SUMMARY

ECJ 14 October 2010, case C-345/09 (J.A. van Delft et al. – v – College van Zorgverzekeringen), Social insurance

<p>Neither Regulation 1408/71 nor Article 21 TFEU preclude national legislation under which recipients of a pension, who reside in another Member State in which they are entitled to sickness benefits in kind provided by that 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. However, Article 21 TFEU does preclude national legislation in so far as it induces or provides for 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.</p>

Facts

Van Delft and five others ("the plaintiffs") were pensioners. They had Dutch nationality but resided in other EU States, namely Spain, France, Malta and Belgium. They were affected by a change of Dutch law effective as of 1 January 2006. Prior to this date, persons with an income below a certain threshold were publicly insured against medical expenses (national health) and persons with an income above that threshold, such as the plaintiffs, had to insure themselves privately. The right of a privately insured individual to receive health care at the expense of his or her insurer is not a benefit as provided in Regulation 1408/71. As a result, the

plaintiffs were not insured in their country of residence and continued to be privately insured in The Netherlands. This was as they wished it to be. On 1 January 2006, Dutch law changed. The distinction between publicly and privately insured persons was abolished. Under the new legislation every resident of The Netherlands must be privately insured and is covered by the Health Care Act ("*Zorgverzekeringswet*"), regardless of age and health. One result of this is that everyone's entitlement to health care at the expense of their insurer is a benefit within the meaning of Regulation 1408/71.

Articles 28 and 28(a) of Regulation 1408/71 provide that a person who receives a pension under the laws of one Member State (in this case, The Netherlands) but resides in another Member State is eligible to receive health care from the health care institutions of his or her country of residence, regardless of whether that country's legal system does not entitle that person thereto (Article 28) or whether all residents are entitled to free health care (Article 28(a)). Such a person may apply for the right to receive health care in his or her country of residence by registering with its health care authorities. If such a person elects to register, he or she must do so by completing a Form E121. Dutch law provides that, regardless of whether or not a pensioner has filed a Form E121, the Dutch authority in charge of coordinating health care insurance, "the CVZ", may deduct a certain contribution from those pensioners' monthly old-age pension payments, as allowed by Article 33 of Regulation 1408/71. Accordingly, the Dutch health care insurers notified their Dutch pensioner customers living elsewhere in the EU that, as from 1 January 2006, they would cease to be insured in The Netherlands. The CVZ sent them E121 Forms, instructing them to register with their local health care authorities. Approximately 230,000 pensioners complied with this instruction and 18,000 did not. In all cases, the CVZ proceeded to make deductions from their monthly old-age pension payments.

National proceedings

The facts of this case are complicated. For the sake of simplicity, this summary leaves out certain facts and assumes (contrary to the actual facts) that all of the plaintiffs were Dutch old-age pensioners living in Spain and that they advanced identical arguments.

The plaintiffs objected against the deductions that CVZ made from their pensions and, when CVZ dismissed their objections, brought proceedings. The court of first instance found in favour of CVZ. The plaintiffs appealed. They argued, briefly stated, that neither Spanish nor

Dutch law, nor any provision of EU law, contained an obligation to register with the Spanish health care authorities, and that they were therefore free not to register, thereby causing them to continue to be privately insured, with the result that the CVZ had no right to make deductions from their pensions. The CVZ took the position that, although Regulation 1408/71 leaves Dutch pensioners residing in Spain free to register with the Spanish health care authorities, they must in any case pay the CVZ pursuant to Article 33 of Regulation 1408/71. The appellate court referred two questions to the ECJ. The first question concerned the interpretation of Regulations 1408/71 and 574/72. The second question concerned the compatibility of the Dutch legislation in question with the right of free movement.

ECJ's ruling

1. Regulation 1408/71 establishes 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. "Since the conflict rules laid down by Regulation 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 withdraw from their application". The ECJ had previously ruled (case C-160/96, *Molenaar*) that neither the EC Treaty nor Regulation 1408/71 gives migrant workers the option to waive in advance the benefits of the mechanism introduced by (*inter alia*) Article 28 of Regulation 1408/71. On the contrary, the clear wording of Articles 28 and 28(a) requires, without offering any alternative, the Member State responsible for the payment of the pension to bear the cost of the health care benefits (§ 51-57).

2. The ECJ went on to deal with the plaintiffs' argument that, in order to receive benefits in Spain, they had to register with the Spanish health care authorities, which implies that by not registering, they could waive the right to receive Spanish health care. The ECJ rejected this argument because a Form E121 is purely declaratory, a mere administrative formality (§ 58-65).

3. Next, the ECJ tackled the plaintiffs' argument that the application of Articles 28 and 28(a) of Regulation 1408/71 cannot justify their being required to contribute to the Dutch sickness insurance scheme since, as non-residents, they are not entitled to benefits under that scheme. This argument disregards the fact that Regulation 1408/71 lays down a mandatory conflict rule and that, if the plaintiffs had resided in The Netherlands, they would have been entitled to

Dutch health care benefits (§ 66-72).

4. It is true that, in the absence of registration with the Spanish health care institution, the plaintiffs cannot actually receive Spanish health care benefits and consequently do not generate any expenditure that the CVZ would be required to refund to the Spanish institution. However, that does not affect the existence of the right to those benefits, and the existence of that right lays the financial risk on the CVZ, even if those benefits are not (yet) actually received. The obligation of the pensioners in question to contribute is inherent in the principle of solidarity, 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 (§ 73-79).

5. The fact that the Dutch legislation at issue (allowing for deductions to be made from old age pensions) is in conformity with secondary EU law, in this case Regulation 1408/71, does not have the effect of removing it from the scope of the provisions of the EU Treaties (§ 81-87).

6. Articles 21 and 45 TFEU (formerly Articles 18 and 39 EC) deal with, respectively, the right of every citizen to move and reside freely within the EU and the right of freedom of movement for workers within the EU. Article 45(3)(d) allows workers to remain in the territory of a Member State after having been employed there. This provision does not apply to a person who has worked in one Member State all his life (e.g. The Netherlands) and exercises his or her right to reside in another Member State (e.g. Spain) only after retirement. Thus, Article 45 (free movement of workers) does not apply in the present case (§ 88-93).

7. As for Article 21 TFEU, the plaintiffs argue that the benefits under the Spanish national health system are less advantageous to them than those afforded under the Dutch system. Thus, they are in a situation that is less favourable than they would have been in had they resided in The Netherlands, a fact that impedes the right to move freely within the EU *(crudely put: they pay (high) Dutch contributions and get (low) Spanish public health care, PCVN (§ 94-*

98)).

8. The ECJ begins by recalling that Article 21 TFEU calls for the coordination, not the harmonisation, of the Member States' social security legislation. In these circumstances, Article 21 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. [...] It follows that, even where its application is less favourable, national social security legislation is 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". It is clear that, in so far as Dutch legislation provides that non-resident pensioners are entitled to sickness benefits under the legislation of their country of residence, that legislation is more likely to promote the free movement of EU-citizens than to restrict it, since it gives those citizens access to care in their country of residence on the same conditions as persons insured under that country's social security scheme (§ 99-102).

9. This is all the more the case as the CVZ must calculate the deductions by using a coefficient reflecting the cost of health care in the country of residence, as a result of which Dutch pensioners living in Spain now contribute less than they would have contributed had they lived in The Netherlands (§ 104).

10. The next issue in the ECJ's ruling had to do with the fact that the Dutch insurance companies in question terminated the relevant insurance contracts in their entirety (i.e. in respect of the compulsory basic benefits and the voluntary supplementary benefits) rather than only in relation to those benefits that are also provided under the Spanish scheme. The Dutch law that came into force on 1 January 2006 provided for the automatic termination of insurance contracts concluded by non-residents. It does not (explicitly) provide for such termination in respect of residents of The Netherlands. Moreover, the plaintiffs allege that Dutch law obligates Dutch insurance companies to accept all persons as insured persons for all types of sickness benefits available (i.e. basic benefits as well as supplementary benefits) without medical testing, but such an obligation does not exist in respect of non-residents. The referring court will need to ascertain whether this allegation is accurate, in which case there

would be a different treatment for residents and non-residents. The absence of a statutory obligation to insure non-residents, in particular with respect to supplementary sickness benefits, in combination with the automatic termination of all existing insurance contracts on 1 January 2006, would be liable to encourage the insurance companies concerned to get rid of "bad risks", which retirees tend to be, or to raise the premiums above the level prevalent in their home country (§ 105-124).

Ruling

Neither Regulation 1408/71 nor Article 21 TFEU preclude national legislation under which recipients of a pension, who reside in another Member State in which they are entitled to sickness benefits in kind provided by that 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. However, Article 21 TFEU does preclude national legislation in so far as it induces or provides for 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.

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