



**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: The Netherlands



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Replies to the questions for the “Seminar organized by the Supreme Administrative Court of Lithuania and ACA-Europe”.

Subject:

“The principle of the protection of legitimate expectations”, referred to as “het vertrouwensbeginsel” in Dutch administrative law.

PART I: THE DEVELOPMENT OF THE PRINCIPLE OF LEGITIMATE EXPECTATIONS

Q1: On what legal principles or values is the principle of the protection of legitimate expectations based?

The central principle is that citizens will be protected against uncertainty or arbitrary action on the part of the government. Accordingly, the principle is closely related to, but is not the same as, the principle of legal certainty. Citizens must know where they stand.

Insofar as the principle of legitimate expectations is applicable in terms of an administrative authority being bound by its own policy, the principle is also related to the principle of equality.

Q2: What is the core objective of the principle of legitimate expectations?

To provide citizens with legal certainty and protect them against arbitrariness on the part of the government.

Q3: Is the principle of legitimate expectations incorporated in national legislation (and if so, how)?

The principle is not embodied in national legislation, but is what is known as a ‘general principle of good administration’.

Two aspects of the principle of legitimate expectations could be said to have been incorporated in legislation:

1) insofar as the principle of legitimate expectations plays a role in terms of binding an administrative authority – *bestuursorgaan*, the Dutch term for the bearer of government powers – to a written policy rule relating to its own actions, the principle is codified in the law: “The administrative authority shall act in accordance with the policy rule, unless that would have consequences for one or more interested parties that are, by reason of exceptional circumstances, disproportionate to the purpose to be served by the policy rule.”

2) In the general statutory regulation on the granting of subsidies, the principle of legitimate expectations is codified as follows. In the national system a subsidy is first *granted* and later, after verification, *the definitive amount is determined*. Once the definitive amount of the subsidy has been determined, it cannot be reclaimed for non-compliance with the rules of the subsidy scheme; the verification of compliance with the rules must be carried out between the granting of the subsidy and the determination of the definitive amount of the subsidy. Once the definitive amount of the subsidy has been determined, the recipient is entitled to rely on that decision, barring exceptional circumstances.

Q4: What have been the most important developments in the principle of legitimate expectations in national law?

In the Netherlands the principle of legitimate expectations has evolved as part of the doctrine of “General principles of good administration.” Some important landmarks in the evolution of the principle are:

1930s: The administrative courts sought to expand their review of legitimacy beyond solely reviewing a decision against statute law. This was connected mainly with the wider possibilities given to administrative authorities to formulate their own policies

which could not be reviewed as laws could. Accordingly, general principles were introduced in the case law, including the principle of legitimate expectations. The principle of legitimate expectations was not yet specifically mentioned at that time.

1945-1994: The administrative courts started to rule that the principle of legal certainty was not only at issue in relation to vested rights, but with respect to all administrative acts that betrayed the trust of the citizen. This idea was then introduced in a general sense in a number of administrative laws in 1954. In 1978, the Dutch Supreme Court ruled that under certain circumstances an administrative authority could be required to apply existing policy *contra legem*.

1994: Administrative law was codified in the General Administrative Law Act, which incorporated a number of general principles of good administration, but *not* the principle of legitimate expectations. The legislator did not want to impair the legal development of the principle through the case law of the administrative courts. It was feared that codification might create constraints. The principle of legitimate expectations has continued to be applied in full in the case law.

The evolution of the principle of legitimate expectations has generally been guided by the case law, but not exclusively so.

Q5: Are there any factors/events that have curtailed the scope of the principle of legitimate expectations?

No. However, over time there have been clear swings in the case law with respect to the readiness of the courts to accept an appeal to the principle of legitimate expectations by petitioners. There is movement on the question of how readily the court will presume that a representative of an administrative authority can be regarded as representing the administrative authority as a whole in creating an expectation. There is also movement on the question of how much importance a court attaches to the citizen's knowledge of the value of legitimate expectations.

On this point, see the answer to question 2 in part II.

Q6: What is the relationship between the principle of legitimate expectations and other legal principles (is it an autonomous concept?).

See the answer to question 1 above regarding the relationship with the principle of legal certainty.

See the answer to question 4 above regarding the historical development that coincided with other "general principles of sound administration".

Insofar as the principle of legitimate expectations is applied in the case law concerning (specific) commitments made by persons that do or do not bind the administrative authority, it is an autonomous doctrine.

PART II: THE APPLICATION OF THE PRINCIPLE OF LEGITIMATE EXPECTATIONS

Q1: When and how does the principle of legitimate expectations bind the legislature?

The principle of legitimate expectations does not readily bind the legislature in the Netherlands. Furthermore, the competence of the administrative courts does not extend to laws and the Netherlands does not have an institution comparable to a constitutional court. A petitioner who challenges a law by reason of conflict with the principle of legitimate expectations will have to seek recourse in the civil courts.

In practice, the court will then review whether adequate transitional provisions were adopted at the time of the changes to the law.

In the Dutch system, however, laws adopted by the central government cannot be reviewed against fundamental legal principles, so that the principle of legitimate expectations as such cannot play a role in a judicial review. It is different when the relevant legal principle can or must be derived from an international order – such as the EU or the ECHR.

Q2: When and how does the principle of legitimate expectations bind the public authorities in individual juristic acts?

The doctrine is as follows. The principle of legitimate expectations in administrative law requires that expectations that have been created must be respected, if:

- 1) The actions can be attributed to the administrative authority that makes the ultimate (disputed) decision.
 - a) Did the person who created the expectation have the authority to make the (disputed) decision? Only then is it attributable.
 - b) Under exceptional circumstances legitimate expectations can be created by an unauthorised body or person by virtue of the *appearance* of authority. In such cases, the citizen's level of expertise is also relevant.
- 2) The expectations must be legitimate. In this context, the nature of the acts of both the administrative authority and the interested party are considered. Relevant aspects are:
 - a) What types of act were involved? See also question 3.1 below.
 - b) The level of expertise of the citizen: did he know or could he reasonably have known that the act could not give rise to a legitimate expectation?
- 3) If these conditions are met, the administrative authority is bound by the expectations created, provided that in a weighing up of the respective interests, in which the interests of the person in whom the legitimate expectations were created weigh heavily, no more important interests prevent the expectations from being respected. Acts that the individual has performed as a result of the creation of the legitimate expectations and the fact that the failure to respect those expectations has prejudiced the position of this citizen are factors taken into account in assessing the interests.

Interests that could weigh more heavily include:

- a) The public interest (conflict with a law is an important public interest).
- b) The interests of a third party.

Q3: Describe the core characteristics of the principle of legitimate expectations.

3.1: What is the normative legal source of the principle? What acts or sources can bind public authorities?

The list of acts that could create legitimate expectations is:

- Specific, unambiguous commitments attributable to the administrative authority that have been made by a person authorised to make them (this can also be a mandated civil servant).
- A consistent course of action by the administrative authority (policy) (internal guidelines/circulars can play a role).
- Codified courses of action of the administrative authority (policy rule). See also the answer to part 1, question 3.
- An agreement by which an administrative authority undertakes to use a power only in a particular manner.
- Earlier decisions (for example, a series of subsidies previously awarded to an organisation can create a legitimate expectation).

The mere failure to enforce a rule or tacitly accept an infringement of a rule, even for an extended period of time, is not a source of a legitimate expectation.

3.2: Are there additional principles that are used to remove ambiguities in the application of the principle of legitimate expectations?

Generally not, since the concept is applied autonomously (in cases involving both specific commitments and forms of policy).

However, in asking whether the administrative authority is bound by a legitimate expectation in a particular case, the courts always weigh up the interests (see the answer to question 2 above (under c)). In this way, the court reviews the proportionality

principle and the principle of equality in the discharge of public burdens.

However, if the question is whether the administrative authority is bound by a policy rule (or should depart from it), the policy rule will generally already be deemed to be the result of a weighing up of interests.

3.3: Does the principle of legitimate expectations operate *contra legem*? If the answer is “yes”, what is the justification for that?

The principle of legitimate expectations can operate *contra legem*. A legitimate expectation that an administrative authority will perform an individual juristic act – such as granting a subsidy – which may not in itself be performed according to the relevant legal instrument – for example because the conditions of the subsidy scheme have not been met – can create an obligation to perform the legal act anyway, even though the law does not permit it. In practice, this only occurs in cases of financial disputes between an administrative authority and a citizen. Otherwise, potential interests of third parties are at stake.

In addition to meeting the standard requirements of the principle of legitimate expectations (see the answer to question 2 above), at least the two following requirements must be met:

- a) the non-application of the statutory provision must not prejudice other interests of third parties that are also protected by that provision or weightier public interests (see the answer to question 2 above, under c; see also part IV, question 1 below).
- b) the statutory provision will not be applied only if the expectation cannot be respected via any other legal channel.

3.4 Is the good faith of the person concerned a key feature in determining whether the principle of legitimate expectations can be invoked? What are the criteria?

This is not a core feature of the application of the principle of legitimate expectations, since the principle relates primarily to acts of the administrative authority rather than those of the citizen. However, good faith does play a role in the following ways (see also the answer to part III, question 3):

- 1) aspects relating to a citizen’s expertise in assessing the legitimacy of the expectations (see the answer to Q2, 1 b). A citizen with specialist knowledge (or represented by a lawyer or other expert) is more likely not to be allowed to invoke expectations that might have been created than a citizen without legal expertise (the concept of equality of arms is also a factor here).
- 2) aspects relating to a citizen’s expertise in assessing whether an expectation that has been created by an unauthorised person can still create the appearance of an expectation (see the answer to Q2, 1 b). A citizen with specialist knowledge (or represented by a lawyer or other expert) is more likely to be expected to have known or to have been able to know that the person who created the expectation was not authorised to act in the matter than a citizen without legal expertise (again, equality of arms plays a role).
- 3) If an expectation is created on the basis of incorrect information provided by the citizen (for example, in an application for a permit), any expectation that is created is unlikely to be legitimate.

3.5 Are there other relevant core concepts in the application of the principle of legitimate expectations?

Not beyond the concepts already covered:

- Legal certainty
- Rule of law
- Principle of equality
- Balanced weighing up of interests
- Principle of equality the principle of equality in the discharge of public burdens
- Equality of arms.

PART III: INFRINGEMENTS OF THE PRINCIPLE OF LEGITIMATE EXPECTATIONS

Q1: What methodology do the courts use to test for infringements of the principle of legitimate expectations? Are there doubts about its reliability?

See the answer to Q2 in part II for the general framework of assessment used by the courts. A standard formulation used to express this test in judgments is:

“To successfully invoke the principle of legitimate expectations it is necessary that specific, unambiguous commitments attributable to the administrative authority were made by an authorised person, from which expectations to be respected in law could be derived.”

The formulation and test are different if the expectation is derived from ‘policy’. In that case, the judgment will in practice not refer to an expectation, but only to the policy. The test will then be as follows: “(...) whether the administrative authority could in the given circumstances reasonably have decided to depart from this policy or not.”

From an evidentiary perspective, there are two problems with the actual application of the test:

1. Is it possible to ascertain *whether* an expectation was actually created. There is often no written documentation of verbal commitments. The court will usually require the citizen to show that it is *plausible* that the act created a legitimate expectation. The court will not quickly make this presumption.
2. It is not always clear when an act that cannot be attributed to the administrative authority nevertheless has the *appearance* of being authorised and can therefore create a legitimate expectation. The court will not quickly make this presumption.

The court did not do so even in the following case,. Did a company have a legitimate expectation that it could use a plot for its activities in derogation from the zoning plan? The expectation was created by three acts: 1) a press release from the municipality; 2) a statement by an executive who was a *member* of the body authorised to make the decision; 3) a statement by the mayor who was also a *member* of the body authorised to make the decision. Even this combination of acts was not enough to create a legitimate expectation that could be attributed to the decision-making body.

Q2: Does the application of the principle of legitimate expectations influence the approach taken by public authorities with respect to individual rights? Is it an effective concept?

There are three types of known effects:

1. Authorities show great restraint in making, concrete unambiguous commitments.
2. Civil servants who communicate with citizens often have no authority to make decisions, so that commitments made by them cannot be attributed to the administrative authority. Civil servants also often attach reservations to their statements.
3. The Netherlands has a close-knit system of types of policy (such as regular practices that may or may not be documented, policies that are documented in writing, and policy rules by which authorities are bound by virtue of statutory provisions; see also the answer to Part I, question 3). The intention is that it will be clear from them which courses of action by the administrative authority a citizen can rely on in practice.

Q3: What remedies are applied in the event of an infringement of the principle of legitimate expectations?

1. Annulment of the decision. For the criteria, see the answer to Part II, question 2.
2. Compensation for the damage that the citizen has sustained as a result of the legitimate expectation that was created. The administrative authority is obliged to

investigate and weigh up whether the costs associated with the occasion when the body infringed the principle of legitimate expectations qualify for compensation. This is more likely to be the case and the interests of the citizen will weigh more heavily if the citizen has performed acts on the basis of the expectation which he would not otherwise have performed, and as a result of which he would be in a disadvantaged position if the expectation is not respected, but the performance of such acts is not essential.

In the Dutch system, in addition to the compensation that the administrative court can award, there are two other routes by which compensation can be secured on the basis that a legitimate expectation was created. In such cases, however, it is not the administrative courts, but the civil courts, that have jurisdiction:

In the first place, a (civil) tort can be invoked. The failure to respect the expectation that was created can produce a claim for damages for tort.

If the basis of the expectation that was created lies in a contract between a public body and a citizen, a claim for damages can also be awarded for non-performance of the contract.

PART IV: OTHER ASPECTS OF THE APPLICATION OF THE PRINCIPLE OF LEGITIMATE EXPECTATIONS

Q1: How do EU law and national law complement one another in the application of the principle of legitimate expectations?

- Where national law applies (exclusively), EU law is not applied. The Community principle of legitimate expectations also do not apply substantively, although naturally there are close similarities between the Community and national principles.
- Where EU law does play a role in the application of national law in a decision of a government body, the national principle applies. In such cases, however, the Community principles of equality and effectiveness must be complied with.
- Where EU law is (directly) applied, the Community principle of legitimate expectations is applied.

In practice, the biggest difference between the national and Community principles is that the national principle *can* be applied *contra legem* (see part II, question 3.3), but the Community principle cannot.

An example: A foundation had been awarded a subsidy that was also approved by the administrative authority. Under national law, the foundation could possibly have successfully invoked the principle of legitimate expectations against a claim for the subsidy to be repaid, since the subsidy had been approved. However, since the subsidy was provided on the grounds of EU legislation and was in breach of that legislation, the principle of legitimate expectations could not be applied *contra legem* and the administrative authority demanded its repayment. Compare the national approach as described in part I, question 3.

Q2: Do the courts refer in practice to the EU Charter in applying the principle of legitimate expectations?

No

Q3: Does the case law of the ECHR play a role in the application of the principle?

No.