OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 25 September 2008 [1]

1. These references for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court), Germany, concern the interpretation of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests ('Regulation No 2988/95' or 'the Regulation'). [2] More particularly, they concern those provisions of the Regulation which establish a limitation period on proceedings for the recovery of sums paid out as export refunds, where the obligation to repay those sums arises as a consequence of an irregularity.

2. The referring court wishes to ascertain the temporal and material scope of the limitation period set out in Article 3(1) of Regulation No 2988/95. In particular, it enquires whether that provision may be applied to situations arising before the Regulation came into force and to administrative actions which do not constitute penalties. It also asks for guidance on the interpretation of Article 3(3) of the Regulation which concerns derogations under national law from the limitation period prescribed by the Regulation.

1 — Original language: English.

2 — OJ 1995 L 312, p. 1.

Legal framework

Regulation No 2988/95

3. Regulation No 2988/95, which entered into force on 26 December 1995, sets out a number of general rules regarding checks, administrative measures and penalties for irregularities where payments are made to beneficiaries under Community policies.

4. Previously, there were no common Community rules defining such irregularities. Nor were there common rules on limitation periods for the investigation or detection of irregularities, or which curtailed the application of administrative recovery measures taken, or administrative penalties applied, as a consequence of such irregularities. [3]

3 — Article 8(1) of Regulation No 729/70/EEC of the Council of 21 April 1970 on the financing of the common agricultural policy (*OJ English Special Edition 1970 (I), p. 218)* specifically required Member States to satisfy themselves that transactions funded by the European Agricultural Guidance and Guarantee Fund ('EAGGF') — including refunds on exports to third countries — were actually carried out and executed correctly, to prevent and deal with irregularities and to recover sums lost as a result of irregularities or negligence. However, it did not lay down any limitation periods in respect of such action.

5. The third, fourth and fifth recitals to the Regulation are particularly relevant. The third recital indicates that detailed rules governing the administration and monitoring of Community expenditure are the subject of differing detailed provisions according to the Community policies concerned, but that acts detrimental to the Communities' financial interests must be countered in all areas. The fourth recital states that a common set of legal rules for all areas covered by Community policies is needed in order effectively to combat fraud committed against the Communities' financial interests. The fifth recital recalls that irregularities, and the administrative measures and penalties relating thereto, are provided for in sectoral rules in accordance with the Regulation. The Regulation is sufficiently broad in its horizontal scope for it to be based on Article 235 EC and Article 203 EA. [4]

6. The Regulation then sets out a series of general rules relating to checks, administrative measures and penalties.

7. Article 1(1) 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.'

8. Article 1(2) defines an 'irregularity' as:

'…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.'

9. The relevant parts of Article 3 provide:

'1. 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[[5]] may make provision for a shorter period which may not be less than three years.

4 — See, in that respect, the 12th recital in the preamble to the Regulation.

5 — At the material time there were no relevant sectoral rules.

In the case of continuous or repeated irregularities, the limitation period shall run from the day on which the irregularity ceases. In the case of multiannual programmes, the limitation period shall in any case run until the programme is definitively terminated.

The limitation period shall be interrupted by any act of the competent authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity. The limitation period shall start again following each interrupting act.

However, limitation shall become effective at the latest on the day on which a period equal to twice the limitation period expires without the competent authority having imposed a penalty, except where the administrative procedure has been suspended in accordance with Article 6(1).

2. The period for implementing the decision establishing the administrative penalty shall be three years. That period shall run from the day on which the decision becomes final.

Instances of interruption and suspension shall be governed by the relevant provisions of national law.

3. Member States shall retain the possibility of applying a period which is longer than that provided for in paragraphs 1 and 2 respectively.'

10. Article 4 provides that, as a general rule, where an economic operator has wrongly obtained an advantage through an irregularity, those advantages are to be withdrawn (either by way of repayment or through forfeiture of a security). Article 4(4) states, however, that '[t]he measures provided for in this Article shall not be regarded as penalties'.

11. Article 5 provides, in contrast, for administrative penalties to be applied in the case of intentional irregularities or those caused by negligence.

12. Article 6 sets out the conditions in which proceedings to impose financial penalties may be suspended. The final sentence of Article 6(1) states: 'Suspension of the administrative proceedings shall suspend the period of limitation provided for in Article 3.'

National legal provisions

13. At the material time Paragraph 195 of the German Civil Code (BürgerlichesGesetzbuch; 'BGB') provided that the standard limitation period for claims made under German civil law was 30 years. Paragraph 195 was amended with effect from 1 January 2002. The standard limitation period was shortened to three years and has remained so since then.

14. At the time the irregularities arose, there were no provisions in German law which set out a specific limitation period for actions to recover wrongfully granted financial advantages (such as recovery of export refunds wrongly granted) or, more generally, administrative benefits wrongly granted. Both the administration and the courts applied Paragraph 195 of the BGB *mutatis mutandis*. [6]

Factual background

15. In 1993, three companies [7] applied for export refund advances on a number of consignments of beef to be exported to Jordan. The Hauptzollamt ('Principal Customs Office') [8] granted those applications.

16. In 1998, the Hauptzollamt carried out a series of inspections. As a result, it took the view that the beef in question had in fact been re-exported from Jordan to Iraq. The Hauptzollamt therefore ordered the three companies to repay the sums granted as export refunds, on the grounds that they had been wrongly paid under an application tainted by an irregularity. [9]

6 — Expressly so described by the national court in the order for reference: 'In Deutschland bestand in dem hier in Betracht zu ziehenden Zeitraum keine Vorschrift, welche die Verjährung eines Anspruches auf Rückforderung zu Unrecht gewährter Ausfuhrerstattung oder — allgemeiner — zu Unrecht gewährter verwaltungsrechtlicher Vergünstigungen speziell regelte. Von der Verwaltung und der Rechtsprechung wurde insofern vielmehr das Bürgerliche Gesetzbuch (BGB) entsprechend angewandt …'

7 — Josef Vosding Schlacht, Kühl- und Zerlegebetrieb GmbH & Co ('Josef Vosding'; Case C-278/07), Vion Trading GmbH ('Vion'; Case C-279/07) and Ze Fu Fleischhandel GmbH ('Ze Fu'; Case C-280/07). All three were initially applicants before the Finanzgericht Hamburg and are now the respondents in the proceedings before the referring court.

8 — The appellant in the proceedings before the referring court.

9 — By its decisions of 23 September 1999 (for Josef Vosding) and of 13 October 1999 (for Vion and Ze Fu).

17. The companies appealed to the Finanzgericht Hamburg (Hamburg Finance Court) against the decisions of the Hauptzollamt. In its judgment of 4 May 2005 the Finanzgericht upheld their appeals. It took the view that the limitation period prescribed by Article 3(1) of Regulation No 2988/95 had expired; in consequence, the Hauptzollamt's application was time-barred.

18. The Hauptzollamt appealed to the Bundesfinanzhof, which has stayed the proceedings and referred the following questions for a preliminary ruling:

'(1) Must the limitation period prescribed in the first sentence of the first subparagraph of Article 3(1) of Regulation No 2988/95 on the protection of the European Communities' financial interests be applied even if an irregularity was committed or ceased before Regulation No 2988/95 entered into force?

(2) Is the limitation period prescribed in that provision applicable in general to administrative measures such as the recovery of export refunds granted as a result of irregularities?

If the answers to those questions are in the affirmative:

(3) May a longer period pursuant to Article 3(3) of Regulation No 2988/95 be applied by a Member State even if such a longer period was already provided for in the law of the Member State before the abovementioned regulation was adopted? May such a longer period be applied even if it was not prescribed in a specific provision for the recovery of export refunds or for administrative measures in general, but resulted from a general rule of the Member State concerned covering all limitation cases not specifically regulated ("catch-all" provision)?'

19. Written observations were submitted by Josef Vosding, Vion and Ze Fu, the Czech Government and the Commission.

20. At the hearing on 17 April 2008, the parties that submitted written observations (except for the Czech Government) and, in addition, the French Government, were present and made oral submissions.

Assessment

Preliminary comment

21. All three companies have argued before the national courts that the Hauptzollamt has failed to show that the alleged irregularity actually took place. They have repeated those arguments in the present proceedings.

22. However, Article 234 EC is based on a clear separation of functions between the national courts and the Court of Justice. Factual matters fall within the jurisdiction of the national courts, whilst the role of the Court of Justice is to give guidance as to the interpretation of Community law. The Court must therefore take as a basis for its judgment in a reference for a preliminary ruling the facts as they are stated by the national court in the order for reference. [10]

The first question

23. The first question concerns the temporal scope of Article 3(1) of Regulation No 2988/95. Essentially, the referring court asks whether that article may be applied to a situation where an irregularity was committed, or ceased, before the Regulation came into effect. [11]

24. The Court has consistently held that 'procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying, in principle, to situations existing before their entry into force'. [12]

10 — See most recently Case C-491/06 *Danske Svineproducenter* [2008] ECR I-3339, paragraph 23 and the case-law cited therein.

11 — Although there may be some doubt as to the exact moment at which the irregularity itself arose, the referring court makes the assumption that the application was tainted by an irregularity in 1993, before the Regulation came into effect in 1995. I shall do likewise.

12 — See Case C-201/04 *Molenbergnatie* [2006] ECR I-2049, paragraph 31 and the case-law cited therein.

25. A substantive rule of law may exceptionally be given retroactive application. Such retroactive application is possible only in so far as there are sufficiently clear indications in the terms, objectives or general scheme of that rule that it is intended to have that effect. In applying a substantive provision retroactively, due respect must also be paid to legal certainty and to legitimate expectations. [13]

26. The first step in determining whether the referring court may give Article 3(1) retroactive effect is therefore to determine whether that article is procedural or substantive.

27. In *Vonk Dairy Products*, [14] the Court did not have to examine expressly whether Article 3(1) of Regulation No 2988/95 is a procedural rule that is applicable retrospectively. The judgment proceeds on the basis that Article 3(1) is a procedural rule, that it was applicable and that the appropriate limitation period was indeed that prescribed therein. [15] Since the proceedings were plainly governed by Regulation No 2988/95 and the actual issue in that case was whether the exporter's activities could be classed as 'continuous or repeated irregularities', it was unnecessary to analyse in any detail whether Article 3(1) was a purely procedural rule. [16]

28. In its order for reference, the Bundesfinanzhof draws a number of parallels between Article 3(1) of Regulation No 2988/95 and Article 221(3) of the Community Customs Code, which was in issue in *Molenbergnatie*. [17]

29. That provision stated that, 'Communication [of the customs debt] to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. However, when it is as a result of an act that could give rise to criminal court proceedings so that the customs authorities were unable to determine the exact amount legally due, such communication may, in so far as the provisions in force so allow, be made after the expiry of such three year period'.

13 — Joined Cases 212/80 to 217/80 *SRL Salumi and Others* [1981] ECR 2735, paragraphs 9 and 10 and the case-law cited therein.

14 — Case C-279/05 [2007] ECR I-239.

15 — See paragraphs 40 to 44 of the judgment, in particular paragraph 42, and points 68 and 79 of my Opinion.

16 — Paragraph 26 of the judgment in *Vonk* records that the last export transaction concerned took place in 28 September 1994. The limitation period was interrupted on two occasions by administrative actions of the kind described in Article 3(1); third subparagraph. The decision requesting repayment of the export refunds is dated 18 April 2001. Thus, the events giving rise to the proceedings arose before the Regulation came into force in 1995, but the administrative decision challenged was taken afterwards. The Regulation was therefore plainly not being applied to proceedings 'pending' at the time when it entered into force

17 — Cited in footnote 12.

30. In their observations, Josef Vosding and Ze Fu follow the conclusions drawn by the Bundesfinanzhof and proceed on the assumption (applying *Molenbergnatie* by analogy) that the rule is a substantive one. By contrast, Vion, France and the Commission are of the opinion that the rule is procedural. [18]

31. In *Molenbergnatie*, the Court held that Article 221(3) was 'a bar on the right of the authorities to recover the debt' but that it was also 'a rule governing the customs debt itself'. [19] Later, the Court drew an unambiguous link between the expiry of the limitation period and the existence of the debt itself, stating that at the expiry of the limitation period 'the debt [becomes] time barred and, consequently, extinguished'. [20] It therefore classified Article 221(3) as a substantive rule.

32. With all due respect, that reasoning cannot be sound. The expiry of a limitation period, just because it prevents a creditor from recovering money owed to him, extinguishes neither the debt itself, nor the effects of the debt. Debts are in general extinguished either by being cancelled by the creditor or by payment by the debtor of the sum owing under the debt. The expiry of a limitation period is analogous to neither of these. Instead, as Advocate General Jacobs argued in *Molenbergnatie*, a limitation period properly belongs in the sphere of the law of actions. [21] Thus, I share Advocate General Jacob's perception that, normally at any rate, the expiry of a limitation period will not automatically 'extinguish' the underlying legal liability that would otherwise be enforceable.

33. Nothing in the wording of Article 3(1) of the Regulation suggests that the substance of the action is governed, or indeed affected, by Article 3(1). [22] It is a limitation provision, pure and simple. Its structure is, indeed, classic.

34. It is obvious that the authorities' investigations will be concerned with establishing whether an irregularity has, in fact, been committed and that the outcome of those investigations has a direct bearing, in turn, on the subsequent decisions (a) whether any

18 — The Czech Government argues that there is no need to debate the question of retroactive effect, as the provision governs the future of a situation which is continuing to produce effects. However, as the situation arose before the Regulation, it seems to me that the question of retroactivity is a valid one.

19 — Paragraph 39 of the judgment.

20 — Paragraph 41 of the judgment.

21 — Advocate General Jacobs considered Article 221(3) to be 'a rule on limitation of actions', such that expiry of the limitation period did not affect the existence of the debt itself (see point 40 of his Opinion in *Molenbergnatie*).

22 — In this respect, Article 3(1) of the Regulation may perhaps be contrasted with Article 221(3) of the Customs Code, under discussion in *Molenbergnatie*. The latter permits communication to the debtor after the expiry of the limitation period, when it is the result of an act that could give rise to criminal court proceedings so that the customs authorities were *unable to determine the exact amount legally due* (my emphasis) — a feature missing from Article 3(1) of the Regulation.

export refund at all should have been paid, (b) if so, in what sum, (c) whether (comparing that figure with the export refund already paid) there has been over-payment and (d) if so, what the sum is that the authorities should be seeking to reclaim from the beneficiary. But these factors cannot lead to the conclusion that the rule in Article 3(1) of the Regulation is substantive in nature.

35. In my view, Article 3(1) of the Regulation is a purely procedural rule. In accordance with the Court's settled case-law, to which I have already referred, [23] it is therefore applicable to all proceedings pending at the time when it entered into force.

36. If the Court none the less considers that Article 3(1) is properly to be construed as a substantive rule, it becomes necessary to examine whether Article 3(1) meets the *Salumi* [24] conditions and may therefore be applied retroactively. These conditions are, put shortly, that retroactivity must clearly follow from the wording and the objectives and general scheme of the measure and that there should be respect for legal certainty and legitimate expectations.

37. Precisely because the first two *Salumi* conditions envisage a measure that has clear substantive effects (which the contested measure does not), it is difficult to see how they are met in the present case. The obvious reading for the first subparagraph of Article 3(1), taken in conjunction with the broad definitions given in Article 1(1), is that it applies to all situations covered by the Regulation. Clear wording to the contrary would be needed to displace that presumption. There is none. However, that does not suffice of itself to establish that the legislator clearly intended application of Article 3(1) to be retroactive.

38. The purpose of the Regulation is to protect the Communities' financial interests and to set out a general set of rules relating to administrative measures and penalties concerning irregularities with regard to Community law. Such a general framework also encompasses limitation periods on the recovery of wrongfully paid sums, but sheds no light on their temporal application.

39. As to the objectives and general scheme, the Regulation introduces a 'common set of rules', [25] explaining why this is necessary and appropriate. [26] Whilst retroactive application of a uniform limitation period does not cut

23 — See footnote 12 above.
24 — Paragraphs 9 and 10 of the judgment and the case-law cited therein, paraphrased at point 25 above.
25 — Recital 4.
26 — Recitals 3 and 4.

across those objectives, nor undermine the general scheme of the Regulation, it is difficult to read into these elements a positive endorsement of retroactive application.

40. Finally, retroactive application of Article 3(1) in the present case would provide a shorter limitation period than that otherwise applicable under national law. That operates to the advantage of the companies concerned, respecting their legitimate expectations. [27] It is less clear that the global interests of legal certainty are served by such an interpretation.

41. I therefore take the view that if (quod non) Article 3(1) of the Regulation were a substantive provision, it would not satisfy the *Salumi* criteria. That said, I conclude that, because the limitation period prescribed in the first sentence of the first subparagraph of Article 3(1) of Regulation No 2988/95 is procedural, not substantive, that limitation period applies even if the irregularity in question was committed or ceased before the Regulation entered into force.

27 — The companies may be said to have had a legitimate expectation that the limitation period would not be extended — here, of course, it was shortened significantly from that previously applicable under national law.

The second question

42. The second question concerns the material scope of Article 3(1) of Regulation No 2988/95. The referring court asks whether the limitation period applies to all recovery measures taken by the national authorities following discovery of an irregularity. [28]

43. In *Handlbauer* [29] the Court held that Article 3(1) is applicable both to the irregularities referred to in Article 4 and to those referred to in Article 5. The Court noted that Article 1(1) introduces 'general rules' and that the broad definition of 'irregularity' in Article 1(2) 'covers intentional irregularities or irregularities arising out of negligence which ... may result in an administrative fine[[30]] as well as those irregularities which entail nothing more than the withdrawal of the wrongly obtained advantage[[31]] ...'. The Court therefore made no distinction between the two categories of irregularities [32]

44. In its written observations, the Commission draws the Court's attention to a number of problems it alleges to have been created by

28 — As opposed to applying only to measures which amount to penalties.
29 — Case C-278/02 [2004] ECR I-6171.
30 — That is, irregularities under Article 5.
31 — That is, irregularities under Article 4.
32 — See paragraphs 32 to 34 of the judgment.

the judgment in *Handlbauer*. It reiterated those concerns at the hearing. In particular, the Commission claims that the Communities' budget might be threatened if the limitation period were taken to extend to non-penal administrative measures.

45. The Commission argues that the limitation period operates in the interests of the companies concerned, by limiting the timeframe within which a company may be penalised for an irregularity, and that that is indeed appropriate in respect of measures imposing penalties. However, the financial interests of the Communities dictate that less serious measures should not be limited in that way. Thus, the Commission distinguishes sharply between the consequences of an irregularity created intentionally or through negligence, and one which arises without fault on the part of the exporter.

46. The penalties in Article 5 are administrative penalties. They differ from the administrative recovery measures in Article 4 in their nature and in the calculation of the sums involved. However, neither arises in a vacuum. Both arise because of, and are inextricably linked to, the irregularity committed.

47. As a general rule, any irregularity involves withdrawal of the wrongly obtained advantage [33] (that is, recovery of the monies paid). Where the irregularity was committed intentionally or through negligence, an administrative penalty may be imposed. The Commission's reasoning leads to the (perverse) result that exporters who commit irregularities intentionally or through negligence can benefit from a limitation period denied to those who are less blameworthy.

48. The Commission suggests that limitation periods, both for administrative recovery measures and for recovery measures which are not triggered by an irregularity, [34] should be governed by national law. It refers to the *travaux préparatoires* for the Regulation, claiming that a majority of Member States wished to confine the application of the limitation period to administrative penalties. However, the *travaux préparatoires* are an ancillary tool in legislative interpretation. They cannot in themselves be used to contradict the clear wording of the legislation. [35] The text of the Regulation as adopted does not bear that construction; and the Court in *Handlbauer* has already rejected the interpretation espoused by the Commission (which set out its views fully in that case). The Court's interpretation was, moreover, in

33 — Article 4(1).

34 — For example, where the administrative authority in question has erroneously paid an export refund to the beneficiary and is seeking to recover it. This question arises in Case C-281/07 *Bayerische Hypotheken*, currently pending.

35 — See point 30 of the Opinion of Advocate General Tizzano in Case C-133/00 *Bowden* [2001] ECR I-7031.

accordance with the Opinion of the Advocate General [36] and the Court of First Instance had previously taken the same approach in Case T-125/01 *Peix*. [37]. The appeal in that case concerned a different point of law.

49. I add that the Commission's reasoning appears to conflate the recovery of export refunds in cases where the irregularity was neither intentional nor negligent with the recovery of export refunds wrongly paid by a competent authority where no irregularity of any kind has arisen. The former is clearly covered by Regulation No 2988/95. [38] The latter, equally clearly, is not. [39]

50. A narrow interpretation of the material scope of Article 3(1) is, moreover, not supported by the wording of the Regulation.

51. First, the Commission argues that the scope of the word 'proceedings' should define the scope of Article 3(1), and that 'proceedings' is to be construed as meaning 'proceedings leading to an administrative penalty'. In my view, however, the parameters of Article 3(1) are set by the scope of the term 'irregularity'. This is defined in Article 1(2) as '*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'. [40]

52. The recovery process arises only if an irregularity has been committed. Both lesser and more serious infringements may prejudice the Community budget, as the broad definition of the term 'irregularity' in Article 1(2) shows. [41] Article 3(1) must therefore cover all proceedings to remedy the wrongful payment of an advantage that arises as a result of any type of irregularity.

53. Furthermore, the Commission's approach appears to ignore the plain wording of Article 1(1) — to which Article 3(1) refers — which states that the Regulation adopts general rules relating to, inter alia, 'administrative measures and penalties'.

36 — See points 39 to 53 of the Opinion, and in particular point 52.

37 — Case T-125/01 *José Marti Peix* v *Commission* [2003] ECR II-865.

38 — See Article 1(2) and Article 4.

39 — See my Opinion in *Bayerische Hypotheken*, cited in footnote 34, which concerns the recovery of an export refund wrongly paid to an exporter as a result of an error on the part of the Hauptzollamt, where no irregularity arose.

40 — My emphasis.

41 — See *Handlbauer*, cited above in footnote 29, at paragraphs 32 and 33, and recitals 3 to 5 of the Regulation. The Court's ruling in *Vonk*, cited in footnote 14, is also predicated upon the assumption that the limitation period in Article 3(1) applies to all proceedings, not just proceedings leading to the imposition of administrative penalties.

54. Second, the Commission argues that the wording of the fourth subparagraph of Article 3(1) demonstrates that all of Article 3(1) is concerned exclusively with irregularities which lead to the imposition of administrative penalties. [42]

55. It seems to me that Article 3(1), read as a whole, lays down a general system of limitation. The normal limitation period is four years (Article 3(1), first subparagraph). The particular problems created by continuous or repeated irregularities are addressed by Article 3(1), second subparagraph. Any act by the competent authorities relating to investigations or legal proceedings suffices to interrupt the limitation period (Article 3(1), third subparagraph). Article 3(1), fourth subparagraph, establishes a general rule that limitation normally becomes effective (inclusive of any interruptions under Article 3(1), third subparagraph) after eight years. There are only two exceptions to that rule: (a) where the competent authorities have imposed a penalty (under Article 5) or (b) where the administrative procedure has been suspended in accordance with Article 6(1). In the first case, Article 3(2) makes provision for a three-year time-frame within which the decision establishing the administrative penalty is to be implemented. In the second case, the detailed special provisions of Article 6 apply. It seems to me that such a reading makes coherent sense of the rules on limitation. In contrast, the Commission's suggested construction of the fourth subparagraph of Article 3(1) distorts the natural meaning of the first three subparagraphs.

42 — This drafting seems also to have troubled the referring court.

56. As I have indicated, I do not consider that the present wording of the Regulation can, without distortion, be made to bear the meaning for which the Commission contends. If the Commission is correct in stating that the legislator's intent was that the limitation period should apply exclusively to administrative penalties, it seems to me that it would be appropriate for the Commission to propose a clarifying amendment to the Council, rather than asking the Court to revisit its ruling in *Handlbauer*.

57. Third, Article 3(1) forms part of the 'General Principles' section of the Regulation. Its scope falls, as a matter of principle, to be construed widely.

58. Fourth, Article 3(1) should be considered within the framework of the administrative law which surrounds it. Here, the Commission points out that the limitation period for administrative penalties is calculated from the moment at which an irregularity arises, whereas, in the case of recovery of wrongly obtained advantages, it runs from the grant of the advantage. The Commission then proceeds on the assumption that the latter always predates the former. On that basis, the Commission asserts that an exporter who has committed an irregularity (whether leading to administrative recovery measures or an

administrative penalty) will, under *Handlbauer*, be treated better than an exporter who has committed no irregularity, because of this difference in the starting point for the limitation period.

59. However, the Commission's premiss is a false one. It is not necessarily the case that the advantage will be granted before the irregularity arises. For example, if the irregularity consists of information wrongly entered on the application form, the order in which the two events occur will be reversed. Whether, in any particular case, an exporter will do better under national law or under the Regulation will depend both on the timing of these two events and on whether national law prescribes a longer or shorter limitation period than the Regulation. This does not provide a sound basis for revisiting *Handlbauer*.

60. I conclude that the limitation period prescribed in Article 3(1) is applicable in general to administrative measures such as the recovery of export refunds granted as a result of irregularities, as well as to administrative penalties.

61. As the answers that I propose to the first two questions are both in the affirmative, I turn to consider the third question.

The third question

62. By its third question, the referring court seeks to clarify Member States' scope, under Article 3(3), for derogating from Article 3(1).

63. This question has two elements. First, must the provision of national law at issue be enacted after Regulation No 2988/88 entered into force in order to benefit from the derogation? Second, how specific must the legislation be?

Timing

64. Article 3(3) states that Member States may 'retain' the possibility of applying a

longer limitation period. [43] The word 'retain' indicates — to my mind, quite unambiguously — that national legislation already in place before Regulation No 2988/95 came into force does not have to be repealed. Such legislation is covered by the derogation. Member States may also introduce new legislation applying longer limitation periods, since their power to do so is preserved by the derogation. What they may not do is to introduce a shorter limitation period. Such an interpretation is consistent with the Regulation's aim of countering acts detrimental to the Communities' financial interests. [44]

Specificity

65. The scope of the limitation period set out in Article 3(1) is itself defined by Article 1(1) and Article 1(2). The limitation period is the period that applies to proceedings in respect of 'irregularities' as defined in Article 1(2). [45] It follows that any legislation which seeks to derogate from Article 3(1) in reliance upon Article 3(3) must likewise fall within that scope.

66. In my view, Paragraph 195 of the BGB does not satisfy that test.

67. The BGB contains the general codification of Germany's civil law. The limitation period set out in Paragraph 195 BGB is a general provision of civil law. It is not, as such, concerned with administrative law matters. In particular, it is not *per se* applicable to the recovery of export refunds that have been wrongly granted. [46]

68. It seems that, before Regulation No 2988/95 entered into force, the German courts applied Paragraph 195 of the BGB *by analogy* to situations involving administrative recovery of sums. An application by analogy is not an application that clearly and unambiguously derogates from the standard limitation period laid down by the Regulation for proceedings in respect of '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'. Regulation No 2988/95 now provides for a standard limitation period (normally, four years). Since it is contained in a regulation, that limitation period is directly applicable. Application of a longer limitation period on the strength of previous judicial analogy would run directly counter to

43 — The article uses 'conservent' in French; 'behalten' in German. Like the English version, both clearly indicate that the provision covers pre-existing legislation that lays down a longer limitation period. The Commission suggests, cogently, that were this not the case, a verb such as 'apply' ('appliquer' or 'anzuwenden') would have been used instead.

44 — See recitals 3 and 4. As to the implications for the 2002 amendment to Paragraph 195 of the BGB (reducing the limitation period in that provision to three years, see point 70 below).

45 — See point 60 above.

46 — See point 14 above.

the requirements of legal certainty. For that reason, I am of the view that the general limitation period in Paragraph 195 of the BGB cannot be applied in reliance upon Article 3(3) of the Regulation.

69. The fact that at the material time the limitation period in paragraph 195 BGB was 30 years received considerable attention in certain written submissions. Were the Regulation not applicable, those arguments might indeed be pertinent to a discussion of whether it was appropriate to apply Paragraph 195 of the BGB by analogy to administrative proceedings for recovery of sums paid from the Communities' budget. Once Regulation No 2988/95 has entered into force, however, the actual length of the national limitation period that the national authorities seek to apply becomes irrelevant. Application by analogy is no longer acceptable.

70. For that very reason, no difficulty arises from the fact that the 2002 amendment to Paragraph 195 of the BGB reduced the general civil limitation period to three years. Since Paragraph 195 of the BGB cannot, in my view, continue to be applied by analogy to the recovery of export refunds which have been wrongly received as the result of an irregularity, the three year period that it lays down does not cut across the four-year period specified in Article 3(1), first subparagraph. Put simply, the two provisions operate in different spheres. There is, in consequence, no conflict between them.

71. For the sake of completeness, I add that any national law retaining a specific (longer) limitation period applicable to proceedings in respect of wrongly-received payments that threaten the Communities' budget would need to conform with general principles of Community law (such as non-discrimination) and to be proportionate in order to fall within the Article 3(3) derogation. Since the standard limitation period under Regulation No 2988/95 is 4 years, a 30-year limitation period would in any event be disproportionate.

72. I therefore conclude that Article 3(3) of Regulation No 2988/95 applies to longer limitation periods laid down by national law before that Regulation was enacted, provided that such limitation periods were or are specifically applicable to proceedings falling within the scope of the Regulation and satisfy general principles of Community law.

Conclusion

73. I therefore recommend that the Court answer the questions referred by the Bundesfinanzhof as follows:

(1) Because the limitation period prescribed in the first sentence of 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 is procedural, not substantive, that limitation period applies even if the irregularity in question was committed or ceased before the Regulation entered into force.

(2) The limitation period prescribed in Article 3(1) is applicable in general to administrative measures such as the recovery of export refunds granted as a result of irregularities, as well as to administrative penalties.

(3) Article 3(3) of Regulation No 2988/95 applies to longer limitation periods laid down by national law before that Regulation was enacted, provided that such limitation periods were or are specifically applicable to proceedings falling within the scope of the Regulation and satisfy general principles of Community law.