

## Reflections on the Concept of "Legitimate Expectation": Aspects of European Law and National Law

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**ABSTRACT:** This paper explores the concept of "legitimate expectation" in the law of the Republic of Moldova, as well as in European law, particularly in European human rights law. The article first examines how this concept is addressed in the European Convention on Human Rights and Fundamental Freedoms and, accordingly, in the jurisprudence of the European Court of Human Rights, which protects it as a "possession." Next, it explores how the concept is implemented—under the influence of ECtHR jurisprudence—into national case law, especially that of the Constitutional Court of the Republic of Moldova. Even though the phrase "legitimate expectation" is not explicitly used in the Civil Code of the Republic of Moldova, the notion implicitly appears in various legal provisions. The paper concludes by analyzing specific applications of this concept within the framework of the Civil Code.

**KEYWORDS:** legitimate expectation, good, property right, real rights, constitutional jurisprudence, non-performance of obligations, recovery of damages

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### Introduction

Expectation is a psychological notion that refers to the mental life and perceptions of the individual. Since the law does not operate with psychological notions as such, but with legal concepts, it is necessary to establish what is meant by the term "legitimate." "Legitimate", according to the Dictionary of the Romanian Language (DEX), is that which is based on the law, which is justified by law, which is recognized according to a right. Evidently, it is the prerogative of the legislator and the judges to establish the legal basis of a phenomenon and whether it is in accordance with the law. It is worth mentioning that, often, alongside the term "expectation", in legislation, for example, in the provisions of the Civil Code of the Republic of Moldova (hereinafter referred to as the "Civil Code" or "C. civ."), the term "reasonable" appears. In the specialized literature, it has been stated that, in

this context, the terms "reasonable" and "legitimate" have the same meaning. It has been demonstrated that reasonableness is synonymous with the law; what is not reasonable cannot belong to the domain of law (Schwarz-Liebermann Von Walhendorf, 1978, p. 43).

To analyze the legal concept of "legitimate expectation", it is necessary to examine the following aspects: a) how this concept is enshrined in law and b) how this concept is implemented in jurisprudence. In the law of the Republic of Moldova, the concept of "legitimate expectation" was "imported" from European law, especially from European human rights law. Therefore, we will first examine how this concept is treated in the European Convention on Human Rights and Fundamental Freedoms (ECHR) and, respectively, in the jurisprudence of the European Court of Human Rights (ECtHR). Then, we will examine how the concept in question is implemented, under the influence of ECtHR jurisprudence, in national jurisprudence, especially in that of the Constitutional Court of the Republic of Moldova. Furthermore, we will analyze some applications of this concept in the provisions of the Civil Code of the Republic of Moldova.

### **Legitimate expectation - a possession protected by the European Convention on Human Rights**

The Notion of "Possession" in the Sense of Article 1 of Protocol No. 1 at ECHR (Council of Europe, 1950), which states that "... [e]very natural or legal person is entitled to the peaceful enjoyment of his possessions [...]", has an autonomous scope of application, which is independent of the formal qualifications of domestic law: certain other rights and interests that constitute assets can also be considered "property rights" and, therefore, "possessions" within the meaning of this provision. The autonomous character of the notion of "possession" in the ECHR system means that even if a state's domestic legislation does not recognize a particular interest as being a "right" or even a "property right", this does not necessarily prevent that interest from being considered a "possession" within the meaning of Article 1 of the First Additional Protocol. In each case, it is important to examine whether the circumstances, taken as a whole, have made the applicant the holder of a substantial interest protected by the aforementioned regulations (*Anheuser-Busch Inc. c. Portugal; Broniowski c. Poland; Iatridis, c. Greece; Beyeler c. Italy*).

The concept of "possessions" within the meaning of Article 1 of Protocol No. 1 is a complex one, which is not limited to ownership of tangible property. It includes both immovable and movable property, i.e., "current assets", as well as assets, including claims, with respect to which the applicant can claim to have at least a "legitimate expectation" of effectively exercising a property right. The notion of "possessions" encompasses not only "existing possessions" but also assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining the effective enjoyment of a property

right (*Pressos Compania Naviera S.A. and others c. Belgiei*, § 31; *J.A. Pye (Oxford) Land Ltd v. United Kingdom*; *Kopecný c. Slovakia*).

Therefore, in certain circumstances, a "legitimate expectation" of obtaining an asset may be protected by Article 1 of Protocol No. 1. Thus, where the proprietary interest has the character of a claim, the person invoking it may be considered as having a "legitimate expectation" if there is a sufficient basis for this interest in national law (when it is expressly provided for or there is a well-established case law of the courts confirming it): (*Kopecný c. Slovakia*, September 28, 2004, §52).

A mere hope, however reasonable it may be, cannot be considered a form of "legitimate expectation" for the purposes of Article 1 of Protocol No. 1 to the Convention; it must have a more concrete nature than a simple hope and be based on a legal provision or a legal act, such as a court decision, which is related to the proprietary right in question (*Gratzinger and Gratzingerova c. Czech Republic*, 10th of July 2002, §73; *Kopecný c. Slovaciei* (MC), §49-50); *Centro Europa 7 S.R.L. and di Stefano c. Italy* (MC), §173; *Bélané Nagy c. Hungary* (MC), §75).

For the first time, the European Court of Human Rights (ECHR) addressed the concept of "legitimate expectation" in the context of Article 1 of Protocol No. 1 in a 1989 case — *Pine Valley Developments Ltd and Others v. Ireland*. In that case, the Court ruled that the granting of a planning certificate, on the basis of which the applicant companies had purchased the land for development, created a "legitimate expectation." The irrevocable planning certificate was "an integral part of the companies' property" (§ 51). The concept in question was also developed in a number of other cases. In the case of *Stretch v. United Kingdom*, §35, for instance, a "legitimate expectation" was found regarding the exercise of the possibility to renew a long-term lease contract. Similarly, in *Ceni v. Italy* (§ 43), it was recognized in the context of a preliminary contract for the purchase of an apartment. In this category of cases, "legitimate expectation" is based on the reasonably justified reliance on a legal act that has a solid legal foundation and involves property rights (*Kopecný v. Slovakia*, § 47).

## 2. "Legitimate Expectation" in National Law

### 2.1. "Legitimate Expectation" in Constitutional Jurisprudence

As mentioned above, to obtain the value of a legal concept, the notion of "legitimate expectation" must be recognized by the legislator and/or judges. The national legislator has not expressly regulated the legal notion of "legitimate expectation" as such, we do not find a legal definition of this notion either in the Civil Code or in other legislative acts, nor do we find mention of this phrase, at least in the Civil Code. However, we encounter the phrase "legitimate expectation" in jurisprudence, especially in the constitutional jurisprudence of the Republic of Moldova, which is influenced by ECtHR case law.

In a 2018 case (Decision no. 613 of August 1, 2017), the Constitutional Court examined a complaint requesting the constitutional review of a text from Government Decision no. 613 of August 1, 2017, which establishes requirements regarding the content and presentation of health warnings and other information that must appear on tobacco products. According to point 3 of the decision in question, stocks of tobacco products and related products manufactured before its entry into force could be sold only until June 30, 2018. The author of the complaint claimed that the time limitation, i.e., until June 30, 2018, of the right to sell tobacco products whose labeling did not meet the requirements provided by the mentioned Decision, but which were purchased by economic agents before its entry into force, represented a disproportionate limitation of property rights.

Since a patrimonial interest of economic agents was invoked, the Court had to determine whether these economic agents had a "legitimate expectation" to realize such a patrimonial interest. In its decision, the Court mentioned that the provisions of the Law on Tobacco Control, which established new conditions regarding the packaging and labeling of tobacco products, entered into force on January 1, 2018, and had been published in the Official Monitor in 2015. Considering the aforementioned, as well as the special status of tobacco merchants as professionals in this market, the Court found that, at least from 2015 onwards, these persons could have foreseen that, starting from 2018, the requirements regarding the labeling and warnings applied on tobacco product packages would be modified, including the fact that the Government would adopt a regulation to this effect. Consequently, the Court held that the complaint was manifestly unfounded and declared it inadmissible.

In a recent case (2022), the Constitutional Court examined an exception of unconstitutionality, which was raised in a dispute, the object of which was an administrative litigation action regarding the authentication of the right of ownership over a land plot from the public domain. The authors of the referral challenged, inter alia, a text from Government Decision no. 984 of September 21, 1998, which states that if the land actually used by the owner of the dwelling house is larger than the area mentioned in the allocation document, the local public administration may decide to transfer the ownership of the land actually used by the owner of the dwelling house, if its area is no more than 10 percent larger than the area mentioned in the documents. The authors claimed that their right to obtain the right of ownership over the surplus of public land in use, which exceeded 10% of the allocated land and over which the plaintiffs had a legitimate expectation to obtain the right of ownership, had been violated.

The Court emphasized that the mentioned legal provision is a permissive norm and, therefore, local public authorities are not obliged, in addition to the legally allocated land, to transfer private ownership of a surplus of public land. The Court based its decision, inter alia, on the jurisprudence of the ECtHR, which has held that Article 1 of Protocol No. 1 applies only to the existing possessions of a

person and does not guarantee the right to acquire property. For a "possession" consisting of a "legitimate expectation" to be recognized, there must be a national legal basis that generates a proprietary interest (*Bélané Nagy v. Hungary*, 13 December 2016, § 79).

## 2.2. "Legitimate/Reasonable Expectation" in the Civil Code of the Republic of Moldova

Even though the phrase "legitimate expectation" is not explicitly used in legislation, this notion is implicitly reflected in various regulations of the Civil Code, and the term "reasonable" is also used, which is very close, or even, as shown above, can be considered synonymous. Unlike the ECHR system, where the "legitimate expectation" is recognized as a possession, being offered protection, along with other categories of possessions, in the Civil Code, in the second book, dedicated to real rights, "legitimate expectation" or "reasonable" is not expressly mentioned in the provisions regarding the notion of "goods" and their typology. However, in the law of obligations, references to the notion of "legitimate" or "reasonable" expectation appear quite frequently.

Since expectations are part of a person's mental life and perceptions, the same circumstances can give rise to different expectations. Therefore, it is important to establish whose behavior in the obligational relationship - the creditor's or the debtor's - must be assessed to determine the legitimate nature of the expectation, and whether the judge must perform an evaluation *in concreto* or *in abstracto* of the facts and circumstances.

As for whose behavior in the obligational relationship should be assessed, the doctrine has shown that the judge must place himself on the creditor's side to assess whether the contract has been properly executed. Thus, judges must, first of all, establish what are the legitimate expectations of the creditor in question, and then, secondly, compare these expectations with the debtor's behavior and the performance received (H. Aubry, *op. cit.*, pp. 647 – 648).

Regarding the methods of evaluation - *in concreto* or *in abstracto* - of facts and circumstances, an analysis of legal provisions in comparative law leads to the conclusion that the judge, when verifying the legitimate character of an expectation, must perform an *in abstracto* evaluation. In the same line of thought, it is important to determine what type of person the judge should refer to in order to assess the legitimate character of an expectation. Using a classic standard model, such as "a good family father" (*pater familias*) (Larroumet, 2003, p. 660), is not appropriate in contemporary law, as it does not take into account the diversity of participants in legal relationships. Therefore, the doctrine has expressed the opinion that it is appropriate to take as a reference the reasonable natural person who belongs to the same category of contracting parties as the creditor (H. Aubry, *op. cit.*, p.637).

The next clarification that is required is that the evaluation may be different depending on whether the creditor is a consumer or a professional. This distinction is made both in European law and in national law, which sometimes offers a different degree of protection when the creditor is or is not a consumer. At the same time, the professional is held to a stricter standard than the non-professional by the fact that the creditor can legitimately expect the professional to fulfill their obligations with more diligence and skill. In this regard, Art. 1012 Civil Code specifies: professional diligence implies the level of specialized competence and prudence reasonably expected from a professional towards consumers, in accordance with fair market practices and/or the general principle of good faith, in the professional's field of activity. The skills attributed to the professional are sources of trust for the creditor and therefore justify the execution of a quality service. The doctrine has shown that "the public often expects more from a professional than from a private individual, even a diligent one. The professional is specialized, is paid for the service they offer, so we can expect more from them than from a good family father"(Serlooten, 1981, p. 805).

The stated consideration can be illustrated by regulations in various special areas of the law of obligations. Thus, in the matter of fiduciary relationships, the law provides: the fiduciary is obliged to act with the competence and prudence expected of a competent and attentive person who manages the affairs of another, taking into account also whether the fiduciary is entitled to remuneration. If acting in the exercise of a profession, the fiduciary is obliged to act with the competence and prudence expected of members of that profession (Art. 2101 Civil Code).

The level of legitimate expectation towards the professional is also higher in the sphere of pre-contractual information obligations: before the conclusion of a contract for the delivery of goods, performance of works, provision of services, supply of digital content or other performance by a professional to another person, the professional has an obligation to provide that person, by any appropriate means, with information on the essential characteristics of the performance to be provided, which the professional holds or can be expected to hold and the non-provision of which would be contrary to good faith (Art. 1011 Civil Code).

It is natural that the requirements towards the professional should have an increased degree of strictness at the stage of performance of contractual obligations as well. Thus, Art. 1338 Civil Code provides: the contractor or service provider must execute the work or provide the service with the competence and prudence that a reasonable provider would have exercised in the circumstances of the case and in accordance with the law or other mandatory norms applicable to the work or service in question. If a higher level of competence and prudence is professed, the contractor or service provider must apply that higher level.

The notion of "legitimate" or "reasonable" expectation runs like a red thread through the regulations regarding non-performance of obligations. In doctrine, it has been noted that measuring the extent of non-performance of the obligation is

done according to the legitimate expectations of the creditor.(H. Aubry, op. cit., p.648). From the provisions of Art. 901 of the Civil Code, it follows that in order to exercise the legal means granted to him, the creditor must prove the non-performance of the contractual obligations. This proof is made according to the nature of the disregarded obligation - an obligation of result or an obligation of means.( Art. 780 of the Civil Code). When the creditor could legitimately expect a certain result, he must prove that this result was not achieved. When he could only expect the debtor to adopt a certain behavior, to manifest reasonable care and diligence, the creditor must prove that the debtor did not meet the legitimate expectations. In turn, the debtor has the possibility to oppose the creditor's action by proving that the expected performance was carried out, i.e. the performance of the obligation is in accordance with the legitimate expectations of the creditor. He may, for example, demonstrate that he has exercised all necessary diligence and performed all acts that the creditor could legitimately expect.

In certain situations, in order to defend himself, the debtor may prove that the performance was absolutely impossible due to a justifying impediment, an institution introduced in the Civil Code as a result of the reform, in accordance with the new concepts enshrined in the instruments for the unification of contract law.( DCFR). According to Art. 904 of the Civil Code, an impediment is an event outside the control of the debtor, when the debtor could not reasonably have taken the impediment into account at the time of conclusion of the contract or other legal act, and it could not be reasonably required of him to avoid or overcome the impediment or its consequences. In such a situation, the debtor cannot be reproached for the non-performance of his obligation, since the creditor could not legitimately expect the debtor to be able to overcome an unforeseeable, inevitable, insurmountable, external event. Thus, what the creditor could reasonably expect from the debtor constitutes the criterion for determining which contracting party bears the consequences of the non-performance of a contractual obligation.

The notion in question also appears in the regulations regarding termination for material non-performance of the contractual obligation: the creditor has the right to termination if the non-performance by the debtor of the contractual obligation is material. The non-performance of the contractual obligation is material, inter alia, when it substantially deprives the creditor of what he could expect under the contract, in relation to the entire contractual relationship or the instalment subject to termination, except when at the time of conclusion of the contract the debtor did not foresee and could not reasonably have foreseen that result (Art. 916 Civil Code).

It should be noted that for the non-performance to be qualified as material, the damage caused must be assessed in an objective, in abstracto manner; what is relevant is not what the creditor actually expected from the contract in concreto, but only what he was "entitled" to expect. The question arises, therefore, of determining what the legitimate expectation of a person of the same quality, placed

in the same situation, would have been. Non-performance is only material when it prevents the realization of that purpose, which would normally lead such a person to conclude the contract in question. Of course, in assessing the nature of the damage, it must also be clarified whether the objective pursued by the creditor was also known to the debtor. Therefore, if it could not be reasonably expected of the debtor that he would foresee this serious result for the creditor, this remedy cannot be resorted to.

### **3. Legitimate/Reasonable Expectation in the Context of Damage Compensation**

The assessment of legitimate/reasonable expectation is also made in the case of damage evaluation, especially for future damage, in the case of lost profits and in the case of loss of chance. In this context, it is necessary to clarify the correlation between such notions as actual damage, future damage and possible damage, examining the conditions they must meet and the methods of evaluating the respective compensations, through the lens of legitimate expectations of the person entitled to obtain compensation.

Actual damage is that which has already occurred. Future damage is that which has not yet occurred, but there is a reasonable probability that it will occur. The notion of "future damage" is an innovation in our civil law. Following the model of uniform law instruments - the UNIDROIT Principles of International Commercial Contracts and the Draft Common Frame of Reference (DCFR) - in the new edition of the Civil Code it is stipulated that the damage compensated through damages includes also the future damage that is reasonably likely to be suffered (Art. 934 (3) C. civ.). Regarding lost profits, it should be noted that this can be a component of actual damage, when it should have already been obtained by the time the court decision awarding compensation is rendered. At the same time, lost profits can also be a component of future damage, when the creditor had a legitimate expectation of obtaining this profit after the decision was rendered, but due to the non-performance of the obligation by the debtor, the profit will not be realized.

Actual and future damage are contrasted with possible damage, which is situated at the level of a mere hope; it is hypothetical, uncertain and, therefore, not reparable. The ECtHR's jurisprudence has repeatedly revealed that a mere hope, however reasonable it may be, cannot be considered a form of "legitimate expectation" for the purposes of Article 1 of Protocol No. 1 to the Convention (see point 1 above). Between future damage and possible damage is the damage caused by the loss of a chance, which consists of the loss of a favorable eventuality and is compensated in proportion to the probability of obtaining the expected advantage. Like the notion of "future damage", that of "loss of chance" is an innovation for our civil law (Art. 19 para. (4) Civil Code). This institution is also found in some



modern codifications, such as the Romanian Civil Code (Art. 1532), as well as in the UNIDROIT Principles (Art. 7.4.3 para. (2)), and in a number of countries, although not enshrined in legislation, this concept is applied through case law. The development and propagation of this institution in European countries has given rise to the assertion in the case law of the Court of Justice of the EU that "the loss of a chance, as a constitutive element of the damage to be compensated, falls within the "general principles common to the legal orders of the Member States", as required by Article 340(2) of the TFEU" (par.62).

As can be observed, the criterion based on which the distinction is made between different categories of damages is the certainty of the occurrence of the respective damage, through the lens of legitimate expectations of the person entitled to obtain compensation. While the certainty of current damage is not questioned, the legitimacy of the entitled person's expectation being evident, regarding future damage, lost profits and loss of chance, their occurrence and extent are affected by an *alea*, not being absolutely certain. In such a hypothesis, for the expectation of the entitled person to be recognized as legitimate, a reasonable, sufficient certainty is necessary, which implies a high degree of probability, having as a criterion the assessment of the normal course of things.

#### 4. Conclusions

The concept of "legitimate expectation" is based on the reasonable and justified trust of the subject of a legal relationship of real or obligational nature in a certain result or behavior. This legal notion contributes to protecting the rights and interests of subjects of legal relationships and ensures respect for the principles of good faith, equity, and security within the legal system. In the law of the Republic of Moldova, reference to legitimate expectation appears today in a more or less explicit way. This phenomenon is essentially due to the influence exercised by European law on our law. Even if the phrase "legitimate expectation" as such is not explicitly used in the Civil Code, this notion is implicitly reflected in various regulations, with the very close term "reasonable" being used as well.

In the Civil Code of the Republic of Moldova, "legitimate" or "reasonable" expectation is not expressly mentioned in the provisions regarding the notion of "goods" and their typology. We consider that it is worth analyzing the opportunity of adopting in the Civil Code the model of this concept from the ECHR system, where "legitimate expectation" is recognized as a possession, being offered protection along with other categories of goods.

The interest in studying the concept of "legitimate expectation" lies in the possibility of achieving a systematization that would allow a better disclosure of certain developments in national civil law, including under the influence of European law, and contribute to greater legal security. Indeed, the concept must allow the formulation of valid solutions for the future that offer subjects the

possibility to know the rule that will be applicable in a certain hypothesis and to act thus safely. Studying comparative law, European law, and the texts of international instruments, we can assume that in our law, legitimate expectation could crystallize as an essential legal concept.

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