OPINION OF ADVOCATE GENERAL LENZ
delivered on 14 April 1994 *

Mr President,
Members of the Court,

A — Introduction

1. The Østre Landsret has referred to the Court four questions on the interpretation of Article 93 of Regulation (EEC) No 1408/71, [1] which concerns the rights of institutions responsible for benefits against liable third parties.

2. Those questions arise in proceedings in which Deutsche Angestellten-Krankenkasse (DAK), a social security institution within the meaning of Regulation No 1408/71, seeks reimbursement by the Danish insurance company Laererstandens Brandforsikring G/S (hereinafter 'LB') of sums paid by DAK for the transport from Denmark to Germany and the hospital treatment in those two countries of a child insured by it. The expenditure was incurred following a fracture sustained by the child (Nadine Leipelt) in a road accident while she was on holiday in Denmark. The accident was caused by a motorist insured with LB.

3. DAK bases its claim on the rights of the accident victim, to which it claims to be subrogated, to the extent of the sums in question, under Paragraph 116 of Part X of the German Sozialgesetzbuch (Social Security Code). Under that provision,

'An insurer or institution responsible for social security shall be subrogated to rights under other statutory provisions to compensation for damage, to the extent that, as a result of the event giving rise to the damage, it has to pay social security benefits which serve to make good damage of the same kind and relate to the same period of time as the compensation payable by the party causing the damage.'

4. LB does not dispute that the conditions in that provision are met. It submits, however,

* Original language: German.

1 — 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; see the consolidated version introduced by Regulation No 2001/83 (OJ 1983 L 230, p. 8).

that in view of Paragraph 17(1) and Paragraph 22(2) of the Danish Law on liability for damages (Erstatningsansvarslov) DAK has no claim against it. Those provisions read as follows:

Paragraph 17(1):

'Benefits under the social legislation, including unemployment benefits, medical assistance, pensions under the social pension legislation and benefits under the Law on industrial injury insurance to which an injured party or a survivor is entitled cannot form the basis for a recoupment action against the party liable for the damage.'

Paragraph 22(2):

'In the case of life assurance, accident or sickness insurance or other personal insurance, the company has no claim against the person liable for damage, whatever the nature of the insurance.'

5. In that context, the parties to the main proceedings discussed two distinct points of law before the national court.

6. The first point was whether the Danish legislation as such precluded claims by DAK against LB. In DAK's opinion, that was not the case, since the provisions were only rules on recoupment, not provisions of substantive law on liability for damages. They did not take account of foreign systems of sickness insurance.

7. LB argued, on the other hand, that the insurance concluded by DAK for the injured party came under the said provisions of Danish law, and DAK thus had no claim against it.

8. The second point at issue between the parties assumed that the Danish legislation precluded a claim by DAK. That point concerned the effect of Article 93 of Regulation No 1408/71 on the outcome of the proceedings. Paragraph 1 of that article states that:

'If a person receives benefits under the legislation of one Member State in respect of an injury resulting from an occurrence in the territory of another State, any rights of the institution responsible for benefits against a third party bound to compensate for the

injury shall be governed by the following rules:

(a) where the institution responsible for benefits is, by virtue of the legislation which it administers, subrogated to the rights which the recipient has against the third party, such subrogation shall be recognized by each Member State;

(b) where the said institution has direct rights against the third party, such rights shall be recognized by each Member State.'

9. DAK considered that Article 93(1)(a) conferred a right to recoupment on a foreign institution which, as in the present case, was subrogated to the rights of the injured party against the insurance company bearing the liability. The Danish provisions in question could not deprive Article 93 of effect. That provision limited the right to recoupment only to the extent that the injured party's right to compensation might be restricted by the provisions of substantive law governing that right in the State where the injury occurred.

10. LB countered that Article 93(1)(a) of Regulation No 1408/71 was merely a rule on the substitution of one creditor for another (subrogation), while the precise content of a claim for recoupment had to be determined in accordance with the substantive law of the country in which the injury occurred. Article 93 was to be regarded as a rule of private international law governing the entitlement to bring an action. Article 93 did not determine the question of which claims had to be recognized.

11. The Østre Landsret did not expressly decide the first point, on the precise scope of the Danish rules. However, from the fact that it requested the Court of Justice to interpret Article 93 of Regulation No 1408/71 and from the wording of its fourth question it may be deduced that it regarded DAK's claim as excluded under Danish law.

12. The questions referred by the Østre Landsret are as follows:

1. Is Article 93 of Council Regulation No 1408/71 to be interpreted as governing only the conditions for the right of the institution responsible for benefits to be subrogated to the rights of the injured party against a third party or does it also govern the rights to which the institution responsible may be subrogated?

2. If Article 93 also governs the rights to which the institution may be subrogated, is the decision on that point to be taken under the legislation of the State in which the institution responsible is established

or under the legislation of the State in which the injury occurred?

3. Is Article 93 to be interpreted as also determining which of the rights to which the institution responsible is subrogated can be enforced in the State where the injury occurred against the liable third party?

4. Is Article 93 to be interpreted as also affording a basis for a recoupment action by the institution responsible against the liable third party in a case in which such an action would otherwise have been precluded under the legislation in the State in which the injury occurred as a result of rules corresponding to Paragraph 17(1) and Paragraph 22(2) of the Danish Law on liability for damage?

B — Opinion

Preliminary remarks

13. *1.* By their wording and context, the Østre Landsret's questions focus exclusively on the effects of the subrogation of rights to compensation, under a provision such as Paragraph 116 of the SGB X, on the relationship between the insurer and the third party liable. It is certain that without that provision Miss Leipelt would have been entitled to bring an action for the amount claimed. It is also clear that the conditions under German law for the subrogation of DAK are fulfilled. [2]

14. LB has argued, however, that in view of certain conditions in Article 93 there could be doubt as to the relevance of the questions referred with respect to part of the sum claimed, and the Court of Justice ought in any event to answer a preliminary question with respect to those conditions. More specifically, LB considers that the part of the payments by DAK which relates to the stay in hospital in Denmark and transport from Denmark to Germany was not paid under the legislation of a Member State other than that in which the event causing the injury occurred. It considers that the Court of Justice should rule on that point of its own motion.

15. On that point it should be stated, firstly, that that argument cannot even cast doubt on the relevance of the questions referred, which cannot be disputed in any case in view of the remainder of the sum. Moreover, the Court of Justice does not check whether the

2 — See paragraph 4 above.

national court was correct in regarding the questions referred by it as necessary to enable it to give judgment. [3] It is necessary only that .certain minimum requirements based on the purpose of Article 177 are complied with. That is the case here. The grounds stated in the order allow the Court to exclude the possibility that the questions referred relate to a general, purely hypothetical problem [4] which clearly has no connection with the facts or subject-matter of the main proceedings. [5] LB's argument can therefore not be used to cast doubt on the admissibility of the questions referred.

16. Secondly, it should be observed that the Court does not have to give an answer of its own motion to the preliminary question on the aforesaid condition of Article 93, if only because that condition is undeniably fulfilled because of the sum relating to the stay in hospital in Germany. Apart from that, as regards the suggestion by LB that that question should be answered, I refer to the consistent case-law on the nature of the procedure under Article 177 of the Treaty. According to that case-law, Article 177 envisages direct cooperation between the Court of Justice and the national courts by way of a non-contentious procedure excluding any initiative of the parties, who are merely invited to be heard in the course of that procedure. [6] LB's suggestion can therefore not be followed.

17. 2. In the light of the order for reference, the Østre Landsret's questions can be divided into two groups.

18. The *first two questions* are based on the idea that it might perhaps be necessary to distinguish between the principle of subrogation and the question of *which* rights the insurer is subrogated to with effect for all Member States. The questions essentially ask whether Article 93 governs which rights the institution responsible for benefits may be subrogated to, and if so, which legislation Article 93 refers to in this respect.

19. The *last two questions* apparently assume that the Danish legislation relates not only to the subrogation of the rights in question but also to the possibility of *enforcing* such rights against the liable third party. They concern the point whether Article 93 also gives the institution responsible that possibility, to the exclusion if need be of contrary rules of the Member State in which the injury has occurred.

3 — Judgment in Joined Cases 98/85, 162/85 and 258/85 *Bertini* v *Regione Lazio* [1986] ECR 1885, paragraphs 5 to 8.

4 — See the judgment in Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 10.

5 — See the judgment in Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia* [1994] ECR I-711, paragraph 17.

6 — Judgment in Case C-364/92 *SAT-Fluggesellschaft* v *Eurocontrol* [1994] ECR I-43, paragraph 9; judgment in Case 44/65 *Hessische Knappschaft* v *Singer* [1965] ECR 965, at page 971.

Questions 1 and 2

20. According to Article 93(1), 'where the institution responsible for benefits is, *by virtue of the legislation which it administers, subrogated* to the rights which the recipient has against the third party, such subrogation shall be recognized by each Member State'. [7]

21. That wording does not distinguish between the question of the principle of subrogation and the further question of *which* of the injured party's original rights the institution is subrogated to.

22. The conclusion drawn from that grammatical interpretation, namely that both questions are subject to the legislation administered by the institution responsible for benefits, is in harmony with the function and purpose of the provision at issue. Article 93(1) can be explained by reference to the principle of Regulation No 1408/71 that persons to whom the regulation applies are to be subject to the legislation of a *single* Member State only (see Article 13(1)). The competent institution of that Member State is also responsible for providing benefits, as follows from Articles 22 and 93, in cases where the injury occurs in another Member State. On this point, in a judgment relating to Article 52 of Regulation No 3, [8] the predecessor of Article 93(1) and with substantially the same wording as it, the Court held as follows:

'The substitution provided for in Article 52 in favour of the national social security institutions constitutes the logical and fair counterpart to the extension of the obligations of the said institutions throughout the Community.' [9]

23. As the German Government has correctly pointed out, the rule, the reason for which is as stated, helps to ensure that the possibility of bringing recoupment actions against third parties, which is one of the sources of finance of the competent institution, is not made more difficult by the fact that the third party is proceeded against in another Member State; the peculiarities of the way in which the institutions of that State are financed are not to have any influence here.

24. It would not be compatible with that purpose, however, if only the principle of subrogation was subject to the conflict-of-laws rule [10] in Article 93, while the determi-

7 — My emphasis.

8 — OJ No 30 of 16 December 1958, p. 561.

9 — Judgment in *Hessische Knappschaft* (cited in footnote 6 above), p. 972.

10 — As it was aptly characterized by Advocate General Gand in his Opinion in Case 31/64 *De Sociale Voorzorg* v *Bertholet* [1965] ECR 81, at page 90.

nation of the rights which could be the subject of subrogation depended on the rules in force in the State where the injury occurred. [11]

25. Even if, as asserted by LB at the oral hearing, some Member States have by means of international agreements waived the exercise of a possible right of recoupment, that would not affect the purpose of Article 93, as described above, and the conclusions drawn therefrom.

26. The answer to the first two questions should therefore be as follows:

Article 93(1)(a) of Regulation No 1408/71 must be interpreted as meaning that the possible subrogation of the institution responsible for benefits is subject, as regards both its principle and its extent, to the legislation administered by that institution.

Questions 3 and 4

27. The problem raised by these questions also requires the wording and purpose of the provision to be examined in turn.

28. The said provision provides that the 'subrogation' which has operated by virtue of the legislation which the institution responsible for benefits administers is to be 'recognized by each Member State'. That wording might give the impression that it relates only to legislation of the Member States which deals specifically with the subrogation of institutions responsible for social security, but not to legislation which concerns the enforcement of the rights which are the subject of such subrogation. At the hearing LB relied on that distinction in arguing that the application of Paragraph 17(1) and Paragraph 22(2) of the Law on liability for damage was not prevented in the present case by Article 93 of Regulation No 1408/71.

29. Such a distinction — an exceedingly subtle one — would not be compatible, however, with the aforesaid purpose of compensating for the insurer's Community-wide responsibility. In the light of that purpose it would make no sense if the Member States were required to recognize the subrogation, but were able to reduce the rights of the institution responsible, which are the necessary legal consequence of that subrogation, by legislation which obstructed the enforcement of such rights.

11 — This was also the view of Advocate General Warner in his Opinion in Case 72/76 *Landesversicherungsanstalt Rheinland-Pfalz* v *Töpfer* [1977] ECR 281, at page 287.

30. It follows that Article 93 also guarantees the institution responsible for benefits the possibility of enforcing the rights to which it is subrogated.

31. Contrary to what LB apparently thinks according to its — less than clear — observations at the hearing, that conclusion is not affected either by the Court's case-law on the content of the subrogated rights. According to that case-law, Article 52 of Regulation No 3 [12] 'in no way modifies the conditions governing the creation and the limits of extra contractual liability, 'since that 'remains subject solely to national law' [13] (and is 'limited to the substitution of a fresh creditor for the previous one'). [14] As can be seen from the context of those observations by the Court, they relate to the determination of the rights which the *injured party or his dependents originally had*. There is no doubt that the national provisions determined by the applicable rules of private international law apply to the principle and extent of those rights. Nor can there be any doubt that rights can — logically — only be the subject of subrogation in so far as they have existed in the person of the recipient of the benefits.

12 — See paragraph 22 above.

13 — Judgment in *Hessische Knappschaft* (see footnote 6), at page 972; similarly the judgment in Case 78/72 *L'Étoile-Syndicat Général* v *de Waal* [1973] ECR 499, paragraph 6.

14 — Judgment in *De Waal* (see previous footnote), paragraph 4.

32. In the present case, however, it is certain that the rights which are now asserted by DAK would have been Miss Leipelt's if that institution had not been subrogated. The effect of the Danish legislation is limited to the stage *after the subrogation* provided for by provisions such as Paragraph 116 of the SGB X. At that stage, however, the rights in question come under the protection set up by Article 93 to fulfil its aforesaid function. The institution responsible for benefits as transferee must therefore have the same possibilities for enforcing the rights in question that the recipient of the benefits would have had if there had been no subrogation. In particular, enforcement of such rights cannot be excluded on the sole ground that they have passed by subrogation from the person originally entitled to the institution responsible for benefits.

33. Accordingly, the answer to Questions 3 and 4 should be as follows:

If an institution responsible for benefits has been subrogated to rights in accordance with Article 93(1)(a) of Regulation No 1408/71, that provision entitles it to enforce those rights in each Member State under the same conditions as would have applied to the recipient of the benefits had there been no subrogation. Rules of national law which restrict or exclude that entitlement are inapplicable in such a case.

C — Conclusion

34. In conclusion, I propose that the Court give the following answer to the questions referred by the Østre Landsret:

1. Article 93(1)(a) of Regulation No 1408/71 must be interpreted as meaning that the possible subrogation of an institution responsible for benefits is subject, as regards both its principle and its extent, to the legislation administered by that institution.

2. If an institution responsible for benefits has been subrogated to rights in accordance with Article 93(1)(a) of Regulation No 1408/71, that provision entitles it to enforce those rights in each Member State under the same conditions as would have applied to the recipient of the benefits had there been no subrogation. Rules of national law which restrict or exclude that entitlement are inapplicable in such a case.