Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 9 November 2017[1]

Case C-359/16

Ömer Altun,
Abubekir Altun,
Sedrettin Maksutogullari,
Yunus Altun,
Absa NV,
M. Sedat BVBA,
Alnur BVBA
v
Openbaar Ministerie

(Request for a preliminary ruling from the Hof van Cassatie (Court of Cassation, Belgium))

(Reference for a preliminary ruling — Migrant workers — Social security — Legislation applicable — Regulation (EEC) No 1408/71 — Article 14(1)(a) — Posted workers — Regulation (EEC) No 574/72 — Article 11(1) — E 101 certificate — Binding nature — Certificate obtained or invoked fraudulently)

I. Introduction

1. 'A right ends where abuse begins'. That maxim used by the professor of French law Marcel Ferdinand Planiol[2] illustrates well the issue facing the Hof van Cassatie (Court of Cassation, Belgium) in the present case, which is one of a series that has given rise to a now well-established body of case-law on the binding nature of the E 101 certificate, which certifies that a worker moving within the European Union is covered by the social security scheme of the Member State to which the issuing institution belongs.[3]

1 Original language: French.

2 Planiol, M., *Traité élémentaire de droit civil*, Volume two, ninth edition, Libraire générale de droit & de jurisprudence, Paris, 1923, p. 287.

3 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, E 127) (2006/203/EC) (OJ 2006 L 77, p. 1). As from 1 May 2010, the E 101 certificate became the A1 portable document, governed by Regulations (EC) Nos 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1) and 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (OJ 2009 L 284, p. 1).

2. The Court has consistently held that, as long as it has not been withdrawn or declared invalid, an E 101 certificate issued by the competent institution of a Member State pursuant to Article 11(1) of Regulation (EEC) No 574/72[4] laying down the procedure for implementing Regulation (EEC) No 1408/71[5] takes effect in the internal legal order of the Member State to which the employee goes in order to work and, therefore, binds the institutions of that Member State. It follows that a court of the host Member State is not entitled to scrutinise the validity of an E 101 certificate in the light of the background against which it was issued.[6]

3. By its request for a preliminary ruling, the referring court is essentially asking the Court whether that case-law applies where a court of the host Member State finds that an E 101 certificate was obtained or invoked fraudulently.[7]

4. In this Opinion, I shall explain the reasons why I consider, first, that an E 101 certificate is not binding on a court of the host Member State where that court finds that the certificate was obtained or invoked fraudulently and, second, that, in such circumstances, that court may refrain from applying the E 101 certificate.[8]

II. EU law

A. Regulation No 1408/71

5. Inserted into Title II of Regulation No 1408/71, entitled 'Determination of the legislation applicable', Article 13, which is entitled 'General rules', provides in paragraphs 1 and 2(a):

'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.'

4 Regulation of the Council of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition 1972(I), p. 149), as amended by Council Regulation (EEC) No 3795/81 of 8 December 1981 (OJ 1981 L 378, p. 1) ('Regulation No 574/72').

5 Regulation of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition: Series I Chapter 1971(II), p. 416), as amended by Council Regulation (EEC) No 1390/81 of 12 May 1981 (OJ 1981 L 143, p. 1), and by Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1) ('Regulation No 1408/71').

6 See, recently, judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraphs 48 and 49). In relation to the Court's case-law on the binding nature of the E 101 certificate, see points 32 to 39 of this Opinion.

7 That question also forms the subject matter of the pending case *CRPNPAC* (C-370/17).

8 See, in relation to the finding of fraud, points 48 to 56 of this Opinion.

6. Article 14, which appears in the same title of Regulation No 1408/71 and is entitled 'Special rules applicable to persons, other than mariners, engaged in paid employment', provides in paragraph 1(a):

'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.'

7. Regulation No 1408/71 was repealed and replaced by Regulation (EC) No 883/2004 with effect from 1 May 2010.[9]

B. Regulation No 574/72

8. Inserted into Title III of Regulation No 574/72, entitled 'Implementation of the provisions of the regulations for determining the legislation applicable', Article 11, entitled 'Formalities in the case of the posting elsewhere of an employed person pursuant to Article 14(1) and 14b(1) of the Regulation and in the case of agreements concluded under Article 17 of the Regulation', provides, in paragraph 1(a):

'The institution 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 the Regulation.'

9. Regulation No 574/72 was repealed and replaced by Regulation (EC) No 987/2009 with effect from 1 May 2010.[10]

III. The dispute in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

10. The Sociale Inspectie (Social Inspectorate, Belgium) conducted an investigation into the employment of the staff at Absa NV, an undertaking governed by Belgian law active in the construction sector in Belgium. That investigation established that from 2008 Absa had practically no staff in its employ and outsourced all manual labour to Bulgarian undertakings under subcontracting agreements. Those Bulgarian undertakings had no activities to speak of in Bulgaria and posted workers to work under subcontracting agreements in Belgium for Absa, partly with the involvement and cooperation of other Belgian companies. The employment of the workers concerned was not notified to the Belgian institution responsible for the collection of social security contributions, as they held E 101 certificates issued by the competent Bulgarian authority, certifying that they were covered by the Bulgarian social security system.

9 See Articles 90 and 91 of Regulation No 883/2004. See points 17 to 21 of this Opinion, concerning the provisions to be interpreted in the present case.

10 See Articles 96 and 97 of Regulation No 987/2009. See points 17 to 21 of this Opinion, concerning the provisions to be interpreted in the present case.

11. It is apparent from the request for a preliminary ruling that the Belgian authorities submitted a reasoned request to the competent Bulgarian institution for the withdrawal of those E 101 certificates, but that that institution did not rule on that request. In that regard, the Belgian Government stated that the request for withdrawal of the E 101 certificates had been sent to the competent Bulgarian institution on 12 November 2012 and that that institution had provided a response on 9 April 2013 containing 'merely a summary of the E 101 certificates issued, their period of validity and the notification that the conditions for posting were met for administrative purposes when the requests for the E 101 certificates at issue were made by the various Bulgarian undertakings, without examining or taking into account the facts found and established in Belgium'.

12. The Belgian authorities brought legal proceedings against the appellants in the main proceedings, Mr Ömer Altun, Mr Abubekir Altun, Mr Sedrettin Maksutogullari, Mr Yunus Altun, Absa, M. Sedat BVBA and Alnur BVBA ('Altun and Others'), in their capacity as employer, servant or agent, first, for having work carried out or allowing work to be carried out by foreign nationals who were not permitted or authorised to stay in Belgium for more than three months or to settle there without having obtained prior authorisation to work there; second, for failing, when workers were employed, to make the declaration required by law to the institution responsible for the collection of the social security contributions; and, third, for failing to register the workers with the National Social Security Office (Belgium).

13. By judgment of 27 June 2014, the correctionele rechtbank Limburg, afdeling Hasselt (Limburg Criminal Court, Hasselt Section, Belgium) acquitted Altun and Others. The Belgian Government's written observations state that the acquittal of the persons concerned was based on the finding that 'the employment of the Bulgarian workers was fully covered by the E 101/A1 forms, which have been regularly and lawfully issued to date'. The public prosecutor's office lodged an appeal against that judgment.

14. By judgment of 10 September 2015, the Hof van beroep Antwerpen (Court of Appeal, Antwerp, Belgium) convicted the persons concerned. In that connection, the referring court states that the appeal judges found that 'the E 101 certificates were obtained fraudulently by means of a representation of the facts which did not reflect the reality of the situation, thereby seeking to circumvent the conditions to which Community legislation makes subject the posting of workers and thus to obtain an advantage which would not have been granted without that fraudulent arrangement'.

15. The appellants lodged an appeal on a point of law against that judgment before the Hof van Cassatie (Court of Cassation), which decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Can an E 101 certificate issued under Article 11(1) of Regulation … No 574/72 …, as applicable before its repeal by Article 96(1) of Regulation … No 987/2009 …, be annulled or disregarded by a court other than that of the sending Member State if the facts which are submitted to its scrutiny support the conclusion that the certificate was obtained or invoked fraudulently?'

16. Written observations have been submitted by Altun and Others, by the Belgian, Irish, French, Hungarian and Polish Governments and by the European Commission. The same parties and interested persons presented oral argument at the hearing held on 20 June 2017.

IV. Analysis

A. The subject matter of the request for a preliminary ruling and the provisions of EU law to be interpreted

17. As a preliminary point, it should be noted that the question referred for a preliminary ruling concerns the interpretation of Article 11(1) of Regulation No 574/72, 'as applicable before its repeal by Article 96(1) of Regulation … No 987/2009 …'.

18. However, the Belgian Government argues that the question referred for a preliminary ruling must be broadened to encompass the interpretation of Article 5(1) and Article 19(2) of Regulation No 987/2009. Those provisions are, in fact, applicable *ratione temporis* to the case in the main proceedings, since the offences in relation to which the appellants in the main proceedings were prosecuted occurred in part after 1 May 2010, namely the date on which that regulation repealed and replaced Regulation No 574/72.[11]

19. However, it should be observed that, in its request for a preliminary ruling, the referring court does not specify the exact period to which the facts of the dispute in the main proceedings relate. In those circumstances, I consider the Court not to be in possession of sufficient factual evidence to extend its response to provisions other than those referred to in the question referred for a preliminary ruling.[12] In this Opinion, I shall therefore confine myself to interpreting the provisions of Regulations Nos 1408/71 and 574/72.

20. Nevertheless, I would point out that, in my view, the response that I propose be given regarding the interpretation of Article 14(1)(a) of Regulation No 1408/71 and of Article 11(1) of Regulation No 574/72 is fully applicable to Article 12(1) of Regulation No 883/2004 and to Article 5(1) and Article 19(2) of Regulation No 987/2009. In that regard, it should be noted, first, that, under the new regulations, Article 12(1) of Regulation No 883/2004 replaced, in essence, Article 14(1)(a) of Regulation No 1408/71, whereas Article 19(2) of Regulation No 987/2009 replaced, in essence, Article 11(1) of Regulation No 574/72.[13] Second, as the Court has held, Regulation No 987/2009, currently in force, codified the Court's case-law, affirming, inter alia, the binding nature of the E 101 certificate and the exclusive competence of the issuing institution to assess the validity of that certificate.[14] Article 5 of Regulation No 987/2009, entitled 'Legal value of documents and supporting evidence issued in another Member State', provides, in paragraph 1, that documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of Regulations Nos 883/2004 and 987/2009, and supporting evidence on the basis of which the documents have been issued, are to be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued.

11 See point 9 of this Opinion.

12 It should be recalled that the Court is empowered to rule on the interpretation of EU provisions only on the basis of the facts which the national court or tribunal puts before it. See order of 4 May 2017, *Svobodová* (C-653/16, not published, EU:C:2017:371, paragraph 18 and the case-law cited).

13 Under Article 12(1) of Regulation No 883/2004, a person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf is to continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed twenty-four months and that he is not sent to replace another person. Article 14(1)(a) of Regulation No 1408/71 is cited in point 6 of this Opinion. Pursuant to Article 19(2) of Regulation No 987/2009, at the request of the person concerned or of the employer, the competent institution of the Member State whose legislation is applicable pursuant to Title II of the basic Regulation (namely Regulation No 883/2004) is to provide an attestation that such legislation is applicable and is to indicate, where appropriate, until what date and under what conditions. Article 11(1)(a) of Regulation No 574/72 is cited in point 8 of this Opinion.

14 See judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraph 59).

21. Furthermore, I consider it appropriate to draw the Court's attention to the current legislative procedure seeking to amend Regulations Nos 883/2004 and 987/2009 on the basis of a proposal presented by the Commission on 13 December 2016.[15] Among the amendments proposed by the Commission are, in particular, the inclusion, in Article 1 of Regulation No 987/2009, of a definition of the concept of 'fraud'[16] and the inclusion, in Article 5(1) and (2) of that regulation, of specific time limits for the issuing institution's review of whether the E 101 certificate was properly issued and, where necessary, for the withdrawal or rectification of that certificate, at the request of a competent institution of another Member State.[17] Although that legislative work does not have a direct impact on the analysis to be carried out in this case, which is concerned solely with the interpretation of the provisions of Regulations Nos 1408/71 and 574/72, now repealed, it is, in my view, connected to the legal context in which the present case arises.

22. Finally, I consider it appropriate to make some comments about the Commission's proposal at the hearing for an 'alternative solution' in relation to the issue raised by the present case. In the Commission's view, the question referred for a preliminary ruling by the national court is not the most relevant question and it would be preferable for the Court to determine whether the circumstances of the present case support the existence of a 'genuine posting' within the meaning of Article 14(1)(a) of Regulation No 1408/71 and, therefore, whether the E 101 certificates concerned were correctly issued by the competent Bulgarian institution.[18] In that context, the Commission takes the view that, should the Court answer those questions in the negative, the competent Belgian institutions could, on the basis of the Court's judgment, ask the competent Bulgarian institution to withdraw the E 101 certificates or declare them to be invalid, and that, where appropriate, that institution would be required to take action. By contrast, should the Court confirm those certificates to be lawful, the dispute in the main proceedings would terminate.

23. I find the solution proposed by the Commission unconvincing for the following reasons.

24. First, I consider that that solution is not compatible with Article 267 TFEU. It should be recalled that, under Article 267 TFEU, which is based on a clear separation of functions between national courts and tribunals and the Court, the latter is empowered to rule on the interpretation or validity of EU provisions only on the basis of the facts which the national court or tribunal puts before it, and it is for the national court or tribunal to apply the rules of EU law to a specific case. Consequently, the Court has no jurisdiction to give a ruling on the facts in the main proceedings or to apply the rules of

15 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (COM(2016) 815 final).

16 According to the definition proposed by the Commission, for the purposes of Regulation No 987/2009 '"fraud" means any intentional act or omission to act, in order to obtain or receive social security benefits or to avoid to pay social security contributions, contrary to the law of a Member State'. See Article 2(4) of the Commission's proposal of 13 December 2016, cited above, and the related explanations in the explanatory memorandum, section 5.

17 See Article 2(7) of the Commission's proposal of 13 December 2016, cited above, and the related explanations in the explanatory memorandum, section 5. In that context, the Commission proposes that, upon detection of an irrefutable case of fraud committed by the applicant of the document, the issuing institution is to withdraw or rectify the document immediately and with retroactive effect. See, with regard to the review conducted by the issuing institution, point 33 of this Opinion.

18 The applicability of Article 14(1)(a) of Regulation No 1408/71 depends, inter alia, first, on whether there is a direct link between the worker and the undertaking posting the worker and, second, on whether that undertaking habitually carries on significant activities in the Member State in which it is established. See judgments of 10 February 2000, *FTS* (C-202/97, EU:C:2000:75, paragraphs 24 and 40 to 45); of 9 November 2000, *Plum* (C-404/98, EU:C:2000:607, paragraphs 21 and 22); and of 26 January 2006, *Herbosch Kiere* (C-2/05, EU:C:2006:69, paragraph 19). See also paragraphs 2 to 4 of Part I of the Administrative Commission's Practical guide to the legislation applicable in the European Union (EU), the European Economic Area (EEA) and in Switzerland of December 2013. See, also, point 52 of this Opinion.

EU law which it has interpreted to national measures or situations, since those questions are matters for the exclusive jurisdiction of the national court or tribunal.[19] In my view, the approach proposed by the Commission would involve the Court carrying out a legal classification of the facts of the present case, which falls outside its jurisdiction.[20]

25. Second, I take the view that the solution proposed by the Commission actually has the effect of modifying the subject matter and the nature of the present case. While the question raised by the referring court concerns the jurisdiction of a court of the host Member State to disapply an E 101 certificate in the event of fraud, the Commission suggests that the Court answer a quite different question, namely whether the E 101 certificates concerned were lawfully issued. However, that question should rather be dealt with in the context of infringement proceedings brought under Article 258 or Article 259 TFEU.

26. Third, even assuming that the Court finds that the conditions for posting laid down in Article 14(1)(a) of Regulation No 1408/71 are not satisfied in the present case, the referring court remains obliged, as indeed the Commission acknowledges, to take account of the E 101 certificates until the competent Bulgarian institution has annulled or withdrawn them. The solution proposed by the Commission is therefore incapable of resolving the situation with which the referring court is faced.

27. Accordingly, I consider that there is no need to reformulate the question referred for a preliminary ruling.

B. The question referred

28. By the question it has referred for a preliminary ruling, the referring court seeks to ascertain whether a court of the host Member State can annul or disregard an E 101 certificate issued under Article 11(1) of Regulation No 574/72 if the facts which are submitted to its scrutiny support the conclusion that that certificate was obtained or invoked fraudulently. In other words, the referring court is essentially asking the Court to clarify whether the binding effect which the case-law of the Court ordinarily attaches to an E 101 certificate applies to a court of the host Member State where that court finds that there has been fraud.[21]

29. In that regard, the Belgian and French Governments take the view that a court of the host Member State should be granted the possibility of disapplying the E 101 certificate in the event of fraud. By contrast, Altun and Others, the Irish, Hungarian and Polish Governments and the Commission argue, in essence, that an E 101 certificate issued by the competent institution of another Member State is binding on a court of the host Member State, even where that court finds that the certificate was obtained or invoked fraudulently.

30. Before commencing the examination of the question raised by the referring court, I consider it appropriate to summarise the Court's case-law on the binding nature of the E 101 certificate and the principles underlying that case-law (first section).

19 Judgment of 11 September 2008, *CEPSA* (C-279/06, EU:C:2008:485, paragraph 28 and the case-law cited).

20 In that regard, the present case differs, in my view, from that which gave rise to the judgment of 9 September 2015, *X and van Dijk* (C-72/14 and C-197/14, EU:C:2015:564). It should be recalled that, in paragraphs 43 to 51 of that judgment, the Court held that a certificate issued in the form of an E 101 certificate in respect of Rhine boatmen who do not come within the scope of Regulation No 1408/71 cannot be regarded as being an E 101 certificate and cannot therefore produce the effects of that certificate, including the binding effect for institutions of the Member States other than the one of the institution which issued such a certificate. That case was concerned not with determining the applicability of the provisions of Regulation No 1408/71 in the situation in question, but rather with clarifying the effects of a certificate issued in respect of persons who fell outside the scope of that regulation. In that regard, the Court stated, in paragraph 36 of the judgment, that it contained no appraisal as to the classification of the applicants in the main proceedings as Rhine boatmen or as to which national legislation was applicable to them.

21 With regard to the Court's case-law on the binding nature of the E 101 certificate, see points 32 to 39 of this Opinion.

31. I shall then examine the question raised by the referring court. First, I shall explain why I consider that the case-law on the binding nature of the E 101 certificate cannot be applied where a court of the host Member State finds that the E 101 certificate was obtained or invoked fraudulently, and that, in such circumstances, that court may disapply that certificate (second section). Second, I shall set out a number of considerations regarding a finding of fraud made by a court of the host Member State (third section). Finally, I shall address the arguments relied on in the present case against the solution I propose that the Court adopt (fourth section).

1. The case-law of the Court on the binding nature of the E 101 certificate

32. The binding nature of the E 101 certificate is clear from the settled case-law of the Court. The Court has held, inter alia, that, as long as it has not been withdrawn or declared invalid, an E 101 certificate takes effect in the internal legal order of the Member State to which the employee goes in order to work and, therefore, binds the institutions of that Member State.[22] It follows, first, that the competent institution of the Member State in which an employee actually works must take account of the fact that that person is already subject to the social security legislation of the Member State in which the undertaking employing him is established, and that institution cannot therefore subject the worker in question to its own social security system. Second, a court of the host Member State is not entitled to scrutinise the validity of an E 101 certificate in the light of the background against which it was issued.[23]

33. The Court has found that the principle of sincere cooperation, laid down in Article 4(3) TEU, requires the institution issuing the E 101 certificate to carry out a proper assessment of the facts relevant for the application of the rules relating to the determination of the legislation applicable to social security and, consequently, to ensure that the information contained in an E 101 certificate is correct. In that context, it is incumbent on that institution to reconsider whether the E 101 certificate was properly issued and, if appropriate, to withdraw that certificate if the competent institution of the host Member State expresses doubts as to the correctness of the facts on which the certificate is based and, consequently, of the information contained therein, in particular because the information does not correspond to the requirements of the provision of Regulation No 1408/71 under which that certificate was issued.[24]

34. In the event that the competent institutions of the Member States concerned do not reach agreement on the determination of the legislation applicable in the case in question, it is open to them to refer the matter to the Administrative Commission. If that commission does not succeed in reconciling the points of view of the institutions concerned, it remains possible, without prejudice to any legal remedies existing in the Member State to which the issuing institution belongs, to bring infringement proceedings under Article 259 TFEU.[25]

22 See, recently, judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraph 48 and the case-law cited).

23 See, recently, judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraphs 43 and 49). I would point out that the nature of the proceedings brought, whether civil or criminal, has no bearing on the binding nature of the E 101 certificate, since it is binding on all the courts and tribunals 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).

24 See, to that effect, judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraphs 39 and 44 and the case-law cited). See, in addition, paragraph 7(a) and (c) of Decision No 181 of the Administrative Commission of 13 December 2000 concerning the interpretation of Articles 14(1), 14a(1) and 14b(1) and (2) of Regulation No 1408/71 (2001/891/EC) (OJ 2001 L 329, p. 73) ('Decision No 181 of the Administrative Commission'). See, finally, Article 5(2) and (3) of Regulation No 987/2009. It should be noted that the latter article is not applicable *ratione temporis* in the present case.

25 See, to that effect, judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraphs 45 and 46 and the case-law cited). See also Article 84a(3) of Regulation No 1408/71, inserted by Regulation (EC) No 631/2004 of the European Parliament and of the Council of 31 March 2004 amending Regulations Nos 1408/71 and 574/72 in respect of the alignment of rights and the simplification of procedures (OJ 2004 L 100, p. 1). See, in addition, paragraph 9 of Decision No 181 of the Administrative Commission, referred to above. See, finally, Article 5(4) of Regulation No 987/2009. With regard to the composition, working methods and tasks of the Administrative Commission, see the provisions of Title IV of Regulation No 1408/71.

35. As I explained in my Opinion in *A-Rosa Flussschiff*, the purpose of the E 101 certificate is to ensure observance of the principle, set out in Article 13(1) of Regulation No 1408/71, that the legislation of a single Member State applies, by aiming to prevent conflicts of competence arising in specific cases as a result of different assessment of the social security legislation applicable.[26] In that regard, the E 101 certificate helps to provide legal certainty for workers moving within the European Union and hence to facilitate freedom of movement for workers and freedom to provide services within the European Union, which is the objective of Regulation No 1408/71.

36. In my view, it follows from the case-law of the Court on the binding nature of the E 101 certificate that the provisions of Title II of Regulation No 1408/71 concerning the determination of the legislation applicable not only establish a system of conflict rules, but at the same time introduce a system of division of jurisdiction between Member States, such that the institution which issued the E 101 certificate is alone competent to review its validity and to determine, either on its own initiative or in response to a request from the competent authority of another Member State, whether, in the light of the information received concerning the situation of the worker concerned, that certificate should be withdrawn or cancelled, which would have the effect that that certificate would no longer be binding on the competent institutions and the courts of the other Member States.[27] The opposite solution would involve a risk of conflicting decisions concerning the legislation applicable in a particular case and hence a risk of double social security cover, with all the consequences which that would entail, including a worker having to pay two lots of contributions.[28]

37. The binding nature of the E 101 certificate is also based on the principle of sincere cooperation, laid down in Article 4(3) TEU. The Court has held that the obligations to cooperate arising from that provision would not be fulfilled if the competent institution of the host Member State were to consider that it was not bound by the E 101 certificate.[29]

38. In the case which gave rise to the judgment in *A-Rosa Flussschiff*,[30] the Cour de cassation (Court of Cassation, France) asked the Court, in essence, whether the case-law of the Court on the binding nature of the E 101 certificate applied to situations in which it is found that the conditions under which the worker concerned carries out his activities clearly do not fall within the material scope of the provision under which the E 101 certificate was issued. The Court answered that question in the affirmative. In that connection, it held that the fact that the workers concerned clearly did not fall within the scope of Article 14 of Regulation No 1408/71 in no way altered the considerations underlying its case-law on the binding nature of the E 101 certificate.[31]

39. It is, however, important to point out that, in *A-Rosa Flussschiff*,[32] unlike in the present case, the Cour de Cassation provided no indication, in its request for a preliminary ruling, that the facts brought before it pointed to the existence of fraud. That was a decisive factor in my analysis of the case. I thus took as a starting point the premiss that the question referred by that court was not intended to obtain clarifications regarding the applicability of the Court's case-law on the binding

26 Opinion in *A-Rosa Flussschiff* (C-620/15, EU:C:2017:12, point 47). See also, to that effect, judgment of 26 October 2016, *Hoogstad* (C-269/15, EU:C:2016:802, paragraph 36 and the case-law cited). Article 13(1) of Regulation No 1408/71 is cited in point 5 of this Opinion.

27 See my Opinion in *A-Rosa Flussschiff* (C-620/15, EU:C:2017:12, point 49) and, to that effect, judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraph 59).

28 See my Opinion in *A-Rosa Flussschiff* (C-620/15, EU:C:2017:12, point 50) and, to that effect, judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraph 42 and the case-law cited).

29 See, recently, judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraph 40 and the case-law cited).

30 Judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309).

31 See judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraph 52).

32 Judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309).

effect of the E 101 certificate in the event of fraud.[33] Similarly, in the subsequent judgment in that case, the Court did not address that question, but confined itself to ruling on the situation where the conditions under which the worker concerned carries on his activities clearly do not fall within the scope of the provision of Regulation No 1408/71 pursuant to which the E 101 certificate was issued.

40. The question raised by the referring court in this case is therefore a novel one. In that connection, the Court is being asked to determine whether the considerations underlying its case-law on the binding nature of the E 101 certificate apply also where a court of the host Member State finds that there has been fraud.

41. I would like to state now that, in my view, that question should be answered in the negative. For the reasons set out below, I consider that the Court's existing case-law on the binding nature of the E 101 certificate cannot be extended to cover a situation, such as that at issue in the main proceedings, in which a court of the host Member State finds that that certificate was obtained or invoked fraudulently, and that that court should be granted the possibility of disapplying the E 101 certificate in such circumstances.

2. The need to combat fraud

42. The Court has consistently held that EU law cannot be relied on for abusive or fraudulent ends and that national courts may, case by case, take account — on the basis of objective evidence — of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of EU law, in the light of the objectives pursued by the provisions of EU law concerned.[34] That principle is, in my view, a general principle of EU law[35] which applies regardless of any provisions implemented in European or national legislation.[36] In my view, it follows from that principle that a national court which is confronted with a case of fraudulent use of provisions of EU law has not only the right but also the duty, as an EU court, to combat fraud by denying the benefit of those provisions to the persons concerned.[37]

43. It follows, in my view, that, in a situation such as that at issue in the main proceedings, in which a court of the host Member State finds that the E 101 certificate was obtained or relied on fraudulently, it falls to that court to deny the persons concerned the benefit stemming from that certificate and, therefore, from the provision of EU law under which that certificate was issued, namely, in the present case, Article 14(1)(a) of Regulation No 1408/71. This means that, in such a situation, the persons concerned cannot rely on the exception laid down in that provision, and that the general rule set out in Article 13(2)(a) of that regulation applies, under which a worker is to be subject to the legislation of the Member State in which he carries on his paid employment (*lex loci laboris*).[38]

33 See my Opinion in *A-Rosa Flussschiff* (C-620/15, EU:C:2017:12, point 36).

34 See judgments of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 68 and the case-law cited), and of 21 July 2011, *Oguz* (C-186/10, EU:C:2011:509, paragraph 25 and the case-law cited).

35 See, to that effect, judgments of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 38), and of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others* (C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraphs 43 and 46). See also Opinion of Advocate General La Pergola in *Centros* (C-212/97, EU:C:1998:380, point 20), and Opinion of Advocate General Poiares Maduro in *Halifax and Others* (C-255/02, EU:C:2005:200, point 64).

36 See, to that effect, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others* (C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 59).

37 See, to that effect, judgments of 3 March 2005, *Fini H* (C-32/03, EU:C:2005:128, paragraph 34), and of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others* (C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 44 and the case-law cited), from which it is clear that it *is for* the national authorities and courts to refuse the right to deduct value added tax (VAT) laid down by the Sixth Directive if it is shown, in the light of objective evidence, that that right is being relied on for fraudulent or abusive ends.

38 See, to that effect, Opinion of Advocate General Lenz in *Calle Grenzshop Andresen* (C-425/93, EU:C:1995:12, point 63), which states that, where an E 101 certificate has been obtained by fraud, that certificate cannot be allowed to prevail over the provisions of Regulation No 1408/71. See, by analogy, in relation to other types of certificates, Opinion of Advocate General Darmon in *van de Bijl* (130/88, EU:C:1989:157, point 17); Opinion of Advocate General Mischo in *Paletta* (C-45/90, EU:C:1991:234, point 34); and Opinion of Advocate General Cosmas in *Paletta* (C-206/94, EU:C:1996:20, point 51). Articles 13(2)(a) and 14(1)(a) of Regulation No 1408/71 are cited in points 5 and 6 of this Opinion.

44. The opposite solution would, in my view, result in an unacceptable outcome. If the E 101 certificate continued to have binding effect where a court of the host Member State finds that there has been fraud, this would mean, first, that the persons responsible for the fraud could benefit from their fraudulent conduct and, second, that such a court should, in certain cases, tolerate or even condone fraud.

45. In that context, I recall that, in *FTS*, Advocate General Jacobs pointed out that, if the host Member State 'can show that the certificate was obtained by means of fraud, the issuing authority should have no problem in withdrawing its certificate'.[39] It should be observed in that regard that, as long as the issuing authority annuls or withdraws the E 101 certificate on the basis of evidence produced by the authorities of the host Member State pointing to the existence of fraud, there is in fact no need to refer the matter to the courts of that host Member State. However, situations may arise, as the present case demonstrates, in which the authority which issued the E 101 certificate does not, for whatever reason, annul or withdraw that certificate, even though the social security authorities of the host Member State have submitted to it evidence pointing to the existence of fraud.[40] In such circumstances, requiring a court of the host Member State to take account of the E 101 certificate despite the finding that that certificate was obtained or invoked fraudulently would be tantamount to obliging that court to close its eyes to the fraud. In any event, I consider that any possibility that the issuing institution may annul or withdraw the E 101 certificate cannot affect the jurisdiction enjoyed by a court of the host Member State to disapply the E 101 certificate where it has sufficient evidence at its disposal to find that that certificate was obtained or invoked fraudulently.[41]

46. In addition, socio-economic considerations likewise support priority being given to the combating of fraud in such a situation. In the context of the system of conflict of laws established by the provisions of Title II of Regulation No 1408/71, fraud linked to the issue of E 101 certificates represents a threat to the coherence of the Member States' social security schemes.[42] In that regard, I consider that Member States have a legitimate interest in taking appropriate steps to protect their financial interests and to ensure the financial balance of their social security systems.[43] In addition, the use of E 101 certificates obtained or invoked fraudulently is, in my view, a form of unfair competition and calls into question the equality of working conditions on national labour markets.

47. It is, however, important to point out that a court of the host Member State may refuse to grant the benefit stemming from an E 101 certificate and, therefore, from the provision under which that certificate was issued only in the event of a duly established case of fraud. It is essential that the solution which I propose not be misused so as to jeopardise the system of conflict of laws established by the provisions of Title II of Regulation No 1408/71. In other words, I consider that the combating of fraud can call into question the binding nature of an E 101 certificate issued by the competent institution of another Member State pursuant to Article 11(1) of Regulation No 574/72 only in very specific circumstances which will be described below.

39 Opinion of Advocate General Jacobs in *FTS* (C-202/97, EU:C:1999:33, point 58).

40 See point 11 of this Opinion. With regard to the obligation on the part of the issuing institution to reconsider whether an E 101 certificate was properly issued and, where appropriate, to withdraw it, see point 33 of this Opinion. The Bulgarian Government has not submitted written observations or presented oral argument before the Court in the present case.

41 See also point 69 of this Opinion.

42 In its written observations, the French Government states that, according to an analysis conducted by the French Cour des comptes (Court of Auditors), fraud linked to undeclared posted workers is responsible for a loss of social security contributions of EUR 380 million to the French social security scheme alone. See, in relation to the issue of portable A1 documents obtained by means of fraud, Jorens, Y., Lhernould, J.-P., *Procedures related to the granting of Portable Document A1: an overview of country practices*, paragraph 3.3.3, report produced at the Commission's initiative in May 2014.

43 See, by analogy, in the context of VAT, judgment of 29 June 2017, *Commission* v *Portugal* (C-126/15, EU:C:2017:504, paragraph 59 and the case-law cited). I would also recall that, in the context of the fundamental freedoms guaranteed by the Treaty, the Court has ruled that combating fraud, in particular social security fraud, and preventing abuse, in particular combating undeclared work, number amongst the overriding requirements in the public interest capable of justifying a restriction on those freedoms, in so far as that objective can form part of the objective of protecting the financial balance of social security systems. See judgment of 3 December 2014, *De Clercq and Others* (C-315/13, EU:C:2014:2408, paragraph 65 and the case-law cited). See, also, to that effect, judgment of 19 December 2012, *Commission* v *Belgium* (C-577/10, EU:C:2012:814, paragraph 45).

3. *The finding of fraud*

48. It should be noted that Regulations Nos 1408/71 and 574/72 contain no definition of 'fraud' for the purposes of the application of those regulations.[44] In the absence of such a definition, it is for the Court to determine the cases of fraud in which a court of the host Member State may disapply an E 101 certificate issued by the competent institution of another Member State.

49. In my view, a finding of fraud requires the satisfaction of an objective criterion and of a subjective criterion. The objective criterion consists in the fact that the conditions for obtaining the advantage sought — in the present case, the conditions laid down in the provision of Title II of Regulation No 1408/71 under which the E 101 certificate was issued — are not in fact satisfied.[45]

50. That finding is not, however, sufficient to conclude that there exists a case of fraud enabling a court of the host Member State to disapply the E 101 certificate. It should be recalled that the Court has held, in the judgment in *A-Rosa Flussschiff*, that the E 101 certificate is binding on the institutions and courts of the host Member State, even where it is found that the conditions under which the worker concerned carries out his activities clearly do not fall within the material scope of the provision of Regulation No 1408/71 under which the E 101 certificate was issued.[46] Such a situation may in fact be the result of a (simple) error of fact or of law made when issuing the E 101 certificate, or of a change in the situation of the worker concerned.[47]

51. In order to find that a case of fraud exists, it is also necessary, in my view, for it to be established that the persons concerned had the *intention* of concealing the fact that the conditions for the issue of the E 101 certificate were not in fact met, in order to obtain the advantage stemming from that certificate.[48] That fraudulent intent is, to my mind, the subjective factor on the basis of which fraud may be distinguished from the simple finding that the conditions laid down in the provision of Title II of Regulation No 1408/71 under which the E 101 certificate was issued are not satisfied. Proof of the existence of such fraudulent intent may consist in an intentional act, in particular an inaccurate presentation of the true situation of the posted worker or of the undertaking posting that worker, or in an intentional omission, such as the non-disclosure of relevant information.

52. It is apparent from the request for a preliminary ruling that, in the present case, the Belgian social inspectorate established that the Bulgarian undertakings concerned which were posting workers to Belgium had no activities to speak of in Bulgaria.[49] However, in accordance with the case-law of the Court, only an undertaking which habitually carries on significant activities in the Member State in

44 The same is true of Regulations Nos 883/2004 and 987/2009, which replaced Regulations Nos 1408/71 and 574/72. However, the Commission's proposal of 13 December 2016, referred to above, seeks to introduce a definition of 'fraud' in Regulation No 987/2009. See point 21 and footnote 16 of this Opinion.

45 In that regard, there is a distinction between fraud and the abuse of rights. According to the case-law of the Court, evidence of an abusive practice 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, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by creating artificially the conditions laid down for obtaining it. See judgment of 16 October 2012, *Hungary* v *Slovakia* (C-364/10, EU:C:2012:630, paragraph 58 and the case-law cited). See, with regard to the distinction between fraud and the abuse of rights, Bouveresse, A., 'La fraude dans l'abus de droit', *La fraude et le droit de l'Union européenne*, Bruylant, Brussels, 2017, p. 18.

46 Judgment of 27 April, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309). See also point 38 of this Opinion.

47 See, in that regard, the Opinion of Advocate General Lenz in *Calle Grenzshop Andresen* (C-425/93, EU:C:1995:12, point 51). As the Court has held, since the E 101 certificate tends to be issued, as a general rule, before or at the start of the period which it covers, the assessment of the facts relevant for the application of the rules relating to the determination of the legislation applicable in the matter of social security is most often carried out at that time, on the basis of the anticipated employment situation of the employed person concerned. See judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe* (C-115/11, EU:C:2012:606, paragraph 43).

48 I find confirmation of that assumption in the European legislation. See, inter alia, Article 1(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the protection of the European Communities' financial interests, established by Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests (OJ 1995 C 316, p. 48) ('any intentional act or omission'). See, in addition, Article 3 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). See, finally, the definition of 'fraud' proposed by the Commission in its proposal of 13 December 2016, referred to above.

49 See point 10 of this Opinion.

which it is established may be allowed the benefit of the advantage offered by the exception provided for by Article 14(1)(a) of Regulation No 1408/71.[50] It therefore appears, subject to verification by the national court, that one of the conditions laid down in Article 14(1)(a) of Regulation No 1408/71, under which the E 101 certificates in question were issued, was not satisfied.[51]

53. It is also apparent from the request for a preliminary ruling that the appeal judges found that 'the E 101 certificates were obtained fraudulently by means of a representation of the facts which did not reflect the reality of the situation, thereby seeking to circumvent the conditions to which Community legislation makes subject the posting of workers and thus to obtain an advantage which would not have been granted without that fraudulent arrangement'.[52] In that connection, the Belgian Government clarified at the hearing that, in the present case, the fraud consisted in setting up 'letterbox' companies in Bulgaria which had no or very limited activities with a view to being able, first, to apply for E 101 certificates and, thereafter, to post employed persons to Belgium, whilst the contributions would continue to be paid in Bulgaria.

54. It is for the national court to examine whether, in the present case, the objective and subjective criteria for a finding of fraud are met. In that regard, it must take account of all the circumstances of the case, including any information provided by the institution which issued the E 101 certificate.[53]

55. I should like to clarify that the fraud must be established in the context of adversarial proceedings with legal guarantees for the persons concerned and in compliance with their fundamental rights, in particular the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union. In that context, it is for the competent authorities to adduce the evidence that a case of fraud exists, that is to say, they must prove to the requisite legal standard, first, that the conditions laid down in the provision of Title II of Regulation No 1408/71 under which the E 101 certificate was issued are not satisfied in the present case (objective criterion) and, second, that the persons concerned intentionally concealed the fact that those conditions were not met (subjective criterion). It is only in those specific circumstances that a court of the host Member State may find that there exists a case of fraud enabling that court to disapply the E 101 certificate.

56. I should further like to clarify the legal consequences of a finding of fraud by a court of the host Member State. First, since the E 101 certificate is a document issued by an institution of another Member State, I consider that a court of the host Member State cannot, even in the event of fraud, be recognised as having jurisdiction to annul that certificate or to declare it invalid. Its power is limited to disapplying the certificate. Second, it seems clear to me that a finding of fraud by a court of the host Member State can produce effects only in respect of the competent authorities of that Member State.

Interim conclusion

57. In the light of all the foregoing considerations, I am of the view that, in a situation such as that at issue in the main proceedings, in which a court of the host Member State finds that an E 101 certificate issued pursuant to Article 11(1) of Regulation No 1408/71 was obtained or invoked fraudulently, that court may disapply that certificate. In order to find that there has been fraud,

50 See judgments of 10 February 2000, *FTS* (C-202/97, EU:C:2000:75, paragraph 40), and of 9 November 2000, *Plum* (C-404/98, EU:C:2000:607, paragraphs 21 and 22). See, in addition, footnote 18 of this Opinion.

51 It should be recalled that, pursuant to Article 11(1)(a) of Regulation No 574/72, an E 101 certificate is to be issued at the request of the employed person or his employer 'in cases referred to in Article 14(1) [of Regulation No 1408/71]'. Article 11(1)(a) of Regulation No 574/72 is cited in point 8 of this Opinion.

52 See point 14 of this Opinion.

53 See, with regard to the obligation to inform the issuing institution of the finding of fraud, point 71 of this Opinion.

justifying disapplication of the E 101 certificate, it is necessary to establish, first, that the conditions laid down in the provision of Title II of Regulation No 1408/71 under which the E 101 certificate was issued are not satisfied in the present case (objective criterion) and, second, that the persons concerned intentionally concealed the fact that those conditions are not met (subjective criterion).

58. In my view, that conclusion cannot be called into question by the opposing arguments relied on by the parties and persons concerned who have submitted observations to the Court. I shall address those arguments next.

4. The opposing arguments relied on

59. A number of arguments have been relied in this case in opposition to the solution which I propose that the Court should adopt.

60. In the first place, the Irish, Hungarian and Polish Governments relied on the codification, in Article 5 of Regulation No 987/2009, of the Court's case-law on the binding nature of the E 101 certificate,[54] arguing, in essence, that that fact prevents the Court from departing from that case-law.

61. That argument cannot succeed.

62. It should be observed, first of all, that the question of fraud was not addressed, let alone settled, by the EU legislature when Regulation No 987/2009 was adopted.[55] In the absence of any indication to the contrary in the wording of the regulation, it should be assumed, in my view, that the EU legislature simply intended to codify the Court's existing case-law on the binding nature of the E 101 certificate.[56] However, as I have already explained above, the Court has not yet had the opportunity to rule on the binding effect of an E 101 certificate in a situation such as that in the main proceedings, in which a court of the host Member State finds that that certificate was obtained or invoked fraudulently.[57] The solution which I advocate therefore entails no change to the Court's earlier case-law, as codified by Regulation No 987/2009, but simply clarifies the scope of that case-law and, inter alia, its applicability in a novel situation, namely a situation in which a court of the host Member State finds that there has been fraud. It follows that the codification of the Court's case-law on the binding nature of the E 101 certificate, contained in Regulation No 987/2009, does not prevent the Court from allowing a court of the host Member State to disapply an E 101 certificate where the latter court finds that that certificate was obtained or invoked fraudulently.

63. In the second place, the Irish, Hungarian and Polish Governments and the Commission rely on the principle that the legislation of a single Member State applies in matters of social security, a principle laid down in Article 13(1) of Regulation No 1408/71, and, in that context, the principle of legal certainty.[58]

64. With regard, first, to the principle that the legislation of a single Member State applies in matters of social security, as laid down in Article 13(1) of Regulation No 1408/71, it should be acknowledged that the solution which I advocate entails, in principle, the possibility of the simultaneous application — at least temporarily — of the legislation of several Member States. Indeed, if a court of the host Member State finds that there has been fraud, in accordance with the principles set out in points 48 to 56 of this Opinion, and disapplies the E 101 certificate, but the issuing institution fails, at

54 See, with regard to that codification, point 20 of this Opinion.

55 By contrast, the question of fraud does form the subject matter of the current legislative process seeking to amend the existing legislative framework on the basis of a proposal presented by the Commission on 13 December 2016 (see point 21 of this Opinion).

56 See, in that regard, recital 12 of Regulation No 987/2009, in which reference is made to the case-law of the Court. See also judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraph 59).

57 See points 39 and 40 of this Opinion.

58 Article 13(1) of Regulation No 1408/71 is cited in point 5 of this Opinion.

the same time, to annul or withdraw that certificate, the worker concerned and his employer risk finding themselves in a situation of double social security cover.[59] However, I consider that that likelihood is inherent in a finding of fraud. In other words, it is my view that, in such circumstances, the need to ensure that the persons concerned derive no benefit from fraudulent conduct must necessarily take precedence over the principle that the legislation of a single Member State applies in matters of social security.[60]

65. In that context, it should be recalled that, according to the case-law of the Court, it falls to the institution which issued the E 101 certificate, in accordance with the principle of sincere cooperation laid down in Article 4(3) TEU, to reconsider whether that certificate was issued properly and, where appropriate, to withdraw it where the competent institution of the host Member State expresses doubts as to the correctness of the facts on which the certificate is based and, consequently, of the information contained therein, in particular because the information does not correspond to the requirements of the provision of Regulation No 1408/71 under which the certificate was issued.[61] I consider that this applies a fortiori where a court of the host Member State finds that the E 101 certificate was obtained or invoked fraudulently.[62] If the institution which issued the E 101 certificate annuls or withdraws that certificate, the principle that the legislation of a single Member State applies in matters of social security is (once more) ensured.

66. With regard, second, to the principle of legal certainty, I consider that, if a court of the host Member State finds that the E 101 certificate was obtained or invoked fraudulently, the perpetrators and/or the beneficiaries of the fraud cannot invoke the principle of protection of legal certainty in order to oppose the refusal to grant the benefit of that certificate and of Article 14(1)(a) of Regulation No 1408/71.[63] In that context, it should be borne in mind that, according to the case-law of the Court, such a refusal does not amount to imposing an obligation on the individual concerned, but is merely the consequence of the finding that the objective conditions required for obtaining the advantage sought have not, in fact, been satisfied.[64]

67. In the third place, and finally, Altun and Others, the Irish, Hungarian and Polish Governments and the Commission rely on the principle of sincere cooperation, set out in Article 4(3) TFEU, and on the existence of a special procedure for resolving disputes concerning the determination of the applicable legislation, under the provisions of Title II of Regulation No 1408/71, in a specific case,[65] arguing, in essence, that the ability of a court of the host Member State to disapply an E 101 certificate in the event of fraud cannot be reconciled with observance of that principle or compliance with that procedure.

68. I am not convinced by that argument.

59 See, in that regard, point 36 of this Opinion.

60 See, with regard to the general principle of combating fraud, point 42 of this Opinion.

61 See point 33 of this Opinion.

62 See, with regard to the obligation to inform the issuing institution of the finding of fraud, point 71 of this Opinion.

63 See, by analogy with regard to the rights to deduction of, exemption from or refund of VAT, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others* (C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 60), which states that a taxable person who has created the conditions for obtaining a right only by participating in fraudulent transactions is clearly not justified in invoking the principles of protection of legitimate expectations or legal certainty in order to oppose the refusal to grant the right in question.

64 See, to that effect, in the context of VAT, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others* (C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 57 and the case-law cited).

65 See, with regard to that procedure, Article 84a(3) of Regulation No 1408/71 and judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraphs 44 to 46 and the case-law cited). See, in addition, paragraphs 7 and 9 of Decision No 181 of the Administrative Commission, referred to above. Under Regulations Nos 883/2004 and 987/2009, that procedure was further developed in Decision A1 of the Administrative Commission of 12 June 2009 concerning the establishment of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the provision of benefits under Regulation (EC) No 883/2004 of the European Parliament and of the Council (OJ 2010 C 106, p. 1). See also Article 76(6) of Regulation No 883/2004 and Article 5(2) to (4) of Regulation No 987/2009, which are not applicable *ratione temporis* to the present case. See, also, my Opinion in *A-Rosa Flussschiff* (C-620/15, EU:C:2017:12, points 59 to 66).

69. As I have already explained, I consider that, if a court of the host Member State finds that there has been fraud, that court is obliged, as an EU court, to deny the benefit stemming from the E 101 certificate.[66] In that regard, its capacity to satisfy that obligation cannot depend on the intention of the issuing institution to annul or withdraw that certificate or on the conduct of a special procedure which, moreover, was in my view designed to deal with quite different situations.[67] Such an approach would result in unacceptable outcomes.[68]

70. I would recall in that context that the Court has not yet had the opportunity to rule on the applicability of its case-law on the binding nature of the E 101 certificate or on the procedure to be followed to settle disputes concerning the determination of the legislation applicable, pursuant to the provisions of Title II of Regulation No 1408/71, where a court of the host Member State finds that there has been fraud.[69] In that regard, the view should be taken, in my opinion, that the principle of sincere cooperation is not absolute and that limitations of that principle can be made in exceptional circumstances, in particular in the event of a finding of fraud.[70] It is essential that the principle of sincere cooperation between Member States not become a matter of blind trust which facilitates fraudulent conduct.

71. Nevertheless, I consider that the principle of sincere cooperation, laid down in Article 4(3) TEU, requires that the social security authorities of the host Member State first contact the institution which issued the E 101 certificate, when they have evidence pointing to the existence of fraud, which would enable that institution to reconsider whether the E 101 certificate was properly issued and to determine whether, in the light of that evidence, that certificate should be annulled or withdrawn. Such consultation would, in practice, make it possible to dispel any doubts relating to the facts of the case in question.[71] In addition, in the event that the issuing institution annuls or withdraws the E 101 certificate following such consultation, there would in fact be no need to bring the matter before the courts of the host Member State.[72] In that regard, consultation of the issuing institution could ensure some procedural economy. I would, however, point out that such consultation cannot affect the jurisdiction enjoyed by a court of the host Member State to disapply an E 101 certificate where it has sufficient evidence at its disposal to find that that certificate was obtained or invoked fraudulently.[73]

66 See points 42 and 43 of this Opinion. With regard to the finding of fraud, see points 48 to 56 of this Opinion.

67 In my view, that procedure is primarily concerned with two types of situation. First, that in which the competent authorities of the host Member State have *doubts* concerning the validity of an E 101 certificate or concerning the accuracy of the supporting documents or facts on the basis of which that certificate was issued and, second, that in which the Member States concerned *disagree* as to the determination, in a specific case, of the legislation applicable in accordance with the provisions of Title II of Regulation No 1408/71. See, in that regard, Article 84a(3) of Regulation No 1408/71; paragraphs 7(c) and 9 of Decision No 181 of the Administrative Commission, cited above; and judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraphs 44 to 46 and the case-law cited). See, in addition, Article 76(6) of Regulation No 883/2004 and Article 5(2) to (4) of Regulation No 987/2009, as well as paragraph 1 of Decision A1 of the Administrative Commission, cited above. It should be noted that Regulations Nos 883/2004 and 987/2009 and Decision A1 are not applicable *ratione temporis* to the present case.

68 See, in that regard, point 44 of this Opinion.

69 See, in that regard, points 39 and 40 of this Opinion.

70 See, by analogy with regard to the principle of mutual trust between Member States, 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), in which the Court held that limitations of the principles of mutual recognition and mutual trust between Member States can be made 'in exceptional circumstances'. See, also, Lenaerts, K., 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', *Common Market Law Review*, Vol. 54, No 3, June 2017, pp. 805 to 840.

71 In my view, a finding of fraud relating to the issue of an E 101 certificate often necessitates an assessment of factual matters in the Member State in which that certificate was issued. The institution which issued the E 101 certificate should, as a general rule, be regarded as being best placed to assess such matters.

72 See also point 45 of this Opinion. I do not consider it useful in the context of the present case for the Court to address the legal consequences or the possible financial consequences for the persons concerned of the annulment or withdrawal of the E 101 certificate by the issuing institution in the event of fraud. Those questions do not arise in the case in the main proceedings. See, however, in that regard, paragraph 7 of Part I of the Administrative Commission's practical guide, referred to above, which states that, in the event of fraud, the portable A1 document (the successor to the E 101 certificate) may also be withdrawn with retroactive effect.

73 See, with regard to the finding of fraud, points 48 to 56 of this Opinion.

V. Conclusion

72. In the light of the foregoing considerations, I propose that the Court reply as follows to the question referred for a preliminary ruling by the Hof van Cassatie (Court of Cassation, Belgium):

Article 11(1) of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, as amended by Council Regulation (EEC) No 3795/81 of 8 December 1981, must be interpreted as meaning that a court of the host Member State may disapply an E 101 certificate issued by the institution designated by the competent Member State authority under Article 14(1)(a) of Regulation No 1408/71, as amended by Council Regulation (EEC) No 1390/81 of 12 May 1981, where that court finds that that certificate was obtained or invoked fraudulently.