



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

6 October 2015*

(Reference for a preliminary ruling — Regulation (EC, Euratom) No 2988/95 — Protection of the European Union's financial interests — Article 1(2) and the first subparagraph of Article 3(1) — Recovery of an export refund — Limitation period — Date from which time runs (*dies a quo*) — Act or omission by the economic operator — Occurrence of the prejudice — Continuous infringement — Single infringement)

In Case C-59/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Hamburg (Germany), made by decision of 13 December 2013, received at the Court on 7 February 2014, in the proceedings

Firma Ernst Kollmer Fleischimport und -export

v

Hauptzollamt Hamburg-Jonas,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Jürimäe (Rapporteur), J. Malenovský, M. Safjan and A. Prechal, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Firma Ernst Kollmer Fleischimport und -export, by D. Ehle, Rechtsanwalt,
- the Greek Government, by I. Chalkias and E. Leftheriotou, acting as Agents,
- the European Commission, by J. Baquero Cruz, P. Rossi and B. Eggers, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 June 2015,

gives the following

* Language of the case: German.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(2) and the first subparagraph of Article 3(1) of 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 request has been made in proceedings between Firma Ernst Kollmer Fleischimport und -export and the Hauptzollamt Hamburg-Jonas (Principal Customs Office, Hamburg-Jonas; 'the Hauptzollamt') concerning the recovery of export refunds.

Legal context

Regulation No 2988/95

- 3 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.'

- 4 Article 3(1) of that regulation provides:

'The limitation period for proceedings shall be four years as from the time when the irregularity referred to in Article 1(1) was committed. However, the sectoral rules may make provision for a shorter period which may not be less than three years.

In the case of continuous or repeated irregularities, the limitation period shall run from the day on which the irregularity ceases. ...

...'

- 5 Article 4 of the regulation concerns administrative measures for the restitution of advantages wrongly obtained. Article 5 of the regulation lays down the administrative penalties to which intentional irregularities or those caused by negligence may lead.

Regulation (EEC) No 565/80

- 6 Under Article 5(1) of Council Regulation (EEC) No 565/80 of 4 March 1980 on the advance payment of export refunds in respect of agricultural products (OJ 1980 L 62, p. 5), prior to its repeal by Commission Regulation (EC) No 1713/2006 of 20 November 2006 abolishing the prefinancing of export refunds in respect of agricultural products (OJ 2006 L 321, p. 11), 'an amount equal to the export refund shall, at the request of the party concerned, be paid as soon as the products or goods have been brought under the customs warehousing or free zone procedure with a view to their being exported within a set time limit'.

7 Article 6 of that regulation provided:

‘The benefit of the arrangements provided for in this Regulation shall be subject to the lodgment of a security guaranteeing reimbursement of an amount equal to the amount paid, plus an additional amount.

Without prejudice to cases of force majeure, this security shall be forfeited in whole or in part:

— where reimbursement has not been made when export has not taken place within the period referred to in Articles 4(1) and 5(1),

or

— if there proves to be no right to the export refund, or if there was a right to a smaller refund.’

Regulation (EEC) No 3665/87

8 Article 17(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), prior to its repeal by Commission Regulation (EC) No 800/1999 of 15 April 1999 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1999 L 102, p. 11), was worded as follows:

‘The product must have been imported in the unaltered state into the non-member country or one of the non-member countries for which the refund is prescribed within 12 months following the date of acceptance of the export declaration ...’

9 Article 18(1) of that regulation provided:

‘Proof that the product has been cleared through customs for release for consumption shall be furnished by production of:

(a) the relevant customs document or a copy or photocopy thereof; such copy or photocopy must be certified as being a true copy by either the body which endorsed the original document, an official agency of the non-member country concerned, or an official agency of a Member State

or

(b) the customs entry certificate made out in accordance with the specimen in Annex II; this certificate must be completed in one or more official languages of the Community and in a language in current use in the non-member country concerned

...’

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 By decisions taken in 1992 and 1993, the Hauptzollamt made advance payment to the applicant in the main proceedings of certain export refunds against the lodgment of security pursuant to Articles 5(1) and 6 of Regulation No 565/80. Those advance payments concerned several consignments of beef placed in warehousing with a view to their exportation.

- 11 By letter of 10 August 1993, the applicant in the main proceedings forwarded Customs Declaration No 79/239, as issued by the Jordanian customs authorities on 9 March 1993, to the Hauptzollamt. The customs declaration certified that one consignment of beef exported by the applicant in the main proceedings had been released for consumption in Jordan. On 30 April 1996 and 4 March 1998, the Hauptzollamt proceeded to release the security that the applicant had lodged.
- 12 From 28 February to 14 March 1998, the European Anti-Fraud Office (OLAF) carried out an inspection mission in which it was found that the customs declaration issued by the Jordanian authorities had been cancelled before the collection of the import duties and that the beef consignment at issue had in fact been re-exported to Irak.
- 13 By notice of 23 September 1999, the Hauptzollamt made an order for the recovery of EUR 103289.89. Following an objection by the applicant in the main proceedings against the recovery decision, that amount was reduced to EUR 59545.70 by decision of 26 September 2011. The remainder of the objection was rejected by decision of 23 January 2012.
- 14 On 5 February 2012, the applicant in the main proceedings brought an action before the Finanzgericht Hamburg (Finance Court, Hamburg), by which it seeks the annulment of the abovementioned three decisions. The applicant claims that the right to restitution is time-barred. In its view, under Article 3(1) of Regulation No 2988/95, the limitation period starts to run not from the time that the security was released but from the time when the irregularity was committed. Article 1(2) of that regulation links the concept of an ‘irregularity’ with an act or omission by an economic operator. It is therefore necessary to take the date of the provision of the customs declaration issued by the Jordanian authorities, namely 10 August 1993, as the basis for determining whether the action for the restitution of wrongful payments is time-barred.
- 15 The referring court inclines to the view that the limitation period begins to run, irrespective of when the prejudice occurs, with the act or omission by the economic operator which constitutes an infringement of a provision of EU law. Such an interpretation can be inferred from the wording of Articles 1(2) and 3(1) of Regulation No 2988/95. First, the wording of Article 1(2) of that regulation indicates that the EU legislature — which drafted the provision in the conditional — does not link the concept of ‘irregularity’ with the occurrence of a prejudice, since the conduct of an economic operator may also constitute an irregularity if it ‘would have’ the effect of prejudicing the budget of the European Union. Second, it follows from the wording of the first subparagraph of Article 3(1) of the regulation, which refers to ‘the time when the irregularity ... was committed’, that the EU legislature intended to link the commencement of the limitation period not to the ‘occurrence’ but to the ‘commission’ of the irregularity, namely to conduct of the economic operator which must consist in an infringement of a provision of EU law.
- 16 The referring court is nevertheless of the opinion that in cases where the infringement of provisions of EU law has been discovered only after the occurrence of the prejudice, the question of determining when the limitation period begins can be interpreted differently. It might be considered that the concept of irregularity envisaged by Article 1(2) of Regulation No 2988/95 requires two conditions to be fulfilled, namely conduct of an economic operator and prejudice resulting from it.
- 17 On the assumption that the limitation period under the first subparagraph of Article 3(1) of Regulation No 2988/95 begins to run only on the date that the prejudice occurs, the referring court enquires whether ‘prejudice’ within the meaning of Article 1(2) of Regulation No 2988/95 arises as soon as the advance payment of an amount equal to the export refund is made or only on the date of the definitive grant of the export refund when the security is released.

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

- (1) In a case where the infringement of a provision of EU law was discovered only after the occurrence of prejudice, does the irregularity which is necessary for the commencement of the limitation period under the first subparagraph of Article 3(1) of Regulation No 2988/95 and which is defined in Article 1(2) of that regulation presuppose, in addition to an act or omission by the economic operator, that the general budget of the European Union or budgets managed by the European Union were prejudiced, so that the limitation period begins to run only after the occurrence of the prejudice, or does the limitation period begin, irrespective of when the prejudice occurs, with the act or omission by the economic operator which constitutes an infringement of a provision of EU law?
- (2) If the reply to the first question is that the limitation period does not begin until the occurrence of the prejudice:

In connection with a demand for the recovery of an export refund which has been definitively granted, is there already 'prejudice' within the meaning of Article 1(2) of Regulation No 2988/95 when an amount equal to the export refund within the meaning of Article 5(1) of Regulation No 565/80 has been paid to the exporter, without the security under Article 6 of that regulation having already been released, or is there no prejudice until the release of the security or the definitive grant of the export refund?

Consideration of the questions referred

The first question

- 19 By its first question, the referring court asks, in essence, whether, in circumstances such as those at issue in the main proceedings, where the infringement of a provision of EU law was discovered only after the occurrence of prejudice, Article 1(2) and the first subparagraph of Article 3(1) of Regulation No 2988/95 must be interpreted as meaning that the limitation period begins to run from the date that the general budget of the European Union or budgets managed by them were prejudiced, or whether the limitation period begins to run, irrespective of that date, with the act or omission by the economic operator that infringed EU law.
- 20 As a preliminary point, it must, first, be recalled that, in the absence of EU sectoral rules or of national legislation providing for specific rules on the limitation period, the four-year limitation rule laid down in the first subparagraph of Article 3(1) of Regulation No 2988/95 is applicable to irregularities which are detrimental to the European Union's financial interests (see, to that effect, judgment in *Pfeifer & Langen*, C-564/10, EU:C:2012:190, paragraphs 39 and 40 and the case-law cited).
- 21 Second, it should be noted that Article 3(1) of Regulation No 2988/95 applies to the present case, even though the facts at issue in the main proceedings date from 1992 and 1993. The Court has already held that the limitation period provided for by that provision applies to irregularities committed before the entry into force of that regulation (see, to that effect, judgment in *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others*, C-278/07 to C-280/07, EU:C:2009:38, paragraph 34).
- 22 According to settled case-law of the Court, in determining the scope of provisions of EU law, in this case Article 1(2) and the first subparagraph of Article 3(1) of Regulation No 2988/95, their wording, context and objectives must all be taken into account (judgment in *Angerer*, C-477/13, EU:C:2015:239, paragraph 26 and the case-law cited).

- 23 According to the wording of the first subparagraph of Article 3(1) of Regulation No 2988/95, the limitation period for proceedings is to be four years as from the time when the irregularity was committed. Article 1(2) of that regulation defines ‘irregularity’ as any infringement of a provision of EU 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.
- 24 The commission of an irregularity with which the limitation period begins to run therefore requires two conditions to be satisfied, namely an economic operator’s act or omission that infringed EU law and a prejudice, or potential prejudice, caused to the budget of the European Union.
- 25 In circumstances such as those at issue in the main proceedings, where an infringement of EU law has been discovered after the occurrence of the prejudice, the limitation period begins to run from the time when the irregularity was committed, namely from the time when both the economic operator’s act or omission that infringed EU law and the prejudice caused to the budget of the European Union or budgets managed by it have occurred.
- 26 Such a finding is consistent with the aim of Regulation No 2988/95 which, under Article 1(1) of the regulation, is intended to protect the European Union’s financial interests. The date from which the limitation period begins to run (*dies a quo*) is the date of the event that last occurs, namely either the date of the occurrence of the prejudice, where the prejudice occurs after the act or omission infringing EU law, or the date of that act or omission, where the advantage at issue has been granted before the act or omission. This thus facilitates the pursuit of the aim of protecting the European Union’s financial interests.
- 27 Moreover, that conclusion is not called into question by the Greek Government’s submission that the *dies a quo* is the day that the competent authorities discover the irregularity. That view is contrary to the Court’s case-law that the date on which the authorities become aware of an irregularity is irrelevant to the starting point of the limitation period (judgment in *Pfeifer & Langen*, C-52/14, EU:C:2015:381, paragraph 67).
- 28 Indeed, according to the case-law of the Court, the public service owes a general obligation of diligence when verifying the legality of payments made by it that are borne by the European Union budget (judgment in *Ze Fu Fleischhandel GmbH and Vion Trading*, C-201/10 and C-202/10, EU:C:2011:282, paragraph 44). To admit that the *dies a quo* is the day of the relevant irregularity’s discovery would run contrary to that obligation of diligence.
- 29 In the light of the above considerations, the answer to the first question is that Article 1(2) and the first subparagraph of Article 3(1) of Regulation No 2988/95 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings where the infringement of a provision of EU law was discovered only after the occurrence of a prejudice, the limitation period begins to run from the time when both the economic operator’s act or omission that infringed EU law and the prejudice caused to the budget of the European Union or budgets managed by it have occurred.

The second question

- 30 By its second question, the referring court asks about the time when a prejudice within the meaning of Article 1(2) of Regulation No 2988/95 occurs in circumstances such as those at issue in the main proceedings.
- 31 Before answering that question, it is appropriate to recall the sequence of events at issue in the case in the main proceedings. Initially, in 1992 and 1993, the applicant in the main proceedings was granted an advance payment in the amount of the export refund pursuant to Article 5(1) of Regulation No 565/80. Then, on 10 August 1993, the applicant in the main proceedings presented a customs

declaration issued by the Jordanian authorities in order to prove that the product had been cleared through customs for release for consumption in Jordan pursuant to Articles 17(3) and 18(1) of Regulation No 3665/87. Lastly, on 30 April 1996 and 4 March 1998, the security lodged at the time of the grant of the advance payment was released pursuant to Article 6 of Regulation No 565/80.

- 32 In those circumstances, 'prejudice' within the meaning of Article 1(2) of Regulation No 2988/95 occurs on the date that the definitive decision is made to grant the advantage at issue, in the present case the export refunds. It is from that time that a prejudice is in fact caused to the budget of the European Union. That prejudice could not be considered to exist before the date on which the advantage was definitively granted unless it were accepted that the limitation period for recovering an advantage is capable of running already from a time at which the advantage has not yet been granted.
- 33 In the light of the above considerations, the answer to the second question is that Article 1(2) of Regulation No 2988/95 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, a prejudice occurs as soon as the decision to grant the export refund to the exporter concerned has been made.

Costs

- 34 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. Article 1(2) and the first subparagraph of Article 3(1) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings where the infringement of a provision of EU law was discovered only after the occurrence of the prejudice, the limitation period begins to run from the time when both the economic operator's act or omission that infringed EU law and the prejudice caused to the budget of the European Union or budgets managed by it have occurred.**
- 2. Article 1(2) of Regulation No 2988/95 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, a prejudice occurs as soon as the decision made to grant the export refund to the exporter concerned has been made.**

[Signatures]