation of public authorities to protect, through consistent and non-contradictory behaviour, the legitimate expectations of citizens and, on the other hand, it establishes their right to evolve within a stable and predictable legal framework.

In the Romanian legal system, by way of example, this principle can be found in the area of building authorisation, namely the provisions laid down in Article 31 of Law No 50/1999 on authorising the execution of building works.

As regards the implementation of this principle in the judicial system, we can say that, in national judicial practice, there are decisions on the annulment of administrative acts adopted in violation of the principle of legitimate expectations, but only to the extent that they are supplemented by other grounds of illegality of the contested administrative act.



**Co-funded by  
the European Union**



**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 domestic judicial practice, the Principle of Good Administration has been invoked in various specific areas such as Integrity in the exercise of public functions and dignities (*HCCJ Decision No 4258/28 September 2021*), authorisation and supervision of financial activity (*HCCJ Decision No 5570/16.11.2021*).

**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.**

According to this principle, every citizen has the right to be heard before a decision which might adversely affect him or her is taken; it also establishes an obligation for the administration to give reasoning for its decisions. The right to good administration also requires the administration to consider citizens' complaints.

Infringements of this principle, in conjunction with other grounds of illegality, may lead, in judicial practice, to the annulment of administrative acts issued in breach of this principle.

On the other hand, consideration of the principle of good administration may lead to the annulment of administrative decisions when it is found that the infringement of this principle is a corollary of the infringement of legal provisions and not when it results from the infringement of aspects of expediency.





**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?**

**X 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 a positive principle in the Romanian legal system and can lead to the annulment of the measure ordered. Moreover, the Romanian Constitutional Court itself, through several decisions, has established that proportionality is a constitutional principle and must be recognised as such (*Decision No 157/1998 of the Constitutional Court, published in O.G. No 3 of 11 January 1999, Decision No 161/1998 of the Constitutional Court, published in O.G. No 3 of 11 January 1999*).

The principle of proportionality is regulated in a number of legal acts, such as the **Administrative Code, which, in Title III, Article 9**, regulates the principle of proportionality as follows: *"The forms of activity of the public administration authorities must be appropriate to the satisfaction of a public interest and balanced in terms of the effects on individuals. Regulations or measures of public administration authorities and institutions shall be initiated, adopted, issued, where appropriate, only after an assessment of the public interest needs or problems, where appropriate, the risks and the impact of the proposed solutions"*. Another example is **Law No 98/2016 on public procurement, which, in Article 2**, enshrines the principles underlying the award of public procurement contracts and the organisation of competitions for solutions, including the principle of proportionality.

In the judicial practice of the High Court of Cassation and Justice of Romania, this principle has often been invoked in tax matters (*HCCJ Decision no. 1041 of 22 February 2021*) as well as in matters of access to and use of European funds (*HCCJ Decision no. 3594 of 10 June 2021*).

**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?**



**Co-funded by  
the European Union**



**X Yes, on some occasions (in this case, explain your answer briefly)**

- Never

In some cases, the national court has taken into account, in addition to other arguments, the interpretation given to these principles by the European national courts in reaching a decision.

### **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?

- X 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.

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

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

**Explain your answer briefly.**

The right to equality applies in all areas of activity regulated by law. National legal rules, Government Ordinance No 137/2000 on the prevention and punishment of all forms of discrimination (republished) prohibits any form of discrimination against a person on the grounds that he or she belongs to a particular race, nationality, ethnicity, religion, social category or disadvantaged group, or on the grounds of his or her beliefs, age, sex or sexual orientation, in an employment and social protection relationship, except in cases provided for by law. For example, measures taken by public authorities or private legal persons for the benefit of a person, group of persons or community, aimed at ensuring their natural development and the effective achievement of equality of opportunity with other persons, groups of persons or communities, as well as positive measures aimed at protecting disadvantaged groups, do not constitute discrimination.



**Co-funded by  
the European Union**



Likewise, a difference of treatment based on a characteristic related to the above criteria shall not constitute discrimination where, by reason of the nature of the occupational activities or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

**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?**

- 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.**

**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.**

According to Romanian law, the lack of reasoning of the administrative act when it is mandatory entails the nullity of the unreasoned administrative act. For the same reasons, the nullity of the administrative act will also be a sanction applied to administrative acts that contain reasons in the reasoning contrary to the provisions of the law in force.

**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.

#### 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)

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**



Co-funded by  
the European Union



- 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)**

- Yes
- Yes, although with nuances arising from the different natures of criminal offences and administrative offences**
- Not in respect of minor, lesser or trivial infractions
- Only in relation to infractions that can be characterised as “criminal” in accordance with the doctrine of the ECHR

**Explain your answer briefly.**

In the area of administrative liability, administrative sanctions are applied after a summary procedure is carried out by persons from the public administration and sanctions are applied in the vast majority of cases by administrative bodies. The procedure under administrative law does not provide the same guarantees as those enjoyed by a person accused of a criminal offence.

**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



**Co-funded by  
the European Union**



- With nuances (in this case, explain your answer briefly)

**Principles of legality and definition of the constituent elements of the offence:**

**X Yes**

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

**Principle of non-retroactivity of sanctioning provisions:**

**X Yes**

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

**Principle of culpability:**

Yes

**X No**

- With nuances (in this case, explain your answer briefly)

**Principle of proportionality**

**X Yes**

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

**Principle of defence and legal assistance:**

**X Yes**

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

**Principle of hearing:**

**X Yes**

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

**Principle of separation between investigating authority and decision-making authority**

- Yes
- No



**Co-funded by  
the European Union**



**With nuances** (in this case, explain your answer briefly). In the case of administrative liability of public officials (with the exception of senior public officials) the disciplinary committees responsible for investigating disciplinary offences are made up of officials of the same authority that takes the disciplinary decision.

#### **Principle of reasoning of the sanctioning decision**

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

#### **Principle of time-barring of administrative offences and sanctions**

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

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

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

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

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

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

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

**24<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**



**Co-funded by  
the European Union**



(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)



**Co-funded by  
the European Union**



#### **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)**

-0-0-0-0-0-0-



**Co-funded by  
the European Union**