OPINION OF ADVOCATE GENERAL
WAHL
delivered on 19 June 2013 (1)

Case C-321/12

F. van der Helder
D. Farrington
v
College voor zorgverzekeringen (CVZ)

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

(Social security – Sickness insurance – Regulation (EEC) No 1408/71 – Title III, Chapter 1 – Article 28(2)(b) – Pensioner entitled to benefits in kind under the legislation of two or more Member States – Legislation to which the pensioner has been subject for the longest period of time – Notion of 'pensions')

1. The free movement of persons within the territory of the European Union constitutes, as the preamble to Council Regulation (EC) No 1408/71 (2) states, one of the cornerstones of the European Union. For this reason the European Union ('EU') legislature adopted a detailed and wide-ranging body of rules to coordinate national social security legislation, as early as 1971, in order to guarantee that 'workers moving within the [European Union] and their dependants and their survivors retain the rights and the advantages acquired and in the course of being acquired'. (3)

2. The case under consideration raises an issue which is important for pensioners who reside in a Member State in which they are not entitled to benefits and who receive pensions from two or more other Member States.

3. By its request for a preliminary ruling, the Centrale Raad van Beroep (Higher Social Security Court) (Netherlands) seeks to ascertain, in a case such as that described above, which branch of social security is decisive for the purpose of determining the Member State responsible for bearing the costs of the benefits in kind to be provided in the State where the pensioners reside and, as a consequence, for deducting the contributions due. To that end, the referring court has asked the Court to interpret the concept of 'legislation [to which] the

pensioner has been subject for the longest period of time', referred to in Article 28(2)(b) of the Regulation ('the concept at issue').

4. Before commencing my legal assessment, however, it may be useful to mention the fact that the Regulation was repealed and replaced from 1 May 2010 by Regulation (EC) No 883/2004. (4) This, however, has no effect on the importance of the issue raised by the Centrale Raad van Beroep, since the provisions which are relevant in the present proceedings have remained in essence identical in the new regulation.

I – Legal framework

A – *EU law*

5. The eighth recital in the preamble to the Regulation reads:

'… employed persons and self-employed persons moving within the Community should be subject to the social security scheme of only one single Member State in order to avoid overlapping of national legislations applicable and the complications which could result therefrom.'

6. The definitions applicable for the purposes of the Regulation are contained in Article 1 thereof, which provides inter alia:

'(j) *legislation* means in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4(1) and (2) or those special non-contributory benefits covered by Article 4(2a).

…'

7. Article 28 of the Regulation, bearing the title '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 … 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:

…

(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.'

8. Article 33(1) of the Regulation, entitled 'Contributions payable by pensioners', provides:

'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 authorized 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.'

B – *National law*

9. Before 1 January 2006, the Ziekenfondswet (Law on sickness funds, 'the ZFW') had provided for a compulsory statutory sickness insurance scheme only for employees whose income was below a certain threshold. Persons not covered by that scheme – in order to be covered against the risk of sickness – had to conclude a private insurance contract.

10. In addition, even before 2006, the Algemene Wet Bijzondere Ziektekosten (General Law on exceptional medical expenses, 'the AWBZ') – which still exists today – ensured that the entire population was covered against the risk of exceptional medical expenses. This concerns, in particular, risks which are not covered by the ZFW or by private insurance.

11. Since 1 January 2006, the Zorgverzekeringswet (Law on health-care insurance, 'the ZVW') has laid down a compulsory statutory sickness insurance scheme for all persons residing or working in the Netherlands.

12. Article 69 of the ZVW provides:

'1. Persons living abroad who, by the application of a regulation of the Council of the European Communities …, have, when they are in need of health care, a right to health care or to the reimbursement of the costs thereof, as provided for in the legislation on health-care insurance of their country of residence, must report to the College voor zorgverzekeringen [Health Care Insurance Board, 'the CVZ'] unless they are obliged to take out health-care insurance under the present 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 health-care insurance premium for the purposes of the application of the Wet op de zorgtoeslag [Law on health-care allowances].

…

4. [The CVZ] shall be responsible for the administration resulting from paragraph 1 and the international rules referred to therein and for decisions on the levying and collection of the contributions referred to in paragraph 2.

…’

II – Facts, procedure and the question referred

13. Mr van der Helder is a Netherlands national who, after residing and working in several Member States, has lived in France since 1991. Since August 1997 he has received a pension from the Netherlands under the Algemene Ouderdomswet (General Law on old-age pensions, ‘the AOW’). That pension is based on 43 completed years of insurance (based partly on residence and partly on voluntary insurance). In addition to that pension, he also receives an old-age pension from Finland, and an old-age pension from the United Kingdom.

14. Mr Farrington, a British national, has lived in Spain since May 2004. As of April 2006, he has received an old-age pension from the Netherlands. That pension is based on 35 completed years of insurance contributions in the Netherlands. In addition to that pension, Mr Farrington receives an old-age pension from the United Kingdom.

15. Mr van der Helder and Mr Farrington (together referred to as ‘the appellants in the main proceedings’) were not compulsorily insured in the Netherlands under the ZFW. They had however concluded private sickness insurance contracts there and were also insured under the AWBZ while they resided in the Netherlands. That is why the appellants in the main proceedings did not at the time fall within the scope of the Regulation. Indeed, as far as medical expenses were concerned, the Regulation was applicable solely to persons to whom the entirety of the Netherlands statutory sickness insurance system under the AWBZ and ZFW was applicable. (5)

16. As of 1 January 2006, when the ZVW entered into force, the statutory sickness insurance system became applicable in its entirety to everyone who resides and works in the Netherlands, including those persons who previously had been privately insured. As a result, the Regulation became applicable to, among others, persons entitled to Netherlands statutory old-age pensions and work incapacity benefits who previously had been privately insured against medical expenses and who live in other Member States. (6)

17. Against this background, the CVZ considered that the appellants in the main proceedings, with effect from 1 January 2006, had to be regarded as ‘treaty beneficiaries’ for the purposes of the Regulation. Accordingly, they were entitled to health care in their respective countries of residence. Since they did not receive any pensions from their respective countries of residence and since, of the countries from which they received a statutory pension, they had been covered by social security insurance for the longest period of time in the Netherlands, the CVZ took the view that the related costs had to be borne by the Netherlands. On that basis, the CVZ decided to deduct, from the pensions to be paid to the appellants in the main proceedings, the contributions provided for in Article 69 of the ZVW.

18. The appellants in the main proceedings brought an action before the Rechtbank te Amsterdam (Amsterdam District Court) to contest the decision of the CVZ to make deductions from their old-age pensions. While they did not dispute that they had worked for the longest period of time in the Netherlands, and that they had also been subject to Netherlands social security legislation for the longest period of time, they contended that Article 28(2)(b) of the Regulation refers to the legislation relating to benefits in respect of sickness and maternity. They argued that since they had never been covered by statutory insurance against medical expenses in the Netherlands (under the ZFW), or since in any event any such insurance had been for a shorter period than was the case for the insurance

against medical expenses by which they had been covered in other Member States, the Netherlands would not be the State which had to bear the costs of the benefits in kind provided in their respective countries of residence. In their submission, those costs were to be borne by Finland in the case of Mr van der Helder and by the United Kingdom in the case of Mr Farrington.

19. By judgments of 23 February 2010 with regard to Mr van der Helder and of 31 August 2009 and 10 May 2011 with regard to Mr Farrington, the Rechtbank te Amsterdam declared the action introduced by Mr van der Helder well-founded, while, however, leaving intact the legal effects of the decision which had been set aside, and declared Mr Farrington's appeals unfounded.

20. The appellants in the main proceedings appealed the judgments of the Rechtbank te Amsterdam before the Centrale Raad van Beroep. Entertaining doubts as to the correct interpretation of Article 28(2)(b) of the Regulation, that court decided to stay the proceedings and refer the following question for a preliminary ruling:

'Does the phrase "legislation [to which] the pensioner has been subject for the longest period of time" in Article 28(2)(b) of [the Regulation] refer to legislation concerning benefits in respect of sickness and maternity, to legislation concerning cash benefits in respect of old age, or to all legislation concerning the branches of social security mentioned in Article 4 of [the Regulation] which has been applicable pursuant to Title II of that Regulation?'

21. At the request of the referring court, this case, in the light of its specific circumstances, has been given priority, pursuant to Article 53(3) of the Rules of Procedure of the Court of Justice.

22. Written observations in the present proceedings have been submitted by Mr Farrington, Mr van der Helder and the CVZ, as well as by the Estonian, Netherlands, Finnish, Swedish, and UK Governments, and by the Commission. Mr van der Helder, the Netherlands, Finnish, Swedish and UK Governments, as well as the Commission, also presented oral argument at the hearing on 18 April 2013.

III – Observations of the referring court and of the parties before the Court of Justice

23. According to the Centrale Raad van Beroep, it is possible to conceive of three different interpretations of the concept of 'legislation [to which] the pensioner has been subject for the longest period of time', referred to in Article 28(2)(b) of the Regulation. These are as follows.

24. In the view of the appellants in the main proceedings, the concept at issue relates exclusively to legislation on sickness and maternity benefits. This interpretation is based mainly on the fact that Article 28 appears in Chapter I – headed 'Sickness and Maternity' – of Title III of the Regulation. According to the appellants in the main proceedings, that heading makes it clear which branches of the social security system are relevant under that provision. They further contend that their reading finds support in a judgment of the Supreme Administrative Court of Sweden of 14 December 2011.

25. Pursuant to a second interpretation, defended by the CVZ and also by the Netherlands and Swedish Governments, the concept at issue refers to the legislation on social security as a whole. This reading is said to find support in Article 1(j) of the Regulation,

which defines the term 'legislation' by referring to Article 4 – which lists all the matters covered by the Regulation – and thus defines that term in the broadest possible sense.

26. Lastly, according to the interpretation adopted by the Rechtbank te Amsterdam, and also favoured by the referring court, the concept at issue refers to the legislation concerning insurance for the pensions received by the individuals concerned. This interpretation would, in the view of those courts, be consistent with the aim and purpose of Article 28(2)(b) of the Regulation, as stated by the Court in *Rundgren.* (7) Holding the State which pays the pension responsible for granting sickness benefits in kind would, moreover, be in keeping with the fact that sickness insurance schemes are funded through contributions based on the income of the person concerned. This interpretation is also supported by the Estonian, Finnish and UK Governments as well as by the Commission.

IV – Analysis

27. In the following analysis, I will illustrate why the Rechtbank te Amsterdam and the Centrale Raad van Beroep are, in my view, correct in their proposed interpretation of Article 28(2)(b) of the Regulation.

28. The Court has already held that the objective of the Regulation, as stated in the second and fourth recitals in the preamble thereto, 'is to ensure free movement of employed and self-employed persons within the European [Union], while respecting the special characteristics of national social security legislation. To that end … [the Regulation] upholds the principle of equality of treatment of workers under the various national legislation and seeks to guarantee the equality of treatment of all workers occupied on the territory of a Member State as effectively as possible, and not to penalise workers who exercise their right to free movement.' (8)

29. This objective of favouring mobility within the European Union, however, is not – and cannot be – furthered by jeopardising at the same time the delicate financial equilibrium between contributions received and benefits provided, on which the Member States' social security systems are generally based.

30. For that reason, the Court has made it clear that substantive and procedural differences between the social security systems of individual Member States, and hence differences in the rights of persons who are insured persons there, are unaffected by the Regulation. Indeed, each Member State retains the power to determine in its legislation, in compliance with EU law, the conditions for granting benefits under a social security scheme. In those circumstances, the provisions of EU law 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 legislation 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 a point of view of social protection. (9)

31. Significantly in this regard, the Court has held that the Regulation constitutes 'a complete system of conflict rules the effect of which is to divest the legislature of each Member State of the power to determine the ambit and the conditions for the application of its national legislation so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned'. (10) Member States are not, therefore, entitled to determine the extent to which their own legislation or that of another Member State is applicable, since they are under an obligation to comply with the provisions

of EU law in force. (11) The application of the system of conflict rules established by the Regulation depends solely on the objective situation of the worker concerned. (12)

32. The crucial principle within this system of rules is provided for in Article 13(1), which opens Title II of the Regulation. This provision states that, save for exceptions expressly provided, '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.'

33. However, the general rules provided for in Title II of the Regulation apply only 'in the absence of provisions to the contrary in the special provisions relating to the various categories or benefits which constitute Title III of the same regulation'. (13)

34. This is precisely the case of the appellants in the main proceedings, since – as is common ground among the parties – they fall within the scope of Article 28 of the Regulation: they are pensioners entitled to benefits in kind under the legislation of at least two Member States, and are not entitled to the said benefits under the legislation of the Member State in which they reside.

35. In that case, Article 28(2)(b) of the Regulation provides that the cost of benefits in kind is to be borne, in principle, 'by the competent institution of the Member State to whose legislation the pensioner has been subject for the longest period of time'.

36. The Court has already had the opportunity to shed light on the scope and meaning of, among others, Article 28 of the Regulation in the *Rundgren* case. The main issue in that case was whether a Swedish national residing in Finland, who actually received pension benefits only from Sweden, was liable to pay contributions in Finland merely because of his resident status.

37. The judgment of the Court in that case provides, in my view, an important insight when interpreting the concept at issue. I will thus reproduce those parts of the judgment which are, in my opinion, key to the present proceedings.

38. When answering one of the questions referred by the national court in *Rundgren*, the Court first pointed out that the purpose of Articles 27, 28 and 28a of the Regulation was 'to identify, in the various situations they describe, first, the institution responsible for providing persons entitled to a pension with sickness and maternity benefits and, second, the institution responsible for bearing the cost'. It then emphasised that Article 28a of the Regulation – which was the relevant provision in that case – 'imposes the cost of those benefits in principle to the institution of one of the Member States competent in respect of pensions, in order that their cost should not be borne by the Member State in which the person concerned resides, merely by virtue of the fact that he resides there'. The aim of that provision was quite clear for the Court: 'to ensure that Member States whose legislation confers a right to receive benefits in kind merely by virtue of residence in their territory are not penalised for so doing.' (14)

39. The Court then added – and this is particularly relevant to the present proceedings – that Article 28a of the Regulation provides that the institution bearing the costs of the benefits in kind must be determined according to rules identical to those which apply under Article 28 of the Regulation. As the Court noted, '[u]nder those rules, the institution of the place of residence provides the benefits in kind to the pensioners on behalf of the institution of one of the Member States competent in respect of pensions, which bears the costs'. (15)

40. On that basis, the Court concluded that 'under the system thus established by Articles 27, 28 and 28a of [the Regulation], the institution which has to bear the cost of the benefits in kind will always be an institution of a Member State competent in respect of pensions, since the pensioner would have a right to those benefits under the legislation of that Member State if he resided in its territory. Where two or more Member States are competent in respect of pensions, the cost of the benefits in kind is attributed to one of them on the basis of specific criteria such as the place of residence of the person concerned or, where none of those Member States is the state of residence of the person concerned, the period of time during which that person was subject to the legislation of each of those Member States.' In that context, the Court also stressed that 'the connection thus established under that system between the competence to provide pensions and the obligation to bear the cost of benefits in kind leads to the conclusion that that obligation is incidental to an actual competence in respect of pensions'. (16)

41. In the more recent *van Delft* case, the Court confirmed those principles, stating 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'. (17)

42. To my mind it is clear from the Court's case-law that a necessary link between the pension and the benefits in kind lies at the heart of Article 28 of the Regulation. In this case, it will always be the Member State required to provide the pension which also has to bear the costs of the benefits in kind.

43. That interpretation of Article 28 finds further support in the following three considerations.

44. In the first place, as several parties which submitted observations in these proceedings have pointed out, the rule in Article 28 is based on the premiss that the financing of any social security system is inevitably dependent on the contributions paid by the citizens who engage in some form of economic activity. (18) It is thus logical and fair that the costs of benefits in kind to be provided during retirement are borne by the Member State in which the pensioner has exercised his economic activity for the longest period. (19) It is presumably in that country that the pensioner will have paid most of his contributions.

45. According to the interpretation put forward by the appellants in the main proceedings, account would also have to be taken of those periods when the pensioner concerned, in all likelihood, did not pay any contributions at all, or paid only limited contributions. In some cases that would mean, however, that longer periods in which no contributions were paid would take precedence over shorter periods in which contributions were actually paid. Indeed, several Member States allow health-care benefits in kind simply on the basis of residence in their territory.

46. In '*De Legibus*' (On the Laws), Latin orator Marcus Tullius Cicero wrote: '*salus populi suprema lex esto*' (the welfare of the people shall be the supreme law). (20) Indeed, I also believe that one of the main goals of any polity should be to take care of the well-being of its citizens. To that end, it is important for a country to provide wide access to health-related services for all citizens, despite the possible differences in income and wealth between them. It is, in fact, common to most developed societies that a universal access to a broad range of public health and medical services is mandated by law. (21) In this context, it is appropriate to recall that the United Nation's Declaration of Human Rights provides that '[e]veryone, as a member of society, has the right to social security' (Article 22) and that '[e]veryone has the

right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control' (Article 25(1)). Likewise, the Charter of Fundamental Rights of the European Union, in Article 35, under the heading 'Health care' states: '…[e]veryone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices.'

47. However, systems permitting a wide access to health-care benefits for the entire population inevitably entail higher costs for society. The costs of health care provided to certain categories of persons such as unemployed persons, students, children, or pregnant women usually have to be covered by the contributions paid by active citizens or, more generally, with taxpayers' monies.

48. In my opinion, the rule enshrined in Article 28 of the Regulation aims to ensure that those Member States which have a more generous policy in that regard are not required to bear the costs of the benefits in kind provided to pensioners who have not contributed to their social security system, or have contributed only to a very minor extent.

49. The objective unfairness of such a system – which would risk inducing Member States to enter into a 'race to the bottom' as regards access to health services – can be illustrated by taking the situation of Mr Farrington as an example.

50. Mr Farrington argues that the United Kingdom should be the Member State responsible under Article 28(2)(b) of the Regulation for the costs of the benefits in kind to be provided to him in Spain, since he resided in the United Kingdom from 1948, when he was aged 7, to 1972, when he emigrated to the Netherlands after 14 years of employment. This means that for a significant part of his life in the United Kingdom, Mr Farrington had access to the National Health Service merely because of his residence in the country. Conversely, Mr Farrington worked in the Netherlands for the entire 32-year period in which he lived there (1972 to 2004). It may be assumed that Mr Farrington has paid much higher contributions to the social security system in the Netherlands than in the United Kingdom – or at least that most people in a similar situation would have done so. Therefore I do not see any reason why it should be the United Kingdom and not the Netherlands that must bear the costs of the benefits in kind which Mr Farrington is entitled to receive in his new country of residence, during his retirement.

51. This example shows that the reading of Article 28(2)(b) advocated by the appellants in the main proceedings cannot be correct. Essentially, interpreting the concept at issue as merely referring to social security legislation on maternity and sickness would sever the connection between the contributions received by the State and the benefits provided by it, which is the foundation of all social security systems. This would, as the Commission rightly points out, lead to an unbalanced distribution of the financial burden among the various Member States and could also, I would add, potentially undermine the stability of some social security systems.

52. As the appellants in the main proceedings point out, their reading of the concept at issue is supported by a judgment from the Supreme Administrative Court of Sweden, dated 14 December 2011, (22) in which the facts at issue were comparable to the facts in the main proceedings. In that case, the Supreme Administrative Court held that Article 28 of the Regulation, which is to be found in Chapter 1, 'Sickness and maternity', of Title III of the

Regulation, constitutes a derogation from the general provisions on determination of the applicable legislation set out in Article 13 of Title II of the Regulation, and concluded that the term 'legislation', must be interpreted as meaning the social security legislation on maternity and sickness.

53. It is true that Article 28 can be found in Chapter 1, 'Sickness and maternity', of Title III of the Regulation. This does not mean, however, that the concept at issue is restricted to the legislation on sickness and maternity. As the Swedish Government observed, the heading of the chapter only indicates the types of benefits governed by the rules provided for under that chapter, in derogation from the general rules laid down in Title II of the Regulation. (23)

54. The weakness of the arguments advanced by the appellants in the main proceedings – when relying on the heading of Chapter 1 – becomes apparent if that heading is read against the general heading of Title III ('Special provisions relating to the various categories of benefits') as well as the headings of the subsequent Chapters in that Title, each indicating the categories of benefits concerned. (24)

55. In the second place, the interpretation of the concept at issue which I suggest produces a conflict rule which, as the United Kingdom correctly points out, is relatively simple to apply and provides results which are legally certain. (25) The periods of time during which a pensioner has accrued pension in each Member State are a matter of record and are obviously known to the competent institutions within each Member State.

56. On the contrary, the interpretation of Article 28(2)(b) of the Regulation defended by the CVZ and by the Netherlands and Swedish Governments, referred to in point 24 above, appears to produce more uncertain results. Since certain branches of social security are often applicable to any resident in a Member State, the main criterion for the application of Article 28(2)(b) of the Regulation would usually be the length of residence of a person in a country. However, as some governments had to concede during the hearing, this information may not always be readily ascertainable or fully reliable. Whereas the periods in which a citizen has paid the contributions for pensions are duly recorded and easily verifiable, the same cannot be said with regard to the periods in which citizens are subject to other branches of social security.

57. In addition, even the Netherlands and Swedish Governments argue that Article 28(2)(b) is meant to ensure that it is the country in which the pensioner has worked the longest and, hence, where he is likely to have paid most of his contributions that must bear the costs of the benefits in kind. Nonetheless, the interpretation of that provision which these governments suggest does not seem to guarantee that this objective will always be achieved. In fact, that interpretation implies that the entire period during which a citizen has been subject to one branch of social security legislation would also be taken into account for the purposes of Article 28 of the Regulation. It would be wholly irrelevant whether for a given period of time the citizen was, for example, merely a child with access to universal health services provided by a Member State, or rather a worker paying all the contributions due. Indeed, the time factor would be the only parameter which would matter in the context of Article 28(2)(b) of the Regulation.

58. That cannot, in my view, be the correct reading of Article 28(2)(b). That interpretation would again risk unduly burdening those Member States which provide their residents with some form of social security assistance, irrespective of whether those citizens are engaged in an economic activity and of whether or not they contribute to the social security system in place.

59. As explained in points 50 and 51 above, such a result would seem to me to be not only unfair vis-à-vis the Member States which are more generous as regards their social security systems, but also potentially detrimental to the financial stability of those systems.

60. Admittedly, Article 1, which contains the definitions for the purposes of the Regulation, under point (j) defines the term 'legislation' as meaning 'in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4(1) and (2) or those special non-contributory benefits covered by Article 4(2a)'. This would seem to suggest a broad interpretation of the concept at issue.

61. However, I do not find this argument persuasive. To my mind, the definition contained in Article 1 necessarily needs to be all-embracing, to the extent that this definition is applicable for the purposes of the entire Regulation. A broad definition of the term 'legislation' is consistent with the EU legislature's aim of ensuring a uniform application of the Regulation in all Members States, despite the variety of social security systems that they have. At the same time, the definition in Article 1 also serves to delineate what is not to be considered social security legislation (for example collective agreements or special schemes for self-employed persons, the creation of which is left to the initiative of those concerned).

62. That does not mean that at every instance where the term occurs in the Regulation, it should always be understood in accordance with the definition contained in Article 1. (26) Some provisions in the Regulation may well further qualify the term 'legislation' and thus refer only to certain branches of legislation.

63. That is precisely the case with Article 28 of the Regulation. The term 'legislation' in Article 28(2)(b) should not be read, in my view, in clinical isolation from the rest of the provision. Tellingly, Article 28(1) refers to: '[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'. The opening passage of paragraph 2, then, by referring to paragraph 1, indicates that it applies only to the cases governed by that paragraph. (27)

64. From a comprehensive reading of Article 28, therefore, it becomes clear that it is the legislation *under* which a person is entitled to a pension, and not the legislation relating to all branches of the social security system, which is relevant.

65. In the third and last place, my proposed interpretation of the concept at issue seems to be borne out by two other legal provisions.

66. First, Article 33(1) of the Regulation provides that '[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 and maternity shall be authorized 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'.

67. That provision lends support to the idea that it is the Member State responsible for paying the pension that must also cover the expenses for the benefits in kind provided in the State of residence of the pensioner. This explains why it is possible for such a Member State to make deductions from the pension payable to the pensioner. Notably, in *Rundgren*, the Court made it clear that the term 'payable' in Article 33 means that a pension must be

actually being paid to the pensioner, and that a hypothetical competence to pay a pension would not be sufficient to allow the competent institution to make any deductions. (28)

68. Second, Article 95 of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71, (29) entitled 'Refund of benefits in kind provided under sickness and maternity insurance to pensioners and to members of their families who do not reside in a Member State under whose legislation they receive a pension and are entitled to benefits', also seems relevant. In *van der Duin* the Court held, in relation to that provision, that 'the amount of the benefits provided by virtue of … Article 28 is in principle repaid to the institution of the place of residence by the competent institution of the State liable for payment of the pension …'. (30)

69. If one were to follow the interpretation of Article 28(2)(b) of the Regulation put forward by the appellants in the main proceedings, or the interpretation advocated by the CVZ, those two provisions would lose their *raison d'être*: it could not be excluded that, in certain cases, the costs of the benefits in kind would have to be covered by a Member State which does not pay any pension to the pensioner. In such cases, obviously no deductions from the pension, or refunds from an institution liable to pay a pension, could take place.

70. In the light of the above reasons, I take the view that the concept at issue refers to legislation concerning pensions.

71. Having reached that conclusion, a further issue needs to be addressed. In the order for reference, the Centrale Raad van Beroep in fact questions what types of pension insurance are to be taken into account for the purposes of Article 28 of the Regulation in a case such as the one under consideration.

72. I am of the view that the wording of Article 28 of the Regulation should, in that respect, be interpreted, first of all, broadly and, second, in accordance with the relevant national legislation.

73. On the first aspect, I observe that there is no element in the text of the Regulation which suggests that that provision is to be interpreted narrowly. Conversely, the expression 'to whose legislation the pensioner has been subject' appears to have been deliberately formulated in the broadest possible sense.

74. In fact, in *Rundgren*, the Court stated that 'the expression "pension" in Article 28a of Regulation No 1408/71 concerns both a pension based on residence and consisting, in particular, of invalidity and old-age benefits … as well as a pension based on gainful employment …'. (31) I believe that such a term is to be interpreted in the same manner under Article 28 of the Regulation.

75. In addition, if the heading of the English language version of Article 28 of the Regulation speaks of 'pensions payable', other language versions of that legal instrument are worded in a different manner. For example, the Danish rendition of the heading of Article 28 refers to '*ret til pension eller rente*', the Dutch one to '*Pensioenen of renten*', the French version to '*pensions ou rentes dues*', the Italian version to '*pensioni o rendite dovute*', the Portuguese version to '*pensões ou rendas devidas*', and the Spanish version to '*pensiones o rentas debidas*'. (32) This comparison suggests that a broad interpretation of the scope of Article 28 is appropriate.

76. In short, there is no indication that the EU legislature intended to limit the scope of Article 28 to any specific types of pension or specific periods of pension insurance such as, for example, old-age pensions or pensions accrued during a person's working life. Likewise, I see no reason why the periods during which a pensioner has paid contributions to one Member State on the basis of a voluntary insurance scheme should not be taken into account, where this is provided for in national legislation.

77. Introducing a distinction between the different types of pension or different periods of pension insurance would, moreover, add an element of complexity and uncertainty in the test provided for in Article 28(2)(b) of the Regulation.

78. On the second aspect, I recall that the Court has already stated that, in principle, the conditions governing the constitution of periods of insurance are, in accordance with Article 1(r) of Regulation No 1408/71, defined exclusively by the legislation of the Member State under which the periods in question were completed. (33)

79. The fact that, fundamentally, Article 28 defers that issue to the relevant domestic legislation seems to me also to be consistent with the fact that the Regulation is based on what is now Article 48 TFEU (formerly Article 51 of the EEC Treaty). In this regard, the Court has consistently held that 'since Article 48 TFEU provides for the coordination, not the harmonisation, of the legislation of the Member States, substantive and procedural differences between the social security systems of individual Member States and, hence, in the rights of persons insured under those schemes, are unaffected by that provision'. (34)

80. For that reason, I conclude that the term 'pensions' must be understood broadly and in conformity with the relevant national legislation, so as to include, where appropriate, pensions which are payable by the Member State on the basis of voluntary contributions.

V – Conclusion

81. In light of the foregoing, I propose that the Court answer the question referred for a preliminary ruling by the Centrale Raad van Beroep (Netherlands) as follows:

The phrase 'legislation [to which] the pensioner has been subject for the longest period of time' in Article 28(2)(b) of 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 refers to legislation concerning pensions. The term 'pensions' must be understood broadly and in conformity with the relevant national legislation, so as to include, where appropriate, pensions which are payable by the Member State on the basis of voluntary contributions.

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1 – Original language: English.

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2 – Council Regulation (EC) 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 ('the Regulation') (OJ, English Special Edition 1971 (II), p. 416).

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3 – Sixth recital in the preamble to the Regulation.

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4 – 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 166, p. 1) repealed and replaced the Regulation from 1 May 2010, when it was brought into effect as a result of the entry into force of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1).

5 – Until 1 January 2006, point 1 of Heading Q (Netherlands) of Annex VI to the Regulation, under (a), provided: 'As regards entitlement to benefits in kind under Netherlands legislation, persons entitled to benefits in kind shall mean persons who are insured or co-insured under the insurance scheme covered by the Netherlands law on sickness insurance funds for the purpose of the implementation of Chapter 1 of Title III.'

6 – At the relevant time, point 1 of Heading R (Netherlands) of Annex VI to the Regulation, under (a), provides: '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 [ZVW], are obliged to take out insurance under a health-care insurer, and (ii) in so far as they are not already included under point (i) … persons who are resident in another Member State and who under the Regulation are entitled to health care in their State of residence, the costs being borne by the Netherlands.'

7 – Case C-389/99 [2001] ECR I-3731.

8 – Case C-50/05 *Nikula* [2006] ECR I-7029, paragraph 20, and Case C-440/09 *Tomaszewska* [2011] ECR I-1033, paragraph 28.

9 – Case C-345/09 *van Delft and Others* [2010] ECR I-9879, paragraphs 99 and 100, and Case C-208/07 *von Chamier-Glisczinski* [2009] ECR I-6095, paragraphs 84 and 85.

10 – Case 60/85 *Lujten* [1986] ECR 2365, paragraph 14, and Case C-3/87 *Agegate* [1989] ECR I-4459, paragraph 27.

11 – Case 302/84 *Ten Holder* [1986] ECR 1821, paragraph 21 and case-law cited.

12 – See, to that effect, Case C-60/93 *Aldewereld* [1994] ECR I-2991, paragraphs 16 to 20, and *van Delft and Others*, paragraph 52 and case-law cited.

13 – Case 227/81 *Aubin* [1982] ECR 1991, paragraph 11.

14 – *Rundgren*, paragraphs 44 and 45.

15 – *Ibid*.

16 – *Rundgren*, paragraphs 46 and 47.

17 – *Van Delft and Others*, paragraph 79.

18 – This principle underpins the entire Regulation, as clarified by Article 13(2)(a) thereof, which provides: ‘a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State’.

19 – In this regard, Advocate General Poiares Maduro stated in point 11 of his Opinion in the *Nikula* case: ‘it is necessary, as far as possible, to ensure that it is the State in which the person concerned has engaged in the activity in respect of which he is entitled to a pension which bears the cost of the benefits provided.’

20 – Book III, part III, sub. VIII.

21 – Recently, the United States of America (‘the U.S.’) have introduced a federal statute aimed at increasing the rate of health insurance coverage for U.S. citizens. See the Patient Protection and Affordable Care Act (PPACA), commonly referred to in the media as ‘Obamacare’, signed into law by President B. Obama on 23 March 2010. On 28 June 2012, in the case National Federation of Independent Business v Sebelius, 567 U.S. ___ (2012), the U.S. Supreme Court upheld the constitutionality of most of the statute.

22 – Case No 4381-10, *Wehmeyer*.

23 – In fact, in point 48 of his Opinion in *Rundgren*, Advocate General Alber suggests that the context of Articles 28 and 28a of the Regulation indicates that they are concerned with pensions.

24 – Chapter 2 ‘Invalidity’, Chapter 3 ‘Old age and death (pensions)’, Chapter 4 ‘Accidents at work and occupational diseases’, Chapter 5 ‘Death grants’, Chapter 6 ‘Unemployment benefits’, Chapter 7 ‘Family benefits’, Chapter 8 ‘Benefits for dependent children of pensioners and for orphans’.

25 – The Court has in fact already emphasised that the system to be applied under the Regulation must be predictable, so as to be consistent with the principle of legal certainty. See Case C-178/97 *Banks and Others* [2000] ECR I-2005, paragraph 41, and the Opinion of Advocate General Jacobs in Case C-227/03 *van Pommeren-Bourgondiën* [2005] ECR I-6101, point 45.

26 – As I pointed out in my Opinion of 29 May 2013 in Case-140/12 *Brey*, pending before the Court, point 34, in general, it is always desirable to interpret the same concepts of EU law uniformly, as doing so provides for greater legal certainty. However, uniform interpretation is not always possible in practice.

27 – Article 28(2) of the Regulation states: ‘In the cases covered by paragraph 1 …’.

28 – *Rundgren*, paragraphs 47 to 50.

29 – OJ, English Special Edition 1972 (I), p. 160.

30 – Case C-156/01 *van der Duin and ANOZ Zorgverzekeringen* [2003] ECR I-7045, paragraph 44.

31 – *Rundgren*, paragraph 39.

32 – In contrast, some language versions are more similar to the English text: the Estonian version speaks of '*makstavad pensionid*', the Finnish version of '*maksettavat eläkkeet*', the German version of '*Rentenanspruch*', and the Swedish version of '*Rätt till pensioner*'.

33 – See, among others, *Tomaszewska*, paragraph 26, and Case C-548/11 *Mulders* [2013] ECR I-0000, paragraph 37.

34 – See, inter alia, C-443/11 *Jeltes and Others* [2013] ECR I-0000, paragraph 43. See also *vonChamier-Glisczinski*, paragraph 84; and Case 41/84 *Pinna* [1986] ECR 1, paragraph 20.