JUDGMENT OF THE COURT
14 December 1995 *

In Joined Cases C-430/93 and C-431/93,

REFERENCES to the Court under Article 177 of the EEC Treaty by the Hoge Raad der Nederlanden for a preliminary ruling in the proceedings pending before that court between

Jeroen van Schijndel

and

Stichting Pensioenfonds voor Fysiotherapeuten

and between

Johannes Nicolaas Cornelis van Veen

and

Stichting Pensioenfonds voor Fysiotherapeuten

* Language of the case: Dutch.

on (i) the interpretation of Community law with regard to the power of a national court to consider of its own motion the compatibility of a rule of domestic law with Articles 3(f), 5, 85, 86 and/or 90 of the EEC Treaty and (ii) the interpretation of those provisions,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida (Rapporteur), P. J. G. Kapteyn, C. Gulmann, J. L. Murray, P. Jann and H. Ragnemalm, Judges,

Advocate General: F. G. Jacobs,
Registrar: R. Grass, Registrar, and H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the appellants in the main proceedings, by I. G. F. Cath, of the Hague Bar,

— the respondent in the main proceedings, by P. A. Wackie Eysten, of the Hague Bar, and E. H. Pijnacker Hordijk, of the Amsterdam Bar,

— the Netherlands Government, by J. G. Lammers, Deputy Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— the German Government, by E. Röder, Ministerialrat at the Federal Ministry of Economic Affairs, and B. Kloke, Regierungsrat in the same Ministry, acting as Agents,

— the French Government, by C. Chavance, Foreign Affairs Secretary at the Directorate of Foreign Affairs of the Ministry of Foreign Affairs, and C. de Salins, Deputy Director in the same directorate, acting as Agents,

— the United Kingdom, by J. D. Colahan, of the Treasury Solicitor's Department, acting as Agent, and P. Duffy, Barrister,

— the Commission of the European Communities, by M. C. Timmermans, Deputy Director-General, B. J. Drijber and B. Smulders, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the appellants in the main proceedings, represented by I. G. F. Cath; of the respondent in the main proceedings, represented by P. A. Wackie Eysten and E. H. Pijnacker Hordijk; of the Netherlands Government, represented by J. W. de Zwaan, Deputy Legal Adviser at the Ministry of Foreign Affairs, acting as Agent; of the German Government, represented by G. Thiele, Assessor at the Federal Ministry of Economic Affairs, acting as Agent; of the Greek Government, represented by V. Kontolaimos, Deputy Legal Adviser to the State Legal Council, acting as Agent; of the Spanish Government, represented by A. Navarro González, Director-General for Legal Coordination of Community Institutional Affairs, and R. Silva de Lapuerta and G. Calvo Díaz, Abogados del Estado, of the State Legal Service, acting as Agents; of the French Government, represented by C. Chavance and H. Renié, Foreign Affairs Secretary in the Directorate of Foreign Affairs of the Ministry of Foreign Affairs, acting as Agent; of Ireland, represented by J. O'Reilly SC and J. Payne, Barrister-at-Law; of the United Kingdom, represented by J. D. Colahan and P. Duffy, and of the Commission, represented by M. C. Timmermans and B. J. Drijber, at the hearing on 4 April 1995,

after hearing the Opinion of the Advocate General at the sitting on 15 June 1995,

gives the following

Judgment

1 By judgments of 22 October 1993, received at the Court on 28 October 1993, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty six questions on (i) the interpretation of Community law with regard to the power of a national court or tribunal to consider of its own motion the compatibility of a rule of domestic law with Articles 3(f), 5, 85, 86 and/or 90 of the EEC Treaty and (ii) the interpretation of those same provisions.

2 The questions were raised in proceedings between Mr van Schijndel and the Stichting Pensioenfonds voor Fysiotherapeuten (Pension Fund Foundation for Physiotherapists, hereinafter 'the Fund') (Case C-430/93) and between Mr van Veen and the Fund (Case C-431/93).

3 By order of 2 December 1993 the two cases were joined for the purposes of the written procedure, the oral procedure and judgment.

4 Under Article 2(1) of the Wet Betreffende Verplichte Deelneming in een Beroepspensioenregeling (Law on Compulsory Participation in an Occupational Pension Scheme, hereinafter 'the WVD'), the Minister of Social Affairs is empowered, at the request of one or more professional organizations which, in his opinion, are sufficiently representative of persons working in the professional sector concerned, to make membership of an occupational pension scheme established by the members of the profession compulsory for all categories or for one or more

particular categories of them. According to Article 2(4) of the same Law, the members concerned must comply with the provisions set out in, or pursuant to, the statutes and regulations of the pension fund.

5 In 1978, the physiotherapists' profession set up the Fund. According to Article 2(1) of the pension scheme regulations adopted by the Fund, a scheme member is 'any physiotherapist carrying on an activity as a physiotherapist in the Netherlands and not yet of pensionable age'. Certain categories of physiotherapists are excluded from the Fund, in particular those 'whose activity is solely in employment in respect of which they are covered by the rules contained in the Algemene Burgerlijke Pensioenwet (General Pensions Law) or by other pension arrangements which are at least equivalent to those laid down in those rules, provided that the persons concerned give the Fund written notice of their intention and comply with the administrative requirements set out in Article 25(3)' (Article 2(1)(a)).

6 On 31 March 1978 the State Secretary for Social Affairs issued a decree pursuant to Article 2(1) of the WVD making membership of the Fund compulsory for physiotherapists carrying on their activity in the Netherlands. Like the Fund regulations, that decree excludes from the obligation to join the Fund physiotherapists 'whose activity is solely in employment in respect of which they are covered by the rules contained in the Algemene Burgerlijke Pensioenwet or by other pension arrangements which are at least equivalent to the aforementioned occupational scheme, provided that the persons concerned give the Fund written notice of their intention and comply with the administrative requirements set out in the abovementioned pension scheme regulations'.

7 Under 'Rules for applying Article 2(1)(a) of the pension scheme regulations', adopted by the Fund, membership is compulsory except where the pension

insurance arrangements, made by a physiotherapist practising his profession under a contract of employment, apply to 'all members of the profession employed by the company'.

8 Pursuant to the provisions described above, Mr van Veen and Mr van Schijndel, who exercise the profession of physiotherapist in the Netherlands as employees, applied for exemption from compulsory membership of the occupational pension scheme for physiotherapists. The Fund refused exemption on the ground that the pension scheme which the two physiotherapists had joined by entering into contractual arrangements with the insurance company Delta Lloyd was not applicable to all members of the profession in the service of the employer concerned ('the collectivity requirement'). It therefore directed Mr van Veen and Mr van Schijndel to continue to pay the contributions payable under the pension scheme. Mr van Veen and Mr van Schijndel challenged the Fund's decisions, the former before the Kantonrechter (Cantonal Court) at Breda and the latter before the Kantonrechter at Tilburg, on the ground that the collectivity requirement had no basis in either the pension scheme regulations of the Fund or in the WVD.

9 The Breda court found against Mr van Veen whilst the Tilburg court found in favour of Mr van Schijndel. On appeal, however, the Breda Rechtbank upheld the Fund's view and dismissed the two appellants' claims.

10 Mr van Veen and Mr van Schijndel applied to the Hoge Raad to have those judgments quashed. For the first time in the proceedings they contended in particular that the Breda Rechtbank should have considered, 'if necessary of its own motion', the question of the compatibility of compulsory Fund membership with higher-ranking rules of Community law, in particular Article 3(f), the second paragraph of Article 5, Articles 85 and 86 and Article 90, as well as Articles 52 to 58 and 59 to

66 of the EEC Treaty. In their view, the requirement in question could render ineffective the competition rules applicable to providers of pension insurance and to individual members of the profession by imposing or promoting the conclusion of contracts incompatible with Community competition rules or reinforcing their effects. Furthermore, the Fund could not meet market demand, or at any rate demand for equivalent pension insurance on more attractive terms.

11 The Hoge Raad has found that in support of their plea in cassation Mr van Veen and Mr van Schijndel are relying on various facts and circumstances which were not established by the Breda Rechtbank or relied on by them in support of their claims before the lower courts. In Netherlands law, a plea in cassation by its nature excludes new arguments unless on pure points of law, that is to say that they do not require an examination of facts. Furthermore, even though Article 48 of the Netherlands Code of Civil Procedure requires courts to raise points of law, if necessary, of their own motion, the principle of judicial passivity in cases involving civil rights and obligations freely entered into by the parties entails that additional pleas on points of law cannot require courts to go beyond the ambit of the dispute defined by the parties themselves nor to rely on facts or circumstances other than those on which a claim is based.

12 In view of those considerations, the Hoge Raad decided to stay proceedings and has referred the following questions to the Court for a preliminary ruling:

'(1) In proceedings concerning civil rights and obligations freely entered into by the parties, should a national civil court apply Articles 3(f), 5 and 85 to 86 and/or 90 of the Treaty establishing the European Economic Community, even where the party to the proceedings with an interest in application of those provisions has not relied upon them?

(2) If Question (1) must in principle be answered in the affirmative, does that answer also apply if in so doing the court would have to abandon the passive role assigned to it since it would be required (a) to go beyond the ambit of the dispute defined by the parties and/or (b) to rely on facts and circumstances other than those on which the party with an interest in application of those provisions relies in order to substantiate his claim?

(3) If Question (2) must also be answered in the affirmative, can the Treaty provisions referred to in Question (1) be relied on before a national court of cassation for the first time if (a) the applicable procedural law provides that new arguments may be submitted in cassation only if they are on pure points of law, that is to say that they do not require any factual enquiry and are applicable in all circumstances, and (b) reliance on those provisions actually calls for factual enquiry?

(4) Given the aims of the WVD [...], is an occupational pension scheme which, pursuant to and in accordance with the WVD, makes membership compulsory for all, or one or more specified groups of, persons belonging to a profession, entailing the legal consequences outlined [...] above attendant upon the Law, to be regarded as an undertaking within the meaning of Articles 85, 86 or 90 of the Treaty?

(5) If so, is the fact of making membership of the occupational pension scheme for physiotherapists [...] compulsory a measure adopted by a Member State which nullifies the useful effect of the competition rules applicable to undertakings, or is this the case only under certain conditions, and if so, under which?

(6) If the last question must be answered in the negative, can other circumstances render compulsory membership incompatible with Article 90 of the Treaty, and if so, which?'

The first question

13 The competition rules mentioned by the national court are binding rules, directly applicable in the national legal order. Where, by virtue of domestic law, courts or tribunals must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned (see, in particular, the judgment in Case 33/76 *Rewe* v *Landwirtschaftskammer für das Saarland* [1976] ECR 1989, paragraph 5).

14 The position is the same if domestic law confers on courts and tribunals a discretion to apply of their own motion binding rules of law. Indeed, pursuant to the principle of cooperation laid down in Article 5 of the Treaty, it is for national courts to ensure the legal protection which persons derive from the direct effect of provisions of Community law (see, in particular, the judgment in Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 19).

15 The reply to the first question must therefore be that, in proceedings concerning civil rights and obligations freely entered into by the parties, it is for the national court to apply Articles 3(f), 85, 86 and 90 of the Treaty even when the party with an interest in application of those provisions has not relied on them, where domestic law allows such application by the national court.

The second question

16 By this question, the Hoge Raad seeks to ascertain whether such an obligation also exists where, in order to apply of its own motion the aforementioned Community rules, the court would have to abandon the passive role assigned to it by going beyond the ambit of the dispute defined by the parties themselves and/or by relying on facts and circumstances other than those on which the party to the proceedings with an interest in application of the provisions of the Treaty bases his claim.

17 In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law (see, in particular, the judgments in Case 33/76 *Rewe* v *Landwirtschaftskammer für das Saarland* [1976] ECR 1989, paragraph 5, Case 45/76 *Comet* v *Produktschap voor Siergewassen* [1976] ECR 2043, paragraphs 12 to 16, Case 68/79 *Hans Just* v *Danish Ministry for Fiscal Affairs* [1980] ECR 501, paragraph 25, Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595, paragraph 14, Joined Cases 331/85, 376/85 and 378/85 *Bianco and Girard* v *Directeur Général des Douanes des Droits Indirects* [1988] ECR 1099, paragraph 12, Case 104/86 *Commission* v *Italy* [1988] ECR 1799, paragraph 7, Joined Cases 123/87 and 330/87 *Jeunehomme and EGI* v *Belgian State* [1988] ECR 4517, paragraph 17, Case C-96/91 *Commission* v *Spain* [1992] ECR I-3789, paragraph 12, and Joined Cases C-6/90 and C-9/90 *Francovich and Others* v *Italian Republic* [1991] ECR I-5357, paragraph 43).

18 The Court has also held that a rule of national law preventing the procedure laid down in Article 177 of the Treaty from being followed must be set aside (see the judgment in Case 166/73 *Rheinmühlen* v *Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33, paragraphs 2 and 3).

19 For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.

20 In the present case, the domestic law principle that in civil proceedings a court must or may raise points of its own motion is limited by its obligation to keep to the subject-matter of the dispute and to base its decision on the facts put before it.

21 That limitation is justified by the principle that, in a civil suit, it is for the parties to take the initiative, the court being able to act of its own motion only in exceptional cases where the public interest requires its intervention. That principle reflects conceptions prevailing in most of the Member States as to the relations between the State and the individual; it safeguards the rights of the defence; and it ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas.

22 In those circumstances, the answer to the second question must be that Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim.

The other questions

23 In view of the answers given to the first two questions, it is not necessary to reply to the third question. Nor is it necessary to reply to the other questions, which called for reply only if it were held that the Hoge Raad must consider an issue such as that raised by the parties to the main proceedings.

Costs

24 The costs incurred by the Netherlands, German, Greek, Spanish and French Governments, Ireland and the United Kingdom, and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgments of 22 October 1993, hereby rules:

1. In proceedings concerning civil rights and obligations freely entered into by the parties, it is for the national court to apply Articles 3(f), 85, 86 and 90 of the Treaty even when the party with an interest in application of those

provisions has not relied on them, where domestic law allows such application by the national court.

2. Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim.

Rodríguez Iglesias Kakouris Edward

Puissochet Hirsch Mancini Schockweiler

Moitinho de Almeida Kapteyn Gulmann

Murray Jann Ragnemalm

Delivered in open court in Luxembourg on 14 December 1995.

R. Grass G. C. Rodríguez Iglesias

Registrar President