JUDGMENT OF THE COURT (Fourth Chamber)

21 December 2011 *

In Case C-465/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Conseil d'État (France), made by decision of 5 July 2010, received at the Court on 27 September 2010, in the proceedings

Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration

v

Chambre de commerce et d'industrie de l'Indre,

THE COURT (Fourth Chamber),

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

* Language of the case: French.

Advocate General: E. Sharpston,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the French Government, by G. de Bergues and B. Cabouat, acting as Agents,

— the Polish Government, by M. Szpunar, acting as Agent,

— the European Commission, by A. Steiblytė and J.-P. Keppenne, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 September 2011,

gives the following

Judgment

1 This reference for a preliminary ruling essentially concerns the interpretation 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) and Council Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1998 L 374, p. 1), as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993 (OJ 1993 L 193, p. 20) ('Regulation No 4253/88').

2 The reference has been made in proceedings between the Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration (Ministry for the interior, overseas territories, local authorities and immigration) and the Chambre de commerce et d'industrie de l'Indre (Chamber of Commerce and Industry for the Indre département) ('the CCI de l'Indre') concerning, inter alia, the reimbursement by the latter of a subsidy which it received from the European Regional Development Fund (ERDF) ('the ERDF subsidy').

Legal context

Legislation governing the Structural Funds

3 Article 7(1) of Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9), as amended by Council Regulation (EEC) No 2081/93 of 20 July 1993 (OJ 1993 L 193, p. 5) ('Regulation No 2052/88') provides:

'Compatibility and checks

1. Measures financed by the Structural Funds or receiving assistance from the [European Investment Bank (EIB)] or from another existing financial instrument shall be in conformity with the provisions of the Treaties, with the instruments adopted pursuant thereto and with Community policies, including those concerning … the award of public contracts …'

4 Article 23 of Regulation No 4253/88 provides:

‘Financial control

1. In order to guarantee completion of operations carried out by public or private promoters, Member States shall take the necessary measures in implementing the operations:

— to verify on a regular basis that operations financed by the Community have been properly carried out,

— to prevent and to take action against irregularities,

— to recover any amounts lost as a result of an irregularity or negligence. Except where the Member State and/or the intermediary and/or the promoter provide proof that they were not responsible for the irregularity or negligence, the Member States shall be liable in the alternative for reimbursement of any sums unduly paid …

Member States shall inform the Commission of the measures taken for those purposes and, in particular, shall notify the Commission of the description of the management and control systems established to ensure the efficient implementation of operations. They shall regularly inform the Commission of the progress of administrative and judicial proceedings.

…’

5 Article 8 of Commission Decision 94/1060/EC of 16 December 1994 on the approval of the Single Programming Document for Community structural assistance in the region of Centre concerned by Objective 2 in France (OJ 1994 L 384, p. 83) provides:

'The Single Programming Document shall be implemented in accordance with Community law, and in particular … the Community Directives on the coordination of procedures for the award of contracts.'

Directive 92/50/EEC

6 Article 1(a)(i) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Council Directive 93/36/EEC of 14 June 1993 (OJ 1993 L 199, p. 1) ('Directive 92/50'), defines 'public service contracts' as being in principle contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, while the first subparagraph of Article 1(b) of the directive states that the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law are regarded in principle as 'contracting authorities'.

7 Article 7(1) of Directive 92/50 provides that the directive is to apply to public service contracts, the estimated value of which, net of VAT, is not less than EUR 200 000.

Regulation No 2988/95

8 According to the third and fifth recitals in the preamble to Regulation No 2988/95, 'acts detrimental to the Communities' financial interests must … be countered in all areas', and, in that regard, 'irregular conduct, and the administrative measures and penalties relating thereto, are provided for in sectoral rules in accordance with this Regulation'.

9 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.'

10 Article 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. 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.

…

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

11 Article 4(1) and (4) of the 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.'

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

12 On 5 December 1995, the CCI de l'Indre applied for an ERDF subsidy from the préfet de l'Indre (prefect of Indre) in order to implement an operation entitled 'Objectif Entreprises' designed to search for French and foreign investors who might be inclined to move to the *Département* of Indre.

13 That application led to the signing on 20 December 1996 of an agreement between the préfet de l'Indre and the CCI de l'Indre allocating an ERDF subsidy totalling FRF 400 000 (EUR 60 979,60). The agreement included, inter alia, references to Regulations Nos 2081/93 and 2082/93. The aid was paid in two instalments, the first, of FRF 100 000 on 17 December 1997, and, the second, of FRF 300 000 on 8 December 1998.

14 It is also apparent from the order for reference that the CCI de l'Indre received two national subsidies for that same operation. Other local authorities also provided additional funding for the operation.

15 The execution of operation 'Objectif Entreprises' led to an audit pursuant to a letter of engagement from the préfet de le région Centre (prefect of the Centre region) on 9 May 2000. That audit, carried out at the CCI's premises on 14 June 2000, resulted in the adoption of a report dated 14 March 2001, which was communicated to the CCI de l'Indre on 18 July 2001. That report, entitled 'Audit sur l'utilisation des Fonds structurels européens' (Audit on the use of European Structural Funds) concluded, in particular, that the CCI de l'Indre had not complied with public procurement legislation when it awarded the contract for implementation of the operation to the company DDB-Needham.

16 In that regard, the report stated that the CCI de l'Indre had organised a tendering procedure which was published in the *Bulletin officiel des annonces des marchés publics* (BOAMP) of 4 November 1995. It is also apparent from the report that the CCI de l'Indre's Public Procurement Board, meeting on 8 December 1995, decided to award the contract in question to DDB-Needham, stating that its tender was to be chosen in preference to the only other admissible tender because the content of the project was good and because of the lower cost proposed by that company.

17 However, the report found, first, that the contract concluded between the CCI de l'Indre and DDB-Needham did not include a date of signature and, secondly, that a note summarising the project case-file had been addressed to the préfet de l'Indre by the CCI de l'Indre on 27 September 1995 stating that 'the [CCI] has chosen the agency DDB-Needham'.

18 The report thus concluded that 'those factors suggest that the subsequent tendering procedure had the sole purpose of putting on a formal footing the legal situation already existing under the (undated) contract'. Since the discrepancies between the dates entailed, de facto, an irregularity, the report stated that had the public procurement rules been complied with, in particular regarding publication in the *Official Journal of the European Communities*, it might have been possible to elicit a tender at a lower price. Consequently, the authors of the report considered that that possibility gave grounds for demanding repayment of the total amount of the ERDF subsidy.

19 By decision of 23 January 2002 the préfet de l'Indre told the CCI de l'Indre that, given that the public procurement rules had not been complied with when recruiting the service provider responsible for implementing the operation 'Objectif Entreprises', the subsidies, in particular those obtained from the ERDF, had to be reimbursed.

20 The CCI de l'Indre applied to have set aside the orders for payment made by the préfet de l'Indre which corresponded to the amounts claimed. That application was dismissed by an implied decision of the Trésorier-payeur general (paymaster).

21 The CCI de l'Indre therefore brought actions seeking, inter alia, annulment of the préfet de l'Indre's decision of 23 January 2002 before the Tribunal administratif de Limoges (Administrative Court, Limoges), which rejected the actions by judgments of 3 June 2004.

22 On appeal by the CCI de l'Indre, the Cour administrative d'appel de Bordeaux (Administrative Court of Appeal, Bordeaux), by a judgment of 12 June 2007, annulled the judgments and, inter alia, the préfet de l'Indre's decision of 23 January 2002 and the orders for payment made by him. In that regard, that court found that the prefect's department had been informed, by a letter addressed to it on 27 September 1995 by the CCI de l'Indre, that the CCI had chosen to engage the services of DDB-Needham. That department would therefore have known of that choice before the tendering procedure was launched since, first, the Public Procurement Board that proposed that DDB-Needham's tender be accepted had met on 8 December 1995 and, secondly, the contract had been signed on 26 May 1996 in the presence of the prefect.

23 While recognising that the CCI de l'Indre had failed to comply with the tendering rules applicable to it when awarding the contract, which had, moreover, not been published in the *Official Journal of the European Communities*, the Cour administrative d'appel de Bordeaux nevertheless found that the agreement concluded between the préfet de l'Indre and the CCI de l'Indre allocating the ERDF subsidy made no reference to awarding a contract, that the agreement did not require all documents to be submitted so that there could be verification of whether the public procurement rules had been complied with, and, lastly, that Article 4 of Regulation No 2988/95 had as neither its object nor effect to allow national authorities to withdraw aid financed by Community funds outside the situations provided for by national law.

24 The Cour administrative d'appel de Bordeaux therefore concluded, first, that none of the provisions relied upon by the defendant authority, nor any of the terms of the agreement of 20 December 1996 on the ERDF subsidy, made the granting of the subsidy subject to a condition that any contract that might be concluded by the CCI de l'Indre to implement the operation should comply with the public procurement rules. Secondly, the court held that, since the public authorities had known from 27 September 1995 that DDB-Needham had been chosen, in this instance before the tendering procedure was launched, the subsidies that were subsequently granted cannot be considered to have been implicitly conditional upon compliance with such a condition.

25 By application brought on 16 August 2007 before the Conseil d'État, the ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration appealed against the judgment of 12 June 2007 of the Cour administrative d'appel de Bordeaux.

26 In those circumstances, the Conseil d'État decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Concerning the existence of a legal basis creating an obligation to recover the aid paid to the CCI:

Where a contracting authority that receives subsidies paid from the ERDF has failed to comply with one or more public procurement rules in the implementation of the subsidised operation, when it is not otherwise disputed that that operation is eligible for that fund and that it has been implemented, is there a provision of Community law, in particular in [Regulation] (EEC) No 2052/88 … and [Regulation] (EEC) No 4253/88 …, that creates an obligation to recover subsidies?

If such an obligation exists does it apply to any failure to comply with the public procurement rules, or only to some of them? In the latter case, which?

(2) If the answer to the first question is at least partly affirmative, then so far as the procedures for recovering unduly paid aid are concerned:

(a) Does the failure, by a contracting authority that receives aid from the ERDF, to observe one or more rules relating to public procurement for the choice of a service provider responsible for implementing the subsidised operation constitute an irregularity within the meaning of Regulation No 2988/95? Does the fact that the competent national authority could not have been unaware, at the time when it decided to grant the aid applied for from the ERDF, that the recipient operator had failed to comply with the public procurement rules in recruiting, before the aid had even been allocated, the provider responsible for implementing the operation financed by the authority affect the characterisation as an irregularity within the meaning of Regulation No 2988/95?

(b) In case of an affirmative answer to question 2(a), and, given that, as the Court of Justice held in Joined Cases C-278/07 to C-280/07 *Josef Vosding Schlacht, Kühl- und Zerlegebetrieb and Others* [2009] ECR I-457, the limitation period referred to in Article 3 of Regulation No 2988/95 is applicable to administrative measures such as the recovery of aid unduly paid to an operator as a result of irregularities it committed:

— should the starting point for the limitation period be set at the date of payment of the aid to the recipient or at that of the recipient's use of the

subsidy received to pay the provider recruited in disregard of one or more of the public procurement rules?

— should that period be regarded as interrupted by the transmission, by the competent national authority to the recipient of the subsidy, of an audit report finding that there was a failure to comply with the public procurement rules and recommending, as a result, that the national authority obtain repayment of the sums paid?

— When a Member State makes use of the possibility afforded by Article 3(3) of Regulation No 2988/95 to apply a longer limitation period for proceedings, in particular where, in France, the ordinary limitation period at the material time is applicable, as set out at Article 2262 of the Civil Code which provides that "all actions, both in rem and in personam, are time-barred after 30 years …", must the compatibility of such a limitation period with Community law, in particular with the principle of proportionality, be determined in the light of the maximum limitation period for proceedings according to the national legislation providing the legal basis for the national administration's demand for recovery or in the light of the period in fact applied in the particular case?

(c) In the case of a negative answer to question 2(a), with regard to payment of aid such as that at issue in the main proceedings, do the financial interests of the Community prevent the court from applying the national rules relating to the withdrawal of decisions creating rights, according to which, except in cases of non-existence, acquisition by fraud or the recipient's request, the administration may withdraw an individual decision creating rights, if it is illegal, only within a period of four months following the date that decision was taken, an administrative decision being none the less capable, in particular when it concerns payment of aid, of being coupled with conditions subsequent, the fulfilment of which allows the withdrawal of the aid in question without any

limitation condition – the Conseil d'État having held that that national rule must be interpreted to the effect that it could not be relied on by the recipient of an aid wrongly attributed in application of Community legislation unless it was in good faith?'

Consideration of the questions referred

Question 1

27 By its first question the referring court asks, in essence, whether, in circumstances such as those at issue in the case in the main proceedings, the third indent of Article 23(1) of Regulation No 4253/88, read in conjunction with Article 7(1) of Regulation No 2052/88, constitutes a legal basis allowing national authorities to recover, from the recipient, the whole of a subsidy granted from the ERDF on the ground that, in its capacity as 'contracting authority' within the meaning of Directive 92/50, the recipient has not complied with the requirements of that directive so far as concerns the award of a public service contract, the purpose of which was the implementation of the operation for which the recipient was granted the subsidy.

28 It should be noted that, in the case in the main proceedings, it is common ground that the CCI de l'Indre was a contracting authority, that the value of the public service contract in question exceeded the EUR 200 000 threshold laid down by Article 7 of Directive 92/50 and that, when awarding the contract, the CCI de l'Indre did not

comply with the public procurement rules for that type of contract laid down by Directive 92/50, in particular since it had already chosen the contractor before the publication of the contract notice and since, in addition, the notice was not published in the *Official Journal of the European Communities*.

29 In that regard, Community funding of a project is, under Article 7(1) of Regulation No 2052/88, conditional upon the recipient complying with procedures for the award of 'public service contracts', within the meaning of Directive 92/50, when that recipient is a 'contracting authority', within the meaning of that directive, and the public contract through which the recipient intends to implement the project exceeds the threshold laid down in Article 7 of Directive 92/50 (see, to that effect, Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraphs 48 and 49).

30 Pursuant to Article 23(1) of Regulation No 4253/88, the Member States are to take, in order to guarantee completion of operations carried out by public or private promoters, the necessary measures in implementing the operations to verify on a regular basis that operations financed by the European Union have been properly carried out, to prevent and to take action against irregularities and to recover any amounts lost as a result of an irregularity or negligence (see Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others* [2008] ECR I-1561, paragraph 37).

31 Since it is clear from Article 7(1) of Regulation No 2052/88 that measures financed from the European Union budget must be carried out in full compliance with the directives on public procurement, the infringement by the recipient of a European Union subsidy, in its capacity as contracting authority, of the rules laid down in Directive 92/50 for the purpose of implementing the subsidised operation constitutes an irregularity as referred to in Article 23(1) of Regulation No 4253/88 and the behaviour of the recipient must be classified, as the case may be, as 'an irregularity' or 'negligence', within the meaning of that provision.

32 Pursuant to the first subparagraph of Article 23(1) of Regulation No 4253/88, read in conjunction with Article 7(1) of Regulation No 2052/88, where an examination of an operation financed by the ERDF reveals a breach of the conditions laid down for the implementation of that operation, in the present case the condition that European Union legislation on public procurement be complied with when the recipient of the funding is a contracting authority, the Member State which has granted financial assistance from the ERDF may, in order to prevent and to take action against irregularities, revoke that assistance and require repayment thereof from the recipient (see, to that effect, Case C-271/01 *COPPI* [2004] ECR I-1029, paragraph 48).

33 In that regard, Regulation No 4253/88 is the relevant legal basis for recovery and not Regulation No 2988/95 which merely lays down general rules for supervision and penalties for the purpose of safeguarding the European Union's financial interests. Recovery must therefore be carried out on the basis of Article 23(1) of Regulation No 4253/88 (see *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*, paragraph 39).

34 It must however be recalled that the exercise of any discretion, by the Member State in question, to decide whether or not it would be expedient to demand repayment of European Union funds unduly or irregularly granted would be inconsistent with the duty imposed on its authorities by the first subparagraph of Article 23(1) of Regulation No 4253/88 to recover any amounts unduly or irregularly paid (see *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*, paragraph 38).

35 It follows that Article 23(1) of Regulation No 4253/88 requires the Member States to recover any amounts lost as a result of an irregularity or negligence without there being any need for authority to do so under national law (see *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*, paragraph 40).

36 On that point, it should be noted, as the French Government has pointed out, that, because of such an irregularity, the wrongly received amounts can be considered to be 'lost as a result of an irregularity or negligence' by the recipient, within the meaning of that provision. While referring to the obligation to recover any 'amounts lost as a result of an irregularity or negligence', Article 23(1) of Regulation No 4253/88 goes on to state that, except where the Member State and/or the intermediary and/or the promoter provide proof that they were not responsible for the irregularity or negligence, the Member State shall be liable in the alternative for reimbursement of 'any sums unduly paid'. That provision thus equates those two concepts.

37 In the case in the main proceedings, the question also arises whether, where, in the context of implementing an operation, the recipient of a subsidy, in its capacity as contracting authority, has failed to comply with the rules applicable to public procurement, the national authority may, on the basis of the third indent of Article 23(1) of Regulation No 4253/88, request repayment of the whole of the subsidy even though the operation, partially financed by the ERDF, has already been implemented.

38 In that regard, it must be noted, first, that the infringement of obligations whose observance is of fundamental importance to the proper functioning of a Community system, such as the obligations resulting from Directive 92/50 concerning the implementation of projects financed by the ERDF, may be penalised by forfeiture of a right conferred by European Union legislation (see, to that effect, Case C-104/94 *Cereol Italia* [1995] ECR I-2983, paragraph 25; Case C-500/99 P *Conserve Italia* v *Commission* [2002] ECR I-867, paragraphs 100 to 102; and order of 16 December 2004 in Case C-222/03 P *AIPO* v *Commission*, paragraph 53).

39 Secondly, the recovery of sums lost as a result of an irregularity or negligence does not apply only where the operation being financed by Structural Funds has not been carried out in whole or in part (see, to that effect, Case C-240/03 P *Comunità montana della Valnerina* v *Commission* [2006] ECR I-731, paragraph 77).

40 Although it certainly cannot be ruled out, as the Commission has stated, that, in accordance with the principle of proportionality, the finding of a minor irregularity should lead only to a partial reimbursement of the amounts paid, it must nevertheless be made clear that, in any event, where, in the context of a project financed by the ERDF, the recipient is found to have infringed one of the fundamental obligations laid down by Directive 92/50, for example by having decided to award a public service contract before the launch of the tendering procedure and by having, in addition, failed to publish a notice in the *Official Journal of the European Union*, only the possibility that such an irregularity may be penalised by the complete cancellation of the aid can produce the deterrent effect required to ensure the proper management of Structural Funds (see, by analogy, *Conserve Italia* v *Commission*, paragraph 101).

41 In the light of the foregoing, the answer to the first question is that, in circumstances such as those at issue in the case in the main proceedings, the third indent of Article 23(1) of Regulation No 4253/88, read in conjunction with Article 7(1) of Regulation No 2052/88, constitutes a legal basis enabling national authorities to recover from the recipient – without there being any need for authority to do so under national law – the whole of a subsidy granted from the ERDF on the ground that, in its capacity as 'contracting authority', within the meaning of Directive 92/50, the recipient has not complied with the requirements of that directive so far as concerns the award of a public service contract whose purpose was the implementation of the operation for which the recipient was granted the subsidy.

Question 2(a)

42 By question 2(a), the referring court asks, in essence, whether the failure, by a contracting authority entitled to an ERDF subsidy, to observe the public procurement rules laid down by Directive 92/50 when awarding the contract whose purpose is to

implement the subsidised operation constitutes an 'irregularity', within the meaning of Article 1 of Regulation No 2988/95 and, if so, whether the fact that the competent national authority could not have been unaware, when the subsidy was granted, that the recipient had already decided which provider it would entrust with the implementation of the subsidised operation influences that classification.

43 Under Article 1 of Regulation No 2988/95, 'irregularity' means any infringement of a provision of European Union law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the European Union or budgets managed by it, either by reducing or losing revenue accruing from own resources collected directly on behalf of the European Union, or by an unjustified item of expenditure.

44 The concept of 'irregularity', within the meaning of Regulation No 2988/95, refers to the infringement of a provision of European Union law resulting from an act or omission by an economic operator; consequently the rule concerning the limitation period laid down in the first subparagraph of Article 3(1) of that regulation is not intended to apply to proceedings in respect of irregularities resulting from errors on the part of the national authorities granting a financial advantage in the name and on behalf of the European Union budget (see, to that effect, Case C-281/07 *Bayerische Hypotheken- und Vereinsbank* [2009] ECR I-91, paragraphs 20 to 22).

45 In circumstances such as those at issue in the case in the main proceedings, notwithstanding its status as a legal person governed by public law, the CCI de l'Indre, as a recipient of a subsidy from the European Union budget, can be treated, for the purposes of applying Regulation No 2988/95, as an economic operator which is alleged to have infringed a provision of European Union law. In that regard, it is common ground that the alleged infringement of the public procurement rules laid down by Directive 92/50 results from an act of the CCI de l'Indre and not of the authority that granted it the ERDF subsidy in the name and on behalf of the European Union budget.

46 Since, as is clear, in particular, from Article 7(1) of Regulation No 2052/88, the Structural Funds cannot be used to finance operations carried out in breach of Directive 92/50, the breach by the recipient of an ERDF subsidy, in its capacity as contracting authority, of procurement rules on public service contracts for the purpose of implementing a subsidised operation involves an unjustified item of expenditure and thus prejudices the European Union budget.

47 Indeed, it should be noted that even irregularities having no specific financial impact may be seriously prejudicial to the financial interests of the European Union (see Case C-199/03 *Ireland* v *Commission* [2005] ECR I-8027, paragraph 31).

48 As regards the fact that the competent authorities were informed by the recipient of the subsidy of its choice of contractor even before the launch of the tendering procedure for awarding the public contract in question, it does not, as such, have any effect on the classification of 'irregularity', within the meaning of Article 1, second subparagraph, of Regulation No 2988/95 (see, by analogy, Case C-94/05 *Emsland-Stärke* [2006] ECR I-2619, paragraph 62).

49 In the light of the foregoing, the answer to question 2(a) is that the failure, by a contracting authority that receives an ERDF subsidy, to comply with the public procurement rules laid down by Directive 92/50 when awarding the contract whose purpose is to implement the subsidised operation constitutes an 'irregularity', within the meaning of Article 1 of Regulation No 2988/95, even if the competent national authority could not have been unaware, when the subsidy was granted, that the recipient had already decided which provider it would entrust with the implementation of the subsidised operation.

Question 2(b), first and second indents

50 By the first and second indents of question 2(b), the referring court seeks, in essence, to ascertain, in circumstances where, in its capacity as contracting authority, the recipient of an ERDF subsidy has not complied with the public procurement rules of Directive 92/50 when awarding the contract whose purpose is to implement the subsidised operation, from what point the limitation period laid down by the first subparagraph of Article 3(1) of Regulation No 2988/95 begins to run and whether that limitation period is interrupted, for the purposes of the third subparagraph of Article 3(1), by the transmission to the recipient of the subsidy of an audit report finding there to have been a failure to comply with the public procurement rules and recommending, as a result, that the national authority demand repayment of the sums paid.

51 It should be recalled that 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 in all areas 'acts detrimental to the Communities' financial interests'.

52 By adopting Regulation No 2988/95, and in particular the first subparagraph of Article 3(1) thereof, the European Union legislature intended 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 European Union budget after the expiry of a four-year period after the irregularity affecting the payments at issue was committed (Case C-131/10 *Corman* [2010] ECR I-14199, paragraph 39, and Joined Cases C-201/10 and C-202/10 *Ze Fu Fleischhandel and Vion Trading* [2011] ECR I-3545, paragraph 24).

53 That limitation rule is applicable to the irregularities referred to in Article 4 of Regulation No 2988/95 which are detrimental to the European Union's financial interests (see Case C-278/02 *Handlbauer* [2004] ECR I-6171, paragraph 34, and *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others*, paragraph 22).

54 In the case in the main proceedings and in the light of the circumstances of that case, the referring court seeks to ascertain, as regards the determination of the point at which the limitation period begins to run, whether it is the date on which the aid was paid to the recipient or the date on which the recipient used the subsidy to pay the provider recruited in disregard of the rules governing the award of public service contracts laid down by Directive 92/50.

55 In that regard, since funds from the European Union budget cannot be used for operations carried out in breach of the provisions of Directive 92/50, it must be held that, in circumstances such as those at issue in the case in the main proceedings, the funds granted to the recipient are unduly received from the point when the recipient breaches those provisions.

56 In respect of such a breach of the tendering rules laid down by Directive 92/50, which was adopted in order to eliminate barriers to the freedom to provide services and to protect the interests of traders established in a Member State who wish to offer services to contracting authorities established in another Member State (see, in particular, Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 32), it should be recalled that the adverse effect on the freedom to provide services arising from the infringement of Directive 92/50 must be found to subsist throughout the entire performance of the contracts concluded in breach of the directive (see Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, paragraph 36, and Case C-503/04 *Commission* v *Germany* [2007] ECR I-6153, paragraph 29).

57 Indeed, although it is true that certain provisions of the public procurement directives permit the Member States to preserve the effects of contracts concluded in breach of those directives and thus seek to protect the legitimate expectations of the parties to such contracts, the effect of those provisions nevertheless cannot be, unless the scope of the FEU Treaty provisions establishing the internal market is to be reduced, that the contracting authority's conduct vis-à-vis the European Union budget is regarded as in conformity with European Union law following the conclusion of such contracts (see, to that effect, Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, paragraph 39, and Case C-503/04 *Commission* v *Germany*, paragraph 33).

58 It follows that, in circumstances such as those at issue in the case in the main proceedings, the infringement by a recipient of an ERDF subsidy of the rules laid down by Directive 92/50 for the purpose of implementing the subsidised operation, which infringement involves an unjustified item of expenditure and thus prejudices the European Union budget, continues throughout the entire period of performance of the contract unlawfully concluded between the provider and the recipient of the subsidy, with the result that such an irregularity must be considered to be a 'continuous irregularity', within the meaning of the second subparagraph of Article 3(1) of Regulation No 2988/95.

59 In accordance with that provision, the limitation period applicable to the recovery of a subsidy wrongly paid to the recipient runs from the day on which the irregularity ceased. Consequently, in circumstances such as those at issue in the case in the main proceedings, since the contract to implement the operation subsidised by the ERDF was not rescinded but was performed, the limitation of four years laid down by the first subparagraph of Article 3(1) of Regulation No 2988/95 begins to run from the day on which the performance of the unlawfully awarded public contract is completed.

60 As regards the issue of whether the transmission of an audit report finding that public procurement rules were infringed constitutes an act of investigation or legal proceedings concerning the irregularity such as to interrupt the limitation period pursuant to

the third subparagraph of Article 3(1) of Regulation No 2988/95, it should be recalled that, in general, limitation periods fulfil the function of ensuring legal certainty and that 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).

61 However, when the national authorities send a person a report drawing attention to an irregularity in which that person is said to have played a part in connection with a specific 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 (Case C-367/09 *SGS Belgium and Others* [2010] ECR I-10761, paragraph 69).

62 In the light of the foregoing, the answer to question 2(b), first and second indents, is that, in circumstances such as those at issue in the main proceedings, where, in its capacity as contracting authority, the recipient of an ERDF subsidy has not complied with the public procurement rules of Directive 92/50 when awarding the contract whose purpose is to implement the subsidised operation:

— the irregularity in question must be considered to be a 'continuous irregularity', within the meaning of the second subparagraph of Article 3(1) of Regulation No 2988/95, and, consequently, the limitation period of four years laid down by that provision to recover the subsidy wrongly paid to the recipient begins to run from the day on which the performance of the unlawfully awarded public contract is completed;

— the transmission to the recipient of the subsidy of an audit report finding there to have been a failure to comply with the public procurement rules and recommending, as a result, that the national authority demand repayment of the sums paid constitutes a sufficiently specific act relating to investigation or legal proceedings concerning the 'irregularity', within the meaning of the third subparagraph of Article 3(1) of Regulation No 2988/95.

Question 2(b), third indent

63 By question 2(b), third indent, the referring court asks, in essence, whether, in the light of the principle of proportionality, a Member State may apply a limitation period of 30 years to the recovery of an advantage wrongly obtained from the European Union budget as a longer limitation period for the purposes of Article 3(3) of Regulation No 2988/95.

64 Under the possibility provided for in that provision, the Member States retain wide discretion with regard to the fixing of longer limitation periods which they intend to apply in cases involving an irregularity that is detrimental to the European Union's financial interests (*Corman*, paragraph 54).

65 However, in light of the objective of protecting the European Union's financial interests, an objective for which the European Union legislature considered that a limitation period of four, or indeed even three, years was already in itself sufficient to enable the national authorities to bring proceedings in respect of an irregularity detrimental to those financial interests and capable of leading to the adoption of a measure such as recovery of a wrongly obtained advantage, it is apparent that to grant those authorities a period of 30 years goes beyond what is necessary for a diligent public service (*Ze Fu Fleischhandel and Vion Trading*, paragraph 43).

66 The answer to the third indent of question 2(b) is therefore that, where the Member States exercise the right afforded them by Article 3(3) of Regulation No 2988/95, the principle of proportionality precludes application of a 30-year limitation period to the recovery of an advantage wrongly obtained from the European Union budget.

Question 2(c)

67 This question was referred only in the event that question 2(a) was answered in the negative.

68 In view of the answer given to question 2(a), it is not necessary to answer question 2(c) referred by the national court.

Costs

69 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. **In circumstances such as those at issue in the case in the main proceedings, the third indent of Article 23(1) of Council Regulation (EEC) No 4253/88 of 19 December 1998 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993, read in conjunction with Article 7(1) of Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, as amended by Council Regulation (EEC) No 2081/93 of 20 July 1993, constitutes a legal basis enabling national authorities to recover from the recipient – without there being any need for authority to do so under national law – the whole of a subsidy granted from the European Regional Development Fund (ERDF) on the ground that, in its capacity as 'contracting authority', within the meaning of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by Council Directive 93/36/EEC of 14 June 1993, the recipient has not complied with the requirements of that directive so far as concerns the award of a public service contract whose purpose was the implementation of the operation for which the recipient was granted the subsidy.**

2. **The failure, by a contracting authority that receives an ERDF subsidy, to comply with the public procurement rules laid down by Directive 92/50 when awarding the contract whose purpose is to implement the subsidised operation constitutes an 'irregularity', within the meaning of Article 1 of Council**

Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests, even if the competent national authority could not have been unaware, when the subsidy was granted, that the recipient had already decided which provider it would entrust with the implementation of the subsidised operation.

3. In circumstances such as those at issue in the main proceedings, where, in its capacity as contracting authority, the recipient of an ERDF subsidy has not complied with the public procurement rules of Directive 92/50 when awarding the contract whose purpose is to implement the subsidised operation:

— the irregularity in question must be considered to be a 'continuous irregularity', within the meaning of the second subparagraph of Article 3(1) of Regulation No 2988/95, and, consequently, the limitation period of four years laid down by that provision to recover the subsidy wrongly paid to the recipient begins to run from the day on which the performance of the unlawfully awarded public contract is completed;

— the transmission to the recipient of the subsidy of an audit report finding there to have been a failure to comply with the public procurement rules and recommending, as a result, that the national authority demand repayment of the sums paid constitutes a sufficiently specific act relating to investigation or legal proceedings concerning the 'irregularity', within the meaning of the third subparagraph of Article 3(1) of Regulation No 2988/95.

4. Where the Member States exercise the right afforded them by Article 3(3) of Regulation No 2988/95, the principle of proportionality precludes application of a 30-year limitation period to the recovery of an advantage wrongly obtained from the European Union budget.

[Signatures]