Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

2 April 2020*

(Reference for a preliminary ruling — Migrant workers — Social security — Regulation (EEC) No 1408/71 — Legislation applicable — Article 14(1)(a) — Posted workers — Article 14(2)(a)(i) — Person normally employed in the territory of two or more Member States and employed by a branch or a permanent representation that an undertaking has in the territory of a Member State other than that where it has its registered office — Regulation (EEC) No 574/72 — Article 11(1)(a) — Article 12a(1a) — E 101 certificate — Binding effect — Certificate fraudulently obtained or relied on — Power of the courts of the host Member State to make a finding of fraud and to disregard the certificate — Article 84a(3) of Regulation No 1408/71 — Cooperation between competent institutions — Authority in civil proceedings of *res judicata* in criminal proceedings — Primacy of EU law)

In Joined Cases C-370/17 and C-37/18,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the tribunal de grande instance de Bobigny (Regional Court, Bobigny, France), made by decision of 30 March 2017 (C-370/17), and by the Cour de cassation (Court of Cassation, France), made by decision of 10 January 2018 (C-37/18), received at the Court on 19 June 2017 and 19 January 2018, respectively, in the proceedings

Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC)

v

Vueling Airlines SA (C-370/17),

and

Vueling Airlines SA

v

Jean-Luc Poignant (C-37/18),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Prechal, M. Vilaras, E. Regan (Rapporteur), M. Safjan, S. Rodin and I. Jarukaitis, Presidents of Chambers, M. Ilešič, C. Toader, D. Šváby and F. Biltgen, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: V. Giacobbo-Peyronnel, Administrator,

* Language of the case: French.

having regard to the written procedure and further to the hearing on 29 January 2019,

after considering the observations submitted on behalf of:

– the Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC), by A. Lyon-Caen and S. Guedes, avocats,

– Vueling Airlines SA, by D. Calciu, B. Le Bret, F. de Rostolan and E. Logeais, avocats,

– Mr Poignant, by A. Lyon-Caen and S. Guedes, avocats,

– the French Government, by D. Colas, A. Alidière, A. Daly and A.-L. Desjonquères, acting as Agents,

– the Czech Government, by M. Smolek, J. Vláčil and J. Pavliš, acting as Agents,

– Ireland, by M. Browne, G. Hodge, K. Skelly, N. Donnelly and A. Joyce, acting as Agents,

– the European Commission, by M. Van Hoof and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 July 2019,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 14(1)(a) and Article 14(2)(a)(i) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition, Series I 1971(II), p. 98), in the version 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 631/2004 of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 100, p. 1) ('Regulation No 1408/71'), and of Article 11(1) and Article 12a(1a) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition, Series I 1972(I), p. 160), as amended and updated by Regulation No 118/97 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 1) ('Regulation No 574/72').

2 The requests have been made in two proceedings: (i) between the Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (the retirement fund for civil aviation flying personnel: CRPNPAC) and Vueling Airlines SA ('Vueling') and (ii) between Vueling and Mr Jean-Luc Poignant, concerning E 101 certificates issued by the competent Spanish institution concerning the flying personnel (flight and cabin crew) of Vueling operating at the Paris-Charles de Gaulle Airport at Roissy (France).

Legal context

European Union law

Regulation No 1408/71

3 Title II of Regulation No 1408/71, entitled 'Determination of the legislation applicable', contained Articles 13 to 17a of that regulation.

4 Article 13 of that regulation, headed 'General rules', provided:

'1. Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

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

…'

5 Article 14 of that regulation, headed 'Special rules applicable to persons, other than mariners, who are self-employed', stated:

'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.

…

(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;

…'

6 Within Title IV of Regulation No 1408/71, entitled 'Administrative Commission on social security for migrant workers', Article 80(1) of that regulation, that article being headed 'Composition and working methods', provided:

'There shall be attached to the Commission an Administrative Commission on Social Security for Migrant Workers (hereinafter called "the Administrative Commission") made up of a government representative of each of the Member States, assisted, where necessary, by expert advisers. A representative of the Commission shall attend the meetings of the Administrative Commission in an advisory capacity.'

7 Within Title VI of that regulation, entitled 'Miscellaneous provisions', Article 84a(3) thereof, that article being headed 'Relations between the institutions and the persons covered by this regulation', provided:

'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.'

Regulation (EC) No 883/2004

8 Regulation No 1408/71 was repealed and replaced with effect from 1 May 2010 by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), as amended by Regulation (EC) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4, and corrigendum, OJ 2004 L 200, p. 1) ('Regulation No 883/2004'). Title II of that regulation, entitled 'Determination of the legislation applicable', which includes Articles 11 to 16 of that regulation, replaces the provisions of Title II of Regulation No 1408/71, whereas Article 71 and Article 76(6) of Regulation No 883/2004 correspond, in essence, to Article 80 and to Article 84a(3) of Regulation No 1408/71.

Regulation No 574/72

9 Article 11(1) of Regulation No 574/72, that article being headed 'Formalities in the case of the posting elsewhere of an employed person pursuant to Article 14(1) and Article 14b(1) of the regulation in the case of agreements concluded under Article 17 of the regulation', provided:

'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 Article 14(1) and Article 14b(1) of the Regulation;

…'

10 Article 12a(1a) of Regulation No 574/72, that article being headed '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', provided:

'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.'

Regulation (EC) No 987/2009

11 Regulation No 574/72 was repealed and replaced with effect from 1 May 2010 by Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation No 883/2004 (OJ 2009 L 284, p. 1).

12 Article 5 of Regulation No 987/2009 provides:

'1. Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of the basic Regulation and of the implementing Regulation, and supporting evidence on the basis of which the documents have been issued, shall be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued.

2. Where there is doubt about the validity of a document or the accuracy of the facts on which the particulars contained therein are based, the institution of the Member State that receives the document shall ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal of that document. The issuing institution shall reconsider the grounds for issuing the document and, if necessary, withdraw it.

3. Pursuant to paragraph 2, where there is doubt about the information provided by the persons concerned, the validity of a document or supporting evidence or the accuracy of the facts on which the particulars contained therein are based, the institution of the place of stay or residence shall, in so far as this is possible, at the request of the competent institution, proceed to the necessary verification of this information or document.

4. Where no agreement is reached between the institutions concerned, the matter may be brought before the Administrative Commission by the competent authorities no earlier than one month following the date on which the institution that received the document submitted its request. The Administrative Commission shall endeavour to reconcile the points of view within six months of the date on which the matter was brought before it.'

French law

The code du travail

13 Article L 1262-3 of the code du travail (Labour Code), in the version applicable at the material time, provided:

'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 manner. 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 [code du travail] applicable to undertakings established in French territory.'

14 Article L 8221-3 of that code provided:

'Concealed employment by means of concealment of activity shall be deemed to exist in the case where a production, transformation, reparation or service provision activity is carried out for purposes of gain or trade activities are undertaken by any natural or legal 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.'

The code de l'aviation civile

15 Article R. 330-2-1 of the code de l'aviation civile (Civil Aviation Code) provides:

'Article [L. 1262-3] of the code du travail 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.'

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-370/17

16 Vueling is an airline with its registered office in Barcelona (Spain), listed in the registre du commerce et des sociétés de Bobigny (Register of Trade and Companies, Bobigny, France) with respect to the establishment of an air transport and self-handling business at Terminal I of the Paris-Charles de Gaulle Airport at Roissy. On 21 May 2007 Vueling began to operate regular flights between that airport and a number of cities in Spain.

17 On 28 May 2008, following checks starting in January of that year, the transport labour inspectorate at Roissy III airport (France) ('the labour inspectorate') issued a report stating that Vueling was engaged in concealed employment.

18 In that report, the labour inspectorate stated that Vueling occupied, at the Paris-Charles de Gaulle Airport at Roissy, commercial operational and management premises, rest rooms and flight preparation rooms for the flight and cabin crew, and a supervising office for ticket counter and passenger registration, and that it employed there, on the one hand, 50 individuals as cabin crew and 25 individuals as flight crew, whose contracts were subject to Spanish law, and on the other hand, ground personnel, including a commercial manager, whose contracts were subject to French law.

19 The labour inspectorate stated that only the ground personnel were declared to the French social security bodies and that the members of the flight and cabin crew were, for their part, holders of E 101 certificates issued by the Tesorería general de la seguridad social de Cornellà de Llobregat (Social security fund of Cornellà de Llobregat, Spain) ('the Spanish issuing institution') stating that they were temporarily posted to France under Article 14(1)(a) of Regulation No 1408/71. The labour inspectorate found that 48 employees had been engaged less than 30 days before the actual date of their posting to France, some of them either the day before or on the same day they were posted, and concluded that they had been engaged with a view to being posted. The labour inspectorate also noted that, for 21 of those employees their pay slips mentioned an address in France and that a significant number of declarations of posting contained false declarations of residence, hiding the fact that the majority of the posted workers did not have the status of Spanish residents, some of them never having even lived in Spain.

20 Further, the labour inspectorate observed that Vueling had, at the Paris-Charles de Gaulle Airport at Roissy, an operating base, within the meaning of Article R. 330-2-1 of the code de l'aviation civile, since the flight and cabin crew of that company started and finished their work at that airport. The labour inspectorate concluded that, under Article L 1262-3 of the code du travail, Vueling could not rely on the provisions applicable to the posting of workers.

21 The labour inspectorate also concluded that the workers at issue in the main proceedings were subject to the French code du travail and that they could not have the status of posted workers. It considered, further, that the posting was fraudulent and that harm was caused to those workers, since they were deprived, in particular, of access to the rights provided for by the French social security scheme, and also to the community, as the employer had not paid the sums due under that scheme. As regards the fact that those workers had an E 101 certificate, the labour inspectorate considered that, while such a document established a presumption of membership of a social security scheme, it did not constitute evidence of the validity of recourse to posting.

22 On the basis of that report, on 11 August 2008 the CRPNPAC brought an action before the tribunal de grande instance de Bobigny (Regional Court of Bobigny, France) seeking damages and compensation for the loss sustained due to the failure to register the flight and cabin crew employed by Vueling at the Paris-Charles de Gaulle Airport at Roissy in the supplementary pension scheme managed by the CRPNPAC.

23 Further, Vueling was the subject of criminal proceedings brought before the tribunal correctionnel de Bobigny (Criminal Court, Bobigny, France), being charged with the offence of concealed employment, within the meaning of Article L 8221-3 of the code du travail, for having at the Paris-Charles de Gaulle Airport at Roissy intentionally exercised the activity of passenger air carrier, between 21 May 2007 and 16 May 2008, without making the required declarations to the social protection bodies or to the tax authorities, in particular by concealing the activity carried out in France and by unlawfully treating it as a posting of workers, although the workers in question were recruited solely for the purpose of working in French territory, from operating bases located in France.

24 Given the existence of those criminal proceedings and pending a final decision in that regard, the tribunal de grande instance de Bobigny (Regional Court, Bobigny) decided to stay the civil proceedings brought by CRPNPAC against Vueling.

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

26 By a judgment of 31 January 2012, the cour d'appel de Paris (Court of Appeal, Paris, France) set aside that judgment, found Vueling guilty of concealed employment and ordered it to pay a fine of EUR 100 000.

27 In support of that conviction, that court, after noting that the flight and cabin crew of Vueling had been recruited in Spain and that the workers at issue had been issued with E 101 certificates by the Spanish issuing institution on the basis of Article 14(1)(a) of Regulation No 1408/71, nonetheless held that Vueling operated its business at the Paris-Charles de Gaulle Airport at Roissy through a branch or, at the least, an operating base, within the meaning of Article R. 330-2-1 of the code de l'aviation civile. That court stated that that entity functioned autonomously and that, consequently, Vueling could not claim that an organic link had been maintained between it and the flight and cabin crew concerned.

28 The cour d'appel de Paris (Court of Appeal, Paris) also held that Vueling had deliberately disregarded the applicable rules, in particular by stating that the place of residence of 41 of the workers concerned was the address of its own head office and had been unable to provide a credible explanation capable of dispelling the suspicion of fraud, and consequently that company could not rely on an unavoidable error in law linked to a belief in the legitimacy of its action. Further, that court held that although the E 101 certificates gave rise to a presumption of affiliation to the Spanish social security scheme which was binding on the competent French social security institutions, those certificates 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 in France.

29 On 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, Seine-et-Marne, France; 'Urssaf') brought the facts to the knowledge of the Spanish institution that had issued the E 101 certificates at issue and requested that they be cancelled.

30 By a judgment of 11 March 2014, the Criminal Chamber of the Cour de cassation (Court of Cassation, France) dismissed the appeal brought by Vueling against the judgment of the cour d'appel de Paris (Court of Appeal, Paris) of 31 January 2012. The Cour de cassation (Court of Cassation) stated that the activity carried out by Vueling at the Paris-Charles de Gaulle Airport at Roissy was performed in a habitual, stable and continuous manner in premises or with infrastructures located in France and that, accordingly, Vueling had within France a branch or, at the least, an operating base. The Cour de cassation (Court of Cassation) concluded that Vueling could not rely on the E 101 certificates to establish the legality of the postings concerned and to bar a national court from finding that there had been a deliberate infringement of the provisions of French law.

31 By a decision of 17 April 2014, the Spanish issuing institution, further to the request from Urssaf of 4 April 2012, cancelled those E 101 certificates.

32 On 29 May 2014, Vueling brought an appeal before a higher administrative authority in Spain against that decision.

33 By a decision of 1 August 2014, the competent higher administrative authority dismissed that appeal, but then nonetheless held, by an amending decision of 5 December 2014, that the cancellation of the E 101 certificates should have no effect. That authority based that decision on the fact that, in view of the time that had elapsed since the events and the impossibility of repaying the contributions

previously paid because of time-bar rules, it was not appropriate to declare that the affiliation of the workers concerned to the Spanish social security system had been improper. That authority also stated that the workers concerned could have been eligible for social security benefits on the basis of those contributions and that, if their affiliation was cancelled, they might have found themselves without social protection. Last, in the view of that authority, the actual cancellation of the E 101 certificates at issue in the main proceedings was not justified, on the ground that they had been issued simply because the workers concerned were affiliated to the Spanish social security system.

34 Following the delivery of the judgment of the Cour de cassation (Court of Cassation) of 11 March 2014, the civil proceedings brought by CRPNPAC before the tribunal de grande instance de Bobigny (Regional Court, Bobigny) were resumed.

35 Against that background, the latter court seeks to ascertain whether the E 101 certificates should be deemed to be binding when the criminal courts of the host Member State of the workers concerned have convicted the employer of the offence of concealed employment. In particular, that court has doubts as to the scope of Article 11(1)(a) and Article 12a(1a) of Regulation No 574/72 and as to the implications of abusive or fraudulent use of such certificates.

36 In those circumstances, the tribunal de grande instance de Bobigny (Regional Court, Bobigny) decided to stay the proceedings and refer the following questions to the Court of Justice 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 [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 law, 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 certificates being called into question by the action for damages brought against the employer?’

Case C-37/18

37 On 21 April 2007, Mr Poignant was engaged by Vueling as a co-pilot, under a contract drafted in English but governed by Spanish law. Subsequently, by a rider to the contract dated 14 June 2007, he was posted to the Paris-Charles de Gaulle Airport at Roissy. That posting, initially for six months, was renewed once for the same duration until 16 June 2008.

38 By letter of 30 May 2008, Mr Poignant resigned, claiming, inter alia, that his contractual situation was illegal under French law; he then withdrew the resignation by email of 2 June 2008. On 9 June 2008 he took formal notice of the termination of his contract of employment, referring, once again, to that illegality.

39 On 11 June 2008 Mr Poignant brought an action before the conseil des prud’hommes de Bobigny (Labour Court, Bobigny, France), requesting first, that his resignation be reclassified as a notification of termination having the effects of a dismissal without real and substantial cause and, second, payment to him, in particular, of a lump-sum payment of compensation for concealed employment and damages as compensation for the loss suffered due to the failure to pay contributions to the French social security system between 1 July 2007 and 31 July 2008.

40 By a judgment of 14 April 2011, that court dismissed all those claims. That court 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 one year and that he had not been sent to France to replace another person.

41 By a judgment of 4 March 2016, the cour d'appel de Paris (Court of Appeal, Paris), basing its decision on the judgment of the Cour de cassation (Court of Cassation) of 11 March 2014 mentioned in paragraph 30 of the present judgment, set aside the judgment of the conseil des prud'hommes de Bobigny (Labour Court, Bobigny) and ordered Vueling to pay to Mr Poignant, inter alia, a lump-sum payment of compensation for concealed employment and damages due to the failure to pay contributions to the French social security system.

42 In the opinion of the cour d'appel de Paris (Court of Appeal, Paris), Mr Poignant had adduced sufficient evidence to establish that his contractual situation was illegal under French law. In particular, that court noted that Mr Poignant's personal address had always been in France although his contract of employment and the rider thereto concerning his posting had falsely stated that he resided in Barcelona. Similarly, a false address in Barcelona had been used on the payslips issued to him.

43 Vueling brought an appeal against the judgment of the cour d'appel de Paris (Court of Appeal, Paris) of 4 March 2016 before the Cour de cassation (Court of Cassation).

44 In its examination of that appeal, the Cour de cassation (Court of Cassation) has doubts, in particular, on whether the interpretation given by the Court of Justice in the judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309), which concerned a dispute where E 101 certificates had been issued under Article 14(2)(a) of Regulation No 1408/71, is also valid in a dispute relating to the offence of concealed employment and concerning certificates issued under Article 14(1)(a) of that regulation, with respect to workers carrying out their activity in the Member State of which they are nationals and on the territory of which the air transport undertaking that employs them has a branch, where a mere reading of those certificates permits the conclusion that they were fraudulently obtained or relied on.

45 Further, that court is uncertain whether the principle of the primacy of EU law precludes a national court or tribunal, on whom under national law the authority of *res judicata* in criminal proceedings is binding in civil proceedings, from taking action in accordance with a decision of a criminal court delivered in a way that is incompatible with EU law by making an order that an employer has civil liability to pay damages to a worker on the sole basis of the criminal conviction of that employer of the offence of concealed employment.

46 In those circumstances, the Social Chamber of the Cour de cassation (Court of Cassation) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the interpretation by the [Court] in its judgment [of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309], 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 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 the employer permitted the conclusion 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 or tribunal, on whom under national law the authority of *res judicata* in criminal proceedings is binding in civil proceedings, from taking action in accordance with a decision of a criminal court delivered in a way that is incompatible with EU law by making an order that an employer has civil liability to pay damages to a worker on the sole basis of the criminal conviction of that employer of the offence of concealed employment?'

47 By decision of the President of the Court of 22 February 2018, Cases C-370/17 and C-37/18 were joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred

The first question in each of the Cases C-370/17 and C-37/18

48 By their first question, the referring courts seek, in essence, to ascertain whether Article 11(1)(a) of Regulation No 574/72 must be interpreted as meaning that the courts of a Member State, seised in legal proceedings brought against an employer with regard to facts that indicate that E 101 certificates issued under Article 14(1)(a) of Regulation No 1408/71 with respect to workers carrying out their activities in that Member State were fraudulently obtained or used, may disregard those certificates.

49 It is apparent from the information available to the Court that that question has arisen in the context of disputes where the French criminal courts have held that E 101 certificates relating to the flight and cabin crew of an airline established in Spain, in this instance Vueling, which had been issued by the Spanish issuing institution on the basis of Article 14(1)(a) of Regulation No 1408/71, relating to the posting of workers, ought to have been issued under Article 14(2)(a)(i) of that regulation, relating, in particular, to workers who, as members of the flight and cabin crew of an undertaking operating international transport services for passengers, are employed in the territory of two or more Member States and are employed by a branch which that undertaking has established in the territory of a Member State other than that where it has its registered office. Those national courts considered that the workers concerned ought to have been affiliated, pursuant to the latter provision, to the French social security system, and not to the Spanish social security system. Those courts held, further, that that airline had been guilty of fraudulent manipulation intended to circumvent or evade the legal conditions governing the issue of those certificates.

50 In that regard, it must be recalled that, under a general principle of EU law, individuals may not rely on EU law for abusive or fraudulent ends (see, to that effect, judgment of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraphs 48 and 49 and the case-law cited).

51 In accordance with the Court's case-law concerning Regulation No 1408/71, findings of fraud vitiating the issue of an E 101 certificate are to be based on a consistent body of evidence that satisfies, first, an objective factor, which consists in the fact that the conditions for obtaining and relying on such a certificate, laid down in Title II of that regulation, are not met, and, second, a subjective factor, which 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 (see, to that effect, judgment of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraphs 50 to 52).

52 The fraudulent procurement of an E 101 certificate may thus result from a deliberate action, such as the misrepresentation of the real situation of the worker or of the undertaking employing that worker, or from a deliberate omission, such as the concealment of relevant information with the intention of evading the conditions governing the application of Article 14(1)(a) of that regulation (judgment of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraph 53).

53 In this instance, as regards, first, the objective factor required if there is to be a finding of fraud, it must be noted that the E 101 certificates at issue in the main proceedings were issued by the competent Spanish institution under Article 14(1)(a) of Regulation No 1408/71, that provision stating that posted workers remain subject to the legislation of the Member State in which the employer is established.

54 However, under Article 14(2)(a)(i) of Regulation No 1408/71, mentioned by the referring courts, a person who is a member of the flight and cabin crew of an airline operating international flights, employed by a branch or permanent representation which that airline has in the territory of a Member State other than that where it has its registered office, is subject to the legislation of the Member State in the territory of which that branch or permanent representation is situated.

55 The application of that provision requires, accordingly, that two cumulative conditions are satisfied: (i) that the airline concerned has a branch or permanent representation in a Member State other than that where it has its registered office and (ii) that the person concerned is employed by that entity.

56 As regards the first condition, as the Advocate General observed, in essence, in points 139 to 142 of his Opinion, the concepts of 'branch' and 'permanent representation' are not defined by Regulation No 1408/71, which also makes no reference, in that respect, to the law of the Member States, and those concepts must, therefore, be given an autonomous interpretation. Like similar or identical concepts to be found in other provisions of EU law, they must be understood as referring to a form of secondary establishment, with an appearance of stability and continuity, intended for the carrying out of an actual economic activity and having, for that purpose organised material and human resources and a certain autonomy in relation to the main establishment (see, by analogy, judgments of 30 November 1995, *Gebhard*, C-55/94, EU:C:1995:411, paragraph 28, and of 11 April 2019, *Ryanair*, C-464/18, EU:C:2019:311, paragraph 33).

57 As regards the second condition, it is clear from the Court's case-law in relation to the determination of the law applicable to individual contracts of employment, for the purposes of Article 19(2)(a) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), that the work relationship of flight and cabin crew of an airline has a significant connection with the place from which they principally discharge their obligations to their employer. That place is the place where or from which those persons carry out their transport-related tasks, where they return to after their tasks, receive instructions concerning their tasks and organise their work, and the place where their work tools are situated, which may be the same place as their 'home base' (see, by analogy, judgment of 14 September 2017, *Nogueira and Others*, C-168/16 and C-169/16, EU:C:2017:688, paragraphs 60, 63, 69, 73 and 77).

58 In this instance, it appears clear from the information provided to the Court that, first, Vueling had, throughout the period at issue in the main proceedings, at the Paris-Charles de Gaulle Airport at Roissy, an operating base, within the meaning of national law, capable of constituting a branch or a permanent representation, within the meaning of Article 14(2)(a)(i) of Regulation No 1408/71, since Vueling operated its air transport activity in a stable and continuous manner from premises or infrastructures that constituted such an operating base, which, being the responsibility of a commercial manager, thus appeared to enjoy a certain degree of autonomy. Second, the same factors also suggest that the flight and cabin crew concerned were employed by that entity, within the meaning of that provision, since that was the place where they essentially discharged their obligations to their employer, in the sense specified in the preceding paragraph.

59 As regards, secondly, the subjective factor in the fraud, it is clear from the documents available to the Court that Vueling itself produced before the cour d'appel de Paris (Court of Appeal, Paris) an information document that clearly set out that workers assigned to an establishment owned by their employer in France must be subject to the French social security system. Further, the same document

seems to indicate that Vueling stated that a significant proportion of the workers concerned were resident at the address of its own registered office in Spain, although the majority of those workers had never lived in Spain and were resident in France.

60 In the light of the foregoing, the competent French institutions and courts could reasonably have come to the view that they were in possession of concrete evidence that indicated that the E 101 certificates at issue in the main proceedings, issued by the competent Spanish institution on the basis of Article 14(1)(a) of Regulation No 1408/71, had been fraudulently obtained or relied on by Vueling, since the flight and cabin crew concerned of Vueling fell, in reality, within the scope of the particular rule laid down in Article 14(2)(a)(i) of that regulation and ought, therefore, to have been subject to the French social security system.

61 However, the existence of evidence such as that at issue in the main proceedings, cannot, in itself, be sufficient to permit the competent institution of the host Member State of the workers concerned or the national courts or tribunals of that Member State to make a definitive finding of the existence of fraud and to disregard the E 101 certificates concerned.

62 In that regard, it must be recalled that, by virtue of the principle of sincere cooperation, enshrined in Article 4(3) TEU, which also implies the principle of mutual trust, an E 101 certificate, in that its purpose is to facilitate freedom of movement for workers and freedom to provide services, is binding, as a general rule, in accordance with the Court's settled case-law, on the competent institution and on the courts and tribunals of the host Member State, in so far as that certificate establishes a presumption that the worker concerned is properly registered with the social security system of the Member State of which a competent institution has issued that certificate (see, to that effect, judgment of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraphs 35 to 40, and, by analogy, judgment of 6 September 2018, *Alpenrind and Others*, C-527/16, EU:C:2018:669, paragraph 47).

63 Consequently, for as long as an E 101 certificate is not withdrawn or declared invalid, the competent institution and the courts and tribunals of the host Member State must take account of the fact that the worker concerned is already subject to the social security legislation of the Member State of which a competent institution has issued that certificate (see, to that effect, judgment of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraph 41).

64 However, it follows from the principle of sincere cooperation that, where the competent institution of the host Member State expresses doubts, within the framework of the procedure laid down in Article 84a(3) of Regulation No 1408/71, as to the accuracy of the facts on which the issue of an E 101 certificate is based and, consequently, of the information contained therein, it is incumbent on the competent institution of the Member State which issued that E 101 certificate to reconsider the grounds for that issue and, if appropriate, to withdraw that certificate (see, to that effect, judgment of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraphs 42 and 43).

65 As stated in that provision, in the event that the institutions concerned do not reach an agreement on, in particular, how the particular facts of a specific case are to be assessed and, consequently, on which is the relevant provision of Regulation No 1408/71 for the purposes of determining the social security legislation that is applicable, it is open to them to refer the matter to the Administrative Commission referred to in Article 80 of that regulation, in order to reconcile their positions (see, to that effect, judgment of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraph 44).

66 However, especially in the context of suspicion of fraud, the implementation of the procedure established by Article 84a(3) of Regulation No 1408/71, prior to any final finding of fraud by the competent authorities of the host Member State, is of particular importance, since that procedure is such as to permit the competent institution of the issuing Member State and that of the host Member State to engage in dialogue and to cooperate closely in order to check and ingather, using the

investigatory powers available to them under national law, all relevant matters of fact or law that may dispel or, on the contrary, confirm the accuracy of, the doubts expressed by the competent institution of the host Member State concerning the circumstances surrounding the issue of the E 101 certificates concerned.

67 Likewise, that procedure, by ensuring the involvement at an early stage of the competent institution of the issuing Member State, allows that institution the opportunity to set out an opposing point of view on any concrete evidence of the existence of fraud submitted to it by the competent institution of the host Member State, and, accordingly, the opportunity, where appropriate, to cancel or withdraw the E 101 certificates concerned if it were to come to the conclusion that that evidence proves that those certificates were indeed obtained or relied on fraudulently.

68 In that regard, it should, in particular, be noted that, if the competent institution of the host Member State could, on the ground of the mere presence of concrete evidence of the existence of fraud, unilaterally disregard E 101 certificates issued by the competent institution of another Member State, even though a final finding of fraud could not, at that stage, properly be made due to the failure to involve the institution that issued the certificates and the absence of a full determination of the relevant circumstances surrounding their issue, there would be an increased risk that contributions would be payable to the social security system of the host Member State, contrary to the principle that the legislation of only one Member State should be applicable, laid down by the provisions of Title II of Regulation No 1408/71 (see, to that effect, judgment of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraph 29), notwithstanding the fact that contributions were previously paid, for the same workers, to the social security system of the Member State with respect to which those certificates state that its national legislation is applicable.

69 In addition, if it were subsequently to be established that contributions were improperly paid to the social security system of the latter Member State, there is the risk that repayment of those contributions may be impossible, due to the existence, for example, as in the present case, of limitation rules applicable in that Member State, even though no fraud had finally been identified.

70 Correspondingly, failure to implement the procedure established in Article 84a(3) of Regulation No 1408/71 would be such as to increase the risk of subjecting the workers concerned to the social security systems of a number of Member States, with all the complications that such overlapping would be likely to entail, which would undermine the rule, in accordance with the principle that the national legislation of only one Member State should be applicable, that workers should be affiliated to one single social security system, and would adversely affect the foreseeability of which system was applicable and, therefore, legal certainty (see, to that effect, judgment of 26 January 2006, *Herbosch Kiere*, C-2/05, EU:C:2006:69, paragraph 25).

71 That procedure therefore constitutes an essential prerequisite for determining whether the conditions for the existence of a fraud are met and therefore, for taking all appropriate action as to the validity or otherwise of the E 101 certificates at issue and as to which social security legislation is applicable to the workers concerned.

72 It follows that where there is concrete evidence indicating that E 101 certificates have been fraudulently obtained or relied upon, what the competent institution of the host Member State should do is not to identify unilaterally a fraud and disregard those certificates, but rather to initiate promptly the procedure laid down in Article 84a(3) of Regulation No 1408/71, so that the institution that issued those certificates, the matter having been referred to it by the institution of the host Member State, may undertake, within a reasonable period, in accordance with the principle of sincere cooperation, a review of the grounds for the issue of those certificates in the light of that evidence and, where appropriate, decide to cancel or withdraw those certificates, as is clear from the case-law cited in paragraph 64 of the present judgment (see, to that effect, judgment of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraph 54).

73 Against that background, when a court or tribunal of the host Member State is seised of an action in legal proceedings brought against an employer suspected of having fraudulently obtained or relied on E 101certificates, that court or tribunal cannot take no account of the procedure established in Article 84a(3) of Regulation No 1408/71 and the outcome of that procedure (see by analogy, judgment of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraphs 96 to 105).

74 In that regard, it must be recalled that, in accordance with the second paragraph of Article 288 TFEU, a regulation, such as Regulation No 1408/71, is binding in its entirety and directly applicable in all Member States. Further, the principle of the primacy of EU law, which establishes the pre-eminence of EU law over the law of the Member States, requires all Member State bodies to give full effect to the various provisions of EU law, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of the Member States (see, to that effect, judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraphs 53 and 54 and the case-law cited).

75 If it were to be accepted that a court or tribunal of the host Member State, seised of an action in the context of legal proceedings brought by an authority responsible for criminal prosecutions, by the competent institution of that Member State or by any other person, could declare an E 101 certificate to be invalid on the sole ground that there is concrete evidence to prove that that certificate was fraudulently obtained or relied on, irrespective of whether the procedure laid down in Article 84a(3) of Regulation No 1408/71 has been initiated or is ongoing, the system put in place by that provision, based on sincere cooperation between the competent institutions of the Member States, would be undermined (see, to that effect, judgments of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraph 47, and of 6 September 2018, *Alpenrind and Others*, C-527/16, EU:C:2018:669, paragraph 46). The particular importance, emphasised in paragraphs 66 and 67 of the present judgment, attached to the implementation of that procedure where there is a suspicion of fraud, would thus be disregarded.

76 Further, since the initiation of the procedure laid down in Article 84a(3) of Regulation No 1408/71 may lead the institution that issued the E 101 certificates concerned to cancel or to withdraw them, that procedure is such as to ensure, in some cases, as the Advocate General stated in point 86 of his Opinion, gains in terms of procedural economy, since the bringing of actions before the courts or tribunals of the host Member State might, as a consequence, become unnecessary

77 Consequently, it is only where that procedure has been initiated by the competent institution of the host Member State and the institution that issued the E 101 certificates has failed to undertake a review of the grounds for the issue of those certificates and has failed to make a decision, within a reasonable time, on the request for review submitted to it by the competent institution of the host Member State, that the concrete evidence that indicates that those certificates were fraudulently obtained or relied on must be able to be adduced in judicial proceedings, brought to obtain from the courts of the host Member State an order to disregard those certificates, provided, however, that the persons who are alleged, in such proceedings, to have fraudulently obtained or relied on those certificates have the opportunity to rebut the evidence on which those proceedings are based, with due regard to the safeguards associated with the right to a fair trial (see, to that effect, judgment of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraphs 54 to 56).

78 Accordingly, a court or tribunal of the host Member State can disregard E 101 certificates within such judicial proceedings only where two cumulative conditions are met: (i) the institution that issued those certificates, to which there has been promptly submitted by the competent institution of that Member State a request to review the grounds for the issue of those certificates, has failed to undertake such a review in the light of the evidence transmitted to it by the latter institution and has failed to make a decision, within a reasonable time, on that request, as appropriate, cancelling or withdrawing those certificates, and (ii) that evidence permits that court or tribunal to find, with due regard to the

safeguards inherent in the right to a fair trial, that the certificates at issue were fraudulently obtained or relied on (see, to that effect, judgment of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraph 61).

79 It follows that a court or tribunal of the host Member State before which an action is brought calling for an examination of the validity of E 101 certificates is obliged to investigate, as a preliminary point, whether the procedure laid down in Article 84a(3) of Regulation No 1408/71 has, prior to that action being brought, been initiated by the competent institution of the host Member State by means of submitting a request for review and withdrawal of those certificates to the institution that issued them, and, if that has not occurred, taking all legal measures available to it to ensure that the competent institution of the host Member State initiates that procedure.

80 Consequently, the court or tribunal of the host Member State seised of an action in the context of legal proceedings brought against an employer for acts that may indicate that E 101 certificates were fraudulently obtained or used can give a definitive ruling on the existence of such a fraud and disregard those certificates only if it finds, after, so far as is necessary, staying the judicial proceedings under national law, that, where the procedure laid down by Article 84a(3) of Regulation No 1408/71 has been initiated promptly, the institution that issued the E 101 certificates has failed to undertake a review of those certificates and has failed to make a decision, within a reasonable time, on the evidence submitted to it by the competent institution of the host Member State, cancelling or withdrawing those certificates, as appropriate.

81 Only that interpretation can safeguard the effectiveness of the procedure laid down in Article 84a(3) of Regulation No 1408/71, by ensuring that the competent institutions of the Member States concerned engage promptly in the dialogue envisaged by that provision, so that, where appropriate, the court or tribunal of the host Member State has, in the proceedings brought before it, all the information required to prove any fraud, and by, at the same time, encouraging the institutions that issue E 101 certificates to respond, within a reasonable time, to a request for the review and withdrawal of those certificates, failing which, after that period of time has elapsed, those certificates are to be disregarded by that court or tribunal.

82 In this instance, it is however clear from the documents available to the Court that the cour d'appel de Paris (Court of Appeal, Paris), by its judgment of 31 January 2012, made a finding of fraud and disregarded the E 101 certificates at issue in the main proceedings before the procedure — laid down in Article 84a(3) of Regulation No 1408/71, then, as from 1 May 2010, in Article 76(6) of Regulation No 883/2004, the rules for the application of that provision being stated in Article 5 of Regulation No 987/2009 — had been initiated and without even having enquired, in advance, whether that had occurred, so that the Spanish institution that issued them might be in a position to re-examine and, where necessary, cancel or withdraw those certificates.

83 It is undisputed that the transmission by the competent institution of the host Member State of the workers concerned, namely Urssaf, to the Spanish institution that issued the E 101 certificates at issue in the main proceedings of the information in relation to the fraud collected by the labour inspectorate, in order to ensure that that institution cancel or withdraw those certificates, was made only by letter of 4 April 2012, which letter post-dated the delivery of that judgment of the cour d'appel de Paris (Court of Appeal, Paris) and was sent almost four years after the labour inspectorate, on 28 May 2008, produced a report alleging concealed employment against Vueling.

84 Further, while the procedure laid down in Article 76(6) of Regulation No 883/2004 and in Article 5 of Regulation No 987/2009, then in force, had already been initiated when, on 11 March 2014, the appeal brought against the judgment of the cour d'appel de Paris (Court of Appeal, Paris) was dismissed by the Cour de cassation (Court of Cassation), it is undisputed that the latter court gave a ruling without seeking to be apprised of the status of the dialogue begun between the Spanish issuing institution and the competent French institution and without waiting for the outcome of that procedure.

85 In that regard, it is true that the Spanish institution that issued the certificates at issue did not deal with the request for review and withdrawal submitted to it by the competent French institution with the expedition required, given that its response to the request more than two years after it was submitted cannot be regarded as being made within a reasonable time, taking into consideration, inter alia, the importance for the parties concerned and the nature of the issues to be examined. The fact remains, however, that the referral of the matter by the French institution to the Spanish institution itself occurred late, approximately four years after the competent French institution came into possession of evidence that supported the existence of fraud.

86 In the light of all the foregoing, the answer to the first question referred in each of the Cases C-370/17 and C-37/18 is that Article 11(1)(a) of Regulation No 574/72 must be interpreted as meaning that a court or tribunal of a Member State, seised of an action in legal proceedings brought against an employer with respect to facts that might indicate that E 101 certificates issued pursuant to Article 14(1)(a) of Regulation No 1408/71 had been fraudulently obtained or used for workers employed in that Member State, may make a finding of fraud and consequently disregard those certificates only when it has satisfied itself that:

– first, the procedure laid down in Article 84a(3) of that regulation was promptly initiated and the competent institution of the issuing Member State was thus put in a position to review the grounds for the issue of those certificates in the light of the concrete evidence submitted by the competent institution of the host Member State that indicates that those certificates were fraudulently obtained or relied on, and

– second, the competent institution of the issuing Member State has failed to undertake such a review and has failed to make a decision, within a reasonable time, on that evidence, cancelling or withdrawing the certificates at issue, where appropriate.

The second question in each of the Cases C-370/17 and C-37/18

87 By their second question, the referring courts seek, in essence, to ascertain whether Article 11(1) of Regulation No 574/72 and the principle of the primacy of EU law must be interpreted as precluding, in a situation where an employer has, in the host Member State, acquired a criminal conviction based on a definitive finding of fraud made in breach of EU law, a civil court or tribunal of that Member State, bound by the principle of national law that a decision which has the authority of *res judicata* in criminal proceedings also has that authority in civil proceedings, from holding that employer to be liable, solely by reason of that criminal conviction, to pay damages intended to provide compensation to the workers or a pension fund of that Member State who claim to be affected by that fraud.

88 As a preliminary point, attention should be drawn, in that regard, to the importance, both in the legal order of the European Union and in national legal systems, of the principle of the authority of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that connection can no longer be called into question (judgments of 6 October 2015, *Târşia*, C-69/14, EU:C:2015:662, paragraph 28; of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 52; and of 11 September 2019, *Călin*, C-676/17, EU:C:2019:700, paragraph 26).

89 Therefore, EU law does not require a national court to disapply domestic rules of procedure conferring the authority of *res judicata* on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law (judgments of 6 October 2015, *Târşia*, C-69/14, EU:C:2015:662, paragraph 29; of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 53; and of 11 September 2019, *Călin*, C-676/17, EU:C:2019:700, paragraph 27).

90 EU law does not therefore require a national judicial body, in order to take account of the interpretation of a relevant provision of EU law adopted by the Court, automatically to revisit a decision that has acquired the authority of *res judicata* (see, to that effect, judgments of 6 October 2015, *Târşia*, C-69/14, EU:C:2015:662, paragraph 38; of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 54; and of 11 September 2019, *Călin*, C-676/17, EU:C:2019:700, paragraph 28).

91 In the absence of EU legislation in this area, the rules for the implementation of the principle of the authority of *res judicata* are a matter for the domestic legal order of the Member States, in accordance with the principle that those States have procedural autonomy. Those rules must not, however, be less favourable than those governing similar domestic situations (the principle of equivalence) nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by the EU legal order (the principle of effectiveness) (judgment of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 24 and the case-law cited).

92 In this instance, the question arises as to whether it is compatible with the principle of effectiveness to adopt an interpretation, in the national law concerned, of the principle that a decision in criminal proceedings that has the authority of *res judicata* also has that authority in civil proceedings such that a civil court, giving a ruling on the same facts as those on which the criminal court gave a ruling, is barred from calling into question not only the criminal conviction of the employer concerned as such, but also the findings of fact and the legal classifications and interpretations adopted by the criminal court, even when those findings of fact and law were made in breach of EU law, since that latter court did not make any enquiry, before making a definitive finding of fraud and consequently disregarding the E 101 certificates concerned, as to the initiation and progress of the procedure of dialogue provided for in Article 84a(3) of Regulation No 1408/71.

93 In that regard, the Court has already held that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its operation and its particular features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure (judgment of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 27 and the case-law cited).

94 In the present cases, it has to be said that the interpretation of the principle of the authority of *res judicata* mentioned in paragraph 92 of the present judgment prevents from being called into question not only a judicial decision in criminal proceedings which has acquired the authority of *res judicata*, even if that decision entails a breach of EU law, but also, in the course of civil judicial proceedings in relation to the same facts, any finding on a common fundamental issue contained in a judicial decision in criminal proceedings which has acquired the authority of *res judicata* (see, by analogy, judgment of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 29).

95 That interpretation of the principle of the authority of *res judicata* therefore has the result that, where the decision of a criminal court that has become final is based on a finding of fraud that has been made by that court with no attention whatsoever given to the procedure of dialogue laid down in Article 84a(3) of Regulation No 1408/71 and on an interpretation of the provisions concerning the binding effect of E 101 certificates that is contrary to EU law, the incorrect application of EU law would be repeated in every decision adopted by the civil courts and tribunals concerning the same facts, and there would be no possibility of correcting a finding and an interpretation that were in breach of EU law (see, by analogy, judgment of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 30).

96 In those circumstances, it must be held that such obstacles to the effective application of the rules of EU law in relation to that procedure and on the binding effect of E 101 certificates cannot reasonably be justified by the principle of legal certainty and must therefore be considered to be contrary to the principle of effectiveness (see, by analogy, judgment of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 31).

97 It follows, in this instance, that, while, in the light of the case-law cited in paragraphs 88 to 90 of the present judgment, the conviction of Vueling, which has acquired the authority of *res judicata*, decided by the criminal courts of the host Member State cannot be called into question notwithstanding its incompatibility with EU law, neither that conviction nor the definitive finding of fraud and the interpretations of law made in breach of EU law, on which that conviction is based, can, conversely, allow the civil courts of that Member State to uphold claims for damages brought by the workers or by a pension fund of that Member State who claim to be affected by Vueling's conduct.

98 In the light of the foregoing, the answer to the second question referred in each of the Cases C-370/17 and C-37/18 is that Article 11(1) of Regulation No 574/72 and the principle of the primacy of EU law must be interpreted as precluding, in a situation where an employer has, in the host Member State, acquired a criminal conviction based on a definitive finding of fraud made in breach of EU law, a civil court or tribunal of that Member State, bound by the principle of national law that a decision which has the authority of *res judicata* in criminal proceedings also has that authority in civil proceedings, from holding that employer to be liable, solely by reason of that criminal conviction, to pay damages intended to provide compensation to the workers or a pension fund of that Member State who claim to be affected by that employer's conduct.

Costs

99 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national courts, the decision on costs is a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 11(1)(a) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005, must be interpreted as meaning that a court or tribunal of a Member State, seised of an action in legal proceedings brought against an employer with respect to facts that might indicate that E 101 certificates, issued under 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 Regulation No 118/97, as amended by Regulation (EC) No 631/2004 of the European Parliament and of the Council of 31 March**

2004, were fraudulently obtained and relied on with respect to workers employed in that Member State, can make a finding of fraud and consequently disregard those certificates only if it has satisfied itself that:

– **first, the procedure laid down in Article 84a(3) of that regulation was promptly initiated and the competent institution of the issuing Member State was thus put in a position to review the grounds for the issue of those certificates in the light of the concrete evidence submitted by the competent institution of the host Member State that indicates that those certificates were fraudulently obtained or relied on, and**

– **second, the competent institution of the issuing Member State has failed to undertake such a review and has failed to make a decision, within a reasonable time, on that evidence, cancelling or withdrawing the certificates at issue, where appropriate.**

2. **Article 11(1) of Regulation No 574/72, in the version amended and updated by Regulation No 118/97, as amended by Regulation No 647/2005, and the principle of the primacy of EU law must be interpreted as precluding, in a situation where an employer has, in the host Member State, acquired a criminal conviction based on a definitive finding of fraud made in breach of EU law, a civil court or tribunal of that Member State, bound by the principle of national law that a decision which has the authority of *res judicata* in criminal proceedings also has that authority in civil proceedings, from holding that employer to be liable, solely by reason of that criminal conviction, to pay damages intended to provide compensation to workers or a pension fund of that Member State who claim to be affected by that fraud**

[Signatures]