
PRINCIPLES OF LEGITIMATE EXPECTATIONS AND LEGAL CERTAINTY IN THE CONTEXT OF AMENDMENTS TO EU LAW AND NATIONAL LEGISLATION

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1. INTRODUCTION

The law¹ constantly changes as it aspires to be an instrument that shapes the reality.² The addressees of legal norms must come to terms with changes in law, which may be driven or even enforced by a change in social or economic conditions.³ It is indicated in judicial case law that one cannot talk about guaranteed immutability of the law or about a justified expectation of its immutability, correlated with such a guarantee, particularly when it comes to the 'eternality' of certain rights and privileges.⁴

A change in law entails a transformation of social relations while, at the same time, the powers and responsibilities of the subjects of the law are changed. This

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¹ The law in its simplest understanding, widespread in the European continental legal culture, used by legal practice: regarded as a set of norms of conduct, enacted or recognised by the competent public authorities; see S. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2002, p. 7. The author omits here the disputes around the ontological complexity of law; see R. Sarkowicz, J. Stelmach, *Teoria prawa*, Kraków 1996, p. 23 et seq.

² See Ch. Waldhoff, *Der Verwaltungszwang. Historische und dogmatische Studien zu Vollstreckung und Sanktion als Mittel der Rechtsdurchsetzung der Verwaltung* (manuscript of habilitation dissertation), München 2002, p. 1.

³ See the Supreme Administrative Court judgments: of 28 October 2015, II GSK 1616/15; of 18 November 2015, II GSK 2373/13; of 28 June 2018, II GSK 2199/16, published: <http://orzeczenia.nsa.gov.pl>. (accessed 23.06.2020).

⁴ See the Supreme Administrative Court judgment of 19 July 2016, II GSK 129/15, <http://orzeczenia.nsa.gov.pl>. (accessed 23.06.2020).

situation is a source of uncertainty as to the legal position of individuals as well as their rights and obligations.⁵ People perceive the law as one element of the reality of persons and objects placed in time and space (institutional reality), where the existence and functioning in such reality could be a source of tensions.⁶ Such tensions may arise from individuals' expectations towards the actions undertaken by public authorities, including the law-making bodies. Under the conditions of the rule of law, not all expectations from public authorities can, or should, be fulfilled; this should apply only to those expectations that can be considered legitimate. Otherwise, it would not be possible for the legislator to fulfil its fundamental role, having received democratic legitimacy to do so.⁷ The principle of legal certainty, derived from the rule of law, does not prohibit amendments to legislation.⁸

I will confine my discussion to selected case law problems concerning amendments to the EU directives and ordinary laws of the EU member states. My reflections will be limited to the so-called prior effectiveness of the EU directives and the retroactivity of the law, using as an example selected judgments of the Court of Justice of the European Union (CJEU) and, additionally, decisions of the Supreme Administrative Court in Poland.

The intention behind the discussion that follows is to delineate the temporal boundaries of the principles of legitimate expectations and legal certainty in the sphere of amendments to the EU directives and ordinary laws of the EU member states. In order to pursue this objective, I will review the claim that the principle of legitimate expectations towards an EU directive or national law allows one to assume that:

- during the transposition period (before the deadline for its implementation) in an EU member state, an EU directive may be a source of legitimate expectations,
- it is permissible to invoke legitimate expectations for the protection against retroactive effects of a law,
- the scope of application of the principle of protecting legitimate expectations goes much further than issues related to intertemporal law or transitional law. This remains without prejudice to the principle of legal certainty or other principles of the EU law.

2. CONCEPTS OF CHANGE OF LAW, PRIOR EFFECTIVENESS AND RETROACTIVITY OF THE LAW

The doctrine of law knows multiple, often interrelated, ways of using the concept of 'change of law'. From the theoretical perspective, this term refers, among others,

⁵ Similarly, J. Mikołajewicz, *Prawo intertemporalne w państwie prawnym*, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 4, 2015, p. 14.

⁶ *Ibid.*

⁷ See H.P. Rill, H. Schäffer, *Art. 7 B-VG*, [in:] B. Kneihns, G. Lienbacher (eds), *Rill-Schäffer-Kommentar. Bundesverfassungsrecht*, Wien 2018, p. 59.

⁸ See the CJEU judgment of 11 June 2015, C-98/14, *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v. Magyar Állam*, ECLI:EU:C:2015:386.

to transformations in a set of normative acts containing legal regulations, changes in a set of legal regulations or changes to the content of legal norms.⁹ In practice, change of law is understood as a logical sum of the aforementioned ways of understanding; for a correct reporting definition of this term, one must capture all circumstances relating to changes in the set of legal regulations, legal norms and normative acts.¹⁰ I will use this very meaning of change of law later in this paper. Regardless of the aforementioned categorisation of changes of law, when one analyses this term, one can refer to the legal situations of individuals. In such a case, the relation between the new law and the previously existing legal situations may consist in the modification or abolition of these situations, or the new law may impose different legal consequences with reference to previous events versus the situation before its entry into force vis-à-vis the moment when these events occurred. In the latter case, one can talk about retroactivity of the law.¹¹

The issues related to the implementation of a new law and its impact on pre-existing situations are very broad. They cannot be exhausted by talking about intertemporal law, understood either as legal issues related to broadly understood legal situations, where a change of law has occurred, or about an objectified set of solutions that specify which set of rules – the ‘old’ or the ‘new’ ones – should be applied to pre-existing situations.¹² The Polish literature adopts the notion of intertemporal law which, in a broad sense, may also include transitional rules containing elements of a material norm, independent of the content of the old and new legal regime.¹³ It is the so-called transitional law, which should comprehensively cover the issues related to the implementation of the new law. According to the view proposing a narrow definition of intertemporal law, transitional law is a broader category: apart from intertemporal law, it also includes adaptive law.¹⁴

It should be pointed out that it is disputed in the Polish legal doctrine whether intertemporal law comprises the category of retroactivity of law or not.¹⁵ It consists in putting the legal relations that were ‘closed’ under the old law into the scope of

⁹ For a detailed discussion on this subject, see: J. Mikołajewicz, *Prawo intertemporalne. Zagadnienia teoretycznoprawne*, Poznań 2000, p. 39 et seq.; *idem*, *Zmiana prawa*, [in:] *Problematyka intertemporalna w prawie. Zagadnienia podstawowe. Rozstrzygnięcia intertemporalne. Geneza i funkcje*, Warszawa 2015, p. 111 et seq.

¹⁰ It should be noted that the applicability of legal regulations in the system is treated as a derivative of the applicability of normative acts, whereas the applicability of the basic body of legal norms is viewed as a derivative of the applicability of legal regulations, see J. Woleński, *Z zagadnień analitycznej filozofii prawa*, Kraków 2012, p. 104 et seq.

¹¹ J. Mikołajewicz, *supra* n. 5, p. 20.

¹² See *ibid.*, p. 17. Cf. definition proposed by Marcin Kamiński in *Prawo administracyjne intertemporalne*, Warszawa 2011, pp. 16–17.

¹³ W. Jakimowicz, *Kilka uwag na temat metod regulacji intertemporalnej w kontekście sytuacji prawnej jednostki*, [in:] J. Korczak (ed.), *Administracja publiczna pod rządami prawa. Księga pamiątkowa z okazji 70-lecia urodzin prof. zw. dra hab. Adama Błasia*, Wrocław 2016, p. 155.

¹⁴ J. Mikołajewicz, *supra* n. 5, p. 19.

¹⁵ Among the principles of intertemporal law, Wojciech Jakimowicz mentions the principle of (prohibition of) retroactive action of the law – see *idem*, *supra* n. 13, p. 156. On the other hand, Jarosław Mikołajewicz argued that functional, psychological and historical relations between the issue of retroactivity of law and intertemporality do not allow retroactive law to be treated as a form of intertemporal law, see *idem*, *supra* n. 5, p. 19 et seq.

the new legal norm. As already mentioned, in such a situation the new regulation extends new legal effects onto factual states emerging and completed under the old law, before the new law has entered into force. The prohibition of retroactivity of national law, especially in the perspective of constitutional law,¹⁶ is indisputable. Literature rarely refers to the EU perspective on this issue, which is particularly noteworthy within the case law of the CJEU, where the principles of legitimate expectations and legal certainty are applied.

Some authors representing the doctrine of Swiss and German law have proposed an even broader understanding of intertemporal law than the one presented above (covering only the norms that have already entered into force), suggesting that this category should also include the issue of the so-called 'prior effectiveness of law' (*Vorwirkung*) and 'subsequent effectiveness of law' (*Nachwirkung*).¹⁷ The former concept means, *in genere*, that the assessment of the current factual states takes into account the future law (which has not yet entered into force, or which has not yet had legal effect).¹⁸ The latter concept refers to a situation where a law produces effects after it has lost its binding force.¹⁹ With regard to the former issue, at the level of the EU law, the CJEU concluded that individuals cannot derive legitimate expectations from the wording of the provisions of a draft regulation which differ from the provisions of the finally adopted legal act.²⁰ In judicial case law, the question of prior effectiveness of an EU directive (*Vorwirkung einer EU-Richtlinie*) is also relevant from the perspective of the protection of legitimate expectations and legal certainty and the analysis of the change of law. This category essentially refers to the legal validity of a directive before the end of the transposition period in a member state. There may be varied cut-off points for the initial moment when the effectiveness of an EU directive is considered. The narrow approach points to the moment when the directive enters into force, whereas the broad approach refers to the moment of the directive's publication in the relevant Official Journal of the European Union.²¹ In any case, the concept of *Vorwirkung* concerns the admissibility of a situation where – when assessing the existing legal situations of individuals – one takes into account a legal act which has either not yet entered

¹⁶ See the Polish Constitutional Tribunal judgments: of 31 March 1998, K 24/97, OTK ZU 2/1998, item 13; of 9 June 2003, SK 12/03, OTK ZU 6a/2003, item 51; of 25 May 2004, SK 44/03, OTK ZU 5a/2004, item 46.

¹⁷ In the Swiss doctrine: L. Weiss, *Zeitlichkeit und Recht*, Zürich 1968, p. 53; M. Thommen, *Zur Problematik der Vorwirkung insbesondere im öffentlichen Recht*, Basel 1979, p. 24. In the German doctrine: A. Guckelberger, *Vorwirkung von Gesetzen im Tätigkeitsbereich der Verwaltung. Eine rechtsvergleichende Studie des deutschen und schweizerischen Rechts*, Berlin 1997, p. 24.

¹⁸ P. Tschannen, U. Zimmerli, M. Müller, *Allgemeines Verwaltungsrecht*, Bern 2014, p. 205; A. Guckelberger, *supra* n. 17, pp. 14–15.

¹⁹ M. Kloepfer, *Vorwirkung von Gesetzen*, München 1974, p. 5; M. Thommen, *supra* n. 17, p. 20; C. Oertel, *Der Zeitfaktor im öffentlichen Wirtschaftsrecht*, Köln 1992, p. 66.

²⁰ See the CJEU judgment of 5 October 1993 in Joined Cases C-13, C-14, C-15 and C-16/92, *Driessen en Zonen, A. Molewijk, Motorschiff Sayonara Basel AG and vof Fa. C. Mourik en Zoon v. Minister van Verkeer en Waterstaat*, ECR 1993/9-10/I-4751.

²¹ For more on this, see V.I. Gronen, *Die „Vorwirkung“ von EG-Richtlinien. Auswirkungen Europäischer Richtlinien auf die nationale Legislative und Judikative im Zeitraum zwischen Richtlinienvorschlag und Ablauf der Umsetzungsfrist*, Baden-Baden 2006, *passim*.

into force at all or is in the process of transposition and cannot have effects on individuals.

The aforementioned categories of *Vorwirkung* evoke certain expectations among individuals, embedded not only on the legal plane but also at the factual level. The task of the judiciary and its decisions is to decide whether these expectations are justified *ad casu* and whether they deserve legal protection.

3. PRINCIPLES OF LEGITIMATE EXPECTATIONS AND LEGAL CERTAINTY IN *GENERE*

In the CJEU case law, the principles of legitimate expectations and legal certainty are recognised as general principles of the European Union law, falling within the so-called *acquis communautaire*, classified as primary legislation of the EU.²² Therefore, an act or omission of a national authority or an EU authority which has been demonstrated as going against one of these principles should be regarded as an infringement of the provisions of the treaties.²³ The legal doctrine explores the origins of the principle of the protection of legitimate expectations by looking at the principle of the protection of trust (*Vertrauensschutz*),²⁴ developed in German doctrine and jurisprudence, although this principle is also known in the legal systems based on the common law tradition (legitimate expectations).²⁵ When looking at this EU principle in the context of the Polish legal system, one should also compare it with the principle of protection of trust, derived from the rule of law (Article 2 of the Polish Constitution). Also, in the doctrine of Austrian law, the protection of legitimate expectations is seen as an element of protection of trust. When legitimate

²² See, first of all: P. Craig, *EU Administrative Law*, Oxford 2006, p. 607 et seq.; J. Schwarze, *European Administrative Law*, London 1992, *passim*. In Polish literature, see, first of all: J. Lemańska, *Uzasadnione oczekiwania w perspektywie prawa krajowego i regulacji europejskich*, Warszawa 2016, p. 41 et seq.; D. Kornobis-Romanowska, *Pewność prawa w Unii Europejskiej. Pomiedzy autonomią jednostki a skutecznością prawa UE*, Warszawa 2018, *passim*.

²³ See the CJEU judgment of 3 May 1978, 112/77, *August Töpfer & Co. GmbH v. Commission of the European Communities*, ECLI:EU:C:1978:94.

²⁴ See, e.g. H. Maurer, *Kontinuitätsgewähr und Vertrauensschutz*, [in:] J. Isensee, P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland. Band III. Das Handeln des Staates*, Heidelberg 1996, p. 212 et seq.; D. Birk, *Kontinuitätsgewähr und Vertrauensschutz*, [in:] H.-J. Pezzer (ed.), *Vertrauensschutz im Steuerrecht. 28. Jahrestagung der Deutschen Steuerjuristischen Gesellschaft e.V., Graz, 15. u. 16. September 2003, Köln 2004*, p. 9 et seq.; S. Muckel, *Kriterien des verfassungsrechtlichen Vertrauensschutzes bei Gesetzesänderungen*, Berlin 1989, p. 13 et seq.; S.M. Ebner, *Vertrauensschutz und Kontinuitätsgewähr in der höchstrechtlichen Rechtsprechung am Beispiel des Steuerrechts: eine Untersuchung unter besonderer Einbeziehung des Beschlusses des Grossen Senats des BFH vom 17.12.2007, GrS 2/04 (Keine Vererblichkeit von Verlustvortügen)*, Frankfurt am Main 2009, *passim*.

²⁵ See J. Supernat, *Zasada ochrony uzasadnionych oczekiwań w angielskim prawie administracyjnym*, [in:] Z. Czarnik, Z. Niewiadomski, J. Połuszny, J. Stelmasiak (eds), *Studia z prawa administracyjnego i nauki o administracji. Księga jubileuszowa dedykowana prof. zw. dr. hab. Janowi Szreniawskiemu*, Przemysł-Rzeszów 2011, p. 721 et seq.; R. Thomas, *Legitimate Expectations and Proportionality in Administrative Law*, Oxford-Portland, Oregon 2000, *passim*; J.S. Schonberg, *Legitimate Expectations in Administrative Law*, Oxford 2000, *passim*.

expectations of an individual with regard to changes in the law are taken into account in certain circumstances, this is viewed as an exception to the law-making competence²⁶ granted to the legislator under the constitution. In this sense, the principle in question is related to the issue of continuity in law (*Rechtskontinuität*).²⁷

The jurisprudence of Polish Constitutional Tribunal indicates that the principle of individuals' trust in the state and in the law enacted by the state enables individuals to decide on their behaviour based on the full knowledge of the rules guiding the state authorities and the legal consequences that individual actions may entail. An individual should be able to determine the consequences of specific behaviour and events on the basis of the law in force at a particular moment, and may reasonably expect that the legislator will not change those consequences in an arbitrary manner.²⁸ It is stressed, however, that the principle of the protection of trust does not exclude changes in the legal system. Individuals must take into account that a change in social or economic conditions may justify changes in the applicable law, or may even entail an immediate implementation of new legal regulations. Therefore, when examining the consistency of normative acts with the aforementioned principle, one should determine whether individuals can reasonably expect that they will not be exposed to legal effects which they could not have foreseen at the time of making decisions and actions, considering the content of previous regulations and the singularities of the sphere of life regulated by these provisions of law.²⁹

With regard to the protection of legitimate expectations, criteria have been formulated in the CJEU case law allowing its application *ad casu*. First of all, there must be an act or other behaviour of the authority which makes or applies the law, which has generated a 'legal expectation' on the part of the individual. Secondly, legitimate expectations may only arise on the part of a reasonable and prudent subject of law (objectification of a legal effect). Thirdly, the protection of legitimate expectations cannot be contrary to public interest underlying the contested act or other behaviour.³⁰

The principle of the protection of legitimate expectations is a specific case of the principle of legal certainty.³¹ The latter principle is based on the fundamental premise that subjects of law must know the current law in order to be able to plan

²⁶ See H.P. Rill, H. Schäffer, *supra* n. 7, p. 60.

²⁷ Less than twenty years ago, German literature stated that, under current German constitutional law, there was an injunction that in every case of legal changes or progressive legal evolution there should be a continuation between the previous and the new legal status, and that discontinuation should be allowed in objectively justified exceptional situations, see A. Leisner, *Kontinuität als Verfassungsprinzip unter besonderer Berücksichtigung des Steuerrechts*, Tübingen 2002, p. 165.

²⁸ See, inter alia, the Polish Constitutional Tribunal judgment of 14 June 2000, P 3/00, OTK ZU 5/2000, item 138, p. 690.

²⁹ See, inter alia, the Polish Constitutional Tribunal judgments: of 7 February 2001, K 27/00, OTK ZU 2/2001, item 29, p. 164; of 3 October 2007, P 28/06; published: <http://trybunal.gov.pl>. (accessed 23.06.2020).

³⁰ See Ł. Prus, *W kwestii ochrony uzasadnionych oczekiwań w prawie administracyjnym UE – glosa do wyroku TS z 19.05.1992 r. w sprawach połączonych: C-104/89 i C-37/90 J. Mulder i inni v. Rada i Komisja*, Europejski Przegląd Sądowy 3, 2012, p. 36.

³¹ T. Tridimas, *General Principles of EC Law*, Oxford 2003, p. 163.

their actions in compliance with the law in force at a particular time. This principle becomes particularly important in relation to the law governing the economic activity of individuals, as anyone conducting such activity must inevitably 'plan for the future'. Clearly and precisely formulated legal provisions facilitate the proper conduct of any activity, especially in business. In accordance with the principle of legal certainty, the effect of a norm of the EU law must be predictable for the addressees. Obligations imposed on individuals under the EU law must be clear and understandable, and any doubts as to the 'language of the law' must be interpreted in favour of the individual.³²

4. SELECTED PROBLEMS IN THE CONTEXT OF JUDICIAL CASE LAW

4.1. PRIOR EFFECTIVENESS OF A DIRECTIVE

The problem of prior effectiveness of an EU directive, in the aforementioned narrow sense, should entail the following question: is it permissible, after a directive has entered into force (hereafter 'a new directive') and before its transposition has ended,³³ to apply this directive directly or interpret national acts in accordance with the content of that (new) directive?³⁴ In other words, can a government agency or an individual at this stage rely on the provisions of the new directive against a provision of national law where the latter is, to a greater or smaller extent, incompatible with the new directive, based on the need to ensure the effectiveness of the provisions of the directive or to protect the rights of individuals?³⁵

³² For more on this, see D. Kornobis-Romanowska, *supra* n. 22, p. 53 et seq. See also the CJEU judgment of 7 June 2005, C-17/03, *Vereniging voor Energie, Milieu en Water and Others v. Directeur van de Dienst uitvoering en toezicht energie*, ECLI:EU:C:2005:518.

³³ It should be noted that the term 'transposition' (Latin *transpositio* – transposition, *transponere* – to transpose) should be distinguished from 'implementation', which has a broader meaning, including the process depicting the entire environment for the effective introduction, implementation of a legal act (usually a directive). Apart from establishing legal norms, implementation involves formal and practical actions, including the establishment of relevant institutions and bodies to effectively enforce the law. Transposition is narrower than implementation: it is an element of implementation, involving the transfer of the provisions of another legal act (a directive) to the national legal order, and, to this end, the adoption of a new legal act, an amendment or annulment of the previous act. See, inter alia: B. Kurcz, *Dyrektywy Wspólnoty Europejskiej i ich implementacja do prawa krajowego*, Kraków 2004, *passim*; M. Szwarz-Kuczer, *Zasada bezpośredniej skuteczności*, [in:] A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, Vol. 2: *Zasady – orzecznictwo – piśmiennictwo*, Warszawa 2007, p. 141; M. Domańska, *Implementacja dyrektyw unijnych przez sądy krajowe*, Warszawa 2014, p. 23 et seq.; E. Golewska, *Implementacja dyrektyw telekomunikacyjnych*, Warszawa 2007, p. 23 et seq.; A. Kunkiel-Kryńska, *Implementacja dyrektyw opartych na zasadzie harmonizacji pełnej na przykładzie dyrektywy o nieuczciwych praktykach handlowych*, *Monitor Prawniczy* 18, 2007, p. 989 et seq. In the Polish legal system, an act of law or other generally applicable national act is a form of transposition.

³⁴ M. Pechstein, *Urteil des Gerichtshofes vom 14. Juni 2007, C-422/-5 Kommissin v. Belgien*, *Deluxe aus Luxemburg – der aktuelle Fall im Europarecht* 7, 2007, p. 1, <https://www.rewi.europa-uni.de> (accessed 9.10.2018).

³⁵ For more on this subject, see S. Prechal, *Direct Effect Reconsidered, Redefined and Rejected*, [in:] J.M. Prinsen, A. Schrauwen (eds), *Direct Effect. Rethinking a Classic of EC Legal Doctrine*,

The period for transposing an EU directive is intended to give the member states time to adapt their internal law to the guidance provided by the directive. Before the expiry of that period, a member state cannot be accused of not having implemented the directive. This allegation can only be effectively raised after the transposition period has expired. The CJEU case law assumes that a provision which is directly effective is one which is sufficiently clear, precise, unconditional and capable of being applied independent of the member states' discretionary powers.³⁶ It is also pointed out that a provision of a directive has direct effect if the time limit laid down in the directive has expired and the national law has no provisions that are in conformity with the directive.³⁷ In the latter case, problems arise in relation to the admissibility of direct application of the directive, the interpretation of national acts in conformity with the directive and liability of the state under the EU law.³⁸

However, according to established CJEU case law, a member state should refrain from issuing provisions which could seriously undermine the achievement of the objective of the (new) directive when the period for transposition is still running.³⁹ There has been an evolution in the CJEU's views with regard to the legal consequences of a situation where the law of a member state thwarts the achievement of the objective of the new EU directive. Until 2007, the prevailing view was that a directive has a 'blocking effect' (in German *Sperrwirkung*) during its transposition period, in the sense that its entry into force prevents a member state from enacting legislation which is incompatible with the directive, and if that happens, the courts and government agencies must not apply such legislation. It follows from the CJEU judgment of 14 June 2007 in Case C-422/05, *Commission v. Kingdom of Belgium*⁴⁰ that the adoption of the concept of prior effectiveness of the directive in terms of a 'blocking effect' was too far-reaching.

In the factual state underlying this judgment, Directive 2002/30/EC of the European Parliament and of the Council of 26 March 2002 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports⁴¹ entered into force on 28 March 2002. The Directive introduced guidelines for the imposition of noise-related operating restrictions at the Union airports. The Directive required member states to establish appro-

Groningen 2002, p. 120; V.I. Gronen, *supra* n. 21, p. 49 et seq.; M. Domańska, *supra* n. 33, p. 23 et seq.

³⁶ See the CJEU judgment of 5 February 1963, 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1; K. Wójtowicz, *Bezpośredni skutek przepisów prawa wspólnotowego w porządku prawnym RP*, *Kwartalnik Prawa Publicznego* 2, 2004, p. 43 et seq.

³⁷ K. Wójtowicz, *supra* n. 36, p. 43 et seq.; Ch. Timmermans, *Application of Community Law by National Courts: (Limits to) Direct Effect and Supremacy*, [in:] R.H.M. Jansen, D.A.C. Koster, R.F.B. von Zutphen (eds), *European Ambitions of the National Judiciary*, Hague-London-Boston 1997, p. 30.

³⁸ M. Pechstein, *supra* n. 34 (accessed 9.10.2018).

³⁹ See, in particular, judgments of 18 December 1997, C-129/96, *Inter-Environnement Wallonie*, para. 45, ECLI:EU:C:1997:628; and of 14 September 2006, C-138/05, *Stichting Zuid-Hollandse Milieufederatie*, para. 42, ECLI:EU:C:2006:577.

⁴⁰ ECLI:EU:C:2007:342.

⁴¹ On the day of the judgment: OJ L 85, p. 40.

priate national legislation to implement the Directive by 28 September 2003. On 14 April 2002, the Kingdom of Belgium issued a Royal Decree regulating night flights of certain types of civil subsonic jet aircraft,⁴² which entered into force on 1 July 2003. The Decree introduced night-time operating restrictions at all airports in Belgium for certain categories of civil subsonic jet aeroplanes. In June 2002, the European Commission approached the Belgian authorities for information on the Royal Decree of 14 April 2002. The Commission considered that the measures taken within the period prescribed for transposing the Directive were seriously undermining the outcome prescribed by the Directive and thus infringed the Directive and the second paragraph of Article 10, in conjunction with the third paragraph of Article 249 EC Treaty.⁴³ The Commission was not satisfied with subsequent explanations by the Belgian authorities and therefore it brought an action before the Court of Justice of the EU on 28 September. The CJEU concluded that the Commission's position was well founded.

On the basis of the aforementioned judgment, literature has pointed out that during the transposition of a directive one should rather talk about the obligation of member states not to issue regulations which undermine the achievement of the objective of the new directive, in the sense that it is prohibited to make its effects (application) illusory (literally, there is the prohibition of frustration, *Frustrationsverbot*), in the understanding of this prohibition in public international law.⁴⁴ As a result, a breach of this prohibition may be declared as such under infringement proceedings.⁴⁵

From the perspective adopted in this study, i.e. the applicable principles of protection of legitimate expectations and legal certainty, it is crucial to consider the CJEU judgment of 7 April 2016 in Case C-324/14, *Partner Apelski Dariusz v. Zarząd Oczyszczania Miasta*.⁴⁶ The Court indicated that Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts⁴⁷ was not applicable *ratione temporis* in the main proceedings. However, in the Court's view, the application of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC⁴⁸ before the expiry of its transposition period would result in member states and contracting authorities not having sufficient

⁴² Moniteur belge of 17 April 2002, p. 15570.

⁴³ Currently Article 288 of the Treaty on the Functioning of the European Union of 25 March 1957, OJ 2004, No. 90, item 864[2], which provides: 'To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. [...] A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

⁴⁴ Article 18 *in principio* of the Vienna Convention on the Law of Treaties of 23 May 1969, OJ 1990, No. 74, item 439, provides: 'A State is obliged to refrain from acts which would defeat the object and purpose of a treaty.'

⁴⁵ M. Pechstein, *supra* n. 34 (accessed 9.10.2018).

⁴⁶ ECLI:EU:C:2016:214.

⁴⁷ OJ 2004 L 134, p. 114. This act was transposed to the Polish legal order by virtue of the Public Procurement Law, Dz.U. of 2013, item 907, as amended.

⁴⁸ OJ 2014 L 94, p. 65.

time to adapt to the new provisions introduced by that directive (which, as follows from its very title, repeals Directive 2004/18/EC). Article 63 of that Directive introduces substantial changes with regard to the economic operator's right to rely on the capacities of other entities in connection with a public contract. This provision introduces new grounds, not envisaged in the previous legal system. In this situation, the said provision of Directive 2014/24/EU cannot be used as a criterion for the interpretation of Article 48(3) of Directive 2004/18/EC, since it is not a question of resolving doubts of interpretation concerning the content of the latter provision. The Court pointed out that a different approach might in some way incorrectly anticipate the application of the new legislation which differs from that laid down by Directive 2004/18/EC, and it would be manifestly contrary to the principle of the legal certainty for economic operators.

In the context of the aforementioned CJEU judgment, it should be added that apart from the need to guarantee the implementation of the principle of legal certainty, the conditions for the application of the principle of the protection of legitimate expectations were present in the analysed case. In the circumstances of that case, the person concerned could have expected that there would be no changes in the law in the course of the proceedings which he could not have foreseen when the proceedings were initiated, despite exercising caution required of diligent economic operators.

4.2. RETROSPECTIVE APPLICATION OF A NORMATIVE ACT

The definition of the (national and EU) *lex retro non agit* principle is relatively less problematic than prior effectiveness of a directive. This principle assumes the non-application of the new provisions of law to the factual situation and relationships established under the previous provisions. *Argumentum a contrario*, we speak of the retroactive effect of law when the new law applies to events that were 'concluded in the past' and completed before the new provisions entered into force.⁴⁹ In this understanding, retroactivity is distinguished from the retrospective effect of the law, which occurs when the provisions of a new law regulate events or legal relationships of an 'open', 'continuous' nature that have not yet reached their completion ('relationships in progress'), and began or emerged under the old law and still continue after the entry into force of the new law.⁵⁰

Except in situations governed by criminal law, the *lex retro non agit* principle is subject to numerous exceptions and, additionally, in the case of a new member state, this principle may be considered together with the principle of immediate effect of the EU law.⁵¹ According to the CJEU, a legislative act may exceptionally have a retroactive effect if two conditions are met: this is required by the objective

⁴⁹ See the Polish Supreme Administrative Court judgment of 29 June 2016, II OSK 2663/14, <http://orzeczenia.nsa.gov.pl>. (accessed 23.06.2020).

⁵⁰ See the Polish Constitutional Tribunal judgments: of 5 November 1986, U 5/86, OTK 1986, item 1; of 28 May 1986, U 1/86, OTK 1986, item 2.

⁵¹ See S.L. Kaleda, *Przejęcie prawa wspólnotowego przez nowe państwo członkowskie. Zagadnienia przejściowe i międzyczasowe*, Warszawa 2003, p. 116 et seq.

of the provision, and the legitimate expectations of the stakeholders (addressees) are duly protected.⁵² These conditions must be met even where the retroactive nature of the provision is not clearly defined in its wording but arises from the nature of the legal norm it contains.⁵³ The need to meet these conditions is excluded where the purpose of the retroactive provision is to ensure the protection of the rights of an individual.⁵⁴

The relevant criteria triggering the retroactive effect of legal provisions were indicated by the Supreme Administrative Court in its judgment of 20 April 2016, I GSK 1259/14.⁵⁵ The circumstances underlying that judgment were connected with the protection of the EU market against imports of certain underpriced goods. In this case, the expectations of the individual who was party to the proceedings could not be regarded as legitimate and, as such, deserving protection, since the transaction conducted by that individual was intended to circumvent the EU law which intended, through sufficiently high duties, to eliminate the dumping applied by the People's Republic of China in respect of those goods.

The admissibility of introducing institutions with retroactive effect in the EU law or national law does not preclude the obligation to take into account certain rules designed to protect the interests of individuals. The CJEU case law highlights, inter alia, the need to consider the entitlements exercised by an individual, as well as the obligation to publicise the content of a legislative act. While this case law, by way of exception, considers it acceptable to apply the technique of giving retroactive effect to a law to protect the general interest, it also emphasizes the specific situations or legal mechanisms that should be associated with the protection of legitimate expectations of an individual. In the judgment of 8 June 2000 in Case C-396/98, *Grundstücksgemeinschaft Schloßstraße GbR v. Finanzamt Paderborn*,⁵⁶ and judgment of 26 April 2005 in Case C-376/02, *Stichting Goed Wonen v. Staatssecretaris van Financiën*, two cases were distinguished. Firstly, that was a situation where, because of the retroactive VAT exemption pertaining to real property rental (this term was also understood as covering, e.g. the use of real property), the taxable person had already deducted the VAT paid before the amended legislation, retroactively introducing an exemption, became effective, and, secondly, a situation where, under similar circumstances, the amending law, because of its retroactive effect, became effective before the taxable person made the VAT deduction. The CJEU indicated that in the former situation it is necessary to protect the legitimate expectations of the taxable

⁵² See the CJEU judgments: of 25 January 1979, 98/78, *A. Racke v. Hauptzollamt Mainz*, ECLI:EU:C:1978:223; of 25 January 1979, *Weingut Gustav Decker KG v. Hauptzollamt Landau*, ECLI:EU:C:1979:15.

⁵³ See the CJEU judgment of 11 July 1991, C-368/89, *Antonio Crispoltoni v. Fattoria autonoma tabacchi di Città di Castellow*, ECLI:EU:C:1991:307.

⁵⁴ See judgment of the Court (Fourth Chamber) of 18 January 1990, C-345/88, *Bundesamt für Ernährung und Forstwirtschaft v. Butterabsatz Osnabrück-Emsland eG*, ECLI:EU:C:1990:22.

⁵⁵ See also the Polish Supreme Administrative Court judgments: of 16 October 2014, I GSK 1174/13; of 22 October 2014, I GSK 1482/13; of 21 January 2015, I GSK 1421/13; of 22 October 2015, I GSK 257/14; of 17 December 2015, I GSK 818/14; of 11 February 2016, I GSK 1095/14; of 24 February 2016, I GSK 806/14; of 5 April 2016, I GSK 1012/14; published: <http://orzeczenia.nsa.gov.pl>. (accessed 23.06.2020).

⁵⁶ Both judgments published at: <http://curia.europa.eu>. (accessed 23.06.2020).

person. In the latter situation, the protection would only have been available if the content of the communications informing individuals about the proposed amendment to the legislation had not been clear enough to enable economic operators carrying out relevant economic activities to understand the effects of the proposed amendment on their activities.

5. CONCLUSIONS

As an inherent feature of democracy, laws can be amended at any time. In a democratic country governed by the rule of law, individuals are not entitled to a guarantee that the laws or their powers will remain unchanged.⁵⁷ Instead, individuals may expect that public authorities will exercise their powers in such a way so as to ensure that this will not affect situations and relationships arising under the applicable law in a way that reasonable and diligent individuals could not reasonably expect. In other words, the principle of legal certainty does not require that there is no legislative change but, instead, requires the legislator to take into account the specific situation of economic operators and to adapt the application of the new legislation accordingly, whenever necessary.⁵⁸

The application of these principles is broader than the norms of intertemporal or transitional law. The protection of legitimate expectations and legal certainty applies to the admissibility of direct legal effects produced by the new law: either before such new law becomes binding on individuals (applicability) or retroactively, with regard to factual states concluded in the past (before the promulgation of a legal act). In the former case, one deals with the so-called prior effect of a legal act (*Vorwirkung*). A particular variety of this institution is the prior effectiveness of an EU directive during the phase of its transposition (*Vorwirkung einer EU-Richtlinie*). In the latter case, one deals with a retroactive effect of a new law.

A conclusion that arises from this analysis is that, firstly, an EU directive during its transposition in an EU member state cannot be a source of legitimate expectations of an individual. This is opposed to the principle of legal certainty, which, in this case, ensures not only the protection of individual rights but also the protection of the public interest. In this way, the principle of legal certainty limits the application of the principle of the protection of legitimate expectations, while ensuring that the guarantees contained therein are fulfilled.⁵⁹

⁵⁷ See the CJEU judgments: of 15 July 2004 in Joined Cases *Di Lenardo Adriano Srl (C-37/02)* and *Dilexport Srl (C-38/02) v. Ministero del Commercio con l'Estero*, ECLI:EU:C:2004:38; of 7 September 2006, C-310/04, *Kingdom of Spain v. Council*, ECLI:EU:C:2006:521.

⁵⁸ See the CJEU judgments: of 7 June 2005, C-17/03, *Vereniging voor Energie, Milieu en Water and Others v. Directeur van de Dienst uitvoering en toezicht energie*, ECLI:EU:C:2005:362; of 10 September 2009, C-201/08, *Plantanol GmbH & Co. KG. v. Hauptzollamt Darmstadt*, ECLI:EU:C:2009:539; of 17 September 2009, C-519/07, *Commission of the European Communities v. Koninklijke FrieslandCampina NV*, ECLI:EU:C:2009:556.

⁵⁹ See K. Vogel, *Rechtssicherheit und Rückwirkung zwischen Vernunftrecht und Verfassungsrecht*, *Juristenzeitung* 18, 1988, p. 833 et seq.

Secondly, it is admissible for an individual to invoke legitimate expectations for protection against the retroactive effects of a new (whether the EU or national) law if the conditions for the application of that principle are met. This does not apply to cases where a person seeks to circumvent, abuse or breach the law through their actions and, therefore, it is necessary to retroactively implement mechanisms aimed at protecting the public interest.

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PRINCIPLES OF LEGITIMATE EXPECTATIONS AND LEGAL CERTAINTY IN THE CONTEXT OF AMENDMENTS TO EU LAW AND NATIONAL LEGISLATION

Summary

This paper concerns selected problems related to the complex topic of changes to the EU law and national legislation. It deals with the so-called prior effectiveness of the EU directives and the retroactivity of (ordinary) laws adopted by the EU member states. The research perspective

focuses on the functioning of these institutions vis-à-vis the principles of legitimate expectations and legal certainty. The article is primarily based on the analytical method, as well as the empirical method, drawing on the extensive case law of the Court of Justice of the European Union and the Supreme Administrative Court in Poland. Based on the research carried out by the author, it must be concluded, firstly, that an EU directive during its transposition period in an EU member state cannot be a source of legitimate expectations of an individual. Secondly, the principle of legal certainty is not negated when a normative act receives retroactive effect by way of an exception in order to protect the public interest, provided that legitimate expectations of individuals are guaranteed.

Keywords: principle of legitimate expectations, principle of legal certainty, change of law, retroactivity of law, directive

ZASADY UZASADNIONYCH OCZEKIWAŃ I PEWNOŚCI PRAWA A ZMIANY PRAWODAWSTWA UNIJNEGO I KRAJOWEGO

Streszczenie

Niniejszy artykuł dotyczy wybranych problemów związanych ze złożoną tematyką zmian prawodawstwa unijnego i krajowego. Rozważania w nim ujęte skupiają się na tzw. uprzedniej skuteczności dyrektywy unijnej oraz na retroaktywności ustaw (zwykłych) stanowionych przez kraje członkowskie UE. Perspektywa badawcza koncentruje się na funkcjonowaniu tych instytucji w obliczu obowiązywania zasad uzasadnionych oczekiwań i pewności prawa. W artykule zastosowano przede wszystkim metodę analityczną, a także metodę empiryczną, korzystając z bogatego orzecznictwa Trybunału Sprawiedliwości UE oraz Naczelnego Sądu Administracyjnego. W wyniku przeprowadzonych badań należy stwierdzić, po pierwsze, że źródłem uzasadnionych oczekiwań jednostki nie może być dyrektywa unijna w okresie jej transpozycji w państwie członkowskim UE. Po drugie, zasadzie pewności prawa nie sprzeciwia się wyjątkowe nadanie aktowi normatywnemu mocy wstecznej, z uwagi na konieczność ochrony interesu publicznego, o ile zagwarantowane są uzasadnione oczekiwania jednostek.

Słowa kluczowe: zasada uzasadnionych oczekiwań, zasada pewności prawa, zmiana prawa, retroaktywność prawa, dyrektywa

LOS PRINCIPIOS DE EXPECTATIVAS FUNDADAS Y SEGURIDAD JURÍDICA EN RELACIÓN CON MODIFICACIONES DE DERECHO COMUNITARIO Y NACIONAL

Resumen

El presente artículo se refiere a problemas selectos relativos a temática compleja de modificaciones de legislación comunitaria y nacional. Se centra en cuestiones de la eficacia anticipada de la directiva y la retroactividad de las leyes promulgadas por los Estados Miembros de la UE. La investigación se concentra en funcionamiento de estas instituciones desde la perspectiva de los principios de expectativas fundadas y seguridad de derecho. En el artículo se emplea sobre todo el método analítico, así como el método empírico, utilizando la jurisprudencia abundante del Tribunal de Justicia de la Unión Europea y del Tribunal Supremo de Administración.

Como conclusión hay que destacar, primero que directiva comunitaria durante el periodo de su trasposición en el Estado Miembro de la UE no puede constituir la fuente de expectativas fundadas de individuo; segundo, el principio de seguridad de derecho no queda vulnerado por la retroactividad excepcional, dado la necesidad de proteger el interés público, siempre que queden garantizadas las expectativas fundadas de individuos.

Palabras claves: principio de expectativas fundadas, principio de seguridad de derecho, cambio de ley, retroactividad de derecho, directiva

ПРИНЦИПЫ ЗАКОННЫХ ОЖИДАНИЙ И ПРАВОВОЙ ОПРЕДЕЛЕННОСТИ В КОНТЕКСТЕ ПОПРАВК К ЗАКОНОДАТЕЛЬСТВУ ЕС И НАЦИОНАЛЬНОМУ ЗАКОНОДАТЕЛЬСТВУ

Аннотация

В статье рассмотрены некоторые вопросы, связанные с внесением изменений в европейское и национальное законодательство. Рассуждения автора в значительной степени основаны на так называемом ретроактивном характере директив ЕС и на обратном действии (обычных) законов, принимаемых в государствах-членах ЕС. Автор фокусирует внимание на функционировании этих институтов в контексте принципов законных ожиданий и правовой определенности. При написании статьи использован, главным образом, аналитический метод. Кроме того, в рамках эмпирического метода проанализирована обширная судебная практика Суда Европейского союза и Высшего административного суда Польши. По результатам проведенного исследования следует сделать вывод, что, во-первых, источником законных ожиданий гражданина не может быть директива ЕС во время ее транспонирования в государстве-члене ЕС. Во-вторых, обратная сила, придаваемая законодательному акту в порядке исключения и в связи с необходимостью защиты общественных интересов, не противоречит принципу правовой определенности при условии гарантирования законных ожиданий граждан.

Ключевые слова: принцип законных ожиданий, принцип правовой определенности, изменения законодательства, придание обратной силы законодательным актам, директива

GRUNDSÄTZE DES VERTRAUENSCHUTZES UND DER RECHTSSICHERHEIT IM ZUSAMMENHANG MIT ÄNDERUNGEN DES EU-RECHTS UND DER NATIONALEN GESETZGEBUNG

Zusammenfassung

Dieser Artikel befasst sich mit ausgewählten Fragen im Zusammenhang mit dem komplexen Thema der Änderungen des Unionsrechts und der nationalen Rechtsvorschriften. Die in dem Beitrag dargelegten Überlegungen konzentrieren sich auf die sogenannte vorherige Wirkung einer europäischen Richtlinie und die Rückwirkung von (gewöhnlichen) Gesetzen, die von EU-Mitgliedstaaten verabschiedet wurden. Die wissenschaftliche Sicht richtet sich auf die Funktionsweise dieser Institutionen angesichts der geltenden Grundsätze des Vertrauensschutzes und der Rechtssicherheit. In dem Artikel finden hauptsächlich das Analyseverfahren und die empirische Methode Anwendung, wobei auf die umfangreiche

Rechtsprechung des EU-Gerichtshofs und des Obersten Verwaltungsgerichts der Republik Polen zurückgegriffen wird. Im Ergebnis der durchgeführten Untersuchungen ist zum einen festzustellen, dass die Umsetzung dieser EU-Richtlinie in einem Mitgliedstaat nicht Quelle berechtigter Erwartungen des Einzelnen und des Vertrauensschutzes sein kann. Zweitens steht, wird einem normativen Rechtsakt ausnahmsweise Rückwirkung zuerkannt, um das öffentliche Interesse zu schützen, dies nicht dem Grundsatz der Rechtssicherheit entgegen, sofern die berechtigten Erwartungen des Einzelnen und damit der Vertrauensschutz gewährleistet sind.

Schlüsselwörter: Grundsatz des Vertrauensschutzes, Grundsatz der Rechtssicherheit, Änderung der Rechtsvorschriften, Rückwirkung des Rechts, Richtlinie

PRINCIPES DE CONFIANCE LÉGITIME ET DE SÉCURITÉ JURIDIQUE DANS LE CONTEXTE DES MODIFICATIONS DU DROIT DE L'UE ET DE LA LÉGISLATION NATIONALE

Résumé

Cet article aborde certaines questions liées au thème complexe des changements dans la législation européenne et nationale. Les considérations qu'il contient se concentrent sur ce que l'on appelle l'efficacité antérieure de la directive de l'UE et sur la rétroactivité des lois (ordinaires) adoptées par les États membres de l'UE. La perspective de recherche se concentre sur le fonctionnement de ces institutions face aux principes de confiance légitime et de sécurité juridique. Dans l'article, la méthode analytique ainsi que la méthode empirique ont été principalement utilisées par l'auteur, qui s'est appuyé sur la riche jurisprudence de la Cour de justice de l'UE et de la Cour administrative suprême. À la suite des recherches menées, il convient de préciser, tout d'abord, que la source des attentes légitimes de l'individu ne peut pas être la directive de l'UE lors de sa transposition dans un État membre de l'UE. Deuxièmement, le principe de sécurité juridique n'est pas empêché par l'effet rétroactif exceptionnel d'un acte normatif, étant donné la nécessité de protéger l'intérêt public, à condition que la confiance légitime des individus soit garantie.

Mots-clés: confiance légitime, sécurité juridique, modification de la loi, rétroactivité de la loi, directive

PRINCIPI DI LEGITTIMO AFFIDAMENTO E CERTEZZA DEL DIRITTO NEL CONTESTO DELLE MODIFICHE AL DIRITTO DELL'UE E ALLA LEGISLAZIONE NAZIONALE

Sintesi

Il presente articolo riguarda problemi scelti legati alla complessa tematica delle modifiche della legislazione comunitaria e nazionale. Le riflessioni in esso contenute si concentrano sulla cosiddetta efficacia anteriore della direttiva comunitaria nonché sulla retroattività delle leggi (ordinarie) promulgate dagli Stati membri dell'UE. La prospettiva di analisi si concentra sul funzionamento di queste istituzioni alla luce dell'applicazione del principio del legittimo affidamento e della certezza del diritto. Nell'articolo è stato utilizzato soprattutto il metodo analitico, e anche il metodo empirico, utilizzando la ricca giurisprudenza della Corte di

giustizia dell'Unione europea e della Corte suprema amministrativa. In seguito alle analisi condotte bisogna affermare in primo luogo che la fonte del legittimo affidamento dei singoli non può essere una direttiva comunitaria in fase di trasposizione presso lo Stato membro dell'UE. In secondo luogo il principio della certezza del diritto non è in contrasto con il conferimento eccezionale di effetto retroattivo ad un atto normativo, a motivo della necessità di tutela dell'interesse pubblico, purché sia tutelato il legittimo affidamento dei singoli.

Parole chiave: principio del legittimo affidamento, principio della certezza del diritto, modifica del diritto, retroattività del diritto, direttiva

Cytuj jako:

Ostojski P., *Principles of legitimate expectations and legal certainty in the context of amendments to EU law and national legislation [Zasady uzasadnionych oczekiwań i pewności prawa a zmiany prawodawstwa unijnego i krajowego]*, „Ius Novum” 2020 (14) nr 2, s. 156–173. DOI: 10.26399/iusnovum.v14.2.2020.19/p.ostojski

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