Selected problems of changes in EU and national legislation in the perspective of the principles of legitimate expectations and legal certainty

Summary

This article addresses selected problems related to the complex topic of changes in EU and national legislation. The considerations contained in the article focus on the so-called previous effectiveness of an EU directive and on the retroactivity of (ordinary) laws passed by EU Member States. The research perspective concentrates on the functioning of these institutions in the face of the principles of legitimate expectations and legal certainty. The article utilizes primarily and predominantly the analytical method, as well as the empirical method, making use of the extensive case law of the EU Court of Justice and the Supreme Administrative Court. As a result of the research, it shall be stated that, first and foremost, the source of legitimate expectations of an individual cannot be an EU directive during the transposition there of in an EU Member State. Secondly, the principle of legal certainty is not precluded by the exceptional retroactive effect of a normative act, due to the need to protect the public interest, provided that legitimate expectations of individuals are guaranteed.

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

I Introductory remarks

The issue of changes in EU or national law is closely related to the convergence of public administration in the Member States of the European Union. The phenomenon of not only harmonization, but also unification of legal and administrative solutions – both in the legal and organizational space of the European Union, as well as in the Member States – is implemented mainly through changes in law. Due to the jurisprudence of the Court of Justice of the European Union, which applies EU law, legal and administrative standards are converging, including through uniform legal principles in the Member States. Among these principles, the most significant are the principles of legal certainty and protection of legitimate expectations, referring mainly to the broadly understood subject of intermittent law.
The courts of EU do not always distinguish between these two basic principles. The principle of the protection of legitimate expectations is usually seen as a specific expression of the principle of legal certainty. The latter principle expresses the basic assumption that legal entities must know the current shape of the law in order to be able to plan their activities in accordance with the law currently in force. This principle is particularly important in relation to the law regulating the economic activity of individuals, since conducting such activity involves upfront planning. Legal provisions formulated in a clear and precise manner facilitate the proper conduct of business, in particular business operations. In accordance with the principle of legal certainty, the effect of a standard of an EU law must be foreseeable for the addressee. Obligations imposed on individuals by an EU law must be clear and understandable, whereas any doubt about the “language of the law” must be interpreted in favour of the individual.

Issues related to the implementation of the new law and the impact thereof on existing situations have an extremely wide dimension. They are not exhausted by the very concept of intertemporal law, understood either as legal issues referring to broadly understood legal situations – upon a change in law, or as an objectified set of solutions to the issue of which set of regulations – “old” or “new” – should be apply to existing situations.

This study is limited to selected case-law problems regarding changes in EU directives and ordinary laws of EU Member States. The study has been narrowed to the so-called the previous effectiveness of EU directives (Vorwirkung einer EU-Richtlinie) and the issue of retroactivity of law – on the example of selected judgements of the Court of Justice of the EU and – in addition – judgements of the Supreme Administrative Court. The category of prior effectiveness of EU directives essentially refers to the question of the legal force of a directive before the end of the transposition period thereof in a Member State. It shall be noted that the time limit regarding the initial moment of considering

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3 T. Tridimas, General principles of EC law, Oxford 2003 p. 163.
the effectiveness of an EU directive varies. From a narrow perspective, the entry of a directive into force is indicated, whereas from a broad perspective – the publication thereof in the relevant EU official journal⁶. In the Polish legal doctrine, the contentious issue is whether the scope of intertemporal law includes the category of retroactivity of law⁷. It consists in extending the scope of the new norm of legal relations “restricted” by the rule of old law. In such a situation, the introduced regulation extends the new legal effects to the facts arising and terminated under the rule of old law, however before the new law entered into force. An undisputed issue is the prohibition of retroactivity of national law, especially in the constitutional field⁸. Literature of the subject rarely indicates the EU perspective of this issue, which has a special connotation in the jurisprudence of the EU Court of Justice on the basis of the application of the principles of legitimate expectations and legal certainty.

The intention of further consideration shall be to indicate the time limits for the principles of legitimate expectations and legal certainty in the area of changes to EU directives and laws of ordinary EU Member States. The following theses will be verified in the course of the study, assuming that: firstly, the source of legitimate expectations may be an EU directive during the transposition period in an EU Member State; secondly, it is permissible to invoke legitimate expectations for protection against the retroactive effects of a legal act.

II Vorwirkung einer EU-Richtlinie

The previous effectiveness of the EU directive (in narrow terms) is related to the answer to the following questions: whether after the entry into force of a directive (hereinafter: “new directive”) and the transposition⁹ thereof

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⁹ It should be noted that the term transposition (Latin *transpositio* – “transposition”, *transponere* – “transpose”)
it is permissible to apply it directly or the interpretation of national acts is in line with the content of this (new) directive? In other words, can, at this stage – guided by the need to ensure the effectiveness of the provisions of the directive or the protection of the rights of individuals – can a public administration body or entity rely on the provisions of the new directive against a provision of national law that is more or less incompatible with the new directive?

Attempting to answer the above-mentioned questions, it shall first be noted that the deadline for transposing an EU directive is to provide a Member State with time to adapt its internal law to the guidelines arising from the directive. Before the expiry of that period, the Member State may not be charged with failure to implement the directive. Effective raising of such an objection can solely be done after the transposition deadline has elapsed. The jurisprudence of the Court of Justice of the European Union assumes that a directly effective provision is a provision that is sufficiently clear, precise, unconditional and the possibility of its application does not depend on the discretion of the Member States. It is also pointed out that a provision of a directive has direct effect if the deadline indicated in the directive has expired and there are no provisions in accordance with the directive in domestic law. In the latter case, there are certain problems related to the admissibility of direct application of the directive,
the interpretation of national acts in accordance with the content of the directive, and state liability under EU law\textsuperscript{14}.

According to the settled case-law of the Court of Justice of the EU, already during the transposition period of a directive, a Member State should refrain from issuing provisions that could seriously impede the achievement of the purpose of this (new) directive\textsuperscript{15}. The views of the Court have evolved regarding the legal consequences of a Member State’s failure to achieve the objective of a new EU directive. Until 2007, the dominant view was that a directive produced a “blocking effect” during its transposition (Ger.: \textit{Sperrwirkung}), in the sense that its entry into force prevents a Member State from adopting legal provisions incompatible with it, and if that is the case, the courts and administrative authorities may not apply such provisions. It follows from the judgement of the Court of Justice of the EU of June 14, 2007 in case C-422/05 Commission v Belgium\textsuperscript{16} that the adoption of the concept of prior effectiveness of the directive in terms of “blocking effect” was too far-reaching.

In the factual state underlying the above-mentioned judgement, on March 28, 2002 directive 2002/30/EC of the European Parliament and of the Council of March 26, 2002 on the establishment of principles and procedures with regard to the introduction of restrictions regarding noise levels at Community airports\textsuperscript{17} entered into force, which introduced, inter alia, guidelines for imposing noise restrictions at EU airports. The directive obliged Member States to establish appropriate national provisions implementing the directive until September 28 2003. The Kingdom of Belgium issued on April 14, 2002 a royal regulation regulating the night-time traffic of certain civil subsonic jet aircraft\textsuperscript{18}. It entered into force on July 1, 2003. This Regulation introduced restrictions on night-time operations at all airports in Belgium for certain categories of civil subsonic jet aircraft. In June 2002, the European Commission asked the Belgian authorities for information on the Royal Regulation of April 14, 2002. The Commission considered that the measures taken during the time prescribed for the transposition of the provisions of the directive seriously hindered the achievement of its result and therefore violated that EC directive. and Art. 10, second paragraph, in connection with Art. 249, third paragraph\textsuperscript{19}. Further explanations by the Belgian

\textsuperscript{15} cf. the judgements of December 18,1997 in case C-129/96 Inter-Environnement Wallonie, point 45, and of September 14, 2006 in case C-138/05 Stichting Zwid-Hollandse Milleufederatie, point 42; publ.: https://eur-lex.europa.eu.
\textsuperscript{16} Publ.: https://eur-lex.europa.eu.
\textsuperscript{17} On the day of issuing the judgement: Official Journal L 85, p. 40.
\textsuperscript{18} Moniteur belge of April 17, 2002, p. 15570.
\textsuperscript{19} Currently Art. 288 of the Treaty on the Functioning of the European Union of March 25, 1957, Official Journal of 2004 no. 90, item 664 [2], according to which: “In order to exercise the Union’s competences, institutions shall
authorities did not satisfy the Commission, therefore it lodged a complaint with the Court of Justice of the EU on September 28. The Court found that the position of the Commission was well founded.

On the basis of the above judgement, it was pointed out in the literature of the subject that during the transposition of the provisions of the directive one shall rather speak about the obligation of Member States not to issue provisions calling into question the achievement of the new purpose of a directive – in the sense of prohibiting its effects (of use) to be illusory (literally prohibition of frustration – Ger.: Frustrationsverbot), as this prohibition is understood in public international law. As a result of a violation of this prohibition, it is possible to determine that failure to fulfil obligations in the context of the infringement procedure.

The judgement of the EU Court of Justice of April 7, 2016 in case C-324/14, Partner Apelski Dariusz v. Zarząd Oczyszczania Miasta (Eng.: Municipal Waste Management Authority), was of key importance from the perspective of the current principles of the protection of legitimate expectations and legal certainty adopted in this study. In the circumstances of the case heard by national authorities, on December 24, 2013, the Municipal Waste Management Authority (of the Capital City of Warsaw; hereinafter: “ZOM”) initiated proceedings regarding the award of a public contract for comprehensive mechanical cleaning of the streets of the Capital City of Warsaw in the winter and summer seasons in the years 2014–2017. At the time these proceedings were initiated, Directive 2004/18/EC of the European Parliament and of the Council of March 31, 2004 on the coordination of procedures for the award of public contracts for works, supplies and services was in force. In accordance with Art. 48 paragraph 3 of this directive, a contractor may, where appropriate and for a specific contract, rely on the capacities of other entities, regardless of the legal nature of his relationship with them. In such a situation, he must prove to the contracting authority that he will have the resources necessary to perform the contract, for instance by submitting the undertaking of these entities to provide him with the necessary resources. ZOM decided to conduct a tender involving an

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adopt regulations, directives, decisions, recommendations and opinions. (...) The Directive binds each Member State to which it is addressed in respect of the result to be achieved, however leaves it to national authorities to select the form and the means.”

20 Article 18 in principio of the Vienna Convention on the Law of Treaties of May 23, 1969, Official Journal of 1990 no. 74, item 439, provides that: “State is obliged to refrain from actions that would frustrate the object and purpose of the treaty.”


23 Official Journal L 2004 134, p. 114. This act has been transposed into the Polish legal order by the Public Procurement Law, Journal of Laws of 2013, item 907, as amended.
electronic auction. After publishing the contract notice in the Official Journal of the European Union, the Partner submitted his offer. ZOM rejected the Partner’s offer in its entirety and ended the public procurement procedure after having carried out the electronic auction. At the time of issuing this decision, Directive 2014/24/EU of the European Parliament and of the Council of February 26, 2014 on public procurement was in force repealing Directive 2004/18/EC, the deadline for transposing the directive of which expired on April 18, 2016. In line with Art. 63 para. 1 sentence 2 of Directive 2014/24, relating to education and professional qualifications (...) or relevant professional experience, contractors may rely on the capacities of other entities only if the latter carry out works or services for which such capacities are necessary”. The Partner appealed to the National Board of Appeal which decided to suspend the proceedings and refer to the Court of Justice of the EU for a preliminary ruling, including whether it is permissible to use the content of the provisions and the preamble of Directive 2014/24/EU when interpreting the provisions of Directive 2004/18, despite the fact that the time for its implementation has not elapsed, as an interpretative premise in so far as it explains certain assumptions and intentions of the Union legislature, and is not contrary to the provisions of Directive 2004/18.

Referring to the above question, the Court of Justice of the EU stated that Directive 2014/24 was not applicable *ratione temporis* in the main proceedings. In the assessment of the Court, the application of Directive 2014/24, which, as its title implies, repeals Directive 2004/18, before the deadline for its transposition would result in Member States and contracting authorities not having sufficient time to adapt to the new provisions introduced by this directive. The provision of Art. 63 of this directive introduces significant changes in relation to the contractor’s right to rely on the capacities of other entities under a public contract. This provision introduces new conditions that were not provided for in the previous legal system. In this situation, the indicated provision of Directive 2014/24 cannot be used as a criterion for the interpretation of Art. 48 para. 3 of Directive 2004/18, since in this case it is not about settling interpretative doubts regarding the content of the latter provision. The Court pointed to the fact that a different approach would in a sense introduce the risk of incorrectly applying in advance a new legal system different from that provided for in Directive 2004/18 and would be clearly contrary to the principle of legal certainty for contractors.

In the context of the above ruling of the Court, it shall be added that, apart from the need to guarantee the implementation of the principle of legal certainty,
in the analysed case there were premises to apply the principle of protection of legitimate expectations. In the circumstances of the said case, the interested party could expect that the course of the proceedings would not bring about any such changes of law that it could not foresee at the time of its initiation, exercising prudence proper to entities operating with due diligence in business transactions.

III Lex retro agit

The principle expressed by the Latin legal maxim *lex retro non agit* presupposes that new provisions are not applied to the actual situation and relations established on the basis of previous provisions. One can speak of retroactive actions of a law when the new law applies to events “finished in the past” and which ended before the new regulations entered into force\(^{25}\). With the exception of situations governed by criminal law, the *lex retro non agit* principle is subject to a number of exceptions, and in addition, in the case of a new Member State, it may be considered together with the immediate effect of EU law\(^{26}\). According to the Court of Justice of the EU, a given normative act may exceptionally have a retroactive effect if two conditions are met: the purpose of the provision requires it and the legitimate expectations of the addressees are duly protected\(^{27}\). These premises must be met even if the retroactive nature of the provision is not clearly defined by its wording, but results from the nature of the legal norm it contains\(^{28}\). The necessity to meet the above-mentioned conditions is excluded if the purpose of a retroactive provision is to ensure the protection of the rights of an individual\(^{29}\).

The Supreme Administrative Court indicated the appropriate criteria determining the retroactive effect of the law in a judgement of April 20, 2016, reference number I GSK 1259/14\(^{30}\). On the basis of the facts on


which that judgement was based, on December 1, 2010 the Customs Authority – acting as the applicant’s indirect representative – submitted supplementary customs declarations drawn up on the basis of an entry in the simplified procedure register of November 29, 2010 for clearance in the procedure granting authorizations for goods imported from Malaysia described as “universal self-tapping screws” and “drywall screws” to be introduced into trade. The Director of the Customs Chamber upheld the decision of the Head of the Customs Office, who informed about the posting of the amount of duties arising from the import debt due to the imposition of the anti-dumping duty on the said goods – including imported from Malaysia. The customs authorities considered that the goods placed under the procedure of introducing into trade on the basis of the said customs declaration were subject to an extended definitive anti-dumping duty of 85% \textit{ad valorem}. By Council Regulation (EC) No. 91/2009 of January 26, 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People’s Republic of China, a definitive anti-dumping duty was imposed on imports of certain iron or steel fasteners originating in People’s Republic of China. In practice, it turned out that the preventive measures introduced were being circumvented by Malaysia, as demonstrated by the initiation of an investigation by the EU Commission and then the extension of the anti-dumping duty to goods imported from that country.

The courts of both instances assumed that retroactive collection of anti-dumping duties was permissible in the present case under Article 1 of Regulation 723/2011 which retroactively extends the application of the provisions establishing the anti-dumping duty to the abovementioned goods imported from Malaysia. On the other hand, the Supreme Administrative Court did not share the position of the Court of First Instance which – repealing the decision of the authority of the second instance – assumed that when determining the amount of anti-dumping duty the customs authorities shall apply the provisions of Council Implementing Regulation (EU) no. 924/2012 of October 4, 2012 amending Regulation (EC) no. 91/2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People’s Republic of China. Thus, in the opinion of the Provincial Administrative Court,

\begin{footnotes}
\item[31] Taric codes 7318 14 99 91 and 7318 12 90 91 were declared for these goods.
\item[33] By Council Implementing Regulation (EU) no. 723/2011 of July 18, 2011 extending the definitive anti-dumping duty imposed by Regulation (EC) no. 91/2009 on imports of certain iron or steel fasteners originating in the People’s Republic of China to imports of certain fasteners of iron or steel consigned from Malaysia, declared or not declared as originating in Malaysia, EU Official Journal L 194 of January 26, 20011, p. 6; hereinafter: “Regulation no. 723/2011”.
\item[34] EU Official Journal L 275 of October 10, 2012, p. 1; hereinafter: “Regulation no. 924/2012”.
\end{footnotes}
the anti-dumping duty rate should be 74.1%. On the other hand, the application by the authority of the duty rate resulting from the original version of Council Regulation (EC) no. 91/2009 of January 26, 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People’s Republic of China\textsuperscript{35} constituted an act of application of the law which did not apply on any of the dates relevant for determining the legal status. The court of second instance did not share this position, stating that the analysed legal provisions clearly showed that the body applying the law was not free to determine the date of entry into force of EU law. Any retroactive effect of a legal act should clearly result from the content of that act. The rate of anti-dumping duty (74.1%), as amended by Regulation no. 924/2012, could have been applicable to the amounts due in this respect calculated on imports of goods declared after the entry into force of this regulation, i.e. after October 11, 2012, and thus the anti-dumping duty rate (85%) introduced by Regulation no. 91/2009 applied to the goods covered by the declarations concerned.

The above position presented by the Supreme Administrative Court expresses the need to protect the public interest; in the presented case it was about protecting the European Union market against imports of specific goods at discounted prices. In the present case under examination by the Court of Cassation, the expectations of the applicant could not be regarded as justified – and therefore deserving protection – since his transaction was aimed at circumventing EU law aiming at sufficiently high duties to eliminate the dumping (within these goods) used by the People’s Republic of China.

The admissibility of introducing retroactive effects in EU law or national law does not exclude the obligation to take into account specific rules designed to protect the interests of an individual. The jurisprudence of the EU Court of Justice has highlighted, inter alia, the need to take into account the rights exercised by an individual, as well as the obligation to publicly announce the content of the normative act. While in this jurisprudence it was considered permissible to use – by way of exception – the retroactive effect of the Act in order to protect the general interest, details of situations or legal mechanisms that should be associated with the protection of the legitimate expectations of the individual were indicated. In the judgements of June 8, 2000 in case C-396/98, Grundstücksgemeinschaft Schloßstrasse GbR v Finanzamt Paderborn\textsuperscript{36}, and of April 26, 2005 in case C-376/02, Goed Wonen v Staatssecretaris van Financiën, two were cases distinguished: firstly, the situation in which, due


\textsuperscript{36} Both judgements are published at: http://curia.europa.eu.
to the retroactive exemption from VAT of property lease (this term also includes the use of real estate), the taxpayer has already deducted the VAT paid before becoming effective by changing the retroactive provisions introducing this exemption – and, secondly, a situation in which, in similar circumstances, the amending act, due to its retroactive effect, became effective before the taxpayer deducted VAT. The Court pointed out that in the first of these situations it is necessary to protect the taxpayer’s legitimate expectations. In the second situation, protection would only be granted if the content of messages informing individuals about the proposed amendment to the regulations was not clear enough for the economic entity carrying out the economic activities covered by the change to understand the effects of the planned change for its activities.

IV Conclusions

In a democratic state ruled by law, an individual is not entitled to a guarantee that the law or his/her rights will not change. The principle of legal certainty does not require the lack of legislative change, but requires the legislator to take into account the specific situation of economic operators and, if necessary, adapt the application of new legal provisions accordingly. The principle of legal certainty, supplemented by the principle of protection of legitimate expectations, requires, firstly, that legal norms be clear and precise, and secondly, that the implementation of legal changes not be sudden and unpredictable – not giving law subjects time to adapt to the new legal situation.

As a result of the research, it shall be stated that, first and foremost, the source of legitimate expectations of an individual cannot be the EU directive during the transposition thereof in an EU Member State. The principle of legal certainty opposes this, which in this case not only protects the rights of an individual but also protects the public interest. Secondly, the principle of legal certainty is not precluded by the exceptional retroactive effect of a normative act, due to the need to protect the public interest, provided that legitimate expectations of individuals are guaranteed. In particular, protection should be granted to an entrepreneur who, despite actions with due caution and prudence, could not foresee retroactive changes in the law that significantly harm his/

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38 cf. judgement of the EU Court of Justice of June 7, 2005 in case C-17/03, Vereniging voor Energie, Milieu en Water and Others v Directeur van de Dienst uitvoering en toezicht energie, publ.: http://curia.europa.eu.

her interests, and at the same time – due to lack of knowledge and surprise by the new law – he/she was not able to adapt to these changes. An example of such situations is the case when a taxpayer under the previous tax law made VAT deductions for the supply of goods or services, and the new (retroactive) regulation no longer allows such deductions for the same period. Another example is the public announcement of the intention to amend the law retrospectively, which a prudent operator was unable to acknowledge. In such a situation, the introduction of changes retroactively – from the date of improper publication of the communication – gives rise to grounds for raising an objection by the entity for violating the principle of protection of legitimate expectations.