

JUDGMENT OF THE COURT (Fourth Chamber)

28 October 2010\*

In Case C-367/09,

REFERENCE for a preliminary ruling under Article 234 EC from the hof van beroep te Antwerpen (Belgium), made by decision of 8 September 2009, received at the Court on 14 September 2009, in the proceedings

**Belgisch Interventie- en Restitutiebureau**

v

**SGS Belgium NV,**

**Firme Derwa NV,**

**Centraal Beheer Achmea NV,**

\* Language of the case: Dutch.

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann, L. Bay Larsen, C. Toader (Rapporteur), and A. Prechal, Judges,

Advocate General: J. Kokott,  
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 June 2010,

after considering the observations submitted on behalf of:

— SGS Belgium NV, by M. Storme, avocat,

— Firme Derwa NV, by L. Wysen and J. Gevers, avocats,

— the Belgian Government, by J.C. Halleux, acting as Agent, assisted by P. Bernaerts and E. Vervaeke, advocaten,

— the Austrian Government, by E. Riedl, acting as Agent,

— the European Commission, by A. Bouquet and F. Wilman, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2010,

gives the following

### **Judgment**

- <sup>1</sup> This reference for a preliminary ruling concerns the interpretation of Articles 3(1), third subparagraph, 5 and 7 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; with corrigendum OJ 1998 L 36, p. 16).
- <sup>2</sup> The reference has been made in proceedings between the Belgisch Interventie- en Restitutiebureau (the Belgian Intervention and Refund Agency, 'the BIRB') and SGS Belgium NV ('SGS Belgium'), a control and supervisory agency, Firme Derwa NV ('Firme Derwa'), an export company, and Centraal Beheer Achmea NV, an insurance

company, concerning the imposition of a penalty on SGS Belgium for having enabled Firme Derwa to obtain an export refund to which it was not entitled.

## **Legal context**

### *European Union law*

#### Regulation No 2988/95

- <sup>3</sup> The second to 5th, 7th, 8th, 10th and 13th recitals in the preamble to Regulation No 2988/95 read as follows:

‘Whereas more than half of Community expenditure is paid to beneficiaries through the intermediary of the Member States;

Whereas detailed rules governing this decentralised administration and the monitoring of their use are the subject of differing detailed provisions according to the Community policies concerned; whereas acts detrimental to the Communities’ financial interests must, however, be countered in all areas;

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 administrative penalties must provide adequate protection for the said interests; whereas it is necessary to define general rules applicable to these penalties;

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;

...

Whereas not only under the general principle of equity and the principle of proportionality but also in the light of the principle of *ne bis in idem*, appropriate provisions must be adopted while respecting the *acquis communautaire* and the provisions laid

down in specific Community rules existing at the time of entry into force of this Regulation, to prevent any overlap of Community financial penalties and national criminal penalties imposed on the same persons for the same reasons;

...

Whereas Community law imposes on the Commission and the Member States an obligation to check that Community budget resources are used for their intended purpose; whereas there is a need for common rules to supplement existing provisions.'

4 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.’

5 Article 2 of the regulation provides that:

‘1. Administrative checks, measures and penalties shall be introduced in so far as they are necessary to ensure the proper application of Community law. They shall be effective, proportionate and dissuasive so that they provide adequate protection for the Communities’ financial interests.

2. No administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it. In the event of a subsequent amendment of the provisions which impose administrative penalties and are contained in Community rules, the less severe provisions shall apply retroactively.

3. 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.

4. Subject to the Community law applicable, the procedures for the application of Community checks, measures and penalties shall be governed by the laws of the Member States.’

6 Article 3(1) of Regulation No 2988/95 states that:

‘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.

...

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.

...’

7 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,

— by the total or partial loss of the security provided in support of the request for an advantage granted or at the time of the receipt of an advance.

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.

3. Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal.

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

8 Article 5 of Regulation No 2988/95 provides, at paragraphs 1 and 2:

'1. 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;

...

- (g) other penalties of a purely economic type, equivalent in nature and scope, provided for in the sectoral rules adopted by the Council in the light of the specific requirements of the sectors concerned and in compliance with the implementing powers conferred on the Commission by the Council.

2. Without prejudice to the provisions laid down in the sectoral rules existing at the time of entry into force of this Regulation, other irregularities may give rise only to those penalties not equivalent to a criminal penalty that are provided for in paragraph 1, provided that such penalties are essential to ensure correct application of the rules.'

- 9 Under Article 7 of Regulation No 2988/95:

'Community administrative measures and penalties may be applied to the economic operators referred to in Article 1, namely the natural or legal persons and the other entities on which national law confers legal capacity who have committed the irregularity. They may also apply to persons who have taken part in the irregularity and to those who are under a duty to take responsibility for the irregularity or to ensure that it is not committed.'

Regulation (EEC) No 3665/87

- <sup>10</sup> Paragraphs 1 and 3 of Article 11 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), as amended by Commission Regulation (EC) No 495/97 of 18 March 1997 (OJ 1997 L 77, p.12, ‘Regulation No 3665/87’) provides:

‘1. Where it is found that an exporter, with a view to the grant of an export refund, has requested a refund in excess of that applicable, the refund due for the relevant exportation shall be the refund applicable to the actual exportation reduced by an amount equivalent to:

- (a) half the difference between the refund requested and the refund applicable to the actual exportation;
  
- (b) twice the difference between the refund requested and the refund applicable, if the exporter has intentionally supplied false information.

...

The sanctions shall be without prejudice to additional sanctions laid down at national level.

...

3. Without prejudice to the obligation to pay any negative amount as referred to in the fourth subparagraph of paragraph 1, where a refund is unduly paid, the beneficiary shall reimburse the amounts unduly received, which includes any sanction applicable pursuant to the first subparagraph of paragraph 1...'

<sup>11</sup> Article 18 of Regulation No 3665/87 provides:

'1. Proof that the product has been cleared through customs for release for consumption shall, at the exporter's choice, be furnished by production of one of the following documents:

(a) the customs document ...

(b) a certificate of unloading and release for consumption drawn up by an international control and supervisory agency approved by a Member State. The date and number of the customs document of release for consumption must appear on the certificate concerned.

2. If the exporter cannot obtain the document chosen in accordance with paragraph 1(a) or (b) even after taking the appropriate steps or if there are doubts as to the authenticity of the document furnished, proof that the product has been cleared through customs for release for consumption may be deemed to have been furnished by the production of one or more of the following documents:

...

- (c) a certificate of unloading drawn up by an international control and supervisory agency approved by a Member State, certifying also that the product has left the port zone or at least that, to its knowledge, the product has not subsequently been loaded for re-export;

...'

### *National law*

- <sup>12</sup> Article 1 of the Royal Decree of 4 January 1985 establishing the conditions for approval of agencies responsible for issuing a certificate of unloading in the country of destination of goods exported in the framework of the common agricultural policy (*Belgisch Staatsblad* of 21 February 1985, p. 1937) is worded as follows:

‘Certificates which prove that the goods exported have been unloaded in the country of destination may, for the application of the common agricultural policy, be accepted

by the competent authorities only if they have been drawn up by international control and supervisory agencies approved for that purpose by orders of the Ministers responsible for economic affairs and agriculture.’

13 Article 2(2) of the royal decree provides that:

‘The agency undertakes:

(i) to be jointly and severally liable, with the other persons involved in an export operation, for the financial consequences of the certificates issued by it;

(ii) to grant access to its premises, at any time, to officials ... and to allow those officials to consult all documents relating to certificates that have been issued;

...’

14 The abovementioned royal decree was repealed by the Royal Decree of 28 February 1999 setting the conditions for approval of agencies responsible for issuing certificates of unloading and release for consumption in the country of destination, of goods exported in the framework of the common agricultural policy (*Belgisch Staatsblad* of 22 June 1999, p. 23534).

- 15 Under Article 2(1)(2)(a) of that royal decree, ‘the agency undertakes to be jointly and severally liable, with the other persons involved in an export operation, for the financial consequences of the certificates issued by it.’

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

- 16 On 6 June 1997, Firme Derwa exported a consignment of 741 144 kilograms of beef to Egypt and applied to the BIRB for an export refund in respect thereof. Firme Derwa thus received, after providing security, an advance of EUR 1 407 268,90 under the pre-financing system.
- 17 In order to become definitively entitled to the full amount of the refund, Firme Derwa was required to produce proof that the shipment of meat in question had been imported into Egypt. The ship transporting the cargo of meat reached its destination on 19 June 1997. On 10 February 1998, Firme Derwa forwarded to the BIRB a certificate, drawn up by SGS Belgium dated 4 November 1997, confirming that the Egyptian customs authorities had cleared the goods in question for release for consumption.
- 18 On 5 June 1998, the BIRB released the security provided by Firme Derwa, which definitively acquired the export refund in question.

- 19 An investigation by the Economic Inspection Board of the Belgian Ministry of Economic Affairs revealed that SGS Egypt Ltd had sent SGS Belgium a fax on 24 September 1997 informing it that it had not been possible to import the goods concerned into Egypt because Egypt had prohibited the import of beef originating in Belgium.
- 20 The BIRB sent SGS Belgium reports relating to the investigation in communications dated 13 August and 9 and 14 October 1998. By letter of 21 April 1999, the BIRB also requested SGS Belgium to provide it with the customs documents on the basis of which SGS had drawn up its certificate of 4 November 1997.
- 21 Having noted that SGS Belgium had failed to act upon its request, the BIRB concluded, in a letter sent to that agency on 5 February 2002, that the goods had not been imported into Egypt and released for consumption and that consequently it had decided to impose an administrative penalty on SGS Belgium pursuant to Article 11 of Regulation No 3665/87, amounting to 200 % of the sum of EUR 1 407 268,90 unduly received by Firme Derwa on the basis of the certificate issued by SGS Belgium. The latter was also asked to pay a sum representing the refund plus an additional amount and, accordingly, a total amount of EUR 4 503 260,74 was claimed from SGS Belgium.
- 22 By letter of 29 April 2002, SGS Belgium informed the BIRB that, following an internal investigation, it had emerged that the goods had been imported into Egypt only temporarily and that they had ultimately been exported to South Africa. In a letter of 27 May 2002, however, SGS Belgium stressed that it had not knowingly supplied incorrect information.

- 23 By writ, service of which was effected on 16 September 2003, the BIRB commenced proceedings before the Rechtbank van eerste aanleg te Antwerpen (Antwerp Court of First Instance), requesting that SGS Belgium be ordered to pay the administrative penalty. SGS Belgium thereupon requested that Firme Derwa and Centraal Beheer Achmea NV be joined as parties to the proceedings.
- 24 By judgment of 13 January 2006, the Rechtbank dismissed as unfounded both the BIRB's action and SGS Belgium's application to join third parties to the proceedings. That court first of all noted that the four-year limitation period provided for in the first subparagraph of Article 3(1) of Regulation No 2988/95 had not expired since it had been interrupted within the meaning of the third subparagraph of that provision as a result of the BIRB sending the letter dated 5 February 2002 by which it imposed the administrative fine on SGS Belgium.
- 25 However, the Rechtbank van eerste aanleg te Antwerpen took the view that Articles 5 and 7 of Regulation No 2988/95 did not provide a sufficient legal basis for imposing an administrative penalty on a firm such as SGS Belgium. In fact, according to the Rechtbank, unlike Article 3 of Regulation No 2988/95, those provisions leave Member States a margin of discretion and do not include an obligation to impose penalties. Thus, it falls to the European Union ('EU') legislature or to national legislatures to provide, in sectoral rules, that operators other than the exporter which has received a refund are required to pay a penalty. It also falls to them to determine those penalties. Furthermore, Regulation No 3665/87 contains no provision allowing persons taking part in an export operation to be penalised for irregularities committed by the exporter.
- 26 The BIRB appealed against that judgment to the referring court, maintaining, *inter alia*, that under the Royal Decree of 4 January 1985, SGS Belgium was jointly and severally liable with the exporter for the financial consequences of certificates drawn up by it. Since SGS Belgium had artificially created the conditions which allowed the exporter wrongly to receive an export refund and since the exporter, Firme Derwa,

was unaware that the certificate provided was incorrect and had not been negligent, the BIRB considered that it was not appropriate to recover the refund from Firme Derwa or to impose an administrative penalty on it. The BIRB argued in essence that, although the penalty provided for in Article 11(1)(b) of Regulation No 3665/87 in principle concerns only the exporter, it was possible under Article 7 of Regulation No 2988/95 – because of the rule laid down by national law concerning the joint responsibility of the control and supervision agency – to impose the penalty on SGS Belgium in its capacity as a person who is under a duty to take responsibility for the irregularity as provided for in that provision. The BIRB also argued that, in any event, if no finding of fraudulent intention were made, SGS Belgium should at the very least be ordered to pay the penalty provided for in Article 11(1)(a) of Regulation No 3665/87.

<sup>27</sup> For its part, SGS Belgium maintained, in particular, that to the extent to which it could be held liable, the liability should be joint and several with the exporter and the insurer since the amounts claimed are owed by the exporter and Article 7 of Regulation No 2988/95 and Article 2(2), point (i), of the Royal Decree of 4 January 1985 entail joint and several liability between the parties to an export operation.

<sup>28</sup> In those circumstances, the hof van beroep te Antwerpen (Antwerp court of appeal) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Do the provisions of Articles 5 and 7 of Regulation No 2988/95 have direct effect in the national legal orders of the Member States without any discretion on the part of those Member States and without the national authorities being required to adopt any measures for their implementation?

- (2) Can an international control and supervisory agency approved by the Member State in which the export declaration was accepted – in this case, Belgium – which has submitted a false certificate of unloading within the meaning of Article 18(2)(c) of Regulation No 3665/87 be deemed to be an economic operator within the meaning of Article 1 of Regulation No 2988/95, or a person who has taken part in the irregularity or is under a duty to take responsibility for the irregularity or to ensure that it is not committed, within the meaning of Article 7 of Regulation No 2988/95?
- (3) Can communication of an investigative report drawn up by the Economic Inspection Board, or a letter requesting the production of additional documents as evidence of the release for consumption, or a registered letter imposing a penalty be deemed to be investigation or legal proceedings within the meaning of the third subparagraph of Article 3(1) of Regulation No 2988/95?

### **Consideration of the questions referred**

#### *First question*

- <sup>29</sup> By its first question, the referring court is, in actual fact, seeking to ascertain whether Articles 5 and 7 of Regulation No 2988/95 apply in such a way that administrative penalties within the meaning of that regulation may be imposed on the basis of those provisions alone.

- 30 SGS Belgium, Firme Derwa and the Austrian Government maintain, in essence, that Articles 5 and 7 of Regulation No 2988/95 do not have direct effect since administrative penalties can be imposed on the various categories of operator taking part in the procedure for checking that payments from the EU budget are properly and lawfully obtained only if EU sectoral rules determining the type of penalty and the category of operators concerned were in force at the time when the irregularity was committed. They submit in that regard that no such sectoral rules existed at the time of the exports at issue in the main proceedings so far as control and supervisory agencies were concerned.
- 31 Conversely, the Belgian Government and the European Commission submit that, where a category of operators is not yet covered by EU sectoral rules such as Regulation No 3665/87 as regards refunds unduly received by exporters, Articles 5 and 7 of Regulation No 2988/95, in so far as they provide generally that an administrative penalty may be applied to operators other than the beneficiaries of export refunds, are directly applicable by virtue of the second paragraph of Article 288 TFEU.
- 32 In that regard, by virtue of the very nature of regulations and of their function in the system of sources of EU law, the provisions of regulations generally have immediate effect in the national legal systems without it being necessary for the national authorities to adopt measures of application (Case 93/71 *Leonesio* [1972] ECR 287, paragraph 5, and Case C-278/02 *Handlbauer* [2004] ECR I-6171, paragraph 25) or without it being necessary for the EU legislature to adopt supplementary legislation.
- 33 Some of the provisions of a regulation may, however, necessitate, for their implementation, the adoption of measures of application (see, to that effect, Case C-403/98 *Monte Arcosu* [2001] ECR I-103, paragraph 26) either by the Member States or by the EU legislature itself.

34 That is the case, in relation to the protection of the EU's financial interests, with regard to administrative penalties imposed on the various categories of operators identified in Regulation No 2988/95.

35 Indeed, 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 whilst, as regards the categories of operators who may be liable to incur such penalties, Article 7 of the regulation provides that those penalties 'may' be applied not only to the economic operators who have committed the irregularity but also to persons who have taken part in the irregularity and to those who are under a duty to take responsibility for the irregularity or to ensure that it is not committed.

36 It must therefore be concluded that those provisions merely lay down general rules for supervision and penalties for the purpose of safeguarding the EU's financial interests (see Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening* [2008] ECR I-1561, paragraph 39). In particular, those provisions do not specify which of the penalties listed in Article 5 of Regulation No 2988/95 should be applied in the case of an irregularity detrimental to the EU's financial interests nor the category of operators on whom such penalties are to be imposed in such cases.

37 In that regard, it should be added, first, that 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 to the regulation, that it is for the EU 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. Furthermore, as is apparent from the seventh recital to Regulation No 2988/95, the latter seeks to establish general rules applicable to such sectoral rules.

- <sup>38</sup> Second, it is apparent from Article 2(4) of Regulation No 2988/95 that, subject to the EU law applicable, the procedures for the application of checks, measures and administrative penalties for which that law provides are to be governed by the laws of the Member States.
- <sup>39</sup> Admittedly, Article 2(2) of Regulation No 2988/95 also provides, in keeping with the principle of the legality of criminal offences and penalties, that no administrative penalty may be imposed unless an EU act prior to the irregularity has made provision for it.
- <sup>40</sup> However, as is clear from Article 325 TFEU, Member States are to take the same measures to counter fraud affecting the financial interests of the EU as they take to counter fraud affecting their own financial interests. Consequently and in view of the objectives pursued by Regulation No 2988/95, when the EU legislature has not adopted sectoral rules intended to protect the Union's financial interests against the conduct of certain operators, Member States are entitled to maintain or adopt provisions in that domain and in respect of those operators in so far as such provisions prove to be necessary for combating fraud and provided that they observe the general principles of EU law, in particular that of proportionality, as well as the general rules laid down in Regulation No 2988/95 and any existing EU sectoral rules concerning other operators.

41 In fact, where EU legislation does not make specific provision for a penalty in cases of infringement, or where such legislation provides that certain penalties may be imposed for infringement of EU law but does not exhaustively list the penalties that the Member States may impose, Article 4(3) TEU requires the Member States to take all effective measures to penalise conduct detrimental to the financial interests of the EU (see, to that effect, Case 68/88 *Commission v Greece* [1989] ECR I-2965, paragraph 23, and Case C-186/98 *Nunes and de Matos* [1999] ECR I-4883, paragraphs 12 and 14).

42 Furthermore, it would be inconsistent with the objective pursued by Article 325 TFEU, which places a duty on both the EU and the Member States to counter fraud and other irregularities affecting the EU's financial interests, to restrict the action of Member States against a category of operators who are not yet subject to sectoral rules adopted at EU level. Indeed, if the protection of the EU's financial interests is to be rendered effective, it is essential that the deterrence of, and the fight against, fraud and other irregularities operate at all levels at which those interests are liable to be affected by such phenomena, in particular since it is often the case that phenomena so fought involve actors at various levels (see, to that effect, Case C-15/00 *Commission v EIB* [2003] ECR I-7281, paragraph 135). That is the case with regard to the role played by control and supervisory agencies in relation to the lawfulness of payments of export refunds.

43 In view of the foregoing, the answer to the first question is that Articles 5 and 7 of Regulation No 2988/95 do not apply in such a way that an administrative penalty may be imposed on the basis of those provisions alone, since, if, in connection with the protection of the EU's financial interests, an administrative penalty is to be applied to a category of persons, a necessary precondition is that, prior to commission of the irregularity in question, either the EU legislature has adopted sectoral rules laying down such a penalty and the conditions for its application to that category of persons or, where such rules have not yet been adopted at EU level, the law of the Member

State where the irregularity was committed has provided for the imposition of an administrative penalty on that category of persons.

*Second question*

<sup>44</sup> By its second question, the referring court asks, in essence, whether, in circumstances such as those in issue before it, in which EU sectoral rules did not yet require Member States to provide for effective penalties in cases in which an international control and supervisory agency approved by a Member State has issued false certificates, Article 7 of Regulation No 2988/95 prevents Member States from imposing, on the basis of national measures, a penalty on that agency in its capacity as a person who has ‘taken part in the irregularity’, a person who is ‘under a duty to take responsibility’ for the irregularity or a person who should have ‘[ensured] that it is not committed’ within the meaning of Article 7.

<sup>45</sup> In that regard, it should be observed that, in issuing a false certificate of unloading and release for consumption for the purposes of Article 18 of Regulation No 3665/87 (a certificate allowing an exporter to receive an export refund to which he is not entitled), an international control and supervisory agency approved by a Member State may be regarded as a person who has ‘taken part in the irregularity’ within the meaning of Article 7 of Regulation No 2988/95 and to whom, by the same token, administrative measures and penalties may be applied for the purposes of that regulation. Such an agency may also be regarded as a person who is under a duty to take responsibility for the irregularity within the meaning of that provision where national law

provides for that agency to be liable for the financial consequences of the certificates issued by it.

<sup>46</sup> However, as has been stated at paragraph 43 of this judgment, a necessary precondition for the application of such a penalty is that EU sectoral rules or, in the absence of such rules, national law, should have provided for the application of an administrative penalty to that category of operators.

<sup>47</sup> At the time of the imports in issue in the main proceedings, EU law did not include any sectoral rules, as referred to in Regulation No 2988/95, specifically governing the penalties to be imposed in cases of acts detrimental to the EU's financial interests resulting from the issue by such control and supervisory agencies of false certificates of unloading and release for consumption.

<sup>48</sup> In fact, it was only with the adoption of Commission Regulation (EC) No 1253/2002 of 11 July 2002 amending Regulation (EC) No 800/1999 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 2002 L 183, p. 12) that a new Article 16c of Regulation No 800/1999 provided that thereafter 'Member States which have approved [control and supervisory agencies ("SA")] shall provide for an effective system of sanctions for cases where an approved SA has issued a false certificate.'

<sup>49</sup> By contrast, Article 11 of Regulation No 3665/87 laid down specific rules concerning the recovery from the exporter of export refunds to which he was not entitled, in conjunction with the imposition of a penalty – in particular where the exporter has obtained an unjustified advantage of that kind by intentionally supplying false information – and with additional penalties which may be provided for by national law. Accordingly, in the case before the referring court, the question arises as to whether

the national authorities were entitled to refrain from recovering the refund from the exporter and from imposing an administrative penalty on him and to proceed instead against the control and supervisory agency which was jointly and severally liable under national law for the financial consequences of the certificates provided by it.

50 In relation to assistance granted by the EU budget in the framework of the Structural Funds and the common agricultural policy, the Court has previously held that the exercise, by a Member State, of any discretion to decide whether or not it would be expedient to demand repayment of assistance unduly or unlawfully granted would be inconsistent with the obligations imposed on national administrations by EU rules applicable in those sectors to recover assistance unduly or unlawfully paid (see, to that effect, Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraph 22, and *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening*, paragraph 38).

51 As a rule, the same is true of the obligation of the Member States to recover from exporters refunds unduly received by them. That obligation is laid down in Article 11 of Regulation No 3665/87 and is allied with the penalty provided for in Article 11(1)(a) or (b), as well as with any additional penalties which may be provided for by national law.

52 It is true that, before the entry into force of Regulation No 1253/2002, Member States were not required to make provision, in a case of refunds unduly received by an exporter, for penalties as against a control and supervisory agency which had provided a false certificate. However, that circumstance does not prevent Member States – as has been stated at paragraph 40 of this judgment – from maintaining or adopting, in connection with the protection of the EU's financial interests, national rules providing for administrative penalties to be applied to the category of operators which the

EU legislature has made responsible for playing a part in checking the lawfulness of export operations in respect of which refunds are payable from the EU budget. Moreover, such measures would merely anticipate the obligation to which Member States are now subject by virtue of Article 16c of 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), as amended by Regulation No 1253/2002.

53 It follows that, in circumstances such as those in issue in the main proceedings and subject to confirmation by the referring court of the applicability of the Royal Decree of 4 January 1985 mentioned in its request for a preliminary ruling, in the absence of EU sectoral rules applicable *ratione temporis* to control and supervisory agencies, the Member States were entitled to provide for agencies of that type to be jointly and severally liable with the exporter, in their capacity as persons who have taken part in the irregularity or as persons who are under a duty to take responsibility for the irregularity, for the financial consequences of their issue of certificates of unloading and release for consumption which made it possible for the exporter to receive, to the detriment of the EU budget, export refunds to which he was not entitled.

54 In the main proceedings, it is apparent, however, that the national authorities are seeking, on the one hand, to recover the unjustified refund from SGS Belgium, and, on the other, to apply to that control and supervisory agency the administrative penalties provided for in Article 11(1)(b) of Regulation No 3665/87 which are normally applied to the exporter, invoking in that regard the direct effect of Article 7 of Regulation No 2988/95 and the fact that under national law such an agency is jointly and severally liable with the exporter. In particular, the BIRB argues that the fact that the control and supervisory agency in issue in the main proceedings intentionally submitted an incorrect certificate gives grounds for concluding that the condition for the

application of the penalty provided for in Article 11(1)(b) of Regulation No 3665/87 is met. However, in the alternative, the BIRB has also submitted before the referring court that, if no fraudulent intention were to be found, SGS Belgium should be ordered to pay the penalty laid down in Article 11(1)(a) of that regulation.

55 In that respect, with regard to recovery of the unduly received refund, as has been stated at paragraph 51 of this judgment, recovery must be made from the exporter who has received a refund to which he was not entitled.

56 With regard to the application of the penalty provided for in Article 11(1)(b) of Regulation No 3665/87, it may be applied only where ‘the exporter has intentionally supplied false information.’ The EU legislature accordingly expressly provided that that condition for application must be met by the exporter alone.

57 In those circumstances, if, in the case before the referring court, it is apparent that the exporter was unaware of the errors in the certificate of release for consumption which was intentionally provided by the control and supervisory agency – a matter which falls to be determined by the referring court, it cannot be held that the exporter intentionally supplied false information for the purposes of Article 11(1)(b) of Regulation No 3665/87: consequently, the penalty provided for in that provision cannot be applied either to the exporter or, in application of a national rule providing for joint and several liability, to the control and supervisory agency.

58 Conversely, in such a situation, the penalty laid down in Article 11(1)(a) of Regulation No 3665/87 could be applied. Indeed, that penalty may be applied even if the exporter has not committed any fault (see Case C-143/07 *AOB Reuter* [2008] ECR I-3171, paragraph 17).

59 In that regard, first, such a penalty may, as a rule, be imposed only on those operators who have applied for export refunds when it is apparent that the information provided by them in support of their application is incorrect. Second, as there is a real risk that the exporter, who is often the last link in a contractual chain of purchases for resale, may avoid responsibility for the inaccuracy of his declaration because of the possibility of error, negligence or fraud further back up the chain, Article 11 of Regulation No 3665/87 makes him responsible for the accuracy of his declaration, subject to a penalty in the event of non-compliance (see, to that effect, Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraphs 42, 61 and 62). The exporter is fully at liberty to select his trading partners and it is up to him to take the appropriate precautions, either by including the necessary clauses in the contracts which he concludes with them or by effecting appropriate insurance (*AOB Reuter*, paragraph 36).

60 However, in a situation in which (i) the exporter obtains an export refund by means of a certificate of release for consumption – which under EU rules must be drawn up by an international control and supervisory agency – and (ii) it transpires that, unknown to the exporter, that agency has drawn up a false certificate making it possible for the insurer covering the risks inherent in the export operation not to indemnify a loss associated with non-performance of that operation, Article 11 of Regulation No 3665/87 does not prevent the national authority – in application of a national rule providing for the joint and several liability of an international control and supervisory agency for the financial consequences of the certificates that it has drawn up – from

deciding to recover from that agency the amounts resulting from the application to the exporter of the penalty laid down in Article 11(1)(a).

- <sup>61</sup> It must, however, be recalled that a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis (Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraph 56; *Käserei Champignon Hofmeister*, paragraph 52; and Case C-274/04 *ED & F Man Sugar* [2006] ECR I-3269, paragraph 15).
- <sup>62</sup> In light of the foregoing, the answer to the second question is that, in circumstances such as those in issue in the main proceedings, in which EU sectoral rules did not yet require Member States to provide for effective penalties in cases in which an international control and supervisory agency approved by a Member State has issued false certificates, Article 7 of Regulation No 2988/95 does not prevent Member States from applying a penalty to that agency in its capacity as a person who has ‘taken part in the irregularity’ or as a person who is ‘under a duty to take responsibility’ for the irregularity within the meaning of Article 7, provided, however, that the application of such a penalty rests on a clear and unambiguous legal basis, a matter which falls to be determined by the referring court.

### *The third question*

- <sup>63</sup> By its third question, the referring court asks whether the communication, to an international control and supervisory agency which has issued a certificate for release

for consumption in respect of an export operation, of an investigative report drawing attention to an irregularity in connection with that operation, the presentation to the agency of a request to produce additional documents for the purpose of checking whether the release for consumption actually took place and the sending of a registered letter imposing a penalty on that agency for having taken part in an irregularity constitute acts notified to the person in question relating to investigation or legal proceedings concerning the irregularity, as referred to in the third subparagraph of Article 3(1) of Regulation No 2988/95.

<sup>64</sup> In the circumstances of the case before the referring court, it should be stated that, in the absence of EU sectoral rules providing for penalties to be applied to international control and supervisory agencies which have taken part in an irregularity that has been detrimental to the EU's financial interests, the decision whether to apply the penalty laid down in Article 11(1)(a) of Regulation No 3665/87 to such an agency, on the basis of its joint and several liability with the exporter under national law, is a matter of choice for the Member States in the context of their strategy for countering fraud and falls within their competence. However, in such a situation, the Member States must observe the general principles of EU law and the general rules laid down in Regulation No 2988/95 and any EU sectoral rules which may be applicable to other operators.

<sup>65</sup> Thus, when it decides to apply such a penalty to a control and supervisory agency on the basis of the latter's joint and several liability with the exporter under national law, the national authority is acting within the scope of Regulation No 2988/95.

<sup>66</sup> Since Regulation No 3665/87 does not lay down any rules concerning the limitation period applicable to an action for recovery of export refunds unduly received, it is

appropriate to refer to the first subparagraph of Article 3(1) of Regulation No 2988/95 (Case C-281/07 *Bayerische Hypotheken- und Veriensebank* [2009] ECR I-91, paragraph 16), since that provision is directly applicable in the Member States, including in the field of export refunds on agricultural products, in the absence of EU sectoral rules providing for a shorter limitation period, which may not be less than three years, or of national rules providing for a longer limitation period (*Handlbauer*, paragraph 35).

<sup>67</sup> Under the third subparagraph of Article 3(1) of Regulation No 2988/95, the limitation period is interrupted by any act of the competent authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity. In addition, the limitation period starts again following each interrupting act.

<sup>68</sup> In general, limitation periods fulfil the function of ensuring legal certainty. Such a function would not be wholly fulfilled, if the limitation period referred to in Article 3(1) of Regulation No 2988/95 could be interrupted by any act relating to a general check by the national authorities which bears no relation to any suspicion concerning the existence of irregularities regarding sufficiently precisely circumscribed transactions (*Handlbauer*, paragraph 40).

<sup>69</sup> However, when the national authorities send a person reports drawing attention to an irregularity in which that person is said to have played a part in connection with a specific export operation, ask the person for further information concerning that operation or apply a penalty to the person in connection with that operation, those authorities adopt acts relating to investigation or legal proceedings concerning the

irregularity which are sufficiently specific for the purposes of the third subparagraph of Article 3(1) of Regulation No 2988/95.

- <sup>70</sup> The answer to the third question is therefore that, in circumstances such as those in issue in the main proceedings, the communication, to an international control and supervisory agency which has issued a certificate for release for consumption in respect of a specific export operation, of an investigative report drawing attention to an irregularity in connection with that operation, the presentation to that agency of a request to produce additional documents for the purpose of checking whether the release for consumption actually took place and the sending of a registered letter imposing a penalty on that agency for having taken part in an irregularity within the meaning of Article 1(2) of Regulation No 2988/95 constitute acts, notified to the person in question and relating to investigation or legal proceedings concerning the irregularity, which are sufficiently specific to interrupt the limitation period for proceedings within the meaning of the third subparagraph of Article 3(1) of Regulation No 2988/95.

## **Costs**

- <sup>71</sup> 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. **Articles 5 and 7 of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests do not apply in such a way that an administrative penalty may be imposed on the basis of those provisions alone since, if, in connection with the protection of the European Union's financial interests, an administrative penalty is to be applied to a category of persons, a necessary precondition is that, prior to commission of the irregularity in question, either the European Union legislature has adopted sectoral rules laying down such a penalty and the conditions for its application to that category of persons 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 imposition of an administrative penalty on that category of persons.**
  
2. **In circumstances such as those in issue in the main proceedings, in which European Union sectoral rules did not yet require Member States to provide for effective penalties in cases in which an international control and supervisory agency approved by a Member State has issued false certificates, Article 7 of Regulation No 2988/95 does not prevent Member States from applying a penalty to that agency in its capacity as a person who has 'taken part in the irregularity' or as a person who is 'under a duty to take responsibility' for the irregularity within the meaning of Article 7, provided, however, that the application of such a penalty rests on a clear and unambiguous legal basis, a matter which falls to be determined by the referring court.**
  
3. **In circumstances such as those in issue in the main proceedings, the communication, to an international control and supervisory agency which has**

**issued a certificate for release for consumption in respect of a specific export operation, of an investigative report drawing attention to an irregularity in connection with that operation, the presentation to that agency of a request to produce additional documents for the purpose of checking whether the release for consumption actually took place and the sending of a registered letter imposing a penalty on that agency for having taken part in an irregularity within the meaning of Article 1(2) of Regulation No 2988/95 constitute acts, notified to the person in question and relating to investigation or legal proceedings concerning the irregularity, which are sufficiently specific to interrupt the limitation period for proceedings within the meaning of the third subparagraph of Article 3(1) of Regulation No 2988/95.**

[Signatures]