Provisional text

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 11 July 2019 (1)

**Joined Cases C-370/17 and C-37/18**

**Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC)**
**v**
**Vueling Airlines SA**

(Request for a preliminary ruling from the tribunal de grande instance de Bobigny (Regional Court, Bobigny, France))
**and**
**Vueling Airlines SA**
**v**
**Jean-Luc Poignant**

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

(Reference for a preliminary ruling — Migrant workers — Social security — Applicable legislation — Regulation (EEC) No 1408/71 — Posting of workers — Article 14(1)(a) — Non-applicability to the flying personnel of airlines carrying out the international transport of passengers — Article 14(2)(a)(i) — Workers employed by a branch or permanent representation which the airline owns in the territory of a Member State other than that in which it has its registered office or place of business — E 101 certificate — Binding effect — Certificate obtained or relied on in a fraudulent manner — Civil action for damages against the employer who has perpetrated the fraud — Jurisdiction of the court of the host Member State to make a finding of fraud and to disregard the certificate — Principle that a decision adopted in criminal proceedings constitutes res judicata in civil proceedings — Prohibition for the civil court to disregard a criminal decision relating to the same facts, even if that decision is contrary to EU law — Incompatibility with EU law)

## I. Introduction

1. The E 101 certificate (2) is a document issued by the competent institution of a Member State, on the basis of a specific provision of Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, (3) and in accordance with Regulation (EEC) No 574/72 laying down the procedure for implementing that regulation. (4) This certificate certifies that a worker moving within the European Union is covered by the social security scheme of that Member State.

2. According to the Court's well established case-law, such a certificate, as long as it has not been withdrawn or declared invalid by the issuing institution, is binding in the internal legal order of the Member State to which the employee goes in order to work and, in this respect, binds the institutions of that Member State. Those institutions cannot, in particular, require that the worker concerned be covered by their own social security scheme. Nor is a court of that State entitled to scrutinise the validity of an E 101 certificate in the light of the background against which it was issued. Any doubts as to the validity or accuracy of such a certificate must be resolved through a procedure of dialogue between the institutions of the Member States concerned, the stages in which have been identified by the Court in its judgments and then codified by the EU legislature.

3. Much has been written about that case-law. For some commentators, it provides a regrettable protection for undertakings seeking to circumvent the applicable social security rules, helped by institutions which are too ready to issue the E 101 certificate. For others, it is the ultimate expression of the necessary cooperation between Member States in the application of the coordination Regulations.

4. In France, the case at issue in the main proceedings has exacerbated the division between those two views. In 2012, Vueling Airlines SA ('Vueling') was convicted for having employed flying personnel at Paris-Charles-de-Gaulle Airport at Roissy (France) without having affiliated them to the French social security scheme. The personnel in question had been covered by the Spanish social security scheme and placed on the 'posting of workers' scheme. Vueling had obtained E 101 certificates from the Spanish competent institution certifying that situation, but the French criminal court had disregarded them.

5. These references for a preliminary ruling are part of the aftermath of Vueling's conviction. They have been made by the tribunal de grande instance de Bobigny (Regional Court, Bobigny, France) and by the Cour de cassation, Chambre Sociale (Court of Cassation, Social Chamber, France), concerning claims for damages in respect of the same facts brought by (i) the caisse de retraite du personnel navigant de l'aéronautique civile (the retirement fund for civil aviation flying personnel; 'CRPNPAC') and (ii) Mr Jean-Luc Poignant against Vueling concerning the loss which they claim to have sustained as a result of not being covered in France. The question of the binding effect of the E 101 certificates obtained by Vueling is decisive for the outcome of those claims.

6. Three of the questions submitted by the referring courts thus invite the Court to state whether case-law on the binding effect of the E 101 certificate also applies when the court of the host Member State finds that that certificate was obtained or relied on in a fraudulent manner. Those questions will allow the Court to clarify the precise scope of its judgment in *Altun and Others*, (5) in which it accepted, in principle, that the court of the host Member State is not bound by an E 101 certificate in the event of fraud. The questions will also make it necessary to focus on the concept of 'fraud', within the meaning of EU law, and, in that context, to interpret, in an unprecedented manner, the rules laid down in Regulation No 1408/71 for an airline's flying personnel engaged in international transport.

7. In this Opinion, I shall propose that the Court hold that the court of the host Member State has jurisdiction to disregard an E 101 certificate where it possesses evidence establishing that that certificate was obtained or relied on fraudulently, irrespective of whether the dialogue between competent institutions takes place. In my view, the effectiveness of the fight against 'social dumping' (6)and the trust which the Court generally places in a national court, as a court of the European Union, to ensure compliance with EU law, depend on that solution.

8. The final question submitted concerns the relationship between the principle of the primacy of EU law and the principle of French law that a decision adopted in criminal proceedings constitutes *res judicata* in civil proceedings. Under that principle, the referring courts would be required to find against Vueling in civil proceedings solely because it had previously been convicted in criminal proceedings, even if that conviction had constituted an infringement of EU law. In view of my suggested answer to the other questions referred, my reasoning on that subject will be essentially subsidiary. I shall nonetheless propose that the Court rule that EU law precludes the application of that principle when it is established that that criminal conviction is incompatible with EU law.

## II. Legal context

### *A. European Union law*

9. Article 13(2)(a) of Regulation No 1408/71 provides that, subject to the provisions of Articles 14 to 17 of that regulation, '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'.

10. Article 14 of that regulation, entitled 'Special rules applicable to persons, other than mariners, engaged in paid employment', provides:

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

1. (a) A person employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 12 months and that he is not sent to replace another person who has completed his term of posting.

(b) If the duration of the work to be done extends beyond the duration originally anticipated, owing to unforeseeable circumstances, and exceeds 12 months, the legislation of the first Member State shall continue to apply until the completion of such work, provided that the competent authority of the Member State in whose territory the person concerned is posted or the body designated by that authority gives its consent; such consent must be requested before the end of the initial 12-month period. Such consent cannot, however, be given for a period exceeding 12 months.

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;

(ii) where a person is employed principally in the territory of the Member State in which he resides, he shall be subject to the legislation of that State, even if the undertaking which employs him has no registered office or place of business or branch or permanent representation in that territory.

…'

11. Article 84a of Regulation No 1408/71, entitled 'Relations between the institutions and the persons covered by this Regulation', inserted in that regulation by Regulation (EC) No 631/2004, amending Regulations Nos 1408/71 and 574/72 in respect of the alignment of rights and the simplification of procedures, (7) provides, in paragraph 3:

'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.'

12. Article 11 of Implementing Regulation No 574/72, entitled 'Formalities in the case of the posting elsewhere of an employed person pursuant to Articles 14(1) and 14b(1) of Regulation [No 1408/71] and in the case of Agreements concluded under Article 17 [of that regulation]', provides, in paragraph 1:

‘The institutions designated by the competent authority of the Member State whose legislation is to remain applicable shall issue a certificate stating that an employed person shall remain subject to that legislation up to a specific date:

(a) at the request of the employed person or his employer in cases referred to in Articles 14(1) and 14b(1) of Regulation [No 1408/71];

…’

13. Article 12a of Implementing Regulation No 574/72, entitled ‘Rules applicable in respect of the persons referred to in Articles 14(2) and (3), 14a(2) to (4) and 14c of [Regulation No 1408/71] who normally carry out an employed or self-employed activity in the territory of two or more Member States’, provides:

‘For the application of the provisions of Article 14(2) and (3), Article 14a(2) to (4) and Article 14c of [Regulation No 1408/71], the following rules shall apply:

…

1a Where, in accordance with Article 14(2)(a) of [Regulation No 1408/71], 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.

…’

14. Regulation No 1408/71 and Implementing Regulation No 574/72 were repealed and replaced, with effect from 1 May 2010, by, respectively, Regulation (EC) No 883/2004 on the coordination of social security systems (8) and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation No 883/2004. (9) Nonetheless, the former regulations apply *ratione temporis* to the facts at issue in the main proceedings.

### ***B. French law***

15. Article L. 8221-3 of the Labour Code, resulting from Order No 2007-329 of 12 March 2007, (10) in the version applicable at the material time, provides:

‘Concealed employment by concealment of activity shall be deemed to exist where an activity involving production, processing, repairs or the provision of services is carried out for profit by any person who, deliberately avoiding his obligations:

…

2. … has not made the required declarations to the social protection bodies or to the tax authorities in accordance with the legal provisions in force.’

16. Article L. 1262-3 of the Labour Code, resulting from Order No 2007-329, in the version applicable at the material time, provides:

‘An employer may not rely on the provisions applicable to the posting of employees where its activity is wholly directed towards the national territory or where it is carried out in premises or with infrastructures which are situated on the national territory and from which that activity is carried out in a habitual, stable and continuous matter. In particular, an employer may not rely on those provisions when its activity consists in seeking and canvassing customers or recruiting employees on that territory.

In those situations, the employer shall be subject to the provisions of the Labour Code applicable to undertakings established in French territory.’

17. In the words of Article R. 330-2-1 of the Civil Aviation Code, resulting from Decree No 2006-1425 of 21 November 2006: (11)

‘Article L. 342-4 of the Labour Code (12) shall be applicable to air transport undertakings in respect of their operating bases situated in French territory.

An operating base is a set of premises or infrastructures from which an undertaking carries on an air transport activity in a stable, habitual and continuous manner with employees for whom those premises or infrastructures are the actual centre of their professional activity. For the purposes of the preceding provisions, the centre of an employee’s professional activity is the place where he habitually works or where he takes up his duties and returns after the performance of his duties.’

## III. The disputes in the main proceedings

### *A. The criminal proceedings against Vueling*

18. Vueling is an airline active in the international transport of passengers, having its registered office in Barcelona (Spain). On 21 May 2007 it began to operate flights to a number of Spanish destinations from Paris-Charles-de-Gaulle Airport at Roissy. On that basis, it had had the creation of an air transport and self-handling business, established at that airport, entered on the registre du commerce et des sociétés de Bobigny (Register of Trade and Companies, Bobigny, France).

19. On 28 May 2008, following a number of inspections, the competent labour inspectorate drew up a report declaring that Vueling was engaged in concealed employment. It was stated in that report that Vueling occupied commercial operational and management premises, rest rooms and flight preparation rooms for the flying personnel, a supervising office for the ticket counter and passenger registration in that airport, where it employed 50 commercial flying personnel and 25 cockpit staff whose contracts of employment were subject to Spanish law, on the one hand, and ground personnel (a commercial manager, a handling manager and a chief mechanic) whose contracts of employment were governed by French law, on the other.

20. The labour inspectorate stated that only the ground personnel were declared to the French social security bodies. The flying personnel held E 101 certificates stating that they were on a temporary posting in France and that they continued to be subject to the

Spanish social security scheme during the period of their posting. The labour inspectorate stated that 48 employees did not habitually work for Vueling and had been engaged less than 30 days before being posted, some of them on the previous day or even on the actual day and concluded that they had been engaged with a view to being posted. In the case of 21 of those employees, the payslips mentioned an address in France and a significant number of declarations of posting contained false declarations of residence, concealing the fact that most of the posted workers did not have the status of Spanish residents, some of them never having lived in Spain. Taking into account those whose contracts of employment had expired, it appeared that 103 workers in all had not been declared to the French social security authorities.

21. The labour inspectorate further observed that Vueling had an 'operating base', within the meaning of Article R. 330-2-1 of the Civil Aviation Code, at Paris-Charles-de-Gaulle airport, where the flying personnel joined and left its service. In application of Article L. 1262-3 of the Labour Code, Vueling could not therefore rely on the provisions applicable to the posting of workers. In that context, the labour inspectorate considered that although, in accordance with the Court's case-law, the E 101 certificate amounted to a presumption of affiliation, that document did not demonstrate that the use of posting was valid. It considered that the posting was fraudulent and that harm was caused to the workers deprived, in particular, of access to the rights of the French social security scheme, and also for the community, as the employer had not paid the sums payable under that scheme.

22. Following that investigation, Vueling was prosecuted for the offence of concealed employment by concealment of activities, provided for in Article L. 8221-3 of the Labour Code, for having, at Roissy, between 21 May 2007 and 16 May 2008, intentionally carried on the activity of air passenger transport and not making the requisite declarations to the social security bodies, notably by concealing the activity carried out in France and unlawfully assimilating it to the posting of workers.

23. By a judgment of 1 July 2010, the tribunal correctionnel de Bobigny (Criminal Court, Bobigny, France) acquitted Vueling.

24. By a judgment of 31 January 2012, the cour d'appel de Paris (Court of Appeal, Paris, France) set aside the judgment delivered at first instance and ordered Vueling to pay a fine of EUR 100 000. It considered, first, that Vueling exercised its activity at Roissy in the context of an 'operating base' within the meaning of Article R. 330-2-1 of the of the Civil Aviation Code, and that that activity therefore came within the situations referred to in Article L. 1262-3 of the Labour Code. That court observed that the entity in question functioned autonomously, as Vueling had recruited for that purpose a manager. That autonomy also meant that the airline could not show an organic link with the posted workers. Secondly, that court considered that Vueling had intentionally breached the applicable rules, in particular by stating that the place of residence of 41 of the workers whom it sought to post was at its own registered office without having been in a position to provide a serious explanation capable of removing the suspicion of fraud. Last, the cour d'appel de Paris (Court of Appeal, Paris) considered that although the E 101 certificates gave rise to a presumption of membership of the Spanish social security scheme, which was binding on the competent French social security institutions, they could not preclude the criminal court from finding that there had been an intentional

breach of the legal provisions that determine the conditions of validity of the posting of workers.

25. Vueling appealed on a point of law. By a judgment of 11 March 2014, the Cour de cassation, chambre criminelle (Court of Cassation, Criminal Chamber, France), dismissed that appeal. It considered that Vueling could not rely on the rules applicable to the posting of workers laid down in Article 14(1)(a) of Regulation No 1408/71 since the activity which it carried out at Roissy was performed in a habitual, stable and continuous manner in premises or with infrastructures situated on the national territory, and was therefore covered by the right of establishment, within the meaning of Article L. 1263-3 of the Labour Code and the Court's case-law. Consequently, Vueling could not rely on the E 101 certificates and the offence of concealed employment, provided for in Article L. 8221-3 of the Labour Code, was made out against it.

### *B. The dialogue between the French and Spanish institutions*

26. It is apparent from the file before the Court that, by letter of 4 April 2012, the Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales de Seine-et-Marne (Union for recovery of social security and family allowance contributions (Urssaf), Seine-et-Marne, France; 'Urssaf') brought the facts at issue to the knowledge of the institution that had issued the E 101 certificates produced by Vueling, namely the Tesorería general de la seguridad social de Cornellà de Llobregat (General Social Security Fund, Cornellà de Llobregat, Spain), and requested it to cancel the certificates in question.

27. By decision of 17 April 2014, the issuing institution cancelled the E 101 certificates at issue. It nonetheless retained the contributions paid by Vueling to the Spanish social security for the workers concerned, on the ground that repayment of those contributions was prohibited.

28. On 29 May 2014, Vueling lodged an appeal to a higher administrative authority against that decision. By decision of 1 August 2014, the higher administrative authority dismissed that appeal. Nonetheless, by decision of 5 December 2014, that authority revoked its initial decision, in order to 'leave unaffected the posting forms', on the ground that, in view of the time that had elapsed since the facts, it was not appropriate to declare that the affiliation of the workers concerned to the Spanish social security was improper, since it was not possible to reimburse the contributions paid. In addition, those workers had been eligible for benefits on the basis of those contributions, so that if their affiliation were cancelled they might not be covered. In those circumstances, according to that authority, the cancellation of the E 101 certificates alone was not justified, on the ground that they had been issued purely because the workers concerned were affiliated to the Spanish social security scheme.

29. At the same time, as they had not received a reply from the issuing institution, and since Vueling's conviction had been upheld by the Cour de cassation, chambre criminelle (Court of Cassation, Criminal Chamber) on 11 March 2014, the French authorities again questioned their Spanish counterparts, on 22 and 23 October 2014.

30. By letter of 9 December 2014, the Spanish authorities informed the French authorities that the issuing institution had adopted a final decision on 5 December 2014

to maintain the E 101 certificates at issue. On 11 December 2014, the Spanish authorities forwarded the text of the decision in question to the French authorities.

31. By letter of 7 April 2015, the French authorities requested the issuing institution to reconsider that decision. On 24 June 2015, a video conference took place between the French and Spanish competent institutions, which did not result in their disagreement being resolved.

### *C. The action brought by the CRPNPAC (Case C-370/17)*

32. On 11 August 2008, the CRPNPAC brought an action before the tribunal de grande instance de Bobigny (Regional Court, Bobigny), seeking damages by way of compensation for the loss which it had sustained owing to the non-affiliation to the supplementary retirement scheme which it administers of the flying personnel employed by Vueling at Roissy.

33. The tribunal de grande instance de Bobigny (Regional Court, Bobigny) stayed proceedings pending a final decision in the criminal proceedings brought against Vueling. Following the judgment of 31 March 2014 of the Cour de cassation, chambre criminelle (Court of Cassation, Criminal Chamber), the proceedings before that court were resumed.

34. In that context, the tribunal de grande instance de Bobigny (Regional Court, Bobigny) wonders whether the Court's case-law on the binding effect of the E 101 certificate is applicable where the courts of the host Member State of the workers concerned have convicted the employer of concealed employment, which implies the existence of fraudulent intent or an abuse of rights.

35. In those circumstances, by decision of 30 March 2017, received at the Court on 19 June 2017, the tribunal de grande instance de Bobigny (Regional Court, Bobigny) stayed proceedings and requested the Court to give a preliminary ruling.

### *D. The action brought by Mr Poignant (Case C-37/18)*

36. On 21 April 2007, Mr Poignant was engaged by Vueling as a co-pilot, under a contract of employment governed by Spanish law. On 14 June 2007, he was posted, by an amendment to that contract, to Paris-Charles-de-Gaulle Airport.

37. By letter of 30 May 2008, Mr Poignant resigned, claiming in particular that his contractual situation was illegal under French law; he then withdrew his resignation by email of 2 June 2008. By letter of 9 June 2008, he was given formal notice of the termination of his contract of employment, again relying on that illegality.

38. On 11 June 2008, Mr Poignant brought an action before the conseil des prud'hommes de Bobigny (Labour Tribunal, Bobigny, France), requesting that his resignation be reclassified as a notification of termination having the effects of a dismissal without real and substantial cause (13) and claiming, in particular, damages for concealed employment and failure to make contributions to the French social security system.

39. By judgment of 14 April 2011, the conseil des prud'hommes de Bobigny (Labour Tribunal, Bobigny) dismissed Mr Poignant's claims. It considered that Vueling had

properly completed the applicable administrative formalities, in particular by requesting the Spanish social security bodies to issue E 101 certificates for its workers. It also observed that Mr Poignant's posting had not exceeded 1 year and that he had not been sent to replace another person.

40. By judgment of 4 March 2016, the cour d'appel de Paris (Court of Appeal, Paris) set aside the judgment of the conseil des prud'hommes de Bobigny (Labour Tribunal, Bobigny). Relying on the principle that the judgment which it delivered in criminal proceedings on 31 January 2012 constituted *res judicata*, it ordered Vueling to pay Mr Poignant damages, in particular in the form of lump sum compensation for concealed employment and for failure to make contributions to the French social security system.

41. Vueling appealed on a point of law. In that context, the Cour de cassation, Chambre Sociale (Court of Cassation, Social Chamber) observes that it follows from the judgment delivered in criminal proceedings by the cour d'appel de Paris (Court of Appeal, Paris) on 31 January 2012 that Vueling had at the material time an 'operating base' at Roissy, that is to say, a 'branch', within the meaning of Article 14(2)(a)(i) of Regulation No 1408/71. Furthermore, the fact that the E 101 certificates on which Vueling relies were issued under Article 14(1)(a) of that regulation, whereas the situation of its flying personnel actually came under Article 14(2)(a)(i) and that they state as the place of activity of the workers concerned Paris-Charles-de-Gaulle Airport is in itself of such a kind as to reveal that those certificates were obtained fraudulently. The Cour de cassation, Chambre Sociale (Court of Cassation, Social Chamber) wonders whether the Court's case-law on the binding effect of the E 101 certificate, restated in the judgment in *A-Rosa Flussschiff*, (14) is applicable in such circumstances.

42. If so, the question would then arise whether the principle of primacy of EU law precluded the cour d'appel de Paris (Court of Appeal, Paris), which in application of domestic law is bound by the principle that a decision adopted in criminal proceedings constitutes *res judicata* in civil proceedings, from drawing, in its judgment of 4 March 2016, the conclusions from the judgment which it had delivered, in criminal proceedings, on 31 January 2012, and ordering Vueling to pay damages to Mr Poignant solely because of that earlier criminal conviction.

43. In those circumstances, by decision of 10 January 2018, received at the Court on 19 January 2018, the Cour de cassation, Chambre Sociale (Court of Cassation, Social Chamber) stayed proceedings and made a reference to the Court for a preliminary ruling.

## IV. The questions referred for a preliminary ruling and the procedure before the Court

44. In Case C-370/17, the tribunal de grande instance de Bobigny (Regional Court, Bobigny) has referred the following questions to the Court for a preliminary ruling:

'(1) 'Is the effect of an E 101 certificate issued, in accordance with Article 11(1) and Article 12a(1a) of [Implementing Regulation No 574/72], by the institution designated by the authority of the Member State whose social security legislation remains applicable to the situation of the employee to be preserved even though the E 101 certificate has been obtained as a result of fraud or an abuse of right, which

has been established in a final decision of a court of the Member State in which the employee carries out or should carry out his activity?

(2) If the answer to that question is in the affirmative, does the issuing of E 101 certificates prevent the victims of the damage suffered as a result of the conduct of the employer, who has committed the fraud, from being compensated for that damage, without the affiliation of the employees to the schemes designated by the E 101 certificate being called into question by the action for damages brought against the employer?'

45. In Case C-37/18, the Cour de cassation, Chambre Sociale (Court of Cassation, Social Chamber) referred the following questions to the Court for a preliminary ruling:

'(1) Is the interpretation by the [Court] in its judgment [in] *A-Rosa Flussschiff* … of Article 14(2)(a) of Regulation [No 1408/71], applicable to a dispute relating to the offence of concealed employment in which E 101 certificates were issued under Article 14(1)(a) [of that regulation], pursuant to Article 11(1) of [Implementing Regulation No 574/72], although the situation was covered by Article 14(2)(a)(i) [of Regulation No 1408/71], for workers carrying on their activity in the territory of the Member State of which they are nationals and in which the air transport undertaking established in another Member State has a branch, and a mere reading of the E 101 certificate, which refers to an airport as the place where the worker is employed and an air transport undertaking as employer, suggested that that certificate had been obtained fraudulently?

(2) In the affirmative, must the principle of the primacy of EU law be interpreted as precluding a national court, bound under its domestic law by the principle that a decision adopted in criminal proceedings constitutes *res judicata* in civil proceedings, from drawing the appropriate conclusions from a decision of a criminal court which is not compatible with the rules of EU law by ordering, in civil proceedings, an employer to pay damages to a worker solely because of the criminal conviction of that employer for concealed employment?'

46. By decision of the President of the Court of 22 February 2018, Cases C-370/17 and C-37/18 were joined, on account of the connection between them, for the purposes of the written and oral parts of the procedure and also of the judgment.

47. The CRPNPAC, Mr Poignant, Vueling, the French and Czech Governments, Ireland and the European Commission lodged written observations before the Court. Those parties and interested parties, with the exception of the Czech Government, were represented at the hearing, which was held on 29 January 2019.

## V. Analysis

### *A. Preliminary observations*

48. There is no need to set out in detail the Court's case-law on the binding effect of the E 101 certificate. (15) The essentials of that case-law are well known: neither the competent institution nor the courts of the host Member State may disregard, or a fortiori

cancel an E 101 certificate issued, on behalf of a worker, by the competent institution of the sending Member State. (16)

49. As I stated by way of introduction to this Opinion, the acceptance of that case-law by the French courts has not been uncontroversial. The *Vueling* case is typical in that respect. The judgment delivered by the chambre criminelle de the Cour de cassation (Criminal Chamber of the Court of Cassation) on 31 March 2014, whereby that court upheld Vueling's conviction for concealed employment, was, with a judgment delivered against easyJet on the same day in a similar case, (17) scarcely noticed. First, because the Criminal Chamber, in its judgments, upheld the approach of the courts below consisting in disregarding the E 101 certificates produced by the airlines, considering that they were not relevant for the purposes of establishing the offence in question. Secondly, because it did not refer a question to the Court for a preliminary ruling on that point.

50. The solution was not however self-evident in the light of the Court's case-law, as it then existed. In fact, the substantive element of such a criminal offence consists of the failure to register the workers concerned with the national social security. That registration can be imposed only in accordance with the conflict rules laid down in Regulation No 1408/71. The proper application of those rules is therefore a question that must be resolved before that offence can be established. According to the Court, the E 101 certificate certifies not only that the worker concerned is registered with the social security legislation of the Member State of the issuing institution, but also the elements of fact and of law on which that registration is based. (18) In other words, the certificate proves that that worker's registration complies with those rules. It was therefore not evident that the court of the host Member State, even when it was adjudicating not on a worker's registration as such, but on such a criminal offence, could decide that the E 101 certificate was irrelevant and determine for itself whether Regulation No 1408/71 was being applied.

51. In the context of the discussion prompted by the judgments of its Criminal Chamber, (19) the Cour de cassation (Court of Cassation), in another case of concealed employment, had decided, in plenary assembly, to submit the question for a preliminary ruling that gave rise to the judgment in *A-Rosa Flussschiff*. By that question, it requested the Court to review its case-law on the binding effect of the E 101 certificate, or, at the very least, to qualify it in the event of a manifest error. I recall that, in that judgment, the Court re-asserted that case-law and held that, even when faced with such a manifest error, the court of the host Member State is bound by that certificate. (20)

52. Nonetheless, the Court had reserved, in the judgment in *A-Rosa Flussschiff*, a situation involving fraud. That situation was addressed in the judgment in *Altun*. In the latter judgment, delivered in the Grand Chamber, the Court accepted, in principle, that the court of the host Member State may disregard an E 101 certificate where that certificate was fraudulently obtained or relied on.

53. The two questions in Case C-370/17 and the first question in Case C-37/18 provide the Court with the opportunity to clarify the scope of the judgment in *Altun*. In the light of the circumstances at issue in the main proceedings, and having regard to the observations submitted to the Court, two points, in my view, require clarification.

54. First, it is necessary to clarify the power recognised to the court of the host Member State to disregard an E 101 certificate which has been fraudulently obtained or relied on. I shall explain why, to my mind, that court has jurisdiction to disregard such a certificate where it has before it evidence of the fraud, and may do so irrespective of whether the dialogue between competent institutions provided for in Article 84a(3) of Regulation No 1408/71 has taken place (21) (Section B).

55. Secondly, it is necessary to revisit the concept of 'fraud' within the meaning of EU law and, in that context, to clarify the way in which the social security rules laid down in Regulation No 1408/71 are to apply to flying personnel of airlines active in international transport. To my mind, and subject to verification by the referring courts, circumstances such as those of the main proceedings are capable of establishing such fraud (Section C).

56. Last, concerning the second question in Case C-37/18, I shall explain why, in my view, EU law precludes a domestic rule relating to *res judicata* under which a civil court is bound to apply a criminal decision that has become final, when it is established that that decision is incompatible with EU law (Section D).

### *B. The competence of the court of the host Member State to disregard an E 101 certificate obtained or relied on fraudulently*

57. The purpose of the E 101 certificate is to ensure respect for the principle, set out in Article 13(1) Regulation No 1408/71, that the legislation of a single Member State is to apply to a worker in social security matters. That certificate is intended to ensure that the institutions of different Member States do not have a different assessment of the legislation and to prevent the conflicts of competence that would ensue. The E 101 certificate thus helps to provide legal certainty for workers moving in the European Union and, by extension, for their employers. It thus facilitates freedom of movement for workers and freedom to provide services within the European Union. (22)

58. If the institutions of the host Member State were not, as a general rule, bound by the terms of the E 101 certificate, those objectives would be compromised. By recognising that that certificate has a binding effect and establishing the exclusive competence of the issuing institution to withdraw it, the Court intended to prevent the consequences which that document is specifically designed to avoid: conflicting decisions concerning the legislation applicable to a given worker and the double liability to contribute which that would entail. (23)

59. Furthermore, the principle of sincere cooperation, set out in Article 4(3) TEU, justifies that solution. In accordance with that principle, the competent institutions of the Member States should provide mutual assistance when implementing the conflict rules laid down in Regulation No 1408/71. That gives rise to a set of reciprocal obligations: the issuing institution must make a correct assessment of the facts relevant for the application of those rules and thus ensure the accuracy of the information on the E 101 certificate; the institutions of the host Member State must, in that spirit of cooperation, recognise, in principle, the validity of that certificate and, in the event of doubt, inform the issuing institution. In such a case, it is for the latter institution to reconsider the grounds on which that certificate was issued, in the same spirit of cooperation. (24)

60. The binding effect of the E 101 certificate further applies by reference to the principle of mutual trust. (25) That principle requires each Member State to assume that, in principle, all the other Member States comply with EU law. (26) In accordance with that principle, the institutions of the host State must therefore presume that in issuing that certificate the issuing institution correctly applied the conflict rules laid down in Regulation No 1408/71.

61. That being so, as the Court held in the judgment in *Altun*, the case-law on the binding effect of the E 101 certificate cannot allow individuals to rely on EU law for abusive or fraudulent ends. (27)

62. In that regard, the Court observed in that judgment that there is, in EU law, a general principle of prohibition of fraud and abuse of rights which individuals must comply with. In effect, the application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law. (28)

63. In application of that general principle, the Court held in that judgment that a fraudulent E 101 certificate cannot have the same binding effect. It accepted in principle that the court of the host Member State has jurisdiction to disregard an E 101 certificate and to draw the appropriate conclusions, laid down in national law, from the failure to comply with the applicable social security rules, when it finds, on the basis of objective evidence, (29) and provided that the person concerned has been given the opportunity to rebut that evidence, with due regard to the safeguards associated with the right to a fair trial, that that certificate was obtained or relied on fraudulently. (30)

64. The Court has nonetheless recognised that competence on the part of the court of the host Member State in a somewhat particular context. In that regard, in the case that gave rise to the judgment in *Altun*, the competent institution of the host Member State, having found a number of matters that tended to indicate that E 101 certificates had been obtained fraudulently, had sent the issuing institution a reasoned request for reconsideration or withdrawal of those certificates. That institution had replied, after receiving a reminder and more than a year and a half after that request, by sending a summary of those certificates, indicating their period of validity, and stating that the conditions of posting were, at the time those certificates were issued, met by the various employers involved. On the other hand, it had not taken into account in that reply of the matters brought to its attention by the competent institution of the host Member State. (31) In those circumstances, the Court held that:

‘… when, in the dialogue provided for in Article 84a(3) of Regulation No 1408/71, the institution of the Member State to which the workers have been posted puts before the institution that issued the E 101 certificates concrete evidence that suggests that those certificates were obtained fraudulently, it is the duty of the latter institution, by virtue of the principle of sincere cooperation, to review, in the light of that evidence, the grounds for the issue of those certificates and, where appropriate, to withdraw them … If the latter institution fails to carry out such a review within a reasonable period of time, it must be possible for that evidence to be relied on in judicial proceedings, in order to satisfy the court of the Member State to which the workers have been posted that the certificates should be disregarded.’ (32)

65. That passage may be interpreted in two ways. *On the one hand*, it is possible to consider, as do Vueling, the Czech Government, Ireland and the Commission, that by those words the Court intended to make the competence of the court of the host Member State to disregard an E 101 certificate obtained or relied on fraudulently conditional on a dialogue having taken place between competent institutions, as provided for in Article 84a(3) Regulation No 1408/71. More specifically, that court has that competence only where *two cumulative conditions* are met, namely (i) that the competent institution of the host Member State has provided the issuing institution with concrete evidence that suggests that the E 101 certificate was obtained fraudulently and (ii) that the issuing institution has failed to reconsider that certificate, in the light of that evidence, within a reasonable time.

66. *On the other hand*, that passage may be read, as it is by Mr Poignant and the CRPNPAC, as meaning that the Court intended not to impose general conditions, but merely to give an answer modelled on the circumstances of the case, without prejudging the competence of the court of the host Member State in other cases.

67. I recall that, as regards the dialogue between competent institutions, the circumstances at issue in the main proceedings are significantly different from those that gave rise to the judgment in *Altun*. (33) The question whether, in those circumstances, the French criminal courts could, and whether the referring courts can, disregard the E 101 certificates at issue has thus divided the parties and the interveners before the Court.

68. In my view, the judgment in *Altun* cannot be interpreted as limiting the competence of the court of the host Member State, when it has before it objective evidence that enables a finding of fraud, to disregard an E 101 certificate. The considerations relating to the dialogue between competent institutions, provided for in Article 84a(3) of Regulation No 1408/71, set out in that judgment cannot be read as conditions of that competence (1). In case the Court should think otherwise, I shall explain the reasons why, in any event, those conditions must be considered to be met in circumstances such as those of the main proceedings (2).

### *1. The lack of effect of the dialogue between competent institutions on the jurisdictionof the court of the host Member State to disregard an E 101 certificate obtained or relied on fraudulently*

69. My suggested interpretation is in my view the consequence of the proper application of the general principle of EU law prohibiting fraudulent or abusive practices (a). A limitation of the competence of the court of the host Member State to disregard an E 101 certificate obtained or relied on fraudulently cannot be justified by any of the reasons that normally underpin the binding effect of that certificate ((b) to (d)). In the interest of completeness, that interpretation is supported, in Case C-37/18, by considerations relating to the effective protection from which a worker must be able to benefit in the event of fraud on the part of his employer (e). Last, that interpretation does not in my view compromise the system based on that certificate (f).

#### *(a) The general principle of prohibition of fraudulent or abusive practices*

70. The interpretation according to which the court of the host Member State has jurisdiction to disregard an E 101 certificate where it finds, on the basis of objective

evidence, that that certificate was fraudulently obtained or relied on is to my mind a direct and necessary consequence of the principle that individuals cannot fraudulently or abusively rely on the norms of EU law.

71. In fact, as the Court has consistently held with regard to that general principle, fraud or abuse of rights in the European Union, when it is found on the basis of objective elements, entails the *refusal to grant the individual concerned the right or the advantage sought* — which, moreover, is simply the consequence of the finding that, in the event of fraud or abuse of rights, the objective conditions required in order to obtain that right or advantage are not, in fact, met. (34)

72. The Court has forcefully reasserted that solution in its recent judgments in *N Luxembourg 1 and Others* (35) and in *T Danmark and Y Denmark*, (36) delivered in the Grand Chamber. It also confirmed in those judgments that a national court faced with abusive or fraudulent use of the provisions of EU law has, under EU law, not merely the *right*, but the *duty* to refuse to grant the person concerned the advantage resulting from those provisions. (37)

73. Accordingly, in application of the general principle in question, the court of the host Member State, when it has evidence establishing that an E 101 certificate has been obtained or relied on fraudulently, not only *has jurisdiction to disregard that certificate*, but also has *the duty to do so*.

74. Whether or not the dialogue between the competent institution of the host Member State and the issuing institution concerning the validity of an E 101 certificate, based on Article 84a(3) of Regulation No 1408/71, has taken place cannot in my view reasonably have an impact of the jurisdiction of the court of the host Member State, in circumstances such as those described in the preceding point, to disregard the certificate at issue. (38)

75. In that regard, I point out that, according to the reading of the judgment in *Altun* suggested by Vueling, the Czech Government, Ireland and the Commission, summarised in point 65 of this Opinion, if the competent institution of the host Member State has not submitted a request for reconsideration of the E 101 certificate to the issuing institution, if a reasonable time has not elapsed since that request or, again, if the issuing institution has replied, within a reasonable time, by stating that in its view, on the basis of the material sent to it, there has been no fraud, the court of the host Member State could not disregard the certificate at issue, even though it had objective evidence of that fraud.

76. In my view, such an outcome would be incompatible with the general principle referred to above and would amount to tolerating the unacceptable in a Union based on the rule of law: on the one hand, an individual would be able to benefit from his fraudulent behaviour; on the other hand, a court would have to tolerate, or indeed condone, fraud. (39)

77. I must underline that fraud causes fundamental disruption to public order, whether that of the host Member State or that of the European Union — which in my view are indistinguishable in cases involving social security fraud. (40) It is the function of the national courts, as courts of the European Union, guardians of that public order, to put an end to that disruption. There should be no limitation of that jurisdiction and, moreover, none of the usual reasons for the binding effect of the E 101 certificate would justify it.

### *(b) The principle of sincere cooperation*

78. In the first place, the principle of sincere cooperation, as implemented in Article 84a(3) of Regulation No 1408/71, cannot justify such a distortion of the principle of prohibition of fraudulent or abusive practices.

79. Admittedly, the institutions of the Member States must cooperate in implementing Regulation No 1408/71. The principle of sincere cooperation therefore requires that the competent institution of the host Member State address the issuing institution when it has evidence pointing to the existence of fraud on the E 101 certificate, in order to enable the issuing institution to reconsider whether that certificate was properly issued and to withdraw it or annul it. (41)

80. The competent institution of the host Member State cannot therefore refrain from all dialogue with the issuing institution, even in the event of fraud. (42) Such a breach of the duty of sincere cooperation, in particular if it should prove to be systematic, could, inter alia, be censured in an action for failure to fulfil obligations.

81. However, that necessary cooperation cannot in my view justify limiting the competence of the court of the host Member State to find fraud on the E 101 certificate. Irrespective of whether the dialogue between competent institutions provided for in Article 84a(3) of Regulation No 1408/71 takes place, that court must be able to disregard an E 101 certificate when it has evidence showing that that certificate was obtained or relied on fraudulently, and must be able to do so whether the matter was referred to it by the competent institution of that Member State, whether it is adjudicating in an action for damages brought by interested third parties, such as the workers who are victims of that fraud, or whether the individual relying on that certificate is the applicant in the proceedings before it.

82. In fact, the court cannot be prevented, with the sole aim of urging the institutions to cooperate, from taking action against fraud in social security matters. In that regard, an effective fight against fraud is crucial. At Member State level, fraud linked with the issuing of E 101 certificates represents a threat to the coherence and financial equilibrium of their social security systems and, at EU level, that fraud is liable to threaten the economic cohesion and the proper functioning of the internal market, by distorting the conditions of competition. (43)

83. However, although close and effective cooperation between competent institutions is indeed a key factor in the fight against fraud, (44) that cooperation does not however have, as EU law now stands, a binding framework allowing it to function with a reasonable degree of speed and effectiveness. (45) In fact, I am aware that EU law does not at present make provision for the issuing or reconsideration of E 101 certificates, which are matters for the national law of each Member State, and no mandatory time limit applies to communications between competent institutions. (46)

84. Furthermore, in the event of disagreement between the competent institutions, recourse to the conciliation procedure before the Administrative Commission is also likely to prolong the time taken to impose a penalty. Nor, moreover, do the Administrative Commission’s decisions have mandatory legal effect. (47) To restrict the fight against

fraud to that cooperation alone would amount in fact to that fight not being deployed with all the requisite vigour and speed.

85. In that context, I am not suggesting that the unilateralism of actions before the court of the host Member State should take precedence over cooperation between competent institutions. To my mind, those two forms of actions should in reality *go hand in hand*, since they complement each other. That, moreover, is the spirit of Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System. (48)

86. The dialogue between competent institutions, before the court of the host Member State is seised, may make it possible to dispel any doubts concerning the factual circumstances of the case in question, in particular when the finding of fraud requires that checks be carried out in the Member State in which that certificate was issued. (49) In addition, if the issuing institution were to cancel or withdraw the E 101 certificate following a request from the competent institution of the host Member State, it might prove unnecessary to seise the court of that State. The dialogue between competent institutions may thus allow procedural economy. (50) Even after a conviction by the court of the host Member State, that dialogue continues to be essential. In particular, the cancellation of an E 101 certificate, which applies throughout the European Union, can be pronounced only by the issuing institution, (51) while the court of the host Member State can only disregard the certificate in the context of the proceedings brought before it. In addition, that dialogue makes it possible to ensure that the financial consequences of the fraud are resolved and that the workers do not have to suffer inconvenience in the exercise of their right to social security. (52)

### *(c) The principle of mutual trust*

87. In the second place, the principle of mutual trust does not in my view call for a different interpretation from the one I propose. First, it should be noted that, in finding that an E 101 certificate has been obtained fraudulently, the court of the host Member State does not call into question the compliance with EU law of the institution that issued it. Such a finding of fraud implies not that that institution should be deemed to have infringed EU law, but merely that it has been deceived by the fraudulent manipulation of the employer.

88. Secondly, where, in the context of their dialogue, the issuing institution has, at the request of the competent institution of the host Member State, reconsidered an E 101 certificate and decided to uphold it, stating that, in its view, that certificate was not obtained or relied on in a fraudulent manner, the principle of mutual trust does indeed require that the court of the host Member State take due account of that answer and of any supporting evidence on which that institution has relied. However, that principle does not require that court to feel bound by that answer when it has before it other evidence establishing that fraud.

89. On that point, no analogy can be drawn with the instruments of EU law in civil and criminal matters, under which the national courts are bound to recognise or enforce certain documents coming from other Member States without being able, in principle, to

question their merits. Those instruments are part of the framework of cooperation between *judicial authorities*, which justifies the high degree of trust underpinning the system of recognition and enforcement provided for in those instruments. (53) The same degree of trust cannot be demanded of a *court* when it is dealing with an opinion expressed by an *administrative authority* of another Member State. In other words, the principle of mutual trust cannot justify the issuing institution having a kind of 'right of veto' over the competence of the court of the host Member State to disregard an E 101 certificate obtained or relied on fraudulently.

90. In any event, I recall, finally, that the principle of mutual trust creates a *presumption* of compliance with EU law: a strong presumption, admittedly, but not an irrebuttable one. On the contrary, that presumption may be rebutted in 'exceptional circumstances'. (54) In my view, proof of fraud constitutes such a circumstance.

### *(d) The principles of affiliation to a single scheme and legal certainty*

91. Nor, in the third place, does the principle of affiliation to a single social security scheme (55) call for a different interpretation. Admittedly, as Vueling submits, in the cases in the main proceedings the finding of fraud and the disregarding of the E 101 certificates at issue would have the effect, inter alia, that it would be ordered to pay damages to the CRPNPAC equivalent to a proportion of the contributions not paid in France, even though the issuing institution refuses at present to review the contributions already paid in Spain, which in fact would amount to compelling it to pay double contributions for the same activity.

92. However, such consequences are detrimental not to the workers concerned, but to *the fraudulent employer*. In fact, the latter takes the risk of such consequences by disrupting, by its fraud, the functioning of the rules laid down in Regulation No 1408/41. Those consequences are also capable of having a deterrent effect against fraud. (56)

93. In the fourth place, as regards the principle of legal certainty, it is sufficient to observe that a person who artificially creates or evades the conditions for obtaining a benefit arising under EU law is not justified in relying on that principle in order to oppose the loss of the benefit concerned pursuant to the principle that abusive practices are prohibited. (57)

### *(e) The right to an effective remedy*

94. In the fifth place, and in the interest of completeness, in Case C-37/18, the interpretation which I suggest is supported by considerations relating to the effective judicial protection from which a worker such as Mr Poignant must be able to benefit in the event of fraud by his employer.

95. In that regard, where an employer commits a fraud by means of an E 101 certificate, he deprives the worker concerned of the contributions to the social security scheme to which that worker should be affiliated, in accordance with the conflict rules laid down by the EU legislature in Regulation No 1408/71. Provided that that legislation is more favourable than the legislation to which that worker has incorrectly continued to be affiliated as a result of the employer's fraudulent manipulation, he sustains harm, for which he is entitled to obtain compensation. It would in my view be a strange state of

affairs if the case-law on the binding effect of the E 101 certificate, established by the Court in particular to protect the right of freedom of movement for workers, could restrict the possibility of such an action for damages.

96. What is more, I observe that a worker does not have the power to initiate a dialogue between competent institutions, pursuant to Article 84a(3) of Regulation No 1408/71, or to ensure that such a dialogue is initiated. Thus, if the competence of the court of the host Member State to disregard an E 101 certificate which is shown to have been obtained fraudulently, in the context of such an action for damages, were to depend on that dialogue having taken place, that would amount to making that worker's access to a court conditional on requirements over which he has no influence. To my mind such a result would scarcely be compatible with the right to such an effective remedy, as provided for in Article 47 of the Charter of Fundamental Rights of the European Union.

97. Admittedly, the Commission claimed at the hearing, in answer to a question from the Court, that the worker could bring an action before the courts of the sending Member State (namely that of the issuing institution and that where the employer has, in principle, its registered office), which have full jurisdiction to disregard or declare the E 101 certificate invalid.

98. In that regard, I accept that, in general, the right to an effective remedy does not guarantee that an individual will be able to bring his claim before the court of his choice. What matters, in principle, is that there is, somewhere, a forum providing the guarantees linked with the right to a fair trial, before which that individual can bring his action. (58)

99. However, I consider that a worker, as the weak party in the employment relationship, must have *easy access* to a court in order to rely on his rights vis-à-vis his employer. In my view, that consideration is incorporated in the requirements imposed by the fundamental right to an effective remedy.

100. On that point, Article 21 of the Brussels I bis Regulation (59) is a relevant point of reference. Under that provision, the worker does indeed have the choice of suing his employer before the courts of the Member State in which the employer has its registered office. However, the EU legislature allowed that worker, above all, to bring his action before a court for the place where he habitually carries out his work, such a court being considered appropriate, both in terms of proximity to the dispute and having regard to the requirement of the protection of the worker. (60)

101. To extend the Court's case-law on the binding effect of the E 101 certificate in such a context would amount in practice to depriving the worker of the court which is best placed to resolve the dispute and to protect his interests and which, moreover, seems to me to be the only 'realistic' court in the event of fraud on the E 101 certificate. In fact, it is likely that ignorance of the language and the local law and the distance from the place where he is domiciled would cause the worker to waive the exercise of his rights before the courts of the sending Member State. (61)

### *(f) The limits of the interpretation which I propose*

102. I would end by emphasising the limits of the interpretation which I propose. It is not a question of recognising a general power to question the E 101 certificate in the host

Member State. First, only the court of that State will be able to disregard it. (62) Secondly, even before that court, the presumption that the affiliation established by that certificate is lawful does not disappear. No longer irrebuttable, it becomes simply a mixed presumption: it may be rebutted by proof of fraud, within the meaning not of national law but of EU law, the definition of which is strict. Last, as I have indicated throughout this section, the E 101 certificate may be disregarded on the basis not of mere *suspicions* of fraud, but of *evidence establishing fraud*, which must be adduced by the individuals claiming that fraud exists.

103. As for the risk of protectionism, which is sometimes referred to in the literature, that such a solution would entail, I shall merely state that the Member States must have mutual trust in their courts, which, in collaboration with the Court, perform a function entrusted to them jointly, in order to ensure that the law is complied with in the interpretation and the application of the Treaties. A national court cannot thus be the object of such suspicions of protectionism, as its independence assumes respect for objectivity and the absence of any interest in the outcome of the dispute apart from the strict application of the rule of law. The Court, moreover, actively ensures respect for that independence. (63) In addition, the Court will be able to monitor, in the context of the preliminary ruling mechanism, the proper use of the exception of fraud. (64)

### *(g) Intermediate conclusion*

104. All of the foregoing considerations therefore lead me to conclude that the court of the host Member State has jurisdiction to disregard an E 101 certificate which was obtained or relied on fraudulently. The fact that the dialogue between competent institutions, provided for in Article 84a(3) of Regulation No 1408/71, has taken place does not affect that competence. Whether that dialogue has not yet been initiated by the institution of that State, whether it is in progress, or whether the issuing institution does not share the opinion of the former institution, that court must disregard that certificate when it has before it evidence establishing the fraud. The judgment in *Altun* cannot in my view be interpreted as laying down conditions contrary to that interpretation.

### *2. In the alternative: the application of the conditions relating to the conduct of the dialogue between competent institutions in circumstances such as those of the main proceedings*

105. I recall that, according to the reading of the judgment in *Altun* suggested by, in particular, Vueling, the Czech Government, Ireland and the Commission, the court of the host Member State has jurisdiction to disregard an E 101 certificate in the event of fraud only on the condition that the authorities of the host Member State have informed the issuing institution of concrete evidence which suggests that that certificate has been obtained fraudulently and that the issuing institution has declined to reconsider that certificate, in the light of that evidence, within a reasonable time.

106. In their submission, those conditions are not fulfilled in the present case. They contend that the French authorities ought to have questioned the issuing institution in May 2008, after the report was drawn up by the labour inspectorate. In fact, they did so only after Vueling had been convicted by the cour d'appel de Paris (Court of Appeal, Paris), on 31 January 2012. (65) According to Vueling, the fact that the French authorities subsequently had exchanges with that institution is irrelevant. The Commission adds that,

since the issuing institution adopted a decision stating that the E 101 certificates at issue should be maintained, (66) the cooperation procedure should be continued in the form of an attempt at conciliation before the Administrative Commission.

107. In my view, first, the court of the host Member State cannot be deprived of its competence to disregard an E 101 certificate which has been fraudulently obtained or relied on for the sole reason that it was seised *before the dialogue was initiated* by the competent institution of the host Member State, in accordance with Article 84a(3) of Regulation No 1408/71. Such an interpretation is unavoidable if only because an action, whether criminal or civil, may be initiated by an individual, such as Mr Poignant, who has no control over the initiation of the dialogue between competent institutions or any knowledge of how that procedure is being conducted. As the French Government maintains, in order to enable the issuing institution, in accordance with the principle of sincere cooperation, to express its views and, where appropriate, to withdraw the E 101 certificate, it is necessary and sufficient that that dialogue takes place *before the court of the host Member State gives a definitive ruling*.

108. Secondly, as regards the outcome of the dialogue, I understand from the reading of the judgment in *Altun* suggested by Vueling, the Czech Government, Ireland and the Commission that the court of the host Member State has jurisdiction to disregard an E 101 certificate which was fraudulently obtained or relied on *either* when the issuing institution has not reviewed the grounds on which the certificate in question issued and adopted a decision to maintain it or withdraw it, and has done so within a reasonable time, *or* when that institution has adopted such a decision within a reasonable time, but has not expressly discussed in the reasons on which that decision was based the evidence communicated by the competent institution of the host Member State. (67)

109. In this instance, first, the issuing institution adopted a first decision concerning the E 101 certificates at issue 2 years after the initial request of the French authorities, while its definitive decision was delivered more than 2½ years after that request. (68) Those decisions were manifestly not adopted within a reasonable time. (69) Secondly, the issuing institution did not discuss, in the reasoning on which that final decision was based, the evidence submitted by the French authorities concerning the fraud, namely, in particular, the false declarations of residence. (70)

110. I am therefore of the view that, in circumstances such as those of the main proceedings, (any) conditions relating to the dialogue between competent institutions should be considered to be fulfilled.

### *C. The concept of 'fraud' within the meaning of EU law*

111. The questions for a preliminary ruling formulated by the referring courts are based on the premiss that Vueling committed fraud, the subject of a definitive finding by the French criminal court.

112. Nonetheless, first, that premiss is based on the concept of fraud *as understood in French law*. In that context, fraud is established by the intentional breach of French law. However, in the judgment in *Altun*, the Court intended to give fraud in social security matters an *autonomous meaning*. In that judgment, the Court held that findings of fraud are to be based on a consistent body of evidence that satisfies both an objective and a

subjective factor. The objective factor consists in the fact that the conditions for obtaining and relying on an E 101 certificate, laid down in Title II of Regulation No 1408/71, are not met. The subjective factor corresponds to the intention of the parties concerned to evade or circumvent the conditions for the issue of that certificate, with a view to obtaining the advantage attached to it. (71)

113. Secondly, the premiss of fraud, within the meaning of EU law, is called in question before the Court. Vueling maintains that it is not satisfied in any of its elements. The Czech Government is also of that view, while the Commission expresses reservations in that respect. Only Mr Poignant, the CRPNPAC and the French Government maintain that fraud is undeniably (and definitively) established in the present case.

114. In those circumstances, it is appropriate, in my view, to provide all the elements of interpretation concerning the concept of 'fraud', within the meaning of EU law, that may be helpful, if only to enable the referring courts to ascertain whether the elements of fraud are present in the present cases. In addition, that information is essential in the interest of attaining legal certainty, in order to avoid diverging assessments and contradictory decisions in the Member States as to what constitutes fraudulent practice on social security matters.

115. Consequently, I shall address the interpretations of the objective elements (2) and the subjective elements (3) of fraud, in the light of the circumstances at issue in the main proceedings. I nonetheless consider it helpful to provide, by way of introduction, some explanations which in my view permit a better understanding of the general context of which the present cases form part (1).

### *1. The organisational structure adopted by the low-cost airlines and the reaction of the French and EU legislatures*

116. According to the studies which I have been able to consult, the 'historical' airlines are traditionally organised on the basis of what is known as a 'hub-and-spoke' transport model. Thus, they have one operating base (sometimes several), or a 'hub', a central airport around which they organise routes ('spokes') and where connections between the different routes are also made. That operating base brings together, in particular, the airline's headquarters and the fleet of aircraft and constitutes the 'home base' (72) of its flying personnel, that is, the airport at which the flying personnel receive their flight plans, from which they begin their duties and to which they return on completion thereof. On the other hand, the routes are only layover airports.

117. The low-cost airlines, on the other hand, have gradually adopted a different model, called 'point-to-point'. While they still generally have a main operating base serving as a hub, they essentially provide relatively short links between two destinations that enable multiple aircraft flights at a sustained pace. The objective of facilitating those flights as much as possible encouraged those airlines to post personnel and equipment for extended periods to the airports which they serve and, in that context, to establish new bases which gradually become important in logistical and human terms.

118. In that context, some low-cost airlines have developed a practice consisting in recruiting workers whom they permanently post to secondary operating bases in other Member States, while applying to them the social law and social security law of their

main operating base, and not the standards and contributions provided for in the Member States in which their secondary bases are located. To that end, those airlines employ, in particular, the model of posting of workers, arguing that their presence in Member States other than the Member State of the main operating base is an application of the freedom to provide services. (73)

119. The French legislature intended to combat that practice by clarifying what constitutes, for an airline, a permanent establishment, according to a definition close to the definition given to that concept in the Court's case-law, in order to justify the application of French law under Article L. 1262-3 of the Labour Code. (74) To that end, it adopted Article R. 330-2-1 of the Civil Aviation Code, which states that L. 1262-3 of the Labour Code is to apply to air transport undertakings in respect of their 'operating bases' situated on French territory, such a 'base' being defined as being 'a set of premises or infrastructures from which an undertaking carries out in a permanent, habitual or continuous manner an air transport activity with employees who have there the effective centre of their occupational activity'. (75) In the present case, the cour d'appel de Paris (Court of Appeal, Paris) specifically based its judgment of 31 January 2012, convicting Vueling, on those provisions. That court precluded the application of the rules on posting since Vueling had such a 'base' at Roissy. (76)

120. The EU legislature has also taken note of the practice in question. On that point, it should be borne in mind that, while Regulation No 1408/71 lays down, in Article 14(2)(a), special rules for the flying personnel of airlines — which are applicable *ratione temporis* in the present case, and to which I shall return below — the EU legislature had not reproduced, in the initial version of Regulation No 883/2004, those special rules, in the interest of simplification. The situation of the flying personnel therefore had to be assessed by reference to the general rules on workers occupied in two or more Member States, which, applied to the flying personnel, tended to designate, most of the time, the law of the place where the employer has its registered office or place of business. Nonetheless, it took the opportunity when adopting Regulation (EU) No 465/2012 (77) to introduce in Regulation No 883/2004 a special new rule, taking the form of a legal fiction according to which the activity of the flying personnel *is deemed to be carried out only in the Member State of its home base*, a fiction thus entailing the application of the law of that State on the basis of the *lex loci laboris*. (78) In other words, the 'home base' has become the criterion for posting in social security matters for the airlines' flying personnel.

### *2. The objective element of the fraud*

121. I recall that the objective element of the fraud lies in the fact that the conditions that need to be satisfied in order to obtain and rely on an E 101 certificate are not satisfied.

122. In the present case, one point should be clarified at the outset, relating to the legal basis on which the E 101 certificates at issue were issued by the issuing institution. In fact, such a certificate can in any event prove only that the conditions laid down by the provision on the basis of which it was issued were complied with. (79)

123. In that regard, the Cour de cassation, Chambre Sociale (Court of Cassation, Social Chamber) states in its order for reference and its first question in Case C-37/18 that those certificates were issued on the basis of Article 14(1)(a) of Regulation No 1408/71 and

Article 11(1) of Implementing Regulation No 574/72, that is to say, the rules applicable to the posting of workers.

124. On the other hand, the tribunal de grande instance de Bobigny (Regional Court, Bobigny) gives the impression, in its order for reference in Case C-370/17, that those certificates were in fact issued on the basis of Article 14(2)(a) of Regulation No 1408/71 and of Article 12a(1a) of Implementing Regulation No 574/72, or the rules applicable to the travelling or flying personnel of international transport undertakings. The first question posed by that court gives rise to doubt, stating that those certificates were issued 'in accordance with' Article 11(1) in conjunction with Article 12a(1a) of Implementing Regulation No 574/72, or under both the rules on posting and the rules applicable to travelling or flying personnel.

125. In reality, as is apparent from the file before the Court, and as the Cour de cassation, Chambre Sociale (Court of Cassation, Social Chamber) indicates, the E 101 certificates at issue were indeed requested by Vueling and issued by the issuing institution on the (sole) basis of the rules applicable to the posting of workers. I shall therefore proceed on the basis of that premiss in this Opinion. It will be for the tribunal de grande instance de Bobigny (Regional Court, Bobigny), which has sole jurisdiction to assess the facts, to verify the point for itself. (80)

126. Having made that clear, I shall explain why E 101 certificates could not be validly issued on the basis of the rules applicable to the posting of workers in circumstances such as those at issue in the main proceedings (a). I shall then explain why the workers concerned could not be placed or maintained under the legislation of the place where the employer has its registered office or place of business under the rules applicable to travelling or flying personnel (b).

***(a) The non-applicability of Article 14(1)(a)of Regulation No 1408/71to the flying personnel of airlines active in international transport***

127. Vueling submits that the rules on the posting of workers, laid down in Article 14(1)(a) of Regulation No 1408/71 and in Article 11(1) of Implementing Regulation No 574/72, can be applied to the flying personnel of an airline that, like Vueling, is active in the international transport of passengers.

128. To my mind, however, as the representative of Mr Poignant and the CRPNPAC claimed at the hearing, the flying personnel of such an airline come under Article 14(2)(a) of Regulation No 1408/71 and cannot be 'posted' to a Member State on the basis of Article 14(1)(a) of that regulation.

129. That interpretation follows, *first of all*, from the scheme of Regulation No 1408/71. The rules on posting and those applicable to the travelling or flying personnel of international transport undertakings constitute, as the first part of Article 14 of that regulation indicates, two exceptions to the *lex loci laboris* principle laid down in Article 13(2)(a) of that regulation. The structure of Article 14 and its relationship with Article 13 underscore the fact that the first exception is not intended to be relied on in order to derogate from the second.

130. That interpretation is unavoidable, *next*, having regard to the actual wording of the relevant provisions of Regulation No 1408/71, read in the light of the general context of which those provisions form part. It will be recalled that Article 14(1)(a) of that regulation refers to 'a person employed in the territory *of a Member State* … who is posted … to the territory *of another Member State*'. Conversely, Article 14(2)(a) of that regulation refers to the situation of workers deemed to be employed, as stated in the first part of that paragraph, 'in the territory of *two or more Member States*'. (81)

131. In that regard, although the concept of 'posting', within the meaning of Article 14(1)(a) of Regulation No 1408/71, is not defined in that regulation, the conditions laid down in that provision reflect the idea of a sedentary worker, habitually employed in one Member State, sent on a temporary basis to another Member State and eventually returning to the first Member State. The flying personnel of an airline, employed on board aircraft making international flights, cannot form part of such an arrangement, as they are not connected to the territory *of a Member State* where their work is habitually carried out. For those personnel, who are mobile by definition, the carrying out of activities in *several Member States* is a normal aspect of their working conditions. (82) That context justifies the EU legislature having established, in that regulation, a criterion of specific connection for those personnel. (83)

132. *Last*, Article 14(1)(a) of Regulation No 1408/71 must, according to the Court, as a derogation, be given a strict interpretation. (84) That provision cannot therefore be applied *by analogy* to the travelling or flying personnel coming under paragraph 2(a) of that article. (85)

***(b) The interpretation of Article 14(2)(a) of Regulation No 1408/71 in circumstances such as those of the main proceedings***

133. In my view, the finding that the E 101 certificates at issue could not be validly issued on the basis of the provisions applicable to the posting of workers is capable in itself of establishing the objective element of the fraud.

134. That being so, since Article 14(2)(a) of Regulation No 1408/71 provides, in principle, for the application of the law of the Member State in which the employer has its registered office or seat of business, and since E 101 certificates could, *hypothetically*, have been issued under that provision, I consider it appropriate, in order to avoid any accusation of formality, to explain why such certificates could not be validly issued by the issuing institution under that provision either.

135. In that regard, I would observe that, while Article 14(2)(a) of Regulation No 1408/71 provides, in principle, for the application of the law of the place in which the employer has its registered office or place of business, that provision also reserves the application of certain exceptions. In particular, subparagraph (i) provides that 'a person employed by [a] branch or permanent representation [which the undertaking in question has in the territory of a Member State other than that in which it has its registered office or place of business] shall be subject to the legislation of the Member State in whose territory such branch or permanent representation is situated'.

136. In accordance with that wording, two cumulative conditions must be satisfied in order for that rule to apply to a worker: first, the employer must have a 'branch or

permanent representation' in a Member State other than that in which it has its registered office or place of business; and, secondly, the worker must be 'employed by' that entity.

137. In that regard, concerning the *first of those conditions*, the discussions before the Court concerning the existence of a 'branch or permanent representation' in the circumstances at issue in the main proceedings reflect, in my view, the explanations set out in points 117 to 119 of this Opinion. In fact, Vueling maintains that, at the material time, it was merely providing, on an experimental basis, regular flights between a number of Spanish towns and Paris in slots that meant that certain aircraft spent the night, between two flights, on the tarmac at Paris-Charles-de-Gaulle Airport. It thus rejects the idea that it had such a branch or permanent representation or any other form of secondary establishment at that airport and, in essence, relies on the exercise of freedom to provide services.

138. Nonetheless, in my view there is little doubt as to the existence of such a 'branch or permanent representation', within the meaning of Article 14(2)(a)(i) of Regulation No 1408/71, in circumstances such as those in the main proceedings.

139. In that regard, it should be observed that that concept of 'branch or permanent representation' is not defined in that regulation, which also makes no reference to the law of the Member States in that respect. It must therefore be given an autonomous interpretation, which must be sought by reference to the normal use of those words in everyday language, while also taking into account the context in which they occur and the objectives pursued by the rules of which they are part. (86)

140. In its usual meaning, the term 'branch' refers to a form of secondary establishment (in contrast to the undertaking's main establishment) having no legal personality of its own (in contrast to a subsidiary) and having a certain degree of autonomy. The term 'permanent representation' reflects a closely related reality, implying a stable entity acting for and on behalf of a main establishment.

141. As regards the context of and the objectives pursued by Regulation No 1408/71, which is both an instrument forming part of the framework of the internal market and an instrument of private international law, the definitions given by the Court to closely related concepts in those fields provide relevant indications. In that regard, first, it will be recalled that, in accordance with the Court's settled case-law, a branch established in one Member State by a company governed by the law of another Member State constitutes a form of secondary establishment coming under Article 49 TFEU. (87) In this context, the concept of 'establishment' implies an infrastructure enabling the undertaking concerned to pursue a professional activity on a stable and continuous basis and, from that infrastructure, to hold itself out to, among others, nationals of the Member State in question. (88) Secondly, a similar reality is to be found in the Court's case-law concerning the concept of 'branch, agency or other establishment' in Article 7(5) of the Brussels I bis Regulation, which implies a centre of operations which has the appearance of permanency, such as the extension of a parent body, with a management and being materially equipped to negotiate business with third parties. (89)

142. It is apparent from all of the foregoing that a 'branch or permanent representation', within the meaning of Article 14(2)(a)(i) of Regulation No 1408/71, is a form of secondary establishment, with an appearance of stability, carrying on an economic

activity with third parties and having for that purpose organised material and human resources and a certain autonomy by comparison with the employer's main establishment.

143. It seems to me, as it does to the Cour de cassation, Chambre Sociale (Court of Cassation, Social Chamber), (90) that, in the air transport sector, the reality referred to by that concept of 'branch or permanent representation' is largely, if not wholly, the same as an 'operating base' as defined, in particular, in French law. (91)

144. The cour d'appel de Paris (Court of Appeal, Paris), in its judgment 31 January 2012 convicting Vueling, established, by reference to the circumstances set out in points 19, 21 and 24 of this Opinion, that that airline had such a base at Roissy. Subject to verification by the referring courts, which alone have jurisdiction to assess the facts, the characterisation of a 'branch or permanent representation' within the meaning of Article 14(2)(a)(i) of Regulation No 1408/71, is in my view complete. (92)

145. As regards the *second condition* stemming from that provision, that the worker concerned must be 'employed by' the employer's branch or representation, Vueling maintained that that could not be the case of the workers 'posted' to its base at Roissy (whose existence, it will be recalled, it contests), since that base did not have the authority characteristic of an employer or competence to manage the flying personnel, as their management was always carried out by the headquarters in Barcelona. Here again, however, there is little doubt in my view that that condition is satisfied in circumstances such as those at issue in the main proceedings.

146. In that regard, I observe that, while the general rule of the *lex loci laboris*, laid down in Article 13(2)(a) of Regulation No 1408/71, is intended to guarantee *equal* treatment for all workers occupied in the territory of the same Member State, (93) the rules laid down in Article 14(2)(a) of that regulation reflect the desire, where it is not possible to identify a single territory in which the activity is carried out, to establish criteria of connection designating the law that is closest to the worker, under a *principle of proximity* that is normal in private international law. Thus, when the worker is employed by a branch or a permanent representation of the employer, the law of the Member State in which that entity is situated applies on the ground that that law is deemed to be closer to the worker concerned than the law of the State in which the employer has its registered office or place of business would be. (94)

147. As for the implications of that principle of proximity, it is possible to reason by analogy with the case-law relating to private international labour law. In that field, it has long been accepted that an employment relationship is generally closely linked with (i) the law and (ii) the courts of the *place where the worker actually pursues his activities*. (95) Where a worker pursues his activities in more than one place, the Court has held, in particular in the judgment in *Nogueira and Others*, (96) which specifically concerned flying personnel, that the employment relationship has a significant link with *the place from which* an employee mainly performs his duties vis-à-vis his employer, which corresponds to the place where he receives instructions concerning his transport-related tasks and organises his work from which he begins those tasks and to which he returns when they are completed. In that judgment, the Court observed that that place coincides, for those flying personnel, with their 'home base'. (97)

148. When transposed to Article 14(2)(a)(i) of Regulation No 1408/71, that reasoning implies that, for the purposes of the application of that provision, it is sufficient to ascertain whether the worker pursues his activities *in*, or *from*, the branch or the permanent representation of the employer. In the case of the flying personnel, that is generally the case if the 'home base' is in that place, which appeared to be the position in the cases in the main proceedings, having regard to the circumstances described in points 19 and 21 of this Opinion. Here, again, it will be for the referring courts to ascertain whether that is so.

### *3. The subjective element of the fraud*

149. In order to find that a fraud exists, it is necessary, as I have already said, to establish that the person concerned had the *intention* to circumvent or evade the conditions on which an E 101 certificate is issued, in order to obtain the advantage associated with that certificate. In the present case, Vueling puts forward that there was no attempt at concealment on its part, having declared the posting of its workers to the French authorities and requested the extension of that posting from the French competent institution.

150. It is not for the Court to establish whether proof of such a fraudulent intention on Vueling's part is established in the circumstances at issue in the main proceedings. Nonetheless, it is appropriate to provide the referring courts, having regard to those circumstances, with all the elements of interpretation of EU law that might be of assistance to them in giving a ruling.

151. In that regard, it should be borne in mind at the outset that proof of a fraudulent intention may result from a voluntary action, such as the misrepresentation of the true situation of the posted worker or of the undertaking posting that worker, or from a voluntary omission, such as concealing relevant information. (98) To my mind, the voluntary nature of the act or omission at issue may be inferred from objective, factual circumstances. (99) In this context, I shall make two additional observations.

152. *In the first place*, the fact that an airline carrying out the international transport of passengers has requested that E 101 certificates be issued on the basis of Article 14(1)(a) of Regulation No 1408/71 in order to send its flying personnel to a branch in another Member State is already in itself liable to raise questions as to its real motivation.

153. In fact, I observe that the application of Article 14(2)(a) of that regulation implies two major disadvantages for such an airline. First, on the procedural level, Article 12a(1a) of Implementing Regulation No 574/72 does not allow that airline to request the competent institution of the Member State in which its registered office or place of business is situated to issue E 101 certificates for its flying personnel (as such a certificate must be requested by the worker himself) although, in accordance with Article 11(1) of that regulation, it may do so in the event of a posting. Secondly, as regards the substance, Article 14(2)(a)(i) of Regulation No 1408/71 provides, exceptionally, for the application of the law of the place of the branch or permanent representation that employs the workers concerned, where the rules on posting would make it possible to avoid the application of that exception and to ensure the application of the law of the Member State in which the registered office or place of business is situated.

154. *In the second place*, the referring courts indicated, as mentioned in points 20 and 24 of this Opinion, that Vueling had stated as the place of residence of a large number of 'posted' workers the address of its own registered office in Spain, although in reality they were residing in France and were also French citizens, while, moreover, half of them did not normally work for Vueling and had been engaged less than 30 days before being posted, some of them on the previous day or on the actual day. Those circumstances also raise questions.

155. In fact, even on the assumption that an airline active in international transport wrongly believes that the rules on the posting of workers may apply to its flying personnel, (100) the failure to disclose to the issuing institution the real place of residence of the workers concerned may help to conceal the circumvention of those rules.

156. In that regard, I observe that Article 14(1)(a) of Regulation No 1408/71 does not admittedly prevent an undertaking from posting workers in the Member State in which they live. Nor does that provision prohibit those workers from having the nationality of the Member State to which they are sent. In addition, according to the Court's case-law, the mere fact that a worker was recruited with a view to being posted does not in itself preclude his coming within the rules on posting. (101)

157. However, it seems to me that, where those circumstances — the recruitment of workers having the nationality of a Member State, residing in that State, with a view to their being employed in that State — are all present, the 'posting' model is artificial. (102) In that regard, I recall that Article 14(1)(a) of Regulation No 1408/71 is essentially intended to promote freedom to provide services for the benefit of the undertakings which avail themselves of it by sending workers to Member States other than that in which they are established and, in that context, to avoid administrative complications. (103) The rules on posting cannot therefore be applied to workers directly recruited in the State to which they are intended to be posted. (104)

158. It will ultimately be for the referring courts to verify Vueling's conduct in the main proceedings. In that context, that airline will have to be given the opportunity to rebut the evidence discussed in this Opinion, in accordance with the guarantees linked with the right to a fair trial. In particular, it will have to be able to provide an explanation concerning the incorrect declarations of residence which it made to the Spanish authorities.

### *D. The principle that a decision adopted in criminal proceedings constitutes res judicata in civil proceedings*

159. By its second question in Case C-37/18, the Cour de cassation, Chambre Sociale (Court of Cassation, Social Chamber) asks, in essence, whether the principle of primacy of EU law precludes a national court, which is bound by the principle that a decision adopted in criminal proceedings constitutes *res judicata* in civil proceedings, from drawing the appropriate conclusions from a decision of a criminal court which is incompatible with EU law by ordering an employer to pay damages to a worker solely because that employer has been convicted in respect of the same facts.

160. The principle that a decision adopted in criminal proceedings constitutes *res judicata* in civil proceedings is, in the French legal order, a judge-made principle which

is consistently applied in the case-law of the Cour de cassation (Court of Cassation), according to which decisions of the criminal courts constitute *res judicata*, with effect *erga omnes*, in civil proceedings. That principle applies not only with regard to the *operative part* of a criminal decision, that is to say, to the finding that the accused is guilty or not guilty and the decision to impose a specific penalty or to discharge him. It also extends to the *grounds* of that decision. (105) Consequently, the civil court, adjudicating on the same facts as the criminal court, is prohibited from calling into question not only the *conviction or acquittal of the accused as such*, but also the *findings of fact* and the *application of the law to those facts* made by the criminal court. Those elements benefit from an irrebuttable presumption of truth and are therefore no longer open to discussion before the civil court. (106)

161. The cour d'appel de Paris (Court of Appeal, Paris), in its judgment of 4 March 2016, thus relied on the *characterisation of concealed employment*, made in the judgment which it had delivered on 31 January 2012 in criminal proceedings against Vueling, to order the latter to pay damages to Mr Poignant. (107) In the event that the Court should rule (contrary to my suggestion) that the court of the host Member State cannot disregard an E 101 certificate in circumstances such as those of the main proceedings, that characterisation would be incompatible with EU law. (108) It would then be necessary to ascertain whether the latter judgment could properly constitute, in civil proceedings, *res judicata* as regards the establishment of the offence which Vueling was accused of committing.

162. I must make clear at the outset that in my view the principle of primacy of EU law does not in itself provide the suitable test for resolving that question. In fact, it is not a matter of ensuring at the outset that the application of Regulation No 1408/71 prevails over the principle *res judicata* as conceived of in French law. Nor do I think that the procedural autonomy of the Member States and, in that context, the tests of equivalence and effectiveness, put forward by the French Government, are relevant. In fact, the question of what may constitute *res judicata* is not a procedural question but a substantive question.

163. In that context, I would observe that, *on the one hand*, the principle that a decision adopted in criminal proceedings constitutes *res judicata* in civil proceedings may impair the effectiveness of EU law. If a criminal decision were contrary to EU law, it would nonetheless have to be applied by the civil court. *On the other hand,* the principle that a decision adopted in criminal proceedings constitutes *res judicata* in civil proceedings reflects, as Mr Poignant and the French Government submit, a legitimate objective of legal certainty, consisting in avoiding contradictions between criminal decisions and civil decisions concerning the same facts. The outlines of judicial policy considerations relating to the particular role recognised to the criminal courts can be made out. (109) It is therefore necessary, in my view, to strike a balance between the effectiveness of EU law and that legitimate objective. (110)

164. As regards that balancing exercise, the Court has indeed repeatedly recognised the importance which the principle that a decision adopted in criminal proceedings constitutes *res judicata* in civil proceedings assumes both in the EU legal order and in the national legal orders. In order to ensure both the stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive following the exhaustion of the available remedies or upon expiry of

the periods prescribed for pursuing those remedies can no longer be challenged. EU law therefore does not require the national courts, in principle, to disapply domestic procedural rules that confer finality on a judgment, even if to do so would make it possible to remedy a situation which is incompatible with EU law. (111)

165. However, as the Commission claims, although EU law does not preclude the conviction or acquittal pronounced by a criminal court (in other words, the *operative part* of that decision) from constituting *res judicata* and no longer being open to challenge, even if it were contrary to EU law, (112) to extend that principle to the *application of the law to the facts by the criminal court* when such application has been shown before the criminal court to be incompatible with EU law would constitute too great an obstacle to the effectiveness of EU law. The person concerned would find that the rights which he derives from the direct effect of EU law were again ignored, in the context of a *second decision*. To my mind, therefore, EU law precludes such a domestic rule concerning *res judicata*. (113)

166. Contrary to the French Government's contention, that interpretation is not called into question by the judgment in *Di Puma and Zecca*. (114) It will be recalled that in that judgment the Court held that the obligation imposed on Member States as a result of the EU legislation to provide for effective, proportionate and dissuasive penalties for insider dealing does not preclude a national rule providing that the findings of fact made in criminal proceedings with regard to the factors constituting insider dealing constitute *res judicata*, with that rule having the consequence that, where the accused is acquitted by the criminal court, proceedings for an administrative fine in respect of the same facts must be closed without a fine being imposed.

167. However, the Court merely held that the *res judicata* effects of a criminal judgment in administrative proceedings did not prevent the finding of violations of the applicable legislation and the imposition of effective penalties, in so far as the findings of fact constituting *res judicata* gave rise to *inter partes* discussion before the criminal court and that the national authority responsible for imposing those administrative penalties has means of ensuring that a judgment convicting or acquitting the person concerned takes account of all the evidence which that authority has at its disposal. (115) The Court therefore did not rule on the situation in which the criminal court has upheld applications of the law to the facts that are incompatible with EU law — by adopting, for example, an interpretation of 'insider dealing' that is contrary to EU law.

168. Having regard to all of the foregoing, I propose that the Court's answer to the second question submitted by the Cour de cassation, Chambre Sociale (Court of Cassation, Social Chamber) in Case C-37/18 should be that EU law precludes a national court, bound under its domestic law by the principle that a decision adopted in criminal proceedings constitutes *res judicata* in civil proceedings, from drawing the appropriate conclusions from a criminal decision that is incompatible with EU law and ordering an employer to pay damages to a worker solely because that employer has been convicted in criminal proceedings in respect of the same facts.

## VI. Conclusion

169. Having regard to all of the foregoing considerations, I propose that the Court answer the questions for a preliminary ruling submitted by the tribunal de grande instance de Bobigny (Regional Court, Bobigny, France) in Case C-370/17 and by the Cour de cassation, Chambre Sociale (Court of Cassation, Social Chamber, France), in Case C-37/18 as follows:

(1) Article 14(1)(a) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006, and Article 11(1) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, in the version amended and updated by Regulation No 118/97, must be interpreted as meaning that the court of the host Member State has jurisdiction to disregard an E 101 certificate when it has before it evidence establishing that that certificate was obtained or relied on fraudulently. Whether the dialogue between competent institutions, provided for in Article 84a(3) of Regulation No 1408/71, as amended by Regulation No 1992/2006, has taken place has no impact on that competence.

(2) European Union law precludes a national court, which is bound under its domestic law by the principle that a decision adopted in criminal proceedings constitutes *res judicata* in civil proceedings, from drawing the appropriate conclusions from a criminal decision that is incompatible with EU law by ordering an employer to pay damages to a worker solely because that employer has been convicted in criminal proceedings in respect of the same facts.

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1 Original language: French.

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2 The E 101 Certificate, entitled ‘Statement of applicable legislation’, is a standard form drawn up by the Administrative Commission on Social Security for Migrant Workers (‘the Administrative Commission’). See Decision No 202 of the Administrative Commission 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) (OJ 2006 L 77, p. 1). Subsequently, that certificate became portable document A1. Having regard to the date of the facts of the dispute in the main proceedings, I shall use the term E 101 certificate in this Opinion.

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3 Council Regulation of 14 June 1971, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 (OJ 2006 L 392, p. 1) (‘Regulation No 1408/71’).

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4 Council Regulation of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, as amended and updated by Regulation No 118/97, as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 ('Implementing Regulation No 574/72').

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5 Judgment of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63; 'the judgment in *Altun*').

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6 According to the definition provided in the European Parliament Resolution of 14 September 2016 on social dumping in the European Union (A8-0255/2016), the concept of 'social dumping' 'covers a wide range of intentionally abusive practices and the circumvention of existing European and national legislation (including laws and universally applicable collective agreements), which enable the development of unfair competition by unlawfully minimising labour and operation costs and lead to violations of workers' rights and exploitation of workers'.

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7 Regulation of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 100, p. 1).

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8 Regulation of the European Parliament and of the Council of 29 April 2004 (OJ 2004 L 166, p. 1).

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9 Regulation of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 284, p. 1).

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10 *JORF*, 13 March 2007.

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11 *JORF*, 23 November 2006.

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12 Following the entry into force of R. 330-2-1 of the Civil Aviation Code, Article L. 342-4 of the Labour Code was replaced by Article L. 1262-3 of the latter code. However, Article R. 330-2-1 of the Civil Aviation Code was not amended accordingly.

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13 In French law, where a worker unilaterally terminates his contract of employment because of circumstances for which he claims the employer to be responsible, that termination constitutes formal notification and has the effects of a dismissal without real and substantive cause. However, the employee can terminate the contract of employment on the ground of fault on the part of the employer only in the event of a sufficient serious breach by the employer that prevents the contract of employment from being performed. Otherwise the formal notification has the effects of a resignation.

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14 Judgment of 27 April 2017 (C-620/15, EU:C:2017:309; 'the judgment in *A-Rosa Flussschiff*').

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15 In that regard, I would refer the reader to my Opinion in *A-Rosa Flussschiff* (C-620/15, EU:C:2017:12, points 44 to 55), and to my Opinion in *Altun and Others* (C-359/16, EU:C:2017:850, points 32 to 37).

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16 Although the E 101 certificate may be issued under the rules applicable to the posting of workers, set out in Article 14(1)(a) of Regulation No 1408/71 and in Article 11(1) of Implementing Regulation No 574/72, it may also be issued on the basis of other provisions, including Article 14(2)(a) of Regulation No 1408/71, applicable to the travelling or flying personnel of transport undertakings (see points 124 and 134 of this Opinion).

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17 Cour de cassation, chambre criminelle, No 11-88420.

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18 See judgment of 26 January 2006, *Herbosch Kiere* (C-2/05, EU:C:2006:69, paragraphs 19 and 32).

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19 The judgments in question divided legal commentators in France. See, among those criticising the judgments, Lhernould, J.P., 'Une compagnie aérienne peut-elle détacher des navigants en France ? L'étonnante leçon anti-européenne de la chambre criminelle à propos du formulaire E 101', *RJS*, 2014, and, among those supporting the judgments, Muller, F., 'Face aux abus et contournements, la directive d'exécution de la directive détachement est-elle à la hauteur?', *Dr. Soc.*, 2014, p. 788. Furthermore, following a complaint by Vueling, the Commission opened an EU Pilot procedure against France. However, that complaint was discontinued following delivery of the judgment in *A-Rosa Flussschiff*.

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20 See judgment in *A-Rosa Flussschiff*, paragraph 61. In that judgment, the Court also held, implicitly but necessarily, that the civil or criminal nature of the proceedings brought has no impact on the binding effect of the E 101 certificate, which is binding on all the courts of the Member States. See order of 24 October 2017, *Belu Dienstleistung and Nikless* (C-474/16, not published, EU:C:2017:812, paragraph 17).

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21 In other words, although I have reservations about the somewhat hasty manner in which the French criminal courts disregarded the E 101 certificates produced by Vueling and the Court's case-law relating to those certificates, I consider that the solution at which they arrived is, in principle, consistent with EU law.

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22 See my Opinion in *Altun and Others* (C-359/16, EU:C:2017:850, point 35).

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23 See my Opinion in *Altun and Others* (C-359/16, EU:C:2017:850, point 36).

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24 See, to that effect, judgment in *Altun*, paragraphs 37 to 39 and 41 to 43 and the case-law cited.

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25 Judgment in *Altun*, paragraphs 39 and 40.

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26 See, in particular, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 36 and the case-law cited).

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27 Judgment in *Altun*, paragraph 48.

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28 See judgment in *Altun*, paragraph 49. See also judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraphs 27, 30, 31 and 33).

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29 For the constituent elements of fraud, within the meaning of EU law, and the indicia on which it may be established, see Section C of this Opinion.

30 See judgment in *Altun*, paragraphs 55, 56 and 60.

31 See judgment in *Altun*, paragraphs 20 and 21.

32 Judgment in *Altun*, paragraphs 54 and 55.

33 See points 26 to 31 of this Opinion.

34 See judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 32 and the case-law cited).

35 Judgment of 26 February 2019 (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraphs 96 to 102).

36 Judgment of 26 February 2019 (C-116/16 and C-117/16, EU:C:2019:135, paragraphs 70 to 76).

37 See judgments of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraphs 110 and 120), and *T Danmark* and *Y Denmark* (C-116/16 and C-117/16, EU:C:2019:135, paragraphs 76 and 82).

38 See, to that effect, Opinion of Advocate General Lenz in *Calle Grenzshop Andresen* (C-425/93, EU:C:1995:12, point 63). See, by analogy, judgment of 27 September 1989, *van de Bijl* (130/88, EU:C:1989:349, paragraphs 20 to 27), and Opinion of Advocate General Darmon in *van de Bijl* (130/88, not published, EU:C:1989:157, point 17). See also Opinion of Advocate General Mischo in *Paletta* (C-45/90, not published, EU:C:1991:434, points 29 to 34) and judgment of 2 May 1996, *Paletta* (C-206/94, EU:C:1996:182, paragraphs 24 to 28). In those judgments, the Court accepted that certain documents, issued by the institutions of a Member State and binding, in principle, on the institutions of another Member State, might be disregarded by the courts of the latter State in the event of fraud. The Court rejected in those cases certain interveners' suggestions that cooperation between institutions should be given priority.

39 See my Opinion in *Altun and Others* (C-359/16, EU:C:2017:850, point 44).

40 See the considerations in point 82 of this Opinion.

41 See my Opinion in *Altun and Others* (C-359/16, EU:C:2017:850, point 71).

42 See, to that effect, judgment of 11 July 2018, *Commission* v *Belgium* (C-356/15, EU:C:2018:555, paragraph 105), where the Court held that the legislation at issue in that case, which was intended to combat E 101 certificates obtained or relied on fraudulently, did not satisfy the requirements of the judgment in *Altun*, since, in particular, that legislation did not lay down an obligation to initiate the dialogue and conciliation procedure provided for in Regulations No 883/2004 and No 987/2009.

43 See my Opinion in *Altun and Others* (C-359/16, EU:C:2017:850, point 46). See also the European Parliament resolution of 14 September 2016, on 'social dumping' in the European Union, cited above. See also, by analogy, concerning 'fiscal dumping', judgments of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 107), and *T Danmark* and *Y Denmark* (C-116/16 and C-117/16, EU:C:2019:135, paragraph 79).

44 See recital 4 of Decision No H5 of the Administrative Commission of 18 March 2010, concerning cooperation on combating fraud and error within the framework of [Regulation No 883/2004] and [Regulation No 987/2009] (OJ 2010 C 149, p. 5).

45 See, by analogy, Opinion of Advocate General Darmon in *van de Bijl* (130/88, not published, EU:C:1989:157, point 17).

46 It will be recalled that the Administrative Commission's decisions laying down such deadlines are not binding. I would note, nonetheless, that the proposal for the amendment of the coordination regulations currently being discussed by the EU legislature provides for the introduction of time limits for the issuing institution's review of whether the E 101 certificate was properly issued and, where appropriate, the withdrawal or rectification of that certificate, at the request of a competent institution of another Member State. In the event of irrefutable fraud on the part of the person requesting the document, the issuing institution must

immediately withdraw or correct the document, with retroactive effect. See, for further details, my Opinion in *Altun and Others* (C-359/16, EU:C:2017:850, point 21).

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47 The case that gave rise to the judgment of 6 September 2018, *Alpenrind and Others* (C-527/16, EU:C:2018:669), provides a striking example in that respect. In that case, the competent institution of the host Member State had informed the issuing institution that the A1 portable documents which it had issued for certain workers were not valid. The issuing institution had refused to withdraw those documents. Following that disagreement, the Member States concerned had referred the matter to the Administrative Commission, which had delivered a decision stating that the documents should be withdrawn. However, those documents had not been withdrawn by the issuing institution following that conciliation procedure.

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48 Directive of the European Parliament and of the Council of 15 May 2014 (OJ 2014 L 159, p. 11). In particular, Article 6(10) of that directive provides that a request for information between competent institutions concerning posting is not to preclude the competent authorities of the host Member State from taking measures in accordance with the relevant national and EU law to investigate and prevent alleged breaches of the rules on the posting of workers.

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49 I am thinking, in particular, of the type of fraud at issue in the case that gave rise to the judgment in *Altun*, which consisted in establishing ‘letter box’ companies in a given Member State for the sole purpose of posting workers to another Member State. Ireland and the Commission, however, go as far as to maintain that the court of the host Member State *cannot have evidence proving the fraud without a dialogue having taken place with the issuing institution*. The excessive nature of that assertion is immediately apparent. While such a dialogue may prove useful for the purpose of obtaining evidence, it is not essential. That institution is not always better placed than the authorities of the host Member State to establish the fraud. In particular, decisive elements may often be found in the host Member State. That is so in circumstances such as those of the main proceedings, where it is a matter of establishing that the employer has a branch in that State and that workers have been posted to that branch (see Section C of this Opinion). Furthermore, the EU legislature has itself emphasised the role of monitor assigned to the authorities of the host Member State, in Directive 2014/67, Article 7 of which provides, in essence, that the monitoring of compliance with that directive is to be the responsibility of the authorities of that state, assisted, where necessary, by the authorities of the issuing Member State.

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50 In the present case, if the French authorities had initiated the dialogue earlier, the issuing institution would probably have cancelled the E 101 certificates at issue, since it refused to do so essentially on time-related grounds.

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51 See my Opinion in *Altun and Others* (C-359/16, EU:C:2017:850, point 56).

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52 See the considerations in footnote 56 of this Opinion.

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53 See, for example, concerning Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), judgment of 10 November 2016, *Poltorak* (C-452/16 PPU, EU:C:2016:858, paragraph 45). See also, in the context 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) ('the Brussels I bis Regulation'), judgment of 16 July 2015, *Diageo Brands* (C-681/13, EU:C:2015:471, paragraphs 40 and 63).

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54 See, in particular, judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 82 and the case-law cited).

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55 See, regarding this principle, point 57 of this Opinion.

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56 Generally, the finding of fraud should, in particular, have the consequence that the workers concerned are affiliated to the social security scheme of the host Member State with retroactive effect. At present, however, the coordination regulations contain no provisions on the regulation of the financial consequences of such a retroactive change, in particular as regards contributions wrongly paid by the employer. The difficulties to which this change of affiliation gives rise may nonetheless be regulated by a solution negotiated between the competent institutions, in a spirit of cooperation. In that regard, I consider that when the court of the host Member State has made a finding of fraud in a definitive judgment, the issuing institution should draw the appropriate conclusions from that judicial decision by withdrawing the certificates at issue and negotiating such a solution. Mutual confidence must operate in both directions (see my Opinion in *Altun and Others* (C-359/16, EU:C:2017:850, point 65)). Furthermore, mechanisms designed to facilitate the regulation of those financial consequences are provided for in the proposal for a Regulation of the European Parliament and of the Council amending [Regulation No 883/2004] and [Regulation No 987/2009] (COM(2016) 815 final), which is still in the process of being adopted.

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57 See, to that effect, judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 43 and the case-law cited), and also my Opinion in *Altun and Others* (C-359/16, EU:C:2017:850, point 66).

58 See judgment of 21 October 2015, *Gogova* (C-215/15, EU:C:2015:710, paragraphs 45 and 46), and also Fawcett, J.J., ‘The impact of Article 6(1) of the ECHR on private international law’, *International & Comparative Law Quarterly*, 2007, 56(1), p. 1.

59 In accordance with Article 1(2)(c) thereof, social security is not covered by the Brussels I bis Regulation. Accordingly, any action brought by the worker against the issuing institution would not come within the scope of that regulation. On the other hand, that exclusion would not apply to an action for damages brought by the worker against his employer, even though such an action would be set against the backdrop of the employer’s failure to comply with his social security obligations (see judgment of 14 November 2002, *Baten* (C-271/00, EU:C:2002:656, point 48)).

60 See judgments of 15 January 1987, *Shenavai* (266/85, EU:C:1987:11, paragraph 16), and of 27 February 2002, Weber (C-37/00, EU:C:2002:122, paragraph 40). On this point, I am inclined to take the view that, in a situation such as that in the main proceedings, the habitual place of work of the workers concerned is not in the sending Member State, but in the host Member State (see point 147 of this Opinion).

61 See, by analogy with regard to territorial jurisdiction in the context of consumer protection, judgment of 27 June 2000, *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraphs 22 to 24).

62 See, *a contrario*, here too, judgment of 11 July 2018, *Commission* v *Belgium* (C-356/15, EU:C:2018:555, paragraph 105), where the Court criticised the legislation at issue on the second ground that it was not limited to conferring on the national court alone the power to make a finding of fraud and to disregard, on that ground, an A1 portable document, but allowed the national administrative authorities to do so, outside any court proceedings.

63 See judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117), and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586).

64 Any errors on the part of the national courts, if made at last instance, might, moreover, be censured by an action for a declaration of liability (judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513)) or by an action for failure to fulfil obligations

(judgment of 4 October 2018, *Commission* v *France (Advance payment of tax)* (C-416/17, EU:C:2018:811)) against the Member State concerned.

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65 In that regard, the French Government explained at the hearing that the practice followed at the material time consisted in the labour inspectorate communicating its report of an offence both to the competent Urssaf and to the prosecutor. When the prosecutor sent the employer before the criminal court, the Urssaf awaited the outcome of those proceedings. Where the accused was convicted, the Urssaf informed the issuing institution. In other words, the French authorities considered it appropriate to inform the issuing institution of doubts as to the validity of an E 101 certificate only when the breach of the social security rules had been established, in *inter partes* proceedings, by the court.

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66 Vueling maintains before the Court that the issuing institution confirmed the *validity* of the E 101 certificates at issue. I observe, however, that it is apparent from the decision of 5 December 2014, an official translation of which Vueling communicated to the Court, that the issuing authority agreed with the French authorities' assessment as regards the social security legislation that ought to have been applied to the workers concerned, with the certificates at issue having been maintained only in the interest of expediency (see points 27 and 28 of this Opinion). It would nonetheless be for the referring courts, where necessary, which alone have jurisdiction to assess the facts, to ascertain whether that is so.

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67 I recall that, in the case that gave rise to the judgment in *Altun*, the institution that had issued the E 101 certificates had replied to the authorities of the host Member State. That institution had not however taken account, in its reply, of the evidence relied on by those authorities.

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68 See points 27 and 28 of this Opinion.

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69 By way of example, the Commission envisages, in the proposal for a regulation that is currently under discussion by the EU legislature, allowing the issuing institution a period of 25 working days from a request by another institution to reconsider and, if appropriate, rectify or withdraw an E 101 certificate.

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70 The letter of 9 December 2014, referred to in point 30 of this Opinion, does indeed indicate that the Spanish authorities did not find that there had been any fraudulent intention. However, there is no indication to that effect in the decision of 5 December 2014. Furthermore, neither that letter nor that decision discusses the evidence put forward in that regard by the French authorities.

71 Judgment in *Altun*, paragraphs 50 to 52.

72 This concept was defined at the material time in Annex III to Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation (OJ 1991 L 373, p. 4), as amended by Regulation (EC) No 1899/2006 of the European Parliament and of the Council of 12 December 2006 (OJ 2006 L 377, p. 1). Annex III defined the concept of 'home base' as 'the location nominated by the operator to the crew member from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal conditions, the operator is not responsible for the accommodation of the crew member concerned'. That concept is, in that context, decisive for the application of the rules on maximum flying time and mandatory rest periods. A home base must thus be nominated for each crew member. Annex III has been replaced twice, by, respectively, Commission Regulation (EC) No 8/2008 of 11 December 2007 (OJ 2008 L 10, p. 1) and Commission Regulation (EC) No 859/2008 of 20 August 2008 (OJ 2008 L 254, p. 1), although that definition has not been amended.

73 See, for fuller explanations, Urban, Q., 'Le droit individuel applicable au personnel d'une compagnie aérienne *low cost* à l'épreuve de son organisation en réseau', in Lyon-Caen, A. and Urban, Q., *Le droit du travail à l'épreuve de la globalisation*, Dalloz, 2008, p. 119 et seq.; Jorens, Y., *Fair aviation for all, a discussion on some legal issues*, ETF, January 2019, especially pp. 12, 13 and 19-31, and Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, entitled 'Aviation Strategy for Europe: Maintaining and promoting high social standards' (COM (2019) 120 final). See further, on the subject, judgment of 14 September 2017, *Nogueira and Others* (C-168/16 and C-169/16, EU:C:2017:688).

74 It will be recalled that that article provides, in essence, that an employer cannot rely on the provisions applicable to posting when it has a permanent establishment on French territory. I do not propose to express a view in this Opinion on the compatibility of that article with EU law.

75 It is suggested in the literature, moreover, that Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3) should be amended to include a definition of 'operating base', similar to that laid down in French law ('an airport at which the airline permanently bases aircraft and crew and from where it operates routes. Both fleet and personnel return to the base at the end of the day'), in order to identify an infrastructure from which an airline carries on its activity in a stable and continuous manner,

that is to say, a secondary establishment coming within the provisions of the FEU Treaty on freedom of establishment See Jorens, Y., cited above, pp. 29 and 30.

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76 To my mind, it is a matter of particular regret that that court did not state the reasons for its decision in the light of Regulation No 1408/71. Instead, it reasoned by reference to domestic provisions (which is already in itself such as to raise questions in terms of observance of the primacy of EU law) which, as I understand it, are designed to transpose Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1). Accordingly, those provisions come under *employment law* and cannot be directly relevant for the purpose of assessing compliance with the rules on *social security* laid down by that regulation. The concepts of posting and the conditions associated therewith are indeed closely related, but nonetheless distinct in those two measures. Accordingly, while analogies may be drawn on certain points, it is not immediately apparent that the solutions applicable in one sphere are automatically capable of being transposed to the other.

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77 Regulation of the European Parliament and of the Council of 22 May 2012 amending Regulations Nos 883/2004 and 987/2009 (OJ 2012 L 149, p. 4).

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78 See Article 11(5) of Regulation No 883/2004 as amended by Regulation No 465/2012.

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79 See my Opinion in *A-Rosa Flussschiff* (C-620/15, EU:C:2017:12, point 35).

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80 The explanations supplied by the tribunal de grande instance de Bobigny (Regional Court, Bobigny) and the wording of that court's first question reiterate Vueling's argument. In fact, in its observations before the Court, that airline, while maintaining that the conditions laid down in Article 14(1)(a) of Regulation No 1408/71 were satisfied in this instance, asserts that the E 101 certificates in question were issued on the basis of Article 14(2)(a) of that regulation and Article 12a(1a) of Implementing Regulation No 574/72.

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81 Emphasis added.

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82 See, to that effect, judgment of 19 March 2015, *Kik* (C-266/13, EU:C:2015:188, paragraph 59).

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83 See, to the same effect, Gamet, L., ‘Personnel des aéronefs et lois sociales françaises : les compagnies *low cost* dans les turbulences du droit social français’, *Droit social*, 2012, p. 502, and, by analogy, concerning travelling personnel, Lhernould, J.F. and Palli, B., ‘Le statut social du chauffeur routier international à la lumière des dernières propositions législatives communautaires’, *Droit social*, 2017, p. 1057.

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84 See, by analogy, judgment of 6 September 2018, *Alpenrind and Others* (C-527/16, EU:C:2018:669, paragraph 95).

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85 I would nonetheless observe that, since Article 14(2)(a) of Regulation No 1408/71 refers only to flying personnel employed on the territory of two or more Member States, it does not apply to workers who are employed only on internal flights. In that case, the basic principle of the *lex loci laboris* in Article 13(2) of Regulation No 1408/71must apply (see, on that point, the case that gave rise to the judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309)) and the workers concerned might benefit from the rules on posting. That particular situation is not however at issue in the present case, as the flying personnel of an international airline active in international transport are habitually required to travel in aircraft flying to different Member States. Furthermore, I observe that the solution might be different under Article 11(5) of Regulation No 883/2004, as amended by Regulation No 465/2012. In fact, in the context of the legal fiction stated therein, the activity of the flying personnel is no longer considered to be carried out in several Member States, but is deemed to be carried out solely in the State of the home base (see point 120 of this Opinion).

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86 See, in particular, judgment of 22 March 2018, *Anisimovienė and Others* (C-688/15 and C-109/16, EU:C:2018:209, paragraph 89 and the case-law cited).

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87 See judgments of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126, paragraphs 17 to 21), and of 26 September 2013, *Texdata Software* (C-418/11, EU:C:2013:588, paragraph 63).

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88 See judgments of 30 November 1995, *Gebhard* (C-55/94, EU:C:1995:411, paragraph 28), and of 11 December 2003, *Schnitzer* (C-215/01, EU:C:2003:662, paragraph 32).

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89 See judgments of 22 November 1978, *Somafer* (33/78, EU:C:1978:205, paragraph 12), and of 11 April 2019, *Ryanair* (C-464/18, EU:C:2019:311, paragraph 33).

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90 See point 41 of this Opinion.

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91 See, for that definition, point 119 of this Opinion.

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92 A difference between the concepts of ‘branch or permanent representation’ and ‘operating base’ might possibly lie in the requirement of autonomy, which is referred to in the former concept, but which does not, to begin with, appear to emerge from the latter. In any event, it is common ground that Vueling’s base at Roissy had a manager and a legal representative, and there is thus no need to go further into the question in the present cases.

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93 See, by analogy, judgment of 6 September 2018, *Alpenrind and Others* (C-527/16, EU:C:2018:669, paragraph 98).

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94 See Omarjee, I., *Droit européen de la protection sociale*, Larcier, 1st Edition, 2018, p. 223 et seq.

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95 See judgments of 26 May 1982, *Ivenel* (133/81, EU:C:1982:199, paragraphs 15 and 20), and of 15 January 1987, *Shenavai* (266/85, EU:C:1987:11, paragraph 16).

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96 Judgment of 14 September 2017 (C-168/16 and C-169/16, EU:C:2017:688). See also my Opinion in Joined Cases *Nogueira and Others* (C-168/16 and C-169/16, EU:C:2017:312).

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97 See judgment of 14 September 2017, *Nogueira and Others* (C-168/16 and C-169/16, EU:C:2017:688, paragraphs 61, 63 and 77). See, for the concept of ‘home base’ and its use in EU law, points 116 and 120 of this Opinion.

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98 See judgment in *Altun*, paragraph 53.

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99 See, by analogy, recital 11 of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law (OJ 2017 L 198, p. 29).

100 See, on that issue, points 127 to 132 of this Opinion.

101 See, by analogy, judgments of 17 December 1970, *Manpower* (35/70, EU:C:1970:120, paragraph 14), and of 25 October 2018, *Walltopia* (C-451/17, EU:C:2018:861, paragraphs 34 and 35).

102 The circumstances at issue in the main proceedings might thus be situated on the borderline between fraud and abuse of rights. In principle, those concepts are distinct. In fact, according to the Court's case-law, proof of such abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, secondly, a subjective element consisting in the intention to obtain an advantage resulting from the EU legislation by creating artificially the conditions laid down for attaining it (see my Opinion in *Altun and Others* (C-359/16, EU:C:2017:850, footnote 45)). Nonetheless, it is not always possible to draw a clear distinction between them.

103 See judgments of 10 February 2000, *FTS* (C-202/97, EU:C:2000:75, paragraph 28), and of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe* (C-115/11, EU:C:2012:606, paragraphs 30 and 31).

104 See recital 13 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 (OJ 2001 L 329, p. 73), and also Steinmeyer, H.D., '*Title II — Determination of the legislation applicable*', in Fuchs, M., and Cornelissen, R., *EU Social Security Law — A Commentary on EU Regulations 883/2004 and 987/2009*, Nomos, 2015, p. 167.

105 More specifically, *res judicata* attaches to everything that has been definitively, necessarily and certainly established by the criminal court, as regards the existence of the fact that forms the common basis of the civil action and the criminal action, its characterisation and the guilt of the person to whom the fact is imputed.

106 See Cour de cassation, chambre civile, 7 March 1855, *Quertier*, Bull. civ. No 31; Cour de cassation, 1re chambre civile, 24 October 2012, No 11-20.442; and Cour de cassation, Chambre Sociale, 18 February 2016, No 14-23.468. That principle is to be compared with the principle that 'criminal proceedings take precedence over civil proceedings', according to which the civil court, when civil proceedings and criminal proceedings have been initiated in

respect of the same facts, is required to stay proceedings pending delivery of a definitive decision in the criminal proceedings. See, for an application of the latter principle in the cases in the main proceedings, point 33 of this Opinion.

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107 See points 24 and 40 of this Opinion.

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108 See the explanations in point 50 of this Opinion.

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109 The Cour de cassation (Court of Cassation) has thus stated, as justification for that principle, that ‘the social order would have to undergo an antagonism which, for the sole purpose of a private interest, would have the consequence of undermining the faith that must be placed in judgments of the criminal courts, and of reopening the question of the innocence of a person who has been found guilty, or the responsibility of an accused who has been found not to be the perpetrator of the act attributed to him’ (Cour de cassation, chambre civile, 7 March 1855, *Quertier*, Bull. civ. No 31).

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110 See, to that effect, Kornezov, A., ‘Res Judicata of national judgments incompatible with EU law: time for a major rethink?’, *Common Market Law Review*, No 51, 2014, p. 809 et seq.

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111 See, to that effect, judgment of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraphs 52 and 53 and the case-law cited).

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112 See, to that effect, judgment of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 54 and the case-law cited).

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113 See, to that effect, judgment of 3 September 2009, *Fallimento Olimpiclub* (C-2/08, EU:C:2009:506, paragraphs 29 to 31). Incidentally, that concept of *res judicata* is not generally accepted in the Member States. The principle that a decision adopted in criminal proceedings constitutes *res judicata* in civil proceedings has been abandoned in Germany and in Spain and is unknown in the common law. Last, in the Netherlands and in Portugal, the law provides that the matters judged by the criminal court have only the value of rebuttable presumptions (see Pradel, J., *Droit pénal comparé*, Précis Dalloz, 4th Edition, 2016, pp. 564-567).

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114 Judgment of 20 March 2018 (C-596/16 and C-597/16, EU:C:2018:192, paragraphs 25, 28, 29 and 32 to 34).

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115 See judgment of 20 March 2018, *Di Puma and Zecca* (C-596/16 and C-597/16, EU:C:2018:192, paragraphs 32 to 34).