



**Seminar organized by the Supreme Administrative Court of Lithuania
and ACA-Europe**

**The Protection of Legitimate Expectations in Administrative Law and EU
Law**

Vilnius, 21–22 April 2016

Answers to Questionnaire: Germany



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Questionnaire for the Seminar

The Protection of Legitimate Expectations in Administrative Law and EU Law

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- Answers of the German Federal Administrative Supreme Court (Leipzig) -

PART I

The Development of the Principle of Legitimate Expectations

Q1. What are the legal parameters (or fundamental legal values) that the principle of legitimate expectations is founded on (the respect for human rights, the rule of law, the principles of legal certainty, good governance, good faith, other)?

In the German case law, the principle of legitimate expectations has been developed versus the administration with reference to cases concerning the withdrawal of an unlawful beneficial administrative act (see I Q4.). In the judgments of the 1950's and 1960's a principle was looked for, which could relativize the principle of legality of the administration as a sub-principle of the rule of law. The first judgments mentioned the principles of good faith and legal certainty as the source for the protection of legitimate expectations. Meanwhile the principle of legitimate expectations is established as an autonomous manifestation of the rule of law.

Q2. What is the principle of legitimate expectations essentially aimed at (promoting the trust in public authorities, ensuring legal stability, other)?

In the German concept that principle aims to protect legitimate dispositions of individuals from changing assessments of the legal situation (administration) and changes in the legal framework (legislature). The principle does not protect from any disappointment; legitimate are only expectations, which have led to relevant dispositions. The principle can be activated in combination with fundamental rights versus the executive branch or the legislature.





Q3. Does the national legislation make explicit reference to the principle of legitimate expectations? If so, does it specify how this principle should be applied?

As elaborated in I Q4., the legislature has incorporated the differentiated case law in section 48 para 2 and 49 of the German Administrative Procedure Act and provides for a certain protection of legitimate expectations by attributing a claim for compensation in section 48 para 3 and section 49 para 6:

Section 48 - Withdrawal of an unlawful administrative act

(1) ...

(2) An unlawful administrative act which provides for a one-time or continuing payment of money or a divisible material benefit, or which is a prerequisite for these, may not be withdrawn so far as the beneficiary has relied upon the continued existence of the administrative act and his reliance deserves protection relative to the public interest in a withdrawal. Reliance is in general deserving of protection when the beneficiary has utilised the contributions made or has made financial arrangements which he can no longer cancel, or can cancel only by suffering a disadvantage which cannot reasonably be asked of him. The beneficiary cannot claim reliance when:

1. he obtained the administrative act by false pretences, threat or bribery;
2. he obtained the administrative act by giving information which was substantially incorrect or incomplete;
3. he was aware of the illegality of the administrative act or was unaware thereof due to gross negligence.

In the cases provided for in sentence 3, the administrative act shall in general be withdrawn with retrospective effect.

(3) If an unlawful administrative act not covered by paragraph 2 is withdrawn, the authority shall upon application compensate the disadvantage to the person affected deriving from his reliance on the existence of the act to the extent that his reliance merits protection having regard to the public interest. Paragraph 2, third sentence shall apply. However, the disadvantage in financial terms shall be compensated to an amount not to exceed the interest which the person affected has in the continuance of the administrative act. The financial disadvantage to be compensated shall be determined by the authority. ...

Section 49 - Revocation of a legal administrative act

(1) ...

(2) A lawful, beneficial administrative act may, even when it has become non-appealable, be revoked in whole or in part with effect for the future only when:

1. revocation is permitted by law or reserved in the administrative act itself;
2. the administrative act is combined with an obligation which the beneficiary has not complied fully or not within the time limit set;
3. the authority would be entitled, as a result of a subsequent change in circumstances, not to issue the administrative act and if failure to revoke it would be contrary to the public interest;
4. the authority would be entitled, as a result of an amendment to a legal provision, not to issue the administrative act where the beneficiary has not availed himself of the benefit or has not





received any benefits derived from the administrative act and when failure to revoke would be contrary to the public interest, or

5. in order to prevent or eliminate serious harm to the common good.

...

(3) A lawful administrative act which provides for a one-time or a continuing payment of money or a divisible material benefit for a particular purpose, or which is a prerequisite for these, may be revoked even after it has become non-appealable, either wholly or in part and with retrospective effect,

1. if, once this payment is rendered, it is not put to use, or is not put to use either without undue delay or for the purpose for which it was intended in the administrative act;
2. if the administrative act had an obligation attached to it which the beneficiary either fails to satisfy or does not satisfy within the stipulated period. ...

(4) ... and (5) ...

(6) In the event of a beneficial administrative act being revoked in cases covered by paragraph 2, nos. 3 to 5, the authority shall upon application make good the disadvantage to the person affected deriving from his reliance on the continued existence of the act to the extent that his reliance merits protection. Section 48, paragraph 3, third to fifth sentences shall apply as appropriate. Disputes concerning compensation shall be settled by the ordinary courts.

Q4. Briefly describe the recognition of the principle of legitimate expectations and its principal stages of evolution in your national legal order. What are the factors that prompted the development of the legal imperative at issue? Is the development of the principle at issue mostly attributed to the judiciary?

The principle of (the protection of) legitimate expectations has been developed by the German administrative courts versus the executive branch. With the advance of the welfare state and the administration's responsibility for public services (the grant of cash benefits e.g. in the post-war burden sharing and refugee law), cases came up in which financial support was unlawfully given. The administration, after having discovered the flaw, revoked the beneficial granting act and this withdrawal was challenged. Assessing the withdrawal of an unlawful beneficial act, the principle of legality seemed no longer convincing as the only criterion for the judicial decision maker. The Bundesverwaltungsgericht held that judges should weigh between the public interest in the legality of the administration and the individual interest of the citizen who has relied on the continuance of the decision. The jurisprudence has developed criteria for the legitimate expectations. These principles were casted into the codification of the Administrative Procedure Act of 1976, with which the legislator has amended the case law criteria by provisions containing a base for a claim for compensation. With regard to the legislature, the ideas behind that principle are much elder and are based in the legal principle that penal provisions should not have retroactive effects.





Q5. Have there been any factors which led to the restriction of the scope of the protection of legitimate expectations, i.e. economic crisis? In case your jurisdiction does not formally recognize the principle of legitimate expectations, what are the objections to the acknowledgment of the principle? Are there any other legal imperatives that substitute (at least in part) the principle of legitimate expectations, especially in those cases where individual rights and legal interests are adversely affected due to the changes in social or economic policy?

(does not apply)

Q6. What is the relation of the principle of legitimate expectations with other legal categories, such as the rules of the protection of acquired rights and *lex retro non agit*? Has the principle of legitimate expectations become an autonomous legal concept or has it proved its efficiency only when it is applied with other closely related legal imperatives such as the principles of equity, proportionality, legal certainty, and others?

Following the German concept, a distinction should be made as to which of the three powers the principle of legitimate expectations is to be directed against in the particular case:

With regard to the *administration*, that principle protects against a disadvantageous reassessment of the legal situation. In this constellation it has meanwhile become an autonomous legal concept as a sub-principle based in the rule of law (see I Q4.).

If the principle of legitimate expectations is to be positioned against the *legislature*, the German Bundesverfassungsgericht (federal constitutional court) activates it as a criterion for assessing resp. justifying *retroactive* effects of new disadvantageous legal provisions (see details under II Q1).

With regard to changes in the *jurisprudence* the principle of legitimate expectations usually cannot be applied. Jurisdiction is not statute law but interpretation, and therefore it has no comparable legal binding effect. The factually binding effect beyond the particular case is based solely on the persuasiveness of its reasons and the authority of the court; the same applies for differing from its earlier judgments. With regard to the protection of legitimate expectations, a change in jurisprudence is not to be objected if it is sufficiently motivated and stays within the framework of a predictable development. If a situation of legitimate expectations was established by settled case-law, this may be taken into account by restrictions of intertemporal application or considerations of equity in the particular case.





PART II

The Application of the Principle of Legitimate Expectations

Q1. Please describe the situations in which the principle at issue binds the legislative bodies and the requirements drawn from that principle, i.e. what imperatives it presupposes to the legislator and other law-making bodies and what difficulties the compliance with these imperatives raises. Can (and to what extent) the principle of legitimate expectations preclude the public authority from acting in its legislative capacity and amending the legal regulation?

In cases concerning intertemporal issues, the German concept differs between the generally prohibited *retroactive* and the generally permitted *retrospective* effect of a new disadvantageous legal provision. This distinction takes into account, whether the regulation changes finished facts belonging to the past or whether it has an effect only on current, unfinished situations and legal relations in the future. But there are exceptions of the general prohibition of *retroactive* as well as the general permission of *retrospective* effects:

The Bundesverfassungsgericht (Federal Constitutional Court) held that even a *retroactive* effect may be justified if the reliance on a specific legal situation was not legitimate. That may be the case if the former legal situation was unclear and confused, if a void provision will be replaced by a legally unobjectionable one or if there are compelling public interest reasons that take precedence over the requirement of legal certainty.

On the other hand, the generally permitted *retrospective* effects of amendments may be unconstitutional in exceptional cases. This may be the case, if there is no appropriate balance between the importance of the legislative concern for the amendment and the legitimate expectations in the continuance of the current legal situation or if the legislator fails to take care for a transition by adequate interim regulations. An infringement of the principle of legitimate expectations is also conceivable, if the legislator grants a time-limited tax concession e.g. for an investment for the period of the next five years. Then the premature termination of that tax concession by an amendment is unconstitutional, because the legislator has bound himself by having given rise to legitimate expectations of the investors that the tax concession lasts for at least the next five years.

Q2. How does the principle of legitimate expectations bind the authorities of public administration in the sphere of individual legal acts? Is it essentially related to the revocation of administrative acts including the situations in which the administrative decisions





are revoked for the purposes of correcting mistakes made by the institutions of public authority?

In the German case law the principle of legitimate expectations appears not only in cases dealing with the revocation of (unlawful) administrative acts. Further issues are - comparable with the obligations of the legislature (see II Q1) - intertemporal transition cases in administrative rulemaking (e.g. granting of a transition period with an amendment in the statute law of a public trade association). The principle is also activated e.g. for the request of equal treatment in regard to changes of the execution of administrative discretionary power and as an obligation to consistency in administrative decisions.

Q3. Briefly describe the core characteristics of the protection of legitimate expectations in the national legal order, i.e.:

3.1. What is the normative legal source of legitimate expectation? What precise acts of the institutions of public authority create legitimate expectations to the person concerned? Are public authorities bound not only by the formal final individual administrative decisions but also by other acts such as the interlocutory administrative decision, guidelines, consultations, and informal communication (e.g. verbal promises, intentions, correspondence etc.)? Does your national legal order recognize the qualified passivity (derived from the principle *qui tacet consentire videtur si loqui debuisset ac potuisset* [He who keeps silent is held to consent if he must and can speak]) and the tolerance of the offence by the authorities as sources of legitimate expectations?

As already answered in I Q1, the first judgments mentioned the principles of good faith and legal certainty as the source for the protection of legitimate expectations. Meanwhile the principle of legitimate expectations is established as an autonomous manifestation of the rule of law and therefore it is laid down at the constitutional level.

Theoretically all acts of public authorities could give rise to legitimate expectations. However, it has to be examined very carefully in the circumstances of the individual case, whether a particular behaviour of an authority could give rise to *legitimate* expectations. Qualified passivity is hard to imagine as a potential source thereof. *Nota bene*: The principle of legitimate expectations does not have the power to overrule the principle of legality. Therefore an authority cannot be forced to act *contra legem* (e.g. to grant an unlawful building-permit after having realised the preliminary misestimate). But informal acts like a (mis)information, if at fault, might cause claims for compensation by liability of public authorities.





3.2. Given the fact that in some cases the judicial application of the principle of legitimate expectations is regarded as ambiguous, does your jurisdiction attach some importance to the interpretation of particular notions accompanying the principle, such as hope, expectation, reasonable expectation, legitimate expectation? How are they interpreted and distinguished in the judicial practice?

As said before (II Q3.1), it has to be examined very carefully in the circumstances of the individual case, whether a particular behaviour of an authority could give rise to *legitimate* expectations. This objective assessment is based on criteria like reasonableness and legitimacy; the decision-maker has to examine, whether the individual's trust based on a particular behaviour of an authority is worth being protected.

3.3. Is the legitimacy of the expectation in question and its legal protection determined by the legitimacy of its source, i.e. can unlawful legal acts create legitimate expectations to the individual who has reasonably relied on these acts? If the answer is affirmative, could you set out the arguments justifying the recognition of the protection of legitimate expectations *contra legem*. Please provide certain examples from the case-law where applicable.

The German Code of Administrative Procedure (VwVfG) provides the assurance in section 38, which aims to issue a certain administrative act at a later date (or not to do so). In order to be valid the assurance has to be given by the competent authority in writing. Its binding effect shall be subject to an unchanged factual and legal situation. Otherwise even an unlawful assurance, which is directed to an unlawful act and therefore should not have been issued, shall bind the authority. But in this case the assurance may be withdrawable according to the conditions of section 48 (see above I Q.3). The possibility of a withdrawal depends on the legitimate expectations of the individual; it may cause compensation (section 48 para 2 and 3 VwVfG).

3.4. Is the good faith of the individual concerned regarded as a core feature in the formation and protection of legitimate expectations? Describe briefly how the good conduct of the individual concerned and the ability to foresee the impugned conduct is related to the application of the principle of legitimate expectations. Are there any other criteria of good behaviour developed by the judicature in application of the principle? Do the do-





mestic courts differentiate two kinds of situations depending on the fact whether the matter concerns the natural person or private undertaking?

In the careful examination and the assessment of the circumstances of the individual case, whether a particular behaviour of an authority could give rise to *legitimate* expectations, good faith of the individual is a necessary but not sufficient requirement. Otherwise there is no trust worthy of being protected. In section 48 of the German Administrative Procedure Act (see above I Q3.) as a specific regulation of legitimate expectations, the legislator explicitly stipulates, that the beneficiary cannot claim reliance when he obtained the administrative act by false pretences, threat or bribery or by giving incorrect or incomplete information or when he was aware of the illegality of the administrative act or was unaware thereof due to gross negligence.

3.5. Are there any other key elements of the protection of legitimate expectations that have gained the importance in application of the principle in your national legal order?

PART III

The Infringements of the Principle of Legitimate Expectations

Q1. Is there a test (methodology) applied by the domestic courts for establishing the infringements of legitimate expectations? Are there any concerns regarding its reliability? Could you please list the main factors which are taken into account as regards the determination whether the legitimate expectations are infringed and require the application of judicial measures of particular nature.

To establish an infringement of the principle, its preconditions have to be examined. The requirements of the principle of legitimate expectations depend on the particular case configuration: Is the principle activated against the *legislature*, the criteria shown in II Q1. apply; is it activated against the administration, the preconditions are described in II Q3.1 seqq.





Q2. Does the application of the principle of legitimate expectations affect the approach of the public authorities to the protection of individual rights? Has the principle proved to be efficient where the rights and legal interests of individuals collide with the general interest? Please provide certain examples from the case-law where applicable.

Following the German concept the principle of legitimate expectations completes the protection of individual rights. In comparison with the judicial standards before the German Grundgesetz entered into force, this constitutional sub-principle of the rule of law has strengthened the individual's position against the legislature and the administration. It is present in the daily work of the administrative judges: The juris-database offers more than 1.800 decisions only of the Bundesverwaltungsgericht, in which the expression "Vertrauensschutz" (protection of legitimate expectations) is to be found without of course always leading to success for the claimant.

Q3. Briefly describe the remedies provided under your national legal order to the individuals whose legitimate expectations were frustrated. How is the choice for the type of the protection of legitimate expectations (*in natura*, compensatory or other) determined?

The remedies depend on the particular case configuration: If legitimate expectations are derived from behaviour of an authority, the petitioner may lodge an action to oblige the authority to issue the requested administrative act. As the principle of legitimate expectations does not have the power to overrule the principle of legality (see II Q3.1), no authority can be forced to act *contra legem* (e.g. to grant an unlawful building-permit after having realized the preliminary misestimate). Only if the petitioner has an assurance as provided in section 38 of the German Administrative Procedure Act (see above II Q3.3), he is able to enforce the claim *in natura*. Otherwise he may bring an action for compensation by way of liability of public authorities.

Part IV

Other Dimensions of the Application of the Principle

Q1. How do European Union law and national law complement one another in application of the principle of legitimate expectations? In some cases, does the national law allow the European Union law to resolve the questions regarding the protection of legitimate expectations with regard to the approaches developed domestically, e.g. the rules on the revocation of individual administrative decisions? Conversely, does European Union law pro-





vide the national court with instruments enabling it to better handle the disputes relating to the violations of legitimate expectations? How is the evaluation of compatibility between national law and EU approach solved?

Meanwhile frictions between the national regulations concerning the withdrawal of unlawful beneficiary administrative acts in section 48 of the German Administrative Procedure Act (see above II Q3.) and European Union law have been cleared. The EJC held in *Alcan* (Judgment of 20 March 1997 - C-24/96; see also judgments of 21 September 1983 - C-205 to 215/82, German Milchkontor; of 12 May 1998 - C-366/95 Steff-Houlberg and of 16 July 1998 - C-298/96, Ölmühle) that the European interests of the common market must be taken fully into consideration in the application of section 48. In view of the mandatory nature of the supervision of State aid by the European Commission, enterprises to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the stipulated prior notification to the European Commission. A diligent businessman should normally be able to determine whether that procedure has been followed. Therefore national authorities do not have any discretion as regards revocation of a decision granting aid and the time-limit laid down in the national regulation for the withdrawal has to be disregarded. According to the EJC's well-established case law, it follows both from the primacy of European Union law and from the direct effect of European provisions that the national standards to invoke legitimate expectations are overruled by European criteria.

Q2. When reviewing the lawfulness of decisions where the individual relies on the principle of legitimate expectations, do administrative courts refer to the provisions of the EU Charter? What consequences does it have for the application of the principle by your national administrative courts?

No decisions found; as the principle is well established in the German tradition there is no need for a reference to the EU Charta of fundamental rights.

Q3. Does the case-law of the European Court of Human Rights play a role in the application of the principle of legitimate expectations in your jurisdiction? If so, how? Please provide examples from your case-law.

