



Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 28 January 2014¹

Case C-583/12

Sintax Trading OÜ
v
Maksu- ja Tolliamet

(Request for a preliminary ruling from the Riigikohus (Estonia))

(Customs action against goods suspected of infringing intellectual property rights — Regulation (EC) No 1383/2003 — Article 13(1) — Competent authority to conduct proceedings to determine whether an intellectual property right has been infringed — Competence of the customs authorities to initiate proceedings to determine whether an intellectual property right has been infringed — Article 47 of the Charter of Fundamental Rights of the European Union)

1. The current case concerns border measures taken in Estonia against goods allegedly infringing design rights. It offers the Court the opportunity to once again interpret Council Regulation (EC) No 1383/2003 ('the Regulation'),² namely with respect to the proceedings to determine whether an intellectual property right has been infringed referred to in Article 13(1) of the Regulation.

2. The Estonian Supreme Court (Riigikohus) referred two questions to the Court. It asks firstly, whether the proceedings mentioned in Article 13(1) of the Regulation can be conducted by the customs authorities themselves and, secondly, whether those authorities may initiate these same proceedings.

3. These questions arose in a lawsuit filed by Sintax Trading OÜ ('Sintax') against the Estonian Tax and Customs Office (Maksu- ja Tolliamet, 'MTA'), which rejected the demand of Sintax to release goods the MTA had detained arguing that they infringe a registered industrial design held by OÜ Acerra ('Acerra').

¹ — Original language: English.

² — Regulation of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (OJ 2003 L 196, p. 7). The Regulation has been interpreted in Case C-93/08 *Schenker* [2009] ECR I-903; Case C-302/08 *Zino Davidoff* [2009] ECR I-5671; Joined Cases C-446/09 and C-495/09 *Philips* [2011] ECR I-12435. Previous legislation was the subject of additional case law.

I – Legal framework

A – *European Union law*

4. Border measures constitute an important part of the European Union's protection of intellectual property rights. The Regulation is neither the first EU legislative measure on the matter,³ nor the last. In fact, with effect of 1 January 2014 it has been repealed by Regulation No 608/2013.⁴ Given the dates of the acts in question, however, the Regulation applies in the case at hand.

5. Recitals 2 and 3 of the Regulation read as follows:

- '(2) The marketing of counterfeit and pirated goods, and indeed all goods infringing intellectual property rights, does considerable damage to law-abiding manufacturers and traders and to right-holders, as well as deceiving and in some cases endangering the health and safety of consumers. Such goods should, in so far as is possible, be kept off the market and measures adopted to deal effectively with this unlawful activity without impeding the freedom of legitimate trade. This objective is consistent with efforts under way at international level.
- (3) In cases where counterfeit goods, pirated goods and, more generally, goods infringing an intellectual property right originate in or come from third countries, their introduction into the Community customs territory, including their transshipment, release for free circulation in the Community, placing under a suspensive procedure and placing in a free zone or warehouse, should be prohibited and a procedure set up to enable the customs authorities to enforce this prohibition as effectively as possible.'

6. Article 10 of the Regulation provides:

'The law in force in the Member State within the territory of which the goods are placed in one of the situations referred to in Article 1(1) shall apply when deciding whether an intellectual property right has been infringed under national law.

That law shall also apply to the immediate notification of the customs department or office referred to in Article 9(1) that the procedure provided for in Article 13 has been initiated, unless the procedure was initiated by that department or office.'

7. According to Article 13(1) of the Regulation:

'If, within 10 working days of receipt of the notification of suspension of release or of detention, the customs office referred to in Article 9(1) has not been notified that proceedings have been initiated to determine whether an intellectual property right has been infringed under national law in accordance with Article 10 or has not received the right-holder's agreement provided for in Article 11(1) where applicable, release of the goods shall be granted, or their detention shall be ended, as appropriate, subject to completion of all customs formalities.

This period may be extended by a maximum of 10 working days in appropriate cases.'

3 — It repealed (Article 24) Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods (OJ 1994 L 341, p. 8), which in turn repealed (Article 16) Council Regulation (EEC) No 3842/86 of 1 December 1986 laying down measures to prohibit the release for free circulation of counterfeit goods, OJ 1986 L 357, p. 1.

4 — Regulation of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003, OJ 2013 L 181, p. 15. See Article 38.

8. Commission Regulation (EC) No 1891/2004⁵ lays down the measures necessary for the application of the Regulation. Its recital 1 provides:

‘Regulation (EC) No 1383/2003 introduced common rules with a view to prohibiting the entry, release for free circulation, exit, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods, and to dealing effectively with the illegal marketing of such goods without impeding the freedom of legitimate trade.’

B – *National law*

9. The Estonian Tolliseadus (law on customs, ‘TS’) provides in its Paragraph 39(4) and (6):

‘(4) In respect of goods which are suspected of infringing an intellectual property right within the meaning of ... Regulation (EC) No 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights ... the right-holder shall, on the basis of an examination of samples, provide a written evaluation within 10 days of notification of the retention of those goods. The right-holder shall not receive payment for providing the evaluation. ...

(6) The customs shall without delay forward a copy of the evaluation obtained from the right-holder to the relevant person, who can within 10 days of receipt of the copy of the evaluation submit to the customs written objections to the evaluation together with relevant evidence.’

10. Paragraph 45(1) of the TS reads:

‘The customs shall seize and sell, destroy under customs supervision, or hand over free of charge in the procedure laid down in Paragraphs 97 and 98 the goods referred to in Articles 53, 57 and 75 of the Community Customs Code.’

11. Paragraph 6 of the Haldusmenetluse seadus (Law on administrative procedure, ‘HMS’) states:

‘The administrative body is obliged to elucidate the facts of essential significance in the matter which is the subject of the procedure and if necessary collect evidence thereon on its own initiative.’

II – Facts and the main proceedings

12. Acerra is the owner of an Estonian registered industrial design for a bottle registered on 15 February 2010 as No 01563 ‘Pudel’ (bottle).

13. On 6 December 2010 Acerra informed the MTA that Sintax was attempting to supply a product in Estonia in bottles embodying the registered design.

14. On 23 December 2010 the MTA carried out a supplementary examination of a shipment of 63 700 bottles sent to Sintax by a Ukrainian company. The MTA found the bottles to be sufficiently similar to the registered design to suspect the infringement of intellectual property rights. By decision of 27 December 2010 the MTA detained the suspected goods in a customs warehouse.

5 — Regulation of 21 October 2004 laying down provisions for the implementation of Council Regulation (EC) No 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights, OJ 2009 L 328, p. 16. See Article 20 of the Regulation.

15. On the same day the MTA notified Acerra and asked it for an evaluation of the goods detained. On 6 January 2011 Acerra submitted the requested evaluation to the MTA claiming the imported bottles infringed its intellectual property rights.

16. Syntax reacted in two ways. First, on 18 January 2011 it asked the MTA to release the goods. Then, on 7 February 2011, it brought an action against Acerra before the Harju Maakohus (Harju District Court) attacking the validity of Acerra's industrial design.

17. As to the request to release the goods, the MTA informed Syntax by letter of 11 February 2011 that Acerra had evaluated the bottles entering Estonia and considered them to be identical with its registered design. Under Regulation No 1383/2003 the MTA could not release the goods, as there was – according to the MTA – an infringement of intellectual property rights. The MTA had no competence to decide whether that intellectual property right was valid. On that same day Syntax demanded the release of the goods for a second time. On 17 February 2011 the MTA again refused to release the goods, offering a similar justification.⁶

18. On 10 March 2011 Syntax brought an action before the Tallinna Halduskohus (Tallinn Administrative Court) to obtain the release of the goods. On 3 June 2011 the Court ordered the MTA to take the decision to release the goods. The MTA appealed to the Tallinna Ringkonnakohus (Tallinn Regional Court), which dismissed the appeal by judgment of 19 January 2012, however basing its judgment on different grounds. The MTA appealed the decision on a point of law to the referring court.

19. Syntax's challenge to the validity of the industrial design was dismissed on 21 December 2011, while the appeal in the proceedings described in the above paragraph was pending. That judgment has become final so that the registration of the design is valid.

III – Questions referred for a preliminary ruling and procedure before the Court of Justice

20. By order of 5 December 2012 the Riigikohus stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

- '(1) May the "proceedings ... to determine whether an intellectual property right has been infringed" referred to in Article 13(1) of Regulation No 1383/2003 also be conducted within the customs department or must "the authority competent to decide on the case" dealt with in Chapter III of the regulation be separate from the customs?
- (2) Recital 2 in the preamble to Regulation No 1383/2003 mentions as one of the objectives of the regulation the protection of consumers, and according to recital 3 in the preamble a procedure should be set up to enable the customs authorities to enforce as effectively as possible the prohibition of the introduction into the Community customs territory of goods infringing an intellectual property right, without impeding the freedom of legitimate trade in accordance with recital 2 in the preamble to the regulation and recital 1 in the preamble to implementing regulation No 1891/2004.

6 — According to Estonia's submission the MTA decided, with a view to the pending lawsuit concerning the validity of the design right, not to adopt an administrative decision on the question whether there was a violation of an intellectual property right in the sense of Article 2(1)(b) of the Regulation, because such a decision would in substance lead to the seizure and destruction of the merchandise.

Is it compatible with those objectives if the measures laid down in Article 17 of Regulation No 1383/2003 can be applied only if the right-holder initiates the procedure mentioned in Article 13(1) of the regulation for determination of an infringement of an intellectual property right, or must it also be possible, for the effective pursuit of those objectives, for the customs authorities to initiate the corresponding procedure?’

21. The Czech Republic, the Republic of Estonia and the Commission submitted written observations. No hearing was requested and none was held.

IV – Assessment

22. The questions posed by the referring Court cannot be understood outside the context both of the system of border measures set up by the Regulation and the manner in which the Estonian courts have interpreted the facts with respect to that system. Accordingly, I will discuss both of these issues in turn before I address the questions themselves.

A – *The subject matter and the system of the Regulation*

23. To protect right-holders, law-abiding manufacturers and traders, but also consumers⁷ the Regulation establishes, first and foremost, a system of customs action against goods *suspected* of infringing intellectual property rights⁸ but also a certain number of measures against goods *found* to have infringed such rights.

24. As to goods⁹ suspected of infringing intellectual property rights, border measures can, as a matter of principle, be taken on an application by the rights-holder,¹⁰ which is granted by the customs authorities.¹¹ Customs authorities suspend the release of or detain goods suspected of infringing an intellectual property right covered by the grant of the application, where necessary after consulting the applicant.¹² If no application has been filed or granted, but customs authorities have sufficient grounds for suspecting that goods infringe intellectual property rights, they may suspend the release of those goods or detain them *ex officio* for three working days to allow the rights-holder to submit an application.¹³

25. However, these measures are temporary in nature. Article 13(1) of the Regulation states that if within 10 working days of receipt of the notification of suspension of release or of detention the customs authorities have not been notified that proceedings have been initiated to determine whether an intellectual property right has been infringed,¹⁴ the goods have to be released or their detention ended. Goods found to infringe an intellectual property right are subject to the measures in Chapter IV of the Regulation, among which figures the destruction of the infringing goods.¹⁵

7 — Recital 2 of the Regulation.

8 — The term is defined in Article 2(1) of the Regulation.

9 — The goods must be subject to a relevant customs regime. See Article 1(1) of the Regulation.

10 — Articles 5 and 6 of the Regulation.

11 — Article 8 of the Regulation. The Regulation uses different terms for the different authorities referred to. The authority receiving and deciding on the application is called the ‘customs department’ (Article 5(1) and (2)), while the authority receiving the granted application and acting on it is referred to as ‘customs office’ (Article 9(1)). ‘Customs authorities’ is employed (e.g. in Article 1(1)) as the generic term referring to any of the particular authorities in the organisation of customs. I will employ this term throughout.

12 — Article 9(1) of the Regulation.

13 — Article 4 of the Regulation.

14 — Alternatively where applicable the so-called simplified procedure governed by Article 11(1) can be utilised. See also *Schenker*, paragraph 26.

15 — Article 17 of the Regulation.

26. Once goods have been found to infringe an intellectual property right, the measures listed in Chapter IV of the Regulation apply: the goods shall not be allowed to enter into the Union customs territory or be subject to any of the other actions listed in Article 16 and Member States have to adopt the measures necessary to allow the competent authorities to take the measures in Article 17, including the destruction of the goods.

27. It is not apparent from the facts whether the procedure provided for in the Regulation has been complied with, in particular whether the right-holder filed the application for action by the customs authorities. It is for the national courts to examine these requirements.

*B – The interpretation of the facts of the case by the national courts with respect to the system of the Regulation*¹⁶

28. In its challenge of the detention of the goods before the Tallinn Administrative Court Syntax argued, amongst others, that the procedure to determine whether an intellectual property right had been infringed mentioned in Article 13(1) of the Regulation had not been initiated in time. The MTA, however, asserted that it had determined that the goods infringe an intellectual property right.

29. The Tallinn Administrative Court held that MTA's notice to Acerra may be regarded as the first action by the MTA in administrative proceedings to determine whether an intellectual property right has been infringed, permissible under Articles 9 and 10 of the Regulation. Apparently, the court thus was of the opinion that the proceedings mentioned in Article 13(1) of the Regulation were commenced by the MTA on 27 December 2010. However, the court did not see a decision by the MTA in any of the later acts. The failure to adopt a decision by the MTA and the Court's interpretation of Article 14 of the Regulation led the Court to rule in favour of Syntax.

30. The MTA appealed the decision, arguing that it could not adopt a decision on infringement due to Syntax's challenge of the validity of the intellectual property right and that Article 14 of the Regulation did not apply absent the provision of a security.

31. The Tallinna Regional Court upheld the decision by the Administrative Court, even if on other grounds. According to the Regional Court's interpretation of the facts, the proceedings referred to in Article 13(1) of the Regulation had not been initiated, as it is not the customs authorities, but rather a civil court that has to decide whether there has been an infringement of intellectual property rights.

32. The MTA appealed this judgment on a point of law, arguing that the question of competence of the customs authorities to decide on infringement had been raised for the first time and that the customs authorities did dispose of such a competence.

33. In its order of referral the Estonian Supreme Court declared that it is 'possible in principle' to interpret Estonian law¹⁷ in such a way that the customs authorities have the competence to decide whether the goods in question are pirated.¹⁸ The referring Court entertains doubts, however, whether that interpretation of national law is in conformity with EU law and considers an answer to the two questions posed as necessary to decide on the content of the instructions to be given to the MTA by the court.

16 — The description is based on the order of referral.

17 — Paragraphs 39(4) and (6) and 45(1) of the TS, and Paragraphs 6, 38 and 39 of the HMS in conjunction with Paragraph 1(4) of the TS.

18 — According to Estonia, the right-holder can also initiate proceedings in a civil court, but the administrative proceedings constitute an alternative to these.

C – The questions referred

34. As I have already stated, the Estonian Supreme Court asks, in substance, two things: whether the proceedings referred to in Article 13(1) of the Regulation can be conducted by the customs authorities themselves (question 1) and whether the customs authorities may also initiate the relevant proceedings (question 2).

1. First question

35. With its first question the Estonian Supreme Court inquires whether the customs authorities themselves can conduct the proceedings referred to in Article 13(1) of the Regulation. Before I analyse the provision, however, I shall briefly summarise the views of the parties and the referring court.

a) Observations submitted to the Court

36. The referring Court doubts whether the Regulation allows the customs authorities themselves to conduct the proceedings mentioned in Article 13(1) of the Regulation. The title of Chapter III of the Regulation refers to ‘customs authorities and ... the authority competent to decide on the case’ and hence seems clearly to distinguish the two. However, it finds the case law on the point inconclusive.

37. All participants to the current proceedings would answer the first question in the affirmative.

38. According to the Republic of Estonia, the regulation only harmonises border measures. As is made clear in recital 8 and Article 10 of the Regulation, the determination of infringement mentioned in Article 13(1) is left to national law and – pursuant to the principle of procedural autonomy of Member States – the determination of the competent authority is within the competence of Member States. Estonia finds confirmation for its argument in Articles 49 and 55 of the TRIPS Agreement, the former explicitly mentioning administrative procedures. The reference in the title of Chapter III according to Estonia only indicates that these authorities can be different, but do not have to be. Also, Article 10 of the Regulation provides that the procedure mentioned in Article 13(1) may be initiated by the customs department and as an administrative department rarely initiates court proceedings to protect the interests of individuals, Article 10 implicitly requires the existence of administrative proceedings. An administrative proceeding would also help achieve the goals of the Regulation, namely better protection against intellectual property infringement. It regards its point of view as confirmed by the case law.

39. The Czech Republic in substance agrees with Estonia. It adds that a different interpretation would only be permissible if a distinction between the customs authorities and the authority deciding in the proceedings referred to in Article 13(1) of the Regulation would pursue a declared objective of the Regulation.

40. According to the Commission, the proceedings mentioned in Article 13(1) of the Regulation are proceedings under national law to determine on the merits whether there has actually been a violation of intellectual property rights. These proceedings have to be distinguished from the procedure governing detention of goods (customs action). The Commission argues that Articles 41 to 49 of the TRIPS Agreement provide conditions for the proceedings on the merits, but that it is for the Member State to determine, among other things, whether the competent authority should be judicial or administrative in nature – although administrative decisions have to be subject to judicial review under Article 41(4).

b) Whether the customs authorities may be the ‘authority competent to decide on the case’ in the sense of Chapter III of the Regulation

41. It cannot be disputed that an administrative authority may also be the competent authority to determine whether an intellectual property right has been infringed under national law, as the Court has already noted when it referred to the ‘judicial or other authority competent to take a substantive decision’ on infringement.¹⁹ The neutral wording of the Regulation itself, namely its reference to the ‘authority competent to decide on the case’ in the title of Chapter III and the fact that it does not state where the proceedings mentioned in Article 13(1) are conducted, confirms that it wanted to leave the determination of the competent authority to the Member States.²⁰

42. Now, the fact that the Regulation does not exclude that the proceedings referred to in Article 13(1) can be conducted by an administrative authority combined with the fact that the customs authorities indubitably *are* administrative authorities does not by itself lead to the conclusion that the customs authorities may be empowered to conduct the relevant proceedings.

43. As a matter of fact there are a couple of circumstances which should cause particular caution before arriving at this conclusion. Firstly, it is worth recalling that the Regulation itself in the title of Chapter III juxtaposes and thus seems to imply a distinction between ‘customs authorities and ‘the authority competent to decide on the case’, i.e. the authority determining whether an intellectual property right has been infringed.

44. Additionally, the wording of Article 10 of the Regulation, to which I will return in my remarks on the second question, reveals that the provision assumes that the authority determining whether an intellectual property right has been infringed and the customs department or office, which may have initiated the procedure, are different entities.²¹

45. The question now is whether under the said conditions and as apparently suggested by the Commission, the Court should hold without further consideration that the Regulation is not opposed to considering the customs authorities as competent to determine whether there has been infringement.

46. In fact, the Commission has proposed that the Court should declare that it is within the competence of Member States to decide which authority is competent and to lay down the details of the proceedings to determine whether an intellectual property right has been infringed. It warns, however, that national law has to provide clearly which authority is competent for these proceedings. It also insists that the proceedings concerning the merits of infringement cannot be the same as the ones for deciding on whether the release of goods is to be suspended and the goods detained or not where goods are suspected of infringing an intellectual property right. It remains to be seen, however, whether these safeguards are sufficient.

47. I do not consider that to be the case.

19 — *Philips*, paragraph 69. My statement in point 96 of the opinion in *Philips* (‘it is not for the customs authorities to decide definitively whether or not any intellectual property rights have been infringed’) intended to show the difference between the procedure relating to customs action against goods suspected of infringing intellectual property rights and that relating to goods found to have infringed such rights. In no way should it be read to exclude the possibility examined here.

20 — Vrans, O., and Schneider, M., *Enforcement of Intellectual Property Rights through Border Measures*, Oxford:OUP (2nd ed. 2012), 5.495.

21 — The German and Danish versions of the second paragraph of Article 10 of the Regulation seem to imply that the customs authorities may conduct the proceedings (‘sofern dieses nicht von dieser Dienststelle oder Zollstelle durchgeführt wird’; ‘medmindre denne gennemføres af nævnte afdeling eller toldsted’). The English, Dutch, French and Italian versions make it clear, however, that the provision refers to these authorities *initiating* the proceedings (‘unless the procedure was initiated by that department or office’, ‘tenzij dat kantoor of die dienst de procedure zelf heeft ingeleid’, ‘à moins que celle-ci n’ait été engagée par ce service ou ce bureau’, ‘sempre che la medesima non sia stata avviata da tale servizio o ufficio doganale’).

48. The circumstance that, under national law, it might be an administrative authority that is empowered to determine whether an intellectual property right has been infringed in the proceedings mentioned in Article 13(1) of the Regulation does not change either the nature or the content of the decision that authority has to make. It is clear that in such proceedings the administrative authority would be ruling on rights and legitimate interests of individuals, namely – in the terminology of the Regulation – of ‘the declarant, the holder or the owner of the goods’.²² In this context it should be emphasised, again, that as a consequence of the decision the goods can be subjected to the measures provided for in Chapter IV of the Regulation.

49. In *Sopropé*, a case involving a decision by customs authorities relating to customs duties, this Court held that in accordance with a general principle of European Union law ‘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’.²³ That analysis must, of course, apply *mutatis mutandis* after the entry into force of the Charter of Fundamental Rights of the European Union (‘Charter’) with the Treaty of Lisbon.²⁴

50. Certainly, regulating the proceedings mentioned in Article 13(1) of the Regulation generally falls within the competence of the Member States in the exercise of their procedural autonomy,²⁵ as the Commission has rightly pointed out. Nevertheless, Member States’ actions in this respect are to be considered ‘implementation of Union law’ within the meaning of Article 51(1) of the Charter.²⁶

51. That being the case, the next step of the required analysis is to determine how and, more to the point, *where* in a post-Lisbon context to locate the procedural guarantees alluded to that are protected at the same time as general principles of European Union law.

52. In my opinion, and this is my main point in this concern, the importance of the nature of the function that is exercised outweighs that of the nature of the public authority exercising it. It is certainly true that the Court has held that Article 6(1) of the European Convention on Human Rights (‘ECHR’), on which Article 47(2) of the Charter is based,²⁷ generally relates to proceedings before a ‘tribunal’ and not to administrative proceedings.²⁸ Nevertheless, it has to be emphasised that the circumstances of the case at hand certainly are particular. In this case an administrative authority would be exercising a function, the structure and working method of which seems to be equivalent to that of a judicial body. It is in that sense that the statement in my opinion in *Philips* that the competent authority ‘normally’ is a court²⁹ should be understood. From this perspective, I would suggest that Article 47 of the Charter should be identified as the proper *sedes* for the mentioned procedural guarantees.

53. The interpretation of Article 6(1) of the ECHR by the European Court of Human Rights strengthens my argument. According to that Court the notion of ‘determination of ... civil rights’ in Article 6(1) of the ECHR includes disputes about the existence and infringement of intellectual property rights, whatever the legal nature of the body examining them under national law.³⁰ The

22 — Article 11(1) of the Regulation.

23 — Case C-349/07 *Sopropé* [2008] ECR I-10369, paragraphs 36 and 37.

24 — More recently the general principle was applied in judgment in Case C-276/12 *Sabou* [2013] ECR, paragraph 38, however in a context involving investigations of tax authorities.

25 — On the principle of procedural autonomy see Case 39/70 *Norddeutsches Vieh- und Fleischkontor* [1971] ECR 49, paragraph 4.

26 — See judgment in Case C-617/10 *Åkerberg Fransson* [2013] ECR, paragraph 19; Opinion of Advocate General Kokott in *Sabou*, points 38 to 46.

27 — Explanations of Article 47 of the Charter.

28 — Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Other v Commission* [2004] ECR I-123; Opinion of Advocate General Kokott in *Sabou*, point 54; ECtHR, *Mantovanelli v. France*, 18 March 1997, § 33, *Reports of Judgments and Decisions* 1997-II.

29 — Opinion in *Philips*, point 41.

30 — See ECtHR, *Kristiansen and Tyvik As v. Norway*, no. 25498/08, § 51, 2 May 2013; ECtHR, *Vrábel and Ďurica v. the Czech Republic*, no. 65291/01, §§ 5, 38 to 40, 13 September 2005; see also ECtHR, *König v. Germany*, 28 June 1978, § 88, Series A no. 27.

protection of Article 6 of the ECHR thus applies where, as here, such a dispute is at stake and the result of the dispute is decisive for the rights in question. In such a case, however, Member States do not have to submit the dispute to a tribunal meeting all the requirements of Article 6 of the ECHR at every stage of the procedure. ‘Demands of flexibility and efficiency ... may justify the prior intervention of administrative ... bodies ... which do not satisfy the said requirements in every respect.’³¹ This assertion implies that, as a matter of principle, the substantive requirements of Article 6 of the ECHR also apply to these administrative proceedings, even if possibly not with the same degree of stringency. These same considerations should be transposed to Article 47 of the Charter according to Article 52(3) of the Charter.

54. On the basis of the preceding analysis it is not difficult to identify the essential guarantees that should accompany the proceedings mentioned in Article 13(1) of the Regulation.

55. Thus, as the Commission has indicated, the national law explicitly has to grant the customs authorities the power to take the relevant decisions. It goes without saying that it is insufficient to deduce the competence of the customs authorities from what may be referred to as their ‘normal’ competence. Likewise, customs authorities empowered to take said decisions are expected to act in a manner that ensures their independence and impartiality. Also, the addressees of decisions which significantly affect their interest must, in observance of the rights of the defence, be able to effectively make known their views as regards the information on which the authorities intend to base their decisions.³² The affected persons hence must be granted a right to be heard. Further, it is clear that the decision taken by the customs authority must be subject to judicial review.

56. Accordingly, I propose to answer that Article 13(1) of the Regulation has to be interpreted in such a way that it does not exclude Member States from empowering customs authorities to conduct the proceedings mentioned in the provision, on condition that the said power is provided for explicitly in national law, the customs authorities act in a manner that ensures their independence and impartiality, the right to be heard is respected and the opportunity for judicial review is granted.

2. Second question

57. With the second question the referring Court essentially asks whether Member States may provide that the customs authorities may commence the procedure mentioned in Article 13(1) of the Regulation.

58. All participants to the proceedings argue that this is the case. They emphasise that the proceedings mentioned in Article 13(1) of the Regulation are governed by national law pursuant to the first paragraph of Article 10. Estonia and the Czech Republic point out that Article 14(2) and the second paragraph of Article 10 state that the proceedings can be initiated by someone who is not the right-holder and, indeed, by the customs authorities themselves and that this interpretation is compatible with the objective of the regulation, namely the fight against intellectual property infringement and the protection of the consumer from infringing goods.

59. It is not apparent from the facts whether the national authorities have initiated the proceedings mentioned in Article 13(1) of the Regulation or not. The examination of the facts is incumbent on the national courts.

31 — ECtHR, *Le Compte, Van Leuven and de Meyere v. Belgium*, 23 June 1981, § 51, Series A no. 43; ECtHR, *Janosevic v. Sweden*, no. 34619/97, § 81, ECHR 2002-VII.

32 — *Sopropé*, Paragraph 37.

60. It is certainly true that the Court has held that the Regulation grants an essential role to the right-holder: it is the right-holder who has to apply for action by the customs authorities under Article 5 of the Regulation and *ex officio* action by the customs authorities under Article 4(1) is permitted only ‘in order to enable the right-holder to submit an application for action in accordance with Article 5’. The Court stated in that context that ‘in order for a final judgment to be given against such practices by the national authority competent to rule on the substance of the case, the case must first be referred to it by the holder of the right. If the case is not so referred by the holder of the right, the measure of suspension of release or detention of the goods promptly ceases to have effect ...’.³³ Even though this statement referred to Regulation No 3295/94, it is also true with respect to the Regulation in force at the time of the events of the present case.

61. That being said, the Court did not intend to describe all possibilities of how the proceedings mentioned in Article 13(1) of the Regulation could be commenced, but in that respect was speaking of the most common case.

62. In fact, the third subparagraph of Article 14(2) of the Regulation explicitly refers to situations ‘[w]here the procedure to determine whether an intellectual property right has been infringed under national law has been initiated other than on the initiative of the holder of a design right ...’. The second paragraph of Article 10 states that the law in force in the Member State in question ‘shall also apply to the immediate notification of the customs department or office referred to in Article 9(1) that the procedure provided for in Article 13 has been initiated, unless the procedure was initiated by that department or office’. The provision explicitly assumes that the procedure provided for in Article 13 can be initiated by the customs department or office referred to in Article 9(1). This disposes of the issue. To what extent the initiation of the proceedings mentioned in Article 13(1) of the Regulation by the customs authorities is necessary or useful for the protection of consumers, as suggested by the referring court, does not need to be decided.

63. In the light of these considerations and of the certainly not very clear circumstances of the case it is important to recall yet again that Article 13(1) of the Regulation imposes an obligation on the customs authorities to release the goods or end their detention if its conditions are fulfilled. This obligation is the consequence of the Regulation’s efforts not to impede the freedom of legitimate trade while at the same time preventing the marketing of goods infringing intellectual property rights mentioned in recital 2 of the Regulation. Thus, the abstention of the right-holder from initiating proceedings within the given time limit can only be replaced by the customs authorities’ initiation of proceedings with the effect of preventing the release of the goods where the customs authorities take a formal decision to initiate the proceedings. In particular, a simple statement that the right-holder considers the importation of the goods in question to violate its intellectual property rights does not suffice to justify the rejection of a demand to release the goods. It is, of course, incumbent on the national courts to determine the relevant circumstances.

64. Having said that I propose that the answer to the second question should be that Article 13(1) of the Regulation has to be interpreted in such a way that it does not exclude Member States from providing for the possibility that the customs authorities also formally initiate the proceedings mentioned in the provision themselves.

³³ — Case C-223/98 *Adidas* [1999] ECR I-7081, paragraph 26.

V – Conclusion

65. In the light of the above considerations, I consider that the Court should answer the questions referred by the Riigikohus as follows:

- Article 13(1) of Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights has to be interpreted in such a way that it does not exclude Member States from empowering customs authorities to conduct the proceedings mentioned in the provision, on condition that the said power is provided for explicitly in national law, the customs authorities act in a manner that ensures their independence and impartiality, the right to be heard is respected and the opportunity for judicial review is granted.
- Article 13(1) of Regulation No 1383/2003 has to be interpreted in such a way that it does not exclude Member States from providing for the possibility that the customs authorities also formally initiate the proceedings mentioned in the provision themselves.