OPINION OF ADVOCATE GENERAL JÄÄSKINEN
delivered on 15 July 2010[1]

I — Introduction

1. This reference for a preliminary ruling is made in connection with the adoption, by the Kingdom of the Netherlands, of legal provisions which extended the compulsory sickness insurance scheme to all persons residing or working on national territory, whereas the previous system excluded part of that population, who were required to conclude private insurance contracts in order to be covered in that regard. That amendment is the consequence of the Zorgverzekeringswet (Law on healthcare insurance, 'the ZVW'), which came into force on 1 January 2006, and which was followed by the Invoerings- en aanpassingswet Zorgverzekeringswet (Law implementing and amending the Law on healthcare insurance, 'the IZVW').

2. That amendment also concerned persons residing in other Member States who, in accordance with Regulation (EEC) No 1408/71,[2] may claim benefits in kind under the legislation of their State of residence, the cost to be borne by the State which pays them an old-age or incapacity pension, namely the Kingdom of the Netherlands. The Netherlands legislature required those persons to report to the College van zorgverzekeringen (Health Care Insurance Board, 'the CVZ') and to pay contributions, even if they had not registered with the institution of their place of residence in accordance with Regulation (EEC) No 574/72.[3]

3. The six appellants in the main proceedings have called in question this new system, and

1 — Original language: French.

2 — Council Regulation 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, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), 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'). I would point out that this was most recently amended by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008, and that Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 200, p. 1) is designed to repeal and replace it.

3 — Council Regulation of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ, English Special Edition 1972(I), p. 159), as amended by Commission Regulation No 311/2007 of 19 March 2007 (OJ 2007 L 82, p. 6) ('Regulation No 574/72').

it is stated that, according to data provided by one of them, more than 100 000 persons receiving only a Netherlands pension live in another Member State of the European Union or in a State which is a signatory to a treaty according them rights equivalent to those laid down by Regulation No 1408/71. In their grounds of appeal, they stated that the contributions they are now charged are claimed for services which they consider less attractive than those they were receiving under the private insurance they had taken out. They also claimed that they were in a less favourable position than residents of the Kingdom of the Netherlands, in that the latter had the opportunity to acquire supplementary private insurance at prices which were negotiated and guaranteed by the State, whereas they had not been given that opportunity.

4. In that connection, the Centrale Raad van Beroep, Netherlands, asks the Court whether persons with social security cover, in the present case pensioners residing in a Member State other than the State responsible for payment of their pensions, may choose not to be subject to the statutory sickness insurance scheme applicable to them under European Union law and, accordingly, to be exempt from the contributions claimed from them in that regard by the latter State.

5. At the request of the national court, this case, in the light of its specific circumstances, has been given priority, pursuant to Article 55(2) of the Rules of Procedure of the Court of Justice.

II — Legal framework

A — *European Union law*

— EC Treaty [4]

6. Article 18(1) EC states:

‘Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the

4 — Articles 18 EC and 39 EC are now Articles 21 TFEU and 45 TFEU. However, since this case relates in the main to the application of provisions of Netherlands law in their version prior to the entry into force of the Treaty on the Functioning of the European Union, namely 1 December 2009, reference will be made to the provisions of the EC Treaty according to the numbering applicable before that date.

limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'.

7. Article 39 EC is worded as follows:

'1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

...'

— Regulation No 1408/71

8. Article 1 of Regulation No 1408/71 provides:

'For the purpose of this Regulation:

(a) *employed person* and *self-employed person* mean respectively:

(i) any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons or by a special scheme for civil servants;

...'

9. Article 2(1) of the regulation provides:

'This Regulation shall apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.'

10. Pursuant to Article 4(1)(a), Regulation No 1408/71 is to apply to all legislation concerning branches of social security including, inter alia, 'sickness benefits'.

11. Article 13 of the regulation, which is in Title II relating to the 'Determination of the legislation applicable', is worded as follows:

'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.'

12. Title III of Regulation No 1408/71 contains the 'special provisions relating to the various categories of benefits' to which the regulation is applicable under Article 4(1). Chapter 1 of Title III of the regulation concerns sickness and maternity benefits.

13. In Section 5 of Chapter 1, entitled 'Pensioners and members of their families', Article 28 of Regulation No 1408/71, concerning 'Pensions payable under the legislation of one or more States, in cases where there is no right to benefits in kind 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;

(b) where the pensioner is entitled to the said benefits under the legislation of two or more Member States, the cost thereof shall be borne by the competent institution of the Member State to whose legislation the pensioner has been subject for the longest period of time; should the application of this rule result in several institutions being responsible for the cost of benefits the cost shall be borne by the institution administering the legislation to which the pensioner was last subject.

...'

14. In the same section, Article 28a of Regulation No 1408/71, headed, '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', lays down that:

'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.'

15. Under Article 33(1) of Regulation No 1408/71, which is also in Section 5 of Title III, Chapter 1 of the regulation:

'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 Articles 27, 28, 28a, 29, 31 and 32 is to be borne by an institution of the said Member State.'

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

17. Point 1(a) to (c) of Section R of Annex VI to Regulation No 1408/71, which concerns the 'Special procedures for applying certain legislations' states as follows:

'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.'

— Regulation No 574/72

18. 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.'

19. Under Article 95 of that regulation, headed 'Refund of benefits in kind provided under sickness and maternity insurance to

pensioners and to 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. The amount of the benefits in kind provided pursuant to Articles 28(1) and 28a and Article 29(1) of the Regulation shall be refunded by the competent institutions to the institutions which provided the said benefits, on the basis of a lump sum which is as close as possible to the actual expenditure incurred.

2. The lump sum shall be determined by multiplying the average annual per capita cost by the average annual number of pensioners and members of their families to be taken into account and by reducing the resultant amount by 20%.

3. The factors necessary for the calculation of the said lump sum shall be determined according to the following rules:

(a) the average annual per capita cost shall be obtained for each Member State, by dividing the annual costs of the total benefits in kind provided by the institutions of that Member State to all pensioners whose pensions are payable under the legislation of that Member State, under the social security schemes to be taken into consideration and to members of their families, by the average annual number of pensioners and members of their families; the social security schemes to be taken into consideration for that purpose are specified in Annex 9;

(b) in dealings between the institutions of two Member States, the average annual number of pensioners and members of their families to be taken into account shall be equal to the average annual number of pensioners, and/or members of their family, referred to in Article 28(2) or Article 29(1) of the Regulation who, whilst residing in the territory of one of the Member States, are entitled to benefits in kind chargeable to the institution of the other Member State.

4. The number of pensioners and members of their families to be taken into account in accordance with paragraph 3(b) shall be determined by means of a list kept for that purpose by the institution of the place of residence, based upon documentary evidence supplied by the competent institution of the rights of the persons concerned. In the event of any dispute, the observations of the institutions involved shall be submitted to the Audit Board provided for in Article 101(3) of the implementing Regulation....'

— Decision No 153 [5]

20. As is apparent from Decision No 153 of the Administrative Commission of the European Communities on social security for migrant workers, Form E 121 is the certified statement required for the purpose of registering a pensioner and members of his family with the institution on their place of residence in accordance inter alia with the provisions of Article 28 of Regulation No 1408/71 and Article 29 of Regulation No 574/72.

B — *Netherlands law*

— Provisions applicable before 1 January 2006

21. According to the information provided by the national court, prior to 1 January 2006, the Ziekenfondswet (Law on sickness funds, 'the ZFW') provided for a system of compulsory sickness insurance for employed persons with an income below a certain threshold. Persons who did not fulfil that dual condition had to conclude a contract with a private insurance company in order to be covered against sickness costs. The aim of the Algemene Wet Bijzondere Ziektekosten (General Law on special sickness costs, 'the ABWZ') was to insure all persons residing in the Netherlands against the risk of special sickness costs, in particular those not covered by the ZFW or by a private insurance contract. Those two compulsory statutory schemes could also be applied, in certain circumstances, to persons residing in a Member State other than the Kingdom of the Netherlands who were entitled to a pension under the Algemene Ouderdomswet (General Law on old-age insurance, 'the AOW') or the Wet op de arbeidsongeschiktheidsverzekering (Law on insurance against incapacity for work, 'the WAO').

— Provisions applicable since 1 January 2006

22. The ZVW, which came into force on 1 January 2006, establishes a compulsory statutory sickness insurance scheme for all persons either residing or working in the Netherlands and, according to the reference for a preliminary ruling, the AWBZ is also

5 — Decision No 153 (94/604/EC) of 7 October 1993 on the model forms necessary for the application of Council Regulation No (EEC) 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 (2006/203/EC) of 17 March 2005 (OJ 2006 L 77, p. 1) ('Decision No 153').

applicable to them. On the other hand, non-residents who do not work in the Netherlands cannot be insured under the ZVW and the AWBZ.

23. The national court states that the relevant provisions of Article 69 of the ZVW, in the version applicable since 1 August 2008, are worded 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 contributions referred to in paragraph 2....'

24. Articles 6.3.1(1) and 6.3.2(1) of the Regeling zorgverzekering (Regulation on healthcare insurance) provide as follows, respectively:

'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 health care expenditure for a person which is to be borne by the social healthcare insurance in that person's country of residence and the average health care 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 health care insurance fund.'

25. Article 2.5.2 of 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].'

III — The main proceedings and the questions referred for a preliminary ruling

26. The appellants in the main proceedings are all Netherlands nationals residing in Member States other than the Kingdom of the Netherlands, [6] who receive either an old-age pension paid by that country under the AOW or a Netherlands pension for incapacity for work under the WAO.

27. Before 1 January 2006, since they were not insured under the compulsory statutory sickness insurance schemes provided by the ZFW and the AWBZ, they took out sickness insurance with private insurance companies established, depending on the circumstances, in the Netherlands or in other Member States.

28. Following the entry into force of the ZVW on 1 January 2006, the CVZ considered that, since the appellants in the main proceedings would have been insured under the compulsory statutory sickness insurance scheme provided by the ZVW if they had resided in the Netherlands, they were henceforth entitled, under Articles 28 and 28a of Regulation No 1408/71, to benefits in kind in the State in which they resided, with the costs to be borne by the State responsible for the payment of the pension, namely the Kingdom of the Netherlands.

6 — Namely, in Belgium (Mr J.C. Ramaer), in Spain (Mr J.A. van Delft and Mr J.M. van Willigen), in France (Mr J.F. van der Nat and Mr O. Fokkens) and in Malta (Mr C.M. Janssen).

29. In order to claim those benefits, the persons concerned had to report to the CVZ, and then to register, by means of a Form E 121 issued by the CVZ, with a sickness fund in their State of residence. As regards the appellants in the main proceedings, Mr Ramaer, Mr van der Nat and Mr Fokkens agreed to register, Mr Fokkens 'under protest', while Mr van Delft, Mr van Willigen and Mr Janssen refused to register.

30. During 2006 or 2007, depending on the circumstances, a deduction was made from the pensions paid to the appellants in the main proceedings in order to recover the amount of the contribution [7] required under Article 69 of the ZVW for entitlement under the compulsory statutory sickness insurance scheme established by that law.

31. Moreover, with effect from 1 January 2006, those of the appellants in the main proceedings who had concluded a private insurance contract with a company established in the Netherlands had that contract automatically cancelled, as provided in Article 2.5.2 of the IZVW. On the other hand, those who had concluded such a contract with a company established in another Member State were able to keep it, since that law did not apply to those situations. The Netherlands Government points out that two conditions had to be satisfied for cancellation, namely, the private insurance contract had to give the person concerned rights equivalent to those to which he is entitled from 1 January 2006 by the application, in the present case, of Regulation No 1408/71, and the insured person had to register with the CVZ before 1 May 2006 in accordance with Article 69 of the ZVW.

32. During 2008, the Rechtbank te Amsterdam dismissed the actions brought by the appellants in the main proceedings challenging the decisions taken in their respect by the CVZ. The six persons concerned lodged an appeal against those judgments before the Centrale Raad van Beroep.

33. According to the reference for a preliminary ruling made by the Centrale Raad van Beroep, the appellants in the main proceedings essentially claimed, on appeal, that Articles 28 and 28a of Regulation No 1408/71 did not contain any mandatory provisions on the basis of which they are subject by law to the scheme of benefits in kind applicable in their country of residence. They therefore considered that they had the option either to register by means of the Form E 121 with the competent institution of the Member State in which they reside in order to qualify for those benefits there, or not to register and to conclude a private insurance contract. They argued that, if a person has provisionally chosen not to register, in accordance with Article 29 of Regulation No 574/72, the Member State

7 — The national court states that the level of the contribution is related to the average costs of healthcare in the country of residence divided by the average expenditure on healthcare per insured person in the Netherlands, which it describes as the country of residence factor.

responsible for the payment of the pension cannot make a deduction because, in such a case, the benefits in kind are not 'borne by an institution of the said Member State', within the meaning of Article 33 of Regulation No 1408/71. In addition, the appellants in the main proceedings alleged an infringement of the right to freedom of movement under Articles 18 EC and 39 EC, on the ground that they are required to pay a contribution for benefits provided by the State of residence of which they do not wish to avail themselves owing to their higher cost and/or their inferior quality in relation to those available under private insurance.

34. The CVZ maintained that the applicability of the rule of conflict stated in Article 28 of Regulation No 1408/71, and therefore the ensuing right to benefits in kind, was not dependent on registration with the competent institution of the Member State of residence. It inferred that, even if the persons concerned have not registered with that institution and have not therefore asserted their right to benefits, the Member State responsible for the payment of the pension is entitled to deduct a contribution from the pension. According to the CVZ, Article 33 of Regulation No 1408/71 is aimed not only at the costs actually borne, but also those which might be borne by the latter State because, otherwise, the solidarity of the social security system would be compromised, since any person concerned could then wait until he needed care in order to register and accordingly be liable for contributions. The CVZ was furthermore of the view that there was no obstacle to the freedom of movement for workers and/or citizens of the Union.

35. As regards the first question referred, the text of which is reproduced in point 39 of this Opinion, the national court states that it raises the question, first, of the relationship between Titles II and III of Regulation No 1408/71, and more particularly of the scope of Article 13(2)(f) of that regulation. It points out that several factors seem to indicate that Regulation No 1408/71 excludes the right of choice referred to by the appellants in the main proceedings. It states that the system provided for particularly by Article 28 of that regulation appears to make a binding determination of the State which must grant the benefits to the person concerned and the State which must bear the cost of those benefits. [8] It adds that when Regulation No 1408/71 provides a right to choose the applicable legislation, it does so expressly. Finally, it mentions that in *Molenaar* [9] the Court held that to offer a migrant worker the possibility of waiving – inter

8 — The Centrale Raad van Beroep refers inter alia to the judgments in Case 69/79 *Jordens-Vosters* [1980] ECR 75, and Case C-156/01 *van der Duin and ANOZ Zorgverzekeringen* [2003] ECR I-7045.

9 — Case C-160/96 *Molenaar* [1998] ECR I-843, paragraph 42.

alia – the benefit of Article 28 of Regulation No 1408/71 does not derive either from the Treaty or from that regulation.

36. On the other hand, the national court states that it might be inferred from Article 29 of Regulation No 574/72 read in conjunction with the judgment in *van der Duin and ANOZ Zorgverzekeringen* [10] that registration with the institution of the Member State of residence is constitutive for the applicability of Articles 28 and 28a of Regulation No 1408/71, which would imply that the persons concerned have a right of choice. So long as the appellants in the main proceedings are not registered, they are not incurring costs 'to be borne' by the competent institution of the Kingdom of the Netherlands within the meaning of Article 33 of Regulation No 1408/71, since no benefit can be granted to them, and, accordingly, no contribution can be deducted from them.

37. As regards the second question referred, the national court states that, if the right of choice relied on by the appellants in the main proceedings is excluded by the provisions of Regulation No 1408/71, it is then necessary to determine whether the contributions deducted under Article 69 of the ZVW and Article 33 of that regulation constitute an obstacle to the freedoms of movement provided for in Articles 18 EC and 39 EC.

38. In that regard, the national court states that the application of the country of residence factor, under Article 69 or the ZVW, has reduced the amount payable by non-residents to a level lower than that payable by the residents of the Netherlands. It also points out that, according to the Court's case-law, [11] the EC Treaty offers no guarantee to a worker that transferring his activities to another Member State will be neutral as regards social security. It states that the fact remains that, for the appellants in the main proceedings, who were already established in another Member State and were covered by private insurance when the ZVW came into force, the effect of that law might be that it becomes less attractive to exercise or to continue exercising their right to move and reside freely outside the Netherlands, firstly because they would have to incur greater costs for their sickness insurance and secondly because they would receive less good care. However, if the wish of the Netherlands legislature to extend compulsory sickness insurance to all the residents of the Netherlands, regardless of their nationality, can be regarded as a ground based on objective considerations of public interest, according to the national court, it is unclear whether the obligation to pay a contribution even if there has been no registration in the

10 — Judgment cited above, paragraph 40.

11 — See inter alia Case C-493/04 *Piatkowski* [2006] ECR I-2369.

State of residence conforms to the principle of proportionality, which would justify such a restriction on freedom of movement.

39. Accordingly, the Centrale Raad van Beroep decided to stay the proceedings and to refer the following questions to the Court of Justice 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 39 EC or Article 18 EC 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?'

40. Written observations were presented by Mr van Delft, Mr van Willigen, Mr Janssen and Mr Fokkens, by the Netherlands, Czech, French and Finnish Governments, and by the Commission of the European Communities. Those four appellants in the main proceedings, the CVZ, the Netherlands Government and the Commission were represented at the hearing, held on 20 May 2010.

41. In essence, the appellants in the main proceedings argue that the Netherlands legislation at issue does not comply with the provisions of Regulation No 1408/71 and Regulation No 574/72, or with Articles 18 EC and 39 EC. On the other hand, the Netherlands, Czech, French and Finnish Governments, and the Commission, consider that the Court should reply to the questions referred to it for a preliminary ruling by declaring that neither those regulations nor the EC Treaty articles referred to preclude that legislation.

IV — Analysis

A — *The first question*

— Preliminary observations

42. By the first question it refers for a preliminary ruling, the Centrale Raad van Beroep seeks to ascertain whether the provisions of Articles 28, 28a and 33 of Regulation No 1408/71, of point 1(a) and (b) of section R(1) of Annex VI to Regulation No 1408/71, and of Article 29 of Regulation No 574/72 preclude Article 69 of the ZVW in so far as, firstly, a pensioner who is entitled to benefit from the health care benefits scheme established by Articles 28 and 28a of Regulation No 1408/71, is required to report to the CVZ and, secondly, a contribution is deducted from the pension or benefit of the person concerned, even if he has refused to register with the competent institution of the State in which he resides, as provided in Article 29 of Regulation No 574/72.

43. In essence, the national court wishes to know whether, by choosing not to register, the appellants in the main proceedings may waive the benefits in kind which would be payable to them under the legislation of the State responsible for the payment of their pension, namely the Kingdom of the Netherlands, in accordance with Articles 28 and 28a of Regulation No 1408/71, and whether they may correspondingly be exempted from the contributions deducted by that State under Article 33 of that regulation. This argument is put forward by Mr van Delft and Mr van Willigen, but it is rejected by the Netherlands, Czech, French and Finnish Governments, and also by the Commission. The question therefore arises whether the rules laid down by Regulation No 1408/71 are mandatory or optional, for the persons to whom they apply.

44. I shall start by ruling out the arguments put forward by Mr Fokkens and Mr Janssen on the basis of Article 13(2)(f) of Regulation No 1408/71,[12] since that article is not mentioned in the questions referred by the national court. Those two appellants in the main proceedings assert it follows from that provision that they fall exclusively within the scope of the legislation of the State of residence, without the opportunity to choose, because the Netherlands legislation has not applied to them since they ceased working in

12 — Regarding the implementation of this provision, see inter alia the judgment in Case C-347/98 *Commission* v *Belgium* [2001] ECR I-3327.

the Netherlands, and that, therefore, they are not required to register with the CVZ.

45. I observe, as does the Commission, that the general rules of conflict set out in Article 13, in Title II of Regulation No 1408/71, [13] have no bearing on the present case since the situation at issue in the main proceedings is governed by the special rules governing connecting factors laid down in Articles 28 and 28a, in Title III of that regulation. [14] This relationship between Title II and Title III of Regulation No 1408/71 is apparent from the case-law of the Court, [15] which is supported by the adage 'lex specialis derogat legi generali'. The preamble to Regulation No 1408/71 states that the exception thus introduced by Articles 28 and 28a is justified by the specific circumstances of pensioners and members of their family. [16]

— The first part of the first question

46. As regards the binding nature of the system of coordination laid down by Articles 28 and 28a of Regulation No 1408/71, it seems to me to be apparent not only from the wording of those provisions, but also from the general scheme of Regulation No 1408/71, and from the context and objectives of the legislation of which they form part, as defined by the case-law of the Court.

47. Article 28 and Article 28a are worded in terms which leave no room for discretion. [17] However, when the Community legislature has wished to give insured persons freedom of choice, it has done so expressly and in detail, as the referring court and the French and

13 — The provisions of Title II of Regulation No 1408/71 constitute a complete and uniform system of conflict rules, which are intended not only to prevent the concurrent application of a number of national legislative systems and the complications which might ensue, but also to ensure that persons covered by that regulation are not left without social security cover because there is no legislation which is applicable to them. See, inter alia, Case 302/84 *Ten Holder* [1986] ECR 1821, paragraph 19; Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 28; and Case C-404/98 *Plum* [2000] ECR I-9379, paragraph 18.

14 — In that regard, I draw attention to the fact that Article 13 of Regulation No 1408/71 contains the 'General rules' of Title II relating to the 'Determination of the legislation applicable', whereas Articles 28 and 28a, which concern sickness benefits paid to pensioners, are in Title III headed 'Special provisions relating to the various categories of benefits'.

15 — Inter alia, Case 227/81 *Aubin* [1982] ECR 1991, paragraph 11, and Case C-372/02 *Adanez-Vega* [2004] ECR I-10761, paragraph 19.

16 — See the 11th and 16th recitals in the preamble to Regulation No 1408/71.

17 — Article 28 provides in mandatory fashion that a pensioner who is entitled to a pension under the legislation of at least one Member State 'shall... receive', not 'may receive', benefits in kind provided under the legislation of the Member State in which he resides, in so far as he would be entitled thereto under the legislation of the State responsible for payment of that pension if he resided there. Similarly, Article 28a imposes on the institution of the competent Member State, without any possible alternative, the burden of paying for the benefits provided in that respect.

Finnish Governments point out. [18] The Court interprets strictly the rights of choice conferred by such provisions, giving a narrow interpretation to the migrant workers who may make use of them. Except in those special cases, the application of the system introduced by Regulation No 1408/71 must be derived objectively from the provisions of the regulation, taking into account the circumstances of the situation at issue and the factors connecting the particular situation with the legislation of the Member States. [19] The enjoyment of the benefits granted under Articles 28 and 28a of that regulation cannot depend on the intention of the interested parties, since the rights and obligations relating to social security are by nature non-disposable.

48. Since the aim of Regulation No 1408/71 is not to harmonise but merely to coordinate the national social security schemes, [20] it is for each Member State to organise its own system and to determine the conditions concerning the right or duty to be insured with a social security scheme, in accordance with settled case-law and with Article 152(5) EC. [21] In the present case, the Czech and French Governments rightly infer, on the one hand, that the Kingdom of the Netherlands had the prerogative of amending its statutory sickness insurance scheme so as to include persons in the situation of the appellants in the main proceedings and, on the other hand, that only the national legislature, not the insured person concerned, may confer the right for the latter to opt for private insurance rather than to be insured under the compulsory statutory scheme. [22]

49. None the less, when exercising their power in the field of social security, Member States must comply with EU law, in

18 — Thus Regulation No 1408/71 expressly gives options to persons employed by diplomatic missions and consular posts and to auxiliary staff of the European Communities (Article 16(2) and (3)), as well as to pensioners (Article 17a). With regard to the choices also offered to an unemployed frontier worker under Articles 69 and 71 of that regulation, see *Aubin*, paragraphs 18 and 19.

19 — Case C-60/93 *Aldewereld* [1994] ECR I-2991, paragraphs 19 and 20. Previously, concerning the interpretation of Article 28 of Regulation No 3 of the Council of the EEC concerning social security for migrant workers (JO, 16 December 1958, p. 561), see Case 11/67 *Couture* [1967] ECR 379, especially p. 388, and Case 12/67 *Guissart* [1967] ECR 425, especially p. 433.

20 — The fourth recital in the preamble to that regulation states: 'It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.' See also Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829, paragraph 59, and Case C-331/06 *Chuck* [2008] ECR I-1957, paragraph 27 and the case-law cited.

21 — Case 266/78 *Brunori* [1979] ECR 2705, paragraph 5; *Kuusijärvi*, paragraph 29; Case C-92/02 *Kristiansen* [2003] ECR I-14597, paragraph 31; *Piatkowski*, paragraph 32; and Case C-341/08 *Petersen* [2010] ECR I-47, paragraph 51.

22 — When referring to private insurance contracts, I intend only to draw a distinction between statutory insurance and supplementary insurance. However, compulsory insurance contracts are also private law contracts. In fact, the Netherlands compulsory scheme is a scheme which, on the one hand, requires insured persons to be insured against certain risks and, on the other hand, requires insurers to provide standardised contracts covering basic care without individual assessment of the risks, since there are no public sickness insurance funds in the Netherlands.

accordance with the principle of the primacy of EU law. [23] Accordingly, the Court has held that the replacement by Regulation No 1408/71 of the provisions of social security conventions between Member States was mandatory in nature and did not allow of exceptions, save for the cases expressly set out in that regulation. [24] Furthermore, the Member States are not entitled to determine the extent to which their own legislation, or that of another Member State, is applicable to a situation falling within the scope of that regulation. [25] According to settled case-law, [26] the provisions of Regulation No 1408/71 which, like Articles 28 and 28a of the regulation, determine the applicable legislation constitute 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.

50. Since those provisions are binding on the Member States, they must a fortiori be binding on individuals such as the appellants in the main proceedings. They cannot therefore be authorised to choose the legislation applicable to their situation. If persons with social security cover had the option of avoiding the mandatory rules governing connecting factors laid down by Regulation No 1408/71, they would, extraordinarily, be given the power to sidestep their practical effects, whereas the competent Member States are deprived of that prerogative.

51. To support the converse argument, Mr van Delft and Mr van Willigen refer to the judgment in *van der Duin and ANOZ Zorgverzekeringen*. [27] They maintain that 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 place of residence, as required under Article 29 of Regulation No 574/72, that he enjoys a right to benefits in kind provided by that institution as if he held a pension under the legislation of the Member State of residence. They also submit that, in his opinion in that case, Advocate General Ruiz-Jarabo Colomer stated: 'The transfer of responsibility for the provision of those benefits to the institution of the Member State of residence is not automatic, however, and does not occur merely as a result of a change of address. Instead, the insured

23 — See, inter alia, Case C-227/03 *van Pommeren-Bourgondiën* [2005] ECR I-6101, paragraph 39, and *Piatkowski*, paragraph 33.

24 — Case C-227/89 *Rönfeldt* [1991] ECR I-323, paragraph 22, and *Kuusijärvi*, paragraph 30.

25 — Case 276/81 *Kuijpers* [1982] ECR 3027, paragraph 14 in fine.

26 — See to this effect paragraph 18 of the judgment in *Adanez-Vega* and the judgments cited there. That case-law concerns both the general rules and the special rules governing connecting factors which are contained in Title II and Title III of Regulation No 1408/71 respectively.

27 — Judgment cited above, paragraphs 40, 47 and 53.

person must signal that he wishes the transfer to occur before it becomes effective',[28] words which, according to the appellants in the main proceedings, expressly confirm the existence of a right of choice.

— The second part of the first question

52. I do not share that view. It seems to me that both the Court and the Advocate General only pointed out that, in order to receive benefits in kind under Article 28 of Regulation No 1408/71, a pensioner is required to register in accordance with Article 29 of Regulation No 574/72. Although the Court mentions registration and the Advocate General mentions the need for the insured person to signal his wishes, it is only to highlight the fact that the mechanism laid down by those provisions cannot be fully effective for an insured person until he has completed all the necessary steps for that purpose. In my view, the required registration with an institution of the place of residence is not an act which is constitutive of rights,[29] but merely an administrative procedure, declaratory in nature, facilitating the exchange of information between the social security institutions of the Member States concerned.[30]

53. The Netherlands, French and Finnish Governments and the Commission infer from the foregoing considerations that the State responsible for payment of the pension is entitled to deduct contributions to cover the risk for which it may have to pay in respect of compulsory insurance, since it is financially responsible for the costs of the sickness benefits provided to a retired person in the Member State of residence, in accordance with Article 33 of Regulation No 1408/71. On the other hand, according to Mr van Delft and Mr van Willigen, it is apparent both from the wording and aim of that provision that, if there is no entitlement to the benefit in kind provided in the State of residence, because there has been no registration in that State, the State responsible for payment of the pension cannot deduct a contribution since it does not bear the cost of any benefit, and it

28 — Opinion in *van der Duin and ANOZ Zorgverzekeringen*, point 26.

29 — See, by analogy, the case-law relating to Form E 101 according to which the issuing of the form only has the effect of proving the existence of rights, not of creating them; it is pointed out that that document is of the same nature as Form E 121 proving registration of pensioners (Case C-202/97 *FTS* [2000] ECR I-883, paragraph 50 et seq., and Case C-178/97 *Banks and Others* [2000] ECR I-2005, paragraph 53 et seq.

30 — To the same effect, Article 29(2) of Regulation No 574/72 provides that, if the person concerned does not actively cooperate, the State of residence may obtain directly from the State responsible for payment of the pension the statement certifying entitlement to benefits under the legislation of the latter State.

is not required to make any reimbursement to the State of residence under Article 36 of that regulation.

54. In that regard, I shall repeat that, under Article 33 of Regulation No 1408/71, '[t]he 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... shall be authorised to make such deductions... from the pension payable by such institution, to the extent that the cost of the benefits... is to be borne by an institution of the said Member State.' [31]

55. It is apparent from that provision that the procedure of registering with the competent institution of the State of residence is by no means presented as a prior condition for deducting contributions. Contributions are the normal consideration for the entitlement to benefits in kind, [32] an entitlement derived directly from Regulation No 1408/71. However, even if that entitlement is not activated in respect of the appellants in the main proceedings who refused to register, the sickness risk remains a potentiality for the Member State responsible for payment of the pension, since the persons concerned could benefit from cover for that risk if they completed the necessary procedures. In my view, the provision requires only that the financial burden caused by benefits is potential, not existing. [33] It is irrelevant that the costs relating thereto are actually borne by that State, since the automatic deduction of contributions is intended to enable it to support that burden if necessary. Indeed, an inherent characteristic of any social insurance scheme is that a contribution is payable to cover a risk irrespective of whether or not that risk materialises.

56. I consider that the Court has already given a fairly clear ruling to that effect because it is evident from the judgment in *Molenaar* [34] that a migrant worker cannot claim the right to be exempted in whole or in part from the payment of contributions for the financing of social benefits such as care insurance benefits, even if he is unable to take advantage of those benefits. There is no rule of Community law which requires the competent institution to ascertain whether an employed person is likely to be able to take advantage of all the benefits of a sickness insurance scheme before registering that person and collecting the appropriate contributions. The Court

31 — It should be pointed out that the Member State concerned is not obliged to make a deduction in respect of social security contributions, but merely has the opportunity to do so, since it may opt for other means of financing.

32 — Case 103/75 *Aulich* [1976] ECR 697, paragraph 7: 'A distinction must... be drawn between the contribution and the benefit: the first governs acquisition of the right, the second assumes that the right exists.'

33 — Compare with Case 143/79 *Walsh* [1980] ECR 1639, point 7: '[A] person who is entitled under the legislation of a Member State to benefits covered by Regulation No 1408/71 by virtue of contributions previously paid compulsorily does not lose his status as a "worker" within the meaning of Regulations Nos 1408/71 and 574/72 by reason only of the fact that at the time when the contingency occurred he was no longer paying contributions and was not bound to do so.'

34 — Cited above, paragraphs 40 to 42.

also pointed out that recognition of a right to exemption would amount to accepting, as regards the scope of the risks covered by sickness insurance, a difference in the treatment of insured persons according to whether or not they resided on the territory of the State in which they were insured.

57. As the Netherlands, French and Finnish Governments point out, making the deduction of a contribution conditional on the wish of pensioners to be registered with the institutions of their State of residence would risk in practice giving rise to speculative behaviour on their part consisting in not registering until the moment they need benefits in kind. I would point out that that does not concern in any way the appellants in the main proceedings whose precarious situation has been brought about by an unexpected legislative amendment. However, from a structural point of view, the risk of abuse referred to might have serious consequences for the balance of the social security systems of the Member States concerned.

58. If deductions were made only when benefits are actually provided, that would be contrary both to the principle of solidarity and to the equivalence between the contributions received and the benefits covered, two rules which are fundamental for those systems because they enable them to function. Furthermore, allowing the various insured persons to choose would make things unmanageable, since situations are likely to vary from one individual to another, whereas the aim of Regulation No 1408/71 is precisely to coordinate the social security systems of the 27 Member States of the Union by establishing a clear rule applicable to all non-residents. Individuals cannot decide to exempt themselves from the contributions corresponding to those benefits, otherwise the mechanism introduced by Regulation No 1408/71 would be rendered worthless. [35]

59. I therefore consider that the provisions of Regulation No 1408/71 and those of Regulation No 574/72 mentioned in the first question referred for a preliminary ruling are to be interpreted as not precluding the Netherlands legislation requiring the recipient of a pension paid by the Kingdom of the Netherlands, firstly, to report to the CVZ and, secondly, to pay a contribution, even if the person concerned has not registered with the institution of the Member State in which he resides in order to be entitled to sickness benefits in kind.

35 — On the other hand, a Member State may waive reimbursement of the benefits which it has to provide on behalf of another Member State, in accordance with Article 36(3) of Regulation No 1408/71.

B — *The second question referred*

— Preliminary observations

60. The national court asks, in the alternative, whether Article 39 EC and/or Article 18 EC preclude Article 69 of the ZVW in so far as it requires citizens of the Union who, in principle, have entitlements under Article 28 and 28a of Regulation No 1408/71 to report to the CVZ and, above all, to have a deduction made from their pension, even though they are not registered in the State in which they reside as provided in Article 29 of Regulation No 574/72.

61. Indeed, even if the contested legislation is declared to be in conformity with the provisions of Regulation No 1408/71, as I propose in reply to the first question, an infringement of provisions of primary Union law is not thereby excluded. [36] It is also not disputed that the provisions of the EC Treaty relating to the freedom of movement of workers constitute the legal basis of Regulations No 1408/71 and No 574/72. [37] Moreover, the Court has affirmed the supremacy of the principle of equal treatment, contained in the EC Treaty, over Regulation No 1408/71. [38]

62. The national court refers, first, to Article 39 EC. This provision is indeed the specific expression, with regard to workers, of the right of every citizen of the Union to move and reside freely within the territory of the Member States, as provided in Article 18(1) EC. [39] Moreover, serious doubts are expressed by the Netherlands, French and Finnish Governments and the Commission as regards the applicability of Article 39 EC in the present case.

63. From the case-file, it appears that the appellants in the main proceedings exercised their freedom to reside in another Member State only after their retirement, since they seem to have spent their entire working lives in the Member State of which they are nationals, the Kingdom of the Netherlands, and to have left that territory without intending to

36 — See Case C-208/07 *von Chamier-Gliszczinski* [2009] ECR I-6095, paragraph 66 and the case-law cited, and Case C-211/08 *Commission* v *Spain* [2010] ECR I-5267, paragraph 45, in which it is stated that: 'The fact that national legislation may be in conformity with Regulation No 1408/71 does not have the effect of removing that legislation from the scope of the provisions of the EC Treaty.'

37 — I note that Article 42 EC provides, in the field of social security, for the introduction of a system securing for migrant workers and their dependants the aggregation, for the purpose of acquiring and retaining the right to benefits and of calculating the amount of benefits, of all periods taken into account under the laws of the several countries, and payment of benefits to persons resident in the territories of Member States.

38 — Case 41/84 *Pinna* [1986] ECR 1, paragraph 21 et seq., and Case 313/86 *Lenoir* [1988] ECR 5391.

39 — Case C-152/05 *Commission* v *Germany* [2008] ECR I-39, paragraph 18 and the case-law cited.

take up employment in the Member State in which they have settled. Now, although Article 39(3)(d) EC provides that a person has the right to remain, after ceasing his occupational activity, in the Member State to which he moved for the purpose of working, the Court has held that a person who has migrated only after retirement cannot rely on the provisions of Article 39 EC relating to freedom of movement for workers. [40] It is to be inferred that the said article is probably not applicable in the main proceedings.

64. Nevertheless, in view of the fact that the specific details provided to the Court are incomplete and of the fact that it appears that a large number of Netherlands citizens are in a situation similar to that of the appellants in the main proceedings, [41] I consider that the Court should therefore give a ruling on the interpretation of Article 39 EC, and leave it to the national court to implement it if the individual case of the persons concerned fell within its scope on the day the proceedings commenced.

65. On the other hand, the situation of the appellants in the main proceedings clearly falls within the personal scope of Article 18 EC, since, under Article 17 EC, every person holding the nationality of a Member State is a citizen of the Union, from which status derive the rights conferred and the duties imposed by the EC Treaty. [42]

66. Whether it is a question of the interpretation of Article 18 EC or of Article 39 EC, the problems are, in my view, identical. It is first necessary to determine whether, in the present case, there is a restriction based on the fact that the appellants in the main proceedings receive, under the contested legislation, less favourable treatment than retired persons residing in the Netherlands, which would lead them to forgo settling in another Member State. In the alternative, if it were to be established that there is an obstacle to the freedom of movement of citizens and/or workers, it would then be necessary to examine the factors which might justify it in the light of the circumstances of the main proceedings.

— Concerning a possible restriction on freedom of movement

67. Article 69 of the ZVW, in conjunction with Article 2.5.2 of the IZVW, might prevent the provisions of the EC Treaty from taking full effect in so far as it deterred nationals of

40 — Case C-520/04 *Turpeinen* [2006] ECR I-10685, paragraph 16, and Case C-544/07 *Rüffler* [2009] ECR I-3389, paragraph 50 et seq.

41 — At the hearing, the representatives of Mr van Delft, Mr van Willigen and Mr Janssen stated that nearly 18000 migrant retired persons of Dutch nationality wished not to join the social security scheme of their State of residence.

42 — Case C-99/06 *Nerkowska* [2008] ECR I-993, paragraph 21 and the case-law cited.

the Netherlands from moving and residing freely in another Member State by penalising them merely for availing themselves of those rights. [43] The appellants in the main proceedings claim that the provisions at issue encourage them to return to the Netherlands, since if they return there they will have the full benefit of the Netherlands system, without the dual burden of contributions and private insurance premiums.

68. In my view, a lack of compliance with Article 18 EC or Article 39 EC cannot be inferred from a mere formality such as the registration with the CVZ required by that Netherlands legislation, since this fully complies with point 1(b) of section R of Annex VI to Regulation No 1408/71, a directly applicable provision of Union law.

69. Similarly, the deduction made from the pension of the appellants in the main proceedings does not harm them specifically, because the burden of contributing to the financing of the compulsory social security scheme is imposed on all its beneficiaries, whether resident or non-resident, in line with the system laid down by the EC Treaty and Regulation No 1408/71.

70. As regards the benefits which the appellants in the main proceedings may receive, it may be observed that the fact that they pay a contribution enables them to claim benefits in kind provided by the statutory sickness insurance scheme in force in the Member State in which they reside, the costs to be borne by the Kingdom of the Netherlands, the Member State responsible for payment of their pensions. This advantage is the aggregate effect of the ZVW and of Articles 28 and 28a of Regulation No 1408/71. Even though the right to benefits is not activated in the present case for certain appellants in the main proceedings, because they have not carried out the required registration, that right exists potentially. Consequently, the contributions are not paid for no return, which would be contrary to the general principle of Union law which prohibits unjustified contributions under a compulsory insurance scheme. [44]

71. Furthermore, the appellants in the main proceedings cannot claim that they will have less adequate care because the level of benefits provided by the State of residence is less satisfactory than that which they had obtained under private insurance contracts. That difference or deterioration, even if it

43 — See, inter alia, Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraph 30; *Turpeinen*, paragraphs 20 and 21; and *Nerkowska*, paragraph 31.

44 — Concerning the prohibition of dual contributions and supplementary contributions which do not offer the corresponding social protection, see, inter alia, Case 102/76 *Perenboom* [1977] ECR 815, paragraph 13 ; Case C-140/88 *Noij* [1991] ECR I-387, paragraphs 14 and 15; *Aldewereld*, paragraph 26; Case C-389/99 *Rundgren* [2001] ECR I-3731, paragraph 57; and Case C-50/05 *Nikula* [2006] I-7029, paragraph 30 and the case-law cited.

is established, is only the result of the decision taken by the Netherlands State to extend its compulsory sickness insurance scheme to all residents and subsequently, of the application of Articles 28 and 28a of Regulation No 1408/71, the effect of which was to include non-resident pensioners among the insured persons falling within the personal scope of that regulation, whereas they were previously excluded when their income exceeded a certain threshold. Since, in matters of social protection, the national legislations are not harmonised, but only coordinated, the Member States may amend the content of their legislation, although they are required to comply with European Union law in the exercise of that power. [45]

72. Also, as the Netherlands, French and Finnish Governments and the Commission point out, neither Article 18 EC nor Article 39 EC can in itself offer a guarantee to an insured person that a move to another Member State will have neutral effects, since such a move may, depending on the circumstances, be more or less to his advantage or even to his disadvantage. [46]

73. In the light of all these considerations, I consider that Articles 18 EC and 39 EC do not preclude the legislation at issue.

74. However, in case the Court should take a contrary view, I shall add in the alternative that the amendment to the sickness insurance scheme decided by the Kingdom of the Netherlands seems to me to be based on considerations which are objective considerations of public interest, independent of the nationality of the persons concerned, and proportionate to the legitimate objective of the national provisions. [47] The aim of the disputed reform is to create a comprehensive compulsory sickness insurance scheme for residents, with a corresponding impact on non-residents who hold pensions, whatever their nationality. The objective that there should no longer be residents excluded from the statutory protection scheme it is, in my view, in the public interest. Moreover, I consider that proportionality is respected since both the principle of the payment of contributions and the amount of them correspond, by application of the country of residence factor, to the benefits in kind which may be obtained by the appellants in the main proceedings in the Member State in which they reside, in the same way as persons

45 — See, inter alia, Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 92; *Tas-Hagen and Tas*, paragraph 22; and Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513, paragraph 74.

46 — *Hervein and Others*, paragraphs 50, 51 and 58; *Piatkowski*, paragraph 32; and *von Chamier-Glisczinski*, paragraphs 84 and 85.

47 — *Tas-Hagen and Tas*, paragraph 33 and the case-law cited.

residing in the Netherlands must pay contributions in order to be entitled to receive benefits there.

75. Nevertheless, legislation adopted in the field of social protection cannot have the actual result of treating nationals who have exercised the right to reside in another Member State less favourably than those who remain in the Member State which they are from. Otherwise, the effectiveness of the provision of the EC Treaty relating to the freedom of movement of citizens and workers of the Union would be undermined. In the present case, there are reasons for believing that discriminatory treatment may have been suffered by the appellants in the main proceedings.

— Concerning the discriminatory treatment of non-residents

76. In that regard, the persons concerned argue that, unlike their vested rights, which have been destroyed, those of residents have been guaranteed by the national legislature, since the ZVW provided that the Netherlands insurers were required to cover the latter, both for basic benefits and for supplementary benefits. They add that they will have to enter into new contracts in order to retain the same rights and, to that end, bear prohibitive costs in view of their advanced age. They maintain that that legislation will encourage them to consider returning to the Netherlands in order to be able to receive such supplementary protection in addition to the basic statutory scheme.

77. The national court has not provided specific information on this matter. However, according to the arguments put forward at the hearing, the contracts were terminated automatically, according to the Netherlands Government, in order to avoid double insurance and hence the payment twice over of contributions, and only as regards private insurance contracts whose effects were the same as those of the compulsory scheme. On the other hand, that part of the private insurance which went beyond the basic statutory cover had to remain intact, in accordance with Article 2.5.2 of the IZVW. Nevertheless, according to the information given by the Netherlands Government and the appellants in the main proceedings, the Netherlands insurance companies did not, in practice, wish to continue covering the risks only on the basis of the optional scheme constituted by the supplementary health insurance.

78. If it were established by the national court that there was differential treatment of residents and non-residents, at least as regards the grant of supplementary insurance, such treatment would be discriminatory since it would not be justified on objective grounds. Indeed, it seems to me that there was nothing to prevent the Netherlands State from providing that non-residents would also be included in the guarantee that insurers were required to offer attractive terms after the

automatic termination of the private insurance contract. According to the case-law, the requirement for a connection relating to residence may represent an arbitrary condition and therefore a condition which is excessive in the light of the circumstances of the case. [48] In the present case, the provision that the retention of private insurance contracts will be subject to the condition of residence seems to me to go beyond what is necessary for attaining the objectives of the legislature. By referring expressly to persons residing abroad, Article 2.5.2 of the ZVW may therefore constitute a factor of direct discrimination.

79. In view of the significant number of vague aspects to this case, it will be for the referring court to examine whether, at the time of the legislative amendment at issue, the Netherlands State actually adopted measures designed to ensure the continuity of comprehensive protection [49] only for residents. If pensioners established in other Member States have, in contrast, been deprived on those protective measures, Articles 18 EC and 39 EC preclude the system thus reformed. As the Court has already held, if legislation places non-residents in a less favourable position than residents with regard to their social security cover, it accordingly undermines the principle of free movement secured by the EC Treaty. [50]

80. The referring court would have do whatever lay within its jurisdiction to make good the consequences of that discrimination, if it existed. It is for the national court to ensure, for matters within its jurisdiction, the full effectiveness of Community law when it determines the dispute before it. [51] If it were not within the power of the national court to restore equality of treatment, having regard to the limits related to the dispute before it, the Netherlands State, under the principle of cooperation in good faith laid down in Article 10 EC, would be required to nullify the unlawful consequences of a breach of Community law, in accordance with settled case-law. [52]

48 — See, inter alia, *Nerkowska*, paragraphs 42 and 43.

49 — Comprehensive in the sense that the legislature provided for the retention of the level of protection offered both by the basic benefits provided under the statutory sickness insurance scheme and by the supplementary benefits provided under private insurance contracts.

50 — *Van Pommeren-Bourgondiën*, paragraphs 44 and 45, referring to Article 39 EC.

51 — See, inter alia, Case C-160/01 *Mau* [2003] ECR I-4791, paragraph 34.

52 — See, inter alia, Case 6/60 *Humblet* v *Belgian State* [1960] ECR 559; Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 36; and Case C-201/02 *Wells* [2004] ECR I-723, paragraph 64.

V — Conclusion

81. In the light of the foregoing considerations, I propose that the Court reply as follows to the questions referred for a preliminary ruling by the Centrale Raad van Beroep:

'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, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006, point 1(a) and (b) of section R of Annex VI to that regulation, and Article 29 of Council Regulation (EEC) 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, as amended by Commission Regulation (EC) No 311/2007 of 19 March 2007, do not preclude a national provision such as that at issue in the main proceedings under which the Member State responsible for payment of a pension requires the pensioner to report to the institution responsible for healthcare insurance in that State and imposes the deduction of a contribution from his pension, even if he has not registered with the institution of the Member State in which he resides, in accordance with Article 29 of Regulation No 574/72, as amended.

2. Articles 18 EC and 39 EC do not preclude a national provision such as that at issue in the main proceedings, the content of which has been summarised above, unless – which it is for the national court to ascertain – in the new legislation which introduced that provision into its national law the Member State concerned adopted measures designed to ensure the continuity of the level of comprehensive protection previously provided by private sickness insurance contracts in respect of insured persons residing in national territory, without providing for equivalent measures in respect of insured persons who have made use of their freedom of movement under European Union law.'