

JUDGMENT OF THE COURT
14 December 1995

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

REFERENCES to the Court under [Article 267 TFEU] 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

on (i) the interpretation of [Union] 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 [Article 3 and the second and third paragraphs of Article 4(3) TEU], [Articles 101, 102 and/or 106 TFEU] and (ii) the interpretation of those provisions,

THE COURT,

composed of: G. C. Rodriguez 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. Ruhl, 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. Roder, 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 [Union], 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 Gonzalez, Director-General for Legal Coordination of [Union] Institutional Affairs, and R. Silva de Lapuerta and G. Calvo Diaz, Abogados del Estado, of the State Legal Service, acting as Agents; of the French Government, represented by C. Chavance and H. Renie, 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 267 TFEU] six questions on (i) the interpretation of [Union] 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 [Article 3 and the second and third paragraphs of Article 4(3) TEU], [Articles 101, 102 and/or 106 TFEU] 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 Physio therapists, 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 above-mentioned 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 [Union] law, in particular [Article 3 TEU], [the third paragraph of Article 4(3) TEU], [Articles 101 and 102 TFEU] and [Article 106 TFEU], as well as [Articles 49 to 54 TFEU] and [Article 56 to 62 TFEU]. 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 [Union] 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 [Article 3 TEU], [the second and third paragraphs of Article 4(3) TEU] and [Articles 101 to 102 TFEU] and/or [Article 106 TFEU], 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 101, 102 or 106 TFEU]?
- (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 106 TFEU], 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 [Union] 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 [the second and third paragraphs of Article 4(3) TEU], it is for national courts to ensure the legal protection which persons derive from the direct effect of provisions of [Union] 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 TEU, 101, 102 and 106 TFEU] 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 [Union] 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 [Union] 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 [Union] 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 [Union] 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 General 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 267 TFEU] 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 [Union] 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 [Union] law does not require national courts to raise of their own motion an issue concerning the breach of provisions of [Union] 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 [Union], 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 TEU, 101, 102 and 106 TFEU] 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. [Union] law does not require national courts to raise of their own motion an issue concerning the breach of provisions of [Union] 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.

Rodriguez 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
Registrar

G. C. Rodriguez Iglesias
President