



**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: Poland



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The principle of the protection of legitimate expectations has gained a fundamental importance in the sphere of administrative law in Europe and is often regarded as a legal category of equal standing to other legal imperatives such as the principles of proportionality, legality, legal certainty, the precept of reasonableness, and others. It is one of the frequently invoked criteria in regard of which the courts review the legality of the activities carried by the public administration. Given the fact that the principle of legitimate expectations is essentially aimed at strengthening the trust in public authorities, it is undoubtedly expedient to have a closer look at what solutions this principle may offer. Considering the above, the aim of the Questionnaire is to explore the objective, functions and the development of the principle of legitimate expectations, its relation to other principles of law, and the key requirements drawn from the principle at issue.

The questionnaire consists of questions based around the above themes. You are asked to answer the questions on behalf of your member institution, and as far as possible to base them on the judicial practice in your organization. Where no information is available, you are welcome to give your own views and insights.

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)?

The principle of legitimate expectations corresponds with the principle of the protection of citizens' trust in the state and its laws that is well known in the Polish legal tradition, is equivalent to the "*Vertrauensschutz*" concept developed within the framework of the German doctrine and jurisprudence, and derives from the clause of the democratic state ruled by law (Art. 2 of the Constitution of the Republic of Poland).



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

The principle of legitimate expectations, equated, in the broad sense, with the principle of trust, is aimed both at building trust towards public authorities - the state as a whole, made up of governmental and local administration authorities, as well as courts (including administrative courts) - and at promoting stability / certainty of the legislation the state passes or applies. The principle is also based on the foreseeability of the administration's actions.

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?

The principle of legitimate expectations, and the requirement of its protection, have not been named, *sensu stricto*, in any of the national normative acts so far.

However, if we assume that the principle of legitimate expectations is, in other words, the principle of the protection of trust, the situation in this context becomes slightly different from what has been stated above.

As indicated above, the principle of the protection of trust is derived both from the constitutional principle of a state ruled by law, and from the provisions of statutory acts regulating general administrative and fiscal administrative proceedings. According to the Constitutional Tribunal's case-law, the principle of protecting trust obliges the legislator, inter alia, to protect the acquired rights and to protect interests of individuals - judgment of the Constitutional Tribunal of 10 February 2015, ref.no. P 10/11; judgment of the Constitutional Tribunal of 25 November 2010, ref. no. K 27/09).

Pursuant to Art. 8 of the Code of Administrative Proceedings of 14 June 1960 (Journal of Laws of 2016, item 23 - consolidated text, as amended), public administration authorities shall conduct proceedings in such a manner that establishes, among the participants, trust towards public authorities.

Furthermore, pursuant to Art. 121 § 1 of the Tax Ordinance Act of 29 August 1997 (Journal of Acts of 2012, item 749 - consolidated text, as amended), fiscal proceedings should be conducted in a manner that establishes trust towards fiscal authorities.

Compliance with the aforementioned imperative (principle) is conditional upon adherence to all rules governing the course of the proceedings, as set out in the Code of Administrative Proceedings and in the Tax Ordinance Act accordingly (the principle of legality, the principle





of objective truth, the principle of furnishing information, the principle of taking into consideration public interest and reasonable interest of the citizens).

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

Although the principle of trust was introduced by Art. 6 of the Code of Administrative Proceedings that was passed in 1960 (and was based on administrative proceedings regulations dating back to 1928), the development of the said principle was observed, to a large extent, following the reactivation of administrative judiciary in 1980, and following the establishment of constitutional judiciary in Poland in the mid-1980s.

Dynamic development of the principle of the protection of trust (protection of legitimate expectations *sensu largo*) gained in momentum after the political transformation of 1989 and after introduction of the clause of the democratic state ruled by law by the so-called December Amendment 1989 - to the 1952 Constitution of the People's Republic of Poland that was still in effect at that time.

The development of the principle at issue needs to be mostly attributed to the judicature, and especially to the case-law of the Constitutional Tribunal and administrative courts: the Supreme Administrative Court and voivodeship administrative courts.

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?

Such factors as the economic crisis do not restrict, directly, the scope of protection of legitimate expectations / the principle of trust.

The principle of trust / legitimate expectations may be restricted, in practice, by the outcome of the process of the general (social) interest being weighted, by public administration entities, in a specific case, against the legal interest of an individual (citizen).





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?

The principle of legitimate expectations is not an autonomous legal concept, for as already indicated above, it is referred to, in the Polish legal system, as the principle of the protection of trust and stems from the clause of the state ruled by law. It cannot be stated, however, that the principle of legitimate expectations is only effective if applied together with other closely related principles - such as the principle of proportionality or principle of legal certainty. Nevertheless, one needs to point out that it is stressed, in the Polish doctrine, that the principle at issue, aiming to establish trust towards public administration authorities, corresponds with the principle of equality, proportionality, legal certainty and subsidiarity.

Due to the meaning of the principle of the protection of trust (the principle of legitimate expectations), as defined in the constitutional case-law (see the case law of the Constitutional Tribunal referred to under Part II), the principle at issue is evidently interrelated, from the practical point of view, with the principle of the protection of justly acquired rights and the *lex retro non agit* principle.

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?

According to the case-law of the Constitutional Tribunal, the principle of the protection of trust provides for the duty to ensure legal security, to protect acquired rights and interests that are pending, for the ban to apply law retroactively, the requirement to observe the rules of proper legislation, including the duty to observe the principle of sufficient certainty of legal regulations and to ensure the appropriate *vacatio legis* (see the judgments of the Constitutional Tribunal of: 13 April 1999, ref. no. K 36/98 and 10 April 2006, ref. no. SK 30/04).





In accordance with the said principle, the rights that the citizens have been granted by the state must not be of apparent character and must not be unenforceable due to legal or factual reasons, or due to unclear definition of the conditions in which they may be taken advantage of. The principle entails a certain presumption that the lack of a clear definition of the entity obliged to provide financial benefits, in a case in which the legislator passes laws providing a basis to raise such claims, renders the public finance system liable to satisfy the claims in question. The transfer of the negative consequences resulting from faulty and insufficiently precise legal regulations concerned with remuneration, onto employees (beneficiaries of the said regulations) is unacceptable (see judgments of the Constitutional Tribunal of: 18 December 2002, ref. no. K 43/01 and 26 January 2010, ref. no. K 9/08).

The principle of the protection of trust is based on the requirement of legal certainty, i.e. such a set of features describing legal regulations that provide individuals with legal security; enable them to decide about their own actions based on the in-depth knowledge of the rationale behind the activities undertaken by the state authorities, and of the legal consequences that the acts of the individuals may bring about (see judgments of the Constitutional Tribunal of: 14 June 2000, ref. no. P 3/00 and 25 April 2001, ref. no. K 13/01).

The principle in question may be in conflict with other constitutional principles and values, for the implementation of which it is necessary, under certain circumstances, to introduce changes that adversely impact the individual. The individual must always take into consideration that a changes in social or economic conditions may require not only that the applicable law be amended, but also that new legal regulations be effected immediately (see judgment of the Constitutional Tribunal of 16 June 2003, ref. no. K 52/02).

Furthermore, it needs to be stressed, that the principle requiring the protection of trust not only determines the legal situation of citizens, but also protects other legal subjects from the intervention of state authorities (subjects similar to individuals; see judgment of the Constitutional Tribunal of 31 January 2001, ref. no. P 4/99).

The passing of a statutory act in which mutually contradicting terms are used, or which enables its free interpretation, would constitute a violation of the principle under which trust to the state and to the law it passes is protected (judgments of: 22 May 2002, ref. no. K 6/02, 8 December 2009, ref. no. K 7/08).

The need to respect the principle under which trust towards the state is protected requires also that no law be passed that introduces apparent legal institutions. It also required to eliminate legal obstacles that prevent the law in question to be applied, i.e. a situation in which the addressees of a given legal standard are never able to take advantage thereof. Legal regulations should provide individuals not only with legal security, but should also





assume full foreseeability of the degree in which their implementation may impact the legal position of the individual under specific legal circumstances (judgments of the Constitutional Tribunal of: 19 December 2002, ref. no. K 33/02 and 9 June 2004, ref. no. SK 5/03).

The principle enables individuals to decide about their own actions based on the in-depth knowledge of the rationale behind the activities undertaken by the state authorities, and of the legal consequences that the acts of the individuals may bring about. Individuals should be able to determine the consequences of their specific behaviors and of events, based on the law in effect, and should be able to reasonably expect that the legislator will not amend the legal regulations in an arbitrary manner (see the judgment of the Constitutional Tribunal of 14 June 2000, ref. no. P 3/00).

In its case-law, the Constitutional Tribunal stresses also that the legislator must not create regulations offering rights that may not be taken advantage of due to the fact that no procedures required for their implementation are in place (see the judgment of the Constitutional Tribunal of 2 March 1993, ref. no. K 9/92; judgment of the Constitutional Tribunal of 8 January 2013, ref. no. K 18/10).

As far as the principle of protection of legitimate expectations is concerned, administrative courts respect and apply, in the cases they review, the case-law of the Constitutional Tribunal.

The primary problems related to undue respect of the legislator for the principle of trust (legitimate expectations), include failures to pass relevant transitional (intertemporal) regulations.

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?

See also: Part IV of the Questionnaire answer to question Q1.

One of the aspects of implementation of the principle of legitimate expectations (principle of trust) is the ability to revoke an administrative decision, both with the use of regular appeal measures, and by applying extraordinary measures.





Pursuant to Art. 15 of the Code of Administrative Proceedings, the administrative proceedings in Poland are of the two-instance character. The above means that all non-final decisions may be appealed against, upon request of the authorized party, to a public administration body of a higher level compared to the one that has issued the original decision that is being appealed against. The above mentioned principle applies also to decisions issued in the course of extraordinary proceedings. Furthermore, it allows for verification of non-final decisions in the course of the proceedings, by ordinary remedies being applied by the authorized entities. The Code of Administrative Proceedings provides for three types of remedies of appeal: appeal, complaint and the application to reconsider the matter. Verification of the decision issued may only be initiated upon request of a party, not *ex officio*.

Once an appeal has been lodged, another decision is issued, in the same case, by the superior body. The appellate authority may uphold the decision that has been appealed against, provided that it is considered to be legal. It may also revoke the decision in full or in part and provide its judgment as to the substance of the matter, or may, by revoking the decision, discontinue the first instance proceedings. This decision of the appellate authority is final and is not subject to any appeal in the course of administrative proceedings.

In addition to the ordinary remedies of appeal that individuals have at their disposal in order to question a specific decision, extraordinary remedies are available as well. These will be presented below, based on the example of the solutions that are also provided for in the Code of Administrative Proceedings. The said extraordinary remedies include the following:

- 1) reopening of the administrative proceedings (Art. 145-152 of the Code of Administrative Proceedings);
- 2) possibility of quashing or amendment of the final decision at any time, on the basis of which none of the parties acquired any rights, by the public administration authority which issued the decision or by the authority of higher level if it is justified by the public interest or just interest of the party (Art. 154(1) of the Code of Administrative Proceedings);
- 3) quashing or amendment of the final decision, upon consent of a party, unless specific provisions disallows for quashing or amending such a decision, if it is justified by public interest or just interest of the party (Art. 155);
- 4) declaration of invalidity of the decision (Art. 156(1) of the Code of Administrative Proceedings) based on following grounds:
 - the decision has been issued in violation of provisions governing competence;
 - the decision has been issued without legal basis or with gross infringement of law;
 - the decision concerns a matter which has been previously decided under another final decision;
 - the decision has been addressed to a person not being a party to the matter;
 - the decision was unenforceable on the day of its issuance and the unenforceability has been permanent;
 - if enforced the decision would cause an offence punishable by penalty;





- the decision contains a defect which renders the decision invalid by operation of law.

See also: Part IV of the Questionnaire, Q1.

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

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

See the case-law of the Constitutional Tribunal referred to above.

It is, in general, the provision of a statutory act that serves as a normative source of a legitimate expectation of an individual (citizen) to enjoy a certain right or benefit. The statutory norm is implemented, in legal, administrative (fiscal) law-related relations with individuals, by means of an individual administrative act (administrative decision) addressed to the specific individual. Such an act is binding upon the authority.

Those aspects of activity of administrative organs that have been referred to above, such as guidelines, consultations, informal communication (e.g. verbal promises, intentions, correspondence, etc.) are not binding upon individuals.

The principle of trust results in the unacceptability of the situation in which the adverse outcomes of actions undertaken by public administration bodies, are shifted onto the citizen (individual). The above includes, in particular, illegal actions, mistakes made by the administration authority itself, e.g. by improper interpretation of law (see, for instance, judgment of the Supreme Administrative Court of 12 December 2013, ref. no. I SA/Gd 661/03). The adverse consequences of improper advice offered to the citizen by the authority in charge of the proceedings must not be transferred onto the individual as well. Pursuant to the judgment of the Supreme Administrative Court dated 18 April 2005 (ref. no. I SA/Wa 303/04) “any doubts concerning the wording of the application should be settled for





the benefit of the applicant, especially in a situation in which the administration authority has pointed out, to the applicant - as the proper solution - a procedure that has been, essentially, (...) devoid of purpose, from the beginning". The *in dubio pro reo* principle that is known in the Polish penal procedure, has an equivalent adopted in the course of administrative proceedings, namely the obligation to settle any doubts in favor of the citizen.

In its judgment of 23 September 1982 (ref. no. II SA/ 1031/82), the Supreme Administrative Court stated that "rights of an administrative authority (...) must not be interpreted in a manner that enables any doubts, should such arise, to be settled to the detriment of the citizen. To the contrary - the citizen should be given the benefit of the doubt, if not crucial social interest prevents such a solution, as only such an approach may deepen the trust of the citizens to the state authorities".

In its judgment of 12 May 2000 (ref. no. III SA 967/99), the Supreme Administrative Court stated that the principle of legality and deepening trust excludes the possibility of burdening the citizen with the results of a mistake made by a public administration employee. The Wrocław Voivodeship Administrative Court, in turn, assumed, in its judgment of 16 September 2009 (ref. no. III SA/Wr 72/09), that "(...) according to the the principle of deepening trust of the citizens to the State authorities (Art. 8 of the Code of Administrative Proceedings), a party to the administrative proceedings must not bear the negative consequences of the fact that its actions were based on the course of action the administrative bodies have taken so far while examining cases of the same character and with regard to the same party. If the previous practice of the authorities has turned out to be faulty, and the authority has corrected its actions in the next case, the adverse effects for the party, resulting from adaptation to the previous behavior of the authority, should be eliminated by the administration upon its own initiative, instead of burdening the party involved".

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?

See also the case-law of the Constitutional Tribunal, as referred to under Part II, Q1.

3.3. Is the legitimacy of the expectation in question and its legal protection determined by the legitimacy of its source, i.e. can unlawful legal acts create legitimate expectations to the individual who has reasonably relied on these acts? If the answer is affirmative, could





you set out the arguments justifying the recognition of the protection of legitimate expectations *contra legem*. Please provide certain examples from the case-law where applicable.

As a rule, unlawful legal acts must not create legitimate expectations to the individual.

In cases involving elements of EU law, e.g. of fiscal nature, administrative courts follow the CJEU case-law (for instance the judgment in joined cases *Lageder*, C-31/91 to C-44/91, item 34; ECLI:EU:C:1993:132) related to the consequences of mistakes or faults of domestic authorities, as far as application of EU law is concerned, according to which “*a practice of a Member State which does not conform to Community rules may never give rise to a legitimate expectation on the part of a trader who has benefited from the situation thus created*” (see for instance judgment of the Supreme Administrative Court of 17 December 2013, ref. no. I FSK 10/13; as far as cases involving fiscal issues are concerned - see also the judgment of the Supreme Administrative Court of 18 November 2015, ref. no. I FSK 1212/14, as referred to in Part IV, Q1).

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 behavior developed by the judicature in application of the principle? Do the domestic courts differentiate two kinds of situations depending on the fact whether the matter concerns the natural person or private undertaking?

Good faith appears, in the context at issue, in a sense, in the case-law of Polish administrative courts, in cases involving the taxpayer’s right to deduct imposed VAT in relation to transactions related to VAT fraud (see, for instance, judgment of the Supreme Administrative Court of 8 December 2015, ref. no. I FSK 1179/14; judgments of: Voivodeship Administrative Court in Bydgoszcz of 6 May 2015, ref. no. I SA/Bd 157/15; Voivodeship Administrative Court in Gdańsk of 11 March 2015, ref. no. I SA/Gd 1380/14; Voivodeship Administrative Court in Warsaw of 17 July 2015, ref. no. III SA/Wa 3838/14; Voivodeship Administrative Court in Wrocław of 9 October 2015, ref. no. I SA/Wr 1205/15).

See also: Part IV of the Questionnaire, Q1.

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?





Assuming that the principle of legitimate expectations is equivalent to the principle of the protection of trust defined on the constitutional level and in statutory acts - the Code of Administrative Proceedings and the Tax Ordinance Act, key elements related to the aforementioned principle have been presented above, in the answer to question Q1 under Part II (case-law of the Constitutional Tribunal) and in the case-law of administrative courts referred to above.

PART III

The Infringements of the Principle of Legitimate Expectations

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

As far as the case law of the Polish administrative courts is concerned, the principal test of violation of the principle of legitimate expectations is of a two-stage character and is, as a rule, coherent with the guidelines provided for in the CJEU case-law (see, for instance, CJEU judgments of: 10 December 1975, in joined cases *Union nationale des coopératives agricoles de céréales and others*, 95/74 to 98/74, 15/75 and 100/75, ECLI:EU:C:1975:172; of 1 February 1978, case 78/77 *Lührs*, ECLI:EU:C:1978:20; of 16 November 1983, case 188/82 *Thyssen*, ECLI:EU:C:1983:329; of 15 December 1983, case 5/82 *Maizena*, ECLI:EU:C:1982:439; of 14 September 2006, joined cases of *Elmeke NE*, C-181/04 to C-183/04, ECLI:EU:C:2006:563). Administrative courts examine, in the first place, whether actions of public administration organs have resulted in rational expectations on the part of a cautious and prudent entity. Secondly, if the answer to the aforementioned question is affirmative, they examine whether such expectations were justified.

In practice, the test is subject to modifications, depending on the circumstances of a particular case. While analyzing the violation of the principle of legitimate expectations, Polish administrative courts take into consideration, in the first place, such criteria as the character and the degree of the violation identified (e.g. whether the violation is of a flagrant nature), existence and character of the legal regulation serving as a basis for the creation of reasonable expectations, existence (or lack) of case-law explaining the correct interpretation of such a regulation, as well as other circumstances that may impact any potential doubts concerning proper interpretation of the regulation on which the justified





expectations of the individual are based (e.g. well-established practice of administrative authorities, existence of discrepancies in judicial case-law).

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.

In the Polish case-law, the principle of legitimate expectations constitutes a crucial component of the system protecting the rights of individual in disputes with public administration authorities. There are two specific obligations that administration authorities must abide by based on the aforementioned principle (in particular - obligation to strictly observe the law, to carefully investigate the circumstances of each case, to assume a specific position with regard to the requests and claims of the parties, and to take into consideration both the public interest and the reasonable interest of individual, as well as to abide by the principle of equality before law - see, for instance, judgment of the Voivodship Administrative Court in Warsaw of 22 October 2008, VI SA/Wa 1182/08; see case-law of the Constitutional Tribunal referred to under Part II, Q1 of the Questionnaire). This principle provides individual with guarantees of their interests being respected in the case of a dispute with administration authorities, and enables the proper balance between contradicting interests in a given case to be achieved. When controlling the legality of administrative decision, administrative courts are also obliged to assess the fulfillment, by the administration authorities, of the requirements stemming from the principle of protection of trust. In this sense, the said principle serves also as one of the primary criteria for assessment of the legality of actions of public administration authorities.

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?

Pursuant to Art. 78 of the Constitution, "Each party shall have the right to appeal against judgments and decisions made at first stage. Exceptions to this principle and the procedure for such appeals shall be specified by statute.."





Both under the Code of Administrative Proceedings and the Tax Ordinance Act, each party has the right to appeal against a decision of the administrative body of first instance, to the administrative body of second instance. Once procedures before both instances of the administrative authorities have been exhausted, an appeal may be filed to administrative court.

Pursuant to Art. 176(1) of the Constitution, Court proceedings shall have at least two stages..

According to the regulations of the Law on the Procedure Before Administrative Courts of 30 August 2002 (Journal of Laws of 2012, item 1270, as amended; hereinafter “LPBAC”), a final act of a public administration authority (e.g. decision or order) may be appealed against, by the individual, to the voivodship administrative court (court of first instance).

Pursuant to Art. 134(1) LPBAC, the administrative court of first instance shall determine the case within its limits while not being bound by the charges and requests of the complaint and the legal basis invoked. The court is obliged to take into consideration, *ex officio*, all violations of the law, as well as all regulations that should be applied in the case at issue.

Lack of restrictions created by the boundaries of the claim means that the court has the right, and even an obligation, to assess the lawfulness of the administrative act that has been appealed against, even if a given plea in law has not been presented in the claim. The court is not bound by the manner in which the claim has been formulated as well, nor by the arguments used and conclusions, pleas in law and requests presented. Hence, the Voivodship Administrative Court should investigate whether the administrative authority has violated, by issuing the contested decision, the principle of protection of trust (protection of legitimate expectations).

If a party is not satisfied with the court’s judgment, they have the right to lodge, to the Supreme Administrative Court, via a legal representative (attorney, legal counsel, tax adviser, patent agent), a cassation appeal against the judgment of the court of first instance.

Art. 77 of the Constitution, in turn, guarantees that “Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law.” (paragraph 1). The same article reads further that “Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.” (paragraph 2).

The state’s liability for damages caused by unlawful actions of public bodies (hence, also by actions that violate the legal principle of protection of legitimate expectations / protection of trust) has been provided for in detail in the Civil Code.





Furthermore, it needs to be pointed out that the individual has the right, in accordance with Art. 79 of the Constitution, to file a constitutional complaint to the Constitutional Tribunal (“In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution..”).

It needs to be stressed, however, that the Polish concept of a constitutional complaint is of a narrow character and such claims cannot be filed, for instance, against a judgment of an administrative court, but against a specific legal provision that served as a legal basis for the ruling issued with regard to the individual at issue. Hence, the individual may question, by means of a constitutional complaint, constitutionality of a given regulation, basing their claim on the principle of protection of trust (principle of legitimate expectations) resulting from Art. 2 of the Constitution in conjunction with another benchmark for constitutional review, i.e. the fundamental right or freedom, set out in the Constitution, that has been violated in the opinion of the individual.

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?

The case-law of Polish administrative courts concerning the application and interpretation of the principle of legitimate expectations quotes EU law in order to supplement/elaborate on the meaning that the said principle has been assigned in the national legislation. As a rule, Polish administrative courts consider those two systems to be complementary, and the standards they provide for, to be consistent. It should be stressed, however, that the case-law of the European Court of Justice regarding revocation of final administrative decisions





and final court judgments that violate the laws of the EU has considerably improved the procedural safeguards of individuals. At present, if a final fiscal decision violates the provisions of EU law, such a violation serves as one of the reasons to renew the fiscal proceedings. Pursuant to Art. 240(1)(11) of the Tax Ordinance Act of 29 August 1997 (Journal of Laws of 2015, item 613, as amended): “In a case that is concluded by means of a final decision, the proceedings are renewed if (...) a ruling of the Court of Justice of the European Union impacts the administrative body’ position presented in the final decision.”

Furthermore, in order to comply with the CJEU judgment in the case of *Köbler*, C-224/01, ECLI:EU:C:2003:513, an extraordinary procedure may be initiated in the case heard by an administrative court – a motion for a declaration of a legally binding judicial decision unlawful (Section VIIa of the Law on Proceedings Before Administrative Courts of 30th August 2002; Journal of Laws of 2012, item 270, as amended; hereinafter: “LPBAC”). Such a motion may be filed, as a rule, against judgments of administrative courts of the first instance. It is possible, however, to file a complaint based on the same principle, against a ruling of the Supreme Administrative Court, in a situation in which non-compliance with the law results from a flagrant breach of the European Union law rules (Art. 285 a LPBAC). Such a solution enables the individual to be compensated for actions of the judiciary that are contrary to European Union law. In most cases such motions are concerned with situations in which the court has failed to abide by the interpretation of the European Union law presented in a judgment of the Court of Justice of the European Union.

A uniform position has been worked out in the current case-law of Polish administrative courts that respects the principle of primacy of European Union law. If Polish regulations are found to be incompatible with the European Union law, Polish administrative courts apply the “pro-european” interpretation of the domestic law. If no such interpretation is possible, or if it leads to a *contra legem* interpretation, those regulations of the national law that do not comply with the European Union law are not applied. In the case of any doubt as to the correct interpretation of the European Union law, Polish administrative courts often rely on the preliminary rulings procedure (so far Polish administrative courts have filed preliminary questions in over 50 cases).

In those cases in which the claimant questions the legality of an administrative decision due to the violation of the EU principle of legitimate expectations, Polish administrative courts consider it necessary to respect that principle as an element of the European Union’s legal system. Polish administrative courts stress that the principle of protection of legitimate expectations, and the principle of legal certainty constitute a part of the European Union’s legal order. The ability to take advantage of the principle of protection of legitimate





expectations by an entity for which a beneficial judgment has been issued required, first of all, to determine whether the actions of an administration body have resulted in a reasonable expectation, on the part of a cautious and prudent trader, and, then, whether such expectations were of a substantiated character. It is the task of a domestic court to determine whether the national regulations, their interpretation, as well as their application comply with the principle of legal certainty and protection of legitimate expectations.

The aforementioned understanding of the principle of protection of legitimate expectations, and the related CJEU case-law are quoted, for example, while assessing the compliance of Polish regulations concerned with VAT exemptions (see, for instance, judgment of the Supreme Administrative Court of 17 December 2013, I FSK 10/13; judgment of the Supreme Administrative Court of 30 December 2008, I FSK 1561/07). The principle of protection of legitimate expectations is also contrasted with the prohibition of an abuse of law in the case in which the taxpayer conducts business activity solely for the purpose of taking advantage of the privileges provided for in the EU law. Polish administrative courts point out that this type of activity, even if not unlawful, does not deserve protection under the EU principle of legal certainty and the principle of protection of legitimate expectations, as the only probable objective of such activity is to undermine the assumptions of the legal system itself (see, for instance, judgment of the Supreme Administrative Court of 18 November 2015, I FSO 1212/14).

The EU's understanding of the principle of legitimate expectations is also quoted by Polish administrative courts while judging intertemporal issues. Pointing out the lack of the unconditional character of the *lex retro non agit* principle, Polish administrative courts quote the judgments of the Polish Constitutional Tribunal (e.g. judgment of the Constitutional Tribunal of 15 July 1996, ref. no. K 5/96; judgment of the Constitutional Tribunal of 14 June 2000, ref. no. P 3/00; judgment of the Constitutional Tribunal of 25 June 2002, ref. no. K 45/01) which stresses that if the general interest so requires and if substantiated expectations of addressees are duly respected, a legal act may become applicable, in exceptional cases, prior to its publication, provided that this has been stated explicitly. The administrative courts point out that the aforementioned understanding of the principle of legitimate expectations coincides with the standpoint assumed by the Court of Justice of the European Union (especially judgment of 26 April 2005 in the case of *ZOTSiS*, C-376/02, ECLI:EU:C:2005:251; judgment of 6 June 2013 in the case of *Paltrade*, C-667/11, ECLI:EU:C:2013:368). In cases involving customs regulations, Polish administrative courts stress that the European Union law, due to the general interest protected (prevention of distortion of competition on the EU's internal market) and procedures applied while investigating dumping practices, allows to levy final anti-dumping customs duties retroactively, provided that the import of the goods involved is previously subjected to





registration (see, for instance, judgment of the Supreme Administrative Court of 11 February 2016, ref. no. I GSK 1095/14; judgment of the Supreme Administrative Court of 17 December 2015, ref. no. I GSK 583/14).

Intertemporal issues were settled by Polish administrative courts also in the context of permissibility of application of the European Union laws that have not been published in the Polish language version of the Official Journal of the European Union by the date of Poland's accession to the European Union. The issue of legal enforceability and applicability of European Union law acts that were not published, as on the date of accession of a new Member State, in one of the official languages, was initially a subject of differing rulings adopted by the judiciary in those Member States that joined the European Union in 2004. Some judgments stated that legal acts that were not published in the language of a given country may not be considered a basis of obligations on the part of individuals, while others stated that such acts apply (see M. Bobek, *The Binding Force of Babel: The Enforcement of EC Law Unpublished in the Languages of the New Member States*, "Cambridge Yearbook of European Legal Studies" 2007, pp. 45–46). In Poland, the problem arose mainly in the context of applicability of the provisions of the Community Customs Code with regard to importers. When judging the enforceability and applicability of the provisions of the Community Customs Code that were not published in the Polish language version of the Official Journal, Polish administrative courts quoted the consequences of the lack of publication of European Union's legal acts in of the official languages of the European Union that stemmed from the ECJ case-law (judgment of 11 December 2007 in the case of *Skoma-Lux*, C-161/06, ECLI:EU:C:2007:773; judgment of 4 June 2009 in the case of *Balbiino*, C-560/07, ECLI:EU:C:2009:341; judgment of 29 October 2009 in the case of *C-140/08 Rakvere Lihakombinaat*, ECLI:EU:C:2009:667). The administrative courts were pointing out that the general principle of a democratic state ruled by law - provided for under Art. 2 of the Constitution of the Republic of Poland - states that orders and prohibitions issued towards citizens by public authorities should be formulated in a manner that is understandable for those citizens. Otherwise, in a democratic state, the law cannot be expected to be observed by its addressees. Provisions of the Constitution of the Republic of Poland - in particular of Art. 27 of the Constitution - provide no basis for acknowledging that Polish citizens could have been required to know languages other than Polish. Polish administrative courts were stressing that legal acts that provide for legal standards addressed to Polish citizens and Polish entities may be applied by the public authorities of the Republic of Poland only if they have been formulated in the Polish language and published in the relevant official journal. The above applies not only to law acts published by domestic legislative authorities, but to all acts in force on the territory of the Republic of Poland - including acts of the so-called secondary Community (EU) law. As a consequence of the arguments presented above and





taking into consideration both the European and the constitutional framework, it was assumed that an act of EU law that has not been published in the Polish edition of the Official Journal of the European Union must not be applied as a legal basis determining the custom duties of Polish citizens or Polish entities (see, for instance, judgment of the Supreme Administrative Court of 25 July 2013, ref. no. I GSK 821/12; judgment of the Supreme Administrative Court of 19 October 2001, ref. no. I GSK 847/10; judgment of the Supreme Administrative Court of 19 September 2008, ref. no. I GSK 1038/07).

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?

The existing case-law of the administrative courts does not include any judgments in which a decision that has been appealed against would be revoked, primarily, due to the violation of the Charter of Fundamental Rights of the European Union. The reasons of this are two-fold.

Firstly, such a situation results from the doubts, present over an extended period of time, concerning the legal status of the Charter of Fundamental Rights of the European Union. The doubts that existed while assessing the application of this particular legal act in the course of proceedings before Polish courts, resulted from the fact that Poland signed Protocol No. 30 to the Lisbon Treaty. The legal meaning of Protocol No. 30 was a subject of the legal doctrine analysis. Various standpoints were adopted with this regard, some of them opted for complete exclusion of the application of CFREU in those Member States who signed the Protocol, while others pointed out to the lack of legal meaning of the Protocol for the practice of CFREU application. Intermediate positions were presented as well. The doubts presented considerably restricted the extent to which claimants were quoting the provisions of the Charter of Fundamental Rights of the European Union during proceedings held before Polish administrative courts.

Secondly, the allegations of violation of the European Convention of Human Rights raised by the claimants (especially Art. 1 of Protocol 1 to the Convention) and of CFREU (especially Art. 17) are quoted as auxiliary measures in order to support the main arguments pointing out to the violation of the constitutional standard of protection of the right of property. When quoting the provisions of the Convention and CFREU, claimants do not put forward





any other (additional) arguments, accepting the coinciding standards of protection of the right of property, as envisaged under national and European Union laws.

In many cases the allegations of violation of the European Convention of Fundamental Rights are dismissed due to the failure to meet the criterion of “EU-element”. The judgment of the Supreme Administrative Court of 1 June 2015, ref. no. II FNP 1/14, may be quoted as an example here. In the case at issue, the Supreme Administrative Court was examining a complaint in which the claimant demanded that a legally binding judgment of the Supreme Administrative Court be considered unlawful. The claimant based his demand on the alleged violation of EU law (Art. 47 CFREU in conjunction with Art. 6(1) TEU and Art. 6(1) ECHR), stating that the Supreme Administrative Court had wrongly refused to consider, based on the merits, the legal measure the claimant was entitled to, which has deprived him of the right to a ruling by an impartial and independent tribunal. The claimant stated that upholding the judgment that had been appealed against deprived him of the guarantees and procedural rights he was entitled to, which constituted a gross violation of the European Union law.

While examining the complaint for considering a legally binding judgment unlawful, the Supreme Administrative Court stressed that the existence of the “EU element” was of key significance for the entire case. The Member States are obliged to apply Art. 47 CFREU, as quoted by the claimant, only within the scope within which the European Union law is applied by them (Art. 51(1) CFREU). The Charter does not extend the scope of application of Union law beyond the competences of the Union or establish any new competence or task for the Union, or modify competences and tasks as defined in the Treaties (Art. 51(2) CFREU). Art. 6(1) ECHR was quoted by the claimant in conjunction with Art. 6(3) TEU, i.e. only as a provision of European Union law. The Supreme Administrative Court has indicated that the EU joins the European Convention on Human Rights, simultaneously reserving that this accession does not infringe upon the Union’s competence set out in the Treaties. Fundamental rights, as guaranteed under the Convention, constitute a part of the Union’s rights, as a general source of law. Therefore, as it is the case with the principles set out under CFREU, they may be questioned by a national court, as Union law, only if the case at issues is of Union relevance.

The Supreme Administrative court has stressed that the case in which the judgment that has been appealed against was issued was concerned with a 2012 personal income tax liability, i.e. referred to a period of time that preceded Poland’s accession to EU. At that particular time Poland was not obliged to apply EU law. The case in which the judgment that has been appealed against was issued was not, therefore, a case of Union relevance. Hence, the Court could not have deprived the claimant, by means of the judgment that has been appealed against, of the right to tribunal based on Art. 47 CFREU and Art. 6(1) ECHR in conjunction with Art. 6(3) TEU.





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 existing case-law of administrative courts does not provide any examples of a direct reference to the ECtHR case-law when it comes to the application of the principle of legitimate expectations. As indicated above in the case-law of Polish courts, due to the coherent character of the systems of protection of legitimate expectations that exist both under Polish and EU laws, Polish administrative courts assess the objections related to the violation of the principle of legitimate expectations based on the criteria worked out in the case-law of the Constitutional Tribunal. It is worth stressing that when claiming that the principle of legitimate expectations has been infringed upon, the parties base their objections on both regulations of the national law (Art. 2 of the Polish Constitution) and of the provisions of ECHR (in particular the principle of protection of property - Art 1 of Protocol 1 to the Convention). Due to the coinciding character of the standards applied to protect the principle of legitimate expectations that are provided for in the Polish constitutional standard and under the Convention regime, Polish administrative courts usually refuse, while rejecting the allegation of the constitutional standard being violated, to uphold the allegations stemming from the provisions of ECHR.

Clear references to ECtHR case-law, made while examining the plea of the principle of legitimate expectations being violated, are sporadic. The judgment of the Voivodeship Administrative Court in Bydgoszcz of 21 July 2015, ref. no. I SA/Bd 183/15, may serve as a good example here. In this particular case, the claimant stated that the principle of legitimate expectations was violated by the tax authorities qualifying, over a prolonged period of time and in an implicit manner, vehicles imported into the country as lorries. The fiscal authorities were not taking any efforts, over a long period of time, aiming to impose excise duty on the taxpayers. This, in the opinion of the claimant, has resulted in the taxpayers' substantiated conviction that the qualification of the vehicles they were making (as lorries) was lawful, which rendered such vehicles exempt from excise duty payments. The Voivodeship Administrative Court in Bydgoszcz pointed out the right to respect private property stemming from Art. 1 of Protocol 1 to the ECHR, but noted that this right may be restricted in exceptional cases, due to the justified general or fiscal interest of the states-signatories of the Convention. In the Court's opinion, in a situation in which the taxpayer has not submitted an excise duty declaration and has not paid the excise duty paid, the customs authorities were not only authorized, but even obliged to initiate relevant proceedings. In the opinion of the court, the activity of the customs authorities that are





bound by a certain legal framework, both in terms of procedures and substantive laws, cannot be considered as contradicting the ECtHR judgment of 22 January 2009 in the case of *Bulves AD vs. the Republic of Bulgaria* (Application no. 3991/03), in which it was pointed out that the omission of the principle of legitimate expectations in the context of the principle of protection of property reconstructed pursuant to Art. 1 of the Protocol to the ECHR, may lead to the violation of the former. The court indicated that inactiveness or passivity of the authorities, regardless of the reasons thereof, is a phenomenon that is of the undesired character. The authorities cannot be expected, however, in such a situation, not to take any action whatsoever, even if, in the opinion of the taxpayer, such a situation is justified. There are no reasons whatsoever to perceive silence on the part of the authorities as their acceptance of a certain status quo, even if this leads to the individuals being convinced that they are acting correctly. Such an understanding of the principle of legality or protection of legitimate expectations that an individual may have towards public administration authorities would lead to unacceptable - especially under Art. 2 of the Constitution of the Republic of Poland - conclusions that silence on the part of an authority, resulting from oversight or erroneous assessment of events, prevents the authority from taking any correct and lawful actions due to the existence of “legitimate expectations of an individual”.

