

# Case C-345/09

**J.A. van Delft and Others**

**v**

**College voor zorgverzekeringen**

(Reference for a preliminary  
ruling from the Centrale Raad van Beroep)

(Social security — Regulation (EEC) No 1408/71 — Title III, Chapter 1 — Articles 28, 28a and 33 — Regulation (EEC) No 574/72 — Article 29 — Freedom of movement for persons — Articles 21 TFEU and 45 TFEU — Sickness insurance benefits — Recipients of old-age pensions or pensions for incapacity for work — Residence in a Member State other than the State responsible for payment of the pension — Provision of benefits in kind in the State of residence with the cost borne by the State responsible for payment of the pension — No registration in the State of residence — Obligation to pay contributions in the State responsible for payment of the pension — Amendment to the national legislation of the State responsible for payment of the pension — Continuity of sickness insurance — Different treatment of residents and non-residents)

Opinion of Advocate General Jääskinen delivered on 15 July 2010 . . . . . I - 9883

Judgment of the Court (Second Chamber), 14 October 2010 . . . . . I - 9912

## Summary of the Judgment

1. *Social security for migrant workers — Legislation applicable — Mandatory nature of the conflict rules — Sickness insurance — Recipients of pensions due under the legislation of a Member State other than the country of residence*  
(Council Regulations No 1408/71, Arts 28 and 28a, and No 574/72, Art. 29)

2. *Social security for migrant workers — Sickness insurance — Recipients of pensions due under the legislation of a Member State other than the country of residence*  
(Council Regulations No 1408/71, Arts 28, 28a and 30, and No 574/72, Art. 29)
  
3. *Citizenship of the European Union — Right to move and reside freely within the territory of the Member States — Social security for migrant citizens — Recipients of pensions due under the legislation of a Member State other than the country of residence*  
(Art. 21 TFEU; Council Regulation No 1408/71)

1. Since the conflict rules laid down by Regulation No 1408/71, as amended by Regulation No 1992/2006, are mandatory for the Member States, it cannot be accepted that insured persons falling within the scope of those rules can counteract their effects by being able to elect to withdraw from their application. The application of the system of conflict rules established by Regulation No 1408/71 depends solely on the objective situation of the worker concerned. Articles 28 and 28a of that regulation are worded in terms which do not confer any right to choose on the pensioners who come under those provisions. Where the recipient of a pension due under the legislation of a Member State is in the objective situation described in those articles, the conflict rule set out in those provisions applies to him, without his being able to waive it by

declining to register, in accordance with Article 29 of Regulation No 574/72 laying down the procedure for implementing Regulation No 1408/71, with the competent institution of his Member State of residence. Articles 28 and 28a of Regulation No 1408/71 are therefore mandatory for the insured persons who fall within their scope.

Registration with the competent institution of the Member State of residence, provided for in Article 29 of Regulation No 574/72 laying down the procedure for implementing Regulation No 1408/71,

is merely an administrative formality which must be carried out to ensure that benefits in kind are actually provided in that Member State in accordance with Articles 28 and 28a of Regulation No 1408/71. By issuing a Form E 121, the competent institution of a Member State does no more than declare that the insured person concerned would be entitled to benefits in kind under the legislation of that State if he resided there. Such a form being purely declaratory, its submission to the competent institution of a Member State with a view to the registration in that State of the insured person concerned cannot therefore constitute a condition for entitlements to benefits to arise in that Member State.

It is true that, in the absence of registration with the competent institution of the Member State of residence, such an insured person cannot actually receive those benefits in that State, and consequently does not generate any expenditure which the Member State responsible for payment of his pension would have to refund to his Member State of residence pursuant to Article 36 of Regulation No 1408/71 in conjunction with Article 95 of Regulation No 574/72. However, that does not in any way affect the existence of the right to those benefits and hence the corresponding obligation to pay to the competent institutions of the Member State whose legislation gives rise to such a right the contributions payable in return for the risk borne by that State under Regulation No 1408/71. The obligation to pay contributions because of the existence of a right to benefits, even if those benefits are not actually received, is inherent in the principle of solidarity which is implemented by national social security schemes, since in the absence of such an obligation the persons concerned might be induced to wait for the risk to materialise before contributing to the financing of the system.

In those circumstances, since pensioners covered by Articles 28 and 28a of Regulation No 1408/71, having regard to the mandatory nature of the system established by those provisions, cannot choose to waive the right to benefits in kind in their Member State of residence by declining to register with the competent institution of that Member State, such a failure to register cannot have the consequence of exempting them from payment of contributions in the Member State responsible for payment of the pension, since they remain in any case the responsibility of that State, as they cannot withdraw from the system laid down by that regulation.

(see paras 52, 57, 61-65, 72-75)

2. Articles 28, 28a and 33 of Regulation No 1408/71, as amended by Regulation No 1992/2006, in conjunction with Article 29 of Regulation No 574/72 laying down the procedure for implementing Regulation No 1408/71, as amended

by Regulation No 311/2007, must be interpreted as not precluding legislation of a Member State under which recipients of pensions payable under the legislation of that State who reside in another Member State in which they are entitled under Articles 28 and 28a of Regulation No 1408/71 to the sickness benefits in kind provided by the competent institution of the latter Member State must pay, in the form of a deduction from their pension, a contribution in respect of those benefits even if they are not registered with the competent institution of their Member State of residence.

amended by Regulation No 1992/2006, to the sickness benefits in kind provided by the competent institution of the latter Member State must pay, in the form of a deduction from their pension, a contribution in respect of those benefits even if they are not registered with the competent institution of their Member State of residence.

(see para. 80, operative part 1)

On the other hand, Article 21 TFEU must be interpreted as precluding such national legislation in so far as it induces or provides for – this being for the national court to ascertain – an unjustified difference of treatment between residents and non-residents as regards ensuring the continuity of the overall protection against the risk of sickness enjoyed by them under insurance contracts concluded before the entry into force of that legislation.

3. Article 21 TFEU must be interpreted as not precluding legislation of a Member State under which recipients of pensions payable under the legislation of that State who reside in another Member State in which they are entitled under Articles 28 and 28a of Regulation No 1408/71, as

(see paras 130-131, operative part 2)