



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

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

Vilnius, 21–22 April 2016

Answers to Questionnaire: Slovenia



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

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

PART I

The Development of the Principle of Legitimate Expectations

Q1. What are the legal parameters (or fundamental legal values) that the principle of legitimate expectations is founded on (the respect for human rights, the rule of law, the principles of legal certainty, good governance, good faith, other)?

The principle of legitimate expectation is founded as a part of rule of law principle. It is embodied under Art. 2 of the Slovene Constitution. This article sets forth that Slovenia is a state where the rule of law shall be respected. Part of this umbrella principle is also legitimate expectation and principle of legal certainty. Apart from that, a principle of good governance and good faith can be found, at least indirectly, in some other constitutional provisions, like Art. 26, which regulates a liability of the public administration. Also, under Art. 25 everybody has a right to legal remedies against the decisions of public administration.

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

The principle of legitimate expectation is primarily aimed to insure foreseeability, legal stability, legal safety, protection of vested rights, the legality of decisions made by public authorities and, as their positive consequence, the promotion of trust in public authorities is also part of the principle.





Q3. Does the national legislation make explicit reference to the principle of legitimate expectations? If so, does it specify how this principle should be applied?

No, the national legislation does not make explicit reference to this principle. It is a part of umbrella and more general principle of rule of law.

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

The principle of legitimate expectation, as described above, being a part of the rule of law and legality principle, has certain tradition in Slovene administrative law. Actually, it is one of the main principle in the General Administrative Procedure Act (Art. 1). This principle prohibits arbitrary decision-making by public authorities, and it is emphasized especially from the beginning of newly founded Slovenian state, from 1991.

Q5. Have there been any factors which led to the restriction of the scope of the protection of legitimate expectations, i.e. economic crisis? In case your jurisdiction does not formally recognize the principle of legitimate expectations, what are the objections to the acknowledgment of the principle? Are there any other legal imperatives that substitute (at least in part) the principle of legitimate expectations, especially in those cases where individual rights and legal interests are adversely affected due to the changes in social or economic policy?

Actually, one can assess that principle is quite emphasized in contrast to previous development, when Slovenia was part of former Yugoslavia. The development of this principle is mostly attributed to jurisprudence; however, also public authorities often refer to it. Limitations and restrictions of the scope of the principle of legitimate expectations are only those, which are recognised also as limitations of the vested rights (in case that it is obvious that certain right should have not been given to the individual, if certain right has been awarded to individual illegally, etc.). However, Constitutional court of the RS adopted a decision in (U-I-13/13) where it claims that law which aims to balance public finances with public expenses can limit vested rights, if this is necessary for economic reasons. Actually, this is the first decision, which invokes economic reasons on the state level as legitimate reasons for limitation of vested rights. This, of course, influences also principle of legitimate expectations.

Q6. What is the relation of the principle of legitimate expectations with other legal categories, such as the rules of the protection of acquired rights and *lex retro non agit*? Has the principle of legitimate expectations become an autonomous legal concept or has it proved its efficiency only when it is applied with other closely related legal imperatives such as the principles of equity, proportionality, legal certainty, and others?

*The principle of legitimate expectation has a close link also to other legal principles like *lex retro non agit*. However, it does not mean that it is only effective in relationship to this or other principle. It can also be invoked as an autonomous, independent, legal concept. Namely, principle of legitimate expectation has different viewpoints and some of them might be closely linked to other principles, some of them not. However, it will be, most of the time, closely linked and applied together with principle of rule of law as described above.*





PART II

The Application of the Principle of Legitimate Expectations

Q1. Please describe the situations in which the principle at issue binds the legislative bodies and the requirements drawn from that principle, i.e. what imperatives it presupposes to the legislator and other law-making bodies and what difficulties the compliance with these imperatives raises. Can (and to what extent) the principle of legitimate expectations preclude the public authority from acting in its legislative capacity and amending the legal regulation?

Q2. How does the principle of legitimate expectations bind the authorities of public administration in the sphere of individual legal acts? Is it essentially related to the revocation of administrative acts including the situations in which the administrative decisions are revoked for the purposes of correcting mistakes made by the institutions of public authority?

Actually, it is not so often linked to the revocation of the administrative decisions, but to safeguarding the expectation from law and general/individual acts. For instance, if certain administrative decision awards a right (for instance to finance the project from public sources) and afterwards (when the project is completed) the financing is rejected due to a mistake in application of the project, which had not been noticed by the public authorities when issuing the decision, than it is a question of legal foreseeability and legal safety.

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

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

*Normative legal base is Art. 2 of the Constitution of the RS and the General Administrative Procedure Act. Legitimate expectations can be created by acts of general applications of the legislator (acts, statutes), also general acts of the executive power (the Government, like regulations, ordinances) and by individual acts of the administrative authorities. Public authorities are bound by rules that are *ius cogens* (obligatory). The Slovene legal order embodies “*exceptio illegalis*” for courts only, meaning that judges are bound with the Constitution and statues, but not with the general acts of the executive authorities. This is not true for administrative authorities. Written and informal communications (like guidance by the ministries) are used by the administrative authorities in adopting individual acts. Verbal promises will not be a source for individual decision. The principle *qui tacet consentire videtur si loqui debuisset ac potuisset* can be applied in case when party needs to prove something but it is not active.*

3.2. Given the fact that in some cases the judicial application of the principle of legitimate expectations is regarded as ambiguous, does your jurisdiction attach some importance to the interpretation of particular notions accompanying the principle, such as hope, expectation,





reasonable expectation, legitimate expectation? How are they interpreted and distinguished in the judicial practice?

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 position. If this is not the case, the principle cannot apply.

3.3. Is the legitimacy of the expectation in question and its legal protection determined by the legitimacy of its source, i.e. can unlawful legal acts create legitimate expectations to the individual who has reasonably relied on these acts? If the answer is affirmative, could you set out the arguments justifying the recognition of the protection of legitimate expectations *contra legem*. Please provide certain examples from the case-law where applicable.

The answer is negative. Illegal 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 expect that its right was not awarded legally.

3.4. Is the good faith of the individual concerned regarded as a core feature in the formation and protection of legitimate expectations? Describe briefly how the good conduct of the individual concerned and the ability to foresee the impugned conduct is related to the application of the principle of legitimate expectations. Are there any other criteria of good behaviour developed by the judiciary in application of the principle? Do the domestic courts differentiate two kinds of situations depending on the fact whether the matter concerns the natural person or private undertaking?

Good faith is not a core argument in protection of the legitimate expectation. Namely, more important is the question whether an individual could have been aware that its right was not awarded to him legally, on a proper legal basis or under the proper procedure. It means that a party might have believed that its right was properly obtained but he/she should have known this is not the case if only acting with proper care. Good faith can therefore not secure its right. This might be the case in private law sphere, but not in case of administrative law.

3.5. Are there any other key elements of the protection of legitimate expectations that have gained importance in application of the principle in your national legal order?

All elements are mentioned in this questionnaire. However, there is one thing it shall be mentioned; the principle of legitimate expectation is not often referred to in the sequel of the decisions/judgements or in the interpretative parts, but this does not mean that it is not applied as an implied principle. It forms a decision-making as a principle, as a framework of the adjudicating process. Therefore, it can often be found between the lines and not expressly mentioned in the decision/judgement.

PART III

The Infringements of the Principle of Legitimate Expectations

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





determination whether the legitimate expectations are infringed and require the application of judicial measures of particular nature.

The principle of legal expectations shall include the following elements:

- *legal safety shall be at stake;*
- *confidence and trust in the legal order as such and in the decision of the administrative authorities shall be given the importance;*
- *it shall be judged objectively applying standard of proper and reasonable care of individual at stake;*
- *it shall be taken into account if the authorities exercise its competence without discretionary power or at least that it was not breached or trespassed.*

Applying the principle of legitimate expectations demands certain courage by the courts, since, logically, the decision will run against certain state authority.

Q2. Does the application of the principle of legitimate expectations affect the approach of the public authorities to the protection of individual rights? Has the principle proved to be efficient where the rights and legal interests of individuals collide with the general interest?

Indeed, the principle of legal expectations at the one hand, and individual rights on the other hand, are two sides of the same coin. However, in case of general interests the authorities can take a further step into the sphere of the rights of the individual. Namely, the property and ind. rights are not absolute and reasons in overriding general interest can prevail. In such cases, one cannot expect the full application of principle of legal expectation. In any, even if an individual right has to step back in favour of the general interest an individual can claim only proportional limitation of his/her rights and the indemnity.

Q3. Briefly describe the remedies provided under your national legal order to the individuals whose legitimate expectations were frustrated. How is the choice for the type of the protection of legitimate expectations (*in natura*, compensatory or other) determined?

The individual can start court actions (administrative dispute), which is two stage procedure. Than it can continue with the constitutional complaint, seeking application of Art. 2 of the Slovene Constitution. It can claim legitimate expectation in natura (recognizing its rights, annulment of the unlawful decision, adopting a new decision etc). In case that in natura claim is not possible (anymore), the individual can claim compensatory measures.

Part IV

Other Dimensions of the Application of the Principle

Q1. How do European Union law and national law complement one another in application of the principle of legitimate expectations? In some cases, does the national law allow the European Union law to resolve the questions regarding the protection of legitimate expectations with regard to the approaches developed domestically, e.g. the rules on the revocation of individual administrative decisions? Conversely, does European Union law provide the national court with instruments enabling it to better handle the disputes relating to the violations of legitimate expectations? How is the evaluation of compatibility between national law and EU approach solved?

EU law is directly applicable but this is not the only possible way to affect the principle of legal expectations. Rules (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 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 Slovene law cannot discriminate when offering legal remedies and favour Slovene rules in comparison to EU law. Further on, EU cases can be used as a help to tackle similar domestic cases recognizing the principle of legal expectations.

Q2. When reviewing the lawfulness of decisions where the individual relies on the principle of legitimate expectations, do administrative courts refer to the provisions of the EU Charter? What consequences does it have for the application of the principle by your national administrative courts?

*EU Charter is applicable only in case when EU law is to performed (case Franssen), but of course; this is also part of domestic courts (administrative) procedure. Administrative courts in Slovenia use Charter as a legal source and also as a source of inspiration for interpretation. This is true also for the principle of legitimate expectations. Might be that the principle is not mentioned, at the end of the day, in the judgement (neither as *ratione decidendi* nor as *obiter dictum*) but it lead the judges to their decision, as a path to be followed.*

Q3. Does the case-law of the European Court of Human Rights play a role in the application of the principle of legitimate expectations in your jurisdiction? If so, how? Please provide examples from your case-law.

EHCR brings the most fundamental rights but leaves MS with certain margin of appreciation. The principle of legitimate expectations is part of lots of articles. A frequent question appears what kind of protection can ind. expects (like, where are the borders to protect private life in case of public, private persons, which state acts can limit property and to which extent, etc). This kind of questions imply the legitimate expectations. The more certain legal rule is open to interpretation and application, the more importance is given to the proper implementation to the principle of the legitimate expectations. Indeed, the jurisprudence of the ECHR plays the important role in application of the said principle.

