OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 12 January 2017 (1)

**Case C-620/15**

**A-Rosa Flussschiff GmbH**
**v**
**Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (Urssaf) d'Alsace, assuming the rights of the Bas-Rhin Urssaf, Sozialversicherungsanstalt des Kantons Graubünden**

(Request for a preliminary ruling from the Cour de cassation (Court of Cassation, France))

(Reference for a preliminary ruling — Regulation (EEC) No 1408/71 — Social security — Determination of the legislation applicable — Article 14(2)(a)(i) — Persons who are members of the travelling personnel of an undertaking operating international passenger transport services — Swiss branch — Regulation (EEC) No 574/72 — Article 12a(1a) — E 101 certificate — Binding effect)

## I – Introduction

1. The Court has already held on many occasions that the E 101 certificate (2) issued by the competent institution (3) of a Member State to show that a worker moving within the European Union is affiliated to that Member State's social security scheme is binding on both the competent institution and the courts of the host Member State, with the result that the worker cannot therefore be made subject to the social security scheme of the latter Member State. (4)

2. In the present case, the Cour de cassation (Court of Cassation, France), sitting in full court, in essence asks the Court whether that case-law is applicable to situations where the competent institution or the courts of the host Member State find that the conditions for issue of an E 101 certificate were clearly not satisfied. (5)

3. The dispute in the main proceedings, between a German company and the French social security authorities, concerns a notice for recovery of more than two million euros, under French social security law, in respect of non-payment by that company of contributions to the French social security scheme for employees working on board cruise ships on French rivers. The French authorities consider that the employees concerned, who had for the full duration of their contracts been posted to ships sailing exclusively in France, were subject to the French social security scheme, in accordance with Article 13(2)(a) of Regulation No 1408/71, (6) which establishes the general rule that a person employed in the territory of a Member State is to be subject to the social security legislation of that State.

4. The company for its part claims that Swiss social security legislation applies to the employees concerned, relying on E 101 certificates stating that they are affiliated to the Swiss social security scheme. Those certificates were issued by the competent Swiss institution on the basis of Article 14(2)(a)(i) of that regulation, which provides that a person employed by a branch and who is a member of the travelling or flying personnel of an undertaking operating international passenger transport services is to be subject to the legislation of the State in whose territory such branch is situated.

5. The referring court considers that the conditions under which the employees in question carry out their activity clearly outside the material scope of Article 14 of Regulation No 1408/71. The question that arises is therefore whether, in such circumstances, the competent institution or the courts of the host Member State may assess and, where appropriate, call into question, in exceptional cases, the validity of an E 101 certificate issued by the competent institution of another Member State.

6. The request raises the delicate question of the balance to be struck, in the field of social security, between the principles of legal certainty and the free movement of workers within the European Union, on the one hand, and the need to ensure a correct application of the relevant provisions of Regulation No 1408/71, on the other. That issue has increased in scale in recent years as a result of the integration of the labour markets of the Member States. (7)

7. In this Opinion, I shall explain my reasons for considering that, in the circumstances of the present case, there is no justification for departing from the Court's case-law and allowing an exception to the binding effect of the E 101 certificate.

## II – Legal context

### A – *Regulation No 1408/71*

8. Article 13 of Regulation No 1408/71, entitled 'General Rules', which appears under Title II, entitled 'Determination of the legislation applicable', provides in paragraphs 1 and 2(a):

'1. ... Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

(a) A person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State.'

9. Article 14 of that regulation, entitled 'Special rules applicable to persons, other than mariners, engaged in paid employment', contained in the same title, provides in paragraph 2(a)(i):

'Article 13(2)(a) shall apply subject to the following exceptions and circumstances:

…

2. A person normally employed in the territory of two or more Member States shall be subject to the legislation determined as follows:

(a) A person who is a member of the travelling or flying personnel of an undertaking which, for hire or reward or on its own account, operates international transport services for passengers or goods by rail, road, air or inland waterway and has its registered office or place of business in the territory of a Member State shall be subject to the legislation of the latter State, with the following restrictions:

(i) where the said undertaking has a branch or permanent representation in the territory of a Member State other than that in which it has its registered office or place of business, a person employed by such branch or permanent representation shall be subject to the legislation of the Member State in whose territory such branch or permanent representation is situated.'

10. Article 84a of Regulation No 1408/71, entitled 'Relations between the institutions and the persons covered by this Regulation', provides in paragraph 3 thereof:

'In the event of difficulties in the interpretation or application of this Regulation which could jeopardise the rights of a person covered by it, the institution of the competent State or of the State of residence of the person involved shall contact the institution(s) of the Member State(s) concerned. If a solution cannot be found within a reasonable period, the authorities concerned may call on the Administrative Commission to intervene.'

11. Regulation No 1408/71 was repealed and replaced by Regulation No 883/2004 (8) with effect from 1 May 2010. (9) The relevant facts of the main proceedings therefore continue to be governed, *ratione temporis*, by Regulation No 1408/71. (10)

B – *Regulation No 574/72:*

12. Article 12a of Regulation (EEC) No 574/72, (11) which is contained in Title III, entitled 'Implementation of the provisions of the Regulation for determining the legislation applicable', provides in paragraph 1a thereof:

'For the application of the provisions of Article 14(2) … of the Regulation the following rules shall apply:

…

Where, in accordance with Article 14(2)(a) of the Regulation, a person who is a member of the travelling or flying personnel of an international transport undertaking is subject to the legislation of the Member State in whose territory the registered office or place of business of the undertaking, or the branch or permanent establishment employing him is located, or where he resides and is predominantly employed, the institution designated by the competent authority of that Member State shall issue to the person concerned a certificate stating that he is subject to its legislation.'

13. Regulation No 574/72 was repealed and replaced by Regulation No 987/2009 (12) with effect from 1 May 2010. (13) The former regulation therefore continues to apply, *ratione temporis*, to the dispute in the main proceedings. (14)

C – *The Agreement between the European Community and its Member States and the Swiss Confederation on the free movement of persons*

14. Article 8 of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons ('the EC-Switzerland Agreement'), (15) entitled 'Coordination of social security systems', provides in point (b):

'The Contracting Parties shall make provision, in accordance with Annex II, for the coordination of social security systems with the aim in particular of: …

(b) determining the legislation applicable.'

15. Annex II of the EC-Switzerland Agreement, entitled 'Coordination of social security schemes', states in Article 1 thereof:

'1. The contracting parties agree, with regard to the coordination of social security schemes, to apply among themselves the Community acts to which reference is made, as in force at the

date of signature of the Agreement and as amended by Section A of this Annex, or rules equivalent to such acts.

2. The term "Member States(s)" contained in the acts referred to in Section A of this Annex shall be understood to include Switzerland in addition to the States covered by the relevant Community acts.'

16. Section A of that annex makes reference in particular to Regulations No 1408/71 and No 574/72.

17. Under Article 90(1)(c) of Regulation No 883/2004 and Article 96(1)(c) of Regulation No 987/2009, Regulations No 1408/71 and No 574/72 are to remain in force and continue to have legal effect for the purposes of, inter alia, the EC-Switzerland Agreement for as long as that Agreement has not been modified in the light of Regulations No 883/2004 and No 987/2009.

18. By Decision No 1/2012 of the Joint Committee established under the EC-Switzerland Agreement, (16) which entered into force on 1 April 2012, Section A of Annex II to the Agreement was updated and now refers to Regulations No 883/2004 and No 987/2009. Since the relevant facts of the dispute in the main proceedings predate the entry into force of that decision, they therefore continue, *ratione temporis*, to be governed by Regulations No 1408/71 and No 574/72. (17)

**III – Main proceedings, question referred for a preliminary ruling and procedure before the Court**

19. The company A-Rosa Flussschiff GmbH ('A-Rosa'), a company incorporated under German law and which has its registered office in Germany, operates river cruises on various rivers in Europe. A-Rosa has a branch in Switzerland which handles all operational, legal and administrative matters concerning ships sailing in Europe as well as human resources in relation to the personnel used on those ships. The company has no subsidiary or branch in France.

20. A-Rosa operates in particular two cruise ships in France, on the Rhône and the Saône, on board which are employed seasonal workers who are nationals of Member States other than France and who perform hotel activities. The two ships sail exclusively on French inland waters.

21. On 7 June 2007, an unannounced inspection was made of those two A-Rosa ships, as a result of which the French social security institutions found irregularities in the social cover of the 90 or so employees engaged in hotel activities on board both ships. The employees concerned had been recruited and employed by the company's Swiss branch under employment contracts subject to Swiss law.

22. On the occasion of those inspections, A-Rosa produced a first batch of E 101 certificates, for the year 2007, issued on 6 September 2007 by the Sozialversicherungsanstalt des Kantons Graubünden (Social Insurance Institution for the Canton of Grisons, Switzerland, 'the Swiss institution'), stating that the employees in question were affiliated to the Swiss social security scheme, pursuant to Article 14(2)(a)(i) of Regulation No 1408/71.

23. On 22 October 2007, the Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (Union for recovery of social security and family allowance contributions) ('the Urssaf') of the French Department of Bas-Rhin sent A-Rosa a recovery notice for EUR 2 024 123, including default interest, for non-payment of contributions to the French social security scheme for the employees concerned for the period from 1 April 2005 to 30 September 2007.

24. On 7 July 2008, A-Rosa challenged the recovery notice before the tribunal des affaires de sécurité sociale du Bas-Rhin (Social Security Court of Bas-Rhin, France), which dismissed the action by judgment of 9 February 2011. That court found in particular that the company's activity in France was habitual, stable and continuous and that the fact that the employer had produced E 101 certificates could not justify cancellation of the disputed recovery notice.

25. On 10 March 2011, A-Rosa lodged an appeal against that judgment before the cour d'appel de Colmar (Court of Appeal, Colmar, France). The Alsace Urssaf, assuming the rights of the Bas-Rhin Urssaf, asked that court, in particular, to uphold the judgment of 9 February 2011 of the tribunal des affaires de sécurité sociale du Bas-Rhin (Social Security Court of Bas-Rhin).

26. By letter dated 27 May 2011, entitled 'Request for withdrawal of E 101 forms issued to persons employed by [A-Rosa] in France', the Bas-Rhin Urssaf asked the Swiss institution to withdraw the E 101 certificates, arguing in particular as follows:

'Since the ships' activities are carried on permanently and exclusively in France, periodic declarations concerning the employees recruited specifically for posting on board the ship ought to have been made to the French social protection bodies.

…

Since the ships sail only on French territorial waters, it follows that [Article 14(2)(a) of Regulation No 1408/71], which is concerned with the international transport of passengers, does not apply to the situation of that company's employees.

Consequently, the E 101 forms issued for those employees ought not to have been drawn up on the basis of [Article 14(2)(a) of Regulation No 1408/71].'

27. By letter of 18 August 2011, addressed to the Bas-Rhin Urssaf, the Swiss institution noted as follows: (18)

'The company [A-Rosa] offers trips on board cruise ships on the Danube, the Rhône/Saône and the Rhine. The company also engages in considerable business activities in Switzerland. The Swiss subsidiary in Chur carries out all activities relating to the operation of the cruise ships. The personnel are also recruited through the Swiss subsidiary in Chur.

The Danube and Rhine cruises in particular pass through several European countries. [A-Rosa] also states that crew members are also employed by rotation on different ships and itineraries. The persons employed by [A-Rosa] in principle satisfy the conditions laid down in [Article 14(2)(a) of Regulation No 1408/71].

We have drawn [A-Rosa]'s attention to the fact that under [Article 14(2)(a) of Regulation No 1408/71], the special rules for employees apply only if the latter are working for an international transport undertaking in the territory of *two or more Member States*. If the persons actually carry on their activities on board ships only in French territory, the provisions of French law apply by virtue of the place of activity principle ([Article 13(2)(a) of Regulation No 1408/71]).

We have now required [A-Rosa] … to deduct social security contributions [in accordance with] the law of the respective country for persons who are actually working in only one State of the [European Union].

In the light of all the facts and given, in particular, that all social security contributions were deducted and paid in Switzerland in 2007 for the persons in respect of whom you are raising a claim, we ask that you abandon any retrospective correction making the social insurance subject to the French legal provisions.'

28. In the course of the proceedings before the cour d'appel de Colmar (Court of Appeal, Colmar), A-Rosa produced a second batch of E 101 certificates, for the years 2005 and 2006, issued by the competent Swiss institution on 14 May 2012 pursuant to Article 14(2)(a)(i) of Regulation No 1408/71.

29. By judgment of 12 September 2013, the cour d'appel Colmar (Court of Appeal, Colmar) rejected A-Rosa's appeal for the most part. In particular, that court held that the E 101 certificates produced by the company did not release it from its obligations in relation to the French social security scheme, to which the employees in question should be subject in

accordance with Article 13(2)(a) of Regulation No 1408/71. With regard to the exception provided for in Article 14(2)(a)(i) of that regulation, that court noted as follows:

'... On the one hand, the only E 101 certificates submitted are not linked with the posts actually occupied on board the vessels Luna and Stella, and the name of those vessels is not even indicated.

On the other hand, moreover, the appellant company does not state that it assigned the staff in question to tasks other than hotel activities on the vessels Luna and Stella. By its own admission, it operated those two cruise ships only on the Rhône and the Saône from April to November and it kept them at mooring in Lyon during the winter period.

It follows that, even if customers could have been canvassed abroad and could have contracted with the appellant company outside French territory, the transport of passengers on inland waterways, to which the staff in question were assigned, was carried out only within national borders and was not of an international nature.

The appellant company had certainly arranged for E 101 certificates to be issued pursuant to [Article 14(2)(a)(i) of Regulation No 1408/71], but it should be noted that it was careful not to specify either the places of performance of the work or the vessels to which staff were assigned. It thus reserved the right to employ the staff recruited in international transport, particularly on the ships which it claims, moreover, to operate on the Rhine and on the Danube, and there is no reason to doubt the validity of the E 101 certificates submitted at the hearing.

However, since the staff in question were ultimately employed only for cruises in France, the appellant company cannot benefit from the exception arrangements provided for the international transport of passengers.'

30. It is apparent from the judgment of the cour d'appel de Colmar (Court of Appeal, Colmar) of 12 September 2013 that the Alsace Urssaf had the Swiss institution joined to the proceedings but that it failed to appear and was not represented.

31. On 21 October 2013, A-Rosa appealed against that judgment before the Cour de cassation (Court of Cassation), which, sitting in full court, decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is the effect of an E 101 certificate issued, in accordance with Article 11(1) and Article 12a(1a) of Regulation … No 574/72 … by the institution designated by the competent authority of the Member State whose social security legislation remains applicable to the situation of the employee, binding, first, on the institutions and authorities of the host Member State and, secondly, on the courts of that Member State, where it is found that the conditions under which the employee carries out his activity clearly do not fall within the material scope of the exceptions set out in Article 14(1) and (2) of Regulation No 1408/71?'

32. Written observations have been lodged by A-Rosa, the Alsace Urssaf, the Belgian and Czech Governments, Ireland, the French and Cypriot Governments, and by the European Commission. A-Rosa, the Alsace Urssaf, the Belgian Government, Ireland and the French Government, and the Commission presented oral argument at the hearing on 5 October 2016.

## IV – Legal assessment

### A – *Introductory remarks*

33. By the question which it has referred for a preliminary ruling, the referring court asks the Court, in essence, to specify whether the binding effect which the Court's case-law normally gives to an E 101 certificate (19) applies to the competent institution and to the courts of the host Member State, where the latter find that the conditions of the employee's activity clearly do not fall within the material scope of Article 14(1) and (2) of Regulation No 1408/71.

34. In support of its request, the referring court notes in particular that that issue currently arises in a large number of disputes owing to the internationalisation of business activity and

the adoption of tax and social security optimisation strategies, such as to call into question the principles of freedom of movement for workers, freedom to provide services and the existence of effective and undistorted competition within the internal market. It is also clear from the observations presented before the Court that this request follows on from two judgments handed down on 11 March 2014 by the criminal chamber of the Cour de cassation (Court of Cassation), calling into question, in criminal proceedings, the binding effect of an E 101 certificate issued by the competent institution of another Member State. (20)

35. It should first of all be noted that it is apparent from the order for reference that the E 101 certificates in question were issued by the Swiss institution under Article 14(2)(a)(i) of Regulation No 1408/71, namely the exception for persons who are members of the travelling or flying personnel of an undertaking which operates international transport services for passengers or goods. (21) It follows that the question raised by the referring court concerning the binding effect of the E 101 certificate arises, in this particular case, only with regard to that provision. The binding effect of the E 101 certificate cannot in fact extend beyond the actual content of that certificate. I therefore take the view that the question referred for a preliminary ruling in reality concerns that provision and not any other exceptions provided for in that article. (22)

36. Next, it should be noted that the referring court has said nothing to suggest, as the Alsace Urssaf and the French Government seem to claim, (23) that this case is concerned with fraud or abuse of right on the part of A-Rosa or the workers concerned. In the analysis which follows, I shall therefore start from the assumption that the question referred for a preliminary ruling is not seeking clarification as to the applicability of the Court's case-law on the binding effect of the E 101 certificate in the event of abuse of right or fraud. (24)

37. On the other hand, I consider that, by its question, the referring court wishes to know whether the competent institution or the courts of the host Member State can disregard an E 101 certificate in order to make the worker subject to that Member State's social security scheme in a situation such as that at issue in the main proceedings, where that institution or those courts find that the conditions of the employee's activity clearly do not fall within the material scope of the provision on the basis of which the E 101 certificate was issued, in this case Article 14(2)(a)(i) of Regulation No 1408/71, even though, despite such a finding, the institution which issued the certificate has not withdrawn or cancelled it. (25)

38. In that regard, it is apparent from the documents before the Court that in this case there has been some dialogue between the French authorities and the Swiss institution which issued the E 101 certificates concerning the withdrawal of those certificates. In that context, the Swiss institution acknowledged to the French authorities that Article 14(2)(a) would not apply to the workers concerned *if* they were actually carrying on their activity on board the ships only on French territory. (26)

39. The Swiss institution has not however made any specific assessment of whether and to what extent this was the situation in which the workers in question found themselves, in order to determine whether each of the certificates should be withdrawn or cancelled. Furthermore, that institution asked the French authorities not to make the workers subject to the insurance provisions of French law retrospectively, a request which the French authorities implicitly rejected. The recovery notice addressed to A-Rosa in fact presupposed precisely such a retrospective adjustment. (27) In short, the dialogue between the French authorities and the Swiss institution failed to resolve the issues raised in this case, in particular the question of the withdrawal of the E 101 certificates and the adjustments to be made in that regard.

40. The question of principle at the heart of this case is that of establishing which national authority is, in such a situation, ultimately competent to determine the validity of the E 101 certificate and hence to determine the social security legislation applicable to the situation of the worker concerned under the provisions of Title II of Regulation No 1408/71. Does the institution which issued the E 101 certificate always have the last word as to the certificate's binding force? Or, in such a situation, must the competent institution of the host Member State or, at the very least, the courts of that Member State be allowed to disregard the E 101 certificate where the issuing institution has not itself withdrawn or cancelled it?

B – *Proposed answers*

41. A-Rosa, the Czech Government, Ireland and the Cypriot Government and the Commission propose that the answer to the question referred for a preliminary ruling should be that the E 101 certificate also has binding effect in a situation, such as that at issue in the main proceedings, where the competent institution or the courts of the host Member State have found that the conditions under which the employee carries out his activity clearly do not fall within the material scope of Article 14(2)(a)(i) of Regulation No 1408/71. Those parties maintain that it follows from the case-law of the Court, starting with the judgment in *FTS*, (28) that only the institution which issued the E 101 certificate, in this case the Swiss institution, is competent to decide to cancel or not to apply the E 101 certificate, by withdrawing it if it finds that it issued the certificate in error.

42. The Alsace Urssaf and the French Government, on the other hand, essentially propose that the Court depart from that case-law by allowing the competent institution and the courts of the host Member State to disregard the E 101 certificate where the provision on the basis of which the certificate was issued clearly does not apply. Those parties refer, first, to the weaknesses in the dialogue and conciliation procedures provided for by Regulation No 1408/71, in terms of ensuring that the host Member State has an effective means of redress if the State issuing the E 101 certificate fails to cooperate or if no agreement is reached with it. Secondly, those parties rely on the importance accorded by the Court's case-law, in other contexts, to the prevention of unfair competition and social dumping. (29)

43. The Belgian Government, for its part, considers that, in the situation which is the subject matter of this question for a preliminary ruling, there is no need to depart from the Court's case-law for it to be possible for the competent institution and the courts of the host Member State to disregard the E 101 certificate, since it would simply be necessary to make a *prima facie* finding that the certificate was issued for an activity different from that carried out by the worker to which it refers.

C – *The system of conflict rules provided for by Regulation No 1408/71 and the case-law of the Court concerning the binding effect of the E 101 certificate*

44. Before addressing the issue of a departure from the Court's case-law concerning the binding effect of the E 101 certificate, I think it is worth reviewing the main characteristics of the system of conflict rules established by the provisions of Title II of Regulation No 1408/71 and the considerations underlying that case-law.

45. It should be noted first of all that although the sole purpose of Regulation No 1408/71 is to establish a system of coordination of national social security legislation, while respecting the special characteristics of that legislation, (30) the system of conflict rules laid down by Regulation No 1408/71 is mandatory for the Member States. (31) As the Court itself has held, the provisions of Title II of Regulation No 1408/71, which includes Article 14(2)(a)(i), establish a complete and uniform system of conflict rules the aim of which is to ensure that workers moving within the European Union are subject to the social security scheme of only one Member State, in order to prevent the national legislation of more than one Member State from being applicable and to avoid the attendant complications of such a situation. (32)

46. That general principle that the legislation of a single Member State applies in matters of social security is enshrined in Article 13(1) of Regulation No 1408/71, which provides that the persons to whom that regulation applies are to be subject to the legislation of a single Member State only. (33)

47. The purpose of the E 101 certificate is to ensure that that principle is observed, aiming to prevent conflicts of competence arising in specific cases as a result of different assessments of the social security legislation applicable. (34) In that regard, the E 101 certificate helps to provide legal certainty for workers moving within the European Union (35) and hence to facilitate freedom of movement for workers and freedom to provide services within the European Union, which is the objective of Regulation No 1408/71. (36)

48. So far as the legal effect of the E 101 certificate is concerned, it is settled case-law that as long as that certificate is not withdrawn or declared invalid, it is binding on the competent institution of the host Member State in so far as that institution must take account of the fact

that the worker is already subject to the social security legislation of the State in which the undertaking employing him is established. That institution cannot therefore subject the worker in question to its own social security system. (37) The Court has also made clear that the E 101 certificate also binds the courts of the host Member State, which are not therefore entitled to scrutinise the validity of an E 101 certificate as regards the certification of the matters on the basis of which such a certificate was issued. (38)

49. Thus, the provisions of Regulation No 1408/71, as interpreted by the Court, not only establish a system of conflict rules, but at the same time introduce a system of division of jurisdiction between Member States, (39) such that the institution which issued the E 101 certificate is alone competent to review its validity and to determine, either on its own initiative or in response to a request from the competent institution of another Member State, whether, in the light of the information received concerning the worker's actual situation, that certificate should be withdrawn or cancelled, which would have the effect that that certificate would no longer be binding on the competent institutions and the courts of the other Member States. (40)

50. The Court's insistence on the issuing institution's sole competence to review the validity of the E 101 certificate (41) is not due to a formalistic approach but is, in my view, based on the need to ensure observance of the principle that the legislation of a single Member State applies, a principle set out in Article 13(1) of Regulation No 1408/71. Indeed, recognition of a parallel competence for the host Member State would inevitably involve a risk of conflicting decisions concerning the legislation applicable in a particular case and hence a risk of double social security cover, with all the consequences which that would entail, including a worker having to pay two lots of contributions. (42) The worker would also have no means of redress to prevent such an outcome. (43)

51. The risk of contradictory decisions is, in my view, by no means insignificant, given the complexity of the rules concerned and the opposing national interests prevailing in social security matters. As this case clearly illustrates, the question of the social security legislation applicable is likely to give rise to divergent opinions, even where the competent institution or the courts of the host Member State believe that the worker's situation is clearly not covered by the provision on the basis of which the E 101 certificate has been issued. (44)

52. Even assuming that the contributions already paid could be reclaimed, the possibility that he might be subject to the host Member State's social security scheme would be likely to create legal uncertainty for the worker. However, as the Court has pointed out, the requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which those rules impose on them. (45) Moreover, reclaiming such contributions would inevitably involve administrative or legal complications, which runs counter to the general objective of Regulation No 1408/71 of facilitating freedom of movement for workers within the European Union. (46)

53. In my view, the foregoing observations apply just as much for the host Member State's competent institution as for its courts. The consequences for the worker concerned are no less serious if the E 101 certificate is disregarded as a result of legal proceedings. (47)

54. What is more, the possibility that the courts of the host Member State might disregard an E 101 certificate from another Member State seems to me to be difficult to reconcile with the general principle that decisions by the authorities of one Member State are reviewed by the courts of that State. (48) Since the E 101 certificate certifies that the worker is affiliated to the social security scheme of the Member State of the institution that issued it, that certificate must be considered an act of that Member State. (49)

55. It follows from the foregoing that the Court's existing case-law on the binding effect of the E 101 certificate is based on general considerations relating to the principles and objectives underlying the conflict rules of Regulation No 1408/71. It is therefore not possible to envisage any departure from that case-law unless it is shown that such a departure is truly necessary in order to ensure that those rules are correctly applied.

56. This applies all the more so since, in revising the regulatory framework for the coordination of social security systems with effect from 1 May 2010, the European legislature opted for a codification of the interpretation established by the Court's case-law concerning the binding effect of the E 101 certificate, so that the issuing institution retains sole competence for assessing the validity of the E 101 certificate. (50)

57. Next, it should be noted that, contrary to what the Belgian Government argues, (51) for the Court to allow the possibility that the competent institution or the courts of the host Member State might be able to disregard an E 101 certificate issued by the competent institution of another Member State, in a situation such as that at issue in the main proceedings, would undoubtedly constitute a departure from the Court's case-law. Such an exception to the binding effect of the E 101 certificate would entail a derogation from the division of powers between the Member States as established by that case-law.

58. In the analysis which follows, I shall examine the two main arguments raised by the Alsace Urssaf and the French Government in support of their proposals that an exception be introduced to the binding effect of the E 101 certificate, namely, first, the alleged deficiencies in the dialogue and conciliation procedures provided for by Regulation No 1408/71 for the purpose of ensuring that the host Member State has an effective means of obtaining the withdrawal of an E 101 certificate (Section D) and, secondly, the importance given by the Court's case-law, in other contexts, to the prevention of unfair competition and social dumping (Section E). (52)

D – *The dialogue and conciliation procedures established by Regulation No 1408/71*

59. Although the competent institution and the courts of the host Member State are not permitted to disregard the E 101 certificate, Regulation No 1408/71 does, on the other hand, provide for a procedure to be followed in order to obtain the withdrawal or cancellation of that certificate by the issuing institution in a situation such as that at issue in the main proceedings, where it is found that the conditions for issue of the certificate are clearly not satisfied.

60. That procedure is based on the principle of sincere cooperation between Member States, enshrined in Article 4(3) TEU, which binds both the host Member State and the State issuing the E 101 certificate.

61. On the one hand, as is clear from Article 84a(3) of Regulation No 1408/71, the principle of sincere cooperation requires the competent institution of the host Member State to open a dialogue procedure with the institution issuing the E 101 certificate if it considers that the conditions for issue of the certificate are not satisfied. (53) This applies particularly, in my view, where, as in the present case, the competent institution of the host Member State considers the certificate to be incomplete. (54) In such a case, the principle of cooperation implies that the issuing institution must have the possibility of correcting the certificate or, if necessary, withdrawing it.

62. Neither can the time that the certificate was issued have any effect on the obligation of the competent institution of the host Member State to open a dialogue with the issuing institution if it considers that the E 101 certificate should be withdrawn. (55) It should be noted that while it is preferable that the E 101 certificate be issued before the start of the period it covers, it may also be issued during that period or even after its expiry. (56) That conclusion is reached because the certificate does not of itself create any right or legal relationship, but is intended simply to attest that the worker is affiliated to the issuing institution's social security scheme during the period shown.

63. On the other hand, the principle of sincere cooperation requires the institution issuing the E 101 certificate to carry out a proper assessment of the facts relevant for the application of the rules relating to the determination of the legislation applicable in the matter of social security and, consequently, to guarantee the correctness of the information contained in the E 101 certificate. (57) In that context, it is incumbent on that institution to reconsider the grounds for issue of the E 101 certificate and, if necessary, to withdraw it if the competent institution of the host Member State expresses doubts as to the correctness of the facts on which the certificate is based and, consequently, of the information contained therein, in

particular because the information does not correspond to the requirements of Article 14 of Regulation No 1408/71. (58)

64. If the institutions concerned fail to reach a solution within a reasonable time, Article 84a(3) of Regulation No 1408/71 provides for the possibility of referring the matter to the Administrative Commission on Social Security for Migrant Workers ('the Administrative Commission'). (59) Under Article 81(a) of Regulation No 1408/71, that commission is tasked in particular with dealing with all administrative questions and questions of interpretation arising from that regulation. (60)

65. If the Administrative Commission does not succeed in reconciling the points of view of the institutions concerned on the subject of the legislation applicable in a particular case, it remains open to the host Member State, without prejudice to any legal remedies existing in the Member State to which the issuing institution belongs, (61) to bring infringement proceedings against the latter Member State under Article 259 TFEU. (62) I would add that such proceedings may also be instituted through the Commission. (63) In this case, however, infringement proceedings could not be brought against the State issuing the E 101 certificates, since the Swiss Confederation is not an EU Member State. On the other hand, the EC-Switzerland Agreement provides for the possibility of referring a matter to the Joint Committee, established under that agreement, which is specifically responsible for deciding the measures to be taken in the event of serious economic or social difficulties. (64)

66. In order to avoid conflicting decisions being handed down by the competent institutions or the courts of different Member States concerning the legislation applicable in a particular case, which would considerably compromise the legal certainty of the workers concerned and hence adversely affect their freedom of movement within the Union, the dialogue and conciliation procedures provided for by Regulation No 1408/71 exclude any unilateral action by the competent institution or the courts of the host Member State.

67. The Alsace Urssaf and the French Government maintain, however, that such unilateral actions are necessary in a situation, such as that at issue in the main proceedings, where the issuing institution has not withdrawn the certificate despite a finding that the conditions for issue of an E 101 certificate are clearly not satisfied.

68. Nevertheless, that argument cannot reasonably be relied upon in this case to justify an exception to the binding effect of the E 101 certificate.

69. I consider that it has not been demonstrated that the procedures established by Regulation No 1408/71 are incapable of ensuring the correct application of the system of conflict rules provided for by that regulation, even in a situation such as that at issue in the main proceedings, provided those procedures are actually followed through to completion by the competent institutions of the Member States concerned. In that regard, it should be noted that in the present case the French authorities did not exhaust the remedies available to them under Regulation No 1408/71.

70. First, while the French authorities did indeed initiate a dialogue with the Swiss issuing institution, asking it to withdraw the E 101 certificates in question, those authorities nevertheless abandoned that dialogue, as the French Government confirmed at the hearing, following that institution's response of 18 August 2011.

71. It seems to me that with that response the Swiss institution, on the one hand, agreed with the French authorities' position regarding the interpretation of Article 14(2)(a)(i) of Regulation No 1408/71, in recognising that that provision was not applicable to the workers concerned if those workers were actually carrying out their activity on board ships solely in French territory. On the other hand, the Swiss institution nevertheless failed to withdraw or cancel the disputed E 101 certificates and made no specific assessment of each certificate in order to ascertain whether, in view of the French authorities' findings, those certificates should be withdrawn or cancelled. (65) Moreover, the Swiss institution requested that the French authorities dispense with any retrospective correction, which those authorities have refused to do. (66)

72. It follows that a number of issues remained unresolved following the dialogue between the French authorities and the Swiss institution. However, the possibility cannot be ruled out that an agreement might have been reached between them if the dialogue had been continued.

73. I also note that the French authorities did not open the dialogue with the issuing institution until more than three and a half years after the recovery notice for non-payment of contributions to the French scheme was served on A-Rosa. Indeed, those authorities unilaterally made the workers concerned subject to the French social security scheme, taking no account of the fact that they were in fact already affiliated to the Swiss social security scheme. (67)

74. Secondly, the possibility of referring the matter to the Administrative Commission, provided for in Article 84a(3) of Regulation No 1408/71, with a view to reconciling the positions of the French authorities and the Swiss institution, was not explored in this case. Even though that commission's decisions do not have binding force, (68) the possibility that a solution might have been found with its help cannot be ruled out.

75. It follows from the foregoing that the facts of this particular case cannot serve as a basis for uncovering supposed deficiencies in the procedures established by Regulation No 1408/71, since those procedures were not in fact properly followed in this case. Furthermore, I can see no basis for the Court considering, in more general terms, those procedures to be altogether inadequate for ensuring that the provisions of that regulation are applied correctly.

76. I am in no way seeking to rule out the possibility that it might be desirable to improve the procedures established under Regulation No 1408/71 in order to ensure the correct application of the provisions of Title II of that regulation. (69) However, that issue is essentially a matter for the European legislature. In that regard, I note that some changes have already been made (70) and that the matter is currently the subject of legislative discussions at European level. (71)

77. In the light of all of the foregoing considerations, I consider that the arguments raised by the Alsace Urssaf and the French Government concerning the alleged deficiencies in the procedures established by Regulation No 1408/71 cannot reasonably be relied on to justify an exception to the binding effect of the E 101 certificate.

E – *The case-law on the prevention of unfair competition and social dumping*

78. The Alsace Urssaf and the French Government refer to the Court's case-law according to which the overriding reasons in the general interest which are capable of justifying a restriction on the freedom to provide services include, in particular, the prevention of unfair competition by undertakings which pay their posted workers less than the minimum wage, since that objective includes an aim of protecting workers by preventing social dumping. (72)

79. Those parties maintain that, by analogy, the objective of preventing unfair competition and social dumping would, exceptionally, justify an E 101 certificate not being binding on the competent institution or the courts of the Member State. In that regard, the Alsace Urssaf notes that some national social security institutions do not 'play the game', since they do not make even the minimum of checks before issuing the E 101 certificates requested by an employer. Similarly, the French Government considers that some institutions or authorities of the State issuing E 101 certificates may be tempted to supply E 101 certificates which should not be issued, thereby engaging in a form of unfair competition against other Member States.

80. It should be noted that the case-law relied on concerns the question whether, in an area which has not been harmonised, (73) objectives such as the prevention of unfair competition and social dumping may be taken into account as overriding requirements in the general interest capable of justifying restrictions on freedom of movement for workers and freedom to provide services within the European Union.

81. In the context of the present case, restrictions on freedom of movement would be justified not so much by the acts of certain economic players as by the failure of other Member

States to put in place adequate controls for ensuring the correct application of the system of conflict rules provided for by the provisions of Title II of Regulation No 1408/71.

82. It follows that the problems raised by the Alsace Urssaf and by the French Government relating to unfair competition and social dumping could actually be resolved by the Member States simply complying with their obligations under Regulation No 1408/71. As explained above, ensuring such compliance by the Member States is precisely the purpose of the dialogue and conciliation procedures established by that regulation. (74)

83. In the light of that finding, I consider that the objectives of preventing unfair competition and social dumping cannot reasonably be relied on in this case to justify an exception to the binding effect of the E 101 certificate.

84. In that regard, it should also be recalled, as the Commission has stated, that Member States are bound by their obligations under EU law regardless of any failure by other Member States to perform their obligations. (75) A Member State cannot unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State of the rules of EU law. (76) Otherwise, the system of conflict rules established by Regulation No 1408/71 would be in jeopardy.

85. By way of conclusion, it should be recalled that the analysis made in this Opinion does not cover cases of abuse of right or of fraud on the part of the worker or his employer, in the light of the circumstances of the main proceedings. (77) It cannot therefore be ruled out that it may in future be necessary to provide further clarification as to the applicability of the case-law on the binding effect of the E 101 certificate to situations in which such abuse or such fraud has been found.

## V – Conclusion

86. In the light of the foregoing considerations, I propose that the Court should respond to the question referred for a preliminary ruling by the Cour de cassation (Court of Cassation, France) as follows:

As long as it is not withdrawn or declared invalid by the institution which issued it, an E 101 certificate issued in accordance with Article 12a(1a) of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, certifying that the employed person is affiliated to the social security scheme of that Member State pursuant to Article 14(2)(a)(i) of Regulation (EEC) No 1408/71 of the Council 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, is binding on the competent institution and the courts of the host Member State, even if they find that the conditions under which the employed person carries out his activity clearly do not fall within the material scope of the latter provision.

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1 Original language: French.

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2 The E 101 certificate, entitled ‘certificate concerning the applicable legislation’, is a model form prepared by the Administrative Commission on social security for migrant workers, referred to in Title IV of Regulation No 1408/71. See Administrative Commission Decision No 202 of 17 March 2005 on model forms necessary for the application of Council Regulations (EEC) No 1408/71 and (EEC) No 574/72 (E 001, E 101, E 102, E 103, E 104, E 106, E 107, E 108, E 109, E 112, E 115, E 116, E 117, E 118, E 120, E 121, E 123, E 124, E 125, E 126 and E 127) (2006/203/EC) (OJ 2006 L 77, p. 1). Under the new Regulations (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1) and (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation No 883/2004 (OJ 2009 L 284, p. 1), the E 101 certificate has from 1 May 2010 become portable document A1.

3 For the term ‘competent institution’, see Article 1(o) 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 (OJ, English Special Edition, 1971 (II), p. 416), as amended by Council Regulation (EEC) No 1390/81 of 12 May 1981 (OJ 1981 L 143, p. 1), Council Regulation (EC) No 1606/98 of 29 June 1998, (OJ 1998 L 209, p. 1), and Regulation (CE) No 631/2004 of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 100, p. 1) (‘Regulation No 1408/71’).

4 See, in particular, judgments of 10 February 2000, FTS (C-202/97, EU:C:2000:75); of 30 March 2000, Banks and Others (C-178/97, EU:C:2000:169); and of 26 January 2006, Herbosch Kiere (C-2/05, EU:C:2006:69).

5 That topic is also the subject matter of other cases, still pending before the Court. See in particular Case C-474/16, *Belu Dienstleistung and Nikless*. See also, in that regard, Cases C-359/16, *Altun and Others*, and C-356/15, *Commission* v *Belgium*.

6 See footnote 3.

7 In 2012 and 2013, the total number of issued A1 certificates (the new document replacing the E 101 certificate) was 1.53 million and 1.74 million, respectively. More particularly, the number of A1 certificates issued to persons carrying out an activity in two or more Member States has increased significantly, that is from 168 279 in 2010 to 370 124 in 2013, an increase of 120% in that period. See Pacolet, J., and De Wispelaere, F., *Posting of workers — Report on A1 portable documents issued in 2012 and 2013*, published by the Commission in December 2014, p. 8.

8 See footnote 2. It should be pointed out that the specific rules applicable to persons working in the international transport sector are not included in that regulation. Those persons are now covered by the provision set out in Article 13 of that regulation concerning persons working in two or more Member States. See Commission Practical Guide of December 2013 on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland, pp. 24 and 31.

9 See Article 91 of Regulation No 883/2004 and Article 97 of Regulation No 987/2009.

10 See also points 13, 17 and 18 of this Opinion.

11 Council Regulation of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition, 1972 (I), p. 160), as amended by Regulation (EC)

No 647/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 1) (‘Regulation No 574/72’).

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12 See footnote 2.

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13 See Article 96(1) of Regulation No 987/2009.

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14 See also points 11, 17 and 18 of this Opinion.

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15 Agreement signed in Luxembourg on 21 June 1999 and approved on behalf of the European Community by Decision 2002/309/EC, Euratom of the Council and of the Commission as regards the Agreement on Scientific and Technological Cooperation of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation (OJ 2002 L 114, p. 1).

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16 Decision No 1/2012 of 31 March 2012 replacing Annex II to that Agreement on the coordination of social security schemes (OJ 2012 L 103, p. 51).

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17 See also Annex II, Section A, points 3 and 4, to the amended version of the EC-Switzerland Agreement, which still refers to Regulations No 1408/71 and No 574/72 ‘when cases are concerned which occurred in the past’.

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18 A translation of the original of that letter, which was written in German, has been provided by the French Government.

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19 See, in particular, judgments of 10 February 2000, FTS (C-202/97, EU:C:2000:75); of 30 March 2000, Banks and Others (C-178/97, EU:C:2000:169); and of 26 January 2006, Herbosch Kiere (C-2/05, EU:C:2006:69).

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20 Judgments No 1078 (FR:CCASS:2014:CR01078) and No 1079 (FR:CCAS:2014:CR01079) of 11 March 2014. By those judgments, the criminal chamber of the Cour de cassation (Court of Cassation) found two air transport companies, British and Spanish, respectively, guilty of concealed employment where those companies had submitted E 101 certificates stating that the workers in question were affiliated to the social security schemes of other Member States. That court considered that it was not necessary to refer a question to the Court for a preliminary ruling.

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21 See points 22 and 28 of this Opinion.

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22 More particularly, I believe that this case is not concerned with the exceptions set out in Article 14(1) of Regulation No 1408/71 for persons *posted* to the territory of other Member States.

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23 At the hearing, the Alsace Urssaf argued that, in the present case, all the French courts had found there to be fraud. The French Government, for its part, states in its written observations that A-Rosa probably concealed the fact that the employees in question were working in only one Member State when that company applied for the certificates which it subsequently presented for the Urssaf's inspection, so that employees who were nationals of EU Member States would not be covered by French legislation. The French Government states that the French Cour des comptes (Court of Auditors) estimated that fraud involving undeclared posted workers resulted in a loss of EUR 380 million in contributions to the French social security scheme.

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24 In accordance with the settled case-law of the Court, in a reference for a preliminary ruling under Article 267 TFEU, the national court alone has jurisdiction to find and assess the facts in the case in the main proceedings. See, for example, judgment of 28 July 2016, *Kratzer*(C-423/15, EU:C:2016:604, paragraph 27).

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25 I would point out that, in this case, the parties to the main proceedings and the parties intervening before the Court have expressed divergent views as to whether or not the situation of the workers concerned falls within the scope of Article 14 of Regulation No 1408/71. A-Rosa argues that the workers' situation is covered by both paragraph 1 and paragraph 2 of Article 14, claiming that the employees in question were engaged to work on all the company's cruise ships regardless of their geographical location. The Alsace Urssaf, on the other hand, takes the view that neither of those two paragraphs is applicable in this case, a view shared by Ireland. The Commission, for its part, agrees with the French courts' analysis that Article 14(2)(a) of Regulation No 1408/71 is clearly not applicable. However, it takes the view that the referring court was wrong to base its question for a preliminary ruling on the premiss that the employees obviously fall outside the scope of Article 14(1)(a). Finally, the Cypriot Government maintains that since the E 101 certificates were issued by the competent institution they must be assumed to have been issued in accordance with the rules and to reflect the actual circumstances.

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26 See point 27 of this Opinion.

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27 The recovery notice addressed to A-Rosa on 22 October 2007 concerned the period from 1 April 2005 to 30 September 2007. See point 23 of this Opinion.

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28 Judgment of 10 February 2000, FTS (C-202/97, EU:C:2000:75).

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29 Those parties also raise a third argument concerning the need to prevent abuse of right and fraud. Given that it does not appear from the order for reference that this case is concerned with an abuse of right or fraud, I consider that it is not necessary to address that argument in the present case. See, in that regard, point 36 of this Opinion.

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30 See fourth recital of Regulation No 1408/71 and judgment of 3 April 2008, Derouin (C-103/06, EU:C:2008:185, paragraph 20).

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31 See judgment of 14 October 2010, van Delft and Others (C-345/09, EU:C:2010:610, paragraph 52).

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32 See judgment of 4 October 2012, Format Urządzenia i Montaże Przemysłowe (C-115/11, EU:C:2012:606, paragraph 29 and the case-law cited).

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33 See point 8 of this Opinion. Concerning the principle of the applicability of the legislation of a single Member State, see judgment of 26 October 2016, Hoogstad (C-269/15, EU:C:2016:802, paragraphs 35 and 36) and recital 8 of that regulation.

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34 See, to that effect, Opinion of Advocate General Lenz in Calle Grenzshop Andresen (C-425/93, EU:C:1995:12, point 60).

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35 It is apparent from the travaux préparatoires for Article 12a(1a) of Regulation No 574/72 that that article was inserted 'out of concern for legal safety'. See explanatory memorandum to the proposal resulting in adoption of Regulation No 647/2005 amending Regulation No 574/72 (COM(2003) 468 final, point 2). See, also, judgment of 12 February 2015, Bouman (C-114/13, EU:C:2015:81, paragraph 27).

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36 See, to that effect, judgment of 26 January 2006, Herbosch Kiere (C-2/05, EU:C:2006:69, paragraph 20). See, also, second recital of that regulation and judgment of 26 May 2005, Allard (C-249/04, EU:C:2005:329, paragraph 31).

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37 To that effect, see, in particular, judgments of 10 February 2000, FTS (C-202/97, EU:C:2000:75, paragraph 55); of 30 March 2000, Banks and Others (C-178/97, EU:C:2000:169, paragraph 42); and of 26 January 2006, Herbosch Kiere (C-2/05, EU:C:2006:69, paragraph 26). See, also, judgment of the EFTA Court of 14 December 2004, *Tsomakas Athanasios m.fl. v Staten v/Rikstrygdeverket* (E-3/04, EFTA Court Report 2004, p. 95, point 31), which equates E 101 certificates with 'equivalent official statements'. While the Court has not yet explicitly ruled on the binding nature of an E 101 certificate issued on the basis of the exception provided for in Article 14(2)(a) of Regulation No 1408/71, it has nevertheless made clear that its case-law in the matter is intended to cover situations where the E 101 certificates were issued under the provisions of Title III of Regulation No 574/72 in respect of workers coming under Title II of Regulation

No 1408/71, while making no distinction between the provisions which they contain. See judgments of 12 February 2015, *Bouman* (C-114/13, EU:C:2015:81, paragraph 26), and of 9 September 2015, X and van Dijk(C-72/14 and C-197/14, EU:C:2015:564, paragraph 43).

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38 See judgment of 26 January 2006, Herbosch Kiere (C-2/05, EU:C:2006:69, paragraphs 30 to 32).

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39 See, to that effect, Opinion of Advocate General Jacobs in FTS (C-202/97, EU:C:1999:33, point 60).

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40 The higher courts of the Member States have indeed taken note of the Court's case-law. See, for example, the judgment of the Cour de cassation (Court of Cassation, Belgium) of 2 June 2003 in Case S.02.0039.N, and the judgment of the Bundesgerichtshof (Federal Court of Justice, Germany) of 24 October 2006 in Case 1 StR 44/06.

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41 See, to that effect, judgments of 10 February 2000, FTS (C-202/97, EU:C:2000:75, paragraphs 53 to 55); of 30 March 2000, Banks and Others (C-178/97, EU:C:2000:169, paragraphs 40 to 42); and of 26 January 2006, Herbosch Kiere (C-2/05, EU:C:2006:69, paragraphs 24 to 26 and 30 to 32). See, also, judgments of 12 February 2015, Bouman (C-114/13, EU:C:2015:81, paragraphs 26 and 27), and of 9 September 2015, X and van Dijk (C-72/14 and C-197/14, EU:C:2015:564, paragraphs 40 and 41).

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42 That risk has in fact materialised in the present case, since the French authorities have required the workers concerned to contribute to the French social security scheme despite the fact that they were already affiliated to the Swiss social security scheme. In that regard, see point 73 of this Opinion.

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43 While it is true that the worker may use the administrative and judicial means of obtaining redress open to him in the Member States concerned, nothing would prevent him from being faced, ultimately, with two contradictory final decisions.

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44 See footnote 25 of this Opinion.

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45 See judgment of 15 December 1987, Denmark v Commission (348/85, EU:C:1987:552, paragraph 19).

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46 See, to that effect, Opinion of Advocate General Lenz in Calle Grenzshop Andresen (C-425/93, EU:C:1995:12, point 61), and Opinion of Advocate General Jacobs in FTS (C-202/97, EU:C:1999:33, point 53).

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47 As Advocate General Szpunar pointed out in his Opinion in Bouman (C-114/13, EU:C:2014:123, point 30), the restriction of judicial review by the host State is justified on grounds of legal certainty.

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48 See, to that effect, Opinion of Advocate General Jacobs in FTS (C-202/97, EU:C:1999:33, point 60). The same consideration could explain the exclusion from the scope of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1), in particular, of revenue, customs and administrative matters and of the liability of the State for acts and omissions committed in the exercise of State authority (acta iure imperii). See Article 1(1) of that regulation.

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49 In that context, the E 101 certificate expresses the competent issuing institution's legal appraisal of a factual situation, namely the appraisal that the situation of the worker to whom the certificate refers falls within the scope of one of the exceptions provided for in Title II of Regulation No 1408/71. See, to that effect, Opinion of Advocate General Lenz in Calle Grenzshop Andresen (C-425/93, EU:C:1995:12, point 59).

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50 See Article 5 of Regulation No 987/2009, entitled 'Legal value of documents and supporting evidence issued in another Member State', which provides in paragraph 1 that documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of Regulations No 883/2004 and No 987/2009, and supporting evidence on the basis of which the documents have been issued, are to be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued. See also recital 12 of Regulation No 987/2009, which makes particular reference to the case-law of the Court and the decisions of the Administrative Commission. It should be noted that the new regulatory framework is not applicable, *ratione temporis*, to the present case. See points 11, 13, 17 and 18 of this Opinion.

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51 See point 43 of this Opinion.

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52 See point 42 of this Opinion.

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53 See also Article 5(2) of Regulation No 987/2009, which provides that where there is doubt about the validity of a document or the accuracy of the facts on which the particulars contained therein are based, the institution of the Member State that receives the document is to ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal of that document. The issuing institution is to reconsider the grounds for issuing the document and, if necessary, withdraw it. It should be recalled that Regulation No 987/2009 is not applicable, *ratione temporis*, to this case. See point 13 of this Opinion.

54 Both the Alsace Urssaf and the French Government have highlighted the fact that the E 101 certificates in question indicated neither the names of the ships to which the workers in question were posted nor the places where they actually worked.

55 In the order for reference, the referring court drew attention to the fact that, in this case, the E 101 certificates were issued by the Swiss institution in two batches and, to a certain extent, retrospectively.

56 See judgment of 30 March 2000, Banks and Others (C-178/97, EU:C:2000:169, paragraph 53). See also point 6 of Decision No 181 of the Administrative Commission of 13 December 2000 concerning the interpretation of Articles 14(1), 14a(1) and 14b(1) and (2) of Regulation No 1408/71 (2001/891/EC) (OJ 2001 L 329, p. 73). See also point 1 of Decision No 126 of the Administrative Commission of 17 October 1985 concerning the application of Articles 14(1)(a), 14a(1)(a), and 14b(1) and (2) of Regulation No 1408/71 (OJ 1986 C 141, p. 3), from which it is apparent that the institution referred to in Articles 11 and 11a of Regulation No 574/72 is required to issue a certificate concerning the applicable legislation (the E 101 certificate), even if issue of that certificate is requested after the beginning of the activity carried out in the territory of the State other than the competent State.

57 See, in particular, judgment of 10 February 2000, FTS (C-202/97, EU:C:2000:75, paragraph 51). The Court has also held that the application of the system of conflict rules established by Regulation No 1408/71 depends solely on the objective situation of the worker concerned (judgment of 14 October 2010, *van Delft and Others*, C-345/09, EU:C:2010:610, paragraph 52). With regard to the factors to be taken into account for determining the legislation applicable, see judgment of 4 October 2012, Format Urządzenia i Montaże Przemysłowe (C-115/11, EU:C:2012:606, paragraphs 45 and 46), from which it is clear, in particular, that the competent institution is required to base its findings on the employed person’s actual situation and, where appropriate, to refuse to issue the E 101 certificate.

58 See, to that effect, judgment of 10 February 2000, FTS (C-202/97, EU:C:2000:75, paragraph 56). See also point 7(a) and (c) of Decision No 181 of the Administrative Commission, op. cit. While that decision is not directly applicable to the present case since the E 101 certificates in question were issued under Article 14(2)(a)(i) of Regulation No 1408/71, a provision to which that decision makes no reference, Decision No 181 does to a large extent reflect the case-law of the Court applicable to all situations where an E 101 certificate has been issued under the provisions of Title III of Regulation No 574/72. See, in that regard, footnote 37 of this Opinion.

59 See also point 9 of Decision No 181 of the Administrative Commission, op. cit., and judgments of 10 February 2000, FTS (C-202/97, EU:C:2000:75, paragraph 57); of 30 March 2000, Banks and Others (C-178/97, EU:C:2000:169, paragraph 44); and of 26 January 2006, Herbosch Kiere (C-2/05, EU:C:2006:69, paragraph 28).

60 Under Article 80(3) of Regulation No 1408/71, decisions of the Administrative Commission on questions of interpretation of the regulation have to be unanimous.

61 See also Article 81(a) of Regulation No 1408/71, which states that the duties of the Administrative Commission are without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and tribunals provided for by the legislations of Member States, by that regulation or by the Treaty.

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62 See, to that effect, judgments of 10 February 2000, FTS (C-202/97, EU:C:2000:75, paragraph 58); of 30 March 2000, Banks and Others (C-178/97, EU:C:2000:169, paragraph 45); and of 26 January 2006, Herbosch Kiere (C-2/05, EU:C:2006:69, paragraph 29).

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63 At the hearing, the Commission representative stated that, so far as he was aware, no Member State had ever asked the Commission to institute infringement proceedings against another Member State on the grounds that the latter Member State's institutions had failed in their obligation to ensure the correctness of the particulars shown on the E 101 certificates. That observation may appear surprising given the major national interests which seem to be at stake according to the observations submitted, in particular, by the Alsace Urssaf and the French Government.

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64 See Article 14, and in particular Article 14(2), of the EC-Switzerland Agreement.

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65 See points 27, 38 and 39 of this Opinion. Concerning the scope of the exception provided for in Article 14(2)(a) of Regulation No 1408/71, see judgment of 19 March 2015, Kik (C-266/13, EU:C:2015:188, paragraph 59), where the Court held that that exception concerns persons whose work is essentially itinerant and carried out in circumstances that do not permit it to be connected to one particular place.

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66 I note that Regulations No 1408/71 and No 574/72 give no indication as to corrections to be made if an E 101 certificate is withdrawn or cancelled. See, in that regard, the Commission Practical Guide, op. cit., p. 35, which states that 'if the information given during the initial process to determine the applicable legislation has not been intentionally wrong then any changes arising from such a review should only take effect from a current date'.

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67 See points 21 to 26 of this Opinion.

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68 According to the case-law of the Court, the Administrative Commission is not empowered to adopt acts having the force of law and a decision of that commission is not of such a nature as to require social security institutions to use certain methods or adopt certain interpretations when they come to apply EU rules. See, to that effect, judgments of 14 May 1981, Romano (98/80, EU:C:1981:104, paragraph 20) and 8 July 1992, Knoch (C-102/91, EU:C:1992:303, paragraph 52).

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69 Above all, the fact that the Administrative Commission's decisions have no binding force seems to me to be a weakness of the present system and also means, in principle, that the merits of that commission's decisions cannot be reviewed by the Courts of the European Union.

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70 See, in particular, Article 71(2) of Regulation No 1408/71, as amended by Regulation No 465/2012, according to which the Administrative Commission is to act by a qualified majority as defined by the Treaties, except when adopting its rules, and Decision No A1 of the Administrative Commission of 12 June 2009 concerning the establishment of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the provision of benefits under Regulation No 883/2004 (OJ 2010 C 106, p. 1), which entered into force on 1 May 2010. See, also, Decision No H5 of the Administrative Commission of 18 March 2010 concerning cooperation on combating fraud and error within the framework of Regulations No 883/2004 and No 987/2009 (OJ 2010 C 149, p. 5).

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71 See, in that regard, point 9 of the European Parliament resolution of 14 September 2016 on social dumping in the European Union (2005/2255(INI)) (P8_TA-PROV(2016)0346), which points out in particular that the competent authorities of the host Member State, in cooperation with those of the sending state, should be able to check the reliability of the A1 form in the event of serious doubts as to whether a posting is genuine. See also the relevant report of the Parliament's Committee on Employment and Social Affairs of 18 August 2016 (A8-0255/2016).

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72 They refer in particular to the judgments of 23 November 1999, *Arblade and Others* (C-369/96 and C-376/96, EU:C:1999:575, paragraph 38); of 3 April 2008, Rüffert (C-346/06, EU:C:2008:189, paragraph 42 and the case-law cited); of 7 October 2010, *dos Santos Palhota and Others* (C-515/08, EU:C:2010:589, paragraph 47 and the case-law cited and paragraph 48); of 19 December 2012, Commission v Belgium (C-577/10, EU:C:2012:814, paragraph 45); and of 3 December 2014, De Clercq and Others (C-315/13, EU:C:2014:2408, paragraph 69). They also refer to the judgment of 2 December 1997, Dafeki (C-336/94, EU:C:1997:579), in which the Court ruled in paragraph 21 that in proceedings for determining the entitlements to social security benefits of a migrant worker, the competent social security institutions and the courts of a Member State must accept certificates and analogous documents relative to personal status issued by the competent authorities of the other Member States, unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question.

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73 See, in particular, judgments of 2 December 1997, *Dafeki* (C-336/94, EU:C:1997:579, paragraph 16); of 7 October 2010, dos Santos Palhota and Others (C-515/08, EU:C:2010:589, paragraph 25); and of 19 December 2012, *Commission* v *Belgium* (C-577/10, EU:C:2012:814, paragraphs 43 and 44).

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74 See points 59 to 66 of this Opinion.

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75 See, to that effect, judgment of 26 February 1976, Commission v Italy (52/75, EU:C:1976:29, paragraph 11), in which the Court points out that the Treaty did not merely create reciprocal obligations between the various subjects to whom it applies, but established a new legal order which governs the powers, rights and duties of the said subjects, as well as the procedures necessary for the purposes of having any infringement declared and punished.

76 See judgment of 23 May 1996, Hedley Lomas (C-5/94, EU:C:1996:205, paragraph 20).