OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 9 July 1991 *

Mr President,
Members of the Court,

1. In the present case the Belgian Court of Cassation has referred to the Court of Justice for a preliminary ruling two questions on the interpretation of the conflict rules contained in Title II of Regulation No 1408/71 [1] in the case of a worker who was the victim of an accident on board a vessel flying the flag of a State other than that in which the undertaking remunerating him is established.

A brief summary of the facts of the case and the legal background will assist in arriving at a better understanding of the scope and the meaning of the questions referred to the Court.

The defendant in the national proceedings, Mrs De Paep, was the director of a Belgian company, De Pax, which was the owner of the fishing vessel *Hosanna*. On running aground in July 1979 the vessel sustained major damage and was declared to be unseaworthy. In January 1980 the fishing vessel was sold to an English undertaking whose shares were held in part by Mrs De Paep, and was then registered under the United Kingdom flag.

Two weeks later the fishing vessel sank and five members of the crew were lost including the captain, Germain Ackx, and the cabin boy, Piet Ackx, respectively the spouse and son of Mrs De Paep. Subsequently both were declared deceased by the Rechtbank van Eerste Aanleg (Court of First Instance), Bruges. At the time of the accident Piet Ackx, residing in Belgium, continued to be paid by the De Pax company.

The Fonds voor Arbeidsongevallen (Accidents at Work Fund, hereinafter referred to as the 'Fund') which is entrusted under the Belgian legislation on accidents at work with the task of paying compensation for accidents at work involving mariners, rejected the application for an annuity submitted by Mrs De Paep for compensation for the loss of her son.

The Court before which Mrs De Paep then brought the matter granted her application and that decision was upheld by the Arbeidshof (Labour court of appeal), Ghent. However, the Fund contested the appellate court's decision on two grounds of appeal in particular, first an infringement of Article 76(1) of the Belgian law of 10 April 1971 on accidents at work whereby for the purposes of that law mariners are defined as the members of the crew of a Belgian fishing vessel, and secondly under Article 89 of the Belgian law of 5 June 1928 governing the contracts of employment of mariners (*Moniteur belge* of 26.7.1928), whereby such contracts are terminated on an official declaration of the vessel's unseaworthiness.

* Original language: Italian.

1 — Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and to members of their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416).

Taking the view that the outcome of the litigation depended on the interpretation of Community social security provisions the Court of Cassation decided to stay the proceedings and to ask the Court of Justice whether, in a case such as that described above, Article 13(2)(b) now Article 13(2)(c) and Article 14(2)(c), now Article 14b, of Regulation (EEC) No 1408/71 must be interpreted as meaning that the employment relationship between the person concerned and the undertaking by which he is remunerated must be assessed in accordance with the law of the country in which the undertaking has its registered office; and also whether the provisions of Community law relating to the free movement and equal treatment of workers from the Member States, in particular Articles 48 and 51 of the EEC Treaty and Article 3(1), Article 13(2)(b) and Article 14(2)(c) of the abovementioned regulation, must be interpreted as meaning that the legislation governing the contract of employment and the legislation on compensation for accidents at work have the effect of depriving the person concerned of his right to social security benefits on the ground that the fishing vessel was not operated under the flag of the country in which the undertaking is established.

2. In order to reply to the first question raised by the national court it is necessary at this point to recall briefly the scope of Regulation No 1408/71, as provided for in Articles 2 and 4 of that regulation. The former provision defines the personal scope of the instrument, by providing in particular that the regulation is to apply to workers who are or have been subject to the legislation of one or more Member States and are nationals of one of the Member States and to members of their families and their survivors. Article 4, which defines the regulation's scope of application *ratione materiae*, provides in paragraph 1 that the regulation is to apply to legislation concerning the various branches of social security.

It follows that, in determining the legislation applicable to employed or self-employed workers, the conflict rules contained in Articles 13 and 14, cited above, of Title II of the regulation refer solely to the legislation concerning the branches of social security enumerated in Article 4 and not to the legislation governing the contractual relationship between the worker and the employer. That relationship is not regulated by the provisions contained in Regulation No 1408/71, but must instead be assessed on the basis of the relevant rules of private international law.

3. As to the second question submitted by the Court of Cassation I would first of all state that its scope does not seem entirely clear, in view of the national legislative situation.

Although the application of Article 76 of the Belgian law on accidents at work, which deems only the members of the crew of a Belgian fishing vessel to be mariners, would deprive the defendant in the main proceedings of her right to compensation because her son was sailing on board a vessel flying the British flag, the situation seems to me to be different as in the case of Belgian law governing the contract of employment of a mariner, on the sup-

position that under the rules of private international law that law would be the one applicable to the present case.

In that regard as the national court itself indicated, whilst Article 89 of that law provides for the termination of the contract of employment on the declaration of the vessel's unseaworthiness, it is also true that under Article 17 that legislation is not applicable to a mariner's contract entered into by a Belgian mariner for service on a foreign vessel, even if it is concluded in Belgium.

Moreover, as the Commission has pointed out, Article 6(1) of the Law on accidents at work provides that the nullity of the contract of employment cannot be invoked against the application of the law itself.

Furthermore, it would be rather surprising if in the presence of essential features constituting salaried employment, that is to say the performance of work, remuneration and subordination, a person could subsequently be deprived of any protection on the ground of the nullity of his contract of employment.

4. Having said that and whilst leaving to the national court the task of interpreting the Belgian legislation on accidents at work, I shall merely attempt to provide a reply as regards the situation contemplated by the national court, that is to say the case in which the legislation governing the contract of employment and that governing accidents at work cannot be relied on by the person concerned *on the ground that the vessel was not sailing under the flag of the State in which the undertaking has its registered office.*

I would first of all observe that Article 1(a) of Regulation No 1408/71 defines the concept of worker very widely, by stating in particular that for the purposes of the regulation a worker is to be deemed to be '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'.

The provision in question constitutes, moreover, the codification of a principle laid down by the Court in connection with the earlier Regulation No 3/58 concerning social security for migrant workers [2] whereby within that legislative framework the concept of 'wage earner or assimilated worker' must have a Community meaning referring to all those who, as such and under whatever description, are covered by the different national systems of social security. [3] The Court has also held that the status of worker within the meaning of Regulation No 1408/71 must be considered to be acquired when the worker complies with the substantive conditions laid down objectively by the social security scheme applicable to him even if the steps necessary for affiliation to that scheme have not been completed. [4]

2 — Journal Officiel 1958 L 30, p. 561.

3 — Judgment in Case 75/63 *Hoekstra* v *Bedrijfsvereniging voor Detailhandel* [1964] ECR 177.

4 — Judgment in Case 39/76 *Mouthan* v *Metaalnijverheid* [1976] ECR 1901.

Title II of the regulation for its part lays down conflict rules in order to determine the applicable social security legislation.

Under the terms of Article 13(2)(b), in the version in force at the material time,[5] a worker engaged on board a vessel flying the flag of a Member State is subject to the legislation of that State, without prejudice to Articles 14 to 17. However, Article 14(2)(c)[6] provides by way of express derogation from the abovementioned rule that a 'worker employed on board a vessel flying the flag of a Member State and remunerated for such employment by an undertaking or a person whose registered office or place of business is in the territory of another Member State shall be subject to the legislation of the latter State if he is resident in the territory of that State; the undertaking or person paying the remuneration shall be considered as the employer for the purposes of the said legislation'.

In accordance with the settled case-law of the Court, the provisions of Title II of Regulation No 1408/71 constitute a complete set of conflict rules,[7] whose purpose is not only to prevent several national legislative systems from applying at the same time but also to prevent persons falling within the scope of the regulation in question from being deprived of social security protection, in the absence of legislation applicable to them.[8]

Consequently, although it is for the legislature of each Member State to determine the conditions under which the right or obligation to be affiliated to a social security scheme arises,[9] the Member States do not enjoy absolute discretion in this regard but are obliged to legislate within the limits laid down by Community law in the matter.

The Court has in fact held that 'the Member States are (not) entitled to determine the extent to which their own legislation or that of another Member State is applicable'[10] since they are 'under an obligation to comply with the provisions of Community law in force'.[11] In particular, the conditions laid down by the Member States for the purposes of affiliation to a social security scheme cannot have the effect of excluding from the scope of the legislation at issue persons to whom it applies pursuant to Regulation No 1408/71.[12]

5. Applying those principles in the recent *Kits van Heijningen* case, which has been mentioned several times and concerns a case similar to the present one, the Court, after recalling that Article 13(2)(a) of Regulation No 1408/71 provides that a person employed in the territory of one Member State is to be subject to the legislation of that State 'even if he resides in the territory of another Member State', went on to stress

5 — See codified version of Regulation No 1408/71 published in OJ C 138 1980, p. 1; the provision in question essentially coincides with Article 13(2)(c) of the current version of the regulation.

6 — 14b(4) of the consolidated version.

7 — Judgment in Case 60/85 *Luitjen* v *Raad van Arbeid* [1986] ECR 2365, at paragraph 14.

8 — Judgment in Case C-2/89 *Kits van Heijningen* v *Bestuur van de Sociale Verzekeringsbank* [1990] ECR I-1775.

9 — Judgments in Case 110/79 *Coonan* v *Insurance Officer* [1980] ECR 1445, at paragraph 12 and in Case 266/78 *Brunori* v *Landesversicherungsanstalt Rheinprovinz* [1979] ECR 2705, at paragraph 6.

10 — Judgment in Case 276/81 *Soziale Verzekeringsbank* v *Kuijpers* [1982] ECR 3027, at paragraph 14.

11 — Judgment in *Koks* v *Raad van Arbeid* [1982] ECR 3013, paragraph 10.

12 — Judgment in *Kits van Heijningen*, cited above, at paragraph 20.

that that provision would have no practical effect if the residence requirement imposed by the legislation of the Member State in whose territory the person is employed as a condition of affiliation to the insurance scheme which it establishes could be relied on against the persons referred to in Article 13(2)(a). With regard to those persons, the effect of Article 13(2)(a) is to replace the residency condition with a condition based on employment in the territory of the Member State concerned. [13]

The reasoning followed by the Court in relation to the provision mentioned above ought in my view also to prevail in relation to Article 14 of the regulation which similarly substitutes for the condition that the person concerned be engaged on board a vessel flying the flag of the Member State in which the undertaking has its registered office, a different condition based solely on the registered office of the undertaking and the residence of the worker. Evidently, that does not apply only to a provision which expressly lays down a different rule, such as Article 76 of the Belgian law on accidents at work, but also to provisions which, if only indirectly, in fact lead to that result. In fact, to allow the national legislature to have recourse, in the case mentioned by that rule, to connecting factors other than those indicated by the Community legislature would be to deprive the provisions of Title II of Regulation No 1408/71 of practical effect.

Consequently, from that point of view, whichever legislation is applicable under the rules of private international law to the contract of employment, it cannot in any event have the effect of rendering nugatory the conflict rules contained in Regulation No 1408/71, thus depriving of protection a person falling under the personal scope of that instrument.

6. In the light of the foregoing considerations I propose that the Court should give the following answers to the questions submitted by the Belgian Court of Cassation:

1. The determination of the legislation applicable to the employment relationship between a worker and the undertaking by which he is employed falls outside the scope of Regulation No 1408/71;

2. The provisions of Title II of Regulation No 1408/71, and in particular Articles 13(2)(b) (now c) and Article 14(2)(c) now Article 14b(4), preclude the application to persons covered by those provisions or to their beneficiaries of a provision in the national law of a Member State whereby affiliation to a social security scheme is directly or indirectly subject to the condition that the person concerned is employed on board a vessel flying the flag of that Member State.

13 — *Kits van Heijningen* judgment cited above, at paragraph 21.