Hilary Term

[2020] UKSC 1

On appeal from: [2018] EWCA Civ 2401

JUDGMENT

FMX Food Merchants Import Export Co Ltd (Respondent) v Commissioners for Her Majesty's Revenue and Customs (Appellant)

before

Lord Reed

Lord Hodge

Lord Briggs

Lady Arden

Lord Kitchin

JUDGMENT GIVEN ON

29 January 2020

Heard on 14 October 2019

Appellant	Respondent
Kieron Beal QC	David Cavender QC
Simon Pritchard	Valentina Sloane QC
(Instructed by HMRC Solicitor's Office (Bush House))	(Instructed by RPC LLP)

LORD BRIGGS: (with whom Lord Reed, Lord Hodge and Lord Kitchin agree)

1.
The main issue in this appeal concerns the meaning and effect of a short, innocent-sounding, phrase in article 221(4) of the (now superseded) Customs Code of the EU, contained in Council Regulation (EEC) No 2913/92 of 12 October 1992. The Customs Code regulated the collection of, and accounting for, customs duty throughout the EU (in 1992, the EEC). As is spelt out in the recitals to Regulation No 2913/92, the purposes of the Customs Code include securing a balance between the needs of the customs authorities in ensuring the correct application of customs legislation, on the one hand, and the rights of traders to be treated fairly, on the other, the establishment of uniform rules and procedure within the internal market, and the prevention of fraud or irregularity which would be liable adversely to affect the General Budget of the EU.

2.
In order to understand the main issue about the meaning and effect of article 221(4) as inserted by Council Regulation (EC) No 2700/2000 of 16 November 2000, it is necessary first to explain some of the basic concepts used within the Customs Code. At the heart of it lies the concept of “customs debt” which is defined in article 4(9), in relation to imports, as follows:

“‘Customs debt’ means the obligation on a person to pay the amount of the import duties (customs debt on importation) or export duties (customs debt on exportation) which apply to specific goods under the Community provisions in force.”

By article 4(12) “debtor” means any person liable for payment of a customs debt.

3.
In relation to imports, article 201(2) provides that a customs debt shall be incurred at the time of acceptance of the customs declaration in question, and article 201(3) identifies as the debtor the person making the declaration, and (if relevant) the person on whose behalf the declaration is made.

4.
Recovery of the amount of the customs debt is governed by Chapter 3 of the Customs Code. Section 1 deals with entry of the debt in the accounts and communication of the amount of duty to the debtor (in both cases by the customs authority of each member state). Articles 218 to 220 lay down strict time limits for the accounting by customs authorities for customs debts including, in article 220, correcting the accounts where a customs debt has originally been entered at a level lower than the amount legally owed. Article 221 provides for the communication to the debtor of the amount of duty as soon as it has been entered into the accounts. Section 2, which begins with article 222, provides time limits and procedures for payment of the duty by the debtor. Those time limits run from the date of communication to the debtor of the amount of duty owed. Thus, although the debtor incurs a customs debt at the time of importation (when making the customs declaration), liability to pay it occurs only upon receipt of communication of the amount by the relevant customs authority.

5.
Returning to article 221, it provided (at the material time) so far as is relevant as follows:

“Article 221

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

2. …

3. Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. This period shall be suspended from the time an appeal within the meaning of article 243 is lodged, for the duration of the appeal proceedings.

4. Where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period referred to in paragraph 3.”

I have italicised the phrase which falls to be interpreted and applied on this appeal. By article 4(23) “provisions in force” include both Community and national provisions.

6.
The issue may be summarised as follows. For the importer FMX Food Merchants Import Export Co Ltd, the respondent, which is the relevant customs debtor, it is said that article 221(4) confers an option on each member state to provide, in advance, an alternative fixed time limit in substitution for the three-year time limit for communication of the amount of duty, where the qualifying condition (namely an act which was liable to give rise to criminal court proceedings) is satisfied. I will call it the criminal proceedings condition. If the member state does not do so (and the UK did not) then the three-year time limit provided by article 221(3) remains in force, because any other outcome would offend against the EU principle of legal certainty.

7.
For HMRC, the appellant, it is submitted that the three-year time limit in article 221(3) is automatically displaced wherever the criminal proceedings condition is satisfied. In such a case the requirement for legal certainty may be met either by a member state's provision of a substitute fixed time limit, or by the combination of a number of specific provisions of the national law which, together, satisfy the requirement for legal certainty or, as a last resort, by the general requirement of EU law that the communication should take place within a reasonable time. The relevant provisions of national law, it is argued, include one or more of the UK's provisions about abuse of process, the equitable doctrine of laches, or the provisions of the Limitation Act 1980.

8.
Thus far, FMX's arguments have been broadly accepted by the First-tier Tribunal ("the FtT") and by the Court of Appeal, whereas the Upper Tribunal ("the UT") found in favour of HMRC.

The Facts

9.
The facts which gave rise to the present dispute are not (now at least) contentious and may be briefly stated. Between August 2003 and January 2004, FMX imported ten consignments of garlic, which were declared to be of Cambodian origin, thus purportedly entitling them to exemption from all import duties under the "Everything But Arms" amendment to the EU's generalised system of preferences made in favour of, amongst other countries, Cambodia in 2001.

10.
In fact, the consignments all originated in China, so that (being outside the relevant quota for fresh garlic) they were subject both to ad valorem duty of 9.6% and additional anti-dumping duty of €120 per 100kg. The duty which should have been paid was £503,577.63.

11.
The false declarations as to origin came to light in the course of HMRC's investigation of later imports, occurring after January 2004, leading to post-clearance demands in February 2007 for duty of £370,872.50 issued within three years from the relevant importations. The FtT dismissed FMX's appeal against those demands in December 2010, holding that the imports had all originated in China.

12.
Following that outcome HMRC issued the post-clearance demand for duty in respect of the August 2003-January 2004 series of imports in March 2011, long after the expiry (if applicable) of the three-year time limit for communication in article 221(3), but only just over three months after the FtT's decision about the later imports.

13.
It was found by the FtT and is now common ground that, in relation to the 2003-04 imports, all the garlic originated in China, that the makers of the certificates of origin knew that they were false, and would be used for the purposes of UK import declarations, that FMX presented these certificates to HMRC and that, although not implicated in the underlying fraud, FMX thereby committed an act that was liable to give rise to criminal court proceeding under section 167(3) of the Customs and Excise Management Act 1979, which creates a strict liability offence.

14.
The result of those factual findings is that the criminal proceedings condition for disapplication of the three-year time limit for communication set out in article 221(4) was satisfied. It is, in passing, common ground that it is not necessary for HMRC to show that criminal court proceedings actually ensued or that the customs debtor was the person who or which committed the relevant criminal act: see Gilbert Snauwaert v Belgium (Joined Cases C-124/08 and C-125/08) [2009] ECR I-6793.

“Conditions set out in the provisions in force”

15.
It is common ground that this phrase is apt to describe both EU provisions and applicable provisions of any relevant member state. The UK has not in fact enacted or prescribed any provisions taking the form of a substitute time limit for communicating a customs debt where the criminal proceedings condition in article 221(4) is satisfied. The UK has, of course, a substantial body of statutory limitation provisions, now consolidated in the Limitation Act 1980 (for England and Wales), but section 37(2)(a) provides that the 1980 Act shall not apply to any proceedings by the Crown for the recovery of any tax or duty, or interest thereon. The result is that there were no provisions in force in England and Wales at the material time which imposed any specific or fixed time limit for the communication of a customs debt in circumstances where the criminal proceedings condition in article 221(4) applied. If, as FMX contends, article 221(4) gives member states the option to prescribe a substitute time limit, failing which the three-year time limit in article 221(3) remains in force, that option has not been exercised in respect of England and Wales.

The principle of legal certainty

16.
In Test Claimants in the FII Group Litigation v Revenue and Customs Comrs (formerly Inland Revenue Comrs) [2012] UKSC 19; [2012] 2 AC 337, 394, Lord Sumption, after mentioning the EU principles of effectiveness and equivalence, continued at para 146:

“There is a third principle which features less prominently in the case law on this subject but is of considerable importance because it informs the approach of the Court of Justice to the first two. This is the principle of legal certainty, which lies at the heart of the EU legal order and entails (among other things) that those subject to EU law should be able clearly to ascertain their rights and obligations.”

17.
Later, at para 149, he continued:

“The implications of these principles for the operation of rules of limitation in national systems of law is the subject of a considerable body of case law in the Court of Justice. Not only is limitation a feature of every national legal system of the EU, but the recognition of national rules of limitation as both

necessary and desirable is treated as part of the principle of legal certainty in EU law. In Rewe I [1976] ECR 1989, one of the first cases to come before the Court of Justice about the application of limitation periods to claims to enforce directly effective rights in the area of tax, the court observed, at para 5, that

'the laying down of such time-limits with regard to actions of a fiscal nature is an application of the fundamental principle of legal certainty protecting both the taxpayer and the administration concerned.'

This is so, notwithstanding that 'the effect of that rule is to prevent, in whole or in part, the repayment of those charges': Haahr Petroleum Ltd v Abenra Havn (Case C-90/94) [1997] ECR I-4085, para 45. Subject to the overriding principles of effectiveness and equivalence, EU law recognises the public interest in orderly national budgeting and equity between generations of taxpayers, which will generally require rules for establishing clear limits beyond which tax accounts may not be reopened."

18.
Two potentially conflicting strands of EU jurisprudence have been identified by the parties to this appeal as emerging from decisions of the Court of Justice of the European Union ("the CJEU"). The first is that, where the provisions in force appear to have a lacuna which, because of the absence of any time limit, would appear to permit a relevant body to pursue a claim or take action against a person without any limit of time, then the principle of legal certainty will require that the claim be made or action be taken within a reasonable time.

19.
The second strand is that where the principle of legal certainty calls for the provision of a time limit, or permits a member state to prescribe a time limit of its own by way of derogation from an EU-wide time limit, then nothing other than a time limit which is both fixed in its duration, and laid down in advance, will do. Central to the outcome of this appeal is the question which of those strands of EU jurisprudence best illuminates the meaning and effect of article 221(4).

20.
The earliest case which the court was shown in the first strand of EU authority is Sanders v Commission of the European Communities (Case T-45/01) [2004] ECR II-3315, CFI ("Sanders"). This was a claim for damages for loss sustained as a result of the alleged failure to recruit the applicants as temporary servants of the European Communities during the time they worked for the Joint European Torus (JET) Joint Undertaking. It was, in essence, a complaint of discrimination by the Commission made by 95 of its employees. The procedural rules governing such an application, contained in the Staff Regulations of Officials of the European Communities, imposed no time limit for the bringing of such claims. Nonetheless, the court held that the applicants were under a duty to do so within a reasonable time after becoming aware of the relevant facts, and that this duty arose from the general principles of Community Law, in particular the principle of legal certainty: see paras 59-61 and 66 of the judgment. At para 59 it was held that:

"There is an obligation to act within a reasonable time in all cases where, in the absence of any statutory rule, the principles of legal certainty or protection of legitimate expectation preclude Community institutions and natural persons from acting without any time-limits, thereby threatening, inter alia, to undermine the stability of legal positions already acquired."

At para 60, the court held that, for Community institutions, the duty to act within a reasonable time is an aspect of good administration and derives from the fundamental need for legal certainty.

21.
In Allen v Commission of the European Communities (Case T-433/10) EU:T:2011:744, EGC (“Allen”), another case about the JET project, 110 employees brought discrimination claims under the Staff Regulations of Officials of the European Communities, which were dismissed by the European Union Civil Service Tribunal (First Chamber) as having been brought out of time. On appeal to the General Court, the applicants argued that there was no time constraint for the bringing of such claims. In rejecting that argument the court held, at para 26, as follows:

“In that regard, it must be held that the appellants’ argument that the absence of a time limit automatically means that it is possible to bring a claim for damages without any time-limit cannot succeed. It should be noted on that point that, contrary to what the appellants contend, there is an obligation to act within a reasonable time in all cases except those where the legislature has expressly excluded or expressly laid down a specific time-limit. The legal basis for setting a reasonable time-limit, in the absence of any statutory rule, is the principle of legal certainty, which precludes institutions and natural persons from acting without any time-limits, thereby threatening to undermine the stability of legal positions already acquired … Thus, in the absence of any statutory rule, it is for the judicature to decide on the length of the reasonable period for submitting a claim for damages, in the light of the circumstances of the case …”

22.
Nencini v European Parliament (Case C-447/13P) EU:C:2014:2372 (“Nencini”) was a case about recovery of expenses over-claimed by an MEP, by the European Parliament. Although the relevant procedural rules imposed a five-year limitation period running from the notification of such a claim to an MEP, no time limit was specified for the making of that notification itself. The communication was made to the MEP more than five years after the Parliament had become aware of the relevant facts. The General Court and the Second Chamber on appeal held that the reasonable time principle applied to the communication by the Parliament of such a claim, because the fundamental requirement of legal certainty prevented Community institutions from indefinitely delaying the exercise of their powers. The CJEU concluded that, in the circumstances, a delay of more than five years from becoming aware of the relevant facts, before communicating the claim, was to be presumed to be unreasonable, in the absence of special facts, such as conduct by the debtor causing delay or other time-wasting manoeuvres or bad faith.

23.
I turn now to the cases cited to this court in the second strand of EU authority, again in chronological order. The most important of those, heavily relied upon by the Court of Appeal in the present case, is Ze Fu Fleischhandel GmbH v Hauptzollamt Hamburg-Jonas (Joined Cases C-201/10 and C-202/10) [2011] ECR I-3545, CJEU (“Fleischhandel”). It concerned the interpretation of article 3(1) and (3) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities’ financial interests and of the principles of proportionality and legal certainty. The underlying claim was for repayment by Fleischhandel of wrongly claimed export refunds in relation to goods which had been cleared for export to Jordan but, in fact, transported to Iraq. Article 3 of Regulation No 2988/95 provided (so far as relevant) as follows:

“1. The limitation period for proceedings shall be four years as from the time when the irregularity referred to in article 1(1) was committed. However, the sectoral rules may make provision for a shorter period which may not be less than three years.

…

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

24.
The exports in question had taken place in 1993, and the claim for repayment was made, in proceedings in the German courts, in 1999, after the discovery of the true export destination during an inspection carried out early in 1998.

25.
The first instance court, the Finanzgericht Hamburg, decided that the claim was out of time under article 3(1) of Regulation No 2988/95, but the Bundesfinanzhof stayed the proceedings of the Hauptzollamt’s appeal, and referred the matter to the CJEU. The referring court’s provisional view was that a general 30-year limitation period in German law could be applied by analogy and, if unreasonably long, could in principle be reduced by judicial decision, but not so as to have rendered the claim in that case time-barred.

26.
The CJEU held that, in principle, a national limitation period as long as 30 years would not offend the principle of legal certainty, but that it would be disproportionately long. If the national court sought to reduce a disproportionate period to one which satisfied the requirements of proportionality this would not satisfy the principle of legal certainty unless the reduced period was fixed in advance so as to be sufficiently foreseeable by a person affected by it: see para 52 of the judgment. The result was that, no such reduced period having been laid down by the German courts in advance, there was no national limitation period which satisfied the principles of legal certainty and proportionality sufficient to displace the four-year period prescribed by article 3(1) of Regulation No 2988/95, by reference to article 3(3).

27.
It was not argued in that case that there was a lacuna which could be filled by an obligation on the claimant to proceed within a reasonable time, no doubt because, in accordance with the clear language of article 3, the four-year limitation period prevailed in the absence of any shorter or longer period which complied with the requirements of EU law.

28.
Firma Ernst Kollmer Fleischimport und-export v Hauptzollamt Hamburg-Jonas (Case C-59/14) EU.C: 2015:660 (“Kollmer”) was also about article 3 of Regulation No 2988/95. At para 30 of his opinion Advocate General Cruz Villalón said that:

“If a four-year limitation period were to appear, from the national authorities’ point of view, too short to enable them to bring proceedings in respect of irregularities displaying a certain complexity, it would always be open to the national legislature to adopt a longer limitation rule suited to irregularities of that type, which would have to meet the requirements of foreseeability and proportionality deriving from the principle of legal certainty.”

He thus analysed article 3(3) as conferring a form of option enabling member states to substitute the four-year period with a longer period of their own choosing, provided that the longer period was compliant with the principle of legal certainty. Failing a compliant exercise of that option, the four-year period would prevail.

29.

Valsts ieņēmumu dienests v Veloserviss SIA (Case C-427/14) EU:C:2015:803 was relied upon by the Court of Appeal and by FMX in this court as affording some additional support for the proposition that a taxpayer or customs debtor is entitled, under the principle of legal certainty, not to have his position open to challenge indefinitely: see para 31 of the judgment. It was a case about the Customs Code, but it was more concerned with national rules about the time for the conduct of post-clearance examinations, than time limits for the communication of a customs debt. Article 221(4) of the Customs Code is referred to in passing, but it is not a case in which the criminal proceedings condition for the application of article 221(4) was satisfied. The importer in that case was neither implicated in the false declaration of Cambodian origin of the bicycles concerned, nor found to have acted otherwise than in good faith (ie, in the context, without reasonable care). There was therefore no issue as to whether the three-year time limit for communication of a customs debt was inapplicable in the circumstances.

30.
I must finally mention Agra Srl v Agenzia Dogane-Ufficio delle Dogane di Alessandria (Case C-75/09) [2010] ECR I-5595. Although it does not fall squarely into either of the streams of European authority to which I have thus far referred, it is specifically about article 221(4) of the Customs Code, and sheds some light on the purpose behind the criminal proceedings exception from the generally applicable three-year time limit for the communication of customs debts. The case concerned an irregular import declaration made by Agra for the purpose of obtaining licences for the import of frozen boned meat, submitted in June 2002, which was found to have been false during an inspection in 2007, leading to a subsequent criminal investigation, and communication of a reassessment of the duty payable in March 2008. The relevant provisions of the Italian Customs Code in force at the time provided for a five-year limitation period for the recovery of customs duties but, where the failure to pay duties had its origins in a criminal offence, time for the purposes of that period was to run from the date on which the order or judgment in the criminal proceedings became final. The question referred to the CJEU was whether a time limit prescribed to run from the date of the conclusion of the criminal proceedings complied with article 221(3) and (4) of the Customs Code. The CJEU ruled that it did. At paras 34-35 of the judgment the CJEU held:

“34. Secondly, it should be observed that, by merely referring to ‘the conditions set out in the provisions in force’ article 221(4) of the Customs Code defers to national law as regards the rules governing the extinction of the customs debt through the passage of time, where that debt arises as a result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings.

35. Accordingly, in so far as EU law does not lay down common rules in this field, it is for each member state to determine the rules governing the extinction, through the passage of time, of customs debts which it has not been possible to assess because of an act which could give rise to criminal court proceedings (see, by analogy, Case C-91/02 Hannl-Hofstetter [2003] ECR I-12077, paras 18 to 20, and Molenbergnatie, para 53).”

31.
That was, of course, a case in which a national provision in force dealt in express terms with the time limit for pursuing a customs debt in circumstances where the criminal proceedings condition in article 221(4) applied rather than, as in the present case, where there is no such specific national provision in force. It may readily be supposed that, if what may loosely be called the Fleischhandel test had by then been enunciated, the Italian provision would have complied with it even though the limitation period was set to run from a date (namely when the criminal proceedings became final) which could

not be ascertained by the taxpayer in advance of factual matters specific to his case. Nonetheless it is of some assistance that the language chosen by the CJEU speaks in terms of the complete disapplication of any community-wide time limit (or other common rules) where the act creating the customs debt could give rise to criminal court proceedings, treating the matter as entirely governed by the rules put in place by the relevant member state. In short, the disapplication of the three-year time limit in article 221(3) is treated as the automatic result of the likelihood of criminal court proceedings, rather than the result of an election by a member state to choose a different time limit for that already prescribed by the EU as appropriate for those circumstances.

Analysis

32.
The starting point for an understanding of the meaning and effect of article 221(4) is an examination of its purpose. It describes the second of two circumstances in which the ordinary three-year time limit for communication of a customs debt is not to apply. The first, in article 221(3), is where the liability for duty is subject to an appeal, within the meaning of article 243. Then, the three-year period is suspended for the duration of the appeal proceedings. The second is where the debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings.

33.
The purpose of the first exception is because, in the event of an appeal, the amount of the customs debt has not been finally determined as it would otherwise be by its amount being entered in the accounts. The purpose of the second exception is not so clear. Under the legal systems of some member states it may be that the amount of the customs debt arising from the potentially criminal act may be determined in the criminal proceedings themselves, with a similar consequence in the unsuitability of the ordinary three-year time limit as would flow from the lodging of an appeal. In other member states, and in the UK in particular, it may be because civil proceedings for the determination of the amount of the debt may be liable to be stayed until the determination of the criminal proceedings, so as to preserve the integrity of the criminal process. This would render the ordinary three-year period equally inappropriate, but would not necessarily make a simple suspension of the period until the end of the criminal proceedings a satisfactory substitute.

34.
It is easy to see why, there being likely divergences in the consequences of criminal proceedings as between different member states, that the decision was taken to leave the conditions (including time limits) for communication of a customs debt, where the criminal proceedings condition applies, to each member state.

35.
The important point for present purposes is that it is reasonably clear from the language and purpose of article 221(4), read in its context, that the three-year period in article 221(3) is regarded as inappropriate for cases where there is a prospect of criminal court proceedings, rather than as a prima facie appropriate period from which, nonetheless, member states are given the option to depart.

36.
This is consistent with a plain reading of the language of article 221(4), which simply provides that communication of the debt may be made after the expiry of the three-year period, where the debt is the result of an act which was liable to give rise to criminal court proceedings. The permission given to communicate such a debt after the expiry of the three-year period is, nonetheless, subject to any

relevant conditions in the “provisions in force” which, as appears from article 4(23), includes Community or national provisions.

37.
There is a sharp difference therefore between this case and the circumstances under review in the Fleischhandel and Kollmer cases, both of which concerned article 3 of Regulation No 2988/95. There, member states had the “possibility” of applying a longer period than the four-year EU-wide time limit, not in special circumstances where that time limit was disapplied, but in every situation to which it did apply, namely the commission of a relevant “irregularity”. The disapplication of the EU-wide time limit was therefore triggered precisely by the exercise of an option conferred upon member states to prescribe a longer time limit. If that option was not exercised in accordance with EU law then, leaving aside the provision for a shorter period in article 3(1), there is nothing in that article, or elsewhere in Regulation No 2988/95, which would make it appropriate to disapply the four-year time limit in favour of a longer one. There was therefore no lacuna in the provisions in force which needed to be filled by reference to an obligation to act within a reasonable time.

38.
Returning to the present case, the next question is whether there was any provision of UK law in force sufficient to prevent communication of the customs debt arising from the false declaration of origin of the garlic being able to be given without any limit of time, contrary to the principle of legal certainty which the existence of such a liberty on the part of HMRC would involve. In my view, there is none. In the UT Birss J considered that there were relevant provisions. At para 34 he said:

“The common law (and rules of equity) already equip the courts to prevent procedural unfairness in proper cases and, for example, go as far striking out a claim as abusive as a result of inordinate delay which would make a fair trial impossible. To take an extreme example, if HMRC knew all the relevant facts but still waited a further 20 years before issuing a communication and seeking to enforce the debt claim, that sort of conduct would very likely make a fair trial impossible and would be abusive. Such a case would very probably be struck out.”

In para 35 he identified the relevant UK law principles as being abuse of process and laches, and HMRC has supported that analysis in its submissions to this court.

39.
I respectfully disagree. Both abuse of process and laches are concerned with the conduct of, or delayed institution of, legal proceedings. But this case is concerned with the need, recognised by the EU principle of legal certainty, for there to be some control upon the timing of the communication of a customs debt, rather than upon the institution of subsequent legal proceedings if, after communication of it, the debt has not paid. The doctrine of laches suffers from the additional difficulty that it relates to the pursuit of equitable relief: see Snell’s Equity, 33rd ed (2015), para 5-011. The recovery of a post clearance customs debt is far removed from the class of equitable claims.

40.
An attempt was made by HMRC to argue that, if UK law was otherwise deficient it would be necessary to reinstate the protection to debtors afforded by the Limitation Act 1980, by disapplying section 37(2)(a) of that Act, which renders the Act inapplicable to tax or duty claims by the Crown. Again, I disagree. There are two difficulties with that analysis. The first is whether, even if the provisions of the Limitation Act 1980 were by that route to be re-instated for the purpose of protecting debtors from late claims for post-clearance customs duty, they would in fact serve that purpose. The second is

whether, even if they would, section 37(2)(a) would be sufficiently inconsistent with the requirements of EU law for it to have to be disapplied.

41.
The Limitation Act 1980 provides limitation periods under which (subject to suspension or postponement) time runs against claimants from the moment when they have a complete cause of action. The Act is, in short, about limitation of action, rather than time limits for the taking of steps which make the claimant's cause of action complete, or steps which would remove a procedural bar to the taking of proceedings. In the present context the ability to take proceedings for recovery of a post-clearance customs debt depends upon the communication of the debt, followed by non-payment during the period prescribed for payment thereafter: see articles 221, 222 and 232 of the Customs Code. While it is true that the debt is incurred at the time of the acceptance of the relevant declaration under article 201(2), I consider it unreal to suppose that HMRC is therefore entitled to sue for or enforce the debt before the time when, under the Customs Code as summarised above, it becomes due and payable, and timely payment has not been made. Furthermore it would be strange indeed for the Customs Code to have made detailed provision in relation to the time permitted for communication of the debt, if the relevant national customs authority of a member state could nonetheless sue for it regardless of communication, and, in particular, where communication had been made out of time. The provision for communication to be made in a timely fashion in article 221 must at least have been designed to prevent the debtor from exposure to liability to proceedings for the enforcement of a debt which had not been communicated to him at all.

42.
But the existence of a requirement to take certain steps before bringing proceedings for the enforcement of a statutory debt does not always mean that there is no cause of action until those steps have been taken: see Swansea City Council v Glass [1992] QB 844. Whether the taking of those steps is a part of the cause of action or simply a procedural requirement is a question of construction of the statute in question; see per Taylor LJ at p 852B-C, applying Coburn v Colledge [1897] 1 QB 702 and Sevcon Ltd v Lucas CAV Ltd [1986] 1 WLR 462.

43.
In written submissions at the court's request following the hearing, both parties were of one accord in asserting that the cause of action in the present case was complete on the date when, pursuant to article 201(1), the customs debt was incurred, rather than upon, or following, the communication of it under article 221. I am not at all sure that this is correct, and there may have been tactical reasons behind what, on FMX's case, would appear to amount to a concession. It seems to me to be well arguable that communication of the debt to the debtor is part of the cause of action for recovery, so that HMRC would have to plead both communication of the debt and (perhaps) non-payment within the prescribed time, as part of its cause of action for recovery. This is, in particular, because article 222(1) speaks not merely of the right of HMRC to take proceedings for recovery, but of the obligation of the debtor to pay, as following upon the communication of the debt. But for the purposes of what follows I will assume that the parties' agreement about this is correct.

44.
Plainly, on that basis, the application of the Limitation Act 1980 would go some way to alleviate the otherwise open-ended ability of HMRC to recover the debt at any time, where article 221(4) disapplies the three-year time limit. Communication of the debt, as a procedural pre-condition to bringing proceedings, would have to be made within the relevant limitation period. But section 37(2)(a) of the Act is not lightly to be disapplied. There must be a real inconsistency with EU law: see Fleming

(trading as Bodycraft) v Revenue and Customs Comrs [2008] UKHL 2; [2008] 1 WLR 195, para 25, per Lord Walker of Gestingthorpe. Plainly no process of construction can be employed to make section 37(2)(a) mean the exact opposite of what it plainly says. The supposed inconsistency with EU law is said to be that, without the three-year time limit in article 221(3) HMRC could delay until the crack of doom before communicating the debt, there being no “provisions in force” to the contrary.

45.
But EU law has its own remedy for the filling of just such a lacuna, namely the requirement that communication be made within a reasonable time, if otherwise the principle of legal certainty would be offended. It is precisely to fill such a lacuna that the EU law requirement to take relevant steps within a reasonable time exists, as is explained and exemplified in the Sanders, Allen and Nencini cases which I have summarised above. It was submitted for FMX that this solution had been created only for cases between institutions and national authorities, so that it had no application to a claim by a national authority against a private person such as a customs debtor. Again, I disagree. That analysis is not born out by those authorities, which apply the duty to act within a reasonable time not only to EU institutions, but also to private individuals, such as employees bringing a discrimination claim against the Commission for which there is no prescribed time limit. Since the principle of legal certainty is one of those fundamental principles of general application in EU law I can see no good reason why it should not be generally applicable to fill any lacuna constituted by the absence of a sufficient time limit in relevant provisions in force, whether that is attributable to a failure by EU legislators to provide one (as in the discrimination cases) or to what I regard as a failure by the UK to provide one in the context of the Customs Code, where the prospect of criminal court proceedings leads to the disapplication of the three year time limit in article 221(3).

46.
It follows that there is no need or requirement to disapply section 37(2)(a) of the Limitation Act 1980 to remedy an inconsistency with EU law. If, as I conclude, EU law has its own way of dealing with the need to avoid communication of the debt being delayed to an extent which undermines the principle of legal certainty, by the imposition of the requirement that it be made within a reasonable time, then there is no inconsistency in the Limitation Act 1980 regime being made unavailable, by section 37(2)(a), for that purpose.

Disposition

47.
I would allow the appeal. I have considered whether this court should make a reference to the CJEU but in my view the above analysis demonstrates a clear answer to the question how article 221(4) is to be interpreted and applied in a situation where there are no national provisions in force which limit the time for the communication to the debtor of the amount of duty, where the three-year time limit in article 221(3) is displaced. The communication must be made within a reasonable time.

48.
I have also considered whether the question whether this communication was made within a reasonable time needs to be referred back to the FtT or to the UT so that it can be decided. It has yet to be decided as a discrete issue, at any level, because the Court of Appeal and the tribunals all decided the appeal on different grounds. Neither of the parties invited this court to take that course, in the event that the reasonable time analysis should prevail. Furthermore, it is not a case in which further facts need to be decided. HMRC made the relevant communication within four months of the outcome of the related appeal to the FtT concerning the post January 2004 imports, which raised

similar issues about their provenance. It has not been suggested by FMX that this was outside a reasonable time for such a communication and, in my view, it clearly was not. It was reasonable for HMRC to delay issuing a communication under article 221 in relation to the pre-January 2004 imports while the closely related litigation about the later imports remained on foot.

49.
The result is that I would restore the decision of the UT, albeit for slightly different reasons.

LADY ARDEN:

50.
I agree with Lord Briggs that this appeal should be allowed but, as appears below, in part by a different route, which places more reliance on domestic law.

51.
The starting point, as I see it, is the interpretation of article 221(4) of the Customs Code as in force at the material time, set out at para 5 above. This does not require member states to adopt legislation extending the three-year period for communicating the amount of a customs debt if it is the result of an act which when committed was liable to give rise to criminal court proceedings. In this Lord Briggs and I agree: see the final sentence of para 31 above.

52.
It would be odd if member states had to decide to extend the period for communicating a post-clearance customs demand resulting from a potentially criminal act since the purpose of article 221(4) is to protect the finances of the EU on whose behalf member states collect customs duties: see, in this connection, the last recital to the Customs Code which states that when adopting measures to implement the Code, “the utmost care must be taken to prevent any fraud or irregularity liable to affect adversely the General Budget of the European Communities”.

53.
Article 221(4) provides that such communication may take place, semble without there having to be any enabling member state legislation, “under the conditions set out in the provisions in force”. That means that a communication of a post-clearance customs debt is not permitted if it does not comply with the conditions for a valid communication set out in the relevant national law or in EU law. Those conditions can trump the extension of time. EU law therefore defers to national law.

54.
For these conditions to apply, there must be some provision of EU law or national law which prevents the communication from taking place with operative effect. That would be the case if under national law the customs debt had been extinguished by effluxion of time, for example because of some general provision of the law preventing the state from pursuing claims after a specified period: see Agra Srl v Agenzia Dogane-Ufficio delle Dogane di Alessandria (Case C-75/09) [2010] ECR I-5595 (“Agra”), paras 34 and 35, set out at para 30 above. These paragraphs are very important because in them the Court of Justice of the European Union (“the CJEU”) takes what may be thought to be an unusual step of stating in terms that EU law “defers” to national law.

55.
The structure of article 221(4) is quite distinct from the equivalent provision of Regulation No 2988/95 in issue in Ze Fu Fleischhandel GmbH v Hauptzollamt Hamburg-Jonas (Joined Cases C-201/10 and C-202/10) [2011] ECR I-3545 (“Fleischhandel”) (para 23 above), which gave member states the

option of providing a limitation period and so the principles of EU law applied to any exercise of that member state option. Lord Briggs makes this point, and other points with which I agree, at paras 32 to 37 of his judgment. Contrary to FMX's submission, it is in my judgment beyond the reach of a purposive interpretation to read a similar provision into article 221(4).

56.
The principle of legal certainty applies to acts done by EU institutions and member states in exercise of the powers conferred by them under EU rules: see Valsts ieņēmumu dienests v Veloserviss SIA (Case C-427/14) EU:C:2015:803 ("Veloserviss"), para 30 and see Test Claimants in the FII Group Litigation v Revenue and Customs Comrs (formerly Inland Revenue Comrs) [2012] UKSC 19; [2012] 2 AC 337, para 146 per Lord Sumption.

57.
Legal certainty may apply to the imposition of criminal offences when done under a power conferred by the treaties or EU legislation: see Hannl + Hofstetter Internationale Spedition GmbH v Finanzlandesdirektion für Wien, Niederösterreich und Burgenland (Case C-91/02) [2003] ECR I-12077 which contrary to the submission of FMX, is therefore distinguishable from article 221(4). Proceedings to recover payments exacted in breach of EU law also stand in a different category because they are required by EU law to give effect to EU law. On that basis, I would distinguish the decisions of the CJEU in Test Claimants in the FII Group Litigation v Revenue and Customs Comrs (formerly Inland Revenue Comrs) (Case C-362/12) [2014] AC 1161, Marks & Spencer plc v Customs and Excise Comrs (Case C-62/00) [2003] QB 866 and Halifax plc v Customs and Excise Comrs (Case C-255/02) [2006] Ch 387, on which FMX relies as showing that EU principles apply even to domestic proceedings.

58.
It follows that the Court of Appeal were wrong to extract from Fleischhandel a principle of EU law that, where a remedy was left to domestic law, there always had to be a finite limitation period fixed in advance. Firma Ernst Kollmer Fleischimport und-export v Hauptzollamt Hamburg-Jonas (Case C-59/14) EU:C:2015:660, discussed by Lord Briggs in para 28 above, is similarly distinguishable. Article 221(4) leaves it to domestic law to determine whether the communication of a post-clearance demand under that sub-article is valid.

59.
The "provisions" referred to in article 221(4) include provisions contained in EU law as well as national law (article 4(23) of the Customs Code). Moreover, the term "provisions" has an extended meaning and is not limited to provisions in legislation. This may be seen from article 221(1). One of the conditions applying to the communications is that they must follow "appropriate procedures" (see article 221(1)). In Belgische Staat v Molenbergnatie NV (Case C-201/04) [2006] ECR I-2049, para 53 the CJEU held that, in the absence of EU legislation or national law setting out "appropriate procedures", the competent authorities in the member states had to ensure that the communication would allow persons liable for customs debts to have full knowledge of their rights. That decision clearly indicates that the "provisions" mentioned in article 221(4) need not be rules of law but may be administrative practices. But there still has to be a provision: a principle of EU law is not enough because EU law under article 221(4) defers to national law.

60.
In England and Wales, there is no statutory limitation period because of section 37(2)(a) of the Limitation Act 1980 (para 15 above).

61.
The CJEU has accepted that national law may not impose a limitation period in the context of the recovery of state aid: see, for example, Italian Republic v Commission of the European Communities (Case C-298/00 P) [2004] ECR I-4087, paras 82 to 91. There is no reason to suggest that it would not similarly accept the notion in other areas. Likewise the Court of Appeal in Revenue and Customs Comrs v GMAC (UK) plc [2016] EWCA Civ 1015; [2017] STC 1247, para 150 (a decision in which the leading judgment was given by Floyd LJ, with which Theis J and I agreed) held that, where proceedings were governed by national law, it was possible for there to be no period of limitation. I do not accept FMX's submission that this holding is inapplicable because the case concerned a claim by the taxpayer and not one, as here, by the state since, as HMRC points out, the need for certainty would exist so far as the taxpayer is concerned in both situations.

62.
There was a further ruling by the Court of Appeal in GMAC (UK) plc which is not relevant in this case. The court concluded, in agreement with the earlier decision of the Court of Appeal in British Telecommunications plc v Revenue and Customs Comrs [2014] EWCA Civ 433; [2014] STC 1926, that the EU reasonable time rule could not be applied to defeat the taxpayer's claims for recovery of overpaid VAT because HMRC had invalidly imposed a condition that the taxpayer had to prove in an insolvency in order to claim bad debt relief and there was no indication in the domestic legislation that a reasonable time limit for making a claim was being imposed. That ruling turned on the domestic law provisions and has no resonance for this appeal.

63.
Contrary to Lord Briggs at para 29 above, I consider that some minor assistance can be gained in the present case from Veloserviss since at para 37 the CJEU made it clear that customs authorities could act under article 221(4) after expiry of the three-year period, and made no reference to the need for any limitation period in domestic law.

64.
Even applying the extended meaning of "provision" explained above, there is, so far as this court has been informed, no relevant provision of EU law stipulating the limit of the period within which a communication must be made. As the CJEU held in Agra, EU law defers to domestic law. Contrary to FMX's submissions, nothing in that case requires a member state to adopt a limitation period. All the CJEU holds is that the question of the effect of the elapse of time is a matter for national law.

65.
The timeliness of a communication of the post-clearance demand is only a relevant issue in connection with proceedings for enforcement of the customs debt, and therefore logically it falls to be determined for that purpose under the domestic law governing the time bar. It follows that it is not, as I see it, relevant whether there was any finding of fact in these proceedings as to reasonable time or whether a reasonable time rule fulfils the EU principle of legal certainty.

66.
So far as the law of England and Wales is concerned, it has been said that there is a general duty to exercise statutory powers within a reasonable time: see R (S) v Secretary of State for the Home Department [2007] EWCA Civ 546; [2007] Imm AR 781, para 51 per Carnwath LJ. However, reasonableness is a flexible standard. If HMRC were to delay unreasonably in communicating a customs debt, it might also be said that its failure to make a decision was irrational in judicial review proceedings: see, for example, R v Inland Revenue Comrs, Ex p Opman International UK [1986] 1

WLR 568. It is not necessary to express a final view on these points and there may be a difference of approach between myself and Lord Briggs on this point (cf paras 38 to 39 above).

67.
It follows that, for the purpose of determining whether HMRC is time-barred from recovering a post-clearance customs debt under domestic law, I consider that the reasonable time principle in Sanders v Commission of the European Communities (Case T-45/01) [2004] ECR II-3315 (cf paras 45 to 46 above) is inapplicable. Under the principle of conferral, the reasonable period principle of EU law can only apply to any incidental issue of law concerning that communication to which EU law applies. It cannot restrict the operation of a domestic law to which EU law has been held by the CJEU to defer. Thus, in my judgment, it does not so apply in the circumstances under consideration. There may be other control mechanisms under domestic law, such as that of judicial review, as already mentioned. This may be one of the reasons why article 221(4) has now been revised.

68.
I need not question the parties' agreement as to when the cause of action for a customs debt is complete (cf para 43 above). The question does not arise because there is no limitation period. Nor do I consider that any question of disapplying section 37(2)(a) arises (cf paras 40-44 above).

69.
In conclusion, for the reasons given above, which differ in part from those given by Lord Briggs, it is no answer to HMRC's case that they have duly communicated a post-clearance customs debt for FMX, which seeks to uphold the decision of the Court of Appeal, to contend that in breach of EU law there is no limitation period fixed by the law of England and Wales for communicating a post-clearance customs debt under article 221(4) of the Customs Code. I would also therefore allow this appeal.