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Court of Justice of the European Union

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Advocate General's Opinion in Case C-359/16  
Ömer Altun and Others v Openbaar Ministerie

## **According to Advocate General Saugmandsgaard Øe, a national court may, in the event of fraud, disapply the social security certificate of posted workers in the European Union**

*Fraud linked to the issue of the E 101 certificates of posted workers represents a threat to the coherence of the Member States' social security schemes, is a form of unfair competition and calls into question the equality of working conditions on national labour markets*

In the context of an investigation into the employment of a Belgian undertaking active in the construction sector (Absa), the Belgian social inspection services established that that undertaking employed practically no staff for a number of years 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.<sup>1</sup>

The Belgian authorities submitted a reasoned request to the competent Bulgarian institution for the withdrawal of the E 101 certificates in question, but that institution did not rule on that request. They then brought legal proceedings against the directors of the undertaking 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 Belgian social security office.

By judgment of 10 September 2015, the Hof van beroep Antwerpen (Court of Appeal, Antwerp, Belgium) convicted the persons concerned, finding that the E 101 certificates had been 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'.

The Hof van Cassatie (Court of Cassation, Belgium), hearing the case, decided to refer a question to the Court of Justice for a preliminary ruling. It seeks to ascertain whether a court of the host Member State can annul or disregard an E 101 certificate if the facts which are submitted to its scrutiny support the conclusion that the certificate was obtained or invoked fraudulently.

<sup>1</sup> That certificate E 101 is a standard form drawn up by the Administrative Commission on Social Security for Migrant Workers, attached to the European Commission. 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)

**In today's Opinion, Advocate General Henrik Saugmandsgaard Øe proposes that the Court rule that the 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. In such circumstances, that court may refrain from applying that certificate.**

The Advocate General first recalls the settled case-law of the Court according to which the E 101 certificate binds the institutions of the host Member State. It follows from that case-law that a court in that Member State is not entitled to scrutinize the validity of that certificate if it has not been withdrawn or declared invalid. However, the Advocate General points out that the question asked by the Court of Cassation is a novel one. In the case, the Court of Justice 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.

In that regard, it notes that the Court has consistently held that EU law cannot be relied on for abusive or fraudulent ends. This means that, in a situation such as that at issue in the main proceedings, the persons concerned cannot rely on the certificate in question and that the general rule – that a worker is to be subject to the legislation of the Member State in which he carries on his paid employment – applies.

The Advocate General next considers that the opposite solution would result in an unacceptable outcome. If the 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 the court should, in certain cases, tolerate or even condone fraud. In addition, fraud linked to the issue of E 101 certificates represents a threat to the coherence of the Member States' social security schemes. Furthermore, the use of E 101 certificates obtained or invoked fraudulently is a form of unfair competition and calls into question the equality of working conditions on national labour markets.

He nevertheless clarifies 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. 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 under which the 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 is a case of fraud enabling that court to disapply the certificate.

Last, as regards the legal consequences of a finding of fraud, the Advocate General observes that the power of the court of the host Member State is limited to disapplying the certificate and that a finding of fraud can produce effects only in respect of the competent authorities of that Member State.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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