# JUDGMENT OF THE COURT
14 December 1995 *

In Case C-312/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour d'Appel, Brussels, for a preliminary ruling in the proceedings pending before that court between

**Peterbroeck, Van Campenhout & C^ie SCS**

and

**Belgian State**

on the interpretation of Community law concerning the power of a national court or tribunal to consider of its own motion the question whether national law is compatible with Community law,

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 (Rapporteur), F. A. Schockweiler, J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann, J. L. Murray, P. Jann and H. Ragnemalm, Judges,

* Language of the case: French.

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

after considering the written observations submitted on behalf of:

— Peterbroeck, Van Campenhout & C^ie SCS, by P. van Ommeslaghe, of the Brussels Bar,

— the Belgian Government, by P. Duray, Assistant Adviser at the Ministry of Foreign Affairs, acting as Agent, and B. van de Walle de Ghelcke, of the Brussels Bar,

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

— the Commission of the European Communities, by S. van Raepenbusch, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Peterbroeck, Van Campenhout & C^ie SCS, represented by V. Piessevaux, of the Brussels Bar, the Belgian Government, represented by P. Duray and B. van de Walle de Ghelcke, the French Government, represented by H. Renié, and the Commission, represented by S. van Raepenbusch, at the hearing on 16 March 1994,

after hearing the Opinion of the Advocate General at the sitting on 4 May 1994,

having regard to the order of 13 December 1994 reopening the oral procedure,

after hearing the oral observations of Peterbroeck, Van Campenhout & C^ie SCS, represented by P. van Ommeslaghe, the Belgian Government, represented by B. van de Walle de Ghelcke, the German Government, represented by G. Thiele, Assessor at the Federal Ministry of Economic Affairs, acting as Agent, the Greek Government, represented by V. Kontolaimos, Assistant Legal Adviser at the State Legal Council, acting as Agent, the Spanish Government, represented by A. Navarro González, Director-General for Community Legal and Institutional Coordination, R. Silva de Lapuerta and G. Calvo Díaz, Abogados del Estado, of the State Legal Service, acting as Agents, the French Government, represented by H. Renié and C. Chavance, Foreign Affairs Secretary at the Directorate of Foreign Affairs in the Ministry of Foreign Affairs, acting as Agents, and the Commission, represented by C. W. A. Timmermans, Deputy Director-General of the Legal Service, 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 judgment of 28 May 1993, received at the Court on 10 June 1993, the Cour d'Appel (Court of Appeal), Brussels, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question of interpretation of Community law concerning the power of a national court to consider of its own motion the question whether national law is compatible with Community law.

2 The question was raised in proceedings between a Belgian partnership with limited liability, Peterbroeck, Van Campenhout & C^ie^ (hereinafter 'Peterbroeck') and the Belgian State concerning the applicable rate of non-resident tax.

3 In the 1974 tax year the Dutch company Continentale & Britse Trust BV (hereinafter 'CBT') drew from Peterbroeck an active partner's income of BFR 6 749 112. When CBT was charged non-resident tax in respect of the 1975 tax assessment year, Peterbroeck, as CBT's legal representative in Belgium, lodged complaints on 22 July 1976 and 24 January 1978 with the Regional Director of Direct Contributions (hereinafter 'the Director').

4 After most of those complaints had been rejected by the Director on 23 August 1979, Peterbroeck, acting on its own behalf and, in so far as necessary, on behalf of CBT, brought proceedings before the Cour d'Appel, Brussels, on 8 October 1979. As the main proceedings now stand, the only outstanding issue is the rate of tax applicable to the income earned by CBT, which the Director set at 44.9%, whereas if the earnings had been those of a Belgian company the rate would not exceed 42%.

5 It was only before the Cour d'Appel that Peterbroeck argued for the first time that application to a company having its seat in the Netherlands of a rate of tax higher than that applicable to a Belgium company constituted an obstacle to freedom of establishment prohibited by Article 52 of the EEC Treaty.

6 The Belgian State contended that that argument was a new plea which was inadmissible because it had been raised outside the time-limit laid down by the combined provisions of the second paragraph of Article 278, the second paragraph of Article 279 and Article 282 of the Code des Impôts sur les Revenus (Income Tax Code, hereinafter 'the CIR'), in the version applicable at the material time. Under those provisions, pleas which had not been raised in the complaint nor considered

of his own motion by the Director could be raised by the appellant taxpayer either in the appeal document or by notice in writing to the Registry of the Cour d'Appel, subject to a limitation period of 60 days with effect from the lodging by the Director of a certified true copy of the contested decision together with all the documents relating to the taxpayer's objection. It appears that, under Belgian case-law, a plea is new for the purposes of the abovementioned provisions if it raises for the first time an issue which in its object, nature or legal basis differs from those already before the Director.

7 The Cour d'Appel considered that, Article 52 of the Treaty having been raised as a ground of appeal for the first time before it, this constituted a new plea within the meaning of the relevant provisions of the CIR. It also considered that those provisions prevented the court from raising of its own motion a point which the taxpayer could no longer raise before it. It observed, however, that the application of those procedural rules would curtail its power to examine the question whether national law was compatible with Community law and limit the possibility which it has under Article 177 of the Treaty to ask the Court of Justice for a preliminary ruling on a question of interpretation of Community law.

8 The Cour d'Appel further observed that, although the procedural rules in question also applied to most pleas based on domestic law, Belgian case-law allowed exceptions for pleas alleging breach of a limited number of principles of domestic law, in particular time-bar of the right to charge tax and the force of *res judicata*.

9 Finally, it referred to the case-law of this Court, which requires national courts and tribunals to ensure the legal protection afforded to individuals by the direct effect of Community law and which confers on national courts and tribunals the power to do all that is necessary to set aside national provisions which might prevent Community law from taking full effect.

10 In view of the foregoing, the Cour d'Appel, Brussels, decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Community law be interpreted as meaning that a national court hearing a dispute concerning Community law must set aside a provision of national law which it considers makes the power of the national court to apply Community law which it is bound to safeguard subject to the making of an express application by the plaintiff in the dispute within a short time-limit which, however, does not apply to applications based on the breach of an — albeit limited — number of principles of national law, in particular the bar on the right to impose taxation outside a given period and the force of *res judicata*?'

11 Having regard to the facts of the case before the national court as set out in its judgment making the reference, that court in substance seeks to ascertain, first, whether Community law precludes application of a domestic procedural rule whose effect, in procedural circumstances such as those in question in the main proceedings, is to prevent the national court, seised of a matter falling within its jurisdiction, from considering of its own motion whether a measure of domestic law is compatible with a provision of Community law when the latter provision has not been invoked by the litigant within a certain period. Secondly, the national court asks whether Community law precludes application of such a rule where it allows exceptions for certain claims founded on principles of domestic law.

## The first part of the question

12 As regards the first part of the question, as thus reworded, the Court has consistently held that, under the principle of cooperation laid down in Article 5 of the Treaty, it is for the Member States to ensure the legal protection which individuals derive from the direct effect of Community law. In the absence of Community rules governing a 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).

13 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).

14 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.

15 In the present case, according to domestic law, a litigant may no longer raise before the Cour d'Appel a new plea based on Community law once the 60-day period with effect from the lodging by the Director of a certified true copy of the contested decision has elapsed.

16 Whilst a period of 60 days so imposed on a litigant is not objectionable *per se*, the special features of the procedure in question must be emphasized.

17 First of all, the Cour d'Appel is the first court which can make a reference to the Court of Justice since the Director before whom the first-instance proceedings are conducted is a member of the fiscal authorities and, consequently, is not a court or tribunal within the meaning of Article 177 of the Treaty (see, to this effect, the judgment in Case C-24/92 *Corbiau* [1993] ECR I-1277).

18 Secondly, the limitation period whose expiry prevented the Cour d'Appel from examining of its own motion the compatibility of a measure of domestic law with Community law started to run from the time when the Director lodged a certified true copy of the contested decision. That meant, in this case, that the period during which new pleas could be raised by the appellant had expired by the time the Cour d'Appel held its hearing so that the Cour d'Appel was denied the possibility of considering the question of compatibility.

19 Thirdly, it seems that no other national court or tribunal in subsequent proceedings may of its own motion consider the question of the compatibility of a national measure with Community law.

20 Finally, the impossibility for national courts or tribunals to raise points of Community law of their own motion does not appear to be reasonably justifiable by principles such as the requirement of legal certainty or the proper conduct of procedure.

21 The answer to be given to the question submitted by the Cour d'Appel, Brussels, must therefore be that Community law precludes application of a domestic procedural rule whose effect, in procedural circumstances such as those in question in the main proceedings, is to prevent the national court, seised of a matter falling within its jurisdiction, from considering of its own motion whether a measure of domestic law is compatible with a provision of Community law when the latter provision has not been invoked by the litigant within a certain period.

## The second part of the question

22 In view of the foregoing, it is not necessary to examine the second part of the question, as reworded above.

## Costs

23 The costs incurred by the German, Greek, Spanish and French Governments, 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Cour d'Appel, Brussels, by judgment of 28 May 1993, hereby rules:

**Community law precludes application of a domestic procedural rule whose effect, in procedural circumstances such as those in question in the main proceedings, is to prevent the national court, seised of a matter falling within its jurisdiction, from considering of its own motion whether a measure of domestic law is compatible with a provision of Community law when the latter provision has not been invoked by the litigant within a certain period.**

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 G. C. Rodríguez Iglesias

Registrar President