

The Principle of Legitimate Expectations in the New Czech Civil Code

I Opening: Scope of Discussion

In discussing the principle of ‘legitimate expectations’,¹ I have to start with some remarks about the articulation of values in Czech civil law, because ‘legitimate expectations’ are about equity. With ‘values’ I mean universal tenets that are frequently referred to in civil-law codifications as interpretation instruments to bridge material (sector) rules in order to achieve fairness in concrete cases.² They are usually expressed as equity norms or standards.

After those introductory remarks, I will continue with comments on the background to the concept of ‘legitimate expectations’ and try to analyse it briefly. I will describe the public-law roots of the concept of ‘legitimate expectations’ and refer to its reflection in EU civil law. The last part of this overview provides information on the implementation of the principle in the new Czech Civil Code. We will see that, although the new law follows the trend and ‘legitimate expectations’ are employed in various contexts, the principle is far from being universally applicable.

II Equity Categories in Civil Code

The Czech Civil Code of 1964³ that preceded the current one⁴ originally showcased quite extensive rules on ‘values’ and overriding principles, but these were conforming to the prevailing ideology (accentuated social – in the meaning of ‘collective’ – dimension of civil law) and would

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¹ We may talk of ‘reasonable expectations’ too; the phrases are synonymous.

² I am aware that the terminology is not unproblematic. Civil law values are not identical to normative principles. Values are primarily an extralegal phenomenon. For more detailed analysis see e.g. Cass R Sunstein, ‘Conflicting Values in Law’ (1994) 62 *Fordham Law Review* 1661–1673, Gerhard Sprenger, ‘Über echte und scheinbare Objektivität von Rechten bei der Legitimation von Recht’ in Arend Soeteman, Mikael M Karlsson (eds), *Law, Justice and the State III: Problems in Law* (Franz Steiner Verlag 1995, Stuttgart, 38–53). Nevertheless, there are certain rules of law, the purpose of which is to transform value effects into normative environment; this is especially true of concepts like ‘legitimate expectations’. As such, equity principles may be regarded as normative reductions of values.

³ Act no 40/1964 Coll., the Civil Code.

⁴ Act no 89/2012 Coll., the Civil Code.

nowadays sound unacceptable.⁵ After the turnaround in 1989 the Civil Code has been stripped of these provisions, mostly without any substitution.⁶ Since then the Civil Code continued with more or less sterile rules – it was a technician statute in its exact meaning. The underlying values were either constructed by case law (not without difficulties)⁷ or extracted directly from the constitutional order.⁸

The new Civil Code changed the course and presents itself as value-based.⁹ At this point the legislator took care that the Code resembles more the Austrian Civil Code (ABGB) than the German one (BGB). The act uses terms like ‘values’ [§ 2(1)], ‘acknowledged principles of justice’ [§ 3(3)], ‘purpose of law’ [§ 2(2)], etc. – these concepts are plentiful especially in the introductory (general) part of the Code. This is a good starting point but this approach looks to be poorly implemented. It is difficult to find a system in the tangle of equity categories that the new Civil Code introduced. We keep the old concept of good morals, but brandish new terms like ‘honesty’ [§ 6(1)], ‘decency’ (e.g. § 2958ff), ‘abuse of law’ (§ 8) and other which all are imperatives imposed on subjects of law. It is questionable whether these concepts have been well considered. They are duplicated or overlapping and their contours are blurred.

It cannot be posited that, if classic rules of law will be, here and there, supplemented by words which represent values (such as ‘fairness’), the law will automatically improve to a qualitatively higher level than the pure technician approach. To employ values in law means to process them by the same juridical methodology as ordinary civil-law matter (ownership, contracts, torts etc.), i.e. to develop systematics, content, internal reasoning mechanisms etc. The difference is that norms that are primarily value-carriers are cross-sectional, i.e. they permeate all (or at least more than one) sector regulations. That is why their form must be more flexible in order to enable applicability in all conceivable situations.

⁵ E.g. art 6: ‘Exercise of rights and obligations resulting from civil law relationships shall conform to the rules of socialist coexistence’. The concept of ‘rules of socialist coexistence’ replaced the traditional ‘good morals’, but its meaning was unclear; if anything, its content was designated arbitrarily according to needs of the regime. Similarly art VII: ‘No one shall misuse his or her rights against the interests of the society or other citizens’ (i.e. ‘interests of the society’ should have gone first).

⁶ Subject to some exceptions. The far-reaching amendment that recast the original wording of the Code in 1991 (Act no 509/1991 Coll.) e.g. returned ‘good morals’ instead of the principle of ‘socialist coexistence’.

⁷ E.g. the principle of proportionality (reasonableness) in assessing spheres of responsibility of contractual parties – Czech Supreme Court: 25 Cdo 2516/2009 (information duties of suppliers *vis-à-vis* consumers).

⁸ Illustratively, various aspects of protection of ownership according to art 11 of the Charter of Fundamental Rights and Basic Freedoms (which forms a part of the constitutional order of the Czech Republic), such as breaking through old law giving tenants a strong position against landlords regarding termination of lease of flats, setting rent etc. (e.g. Constitutional Court: Pl. ÚS 20/05).

⁹ See the explanatory memorandum to § 2 of the new Civil Code: ‘It is provided that law is not autotelic but sticks to certain value framework expressed in accordance with our constitutional order and especially with principles of natural law.’

III The Principle of Legitimate Expectations: Background

Now let's come back to the very principle of 'legitimate expectations'. The concept is well known in constitutional and administrative law.¹⁰ It has to do with the idea of rule of law (*Rechtsstaat*) and legal certainty. It sets requirements for law-making so that basic standards of foreseeability are to be respected – a ban on retroactivity,¹¹ respect for acquired rights (*iura quaesita*),¹² matching the title and content of law regulations,¹³ etc. may be derived from the tenet. Similarly, the administrative branch should observe a certain logical continuity of action and not to change its practice, on which its addressees rely, unexpectedly and without sufficient reasons.¹⁴ This applies in large part also to retroactive effect case law.¹⁵

In civil law, the position of the principle of 'legitimate expectations' is more ambiguous. 'Legitimate expectations' are not aimed at public bodies but at all conceivable subjects of the law (contractual partners, tortfeasors, shareholders, family members, etc). It does not relate primarily to law (in the objective meaning) and its practical implementation, but to (subjective) rights and obligations. Moreover, the rule is basically reciprocal, so not only the legitimate expectations of one party, but those of both of them must be taken into account in order to evaluate respective legal consequences.

The category of 'legitimate expectations' started to appear on the European level in the first consumer directives from the 1980s and 1990s. Art 6 of Directive 85/374/EEC concerning liability for defective products¹⁶ provides that 'a product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including (a) the presentation of the product, (b) the use to which it could reasonably be expected that the product would be put, (c) the time when the product was put into circulation'. Directive 1999/44/EC on certain aspects of the sale of consumer goods¹⁷ states that 'the seller must deliver goods to the consumer which are in conformity with the contract of sale. Consumer goods are presumed to be in conformity with the contract if they [...] show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect,

¹⁰ For English law see *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213. Jonathan Moffett 'Resiling from Legitimate Expectations' (2008) 13 Judicial Review 219–231, 219 summarises that 'where a public authority represents (either by way of an express promise or implicitly by way of past practice) that it will conduct itself in a particular way, that representation may give rise to a legitimate expectation on the part of the representee that the public authority will so act, and the public authority may have to give effect to that expectation'

¹¹ Czech Constitutional Court: IV. ÚS 251/94.

¹² Czech Constitutional Court: I. ÚS 3296/12 (parties cannot suffer adverse financial consequences from an amendment of procedural law which entered into force in course of running a civil proceeding).

¹³ Czech Constitutional Court: Pl. ÚS 77/06 (the title of a statute which confuses its addressees as to the content of the statute may lead to an unconstitutional result).

¹⁴ Czech Constitutional Court: IV. ÚS 525/02.

¹⁵ Czech Constitutional Court: III ÚS 3221/11.

¹⁶ Council Directive (EEC) 85/374 of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210.

¹⁷ Directive (EC) 1999/44 of the European Parliament and of the Council of 25 May 1999 on certain aspect of the sale of consumer goods and associated guarantees [1999] OJ L171.

given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling' (art 2). Art 3(3) of Directive 2001/95/EC on general product safety¹⁸ speaks of 'reasonable consumer expectations concerning safety'.¹⁹

Hans-W. Micklitz in his paper *Legitime Erwartungen als Gerechtigkeitsprinzip des europäischen Privatrechts*²⁰ sees the trend – as I understand it – as an attempt to escape national concepts of good faith (*Treu und Glauben, bonne foi, bona fides*), the interpretation and application of which is extremely variable among the Member States but, at the same time, to institute an equity category which would be easily compatible with national legal orders and, thus, implementable into them (so that the concept will rest not only in European law).²¹

Nevertheless, it may be questionable whether the cited provisions of European directives alone would be able to give rise to a normative principle of European law or Member States' civil laws, respectively²² (and, moreover, the provisions are not reciprocal as the model rule, but protective of consumers only), but it is clear that the mentions of 'legitimate expectations' in the EU legislation head deeper. The provisions indeed do not establish a distinct (independent) legal obligation, but seem to refer to a standard of behaviour of the supplier which would have to be applied anyway (irrespective of its legal grounds). It can be claimed that the existing instances of application of the rule of 'legitimate expectations' in EU law refer exactly to the principle of good faith which Prof. Micklitz hinted at, but which he did not follow due to its controversial nature.

'Legitimate expectations' mean to take into account and respect the mental and factual position of those with whom legal (or, more generally, social) relations are entered into or exercised. It does not mean that one must make concessions to the interests of others, but abusive

¹⁸ Directive (EC) 2001/95 of the European Parliament and of the Council of 3 September 2001 on general product safety [2002] OJ L11.

¹⁹ Also Council Directive (EEC) 86/653 of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L382 contains a mention of expectations of the agent [art 4(2)(b)]. See also the Acquis Principles (Principles of the Existing EC Contract Law) by the Acquis Group (Research Group on the Existing EC Private Law) published in 2007, in particular art 7:101(2): 'A business must perform its obligations with the special skill and care that may reasonably be expected to be used with regard, in particular, to the legitimate expectations of consumers.' Protection of the 'expectation interest' is acknowledged also in common law; for England see Ewan McKendrick, *Contract Law* (Macmillan 1997, Houndmills, London) 371 et seq. ('there are a number of doctrines and rules which weaken the commitment of the law of contract to the protection of the expectation interest'). After all, the theory of implied contractual terms, especially terms implied in fact, is very close to 'legitimate expectations', e.g. Guenter H Treitel, *The Law of Contract* (Sweet & Maxwell 1995, London) 185 et seq.

²⁰ Hans-W. Micklitz, 'Legitime Erwartungen als Gerechtigkeitsprinzip des europäischen Privatrechts' in Ludwig Krämer, Hans-W. Micklitz, Klaus Tonner (eds), *Law and Diffuse Interests in the European Legal Order: Liber amicorum Norbert Reich* (Nomos Verlag 1997, Baden-Baden, 245–278) 271.

²¹ Micklitz (n 20) 271: 'Ein supranationaler Konkretisierungsversuch von *Treu und Glauben* berührt nationale Rechtsstraditionen und Rechtsentwicklungen.'

²² See Karl Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (De Gruyter Recht 2003, Berlin) 570. For somewhat different reasoning see Norbert Reich, Hans-W. Micklitz, *Europäisches Verbraucherrecht* (Nomos Verlag 2003, Baden-Baden) 29: the principle functions as 'Abwägung der Interessen des Unternehmens [an möglichst ungehindertem] Marktzugang und des Verbrauchers an einer Durchsetzung berechtigter Interessen andererseits'.

and inconsiderate actions must be avoided (such as profiting from an information deficit).²³ The rule of ‘legitimate expectations’ definitely requires certain level of empathy and communicative attitude. But this is no difference from social intercourse in general – it is just a legal reflection of normal (sound) social activity.

IV Concept of Legitimate Expectations in Civil Law

That is why it may be tricky to present ‘legitimate expectations’ as a separate issue, as an independent principle or value. It is one of several sides (aspects) of the legal concept of good faith and fair dealing²⁴ (*Treu und Glauben*).²⁵ Nevertheless, I am convinced at the same time that it is useful to discuss ‘legitimate expectations’ as such. I have at least two reasons for it: The first is the example of European law – we see that if no consensus can be reached in regard to more complex concepts (such as *Treu und Glauben*), ‘legitimate expectations’ may be the common ground. The second reason is that ‘good faith’ is too broad (voluminous) a category and its particular effects must be studied on its components anyway – such as ‘legitimate expectations’, or even subcategories of ‘legitimate expectations’, such as the principle ‘*venire contra factum proprium*’ (No-one may set themselves in contradiction to their own previous conduct).

‘Legitimate expectations’ as a legal concept is a combination (interplay) of subjective and objective factors.²⁶ ‘Expectations’ is a subjective mental element which is corrected by the requirement of ‘legitimacy’ (as the objective element). Not all expectations are therefore protected, but only those which can be generally perceived as legitimate (or reasonable) in the given situation, that is, provided that a reasonable (ordinary, mindful) person would have similar expectations under given conditions. At the same time, we must be aware that the expectations are not judged in an isolated manner but in context of the entire interaction of the expecting party and the party to which the expectations relate. Especially if a kind of privity relation exists, such as in a contract, one can expect closer interaction between the parties and a higher level of cooperation (and not doing so, the party would have to be estopped from making the argument of illegitimacy, in most cases).

Another important problem is when and how the ‘legitimate expectations’ rule can be applied (in abstraction). It is clear that – as a legal principle – it cannot give rise to rights and

²³ The philosophy of ‘legitimate expectations’ more or less corresponds to the classical *exceptio doli*, see Reinhard Zimmermann, Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000, Cambridge) 16 et seq.

²⁴ The term ‘good faith and fair dealing’ is used in line with the Principles, Definitions and Model Rules of European Private law: Draft Common Frame of Reference (DCFR) by the Study Group on a European Civil Code and the Acquis Group (Research Group on the Existing EC Private Law), published in 2009, to underscore ‘good faith’ as objective standard of behavior and not just a subjective state of mind (DCFR, Annex 1).

²⁵ Taking into account all facets of ‘*Treu und Glauben*’ developed by German legal doctrine, i.e. *Treu-, Schutz-, Mitwirkungs- & Aufklärungspflichten*, see e.g. Eugen Klunzinger, *Einführung in das Bürgerliche Recht* (Verlag Vahlen 2004, München) 183–185.

²⁶ Micklitz (n 20) 269.

obligations per se.²⁷ It cannot be held that if somebody expects something from another person, this person must comply with it – of course, unless a legal title exists (such as contract, duty of care etc). However, the law may provide otherwise (e.g. apparent authority according to the law of agency). There are in principle three possibilities on how to apply ‘legitimate expectations’ within the framework of positive law (not taking into account ‘legitimate expectations’ as a factor for considerations de lege ferenda ‘with a view to the future law’ – which would be the fourth eventuality):

1. as an interpretation rule: this is the most natural context. In course of interpretation of contracts (and legal positions), regard should be paid to whether the legitimate expectations of a party were observed or ignored,²⁸

2. as a component of the standard of care (especially in tort law and fiduciary contract relationships): this aspect is about the objectivisation of subjective mental factors which constitute negligence (fault), i.e. the creation of various standards of care in tort law. There is no uniform standard of care, but particular standards depend on (possibly multiple) interactions between the parties. For example, if two people, who have met never before, come together, the standard of care in their mutual contact is defined by that which one can expect of an average mindful person. If the relationship gets more intimate, then all known specifics shall be included in the what-can-be-expected test (which reflects – in turn – in tightening the applicable standard of care). Naturally, professionals are, as a rule, burdened with a higher standard of care than laymen,

3. as a lead (guideline) to exercise discretionary powers (whether contractual or statutory): this function is similar, although not identical, to the interpretation task: in structurally unbalanced contracts, which are frequent nowadays, the weaker party often gives a right to the stronger party to exercise a right or measure at its sole discretion without any predefined terms (e.g. to place or not to place orders, to provide optional consideration, to terminate the contract, etc). The principle of ‘legitimate expectations’ can be a tool by which the actions of the dominant party can be sanctioned if they would lead to unreasonably severe consequences.²⁹

²⁷ For similar interpretation in case of the concept of ‘good faith’ in the Uniform Commercial Code, see the Official Comment to § 2:103(b) UCC.

²⁸ See DCFR (n 24) art II.-8:101(2): ‘If one party intended the contract, or a term or expression used in it, to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could reasonably be expected to have been aware, of the first party’s intention, the contract is to be interpreted in the way intended by the first party.’ The theory of ‘legitimate expectations’ finds place also in art II.-8:102 on matters relevant for interpretation of contracts.

²⁹ DCFR in similar context does not speak of ‘legitimate expectations,’ but of ‘gross unreasonableness.’ See art II.-9:105: ‘Where the price or any other contractual term is to be determined by one party and that party’s determination is grossly unreasonable then, notwithstanding any provision in the contract to the contrary, a reasonable price or other term is substituted.’ However, in general, the problem is not limited to determination of contractual terms; it refers to exercise of any contractual right of discretionary nature.

V Legitimate Expectations in Czech Civil Code

Although the term ‘legitimate expectations’ (*oprávněná očekávání*) is spread in several places in the new Czech Civil Code, no cover rule exists, but this is no surprise taking the quite confused situation with equity categories in the Code mentioned earlier into account. According to § 6, everybody shall act honestly in legal transactions. It can be argued that the formulation encompasses also respect for the ‘legitimate expectations’ of the other party (and it would be logical), but the wording itself is too vague.³⁰

Unlike that, the new Code is more helpful in specifying the general (first-order) standard of care, the definition of which was absent in the previous Code. A series of rebuttable presumptions are used for that purpose. According to § 4, it is presumed that every legally competent person possesses the intellect of an average man and ability to use it with ordinary care and caution and that everybody may reasonably expect that. If ‘knowledge’ is relevant for some legal consequence, it should rely on the knowledge of a person knowledgeable of the case after taking all circumstances which must have been obvious to someone in their position into account.³¹ According to § 5, professionals who present themselves as such show that they are able to act with the knowledge and care connected with the profession.³² Negligence (generally, not only of professionals) is presumed if one does not act in a way as can be expected from a person of average knowledge in private relations (§ 2912).³³

However, as mentioned, the provisions define primarily the first-order standard of care. If the parties are knowledgeable of each other, of their background, expectations and interests, the standard of care will have to be refined to the actual situations. In that respect, the general rules are not ideal as they count mainly on the average person, which may not be the case. However – as indicated – the rules just set rebuttable presumptions, so adapting the standard of care should not be much of a problem.

Also, the interpretation of juridical acts rests (rightly) in large part on the ‘legitimate expectations’ rule. Pursuant to § 556, if a juridical act is not to be interpreted on the basis of the intention of the acting party, expressions shall be construed in accordance with the meaning which would be typically attributed to them by a person in the position of the addressee of the expression (i.e. which this person must have ‘reasonably expected’).

The ‘legitimate expectations’ standard is of course also used within the contract law, e.g. in case of culpa in contrahendo (fault in conclusion of a contract).³⁴ This is the best evidence that

³⁰ This contrasts with the new Hungarian Civil Code (Act V of 2013) which provides (s 1:3) simply but aptly that ‘in exercising rights and fulfilling obligations, the requirements of good faith and fair dealing should be observed,’ and that ‘the requirements of good faith and fair dealing shall be considered breached where a party’s exercise of rights is contradictory to their previous actions which the other party had reason to rely on.’ Hence, the concept of good faith in objective meaning is expressly referred to and accent is put on the principle *venire contra factum proprium*.

³¹ This shall apply *mutatis mutandis* also to ‘doubts’ [§ 4(2)].

³² Somewhat comparable rules can be found in s 1:4 of the Hungarian Civil Code (n 30).

³³ This rule applies within the tort law whereas the provisions cited before are of general applicability.

³⁴ Similarly the Acquis Principles (n 19) art 2:102: ‘In pre-contractual dealings, a business must act with the special skill and care that may reasonably be expected to be used with regard, in particular, to the legitimate expectations of the consumers.’

'legitimate expectations' are nothing new in the civil law. If one party expects the conclusion of a contract and relies on it and the other party frustrates the negotiations for no legitimate reason, it shall be liable for the damage caused (§ 1729). But what is new is the rule that provisions of standard business terms which the other party could not have reasonably expected shall have no effect unless the other party expressly accepted them (§ 1753). This is an example of the proper implementation of the 'legitimate expectations' principle, which can be helpful in practice.

Aside from that, 'legitimate expectations' must not be necessarily examined only as a positive principle of law, but also as a piece of legal philosophy, a source of law. This would lead to a much broader analysis which would exceed the scope of this paper. It might be just worth mentioning that the new Czech Civil Code radically extended the possibilities of bona-fide acquisition of property (i.e. acquisition of property from a non-owner, provided that the acquirer is in good faith that they are acquiring property from the owner or another entitled person). The old Civil Code did not allow bona-fide acquisition except for some rather marginal cases (within inheritance law and certain business transactions),³⁵ which led to difficult situations if the line of bona fide owners departed from the formal sequence of legal titles (especially in the case of real property). Now, every purchaser who relies in good faith on public records in the Real Estate Cadastre shall acquire valid title to the purchased land (§ 984). Broad possibilities of bona fide acquisition are open also with regard to personal property.³⁶ It is clear that purpose of these regulations is to protect the acquirer who 'legitimately expects' to obtain title to the property.³⁷

VI Conclusion

Instead of conclusions, it would be useful to underscore a question that should have been probably discussed at the beginning. Is it necessary at all to deal with concepts like 'legitimate expectations', 'good faith' and similar? They are hard to grasp, without clear content and scope of applicability and extremely conditional on factual circumstances. Practitioners would agree that one cannot rely on them before the courts, because their application depends very much

³⁵ The former situation concerned sale of inherited estate by a putative heir whom the inheritance had been affirmed by a probate court [§ 486 of the Act no 40/1964 Coll. (the old Civil Code)] and the later sale of personal property between businesses [§ 446 of the Act no 513/1991 Coll., the Commercial Code (which was abrogated along with the old Civil Code and replaced by the new Civil Code)]. Both situations were conditioned by good faith of the acquirer.

³⁶ § 1109ff (applicable to the following acquisitions: in public auctions, in stock or commodity exchanges, from businesses in the ordinary course of business, against payment from someone whom the property has been entrusted, from putative heirs whom the inheritance has been affirmed by a probate court; otherwise only if good faith of both the buyer and the seller is proven and the real owner was not deprived of the property by a crime).

³⁷ The principle of 'legitimate expectations' was invoked by Czech Constitutional Court in context of bona-fide acquisition even before the new Civil Code entered into force. E.g. in Pl. ÚS 78/06 of 16 October 2007 the Constitutional Court argues that cancellation (annulment) of legal title to immovable property which belonged to legal predecessor of the current owner cannot lead to loss of ownership by the current owner. The obligation to respect 'legitimate expectations' has been derived from the constitutional principle of legal certainty (rule of law, *Rechtsstaat*).

on the judge's discretion. Despite all of that, abstract equity concepts are necessary and I am convinced that, over time, they will be even more necessary. Civil law is normally conservative, which is not wrong, but it must take care not to lose touch with social reality (development). This can be most easily achieved by engaging dynamic legal concepts, such as 'legitimate expectations' or 'good faith', the content of which is variable depending on the actual situation (whether on a macro or micro social level). All we need is to learn to process and apply them so that they do not give the impression of legal scholars' whims but are perceived as a workable and useful element of law.