

Pieter Paepe successfully assists the Belgian State in a land-mark social security case before the Grand Chamber of the EU Court of Justice

Belgium secured a significant win before the Grand Chamber of the Court of Justice on 6 February 2018 in [Case C-359/16](#) (*Altun*). The Court followed Belgium's argument that in specific cases of demonstrated fraud a court can disregard an E101 certificate. The Court's judgment will have significant consequences for the Member States' fight against fraudulent constructions involving posted workers and makes vital clarifications on the limits of the binding force of so-called E101 (now A1) certificates.

Importantly, the Court acknowledged unequivocally that the principle of prohibition of fraud and abuse of rights is a "general principle of EU law", and that this principle prevents transactions "carried out for the purpose of fraudulently and wrongfully obtaining advantages provided for by EU law". General principles of EU law are part of EU primary law and rank among the same level as the Treaty on the Functioning of the European Union (TFEU). The Court applies in *Altun* the principle of prohibition of fraud for the first time in the domain of EU rules regulating the application of social security (Regulation 1408/71, now Regulation 883/2004).

The establishment of fraud must be based on "a consistent body of evidence" and requires the presence of both an objective and a subjective element, the latter being an "intention ... to evade or circumvent the conditions for the issue of [an E101 certificate], with a view to obtaining the advantage attached to it". Fraud, the Court has emphasized, may result both from deliberate actions (e.g., misrepresentation of the real situation of the posted worker or of the undertaking posting that worker) and from deliberate omissions (concealment of relevant information).

For posted workers, it is established case law that E101 (now A1) certificates establish a presumption that the worker is properly registered with the social security system of the Member State in which the employer is established (home Member State). This certificate binds the competent institutions of the Member State in which the posted person actually works (host Member State). That binding force also extends to cases where there are doubts on the accuracy of the facts on which the certificate is based and even on cases of manifest error in assessment.

The Court now finds that in the specific case that an E101 certificate has been fraudulently procured, a court in the host Member State may 'disregard' this certificate. In other words, in cases of fraud the binding force of E101 certificates is not absolute.

The circumstances and limits wherein an E101 certificate can be disregarded have been carefully described. If during the dialogue procedure, the host Member State puts before the social security institution of the Member State that issued an E101 certificate "concrete evidence" showing that the certificate has been obtained fraudulently, the latter is *obliged* to review, *within a reasonable period of time*, the grounds for issuing the certificate and, where appropriate, to withdraw the certificate. If not, it must be possible to rely on that evidence in a judicial proceeding in the host Member State, where the court can effectively decide to 'disregard' the E101 certificates. Before a national court decides to disregard the certificates,



the persons who are alleged to have fraudulently posted workers must be given the opportunity to rebut the evidence.

Philippe De Backer, the Belgian Secretary of State for the Fight against Social fraud, Privacy and the North Sea, emphasized that the Court's judgment gives social inspection services an additional tool to fight against social dumping. The Court's judgment, he continued, is groundbreaking in the fight against posting fraud and unfair competition.

Marianne Thyssen, the Belgian Commissioner responsible for Employment, Social Affairs, Skills and Labour Mobility, welcomed the Court's judgment and commented in *De Standaard* and *De Tijd* that the general principle that fraud and abuse of rights are prohibited also applies to the posting of workers has finally found resonance.

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