



## Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

13 December 2012\*

(Protection of the European Union's financial interests — Regulation (EC, Euratom) No 2988/95 — Articles 4 and 5 — Administrative penalty — Administrative measure — Regulation (EEC) No 822/87 — Aid for the private storage of concentrated grape must — Community origin — Regulation (EEC) No 1059/83 — Long-term storage contract — Article 2(2) — Article 17(1)(b) — Reduction of the amount of aid in relation to the seriousness of the breach committed)

In Case C-670/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Conseil d'État (France), made by decision of 28 November 2011, received at the Court on 29 December 2011, in the proceedings

**Établissement national des produits de l'agriculture et de la mer (FranceAgriMer)**

v

**Vinifrance SA,**

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, acting as the President of the Fourth Chamber, J.-C. Bonichot, C. Toader (Rapporteur), A. Prechal and E. Jarašiūnas, Judges,

Advocate General: E. Sharpston,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 3 October 2012,

after considering the observations submitted on behalf of:

- Établissement national des produits de l'agriculture and de la mer (FranceAgriMer), by H. Didier and F. Pinet, avocats,
- the French Government, by G. de Bergues and S. Menez and C. Candat, acting as Agents,
- the Polish Government, by M. Szpunar and B. Majczyna, acting as Agents,
- the European Commission, by B. Schima and D. Triantafyllou, acting as Agents,

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

\* Language of the case: French.

gives the following

### Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organisation of the market in wine (OJ 1987 L 84, p. 1), as amended by Council Regulation (EEC) No 2253/88 of 19 July 1988 (OJ 1988 L 198, p. 35, 'Regulation No 822/87'), of Commission Regulation (EEC) No 1059/83 of 29 April 1983 on storage contracts for table wine, grape must, concentrated grape must and rectified concentrated grape must (OJ 1983 L 116, p. 77), as amended by Commission Regulation (EC) No 2646/1999 of 15 December 1999 (OJ 1999 L 324, p. 10, 'Regulation No 1059/83'), as well as Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1).
- 2 The reference has been made in proceedings between *Établissement national des produits de l'agriculture et de la mer (FranceAgriMer)*, successor in title to the *Office national interprofessionnel des vins (Onivins)*, and *Vinifrance SA ('Vinifrance')* concerning recovery of the whole of the storage aid received by *Vinifrance*.

#### I – Legal context

##### *A – The rules on the common organisation of the market in wine*

###### 1. Regulation No 822/87

- 3 According to Article 1 of and Annex I paragraph 6 to Regulation No 822/87, the regulation, *inter alia*, to concentrated grape must, defined as uncaramelized grape must which is obtained by partial dehydration of grape must and 'produced within the Community'.
- 4 Article 32(1) and (2) of that regulation provide:

'1. A system of aid is hereby instituted for the private storage of:

...

— grape must, concentrated grape must and rectified concentrated grape must.

2. The aid referred to in paragraph 1 shall be granted subject to the conclusion with intervention agencies ... of a long-term storage contract.'

###### 2. Regulation No 1059/83

- 5 It is apparent from Article 1 of Regulation No 1059/83 that that regulation lays down rules for the conclusion of storage contracts.
- 6 The third recital in the preamble to Regulation No 1059/83 states that, given that 'contracts [are] concluded between the intervention agencies and producers who request them[,] ... the term "producer" should be defined and, in view of the obligations which have to be imposed upon such persons, it should be laid down that they must be the owners of the products stored'.

7 Article 2 of Regulation No 1059/83 reads as follows:

‘1. Intervention agencies shall conclude contracts only with producers, whether as individuals or in groups.

For the purposes of this Regulation, “producer” means any natural or legal person or group of such persons carrying out, or ordering to be carried out on their behalf, any of the following operations:

- the processing of fresh grapes into grape must,
- the processing of grape must into concentrated grape must or rectified concentrated grape must,
- the processing of fresh grapes, grape must or grape must in fermentation into table wine.

2. A producer may conclude contracts only in respect of products produced by him or under his responsibility and of which he remains the owner.’

8 Article 12 of Regulation No 1059/83 lays down the standard rates, per hectolitre per day, of storage aid payable throughout the European Union, inter alia for grape musts.

9 Article 17(1) of Regulation No 1059/83 states:

‘Except in case of force majeure:

- (a) if the producer fails to fulfil his obligations under Articles 7(2), 15 and 16 and, where relevant, Article 10(2), no aid shall be payable;
- (b) if the producer fails to fulfil one of his obligations under this Regulation or under the contract, other than those referred to in (a) above, the aid payable shall be reduced by an amount determined by the competent authority in relation to the seriousness of the breach committed.’

*B – Regulation No 2988/95 on the protection of the European Communities’ financial interests*

10 The fourth, fifth and eighth recitals in the preamble to Regulation No 2988/95 read as follows:

‘Whereas the effectiveness of the combating of fraud against the Communities’ financial interests calls for a common set of legal rules to be enacted for all areas covered by Community policies;

Whereas irregular conduct, and the administrative measures and penalties relating thereto, are provided for in sectoral rules in accordance with this Regulation;

...

Whereas Community law has established Community administrative penalties in the framework of the common agricultural policy; whereas such penalties must be established in other fields as well.’

11 Article 1 of Regulation No 2988/95 provides:

‘1. For the purposes of protecting the European Communities’ financial interests, general rules are hereby adopted relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law.

2. “Irregularity” shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.’

12 Under Article 2(3) of Regulation No 2988/95, ‘Community law shall determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility.’

13 Article 4 of Regulation No 2988/95, which is in Title II of the regulation entitled ‘Administrative measures and penalties’, provides:

‘1. As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage:

— by an obligation to pay or repay the amounts due or wrongly received,

...

2. Application of the measures referred to in paragraph 1 shall be limited to the withdrawal of the advantage obtained plus, where so provided for, interest which may be determined on a flat-rate basis.

...

4. The measures provided for in this Article shall not be regarded as penalties.’

14 Article 5(1) of Regulation No 2988/95 provides:

‘Intentional irregularities or those caused by negligence may lead to the following administrative penalties:

(a) payment of an administrative fine;

(b) payment of an amount greater than the amounts wrongly received or evaded, plus interest where appropriate; this additional sum shall be determined in accordance with a percentage to be set in the specific rules, and may not exceed the level strictly necessary to constitute a deterrent;

(c) total or partial removal of an advantage granted by Community rules, even if the operator wrongly benefited from only a part of that advantage;

(d) exclusion from, or withdrawal of, the advantage for a period subsequent to that of the irregularity;

...’

## **II – The facts in the main proceedings and the questions referred for a preliminary ruling**

15 Vinifrance is a company whose business activities include the sale and brokerage of wine and grape concentrates. In December 1997 it acquired 34 408 hectolitres of grape must from two Italian suppliers, Cantine Trapizzo and Far Vini. Within the framework of two long-term storage contracts concluded on 23 January and 4 February 1998 with Onivins, Vinifrance had that grape must concentrated in Italy and stored it in France. The first storage contract concerned 8 110 hectolitres of concentrated grape must which had been supplied by Cantine Trapizzo, while the second contract

concerned 1 215 hectolitres supplied by Far Vini. Pursuant to Article 32 of Regulation No 822/87 Vinifrance received in this respect, on 10 March and 6 April 1998 respectively, storage aid of EUR 170 391.31 and EUR 23 280.79.

- 16 An inspection carried out during the months of May, June and July 2000 by the Agence centrale des organismes d'intervention dans le secteur agricole (Central Agency for intervention agencies in the agricultural sector) (ACOFA) at Vinifrance established, first, that Far Vini had not existed since 1992 and that no wine company was based at the address indicated on the invoices, and, second, that most of the grape musts acquired by Vinifrance from Cantine Trapizzo had in reality been supplied to Cantine Trapizzo by Far Vini.
- 17 In the light of the fact that Far Vini did not exist on the date the contracts of sale were concluded, ACOFA's report found in essence that the Community origin of the grape musts supplied directly or indirectly by Far Vini was in doubt and that it was not certain that Vinifrance was its owner. On the other hand, ACOFA does not seem to have called in question the Community origin and the ownership of the grape musts which had been acquired by Vinifrance from Cantine Trapizzo, but which had not been supplied to Cantine Trapizzo by Far Vini, a quantity, before concentration, of 4 587,8 hectolitres of grape must out of the 34 408 hectolitres in question.
- 18 In the light of the ACOFA report, the director of Onivins, by a decision of 23 December 2003, ordered recovery of all the storage aid which had been paid to Vinifrance, considering essentially that Vinifrance was not able to establish that the grape musts supplied directly or indirectly by Far Vini were of Community origin or further to prove that it was their owner.
- 19 By action brought on 16 January 2004 before the tribunal administratif de Montpellier (Administrative Court, Montpellier), Vinifrance sought annulment of that decision. By judgment of 15 June 2007, that court annulled that decision on the ground that Onivins could not legally call for repayment in full of the aid.
- 20 According to the tribunal administrative de Montpellier, Article 17(1)(b) of Regulation No 1059/83 allows only for repayment in part to be required, in proportion to the seriousness of the breach committed by the producer. That court considered that the alleged failures of Vinifrance came under Article 17. In particular, it found that the claim, alleging that Vinifrance could not establish Community origin and ownership of the grape musts, was only valid for one part and not for all of the concentrated grape musts affected by the storage contracts. Consequently, that court found that Onivins' decision was illegal in that it required total repayment including the part of the aid granted legally.
- 21 The Office national interprofessionnel des fruits, des légumes, des vins et de l'horticulture (National Interbranch Office for Fruit, Vegetables, Wine and Horticulture) (Viniflor), successor in law to Onivins, appealed against that judgment to the cour administrative d'appel de Marseille (Administrative Court of Appeal, Marseille). By judgment of 15 June 2009, that court dismissed the appeal finding inter alia that the tribunal administrative de Montpellier had correctly applied Article 17(1)(b) of Regulation No 1059/83. In particular, it found that the mere fact that Onivins' director had required repayment of all of the aid, including the part thereof relating to the grape musts the origin and ownership of which had not been disputed by ACOFA, was sufficient to establish, in any event, that that decision had been vitiated by an error of law.
- 22 FranceAgriMer, the body which succeeded Viniflor, appealed in cassation against that judgment to the Conseil d'État (Council of State), claiming, inter alia, that the cour administrative d'appel de Marseille had erred in law, first, by considering that the decision of Onivins' director could not require total repayment of the aid received by Vinifrance and, second, by deducing from that fact that the decision must be annulled in its entirety.

- 23 According to FranceAgriMer, the irregularities committed do not come under Article 17 of Regulation No 1059/83. Therefore, in the absence of an express provision in that sectoral rule with regard to the alleged irregularities, in this case the fact that Vinifrance had not established that it was the owner of the grape musts within the meaning of Article 2(2) of Regulation No 1059/83, or that the grape musts were of Community origin as required by Regulation No 822/87, such irregularities, rendering invalid the storage contracts on the basis of which the aid had been paid, should be the subject of a measure withdrawing the advantage wrongly obtained. Thus, FranceAgriMer claims that, on the basis of Regulation No 2988/95, Onivins could legally require the total repayment of the two private storage aids which had been granted to Vinifrance. In the alternative, that intervention agency claims that Onivins' decision should have been annulled not in its entirety but only to the extent that it required repayment of the part of the aid whose compliance with the regulatory conditions had not been called into question.
- 24 In those circumstances, the Conseil d'État decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
1. Where it is apparent that a producer who received Community storage aid for concentrated grape must in return for concluding a storage contract with the national intervention agency acquired from a fictional or non-existing company the grape must which he then had concentrated under his responsibility before storing it, can he be regarded as having the capacity of "owner" of the concentrated grape must for the purposes of Article 2(2) of ... Regulation ... No 1059/83 ...? Is Article 17 of that regulation applicable where the storage contract concluded with the national intervention agency contains a particularly serious flaw, relating in particular to the fact that the company which concluded the contract with the national intervention agency cannot be regarded as [being] the owner of the stored products?
  2. Where a sectoral regulation, such as [Regulation No 822/87], establishes a mechanism for Community aid without also laying down a system of penalties in the event of a breach of its provisions, must [Regulation No 2988/95] be applied in the event of such a breach?
  3. Where an economic operator has failed to fulfil the obligations defined by a sectoral Community regulation, such as Regulation No 1059/83, and to satisfy the conditions which that regulation lays down for entitlement to Community aid and where that sectoral regulation provides, as does Article 17 of the abovementioned regulation, for a system of measures or penalties, does that system apply to the exclusion of any other system provided for in ... Union law, even where the breach in question prejudices the financial interests of the ... Union? Or, conversely, is the system of measures and administrative penalties provided for in Regulation No 2988/95 alone applicable in the event of such a breach? Or are both regulations applicable?
  4. If the sectoral regulation and Regulation No 2988/95 are both applicable, how must their provisions be combined for the purpose of determining the measures and [the] penalties to be implemented?
  5. Where an economic operator has committed a number of breaches of European Union law and where some of those breaches fall within the scope of the system of measures or penalties of a sectoral regulation, while others constitute irregularities within the meaning of Regulation No 2988/95, must the latter regulation alone be applied?

### III – Consideration of the questions referred

#### A – *The first part of the first question*

- 25 By the first part of its first question the national court asks, in essence, whether, in a situation such as that in the main proceedings where the non-existence of the company alleged to have sold grape musts means that the Community origin of the grape musts cannot be established, the producer having acquired the grape musts from that company may none the less legitimately conclude a storage contract relating to them, including with regard to the obligation to ‘remain the owner’ of those grape musts, as provided for in Article 2(2) of Regulation No 1059/83, and thus benefit in this respect from a storage aid under Regulation No 822/87.
- 26 It should be noted that, although Article 2 of Regulation No 1059/83 defines the term ‘producer’ for the purposes of that regulation, and requires inter alia that the producer be ‘owner’ of the grape musts to legitimately conclude with an intervention agency a storage contract conferring on it an entitlement to storage aid, it does not define the term ‘owner’.
- 27 However, that regulation establishes only the methods of implementing Regulation No 822/87 as regards storage contracts which may confer an entitlement to the collection of a storage aid.
- 28 As FranceAgriMer and the European Commission rightly claimed, the question whether an operator may be referred to as ‘owner’ within the meaning of Article 2(2) of Regulation No 1059/83, and, therefore, may conclude a storage contract conferring an entitlement to storage aid, should only arise in the situation where the grape musts fall within the material scope of Regulation No 822/87. On this issue, it is not disputed that, in applying the rules at issue, only grape musts of Community origin may confer an entitlement to storage aid such as provided for in the regulation.
- 29 In the main proceedings, it is agreed that Vinifrance did not produce the grape musts itself, but acquired them through a contract of sale. However, it is apparent that that contract of sale had been drawn up with a company which did not legally exist at the time of conclusion of the contract and that therefore the Community origin of the grape musts supplied directly or indirectly by that company could not be established.
- 30 In such circumstances, regardless of whether Vinifrance, as ‘producer’, had been in law or in fact owner of the goods at issue, as those goods could not be considered to be grape musts of Community origin, such an operator could not in any event be regarded as having acquired grape musts which fell within the scope of Regulation No 822/87 and allowed it to benefit from storage aid pursuant to that regulation.
- 31 In the light of the foregoing, the answer to the first part of the first question is that, in a situation such as that in the main proceedings, where the non-existence of the company alleged to have sold grape musts means that the Community origin of the grape musts cannot be established, the producer who has acquired those grape musts from that company cannot, on any view, benefit from a storage aid under Regulation No 822/87.

#### B – *The second part of the first question and the second to the fifth questions*

- 32 By the second part of the first question and the second to the fifth questions, the national court asks, in essence, whether Article 17(1)(b) of Regulation No 1059/83 must be interpreted as meaning that the system of penalties which it provides for applies where a producer benefited from storage aid even though most of the grape musts which were the subject of the storage contracts presented in support of the aid applications were not, contrary to the requirements of Regulation No 822/87, of Community

origin. Furthermore, by those same questions, the national court seeks to ascertain whether, and in what way, the provisions of Regulation No 2988/95 may constitute an additional or alternative legal basis for the purposes of proceedings concerning those irregularities.

#### 1. Observations submitted to the Court

- 33 FranceAgriMer and the French Government claim in essence that Article 17 of Regulation No 1059/83 is not intended to regulate proceedings concerning irregularities such as those at issue in the main proceedings. First, Article 17(1)(a) establishes a system of penalties for the failure to fulfil obligations resulting from certain provisions of that regulation which are listed exhaustively, but which are not at issue in the main proceedings. Second, although Article 17(1)(b) lays down a penalty for the breach of other obligations resulting from that regulation or from storage contracts, that penalty, consisting of the reduction of aid paid in relation to the seriousness of the breach committed, cannot regulate defects as serious as the lack of ownership of the grape musts, constituting a non-compliance with Article 2(2) of Regulation No 1059/83, or the impossibility of establishing the Community origin of the grape musts which enabled the grant of storage aid, which constitutes a non-compliance with an obligation which is fundamental and inherent to the granting of a storage aid such as provided for by Regulation No 822/87.
- 34 In particular, the French Government considers that Article 17 of Regulation No 1059/83 lays down penalties connected with the performance of storage contracts. The irregularities highlighted in the main proceedings concerned the very conditions of the conclusion of those contracts and, thus, the validity of those contracts for the purposes of granting storage aid.
- 35 In the absence of a defined penalty in the sectoral rules applicable, in this case Regulations No 822/87 and No 1059/83, FranceAgriMer and the French Government take the view that Regulation No 2988/95 is intended to apply in so far as the alleged failures constitute irregularities within the meaning of Article 1 of that regulation. In that respect, they note that it is true that the Court has already held that Article 5 of that regulation cannot serve as a legal basis for imposing an administrative penalty. However, they consider that Article 4 of that regulation, in so far as it lays down the general principle of European Union law under which there is an obligation of repayment of all Community aid wrongly received, may constitute the legal basis for the purposes of repayment of the whole of the storage aid at issue in the main proceedings.
- 36 The Polish Government submits, for its part, that when a sectoral rule does not provide for the imposition of a penalty for the purposes of proceedings concerning an irregularity, penalties which are provided for in national law should be applied where they exist. However, that Government states that the obligation to repay aid wrongly received falls within the notion of ‘administrative measure’ within the meaning of Article 4 of Regulation No 2988/95, and does not preclude an administrative penalty being imposed in addition to such withdrawal.
- 37 The Commission claimed initially that, as both failures to comply with the rules concern only part of the grape musts at issue in the main proceedings, the decision adopted by the French intervention agency to withdraw the two storage aids in full in fact had two aspects.
- 38 First, that decision consisted of a withdrawal of the part of the storage aid linked to the amount of grape must for which Vinifrance had not adduced proof that it was the ‘owner’ and that it was of Community origin. In that respect, the Commission claimed that, in accordance with the case-law of the Court, such a withdrawal is simply the consequence of the finding that the conditions required to obtain the advantage derived from the European Union rules were not fulfilled, rendering the aid received a payment that was not due and thus justifying the obligation to repay it.



- 39 Second, as regards the withdrawal of the part of the aid linked with the amount of grape must coming exclusively from Cantine Trapizzo and in relation to which no failure to fulfil regulatory obligations had been found, the Commission claimed that that part of the decision must be regarded as a penalty. However, the decision would then not have had any legal basis in Regulation No 2988/95, in the sectoral regulations – Regulations No 822/87 and No 1059/83 – or in national law.
- 40 However, at the hearing, the Commission stated that, in so far as it was not possible to distinguish, after concentration, the grape musts of Community origin from the grape musts of non-Community origin, it had concluded that, in those circumstances, all of the storage aid should have been recovered by means of an administrative measure.

## 2. The Court's reply

### a) General considerations regarding Regulation No 2988/95

- 41 It should be borne in mind that Article 1(1) of Regulation No 2988/95 introduces general rules relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law in order, as is clear from the third recital in the regulation, to combat fraud against the Communities' financial interests for all areas (Case C-278/02 *Handlbauer* [2004] ECR I-6171, paragraph 31, and Case C-131/10 *Corman* ECR I-14199, paragraph 36).
- 42 It is apparent from the fourth recital in Regulation No 2988/95 that the effectiveness of the combating of fraud against the European Union's financial interests calls for a common set of legal rules to be enacted for all areas covered by European Union policies. Furthermore, according to the fifth recital, the conduct which constitutes an irregularity and the administrative measures and penalties relating thereto are provided for in sectoral rules in accordance with Regulation No 2988/95 (Case C-295/02 *Gerken* [2004] ECR I-6369, paragraph 55).
- 43 In the area of checks and penalties for irregularities committed under European Union law, the European Union legislature has, by adopting Regulation No 2988/95, laid down a series of general principles and has required that, as a general rule, all sectoral regulations are to comply with those principles (see, inter alia, Case C-420/06 *Jager* [2008] ECR I-1315, paragraph 61; Case C-150/10 *Beneo Orafti* [2011] ECR I-6843, paragraph 69; and C-669/11 *Société ED & F Man Alcohols* [2012] ECR, paragraph 45). Furthermore, it is apparent from that regulation that it clearly applies equally to sectoral rules in existence when it entered into force (see, to that effect, Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 39).
- 44 Regulation No 2988/95 is intended to regulate any situation involving an 'irregularity' within the meaning of Article 1 of that regulation, namely a breach of a provision of European Union law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union or budgets managed by it, either by reducing or losing revenue accruing from own resources collected directly on behalf of the European Union, or by an unjustified item of expenditure.
- 45 In that respect, any 'irregularity' within the meaning of Article 1 of Regulation No 2988/95 gives rise to the application of administrative measures and penalties (see, to that effect Case C-489/10 *Bonda* [2012] ECR, paragraph 33).
- 46 The first indent of Article 4(1) of Regulation No 2988/95 thus provides that, as a general rule, any irregularity is to involve, as a general rule, withdrawal of the advantage wrongly obtained, in particular by an obligation to pay or repay the amounts due or wrongly received.

- 47 Article 5 of that regulation merely provides that intentional irregularities or those caused by negligence may lead to certain administrative penalties listed in that provision (see Case C-367/09 *SGS Belgium and Others* [2010] ECR I-10761, paragraph 35).
- 48 That provision does not specify which of the penalties it lists should be applied in the case of an irregularity detrimental to the European Union's financial interests (see *SGS Belgium and Others*, paragraph 36, and *Société ED & F Man Alcohols*, paragraph 46).
- 49 It is clear from Article 2 of Regulation No 2988/95, in particular from paragraph 3 thereof, in conjunction with the fifth and eighth recitals in the regulation, that it is for the European Union legislature to lay down sectoral rules establishing administrative penalties, following the example of those which already existed in the sphere of the common agricultural policy when the regulation was adopted (see *SGS Belgium and Others*, paragraph 37).
- 50 It may be seen from Article 5(1)(c) and (d) of Regulation No 2988/95 that the total or partial removal of an advantage granted by Community rules, even if the operator has wrongly benefited from only a part of that advantage, constitutes an administrative penalty (see, to that effect, *Bonda*, paragraph 34). However, the case-law of the Court provides that a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis (see Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraph 56; Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 52; and Case C-274/04 *ED & F Man Sugar* [2006] ECR I-3269, paragraph 15), and cannot, consequently, be imposed on the basis of those provisions alone (see, to that effect, *SGS Belgium and Others*, paragraph 43).
- b) Relationship between the sectoral Regulations No 822/87 and No 1059/83 and Regulation No 2988/95
- 51 In the system of storage aid put in place by Regulation No 822/87, it must be noted that only the storage of grape must of Community origin may be the subject of such aid. Furthermore, in accordance with Article 32(2) of Regulation No 822/87, such aid is granted subject to the conclusion by the producer, with one or more intervention agencies, of one or more storage contracts, the validity of which is a condition for the eligibility of that aid.
- 52 The non-compliance with obligation regarding the Community origin of the grape musts constitutes a breach of provisions of European Union law which prejudices the European Union budget by creating an unjustified item of expenditure. Therefore such non-compliance comes under the concept of 'irregularity' within the meaning of Article 1 of Regulation No 2988/95.
- i) The possibility of imposing a penalty on the basis of Article 17(1)(b) of Regulation No 1059/83
- 53 As regards whether such an irregularity, within the meaning of Article 1 of Regulation No 2988/95, may be pursued on the basis of Article 17(1)(b) of Regulation No 1059/83, which is a sectoral rule, it must be noted that Article 17(1) provides for two types of penalties.
- 54 First, Article 17(1)(a) of Regulation No 1059/83 provides that no storage aid is to be payable if the producer fails to fulfil his obligations under Articles 7(2), 15 and 16 and, where relevant, Article 10(2) of that regulation. Such obligations, which are not at issue in the main proceedings, relate in essence to the conditions of performance of a storage contract linking the producer to the intervention agency and concern obstruction by the producer of any checks that may be undertaken by that agency, as well as the very conditions of the storage of grape musts the subject of that contract.

55 Second, Article 17(1)(b) of Regulation No 1059/83 provides, as regards the other obligations of the producer under that regulation or under a storage contract, that the failure to fulfil those obligations gives rise to a reduction in the aid in relation to the seriousness of the breach committed.

56 In that respect, it should be noted that, in the regulations prior to Regulation No 1059/83, the provision corresponding to Article 17 of Regulation No 1059/83 only provided for the application of a single penalty consisting of a straightforward withdrawal of aid, without expressly providing for the possibility of a reduction of the aid granted in a case where the operator had failed to fulfil an obligation imposed by those regulations. Article 15(1) of Commission Regulation (EEC) No 2015/76 of 13 August 1976 on storage contracts for table wine, grape must and concentrated grape must (OJ 1976 L 221, p. 20), and Article 16(1) of Commission Regulation (EEC) No 2600/79 of 23 November 1979 on storage contracts for table wine, grape must and concentrated grape must (OJ 1979 L 297, p. 15), provided that '[e]xcept in case of force majeure, if the producer fails to fulfil his obligations under the contract no aid shall be payable'.

57 In those circumstances, it must be held that, by adopting Article 17 of Regulation No 1059/83, the European Union legislature sought to make a distinction between, and grade the penalties for, on the one hand, breach of the obligations exhaustively identified, for which the penalty to be applied consisted of a simple withdrawal of aid and, on the other hand, breach of contractual obligations or less important rules for which a reduction of aid in proportion to seriousness was a more appropriate penalty.

58 It follows from the foregoing that, as FranceAgriMer, the French Government and the Commission correctly claimed, the penalty provided for in Article 17(1)(b) of Regulation No 1059/83 is intended to apply to proceedings concerning irregularities in relation to the performance of a storage contract and which are less serious than those referred to in Article 17(1)(a). On the other hand, Article 17(1)(b) of that regulation cannot be applied to punish serious defects affecting the very validity of a storage contract presented in support of a storage aid application, which directly affect the eligibility of the producer for storage aid.

59 Where the Community origin of the grape musts the subject of a storage contract presented in support of an application for aid is not established, that fact alone is sufficient to preclude such a contract validly giving entitlement to storage aid under Regulation No 822/87.

ii) The possibility of applying an administrative penalty or an administrative measure on the basis of Regulation No 2988/95

60 It should also be determined whether, in the absence of a penalty imposed by the applicable sectoral rules, such an irregularity, within the meaning of Article 1 of Regulation No 2988/95, may, on the basis of that regulation, give rise to the application of an administrative penalty or, where appropriate, an administrative measure.

61 In that respect, it should be noted that, in connection with the protection of the European Union's financial interests, Article 5 of Regulation No 2988/95 is not a sufficient legal basis for the application of an administrative penalty, since the application of a penalty requires that, prior to commission of the irregularity in question, either the European Union legislature has adopted sectoral rules laying down such a penalty or, where such rules have not yet been adopted at European Union level, the law of the Member State where the irregularity was committed has provided for the application of an administrative penalty (see, to that effect, *SGS Belgium and Others*, paragraph 43, and *ED & F Man Alcohols*, paragraph 47).

- 62 It follows that, in circumstances such as those in the main proceedings, in the absence, in sectoral rules and in national rules, of a provision providing for the application of a penalty, the ‘irregularity’ at issue cannot be subject to a ‘penalty’ within the meaning of Article 5 of Regulation No 2988/95.
- 63 The question therefore is whether such irregularity, within the meaning of Article 1 of Regulation No 2988/95, may on the other hand give rise to the application of an administrative measure within the meaning of Article 4 of that regulation.
- 64 It should also be noted in that regard that, under the common agricultural policy, when the European Union legislature fixes conditions for eligibility in respect of the award of aid, the exclusion entailed by the failure to observe one of those conditions is not a penalty, but merely the consequence of failure to fulfil those conditions laid down by the law (see, Case C-45/05 *Maatschap Schonewille-Prins* [2007] ECR I-3997, paragraph 47, and Case C-188/11 *Hehenberger* [2012] ECR, paragraph 37).
- 65 Consequently, the obligation to give back an advantage improperly received by means of an irregular practice does not breach the principle of legality. A finding that the conditions required to obtain the advantage derived from the European Union law were created artificially makes, on any view, the advantage received a payment that was not due and thus justifies the obligation to repay it (see, to that effect, *Emsland-Stärke*, paragraph 56, and Case C-158/08 *Pometon* [2009] ECR I-4695, paragraph 28).
- 66 In relation to aid granted by the European Union budget in the framework of the common agricultural policy, the Court has already held that any exercise, by a Member State, of a discretion to decide whether or not it would be expedient to demand repayment of aid unduly or unlawfully granted would be inconsistent with the obligations imposed on national administrations by European Union rules applicable in those sectors to recover aid unduly or unlawfully paid (*SGS Belgium and Others*, paragraph 50).
- 67 Consequently, in circumstances such as those in the main proceedings, where the irregularities found result in the storage contract not being regarded as having been validly concluded for the purposes of obtaining the storage aid at issue, the national authorities are required to apply an administrative measure, within the meaning of the first indent of Article 4(1) of Regulation No 2988/95, which requires repayment of the aid unduly received.
- 68 It must be stated that, in the circumstances of the case in the main proceedings, the alleged irregularities concerned most of the grape musts, since, of the 34 408 hectolitres at issue, 29 821 hectolitres came directly or indirectly from Far Vini, a non-existent company, whereas only 4 587 hectolitres were regularly supplied by Cantine Trapizzo.
- 69 Furthermore, it is apparent from the decision to refer that 4 587 hectolitres were the subject of a storage contract giving rise to the payment of a sum of EUR 170 391.31 on 10 March 1998. Thus, those amounts were mixed with the grape musts supplied by Cantine Trapizzo but which had been supplied to it by Far Vini.
- 70 In such circumstances, where the grape musts of Community origin were not the sole subject of one of the two storage contracts, which is for the national court to determine, the national court will be able, where appropriate, to find that, in so far as the grape musts of Community origin were mixed with the grape musts of non-Community origin so that they can no longer, after concentration, be identified or separated, those two storage contracts were, overall, irregular in the light of the condition relating to the Community origin of the grape musts at issue.
- 71 It follows that, as FranceAgriMer, the French Government and the Commission claimed at the hearing, the two storage contracts could not legitimately confer an entitlement to the storage aid at issue in the main proceedings, so that the national authorities are entitled to require repayment of all of the aid having thus been unduly paid to Vinifrance.

72 In light of the foregoing, the answer to the second part of the first question and the second to the fifth questions is that, in circumstances such as those in the main proceedings:

- Article 17(1)(b) of Regulation No 1059/83 cannot constitute a legal basis for the purposes of punishing a breach by the producer of the obligation laid down by Regulation No 822/87, according to which the grape musts which can confer an entitlement to storage aid must be of Community origin;
- in the absence, both in sectoral rules and in national rules, of a provision providing for the application of a penalty, the irregularities at issue cannot be subject to a ‘penalty’ within the meaning of Article 5 of Regulation No 2988/95, and
- the national authorities are required to apply an administrative measure, within the meaning of the first indent of Article 4(1) of Regulation No 2988/95, which requires repayment of all of the aid unduly paid, in so far as it is established, which is a matter for the national court to determine, that the two storage contracts at issue in the main proceedings each related, partially or totally, to the grape musts which cannot be regarded as being of Community origin and which were mixed, in the course of concentration and storage, with grape musts of Community origin.

#### IV – Costs

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

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

1. **In a situation such as that in the main proceedings, where the non-existence of the company alleged to have sold grape musts means that the Community origin of the grape musts cannot be established, the producer who has acquired those grape musts from that company cannot, on any view, benefit from a storage aid under Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organization of the market in wine, as amended by Council Regulation (EEC) No 2253/88 of 19 July 1988.**
2. **In circumstances such as those in the main proceedings:**
  - **Article 17(1)(b) of Commission Regulation (EEC) No 1059/83 of 29 April 1983 on storage contracts for table wine, grape must, concentrated grape must and rectified concentrated grape must, as amended by Commission Regulation (EC) No 2646/1999 of 15 December 1999, cannot constitute a legal basis for the purposes of punishing a breach by the producer of the obligation laid down by Regulation No 822/87, as amended by Regulation No 2253/88, according to which the grape musts which can confer an entitlement to storage aid must be of Community origin;**
  - **in the absence, both in sectoral rules and in national rules, of a provision providing for the application of a penalty, the irregularities at issue cannot be subject to a ‘penalty’ within the meaning of Article 5 of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, and**
  - **the national authorities are required to apply an administrative measure, within the meaning of the first indent of Article 4(1) of Regulation No 2988/95, which requires repayment of all of the aid unduly paid, in so far as it is established, which is a matter**

**for the national court to determine, that the two storage contracts at issue in the main proceedings each related, partially or totally, to the grape musts which cannot be regarded as being of Community origin and which were mixed, in the course of concentration and storage, with grape musts of Community origin.**

[Signatures]