OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 15 July 2010[1]

I — Introduction

1. Anyone who exports agricultural products from the European Union and thereby receives export refunds, which, as we know, are intended to compensate for the price differential between the internal market and the world market, is required, in the event of irregularities, not only to repay the sums wrongly received, but is also subject to financial penalties. In the present case, however, proceedings were brought not against the exporter itself, but only against the international control and supervisory agency which was responsible for issuing a certificate for the importation into the third country in question and, in doing so, had supplied false information. In this connection, two points must essentially be resolved: first, whether at the relevant time – in 1997 – Community law provided a sufficient legal basis for that penalty and, second, whether the limitation period was interrupted by certain acts of the national administrative authorities.

2. The first of these two points is of particular interest in so far as it concerns the issue of the direct effect of EU regulations and the principle of legal certainty. It is necessary, in connection with the protection of the European Union's financial interests, to examine the interplay between the general rules and the sectoral rules.

II — Legislative framework

A — *Community law*

1. Regulation No 2988/95

3. By Regulation No 2988/95[2] the Council enacted a common set of legal rules for

1 — Original language: German.

2 — 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; with corrigendum OJ 1998 L 36, p.16).

all areas covered by Community policies to counter acts – in particular fraud – detrimental to the Communities' financial interests.

4. Under Article 5(1) of the regulation, 'intentional irregularities or those caused by negligence may lead to the following administrative penalties:... (a) payment of an administrative fine; (b)...'

5. 'Irregularity' is defined in Article 1(2) of the regulation as follows: 'any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure'.

6. Under Article 7 of the regulation, 'Community administrative measures and penalties may be applied to the economic operators referred to in Article 1, namely the natural or legal persons and the other entities on which national law confers legal capacity who have committed the irregularity. They may also apply to persons who have taken part in the irregularity and to those who are under a duty to take responsibility for the irregularity or to ensure that it is not committed'.

7. The first sentence of Article 2(2) of the regulation provides that 'no administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it' and Article 2(3) provides that 'Community law shall determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility'.

8. In this regard, the Council stated in the fifth recital in the preamble to the regulation that 'irregular conduct, and the administrative measures and penalties relating thereto, are provided for in sectoral rules in accordance with this Regulation'.

9. Article 3 of the regulation governs limitation. Under subparagraph 3 of Article 3(1), '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. Regulation No 3665/87

10. In order to combat irregularities and fraud in connection with export refunds in respect of agricultural products more effectively, amending Regulation No 3665/87 [3] in 1994, the Commission introduced the following penalty:

'*Article 11*

1. 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) twice the difference between the refund requested and the refund applicable, if the exporter has intentionally supplied false information.

...

Where the reduction referred to under (a) or (b) results in a negative amount, the exporter shall pay that negative amount.

Where the competent authorities have established that the refund requested was incorrect and the exportation has not been effected and consequently no reduction of refund is possible, the exporter shall pay the amount equivalent to the sanction referred to under (a) or (b).

...

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

3 — 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 amending Regulation (EEC) No 3665/87 laying down common detailed rules for the application of the system of export refunds on agricultural products as regards the recovery of amounts unduly paid and sanctions (OJ 1994 L 310, p. 57, corrected in OJ 1995 L 132, p. 22).

basis of the time elapsing between payment and reimbursement. However,

— where reimbursement is covered by a security not yet released …;

— where the security has been released, the beneficiary shall pay the amount of the security which would have been forfeit plus interest calculated from the date of release to the day preceding the date of payment.'

B — *National law*

11. Under Article 2(2) of the Royal Decree of 4 January 1985,[4] an international control and supervisory agency approved in Belgium is jointly and severally liable, with the other persons involved in an export operation, for the financial consequences of the certificates issued by it.

4 — *Moniteur belge*, 21 February 1985, p. 1937. This decree is mentioned both in the order for reference in the report of the different submissions of the parties and in the written observations submitted by the Belgian Government to the Court of Justice. In its written observations to the Court, the Commission, on the other hand, cites a Royal Decree of 28 February 1999, *Moniteur belge*, 22 June 1999, which according to the Commission took effect from 1 January 1995 and contained a similar provision.

III — Facts and questions referred for a preliminary ruling

12. In June 1997 the Belgian undertaking FIRME DERWA NV ('DERWA') sold 741 144 kg of beef to a customer in Egypt. The goods were shipped to Egypt and unloaded there in the same month.

13. DERWA applied to the Belgian Intervention and Refund Agency (BIRB)[5] for a differentiated export refund in respect of that export transaction and, after lodging a security for 120%, it received a sum equivalent to EUR 1 407 268,91 as an advance. In order to become fully entitled to the sum, DERWA was required to prove, within 12 months from the acceptance of the export declaration, that the goods had been released for consumption in Egypt.

14. On 10 February 1998, DERWA submitted to BIRB a certificate dated 4 November 1997 issued by the international control and supervisory agency approved by Belgium, SGS BELGIUM NV ('SGS Belgium'), which stated that the Egyptian customs authorities had cleared the products in question for

5 — Belgisch Interventie- en Restitutiebureau.

release for consumption. Thereupon, BIRB released the security lodged by DERWA and the export refund was definitively granted.

15. However, an investigation of SGS Belgium undertaken by the Economic Inspection Board of the Belgian Ministry of Economic Affairs revealed that SGS Egypt Ltd had sent SGS Belgium a fax on 24 September 1997 informing it that, although the Egyptian customs authorities had released the goods, these could not be imported into Egypt because the Egyptian authorities had prohibited the import of Belgian beef. That fax was apparently preceded by an enquiry from the insurance undertaking Central Beheer Achmea NV, which had insured the goods and requested SGS Belgium to submit a customs entry certificate following inspection.

16. BIRB, which the Economic Inspection Board had kept up-to-date with the investigation of SGS Belgium, notified SGS Belgium of the outcome of the investigation by registered letter of 21 April 1999 and requested it to produce the customs documents on the basis of which the certificate of 4 November 1997 had been issued.

17. By registered letter of 5 February 2002, BIRB noted that SGS Belgium had failed to comply with the request of 21 April 1999 and that it had to be concluded from the available information that the shipment to Egypt had not been released for consumption. Since BIRB was of the view that SGS Belgium had intentionally supplied false information, it imposed on it a sanction of 200 % pursuant to Article 11 of Regulation No 3665/87, and demanded payment by SGS Belgium of the sum of EUR 4 503 260,74. [6]

18. By registered letter of 29 April 2002, SGS Belgium replied that on closer examination it had emerged that the goods had been imported into Egypt only temporarily. In a further letter of 27 May 2002, SGS Belgium acknowledged that it had supplied incorrect information, albeit unknowingly.

19. By writ, service of which was effected on 16 September 2003, BIRB asked the Rechtbank van eerste aanleg te Antwerpen (Antwerp Court of First Instance) to order SGS Belgium to pay EUR 4 503 260,74. SGS Belgium thereupon requested that DERWA and Centraal Beheer Achmea be joined to the proceedings and ordered to release SGS Belgium.

20. By judgment of 13 January 2006, the Rechtbank dismissed the action brought by BIRB as unfounded and found the claims made by SGS Belgium to be devoid of purpose.

6 — This sum is broken down as follows: the principal sum of EUR 1 407 268,90, which represents the amount of the export refund, together with an uplift of 20 %, making a further EUR 281 453,72, and the penalty of 200 % of the principal sum, EUR 2 814 538,12.

21. The action brought by BIRB is not barred by limitation because the limitation period of four years under Article 3 of Regulation No 2988/95, which began to run on 10 February 1998,[7] was interrupted by the registered letter from BIRB of 5 February 2002, by which it imposed the penalty.

22. However, there is not a sufficient legal basis to impose a penalty on a party to an irregularity committed by the exporter, such as SGS Belgium. In particular, Articles 5 and 7 of Regulation 2988/95 do not have direct effect, since they allow the Member States a margin of discretion. Furthermore, BIRB did not show that DERWA wrongly received the export refunds and that the certificate issued by SGS Belgium contained false information.

23. BIRB appealed against that judgment to the referring court, the Hof van Beroep te Antwerpen, which, by decision of 8 September 2009, referred the following questions to the Court for a preliminary ruling:

'(1) Do the provisions of Articles 5 and 7 of Regulation No 2988/95 have direct effect in the national legal orders of the Member States without any discretion on the part of those Member States and without the national authorities being required to adopt any measures for their implementation?

(2) Can an international control and supervisory agency approved by the Member State in which the export declaration was accepted – in this case, Belgium – which has submitted a false certificate of unloading within the meaning of Article 18(2)(c) of Regulation No 3665/87 be deemed to be an economic operator within the meaning of Article 1 of Regulation No 2988/95, or a person who has taken part in the irregularity or is under a duty to take responsibility for the irregularity or to ensure that it is not committed, within the meaning of Article 7 of Regulation No 2988/95?

(3) Can communication of an investigative report drawn up by the Economic Inspection Board, or a letter requesting the production of additional documents as evidence of the release for consumption, or a registered letter imposing a sanction be deemed to be investigation

7 — On that date DERWA had submitted to BIRB the certificate issued by SGS Belgium relating to the import to Egypt.

or legal proceedings within the meaning of the third subparagraph of Article 3(1) of Regulation No 2988/95?'

24. SGS Belgium, DERWA, the Belgian and Austrian Governments, and the European Commission took part in the proceedings before the Court, the Austrian Government only submitting written observations.

IV — Legal assessment

A — *The first question*

25. In the view of the Belgian Government and the Commission, Articles 5 and 7 of Regulation No 2988/95 have direct effect. This follows from the legal nature and the function of regulations. There may be exceptional cases where national implementing measures are required, but that is not the situation here. Nor are there any more specific sectoral rules which would take precedence.

26. In fact, under the second paragraph of Article 288 TFEU, regulations 'have general application'. A regulation is 'binding in its entirety and directly applicable in all Member States'. [8]

27. This general statement of primary law would appear to apply also to Regulation No 2988/95. That is at least the implication of Article 11(2) of that regulation, under which the regulation is binding in its entirety and directly applicable in all Member States.

28. In *Handlbauer* [9] the Court was asked about the direct applicability of Regulation No 2988/95. That case was a reference for a preliminary ruling from an Austrian court which had opted for the wording '*unmittelbar anwendbar*' rather than the German wording used in primary law and in Regulation No 2988/95 '*unmittelbar gilt*'. In the French version of the judgment – as we know, the Court's judges hold their deliberations in French – the words '*directement applicable*' were used, which corresponds to the French wording used in primary law and in Regulation No 2988/95. This shows that no difference in meaning can be attached to the word pairs '*unmittelbare Geltung*' and

8 — The same provision was made in the second paragraph of Article 189 of the EC Treaty, which is relevant to the present case.

9 — Case C-278/02 *Handlbauer* [2004] ECR I-6171.

'*unmittelbare Anwendbarkeit*', at least as far as the judgment in *Handlbauer* is concerned.

29. That case, like the present case, concerned proceedings brought in respect of irregularities in connection with export refunds for agricultural products. The Court confirmed the direct applicability of Article 3(1) of the regulation, which provides for a limitation period of four years for bringing proceedings in respect of irregularities. [10]

30. In the grounds of the judgment, the Court pointed out, first of all, that 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' [11] in the national legal systems without it being necessary for the national authorities to adopt measures of application. [12] Some of their provisions may none the less necessitate, for their implementation, the adoption of measures of application by the Member States. [13] However, that is not the case as regards Article 3(1) of Regulation No 2988/95.

31. It cannot be inferred either from that judgment or from the previous case-law that the Court draws a clear distinction between the notions of direct validity, applicability and effect. Even though some of the parties considered in detail the possible differences between those terms, I consider it to be of little benefit to enter into fundamental discussion about the notion of direct effect of Union law, and specifically of regulations in the sense of *effet direct*. [14]

32. If the question is raised in the present case of the direct effect of Articles 5 and 7 of Regulation No 2988/95, it must simply be clarified whether an onerous measure imposed by an authority on an undertaking can be based directly on a provision of that regulation. That issue was ultimately also the subject of the *Handlbauer* case. In that case, the penalty as such was not based directly on Regulation No 2988/95. However, the four-year limitation period provided for therein – and this was clearly the crucial point for the legality of a penalty – was not only longer than the period which would have been

10 — *Handlbauer*, cited in footnote 9, paragraph 35; see also Joined Cases C-278/07 to C-280/07 *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb* [2009] ECR I-457, paragraphs 27 and 28.

11 — In the French version of the judgment: '*effet immédiat*'.

12 — *Handlbauer*, cited in footnote 9, paragraph 25, with reference to Case 93/71 *Leonesio* [1972] ECR 287, paragraph 5.

13 — *Handlbauer*, cited in footnote 9, paragraph 26, with reference to Case C-403/98 *Monte Arcosu* [2001] ECR I-103, paragraph 26.

14 — See, inter alia, Edward, David O.A., 'Direct Effect: Myth, Mess or Mystery?', in *Direct effect, Rethinking a Classic of EC Legal Doctrine*, ed. Jolande M. Prinssen and Annette Schrauwen, Europa Law Publishing, Groningen 2002, p. 3.

applicable if Article 3(1) of the regulation were not attributed direct effect, but could also be interrupted.

33. The criteria for examining appropriateness as a legal basis for penalties are easy to identify.

34. Thus, the first sentence of Article 2(2) of Regulation No 2988/95 states that no administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it. Article 2(3) also provides that Community law determines the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility.

35. Specifically with regard to export refunds for agricultural products, the Court has held on numerous occasions that a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis. [15]

36. This requirement, like the principle of the legality of criminal offences and penalties, [16] is a specific expression of the general principle of legal certainty, which is a fundamental principle of Community law and requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly. [17]

37. Even though in some cases the Court is – in my view quite rightly – cautious in applying principles of criminal law to administrative penalties, [18] there is nothing to prevent the substance of the principle of the legality of criminal offences and penalties being used for guidance.

38. This principle implies that legislation must define clearly offences and the penalties which they attract. That condition is met in the case where the individual concerned is in

15 — Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569 paragraph 56; Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 52; and Case C-274/04 *ED & F Man Sugar* [2006] ECR I-3269, paragraph 15.

16 — *Nullum crimen, nulla poena sine lege*; see Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraph 70.

17 — *Intertanko and Others*, cited in footnote 16, paragraph 69.

18 — See *Käserei Champignon Hofmeister*, cited in footnote 15, paragraph 44, in which the Court found that the penalty under point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 is not of a criminal nature and the principle '*nulla poena sine culpa*' is not therefore applicable. On the other hand, in Case C-45/06 *Campina* [2007] ECR I-2089, paragraph 40, and Case C-420/06 *Jager* [2008] ECR I-1315, paragraph 59 et seq., the Court considered the principle of retroactive application of the more lenient penalty to be applicable in connection with the imposition of administrative penalties; it pointed out that that principle is more specifically laid down in the second sentence of Article 2(2) of Regulation No 2988/95. It should also be pointed out merely in passing that, according to its 10th recital, Regulation No 2988/95 also takes into consideration the principle of *ne bis in idem*.

a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable. [19]

39. If the criteria of clarity and precision are applied to Articles 5 and 7 of Regulation No 2988/95, it must be stated, first of all, that the definition of irregularity in Article 1(2) of Regulation No 2988/95, to which reference is made in Articles 5 and 7, evidently needs to be refined. That definition centres on the simple infringement of a provision of Community law and any resulting damage to the Community budget, without beginning to give even a general clarification of the envisaged conduct.

40. As SGS Belgium, DERWA and the Austrian Government also state, Articles 5 and 7 of Regulation No 2988/95 are purely discretionary provisions. Under Article 5 of the regulation, irregularities 'may' lead to certain administrative penalties, including an administrative fine, and under Article 7 of the regulation those penalties 'may' be applied to certain persons. An examination of other language versions leads to the same conclusion. [20]

41. It is also worth noting that, for the listed penalties, Article 5 of Regulation No 2988/95 does not distinguish between intentional irregularities or those caused by negligence. Nor does Article 7 of the regulation distinguish the possible persons to whom a penalty may be applied according to the degree of responsibility for the irregularity.

42. This analysis of the wording in itself raises doubts that Articles 5 and 7 of Regulation No 2988/95 have direct effect in the sense that they can serve as an autonomous legal basis for the imposition of a penalty. However, the regulation offers further indications that the provisions in question, having regard to their specific content, [21] cannot have direct effect in this sense.

43. In accordance with Article 1(1), the regulation states that it merely has the function of laying down 'general rules'. Article 2(1) then states that, among other things, penalties are

19 — *Intertanko and Others*, cited in footnote 16, paragraph 71, with reference to Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 50, and European Court of Human Rights judgment of 22 June 2000 in *Coëme and Others* v *Belgium*, Reports 2000-VII, p. 1, § 145).

20 — The French states '*peuvent*', the English 'may', the Italian '*possono*', the Spanish '*podrán*' and the Dutch '*kunnen*'.

21 — Thus, I am certainly not calling into question the conclusion reached by the Court in *Handlbauer*, cited in footnote 9, paragraph 35, that the four-year limitation period under Article 3(1) of Regulation No 2988/95 is directly applicable.

to be introduced 'in so far as they are necessary'. As has already been stated, Article 5 of the regulation does not specify – or any other article of the regulation – when a penalty of a certain kind is necessary. The wording 'shall be introduced' [22] also suggests that further provisions in addition to Regulation No 2988/95 are needed to create a directly applicable penalty.

44. Article 2 of Regulation No 2988/95 becomes even clearer in the abovementioned first sentence of Article 2(2) and Article 2(3): the fact that it is provided that no administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it shows that, when it adopted the regulation, the Council assumed that the regulation itself is not sufficient for the imposition of a penalty.

45. The fact that it is also provided that Community law must determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility confirms that the general rules laid down in the regulation are not in themselves sufficient to serve as an autonomous legal basis for a penalty. The regulation itself does not satisfy any of these criteria.

46. Lastly, the fifth recital in the preamble to Regulation No 2988/95 states that irregular conduct, and the administrative measures and penalties relating thereto, are provided for in sectoral rules in accordance with the regulation.

47. This is also consistent with previous case-law, according to which the Community legislature has, by adopting Regulation No 2988/95, laid down a series of general principles and has required that, as a general rule, all sectoral regulations comply with those principles. [23]

48. Consequently, the Court has recognised, with regard to the Structural Funds for example, the legal basis for the obligation to recover in the relevant Council implementing regulation, rather than in Regulation No 2988/95, 'which, as the Commission points out, merely lays down general rules for... sanctions'. [24] It thus expressly concurred with the view taken by the Commission, which had specifically

22 — It should be pointed out that this is not a recital, which announces the subject-matter of the regulation, but an actual provision of the regulation.

23 — *Jager*, cited in footnote 18, paragraph 61 and the case-law cited.

24 — Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening* [2008] ECR I-1561, paragraph 39.

argued that 'Regulation No 2988/95 does not constitute an independent legal basis for the national authorities to take steps in the event of irregularities. That measure contains only general provisions…' [25] If the Court had merely meant, as the Commission now clearly believes, that where there exists a sectoral rule regard should be had to it rather than to Regulation No 2988/95, it would probably have opted for a different wording.

49. I therefore conclude that Articles 5 and 7 of Regulation No 2988/95 do not in themselves have any direct effect in the sense that they can serve as an autonomous legal basis for the imposition of a penalty.

50. As is clear from the order for reference, however, BIRB did not rely solely on Articles 5 and 7 of Regulation No 2988/95 to justify the penalty imposed on SGS Belgium, but on an interplay between those provisions and Article 11(1) of Regulation No 3665/87.

51. The Commission also considers Article 11(1) of Regulation No 3665/87 to be important in the present context. It takes the view that Articles 5 and 7 of Regulation No 2988/95 can serve as an autonomous legal basis for the imposition of penalties on an international control and supervisory agency. However, having regard to the principle of legality, and taking into account Article 2(2) of the Royal Decree of 4 January 1985, such a penalty may not exceed the maximum amount which may be set as a penalty against the exporter. The level of the penalty imposed on the exporter is determined on the basis of Article 11(1) of Regulation No 3665/87.

52. However, the question whether Articles 5 and 7 of Regulation No 2988/95, in conjunction with Article 11(1) of Regulation No 3665/87, provide a sufficient legal basis for the imposition of a penalty on an international control and supervisory agency such as SGS Belgium can be examined only in connection with the answer to the second question.

53. The first question should therefore be answered to the effect that Articles 5 and 7 of Regulation No 2988/95 do not in themselves have any direct effect in the sense that they can serve as an autonomous legal basis for the imposition of a penalty.

25 — *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening*, cited in footnote 24, paragraph 34.

B — *The second question*

54. By its second question, the Hof van Beroep is seeking to ascertain whether an international control and supervisory agency, such as SGS Belgium, which has submitted a false certificate of unloading within the meaning of Article 18(2)(c) of Regulation No 3665/87 can be deemed to be an economic operator or other person within the meaning of Articles 1 and 7 of Regulation No 2988/95 and can therefore be the subject of a possible penalty under that regulation.

55. In view of the proposed answer to the first question, there is actually no need to answer the second question. Because Regulation No 2988/95 does not provide a directly applicable legal basis for the imposition of penalties, considered in isolation it is unnecessary to examine further whether an international control and supervisory agency like SGS Belgium can be the subject of a penalty under that regulation.

56. The second question retains its relevance, however, if Article 11(1) of Regulation No 3665/87 is included in the search for a sufficient legal basis for the imposition of penalties on international control and supervisory agencies. That provision contains a specific, temporally applicable Community-law penalty in respect of wrongly requested export refunds for agricultural products, even if its function as a penalty is evident only on closer inspection. [26]

57. It is thus conceivable that, if Articles 5 and 7 of Regulation No 2988/95 and Article 11(1) of Regulation No 3665/87 are considered together, a sufficient legal basis for the imposition of penalties on international control and supervisory agencies can be taken to exist. In order to be able to clarify this, the provisions of Articles 1 and 7 of Regulation No 2988/95 on the persons to whom penalties are applied are also to be interpreted.

58. According to its wording, the penalty under Article 11(1) of Regulation No 3665/87 is addressed solely to the exporter [27] and is geared to the situation where the exporter has requested a too high export refund, including

26 — See, inter alia, Case C-143/07 *AOB Reuter* [2008] ECR I-3171, paragraph 22. In any case, the word "sanction' is expressly used in the third and fifth subparagraphs of paragraph 1. With regard to the non-criminal nature of the sanctions under point (a) of the first subparagraph of Article 11(1), see also *Käserei Champignon Hofmeister*, cited in footnote 15, paragraph 35 et seq.

27 — See also *Käserei Champignon Hofmeister*, cited in footnote 15, paragraph 42.

the case that he is not actually entitled to a refund. [28] In examining this question, not only are the facts known to the competent authorities at the time they examine the request for a refund relevant, but also facts subsequent to that request. [29]

59. The Court has already found that that provision constitutes a legal basis for the application of sanctions against the exporter which is clear and sufficient. [30]

60. None of the parties to the proceedings has claimed that a penalty can be imposed on SGS Belgium as an international control and supervisory agency on the basis of that provision alone.

61. Because the irregularity in respect of which a penalty is applied under Article 11(1) of Regulation No 3665/87 can only be committed by the exporter itself, there is no need to examine whether SGS Belgium can be deemed to be an economic operator within the meaning of Article 1(2) and the first sentence of Article 7 of Regulation No 2988/95. SGS Belgium cannot have committed the irregularity in question itself and a possible penalty cannot therefore be imposed on it in a capacity as an economic operator within the meaning of those provisions.

62. It must therefore still be examined whether Article 11(1) of Regulation No 3665/87, in conjunction with the second sentence of Article 7 of Regulation No 2988/95, may serve as the legal basis for a penalty against SGS Belgium, since they provide that Community administrative penalties may also be applied to persons who have participated in committing an irregularity and to those who are under a duty to take responsibility for the irregularity or to ensure that it is not committed.

63. An irregularity would exist, for the purposes of the second sentence of Article 7 und Article 1(2) of Regulation No 2988/95, if DERWA wrongly received the export refunds under Article 11(1) of Regulation No 3665/87.

64. It is ultimately for the referring court to clarify this point. The second question does assume, as can be inferred from its wording, that the certificate of unloading issued by SGS Belgium and used by DERWA within the meaning of Article 18(2)(c) of Regulation No 3665/87 was false. However, it is clear from the order for reference that this is still disputed before the referring court. Furthermore, the referring court argued that

28 — *AOB Reuter*, cited in footnote 26, paragraph 22.
29 — *AOB Reuter*, cited in footnote 26, paragraph 23.
30 — *AOB Reuter*, cited in footnote 26, paragraph 34.

the goods had been imported from Egypt to South Africa, with the result that DERWA was entitled to export refunds irrespective of the accuracy of the contested certificate of unloading.

65. An exporter must in any case guarantee the accuracy of his declarations and the penalty under point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 is applied regardless of the subjective element of fault. [31] The fault or error committed by an exporter's contracting partner does not constitute *force majeure*, but is an ordinary commercial risk and cannot be considered to be unforeseeable in the context of commercial transactions. The exporter has various means at his disposal, such as the liberty to select his trading partners, appropriate clauses in contracts or insurance, to project himself against this. [32]

66. I cannot see any reason why this should not also apply as between an exporter and an international control and supervisory agency, regardless of whether the certificate used by the exporter was issued for the exporter himself or – as would appear to be the case here – for his insurer. Moreover, Regulation (EC) No 800/1999, [33] by which Regulation No 3665/87 was superseded, expressly provided that the acts of any third party relating directly or indirectly to the formalities necessary for the payment of the refund, including the acts of the international control and supervisory agencies, shall be attributable to the beneficiary. [34]

67. If we adopt a further working hypothesis that DERWA did commit an irregularity which was caused by a false certificate issued by SGS Belgium, SGS Belgium is in any case to be regarded as a person who has participated in committing an irregularity.

68. It must also be examined whether the combination of Article 11(1) of Regulation No 3665/87 and the second sentence of Article 7 of Regulation No 2988/95 is so clear and precise that it can serve as a legal basis for a penalty against an international control and supervisory agency such as SGS Belgium.

31 — *Käserei Champignon Hofmeister*, cited in footnote 15, paragraph 59 et seq., and Case C-542/03 *Milupa* [2005] ECR I-3989, paragraph 26.

32 — *Käserei Champignon Hofmeister*, cited in footnote 15, paragraph 80, and *AOB Reuter*, cited in footnote 26, paragraph 36.

33 — Commission Regulation of 15 April 1999 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1999 L 102, p. 11).

34 — Second subparagraph of Article 52(4).

69. First of all, it must be reiterated that the second sentence of Article 7 of Regulation No 2988/95 is merely a discretionary provision. It clearly allows a margin of discretion.

70. Even though the penalties under Article 11 of Regulation No 3665/87 have a non-criminal nature, [35] it seems to me to be incompatible with the requirements of clarity and precision if their application to the persons mentioned in the second sentence of Article 7 of Regulation No 2988/95 were placed in the discretion of the national administrative authorities. In *AOB Reuter*, [36] before finding that Article 11(1) of Regulation No 3665/87 constitutes a legal basis for sanctions against the exporter which are clear and sufficient, the Court found that it is necessary to apply the sanction, where the criteria are satisfied, unless one of the exhaustively defined exceptions applies.

71. However, the individual cannot know from the wording of the provisions at issue which acts or omissions will make him liable under the rules on penalties. For that reason, the principle of legality is not satisfied. The margin of discretion provided for in the second sentence of Article 7 of Regulation No 2988/95 must be exercised by the Community legislature or by the Member States on its behalf, so that a directly applicable penalty is created.

72. It should also be stated that in determining the nature and scope of the penalty, Article 11(1) of Regulation No 3665/87 has particular regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility, as is required by Article 2(3) of Regulation No 2988/95. On the other hand, the second sentence of Article 7 of Regulation No 2988/95 does not modulate the penalty for the persons covered by it depending on the nature and the seriousness of their participation and their knowledge of the extent of the damage which has been caused, or threatens to be caused, to the Community budget. If a cautious parallel is drawn with criminal law, it can be seen that no distinction is drawn on the basis of commission of an offence and complicity.

73. The present case specifically shows that the rules at issue would not be capable of imposing an appropriate penalty. Thus, BIRB alleges that SGS Belgium intentionally issued a false certificate and, at the same time, assumes that DERWA was not aware of the inaccuracy. However, the two provisions under examination do not provide a clear aid for considering the alleged fault of SGS Belgium for the assessment of the penalty imposed on

35 — With regard to the definition of penalty under point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87, see *Käserei Champignon Hofmeister*, cited in footnote 15, paragraph 44.

36 — Cited in footnote 26, paragraph 30.

it, if the view is taken that SGS Belgium has at most participated in committing an irregularity and cannot itself be considered the perpetrator of the irregularity.

74. I believe that my analysis thus far is also confirmed by the fact that, as the Austrian Government has also pointed out, in 2002, in connection with an amendment [37] of Regulation No 800/1999, Cited in footnote 33.which had in the meantime superseded Regulation No 3665/87, the Commission introduced a provision with the following content for export refunds for agricultural products: 'Member States which have approved SAs shall provide for an effective system of sanctions for cases where an approved SA has issued a false certificate.' The relevant second recital in the preamble to the amending regulation states: 'It is further considered necessary to provide for an effective system of sanctions, to be implemented by Member States, in cases of irregular proofs of arrival delivered by SAs.'

75. The Commission did not therefore consider that the combination of Article 11(1) of Regulation No 3665/87 and the second sentence of Article 7 of Regulation No 2988/95 constitute a sufficient legal basis for penalties against international control and supervisory agencies. It is particularly indicative that this newly introduced provision opts for a completely different path to that applicable to the exporter. The Member States are given the task of providing for a system of sanctions for international control and supervisory agencies, which is not defined in any greater detail. If there had previously been a sufficient sanction mechanism at Community level, there would have been no need for that provision; it would then also have to be assumed that there are now two provisions, without any clarification of the relationship between them.

76. Lastly, I would like to point out that it is not possible to find clarification in national law, for example in Article 2(2) of the Royal Decree of 4 January 1985, of the definition which does not exist at the level of Community law for the period relevant to the present case.

77. Neither Regulation No 2988/95 nor Regulation No 3665/87 contains a reference to national law which would make it possible to find clarification, as is necessary for the purposes of substantive law, in national law of a penalty which has only been outlined.

37 — Through the insertion of a new Article 16c by Commission Regulation (EC) No 1253/2002 of 11 July 2002 amending Regulation (EC) No 800/1999 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 2002 L 183, p. 12).

78. By contrast, Regulation No 2988/95 expressly provides that no administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it and that Community law shall determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility. The fifth recital in the preamble to Regulation No 2988/95 states that irregular conduct, and the administrative measures and penalties relating thereto, are provided for in sectoral rules in accordance with the regulation.

An international control and supervisory agency approved by the Member State in which the export declaration was accepted – in this case, Belgium – which has submitted a false certificate of unloading within the meaning of Article 18(2)(c) of Regulation No 3665/87 cannot be deemed to be an economic operator within the meaning of Article 1(2) and the first sentence of Article 7 of Regulation No 2988/95 for the purposes of imposing on it a penalty on the basis of those provisions in conjunction with Article 11 of Regulation No 3665/87. It can be deemed to be a person who has participated in committing an irregularity within the meaning of Article 7(2) of Regulation No 2988/95, but that provision itself in conjunction with Article 11 of Regulation No 3665/87 does not offer a sufficient legal basis for the imposition of a penalty on it.

C — *The third question*

79. Consequently, I therefore take the view that the second question should be answered as follows:

80. In view of my proposed answers to the first two questions, there is no longer any need to answer the third question. If a penalty could not be imposed at all, it is pointless to examine whether it could possibly no longer be imposed. I will therefore examine this question only in the alternative in case the Court should not concur with my conclusion regarding the first two questions.

81. Under the first sentence of the third subparagraph of Article 3(1) of Regulation No 2988/95, the limitation period is interrupted by any act of the competent authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity.

82. The referring court mentions the following as possible acts relating to investigation or legal proceedings

— the investigation report drawn up by the Economic Inspection Board, which was sent to BIRB on 13 August 1998 and a letter from the Economic Inspection Board to BIRB of 9 October 1998 and a fax of 14 October 1998, transmitting investigation reports;

— the registered letter from BIRB to SGS Belgium of 21 April 1999 requesting the production of additional documents as evidence of the release for consumption;

— the registered letter from BIRB to SGS Belgium of 5 February 2002 imposing a sanction 'pursuant to Article 11 of Regulation No 3665/87'.

83. The Court has already made clear that an act relating to a general check by the national authorities which bear no relation to any suspicion concerning the existence of irregularities regarding sufficiently precisely circumscribed transactions cannot interrupt the limitation period under Article 3(1) of Regulation No 2988/95. Thus, notification of a general customs inspection without a precise definition of the transactions to which the suspicion of the existence of irregularities relates does not constitute an act relating to investigation or legal proceedings which interrupts the limitation period. [38] On the other hand, the Court considered a letter from the Commission informing the recipient of Community financial aid in the fisheries sector that it was reducing the amount of aid originally granted because the fisheries resources of the third country mentioned in the aid decision had not been used for long enough to be an act relating to investigation proceedings. [39]

84. According to the wording of the third question and the further statements made in the order for reference, it must be assumed that the contested investigation reports in relation to SGS Belgium were notified during the ongoing investigations. In my opinion, the referring court must assess, having regard to the abovementioned case-law, whether the investigation reports in question were sufficiently specific and SGS Belgium could detect that it was being investigated on account of the certificate of 4 November 1997.

85. I do not see any problem, as SGS Belgium evidently does, in the fact that the documents are not BIRB's own investigation reports. The

38 — *Handlbauer*, cited in footnote 9, paragraphs 40 and 43.

39 — Case C-226/03 P *José Martí Peix* v *Commission* [2004] ECR I-11421, paragraph 30.

question whether a Member State confers competence for investigations and/or legal proceedings on just one or several authorities cannot per se call into question the classification of the measures in question as measures relating to investigation or legal proceedings. However, it may be necessary to give a different assessment if the authority which sends the reports produced by another authority to the relevant person creates in that person the impression there are not sufficient grounds for suspicion in its view.

86. As regards the registered letter from BIRB to SGS Belgium of 21 April 1999 requesting the production of additional documents as evidence of the release for consumption, there is much to suggest, in my opinion, that it was at least an act relating to investigation proceedings. However, in this respect the referring court must examine the precise content in order to establish that it is clear from that letter that BIRB had doubts as to the accuracy of the certificate of 4 November 1997 and did not merely, for example, endeavour to supplement its own documents. According to the description of the facts by the referring court, [40] SGS Belgium was also notified by that registered letter of the results of the investigation by the Economic Inspection Board. The statements made in the two above points hold in this regard.

87. With regard to the registered letter from BIRB to SGS Belgium of 5 February 2002 imposing a sanction 'pursuant to Article 11 of Regulation No 3665/87', I have no doubt that it constitutes an act relating to legal proceedings which could interrupt limitation. According to the order for reference, it is clear from the registered letter why the penalty was imposed. It may be a little surprising that SGS Belgium did not seise the Belgian courts in order to protect itself against that penalty, but conversely BIRB brought proceedings against SGS Belgium for payment of the fine. At the hearing, the Belgian Government stated that the administrative decision on the penalty is not enforceable as such. If the person on whom such a penalty is imposed refuses to pay it, the Belgian authorities must seise the courts to enforce the penalty, which fix the appropriate sum within the scope of the amount requested. Irrespective of this procedural arrangement, it must be stated that by the registered letter a penalty was imposed on SGS Belgium, and SGS Belgium was requested to pay the fine. It therefore unmistakeably constitutes a measure relating to legal proceedings.

40 — See the reproduction of the facts in point 16 above.

88. In the alternative, I suggest that the third question be answered to the effect that a registered letter from the competent national administrative authority imposing a sanction in respect of a situation described in greater detail in that letter can be deemed to be an act relating to investigation or legal proceedings within the meaning of the third subparagraph of Article 3(1) of Regulation No 2988/95.

V — Conclusion

89. I accordingly suggest that the questions referred by the Hof van Beroep te Antwerpen be answered as follows:

'(1) Articles 5 and 7 of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests do not in themselves have any direct effect in the sense that they can serve as an autonomous legal basis for the imposition of a penalty.

(2) An international control and supervisory agency approved by the Member State in which the export declaration was accepted – in this case, Belgium – which has submitted a false certificate of unloading within the meaning of Article 18(2)(c) 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, as amended by Commission Regulation (EC) No 2945/94 of 2 December 1994, cannot be deemed to be an economic operator within the meaning of Article 1(2) and the first sentence of Article 7 of Regulation No 2988/95 for the purposes of imposing on it a penalty on the basis of those

provisions in conjunction with Article 11 of Regulation No 3665/87. While it may be deemed to be a person who has participated in committing an irregularity within the meaning of Article 7(2) of Regulation No 2988/95, that provision itself, in conjunction with Article 11 of Regulation No 3665/87, does not provide a sufficient legal basis for the imposition of a penalty on it.

(3) A registered letter from the competent national administrative authority imposing a sanction in respect of a situation described in greater detail in that letter can be deemed to be an act relating to investigation or legal proceedings within the meaning of the third subparagraph of Article 3(1) of Regulation No 2988/95.'