Association of European Administrative Judges

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"Europeanization of Administrative Law"

Questionnaire:

II The influence of principles of European law in the evolution of administrative law

PREAMBLE: HOW EUROPEAN LAW IS ACTING ON DOMESTIC PUBLIC LAW?

The direct consequences provided by European law: the impact of European Union law

The EU norms standards have become quantitatively the most important source of national law in the member states. And these rules have a major impact in the member States through a combination of two complementary principles that challenge the dualistic conception:

a) The principle of "direct effect": ECJ, 5 February 963, Van Gend en Loos
And also the requirement to transpose the European directives into national law.

b) The principle of primacy of European law over the national laws: ECJ, 15 July 1964, Costa v. ENEL

And the necessity for the National Courts to take into account the jurisprudence of European courts and the requirement of consistent and uniform interpretation of the European Union law.

The indirect consequences of European law, through the influence of principles coming from European law

The European Convention of Human Rights, but also the EU law, have elaborated "general legal principles of law"1. The strength, the impact of those concepts is essential. They are structural. They structure important aspects of the evolution of administrative law.

The concept of "general principles of law" can also be found in public international law with the "general principles of law recognized by civilized nations", regarded as a source of law by Article 38 of the Statute of the International Court of Justice.

A lot of them are similar with those introduced in constitutional texts or laws or proclaimed by the case law (for example in France a long time ago by the case law of the French Council of State). But it is impossible to say that these principles coming from Europe don't have any influence on national administrative law. In fact European law created new principles and imposed new elements inside the old principles, it means a relooking.

Those consequences are more recent and less studied because they are less visible at first sight. The impact of European law in terms of relooking old principles is less visible. But in fact those indirect consequences are also very important.

Some concepts, designated with the same words, have sometimes different meanings in the different national legal systems. The approach of European law gives the possibility to built a common language for understanding them better. And perhaps it may contribute to harmonize the national legal systems. European law leads changes in vocabulary that are not just new labels on old principles. These changes in the vocabulary used by the Courts also induce a mutation of old concepts. They acquire progressively a new meaning.

A list

6. The principle of legality and the respect for fundamental rights
7. The principles of primacy and 8. direct effect of European Union law
9. The principle of subsidiarity
10. The principle of transparency
11. The principle of public participation
12. The principle of egality and non-discrimination
13. The principle of proportionality
14. The precautionary principle
15. Protection of legitimate expectations and the principles of legal certainty and good faith
16. The principle of responsibility

[1] X. Groussot, "The general principles of Community law," Europa, 2006.

6. The principle of legality and the respect for fundamental rights:

Austria

(given by Austrian Administrative Court):The fundamental rights are enshrined **in the Austrian Constitution**. In Austria this is also true for the fundamental rights of the European Human Rights Declaration giving them the same status as national constitutional rights. Therefore the Austrian constitutional review process applies fully to all questions of fundamental rights on an equal basis.

If a national provision is not in line with constitutional rights, a national judge can file a motion with the Constitutional Court to declare a national provision as incompatible with the Constitution. Additionally, in Austria the **Constitutional Court can be addressed directly by private parties in public law matters**. There are **two ways to reach the Constitutional Court**. First, one can appeal eventually to the Constitutional Court after exhaustion of all regular remedies if an authoritative measure directly hurts the rights of a person. In such a case the Court looks into the individual administrative case by itself. The second ground for constitutional review is if somebody claims that the general provision was applied correctly by the administration in their single case, but the applied provision itself was not in line with the constitution. Then the Constitutional Court can open a review not on the administrative behavior, but on the general law. If the Court finds the arguments of the plaintiff valid, it can declare the provision *pro futuro* for void, which will be published in the federal gazetta normally publishing passed laws. The Constitutional Court is thereby acting as a negative legislator. However, there is also the possibility for the Court to grant parliament a "repair period" of up to 18 months. In this period the provision - although already found to be unconstitutional - has to be applied further on. The grant of such repair periods depends, of course, on the extent of constitutional infringement. The individual case having raised the issue however always benefits from a successful constitutional challenge. In that case the national law has already to be applied without consideration of the unconstitutional provision.

This system shall keep the **balance between the principle of legality and the principle of uniformity in the application of law** on the on hand side **and the respect for constitutional rights** on the other hand side.

The new **European Charta on Human Rights** will however influence this review system as it might then be not only the Constitutional Court enforcing fundamental rights but also other judges when applying the disputed provision. Yet case law has still to be developed in this field. However, the Constitutional Court has already held that it will examine cases under the European Charta as well regarding them as equal rights to the national constitutional rights.

Czech Republic

The principle of legality and the respect for fundamental rights are included in Art. 4 of the Charter (of Fundamental Rights and Freedoms):

"*(1) Duties may be imposed only on the basis, and within the bounds, of law, and only while respecting the fundamental rights and freedoms.*
(2) Limitations may be placed upon the fundamental rights and freedoms only by law and under the conditions prescribed in this Charter of Fundamental Rights and Freedoms.
(3) Any statutory limitation upon the fundamental rights and freedoms must apply in the same way to all cases which meet the specified conditions.
(4) When employing the provisions concerning limitations upon the fundamental rights and freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations shall not be misused for purposes other than those for which they were enacted."

Similar provisions are included also in the Code of Administrative Procedure in Section 2:

"(1) An administrative body shall act in accordance with laws and other legislative instruments as well as international treaties which constitute a component part of the legal order (hereinafter referred to as 'legislation'). Where a law is mentioned in the Act herein, international treaties, which are part of the legal order, shall be included.
(2) An administrative body shall execute its power only for the purposes for which they have been entrusted by or upon the law, and within the scope determined thereby."

Even though it is not necessary to explicitly express it in their discretion, the administrative courts of the Czech Republic shall always take into consideration the constitutionality of their decisions and it is their duty to measure the decisions with the requirement of protection of fundamental human rights and freedoms, regardless whether there has been raised as an objection by the party or not. It is also necessary to always focus on the intensity of the violation of fundamental rights, since the violation needs to be severe and with crucial faults.

Administrative courts shall take into account the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights. It also should consider the case-law of the ECJ in case it is relevant for limitation of human rights.

Regarding the pensions of migrants between Member States, the Supreme Administrative Court (hereinafter as the "Court") ruled in decision File No. 3 Ads 102/2006-60[2] that the administrative authority cannot refer to a national legislation, thereby restricting the scope of individual rights guaranteed under Community law regulations. The Court is *ex officio* obliged to take into account the Community law if violation thereof would lead to the defects mentioned under Section 109 (2) and (3) of Code of Administrative Justice (No. 150/2002 Coll.) or to other defects, which the Court has obligation to take into account even when applying national law.[3]

[2] Judgment of 28 February 2007, No. 3 Ads 102/2006-60, No. 1648/2008 Court Reports.
[3] Judgment of 18 June 2009, No. 8 As 33/2009-56, No. 1908/2009 Court Reports.

France

The principle of legality and the respect for fundamental rights: in French law vocabulary they are called “General principles of law” and “Fundamental principles recognized by the laws of the Republic”. This is a common set of rights and fundamental freedoms which are considered to be intangible. In the EU system they are designated by the more vague concept of "European values".

The reference, more or less directly, to the ECHR jurisprudence and recently to the Charter of Fundamental Rights of the EU has modernized the approach of two old French constitutional declarations about fundamental rights and freedoms: the “Bill of the rights of men and citizens” of 1789 written at the beginning of the French Revolution and the preamble of the Constitution of 1946, which was not removed at the time of entry into force of the current Constitution of 1958.

And the presentation of the "general principles of law" declared by the case law of the Council of State itself deeply evolved under the influence of this double phenomenon: the Europeanization and the Constitutionalisation of administrative law. European law broke more easily the traditional democratic principle of the primacy of law voted by the Parliament, considered as to be as the "expression of the general will", and for that reason situated at the top of the hierarchy of norms. The higher principles of the “rights and fundamental freedoms” proclaimed by the European law introduced a legitimacy to create limits on the exercise of the legislative power.

“The application for a priority preliminary ruling on the issue of constitutionality” (QPC) was introduced under the constitutional reform of July 23rd 2008.

Prior to this reform, it was impossible to challenge the constitutionality of a law which had come into force. An "application for a priority preliminary ruling on the issue of constitutionality" is the right for any person who is involved in legal proceedings before a court to argue that a statutory provision infringes rights and freedoms guaranteed by the Constitution.

Once conditions of admissibility have been complied with, the Constitutional Council, to whom the application will have been referred by the Conseil d'Etat or the Cour de cassation, will give its ruling and, if need be, repeal the challenged statutory provision.

This important constitutional reform is not directly but indirectly a consequence of the influence of European Law.

Germany

The principle of legality as well as the respect for fundamental rights have been cornerstones of the Basic Law (particularly Art 20 Para 3 and Articles 1 to 19, 103 BL) and the jurisdiction of the Federal Constitutional Court from the beginning. Problems arose now and then when compliance of secondary EU law with fundamental rights as stated in the Basic Law was doubted. The Federal Constitutional court announced a respective control but in the

end restrained from an in depth scrutiny assuming that EU law itself provides for similar guarantees and that the core of protection by the Basic law was not harmed. This attitude is backed now by the Lisbon treaty entailing the entering into force of the EU Charter of fundamental rights.

Greece

EU Legislation, as well as the rulings of the European Court of Human Rights and of the Court of Justice of EU have had a profound effect on the new laws that have been enacted in Greece in the past years.

It has to be stressed, that many of the Laws that are presented are relatively new and so one cannot yet assess their effectiveness in the day-to-day life of the citizen. Furthermore, the administrative courts have not yet reviewed all those laws and there is not yet an established case law, though the current 'Crisis' will probably lead to the reviewing of a greater number of administrative acts and laws by the administrative courts, who will seek for guidance to the Constitution as well as the ECHR and the principles of EU Law.

The current 'Crisis' is stressing the national budget and the parliament enacts laws that have a direct impact on the rights of each citizen. The Council of the State has already ruled (Decision 668/2012 of the Grand Chamber) that the measures (reduction of pensions and wages of public employees) that were taken in 2010 where in accordance with the Constitution, as well as the fundamental rights. However, the court emphasized that the power of the Parliament to further reduce pensions and wages of public employees is limited, since the measures should not focus in only one category of citizens (pensioners and public employees) and should also respect human dignity[u1].

Italy

The Italian legal system has a large number of principles concerning the action of the public administration and the legal protection of private individuals made up on the basis of the principles of case-law and the attainments of scholars. Most of those principles have been codified, some at constitutional level, some at legislative level (especially through Law n° 241/1990 on the administrative proceeding), but some remain unwritten. Generally speaking they have been implemented in the judgments by the Council of State (High Court for administrative cases) and the Regional Administrative Tribunals.

The Italian administrative law's principles derive from a common European tradition and thus are not different from the EU's ones, as mentioned in the items n° 6-12 and 15-16.

The European Court of Human Rights (ECHR) has repeatedly_condemned Italy for the infringement of the right of property, so that the Law on expropriation has been amended and the former, special form of expropriation de facto which had originated the litigation, has been repealed (item n° 6).

Lithuania

The EU law principles as *ius non scriptum* are constitutional principles of the Republic of Lithuania. They are principles of administrative law as well (some of them even are incorporated in legal statutes).

The principle of legality and the respect for fundamental rights

Any law or other act, which is contrary to the Constitution, shall be invalid (Part 1 of Article 7 Of the Constitution). From the constitutional principle of a state under the rule of law and other constitutional imperatives arises the requirement to the legislator to pay heed to the hierarchy of legal acts which originates from the Constitution. This requirement inter alia means that it is prohibited to regulate the public relations by legal acts of lower power, which may be regulated only by legal acts of higher power, it also means that it is prohibited to establish in legal acts of lower power any such legal regulation, which would compete with the one established in the legal acts of higher power. Within the context of the constitutional justice case at issue it is worth emphasising that by a substatutory legal act norms of the law are realised, therefore such a substatutory legal act may not replace the law itself or create any new legal norms of general character which would compete with the norms of the law, as thus the supremacy of laws in respect to substatutory acts which is established in the Constitution would be violated (Constitutional Court ruling of 21 August 2002); it is also to be stressed that substatutory legal acts cannot be in conflict with laws, constitutional laws, and the Constitution, that substatutory legal acts must be adopted on the basis of laws, that a substatutory legal act is an act of application of legislative norms irrespective of whether this act is of one-time (ad hoc) application, or of permanent validity.

The constitutional principle of a state under the rule of law implies various requirements for the legislator and other law-making entities; the law-making entities may pass legal acts only without exceeding their powers; the requirements established in legal acts must be based on the provisions of general type (legal norms and principles) which can be applied in regard to all the specified subjects of respective legal relations; in order to ensure that the subjects of legal relations know what the legal norms require from them, the legal norms must be established in advance, the legal acts must be published officially, they must be public and accessible; the legal regulation established in laws and other legal acts must be clear, easy to understand, consistent, formulas in the legal acts must be explicit, consistency and internal harmony of the legal system must be ensured, the legal acts may not contain any provisions, which at the same time regulate the same public relations in a different manner; in order that subjects of legal relations could orient their behaviour according to the requirements of law, the legal regulation must be relatively stable; the legal acts may not require the impossible (lex non cogit ad impossibilia); the power of the legal acts is prospective, while retrospective validity of the laws and other legal acts is not permitted (lex retro non agit) unless the legal act mitigates the situation of the subject of legal relations and does not injure other subjects of legal relations by the same (lex benignior retro agit); violations of law, for which liability is established in legal acts, must be clearly defined.

According to 3 Article of the Republic of Lithuania Law on Public Administration the supremacy of law as law principle means that that the powers of entities of public administration to engage in public administration must be stipulated in legal acts, and their

activities must comply with the legal principles laid down in this Law. Administrative acts related to the implementation of rights and duties of persons must in all cases be based on laws. Absence of abuse of power as law principle means that entities of public administration shall be prohibited from performing the functions of public administration without the powers of public administration granted in accordance with the procedure laid down by this Law or from taking administrative decisions seeking to attain purposes other than those prescribed by laws or other regulations (also see 24 August 2012 decision of the Supreme Administrative Court).

Slovenia

The principle of legality and the respect for fundamental rights:

This basic principle has been adopted in our Constitution as it stands among numrous provisions cited above, especially in the Article 153 (Conformity of Legal Acts) and in the Article 154 (Validity and Publication of Regulations) in the 7th Chapter of the Constitution (Constitutionality and Legality) even in the worthing of the Preamble, as follows: „Proceeding from the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, and from fundamental rights and freedoms, and the fundamental and permanent right//...//

Sweden

The principle of legality is written down in the Swedish Constitution, (first chapter, first article: The public power must be executed according to law) as is **the respect for fundamental rights** – the Constitution refers to the ECHR, which, as is mentioned above, is incorporated as a Swedish law, and according to chapter 2, article 19 in the Constitution no Swedish law must be passed that is contrary to the ECHR..

7. The principles of primacy and direct effect of European Union law:

Austria

(given by Austrian Administrative Court):The **Principle of Legality** and the **Principle of Loyalty to European Law** can interfere with one another. In case of European law provisions enjoying direct and primary effect it is fully established that national provisions have to be set aside if they are in conflict with European requirements. In Austrian Court practice there have already been a lot of cases dealing with such constellations. National jurisprudence plays hereby an important role in the surveillance of the respect of the national legislator for European Law. The principle of (national) legality steps behind.

This might only cause a problem in such constellations where there is no clear answer to a conflict situation between national law and European law of direct effect. In such constellations some lower courts might take one position and the others another one jeopardizing of course the principle of uniformity of application of law and creating possibly huge **legal uncertainties** on short terms. It's then up to the Supreme Court to (re)establish the uniform application of law. The Austrian constitutional system avoids such problems as national provisions have to be applied as long as the Constitutional Court has not found them

to be incompatible. Thus it is only the Constitutional Court and not every judge on its own ruling on the legality of a national provision in the constitutional perspective. However, in Austria **both systems coexist** today side by side - the centralized examination of constitutional issues by a specialized Supreme Court and the implied examination of directly applicable European law by every applying judge (which is in the last instance the Austrian Administrative Supreme Court).

There is, however, another field of possible conflict between national law and European law that does not occur that often and where scholars are still arguing about the correct balancing of the interests of legality and European Law. This is the **question of limits of harmonizing interpretation**, if a national provision is not in line with European Law that does *not* have direct effect. Here the question remains, in how far national judges should harmonize the understanding of the national provision with European Law although the latter is not directly applicable.

This can be **demonstrated on a fictious tax case**: The EU Council directive 2006/112/EC of 28 November 2006 on the common system of value added tax allows Member States in Art 98 to apply either one or two reduced rates to supplies of certain goods or services listed in Annex III. This Annex reads in paragraph 7 as follows: "admission to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and facilities". In the Case *Erotic Center* C-3/09 the ECJ held that the concept of "admissions to a cinema" referred to in the Council Directive must be interpreted as meaning that it does *not* cover the payment made by a customer so as to be able to watch on his own one or more films, or extracts from films, in private cubicles such as those in issue in the main proceedings.

The Austrian VAT-Act now did not transpose the directive using the wording "cinema" of the directive, but chose a broader term granting a reduced VAT rate for the "presentation of films" in Art 10 para 2 subpara 10 VAT-Act. From the mere wording of the national provision erotic cinema displays such as the Belgian ones would be included in the VAT-reduction. A **national judge** is now **confronted with the following questions**:

- Should national judges now grant the broadly phrased VAT reduction in order not to frustrate people's trust in national law for legality reasons although they are thereby breaching - *not* directly applicable - EC Law?

- Or should they rather reduce the wording of "presentation of films" down to "cinema displays" in order to avoid EU conflicts?

- In how far does the wording of a national provision set out limits to possible interpretation approaches so that the breach of not directly applicable EU Law has to be targeted separately by the EU Commission in an Infringement Procedure and can not be mitigated by national judges?

The **approaches of national jurisdictions** seem to be **different** in this respect. Austria has too little case law to detect a clear border line. In principle the wording is regarded as a limit

of interpretation; but teleologic reductions are also used in mere national interpretation contexts, so that there is rather room for individual case arguing case by case.

Czech Republic

The administrative courts and administrative authorities use to apply directly or indirectly Union law and also have recognized the principle of the primacy of Union law. By non applying of the EU law their decisions will be quashed by administrative courts (or the Court) as unlawful. For example in the decision File No. 3 Azs 259/2005-42 the Court drew a conclusion about the direct effect and priority for an application on provisions of the Protocol on Asylum for Nationals of Member States of the European Union. However, the Court also stated that the national regulatory framework must be observed by administrative authorities while respecting the obligations arising from the Community law.

Community law and Community case-law represent obligatory interpretative guidance for administrative authorities adjudicating legal matters that emerged after the accession to the European Union. The Court also held that there is an obligation to interpret national provisions in compliance with the EU law and an obligation resulting from it to depart from the existing case-law of the Court in cases when the transposition period for the implementation of the Community directive expired and when no text changes in the statutory provisions have occurred.[4]

France

The principles of primacy and direct effect of European Union law are included in French vocabulary legal system in "the principle of legality" and of the "hierarchy of norms".

Legal rules are classified in a hierarchy. And according to the Constitution written and implemented in 1958, Article 55: "*Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party*".

The principle of the primacy of European law is mainly respected in France since 1989 (CE ass, 1989, Nicolo). But the case law of the Supreme courts proclaim the primacy of constitutional law over European law.

Beyond this contradiction in practice each member state strives to avoid conflicts between constitutional norms and European norms. It the reason why the European law has become the main driver for constitutional reforms. And in order to reduce the risk of conflicts and contradictions, the constitutional courts are struggling through their case law to include the case law of the ECHR and the ECJ.

But it should be added that so far the French Constitutional Council, keeping with the tradition of the primacy of the constitutional law, refuses to use the possibility of preliminary rulings from the ECJ.

[4] Judgment of 13 August 2008, No. 2 Azs 45/2008-67, No. 1713/2008 Court Reports.

The case law about the principle of direct effect in more sophisticated.

Germany

About the principles of primacy and direct effect of European Union law:

These principles are not questioned in court practice. Therefore the more EU law and decisions of the CJEU are released the more these principles will have influence on the national legal order.

Greece

As regards the primacy and direct effect of EU law[u2], it is worth mentioning Decision 161/2010 of the Grand Chamber of the Council of State in which the court stated that when reviewing a law the courts must first consider whether the law is contrary to the Constitution and only if the answer to that question is negative, the courts should consider whether the law is contrary to the EU law. The Court stressed that this way of reviewing national laws is not contrary to the principle of the primacy and direct effect of EU law, but it is appropriate, since in order to assess the compatibility of a national law with EU law (and perhaps ask the Court of Justice of EU for a preliminary ruling) the (only competent) national judge should firstly adjudicate on all the issues of interpretation and applicability of national law[5].

Italy

Lithuania

The principles of supremacy and direct effect of European Union law:

On 13 July 2004, the Seimas adopted the Law on Supplementing the Constitution of the Republic of Lithuania with the Constitutional Act "On Membership of the Republic of Lithuania in the European Union" and Supplementing Article 150 of the Constitution of the Republic of Lithuania, by Article 1 whereof it supplemented the Constitution with the Constitutional Act of the Republic of Lithuania "On Membership of the Republic of Lithuania in the European Union", which is a constituent part of the Constitution (Article 150 of the Constitution). The said Constitutional Act came into force on 14 August 2004. Thereby the membership of the Republic of Lithuania in the European Union was constitutionally confirmed (Constitutional Court ruling of 13 December 2004).

Under Paragraph 2 of the Constitutional Act "On Membership of the Republic of Lithuania in the European Union", the norms of the European Union law shall be a constituent part of the legal system of the Republic of Lithuania, and where it concerns the founding Treaties of the European Union, the norms of the European Union law shall be

[5] 13 members of the Court dissented mentioning that the court on the specific case should firstly adjudicate on the compatibility of the specific law with EU legislation, since that law was enacted in order to comply with rulings of the Court of Justice of EU. The dissenting opinion also stressed that in accordance with the principles of primacy and direct effect of EU law the court should interpret the relevant constitutional provisions 'in the light of EU law' so as to minimize the possibility of conflict between the Constitution and EU Legislation.

applied directly, while in the event of collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania.

Thus, the Constitution consolidates not only the principle that in cases when national legal acts establish the legal regulation which competes with that established in an international treaty, then the international treaty is to be applied, but also, in regard of European Union law, establishes *expressis verbis* the collision rule, which consolidates the priority of application of European Union legal acts in the cases where the provisions of the European Union arising from the founding Treaties of the European Union compete with the legal regulation established in Lithuanian national legal acts (regardless of what their legal power is), *save the Constitution itself.* (14 March 2006 ruling of the Constitutional Court).

Slovenia

The principles of primacy and direct effect of European Union law:

Looking at the constitutional provisions governing the effects of the EU norms on the domestic orders it should be pointed out that in the Constitution of the Republic of Slovenia the newly passed Article 3a was added in year 2003 (Official Gazette of the Republic of Slovenia, No. 24/03), as follows: Pursuant to a treaty ratified by the National Assembly by a two-third majority vote of all deputiea, Slovenia may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy and the priniples of the rule of law and may enter into a defensive alliance with the states which are based on respect for these values. Legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organisations.

Sweden

The principles of primacy and direct effect of EU law follows from the law from 1994 on the Swedish accession to the European Union.

9. The principle of subsidiarity

Austria

(given by Austrian Administrative Court): The principle of subsidiarity applies in several constellations. First it applies in **procedural law** stipulating that it is up to national law to structure the administrative procedures as long as the national procedural law does not make claims based on European law ineffective or worse off than claims based on national law.

In tax law the Austrian Administrative Supreme Court referred, for instance, a case concerning the repayment of Austrian duty on alcoholic beverages to the ECJ. In C-147/01, *Weber's Wine World* the Court held that on the one hand the **principle of effectiveness** precludes national legislation or a national administrative practice which makes the exercise of the rights conferred by the Community legal order impossible in practice or excessively difficult by establishing a presumption of unjust enrichment on the sole ground that the duty

was passed on to third parties. On the other hand the **principle of equivalence** precludes national rules which lay down less favourable procedural rules for claims for repayment of a charge which has been levied though not due from the aspect of Community law than those applicable to similar actions based on certain provisions of domestic law.

On the basis of this ECJ ruling there is also a **major role of the national judge**. It is - so the ECJ - "for the national court to ascertain, on the basis of a comprehensive assessment of national law", whether it is actually the case that claimants who bring proceedings based on domestic law may rely on more favourable conditions than those applicable to actions relating to taxes held to be contrary to Community law. If a national judge finds such an unjustified differentiation, **national subsidiarity in procedural issues ends** and the more favourable procedural conditions have to be applied.

Secondly, the principle is also known for the **relationship between European Law and national law**. Yet, at the moment this is rather a topic between national parliaments and the European Parliament and thereby a topic for the ECJ than for national courts.

Czech Republic

The subsidiarity principle is expressed in the requirement of exhaustion of ordinary remedies in the proceedings before an administrative authority (Sections 5 and 68 of the Code of Administrative Justice). This means that the party to administrative proceedings must always exhaust all remedies to protect his/her rights, which is available in the proceedings, and only after their useless exhaustion may seek judicial protection. Judicial review of an administrative decision is conceived as a subsequent mean of protection to the individual public-law rights, which cannot substitute resources located within the public administration.[6]

Another expression of the principle of subsidiarity can be found in town and country spatial planning, which implies that the matters of local significance shall be – to the extent they have specifically local character – subordinated to the regulation on this level of the public administration.[7]

France

The principle of subsidiarity:

Named principles of centralization, devolution and decentralization in French law – In France, the political and administrative organization is traditionally highly centralized. This is an old tradition, built at first by the monarchy who created the French hexagon, and then confirmed by the Revolution (1789-1799) and the Napoleonic Empire (1799-1815). This tradition of centralization has been reduced by the more democratic regimes ruling France in the 19th century, mainly by the Third Republic, between 1871 after the Franco-Prussian war and 1940 the invasion of France by Germany, through the principles of devolution and decentralization, which are the basis of the French local administrative organization.

[6] Judgment of 12 May 2005, File No. 2 Afs 98/2004, No. 672/2005 Court Reports.
[7] Judgment of 16 June 2011, No. 7 Ao 2/2011-127, No 2497/2012 Court Reports.

These principles are now implemented and discussed with reference to the principle of subsidiarity coming from European law. Particularly through this concept of subsidiarity, European law strengthens the legal basis of the local public authorities and the decentralized administrative system and brings out about a new less centralized governance. European law is also behind the creation of a lot of administrative "agencies". And we can say that this trend improved democracy into the administrative system and modernized the French administration. But this evolution brought also new problems because this new administration is more complex and more fragmented.

Germany

This principle of subsidiarity (as stipulated in Art. 5 TEU) primarily addresses the legislative powers. It is of some importance in court practice especially when procedural autonomy of member states is at stake or when the interpretation of material law suggests or requires the recourse to demarcation of competences as an argument for determining the range of applicability of the material provisions.

Greece

Cf principle of transparency.

Italy

Lithuania

According to 3 Article of the Republic of Lithuania Law on Public Administration subsidiarity as law principle means that the decisions of entities of public administration must be adopted and implemented at the most efficient level of public administration system (also see 24 August 2012 decision of the Supreme Administrative Court).

Slovenia

The principle of subsidiarity and the principle of proportionality:

As the principle of subsidiarity is fundamental to the functioning of the EU, and more specifically to European decision-making, in particular, the principle determines when the EU is competent to legislate, and contributes to decisions being taken as closely as possible to the citizen. The principle of subsidiarity appears alongside two other principles that are also considered to be essential to European decision-making: the principle of coferral and of proportionality. The principle of subsidiarity aims at determining the level of intervention that is most relevant in the areas of competention shared between the EU and the Member States. This may concern the action at European, national or local levels. In all cases, the EU may only intervene if it is able to act more effectively than Member States. The Protocol on the application of the principles of subsidiarity and proportionality lays down three criteria aimed at establishing the desirability of intervention at European level: (1) does the action have transnational aspects that cannot be resolved by the Member State; (2) would national action or an absence of action be contrary to the requirement of the Treaty; (3) does action at Europe level have clear advantages.

The principle of subsidiarity also aims at bringing the EU and its citizens closer by guaranteeing that action is taken at local level where it proves to be necessary. However, the principle of subsidiarity does not mean that action must always be taken at the level that is closest to the citizen.

Complementarity with the principles of conferral and of proportionality is based on the Article 5 of the Treaty on european Union, which defines the division of competences between the Union and the Member States. It first refers to the principle of conferral according to which the Union has only those competences that are conferred upon it by the Treaties.

Subsidiarity and proportionality are corollary principles of the principleof conferral. They determine to what extent the EU can exercise the competences conferred upon it by the Treaties. By virtue of the principle of proportionality, the means implemented by the EU in order to meet the objectives set by the Treaties cannot go beyond what is necessary.

Sweden

The European Charter on Fundamental rights refers to the **principle of subsidiarity** in article 51regarding the scope of the rules and the **principle of proportionality** in the article 52 regarding the range and interpretations of the rights. As mentioned above the Charter is legally binding in the Member States since the year 2007.

I have only found a few cases where the court refers to **the principle of subsidiarity**.

10. The principle of transparency:

Austria

(given by Asylum Court)The principle of transparency has been developed by the CJEU especially in the area of public procurement. The principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified (Case C-19/00, *SIAC Construction*, paragraph 41). This means for example that the award criteria must be formulated in the contract documents or the contract notice in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way. This obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure (Case C-19/00, *SIAC Construction*, paragraph 42).

In Austria the relevant publications concerning public procurement are done in the official journal of the "Wiener Zeitung" and in the official journal of the EU (concerning the so called "Oberschwellenbereich"). The very first decision amenable to judicial review is a decision where a contracting authority decides not to initiate an award procedure on the ground that the contract in question does not, in its opinion, fall within the scope of the relevant Community rules (Case C-26/03, *Stadt Halle*, paragraph 33). Other decisions amenable to judicial review are the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract (Case C-81/98, *Alcatel Austria*, paragraph 43), the withdrawal of the invitation to tender (Case C-92/00, *Hospital Ingenieure II*, paragraph 54, and Case C-15/04, *Koppensteiner*, paragraph 29), and the decision by which

the contracting authority eliminates the bid of a tenderer even before making that selection (Case C-249/01, *Hackermüller*, paragraph 24). An expression of the will of the contracting authority in connection with a contract, which comes in whatever way to the knowledge of the persons interested, is amenable to review where that expression has passed the stage referred to in the previous paragraph and is capable of producing legal effects (Case C-26/03, *Stadt Halle*, paragraph 39).

Czech Republic

The principle of transparency is generally recognized as one of the fundamental principles of administrative law, despite the fact it is usually not explicitly stated in laws (with couple of exceptions). The main issue where the principle of transparency comes into account within Czech administrative law is undoubtedly the law of public contracts. Transparent public procurement is one of the most effective ways to prevent corruption. The contracting authority is under the provision of Section 6(1) of the Law No. 137/2006 Coll., on Public Procurement, obliged to follow principles of transparency, equality and non-discrimination. Similar provision can be found in Section 3a of Law No. 139/2006 Coll., on Concession Contracts and Procedure.

France

The principle of transparency:

In French law it is the right to disclosure of administrative documents - This principle was implemented in French administrative law by an act of the Parliament made in July 17, 1978. Before the entry into force of this law, all the Public Administrations had the right to oppose the principle of administrative secret.

Germany

The principle of transparency: There seems to be no specific effect going beyond the usual national court practice, apart from the aspect of public participation in administrative decisions (see below 11.).

Greece

Also, it is worth mentioning that the Constitution (after the Amendment of 2001) explicitly assigns to the state the obligation to respect the principle of proportionality[u3] (article 25§1). The Constitution also obliges the State to take into account the precautionary principle[u4] when assessing issues concerning the environment (article 24§1). As a result, on the one hand the administration has started to mention these principles in its administrative acts (though not in all of them), and on the other hand citizens have started (much more than in the past) to invoke those principles before the administrative courts.

Perhaps the greatest advance in the principle of transparency[u5] was Law 3861/2010, which stipulates that all administrative acts must be published on the internet (with a unique number) with free access to all citizens. Also the Law established the on-line public

consultation before the reading of Laws before Parliament and in that respect it enhanced the public participation[u6] in the legislature procedure[8]. This principle has also been enhanced with Law 3852/2010, which provided greater participation of the citizen at the level of municipalities and prefectures. This Law creates the 'Consultation Commission'[9], with which the council of the municipality or the prefecture must consult in every issue. Also with this Law the administration of various local issues (which were dealt by the Central Government) were decentralized to municipalities and prefectures, in accordance with the principle of subsidiarity[u7]. However, the mayors and the presidents of the prefectures (which are directly elected as well as the members of the councils) complain that the above-mentioned decentralization was not 'supported' with the transfer of money from the budget of central government to the budgets of local governments[10] and so it remains to be seen whether they will be able to comply with all their new duties.

Italy

Lithuania

The principle of transparency

According to Part 1 of Article 3 of the Republic of Lithuania Law on Civil Service the civil service in the Republic of Lithuania shall be based on the principles of the rule of law, equality, loyalty, political neutrality, *transparency*, responsibility for the decisions taken and career development.

It is universally recognised that transparency, as the principle of the activity of the institutions of public power and officials, implies the imparting of information and communication, openness and publicity (inasmuch as it does not harm other values protected by law), accountability to the corresponding community and responsibility for decisions adopted by the officials who adopt the said decisions, as well as the fact that the adopted decisions must be grounded and clear and that one could, if need may be, rationally reason these decisions; other persons must have the possibility to dispute these decisions under the established procedure. Transparency is to be linked to participation democracy, freedom of information and the possibility for the citizens and other persons to criticise the activity of the institutions of power. The transparency of the state service is a necessary precondition against consolidation of corruption and protectionism, against discrimination of some persons and granting privileges to others, against abuse of power, thus, also a necessary precondition for the people to trust the institutions of public power and the state in general (22 January 2008 ruling of the Constitutional Court).

Slovenia

To put the principle of transparency into life the National Assemby passed the Access to Public Information Act in the year 2004. Under Article 38 of the Constitution (Protection of

[8] Though the participation of people is limited. So far (16/10/2012) there have only been 76.601 comments on laws to be enacted, though the website does not provide any feedback as to which comments have led to alteration of provisions of laws.
[9] In municipalities and prefectures with population more than 10.000 people.
[10] Under current law local governments have little power to tax their residents

Personal Data) the protection of personal data shall be guranteed. The use of personal data contrary to the purpose for which it was collected, is prohibited.

On the other hand under Article 39 (Freedom of Expression) the freedom of expression of thought, freedom of speech and public appearance, of the press and other forms of public communikation and expression shall be guaranteed. Everyone may freely collect, receive and disseminate information and opinions. Except in such cases as are provided by law, everyone has the right to obtain information of a public nature (in which he has a well founded legal interese under law). After Access to Public Information Act entered into force the judicial interpretation of the both these two legal sources noticed, that the condition of the » well founded legal interest to obtain information of the public nature has been fulfilled automathically as by the Access to Public Information Act had been passed.

Sweden

11. The principle of public participation:

Austria

(given by Asylum Court) The principle of public participation holds that those who are affected by a decision have a right to be involved in the decision-making process. Public participation implies that the pub-lic's contribution will influence the decision.

The strongest impact of this approach can be found in the context of environmental governance. It is recognized that environmental problems cannot be solved by government alone. Participation in environmental decision-making effectively links the public to environmental governance.

According to the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (usually known as "Aarhus Convention") which entered into force on 30 October 2001, the public must be informed about all the relevant projects and it has to have the chance to participate during the decision-making and legislative process. The Aarhus Convention has also been ratified by the European Union.

As a consequence the Environmental Impact Assessment (EIA) Directive (85/337/EEC) - in force since 1985 - was amended in 2003 in such a way that the public – defined as "one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organizations or groups" – concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

In Austria, this was transposed mainly by Art. 9 EIA Act 2000 on public inspection into the application, the relevant documents and the environmental impact statement (which have to be provided by the project applicant) as well as its Art. 19 according to which – apart from registered environmental organizations – also citizens' groups (ad hoc groups of 200 persons

or more having signed a comment) have locus standi in the development consent procedure for the project including the right to complain to the Administrative Court and the Constitutional Court.

The IPPC Directive (Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control, which has been integrated in the Industrial Emissions Directive in 2010) containing similar provisions with regard to smaller projects has been transposed by provisions in various acts regulating industrial plans (e.g. the Industrial Code [Gewerbeordnung]).

Czech Republic

Principle of public participation belongs among fundamental principles of administrative proceedings and decision-making. Special procedural rights are guaranteed for NGOs (e. g. in procedures concerning environmental law or protection of cultural heritage; during these procedures NGOs may bring a legal action or raise objections even if their own rights are not affected). Public is typically allowed to participate *inter alia* in town and regional planning. For purposes of such proceedings the public may be represented by a representative elected for this task [see Section 23 of Law No. 183/2006 Coll., on Spatial Planning and Building Code (Building Act)]. Public may during the process of town and regional planning also raise objections and remarks (see Sections 39, 41, 52 and 53 of Building Act).

France

The principle of public participation throught the mechanisms of consultations (advices) and public inquiries –The public inquiry procedure, which is the model of public participation in French law, is required before any administrative authorization about management of new big constructions. It was established in 1810 to ensure respect for the right of property before an expropriation.

The scope of this principle is becoming larger but remains limited. And it is difficult to say that the European law or the Aahrus Convention had an impact on this principle in French administrative law.

Germany

The principle of public participation:

This principle has doubtless been fostered by EU law, particularly in the field of environmental law (e.g. Directives on Environmental Impact Assessment), and entailed national legislation as well as jurisdiction safeguarding the application of this principle.

Greece

Cf principle of transparency.

Italy

Lithuania

The principle of public participation

Constitutional principle that law can not be non public draws even some imperative norms providing that society participates in public administration. For example, according to Article 30 of the Republic of Lithuania Law on Territorial Planning the procedures ensuring publicity of territorial planning (publication of the decision on the beginning of the preparation of planning documents and planning targets, consulting, public hearing, provision of information, etc.) shall be carried out by the organiser of planning; the general and simplified procedure of the participation of the public in the territorial planning process shall be regulated by the Regulations of Consulting, Public Hearing, approved by the Government. The general and simplified procedure of hearing of the public participation in the process of territorial planning shall be set taking into account the levels and types of the territorial planning documents.

Slovenia

The principle of public participation:

I can no more than to agree with Tom Atlee, that public participation in democratic society is both vital and problematic. Some public meetings are nothing but dysfunctional. Sometimes extensive public inpout is sought in numerous forums, only to have all that input ignored. Generally public participation is based on the belief that those who are affected by a decission have a right to be involved in the decision-making process. Public participation includes the promise that the contribution of the public wil influence the decision: it engage community members in learning about and understanding community issues, and the economic, social, environmental, political, psyhological, and other impacts associated with alternative courses of action; it incorporate the diverse interests and cultures of the community in the community development process, especially in local-community level. However, on the level of the state public participation is »reserved« for the political parties, unwilling to share their powers with other bodies of the civil society, including trade unions.

Sweden

12. The principle of egality and non-discrimination:

Austria

(given by Independent Administrative Tribunal) Those principles are already guaranteed in the Federal Constitutional Law, especially and explicitly the principle of egality and non discrimination. It mainly plays a role in cases of law relating to aliens, here European law brought the better protection of nationals with the prohibition of averse discrimination.

Administrative discretion has to be based on law.

Czech Republic

The principle of egality and non-discrimination is one of the most fundamental principles of Constitutional law (see for instance Art. 1 of Resolution of the Presidium of the Czech National Council of 16 December 1992 on the declaration of the Charter of Fundamental

Rights and Basic Freedoms as a part of the constitutional order of the Czech Republic). In the frame of administrative law, this principle is enshrined *inter alia* in Section 7 of the Code of Administrative Procedure, which guarantees equal procedural rights of persons exercising their rights. Paragraph 2 of this provision states that where the equality of persons concerned may be prejudiced an administrative body shall take necessary measures to ensure equality.

France

The principle of egality and non-discrimination:

The principle of equality in law is stated in the French Declaration of 1789, which is a text with a constitutional value. It was then extended by the Council of State to the administrative action and public services. It means that it is forbidden to make any differences between people who are in the same situation. The old concept of equality proclaimed by the Declaration of 1789 is very ambitious, but may be too conceptual to be really efficient. The more recent concept of "non discrimination" coming from the European law is not so large, but more pragmatic and perhaps more efficient in practice. This new approach about the old principle of equality through the concept of non discrimination produces great impacts in practice.

Germany

The principle of egality and non-discrimination:

Although these principals were existing in national law before EU law and CJEU decisions stressed and shaped their validity (e.g. access to civil and military service, to education).

Greece

Italy

Lithuania

The principle of equality and non-discrimination

Paragraph 1 of Article 29 of the Constitution consolidates formal equality of all persons, and Paragraph 2 of this article – the principle of non-discrimination and not granting of privileges. In its rulings of 28 February 1996 and 17 November 2003, the Constitutional Court held that the constitutional principle of equality of persons should be applied not only to natural, but also to legal persons.

Slovenia

The principle of egality and non-discrimination:

This principle is beside beeing a fundamental element of international human rights law also fundamental princple of Slovene constitutional and administrative law. It requires that all persons be treated equally before the law, without discrimination. It guaranties, that those in equal circumstances are dealt with equality in law and practice. Human rights instruments

prohibit discrimination on several grounds, but in certain circumstances require a state to take affirmative action to diminish or eliminate conditions that cause or help to perpetuate discrimination.

Sweden

In the Swedish law on Public procurement references are made to **the principles of equality, non-discrimination, mutual recognition and proportionality** because these principles are written in the EU directive on Public procurement but in domestic law that is not based on EU law such references are not made**.**

13. The principle of proportionality:

Austria

Czech Republic

The principle of proportionality was introduced in Czech legal system by judgment of the Constitutional Court of 12th October 1994, File No. Pl. ÚS 4/94, No. 214/1994 Coll., as a principle binding for all authorities (including the administrative bodies). In this judgment the Constitutional Court assembled so called "proportionality test" which represents the ultimate algorithm of solving conflicts between opposing rights. The principle of proportionality is in various contexts enshrined also in a number of laws throughout the whole Czech legal system (see for instance Section 10 of Law No. 139/2002 Coll., on Land Adjustments and Land Authorities).

France

The principle of proportionality:

This principle requires that administrative action takes place in proportion to the objectives of this action. It is binding on the administrative action and it is also a guideline and the background to the intensity of the control exercised by the administrative judge over administrative decisions, for example for the activities of the police and administrative sanctions. In this scope, proportionality is mostly examined through the necessity test *i.e.* to ensure that the measure is the most adequate and the less restrictive for citizens' rights. The balance of advantages and disadvantages is not traditionally included in this control. Furthermore, the judicial examination of the principle of proportionality may vary in intensity.

The latest developments of the principle of proportionality, taken in a broad sense, have been affecting the role of the administrative jurisdiction. Several judicial powers recently recognized by the Council of State – including the power to postpone the effects of a judgment (2004), the power to quash a public procurement contract (2007) or the power to order resumption of a contract (2011) – may be used after having weighed public and private interests.

Germany

The principle of proportionality has been developed and elaborated especially by the Federal Constitutional Court and was likewise introduced into EU law by the jurisdiction of the CJEU thus marking a common standard to be observed by legislators and administrative authorities notably when affecting subjective rights.

Greece

Italy

Instead, in the past we knew neither the principle of proportionality nor the precautionary principle, even though they (especially the first one) can be considered as implicit in other principles. Indeed the Italian judge has always used a reasonableness test in reviewing discretionary power exercised by the public administration.

Although under Article 5 of the Treaty on European Union the principle of proportionality is described as a rule for the institutions whose action must be limited to what is necessary to achieve the objectives of the Treaties, the Italian judge uses this principle in different ways to scrutiny the discretionary powers of a public body, when the latter has to consider and balance several interests involved that are relevant for their decision. In other words he/she checks whether an administrative measure is appropriate (suitable) and necessary in order to reach or achieve a given goal or objective, as well as proportionate (item n° 14).

Lithuania

The principle of proportionality

According to 3 Article of the Republic of Lithuania Law on Public Administration proportionality as the law principle means that the scope and the implementation measures of an administrative decision must conform to the necessary and reasonable goals of administration (also see 24 August 2012 decision of the Supreme Administrative Court).

When setting legal restrictions and liability for violations of law, legislature must pay heed to the requirement of reasonableness and the principle of proportionality, according to which the established legal measures are to be necessary in a democratic society and suitable for achieving legitimate and universally important objectives (there must be a balance between the objectives and measures), they may not restrict the rights of the person more than it is necessary in order to achieve the said objectives, and if these legal measures are related to the sanctions for the violation of law, in such case the aforementioned sanctions must be proportionate to the committed violation of law.

Slovenia

Sweden

The **principle of proportionality** is often referred to by the parties in a case. I have found more than 1000 cases in the administrative courts where the court has applied this **unwritten** principle as derived from the ECHR.

Le principe de proportionnalité est souvent désigné par les parties dans une affaire. J'ai trouvé plus de 1000 cas dans les tribunaux administratifs si le tribunal a appliqué ce principe non écrit tel qu'il découle de la CEDH.

14. The precautionary principle:

Austria

(given by Independent Administrative Tribunal) The precautionary principle is not often invoked before the Independent Administrative Tribunals since they do not deal with cases concerning permits like in environmental cases or permits for buildings or the distribution of pharmaceutical products

Czech Republic

The precautionary principle is a general principle within Czech legal system. It is stipulated for instance in Section 415 of Law No. 40/1964 Coll., the Civil Code, and it is generally recognized as one of the leading principles of private law. However, administrative law applies this principle as well. It is embodied for instance in Act on Integrated Prevention, which serves to provide integrated implementation of the public administration in permitting the operation of installations in order to achieve a high level of environmental protection as whole. Sort of "individual" precautionary principle represents punishing of misdemeanors (see Law No. 200/1990, Coll., on Misdemeanors) and disciplinary proceedings (see Law No. 7/2002 Coll., on Disciplinary Proceedings Concerning Judges, State Prosecutors and Enforcement Agents).

France

This principle has important effects mainly on public health law and on environmental law. The Environmental Law refers to the principles elaborated at the International and European level. They have been progressively integrated in the French legal system: by a law at first[11], and then in 2005 by the Constitution[12].

An "Environmental Charter" was introduced into the French Constitution by the Constitutional Law n° 2005-205 of March 1, 2005.

This Constitutional Environmental Charter consists of 10 items. It recognizes the fundamental rights and duties relating to environmental protection. It states in particular three main principles: the precautionary principle, the prevention principle and the polluter payer principle. This Charter does not state a right of access to justice, but Article 7 provides that "Everyone has the right, under the conditions and limits defined by law, to access to information about the environment held by public authorities and to participate in the development of public decisions affecting the environment. "

[11] The Book 1 of the Environmental Code: written by a law implemented on the 2 February 1995.

[12] A "charter of the environment" added in the Constitution.

Citizens can invoke these constitutional standards in administrative, and also before courts against law, since the entry into force in March 2010 of the "Priority application for a preliminary ruling on the issue of constitutionality", introduced under the Constitutional Reform of July 23rd 2008.

Germany

The precautionary principle is of substantial importance in environmental law where EU provisions require its application. It has been promoted by EU law insofar as national law did not contain respective provisions and did not – like in Germany – grant standing to sue based on this principle. With regard to the late jurisdiction of the CJEU (e.g. the TRIANEL judgement) it now can be invoked by environmental associations even if national law is not yet adjusted, following the principle of primacy (Judgement .

Greece

Italy

The precautionary principle has been applied for by administrative judges, too, especially in the matter of environment law (it is clearly mentioned under Art. 3 ter of the Environment Code) and for urgent measures in cases of public danger, disaster and so on (item n° 15).

Lithuania

The precautionary principle

Paragraph 2 of article 191 of the Lisbon Treaty states that "Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay".

According to 23 Article of the Republic of Lithuania Law on Environmental protection persons must comply with the waste management requirements set forth by laws of the Republic of Lithuania and other legal acts; waste management expenses shall be paid by the polluter.

Slovenia

The precautionary principle:

The precautionary principle aims at ensuring a higher level of environmental protection through preventative decision-taking in the case of risk. However, in practice, the scope of this principle is far wider and also covers consumer policy. It enables rapid response in face of a possible danger to human, animal or plant health, or to protect the environment. In particular, where scientific data do not permit a complete evaluation of the risk, recourse to this principle may, for example, be used to stop distribution or order withdrawal from the market of products likely to be hazardous. The definition of the principle shall also have a positive impact at international level, so as to ensure an appropriate level of enrionmental and

health protection. It has been recognised by various international agreements, notably in the Sanitary and Phitosanitary Agreement concluded in the framework of the World Trade Organisation (WTO). The precautionary principle may be invoked when a phenomen, product or process may have a dangerous effect, identified by a scientific and objective evaluation does not allow the risk to be determined with sufficiant certanity. When the burden of proof is the matter in most cases Slovene/European consumers and the associations which represent them must demonstrate the danger associated with a procedure or a product placed on the market, except for medicines, pesticides and food additives. However, in the case of an action being taken under precautionary principle, the producer, manufacturer or importer may be requiredto prove the absence od danger. This possibility shall be examined on a case-by-case basis. The precautionary principle may only be invoked in the event of a potential risk and it can never justify arbitrary decisions.

Sweden

The precautionary principle is written down in the Environmental Code and referred to in other laws on environmental issues.

15. Protection of legitimate expectations and the principles of legal certainty and good faith:

Austria

(given by Independent Administrative Tribunal) This principle mainly concerns the Constitutional Court, especially in fiscal law, retirement pay, aid and public measures. All these are not in competence of Independent Administrative Tribunals

Czech Republic

Both legitimate expectation and principle of legal certainty and good faith are protected by whole Czech legal system and therefore not only by provisions of administrative law. The Section 2(3) of the Code of Administrative Procedure stipulates that administrative bodies shall examine rights acquired in good faith as well as lawful interest of persons who are affected by the activities of administrative body in any particular case. An administrative body may interfere with these rights only under conditions determined by legislation and only within the necessary scope. Paragraph 4 states *inter alia* that an administrative body shall ensure that no unreasonable differences occur in deciding cases which are identical or similar in respect to the facts.

All principles in question were also confirmed by case-law of Constitutional Court of the Czech Republic [e.g. judgment of the Constitutional Court of 9th October 2003, File No. IV. ÚS 150/01 (legal certainty and good faith) – or judgment of the Constitutional Court of 27th March 2003, File No. IV.ÚS 690/01 (legitimate expectations)].

France

Protection of legitimate expectations and the principles of legal certainty and good faith:

These concepts recognized by the European Courts of Strasbourg and Luxembourg were absent in the French Constitution, and the Constitutional Council refused to recognize this principle in 1984. There is only the notion of "guaranteed of rights" enshrined in Article 16 of the Declaration of 1789.

The Council of State recognized at first a long time ago some elements of this principle. It had formulated in 1922 the principle of “the inviolability of individual effects on creative acts of law, and in 1948 the principle of non retroactivity of administrative acts, which prohibits validations.

The Council of State introduced in 2004 the possibility of time effects modulation when an administrative act is cancelled. And in 2006 he established the more globalized principle of "legal security" itself. This newly recognized principle forbids the administration to pass an act without standby period, in order for citizens to adapt their choices to the new provisions. You can find also "the principle of legitimate expectation” which is the cousin of the “legal security” in the decision taken about that case : extracts: "*the principle of legitimate expectation, which belongs to the general principles of EU law, only applies in the national legal order, when the legal situation is managed by the EU*".

This broad principle of “legal security” is a new weapon in the hands of administrative courts, in a context of disorder and increasing of the complexity of law, in order to improve the quality of drafting of legal rules and to reduce the proliferation of norms. The new legal rules should be clear, more simple, coherent within the existing rules, and stable. More clear norms is an essential element for the “legal security”.

The Constitutional Council also now refers partly to this principle in the following terms: "*The principle of clarity of the law and the constitutional objective of intelligibility and accessibility of the law require to adopt provisions sufficiently precise and unambiguous, to protect individuals against an interpretation of law to be unconstitutional or against the risk of arbitrary, without reporting on administrative or judicial authorities the task of fixing the rules which the Constitution attributes competence only to the Parliament*"36. The Constitutional Council also cancel laws without any normative effect, unless for law programs.

The Constitutional Council had previously limited the possibility of retroactivity for non-criminal laws. The principle of non retroactivity of criminal laws is constitutional under Article 8 of the Declaration of 1789. The Constitutional Council strengthened its control over the laws of validation under the influence of jurisprudence of the ECHR and to protect the signed contracts. There is only one exception, when a general interest may authorize the legislator to challenge the contracts in progress.

There are still some doubts about the legal validity of some of these principles, for example about the principle of “legitimate expectations” or the principle of “good administration: efficiency and effectiveness”. And the principle of “effective legal protection” is not really implemented as a principle in French law.

Recently, the Council of State has admitted the principle of loyalty as a way for parties to an administrative contract to avoid unfair argumentations, close to estoppel (2009). In tax litigation, a narrow principle has been applied.

Germany

Legal certainty and protection of good faith both being part already of the national constitutional legal order stand in contrast to each other and have to be balanced. EU law requires more strictly than national German law to observe objective legality particularly in the field of granting subsidies and their revocation in case of unlawfulness. German jurisdiction was adjusted respectively.

Greece

Italy

Lithuania

Protection of legitimate expectations and the principles of legal certainty and good faith

In its rulings the Constitutional Court has held more than once that the principle of a state under the rule of law which is entrenched in the Constitution, in addition to other requirements also implies that human rights and freedoms must be ensured, that all the institutions implementing state power and other state and municipal institutions, and all the officials must act on the basis of law and must obey the Constitution and law, that the Constitution bears the supreme legal power, and that all the legal acts must be in compliance with the Constitution. Inseparable elements of the principle of a state under the rule of law are the protection of legitimate expectations, legal certainty and legal security. The principle of legal security is one of the basic elements of the entrenched in the Constitution principle of a state under the rule of law, which means the obligation of a state to ensure the certainty and stability of the legal regulation, to protect the rights of the subjects of legal relations, as well as the acquired rights, to respect the legitimate interests and legitimate expectations. If the protection of legitimate expectations, legal certainty and legal security were not ensured, the trust of the person in the state and law would not be guaranteed. The state must fulfil all its obligations to the person.

In its rulings of 4 July 2003 and 3 December 2003, the Constitutional Court held that one of the elements of the principle of legitimate expectations is the protection of rights which were acquired under the Constitution as well as laws and other legal acts which are not in conflict with the Constitution. It needs to be noted that, according to the Constitution, only those expectations of the person in relationships with the state are protected and defended, which arise from the Constitution itself or from the laws and other legal acts that are not in conflict with the Constitution. Only these expectations of the person in relationships with the
state are considered legitimate.

The constitutional protection of legitimate interests of the person is to be construed inseparably from the entrenched in the Constitution principle of justice, the entrenched in the Constitution protection of the acquired rights, the necessity to ensure the trust of a person, who obeys law and follows the requirements of the laws, in the state and law. The trust of

the person in the state and law as well as the protection of legitimate interests, as constitutional values, are inseparable from the constitutionality of legal acts and presumption of legitimacy. Legal acts (parts thereof) are considered to be in compliance with the Constitution and legitimate until the moment, when, upon the procedure established by the Constitution and the Law on the Constitutional Court, they are recognised as being in conflict with the Constitution (substatutory legal acts-as being in conflict with the Constitution and/or the laws). Thus, until the moment when legal acts (parts thereof), upon the procedure established by the Law on the Constitutional Court, are recognised as being in conflict with the Constitution (substatutory legal acts-as being in conflict with the Constitution and/or the laws) or until the moment when, upon the established procedure, they are recognised as no longer effective, the legal regulation established therein is compulsory for respective subjects of legal relations. The person who obeys law, who follows the requirements of the laws, is protected and defended by the Constitution. A failure to pay heed to this provision would mean a deviation from the principle of justice which is enshrined in the Constitution as well.

It is to be stressed that there may be factual situations, where the person who meets the conditions established in legal acts, under the said legal acts acquired particular rights and therefore gained expectations, which could be considered by this person to be reasonably legitimate during the period of validity of the said legal acts, therefore, he could reasonably expect that if he obeys law, and fulfils the requirements of the laws, his expectations will be held legitimate by the state and will be defended and protected. Even the legal acts which, on the basis and upon the procedure established in the Constitution and the laws, are later recognised as being in conflict with the Constitution (substatutory legal acts-as being in conflict with the Constitution and/or the laws), may give rise to such expectations. It is worth noticing in this context that there may also be factual situations, where the person has already fulfilled his rights and obligations arising from the legal act which was later recognised as being in conflict with the Constitution (substatutory legal acts-as being in conflict with the Constitution and/or the laws) in regard to other persons and after that, due to this, the aforementioned other persons gained particular expectations, the defence and protection of which by the state they could reasonably expect, as well. It should be especially stressed that in certain cases quite a long period of time may pass from the moment of appearance of such expectations and recognition of respective legal acts as being in conflict with the Constitution (substatutory legal acts-as being in conflict with the Constitution and/or the laws). The imperative of the balance between the constitutional values, the constitutional requirements of legal certainty and legal security, the enshrined in the Constitution protection of the acquired rights, and the presumption of constitutionality and legitimacy of legal acts pre-determines inter alia the fact that the Constitution generally does not prevent from protecting and defending in certain special cases also such acquired rights of the person arising from the legal acts recognised later as being in conflict with the Constitution (substatutory legal acts-as being in conflict with the Constitution and/or the laws), which, if not defended or protected, would result in greater harm to the person, other persons, society or the state, than the harm inflicted in case of total non-defence or non-protection or partial defence or protection of the said rights. When deciding whether the acquired rights gained by the person during the period of validity of the legal act which was recognised later as being in conflict with the Constitution (substatutory legal acts-as being in conflict with the Constitution and/or the laws) are to be protected and defended or not (and if so, to what extent), in each case it is necessary to find out whether in case of failure to protect and defend such acquired rights, other values

protected by the Constitution would not be violated, and whether the balance between the values entrenched in and protected and defended by the Constitution would not be disturbed. Upon recognising the legal acts as being in conflict with the Constitution (substatutory legal acts-as being in conflict with the Constitution and/or the laws) and, due to this, certain persons who have obeyed law, followed the laws and respected the state and its law before the said recognition can suffer negatyve consequences, while the legislator bears the constitutional duty to evaluate all the circumstances related with this and, if necessary, establish such legal regulation, which would provide an opportunity in the aforementioned extraordinary cases to fully or partially protect and defend the acquired rights of the persons who obeyed law and followed the requirements of the laws, arising from the legal acts which were later recognised as being in conflict with the Constitution (substatutory legal acts-as being in conflict with the Constitution and/or the laws), so that the enshrined in the Constitution principle of justice would not be deviated from, too.

By the same it is worth stressing that the Constitution does not protect and defend the acquired rights of persons which are privileges in their essence; the protection and defence of privileges would mean that the constitutional principle of equal rights of persons and the constitutional principle of justice, the imperative of a harmonious civil society enshrined in the Constitution, and, therefore, the constitutional principle of a state under the rule of law, are violated.

Slovenia

Protection of legitimate expectations and the principles of legal certanity and good faith:

In English law, the concept of legitimate expectations arises from administrative law. In proceedings for judicial review, it applies the principles of fairness and reasonableness to the situation where a person has an expectation in a public body retaining a long-standing practice or keeping a promise. The traditional constraint on a public body has been test of irrationality which stated that a decision would be unreasonable if //…//. Hence, when face with claims of a legitimate expectation, the courts have begun to require public officials to adopt the same approach as in making decisions affecting fundamental human rights.

Sweden

Ukraine

16. The principle of responsibility:

Austria

(given by Independent Finance Board) First I may refer to the Austrian report within the scope of the meeting "Primacy of EU law for Administrative Judges" in Beaulieu-sur-Mer 2006.

As already mentioned in this report there is a general consensus accepting the precedence of community law even against constitutional law.

As far as it concerns taxation law, Austria can be regarded as a role model at the conversion of Community Law.

For example: though there is no specific mandate to harmonize the direct taxation, the Austrian legislator has implemented community law standards to a large extent (deduction of losses of non-domestic permanent establishments, equal treatment of foreign and domestic capital gains as well as portfolio capital gains etc.).

Due to the case-law of the ECJ, which is the driving force for the harmonization, new questions have been raised, especially in the literature and academia.

The IFB took up this challenge not only in several requests for preliminary ruling to the ECJ but also by direct application of Community Law as well.

For instance the IFB decided that the principles of free movement and freedom of capital have to be extended to the participation in foreign companies.

In the field of VAT harmonization is achieved by the Sixth VAT Directive.

The interpretation of national VAT law has to comply with the directive.

In case that the national legislator hasn't converted Community Law accordingly the directive has direct effect.

In spite of the Sixth VAT Directive the jurisprudence of the ECJ is very important for the further development of harmonization in the field of VAT.

The IFB filed several requests for preliminary rulings to the ECJ for instance regarding the treatment of companies which go public to issue new shares. This question was discussed in several European Countries and resulted in a statement of the European Commission, which was adopted by the Advocate General.

In several other cases the IFB decided by immediate implementation of Community Law. For instance: in an intensively discussed decision the IFB regarded the taxation of self-supply in connection with the international leasing of cars as not in compliance with Community Law.

Czech Republic

The principle of responsibility poses one of the fundamental principles of Czech legal system as whole. In this respect, the principle of responsibility binds both persons (liability for wrongs in private law or crimes and misdemeanors in criminal and administrative law) and public authorities. Concerning public authorities (including administrative bodies) this principle is clearly expressed by Law No. 82/1998 Coll., on Liability for Damage Caused by the Execution of Public Authority by a Decision or Incorrect Official Procedure.

France

The principle of responsibility:

The French Council of State created this principle in the nineteenth century, a long time ago before the creation of European law. The administrative courts, but not the judges in the civil courts, are competent to guarantee and implement this principle. This old principle of the French administrative law was a reference for the Court of Justice of EU, when it established this principle of responsibility.

But the development of this jurisprudence of the European Court of Luxemburg through several decisions required the French administrative courts to extend this principle to new situations, for example when a damage is due to a violation of EU law by national authorities.

However, the European acceptation of the principle of responsibility has found little applications in French administrative law. Two examples might though be found concerning the liability of the legislative power (2007) and of the judicial power (2008) due to infringements of EU law. These precedents tend to demonstrate that the greatest effect of the principle of responsibility in French administrative law is to lessen the scope of irresponsibility, particularly in sovereignty matters (for example concerning prisoners' rights).

More generally, when dealing with responsibility matters, the Council of State takes into account the consequences of the right to peaceful enjoyment of property recognized by the 1st protocol to the Echr.

Germany

The principle of responsibility:

The substance of this principle seems not quite clear, it should be explained in the workshop.

Greece

Italy

Lithuania

The principle of responsibility

According to Part 1 of Article 3 of the Republic of Lithuania Law on Civil Service the civil service in the Republic of Lithuania shall be based on the principles of the rule of law, equality, loyalty, political neutrality, transparency, *responsibility for the decisions taken* and career development.

Slovenia

The principle of responsibility:

Slovene Constitution stated so as to elect everybody, thus making everybody directly responsible to the people. Under Article 3 (1) Slovenia is a state of all its citizens and is founded on the permanent and inalienable right of the slovene nation to self-determination. In Slovenia power is vested in the people. Citizens exercise this power directly andthrough elections, consistent with to the principle of separation of legislative, executive and judicial

powers .

Sweden

17. The impact of other principles of European law on administrative law?

Austria

(given by Independent Finance Board) Since the judgement in avoir fiscal the principle of non-discrimination has been extended to the tax law.

According to the case-law of the ECJ a three step discrimination test has to be conducted to examine, if a national provision is in accordance with Community law.

Firstly, rules regarding equality of treatment forbid not only overt discrimination by reason of nationality or, in case of a company, its seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (Case C-1/93 Halliburton).

Secondly, a general objective control even of non-discriminatory limitations in national law has to be conducted. ECJ derives this from the development of the prohibition of discrimination into a prohibition against limitations being imposed, deducing from this the formulation that anything which makes the exercise of a fundamental freedom less attractive or is capable of doing so could constitute an impermissible limitation of fundamental freedoms (Case C-267/91, Bosman, C-268/91, Keck).

Thirdly a justification and proportionality test has to be conducted in case of discriminatory and non-discriminatory limitations of the fundamental freedoms by national law. The admissibility of justification reasons is very restrictive.

Potential tax reductions, economical reasons or low taxation abroad are not regarded as justification (case C-324/00Lankhorst-Hohorst, C-136/00 Danner).

In the case of tax evasion the ECJ has clarified essentially, the provisions aimed at combating tax evasion and the transfer of revenue to tax havens are in principle incompatible with the principle of free movement within the EU; such provisions could, however, be justified only where they are limited to combating commensurately the establishment of artificial and abusive structures.

The coherence of the national law can be reason of justification for different treatment. However the case-law of the EJC requires a direct link between tax advantage and tax disadvantage (Case C-107/94, Asscher, C-168/01, and Bosal).

In Marks&Spencer (C-446/03) the ECJ recognized in an over all consideration a combination of justification reasons though the single reason would not meet the requirements.

Czech Republic

The impact of other principles of European law on administrative law?

Czech administrative law is *inter alia* influenced by the right to good administration established in European Law by Article 41 of the EU Charter of Fundamental Rights and expressed in Czech legal system *inter alia* in Section 8(2) of the Code of Administrative Procedure which states that "*administrative bodies shall cooperate with each other in the interest of good administration*".

France

There are still some doubts about the legal validity of 3 other principles in French Law:
-The principle of "legitimate expectations".
-The principle of "good administration: efficiency and effectiveness".
-The principle of "effective legal protection": this principle is not really implemented as a principle in French law.

Germany

The impact of other principles of European law on administrative law?

The well known principles of effectiveness and equivalence are top guidelines for interpretation when applying EU law or national law in the light of EU law.

Greece

Italy

Lithuania

Slovenia

The impact of other principles of European law on administrative law:

At this point the best answer gave Martinico, G., Pollicino, O., The Interaction between Europe s Legal Systems, 2012: »It seems that the distance between EU law and ECHR law has been reduced with regard to their relation with domestic law. First of all, absolute radical supremacy no longer seems to be a cornerstone of EU law, and CEU is more and more committed to (working on) a self-restriction of the principle of primacy, when it comes to the protection of the fundamental principles of one or more Member States. Second, the progressive self-perception of the ECtHR constitutional role has led to the consequence of increasing the acknowledgement of the (relative) primacy of the ECtHR interpretation of national law.«

Sweden

The Court of Justice of the EU has repeatedly stated that the member states are to apply EU law according to their own procedural law on condition that they follow some important principles: Such procedural rules must not be less favorable than those governing similar domestic actions **(the principle on equivalence)** nor render virtually impossible or excessively difficult the exercise of rights conferred by EC law **(the principle on**

effectiveness). These principles were established by the Court in the cases 33/76 Rewe and 45/76 Comet and have since then been confirmed and developed in many other cases.

The Swedish administrative court's system and the procedural rules are following these principles but nothing is perfect: Some years ago the European Commission turned to Sweden with complaints regarding the handling of cases concerning the Act on Electronic communication – in the view of the Commission the proceedings in Sweden were too slow. Because of these complaints the procedural rules were changed: It is no longer possible to make an appeal to the Supreme Administrative Court in these cases, specific time limits are introduced and the possibility to decide on temporary suspension is reduced as is the right to bring forward new evidence. Also, in the law there are rules on the composition of the court: In many cases there must be two judges and two economical experts. **This is an example of a direct EU influence on domestic procedural rules.**

It is also worth mentioning that you can find some **secondary legislation** that is obliging the member states to follow **precise procedural rules**, for instance: directive 2004/18/EG on public procurement, directive 2004/38/EG on the right of citizens of the Union and their family members to move and reside freely, regulation 1612/68 on the freedom of movement for workers, directive 2006/123/EG on services in the internal market and regulation (EG) 764/2008 on procedures relating to the application of certain technical rules.