



The Europeanisation of the law on legitimate expectations

Recent case law of the English and European Union
courts on the protection of legitimate expectations
in administrative law

Esther Drabkin-Reiter

Thesis submitted for assessment with a view to obtaining the degree of
Master in Comparative, European and International Laws (LL.M.)
of the European University Institute

Florence, September, 2015

European University Institute
Department of Law

The Europeanisation of the law on legitimate expectations
Recent case law of the English and European Union courts on the
protection of legitimate expectations in English law

Esther Drabkin-Reiter

Thesis submitted for assessment with a view to obtaining the degree of
Master in Comparative, European and International Laws (LL.M.)
of the European University Institute

Supervisor

Professor Loïc Azoulai, European University Institute

© Esther Drabkin-Reiter, 2015

No part of this thesis may be copied, reproduced or transmitted without prior
permission of the author

Summary of Thesis

This thesis considers the Europeanisation of English administrative law, in the specific context of the principle of protection of legitimate expectations. It assesses whether, how and to what extent the way in which legitimate expectations are protected in EU law has influenced the protection of legitimate expectations in English law. To make this assessment, a thorough analysis is conducted of case law in both jurisdictions.

The thesis is structured into five main Chapters. Chapter A provides an introduction and looks at some general issues surrounding the concept of legitimate expectation, including which expectations are protectable and what is meant by “legitimacy”. Chapter B traces the development of the protection of legitimate expectations in English and EU law, and considers certain particular features in more detail for each jurisdiction, with the aim of establishing some parameters against which more recent case law can be tested and compared. In Chapter C an in-depth analysis of recent case law of the English courts, both falling within and outside the scope of EU law, is undertaken, and comparisons are drawn between these cases and with the traditional position of EU law on the protection of legitimate expectations. Chapter D contains a similar analysis in respect of recent cases of the Court of Justice of the European Union. Finally, Chapter E draws these analyses together and concludes that while there is limited convergence in the way English and EU courts approach the protection of legitimate expectations, both jurisdictions remain wary of external influence.

Contents

A. Introduction	1
I. What is Europeanisation?	2
II. The nature of a legitimate expectation	2
1. What is a protectable expectation?	3
2. What is “legitimate”?	3
3. A legitimate expectation as an interest, right or principle?	4
B. How are legitimate expectations protected by the courts in English law and EU law?	7
I. The protection of legitimate expectations in English law	8
1. Historical context	8
2. Procedural and substantive legitimate expectations	9
3. Knowledge, reliance and consistency of treatment	13
4. Fairness and abuse of power	15
5. Relief	17
II. The protection of legitimate expectations in EU law	18
1. The state of knowledge of the individual harbouring the legitimate expectation: the prudent trader	21
2. The state of knowledge of the individual harbouring the legitimate expectation: the concept of reliance	22
3. The relationship between the individual harbouring the legitimate expectation and the public authority generating it: foreseeability and discretion	23
4. The power to make a binding representation – ultra vires representations and binding others	24
5. Relief	25
III. Conclusion	25
C. Recent case law of the English courts	27
I. Introduction	27
1. Scope and case selection	27
2. When are English courts under an obligation to apply the EU principle of legitimate expectations?	28
II. The individual harbouring the expectation – the applicant for judicial review	29
1. The state of knowledge of the individual	29
2. The relevance of reliance	36
III. The public authority generating the expectation	41
1. The power of the public authority to make the representation	41
2. Discharging the legitimate expectation	45
IV. The role of the court	48
1. The intensity of review	48
2. The relief ordered by the court once a legitimate expectation has been found	52

D. Recent case law of the European Court of Justice on legitimate expectations	59
I. Introduction and scope.....	59
II. The individual harbouring the legitimate expectation.....	61
1. The state of knowledge of the individual.....	61
2. The role of an individual's reliance in the test for legitimate expectations	66
III. The Court's approach to the protection of legitimate expectations	69
1. A "legitimate expectation of a procedural nature"	70
2. Procedural protection of (substantive) legitimate expectations	72
E. Conclusions	77
I. State of knowledge of the individual	78
II. Relief	79
III. Concluding thoughts	79
Bibliography.....	81
Table of cases heard by the English courts (in alphabetical order)	83
Table of cases heard by the EU courts (in case number order).....	85
Table of cases from other jurisdictions (in alphabetical order)	87

A. Introduction

My research question seeks to ascertain whether and how the protection of legitimate expectations in English administrative law¹ has been subjected to the phenomenon of “Europeanisation”, whereby as a result of national courts’ exposure to European Union law through their obligation to apply it in particular situations, national legal principles become aligned with their European counterparts. In fact, this thesis will demonstrate that English courts have mostly been resistant to any influence of EU law in the field of legitimate expectations. Even in cases falling within the scope of EU law, where English courts are under an obligation to apply the EU law principle of legitimate expectations, they have still expressed and applied the test in English law terms.

Briefly, and generally, a legitimate expectation in the context of administrative law is some legal interest that a natural or legal person can invoke to require some part of the State apparatus to act or refrain from acting, although such behaviour is not otherwise mandated by law. There are three main actors in a typical legitimate expectation relationship, and the treatment of these actors in case law will form the basis for the subsequent discussion and the case analysis. These actors are: an individual or undertaking, usually a member of the public;² a public authority or other State entity who has allegedly breached the legitimate expectation, and in most cases created it; and the courts, whose role it is to decide whether an interest amounting to a legitimate expectation has indeed been breached, and whether that breach was justified.³

The following Chapters will consider some general issues surrounding the concept of legitimate expectation (Chapter A), provide some background on the way that legitimate expectations have been protected in English and EU law in the past (Chapter B), analysis recent case law of the English and EU courts (Chapters C and D) and draw these analyses together with some conclusions (Chapter E).

¹ In what follows, all references to “English law” and “English courts” should be read as referring to the law as it applied in England and Wales and the courts of England and Wales respectively.

² In certain situations the “individual” might be another public authority: see, for example, *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin).

³ In what follows, different terms will be used to refer to each of these three actors, depending on the context. The individual may be referred to as the representee, the promisee or the claimant or applicant bringing a judicial review claim. The public authority or State entity may also be referred to as the local council or the representor. “The Court” refers to the Court of Justice of the European Union unless otherwise indicated.

I. What is Europeanisation?

The potential for a transfer of administrative legal principles from EU law to national law has long been recognised in the academic literature.⁴ In a multi-layered system such as the European Union, where national courts must apply European law in cases before them whose subject matter falls within the scope of EU law, it is possible that even in cases involved purely domestic situations (those involving national law only), judges will begin to modify domestic principles so that they begin to coincide with their counterparts in European law.⁵

Such a process may be termed the “Europeanisation” of domestic laws. It has been explained on the basis that it may be difficult for judges to apply two conceptions of the same legal principle in tandem, depending on the subject matter of the case, without one influencing the other.⁶ There is greater scope for such a process to occur in the area of administrative law where the same behaviour (acts of the administration) will be tested against legal principles originating from EU or English law, depending on its subject matter. However, it is also possible that in such a situation a domestic legal principle develops independently of its European counterpart – judges might reason by analogy with other domestic legal principles, or with reference to the national constitutional tradition.

II. The nature of a legitimate expectation

At once one of the most important and difficult questions to answer in setting up the issues which will be subsequently explored is what exactly a “legitimate expectation” is. Courts and academic commentators have suggested many different formulations,⁷ but it is difficult to identify an overarching definition that covers all situations which the concept can apply to, not least given the fact that a “legitimate expectation” can mean different things depending on the administrative law traditions of the jurisdiction in which it is invoked. As a generalised starting point one can take Calmes’ explanation of the role of legitimate expectations: the

⁴ Schonberg, *Legitimate Expectations in Administrative Law* (2000) p 27; Schwarze, “The Convergence of the Administrative Laws of the EU Member States” in Snyder (ed), *The Europeanisation of Law* (2000).

⁵ Boymans and Eliantonio, “Europeanization of Legal Principles? The Influence of the CJEU’S Case Law on the Principle of Legitimate Expectations in the Netherlands and the United Kingdom” (2013) 19(4) *European Public Law* 715, 716.

⁶ Schwarze, “The Convergence of the Administrative Laws of the EU Member States” in Snyder (ed), *The Europeanisation of Law* (2000) p 181.

⁷ See, for example, Schonberg, *Legitimate Expectations in Administrative Law* (2000) p 1; Boymans and Eliantonio, “Europeanization of Legal Principles? The Influence of the CJEU’S Case Law on the Principle of Legitimate Expectations in the Netherlands and the United Kingdom” (2013) 19(4) *European Public Law* 715, 718; *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [17].

operation of law as protection against illegitimate changes of policy by public power.⁸ In the following section I will seek to unpack the term “legitimate expectations” a little more, in the hope of understanding it better.

1. What is a protectable expectation?

The standard case of legitimate expectation⁹ focusses on the state of mind of the individual, which is clear from the very terminology employed – the word “expectation” implies a belief or idea about a certain state of affairs. Taking the first definition of expectation in the Oxford English Dictionary, namely “the action or fact of anticipating or foreseeing something; the belief that something will happen or be the case”,¹⁰ it is clear that an expectation is something more than a mere hope in relation to the future. The English courts have explained this difference as a requirement that a clear understanding and acceptance on the part of the individual or any representation must be present. Where no such understanding of acceptance was present, the applicant might be said to have a hope, but not an expectation.¹¹ In German academic literature, a similar distinction has been drawn between a mere expectation (*Erwartung*) and an individual’s trust worthy of protection (*Vertrauen*).¹²

However, it is also worth noting that in certain cases where a legitimate expectation has been found, this has occurred notwithstanding the complete lack of knowledge of the applicant of the conduct that is claimed generated the expectation. In English law, this is the case where a legitimate expectation is based on “conspicuous unfairness”, rather than reliance on a specific representation made by a public authority.¹³ In EU law, a legitimate expectation may arise automatically where an individual’s EU law rights are curtailed abruptly and without notice.¹⁴

2. What is “legitimate”?

A further question is when an expectation will be considered “legitimate”. This term is used in many different ways in the authorities and it is not clear whether legitimacy is a legal

⁸ Calmes, *Du principe de la confiance légitime en droits allemande, communautaire et français* (2001).

⁹ There are certain exceptions, which will be discussed in more detail below.

¹⁰ Oxford English Dictionary (3rd edition, 2015).

¹¹ Sedley LJ in *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at 1133D to E. The judge may have been influenced by the fact that the representation relied on was not made to the applicant, but to another individual also affected by the policy change.

¹² Schwarz, *Vertrauensschutz als Verfassungsprinzip* (2002) pp 376 et seq.

¹³ *Rashid v Secretary of State for the Home Department* [2005] EWCA Civ 744.

¹⁴ See, for example, Case C-62/00 *Marks & Spencer v Her Majesty’s Revenue and Customs*, ECLI:EU:C:2002:435.

construct,¹⁵ a factual test or simply a label applied to an expectation that the court considers should be upheld. Watson notes that legitimacy should be concerned with factual, rather than normative considerations – once certain facts are in place and a legitimate expectation arises, then a decision can be taken as to whether to uphold or deny that expectation, by balancing the interests of the individual claiming the legitimate expectation with those of the wider public. However, he accepts the problems caused by the word “legitimate” regarding the normative implications of validity which it raises for the factual situations it is applied to. He suggests “reasonable” as a better term to describe expectations that should, absent an overriding public interest, be upheld, but accepts that the use of the term “legitimate” is now ingrained in the judicial protection of expectations.¹⁶ By contrast, Schonberg does see a normative function for the term “legitimate”, noting that such legitimacy in the protection of legitimate expectations in EU law arises from the balancing act between the individual interest and that of the wider public.¹⁷

Recent case law of the English courts has indicated different – but limited – interpretations of “legitimacy”: some judges have considered it arises upon reliance on the expectation,¹⁸ or the reasonableness of the expectation or reliance on it;¹⁹ others have considered the power of the authority to make the representation to be determinative of the legitimacy of the expectation.²⁰

3. A legitimate expectation as an interest, right or principle?

There is general agreement that legitimate expectations are not rights – this can be seen in their contradistinction from the concept of “*droits acquis*” or vested rights.²¹ Furthermore, although the administration may have a duty to take legitimate expectations into account

¹⁵ Elliot, “Legitimate Expectation, Consistency and Abuse of Power: the Rashid Case” [2005] *Judicial Review* 281 at [8].

¹⁶ Watson, “Clarity and Ambiguity: a new approach to the test of legitimacy in the law of legitimate expectations” [2010] *Legal Studies* 633, 634 to 635.

¹⁷ Schonberg, *Legitimate Expectations in Administrative Law* (2000) p 118.

¹⁸ Sedley LJ in *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at 1133D to E.

¹⁹ *R (Bloggs 61) v Secretary of State for the Home Department* [2003] EWCA Civ 686 at [39]; *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [21] and [46].

²⁰ *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [21] and [46]; *Henry Boot Homes v Bassetlaw District Council* [2002] EWCA Civ 983.

²¹ Calmes, *Du principe de la confiance légitime en droits allemande, communautaire et français* (2001) p 32; *Solar Century Holdings Ltd v Secretary of State for Energy and Climate Change* [2014] EWHC 3677 (Admin) at [97]; *R (Abbassi and others) v Secretary of State for the Home Department* [2011] EWCA Civ 814 at [29] and [46] using the terminology of “accrued right”.

when it exercises public power, this duty may be trumped by an overriding public interest,²² and will not apply where there is “bad faith” in the sense of illegality or misconduct of the representee,²³ or (in most cases) where it has been generated by a mistake of the administration.²⁴ Calmes notes that a legitimate expectation occupies the space somewhere between an individual interest (exclusively that of trust or expectation) and a subjective right (not yet an acquired one). She suggests that it can be considered as a right to the foreseeability of changes of the lines of political policy or action, or the right to foreseeability of changes to an individual’s own situation.²⁵ Advocate General Trabucchi made it clear that a legitimate expectation receives its importance precisely in cases where the interest would otherwise not be protected by a subjective right. *Droits acquis* reflect a certain standard of the protection of individual interests in relation to public power, a level of protection that legitimate expectations fall short of.²⁶ The concept of legitimate expectation has been described both by English and EU commentators as a “principle”, and yet this means different things in each legal system: as a general principle of EU law, the protection of legitimate expectations can operate to annul secondary EU legislation and national legislation; as a principle of English law, legitimate expectations informs the role of the courts in reviewing administrative acts.²⁷

²² *R (Capital Care Services) v Secretary of State for the Home Department* [2012] EWCA Civ 1151 at [22]; Case C-183/95 *Affish BV v Rijksdienst voor de Keuring van Vee en Vlees*, ECLI:EU:C:1997:373 at [55] to [59].

²³ *R (Abbassi and others) v Secretary of State for the Home Department* [2011] EWCA Civ 814 at [45] and [46]; Case C-492/13 *Traum EOOD v Direktor na Direktsia «Obzhalvane i danachno-osiguritelna praktika» Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* at [41] and [42].

²⁴ *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115, 1127B to D; *R (Capital Care Services) v Secretary of State for the Home Department* [2012] EWCA Civ 1151 at [13], [16] to [18]. By contrast see *Rashid v Secretary of State for the Home Department* [2005] EWCA Civ 744.

²⁵ Calmes, *Du principe de la confiance légitime en droits allemande, communautaire et français* (2001).

²⁶ Opinion of Advocate General Trabucchi in Case 74/74 *CNTA v Commission*, ECLI:EU:C:1975:53.

²⁷ Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (2000) pp 1 to 6.

B. How are legitimate expectations protected by the courts in English law and EU law?

Having discussed some of the conceptual questions surrounding legitimate expectations, I will now consider in more detail the way in which English and EU courts have developed and applied the principle of protection of legitimate expectations as found in their respective legal systems. This will be used as a basis for the analysis of more recent case law and an assessment of how, if at all, external influences have led to changes in the way legitimate expectations are protected in either jurisdiction.

In their development of the principle of protection of legitimate expectations, English and European courts have identified similar elements which go to the establishment and protection of a legitimate expectation. Usually, some kind of representation or undertaking made by a public authority to an individual will be necessary: this could be a promise,²⁸ a settled practice²⁹ or pre-existing situation,³⁰ or a previously published policy.³¹ This representation should have caused a certain expectation or “justified hope” on the part of the individual of a particular outcome or procedure,³² which will then be balanced against any overriding public interest to decide whether the expectation should be upheld or denied.³³ While these features form a rough skeleton of the way legitimate expectations are protected in both jurisdictions, certain nuances can be found in the way they have been fleshed out by national and European courts, which will be described in the following section.

²⁸ *R (Patel) v General Medical Council* [2013] EWCA Civ 327 at [15] to [24].

²⁹ *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755; Case C-373/07 P *Mebrom NV v Commission*, ECLI:EU:C:2009:218.

³⁰ Case C-168/09 *Flos SpA v Semeraro Casa e Famiglia SpA*, ECLI:EU:C:2011:29; Case T-415/03 *Cofradía de pescadores "San Pedro" de Bermeo and Others v Council of the European Union*, ECLI:EU:T:2005:365; Case C-310/04 *Spain v Council*, ECLI:EU:C:2006:521.

³¹ *Rashid v Secretary of State for the Home Department* [2005] EWCA Civ 744; Case C-501/11 P *Schindler Holding Ltd and others v European Commission*, ECLI:EU:C:2013:522.

³² *R (Patel) v General Medical Council* [2013] EWCA Civ 327 at [47]; Case C-369/09 P *ISD Polska sp. z o.o. and Others v European Commission*, ECLI:EU:C:2011:175 at [110].

³³ *R (Capital Care Services) v Secretary of State for the Home Department* [2012] EWCA Civ 1151 at [22]; Case C-183/95 *Affish BV v Rijksdienst voor de Keuring van Vee en Vlees*, ECLI:EU:C:1997:373 at [55] to [59]. For a recent discussion of overriding public interest in the English Administrative Court, see *R (Birks) v Commissioner of Police of the Metropolis* [2014] EWHC 3041 (Admin) at [46], [69] and [73].

I. The protection of legitimate expectations in English law

1. Historical context

The protection of legitimate expectations came to be recognised in English public law as a way of reviewing the acts of the administration in the second half of the 20th Century. Its development by the English courts occurred at much the same time as the European Court of Justice was cultivating its own jurisprudence on the protection of legitimate expectations in EU law, and also roughly coincided with UK accession to the EU.³⁴ The introduction of the principle of legitimate expectations into the English legal order must be understood in the context of the nascence of an English administrative law, characterised by the revival of principles and remedies that had fallen out of use and a renewed judicial willingness to review administrative action.³⁵

The relatively late development of administrative law in England was a consequence of the general antipathy of the courts to judicial review of the use of administrative power. This was a result of the prevailing belief in a theory of the separation of powers (as expounded by A V Dicey in his influential work *Introduction to the Study of the Law of the Constitution*)³⁶ that sought to wholly exclude the courts from adjudicating on political matters. The dominant approach was to allow review of administrative action only if it was outside the powers granted to the executive by Parliament (*ultra vires*) – a consequence also of the belief in a theory of parliamentary sovereignty, which designates Parliament as the supreme legal authority, which cannot be overridden by the courts or the executive.³⁷ The courts' fear of taking what were essentially political decisions meant that initially they favoured procedural rather than substantive standards of review, assessing a decision on the basis of whether affected individuals were offered the chance to be heard, or whether there had been any bias on the part of the decision-maker. Substantive challenge, that is of the content of the decision itself, was confined to a vague standard of “*Wednesbury* unreasonableness”, which allowed a decision-maker to choose from a wide range of possible options, only limited by those which were “so unreasonable a reasonable decision-maker would not [choose them]”.³⁸

³⁴ Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (2000) pp 46 to 48.

³⁵ Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (2000) pp 9 and 26.

³⁶ Dicey, *Introduction to the Study of the Law of the Constitution* (10th edition, 1959) (first published 1885).

³⁷ Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (2000) p 9.

³⁸ *Associated Provincial Picturehouses Ltd v Wednesbury Corporation* [1948] 1 KB 233.

More specifically, the courts' focus on procedural standards of protection meant a renewed application of the judicially developed principles of "natural justice", encapsulated in the Latin maxims *audi alteram partem* (the right to notice of charge and to a hearing) and *nemo judex in causa sua* (the rule against bias). Particularly relevant for the development of the principle of protection of legitimate expectations in English law was the right to a hearing, revived in the landmark decision *Ridge v Baldwin*.³⁹ In that case the House of Lords found that the restrictions which had previously been placed on the applicability of that right, to some extent resulting from the special context of wartime Britain, unnecessarily hindered the development of procedural protection.⁴⁰ The close link between these developments in procedural protection and the nascence of a principle of protection of legitimate expectations is clear from the first English case to mention "legitimate expectation".⁴¹ In *Schmidt v Secretary of State for Home Affairs*, Lord Denning noted that notwithstanding the fact that the principles of natural justice did not apply to the claimants in question, who were not British citizens, an administrative body might nonetheless be bound to give such a person affected by a decision of that body, in this case not to extend a person's permit to stay in the country, an opportunity to make representations. Such an obligation would arise, among other situations, where a person had a "legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say".⁴²

2. Procedural and substantive legitimate expectations

This early development of an English principle of protection of legitimate expectations, offering the right to a hearing where a claimant would otherwise in law not be entitled to one, resulted in the creation of an important distinction between "procedural" and "substantive" legitimate expectations.⁴³ The difference is characterised by what has been promised by the public authority. A procedural legitimate expectation is generated by an assurance that an administrative decision will be taken following a particular procedure – in *Schmidt*, that an individual affected by the decision will have the opportunity to present their case. A substantive legitimate expectation is generated by an assurance that a particular outcome will be reached as a result of the administrative decision.

³⁹ *Ridge v Baldwin* [1964] AC 40.

⁴⁰ *Ridge v Baldwin* [1964] AC 40, 71 to 78; Craig, *Administrative Law* (6th edition, 2012) pp 375 to 376.

⁴¹ Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (2000) p 50.

⁴² *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 170E to F.

⁴³ Craig, *Administrative Law* (6th edition, 2012) p 647.

A further distinction was made in the case law on procedural legitimate expectations between two situations: those where there is an assurance that a particular procedure will be followed, and those where the assurance is of a substantive outcome, but this generates a requirement of consultation before any changes are made to the policy. The latter situation has somewhat misleadingly been described as a “secondary procedural expectation”.⁴⁴ In fact, this type of expectation is not a true “procedural legitimate expectation” at all, but is rather an expectation of a substantive outcome that is being protected by procedural methods.⁴⁵

For a long time, English courts resisted any arguments that a substantive legitimate expectation could be enforced against the administration, rather than simply giving rise to further procedural protection. Allowing substantive legitimate expectations to override the freedom of the executive to exercise its discretion was described as “heretical” in *R v Secretary of State for the Home Department, ex parte Hargreaves* and as an “obvious and unacceptable fetter upon the power, and duty, of a responsible public authority to change its policy when it considered that that was required in fulfilment of its public responsibilities” in *R v Secretary of State for Transport, ex parte Richmond London Borough Council*.⁴⁶

The courts’ unwillingness to recognise substantive legitimate expectations was related to the fact that this would inevitably have involved a much higher level of substantive review of executive action than that provided by the test of *Wednesbury* unreasonableness – by upholding an expectation of a substantive outcome the court would have approved one outcome, rather than simply identifying a range of responses from which the decision-maker could choose. However, it has since come to be accepted that a substantive legitimate expectation can be protected under English law, although there is some indication that the type of legitimate expectation involved may determine the intensity of review to which an English court will subject any claimed breach of legitimate expectation.⁴⁷ The precarious place which the protection of substantive legitimate expectations occupies in English law is nevertheless evident from the judgment of Lord Carswell in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)*, who expressed his reluctance to give a

⁴⁴ *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 at [32] and [39].

⁴⁵ *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 at [33]; *R v Secretary of State for Transport, ex parte Richmond London Borough Council* [1994] 1 WLR 74 at 92D to 93A.

⁴⁶ *R v Secretary of State for the Home Department, ex parte Hargreaves* [1997] 1 WLR 906, 921 per Hirst LJ, 924-925 per Pill LJ; *R v Secretary of State for Transport, ex parte Richmond London Borough Council* [1994] 1 WLR 74 at 93C.

⁴⁷ See Section B.I.2.b) below.

concluded opinion on the scope of the protection of substantive legitimate expectations, since the issue had not yet been given detailed consideration in the case law of the highest English court, the House of Lords.⁴⁸

Given the central place of the distinction between procedural and substantive in the development of the English courts' jurisprudence on legitimate expectations, it is noteworthy that this has not formed a part of judicial deliberations at EU level. The recognition and protection of legitimate expectations by the Luxembourg courts has traditionally been substantive: the expectation is that a particular situation will be maintained, or will not be changed with retroactive effect, and infringing a legitimate expectation, as a breach of a general principle of law, will result in the affected measure being annulled as contrary to EU primary law. However, as will be discussed below, recent case law indicates a developing practice of the European Court of Justice in protecting legitimate expectations by procedural methods, and there has been some judicial support for the recognition of procedural legitimate expectations in EU law.⁴⁹ In this respect it is interesting to note that although procedural legitimate expectations are not a distinct entity in German law, the principle of legitimate expectations as set out in paragraphs 48 and 49 of the *Verwaltungsverfahrensgesetz* does have a procedural character, such that it has been argued that the balancing act prescribed in that law is an aspect of German national procedural autonomy, which should not have to give way to the EU law principles of effectiveness and equivalence.⁵⁰

a) The "added value" of a procedural legitimate expectation

One of the reasons that procedural legitimate expectations have not been widely recognised in EU law may be that while they remain in English law as a vestige of the close relationship between legitimate expectations and natural fairness, they are simply not necessary. For example, one can say that a duty to observe procedural fairness arises because the circumstances call for a fair procedure, and to say that the circumstances also lead to a legitimate expectation that a fair procedure will be adopted would be superfluous.⁵¹ However, Craig has demonstrated that at least in English law there is scope for procedural legitimate

⁴⁸ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61 at [133].

⁴⁹ See Section D.III. below.

⁵⁰ Schwarz, *Vertrauensschutz als Verfassungsprinzip* (2002) pp 484 to 488.

⁵¹ *Attorney-General of New South Wales v Quin* (1990) 170 CLR 1, 55. See also *Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government* [2012] EWCA Civ 379 at [36].

expectations to give greater protection than that which can be offered by principles of procedural fairness.⁵² A legitimate expectation might justify according a right to be heard where the individual in question is not one who could normally benefit from procedural protection, as Lord Denning indicated in *Schmidt*.⁵³ Even in a situation where an individual has some procedural rights, assurances made by a public authority may serve to enhance that procedural protection – for example, in *Liverpool Taxi Fleet Operators' Association*, Lord Denning held that given the representations made by the city council that the number of licensed taxis would not be increased without consulting the applicants, the council's policy on the number of licensed taxis could only be changed “after the most serious consideration” and “if satisfied that the public interest requires it”. All the judges agreed that this “most serious consideration” meant that representations by affected individuals would have to be taken into account.⁵⁴

b) The relevance of the procedural/substantive distinction for intensity of review

The debate in English law as to whether a substantive legitimate expectation could be protected by the courts was conclusively settled in *R v North and East Devon Health Authority, ex parte Coughlan*.⁵⁵ In that case, the Court of Appeal found that a long-term disabled person, who had agreed to move from the hospital she was resident in to a care home on the assurance that it would be her “home for life”, had a legitimate expectation that prevented the health authority from closing that care home and moving her elsewhere. Important for present purposes are the three categories of legitimate expectation outlined by Lord Woolf: first, cases where a public authority will only be required to bear in mind its previous policy or representation, giving it due weight, before it changes course; second, a promise or practice that gives rise to a procedural legitimate expectation; and third, a promise or practice giving rise to a substantive legitimate expectation. Lord Woolf opined that in the first case the conduct of the public authority would only be subjected to a light-touch *Wednesbury* review, in the case of procedural legitimate expectations, the court should consider whether the decision-making procedure was fair, and where a substantive legitimate expectation had arisen the court should consider whether to frustrate an expectation would be

⁵² Craig, “Legitimate Expectations: A Conceptual Analysis” [1992] *Law Quarterly Review* 79.

⁵³ This was applied in *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, where the claimant was entitled to a hearing as a result of a legitimate expectation, although as an alien he did not benefit from the protection of the principles of natural justice.

⁵⁴ *R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299, 308 and 311 to 313.

⁵⁵ *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213.

so unfair as to amount to an abuse of power, especially considering any possible overriding public interest.⁵⁶ Whether this distinction has been maintained in subsequent cases will be discussed in more detail below.⁵⁷

c) Distinguishing between procedural and substantive legitimate expectations

Despite the importance of the difference between procedural and substantive legitimate expectations, there is a fine distinction between the two, as demonstrated in *R (Bloggs 61) v Secretary of State for the Home Department*, where a plea of legitimate expectation was changed from substantive to procedural when the applicant appealed against an unfavourable decision of the High Court.⁵⁸ In that case, the applicant, a convicted prisoner, had agreed to act as an informant in order to benefit from the protection of a protected witness unit scheme. When the applicant was later returned to the general prison population he claimed a legitimate expectation that he would remain in the protected witness unit for the duration of his sentence, based on assurances made by the police at the time the scheme was offered to him. The Court of Appeal considered and rejected the possibility of both a procedural and substantive legitimate expectation arising on the facts. The police officers, in presenting the scheme, had no authority to bind the Prison Service as to the extent of protection that could be offered.⁵⁹ Regarding the procedural legitimate expectation, the proper procedure had been followed when the initial decision was taken to remove the applicant from the protected witness unit, and all relevant considerations had been taken into account.⁶⁰ Difficulties in distinguishing between procedural and substantive legitimate expectations have led some judges to hold that the distinction is confusing or unnecessary,⁶¹ but for the moment it remains an important aspect of the protection of legitimate expectations in English law.

3. Knowledge, reliance and consistency of treatment

Another much-discussed issue in the development of an English jurisprudence on legitimate expectations is whether an individual must have “relied” on an assurance before they can claim a legitimate expectation – it is commonly expressed as part of the test for a finding of

⁵⁶ *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [57] to [58].

⁵⁷ See Section C.IV.1.a) below.

⁵⁸ *R (Bloggs 61) v Secretary of State for the Home Department* [2003] EWCA Civ 686 at [28].

⁵⁹ *R (Bloggs 61) v Secretary of State for the Home Department* [2003] EWCA Civ 686 at [38] to [44].

⁶⁰ *R (Bloggs 61) v Secretary of State for the Home Department* [2003] EWCA Civ 686 at [46].

⁶¹ *R v Secretary of State for Transport, ex parte Richmond London Borough Council* [1994] 1 WLR 74 at 93A; *R (Abdi and Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [69]; *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [59].

legitimate expectation.⁶² A person relies on a promise or practice of a public authority when they act or refrain from acting because of that public authority's behaviour. Reliance can be considered "detrimental" where the individual suffers harm as a result of the trust they placed in a pre-existing situation being maintained or a promise being fulfilled.⁶³

The concept of reliance, which was not part of the test developed by the Court of Justice for establishing a legitimate expectation, may have been introduced into the English courts' approach to the protection of legitimate expectations through the influence of the doctrine of "estoppel by representation". Although it is now clear that private law notions of estoppel cannot, without more, be applied to public authorities, there is a striking similarity between the way an estoppel is established and the test for a legitimate expectation.⁶⁴ Estoppel by representation means that an individual who has made an untrue statement is estopped from relying on its falsity if three conditions are met, namely that a precise and unconditional (although untrue) statement has been made, that has been communicated to the recipient with the knowledge or intention that it will be relied on, and that the recipient has reasonably assumed the truth of the statement, and consequently relied on it to her or his financial detriment.⁶⁵ Such a requirement of reliance sets a high burden for the individual invoking the legitimate expectation – they must show that they have suffered financially as a result of their change in behaviour generated by the expectation that the public authority has caused. However, English courts have subsequently tried to distance themselves from the requirement that "financial detriment" must be proved, suggesting that in some cases reliance need not be detrimental, or that moral detriment might suffice.⁶⁶

As will be discussed in greater detail below, there is a close relationship between the state of knowledge of the individual and whether they can be said to have relied on a legitimate

⁶² *Office of Fair Trading v Somerfield Stores Limited* [2014] EWCA Civ 400 at [30]. For further discussion see Elliot, "Legitimate Expectation, Consistency and Abuse of Power: the Rashid Case" [2005] *Judicial Review* 281; Forsyth, "Legitimate Expectations Revisited" [2011] *Judicial Review* 429.

⁶³ Schonberg, *Legitimate Expectations in Administrative Law* (2000) pp 10 to 11.

⁶⁴ For example, *R (Bloggs 61) v Secretary of State for the Home Department* [2003] EWCA Civ 686 at [38] to [42]; *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [26] and [55].

⁶⁵ Schonberg, *Legitimate Expectations in Administrative Law* (2000) p 109.

⁶⁶ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61 at [73]; *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [55]. See also *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin) at [104], where reliance was accepted although the evidence of any detriment was extremely thin.

expectation.⁶⁷ Where an individual does not know of the policy or promise upon which the claimed legitimate expectation is based, they cannot be said to rely on it – in certain cases, this has been determinative for the question of whether a legitimate expectation has arisen. The potential unfairness caused in cases where a policy is not applied to an individual who did not know of it may be better protected by a principle of consistency or equality of treatment.⁶⁸

4. Fairness and abuse of power

Following the liberation of process rights through the abovementioned case *Ridge v Baldwin*, concepts of “fairness” and a “duty to act fairly” began to be imported into the nascent English administrative law, mention of which became commonplace in cases involving claims of natural justice.⁶⁹ Craig notes that it was not clear whether natural justice and fairness were interchangeable terms, or whether each applied in particular contexts (the former to judicial decision-making and the latter to executive or administrative decision-making), and further that there was disagreement on extent to which the move to a terminology of “fairness” would allow the courts to go further in reviewing administrative action which allegedly breached process rights.⁷⁰ This is reflected in the English courts’ past and continuing development of the principle of protection of legitimate expectations: they have defined their own jurisdiction to protect legitimate expectations on grounds of fairness, but have not come to a clear conclusion as to whether fairness operates as a justification for the protection of legitimate expectations,⁷¹ a separate ground of review,⁷² or an overarching category into which legitimate expectations could be subsumed.⁷³ The ability of fairness to augment and extend categories of judicial review is clear from Sir Thomas Bingham MR’s (as he then was) aphoristic statement in *R v Inland Revenue ex parte Unilever plc* that “[t]he categories of unfairness are not closed, and precedent should act as a guide not a cage”.⁷⁴

⁶⁷ See Section C.II.1. below.

⁶⁸ For the development of such a principle in English law, see *R (Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23, more explicitly distinguished from the protection of legitimate expectations by the Scottish Inner House of the Court of Session in *DM v Secretary of State for the Home Department* [2014] CSIH 29.

⁶⁹ Craig, *Administrative Law* (6th edition, 2012) pp 376 to 377.

⁷⁰ Craig, *Administrative Law* (6th edition, 2012) pp 377 to 378.

⁷¹ *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [18].

⁷² *R (Bloggs 61) v Secretary of State for the Home Department* [2003] EWCA Civ 686 at [70] to [76].

⁷³ *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472 at [15].

⁷⁴ *R v Inland Revenue ex parte Unilever plc* [1996] STC 681, 690F.

Fairness in the protection of legitimate expectations by English courts is closely linked to the concept of abuse of power – an often repeated formulation of when a legitimate expectation will arise is where there is “unfairness amounting to an abuse of power”.⁷⁵ Although abuse of power has been described as “the root concept which governs and conditions our general principles of public law”, judges have also recognised difficulty of translating this first principle into a hard legal test and the uncertainty regarding its meaning and application.⁷⁶

On one approach, abuse of power and fairness are simply labels applied to a situation in which, for other reasons, the court has found an expectation worthy of protection.⁷⁷ However, other cases indicate a wider role for the invocation of fairness and abuse of power in the protection of legitimate expectations by English courts. Thus in the case of *R v Secretary of State for Education and Employment, ex parte Begbie* in the context of administrative mistake, Mr Justice Peter Gibson and Mr Justice Laws would – exceptionally – have been willing to hold the public authority to its mistake in a case where there was evidence of an abuse of power.⁷⁸ This may have been one reason why the court upheld the legitimate expectation in *Rashid*, discussed below, where the failures of the Home Office were described as “startling and prolonged” and without reasonable explanation.⁷⁹ In other cases, notions of fairness have been used to distinguish legitimate expectation from the similar private law concept of estoppel.⁸⁰ Finally, considerations of fairness might allow the courts to apply the test of legitimate expectations more flexibly, taking into account considerations other than the requirement of a clear and unequivocal assurance, upon which an individual may have relied, and the absence of an overriding public interest.⁸¹

⁷⁵ *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [34]; *R (Godfrey) v London Borough of Southwark* [2012] EWCA Civ 500 at [51].

⁷⁶ Laws LJ in *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115, 1129F to H.

⁷⁷ See Lord Carswell in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61 at [135].

⁷⁸ *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at 1127C to F and 1129F to H.

⁷⁹ *Rashid v Secretary of State for the Home Department* [2005] EWCA Civ 744 at [13] and [31].

⁸⁰ *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [26]; *R (Bloggs 61) v Secretary of State for the Home Department* [2003] EWCA Civ 686 at [39].

⁸¹ For example in *Henry Boot Homes* the fact that the applicant developers did not avail themselves of legal help when they could have done, or of the method available by which they might have been able to achieve retrospective authorisation for the works already carried out, were relevant considerations when determining whether the public authority’s action was unfair: *Henry Boot Homes v Bassetlaw District Council* [2002] EWCA Civ 983 at [58] and [61]. Similarly in *Patel Lloyd Jones LJ* noted five further considerations that “go to the evaluation of unfairness” which all spoke in favour of finding and upholding the claimed expectation: *R (Patel) v General Medical Council* [2013] EWCA Civ 327 at [84].

The importance of fairness as an explanation and justification for the protection of legitimate expectations in English law can be contrasted with its limited relevance in the case law of the European courts. Notions of fairness were raised in the early development of the principle of protection of legitimate expectations in certain opinions given by Advocates General – however, these were not adopted or even mentioned by the Court of Justice.⁸² More recent case law has made clear that “fairness” has no supplementary role to play in the European courts’ jurisprudence on the protection of legitimate expectations. In cases involving the setting of fines for breaches of competition law, the Court of Justice has held that fairness cannot operate to restrict the unlimited jurisdiction of the Court of First Instance (as it then was) in deciding the levels of these fines, even if a legitimate expectation has arisen as a result of Commission practice.⁸³ Similarly, in cases where the Commission has tolerated irregularities in the past, fairness does not operate so as to give rise to a legitimate expectation that this practice will be continued in the future.⁸⁴

5. Relief

In English law, it is at the court’s discretion whether to order any remedy as a result of a successful judicial review claim. In principle, the whole array of public law remedies is available to a court when deciding how to protect a claim of legitimate expectation. These might include injunctions and mandatory orders prohibiting or mandating a certain course of action for the administration. They could also include a simple declaration that a legitimate expectation has been breached, or that it should be taken into account in future decision-making, without offering the individual any further remedy for that breach other than saying it has occurred.⁸⁵

⁸² Opinion of Advocate General Darmon in Case 210/87 *Remo Padavani v Amministrazione delle finanze dello stato*, ECLI:EU:C:1988:305 at [19], noting the balance struck by the principle of protection of legitimate expectations between the “requirements of law and the considerations of equity”; Opinions of Advocate General Trabucchi in Case 5/75 *Deuka Deutsche Kraftfutter GmbH B. J. Stolp v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1975:88 at [5], referring to the “equitable function” of the principle of protection of legitimate expectations and Case 74/74 *CNTA v Commission*, ECLI:EU:C:1975:53 at [8], referring to the principles of fair dealing and good faith.

⁸³ Case C-501/11 P *Schindler Holding Ltd and others v European Commission*, ECLI:EU:C:2013:522 at [164]; Case C-70/12 P *Quinn Barlo Ltd and Others v European Commission*, ECLI:EU:C:2013:351 at [57]; Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri A/S v Commission*, ECLI:EU:C:2005:408 at [245].

⁸⁴ Case C-199/03 *Ireland v Commission*, ECLI:EU:C:2005:548 at [68]; Case C-339/00 *Ireland v Commission*, ECLI:EU:C:2003:545 at [81].

⁸⁵ Craig, *Administrative Law* (6th edition, 2012) Chapter 25 and p 919.

As well as these remedies, which might be considered “substantive” since they seek to give effect to the content of the expectation, the court may choose to offer procedural protection of the expectation instead. Such procedural protection might take the form of requiring a decision-maker to retake the decision, with an explicit instruction to take into account the identified legitimate expectation, or could require a decision-maker to consult affected parties before taking away a substantive benefit.⁸⁶

A significant degree of flexibility is thus characteristic of the courts’ remedial powers where the principle of protection of legitimate expectations is breached under English law. This can be contrasted with the position where an English court, within its jurisdiction to apply EU law, finds that the EU law principle of protection of legitimate expectations has been breached. Where the expectation has been breached by the enactment of a new Act of Parliament, the court is obliged to disapply the conflicting English legislation,⁸⁷ although in the case of Acts of Parliament the courts do not have the power to annul these. The English courts have abided by this rigid approach, refusing to introduce elements of the remedial flexibility available to them under English law. Even where disapplication leaves a gap in the legal provisions governing a particular area, the courts have left it to Parliament or the executive to put transitional measures in place.⁸⁸

II. The protection of legitimate expectations in EU law

The protection of legitimate expectations in EU law was developed by the Court of Justice in response to issues raised in preliminary references brought before it, and through the recognition of legal certainty and the protection of legitimate expectations as general principles of EU law.⁸⁹ The principles of legal certainty and legitimate expectations were not, and have not since been given any written expression in the Treaties.⁹⁰ As a general principle of EU law, the principle of protection of legitimate expectations has a superior status as a

⁸⁶ *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 60 at [67]; *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin) at [122] and [126].

⁸⁷ *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners* [2008] UKHL 2 at [22] per Lord Scott of Foscote, [24] per Lord Walker of Gestingthorpe.

⁸⁸ *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners* [2008] UKHL 2 at [77] per Lord Carswell, [104] per Lord Neuberger of Abbotsbury.

⁸⁹ Schwarze, *European Administrative Law* (revised 1st edition, 2006) pp 941 to 942; Schwarz, *Vertrauensschutz als Verfassungsprinzip* (2002) p 393.

⁹⁰ Jacqué, *Droit institutionnel de L'Union Européenne* (6th edition, 2010) at [826]. The principle of non-retroactivity has now been given expression in the Charter of Fundamental Rights of the European Union – see Articles 41 and 49 of the Charter of Fundamental Rights.

“constitutional” principle, which means that it can be used to challenge and potentially annul EU and national legislation.

The origins of the protection of legitimate expectations in European Community law (as it then was) can be traced to the German principle of *Vertrauensschutz* (protection of trust). In the mid-20th Century the only European countries with a developed approach to the protection of legitimate expectations were Germany and the Netherlands.⁹¹ In the early cases of *Hoogovens*⁹² and *Lemmerz-Werke*⁹³ the Advocates General focussed on its German provenance when raising the issue of protecting legitimate expectations, something that was explicitly recognised by the court in the latter case.⁹⁴ However, although inspired by the principle of *Vertrauensschutz*, the Court of Justice has been unwilling to protect individual expectations to quite the same extent as the approach under German law.⁹⁵

The development of the protection of legitimate expectations by the Court of Justice has differed according to the context, both in terms of the subject matter with regard to which such expectations can arise and the types of action which they can be used to challenge.⁹⁶ With regard to the latter, it is possible to identify three rough categories of action: legislative measures with actual or apparent retroactivity; revocation of individual acts; and the conduct of European institutions.⁹⁷ An example of context-specific rules on legitimate expectation are those related to the recovery of unlawful State aids by national courts after a decision on incompatibility has been issued by the Commission. The ability to invoke legitimate expectations in this context has been strictly circumscribed by the Court, in order to prevent the system for monitoring and approving State aids from being undermined.⁹⁸ Similarly, the Court has been less willing to recognise the creation of legitimate expectations in the context of the Common Agricultural Policy, where the Court takes the approach that individuals

⁹¹ Von Danwitz, *Europäisches Verwaltungsrecht* (2008) p 574; Schwarz, *Vertrauensschutz als Verfassungsprinzip* (2002) pp 393 to 394.

⁹² Case 14/61 *Koninklijke Nederlandsche Hoogovens en Staalfabrieken NV v High Authority of the European Coal and Steel Community*, ECLI:EU:C:1962:28.

⁹³ Case 111/63 *Lemmerz-Werke GmbH v High Authority of the ECSC*, ECLI:EU:C:1965:76.

⁹⁴ Case 111/63 *Lemmerz-Werke GmbH v High Authority of the ECSC*, ECLI:EU:C:1965:76 at 691. This was the first case in which the Court of Justice explicitly recognised the protection of legitimate expectations as part of the EU legal order.

⁹⁵ Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (2000) p 42 and fn 7.

⁹⁶ Schwarze, *European Administrative Law* (revised 1st edition, 2006) pp 942 to 946; Schwarz, *Vertrauensschutz als Verfassungsprinzip* (2002) pp 391 to 392; Crones, *Selbstbindungen der Verwaltung im Europäischen Gemeinschaftsrecht* (1996) pp 111 to 112.

⁹⁷ I borrow these from Hofmann et al: Hofmann, Rowe and Türk, *Administrative Law and Policy of the European Union* (2011) pp 178 to 190.

⁹⁸ Tridimas, *General Principles of EU Law* (2nd edition, 2006) p 296.

should be aware of the need for flexible policy-making to cope with the fluctuations in the market.⁹⁹

The way that the Court's approach has developed, and the fact that the Court has been unwilling to provide a theoretical justification for the protection of legitimate expectations,¹⁰⁰ make it difficult to identify one particular "test" by which a legitimate expectation can be established under EU law. However, certain general rules can be identified which the Court applies in each type of case, although it appears to apply them more or less strictly depending on the context.¹⁰¹

Regarding legitimate expectations generated by individualised representations made by EU institutions, a general formulation as expressed in the case *Branco v Commission* has been that "precise, unconditional and consistent assurances originating from authorised and reliable sources" must have been given to the person claiming to have a legitimate expectation, which "give rise to a legitimate expectation on the part of the person to whom they are addressed" and "comply with the applicable rules".¹⁰² There must also be no overriding reasons in the public interest why the legitimate expectation should be defeated.¹⁰³ Legislation with actual or apparent retroactivity and the revocation of lawful acts are not precluded so long as there has been proper respect for legitimate expectations, which seems to require taking any expectations into account when deciding whether to pass retroactive legislation or to revoke an act, perhaps by introducing transitional measures.¹⁰⁴ In the following sections, certain features of the way in which legitimate expectations are protected by the EU courts will be examined in more detail.

⁹⁹ Case C-310/04 *Spain v Council*, ECLI:EU:C:2006:521 at [81]; Case C-362/12 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners*, EU:C:2013:834 at [47]; Craig, *EU Administrative Law* (2nd edition, 2012) p 574.

¹⁰⁰ Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (2000) p 44.

¹⁰¹ Schwarze, *European Administrative Law* (revised 1st edition, 2006) p 943; Hoffman, Rowe and Türk, *Administrative Law and Policy of the European Union* (2011) pp 178 to 190.

¹⁰² Case T-347/03 *Branco v Commission*, ECLI:EU:T:2005:265 at [102].

¹⁰³ Case 74/74 *CNTA SA v Commission*, ECLI:EU:C:1976:84 at [43].

¹⁰⁴ Case C-98/14 *Berlington Hungary Tanácsadó és Szolgáltató kft and others v Magyar Állam* at [83] to [85]; Case C-362/12 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners*, EU:C:2013:834 at [47]; Hofmann, Rowe and Türk, *Administrative Law and Policy of the European Union* (2011) p 183.

1. The state of knowledge of the individual harbouring the legitimate expectation: the prudent trader

In EU law, the state of knowledge of the individual claiming the benefit of the legitimate expectation is described by the expression “the prudent trader”. Thus even if the assurance is precise and specific, a legitimate expectation can be defeated if the conduct complained of could have been foreseen by a “prudent and circumspect trader”.¹⁰⁵ Importantly, the trader must be legally as well as factually well-informed, which normally means that a prudent trader should have sought legal advice, and that they are assumed to be aware of the law, for example as it is published in the Official Journal.¹⁰⁶ The foreseeability of legislative or policy change, as well as the level of knowledge a “prudent trader” is expected to have, are high hurdles for any potential claimant to overcome. For example, in *Lühns*, where two measures changing the tax regime for exportation of potatoes were introduced due to a very poor potato harvest in 1975, the mere existence of similar earlier measures, adopted by the Community and in some Member States, was enough to render it foreseeable that the challenged measures would be put in place.¹⁰⁷ In *Delacre*, the Court held that downward trends in butter stock levels over the course of two years and the resulting increase of the price of butter implied that it was inevitable that the availability of Community aid for butter would decrease, such that the applicants could not have a legitimate expectation that such aid would remain at the same levels indefinitely.¹⁰⁸

Within this test for the state of knowledge of the individual there are tensions between the objective and subjective elements. Considering a hypothetical individual such as “the prudent trader” strongly implies an objective approach – the Court of Justice imbues this figure with the characteristics and knowledge they consider relevant, and uses it as a standard against which to compare the behaviour of actual individual claiming the expectation. This objective approach is most obvious in the context of State aid cases, where the opportunities for upholding an alleged legitimate expectation have been strictly circumscribed by the Court, to prevent the prescriptive EU laws on State aid from being undermined. For example,

¹⁰⁵ Joined cases C-37/02 and C-38/02 *Di Lenardo and Dilexport v Ministero del Commercio con l'Estero*, ECLI:EU:C:2004:443 at [70]; Craig, *EU Administrative Law* (2nd edition, 2012) pp 567 to 572; Schwarze, *European Administrative Law* (revised 1st edition, 2006) p 952.

¹⁰⁶ Case C-80/89 *Erwin Behn Verpackungsbedarf GmbH v Hauptzollamt Itzehoe*, ECLI:EU:C:1990:269 at [13]; Craig, *EU Administrative Law* (2nd edition, 2012) p 571.

¹⁰⁷ Case 78/77 *Lühns v Hauptzollamt Hamburg-Jonas*, ECLI:EU:C:1978:20 at [6].

¹⁰⁸ Case C-350/88 *Société française des Biscuits Delacre e.a. v Commission of the European Communities*, ECLI:EU:C:1990:71 at [37].

regardless of whether the individual knows of it, a Member State's failure to notify any measure that is subsequently found to constitute State aid will normally be enough to completely exclude the application of the principle of protection of legitimate expectations. A prudent trader is one who would have suspected that the measure they have benefited from is one which could constitute State aid, and would accordingly have made inquiries as to whether the measure has been notified.¹⁰⁹ However, as Schonberg notes, in some cases the Court has taken subjective considerations into account, such as the actual state of knowledge of the claimant, in order to deny the existence of a legitimate expectation.¹¹⁰ As will be seen below, the Court has continued to adopt this approach in some of its more recent jurisprudence.¹¹¹

2. The state of knowledge of the individual harbouring the legitimate expectation: the concept of reliance

Reliance takes a much smaller role in the protection of legitimate expectations by EU courts than in corresponding cases heard by the English courts. This is clear at the outset from the test way in which the Court of Justice applies to determine the existence of a legitimate expectation. The test cited above applied by the Court in *Branco*, which simply refers to precise and unconditional assurances originating from authorised and reliable sources, is reiterated in the more recent case of *Evropaïki Dynamiki v Commission*: the principle of the protection of legitimate expectations “extends to any individual who is in a situation in which it is clear that the European Union authorities have, by giving him precise assurances, led him to entertain legitimate expectations”.¹¹² In order to engage the protection of the legitimate expectations regime, an individual must simply have expected something as a result of an authorised, sufficiently precise assurance – it is not necessary for them to prove that they suffered some financial detriment as a result of the expectation, or even that they acted on the assurance or changed their behaviour as a result of it.

Reliance has some role to play in EU law – it will necessarily be taken into account by the European courts if relief is sought via a claim that a Member State or Union institution acted in breach of EU law, as the individual claiming the expectation will need to establish a causal

¹⁰⁹ Joined cases C-183/02 P and C-187/02 P *Daewoo Electronics Manufacturing España SA (Demesa) v Commission*, ECLI:EU:C:2004:701 at [44] and [45]; Case C-24/95 *Land Rheinland-Pfalz v Alcan Deutschland*, ECLI:EU:C:1997:163 at [25].

¹¹⁰ Schonberg, *Legitimate Expectations in Administrative Law* (2000) p 125.

¹¹¹ See Section D.II.1. below.

¹¹² Case T-554/08 *Evropaïki Dynamiki v Commission*, ECLI:EU:T:2012:194 at [51].

link between the breach of the expectation and a loss that they have suffered. Schonberg has also argued that reliance will be an important consideration for the EU Courts' balancing of public and private interests when deciding whether a legitimate expectation should be upheld.¹¹³ However, since claims of a legitimate expectation are often denied on the basis of a lack of sufficiently precise assurances on the part of the administration, and the court has rarely undertaken this balancing exercise explicitly,¹¹⁴ the concept of reliance has received scarce treatment by the Court of Justice.

3. The relationship between the individual harbouring the legitimate expectation and the public authority generating it: foreseeability and discretion

One of the most important elements of the approach of the Court of Justice to the protection of legitimate expectations is the foreseeability of the institutional conduct which, it is claimed, is in breach of a legitimate expectation. If such conduct could have been foreseen by the Court's hypothetical "prudent trader", there is no scope for the operation of the principle of protection of legitimate expectations.¹¹⁵ The courts' treatment of this requirement of foreseeability in conjunction with its discussion of the discretionary power of EU institutions gives a good indication of how it views the relationship between the individual claiming the legitimate expectation and the public authority against which it is claimed. Where EU institutions or Member States are given large areas of discretion under EU law, a legislative amendment adopted through the exercise of that discretion cannot be considered unforeseeable, and thus no legitimate expectation can arise.¹¹⁶

This approach contrasts with the general position of the English courts on the role of legitimate expectations in the relationship between the administration and the individual. Legitimate expectations arise precisely where an area of discretion has been granted to a public authority by the legislature – a representation made by such an authority, whether in the form of an individualised assurance or a communicated policy – informs the courts'

¹¹³ Hoffman, Rowe and Türk, *Administrative Law and Policy of the European Union* (2011) p 178; Schonberg, *Legitimate Expectations in Administrative Law* (2000) p 129.

¹¹⁴ For an interpretation of cases decided by the Court of Justice which suggests that this balancing exercise is carried out tacitly, see Schonberg, *Legitimate Expectations in Administrative Law* (2000) pp 129 to 131.

¹¹⁵ Joined cases C-37/02 and C-38/02 *Di Lenardo and Dilexport v Ministero del Commercio con l'Estero*, ECLI:EU:C:2004:443 at [70].

¹¹⁶ See the classic statement in Joined cases C-37/02 and C-38/02 *Di Lenardo and Dilexport v Ministero del Commercio con l'Estero*, ECLI:EU:C:2004:443 at [70], often repeated in subsequent cases; see also Case C-201/08 *Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt*, ECLI:EU:C:2009:539 at [54] and Case C-496/08 *Pilar Angé Serrano and Others v European Parliament*, ECLI:EU:C:2010:116 at [93] applying the principle to Member States and to the Union legislature respectively.

assessment of how such a discretion should be exercised. For example, it was implicitly accepted in *Begbie* that the legitimate expectation contended for could have bound the Secretary of State, if it had not been in conflict with the statutory purpose for which the discretion in question had been granted.¹¹⁷

4. The power to make a binding representation – ultra vires representations and binding others

There are two facets to the power of an EU institution or a Member State to make a representation that will be capable of generating a binding legitimate expectation: one relates to the scope that the representation can cover, and the other to the identity of the institutions that a public authority can bind by such a representation.

Similarly to their English counterparts,¹¹⁸ the EU Courts have adopted a strict approach to the extent to which a precise assurance can have binding effects for the public authority and an even stricter approach to whom a public authority is able to bind by the assurances they make. Under EU law an assurance made outside the power of the Member State or Union institution who makes it cannot generate a legitimate expectation.¹¹⁹ This approach has been confirmed in recent case law of the Court of Justice,¹²⁰ and contrasts with the willingness of the English courts to deal with the issue of representations made outside the scope of the authority's powers slightly more flexibly, mainly due the influence of the Human Rights Act and the jurisprudence of the European Court of Human Rights, as discussed below.¹²¹

The EU courts have also taken a strict approach to the question of whom a representation will be held to bind. Representations made by Member States or national authorities within them cannot be binding on Union institutions – if this were possible, Member States could take advantage of the principle of protection of legitimate expectations to alter the balance of

¹¹⁷ *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at 1125F, 1129E and 1130B-H.

¹¹⁸ See Section C.III.1. below.

¹¹⁹ Schonberg notes that a very limited exception to this principle operates in cases concerning fines imposed by the Commission on companies for violations of EC law, where “specific and misleading assurances made by Commission officials may lead to the mitigation of such fines”: Schonberg, *Legitimate Expectations in Administrative Law* (2000) p 148, referring to Case 188/82 *Thyssen AG v Commission*, ECLI:EU:C:1983:329.

¹²⁰ Case C-568/11 *Agroferm A/S v Ministeriet for Fødevarer, Landbrug og Fiskeri*, ECLI:EU:C:2013:407 at [56]; Case C-369/09 P *ISD Polska sp. z o.o. and Others v European Commission*, ECLI:EU:C:2011:175 at [123]; Case C-508/03 *Commission v United Kingdom*, ECLI:EU:C:2006:287 at [67] to [69].

¹²¹ See Section C.III.1.a) below.

powers and division of competences set out in the Treaties.¹²² The requirement that legitimate expectation must come from an “authorised and reliable source” is also interpreted strictly within the Union institutions: an assurance made by an individual Director-General will normally not bind the Commission.¹²³ The Court of Justice has further held that in the context of setting fines for breaches of EU competition law, Commission practice or guidelines cannot bind the General Court or the European Court of Justice when it comes to review such fines – although this may be a consequence of explicit provisions stating that the EU Courts have unlimited jurisdiction to decide the level of such fines.¹²⁴

5. Relief

In the rare case that a legitimate expectation is upheld by the EU courts, the remedies available are different to those which can be offered by the English courts. In the first instance, breach of a legitimate expectation under EU law would result in a challenged piece of secondary legislation or administrative being struck down as invalid. Breach of a legitimate expectation can also give rise to a claim for damages if it is a sufficiently serious breach to ground either Member State liability under the *Brasserie du Pecheur* and *Francovich* rules or non-contractual liability of the Union under Article 340 TFEU.¹²⁵ Once the requirements for such a claim are made out, the court does not have any discretion to refuse it, although some flexibility may be imported through the test of whether breach of legitimate expectation constitutes such a sufficiently serious breach as to justify an award of damages. Nevertheless, and by contrast with the wide discretion the English courts have to order relief for breaches of administrative law, the remedial options available to the Luxembourg courts are strict and rigid.

III. Conclusion

A number of differences between the protection of legitimate expectations as initially developed by the EU and English courts can thus be identified. These include: the scope of the operation of the principle, in particular which types of EU, State and public authority acts it can be used to review and annul; the distinction or lack thereof between procedural and

¹²² Case C-148/04 *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1*, ECLI:EU:C:2005:774 at [107].

¹²³ Hoffman, Rowe and Türk, *Administrative Law and Policy of the European Union* (2011) p 188 and cases referenced therein.

¹²⁴ Case C-70/12 P *Quinn Barlo Ltd and Others v European Commission*, ECLI:EU:C:2013:351 at [52] and [53].

¹²⁵ Case C-152/88 *Sofrimport SARL v Commission*, ECLI:EU:C:1990:259 at [24] to [32]; Case 74/74 *CNTA SA v Commission*, ECLI:EU:C:1976:84 at [43] to [47].

substantive legitimate expectations; the relevance of concepts such as reliance and foreseeability; and the nature of any relief available. These differences will inform the more detailed analyses of recent case law which follow.

C. Recent case law of the English courts

I. Introduction

In the following section, recent case law of the English courts on legitimate expectations is analysed and compared, in order to assess whether and how this jurisprudence has been affected by the influence of European law. Comparisons are made between cases where EU law has some relevance for the case to those involving purely domestic situations. In this analysis, recurring themes can be identified, which pertain to the three actors involved in the relationship generated by a legitimate expectation – the individual claiming the expectation, the public authority giving the assurance that generated it, and the court which is called on to enforce the expectation.

1. Scope and case selection

The cases have been selected by searching first for any case in which a claim of legitimate expectation has been raised before an English court. These cases have then been divided according to whether a provision or principle of EU law has been raised in the case or not. EU law has a range of applications in those cases where it is mentioned: this could range from an obligation on the court to apply an EU principle of legitimate expectations¹²⁶ to an incidental relevance where an obligation under EU law, such as the notification of technical regulations, furnishes another ground of review.¹²⁷

Since there are a much larger number of cases on legitimate expectation where where EU law has no relevance, for this category the analysis has been limited to cases decided by the Supreme Court, its predecessor the House of Lords, and the Court of Appeal, which together make up the highest English courts.

The analysis is also limited to only those cases decided after 2000. Two detailed comparative studies on legitimate expectations in English and EU law were undertaken before 2000:¹²⁸ it will be interesting to consider more recent case law in the context of those findings, and the

¹²⁶ *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin); *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19.

¹²⁷ *R (Actis SA) v Secretary of State for Communities and Local Government* [2007] EWHC 2417 (Admin).

¹²⁸ Schonberg, *Legitimate Expectations in Administrative Law* (2000); Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (2000). Since then there has been a further study in French: Calmes, *Du principe de la confiance légitime en droits allemande, communautaire et français* (2001), as well as shorter analyses, such as Boymans and Eliantonio, “Europeanization of Legal Principles? The Influence of the CJEU’S Case Law on the Principle of Legitimate Expectations in the Netherlands and the United Kingdom” (2013) 19(4) *European Public Law* 715.

closer integration of the European Union culminating in the signing of the Treaty of Lisbon. Furthermore, the judgment of the Court of Appeal in *Coughlan*, handed down in July 1999, represented a significant watershed in the protection of legitimate expectations by English courts.¹²⁹

2. When are English courts under an obligation to apply the EU principle of legitimate expectations?

Since the discussion that follows will compare the approach of English courts in cases involving EU law and English law, it is important to clarify when English courts will be under an obligation to apply the EU law principle of legitimate expectations, in place of the domestic one. Although it is difficult to give a general definition of when cases will fall within the scope of EU law, thereby obliging national courts to apply EU legal principles,¹³⁰ a number of specific situations can be identified where EU law will apply. These include: when a directly enforceable EU law right is at stake;¹³¹ when the administration is exercising a discretion given to them under EU law¹³² or is implementing a directive or other EU legislation;¹³³ and when the administration exercises a right to derogate from EU law.¹³⁴

It is worth noting here that the approach of the Court of Justice has been that in situations where national courts are required to apply the EU principle of legitimate expectations, the scope of protection should be limited to what is offered under EU law.¹³⁵ By contrast, English courts have seen their jurisdiction in cases involving EU law issues as more wide-ranging, drawing on aspects of the protection of legitimate expectations in both jurisdictions.¹³⁶

¹²⁹ Craig and Schonberg, “Substantive Legitimate Expectations after *Coughlan*” [2000] *Public Law* 684.

¹³⁰ Dérén and Lindholm, “Three Ideas: The Scope of EU Law Protecting Against Discrimination” in Dérén and Lindholm (eds), *Volume in Honor of Pär Hallström* (2012) p 78; *R v Ministry of Agriculture, Fisheries and Food ex parte First City Trading* [1997] 1 CMLR 250.

¹³¹ *Fleming (trading as Bodycraft) v Her Majesty’s Revenue and Customs* [2006] EWCA Civ 70. In *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19 the majority (whose position was confirmed by the Court of Justice on a preliminary reference) expressed this as part of the obligation on national courts to ensure the effectiveness of EU law.

¹³² *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin).

¹³³ *R (Sagemaster Plc) v Commissioners of Customs and Excise* [2004] EWCA Civ 25 at [7], citing the headnote of Case C-62/00 *Marks & Spencer v Her Majesty’s Revenue and Customs*, ECLI:EU:C:2002:435 as reported at [2002] 3 CMLR 9.

¹³⁴ Case C-260/89 *ERT v DEP*, ECLI:EU:C:1991:254 at [43].

¹³⁵ Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening v Minister van Sociale Zaken en Werkgelegenheid*, ECLI:EU:C:2008:165 at [53] and [57].

¹³⁶ The most explicit example of this is *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin).

II. The individual harbouring the expectation – the applicant for judicial review

Two main themes in the case law pertain to the position of the individual harbouring the expectation; these can have important consequences for whether an expectation is found and is upheld. The first concerns the individual's state of knowledge, while the second concerns the relevance of reliance, detrimental or otherwise, for a finding of legitimate expectation.

1. The state of knowledge of the individual

A recurring theme in the case law on legitimate expectations is the effect that the knowledge that an individual has or can be assumed to have has on their ability to establish a claim of legitimate expectation. This can be compared with the role of the concept of the “prudent trader” in EU law, and the extent to which the notion of foreseeability can be used to defeat a legitimate expectation. Although English courts have been less explicit than their EU counterparts in discussing the state of knowledge of the individual, it is nevertheless a relevant factor in many decisions of the former in the context of legitimate expectations.

a) Cases decided by English courts where there is no connection with EU law

Two different approaches can be identified regarding the individual's state of knowledge in cases heard by the English courts where there is no connection with EU law. In some cases, the courts have not considered the actual knowledge of the individual, but rather adopted an objective approach much like the European courts' prudent trader, assuming that the individual does or should have a certain state of knowledge, as a member of a particular group. By contrast, in other cases the information actually in the mind of the individual claiming the legitimate expectation has been given weight by English judges.

When applying the first approach, English courts have been prepared to assume that an individual has a certain state of knowledge, even where this has not been convincingly proven on the facts. Examples include *R (Davies and another) v Revenue and Customs Commissioners*;¹³⁷ *R (Capital Care Services) v Secretary of State for the Home Department*¹³⁸ and *Begum and others v Returning Officer for London Borough of Tower Hamlets*.¹³⁹ *Davies* concerned the interpretation of a provision of guidance issued by the Inland Revenue on the meaning of “residence” for tax purposes. The case was only concerned with what representation, if any, was contained in the guidance – it was accepted by both sides that if a representation was

¹³⁷ *R (Davies and another) v Revenue and Customs Commissioners* [2011] UKSC 47.

¹³⁸ *R (Capital Care Services) v Secretary of State for the Home Department* [2012] EWCA Civ 1151.

¹³⁹ *Begum and others v Returning Officer for London Borough of Tower Hamlets* [2006] EWCA Civ 733.

made out, this would give rise to a legitimate expectation.¹⁴⁰ In determining the content of any representation made in the guidance, Lord Wilson JSC (with whom Lord Hope, Lord Walker and Lord Clarke JJSC agreed) considered how the “ordinarily sophisticated taxpayer” would have understood the guidance. On Lord Wilson JSC’s interpretation the contents of the guidance were unlikely to have come as a surprise to such an individual.¹⁴¹ Rather than taking into account what Mr Davies and the other appellants in the appeal had actually believed or expected, Lord Wilson JSC based his judgment on what a fictitious person with a certain level of “sophistication” would have understood. This led to a finding that the representation contained in the guidance was not the one contended for by the appellants, and their claim of legitimate expectation failed.

In *Capital Care Services* and *Begum*, factors that an appellant knew or should have known were relevant considerations for determining whether a legitimate expectation was present on the facts. *Capital Care Services* was an appeal of a decision refusing permission for judicial review in the immigration law context. The appellants contended that the revocation of their licence to operate as a sponsor for immigrant workers coming to the United Kingdom breached their legitimate expectation arising from guidance issued by the Secretary of State when the appellants applied for their licence. In rejecting the appeal, a relevant factor was that the appellants knew or must have been taken to know the relevant policy and changes to the guidance. Although ultimately the expectation was based on a mistaken misrepresentation by the Secretary of State, contravening his responsibility to apply his own policy correctly, the applicants also had to share some of the responsibility, given that they were to be treated as having known the policy and the guidance.¹⁴²

The applicants in *Begum* were prospective candidates at a local election – they contended that they had a legitimate expectation that their nomination papers would be checked by the returning officer before the deadline for nominations, and that the failure to do so (due to an administrative mistake) prevented them from standing for election. Breach of legitimate expectation was found in the High Court, but the Court of Appeal allowed an appeal brought by the returning officer, overturning this decision. A relevant factor was that the nominees

¹⁴⁰ *R (Davies and another) v Revenue and Customs Commissioners* [2011] UKSC 47 at [2].

¹⁴¹ *R (Davies and another) v Revenue and Customs Commissioners* [2011] UKSC 47 at [45].

¹⁴² *R (Capital Care Services) v Secretary of State for the Home Department* [2012] EWCA Civ 1151 at [18].

and their representatives had failed to fill in the forms correctly, despite receiving explicit advice from the deputy returning officer.

By contrast, the second approach can be seen in Lord Mance JSC's dissenting judgment in *Davies*, following the statement of Lord Justice Dyson in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* that "the question is how on a fair reading of the promise it would have been reasonably understood by those to whom it was made."¹⁴³ While this approach still requires some objective assessment through the concept of "reasonableness", its focus is on the individual in question, rather than any member of the group to which they belong (in *Davies* the "ordinary taxpayers" as identified by Lord Wilson JSC. The relevance of the difference in approach becomes clear when it is applied to the facts of the case. Lord Mance JSC found that "the guidance is meant to reflect 'the law and practice', and ... it was and is intended to obviate any need for a taxpayer to look further".¹⁴⁴ Thus it was "wrong to assume a knowledge of the case law as a background to the construction of the guidance", especially as taxpayers' professional advisers would be very likely to be (as in the case of the appellants) accountants rather than lawyers.¹⁴⁵ This led him to the conclusion that the interpretation contended for by the appellants was the correct one, and that the legitimate expectation should thus be upheld.

b) Cases decided by English courts where there is a connection with EU law

In cases decided by English courts with a direct or indirect connection with EU law, the court's reasoning has usually been expressed in terms borrowed from the European courts: it considers how a prudent, normally informed businessman, or normally diligent taxpayer in the applicant's situation would have acted.¹⁴⁶ Following the approach of the European courts, this normally requires the applicant to have taken legal advice: in *Test Claimants in the FII Group v Revenue and Customs Commissioners*,¹⁴⁷ Lord Sumption JSC referred to the "well-advised" person in the claimant's position, while in *R (Sovio Wines Ltd) v Food Standards*

¹⁴³ *R (Davies and another) v Revenue and Customs Commissioners* [2011] UKSC 47 at [71]; *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473 at [56].

¹⁴⁴ *R (Davies and another) v Revenue and Customs Commissioners* [2011] UKSC 47 at [87].

¹⁴⁵ *R (Davies and another) v Revenue and Customs Commissioners* [2011] UKSC 47 at [94].

¹⁴⁶ *R (Sovio Wines Ltd) v Food Standards Agency (Wine Standards Branch)* [2009] EWHC 383 (Admin) at [94]; *Azam & Co v Legal Services Commission* [2010] EWHC 960 (Ch) at [38]; *Fleming (trading as Bodycraft) v Her Majesty's Revenue and Customs* [2006] EWCA Civ 70 at [47].

¹⁴⁷ *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19.

Agency (Wine Standards Branch) Mr Justice Dobbs considered that in the situation before him a prudent business would have taken legal advice.¹⁴⁸

The requirement to be well-advised notwithstanding, it seems that English courts take a less strict approach to the standard of knowledge and extent of foresight expected of a prudent trader than their European counterparts. This is clear in *Azam & Co v Legal Services Commission*,¹⁴⁹ a case concerning a failure by the Legal Services Commission to expressly identify in a letter to the applicant solicitors' firm the deadline for submitting a tender for immigration work, which the applicant contended was in breach of its legitimate expectation. The public procurement process in this case was wholly governed by EU law, although the court did not make any mention of the relevance of this for its application of the principle of protection of legitimate expectations. Regarding the behaviour expected of the individual claiming the legitimate expectation, Mr Justice Briggs was: "not persuaded that the obligation on a person relying on a legitimate expectation to exercise reasonable care and diligence necessarily required solicitors in the position of [the applicant] to study the consultation process in detail". The circumstances in which the judge did find that a reasonably and carefully diligent solicitor could not have entertained a legitimate expectation were where a letter sent by the Legal Services Commission was stated in unambiguous terms, clearly referred the reader to sources of further information, and whose final statement was irreconcilable with the expectation relied on by the applicant.¹⁵⁰ The decision of Mr Justice Briggs was affirmed on appeal, although the argument on legitimate expectation was rejected in stronger terms by Lord Justice Pill, who was "entirely unimpressed by it".¹⁵¹

A good example of possible different approaches to the state of knowledge expected of an individual claiming a legitimate expectation is the case *Test Claimants in the FII Group*. In this case, the Supreme Court had to consider two legislative provisions (section 320 of the Finance Act 2004, and section 107 of the Finance Act 2007) which curtailed the limitation period for restitution of payments based on a mistake. EU law was engaged because the restitutionary claim arose from the fact that the tax in question, advance corporation tax, had been found to give rise to an unjustified difference of treatment contrary to the freedom of establishment and free movement of capital provisions at that time enshrined in Articles 43

¹⁴⁸ *R (Sovio Wines Ltd) v Food Standards Agency (Wine Standards Branch)* [2009] EWHC 383 (Admin).

¹⁴⁹ *Azam & Co v Legal Services Commission* [2010] EWHC 960 (Ch).

¹⁵⁰ *Azam & Co v Legal Services Commission* [2010] EWHC 960 (Ch) at [56] and [57].

¹⁵¹ *Azam & Co v Legal Services Commission* [2011] EWCA Civ 1194.

and 56 of the EC Treaty. Although the seven justices on the bench all purported to apply the test of legitimate expectations under EU law, they interpreted the requirements of that test in different ways, and ultimately this difference in interpretation meant that a reference to the European Court of Justice was required.

In his dissenting opinion, Lord Sumption JSC emphasised that the right to restitution claimed by the Claimants had only been recognised in English law for seven weeks before Parliament legislated in section 320 of the 2004 Act to curtail the limitation period for such restitution claims.¹⁵² Given the fact that the finding of such a claim by a first instance court was virtually certain to be appealed, and that the outcome of any appeal was uncertain, it could not be said that such an unequivocal state of affairs was present that a reasonable person could have made plans based on it.¹⁵³ By contrast, the majority (whose approach was confirmed by the Court of Justice) effectively found that as soon as a right to a restitutionary payment arose, the principle of legitimate expectations (as an element of the principle of effectiveness) was engaged and prevented the limitation period for such a right from being curtailed without a reasonable transitional period.¹⁵⁴

When analysing the circumstances in which the right to restitution arose and the enactment of section 320, Lord Sumption adopted a more subjective approach to legitimate expectation; the existence of an expectation should be based on the state of knowledge of a well-advised person in the claimants' position. Agreeing with Lord Sumption, Lord Brown posited that on the facts of the case no legitimate expectation could be made out.¹⁵⁵ The majority and the Court of Justice however applied a more objective and abstract approach to legitimate expectation; once the possibility of a restitutionary claim had been recognised by a court, a transitional period is required even where it might reasonably have been said that due to the uncertainty of the legal position a person should not have been entitled to rely on such a possible claim. The legitimate expectation was thus detached from the actual circumstances of the case.

¹⁵² By Park J in *Deutsche Morgan Grenfell v Inland Revenue Commissioners* [2003] EWHC 1779 (Ch) on 18 July 2003.

¹⁵³ *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19 at [200].

¹⁵⁴ *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19 at [96], [112] and [115]; Case C-362/12 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners*, EU:C:2013:834 at [40], [43] and [47].

¹⁵⁵ *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19 at [123].

In *Corkteck Ltd v Revenue and Customs Commissioners*¹⁵⁶ the court's decision to reject the legitimate expectation was based both on an objective and subjective consideration of the state of knowledge of the applicant undertaking. The expectation was claimed on the basis of advice allegedly given during a brief telephone call with the National Advisory Service for tax matters; the tax in the case, value added tax, was then and is still governed by EU law, and Mr Malde, Corkteck's director, had asked for advice in relation to the taxation of shipments of soft drinks to a trader in Poland. Mr Justice Sales first concluded that certain circumstances of the case, such as the length of the telephone call and the fact that the National Advisory Service only held itself out as a source of "general advice", meant that it would not have been reasonable to rely on the advice given during the phone call as a foundation for the view that the rules on VAT would be applied by the Revenue and Customs Commissioners in a certain way. The judge then found this to be reinforced by the facts that were in the mind of Mr Malde at the time of the phone call – he would have been aware of the terms of the Commissioners' notice that conflicted with the advice he had allegedly been given, and of the facts of his employment relationship with the trader in Poland which also contradicted the legitimate expectation that he claimed.¹⁵⁷ By considering the reality of Mr Malde's state of mind to reinforce his conclusions, Mr Justice Sales thus distanced himself from the concept of the hypothetical prudent trader.

In contradistinction with the decisions discussed above, where a more subjective and less strict view was taken as to the state of knowledge of the individual claiming the legitimate expectation, in *Solar Century Holdings v Secretary of State for Energy and Climate Change*¹⁵⁸ Mr Justice Green adopted an approach that was very much in concordance with that of the Court of Justice. Although EU law only incidentally relevant for the case, as the challenged policy was said to be part of the government's long-term strategy to comply with its obligations in relation to renewable sources of energy under Directive 2009/28/EEC,¹⁵⁹ there is a striking similarity between the situation in *Solar Century Holdings* and the facts giving rise to the preliminary reference in *Plantanol GmbH & Co. KG v Hauptzollamt*

¹⁵⁶ *Corkteck Ltd v Revenue and Customs Commissioners* [2009] EWHC 785 (Admin).

¹⁵⁷ *Corkteck Ltd v Revenue and Customs Commissioners* [2009] EWHC 785 (Admin) at [31].

¹⁵⁸ *Solar Century Holdings Ltd v Secretary of State for Energy and Climate Change* [2014] EWHC 3677 (Admin).

¹⁵⁹ *Solar Century Holdings Ltd v Secretary of State for Energy and Climate Change* [2014] EWHC 3677 (Admin) at [16].

Darmstadt,¹⁶⁰ discussed in more detail below. In *Solar Century Holdings* the applicant claimed that the premature withdrawal of a scheme subsidising certain renewable energies was in breach of their legitimate expectation. In finding that no expectation arose on the facts, Mr Justice Green held that the limits imposed on the scheme in a control framework published in 2011 and described in argument by the defendant as an “ever-present and all pervasive”¹⁶¹ feature of the scheme were “a systemic risk which all operators must be taken to have accepted”.¹⁶² Rather than considering what the applicant in question knew or believed, Mr Justice Green thus took an objective view of situation that all operators benefiting from the scheme were in, and what one of those operators was entitled to expect in relation to its continuance.

c) Some conclusions

The above analysis indicates that there are some differences in the English and EU courts’ approach with regard to the state of knowledge of the individual claiming a legitimate expectation. In both cases falling within and outside the scope of EU law, some English judges appear to have taken a more flexible approach take into account an individual’s personal characteristics, for example by considering how a statement made by a public authority might have reasonably been understood by the individual to whom it was made, rather than the class of persons to whom the individual belongs.¹⁶³ Although English courts have adopted the EU terminology of the “prudent and discerning trader” when discussing cases involving EU law issues, they still appear to be applying this requirement more liberally than the European courts.

This difference in approach may be connected to the nature of the litigants bringing cases before the respective courts. Schonberg notes that “the notion of foreseeability is extremely important in EC law, because most litigants are professional traders and civil servants, and both of these groups may be expected to show considerable diligence in their dealings with the administration”. This leads to a very strict view of what these litigants should know and

¹⁶⁰ Case C-201/08 *Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt*, ECLI:EU:C:2009:539.

¹⁶¹ *Solar Century Holdings Ltd v Secretary of State for Energy and Climate Change* [2014] EWHC 3677 (Admin) at [4].

¹⁶² *Solar Century Holdings Ltd v Secretary of State for Energy and Climate Change* [2014] EWHC 3677 (Admin) at [78].

¹⁶³ *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473 at [56].

be able to foresee.¹⁶⁴ This can be contrasted with cases before national courts, where litigants are far more likely to be individuals whose personal or working lives have been affected in some way by a government's change of policy or failure to honour a promise. Nevertheless, as Schonberg argues, not all litigants bringing EU law cases will be large corporations – some will be smaller enterprises without the resources to keep abreast of current developments as the model prudent trader might do. A clear example is the solicitors' firm in *Azam*, whose income came largely from public contracts.¹⁶⁵

More recent cases such as *Davies*, *Capital Care Services* and *Solar Century Holdings* do however furnish some evidence of English courts adopting a more objective approach to the protection of legitimate expectations. Given the similarities between the factual situations in *Solar Century Holdings* and *Plantanol*, and the fact that English tax law is increasingly subject to European regulation, this may well be the result of the influence of the case law of the Luxembourg courts.

2. The relevance of reliance

a) Reliance as applied by the English courts in purely domestic cases

Although as noted above reliance has always been recognised as an important part of the courts' discussion of legitimate expectations, there is a long-standing debate as to whether reliance is a pre-requisite for establishing a legitimate expectation. Two lines of case law on reliance can be identified in the recent case law. One characterises reliance as an essential part of the test for legitimate expectations.¹⁶⁶ The other approach treats lack of reliance as a relevant consideration – something that can be taken into account when determining the existence of a legitimate expectation, the absence of which is not however fatal for such an expectation.¹⁶⁷

The focus on reliance as an essential element for establishing a legitimate expectation is related to an argument that where the individual in question is unaware of the policy or assurance upon which the expectation is based they cannot be said to expect any procedure or

¹⁶⁴ Schonberg, *Legitimate Expectations in Administrative Law* (2000) pp 127 to 128.

¹⁶⁵ *Azam & Co v Legal Services Commission* [2010] EWHC 960 (Ch) at [2] and [72]. Ordinary Union citizens might also seek to rely on the principle of protection of legitimate expectations - see Case C-167/06 P *Ermioni Komninou and Others v Commission*, ECLI:EU:C:2007:633.

¹⁶⁶ *R (Abbassi and others) v Secretary of State for the Home Department* [2011] EWCA Civ 814 at [43].

¹⁶⁷ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61; *Begum and others v Returning Officer for London Borough of Tower Hamlets* [2006] EWCA Civ 733; *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607.

outcome. Where there is a lack of knowledge of a representation, there is necessarily no reliance. In *R (Abbassi and others) v Secretary of State for the Home Department* the fact that the applicants did not know of the existence of the policy was one element in deciding that there could be no legitimate expectation, precisely because this meant that there could not have been any reliance (although Lord Justice Stanley Burton, with whom the rest of the court agreed, did not go so far as to say that the concept of legitimate expectation could never be applied in cases where those claiming such an expectation are not aware of any representation).¹⁶⁸ Lord Justice Peter Gibson similarly emphasised the importance of reliance in *Begbie*, stating that he was unable to “accept that the mere fact that a clear and unequivocal statement such as that made [in these circumstances] is enough to establish a legitimate expectation ... such that the expectation cannot be allowed to be defeated”.¹⁶⁹ Something more, namely reliance to the applicant’s possible detriment, was necessary.¹⁷⁰

However, even in *Abbassi* the court was unwilling to hold that reliance was an essential element in every situation in which a legitimate expectation would be upheld, and it is arguable that in *Begbie* Lord Justice Peter Gibson’s view misrepresented the English principle of legitimate expectations. His implication was that a requirement for detrimental reliance would be the only way to prevent a clear and unequivocal statement that generates an expectation from being upheld in all circumstances. This appears to ignore the fact that such an expectation could nevertheless be validly breached where an overriding public interest justified doing so.

A more moderate and nuanced approach that can be found in some of the cases treats reliance, detrimental or otherwise, as a relevant consideration for establishing a legitimate expectation, rather than as an essential element without which a legitimate expectation claim will fail. This is most clearly expressed in *R (Bibi) v Newham London Borough Council*, which describes the presence or absence of reliance as a factual, rather than a legal consideration.¹⁷¹ In that case, the applicants, who were refugees, were found to have relied on

¹⁶⁸ *R (Abbassi and others) v Secretary of State for the Home Department* [2011] EWCA Civ 814 at [43].

¹⁶⁹ *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at 1127B.

¹⁷⁰ *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at 1126E to 1127A.

¹⁷¹ *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [31]. This approach was approved by Laws LJ giving the sole judgment in *R (Abdi and Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [70].

the expectation of a secure tenancy generated by the local authority's mistaken view of the legal position at the time, although they had suffered no financial detriment as a result.¹⁷²

The importance attached to reliance as an element of the test for establishing a legitimate expectation may also depend on the context in which the legitimate expectation is claimed. For example, in *Begbie* Lord Justice Sedley stated that reliance will not be necessary where "the government has made known how it intends to exercise powers which affect the public at large".¹⁷³ In his minority judgement in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* Lord Bingham appears to be applying this approach when he holds that on the facts the Government could not lawfully resile from its representation, made generally to the Chagossian Islanders, without compelling reason, and in such circumstances it was not necessary to show (detrimental) reliance.¹⁷⁴

Given the importance of reliance as part of the test for legitimate expectations, whether as an essential element or relevant consideration, it is strange that few cases consider what actually constitutes reliance for the purposes of establishing an expectation. *Bibi* is an important exception, where Lord Justice Schiemann reading the judgment of the court explained that reliance (as a relevant factor) need not involve "concrete" detriment (in the sense of a financial or other tangible loss) or a change of position of the representee. Lord Justice Schiemann explains that a lack of change of position does not mean there has been no reliance: a representee may maintain their position as a result of a representation, which they might otherwise have changed. Furthermore, while "moral" detriment (the prolonged disappointment of the failure to fulfil the expectation, and the potential detriment that might occur in the future) might not be enough to found an estoppel claim in private law, it was relevant for the concepts of fairness and abuse of power in public law.¹⁷⁵

Defining the concept of reliance so widely may mean that it is always present in cases where a legitimate expectation is claimed, at least where the representee is aware of any representation that has been made, thus making the distinctions between the approaches

¹⁷² This resulted from the particular interpretation of reliance adopted by Schiemann LJ, discussed below. The outcome of the case may also be related to the fact that the applicants were in a particularly vulnerable position as asylum seekers, and wholly dependent on the local authority for accommodation.

¹⁷³ *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at 1133D to E. Craig also notes that it should not be necessary to prove reliance where a public body seeks to depart from its previously published policy: Craig, *EU Administrative Law* (2nd edition, 2012) p 554.

¹⁷⁴ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61 at [73].

¹⁷⁵ *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [53] to [55].

outlined above more apparent than real. However, Lord Justice Schiemann's discussion of the concept of reliance should be understood in the context of the part of the judgment in which it appears. This essentially sets out guidelines for the local authority decision-maker on how they should re-take the challenged decision, this time taking the legitimate expectation into account. Lord Justice Schiemann does not say anything about how a court should review the re-taken decision, if the decision-maker were challenged again for failing to take the legitimate expectation properly into account.

b) Reliance in decisions by English courts on cases involving EU law

When English courts have been called on to protect legitimate expectations in cases involving EU law, the court has often failed to explicitly state whether it is applying the English law or EU law test of legitimate expectations.¹⁷⁶ Where courts have engaged with this issue head on, they have mostly been content to assume that the application of either test leads to materially the same result.¹⁷⁷ This means that reliance has formed an important part of the test for establishing a legitimate expectation even in cases involving EU law issues, although the Luxembourg courts have not routinely or explicitly considered reliance as a relevant consideration.

For example, in *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs*, where changes to the allocation of fishing quotas were challenged, Mr Justice Cranston considered whether detrimental reliance had been demonstrated on the facts of the case (although he accepted that in some circumstances it might not be required).¹⁷⁸ Similarly, the fact that the claimant had refrained from acting (for example, by bringing legal proceedings) in reliance on the defendant Minister's assurance was a consideration that Mr Justice Charles took into account in *R (Actis SA) v Secretary of State for Communities and Local Government* when upholding a claim of legitimate expectation in relation to a change to the Building Regulations that was required to be

¹⁷⁶ See, for example, *Office of Fair Trading v Somerfield Stores Limited* [2014] EWCA Civ 400; *Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government* [2012] EWCA Civ 379; *R (Sovio Wines Ltd) v Food Standards Agency (Wine Standards Branch)* [2009] EWHC 383 (Admin); *R (Actis SA) v Secretary of State for Communities and Local Government* [2007] EWHC 2417 (Admin).

¹⁷⁷ See, for example, *Azam & Co v Legal Services Commission* [2010] EWHC 960 (Ch) at [37]; *R v Ministry of Agriculture, Fisheries and Food ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 at [26]; *Intervention Board for Agricultural Produce v Highland Meats Ltd* [2001] All ER (D) 238 (Mar) at [98].

¹⁷⁸ *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin) at [104].

notified under Directive 98/34/EC.¹⁷⁹ The focus of English courts on reliance when determining the existence of a legitimate expectation has also affected the way in which cases are presented to the court – for example, in *R (Energie EST LDA) v Secretary of State for Energy and Climate Change* and *Sovio Wines* the applicants emphasised the fact that they had relied on the claimed representation as a central part of their case.¹⁸⁰

c) Some conclusions

The central position which English courts have accorded to an individual's reliance on a public authority's representation when determining the existence of a legitimate expectation may be explained by reference to two factors: first, the relationship between the protection of legitimate expectations and the private law doctrine of estoppel, discussed above, and second, a judicial fear that without a requirement of reliance, legitimate expectations might be pleaded even where an individual had no knowledge of the policy or practice said to have generated the expectation. The latter situation could be problematic from a principled point of view, enlarging the meaning of the term legitimate expectation to such an extent that it no longer functions as a distinct and recognisable category.¹⁸¹ However, from the point of view of holding public authorities to account for their use of public power, it should not be possible to avoid the consequences of making an assurance, following a practice or publishing a policy simply by virtue of the fact that an individual was not aware of it.¹⁸²

As explained above, estoppel no longer has a significant role to play in the modern application of the principle of protection of legitimate expectations. English courts have emphasised that considerations of fairness which underpin public law mean that situations in which a private law action of estoppel would not arise might nevertheless ground a claim of legitimate expectation.¹⁸³

¹⁷⁹ *R (Actis SA) v Secretary of State for Communities and Local Government* [2007] EWHC 2417 (Admin) at [132].

¹⁸⁰ *R (Energie EST LDA) v Secretary of State for Energy and Climate Change* [2013] EWHC 3026 (Admin) at [71]; *R (Sovio Wines Ltd) v Food Standards Agency (Wine Standards Branch)* [2009] EWHC 383 (Admin) at [32].

¹⁸¹ Elliot, "Legitimate Expectation, Consistency and Abuse of Power: the Rashid Case" [2005] *Judicial Review* 281 at [8].

¹⁸² As noted above (see Section B.I.3.), this problem could be solved by a more widespread recognition of a principle of consistent application or equal treatment in English administrative law. Such a principle may be emerging, but in the meantime the principle of protection of legitimate expectations still has a role to play in the policing of administrative action.

¹⁸³ *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [55].

III. The public authority generating the expectation

There are two important themes in the case law in relation to the role of the public authority in generating the legitimate expectation: whether the individual or body making a representation has the power or authority to do so, both in terms of the legality of the representation and whom the representation can be said to bind; and what a public authority must do in order to discharge its duty in relation to any legitimate expectation it may have generated.

1. The power of the public authority to make the representation

As will become evident from the discussion below, the power of the public authority is an important factor in establishing a legitimate expectation and has been the subject of much discussion in the case law of the English courts in cases involving purely domestic law issues, although to a much lesser extent where EU law is engaged. Two main issues can be isolated. First, whether a representor has legal authority to make a representation. Given the English law principle that the executive can only act within the powers transferred to it by Parliament, a representation made outside the scope of those powers will in general not be binding – such a representation may be termed an “ultra vires” one. The second issue, which rose to the fore after it was discussed in *R (BAPIO Action Ltd) v Secretary of State for the Home Department*¹⁸⁴ is whether an official from one part of the executive has the power to bind another part of the executive.

a) *Ultra vires representations and statutory schemes*

The issue of representations made outside the representor’s power most often arises in the context of statutory schemes, in which an area of law is wholly regulated by statute law (Acts of Parliament and Statutory Instruments). For example, in *Westminster City Council v The Albert Court Residents’ Association*, the corporation responsible for managing the Royal Albert Hall, a concert and event venue in London, applied to the local council for a variation of its premises licence, to allow among other things extended opening hours, extended hours for serving alcohol, and for boxing and wrestling to be permitted licensable activities in the venue.¹⁸⁵ Under the relevant statutory provisions there was a clear obligation to grant an application for variation of a licence where no objection had been made to the application within a particular time frame.

¹⁸⁴ *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] UKHL 27.

¹⁸⁵ *Westminster City Council v The Albert Court Residents’ Association* [2011] EWCA Civ 430 at [3].

The court was prepared to assume that the applicant Residents' Association had a legitimate expectation that they would be notified of the licence application, and that such an expectation was breached by the local council's failure to do so. However, despite the fact that this breach had resulted in the Residents' Association not being able to bring their objection in time, the legitimate expectation could not be upheld in the face of an explicit statutory rule which stated the circumstances in which the variation of a licence application had to be granted. In a judgment with which the rest of the court agreed, Lord Justice Stanley Burton held that this was "no more than an incident of the principle of legislative supremacy". The statutory duty to grant the application trumped any legitimate expectation which conflicted with it.¹⁸⁶

Similarly, in *Begbie* the representation generating the alleged legitimate expectation conflicted with the statutory limits to the Secretary of State's discretion, and could therefore not be upheld. That case concerned a scheme offering assistance with school fees for children from underprivileged backgrounds. Prior to the 1997 General Election, the Labour Party had stated its intention to abolish the scheme if it regained power, while indicating that students already enrolled in the scheme would continue to benefit from it. Having won the election, the newly formed Labour government duly went about dismantling the assisted school places scheme, which included putting in place transitional discretionary powers to enable the Secretary of State for Education to continue to offer assistance to a particular individual where the circumstances mandated it. Given that these powers were presented as to be exercised only in exceptional circumstances, and the effect of the legitimate expectation contended for would have obliged the power to be exercised in the case of "virtually all children receiving primary education" at a certain type of school,¹⁸⁷ the legitimate expectation could not be upheld.¹⁸⁸

There is one important exception to the general rule that representations made outside the power of the public authority in question cannot generate legitimate expectations, which flows from Article 1 of Protocol No. 1 of the European Convention on Human Rights. The European Court of Human Rights has held that the concept of "possessions" in that article includes legitimate expectations when they relate to the enjoyment of a property right, even

¹⁸⁶ *Westminster City Council v The Albert Court Residents' Association* [2011] EWCA Civ 430 at [34] to [37].

¹⁸⁷ This would have encompassed around 1,200 to 1,500 school children: *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at 1117F to G.

¹⁸⁸ *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at 1125D to G.

where the expectation results from the ultra vires act of a public authority.¹⁸⁹ However, the individual claiming to have a legitimate expectation will still have to prove that the public authority acted disproportionately when it interfered with the legitimate expectation. In undertaking this analysis the English courts have conducted a similar balancing exercise to that which they undertake when considering whether there is an overriding public interest which justifies resiling from an expectation.¹⁹⁰

b) The authority to bind other parts of the executive

The case of *R (BAPIO Action Ltd) v Secretary of State for the Home Department* is an unusual one. Although the effect of the court's decision was to uphold the legitimate expectation contended for by the applicants, only half of the majority based their reasoning on legitimate expectations. The other two judges in the majority cited a more formalistic reason for dismissing the appeal: the guidance upon which the Secretary of State relied was unlawful, not because it conflicted with a legitimate expectation, but because its content should have been included as an amendment to the Immigration Rules, thus subject to Parliamentary scrutiny.

The different reasoning evident in the majority judgments makes *BAPIO* a difficult case from which to draw conclusions as to the content of the principle of legitimate expectations in English law. Nevertheless, the judgments which do deal with legitimate expectations are important for their treatment of whether one part of the executive has the authority to bind another. Lord Rodger, agreeing with the majority view, explained that “the executive power of the Crown is, in practice, exercised by a single body of ministers, making up Her Majesty's Government”. In these circumstances it would not make sense to separate the powers and duties of the Secretary of State for the Home Department from those of the Secretary of State for Health, and the latter will and should be bound by representations made by the former.¹⁹¹ By contrast, Lord Scott, giving a minority judgment, warned against using the constitutional theory of the indivisibility of the Crown to decide on the lawfulness of guidance issued by a minister, upon which the majority appeared to rely. Ministers have quite different and separate statutory powers and duties and he could see no reason “why what is done by one department in the proper discharge of its statutory duties should be taken to be a

¹⁸⁹ *Stretch v United Kingdom* (2003) 28 EHRR 196, cited in *Rowland v Environmental Agency* [2003] EWCA Civ 1885 at [88].

¹⁹⁰ *Rowland v Environmental Agency* [2003] EWCA Civ 1885 at [96].

¹⁹¹ *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] UKHL 27 at [33] to [34].

limitation on what can be done by another department in the otherwise proper and unexceptionable exercise of its own ... statutory duties and powers”.¹⁹² Interestingly, while Lord Rodger’s approach would have the potential to radically extend the scope of the principle of the protection of legitimate expectations, it applied the old-fashioned, more traditional theory of the constitutional indivisibility of the Crown, and the idea of the Cabinet operating together under the direction of the Prime Minister. By contrast, Lord Scott’s approach is the more realistic one given the increase in importance of Government departments for executing legislative decisions, the wide range of powers and duties wielded by those departments and the fact that the interests and views of different departments may often conflict. Furthermore, it is unclear whether Lord Rodger’s approach could still have been applied if the case had arisen two years later, when the Conservative-Liberal Democrat coalition formed the Government.

In any case, this aspect of *BAPIO* has been questioned in subsequent case law and academic commentary.¹⁹³ The authority of one part of the executive to bind another was implicitly rejected by the court in *R (Naik) v Secretary of State for the Home Department*,¹⁹⁴ again in the context of immigration law. The repeated grant of entry clearances by immigration officers was not a practice which could bind the Secretary of State in her use of the quite distinct power to refuse or revoke an entry visa on the basis that exclusion is “conducive to the public good”.¹⁹⁵ Nevertheless, the specific national security context in which the decision was made may have been a reason for the rejection of the *BAPIO* approach – the Court of Appeal also went further than the judge below in rejecting the argument that the actions of previous Secretaries of State could be relevant for whether the applicant had a valid legitimate expectation. In effect the Court of Appeal held that in this context no representation or practice relating to an individual entrant could ever override the Secretary of State’s duty to the public as a whole.¹⁹⁶

¹⁹² *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] UKHL 27 at [28].

¹⁹³ *R (Sovio Wines Ltd) v Food Standards Agency (Wine Standards Branch)* [2009] EWHC 383 (Admin) at [100]. For earlier discussion of this issue, see *R (Bloggs 61) v Secretary of State for the Home Department* [2003] EWCA Civ 686. See also Knight, “Expectations in transition: recent developments in legitimate expectations” [2009] *Public Law* 15.

¹⁹⁴ *R (Naik) v Secretary of State for the Home Department* [2011] EWCA Civ 1546.

¹⁹⁵ *R (Naik) v Secretary of State for the Home Department* [2011] EWCA Civ 1546 at [14] and [20] to [23].

¹⁹⁶ *R (Naik) v Secretary of State for the Home Department* [2011] EWCA Civ 1546 at [23].

c) Some conclusions

Concerning the relationship between legitimate expectations and the authority of a public body to make a particular promise or engage in a certain practice, the traditional position shared by EU law and English law is clear: a public body cannot extend or exceed the limits of the power transferred to it or bind other public bodies by engendering hopes or expectations in an individual. However, the English courts have approached these issues slightly more flexibly than the European courts, where required to do so through their obligations under the European Convention on Human Rights, or where, as in *BAPIO*, they have considered that the situation demands it.

2. Discharging the legitimate expectation

In certain circumstances, a public authority will be able to discharge a legitimate expectation where that expectation was taken into account in the decision-making process. Although this is more relevant for procedural legitimate expectations, namely those where the expectation is that a particular procedure will be followed in the decision-making process, taking the legitimate expectation into account has had the same effect in certain cases where the expectation was one of a substantive benefit.¹⁹⁷ This is similar to the EU law requirement of giving due respect to legitimate expectations when enacting retrospective legislation.

a) Cases dealing with purely English issues

How a legitimate expectation might be discharged by the public authority by taking it into account in the decision-making process has been dealt with in different ways by different courts. For example, in *Paponette v Attorney General of Trinidad and Tobago*¹⁹⁸ Lord Dyson JSC giving the judgment for the majority held that the authority was under a duty to consider the legitimate expectation they had generated in the decision-making process. In the context, failure to do so was enough to constitute breach of the legitimate expectation.¹⁹⁹ In *R (Bloggs 61) v Secretary of State for the Home Department*²⁰⁰ and *R (Barker) v Waverley Borough Council*²⁰¹ the same principle was applied to come to the opposite conclusion: since the contended for legitimate expectations were taken into account in the decision-making process

¹⁹⁷ Cases where a substantive legitimate expectation was upheld: *R (Abbassi and others) v Secretary of State for the Home Department* [2011] EWCA Civ 814 and *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] UKHL 27.

¹⁹⁸ *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32.

¹⁹⁹ *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32 at [45] to [47].

²⁰⁰ *R (Bloggs 61) v Secretary of State for the Home Department* [2003] EWCA Civ 686.

²⁰¹ *R (Barker) v Waverley Borough Council* [2001] EWCA Civ 566.

the respective decisions could not be faulted. Once the expectations were taken into account, it was for the decision-maker to decide how much weight to accord them in the decision-making process, and the relative weighting of different factors could only be judicially challenged if “so unreasonable” that a reasonable decision-maker would not have applied such weighting.²⁰²

Other cases offer examples of more implicit support for this principle. For example, in *BAPIO* the fact that the challenged guidance applied to four different categories of highly skilled medical student immigrants was a relevant factor for determining whether the Secretary of State took legitimate expectations into account when making the decision to issue the guidance. If she had done, it was likely that she would have adopted a more nuanced approach.²⁰³ Unusually, in *R (Huitson) v Revenue and Customs Commissioners* it was a relevant fact that the *judge* in the court below took the legitimate expectation into account when considering whether retrospective legislation struck a fair balance between the interests of the general body of taxpayers and the right of the claimant to the enjoyment of his possessions and was therefore justified.²⁰⁴

b) Cases with an EU law element

There are also examples among the cases with some connection with EU law of public authorities taking individual interests into account and courts finding as a result that any duty to give effect to a legitimate expectation has been discharged. *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs*²⁰⁵ was a challenge to changes made to the system for allocating fishing quotas, which involved the defendant exercising a discretion accorded to him under the EU Common Fisheries Policy. A legitimate expectation was claimed to arise based on the previous practice of the Secretary of State as well as representations in various Government publications and statements, and to have been breached by a retroactive change of this practice. While Mr Justice Cranston held at the outset that no precise and specific assurance had been made on

²⁰² *Associated Provincial Picturehouses Ltd v Wednesbury Corporation* [1948] 1 KB 233; *R (Bloggs 61) v Secretary of State for the Home Department* [2003] EWCA Civ 686 at [27] and [46]; *R (Barker) v Waverley Borough Council* [2001] EWCA Civ 566 at [46].

²⁰³ *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] UKHL 27 at [63].

²⁰⁴ *R (Huitson) v Revenue and Customs Commissioners* [2011] EWCA Civ 893 at [73] and [95].

²⁰⁵ *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin).

out the facts,²⁰⁶ the judge nevertheless went on to consider whether the breach of any legitimate expectation could have been justified. A relevant consideration in this regard was that the Department had changed its methodology in response to concerns raised by fish producer organisations, thus taking into account their interests.²⁰⁷ Similarly, in *Rayner Thomas v Carmarthenshire Council*,²⁰⁸ where it was argued that the imposition of a particular planning condition disappointed the legitimate expectations of the applicant, the court held that “there was plainly careful consideration ... by the defendant and its advisers” of the issue on which the applicant’s claimed legitimate expectation rested, and in any case the only legitimate expectation raised on the facts was that the applicant’s complaints and objections would be taken into account.²⁰⁹

c) Some conclusions

The approach of the English courts outlined above shows another situation in which a legitimate expectation will not bind the public authority which has generated it, alongside situations where there is an overriding public interest or the expectation conflicts with a statutory duty. This factor – taking the legitimate expectation into account in the decision-making process – is not something which has been an explicit feature of the jurisprudence of the European courts. To some extent, the obligation to apply transitional measures in cases of retroactive legislation operates in a similar way, although it arises by operation of law and does not require any individual to demonstrate that they have a particular expectation.

The approach taken by the English courts makes sense where the expectation is one that a particular procedure will be followed – if such a procedure has been followed, the expectation has not been breached and the administrative action is unimpeachable. However, it is more problematic in cases where the expectation is one of a substantive outcome. The protection of legitimate expectations is based on a relationship between the administration and the individuals it governs, founded on considerations of trust, fair dealing and proper use of public power. Where a clear assurance has been given, simply taking the legitimate expectation into account may not give it the necessary weight in the decision-making process. In cases of substantive legitimate expectations, as well as considering whether the legitimate

²⁰⁶ *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin) at [99].

²⁰⁷ *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin) at [106].

²⁰⁸ *Rayner Thomas v Carmarthenshire Council* [2013] EWHC 783 (Admin).

²⁰⁹ *Rayner Thomas v Carmarthenshire Council* [2013] EWHC 783 (Admin) at [47].

expectation was taken into account, a court should also be willing to assess the relative weight the expectation was accorded in comparison to other interests, and compare this with their own view of the balance to be struck between an expectation and any overriding public interest.

IV. The role of the court

The third main actor in legitimate expectations cases is the court before whom a challenge to administrative action is brought on grounds of legitimate expectation. In the course of developing their approach to the protection of legitimate expectations, English courts have often reflected carefully on their role in upholding or denying legitimate expectations. Two main reasons for this present themselves – first, the general fear of English administrative courts of encroaching on areas which are the province of the executive, exacerbated by the possibility of carrying out substantive review in legitimate expectation cases,²¹⁰ and second, the fact that they are continuing to search for a principled test and justification for the protection of legitimate expectations in English law.²¹¹ In the following sections, two aspects of the role of the court in legitimate expectations cases will be discussed in more detail: the intensity of review to which a Court will subject administrative conduct in breach of a legitimate expectation, and what relief the court will order where a finding of legitimate expectation is made out.

1. The intensity of review

As explained above, the courts have adopted different standards of review to the challenged administrative conduct in cases where legitimate expectations have been raised. The different standards of review and the reasons for adopting them as evident from the recent case law of the English courts will be outlined in the following section, with a particular focus on distinctions drawn in relation to the type of legitimate expectation and the context in which it arises, as well as the application of a new standard of proportionality review.

a) Distinctions based on procedural and substantive legitimate expectations

Following *Coughlan*, some courts have drawn a distinction between the standard of review that can be applied to procedural or substantive legitimate expectations. The leading judgments in *Naik* and *Bhatt Murphy* both applied the distinction drawn in *Coughlan* to decide whether a legitimate expectation should be upheld. In *Naik*, Lord Justice Carnwath

²¹⁰ *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [41].

²¹¹ *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 at [3].

used *Coughlan* as support for the statement that “where a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, the court will consider whether to frustrate the expectation is so unfair that to take a new and different course would amount to an abuse of power”.²¹² In *Bhatt Murphy*, Mr Justice Laws explained that while the creation of a new policy can only be tested against the standards of *Wednesbury* unreasonableness, where such a policy is in breach of a prior substantive legitimate expectation this will be judged by a “more rigorous standard”, namely the court’s own view of what fairness requires.²¹³ The court is thus able to substitute its judgment for that of the decision-maker, rather than simply considering whether the decision reached was one of a number of possible outcomes.

The difference that the intensity with which a decision is reviewed can make to the outcome of the case was made strikingly clear in *R (Luton Borough Council) v Secretary of State for Education*.²¹⁴ That case involved a decision by the Conservative and Liberal Democrat coalition government, on coming to power in 2010, to end a programme started by the previous Labour government which funded the building of new schools. As a result, while certain planned building projects would still go ahead, others would be stopped.²¹⁵ Six local authorities brought a claim of judicial review challenging the decision to end building programmes in their areas which had previously been given outline approval. While Mr Justice Holman did not find there was an assurance that was clear and unambiguous enough to generate a substantive legitimate expectation, the “pressing and focussed” impact of the Government department’s past conduct on the applicants meant that they should have been consulted before the decisions to end their particular programmes were taken.²¹⁶ Although the factual scenario was not enough to justify substantive protection of expectations, it did require procedural protection to be given.

b) The character of the decision

In other cases, the context in which the decision is taken will have an impact on the level of scrutiny to which the court subjects it to. This is a general feature of English administrative law – in certain areas the executive may be held to have superior institutional knowledge,

²¹² *R (Naik) v Secretary of State for the Home Department* [2011] EWCA Civ 1546 at [19].

²¹³ *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 at [35].

²¹⁴ *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin)

²¹⁵ *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin) at [3].

²¹⁶ *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin) at [78] to [81] and [90] to [94].

leading to a more deferential approach by the court, while in other areas the nature of the interests at stake, for example as human rights, may justify more “anxious scrutiny”.²¹⁷ In *Luton*, Mr Justice Holman called on this subject-based approach to the intensity of review to justify his decision to deal with the case in an “impressionistic way”, “without unduly detailed or sophisticated enquiry”, despite the large number of documents, totalling around 7,500 pages, which the parties had brought to the courts attention. No human rights issues arose, the claimants themselves being public authorities, and the political, large scale macro-economic character of the decision challenged meant that any public law irrationality or unlawfulness should be obvious on a relatively broad inquiry.²¹⁸

A similar approach has been adopted in cases where the legitimate expectation is claimed as a result of the exercise of a discretion under EU law. In *United Kingdom Association of Fish Producer Organisations* Mr Justice Cranston, summarising the position in English law on the protection of legitimate expectations, noted that the intensity of review would depend on the character of the decision – again, less intensive review would be required in cases falling in the macro-political field.²¹⁹ Applying this principle to the facts of the case, the judge noted that the subject matter of the case, the Common Fisheries Policy and its administration, lay “towards the macro-political end of the policy-making spectrum”. He noted that due to the scarcity of fish as a resource, decisions made under this policy have “important social, economic and environmental considerations” and as such were “highly contentious and a matter of intense political discussion”.²²⁰ These factors all made it more difficult for the applicants to prove that their legitimate expectations had been affected – they would have to show a very strong individual interest in such situations in order to outweigh the wider public interest.

c) A possible proportionality test

In the case *R (Abdi and Nadarajah) v Secretary of State for the Home Department*,²²¹ Lord Justice Laws sought to introduce a new standard for testing whether a legitimate expectation has been justifiably breached, based on a traditional human rights analysis of whether that

²¹⁷ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61 at [52] per Lord Hoffman.

²¹⁸ *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin) at [7] and [8].

²¹⁹ *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin) at [92].

²²⁰ *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin) at [105].

²²¹ *R (Abdi and Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363.

breach is a proportionate response to a legitimate aim.²²² Such an approach could have offered a more structured, more transparent way for the courts to carry out the balancing act between an individual's and the public interest and to explain how a court reached its conclusion on a particular set of facts. This approach has not been adopted or even discussed in subsequent cases involving purely domestic issues, and it is perhaps telling that Lord Justice Laws himself does not apply it to claims of legitimate expectation raised before him in later cases, such as *Bhatt Murphy*.

Nevertheless, a proportionality test has been applied in cases where EU law has been engaged either directly or indirectly. For example, in *United Kingdom Association of Fish Producer Organisations*, the means by which the decision to change policy was undertaken were proportionate – there were safeguards in the decision-making methodology, that methodology had been changed in response to comments from producer organisations, there was a possibility to appeal the outcomes of the methodology, and there were no suitable alternative ways to maximise use of allocated quota.²²³ Here, although proportionality was not used specifically as a standard of review for the administrative action, which the judge had already held was justified, it was implicit that a lack of proportionality in the way the decision was taken could have been another way of striking it down.

Another example is *Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government*,²²⁴ a case where EU law was engaged by the fact that planning permissions for a waste plant required special permissions under the Habitats Regulations, implementing the Habitats Directive²²⁵ in English law. In that case Lord Justice Pill, with whose judgement the other judges agreed noted that in the court below the judge had referred to the proportionality test set out in *Abdi and Nadarajah*, as the method for ascertaining whether a legitimate expectation has been overridden by public interest considerations.²²⁶ However, although this method was given implicit support by that repetition, no balancing exercise was carried out by the Court of Appeal, since any legitimate

²²² *R (Abdi and Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68] and [71].

²²³ *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin) at [106].

²²⁴ *Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government* [2012] EWCA Civ 379.

²²⁵ Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.

²²⁶ *Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government* [2012] EWCA Civ 379 at [27].

expectation had already been rejected on the basis that the planning inspector who allegedly gave the assurance had no authority to bind the competent decision-making authority, the Secretary of State, and in any case the circumstances had changed such that a change of position was justified.²²⁷

d) Some conclusions

The adoption of Lord Woolf's approach in *Coughlan* by judges in subsequent cases shows that the courts will, in certain circumstances, scrutinise administrative action more closely where it is in breach of a legitimate expectation. This "unique intensity of review", in Watson's words, is important viewed in the wider context of English administrative law, where administrative action will (excluding situations where a greater intensity of review is mandated by European Union or human rights law) normally only be subject to reasonableness review.²²⁸

The European courts have not explicitly stated the intensity with which they review Union and Member State conduct in breach of legitimate expectations – the paucity of cases in which legitimate expectations have been upheld suggests that the EU courts apply a light-touch review, which is supported by the fact that the European courts are slow to hold that a clear and unambiguous assurance has been made. Ironically, applying an EU-style proportionality test is seen by English lawyers as a method of scrutinising conduct in breach of legitimate expectations more closely – while the EU courts themselves seem to apply a lesser intensity of review than their English counterparts.²²⁹

2. The relief ordered by the court once a legitimate expectation has been found

As explained above, in English law it is at the court's discretion whether to order any remedy as a result of a successful judicial review claim.²³⁰ Thus as well as undertaking a balancing act to determine whether or not a legitimate expectation has arisen and been breached, courts also take into account competing considerations of individual rights and the public interest when deciding what relief to order. In some cases where the courts have denied the existence of a legitimate expectation, they have nevertheless offered some *obiter* discussion on what

²²⁷ *Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government* [2012] EWCA Civ 379 at [36] and [37].

²²⁸ Watson, "Clarity and Ambiguity: a new approach to the test of legitimacy in the law of legitimate expectations" [2010] *Legal Studies* 633, 633.

²²⁹ Schwarz, *Vertrauensschutz als Verfassungsprinzip* (2002) p 397.

²³⁰ See Section B.I.5. above.

remedy would have been offered if an expectation had been found. The courts have also applied EU law remedies in cases where they have been obliged to do so.

a) Cases involving purely domestic law issues

Cases in which the legitimate expectation has been upheld by the courts and a substantive remedy ordered are few: they include *R (Patel) v General Medical Council* [2013] EWCA Civ 327, *Paponette* and *Rashid*.

Patel, a case in which a medical student had been given assurances that the qualification offered by his chosen institution for medical study would be sufficient to allow him to continue his studies in the United Kingdom, is by far the strongest example of a court's willingness to protect a legitimate expectation in recent years. Lord Justice Lloyd Jones, with whom the other judges agreed, held that the claimant's legitimate expectation was breached when the General Medical Council changed its policy without adopting transitional provisions that would have covered the claimant's situation.²³¹ Lord Justice Lloyd Jones was not prepared, nor did he consider it necessary, to state what the transitional measures should have been, or to impose any that might apply to other individuals in a similar situation.²³² However, in relation to the situation of the claimant in question, he did order that specific relief should be given of a substantive nature: the General Medical Council was required to recognise the claimant's medical degree as an acceptable overseas qualification for the purposes of the Medical Act 1983, thus enabling him to practice as a doctor in the United Kingdom.²³³

In *Paponette*, the judge at first instance had required the defendants to reimburse the entire fees paid by the taxi association for use of the taxi rank which they had been assigned to in breach of their legitimate expectation. When it upheld this decision, the Privy Council questioned whether this was the correct award, suggesting that the judge should have taken into account any costs the taxi association might have incurred for using another taxi rank, and deducted these. Nevertheless, as the relief granted by the judge was not appealed, the Privy Council was unable to modify the initial order.²³⁴ In *Rashid* the failure to apply an immigration policy to the applicant, an Iraqi Kurd, although it had been applied to other individuals in the same position, led to an order by the court that the Secretary of State should

²³¹ *R (Patel) v General Medical Council* [2013] EWCA Civ 327 at [85].

²³² *R (Patel) v General Medical Council* [2013] EWCA Civ 327 at [86].

²³³ *R (Patel) v General Medical Council* [2013] EWCA Civ 327 at [93].

²³⁴ *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32 at [53].

give the applicant indefinite leave to remain. This was despite the fact that, as a failure to apply a pre-existing policy without a clear representation being made to an individual, the facts of this case fell within the type “secondary procedural expectation” (as so characterised in *Bhatt Murphy*) and thus would normally justify procedural rather than substantive protection.

Cases where substantive relief was discussed but not ordered include *Majed*, and *Bibi*.

In *Majed*, where the defendant local council was found to have breached the applicants’ legitimate expectation that they would be notified if an application for planning permission was made by one of their neighbours, the court held that enforcing the legitimate expectation and annulling the planning permission was inconceivable, relying on: “the history of this matter, in particular the lack of any development plan objection, the lack of any real planning harm to the appellant, and, by contrast, the very real and obvious prejudice that would be suffered by the interested party”. None of the other adjoining occupiers had objected to the planning permission, the building works had been completed, and the building extension for which planning permission had been granted was already occupied as part of the interested party’s home.²³⁵ The court came to this decision on the basis that the legitimate expectation required the issue to be remitted to the initial decision-maker for re-decision, but that there was no need to do so given the obvious outcome that the local council would come to the conclusion that the planning permission should be upheld. However, the court did recognise the importance of granting declaratory relief in the form of a statement that the applicants’ legitimate expectation had been breached, to prevent the same error from occurring again in the future.²³⁶

The case of *Bibi* provides a further example of how the court will exercise its discretion to order relief where it confirms the existence of a legitimate expectation. There, the court held that it “will not order the authority to honour its promise where to do so would be to assume the powers of the executive”.²³⁷ The challenged decision would therefore be remitted to the initial decision-maker, who would be obliged to re-take that decision taking into account the legitimate expectation as found by the court. Once a new decision had been made, this could again be challenged before the courts if it had failed to take the legitimate expectation into

²³⁵ *R (Majed) v London Borough of Camden* [2009] EWCA Civ 1029 at [32].

²³⁶ *R (Majed) v London Borough of Camden* [2009] EWCA Civ 1029 at [33].

²³⁷ *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [41].

account.²³⁸ Despite its considerable deference to the executive decision-maker, the court suggested a number of factors which the local authority should take into account when re-taking its decision.²³⁹ The detail in which these factors were expressed, coupled with the possibility of further review of the remitted decision, should have led a prudent public authority to follow the court's suggestions.

b) Cases with an EU law element

Of the cases analysed where there is some connection with EU law, in only three has the court confirmed the existence of a legitimate expectation.

In *Actis SA* the court found that the Secretary of State acted in breach of a legitimate expectation by not consulting the claimants about a change to the Building Regulations.²⁴⁰ EU law was not engaged directly by the legitimate expectation claim, although it was relevant to another ground of review, which stated that the change should have been notified to the Commission. However, the judge reserved his decision on the remedy to be awarded to a later hearing, and no record of this hearing is available in the online databases. It may be that an agreement was reached between the parties, rendering judgment on relief unnecessary.

Test Claimants in the FII Group and *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners*²⁴¹ were both cases in which the claim of legitimate expectation was directly governed by EU law. Similarly to the situation in *Test Claimants*, the breach of legitimate expectation in *Fleming* arose as a result of the retroactive restriction of a limitation period for the repayment of tax sums required from individuals in breach of EU law, in this case value added tax. Finding that the retroactive effect of the regulation and the failure to introduce transitional measures when substituting what was effectively an unlimited time for bringing claims with a three year limitation period was contrary to EU law, the House of Lords had no qualms about disapplying the regulation in question. However, it left the issue of the length and nature of any transitional period to Parliament and the Revenue and Customs Commissioners.²⁴²

²³⁸ *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [66].

²³⁹ *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [52] to [59].

²⁴⁰ *R (Actis SA) v Secretary of State for Communities and Local Government* [2007] EWHC 2417 (Admin) at [132] to [136].

²⁴¹ *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners* [2008] UKHL 2.

²⁴² *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners* [2008] UKHL 2 at [12], [20] to [21], [77] and [104].

In *Test Claimants*, the Supreme Court was also willing to disapply national legislation in breach of EU law, and stated that this would be the case in respect of section 107 of the Finance Act 2007, which the whole court had agreed contravened the EU law principles of effectiveness and protection of legitimate expectations. In relation to the other challenged legal provision, section 320 of the Finance Act 2004, two questions were referred to the Court of Justice, which found that the situation caused by the enactment of that legal provision was contrary to EU law.²⁴³ However, while the English courts were conscious of their duty to disapply legislation to the extent that it is in breach of EU law, the legislature was not fast enough in passing new legislation to fill the resulting gap. Thus a recent infringement action brought by the Commission against the United Kingdom for failure to implement the judgment in the *Test Claimants* preliminary reference case was upheld by the Court of Justice. Although the United Kingdom argued that it was in the process of passing an amendment to section 107 which would render it compatible with EU law, this was rejected as irrelevant for the question of a Member State's compliance with its obligations under Article 4(3) of the Treaty on European Union. Because the offending section was still in place at the end of the time prescribed for the implementation of the judgment in *Test Claimants*, the UK had failed to comply with its obligations under the Treaties, and although no damages claim had been brought by the Commission, the UK was required to pay the costs of the case.²⁴⁴

c) Some conclusions

Some explanation for the decisions of English courts to award or refuse relief in cases where a legitimate expectation has arisen can be offered by a consideration of the subject matter which the cases dealt with. The planning law context in which the decision in *Majed* was taken is an obvious example – significant building works may have been carried out in reliance on a planning permission, and it could be disproportionately onerous to require these to be dismantled as a result of a legitimate expectation which had been breached by the local council. Similarly, the realities of the area which housing law seeks to regulate led to a more restrained, deferent approach of the court towards the decision-maker in *Bibi*. In that case the court recognised the difficulties that would be caused by allowing certain people to jump to

²⁴³ *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19 at [22], [124] to [125], [129], [135] to [136], [140], [207] to [208], [246]; Case C-362/12 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners*, EU:C:2013:834 at [49] and [52].

²⁴⁴ Case C-640/13 *Commission v UK* at [42] to [45].

the top of the list for social housing due to a legitimate expectation, given that the personal circumstances of others on the list might put them in more pressing need of social housing at any particular time. Furthermore, the serious housing shortage made decision-making in this area extremely difficult, and justified those decisions being taken by a democratically mandated body with greater access to expert information than the court.²⁴⁵ The court will however take a more active role in ordering relief where it considers that the demands of fairness mandate this, for example in *Rashid* where Home Office failures were “startling and prolonged” and there was evidence of the “gross nature of errors”.²⁴⁶

The availability of relief is also the area in which there is the greatest difference between the approach of English courts in cases with an EU law element and those involving purely domestic situations. On the one hand, in cases with an EU law element, further remedies are available to the court, such as the disapplication of primary legislation, which sends a strong message to the legislature that the challenged measure must be amended, or new legislation put in its place. On the other hand, some of the courts’ remedial flexibility is taken away, as they are not able to hold that the legitimate expectation can be protected by procedural methods, or that any duty in respect of the expectation has been discharged by taking it into account in the decision-making process. This remedial rigidity is further underlined by the recently upheld Commission action against the United Kingdom for failing to implement the judgment in *Test Claimants*. The court’s disapplication remedy was not enough – in order to comply with EU law, the offending legislation had to be repealed by Parliament. This is an important difference between English law and EU law which may explain the different approaches the courts use when assessing the existence of a legitimate expectation.

²⁴⁵ *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [63] to [64].

²⁴⁶ *Rashid v Secretary of State for the Home Department* [2005] EWCA Civ 744 at [13] and [32].

D. Recent case law of the European Court of Justice on legitimate expectations

I. Introduction and scope

This section will consider recent cases decided by the European Court of Justice in order to track the development of the principle of the protection of legitimate expectations in European Union law. As with the case law of the courts of England and Wales, the scope of this analysis has been limited to cases decided since the year 2000. The pool of cases has further been limited to only those decided by the European Court of Justice (as opposed to the General Court or Court of First Instance) where the term “legitimate expectations” can be found among the key-words assigned to the case on Eur-LEX. These restrictions are intended to catch the most important cases while also enabling a more in-depth consideration of a limited number of cases.

At the outset it should be noted that the success rate of cases in which claims of legitimate expectations are raised is even lower in cases decided by the European Court of Justice than in those decided by English courts – of the 48 cases analysed, in only three was the existence of a legitimate expectation accepted.²⁴⁷ Although in many of the cases under consideration the Court of Justice has held that it is for the national court to decide whether the requirements for a finding of legitimate expectation are present,²⁴⁸ it is nevertheless striking that even in cases where the Court of Justice admits jurisdiction to determine whether a legitimate expectation has arisen, a positive finding is extremely rare. Furthermore, in a number of cases where the Court of First Instance had confirmed the existence of a legitimate expectation, the European Court of Justice overturned this decision on appeal.²⁴⁹ As well as the Court’s restrictive view of the division of jurisdiction in this area between it and national courts, two other factors may go some way to explaining this paucity. First, many of the cases in which the European Court is asked to determine the existence of a legitimate expectation have arisen in the field of State aid, where the Court has developed a particularly strict

²⁴⁷ Case C-362/12 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners*, EU:C:2013:834; Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416; Case C-62/00 *Marks & Spencer v Her Majesty’s Revenue and Customs*, ECLI:EU:C:2002:435.

²⁴⁸ See, most recently, Case C-98/14 *Berlington Hungary Tanácsadó és Szolgáltató kft and others v Magyar Állam* at [80] and [81].

²⁴⁹ For example, Case C-519/07 P *Commission v Koninklijke FrieslandCampina NV*, ECLI:EU:C:2009:556; Case C-334/07 P *Commission of the European Communities v Freistaat Sachsen*, ECLI:EU:C:2008:709.

approach to the application of the principle of protection of legitimate expectations. Secondly, unlike the English courts, the European Court of Justice has identified certain situations where the operation of the principle of protection of legitimate expectations is completely excluded – for example, a legitimate expectation cannot be pleaded as a collateral defence to an infringement action.²⁵⁰

Recent cases raising issues of legitimate expectations before the Court of Justice have arisen across the spectrum of EU law. By far the largest group of cases are annulment actions in respect of an unfavourable Commission decision on State aid.²⁵¹ Other cases deal with, among other things, EU remedies for sums wrongly paid or tax issues,²⁵² fines for breach of competition law,²⁵³ and the common market.²⁵⁴ To some extent, the preponderance of cases concerning similar subject matters has resulted in the Court of Justice developing sector-specific approaches to the protection of legitimate expectations in those areas. As explained above, this is most obvious in State aid cases, where the scope for the application of the principle of protection of legitimate expectations has been limited by the Court in order to prevent the strict procedure set out in the Treaties from being undermined, but the Court has also developed settled jurisprudence in the context of the common market, Common Agricultural Policy, and setting of fines for breaches of competition law.

In addition to the development of sector-specific approaches, the jurisprudence of the European Court of Justice has also developed horizontally, across all cases in which the principle of protection of legitimate expectations is raised. Although this case law has seen far less development in the last 15 years than that of the English courts, perhaps because of the tendency of the European Court of Justice to repeat verbatim its previous statements as to a particular legal position, or simply because the principle of protection of legitimate expectations is at a less developed stage in English law, subtle changes can be identified.

²⁵⁰ Case C-39/06 *Commission v Germany*, ECLI:EU:C:2008:349 at [23], [24] and [42].

²⁵¹ For example, Joined cases C-630/11 P to C-633/11 P *HGA Srl and others v Commission*, ECLI:EU:C:2013:387; Case C-369/09 P *ISD Polska sp. z o.o. and Others v European Commission*, ECLI:EU:C:2011:175; Case C-519/07 P *Commission v Koninklijke FrieslandCampina NV*, ECLI:EU:C:2009:556; Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416.

²⁵² Case C-362/12 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners*, EU:C:2013:834; Case C-201/08 *Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt*, ECLI:EU:C:2009:539.

²⁵³ Case C-501/11 P *Schindler Holding Ltd and others v European Commission*, ECLI:EU:C:2013:522; Case C-70/12 *Quinn Barlo Ltd and others v Commission*, ECLI:EU:C:2013:351.

²⁵⁴ Case C-98/14 *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v Magyar Állam*; Joined cases C-37/02 and C-38/02 *Di Lenardo and Dilexport v Ministero del Commercio con l'Estero*, ECLI:EU:C:2004:443.

These will be discussed below in two sections: first, those relating to the individual who claims the benefit of the expectation, and second, those concerning approach of the courts in upholding or denying any expectations.

II. The individual harbouring the legitimate expectation

In cases concerning the protection of legitimate expectations which come before the Court of Justice, it may be misleading to think of the “individual” as one part of the relationship generated by a legitimate expectation. In the cases discussed in this section, the entity which claims the expectation is rarely an individual – instead, it is far more likely to be an undertaking (for example, a business with cross-border operations) or, particularly in State aid cases, a Member State of the EU. Nevertheless, cases involving individuals do arise, for example in the civil service law context, one of the areas of EU law in which the jurisprudence on the protection of legitimate expectations initially developed.²⁵⁵ The term is retained here as a useful shorthand to distinguish those entities entertaining legitimate expectations from the EU institutions allegedly generating such expectations.

Regarding the individual harbouring the legitimate expectation, aspects of the Court’s jurisprudence on legitimate expectations which have seen some change are: one, the development of the concept of the prudent trader – the addition of subjective elements and more creative application of the concept; and two, a greater importance and relevance for an individual’s reliance on an assurance when determining whether an expectation has arisen.

1. The state of knowledge of the individual

As discussed above, the Court of Justice expects individuals to have a certain degree of knowledge concerning the situation in which the legitimate expectation arises, expressed by the label “prudent and circumspect trader”. This label arises in the classic ECJ statement on legitimate expectations, repeated time and again in the case law: “if a prudent and circumspect trader could have foreseen that the adoption of a Community measure is likely to affect his interests, he cannot plead that principle if the measure is adopted”.²⁵⁶

²⁵⁵ For a recent example, see Case C-496/08 P *Pilar Angé Serrano and Others v European Parliament*, ECLI:EU:C:2010:116. See also Case C-167/06 P *Ermioni Komninou and Others v Commission*, ECLI:EU:C:2007:633.

²⁵⁶ See, for example: Joined cases C-37/02 and 38/02 *Di Lenardo and Dilexport v Ministero del Commercio con l’Estero*, ECLI:EU:C:2004:443 at [70]; Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416 at [147].

Despite the frequency with which this statement arises in the case law, the Court has rarely given further indication of what knowledge the prudent trader is imbued with. However, in a small number of recent cases, the Court has given slightly more depth to the character of the prudent trader. These cases are scattered across the spectrum of legitimate expectations cases, both in terms of their subject matter and the type of representation which has given rise to the expectation. For example, the cases in point cover areas such as State aid,²⁵⁷ the internal market,²⁵⁸ and tax advantage schemes for undertakings supplying renewable energy.²⁵⁹ The types of representation involved range from the previous administrative practice of the Commission²⁶⁰ and promises to keep a scheme in place until a certain point in time²⁶¹ to previous Commission decisions in relation to similar situations.²⁶²

a) A more subjective approach?

In some of these recent cases, the tension between the objective and subjective elements in the European courts' application of the test of the prudent trader to the cases which come before it has come to the foreground. Where the courts have considered the state of knowledge of the individual in greater depth, they have been more willing to focus on the subjective knowledge at the base of the legitimate expectation claimed. This has been used in the traditional way, outlined above,²⁶³ to support a finding that it was foreseeable that an existing situation would change and thus excluding the application of the protection of the principle of legitimate expectations, in the cases *Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt*²⁶⁴ and *Mebrom NV v Commission*.²⁶⁵ The Court of First Instance went further in *Koninklijke Friesland Foods v Commission*,²⁶⁶ using the subjective knowledge of the individual as one reason to confirm the existence of a legitimate expectation.

²⁵⁷257 Case C-519/07 P *Commission v Koninklijke FrieslandCampina NV*, ECLI:EU:C:2009:556; Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416.

²⁵⁸258 Case C-373/07 P *Mebrom NV v Commission*, ECLI:EU:C:2009:218.

²⁵⁹259 Case C-201/08 *Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt*, ECLI:EU:C:2009:539.

²⁶⁰260 Case C-373/07 P *Mebrom NV v Commission*, ECLI:EU:C:2009:218.

²⁶¹261 Case C-201/08 *Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt*, ECLI:EU:C:2009:539.

²⁶²262 Case C-519/07 P *Commission v Koninklijke FrieslandCampina NV*, ECLI:EU:C:2009:556; Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416.

²⁶³263 See Section B.II.1. above.

²⁶⁴264 Case C-201/08 *Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt*, ECLI:EU:C:2009:539.

²⁶⁵265 Case C-373/07 P *Mebrom NV v Commission*, ECLI:EU:C:2009:218.

²⁶⁶266 Case T-348/03 *Koninklijke Friesland Foods v Commission*, ECLI:EU:T:2007:256, overturned on appeal to the Court of Justice as case C-519/07 P *Commission v Koninklijke FrieslandCampina NV*, ECLI:EU:C:2009:556.

Plantanol was a preliminary reference concerning the interpretation of a Directive on the use of biofuels and other renewable resources for use in transport, and whether changes made to a (German) national tax exemption scheme were in compliance with the Directive and with general principles of EU law. While the Court of Justice emphasised that it was for the national court to determine whether “a prudent and circumspect economic operator could have foreseen the possibility of such withdrawal in a context such as that of the main proceedings”, it proceeded to give detailed guidance to the national court in making this determination.²⁶⁷ The national court was obliged to take into account all the circumstances of the case, in order to determine whether the applicant in the specific case “had sufficient information to permit it to expect that the tax exemption scheme at issue in the main proceedings could be withdrawn before the date initially laid down for its expiry”. Although this approach still adopts an objective view of what information might be available to a prudent and circumspect operator, it imports a subjective element in the instruction to the national court to take into account the particular circumstance of the case, in particular whether on the facts the applicant had sufficient information available to it. Furthermore, the approach of the Court of Justice implicitly leaves open the possibility for the national court to affirm a legitimate expectation on the basis of a subjective appreciation of the knowledge of the individual. If the national court found that the applicant had not had sufficient information, the withdrawal of the tax exemption would not have been foreseeable.

The Court of First Instance has been willing to take the applicant’s characteristics into account to a greater extent in *Mebrom* and *Koninklijke Friesland Foods v Commission* to deny and confirm the existence of a legitimate expectation respectively. The applicant in *Mebrom* sought annulment of a Commission Decision refusing to allocate it an import quota for methyl bromide in 2005. The Decision resulted from a change in the administrative practice of the Commission, by which it no longer granted import quotas to actual importers, such as the applicant, but that fumigators, that is methyl bromide users, would apply for user licences, upon which basis importers would apply for corresponding import licences. In deciding that the applicant could not rely on any legitimate expectation allegedly generated by the Commission, the Court of First Instance first took an objective approach, considering what an “alert reader” would have inferred from a notice published by the Commission.²⁶⁸

²⁶⁷ Case C-201/08 *Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt*, ECLI:EU:C:2009:539 at [57].

²⁶⁸ Case C-373/07 P *Mebrom NV v Commission*, ECLI:EU:C:2009:218 at [34].

However, when considering what a prudent trader could have foreseen, the Court of First Instance adopted a subjective approach, making specific reference to the fact that the applicant had admitted that it expected changes to the import scheme, and should thus have sought specific information concerning these changes.²⁶⁹ The applicant's actual knowledge, rather than that of the hypothetical trader, thus informed the standard of foresight it was held to. The Court of Justice implicitly affirmed this approach, stating in support of its decision that the Commission had not breached the principle of protection of legitimate expectations that it was "undisputed that Mebrom ... expected changes to the applicable regime from 1 January 2005".²⁷⁰

Koninklijke Friesland Foods v Commission was a case concerning State aid implemented by the Netherlands for international financing activities, where transitional measures had been put in place to protect undertakings which were negatively affected by a Commission finding that the aid in question was incompatible with the common market. Due to the Commission's conduct in relation to a similar State aid scheme in Belgium,²⁷¹ it was accepted that those undertakings already authorised to benefit from the State aid scheme would not be required to repay the aid received, and could also take advantage of certain transitional measures while the aid scheme was being dismantled. The case was brought on behalf of those undertakings which had applied for authorisation under the State aid scheme, but had not yet had that authorisation granted. On the basis that once an application had been made, it was inevitably granted, those undertakings claimed that they too had a legitimate expectation that they would benefit from the State aid scheme.

The Court of First Instance agreed with the applicant that their legitimate expectations had been breached, taking their subjective knowledge into account. In doing so, it went against settled case law on legitimate expectations, holding that the initiation of the formal investigation procedure in relation to a suspected aid measure could not preclude the application of the principle of protection of legitimate expectations.²⁷² Given the circumstances of the case, in particular the Commission's earlier assessment of a previous scheme, the applicant could not have pre-judged the outcome of the formal investigation procedure. This conclusion was in direct contradiction with previous case law on State aid

²⁶⁹ Case C-373/07 P *Mebrom NV v Commission*, ECLI:EU:C:2009:218 at [40].

²⁷⁰ Case C-373/07 P *Mebrom NV v Commission*, ECLI:EU:C:2009:218 at [92].

²⁷¹ Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416.

²⁷² Case C-519/07 P *Commission v Koninklijke FrieslandCampina NV*, ECLI:EU:C:2009:556 at [31].

and legitimate expectations, where initiation of the formal investigation procedure is held to create a situation of uncertainty regarding the aid measure, and thus there can be no legitimate expectation that the aid will be found to be compatible with the Treaties.²⁷³ Indeed, the Court of Justice overturned the Court of First Instance's finding that a legitimate expectation had arisen and been breached, although it did not specifically reject the arguments of the Court of First Instance in relation to the formal investigation procedure. Nevertheless, in a subsequent case the Court of Justice reiterated its previous position that initiating the formal investigation procedure precluded a diligent economic operator from relying on the continuity of aid.²⁷⁴

Plantanol, *Mebrom* and *Koninklijke Friesland Foods* could be the early signs of a greater willingness to take subjective factors into account when determining the existence of a legitimate expectation, perhaps through the influence of European jurisdictions such as the English one where such factors are relevant for how a legitimate expectation is to be understood. In the end, a fusion between the two approaches would result in the Court considering what a reasonable person in the applicant's position or line of business would have thought, bearing in mind the particular information and knowledge which the applicant (as proven on the facts) is known to have.

b) A wider relevance for the concept of the "prudent trader"

Another aspect to note about the development of the concept of the "prudent trader" is the possibility that it might have a wider application than simply when determining whether the conduct allegedly in breach of the legitimate expectation was foreseeable. This is evident in one case in particular: *Belgium and Forum 187 v Commission*.²⁷⁵

Belgium and Forum 187 was a case involving almost exactly the same fact pattern as *Koninklijke Friesland Foods*, in which a tax scheme that certain co-ordination centres had benefited from was found by the Commission to constitute unlawful State aid, but due to two previous decisions that the aid was lawful, the applicants argued that the principle of legitimate expectations prevented it from ordering recovery from the co-ordination centres. The Court applied the concept of the prudent trader in a new way to support its finding that a legitimate expectation had indeed arisen on the facts, specifically stating that since the regime

²⁷³ Case C-91/01 *Italy v Commission*, ECLI:EU:C:2004:244 at [66].

²⁷⁴ Case C-129/12 *Magdeburger Mühlenwerke GmbH v Finanzamt Magdeburg*, ECLI:EU:C:2013:200 at [47].

²⁷⁵ Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416.

under scrutiny was “a tax regime under which authorisations for a period of 10 years are granted, which calls for measures of an accounting nature and financial and economic decisions which cannot be taken in such a brief time by a prudent economic operator”, the time between the decision initiating the formal investigation procedure for suspected State aid measures and the Commission’s decision finding unlawful State aid (8 months) was insufficient.²⁷⁶

The prudent trader thus becomes relevant because of the care such a person would take in their financial decision-making and planning, affecting the length of time which the Commission would have to leave after the initiation of the formal procedure in order to comply with the principle of protection of legitimate expectations, rather than for their ability to foresee a Commission finding of unlawful State aid. This wider application of the concept of the prudent trader is also a rare indication of a more lenient approach of the Courts to the position of the individual in a legitimate expectation relationship. The knowledge and expertise of the hypothetical individual is used to justify a legitimate expectation, rather than deny it.

2. The role of an individual’s reliance in the test for legitimate expectations

As explained above, an individual’s reliance on assurances made by Union institutions has played a much lesser role in the development of the Luxembourg courts’ jurisprudence on legitimate expectations than it has done in the protection of such expectations by English courts.²⁷⁷ Recent case law of the Court of Justice however indicates a growing role for reliance as a relevant consideration when determining the existence of a legitimate expectation, as from time to time arguments based on reliance are made by the parties and considered by the Court. Nevertheless, the way in which reliance is understood by the Court of Justice is subtly different to the way in which the English courts conceive it.

a) The concept of reliance applied by the Court of Justice

Where the Court of Justice has considered reliance to be a relevant factor, it has applied its particular concept of reliance to the case at hand. This is most clearly illustrated in *Commission v Koninklijke FrieslandCampina NV*,²⁷⁸ the Court of Justice’s decision on appeal of *Koninklijke Friesland Foods* discussed above. There, the Court found that the

²⁷⁶ Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416 at [162].

²⁷⁷ See Sections B.I.3. and C.II.2.b) above.

²⁷⁸ Case C-519/07 P *Commission v Koninklijke FrieslandCampina NV*, ECLI:EU:C:2009:556.

distinguishing factor between the two groups of undertakings (some already authorised under the State aid scheme and others having simply applied for such authorisation) was the fact that the former “suffered losses owing to investments made and commitments undertaken in the past, at a time when the legality of the tax scheme in question had not been in doubt”, while the latter had simply relied on the fact that they would be able to benefit in the future from the advantages that authorisation would bring.²⁷⁹ In order to benefit from a legitimate expectation, the applicants would have had to demonstrate that they had suffered actual loss as a result of reliance on a scheme they considered to be legal. This is a different approach to the concept of reliance which has been adopted in certain decisions of the English courts. For example, in *Bibi*, Lord Justice Schiemann giving the judgment of the Court emphasised that reliance need not involve concrete detriment, or indeed a change in position of the individuals harbouring the legitimate expectation, but could be found, for example, in the “prolonged disappointment and “potential detriment [caused by] the deflection of the possibility” that their expectation would be fulfilled.²⁸⁰

b) The relevance of reliance for the existence of a legitimate expectation

In recent years, the concept of reliance has been given a more prominent place in the exercise undertaken by the Court of Justice when determining whether a legitimate expectation has arisen. This is evident from a number of cases, most notably in *Koninklijke FrieslandCampina*, discussed above. In that case the Court used the concept of reliance to distinguish the case before them from *Belgium and Forum 187*, a case in which on essentially the same facts, undertakings who had applied for an authorisation but not yet been granted it at the time when the State aid was found incompatible with the Treaty did benefit from a legitimate expectation, and were not required to pay back the aid. The Court noted that in *Belgium and Forum 187* it had taken account of the significant investments and long-term investments made by undertakings, and compared this with the position of the applicant *Koninklijke FrieslandCampina* which had not provided evidence of investments made or commitments already undertaken. Rather than alleging current reliance, the applicant in *Koninklijke FrieslandCampina* appeared to challenge the fact of not being able to benefit in the future, from the advantage of authorisation.²⁸¹ The specific difference between the two

²⁷⁹ Case C-519/07 P *Commission v Koninklijke FrieslandCampina NV*, ECLI:EU:C:2009:556 at [94].

²⁸⁰ *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [51] to [55].

²⁸¹ Case C-519/07 P *Commission of the European Communities v Koninklijke FrieslandCampina NV*, ECLI:EU:C:2009:556 at [91] to [93].

cases, which led to the Court's rejection of the claim of legitimate expectation in *Koninklijke FrieslandCampina*, was that the undertakings in *Belgium and Forum 187* had made applications for renewal of authorisations under the scheme, while *Koninklijke FrieslandCampina* had made an initial application for authorisation. In the former case the individual undertaking had already obtained some benefit under the scheme.

An individual's reliance on their expectation was also given a prominent place in the Court's reasoning in *Plantanol*. While emphasising that it was the role of the national court to determine whether the implementing legislation complied with the general principles of legal certainty and legitimate expectations,²⁸² the Court gave detailed guidance to the referring court on how to carry out this exercise. To this end the Court considered it a relevant factor for the national court to take into account that a trader had made costly investments on the basis of a pre-existing tax exemption scheme.²⁸³

In other cases, reliance has played a more implicit role in the Court's reasoning, as part of an approach which focuses on the consequences of breaching possible expectations. For example, in *Traum EOOD v Direktor na Direktsia «Obzhalvane i danachno-osiguritelna praktika» Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* and *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening v Minister van Sociale Zaken en Werkgelegenheid* the Court held that where changes to the rules are "liable to entail financial consequences" the principle of protection of legitimate expectations warrants stricter application.²⁸⁴

These cases show a greater willingness of the Court to uphold a legitimate expectation (or subject the institution under review to closer scrutiny) where it appears that an undertaking has suffered detriment in reliance on a legitimate expectation. The Court has not made it explicit in its reasoning whether detriment resulting from reliance is enough to ground a finding of a legitimate expectation in the absence of precise assurances, although its emphasis on the need to apply the principle of protection of legitimate expectations strictly in cases

²⁸² Case C-201/08 *Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt*, ECLI:EU:C:2009:539 at [44] to [45].

²⁸³ Case C-201/08 *Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt*, ECLI:EU:C:2009:539 at [52]. This approach was affirmed in case C-98/14 *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v Magyar Állam* at [87].

²⁸⁴ Case C-492/13 *Traum EOOD v Direktor na Direktsia «Obzhalvane i danachno-osiguritelna praktika» Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* at [29]; Joined cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening v Minister van Sociale Zaken en Werkgelegenheid*, ECLI:EU:C:2008:165 at [52].

where negative financial consequences could otherwise ensue would imply that in such cases other requirements for establishing a legitimate expectation should be relaxed. Previously, the Court of Justice has been resistant to arguments based on detrimental reliance suffered by individuals asserting legitimate expectations. In *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1* it rejected the argument that adverse effects on the finances of undertakings of a Commission Decision finding State aid incompatible with the common market should prevent recovery of the aid they had been granted, as such an approach would undermine the effectiveness of the State aid regime.²⁸⁵ Similarly, in *Spain v Council* and *Dansk Rørindustri A/S v Commission* the Court cited arguments raised by the parties based on the reliance they claimed to have placed on the pre-existing legal situation, but implicitly rejected them, by deciding the cases, respectively, on the basis of foreseeability of legislative change and lack of a precise assurance.²⁸⁶ Given this context, the Court's reasoning in *Koninklijke FrieslandCampina* and *Plantanol* may have been a result of a desire to reach a particular outcome. In *Koninklijke FrieslandCampina* the Court was clearly keen to limit the effect of its decision in *Belgium and Forum 187* on future cases, to restrict the situations in which the Commission would be prevented from ordering recovery of unlawfully disbursed State aid. In *Plantanol*, the focus on reliance may have been the result of the context in which the legitimate expectation claim arose, namely a preliminary reference procedure, and of the backdrop of the arguments which had been raised in the main proceedings before the national court.

III. The Court's approach to the protection of legitimate expectations

The Court's approach to the protection of legitimate expectations has generally remained the same, even in its more recent jurisprudence – in particular, it continues to apply its test for finding a legitimate expectation strictly. However, some recent cases show a growing tendency for the Court of Justice to recognise procedural as well as substantive aspects of the principle of protection of legitimate expectations.

As discussed above, unlike the course of its development in the jurisprudence of the English courts, the principle of protection of legitimate expectations as applied by the European

²⁸⁵ Case C-148/04 *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1*, ECLI:EU:C:2005:774 at [110].

²⁸⁶ Case C-310/04 *Spain v Council*, ECLI:EU:C:2006:521 at [80] and [84]; Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri A/S v Commission*, ECLI:EU:C:2005:408 at [162], [186] and [188].

courts has not distinguished between the procedural and substantive legitimate expectations, whether in terms of the content of the expectation or the way in which it is protected. While they often arise in the same cases, procedural rights are given quite separate treatment from any claimed legitimate expectation.²⁸⁷ However, an expectation of a particular procedure, and particularly the protection of a substantive legitimate expectation by according additional procedural rights, have arisen to some extent in the recent case law of the Court of Justice, particularly in the contexts of recovery of sums unlawfully paid, State aid, and competition law.

1. A “legitimate expectation of a procedural nature”

In one recent case, upheld on appeal to the Court of Justice, the Court of First Instance arguably accepted that a legitimate expectation that a particular procedure will be followed can arise under EU law. *Ferriere Nord SpA v Commission*²⁸⁸ was an application for annulment of a Commission decision classifying aid granted by Italy to the applicants as incompatible with the Treaties on the basis that it was being granted primarily for economic, rather than environmental, purposes. The case was complicated by the fact that different aspects of Ferriere Nord’s business fell within the Treaties of the European Coal and Steel Community and the European Community; although separate notifications had been made under each Treaty, the applicant had not kept separate accounts as to the parts of its business covered by the different Treaty regimes.

One of the grounds on which Ferriere Nord challenged the Commission’s decision was that it “failed to provide the protection which ought to be given to a legitimate expectation of a procedural nature”. Since the Commission had not asked the applicant or the Italian authorities, at the initiation of the formal investigation procedure, to provide evidence establishing the environmental objective of the aid, it was argued that the Commission should not be able to draw consequences from the fact that no such evidence had been provided.²⁸⁹ This argument was accepted by the Court of First Instance, which stated that the Commission must take account of any legitimate expectations generated by what was stated in the decision opening the formal investigation procedure for State aid. However, on the facts, the opening

²⁸⁷ See, for example, Joined cases C-630/11 P to C-633/11 P *HGA Srl and others v Commission*, ECLI:EU:C:2013:387 at [52] to [53] and [129] to [137].

²⁸⁸ Case T-176/01 *Ferriere Nord SpA v Commission*, ECLI:EU:T:2004:336 upheld on appeal to the Court of Justice at Case C-49/05 P *Ferriere Nord SpA v Commission*, ECLI:EU:C:2008:259.

²⁸⁹ Case T-176/01 *Ferriere Nord SpA v Commission*, ECLI:EU:T:2004:336 at [83].

procedure did give a “sufficiently clear and precise” indication to the Italian authorities and the applicant that they should “provide all the relevant evidence capable of showing that the investment had a principally environmental objective.”²⁹⁰

Craig has used this case as a basis for stating that EU law does recognise procedural legitimate expectations.²⁹¹ However, he is not able to cite any further evidence for this view. It is true that when it refers to a “legitimate expectation of a procedural nature” the Court of First Instance refers to a previous case, *ESF Elbe-Stahlwerke Feralpi v Commission*,²⁹² which provides much stronger support for the recognition of procedural legitimate expectations in EU law. In that case the Court of First Instance found that the Commission decision opening the procedure for the investigation of a possible State aid measure indicated that the Commission would examine what portion of the alleged aid fell outside of the scope of the ECSC Treaty, but did not clearly specify that the parties would have to communicate evidence in this regard. The parties were thus entitled to expect that the Commission would request them to provide such evidence before making its decision on the compatibility of the aid with the Treaties.²⁹³ The fact that the Commission failed either to carry out the examination it had described or make any request for more information was enough to dispose of the case.²⁹⁴

Although *ESF Elbe-Stahlwerke Feralpi* was applied in *Ferriere Nord*, in the latter case the Court of First Instance dismissed the possibility of any procedural legitimate expectation arising on the facts. Since then, the possibility of a “legitimate expectation of a procedural nature” has not arisen in the case law of the EU courts,²⁹⁵ and in any case it has never been discussed by the Court of Justice.²⁹⁶ This indicates a negligible role for procedural legitimate expectations to play in EU law. It may be that such expectations only become relevant in State aid cases, where once a formal investigation procedure is opened the opportunities for substantive legitimate expectations may be few, as a prudent trader is not entitled to form a

²⁹⁰ Case T-176/01 *Ferriere Nord SpA v Commission*, ECLI:EU:T:2004:336 at [88] to [91].

²⁹¹ Craig, *EU Administrative Law* (2nd edition, 2012) p 582.

²⁹² Case T-6/99 *ESF Elbe-Stahlwerke Feralpi v Commission*, ECLI:EU:T:2001:145.

²⁹³ Case T-6/99 *ESF Elbe-Stahlwerke Feralpi v Commission*, ECLI:EU:T:2001:145 at [126] to [128].

²⁹⁴ Case T-6/99 *ESF Elbe-Stahlwerke Feralpi v Commission*, ECLI:EU:T:2001:145 at [130] to [135].

²⁹⁵ A search for “legitimate expectation of a procedural nature” on Eur-LEX only brings up the two cases mentioned above.

²⁹⁶ On appeal, the Court of Justice rejected the pleas on legitimate expectations in Case C-49/05 P *Ferriere Nord SpA v Commission*, ECLI:EU:C:2008:259 on the basis of a lack of jurisdiction, since these repeated questions of fact that were properly for the Court of First Instance to determine.

legitimate expectation that the aid will be compatible with the common market. Since the procedure is so strict, it may be necessary to offer individuals alternative protection to ensure that aid assessment is carried out fairly and with due respect for procedural rights. A further interesting point to note, in contrast to the operation of the protection of procedural legitimate expectations in English law, is that in *ESF Elbe-Stahlwerke Feralpi* the procedural expectation was upheld by annulling the challenged measure – that is, through the application of a substantive remedy.

2. Procedural protection of (substantive) legitimate expectations

The recent case law of the Court of Justice also indicates a growing willingness to protect legitimate expectations via procedural rather than substantive methods, often through the mechanism of transitional measures. These can be considered “procedural” in the sense that they offer the individual who benefits from them a guarantee as to the procedure by which the decision in breach of their expectation will be taken, namely that such a decision will not be taken without providing for some sort of grace period. In other cases, the Court of Justice has also recognised a wider relevance for procedural guarantees in giving effect to legitimate expectations.

Procedural protection of legitimate expectations through the application of transitional measures can either occur at the stage where the Court considers whether a legitimate expectation has arisen, or when the Court determines what relief should be available for breach of a legitimate expectation. The first type of case is exemplified by a line of case law concerning the retroactive restriction of limitation periods, particularly in the context of taxes levied contrary to EU law.²⁹⁷ Here, the Court has held that a legitimate expectation arises automatically, by operation of law, in conjunction with the EU law principles of effectiveness and legal certainty, in order to ensure an individual’s directly effective rights under EU law are not unduly restricted. However, a national authority can ensure compliance with those principles where it provides for a transitional period, after the announcement of the

²⁹⁷ Case C-228/96, *Aprile v Amministrazione delle Finanze dello Stato*, ECLI:EU:C:1998:544; Case C-62/00 *Marks & Spencer v Her Majesty’s Revenue and Customs*, ECLI:EU:C:2002:435; Case C-255/00 *Grundig Italiana SpA v Ministero delle Finanze*, ECLI:EU:C:2002:525; Case C-362/12 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners*, EU:C:2013:834.

retroactive curtailment of the limitation period.²⁹⁸ Any duty to take into account legitimate expectations is thus discharged by the application of a transitional period.

An example of the second type of case is *Belgium and Forum 187*. This is a rare case in which the Court of Justice was willing to accept that a legitimate expectation had arisen. One of the justifications for the finding of a legitimate expectation was the short period of time between the decision to initiate the formal investigation procedure in relation to a possible State aid measure and the decision that the aid was incompatible with the Treaty.²⁹⁹ This lack of time for individuals to arrange their affairs led to a finding that the “contested decision must be annulled in so far as it does not lay down transitional measures”.³⁰⁰ Once transitional measures were put in place (by the Commission) the decision on incompatibility would stand.

Other cases have raised the possibility of wider procedural protection of legitimate expectations. *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v Magyar Állam* was a preliminary reference procedure in which the Hungarian referring court raised a number of questions concerning the compatibility of taxes on slot machines and gambling which had been increased without the introduction of a transitional period.³⁰¹ Although on the specific facts of the case, the relevant procedural protection claimed was a transitional or “adaptation” period, it was implicit in the Court’s statement that “a trader cannot place reliance on there being no legislative amendment whatever, but can only call into question the arrangements for the implementation of such an amendment” that wider procedural protection might be available in other circumstances.³⁰²

An example of such wider protection has occurred in the context of the setting of fines for breaches of competition law. In *Quinn Barlo Ltd and others v Commission*,³⁰³ the Court referred to its case law on the duty of the Commission to follow guidelines or rules of conduct that it has previously published. Where the Commission chooses to depart from its published guidelines in individual cases, in order to comply with the principle of protection of legitimate expectations it must “give reasons that are compatible with the principle of equal treatment”. However, the Court defined the scope of such procedural protection rather

²⁹⁸ Case C-62/00 *Marks & Spencer v Her Majesty’s Revenue and Customs*, ECLI:EU:C:2002:435 at [36], [44] to [46].

²⁹⁹ Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416 at [162].

³⁰⁰ Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416 at [174].

³⁰¹ Case C-98/14 *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v Magyar Állam* at [22].

³⁰² Case C-98/14 *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v Magyar Állam* at [78].

³⁰³ Case C-70/12 *Quinn Barlo Ltd and others v Commission*, ECLI:EU:C:2013:351.

narrowly – the Commission’s self-imposed guidelines could not bind the Courts of the European Union in the same way where they exercised their unlimited jurisdiction to substitute their own appraisal of the level of the fines imposed for the Commission’s calculations.³⁰⁴

The possibility of procedural protection was also raised by the applicants in argument in another case concerning fines imposed for infringement of EU competition law, *Dansk Rørindustri A/S v Commission*.³⁰⁵ They submitted that at the Commission should at least have warned them of a change in the way it calculated those fines, namely its move from following a “consistent and long-standing practice” to applying the calculated method set out in new guidelines adopted both after the infringements and after the hearings held in relation to those infringements.³⁰⁶ This argument was however rejected by the Court of Justice, which relied on the fact that the Commission has a discretion to raise the general level of fines at any time, if necessary to ensure the implementation of EU competition policy to deny the existence of a legitimate expectation.³⁰⁷

In *Dansk Rørindustri* the applicants relied on the case of *Ferriere San Carlo v Commission*,³⁰⁸ in which it had found that there was a duty incumbent on the Commission to warn the undertaking in question that it was discontinuing its practice of tolerating deliveries in excess of import quotas, where that practice had been ongoing for two years. The Court of Justice held that such a duty could not arise on the facts of *Dansk Rørindustri* “because of the specific context of the Commission’s supervisory powers in competition law”,³⁰⁹ implying that a duty to warn individuals of changes to long-standing practices could still apply in relation to other areas of law. Since then the Court has rejected an argument raised in *Mebrom* that the Commission should have expressly warned undertakings of a change to the licensing system for the importation of methyl bromide, holding that the change was foreseeable in the light of a previously published Regulation and that in any case the

³⁰⁴ Case C-70/12 *Quinn Barlo Ltd and others v Commission*, ECLI:EU:C:2013:351 at [53].

³⁰⁵ Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri A/S v Commission*, ECLI:EU:C:2005:408.

³⁰⁶ Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri A/S v Commission*, ECLI:EU:C:2005:408 at [157] to [161].

³⁰⁷ Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri A/S v Commission*, ECLI:EU:C:2005:408 at [171] to [173] and [191].

³⁰⁸ Case 344/85 *Ferriere San Carlo v Commission*, ECLI:EU:C:1987:486.

³⁰⁹ Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri A/S v Commission*, ECLI:EU:C:2005:408 at [174] to [175].

applicants themselves expected changes.³¹⁰ This leaves open the possibility that a duty to warn could arise in future situations such as that in *Ferriere San Carlo*, where the change in administrative practice came as a complete surprise to the affected undertaking.

The developing jurisprudence on procedural protection could indicate an increased flexibility in the approach of the Court of Justice to the protection of legitimate expectations. As yet such protection operates in narrow confines in relation to specific issues raised before the Court of Justice. However, the Court could use its statement in *Berlington Hungary* that a trader might be able to “call into question the arrangements for the implementation of [a legislative amendment]” as a springboard for the wider applicability of procedural protection for legitimate expectations.³¹¹

³¹⁰ Case C-373/07 P *Mebrom NV v Commission*, ECLI:EU:C:2009:218 at [90] to [93].

³¹¹ Case C-98/14 *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v Magyar Állam* at [78].

E. Conclusions

Recent cases of the courts of the European Union and England and Wales show that the protection of legitimate expectations in both jurisdiction is still developing. As to be expected, this development is more marked in relation to the principle of protection of legitimate expectations in English law, which was previously characterised by a reluctance to substantively review administrative decision-making, and where the courts were more tentative in applying that principle in early case law.

On the level of discourse, it is clear that the English and European courts chose different ways to express what they are doing when they protect legitimate expectations. Terms such as fairness and abuse of power employed by the English courts have a more individual-centric focus, whereas the language adopted by the European Union indicates a much more economics-based approach. To some extent, this language is translated into action. In comparison to the experience before the Court of Justice, an individual claiming a legitimate expectation in English law will find it easier to establish a legitimate expectation. This is in part due to the fact that considerations of fairness can operate to remove or make less strict some of the otherwise mandatory requirements for establishing a legitimate expectation.

Nevertheless, an underlying theme of the recent case law, when comparisons are drawn between the two jurisdictions, is that jurisprudential change and development is leading to greater similarities in the protection of legitimate expectations by both court systems. Some of these changes will be discussed in more detail below, with specific reference to the findings made above. This convergence is not just a result of the reception of EU law by the English courts, but also due to changes experienced at EU level – perhaps something of a middle way between the protection of legitimate expectations as originally conceived in both jurisdictions is on the horizon. However, the analysis also indicates that courts in both jurisdictions are wary of external influence. Where English courts are faced with cases involving EU law, they rarely explicitly apply the test for legitimate expectations, instead relying on English case law as precedent. This inevitably leads to factors such as reliance being taken into account, sometimes determinatively for the outcome of the case, which would have much less relevance under the test in EU law. In the cases where English courts do recognise an obligation to apply EU law, this is done in conjunction with the test in national law – the implication is that the challenged administrative action can and should be assessed against the principle of protection of legitimate expectations as it has been

developed in both legal systems. This approach conflicts with that adopted by the Court of Justice, which has held (for example in the case *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening*) that where conduct falls within the scope of EU law, there is no room for the application of a national principle of protection of legitimate expectations.³¹²

I. State of knowledge of the individual

The case law on the state of knowledge of the individual claiming a legitimate expectation has, in the English courts, been characterised by a consideration of both objective and subjective factors – what a person is entitled to or should expect, and what they actually expected. This can be contrasted with the almost exclusively objective approach adopted in cases heard by the European courts. However, recent case law indicates greater convergence in the courts approach. In some cases, notably *Davies*, English courts are adopting a more objective approach, applying a standard of a hypothetical individual rather than taking into account the particular knowledge of the applicant before them. On the other side, in cases such as *Mebrom* and *Plantanol* European courts have been more willing to take into account factors which are specific to the individual or undertaking in question.

Regarding the relevance of an individual's reliance on an assurance made by a public authority, greater similarity between the approaches of the English and European courts is also evident. Moving away from the original position where reliance was considered an essential element for establishing a claim of legitimate expectation before an English court, and had no role to play in European law, arguments based on reliance and financial loss are now taken into account by European courts, while some English judges have suggested that reliance might not be relevant in certain circumstances. However, there are important differences between what constitutes reliance for the protection of legitimate expectations in English and European law, with the European courts adopting a more “concrete” approach and requiring financial detriment. This might simply be a consequence of the nature of the claimants appearing before the Court of Justice, who will usually be traders and businesses. Similarly, the argument in *Abbassi* that a person who does not know of an assurance cannot rely on it, and can therefore not benefit from a legitimate expectation, contrasts with the approach of the European courts to legitimate expectations in cases such as *Test Claimants* where the principle of effectiveness demands that expectations are given effect to – here an

³¹² Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening v Minister van Sociale Zaken en Werkgelegenheid*, ECLI:EU:C:2008:165 at [53] and [57].

expectation arises by operation of law, rather than any special facts pertaining to the interaction between an individual and a public authority.

II. Relief

A growing convergence can also be seen in the relief offered where a breach of legitimate expectation is confirmed by the courts. The English remedial jurisdiction has been characterised by a high degree of flexibility, which is now increasingly evident in the jurisprudence of the European courts as well. A particular example is offering procedural protection to substantive legitimate expectations in the form of transitional measures in cases such as *Test Claimants* and *Marks and Spencer*. Nevertheless, while the European courts have expressed their willingness to offer procedural protection, they have not gone quite as far as their English counterparts in actually doing so. In *Berlington Hungary*, although the Court of Justice held that the procedure for policy change could be challenged, it did not find a precise and specific assurance on the facts. Unlike the approach of the English courts, as exemplified in cases such as *Luton*, the European courts have not been willing to modify the standard of review or lower the hurdle for establishing a legitimate expectation where the expectation is of a procedural nature or will be protected by procedural means. This may be due to the fact that as a general principle of European law, the principle of protection of legitimate expectations can be used to challenge and annul Union legislation, a consequence which arises automatically where a legitimate expectation is held to be infringed.

Another important difference in the remedial powers of English and EU courts is the fact that a *Francovich* claim for damages will not result simply from a finding of a European court that a legitimate expectation has been infringed. An individual, or a Union institution, will have to bring that claim before the court, as the Commission did in the recent case *Commission v UK*. This fact restricts the European courts' ability to remedy any damage caused by a legitimate expectation. While an English court is free to apply a mandatory or injunctive order to a public authority to protect the interest to which the expectation relates, the European court is dependent on whatever claim is brought by the individual challenging the breach of legitimate expectation.

III. Concluding thoughts

The differences which remain in place between the way legitimate expectations are protected in English and EU law are a factor of both the historical beginnings and development of that protection within each jurisdiction and the wider context of the administrative laws in which

that protection developed. These factors remain relevant to how legitimate expectations are protected in both jurisdictions today. In the context of these differences, it is surprising that there is any convergence between the different courts' approaches at all. The fact that such convergence does exist suggests a high level of judicial dialogue and mutual recognition.

Bibliography

Philippe Boymans and Mariolina Eliantonio, “Europeanization of Legal Principles? The Influence of the CJEU’S Case Law on the Principle of Legitimate Expectations in the Netherlands and the United Kingdom” (2013) 19(4) *European Public Law* 715.

Sylvia Calmes, *Du principe de la confiance légitime en droits allemande, communautaire et français*, Dalloz (2001).

Paul Craig, *Administrative Law*, Sweet & Maxwell (6th edition, 2012).

Paul Craig, *EU Administrative Law*, Oxford University Press (2nd edition, 2012).

Paul Craig, “Legitimate Expectations: A Conceptual Analysis” [1992] *Law Quarterly Review* 79.

Paul Craig and Soren Schonberg, “Substantive Legitimate Expectations after *Coughlan*” [2000] *Public Law* 684.

Crones, *Selbstbindungen der Verwaltung im Europäischen Gemeinschaftsrecht*, Nomos (1996).

Dérén and Lindholm, “Three Ideas: The Scope of EU Law Protecting Against Discrimination” in Dérén and Lindholm (eds), *Volume in Honor of Pär Hallström*, Iustus (2012).

Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, MacMillan (10th edition, 1959) (first published 1885).

Mark Elliot, “Legitimate Expectation, Consistency and Abuse of Power: the Rashid Case” [2005] *Judicial Review* 281.

Christopher Forsyth, “Legitimate Expectations Revisited” [2011] *Judicial Review* 429.

Hofmann, Rowe and Türk, *Administrative Law and Policy of the European Union*, Oxford University Press (2011).

Jean-Paul Jacqué, *Droit institutionnel de L’Union Européenne*, Dalloz (6th edition, 2010).

Christopher Knight, “Expectations in transition: recent developments in legitimate expectations” [2009] *Public Law* 15.

Soren Schonberg, *Legitimate Expectations in Administrative Law*, Oxford University Press (2000).

Kyrrill-Alexander Schwarz, *Vertrauensschutz als Verfassungsprinzip*, Nomos (2002).

Jürgen Schwarze, *European Administrative Law*, Sweet & Maxwell (Revised 1st edition, 2006).

Jürgen Schwarze, “The Convergence of the Administrative Laws of the EU Member States” in Snyder (ed), *The Europeanisation of Law*, Hart (2000).

Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law*, Hart (2000).

Takis Tridimas, *General Principles of EU Law*, Oxford University Press (2nd edition, 2006).

Thomas von Danwitz, *Europäisches Verwaltungsrecht*, Springer (2008).

Jack Watson, “Clarity and Ambiguity: a new approach to the test of legitimacy in the law of legitimate expectations” [2010] *Legal Studies* 633.

Table of cases heard by the English courts (in alphabetical order)

Associated Provincial Picturehouses Ltd v Wednesbury Corporation [1948] 1 KB 233 (Court of Appeal).

Attorney-General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629 (Privy Council).

Azam & Co v Legal Services Commission [2011] EWCA Civ 1194.

Azam & Co v Legal Services Commission [2010] EWHC 960 (Ch).

Begum and others v Returning Officer for London Borough of Tower Hamlets [2006] EWCA Civ 733.

Corkteck Ltd v Revenue and Customs Commissioners [2009] EWHC 785 (Admin).

Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government [2012] EWCA Civ 379.

Deutsche Morgan Grenfell v Inland Revenue Commissioners [2003] EWHC 1779 (Ch).

Fleming (trading as Bodycraft) v Revenue and Customs Commissioners [2008] UKHL 2.

Fleming (trading as Bodycraft) v Her Majesty's Revenue and Customs [2006] EWCA Civ 70.

Henry Boot Homes v Bassetlaw District Council [2002] EWCA Civ 983.

Intervention Board for Agricultural Produce v Highland Meats Ltd [2001] All ER (D) 238 (Mar) (Commercial Court).

Office of Fair Trading v Somerfield Stores Limited [2014] EWCA Civ 400.

Paponette v Attorney General of Trinidad and Tobago [2010] UKPC 32.

R v Inland Revenue ex parte Unilever plc [1996] STC 681 (Court of Appeal).

R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association [1972] 2 QB 299 (Court of Appeal).

R v Ministry of Agriculture, Fisheries and Food ex parte First City Trading [1997] 1 CMLR 250 (High Court, Queen's Bench Division).

R v Ministry of Agriculture, Fisheries and Food ex parte Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714 (High Court, Queen's Bench Division).

R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213 (Court of Appeal).

R v Secretary of State for Education and Employment, ex parte Begbie [2000] 1 WLR 1115 (Court of Appeal).

R v Secretary of State for the Home Department, ex parte Hargreaves [1997] 1 WLR 906 (Court of Appeal).

R v Secretary of State for Transport, ex parte Richmond London Borough Council [1994] 1 WLR 74 (High Court, Queen's Bench Division).

R (Abbassi and others) v Secretary of State for the Home Department [2011] EWCA Civ 814.

R (Abdi and Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363.

R (Actis SA) v Secretary of State for Communities and Local Government [2007] EWHC 2417 (Admin).

R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence [2003] EWCA Civ 473.

R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2008] UKHL 61.

R (BAPIO Action Ltd) v Secretary of State for the Home Department [2008] UKHL 27.

R (Barker) v Waverley Borough Council [2001] EWCA Civ 566.

R (Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755.

R (Bibi) v Newham London Borough Council [2001] EWCA Civ 607.

R (Birks) v Commissioner of Police of the Metropolis [2014] EWHC 3041 (Admin).

R (Bloggs 61) v Secretary of State for the Home Department [2003] EWCA Civ 686.

R (Capital Care Services) v Secretary of State for the Home Department [2012] EWCA Civ 1151.

R (Davies and another) v Revenue and Customs Commissioners [2011] UKSC 47.

R (Energie EST LDA) v Secretary of State for Energy and Climate Change [2013] EWHC 3026 (Admin).

R (Godfrey) v London Borough of Southwark [2012] EWCA Civ 500.

R (Huitson) v Revenue and Customs Commissioners [2011] EWCA Civ 893.

R (Kambadzi) v Secretary of State for the Home Department [2011] UKSC 23.

R (Luton Borough Council) v Secretary of State for Education [2011] EWHC 217 (Admin).

R (Majed) v London Borough of Camden [2009] EWCA Civ 1029.

R (Naik) v Secretary of State for the Home Department [2011] EWCA Civ 1546.

R (Patel) v General Medical Council [2013] EWCA Civ 327.

R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472.

R (Sagemaster Plc) v Commissioners of Customs and Excise [2004] EWCA Civ 25.

R (Sovio Wines Ltd) v Food Standards Agency (Wine Standards Branch) [2009] EWHC 383 (Admin).

Rashid v Secretary of State for the Home Department [2005] EWCA Civ 744.

Rayner Thomas v Carmarthenshire Council [2013] EWHC 783 (Admin).

Rowland v Environmental Agency [2003] EWCA Civ 1885.

Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149 (Court of Appeal).

Solar Century Holdings Ltd v Secretary of State for Energy and Climate Change [2014] EWHC 3677 (Admin).

Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2012] UKSC 19.

United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs [2013] EWHC 1959 (Admin).

Westminster City Council v The Albert Court Residents' Association [2011] EWCA Civ 430.

Table of cases heard by the EU courts (in case number order)

Case 14/61 *Koninklijke Nederlandsche Hoogovens en Staalfabrieken NV v High Authority of the European Coal and Steel Community*, ECLI:EU:C:1962:28.

Case 111/63 *Lemmerz-Werke GmbH v High Authority of the ECSC*, ECLI:EU:C:1965:76.

Case 74/74 *CNTA SA v Commission*, ECLI:EU:C:1976:84.

Case 78/77 *Lühns v Hauptzollamt Hamburg-Jonas*, ECLI:EU:C:1978:20.

Case 188/82 *Thyssen AG v Commission*, ECLI:EU:C:1983:329.

Case 344/85 *Ferriere San Carlo v Commission*, ECLI:EU:C:1987:486.

Case C-152/88 *Sofrimport SARL v Commission*, ECLI:EU:C:1990:259.

Case C-350/88 *Société française des Biscuits Delacre e.a. v Commission of the European Communities*, ECLI:EU:C:1990:71.

Case C-80/89 *Erwin Behn Verpackungsbedarf GmbH v Hauptzollamt Itzehoe*, ECLI:EU:C:1990:269.

Case C-260/89 *ERT v DEP*, ECLI:EU:C:1991:254.

Case C-24/95 *Land Rheinland-Pfalz v Alcan Deutschland*, ECLI:EU:C:1997:163.

Case C-183/95 *Affish BV v Rijksdienst voor de Keuring van Vee en Vlees*, ECLI:EU:C:1997:373.

Case C-228/96, *Aprile v Amministrazione delle Finanze dello Stato*, ECLI:EU:C:1998:544.

Case T-6/99 *ESF Elbe-Stahlwerke Feralpi v Commission*, ECLI:EU:T:2001:145.

Case C-62/00 *Marks & Spencer v Her Majesty's Revenue and Customs*, ECLI:EU:C:2002:435.

Case C-255/00 *Grundig Italiana SpA v Ministero delle Finanze*, ECLI:EU:C:2002:525.

Case C-339/00 *Ireland v Commission*, ECLI:EU:C:2003:545.

Case C-91/01 *Italy v Commission*, ECLI:EU:C:2004:244.

Case T-176/01 *Ferriere Nord SpA v Commission*, ECLI:EU:T:2004:336.

Joined cases C-37/02 and C-38/02 *Di Lenardo and Dilexport v Ministero del Commercio con l'Estero*, ECLI:EU:C:2004:443.

Joined cases C-183/02 P and C-187/02 P *Daewoo Electronics Manufacturing España SA (Demesa) v Commission*, ECLI:EU:C:2004:701.

Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri A/S v Commission*, ECLI:EU:C:2005:408.

Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416.

Case C-199/03 *Ireland v Commission*, ECLI:EU:C:2005:548.

Case T-347/03 *Branco v Commission*, ECLI:EU:T:2005:265.

Case T-415/03 *Cofradía de pescadores "San Pedro" de Bermeo and Others v Council of the European Union*, ECLI:EU:T:2005:365.

Case C-508/03 *Commission v United Kingdom*, ECLI:EU:C:2006:287.

Case C-148/04 *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova I*, ECLI:EU:C:2005:774.

Case C-310/04 *Spain v Council*, ECLI:EU:C:2006:521.

Case C-49/05 P *Ferriere Nord SpA v Commission*, ECLI:EU:C:2008:259.

Case C-39/06 *Commission v Germany*, ECLI:EU:C:2008:349.

Case C-167/06 P *Ermioni Komninou and Others v Commission*, ECLI:EU:C:2007:633.

Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening v Minister van Sociale Zaken en Werkgelegenheid*, ECLI:EU:C:2008:165.

Case C-334/07 P *Commission of the European Communities v Freistaat Sachsen*, ECLI:EU:C:2008:709.

Case C-373/07 P *Mebrom NV v Commission*, ECLI:EU:C:2009:218.

Case C-519/07 P *Commission v Koninklijke FrieslandCampina NV*, ECLI:EU:C:2009:556.

Case C-201/08 *Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt*, ECLI:EU:C:2009:539.

Case C-496/08 P *Pilar Angé Serrano and Others v European Parliament*, ECLI:EU:C:2010:116.

Case T-554/08 *Evropaïki Dynamiki v Commission*, ECLI:EU:T:2012:194.

Case C-168/09 *Flos SpA v Semeraro Casa e Famiglia SpA*, ECLI:EU:C:2011:29.

Case C-369/09 P *ISD Polska sp. z o.o. and Others v European Commission*, ECLI:EU:C:2011:175.

Case C-501/11 P *Schindler Holding Ltd and others v European Commission*, ECLI:EU:C:2013:522.

Case C-568/11 *Agroferm A/S v Ministeriet for Fødevarer, Landbrug og Fiskeri*, ECLI:EU:C:2013:407.

Joined cases C-630/11 P to C-633/11 P *HGA Srl and others v Commission*, ECLI:EU:C:2013:387.

Case C-70/12 P *Quinn Barlo Ltd and Others v European Commission*, ECLI:EU:C:2013:351.

Case C-129/12 *Magdeburger Mühlenwerke GmbH v Finanzamt Magdeburg*, ECLI:EU:C:2013:200.

Case C-362/12 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners*, EU:C:2013:834.

Case C-492/13 *Traum EOOD v Direktor na Direksia «Obzhalvane i danachno-osiguritelna praktika» Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite*.

Case C-640/13 *Commission v UK*.

Case C-98/14 *Berlington Hungary Tanácsadó és Szolgáltató kft and others v Magyar Állam*.

Table of cases from other jurisdictions (in alphabetical order)

Attorney-General of New South Wales v Quin (1990) 170 CLR 1 (Australia, High Court).

DM v Secretary of State for the Home Department [2014] CSIH 29 (Scotland, Inner House of the Court of Session).

Stretch v United Kingdom (2003) 28 EHRR 196 (European Court of Human Rights).