

Decisions in relation to Customs matters - Right to be Heard Manual

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The “Right to be Heard” by a person who may be adversely affected by a decision in relation to Customs.

1. Introduction

1.1 In its judgment in Case C-349/07 – “Sopropé” – delivered in December, 2008, the European Court of Justice held that, where it is proposed to take a decision that will adversely affect a person (this includes a legal person), that person must be given an opportunity to express their point of view before the decision is taken.

1.2 Upholding the principle of the right to be heard, the Court stated:

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.

1.3 Decisions in relation to customs issues, being defined under Article 4 (5) of the Customs Code, are subject to the application of this right to be heard principle, and the EU Commission has advised Member States that national provision must be made for its application.

1.4 It should be noted that this “right to be heard” principle arises *before* the decision is actually taken. The principle is in addition to the right of appeal (which can only arise *after* the decision has been taken).

1.5 Following legal advice, the ECJ judgement is regarded as applying only in relation to decisions in relation to Customs matters.

2. Scope of customs decisions affected

2.1 All decisions pertaining to the application of customs rules and which will adversely affect the person concerned come within the scope of the right to be heard principle.

2.2 However, in some instances, existing practices will already reflect this principle. For example, following a customs audit, where the findings/outcome of the audit is discussed with the person concerned and any comments made by that person are considered. In such circumstances the right to be heard requirement has been met.

2.3 It is also important to note that the principle does not apply where Revenue is expressing a view that is not legally binding on the person concerned. Examples here would be an opinion as regards a tariff classification or a view relating to the application of the customs valuation rules.

2.4 Instances of customs decisions where the right to be heard principle will need to be applied before the decision is taken include:

- Demand for payment of duty without prior discussion with the person concerned;

- Refusal to grant an authorisation for a customs procedure, a simplified procedure, AEO, etc;
- A classification decision conveyed by Binding Tariff Information (BTI), which will result in payment of a higher rate of duty;
- A binding origin decision that will result in payment of a higher rate of duty;
- Refusal to grant a request for repayment of duty or to remit a customs debt;
- Refusal to grant relief from payment of duty (e.g. under the terms of Transfer of Residence).

3. Action to be taken

3.1 Where it is proposed to take a decision in relation to a customs issue that will adversely affect a person, the person affected must be advised of the grounds on which it is intended to base the decision and be allowed to express their point of view.

3.2 Depending on the circumstances in which the decision will be conveyed (e.g. if the intended recipient is present), communication of the advice may be made orally or by any other means and, if the person wishes, the person may express their point of view in the same way.

3.3 To avoid the right to be heard giving rise to prolonged delays, a time limit for the person's response should normally be indicated. The person can then be advised that failure to respond within that period will be deemed to be a waiver of the right to be heard. No specific time limit has been settled but the time limit must be sufficient to allow a person a reasonable opportunity to respond. This would suggest that in the case of written correspondence a period of, perhaps, 14 days would be appropriate.

3.4 In circumstances where a person indicates that they wish to waive the right to be heard, this fact should be recorded and retained as evidence that the intended recipient was provided with the possibility to respond.

4. Failure to respect the right to be heard principle

4.1 In the "Sopropé" case the ECJ referred the issue back to the national court to decide the implications of the Court ruling. In any event, however, it is clear that failing to allow the person the right to be heard could, at some future stage, allow the person the opportunity to successfully call the decision that was taken into doubt. This could result in the decision being overturned, or, as a minimum, require the decision to be re-visited.

5. Further information

5.1 The practical effect of the right to be heard principle in relation to Customs decisions will be kept under review. Any feedback regarding the application of the principle, especially where it is giving rise to particular difficulties, would be appreciated. Further information is available at Own Resources Unit, Customs Division, Nenagh.