Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 25 February 2014[1]

Joined Cases C-129/13 and C-130/13

Kamino International Logistics BV (C-129/13),
Datema Hellmann Worldwide Logistics BV (C-130/13)
v
Staatssecretaris van Financiën

(Requests for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands))

(Recovery of a customs debt — Rights of the defence — Principle of respect for the rights of the defence — Direct effect)

I – **Introduction**

1. The joined cases before the Court concern the rights of the defence and, more specifically, the right to be heard in the context of administrative proceedings.

2. By its decisions of 22 February 2013, received at the Court on 18 March 2013, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) asks the Court, first, if the principle of respect for the rights of the defence is directly applicable. If the answer is in the affirmative, it asks whether the right to be heard must be regarded as infringed if the natural or legal person concerned had the opportunity to make known his views only in an administrative appeal, in other words after the initial decision was taken. Finally, it asks the Court about the legal consequences of a possible infringement of the principle of respect for the rights of the defence and the circumstances likely to have an impact on such consequences.

II – **Legal framework**

A – *European Union law*

1. The Charter of Fundamental Rights of the European Union

3. Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter'), entitled 'Right to good administration', provides in paragraphs 1 and 2:

'1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

1 — Original language: French.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

…'

4. Article 51 of the Charter, entitled 'Field of application', provides in paragraph 1:

'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.'

2. Regulation (EEC) No 2913/92

5. Articles 220 and 221 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code[2] ('the CCC'), form part of Chapter 3, Section 1, entitled 'Entry in the accounts and communication of the amount of duty to the debtor'.

6. Article 220(1) of the CCC provides:

'Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor (subsequent entry in the accounts). That time-limit may be extended in accordance with Article 219.'

7. Article 221 of the CCC provides:

'1. As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.

…

3. Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. This period shall be suspended from the time an appeal within the meaning of Article 243 is lodged, for the duration of the appeal proceedings.

…'

8. Articles 243 to 245 of the CCC form part of Title VIII, entitled 'Appeals'.

9. Article 243 of the CCC provides:

'1. Any person shall have the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him directly and individually.

2 — OJ 1992 L 302, p. 1, as amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 (OJ 2000 L 311, p. 17).

Any person who has applied to the customs authorities for a decision relating to the application of customs legislation and has not obtained a ruling on that request within the period referred to in Article 6(2) shall also be entitled to exercise the right of appeal.

The appeal must be lodged in the Member State where the decision has been taken or applied for.

2. The right of appeal may be exercised:

(a) initially, before the customs authorities designated for that purpose by the Member States;

(b) subsequently, before an independent body, which may be a judicial authority or an equivalent specialised body, according to the provisions in force in the Member States.'

10. Article 244 of the CCC provides:

'The lodging of an appeal shall not cause implementation of the disputed decision to be suspended.

The customs authorities shall, however, suspend implementation of such decision in whole or in part where they have good reason to believe that the disputed decision is inconsistent with customs legislation or that irreparable damage is to be feared for the person concerned.

Where the disputed decision has the effect of causing import duties or export duties to be charged, suspension of implementation of that decision shall be subject to the existence or lodging of a security. However, such security need not be required where such a requirement would be likely, owing to the debtor's circumstances, to cause serious economic or social difficulties.'

11. Article 245 of the CCC provides:

'The provisions for the implementation of the appeals procedure shall be determined by the Member States.'

B – *Netherlands law*

12. Under Article 4:8(1) of the General Law on administrative law (Algemene wet bestuursrecht, 'the Awb'), before taking a decision likely to affect adversely an interested party who did not request that decision, an administrative body must give the interested party the opportunity to put forward his views if that decision relies on information relating to facts and interests which concern the interested party and the information concerned was not provided by the interested party himself.

13. Article 4:12(1) of the Awb states:

'An administrative body may decline to apply the provisions of Articles 4:7 and 4:8 when taking a decision that sets out a financial obligation or financial right if:

(a) an objection or administrative appeal may be lodged against that decision, and

(b) the adverse consequences of the decision are likely to be nullified in their entirety as a result of the objection or appeal.'

14. Article 6:22(1) of the Awb states:

'A decision against which an objection or appeal is lodged may, notwithstanding the infringement of a written or unwritten legal rule or of a general legal principle, be upheld by the body which decides on the objection or appeal, if it may be considered that the infringement of the rule or principle did not adversely affect the interested parties.'

15. Article 7:2 of the Awb states:

'1. Before deciding on the objection, the administrative body shall give the interested party the opportunity to be heard.

2. In all cases, the administrative body shall notify the decision to the party that lodged the objection and to the interested parties who, in the course of preparing the decision, have made their views known.'

16. Administrative decisions may subsequently be challenged before the courts, with the possibility of an appeal and a further appeal on a point of law.

III – **Facts, main proceedings and questions referred**

A – *Facts underlying the requests for a preliminary ruling*

17. In each of the main actions pending before the national court, a customs agent, namely Kamino International Logistics BV in Case C-129/13 and Datema Hellmann Worldwide Logistics BV in Case C-130/13 ('the interested parties'), acting on the instructions of the same undertaking, filed declarations in 2002 and 2003 for the release for free circulation of specified goods, described as 'garden pavilions/party tents and side walls'. The interested parties declared those goods under code 6601 10 00 ('garden or similar umbrellas') of the Combined Nomenclature ('CN'). The customs authorities levied customs duties at the cited rate of duty for that code of 4.7%.

18. Subsequently, the Netherlands customs authorities carried out an inspection of the interested parties' client in order to check the correctness of that tariff classification. Following the inspection, the competent Netherlands authority, namely the tax inspector, found that the classification was incorrect and that the goods concerned should be classified under CN code 6306 99 00 ('tents and camping goods'), which is subject to a higher rate (12.2%).

19. Given the difference between the rates applicable to the two codes referred to above, the tax inspector, by decision of 2 April 2005, ordered post-clearance recovery of the additional customs duties (approximately EUR 10 000 in both cases). Accordingly, each interested party received a demand for payment drawn up on the basis of Article 220 of the CCC.

20. The interested parties did not have the opportunity to put forward their arguments before the demands for payment were issued.

B – *Course of the administrative and judicial proceedings*

21. The interested parties lodged an objection against the demands for payment with the tax inspector, who gave them the opportunity to express their views, but dismissed the objections as unfounded.

22. The Rechtbank te Haarlem (District Court, Haarlem) dismissed the appeals lodged by the interested parties against the tax inspector's decision as unfounded. On appeal, the Gerechtshof te Amsterdam (Court of Appeal, Amsterdam) upheld the judgment of the Rechtbank te Haarlem in so far as it required the interested parties to perform their obligations under the demands for payment.

23. The interested parties then appealed on a point of law to the Hoge Raad der Nederlanden. It is in those proceedings that the questions referred were raised.

24. In its orders for reference, the Hoge Raad der Nederlanden recalls that the Gerechtshof te Amsterdam ruled, on appeal, that the tax inspector had infringed the principle of respect for the rights of the defence by not affording the interested parties, prior to issuing the demands for payment, the opportunity to comment on the information on which the post-clearance recovery of customs duties was based.

25. However, it points out that neither the CCC nor the applicable national law contains procedural rules requiring the customs authorities, before making a communication of a customs debt within the meaning of Article 221(1) of the CCC, to give the customs debtor the opportunity to make known his views as regards the information on which the post-clearance recovery is based.

26. With that as the starting point, the Hoge Raad der Nederlanden asks, first, whether the principle of respect for the rights of the defence lends itself to direct application by the national courts. Next, if the answer to that question is in the affirmative, it asks whether it is correct that, as the Gerechtshof te Amsterdam ruled, the principle of respect for the rights of the defence (more specifically, the right to be heard which falls within it) was infringed when the interested parties were not able to put forward their arguments before the tax inspector's first decision, but had the opportunity to defend their position in objection and appeal proceedings. Lastly, the Hoge Raad der Nederlanden asks the Court about the legal consequences of infringing the principle of respect for the rights of the defence and whether those consequences fall to be determined in accordance with national law or European Union law. More precisely, if the legal consequences are determined by European Union law, the Hoge Raad der Nederlanden asks whether, where the principle of respect for the rights of the defence has been infringed, the national court is bound to annul the disputed decision or whether it may take account in its assessment of the fact that the decision would have been the same had the infringed right been respected.

C – *Questions referred*

27. In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling, questions which are identically worded in each of the joined cases:

'1. Does the European law principle of respect for the rights of the defence by the authorities lend itself to direct application by the national courts?

2. If the answer to Question 1 is in the affirmative:

   (a) Must the European law principle of respect for the rights of the defence by the authorities be interpreted to mean that the principle was infringed where the addressee of an intended decision was not given a hearing before the authorities adopted a measure which adversely affected it but was given the opportunity to be heard at a subsequent administrative (objection) stage, which precedes access to the national courts?

   (b) Are the legal consequences of the infringement by the authorities of the European law principle of respect for the rights of the defence governed by national law?

3. If the answer to Question 2(b) is in the negative, what circumstances may the national courts take into account when determining the legal consequences, and in particular may they take into account whether it is likely that, without the infringement by the authorities of the European law principle of respect for the rights of the defence, the proceedings would have had a different outcome?'

IV – **Procedure before the Court of Justice**

28. The requests for a preliminary ruling were lodged at the Court on 18 March 2013. By decision of 24 April 2013, the President of the Court ordered that the cases be joined.

29. The interested parties, the Netherlands, Belgian, Greek and Spanish Governments and the European Commission submitted written observations. At the hearing held on 15 January 2014, the interested parties, the Netherlands, Belgian and Greek Governments and the Commission made oral submissions.

V – **Legal analysis**

A – *The first question referred*

30. By its first question, the referring court asks whether the principle of respect for the rights of the defence lends itself to direct application by the national courts.

31. It is clear that 'the rights of the defence, which include the right to be heard …, are among the fundamental rights forming an integral part of the European Union legal order and enshrined in the Charter of Fundamental Rights of the European Union'. [3]

32. Furthermore, it was in a case involving proceedings for the post-clearance recovery of customs duties on import that the Court stated that, according to that principle, 'the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision'. [4] In other words, '[t]he right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely'. [5]

33. In addition, 'the right of every person to be heard, before any individual measure which would affect him or her adversely is taken' is now expressly included in the right to good administration by Article 41(2) of the Charter.

34. It cannot be denied that, in the present case concerning proceedings for the post-clearance recovery of customs duties and, therefore, the implementation of European Union law, the Member States must comply with Article 41 of the Charter, in accordance with Article 51(1) of the Charter.

3 — Case C-383/13 PPU *G and R* [2013] ECR, paragraph 32. Also see, to that effect, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v Kadi* [2013] ECR, paragraph 99.

4 — Case C-349/07 *Sopropé* [2008] ECR I-10369, paragraph 37.

5 — Case C-277/11 *M* [2012] ECR, paragraph 87 and the case-law cited.

35. As to the role of the national courts, the Court has already stated in *Sopropé* that it is for them 'to satisfy [themselves] that the period [for collecting the observations of the interested parties] thus individually assigned by the authorities corresponds to the specific circumstances of the person or undertaking at issue and that it makes it possible for them to exercise their rights of defence in accordance with the principle of effectiveness'. [6]

36. Consequently, in my opinion it is apparent from the foregoing that not only are national administrative authorities required to respect the rights of the defence when they implement European Union law, but also that the persons concerned must be able to rely on them directly before the national courts, in order to avoid those rights remaining a dead letter or a pure formality. [7]

B – *The second question referred, part (a)*

37. The second question referred is divided into two parts.

38. The second question, part (a), asks whether the rights of the defence of the addressee of a decision are infringed if he has not been heard before the adoption of the decision (in this case, the demands for payment), even though he will be able to express his views in a subsequent administrative objection phase. The second question, part (b), concerns the legal consequences of infringing the principle of respect for the rights of the defence. This second part covers the same issues as the third question raised by the referring court. I will therefore examine them together at a later stage and I will confine my examination here to part (a) of the second question.

39. However, before beginning that examination, I would like to address one issue which was discussed at length during the hearing and was mentioned by the referring court: Do the proceedings starting with the demands for payment and ending with the decision on the objection lodged on the basis of the Awb constitute a single set of proceedings (in which case the rights of the defence of the addressee of the decision, by definition only one, would necessarily have been respected)? Or, on the contrary, do those proceedings cover two stages and two decisions, the second taking place only in the event of an objection to the first (in which case the question of respect for the rights of the defence arises, as the addressee of the decisions was not heard until after the initial decision and his objection)?

40. Even if the administrative authority remains the same throughout the proceedings (although the representative of the Netherlands Government stated at the hearing that the authority could have recourse to another body, but under its jurisdiction and authority), I am strongly inclined towards the second alternative.

41. The drawing up and issuing of a demand for payment constitutes a decision having true legal effects which require the addressee to pay, in the present case, additional customs duties. Those effects are definitive if the addressee, who has not been heard at that stage, does not file an objection. It is only when there is an objection that the competent administrative authority will have to hear the interested party, conduct a comprehensive review of the documents in the case, and take a new decision or confirm the contested demand for payment.

6 — *Sopropé*, paragraph 44.

7 — That was also my position in *G and R*, which concerned Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98). See point 52 of my View in that case.

42. Furthermore, consideration of the applicable European Union and national law shows that the objection does not have automatic suspensory effect, so that payment of the customs duties claimed remains due. The fact that an application may be made for suspension (and that, according to the statements of the Netherlands Government's representative at the hearing, a ministerial circular requires such suspension to be granted except in cases of fraud) has no bearing on the fact that the demand for payment constitutes a decision having independent legal effects.

43. Accordingly, it is on the basis of that premiss that I shall set out my arguments below.

1. Objective pursued by the right to be heard

44. In order to reply to the question raised by the Hoge Raad der Nederlanden, consideration should first be given to the objective pursued by the principle of respect for the rights of the defence and, more specifically, the right to be heard.

45. According to the Court, '[t]he purpose of the rule that the addressee of an adverse decision must be placed in a position to submit his observations *before* that decision is adopted is to enable the competent authority effectively to take into account all relevant information. In order to ensure that the person or undertaking concerned is in fact protected, the purpose of that rule is, inter alia, to enable them to correct an error or submit such information relating to their personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content'. [8]

46. In other words, '[t]he right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely'. [9]

47. The Court had previously clarified the scope of the right to be heard in *Gerlach*, [10] a case which concerned the transit procedure in the European Union. According to the Court, it followed from the legislation applicable at the relevant time [11] that the Member State of the office of departure could proceed to recover import duties only if it had first informed the principal that it had a period of three months to provide the requested proof and if such proof had not been provided within that period. The Court held that, in those circumstances, such a period could not be granted for the first time during the proceedings dealing with the objection lodged against the decision of the competent authorities to recover the import duties. [12] The Court described the right of the principal as being 'to set out its views on the regularity of the transit operation, *before* the taking of the decision to recover duties which is addressed to it and which materially affects its interests'. [13]

48. It follows from that case-law that granting the addressee of a decision which affects him adversely the right to defend his position *after* the adoption of that decision does not respect the right to be heard or the rights of the defence.

8 — *Sopropé*, paragraph 49. My emphasis.

9 — *M*, paragraph 87 and the case-law cited. My emphasis.

10 — Case C-44/06 *Gerlach* [2007] ECR I-2071.

11 — Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit (OJ 1977 L 38, p. 1), as amended by Council Regulation (EEC) No 474/90 of 22 February 1990 (OJ 1990 L 51, p. 1), and Commission Regulation (EEC) No 1062/87 of 27 March 1987 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (OJ 1987 L 107, p. 1), as amended by Commission Regulation (EEC) No 1429/90 of 29 May 1990 (OJ 1990 L 137, p. 21).

12 — *Gerlach*, paragraph 36.

13 — Ibid, paragraph 37. My emphasis.

49. However, according to equally settled case-law, 'fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed'. [14] In the same judgment, *Dokter and Others*, the Court also states that such a restriction would 'be a disproportionate and intolerable intervention infringing upon the very substance of the rights of the defence only if the interested parties were given no opportunity to contest those measures in subsequent proceedings and to make their views known effectively at that stage'. [15]

2. Restriction of the principle of the right to be heard

50. In order to reply to the question whether the restriction of the right to be heard created by the procedure established by the Kingdom of the Netherlands satisfies the conditions set out in *Dokter and Others*, regard should be had, first, to the mandatory conditions imposed by European Union law itself in relation to the subsequent entry in the accounts of duties resulting from a customs debt and, secondly, to the administrative proceedings as a whole as governed by national law.

a) Time-limits imposed by the CCC

51. Article 220(1) of the CCC provides that, where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered is to be entered in the accounts *within two days* of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor. Article 221 of the CCC adds that the amount of duty is to be communicated to the debtor *as soon as it has been entered in the accounts*.

52. That mandatory time-limit of two days is difficult to reconcile with the obligation to hear the interested party prior to the decision to enter the amount of duty to be recovered in the accounts.

53. Indeed, the compatibility of this time-limit with the principle of respect for the rights of the defence was previously the subject of debate in a case involving a failure by the Italian Republic to fulfil its obligations. [16] Although the Court held that the principle of respect for the rights of the defence applied to post-clearance recovery proceedings, it qualified that assertion with the proviso that the principle 'cannot … result in a Member State being entitled to disregard its obligation to enter into the accounts, within the time-limits laid down in the Community legislation, the [European Union's] own resources entitlement'. [17]

54. In that judgment, the Court therefore chose to follow up the reference to the principle with a proviso. It follows from that formulation that although the principle of the rights of the defence must indeed be respected, it may not result in infringement of the time-limits imposed on Member States by European Union customs legislation.

14 — Case C-28/05 *Dokter and Others* [2006] ECR I-5431, paragraph 75.

15 — Ibid, paragraph 76.

16 — See Case C-423/08 *Commission v Italy* [2010] ECR I-5449.

17 — Ibid, point 45.

55. Conscious of the restriction on the rights of the defence resulting from this proviso, the Court mitigates its effect by stating that, '[f]urthermore, it should be noted that entry into the accounts and notification of the amount of customs duty owed, as well as the crediting of the own resources, does not prevent the debtor challenging, under Article 243 et seq. of the Customs Code, the obligation imposed on him by means of all the arguments at his disposal'. [18]

56. The European Union legislature appears for its part to be aware of the difficulties for Member States in hearing interested parties before the amount of duty to be recovered is entered in the accounts.

57. Thus, Article 22(6) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), [19] henceforth expressly provides that '[b]efore taking a decision which would adversely affect the applicant, the customs authorities shall communicate the grounds on which they intend to base their decision to the applicant, who shall be given the opportunity to express his or her point of view within a period prescribed from the date on which he or she receives that communication or is deemed to have received it'. Recital 27 in the preamble to the regulation also states that this obligation is necessary because of the Charter. Furthermore, Article 105(3) of the regulation provides that the amount of import or export duty payable is to be entered in the accounts, when the relevant provisions apply, [20] within 14 days of the date on which the customs authorities 'are in a position to determine the amount of import or export duty in question and take a decision'. [21]

b) Characteristics of the national administrative proceedings in question

58. In the present case, the administrative proceedings are governed by the Awb. The principle, set out in Article 4:8 of the Awb, requires administrative bodies, before taking a decision which could adversely affect an interested party who did not request that decision, to give the interested party the opportunity to put forward his views.

59. According to Article 4:12 of the Awb, this principle does not, however, apply to decisions of a financial nature if an objection may be lodged against the decision and the adverse consequences of the decision are likely to be nullified in their entirety as a result of the appeal.

60. In the present case, both conditions appear to be satisfied.

61. The interested parties were able to have the decision reviewed by the administrative body that took the decision (before being able to lodge a challenge before the courts, with the possibility of an appeal and a further appeal on a point of law).

62. According to the Netherlands Government, this administrative review is effected *ex nunc*, in other words on the basis of the relevant legal rules and facts as they stand when the decision on the objection is taken. The adverse consequences of the disputed decision could therefore be nullified as a result of the proceedings dealing with the objection.

63. Moreover, in accordance with Article 7:2 of the Awb, '[b]efore deciding on the objection, the administrative body shall give the interested party the opportunity to be heard'.

18 — Ibid, paragraph 46.

19 — OJ 2013 L 269, p. 1, and corrigendum OJ 2013, L 287, p. 90.

20 — In accordance with Article 288(2) of Regulation No 952/2013, Articles 22 and 105 are to apply as from 1 May 2016.

21 — While Article 220(1) of the CCC, which applies in the present case, only provides for a time-limit of two days from the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor.

64. However, I note that under the first paragraph of Article 244 of the CCC, the lodging of an appeal does not cause implementation of the disputed decision to be suspended. Admittedly, the second paragraph of that article qualifies the rule by permitting the customs authorities to suspend implementation of that decision in whole or in part. None the less, such suspension is only possible if the customs authorities have good reason to believe that the disputed decision is inconsistent with customs legislation or if irreparable damage is to be feared for the person concerned. Furthermore, in those circumstances the third paragraph of Article 244 of the CCC requires a security to be lodged (unless such requirement would cause the debtor serious economic or social difficulties).

65. According to the Netherlands Government, the possible adverse consequences of the disputed decision could nevertheless be nullified afterwards, since the payment could be deferred in the event of an objection and the decision suspended until the outcome of the objection (and appeal) is known in accordance with the national rules.

66. However, as I have already pointed out, the Netherlands Government's representative stated at the hearing that suspension was not automatic and had to be requested by the addressee of the disputed demand for payment in his objection. It also follows from his statements that although suspension is usually granted, the only provision made for such grant as a matter of principle is in a ministerial circular.

67. Subject to verification by the referring court (which made no mention of the circular in its request for a preliminary ruling), a provision of that kind — which, by definition, may be altered at any time — is not, to my mind, capable of suspending in a sufficiently automatic manner the independent legal effects of the demand for payment until such time as it has been varied, more specifically, the obligation to pay the additional customs duties.

c) Conclusion on the second question, part (a)

68. In the present case, the addressee of the demand for payment was not heard prior to a decision adversely affecting it, although Article 7:2 of the Awb expressly provides that, before deciding on an objection, the administrative body must give the interested party the opportunity to be heard.

69. The need to distinguish between the rights enshrined in Article 41 of the Charter (administrative disputes) and Article 47 of the Charter (judicial disputes) is respected, as provision is indeed made for the interested party to be heard not only in proceedings before the courts, but also in the administrative proceedings.

70. Accordingly, we are not faced with a case where, in the words of the Court in *Dokter and Others*, 'the interested parties were given no opportunity to contest [the disputed decision] in subsequent proceedings and to make their views known effectively at that stage'. [22]

71. However, those factors are not, in my view, sufficient to constitute a justified restriction on the principle of respect for the rights of the defence, for three reasons.

72. First, I fail to see the reasons that could be put forward as objectives of public interest justifying the absence of a prior hearing. In that regard, I do not think that the time-limit requirements alone flowing from European Union legislation could be accepted as such reasons.

73. Secondly, the decision taken without hearing the addressee can only form the subject-matter of a new administrative decision on the initiative of the addressee.

22 — Paragraph 76 of the judgment.

74. Lastly, and above all, the proceedings dealing with the objection do not have automatic suspensory effect. It is apparent from the case-law of the Court that this factor is of decisive importance when considering possible justifications for restricting the right to be heard prior to the adoption of an adverse decision.

75. In *Texdata Software*,[23] the Court held inter alia that 'it does not appear that … the imposition of an initial penalty of EUR 700 without prior notice or any opportunity for the company concerned to make known its views before the penalty is imposed impairs the substance of the fundamental right at issue, *since the submission of a reasoned objection against the decision imposing the periodic penalty immediately renders that decision inoperable* and triggers an ordinary procedure under which there is a right to be heard' (my emphasis).

76. In the present case, although the second requirement is satisfied (the addressee is heard in the proceedings dealing with the objection), the first requirement (immediate inoperability of the adverse measure in the event of appeal) is not.

77. In those circumstances, I am of the view that national legislation such as that at issue in the main proceedings is inconsistent with the principle of respect for the rights of defence of the person concerned, more specifically the right to be heard.

78. If the Court does not agree with my analysis, it is not necessary to reply to the second question, part (b), or to the third question, since they cover the legal consequences of infringing the principle of respect for the rights of the defence.

C – *The second question, part (b), and the third question*

79. By its second question, part (b), and third question, the referring court asks, first, whether the legal consequences of the infringement by the authorities of the principle of respect for the rights of the defence are determined by national law and, secondly, if they are not, what circumstances may be taken into account by the national courts in their examination. In its third question, the referring court specifically mentions taking into account the situation where the outcome of the decision-making process would have been the same had the infringed right been respected.

80. These questions are answered clearly, precisely and unequivocally in *G and R*, where the Court held as follows:

'35 Thus, when they take measures which come within the scope of European Union law, the authorities of the Member States are, as a rule, subject to the obligation to observe the rights of the defence of addressees of decisions which significantly affect their interests. *Where, as in the main proceedings, neither the conditions under which observance of the … right to be heard is to be ensured, nor the consequences of the infringement of that right, are laid down by European Union law, those conditions and consequences are governed by national law*, provided that the rules adopted to that effect are the same as those to which individuals in comparable situations under national law are subject (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the European Union legal order (principle of effectiveness) …

36 None the less, while the Member States may allow the exercise of the rights of the defence of third-country nationals under the same rules as those governing internal situations, those rules must comply with European Union law and, in particular, must not undermine the effectiveness of Directive 2008/115.

23 — Case C-418/11 *Texdata Software* [2013] ECR, paragraph 85.

…

38 As regards the questions raised by the referring court, it must be noted that, according to European Union law, an infringement of the rights of the defence, in particular the right to be heard, results in annulment only if, had it not been for such an irregularity, the outcome of the procedure might have been different …' [24]

81. This rule is not new. It was the approach advocated by the Court in *Distillers Company* v *Commission*, [25] where the applicant contended, inter alia, that the competent authority had not been in a position to take account of all of the arguments put forward in support of its appeal during the hearing or several supplements to its reply to the Commission's statement of objections. However, in its judgment the Court considered that it was 'unnecessary to consider th[ose] procedural irregularities' and that it 'would be different only if in the absence of those irregularities the administrative proceedings could have led to a different result'. [26]

82. In so far as the Court retained that approach in *G and R*, which involved a measure having such a restrictive effect on personal freedom as the extension of the detention of a foreign national awaiting return to his country of nationality from 6 to 18 months, I cannot imagine that things would be any different in proceedings involving strictly financial matters.

83. I would also observe that, in this case, the administrative decision taken on the objection and the judgments of the district and appeal courts confirmed the initial decision, after the interested parties had had the opportunity to put forward their arguments.

84. In the light of the foregoing, I suggest that the Court give the following reply to the second question, part (b): the conditions under which respect for the rights of the defence is to be ensured and the consequences of infringing those rights are governed by national law provided that the rules adopted to that effect are the same as those to which individuals in comparable situations under national law are subject (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the European Union legal order (principle of effectiveness).

85. The extension of this approach to customs matters is essential inasmuch as Article 245 of the CCC expressly refers to national law, stating that '[t]he provisions for the implementation of the appeals procedure shall be determined by the Member States'.

86. However, since the full effect of European Union law must be ensured, I would also invite the Court to give the following reply to the third question: according to European Union law, an infringement of the rights of the defence — in particular the right to be heard — results in annulment of the decision taken at the end of the administrative proceedings in question only if, had it not been for such an irregularity, the outcome of the proceedings might have been different.

87. That approach is particularly necessary in the present case because the interested parties themselves admit that the proceedings dealing with the objection would not have had a different outcome had they been heard prior to the contested decision, since they do not dispute the tax inspector's tariff classification. As indicated above, the administrative decision taken on the objection and the judgments of the district and appeal courts confirmed the initial decision.

24 — *G and R* (my emphasis).

25 — Case 30/78 *Distillers Company v Commission* [1980] ECR 2229.

26 — Ibid, paragraph 26.

VI – **Conclusion**

88. In the light of the foregoing considerations, I propose that the Court give the following replies to the questions referred by the Hoge Raad der Nederlanden:

(1) The principle of respect for the rights of the defence by the authorities may be relied on directly by individuals before the national courts.

(2) (a) National legislation, such as that at issue in the main proceedings, which does not allow the addressee of a decision adversely affecting him to be heard by the authorities before the decision is taken, but which gives him the opportunity to be heard at a subsequent administrative stage, without that appeal entailing the automatic suspension of the adverse decision, is inconsistent with the principle of respect for citizens' rights of the defence and, more specifically, the right to be heard.

(2) (b) The conditions under which respect for the rights of the defence is to be ensured and the consequences of infringing that principle are governed by national law, provided that the rules adopted to that effect are the same as those to which individuals in comparable situations under national law are subject (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the European Union legal order (principle of effectiveness).

(3) As the national court has the obligation to ensure that European Union law is given full effect, it may, when assessing the consequences of an infringement of the rights of the defence, in particular the right to be heard, take account of the fact that such an infringement results in the annulment of the decision taken at the end of the administrative proceedings in question only if, had it not been for such an irregularity, the outcome of the proceedings might have been different.