



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

### GENERAL REPORT<sup>1</sup>

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

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## Introduction

The principle of legitimate expectations is widely recognized in the member institutions as a general legal principle. This is true for the majority of member institutions which submitted the reports. However, in two member institutions – France and Sweden – there is no formal recognition of the principle save the application of EU law. Nevertheless, here too certain neighbouring legal imperatives or general legal principles exist which to some extent can be comparable to the principle of legitimate expectations. An examination of the application of the principle in the sphere of public administration reveals a considerable amount of parallel thinking regarding the origin, aim, functions, and principal stages of development of the principle. However, the reports also reveal considerable differences in respect of the application of the principle when it comes down to more controversial questions linked to the protection of legitimate expectations such as legal rules on the revocation of administrative decisions, the protection *contra legem* or keeping the balance between competing individual rights and public interest.

Prior to presenting the main insights and approaches set out in the reports, it should be noted that overall twenty reports were received. The answers to the Questionnaire were presented by these member institutions:

<b>Belgium</b>	<b>Finland</b>	<b>Ireland</b>	<b>The Netherlands</b>
<b>Bulgaria</b>	<b>France</b>	<b>Latvia</b>	<b>Poland</b>
<b>Cyprus</b>	<b>Germany</b>	<b>Lithuania</b>	<b>Slovenia</b>
<b>The Czech Republic</b>	<b>Greece</b>	<b>Luxembourg</b>	<b>Spain</b>
<b>Estonia</b>	<b>Hungary</b>	<b>Montenegro</b>	<b>Sweden</b>

The Questionnaire was divided into four parts in order to explore the objective, functions and the development of the principle of legitimate expectations in administrative law and EU law, its relation to other principles of law, and the key requirements drawn from the principle at issue. The questionnaire consisted of questions based around the above themes.

## PART I

### The Development of the Principle of Legitimate Expectations

#### I.1. The Origin and Aim of the Principle

The majority of the reports make references to the rule of law and closely related legal imperative of legal certainty as a principal foundation of the principle of legitimate expectations (e.g. *Germany, the Netherlands, Poland, Cyprus, Hungary, Slovenia, Latvia, Estonia, Lithuania, Bulgaria, Montenegro, Spain, Luxembourg, Greece, the Czech Republic, and Belgium*). In addition to this, other legal imperatives are quoted as additional legal parameters that the principle of legitimate expectations is related to, i.e. the principle of equity (e.g. *the Netherlands, Finland, Ireland*), good faith (e.g. *Germany, Slovenia, Luxembourg, Finland*), prohibition of abuse of discretion (e.g. *Cyprus*),

prohibition of retroactive effect (e.g. *Bulgaria, Montenegro, Finland*), principle of coherence (e.g. *Luxembourg*), *res judicata* of administrative decisions (e.g. *Finland*) and others<sup>2</sup>.

In most of the cases it is noted that the principle of legitimate expectations is based on (founded upon) the constitutional provisions and has been recognized to have a constitutional status (e.g. *Belgium, Greece, Latvia, Lithuania, Poland, Germany, and Slovenia*). Nevertheless, the principle of legitimate expectations has not achieved the same level of legal recognition in all member institutions and in certain jurisdictions it is recognized to be a general legal principle. Moreover, few member institutions do not formally recognize the principle and apply it only inasmuch as the matters fall into the ambit of EU law. In this regard, one should mention *France* and *Sweden*. In *France* the principle of legitimate expectations is only applied as a general principle of the European Union and cannot be invoked by individuals outside the scope of EU law. Nevertheless, the *French* report indicates certain “neighbouring principles” such as legal certainty and the concept of legitimate expectations in connection with the application of the European Convention on Human Rights (hereinafter the ECHR). The same seems to be true in *Sweden*. On the point, the *Swedish* report notes that the principle “*is mainly considered to be a principle within EU-law and does not limit or determine the actions and the capacity of the Swedish legislator or the public authorities outside the area of EU-law*”. However, even there certain manifestations of the principle exist. As the *Swedish* report indicates, “*a variant of the principle is well recognized in the legal practice of administrative courts, first and foremost as a principle concerning the legal force of favourable administrative decisions (gynnande besluts rättskraft)*”. A prohibition of retroactive legislation is noted as another constitutional imperative closely related to the principle of legitimate expectations in *Sweden*.

A progressive development of the principle has brought a rather uniform tendency. Currently, the principle of legitimate expectations is considered to be an autonomous principle in the larger part of member institutions (e.g. *Latvia, Lithuania, Ireland, the Netherlands, Slovenia, partly Finland*). This general principle of law is closely related to (where applicable, corollary of) other legal principles such as legal certainty, *lex retro non agit*, and *droits acquis*. However, the latter fact is not interpreted as meaning that the principle of legitimate expectations is not effective when applied independently. This is further explained by the rapporteur from *the Czech Republic*:

*“The principle is simply so closely connected with others abovementioned (e.g. legal certainty, predictability of legal order, prohibition of retroactivity etc.) that it could be hardly “cut off” from them. In other words we could also say that terms like legal certainty or legal expectations are quite vague therefore they sometimes merge in with each other.*

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<sup>2</sup> In this regard, one can also note less frequently cited legal principles such as the principle of equality. For further details please refer to the report of *Montenegro*.

*At the same time it should be pointed out that these questions are in large measure also thing of theory. <...> For example one our academic author stipulated that “[i]f the principle of proportionality aims to find equilibrium between objectives and interests, then the principle of legitimate expectations balances between the certainty and constancy on one side and need of creation of new decisions with better proportionality of interests and goals on the other.”<sup>3</sup>*

According to the reports, the principle is directed at protecting the individual rights and legal interests in legal relationships between private parties and institutions of public authority. This fundamental aspect of the principle is mentioned in the reports of *Lithuania, Finland, Hungary, Latvia, Bulgaria, and Montenegro* and is in particularly stressed by the rapporteur from *Estonia*:

*“The principle of legitimate expectations protects an individual’s autonomy: for a person to be autonomous he or she must have the opportunity to plan, or at least to a reasonable extent foresee, the consequences of his or her actions. Certainty in the preservation of the law in force must always be protected, if before the complete arrival of the prescribed consequence the legal order changes in such a way that the consequence does not arrive or does not arrive to its full extent. At the same time, nobody can have an absolute right to the preservation of a legal situation. According to the principle of legitimate expectations, everyone must have the opportunity to design their life in the reasonable expectation that the rights given and the obligations set upon him or her by the legal order will remain stable and will not strikingly change in a direction that is unfavourable to the person. However, legitimate expectations do not mean that the restriction of a person’s rights or the termination of their advantages is entirely prohibited. According to the principle of legitimate expectations, everyone has the right to operate in the reasonable expectation that the applied law will remain in force. Everyone must also be able to use the rights and freedoms given to him or her by the law at least during the term established in the law. Therefore, an amendment made to the law cannot break its word in relation to the subjects of the law.”<sup>4</sup>*

Further to the goals that the principle of legitimate expectations is aimed at, the reports also reveal that the principle of legitimate expectations has multifaceted legal nature and proves its efficacy in pursuing various interrelated goals which can be summarized as follows:

- Ensures the trust in state and its institutions. This is one of the main aims of the principle of legitimate expectations set out in the reports of *Poland, Cyprus, Ireland, Lithuania, Hungary, Slovenia, Latvia, Montenegro, Spain, the Czech Republic, and Luxembourg*. As noted in the report of *Poland*, the principle of legitimate expectations in the broad sense may be equated with the principle of trust and is aimed at building the trust in public authorities – the state as a whole, consisting of governmental and local administrative authorities and courts.

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<sup>3</sup> Pomahač, R. Právní principy dobré správy – imaginace či realita? In Právní principy. Pelhřimov: Vydavatelství 999, 1999, p. 191.

<sup>4</sup> See, for example, the judgment of the Constitutional Review Chamber of the Supreme Court of 2 December 2004 in Case No. 3-4-1-20-04 and the judgment of the Supreme Court en banc of 16 March 2010 in Case No. 3-4-1-8-09, available online in English: <http://www.nc.ee/?id=396> and <http://www.nc.ee/?id=1122>.

- Promotes legal certainty, legal stability and consistency. The latter aim is pointed out by *the Netherlands, Hungary, Germany, Slovenia, Estonia, Latvia, Montenegro, Ireland, Spain, Luxembourg, the Czech Republic, and Greece*. As it was summarized in the report of *Luxembourg*, the principle of legitimate expectations combines the overall aim of maintaining and strengthening to the extent possible the trust of the individuals in the continuity and predictability of the administration. As stressed in the report of *Germany*, the principle protects against unfounded legal changes brought by the actions of both the legislature and administration. In this regard, it is noted that the principle of legitimate expectations “*aims to protect legitimate dispositions of individuals from changing assessments of the legal situation (administration) and changes in the legal framework (legislature)*”. However, according to the report of *Ireland*, attention should be paid to the fact that legal certainty “*<...> 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.*”
  
- Protects against arbitrariness of administration (*the Netherlands, Greece*) and promotes good administration (e.g. *Ireland*) and administrative efficacy. The latter aspects are accurately observed by the rapporteur from *Bulgaria* noting that the recognition of legitimate expectations is not only about fairness to the individual and control of administrative power, it is also a powerful means of administrative efficacy: “*Administrative efficacy is an aspect of the wider notion of good administration, the enforcement of which is an important part of modern judicial review. The law should ensure that administrative action is based on a mix of short-term exigencies and more long-term considerations. Individual planning becomes difficult or impossible if law and policy are changed too often and too abruptly. Moreover, frequent changes may undermine individual rights by creating uncertainty about the boundaries of those rights. The legal protection of legitimate expectations by administrative law is a way of giving expression to the requirements of predictability, formal equality, and constancy inherent in the rule of law*”.

Due to the fact that the principle of legitimate expectations is usually recognized as a general legal principle it is uncommon to explicitly establish it in the legal acts. Every individual who has reasonably relied on the institutions of public authorities can invoke the principle irrespective of whether the principle is expressly set out in the positive law. The majority of the reports indicate that there are no explicit references to the principle of legitimate expectations (e.g. *Hungary, Poland, the Netherlands, Cyprus, Slovenia, Bulgaria, Luxembourg, the Czech Republic, and Greece*). Moreover, enshrining the principle in the legal regulation seems to be rather an uncommon practice in member institutions. One should note *Finland, Latvia, and Spain* as exceptions to the aforementioned general trend. There general acts on administrative procedure expressly set out that the administration shall act in a manner consistent with the protection of legitimate expectations.

Despite the fact the principle of legitimate expectations is rarely explicitly declared in general acts on administrative procedure, the principle reveals itself in various provisions of these acts and specialized legal regulation:

- (1) Firstly, the principle is related to the legal provisions of legal acts regarding the duty on the part of the public bodies to act in a consistent manner (e.g. *Latvia*<sup>5</sup>, *Cyprus*<sup>6</sup>, *the Czech Republic*<sup>7</sup>) or in a manner that establishes trust (*Poland*<sup>8</sup>). The principle is also linked to the legal provisions laying down the duty on the administration to respect its previous policies (*the Netherlands*<sup>9</sup>, *Bulgaria*<sup>10</sup>).
- (2) There is also a tendency to relate the principle of legitimate expectations to the legal provisions regulating the revocation or withdrawal of administrative decisions (e.g. *Germany*, *Estonia*, and *Luxembourg*). In this regard, *Germany* seems to have the most detailed legal rules. Sections 48 para 2 and 49 of the German Administrative Procedure Act provide for a certain protection of legitimate expectations.
- (3) The legal protection to the individual who reasonably relies on the acts of public bodies is also provided by the legal provisions regarding the correction of mistakes in administrative decisions. For example, both rapporteurs from *Finland* and *Latvia* note that the principle reveals itself in the legal provisions directed at remedying administrative errors. In *Latvia* Section 10 of the Administrative Procedure Act provides that „*An institution's error, for the occurrence of which a private person cannot be held at fault, may not cause unfavourable consequences for the private person*“. Meanwhile, in *Finland*, Section 50 of the Administrative Procedure Act sets out that „*the consent of the party involved is a*

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<sup>5</sup> As noted by the rapporteur from *Latvia*, „[t]he principle of legitimate expectations is stipulated in Section 10 of the Administrative Procedure Law. Foregoing section provides that a private person may have confidence that the actions of an institution will be legal and consistent. An institution's error, for the occurrence of which a private person cannot be held at fault, may not cause unfavourable consequences for the private person“.

<sup>6</sup> Report of *Cyprus*: „Although there is no explicit provision in the General Principles of Administration Law (Law 158(I)/99) safeguarding legitimate expectations, it is provided that the Administration will not act inconsistently, contradictory, in bad faith or in a way aimed at deceiving the citizen. It is also provided that it is not permissible for administrative acts to be contrary to representations or information provided by the competent authorities if the representations and the information is consistent with the law.“

<sup>7</sup> Report of the *Czech Republic*: „On the other hand we can surely find the principle implicitly mentioned i.a. in § 2(4) of the Code of Administrative Procedure which expresses principle “*de similibus idem est iudicandum*” i.e. the aspect of the principle of legitimate expectations that similar cases shall be decided in the same way.“

<sup>8</sup> Report of *Poland*: “Pursuant to Art. 8 of the Code of Administrative Procedure of 14 June 1960 (*Journal of Acts of 2016, item 23*), public administration authorities conduct the proceedings in a manner that establishes, among the participants, trust towards public authorities.”

<sup>9</sup> Report of the *Netherlands*: “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.”

<sup>10</sup> Report of *Bulgaria*: „In the Bulgarian legal system this principle is reflected in the art. 6 of the Law on Limiting Administrative Regulation and Administrative Control on Economic Activity and used for the purposes of proceedings under this special law. According to this principle, the administrative body should be disclosed policy that will follow when issuing administrative decisions and stick to it; any change to the consistent practice of the bodies should be motivated. Similar wording exists in art. 13 of Administrative Procedure Code under which the administrative authorities promptly make public the criteria, internal rules and practice in the exercise of its discretion in applying the law and achieve its objectives.“

*requirement for a correction of the decision if the correction is to the detriment of that party. However, the consent is not required if the error is obvious and has arisen from the conduct of that party as the party cannot have legitimate expectations concerning the administrative decision in question.”*

- (4) The reports also reveal that the protection of legitimate expectations is frequently related to the provisions of specialized legal regulation, in particular the tax laws (e.g. *Finland, Greece*) or subsidies (e.g. *the Netherlands*).

Thus, there is no common position regarding the expedience of the codification of the principle. As *Latvia's* and *Finland's* experiences have proved, having established the principle of legitimate expectations in the Law on Administrative Procedure encouraged further development of the principle. Meanwhile, the rapporteur from *the Netherlands* points out that here the legislator is very mindful about not impairing the legal development of the principle via the case-law of administrative courts. Due to this, the principle is not codified in the General Administrative Law Act. Nevertheless, having in mind subjective nature of the principle, it seems that consideration should be given to the question of whether a more detailed and coherent legal regulation could ensure a better protection of individual rights and legal interests. In this regard, the rapporteur from *Hungary* points out that “*the principle of legitimate expectations would be able to strengthen trust in public authorities if legal acts regulated it not only on the level of principles, but also content-wise and additionally, if they contained detailed rules about its execution in order to make the realization of the principle more efficient.*”

## I.2. The Principal Stages of the Development

As can be seen from the reports, the development of the principle was not a unified process in Europe. The time of the recognition of the principle and the principal stages of its evolution vary from member institution to member institution. For example, the rapporteur from *the Netherlands* points out that the roots of the principle understood as a corollary of the principle of good administration can be found as early as in 1930s. Meanwhile, the rapporteur from *Poland* refers to the Code of Administrative Procedure of 1960. Even though the data provided in the reports leaves some uncertainty regarding the question when the principle of legitimate expectations has been first introduced to the national legal orders, it can be established that the principle has paved the way for a more widespread recognition and coherent application in the case-law in the nineties and early noughties respectively.

There is also no single reason that prompted the development of the principle. First of all, a group of member institutions can be indicated which relates the development of the protection of legitimate expectations to the development of the principle of sound administration (e.g. *the Netherlands, Montenegro*). The report of *the Netherlands* reveals a rather substantial experience regarding the development of the principle of legitimate expectations as part of the doctrine of “General principles of good administration”. The rapporteur from *the Netherlands* notes these important landmarks in the evolution of the principle:

*“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”.*

In the larger part of the reports it is pointed out that the development of the principle has been a response to the changing social and economic policies. In this regard, the restitution process (e.g. *in Estonia, Lithuania, the Czech Republic*), the economic recession and austerity measures (e.g. *Estonia, Lithuania, Latvia, Slovenia, Spain, Greece, the Czech Republic*; however, for the divergent view please see the reports of *Cyprus, Bulgaria, and Luxembourg*) and changes in the tax regime (e.g. *Estonia, Finland*) have been noted as significant context for the development of the principle. On this point, the experience of *Estonia* provides an illustrative example:

*“The development of the principle of legitimate expectations resulted from the need to react to perfidious behaviour of the legislator. The most well-known case on legitimate expectations is an early 1994 decision, in which the Court derived legitimate expectations from the general principles of law. In this case, the law prescribed a five-year tax exemption, which was repealed before the expiry of the term. The court later declared the legislative amendment invalid because “an amendment made in the law cannot break its word towards the subject of the law”.<sup>11</sup> Cases from 1998 and 1999 regarding ownership reform amendments must also be highlighted, where the principle of legitimate expectations was applied in relation to proceedings that had already been initiated for property compensation where, due to the amended legal order, the applicants*

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<sup>11</sup> Judgment of the Constitutional Review Chamber of the Supreme Court of 30 September 1994 in Case No. III-4/A-5/94, available online in English: <http://www.nc.ee/?id=482>.

lost their right to receive compensation.<sup>12</sup> In a newer case, the Constitutional Review Chamber of the Supreme Court completely disregarded the right to engage in entrepreneurial activity, applying the principle of legitimate expectations as a fundamental right when considering the constitutionality of a 100,000 euro deposit obligation for the sellers of liquid fuel with a 16 day advance notice.<sup>13</sup>

Even though making explicit references to the principle in the legal acts is not a widespread practice, the member institutions which implement it point, in one voice, that setting out the principle in the positive law has served as important factor for further development of the principle. This is the case in *Finland*, *Latvia*, and *Spain*. As noted by *Finland*, “[t]he principle of legitimate expectations can not be said to have been included in the most traditional principles of Finnish administrative law, that is equality, objectivity, proportionality and *détournement de pouvoir*. After the entering into force of the APA 2003, the principle of legitimate expectations is now recognized as a fundamental principle of Finnish administrative law as it is now specifically noted besides these most traditional principles stated in the Section 6 of this Act, as mentioned above.”

In this context, it should also be noted that the vast majority of the reports indicates that the case-law of the European Court of Human Rights (hereinafter the ECtHR) and the case-law of the Court of Justice of European Union (hereinafter the CJEU) are important sources prompting the development of the principle in national legal orders. This comes as no surprise keeping in mind that the principle of legitimate expectations has been evolving in member institutions much later than it was developed in the jurisprudence of the ECtHR or the CJEU:

- The influence of the CJEU on the development of the principle in national legal order has been noted in the reports of *Latvia*, *Bulgaria*, *Hungary*, *Finland*, *Luxembourg*, *Sweden*, *France*, and *Spain*. In this regard, judgment of 22 March 1961, *S.N.U.P.A.T. / ECSC High Authority* (42 and 49/59, ECR 1961 p. 101), judgment of 13 July 1965, *Lemmerz Werke / ECSC High Authority* (111/63, ECR 1965 p. 677) (report of *Spain*), and judgment of 20 March 1997, *Alcan* (C-24/95, ECR 1997 I-01591) (report of *Latvia*, *Germany*) are mentioned. As indicated in the reports of *Latvia* and *Finland*, the influence of the case-law of the CJEU is mostly felt in the area of reduction of the amount of agricultural aid.
- Meanwhile, the impact of the case-law of the ECtHR has been pointed out in the reports of *Bulgaria*, *Hungary*, *Lithuania*, *Finland*, *France*, *the Czech Republic*, and *Sweden*. The rapporteur from *France* mentions that in the fiscal area the Conseil d'État has referred to the concept of legitimate expectations developed by the ECtHR in applying Article 1 of Protocol No. 1 to the European Convention on Human Rights. Article 1 of Protocol No. 1 has had its impact on the perception of legitimate expectations also in *Hungary* and *Cyprus* (see *inter alia* judgment of 14 May 2013 *N.K.M. v. Hungary*, application No. 66529/11). According to the reports, the impact of the ECHR is in particularly felt in developing the principle of legitimate expectations in *the Czech Republic* and *Lithuania*. The rapporteur from *the Czech Republic* indicates the case-law of the European Court on Human Rights and the right to protection of property “[a]s the most important “accelerators” in development of the

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<sup>12</sup> Judgments of the Constitutional Review Chamber of the Supreme Court of 30 September 1998 in Case No. 3-4-1-6-98 and of 17 March 1999 in Case No. 3-4-1-2-99, available online in English: <http://www.nc.ee/?id=459> and <http://www.nc.ee/?id=453>.

<sup>13</sup> Judgment of the Constitutional Review Chamber of the Supreme Court of 31 January 2013 in Case No. 3-4-1-24-11.

principle. On the subject, *Lithuania's* report further notes that “*in cases lodged against Lithuania the ECtHR has revealed a whole series of problematic issues arising from the failure to respect legitimate expectations and on numerous occasions has emphasised that the principle of good governance together with the legal imperative at issue may impose on the authorities an obligation to act promptly and consistently*<sup>14</sup>.”

Having summarized overall reports, it can be assumed that the development of the legitimate expectations has been prompted by the shifting attention from the administration to the protection of individual rights and legal interests. The latter aspect is well captured and explained in the report of *Finland*:

*“In Finnish administrative law, the importance of the protection of individuals in relation to the public administration has been strongly underlined for a long time. It has had a strong bearing in administrative law and it has been frequently and repeatedly used in legal reasoning. This being so, however in legal dogmatics traditionally, the major principle was that of conformity of administration to law and not, for instance, the concept of subjective public rights of individuals. The starting point predominant here for major concepts and principles of administrative law was that of administration or administrative decision-making.*

*Since about the turn of 1990's the perspective of the rights of individuals has been strengthened in the legislation due to for instance the Reform of the Fundamental and Basic Rights in the Constitution of Finland in 1995 and to Finland's accession to the European Convention of Human Rights in 1990. At the same time, concepts that outline the legal position of individuals, such as subjective public rights of them, have been used ever more frequently. The introduction and acquaintance of the principle of legitimate expectations can be seen as a part of this development, stressing the legal position of individuals, not only on the level of legal reasoning and on the content of administrative law but even on the level of legal concepts and organized structure of law.”*

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<sup>14</sup> The European Court of Human Rights. *Judgment of 12 November 2013 in the case of Pyrantienė v. Lithuania, application No. 45092/07; Judgment of 10 December 2013 in the case of Nekvedavičius v. Lithuania, application No. 1471/05; Judgment of 6 March 2003 in the case of Jasiūnienė v. Lithuania, application No. 41510/98; Judgement of 27 May 2014 in the case of Albergas and Arlauskas v. Lithuania, application No. 17978/05; Judgment of 14 October 2014 in the case of Paplauskienė v. Lithuania, application No. 31102/06; Judgment of 21 October of 2014 in the case of Digrytė Klibavičienė v. Lithuania, application No. 34911/06.*

The reports have not revealed any substantial intentions in the member institutions to limit the application of the principle of legitimate expectations. On the contrary, certain insights in the reports give grounds on assuming that the principle of legitimate expectations is currently very much in the stage of development aimed at the clarification of the concept.

Based on the reports, it is reasonable to consider that further development of the principle will be increasingly relied on the case-law of the CJEU. In this regard, one can note the insights provided by the *Swedish* rapporteur stating that *“the Supreme Administrative Court has modified the extent of this main principle [that the applicable law in a case is the one in force when the adjudication takes place] by referring to EU-law and the principles of proportionality, legal certainty or security and legitimate expectations. This reference to general principles of union law was made even though the case did not concern union law as such.”* Similarly, according to the *Irish* rapporteur, *“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.”*

Nevertheless, certain concerns regarding the further application of the principle have been also raised and can be summarized as follows:

- The *French* report notes that the principle of legitimate expectations is foreign to the legal tradition in France since it is based on the subjective view of law. It is added that the principle of legal certainty applied in the cases regarding the prohibition of retroactive effect and the duty to set out transitional provisions help to achieve a very similar result to that of the principle of legitimate expectations. The aforementioned aspect is also mentioned in the *Bulgarian* report stating that less intensive application of the principle may be related to its lack of autonomous nature since it is applied together with other principles and legal norms.
- It follows from the *Bulgarian* report that the limitations of the principle stem from the fact that this principle is not expressly formulated in positive law but it is derived from the explicit wording of the other principles such as legal certainty, predictability, and publicity.
- Meanwhile, the report of *the Netherlands* points out certain issues regarding effective application of the principle: *“<...> 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.”*

## PART II

### The Application of the Principle of Legitimate Expectations

#### II.1. The Application of the Principle and Legislative Procedures

The reports reveal that in most of the cases the principle of legitimate expectations has not established itself as an autonomous legal imperative binding the law-making bodies. Generally it operates under the umbrella of (or in combination with) the prohibition of retroactive legislation.

In order to gain a better understanding of the afore-mentioned prohibition, it might be useful to have a closer look at the *Germany's* case:

*“If the principle of legitimate expectations is to be positioned against the legislature, the German Bundesverfassungsgericht (Federal Constitutional Court) activates it as a criterion for assessing resp. justifying retroactive effects of new disadvantageous legal provisions.*

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

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

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

In their consideration how and if the principle of legitimate expectations binds the legislative bodies, the majority of reports stresses that the person relying on the principle cannot expect to maintain the status quo (e.g. *Latvia, Cyprus, Estonia, Lithuania, Spain, Poland, Ireland, the Czech Republic, and Greece*). For example, in *Latvia*, “[t]he Supreme Court has recognised that the principle of legitimate expectations does not exclude an opportunity for the state to alter existing legal regulation. When altering legal regulation, the state must observe rights, preservation or implementation of which the person might expect for. The principle of legitimate expectations demands that the state, when altering legal regulation, would observe reasonable balance between individual’s expectations and interests, which are the reason for amending of regulation <...>.” In the

same manner the rapporteur from Cyprus explains that “<...> there is no recognized right to indefinitely maintaining legislation.” The delicate line between preservation of the established legal regime and the legislature’s right to amend the legal regulation is further discussed by the rapporteur from Estonia: “Trust in the permanence of the law in force must always be protected, if before the complete arrival of the prescribed consequence the legal order changes in such a way that the consequence does not arrive or does not arrive to its full extent. At the same time, legitimate expectations do not mean that the restriction of the person’s rights or the termination of their advantages is entirely prohibited.”

In ensuring the respect for legal certainty and legitimate expectations in the sphere of legislative procedures, the reports indicate that the main emphasis is placed on few fundamental requirements addressed to the law-making bodies.

First of all, to this end the member institutions highlight the need to provide for the transitional legal regulation (*Poland, Germany, Lithuania, Belgium, the Czech Republic*). The rapporteur from Poland reveals that “[t]he primary problems related to undue respect of the legislator for the principle of trust (legitimate expectations) include failures to pass relevant transitional (intertemporal) regulations“. The significance of transitional provisions is further illustrated by enlightening example from the case-law provided in the report of the Czech Republic:

*“The Constitutional Court, however, intervenes only when there is interference with the constitutional order and act’s inaccuracy, uncertainty and unpredictability extremely violate fundamental requirements imposed on a law under conditions of the rule of law<sup>15</sup>. Such violation was found by the Constitutional Court in the amendment of the former Czech Civil Code (Act No. 40/1964 Coll.) by the Act No. 229/2001 Coll. which had annulled the transitional provision of § 879c of the former Civil Code stipulating acquisition of title to land property on the basis of its permanent use only a day before the addressees should have become the owners pursuant to the annulled provision. The Constitutional Court ruled that “the legislator violated one of the fundamental principles of the rule of law i.e. principle of legal certainty and trust in law as implies Art. 1(1) of the Czech Constitution. By changing rules basically a day before the time limit set for the acquisition of the title the legislator resigned from its moral duty to set an example in respecting the law. The intervention of the legislator appears strongly arbitrary. Such procedure impairs the trust in law, which is one of the basic attributes of the rule of law. The proceeds of the legislator did not correspond to the fundamental principles of rule of law, among which the principle of predictability of the law, its clarity and its cohesion.”<sup>16</sup>*

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<sup>15</sup> Judgment of the Constitutional Court, No. Pl. ÚS 56/05, No. 60/2008 CC Reports.

<sup>16</sup> Judgment of the Constitutional Court, No. Pl. ÚS 2/02, No. 278/2004 Coll.

As regards amendments of legal regulation and the protection of subjective rights, particular attention is also given to the establishment of adequate *vacatio legis*. This aspect was in particularly stressed in the reports of *Poland*, *Lithuania*, *Estonia*, and *Germany*. On this point, the report of *Estonia* puts forward an example from the case-law of the Supreme Court on implementation of *vacatio legis* requirement:

*“The Supreme Court has also declared a legislative amendment as unconstitutional in a case where fuel sellers, who had already been registered with a longer term, were obligated to submit a new registration application within 2.5 months from the entry into force of the legislative amendment, and to pay a significantly larger deposit than before (in the case of a small enterprise complainant it was 81 times greater than before). For the Supreme Court, the short vacatio legis became decisive – in addition, the Court found that for the enterprise to be able to reorganise its economic activities for the purpose of continuing its business, the vacatio legis must also take into account that the enterprise should be able to leave the market in normal conditions if it wanted. Thereby, the situation must also be considered where the enterprise tries to first find opportunities to comply with the new requirements (e.g. it could apply for a reduction of the deposit from the tax administrator, try to get a bank’s surety, or find another additional deposit), but decides to leave the market upon failing to find such opportunities. 2.5 months was an unreasonably short time for this process.”*

Another example for the implementation of *vacatio legis* is provided in the report of *Lithuania*:

*“The imperatives of the principle presuppose that under certain circumstances it is incumbent on the legislator to establish a sufficient transitional period (vacatio legis) once it decides to amend the legal regulation. The locus classicus of this approach is demonstrated by the ruling of 16 May 2013 of the Constitutional Court. Petitioner claimed that after the legal regulation had reduced the amounts of the maternity (paternity) benefits to be awarded as from 1 July 2010, the legitimate expectation of the persons to whom those benefits had not been awarded and/or paid, however, they would have been awarded as from 1 July 2010, to receive the benefits in the amounts established in the valid legal acts, was violated. The Court pointed out that the changes in the legal regulation must be made in a manner so that the persons whose legal status is affected by those changes would have a real opportunity to adapt to a new legal situation. It was established that the application of amended legal regulation would start after nine months from its official publishing (entry into force). The Court held that such a vacatio legis should be assessed as a sufficient one, since it created preconditions for the persons for an appropriate preparation for the planned changes.”*

However, as noted in the report of *Poland*, “[t]he individual must always take into consideration that a shift in social or economic conditions may require not only that the applicable law be amended, but also that new legal regulations be effected immediately”. The same aspect is also highlighted in the report of *Belgium*.

In addition to the requirements to provide for transitional legal regulation and adequate *vacatio legis*, the report of *Lithuania* indicates one more legal measure aimed at the protection of legitimate expectations in the face of legal changes. As noted in the report, under certain circumstances, in order to comply with the principle of legitimate expectations it is incumbent on the legislator to provide for a mechanism of compensation:

*“Mostly the compensation mechanism for frustrated legitimate expectations is required where the legislator amends the legal regulation in a way which restricts or denies the rights of individuals who have acquired them under the previous legal regulation. In this regard one should mention the Ruling of 13 May 2005 of the Constitutional Court<sup>17</sup>. The Court stated that individuals who had implemented previously valid legal regulation and acquired the right to form and rent land plots for hunting had certain expectations to use those plots. The Court held that where these acquired rights were adversely affected by the legislative amendments, the legislator should have provided for a compensatory mechanism. Having established that the law did not provide for the compensation, the Court stated that the legal regulation in question breached the principle of the protection of legitimate expectations.*

*The compensation aspect for frustrated legitimate expectations may be also well analysed in the context of cases concerning the reductions in social allowances. The widespread recession due to the economic crisis in 2008 caused the Lithuania’s government to reduce old age pensions, parental leave allowances and many other benefits paid from the state budget. Most of those decisions established by the laws were challenged before the Constitutional Court<sup>18</sup>. The Constitutional Court <...> stated that when there is a particularly difficult economic and financial situation in the state and when due to this there is a necessity to temporarily reduce the awarded and paid pensions in order to secure vitally important interests of the society and the state, the legislator is entitled to reduce respective benefits. In regard of old age pensions the Constitutional Court has noted that the parliament is under obligation to establish a uniform and non-discriminatory scale of reduction of pensions whereby the pensions would be reduced in a manner not violating the principle of proportionality<sup>19</sup>. The Constitutional Court emphasized that such reduction must be temporary and grounded upon the circumstances of the extremely difficult economic and financial situation in the state, as, for instance, the state is unable to collect the state budget revenue and such situation in the state is not short-termed. What is more, the Constitutional Court stated that in these cases the legislator must provide for a mechanism of compensation for incurred losses to the persons to whom such pensions were awarded and paid before the reduction.*

*It should be noted that the case is treated differently where maternity (paternity) benefits are concerned. According to the Constitutional Court, legitimate expectations are not disregarded where no compensation for the reduced parental leave allowances is available to their recipients. The different approach was justified by the specific nature of parental leave allowances. The Constitutional Court has emphasized that these allowances are time barred and have a very*

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<sup>17</sup> The Constitutional Court of the Republic of Lithuania, Ruling of 13 May 2005.

<sup>18</sup> Ruling of 6 February 2012 of the Constitutional Court concerned the reductions in old age pensions and state pensions paid to officers, Ruling of 29 June 2010 – state pensions granted to judges. Meanwhile, Ruling of 5 March 2013 of the Constitutional Court dealt with the amendments of the legal regulation on parental leave allowances.

<sup>19</sup> The Constitutional Court of the Republic of Lithuania, Ruling of 6 February 2012. In this context it should be noted that the position adopted by the Constitutional Court of the Republic of Lithuania is similar to the one developed by the ECtHR. According to the ECtHR, under similar circumstances it is necessary to ascertain whether the interference in question strikes a fair balance between the interests of the applicant and those of society as a whole. It must be established whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see ECtHR *Valkov and others v Bulgaria*, nos 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05, 25 October 2011; *Wieczorek v Poland*, no 18176/05, 8 December 2009; *Kjartan Ásmundsson v Iceland*, no 60669/00, ECHR 2004-IX).

*definite objective, i.e. to support financially the individuals concerned for raising and bringing up a child at home during the specified period of time<sup>20</sup>.*”

Few reports expressly indicate that the principle of legitimate expectations does not bind the legislature save certain exceptions with regard to EU law or application of the ECHR (*Finland, the Netherlands, France, and Sweden*). As noted in the report of Finland, “<...> *the principle of legitimate expectations is an established principle of administrative law since 1990's. The principle has not in the same way established itself as a principle of constitutional law. Thus, it has not been typical to take it up when discussing legal restrictions concerning the powers of the legislator*”. Further, it appears that this is also the case in *the Netherlands*; however there the application of the principle in the sphere of law-making may be relevant in so far as the case concerns the application of EU law or the ECHR. In this regard, the rapporteur from *the Netherlands* notes that “*the principle of legitimate expectations does not readily bind the legislature in the Netherlands. <...> 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*”. In this connection, one may also find of interest the report of *France*. It is worth noting that, as indicated in the report, the principle of legitimate expectations does not bind the legislative authorities save for the matters falling into the ambit of EU law. However, the most recent jurisprudence on the principle of non-retroactivity of laws presupposes relatively similar restrictions. Even though the legislature is entitled to modify the legal acts, it cannot do so without a sufficient public interest and by failing to give the acquired rights proper legal significance.

While considering the reports on this issue, the report of *Sweden* should feature a separate mention. In *Sweden* not only no principle like legitimate expectations binds the legislature, but also retroactive effects of a new legislation are not generally prohibited. The report reveals that “*Swedish law lacks a general prohibition concerning retroactive legislation*” as it is further explained:

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<sup>20</sup> The Constitutional Court of the Republic of Lithuania, Ruling of 20 November 2013.

*“<...> the Supreme Administrative Court has acknowledged the main principle that the applicable law in a case is the one in force when the adjudication takes place. This presumption can be rebutted by explicit regulation in transitional provisions to the legislation or by an interpretation of the preparatory works of the legislation in question. However, the Supreme Administrative Court has modified the extent of this main principle by referring to EU-law and the principles of proportionality, legal certainty or security and legitimate expectations. This reference to general principles of union law was made even though the case did not concern union law as such. The Supreme Administrative Court found that under the given circumstances it was not reasonable to enforce legislation on environmental responsibility retroactively to the disadvantage of a private party. The Court especially took notice of the fact that the legislator had not expressed a wish for such retroactive application in transitional provisions or in the preparatory works of the legislation.”*

## II.2. The Protection of Legitimate Expectations in the Sphere of Public Administration

In the sphere of public administration the principle of legitimate expectations is mostly applied in connection with the rules on revocation of administrative decisions. As can be seen from an analysis of the reports, legal rules on revocation of administrative decisions remain different in terms of scope.

First of all, it is possible to discern a group of member institutions which has reported a complete legal regime in respect of revocation of administrative decisions established in the general legal acts on administrative procedure (e.g. *Germany, Hungary* (related to the protection of acquired rights), *Finland, Poland, Latvia, and Estonia*). On this point, a distinction is usually drawn on the revocation of unlawful and lawful administrative acts. As has been mentioned above, *Germany* seems to have the most detailed rules on the subject. There the legislature has incorporated the differentiated case-law in section 48 and 49 of the German Administrative Procedure Act:

### ***“Section 48 - Withdrawal of an unlawful administrative act***

*(1) ...*

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

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

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

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

*has in the continuance of the administrative act. The financial disadvantage to be compensated shall be determined by the authority. ...*

**Section 49 - Revocation of a legal administrative act**

*(1) ...*

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

- 1. revocation is permitted by law or reserved in the administrative act itself;*
- 2. the administrative act is combined with an obligation which the beneficiary has not complied fully or not within the time limit set;*
- 3. the authority would be entitled, as a result of a subsequent change in circumstances, not to issue the administrative act and if failure to revoke it would be contrary to the public interest;*
- 4. the authority would be entitled, as a result of an amendment to a legal provision, not to issue the administrative act where the beneficiary has not availed himself of the benefit or has not received any benefits derived from the administrative act and when failure to revoke would be contrary to the public interest, or*
- 5. in order to prevent or eliminate serious harm to the common good.*

*...*

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

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

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

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

Certain similarities can be drawn from the legal regulation in Latvia, where "[r]ights, which were previously granted to a person, and expressions provided by an authority must remain invariable in respect of a private person":

*"Protection of legitimate expectations is related to strict criteria stipulated in the law regarding the revocation of an administrative act. In particular, in accordance with Section 85, Paragraph two, of the Administrative Procedure Law, a lawful administrative act, which is favourable to the addressee, may be revoked upon existence of any of following circumstances: 1) the legal provision envisages revocation of an administrative act or an administrative act contains disclaimer on revocation thereof; 2) the administrative act has been issued under some other condition and such condition has generally not been fulfilled, has not been adequately fulfilled or has not been fulfilled in good time; 3) the actual or legal circumstances of the case have changed, such that had they so existed at the time the administrative act was issued, the institution may have not issued such administrative act. In such case, the administrative act may be revoked within a period of three months from the day the institution comes to know that it is possible to revoke it, but not later than within a one-year period from the day it comes into effect; 4) the actual or legal circumstances of the case have changed such that had they so existed at the time the administrative act was issued, the institution may have not issued such administrative act, and the continuation of the administrative act being in effect affects*

*significant interests of the public. However, in accordance with Section 86, Paragraph two, of the Administrative Procedure Law, an administrative act favourable to the addressee may be revoked if at least one of the following circumstances exist: 1) the addressee has not yet exercised his or her rights, which are confirmed or granted by such administrative act; 2) legal provision permits the revocation of the administrative act or the administrative act contains disclaimer on revocation thereof; 3) the continuation of the administrative act being in effect affects significant interests of the public. If the addressee on the basis of such administrative act has received money or other benefits, the administrative act shall cease to be in effect as of the day of revocation thereof; 4) the addressee has achieved the issue of the respective administrative act by knowingly providing false information, by bribery, duress, threats or other illegal actions. In such case, the institution shall assess the illegality of the actions carried out by the addressee and shall revoke the administrative act as of the day of issue thereof; 5) unlawfulness of the administrative act is so evident that the addressee of the administrative act could be and should be aware of it. <...>.”*

In Estonia, the Administrative Procedure Act also regulates the consideration of legitimate expectations when repealing administrative acts, including for rectifying the earlier mistakes of an administrative authority. This is also the main field where the administrative authorities must take into account the principle of legitimate expectations:

*“According to Subsection 67 (1) of the Administrative Procedure Act, upon the resolution of a repeal of an administrative act to the detriment of a person, the administrative authority shall take into account, among other things, the person’s certainty that the administrative act would remain in force. Subsection 67 (2) of the Administrative Procedure Act establishes that an administrative act shall not be repealed to the detriment of a person if the person, trusting that the administrative act will remain in force, has used the property acquired on the basis of this administrative act, performed a transaction to dispose of his or her property, or changed his or her way of life in any other manner, and his or her interest that the administrative act remains in force outweighs the public interest that the administrative act be repealed. If the public interest outweighs the person’s legitimate expectations, or proprietary damage is caused or will certainly be caused to the person due to the person’s certainty in the administrative act, then this shall be compensated to the person (Administrative Procedure Act Subsection 67 (3)). However, certainty cannot be used as the basis, if: 1) the term for filing an action over an administrative act (generally 30 days) has not yet expired, or court proceedings are ongoing; 2) the possibility for a repeal is prescribed by law or a possibility for the repeal exists in the administrative act; 3) the person has not performed the additional duties related to the administrative act; 4) the person has not used the money or item transferred on the basis of the administrative act for its intended purpose; 5) the person was aware of the unlawfulness of the administrative act, or was unaware thereof due to his or her own fault; or 6) the administrative act was issued on the basis of false or incomplete information submitted by the person, or by fraud or a threat, or as a result of an exercise of unlawful influence on the administrative authority in any other manner (Administrative Procedure Act Subsection 67 (4)).”*

Even though *France* and *Sweden* do not formally recognize the principle of legitimate expectations, the legal rules on the revocation are a constituent part of their legal order too. As it is noted in the report of *Sweden*, “[t]he principle concerning the legal force of favorable administrative decisions implies that a favorable decision of this kind may not be changed or revoked after the individual has received notice of the decision. This applies even if the decision later is found to be incorrect or even in contravention of law. The legal security of the individual is paramount, over and above general public interests. The principle is not written in statutory law but is as a well-accepted principle of administrative law established by case-law. The application of the principle is characterized by a lack of discretionary assessments and considerations of other interests such as social and economic impact. The most important argument in *Sweden* for upholding this strict approach to when a favorable administrative decision can be reviewed or changed has to do with the legal security of the individual. The individual must be able to trust the decisions of the authorities and act accordingly. In this way, the prohibition to change favorable administrative decisions is a procedural safeguard and part of the administrative rule of law. A strict approach in this issue also disciplines the public authorities to strive for accurate and exact decisions in all their duties, which of course promotes good governance and trust in public authorities.” On this point, it should also be noted that there are certain exceptions to the aforementioned principle related to the cases where the interest of the public takes precedence.

It also follows from the indicated group of reports that there are certain differences regarding the legal effects of the revocation of administrative decisions. In this regard, there are distinct rules setting out the conditions on *ex tunc* and *ex nunc* revocation. In addition to this, diverging time-limits for the initiation of the revocation procedure should also be mentioned. The latter differ remarkably. For example:

- In *France* the withdrawal of unlawful administrative acts which create rights can take place within 4 months after their enactment.
- In *Hungary* “[t]he unlawful administrative decision cannot be amended, modified, revoked or set aside if one year has passed since the operative date of the decision, and the amendment, modification, or revocation would compromise the client’s rights acquired and exercised in good faith. (Section 81/B (2), section 115 (4) and section 121 (4) in Administrative Procedure Law). In case of the nullity of decisions – e.g. an administrative decision is annulled because the authority had no jurisdiction, competence or powers for the case in question – this time limit is three years.”
- In *Latvia* “<...> the revocation of the administrative act, in accordance with Clause 1, is permissible within a three-month period from the day when the institution comes to know that it is possible to revoke it, but not later than within a one-year period from the day it comes into effect (Section 86, Paragraph three, of the Administrative Procedure Law)“.

In contrast to the time-limits of revocation, the report of *Spain* indicates that generally institutions can revoke administrative acts at any time. Nevertheless, such revocation should give proper legal significance to the principle of equity, good faith, public interest, individual rights, the passage of time and other.

In this context, it should also be noted that establishing legal regime for the revocation of administrative decisions is not a uniform practice among member institutions and there are jurisdictions where there are no detailed legal rules on the revocation of administrative decisions. For example, the rapporteur from *Lithuania* states that “*[f]inal administrative decision naturally leads the individual concerned to reasonably expect that the initial legal decision will not be amended by the subsequent decision. This is a central aspect of the doctrine of legitimate expectations which is also known as a principle of irrevocability. In Lithuania the scope of this principle is a wide one. Indeed, neither the legislator nor administrative courts have ever recognized the position that the public authorities have an inherent power to amend or withdraw a formal decision. In the Law on Public Administration the Lithuanian legislator implicitly has established that the public authorities do not hold the power to revoke formal administrative decision they adopt. This general rule applies to all types of decisions immaterial of their legal consequences, i.e. lawful and unlawful, favourable, declarative and other formal decisions are all irrevocable in the absence of express statutory power. The single exception to the rule set out in the Law on Public Administration provides that a formal decision may be amended only to the extent necessary to correct clerical errors. <...> The exceptions to the aforementioned rule of irrevocability are only found in the special legal regulation which expressly provides that respective public authorities are entitled to amend or revoke their final decisions.*”

The protection of legitimate expectations in the sphere of public administration is not limited to the legal rules on revocation. In considering the application of legitimate expectations in the sphere of public administration, the rapporteur from *Germany* points out that in the German case-law the principle of legitimate expectations appears not only in cases dealing with the revocation of (unlawful) administrative acts. Further issues are “*<...> intertemporal transition cases in administrative rulemaking (e.g. granting of a transition period with an amendment in the statute law of a public trade association). The principle is also activated e.g. for the request of equal treatment in regard to changes of the execution of administrative discretionary power and as an obligation to consistency in administrative decisions.*”

### II.3. Administrative Acts Capable of Creating Legitimate Expectations

The Questionnaire which had been presented to the member institutions was also aimed at a better understanding of key elements of the protection of legitimate expectations in national legal orders. The reports addressed the various forms of the grounds (sources) for the formation of legitimate expectations. As it is indicated in the majority of the reports, in order to create legitimate expectations precise and consistent acts (in a broad sense) of the administration are required. In this regard, one should note the following important insights:

- The report of *Bulgaria* reveals that “[w]hen checking whether the administrative act is fit to generate legitimate expectations, the court examines some question as to whether the expectation is concrete and does it have an objective character. <...>. Generally there are three criteria for protection of legitimate expectations - an objective criterion - an act of administrative authority, a subjective criterion - formed good faith belief in the existence of certain rights and obligations, and a causal link between them.”
- In order to explain the background of legitimate expectations, the rapporteur from *Latvia* refers to the Law on Administrative Procedure: “In accordance with understanding of principle of legitimate expectations existing in Latvia, inter alia, explanation of the principle of legitimate expectations laid down in Section 10 of the Administrative Procedure Law, the form of action or a decision establishing the expectations does not play crucial role. Significance is granted to circumstances whether 1) the person had something to rely on (expectation was created by clear expression of will of an institution) and 2) whether a person reacted, i.e., relied on it.”
- In this regard, the rapporteur from *Ireland* points out that the representation on which the expectation is based must be communicated directly to the aggrieved party. The representation must also be unqualified and unambiguous.
- A sufficiently detailed framework regarding the sources of legitimate expectations is also provided in the report of *the Netherlands*. The rapporteur lists acts that are regarded as capable of creating legitimate expectations:
  - “- 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). <...>.
  - 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).”

On this point, few reports also stress that the background for legitimate expectations must be of objective nature. In this regard, the rapporteur from *Cyprus* emphasises that legitimate expectation is not considered to be the same thing as anticipation. It is distinct and different from a mere desire or hope. Similarly, this point is noted in the report of *Spain*, stating that the protection of legitimate expectations does not cover any kind of subjective psychological conviction of the individual and is

based only on signs or outward facts that can be regarded as a sufficiently conclusive result of the administration's activities. This view is also complimented by the rapporteur from *Slovenia* noting that “<...> *legal expectation is not a concept without the borders. Future possible rights are not included and a hope also not. It relates only to reasonable expected rights. A party must prove that certain act/decision of the public authorities would change its legal portion. If this is not the case, the principle cannot apply.*”

Nevertheless, it should be kept in mind that the assessment on the subject is highly depended on individual circumstances of the case. In this regard, the rapporteur from *Germany* notes that “[t]heoretically all acts of public authorities could give rise to legitimate expectations. However, it has to be examined very carefully in the circumstances of the individual case, whether a particular behaviour of an authority could give rise to legitimate expectations”. The significance of individual circumstances is also stressed in the report of *Finland*. According to the rapporteur from *Finland*, “[t]he estimation of whether expectations are legitimate and thus are to be protected is finally based on case by case considerations in which the expectations of an individual shall be judged in relation to public and general interests.”

In addition to this, the reports reveal that the public authorities are regarded to be 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.). The passivity and the tolerance of the offence by the authorities as sources of legitimate expectations are also addressed in the reports. However, the information given in the reports does not lend itself to making any further generalisations since considerable differences in respect of the possible background for the formation of legitimate expectations are revealed. *Please refer to the Table below for further details.*

The same is true with reference to the views of the member institutions regarding the protection of legitimate expectations *contra legem* (*please see the Table below for further details*). The reports reveal that under exceptional circumstances legitimate expectations based upon unlawful acts can also be protected. For example, this approach is not foreign to the legal order in *the Netherlands*:

*“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.”*

In contrast to the view quoted, special mention must be made of the reports which state that their legal order does not acknowledge the protection for expectations stemming from unlawful acts of public authorities. In this regard, the report of Cyprus notes: “<...> when the administrative authority has acted unlawfully in the past that does not allow a person to recall the principle of legitimate expectations, unless his expectations are legal. People will normally formulate expectations to the extent that such expectations are recognized and protected by the law. As it is a well established principle there is no equality in unlawfulness.” Similarly, the rapporteur from Slovenia reports that “[i]llegal acts cannot establish legal protection. The same is true for assessment of the vested rights; rights awarded illegally cannot be safeguarded. The same is true if a party could reasonably expected that its right was not awarded legally.”

## The Basis of Legitimate Expectations (or, where applicable, acts binding the administration)

	BE	BG	CY	CZ	EE	FI	FR	DE	GR	HU	IE	LV	LT	LU	ME	NL	PL	SI	ES	SE	Relevant Comments
Individual acts	-	√	√	-	√	√	√	√	√	√	√	√	√	√	-	√	√	√	√	-	<p><b>EE:</b> “The Supreme Court has expressed the position that, in a situation where a person’s right to benefits has been ascertained by an individual administrative act, the person’s certainty must be protected even more strongly than in the case of a benefit arising from the law, because with an individual act the state has expressed its position regarding a specific question, and not just abstractly.”</p> <p><b>BG:</b> “&lt;...&gt; the courts tend to give protection of legitimate expectations arising from the favorable administrative act, rather than the actions of the administration. It is justified in terms of enhanced stability of the legal consequences of the administrative act.”</p>
Interlocutory Acts	-		-	-	x	x	-	-	√	-	-	-	√	-	-	-	-	-	-	-	
Guidelines / Circulars	-	√	-	-	-	√	-	-	√	-	√	-	√	√	-	√	x	√		-	<p><b>IE:</b> “Administrative circulars, which are published statements of policy, are one of the most common ways in which legitimate expectations have been created in Ireland.”</p>
Consultation / Information	-	x	-	√	-	√	-	√	√	x	-	√	√	-	-	-	x	-	√	-	
Informal Communication (verbal promises, correspondence etc)	-	√	-	-	-	x	-	-	x	x	√	√	x	-	-	-	x	x	-	-	<p><b>BG:</b> “Regarding assurances and promises of administrative bodies - they can generate legitimate expectations if there is a clear commitment, i.e. the authority is bound himself to act in a certain way and not just promised to solve the problem”.</p> <p><b>IE:</b> “Indeed, in Webb, the case in which the doctrine was established in Ireland, the applicants recovered on foot of an oral representation.”</p>
Established Practice	√	√	√	√	√	√	-	-	-	-	√	-	√	-	-	√	-	-	-	-	<p><b>EE:</b> “&lt;...&gt; the permanent practice of the administrative authority may give grounds for legitimate expectations to arise, but the protection of trust cannot be applied for the purpose of continuing an incorrect administrative practice.”</p> <p><b>BG:</b> „When the administrative authority shall issue an act or acts, it can be bound by its constant practice. Such cases take place where the</p>

	BE	BG	CY	CZ	EE	FI	FR	DE	GR	HU	IE	LV	LT	LU	ME	NL	PL	SI	ES	SE	Relevant Comments
																					administrative act is a part of a series of administrative acts or similarity is in respect of the same person."
Passivity	-	-	✓	x	✓	x	✓	x	x	✓	✓	x	✓	x	-	x	✓	✓	x	-	<p><b>FR:</b> "The application of new principle "silence is consent" is accepted; however the jurisprudence approaches the question with vigilance."</p> <p><b>IE:</b> "&lt;...&gt; 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."</p>
Contra legem	-	-	x	✓	✓	✓	✓ (EU law)	x	✓	✓	x	✓	✓	x	x	✓	✓	x	x	-	<p><b>CY:</b> "There is no equality in unlawfulness".</p> <p><b>DE:</b> "The principle of legitimate expectations does not have the power to overrule the principle of legality. Therefore an authority cannot be forced to act contra legem (e.g. to grant an unlawful building-permit after having realised the preliminary misestimate). But informal acts like a (mis)information, if at fault, might cause claims for compensation by liability of public authorities."</p> <p><b>PL:</b> „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."</p> <p><b>IE:</b> "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</p>

	BE	BG	CY	CZ	EE	FI	FR	DE	GR	HU	IE	LV	LT	LU	ME	NL	PL	SI	ES	SE	Relevant Comments
																					<p>vires rule, i.e. that a public authority cannot give itself a jurisdiction it does not possess. This rule also applies in relation to legitimate expectations and EU law.”</p> <p><b>NL:</b> “There are, however, possibilities for <i>the contra legem</i> application of the principle in disputes of a financial nature &lt;...&gt;”</p>

- in the report the subject is not addressed explicitly or with satisfactory clarity in order to draw general conclusions
- ✓ the act in question is recognized as a background of legitimate expectations (where applicable, binds the administration)
- ✗ the act in question is not recognized as a background of legitimate expectations (where applicable, does not bind the administration)

## II.4. Good Faith

The majority of the reports reveals that the good faith is one of the basic features of legitimate expectations. As noted in the report of the *Czech Republic*, “<...> *neither mala fides nor abuse of rights enjoy any legal protection. The addressees cannot rely on good faith if they acted undoubtedly in apparent contradiction to law, not even in such a situation when the public authority had unlawfully approved the conduct by its individual legal act*<sup>21</sup>”. The fact that the good faith of the individual concerned is regarded as a core feature is also pointed out in the report of *Finland* stating that “[a]n individual can not successfully appeal to the principle of legitimate expectations if there is his or her conscious illegal action in the background or if the administrative decision has been founded on incorrect or essentially incomplete information he or she has given.”

The concept of good faith is a wide one and covers a great variety of situations, *inter alia* circumstances where the individual concerned ought to be aware of the unlawfulness of the administrative act in question. As noted in the report of *Bulgaria*, “<...> *not only fraud or deception, but even error leads to the rejection of the claim*”. By the same token, the rapporteur from *Latvia* points out that the good faith is related not only to the unlawful activities but also unfair actions in general:

*“Usually, the person acts in good faith, if he or she had not achieved issue of the administrative act by unlawful or, at least, unfair actions. Expectations are not legitimate and, therefore, fair, if the respective person knew or should have known that the respective act was unlawful, or, if the person provided false or incomplete information, counterfeited documents, gave a bribe or performed other actions in bad faith (Section 86, Paragraph two, Clauses 4 and 5, of the Administrative Procedure Law).”*

Indeed, the meaning of what the individual ought to know might turn up to be an extensive one. In this regard, one may find of interest the insights provided by the rapporteur from *Estonia*. It is noted that the national legal regulation sets out certain provisions not only related to good faith of the individual but also to the public authorities themselves. In addition to this, it is mentioned that the complexity of the situation shall be taken into account:

*“<...> certainty cannot be relied on if the person is aware of the unlawfulness of the administrative act, or is unaware of the unlawfulness due to his or her own fault (Administrative Procedure Act Clause 67 (4) 5)), or if the administrative act has been issued on the basis of false or incomplete information submitted by the person, or by fraud or a threat, or as a result of exercising an unlawful influence on the administrative authority in any other manner (Administrative Procedure Act Clause 67 (4) 6)). An exception has in turn been made of the latter in Subsection 67 (5) of the Administrative Procedure Act: the submission of false information does not preclude the consideration of certainty if the submission of such false or incomplete information is caused by an administrative authority, and the person was not and need not have been aware of the unlawfulness of the administrative act.*

*<...> in several cases the Supreme Court has deemed the repealing of an unlawful administrative act to be in conflict with the principle of legitimate expectations if its consequences include reclaiming the benefits given by the act from the person receiving such benefits. For example, in*

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<sup>21</sup> Judgment of the Supreme Administrative Court of 12<sup>th</sup> February 2015, No. 2 As 241/2014-36.

*a case where a dispute arose over the reclaiming of an unemployment insurance benefit, the Supreme Court considered the following circumstances as important: the complainant had used the benefit in good faith for coping with the unemployment; the complainant did not and was not supposed to understand the unlawfulness of the administrative act, as it was a complex legal situation and the complainant could trust in the competence of the official from the Unemployment Insurance Fund; and the complainant had, on the basis of the Unemployment Insurance Fund's promises about the receipt of the unemployment insurance benefit, waived challenging the grounds of his dismissal<sup>22,23</sup> Furthermore, in a case where a dispute arose over whether damage to the health of the complainant, who was a rescue servant, was caused by his or her work (i.e. whether it was an occupational accident), and the different authorities had taken different positions on this issue, the Supreme Court considered reclaiming the benefits prescribed for an occupational accident to be in conflict with Subsection 67 (2) of the Administrative Procedure Act.<sup>24</sup>*

The broad sense of good faith is also peculiar to other jurisdictions. Nevertheless, as noted in the report of *Bulgaria* “<...> even if a person has not done anything objectionable legitimate expectations might not be justified.” This can be further explained by the insights provided in the report of *Germany*: “In the careful examination and the assessment of the circumstances of the individual case, whether a particular behaviour of an authority could give rise to legitimate expectations, good faith of the individual is a necessary but not sufficient requirement. Otherwise there is no trust worthy of being protected. In section 48 of the German Administrative Procedure Act <...> as a specific regulation of legitimate expectations, the legislator explicitly stipulates, that the beneficiary cannot claim reliance when he obtained the administrative act by false pretences, threat or bribery or by giving incorrect or incomplete information or when he was aware of the illegality of the administrative act or was unaware thereof due to gross negligence.”

In this context, it should also be noted that the great majority of the reports does not reveal any differences regarding the question whether the domestic courts differentiate between two kinds of situations depending on the fact whether the matter concerns the natural person or private undertaking (e.g. reports of the *Czech Republic, Greece, Luxembourg, Finland, Latvia* etc.). Only few reports indicated that the good faith of individual concerned is not a key element of the principle. In this regard, one should refer to the views expressed by the rapporteur from *the Netherlands*:

*[Good faith] “<...> 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 <...>: (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*

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<sup>22</sup> The receipt of the unemployment insurance benefit is only prescribed in the case of some grounds for dismissal.

<sup>23</sup> Judgment of the Administrative Law Chamber of the Supreme Court of 24 November 2011 in Case No. 3-3-1-74-11, p. 17.

<sup>24</sup> Judgment of the Administrative Law Chamber of the Supreme Court of 27 November 2014 in Case No. 3-3-1-66-14, p. 28.

*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.”*

## PART III

### The Infringements of the Principle of Legitimate Expectations

#### III.1. Methodology for Establishing the Violations of the Principle

The preceding discussion has considered the concept of legitimate expectations at the legislative and public administration level. We should now shift the attention to the judicial protection of legitimate expectations, particularly to the nature of the legal test applied by the courts in deciding whether to grant the protection to the expectations in question.

The frame developed by the member institutions leaves open the question of precise structure of the test for establishing the infringements of legitimate expectations. In this regard, the reports of *Greece, Luxembourg, the Czech Republic, and France* note that there is no predetermined test or general analytical framework. Even in these cases the acts of the public authorities, giving rise to legitimate expectations, and good faith of the individual concerned are named as elements of legal significance (for further details please see the reports of *the Czech Republic, Greece, and Spain*). It is also pointed out that generally the courts decide the matter on a case-by-case basis.

On the other hand, some of the reports indicate rather settled practices regarding the test (the methodology) applied by the domestic courts for establishing the infringements of legitimate expectations. For example, in *Lithuania* the judicial mechanism in deciding on the protection of legitimate expectations involves a legal test of three steps:

*a) First of all, the court assesses whether there is a legitimate expectation. The doctrine of legitimate expectations requires the individual concerned to prove the existence of a reasonable expectation when it comes to the factual circumstances of the case. The source of legitimate expectations varies. So far it has been recognized by administrative courts that the legal regulation (a loophole of the regulation) per se, final administrative decisions, consultations, and well-established practice of public authorities may give rise to legitimate expectations and other.*

b) On the second step the court evaluates whether the individual in question acted as a prudent person. It is clear from the jurisprudence of administrative courts that the extent of the protection of legitimate expectations is related to the conduct of the individual concerned. Whether the expectations are protected depends on the good faith of the applicant. When the alleged violation of expectations is related to the contribution of the claimant (in the case the individual concerned did not act as a prudent person) the court usually does not grant any protection. However, if the applicant has acted in good faith as a diligent person and the unlawfulness of the decision is related to the acts of the administration, the principle of legitimate expectations is applied to its fullest extent.

c) Finally, the court assesses whether there is a public interest which could trump individual expectations. The public authority may plead that there is an overriding public interest that can justify the adoption of respective administrative decision. However, the protection of legitimate expectations may be restricted only in accordance with the principle of proportionality. Thus, the court will engage into the balancing test where the equilibrium between the public interest against that of the individuals claiming the legitimate expectations is set.

It is also noted by the rapporteur from *Lithuania* that the structure of this test is inspired by approach of the ECtHR: “The ECtHR expresses the view that even in the cases of expectations arising from public authorities’ actions contrary to the law; it is necessary to identify clearly the aims pursued, the individuals affected and the measures to secure proportionality. The requisite balance between the demands of the general interest of the community and the requirements of fundamental rights will be upset if the person concerned has had to bear an individual and excessive burden<sup>25</sup>.”

It is not only Lithuanian legal order that applies balancing approach or the principle of proportionality while deciding the cases concerning the adjustment of the principle of legitimate expectations with the protection of general interest. The balancing test to a certain extent is also acknowledged by *Greece, the Netherlands, Finland, Latvia, Estonia, and the Czech Republic*.

Meanwhile, the report of *Poland* identifies the case-law of the CJEU as the main source for developing the test in order to determine whether there is an infringement of legitimate expectations:

“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 ECJ case-law (see, for instance, ECJ verdicts of: 10 December 1975 in the joined cases of *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 in the case 78/77 *Lühns*, ECLI:EU:C:1978:20; of 16 November 1983 in the case 188/82 *Thyssen*, ECLI:EU:C:1983:329; of 15 December 1983 in the case 5/82 *Maizena*, ECLI:EU:C:1982:439; of 14 September 2006 in the joined cases of *Elmeka 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

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<sup>25</sup> ECtHR *Yordanova and others v Bulgaria*, no 25446/06, 24 April 2012; also see ECtHR *Fedorenko v Ukraine*, no 25921/02, 1 June 2006.

*the answer to the aforementioned question is affirmative, they examine whether such expectations were justified.”*

In addition to this, the rapporteur from *Poland* addresses the criteria which have legal significance in applying the aforementioned test:

*“In practice, the test is subject to modifications, depending on the circumstances of each specific 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 gross nature), existence and character of the legal regulation serving as a basis for the creation of reasonable expectations, existence (or lack) of case-law pinpointing 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).”*

In terms of how the courts will analyse legitimate expectation claims, the rapporteur from *Ireland* observes that the starting point for analysis will be an application of the test 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.’”

On this subject, the report of *the Netherlands* also points out certain difficulties in establishing the infringements of legitimate expectations:

*“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.”*

### III.2. Judicial Remedies

The member institutions were also kindly asked to address the question of remedies available to the individuals whose legitimate expectations have been frustrated in order to determine whether the infringement of legitimate expectations requires the application of judicial measures of particular nature. The reports reveal that the member institutions provide both the substantive and compensatory remedies for the protection of legitimate expectations. Under substantive model an individual concerned is able to bring before the court an action for annulment and court order against the administration when legitimate expectations are challenged. Meanwhile, the compensatory model on the protection of legitimate expectations is mainly concerned with the actions for damages. *For further details and peculiarities please see the table below.*

### Judicial Remedies

Remedies	BE	BG	CY	CZ	EE	FI	FR	DE	GR	HU	IE	LV	LT	LU	ME	NL	PL	SI	ES	SE	Relevant Comments
Protection in natura: annulment, modification of the act, injunction	-	✓	✓	-	✓	✓	✓	✓	✓	✓	✓	-	✓	✓	-	✓	-	✓	-	-	<b>BG:</b> "In assessing whether to issue the annulment the court examines whether there is a significant a public value. Burden of proof to the public interest lies on administrative authority."
Compensation	-	✓	✓	-	✓	✓	✓	✓	✓	x	✓	✓	✓	x	-	✓	✓	✓	✓	-	<p><b>LU; HU:</b> Claims for damages are heard by the courts of general jurisdiction</p> <p><b>BG:</b> "If the Court finds that there exists a legitimate expectation it seeks to provide protection. This does not become necessarily by canceling the act which had changed the legal position, but through the way of awarding of damages.&lt;...&gt; Indemnification is carried out when the rights have been acquired by third parties."</p> <p><b>SI:</b> "In case that in natura claim is not possible (anymore), the individual can claim compensatory measures."</p> <p><b>LV:</b> "It is possible to compensate losses not only in terms of money or property, but also by restoration of previous situation, or by avoiding or compensating unfavourable consequences in other way."</p> <p><b>EE:</b> "&lt;...&gt; the expenses, which the person invested trusting the administrative act and realising the rights arising from the administrative act, and which have lost their value as an investment due to the administrative act being repealed because they cannot be recouped, should be compensated. &lt;...&gt; If the legitimate expectations have been infringed because of a legislative amendment (issuing legislation, or also failure to issue legislation), the damaged person has the right to claim compensation for the damage pursuant to Subsection 14 (1) of the State Liability Act. Still, compensation for such damages may only be required if the damage was caused by a significant violation of the obligations of a public authority, the legal provision forming the basis for the violated obligation is directly applicable, and the person belongs to a group of persons who have been specially injured due to the legislation for the general application, or by the failure to issue legislation for the general application."</p> <p><b>NL:</b> "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</p>

Remedies	BE	BG	CY	CZ	EE	FI	FR	DE	GR	HU	IE	LV	LT	LU	ME	NL	PL	SI	ES	SE	Relevant Comments
																					disadvantaged position if the expectation is not respected, but the performance of such acts is not essential."
Protection in natura contra legem	-	-	-	-	-	x	-	x	-	-	-	-	√	-	-	-	-	-	-	-	<p><b>LT:</b> "The national jurisprudence recognizes the protection of legitimate expectations where a considerable period of time has elapsed since the situation in question had developed and on condition that the good faith of the claimant is established."</p> <p><b>FI:</b> "The principle of legitimate expectations may not for example lead to the state of affairs in which the individuals would be granted benefits to which they according to the legislation are not entitled."</p> <p><b>DE:</b> „As the principle of legitimate expectations does not have the power to overrule the principle of legality &lt;...&gt;, no authority can be forced to act contra legem (e.g. to grant an unlawful building-permit after having realized the preliminary misestimate)."</p>
Compensatory protection contra legem	√	-	-	-	-	-	-	-	√	-	-	-	√	-	-	-	-	-	-	-	<b>GR:</b> Compensatory remedies favoured in case of the protection of legitimate expectations contra legem.
Other	-	-	-	-	√	-	-	-	-	√	√	-	-	√	-	√	√	-	-	-	<p><b>LU:</b> Separate procedure for state liability may be initiated.</p> <p><b>HU:</b> Under exceptional circumstances courts are entitled to modify administrative acts on their own motion.</p> <p><b>PL:</b> Individual can lodge constitutional complaint.</p> <p><b>EE:</b> "If necessary, declaring the piece of legislation that is the basis of the administrative act as unconstitutional may also be applied for, as part of this court action (incl. due to a breach of legitimate expectations)."</p> <p><b>NL:</b> "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."</p> <p><b>IE:</b> "A legitimate expectation often gives rise to a right to be heard before the expectation is adversely affected."</p>

- in the report the subject is not addressed explicitly or with satisfactory clarity in order to draw general conclusions

√ the remedy is applied by the member institution

x the remedy is not applied by the member institution

### III.3. Legitimate Expectations and Protection of Individual Rights

The reports were also aimed at exploring whether the principle contributes to the promotion of the protection of individual rights. In the larger part of the reports it is noted that this is indeed the case. In this regard, first, the report of *Germany* shall be referred to. It is stated that “[f]ollowing the German concept the principle of legitimate expectations completes the protection of individual rights. In comparison with the judicial standards before the German Grundgesetz entered into force, this constitutional sub-principle of the rule of law has strengthened the individual's position against the legislature and the administration. It is present in the daily work of the administrative judges: The juris-database offers more than 1.800 decisions only of the Bundesverwaltungsgericht, in which the expression “Vertrauensschutz” (protection of legitimate expectations) is to be found without of course always leading to success for the claimant.”

The legal significance of the principle on the development of the protection of subjective rights is further elaborated by the rapporteur from *Poland* stating that the principle is one of the primary criteria in judicial review. According to the report, “[t]his principle provides individual with basic 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 fulfilment, 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.”

On the subject, the insights provided in the report of *Estonia* are also worthy of mention. The rapporteur from *Estonia* provides illustrative examples from the case-law and states that “[i]t has been shown by Supreme Court case law that the principle of legitimate expectations (though in conjunction with other principles) has been applied fairly strictly, and that extensive public or general interests have not been a sufficient reason to disproportionately restrict the rights (incl. the legitimate expectations) of an individual. Therefore, the principle may be considered as an efficient measure for protecting the rights of persons.”

In this context, it is also interesting to note that even in the member institutions which formally do not recognize the principle save for EU law the discussions on the legitimate expectations have had positive effects towards the protection of individual rights. In this regard, the rapporteur from *France* notes that the development of rules on the transitional regulation has been partly encouraged by the discussions on legitimate expectations.

The discussions in the reports also reveal a more restrictive approach towards a positive effect of the principle for the protection of individual rights. For example, the rapporteur from *Cyprus* notes that “[l]egitimate expectation has no role to play where the act is based on of public policy or is taken in the public interest unless the action taken amounts to an abuse of power. The principle is not considered an effective and efficient toll in the hands of individuals when they are to confront decision taken in the public interest or for policy reforms”. The same aspect is highlighted by the rapporteur from *Greece* pointing out that the impact of the principle is currently not clear and the legal order generally puts the emphasis on the protection of public interest. The same seems to be

true in *Ireland*. According to the rapporteur, “[w]here a legitimate expectation of an individual or identifiable group of persons clashes with the general interest, generally speaking the public interest will win out<sup>26</sup>”. Nevertheless, it is further noted that even though “[i]ndividuals 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.”

## PART IV

### Other Dimensions of the Application of the Principle

#### IV.1. EU law and the Case-law of the CJEU

The reports, in one voice, confirm that references to the principle as applied and interpreted by the CJEU are made when the matter at hand concerns the questions of EU law. This is explicitly pointed out by *France, Estonia, the Netherlands, Ireland, Greece*, and others.

No major frictions between the legal orders are reported inasmuch as the application of legitimate expectations is concerned. In this regard, for further details one should note the report of *Germany*. It is stated the frictions regarding the withdrawal of unlawful beneficiary administrative act have been cleared. It is the sphere of state aid that initially had brought considerations. In this regard, it is further explained:

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

The fact that the EU law have had impact on the application of legal rules on revocation is also highlighted by rapporteurs from *Finland* and *Slovenia*. According to the report of *Finland*, “[t]he EU law was seen making the application of *Bestandskraft* doctrines [“res judicata of administrative decisions] more lenient and smoother in cases in which the decisions had been made applying EU law.” Meanwhile, in the report of *Slovenia* it is noted that “[r]ules (i.e., CEU jurisprudence) on revocation of the individual acts/decision is one such additional example where domestic law shall be applied in the light of the EU approach and give the precedence over national rules. Also, if a right (to which the legitimate expectation applies) is a right of the EU law, the principle of *effet utile* of

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<sup>26</sup> “Any legitimate expectation, as opposed to a right, must yield to the public interest.” – de Blacam, op.cit., at p.266

*the EU law also applies. It means that the principle of legal expectation shall give the full affect also in case that the right at stake is the "EU right".*

The relationship between the national legal order and EU law is probably the most elaborated by the rapporteur from *Poland*. In the report several examples of interaction are presented. Firstly, according to the report, "*<...> 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.*" In addition to this, it is observed 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*". It is the tax and customs disputes and the rule of *lex retro non agit* that in most of the cases required to provide references to the case-law of the CJEU (for further details please see the report of *Poland*, Part IV, answer to the Question 1). The EU's understanding of the principle of legitimate expectations is also quoted by Polish administrative courts while judging on intertemporal issues:

*"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 verdicts 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 surfaced 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 (verdict of 11 December 2007 in the case of *Skoma-Lux*, C-161/06, ECLI:EU:C:2007:773; verdict of 4 June 2009 in the case of *Balbiino*, C-560/07, ECLI:EU:C:2009:341; verdict 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 of 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 normative 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 sources published by domestic legislative authorities, but to all normative acts in effect on the territory of the Republic of Poland - including acts of the so-called derivative 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 duties of Polish citizens or Polish entities (see, for instance, verdict of the Supreme Administrative Court of 25 July 2013, I GSK 821/12; verdict of the Supreme Administrative Court of 19 October 2001, I GSK 847/10; verdict of the Supreme Administrative Court of 19 September 2008, I GSK 1038/07)."*

## IV.2. The Charter of the Fundamental Rights of the European Union

The reports concerning the application of the EU Charter do not confirm a frequent application of the document where the principle of legitimate expectations is brought into play. *Greece, Estonia, Hungary, Slovenia, Latvia, the Netherlands, France, and Germany* note that currently there is no relevant national case-law on the matter. The rapporteur from *Germany* further mentions that this is due to the fact that *"the principle is well established in the German tradition there is no need for a reference to the EU Charta of fundamental rights."*

Nevertheless, few reports indicate certain cases where references to the provisions of the Charter have been made:

- In the report of *Spain* references to Article 41 of the Charter which sets out the right to good administration are mentioned.
- According to the report of *Poland*, the applicants have relied on the provisions of the Charter which guarantee the protection of property rights; however not successfully. In this regard, it is explained that *"<...> 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 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."*
- Similarly to the report of *Poland*, the report of *the Czech Republic* also notes Article 17 of the Charter. In addition to this, references to Article 16 which guarantees the right to conduct a business have been made. The references to the indicated articles were made while adjudicating on the right freely to exercise an economic activity in the sphere of lotteries. In the case of 24th February 2015, No. 6 As 285/2014, *"<...> the Supreme Administrative Court dealt with legitimate expectations of video-lottery terminal keeper. At first, the Ministry of finance awarded the keeper with the license to run the cited terminals. Later on, this license was cancelled as unlawful because the terminals were situated nearby a school. The school was at the same place since the beginning, even sooner than the terminals, however the Ministry at first permitted the lottery business. Only later, after intervention of the Constitutional Court and legislative changes, it was made clear that the Ministry had not applied the act on lotteries correctly. Thus the keeper could not have, according to the"*

*Supreme Administrative Court, any legitimate expectations about his right to run his lottery business after this clarification and the cancellation of the license had to be expected.” It is further explained by the rapporteur that under these circumstances “Such references to the provisions of the EU Charter make decisions more convincing and it broadens the use of the principle of legitimate expectations.”*

### IV.3. The European Convention on Human Rights

Lastly, the impact of the application of the principle in the case-law of the ECtHR on the legal orders of member institutions was explored. The majority of the reports reveal that the decisions of the ECtHR are important source of interpretation and the national approach is developed in the light of the observations made by this court. The impact of the case-law of the ECtHR regarding the protection of property rights as guaranteed by Article 1 of Protocol No. 1 to the Convention has been acknowledged in the reports of *Cyprus, Hungary, Finland, the Czech Republic, Greece, Lithuania, Slovenia, and Poland*. In most of the cases, the references to the ECHR are made in the sphere of tax law, territorial planning, and restitution.

Similarly to the case of EU law, the ECHR seems to extend the scope of the application of legitimate expectations. Both *Sweden* and *France* note that the application of the ECHR has contributed to the acknowledgment of the legitimate expectations within the international law.

Meanwhile, *Estonia, the Netherlands, and Germany* report that there have been no references to the provisions of the ECHR that would have had legal significance to the application of the principle.