

# The Ghost of the ‘Criminal Charge’: the EU Rights of the Defense in Dutch Administrative Law

Adrienne de Moor-van Vugt

*Professor of Administrative Law at the University of Amsterdam (The Netherlands)*

## Abstract

*Although observance of the rights of the defense is recognised as a general principle of EU law, not all EU member states have adopted it in its EU form. In the Netherlands we have been struggling with it for some time now.*

*In short, there are two main reasons for the Dutch unease with the rights of the defense in administrative law:*

- *Dutch law sees the rights of the defense as closely connected to the rights guaranteed in case of a ‘criminal charge’.*
- *The rights of the defense in their EU form sit uncomfortably with the General Administrative Law Act (GALA), the Dutch codification of administrative law, which articulates the right to a hearing as a tool for decision making.*

*This is related to the ‘instrumentalist’ approach in Dutch law towards the rights of the defense, leading to the application of those rights as a useful decision-making tool for the administration. Other Member States leave room for a more ‘essentialist’ approach, which leads to the conceptualisation of those rights as fundamental rights of individual citizens.*

*Due to the increasing influence of EU law and human rights law the Dutch need to rethink the applicability and scope of the rights of the defense beyond criminal charge cases. Comparative law and the notions derived from EU law can help bring this about.<sup>1</sup>*

## I A General Principle of EU Law

A famous British case, *Ridge v. Baldwin*, was one of the reasons for Advocate General Warner to argue that the rights of the defense were part of the general principles of EC law.<sup>2</sup> In his oft recited conclusion in the *Transocean Marine Paint* case, he undertook a comparative analysis to find out if *TMP* was right in its proposition that it was entitled to express its views before the Commission decided upon the conditions for an exemption from the com-

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<sup>1</sup> Roberto Caranta, ‘Pleading for European Comparative Administrative Law, What is the Place for Comparative Law in Europe?’ *REALaw* 2009, vol. 2, nr. 2, 155-173.

<sup>2</sup> *Ridge (A.P.) v. Baldwin and others* [1963] 2 W.L.R. 935 [1964] AC 40 [1963] UKHL 2.

petition rules.<sup>3</sup> Since then, the rights of the defense form a series of rights that must be guaranteed in a procedure that lies within the scope of EU law.<sup>4</sup> The core of the rights entails the general rule that a person whose interests are adversely affected by a decision taken by a public authority must be given the opportunity to make his point of view known. This rule requires that a person or an undertaking be clearly informed, in good time, of the essence of the decision the authority intends to take and that they must have the opportunity to submit their observations to the authority. In order to do so, access must be granted to the files that form the basis of the proposed decision.<sup>5</sup> Also, in case the party affected seeks legal assistance, the confidential nature of written communications between lawyer and client needs to be respected (legal professional privilege).

The *TMP* case was a landmark in the development of the rights of the defense, which laid the foundation for a crossover of the rights of the defense from competition law to other fields of EC law. From there, the rights jumped over to national law through the implementation of the EC law concerned, while at the same time the European Court of Human Rights (ECrHR) elaborated upon its case law of a fair hearing before an administrative sanction is imposed.

When the Dutch General administrative law act (GALA) was evaluated a few years ago, legal scholars proposed to bring Dutch law in line with EU law and codify the rights of the defense in the GALA.<sup>6</sup> The advisory committee to the government (of which I was a member) did not support the suggestion. It held that the legislator should be reluctant to put vague general principles into rules, because it could trigger (unwanted) questions.<sup>7</sup> It may well be, that these questions do not pertain to the right to a hearing but to the rights that accompany the right to a hearing: legal counsel, access to files, time for preparation. These questions may also lead to new discussions about the nature of the decision involved, since in the Dutch debate the rights of the defense have always been so closely linked to that of the ‘criminal charge’. The Dutch legislator is keen to avoid the label ‘criminal charge’, when introducing new legal instruments that affect the rights and interests of the individual. The efforts to follow up on the procedural guarantees are seen as costly and time-consuming and standing in the way of efficient administration.

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<sup>3</sup> Case 17/74 *Transocean Marine Paint* [1974] ECR 1063.

<sup>4</sup> Case C-349/07 *Sopropé – Organizações de Calçado Lda v Fazenda Pública* [2008] ECR I-10369.

<sup>5</sup> See Simone White, ‘Rights of the Defence in Administrative Investigations: Access to the File in EC Investigations’, *REALaw* 2004, vol. 2, nr. 1, 57-69.

<sup>6</sup> R.J.G.M. Widdershoven c.s., *Derde evaluatie van de Algemene wet bestuursrecht 2006, De Europese agenda van de Awb*, Den Haag: Boom Juridische uitgevers 2007.

<sup>7</sup> Commissie Evaluatie Awb III, *Derde Evaluatie van de Algemene wet bestuursrecht 2006, Toepassing en effecten van de Algemene wet bestuursrecht 2002-2006*, Den Haag: Boom Juridische uitgevers 2007, p. 53.

In the following paragraphs the different approaches of the rights of the defense in the UK, France and the Netherlands will be discussed. It will be shown that the Dutch doctrine can be reconciled with EU law if the Dutch acknowledge that respecting the rights of the defense does not necessarily mean that the decision involved must be labeled as a 'criminal charge'.

## 2 Instrumentalist and Essentialist Approaches

At this point it is useful to cite Barbier de La Serre, who wrote an interesting article about procedural justice in EU case-law.<sup>8</sup> He observes that considerations relating to both the social functions as well as to the very substance of the rights of the defense play a decisive role in setting their scope of application and forms of exercise. He distinguishes two different approaches in the EU case law. The first is an instrumental approach, which focuses on the common interest goals advanced by the rights of the defense, such as correct decision-making. The second is an 'essentialist' approach, focused on the protection of participation of individuals independent from their contribution to the public interest, such as in quasi-judicial decision-making.

From there, Barbier de la Serre draws up a catalogue of criteria in order to identify and understand the factors which tend to influence the EU Court when it adjusts the rights of the defense to the specific circumstances of each case. This makes it possible to identify several circumstances that, as a general matter, make it probable that outside of clear-cut situations the rights of the defense will be acknowledged and/or increased in their intensity. The cases in which the Court finds it necessary to grant further rights are related to situations in which protection of (fundamental) rights are at stake. The cases where the Court is reluctant to acknowledge the rights of the defense the cost – benefit balance works out to the advantage of the administration rather than the party whose interests are involved.

The catalogue runs as follows. The rights of the defense will be acknowledged and/or increased in their intensity, where

- i. the authority enjoys a wide margin of appreciation,
- ii. the party's participation may contribute substantially to the overall quality of the decision;
- iii. the procedure concerns a field in which the authority enjoys strong investigative powers;
- iv. the decision to be taken involves an appreciation of the party's behavior and/or could be injurious to that party's reputation;

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<sup>8</sup> See Eric Barbier de La Serre, 'Procedural Justice in the European Community Case-law concerning the Rights of the Defence: Essentialist and Instrumental Trends', *European Public Law* 2006, no. 2: 225-250.

- v. the exercise of the rights of the defense entails no excessive material costs;
- vi. failure to exercise the rights of the defense would entail significant moral costs, in that sense that a decision may not be accepted by the parties involved.

This means the acknowledgment of the rights of the defense does not need to have an all or nothing approach and can benefit from a more subtle categorisation. It is this differentiating line of thinking that might help to solve the problem the Dutch have with acknowledging the rights of the defense in administrative law outside the scope of a criminal charge case (within the meaning of Article 6 ECRM). Before we turn to the Netherlands we will spend the following paragraphs showing how the rights of the defense have developed in the UK and France, the two homes of the rights of the defense in EU law and the European Convention on Human Rights.

### 3 The Origins of the Rights of the Defense in UK Law

In 1958, the Brighton watch committee decided to dismiss their chief constable Ridge.<sup>9</sup> He had been acquitted from charges of corruption but the judge in the case suggested that the Brighton Police force look for a new chief constable. The watch committee then decided to dismiss him anyway. Four years later, the House of Lords ruled that this decision was ineffective. Among the conclusions of the majority of the House was that natural justice required a hearing to have been given to the chief constable before his dismissal and that in the absence of a hearing the dismissal was invalid. The question was not a simple one of whether or not Ridge should be dismissed. There were several possible courses open to the watch committee, either dismissing him or requiring him to resign. The difference between the two is that dismissal involved forfeiture of pension rights, whereas requiring him to resign did not. Ridge's real interest in the case was to try and save his pension rights.

As became clear from the cases cited by Lord Reid, the angle from which the case was considered was that of the applicability of the principles of natural justice, the 'essentialist' approach. Natural justice is comprised of two rules, the rule against bias (impartiality) and the right to be heard (also referred to as fairness). One immediately thinks of article 6 of the European Convention, which indeed is an expression of these rules that themselves go back to Roman law.<sup>10</sup>

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<sup>9</sup> *Ridge v. Baldwin*, cited above.

<sup>10</sup> *Nemo auditor in causa sua, Audi et alteram partem.*

In applying the rules of natural justice, British courts at the time adopted a two-tier approach. First, they would ascertain the duty to apply the rules of natural justice. Second, they would examine if one of the two rules (or both) had been broken. The answer to the first question was a difficult one. The general opinion seemed to be that natural justice must be observed if there is a duty to act judicially. But when is that the case? It turned out, that in a long line of precedents it had been decided that this duty exists when one was acting as a tribunal. And this was the case when a person or body was required to give a hearing, for this duty was the hallmark of a tribunal.<sup>11</sup>

In *Ridge v. Baldwin* Lord Reid put an end to this circular way of reasoning, and, as Warner did in his conclusion of the TMP case cited above, he went back to an older precedent. In Reid's search for precedents it became clear that the essence of the matter would lie in actions that may affect property rights and privileges.<sup>12</sup> In the *Wandsworth* case, cited by Reid, it was an action to demolish a building that had not been properly notified to the authorities. In that case, Justice Byles said that 'although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.' In short, the right to be heard should have been granted, because the fundamental right of property was affected.

Although the theory of the applicability of the principles of natural justice and the right to be heard was clarified, the language stayed: judicial and quasi-judicial decisions require a hearing.

#### 4 The Origins of the Rights of the Defense in French Law

In France, the famous case of *Dame Veuve Trompier-Gravier* still leads when it comes to the rights of the defense, or *les droits de la défense*, as the French call them.<sup>13</sup> Dame Trompier owned a newsagent's shop and had a permit to sell newspapers, which was revoked after she allegedly had tried to blackmail the manager of the stand. The Conseil d'État ruled that such a decision should not have been made without giving la Dame the opportunity to express her views on the allegation. Commissaire du gouvernement Chenot explained in his conclusion that two conditions must be fulfilled. First, the administrative decision must entail a sanction for the person affected, which means that the decision aims to suppress wrongful conduct. Second, the decision must be sufficiently severe. Decisions which take away an advantage, a capacity or which

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<sup>11</sup> See A.W. Bradley, 'A Failure of Justice and Defect of Police: A Commentary on *Ridge v. Baldwin*', *The Cambridge Law Journal* (Apr. 1964), Vol. 22, No. 1, p. 83-107 (95).

<sup>12</sup> *Cooper v. Wandsworth Board of Works* (1863) 14 C.B.N.S. 180.

<sup>13</sup> CE 5 Mai 1944, *Dame veuve Trompier-Gravier*, *Rec. Lebon*, p. 133.

deny a public service are considered to be severe.<sup>14</sup>In other words, the fact that a person is affected in his moral or material interests invokes the rights of the defense if the harm is sufficiently severe. The scope of the rights extended in later years to rejections of an application based on information not provided by the applicant himself, something that we find in the Dutch GALA as well.<sup>15</sup>

The right has been derived from earlier case law concerning judicial procedures and from legislation concerning civil servants.<sup>16</sup> The rights of the defense are considered as belonging to the *principes généraux du droit publique* (the general principles of public law). A real boost to the right to a hearing in administrative procedures was given by the enactment of legislation concerning the duty to state reasons.<sup>17</sup> Up to 1979, French authorities did not have the obligation to explain their decisions to the addressees. The duty to underpin decisions with adequate reasons was considered to help the courts in their scrutiny of the legality of those decisions.<sup>18</sup> If a French authority refused to explain to the court, the court would summon the authority to hand over the file and find out itself whether or not the decision was *ultra vires*. This would leave the party involved with a difficult choice. He could bring the matter before the court just to find out the reasons and in hindsight conclude that the action had been pointless. On the other hand, not knowing the reasons for the decision he could forgo any attempt to use legal remedies and avoid the risk of expensive legal proceedings with an unpredictable outcome. The 1979 legislation put this to an end and required the statement of reasons for specific sorts of decisions. The categories all have in common the fact that they can seriously affect the legal position of interested parties, be it by way of a sanction, by the denial or revocation of permits, or by the stipulation of certain conditions in favourable decisions etc.

The duty to state reasons was consequently linked to the right to be heard and its accessory rights.<sup>19</sup> It can be observed, that the rights of the defense in France are, once applicable, and similarly to the UK, closely linked to (judicial and) quasi-judicial decisions. When we look at the doctrine in France, these procedural duties stem from the conviction that public authorities are perform-

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<sup>14</sup> See the French report to the Association des Conseils d'Etat et des Juridictions administratives suprêmes de l'Union européenne, 9e colloque du 16 au 19 mai 1984 à Dublin: 'Le droit de la défense devant l'administration et devant le juge de celle-ci', p. 7 ([www.juradmin.eu/colloquia/1984/france.pdf](http://www.juradmin.eu/colloquia/1984/france.pdf)).

<sup>15</sup> CE 25 Novembre 1994, *Palem*, *Rec. Lebon*, p. 753.

<sup>16</sup> CE 20 Juin 1913, *Téry*, *Rec. Lebon*, p. 736. Article 65 Loi du 22 avril 1905 portant fixation du budget des dépenses et des recettes de l'exercice 1905.

<sup>17</sup> Loi n° 79-587 du 11 juillet 1979 relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public.

<sup>18</sup> CE 26 Janvier 1968, *Société 'Maison Genestal'*, n° 69765, *Rec. Lebon*, p. 68.

<sup>19</sup> Loi n° 2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations Article 24.

ing 'judicial' tasks, such as imposing a sanction, denying a right, or taking away a financial advantage.<sup>20</sup> Therefore, they act quasi-judicially and need to observe the guarantees that are normally given to people that are brought before a court. Here too, we find a more 'essentialist' approach.

## 5 The Origins of the Rights of the Defense in Dutch Law<sup>21</sup>

Unlike the UK and France, Dutch administrative law was not originally acquainted with defense rights, at least not beyond disciplinary staff cases. Administrative procedures were designed in such a way that maximum convenience for the administration was combined with the right to proper administration.

In 1857 the Dutch parliament discussed new legislation for the Council of State.<sup>22</sup> At that time, the Council of State functioned as an advisory college to the Crown, especially in administrative disputes between government and citizens. The system was similar to the French system of *justice retenue*. One of the issues debated was the power of the Council of State to make inquiries and get information about the cases brought before it. Should the Council have the power to invite the parties involved for a hearing? Some members of parliament were against the introduction of such a power because they opposed the Council of State gaining judicial powers in administrative law disputes. The notion of a hearing was thus seen as interconnected with judicial review and judicial powers as well as with the right of the parties to defend their positions. MP's warned against the complications and costs if the procedure would be modeled on the civil law procedure.<sup>23</sup> The latter procedure was adversary in nature and allowed the parties to defend their positions in an oral or written hearing before the court. The opinion was that this went against the nature of the procedure before the Council of State, which was supposed to be simple and offer instruments to help the Council to draw up an adequate advice to the government. To tackle the objections, the government proposed to provide the Council with the power to grant a hearing to the parties involved, only in order

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<sup>20</sup> CE 20 Juin 1913, *Téry, Rec. Lebon*, p. 736, as discussed in: M. Long et al (eds.), *Les grands arrêts de la jurisprudence administrative*, Paris: Dalloz 1996 (11e édition), p. 156-162.

<sup>21</sup> Historical details in this paragraph were gathered by mrs Klaske de Jong, lecturer Administrative law at the University of Amsterdam. De Jong is preparing a dissertation on continuity and change in the nature and organization of administrative procedure in the Netherlands.

<sup>22</sup> Tweede wetsvoorstel Wet op de Raad van State, *Bijlagen Handelingen II 1857/58*, nr. XLV.

<sup>23</sup> *Bijlagen Handelingen II 1857/58*, nr. XLV, p. 849.

to ask questions and thus get the additional information it needed.<sup>24</sup> Thus the instrumentalist approach had made its entrance into Dutch administrative law.

The dominance of the instrumentalist approach is reflected in the report *ABAR*, which was drawn up by respected scholars in 1984 in preparation for a debate on the codification of rules of administrative law.<sup>25</sup> In the section about the duty of the administration to grant interested parties a hearing before a decision is made, the commission concludes that a general principle of law involving such a duty does not exist.<sup>26</sup> The commission observes that case law demands a hearing in relation to the careful preparation of decisions and sometimes in relation to correct behaviour towards a citizen. When the administration performs semi judicial functions, for instance when deciding on formal objections (*bezwaarschriften*), the commission finds that a hearing is warranted. Furthermore, and similar to the French, the commission discerns a category of decisions that seriously affects the legal position of interested parties: disciplinary sanctions, withdrawal of favourable decisions, capacities or rights etc. The commission recommends codification of the right to a hearing in those cases.<sup>27</sup> This last recommendation however, did not get a follow up in the *GALA*.<sup>28</sup>

The *GALA* mirrors the instrumentalist approach. Administrative authorities must comply with the rules pertaining to the preparation of decisions, which are provided for in the *GALA*. Additional provisions can follow from the underlying legislation and from the principles of proper administration (*algemene beginselen van behoorlijk bestuur*). The design of the *GALA* is largely borrowed from German law. At the same time, legal doctrine has experienced influences of the case law of the European Human Rights Court, as well as of the Court of Justice. This means influences from French law (the original approach of administrative law), German law (in the *GALA*), human rights law, and EU law. Under these influences the approach in Dutch law seems to be threefold.

In the first place, a hearing is part of the rules pertaining to the preparation of a decision. It serves mainly the interest of the administration in finding the facts. The duty to examine the facts and explore the interests involved may bring about the need to inquire with the interested parties and check the facts. This 'fact finding' function of a hearing is dominant in the *GALA*.<sup>29</sup> This means that

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<sup>24</sup> *Bijlagen Handelingen II* 1857/58, nr. XLV, p. 708

<sup>25</sup> *Algemene bepalingen van administratief recht* (Rapport van de commissie inzake algemene bepalingen van administratief recht), Alphen aan den Rijn: Samsom/H.D. Tjeenk Willink 1984.

<sup>26</sup> *Rapport ABAR*, p. 129.

<sup>27</sup> *Rapport ABAR*, p. 133-134.

<sup>28</sup> A translation of the *GALA* in English can be found at: [www.rijksoverheid.nl/documenten-en-publicaties/besluiten/2009/10/01/general-administrative-law-act-text-per-1-october-2009.html](http://www.rijksoverheid.nl/documenten-en-publicaties/besluiten/2009/10/01/general-administrative-law-act-text-per-1-october-2009.html).

<sup>29</sup> See Articles 4:7 and 4:8, that read: Article 4:7 1. Before refusing all or part of an application for an individual decision an administrative authority shall give the applicant the opportunity to express his views if: a. the refusal would be based on information about facts and interests concerning the applicant, and b. this information differs from information the applicant has himself supplied on the matter. 2. Paragraph 1 does not apply if the difference from the appli-

a hearing will only take place when the authorities want to establish facts that are not backed by information the interested party has provided. These rules of the GALA therefore, do not oblige public authorities to grant the right to a hearing in the context of defense rights.

Second, rights of the defense are acknowledged in case an administrative sanction boils down to a punishment, or – in other words – a criminal charge. The case law of the European Court of Human Rights, applying Article 6 of the Convention, has been quite influential. The awareness that administrative acts can imply sanctions of a punishing nature, and that some of them must be considered as 'criminal charges' within the meaning of Article 6 has caused a major change in legal thinking.<sup>30</sup> In reaction to the *Engel*-case and in the well-known *Öztürk*-case, Dutch Courts have established that several important sanctions in national administrative law must comply with Article 6.<sup>31</sup> The most frequently addressed sanction is the administrative fine. This has had important consequences in view of procedural rights. Not only does the right to a previous hearing need to be respected, but also other guarantees like the right to remain silent, the presumption of innocence, or the rule against self-incrimination. The rights of the defense, including the right to have prior notice of the grounds for a sanction and access to the files were incorporated in the GALA only recently, at least as far as the administrative fine is concerned.<sup>32</sup>

Third, in the case of decisions that can gravely affect one's legal position, apart from the 'criminal charge' situation, a hearing is also warranted. These types of cases however, are not designed by way of a right but rather as a duty for the administration to lend its ear to the party affected, who consequently can put forward information about his interests in the matter. This duty is based on the (unwritten) principle of proper preparation of a decision (duty of care or *zorgvuldigheidsbeginsel*). Here we see a hybrid form: on the one hand, the hearing serves the interests of correct decision making and on the other, it is meant to offer an opportunity to defend individual interests involved in the matter. This is illustrated by the example of the decision Dutch lawyers call the administrative sanction of a restoring nature: to repair what has been done or

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cation can only have minor significance for the applicant. Article 4:8 1. Before an administrative authority takes a decision about which an interested party other than the applicant can be expected to have reservations, it must give this interested party the opportunity to express his views if: a. the decision would be based on information on facts and interests concerning the interested party, and b. this information was not supplied for the purposes of the decision by the interested party himself. 2. Paragraph 1 does not apply if the interested party has failed to comply with a statutory obligation to supply information.

<sup>30</sup> ECtHR 8 June 1976, *Engel and Others*, Publ. ECHR, Series A No. 22; ECtHR 21 February 1984, *Öztürk*, Series A No. 73.

<sup>31</sup> See Rob Widdershoven, 'Encroachment of Criminal Law In Administrative Law In The Netherlands', *Electronic Journal of Comparative Law*, December 2002, vol 6.4, [www.ejcl.org/64/art64-25.txt](http://www.ejcl.org/64/art64-25.txt).

<sup>32</sup> See Articles 5:48 to 5:53 GALA.

omitted in violation of the law (*herstelsanctie*). The French would call this ‘*mesure de police*’. For instance, to demolish a barn that was erected without the necessary permit or to replant trees where trees were cut down without permit. Imposing such a duty to rectify what has been done against the law is not meant to punish, nor to cause injury to the offender or inflict a moral blame. But it is clear that the party addressed by such a measure would want to say something for himself, point out facts that put the situation in a different perspective or rely on mitigating circumstances as such a decision would affect his material interests. In some cases it would also affect his moral interests, especially when the violation is legally framed as an offense. Under EU law, this would be a clear case for the rights of the defense whereas under Dutch law it is a matter of proper decision making.

## 6 The Dutch Fear of the ‘Criminal Charge’ Ghost

As we have seen, different approaches define and determine the scope of application of the rights of the defense and their forms of exercise in British, French and Dutch law. We have seen that the UK and France are inclined to adhere to the essentialist approach and apply the rights of the defense as a method to protect the individual against aggravating decisions. The focus on the instrumentalist approach in the Netherlands leads to difficulties when it comes to the kind of decisions that have a hybrid character. On the one hand, they qualify as measures that serve or restore the public order. On the other hand, they interfere with the interests of the individual and affect those interests severely. By using the right to a hearing as a tool to get more information and make better decisions, the element of protection of the individual that is also part of the right to a hearing and the broader rights of the defense is neglected.

The mix of the instrumentalist with the essentialist approach is greeted with caution and suspicion in the Netherlands, because the essentialist approach is associated with two consequences, neither of which is wanted. The first is the catalogue of rights that accompany the right to a hearing, the right to be clearly informed, in good time, of the essence of the decision the authority intends to take, the opportunity to submit observations, the right to have access to the files and in some cases, respect for legal professional privilege. This catalogue sits uncomfortably with the system of the GALA because the GALA’s set up does not (yet) leave room for the third category of decisions that were discussed in paragraph 5. Moreover, granting such rights would mean spending time and effort on decision-making procedures, which is not in line with the overriding instrumentalist thinking within the administration. For these reasons, it is often maintained that the objection procedure offers the required guarantees for these kinds of aggravating decisions.

The second unwanted consequence is the start of a debate on the nature of the decision, it might be a criminal charge within the meaning of Article 6 ECHR.<sup>33</sup> As a consequence, even more rights must be respected: the right to remain silent, the presumption of innocence, and the protection against self-incrimination. Even the standard of proof is considered to be higher than for other, 'normal' aggravating decisions. The implications of human rights case law have been much debated.<sup>34</sup> The ghost of the 'criminal charge' made every decision with a negative effect suspicious. Withdrawal of permits, grants, social security benefits, all might be criminal charges, just as public order decisions, like closing a polluting factory or a coffee shop causing nuisance in a neighbourhood. There seemed to be an element of deliberate injury or moral blame in every decision. This discussion has made the Dutch authorities very cautious in their qualifications of decisions. The Dutch Council of State decided that the intention to punish as voiced by the legislator (or the administration) should be dominant in order to decide whether or not a decision entails a 'criminal charge'.<sup>35</sup> Therefore, new instruments, like the scrutiny of the integrity of applicants of permits (*Bibob-toets*) or the publication of sanctions (naming and shaming) are expressly denominated as non 'charges' by the legislator, in order to avoid discussion about the extra protection offered by the label 'criminal charge'.<sup>36</sup>

## 7 Rights of the Defense: a Sliding Scale

The Dutch instrumentalist approach regarding procedural rights in decision-making procedures leads to bias when it comes to the incorporation of the rights of the defense in the administrative law system. The legislator and the administration are reluctant to include them in the GALA. Two reasons prevent them from codification: uneasiness with the procedural rights

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<sup>33</sup> See for a survey of the case law: Paul Mahoney, 'Right To a Fair Trial in Criminal Matters under Article 6 E.C.H.R.', *Judicial Studies Institute Journal* 2004, p. 107-139.

<sup>34</sup> See W. Huisman & M.L. Koemans, 'Administrative measures in crime control', *Erasmus Law Review* 2008, 1(5), 121-145; Rob Widdershoven, 'Encroachment of Criminal Law In Administrative Law In The Netherlands', vol 6.4 *Electronic Journal of Comparative Law*, (December 2002), [www.ejcl.org/64/art64-25.txt](http://www.ejcl.org/64/art64-25.txt); André Klip & Harmen van der Wilt, 'Netherlands' report for the International Association of Penal Law on *Ne bis in idem*', 73 *Revue Internationale de Droit Pénal* 2002, p. 1091-1137; A.J.C. de Moor-van Vugt, 'The Dutch System of Penal and Administrative Sanctions', in: M.S. Groenhuijsen & M.I. Veldt, *The Dutch Approach in Tackling EC Fraud*, The Hague/London/Boston: Kluwer 1995, p. 37-44.

<sup>35</sup> B.J. van de Griend, *Het oogmerk als ijkpunt, Bestuurlijke sancties in bestuursrechtspraak en wetgevingsadvisering*, Raad van State Den Haag 2003, [www.raadvanstate.nl](http://www.raadvanstate.nl).

<sup>36</sup> The *Bibob-toets* has been tested by the ECtHR and found not to involve the determination of a criminal charge within the meaning of Article 6 § 1 of the Convention. See ECtHR 20 March 2012, Application no. 18450/07, *Murat BINGÖL v. the Netherlands*.

that accompany the right to a hearing and fear it might lead to an unwanted discussion about the 'criminal' nature of a decision.

Still, Dutch administrative law does acknowledge the existence of the rights (without calling them rights of the defense) and has found ways to comply with them, either by compensating in the formal objection procedure, or by applying the principle of duty of care (proper preparation of a decision). From the analysis of British, French and Dutch law we can draw the conclusion that these law systems don't differ much in substance when it comes to the respect of the right to a hearing and its accessory rights. In all three systems when confronted with a decision that adversely affect his interests the individual is entitled to a hearing in order to defend those interests. It seems that all three systems apply a sliding scale in order to decide how much a decision affects individual interests and in which category of procedural rights it should be put. In the Netherlands, the discussion about such a sliding scale is underdeveloped, due to the focus on the debate whether or not a specific decision represents a criminal charge. The merit of Barbier de La Serre's catalogue is that it articulates the values and interests that govern the case law of the Court of Justice in rulings about the rights of the defense. In fact, this catalogue has things in common with the French legislation pertaining to the duty to state reasons. The French law is formulated as a general rule, and sums up decisions that always must be underpinned with reasons and are therefore subject to the right to a hearing. Although this differs from the more general way of legislating in the GALA, following the French example might serve as an experiment for new rules. The catalogue also makes it clear that the rights of the defense are not an all or nothing issue. A nuanced approach is possible in order to reconcile the essentialist with the instrumentalist approach.

This catalogue, or at least its line of thinking, might help the Dutch to overcome their reluctance to give full acknowledgment to the rights of the defense in the GALA. This system of analysis offers criteria that could help the Dutch legislator to come away from the 'criminal charge' ghost, and define more clearly when and how the rights of the defense should be respected in Dutch law. Following these examples would result in benefitting from comparative law and from the horizontal and vertical crossovers that the rights of the defense have taken through the various jurisdictions.