I — Introduction

1. The main question to be dealt with in this case is whether the competent social security institution in a Member State, which has authorised an employed person, affiliated to its public health insurance system, to receive medical treatment in another Member State, is obliged to reimburse the costs of emergency, life-saving treatment, where the medical services of the latter Member State have decided that this treatment can only be provided in a medical institution in a country outside the European Union.

II — Relevant provisions of Community and national law

2. The relevant provisions of Community law are Articles 3(1) and 22(1)(a) and (c) of 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 (hereinafter: Regulation No 1408/71) and Article 22(1) and (3) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (hereinafter Regulation No 574/72):

Article 3(1) of Regulation No 1408/71

'Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'
Article 22 of Regulation No 1408/71

1. ‘An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:

(i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence in accordance with the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided shall be governed however by the legislation of the competent State; ...’

Article 22 of Regulation No 574/72

1. In order to receive benefits in kind under Article 22(1)(b)(i) of the Regulation, an employed or self-employed person shall submit to the institution of the place of residence a certified statement testifying that he is entitled to continue receiving the said benefits. The certified statement, which shall be issued by the competent institution, shall specify in particular, where necessary, the maximum period during which such benefits may continue to be provided, in accordance with the provisions of the legislation of the competent State. The certified statement may, at the request of the person concerned, be issued after his departure if, for reasons of force majeure, it cannot be drawn up beforehand.
3. Paragraphs 1 and 2 shall apply by analogy in respect of the provisions of benefits in kind in the case referred to in Article 22(1)(c) (i) of the Regulation.

3. The certified statement referred to in Article 22(3) of Regulation No 574/72 is Form E-112. Persons who are in the situation indicated in Article 22(1)(a) of Regulation No 1408/71 are provided with Form E-111 by the competent institution.

III — Facts, procedure and preliminary questions

4. According to Article 18(4) of Decree No 2766/67, implementing Article 102(3) of the Spanish General Law on Social Security, affiliated persons are entitled to the reimbursement of the costs of medical services provided to them outside the national social security system in cases of a life-threatening emergency, after the competent institution has verified that such an emergency situation did indeed occur.

5. Under the first subparagraph of Paragraph 18 of the German Social Code, Book V (SGB V), in the version in force since 1 January 1992, the German Sickness Fund can meet all or part of the costs of the requisite treatment if treatment corresponding to the recognised state of medical knowledge can only be provided abroad.

6. Ms Annette Keller, of German nationality and resident in Spain, was affiliated to the Spanish general social security scheme. During a family visit to Germany in September 1994, Ms Keller was admitted to the hospital of Gummersbach, attached to the Clinic of the University of Cologne. There she was diagnosed as having a malignant tumour at the base of the skull which was sufficiently serious to be capable of causing her death at any time. Already in possession of the mandatory travel Form E-111, covering the period from 15 September to 15 October 1994, on 24 October 1994, Ms Keller obtained from the competent Spanish health authority (INSALUD) Form E-112. The validity of this latter form was subsequently extended a number of times until June 1996 in order to enable her to continue receiving the necessary medical care from the German public medical services, as
transferring her to Spain was considered to be inadvisable. In considering the various therapeutical possibilities, the German medical services reached the conclusion that Ms Keller needed immediate surgery and that, given the expertise required for this, the only place in Europe which was capable of performing the operation was the University Clinic in Zurich. Ms Keller was taken by the German medical services to this clinic where she underwent surgery with satisfactory results. This was followed by radiotherapy in the period from December 1994 to February 1995.

7. After having paid the costs of this treatment (CHF 87 030), Ms Keller applied to INSALUD for reimbursement. This was refused, on the grounds that she had not sought prior authorisation for her operation in Switzerland as required by Spanish legislation and INSALUD had not been able to verify that a life-threatening emergency was involved. Ms Keller thereupon brought an action before the Juzgado de lo Social No 20 of Madrid (hereinafter: Juzgado de lo Social) challenging this decision by INSALUD. This action was extended to INSS, since that authority was the one which would have to pay the costs to Ms Keller if her application was allowed. Ms Keller died on 30 October 2001. The action was continued by her parents as her heirs.

8. The Juzgado de lo Social established that, had Ms Keller been affiliated to the German social security system, she would have been eligible for complete reimbursement of the costs of her treatment in Switzerland. In the light of this fact, it then considered that the outcome of the case depends on the answer to the following two questions relating to the interpretation of Regulation No 1408/71, which it now submits to the Court for a preliminary ruling under Article 234 EC:

1. Are Form E-111 and in particular Form E-112, the issue of which is provided for in Articles 22(1)(c) of Regulation No 1408/71 and Article 22(1) and (3) of Regulation No 574/72, binding on the competent institution which issues them (in this case the Spanish Social Security) as regards the diagnosis made by the institution of the place of residence (in this case the German Public Health Service), and specifically the conclusions reached therein that the worker required an immediate surgical operation as the only treatment capable of saving her life and that the operation could only be carried out by a hospital in a country not belonging to the European Union, namely the University Clinic in Zurich, Switzerland, so that the institution of the place of residence may send the worker to that hospital without the competent institution being
authorised to require the worker to return so that it can carry out the medical examinations it considers appropriate and offer him [her] the care options appropriate for the pathology which he [she] presents?

2. Is the principle of equal treatment laid down in Article 3 of Regulation No 1408/71, which provides that workers are to ‘... enjoy the same benefits under the legislation of any Member State as the nationals of that State’, in conjunction with Articles 19(1)(a) and 22(1)(i) of that regulation, which provide that a worker residing in the territory of another Member State is to be entitled to benefits in kind provided on behalf of the institution of the place of stay or residence in accordance with the provisions which it applies, as though he were insured with it, to be interpreted as meaning that the competent institution is required to assume the costs of the health care provided by a country outside the European Union when it is established that if the worker had been affiliated to or been insured by the institution of the place of residence he would have been entitled to that health benefit, when in addition the said health care – that is, health care in cases of life-threatening emergency provided by private centres, including those in countries not belonging to the European Union — is among the benefits provided for by the legislation of the competent State?

9. Written observations were submitted by the parties to the main proceedings, by the Spanish, Belgian and Netherlands Governments and by the Commission. With the exception of the Belgian Government, these parties were also represented at the oral hearing on 9 November 2004.

IV — Assessment

A — Preliminary remark

10. Both INSALUD and the Spanish Government assert that the facts established by the Juzgado de lo Social are inaccurate. In particular they state that Ms Keller was already aware of her ailment at the time she travelled to Germany and that she herself voluntarily left the clinic in Cologne, against the advice of the German medical specialists,
to go for further treatment in Zurich. They, therefore, are of the opinion that the preliminary questions referred by the Juzgado de lo Social relate to a hypothetical situation and that, consequently, they should be declared inadmissible by the Court.

11. It is well established that in the context of proceedings under Article 234 EC, the assessment of the facts underlying the case in the main proceedings is a matter for the national court. As the Court has pointed out, it is for the national court to assume responsibility for the subsequent judicial decision, and to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. 4

12. In the present case, and similar to the situation in IKA, there is no reason to doubt that the Juzgado de lo Social has assessed the facts which gave rise to the proceedings before it correctly. The questions must therefore be considered to be admissible.

13. The first question submitted by the referring court is aimed at ascertaining whether or not the competent institution issuing Forms E-111 and E-112, thereby authorising an affiliated person to undergo medical treatment in another Member State, is bound by the decisions of the medical services of that Member State as to the diagnosis of the ailment and the therapeutic measures to be taken, where these measures include urgent, life-saving surgery being carried out in a country not belonging to the European Union and without the competent body in the Member State of origin being enabled to require the worker concerned to return, so that it can carry out its own medical examination and suggest other appropriate methods of treatment.

14. One particular point to be clarified before addressing the substance of the first question is which provision of Regulation No 1408/71 is applicable in the circumstances of this case. As Ms Keller was already in Germany when the diagnosis was made and was in possession of Form E-111 which provided a suitable basis for her receiving treatment in that Member State, it could be queried why it was necessary for her to be provided, in addition, with a Form E-112 which is usually issued after the diagnosis has

4 — Case C-326/00 IKA [2003] ECR I-1703, at paragraph 27 of the judgment.
been set in the competent Member State and the person concerned is subsequently authorised to go to another Member State to receive medical care. Although both forms give entitlement to the same benefits under subparagraph (i) of Article 22(1) of Regulation No 1408/71, the Court asked the intervening parties to indicate whether, given the difference between the situations envisaged by Article 22(1)(a) and (c) to which Forms E-111 and E-112 respectively relate, this difference could influence the answer to be given to this preliminary question. All parties agree, and I believe correctly, that this difference is irrelevant to the answer to this question given the fact that both forms serve a similar function in different situations and that they establish entitlement to exactly the same benefits in kind. As the referring court places most emphasis on Form E-112 and the scope of the authorisation it contains, I will discuss this question mainly by reference to this document and the situation for which it is provided, i.e. the situation in which the affiliated person intends to go to another Member State to receive medical treatment there. My observations apply *mutatis mutandis* to Form E-111.

15. The question as to the binding character of Form E-112 in the circumstances of the present case must be answered in the light of its function in the system and of the objectives of Article 22(1)(c) of Regulation No 1408/71. This article makes provision for (self-)employed persons being authorised by the competent institution in a Member State to go to another Member State in order to receive treatment appropriate to his or her condition. In that case, the person concerned shall be entitled, under subparagraph (i) of Article 22(1)(c) of Regulation No 1408/71, to benefits in kind provided on behalf of the competent, authorising institution by the institution of the place of stay or residence, in accordance with the legislation the latter administers, as though he or she were insured with it. The period during which these benefits may be received is governed by the legislation of the competent Member State.

16. Article 22(1)(c)(i) of Regulation No 1408/71 is based, as was observed by the Netherlands Government, on a clear division of tasks between the authorities of the competent Member State and the Member State providing the medical treatment to the person concerned. By stating that the benefits in kind, i.e. the medical treatment, are to be provided in accordance with the legislation administered by the latter bodies and that the competent institution only determines the duration of the authorised treatment, it is evident that decisions concerning such treatment must be taken in accordance with the legislation of the Member State in which the medical treatment is provided without any involvement of the authorities of the competent
Member State. On the other hand, by authorising a person to receive medical treatment outside its own system in another Member State, the competent institution assumes the responsibility to bear the costs of the treatment provided by the relevant institutions in the Member State concerned. This division of tasks was also emphasised by the Court in its judgment in *Vanbraekel*. 5

17. The system envisaged by Article 22(1)(c) of Regulation No 1408/71 is designed to promote the free movement of workers by removing obstacles which may result from differences between national systems of public health insurance. 6 In this respect Form E-112 fulfils two functions. On the one hand, it operates as a medical passport, ensuring to the authorities of the place of stay or residence that the holder is authorised to receive medical treatment in that Member State. On the other hand, it guarantees to these same authorities that the costs of the treatment will be reimbursed by the competent institution. By granting authorisation the latter accepts responsibility for bearing the costs of the care provided in another Member State.

18. This system can only operate on the basis of the loyal cooperation of and mutual trust between the national authorities involved, as required by Article 10 EC. 7 The competent institution must therefore, in principle, recognise and accept the decisions taken by the services in the place of stay or residence as regards the medical treatment to be provided. The provision of such treatment cannot be made conditional on any further prior or posterior agreement of the competent institution. If this were to be accepted, it would deprive Form E-112 of its basic function and call the functioning of the whole system into question. As was pointed out by the Netherlands Government, insured persons in possession of Form E-112 must be able to rely on them being provided with the treatment appropriate to their condition, as guaranteed by Article 22(1)(c) of Regulation No 1408/71.

19. It must therefore be established that, as a basic rule, the decisions made by the institution of the place of stay or residence in respect of the holder of a Form E-112 as regards the diagnosis and the therapeutical measures to be taken, are binding on the competent institution which issued this form. As it is up to the competent institution to determine the period during which treatment may be received in another Member State this applies as long as the authorisation is not withdrawn by that institution. 8

5 — *Case C-368/98 Vanbraekel* [2001] ECR I-5363 at paragraphs 32 to 33 of the judgment.

6 — Idem, at paragraph 32 of the judgment.

7 — Cf. *Case C-326/00, IKA*, cited in footnote 4, at paragraph 51 of the judgment.

20. It should not be excluded, however, that, despite the basic rule indicated above, disagreement may arise between the national bodies involved, as regards the appropriateness of the treatment provided and the costs to be reimbursed. Where this occurs, such a conflict should be resolved between these bodies, without the insured person being involved. In this respect reference may be made to the Court’s case-law in respect of other forms issued under Regulation No 1408/71, E-101 in particular. Here, the Court takes as its point of departure that, in view of the aims of the relevant provisions of Regulation No 1408/71, institutions are, in principle, bound by such certificates, but that, should the institution in the host Member State have doubts as to the correctness of the facts on which it is based, the institution issuing the certificate should reconsider these grounds. Ultimately, both institutions should attempt to reach agreement in a spirit of loyal cooperation, failing which the matter should be referred to the Administrative Commission. 9 It would appear to me that this same approach ought to apply to forms issued in the context of Article 22(1) of Regulation No 1408/71.

21. Having established that, once Form E-112 has been issued, the decisions of a medical nature taken by the services in the place of stay or residence are binding on the competent institution, the following point to be discussed is whether this also applies in the situation that the medical services of the place of stay or residence determine that the necessary treatment can only be provided in a State which is not a member of the European Union. In other words, does the scope of the authorisation given and the obligation to reimburse costs also apply to treatment provided to the authorised worker outside the European Union at the instigation of the medical services of the place of stay or residence?

22. In this respect INSALUD and the Spanish Government assert that as the applicability of Regulation No 1408/71 and of the free movement of persons is restricted to the territory of the Member States, any medical treatment enjoyed in a third country does not come within the scope of that regulation and that any such entitlement is governed solely by national law. Referring to the explicit terms of Article 22(1)(c) of Regulation No 1408/71, which in their view should be interpreted restrictively, they state that the authorisation is limited to treatment received in the Member State of stay or of residence. The Belgian Government, too, observes that, except in cases of great urgency, the treatment to be received must remain within the express terms of the authorisation.

---

9 — Case C-202/97 Fitzwilliam Executive Search [2000] ECR I-883 at paragraphs 51 to 57 of the judgment and Case C-178/97 Banks, cited in footnote 8, at paragraphs 47, 51 and 52 of the judgment.
23. As I pointed out in paragraph 16 above, it follows from the structure of Article 22(1)(c) of Regulation No 1408/71 that decisions as to what treatment may be deemed to be appropriate are to be taken by the services of the Member State which the holder of a Form E-112 has travelled to in order to receive medical care. In the division of responsibilities between the institutions concerned the competent institution must, as a basic rule, accept these decisions in respect of the diagnosis of the ailment and the therapeutical measures deemed necessary and reimburse the costs in respect of these. Where the medical services concerned decide, in accordance with the conditions laid down in and within the limits of their national legislation, that treatment must be provided in whole or in part in a medical institution outside the territory of that Member State, including non-Member States of the European Union, this decision must be regarded as being an integral aspect of the decision these services are competent to take under Article 22(1)(c) of Regulation No 1408/71. To the extent that this treatment by objective standards may be regarded as being covered by the authorisation provided by the competent institution.

24. One argument against this interpretation is to be found in the wording of Article 22(1)(c) of Regulation No 1408/71, which states that the worker concerned is authorised to go to the territory of another Member State to receive 'there' treatment appropriate to his condition. Reading this provision restrictively, the word 'there' would indicate that the treatment must indeed be received on the territory of the Member State concerned. However, in my view, the word 'there' should not be seen in isolation from rest of this provision. Taken as a whole, Article 22(1)(c) of Regulation No 1408/71 together with subparagraph (i) of this provision emphasise that the treatment to be received is both 'appropriate' to the condition of the worker and to be provided in accordance with the legislation administered by the competent institution. Following this more substantive approach to this provision, what is relevant is that the medical decisions concerning the worker are taken by the medical services of the Member State concerned, but the treatment to be received depends on the terms of the applicable legislation of that Member State. As pointed out above, where that legislation, under certain conditions, permits the reimbursement of treatment received outside the territory of that Member State, this also should apply to treatment received by a worker authorised by the competent institution under Article 22(1)(c) of the Regulation.

25. Indeed, to my mind, in the light of the division of tasks under Article 22(1)(c) of Regulation No 1408/71, how and where the treatment deemed to be appropriate is...
ultimately received by the authorised worker can only be of secondary interest to the competent institution. In Ms Keller's case it would appear to be irrelevant to INSALUD, as the competent institution in Spain, whether that treatment was provided in Germany, another Member State or a non-Member State, such as Switzerland. From the point of view of cost management, what is of importance is that the competent institution has authorised an affiliated person to receive treatment outside its own system and therefore outside its budgetary control. In addition, it must be realised that it will only be in highly exceptional circumstances, such as those of Ms Keller, that treatment being received outside the schemes of the Member States or in non-Member States will be permitted, the normal situation being that treatment will be provided within these systems.

26. It is further argued that receiving treatment in a third country on the basis of an E-112 Form is not possible, as the territorial scope of Regulation No 1408/71 and the free movement of persons, which it seeks to facilitate, are limited to the territory of the Member States. It should be recalled that the essential objective of Regulation No 1408/71 is to contribute to the free movement of workers within the Community by removing obstacles which may result from differences between the national systems of social security by bringing about the necessary degree of coordination between these systems. In a case such as the present one, in which the worker received treatment in a third country, there is no question of the extra-territorial application of Regulation No 1408/71 as both the decision authorising the worker to receive medical treatment outside the system of the competent institution and the decision in respect of the treatment to be applied were taken within the system provided for by Article 22(1)(c) of Regulation No 1408/71. The place where this treatment was received is irrelevant to the content of these decisions.

27. Finally, on this aspect, it was observed that permitting persons who were authorised to receive medical treatment in another Member State to go to a non-Member State to receive that treatment would be tantamount to giving them a blank cheque in this regard. To this it must be answered that Article 22(1)(c) of Regulation No 1408/71 contains a number of inherent restrictions. The first restriction is to be found in the notion that the treatment to be received is 'appropriate' to the condition of the worker concerned. The second restriction resides in the fact that it is only where treatment outside the national system concerned is permitted by the legislation applicable, and
under the conditions laid down therein, that the worker will be entitled to reimbursement of the costs of such treatment. Thirdly, the competent institution has the power to determine the period during which the treatment may be enjoyed.

28. The last element of the first preliminary question addresses the question whether the medical services may take a decision to send a worker in possession of Form E-112 to receive medical treatment in a non-Member State without enabling the competent institution to require the worker to return, so that it can carry out its own medical examination of the worker in order to be able to offer him other care options. Having already concluded that decisions in respect of the medical treatment to be applied come wholly within the competence of the authorities of the Member State which the worker has been authorised to go to for treatment, it would go against this division of responsibilities to accept that the competent institution would be entitled to oblige the authorised worker to return for such an examination as a precondition for eligibility for reimbursement. It would also undermine the basic function of Article 22(1) of Regulation No 1408/71 to facilitate free movement of workers within the Community. This may explain why the regulation does not contain any explicit provision for this purpose. As was pointed out by Keller and the Commission, Article 87 of Regulation No 1408/71 provides an appropriate method to ensure that the interests of the competent institution are protected. The application of this facility must take place in the context of the cooperation between the authorities involved as required by Article 10 EC.

29. The answer to the first preliminary question must, therefore, be that Forms E-111 and E-112 provided for in Article 22(1) (c) of Regulation No 1408/71 and Article 22 (1) and (3) of Regulation No 574/72 are binding on the competent institution which issues them as regards the diagnosis made by the institution of the place of stay or residence. This includes the decision to send the worker concerned to a medical institution in a non-Member State for treatment, without the competent institution being enabled to require the worker to return for medical examination.

C — Second question

30. By its second preliminary question the Juzgado de lo Social essentially asks the
Court whether the principle of equal treatment laid down in Article 3(1) in conjunction with Article 22(1)(i) of Regulation No 1408/71 implies that the competent institution is required to assume the costs of medical health care provided by a non-Member State to a worker authorised to receive treatment in another Member State, where it is established that, if the worker had been affiliated to the institution of the place of stay or residence, he would have been entitled to that health benefit and, in addition, the care involved is among the benefits provided for by the legislation of the competent State.

31. According to Article 22(1)(i) of Regulation No 1408/71 the worker authorised to go to another Member State to receive medical treatment is entitled to this treatment in accordance with the applicable national legislation of that Member State, 'as though he were insured with it'. It follows from the clear wording of this provision that an authorised worker in possession of Form E-111 or E-112 has a right to the same treatment as persons affiliated to the national security system of the place of stay or residence. Where, as in the case of the German social security system, affiliated persons have a right under certain conditions to the reimbursement of costs incurred for treatment in a non-Member State, the same necessarily must apply to persons authorised by the competent institution to receive medical treatment in that Member State.

32. The objection of INSALUD and the Spanish Government that the principle of equal treatment does not apply outside the territory of the Member States of the European Union is not relevant in this respect as the decision concerning Ms Keller's treatment was taken by the medical services of the Member State she was authorised to go to for medical treatment.

33. The answer to the second preliminary question must therefore be that the principle of equal treatment laid down in Article 3(1) in conjunction with Article 22(1)(i) of Regulation No 1408/71 implies that the competent institution is required to assume the costs of medical health care provided by a non-Member State to a worker authorised to receive treatment in another Member State, where it is established that, if the worker had been affiliated to the institution of the place of stay or residence, he would have been entitled to that health benefit and in addition the care involved is among the benefits provided for by the legislation of the competent State.
V — Conclusion

34. In the light of the foregoing considerations, I therefore propose to the Court to answer the preliminary question referred to it by the Juzgado de lo Social No 20 of Madrid as follows:

(1) Form E-111 and Form E-112, the issue of which is provided for in Articles 22(1) (a) and (c) of Regulation No 1408/71 respectively and Article 22(1) and (3) of Regulation No 574/72, are binding on the competent institution which issues them as regards the diagnosis made by the institution of the place of stay or residence, including the decision to send the worker for an emergency, life-saving operation in a medical institution in a country not belonging to the European Union (Switzerland), and without the competent institution being enabled to require the worker to return so that it can carry out the medical examinations it considers appropriate and offer him the care options appropriate for the pathology which he presents.

(2) The principle of equal treatment laid down in Article 3 of Regulation No 1408/71 in conjunction with Articles 19(1)(a) and 22(1)(i) of that regulation, is to be interpreted as meaning that the competent institution is required to assume the costs of the health care provided to a worker by a country outside the European Union, when it is established that if the worker had been affiliated to or been insured by the institution of the place of residence he would have been entitled to that health benefit, when in addition the said health care is among the benefits provided for by the legislation of the competent State.