JUDGMENT OF THE COURT
16 DECEMBER 1976 [1]

Comet BV
v Produktschap voor Siergewassen
(preliminary ruling requested by the College van Beroep voor het Bedrijfsleven)

Case 45/76

Summary

1. *Customs duties on exports — Charges having equivalent effect — Abolition — Direct effect — Individual rights — Protection by the national courts*
(EEC Treaty, Article 16; Regulation No 234/68, Article 10)

2. *Community law — Direct effect — Individual rights — Protection by the national courts — Legal proceedings — National procedural rules — Application*

1. The prohibition laid down in Article 16 of the Treaty and that contained in Article 10 of Regulation No 234/68 have direct effect and confer on individuals rights which the national courts must protect.
2. In the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing the same right of action on an internal matter. The position would be different only if those rules made it impossible in practice to exercise rights which the national courts have a duty to protect.

In Case 45/76,

Reference to the Court under Article 177 of the EEC Treaty by the College van Beroep voor het Bedrijfsleven, for a preliminary ruling in the action pending before that court between

1 — Language of the Case: Dutch.

COMET BV, Sassenheim,

and

PRODUKTSCHAP VOOR SIERGEWASSEN,

on the interpretation of the Community provisions for the free movement of goods,

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order making the reference and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

A Netherlands regulation of 1956 by the 'Produktschap voor Siergewassen' (Ornamental Plants Production Board) provides for a levy on exports of bulbs and corms of flowering plants to West Germany.

The levy, which amounts to 0.5 % of the invoiced amount of each consignment is used to finance sales publicity for the said products (Blumenwerbung) in the Federal Republic of Germany. The levy is payable by the German importer to the Netherlands exporter who has to pass it on to the Produktschap. The regulation was repealed on 8 July 1969 with effect from 1 June 1969. By levy notices of 7 July 1969 and 19 September 1969, the Comet BV company was notified that it owed several amounts in respect of flower bulb exports effected before 1 June 1969.

Comet did not initiate proceedings against these levy notices or against a reminder of 8 July 1971 and it paid the amounts claimed. It subsequently maintained that it had paid these amounts in error and claimed to set

them off against sums which it had been called upon to pay under a different head in 1975.

When the Produktschap refused to agree to this set-off, Comet brought proceedings against this refusal before the College van Beroep voor het Bedrijfsleven.

Before that court, the Produktschap did not dispute that the contested charges were incompatible with Community law but it maintains that the application for set-off should be rejected because proceedings were not taken against the 1969 levy notices and the 1971 reminder within the period of 30 days prescribed by Article 33 of the Law concerning administrative jurisdiction over trade organizations (wet administratieve rechtspraak bedrijfsorganisatie).

By order of 25 May 1976, the College van Beroep voor het Bedrijfsleven has referred the following question to the Court:

'Does any provision or any principle of Community law prohibit the raising of an objection against a litigant who is challenging before the national courts a decision of a national body for incompatibility with Community law on the ground that he has allowed the period for lodging an appeal under national law to elapse, either in the sense that the action of the litigant may be declared inadmissible by the court for failure to observe the time-limit or in the further sense that the administration may derive from the failure to comply with the time-limit a right to refuse to reconsider its decision?'

The order making the reference was entered at the Court Registry on 26 May 1976.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the Comet company, the Commission of the European Communities and the Government of the Federal Republic of Germany.

The Court, on hearing the report of the Judge-Rapporteur and the views of the Advocate-General, decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted before the Court

A — Observations of the Comet company

The plaintiff in the main action agrees that as a rule, the expiry of the limitation period for an appeal can, under national law, be pleaded against a litigant and that it prevents the administrative act from being contested.

The question which arises under Netherlands law involves the application of this principle to a situation in which an administrative act is claimed or is found to be incompatible with Community law and, in consequence, this question concerns the relationship between Community law and national law.

Has a party an independent right of action to end a situation in which Community law is being infringed? Is such an action beyond the reach of national provisions with the result that it can validly be brought even after expiry of the limitation periods for proceedings under national law? Or, on the other hand, must the time-limits for bringing proceedings be held to apply since, as is suggested in the order making the reference, 'acceptance of the plaintiff's point of view would mean that decisions of the national administration could be contested in the national courts without any limitation as to time on grounds of alleged incompatibility with Community law — in this case on grounds of alleged invalidity of EEC provisions — on which

the relevant decision is based, thereby depriving the administration of the protection necessary to enable it to carry out properly its own duties as well as those assigned to it in a Community context'.

The plaintiff in the main action contends that the abolition of a situation of incompatibility with Community law is a consideration which takes precedence over the submission based on expiry of the limitation period for bringing proceedings.

The general legal principle that Community law prevails over national law is one which implies that the Community legal order would be undermined if the Member States were still in practice able to promulgate measures the practical effect of which would be to frustrate the application of the Treaty on the basis of the direct effect of certain provisions. A Member State ought not to be able to rely on procedural requirements if this means that the legal position of a party is not wholly and unreservedly consistent with the objectives of Community law. On this point the plaintiff in the main action refers to Article 5 of the Treaty and to decisions of the Court concerning 'the effectiveness' of Community law.

As regards the question whether a party has a right of action the plaintiff in the main action considers that the answer depends not only on procedural rules but also on the duty of the Member States, of individuals and of the Community institutions to contribute to the practical application of Community law. All subject to Community law possess a right corresponding to this duty; this is the right to obtain a 'Folgenbeseitigung', that is to say, the annulment, whatever form it may take, of the consequences of a situation which is contrary to Community law. In this connexion the plaintiff in the main action refers to the arguments developed by the Rewe concern in Case 33/76 and to the judgment of the Court in Case 39/72 *Commission* v *Italy* [1973] ECR 101 in which it was held that the default of a Member State can constitute the basis of liability on its part towards individuals. Individual action is, therefore, necessary and must necessarily prevail over the rules of national law so as to ensure full and uniform application of Community law. The plaintiff in the main action ought therefore to be considered as having the right to be heard and the defendant in the main action cannot avail itself of the lapse of the limitation period for bringing proceedings under national law as justification for refusing to rescind the contested decision. The incompatibility of the national provision is something separate from a finding by the Court that Community provisions have been infringed. The judgment of the Court is declaratory and does not confer rights.

As regards the consequences for the State authorities of the independent existence of a right of action and the misgivings expressed by the national court, the plaintiff in the main action points out that if practical considerations concerning the financial consequences of entertaining an individual action were taken into account it would once again be the Member State which, in practice, determined the extent of the legal consequences of its actions. The protection which should be available to the administration to enable it to fulfil its tasks ought primarily to be determined by the administration itself which should take care to ensure that administrative acts accord with Community law.

B — Observations of the Commission of the European Communities

While noting that it is common ground between the parties in the main action that the contested levies are charges having an effect equivalent to duties on exports, which are prohibited by Article 16 of the EEC Treaty as from the end of the first stage (1 January 1962), the

Commission points out that this does not mean that when such a charge has been levied, the undertaking concerned must be recognized as having an independent right of action whereby the latter may claim reimbursement of the charge imposed regardless of any principle of national law.

There can be no doubt about the direct applicability of Article 16 but the mere fact that the accountable party is recognized as being able, on its own account, to claim the illegality of the charge in the light of the Treaty is insufficient indication in what circumstances, in what manner and on what legal basis that party can claim repayment of a charge collected contrary to the Treaty.

Article 16 of the Treaty first confers on a person called upon to pay a charge the right not to pay it, or if he has paid it, the right to have it repaid to him. The Court of Justice has in any case laid down that a claim for repayment of charges, whether national or Community, which have been paid without lawful cause must be submitted on the basis of the provisions made for such actions under national law. In this connexion the Commission quotes the judgment of 19 December 1968 in Case 13/68 *Salgoil* v *Italy* [1968] ECR 453 at p. 463 in which it was held that 'in so far as the provisions in question [Articles 31 and 32 of the EEC Treaty] confer on persons subject to the jurisdiction rights which national courts must protect, those courts must ensure that the said rights are indeed protected, but that it is for the legal system of each Member State to decide which court has jurisdiction and for this purpose to classify those rights with reference to the criteria of national law'.

Similarly, in its judgment of 16 December 1960 in Case 6/60 *(Humblet,* Rec., p. 1131) the Court held that it was for the national legislature to determine whether an unlawful imposition of tax gave rise to a claim for compensatory interest, while it is clear from the judgment of 21 May 1976 in Case 26/74 *(Roquette* [1976] ECR 677) that actions brought in connexion with the common agricultural policy for reimbursement of levies improperly collected on imports must first be brought, in accordance with the rules of national law, against the Member State which collected them, before proceedings may be brought against the Community under Article 215 of the EEC Treaty.

Undoubtedly, the need to base applications for a refund on the provisions of national law has the effect of making repayment dependent on rules which vary from one Member State to another, but this is the position at the present stage of harmonization on the subject of the protection of individual rights.

It fully accords with the system of legal protection provided for by the Treaty under which Community and national guarantees of legal protection shall be complementary and interdependent instead of being in conflict with each other by being mutually exclusive, to appraise the legality or otherwise of the collection of a charge having equivalent effect on the basis of criteria supplied by the Treaty while at the same referring the party concerned to the provisions of national law for the protection of its right to repayment.

The right to be repaid provided for under national law may be asserted by the party concerned only to the extent and under the conditions laid down by that national law. This applies to the actual conditions for the right to repayment as it does to questions of jurisdiction and procedure and the question remains whether a single legal basis is adequate in the case of an application for refund of a payment made or whether, in addition to an action for repayment properly so-called, a separate action should be brought for

annulment of the payment notices issued to the party concerned.

In this connexion it would be reasonable to accept the principle that while substantive national law continues to apply this does not rule out the possibility of considering in a particular case, whether certain provisions of national law, which, *a priori,* make full and unconditional repayment of the amounts collected out of the question, may be incompatible with the guarantee of legal protection given by Article 16 of the EEC Treaty and, if the answer is in the affirmative, to what extent.

Taken by itself, the statement that Article 16 of the EEC Treaty creates rights for the benefit of individuals which national courts must protect could imply that this article provides not only a means for reviewing the legality of a particular charge but also the substantive foundation for an independent and individual right to repayment. The conditions for repayment would thus be based on a single legal foundation and would be freed from the conditions, variations and fortunes of national legal systems. In this way the legal protection of individuals against action taken contrary to the Treaty would be standardized in one important respect. In these circumstances, the Member States could not make repayment of improperly collected charges subject to different conditions laid down under national law but the consequence would be that the individuals concerned could not avail themselves of the legal remedies provided by their national law. In the Commission's view, this notion would obviously be alien to the precedence established by the Court of Justice concerning the direct effect of Articles 13 (2) and 16, failing acceptance of the concept of parallel actions which gives a litigant the choice between national and Community means of legal redress. Apart from the fact that this would involve something totally new in Community law it is likely that, because it would be stricter, the less advantageous means of redress would be replaced by the other.

As regards the applicability of national rules of procedure the Commission considers that, whether the action is based on national or Community law, proceedings for recovery of the overpayment must be brought before the Netherlands court in accordance with rules of procedure applicable in the Netherlands.

In respect of procedural matters, there are no Community provisions which explicitly or by their nature take precedence over the provisions of national law. The question remains, however, whether and to what extent Article 16 of the EEC Treaty prevents the application of the provisions of the Netherlands ARBO Law (Law concerning administrative jurisdiction over trade organizations).

If Article 16 of the Treaty is interpreted as a straightforward statement that charges on exports are illegal, the national rules of procedure continue to apply unconditionally, there being no conflict with the paramountcy of Community law.

If, on the other hand, Article 16 is interpreted as conferring on the applicant a right to recovery of the overpayment, there may, in the Commission's view, be a conflict between the purpose of the rule laid down in Article 16 and the conditions for exercise of the right of action laid down by the Netherlands Law.

If, on the one hand, an action brought under Article 16 is fully discharged only after all the overpayments have been reimbursed and, on the other, the effect of the provisions of the ARBO Law is in fact to make recovery impossible after a certain period, the conditions laid down by the ARBO Law cannot be pleaded against the applicant. A consideration which argues in favour of this solution is

that, for individuals, as a result of direct applicability, the object and the effect of legal protection would, as far as individuals are concerned, be to make repayment subject to uniform conditions in all the Member States.

It must, however, be emphasized that adoption of this solution implies, in the present state of the law, a straightforward abandonment of any rules governing time-limits and the conditions under which proceedings can be brought in view of, first, the lack of any relevant Community rules and, secondly, the possible non-application of national rules.

Such a fundamental and comprehensive abandonment of national rules of procedure cannot easily be reconciled with the principle hitherto recognized by the Court of Justice that national courts must take their decisions in accordance with national rules of procedure.

In the Commission's view, the declared precedence of Article 16 of the EEC Treaty over national law does not absolutely preclude the application of national rules of procedure.

The principle on which the provisions of the ARBO Law are based and which makes the protection of the right of individuals subject to the requirements of legal certainty is recognized in the legal systems of all the Member States. In this connexion the Commission refers to the judgment of the Court of 8 April 1976 in Case 43/75 *Defrenne*, [1976] ECR 455 in which it was held that the individual rights of private parties arising directly out of a provision of the EEC Treaty may, for considerations of legal certainty, be exercised only within prescribed time-limits, even if none have been expressly laid down by Community law.

Nevertheless, rules of procedure which, *a priori*, make it impossible for an applicant to assert his right to repayment in the courts or which make this subject to conditions which cannot be fulfilled are illegal. But the application of Article 33 of the ARBO Law gives rise to no criticism on that account.

The Commission concludes with the statement that, until uniform Community regulations have been adopted, a right to repayment based either on national or Community law is subject to the national rules of procedure relating to the conditions of admissibility and time-limits.

C — Observations of the Government of the Federal Republic of Germany

The Government of the Federal Republic of Germany refers to its observations in Case 33/76, *Rewe*.

These observations are to the effect that no rule of Community law confers on an individual the right to have an administrative act of a Member State annulled or withdrawn if under the national law of that Member State, the act can no longer be contested and has become final.

Individuals are able to rely on the direct effect of a Community provision only in so far as they may do so under the provisions of the administrative law and the procedural law of the Member State concerned.

The absence of Community rules governing procedure in administrative cases is due not to the fact that the component bodies of the Community have not yet completed the task of harmonization but to the fact that the Community was constructed by the Treaty of Rome in such a way that, with the exception of the fields which come under the direct control of the Community and the general task of harmonization assigned to it, the application of Community law was entrusted to the authorities and courts of the Member States.

The distribution of responsibility between the Community and the Member States inherent in the constitution of the Community makes it clear that the rights of individuals to have administrative acts annulled or withdrawn or to recover over-payments are laid down and defined by the relevant national provisions.

There is no question of conflict between Community law and national law since the conditions laid down by national law in respect of procedure in fact constitute a rule of Community law.

Rules governing the existence, in terms of form and finality, of administrative acts, help to ensure legal certainty and stability, principles which form part of the legal order of the Member States and thereby constitute unwritten principles of Community law.

The Government of the Federal Republic of Germany accepts that the legal rights of an individual may differ from one Member State to another. However, the existence of a uniform right to have administrative acts which conflict with a Community provision annulled would produce the scarcely acceptable result that the administrative law of the Member States would have to contain, in respect of certain aspects of administrative action, rules providing for derogations therefrom.

Such a uniform Community law is inconceivable in the absence of complete standardization of the law governing administrative procedure.

Neither Article 3 of the Treaty nor the 'general principles' recognized by the Member States in the field of administrative procedure justify the conclusion that there exists a right under Community law to have administrative acts which have become final withdrawn.

The precedents established by the Court of Justice have, on many occasions, recognized the power of the national legislature to lay down rules on the procedural aspects of rights arising under Community instruments in so far as such rights come within the ambit of the application of Community law by the Member States.

The German Government concludes that neither the provisions prohibiting charges having effect equivalent to customs duties nor other rules of Community law confer on individuals the right to have annulled an administrative act which, under the provisions of the Member State which promulgated it, can no longer be impugned because of non-compliance with the prescribed time-limit.

The plaintiff in the main action, represented by Hattinga Verschure, of The Hague Bar, the Government of the Federal Republic of Germany, represented by its Agent, Mr Seidel, and the Commission of the European Communities, represented by its Agent, Mr Bourgeois, submitted their oral observations at the hearing on 9 November 1976.

The Advocate-General delivered his opinion at the hearing on 13 November 1976.

Law

1 By order of 25 May 1976, received at the Court Registry on 26 May 1976, the College van Beroep voor het Bedrijfsleven referred the following question to the Court under Article 177 of the EEC Treaty: 'Does any provision or any

principle of Community law prohibit the raising of an objection against a litigant who is challenging before the national courts a decision of a national body for incompatibility with Community law on the ground that he has allowed the period for lodging an appeal under national law to elapse, either in the sense that the action of the litigant may be declared inadmissible by the court for failure to observe the time-limit or in the further sense that the administration may derive from the failure to comply with the time-limit a right to refuse to reconsider its decision?'

2 The question was submitted in connexion with proceedings brought before that court by the plaintiff in the main action for a declaration that, on exports of bulbs and corms of flowering plants to West Germany effected during the concluding months of 1968 and the early months of 1969, it made an undue payment to the Produktschap voor Siergewassen (hereinafter referred to as 'the Produktschap'), the defendant in the main action, of levies constituting charges having an effect equivalent to customs duties on exports which are contrary to Article 16 of the Treaty and are, moreover, prohibited by Article 10 of Regulation (EEC) No 234/68 of the Council of 27 February 1968 on the establishment of a common organization of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage, which was applicable with effect from 1 July 1968.

3 The plaintiff in the main action asks the national court to recognize that it is entitled to set off the undue payments made against amounts being claimed from it by the Produktschap under a different head.

4 The Produktschap does not dispute that the contested levy constitutes a charge having an effect equivalent to a customs duty on exports and concedes that the national provisions for its imposition had, with effect from 1 July 1968, the date of entry into force of Regulation No 234/68, become incompatible with Article 10 of the Regulation which, in the internal trade of the Community in the horticultural products covered by the regulation, prohibited the levying of any customs duty or charge having equivalent effect.

5 It must, however, be observed that this incompatibility came into being on 1 January 1962 by virtue of Article 16 of the Treaty, under which the Member States are enjoined to abolish between themselves customs duties on exports and charges having equivalent effect by the end of the first stage at the latest.

6 There can, therefore, be no doubt that the levies imposed on the plaintiff in the main action by the levy notices and by the reminder sent to it on 7 July 1969, 19 September 1969 and on 8 July 1971 were in breach of the prohibition in Article 16 of the Treaty.

7 Nevertheless these levies were paid by the plaintiff in the main action which, on the ground that it paid them in error, is claiming reimbursement by way of set-off before the national court.

8 The Produktschap contends that the plaintiff in the main action can no longer impugn the contested levies or claim their reimbursement because it failed to bring proceedings against the levy notices and the reminder which had been sent to it within the period prescribed by national law for such proceedings.

9 The applicant in the main action contends, on the other hand, that the primacy of Community law means that it overrules any decision which constitutes an infringement of it and that, before the national courts, which are bound to protect the rights conferred on it by Article 16, it possesses, in consequence, an independent right of action which is unaffected by limitations provided for under national law which are liable to weaken the impact of the direct effect of that article in the legal order of the Member States.

10 Thus, the question referred seeks to establish whether the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire as the result of the direct effect of a Community provision, in the present case Article 16 of the Treaty and Article 10 of Regulation No 234/68, especially the rules concerning the period within which an action must be brougt are governed by the national law of the Member State where the action is brought or whether, on the other hand, they are independent and fall to be determined only by Community law itself.

11 The prohibition laid down in Article 16 of the Treaty and that contained in Article 10 of Regulation No 234/68 have direct effect and confer on individuals rights which the national courts must protect.

12 Thus, in application of the principle of cooperation laid down in Article 5 of the Treaty, the national courts are entrusted with ensuring the legal protection conferred on individuals by the direct effect of the provisions of Community law.

13 Consequently, in the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing the same right of action on an internal matter.

14 Articles 100 to 102 and 235 of the Treaty enable the appropriate steps to be taken as necessary, to eleminate differences between the provisions laid down in such matters by law, regulation or administrative action in Member States if these differences are found to be such as to cause distortion or to affect the functioning of the common market.

15 In default of such harmonization measures, the rights conferred by Community law must be exerciced before the national courts in accordance with the rules of procedure laid down by national law.

16 The position would be different only if those rules and time-limits made it impossible in practice to exercise rights which the national courts have a duty to protect.

17 This does not apply to the fixing of a reasonable period of limitation within which an action must be brought.

18 The fixing, as regards fiscal proceedings, of such a period is in fact an application of a fundamental principle of legal certainty which protects both the authority concerned and the party from whom payment is claimed.

19 The answer must therefore be that, in the case of a litigant who is challenging before the national courts a decision of a national body for incompatibility with Community law, that law, in its present state, does not prevent the expiry of the period within which proceedings must be brought under

national law from being raised against him, provided that the procedural rules applicable to his case are not less favourable than those governing the same right of action on an internal matter.

Costs

20 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted their observations to the Court, are not recoverable.

21 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the College van Beroep voor het Bedrijfsleven by order of 25 May 1976, hereby rules:

In the case of a litigant who is challenging before the national courts a decision of a national body for incompatibility with Community law, that law, in its present state, does not prevent the expiry of the period within which proceedings must be brought under national law from being raised against him, provided that the procedural rules applicable in his case are not less favourable than those governing the same right of action on an internal matter.

Kutscher Donner Pescatore Mertens de Wilmars

Sørensen Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 16 December 1976.

A. Van Houtte — Registrar

H. Kutscher — President