

JUDGMENT OF THE COURT (Second Chamber)

29 January 2009\*

In Joined Cases C-278/07 to C-280/07,

REFERENCES for a preliminary ruling under Article 234 EC, from the Bundesfinanzhof (Germany), made by decisions of 27 March 2007, received at the Court on 13 June 2007, in the proceedings

**Hauptzollamt Hamburg-Jonas,**

v

**Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb GmbH & Co. (C-278/07),**

**Vion Trading GmbH (C-279/07),**

**Ze Fu Fleischhandel GmbH (C-280/07),**

\* Language of the case: German.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot, J. Makarczyk, P. Küris and C. Toader (Rapporteur), Judges,

Advocate General: E. Sharpston,  
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 17 April 2008,

after considering the observations submitted on behalf of:

- Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb GmbH & Co., by F. Grashoff, Rechtsanwältin,
  
- Vion Trading GmbH, by K. Landry, Rechtsanwalt,
  
- Ze Fu Fleischhandel GmbH, by D. Ehle, Rechtsanwalt,
  
- the Czech Government, by T. Boček, acting as Agent,

— the French Government, by J.-C. Gracia, acting as Agent,

— the Commission of the European Communities, by F. Erlbacher and Z. Malůšková, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 September 2008,

gives the following

### **Judgment**

- <sup>1</sup> These references for a preliminary ruling concern the interpretation of Article 3(1) and (3) 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).
  
- <sup>2</sup> The references were submitted in the course of proceedings between the Hauptzollamt Hamburg-Jonas (the Principal Customs Office; 'the Hauptzollamt'), on the one hand, and Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb GmbH & Co., Vion Trading GmbH and Ze Fu Fleischhandel GmbH ('the defendants in the main proceedings'), on the other, regarding the repayment of export refunds.

## Legal context

### *Community law*

3 According to the third recital in the preamble to Regulation No 2988/95, ‘acts detrimental to the Communities’ financial interests must... be countered in all areas’.

4 Under the fifth recital in the preamble to that regulation, ‘irregular conduct, and the administrative measures and penalties relating thereto, are provided for in sectoral rules in accordance with this Regulation’.

5 Article 1 of that regulation 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.'

6 Article 3(1) and (3) of Regulation No 2988/95 provides:

'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 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....

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.

...

3. Member States shall retain the possibility of applying a period which is longer than that provided for in [paragraph] 1...'

7 Article 4(1) and (4) of that regulation states:

‘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,

...

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

8 Pursuant to the first paragraph of Article 11 of Regulation No 2988/95, that regulation was to enter into force on the third day following its publication in the *Official Journal of the European Communities*, which was on 23 December 1995.

#### *National law*

9 According to the information provided by the referring court, at the material time there was no specific provision in Germany on limitation periods applicable to administrative proceedings relating to wrongly granted advantages. However, both the German administrative authorities and the German courts applied by analogy the standard

30-year limitation period, as laid down in Paragraph 195 of the German Civil Code (Bürgerliches Gesetzbuch). Since 2002, that standard limitation period has however been decreased to three years.

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

- 10 It is apparent from the orders for reference that, in 1993, the defendants in the main proceedings arranged for a quantity of beef to be cleared for export to Jordan and, on their application, received export refund advances for this. Following inspections carried out at the beginning of 1998, it was discovered that the cargo at issue had in fact been transported to Iraq under transit or re-export procedures.
- 11 Accordingly, the Hauptzollamt, by decisions of 23 September 1999 (Case C-278/07) and 13 October 1999 (Cases C-279/07 and C-280/07), ordered that the export refunds at issue be repaid.
- 12 The defendants in the main proceedings then challenged those decisions before the Finanzgericht Hamburg (Hamburg Finance Court). That court allowed the actions on the ground that the rule on limitation, as set out in Article 3(1) of Regulation No 2988/95, precluded the repayment of the sums in question because those sums had been claimed more than four years after the export transactions at issue.

13 The Hauptzollamt appealed to the referring court on a point of law ('Revision') against the decisions of the Finanzgericht.

14 Noting, *inter alia*, that the alleged irregularities concern a period prior to the adoption of Regulation No 2988/95, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer to the Court for a preliminary ruling the following questions, which were drafted in identical terms in the three cases C-278/07 to C-280/07:

1. Must the limitation period prescribed in the first sentence of the first subparagraph of Article 3(1) of... Regulation... No 2988/95... 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)?’

- 15 By order of the President of the Court of 30 July 2007, Cases C-278/07 to C-280/07 were joined for the purposes of the written and oral procedure and of the judgment.

### **Preliminary observations**

- 16 First of all, as regards the argument of the defendants in the main proceedings seeking to call into question the statement of the facts by the referring court, in particular so far as concerns the existence of the irregularities which they are alleged to have committed, it is not for the Court to establish the facts relevant to the decision in the main proceedings. The Court must take account, under the division of jurisdiction between the Community Courts and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set (see, to that effect, Case C-153/02 *Neri* [2003] ECR I-13555, paragraphs 34 and 35, and Case C-347/06 *ASM Brescia* [2008] ECR I-5641, paragraph 28).
- 17 Consequently, the questions referred for a preliminary ruling must be examined in the factual framework described by the Bundesfinanzhof.

## The questions referred

### *The second question*

18 By its second question, which it is appropriate to consider first, the Bundesfinanzhof is essentially inquiring whether the limitation period laid down in the first subparagraph of Article 3(1) of Regulation No 2988/95 is applicable not only to administrative penalties, but also to administrative measures.

19 Thus, that court is seeking confirmation that the concept of ‘proceedings’ referred to in that provision applies without distinction to any step taken by the national authorities in connection with an irregularity and that, consequently, it does not cover only measures which may lead to an administrative penalty for the purpose of Article 1(1) of Regulation No 2988/95.

20 In this connection, Article 1(1) of Regulation No 2988/95 introduces ‘general rules ... relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law’ in order, as is clear from the third recital in the preamble to the regulation, to counter ‘acts detrimental to the Communities’ financial interests... in all areas’ (Case C-278/02 *Handlbauer* [2004] ECR I-6171, paragraph 31).

21 The first subparagraph of Article 3(1) of the regulation fixes, as far as proceedings are concerned, a limitation period which runs from the time when the irregularity was committed, such irregularity, according to Article 1(2) of that regulation, being ‘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 ...' (*Handlbauer*, paragraph 32).

22 Thus, contrary to what is submitted, inter alia, by the French Government and the Commission of the European Communities, it follows that Article 3(1) of Regulation No 2988/95 is applicable both to irregularities leading to the imposition of an administrative penalty for the purposes of Article 5 thereof and to irregularities which are the subject of an administrative measure for the purposes of Article 4 of that regulation, a measure which is intended to withdraw the wrongly obtained advantage without however constituting a penalty (see, to that effect, *Handlbauer*, paragraphs 33 and 34).

23 The answer to the second question is therefore that the limitation period laid down in the first subparagraph of Article 3(1) of Regulation No 2988/95 is applicable to administrative measures such as the recovery of export refunds wrongly received by the exporter as a result of irregularities it committed.

### *The first question*

24 By its first question, the referring court is inquiring whether the four-year limitation rule, laid down in the first subparagraph of Article 3(1) of Regulation No 2988/95, is to be applied to irregularities which were committed or ceased before that regulation entered into force.

25 First of all, it must be pointed out that, before the adoption of Regulation No 2988/95, the Community legislature had made no provision for a rule on limitation applicable to the recovery of advantages wrongly received by economic operators as a result of an act or omission on their part which had or would have had the effect of prejudicing the general budget of the Communities or budgets managed by them.

26 Therefore, before the adoption of Regulation No 2988/95, in the absence of provisions of Community law, disputes concerning the recovery of amounts wrongly paid under Community law had to be decided by national courts in application of their own domestic law, subject nevertheless to the limits imposed by Community law, on the basis that the rules and procedures laid down by domestic law were not permitted to have the effect of making it in practice impossible or excessively difficult to recover the aid not due and that domestic law had to be applied in a manner which was not discriminatory as compared to procedures for deciding similar national disputes (Case C-336/00 *Huber* [2002] ECR I-7699, paragraph 55 and the case-law cited).

27 By adopting Regulation No 2988/95, and in particular the first subparagraph of Article 3(1) thereof, the Community legislature intended however to establish a general rule on limitation which was applicable in that area and by which it intended, first, to define a minimum period applied in all the Member States and, secondly, to waive the possibility of recovering sums wrongly received from the Community budget after the expiry of a four-year period after the irregularity affecting the payments at issue was committed.

28 It follows that, as from the date on which Regulation No 2988/95 entered into force, any advantage wrongly received from the Community budget can, as a rule and apart from in the sectors for which the Community legislature has prescribed a shorter period, be recovered by the competent authorities of the Member States within a period of four years.

- 29 As regards the treatment to be given to advantages wrongly received from the Community budget as a result of irregularities committed before Regulation No 2988/95 entered into force, it must be stated that, by the adoption of Article 3(1) of that regulation and without prejudice to Article 3(3) thereof, the Community legislature thereby defined a general rule on limitation by which it voluntarily reduced to four years the period during which the authorities of the Member States, acting in the name and on behalf of the Community budget, should recover or should have recovered such wrongly received advantages.
- 30 However, in accordance with the principle of legal certainty, the application of the first subparagraph of Article 3(1) of Regulation No 2988/95 cannot permit those national authorities to recover debts predating the entry into force of that regulation where recovery was already time-barred under national rules on limitation applicable at the time the irregularities at issue were committed.
- 31 As regards debts which arose subject to a national rule on limitation, such as that at issue in the main proceedings, the recovery of which is not yet time-barred, the entry into force of Regulation No 2988/95 has the effect that, pursuant to the first subparagraph of Article 3(1) thereof, the recovery of such debts must as a rule be time-barred within a period of four years running from the date on which the irregularities were committed.
- 32 Accordingly, pursuant to that provision, the repayment of any sum wrongly received by an operator as a result of an irregularity predating the entry into force of Regulation No 2988/95 must, as a rule, be regarded as time-barred in the absence of any suspensory act adopted in the four years following the commission of the irregularity, a suspensory act which, pursuant to the third subparagraph of Article 3(1) of the regulation, is to be understood as an act of the competent authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity.

33 It follows that, where an irregularity was committed, as in the cases in the main proceedings, in the course of 1993 subject to a national rule providing for a 30-year limitation period, such an irregularity will be covered by the general Community rule providing for a four-year limitation period and will, on that basis, be subject to limitation in the course of 1997 according to the exact date of the commission of that irregularity in 1993, subject none the less to the possibility retained by the Member States, under Article 3(3) of Regulation No 2988/95, of providing for longer limitation periods.

34 Taking account of the foregoing, the answer to the first question is that, in situations such as those at issue in the main proceedings, the limitation period provided for in the first subparagraph of Article 3(1) of Regulation No 2988/95:

- applies to irregularities committed before the entry into force of that regulation;
  
- starts to run from the date on which the irregularity at issue was committed.

*The third question*

35 By its third question, the referring court is seeking to ascertain, first, whether the possibility retained by Member States, under Article 3(3) of Regulation No 2988/95, of applying a limitation period which is longer than that provided for in Article 3(1) can cover a rule on limitation predating the adoption of that regulation. Secondly, that court is inquiring whether such a longer period must result from a specific national provision

for the recovery of export refunds or for administrative measures in general or whether that period can also result from a general provision of law.

- 36 In situations such as those at issue in the main proceedings, in which the irregularities were allegedly committed by the operators in 1993 subject to a national rule providing for a 30-year limitation period, as was found in paragraph 33 above, the repayment of the sums wrongly received as a result of such irregularities was liable, in the absence of a suspensory act, to be time-barred in the course of 1997, provided that the Member State in which the irregularities were committed has not made use of the possibility offered to it under Article 3(3) of Regulation No 2988/95.
- 37 It is apparent from the orders for reference that, in the cases in the main proceedings, the competent national authorities claimed repayment of the export refunds at issue by decisions of 23 September 1999 (Case C-278/07) and 13 October 1999 (Cases C-279/07 and C-280/07).
- 38 It follows from this that the recovery of the sums at issue should as a rule have been regarded as time-barred by the application of the general four-year limitation period provided for in the first subparagraph of Article 3(1) of Regulation No 2988/95.
- 39 However, after the entry into force of that regulation, the German courts continued to apply the 30-year limitation period under Paragraph 195 of the German Civil Code to actions for the recovery of refunds wrongly received by operators.

40 In that regard, Article 3(3) of Regulation No 2988/95 refers to the ‘possibility’ which Member States ‘retain’ of providing for a limitation period which is longer than that provided for in the first subparagraph of Article 3(1) thereof.

41 Thus, it is apparent from the wording of Article 3(3) of Regulation No 2988/95 that that provision does not merely provide for the possibility for Member States to introduce a limitation period which is longer than that laid down in the first subparagraph of Article 3(1). Article 3(3) also expressly affords Member States the possibility of retaining a longer limitation period which existed when that regulation entered into force.

42 Accordingly, under Article 3(3) of Regulation No 2988/95, Member States can, first, continue to apply longer limitation periods which existed at the date when that regulation was adopted and, secondly, introduce new rules on limitation providing for such periods after that date.

43 As regards whether those national limitation periods must be specifically provided for by a national provision applicable to the recovery of export refunds or, more generally, to administrative measures, it must be observed that the wording of Article 3(3) of Regulation No 2988/95 does not contain any details providing an explicit answer to that question.

44 Admittedly, the first subparagraph of Article 3(1) provides that sectoral rules may make provision for a period shorter than the four-year period, but which may not be less than three years. Nevertheless, that provision deals with sectoral rules adopted at Community level, as the fifth recital in the preamble to that regulation confirms, and not national sectoral rules (see, to that effect, *Handlbauer*, paragraph 28).

45 Moreover, Regulation No 2988/95 does not provide for any information or notification process relating to the use made by Member States of their possibility of providing for longer limitation periods, in accordance with Article 3(3) thereof. It follows that no form of monitoring has been provided for at Community level as regards either the limitation periods applied by way of exception by Member States under that provision or the sectors in which Member States have decided to apply those periods.

46 Consequently, Article 3(3) of Regulation No 2988/95 cannot be interpreted as meaning that the Member States must, in the context of that provision, provide for those longer limitation periods in specific and/or sectoral rules.

47 In the light of the foregoing, the answer to the third question is that the longer limitation periods which Member States retain the possibility of applying under Article 3(3) of Regulation No 2988/95 may result from general provisions of law predating the adoption of that regulation.

## **Costs**

48 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 (Second Chamber) hereby rules:

- 1. The limitation period laid down in 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 applicable to administrative measures such as the recovery of export refunds wrongly received by the exporter as a result of irregularities it committed.**
  
- 2. In situations such as those at issue in the main proceedings, the limitation period provided for in the first subparagraph of Article 3(1) of Regulation No 2988/95:**
  - applies to irregularities committed before the entry into force of that regulation;**
  
  - starts to run from the date on which the irregularity at issue was committed.**
  
- 3. The longer limitation periods which Member States retain the possibility of applying under Article 3(3) of Regulation No 2988/95 may result from general provisions of law predating the adoption of that regulation.**

[Signatures]