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THE PROTECTION OF LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE LAW: A HORIZONTAL PERSPECTIVE

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ABSTRACT

The term “protection of legitimate expectations” in administrative law traditionally draws our attention to vertical relationships between the State and an individual. In my text I propose a non-traditional approach to the issue of protection of legitimate expectations in administrative law. Instead of analysing the problem from the perspective of the relationship between the administrative body and the individual, I have attempted to tackle the problem from the perspective of entities involved in peer relationships.

The subject of my analysis is the principle of good faith as the axiological foundation for the protection of legitimate expectations in administrative law. Next the article addresses the specific legal institutions that express the protection of legitimate expectations in horizontal perspective: prohibition to make assertions contradictory to prior position (estoppel), institutions that express the protection of legitimate expectations in

administrative contracts, as well as the principle of good faith in relationship between administrative bodies. The principle of good faith is a universal legal construct that forms the foundation of the legal system. Thus it is applicable in the sphere of administrative law, especially in the case of the relationship between equal-level entities.

KEYWORDS

The principle of good faith, legitimate expectations, estoppel, forfeiture of rights, multi-polar administrative relationships

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INTRODUCTION

The principle of protection of legitimate expectations is recognized as the foundation of any legal system (*Grundforderung rechtlicher Ordnung*).¹ Without confidence, it is impossible to establish firm relationships between entities within a legal system. Confidence guarantees the stability of law, sense of security and legal certainty. The principle of protection of legitimate expectations and the principle of good faith form the basic components of the principle of democratic rule of law, and thus the basic standards for the functioning of public administration.²

There are a great number of studies on the principle of protection of legitimate expectations in administrative law,³ but this issue is almost exclusively addressed in terms of protecting individual's legitimate expectations against the State (public administration). It is deemed unnecessary to consider protecting legitimate expectations of the public administration towards an individual, since the public administration has the power to unilaterally govern the formation of legal relationships with an individual.⁴

The term "protection of legitimate expectations" in administrative law traditionally draws our attention to vertical relationships between the State (public administration) and an individual. This is for two reasons. First, the greater part of legal relationships governed by administrative law is formed by vertical relationships. This conclusion is derived from the classic approach to the administrative-law relationship. Its key element is the administrative body's authority to govern the legal position of an individual in a sovereign manner. Second, this direction of analysis is reasonable in view of the basic function of the principle of protection of legitimate expectations. This principle is one of the main instruments for the protection of an individual in relation to the State. The essence of this principle is expressed in the fact of "the public authorities being self-bound

¹ Joachim Burmeister, *Vertrauensschutz im Prozeßrecht* (Berlin-New York: Walter de Gruyter 1979), 115; Heinrich de Wall, *Die Anwendbarkeit privatrechtlicher Vorschriften im Verwaltungsrecht* (Tübingen: Mohr Siebeck, 1999), 242.

² See the fundamental standards governing the relationships between public administration and a private entity in European soft law: Article 10 of *The European Code of Good Administrative Behaviour*, Resolution of the European Parliament of 6 September 2001, Decision on Code of Good Administrative Behavior, [2011] OJ C 285/3; Article 6 of the *Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on Good Administration*, Adopted on 20 June 2007 // rm.coe.int/16807096b9.

³ The literature of reference was analysed in fundamental books on the topic, for example: Soeren J. Schönberg, *Legitimate Expectations in Administrative Law* (London: Oxford University Press, 2000); and Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Oxford-Portland: Hart Publishing, 2000). In the Polish literature: Joanna Lemańska, *Uzasadnione oczekiwania w perspektywie prawa krajowego i regulacji europejskich* (Warszawa: Wolters Kluwer, 2016).

⁴ Heinrich de Wall, *supra* note 1, 241–242.

by their prior conduct" (*Selbstbindung von Kompetenzträgern aufgrund vorangegangenen Tuns*⁵).

An analysis of the protection of legitimate expectations in horizontal relationships between peers is specific for private law, wherein legal relationships are based on the autonomy of the will of the parties, and confidence is one of prerequisites of due functioning within legal transactions. However, there are concepts raised by scholars of law and in the relevant case law, in which the protection of legitimate expectations in administrative law appears in relation to horizontal relationships between entities of equivalent position. The aim of this paper is to present these concepts and provide a critical analysis thereof.

The article begins with a discussion of the axiological fundament of the protection of legitimate expectations in horizontal relationships, namely, the principle of good faith in public law. Then I outline the sources of this principle in public law, after which the article will point to a few of its specific manifestations, including especially the following: *estoppel* (the prohibition to make assertions contradictory to prior position) in administrative law and the concept of forfeiture of rights (*Verwirkung*) in administrative law. Then I look at how the subjective structure of a legal relationship affects the protection of legitimate expectations in horizontal relations.

The next part of the article includes an analysis of the problem of good faith and protection of legitimate expectations in administrative. This part considers how the subjective structure of a relationship in administrative contracts affects the protection of legitimate expectations. After that, this section identifies the specific instruments for protecting legitimate expectations of contractual parties in administrative contracts. A particular aspect of the problem at issue is the protection of legitimate expectations in relationships between public administration bodies.

The final section of the article analyses good faith and the protection of legitimate expectations in horizontal relations in Polish administrative law. The conclusion brings together basic theses put forward in the earlier parts of the paper, providing additionally some general observations about the incorporation of traditional civil law constructs serving the protection of legitimate expectations and good faith into administrative law.

⁵ Joachim Burmeister, *supra* note 1, 7.

1. THE PROTECTION OF LEGITIMATE EXPECTATIONS IN HORIZONTAL RELATIONSHIPS AS A MANIFESTATION OF THE GOOD FAITH PRINCIPLE IN ADMINISTRATIVE LAW

1.1. THE PRINCIPLE OF GOOD FAITH IN PUBLIC LAW

Originally, the axiological reasons for the protection of legitimate expectations (*Vertrauensschutz, confianza legítima, legittimo affidamento*) were sought in the principle of good faith in its broader sense (*Treu und Glauben, principio de buena fe, principio di buona fede*), which in turn constitutes one of the elements of legal certainty.⁶ The principle of good faith has its roots in private law, as evidenced by § 242 of the German *Bürgerliches Gesetzbuch* or Article 2.1 of the Swiss *Zivilgesetzbuch*.

It is believed, however, that the principle of good faith is a general principle of law applicable in each branch of law, including public law.⁷ The resulting imperative of loyal conduct in legal transactions also applies in relations between both public and private entities, as well as mutually between public entities. In the area of public law, this means that public authorities and individuals, when establishing and shaping their relations, must respect each other's positions (*Rücksicht zu nehmen*).⁸ Close links between the two principles are sometimes directly expressed in legal provisions, as exemplified by Article 3.1 of the Spanish Administrative Procedure Act 1992 (*Ley de Régimen Jurídico y Procedimiento Administrativo Común*), which lists, among general principles, the obligation of the public administration to respect the principle of good faith and reasonable confidence (*confianza legítima*).⁹

Currently, scholars of law usually stop referring to the principle of good faith in their deliberations on the protection of legitimate expectations, recognizing that the protection of legitimate expectations is derived directly from the rule of law

⁶ More in Karl H. Schmitt, *Treu und Glauben im Verwaltungsrecht* (Berlin: Junker und Dünhaupt, 1935); Eduardo García de Enterría, "El principio de protección de la confianza legítima como supuesto título justificativo de la responsabilidad patrimonial del Estado legislador," *Revista de Administración Pública* No. 159 (2002); Fernando Castillo Blanco, *Protección de Confianza en el Derecho Administrativo* (Madrid: Marcial Pons, 1998); Sabino Cassese, *Istituzioni di diritto amministrativo* (Milano: Giuffrè Editore, 2004), 13; Rene Seerden and Fritz Stroink, *Administrative law in the Netherlands*: 169–170; in: Rene Seerden, Fritz Stroink, *Administrative law of the European Union, its member states and the United States: a comparative analysis* (Antwerpen: Intersentia, 2002).

⁷ Norbert Achterberg, *Allgemeines Verwaltungsrecht* (Heidelberg: C.F. Müller, 1986), 598; Hans P. Bull and Veith Mehde, *Allgemeines Verwaltungsrecht mit Verwaltungslehre* (Heidelberg, München, Landsberg, Frechen, Hamburg: C.F. Müller, 2009), 138; Thomas Gächter, *Rechtsmissbrauch im öffentlichen Rechts* (Zürich/Basel/Genf: Schulthess, 2005), 115–116; Heinrich de Wall, *supra* note 1, 242; Hans J. Wolff, Otto Bachof, and Rolf Stober, *Verwaltungsrecht I* (München: C.H. Beck, 1994), 480.

⁸ Ulrich Häfelin and Georg Müller, *Grundriss des Allgemeinen Verwaltungsrechts* (Zürich: Schulthess, 1998), 126–127.

⁹ Cf. Eduardo García de Enterría, *supra* note 6: 173; Silvia Díez Sastre and Kevin Weyand, "Spanien: 331; in: Jens-Peter Schneider, Hans-Werner Rengeling, Oliver Dörr, and Albrecht Weber, eds., *Verwaltungsrecht in Europa. Band 1. England und Wales, Spanien, Niederlande* (Göttingen: Vandenhoeck & Ruprecht, 2010).

concept.¹⁰ If, however, the reasoning is being conducted in the context of an evaluation of the actions of an individual, it is not possible to invoke the rule of law. The addressee of directions arising from this principle is public authority. Thus, the principle of the rule of law cannot be invoked to justify the sanctioning of actions of individuals contrary to good faith, addressed towards the State or other individual. In these situations, when seeking the axiological justification, one must resort to the principle of good faith as a general rule of the legal system.¹¹

1.2. THE PROHIBITION TO MAKE ASSERTIONS CONTRADICTORY TO A PRIOR POSITION (ESTOPPEL) IN ADMINISTRATIVE LAW

From the principle of good faith the prohibition to make assertions contradictory to a prior position of the person who makes these assertions (*Verbot widersprüchlichen Verhaltens*) is derived as a special case of protection of legitimate expectations in administrative law. This institution corresponds to the principle *venire contra factum proprium*, which is applicable in private law or the doctrine of estoppel in common law. Depending on the entity concerned (the State or an individual), the justification for the prohibition to make assertions contradictory to prior position is derived either from the *ultra vires* principle (as a part of the rule of law)¹² or from the principle of good faith.¹³

The essence of this construct is to prevent someone from making assertions contradictory to his/her prior position if another person bases his or her legitimate expectation on this position and takes a certain action based on this legitimate expectation.

A classic example is a neighborhood dispute in the field of construction law. At the stage of preparation and implementation of a construction project, a neighbor (the owner of the neighboring plot) does not question the investor's actions (and therefore implicitly consents to them) or even expresses his consent. However, at the final stage of implementation or after the completion of the project, the neighbor unexpectedly raises protection claims, undermining the legality of the acts under which the project is being (or has already been) completed. Of course, every

¹⁰ Soeren J. Schönberg, *supra* note 3, 12 and the literature referred to therein.

¹¹ Heinrich de Wall, *supra* note 1, 240-241.

¹² Gaetano (Tony) Pagone, "Estoppel in Public Law: Theory, Fact and Fiction," *University of New South Wales Law Journal* Vol. 7, No. 2 (1984): 270-272.

¹³ Thomas Gächter, *supra* note 7, 177-178, 187; Christoph Knödler, *Mißbrauch von Rechten, selbstwidersprüchliches Verhalten und Verwirkung im öffentlichen Recht* (Herbolzheim: Centaurus Verlag, 2000), 80, 199-200; Rudolf Stich, "Die Verwirkung im Verwaltungsrecht," *DVBl* (1959): 235; Heinrich de Wall, *supra* note 1, 246; Michael Sachs, "§ 53 Hemmung der Verjährung durch Verwaltungakt": 1568; in: Paul Stelkens, Heinz J. Bonk, and Michael Sachs, eds., *Verwaltungsverfahrensgesetz. Kommentar*, 7th ed. (München: C.H. Beck, 2008); Friedhelm Hufen, *Verwaltungsprozessrecht*, 9th ed. (München: C.H. Beck 2013), 387-388; *Federal Administrative Court (Bundesverwaltungsgericht)*, 23 Mai 1975 (BVerwGE 48, 247).

situation requires an individual approach. It cannot be contested that the neighbor has the right to question the project and to raise protective claims in case the project materially deviates from the agreed arrangements or results in an unexpected damage.¹⁴

1.3. THE CONCEPT OF FORFEITURE OF RIGHTS (*VERWIRKUNG*) IN ADMINISTRATIVE LAW

The prohibition to make assertions contradictory to prior position in administrative law is most often associated with the construct of the forfeiture of rights – *Verwirkung*. It is also a private law concept, but according to a well-established view public-law rights are also subject to forfeiture.¹⁵

The concept of forfeiture may be described as follows: the entitled person cannot exercise his right if, from the moment when the right became due a significant period of time has elapsed (temporal element) and a special circumstance has arisen that causes that the late exercise of the right will be contradictory to the principle of good faith (circumstance element). To this description, elements referring to the protection of legitimate expectations are added. As a result of the specific behavior of one entity, another person could have believed and indeed believed that after such a long period of time the right would no longer be exercised (basis for confidence – *Vertrauensgrundlage* and situation of confidence – *Vertrauenbestand*). Based on this reasonable confidence, the person has taken specific actions (*Vertrauensbetätigung*). As a result of these actions, the delay in lodging a claim will result in unacceptable negative consequences for that person.¹⁶

When analysing the institution of forfeiture in administrative law, the case law emphasizes the protection of legitimate expectations, legal certainty and legal peace. In its verdict of 26 January 1972¹⁷, the German Federal Constitutional Court (*Bundesverfassungsgericht*) stated that according to the prevailing view, forfeiture (*Verwirkung*) of rights may take place when a delayed raising of claims violates the principle of good faith (*Treu und Glauben*). However, the mere fact that a person entitled delays with invoking his rights (the mere passage of time) does not yet lead to the loss of rights. There must be also a situation where the entitled person

¹⁴ Cf. Freidhelm Hufen, *supra* note 13, 388; Christoph Knödler, *supra* note 13, 201; Heinrich de Wall, *supra* note 1, 245-246. Some authors raise objections to this general institution so defined, claiming that it entails a danger of uncontrolled “escape into general clauses” (*Flucht in die Generalklauseln*) – see the literature quoted there.

¹⁵ Heinrich de Wall, *supra* note 1, 246-247; Christoph Knödler, *supra* note 13, 205.

¹⁶ Heinrich de Wall, *supra* note 1, 248; Christoph Knödler, *supra* note 13, 206; Ferdinand O. Kopp and Ulrich Ramsauer, *Verwaltungsverfahrensgesetz*, 13th ed. (München: C. H. Beck 2012), 1232-1233; Michael Sachs, *supra* note 13: 1569; Hans J. Wolff, Otto Bachof, and Rolf Stober, *supra* note 7, 480.

¹⁷ Federal Constitutional Court (*Bundesverfassungsgericht*), 26 January 1972 (BVerfGE 32, 305).

fails to act in such circumstances when he is expected to take some steps to protect his rights. Only then will there be a legitimate expectation on the opponent's side. As regards procedural rights, it can be thus considered inadmissible to lodge a complaint with the court after a long period of time not only due to the legitimate expectation on the part of the opponent, but also due to the public interest in maintaining the legal peace (*Rechtsfrieden*).

These elements of protection of the public interest, manifesting in the protection of legal certainty and stability of the decisions, were emphasized by the Federal Administrative Court (*Bundesverwaltungsgericht*) of August 10, 2000.¹⁸ The court found that the procedural institution of forfeiture of rights was based on an unfair delay in filing the suit, contrary to the principle of good faith. This institution also serves the public interest – to protect the legal peace. This may lead to the loss of the right to file a suit, but does not violate the legal protection guarantees (Article 19 (4), sentence 1 of *Grundgesetz*). Of course, legal protection may not be restricted in an unacceptable manner. Forfeiture of the right to complain requires a longer period of time during which there is a possibility of filing the suit. The entitled person must be aware of this possibility (or at least he/she would easily become aware with required diligence). Filing a complaint will be considered an infringement of the principle of good faith (*Treu und Glauben*) just because the person entitled knowing (or where he/she can easily become aware of) his or her rights files a complaint so late that other parties to the dispute could no longer expect a complaint to be filed.

This reasoning indicates that this institution is an element of protection of legitimate expectations against the delayed lodging of claims that breaches good faith.

1.4. FORFEITURE OF RIGHTS AND OTHER LEGAL CONSTRUCTS LIMITING THE TIME FOR ASSERTING CLAIMS

Forfeiture is not the only legal construct combining the loss or inadmissibility of the exercise of a right with passive behavior for a prolonged period of time. Administrative law also contains the institutions of statute of limitation, final date, or other time limits restricting the use of claims.

When analysing the relationship between these institutions, it is widely stated that forfeiture is independent on the possible existence or lack of statutory time limits that define the temporal scope of exercise of rights (e.g. statute of

¹⁸ *Federal Administrative Court*, 10 August 2000 (NVwZ 2001, 206), 206-208.

limitation). The forfeiture may take place even if the statute of limitations period has not yet expired.

The difference lies in the fact that to perform a forfeiture it is not enough to prove the passage of time; there must yet be a condition of particular circumstances in which the entitled person asserts claims in a situation where this is contrary to the principle of good faith. It is not possible to define a general period, the expiry of which results in a forfeiture. It is crucial to analyse the circumstances of a particular case. This institution is to correct unfair effects of exercising one's rights in a given case.¹⁹

The problem of forfeiture of the right to appeal against administrative acts is the consequence of the fact that the same administrative act may become effective with regard to different entities at different times. Consequently, there will be differences as regards the time limits for lodging appeals. This is especially the case with a large number of participants to the trial. A typical example is construction law disputes in the case of large projects, where an administrative act becomes effective for the investor at a different time than for the entities whose rights may be affected by the project. There may also be situations in which a person having a legal interest in filing an appeal against the act does not participate in the proceedings and becomes aware of the issue of the act much later than the other parties.

An example of this may be the application of the principles of good faith and protection of legitimate expectations in the so-called good neighborly relations (*nachbärliche Gemeinschaftsverhältnisse*). If a neighbor who has not been served with the administrative act has obtained reliable information about the issuance of the building permit (or could easily have known it if he or she had been diligent) then he/she would be treated like an entity to whom the permit was duly served.²⁰ This solution blocks the possibility of challenging an administrative act after a considerable period of time, in order to protect the investor from unexpected loss.

Similar ideas can be found in English administrative law, when a court refuses to grant a remedy, where it would cause substantial hardship or substantial prejudice to the rights of others. Examples of such prejudice have arisen in the context of planning permission where the recipient has relied on the planning

¹⁹ Heinrich de Wall, *supra* note 1, 251-253; Ferdinand O. Kopp, *supra* note 16, 1203-1204; Michael Sachs, *supra* note 13:1569.

²⁰ *Federal Administrative Court*, 25 January 1974 (BVerwGE 44, 294, 300). Similarly in: Ferdinand O. Kopp and Ulrich Ramsauer, *supra* note 16, 844; Anna-Bettina Kaiser, "Bauordnungsrecht": 291-292; in: Dirk Ehlers, Michael Fehling, and Hermann Pünder, eds., *Besonderes Verwaltungsrecht, Band 2, Planungs-, Bau- und Straßenrecht, Umweltrecht, Gesundheitsrecht, Medien- und Informationsrecht*, 3rd ed. (Heidelberg: C.F. Müller, 2013); Christoph Knödler, *supra* note 13, 210; Ulrich Stelkens, "§ 41 Bekanntgabe des Verwaltungsaktes": 1130; in: Paul Stelkens, Heinz J. Bonk, and Michael Sachs, eds., *Verwaltungsverfahrensgesetz. Kommentar*, 7th ed. (München: C.H. Beck, 2008); Freidhelm Hufen, *supra* note 13, 388.

permission and entered into contracts with third parties to carry out the development contemplated by the planning permission. Where the benefit of such contracts would be lost, or where the quashing of the planning permission would lead to further costs being incurred, the court may refuse a remedy.²¹

1.5. THE SUBJECTIVE STRUCTURE OF A LEGAL RELATIONSHIP AND THE PROTECTION OF LEGITIMATE EXPECTATIONS IN HORIZONTAL RELATIONS

The classic legal relationship in administrative law is bi-polar (German: *bipolares*). However, more often the institution of forfeiture appears in relation to so-called multi-polar (*multipolaren*) legal relationships.

The problem of multi-polar administrative relations (*multipolaren Verwaltungsrechtsverhältnisse*) can be explained using a triangular arrangement. On both opposing points of the base stand mutually opposed private entities whose interests collide with each other. The administrative body which is to resolve the dispute should be placed at the apex of the triangle.

Describing this relationship using traditional methods and concepts of administrative law (specific for the continental classical approach) is difficult. This is a fundamentally different situation than the bipolar, vertical relationship between the State and an individual which is typical for administrative law. The concept of public-law right, which is a key concept in continental administrative law, was created as an instrument for the protection of the individual's interests in this bi-polar relationship (according to the protection theory – *Schutznormtheorie*, currently widely accepted by German scholars). The whole public-law rights dogma is determined by the tension between the State and an individual, between the public and private interests.²²

The fundamental problem is the relationship between private entities. To explain the problem, one must refer to the above-mentioned triangular arrangement illustrating the positions of participants in this relationship. There is no connecting line between the points occupied by the opposing individuals which would be governed by administrative law (*verwaltungsrechtliche Verbindungslinie*). The case law recognizes the existence of two separate, bipolar legal relationships (investor and public authority, neighbor and public authority).²³ Traditional methods of describing and analysing administrative legal relations are not useful in such a situation, therefore a new methodology in this regard should be developed.

²¹ Clive Lewis, *Judicial Remedies in Public Law* (London: Sweet & Maxwell 2015), 417.

²² Michael Schmidt-Preuß, *Kollidierende Privatinteressen im Verwaltungsrecht (Das subjektive öffentliche Recht im multipolaren Verwaltungsrechtsverhältniss)* (Berlin, 1992), 1-3.

²³ *Ibid.*, 17-20.

In practice, the institution of forfeiture often appears in such multi-polar legal disputes in the context of construction processes.

The specificity of the multi-polar legal relationship determines how the institution of forfeiture applies. On the one hand, there is a legal relationship between the authority and the investor, within which administrative acts are issued to allow the completion of the construction project. On the other hand, a neighbour (the owner of a neighbouring plot of land) is submitting his protective claims to the authority (he invokes them during the proceedings before that authority). For obvious reasons, they are not addressed to the investor because it is not the investor, but the authority who decides on their legal effectiveness. However, the prerequisites of the institution of forfeiture (related to the passage of time and circumstances of the situation) relate to the relationship between the investor and the neighbour. The neighbour's claim is subject to forfeiture when the neighbour is late to use it and thus disturbs the legitimate expectations of the investor who no longer expects his neighbour's "attack."²⁴ It is therefore about protecting the confidence of the individual; but these legitimate expectations are rooted in the third party conduct of another entity, not the conduct of the authority as in the classical understanding of the principle of protection of legitimate expectations.

In a multi-polar relationship there is a collision of the interests between two (or more) private entities that requires balancing. It is necessary to decide whether the value worth protection will include legitimate expectations of the investor (who is confident that the neighbour will no longer use protective claims) in the case in question, or if the interests of the neighbour must prevail even if the neighbour has been late with bringing legal action. The institution of forfeiture of rights in any situation must take into account the complex constellation of interests in multi-polar relationships.

2. GOOD FAITH AND PROTECTION OF LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE CONTRACTS

2.1. THE STRUCTURE OF SUBJECTIVE RELATIONSHIPS IN ADMINISTRATIVE CONTRACTS AND THE PROTECTION OF LEGITIMATE EXPECTATIONS

The vertical perspective, which determines the way to look at the protection of legitimate expectations in administrative law (protection of legitimate

²⁴ Heinrich de Wall, *supra* note 1, 255-256.

expectations of an individual towards the State), is changed in the context of administrative agreements.

At the outset, we should point out some difference between the German and French scholarly opinions as regards the approach to subjective relations in administrative contracts. German scholars are of the opinion that equality of the parties remains the principle of contract law (whether private or public). This thesis is based on the fact that all contracts are formed by mutual and clear will of the parties.²⁵ French scholars, on the other hand, emphasize the difference between civil and administrative contracts. The essence of a civil contract is an agreement based on declarations of two entities that are legally equal (although there may be economic inequalities). By contrast, in an administrative contract a public entity benefits from certain prerogatives resulting from the overriding public interest to be protected. The public governance specific for an administrative act (*puissance publique*) appears also in administrative contracts. A contract is made based on mutually consistent declarations, but the public administration maintains its superior position with respect to the contractual partner and may not waive its powers.²⁶

2.2. INSTRUMENTS FOR PROTECTING LEGITIMATE EXPECTATIONS OF CONTRACTUAL PARTIES IN ADMINISTRATIVE CONTRACTS

2.2.1. INTRODUCTION

Every contract, whether private or public, is based on trust between partners. Protecting legitimate expectations of contractual partners is of particular importance in two situations. First, at the stage of negotiation leading to the conclusion of the contract. Second, at the implementation stage, when unforeseen circumstances arise that fundamentally change the contractual relationship. Changes to the contract must take into account the partner's legitimate expectations with regard to the sustainability of the relationship.

The concepts and institutions known in civil law are used to solve problems emerging in the field of administrative contracts. For example: in German law the possibility of such "transfer of concepts" results from the referral contained in § 62, sentence 2 of the German Administrative Procedure Act²⁷. This provision allows them to additionally apply the provisions of *Bürgerliches Gesetzbuch* to

²⁵ Hartmut Maurer, *Allgemeines Verwaltungsrecht* (München: C.H. Beck, 2006), 371.

²⁶ Jean Waline, *Droit administratif* (Paris: Dalloz, 2008), 422; René Chapus, *Droit administratif général, Tome 1* (Paris: Montchrestien, 2001), 1209.

²⁷ *Verwaltungsverfahrensgesetz (VwVfG, Administrative Procedure Act) of 25 May 1976*; in the wording last promulgated on 23 January 2003 ([2003] *Bundesgesetzblatt* I p. 102).

administrative contracts as appropriate. This referral allows the transfer of constructs known in civil law to an administrative contract, unless this is contrary to its essence and principles of administrative law.

2.2.2. THE INSTITUTION OF *CULPA IN CONTRAHENDO* IN ADMINISTRATIVE CONTRACTS

At the stage of pre-contract negotiations, the protection of a partner's legitimate expectations is manifested in particular in the institution of liability for *culpa in contrahendo*. The German scholarly opinion and jurisprudence agree that these rules of liability also apply to administrative contracts.²⁸ It is believed that the aforementioned reference contained in § 62, sentence 2 of VwVfG, not only applies to the provisions of the Civil Code, but also to institutions that have been developed based on them.²⁹

The compensation payable due to *culpa in contrahendo* is based on the breach of the contractual party's legitimate expectations regarding the other party's proper conduct. This applies equally to civil and administrative contracts. It may also provide grounds for a claim for performance if the defective conduct results in the ineffectiveness of the contract. However, such a claim may be contrary to the provisions of administrative law. In such an event, the only remedy is the compensation for damage resulting from the breach of legitimate expectations.³⁰

2.2.3. THE IMPACT OF CHANGE IN CIRCUMSTANCES ON THE CONTENT OF OBLIGATION IN ADMINISTRATIVE CONTRACTS

The problem of protection of legitimate expectations of contractual parties also appears in legal constructs concerning the influence of the change in circumstances on the content of the contract. The concepts known in civil law have been in this case the inspiration for working out specific solutions that take into account the specificities of administrative contracts.

In German administrative law, concepts used to solve the problem of extraordinary change in legal and factual relationships on which the administrative contract was based include the *rebus sic stantibus* clause and the ground that the basis of the transaction had ceased to exist (*Wegfall der Geschäftsgrundlage*).³¹

Both constructs involve balancing the interests of contractual partners based on the principles of good faith and protection of legitimate expectations. On the one

²⁸ Heinrich de Wall, *supra* note 1, 421; Hans J. Wolff, Otto Bachof, and Rolf Stober, *supra* note 7, 829.

²⁹ Heinrich de Wall, *supra* note 1, 422.

³⁰ *Ibid.*, 423–424.

³¹ Heinrich de Wall, *supra* note 1, 288. Hans J. Wolff, Otto Bachof, and Rolf Stober, *supra* note 7, 830.

hand, the implementation of the contract in its current form would be in breach of the principle of good faith and protection of legitimate expectations of the partner obliged to perform, who entered into an obligation under certain conditions (of course, taking into account the normal economic risk). On the other hand, legitimate expectations of a partner entitled to accept the performance, who was confident that the contract entered into would be of a lasting nature, are worth protection. There is yet another element of public interest in administrative contracts, which may speak for either a change or withdrawal from the contract (if its implementation as a result of the change of circumstances ceases to be in line with the public interest) or, on the contrary, for further implementation thereof (where it is necessary to keep meeting public needs).

The legal basis for amending or terminating the contract in the described situations is § 60 sec. 1 VwVfG. According to this provision, if the circumstances which determine the content of the agreement have been altered since the agreement was concluded, and the parties to the agreement cannot reasonably be expected to adhere to the original provisions of the agreement, this party may request that the content of the agreement be adapted to the changed conditions or where such adaptation is impossible or not reasonably expected of the parties, may terminate the agreement. The authority may also terminate the agreement in order to avoid or eliminate grave harm to the common good.³²

The above-cited provision combines both civil law constructs: in the description of the facts, it refers to the elements of the *rebus sic stantibus* clause (extraordinary change of circumstances), while in the element defining the legal consequences there appears the construct based the ground that the basis of the transaction had ceased to exist – the possibility of termination of the agreement.³³

The literature of reference points out that, first, the change in legal grounds must be of material significance; second, it must exceed the limits of the risks that contracting parties face; and third, it must lead to a situation in which the contract cannot be enforced under changed circumstances.³⁴

If it is not possible to match the contract to the changed circumstances, the right to terminate the agreement is established. There is a so-called subsidiary termination (*subsidiäre Kündigung*) that may be used by both parties, and an

³² "Haben die Verhältnisse, die für die Festsetzung des Vertragsinhalts maßgebend gewesen sind, sich seit Abschluss des Vertrags so wesentlich geändert, dass einer Vertragspartei das Festhalten an der ursprünglichen vertraglichen Regelung nicht zuzumuten ist, so kann diese Vertragspartei eine Anpassung des Vertragsinhalts an die geänderten Verhältnisse verlangen oder, sofern eine Anpassung nicht möglich oder einer Vertragspartei nicht zuzumuten ist, den Vertrag kündigen. Die Behörde kann den Vertrag auch kündigen, um schwere Nachteile für das Gemeinwohl zu verhüten oder zu beseitigen."

³³ Heinrich de Wall, *supra* note 1, 281.

³⁴ *Ibid.*, 288.

extraordinary termination (*außerordentliche Kündigung*), vested exclusively with the public authority, in the event the common good is at risk.³⁵

Protection of the partner's legitimate expectations in the event of an extraordinary termination of the contract in view of the need to protect the common good is, in principle, reduced to claims for damages. The compensation is intended to compensate for damage suffered by the partner as a result of failure to perform the contract (breach of legitimate expectations as to its durability).³⁶

The French scholarly opinion and jurisprudence, based also on civil law, have worked out specific and independent constructs of solving the problem of the impact of new unforeseen circumstances on the execution of administrative contracts (*influence des faits nouveaux sur l'exécution des contrats administratifs*). These institutions include the following: force majeure, intervention of the public authority in the performance of the contract (act of government, *le fait du prince* - literally "princely act") and the theory of unforeseen circumstances (*theorie de l'imprévision*).

The influence of civil law is most evident in the case of force majeure. In the case of administrative contracts, it may lead, as the case may be, to an exemption from contractual obligations without the requirement of compensation but may also form grounds for claims for damages.³⁷ The so-called "princely act" is a solution specific to administrative contracts in France. It has a long tradition, but it rarely appears in practice today. It involves the issuance of a sovereign act in the event that performance of contractual obligations under an administrative contract by a public body is subject to severe difficulties or costs. This is an element of operation in the state of so-called administrative risk (*aléa administratif*), the state of administrative necessity. The application of this measure encumbers the public administration with the obligation to compensate the damage done to the contractual partner.³⁸

The essence of the theory of unforeseen circumstances may be explained as follows: during the performance of the contract a situation may occur when, due to abnormal and unforeseen events independent from the other contracting party (*cocontractant*), the burden associated with the obligations of this party significantly increases and particular difficulties in performing these obligations emerge. Unlike force majeure, these events do not affect the ability to perform the

³⁵ Hartmut Maurer, *supra* note 25, 402. This case is sometimes referred to as the case where the ground of an administrative action ceases to exist (*Wegfall der Verwaltungsgrundlage*) – according to Hans J. Wolff, Otto Bachof, and Rolf Stober, *supra* note 7, 830.

³⁶ Hartmut Maurer, *supra* note 25, 402; Hans J. Wolff, Otto Bachof, and Rolf Stober, *supra* note 7, 830. More about liability for breach of legitimate expectations in administrative law, see: Florian Küch, *Vertrauensschutz durch Staatshaftungsrecht* (Baden-Baden: Nomos, 2003).

³⁷ Yves Gaudemet, *Traité de droit administratif. Tome I* (Paris: L.G.D.J., 2001), 709-710.

³⁸ René Chapus, *supra* note 26, 1209-1211; Yves Gaudemet, *supra* note 37, 710-712; Jean Waline, *supra* note 26, 436-437.

contract itself. A classic example is a significant, unforeseen increase in the cost of materials needed to perform the contract. The specificity of administrative contracts requires a different approach to the situation than in the case of civil contracts. It is necessary to consider public interest and public service (*service public*) requirements. The occurrence of unforeseen circumstances leads to the so-called extra-contractual (*extracontractuelle*) situation that goes beyond the expectation of the contractual parties. Therefore, the problems arising from it cannot be resolved on the basis of the agreement between the parties. Public interest requires that such an "extra-contractual" situation does not relieve the other party to the contract of its obligations.

As compensation (and for public interest that could be jeopardized in the event of insolvency of the obliged party), the public administration should assist the other party to the contract by taking over part of the additional burden arising from the unforeseen circumstances. This contribution usually takes the form of compensation. Its amount should be adequate to the losses incurred, i.e. the deficit caused by the extra-contractual circumstances (which could not be taken into account when the contract was entered into). The compensation also occurs in the event of the above-mentioned institution of public authority's intervention in the execution of the contract (*fait du prince*). For the institution of unforeseen circumstances the element of distribution of burden of unforeseeable circumstances between the administration and the private contracting party is crucial. The extent to which the administration is to contribute to this additional encumbrance in the event of a dispute shall be subject to review by an administrative court.³⁹

3. THE PROTECTION OF LEGITIMATE EXPECTATIONS IN RELATIONSHIPS BETWEEN PUBLIC ADMINISTRATION BODIES

The possibility of invoking the principle of protection of legitimate expectations in mutual relations between public administration bodies is disputed among scholars of law. The predominant opinion negates such possibility, although there are also statements permitting it.⁴⁰

The case law assumes that an administrative body may not invoke the protection of legitimate expectations towards another body, as this institution grants protection of legitimate expectations against the public administration. The administration itself does not need such protection.⁴¹ The argument was also raised

³⁹ René Chapus, *supra* note 26, 1211-1213; Yves Gaudemet, *supra* note 37, 712-715; Jean Waline, *supra* note 26, 437-439.

⁴⁰ Similarly, Hans J. Wolff, Otto Bachof, and Rolf Stober, *supra* note 7, 526.

⁴¹ *Federal Administrative Court*, 8 December 1965 (BVerwGE 23, 25) and 20 June 1967 (BVerwGE 27, 215).

that public administration entities (*Träger öffentlicher Verwaltung*) and those invoking legitimate expectations could weaken the strict observance of law by the authorities.⁴² If disputes between public administration entities arise in relation to the protection of legitimate expectations, these disputes should be settled on the basis of the principle of legality, which also includes legal certainty.⁴³ If the conflict is about the same public administrative body (*Verwaltungsträger*), it should be resolved by a superior authority within the organizational structure, based on legal and teleological criteria. Therefore, it is not about protected legitimate expectations of this body with regard to the conduct of another body. In addition, the functions of the principle of good faith are exercised by other legal institutions, such as the requirement of respecting the principle of federalism (*bundesfreundlichen Verhaltens*).⁴⁴

In the administrative law scholarship in English-speaking countries, elements of legitimate expectations in relations between administrative bodies appear in the context of the principle of *comity*. This is primarily the principle of international law, used to relations between countries.⁴⁵ In the field of administrative law, the doctrine of comity is applied mainly in antitrust law in cases with a so-called extraterritorial element and serves to shape the proper relations between powers of antitrust authorities in various countries.⁴⁶ The principle of *comity* is also manifested in relation to the relationship between public authorities in the same country, in particular federal ones and the relationship between federal and state authorities.⁴⁷

The principle of *comity* is also invoked in the description of the relationship between administrative bodies and courts, treating it as an element of the rule of law. The executive power must respect judicial decisions, while the legislator, in creating the principles of judicial review of action of the public administration, must take into account the need to perform effectively the tasks entrusted to the administration.⁴⁸ This principle also applies to relations between bodies, deriving

⁴² *Federal Administrative Court*, 29 Mai 1980 (BVerwGE 60, 208).

⁴³ *Federal Administrative Court*, 27 April 2006 (3 C 23.05) // www.bverwg.de.

⁴⁴ Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, Band I (München: C.H. Beck, 1984), 702-703; Hartmut Bauer, *Die Bundestreue. Zugleich ein Beitrag zur Dogmatik des Bundesstaatsrechts und zur Rechtsverhältnislehre* (Tübingen: Mohr Siebeck, 1992), 356-358; Heinrich de Wall, *supra* note 1, 241.

⁴⁵ See: Joel R. Paul, "Comity in International Law," *Harvard International Law Review* Vol. 32, No 1 (1991): 4.

⁴⁶ Stefano Battini, "Globalisation and Extraterritorial Regulation: An Unexceptional Exception": 78-79; in: Gordon Anthony, Jean-Bernard Auby, John Morison, and Tom Zwart, eds., *Values in Global Administrative Law* (Oxford, Portland: Hart Publishing, 2011).

⁴⁷ Gil Seinfeld, "Reflections on Comity in the Law of American Federalism," *Notre Dame Law Rev.* 90, No. 3 (2015).

⁴⁸ Thomas Endicott, *Administrative Law* (Oxford, New York: Oxford University Press 2011), 19, 50, 53.

from it an obligation to mutually respect decisions and assigned powers. As Timothy Endicott puts it, "comity is a requirement of responsible government"⁴⁹.

4. GOOD FAITH AND PROTECTION OF LEGITIMATE EXPECTATIONS IN HORIZONTAL RELATIONS IN POLISH ADMINISTRATIVE LAW

The case law of Polish administrative courts shows a high level of care in relation to the transfer of general clauses from private law to administrative law.

The Polish equivalent of §242 of German BGB, expressing the principle of good faith, are the Polish clauses of social coexistence and prohibition of abuse of rights expressed in Article 5 of the Polish Civil Code.

The prevailing opinion in Polish jurisprudence is that the clause of social coexistence is a rule governing private law and does not apply to administrative relations. The interpretation of administrative law may not be based on this clause, except where specific provisions expressly refer to it.⁵⁰ The clauses set out in the Civil Code relate to civil law relationships between natural persons and legal persons rather than to administrative relations between those persons and public administration bodies. These bodies operate under the law. Since the authorities are bound by law, they may neither challenge nor modify the law by invoking social rules unless the legislature has given them the form of legal norms.⁵¹

It is also noteworthy that judicial review of administrative activities is based on the criterion of legality and does not include, as a rule, the assessment of activities of the administration in terms of so-called extra-system criteria of fairness, principles of social coexistence, or teleological criteria, such as the implementation of a specific policy of application of administrative law.⁵²

Exceptions include situations in which administrative courts apply the social coexistence clause as a criterion for assessing actions of individuals towards other individuals in the area of administrative law, especially in the context of horizontal relations. As an example: in the judgment of Voivodship Administrative Court in Lodz of 16 October 2014⁵³, the court assessed the demands of the applicant who had challenged her de-registration from a permanent residence address, in view of the rules of social coexistence. According to the court, the interests of the

⁴⁹ *Ibid.*, 25, 37.

⁵⁰ *Supreme Administrative Court (Naczelny Sąd Administracyjny)*, 22 September 1983 (SA/Wr 367/83, "Orzecznictwo Naczelnego Sądu Administracyjnego – ONSA" 1983/2/75); 15 December 1987 (I SA 177/87, ONSA 1987/2/88); 14 December 1993 (SA/Po 280/93, „Monitor Podatkowy” 1994/10, p. 315); 9 July 1998 (I SA 2224/97, Legal Information System LEX no 44515); 15 December 1998 (I SA 649/98, LEX no 45696); 20 November 2003 (IV SA 4138/01) // orzeczenia.nsa.gov.pl; 18 Mai 2011 (I OSK 124/11) // orzeczenia.nsa.gov.pl; 29 Mai 2012 r. (II GSK 519/11) // orzeczenia.nsa.gov.pl.

⁵¹ *Supreme Administrative Court*, 5 March 2008 (II OSK 113/07) // orzeczenia.nsa.gov.pl.

⁵² *Supreme Administrative Court*, 25 September 2009 (I OSK 1403/08) // orzeczenia.nsa.gov.pl.

⁵³ *Voivodship Administrative Court (Wojewódzki Sąd Administracyjny) of Lodz*, 16 October 2014 (III SA/Ld 692/14) // orzeczenia.nsa.gov.pl.

applicant, who violated the rules of social coexistence, cannot be more important than interests of the other party to the proceedings.

The Polish administrative case law deals in a similar way with the clause of good faith in horizontal relations. In the relations between equal-level entities, good faith of an individual in relation to actions of another individual does not affect, as a rule, the legal assessment of activities of that individual from the point of view of administrative law. Legitimate expectations as regards the integrity of a partner to a legal relationship does not protect against the negative consequences under administrative law. Legality requirements take precedence over such assessments of social relationships that refer to non-legal criteria.

Examples include cases concerning registration of vehicles purchased from persons that are not their legitimate owners (most often as a result of theft) or those vehicles that do not meet the technical requirements to be admitted for traffic. The case law clearly indicates that good faith of the buyer and legitimate expectations as regards integrity of the contracting party do not affect the matter of admissibility of vehicle registration. It has often been explicitly pointed out that good or bad faith are civil law concepts and that they cannot affect the content of an administrative decision.⁵⁴

Similarly, Polish administrative court's case law recognizes that legitimate expectations as regards the integrity of a business partner are irrelevant from the point of view of the application of tax law. Courts believe that good or bad faith does not affect the right to deduct VAT. Contrary to the Civil Code, which assumes good faith of the purchaser of goods, the tax law provisions ignore such reference. Applicable regulations provide for the loss of the right to deduct where the invoice is not true or contains false data. Good or bad faith of the taxpayer will not matter because the risk of choosing a wrong, also fraudulent, contractor is the responsibility of the buyer of goods and services.⁵⁵

The exceptions include situations where the provisions of the administrative law expressly refer to the principle of good faith as a criterion for resolving the case. A characteristic example can be Article 131.2.1 of the Polish Industrial Property Law of 2003.⁵⁶ According to this provision, the trademark rights shall be refused for those trademarks that have been applied for in bad faith. In addition, if

⁵⁴ *Supreme Administrative Court*, 20 March 2003 (II SA/Po 1053/01); *Voivodship Administrative Court of Gliwice*, 13 October 2004 (II SA/Ka 2188/02); *Voivodship Administrative Court of Wrocław*, 28 April 2004 (I SA/Wr 709/03); *Voivodship Administrative Court of Lublin*, 14 February 2013 (III SA/Lu 801/12) // all: orzeczenia.nsa.gov.pl.

⁵⁵ *Supreme Administrative Court*, 9 November 1999 (I SA/Wr 1495/97) // orzeczenia.nsa.gov.pl.

⁵⁶ *Act of June 30, 2000, on Industrial Property*, [2017] *Dziennik Ustaw*, p. 776.

a trademark right has been granted, the trademark application submitted in bad faith may form the basis for the annulment of this right.⁵⁷

It should be noted, however, that the more recent literature provides statements indicating the need to change the perspective of looking at the possibility of applying private-law clauses in administrative law. In terms of the so-called "situational" doctrine, the principles of social coexistence reflect the universal values to be protected by the entire legal system, including administrative law. These values must therefore also be respected by a public administration body. As Jan Zimmermann points out: "a correct, conflict-free social coexistence and its rules shaped by scholars of law and jurisprudence of civil courts coincide with the public interest. And vice versa: it is in the public interest that the coexistence within the society, the coexistence between individuals be correct and optimal". The author sees the possibility of applying the principles of social coexistence in the area of discretionary powers of administration, where they would stimulate freedom of choice in decision-making process.⁵⁸

CONCLUSIONS

The principle of good faith is a general principle of law applicable in each branch of law, including public law. The imperative of loyal conduct in legal transactions also applies in relations between public entities, as well as mutually between public and private entities. Also in administrative law, the principle of good faith is a fundament of protection of legitimate expectations in horizontal relations. A number of legal institutions with such a function are derived from the principle of good faith: estoppel (prohibition to make assertions contradictory to prior position; *venire contra factum proprium*, *Verbot widersprüchlichen Verhaltens*), and forfeiture of rights (*Verwirkung*). These institutions apply in particular to the so-called multipolar legal relationships in administrative law, where there is a collision between the interests and the need to balance the interests of two (or more) private or public entities. The principle of protection of legitimate expectations in horizontal perspective is also present in the sphere of administrative contracts. A number of legal institutions protecting the rights of contractual partners, based on confidence to other party, are derived from this principle. These include liability for *culpa in contrahendo* at the stage of pre-contract negotiations or a number of legal institutions relating to the effect of change in circumstances on the content of obligation (*rebus sic stantibus* clause, the ceasing to exist of the basis of the

⁵⁷ *Supreme Administrative Court*, 17 July 2003 (II SA 1165/02) and 13 July 2004 (GSK 246/04) // orzeczenia.nsa.gov.pl. See also the grounds for annulment of the trademark right, which appeal to the principle of good and bad faith: Art. 164 and Art. 165.2 of Polish Industrial Property Law.

⁵⁸ Jan Zimmermann, *Aksjomaty prawa administracyjnego* (Warszawa: Wolters Kluwer 2013), 86-87.

transaction, force majeure, the theory of unforeseen circumstances). The concept of protection of legitimate expectations also applies to the relationships between public administration bodies (see: the concept of comity in English public law).

Polish scholarship and jurisprudence takes a lot of restraint in the matter of incorporating private law principles referring to the protection of legitimate expectations in horizontal relations (good faith, principles of social coexistence) into the administrative law.

Undoubtedly, it is not possible to "transplant" traditional civil law constructs into administrative law in an automated and thoughtless manner. Such a "concept transfer" must take into account the specificity of legal relationships within these two branches of law.

However, the theoretical purity of division into public and private law (where such division occurs traditionally, namely in continental systems) should not be a decisive criterion. Rationality and purpose should decide in finding solutions to problems arising in complex, multi-polar legal relationships. The concepts derived from private law should not be rejected if traditional constructs known in administrative law appear insufficient to address them.

There are some legal constructs that are universal to such an extent that they form the foundation of the legal system as such. They occur in all branches of law, of course taking into account the specific details of the given sphere of regulation. Such legal constructs undoubtedly include the protection of good faith and the principle of protection of legitimate expectations that is derived from the former. So I do not think there is a sufficiently strong argument to exclude the application of this principle in the area of administrative law, in the case of equal-level entities, if such relations exist in this sphere.

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