



**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: Ireland



Seminar co-funded by the “Justice” programme of the European Union

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)?

According to Hogan and Morgan, a leading Irish text book, “..legitimate expectations are protected in the interests of safeguarding the citizen against haphazard and unfair changes in administrative policy and practice.”¹ Thus, one of the primary justifications for protecting a legitimate expectation is the need to promote integrity and consistency in public decision-making.² For example, in *Webb v Ireland*,³ a representation was made to the effect that certain individuals would be “honourably treated” and this founded the basis of a claim in legitimate expectation in circumstances where it would have been unjust to allow the public body concerned to break its promise. It has been suggested that if the State were permitted to do so, public confidence in government may suffer as a result.⁴

Legal certainty is also one of the principles protected by the doctrine of legitimate expectation, though this must be balanced with another, potentially opposing value, namely administrative flexibility, particularly in the context of allowing the administration to make and change policy as and when the circumstances require.⁵

In *Fakih v Minister for Justice* [1993] 2 IR 406, the following statement from UK case *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 was endorsed by the Irish High Court:

¹ Hogan and Morgan, *Administrative Law in Ireland*, 4th Ed., (Dublin, 2010) at p. 1030.

² De Blacam, *Judicial Review*, 2nd Ed., (Dublin, 2009) at p. 258.

³ [1988] IR 353.

⁴ *Ibid.* For more detail on the *Webb* case please see the answer to question 4 in this Part.

⁵ *Ibid.*

“The justification [for the principle of legitimate expectations] is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as the implementation does not interfere with its statutory duty.”⁶

Protection of the citizen from arbitrary changes of policy is linked, in conceptual and practical terms, to good governance, fair procedures and legal certainty.

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

It may be inferred from the answer to question 1 of this section that the principle of legitimate expectations is aimed at safeguarding the citizen against haphazard and unfair changes in administrative policy and practice.

The doctrine may be invoked to protect or ensure fair procedures, particularly where a government minister is exercising a discretionary power.⁷ As noted above, it is also aimed at promoting integrity and consistency in public decision-making⁸ because without that integrity, public confidence in government may suffer. Therefore, the protection of expectations serves to promote legal certainty.⁹ Equally, administrative flexibility is protected by the doctrine, which must be balanced with that of legal certainty in the consideration of legitimate expectation claims.¹⁰ The extent to which substantive rights may also be protected by the doctrine is a matter which is less certain, and that is discussed later in this questionnaire.

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?

No. This is a doctrine which was developed in Irish law through case law/precedent rather than legislation. Therefore second part of question does not apply.

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?

The development of the principle of legitimate expectation in Ireland occurred through a series of decisions beginning with *Webb v Ireland* [1988] I.R. 353. In that case, the plaintiffs were the

⁶ Hogan and Morgan, op.cit., at pp.1038-1039.

⁷ *Tara Prospecting Ltd v Minister for Energy* [1993] ILRM 771.

⁸ De Blacam, op.cit., at p. 258.

⁹ *Ibid.*

¹⁰ *Ibid.*

individuals who found the Derrynaflan Hoard - a collection of Christian art antiquities which has been described as “one of the most significant discoveries ever made of Christian art”.¹¹ The plaintiffs brought the artefacts to the National Museum with a letter stating that it was to be given to the director of the museum ‘. . . for the present and pending the determination of the legal ownership or status thereof.’ On receiving the artefacts, the director told the plaintiffs that they would be “honourably treated.”

The Plaintiffs subsequent attempt to retrieve the hoard from the museum was unsuccessful, but a legitimate expectation to be compensated was held to arise from the promise to be “honourably treated”. The Court reasoned as follows:

“It would appear that the doctrine of "legitimate expectation" sometimes described as "reasonable expectation", has not in those terms been the subject matter of any decision of our courts. However, the doctrine connoted by such expressions is but an aspect of the well-recognised equitable concept of promissory estoppel (which has been frequently applied in our courts), whereby a promise or representation as to intention may in certain circumstances be held binding on the representor or promisor. The nature and extent of that doctrine in circumstances such as those of this case has been expressed as follows by Lord Denning M.R. in Amalgamated Property Co. v. Texas Bank [1982] Q.B. 84, 122:—

‘When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.’

Applying the law as there stated, which seems to me to accord with fundamental equitable principles, I am satisfied that the unqualified assurance given to the first plaintiff by the director of the National Museum that he (Mr. Webb) would be honourably treated was an integral part of the transaction under which the hoard was deposited in the Museum and accepted on behalf of the State, and that the State cannot now go back on the assurance. It must be given effect to in the form of a monetary award of an amount which is reasonable in the light of all the relevant circumstances.”

Part of the argument made by the plaintiffs was that the practice of the museum of compensating persons who found such artefacts contributed to their legitimate expectation, but the Court found that the assurance was sufficient for this purpose, stating that it would be “inequitable and unjust if the State were to be allowed to repudiate.” Part of the significance of *Webb* is that it developed the doctrine of legitimate expectation in Ireland because the assurance in question grounded a

¹¹ *Webb v Ireland* [1988] I.R. 353 at p. 373.

cause of action, whereas prior to this decision, the doctrine had been said to be a “shield and not a sword”, *i.e.* it did not confer a cause of action where none had existed before.¹²

In *Tara Prospecting Ltd v Minister for Energy* [1993] ILRM 771, the Court confirmed that in cases involving the exercise of statutory powers, the doctrine of legitimate expectations is limited to procedural matters.¹³ In that case, the applicants were prospecting companies who had been awarded mining prospecting licenses on a number of occasions. The prospectors found gold in one particular area, and though their licences were renewed at this point, large areas of territory included in the earlier licences were excluded.¹⁴ In particular, the area around Croagh Patrick, an area of particularly beautiful scenery and pilgrimage site in the West of Ireland, was excluded from the licence. This area was excluded on environmental, cultural and religious grounds, but the applicants argued that this limitation on their licences constituted a breach of legitimate expectations, asserting that the Minister had represented that their licences would be renewed in full if the prospecting had proved to be successful.¹⁵ On the facts of this case, although the Court accepted that the applicants could reasonably have expected that if prospecting was successful, their licences would be renewed until such time as they were in a position to apply for a mining lease,¹⁶ the Court held that “this expectation could only be a conditional one as the Minister was exercising a discretionary power and the applicants should have been aware that the renewal of the licence was conditional on the Minister concluding at the time of renewal that renewal was in the public interest.”.

In holding that the doctrine of legitimate expectations was limited to procedural matters in cases involving the exercise of statutory powers, the Court provided a review of the principles applicable and the state of the law as it was at the time, noting that the doctrine may exceptionally protect substantive rights, such as in *Webb*, but that such cases actually represented an application of the principles of promissory estoppel rather than legitimate expectation as such.¹⁷

¹² De Blacam, *op.cit.*, at p.256.

¹³ Hogan and Morgan, *op.cit.*, at p.1041.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.* De Blacam defends the decision in *Webb* as “much more than an application of the promissory estoppel doctrine” in that it represented an implicit acceptance of the doctrine of legitimate expectation in Ireland, and in that it developed the doctrine such that it could confer a cause of action where none had previously existed. De Blacam, *op. cit.* at p. 256.

The next major doctrinal development was in the case of *Glencar Exploration v Mayo County Council*,¹⁸ in which the tests which are currently used by the courts to determine if a legitimate expectation exists were set out by the Supreme Court as follows:

“In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavored to formulate seem to me to be preconditions for the right to invoke the doctrine.”¹⁹

Although, in that case, this *dicta* was, strictly speaking, *obiter*, it has been endorsed and applied by the Irish courts in a number of subsequent cases and represents the current test in Ireland. Notably, the test has been adopted by the High Court and the Supreme Court in *Lett & Co. v Wexford Borough Council*.²⁰ Further development of the principle occurred in *Glenkerrin Homes Ltd v Dun Laoghaire-Rathdown Corporation*,²¹ in which the High Court determined that although a legitimate expectation cannot arise to the effect that a policy will not be changed (as established in previous cases), nevertheless, where third parties reasonably arrange their affairs by reference to such a practice, such third parties may be entitled to reasonable notice that the practice is to change in order to allow such parties to “consider and implement an alternative means for dealing with the issues arising.”

Most recently, in *Cromane*, Clarke J. repeated the observation of the Court in *Glencar* that “jurisprudence in the area of legitimate expectation continues to evolve” before going on to apply the tests set out in that case.

¹⁸ [2002] 1 IR 84.

¹⁹ *Ibid* at p.162-163.

²⁰ [2007] IEHC 195; [2016] IESC 6; [2014] 2 IR 198.

²¹ [2007] IEHC 298.

Is the development of the principle at issue mostly attributed to the judiciary?

Yes, the principle is mostly attributable to the judiciary in that it developed through case law rather than legislation. The courts also have regard to case law of the Court of Justice of the European Union²² and case law of other jurisdictions, in particular the UK.

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?

As Ireland recognises the doctrine of legitimate expectations, the second and third parts of this question do not apply.

In response to the first part of the question, there has been some judicial consideration of application of the principle of legitimate expectation in the context of situations such as economic crisis. Certain circumstances have been recognised by the courts as inappropriate to an application of the doctrine of legitimate expectations. These were summarised in *Lett & Company v. Wexford Borough Corporation and Ors.* [2012] 2 IR 198, as follows:

*“The negative factors are issues which may either prevent those three tests from being met (for example the fact that, as in *Wiley v. The Revenue Commissioners* [1994] 2 I.R. 160, it may not be legitimate to entertain an expectation that a past error will be continued in the future) or may exclude the existence of a legitimate expectation by virtue of the need to preserve the entitlement of a decision maker to exercise a statutory discretion within the parameters provided for in the statute concerned or, alternatively, may be necessary to enable, as in *Hempenstall v. Minister for Environment* [1994] 2 I.R. 20, legitimate changes in executive policy to take place.”*

Therefore, where executive policy change is required, such can not be prohibited by legitimate expectations. Hogan and Morgan observe that “the public body is generally entitled to resile from its previous practice or representation where there actually exist in the particular case objective reasons which justify this change of position. At most then, the effect of the doctrine of legitimate

²² As discussed in Part IV of this questionnaire.

expectations is only to protect the citizen against a sudden or arbitrary change of position by a public authority....”²³

Authorities for this proposition include *Curran v Minister for Education and Science*,²⁴ in which the Minister, “faced with a sudden and severe crisis in the public finances...immediately terminated an early retirement scheme for teachers, even though this impacted on a number of teachers who had organised their affairs on the basis that the scheme would be available.”²⁵

The Court in that case held that “the public interest considerations were so acute that they justified this sudden change.”²⁶

According to Hogan and Morgan, such authorities “demonstrate that a public body is entitled to change its position where new factors or objective alterations in circumstances will justify it in so doing, and this remains true even though the private citizen had a legitimate expectation that the public body would adhere to the previous practice.”²⁷

With that said, the government may not simply change policy with impunity. It was established in *Glenkerrin Homes*²⁸ that although a legitimate expectation cannot be held to the effect that a policy will not be changed (as established in previous cases), nevertheless, where third parties reasonably arrange their affairs by reference to such a practice, such third parties may be entitled to reasonable notice that the practice is to change in order to allow such parties to “consider and implement an alternative means for dealing with the issues arising.”²⁹

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?

²³ Hogan and Morgan, op.cit. at para.19-63

²⁴ [2009] IEHC 378; [2009] 4 IR 300

²⁵ Hogan and Morgan, op.cit., at p.1050.

²⁶ *ibid.*

²⁷ *Ibid* at pp.1050-1051.

²⁸ As discussed in the answer to question 4 in this section

²⁹ *Glenkerrin Homes Ltd v Dun Laoghaire-Rathdown Corporation* [2011] 1 IR 417 at p.426.

Legitimate expectation constitutes an autonomous legal ground in Irish law and does not necessarily have to be argued in conjunction with other categories of claim, although it is frequently argued in conjunction with promissory estoppel³⁰ and/or negligence.³¹ It has been observed that prior to *Webb*, legitimate expectation was considered not to be appropriate to ground causes of actions, and was considered to be a “shield and not a sword”.³² However, in *Webb*, the assurance in question grounded a cause of action, which led to the development of the principle generally in Irish law thereafter.³³

With that said, there is a significant overlap between the principles of legitimate expectation and promissory estoppel, to the extent that some of the early cases on legitimate expectation suggest that the doctrines are interchangeable.³⁴ Although these observations have been criticised as going too far and not recognising the important differences between the two principles,³⁵ they demonstrate the “close relationship between them”.³⁶ Hogan and Morgan observe that the courts “have shown an increasing willingness to hold a public authority to an earlier promise, representation or practice, irrespective of which of the doctrines the decision is grounded upon.”³⁷ The authors also point out that both of these doctrines also have at least one significant limitation in common, namely, the *ultra vires* principle: “a public authority cannot give itself a jurisdiction it does not possess” whether by creating a legitimate expectation or putting itself in a position in which an estoppel arises.³⁸

However, there are significant differences between legitimate expectations and promissory estoppel. While it would be outside of the scope of this questionnaire to go into an exhaustive analysis of the differences between these doctrines, a few points are noteworthy. First, it has been observed that legitimate expectation is often seen as “the public law counterpart of the equitable doctrine of estoppel.”³⁹ Of course, both doctrines may be relied upon against public bodies,⁴⁰ though the latter doctrine tends to be argued in relation to matters of private right rather than

³⁰ *Webb*,

³¹ *Glencar, Cromane*

³² *Combe v Combe* [1951] 2 KB 215; De Blacam, op.cit., at p. 256.

³³ De Blacam, op.cit., at p. 256.

³⁴ *Webb v Ireland* [1988] IR 353 at p.384, *Garda Representative Association v Ireland* [1989] IR 193, *Association of General Practitioners Ltd v Minister of Health* [1995] IR 382.

³⁵ Hogan and Morgan, op.cit. at p.1030.

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid* at p.1031.

³⁹ *Lett & Co. v. Wexford Borough Council* [2007] IEHC 195.

⁴⁰ *Webb v Ireland* [1988] I.R. 353 at p. 373.

public law.⁴¹ Further, promissory estoppel is largely defensive in nature in that its use is “basically to ensure that a person who has made a representation that they will not exercise some legitimate right is in fact bound by that expectation and cannot exercise the right.”⁴²

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?

The general rule is that the principle of legitimate expectations can not preclude public authorities from acting in their legislative capacity. As Hogan and Morgan describe the state of the law, “[s]ubject to any possibility of constitutional intervention, the legitimate expectations doctrine can certainly not be invoked in this context where honouring the expectation would necessitate a breach or change of the law.”⁴³ The executive may not “fetter its statutory discretion” in the manner described as this would be an unconstitutional breach of the separation of powers. This principle has been established in a series of cases with a few narrowly defined exceptions.

As discussed above,⁴⁴ in the High Court judgment in *Lett & Company Limited v. Wexford Borough Corporation and ors.*⁴⁵ at para. 29, Clarke J. suggested that the case law established, in addition to the positive elements which must be met in order for a legitimate expectation to arise, negative factors whose presence might exclude a legitimate expectation. These negative factors included “the need to preserve the entitlement of a decision maker to exercise a statutory discretion within the parameters provided for in the statute concerned or, alternatively...to enable...legitimate changes in executive policy to take place.”⁴⁶

In *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97 the Supreme Court rejected a challenge to the applicant’s conviction in the Special Criminal Court. The Court acknowledged that the Human Rights Committee, as established under the International Covenant on Civil and Political

⁴¹ *Abrahamson v Law Society of Ireland* [1996] 1 I.R. 431.

⁴² *Ibid.*

⁴³ Hogan and Morgan, *op.cit.*, at pp. 1060-1061.

⁴⁴ See the answer to Part 1, question 5.

⁴⁵ [2012] 2 I.R. 198, [2007] I.E.H.C. 195

⁴⁶ As noted, Clarke J. repeated these views in the recent *Cromane* judgment.

Rights, had held that the applicant's trial in the Special Criminal Court would constitute a violation of his right to equality before the law under the Constitution of Ireland, and that the State's adherence to the Covenant could create an expectation that its agencies would respect its terms. However, the Court also held that the Covenant could not prevail over the provisions of the Offences Against the State Act 1939 (under which the Court had been established) on the basis that the Covenant had not been enacted into Irish law.⁴⁷ The Supreme Court endorsed the statement of the court in *Minister of State for Immigration and Ethnic Affairs v Teoh* (1994-1995) 183 CLR 273, that "[t]he existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between a legitimate expectation and a binding rule of law."

Further, legitimate expectations may have to give way to the public interest.⁴⁸

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?

The doctrine does not operate to bind the legislature in this way in Ireland. In light of the rule that the legislature may not fetter its discretion, and due to the much broader reason that public bodies are generally entitled to resile from previous practices or representations where there are objective reasons to do so, the extent of the effect of legitimate expectation on public bodies is to protect the citizen against a sudden or arbitrary change of position by a public body.⁴⁹

In other words, generally, the doctrine may not be invoked to limit the scope of a statutory power, or to prevent the enactment or enforcement of legislation.⁵⁰ This is because such an outcome would be prevented by the doctrine of separation of powers. The executive arm of government, or any third party, may not commit the legislature as to any laws it will or will not make.⁵¹ In the *Nova Media Services*⁵² case it was held that a statutory provision can not be "repealed, waived or abandoned" by decision or agreement.

⁴⁷ De Blacam, op.cit. at p.266.

⁴⁸ See answer to question 2 of Part III.

⁴⁹ Hogan and Morgan at p.1050.

⁵⁰ *Pesca Valentia Ltd v Minister for Fisheries* [1990] 2 IR 305; Hogan and Morgan, op.cit., at p. 1055.

⁵¹ Hogan and Morgan, op.cit. at p.1056.

⁵² *Nova Media Services Ltd v Minister for Posts and Telegraphs* [1984] ILRM 161.

That is not to say that the doctrine has no impact on authorities that find themselves faced with policy changes, however, as there may be a duty to inform persons who may be affected that such changes are to occur. Further, in *Lett*, the Supreme Court held that “the existence of a policy does not carry with it an entitlement to prevent the policy maker from changing that policy” but that “[t]he doctrine of legitimate expectation may, however, require that the way in which policy changes are effected do not breach existing legitimate expectations.”⁵³

An established practice may give rise to a legitimate expectation if notice is not given that the public body in question intends to depart from that practice. In *Glenkerrin Homes Ltd*,⁵⁴ the Court explained that “[t]he notice that would be required is such as would reasonably allow those who have conducted their affairs in accordance with the practice to consider and implement an alternative means for dealing with the issues arising.”⁵⁵

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?

The doctrine of legitimate expectations has its roots in the principles of equity. The law of equity originally developed in the United Kingdom (of which, at the time, Ireland was part) in tandem with the common law as a means to mitigate the potential harshness of that system on the individual whose grievance or claim may not have necessarily fit within common law precedents, or may have required a remedy not provided by that system.⁵⁶ Originally, the courts of equity (or chancery as they were originally known) were separate from the courts of common law, and grievances were remedied “not by overturning the common law, but by requiring the litigants who came before [the courts of chancery] to obey the dictates of conscience.”⁵⁷ Keane notes that the jurisdiction of ‘chancery’ or ‘equity’ which emerged was “essentially supplementary to the common law.”⁵⁸

⁵³ *Lett & Co. Ltd. v. Wexford Borough Council & Ors.* [2012] 2 IR 198 at pp. 211-212 per. Clarke J.

⁵⁴ *Glenkerrin Homes Ltd v Dun Laoghaire Rathdown Corporation* [2007] IEHC 298

⁵⁵ At para. 22.

⁵⁶ See generally Keane, *Equity and the Law of Trusts in the Republic of Ireland* 2nd Ed., (Dublin, 2011) at pp.1-3.

⁵⁷ *Ibid* at p.2.

⁵⁸ *Ibid*.

Eventually, in the mid-nineteenth century, the common law courts and the courts of equity were merged by the Judicature Acts, allowing litigants to avail of equitable remedies without having to pursue a separate action for that relief.⁵⁹

As noted, Ireland was part of the United Kingdom until the early 1920s. On becoming an independent state, Ireland continued to apply laws that were already in force unless they were in conflict with the Constitution.⁶⁰ In this way, Ireland retained the common law and the principles of equity. However, the manner in which laws have developed in Ireland may, in any given instance, be different from the manner in which they have developed in the United Kingdom, since even though decisions of the courts of the United Kingdom may have persuasive effect on the Irish courts, they are, of course, no longer binding.

It is clear from the decision in *Webb v Ireland* that the doctrine of legitimate expectation as it applies in Ireland emerged from the doctrine of promissory estoppel, another equitable doctrine with which legitimate expectations remains conceptually linked. Both of these doctrines, being equitable in nature, are fundamentally concerned with balancing the actions and role of the State⁶¹ in governing with principles of fairness and accountability where representations have been made to individuals.

What precise acts of the institutions of public authority create legitimate expectations to the person concerned?

As a general rule, a mere representation, without more, would not seem to suffice to give rise to a legitimate expectation.⁶² There must also be “something approaching reliance or change of circumstances so as to make it unfair or inequitable for the representor to renege on an assurance.”⁶³

The expectation itself must be more than a mere expectation that a public authority will act lawfully. In *Glencar*, Fennelly J. explained that “[e]very citizen can...assert an expectation that public authorities will act within the law, but that is clearly not enough.”⁶⁴

⁵⁹ *Ibid.*

⁶⁰ First, the Free State Constitution 1922, and subsequently, Bunreacht na hÉireann 1937.

⁶¹ Promissory estoppel may also be used in the context of private law and not only in actions against public bodies.

⁶² Hogan and Morgan, *op.cit.* at p. 1052.

⁶³ *ibid.* See *Garda Representative Association v Ireland* [1989] ILRM 1; *Dunleavy v Dun Laoghaire-Rathdown County Council* [2005] IEHC 381; *Curran v Minister for Education and Science* [2009] 4 IR 300.

⁶⁴ *Glencar Explorations plc v Mayo County Council (No 2)* [2002] 1 IR 84 at 161; De Blacam, *op.cit.*, at p.259.

The question arises as to whether the representation on which the expectation is based must be communicated directly to the aggrieved party. In *Glencar*, the test set out was whether the representation:

“was addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation.”⁶⁵

The representation must also be unqualified and unambiguous.⁶⁶ A possible exception to this has arisen in the context of binding procedures, whether published or circulated, that identifiable groups may rely on.⁶⁷ For example in *Fakih v Minister for Justice* [1993] 2 IR 406, a group of asylum seekers was entitled to rely on the terms of a commitment given regarding the treatment of such persons in a letter from the relevant Minister to the UN High Commissioner for refugees, notwithstanding the fact that the applicants could not have had knowledge of that content prior to their entry into the State.⁶⁸

Similarly, in *Curran v Minister for Education and Science* [2009] IEHC 378 teachers were entitled to rely on a department circular which was addressed to members of the teaching profession generally.⁶⁹

In addition, an established practice may also give rise to a legitimate expectation if notice is not given that the public body in question intends to depart from that practice.⁷⁰

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.)?

Yes, public authorities may potentially be bound by any such acts. Indeed, in *Webb*, the case in which the doctrine was established in Ireland, the applicants recovered on foot of an oral representation.

⁶⁵ *Glencar Exploration v Mayo County Council* [2002] I IR 84 at p.162.

⁶⁶ *Devitt v Minister for Education* [1989] ILRM 686; Hogan and Morgan, op.cit. at p.1053.

⁶⁷ Hogan and Morgan, op.cit. at p.1054.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ *Glenkerrin Homes Ltd v Dun Laoghaire Rathdown Corporation* [2007] IEHC 298; See the answer to question 2 in this part.

The test as set out in *Glencar* states that in order for a legitimate expectation to be made out, the public authority “must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity.” This is a relatively broad set of criteria, which has been found to include established practices⁷¹ and even silence or inaction in circumstances where a response was warranted.⁷²

Administrative circulars, which are published statements of policy, are one of the most common ways in which legitimate expectations have been created in Ireland.⁷³

Does your national legal order recognize the qualified passivity (derived from the principle *qui tacet consentire videtur si loquide buisset 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?

This principle is discernible from the national case law. In *Ghneim v Minister for Justice*,⁷⁴ for example, the applicant had sought permission to stay in Ireland for the duration of a course of study. When, after a year and a half, the Minister had not responded to the applicant, it was held that this silence/inaction on the part of the Minister had led to a reasonable expectation on the part of the applicant that he would be allowed to remain in the country for the duration of his course.

Recently, in *Cromane*, the Court (Clarke J.), in applying the *Glencar* tests for legitimate expectation, stated that it is “necessary to identify what it is that the public authority said or did (or, perhaps, in an appropriate case, refrained from doing or saying) that amounted to what Fennelly J. described as a ‘promise or representation’ as to how it would ‘act in respect of an identifiable area of its activity’” which would seem to indicate that, in appropriate circumstances, silence or inaction may satisfy the *Glencar* test.

Therefore it is apparent that silence or lack of opposition can amount to a form of representation which may be construed as consent in appropriate cases. This must be considered in the context that there are also exceptions (e.g. no legitimate expectation for the continuity of an error, or for an illegal or *ultra vires* act), and therefore insofar this question refers to the “tolerance of the offence by the authorities” these limitations must be borne in mind.

⁷¹ *Ibid.*

⁷² *Ghneim v Minister for Justice* (1989) *Irish Times* 2 September As discussed above; See De Blacam, op.cit. at p.260

⁷³ Hogan and Morgan, op.cit. at p.1061.

⁷⁴ (1989) *Irish Times* 2 September

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?

The test itself, as set out below, refers to some of these concepts. In particular, action on the faith of the representation, that the expectation must be reasonably entertained, and that it would be unjust to allow the public authority to resile from their representation form part of the legal tests for legitimate expectation. These principles are also balanced with considerations of the public interest, including the principle that freedom to exercise a statutory power is to be respected, but are premised, as discussed in Part I of this questionnaire, upon promotion of integrity and consistency in public decision-making.⁷⁵

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?

Generally speaking, unlawful legal acts can not create legitimate expectations for the individual who has reasonably relied on those acts. Therefore, the source of the expectation forms part of the consideration of the application of the doctrine. There can be no legitimate expectation which is contrary to law. This is primarily due to the *ultra vires* rule, i.e. that a public authority cannot give itself a jurisdiction it does not possess.⁷⁶ This rule also applies in relation to legitimate expectations and EU law.⁷⁷

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.

Although the answer is negative, it is worth noting that in *Asbourne Holdings v An Bord Pleanála*⁷⁸ it was suggested by the Supreme Court that a less absolute approach to the existence of a legitimate expectation which is contrary to law may be possible where the invalidity relates to “something more marginal than the essence of the [administrative] action which is impugned – for example, its scope of extent rather than its nature – there may be greater scope for the operation of estoppel.”⁷⁹

⁷⁵ De Blacam, op.cit., at p. 258.

⁷⁶ Hogan and Morgan, op.cit. at p. 1031; *Re Green Dale Building Co.* [1977] IR 256.

⁷⁷ *ibid*, fn.17; See *Hagemayer Ireland Plc v Revenue Commissioners* [2007] IEHC 49.

⁷⁸ [2003] 2 IR 114 at 137 per Hardiman J.; Hogan and Morgan, op.cit. at p.1032.

⁷⁹ *Ibid*.

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?

Yes, the good faith of the individual claiming to have a legitimate expectation is relevant because part of the test for legitimate expectation is that the person(s) concerned relied on the statement concerned in good faith. This is probably unsurprising given the power differential between public and private bodies in general terms and the equitable origins of the doctrine.

Further, an applicant's illegal activity, even if acquiesced in by the respondent, may not form the basis of a legitimate expectation.⁸⁰ This rule was considered in *Daly v Minister for the Marine*,⁸¹ in which the Supreme Court held that the applicant's previous illegal fishing activities could not form the basis of an expectation.

Further, general principles of equity would be relevant to any consideration of legitimate expectations such that the doctrine will not be applied in an overly mechanistic way, but taking the circumstances of each case into account.

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

The test as set out in *Glencar* refers to an identifiable person or group of persons. Whether it is a natural or legal person does not form part of the consideration of the application of the doctrine, except perhaps to the extent that in the context of argument, natural persons can rely on certain constitutional guarantees that companies may not, but this is not unique to the application of this particular doctrine.

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?

This is dealt with in substance in part III question 1 which sets out the test for legitimate expectations applied by the courts.

PART III

The Infringements of the Principle of Legitimate Expectations

⁸⁰ *ibid* at p. 264/265.

⁸¹ [2001] 3 IR 513.

Q1. Is there a test (methodology) applied by the domestic courts for establishing the infringements of legitimate expectations?

The test for determining whether a legitimate expectation has been established was set out in the case of *Glencar Exploration plc v Mayo County Council (No. 2)* [2002] 1 IR 84 by Fennelly J. at pp. 162-163 of the report as follows:

“Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavored to formulate seem to me to be preconditions for the right to invoke the doctrine.”

This test was recently adopted by O’Donnell J. in the Supreme Court in *Lett & Company v Wexford Borough Council and ors* [2014] 2 IR 198 and represents the current test utilised by the Irish courts to determine whether a legitimate expectation has arisen.

Further, in *Lett & Company v Wexford Borough Corporation and Ors.* [2012] 2 IR 198, the High Court (Clarke J.) suggested that the case law established, in addition to the positive elements which must be met in order for a legitimate expectation to arise (as set out in the *Glencar* tests above), certain negative factors whose presence might exclude a legitimate expectation:⁸²

*“The negative factors are issues which may either prevent those three tests from being met (for example the fact that, as in *Wiley v. The Revenue Commissioners* [1994] 2 I.R. 160, it may not be legitimate to entertain an expectation that a past error will be continued in the future) or may exclude the existence of a legitimate expectation by virtue of the need to preserve the entitlement of a decision maker to exercise a statutory discretion within the parameters provided for in the statute concerned or, alternatively, may be necessary to enable, as in *Hempenstall v. Minister for Environment* [1994] 2 I.R. 20, legitimate changes in executive policy to take place.”*

⁸² As discussed in *Cromane & Anor. v Minister for Agriculture* [2016] IESC 6; (Unreported, Supreme Court, 22nd February, 2016).at para. 10.3.

In his recent judgment in *Cromane*⁸³ Clarke J. stated, in relation to these criteria, “I do not see any reason to depart from those views at this stage” but that “it is inevitable that the starting point has to be to consider whether the criteria identified by Fennelly J. in *Glencar* have been met.”

Therefore, in terms of how the courts will analyse legitimate expectation claims, the starting point for analysis will be an application of the test as set out in *Glencar*. In the recent judgment of Clarke J. in *Cromane*, these criteria were summarised as “first that there must be an appropriate promise or representation, second, that it must be addressed to an identifiable group of persons creating a relationship between that group of persons and the public authority concerned, and third, that the expectation created by the promise or representation in question must be such that it would be ‘unjust to permit the public authority to resile from it.’” Clarke J. continued to observe that “[i]t is hardly a surprise that Fennelly J. started with the question of the promise or representation itself, for it is necessary to identify what it is that the public authority said or did (or, perhaps, in an appropriate case, refrained from doing or saying) that amounted to what Fennelly J. described as a ‘promise or representation’ as to how it would ‘act in respect of an identifiable area of its activity.’”

Next, the court may consider the negative criteria as set out in *Lett* (above). Ultimately, a consideration of the application of those negative factors may operate to guide the court in terms of what remedy may be available, as discussed in the answer to question 3 of this section. As an example, it may be that a legitimate expectation is precluded from arising because, for example, legitimate changes in executive policy may be necessary. However, if an identifiable class of persons organised their affairs in accordance with the policy before it was changed, they may be entitled to some remedy (perhaps damages) if they were not given notice of the change in policy in order to have an opportunity to regularise their affairs in advance of that change.⁸⁴

Are there any concerns regarding its reliability?

It would not seem that there are any concerns surrounding the reliability of the test, but there are some matters which have not been fully established in terms of its application. For instance, in the recent case of *Cromane*, the Supreme Court held that damages could probably be awarded for a breach of legitimate expectation, but that the Court would leave over to an appropriate case in

⁸³ *Ibid.*

⁸⁴ *Glenskerrin Homes Ltd v Dun Laoghaire-Rathdown Corporation* [2007] IEHC 298.

which the matter fully arose a definitive answer to that question. The indications are that a claim in damages will ultimately be permitted, but no final decision has as yet been made on that topic.

Criticism has been levelled in terms of uncertainty surrounding whether or not the doctrine may give rise to a right to a substantive benefit.⁸⁵ It has been noted in the case law that “the doctrine of legitimate expectation does not, in the normal course of events, guarantee anything more than procedural fairness.”⁸⁶ However, with that said, there have been some exceptions.⁸⁷ The nature of equitable principles is that developments occur incrementally, and so it remains to be seen whether further exceptions emerge. At this point, it appears that the courts are open to considering the protection of substantive rights in appropriate circumstances.

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.

The main factors to be taken into account are listed in clear terms in the *Glencar* test and the negative factors that the courts may consider as set out in the *Lett* judgment. These tests and criteria are set out in the answer to question 1 of this section.

In terms of the requirement for judicial measures of a particular nature please see the answer to question 3 in this section on remedies.

Ultimately, the award of any damages or remedies are at the discretion of the court.

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.

Where a legitimate expectation of an individual or identifiable group of persons clashes with the general interest, generally speaking the public interest will win out.⁸⁸

For example, in *Egan v Minister for Defence*⁸⁹ the refusal of an application for early retirement of an air corps officer was held to be done in the public interest. The court found that there was no practice on the part of the Minister of acceding to such applications but that in any case, the

⁸⁵ De Blacam, op.cit. at p.270.

⁸⁶ *Kavanagh v Government of Mountjoy Prison* [2002] 3 IR 97 at 128 per Fennelly J.; De Blacam, op.cit. at p. 271, fn. 63.

⁸⁷ See the answer to question 3 of Part III of this questionnaire.

⁸⁸ “Any legitimate expectation, as opposed to a right, must yield to the public interest.” – de Blacam, op.cit., at p.266

⁸⁹ (24 November 1988, unreported) High Court, Barr J.

minister's refusal was reasonable in circumstances where such applications had been made by numerous pilots who wished to retire early in order to fly with commercial airlines, because of the public interest in maintaining a viable air corps.⁹⁰

Similarly, in *Eoghan v University College Dublin*,⁹¹ a University professor argued that he had a legitimate expectation that he would be permitted to stay in office until the age of 70, as there had been a practice of extending time in office. However, this practice ceased in 1987, and the University justified this change on the basis that it sought to "achieve a reduction in the age profile of academic staff in UCD and to make financial savings." Therefore, although the Court held that a legitimate expectation arose on the part of the applicant, it only entitled him to comment on the proposed change, and he had been given opportunities to do so.⁹²

Individuals may not prevent a change in policy by invoking the doctrine of legitimate expectations, but they may be entitled to certain remedies under the legitimate expectations doctrine that would operate to mitigate the harshness of a sudden change in administrative policy.

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?

A legitimate expectation often gives rise to a right to be heard before the expectation is adversely affected.⁹³ There is authority to suggest that this is the only benefit that may derive from a breach of a legitimate expectation⁹⁴ though it would seem that the case law has advanced somewhat since that principle was set out down, and that other remedies may now be available in certain circumstances. In terms of procedural remedies, however, De Blacam observes that "[t]he legitimate expectation of a benefit does not give rise to a right to it, but there may be cases where the court will uphold the expectation of a benefit."⁹⁵

In *Slevin*, an order of mandamus was granted, enforcing the applicant's substantive expectation. In that case, the applicant had sought and obtained certain fishing licences successfully for many

⁹⁰ De Blacam, *op.cit.*, at p. 266.

⁹¹ [1996] 1 IR 390.

⁹² Hogan and Morgan, *op. cit.*, fn 109 at p.1050.

⁹³ Allan, *Law, Liberty and Justice* (Oxford, 1993) at p.201; cited in De Blacam, *op.cit.* at p.270, FN 58.

⁹⁴ *Navan Tanker Services Ltd v Meath County Council* [1998] 1 IR 166, *Pesca Valentia*; *De Blacam* at p. 270

⁹⁵ *Op.cit.* at p.271; See also *Ghneim v Minister for Justice* (1989) Irish Times 2 September.

years before an issue arose due to failure of the respondent to inform him of the reason for a change in its policy with regard to the issue of those licences.⁹⁶

In *Abrahamson v. Law Society of Ireland*⁹⁷ it was stated that the courts would endeavour to obtain a benefit in respect of which a legitimate expectation arose “or to compensate the applicant...by an award of damages.”⁹⁸ For example, if the expectation is that compensation will be paid, as occurred in *Lett*, then an award of damages may be made.⁹⁹ An award of damages may be made in lieu of the expected benefit if it would be impossible to bestow that benefit¹⁰⁰ or if it would be futile, by the time the case was heard, to make an order for a procedural right such as a fair hearing.¹⁰¹

The Courts have discretion as to what relief will be ordered.

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 provide 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?

Irish courts frequently have regard to the case law of the Court of Justice of the European Union in the resolution of cases, and legitimate expectations cases are no exception to this general rule. In *Wiley*,¹⁰² for example, the Supreme Court expressed a willingness to draw on the jurisprudence of the Court of Justice in potentially expanding the doctrine of legitimate expectations in future cases.¹⁰³

⁹⁶ De Blacam, op.cit. at p.271. See also *VI v Commissioner of an Garda Síochána* [2006] IEHC 30.

⁹⁷ [1996] 1 I.R. 403.

⁹⁸ See judgment of Clarke J. in *Cromane & Ors. v Minister for Agriculture* [2016] IESC 6; (Unreported, Supreme Court, 22nd February, 2016).

⁹⁹ *Ibid* at p. 272-273.

¹⁰⁰ *Ibid*; *Duggan v an Taoiseach* [1989] ILRM 710.

¹⁰¹ *Hennessy v St Gerard's School Trust* (17 February 2006, unreported) High Court (Haugh J.)

¹⁰² *Wiley v Revenue Commissioners* [1994] 2 I.R. 160.

¹⁰³ Hogan and Morgan, op.cit. at pp. 1041.

In *Carbury*¹⁰⁴ the court had regard to principles of both Irish and EU law in considering whether the applicant had established their claim in legitimate expectations (or in promissory estoppel). In that case, the applicant manufactured a certain type of milk product which was misclassified by the defendants for Common Customs Tariff Classification purposes, leading to the applicant wrongly claiming export refunds to which they were not entitled. This also caused the applicants to enter into certain contracts on the basis that they had been given to believe that they were entitled to claim the refunds in question. After the error was discovered, the plaintiffs attempted to claim export refunds for two years during which their product had been wrongly classified. Ultimately, the Court held that the Minister was estopped from denying the plaintiffs their entitlement to the export refunds.¹⁰⁵ Although this case was ultimately decided on the basis of promissory estoppel, it is demonstrative of the willingness of the Courts to enter into consideration of EU law principles in the context of consideration of a legitimate expectations claim. It has been observed that “the Irish courts have no difficulty in such circumstances in drawing on European concepts of legitimate expectations in order to bolster a conclusion that a plaintiff was entitled to relief where it had been misled into altering its position to its detriment by a representation by an agent of the State.”¹⁰⁶

Other examples could be given. In essence, Irish courts frequently have regard to principles of EU law and interpretation thereof by the Court of Justice of the European Union. In particular, in applying EU law itself, the Irish courts would feel bound to apply ECJ jurisprudence. However, in addition to that obligation, the Irish courts would consider the case law of the ECJ in evaluating possible development in the application of the doctrine in a purely national context.

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?

Ireland would certainly apply EU concepts of legitimate expectation in an EU law case (including the Charter) and developments in EU law in that regard may influence (along with developments in other Common Law countries, especially the UK) the development of our own case law. Legitimate expectation is a principle that is operative in the context of public law, and therefore consideration of the application of the Charter may be required in appropriate circumstances.

¹⁰⁴ *Carbury Milk Products Ltd v Minister for Agriculture* (1988-1993) 4 *Irish Tax Reports* 492.

¹⁰⁵ Hogan and Morgan, *op.cit.*, at pp.1047-1048.

¹⁰⁶ *Ibid* at p.1048.

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.

The Irish courts would certainly have regard to the case law of the ECtHR in appropriate circumstances in cases concerning legitimate expectations, particularly since the enactment of the European Convention on Human Rights Act 2003 was enacted, s.2(1) of which states:

In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.