



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

Madrid, 21 November 2022

GENERAL REPORT

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

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

Question 1.

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.**

Summary of answers

- They are applied where there are gaps in the law (Austria, Belgium, Croatia, Czech Republic, Spain, Estonia, Finland, Germany, Italy, Lithuania, Portugal, Poland, Romania, Slovakia, Slovenia, Sweden, Norway)
- They may be applied directly, even to the extent of displacing the initially applicable written law and prevailing over it (Bulgaria, Cyprus, France, Greece, Hungary, Latvia, Luxembourg, Netherlands)

Most of the national reports (17 of the countries that answered the questionnaire, including Austria, Belgium, Croatia, Czech Republic, Spain, Estonia, Finland, Germany, Italy, Lithuania, Portugal, Poland, Romania, Slovakia, Slovenia, Sweden, Norway) indicate that general principles are applied where there are gaps in the law and are therefore subject to the written law.

Conversely, eight of the countries (Bulgaria, Cyprus, France, Greece, Hungary, Latvia, Luxembourg, Netherlands) confirm the feasibility of directly applying general principles, which may displace the initially applicable written law and prevail over the solution that would result from its application.

In this regard, Bulgaria indicates that although most general principles of law have been incorporated into positive law, based on the premise of Article 5 of the Civil Judicial Code that these are applied where there are gaps in the law, the case law of Bulgaria's Supreme Administrative Court has determined that these principles are directly applicable, and may pass over a normative provision that is in contradiction with the principle concerned.

Cyprus states that the general principles of law have been formed in a traditional manner by the judiciary through case law. However, in 1999 the developed general principles of administrative law were codified in a statute to safeguard administrative decision-making



**Co-funded by
the European Union**



through the establishment of rules. Thus, the legal framework of administrative principles is governed by the General Principles of Administrative Law provided for in the 1999 Law (L. 158(I)/1999).

In France, general principles are generally subordinated to the written law. However, as the French Council of State has affirmed, there are some general principles that have constitutional value and are therefore binding on the law, such as the principle of equality and the principle of continuity in the provision of public service.

Greece states that according to case law, only those general principles with constitutional value can displace and prevail over the initially applicable written law.

Hungary states that the presence of the general principles of law can be observed at different levels of the entire body of sources of law in its legal system, being present not only in the binding framework of the Fundamental Law of Hungary of 1 January 2012, but also in the regulation of various fundamental rights, as constitutional requirements expressed in the decisions of the Constitutional Court and as principles in various general and sector-specific laws.

Latvia's report indicates that since the general principles of law arise from natural law, they constitute a criterion of legitimacy for written laws and for the legislator itself. Therefore, written laws must comply with the general principles of law, and it follows from this that these principles prevail over the written law.

Luxembourg states that traditionally, both the Council of State and the contentious-administrative courts had indicated the existence of general principles of law that have legislative value. However, the Constitutional Court has recently identified general principles of law that have supra-legislative value and are enshrined as general principles with constitutional value.

The Netherlands confirms that the general principles may also be applied directly, even to the extent that they prevail over the applicable written law, in what has been doctrinally referred to as "*contra legem* application of general principles". This *contra legem* application of general principles has been accepted by the Supreme Court of the Netherlands since the 1970s, although it makes it clear that there are limitations on their application (for example, the limitation provided for in Article 120 of the Constitution itself).

Serbia indicates that the general principles of law (including some derived from European Union law) are incorporated into the Constitution, laws and other written rules.

The United Kingdom, for its part, cannot offer an unambiguous answer to this question given the existence of two predominant sources of law in its legal system: written law and common law. Primary laws enacted by the UK Parliament take precedence over all other sources of law under the constitutional principle of parliamentary sovereignty. For legal matters and questions on which the Parliament has not enacted any legislation, or where a law requires interpretation, the law is given by common law. Common law is an evolving set of rules and principles developed by judges through case law over the centuries. Common law does not allow for any gaps: in principle, it will always provide a legal rule that must be applied in order to answer a legal problem. A number of fundamental constitutional principles and rights have been developed through common law, these being the closest things to "general principles of law" presented by the United Kingdom. Thus, although general principles cannot displace or





prevail over primary laws passed by the Parliament, they can influence the way in which the courts interpret them.

Spain reports that Article 1.4 of the Spanish Civil Code states that “General legal principles shall apply in the absence of applicable written law or custom, without prejudice to the fact that they contribute to shaping the legal system”. Based on this precept, case law indicates that general principles of law can be successfully cited in judicial practice only where there are no legal or customary rules. Thus, the Supreme Court of Spain’s judgment 107/2005 of 3 March states that principles of law, “as subsidiary sources, after written law and custom, can be invoked only by justifying their strict necessity due to a deficiency in the written or customary legal system”. However, the great majority of the most relevant principles in judicial practice have been incorporated into positive law through their recognition and inclusion in written laws, so that they tend to be invoked directly through citation of the laws in which they are enshrined.

Question 2.

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

Summary of answers.

- Yes (Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Slovakia, Slovenia, Serbia, Spain, Sweden, Norway, United Kingdom)
- Yes, the most relevant ones (Austria, Belgium, France, Romania)
- No (Malta, Netherlands)

For the most part, the national reports gave an unambiguously positive response to this question, so we can say that the general principles of law have found explicit normative support in their various legal systems (see, in this regard, the reports of Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Slovakia, Slovenia, Serbia, Spain, Sweden, Norway, United Kingdom).

Four countries said that the most relevant general principles have been enshrined in written rules.

In this regard, Austria indicates that the main principles of Public Law have been positivised in constitutional, procedural or administrative rules. These include the principles of *ex officio* investigation, the right to be heard, the principle of impartiality and reasoning, the right to a fair trial, the principle of *non bis in idem*, the principle of legality and definition of the constituent elements of the offence, and the principle of legitimate expectation.

Belgium indicates that among the most important principles to have found explicit normative recognition are the principles of equality and non-discrimination, the principle of reasoning



**Co-funded by
the European Union**



(formal and material) for individual administrative acts, and the principle of proportionality (e.g. for authorisations of access to a service activity). In the field of public procurement, this is also true for the principles of equality, non-discrimination, transparency and proportionality.

France has a set of general principles of law identified by the Council of State that are unwritten and apply “even without a text”, such as the principle of prohibition of dismissal of a pregnant woman on the grounds of circumstances related to her maternity within the framework of a contract under public law. However, certain principles have been expressly enshrined in positive law, such as the right to recourse for abuse of power, the principle of job reclassification, respect for privacy, and the protection of human dignity.

Luxembourg indicates the existence of a set of general principles that arise from case law but have been enshrined in legislation since the 1970s, and that seek to establish a set of procedural guarantees for citizens in their relations with the Public Administration. These include the principles of reasoning of administrative acts, good administration, rights of defence, the necessary participation of the citizen – to the extent possible – in the administrative decision, the principle of procedural collaboration by the Administration, the right of the citizen to be heard and to obtain the administrative record, and the Administration’s obligation to provide the citizen with the necessary information.

Romania indicates, by way of example, that the body of general principles applicable to the Public Administration, as expressly set out in the Romanian Administrative Code, include the principle of legality, the principle of equality, the principle of transparency, the principle of proportionality, the principle of satisfaction of the public interest, the principle of impartiality, the principle of continuity and the principle of adaptability.

It should be noted that out of all the countries that replied to the questionnaire, only Malta and the Netherlands gave a negative answer to this question. In this regard, the Netherlands’ report states that although there are a considerable number of principles that have been positivised in its legislation (duty of diligence, prohibition of misuse of power, the principle of proportionality and the duty of reasoning, among others), these are not the most relevant, pointing out that the principles of legal certainty and legitimate expectation have not been expressly reflected in the administrative rules.

Question 3.

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 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.**

Summary of answers.



**Co-funded by
the European Union**



- They are frequently invoked and applied, and are relevant and decisive in the settlement of disputes. (Austria, Bulgaria, Belgium, Cyprus, France, Hungary, Latvia, Luxembourg, Netherlands, United Kingdom)
- 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. (Spain, Croatia, Czech Republic, Estonia, Finland, Greece, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Norway, Sweden)
- They are not frequently invoked and applied as a basis for decisions. (Germany)

A notable majority of countries confirm that general principles of law are frequently applied in their legal systems (25 countries).

Thus, ten countries (Austria, Bulgaria, Belgium, Cyprus, France, Hungary, Latvia, Luxembourg, Netherlands, United Kingdom) state that these principles are not only frequently invoked and applied, but are also relevant and decisive for the resolution of disputes, thus acquiring considerable importance in those systems.

Meanwhile, fifteen countries report that in their legal systems, general principles are applied or invoked as a complement to the written rules, contributing to their proper interpretation.

Countries such as Austria, Greece, Spain, Slovenia and Serbia base this answer on the fact that the most relevant general principles of law have been incorporated, for the most part, into positive law, including in rules of a constitutional nature. This is why, if these principles are mentioned, it is often because the written rules that include and enshrine them are directly invoked.

Other countries such as Italy, Lithuania, Malta, Poland, Portugal, Romania and Norway say that although principles of law generally have a subsidiary role in the hierarchy of sources of law, they are often invoked in judicial practice. Thus, they serve not only to reinforce arguments based on the written rules, but also as tools for interpreting those rules when they are ambiguous or uncertain.

Slovakia, for its part, offers a mixed solution, stating that in its practical application, the bodies of the Public Administration make their decisions according to the letter of the written laws, but in disputed cases the general principles of law are taken directly as the basis of the decision (e.g. principles of public procurement).

The only country to say that the general principles of law are not frequently invoked and applied as a basis for decisions is Germany. In this regard, the German report justifies this answer from the perspective that most of the general principles have been transferred to the written laws and are therefore directly applicable.

Question 4.

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?



**Co-funded by
the European Union**



Summary of answers.

All the States surveyed gave a positive answer to this question, confirming that their courts apply general principles of law in a general and transverse way, in all areas or matters of Public Law.

Question 5.

In your country's legal system, are there general principles specific to Administrative Law, independent of other general principles of law that are applied interchangeably in all sectors of the legal system, such as civil, criminal or labour matters?

Summary of answers.

Almost all the States consulted confirm that they have potentially applicable principles specific to Administrative Law alongside other general principles.

The only exception is Croatia, where there are no general principles specific to Administrative Law.

As for Italy, although it has principles specific to Administrative Law, it adds that these exclude and displace the application of the other general principles, explaining that in its legal system, the general principles relating to Administrative Law are specific and included in both the Constitution and the written law, and may prevail over other general principles relating to different matters, as a result of the weighting exercised by the courts when deciding on a particular case.

As regards the taxonomy of these principles, it should be emphasised that many countries concur in including in their catalogues the principles of good administration (the Netherlands even differentiates between good procedural administration and good substantive administration), efficiency and effectiveness, legality and transparency.

Apart from this structural and common set of principles, it is rewarding to note the presence of other more endemic types, such as legitimate expectation (Germany); official secrecy (Austria); public service nature of the Administration (Czech Republic); substantial truth and amicable settlement (Slovakia); continuity of public service (Greece); one-stop shop and objective research (Lithuania); subsidiarity (Romania); officiality (Sweden); and electronic administration, open administration and cooperation with the European Union as set out in the Portuguese Code of Administrative Procedure.

Finally, the United Kingdom also has principles of Administrative Law that can be applied with other general principles, many of which have been developed by common law. Although certain principles of customary law will be relevant only to matters of public and administrative law, these types of dispute may require the application of general principles of a different nature.



**Co-funded by
the European Union**



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

Question 6.

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

Summary of answers.

With regard to the incorporation of the general principles of European Union law into national legal systems, the survey is heterogeneous in this respect.

Thus, in attempting to establish some kind of systematic model, it can be seen that the major Mediterranean States say they have not experienced major difficulties in incorporating the general principles of European Union law into their existing bodies of law. This is the case with France, which has accepted the binding nature of the general principles of European Union law for national acts since the Council of State clearly affirmed in 2001 the applicability to domestic law of the general principles of Union law through the Assembly's Freymuth and FNSEA rulings.

Italy too embraces these types of principles, irrespective of the fact that the general principles of impartiality and good administration are enshrined in Article 97 of the Italian constitution, since this does not preclude the incorporation of the general principles of European Union law.

Portugal, meanwhile, emphasises the role of the national legislator in the transposition of Directives. Finally, Spain once again answers in the affirmative on this point, although it admits that there has been some complexity when institutions outside its legal tradition have been incorporated into Spanish law, such as the transposition of the Directive on services in the internal market, which entailed limitation of the traditional administrative "authorisation regime", with other mechanisms such as self-responsibility or citizen self-control gaining ground.

Cyprus, for its part, confirms that most of the general principles of EU law applied by the Court of Justice of the European Union in determining the legality of administrative measures, such as legal certainty, equal treatment, proportionality, good administration and respect for fundamental rights, are principles enshrined in national legislation, stressing that they are also safeguarded by the judiciary in established judicial precedents.

Of the Baltic states, only Latvia does not incorporate the general principles of Union law. Estonia and Lithuania frequently recognise and apply them in their legal systems, with many of them coinciding with legal principles derived from their own constitutional charters.

Conversely, it should be noted that in Nordic countries such as Finland and Sweden, no special or specific incorporation of these supranational principles has been necessary, since they were already recognised and enshrined in the country's legislation and procedural practice. In the same situation are Central European States such as Germany, Slovakia (Article 7 of its Constitution provides that "The legally binding acts of the European Communities and the European Union shall prevail over the laws of the Slovak Republic"), the Netherlands and Poland, in contrast to neighbouring States that do fit them into their systems such as Austria, Croatia, Serbia, Hungary, Romania and the Czech Republic, with the latter also acknowledging



**Co-funded by
the European Union**



problems of fit with regard, for example, to the principle of public participation in procedures relating to environmental protection, where the Czech legislator's decision to restrict the access of environmental NGOs to the procedures under the Construction Law caused controversy.

Norway is a singular case, since despite not being a member of the European Union, it applies the relevant principles in the context of the European Economic Area (EEA) Agreement of 2016, incorporating them through an adaptation of "EEA law" which provides that the Agreement applies as Norwegian law and that in the event of a conflict between a legislative act designed to ensure compliance with EEA law and other provisions of Norwegian law, the rule of compliance with EEA law will prevail.

Finally, the United Kingdom does not consider this incorporation of the general principles of European Union law into its domestic system to be necessary, although many of these principles find expression in customary law. Thus, Section 6 of the European Union (Withdrawal) Act of 2018 establishes that the validity, meaning or effect of any retained EU law is to be decided in accordance with the general principles of EU law as they stood on 31 [sic] November 2020.

Question 7.

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**

Summary of answers.

Most of the States that responded to this question answered in the affirmative, citing circumstances in which the general principles of European Union law are frequently invoked and taken into account in areas where there is no harmonisation of legislation. This was mentioned, for example, by the Czech Republic, Greece, Slovenia and Spain with reference to the area of non-harmonised tax law. Poland also highlighted, in particular, the applicability of the right to good administration in those areas that are not harmonised. Italy indicates that the general principles of EU law are invoked and taken into account on a par with the general principles of its domestic law. Bulgaria, for its part, highlighted the principle of proportionality.

Some States answered "no" to this question: Austria states that these principles are invoked and taken into account only if they can be drawn from its domestic legislation, as is also the case with Finland. France, Malta and Germany stress that they are invoked only in the area of European Union law. Slovakia's answer is also negative, as are those of Norway and the United Kingdom, even though these are States that do not belong or have ceased to belong to the European Union. In particular, we see in the case of the UK that, irrespective of the above, almost all of the principles find expression in its own "common law".



**Co-funded by
the European Union**



Question 8.

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**

Summary of answers.

The great majority of States that responded to this question answered in the affirmative.

In particular, France notes that in the decision on the case of the National Union for the Pharmaceutical Industry (SNIP) of 3 December 2001, the French Administrative Court gave a clear and definitive opinion on the delicate question of the ranking of national law and the general principles of the Union's legal system in the hierarchy of rules. The Council of State reviewed the law in the light of two general principles of EU law, namely legal certainty and legitimate expectation, thus accepting that these principles have a supra-legislative value. In the wake of the Council of State's SNIP ruling, other decisions refer to the general principles of the EU legal system, stressing that they have "the same value as the Treaties".

Malta underlined and highlighted the principle of consistent interpretation in its answer to this question. And Romania says that since the general principles of European Union law are, together with primary sources and secondary law, one of the sources of European law, in the event of a conflict between the national rules and a general principle of the European Union, the domestic judge must apply the principle of supremacy of the Union, while stressing the importance of the pre-judicial mechanism before the European Court of Justice.

The answer to this question from Norway and the United Kingdom is negative.

Question 9.

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.

Summary of answers.

The majority of States responded to this question by indicating that it is common for the principle of legitimate expectation to invoke and take into account as a transversal principle.

Some of these States said that this principle arises directly from their constitutional texts in the sense interpreted by their constitutional courts. These include Austria, Czech Republic, Estonia,





Luxembourg, Portugal and Slovenia. It is a principle that has been incorporated into domestic legal texts in States such as Finland, Lithuania and Poland.

Some States responded by pointing out the connection between the principle of legitimate expectation and other principles. In this regard, Cyprus linked it to *good faith* and *stare decisis*, Austria to the principle of equality, and the United Kingdom to the doctrine of *estoppel*.

The Netherlands, for its part, makes it clear that the scope of application of this principle is broader in its own case than in other States, since it can also operate *contra legem*.

The answer was negative in the case of Norway and also in the case of France. However, in the latter case, it is clear that this principle is applicable in the field of European Union law and that it has given rise to intense doctrinal and jurisprudential debate.

In the cases of Hungary, Romania, Sweden and the United Kingdom, the answer was that the invocation and consideration of this principle is limited to certain sector-specific areas harmonised by Union law.

Question 10.

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.**

Summary of answers.

Yes, in some specific cases.

All the countries except Norway chose this option, although in most cases it is stated either that it does not happen frequently, that it is subject to strict conditions or that it is taken into consideration to modulate the analysis of the contested measure's compliance with the law.

Spain states that the scope of this principle has, for the most part, concerned the analysis of the Administration's liability, and the United Kingdom that, if it is possible for the Administration to act fairly without satisfying the principle of legitimate expectation, the court may then grant a different remedy or benefit, or order the Administration to consider its decision taking legitimate expectation into account as a relevant factor.

The Netherlands, while stating that violation of this principle, as set out in domestic law, can result in the annulment of administrative decisions, adds that it is more difficult for the application of the European principle of legitimate expectation to lead to such a result, since that principle sets higher requirements than its Dutch equivalent. Sweden states that this principle has not had a major impact on case law in cases that do not concern EU law.

Luxembourg states that a *contra legem* application of the principle of legitimate expectation would not in principle be possible, but that, since the enshrinement of this principle by its





Constitutional Court, this solution should be called upon to evolve, although the administrative court has not yet had the occasion to give its opinion.

France states that the principle of legitimate expectation does not exist in its domestic law, and that the role of the judge has been decisive in the evolution of the principles of protection of legitimate expectation and legal certainty.

Norway is the only country to have answered in the negative, as it considers that these principles play a role only in order to provide for reparation or compensation when they are violated in some way by the decisions of the Administration. It adds that the expectations of an individual will not normally be compensated, although this will depend on the basis of the expectations and on the circumstances that led to the decision against them.

Question 11.

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**
- **Only in certain sector-specific matters and areas harmonised by Union law (please indicate what these are)**
- **Not commonly applied**

Summary of answers.

Most of the countries apply this principle in their judicial practice, even where it is not reflected as such in the respective constitutions or national laws, since it is implicit in other principles that do form part of their domestic systems.

Some of the principles cited by the above-mentioned countries in which the principle of good administration is considered to be implicit are those of objectivity, effectiveness, impartiality, the right to be heard, access to personal records, and the right to obtain a reasoned decision without undue delay.

Romania answers that it is applied only in certain matters or areas, citing the exercise of public functions and the supervision of financial activity.

Austria, France, Malta, Norway, the Netherlands, the United Kingdom and Sweden answered in the negative, although Malta states that despite not being specifically provided for in its domestic law, it is commonly applied in judicial practice.

Austria, France and the Netherlands state that Article 41 of the Charter of Fundamental Rights of the European Union concerns the institutions of the European Union and does not refer directly to the Member States or their institutions. The Netherlands says that the principle of good administration reflects general legal principles of EU law, and is applied by the Dutch courts when a case falls within the scope of application of Union law.

The United Kingdom states that the Charter of Fundamental Rights of the European Union was not identified in the European Union (Withdrawal) Act 2018 as European Union law to be retained, and therefore no longer has any application in the United Kingdom.



**Co-funded by
the European Union**



Sweden states that although it has been introduced into national law, it is not regarded as an enforceable individual right.

And Norway, while stating that much of the content of the principle of good administration is applied in Norwegian law, is not established as a specific principle or right of the individual to have his/her affairs handled fairly and within a reasonable time.

Question 12.

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.**

Summary of answers.

The majority of countries answer in the affirmative, with some of them linking the annulment of administrative decisions to the violation of proximate principles or to the violation of one or more of the components of that principle.

Some of the principles or rights identified by the different countries that can be invoked and whose violation can lead to the annulment of the administrative act are continuity of public services, legality, legal certainty, effectiveness, impartiality, the right to be heard, to have access to one's own personal file, to obtain a reasoned decision without undue delay, and to use one's mother tongue.

Germany states that this principle primarily concerns the formal legality of an administrative act, and procedural defects will result in annulment of the decision only in the event of very serious violations. Austria states that the principle of good administration, as laid down in Article 41 of the Charter of Fundamental Rights of the European Union, concerns the institutions of the EU, not national institutions, but that the principle of good administration is also enshrined in its law on administrative procedure. The Czech Republic, for its part, states that although this is a principle that serves mainly as a guide for the conduct of the Administration, it can nevertheless be invoked and its violation can result in the annulment of the administrative decision. Slovakia notes that in the field of university self-government, on which the general provisions of the administrative procedures do not apply, the Supreme Court has repeatedly annulled decisions of public bodies with reference to the European regulation on the principles of good administration.

Portugal, the United Kingdom and Sweden answer in the negative. Portugal states that control of the courts is in line with strict legality, so it can hardly, in itself, be a cause of nullity. The United Kingdom justifies its answer that the principle is not applicable in its country, although various customary rules of public law can be explained as aspects of good administration. Sweden states that it is not regarded as an enforceable individual right.



**Co-funded by
the European Union**



Question 13.

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?

Summary of answers.

The majority of the participating States concur in assigning a positivist or basic character to this principle, violation of which results in the nullity of the administrative act or general provision. There are only two exceptions: Malta and Norway, where this principle is not applied.

But this principle is not only administrative in nature: in some States it is either enshrined in the constitution itself or elevated to the status of a constitutional principle. Countries that have it enshrined in their constitution include Greece (Articles 5 and 25 of the Greek Constitution guarantee the right to economic freedom and the principle of proportionality), Italy (under Article 41 of the Italian Constitution, the right to economic initiative can only be limited for social reasons), Latvia (Article 1 of the Constitution) and Slovenia (the Constitution uses it as a criterion for assessing interference in an individual human right – private property, free economic initiative, etc.).

As a constitutional principle, it results from a declaration to that effect made by the respective Constitutional Court: this is the case in Romania, whose Constitutional Court has declared that the principle of proportionality must be recognised as a constitutional principle (Decision 157/1998 and Judgment 161/1998), and also in Luxembourg, where the Constitutional Court, based on the application of this principle as a general principle, has formally declared it to be a principle with constitutional value since the judgment of 19 March 2021.

These categories of necessity and proportionality can also be used as a principle implicit in the constitutional order as part of what is known as the “proportionality test”: this is the case in the Czech Republic (in proceedings for annulment of legal provisions) or the Netherlands (whose Council of State declares that this proportionality test encompasses the three elements of appropriateness, necessity and proportionality *stricto sensu*). For its part, Estonia regards a restriction of the right to take action as a cause of unconstitutionality.

From an administrative perspective, it is stated that the principle of necessity and proportionality operates in a general way as a parameter of legality of the actions of the public authorities, both in the adoption of administrative acts and in the adoption of general provisions, and is applied in all decision-making areas (Cyprus) or in all legal relations between the Administration and citizens (Latvia).

It also has a characteristic projection that manifests itself as a mechanism for limiting administrative discretion, weighing the general interest against the individual interest. Countries that answered along these lines included Portugal (restrictive measures must observe “fair proportion” in respect of the cost/benefit weighting), Cyprus (proportionality consists of the correlation between the administrative decision and the legitimate purpose for which it is designed), Latvia (the restriction of individual rights is justified only insofar as it represents a significant benefit to society), Serbia (the imposition of obligations must be effected through the adoption of measures that are less restrictive or more beneficial for the party concerned, as long as they achieve the aim of the regulation) and the Netherlands (the





adverse consequences of an order directed at the person concerned cannot be disproportionate to the ends pursued by that order).

The application of this principle in the judicial practice of the participating States is becoming more and more widespread, with emphasis on its application in specific areas such as: the revision of restrictive measures during the COVID-19 pandemic (Czech Republic and Finland); the exercise of certain professions, notably the business of photography (Austria); public procurement, taxation and access to and use of European funds (Romania, Court of Cassation judgments of 22 February and 10 June 2021); taxation (Slovakia, judgment of the Constitutional Court of 29 June 2010); taxes and regulation of public advertising fees (Slovenia); restriction of use of beach property and prohibition of reforestation (Sweden); disputes concerning the Administration's refusal to grant a licence or permit necessary for the exercise of an economic activity (Bulgaria); and in matters of public order and administrative policy, freedom of assembly, freedom of trade and industry, and as a criterion for reviewing administrative sanctions or certain regulatory decisions on economic activity, such as concentration authorisations (France, Benjamin judgment of 19 May 1933, Council of State judgments of 22 June 1951, 13 March 1968 and 21 December 2012).

This application is carried out not only within the framework of the principles of the legal system concerned, but also in the light of the case law of the Court of Justice of the European Union (France) or of the European Convention on Human Rights (United Kingdom).

Question 14.

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?

Summary of answers.

The answers given by the participating States range from those that do not take the decisions of other jurisdictions into consideration (Croatia, Hungary, Lithuania, Poland, Sweden, Norway and the United Kingdom) to those where the case law of other States is occasionally taken into account, either on the basis of the proximity or affinity of the legal systems or in the prosecution of certain matters. In the first of these two cases – proximity or affinity – we find Cyprus (in relation to the Greek Council of State, given that its public law applies the Greek administrative system), Greece (whose legal system is inspired by French and German law); Malta (in respect of the jurisdictions of Italy and the United Kingdom); Slovenia (in respect of the jurisdictions of Germany, France, Ireland and Luxembourg); and Slovakia (in respect of the Czech Republic, particularly in matters governed by European Union law).

In the second case, where the case law of other States is occasionally taken into account in respect of certain matters, we find: Austria (which follows the case law of the German Federal Constitutional Court on asylum matters), the Czech Republic (which draws on the case law of the German Federal Constitutional Court with regard to the principle of legitimate trust), France (which relies on the case law of the German Federal Constitutional Court and the CJEU with regard to the principle of proportionality), Italy (with regard to pronouncements concerning COVID-19), Portugal (which is inspired by German constitutional case law with



**Co-funded by
the European Union**



regard to the application of the “metadata law”), and the Netherlands (which is inspired by German case law with regard to the proportionality test).

Some countries single out the taking into consideration of the case law of the CJEU and/or the ECtHR: Latvia, the Netherlands, Luxembourg and Serbia.

Finally, other countries state that they only occasionally take such decisions into consideration, but without giving any further details in this regard: Germany and Romania.

Question 15.

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?

Summary of answers.

Most of the participating States answer this question in the affirmative, in the sense that such identification is made especially on the basis of the case law of the Court of Justice of the European Union or of the European Court of Human Rights.

However, we can find some cases in which the answer is nuanced. For example, Germany states that such identification can be found in the case law of the Federal Constitutional Court and, to a lesser extent, in that of the Supreme Administrative Court.

Luxembourg states that its Constitutional Court, particularly in Judgment 146 of 19 March 2021, enshrines the notion of a common basis in the recognition of certain fundamental rights provided for in parallel by the Luxembourg Constitution, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.

Spain says that the Spanish Supreme Court has taken into consideration decisions of the French Court of Cassation concerning the application of principles associated with the freedom to provide services and with proportionality in matters of town planning that affect the exercise of economic activities (e.g. properties for tourist use), as well as decisions of the German Constitutional Court in relation to the limits of the principle of economic capacity. Recently, in the judicial response to the COVID-19 pandemic, the Spanish Supreme Court has applied general principles of law similar to those considered by other Supreme Courts within the scope of the ACA (such as the French Council of State or the Italian Council of State), arriving at common solutions to ensure the upholding of constitutional values or the defence of public order.

Estonia states that, while it is not known that the Administrative Law Chamber of the Supreme Court has made explicit reference to the case law of other European national high jurisdictions, the case law of other countries is investigated as a source of inspiration when difficult and novel disputes are encountered.

France states that the domestic courts interpret and apply the provisions relating to fundamental rights in a variable manner, making it difficult to identify common bases between the Member States. However, it says that rights such as privacy and a fair trial or the principles of legality and proportionality in relation to criminal offences and penalties derive from



**Co-funded by
the European Union**



constitutional traditions common to the Member States and identified as such by the Council of State. In this regard, it notes that the right to education guaranteed by Article 14 of the Charter of Fundamental Rights of the European Union and the principle of legality and proportionality of criminal offences and penalties enshrined in Article 49 of the Charter derive from rules that were already common to many Member States.

Conversely, the Netherlands and Norway say that no such identification is made, with Norway pointing out that such a link with the CJEU has not been considered because it is not a member of the European Union.

III. – GENERAL PRINCIPLES AND FUNDAMENTAL RIGHTS

Question 16.

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, in a transversal manner.**
- **It is a principle that is taken into consideration and applied in certain legal relations and sector-specific areas.**

Summary of answers.

The principle of equality is considered to be a fundamental right by almost all the surveyed countries, and is seen as inspiring judicial practice in a transversal manner. For France, this is the principle that governs the operation of public services, as outlined in 1951 by the Council of State.

It is a generalised criterion that the principle of equality includes gender equality, so that privileges arising from personal characteristics are excluded, and therefore the principle of non-discrimination is implicit.

Finland, for its part, notes that gender equality is the most prolific issue in judicial decisions on the application of the principle since the entry into force of the Law on Equality between Men and Women in 1986. With regard to disability, it refers to a court ruling that found negligence on the part of an airline that did not take reasonable measures to accommodate a disabled person.

In Austria, the Constitutional Court declared it to be objectively unjustified, in the civil realm, for a married woman to be given the option of adding her maiden name when no such provision was made for men. In the area of employment, among others, the age difference between men and women for retirement purposes, or in respect of the right to severance pay for civil servants, was deemed unconstitutional.

France, for its part, highlights the principle of equality before the law, especially with regard to equality of access to public functions, with relevant case law going back as far as 1954 (the Barel case), which defended the need for impartiality and neutrality as a corollary of equality between candidates. Moreover, since the Law of 10 July 1975, most civil service posts must be offered to men and women, except those reserved for "service reasons". Finally, this inclusive



**Co-funded by
the European Union**



interpretation of the principle of equality has been reinforced by European law, extending the application of the principle to foreign nationals of Member States of the European Union.

Some States highlight the existence of specific rules on equality and discrimination. For example, the Czech Republic cites the Anti-Discrimination Law transposing some European Law directives in this area; Hungary the 2003 Equality of Treatment and Promotion of Equal Opportunities Law; Slovakia the Anti-Discrimination Law of 2004, which establishes the legal basis for compliance with the principle of equality of treatment in the country's legal system, transposing European anti-discrimination legislation. In Slovakia there is the Law on Equal Opportunities for Men and Women, and in Norway the Equality and Anti-Discrimination Law, which applies to all sectors of society. Bulgaria mentions the Anti-Discrimination Law, and in Spain there is Organic Law 3/2007 of 22 March on the effective equality of women and men.

Portugal adds that among the case law recognising the principle of equality, with regard to its non-discrimination and gender equality aspects, the following decisions of its Constitutional Court stand out: Decision 186/90 enshrining the binding nature of the principle for the public sectors in the legislative, judicial and governmental realms, and Decision 412/02, where the principle of non-discrimination prohibits any difference in treatment on the basis of subjective criteria, such as race, language, religion or ideology, among others.

Both Romania and Cyprus state that, within the scope of the principle of equality, there are cases in which measures are taken to enable certain groups to be placed at a level equivalent to others.

The Supreme Court of Romania mentions measures taken by public authorities, or by the private sector, for the benefit of a person or group of persons in order to ensure the natural development and effective achievement of equality of opportunity with respect to other persons. Meanwhile, Cyprus's constitution incorporates the principle of relative equality, whereby not every difference of treatment will give rise to discrimination because sometimes the difference will be justified by the objectively identifiable circumstances, with the aim of mitigating the causes that give rise to such discrimination, as provided for in Law no. 146 (I)/2009 regulating employment for people with disabilities, which was applied in the Tsikkasa case on 3 September 2015 when the judgment recognised the right of physical education teachers with disabilities to have equal career opportunities. Bulgaria cites the Supreme Court's referral for a preliminary ruling in relation to the prohibition of discrimination against people with disabilities (C-824/19).

Finally, Sweden, the United Kingdom and Lithuania consider the principle of equality to be applicable, but for certain legal relations and specific sectors.

Sweden states that it applies to public procurement subject to the European legal framework, and adds that Chapter 1 of Section 9 of the Government Instrument states that the Courts, the Administration and any public body must act on the basis of objectivity and impartiality. It also states that the Supreme Court does not hear cases relating to discrimination, but that this is a matter for the lower courts.

In the United Kingdom, the Equality Act 2010 protects against discrimination for reasons of gender in employment, housing or public services. It points out that in any case, unjustified discrimination may form the subject of a claim for violation of public law, but for violation of the "common law" requirement of rationality.



Co-funded by
the European Union



Finally, in Lithuania the principle of equality breaks the principle of gender equality in practice.

Question 17.

- **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**

Summary of answers.

In general, most of the countries extensively apply the principle of protection of vulnerable groups, although these groups are not specified in a particular list.

Austria highlights the application of the principle in asylum proceedings requested by unaccompanied minors, in which both the legal adviser and the minor's legal representative must be present at every interview and hearing that takes place in the proceedings. The Czech Republic adds, among other things, the right to access to justice for economically excluded people and the right people with illnesses to have their cases handled preferentially, depending on the type of illness that they have.

Estonia states that the practice of this principle of protection is linked to the principle of predicable investigation, in both judicial and administrative contexts, in order to ensure that the absence of legal training of the affected person does not curtail any of his or her due rights.

This being an obligation enshrined in international law, Finland states that the principle is invoked and applied pursuant to international instruments such as the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

France highlights its Law of 10 July 1987 imposing a minimum quota of posts reserved for people with disabilities (6%), and since 2005 a contribution must be made to funds for the inclusion of people with disabilities in the civil service. In 2020, the Council of State enshrined the liability of the State in the event of any failure to comply with this obligation.

Hungary mentions that its Law on Proceedings before the General Public Administration 2016 includes measures to ensure the protection and confidentiality of the personal data of minors and adults with disabilities in hearings or witness statements.

Latvia, for its part, applies this principle to groups of socially vulnerable people, in relation to the country's socio-economic situation: single-parent families, homeless people, victims of people trafficking, children, victims of violence, people with disabilities, ex-convicts, large families and the elderly, among others.

Germany states that the principle of protection of vulnerable groups is provided for in its domestic law, and the specific situation of the group concerned will be taken into account when considering its fundamental rights.





Italy, meanwhile, cites the Decree annulled in 2010 whereby emergency measures, such as surveillance and profiling, were adopted in relation to members of Roma communities settled on the outskirts of the most important Italian cities. The Council of State considered that the grounds of emergency did not legitimise discriminatory treatment based on the fact of settlement per se.

In Slovenia, the Italian and Hungarian communities, as well as Roma communities, are given special protection by the Constitution (Art. 65).

In Luxembourg, the protection of vulnerable groups is extended to the health field, especially in the light of the severity of the COVID-19 pandemic, with two rulings delivered by the Constitutional Court on laws that adopted restrictive measures to combat the pandemic and interfered with fundamental freedoms.

Portugal cites the 2017 “Inclusive Courts” project examining the courts’ relations with minorities, with a view to conducting a critical examination of the multicultural case law of the Portuguese courts in relation to international human rights standards, and comparing the experiences of US and European courts.

Countries that do not recognise the principle of special protection of vulnerable persons as a principle generally applied in their judicial system include Lithuania, the Netherlands and the United Kingdom.

Lithuania points out that this does not mean there has been any non-compliance with, for example, the Council of Europe’s Recommendation 1740 (2010) and the case law of the European Court of Human Rights with regard to the adoption of measures to protect vulnerable persons when they are removed from buildings.

The Netherlands states that although this principle has not been recognised as such in judicial practice, it is considered to be a manifestation of the principle of proportionality, which is expressly provided for in its legal system. Thus, in cases of eviction, the presence of minors must be an aspect taken into account, as indicated by the Administrative Jurisdiction Division of the Council of State. In addition, there is specific legislation protecting certain groups, such as adolescents and people with disabilities or chronic illness.

Finally, in the United Kingdom the principle is applied in linkage with the provision contained in the rules that protect, where applicable, persons with particular characteristics. The characteristics eligible for protection are itemised in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race and religion, and the authorities are obliged to avoid situations of discrimination or harassment.

Question 18.

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 reasoning is required in these cases.**
- **Yes, and its absence results in the nullity of the decision.**



**Co-funded by
the European Union**



Summary of answers.

In most of the countries that responded to the survey, enhanced reasoning of administrative measures affecting vulnerable groups, or affecting other constitutional values such as the family, is an essential element guaranteed by their administrative legal system.

Many national systems require such reasoning in cases relating to asylum, especially – as Austria indicates – when taking decisions to return unaccompanied minors to their country of origin. Bulgaria also mentions that the Supreme Court has issued a series of rulings on the assessment of asylum applications submitted by minors, which must be reasoned by the Administration in terms of what they call the “quality of the candidate”. If this reasoning is not provided, the annulment of the administrative decision may be granted.

One country in which case law has addressed the importance of the reasoning of administrative decisions in respect of vulnerable groups is Slovakia, as happened in the examination of a case of refusal of asylum for the applicant and his sick youngest child with heart disease. The court’s decision emphasised the necessity for administrative bodies to test for signs of vulnerability (judgment of 13 December 2017).

This approach is also followed by Spain, as enshrined in STS 151/2021 of 17 December, which lays down the requirement for the administrative decision to be taken in the light of the personal circumstances of the applicant.

With regard to evictions, there is a unanimous stance of weighting the conflicting interests when a minor or vulnerable person is involved, and Spain, moreover, reiterates this with respect to the judges competent to authorise entry into the home (STS 1197/2021 of 4 October).

The Italian courts have required the Administration to assess the possible absence of guarantees of protection for an immigrant in his/her country of origin, when he/she belongs to a vulnerable group. The Czech Republic adds, with regard to foreigners involved in administrative proceedings, the need to take into account their ability to get by in the country’s language.

In Luxembourg, the requirement for enhanced reasoning is considered to be a logical consequence of the application of the constitutional principle of proportionality, in order to ascertain the reasons for interfering in the natural rights of the individual as provided for in the country’s constitution, such as life or health.

Lithuania stresses that although the principle of protection of vulnerable groups is not provided for in its legal system, this does not mean that such circumstances are not taken into account, not only in the judicial decision, but also in the administrative process, to determine whether the measure to be adopted is appropriate.

In addition, thirteen countries (France, Germany, Hungary, Malta, Poland, Portugal, Slovenia, Sweden, Norway, United Kingdom, Croatia, Estonia and Italy) state, on the one hand, that in general no special reasoning is required of the Administration in order to adopt measures affecting vulnerable groups; and, on the other hand, that the absence of such reasoning does not result in the nullity of the decision.





In this regard, Sweden states that the principles of freedom to litigate and freedom of proof are enshrined in its legal system, and therefore in most cases the burden of proof does not apply as an obligation for either party.

Italy, Portugal, Croatia and Estonia point out that the absence of a general obligation of enhanced reasoning in these cases is not an obstacle to this being done, if provided for in the specific legislation, given that discretionary power is exercised by the administrative body, or when – as Sweden points out – it is necessary to provide reasoning of the State intervention that the measure entails.

Finally, the case law of the United Kingdom determined in 2019 that there is no obligation under common law to provide reasoning of an administrative decision, although there have been differing opinions, focusing on the need to allow the person concerned to know the reasons in order to appeal, considering this criterion to be superior to the nature of the decision taken or the characteristics of the person concerned ((*Help Refugees Ltd*) v. Secretary of State for the Home Department [2018]).

Question 19.

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.

Summary of answers.

The majority of the answers are in the negative, with some nuances.

France states that the Council of State has not received any appeal against administrative decisions taken by or with the help of an artificial intelligence (AI) system on the grounds of the opaque or discriminatory nature of that system. However, appeals have been made in three cases where the legality of such systems was questioned.

One of these concerned the transparency of the algorithmic processing used to allocate places at higher education institutions to students who have passed the baccalaureate (“*Parcoursup*” system). The institutions are authorised to use algorithmic processing to achieve the best possible match between supply and demand for courses, with decisions not fully automated but with the participation of a committee and the institution’s director. In essence, it was ruled that the secrecy of the deliberations of the educational teams responsible for examining applications precluded communication of the source codes of the programs used by the centres, but that firstly, applicants who had received a rejection decision could obtain information about the criteria used by the centre and their weighting, including, where applicable, the criteria used by the algorithmic processing, and secondly, upon completion of the procedure, each institution must publish the criteria according to which the applications were examined, specifying the extent to which algorithmic processing was used to carry out that examination.



**Co-funded by
the European Union**



In the other two cases, the processing of the personal data necessary for the design and implementation of AI decision-making support systems was criticised on the basis of the GDPR. The question of transparency and respect for the principles of equality and non-discrimination was not discussed in the first case (decision of 30 December 2021, *Sté Gerbi avocat victimes & préjudices* and others, no. 440376 et al., relating to the “DataJust” project, the purpose of which was to identify the determining factors for the amount of compensation due in the event of personal injury and to develop an indicative frame of reference for compensation). The second case, relating to the automated data collection system (“web scraping”) of the tax and customs authority, is still pending.

Hungary, for its part, states that its judicial bodies are familiar with the new data management technologies and services. The efforts made to use these tools in decision-making processes are visible, but no significant proceedings have taken place. Artificial intelligence and data management systems are not used in judicial adjudication, so there have not been any disputes relating to such systems.

Belgium reports that to date, the judgments of the Council of State do not yet mention any grounds based on violation of the principle of non-discrimination, transparency and (adequate) reasoning of the contested act in relation to the use of AI by the authority in making a decision. However, it is assumed that these procedures are already (more or less) frequently used, for example in the context of detecting tax fraud or social security fraud, or when allocating a place (enrolment of a student in a school knowing that such enrolment is not necessarily at the school “of his/her choice”), etc. It is expected that this will not be long in coming, for example as a result of an appeal against an administrative decision denying access (violation of the principle of transparency) to the algorithms.

Other countries report that these principles are not frequently invoked from this particular perspective, but that some examples exist.

For example, Cyprus states that some of the artificial intelligence systems used in that country have been analysed by its Supreme Court. However, when the Court reviews the legality of a contested decision that was made by automated systems, its competence does not extend to questions of a technical nature. The Court will only intervene if, after taking all the facts of the case into account, it finds that the conclusions of the public body cannot be upheld, result from an error of fact or law, exceed its discretionary powers, are contrary to administrative principles or encroach upon constitutional rights.

Italy states that the use of electronic means in the judicial process is not widespread in that country. It is used mainly for decisions that do not involve any discretion, because in these cases it is more difficult to prepare the algorithm that includes the elements to be taken into account. Only in these cases can the correct preparation of the algorithm with respect to the principles in question be relevant for the judgment.

The response from the Netherlands states that the issue of transparency has been raised in relation to decisions based on the “AERIUS Calculator” software. This application is used to calculate nitrogen levels. The calculation requires a large amount of data. In this connection, the problem has arisen as to the extent to which that data must be available to the parties to



**Co-funded by
the European Union**



the process. The Council of State does not explicitly mention the principles of transparency and non-discrimination, but does not mention the risk of unequal treatment of the parties to the process. In such cases of unequal treatment, ministers and secretaries of state are obliged to disclose the choices made and the data involved, so that they are accessible to third parties.

The United Kingdom says that although decision-making based on artificial intelligence is not widespread, there has been increasing controversy about discrimination in this context. It cites the problem of the use of facial recognition, concluding that this can produce results that involve indirect discrimination based on sex and race.

Finally, Poland states that the administrative courts apply the principles of transparency, equality and non-discrimination, but that there is little connection with decisions based on artificial intelligence systems, since there have not been many cases of decisions taken by such systems.

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

IV.1. - ORGANISATION AND ADMINISTRATIVE PROCEDURE.

Question 20.

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)**

Summary of answers.

Most of the answers are in the affirmative.

Luxembourg states that it relies primarily on the case law of the Constitutional Court, which has recognised in various judgments that the provisions of the European Charter of Local Self-Government of 15 May 1985, ratified by the Grand Duchy of Luxembourg in a Law dated 18 March 1987, overlap with the provisions of Article 107(1) of the Constitution enshrining the principle of local self-government. This means that, in a spirit of subsidiarity, the Constitutional Court analyses the conformity of certain laws concerning local matters not only in relation to Article 107, but also in relation to the corresponding – and often more precise – articles of the Charter of Local Self-Government. Whenever the Constitutional Court has had to make a ruling, the preliminary referral has come from the Administrative Court. In some cases, the Administrative Court has had to rule in the final instance and apply, through transposition, the principles adopted by the Constitutional Court, in particular on the basis of the principle of subsidiarity and the Charter of Local Self-Government, together with the principle of local self-government enshrined in Article 107 of the Constitution.

Only Sweden and the United Kingdom answer in the negative.



**Co-funded by
the European Union**



Finally, some countries answer that these principles do not apply generally, but in certain areas or sectors.

For example, Belgium states that decentralisation is organised, as a rule, by or under the law. Decentralisation implies the granting of legal personality to an autonomous entity (in principle, under the control of a supervisory authority). The granting of legal personality requires the intervention of the legislator. The decentralisation of local and provincial authorities, on the other hand, is enshrined in the Constitution (Art. 162). Once decentralisation is organised by law, the principle of subsidiarity for the decentralised entity is recognised and protected. However, this principle is applied rather through the principle of proportionality.

Germany says it is organised as a federal State. This means that a degree of decentralisation is part of its DNA. Therefore, decentralisation and subsidiarity cannot be described as general principles, but both categories exist in political and administrative culture.

Malta reports that due to geographical considerations, most administrative functions are effectively centralised, but that some decentralised aspects of administration are entrusted to local or regional bodies.

Question 21.

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 (enforceable decision, without the need for judicial assistance)



**Co-funded by
the European Union**



- Yes
- No

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

Summary of answers.

A) Principle of publicity and transparency

The large majority of the answers are in the affirmative.

Belgium states that this principle is applicable in relation to public procurement, concessions and administrative law on property.

Austria, Germany and the Netherlands answer in the negative.

B) Principle of proportionality

Again, a clear majority of the countries answer in the affirmative.

Austria, Norway and the United Kingdom answer in the negative.

C) Principle of impartiality

All answers are in the affirmative.

D) Principle of anti-formalism

On this point, there is more division. Croatia, Cyprus, the Czech Republic, Estonia, France, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Slovakia and Norway answer in the affirmative.

Austria, Finland, Germany, Greece, Lithuania, the Netherlands, Romania, Slovenia and the United Kingdom answer in the negative.

Belgium says it should be borne in mind that Article 14, § 1, paragraph 2 of the Consolidated Acts on the Council of State provides that, with regard to appeals for annulment due to substantial formal defects, or those required under penalty of nullity, excess or misuse of powers, brought against the acts and regulations of the various administrative authorities (Art. 14, § 1, paragraph 1): “the irregularities referred to in the first paragraph shall give rise to annulment only if they have influenced the direction of the decision taken, deprived the interested parties of a guarantee or had the effect of affecting the competence of the author of the act” (interest of the stated grounds).

E) Principle of gratuitousness



**Co-funded by
the European Union**



Croatia, Cyprus, Estonia, Hungary, Latvia, Luxembourg, Malta, Portugal, Romania, Slovakia, Slovenia and Norway answer in the affirmative.

Austria, the Czech Republic, Finland, France, Greece, Italy, Lithuania, the Netherlands and the United Kingdom answer in the negative.

Belgium states that the principle of “gratuitousness” is not recognised as such, since the public service is provided/financed either (i) by taxes or (ii) by tax revenue (and therefore, in the latter case, “gratuitously”, i.e. with no direct economic compensation). However, it is understood that, on equal terms, the interested party must have access to the service of general (economic) interest, i.e. “universal”, if necessary at a reasonable price (remuneration).

It should be noted that both Germany and Sweden report difficulties in giving an answer on this point because it is not sufficiently clear what this principle means.

F) Principle of self-correction

The large majority of countries answer in the affirmative.

Belgium points out that the enforcement of an administrative decision requires the intervention of the judge, except where there is express legal authorisation (warrant / “*dwangbevel*”) or urgent need.

Austria, Lithuania and the Netherlands answer in the negative..

Again, Germany states that it is not sufficiently clear what this principle means.

G) Other general principles

Cyprus mentions the right to be heard, the principle of good faith, the principle of adequate investigation and the principle of good record-keeping.

The Czech Republic states that some basic principles worth mentioning include the principle of non-abuse of administrative discretion, the principle of accordance with the public interest, the principle of substantive truth, the principle of administration as a public service, the principle of courtesy and assistance, the principle of providing information about rights and remedies, the principle of enabling interested parties to assert their legitimate rights and interests, the principle of amicable resolution of disputes, the principle of effectiveness and efficiency, and the principle of cooperation and collaboration between the administrative authorities.

This country stresses the principle of publicity and transparency, noting that although one of the principles of the administrative process is that of non-publicity, there are certain instruments that ensure the publicity and transparency of administrative activities carried out by the authorities.

France refers to the principle of non-retroactivity of administrative acts, the principle of the right of defence and the right to appeal against any administrative act for abuse of power.





Latvia indicates the following principles that it considers must also be applied: 1) Principle of respect for the rights of private persons. Taking into account the scope of the law, institutions and courts must facilitate the protection of the rights and interests of private persons. 2) Principle of the rule of law. The decisions of institutions and courts must comply with the law. Courts and institutions must act in accordance with the powers conferred upon them by law. 3) Principle of reasonable application of legal provisions: basic interpretation methods must be used when carrying out the relevant legal provisions. 4) Principle of priority of laws. Administrative acts favourable to a private person that regulate legal relations with regard to an aspect vital to a democracy must be carried out on the basis of the principles established by the constitution or laws. 5) Principle of procedural fairness. Courts and institutions must respect objectivity.

Slovakia considers it important to highlight the principle of substantive truth (investigative principle). This principle allows the authority to establish objective facts.

IV.2. – ADMINISTRATIVE SANCTIONS

Question 22.

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 and administrative offences**
- **Not in relation to minor, lesser or trivial infractions.**
- **Only in relation to infractions that can be characterised as “criminal” in accordance with the doctrine of the ECtHR**

Summary of answers.

The Spanish Supreme Court has recognised that the substantive principles underlying the criminal law system are applicable, with certain nuances, to administrative sanctions law, since they are both manifestations of the State’s punitive system, and has projected on to measures aimed at exercising the Administration’s sanctioning powers the principles of legality, definition of the constituent elements of the offence and culpability, as well as procedural guarantees of the following rights: the right to defence, with proscription of any lack of defence representation; the right to legal assistance, which can be transferred under certain conditions; the right to be informed of the accusation, with the unavoidable consequence of the unalterability of the allegations; the right to the presumption of innocence, which means that the burden of proof of the constitutive facts of the offence lies with the Administration, with prohibition of the use of evidence obtained in violation of fundamental rights; the right not to incriminate oneself; and the right to use appropriate means of proof for the defence.

Most of the surveyed countries also consider, with nuances, that the principles of criminal law are also applicable to administrative sanctions law, so that in Austria, for example, there are no significant differences in administrative criminal law proceedings other than the following: principle of investigation: in general, the criminal administrative authorities are both





“prosecutors” and “judges”, with some exceptions; representation by a lawyer in cases of appeal before the administrative courts of first instance is not mandatory; the principles of publicity, orality and immediacy apply only to proceedings before the administrative courts of first instance, and not those before the administrative authorities.

In the case of Belgium, in general, any punitive decision may be taken only by taking into account the right of defence and the principle of *non bis in idem*. This is the case, for example, with disciplinary sanctions. In addition, where the sanction is likely to constitute a criminal charge (i.e. “punitive” administrative sanctions), certain general principles of criminal law must be applied (e.g. guarantees of the right of access to a judge), but with nuances deriving from the different natures of criminal sanctions and administrative sanctions. The general principles of criminal law (respect for the rights of defence, assistance of a lawyer, access to files, accusatory principle, principle of *non bis in idem*, principle of (strict) legality, no offence or punishment without law, etc.) apply with respect to administrative infractions (and sanctions) that can be characterised as “criminal” in accordance with the doctrine of the ECtHR. That being said, the general principles of law (in general) apply in the context of “pure” administrative sanctions that are not considered to be “criminal” sanctions within the meaning of Art. 6 ECHR (*audi alteram partem*, principle of diligence, reasonableness, proportionality, reasoning, etc). The principle of *non bis in idem* does not apply if an act is punished criminally and also by disciplinary means, since these are sanctions “of a different order”.

In Cyprus, an administrative sanction is distinguished from a criminal sanction because a criminal prosecution can be carried out only in accordance with the provisions of the Constitution, and therefore a criminal sanction requires a constitutionally acceptable finding of guilt without which that penalty could not have been imposed. In the case “República contra Demand Shipping Co. Ltd (1994) 3 C.L.R. 460”, the Supreme Court declared, by a majority judgment, that the imposition of a pecuniary administrative sanction was not a criminal indictment under Article 12 of the Constitution, but an administrative sanction imposed by a public body for administrative infractions of the relevant legal provisions. In this regard, it is established case law that an administrative sanction is one imposed by a competent administrative authority and that it is distinguished from criminal sanctions imposed by criminal courts. In making the distinction, the Engel criteria serve as a starting point and a guide for the Cypriot courts. While the ECtHR’s independent interpretation of the concept of “criminal prosecution” laid the basis for a “progressive extension of the application of the criminal guarantees of Article 6”, Cyprus’s case law takes a fairly dominant and consistent view that the less “harsh” categories of criminal law must be maintained within the sphere of administrative law, so that the criminal guarantees are not necessarily applied with their full rigour.

Moreover, the principle of legality – *nullum crimen nulla poena* – applies in a similar way to administrative offences that incur administrative sanctions. Therefore, a competent public body cannot impose any administrative sanction without legal authorisation and subsequent non-compliance or non-compliance by a regulated company/institution/person. Therefore, a violation is identified by a competent public body mandated by law to regulate a group of persons for the public interest. In this way, the public body supervises, enforces the law and imposes administrative sanctions on offenders. In short, administrative procedures are safeguarded by principles similar but not identical to those of criminal law. Likewise, administrative sanctions do not infringe Article 6 of the ECHR since they may be subject to a judicial control that satisfies Article 6.1 of the ECHR.





With regard to the Czech Republic, although the Supreme Administrative Court has repeatedly held that the principles of criminal law are applicable, in particular, with regard to liability for infractions in the area of administrative sanctions law, the new Law on Liability for Administrative Infractions and Proceedings (which is based on those findings) nevertheless holds that there is scope for judicial practice to apply or project other principles of criminal law in the area of administrative sanctions. The differences between criminal law and administrative sanctions law deriving from the different natures of criminal offences and administrative offences are found mainly at procedural level (for example, criminal proceedings are governed by the principle of publicity, the principle of defence and legal assistance, there are more procedural safeguards to protect the rights of the accused, etc.).

In the case of France, if the power to impose sanctions remains highly disputed, this is even more true with regard to the procedural guarantees of the affected persons, particularly in relation to the right of defence. The Constitutional Council has specified a number of conditions that must be satisfied in order for the attribution of a sanctioning power to independent administrative authorities to be constitutionally admissible: - a law must establish the power to impose sanctions; - the rights of defence must be respected; - the parties must be offered the possibility of appealing the authority's decision before a court, as well as the possibility of the court suspending an immediately enforceable decision; - in addition, the sanctions imposed must be proportionate, and their combination with strictly criminal sanctions must not exceed the maximum penalty of the most serious sanction.

The Greek Council of State has also recognised the application, with some nuances, of the substantive principles of criminal law to administrative sanctions law and disciplinary law, both manifestations of the State's punitive system. It has transposed the principles of legality, definition of the constituent elements of the offence and culpability, as well as procedural guarantees of the following rights: the right to defence, prohibiting any loss or limitation of the means of defence; the right to be assisted by a lawyer; the right to be informed of the accusation, with the unavoidable consequence of the unalterability of the allegations; the right to the presumption of innocence, with prohibition of the use of evidence obtained in violation of fundamental rights; the right not to incriminate oneself; the right to use appropriate means of proof for the defence; the principle of non-retroactivity of sanctioning provisions; the principle of *ne bis in idem*, and finally the publicity of the process.

As far as Hungary is concerned, there are separate laws regulating statutory offences (Law no. II of 2012) and sanctions imposed for infractions of administrative law, such as warnings, administrative fines, prohibition of conducting an activity, and confiscation (Law no. CXXV of 2017). Similarly, certain general principles of criminal law apply in the case of statutory offences (Law no. II of 2012), for example the principle of presumption of innocence. Meanwhile, in the case of infractions of administrative law (Law no. CXXV of 2017), we can also find a number of principles such as proportionality. These principles are invoked in the above-mentioned laws.

Similarly, in Italy, the general principles relating to administrative sanctions are laid down in Law no. 689 of 24 November 1981. They are based on the criminal law model, but with significant differences, for example with regard to the effects of the law on the time and subjective element of the offence.

Mention should also be made of the case of Lithuania, where the Constitutional Court has stated that constitutional principles must be respected when the legislator establishes



Co-funded by
the European Union



administrative liability for infractions of the law. The entire legal system is based on the rule of law, which, among other things, presupposes the proportionality of the sanction. According to the doctrine of the Constitutional Court, the measures taken must not only be proportional, but must also reflect lawful objectives of general importance, and the rights of the individual must not be restricted any more than is necessary to achieve those objectives. There must also be the possibility of individualising a sanction. It is important to note that the Constitutional Court has placed emphasis on situations in which the nature of the sanction applied (for example, rigour) coincides with the criminal punishment; in such cases, the procedural rights conferred on the person must be the same as those provided for in the Constitution (i.e. those constitutional rights are not reserved only to defendants in a criminal trial). This applies even if the sanction is designated “economic” in the law that establishes it.

In Luxembourg, in general the Administrative Court recognises by transposition the general principles applicable in criminal matters, including in the area of administrative sanctions, particularly insofar as they fall within the autonomous concept of criminal law defined by the European Court of Human Rights. In the field of European Union law, the Administrative Court has placed special emphasis on the application of the fundamental principle of proportionality, particularly in relation to greenhouse-gas emission quotas in the context of the transposition of the Kyoto Protocol by European Union legislation, as has also been applied in the Grand Duchy of Luxembourg. (Administrative Court, 7 February 2019, register no. 40990C, and Administrative Court, 7 July 2020, register no. 40990CA).

In the case of Poland, the Polish Code of Administrative Procedure distinguishes the principles of criminal law in the field of administrative sanctions. However, its content is partly similar to that of the criminal law.

In Portugal, the concept of an administrative sanction can be defined as a punitive measure applied in administrative relations when an administrative infraction is committed. Thus, the sanction takes the form of a sanctioning administrative act, combining the pursuit of the public interest and the punitive aspect. Meanwhile, the criminal sanction, as a basic expression of public punishment, protects “primary interests”, i.e. the legal values and assets essential to community life, such as personal integrity, life, freedom, and tangible and intangible heritage. The transposition of the principles of criminal law into administrative sanctions law does not happen automatically, but to the extent necessary to preserve the essential values that underlie the constitutional norm and are compatible with the nature of the sanctioning administrative procedure.

In the case of Romania, in the area of administrative liability, administrative sanctions are applied after a summary procedure by members of the public administration, and in the great majority of cases the sanctions are applied by administrative bodies. The administrative law procedure does not offer the same guarantees as those enjoyed by a person accused of a criminal offence.

In the case of Norway, the applicable general principles of criminal law include a number of fundamental substantive and procedural guarantees, but the scope of their application varies to some extent depending on the seriousness of the case and the nature of the administrative proceeding. Infractions that can be characterised as “criminal” in accordance with the doctrine of the ECtHR entail the application of general principles of criminal law close to or fully on a par with criminal proceedings. For less serious offences and proceedings, some of the general principles are not applied to the same extent.





Other countries state that there is no specific legislation or case law establishing that the general principles of criminal law apply in cases of administrative sanctions.

This is the case with Finland, although it says that most of the principles listed in the next question are also central principles of administrative law and therefore apply in matters relating to administrative sanctions.

In the case of Germany, administrative sanctions are not known to German administrative law. Administrative law can be applied by declaring its infraction by the individual as a crime or a misdemeanour.

As regards Sweden, unlike the Spanish Supreme Court, the Swedish Supreme Court has not ruled on the question of whether the substantive principles on which the criminal system is based are applicable to the law on administrative sanctions. Similarly, administrative sanctions are not codified in the Swedish criminal system, but are handled by the administrative courts. However, the principle of legality and the burden of proof are applicable in the administrative procedure rules relating to administrative sanctions.

The situation is different in Slovakia, where the scope of administrative sanctions is codified not in a single legal norm, but in a number of specific laws. Any gaps in the legislation are filled through appropriate application of the principles of criminal law, while proportionality depends on the individual circumstances of the case, so there is no automatic annulment of these principles. The principles of criminal law are those explicitly enshrined in the Code of Criminal Procedure (principles of criminal procedure), as with the principles for the imposition of penalties (e.g. principle of absorption).

The legal system of the Republic of Serbia provides the opportunity to issue and determine administrative measures of a criminal nature, provided for by laws regulating specific administrative matters. The administrative measures are those determined by the Commission for Protection of Competition requiring a market participant to pay a certain amount of money, not exceeding 10% of the total annual revenue earned in the territory of the Republic of Serbia, if, for example, it abuses its dominant position. In addition, the Law on Protection of Competition provides for a procedural sanction of EUR 500 to EUR 5,000 per day of action in breach of the decision issued by the Commission for Protection of Competition during the proceedings, which does not act in accordance with that order in certain circumstances. Procedural sanctions may not amount to more than 10% of the total annual revenue calculated in accordance with Article 7 of Law on Protection of Competition.

The measures aimed at the protection of competition, as well as the procedural sanctions, are of a punitive nature, but their application is in line with Union law due to the approval of the Law on Protection of Competition. In addition, in accordance with the Law on Protection of Competition, there are also measures aimed at eliminating damage to competition that are implemented by issuing orders for the execution of certain actions or for the prohibition of certain behaviours (“behavioural” measures). The administrative measures are determined by separate laws regulating specific administrative fields, regardless of whether there are any offences prescribed for those specific administrative fields. Finally, disciplinary proceedings against prosecutors are carried out in accordance with the Law on the Public Prosecutor’s Office and the Rules on Disciplinary Procedure and Disciplinary Liability of Prosecutors and Deputy Prosecutors. Matters not covered by the regulations of Article 1 of that Law are governed by the provisions of the Criminal Code.





Finally, with regard to infractions that can be characterised as “criminal” in accordance with the doctrine of the ECtHR, in the United Kingdom, government departments may, in certain areas, impose administrative sanctions as alternatives to the initiation of criminal proceedings. For example, with regard to benefit fraud, the Department of Work and Pensions can offer an administrative sanction to a person when the case is not considered to be so serious as to consider the possibility of initiating court proceedings at first instance. A person can choose to accept this penalty without any admission of guilt and without many of the same processes and principles of criminal law being applied. In general, however, the strengthened protections associated with criminal law apply only when infractions of administrative measures can be characterised as criminal in line with the ECtHR.

In Estonia, the scope of application of sanctioning administrative law is currently quite limited, since there is no established system of administrative offences, and even less serious offences (misdemeanours) are subject to the general part of criminal law and the jurisdiction of the criminal courts. However, punitive administrative sanctions do exist (for example, disciplinary sanctions against prisoners or officials). In these cases, Estonia’s Supreme Court has applied the general principles of criminal law that derive from the Constitution and the case law of the ECtHR.

In the case of Latvia, according to the judicial practice of the Supreme Court, the principles of criminal law can be applied to tax fines. Because of the punitive nature and the amount of such fines, they can be considered to be criminal fines within the meaning of Articles 6 and 7 of the European Convention on Human Rights. There are no other cases before the Administrative Court in which the principles of criminal law can be applied.

In Malta, the predominant interpretation seems to be that the general principles of criminal law apply only in cases where the administrative sanction imposed reaches a certain threshold and can therefore be considered to be a criminal sanction. In previous years, there have been some notable cases in which administrative sanctions have been challenged on the basis that they provide for criminal sanctions without the additional guarantees available in the context of criminal proceedings.

In the Netherlands, general principles of law that are specific to criminal law (such as the presumption of innocence) apply only to infractions that can be described as “criminal” in accordance with the doctrine of the ECtHR. General principles of law that are not specific to criminal law (such as the principle of proportionality and the principle of reasoning of the sanctioning decision) apply to all administrative sanctions.

In the case of Slovenia, the country’s legal system traditionally considers that all infractions of the law that must be sanctioned fall within the scope of criminal law and not administrative law and jurisdiction. Consequently, “criminal sanctions” and “sanctions for minor offences” are regulated as sanctions for different criminal acts. The system of criminal sanctions is regulated by the Penal Code and covers “sanctions”, “warnings” and “security measures”. Sanctions for minor offences, i.e. less serious criminal acts, are numerous, for example, “fine”, “warning”, “deportation of non-nationals”, “seizure of items”, etc., and all are systematically regulated by the Minor Offences Law.

“Administrative sanctions” is a relatively new legal (statutory) term in Slovenian legislation. However, this does not mean that they do not exist. Systematic regulation (the Minor Offences Law) refers here to the possible regulation of the imposition of sanctions on legal persons for





administrative infractions. Therefore, administrative sanctions will be regulated by different statutes (*lex specialis*) outside the Minor Offences Law, but these have not yet been passed. The administrative sanctions and the applicable principles are not (yet) defined as such in the country's legislation, administrative practice and case law. Consequently, the only legal basis for the application of the principles of criminal law in administrative matters is currently the ECtHR.

Since administrative sanctions are not yet a general feature in the Slovenian legal system, and since acts that in future will presumably be punished by administrative sanctions are currently treated as minor offences, the Slovenian legal system for minor offences could be regarded as a kind of hybrid system. The administrative authorities are competent to supervise the correct application of the regulations (law) and the proper performance of inspection procedures, and also function as minor offences authorities (at first instance). There is no prohibition for an official of an administrative authority acting as a minor offences authority who finds a breach of the law to initiate or even terminate the minor infraction procedure. However, it should be noted that the judicial review of the sanctions imposed is carried out by the criminal rather than the administrative courts.

Question 23.

If you answered yes to the previous question, could you specify whether or not the following general principles on administrative sanctions are applied or to what extent?

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

- Yes
- No
- With nuances

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

- Yes
- No
- With nuances

Principle of non-retroactivity of sanctioning provisions:

- Yes
- No
- With nuances

Principle of culpability:

- Yes
- No
- With nuances

Principle of proportionality

- Yes
- No





- With nuances

Principle of defence and legal assistance:

- Yes
- No
- With nuances

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

Summary of answers.

A) Principle of presumption of innocence and right not to incriminate oneself or plead guilty.

Most of the countries surveyed apply these principles.

In the case of Belgium, however, due to a cooperation requirement specific to the administrative procedure, it is not impossible for the inertia or silence of a person charged with an administrative offence to harm that person's defence. That being said, in disciplinary matters (a "quasi-judicial" issue), (recent) case law seems to align with the criminal case law accepting that the accused is free to choose the defence of his/her choice, including the right to remain silent.

In Finland, the burden of proof in cases of administrative sanctions generally falls on the Administration. The right not to incriminate oneself can be applied in some situations of administrative sanctions.

In the case of France, the decision of the Constitutional Council of 10 June 2009 censuring the "HADOPI" law revises the constitutional case law on administrative sanctions. The Constitutional Council adds itself to the list of "guarantees" that must govern the imposition of administrative sanctions. It enshrines the applicability of the principle of presumption of innocence in censuring the law on the basis of Article 9 of the Declaration of the Rights of Man and of the Citizen.

In the case of the Netherlands, this principle is generally applied only to punitive administrative sanctions.

This principle is not applied in Sweden.

B) Principles of legality and definition of the constituent elements of the offence.

All surveyed countries that answered this question apply these principles.

In the case of Belgium, however, in disciplinary matters, for example where the alleged conduct remains vague ("acts endangering the proper functioning of the service or the dignity of the public function"), the criminal law principle of *nullem crimen sine lege* is not applied. There is no exhaustive list of ethical rules that can be violated. The administrative authority judges at its discretion (under the supervision of the judge) what it considers to be misconduct.

In Cyprus, the principle of legality is held to be the most substantive and essential principle for a democratic State that respects the rule of law and acts primarily in the public interest.





In the case of France, like the Council of State, the Constitutional Council ensures that the infraction is “defined in sufficiently clear and precise terms to exclude arbitrariness”. However, the Constitutional Council observes a certain flexibility in stating that “applied outside the criminal law, the requirement for a definition of the sanctioned infractions is satisfied, in administrative matters, with reference to the obligations to which the holder of an administrative authorisation is subject pursuant to laws and regulations”. In the Assembly decision of 7 July 2004, the Council of State endorsed this case law, stating that “infringements could be defined in terms of the obligations to which a person is subject by virtue of the activity that he/she carries on, the profession to which he/she belongs or the institution to which he/she belongs”. Reversing the previous case law, the Council of State thus ruled that the principle of legality of infractions also applies to disciplinary sanctions imposed on members of the regulated professions. It should be noted, however, that it does not apply to the disciplinary sanctions that the administrative authority has the power to impose on public officials placed under its authority. Thus, although the principle of legality applies to “any sanction that has the nature of a penalty”, there is flexibility in cases where there is a “prior relationship” (of special subjection) between the administration and the sanctioned person.

C) Principle of non-retroactivity of sanctioning provisions:

All surveyed countries that answered this question apply this principle.

In the case of France, the principle of non-retroactivity of criminal law applies only if its provisions are more stringent. However, in the area of sanctions, particularly criminal sanctions, the principle of application of the newer, more lenient law (the principle of retroactivity *in mitius*) states that if a new law is more lenient than the old one, it is applied retroactively to acts committed before their entry into force (Art. 112-1 of the Penal Code). It has been enshrined as a constitutional principle by the Constitutional Council. The Council of State applies it in the area of administrative sanctions when it acts as a court of full jurisdiction.

D) Principle of culpability:

Most of the countries surveyed apply this principle.

In the case of Belgium, this principle means that if the burden of proof falls on the administrative authority, the answer is in the affirmative. If by “principle of culpability” we mean the need for a moral element (intent), the answer is in the negative.

In the Czech Republic, the principle of culpability in administrative sanctions law applies to persons who are not employers. However, in the case of employers and legal entities, strict liability applies for offences based on the imputability of the conduct of the persons concerned (employees, etc.). Conversely, in criminal law there is no distinction between the criminal liability of employers and non-employers (liability in both cases is based on the principle of culpability). And although the criminal liability of legal entities is also based on the imputability of the conduct of the persons concerned on behalf of, in the interest of or in the course of the activities of the legal entities, their criminal liability, unlike liability for crimes, is not strict. Legal entities can be held criminally liable only if the persons whose conduct can be imputed to





them are culpable, hence the principle of culpability applies. Another significant nuance between criminal and administrative sanctions law is the degree of culpability required for the person to be held liable. While criminal law requires intent (unless the written law expressly states otherwise), negligence is sufficient in administrative sanctions law (again, unless the written law expressly states otherwise).

This principle does not apply in Finland.

France states that the dominant trend in that country is for a simple “material fault” to be sufficient. It may not be an exaggeration to see signs of an opposite trend in tax law in which the administration is obliged to prove the offender’s bad faith or fraud.

This principle does not apply in Romania either.

In the case of the Netherlands, this principle is generally applied only to punitive administrative sanctions.

E) Principle of proportionality:

Most of the countries surveyed apply this principle.

In the case of Italy, the principle of proportionality is not included among the general principles of administrative sanctions laid down in Law no. 689 of 1981. Although it is widely applied in judicial practice to determine whether the level of the sanction exceeds the seriousness of the sanctioned conduct, the law gives the public authority the power to graduate the sanction.

In Norway, to the extent that the infraction can be characterised as “criminal” in accordance with the doctrine of the ECtHR, the response must be determined on the basis of criteria that promote proportionality, such as the scope and effects of the infraction, the degree of culpability of the private individual or entity, etc. For administrative procedures relating to the withdrawal or restriction of a public licence, there is also a stricter principle of proportionality.

The United Kingdom answers in the negative.

F) Principle of defence and legal assistance:

Most of the countries surveyed apply this principle.

Spain states that in sanction proceedings, the sanctioned person has the right to be assisted by a lawyer, but if they do not appoint a lawyer and pay the related fees out of their own pocket, the Spanish State will not provide them with a duty lawyer. The duty lawyer system is a service provided by lawyers who, on a rotating basis, defend citizens who, due to lack of funds or in certain situations of special protection (minors, detainees, foreigners “without papers”, victims of gender-based violence, etc.) require “free justice.” Conversely, in criminal proceedings under Spanish law, if the accused does not appoint a lawyer to defend them, the Spanish State must provide the arrested person with a lawyer through the *Colegio de Abogados* [Spanish Bar Association].)

In Austria, representation by a lawyer is not mandatory (either before the administrative authority or before the administrative court of first instance). However, if required, in the





interest of delivering justice, and particularly in the interest of an adequate defence, a defendant may be assigned a duty lawyer for judicial proceedings at his/her request if he/she cannot bear the costs of his/her defence without this making it difficult to cover the basic necessities of life. In assessing whether the assignment of a duty lawyer is necessary, in the interest of delivering justice, the difficulty of the situation in fact and in law, the particular personal circumstances of the defendant and the particular consequences of the case for the accused must be taken into account.

As regards Belgium, this principle applies when the matter concerns a “punitive” administrative sanction or the right of defence within the meaning of Article 6 of the ECHR, and also in the case of a disciplinary sanction or a “pure” administrative sanction (e.g. in socio-economic matters, the withdrawal of an approval, authorisation or licence), with the authority making its position known in writing. Legal assistance may be granted free of charge for proceedings before administrative courts.

In the case of Cyprus, the principle of natural justice is based on “two pillars” of procedural fairness known as “the rule against bias” and “the right to be heard”. The right to be heard is enjoyed by any person who is affected by the disciplinary or sanctioning act or measure or who is prejudiced in any way, and can be exercised as a litigant in person or with a lawyer, either orally or in writing. With regard to free legal assistance, the legal framework is governed by the Legal Assistance Law of 2002. Under its provisions, free legal assistance is available to eligible applicants under certain conditions and for certain proceedings, but these do not include proceedings relating to administrative sanctions.

In the Czech Republic, in administrative sanctions proceedings, offenders have the right to be assisted by a lawyer, but the State does not provide them with a duty lawyer if they do not appoint one or cannot afford to pay for one. However, although the Law on Liability for Administrative Infractions and Proceedings does not enshrine the right to free legal assistance for citizens who, due to lack of funds, cannot afford a lawyer, the Law on Defence provides the option (not only for offenders in sanction proceedings, but in general) to file a request – accompanied by documents declaring income, assets, etc. – with the Bar Association of the Czech Republic. If certain conditions are met, the Bar Association appoints a duty lawyer who then provides free legal consultation or the legal services for which the request was filed. The costs of sanctioning administrative procedures are borne by the State. In addition, the law regulating proceedings before administrative courts enshrines the right of persons entitled to exemption from legal fees, if necessary to protect their rights, to request the appointment of a legal representative by the court (again, the costs are again borne by the State). Conversely, in criminal proceedings under Czech law, the State automatically provides the accused with a lawyer if he/she does not appoint one him/herself. However, this applies only to certain situations (e.g. if the accused is in custody, persons with limited legal capacity, etc.) expressly listed in the Code of Criminal Procedure.

In Finland, legal assistance is generally available in administrative judicial matters for persons with low income who cannot afford a lawyer on their own.

In the case of Luxembourg, appeals before the Administrative Court can be brought only by a lawyer with full court training, including the final examination for judicial training, which corresponds to the former office of prosecutor. Legal assistance is not regulated by the Administrative Court, but jointly by the bar associations and the Ministry of Justice.





In the Netherlands, in cases of general criminal law and in cases of detention (including temporary custody in immigration cases), the accused or the applicant is entitled to legal assistance. In administrative and civil law cases in general, all parties have the right to defend themselves and to be represented by a lawyer, but only parties with incomes below a certain threshold are entitled to free legal assistance.

In Portugal, in accordance with the General Regime for Administrative Offences (GRAO), the accused has the right to be accompanied by a lawyer chosen at any stage of the proceedings. In addition, the administrative authority will appoint a defence lawyer for the accused, either on its own initiative or at his/her request, in accordance with the legal assistance legislation, provided that the circumstances of the case show the need or desirability for the accused to be assisted.

In Slovakia, in general, the right to defence can be exercised by the accused him/herself or through a defence lawyer. The law does not demand mandatory representation by a lawyer in sanction proceedings before a public administration body, but the accused has the right to choose to be represented by a defence lawyer. In criminal proceedings, there is a mandatory requirement, in certain circumstances, for the accused to be represented by a lawyer (for example, if he/she is being detained, is devoid of legal capacity, if the case involves a particularly serious offence, if the case is against a minor, etc.). In administrative judicial proceedings, with some exceptions, the law provides for mandatory legal representation by a lawyer as a procedural requirement. At both stages, in administrative proceedings and in judicial administrative proceedings, the accused has the right to request legal assistance if the preconditions are met.

In Norway, although a private individual or entity is always granted the right to be represented by a lawyer, as well as the right to a defence that includes the use of appropriate means (evidence) to contradict or challenge the authorities' factual or legal assessments, the costs of hiring such a lawyer are not automatically paid or reimbursed by the authorities in proceedings for less serious cases.

The United Kingdom, Italy and Latvia do not apply this principle.

G) Principle of hearing.

Most of the countries surveyed apply this principle.

In the case of Belgium, this principle applies in cases involving a “punitive” administrative sanction, a disciplinary sanction or, in the case of a “pure” administrative sanction (*audi alteram partem*), with the authority making its position known in writing (often in the context of a withdrawal of an authorisation, licence, etc. in socio-economic matters).

In Slovakia, infractions are always dealt with before an administrative authority in accordance with the Law on Infractions. In other cases, the general rules on administrative procedures (Administrative Procedure Law) impose an obligation on the administrative authorities to order an oral hearing only if this is required due to the nature of the case, in particular if it helps to clarify the case, or if it is provided for by a special law.

In Norway, although the principle of hearing both parties is always applied, there is no general principle of oral hearing that applies to all administrative sanctions procedures.





Latvia answers in the negative.

H) Principle of separation between investigating authority and decision-making authority

This principle is applied in some countries.

In the case of Austria, as a general rule, the criminal administrative authorities are both “prosecutors” and “judges”. There are exceptions in respect of disciplinary procedures, where a disciplinary lawyer initiates a judicial process.

In the case of Belgium, this principle applies with the nuance that the principle of impartiality in administrative matters knows these limits and is therefore less absolute than for the courts, particularly when the law provides otherwise or when this principle conflicts with the structure of the organisation in such a way that the application of this principle will make a decision impossible. In any event, there remains access to an (administrative) court of “full jurisdiction” within the meaning of Article 6 of the ECHR.

In Cyprus, the case law of the European Court of Human Rights on this question is consistent with the fact that an administrative body combining the functions of investigation, prosecution, judgment and imposition of penalties cannot be “independent and impartial” within the meaning of Article 6 of the ECHR. However, the case law establishes that this defect can be remedied when the parties have the right to appeal the decisions of such bodies/authorities before judicial bodies with full competence or power to exercise sufficient control, including the power to nullify questions of fact and law and overturn the contested decision, and capable of ensuring that the procedure as a whole is compatible with Article 6 of the ECHR.

The example is given of the case *Sigma Radio Television Ltd v. Cyprus*, no. [32181/04](#) and [35122/05](#) of 21 July 2011, where the ECtHR considered that the combination of different functions of the Cyprus Radio Television Authority (CRTA) gave rise, in the Court’s opinion, 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. In this regard, the ECtHR considered that the judicial remedy provided for in Article 146 of the Constitution was sufficient to comply with Article 6 of the Convention.

In the case of Estonia, administrative sanctions are decided by the administrative authorities, which also investigate the cases. However, these decisions are subject to review in the administrative judicial system, which has full jurisdiction to examine all relevant questions of fact and law.

In the case of France, although the impartiality of the sanction procedure of certain administrative authorities could be affirmed, this could not be said for all authorities. For



Co-funded by
the European Union



example, the implementation of the sanctioning power of ARCEP [*Autorité de Régulation des Communications Électroniques, des Postes et de la Distribution de la Presse* – Electronic Communications, Postal and Print Media Distribution Regulatory Authority] was recently challenged by Orange as part of a QPC in 2019, due to a question of impartiality. The law provides that ARCEP’s College may participate in training on dispute resolution, prosecution and investigation. There is therefore no separation between the teams responsible for prosecuting, investigating and sanctioning, unlike other authorities with sanctioning power such as the *Autorité des Marchés Financiers* (AMF). Orange believes that in the absence of any such clearly dissociated organisation, there are real doubts about the constitutionality of ARCEP’s sanctioning power. However, Orange chose to withdraw this QPC on 26 September 2019 and doubts about ARCEP’s impartiality remain unanswered, which could prove problematic in view of the potential litigation arising from the development of the 5G network in France.

On the other hand, the Council of State has been able to affirm that since the decision of an independent administrative authority may form the subject of an appeal before a court of full jurisdiction, “the fact that the proceedings before [that authority] do not comply in all respects with the requirements of [Article 6 of the European Convention on Human Rights] cannot lead in all cases to a violation of the right to a fair trial”.

In Italy, the principle in question is not included among the general principles of administrative sanctions laid down in Law no. 689 of 1981, but it is applied in judicial practice. For example, the internal organisational measures of the prosecuting public authority are sometimes considered to be illegitimate if they do not comply with that principle, especially if the administrative body that decides on the sanction has an economic interest that can be traced back directly to the prosecuting authority.

In Poland, the administrative procedure and the final decision are issued by the same administrative authority. If a decision is final, it may be subject to a judicial control.

In Romania, in the case of administrative liability of public officials (other than the most senior public officials), the disciplinary committees responsible for investigating disciplinary matters are made up of officials of the same authority that takes the disciplinary decision.

This principle is not applied by countries such as the United Kingdom, the Czech Republic, Finland, Latvia, Lithuania, the Netherlands, Slovakia, Sweden and Norway.

l) Principle of reasoning of the sanctioning decision

All surveyed countries that answered this question apply this principle.

In Austria, in general, administrative criminal decisions must include a reasoning. However, in some cases the administrative authorities (instead of issuing an administrative criminal decision) may issue a sanction notice without any prior investigation in expedited proceedings. No reasoning of the sanction notice is required. If the accused subsequently files an admissible appeal against this sanction notice, the ordinary procedure will be initiated and the





administrative authority may, where applicable, issue a sanctioning administrative decision (with due reasoning).

In the case of Belgium, this principle is applied in the same way as any administrative decision, under the Law of 29 July 1991 on the formal reasoning of administrative acts.

In the case of the United Kingdom, for certain administrative sanctions, the body that imposes them must provide the reasons for them. For example, when the Competition and Markets Authority imposes sanctions for various breaches of research requirements, it is obliged to provide the reasons for those sanctions. In other circumstances – for example in cases involving benefit fraud – it is not necessary to provide the reasons, although the person concerned must be informed that there are grounds for criminal prosecution.

In France, before the entry into force of Law no. 79-587 of 11 July 1979, the rule was that the administration did not have to give reasons for its decisions, unless the law provided otherwise. According to the Council of State, the legislator sought to impose on an authority imposing a sanction “the obligation to specify in its decision the accusations that it intends to make against the person concerned, so that the person concerned can know, solely from reading the decision notified to him/her, the reasons for the sanction imposed on him/her”. The contentious-administrative judge adopts a circumspect position with regard to the content of the reasoning. It is therefore not necessary for the administrative authority to respond to all allegations put before it, nor to attach a specific reasoning to the sanction, other than the main grounds, that would constitute an additional sanction, such as the decision to make the main sanction public.

As regards the reasoning of imposed sanctions before the court, for example by the disciplinary sections of the professional bodies which, as has been said, are a specialised administrative court, it is up to the judicial body to determine the facts with sufficient precision so that the Council of State can exercise its control, making reference to the specific cases examined for its review.

The Law of 11 July 1979 now enshrines the principle of reasoning of unfavourable individual decisions and of individual decisions that provide exceptions to the general rules established by the law or by regulations. However, there are two important exceptions to the reasoning requirement in respect of these two categories of acts. The first concerns cases of extreme urgency. However, if the person concerned so requests, within the time limit for the disputed appeal, the authority that took the decision must inform him/her of the reasons within one month. The second exception concerns cases where disclosure of the reasons for the decision would jeopardise medical confidentiality or other secrets, such as governmental and national defence deliberations.

J) Principle of time-barring of administrative infractions and sanctions

Most of the countries surveyed apply this principle.

In the case of Belgium, this principle is applied by virtue of the legal provisions and, where appropriate (in the absence of an explicit rule) through the principle of “reasonable time”.

Countries that do not apply this principle include the United Kingdom, Finland and Latvia.



Co-funded by
the European Union



K) Principle of judicial protection

All surveyed countries that answered this question apply this principle.

In the case of **Belgium**, this principle is applied through an appeal for annulment before the Council of State or another judicial body expressly designated by law.

L) Principle of double instance

Most of the countries surveyed apply this principle.

Spain states that the Plenary of the Contentious-Administrative Division of the Supreme Court recently delivered two judgments on 25 November 2021 (RRCA/8156/2020 and 8158/2020) establishing as doctrine that the requirement for review by a higher tribunal of a judgment confirming an administrative decision imposing a criminal sanction, as referred to in Article 2 of Protocol 7 to the European Convention on Human Rights, in the interpretation given by the ECtHR judgment of 30 June 2020 in *Saqueti v. Spain*, can be satisfied by the filing of an appeal for cassation, the admission of which shall be subject to assessment of whether the criminal nature of the sanctioned offence is justified in the notice of appeal in the terms established by the ECtHR, as well as the basis of the offences imputed in the appealed judgment confirming the administrative sanctioning decision.

In the United Kingdom, in certain contexts, such as cases brought before the above-mentioned Competition and Markets Authority, there is the possibility of appealing to an independent court. In other cases, there is the possibility of seeking judicial review in a common law court of a decision imposing a sanction. In both cases, there is the possibility of filing other appeals.

In the Czech Republic, in criminal proceedings before the courts, the principle of double instance is applied (the accused always has the right to appeal), with the possibility of filing an extraordinary appeal before the Supreme Court. In the area of administrative sanctions law, the answer to the question differs. With regard to liability for offences, the proceedings are initially carried out by the administrative authorities, and the principle of double instance applies (in most cases, the accused has the right to appeal to a higher administrative authority). Moreover, since the offences typified in Czech legislation generally meet the so-called Engel criteria, the accused can also challenge the final decisions of the administrative authorities in the courts and subsequently file a cassation complaint with the Supreme Administrative Court. Therefore, the principle of double instance applies. However, with regard for example to the disciplinary liability of judges, disciplinary proceedings (which, as the Constitutional Court has held, do not meet the Engel criteria) are conducted in a single instance by the Supreme Administrative Court.

In Finland, the decisions of administrative courts can be appealed before the Supreme Administrative Court, provided authorisation to appeal is granted.

In the case of Latvia, according to the judicial practice of the Supreme Administrative Court, the following principles of criminal law are also applicable to fines under tax law: -Principle of term of validity of the law This principle provides that a law that recognises an offence as non-punishable, reduces the penalty or is beneficial for a person, unless otherwise provided by the



Co-funded by
the European Union



applicable law, has retroactive effect, i.e. it applies to offences committed before the entry into force of the applicable law;
-Inadmissibility of double jeopardy (*ne bis in idem*). This principle establishes the right not to be sanctioned repeatedly for the same unlawful act.

There are other countries where this principle is not applied, such as Belgium and Greece.

M) Other principles

In the case of Portugal, the principles of administrative sanctions law include, in addition to those mentioned above, (i) the principle of investigation; (ii) the principle of reservation of law; (iii) the principle of due process; and (iv) the principle of prohibition of analogy.

IV.3. – SUBSIDIES AND PUBLIC AID

Question 24.

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.**

Summary of answers.

In most of the countries surveyed, the principle of proportionality is applied to modulate the consequences of non-compliance with the requirements of public subsidies, aid or resources, mitigating the negative effects on the basis of considerations such as the degree of partial compliance identified. This is the case for Croatia, Cyprus, the Czech Republic, Belgium, Estonia, Finland, Hungary, France, Luxembourg, Portugal, Slovakia, Slovenia and Norway.

Spain states that the principle of proportionality is used in these cases to modulate the consequences of an undisputed non-compliance, tempering the negative effects according to either the degree of partial compliance identified or the inexcusable third-party intervention as a determining cause of the non-compliance. Thus, for example, the principle of proportionality, of jurisprudential origin, has been expressly enshrined in the *Ley General de Subvenciones* [General Law on Subsidies], Article 37.2 of which (in relation to Art. 17.3.n) provides that when compliance with the obligations and conditions of the subsidy closely approximates total compliance and the actions of the parties concerned are unequivocally geared towards fulfilment of their commitments, the amount to be repaid will be determined by the application of certain criteria, and the principle of proportionality must be satisfied (see, in particular, STS 186/2020 of 12 February). To give another example, in the regulated energy sector, case law has held that the right to be paid the premium tariff should not be lost when delay in the fulfilment of formal obligations (registration) or material obligations (feed-in of energy into the network) is due to the actions of a third party (either the Administration or the energy distributor), without finding any lack of diligence on the part of the facility's owner.



**Co-funded by
the European Union**



This modulation or tempering of the consequences of non-compliance is conceived as a concrete expression of the principle of proportionality (see, in particular, STS 1261/2017 of 26 October and STS 1517/2017 of 5 October).

In the case of Belgium, provided that the administrative authority has discretionary powers in this context, judicial control will be carried out as in other areas (among others) according to the principle of proportionality. More broadly, however, it should be noted that the texts often provide for an obligation of restitution, and that the related disputes are generally regarded as disputes relating to subjective rights and therefore do not fall within the competence of the Council of State.

In Cyprus, the principles of due investigation and proportionality apply to all administrative decisions in all areas of the civil service, regardless of whether the decision concerns a beneficiary or simply a person or body subject to the authority's administration. The administration is bound by these principles, and if a contested decision does not comply with them, it will be annulled by the court.

In the Czech Republic, although the principle of proportionality is a transverse principle applied to all external activities of the public administration, in the field of public subsidies and other types of public aid, the contentious-administrative courts have ruled that the principle of proportionality must be applied in order to determine the amount of the fine to be imposed on a beneficiary who has infringed budgetary discipline or, if the subsidy has not yet been paid to the beneficiary, to determine the amount of the subsidy that will not be released.

In the case of France, when a public authority withdraws a subsidy due to misconduct, a judicial appeal before the administrative judge is possible. The judge will assess the fault alleged by the public authority, as well as its proportionality with the sanction of withdrawing the subsidy. The judge assesses the legality of the withdrawal, and does not only consider the manifest errors of assessment committed by the public authority.

In Hungary, this principle applies in various areas, such as agricultural aid or job creation subsidies. The Hungarian Curia case of 22 January 2019, which concerned a subsidy granted for the provision of village care services, is mentioned. The beneficiary (in this case, a local government body) failed to comply with its administrative obligations, and the administrative authority hearing the complaint issued an order for the entire subsidy to be recovered. The Curia considered that the administrative decision, which did not impose a proportionate reimbursement obligation consistent with the facts of the case, violated the relevant legislation (the Public Finance Law). In 2019, almost 50 cases of this type were pending before the Hungarian Curia.

In Portugal, the principle of proportionality applicable to public subsidies if there is a breach of obligation within the regulated market, specifically in the electricity sector, the Regulation on Commercial Relations in the Electricity and Gas Sectors provides that failure to comply with the clause concerning the loyalty period constitutes an obligation for the party in breach to compensate the other party, in accordance with the stipulated terms. In this context, "the compensation due shall be provided and shall not exceed the direct economic loss for the supplier or market participant involved in the aggregation from the time of termination of the contract, including the costs of investments or pooled services already provided under the contract" (Article 19, nos. 6 and 7).





Slovenia states that the Supreme Court has taken various decisions in which it has confirmed that the general principle of proportionality must also apply in these cases, and has also referred to the principles of the subsidy system established by European Union law (e.g. in agriculture).

In the case of Serbia, Article 52 of the Law on the Control of State Legal Aid sets out the administrative measures adopted by the Commission. In the subsequent monitoring procedure, the Commission can decide to impose behavioural measures requiring the repayment of State aid or other administrative measures in accordance with this Law. The Commission can impose the measure aimed at eliminating inconsistencies, i.e. prevention of the granting of State aid, which specifically involves the temporary or permanent suspension of the provision of State aid (behavioural measure). If it determines any such inconsistency, the Commission issues an order for the providers of State aid to take appropriate measures without delay to reimburse the relevant amount of the State aid, plus statutory default interest, from the day of use of that aid until the day of reimbursement of the amount used, and also to immediately suspend the provision of the unused amount of the State aid (return measure). Exceptionally, the Commission may waive the reimbursement of default interest, contrary to the provisions of paragraph 3 of this Article, provided that the lender shows that such action would result in the user's bankruptcy or cessation of business activity. The Commission informs the competent authority for State audit activities, i.e. budgetary inspection, of the measures adopted in paragraph 1 of this Article.

On the other hand, there are a number of countries where, in the obtaining of public aid or resources, the relationship between public and private parties after the funding is considered to be a private relationship governed by the principles of civil law relating to breach of legal obligations in this area, including proportionality between the infraction and the resulting sanction. However, if the subsidies or aid have an EU origin, the resources received unduly must in any case be recovered in full in accordance with the relevant EU legislation.

This is the case for both Italy and Austria, where the civil courts are competent to rule on such cases. For example, a regulation of the Minister of Finance establishes general guidelines for the granting of subsidies from federal funds, although there is no Supreme Court case law relating to this question. Other general principles applicable to subsidies include effectiveness, transparency, economy, efficiency and desirability.

Finally, in a number of countries, the principle of proportionality is not applied in order to modulate the consequences of non-compliance by a beneficiary of public subsidies, aid or resources. These include the United Kingdom, Germany (no answer given), Greece, Latvia, Lithuania, Malta, Romania, the Netherlands, Poland and Sweden.

In the case of Latvia, it is stated that the principle of proportionality in the context of State aid is interpreted as meaning that the State aid measure (amount and intensity) should be limited to the minimum necessary to induce the companies concerned to undertake additional investments or activities on their own, i.e. the same result could not be achieved if the amount of aid were lower. If the aid exceeds the minimum necessary, its recipient will obtain excessive benefits that could unnecessarily distort competition and therefore cannot be said to be compatible with the EU's single market. According to judicial practice, the principle of financial precaution must also be taken into account in this area. This principle is intended to ensure that public finances are not invested in projects whose success there are objective reasons to doubt, since otherwise the country runs an excessive risk of wasting public money.



**Co-funded by
the European Union**



For its part, the Netherlands says that when an administrative authority has a discretionary power to reclaim subsidies, the application of the principle of proportionality can lead to a reduction in the amount that must be repaid by the beneficiary. However, when an administrative authority has the obligation to reclaim subsidies, the principle of proportionality does not apply. This is the case, for example, when the obligation to reclaim subsidies is based on EU law.

IV.5. – CONTRACTING BY PUBLIC BODIES

Question 25.

Is contracting by public bodies governed by different principles from contracting between private individuals and entities?

- **Yes. Although based on a common foundation, administrative procurement contracts are governed by different principles from civil or private contracts.**
- **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)

Summary of answers.

In Austria 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. In particular, in Austria the general principles of public procurement procedures include the principles of equal treatment of all candidates and tenderers, non-discrimination, proportionality, transparency, free and fair competition and economic efficiency, as well as the principle of awarding contracts to authorised, capable and reliable contractors at reasonable prices (see sec. 20 para. 1, Federal Procurement Act 2018-Bundesvergabegesetz 2018, BVergG 2018, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20010295>).

In Belgium, public contracting is governed, in principle, by rules different from those applicable to private contracting. The former is governed by the Law of 17 June 2016 on public contracting, and the latter by the relevant provisions of the Civil Code (Articles 1787-1799 of the “old” Civil Code). It should be noted that the “authorities” subject to the Law of 17 June 2016 may be public authorities in the organic sense of the term, or legal persons under private





law that provide a service of general interest. The system of judicial control of the decisions taken by the contracting parties (public or private) depends on the nature of the contracting authority: for the decisions of public parties, the Council of State is competent; for the decisions of private parties, the ordinary courts (in principle, the commercial courts) are competent. The Constitutional Court has ruled that the two types of judicial procedures offer equivalent protection and that there is therefore no discrimination between two categories of complainants (Judgment no. 157/2020 of 26 November 2020). This does not prevent the rules on competence from being confusing for economic operators.

In Croatia, Malta and Serbia, contracting by public bodies, although based on a common foundation, is governed by principles different from those applicable to civil or private contracting.

In particular, in Serbia, the provisions of Articles 22 to 26 constitute the administrative contract instrument. The administrative contract is a mutually binding written document which, when required by a separate law, is signed by the authority and the other party, and which creates, modifies or eliminates the legal relationship in administrative matters. The content of the administrative contract must not be contrary to the public interest or the legal interest of third parties. If, due to circumstances subsequent to the conclusion of an administrative contract that could not have been anticipated at the time of the conclusion of that contract, the fulfilment of the obligations of one of the contracting parties becomes significantly more difficult, they may request the other contracting party to amend the contract and adapt it to the new circumstances. The administrative authority dismisses the party's request by issuing a decision in the event that the conditions for amendment of the contract are not met, or if such amendment of the contract would cause a harm to the public interest that would be greater than the harm suffered by the party. The public authority can terminate the contract by issuing a decision with a precise reference and a clear explanation of the reasons for the termination. If the administrative authority fails to fulfil its contractual obligation, the contractor does not have the option of terminating the administrative contract, but can raise objections. Application of this law and laws governing contracts and extracontractual liability (laws torts [sic]).

In Cyprus, Hungary, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Norway and the United Kingdom, 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.

In Portugal, in accordance with the Public Procurement Code (approved by Decree-Law no. 18/2008 of 29 January, with Amendment no. 25/2021 of 21 July), in the preparation and execution of public contracts, the general principles of the Constitution of the Portuguese Republic and the Code of Administrative Procedure must be complied with, as well as the principles of competition, publicity, comparability and intangibility of tenders (Articles 1-A; 4, no. 1; 72, 56 and 70).

In the Slovak Republic, the effectiveness of contracts in the field of public procurement is linked to their publication in the Central Register of Contracts.



**Co-funded by
the European Union**



In the Czech Republic, 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.

In Estonia, although contracting by public bodies has a common basis with contracting between individuals, administrative contracting is governed by principles different from those applicable to civil or private contracting. In particular, the general principles applicable to public procurement include transparency, verifiability, proportionality, equality of treatment and non-discrimination, effective use of competition and public funds, non-distortion of competition, absence of conflicts of interest, economic and purposeful application of funds, best price-quality ratio, and absence of prejudice to public interests and the rights of the persons in respect of whom the duty must be fulfilled (see § 3 of the Public Procurement Act, available in English: <https://www.riigiteataja.ee/en/eli/513072020002/consolide>, and § 5 of the Administrative Co-operation Act, available at <https://www.riigiteataja.ee/en/eli/522112021003/consolide>).

Similarly, in Finland, although contracting by public bodies has a common basis with contracting between individuals, administrative contracting is governed by principles different from those applicable to civil or private contracting.

In France, although contracting by public bodies has a common basis with contracting between individuals, administrative contracting is governed by principles different from those applicable to civil or private contracting. It is in the execution stage of the contract that the difference between public and private contracting is really seen. Under a public contract, the contractor has prerogatives conferred on it by virtue of the administrative nature of the contract. The following are reserved for administrative contracts: 1.- The power to unilaterally modify the contract. This power, created by case law, has been codified in Article L. 2194-2 of the Public Order Code: *“When the buyer unilaterally submits to this book a modification to an administrative contract, the contracting party shall have the right to maintain the financial value of the contract, in accordance with the provisions of Article L.6.”* According to the Council of State, this implies that the additional costs incurred by the unilateral modification must be fully compensated by the public person (EC Sect. (CE Sect. 27 October 1978, City of Saint-Malo, Rec. 401). Moreover, in the absence of any explicit indication of this modification option in the contract, private contracts are in principle intangible. 2.- Termination of the contract for simple reasons of public interest. The public person always has the right to unilaterally terminate the contract for reasons of general interest, even in the absence of a contractual clause to that effect. The price paid for exercising this right is the full compensation of the contractor who, by definition, has not committed any fault. However, this right to compensation can have its limits in practice, since certain contracts, particularly “purchase orders”, do not specify an amount committed by the Administration, thus depriving the contractor of the possibility of seeking compensation. This option of termination is a matter of public policy, and a contractual clause that deprives the public person of that option will be considered null and void. Conversely, this option cannot be accepted in the context of a private market, because it is fundamentally unbalanced. Moreover, where public contracts protect the interests of the public contracting authority, private contracts offer their contractors some protection in the event of a breach by the contracting party of its contractual obligations. This protection is enshrined, in particular, in the principle of *exceptio non adimpleti contractus*, which allows a



Co-funded by
the European Union



party to a contract to withhold its own performance until the other party has duly performed its own obligations towards that first party. Moreover, unlike public contracts, private contracts can include deferred payment clauses and can be freely concluded at provisional prices.

In Germany, Greece, Italy and Latvia, contracting by public bodies, although based on a common foundation, is governed by principles different from those applicable to civil or private contracting.

IV.6. – TOWN PLANNING AND ENVIRONMENT

Question 26.

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)

Summary of answers.

A) Precautionary principle

In Austria, Belgium, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Serbia and Norway, the environmental precautionary principle is invoked and applied.

In Lithuania, the environmental precautionary principle has been applied occasionally or on a limited basis, as there have been only a few cases in which this principle has been invoked (particularly in relation to the management of hazardous waste).

In Sweden, the Supreme Contentious-Administrative Court does not deal with cases or matters relating to town planning or the environment. These cases are the responsibility of the Land and Environment Courts, where the Land and Environment Court of Appeal is the highest





instance. Therefore, Sweden's Supreme Contentious-Administrative Court states that it cannot contribute answers to the questions in Section 5.

In the **United Kingdom** too, the environmental precautionary principle has been applied occasionally. The courts will not challenge the government's failure to apply the precautionary principle as a matter of routine (*R (Duddridge) v. Secretary of State for Trade and Industry* [1995] Env L.R. 151). However, the courts have accepted that where the government has sought to apply the precautionary principle using a specific or identifiable mechanism or methodology, a challenge can be filed on the basis that the government did not follow those mechanisms [*R (Amvac Chemical UK Ltd) contra Secretary of State for Environment, Food and Rural Affairs* [2001] EWHC 1011).

The precautionary principle has been incorporated into UK domestic law in a limited sense by Article 17 of the Environment Act 2021. This requires the Secretary of State to prepare a policy statement setting out how certain environmental principles must be interpreted and applied proportionately by government ministers when formulating policies. The precautionary principle with regard to the environment is one of these principles.

B) "Polluter pays" principle

In Austria, Belgium, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Serbia and Norway, the "polluter pays" principle is also invoked and applied.

C) Other principles

Other examples of environmental principles in Austrian legislation are the principles of sustainability, conservation of resources, efficiency of resources, and waste prevention and separation (sec. 1 Waste Management Act-Abfallwirtschaftsgesetz 2002, AWG 2002, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20002086>).

In Estonia, there is also application of the principle of high-level protection of the environment, the principle of integration (considerations that ensure a high level of protection of the environment must be taken into account as guidelines for the development of all areas of life in order to ensure sustainable development), the principle of prevention, and the principle of economic use of natural resources.

The Fundamental Law of Hungary recognises and endorses the right to a healthy environment, enshrines the "polluter pays" principle and prohibits the import of polluting waste [Article XXI of the Fundamental Law]. According to Article XXI of the Fundamental Law: "(1) Hungary shall recognise and endorse the right of everyone to a healthy environment. (2) Anyone who causes damage to the environment shall be obliged to restore it or to bear the costs of restoration, as provided for by an Act.

(3) The transport of polluting waste into the territory of Hungary for the purpose of disposal shall be prohibited."



Co-funded by
the European Union



Decision no. 4/2019 (III.7.) of the Constitutional Court of Hungary summarised the practical application, in particular with regard to the principle of non-derogation, of Article XXI of the Fundamental Law and the obligation to protect natural resources referred to in Article P) of the Fundamental Law. As regards the right to a healthy environment, the Constitutional Court emphasised that in regulating the strengthened system of values concerning the environment, the legislator must demonstrate that the new regulation does not constitute a retrograde step from the level of environmental protection achieved and therefore does not cause irreversible damage. However, a backward or retrograde step must be examined using the fundamental law test: it must be decided whether the regulation falls within the scope of application of the right to a healthy environment and whether a backward or retrograde step in the level of protection can be detected; if so, can the restriction involved in the backward step be justified by the criteria of necessity and proportionality?

In Latvia, in accordance with the Environmental Protection Law, the State's environmental policy will be developed and decisions will be taken that may affect the environment or human health, respecting the following principles of environmental protection: the principle of prevention, whereby a person must prevent as far as possible the occurrence of pollution and other adverse effects harmful to the environment or human health, or, if this is not possible, must prevent its spread and its negative consequences; the principle of assessment, whereby the effect of any activity or measure that could substantively affect the environment or human health must be assessed prior to the authorisation or initiation of that activity or measure. An activity or measure that could have adverse effects on the environment or human health, even if all environmental protection requirements are met, will be permitted in such a case only if the expected positive result for the public as a whole is greater than the damage caused by the activity or measure in question to the environment and the public.

In the field of construction, the following principles apply: the principle of architectonic quality, whereby structures are designed by balancing the functional, aesthetic, social, cultural, historical, technological and economic aspects of the construction and also the interests of the initiator of the construction and the public, emphasising the individual identity of the natural or urban landscape and integrating this organically into the cultural environment, thus enriching it and creating a living space of good quality; the principle of technical engineering quality, whereby the technical engineering solution of the structure is safe for use, as well as economically and technologically efficient; the principle of openness, whereby the construction process is open and the public is informed about the planned construction and the decisions taken in this regard; the principle of public participation, whereby, in the cases specified in this Law, public discussion of the intended construction is guaranteed; the principle of sustainable construction, whereby a quality living environment is created for present and future generations during the construction process, increasing the efficient use of renewable energy resources and promoting the efficient use of other natural resources to that end; the principle of environmental accessibility, whereby that environment is created during the construction process, in which any person can move around comfortably and use the structure according to its intended use.

In the Netherlands, the "polluter pays" principle is invoked and applied in the country's judicial practice only occasionally or on a limited basis. The "polluter pays" principle is not considered to be a general principle that can be invoked and applied in the judicial practice of the Administrative Jurisdiction Division of the Council of State (AJD). However, it is common



**Co-funded by
the European Union**



practice for the legislator and the administrative authorities to refer to this “principle” when formulating legislation and policy.

In Portugal, in accordance with Law no. 19/2014 of 14 April, the Framework Law on the Environment, in addition to the principles already mentioned, others can be invoked, namely: the principle of sustainable development; the principle of intra- and inter-generational responsibility; and the principle of environmental education (Article 3(a) and (d) and Article 4(d)).

In its practice, the Supreme Court of Slovenia has also highlighted the precautionary and preventive principles, which are defined as fundamental environmental principles by Article 191, para. 2, of the Treaty on the Functioning of the European Union and Articles 8 and 7 of the Environmental Protection Act.

In the United Kingdom, the “polluter pays” principle is invoked and applied in the country’s judicial practice only occasionally or on a limited basis. Although the “polluter pays” principle is given some expression in the legislation (see, for example, Part IIA of the Environmental Protection Act 1990 concerning Waste on Land), the courts have hesitated to adopt the principle as a more general basis for liability. For example, the House of Lords held in *R (National Grid Gas plc/Environment Agency) [2007] UKHL 30* that the “polluter pays” principle was not a basis for extending liability under the Part IIA regime to the successors-in-title of past polluters. However, the “polluter pays” principle has been incorporated into UK domestic law in a limited sense by Article 17 of the Environment Act 2021. This requires the Secretary of State to prepare a policy statement setting out how certain environmental principles must be interpreted and applied proportionately by government ministers when formulating policies. These include the “polluter pays” principle.

IV.6. – TAXATION.

Question 27.

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



**Co-funded by
the European Union**



- **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)

Summary of answers.

A) Principle of legality: Tax liability can be established only by rules with legal status.

In Austria, Belgium, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Serbia, Norway and the United Kingdom, the principle of legality is invoked and applied in tax matters.

B) Principle of economic or contributory capacity

In Austrian legislation and practice, the “principle of economic or contributory capacity” is applied with nuances, because although the principle of economic or contributory capacity is one of the most fundamental principles of the Income Tax Act, there are other areas of tax law where this principle is not applied, such as the Value Added Tax Act.

In the legislation and practice of the Slovak Republic, the “principle of economic or contributory capacity” is also applied with nuances. The “with nuances” answer applies whenever the principle of “contributory capacity” means the principle of capacity to pay, whereby taxes take account of a taxpayer’s capacity to pay. Exceptions to the principle of taxation on the basis of a taxpayer’s capacity to pay include the tax on sales of real estate assets.

In the legislation and practice of Belgium, Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, Malta, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Serbia, Norway and the United Kingdom, the “principle of economic or contributory capacity” is applied.

For example, by Decision no. X Ips 367/2015 of 30 August 2017, the Slovenian Supreme Court ruled that income tax should be based on an objective net principle that ensures tax fairness. This means that the costs incurred in obtaining an income must be deducted, since only the (positive) difference is what actually represents an increase in the taxpayer’s assets (economic power).

In the legislation and practice of the Czech Republic, the “principle of economic or contributory capacity” is applied with nuances. The principle of economic or contributory capacity is not a guiding principle. However, the Tax Code provides several instruments that allow the current economic or contributory capacity of a taxpayer to be taken into account. These include





exemption from taxes, which is an exceptional option provided for only in certain specific statutes (for example, in the Law on Budgetary Rules, which authorizes the tax authorities to waive the fine imposed for breach of budgetary discipline). There is also the possibility of a massive waiver by the Minister of Finance in the event of emergencies, particularly natural disasters. In addition, if a tax that led to a penalty has been paid, the tax authorities can exempt up to 75% of that penalty. Similarly, the Tax Code allows the waiver of penalties for late filing or default interest, while expressly establishing that in assessing the extent to which the penalty (or interest) will be exempt, the tax authorities will take into account whether the taxpayer's economic or social circumstances justify the severity of the penalty incurred (or of the interest charged). In addition to exemptions, there are also other mitigating instruments related to the payment of taxes, such as deferral of payment or allowing the taxpayer to pay the tax in instalments. Most of the conditions set out in the Tax Code for this procedure relate to economic or contributory capacity (e.g. whether immediate payment would cause serious harm to the taxpayer, or whether the subsistence of the taxpayer or his/her dependants would be threatened, etc.).

In Latvia and Lithuania, the principle of economic or contributory capacity is not applied.

C) Principles of equality and generality

In the legislation and practice of Austria, Belgium, Croatia, Cyprus, the Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, Serbia and Norway, the principles of equality and generality are applied.

In French legislation and practice, the principles of equality and generality are applied with nuances. The principle of equality under French tax law does not preclude the legislator from pronouncing differently on different situations or making exceptions to equality on grounds of general interest, provided that, in both cases, the resulting difference in treatment is directly related to the purpose of the establishing law.

In the United Kingdom, there is no general principle of equality and generality in tax legislation. However, Article 14 of the European Convention on Human Rights protects against the imposition of tax obligations in a discriminatory manner. Nevertheless, provided that it is not discriminatory, different persons can be taxed at different rates without this being unlawful (see, for example, *Inland Revenue Commissioners/The National Federation of Self-Employed & Small Businesses Limited* [1982] AC 617).

D) Principle of progressiveness and its limit: non-confiscatory taxation

In Austria, the principle of progressiveness and its limit: non-confiscatory taxation is applied with nuances, since not all tax rates are established progressively in Austrian tax law. Examples of such progressive tax rates are income tax, where the rate is established progressively on the basis of annual income, and the licence tax provided for by the Gambling Act. Rules that stipulate confiscatory taxes (which result in an excessive burden on taxpayers) are unconstitutional (see, inter alia, the Judgment of the Constitutional Court of the Republic of Austria VfGH 11.3.1977, B274/74, https://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_19770311_74B00274_01/JFR_19770311_74B



Co-funded by
the European Union



[00274_01.pdf](#)). Other important principles of Austrian income tax law include individual taxation, periodic taxation, taxation of net income, and universality or territoriality.

In Belgium, the principle of progressiveness and its limit: non-confiscatory taxation is applied. The Belgian Constitutional Court has ruled, for example, that “B.15.6 In the present case, the legislator has disproportionately undermined both the testator’s right to dispose of his property and the legatee’s legitimate expectation of receiving it, by fixing a rate that is inconsistent with the taxes imposed for other forms of transmission of property and those affecting other categories of heirs”. This case concerned an inheritance tax at a rate of 95%. The Court went on to state that: “While it is the political choice of the tax legislator to apply different rates to different taxes and to tax different categories of heirs, it is manifestly disproportionate to apply, with regard to inheritance tax, such a high rate unjustified by any specific objective of the category of taxpayers in question and taking into account only the budgetary objective pursued. B.15.7. Insofar as the rate applicable to the amount exceeding EUR 175,000 is greater than 80%, Article 1 of the contested Decree is not compatible with Articles 10, 11 and 172 of the Constitution and must be annulled to that extent”.

In Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Serbia and Norway, the principle of progressiveness and its limit: non-confiscatory taxation is applied.

In Hungary, as in all administrative procedures, the provisions of the Fundamental Law must also be respected and applied in tax-related administrative procedures. Law no. CL of 2017 on tax rules expressly sets out specific sectoral principles such as (Part I, Chapter I): the requirement for the correct (intentional) exercise of rights (prohibition of abuse of rights), the requirement to assess a contract on the basis of its content (authenticity clause), the requirement to assess a transaction on the basis of the economic results, the requirement to assess contracts between related companies, the taxation in Hungary of income covered by an international contract, and the possibility of applying an estimate in the event of any improper exercise of rights.

In the Slovak Republic, the rate of personal income tax depends on the amount of taxable income. Up to a certain level of taxable income, a lower tax rate (19%) will be applied, with a higher rate (25%) being applied when that limit is exceeded. This limit is based annually on the amount of the minimum applicable taxable income level. The dual rate for income tax (15% and 21%) also applies to corporation tax. Article 11 of the Income Tax Act also defines the establishment of the tax-free income allowance, which means that below a certain limit, income is not subject to tax.

By Resolution no. U-I-113/17 of 30 September 2020 (RS Official Gazette no. 145/20), the Slovenian Constitutional Court ruled on an application by the Administrative Court to review the constitutionality of Article 68.A of the Tax Procedure Act, which determined that a tax rate of 70% would be applied to undeclared income. The regulation on the taxation of undeclared income that was in force before the contested regulation made the rate applicable to these taxes dependent on the rates derived from the Income Tax Act (which sets a maximum rate of 50% for the highest income bracket.) The Constitutional Court therefore proceeded from the assessment that in determining a tax rate of 70%, the legislator substantially promulgated – in addition to the tax calculated according to the income tax rate in force – an increase, i.e. a



Co-funded by
the European Union



surcharge on the normal income tax rate. The surcharge serves to deter taxpayers from violating tax law obligations and to encourage them to fulfil those obligations. The Constitutional Court considered that in promulgating a surcharge, the legislator did not pursue the objective of financing public expenditure nor any of the socio-political objectives (within the framework of social or economic policy) which, in accordance with the constitutional determination of taxes and the case law of the Constitutional Court, are acceptable objectives of taxes. It therefore concluded that in constitutional terms, the surcharge is not a tax, but a measure intended to: 1) repair the damage suffered by the public finances and revenues due to violations of the obligation to declare income; 2) annul the benefits obtained by taxpayers as a result of such violations (i.e. a restorative measure); or 3) sanction taxpayers for such violations (i.e. a punitive measure). The Constitutional Court repealed this provision on the grounds that the tax rate of 70% determined therein exceeded the tax rate prescribed by the regulation previously in force on the taxation of undeclared income.

In the Czech Republic, Latvia, Lithuania and Romania, the principle of progressiveness and its limit: non-confiscatory taxation is not applied.

However, Latvia has adopted a principle of progressiveness for personal income tax, which means that people with lower incomes pay less tax and those with higher incomes pay more. The Latvian tax administration operates in accordance with the “adviser first” principle, which establishes that the main objective is not to penalise, but to achieve cooperation between companies and supervisory authorities in order to ensure that companies know and understand their obligations and fulfil them in good faith. The tax legislation also applies the principles of proportionality, legality, equality and other principles of administrative law.

The principle of progressiveness in tax matters is implicitly established in Luxembourg’s system with regard to the direct taxes that fall under the jurisdiction of the administrative courts, and it operates in such a way that there is a prohibition of taxation of the substance in the sense that no tax should in principle exceed 50%.

In Portugal, in accordance with the Constitution of the Portuguese Republic and the General Tax Law (approved by Decree-Law no. 398/98 of 17 December, last amended by Law no. 7/2021 of 26 September), in addition to the principles mentioned above, other principles may be invoked, namely: the principle of prohibition of tax retroactivity (Article 103 of the Constitution); the principle of exclusive responsibility to legislate (Article 165, 1, subparagraph i) of the Constitution); and the principle of participation (Article 60 of the General Tax Law).

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

In the United Kingdom, taxation is generally applied progressively, but there is no general principle that it should be so applied or that there are limits based on the principle of non-confiscatory taxation. The form and amount of taxes fall within the competence of the Parliament. The Human Rights Act 1998, which gives some force to the Convention rights by





virtue of the European Court of Human Rights, can affect the interpretation of tax statutes in order to provide a limited degree of protection against confiscatory taxes.

Taxes are established by Acts of Parliament. This is interpreted with the aim of ensuring that the Parliament's basic intention to impose a tax is restricted and the scope for unlawful tax evasion is minimised.

-o-o-o-o-o-o-



Co-funded by
the European Union