LEGAL CERTAINTY AND LEGITIMATE EXPECTATION IN THE EU LAW

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Abstract
European Union law is a legal system which has its own institution of adopting legislative acts, governing bodies and judicial review guarantying the operating of the system under its principles. According to the founding treaties European Union operating is based on its principles as well as on the common constitutional traditions of the Member States which form the general principles of the Union Law. All the constitutions of the Member States are based on Rule of Law; subsequently the general principles of the Union Law derived from rule of law. Legal certainty and legitimate expectation is a central issue and important principle of the rule of law. Subject of this paper will be analysing the implementation of the Legal certainty and legitimate expectation as general principle of the EU law, through the case law developed by Court of Justice of the European Union as the institution which has the exclusive competence to ensure that in the interpretation and application of the Treaties the law is observed and the sole competence to declare an act of an EU institution to be invalid. Analysing the application of this principle will help understanding better the rule of law as main criteria for Albania in its path toward the EU integration.

Key words: Rule of law; European Union Law; Judicial Review; Court of Justice of the European Union; European Integration; Approximation of legislation.

Introduction
Albanian political and legal system is based on rule of law. However, due to many factors the rule of law is not fully achieved especially in the legal system. The Albanian legal system as well as its institutional setup has been in continuous change in order to accomplish the requirements of the rule of law. On the other hand in the framework of the EU integration as one of its main political goals, Albania is required by all EU reports and bilateral documents in this process to strengthen the law enforcement in align with the best practices of the EU. Stabilization Association Agreement (SAA), the most important instrument in this process, among others, serves also as a commitment for the changes in the institutional framework of Albania. The institutional framework of Albania has changed a lot for this purpose since the starting the negotiations on SAA. The main focus on these changes has been the distinction between regulatory functions and policy function. In order to have regulatory system independent from the policy making institutions, many new institutions were established and many others were restructured. The process of the reforming the institutional set up has been in aligning with the other fundamental commitment under the SAA; the approximation of EU legislation into Albanian legal system. For the EU legislative acts the approximation of legislation in Albania has succeeded to satisfy the requirements of the process; most difficult has been implementing these laws effectively in compliance with the rule of law requirements. The Albanian administrative bodies and courts, often failed to satisfy the essential requirements of rule of law, due to the rapid changes in their mission and structures and the lack of the tradition.

In this regard, the general principles of the rule of law In this regard the principle of legal certainty and legitimate expectation provides an important assertion of the rule of law that ‘those subject to the law must know what the law is so as to plan their action accordingly’\(^1\). Being general principles of law, legal

Legal certainty and legitimate expectation jurisprudence in the EU are developed by Court of Justice of the European Union in its case law and is part of the EU legal order. In the hierarchy of the norms ‘general principles’ sit below the constituent treaties and may be used not only for interpreting legislative and implementing acts but also as ground for review of the legality of such acts.

Court of Justice of the European Union has the duty to secure the uniformity and coherence in the application of the EU law. Therefore the CJEU is in charge to safeguard the Rule of Law within the union including the legislative acts, so called soft laws, implementing acts and all the activity of the EU bodies and agencies. In this regard the CJEU has jurisdiction in three main areas. First, infringement proceedings, means the competence to rule over action brought against a Member State for failing to fulfil their obligations under the Union law. Second, the power of judicial review of EU legislative and executive acts; under the article 230 of TFEU it can review the legality of all acts producing legal effects. And third, upon the request of the national courts of Member States it gives ruling on cases that relate on any aspect of EU law. Under the article 263 (2) Judicial review shall be available also for infringement of the treaties or any rule of law relating to their application or misuse of powers.

Principle of legal certainty and legitimate expectations is developed in the case law by the CJEU under the power of the judicial review of EU acts. General principles of rule of law serve as guide to the interpretation of the EU law, and constitute ground for review of the EU law including implementing acts. Given the paucity of provisions in the original Treaties, the Court of Justice has established general principles of Community law by resorting to a creative method of ‘evaluative comparison’ of the laws of the Member States to fill gaps in Community law.

Although mentioned together in substance the legal certainty and the legitimate expectation are two separate principles. While legal certainty require that individuals must be able to ascertain what their rights and obligations are, and is strongly based upon the temporal dimension and retroactivity, the legitimate expectation is rooted in the concept of the good faith meaning that an operator induced to take an action the administration should not withdraw from, so the operator suffers loss.

Legal Certainty

In general, for the principle of Legal Certainty is that the law must provide its subjects with the ability to regulate their conduct inasmuch to protect themselves from the arbitrary use of the state power. It is also known as the maximum predictability of the administration’s behavior. Legal certainty requires that "there be no doubt about the law applicable at a given time in a given area and, consequently, as to the lawful or unlawful nature of certain acts or conduct".

Legal certainty as central requirement for the rule of law has been protected since the very beginning of the integration process of Europe. The first case law in the issue was in joint cases 42/59 and 49/59, SNUMAT v High Authority (1961) ECR 109. But the most accurate definition was given in Heinrich:

Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.

It has two dimensions; the temporal one mainly focused on retroactivity and the clarity of law which enables the subject of EU law to understand their rights and obligations.

Temporal dimension and the prohibition of retroactivity set a prohibition for the measures to take effects prior their publication. This is a worldwide known principle and is also confirmed by the Court of Justice since 1979 in the case Tomadini v Administration delle Finanze dello Stato. It is a simple principle meaning that the effects arrived prior to the publication of the act should not be regulated by the later legal acts. However it is not considered to be retroactive if the act regulates retroactively the future effects of the situations existing before the publication of the act in question.

In Regina v Kirk, Kent Kirk the master of a Danish shipping vessel “Sandkirk”, sailed from Denmark and commenced fishing on 6 January with the 12 miles coastline of the United Kindom. Following Mr. Kirk was condemned by UK court for fishing on 06/01/1983, within 12 miles limited British lines in contravention with the Sea Fish (Specified United Kingdom Water) (Prohibition of fishing) Order 1982. Mr. Kirk submitted that UK was not entitled to bring into force the so called Sea Fish 1982 Order.

The outline of the legislative situation was that by Council Regulation No 101/76 was established the
The Member States shall ensure equal conditions of access and terms of use of fishing grounds ... for all fishing vessels flying a flag of a Member State and Registered in Community territory. Derogation from the principle of equal conditions of access was allowed by the regulation for a 10 years period expiring 31 December 1982. United Kingdom exercised that derogation by adopting the Fishing Boat Designation Order 1972, by which the Danish vessels were restricted of fishing within the 6 up to 12 miles of UK coastline. By expiration the derogation period the Council failed to adopt a measure regulating the common fisheries policy as the regulation 101/76 foresaw. The United Kingdom adopted the Sea Fish Order 1982, which came in force on 1 January 1983, and applied for approval by the Commission. The Sea Fish Order banned fishing within the United Kingdom 12 miles limit by vessels registered in Denmark. The approval by community law came on 25 January 1983 by Council regulation No 170/83 establishing a community system for the conservation and management of fishery recourses. The regulation 170/83 authorized retroactively as from 1 January 1983 the retention of the derogation regime, established meanwhile by the Sea Fish Order 1982. The issue in dispute in the main proceeding was the intervening period from 1 January from 25 January 1983, the period enforced retroactively by regulation in quest. Upon the appeal of the Mr. Kirk the Newcastle Crown Court referred for Preliminary Ruling to the Court of Justice of Communities the question: having regard the to all relevant provisions of the community law did the United Kingdom have the right after 31 December to bring into force the Sea Fish Order 1982 to that extent that the order prohibits only vessels registered in Denmark shipping as specified in Order? The Court of Justice ruled that: “...it is sufficient to point out that such retroactivity may not, in any event, have the effect of validating ex post facto national measures of a penal nature which impose penalties for an act which, in fact, was not punishable at the time at which it was committed. That would be the case where at the time of the act entailing a criminal penalty, the national measure was invalid because it was incompatible with Community law.”

It also pointed out that: “The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice”.

The main focus in this regard is to prevent the retroactivity of penal measures. The retroactivity of rules having financial consequences is also strictly observed by Court of Justice. However there are derogations from the principle as exemption in some case the measure can produce it effects retroactively prior their publication. In this case two conditions should be satisfied. First, the retroactivity of effects of measure in quest should be essential requirement to achieve the aim of the measure and secondly the legitimate concerns of those concerned by the measure should be respected. In such derogations the importance of the issue regulated and the purpose aimed prevails. Court of Justice ruled that the legality of a measure in the common agriculture policy can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see Fedesa). In Fedesa, a directive forbidding the use of certain hormones in agriculture was annulled for procedural reason. A new directive containing the same rules having regard to the hormones in quest was adopted on 7 March 1998 stipulating the retroactive effects from the beginning of the year 1998. The retroactivity of the measure in this case was justified with the reason of not having the markets unregulated for the period prior to the march 1998 due to the annulment of the previous directive. The Court of Justice found no breach of the principle of legal certainty in this case due to no changes on the legitimate expectations of the concerned by directive, importance of the issue covered by directive and short period covered by retroactivity: “As regards the retroactive effect of the directive at issue outside the criminal sphere, it should be recalled that, ……, although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. In order to reply to the question raised, it is therefore necessary to determine whether those criteria were satisfied in the present case.”

Since in the present case the earlier directive was annulled because of a procedural defect, the Council considered it necessary to adopt a directive in the same terms, including the date stipulated for its

12 Case C-331/88 R v MAFF, ex parte Fedesa (1990) ECR I- 4023
13 Case C-331/88 R v MAFF, ex parte Fedesa (1990) ECR I- 4023, paragraph 45.
implementation, in order to avoid a temporary legal vacuum with regard to the existence of a basis in Community law for national provisions adopted by the Member States in order to comply with the directive which was annulled.

In those circumstances, the persons concerned, whose activities were subject to national legislation adopted in order to implement the directive which was annulled, could not expect the Council to change its attitude on the substance of the matter? Accordingly, the retroactive nature of the new directive does not infringe the principle of the protection of legitimate expectation.

It follows from the foregoing that the directive is not inconsistent with the principle that legislation should not be retroactive.\(^1^4\)

The second dimension of the principle of the Legal Certainty is the clarity. In other words the subjects concerned must know their rights and obligations. In this regard, there are two issues to take in consideration. First the publishing and second the EU measures should be clear and their application should be foreseeable. Due to the complex and comprehensive procedure of adoption of legislation and implementing acts in the EU, there are no records of obscure measures. But having in mind the Court of Justice stated that EU measures should be clear and foreseeable\(^1^5\), can be realized that obscure measure would be struck down by the Court of Justice.

However, for the principle of legal certainty to be respected the publishing of the measures is a sine qua non condition. In Heinrich\(^1^6\) Austrian authorities banned a traveler to get on board of an aircraft with his tennis racquets as the latter were listed as forbidden item on board in the annex of the Regulation No 622/2003. This annex was non published on the Official Journal of the European Union, and the case was referred to Court of Justice to decide whether such unpublished obligation be enforceable against individuals. The Court ruled that:

“…. it is contrary to the requirements of legal certainty to allow the annex to Regulation No 622/2003 to remain effective, in so far as that annex seeks to impose obligations on individuals, pending the adoption by the Commission of any necessary measures to confer upon it binding force with regard to individuals.”

**Legitimate Expectation**

While the principle of legal certainty dates from the very beginning of the application of the rule of law and is quite simple to understand the principle of the Legitimate Expectation is a later principle complementary and very linked to the first one\(^1^7\). In this respect, the principle of the protection of legitimate expectations ‘appears to be an expression, taking the form of a subjective right, of legal certainty\(^1^8\).

The losses suffered by individual and good faith in relation with the administration are essential in this regard. The administration once induced individuals to take an action should not renege on that, inasmuch the induced individual suffer losses.

The most comprehensive definition of the legitimate Expectation in the EU law was given by the Court of Justice in _Branco_\(^1^9\). In short, Branco was a Portuguese individual evolved by a contract with the Portuguese authorities in training activities under the program European Social Fund for training young adults. Under the regulation ruling such fund, was for the national authorities to certify the trainers to be awarded and for the commission to pay such payment. Branco was certified by the Portuguese authorities to award the training funding and submitted the request for the payment to the commission. Later on, irregularities on fulfilling its duties under contracts by Branco were found, after an investigation procedure by the Portuguese authorities. Based on these finding the commission refused to pay the final payment and asked Branco the reimbursing of the already paid sums. Branco appealed claiming among others that was in contrary to the principle of the Legitimate Expectation due to the fact that his work had been certified by the Portuguese ministry once and he was entitled such payment. Among other the Court of Justice observed:

*Three conditions must be satisfied in order to claim entitlement of the protection of the legitimate expectation. First, precise, unconditional and consistent assurances originating from authorized and reliable sources must have been given to the person concerned by the community authorities. Secondly, those assurances must be such give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules.*\(^2^0\)

The Court found that _Branco_ was not entitled of such protection due to failing to satisfy the first condition. It observed that was for the commission the decision whether to authorize or not the payment and not for the Portuguese ministry, and further, the Commission has given no assurances in case.

Furthermore, also in case of the assurances given they should create expectations on the part if they satisfy

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\(^{1^4}\) Case C-331/88 R v MAFF, ex parte Fedesa (1990) ECR I- 4023, paragraph 48.

\(^{1^5}\) Case 325/85 Ireland v Commission (1987) ECR 5041 ; Case C-301/97 Netherland v Council (2001) ECR I- 8853

\(^{1^6}\) Case: C- 345/06, Heinrich, Judgment of 10 March 2009.

\(^{1^7}\) See: S. Schonberg, Legitimate Expectation in Administrative Law (Oxford, Oxford University 2000).


\(^{1^9}\) See: Case T-347/03 Branco v Commission (2005) ECR II-255

not only subjective assumption but also objective criteria. The objective criterion is satisfied if a prudent trader would rely on it on basis of the legitimate representation of the institutions. Assurances can be of general nature or actions in their course of activity and does not need to be individually named in order to be entitled of such protection. The Court found protection by legitimate expectation also for an individual who joined a scheme which was applied by others previously for a period of time, against the claims of the authorities that they were not part of the scheme as it was not mentioned. In *Mudler*, the framework policy was to reduce milk production and subsequently a system of *inter alia* non-marketing premiums to be granted on demand to any milk producer who undertook not to dispose of milk or milk products, was established. Mudler put his land out of production and asked under the scheme to tor resume his milk production without paying levy. He was refused with the justification that he has not been producing milk the preceding year, and the scheme was possible only for those who produced the preceding year. He pretended to be protected by legitimate expectation as was encouraged to take his land out of production by the premiums offered by the EU scheme. The court ruled that he was protected under legitimate expectation as he was encouraged by a community measure to suspend for a limited period in the general interest and he legitimately may expect not to be subject of restrictions upon the applying for the benefits offered by the EU measure. While in *Mudler*, the court decided that was a measure not complying with the policy framework and therefore was a violation of the legitimate expectation, it also observed that just a change in the policy framework is not against the legitimate expectation. It noted that a prudent trader should take into account the changes of law and the freedom to legislate cannot be bound. However in case of the sudden change of the policy, having unexpected financial effects and the change cannot be foreseen by a prudent trader the court ruled that it is a violation of the legitimate expectation and therefore in breach of the general principle of rule of law. The *vested rights* are strongly protected under the legitimate expectation as they are conferred to the subjects of law expressly by administrative acts. Vested rights results from benefits or rights given by administrative acts. Two are issues with the vested rights which compete with the freedom to legislate; the legitimacy of the administrative acts and the revocation of unlawful acts. In case of a legal act creating rights expressly for the subjects of law, it’s considered that these rights prevail over the public interest so its revocation is prohibited. The public interest is taken into account if the acts are lawful as lawful means deriving from the hierarchy of normative acts. Subjects addressed by law should be able to rely on the continuance of the existing law in order to plan their activities. However the court ruled that the institutions have their discretionary power to choose means in order to implement their policy. The legitimate expectation arise when the subjects of the law has been subject to certain obligations *vis-à-vis* the public authorities. The changes in the public policy should put in balance the public interest and expectations protected by law, and changes to the law should be foreseeable in order to protect the expectations resulting from the change of the law which gave to these subjects’ precise assurances. As for the unlawful acts, the retroactive revocation is allowed only with the condition that the revocation take place within a reasonable time in order that subjects of the law can foresee and adopt their conduct, and the institutions which revoke the retroactively the act have taken into consideration if the subjects of unlawful measure had relied on it, and if so how far they did it. In overall, there are three conditions to fulfill for the legitimate expectation; precise unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by Community authorities, the assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed and the assurances given must comply with the applicable rules.  

**Conclusions**

Legal certainty and legitimate expectation as central requirement of rule of law have been largely developed by the European Court of Justice. In its jurisprudence these principles were used as ground for the validation of the legislative acts as well as implementing acts. EU law cannot be understood without the application of these principles in all legislative and implementing activities. Due to the process of the Stabilization Association Process Albania has the duty to fully approximate the

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21 See: 120/86 Mudler v Minister von Landbow en Visserij (1998) ECR 2321
22 See: Case 74/74 CNTA v Commission (1975) ECR 533.

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25 As defined in Cases: T-347/03 Branco v Commission [2005] ECR II-2555 and
   Case T-251/00 Lagardère and Canal+ v Commission [2002] ECR II-4825 and
EU legislation and to comply with the best practices of EU. As seen in the previous chapters the general principles of rule of law constitute an essential part of EU legal order and the courts play a crucial role in this regard. Subsequently, the Albanian law must comply with the general principle as legal certainty and legitimate expectation especially in the administrative law. Special attention should also be given to these principles by the administrative authorities in their activity and by Albanian courts in cases when the administrative acts are in dispute. Legal certainty and the legitimate expectation must be handled by Albanian authorities not only as general principles of rule of law but also as crucial commitment under the process of the EU integration.

Leterature

Treaties
1. Treaty of the European Union
2. Treaty on functioning of the European Union
Case law developed by Court of Justice of The European Union:
2. Case: C-331/88 R v MAFF, ex parte Fedesa (1990) ECR I-4023
3. Case: C- 84/78 Tomadini v Administrazione delle Finanze dello Stato (1979) ECR 1801.