Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 15 May 2019[1]

Case C-378/18

Landwirtschaftskammer Niedersachsen
v
Reinhard Westphal

(Request for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Germany))

(Reference for a preliminary ruling — Common agricultural policy — Community aid schemes — Area payments — Recovery of undue payments — Penalties — Limitation — Start of the limitation period — Possible application of the rules on protection of the EU's financial interests)

1. In 2001 and 2002 a German farmer applied for aid for agricultural areas under Regulation (EC) No 1251/1999.[2] He received the corresponding payments some months after each application but, in 2006, the Landwirtschaftskammer Niedersachsen (Chamber of Agriculture of Lower Saxony, Germany; 'the Chamber of Agriculture') established that the farmer had incorrectly declared the area of his agricultural land and therefore it decided to remove the aid in its entirety as an appropriate penalty for that conduct.

2. The proceedings before the German courts have focused on the limitation period applicable to those events, an issue related to the retroactivity *in melius* of certain provisions of EU law which introduced a more lenient system of penalties.

1 Original language: Spanish.

2 Council Regulation of 17 May 1999 establishing a support system for producers of certain arable crops (OJ 1999 L 160, p. 1).

I. Legislative framework

A. Provisions of the common agricultural policy

1. Regulation (EEC) No 3887/92[3]

3. Pursuant to Article 9(2):

'2. If the area actually determined is found to be less than that declared in an "area" aid application, the area actually determined on inspection shall be used for calculation of the aid. However, except in cases of *force majeure*, the area actually determined on inspection shall be reduced by twice the difference found if this is more than 3% or two hectares but not more than 20% of the determined area.

If the difference is more than 20% of the determined area no area-linked aid shall be granted.

…

For the purposes of this Article, "determined area" means the area for which all of the conditions laid down in the rules have been met ...'

2. Regulation (EC) No 2419/2001[4]

4. Article 32(1) provides:

'1. If, in respect of a crop-group, the area declared exceeds the area determined in accordance with Article 31(2), [5] the aid shall be calculated on the basis of the area determined reduced by twice the difference found if that difference is more than either 3% or two hectares but no more than 20% of the area determined.

If the difference is more than 20% of the area determined, no area-linked aid shall be granted for the crop-group concerned.'

5. Article 49 (headed 'Recovery of undue payments') reads:

'1. If undue payment is made, the farmer shall repay the amount in question plus interest calculated in accordance with paragraph 3.

…

5. The repayment obligation referred to in paragraph 1 shall not apply if the period which elapsed between the date of the payment of the aid and that of the first notification to the beneficiary by the competent authority concerning the undue nature of the payment concerned is more than ten years.

3 Commission Regulation of 23 December 1992 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391, p. 36), as amended by Commission Regulation (EC) No 2801/1999 of 21 December 1999 (OJ 1999 L 340, p. 29).

4 Commission Regulation of 11 December 2001 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes established by Council Regulation (EEC) No 3508/92 (OJ 2001 L 327, p. 11).

5 That article sets the basis for calculating the amount of aid.

However, the period referred to in the first subparagraph shall be limited to four years if the beneficiary acted in good faith.

6. Amounts to be recovered as a consequence of the application of reductions and exclusions pursuant to Article 13 and Title IV shall be subject to a prescription period of four years.

…'

6. Article 52a, headed 'Prescription with regard to aid applications relating to marketing years and premium periods which started before 1 January 2002', inserted by Article 1(13) of Regulation (EC) No 118/2004,[6] provides:

'By way of derogation from Article 54(2) and without prejudice to more favourable rules on limitation periods laid down by Member States, Article 49(5) shall also apply to aid applications relating to the marketing years and premium periods that started before 1 January 2002, unless the beneficiary has already been notified by the competent authority of the undue nature of the payment concerned before 1 February 2004.'

7. Although Article 80(1) of Regulation (EC) No 796/2004[7] repealed Regulation No 2419/2001, the provisions on limitation were retained in Article 73(1), (5) and (6) of the former regulation until it was repealed, on 1 January 2010, by Article 86(1) of Regulation (EC) No 1122/2009.[8] The latter was replaced in turn by Regulation (EU) No 640/2014,[9] in force since 1 January 2015.

B. Provisions on the protection of the EU's financial interests. Regulation (EC, EURATOM) No 2988/95[10]

8. The provisions governing the fight against fraud, in order to protect the EU's financial interests, are contained in Regulation No 2988/95, which is a general piece of legislation ancillary to the sectoral rules governing, inter alia, agriculture.

9. The ninth recital reads:

'Whereas Community measures and penalties laid down in pursuance of the objectives of the common agricultural policy form an integral part of the aid systems; whereas they pursue their own ends …; whereas their effectiveness must be ensured by the immediate effect of Community rules ...'

6 Commission Regulation of 23 January 2004 amending Regulation (EC) No 2419/2001 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes established by Council Regulation (EEC) No 3508/92 (OJ 2004 L 17, p. 7).

7 Commission Regulation (EC) No 796/2004 of 21 April 2004 laying down detailed rules for the implementation of cross-compliance, modulation and the integrated administration and control system provided for in Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers (OJ 2004 L 141, p. 18).

8 Commission Regulation of 30 November 2009 laying down detailed rules for the implementation of Council Regulation (EC) No 73/2009 as regards cross-compliance, modulation and the integrated administration and control system, under the direct support schemes for farmers provided for that Regulation, as well as for the implementation of Council Regulation (EC) No 1234/2007 as regards cross-compliance under the support scheme provided for the wine sector (OJ 2009 L 316, p. 65).

9 Commission Delegated Regulation (EU) No 640/2014 of 11 March 2014 supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to the integrated administration and control system and conditions for refusal or withdrawal of payments and administrative penalties applicable to direct payments, rural development support and cross compliance (OJ 2014 L 181, p. 48).

10 Council Regulation of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1).

10. Article 1(2), which is within Title I ('General principles'), provides:

'2. "Irregularity" shall mean any infringement of a provision of [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 Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the [Union], or by an unjustified item of expenditure.'

11. In accordance with Article 2(2):

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

12. Article 3 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 …

In the case of continuous or repeated irregularities, the limitation period shall run from the day on which the irregularity ceases …

The limitation period shall be interrupted by any act of the competent authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity. The limitation period shall start again following each interrupting act.

…

2. The period for implementing the decision establishing the administrative penalty shall be three years …

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.'

II. Facts and procedure in the case at first instance

13. I shall set out the account of the facts as it appears in the order for reference (several sections of which I shall transcribe *verbatim*), while also noting that a number of these facts are somewhat unclear.

14. Mr Westphal, a farmer, applied for area payments in May 2000 and May 2001[11] relating to the premium periods concerned, in accordance with the support system for producers of certain arable crops.

11 The case-file forwarded by the referring court includes the Chamber of Agriculture's decision of 23 July 2007, to which I shall refer below, and in which, however, it states that the applications were lodged in March 2000 and March 2001.

15. The Chamber of Agriculture granted the payments and paid each of them in the years in which the applications were submitted. [12]

16. 'In the context of an on-the-spot check [on 12] January 2006, the [Chamber of Agriculture] established irregularities in the data on the set-aside areas. After hearing Mr Westphal, it partly annulled, inter alia, the decisions to grant aid for the years 2000 and 2001 by decision of 23 July 2007 and demanded repayment of the overpayments. When calculating them, it held that, as a penalty for an over-declaration for the set-aside areas, no aid at all would be granted.' [13]

17. Mr Westphal brought an action against that decision. 'In the appeal proceedings, he accepted the removal of the grants and the repayments insofar as they were not based on the penalty. … Regarding the remaining recovery based on the penalty, the Court of Appeal annulled the decision of 23 July 2007'. [14]

18. The appeal court relied on the following arguments in support of its judgment: [15]

– The substantive requirements for imposition of the penalty under the second subparagraph of Article 9(2) of Regulation (EEC) No 3887/92 were met. As regards the two years at issue, the difference between the set-aside area declared and the set-aside area actually determined was more than 20% of the latter.

– However, the penalty had become subject to limitation.

– According to the principle of retroactive application of the more lenient penalty (second sentence of Article 2(2) of Regulation No 2988/95), the limitation rules under Article 49(5) and (6) of Regulation No 2419/2001 were applicable.

– According to those rules, the penalty had become subject to limitation because more than four years had elapsed between the dates of the payments of the aid and the date on which the applicant was first notified by the competent authority, following the on-the-spot check, that the aid had been wrongly granted to him.

– Those limitation rules are more lenient than the otherwise applicable limitation rule (the first sentence of the second subparagraph of Article 3(1) of Regulation No 2988/95) because, under the latter provision, in cases of repeated irregularity, like this one, the limitation period only begins when the irregularity ceases.

19. The Chamber of Agriculture brought an appeal against that judgment to the referring court.

III. Questions referred for a preliminary ruling and procedure before the Court of Justice

20. The referring court agrees with the first-instance court that the requirements for imposition of the penalty under Regulation No 3887/92 were satisfied, particularly in the light of the difference of more than 20% between the declared area and the determined area.

12 It may be inferred from the Chamber of Agriculture's decision that the grants of aid were notified on 30 November 2000 and 30 November 2001.

13 Order for reference, paragraph 2.

14 Ibid., paragraph 3.

15 Ibid., paragraph 4.

21. However, the referring court is unsure about the application of the criterion of the most lenient penalty, arguing that:

– Regulation No 3887/92 did not contain rules on limitation periods for penalties and therefore the rules under the first and second subparagraphs of Article 3(1) of Regulation No 2988/95 are applicable; the limitation period of four years laid down therein runs from the time when the repeated irregularity ceases. [16]

– German law did not exercise the option of introducing 'a period which is longer', as referred to in Article 3(3) of Regulation No 2988/95.

– As a result of the adoption, for the first time, in Article 49(5) and (6) of Regulation No 2419/2001 of sectoral rules on penalties for recovery of undue payments, including repayments in respect of reductions or exclusions, the starting point of the limitation period was amended and the payment of the aid was taken as the reference point, although the four-year period was retained.

22. Since Article 49(6) of Regulation No 2419/2001 does not indicate when the limitation period starts for amounts to be recovered as a consequence of the application of reductions and exclusions, the referring court asks:

– Whether the *dies a quo* referred to in Article 49(5) (the date of payment of the aid) must be applied. If that is the case, the limitation period will have passed.

– If, on the other hand, that gap must be filled by relying on the second subparagraph of Article 3(1) of Regulation No 2988/95, as the general ancillary rule, the limitation period will not have passed.

23. According to the referring court, the principle of application of the less severe penalty (second sentence of Article 2(2) of Regulation No 2988/95) is applicable, even though the new sectoral rules laid down in Regulation No 2419/2001 entered into force on 1 January 2002, in other words, after payment of the aid. [17] Moreover, the latter regulation left the rules on aid and penalties unchanged and therefore, in accordance with case-law, it is possible to rely on that principle despite the different legislative context. [18]

24. It would remain to be determined whether the new rules on limitation are *provisions which impose administrative penalties* for the purposes of the second sentence of Article 2(2) of Regulation No 2988/95. According to the referring court, German criminal courts treat the limitation period for criminal offences as part of procedural law, so that the principle of the application of the most lenient law [19] only applies if the substantive criminal penalty is made more severe between commission of the act and judgment, and, as a result, the limitation period changes, which has not occurred in this case. In any event, account must be taken of *fairness* and the fact that the introduction of new limitation rules necessarily involves a fresh assessment of the rules by the legislature.

25. If the less severe limitation rule were not applicable, Article 49(6) of Regulation No 2419/2001 would not apply. The possibility would then arise of the application by analogy of Article 49(5), even though the wording of the provision excludes this. In the referring court's view, it is logical that the wording of Article 52a of Regulation No 2419/2001 was founded on the idea that Article 49(6) does not require a specific rule because a coherent system was ensured by the second sentence of Article 2(2) of Regulation No 2988/95. The referring court asks whether there is a regulatory gap which can be closed by analogy.

16 The referring court does not question the classification as a repeated irregularity.

17 The referring court cites the judgment of 1 July 2004, *Gerken*, C-295/02, EU:C:2004:400, paragraphs 53 to 58.

18 The referring court cites, in that connection, the judgment of 11 March 2008, *Jager*, C-420/06, EU:C:2008:152, paragraphs 68 and 73.

19 Laid down in Paragraph 2(3) of the Strafgesetzbuch (German Criminal Code; 'StGB').

26. In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court, Germany) decided to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the limitation period within the meaning of Article 49(6) of Regulation (EC) No 2419/2001 begin with the payment of the aid or is the beginning of that period governed by the first sentence of the second subparagraph of Article 3(1) of Regulation (EC, Euratom) No 2988/95?

(2) Are the limitation rules under Article 49(6) of Regulation (EC) No 2419/2001 or Article 3(1) of Regulation (EC, Euratom) No 2988/95 provisions which impose administrative penalties within the meaning of the second sentence of Article 2(2) of Regulation (EC, Euratom) No 2988/95?

(3) Can Article 52a of Regulation (EC) No 2419/2001 with its provision regarding the retroactive application of the limitation rule of Article 49(5) of Regulation (EC) No 2419/2001 also be applied analogously to Article 49(6) of Regulation (EC) No 2419/2001?'

27. The referring court explains that, if the first sentence of the second subparagraph of Article 3(1) of Regulation No 2988/95 is applicable (first question), the other questions do not need to be answered. On the other hand, if it is necessary to answer the second question and that answer is affirmative, there will be no need to answer the third question.

28. The order for reference was received at the Court of Justice on 8 June 2018, and written observations were lodged within the time limit by the Chamber of Agriculture and the European Commission. It was not considered necessary to hold a hearing.

IV. Legal analysis

A. The first question

1. Relevant limitation rules

29. It is apparent from the account of the facts in the order for reference that, by decision of 23 July 2007, the Chamber of Agriculture imposed on Mr Westphal a *penalty* within the meaning of the second subparagraph of Article 9(2) of Regulation No 3887/92. The penalty related to the aid applications submitted in May 2000 and May 2001 for the respective marketing years, which were granted in the same years. The competent administrative authority did not intervene for the first time until January 2006 when it carried out an on-the-spot-check and discovered the difference in areas, which gave rise to the uncertainties regarding the limitation period.

30. The questions referred for a preliminary ruling appear to assume that the limitation period (four years) stipulated in Article 49(6) of Regulation No 2419/2001 is applicable to this case. However, for the reasons I shall set out below, I do not believe that that is the relevant paragraph for the purposes of resolving the case.

31. The main reason is the nature of the reductions and exclusions to which Article 49(6) of Regulation No 2419/2001 refers in connection with the limitation period. A reading of Articles 13 (late submission of applications), 32 (reductions and exclusions in cases of overdeclaration of areas)[20] and 38 (those in respect of differences in the number of livestock) of that regulation suggests that it refers to financial penalties, that is the payment of sums exceeding a calculation whereby the amount to be recovered by the administrative authority is proportional to the overdeclaration.

20 The provision which replaced Article 9 of Regulation No 3887/92.

32. The reductions and exclusions are effectively designed as a *penalty* within the meaning of Article 5(1)(b) of Regulation No 2988/95,[21] since they require the applicant to pay an amount greater than the amounts wrongly received. The punitive nature of those legal provisions is supported by the case-law of the Court, which has not hesitated to categorise them as penalties.[22]

33. The amounts to be recovered *as a consequence of* the reductions and exclusions are, naturally, calculated in the relevant administrative decisions imposing the penalties. Those amounts become due on the date of the decisions. Further, just as the general legislation (first subparagraph of Article 3(2) of Regulation No 2988/95) fixes a 'period for implementing the decision establishing the administrative penalty [of] three years', the sectoral provision (Article 49(6) of Regulation No 2419/2001) lays down a limitation period of four years, which must be construed as the deadline within which administrative authorities can collect the amounts recoverable as a result of the penalty imposed.[23]

34. In my view, that interpretation avoids the absurdity of establishing a limitation period of only four years for conduct which, since it is definitely unlawful, is accompanied by penalties (paragraph 6), while, on the other hand, establishing a period of up to 10 years for other, less serious conduct (paragraph 5) which simply creates a repayment obligation. The only explanation I can find is that the time limits are different in nature and, as I have just stated, paragraph 6 refers to execution of the penalty itself.

35. In these proceedings there appears to be no discussion regarding the limitation period for *enforcing* the *penalties* (reductions and exclusions) which were imposed by the decision of the Chamber of Agriculture of 23 July 2007.[24] The dispute is confined to the limitation period for the *obligation to repay* the amounts paid to the farmer as aid for the marketing years 2000 and 2001, which he received unduly because they corresponded to areas which differed from the actual areas.

36. Accordingly, I believe that the interpretation of Article 49(6) of Regulation No 2419/2001 is not relevant to this case.

37. Regulation No 1251/1999, under which Mr Westphal's applications were submitted, did not contain any provisions governing the limitation period for the repayment obligations derived from irregularities like those at issue. Nor were any such provisions included in Regulation No 3887/92, Article 9 of which was the basis for the adoption by the Chamber of Agriculture of the decision of 23 July 2007 imposing the penalties.

38. In the absence of specific rules, it was necessary to rely on the general legislation,[25] namely, Article 3 of Regulation No 2988/95, which was in force when the applications were submitted and when the amounts of the aid applied for were paid (in 2000 and 2001 respectively).[26]

21 On the way in which Regulation No 2988/95 informs the sectoral provisions, such as those governing agriculture, see the judgment of 13 December 2012, *FranceAgriMer*, C-670/11, EU:C:2012:807, paragraph 43.

22 See, for example, judgments of 4 October 2007, *Kruck*, C-192/06, EU:C:2007:579, paragraph 35, and of 14 September 2000, *Fisher*, C-369/98, EU:C:2000:443, paragraphs 43 to 47.

23 The need to include paragraph 6 of Article 49 of Regulation No 2419/2001, as *lex specialis*, is derived from the increase to four years for which it provides in respect of the period in the first subparagraph of Article 3(2) of Regulation No 2988/95 (three years). There is a regulatory parallel between Article 3(1) and (2) of the latter regulation and Article 49(5) and (6) of Regulation No 2419/2001.

24 Furthermore, the decision of 23 July 2007 has been contested and it seems reasonable to assume that any limitation period which may be applicable to it has been interrupted by subsequent actions.

25 In that connection, see judgment of 28 October 2010, *SGS Belgium and Others*, C-367/09, EU:C:2010:648, paragraph 66.

26 It should be recalled at this juncture that, in my Opinion in *Glencore Céréales France* (C-584/15, EU:C:2016:655), point 24, I stated that the use of the phrase 'limitation period for proceedings' in Article 3 of Regulation No 2988/95 may be misleading because, strictly speaking, this is not a limitation period for proceedings but rather a time limit for the exercise by the administrative authorities of the right to recover sums wrongly paid to recipients of aid.

39. However, in 2001, specific legislation was adopted (for aid in the agricultural sector) which introduced its own limitation rules. The sectoral limitation rules for repayment of undue payments of this type of aid were given legislative expression in Article 49 of Regulation No 2419/2001 and were partially amended in 2004 when Article 52a was inserted into that regulation.

40. The *new* limitation rules acquired retroactive effect following the amendment in 2004 of Regulation No 2419/2001: to be specific, repayment obligations relating to aid applications for marketing years which started before 1 January 2002 qualified for the limitation period laid down in Article 49(5) of Regulation No 2419/2001. [27]

41. In accordance with those new rules, which are applicable retrospectively, the repayment obligation is subject to limitation if more than 10 years (in the absence of good faith) or four years (if there is good faith) have elapsed 'between the date of the payment of the aid and that of the first notification to the beneficiary by the competent authority concerning the undue nature of the payment concerned'. That is, in short, the wording of Article 49(5) of Regulation No 2419/2001.

42. As a result of the insertion of Article 52a, the application of Article 49(5) of Regulation No 2419/2001 to aid applications made before 1 January 2002 (as in the instant case) entered into force on 25 January 2004. Since, on that date, the (general) four-year limitation period was still running, in accordance with Article 3(1) of Regulation No 2988/95, no difficulties arise from the perspective of legal certainty [28] in relation to irregularities committed in good faith: the limitation period was the same under both (the general and the specific) rules, namely, four years.

43. More difficulties are raised by the retroactive application of Article 49(5) of Regulation No 2419/2001 if it is found that Mr Westphal did not act in good faith. In that situation, the limitation period laid down in the new sectoral provision (10 years), is more onerous than that laid down in the general provision (four years). However, I believe that such retroactive application has a basis in law.

44. The case-law of the Court has granted Member States the power to set longer limitation periods in relation to penalties, which can be taken into account only if, on the date on which the new period enters into force, the irregularity is not time-barred and the general principles of EU law are observed, [29] in particular the principles of legal certainty and proportionality.

45. I see no reason why those case-law guidelines should not be applied to legislation adopted by the EU legislature, subject to those same criteria.

46. In this case, the extension of the limitation period to 10 years (Article 49(5) of Regulation No 2419/2001) is applicable only to applications submitted in bad faith where the relevant period has not yet elapsed. [30]

47. As regards proportionality, [31] although a 10-year period may appear excessive, that impression is minimised if account is taken of the sums used each year for agricultural premiums and the fact that they are divided between a large number of applications, while Member States do not carry out exhaustive checks on these but simply use sampling methods.

27 Unless the competent authority had notified the beneficiary of the wrongful nature of the payment before 1 February 2004.

28 See, in that respect, judgment of 29 January 2009, *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others*, C-278/07 to C-280/07, EU:C:2009:38, paragraphs 30 and 31.

29 Judgments of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 57, and of 2 March 2017, *Glencore Céréales France*, C-584/15, EU:C:2017:160, paragraphs 69, 70 and 72.

30 As required by the case-law cited in the previous footnote.

31 Judgment of 2 March 2017, *Glencore Céréales France*, C-584/15, EU:C:2017:160, paragraph 74 and case-law cited.

2. Dies a quo *for the start of the limitation period*

48. The fact that Article 49(5) of Regulation No 2419/2001 is applicable *ratione temporis* makes it possible to calculate the date on which the limitation period started to run in respect of Mr Westphal's repayment obligation: the date of the payment of the aid, in accordance with the first subparagraph of that provision.

49. Further, unlike Regulation No 2988/95, Article 3 of which fixes the *dies a quo* for the limitation period as the date of commission of the *irregularity* (in the instant case, that would be a date in May 2000 and May 2001),[32] the first subparagraph of Article 49(5) of Regulation No 2419/2001 establishes the start of the limitation period as the date of the payment of the aid.

50. Moreover, Regulation No 2419/2001 does not differentiate between one-off and continuous *irregularities* in the same way as Regulation No 2988/95. The referring court assumes that the irregularity concerned is continuous[33] because it covers the two applications made in 2000 and 2001.

51. That classification may be borne out by a reading of Regulation No 1251/1999,[34] which creates a structure for aid applications (like Mr Westphal's) based on the 'application first, payment later' model, and by the facts of the case, since the applications were submitted in two consecutive years, in May 2000 and May 2001, and the corresponding payment was made at the end of each of those years.

52. According to the Court's case-law, in such cases, the date from which the limitation period begins to run is the date of the occurrence of the prejudice to the EU budget, in other words, the payment because that occurred after the act or omission infringing EU law.[35]

53. In short, the criterion laid down in Article 49(5) of Regulation No 2419/2001 for identifying the date from which the limitation period begins to run is the same as that laid down by the Court in relation to continuous irregularities. In this case, both of these lead to the same outcome: the *dies a quo* is the date of payment of the wrongly granted aid.

54. A final clarification remains to be made about which of the two limitation periods provided for in Article 49(5) of Regulation No 2419/2001 is applicable, assuming the administrative authority's earlier inactivity in both cases until 2006: the 10-year period from the date of payment, subject to no other requirements, or the four-year period from the date of payment, subject to the requirement that Mr Westphal acted in good faith.

55. Since the assessment of good faith concerns a question of fact, it is for the national court to carry out that assessment, and, based on its finding,[36] to apply the applicable option.

B. The second question

56. The referring court asks whether the limitation rules in Article 49(6) of Regulation No 2419/2001 and Article 3(1) of Regulation No 2988/95 can be classified as *provisions which impose administrative penalties*.

32 See judgments of 6 October 2015, *Firma Ernst Kollmer Fleischimport und –export*, C-59/14, EU:C:2015:660, paragraph 24, and of 29 January 2009, *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others*, C-278/07 to C-280/07, EU:C:2009:38, paragraph 27.

33 See footnote 16 of this Opinion.

34 See, in particular, Articles 6, 7 and 8 of that regulation.

35 Judgment of 2 March 2017, *Glencore Céréales France*, C-584/15, EU:C:2017:160, paragraph 47 and case-law cited.

36 The first paragraph of page 4 of the Chamber of Agriculture's decision of 23 June 2007 states that Mr Westphal could not rely on good faith because he should have realised in time his error in the calculation of the areas in respect of which he applied for aid. From another perspective, it may be inferred from the judgment on appeal, contained in the case-file forwarded by the referring court, that Mr Westphal used the land tax values of those areas. That factor may be relevant, subject always to the referring court's assessment of other factual matters.

57. The referring court believes that the application of the principle of retroactivity *in melius*, typical where penalties are provided for subsequently which involve more favourable treatment of the person concerned, will depend on the answer. The embodiment of that principle can be seen in Article 2(2) of Regulation No 2988/95 and the last sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union. [37]

58. Since I do not consider Article 49(6) of Regulation No 2419/2001 to be applicable, I believe that it is not necessary to answer this question. The arguments I shall set out below are, therefore, solely in the alternative.

59. In this regard, reference must again be made to the case-law in *Taricco and Others*, [38] supplemented by that in *M.A.S and M.B*. [39] In the latter, the Court's answer was given in the light of the fact that the referring court drew attention to 'the substantive nature of the limitation rules in the Italian legal system, which means that those rules must be reasonably foreseeable by individuals at the time when the alleged offences are committed and cannot be retroactively altered *in peius*'. [40]

60. The judgment in *M.A.S and M.B* states that account must be taken of whether, under the national rules of the court which must apply EU law, 'the requirements of foreseeability, precision and non-retroactivity inherent in the principle that offences and penalties must be defined by law apply also … to the limitation rules for criminal offences'. [41]

61. The referring court has confirmed that, in German law, limitation periods are not covered by substantive law but rather by criminal procedural law, and accordingly the provisions which govern such periods are not subject to the principle of non-retroactivity (or, therefore, to the principle of retroactivity *in melius*). The order for reference states that the principle of legality in relation to criminal offences and penalties does not encompass limitation rules. [42]

62. That being so, there is no reason why provisions setting shorter limitation periods for administrative offences or penalties should necessarily apply in preference to those which, at the time when the acts were committed, laid down longer limitation periods. Further, as I have already pointed out, [43] there is nothing to preclude the extension of limitation periods for offences of that kind which have not yet become subject to limitation, as the Court acknowledged in *Glencore Céréales France*. [44]

63. From another perspective, more connected to the specific facts of the case, the Chamber of Agriculture states that the amount of the penalty applicable under the *lex posterior* (Article 32 of Regulation No 2419/2001) was not lower than that resulting from application of the provision pursuant to which the penalty was imposed on Mr Westphal (Article 9 of Regulation No 3887/92).

64. Although the principle of retroactivity of the most lenient penalty applies where a provision of EU law amends a posteriori a penalty provided for in another, earlier provision, by reducing that penalty, the amount in this case was the same under either provision.

37 See, in relation to Article 2(2) of Regulation No 2988/95, the judgment of 11 March 2008, *Jager*, C-420/06, EU:C:2008:152, paragraph 60: 'That principle [of retroactive application of the more lenient penalty] is expressed more specifically in the second sentence of Article 2(2) of Regulation No 2988/95, pursuant to which the competent authorities are required to apply retroactively to conduct constituting an irregularity within the meaning of Article 2(1), subsequent amendments made by provisions contained in Community sectoral rules introducing less severe administrative penalties …'

38 Judgment of 8 September 2015, C-105/14, EU:C:2015:555.

39 Judgment of 5 December 2017, C-42/17, EU:C:2017:936.

40 Ibid., paragraph 27.

41 Ibid., paragraph 58.

42 Paragraph 20 of the order for reference.

43 In points 44 to 46 of this Opinion.

44 Judgment of 2 March 2017, C-584/15, EU:C:2017:160, paragraph 73.

65. For retroactivity *in melius* to be applicable, there would need to have been 'a revised assessment by the Community legislature as to whether the penalty is commensurate with the gravity of the irregularity at issue.'[45] It would follow from that revised assessment that the amount of the penalty, under the new provision, is lower than that under the earlier provision.[46] That does not appear to have occurred in this case.

C. The third question

66. By its third question, the referring court asks whether the retroactive application of the limitation rule in Article 49(5) of Regulation (EC) No 2419/2001 can be applied by analogy to Article 49(6) of Regulation (EC) No 2419/2001.

67. As I said with respect to the second question, nor do I find it necessary to answer the third question, since the references to Article 49(6) of Regulation No 2419/2001 are of no relevance to the outcome of the proceedings. However, I shall also deal with this question solely in the alternative.

68. The reductions and exclusions to which Article 49(6) of Regulation No 2419/2001 refers presuppose action on the part of the competent authority which imposed them. As I have already stated, that factor is separate from a lack of action on the part of the administrative authority for 10 years or four years, which are the limitation periods laid down in Article 49(5) of the regulation for repayment obligations where payment has not been demanded from the beneficiary.

69. While, in 2004, the legislature inserted Article 52a into Regulation No 2419/2001, limiting the retroactive effect of the (new) limitation periods to the situations referred to in Article 49(5) and excluding those referred to in Article 49(6), I believe that the purpose of that legislative decision was to differentiate between, rather than conflate, the situations in each paragraph, which are not analogous.

70. Moreover, in situations where the applicant acted in good faith, the limitation period in the second subparagraph of Article 49(5) of Regulation No 2419/2001 is the same as that in the first subparagraph of Article 3(1) of Regulation No 2988/95, which, in fact, it replaced in relation to the aid sector at issue.

71. I conclude from the above that, in providing for the retroactive application of limitation periods in this way (Article 52a of Regulation No 2419/2001), the legislature deliberately sought to extend the limitation period for repayment obligations to 10 years in all cases of intentionally incorrect declarations (applications), including those relating to marketing years prior to 2002, and to retain the four-year period for declarations made in good faith.

72. Further, once the administrative authorities have intervened and indicated, by means of the appropriate decision, the amount to be recovered through reduction and/or exclusion, it is irrelevant whether or not the applicant concerned acted in good or bad faith, particularly for the purposes of the limitation period.

73. In summary, the conditions for applying to Article 49(6) of Regulation No 2419/2001 the retroactive effect of the limitation period in Article 49(5) of that regulation, read in conjunction with Article 52a thereof, have not been met.

45 Judgment of 11 March 2008, *Jager*, C-420/06, EU:C:2008:152, paragraph 70.

46 Judgment of 4 May 2006, *Haug*, C-286/05, EU:C:2006:296, paragraph 23: 'the second sentence of Article 2(2) of Regulation No 2988/95 would tend to apply if, a difference of more than 20% of the determined area within the meaning of Article 9(2) of Regulation No 3887/92 having been found, full repayment of the Community aid initially awarded, together with interest, is sought whereas a provision of Community law introducing a subsequent amendment to the penalty under Article 9(2) of Regulation No 3887/92 provides for a *lesser* amount to be repaid' (no italics in the original).

V. Conclusion

74. In the light of the foregoing arguments, I propose that the Court of Justice reply as follows to the questions referred for a preliminary ruling by the Bundesverwaltungsgericht (Federal Administrative Court, Germany):

In a situation like that at issue in the main proceedings, in which a penalty was imposed on a farmer who submitted aid applications for an area declared to be larger than that subsequently determined by the competent authority, Article 49 of Commission Regulation (EC) No 2419/2001 of 11 December 2001 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes established by Council Regulation (EEC) No 3508/92 must be interpreted as meaning that:

– Under Article 49(5) of that regulation, the obligation to repay amounts wrongly received can be regarded as being extinguished due to limitation, provided that the competent authority has not adopted any act to demand repayment of those amounts, either merely because 10 years have elapsed since the date on which the payment was made or, if the applicant acted in good faith, because four years have elapsed since that date. It is for the referring court to determine whether the applicant acted in good faith when he lodged the applications at issue in these proceedings.

– Article 49(6) is not applicable to the situation at issue.

– The limitation rules applicable to aid applications relating to marketing years and premium periods which started before 1 January 2002, as expressed in Article 52a of Regulation No 2419/2001, are not ‘provisions which impose administrative penalties’ within the meaning of Article 2(2) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests.

– The conditions relating to the limitation period in Article 49(5) are different from those on which the limitation period in Article 49(6) are based, and therefore the retroactive effect of Article 49(5), read in conjunction with Article 52a of Regulation No 2419/2001, cannot be applied, by analogy, to Article 49(6).