JUDGMENT OF THE COURT (Grand Chamber)

12 February 2008 *

In Case C-2/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Finanzgericht Hamburg (Germany), made by decision of 21 November 2005, received at the Court on 4 January 2006, in the proceedings

Willy Kempter KG

v

Hauptzollamt Hamburg-Jonas,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and A. Tizzano (Rapporteur), Presidents of Chambers, J.N. Cunha Rodrigues, A. Borg Barthet, M. Ilešič, P. Lindh and J.-C. Bonichot, Judges,

* Language of the case: German.

Advocate General: Y. Bot,
Registrar: J. Swedenborg, Administrator,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Willy Kempter KG, by K. Makowe, Rechtsanwalt,

— the Czech Republic, by T. Boček, acting as Agent,

— the Republic of Finland, by E. Bygglin, acting as Agent,

— the Commission of the European Communities, by F. Erlbacher and T. van Rijn, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 April 2007,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of the principle of cooperation arising from Article 10 EC, construed in the light of the judgment in Case C-453/00 *Kühne & Heitz* [2004] ECR I-837.

2 The reference was made in proceedings between Willy Kempter KG ('Kempter') and the Hauptzollamt Hamburg-Jonas (Principal Customs Office Hamburg-Jonas; 'the Hauptzollamt') concerning the application of Paragraphs 48 and 51 of the Law on Administrative Procedure (Verwaltungsverfahrensgesetz) of 25 May 1976 (BGBl. 1976 I, p. 1253; 'the VwVfG').

Legal context

Community legislation

3 Article 4(1) of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1987 L 351, p. 1) is worded as follows:

'Without prejudice to the provisions of Articles 5 and 16, the refund shall be paid only upon proof being furnished [that] the products for which the export declaration was accepted have, within 60 days from the date of such acceptance of the export declaration, left the customs territory of the Community in the unaltered state.'

4 Article 5(1) of Regulation No 3665/87 states:

'Payment of the differentiated or non-differentiated refund shall be conditional not only on the product having left the customs territory of the Community but

also — save where it has perished in transit as a result of force majeure — on its having been imported into a non-member country and, where appropriate, into a specific non-member country within 12 months following the date of acceptance of the export declaration:

(a) where there is serious doubt as to the true destination of the product …

…'

National legislation

5 The first sentence of Paragraph 48(1) of the VwVfG provides that an unlawful administrative act may, even after it has become unchallengeable, be withdrawn wholly or in part, with prospective or retroactive effect.

6 Paragraph 51 of the VwVfG concerns the reopening of a procedure closed by an administrative act that has become unchallengeable. Paragraph 51(1) provides that the relevant authority must, on application by the person concerned, decide whether to set aside or amend an unchallengeable administrative act:

1. if the factual or legal situation on which the act was based has changed, following its adoption, in favour of the person concerned ;

2. if there is new evidence which would have led to a decision more favourable to the person concerned;

3. if there are grounds for reopening the procedure in accordance with Paragraph 580 of the Code of Civil Procedure (Zivilprozessordnung).

7 Paragraph 51(3) states that such an application must be made within a period of three months from the day on which the person concerned became aware of the ground for reopening the procedure.

The facts of the main proceedings and the questions referred for a preliminary ruling

8 According to the order for reference, Kempter exported cattle in the years 1990 to 1992 to a number of Arab countries and countries of the former Yugoslavia. It applied for and received export refunds from the Hauptzollamt on this basis, in accordance with Regulation No 3665/87 which was in force at the time.

9 On conduct of an inquiry, the Betriebsprüfungsstelle Zoll (Customs Inspectorate) of the Oberfinanzdirektion (Principal Revenue Office), Freiburg, established that, before their import into those non-member countries, some of the animals had died or been slaughtered out of necessity during transport or in the course of quarantine in the countries of destination.

10 By decision of 10 August 1995, the Hauptzollamt accordingly demanded that Kempter repay the export refunds which it had received.

11 Kempter brought an action against that decision, but did not plead breaches of Community law. By judgment of 16 June 1999, the Finanzgericht Hamburg (Finance Court, Hamburg) dismissed the action, on the ground that the claimant had not proved that the animals were imported into a non-member country within 12 months following the date of acceptance of the export declaration, as required by Article 5(1)(a) of Regulation No 3665/87 for the payment of refunds. By order of 11 May 2000, the Bundesfinanzhof (Federal Finance Court) rejected at final instance Kempter's appeal against that judgment.

12 The Hauptzollamt's repayment decision of 10 August 1995 thus became final.

13 In its judgment of 14 December 2000 in Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, at paragraph 48, the Court held that the condition that the goods must have been imported into a non-member country in order for the export refunds provided for by a Community regulation to be granted can be raised against the recipient of the refunds only before their grant.

14 In a separate case, the Bundesfinanzhof delivered a judgment on 21 March 2002 in which it applied that interpretation established by the Court. Kempter claims that it became aware of the Bundesfinanzhof's judgment on 1 July 2002.

15 On 16 September 2002, that is to say approximately 21 months after delivery of the judgment in *Emsland-Stärke*, Kempter, relying on the Bundesfinanzhof's judgment, requested the Hauptzollamt on the basis of Paragraph 51(1) of the VwVfG to review and withdraw the repayment decision at issue.

16 By decision of 5 November 2002, the Hauptzollamt rejected Kempter's application, stating that this alteration in the case-law did not mean any change in the legal situation, which alone would justify reopening the procedure under Paragraph 51(1)(1) of the VwVfG. An administrative appeal against that decision was also rejected on 25 March 2003.

17 Kempter then brought the matter before the Finanzgericht Hamburg again, submitting in particular that in the case in point the conditions for review of a final administrative decision, which had been set out by the Court in *Kühne & Heitz*, were met and that consequently the Hauptzollamt's repayment decision of 10 August 1995 had to be withdrawn.

18 In its order for reference, the Finanzgericht Hamburg first finds that, in the light of *Emsland-Stärke* and the Bundesfinanzhof's judgment of 21 March 2002, the Hauptzollamt's repayment decision of 10 August 1995 is unlawful. It then considers whether the Hauptzollamt is therefore obliged to review that decision, which in the meantime has become final, although the claimant did not plead misinterpretation of Community law, namely of Article 5(1) of Regulation No 3665/87, before either the Finanzgericht Hamburg or the Bundesfinanzhof.

19 The referring court recalls that in *Kühne & Heitz* the Court of Justice ruled:

'The principle of cooperation arising from Article 10 EC imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where:

— under national law, it has the power to reopen that decision;

— the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;

— that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under [the third paragraph of Article 234] EC; and

— the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.'

20 The Finanzgericht Hamburg considers that the first two conditions set out in the preceding paragraph are met in the present case given the fact that, first, the Hauptzollamt has the power, under the first sentence of Paragraph 48(1) of the VwVfG, to withdraw its repayment decision of 10 August 1995 and, second, that decision did become final by reason of the order of 11 May 2000 of the Bundesfinanzhof which ruled at last instance.

21 As regards the third condition referred to in *Kühne & Heitz*, the Finanzgericht is uncertain whether it must be interpreted as meaning that, first, the person concerned must have relied on Community law when he contested the administrative decision in court and, second, the national court must have dismissed the action without referring a question to the Court for a preliminary ruling. If that were the case, this condition

could not be regarded as met here and, consequently, the action brought by Kempter would have to be dismissed, given that it pleaded misinterpretation of Community law before neither the Finanzgericht Hamburg nor the Bundesfinanzhof.

22 The Finanzgericht Hamburg nevertheless considers that it can be seen from the judgment in *Kühne & Heitz* that in the case which gave rise to that judgment the claimant likewise did not request that a question be referred to the Court for a preliminary ruling.

23 In the grounds of its order for reference, the Finanzgericht Hamburg suggests, moreover, that the fact that national courts have themselves not understood the significance of a question of interpretation of Community law should not be held against the individual affected.

24 The Finanzgericht Hamburg considers that the fourth condition referred to in *Kühne & Heitz* is met if the individual affected by the administrative decision inconsistent with Community law requests the administrative authority 'without delay' or 'without culpable delay' to review that decision, once it has 'positive awareness' of the relevant decision of the Court.

25 In the circumstances of the main proceedings, although Kempter's application for review to the Hauptzollamt was made 21 months after delivery of the judgment in *Emsland-Stärke*, it cannot be regarded as too late, considering that it was made on 16 September 2002, that is to say less than three months from when Kempter has claimed to have become aware of the judgment in which the Bundesfinanzhof applied *Emsland-Stärke*.

26 Inasmuch as administrative authorities must apply the interpretation of a provision of Community law supplied by the Court in a preliminary ruling to legal relationships which have arisen before the Court's judgment, the referring court is unsure whether the possibility of applying for review and withdrawal of an administrative decision that is final and infringes Community law might be temporally unrestricted or whether, on the other hand, it must be subject to a time-limit justified by reasons of legal certainty.

27 In those circumstances, the Finanzgericht Hamburg decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are the review and amendment of a final administrative decision in order to take account of the interpretation of the relevant Community law carried out in the meantime by the Court of Justice of the European Communities subject to the requirement that the party concerned relied on Community law when contesting the administrative decision before the national courts?

(2) Is an application for the review and amendment of a final administrative decision which is contrary to Community law subject to a limit in time for overriding reasons of Community law, apart from the conditions set out in [*Kühne & Heitz*]?'

Consideration of the questions referred for a preliminary ruling

Question 1

28 By its first question, the referring court essentially asks whether *Kühne & Heitz* requires an administrative decision that has become final by virtue of a judgment of

a court of final instance to be reviewed and amended only if the claimant relied on Community law in the legal action under domestic law which he brought against that decision.

Observations submitted to the Court

29 Kempter, the Finnish Government and the Commission of the European Communities submit that the first question should be answered in the negative.

30 First of all, Kempter states that it does not follow from the third paragraph of Article 234 EC that the parties to the main proceedings must have pleaded misinterpretation of Community law before the national court in order for it to be obliged to make a reference for a preliminary ruling. Nor, the Commission adds, does such a condition follow from the grounds or operative part of the judgment in *Kühne & Heitz*.

31 Second, Kempter and the Commission observe that the obligation, under the third paragraph of Article 234 EC, on national courts ruling at final instance to make a reference for a preliminary ruling cannot depend either on the parties requesting them to make such a reference.

32 Finally, the Finnish Government submits that a need for the parties to the main proceedings to have pleaded misinterpretation of Community law before the national court could render the exercise of rights conferred by Community law impossible in practice and thus run counter to the principle of effectiveness. Nor should the fact that a national court has not recognised the significance of a question of Community be held against the citizen affected.

33 The Czech Government submits that review and withdrawal of a final decision by an administrative authority can be limited so as to require the person concerned to have relied on Community law when contesting that decision before the national courts only where those courts do not have, under domestic law, the power or the obligation to apply Community law of their own motion and that does not impede observance of the principles of equivalence and effectiveness.

The Court's answer

34 In answering the first question, it should be remembered first of all that, in accordance with settled case-law, all the authorities of the Member States have the task of ensuring observance of the rules of Community law within the sphere of their competence (see Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 13, and *Kühne & Heitz*, paragraph 20).

35 It should also be remembered that the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 234 EC, the Court gives to a rule of Community law clarifies and defines, where necessary, the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its

coming into force (see, inter alia, Case 61/79 *Denkavit italiana* [1980] ECR 1205, paragraph 16; Case C-50/96 *DeutscheTelekom* [2000] ECR I-743, paragraph 43; and *Kühne & Heitz*, paragraph 21). In other words, a preliminary ruling does not create or alter the law, but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force (see, to this effect, Case C-137/94 *Richardson* [1995] ECR I-3407, paragraph 33).

36 It follows that, in a case such as the main proceedings, a rule of Community law as thus interpreted must be applied by an administrative body within the sphere of its competence even to legal relationships which arose and were formed before the Court gave its ruling on the request for interpretation (see *Kühne & Heitz*, paragraph 22, and, to this effect, Case C-347/00 *Barreira Pérez* [2002] ECR I-8191, paragraph 44; Joined Cases C-453/02 and C-462/02 *Linneweber and Akritidis* [2005] ECR I-1131, paragraph 41; and Case C-292/04 *Meilicke and Others* [2007] ECR I-1835, paragraph 34).

37 However, as the Court has pointed out, this case-law must be read in the light of the principle of legal certainty, which is one of the general principles recognised by Community law. Finality of an administrative decision, which is acquired upon expiry of reasonable time-limits for legal remedies or, as in the main proceedings, by exhaustion of those remedies, contributes to such legal certainty, with the consequence that Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final in that way (*Kühne & Heitz*, paragraph 24).

38 The Court has none the less held that specific circumstances may be capable, by virtue of the principle of cooperation arising from Article 10 EC, of requiring a national administrative body to review an administrative decision that has become final following the exhaustion of domestic remedies, in order to take account of the

interpretation of a relevant provision of Community law given subsequently by the Court (see, to this effect, *Kühne & Heitz*, paragraph 27, and Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-8559, paragraph 52).

39 As the referring court points out, in light of paragraphs 26 and 28 of *Kühne & Heitz*, the conditions capable of providing the basis for such an obligation of review that have been taken into account by the Court include the fact that the judgment of the court of final instance, by virtue of which the contested administrative decision became final, was, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 234 EC.

40 The present question referred for a preliminary ruling is designed to ascertain solely whether such a condition is met only if the claimant relied on Community law in the legal action brought by him against the administrative decision in question.

41 In this connection, it is to be noted that the system established by Article 234 EC with a view to ensuring that Community law is interpreted uniformly in the Member States instituted direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties (see, to this effect, Joined Cases 28/62, 29/62 and 30/62 *Da Costa and Others* [1963] ECR 31, at 38; Case 62/72 *Bollmann* [1973] ECR 269, paragraph 4; and Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 31).

42 As the Advocate General explains in points 100 to 104 of his Opinion, the system of references for a preliminary ruling is based on a dialogue between one court and

another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary (see, to this effect, Case 126/80 *Salonia* [1981] ECR 1563, paragraph 7).

43 Moreover, as observed by the Commission and by the Advocate General in points 93 to 95 of his Opinion, the wording of *Kühne & Heitz* does not in any way indicate that the claimant is required to have raised, in his legal action under domestic law, the point of Community law that was subsequently the subject of the Court's preliminary ruling.

44 It cannot therefore be inferred from *Kühne & Heitz* that, for the purposes of the third condition established by that judgment, the parties must have raised before the national court the point of Community law in question. In order for that condition to be satisfied, it is sufficient if either the point of Community law the interpretation of which proved to be incorrect in light of a subsequent judgment of the Court was considered by the national court ruling at final instance or it could have been raised by the latter of its own motion.

45 It is to be noted that, while Community law does not require national courts to raise of their own motion a plea alleging infringement of Community provisions where examination of that plea would oblige them to go beyond the ambit of the dispute as defined by the parties, they are obliged to raise of their own motion points of law based on binding Community rules where, under national law, they must or may do so in relation to a binding rule of national law (see, to this effect, Joined Cases C-430/93 and C-431/93 *van Schijndel and van Veen* [1995] ECR I-4705, paragraphs 13, 14 and 22, and Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraphs 57, 58 and 60).

46 Accordingly, the answer to the first question referred must be that, in the context of a procedure before an administrative body for review of an administrative decision that became final by virtue of a judgment, delivered by a court of final instance, which, in the light of a decision given by the Court subsequent to it, was based on a misinterpretation of Community law, Community law does not require the claimant to have relied on Community law in the legal action under domestic law which he brought against the administrative decision.

Question 2

47 By its second question, the referring court essentially asks whether Community law imposes a limit in time for making an application for review of an administrative decision that has become final.

Observations submitted to the Court

48 Kempter notes first of all that Community law does not contain any specific provision relating to a time-limit or limitation period for an application for review. It adds that, in accordance with *Kühne & Heitz*, the person concerned can assert his right to review of the administrative decision that has become final only in so far as a national provision so permits. Therefore, in order to decide whether or not this right is subject to a time-limit, the national provisions concerning limitation should be referred to.

49 Kempter also submits that, if Community provisions governing time-limits or limitation periods were to be applied by analogy, its application should still not be regarded as out of time, in view of the fact that it was lodged less than three years after the date of the Advocate General's Opinion in *Emsland-Stärke*, that is to say the time from which a change in the German courts' settled case-law could have been envisaged.

50 In the case of the fourth condition established by the Court in *Kühne & Heitz*, the Czech and Finnish Governments agree with the view expressed by the referring court that the time-limit which the Court thereby created for applying for review of an administrative decision that has become final should be linked to positive awareness of the case-law on the part of the person concerned.

51 They further submit that Community law does not prevent the right to apply for review of an unlawful administrative decision from being limited in time. National procedural rules may thus legitimately provide that this type of application must be made within a specific period, provided that the principles of equivalence and effectiveness are observed.

52 According to the Commission, the second question referred for a preliminary ruling concerns only the interval between delivery of the Court's judgment causing the administrative decision to be unlawful and the application submitted by Kempter for review and withdrawal of that decision.

53 In addition, the Commission states that the principle of procedural autonomy of the Member States precludes the setting of a time-limit at Community level. It suggests that, for reasons of legal certainty, the fourth condition established by *Kühne & Heitz*

be supplemented so as to require the person concerned to have complained to the administrative body immediately after becoming aware of the preliminary ruling of the Court causing the administrative decision that has become final to be unlawful, and within a period of time after delivery of the Court's judgment which appears to be reasonable in light of the principles of national law and consistent with the principles of equivalence and effectiveness.

The Court's answer

54 With regard to the question of time-limits for making an application for review, it should be noted first of all that, in the case which gave rise to the judgment in *Kühne & Heitz*, the claimant undertaking applied for review and amendment of the administrative decision within a period not exceeding three months after it had become aware of the judgment in Case C-151/93 *Voogd Vleesimport en -export* [1994] ECR I-4915 which caused the administrative decision to be unlawful.

55 It is true that, in its assessment of the factual circumstances of the case which gave rise to the judgment in *Kühne & Heitz*, the Court held that the length of the period within which the application for review had been made was to be taken into consideration and, in conjunction with the other circumstances indicated by the referring court, justified review of the contested administrative decision. Nevertheless, the Court did not require that an application for review necessarily had to be made immediately after the applicant had become aware of the decision of the Court on which the application was based.

56 It is clear that, as the Advocate General notes in points 132 and 134 of his Opinion, Community law does not impose any specific time-limit for making an application for review. Consequently, the fourth condition referred to by the Court in *Kühne & Heitz* cannot be interpreted as an obligation to make the application for review in question within a certain specific period after the applicant has become aware of the decision of the Court on which the application itself is based.

57 It should nevertheless be pointed out that, in accordance with settled case-law, in the absence of Community rules in the field it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, in particular, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 43, and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 28 and the case-law cited).

58 The Court has thus recognised that it is compatible with Community law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty (see, to this effect, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraphs 17 and 18; *Denkavit italiana*, paragraph 23; Case C-208/90 *Emmott* [1991] ECR I-4269, paragraph 16; *Palmisani*, paragraph 28; Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, paragraph 48; and Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, paragraph 34). Such time-limits are not liable to render practically impossible or excessively difficult the exercise of rights conferred by Community law (*Grundig Italiana*, paragraph 34).

59 It follows from that settled case-law that the Member States may, on the basis of the principle of legal certainty, require an application for review and withdrawal of an administrative decision that has become final and is contrary to Community law as interpreted subsequently by the Court to be made to the competent administrative authority within a reasonable period.

60 Consequently, the answer to the second question referred must be that Community law does not impose any limit in time for making an application for review of an administrative decision that has become final. The Member States nevertheless remain free to set reasonable time-limits for seeking remedies, in a manner consistent with the Community principles of effectiveness and equivalence.

Costs

61 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Grand Chamber) hereby rules:

1. **In the context of a procedure before an administrative body for review of an administrative decision that became final by virtue of a judgment, delivered by a court of final instance, which, in the light of a decision given by the Court subsequent to it, was based on a misinterpretation of Community law, Community law does not require the claimant to have relied on Community law in the legal action under domestic law which he brought against the administrative decision.**

2. **Community law does not impose any limit in time for making an application for review of an administrative decision that has become final. The Member States nevertheless remain free to set reasonable time-limits for seeking remedies, in a manner consistent with the Community principles of effectiveness and equivalence.**

[Signatures]