

The Right to be Heard in EU Customs Law

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Abstract

This article analyses the origin and the main features of the right to be heard as a general principle of European Union (EU) law. It also analyses the EU customs rules regarding this principle, which are included in the regulation 952/2013 establishing the Union Customs Code and in the Commission Implementing Regulation (EU) 2015/2447. To this end, the analysis, also based on European Court of Justice (ECJ) case law, refers to possible restrictions to the right to be heard and the consequences arising from its violation. It highlights how the right to be heard protects not only the interests of individual customs operators, but also the interest of the EU in the proper conduct of relations between EU Member State authorities.

1. The right to be heard and its origin in EU law

The right to be heard, as a fundamental principle, has general application in European Union law. Its origin dates to the beginning of European Union integration, at the time when the European Economic Community was building up, step by step, its peculiar and, to a certain extent, unique features (Dinan, 2014; Hoffman, Rowe, & Türk, 2011). Specifically, the right to be heard has been established by the European Court of Justice (ECJ) since 1963 in its judgement of 4 July 1963 rendered in case no. 32/62. The Court of Justice considered the right to be heard as a general principle of law and that the Community's bodies, before applying an unfavourable decision to any persons, must allow these persons to submit defences in relation to the charges that were moved against them. The Court also considered the right to be heard as a principle generally recognised by the administrative laws of all member States.

Subsequently, in the judgement dated 24 October 1996, in the case C-32/95, the Court of Justice reiterated that the respect of the right to submit defences, within any proceedings commenced against a person and that may result in a decision that is prejudicial to such person, constitutes a fundamental principle of Community law. The Court held that any person, in relation to which a prejudicial decision might be adopted, must be put in a condition to know and to express his/her point of view with respect to the elements that were taken into consideration against him/her and on which the prejudicial decision was based. The Court also noted that national authorities must respect the right of defence as established by its case law, as this is the expression of a general principle.

In further stressing the relevance of such a principle, the Court of Justice, in its judgement dated 13 September 2007, cases C-439/05 and C-454/05, specified that respect of the right of defence, and of the related principle of the right to be heard, is applicable in all proceedings instituted against a person and that may result in an act which is prejudicial for the latter, so much so that respect of this principle must always be guaranteed by all member States, even in the absence of a specific statutory provision to this effect. A further statement on the right to be heard is included in the EU Court decision dated 18 December 2008, in the case C-349/07. The Court reaffirmed that respect of the right of defence constitutes a general principle of EEC law and two consequences arise from this principle: the party interested by a prejudicial act must be granted an adequate term to be heard by the State authorities and

the national judges must verify whether the relevant administration has adequately taken into account the observations that were transmitted to it. The purpose of the right to be heard is, on the one hand, to enable the competent authority to effectively take into account all relevant information and, on the other hand, to enable the person concerned to correct an error or submit such information relating to his or her 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” (C349/07).

As a general principle (Amalfitano, 2018; Groussot, 2006; Papadopoulou, 1996; Pescatore, 1980), the right to be heard is included in the Charter of Fundamental Rights of the European Union. ¹ The provision to which reference is to be made is Article 41 of the Charter, according to which the right to a good administration, with respect to the activity of the institutions and bodies of the European Union, entails the right of each individual to be heard prior to the adoption of a prejudicial individual decision against him/her. This principle that guarantees the right to good administration is not retroactively applicable, as the European Court of Justice pointed out (C-129/13 and C-130/13), so it can be claimed since 1 December 2009, when the Charter of Fundamental Rights of the European Union entered into force. In addition, according to the Court of Justice such principle also includes, as a logical consequence, that “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” (C-349/07).

A further and coherent consequence of the abovementioned principle is that the authorities of Member States are subject to the obligation to recognise the right to be heard when they take decisions which come within the scope of EU law, even though their applicable legislation does not expressly provide for such a procedural requirement (C-349/07).

2. The right to be heard in EU customs law

As to the Customs Code perspective, recital no. 27 in Council regulation 952/2013 (hereinafter, the ‘Customs Code’) states, also in accordance with the Charter of Fundamental Rights of the European Union, ² that “it is necessary, in addition to the right of appeal against any decision taken by the customs authorities, to provide any person with a right to be heard before any decision, which would adversely affect him or her, is taken. It is understood that the right to be heard is a fundamental principle in customs law” (UE 952/2013). ³

According to Section 22, paragraph 6, first part of the Customs Code, which reproduces Section 16, paragraph 4, of regulation no. 450/2008, “before taking a decision which would adversely affect the applicant, the customs authorities must communicate the grounds on which they intend to base their decision to the applicant, who shall be given an 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” (UE 952/2013). ⁴ Such a provision was not included in the Customs regulation of 1992 (EEC 2913/92). Section 6, par. 3, of this regulation stated that any decisions adopted by the customs authorities, which either reject requests or are detrimental to the persons to whom they are addressed, shall set out the grounds on which they are based and shall refer to the right of appeal. ⁵

The provision included in Section 22, paragraph 6, first part of the Customs Code, concerns decisions taken by customs authorities ⁶ that may “adversely affect” the applicant or addressee: this means that these decisions are those which produce legal and unfavourable effects. ⁷ In addition, the fulfilment by customs authorities of the obligation of communicating to the applicant the grounds on which they intend to base their decision must be effective: this means that the reasons of the final provision must correspond to those communicated in advance to the applicant and cannot be substantially different.

The right to be heard is also contemplated in specific areas of customs law. According to Section 70, paragraph 3, of the Customs Code, the transaction value method, as a primary basis for the customs evaluation of goods, applies provided that several conditions are fulfilled.⁸ Should these conditions not be met, instead of the transaction value method, the customs value of goods shall be determined by using the secondary methods set forth by Section 74 of the Customs Code.⁹ The conditions mentioned by Section 70, paragraph 3, of the Customs Code include the fact that the buyer and seller are not related, or their relationship did not influence the price. Consequently, in the event of customs transactions between related persons, reference should be made to Section 134 of the Commission Implementing Regulation (EU) 2447/2015. According to this provision, where the buyer and the seller are related, and to determine whether such a relationship did not influence the price, the circumstances surrounding the sale shall be examined as may be necessary. In this case, the declarant shall be given an opportunity to supply further detailed information as may be necessary about those circumstances.¹⁰

In addition, with reference to the effectiveness of the right to be heard, Section 8 of the Commission Implementing Regulation (EU) 2015/2447 should be mentioned, which relates to the ‘General procedure for the right to be heard’. This provision establishes that the communication of the grounds on which the customs authorities intend to base their decision, which would adversely affect the applicant, shall include a reference to the documents and information on which the customs authorities intend to base their decision. It shall indicate the period within which the person concerned may express his or her point of view from the date on which he or she receives that communication or is deemed to have received it.¹¹ It also establishes that said communication shall include a reference to the right of the person concerned to have access to the documents and information on which the customs authorities intend to base their decision in accordance with the applicable provisions.¹²

3. Possible restrictions to the right to be heard

A further point to examine is whether and to what extent the right to be heard, as a fundamental right, can be subject to restrictions. From a general perspective and according to the European Court of Justice, fundamental rights can be subject to restrictions to a certain extent. However, such restrictions are subject to specific requirements: they must reflect a general interest from the European Union perspective and they must be compliant with the principle of proportionality (ECJ, C-28/05; Ellis, 1999; Emiliou, 1996; Wouters et al., 2020; Varju, 2014; Alston, 1999). The Court also pointed out that the general principle of EU law of respect for the rights of the defence is not an unfettered prerogative but may be restricted, provided that the restrictions correspond to objectives of public interest and do not constitute, in the light of the objectives pursued, a disproportionate and intolerable interference which impairs the very substance of the rights guaranteed (C-298/16).

As mentioned in the previous paragraph, recital no. 27 of the Customs Code states that restrictions to the right to be heard may be justified if required by the nature or the level of the threat to the security and safety of the Union and its residents, to human, animal or plant health, to the environment or to consumers. Such provision reflects, more generally, the safeguard principle also expressed in Section 36 of the Treaty on the Functioning of the European Union, which concerns restrictions on import and export of goods between Member States. According to such provision, the freedom of movement of goods does not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value or the protection of industrial and commercial property.¹³

Exceptions to the right to be heard are provided for by Section 22, paragraph 6, part two, of the Customs Code. A first exception concerns decisions relating to binding tariff information (BTI decisions), and decisions relating to binding origin information (BOI decisions). Such decisions are

taken upon application and they are binding on the customs authorities and on the addressee of the decision.¹⁴ This provision reflects the specific nature of the proceedings aimed at the release of binding information, where the Member State Customs Authority is involved in assessing the requirements for the tariff classification or determination of the origin of goods, being such assessment binding both on the customs authorities and against the addressee of the decision.¹⁵ However, the exception to the right to be heard is not applicable in the event the Customs Authority decides to reject the application for a binding information decision. As stated by the European Commission,¹⁶ the right to be heard must be allowed when the customs authority refuses to issue a BTI decision, because the refusal of customs authorities to issue such a decision can be considered as potentially detrimental to the interests of an economic operator. Consequently, the customs authority, when notifying the applicant of its impending decision, must invite the applicant to express their point of view on the matter.

A second exception to the right to be heard regards the refusal of the benefit of a tariff quota where the specified tariff quota volume is reached.¹⁷ This provision refers to Article 56(4) of the Customs Code,¹⁸ which sets forth an automatic termination of preferential measures or exemptions because of reaching the allowed volume of imports or exports.

A further exception, which also reflects recital no. 27 of the Customs Code, concerns a safeguard clause which is applicable where the fundamental interests of the European Union are put in danger: this can occur where “the nature or the level of a threat to the security or safety of the Union and its residents, to human, animal or plant health, to the environment or to consumers so requires” (EU 952/2013).¹⁹

Also, no right to be heard is allowed in connection with decisions aiming at securing the implementation of another decision for which the same right has already been applied: in such a case, the ancillary or subordinate nature of the implementing decision exclude any violation of the right to be heard, as the affected party is allowed to enforce its rights with the first decision.²⁰

The exercise of the right to be heard does not apply where its exercise could prejudice investigations initiated for the purpose of combating fraud: this may happen, for example, when the stated intention of the authority to issue a decision with the aim of countering customs fraud may induce potential addressees to adopt illicit measures and so frustrate the achievement of the antifraud purpose.²¹

4. Consequences arising from violations of the right to be heard

Under Article 243(1) of the Customs Code, any person has the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him or her directly and individually.²² Any decision of the customs authority related to the application of customs law and rendered in violation of the right to be heard can be challenged by the addressee. In connection with such issues, the Court of Justice has analysed the consequences arising from the violation of the right of defence, of which the right to be heard on a pre-emptive basis constitutes a corollary. The Court has noted that violation of the right to be heard determines a defect of the issued decision only to the extent that, in the absence of such violation, the related proceeding might have had a different outcome.²³ This observation of the Court needs to be put into context to avoid its interpretation as restricting the right of defence. Such would be the case if the Court’s reasoning was to be interpreted in the sense that the violation of the right to be heard on a pre-emptive basis would not entail the illegitimacy of the issued decision where the elements that might have been submitted during such a phase would be unfit to lead to a declaration of illegitimacy.

It is clear that if this were the case, the right to be heard on a pre-emptive basis would lose any autonomous relevance, as it would be absorbed by the merits of the dispute. This observation is confirmed by the fact that the Court of Justice observed that the reclamation proceeding would not

have had a different outcome if the interested persons had been heard before the decision of the dispute, as they were not challenging the merit of the tax claim (in particular, the customs classification rendered by the tax administration).

A similar confirmation is provided by examining the precedents cited in the judgement at issue: in particular, in the judgement dated 14 February 1990 (ECJ, C-301/87, Slot, 1991), the Court notes that in the context of the examination of an aid project by the Commission, the relevant Member State must be put in a position to express its opinion on observations submitted by interested third parties. Hence, if the Member State has not had a chance to comment upon such observations, the Commission cannot take them into consideration without violating the State's right of defence. This would render illegitimate the issued decision if, in the absence of this irregularity, the proceeding might have had a different outcome (in that case this possibility was excluded as the observations that had been submitted did not contain any additional information that had not already been acquired by the Commission and was not known to the State).²⁴

The ECJ also stated that in the event of a breach of the right of the person concerned to be heard and to raise objections under Article 181a (2) of Regulation no. 2454/93,²⁵ it is for the national court to determine whether the decision, which was adopted in breach of the principle of respect for the rights of the defence, must be annulled on that ground. The national court may also give a ruling in the action brought against that decision or can consider referring the matter back to the competent administrative authority. To this end, the national court must have regard to the particular circumstances of the case before it and to the principles of equivalence and effectiveness.²⁶

More recently, the Court decision rendered on 3 July 2014, cases C-129/13 and C-130/13, sets forth interesting remarks regarding the relevance of the right to be heard and the consequences arising from its violation. The Court confirmed that the right to be heard, before a decision that may affect the addressee's rights is taken, can be claimed before any courts of a Member State. According to the Court, where national legislation sets a time limit for collecting the observations of the parties concerned "it is for the national court to ensure, while duly taking into account the specific facts of the case, that that period corresponds with the particular situation of the person or undertaking in question and that it allows them to exercise their rights of defence in accordance with the principle of effectiveness."²⁷

5. Conclusion

The analysis conducted in this article has highlighted some relevant aspects of the right to be heard. As a fundamental right, the right to be heard has general application in the law of the European Union and finds specific relevance in the field of customs law by virtue of a principle contained in the Customs Code and of the case law of the Court of Justice of the European Union and, more generally, because of the provisions included in the Charter of Fundamental Rights of the European Union. The right to be heard protects not only the interests of individual customs operators who are addressees of decisions which could adversely affect their rights, but also the interest of the European Union in the proper conduct of relations between EU Member State authorities, which apply customs rules, and customs operators. More generally, the right to be heard protects the correct enforcement of customs rules and procedures, ensuring that the same protection is uniformly given in all Member States of the European Union. The right to be heard is also linked to the right of defence, which is also a fundamental right in the EU law system, as it anticipates the possibility for the addressee of unfavourable decisions to assert its defences before the customs authorities of the relevant Member State and ultimately understand if its position deserves to be defended before national courts.

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Notes

- 1 The Charter became fully binding for Member States and European Union Institutions with the entry into force of the Lisbon Treaty on 1st December 2009.
- 2 The Charter of Fundamental Rights is binding, as set forth by Article 6.1 of the Treaty on European Union: “The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties”.
- 3 See European Commission, Commission Staff Working Document General Guidance on Customs Decisions, taxud.a.2(2016)3945564, 8 July 2016, available at https://ec.europa.eu/taxation_customs/system/files/2016-09/guidance_general_cust_dec_en.pdf
- 4 See also recital no. 27 of the Customs Code, where it is specified that limitations to the right to be heard may be justified if required by the nature or the level of a threat to the security of the Union and of its residents, or by the protection of human, animal or plant health, the environment or consumers.
- 5 According to the European Court of Justice “the obligation imposed by Article 6(3) of the Code to set out the grounds on which the decision is based concerns only adverse decisions taken in writing which are in response to a request or are addressed to a particular person”. See judgment 7 December 2000, C-213/99, de Andrade, point 30, ECLI:EU:C:2000:678.
- 6 These authorities are defined as “the customs administrations of the Member States responsible for applying the customs legislation and any other authorities empowered under national law to apply certain customs legislation”. See Section 5, n. 1 of the Customs Code.
- 7 Consequently, preliminary decisions, which do not have such nature, cannot be included in this provision. See for instance EU Civil service tribunal, 28 April 2009, Cases F-5/05 and F-7/05, point 2, ECLI:EU:F:2009:39, where it is underlined that “Acts preparatory to a decision do not adversely affect”.
- 8 These conditions are the following: (a) there are no restrictions as to the disposal or use of the goods by the buyer, other than any of the following: (i) restrictions imposed or required by a law or by the public authorities in the Union; (ii) limitations of the geographical area in which the goods may be resold; (iii) restrictions which do not substantially affect the customs value of the goods; (b) the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued; (c) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made; (d) the buyer and seller are not related or the relationship did not influence the price.
- 9 See also Sections 141 ff. of the Commission implementing regulation (EU) 2015/2447.
- 10 According to Section 134 the goods shall be valued in accordance with the transaction value method where the declarant demonstrates that the declared transaction value closely approximates to one of the following test values, determined at or about the same time: (a) the transaction value in sales, between buyers and sellers who are not related in any particular case, of identical or similar goods for export to the customs territory of the Union; (b) the customs value of identical or similar goods, determined in accordance with Article 74(2)(c) of the Customs Code; (c) the customs value of identical or similar goods, determined in accordance with Article 74(2)(d) of the Customs Code.
- 11 It should be noted that according to the last paragraph of Section 8 of Commission Implementing Regulation (EU) 2015/2447 “where the person concerned gives his point of view before the expiry of the period referred to in paragraph 1(b) the customs authorities may proceed with taking the decision unless the person concerned simultaneously expresses his intention to further express his point of view within the period prescribed”.
- 12 As to access to documents, it should be noted that according to recital no. 58 of the Customs Code, “This Regulation should be without prejudice to existing and future Union rules on access to documents adopted in accordance with Article 15(3) of the Treaty on the Functioning of the European Union. It should also be without prejudice to national rules on access to documents”. Under Article 15(3), first part of the Treaty on the Functioning of the European Union “Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union’s institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph”.
- 13 As a matter of principle and according to Section 36 of the Treaty on the Functioning of the European Union such prohibitions or restrictions shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.
- 14 According to Section 33(1) of the Customs Code “The customs authorities shall, upon application, take decisions relating to binding tariff information (BTI decisions), or decisions relating to binding origin information (BOI decisions)”.
- 15 See Section 32(2) of the Customs Code.
- 16 See European Commission, Administrative Guidance on the Binding Tariff Information Process, Bruxelles, 2018, available at https://ec.europa.eu/taxation_customs/system/files/2019-04/bti_guidance_en.pdf
- 17 See first subparagraph of Article 56(4) of the Customs Code.

- 18 Under this provision “where application of the measures referred to in points (d) to (g) of paragraph 2, or the exemption from measures referred to in point (h) thereof, is restricted to a certain volume of imports or exports, such application or exemption shall, in the case of tariff quotas, cease as soon as the specified volume of imports or exports is reached”.
- 19 The protection of fundamental interests is paramount in the EU Customs Code. See Section 134 according to which “Goods brought into the customs territory of the Union shall, from the time of their entry, be subject to customs supervision and may be subject to customs controls. Where applicable, they shall be subject to such prohibitions and restrictions as are justified on grounds of, inter alia, public morality, public policy or public security, the protection of the health and life of humans, animals or plants, the protection of the environment, the protection of national treasures possessing artistic, historic or archaeological value and the protection of industrial or commercial property, including controls on drug precursors, goods infringing certain intellectual property rights and cash, as well as to the implementation of fishery conservation and management measures and of commercial policy measures”.
- 20 Such an exclusion is provided for by section 6, letter d), of Article 22, without prejudice to the law of the Member State concerned.
- 21 A further exclusion of the right to be heard, according to Section 22, paragraph 6, second part, letter f of the Customs Code, concerns “other specific cases”.
- 22 It should be noted that, in the absence of a hearing prior to the adoption of a demand for payment, the lodging of an objection or administrative appeal against that demand for payment should not necessarily have the effect of automatically suspending implementation of the demand for payment to ensure observance of the right to be heard in connection with that objection or appeal. See ECJ, judgment of 3rd July 2014, Kamino, C129/13 and C130/13, EU:C:2014:2041, paragraph 67. Moreover, the lodging of an appeal pursuant to Article 243 of the Customs Code does not, under the first paragraph of Article 244 of that code, in principle, cause implementation of the disputed decision to be suspended. As the appeal does not have a suspensory effect, it does not preclude the immediate implementation of that decision. The second paragraph of Article 244 of the Customs Code authorises the customs authorities to suspend, in whole or in part, implementation of a customs decision 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.
- 23 See also Court of Justice, Judgment dated 14th February 1990, case 301/87.
- 24 Similarly, see Court of Justice, Judgment dated 5th October 2000, case C-288/96.
- 25 According to Article 181a(2) of the Regulation 2454/93, where the customs authorities have the doubts described in paragraph 1 they may ask for additional information in accordance with Article 178(4). If those doubts persist, the customs authorities must, before reaching a final decision, notify the person concerned, in writing if requested, of the grounds for those doubts and provide him with a reasonable opportunity to respond. A final decision and the grounds shall therefore be communicated in writing to the person concerned.
- 26 See judgment of the Court (First Chamber) of 13th March 2014, Joined cases C-29/13 and C-30/13, ECLI:EU:C:2014:140. In any event, it must be pointed out that the obligation of the national court to ensure the full effectiveness of EU law does not always result in the annulment of a contested decision, where the latter was adopted in infringement of the rights of the defence. According to settled case-law, an infringement of the rights of the defence, in particular the right to be heard, results in the annulment of the decision taken at the end of the administrative procedure at issue only if, had it not been for such an irregularity, the outcome of the procedure might have been different (judgments of 10th September 2013, G. and R., C383/13 PPU, EU:C:2013:533, paragraph 38, and of 3rd July 2014, Kamino International Logistics and Datema Hellmann Worldwide Logistics, C129/13 and C130/13, EU:C:2014:2041, paragraphs 78 and 79).
- 27 This remark reflects the Court’s position in the Sopropé case, C-349/07, ECLI:EU:C:2008:746. See paragraph 44, where the Court maintains that where national legislation or regulations lay down within a specific time range the period for collecting the observations of the parties concerned, it is for the national court to satisfy itself that the period 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.

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