

Case C-447/20**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

22 September 2020

Referring court:

Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal)

Date of the decision to refer:

1 July 2020

Appellant:

Instituto de Financiamento da Agricultura e Pescas IP (IFAP)

Respondent:

LM

Subject matter of the main proceedings

This request for a preliminary ruling arises in the course of proceedings between the Instituto de Financiamento da Agricultura e Pescas I.P. (Institute for the Financing of Agriculture and Fisheries I.P.) ('IFAP') and LM in which the former appeals against the judgment dismissing, on the ground of the expiry of the four-year limitation period applicable, the [judicial] opposition to the proceedings instituted by the appellant against the respondent for the enforced recovery of debts arising from aid unduly received under the AGRO Operational Programme.

Subject matter and legal basis of the request for a preliminary ruling

This case calls for a determination of whether a [judicial] opposition in the course of enforced recovery proceedings is the appropriate procedural mechanism for obtaining a ruling on the limitation period applicable to proceedings for the repayment of unduly received economic aid and, if so, of what time limit is applicable and what the rules are for calculating it, account being taken of the

provisions of Article 3(1) of Council Regulation (EC, Euratom) No 2988/95 of 18 December on the protection of the European Communities financial interests.

Questions referred for a preliminary ruling

I. Does Article 3(1) of Regulation No 2988/95 preclude national legislation which imposes on the beneficiary of a subsidy the burden of bringing before the competent court an administrative action against a measure ordering the repayment of amounts received unduly by reason of the occurrence of an irregularity, failing which that measure will become final [...] if it not appealed in time (that is to say, if the beneficiary does not avail himself in time of the means of defence available to him under national law) and, in consequence, the amount unduly received will be recoverable in accordance with the rules and time limits laid down by national law?

II. Does Article 3(1) of Regulation No 2988/95 preclude national legislation according to which the beneficiary of a subsidy may not rely on the expiry of the four- or eight-year time limit in the course of judicial proceedings for enforcement which have been brought against him, since that issue can be assessed only in the context of an administrative-law action brought against the measure ordering repayment of the amounts received unduly by reason of the establishment of an irregularity?

Provisions of EU law relied on

Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests: Article 3.

Provisions of national law relied on

Decreto-Lei n. 163-A/2000, de 27 julho – Estabelece as regras gerais de aplicação do Programa Operacional de Agricultura e Desenvolvimento Rural (POADR/Programa), bem como da componente agrícola dos programas operacionais de âmbito regional do III Quadro Comunitário de Apoio (QCA III) [Decree-Law No 163-A/2000 of 27 July 2000 establishing the general rules for the implementation of the Operational Programme for Agriculture and Rural Development (OPARD/Programme) and of the agricultural component of the regional operational programmes under Community Support Framework III (CSF III)]

‘Article 11

Unilateral termination or amendment of the contract by IFADAP

1. IFADAP may unilaterally terminate contracts if the beneficiary fails to comply with any of his obligations or if, for a reason attributable to the

beneficiary, any of the conditions governing the grant of the aid is not or is no longer met.

2. In the event of non-compliance, IFADAP may also unilaterally amend the contract, in particular the amount of the aid, where this is justified in the light of the conditions under which the project has actually been executed or in the event of the absence or inadequacy of the supporting documentation.

Article 12

Repayment of aid and expenditure

1. In the event that the contract is terminated by IFADAP, the beneficiary shall repay the amounts received by way of aid, together with the statutory interest accrued since the date on which the aforementioned amounts were made available to him, without prejudice to the possible application of other penalties provided for by law.

2. The repayment provided for in the foregoing paragraph shall be made within fifteen days of notification of termination of the contract, it being noted that the beneficiary must be expressly notified of any such termination.

3. In the event that the beneficiary does not make the repayment within the time limit laid down in the foregoing paragraph, the amount owed shall bear default interest at a rate equal to 2% from the date on which the aforementioned time limit expired until the date on which repayment is actually made.

4. In the situation provided for in the foregoing paragraph, the beneficiary must also pay to IFADAP the amounts corresponding to the costs connected with the extra-judicial recovery of the sums owed, which amount to 10% of the total value of the sums received by the beneficiary.

5. The provisions contained in the foregoing paragraphs shall apply in the event of a unilateral contract termination triggering the obligation to repay the amounts received, together with the percentage of the amount to be repaid that is specified in paragraph 4. ...

Article 15

Enforceable instruments

Debt certificates issued by IFADAP are enforceable instruments. ...'

Decreto-Lei n. 4/2015 de 7 de janeiro – Aprova o Código do Procedimento Administrativo (Legislative Decree No 4/2015 of 7 January 2015 approving the Code of Administrative Procedure)

'Article 163

Measures amenable to annulment and the rules governing amenability to annulment

1. Measures amenable to annulment shall be those which have been adopted in breach of principles or rules of law for the infringement of which no other penalty is available.
2. A measure amenable to annulment shall be one which produces legal effects that can be eliminated retroactively by an annulment order made by the administrative courts or by an annulment decision adopted by the administration itself.
3. Measures amenable to annulment may be appealed to the administration itself or to the competent administrative courts within the time limits laid down by law. ...

Article 179

Enforcement of financial obligations

1. Where, under an administrative measure, a sum must be paid to or by order of a legal person governed by public law, any voluntary non-payment of that sum within the time limit prescribed shall trigger the proceedings for enforced recovery provided for in the legislation governing the taxation procedure.
2. For the purposes of the provisions contained in the foregoing paragraph, the competent body shall, in accordance with the provisions laid down by law, issue a certificate having the value of an enforceable instrument which it shall submit to the competent department of the tax administration, together with the file relating to the administrative proceedings?

Decreto-Lei n. 214-G/2015, de 2 de outubro – Código do Processo nos Tribunais Administrativos (Decree-Law No 214-G/2015 of 2 October 2015 laying down the Code of procedure before the administrative courts)

‘Article 58

Time limits

1. Unless otherwise provided for by law, the bringing of an administrative action against void measures shall not be subject to a time limit, whereas, in the case of measures amenable to annulment, such an action must be brought within the following time limits:
 - a) one year, if it is brought by the Public Prosecutor’s Office;
 - b) three months, in other cases.

2. Without prejudice to the provisions of Article 59(4), the time limits specified in the foregoing paragraph shall be calculated in accordance with the provisions of Article 279 of the Civil Code.

3. On expiry of the time limit laid down in paragraph 1(b), an action shall be admissible:

a) in the case where there is a justified impediment as provided for in civil procedural law;

b) provided that it is brought within a period of three months as from the date on which the error ceased to exist, in the case where it is established, in accordance with the principle of adversarial procedure, that, in the particular case concerned, a normally diligent citizen could not have been expected to bring an action in time because he was misled by the conduct of the administration, or

c) in the case where, not more than one year after the date on which the measure was adopted or published, if publication is compulsory, the delay must be regarded as justified in the light of the ambiguity of the legislative framework applicable or in the light of the difficulties connected, in the particular case, with identifying the challengeable measure or classifying it as an administrative measure or as a rule’.

Decreto-Lei n. 433/99 de 26 de outubro – Aprova o Código de Procedimento e de Processo Tributário (Decree-Law No 433/99 of 26 October 1999 approving the Code of administrative and judicial procedure in matters of taxation)

‘Article 148

Scope of the enforced recovery procedure

1. The enforced recovery procedure shall have as its purpose the enforced recovery of the following debts: [...]

2. The following may also be recovered by way of the enforced recovery procedure, in the circumstances and under the conditions provided for by law:

a) other debts contracted with the State or with other legal persons governed by public law which must be paid under an administrative measure;

b) reimbursements or refunds.

Article 204

Grounds for opposition to enforced recovery

1. An opposition to enforced recovery may be based only on the following grounds:

...

d) time barring of the debt forming the subject of the enforced recovery’.

Brief presentation of the facts and main proceedings

- 1 On 13 February 2002, IFADAP [(predecessor to IFAP)] and LM concluded a contract for the grant of aid under the programme entitled AGRO/Measure 5 Prevention and Restoration of Agricultural Production Potential, co-financed by the EAGGF.
- 2 On 15 February 2002, ABISTRAL – Construções e Terraplanagens, L.^{da} and LM concluded an agreement in writing.
- 3 On 26 February 2006, LM was notified by registered letter with acknowledgement of receipt that, following a series of inspections, a failure to comply with the applicable legislation had been identified and, consequently, certain sums relating to certain items were considered not be eligible for subsidy: labour costs associated with LM’s husband; costs of recovering materials from demolition, in the absence of supporting documentation; and payments to ABISTRAL, on the ground that, since LM had failed to submit bank documentation showing that the cheques had actually been processed, there was no proof that payment had actually been made. In accordance with the law, LM had 10 days in which to respond, following which the subsidy would be adjusted.
- 4 LM signed the aforementioned acknowledgement of receipt on 1 March 2006.
- 5 On 17 March 2006, IFADAP received LM’s reply.
- 6 IFAP sent LM a notification worded as follows: ‘... Following completion of the administrative procedure ..., a final decision must now be adopted, ... on the terms and grounds set out below: The application [for aid] under the aforementioned project was approved on 20 December 2001 ... and the contract for the grant of aid having an investment value of EUR 145 080.36, corresponding to a subsidy of EUR 108 810.27, was concluded on 7 March 2002. Following an audit conducted in relation to that project, [LM] was informed by notification ... of 23 February 2006 ... of the failures to comply with the legislation applicable to measure 5 of the AGRO programme which had been identified in the course of physical and accounting checks, and, consequently, of the impossibility of endorsing the expenditure referred to in the aforementioned notification. On 17 March 2006, we received your letter of reply ...’.
- 7 On 23 June 2011, IFAP sent LM a letter of voluntary payment of the amount referred to in the preceding paragraph.
- 8 On 8 August 2012, the Serviço de Finanças do Porto 1 (Tax Office, Porto 1) began proceedings for the enforced recovery of debts arising from aid unduly

collected under the POAGRO operational programme in the amount of EUR 29 917.67.

Essential arguments of the parties to the main proceedings

- 1 **IFAP** submits that, as regards the enforced recovery proceedings at issue, it did not adopt the administrative measure under which LM (opponent) was obliged to pay it EUR 29 917,67 (difference between the initial value of the aid and the value obtained after excluding the expenditure not eligible for subsidy) until 30 April 2010, with the result that the limitation period may start to run only from that date.
- 2 It also submits that the Tribunal Administrativo e Fiscal do Porto (Administrative and Tax Court, Oporto) lacked jurisdiction on account of the subject matter, in respect of which jurisdiction lies with the administrative-law section of the Tribunal Administrativo e Fiscal, given that the time-barring affects the examination, assessment and determination of the facts in relation to the lawfulness of the creation, modification or extinguishment of IFAP's claim.
- 3 It takes the view that, in its judgment, the Tribunal Administrativo e Fiscal do Porto committed an error in confusing, for the purposes of the application of Article 3 of Regulation No 2988/95, the limitation period applicable to the proceedings (which is provided for in that article) and the limitation period applicable to the claim/debt (which is not governed by that article).
- 4 The Tribunal Administrativo e Fiscal do Porto erred in its assessment of the evidence inasmuch as it omitted in the judgment under appeal to examine, assess and determine the facts relevant to limitation, in particular in relation to the date on which LM should have proved in the administrative proceedings that he had made the alleged payment by way of 'recovery of materials', and inasmuch as, in that judgment, it established the date on which the contract for the supply of goods and services between LM and ABISTRAL L.^{da} was concluded (15 February 2002) as the date for calculating the limitation period applicable to the 'debt under enforcement', corresponding to the claim in favour of IFAP, which, on that date, had not legally come into being (that claim not having come into being until the administrative measure forming the subject of enforcement was adopted on 30 April 2010).
- 5 **LM** takes the view that the court had jurisdiction in respect of the subject matter and that, in accordance with the case-law of the Court of Justice of the European Union ('the Court of Justice') relating to the provisions of Council Regulation (EC, Euratom) No 2988/95, the limitation period applicable to the debt under enforcement is dictated by the limitation period applicable to the proceedings, which is to say four years as from the date on which the irregularity was committed, that period ending no later than on the date of expiry of a period of time equal to twice the limitation period during which the competent authority has not imposed a penalty.

- 6 That time limit is applicable because both the Court of Justice and the Supremo Tribunal Administrativo (Supreme Administrative Court) consider that, since national law does not provide for a specific time limit for that purpose, the time limit applicable is that provided for in Article 3(1) of the aforementioned Regulation.
- 7 The infringement was committed on 15 February 2002 but was not notified to LM until 1 March 2006, and a final decision in the administrative proceedings was not adopted until 30 April 2010.

Brief presentation of the grounds of the request for a preliminary ruling

- 1 In the first place, **IFAP** raises the question of whether, in the course of an opposition to enforced recovery proceedings, the tax courts may rule on the limitation period applicable to the repayment proceedings provided for in Article 3(1) of Regulation (EC, Euratom) No 2988/95. In its opinion, the debt in question here is an administrative rather than a tax debt, with the result that, in order to ascertain whether the tax court has jurisdiction, it is necessary to determine, first of all, whether the procedural mechanism of opposition to enforced recovery is appropriate for the purposes of ensuring judicial protection in the present case.
- 2 **LM** requested that the Tribunal Administrativo e Fiscal do Porto give a ruling on the lawfulness of the recovery proceedings instituted against him, and based the alleged unlawfulness of the recovery on the ground that it was time-barred: **the measure seeking repayment of the aid** (and, therefore, constituting the enforceable instrument) **was adopted on 23 June 2011**, that is to say, *more than eight years after* the date on which the irregularities are alleged to have been committed in the course of performance of the contract, **15 February 2002**. What is more, IFAP did not notify the aforementioned irregularity until **1 March 2006**, that is to say, more than four years after the irregularity had been committed.
- 3 Even if it is accepted that a person against whom enforcement is sought, who has not appealed the decision requiring him to repay aid on the ground of the commission of irregularities, was able to rely on limitation in the course of the opposition to the enforced recovery proceedings, the issue arises as to what time limit must be applied: whether it should be **the period of four years from the commission of the irregularity** (first subparagraph of Article 3(1), of Regulation No 2988/95); whether, given that that period is not absolute and the court hearing the opposition does not have jurisdiction to rule on the administrative matter, it is then necessary to apply the **period of eight years from commission of the irregularity** (third subparagraph of Article 3(1) of Regulation No 2988/95), or whether, given that what is involved is the enforcement of an administrative decision requiring the repayment of sums unduly paid (enforcement of the administrative measure), it is necessary to add to the period of eight years prescribed for the application of the measure the period of three years which the

administration has to enforce the decision, with the result that, in order for the obligation to become fully time-barred, **a period of 11 years from the commission of the irregularity** (Article 3(2) of Regulation No 2988/95) must have passed.

- 4 The **Court of Justice** has repeatedly held that Article 3(1) applies both to administrative measures and to administrative penalties [see, to that effect, the judgments in *Handlbauer*, C-278/02, EU:C:2004:388; *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others*, C-278/07 to C-280/07, EU:C:2009:38; *Cruz & Companhia*, C-341/13, EU:C:2014:2230; *Pfeifer & Langen*, C-52/14, EU:C:2015:381; *Corman*, C-131/10, EU:C:2010:825; *Glencore Céréales France*, C-584/15, EU:C:2017:160; *Firma Ernst Kollmer Fleischimport und export*, C-59/14, EU:C:2015:660; *Établissement national des produits de l'agriculture et de la mer (FranceAgriMer)*, C-383/14, EU:C:2015:541, etc.]. It is also settled case-law of the Supremo Tribunal Administrativo (Supreme Administrative Court) that the limitation period for proceedings provided for in Article 3(1) of Regulation (EC, Euratom) No 2988/95, which applies to the imposition of penalties and to the repayment of EU aid irregularly received under the Common Agricultural Policy, is four years as from the point of occurrence of both the act or omission constituting an infringement of EU law and of the harm to the EU budget. The limitation period begins to run in any event on the date on which the last act took place and may be extended up to a period of eight years. States have a further three years, after the adoption of the measure requiring repayment of the aid items or imposing the penalty, to enforce that measure. Thus, the State appears to have a period of up to 11 years to obtain the enforced recovery of the amount unduly paid, provided that it gives proper notice of the measure requiring repayment, at the latest within eight years of the occurrence of the irregularity.
- 5 In the light of **Portuguese law**, the limitation period for proceedings referred to in Article 3(1) of the aforementioned Regulation No 2988/95 is an issue which LM should have invoked by bringing the corresponding administrative action against the measure in which the proceedings culminate, since it is possible to examine in the course of an opposition to an enforced recovery the lawfulness of the enforceable instrument because the proceedings for establishing the occurrence of the irregularity, which concluded with the adoption of the measure requiring repayment of the subsidy, are time-barred.
- 6 The issue arises because the difference between the limitation period for proceedings and the limitation period for the debt is, in practice, irrelevant for the purposes of EU law, which prescribes for the repayment of irregularly granted aid a time limit the expiry of which appears to preclude the enforceability of its repayment.
- 7 Consequently, it falls to be determined whether the national rules, which appear to form the foundation not only of the administrative court's lack of jurisdiction to rule on the limitation period laid down in the EU Regulation but also of the non-

existence of a basis for opposing enforced recovery, are in conformity with EU law and, in particular, whether they infringe Article 3 of Regulation No 2988/95.

[In the event that the aforementioned questions referred for a preliminary ruling (I and II) are answered in the negative, the referring court raises a further two questions (III and IV) which do not appear in the operative part of its order:

III. Must the three-year limitation period provided for in Article 3(2) of Regulation No 2988/95 be regarded as a limitation period for the debt that is created by the measure requiring repayment of amounts unduly received by reason of the occurrence of irregularities in the financing? Does that period start to run from the date on which that measure was adopted?

IV. Does Article 3 of Regulation No 2988/95 [preclude] national legislation according to which the three-year limitation period for the debt that is created by the measure requiring repayment of amounts unduly received by reason of the occurrence of irregularities in the financing must start to run from the date on which that measure was adopted and must be interrupted by a notification of the institution of proceedings for the enforced recovery of those amounts, remaining suspended until such time as those proceedings culminate in a definitive or final decision in cases involving a complaint, a challenge, an appeal or an opposition, where these suspend recovery of the debt?]