Opinion of advocate general Ruiz-Jarabo Colomer delivered on 15 October 2002 (1)

Idryma Koinonikon Asfaliseon v Vasilios Ioannidis

Reference for a preliminary ruling from the Dioikiti Protodikio Thessalonikis (Greece)
Refund of expenditure relating to hospital treatment for a pensioner in another Member State – Conditions – Social security – Articles 22, 31 and 36 of Regulation (EEC) No 1408/71 – Freedom to provide services – Articles 46 EC, 49 EC and 50 EC – Fundamental rights – Right to own propert

Case C-326/00

Opinion of advocate general

1. The Dioikiti Protodikio Thessalonikis, (2) Greece, asks the Court of Justice, pursuant to Article 234 EC, to interpret Articles 31 and 36 of Regulation (EEC) No 1408/71, (3) Articles 31 and 93 of Regulation (EEC) No 574/72, (4) Articles 46 EC, 49 EC and 50 EC, and Article 1 of the Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms.The national court wishes to know, in essence, whether it may be a condition of the refund by the institution of the country in which a pensioner resides of the costs of sickness benefits in kind provided to him by the social security institution of the Member State in which he is temporarily staying, that the illness has manifested itself suddenly and for the treatment to have been needed urgently, or whether, on the contrary, it is enough that the person concerned should have required medical care.

I — The facts in the main proceedings

2. Mr Ioannidis receives a retirement pension from the Idryma Koinonikon Asfalisseon (hereinafter IKA) and resides in Greece. During a stay in Germany he was admitted to a clinic for cardiovascular diseases where he remained from 26 November to 2 December 1996. On 6 December 1996, he asked the Sickness Fund of the undertaking Karstadt in Germany, the institution of his place of stay, to pay for his hospital treatment, intending that the IKA would refund the costs.
3. By Form E 107, (5) which is used to seek confirmation of entitlement to benefits in kind, the Sickness Fund asked the IKA, as the competent institution, to forward Form E 112 concerning the retention of the right to sickness benefits currently being provided, (6) by way of authorisation for the period of hospital treatment notified in Form E 113. (7) It asked to be notified if such a certified statement could not be issued.
4. The IKA confirmed that, on 15 November 1996, it had supplied to Mr Ioannidis Form E 111 concerning his entitlement to sickness benefits in kind while staying temporarily in another Member State, valid from 16 November to 31 December 1996.
5. On 31 March 1997, the IKA's Division for Sickness Benefits in kind forwarded Form E 107 to its Medical Committee of Appeal (hereinafter MCA), which is composed of doctors, for it to give an opinion as to whether the defendant's hospital treatment was to be authorised *ex post facto* after examination of whether or not the illness for which he was admitted to the German clinic manifested itself suddenly.
6. On 15 April the MCA issued an unfavourable opinion on the ground that, since the illness had not manifested itself suddenly, immediate admission to hospital was not justified, and therefore the patient could have been duly treated in a Greek hospital. (8) In reaching that conclusion, it took into account the fact that the defendant's illness was chronic, as was apparent from a coronary angiography and angioplasty carried out in June 1996, that the deterioration in the state of his health was not sudden, given that a further coronary angiography had been carried out in his country of origin on 11 November 1996, and that his hospital treatment in Germany had been planned, since the angiography carried out when he was admitted gave the same findings as that carried out in Greece a few days previously.
7. In the light of the opinion, on 18 April 1997 the IKA refused the request, by decision of the Director of the Regional Branch, on the basis that the conditions for application of Article 3a(4)(g) of its Hospital Care Regulations were not met. Form E 107 was returned to the Sickness Fund. Paragraph 10.2 of the form stated the reasons why the IKA, as the competent institution, was unable to issue Form E 112.
8. Mr Ioannidis lodged an objection challenging that decision with the local Administrative Committee of the IKA Regional Branch, which upheld his claim on 14 July 1997. After appraising the circumstances of the case, in particular, the fact that the defendant had married a German, that he went to Germany to meet his child, where his illness manifested itself suddenly, and that his illness was serious, it decided that Article 3a(4)(g) of the IKA's Hospital Care Regulations was applicable and that the hospital treatment should be authorised *ex post facto* and the expenditure relating thereto reimbursed.
9. The IKA brought an action before the Dioikiti Protodikeio Thessalonikis for annulment of that decision, pleading that, according to the facts available, the conditions for granting authorisation *ex post facto* were not met.

II — The questions referred for a preliminary ruling

10. In order to settle the dispute, the national court asks the Court of Justice:
(1) whether Article 3a(4)(g) of the Hospital Care Regulations of the IKA, ..., to the extent that it laid down as an additional requirement, before the IKA may in very exceptional cases — namely in cases where a particular illness of

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the pensioner of the IKA seeking their refund manifested itself suddenly while he was temporarily staying abroad or he was transferred there urgently in order to avert a real risk to his life — refund the costs of treatment which has already taken place in hospital abroad, that the director of the competent regional branch of the IKA must grant the related authorisation after an opinion has been given by the IKA's Medical Committee of Appeal, is consistent with the provisions ... of Articles 31 and 36 of Regulation (EEC) No 1408/71 ... and Articles 31 and 93 of Regulation (EEC) No 574/72 ... since, even if it were accepted that those provisions in principle confer on the Member States discretion — in respect of benefits including sickness benefits in kind to pensioners temporarily staying in the territory of a Member State other than the one in which they reside, which benefits must be considered also to comprise the provision of hospital treatment — to enact provisions establishing as an additional condition for the refundof the costs relating to the benefits the, albeit *ex post facto* , authorisation of those costs, it is in any event not entirely clear and free from doubt whether they additionally allow the Member States to enact provisions establishing as a necessary condition for the grant of such authorisation that requirements be met similar to those laid down in the aforementioned provision of the IKA Regulations ..., that is to say requirements which are related to the immediate need for provision of hospital treatment;.

(2) whether, on the basis that services comprising the provision of care within hospitals constitute services within the meaning of Article 60 of the EC Treaty (now Article 50 EC), the aforementioned provision of the IKA Regulations, even if it were considered, to the extent referred to above, not to be contrary to the above provisions of the Council Regulations, is consistent to that extent with Articles 59 (now, after amendment, Article 49 EC) and 60 of the EC Treaty;

(3) if Question 2 is answered in the negative, whether the rule laid down by that provision of the IKA Regulations is justified on grounds of public health which are related to the provision of a balanced hospital service accessible to everybody resident within Greece and therefore falls within the exceptions in Article 56 of the EC Treaty (now, after amendment, Article 46 EC);

(4) whether, on the basis that entitlement to sickness benefits in kind and, by extension, the claim for refund of the costs relating to them constitute possessions within the meaning of Article 1 of the Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Paris on 20 March 1952, the aforementioned provision of the IKA Regulations — even if it were considered that ... it is not contrary to the aforementioned provisions of the ... Regulations and of the EC Treaty, or, that is to say ..., that it is justified in accordance with the matters previously set out — is consistent ... with the first paragraph of Article 1 of the Protocol; and

(5) if Question 4 is answered in the negative, whether the rule laid down by the aforementioned provision of the IKA Regulations is justified on grounds of public interest which are connected with preservation of the financial stability of the social security system and therefore falls within the exceptions in the second paragraph of Article 1 of that Protocol.

III — National legislation

11. Decision 416/1993 of the Minister for Social Security (9) of 31 July 1984, which was adopted pursuant to Article 16 of Law 1846/1951, (10) added Article 3a to the IKA Hospital Care Regulations. (11) Article 3a(1)(a) establishes that, if it is not possible for the illness to be diagnosed in Greece or for the person insured with the IKA to be treated in hospital in Greece, because of a lack either of doctors with the required specialty or of suitable scientific means, the IKA is to pay all the costs incurred abroad. It also pays the transfer costs of the patient and a companion, paying a daily fixed subsistence allowance calculated according to the country to which he is going.As a general rule, hospital treatment abroad requires prior authorisation. Nevertheless, an exception is recognised by Article 3a(4)(g) (12) which provides that, in very exceptional cases, the director of the competent regional branch may authorise hospital treatment which has already taken place abroad either because the illness manifested itself suddenly while the patient was staying in another country or because he had to be transferred there urgently in order to avert a real risk to his life. That provision became applicable on 23 August 1984.

12. Decision F. 7/oik.15 of the State Secretary for Labour and Social Security of 7 January 1997, (13) adopted pursuant to Article 40(4) of Law 1316/1983, (14) laid down in a uniform manner the conditions for the provision of hospital treatment abroad, and the procedure for its authorisation, for persons insured with all the sickness institutions and branches within the competence of the General Secretariat for Social Security, which include the IKA.From 20 January 1997, Article 3a(4)(g) ceased to apply, and it covered thereafter only the cases of persons insured with and pensioners of the IKA (15) who had received hospital treatment abroad between 23 August 1984 and 19 January 1997. (16)

IV — The proceedings before the Court of Justice

13. Written observations have been submitted in these proceedings, within the period laid down by Article 20 of the EC Statute of the Court of Justice, by the IKA, the Belgian, Greek, Spanish, Irish, Austrian and United Kingdom Governments and the Commission.At the hearing held on 10 September 2002, the IKA's representative, the agents of Greece, Spain, Ireland, Netherlands, Finland, the United Kingdom and the Commission presented oral argument.

V — Consideration of the questions referred for a preliminary ruling

A — The first question

14. By the first question it raises, the national court wishes to know whether Articles 31 and 36 of Regulation No 1408/71, and Articles 31 and 93 of Regulation No 574/72, preclude national legislation which requires, as an additional requirement, before the social security institution refunds the costs of treatment which has already taken place in hospital abroad, a special authorisation which is granted only in very exceptional cases, namely, if the illness of the

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insured, who is a pensioner, has manifested itself suddenly during a stay abroad and medical care had been required immediately, or when he has been transferred there urgently in order to avert a real risk to his life.

15. The Belgian Government considers that the scope of Articles 22 and 31 of Regulation No 1408/71 is different and that the latter article grants the pensioner, while staying abroad, entitlement to receive any medical care he requires, even if, in the light of his state of health at the beginning of his journey, it was already foreseeable that he would need it.

16. The Greek Government maintains, as does the IKA, that the facts are not governed by Articles 31 and 36 of Regulation No 1408/71, but are covered by Article 22(1)(c) and (2). The German institution asked the IKA for Form E 112, even though the insured had Form E 111, because it did not accept that the treatment given was either necessary or urgent, which confirms, in its opinion, that the pensioner went to Germany for medical reasons. The Spanish Government takes the same view.

17. The Irish Government proposes that the question be reworded, because it considers that the facts fall within the scope of Articles 22, 22a and 31 of Regulation No 1408/71. In that case, there is entitlement to receive medical treatment without any authorisation, and it is the national court which has to assess whether it was essential for the insured to receive the treatment described. If the question is not reworded, the Irish Government suggests that a reply be given to the national court to the effect that the Community legislation referred to does not preclude the contested Greek provision.

18. The Netherlands Government points out that, in accordance with the principle of equality of treatment, all persons who fall within the scope of Regulation No 1408/71 are to be entitled to social security benefits on the same terms and to the same extent. It adds that Articles 22 and 22a govern all the possible situations of health care for the insured, including retired persons, when they have to receive medical care in another Member State.

19. The Austrian Government considers that, for the purposes of Regulation No 1408/71, pensioners are treated in the same way as workers and, if they are staying temporarily in a Member State in which they are not resident, Article 22(1)(a) is applicable to them by analogy, with the result that they will be entitled only to those benefits which are needed immediately. It considers that Article 22(1)(a) is contrary to a provision such as that contained in Article 3a(4)(g) of the IKA's Hospital Care Regulations, which imposes the obligation to obtain an authorisation always, and not only in the situations laid down in Paragraph 1(c).

20. The Finnish Government considers that the application of Article 31 of Regulation No 1408/71 does not justify the requirement of an authorisation, even *ex post facto* . In order to obtain any medical treatment he needs while in a Member State other than that in which he is resident, a pensioner is only required to submit Form E 111, and does not also have to establish that he needs the treatment urgently or unexpectedly. If the treatment is planned, on the other hand, he will have to have Form E 112.

21. The United Kingdom Government points out that Articles 31 and 22(1)(c) of Regulation No 1408/71 govern different situations. If the national court decides that Mr Ioannidis's condition worsened while he was in Germany and that he needed to be admitted to hospital, it should apply Article 31, and the IKA should bear the costs. If, on the other hand, it is persuaded that there was no such sudden deterioration, it should settle the dispute in accordance with Article 22(1)(c), in which case the IKA is free from that obligation. The United Kingdom Government maintains that the contested Greek provision is compatible with Articles 31 and 36 of Regulation No 1408/71 and with Articles 31 and 93 of Regulation No 574/72, but not with Article 22(1)(c) and (2) of Regulation No 1408/71.

22. The Commission draws a distinction between treatment required abroad immediately, provided for in Article 22(1)(a) of Regulation No 1408/71, given to those in possession of Form E 111; planned hospital treatment, governed by Article 22(1)(c) and (2), second subparagraph, which is provided if there is prior authorisation by means of Form E 112; and treatment needed abroad by pensioners, which is covered by Article 31, and given to the bearers of Form E 111.

23. It is curious to note the profound differences between those who have submitted observations in these proceedings, not only with regard to the reply they propose but also — and this is what is surprising — in respect of the scope they accord to the same provisions of Regulation No 1408/71, which should be uniformly applicable throughout the Community. These disparities do not fail to emerge every time the social security institutions of the various Member States are confronted with financing health care provided in another Member State, as has been pointed out in a few cases decided by the Court of Justice in recent years: either because in some States the health insurance grants benefits in kind and in others it refunds part of the cost borne by the insured, or because the specific experience of social security organisations require them to adopt a well-defined approach. (17) It should be remembered that, under Article 249 EC, both Regulation No 1408/71 and Regulation No 574/72, which expands it, which were adopted in order to implement the provisions of Article 42 EC, are directly applicable throughout the Union. In that regard, the Court of Justice has stated that a Member State is not at liberty to create a situation in which the direct effect of Community regulations is compromised. (18)

24. In the present case, the preliminary discussion focuses on determining whether the provision whose interpretation is relevant to the settlement of the dispute is Article 31 of Regulation No 1408/71, to which the national court refers, or Article 22, as suggested by the IKA and most of the Member States appearing.Although the Court of Justice has already had several opportunities to examine Article 22, (19) it has only given one ruling on Article 31, and that was indirectly.

25. From the time of the judgments in the *Pierik* cases, (20) both the application *ratione personae* and the scope of Articles 22 and 31 of Regulation No 1408/71 should have been clear. However, to judge by the differences revealed by the social security institutions of the Member States, that assessment is over-optimistic.I therefore agree with the Commission that it is necessary to study the disparity between the rules applicable to active workers and pensioners, when both need medical care during a stay in a Member State in which they do not reside, and also the concordance of those rules when they go to another Member State in order to obtain planned health benefits.

26. Article 22 of Regulation No 1408/71 is in Chapter 1 of Title III, devoted to sickness and maternity benefits. Section 2 of that Chapter, which comprises Articles 19 to 24, concerns employed or self-employed workers and members of their families. (21) The article governs three situations: stay outside the competent State, return to or transfer of

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residence to another Member State during sickness or maternity, and the need to go to another Member State in order to receive appropriate treatment. For the purpose of deciding the present case, only the first and third are relevant.

27. The first situation is provided for in Article 22(1)(a), according to which a worker who satisfies the conditions of the legislation of the competent State for entitlement to benefits, and who requires immediate treatment during a stay in the territory of another Member State, is to be entitled to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence, as though he were insured with it. As we can see, the rule requires the need for benefits to be immediate.

28. The third situation is covered by Article 22(1)(c)(i) and the second subparagraph of Article 22(2). Under those provisions, a worker who is authorised by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his ailment, is entitled to benefits in kind provided on behalf of the competent institution by the institution of the place of stay, as though he were insured with it. The authorisation may not be refused where provision is not made for the treatment in question by the legislation of the Member State in which he resides, or where, owing to his present state of health and the probable development of the illness, the treatment cannot be given to him within the period usually required for obtaining treatment in the Member State in which he resides.Here the emphasis is placed on the person concerned obtaining the authorisation of the competent institution before he leaves, although the Court has acknowledged that, where a request made by an insured person on the basis of Article 22(1)(c) has been refused by the competent institution and it is subsequently established, either by the competent institution itself or by a court decision, that that refusal was unfounded, that person is entitled to be reimbursed directly by the competent institution by an amount equivalent to that which it would have borne if authorisation had been properly granted in the first place. (22)

29. In *Pierik II* , (23) the Court defined the personal scope of Article 22(1)(c) of Regulation No 1408/71. It was a matter of ascertaining whether that provision, which confers entitlement to benefits in kind on a worker, also covers a pensioner, who is not, or is no longer, at work, and who asks the competent institution for authorisation to go to a Member State other than the one in which he resides to receive there the treatment appropriate to his state of health.

The Court considered that the definition of worker, adopted for the purpose of this Regulation, has general scope and covers any person who is insured under the social security legislation of one or more Member States, whether or not he pursues a professional or trade activity. It follows that, even if they do not pursue a professional or trade activity, pensioners entitled to draw pensions under the legislation of one or more Member States come within the provisions of the regulations concerning workers by virtue of their insurance under a social security scheme, unless they are subject to special provisions laid down regarding them. (24)

30. In the judgment it is then observed that Articles 27 to 33 are in Title II, Chapter 1, Section 5, concerning pensioners and members of their families, and that they apply exclusively to those categories of insured, from which two consequences are drawn: first, that Article 31 confers on pensioners entitlement to benefits in kind where those benefits become necessary during a stay in a Member State other that the one in which they reside; second, that Article 22(1)(c), in Chapter 1, Section 2, governs the entitlement to benefits in kind of an insured person residing in a Member State who asks the competent institution for authorisation to go to the territory of another Member State to receive there the treatment appropriate to his condition.

31. It is clear from the actual wording of Article 22(1)(a) and Article 31 of Regulation No 1408/71, from the context in which they occur and from the interpretation given to them by the Court in *Pierik II* , that the rules applicable to pensioners and to all the other categories of insured persons, when they need sickness benefits in kind during a stay in a Member State other than the one in which they reside, are different and have a different content: whereas Article 31 confers on pensioners entitlement to obtain the benefits subject to no condition other than that they need them, Article 22(1)(a) provides that the state of health of the other categories of insured persons should necessitate *immediate* benefits.This fundamental differencebetween pensioners and other insured persons is expressly stated in letter a) of the instructions on the back of Form E 111, which is the document completed by the competent institution at the request of the insured person before he begins his journey or of the institution of the place of stay, if it requests the form, and which is designed to confirm that the insured person is entitled to sickness benefits during a stay in another Member State. (25)

32. I have wondered why these two situations differ in the regulations. However, the disparity is there and Article 22(1)(a) should not be applied to pensioners by analogy. By treating pensioners — who make up a sector of the population which frequently seeks medical attention, because of chronic illness or because of the havoc wreaked on their health by age — more generously than other insured persons, the legislature seeks to encourage retired persons to travel around the territory of the Union, and to prevent them from abandoning travelling because they are afraid that they might not have cover if their state of health deteriorates.The requirement that their state of health should need immediate medical attention while they are temporarily outside their country of residence or, as provided in Article 3a(4)(g) of the IKA Hospital Care Regulations, the condition that the illness should have manifested itself suddenly, may discourage older people from travelling to other Member States.

33. I should add that, if the Community legislature had wished pensioners to be treated in the same way as other insured persons, when receiving medical care during a stay in a Member State other than the one in which they reside, it would not have laid down provisions such as Article 31 of Regulation No 1408/71 and Article 31 of Regulation No 574/72, which apply only to pensioners, and would have acted as it did in respect of planned transfers, which are governed, for all insured persons, by Article 22(1)(c) of Regulation No 1408/71.

34. As we all know, in preliminary ruling proceedings, which are based on a clear separation of functions between the national courts and the Court of Justice, it is for the national court to establish the facts which gave rise to the dispute and to draw from them the appropriate conclusions for the decision it has to give. (26) As a result, the Court of Justice has no jurisdiction to rule on the facts in the main proceedings or to apply the rules of Community law which it has interpreted to national measures or situations, since those questions are matters for the exclusive jurisdiction of the national court. (27)

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35. In the light of the description of the facts given in the order for reference, and bearing in mind the provisions of Regulation No 1408/71 in respect of pensioners, on the one hand, and all other insured persons, on the other, the national court has correctly identified the problem when it asks the Court of Justice to interpret Article 31. It is therefore not appropriate to reword the first question referred for a preliminary ruling in order to give it the meaning that what the national court needs, in fact, to resolve the main dispute, is the interpretation of Article 22(1)(c), as the IKA and a good number of the Member States claim.

36. The eagerness to resort to Article 22(1)(c) is apparently motivated by the attitude of the German institution, which did not accept Form E 111. That refusal has compelled the party concerned to take a very long series of measures, including an action in Greece and interlocutory proceedings in Luxembourg, in order to clarify who should bear the cost of a benefit which, as the beneficiary of sickness insurance in a Member State, he was in all probability entitled to receive free.

37. The order for reference does not state the reasons which have led the German institution to reject the Form E 111 issued by the Greek institution and request that it forward Form E 112 instead. (28) This conduct surprises me for several reasons: first, because Article 31 of Regulation No 574/72 only requires the insured to present a certificate to the institution of the place of stay confirming his entitlement to the benefits; second, because the specific function of Form E 111 is to confirm entitlement to sickness benefits in kind; and third, because, according to the provisions of Article 93(1) of Regulation No 574/72, the actual amount of benefits in kind provided under Articles 22 and 31 of Regulation No 1408/71 is to be refunded by the competent institution to the institution which provided them, as shown in the accounts of that institution. So the German institution would have received the same amount from the Greek institution, irrespective of whether the hospital care was provided under Form E 111, as the insured must have claimed, or E 112, as the German institution wished.

38. The Commission rightly points out that it is incumbent on every social security institution of a Member State to acknowledge the validity of the certificates issued in the other States, the aim of which is to ensure the uniform and consistent application of Regulation No 1408/71, which coordinates the national social security schemes. That duty to cooperate in good faith is laid down in general terms in Article 10 EC and, in respect of cooperation between social security institutions, in Article 84 of Regulation No 1408/71. (29)

39. During recent years the Court of Justice has been faced for the first time with questions referred for a preliminary ruling in which it was asked about the consequences in a Member State of the forms issued by the social security institutions of other Member States, in implementation of Regulations No 1408/71 and No 574/72. It has construed Form E 101, which confirms the legislation applicable in the event of the temporary posting of workers, issued by the competent authority of a Member State, as being binding on the social security institutions of other Member States in so far as it certifies that workers posted by an undertaking providing temporary personnel are covered by the social security system of the Member State in which that undertaking is established. (30) It added that the competent institution which issued the Form E 101 must reconsider the grounds for its issue and, if necessary, withdraw the certificate if the competent institution of the State to which the workers are posted expresses doubts as to the correctness of the facts on which the certificate is based and, consequently, of the information it contains. (31)

40. In my view, since Form E 111 confirms entitlement to sickness benefits in kind during a stay in a Member State in which the insured does not reside, it should be accorded the same binding nature and evidential value, with respect to the social security institutions of the other Member States, as the Court has accorded to Form E 101, which confirms the affiliation of a transferred worker to the social security scheme of the Member State in which the company is established. If the institution of the place of stay finds that, in fact, the insured has gone there with the intention of receiving medical attention, (32) in application of the principle of cooperation in good faith, laid down in Article 10 EC and Article 84 of Regulation No 1408/71, it must pass on that information to the institution of the State of residence, which may cancel the validity of Form E 111 for the period during which the planned benefits were received.

41. If the institution of the place of stay were able to refuse at will the validity of Certificate E 111 issued by the institution of the State of residence, as the German institution seems to have done, that would leave without medical cover a person who, in good faith, has believed that, because he was carrying it, he was entitled to sickness benefits in kind while he was in another Member State, and the free movement of persons within the Community would be seriously obstructed. (33)

42. It seems clear to me that, behind the observations of the IKA and the various governments appearing in this case, lies a concern to prevent a request for benefits in kind made by a pensioner staying in a Member State, under cover of Form E 111, from concealing a movement to another country with the aim of receiving medical treatment, by circumventing the procedure established, for all insured persons, in Article 22(1)(c), which includes the authorisation by the competent institution by means of Form E 112.However, that concern cannot justify evading application of the rule laid down by the legislature for the specific case or applying a rule, by analogy, to a situation which it is not designed to govern. If the authorities of the Member State of residence suspect that the movement of the party concerned under cover of form E 111 has been motivated by the intention to receive medical treatment, they must evaluate, before taking a decision, not only the attitude adopted by the institution of the Member State of stay but also the documents from other sources, like, for example, the certificates issued by the hospital or by the doctors who have attended the patient. They may also consider evidence such as: checking whether the person concerned was on a long waiting-list for the treatment carried out in another Member State, or verifying whether he had recently requested, and been refused, authorisation for the movement from the competent institution; this is evidence which, while not conclusive, may, when taken together with other factors, help the authorities to reach a decision.

43. It is established in the main proceedings that the patient, a pensioner, has a heart condition and needed to be admitted to hospital while he was on a visit to Germany. The file also contains a certificate issued by the Director of the Centre and the report of the doctor who attended the patient, according to which he was admitted to hospital as a matter of urgency, owing to repeated chest pains caused by angina. It is also established that he had a valid Certificate E 111.Under Article 31 of Regulation No 1408/71, he was therefore entitled to receive sickness benefits in kind, while he was in Germany, provided by the institution of that State, in accordance with its legislation, and at the expense of the Greek institution.

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44. When a pensioner goes temporarily to a Member State in which he does not reside and needs medical care, the institution of the place of stay must apply Article 31 of Regulation No 1408/71, without imposing any additional condition or assessing whether the need for care is immediate, a requirement laid down only by Article 22(1)(a) for all other insured persons.Nor may the institution of the country of residence impose the requirement of authorisation *ex post facto* , as allowed under Article 3a(4)(g) of the IKA Hospital Care Regulations.

45. That provision seems to be designed to enable the Greek social security institution to control the way in which Article 22(1)(a) has been applied abroad, on the one hand, and to assess, on the other, whether it is appropriate, when the movement has been made urgently, to grant the authorisation provided for in Article 22(1)(c), once the medical care has been given.In the latter case, the prerequisite for authorising payment of the benefits is that the movement has been made urgently in order to avert any real risk to the patient's life. I note, however, that that requirement is even more restrictive than Article 22(1)(c) of Regulation No 1408/71, which only requires, for authorisation of the transfer and, if appropriate, the subsequent refund, the fact that, in view of the state of the patient's health and the likely development of his illness, the care cannot be provided within the period normally necessary for obtaining treatment in the State of residence.

46. Accordingly, the costs of Mr Ioannidis's hospital treatment in Germany must be borne by the institution of the State of residence, if the conditions laid down by Article 31 of Regulation No 1408/71, namely that a pensioner has stayed in a Member State in which he does not reside and that he has needed medical care, are met.

47. It is not recorded in the file whether the German sickness fund paid the cost of the hospital treatment or if the party concerned paid them directly, since the national court only states in its order that the Greek institution was asked to forward Form E 112. (34)

48. The first situation requires application of Article 36 of Regulation No 1408/71 and Article 93 of Regulation No 574/72, which govern the procedures for reimbursement of the sickness or maternity benefits in kind provided by the institution of one Member State on behalf of the institution of another Member State. Reimbursement between institutions is made in accordance with the costs reflected in the accounts of the institution which has provided the benefits, if the insured was entitled to receive them.

49. In the second situation, resort must be had to Article 34 of Regulation No 574/72, under which, if the formalities provided for in Article 31 have not been completed during the stay, and the patient has paid the medical costs, he will be reimbursed by the competent institution according to the rates of the institution of the place of stay.

50. The condition for application of Article 34 of Regulation No 574/72 is that it has not been possible to complete the formalities laid down, in so far as is of concern here, by Article 31 of that regulation. That formality consists in presenting a certificate confirming entitlement to the benefits, stating the maximum period for which these are granted in the State of residence. Failure to comply with that obligation may be due to the fact that the insured did not have Form E 111, that the institution of the place of stay has not requested it from the country of residence, or that it has not been forwarded to it in time.

51. There is no record of an agreement between the German institution and the Greek institution waiving any reimbursement or a fixed reimbursement of the benefits provided under Article 31 of Regulation No 1408/71. If there were, the former institution would have to transfer to the latter the sum which has to be refunded to the person concerned who has paid the cost of the benefit.

52. Article 34(4) of Regulation No 574/72 (35) provides an exception to the rule. It allows the competent institution to pay the expenses incurred in accordance with the rates it administers provided that it is possible to make a refund in accordance with those rates, that the expenses to be refunded do not exceed the amount determined by the Administrative Commission and that the person concerned agrees to the application of this provision. It is for the competent institution to initiate application of that procedure. However, under no circumstances is the amount of reimbursement to exceed the amount of the expenses actually incurred. (36) If the legislation of the State of residence has not provided for rates of reimbursement, the competent institution may effect the reimbursement without the agreement of the person concerned being necessary.

53. The refusal by the institution of the place of stay to accept the Form E 111 submitted by a pensioner who resides in another Member State is not considered by Article 34 of Regulation No 574/72 to be a circumstance giving rise to reimbursement by the institution of the State of residence to the insured of the costs he has borne.In my view, however, if the refusal to accept Form E 111 is unjustified, the consequences must be the same as those established in that rule, so that the pensioner is never adversely affected.

54. It should therefore be stated that Article 31 of Regulation No 1408/71 and Article 31 of Regulation No 574/72 preclude national legislation which requires, as an additional requirement, before the social security institution refunds the costs of treatment which has already taken place in hospital abroad, a special authorisation which is granted on condition that the illness of the insured, who is a pensioner, has manifested itself suddenly during a stay abroad and that medical care has been required immediately.

B — The other questions referred for a preliminary ruling

55. The national court raised the remaining questions in case the Court of Justice were to hold that the rules of Regulation No 1408/71 and Regulation No 574/72 are not incompatible with the national provision at issue, which is the subject-matter of the first question.Since the reply I propose is in the affirmative, there is no need to go on to examine the other questions.

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VI – Conclusion

56. In the light of the foregoing arguments, I suggest that the Court reply to the questions referred to it for a preliminary ruling by the Dioikiti Protodikeio Thessalonikis by declaring that:Article 31 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, and Article 31 of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71, preclude national legislation which requires, as an additional requirement, before the social security institution refunds the costs of treatment which has already taken place in hospital abroad, a special authorisation which is granted on condition that the illness of the insured, who is a pensioner, has manifested itself suddenly during a stay abroad and that medical care has been required immediately.

1 – Original language: Spanish.

2 – Administrative Court of First Instance, Thessaloniki.

3 – Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 II, p. 416), as amended by Council Regulation (EC) No 3096/95 of 22 December 1995 (OJ 1995 L 335, p. 10).

4 – Regulation (EEC) of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 (OJ, English Special Edition 1972 I, p. 159) as amended by Council Regulation (EC) No 3096/95 of 22 December 1995 (OJ 1995 L 335, p. 10).

5 – The application of Regulation No 1408/71 and Regulation No 574/72 has required the approval, by the Administrative Committee of the European Communities on Social Security for Migrant Workers, established by Article 80 of Regulation No 1408/71, of various model forms, drawn up in all the official languages, which are generally used as certificates. Those mentioned in this case were approved by Decision No 153 (94/604/EC) of 7 October 1993 on the model forms necessary for the application of Council Regulation (EEC) No 1408/71 and (EEC) No 574/72 (E 001, E 103 to E 127) (O J 1994 L 244, p. 22).

6 – This is the form used by the competent institution when authorising an insured, pursuant to Article 22(1)(c) of Regulation No 1408/71, to go to another Member State to receive there the medical treatment appropriate to his condition.

7 – This is issued in the event of refund of the cost of benefits in kind on the basis of actual costs, and gives the date of admission and discharge in the case of hospitalisation.

8 – The following hospitals are cited as examples: Geniko Kratiko, Ippokrateio, Evangelismos and Onaseio, in Athens, or Achema and G. Papanicolaou, in Thessaloniki.

9 – FEK (Official Gazette) B, 584/23.8.1984.

10 – FEK A, 179.

11 – Decision 33651/E. 1089/ 2.6.1956 of the Minister for Labour, FEK B, 126/3.7.1956.

12 – Correction of errata published in FEK B, 669/20.9.1984.

13 – FEK B, 22/20.1.1997.

14 – FEK A, 3. The definitive version resulting from the replacement of this article by Article 39 of Law 1759/1988, FEK A, 50.

15 – Under the provisions of Article 31(2) of Law 1846/1951.

16 – According to the information supplied by the Commission in its written observations, the new legislation has not made any substantial amendments to that which applied previously. This was confirmed during the hearing by the IKA's representative.

17 – For example, the Belgian Government informs the Court that it has been obliged to set up a procedure for issuing Form E 112 as a matter of urgency to pensioners staying in particular areas of Spain who are refused the medical treatment they need and have to return to Belgium in order not to endanger their health; the Austrian Government states that Member States are flexible when applying Regulations Nos 1408/71 and 574/72 in respect of health care provided in another State, so that, once the care has been provided, the institution of the place of stay asks the competent institution for the corresponding form in order to make sure, *ex post facto* , that there will be a refund of costs between the institutions; the Greek Government states that Article 31 of Regulation No 1408/71 is not interpreted uniformly in the Community and that the overwhelming majority of social security institutions in the Member States apply to pensioners, by analogy, Article 22(1)(a). I note that the Austrian Government supports that application by analogy in its observations.

18 – Case 39/72 *Commission* v *Italy* [1973] ECR 101, paragraph 17; and Case 272/83 *Commission* v *Italy* [1985] ECR 1057, paragraph 26.

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19 – See, in particular, Case 117/77 *Pierik* [1978] ECR 825, *Pierik I* ; Case 182/78 *Pierik* [1979] ECR 1977, *Pierik II* ; Case C-120/95 *Decker* [1998] ECR I-1831; Case C-158/96 *Kohll* [1998] ECR I-1931; and Case C-368/98 *Vanbraekel and Others* [2001] ECR I-5363.

20 – Cited above.

21 – In order to facilitate temporary stays and access to treatment with the authorisation of the competent institution in European Union territory, the Council extended the benefit of Article 22(1)(a) and (c) to all nationals of Member States who are insured under the legislation of a Member State and to the members of their families residing with them, even if they are neither employed nor self-employed. Council Regulation (EC) No 3095/95 of 22 December 1995 amending Regulation No 1408/71, Regulation No 574/72, Regulation (EEC) No 1247/92 amending Regulation EEC) No 1408/71 and Regulation (EEC) No 1945/93 (OJ 1995 L 335, p. 1).

22 – *Vanbraekel and Others* , cited above, paragraph 34.

23 – Cited above, paragraph 3.

24 – *Pierik* , cited above, paragraph 4.

25 – This instruction is also contained in the recent version of Form E 111, approved by Decision No 179 of 18 April 2000 on the model forms necessary for the application of Regulations (EEC) No 1408/71 and (EEC) No 574/72 (E 111, E 111 B, E 113 to E 118 and E 125 to E 127) (OJ 2002 L 54, p. 1). This new version also establishes entitlement to benefits in kind in the event of chronic illness. At the hearing the Agent of the Spanish Government said that, in June 2002, a resolution had been passed to mention also pre-existing illnesses on the form.

26 – Case 36/79 *Denkavit* [1979] ECR 3439, paragraph 12; Case 17/81 *Pabst & Richarz* [1982] ECR 1331, paragraph 12; Case C-30/93 *Ac-atel Electronics Vertriebs* [1994] ECR I-2305, and Case C-235/95 *Dumon and Froment* [1998] ECR I-4531, paragraph 25.

27 – Case 13/68 *Salgoil* [1968] ECR 661, 672; Case 51/74 *Van der Hulst* [1975] ECR 79, paragraph 12; Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraph 11; and Joined Cases C-175/98 and C-177/98 *Lirussi* [1999] ECR I-6881, paragraphs 37 and 38.

28 – The German institution is not a party in the main proceedings and therefore could not appear in the proceedings for a preliminary ruling. The German Government, which might have been able to inform the Court of Justice on this point, has not submitted observations in these proceedings.

29 – C-335/95 *Picard* [1996] ECR I-5625, paragraph 18.

30 – Case C-202/97 *FTS* [2000] ECR I-883, paragraph 59. In Case C-178/97 *Banks and Others* [2000] ECR I-2005, the Court construed Form E 101, in so far as it establishes a presumption that the self-employed person concerned is properly affiliated to the social security scheme of the Member State in which he is established, as being binding on the competent institution of the Member State to which that person goes to carry out a work assignment.

31 – Judgments in *FTS* and *Banks* , cited above, paragraphs 56 and 43 respectively.

32 – It is expressly stated in Form E 111 that the certificate does not confer entitlement to sickness benefits in kind if the person concerned has gone to another country with the aim of receiving medical treatment.

33 – At the hearing the Agent of the Spanish Government informed the Court that the Commission had brought an action for failure to fulfil to fulfil obligations against the Kingdom of Spain, because it required Form E 112 from pensioners from other Member States whose state of health necessitated hospital treatment during a stay in its territory, in particular Belgians and Italians. The proceedings were discontinued when Spain proceeded to accept Form E 111. He said, however, that other Member States still pursued that negative course of action.

34 – In reply to my questions at the hearing, the Agent of the Greek Government stated that he did not have that information and the IKA's representative said that he believed that Mr Ioannidis had paid the costs in Germany.

35 – In the version resulting from Council Regulation (EEC) No 1249/92 of 30 April 1992 (OJ 1992 L 136, p. 28). This paragraph was added in order to lay down a simplified procedure to authorise, in certain circumstances, reimbursement of the medical costs according to the rates applied by the competent institution.

36 – This rule applies only where the total amount of the costs incurred during the temporary stay is less than or equal to the amount fixed by each Member State up to a maximum of EUR 1 000. Decision No 176 (2000/582/EC) of 24 June 1999 concerning the reimbursement by the competent institution in a Member State of the costs incurred during a stay in another Member State by means of the procedure referred to in Article 34(4) of Regulation (EEC) No 574/72 (OJ 2000 L 243, p. 42).

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