Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 11 June 2015 [1]

Case C-59/14

Firma Ernst Kollmer Fleischimport und -export
v
Hauptzollamt Hamburg-Jonas

(Request for a preliminary ruling from the Finanzgericht Hamburg (Germany))

(Regulation (EC, Euratom) No 2988/95 — Protection of the European Union's financial interests — Article 3(1) — Recovery of an export refund — Advance payment — Limitation period — Dies a quo — Act or omission by the economic operator — Occurrence of the prejudice — Release of the security — Continuous or repeated infringement — One-off infringement)

1. The request for a preliminary ruling made by the Finanzgericht Hamburg has its origin in a dispute between the undertaking Ernst Kollmer Fleischimport und –export ('Ernst Kollmer') and the Hauptzollamt Hamburg-Jonas (Hamburg Customs Office; 'the Hauptzollamt') concerning the export to Jordan in the early 1990s of consignments of beef that were re-exported to Iraq, in breach of the embargo imposed on that country.

2. Those same exports have already given rise to the judgments in *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others* [2] and *Ze Fu Fleischhandel and Vion Trading*. [3] In the first of those judgements, the Court of Justice confirmed that the limitation period established by the first subparagraph of Article 3(1) of Regulation No 2988/95 [4] is also applicable to administrative measures such as the recovery of export refunds wrongly received as a result of irregularities committed by exporters, including before the entry into force of that regulation. It also held, without further clarification, that that period starts to run from the date on which the irregularity was committed. [5]

1 — Original language: Spanish.

2 — C-278/07 to C-280/07, EU:C:2009:38.

3 — C-201/10 and C-202/10, EU:C:2011:282.

4 — 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).

5 — It also held that the longer limitation periods which Member States may apply under Article 3(3) of the aforementioned regulation may result from provisions of national law predating the adoption of that regulation. The judgment in *Ze Fu Fleischhandel and Vion Trading* (C-201/10 and C-202/10, EU:C:2011:282) was specifically concerned with the longer limitation periods that may be established in national law. The Court pointed out in particular that such periods must satisfy the requirements of foreseeability and proportionality deriving from the principle of legal certainty.

3. In the present case, the Court is faced with the specific question of the point at which the aforementioned limitation period starts to run in a case where a demand has been made for the return of export refunds paid in advance and guaranteed by the corresponding security.[6]

I – **Legal framework**

4. Article 1 of Regulation No 2988/95 provides as follows:

‘1. For the purposes of protecting the European Communities’ financial interests, general rules are hereby adopted relating to homogeneous 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 3(1) and (3) of the aforementioned regulation is worded as follows:

‘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. 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).

…

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

6 — In the present case, the refund had been paid in advance, that payment, guaranteed by a security, having been made before the infringement of EU law that rendered it undue was committed. The infringement was discovered after the security provided as a guarantee for the aforementioned advance payment had been returned to the economic operator. In the judgments cited in point 2 of this Opinion, the Court did not specifically address the question now being raised, that is to say whether, in the case of export refunds which have been paid in advance, the start of the aforementioned limitation period presupposes not only that an irregularity has been committed but also that prejudice has been caused to the European Union budget (in this Opinion, I shall use the terms ‘European Communities’ and ‘Community law’ when citing legislative provisions in which those expressions are used; in all other cases, I shall use the terms ‘European Union’ or ‘EU law’).

6. Under Article 5(1) of Regulation No 565/80,[7] '[a]n amount equal to the export refund shall, at the request of the party concerned, be paid as soon as the products or goods have been brought under the customs warehousing or free zone procedure with a view to their being exported within a set time limit.'

7. Article 6 of Regulation No 565/80 provides as follows:

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

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

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

or

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

8. Under Article 17(1) of Regulation No 3665/87,[8] in order to be entitled to the export refund, the product must have been imported in the unaltered state into the non-member country or one of the non-member countries for which the refund is prescribed within 12 months following the date of acceptance of the export declaration. Under paragraph 3 of that article, 'a product shall be considered to have been imported when it has been cleared through customs for release for consumption in the non-member country concerned'.

9. Under Article 18(1) of Regulation No 3665/87:

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

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

or

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

or

c) any other document endorsed by the customs authorities of the non-member country concerned which identifies the products and shows that they have been released for consumption in that country.'

7 — Council Regulation (EEC) No 565/80 of 4 March 1980 on the advance payment of export refunds in respect of agricultural products (OJ 1980 L 62, p. 5).

8 — Commission Regulation 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; Corrigendum in OJ 1988, L 337, p. 29). Although, since 1 July 1999, Regulation No 3655/87 has been replaced by Commission Regulation (EC) No 800/1999 of 15 April 1999 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1999 L 102, p. 11; Corrigendum in OJ 1999 L 180, p. 53), it is still applicable to the facts at issue in this case.

10. The detailed rules governing the release of the security are set out in Article 33 of Regulation No 3665/87.

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

11. By various decisions adopted in 1992 and 1993, the Hauptzollamt granted Ernst Kollmer, in return for the provision of a security, advance payment of an export refund [9] in respect of various consignments of beef, as the exporter had requested. On 10 August 1993, Ernst Kollmer sent the Hauptzollamt, among other documents, a Jordanian customs declaration of 9 March 1993 certifying customs clearance of the exported goods. In 1993, the Hauptzollamt accepted the documents as proof that the goods exported to Jordan had been released for consumption and released part of the security in that year. The rest of the security was released on 30 April 1996 and 4 March 1998. [10]

12. During an inspection mission carried out by the European Anti-Fraud Office (OLAF) in 1998, it was found that, in many cases, the Jordanian customs documents did not prove that the import duties had been paid or that the meat had been released for consumption in Jordan. The documents had been cancelled before the duties were collected and the goods concerned had in fact been transported to Iraq (a country subject to an embargo). This was the case, inter alia, with the customs clearance certificate which had been presented by Ernst Kollmer (albeit, according to that exporter, without its knowledge). Consequently, by notice of 23 September 1999, the Hauptzollamt, taking the view that the aforementioned exporter had not actually provided the proof necessary to qualify for the export refund, demanded the repayment of that refund. On the basis of the judgment of the Court of Justice in *Ze Fu Fleischhandel and Vion Trading*, [11] the Hauptzollamt partially revoked the demand for repayment (in so far as it related to the part of the security released in 1993) as it was time-barred, but continued to demand from Ernst Kollmer the repayment of almost EUR 60 000 corresponding to that part of the security released in April 1996 and March 1998.

9 — Export refunds are a form of aid for the exportation of certain agricultural products which is granted by the European Union under the Common Agricultural Policy in order to make it easier for those products to compete on world markets. The amount of the export refund covers the difference between the price of a product on the European Union market and its price on the world market, which is generally lower. Under the general procedure for the payment of export refunds, the exporter bears the financial burden of not receiving the refunds until it has proven that the customs formalities for exportation have been completed, that the product has left the European Union customs territory and, in some cases, that the product has reached its destination. In order to avoid that burden and to make it easier to finance exports, the exporter may be granted the refund as soon as the customs authorities accept the export declaration, without having to wait until the goods have physically left the European Union customs territory. In those circumstances, the advance payment is made when the goods are brought under the customs warehousing or free zone procedure with a view to their being exported within a set time-limit. The exporter's undertaking that the goods will be leaving the European Union customs territory must be guaranteed by the provision of a security in the amount of the value of the refund to be received, plus a specific percentage. See in this regard, inter alia, Á De Ureta Huertos, 'Marco general de las restituciones a la exportación', *Boletín económico de ICE* No 2449, 1995, pp. 65 et seq., and G. Gigante Guerrero, 'Restituciones a la exportación en el marco de la Unión Europea', *Economistes*, No 225, 2002.

10 — Ernst Kollmer points out this fact in its observations, stating that, in its case, unlike with other exporters in the same situation, the security was not released in full immediately after the Hauptzollamt had accepted the Jordanian customs declaration as proof that the exported goods had been released for consumption in Jordan. The referring court states that the delay occurred 'for reasons not relevant for the purposes of this dispute'. In its observations (paragraph 8), Ernst Kollmer reproduces the statement of those reasons given by the Hauptzollamt itself: 'since customs clearance procedures other than the customs warehousing processes in question had exhibited irregularities which made it impossible to release the security immediately …'; according to Ernst Kollmer, this means the late release of part of the security bore no material or temporal relation to the disputed exports (paragraph 11 of its observations), but had to do with other exports to Egypt for which no proof had been provided, even though the Hauptzollamt stated that the specific circumstances that had led to the late release of the security in the case of the exporter in question were irrelevant for the purposes of examining the question of limitation (paragraph 12).

11 — C-201/10 and C-202/10, EU:C:2011:282. On the basis of that judgment, from which Ernst Kollmer also benefited, all demands for repayment made against German exporters of beef to Jordan were cancelled in full, since more than four years had elapsed between the grant of the export refund (in the form of an advance payment in 1992 and 1993 and the immediate release of the security on production of the corresponding certificate) and the notice demanding repayment in September 1999 (see paragraph 6 of Ernst Kollmer's observations).

13. In its application before the Finanzgericht Hamburg, Ernst Kollmer alleges, in essence, that the right to demand repayment of the export refund which had been granted to it had become time-barred. [12] According to its testimony before the Finanzgericht Hamburg, the four-year limitation period provided for in Article 3(1) of Regulation No 2988/95 starts to run from the point in time at which the irregularity is committed, not from when the security is released. Article 1(2) of Regulation No 2988/95 expressly links the factual circumstance of an irregularity to an act or omission by an economic operator, that is to say, in its case, the presentation of the Jordanian certificate of customs clearance. That act — assuming that it had improperly asserted the right to the refund — had the effect of prejudicing the European Union budget, in so far as Ernst Kollmer, as the exporter, had actually already received the amount corresponding to its refund entitlement in the form of the advance payment, which was charged to that budget.

14. For its part, the Hauptzollamt alleges before the Finanzgericht Hamburg, that limitation had not yet become effective in accordance with Article 3 of Regulation No 2988/95 because the *dies a quo* is the point in time at which the security is released (in the case at issue, 1999 at the very earliest), since it is not until then that there is a final decision with respect to the grant of the export refund or prejudice within the meaning of Article 1(2) of Regulation No 2988/95. The advance payment is guaranteed by a security, with the result that, when the payment is made, no prejudice has yet been caused to the European Union Budget. Until such time as the security is released, the Hauptzollamt still has the possibility of releasing the security or retaining it.

15. According to the Finanzgericht Hamburg, the presentation by Ernst Kollmer of an incorrect customs clearance certificate as proof that the consignment had been released for consumption in Jordan constitutes an infringement of a provision of Community law, in particular Article 18(1)(a) of Regulation No 3665/87. If, for the purposes of the first subparagraph of Article 3(1) of Regulation No 2988/95, an irregularity is understood to have been committed simply by virtue of an act or omission by an economic operator which infringes a provision of Community law, irrespective of when the prejudice occurred, limitation would already have become effective when the demand for repayment of the unduly paid export refund was issued in 1999, since, according to that provision, the limitation period is four years as from the commission of the irregularity. If, on the other hand, an irregularity is regarded as having been committed only if prejudice has also occurred, it will be necessary, in order to determine whether limitation had already become effective in 1999, to establish whether the prejudice had already occurred when the advance payment of the export refund was made in 1992 or 1993 or whether it occurred at the time when the security was released in 1996 or 1998.

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

‘(1) In a case where the infringement of a provision of Community law was discovered only after the occurrence of prejudice, does the irregularity which is necessary for the commencement of the limitation under the first subparagraph of Article 3(1) of Regulation (EC, Euratom) No 2988/95 and which is defined in Article 1(2) of that regulation presuppose, in addition to an act or omission by the economic operator, that the general budget of the European Union or budgets managed by the European Union were prejudiced, so that the limitation period begins to run only after the occurrence of the prejudice, or does the limitation period begin, irrespective of when the prejudice occurs, with the act or omission of the economic operator which constitutes an infringement of a provision of Community law?

12 — It also alleges, as is apparent from its observations, that the Jordanian Customs Authority had repeatedly acted unlawfully over a long period of time, a fact on which it also relies, as a ground of *force majeure*, in order to oppose the demand for repayment of the export refund made by the Hauptzollamt.

(2) If the reply to the first question is that the limitation period does not begin until the occurrence of the prejudice:

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

17. Written observations in these proceedings have been submitted by Ernst Kollmer, the Greek Government and the European Commission.

III – **Summary of the positions of the parties**

18. With regard to the first question, Ernst Kollmer endorses the view that the only factor determining the start of the limitation period is the commission of an irregularity as defined in Article 1(2), regardless of when the prejudice occurs (or when it is discovered). It supports its arguments by reference to the principle of legal certainty (in so far as the latter requires that the start of the limitation period should be foreseeable). It considers that the factor determining the start of the limitation period is specific conduct on the part of the economic operator and not an administrative decision, which may be adopted at a time not determined by law.

19. The Greek Government confined its observations to the first of the questions referred. In its opinion, the decisive point in time for the purposes of the start of the limitation period is that at which the competent authority discovers that the payment made was undue (that is to say, in this case, the point at which the customs authorities became aware of the results of the inspection carried out by OLAF). In the view of the Greek Government, this is a clear and objective criterion for determining the point at which the limitation period commences, because it is then that all the conditions for demanding repayment of the amount unduly paid are met. The Greek Government interprets Article 3(3) of Regulation No 2988/95 as meaning that it gives the Member States discretion both to establish longer limitation periods and to determine the point at which those periods start to run. Consequently, according to that Government, that regulation also permits the national legal systems to establish the point at which the irregularity and the prejudice are discovered as being the point at which the limitation period starts to run.

20. With regard to the second question referred, Enst Kollmer takes the view — in the event that the Court's answer is that the start of the limitation period depends on when the prejudice occurs — that the prejudice arises as soon as the advance payment is made, since that payment itself represents 'an item of expenditure' within the meaning of Article 1(2) of Regulation No 2988/95. In support of its argument, the aforementioned exporter also relies on the broad definition of prejudice that follows from the judgment in *Chambre de commerce et d'industrie de l'Indre*, in which the Court held that 'even irregularities having no specific financial impact may be seriously prejudicial to the financial interests of the European Union'.[13] Moreover, the limitation period must start at a point in time determined by law and that, in accordance with Article 3(1) of the aforementioned regulation, is the time of commission of the irregularity, which is a point in time clearly established by law that is foreseeable by economic operators, even if they themselves are unaware or had no reason to be aware

13 — C-465/10, EU:C:2011:867, paragraph 47.

that they were committing an irregularity. According to Ernst Kollmer, to make the start of the limitation period dependent on the decision by the administrative authority to release the security is to make it dependent on a point in time that is not foreseeable, since there is no legal provision establishing when that security must be released. [14]

21. Ernst Kollmer adds that, in the case at issue, the Hauptzollamt improperly delayed the release of the security, making it dependent on factors other than those on which the present dispute is based. That circumstance supports the proposition that making the start of the limitation period dependent on the decision by the customs authorities to release the security would effectively give them carte blanche to decide when that period will start. Objectively, at the time when the (incorrect) declaration issued by the Jordanian customs authorities and certifying the customs clearance of the export consignment was presented to the Hauptzollamt in August 1993 (that is to say, the point in time at which the irregularity was committed), 'an unjustified item of expenditure' within the meaning of Article 1(2) of Regulation No 2988/85, in the form of the advance payment of the export refund, had already been generated and the associated prejudice — understood, in the words of the aforementioned judgment in *Chambre de commerce et d'industrie d'Indre*, [15] as serious prejudice to the financial interests of the European Union, had already occurred. In Ernst Kollmer's opinion, the 'infringement of a provision of Community law resulting from an act or omission by an economic operator' and the occurrence of prejudice to the general budget of the European Union does not have to be linked by temporal immediacy; they simply have to be based on the same events.

22. The Commission — which proposes that the questions referred be reformulated and answered together — takes the view that, in cases such as that at issue, the irregularity 'materialises', so to speak, at the time when the security is released. It is only then that the limitation period provided for in Article 3(1) of Regulation No 2988/95 starts to run, because it is only then that the claim for repayment of a wrongly obtained advantage can be substantiated and quantified. The final decision on the amount of the export refund is taken once the export certificates have been received and examined, and, in consequence, the corresponding security, the purpose of which is to protect the budget of the European Union until such time as it is decided that the export refund requested is lawful, is (simultaneously) released.

23. In the event that the Court is inclined to the view that, in this case, the infringement of Community law occurred at the time when the false customs clearance certificate was presented, the Commission considers that that infringement will have to be regarded as a continuous infringement that does not cease until the security is released following the customs authority's final decision on the amount of the export refund to which the applicant is entitled. In the case at issue, at the time when Ernst Kollmer presented its customs clearance certificate, it was by no means clear that there would be any undue advantage at all, since no final decision had yet been made on whether it was entitled to an export refund. Consequently, in those particular circumstances, the Commission further contends, the start of the limitation period cannot be made to depend on the original action by the economic operator. The prejudice to the European Union budget does not occur, therefore, until such time as it is definitively decided that there is an entitlement to the export refund, since that is the point at which the security is released. As the procedures in questions are lengthy, making the limitation period start to run from the point of the original action by the economic operator would make it effectively impossible ever to recover advantages wrongly obtained within the prescribed time-limit.

14 — According to the Commission, the final decision on the amount of the export refund is taken once the customs authority has received and examined the documentation relating to the exports, in particular the customs clearance certificate from the country to which the goods were exported. The point in time at which that decision is taken 'is necessarily the same as that when the security is released' (paragraph 27 of the Commission's observations). In this instance, that may not have been the case, as is clear from Ernst Kollmer's observations (see, in particular, paragraphs 3, 8 and 11 thereof).

15 — C-465/10, EU:C:2011:867.

IV – **Analysis**

A – *The first question referred for a preliminary ruling*

1. Introduction

24. By its first question, the Finanzgericht Hamburg wishes to ascertain, in essence, whether, in order for the limitation period provided for in the first subparagraph of Article 3(1) of Regulation No 2988/95 to start to run in cases where an infringement of a provision of EU law is discovered after the prejudice has occurred, it is necessary not only that there should have been an act or omission by the economic operator, but also that actual prejudice should have been caused to the general budget of the European Union or the budgets managed by it. If that question is answered in the affirmative, the referring court wishes to ascertain, secondly, when the prejudice is deemed to have occurred for these purposes, in particular whether it occurs when an amount equal to the export refund is paid in advance or when the corresponding security is released.

25. The answer to the first question essentially requires an interpretation of the first subparagraph of Article 3(1) of Regulation No 2988/95, which states that the limitation period for proceedings is four years *as from the time when the irregularity* referred to in Article 1 of that regulation *was committed*.[16] Article 3(3) of that regulation makes it possible for the Member States to apply a period longer than that provided for in paragraph 1.

26. Consequently, according to the wording of the first paragraph of Article 3(1) of Regulation No 2988/95, the start of the limitation period is determined by the commission of the irregularity, which is defined in Article 1(2) thereof 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 the 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'. That definition covers intentional irregularities or irregularities arising out of negligence which may result in an administrative fine, as well as those irregularities which entail nothing more than the withdrawal of the wrongly obtained advantage.[17]

2. Scope of application of Article 3(1) of Regulation No 2988/95

27. In order to protect the financial interests of the European Union, Regulation No 2988/95 establishes a series of general rules relating to administrative measures and penalties applicable to irregularities that infringe EU law in all areas covered by its policies and cause prejudice to the European Union's financial interests.

28. By the first subparagraph of Article 3(1) of Regulation No 2988/95, the EU legislature sought to establish a general limitation rule applicable in all cases where there are no European Union sectoral rules providing for a shorter period, which may not be less than three years, or national rules providing for a longer limitation period.[18] The rule laid down in the first subparagraph of Article 3(1) of that regulation applies to all acts of an administrative nature adopted by the national or European Union authorities with a view to prosecuting such irregularities, whether these consist of

16 — The second subparagraph of that provision establishes a special rule for continuous or repeated irregularities: in such cases, the limitation period runs from the day on which the irregularity ceases. The fourth subparagraph adds a final rule: limitation becomes 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.

17 — Judgment in *Handlbauer*, C-278/02, EU:C:2004:388, paragraph 33.

18 — Judgment in *Handlbauer*, C-278/02, EU:C:2004:388, paragraph 35.

administrative penalties within the strict sense defined in Article 5 of that regulation, or measures intended to withdraw a wrongly obtained advantage in accordance with Article 4 of that regulation, such as the recovery of an export refund unduly received by an exporter as a result of irregularities committed by him. [19]

29. Before the adoption of Regulation No 2988/95, EU law did not contain a limitation rule applicable to the recovery of advantages wrongly obtained by economic operators in a manner prejudicial to the European Union's financial interests. By the adoption of Article 3(1) of that regulation, the EU legislature sought, on the one hand, to define a minimum period applicable in all the Member States — to which end the EU legislature voluntarily reduced to four years the period during which the authorities of the Member States, acting in the name and on behalf of the European Union budget, should recover or should have recovered wrongly received advantages. [20] On the other hand, the legislature agreed to waive the possibility of recovery of sums wrongly received from the European Union budget after the expiry of a four-year period after the irregularity affecting the payments at issue was committed. [21] The limitation period provided for in the first subparagraph of Article 3(1) of Regulation No 2988/95 also applies to irregularities committed before the entry into force of that regulation, [22] such as that at issue in this case. [23]

30. The purpose of the aforementioned limitation period is to determine the point in time up to which the national authorities may take action against irregularities which, in the words of Article 1(2) of Regulation No 2988/95 itself, *have or would have the effect* of prejudicing the financial interests of the European Union. The Member States owe a general obligation of diligence when verifying the legality of payments made that are borne by the European Union budget, which flows from the obligation of general diligence under Article 4(3) EU, which entails that they must take steps to rectify irregularities promptly. [24] If a four-year limitation period were to appear, from the national authorities' point of view, too short to enable them to bring proceedings in respect of irregularities displaying a certain complexity, it would always be open to the national legislature to adopt a longer limitation rule suited to irregularities of that type, [25] which would have to meet the requirements of foreseeability and proportionality deriving from the principle of legal certainty. [26]

19 — Judgment in *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others*, C-278/07 to C-280/07, EU:C:2009:38, paragraph 22. As a general rule, any irregularity involves withdrawal of the wrongly obtained advantage (that is, recovery of the moneys paid). Where the irregularity was committed intentionally or through negligence, an administrative penalty may be imposed (see the Opinion of Advocate General Sharpston in *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others*, C-278/07 to C-280/07, EU:C:2008:521, point 47).

20 — Judgment in *Cruz & Companhia*, C-341/13, EU:C:2014:2230, paragraph 50. The limitation period provided for in Article 3(1) of Regulation No 2988/95 is directly applicable in the Member States in matters relating to export refunds for agricultural products, in the absence of European Union 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 (judgment in *Handlbauer*, C-278/02, EU:C:2004:388, paragraph 35) which is not disproportionate (judgments in *Ze Fu Fleischhandel and Vion Trading*, C-341/13, EU:C:2014:2230, paragraph 65). Such national rules may predate the adoption of the aforementioned regulation (judgment in *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others*, C-278/07 to C-280/07, EU:C:2009:38, paragraph 42).

21 — Judgments in *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others*, C-278/07 to C-280/07, EU:C:2009:38, paragraphs 25, 27 and 29 and *Ze Fu Fleischhandel and Vion Trading*, C-201/10 and C-202/10, EU:C:2011:282, paragraph 24.

22 — Judgment in *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others*, C-278/07 to C-280/07, EU:C:2009:38, paragraph 34.

23 — Provided, of course, that the debts prior to the entry into force of the regulation had not become time-barred under national rules on limitation applicable at the time the irregularities at issue were committed (judgment in *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others*, C-278/07 to C-280/07, EU:C:2009:38, paragraph 30).

24 — Judgment in *Ze Fu Fleischhandel and Vion Trading*, C-201/10 and C-202/10, EU:C:2011:282, paragraphs 43 and 44.

25 — Ibid., paragraph 46.

26 — Ibid., paragraphs 32 and 43.

3. The start of the limitation period under Article 3(1) of Regulation No 2988/95

31. With regard, first of all, to the wording of that provision, the following comments must be made. According to the first subparagraph of Article 3(1) of the aforementioned regulation, the limitation period for proceedings is four years *as from the time when the irregularity was committed*. As so expressed, that provision takes as its point of reference, for the purposes of the start of the limitation period, the irregularity itself, as defined in Article 1(2) of that regulation, and the point in time at which it is 'committed'.

32. In the case at issue, the referring court tells us that the irregularity consisted in the presentation by Ernst Kollmer on 10 August 1993 of an incorrect customs clearance certificate as proof that the consignment had been cleared for consumption in Jordan, which constitutes an infringement of Article 18(1) of Regulation No 3665/87.

33. From the point of view exclusively of the wording of Article 3(1) in conjunction with Article 1(2) of Regulation No 2988/95, the aforementioned provision does not make the start of the limitation period dependent on the occurrence of a result, since it refers to the 'commission of the irregularity', not to the 'result' of it: according to the wording of that provision, what marks the start of the limitation period is not the occurrence of prejudice but specific conduct on the part of an economic operator [27] which infringes a provision of EU law. That assessment is confirmed by other language versions of that provision, none of which refers to any kind of result: while the English-language version uses the terms 'when the irregularity … was *committed*', the German-language version refers to '*Begehung* der Unregelmäßkeit', the French-language version to '*réalisation* de l'irrégularité', the Italian-language version to the '*esecuzione* dell'irregolarità' and the Portuguese-language version to the 'data em que foi *praticada* a irregularidade'. [28] In other words, they all take as the point of reference the *commission* of the irregularity, not the effect or result of it.

34. For its part, Article 1(2) of the Regulation defines 'irregularity' as follows: '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'. The use of the conditional 'would have the effect' seems to indicate that an irregularity exists even if the prejudice has not yet occurred or has not definitively materialised, provided that the conduct on the part of the operator is potentially capable of bringing it about. [29]

35. It may well be, as in the case at issue, that it is not possible to quantify the undue advantage at the point when an irregularity is committed. [30] However, this should not alter the interpretation of the provision contained in Article 3(1) of Regulation No 2988/95, particularly given that 'even irregularities having no specific financial impact may be seriously prejudicial to the financial interests of the European Union'. [31]

27 — The concept of 'irregularity' within the meaning of Regulation No 2988/95 does not include circumstances where an export refund has been unduly paid to an economic operator as a result of errors on the part of the national authorities (judgments in *Bayerische Hypotheken- und Vereinsbank*, C-281/07, EU:C:2009:6, paragraphs 20 and 21, and *Chambre de commerce et d'industrie de l'Indre*, C-465/10, EU:C:2011:867, paragraph 44).

28 — Emphasis added.

29 — That idea of potential capacity is more clearly expressed, in my opinion, in the Portuguese- language ('um acto ou omissão de um agente económico que tenha ou *possa ter por efeito* lesar o orçamento geral das Comunidades ou orçamentos geridos pelas Comunidades) and Italian-language ('un'azione o un'omissione di un operatore economico che abbia o *posso avere come conseguenza* un pregiudizio al bilancio general delle Comunità o ai bilanci da queste gestite') versions of Article 1(2) of that regulation (emphasis added).

30 — This point is made by Advocate General Sharpston in her Opinion in *Pfeifer & Langen*, C-564/10, EU:C:2012:38, point 101.

31 — Judgment in *Chambre de Commerce et d'Industrie de l'Indre*, C-465/10, EU:C:2011:867, paragraph 47.

36. The Court has frequently had occasion to examine the first subparagraph of Article 3(1) of Regulation No 2988/95 and, when applying it, has always taken into account its wording, without ever having made the start of the limitation period subject to the occurrence of prejudice. In this regard, it is important to recall first and foremost the judgment in *Handlbauer*, [32] in which the Court held for the first time that that provision, 'by fixing the limitation period for proceedings at four years as from the time when the irregularity is committed, leaves the Member States no discretion', [33] and that the limitation period established by Article 3(1) 'runs from the time when the irregularity is committed'. [34]

37. That form of words was later repeated verbatim in the judgment in *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others*, [35] which, like this case, was also concerned with advance payments of export refunds for disputed consignments of beef initially intended for Jordan and later transported to Iraq. In that judgment, the Court reiterated that the debts in question must in principle be time-barred within a period of four years 'running from the date on which the irregularities were committed'. [36] Proceedings must be regarded as time-barred 'in the absence of any suspensory act adopted in the four years following the commission of the irregularity', so that, 'where an irregularity was committed, as in the cases in the main proceedings …, such an irregularity … will be subject to limitation in the course of 1997 according to the exact date of the commission of that irregularity in 1993', [37] without prejudice to the possibility available to the Member States of providing for longer limitation periods. The Court then expressly held, in the operative part of the aforementioned judgment, that the limitation period provided for in the first subparagraph of Article 3(1) of Regulation No 2988/95 'starts to run from the date on which the irregularity at issue was committed'.

38. I therefore take the view, in the case at issue, that, taking into account in principle the wording of the provision in question and the way that provision has been applied to date by the Court, the limitation period started at the point in time of the act by which the economic operator infringed a provision of EU law, that is to say at the time of the presentation, on 10 August 1993, of a customs clearance certificate which proved to be incorrect and which rendered undue the advance payment that had been made to Ernst Kollmer in 1992 or 1993.

39. In that regard, I cannot concur with the argument put forward by the Commission, in paragraph 30 of its observations, that what we have here is a 'continuous infringement' which started when the aforementioned customs clearance certificate was presented and ceased when the security was released as a result of the final decision on the actual amount of the export refund.

40. On the basis of the definition of 'continuous or repeated irregularity' adopted by the Court in the judgment in *Vonk Dairy Products* ('an irregularity is continuous or repeated for the purposes of the second subparagraph of Article 3(1) of Regulation No 2988/95 where it is committed by a Community operator who derives economic advantages from *a body of similar transactions* which infringe the same provision of Community law') [38] or the definition of 'continuous infringement' given, in another context, in the judgment in *Montecatini* ('although the concept of a continuous infringement has different meanings in the legal orders of the Member States, in any event it

32 — C-278/02, EU:C:2004:388.

33 — Ibid., paragraph 27.

34 — Ibid., paragraph 32.

35 — C-278/07 to C-280/07, EU:C:2009:38, paragraph 21. See also the judgment in *Corman*, C-131/10, EU:C:2010:825, paragraph 38.

36 — C-278/07 to C-280/07, EU:C:2009:38, paragraph 31. See also the judgment in *Ze Fu Fleischhandel and Vion Trading*, C-201/01 and C-202/10, EU:C:2011:282, paragraph 51: 'starts to run from the date on which the irregularity at issue was committed'.

37 — C-278/07 and C-280/07, EU:C:2009:38, paragraph 33.

38 — C-279/05, EU:C:2007:18, paragraph 41 (emphasis added).

comprises a *pattern* of unlawful conduct implementing a single infringement, united by a common subjective element'),[39] it is clear that the presentation of an ultimately incorrect single customs certificate in connection with a single export of beef does not support the view that what we have here is a 'continuous and repeated irregularity'.

41. From a schematic point of view, which, to my mind, confirms the grammatical interpretation set out in point 38 of this Opinion, it is important to recall the marked difference between the wording of the first subparagraph of Article 3(1) of Regulation No 2988/95 and the definition of the *dies a quo* given in Regulation No 800/1999 (which applies to exports of agricultural products from 1 June 1999 and is not therefore applicable to this case). For the purposes of the present case, that regulation establishes, from the point of view of the recovery of export refunds unduly received (albeit only in cases where the beneficiary has acted in good faith), a four-year limitation period that starts to run from '*the day of notification to the beneficiary of the final decision on the granting of the refund*' [point (b) of the first subparagraph of Article 52(4)].[40]

42. Taking into account the meaning and purpose of Regulation No 2988/95, my interpretation to the effect that the start of the limitation period depends only on the commission of an irregularity by the economic operator, there being no need for prejudice to have occurred or for that prejudice to be quantifiable, is also consistent with the requirements which the Court has inferred from the principle of legal certainty in connection with limitation periods, such legal certainty having to be reconciled, of course, with the effective protection of the European Union's financial interests which that regulation seeks to achieve.

43. As the Court held in the judgment in *Ze Fu Fleischhandel and Vion Trading* (also in relation to advance payments to German undertakings of export refunds for exports of beef to Jordan that ultimately went to Iraq), 'the principle of legal certainty requires in particular that the position of that operator, having regard to his rights and obligations vis-à-vis the national authority, not be open to challenge indefinitely … A limitation period must be applicable to proceedings in respect of such an irregularity and, in order to fulfil its function, that period must be fixed in advance'.[41] It goes on to say that 'acceptance that it is possible for Member States to grant the public service a period within which to act' which is much longer than that laid down in the first subparagraph of Article 3(1) of Regulation No 2988/95 'could, in a certain way, encourage inertia on the part of the national authorities in bringing proceedings in respect of "irregularities" within the meaning of Article 1 of Regulation No 2988/95, whilst exposing operators, first, to a long period of legal uncertainty and, secondly, to the risk of no longer being in a position to prove at the end of such a period that the transactions in question were lawful'.[42]

44. Consequently, making the start of the limitation period entirely dependent on action on the part of the national authorities making it possible to arrive at a definitive quantification of the extent of the prejudice caused would be at odds with the line of reasoning set out above. It is true that efforts to combat the adverse economic effects on the European Union budget of irregularities committed in this field might be more effective if the start of the limitation period were moved to the point in time at which the prejudice is rendered definitive following the release of the security in the case of advance payments, as the Commission proposes. In my view, however, it is not possible to stretch the grammatical interpretation of the provision at issue if this has the effect of undermining the

39 — C-235/92 P, EU:C:1999:362, paragraph 195 (emphasis added).

40 — Emphasis added. On the issues raised by the relationship between the limitation rule laid down in point (b) of the first subparagraph of Article 52(4) of Regulation No 800/1999 and those contained in Article 3 of Regulation No 2988/95, see U. Krüger, 'Verjährung erstattungsrechtlicher Rückzahlungsansprüche', *Zeitschrift für Zölle und Verbrauchsteuern*, 2008, pp. 244 et seq.

41 — Judgment in *Ze Fu Fleischhandel and Vion Trading*, C-201/10 and C-202/10, EU:C:2011:282, paragraph 32. See also the judgment in *Chemiefarma* v *Commission*, 41/69, EU:C:1970:71, paragraph 19.

42 — Judgment in *Ze Fu Fleischhandel and Vion Trading*, C-201/10 and C-202/10, EU:C:2011:282, paragraph 45. See also the judgments in *Cruz & Companhia*, C-341/13, EU:C:2014:2230, paragraph 62 and *Handlbauer*, C-278/02, EU:C:2004:388, paragraph 40.

requirements (as described above) arising from legal certainty.[43] Although the Commission states that the security must be released at the time when the authorities adopt a final decision on the grant of the refund, it produces no evidence to show that the authorities are legally obliged to release the security at that precise point in time.[44] I agree with the view expressed by Ernst Kollmer in its observations to the effect that any absence of such a legal obligation to release the security at a point precisely defined by law would constitute a failure to satisfy the requirement of foreseeability with which limitation periods must comply, thus exposing the economic operator to legal uncertainty.

45. Lastly, and in connection with the foregoing, I also do not concur with the Greek Government's proposal that the limitation period should be deemed to commence at the point when the competent authority *discovers* that the payment made was undue. Regardless of the fact that there is no textual basis to support that interpretation of Article 3(1) of Regulation No 2988/95,[45] if the limitation period did not start until that point in time, this would extend the periods established by the legislature, in principle indefinitely, in breach of any requirement of foreseeability. In such cases, the start of the limitation period would depend on the uncertain point in time at which the authorities take the steps necessary to assess the lawfulness of the transactions carried out by the economic operator. This would not only expose that operator to an indeterminate period of legal uncertainty but also make it more difficult to prove that the disputed acts or omissions are lawful, which would be contrary to the requirements of legal certainty.[46]

46. Consequently, I propose that the answer to the question raised by the referring court should be that, in situations such as that giving rise to the dispute in the main proceedings, the limitation period provided for in the first subparagraph of Article 3(1) of Regulation No 2988/95 starts to run on the date on which the irregularity at issue, as defined in Article 1(2) of that regulation, was committed, irrespective of when the prejudice to the general budget of the European Union or the budgets managed by it occurs.

B – *The second question referred for a preliminary ruling*

47. Taking into account the answer I am proposing should be given to the first question raised by the referring court and all the considerations set out above, there is no need to answer the second question referred for a preliminary ruling.

V – **Conclusion**

48. In the light of the foregoing considerations, I propose that the Court reply as follows to the Finanzgericht Hamburg:

(1) In situations such as that giving rise to the dispute in the main proceedings, the limitation period provided for 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 starts to run on the date on which the irregularity at issue, as defined in Article 1(2) of that regulation, was committed, irrespective of when the prejudice to the general budget of the European Union or the budgets managed by it occurs.

43 — It should be borne in mind in this regard that the Member States are free to seek to make their efforts to protect the European Union's financial interests more effective by establishing longer limitation periods (Article 3(3) of Regulation No 2988/95), provided that they respect the requirements of foreseeability and proportionality.

44 — Ernst Kollmer seems to confirm that view in paragraph 31 of its observations.

45 — In fact, that interpretation seems to have been expressly excluded in the judgment in *José Martí Peix*, C-226/03 P, EU:C:2004:768, paragraphs 25 to 28, in which the Court held that the General Court had erred in law in considering that the *dies a quo* for the limitation period for proceedings in that case was the day on which the Commission had discovered the irregularity at issue.

46 — See the judgment in *Ze Fu Fleischhandel and Vion Trading*, C-201/10 and C-202/10, EU:C:2011:282, paragraph 45.

(2) Taking into account the answer given to the first question raised by the referring court, there is no need to answer the second question referred for a preliminary ruling.