JUDGMENT OF THE COURT (Second Chamber)

14 October 2010 *

In Case C-345/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Centrale Raad van Beroep (Netherlands), made by decision of 26 August 2009, received at the Court on 27 August 2009, in the proceedings

J.A. van Delft,

J.C. Ramaer,

J.M. van Willigen,

J.F. van der Nat,

C.M. Janssen,

* Language of the case: Dutch.

O. Fokkens

v

College voor zorgverzekeringen,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, A. Rosas, U. Lõhmus and A. Ó Caoimh (Rapporteur), Judges,

Advocate General: N. Jääskinen,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 May 2010,

after considering the observations submitted on behalf of:

— Mr van Delft and Mr van Willigen, by E. Pijnacker Hordijk, advocaat,

— Mr Janssen, by H. Frantzen and H. Ebbink, advocaten,

— Mr Fokkens, by himself,

— the College voor zorgverzekeringen, by M. van Dijen and R.G. van der Wissel, acting as Agents,

— the Netherlands Government, by C. Wissels and J. Langer, acting as Agents,

— the Czech Government, by M. Smolek and D. Hadroušek, acting as Agents,

— the French Government, by G. de Bergues and A. Czubinski, acting as Agents,

— the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

— the European Commission, by V. Kreuschitz and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 28, 28a and 33 and provisions of Annex VI, section R, point 1(a) and (b) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 (OJ 2006 L 392, p. 1) ('Regulation No 1408/71'), Article 29 of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Commission Regulation (EC) No 311/2007 of 19 March 2007 (OJ 2007 L 82, p. 6) ('Regulation No 574/72'), and Articles 21 TFEU and 45 TFEU.

2 The reference has been made in proceedings between Mr van Delft, Mr Ramaer, Mr van Willigen, Mr van der Nat, Mr Janssen and Mr Fokkens (referred to collectively as 'the appellants in the main proceedings') and the College voor zorgverzekeringen (Health Care Insurance Board, 'the CVZ') concerning the payment of contributions due under the compulsory statutory sickness insurance scheme applicable in the Netherlands.

Legal context

European Union legislation

3 Article 13 of Regulation No 1408/71, which forms part of Title II of the regulation, 'Determination of the legislation applicable', provides:

'General rules

1. Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

…

(f) a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs or in

accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone.'

4 Also in Title II, Article 17a of Regulation No 1408/71, 'Special rules concerning recipients of pensions due under the legislation of one or more Member State', reads as follows:

'The recipient of a pension due under the legislation of a Member State or of pensions due under the legislation of several Member States who resides in the territory of another Member State may at his request be exempted from the legislation of the latter State provided that he is not subject to that legislation because of the pursuit of an occupation.'

5 Title III of Regulation No 1408/71 contains special provisions relating to the various categories of benefits to which the regulation applies in accordance with Article 4(1). Chapter 1 of Title III concerns sickness and maternity benefits.

6 In Section 5 of Chapter 1, 'Pensioners and members of their families', Article 28 of Regulation No 1408/71, 'Pensions payable under the legislation of one or more States, in cases where there is no right to benefits in the country of residence', provides:

'1. A pensioner who is entitled to a pension under the legislation of one Member State or to pensions under the legislation of two or more Member States and who is not entitled to benefits under the legislation of the Member State in whose territory

he resides shall nevertheless receive such benefits for himself and for members of his family, in so far as he would, taking account where appropriate of the provisions of Article 18 and Annex VI, be entitled thereto under the legislation of the Member State or of at least one of the Member States competent in respect of pensions if he were resident in the territory of such State. The benefits shall be provided under the following conditions:

(a) benefits in kind shall be provided on behalf of the institution referred to in paragraph 2 by the institution of the place of residence as though the person concerned were a pensioner under the legislation of the State in whose territory he resides and were entitled to such benefits;

…

2. In the cases covered by paragraph 1, the cost of benefits in kind shall be borne by the institution as determined according to the following rules:

(a) where the pensioner is entitled to the said benefits under the legislation of a single Member State, the cost shall be borne by the competent institution of that State;

…'

7 Also in that section, Article 28a of Regulation No 1408/71, 'Pensions payable under the legislation of one or more of the Member States other than the country of residence where there is a right to benefits in the latter country', provides:

'Where the pensioner entitled to a pension under the legislation of one Member State, or to pensions under the legislations of two or more Member States, resides in the territory of a Member State under whose legislation the right to receive benefits in kind is not subject to conditions of insurance or employment, nor is any pension payable, the cost of benefits in kind provided to him and to members of his family shall be borne by the institution of one of the Member States competent in respect of pensions, determined according to the rules laid down in Article 28(2), to the extent that the pensioner and members of his family would have been entitled to such benefits under the legislation administered by the said institution if they resided in the territory of the Member State where that institution is situated.'

8 Under Article 33 of Regulation No 1408/71, which also forms part of Section 5 of Chapter 1 of Title III and is entitled 'Contributions payable by pensioners':

'1. The institution of a Member State which is responsible for payment of a pension and which administers legislation providing for deductions from pensions in respect of contributions for sickness and maternity shall be authorised to make such deductions, calculated in accordance with the legislation concerned, from the pension payable by such institution, to the extent that the cost of the benefits under Article 27, 28, 28a, 29, 31 and 32 is to be borne by an institution of the said Member State.

2. Where, in the cases referred to in Article 28a, the acquisition of benefits in respect of sickness and maternity is subject to the payment of contributions or similar payments under the legislation of a Member State in whose territory the pensioner in question resides, by virtue of such residence, these contributions shall not be payable.'

9 Under Article 36(1) of Regulation No 1408/71, benefits in kind provided, in accordance inter alia with Articles 28, 28a and 33 of the regulation, by the institution of one Member State on behalf of the institution of another Member State are to be fully refunded.

10 Point 1(a) to (c) of Section R of Annex VI to Regulation No 1408/71 provide as follows:

'1. *Health care insurance*

(a) As regards entitlement to benefits in kind under Netherlands legislation, persons entitled to benefits in kind for the purpose of the implementation of Chapters 1 and 4 of Title III of this Regulation shall mean:

(i) persons who, under Article 2 of the Zorgverzekeringswet (Health Care Insurance Act), are obliged to take out insurance under a health care insurer,

and

(ii) insofar as they are not already included under point (i), persons who are resident in another Member State and who, under this Regulation, are entitled to health care in their state of residence, the costs being borne by the Netherlands.

(b) The persons referred to in point (a)(i) must, in accordance with the provisions of the Zorgverzekeringswet (Health Care Insurance Act), take out insurance with a health care insurer, and the persons referred to in point a(ii) must register with the College voor zorgverzekeringen (Health Care Insurance Board).

(c) The provisions of the Zorgverzekeringswet (Health Care Insurance Act) and the Algemene wet bijzondere ziektekosten (Law on General Insurance Against Special Medical Expenses) concerning liability for the payment of contributions shall apply to the persons referred to under point (a) and the members of their families. In respect of family members, the contributions shall be levied on the person from whom the right to health care is derived.'

11 Article 29 of Regulation No 574/72, which lays down the procedure for implementing Regulation No 1408/71, provides, under the heading 'Benefits in kind for pensioners and members of their families who are not resident in a Member State under whose legislation they receive a pension and are entitled to benefits':

'1. In order to receive benefits in kind in the territory of the Member State in which he resides, under Articles 28(1) and 28a of the Regulation, a pensioner and the members of his family residing in the same Member State shall register with the institution of the place of residence by submitting a certified statement testifying that he is

entitled to the said benefits for himself and for the members of his family, under the legislation or one of the legislations under which a pension is payable.

2. This certified statement shall be issued, at the request of the pensioner, by the institution or one of the institutions responsible for payment of the pension or, where appropriate, by the institution empowered to determine entitlement to benefits in kind, as soon as the pensioner satisfies the conditions for acquisition of the right to such benefits. If the pensioner does not submit the certified statement, the institution of the place of residence shall obtain it from the institution or institutions responsible for payment of the pension, or, where appropriate, from the institution empowered to issue such certified statement. Whilst awaiting the receipt of this certified statement the institution of the place of residence may, in the light of the documentary evidence accepted by it, register the pensioner and the members of his family residing in the same Member State provisionally. This registration shall bind the institution responsible for the payment of benefits in kind only if this latter institution has issued the certified statement provided for in paragraph 1.'

12 Article 95 of that regulation provides that amount of the benefits in kind provided under Articles 28 and 28a of Regulation No 1408/71 is to be refunded by the competent institutions to the institutions which provided those benefits, on the basis of a lump sum which is as close as possible to the actual expenditure incurred, calculated according to the method defined in that provision.

13 In accordance with Decision No 153 of the Administrative Commission of the European Communities on Social Security for Migrant Workers of 7 October 1993 on the model forms necessary for the application of Council Regulations (EEC) No 1408/71 and (EEC) No 574/72 (E 001, E 103 to E 127) (OJ 1994 L 244, p. 22), as amended by Decision No 202 of the Administrative Commission of the European Communities on Social Security for Migrant Workers of 17 March 2005 (OJ 2006 L 77, p. 1), Form E 121 is the certified statement required for the registration of a pensioner and the

members of his family with the institution of their place of residence in accordance with Article 28 of Regulation No 1408/71 and Article 29 of Regulation No 574/72.

National legislation

14 Before 1 January 2006, the Law on sickness funds (Ziekenfondswet, 'the ZFW') laid down a compulsory statutory sickness insurance scheme only for employees whose income was below a certain threshold.

15 That compulsory statutory scheme was also applicable under certain conditions to non-resident recipients of a pension under the General Law on old-age insurance (Algemene Ouderdomswet, 'the AOW') or the Law on insurance against incapacity for work (Wet op de arbeidsongeschiktheidsverzekering, 'the WAO').

16 Persons not covered by that scheme, on the other hand, in order to be covered against the risk of sickness, had to conclude an insurance contract privately with an insurance company.

17 From 1 January 2006, the Law on healthcare insurance (Zorgverzekeringswet, 'the ZVW') has laid down a compulsory statutory sickness insurance scheme for all persons residing or working in the Netherlands.

18 Article 69 of that law, in the version applicable on 1 August 2008, reads as follows:

'1. Persons living abroad who, by the application of a regulation of the Council of the European Communities or the application of such a regulation pursuant to the Agreement on the European Economic Area or to a treaty on social security, when they are in need of healthcare have a right to healthcare or to the reimbursement of the costs thereof, as provided in the legislation on healthcare insurance of their country of residence, must report to the [CVZ] unless they are obliged to take out healthcare insurance under this law.

2. The persons referred to in paragraph 1 are obliged to pay a contribution to be determined by ministerial regulation, a portion of which, as determined by that regulation, is to be regarded as a healthcare insurance premium for purposes of the application of the Wet op de zorgtoeslag (Law on healthcare allowances).

3. If such notification has not occurred within four months of the right referred to in paragraph 1 coming into being, the [CVZ] shall impose a fine on persons who should have made such notification which is equivalent to 130 % of a portion, to be determined by ministerial regulation, of the contribution referred to in paragraph 2, over a period equal to the period between the day on which the right came into being and the day on which the notification took place, but with a maximum of five years.

4. The [CVZ] shall be responsible for the administration resulting from paragraph 1 and the international rules referred to there and for decisions on the levy of the contribution referred to in paragraph 2.…'

19 Articles 6.3.1(1) and 6.3.2(1) of the Regulation on healthcare insurance (Regeling zorgverzekering) provide as follows:

'The contribution payable by a person referred to in Article 69(1) of the [ZVW] is calculated by multiplying the basic contribution by the number arrived at by calculating the ratio between the average healthcare expenditure for a person which is to be borne by the social healthcare insurance in that person's country of residence and the average healthcare expenditure for a person which is to be borne by the social healthcare insurance in the Netherlands.

…

The contribution referred to in Article 6.3.1 for a person referred to in Article 69(1) of the [ZVW] who is entitled to a pension, and for the members of his family, shall be deducted from that pension by the institution which pays that pension and paid to the healthcare insurance fund.'

20 Article 2.5.2(2) of the Law implementing and amending the Law on healthcare insurance (Invoerings- en aanpassingswet Zorgverzekeringswet, 'the IZVW') provides:

'An agreement concerning insurance for medical care or the costs thereof concluded for or with an insured person living abroad who, by the application of a regulation of the Council of the European Communities or the application of such a regulation pursuant to the Agreement on the European Economic Area or to a treaty on social security, is entitled to healthcare or to the reimbursement of the costs thereof, as provided in the legislation on healthcare insurance of his country of residence, shall be terminated as from 1 January 2006, to the extent that rights could be derived from that agreement equivalent to those to which the person concerned is entitled from

that date by the application of such a regulation or treaty, provided that before 1 May 2006 the insured person complied with the obligation to register with the [CVZ] under Article 69 of the [ZVW].'

The dispute in the main proceedings and the questions referred for a preliminary ruling

21 The appellants in the main proceedings, who are all Netherlands nationals residing in a Member State other than the Kingdom of the Netherlands – in Belgium, Spain, France or Malta, as the case may be – are recipients of pensions under the AOW or the WAO.

22 Before 1 January 2006, the appellants, none of whom was insured under the compulsory statutory sickness insurance scheme laid down by the ZFW, had in order to cover themselves against the risk of sickness concluded insurance contracts privately with insurance companies established either in the Netherlands or in other Member States.

23 After the entry into force of the ZVW on 1 January 2006, the CVZ took the view that, since the appellants in the main proceedings would have been covered by the compulsory statutory sickness insurance scheme provided for by the ZVW if they had resided in the Netherlands, they were now entitled in accordance with Articles 28 and 28a of Regulation No 1408/71 to benefits in kind in their State of residence, the cost being borne by the institutions of the State responsible for payment of the pension, namely the Netherlands. The CVZ therefore sent each of the appellants a Form E 121, so that they could register with a sickness fund in their State of residence.

Mr Ramaer, Mr van der Nat and Mr Fokkens registered, 'under protest' in Mr Fokkens's case. Mr van Delft, Mr van Willigen and Mr Janssen refused to register.

24 Also on 1 January 2006, the appellants in the main proceedings who had concluded insurance contracts privately with companies established in the Netherlands had those contracts automatically terminated pursuant to the provisions of the IZVW. Those of them who had concluded such contracts with companies established in other Member States, on the other hand, retained them.

25 By decisions taken during 2006 and 2007, the CVZ deducted from the pensions paid to the appellants in the main proceedings the amount of the contribution provided for in Article 69 of the ZVW for benefiting from the compulsory statutory sickness insurance scheme established by that law.

26 By judgments of 31 January and 17 December 2008, the Rechtbank te Amsterdam (Amsterdam District Court) dismissed the actions brought by the appellants in the main proceedings contesting those decisions.

27 They appealed against those judgments to the Centrale Raad van Beroep (Higher Social Security Court).

28 According to the order for reference, all the appellants in the main proceedings submit in that appeal that Articles 28 and 28a of Regulation No 1408/71 do not contain binding rules for determining the applicable legislation on the basis of which they are automatically subject to the system of benefits in kind of the Member State of residence. They consider, rather, that they can choose either to register, by means of Form E 121, with the competent institution of the State of residence in accordance

with Article 29 of Regulation No 574/72, in order to receive benefits in kind in that State in accordance with Articles 28 and 28a of Regulation No 1408/71, or, if they do not register with that institution, to conclude a private contract of insurance. In the latter case, the Member State responsible for payment of the pension cannot deduct a contribution under Article 33 of that regulation, because the cost of the benefits in kind is not then borne by an institution of that State.

29 Furthermore, according to the order for reference, all the appellants in the main proceedings claim that there has been an infringement of their rights under Articles 21 TFEU and 45 TFEU, since they are obliged to pay a contribution for benefits in the State of residence which they do not wish to receive because, in their opinion, they are less advantageous. They wish instead to preserve the position prior to 1 January 2006, so as to be able to conclude insurance contracts themselves privately for all sickness costs.

30 The order for reference states that CVZ for its part submits that the right to benefits in kind under Articles 28 and 28a of Regulation No 1408/71 does not depend on registration with the competent institution of the State of residence, so that, even if the persons concerned have not registered with that institution and have not thus asserted their right to benefits in kind under those provisions, the Member State responsible for payment of the pension is entitled to make a deduction from that pension. If it were otherwise, the solidarity of the social security system would be affected, since any person could wait until he needed care before registering and thus being liable to pay the contributions.

31 The referring court observes that a number of factors appear to indicate that Regulation No 1408/71 excludes the right to choose relied on by the appellants in the main proceedings. The regulation makes a binding determination of the State which must

provide the person concerned with the benefits and the State which must bear the cost of those benefits. Moreover, where Regulation No 1408/71 provides for a right of choice, it does so expressly. On the other hand, it might follow both from Article 29 of Regulation No 574/72 and from the judgment in Case C-156/01 *van der Duin and ANOZ Zorgverzekeringen* [2003] ECR I-7045, paragraph 40, that registration with the institution of the State of residence is the factor which makes Articles 28 and 28a of Regulation No 1408/71 applicable. In those circumstances, in the absence of registration, the cost of the benefits paid to the appellants in the main proceedings would not be borne by the competent institutions of the Netherlands for the purposes of Article 33 of Regulation No 1408/71, since no benefits could be granted to them in that case. The conditions of application laid down by that provision for the levying of a contribution would therefore not all be satisfied.

32 Moreover, according to the referring court, if the right to choose relied on by the appellants were excluded by Regulation No 1408/71, the question would arise of whether the contribution deducted pursuant to Article 69 of the ZVW and Article 33 of that regulation was contrary to Articles 21 TFEU and/or 45 TFEU.

33 The referring court observes that, while the application of a residence coefficient had the effect of reducing the amount payable by non-residents compared to that payable by residents, and although European Union law does not guarantee that the transfer of a worker's activities or residence to another Member State will be neutral as regards social security, for the appellants in the main proceedings, who were already covered privately by contracts of insurance when the ZVW entered into force, the effect of that law could nevertheless be that it becomes less attractive for them to continue to make use of their right to move and reside freely outside the Netherlands. They have to incur greater costs for sickness insurance and they receive less advantageous care. While the Netherlands legislature's concern to establish compulsory sickness insurance for all residents of the Netherlands may be regarded as a reason based on objective considerations of the public interest, it is not clear that the obligation to

pay a contribution in that respect even if no registration has taken place in the State of residence is consistent with the principle of proportionality.

34 In those circumstances, the Centrale Raad van Beroep decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Should Articles 28, 28a and 33 of Regulation No 1408/71, the provisions of point 1(a) and (b) of section R of Annex VI to Regulation No 1408/71, and Article 29 of Regulation No 574/72 be interpreted as meaning that a national provision such as Article 69 of the ZVW is incompatible therewith, in so far as a pensioner who in principle has entitlements under Articles 28 and 28a of Regulation No 1408/71 is obliged to report to the CVZ and a contribution must be deducted from that person's pension even if no registration has taken place under Article 29 of Regulation No 574/72?

2. Should Article [21 TFEU] or Article [45 TFEU] be interpreted as meaning that a national provision such as Article 69 of the ZVW is incompatible therewith in so far as a citizen of the European Union who in principle has entitlements under Articles 28 and 28a of Regulation No 1408/71 is obliged to report to the CVZ, and a contribution must be deducted from that citizen's pension, even if no registration has taken place under Article 29 of Regulation No 574/72?'

35 At the request of the referring court, the President of the Court decided that the present case should be given priority, pursuant to the first subparagraph of Article 55(2) of the Rules of Procedure of the Court.

Consideration of the questions referred

Question 1

36 By its first question, the referring court asks whether Articles 28, 28a and 33 of Regulation No 1408/71 in conjunction with Article 29 of Regulation No 574/72 must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which recipients of pensions payable under the legislation of that State who, like the appellants in the main proceedings, reside in another Member State must, in order to receive the sickness benefits in kind to which they are entitled with the cost being borne by the former Member State, report to the competent institution of that State and pay, in the form of a deduction from the pension, a contribution in respect of those benefits even if they are not registered with the competent institution of their Member State of residence.

37 According to the order for reference, that question arises in the course of a dispute relating to the lawfulness of contributions claimed by the Netherlands authorities from the appellants in the main proceedings in respect of the sickness benefits in kind provided under Articles 28 and 28a of Regulation No 1408/71 in their Member State of residence at the expense of the Kingdom of the Netherlands after the entry into force in that Member State on 1 January 2006 of the new compulsory statutory sickness insurance scheme introduced by the ZVW, which, replacing the scheme laid down before that date by the ZFW solely for employees whose income was below certain thresholds, now applies to all persons residing or working in that Member State.

38 It should be recalled, to begin with, that Articles 28 and 28a of Regulation No 1408/71 lay down a 'conflict rule' enabling the determination, in relation to pensioners residing in a Member State other than the State responsible for payment of the pension, of the institution responsible for provision of the benefits mentioned in those provisions and the legislation applicable (see Case 69/79 *Jordens-Vosters* [1980] ECR 75, paragraph 12; Case C-389/99 *Rundgren* [2001] ECR I-3731, paragraphs 43 and 44; and *van der Duin and ANOZ Zorgverzekeringen*, paragraph 39).

39 In accordance with Article 28 of Regulation No 1408/71, recipients of pensions payable under the legislation of a Member State who reside in another Member State, in which they are not entitled to sickness benefits in kind, are to receive those benefits from the competent institution of their Member State of residence, on behalf and at the expense of the State responsible for payment of the pension, in so far as they would be entitled to them under the legislation of the State responsible for payment of the pension if they were resident in its territory (see *van der Duin and ANOZ Zorgverzekeringen*, paragraphs 40, 47 and 53).

40 Article 28a of Regulation No 1408/71 lays down a substantially similar rule where there is an entitlement to sickness benefits in kind in the Member State of residence, that State not subjecting the right to those benefits to insurance or employment conditions; this is in order not to penalise Member States whose legislation confers a right to receive benefits in kind merely by virtue of residence in their territory (see *Rundgren*, paragraphs 43 and 45).

41 It follows that, in the present case, after the entry into force of the ZVW, persons entitled to a pension under Netherlands legislation, such as the appellants in the main proceedings, residing in a Member State other than the Netherlands who, before that date, were not covered by the provisions of Articles 28 and 28a of Regulation No 1408/71 – being excluded by reference to their income level, whatever their place of residence, from the sickness benefits provided for by the compulsory statutory

sickness insurance scheme – are covered by the provisions of those articles from 1 January 2006.

42 By virtue of point 1(a) and (b) of section R of Annex VI to Regulation No 1408/71, such pensioners who are entitled to sickness benefits in kind, the cost to be borne by the Kingdom of the Netherlands, in their Member State of residence under Articles 28 and 28a of that regulation must report to the CVZ for that purpose. Moreover, under Article 29 of Regulation No 574/72, in order to receive those benefits, they must also register with the competent institution of their Member State of residence by submitting a certified statement testifying that they are entitled to those benefits under the legislation of the State responsible for payment of the pension. Form E 121 constitutes that certified statement.

43 The documents in the case-file submitted to the Court show that in the present case, although the obligation for pensioners entitled to a pension under Netherlands legislation who reside in a Member State other than the Netherlands to report to the CVZ in order to receive sickness benefits in kind there under Articles 28 and 28a of Regulation No 1408/71 is mentioned in the wording of the first question referred, it is called into question in the main proceedings only in so far as it gives rise to the deduction from their pensions by that State of the contributions whose lawfulness is contested.

44 In those circumstances, it should be considered that by its first question the referring court seeks essentially to know whether pensioners who, like the appellants in the main proceedings, reside in a Member State other than the State responsible for payment of their pensions may, by declining to register with the competent institution of the Member State in which they reside, choose to remove themselves from the application of Regulation No 1408/71 and consequently waive the benefits provided in the latter Member State under Articles 28 and 28a of that regulation, and thus not

be obliged to pay the contributions payable in that respect, under Article 33 of that regulation, in the Member State responsible for payment of their pensions.

45 Mr Janssen and Mr Fokkens submit, however, that, contrary to the view taken by the referring court, their situation is covered not by Articles 28 and 28a of Regulation No 1408/71 but by Article 13(2)(f) of that regulation, by virtue of which, since the Netherlands legislation is no longer applicable to them because they have ceased occupational activity in the Netherlands, they are covered exclusively by the legislation of their Member State of residence, without having any possibility of choice. They submit that the Kingdom of the Netherlands is not therefore competent to levy a contribution in respect of those benefits.

46 On this point, it should be noted that under Article 13(2)(f) of Regulation No 1408/71 a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with the provisions of Article 13(2)(a) to (d) or Articles 14 to 17 of that regulation, is subject to the legislation of the Member State in whose territory he resides. According to settled case-law, Article 13(2)(f) applies inter alia to persons who have definitively ceased all activity (Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraphs 39 and 40, and Case C-372/02 *Adanez-Vega* [2004] ECR I-10761, paragraph 24).

47 However, that provision of a general nature, which appears in Title II of Regulation No 1408/71, 'Determination of the legislation applicable', applies only in the absence of provision to the contrary in the special provisions relating to the various categories or benefits which constitute Title III of that regulation (see Case 227/81 *Aubin* [1982] ECR 1991, paragraph 11).

48 Articles 28 and 28a of that regulation, which appear in Title III, Chapter 1 of the regulation, 'Sickness and maternity', do in fact derogate from those general rules as regards the provision of sickness benefits in kind to pensioners resident in a Member State other than the State responsible for payment of the pension.

49 In a case such as that in the main proceedings, the referring court was therefore correct in excluding the application of Article 13(2)(f) of Regulation No 1408/71 in favour of Articles 28 and 28a of that regulation.

50 The national court's uncertainty relates essentially to, firstly, whether the system established by Articles 28 and 28a is mandatory for pensioners within the scope of those provisions and, secondly, whether they are obliged to pay contributions in respect of the benefits provided for by those provisions.

51 As regards, firstly, the possibility for pensioners residing in a Member State other than the State responsible for payment of the pension to waive the application of the system laid down in Articles 28 and 28a of Regulation No 1408/71, it is settled case-law that the provisions of Regulation No 1408/71 determining the applicable legislation form a complete system of conflict rules the effect of which is to divest the national legislatures of the power to determine the ambit and the conditions for the application of their national legislation on the subject so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned (see, inter alia, *Adanez-Vega*, paragraph 18 and the case-law cited).

52 Since the conflict rules laid down by Regulation No 1408/71 are thus mandatory for the Member States, *a fortiori* 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 (see, to that effect, Case 11/67 *Couture* [1967] ECR 379, 388; Case 12/67 *Guissart* [1967] ECR 425, 433; and Case C-60/93 *Aldewereld* [1994] ECR I-2991, paragraphs 16 to 20).

53 In this context, the Court has held with reference to migrant workers that neither the FEU Treaty, in particular Article 45 TFEU, nor Regulation No 1408/71 gives those workers the option to waive in advance the benefit of the mechanism introduced inter alia by Article 28(1) of that regulation (Case C-160/96 *Molenaar* [1998] ECR I-843, paragraph 42).

54 Moreover, where Regulation No 1408/71 gives insured persons within its scope a right of choice as to the legislation applicable, it does so expressly (*Aubin*, paragraph 19).

55 That is indeed the case, as Mr van Delft and Mr van Willigen have pointed out, with Article 17a of Regulation No 1408/71, which allows recipients of a pension due under the legislation of one or more Member States who reside in another Member State to ask to be exempted from the legislation of the latter Member State, provided that they are not subject to that legislation because of the pursuit of an occupation.

56 However, it is common ground that that provision, which appears in Title II of Regulation No 1408/71, does not apply in a case such as that in the main proceedings, since, as Mr van Delft and Mr van Willigen concede, Articles 28 and 28a of that

regulation contain specific derogating rules with respect to sickness benefits for those pensioners.

57 By contrast, as the Advocate General observes in point 47 of his Opinion, Articles 28 and 28a of Regulation No 1408/71 are worded in terms which do not confer any right to choose on the pensioners who come under those provisions. Article 28 lays down a mandatory rule that, where the recipient of a pension due under the legislation of a Member State resides in another Member State in which he is not entitled to benefits, he is nevertheless to 'receive' benefits in kind provided by the competent institution of that Member State, in so far as he would be entitled to them if he resided in the Member State responsible for payment of his pension. Similarly, where the Member State of residence provides for an entitlement to benefits in kind, Article 28a of the regulation requires, without offering any alternative, the Member State responsible for payment of the pension to bear the cost of those benefits, again in so far as the pensioner would be entitled to them if he resided in the Member State responsible for payment of the pension.

58 The appellants in the main proceedings argue, however, that in accordance with the wording of Article 29 of Regulation No 574/72 a pensioner, in order to 'receive' benefits in kind in his Member State of residence under Articles 28 and 28a of the Regulation, must register with the institution of that State by submitting a certified statement in the shape of Form E 121 testifying that he is entitled to those benefits under the legislation under which the pension is payable.

59 They submit in this respect that in paragraphs 40, 47 and 53 of the *van der Duin and ANOZ Zorgverzekeringen* judgment the Court held that it is only 'once' a pensioner has subscribed to the system established by Article 28 of Regulation No 1408/71 by registering with the institution of the Member State of residence that he enjoys a right to benefits in kind in that State. They argue that it follows that the absence of

registration with the competent institution of the Member State of residence allows the recipient of a pension payable under the legislation of another Member State to waive the right to benefits in kind in the Member State of residence.

60 That argument cannot be accepted, however.

61 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 (see, by analogy, Case C-202/97 *FTS* [2000] ECR I-883, paragraph 50, and Case C-178/97 *Banks and Others* [2000] ECR I-2005, paragraph 53).

62 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.

63 It follows that registration with the competent institution of the Member State of residence, provided for in Article 29 of Regulation No 574/72, 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. That is how paragraphs 40, 47 and 53 of *van der Duin and ANOZ Zorgverzekeringen*, in which the Court held that it is only once pensioners have registered with that institution that, in accordance with Article 28 of Regulation No 1408/71 and Article 29 of Regulation No 574/72, they receive benefits in kind from that institution, should be understood.

64 Consequently, where the recipient of a pension due under the legislation of a Member State is in the objective situation described in Articles 28 and 28a of Regulation No 1408/71, 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 with the competent institution of his Member State of residence.

65 Articles 28 and 28a of Regulation No 1408/71 are therefore mandatory for the insured persons who fall within their scope.

66 As regards, secondly, the obligation to pay contributions in the Member State responsible for payment of the pension, Mr Janssen and Mr Fokkens submit that the application of Articles 28 and 28a of Regulation No 1408/71 cannot in any event justify their being required to contribute to the compulsory statutory sickness insurance scheme established by the ZVW, since, as they do not reside or work in the Netherlands, under that new legislation they are not entitled to sickness benefits in kind in that Member State. Unlike the ZFW, the ZVW expressly excludes non-residents from its scope.

67 That argument, however, disregards the fact that, as is apparent from paragraphs 37 to 41 above, Articles 28 and 28a of Regulation No 1408/71 lay down a 'conflict rule' under which pensioners who reside in a Member State other than the State responsible for payment of the pension are entitled, at the expense of the latter State, to sickness benefits in kind in their Member State of residence, in so far as they would be entitled to them under the legislation of the State responsible for payment of the pension if they resided in its territory.

68 Consequently, while it is indeed correct, as is not disputed, that the ZVW does not apply to recipients of a pension payable under Netherlands legislation who, like the appellants in the main proceedings, reside in a Member State other than the Netherlands, the fact remains that, since the appellants would be entitled to sickness benefits in kind in the Netherlands under the ZVW if they resided in that Member State, they are entitled under the system laid down by Articles 28 and 28a of Regulation No 1408/71 to receive those benefits, at that State's expense, in their Member State of residence.

69 It should be noted here that under Article 33(1) of Regulation No 1408/71 the institution of a Member State which is responsible for payment of a pension and which administers legislation providing for deductions from pensions in respect of contributions for sickness is authorised to make such deductions from the pension payable by it, to the extent that the cost of the benefits under Articles 28 and 28a of the regulation is to be borne by an institution of that Member State.

70 In the present case, it is common ground that the Netherlands legislation under which the pensions of the appellants in the main proceedings are payable provides for such deductions of contributions.

71 In the system established by Articles 28 and 28a of Regulation No 1408/71, benefits in kind are provided to pensioners by the competent institution of the Member State of residence with the cost being borne by the Member State responsible for payment of the pension.

72 In those circumstances, since, as follows from the foregoing, 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.

73 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.

74 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. As the Court has previously held, there is no rule of European Union law which requires the competent institution of a Member State to ascertain whether an insured person is likely to be able actually to receive all the benefits of a sickness insurance scheme before registering that person and collecting the corresponding contributions (*Molenaar*, paragraph 41).

75 As the Netherlands Government and the European Commission submit, 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.

76 The circumstance asserted by Mr van Delft and Mr van Willigen that, in view of their age, that sort of speculative conduct is of no interest to them, who were and still are insured against the risk of sickness under private insurance contracts, is immaterial, since it is common ground that the risk of such conduct cannot be excluded with respect to at least some of the insured persons covered by the social security scheme at issue. If it is not to be deprived of its essential content, the solidarity of such a scheme must be ensured in mandatory fashion by all the insured persons covered by the scheme, regardless of the individual conduct which each of them may adopt according to their personal situation.

77 Moreover, Mr van Delft and Mr van Willigen are wrong to submit that the Member State responsible for payment of the pension cannot argue on the basis of the solidarity of the scheme at issue because it does not bear the risk of providing the sickness benefits in kind in the Member State of residence.

78 Although in accordance with Article 95 of Regulation No 574/72 the amount of the benefits provided under Articles 28 and 28a of Regulation No 1408/71 is in principle refunded to the institution of the Member State of residence by the competent institution of the Member State responsible for payment of the pension by means of a lump-sum amount, that lump sum is intended to cover all the benefits in kind provided to the persons concerned, and its amount depends on the average annual healthcare costs generated by a pensioner falling within the system of the Member State of residence, the lump sum being, in the words of that provision, 'as close as

possible' to the actual expenditure (see, to that effect, *van der Duin and ANOZ Verzekeringen*, paragraph 44).

79 It follows that the Member State responsible for payment of the pension paid to a pensioner resident in another Member State bears the essential risk linked to the provision of sickness benefits in kind in the Member State in which that person resides.

80 In the light of the foregoing, the answer to the first question is that Articles 28, 28a and 33 of Regulation No 1408/71 in conjunction with Article 29 of Regulation No 574/72 must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, 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 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.

Question 2

81 By its second question, the referring court asks whether Articles 21 TFEU and 45 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, 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 report

to the competent institution of the Member State responsible for payment of the pension and pay, in the form of a deduction from the pension, a contribution in respect of those benefits even if they are not registered with the competent institution of their Member State of residence.

82 As already stated in paragraph 43 above, the obligation for those pensioners to report to the CVZ in order to receive sickness benefits in kind under Articles 28 and 28a of Regulation No 1408/71 is not as such the subject of challenge in the main proceedings.

83 In those circumstances, the second question must be understood as seeking essentially to know whether Articles 21 TFEU and 45 TFEU preclude national legislation, such as that at issue in the main proceedings, which provides in accordance with Articles 28, 28a and 33 of Regulation No 1408/71 that pensioners who reside in a Member State other than the State responsible for payment of the pension are required to pay contributions in the latter State for the provision of sickness benefits in kind in their Member State of residence even if they are not registered with the competent institution of that State.

84 It must be noted that it follows both from the case-law of the Court and from Article 168(7) TFEU that European Union law does not detract from the power of the Member States to organise their social security systems and to adopt, in particular, provisions intended to govern the organisation and delivery of health services and medical care. In the absence of harmonisation at European Union level, it is thus for the legislation of each Member State to determine the conditions for granting social security benefits. However, when exercising that power, the Member States must comply with European Union law, in particular the provisions of the Treaty on freedom of movement for workers and on the freedom of every citizen of the Union to move and reside in the territory of the Member States (see, to that effect, inter alia, Case C-208/07 *von Chamier-Glisczinski* [2009] ECR I-6095, paragraph 63

and the case-law cited, and Case C-211/08 *Commission* v *Spain* [2010] ECR I-5267, paragraph 53).

85 That being so, the interpretation of Regulation No 1408/71 given by the Court in answer to the first question must be understood without prejudice to the result of the possible applicability of provisions of primary law. The fact that national legislation may be in conformity with secondary law, in this case Regulation No 1408/71, does not have the effect of removing it from the scope of the provisions of the Treaty (see, inter alia, Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 47; *von Chamier-Glisczinski*, paragraph 66; and *Commission* v *Spain*, paragraph 45).

86 It follows that the applicability of Articles 28, 28a and 33 of Regulation No 1408/71 to a situation such as that at issue in the main proceedings does not in itself rule out the possibility that the appellants in the main proceedings may be able, on the basis of primary law, to contest the deduction of contributions from their pensions by the competent institution of the Member State responsible for payment of their pensions for the provision of sickness benefits in kind by the competent institution of their Member State of residence (see, by analogy, *von Chamier-Glisczinski*, paragraph 66).

87 In the present case, it should first be examined whether a situation such as that at issue in the main proceedings falls within the scope of the provisions referred to in the second question, namely Articles 21 TFEU and 45 TFEU.

88 On the question of the applicability of Article 45 TFEU, it should be noted at the outset that there is no single definition of worker/employed or self-employed person

in European Union law; it varies according to the area in which the definition is to be applied. Thus the concept of 'worker' used in the context of Article 45 TFEU does not necessarily coincide with the definition applied in relation to Article 48 TFEU and Regulation No 1408/71 (see *von Chamier-Glisczinski*, paragraph 68 and the case-law cited).

89 As regards Article 45 TFEU, it is settled case-law that the concept of 'worker' within the meaning of that provision has an autonomous meaning specific to European Union law and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship, according to that case-law, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see *von Chamier-Glisczinski*, paragraph 69 and the case-law cited).

90 Moreover, while Article 45(3)(d) TFEU and Article 17(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77) provide for a right of a person, after ceasing work, to stay in the Member State to which he moved for the purpose of working there, it follows from the case-law that a person who has carried out all his occupational activity in the Member State of which he is a national and has exercised the right to reside in another Member State only after his retirement, without any intention of working in that other State, cannot rely on the principle of freedom of movement for workers (Case C-520/04 *Turpeinen* [2006] ECR I-10685, paragraph 16, and Case C-544/07 *Rüffler* [2009] ECR I-3389, paragraph 52).

91 In the present case, the information in the documents submitted to the Court tends to show that the appellants in the main proceedings, who have all reached retirement age, are Netherlands nationals in receipt of pensions under the AOW or the WAO who, after spending their entire working lives in the Netherlands, subsequently established their residence in another Member State in which they do not work and have never sought work.

92 Mr van Delft and Mr van Willigen submit that their situation could be covered by Article 45 TFEU. They have not, however, supported that assertion by any specific elements which could cast doubt on the above considerations. On the contrary, they explicitly state that they emigrated to another Member State after retiring from work.

93 In those circumstances, it must be considered, in agreement with the Commission and the French and Finnish Governments, that it does not appear possible for Article 45 TFEU to apply in a dispute such as that in the main proceedings.

94 It must be emphasised, on the other hand, that the appellants in the main proceedings, as Netherlands nationals, enjoy in any event the status of citizens of the Union by virtue of Article 20(1) TFEU.

95 By going to another Member State and establishing their residence there, they exercised the rights conferred on them by Article 21(1) TFEU. A situation such as theirs thus comes under the right of citizens of the Union to move and reside freely in the territory of a Member State other than that of which they are nationals.

96 In accordance with Article 21(1) TFEU, every citizen of the Union has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down by the Treaty and the measures adopted to give it effect.

97 It is settled case-law that the opportunities offered by the Treaty in relation to freedom of movement for citizens of the Union could not be fully effective if a national of a Member State could be deterred from availing himself of them by obstacles placed in the way of his stay in another Member State by legislation of his Member State of origin penalising him for the mere fact that he has used those opportunities (see *von Chamier-Glisczinski*, paragraph 82 and the case-law cited).

98 In the present case, the appellants in the main proceedings submit that because of their transfer of residence to a Member State other than the Netherlands they are in a situation, with respect to the provision of sickness benefits in kind, that is less favourable than the situation they would have been in if they resided in the Netherlands. As a result of the entry into force of the ZVW on 1 January 2006, they, in contrast to Netherlands residents, suffered a significant reduction in the level of protection they enjoyed against the risk of sickness, since, in terms both of cost and of quality, the benefits provided under the legislation of the Member State of residence are less advantageous than those available under private insurance contracts. The benefits available to Netherlands residents under the ZVW, by contrast, are comparable to the latter benefits.

99 On this point, it must be recalled that, since Article 48 TFEU provides for the coordination, not the harmonisation, of the legislations of the Member States, substantive and procedural differences between the social security systems of individual Member States, and hence in the rights of persons who are insured persons there, are unaffected by that provision, as each Member State retains the power to determine in its legislation, in compliance with European Union law, the conditions for granting

benefits under a social security scheme (see, to that effect, *von Chamier-Glisczinski*, paragraph 84).

100 In those circumstances, Article 21(1) TFEU cannot guarantee to an insured person that a move to another Member State will be neutral in terms of social security, in particular as regards sickness benefits. In view of the disparities existing between the schemes and legislations of the Member States in this field, such a move may, depending on the case, be more or less advantageous or disadvantageous for the person concerned from the point of view of social protection (see *von Chamier-Glisczinski*, paragraph 85).

101 It follows that, even where its application is thus less favourable, national social security legislation is still compatible with Article 21 TFEU as long as it does not simply result in the payment of social security contributions on which there is no return (see, by analogy, Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829, paragraph 51; Case C-493/04 *Piatkowski* [2006] ECR I-2369, paragraph 34; and Case C-50/05 *Nikula* [2006] ECR I-7029, paragraph 30).

102 In the present case, as appears from paragraph 41 above, if recipients of pensions payable under Netherlands legislation who reside in a Member State other than the Netherlands are, since 1 January 2006, covered by the sickness benefits in kind provided for by the legislation of their Member State of residence, whereas previously they were not covered by any compulsory statutory sickness insurance scheme and could thus be covered against the risk of sickness only under private insurance contracts, that is because of the decision of the Netherlands legislature, in the exercise of its powers in relation to the organisation of social security schemes, to extend the compulsory statutory sickness insurance scheme inter alia to all Netherlands residents, which had the consequence, in view of the conflict rules in Articles 28 and 28a

of Regulation No 1408/71, of including those pensioners among the persons entitled to the sickness benefits provided in their Member State of residence.

103 It is clear that, as the Netherlands Government has submitted, in so far as the national legislation at issue in the main proceedings provides, consistent with the provisions of Regulation No 1408/71, that non-resident pensioners are entitled to sickness benefits in kind under the legislation of their Member State of residence, that legislation is more likely to promote the free movement of citizens of the Union than to restrict it, since it gives those citizens access in the Member State of residence to the care corresponding to their state of health, on the same conditions as persons insured under the social security scheme of that Member State.

104 That is all the more so in the case at issue in the main proceedings in that, as is common ground, following legal proceedings for interim relief brought by the appellants in the main proceedings before the national courts, the amount of the contributions to be paid by recipients of pensions payable under Netherlands legislation who reside in a Member State other than the Netherlands, since it is multiplied by a coefficient reflecting the cost of living in the Member State of residence, is now less than that paid by recipients of those pensions who reside in the Netherlands.

105 Admittedly, it cannot be ruled out that, as the appellants in the main proceedings submit, the sickness benefits in kind provided in accordance with Regulation No 1408/71 in the Member State of residence may be less favourable in terms of cost and quality than those available to Netherlands residents under the ZVW.

106 However, since such a difference in the level of protection against the risk of sickness between the national social security schemes of the Member States is the result of the lack of harmonisation of European Union law in this field, it cannot, in accordance with the case-law cited in paragraphs 99 and 100 above, be regarded as a restriction caught by Article 21(1) TFEU. Contrary to the submissions of Mr van Delft and Mr van Willigen, it is immaterial in this respect that they transferred their residence to another Member State before rather than after the ZVW entered into force.

107 Moreover, the national legislation at issue in the main proceedings does not require pensioners resident in a Member State other than the Netherlands to contribute to a social security scheme without providing corresponding social protection.

108 Although in the absence of registration in their Member State of residence no sickness benefits in kind can be provided there to recipients of pensions payable under Netherlands legislation, the payment of contributions in the Netherlands none the less gives those insured persons a right to receive benefits in their Member State of residence with the cost being borne by the Netherlands.

109 That said, it may be noted in this case that the legislation at issue in the main proceedings did not confine itself to extending the compulsory statutory sickness insurance scheme inter alia to all Netherlands residents and providing, in accordance with Regulation No 1408/71, that recipients of pensions payable under Netherlands legislation who resided in a Member State other than the Netherlands would, in return for the payment of a contribution in the Netherlands, receive sickness benefits in kind in their Member State of residence. That legislation also provided at the same time for the automatic termination as from 1 January 2006 of the insurance contracts concluded before that date by such non-residents with companies established in the

Netherlands, in so far as those contracts created rights equivalent to those deriving from the application of Regulation No 1408/71.

110 Mr van Delft, Mr van Willigen and Mr Fokkens submit that that automatic termination under Article 2.5.2 of the IZVW substantially affected the existing rights of non-resident pensioners in receipt of pensions under Netherlands legislation derived from contracts of insurance concluded under the previous statutory system with insurance companies established in the Netherlands. As a result of that statutory termination those non-residents were compelled, in order to ensure that the level of overall protection under those contracts would continue, to enter into new contracts of insurance after 1 January 2006 so as to supplement the basic benefits provided in the Member State of residence. In view of their age, those new contracts could be concluded only on tariff conditions that were especially unfavourable.

111 According to Mr van Delft and Mr van Willigen, residents and non-residents were not treated in the same way in this respect. In practice, the tariff conditions in the new insurance contracts concluded by residents after the entry into force of the ZVW substantially corresponded to those they had agreed to in the insurance contacts concluded when the ZFW was in force, whereas for non-residents, on the other hand, the conditions offered by the insurance companies after that entry into force were significantly less favourable than those previously applicable under their former contracts.

112 The Netherlands Government, questioned on this point at the hearing, stated that the IZVW had provided for the automatic termination on 1 January 2006 of insurance contracts concluded with companies established in the Netherlands before the entry into force of the ZVW only 'to the extent that'those contracts created rights, as

regards sickness benefits in kind, equivalent to those which the persons concerned could claim after that entry into force under Regulation No 1408/71. The automatic termination thus related not to the entire content of the insurance contracts but solely to the parts of the contracts which corresponded to the basic statutory scheme laid down by the Member State of residence, in order to avoid double insurance and hence double payment of contributions.

113 The Netherlands Government concedes that in practice the insurance contracts in question were indeed, in most cases, terminated in their entirety, compelling those persons who wished to maintain after 1 January 2006 supplementary protection against the risk of sickness in addition to the basic statutory scheme to conclude new contracts of insurance. However, residents and non-residents had been treated alike in this respect.

114 It is not for the Court, in the context of a reference for a preliminary ruling, to rule on the interpretation of provisions of national law or on the assessment of the factual context of the main proceedings, which is a task reserved exclusively for the referring court (see, to that effect, inter alia, Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-3071, paragraph 48).

115 It is thus for the referring court to ascertain whether and to what extent the national legislation at issue in the main proceedings treats residents and non-residents differently.

116 Should it be established that that legislation contains measures intended to ensure the continuity of the overall protection deriving from the insurance contracts concluded before the ZVW entered into force, and that those measures relate solely to contracts

concluded by residents, such a difference of treatment compared to non-residents would, as the Advocate General observes in point 79 of his Opinion, constitute a restriction of the freedom of movement of Union citizens for the purposes of Article 21(1) TFEU, since it could, in the manner stated in the case-law cited in paragraph 97 above, deter recipients of pensions under Netherlands legislation, such as the appellants in the main proceedings, from maintaining their residence in a Member State other than the Netherlands. Neither the Netherlands Government nor the CVZ has put forward, in connection with the present reference for a preliminary ruling, anything to justify such a difference of treatment.

117 To examine whether there is a restriction for the purposes of Article 21 TFEU, the referring court will in particular have to take account of the relevant factors below, which appear from the documents submitted to the Court.

118 First, it follows from the very wording of Article 2.5.2(2) of the IZVW that that law provides for the automatic termination only of contracts of insurance concluded by non-residents. It does not, on the other hand, relate to contracts of insurance concluded by residents.

119 In order to determine whether that provision, as its wording thus tends to indicate, introduces different treatment for residents and non-residents, it will be for the referring court to establish whether the national legislation at issue in the main proceedings includes, as the Netherlands Government suggests, a further statutory provision which also, in the same way, provides for the automatic termination of insurance contracts concluded by residents before the entry into force of the ZVW.

120 If so, that court will also have to ascertain whether the automatic termination produces the same effects for residents and non-residents, and in particular whether, as the Netherlands Government submits, the termination relates in each case solely to the part of the contract that created rights equivalent to those under the applicable compulsory statutory scheme.

121 Second, it appears both from the written submissions of Mr van Delft and Mr van Willigen and from those of the Netherlands Government that, as regards residents who were subject on 1 January 2006 to a contract of insurance, the national legislation at issue in the main proceedings required the companies taking part in the compulsory statutory sickness insurance scheme established by the ZVW to accept all those persons as insured persons for all the sickness benefits in kind available to them under those contracts, namely both the basic benefits corresponding to the rights under the ZVW and the supplementary benefits going beyond that statutory minimum provision.

122 By contrast, according to Mr van Delft and Mr van Willigen, the legislation did not impose on those insurance companies, if they were established in the Netherlands, such an obligation to accept non-residents who were insured, before the ZVW entered into force, under insurance contracts with them and, since it entered into force, are entitled under Articles 28 and 28a of Regulation No 1408/71 to benefits in kind provided in the Member State of residence with the cost being borne by the Netherlands.

123 If, which will be for the referring court to determine, those statements are shown to be correct, there would also be a difference of treatment between residents and non-residents which placed the latter in a less favourable situation when the ZVW entered into force.

124 In the absence of a statutory obligation to insure non-residents, in particular with respect to sickness benefits supplementary to the basic benefits which those non-residents are entitled to in their Member State of residence, such national legislation would have been liable to encourage the insurance companies concerned to take the opportunity of the entry into force of the ZVW to terminate in their entirety the insurance contracts previously concluded with those non-residents, who are regarded as falling within the category of 'bad risks' in view of their age and state of health, in order to review and adapt the tariff conditions offered to them in the light of changes in those factors since the date of conclusion of the original contract.

125 Third and finally, Mr van Delft and Mr van Willigen stated at the hearing that the entry into force of the ZVW had been preceded by close discussions between the Netherlands Government and the insurance companies in question. Following those discussions, the intention had been, at any rate from a political point of view, that residents should be offered tariff conditions that were reasonable and substantially the same as those that applied under the contracts concluded before 1 January 2006.

126 The Netherlands Government, questioned on this point at the hearing, submitted that, apart from the fact that the complete termination of insurance contracts concluded before the entry into force of the ZVW concerned both residents and non-residents, the Government cannot be held responsible, because the IZVW confined itself to requiring the partial termination of those contracts. The supposedly unfavourable tariff conditions imposed on the appellants in the main proceedings on conclusion of the new insurance contracts for the provision of supplementary protection thus originated solely in commercial decisions taken independently by the insurance companies concerned.

127 It is for the referring court to determine whether, as Mr van Delft and Mr van Willigen submit, such a commitment was in fact entered into by the insurance companies

concerned, at the request of the Netherlands Government, to guarantee the continuity of the overall protection deriving from the insurance contracts concluded before the ZVW entered into force, and, if so, whether that guarantee relates exclusively to residents or applies also to non-residents.

128 It must be pointed out, however, that any difference of treatment between residents and non-residents suggested by the Netherlands Government and carried out with its assistance by the insurance companies established in the Netherlands, were it to be established, would not escape the prohibition which follows from Article 21 TFEU, contrary to the Netherlands Government's submissions, merely because it was not based on decisions which were legally binding on those companies.

129 Even acts of the authorities of the Member States which do not have binding force may be capable of influencing the conduct of undertakings and thus of frustrating the aims pursued by Article 21 TFEU. That would be the case if a tariff practice adopted by insurance companies represented the implementation of a 'political' agreement defined by the Netherlands Government and intended to ensure the continuity of the overall protection of residents alone, to the exclusion of non-residents (see, by analogy, Case 249/81 *Commission* v *Ireland* [1982] ECR 4005, paragraphs 27 to 29).

130 In the light of the foregoing, the answer to the second question is that Article 21 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, 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.

131 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 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.

Costs

132 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Articles 28, 28a and 33 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006, in conjunction with**

Article 29 of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Commission Regulation (EC) No 311/2007 of 19 March 2007, must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, 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.

2. Article 21 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, 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 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.

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.

[Signatures]