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Het Unierechtelijke verdedigingsbeginsel: het recht een standpunt naar behoren en effectief kenbaar te mogen maken voordat een bestuursorgaan een bezwarend besluit neemt.

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SUMMARY

The rights of the defence is a fundamental principle of European Union law, to which the Union right to be heard in all proceedings is inherent (hereafter: the right to be heard). The right to be heard is affirmed in the Charter of Fundamental Rights of the European Union (hereafter: Charter), which ensures that both the rights of the defence and the rights to a fair legal process in all judicial proceedings is respected. In accordance with the right to be heard, which applies when authorities intend to adopt a measure that will adversely affect a person, the addressees of such judicial decisions must be provided with the opportunity to make their views effectively known, regarding the information on which the authorities intend to base their decision. The authorities of the Member States are subject to that obligation when taking decisions that are within the scope of European Union law, even though their national legislation does not expressly provide such a procedural requirement.

The purpose for writing this thesis is derived from the current debate in the Netherlands on how this right to be heard should be applied in Dutch tax matters and tax decisions. Concerning the scope of this right a number of discussions and ambiguities exist. Discussions on this topic take place because Dutch legislation does not implement the right to be heard for the majority of tax decisions. In order to answer the question how to deal with the Union right to be heard in Dutch tax matters, I have formulated the following research question:

To what extent does Dutch (tax) procedural law comply with the right to be heard and how can Dutch (tax) procedural law be structured to ensure it is in line with this right?

Findings

Principles have a relative character and the right to be heard competes with other principles. The use of principles is not undisputed, due to the incommensurability of principles and the issue of vagueness. When using principles, legislators and legal practitioners should take into account that principles have an initial weight. Legislators and legal practitioners also have the duty to substantiate decisions. They are obliged to be consistent when applying principles as well. When the right to be heard is codified, it could become a legal rule. An example of the right to be heard as a legal rule can be found in the Union Custom codes.

The right to be heard only has a direct effect on national matters if Union law is being implemented under national laws and regulations. It is not always clear when Union law is being implemented. It is possible that a case takes entirely place within one Member State and at the same time is subject to Union law and a cross-border element does not necessarily mean that Union law is being implemented. When applying customs law and VAT, Union law is being implemented. Also, for excise duties it is mainly clear when Union

law is being implemented and that the right to be heard has a direct effect. More uncertainty arises in cases that concern other Dutch taxes, such as income taxes.

The right to be heard guarantees every person the opportunity to make his or her views effectively known during an administrative procedure, before the adoption of any decision that adversely affects his or her interests. The right to be heard consists of four elements. It entitles a person to (1) information, (2) access to documents upon request, (3) sufficient time to prepare for the defence and (4) the right to express his or her views. The right to be heard is applied to a larger scope of decisions than the rulings defined in the Dutch (tax) administrative law. The right to information implies that the administrative authority must inform the addressee on the main elements of the claim, their classification and the evidence it is based on. The right to documents entails that an administrative authority must, at the request of the person concerned, provide access to all documents that may be relevant for his/her defence. The time period granted to the addressee to prepare his/her defence varies and depends on the facts and circumstances of each specific case. In the last phase this person must be able to make his/her views known on the elements of the claim and their classification. If (s)he has been able to fulfil all four elements of the right to be heard, (s)he was able to make his/her views *effectively* known.

The right to be heard is codified in article 41 of the Charter, but this article only concerns institutions, bodies, offices and agencies of the European Union and it is not applicable in national disputes. The right to be heard is codified in Article 47 of the Charter for tax fines. Article 48 of the Charter concerns the rights of the defence in the phase of appeal and does not include the right to be heard before a decision is made. In tax matters that do not concern a tax fine, a person cannot invoke the Charter but can rely on the unwritten right to be heard.

The written and unwritten right to be heard offers the same level of protection. The conditions for limiting the right to be heard differ for the written and unwritten form. For custom matters the right to be heard is codified as a rule of law and the Union Custom Codes determines the maximum protection as well as the limitations of this right. The Custom Code determines that the right to be heard may be limited in "other specific cases" (article 22 of the Union Custom Codes). In my opinion this gives the Member States the freedom to limit the right to be heard in custom matters for other cases than the ones that are specifically named in article 22 of the Union Custom Codes.

Fundamental rights – such as the rights of the defence, which include the right to be heard – may be restricted, provided that the limitations correspond to objectives of general interest pursued by the measure in question and do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed. Any limitation on the exercise of the written right to be heard must be provided by law.

The expression 'in accordance with the law' requires, firstly, that the impugned limitation should have some basis in domestic law; secondly, it refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for them, and that it is compatible with the rule of law.

Furthermore, the limitation must pursue a general interest, for example, in fiscal matters, threats to the security of the European Union and its residents, the environment or consumers and the fight against fraud.

Alimitation is not disproportionate if it is suitable, necessary and meets the requirements of proportionality *stricto sensu*. Suitable means that a limitation must be fit to achieve its legitimate purpose. The government can demonstrate that this is the case. In general, a limitation easily fulfils this condition. In addition, the limitation must be necessary. This involves a check whether the least drastic restrictive measure has been chosen. Finally, there is the requirement of proportionality *stricto sensu*. Proportionality *stricto sensu* means that a limitation is only allowed where the legitimate aim, represented by the competing principle served by the limitation, can justify the negative restrictive effects on one or more other principles. The analysis of various circumstances that appear in the literature and case law of the Court of Justice gives a catalog of circumstances that should be taken into account when the right to be heard is being restricted in fiscal matters. This catalog also provides information on the kind of effect a circumstance has.

Circumstances	Influence on the weight of the limitation of the right to be heard	Influence on the weight of the competitive principle	Comments
An asymmetrical legal relationship and inequality between the parties	Enlarging	n/a	n/a
Unilateral intervention	Enlarging	n/a	n/a
Multitude of changes	Enlarging	n/a	n/a
Discretion	Enlarging	n/a	n/a
Sanctions	Enlarging	n/a	n/a
Reversal of proof and increased burden of proof	Enlarging	n/a	n/a

Circumstances	Influence on the weight of the limitation of the right to be heard	Influence on the weight of the competitive principle	Comments
Costs to implement the right to be heard	Reducing	Enlarging	Costs can only play a role in combination with other circumstances in limiting the right to be heard. The cost aspect alone is not sufficient to limit the right to be heard.
State security or public health		Enlarging	n/a
Fight against fraud		Enlarging	This circumstance is frequently cited to limit the right to be heard in tax matters.
Urgency limitation		Enlarging	n/a
Administrative efficiency	Reducing	n/a	This circumstance is frequently cited to limit the right to be heard in tax matters.
Increasing duration of the limitation		Reducing	n/a
Increasing efficiency of the limitation		Enlarging	n/a
Increasing scope of the limitation		Reducing	n/a
Major (economic) interests of the interested party	Enlarging	n/a	n/a

Circumstances	Influence on the weight of the limitation of the right to be heard	Influence on the weight of the competitive principle	Comments
Limitation is categorical in nature	Reducing	n/a	<p>4 categorical limitations are possible:</p> <p>1) The legal consequences – if the limitation is contested – are canceled and a normal procedure is started that complies with the requirements of the right to be heard (paragraph 6.7.1.e).</p> <p>(2) If a decision restricting the right to be heard is followed by subsequent decisions where first the legal effect of the primary decision is taking effect and a procedure is followed that meets the requirements of the right to be heard (section 6.8.1).</p> <p>3) If there is a tied decision and the interested party is unable to give information that may be relevant for taking the decision (section 6.8.2).</p> <p>4) If an adverse decision is preceded by an adversely affecting decision (first decision) that meets the requirements of the right to be heard and the subsequent adversely affecting decision with regard to which the right to be heard is limited, only implements the first decision (section 6.8.4).</p>
The costs of the limitation for a third party		Reducing	This circumstance seems of little significance in tax law.

Table 13

Union law does not regulate the consequences of non-observance of the right to be heard, which means Member States have procedural autonomy. Member States must, however,

respect the principles of effectiveness and equivalence. Non-observance of the right to be heard can only lead to an annulment of the adverse decision if it is established that, had it not been for such an irregularity, the outcome of the procedure might have been different (the 'other outcome'-criterium). Non-observance of the entire right to be heard or total non-observance of the right to (get access to) the documents leads to the annulment of the adverse decision if the 'other outcome'-criterium is met.

Partial annulment of an adverse decision is possible when 1) the formal document entails more than just the material adverse decision, 2) Union Law applies to only part of the adverse decision, 3) non-observance applies to only part of the adverse decision and when 4) disadvantage only applies to part of the adverse decision. This is shown in figure 35.

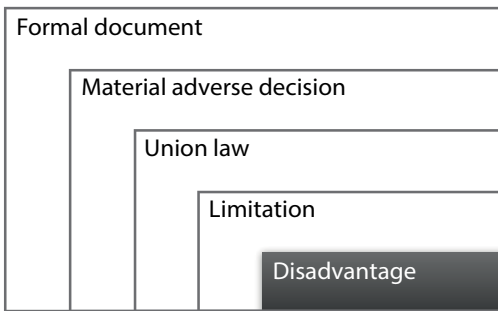


Figure 34

The burden of proof that the right to be heard has been fulfilled, lies with the administrative authority. In the event of non-observance of the right to be heard, the burden of proof that the 'other outcome'-criterium is met, lies with the interested party.

The 'other outcome'-criterium can be met when:

- the interested party can bring forward a legal statement that would make sense,
- evidence has been lost due to the passage of time,
- there is discussion about the facts or their interpretation,
- the tax authorities have made a settlement proposal, or
- a previous judicial authority has delivered a favorable opinion to the interested party.

My investigation into the right to be heard has yielded the following step-by-step plan to assess whether there is non-observance of the right to be heard and whether non-observance should result in an annulment of the adverse decision:

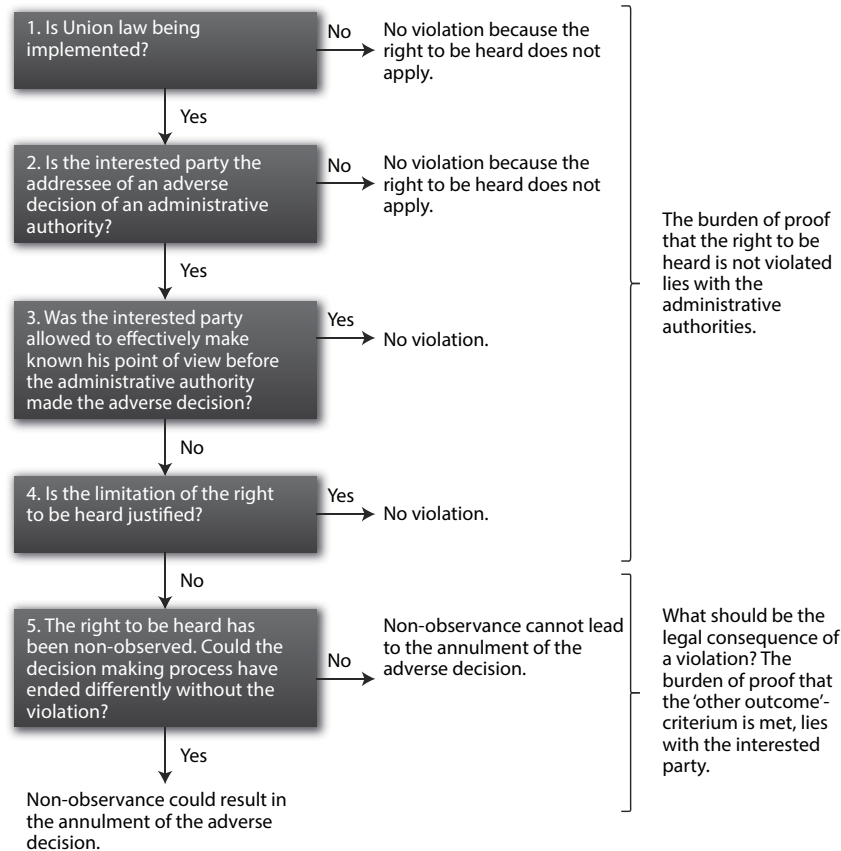


Figure 35

Guided by the step-by-step plan, Dutch (fiscal) procedural law was compared with the requirements of the right to be heard. The most significant similarities are:

- The Dutch objection phase meets the requirements of the right to be heard.
- The Dutch procedure for administrative tax fines meets the requirements of the right to be heard.
- The individual limitations of the right to be heard as codified in the Awb, when the conditions of a limitation are met, lead to justified limitations of the right to be heard.

In addition, a number of discrepancies have been identified. Differences that could lead to non-observance of the right to be heard are:

- The right to be heard in Dutch procedural law has a smaller scope than the right to be heard in Union law.

- The categorical limitation of the right to be heard for financial decisions in Dutch procedural law leads to non-observance of the right to be heard, if Union law is being implemented.
- The moment of assessment of a limitation of the right to documents leads in most cases to non-observance of the right to be heard. Non-observance cannot be undone at the moment of assessment.

Conclusion and recommendations

Steps 1 through 3

The right to be heard applies only if a Member State implements Union law. A Member State is likely to be acting within the scope of Union law when a Member State:

1. directly applies a source of Union law to a specific case at hand, most frequently a regulation (the *direct application* scenario);
2. applies national law that transposes or implements a measure or an obligation of Union law. Although the national authority is likely to apply a source of national law to a case, Union law still remains in the background, certainly for the purposes of interpretation (the *indirect application* scenario); and
3. finds itself in a situation in which a national rule makes use of the derogations or justifications to limitations allowed by Union law (the *derogation* scenario).

The answer to the question if Union law is being implemented by different Dutch tax laws and regulations is not always simple or clear early on in a case. This means that it will be difficult to introduce the right to be heard only for those (intended) Dutch tax decisions that implement Union law. In addition, introducing the right to be heard for only those tax matters that implement Union law could result in different procedures for different parts of the same formal tax decisions. The party concerned will be able to express his/her view about one part of the intended decision before the decision is made, however, (s)he should then wait until the decision is made, before (s)he will be able to express his/her views about another part of the decision. This can be the case, for example, when directors are held liable for VAT and payroll taxes. Implementation of the right to be heard in all cases where Union law is implemented is only possible if the right to be heard is being applied in all tax decisions, where it is possible to implement Union law. This also prevents the divergence of coherent procedures. A broad application of the right to be heard is in line with the membership of the Netherlands to the European Union. This way, the Netherlands conform to the decisions made under Union law. Implementation also leads to more recognition and appreciation of the right to be heard.

The right to be heard as defined in Union law has a broader concept of decisions than the right to be heard as stated in the Dutch procedural laws and regulations. Meaning that it is not automatically possible that the right to be heard will be integrated in the existing articles in Dutch procedural law. This discrepancy can, however, be remedied through the codification of the right to be heard in all tax decisions.

In Dutch law diverse elements of the right to be heard are codified for various tax decisions. This does not help the Dutch tax authorities in understanding what exactly is expected of

them. As a result, the Dutch tax authorities do sometimes only execute what is codified and not what is actually demanded of them in relation to the right to be heard. This situation is not desirable and can lead to non-observance of the right to be heard. It can, however, be avoided by codifying all four elements of the right to be heard.

An analysis of the first three steps of the step-by-step plan with regard to the differences between Dutch procedural (tax) law and the right to be heard leads to the recommendation to codify the right to be heard by creating a right for a person to make his/her position known before an administrative authority takes an incriminating tax decision, in which the four elements of this right are also codified. Inspiration for the codification can be found in the procedure for fines in the AWR, paragraph 49.2a of the Dutch 'Richtlijn Invoordering', article 22 of the Custom laws and the proposal for European administrative rules (see section 9.3.3.a of this thesis). The assessment method which is applied (self-assessment or return-based), gives no significant larger or smaller number of cases in which the right to be heard must be implemented.

Step 4 (figure 36)

The first recommendation (previous paragraph) leads to codification of the right to be heard for a very large number of intended tax decisions. The codification of limitations of the right to be heard creates a system with nuances in which the right to be heard is balanced with competing interests, such as practicality, efficiency and the fight against tax fraud. Analysis of the fourth step of the step-by-step plan, with regard to the differences between Dutch (fiscal) procedural law, leads to the second recommendation. This recommendation is to link categorical and individual limitations to the codification of the right to be heard.

If the conditions of the individual limitation are met, the limitation will be justified (Section 9.2.4.a of this thesis contains a list of possible individual limitations). This is not automatically the case for categorical limitations. Limiting the right to be heard for *all* adverse tax decisions would affect the essential content of this right and will lead to non-observance of the right to be heard. Judgements of the European Court and Union Custom laws show that there are at least four situations in which a categorical limitation of the right to be heard is possible for a limited number of tax decisions. The right to be heard can be justifiably limited in:

1. Decisions of which the legal consequences, when contested, are nullified and a normal procedure is started that meets the requirements of the right to be heard (section 6.7.1.e).
2. Decisions restricting the right to be heard, and this decision is followed by subsequent decisions where the legal effect of the first decision is noticeable first, and a procedure that meets the requirements of the right to be heard is followed regarding those subsequent decisions (see section 6.8.1 of this thesis).
3. Bound decisions where the interested party does not have access to information relevant for the decision that must be made (see section 6.8.2 of this thesis).
4. Successive decisions, whereby a procedure has been followed with regard to the previous adversely affecting decision that complies with the requirements of the right to be heard and the subsequent adverse decision is limited only to the implementation of the preceding decision (see section 6.8.4 of this thesis).

A categorical limitation must in all cases comply with the negative rule from the *Kamino-case*. Meaning that the person concerned should be able to request and under certain circumstances obtain suspension of the adverse decision, and (s)he must be able to contest the decision that is adversely affecting him/her. A categorical limitation may be appropriate for, for example, default fines, payment reminders and writ of execution.

This thesis shows that the limitation of the right to documents in Dutch procedural (tax) laws (articles 7:4 and 8:29 of the Awb) are in line with the right to be heard. However, as the assessment of whether the limitation is justified does not take place before the appeal phase, a finding such as that a document or part of it has been wrongfully kept secret may result in non-observance of the right to be heard, and this non-observance cannot be remedied by the subsequent submission of the documents in the judicial phase. This leads to the third recommendation, with regard to limiting the right to documents, to create a moment of assessment of this limitation before an adverse decision is taken.

Step 5

Analysis of the fifth step of the step-by-step plan regarding the differences between Dutch procedural (tax) law and the Union law shows that in case of non-observance of the right to be heard, it should be considered what consequences this non-observance must have. Since Union law does not regulate the consequences, Member States have procedural autonomy. Annulment of the adverse decision is only possible if the "other outcome" criterion is met. The procedural autonomy of the Member States means that a Member State also has the option to provide legal consequences to non-observance other than (partial) annulment of the adverse decision in the event of established non-observance. It is possible to refer a case back to the objection phase, if this helps to rectify the non-observance. It could also be considered to preserve the legal consequences of the adverse decision, whether or not with reimbursement of the legal costs. Research into the legal consequences of non-observance in Dutch tax proceedings shows that only the annulment of the adverse decision is being used. Legal protection is important, however, minor non-observances of the right to be heard, should not lead to disproportionate consequences. The last (fourth) recommendation therefore addresses the legal operators and ensures proportionality between the type of non-observance and the consequences of the non-observance.

Feasibility and desirability of the recommendations

When drawing up recommendations, it is important to consider whether the recommendations are actually feasible. Even more so because the Dutch legislator has deliberately chosen to exclude the right to be heard in financial decisions, because it will entail an expected heavy (financial) burden on the government. This is due to the large number of tax decisions that recur annually. The fact that other Member States already apply the right to be heard, in itself shows that codification of the right to be heard is feasible. The feasibility is also reflected in the proposed European administrative rules, that also include the right to be heard. The feasibility of this proposal has been considered by a large group of scientists from different Member States of the Union. With the increasing influence of Union law, it is conceivable that European administrative rules will be introduced in the future, and should be applied by all Member states.

In addition, it is important to realise that the right to be heard applies to only part of the intended tax decisions, namely only the adverse decisions. Furthermore, the Dutch tax authorities already apply the right to be heard for a number of intended adverse decisions, such as certain liabilities and customs decisions. In addition, not every taxpayer will use his/her right to be heard on an intended adverse decision. After all, it is a taxpayer's right and not a duty (see section 5.4.4). In addition, under specific conditions, it is possible to introduce individual and categorical limitations. Finally, it is likely that the introduction of the right to be heard will lead to a decrease in the number of objections. Tax authorities/customs seem to confirm this, although hard figures to support this assumption are hard to find.

In view of the above, there is no doubt about the feasibility of the codification of the right to be heard for tax decisions.

Finally, the question rises whether such codification of the right to be heard, as outlined before, is desirable. Based on this research, I think it is. Membership of the European Union also means that a Member State complies with regulations of Union law. Codifying the right to be heard helps reducing inequalities between citizens and administrative authorities in an early stage. Such inequality compensation may be considered to be of significant importance in a time where administrative authorities have numerous powers, which sometimes intervene deeply in the fundamental rights of their citizens. The tax authorities also benefit from codifying the right to be heard. Involvement of the person concerned at an early stage in the decision process will enable him/her to contribute to the investigation of the facts, to prevent errors and to report personal circumstances. This will allow the tax authorities to make more objective and better decisions at an early stage. I expect that the national application of the right to be heard will reduce the number of objections. It is also quite feasible that such an early collaboration between the party concerned and the tax authorities will frequently lead to the prevention of legal proceedings. Therefore, the application of the right to be heard does not have to lead to a decreasing administrative efficiency and the associated increase in costs. Reaching out to a taxpayer early on will have an enlarging effect on the relationship between tax authorities and taxpayers and thus also an aggravating effect on the reputation of tax authorities. All in all, I strongly recommend the implementation of the right to be heard in tax matters and to codify limitations of the right to be heard.

