JUDGMENT OF THE COURT (Second Chamber)

18 December 2008 *

In Case C-349/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Supremo Tribunal Administrativo (Portugal), made by decision of 12 June 2007, received at the Court on 27 July 2007, in the proceedings

Sopropé — Organizações de Calçado Lda

v

Fazenda Pública,

intervening party:

Ministério Público,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot (Rapporteur), K. Schiemann, P. Kūris and L. Bay Larsen, Judges,

* Language of the case: Portuguese.

Advocate General: V. Trstenjak,
Registrar: M. Ferreira, Principal Administrator,

after considering the observations submitted on behalf of:

— Sopropé — Organizações de Calçado Lda, by A. Caneira, advogado,

— the Portuguese Government, by H. Ventura, C. Guerra Santos and L. Fernandes, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. Albenzio, avvocato dello Stato,

— the Commission of the European Communities, by S. Schønberg and P. Guerra e Andrade, acting as Agents,

having regard to the written procedure and further to the hearing on 2 October 2008,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the principle of respect for the rights of the defence.

2 The reference has been made in the course of proceedings between Sopropé — Organizações de Calçado Lda ('Sopropé') and the Fazenda Pública (the Portuguese Treasury) concerning an application for post-clearance recovery of a customs debt established following an investigation into the origin of goods imported into Portugal by Sopropé between 2000 and 2002.

Legal context

Community legislation

3 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) was amended by Regulation (EC) No 2700/2000 of

the European Parliament and of the Council of 16 November 2000 (OJ 2000 L 311, p. 17) ('the Customs Code').

4 Chapter 3 of Title VII of the Customs Code deals, in Articles 217 to 232, with the recovery of customs debts.

5 Article 221(1) of the Customs Code provides:

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

6 Article 222(1)(a) of the Customs Code provides:

'1. Amounts of duty communicated in accordance with Article 221 shall be paid by debtors within the following periods:

(a) if the person is not entitled to any of the payment facilities laid down in Articles 224 to 229, payment shall be made within the period prescribed.

Without prejudice to the second paragraph of Article 244, that period shall not exceed ten days following communication to the debtor of the amount of duty owed and, in the case of aggregation of entries in the accounts under the conditions laid down in the second subparagraph of Article 218(1), it shall be so fixed as not to enable the debtor to obtain a longer period for payment than if he had been granted deferred payment.

…'

7 Articles 243 to 246, which are set out under Title VIII of the Customs Code, relate to appeals.

8 Article 245 of the Customs Code provides:

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

National legislation

9 The General Tax Law ('the GTL'), which was approved by Decree-Law No 398/98 of 12 December 1998, expressly provides for the principle of participation in fiscal

procedure, which was laid down in Article 267 of the Constitution of the Portuguese Republic and already provided for, as regards administrative procedure, in Article 100 et seq. of the Code of Administrative Procedure.

10 Article 60 of the GTL, in the version applicable to the facts of the case in the main proceedings, provides:

'1. Taxpayers shall participate in the making of decisions which concern them, unless provided otherwise by law, in one of the following ways:

(a) the right to a hearing prior to recovery;

…

(e) the right to a hearing before the Tax Inspectorate's report is finalised.

…

4. The right to a hearing must be exercised within a period to be laid down by the tax authorities by way of registered letter sent for that purpose to the taxpayer's residence for fiscal purposes.

…

6. The period for the exercise, orally or in writing, of the right to a hearing may not be less than 8 days or greater than 15 days.

…'

11 The Supplementary Rules of Procedure of the Tax Inspectorate were adopted by Decree-Law No 413/98 of 31 December 1998.

12 Article 60 of that Decree-Law, which relates to prior hearings, provides:

'1. When the inspection measures have been completed and if they give rise to measures levying taxes or tax measures which are unfavourable to the body which has been the subject of the inspection, the draft findings in the report, including a statement of those measures and the reasons for them, must be notified to that body within a period of 10 days.

2. The notification must provide for a period of 8 to 15 days to allow the body which has been the subject of the inspection to express its opinion on the draft findings.

3. The body which has been the subject of the inspection may express its opinion in writing or orally; in the latter case, its statements must be recorded in written form.

4. The final report must be drafted within a period of 10 days following the statements referred to in the preceding paragraph.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 Sopropé is a Portuguese undertaking which sells footwear imported from Asia. The dispute in the main proceedings concerns 52 consignments of imported footwear which were declared as originating in Cambodia and which benefited, by virtue of their supposed origin, from preferential customs treatment under the Generalised System of Preferences over a period of two and a half years from 2000 to mid-2002.

14 An inspection was carried out at the beginning of 2003 by the Portuguese customs authorities' Directorate of Anti-Fraud Services in the context of an administrative cooperation mission launched by the Commission's European Anti-Fraud Office (OLAF) for the purpose of determining the origin of the footwear imported from Asia.

15 The investigations carried out by the customs authorities within Sopropé began on 14 February 2003. Those investigations led the Portuguese authorities to take the view that the abovementioned 52 consignments had been imported on the basis of the submission of falsified certificates of origin and bills of lading.

16 The customs authorities concluded that the imported goods were of non-preferential origin and therefore could not qualify for the Generalised System of Preferences, and that consequently the rate of customs duty applicable to goods from non-member countries had to be applied to them.

17 On 3 July 2003, Sopropé was informed that it could exercise its right to a prior hearing in respect of the draft findings in the inspection report and the annexes thereto within a period of eight days under Article 60 of the GTL. The company exercised that right on 11 July 2003.

18 As it took the view that Sopropé had not submitted any new information which could alter the draft inspection report, the customs authorities informed Sopropé, by letter of 16 July 2003, which was received on the following day, that it had a period of 10 days, in accordance with Article 222 of the Customs Code, in which to pay the customs duty owed. That customs duty amounted to EUR 212 684.98, increased by EUR 36 757.99 in value added tax and EUR 19.30 in compensatory interest, making a total of EUR 249 462.27.

19 Thirteen days thus elapsed between the date of the notification in respect of the exercise of the right to a hearing and that of the notification relating to payment.

20 Sopropé refused to pay the customs debt of which it had been notified within the period prescribed. On 8 September 2003, it brought an action before the Tribunal Administrativo e Fiscal de Lisboa (Administrative and Tax Court, Lisbon), based on, inter alia, infringement of the principle of respect for the rights of the defence, by reason of the insufficiency of the period granted to it for submission of its observations. That court, however, held that the decision to recover the duty was justified as no evidence capable of calling it into question had been adduced. Furthermore, it held that the rights of the defence had been respected inasmuch as the requirement relating to a prior hearing, as set out in the GTL, had been satisfied and the procedural rules of the Tax Inspectorate had been complied with.

21 Sopropé appealed against that ruling to the Supremo Tribunal Administrativo (Supreme Administrative Court) on the ground, inter alia, that the first-instance court had not correctly applied the principle of respect for the rights of the defence as guaranteed by Community law.

22 It was in the context of that appeal that the Supremo Tribunal Administrativo decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the period of 8 to 15 days set by Article 60(6) of the General Tax Law and by Article 60(2) of the Supplementary Rules of Procedure of the Tax Inspectorate, approved by Decree-Law No 413/98 of 31 December 1998, for the exercise by the taxpayer, either orally or in writing, of the right to a hearing compatible with the principle of respect for the rights of the defence?

(2) May a period of 13 days, reckoned from the notification made by the customs authority to a Community importer (in this case, a small Portuguese undertaking dealing in footwear) to exercise its right to a prior hearing within 8 days to the date of notification to pay import duties within 10 days in relation to 52 imports of

footwear from the far east under the GSP made over a period of two and a half years (between 2000 and mid-2002), be considered reasonable for an importer to exercise its rights of defence?'

The questions referred for a preliminary ruling

23 By its two questions, which it is appropriate to examine together, the national court asks the Court of Justice whether a period of eight days granted to an undertaking to submit its observations on a draft decision for post-clearance recovery of import duty in the amount of EUR 249 462.27, relating to 52 consignments of goods which were imported over a period of two and a half years, complies with the requirements of Community law and, in particular, with the general principle of respect for the rights of the defence, in the case where, in particular, the decision to recover the duty was taken by the authorities five days after that period had expired.

Observations submitted to the Court

24 The appellant in the main proceedings states that it is apparent from the case-law of the Court that the principle of respect for the rights of the defence requires that, where it is proposed to take a decision which will adversely affect an individual, that individual

must be placed in a position in which he may effectively make known his views (see, inter alia, Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21; Case C-462/98 P *Mediocurso* v *Commission* [2000] ECR I-7183, paragraph 36; and Case C-395/00 *Cipriani* [2002] ECR I-11877, paragraph 51).

25 Furthermore, Sopropé maintains that a period such as that granted under the GTL to an importer in which to exercise its right to a hearing can be regarded as complying with the principle of respect for the rights of the defence only if it makes it possible for that importer effectively to make known its views. In circumstances such as those of the dispute in the main proceedings, Sopropé takes the view that the period given to it was not sufficient.

26 The Portuguese Republic submits that the principle of respect for the rights of the defence does not apply to the preliminary hearing procedure provided for by the GTL. That procedure, it is argued, is the expression of the principle of participation in decisions and not of the right to appeal. Furthermore, it is apparent from the case-law of the Court, in particular from Case C-176/99 P *ARBED* v *Commission* [2003] ECR I-10687, that the principle of the right to a prior hearing forms part of the rights of the defence only in proceedings imposing penalties, which is not the case in the main proceedings here. Consequently, the Portuguese Republic is of the opinion that the period provided for in Article 60 of the GTL cannot be appraised in the light of the principle of respect for the rights of the defence. It cannot therefore be considered unreasonable, in so far as it is only one of a variety of remedies provided for against a decision to impose a charge, thereby strengthening the actual possibility of exercising rights of defence.

27 The Portuguese Republic adds that, should the Court take the view that the rights of the defence do apply to the prior hearing procedure provided for by the GTL, the disputed period in the main proceedings will be compatible with Community law as long as the principles of equivalence and effectiveness have been observed (see, inter alia, Case C-30/02 *Recheio — Cash & Carry* [2004] ECR I-6051). According to the Portuguese Republic, the principle of equivalence has been observed in so far as the GTL provides for an identical period in respect of all acts that levy tax dues, whether their basis is

Community or domestic law. It is for the national court to establish whether the principle of effectiveness has been observed.

28 The Italian Republic observes that the Customs Code does not even provide for the debtor to be heard before his customs debt is recovered. It relies on Article 245 of that Code to claim that the provisions governing implementation of the appeals procedure fall within the competence of the Member States. Consequently, it takes the view that the Court should merely reaffirm the principle that an operator should have a right to a hearing, both at the administrative stage and at the litigation stage, under national law.

29 The Commission of the European Communities observes that it is apparent from the case-law of the Court that respect for the rights of the defence requires that any addressee of a decision which significantly affects his interests must have the right to a hearing, that is to say, that he should be able effectively to make known his views, which means that a reasonable period must be provided for the submission of his observations (see, inter alia, Case 55/69 *Cassella Farbwerke Mainkur* v *Commission* [1972] ECR 887; Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885; and Joined Cases C-439/05 P and C-454/05 P *Land Oberösterreich and Austria* v *Commission* [2007] ECR I-7141).

30 The Commission states that decisions to recover duty taken pursuant to the Customs Code may significantly affect the interests of importers such as the appellant in the main proceedings and that, consequently, Member States must guarantee the rights of the defence when implementing the provisions of that Code relating to the arrangements for recovering customs debts, even though the Code does not contain any provision dealing with the right to a hearing.

31 From this the Commission infers that a period such as that provided for by the GTL is compatible with the principle of the right to a hearing if persons whose interests are significantly affected by decisions taken under Community law have the possibility effectively to make known their views on those decisions.

32 According to the Commission, it is for the national court to assess whether the requirements connected with respect for the rights of the defence have been satisfied, having regard to both the Community and the national legal context and after having made a global assessment of the facts of the dispute in the main proceedings. It takes the view that the national court may, in order to determine whether the right to a hearing has been observed, be guided by criteria drawn from the case-law of the Court, namely the objectives pursued by the Community rules applicable, the complexity of the facts and grounds underlying the decision, the complexity of the legal context, the possibility of requesting an extension of the period prescribed and, lastly, the possibility of submitting additional observations.

The Court's reply

33 Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, it draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories (see, inter alia, Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 37).

34 It also follows from the settled case-law of the Court that, where national legislation comes within the scope of Community law, the Court, when requested to give a preliminary ruling, must provide all the criteria of interpretation required by the

national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures (see, inter alia, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 42, and Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685, paragraph 31).

35 Since the questions referred for a preliminary ruling concern the procedures to be followed by national authorities when applying the Community Customs Code, the Court has jurisdiction to provide the national court with all the criteria of interpretation required by that court to determine whether the national rules at issue are compatible with the fundamental rights the observance of which the Court ensures.

36 Observance of the rights of the defence is a general principle of Community law which applies where the authorities are minded to adopt a measure which will adversely affect an individual.

37 In accordance with that principle, the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. They must be given a sufficient period of time in which to do so (see, inter alia, *Commission* v *Lisrestal and Others*, paragraph 21, and *Mediocurso* v *Commission*, paragraph 36).

38 The authorities of the Member States are subject to that obligation when they take decisions which come within the scope of Community law, even though the Community legislation applicable does not expressly provide for such a procedural requirement. As regards the implementation of that principle and, in particular, the periods within which the rights of the defence must be exercised, it must be stated that, where those periods are not, as in the main proceedings, fixed by Community law, they are governed by national law on condition, first, that they are the same as those to which individuals or undertakings in comparable situations under national law are entitled

and, secondly, that they do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the Community legal order.

39 The national court raises two issues in connection with the principle of respect for the rights of the defence; first, it asks whether a period of 8 to 15 days as generally provided for by national law for a taxpayer to exercise his right to a hearing may be regarded as sufficient and, secondly, it asks whether, in the circumstances of the main proceedings, the period of 13 days which elapsed between the time when Sopropé was placed in a position in which it could submit its observations and the date of the decision to recover the duty satisfies the requirements of that principle.

40 As regards the first issue, it must be pointed out that it is normal and also appropriate for national legislation and regulations to establish, within the context of the numerous existing administrative procedures, general rules governing periods within which particular steps may or must be taken. The establishment of such rules also serves to promote the principle of equal treatment. In respect of national legislation which comes within the scope of Community law, it is for the Member States to establish those periods in the light of, inter alia, the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration.

41 As regards post-clearance recovery of customs import duties, a period within which a taxpayer may exercise his right to a hearing which cannot be less than 8 days or greater than 15 days does not, as a matter of principle, make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the Community legal order. The undertakings which may be affected by the procedure at issue in the main proceedings are professionals which have recourse to importation on a regular basis. Furthermore, the applicable Community legislation provides that those undertakings must be able to furnish proof, for the purposes of inspection, of the lawfulness of all the

transactions that they have effected. Lastly, the general interest of the European Community and, in particular, the interest in recovering its own revenue as soon as possible mean that inspections must be capable of being carried out promptly and effectively.

42 However, the appellant in the main proceedings stated before the national court that it had had a period of only 8 days to submit its observations and that the decision to recover the duty was taken only 13 days after it had been asked to submit its observations. That is why the national court is asking the Court of Justice to determine whether such periods are compatible with Community law.

43 Although the Court has no jurisdiction under Article 234 EC to apply a rule of Community law to a particular case and thus to judge a provision of national law by reference to such a rule, it may none the less, within the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of Community law which may be useful to it in assessing the effects of that provision (Case 20/87 *Gauchard* [1987] ECR 4879, paragraph 5; Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 22; and Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 37).

44 In that regard, it must be pointed out that where national legislation or regulations, as is the case in the applicable legislation here at issue in the main proceedings, lays 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. The national court must, in those circumstances, have due regard to the facts specific to the case. In the case of imports from Asian countries, factors such as the complexity of the transactions in

question, the distance involved or even the quality of the relations normally maintained with the competent local authorities may thus be significant. Likewise, regard must be had to the size of the undertaking and to the question whether or not it normally maintains commercial relations with the country in question.

45 As regards inspections such as those at issue in the main proceedings, it must be pointed out that these constitute a whole. Thus, an inspection procedure carried out over a number of months, which includes on-the-spot checks and a hearing of the undertaking concerned, the declarations of which are placed on the file, may justify the assumption that that undertaking was aware of the reasons why the inspection procedure had been carried out and the nature of the facts alleged against it.

46 Such circumstances, which may make it possible to establish that the undertaking concerned was, in any event, given the opportunity to set out its views in the course of the inspection, must also be taken into consideration.

47 It is for the court before which the dispute in the main proceedings has been brought to examine whether, in the light of, inter alia, those various criteria, the period which was granted by the competent authorities within the time range provided for by the national legislation meets the Community-law requirements set out above.

48 The following points must be made with regard to the question of the possible effect on the decision under challenge in the main proceedings of the fact that it was taken 13 days after the company had been informed that it had a period of 8 days within which to submit its observations.

49 The purpose of the rule that the addressee of an adverse decision must be placed in a position to submit his observations before that decision is adopted is to enable the competent authority effectively to take into account all relevant information. In order to ensure that the person or undertaking concerned is in fact protected, the purpose of that rule is, inter alia, to enable them to correct an error or submit such information relating to their personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content.

50 Accordingly, respect for the rights of the defence implies that, in order that the person entitled to those rights can be regarded as having been placed in a position in which he may effectively make known his views, the authorities must take note, with all requisite attention, of the observations made by the person or undertaking concerned.

51 It is for the national court alone to ascertain whether, having regard to the period which elapsed between the time when the authorities concerned received the observations and the date on which they took their decision, they can be held to have taken due account of the observations sent to them.

52 The answer to be given to the national court must therefore be that, with regard to recovery of a customs debt for the purpose of effecting post-clearance recovery of customs import duties, a period of 8 to 15 days allowed to an importer suspected of having committed a customs offence in which to submit its observations complies in principle with the requirements of Community law.

53 It is for the national court before which the case has been brought to ascertain, having regard to the specific circumstances of the case, whether the period actually allowed to that importer made it possible for it to be given a proper hearing by the customs authorities.

54 The national court must also ascertain whether, in the light of the period which elapsed between the time when the authorities concerned received the importer's observations and the date on which they took their decision, they can be deemed to have taken due account of the observations sent to them.

Costs

55 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **With regard to recovery of a customs debt for the purpose of effecting post-clearance recovery of customs import duties, a period of 8 to 15 days allowed to an importer suspected of having committed a customs offence in which to submit its observations complies in principle with the requirements of Community law.**

2. **It is for the national court before which the case has been brought to ascertain, having regard to the specific circumstances of the case, whether the period actually allowed to that importer made it possible for it to be given a proper hearing by the customs authorities.**

3. **The national court must also ascertain whether, in the light of the period which elapsed between the time when the authorities concerned received the importer's observations and the date on which they took their decision, they can be deemed to have taken due account of the observations sent to them.**

[Signatures]