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Consequences of the Violation by Administrative Authorities of the Right to be heard under EU Law: the Case M.G. and N.R.

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Abstract

The ECJ's judgment of 10 September 2013 in Case C-383/13 M.G. and N.R. sheds new light on the possible consequences of a violation of the EU right to be heard by administrative authorities of the Member States. The Court predicates that room should be left to national law but in essence provides a framework dictated by EU law itself. This framework seems to foster a balanced approach: no annulment of the contested decision per se.

1 Introduction

The right to be heard is one of the core elements of the rights of defence, a general principle of EU law since the 1970's, nowadays also codified in the EU Charter of fundamental rights.[1] In addition to questions on the precise content of this right, its scope and the consequences of its codification in the Charter, a particularly important question is what the consequences should be if this right has been violated by an administrative authority. From earlier case law of the ECJ, as well as from national legal systems it becomes clear that at least two different approaches are possible: a strict approach that automatically leads to the annulment of the contested decision and a more balanced approach that leaves room for a balancing of interests and taking into account whether the violation had genuine impact on the decision taken. EU law and national law show different approaches. Dutch law for instance, demonstrates a balanced approach whereas EU law has not been very clear on this matter and seems to apply both approaches. The ECJ's judgment of 10 September 2013 in Case C-383/13 *M.G. and N.R.* sheds new light on how this question should be dealt with. The result seems to be that the Court predicates that room should be left to national law but in essence provides a framework dictated by EU law itself. This framework seems to foster a balanced approach This case analysis discusses various aspects of this important case. First the facts and background (par. 2) will be addressed. In paragraph 3 the 'view' of the Advocate General (AG)

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1 About this in more depth par. 5.

Wathelet will be dealt with. This 'view' – not an opinion because in the *M.G. and N.R.* case the urgent procedure (PPU) was applied on request of the referring Dutch court, the Raad van State (see about this PPU in more depth par. 2) – is worth noting because the AG answers the question of the consequences of a violation of the right to be heard in a radically different manner from the ECJ itself (see par. 4). Finally paragraph 5 comments on the most important aspects of *M.G. and N.R.* primarily from a perspective of European administrative law.[2]

2 Facts and Background

2.1 Proceedings before the National Court

On 24 October and 11 November 2012 the Netherlands authorities placed Mr M.G. and Mr N.R. in detention in the context of a procedure for removing them from the Netherlands. By separate extension decisions of 19 and 29 April 2013, the duration of the detention imposed on them was extended by a maximum of 12 months, on the ground, inter alia, of a lack of cooperation on the part of the foreign nationals in the removal procedure. Mr G. and Mr R. each brought court proceedings challenging the decision to extend their respective detention. By judgments of 22 and 24 May 2013, the Rechtbank Den Haag (The Hague District Court), court of first instance, found that the rights of the defence had been infringed, but rejected the claimants' actions on the ground that the infringement in question did not give rise to annulment of the extension decisions. M.G. and N.R. lodged appeals against those judgments before the Raad van State. According to the Raad van State, the circumstances of the dispute come within the scope of Directive 2008/115, the so-called Return Directive. Subsequently, the Raad van State considers that it is not disputed that the rights of the defence were infringed, since M.G. and N.R. were not properly heard under the conditions provided for by national law before the adoption of the extension decisions. The Raad van State stated that, under Netherlands law, the courts determine the legal consequences of such an infringement, taking into account the interests served by the extension of detention and that they are therefore not required to annul an extension decision adopted without the party concerned being heard beforehand if the interest served by keeping the party concerned in detention is considered to be a priority. The Raad van State was uncertain however, of whether such case-law is in accordance with European Union law. It also stated that, under Netherlands law, if a national court holds

[2] This case has been commented on, in Dutch law, sometimes primarily from refugee law point of view, sometimes taking aspects of European administrative law into account, in various case notes in Dutch law. Cf. Reneman, *AB* 2013/404, Mok, *NJ* 2014/3 and Boeles, EHCR 2013/230.

that a detention decision must be annulled, the competent authorities cannot adopt a new decision and that the party concerned must be immediately released.

Because of this the Raad van State decided to stay proceedings and to refer questions to the Court of Justice for a preliminary ruling.[3] Those questions were the following:

'(1) Does infringement by the national administrative authority of the general principle of respect for the rights of the defence, which is also given expression in Article 41(2) of [the Charter], in the course of the preparation of an extension decision within the terms of Article 15(6) of Directive 2008/115, automatically and in all cases mean that the detention must be lifted?

(2) Does that general principle of respect for the rights of the defence leave scope for a weighing up of interests in which, in addition to the seriousness of the infringement of that principle and the interests of the foreign national adversely affected thereby, the interests of the Member State served by the extension of the detention measure are also taken into account?'

2.2 The Urgent Procedure (PPU)

The Raad van State asked the ECJ to apply the urgent procedure (PPU) pursuant to Article 23a of the Statute of the Court of Justice and Article 107 of the Rules of Procedure, because the claimants in the main proceedings were deprived of their liberty and the resolution of the main proceedings might result in that deprivation of liberty being immediately brought to an end. The ECJ agreed to this request. The PPU, which came into force on 1 March 2008, enables the ECJ to deal with the most sensitive issues relating to the area of freedom, security and justice (police and judicial cooperation in civil and criminal matters, as well as policies on border checks, visas, asylum and immigration) far more quickly (in two to three months).[4] It should be distinguished from the expedited procedure which had already been introduced in July 2000.[5] This expedited procedure is only intended to be applied infrequently in certain narrowly defined circumstances. It has the same procedural stages as the normal preliminary ruling procedure and the increased speed is achieved primarily by giving absolute priority to the case at hand at all stages. This has an impact on the speed with which all other pending cases are treated.[6]PPU cases are referred to a designated chamber of five judges and the written procedure – limited to

3 ABRvS 5 juli 2013, 201304861/1/T1/V3 and 201305033/1/T1/V3, *JV* 2013/292, *NJB* 2013/1700.
4 The abbreviation PPU finds its origin from the French name of the urgent procedure, le procédure préjudicielle d'urgence.
5 Art. 23a Statute of the Court of Justice of the European Union and art. 105 Rules of Procedure.
6 See M. Broberg & N. Fenger, *Preliminary References to the European Court of Justice*, Oxford: Oxford University Press 2014, p. 399.

the parties to the main proceedings, the Member State from which the reference is made and the European Commission, as well as other EU institutions whose measure may be at issue in the reference – is, in practice, essentially conducted electronically. It entails, just as the expedited procedure, a more limited role for the AG. According to Article 23a Statute it can be decided that the case will be dealt with by the ECJ without an Opinion of the AG. The role of the AG has been limited in such a way that he only has to be heard. This can be done orally, but in practice AG's are inclined to put their thoughts on paper. Those so called 'views' are published on the curia website.

3 The View of the Advocate General

3.1 Principle Line of Reasoning: Annulment of the Decision and Release of the Refugees according to Article 15(2) of the Return Directive (Strict Approach)

The view of AG Wathelet is worth noting and commenting on because the AG takes a different route and answers the questions referred by the Raad van State in a different way to that of the ECJ. His view is, in essence, that a violation of the right to be heard in a case like this is so fundamental that the only consequence can be annulment of the decision and in this case the lifting of the detention in conformity with art 15 of the Return Directive. In other words, he favours a strict approach. He does not accept the argument put forward by the Dutch Government that, because the Return Directive does not contain any provision setting out the legal consequences which a national court must attach to an infringement of the principle of the rights of the defence in the preparation of a measure extending detention within the terms of Article 15(6) of that directive, the legal consequences of a failure to respect the principle of the rights of the defence are governed by national law.

The Dutch government's argument was based on the *Sopropé* judgment. According to the Dutch government, from *Sopropé* it had become clear that, in the absence of rules laid down by EU law, it is for the national court to determine the legal consequences to be attached to an infringement of the principle of the rights of the defence in accordance with the principles of equivalence and effectiveness, that have been developed following the well known *Rewe* case.[7]

7 Case 33/76 *Rewe*, ECR 1976, 1989 and Case 45/76 *Comet*, ECR 1976, 2043. Cf. Rob Widdershoven, 'European Administrative Law', in: Rene Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States*, Intersentia 2012, p, 249-250 and Rob Widdershoven & Sacha Prechal, 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection' [2011-2] *REALaw*, p. 31-50.

As mentioned before, the AG does not accept that argument. He also refers to *Sopropé* and argues that from this case it is absolutely clear that the principle of procedural autonomy applies only where EU law does not lay down the rules for implementing legislation, those rules being governed, as a consequence, by the internal legal order of the Member States. According to the AG, in the case at hand EU law does lay down those rules. Article 15(2) of the Return Directive lays down the legal consequences that have to be followed by a national court which stems from an infringement of the right to be heard where it expressly provides that 'the third-country national concerned shall be released immediately if the detention is not lawful'. In the AG's view this mandatory provision gives Member States no discretion and reflects the express intention of the EU legislature to ensure that no third-country national staying illegally may be deprived of his liberty without that right being respected.

The Commission had put forward the argument that Article 15(2) of the Return Directive does not determine the legal consequences that follow from an infringement of the right to be heard when a measure extending detention is adopted because Article 15(2) only concerns the substantive requirements to be met in order for detention or extension to be ordered and not the decision leading thereto. The AG does not share this interpretation because the distinction between the lawfulness of the detention and the lawfulness of the decision ordering the detention is, in his view, inconceivable: he fails to see how detention can still be lawful when the decision ordering detention is not.

This leads the AG to the following conclusion; the Court should answer the question referred to the effect that infringement by the national administrative authority of the general principle of respect for the rights of the defence (in the present case, of the right to be heard, as provided for in Article 41(2)(a) of the Charter) in the course of the preparation of a measure extending detention within the terms of Article 15(6) of the Return Directive, means that the measure must be annulled and that the person concerned must be released immediately in accordance with Article 15(2) of the Return Directive.

3.2 Subsidiary Line of Reasoning: Alternative Solutions

Probably because this strict approach cannot be derived, at least not with any certainty, from earlier case law of the ECJ (see par. 5) the AG considers a few alternative solutions. The first is a weighing of interests, as proposed by the Raad van State. The AG does not discuss this solution further, considering that the observations made by the Judge-Rapporteur at the hearing have shown that this is a puzzling concept, particularly so far as the factors or interests that should be compared are concerned, a point on which no clarification was given at the hearing. In my view, this argument is not completely convincing because in the second question put forward by the Raad van State those factors had been, at least in part, already incorporated.

The second alternative put forward by the AG is that the right to be heard is not absolute and that restrictions can be justified in cases of great urgency and where compelling reasons so require. Although this aspect fundamentally deals with the question of whether there is a violation of the right to be heard as such, there is a connection with the consequences of not respecting this right: if there were compelling reasons not to hear the defence at the time the contested measure was adopted, this might justify a modification of the consequences of that infringement. According to the AG, those exceptional circumstances of serious, extreme urgency, that might justify the infringement of the right to be heard, are absent in the case of *M.G. and N.R.* He makes a comparison with the well known *Kadi I*-case and the Case *France v. People's Mojahedin Organization of Iran* that both concerned asset-freezing measures.[8] He also brings in the *Dokter* case that concerned measures to combat foot-and-mouth disease.[9]First, the 'extreme' measure at stake in *M.G. and N.R.,* extending detention by 12 months, is incomparable with the measures at stake in *Kadi I, France v. People's Mojahedin Organization of Iran* and *Dokter* and second, the reasons for justifying an infringement of the right to be heard were much more substantial and serious in those three cases, the global threat of terrorism and the risk to public health, and therefore were of greater urgency.

The third and final alternative put forward was the possibility of the annulment of the contested decisions and the adoption at the same time of new and lawful decisions, or the adoption of lawful new administrative decisions before the annulment of the contested decisions. According to the AG this alternative does not have value in the case at hand: under Dutch law the Dutch Staatssecretaris does not have that power, either in relation to the detention decision or in relation to the decision to extend detention.

4 The ECJ Ruling

The ECJ's judgment deviates in almost all aspects from the view of AG Wathelet. To start with, the ECJ considers that the consequences of violation of the right to be heard are not regulated in the Return Directive:

'Although the drafters of Directive 2008/115 intended to provide a detailed framework for the safeguards granted to the third-party nationals concerned as regards both the removal decision and the detention decision, they did not, however, specify whether, and under what conditions, observance of the right

8 Joined Cases C-402/05P and C-415/05P *Kadi I*, ECR 2008, 6351 and Case C-27/09P *France v. People's Mojahedin Organization of Iran*, ECR 2011, 13427.

9 Case C-28/05 *Dokter and Others*, ECR 2006, 5431.

to be heard of those third-country nationals was to be ensured, nor did they specify the consequences of an infringement of that right, apart from the general requirement for release if the detention is not lawful'.[10]

This leads the ECJ to conclude that, where neither the conditions under which observance of the third-country nationals' right to be heard is to be ensured, nor the consequences of the infringement of that right, are laid down by European Union law, those conditions and consequences are governed by national law, within the well known limits developed in the *Rewe* case law. Those limits are that the national rules adopted to that effect are the same as those to which individuals in comparable situations under national law are subject (the principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the European Union legal order (the principle of effectiveness).[11]

The ECJ then specifies the principle of effectiveness in relation to the present case:

'None the less while the Member States may allow the exercise of the rights of defence of third country nationals under the same rules as those governing internal situations (i.e. the principle of equivalence, T.D.), those rules must comply with European Union law and, in particular, must not undermine the effectiveness of Directive 2008/115.'[12]

In this regard the ECJ underlines the fact that the Member States must therefore take account of the case-law concerning observance of the rights of the defence in conjunction with the scheme of Directive 2008/115 when, in the exercise of their procedural autonomy, they determine the conditions under which observance of the right to be heard of third country nationals staying illegally is to be ensured and act upon an infringement of that right.

Taking those conditions into account the ECJ then answers the questions put forward by the Raad van State. First, the ECJ puts forward an interesting and possibly surprising general consideration about what EU law stipulates as far as the consequences of the violation of the right to be heard are concerned:

'(...) it must be noted that, according to European Union law, an infringement of the rights of the defence, in particular the right to be heard, results in annul-

10 Point 31.
11 Point 35, referring to earlier case law, *inter alia*, Case C-349/07 *Sopropé,* ECR 2008, 10369 and Case C-452/09 *Iaia and Others,* ECR 2011, 4043.
12 Point 36.

ment only if, had it not been for such an irregularity, the outcome of the procedure might have been different.'[13]

The ECJ stresses that not every irregularity in the exercise of the rights of the defence in an administrative procedure extending the detention of a third-country national with a view to his removal will constitute an infringement of those rights. As a result, not every breach of the right to be heard will necessarily render the decision taken 'unlawful' in the sense of Article 15(2) of the Return Directive. Therefore, not every breach of the right to be heard will automatically require the release of the third-country national concerned.

The ECJ substantiates this conclusion by making a connection (again) to the effectiveness of the Return Directive. It underlines that the effectiveness of that directive might be undermined if a national court should be required to rule that every infringement of the right to be heard would automatically bring about the annulment of the decision extending the detention and the lifting of that measure, even though such a procedural irregularity might actually have had no impact on that extension decision and the detention is in accordance with the substantive conditions laid down in the Return Directive, more specifically Article 15 thereof. It puts forward two aspects concerning the effectiveness of this directive that are at stake here. First, the Return Directive is intended to establish an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.[14] The use of coercive measures should thus be subject not only to the principle of proportionality, but also to the principle of effectiveness, with regard to the means used and objectives pursued.[15] Second, the removal of any third country national staying illegally is a matter of priority for the Member States, in accordance with the scheme of the Return Directive.[16] Therefore, answering the question of when a violation of the right to be heard should indeed result in rendering the decision unlawful and in the release of the person in detention, the ECJ concludes that:

'The national court's review of an alleged infringement of the right to be heard during an administrative procedure adopting a decision to extend a detention measure, as provided for in Article 15(6) of Directive 2008/115, must therefore consist in ascertaining, in the light of all of the factual and legal circumstances of each case, whether the infringement at issue actually deprived the party rely-

13 Point 38. Referring to Case C-301/87 *France v. Commission*, ECR 1990, 307, Case C-288/96 *Germany v. Commission*, ECR 2000, 8237, Case C-141/08 *Foshan Shunde Yongjian Housewares & Hardware v. Council*, ECR 2009, 9147 and Case C-96/11 *P Storck v. OHIM*, nyp.

14 Referring to recital 2 in the preamble to the Return Directive.

15 Referring to recital 13 in the preamble to the Return Directive.

16 Referring to Case C-329/11 *Achughbabian*, ECR 2011, 12695.

ing thereon of the possibility of arguing his defence better, to the extent that the outcome of that administrative procedure could have been different.[17]

5 Case Commentary

5.1 The Right to heard as Part of the Rights of Defence

The rights of defence have been developed by the ECJ as a general principle of community law starting in the 1970's. From the outset, one of the core elements of the rights of defence has been the right to be heard. Already in the landmark case *Transocean Maritime Paint Association* the ECJ acknowledged the general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known. [18]From subsequent ECJ case law it has become clear that the rights of defence also comprise other sub-rights, such as the right to access the file, the right to legal assistance, legal professional privilege, the right against self-incrimination, the right to a reasoned decision and the right to have a sufficient period of time to prepare the defence.[19] In the *Dokter*-case the rights of defence were classed as a fundamental right, that might be restricted if those restrictions correspond to objectives of general interest pursued by the measure in question and if those restrictions do not involve a disproportionate and intolerable interference which impairs the very substance of this right.[20]

The ECJ has always affirmed the importance of the right to be heard as part of the rights of the defence and its very broad scope in the EU legal order, considering that this right must apply in all proceedings that are liable to culminate in a measure adversely affecting a person.[21] In *Sopropé* it underlined that the observance of the right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement. This has more recently been affirmed in the *Sabou*-case.[22] Case law of the ECJ has also made clear that the general principle of EU law requiring the observance of the rights of the defence has to be respected not only by EU institutions, but also

17 Point 44.
18 Case 17/74, ECR 1974, 1063, point 15. In the staff Case 19/70 *Almimi*, ECR 1971, 623, this approach was already visible.
19 See *i.a.* Rob Widdershoven, 'European Administrative Law', in: Rene Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States* (Intersentia 2012), p, 279-280.
20 Case C-28/05, *supra*, point 75. See more recently Case C-418/11 *Texdata Software*, nyp, point 83-84.
21 See *i.a.Transocean Marine Paint Association*, Case C-7/98 *Krombach*, ECR 2000, 1935 and Case C-349/07 *Sopropé, supra*.
22 Case C-276/12 *Sabou*, nyp.

by authorities of the Member States when they act 'within the scope of EU law'. This concept, developed by the ECJ in its case law since the 1980's concerning the scope of general principles of community law,[23] has been applied recently also as far as the scope of the rights under the Charter of Human Rights is concerned. Whereas Article 51(1) states that the provisions of this Charter are addressed to the Member States only when they are implementing Union law, in *Åkerberg Fransson* the ECJ ruled that this provision should be interpreted in accordance with earlier case law concerning 'the scope of EU law'.[24]

The right to be heard has been affirmed in the Charter in Articles 47 and 48 which ensure respect of both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41, which guarantees the right to good administration. Article 41(2) of the Charter provides that the right to good administration includes the right of every person to be heard before any individual measure which would affect him or her adversely is taken, the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy, and the obligation of the administration to give reasons for its decisions.[25] In the *MM*-case the ECJ considered that, as follows from its very wording, this provision is of a general application and applied Article 41(2) in a national situation.[26] The text of Article 41 implies an important restriction however. In derogation of Article 51(1) of the Charter it is deliberately directed towards EU institutions only.[27] This was confirmed by the ECJ in the earlier *Cicala*-case.[28] As a consequence, in national situations only the general principle of EU law that the right to be heard should be observed applies. It seems that in *M.G. and N.R.* the Court used the opportunity to emphasise this and to reverse its (overly) broad interpretation in *MM* in this respect. This explains why, although the Raad van State in its referring questions explicitly makes reference of Article 41(2) of the Charter, the ECJ does not pay attention to this article and answers the Raad van State's questions using the rights of defence and the right to be heard as general principles of EU law and, in line with *Dokter*, as a fundamental right.

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23 See *i.a.* Case C-260/89 *ERT*, ECR 1991, 2925, Case C-299/95 *Kremzow* ECR 1997, 2629 and Case C-309/96 *Annibaldi*, ECR 1997, 7493.

24 Case C-617/10 *Åkerberg Fransson*, nyp.

25 See about art. 41(2) of the Charter, Itai Rabinovici, 'The Right to Be Heard in the Charter of Fundamental Rights of the European Union', [2012/1] *European Public Law*, p. 149–173.

26 C-277/11 *M.M.* nyp, point 84.

27 See C. Ladenburger, *FIDE 2012 – Session on 'Protection of Fundamental Rights post-Lisbon – The interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and national Constitutions'* (Institutional Report), p. 5.

28 Case C-482/10, point 28, nyp.

5.2 Rules on the Consequences of a Violation of the Right to be heard: National Procedural Autonomy?

The ECJ in *Sopropé* had already found that whereas certain aspects of procedural law – in that particular case the period of time to prepare one's defence – were not 'fixed by Community law', they are governed by national law on the condition that, first, they are similar to 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 EU legal order. This implies that in so far as the implementation of the right to be heard is concerned, Member States have procedural autonomy within the famous Rewe-limits of equivalence and effectiveness, under the condition that those aspects have not been fixed by EU law.

A first aspect dealt with in *M.G. and N.R.* touches upon the question of when a certain subject of procedural law has been fixed by EU law. The aspects of implementation of the right to be heard that are at stake here concern the *conditions* under which third party nationals have to be heard and the *consequences* of the infringement of this right. Those aspects, and especially the consequences of an infringement, have not been regulated or 'fixed' by EU law according to the ECJ in *M.G. and N.R.*. In the Return Directive, Article 15(6), there is only the 'general requirement' for release if the detention is not lawful. Interestingly, the AG Wathelet was of the opinion that this provision did fix the consequences of an infringement of the right to be heard: violation of this right implied that the detention was not lawful and therefore the consequence of the violation had to be the release of the refugee. From *M.G. and N.R.* the conclusion can be drawn that according to the ECJ, EU law 'fixes' a certain aspect of procedural law, and as a consequence dissolves national procedural autonomy on this aspect of law, but only if EU law regulates this aspect in an explicit and specific way.

A second aspect that is of importance in the present case concerns the effectiveness principle. With regard to this principle, it can be established from earlier case law that it has been applied by the ECJ in various ways. The original yardstick developed in the 1970's was that the national rule or practice should not make it impossible in practice or excessively difficult to exercise the rights conferred upon individuals by the Community legal order. Later on, a different method has been developed for assessing whether or not there has been an infringement of the effectiveness principle with the introduction of the 'procedural rule of reason'.[29] This assessment instrument provided for a balancing of the interest(s) behind the national rule or practice, analysed by the role of that

[29] For the first time in Cases C-430 and 431/90 *Van Schijndel*, ECR 1995, 4705 and Case C-312/93 *Peterbroeck*, ECR 1995, 4599.

provision in the procedure, its progress and its special features, viewed as a whole, against the effective application of EU law.[30] Nevertheless in recent case law the first more blunt criterion has still been applied.[31]

How does the ECJ operationalise the effectiveness principle in *M.G. and N.R.*? In my view, the ECJ does not apply one of the earlier mentioned tests in a clear way. First, the ECJ argues in point 35 that the national rules on the consequences of the violation should not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the European Union legal order. Then in point 36 it adds that those rules have to comply with EU law and, in particular must not undermine the effectiveness of the Return Directive. So the ECJ puts forward a double test. National rules on the consequences of a violation of the right to be heard have to be assessed using both yardsticks: the effectiveness of the right to be heard as such and the effectiveness of the Return Directive. Although the ECJ then stipulates that it is up to the Member States – including Member State courts I presume – while exercising their procedural autonomy, to determine those rules on the consequences with these two yardsticks in mind, and in particular paying attention to the case law of the ECJ on the observance of the rights of the defence (point 37), in the end, the ECJ itself prescribes an EU test or framework that Member States and Member State courts have to use: they have to ascertain, in the light of all of the factual and legal circumstances of each case, whether the infringement at issue actually deprived the party relying thereon of the possibility of arguing his defence more effectively, to the extent that the outcome of that administrative procedure might have been different (see further par. 5.3). In my view this approach by the ECJ may have had its origins in the formulation of the questions by the Raad van State. Although the Raad van State paid attention to the balanced approach in Dutch case law about the consequences of a violation of the right to be heard in refugee cases, its preliminary questions were primarily asked from an angle of EU law and focussed on how the EU principle of the rights of defence had to be interpreted in the case at hand and whether a weighing of interests was allowed that, in particular, also included the interests of the Member State. The ECJ's approach, leading to a Europeanisation of the rules or principles to be applied by Member States in the case at hand, might in my view also be interpreted as fitting into a broader development in recent case law about the application of national rules and principles in other areas, that might be cautiously labelled as a 'tendency' to Europeanisation. For instance, the application of the national rules and principles concerning the protection of legitimate expectations has been Europeanised as well: the EU principle of

30 Cf. *Van Schijndel*, point 19. See Widdershoven in Seerden, *supra*, p. 279-280 and Widdershoven & Prechal, *supra*, p. 31-50.

31 See f.i. Case C-317/08 *Alassini*, ECR 2010, 2213.

legitimate expectations has to be applied, even in cases where national principles offer more protection.[32] Even the application of national constitutional rules that offer more protection than its EU counterparts has been limited and Europeanised to a certain extent: this application should not compromise the level of protection provided by the EU Charter on Fundamental Rights, as interpreted by the Court, and the primacy, unity and effectiveness of EU law.[33] Of course, whether those examples express an actual 'tendency' towards Europeanisation in ECJ case law is debatable, but at least in my opinion they show a quite intrusive approach from the point of view of national law, as far as specific topics related to legal autonomy of the Member States are concerned.

Anyhow, the judicial test or framework that according to *M.G. and N.R.* should be used in determining whether the violation of the rights of defence should result in annulment of the decision or, in this case, the lifting of the detention, turns out to be, I believe, very much an EU framework, a test put down by the ECJ. National procedural autonomy has been put forward as leading principle in word, but has almost vanished in law. This becomes even clearer when we compare this framework put forward by the ECJ with the framework that was proposed by the Raad van State in its questions. As mentioned above in its preliminary question the Raad van State stressed the possibility of taking into account the interests of the Member State served by the extension of the detention. These interests are absent in the framework put forward by the ECJ, which only allows a Member State court to take into account, in the light of the factual and legal circumstances of the case, whether the outcome of the procedure could have been different had the right to be heard been respected.

5.3 A Strict or a Balanced Approach in EU Law?

The test put forward by the ECJ as described above can be labeled as a soft or balanced approach: no annulment per se. This is interesting and somewhat surprising because this general conclusion could not be derived from earlier case law, at least not convincingly. What did earlier EU case law say about the consequences of a violation of the rights of the defence?

It appeared that some case law implied a strict approach, whereas other case law suggested a balanced approach. A strict approach can be found in cases like

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32 See joined Cases C-383-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*, ECR 2008, 1561 and Case C-568/11 *Agroferm*, nyp. Cf. Philippe Boymans & Mariolina Eliantonio, 'Europeanization of Legal Principles? The Influence of the CJEU'S Case Law on the Principle of Legitimate Expectations in the Netherlands and the United Kingdom', *European Public Law,* Issue 4, p. 715–738.

33 Case C-399/11 *Melloni*, nyp. Cf. *i.a.* John Vervaele, 'The European Arrest Warrant and Applicable Standards of Fundamental Rights in the EU' [2013-2] *REALaw*, p. 37-54.

Lisrestal, *Mediocurso*, and *Foshan Shunde*.[34] A violation of the rights of defence resulted in annulment of the decision taken. Cases like *Distillers Company*, *Belgium v. Commission* and *Thyssen Stahl*, showed a balanced approach, implying that it should be assessed whether the violation resulted in the impossibility of defending oneself in such a way that the procedure might have had a different result.[35] This uncertainty has been the reason that Dutch courts, even before the questions from the Raad van State, were asking for preliminary ruling. The Hoge Raad did so early in 2013, six months before the questions of the Raad van State, in tax cases with regard to the consequences of the violation of the right to be heard that consisted in not hearing an interested party in the period before a so called 'invitation to payment' was issued.[36] This case is pending before the ECJ at the time of writing.[37] The Hoge Raad was led to ask those preliminary questions by the opinion of AG Van Hilten. In her opinion she referred to the two approaches in the case law of the ECJ mentioned above and stressed that ' the palette of case law of the ECJ about the consequences of the violation of the rights of defence is overall not monochromatic' and showed both a balanced and a strict approach.[38]

One has to say that it is striking that in his 'view' on *M.G and N.R* AG Wathelet labels this strict line as the main rule. The ECJ's above mentioned case law casts serious doubts over whether this view is correct. An even more remarkable aspect of *M.G. and N.R.* itself is that the ECJ makes no reference at all to the existence of this strict line in EU law. Without any reservation, in point 38, it observes that according to European Union law, an infringement of the rights of the defence, in particular the right to be heard, results in annulment only if, had it not been for such an irregularity, the outcome of the procedure might have been different. This is an important general statement by the ECJ, but whether it clarifies and ends the debate about the strict and balanced approach is not yet clear. In my opinion, one might doubt whether the ECJ really wanted to put forward this balanced approach as the general rule, because no reference was made to case law that supported the strict line and no argument has been given as to why this strict line would not be correct, at least in some cases. One gets the impression that the ECJ mistakenly only paid attention to one side of the coin of its earlier case law. Subsequent case law on this subject-matter – and as mentioned before, there are cases pending before the ECJ –

34 Case C-32/95 *Lisrestal*, ECR 1996, 5373, Case C-462/98 P *Mediocurso*, ECR 2000, 7183 and Case C-141/08, Foshan Shunde, *supra*.
35 Case 30/78 *Distillers Company*, ECR 1980, 2229, Case C-142/87 *Belgium/Commission*, ECR 1990, 959 and Case C-194/99 P *Thyssen Stahl*, ECR 2003, 10821.
36 HR 22 February 2013, nr. 10/0277, ECLI:NL:HR:2013:BR0671.
37 Case C-129/13 *Kamino International Logistics* and Case C-130/13 *Datema Hellman Worldwide Logistics*. AG Wathelet has delivered his opinion in Case 129/13 on 25 February 2014.
38 Conclusion AG Van Hilten, point 7.18.

needs to clarify this. If the ECJ is going to follow the opinion of AG Wathelet in the pending *Kamino*-case[39] – which has to be awaited because it did not follow Wathelet in *M.G. and N.R.* at all – this would imply in essence a confirmation of the application of the balanced approach of *M.G. and N.R.* in (tax) cases in which only financial interests are at stake.[40]

5.4 Specific National Law Aspects

From a national law point of view it is intriguing that the Raad van State has 'overhauled' the earlier questions asked by the HR and, via the urgent procedure, asked for a quick answer from the ECJ. An explanation might be found in the different fields of law that were at stake, tax law versus refugee law. The approach in Dutch case law as far as refugee law is concerned has always been the balanced approach: according to well established case law in cases of a violation of the rights of defence concerning measures on the detention or extension thereof a balancing of interests should be exercised, which takes not only the severity of the violation and the interests of the refugee into account but also the interest served by the measure taken by the authorities. Procedural deficiencies do not automatically result in annulment of the decision. The Raad van State summarises this case law in its referring judgment as follows: detention only becomes unlawful in cases where the interests served by detention do not reasonably outweigh the severity of the deficiency and the interest harmed as a result of that deficiency.[41]

Dutch case law in tax matters shows a different picture. Recent judgments of, for instance, the Rechtbank Haarlem (Haarlem District Court)[42] and the Gerechtshof Amsterdam (Appeal Court Amsterdam)[43] seem to apply a strict line whereas other judgments seem to allow a test of whether the interested party really was harmed by the violation of his rights of defence.[44] This gives the impression that the Raad van State made sure that the balanced line in refugee law would not be blurred by a potentially more strict approach approved by the ECJ in tax cases. The Raad van State explicitly makes reference to the fact that because of the preliminary questions asked by the Hoge Raad, there is uncertainty in Dutch case law on the question of the consequences of the violation of the rights of defence. [45]It also stresses a typical aspect of refugee law and especially the detention measure compared with administrative law in

39 See *supra*.
40 Opinion AG Wathelet in Case C-129/13 *Kamino*, point 82-86.
41 See *supra* fn. 3, point 3.
42 Haarlem District Court 3 April 2009, AWB 08/1021, *LJN* BI9735, *AB* 2009/326.
43 Appeal Court Amsterdam 6 januari 2011, P09/00297 en P09/00298, *LJN* BP1057.
44 F.i. Appeal Court Amsterdam 27 Januari 2011, P09/00357, *LJN* BP2612.
45 See *supra* fn. 3, point 15.1.

general, namely that the annulment of the measure by a court leaves no room for the administrative authority to restore the deficiencies and to take a lawful decision in the case at hand. [46]In the end this 'overhauling' action by the Raad van State has turned out to be only partly successful. On the one hand, a balanced approach seems to have been declared as the main rule by the ECJ, not only in refugee cases. On the other hand, it has to be concluded that, as highlighted above, this balanced approach has turned out to be a somewhat different one than that which until now was applied in Dutch refugee law and in particular omits the interests of the state in the balance of objectives.

Finally, a few weeks after the *M.G and N.R* judgment, on 4 October 2013, the Raad van State issued its final judgment.[47] The Raad van State applied the test put forward by the ECJ and concludes that both refugees have not put forward any facts or circumstances during the exit talks and earlier court sessions that would suggest that the Staatssecretaris van Veiligheid en Justitie (State Secretary for Security and Justice) was not allowed to take the contested decisions. There was no foundation for the judgment that the refugees were deprived of the possibility to defend themselves in such a way that the outcome of the decision process could have been different.

46 See *supra* fn. 3, point 15.3.
47 Cases 201304861/1/V3 and 201305033/1/V3.