JUDGMENT OF THE COURT (Second Chamber)

24 June 2004 *

In Case C-278/02

REFERENCE to the Court under Article 234 EC by the Berufungssenat I der Region Linz bei der Finanzlandesdirektion für Oberösterreich (Austria) for a preliminary ruling in the proceedings brought by

Herbert Handlbauer GmbH,

on the interpretation 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 (OJ 1995 L 312, p. 1),

* Language of the case: German.

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, J.N. Cunha Rodrigues, J.-P. Puissochet, R. Schintgen (Rapporteur) and N. Colneric, Judges,

Advocate General: A. Tizzano,
Registrar: M. Múgica Arzamendi, Principal Administrator,

after considering the written observations submitted on behalf of:

— Herbert Handlbauer GmbH, by L. Harings, Rechtsanwalt,

— the Austrian Government, by H. Dossi, acting as Agent,

— the Commission of the European Communities, by G. Braun and M. Niejahr, acting as Agents,

having regard to the Report for the Hearing

after hearing the oral observations of Herbert Handlbauer GmbH, represented by L. Harings, of the Austrian Government, represented by J. Bauer and H. Schauer,

acting as Agents, of the United Kingdom Government, represented by K. Manji, acting as Agent, assisted by T. Eicke, barrister, and the Commission, represented by M. Niejahr, at the hearing on 4 November 2003,

after hearing the Opinion of the Advocate General at the sitting on 15 January 2004,

gives the following

Judgment

1 By order of 11 July 2002, received at the Court of Justice on 29 July 2002, the Berufungssenat I der Region Linz bei der Finanzlandesdirektion für Oberösterreich (Linz Regional Appeal Board I at the Provincial Finance Directorate for Upper Austria) referred to the Court for a preliminary ruling under Article 234 EC two questions on 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).

2 Those questions were raised in a dispute between Herbert Handlbauer GmbH ('Handlbauer') and Zollamt Salzburg/Erstattungen (Salzburg customs office/ Reimbursements, hereinafter 'the Zollamt') concerning the requirement to repay an advance on export refund in respect of a consignment of beef or veal paid in 1996.

Legal framework

Community law

3 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.'

4 Article 3 of the regulation 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.

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

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

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

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

5 Article 4 of Regulation No 2988/95 concerns repayment of any advantage wrongly received as follows:

'1. As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage:

— by an obligation to pay or repay the amounts due or wrongly received,

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

2. Application of the measures referred to in paragraph 1 shall be limited to the withdrawal of the advantage obtained plus, where so provided for, interest which may be determined on a flat-rate basis.

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

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

6 Article 5 of the regulation lays down the administrative penalties to which intentional irregularities or those caused by negligence may lead, including the payment of an administrative fine or the total or partial removal or withdrawal of an advantage.

7 Finally, Article 8 of Regulation No 2988/95 requires the Member States to put in place the necessary checks to ensure the regularity of transactions involving the Communities' financial interests, the nature and frequency of the checks and inspections on the spot, the procedure for performing them being determined as necessary by sectoral rules in such a way as to ensure the uniform application of the relevant measures.

The system of export refunds on agricultural products

8 Article 11(1) of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1987 L 351, p. 1), as amended by Commission Regulation (EC) No 2945/94 of 2 December 1994 (OJ 1994 L 310, p. 57), provides:

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

(a) half the difference between the refund requested and the refund applicable to the actual exportation;

(b). ...'

9 According to Article 11(3):

'Without prejudice to the obligation to pay any negative amount as referred to in the fourth subparagraph of paragraph 1, where a refund is unduly paid, the beneficiary shall reimburse the amounts unduly received — which includes any sanction applicable pursuant to the first subparagraph of paragraph 1 — plus the interest calculated on the basis of the time elapsing between payment and reimbursement. ...'

10 Furthermore, Council Regulation (EEC) No 4045/89 of 21 December 1989 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC (OJ 1989 L 388, p. 18) requires, at Article 2, the Member States to carry out annually a scrutiny on a selection of undertakings which make transactions under the aforementioned system of financing. The selection is to be made by reference to the importance of the undertakings and other risk factors.

The Community Customs Code

11 Article 221(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ('CCD') (OJ 1992 L 302, p. 1) provides:

'As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.'

12 According to Article 221(3):

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

National law

13 Article 5 of the Ausfuhrerstattungsgesetz (Law on the implementation of export, BGBl. 1994/660, 'the AEG') provides for the repayment of refunds wrongly granted. Although it does not make direct provision for a limitation period for such repayment, Paragraph 1(5) thereof refers in that respect to the provisions applicable to customs matters.

14 In that connection, Article 74(2) of the Zollrechts-Durchführungsgesetz (Customs Law Implementation Law, BGBl. I 1998/13, 'the ZollR-DG'), in the version in force at the material time, provides:

'So far as concerns import duties and export duties, the limitation period shall be of three years from the date on which the customs debt was incurred. So far as concerns import duties and export duties wrongly unpaid, that period shall be of 10 years, on condition, however, that the customs authorities, following a financial

crime which may only be pursued before a court or appeal board, cannot or cannot accurately identify the debt within three years from the date on which it was incurred. So far as concerns other benefits in kind, the limitation period shall be fixed in accordance with Community law in the field of duties.'

The main proceedings and the questions referred to the Court

15 On 3 September 1996, Handlbauer exported to Hungary 958 pieces of frozen beef of a total weight of 19 912.35 kg. For that transaction, Handlbauer was granted on 24 September 1996 an advance towards the export refund of ATS 202 769.00. The security agreed for the advance was released on 12 December 1996.

16 On 20 December 1999, Handlbauer was notified that the External and Undertakings Inspection/Customs of the Hauptzollamt (Principal Customs Office) Linz (Austria) was to carry out a scrutiny of exports in 1996 in the market organisations for beef and veal and for pigmeat. It is apparent from the order for reference that Handlbauer was included among the undertakings to be scrutinised under Regulation No 4045/89 because several irregularities had already been noted in the exports for 1995.

17 In the course of the scrutiny carried out in 2000 it was ascertained that, in numerous cases, the Community origin of the meat exported in 1996 could not be proved.

18 Consequently, by decision of 20 January 2001, the Zollamt, pursuant to Article 5 of the AEG in conjunction with Article 11(3) of Regulation No 3665/87, ordered Handlbauer to repay the advance on the refund and imposed upon it a penalty of ATS 101 384.00 in accordance with Article 11(1)(a) of Regulation No 3665/87.

19 Following dismissal of its administrative appeal against that decision, Handlbauer brought an appeal before the referring court, claiming that the three-year limitation period, mentioned in both Article 221(3) of the CCC and Article 74(2) of the ZollR-DG, had expired. That situation was not affected by Regulation No 2988/95, which merely constitutes a set of general rules for the Member States which is not such as to produce direct effects to the detriment of operators or to constitute a legal basis for the imposition of penalties.

20 According to Handlbauer, the limitation period began to run on 24 September 1996, when the export refund was granted, or on 12 December 1996, when the security was released. However, the decisions regarding the claim for repayment of the export refund and the corresponding penalty were taken on 20 January 2001.

21 In reply, the Zollamt referred to Article 3(1) of Regulation No 2988/95 which it claims is directly applicable and provides for a limitation period of four years which may be interrupted by inspections such as those carried out on Handlbauer's premises.

22 It is in those circumstances that the Berufungssenat I der Region Linz bei der Finanzlandesdirektion für Oberösterreich decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1 Is ... Regulation ... No 2988/95 ... directly applicable in the Member States, in particular in the field of organisations of the market (export refunds) where there are irregularities?

Is Article 3(1) of the said regulation, which lays down a limitation period of four years for proceedings concerning irregularities, directly applicable by the customs authorities of the Member States?

2 Is the notification of a customs inspection made to the relevant responsible persons of an undertaking an act relating to investigation or legal proceedings which interrupts the limitation period of four years under Article 3(1) of the said regulation, if the inspection takes place under Regulation (EEC) No 4045/89 because of the generally known risk or the frequency of acts prejudicial to the financial interests of the Community in implementing the common agricultural policy?'

23 During the course of the proceedings, the Court was informed that, as a result of the entry into force of the Abgaben-Rechtsmittel-Reformgesetz (Law reforming appeal procedures in fiscal matters, BGBl. 2002/97), the Unabhängiger Finanzsenat, Außenstell Klagenfurt (Austria) now has jurisdiction in the case in the main proceedings.

Question 1

24 By its first question, set out in two parts which should be taken together, the referring court is asking, in essence, whether Article 3(1) of Regulation No 2988/95 is directly applicable in the Member States, including in the field of export refunds for agricultural products, notwithstanding the existence of national customs measures which provide for a shorter limitation period.

25 By virtue of the very nature of regulations and of their function in the system of sources of Community law, the provisions of those regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application (Case 93/71 *Leonesio* [1972] ECR 287, paragraph 5).

26 Some of their provisions may none the less necessitate, for their implementation, the adoption of measures of application by the Member States (C-403/98 *Monte Arcosu* [2001] ECR I-103, paragraph 26).

27 However, that is not the case as regards Article 3(1) of Regulation No 2988/95 which, 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 nor does it require them to adopt implementation measures.

28 The fact that sectoral rules may make provision for a shorter period which may not be less than three years, in accordance with the first subparagraph of Article 3(1) of Regulation No 2988/95, or that, in accordance with the third subparagraph thereof, Member States may apply a period which is longer, is not such as to call in question the immediate applicability of Article 1(1) of the regulation precisely where such derogatory rules are absent in national or Community sectoral legislation.

29 However, at the material time, no Community sectoral provision in the field of export refunds for agricultural products provided for a shorter limitation period for the repayment of amounts wrongly paid. By the same token, it is apparent from the case-file that there was no Austrian provision of the time which provided for a limitation period longer than four years.

30 Handlbauer and the Commission take the view, however, that Article 3(1) of Regulation No 2988/95 does not concern the repayment of financial advantages wrongly received. According to Handlbauer, that provision concerns exclusively the fines to be imposed for irregularities, whereas the Commission is of the view that it covers only measures providing for an administrative fine under Article 5 of Regulation No 2988/95.

31 In that regard, it should be borne in mind 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 combat 'fraud against the Communities' financial interests ... for all areas ...'.

32 Article 3(1) of Regulation No 2988/95 fixes a limitation period for proceedings at four years which runs from the time when the irregularity is committed, such irregularity, according to Article 1(2) thereof, being 'any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities ...'.

33 As the Austrian and United Kingdom Governments observed, such a definition covers intentional irregularities or irregularities arising out of negligence which, in accordance with Article 5 of Regulation No 2988/95, may result in an administrative fine as well as those irregularities which entail nothing more than the withdrawal of the wrongly obtained advantage in accordance with Article 4 thereof.

34 It follows that Article 3(1) of Regulation No 2988/95 is applicable both to the irregularities referred to in Article 5 and to those referred to in Article 4 thereof which are detrimental to the Communities' financial interests.

35 Accordingly, the answer to the first question should be that Article 3(1) of Regulation No 2988/95 is directly applicable in the Member States, including in the field of export refunds on agricultural products, in the absence of sectoral Community 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.

Question 2

36 By its second question, the national court is asking, in essence, whether the third subparagraph of Article 3(1) of Regulation No 2988/95 should be interpreted as meaning that notification of a customs inspection made to the undertaking involved

constitutes an act relating to investigation or legal proceedings concerning the irregularity which interrupts the limitation period referred to in the first subparagraph of Article 3(1).

37 According to Handlbauer, the principles of legal certainty and the protection of legitimate expectations require that only acts relating to investigation or legal proceedings which are based on a clear suspicion that an irregularity has been committed can interrupt the limitation period under the third subparagraph of Article 3(1) of Regulation No 2988/95. By contrast, checks within the meaning of Article 8 of Regulation No 2988/95, which include inspections into undertakings carried out under Regulation No 4045/89, cannot have such an effect. At most, they might result in the execution of acts relating to investigation or legal proceedings interrupting the limitation period.

38 The Austrian Government takes the view that, in this case, the limitation period was, in any event, interrupted, in accordance with the third subparagraph of Article 3(1) of Regulation No 2988/95, by the inspections carried out at Handlbauer's premises.

39 The Commission is of the view that notification of an inspection pursuant to Regulation No 4045/89 intended to detect any specific irregularities already constitutes, of itself, an act which interrupts the limitation period. Indeed, the third subparagraph of Article 3(1) of Regulation No 2988/95 does not require that the act relating to an investigation should relate to a specific irregularity since it cannot be ascertained until the inspection is completed.

40 In that connection, it must be pointed out that, in general, limitation periods fulfil the function of ensuring legal certainty (Case 41/69 *ACF Chemiefarma* v

Commission [1970] ECR 661, paragraph 19). Such a function would not be fully fulfilled, as the Advocate General points out in paragraph 82 et seq. of his Opinion, 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 bore no relation to any suspicion concerning the existence of irregularities regarding sufficiently precisely circumscribed transactions.

41 In the present case, it is clear from the case-file that the notification served on Handlbauer regarding the decision to carry out an inspection under Regulation No 4045/89 related to all its exports in 1996 without distinction in the context of the common organisations of the markets in beef and veal and for pigmeat. Such notification, which contained no mention of any sufficiently defined suspicions concerning the existence of irregularities, could not, as such, interrupt the limitation period for the repayment of the refund granted on 24 September 1996.

42 It is for the national court to ascertain whether the subsequent acts carried out by the national authorities in the context of or at the end of the inspection notified on 20 December 1999 concerned one or several specific irregularities surrounding the exports in respect of which the refund in issue was granted and were, consequently, such as to interrupt the limitation period for the repayment of the abovementioned refund.

43 In view of the foregoing considerations, the answer to the second question must be that the third subparagraph of Article 3(1) of Regulation No 2988/95 is to be interpreted as meaning that notification of a customs inspection made to the undertaking involved does not constitute an act relating to investigation or legal proceedings which interrupts the limitation period of four years under the first subparagraph of Article 3(1) of the said regulation unless the transactions to which the suspicion of the existence of irregularities relates are sufficiently precisely defined by the act.

Costs

44 The costs incurred by the Austrian and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Berufungssenat I der Region Linz bei der Finanzlandesdirektion für Oberösterreich by order of 11 July 2002, hereby rules:

1. **Article 3(1) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests is directly applicable in the Member States, including in the field of export refunds on agricultural products, in the absence of sectoral Community 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.**

2. **The third subparagraph of Article 3(1) of Regulation No 2988/95 must be interpreted as meaning that notification of a customs inspection made to the undertaking involved does not constitute an act relating to investigation or legal proceedings which interrupts the limitation period of four years under the first subparagraph of Article 3(1) of the said regulation unless the transactions to which the suspicion of the existence of irregularities relates are sufficiently precisely defined by the act.**

Timmermans Cunha Rodrigues Puissochet

Schintgen Colneric

Delivered in open court in Luxembourg on 24 June 2004.

Registrar

R. Grass

President of the Second Chamber

C. W. A. Timmermans