



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

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

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Answers to Questionnaire: Hungary



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The Protection of Legitimate Expectations in Administrative Law and EU Law

Part I

The Development of the Principle of Legitimate Expectations

Q1.

Legal certainty is an essential element of the rule of law. The principle of legal certainty requires from the state, and especially from the legislation, that law, its various areas, as well as its rules are clear, unambiguous and predictable.

The predictability of legal acts as well as the knowledge and unambiguity of the case-law are essential. The Hungarian Constitutional Court derived the requirement of the protection of legitimate expectations from legal certainty, which is an element of the rule of law. Decision 142/2010. pointed out that legal certainty includes not only the prohibition of retroactive laws and the protection of acquired rights but the protection of legitimate expectations as well. This interpretation of legal certainty is prevalent in the jurisdiction of both the European Court of Justice (hereinafter: ECJ) and the European Court of Human Rights (hereinafter: ECtHR). The protection of legitimate expectations however is not identical with either the protection of acquired rights or the prohibition of retroactive legislation: it applies in a wider sense.

Q2.

The principle of legitimate expectations aims to ensure that the person who trusts the written and non-written law (e.g. common law) shall not be adversely affected, their rights can be limited only to the extent required for the protection of public interest, judicial tyranny shall not remove their rights, and their acquired rights can be limited only proportionally and this limitation shall be sufficiently compensated for. Additionally, it ensures legal certainty, rule of law and prohibits retroactive jurisdiction.

In my view, the principle of legitimate expectations would be able to strengthen trust in public authorities if legal acts regulated it not only on the level of principles, but also content-wise and additionally, if they contained detailed rules about its execution in order to make the realization of the principle more efficient.

Q3.

Neither the Fundamental law, nor any other domestic law makes explicit reference to the principle of legitimate expectations. The case-law, however, has always considered this principle a component of fair procedure due to the jurisdiction of the ECJ, the ECtHR and the provisions in Act CXXX of 2010. The latter one considers the clarity of legal acts an essential requisite of legislation and it prohibits their retroactive effect.

It also states that a legal act cannot impose any obligation, or make an already existing one more cumbersome, or take away or limit rights or declare any behavior unlawful prior to its entry into force. The date of entry into force shall be determined in a way that there is sufficient time to prepare for the application of the act. It must be ensured that the legislation complies with the obligations arising from both the content and formal requirements of the Fundamental Law, as well as international and European Union law.

Q4.

Before the Fundamental Law's entry into force, the Constitutional Court derived the right to a fair trial from rule of law and the right to an independent and impartial court, which was reflected in their decisions likewise. Other domestic courts followed this interpretation as well.

Hungary's current Fundamental Law (date of entry into force: 25 April 2011) covers the right to a fair trial in Art. XXIV and XXVIII in the context of public administration and judicial proceedings. The provisions of the Fundamental Law mentioned above are in line with the right to good administration enshrined in Art. 41 of the EU Charter of Fundamental Rights, and Art. 6, 13, 14 of 17 of the European Convention on Human Rights (hereinafter: Convention).

Act CXL of 2004 on the General Rules of Administrative Proceedings and Services (hereinafter: Administrative Procedure Act) states that powers shall be exercised lawfully. The Act lays down the prohibition of discrimination, the principle of equal treatment, equality before the law, administration without undue bias, the principle of proportionality, the protection of client's rights acquired and exercised in good faith, the compensation for damages caused by undue administrative process, obligation to provide information, and a quick, efficient and cost-efficient process. What is clear from this list is that Art. 41 of the EU Charter and Art. 6 of the Convention were incorporated in the Administrative Procedure Act, however, the principle of legitimate expectations is not articulated explicitly in this act either. In my opinion, however, the protection of rights acquired and exercised in good faith encompasses the protection of legitimate expectations, and it is closely linked to the principle of legal certainty (predictability), particularly with regard to the fact that the client's good faith shall be presumed, and the burden of proof of bad faith shall rest with the authorities (Section 6 (1) in Administrative Procedure Act)

The Administrative Procedure Act does not only define the protection of rights acquired and exercised in good faith as a principle, but it also provides specific provisions for its application.

In Hungary, according to Act CLXI of 2011 on the Organization and Administration of the Courts, the Curia publishes decisions of principle and takes uniformity decisions that shall be binding upon the courts in order to ensure the further development of case law and uniform judicial practice. Consequently, it plays a significant role in the application of legal principles, including the principle of legitimate expectations.

Q5.

On 22 July 2010 Parliament adopted Act no. XC of 2010 on the Adoption and Modification of Certain Economic and Financial Laws, which introduced inter alia a new tax on certain payments for employees of the public sector whose employment was terminated. Consequently, severance pay and other payments related to the termination of employment exceeding HUF 2 million and HUF 3,5 million became subject to a 98% tax. The bill preceding the act justified the tax with reference to public morals and the unfavourable

budgetary situation of the country. The act imposed taxation with retroactive effect with no remedy available. (For more details see the decisions of the ECtHR).

In its decisions no. 41838/11, 66529/11 and 49570/11, the ECtHR stated that the imposition of the 98% tax was contrary to Article 1 of Protocol No. 1 (the protection of property) and invoked the principle of legitimate expectations. The national courts, including the Curia, thereafter referred to the decisions of the Constitutional Court and the ECtHR and invoked the principle of fair procedure. They passed decisions in favour of the taxpayers by setting aside the decisions of the tax authority that obliged them to pay the 98% tax.

National law does not stipulate the principle of legitimate expectations explicitly, however, as it has been pointed out at Part I questions 3 and 4, it is considered as part of fair procedure and as directly and closely linked to it. This approach is reflected in the case-law of the Curia. Wherever due, it applies the principle of legitimate expectations by referring to the decisions of the ECtHR and ECJ and the legal rules and interpretations pointed out in them.

Q6.

As it has already been mentioned, the principle comes up as an element of fair procedure, mostly with regard to proportionality, equity, the prohibition of retroactive legislation or law enforcement and the protection of rights acquired and exercised in good faith, especially in tax administration lawsuits and proceedings before the Curia's municipal issues council. The latter one has the power to examine and overturn an unlawful municipal decree in case of a motion under the Fundamental Law. The municipal issues council has already overturned several municipal decrees due to retroactive legislation and infringement of the principle of proportionality, and it has dealt with the prohibition of discrimination and sufficient preparation time before a legal act's entry into force.

Part II.

The Application of the Principle of Legitimate Expectations

Q1.

Given that the national law does not explicitly regulate the principle of legitimate expectations, I cannot mark specific rights or obligations in relation to this principle that are incumbent on the legislative body.

In Part I, Q.3. I already referred to the CXXX act of 2010, and I presented its fundamental provisions that are consistently enforced by the judicial practice as well. I want to complement this with the fact that the legislative bodies shall comply with the rules based on the principle of the hierarchy of norms. Accordingly, the lower level legislation shall not be contrary to the higher-level legislation. (E.g. a municipal decree with a law) All pieces of legislation shall be guided by the Fundamental Law, which recognizes the fundamental rights enshrined in international treaties and conventions.

The Constitutional Court has the right to overturn legal acts or its provisions, as well as judicial decisions in case they are contrary to the Fundamental law, as well as laws contrary to international treaties. However, I find it essential to highlight that the Constitutional Court's right to review legislation is limited on budgetary and tax issues. Only the right to life and human dignity, the protection of personal data, freedom of thought, conscience and religion, and Hungarian nationality are the issues where there is place for a constitutional review.

The Curia's municipal issues council made decisions that are linked with the principle of legitimate expectations, and some special tax decisions also covered the principle. (see Part I. Q5.)

Q2.

Given the fact that national legislation does not regulate the principle of legitimate expectations separately, it does not regulate the revocation of unlawful administrative decisions.

However, the Administrative Procedure Act protects the rights acquired and exercised in good faith not only on the level of principles, but it also provides specific legal provisions for its application as well as for the application of other rights following from this core principle. The unlawful administrative decision cannot be amended, modified, revoked or set aside if one year has passed since the operative date of the decision, and the amendment, modification, or revocation would compromise the client's rights acquired and exercised in good faith. (Section 81/B (2), section 115 (4) and section 121 (4) in Administrative Procedure Law) In case of the nullity of decisions – e.g. an administrative decision is annulled because the authority had no jurisdiction, competence or powers for the case in question – this time limit is three years.

The administrative appellate authority is not bound to what is contained in the appeal, it fully examines both the contested decision and the prior procedure. In case the authority of first instance made the decision under the right of deliberation, the authority of second instance shall not establish more severe obligations than what has been adopted in the decision in the first instance. (Section 104 (3) and 105 (1) in Administrative Procedure Law) Due to the fact that taxing is not a right but an obligation, Act XCII of 2003 on the Rules of Taxation does not contain the protection of rights acquired and exercised in good faith. It states, however, that “if a resolution has been adopted in conclusion of a previous audit, no new resolution changing the tax liability, the tax base, the tax amount, the base and the amount of central subsidy to the detriment of the taxpayer may be adopted more than one year following the time when the audit was concluded, or if the audit has been concluded without the opening of an official proceeding. Furthermore, a new resolution cannot be adopted if the resolution adopted in the original proceeding is overturned by the superior tax authority and a new proceeding is ordered or if the tax authority of the first instance has withdrawn the resolution.” (time-limited prohibition of *reformatio in peius*)

Q3.

Q3.1.

The administrative authority is bound by the final decision passed in the case in question, which can be a first instance decision or a second instance decision made on the basis of an appeal. Consultations, verbal promises, correspondence (information given upon request) do not bind the authority. These cannot serve as a ground for the administrative authority to disregard infringement on the part of the client. They can be contemplated only in relation to sanctions (fines, default interests etc) imposed due to infringement.

Article 20(1)-(3) in Administrative Procedure law stipulates that the authority shall proceed within its area of jurisdiction in the cases for which it has competence as well as on the basis of designation. If the authority fails to comply with this obligation within the relevant time limit, the supervisory organ shall order the authority to conclude the proceedings under

priority. If the required result is not achieved, the supervisory organ shall bring disciplinary charges against the defaulting authority and shall transfer the case to another authority of similar competence. If the authority fails to execute its obligation in spite of a call therefor by the competent public prosecutor's intervention, the prosecutor may bring action before the court for administrative actions.

Unless otherwise provided for by an act or government decree, where a request made by a client pertains to the acquisition of rights and there is no adverse party involved in the first instance, the client shall be considered to have been authorised to exercise the right in question if the authority fails to adopt a decision within the prescribed time limit and a conditional decision providing for the exercise of the right asserted should not have been adopted. The consent of the specialist authority shall be considered granted if the specialist authority in question fails to provide an assessment decision within the prescribed time limit. (Section in 71(2)-(4) in Procedural Law.) The authority shall avoid to adopt a resolution where the exercise of a right afforded by law is conditional only upon the submission of the client's application therefor. At the client's request, the authority shall verify that the client is within his rights in exercising the aforementioned statutory right as of the time of submission of the application (Art. 71(6)). There has been no case-law in this area since the legislation is effective as of 2014 and 1 January 2016 and no cases have reached the Curia, which proceeds only as a forum of extraordinary remedy in administrative proceedings.

Q3.2.

National law does not define and therefore does not differentiate between the concepts of hope, expectation, reasonable expectation, legitimate expectation. It does not define the concept of the protection of rights acquired and exercised in good faith either, which is related to the imperative of the protection of legitimate expectations. Legal rules only state that both the authority and the client have to proceed in good faith, the good faith of the client must be presumed by the authority, furthermore the burden of proof of bad faith lies with the authority. The right acquired and exercised in good faith can only be a right acquired and exercised based on a final decision. The court always evaluates all the circumstances of the case, especially whether the final decision created any right, and if yes, whether the client actually exercised this right, whether the final decision was unlawful and whether the client was aware of the unlawful nature of the final decision etc.

Q3.3.

According to national law, unlawful administrative decisions can create legitimate expectations for the individual who has reasonably relied on the decision in respect of rights acquired and exercised in good faith in a time span specified by the Act on Administrative Procedure. (see part II, question 2)

In decision no. BH2011.264.Kfv.I.39.221/2010 the Curia stated that agricultural support that has been legally established for the client can only be revoked without violation of legal certainty and the principle of legitimate expectations. In its decision the Curia referred to decisions T-310/06 and C-24/95. According to the standpoint of the Curia, the client reasonably supposed that he was entitled to the benefit based on the appendix of the request and the content of the decision issued by the administrative authority, what is more, a revoking and modifying decision should have been adopted within reasonable time.

In decision Kfv.35.038/2014/5 the Curia stated that the client pursued its agricultural activities based on the request for support that was granted by the administrative authority and

with the financial means that was granted to him based on this decision. He reasonably supposed that he was exercising his rights lawfully. Therefore, in the fifth year of his agricultural activities the administrative authority is not entitled to establish the unlawful nature of his request and the payments – it should have established this when evaluating the request.

Q3.4.

According to national law, as I have already mentioned, two cumulative conditions must be fulfilled: the right shall be obtained and exercised in good faith. (See Part II Q2).

In Hungarian domestic law, not only individuals, but also legal entities shall act in good faith. The client's good faith in proceedings shall be presumed, the burden of proof of bad faith shall lie with the authorities. (Section 6 of Administrative Procedure Act)

None of the legal acts define 'good faith' or 'exercise of rights in good faith.' The court decides whether the right has been acquired and exercised in good faith based on the data, facts and conditions of the individual case. The Administrative Procedure Act states only that the client's behavior shall not aim at the misleadership of an authority or at the undue delay of legislation or execution as the judicial practice perceives this as bad faith. Furthermore, no one shall refer to their own wrongful conduct. Given that the client provides false, incomplete or incorrect data to the authorities, bribes the authority personnel, or he or she is aware that the decision will not be upheld (based on e.g. legal knowledge, skills, practice, former experience, previously rejected requests), he or she is considered to have bad faith.

Rights acquired and exercised in good faith are usually referred to in building and property registration cases. However, courts barely classify clients' behavior, as in most of the cases they have to decide instead whether the client has acquired a right at all, if yes, whether the decision – that the rights acquired and exercised in good faith is based on – has come to force, and are the cumulative conditions actually there, so the client was in fact exercising his or her right.

Q3.5.

In respect of legitimate expectations and fair procedure the national law and case-law follow the regulations of the EU Charter and the Convention as well as the case law of the ECJ and ECHR.

Part. III.

The Infringements of the Principle of Legitimate Expectations

Q1.

National law does not contain any methodology to be used in order to determine whether there has been an infringement of the principle in question. National case-law is guided by and applies the findings of ECJ and ECtHR.

In Part II. Q3. 3, I presented the factors that the Curia considered when they were applying the principle of legitimate expectations.

Q2.

The principle of legitimate expectations is not defined in national law, however, my standpoint is that courts as well as administrative authorities know community law and pay due attention to decisions made in respect of the interpretation and application of community law, as well as to all those decisions that the Curia passes in respect of the violation of the principles of community law, legal rules that have direct effect and fundamental rights enshrined in national law.

The clashes between the individual's rights and public interest are, however, in the case-law of the Curia contemplated not in relation to the principle of legitimate expectations but in relation to the principle of proportionality, equity, the prohibition of retroactive effect and the protection of rights acquired and exercised in good faith.

Q3.

The procedure, decision or failure of the administrative authority can be in conflict not only with national law, but also with international treaties, namely the Charter and the Convention. The unlawful nature of the administrative decision can be remedied within the framework of the administrative proceeding itself, namely by supplementary modification, revocation, repeal, appeal, supervisory procedure, prosecutor's action and request for review. If these are not resorted to, a request for a judicial review of the administrative decision can be made and violation can be remedied in the judicial procedure. The court, however, can only set aside the unlawful decision, or can call upon the authority to conduct a new procedure while setting aside the decision, and in some cases prescribed by law it can modify the administrative decision. (Code of Civil Procedure, Art. 339 (1) and (2) Administrative authorities are subject to civil liability for damages caused by any unlawful proceedings and they are liable to pay restitution for any violation of rights relating to personality resulting from unlawful proceedings. (Section 4 (2)-(3) of Administrative Procedure Act) According to national law, that is, the administrative court can never make a decision on the compensation of the client, neither is it entitled to control or review the execution of the decision made in favour of the client.

Part IV.

Other Dimensions of the Application of the Principle

Q1.

The general principles of community law are an important part of the *acquis*, they enjoy priority over national regulations (Simmenthall decision), they have direct effect (Van Gend en Loos and Costa v. ENEL). Therefore, if national law is contrary to community law, the court can set aside national law and cannot apply it. The individual has the right to turn to court by referring to community law provisions. Reference to the violation of the principle of legitimate expectations endorsed by community law, therefore, can lead to establishing the unlawful nature of an administrative decision.

Though Hungarian national law does not provide for the protection of legitimate expectations explicitly, the violation of principles that are related to it (legal certainty, fair procedure,

protection of rights acquired and exercised in good faith, prohibition of retroactive effect) can serve as a ground to pass lawful judicial decisions in compliance with community law. In my standpoint, national law is in compliance with community law in spite of the fact that the principle of legitimate expectations is not defined in national law.

Q2.

In the case-law of the Curia there have been no cases, in which the individual based its request on the principle of legitimate expectations. (The reason for this is probably due to the fact that national law does not provide for this principle explicitly.)

In some of its decisions the Curia referred to the principle in question. In these cases the Curia based its decisions in favour of the client not by reference to the EU Charter but by reference to decisions of the ECHR, and the legal rules and interpretation expressed therein. There has been a case (Kfv.I.35.384/2015/4), in which the Curia stated the lawfulness of the administrative decision by reference to the interpretation expressed in the decisions of the ECHR: the violation of the principle of legitimate expectations cannot be claimed if an earlier tax audit covering years not subject to litigation did not establish any deficiencies or unlawfulness.

Q3.

The case-law of the ECHR plays an important role in the case-law of the Curia, whenever the application of the principle of legitimate expectations rises. See cases at part I question 5, part II question 3.3 and part IV question 2.