**Posted workers, judges and smokescreens: Narrowing the gap in judicial control**

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# **Introduction**

Should posted workers remain barred from the courts of the Member State in which they temporarily work? As it stands, employers can request their Member State of establishment to certify that their workers, being posted, are subject to its own social security system rather than that of the Member State of destination. Such posting certificates, often issued with little or no verification as to whether the conditions for being posted are actually fulfilled, in principle bind the social security institutions and courts of the State of destination. Consequently, these institutions and workers can only sue in the courts of the State of origin to claim the social security contributions and benefits that are their due. But access to those courts is often difficult. The resulting hurdle to judicial control may facilitate non-compliance and social dumping in a significant and rising number of cases—the number of posting certificates tripled in a decade, reaching 3.2 million in 2019.[[1]](#footnote-1) The topicality of the issue is further confirmed by a gush of preliminary references,[[2]](#footnote-2) instances of more overt judicial and political resistance,[[3]](#footnote-3) and legislative deadlock. Five years after the Commission’s proposal for the reform of the social security regulations, the posting certificate still features among the outstanding issues.[[4]](#footnote-4)

All too often, posting certificates act as a smokescreen for breaches of EU law. The social security institutions of the State of origin tend to rubber-stamp certificates rather than scrutinising whether the conditions for issuing them are satisfied. Certificates that should not have been issued deprive migrant workers of equal access to the social security system of their State of work, while enabling employers to escape its contribution duties. By requesting posting certificates from remiss institutions, employers can indulge in what is variously called “law, forum, or regime shopping”, “abusive practices” or “social dumping”: they can effectively choose the social security system that is most favourable to them, in breach of EU law.[[5]](#footnote-5)

Ideally, administrative decisions would be both reliable and easy to challenge in court. Posting certificates are neither. I have written elsewhere that the reliability of the certificate ought to be strengthened through administrative means.[[6]](#footnote-6) In this article, I argue that the legal effect of the certificate ought to be weakened through judicial means: judicial control should be facilitated.

# **Enforcing the posting rule**

Three major conflict rules determine the social security legislation applicable to employed persons.[[7]](#footnote-7) Foremost is the *lex loci laboris*: workers are subject to the legislation of the Member State in which they work.[[8]](#footnote-8) This rule would be problematic for those who also work in a second Member State. If the work there is temporary or if the place of work alternates, the applicable legislation would flicker: every border-crossing would entail a shift to another social security system and a reassessment of the worker’s rights and obligations as well as the employer’s obligations.[[9]](#footnote-9) If the activities are carried out simultaneously in both States, a strict application of the *lex loci laboris* would render both legislations applicable, which might double social protection and contribution burdens, in breach of the principle that only one social security legislation shall apply at any given time.[[10]](#footnote-10)

In order to designate only one, stable, legislation, two conflict rules flank the *lex loci laboris*. Art.13 Regulation 883/2004 subjects persons who “normally” pursue their activities in more than one Member State to the legislation of their State of residence or another State, depending on their circumstances. Art.12(1) Regulation 883/2004 keeps workers who are posted abroad subject to the legislation of the Member State of origin under certain conditions: essentially, they must be sent by their employer, who normally carries out its activities there, and with whom they maintain “a direct link”, to work in another Member State for a period of up to two years, and they may not replace other posted persons.[[11]](#footnote-11) These are the—arguably lenient[[12]](#footnote-12)—posting conditions whose enforcement is central to this article. The ECJ considers the *lex loci laboris* to be the general rule, partly because it guarantees migrants equal treatment in their Member State of work, and reasons that the derogations from this rule laid down in art.12 and 13 must be interpreted strictly.[[13]](#footnote-13)

Depending on which conflict rule applies, workers and employers can be subject to the legislations of the State of destination (the *lex loci laboris*), the State of origin (the posting rule), the State of residence or even other Member States (the art.13 conflict rules on multi-activity). Once found, the applicable legislation determines the worker’s social protection, the employer’s labour costs (and therefore competitiveness), as well as the revenues and liabilities of all States involved.

Employers will often be drawn to the posting rule, as it designates the legislation of their State of establishment.[[14]](#footnote-14) Posting reduces their administrative costs, as they do not have to familiarise themselves with foreign social security systems or register their workers with them, as would be the case if the *lex loci laboris* applied.[[15]](#footnote-15) Posting further compresses employers’ labour costs and enhances their competitiveness if contribution rates, which vary widely,[[16]](#footnote-16) are lower in the State of origin than in the State of destination. Employers therefore have an incentive to avail of the posting rule, even when the conditions may not be satisfied. The laxer the enforcement of those conditions, the more posting can be used as a vehicle for illicit law shopping.

## *The certificate’s legal strength*

Who, then, enforces those conditions and determines the applicable social security legislation? That largely depends on whether and when the State of origin issues a posting certificate (officially known as E 101 certificate or Portable Document A1). In the late 1950s the Member States, sitting in the Administrative Commission of the European Communities on Social Security for Migrant Workers (“Administrative Commission”), drew up a model posting certificate for employers and posted workers.[[17]](#footnote-17) The ECJ in *Fitzwilliam* declared the certificate to be “binding on the competent institution of the Member State to which those workers are posted”: until withdrawn or invalidated by the State of origin, the certificate prevents the institution of the State of destination from subjecting them to its legislation.[[18]](#footnote-18) In *Herbosch Kiere*, the ECJ extended this binding effect to the courts of the State of destination.[[19]](#footnote-19) Certificates remain binding, even if they find that the posting conditions are clearly breached.[[20]](#footnote-20) This case-law is now partly codified in art.5 Regulation 987/2009, which provides that certificates “shall be accepted by the institutions of the other Member States”.[[21]](#footnote-21) While that provision strikingly does not reference courts, the ECJ ruled that the judges of the State of destination remain bound by posting certificates.[[22]](#footnote-22) They can only disregard fraudulent certificates “in very specific circumstances” discussed below.[[23]](#footnote-23)

By shielding posting certificates from scrutiny, the ECJ forecloses all sorts of proceedings: workers suing the institution of the State of destination to obtain (compensation for) unpaid benefits; workers suing the institution of the State of origin to obtain repayment of the contributions they paid; workers suing their employer or the service recipient for compensation; the institution of the State of destination suing employers and service recipients for (compensation for) unpaid contributions; and the prosecutors and labour inspectorates of the State of destination suing employers and service recipients for breach of criminal law.[[24]](#footnote-24)

In the language of private international law, the binding effect of the certificate is shorthand for a set of rules on the international competence of administrations and courts, and on the recognition of administrative and judicial decisions. The exclusive administrative competence to issue and withdraw a certificate lies with the institution of the State of origin. Its counterpart in the State of destination must recognise the certificates. It can monitor whether the posting conditions are satisfied, but in case of doubt it can only ask the institution of the State of origin to withdraw the certificate.[[25]](#footnote-25)

The exclusive administrative decision-making powers of the State of origin are paired with the near-exclusive adjudicative jurisdiction of its courts. Only they can invalidate certificates. The courts of the State of destination only have jurisdiction to disregard certain fraudulent certificates and to set “aside any decision of the host State which fails to recognise the certificate and purports to treat the worker as subject to the social security system of the latter State.”[[26]](#footnote-26) In other cases, the courts of the State of destination lack jurisdiction to review the certificates issued by the social security institutions of the State of origin.

Accordingly, administrative and judicial competences are mostly concentrated in the State of origin. Far from being a mere formality, the posting certificate allocates substantive regulatory authority (by determining the applicable legislation) and institutional regulatory authority (by identifying the social security institution or court that determines the applicable legislation and decides the case).[[27]](#footnote-27)

All of this only applies where the State of origin issues a certificate. Unless and until it does so, the State of destination can decide that its own legislation applies. Such a decision however does not bind the State of origin, which can overrule it by subsequently issuing a certificate with retroactive and binding effect.[[28]](#footnote-28)

What is the justification for the certificate’s binding effect? More specifically, why should the State of destination be prevented from applying its legislation when it is in fact applicable? First and foremost, there is the argument from exclusivity—the principle that, unless otherwise provided, people are subject to only one law at any given time.[[29]](#footnote-29) The ECJ fears that several Member States would apply their legislation to—and levy contributions from—a worker, employer or self-employed person.[[30]](#footnote-30) To be clear, even if the certificate were not binding, the principle of exclusivity would be intact in theory since only one Member State would be allowed to apply its legislation. The principle as such is not at stake, but rather its implementation by Member States. Properly understood, the binding effect of the certificate enhances the principle of exclusivity in action (rather than in the books): it helps to ensure that, in practice, workers, employers and self-employed persons only have to pay one lot of contributions.

Second, the binding effect of the certificate taps into constitutional principles of the EU. In the ECJ’s eyes, if the institution of the State of destination were to disregard the certificate and subject workers to its legislation, it would go against the principle of sincere cooperation laid down in art.4(3) TEU.[[31]](#footnote-31) In *Altun*, the ECJ observed that “the principle of sincere cooperation also implies that of mutual trust.”[[32]](#footnote-32) Elsewhere, it underlined the “fundamental importance in EU law” of the principle of mutual trust, which “requires, particularly with regard to the area of freedom, security and justice, each [Member State], save in exceptional circumstances, to consider all the other Member States to be complying with EU law”.[[33]](#footnote-33)

Third, the certificate is meant to ensure legal certainty. Without binding certificates, it would be “difficult to know which system is applicable”,[[34]](#footnote-34) especially as the boundaries between the *lex loci laboris*, the posting rule and the multi-activity rules can be fuzzy.[[35]](#footnote-35)

Ultimately, the certificate is a means to an end: because it facilitates posting, the aims of the posting rule support its binding force.[[36]](#footnote-36) The ECJ sees the purpose of that rule—and thus of the certificate—as the promotion of the freedom to provide services of the employer or self-employed person and the free movement of workers.[[37]](#footnote-37) The posting rule aims “at encouraging economic interpenetration whilst avoiding administrative complications, in particular for workers and undertakings”.[[38]](#footnote-38) It frees them from cumbersome switches in the applicable social security legislation.

The ECJ makes a powerful case for the binding effect of the certificate, drawing on principles of the TFEU (free movement, sincere cooperation, and mutual trust), a general principle of EU law (legal certainty), and a principle of the social security regulations (exclusivity). While those arguments can be nuanced at times,[[39]](#footnote-39) they retain much of their strength.

## *The certificate’s factual weakness*

The main objection to the binding effect of the certificate is that it poorly captures reality: its legal strength contrasts with its factual weakness.[[40]](#footnote-40) In theory, the institution of the State of origin must “carry out a proper assessment of the facts” before issuing a certificate.[[41]](#footnote-41) In practice, it may well fail to perform even a cursory check. For example, the condition that the employer ordinarily performs substantial activities in the State of origin is crucial for combatting letterbox companies.[[42]](#footnote-42) Yet, Eurofound reports that, before issuing a posting certificate, France, Germany, Hungary, Ireland, the Netherlands, Poland and Slovenia simply ask employers to confirm that they exercise genuine activities on their territory without requiring documents, while Austria, Denmark, Sweden and the UK do not check that condition.[[43]](#footnote-43) These States issued 75% of the certificates for posted workers in 2019.[[44]](#footnote-44) Considering the methodological limitations of the Eurofound study, these findings should not be taken at face value. Still, all the evidence to date suggests that practice tends to be a far cry from the required proper assessment of the facts: States rubber-stamp certificates.[[45]](#footnote-45)

This shortcoming afflicting the issuing of certificates is not readily corrected afterwards. In theory, upon request from its counterpart in the State of destination, the institution of the State of origin must reconsider whether the certificate is valid and accurate, and, if not, withdraw it.[[46]](#footnote-46) In practice, it can be reluctant to do so;[[47]](#footnote-47) with the benefit of hindsight, Advocate General Jacobs was overoptimistic when he wrote that “[i]f the error really is manifest or the host State can show that the certificate was obtained by means of fraud, the issuing authority should have no problem in withdrawing its certificate.”[[48]](#footnote-48) Should their dialogue not bear fruit, the State of origin and the State of destination can bring the matter before the Administrative Commission, which can issue a non-binding opinion as to whose legislation is applicable.[[49]](#footnote-49) This conciliation procedure is hardly used and rather ineffective.[[50]](#footnote-50) Ultimately, if no agreement is found, the State of destination must either give up or launch infringement proceedings—there is no choice other than resignation and pugnacious litigiousness.[[51]](#footnote-51)

Further research should diagnose whether the posting rule suffers from a “pathology of non-compliance”[[52]](#footnote-52) or a milder ailment. But whatever its precise dimensions, there is a gap between the law in the books and the law in action. The causes of this enforcement deficit relate, not only to the difficulties in monitoring a temporary state of affairs across borders, but also to the State of origin’s disinclination to invest in enforcement activities that could reveal that its legislation is in fact inapplicable, depriving its businesses and workers of economic opportunities and its social security system of resources.[[53]](#footnote-53) The State of origin therefore has incentives to issue certificates without asking questions.

The principal effect of the enforcement deficit is that private actors can breach EU law with impunity. Each certificate that should not have been delivered or maintained (i) allows an undertaking to choose the applicable social security system, compressing its labour costs and bolstering its competitiveness; (ii) divests the competent State of revenue; and (iii) denies a migrant worker equal access to the social protection schemes of their State of work.[[54]](#footnote-54) These effects are particularly pronounced and problematic where the worker moves from a State whose social security system is less generous and onerous than that of the State of destination (“low-to-high movements”).

How might the enforcement of, and therefore the compliance with, the posting rule be improved? A first approach would be to tackle the factual unreliability of certificates by enhancing administrative enforcement and cooperation. This tack underpins the launch of the European Labour Authority and the amendments to the social security regulations currently under negotiation.[[55]](#footnote-55) Much as this avenue holds promise, the EU legislator’s blind spots should temper expectations.[[56]](#footnote-56) In any case, administrative enforcement is no substitute for judicial enforcement.

Mitigating the binding effect would be a second way to improve the posting rule’s practical implementation—the extent to which it is enforced by public actors and complied with by private actors.[[57]](#footnote-57) The easier it is to disregard the certificate, the less its inaccuracy matters. This is the road not taken by the EU institutions.[[58]](#footnote-58) While supporting the undiluted binding effect *vis-à-vis* administrative bodies, I have reservations about administrative certificates binding courts. The law as it stands makes judicial control of certificates excessively difficult, enabling non-compliance to go undetected or at least unremedied. I will argue that access to the courts of both States should be facilitated. Doing so would help to address a major cause of deficient administrative enforcement, which is that the State of origin has insufficient incentives to monitor closely.[[59]](#footnote-59) The greater the likelihood of litigation, the more motivated it will be to ensure that its certificates accurately capture reality.

# **Judicial control of the certificate**

The defective practical implementation of the posting rule is the product of the certificate’s factual inaccuracy and its legal strength. If the binding effect is part of the problem, could reducing it be part of the solution? How and to what extent would a “softer” certificate improve enforcement and affect other goals, interests and principles?

As discussed above, weighty arguments underpin the binding effect of the certificate. The main counterargument is the certificate’s inaccuracy. Accordingly, the binding effect should not be limited, unless doing so would improve enforcement because there are reasons to believe that the body bound by a certificate is better placed to enforce the posting conditions than the institution that issued it.

A first body that is bound by the certificate is the social security institution of the State of destination, which is not generally in a better position to enforce the posting rule than its counterpart in the State of origin.[[60]](#footnote-60) Allowing institutions to disregard a certificate would end its virtues but not its vice—the enforcement deficit. On balance, institutions should therefore remain bound by the certificate.

Much the same applies to the inability of the Administrative Commission—composed of government representatives and a representative of the European Commission—to pre-empt or overrule certificates.[[61]](#footnote-61) The EU institutions were well advised to ignore calls made in political and judicial circles to make the single-case decisions of the Administrative Commission binding.[[62]](#footnote-62) Lacking fact-finding powers, independence, rules of due process, and generally the necessary guarantees of a fair trial, the Administrative Commission is a diplomatic and technical rather than judicial forum, suited more to reconciliation than adjudication.[[63]](#footnote-63)

The certificates also bind the courts of the State of destination, even though they are much better placed to enforce the posting rule than the institutions of the State of origin.[[64]](#footnote-64) In the following pages, I will first discuss the ECJ case-law enabling the courts of the State of destination to disregard fraudulent certificates under certain circumstances. I will then show that opportunities for judicial control of other certificates remain too sparse, before formulating two suggestions to widen access to courts. This is important in its own right, as well as instrumentally: greater exposure to judicial control increases the likelihood that the State of origin’s laxity is detected, and therefore encourages it to commit itself more fully to administrative enforcement.

## *Fraud: conditions and consequences*

In essence, non-compliance can be unintentional (“error”) or intentional (“fraud”). Fraud enables employers and self-employed persons to unilaterally choose the applicable legislation, breaching national and EU law. Employers are likely to be drawn to social security systems with low contribution levels, which tend to offer low social protection to workers. Contribution fraud can affect “the coherence and financial equilibrium of … social security systems”.[[65]](#footnote-65) In low-to-high movements, fraudulent certificates give the fraudster a competitive edge, which generates unfair competition,[[66]](#footnote-66) while excluding migrant workers from the more generous social security system of their State of work. Fraudulent certificates call “into question the equality of working conditions on national labour markets.”[[67]](#footnote-67) Finally, fraud can undermine the mutual trust and sincere cooperation on which the certificate largely rests:

“It is essential that the principle of sincere cooperation between Member States [does] not become a matter of blind trust which facilitates fraudulent conduct.”[[68]](#footnote-68)

While several effects of non-compliance do not depend on whether it is intended, (intentional) fraud calls for stronger enforcement measures than (unintentional) error, whether for reasons of deterrence or retribution.

There have long been questions about how fraudulent certificates should be treated. It is well-established that “Community law cannot be relied on for the purposes of abuse or fraud”.[[69]](#footnote-69) In its *Altun* ruling, the Grand Chamber applied that principle of prohibition of fraud to the certificate.[[70]](#footnote-70) The Belgian authorities had found that construction workers sent from Bulgaria to Belgium were not posted despite holding Bulgarian certificates, as the Bulgarian undertakings deployed no significant activities in Bulgaria—in other words, they were letterbox companies. Upon receipt of evidence to that effect and a request to review or withdraw the certificates, the Bulgarian authorities declined to do so. The Belgian authorities then launched criminal proceedings, which turned on whether Belgian courts were bound by the certificate. The ECJ ruled that the courts of the State of destination may disregard fraudulent certificates, provided certain conditions of substance and procedure are satisfied. The principle of prohibition of fraud then takes precedence over the binding force of the certificate.

A finding of fraud can have different consequences, depending on the behaviour of the institutions in each State. In *Altun*, the ECJ ruling prevented the certificate from being relied upon in criminal proceedings to show that various offences were not made out. *Altun*’s wider significance is that the court of the State of destination may find that the employer, self-employed person and/or worker ought to pay social security contributions under its law, possibly with retroactive effect. The institutions of the State of origin are not bound by the ruling of the court of the State of destination, which can only disregard but not annul or invalidate the certificate. As we saw above, those institutions ought to review and where appropriate withdraw the certificate. If they maintain it, the person concerned will be asked to pay contributions in two Member States. Exclusivity in practice is then undermined by whichever State is not competent. Advocate General Saugmandsgaard Øe considered the possibility of double contribution duties to be

“inherent in a finding of fraud. … [T]he 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.”[[71]](#footnote-71)

He added that

“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 [the] certificate”.[[72]](#footnote-72)

Even though I agree with the general sentiment, it must be acknowledged that not only the perpetrator of fraud, but also workers would encounter legal uncertainty and bear a double contribution burden, which they might not be able to escape other than through judicial proceedings against their employer and/or whichever institution wrongly applied its legislation. *Altun* accordingly negatively affects exclusivity in practice, while creating a minor risk of contradictory judgments in two States.

By shifting powers from the social security institutions of the State of origin to the more accurate courts of the State of destination, *Altun* contributes to the enforcement of the posting rule, but jeopardises exclusivity in practice. In other words, it tilts the balance away from the exclusivity of the applicable legislation and towards its correct determination.

Those effects of *Altun* are severely limited by the conditions of substance and procedure for finding fraud. In terms of substance, fraud consists of an objective factor—the non-fulfilment of “the conditions for obtaining and relying on an E 101 certificate, laid down in Title II of Regulation [883/2004]”—and a subjective factor—the parties’ intention “to evade or circumvent the conditions for the issue of that certificate, with a view to obtaining the advantage attached to it.”[[73]](#footnote-73) That advantage consists in the substitution of applicable social security legislation by inapplicable social security legislation. Acts or omissions are fraudulent where they intentionally misrepresent the situation as falling under the posting rule in order to evade its conditions.[[74]](#footnote-74)

Does *Altun* also cover abuse of EU law? “If both frauds and abuses of law aim at wrongfully obtaining a benefit from the legal system, frauds involve misrepresentation, whereas abuses of law rely on circumvention.”[[75]](#footnote-75) Both are intentional. The difference between them is that, where fraud concerns situations where a posting condition is not fulfilled, abuse concerns situations where a posting condition is formally, but artificially, fulfilled. The principle of prohibition of abuse can then disallow the construction. In *Altun*, the ECJ mentioned that principle in passing.[[76]](#footnote-76) Still, there is room for arguing that *Altun* only covers fraud. The facts, the bulk of the reasoning and the operative part of that case all concern fraud rather than abuse.[[77]](#footnote-77) AG Saugmandsgaard Øe suggested that abuse would fall foul of the objective factor required by *Altun*, as “evidence of an abusive practice requires … 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”.[[78]](#footnote-78) Thin though it may be, a distinction between the breach of a posting condition[[79]](#footnote-79) and the breach of the principle of prohibition of abuse could be tenable. More fundamentally, the role of that principle in EU social security law remains unclear.[[80]](#footnote-80) This article focuses on fraud without meaning to rule out the possibility that the same may apply to abuse.

Clearer is that a court cannot invoke social dumping:

“the need to prevent unfair competition and social dumping can in no way … justify a decision to disregard an E 101 certificate issued by the competent institution of another Member State.”[[81]](#footnote-81)

Fraud and possibly abuse might be construed more loosely in a national context, perhaps under the influence of domestic understandings of “fraud”, “abuse” or even “social dumping”.

In *Altun*, the ECJ set a rather high standard of proof and spelled out the procedure that must precede the disregarding of a certificate because it is tainted by fraud. Fraud can only be established by courts on the basis of “a consistent body of evidence” of the objective and subjective factors.[[82]](#footnote-82) The fraud exception to the binding effect of the certificate exclusively covers cases of duly evidenced fraud—an EU rather than national notion—established in judicial proceedings. Even if it stretches to abuse, it is narrow.

Regrettably, the judgment in *CRPNPAC and Vueling Airlines* narrows it further.[[83]](#footnote-83) The case concerned the crew Vueling fraudulently posted to France with Spanish certificates. Some of the key differences with *Altun* were that the French institution was very late in asking the Spanish institution to cancel its certificates, and that various French courts had handed down their judgments disregarding those certificates without waiting for the start or the outcome of the dialogue between institutions. The Grand Chamber held that *only* if the institution of the State of destination has promptly requested the institution of the State of origin to review the certificates in the light of its concrete evidence of fraud, and the latter fails to do so within a reasonable time, can the courts of the State of destination disregard the certificates on the grounds of fraud.[[84]](#footnote-84)

Much as such a request is valuable and indeed required by art.5(2) Regulation 987/2009,[[85]](#footnote-85) to my mind failure to make it promptly should not curtail the jurisdiction of courts.[[86]](#footnote-86) *CRPNPAC and Vueling Airlines* maintains the binding effect of dozens of certificates, even though several courts, including the ECJ and the French Court of Cassation, had found them to be fraudulent. The ECJ’s insistence that “[o]nly that interpretation can safeguard the effectiveness of the [dialogue] procedure”[[87]](#footnote-87) should not distract from the fact that it jeopardises the effectiveness of the—rather more important—conflict rules. The dialogue procedure is meant to enhance enforcement; here it has the opposite effect. The ruling might enable the institution of the State of origin to save patently fraudulent certificates merely by carrying out a review in good time. Sure, its review must engage with the evidence, align with the principle of sincere cooperation, and lead to a decision within a reasonable period[[88]](#footnote-88)—but these are vague standards.

As Advocate General Saugmandsgaard Øe powerfully argued, to prevent courts from disregarding demonstrably fraudulent certificates merely because of an administrative failure is to force them “to tolerate, or indeed condone, fraud”; to allow the perpetrator of fraud to benefit from it; and to make the “worker’s access to a court conditional on requirements over which he has no influence.”[[89]](#footnote-89) *CRPNPAC and Vueling Airlines* does all these things. As a result, a co-pilot, who had been fraudulently posted to France within two months of starting his employment and resigned, protesting against the illegality of his contractual situation, could not obtain compensation for the loss of French social protection in French courts; instead, he should sue in Spain, where he had never lived.

In addition to these substantive and procedural limitations, there are practical hurdles. The fact that the employer is (or at least should be) based abroad might make it hard for the State of destination to gather a consistent body of evidence relating to the subjective factor. As regards the objective factor, the breach of many conditions is likely to escape its notice, as the evidence is located in the State of origin.

In sum, due to its widely recognised importance, the fight against fraud can pierce the fierce defence of the principle of exclusivity in practice. While the conditions set in *Altun* limit its effectiveness as an instrument in the fight against fraud, they could be justified in the light of the legitimate goals they serve.[[90]](#footnote-90) The same cannot be said for the requirement imposed in *CRPNPAC and Vueling Airlines*, which deals a serious and unwarranted blow to that cause.[[91]](#footnote-91) Institutional failures over which workers have no sway shield flagrantly fraudulent certificates from judicial control in the State of destination.

*CRPNPAC and Vueling Airlines* moreover creates problematic uncertainty and delays.[[92]](#footnote-92) Workers seeking to dispute the applicability of the posting rule in the courts of the State of destination must wait for the inter-institutional dialogue to start and for a reasonable period of time to elapse. They must then hope that the judge will agree that the time was reasonable, that the institution of the State of origin failed its duties, *and* that the certificate was fraudulent as opposed to merely erroneous. Even a favourable judgment might be in vain: the employer might have vanished, leaving no assets behind.

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## *The limitations of judicial protection in the State of origin*

In *Herbosch Kiere*, the ECJ held that the courts of the State of destination are

“not entitled to scrutinise the validity of an E 101 certificate as regards the certification of the matters on the basis of which such a certificate was issued”.[[93]](#footnote-93)

This heavy restriction of adjudicative jurisdiction does not need to be problematic, provided there is strong judicial protection in the courts of the State of origin. I will argue that this is not the case: unless claimants can access the courts of the State of destination on the basis of *Altun*, their judicial protection is insufficient. This section and the next therefore focus on those cases that fall outside the narrow confines of *Altun* and *CRPNPAC and Vueling Airlines*, whether because they are merely erroneous or because, even though fraudulent, they do not meet all the conditions set in those judgments.

My starting point is the question of what should guide the allocation of adjudicative jurisdiction. If no administrative decision is to be unchallengeable in practice, at least one actor should have an incentive *and* the capacity to lodge judicial proceedings.

Posting employers are likely to have standing in the courts of the State of origin if their interests and/or rights are affected,[[94]](#footnote-94) but they have little incentive to bring proceedings—they probably requested the certificate, which always limits their administrative burden and regularly compresses their labour costs. It is therefore unlikely that employers would challenge compromised certificates.[[95]](#footnote-95)

The more direct the harm to the rights and interests of the competitors of the “posting” employer, the greater their incentive to challenge dubious certificates and their chances of having standing. But apart from, say, lost tenders, it seems unlikely that competitors based in the State of destination would find their way to the courts of the State of origin.

Workers would probably have standing, but their interests are mixed and their position is weak. On the one hand, a ruling invalidating tainted certificates would increase their social protection in low-to-high movements. On the other hand, their employment prospects might depend on the certificates; low-to-high “posting” may well increase their wages[[96]](#footnote-96) while high-to-low “posting” would preserve their beneficial social protection; and in any case it is difficult for workers to sue (against the wishes of) their employers. Empirical studies found that very few EU-8 migrants in the UK bring claims to enforce their employment rights.[[97]](#footnote-97) Regardless of the extent to which this finding is generalisable to other workers, States, and claims, workers who are (rightly or wrongly) posted would face two additional obstacles: their claim would only cover a (presumably) temporary state of affairs[[98]](#footnote-98) and, in cases not covered by *Altun*, they would have to sue in the State of origin, which they might have long left. The vulnerability of the position of many posted workers must also be borne in mind.[[99]](#footnote-99) The likelihood that a worker would challenge compromised certificates is thus relatively low.

The social security institution of the State of destination has a strong incentive to contest suspicious certificates, as they deprive it of revenue, and, in low-to-high movements, result in unfair competition for local businesses and workers. Its capacity is less obvious. *Herbosch Kiere* and *Altun* mean that, except in some cases of fraud, it would have to launch those proceedings in the State of origin, where it might lack standing. A comparative study found that public authorities have standing before their own administrative courts in six Member States, limited standing in two Member States, and no standing in one Member State.[[100]](#footnote-100) While it is too general to allow to draw firm conclusions as to the standing of a social security institution challenging a certificate in a foreign court, this study suggests that at least in some Member States standing rules would be problematic.[[101]](#footnote-101) Even if they have standing, if they are aware of the workers’ activities on their territory, if they have detected non-compliance, and if they have located the employer, social security institutions would have to overcome practical hurdles to bring proceedings abroad against an institution with which they would have to later cooperate and on whose goodwill they would need to count. Unsurprisingly, it seems that such proceedings are rarely if ever attempted.[[102]](#footnote-102)

In conclusion, none of the actors involved is likely to challenge certificates in the courts of the State of origin. This low likelihood of litigation means that judicial control is too weak for certificates that are fraudulent, but not covered by *Altun*, or erroneous. The institution of the State of origin can largely escape scrutiny, which is especially troubling considering its practice: certificates awarded without verification are particularly difficult to challenge in court. This in turn reduces the incentive for the State of origin to monitor assiduously. The restricted access to courts undermines the uniform and effective enforcement of EU and domestic social security law.[[103]](#footnote-103)

Before turning to potential solutions, I should emphasise again that the above analysis does not apply to cases covered by *Altun*, where judicial protection is stronger because workers and social security institutions can sue in the courts of both States. This is a further reason for regretting the hollowing out of that judgment in *CRPNPAC and Vueling Airlines*.

## *Rethinking the horizontal division of adjudicative jurisdiction*

The insufficient judicial control of certificates not covered by *Altun*—and therefore challengeable only in the courts of the State of origin—results from the distribution of incentives and capacities to sue. As incentives resist change, the question is whether the capacity of actors to launch proceedings can be enhanced.

First, the standing of the social security institution of the State of destination in the courts of the State of origin could be guaranteed, thus ensuring that an actor with great interest in challenging a certificate can do so. This would not threaten exclusivity in practice.[[104]](#footnote-104) Although the extent to which this solution would improve enforcement is not clear considering the practical hurdles institutions must surmount to bring proceedings abroad, it would not create obvious problems.

A second, more ambitious and effective, intervention would be to reallocate adjudicative jurisdiction by allowing workers and institutions to challenge certificates in the courts of the State of destination even when there is no fraud, thus reversing *Herbosch Kiere*. That ruling is presented as the logical corollary of “the normal principle that the decisions of a Member State’s authorities should be reviewed by the courts of that State.”[[105]](#footnote-105) This might be the norm in some contexts,[[106]](#footnote-106) but it is not an inevitability. While courts would not assume jurisdiction to *invalidate* the transnational administrative decisions of another Member State,[[107]](#footnote-107) nothing stops them from considering themselves competent to *disregard* such decisions, as they did when sending requests for preliminary rulings to the ECJ. Properly understood, disputes before the courts of the State of destination centre on the applicability of its social security legislation rather than on the validity of certificates in the State that issued them. *Herbosch Kiere* is not dictated by some superior rule of administrative law.

On the contrary, that judgment sits uneasily with parts of EU law. First, it represents an intrusion into the national procedural autonomy of Member States by denying courts jurisdiction concerning the applicability of their own social security legislation.

Second, *Herbosch Kiere* derogates from the principle governing the allocation of adjudicative jurisdiction in EU social security law, which is that the courts of the Member State whose legislation is applicable are competent.[[108]](#footnote-108) When the legislation of the State of destination is applicable, *Herbosch Kiere* divests its courts of jurisdiction.

Third, where the claimant is a migrant worker, the absence of jurisdiction contradicts Directive 2014/54, which provides that

“Member States shall ensure that … judicial procedures, for the enforcement of obligations under Article 45 TFEU and under Articles 1 to 10 of Regulation (EU) No 492/2011, are available to all Union workers … who consider themselves wronged by a failure to apply the principle of equal treatment to them”.[[109]](#footnote-109)

Wrongly labelling workers as posted deprives them of the social security benefits of the State of destination, which they could contest on the basis of art.45 TFEU and art.7(2) Regulation 492/2011.[[110]](#footnote-110) Directive 2014/54 says that the State of destination ought to provide judicial procedures for such claims; *Herbosch Kiere* says the opposite.

Fourth, that judgment contrasts with the labour law protection of posted workers. In disputes concerning individual contracts of employment, because they are the weaker party, posted workers seeking to assert their rights under the laws of the State of destination can choose to institute proceedings in the courts of up to four Member States, which include the States of origin and destination.[[111]](#footnote-111) In disputes concerning social security law, workers seeking to assert their right to the social protection of the State of destination have no choice but to sue in the courts of the State of origin.[[112]](#footnote-112) Not only is the restriction to a single forum intrinsically problematic for workers whose professional lives straddle national boundaries, for some of them the courts of the State of origin are not the most suitable forum—at least during the posting, they might not be present there. In order to demonstrate that they are insufficiently connected to the State of origin to fall under its social security system, workers might have to institute proceedings in its courts. Some might be forced to sue in a State in which never have set foot. It is not obvious that there is less of a need for judicial protection in social security law than in labour law. Yet, the same courts that are denied jurisdiction to hear claims concerning the social security rights of posted workers are expressly granted jurisdiction to hear claims concerning their employment rights. Moreover, having obtained the annulment of the certificates, workers might still have to seek (retroactive) social protection or compensation in the courts of the State of destination—this incentive to bring all social security claims in that State has no equivalent in labour law.

A fifth and final reason to question *Herbosch Kiere* concerns the relationship between the executive and the judiciary. The courts’ incapacity to review a transnational administrative decision is all the more incongruous as courts are not bound, by virtue of EU law, to recognise one another’s judgments in the field of social security.[[113]](#footnote-113) Social security judgments, handed down by impartial courts observing procedures reflecting the rule of law, are denied recognition by judges and administrations.[[114]](#footnote-114) But social security decisions, made by partial administrations without guarantees of due process and possibly without any investigation of the facts, bind judges.[[115]](#footnote-115)

There are thus five reasons why the EU legislator should return jurisdiction to the courts of the State of destination, even for cases free from fraud as narrowly understood in *Altun*. What would be the consequences of such a reversal of the “settled case-law”[[116]](#footnote-116) started in *Herbosch Kiere*? It would facilitate judicial protection by enabling workers, social security institutions and labour inspectorates to sue in the State of destination.[[117]](#footnote-117) The resulting higher likelihood of litigation would incentivise the State of origin to enforce more diligently. As courts are more accurate than social security institutions, overruling *Herbosch Kiere* would improve the judicial and administrative enforcement of EU law.

The major drawback is the risk of conflicting administrative and judicial decisions.[[118]](#footnote-118) The judgment of the State of destination disregarding the certificate would not bind the social security institution of the State of origin, which might maintain it (perhaps acting on a judgment of the State of origin), leading to double contributions. This risk of dual burden could be mitigated by making the adjudicative jurisdiction of the courts of the State of destination conditional on, for instance, a finding of *manifest* error, though precise tests might be elusive.[[119]](#footnote-119) To preclude that risk rather than merely reduce it, rules on the recognition of social security judgments would be necessary, such that the rulings of the courts of the State of destination bind the social security institutions of the State of origin, and conflicts between judgments are prevented or resolved.[[120]](#footnote-120) In addition, issues relating to the timing of the switch in the applicable legislation and the fate of paid or due contributions and benefits ought to be settled.[[121]](#footnote-121)

In sum, giving adjudicative jurisdiction to the courts of the State of destination would enhance judicial protection and the enforcement of EU law, but it would either threaten exclusivity in practice or require the recognition of social security judgments.

# **Conclusion**

The enforcement of the posting rule affects the social protection of workers, the competitive position of undertakings, and the funding of social security systems. Regularly unreliable and yet hard to challenge in court, the posting certificate is the antithesis of the ideal administrative act. Nonetheless, the binding effect of such certificates rests on firm foundations: it serves the free movement of services, legal certainty, and exclusivity in practice. It is questionable only where the body issuing the certificate is in a worse position to enforce the posting conditions than the body bound by it. Accordingly, the certificate should continue to bind national and European administrative bodies, but not courts.

My premiss is that, for rule of law reasons, single-case administrative decisions should not be practically unchallengeable. Therefore, at least one actor (and arguably all relevant actors)[[122]](#footnote-122) ought to have an incentive *and* the capacity to sue. Much as the social security institutions of the State of destination and workers have an interest in launching proceedings, their capacity to do so is heavily constrained. Certificates falling outside the narrow parameters of *Altun* can only be challenged before the courts of the State of origin. This limitation to a single, possibly unsuitable, forum constitutes a practical obstacle for workers and the institutions of the State of destination, and a legal obstacle for institutions lacking standing.

Now that *CRPNPAC and Vueling Airlines* has entrenched a narrow reading of *Altun*, such that it only makes a relatively modest contribution to reducing the gap in judicial protection, two options remain. Guaranteeing standing to the social security institutions of the State of destination in the courts of the State of origin would facilitate judicial enforcement without tangible downsides. Another suggestion flows from the weaknesses of *Herbosch Kiere*. That ruling, which was never properly codified and which the ECJ expressly confirmed could be overturned by the EU legislator,[[123]](#footnote-123) precludes the courts of the State of destination from reviewing certificates issued, quite possibly without assessment of the facts, by foreign social security institutions that have incentives to award them. Administrators bind judges rather than the other way around. This is problematic as a matter of principle and as a matter of enforcement: the courts of the State of destination are much more accurate than the social security institutions of the State of origin. Denying courts jurisdiction to decide on the applicability of their own social security legislation runs counter principles of EU and national law.

A further reason for reform is that the *status quo* invites strategic behaviour. In *Alpenrind*, the Austrian institution correctly determined that some workers active on its territory were subject to its social security legislation, as they did not fall under the posting rule. Subsequently, Hungary, where their employer was based, issued retroactive certificates stating that they were subject to its legislation. The ECJ held that the Hungarian A1 certificate trumped the pre-existing Austrian decision. But what if the Austrian institution, instead of merely deciding that the workers were subject to its legislation, had issued an A1 certificate to that effect?[[124]](#footnote-124) If it becomes aware of the existence of a worker on its territory before the State of origin issues an A1 certificate, the State of destination can turn the tables by granting an A1 certificate first, putting the State of origin in the weak position in which it usually finds itself. Whether or not this manoeuvre contributes to enforcement, it comes with perverse incentives. Whichever State first declares its social security legislation to be applicable can bind the other. This could trigger a race to the rubber stamp by encouraging both States to flout principles of good administration in the interest of speed.[[125]](#footnote-125) The current state of affairs therefore leaves the certificate vulnerable to strategic behaviour by regulatees, who might unlawfully minimise their financial or administrative burden with impunity, and by regulators, who might feel compelled to proceed with haste rather than care.

A clearer path to courts would directly improve the position of (prospective) litigants. Less directly but no less importantly, it would enhance administrative enforcement, again benefiting workers and the social security institutions of the State of destination. The prospect of litigation should incentivise the institutions of the State of origin to take their enforcement duties more seriously. It should also encourage the State of destination to mobilise its own enforcement machinery: the easier for that State to judicially challenge certificates, the more it stands to gain when it detects breaches of the posting rule. As it is now, its evidence of non-compliance is regularly ignored by the State of origin. Better judicial enforcement should therefore prompt greater administrative enforcement activity in both States. The surging number of posting certificates, the incentives employers have to circumvent the posting conditions and the shortcomings of administrative enforcement lend urgency to that argument.

Although this article centres on posting, its main conclusions apply by analogy to the rules laid down in art.13 Regulation 883/2004 for those who normally (rather than temporarily) work in more than one Member State. These multi-activity rules enable employers to compete durably on the territory of a Member State without paying its contribution duties, compressing their labour costs.[[126]](#footnote-126) Depending on circumstances, those rules designate the State of residence, one of the States of work, or the State of the registered office of the employer(s).[[127]](#footnote-127) When employers do not need to familiarise themselves with foreign law, art.13 reduces administrative costs much in the same way as the posting rule laid down in art.12. Both provisions are enforced through the same A1 certificate; the number of certificates issued on the basis of art.13 soared from 168 thousand in 2010 to 1.3 million in 2019.[[128]](#footnote-128) Much like art.12, art.13 is vulnerable to error, fraud and abuse. The motive and method are common to both provisions: attracted by the prospect of savings, unscrupulous employers can request certificates in a “cheap” jurisdiction that liberally awards them without asking questions. While there are some differences between the enforcement of art.12 and 13,[[129]](#footnote-129) the main reason for this article’s focus on posting is a concern for legibility: including the multi-activity rules, which do not allow an analysis centred on the Member States of origin and destination, could cloud the analysis. That the gap in judicial control of the certificate is problematic, not just for posting, but also for the multi-activity rules, adds further weight to this article’s argument.

1. \* I am grateful to Charlotte O’Brien, Herwig Verschueren, Pauline Melin and the reviewers for their comments on an earlier version of this article, and to the participants of the Maastricht Centre for European Law Seminar for their questions and observations. The usual disclaimer applies.

 F. De Wispelaere, L. De Smedt and J. Pacolet, *Posting of workers: Report on A1 Portable Documents issued in 2019* (Luxembourg: Publications Office of the European Union, 2021), p.29. [↑](#footnote-ref-1)
2. Since 2015, there has been on average one preliminary ruling on the binding effect of certificates per year. [↑](#footnote-ref-2)
3. The French Cour de cassation rebelled openly in its Judgments of 11 March 2014 (ECLI:FR:CCASS:2014:CR01078 and ECLI:FR:CCASS:2014:CR01079), while the highest courts of other Member States have followed or even somewhat anticipated the ECJ’s approach (Judgment of the Belgian Cour de cassation of 2 June 2003 in Case S.02.0039.N; Judgment of the German Bundesgerichtshof of 24 October 2006 in Case 1 StR 44/06). Belgian legislation seeking to counteract ECJ case-law was found to breach EU law in *Commission v Belgium (fraud)* (C-356/15) EU:C:2018:555, 11 July 2018. [↑](#footnote-ref-3)
4. Commission, “Proposal for a Regulation amending Regulation 883/2004 on the coordination of social security systems and Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004” COM(2016)815 final/2. The latest available document is an agreement reached in trilogue that was rejected in Coreper late 2021 (General Secretariat of the Council, “Proposal for a Regulation amending Regulation 883/2004 on the coordination of social security systems and Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004 – Analysis of the compromise text with a view to agreement” 15068/21 Add 1 (hereinafter “the Second Trilogue Agreement”, as a previous agreement also failed to obtain a qualified majority)). [↑](#footnote-ref-4)
5. More broadly, see N. Rennuy, "Shopping for social security law in the EU" (2021) 58 Common Market Law Review 13. [↑](#footnote-ref-5)
6. See N. Rennuy, "Posting of workers: Enforcement, compliance, and reform" (2020) 22 European Journal of Social Security 212. [↑](#footnote-ref-6)
7. Similar rules apply to self-employed persons, but given that only 5% of posting certificates are issued to them, I will focus on employed persons (De Wispelaere, De Smedt and Pacolet, *Posting of workers* (Luxembourg: Publications Office of the European Union, 2021), p.30). [↑](#footnote-ref-7)
8. Art.11(3)(a) Regulation 883/2004 on the coordination of social security systems [2004] OJ L166/1. [↑](#footnote-ref-8)
9. See e.g. *X v Staatssecretaris van Financiën* (C-570/15) EU:C:2017:674, 13 September 2017, at [16]. See further N. Rennuy, "The trilemma of EU social benefits law: Seeing the wood and the trees" (2019) 56 Common Market Law Review 1549, 1560–1562. [↑](#footnote-ref-9)
10. Art.11(1) Regulation 883/2004. [↑](#footnote-ref-10)
11. *Fitzwilliam Executive Search Ltd v Bestuur van het Landelijk instituut sociale verzekeringen* (C-202/97) EU:C:2000:75; [2000] 1 C.M.L.R. 708, at [24]. [↑](#footnote-ref-11)
12. See Rennuy, "Shopping for social security law" (2021) 58 Common Market Law Review 13, 17–25. [↑](#footnote-ref-12)
13. *Alpenrind* (C-527/16) EU:C:2018:669, at [95], [98]; *Format Urządzenia i Montaże Przemysłowe v Zakład Ubezpieczeń Społecznych I Oddział w Warszawie* (C-879/19) EU:C:2021:409, 20 May 2021, at [33]. [↑](#footnote-ref-13)
14. The multi-activity rules laid down in art.13 Regulation 883/2004 might appeal to employers for the same reason. [↑](#footnote-ref-14)
15. See *S.A.R.L. Manpower v Caisse primaire d'assurance maladie de Strasbourg* (35/70) EU:C:1970:120; [1971] C.M.L.R. 222, at [10]–[11]. [↑](#footnote-ref-15)
16. Http://europa.eu/economy\_finance/db\_indicators/tab/# [all websites accessed 11 December 2021]. [↑](#footnote-ref-16)
17. Décision no 1 concernant les modèles de formules E 1 à E 21 [1959] OJ 3/37. [↑](#footnote-ref-17)
18. *Fitzwilliam* (C-202/97) EU:C:2000:75, at [53], [55]. [↑](#footnote-ref-18)
19. *Rijksdienst voor Sociale Zekerheid v Herbosch Kiere NV* (C-2/05) EU:C:2006:69, 26 January 2006. For early and pertinent criticism, see H. Verschueren, "Sécurité sociale et détachement au sein de l’Union européenne. L’affaire Herbosch Kiere : Une occasion manquée dans la lutte contre le dumping social transfrontalier et la fraude sociale" (2006) 48 Revue belge de sécurité sociale 403. Certificates also bind the service recipients based in the State of destination (*Barry Banks and Others v Theatre royal de la Monnaie* (C-178/97) EU:C:2000:169; [2000] 2 C.M.L.R. 754, at [47]). [↑](#footnote-ref-19)
20. *A-Rosa Flussschiff GmbH v Union de recouvrement des cotisations de sécurité sociale et d’allocations familiales d’Alsace (Urssaf), venant aux droits de l’Urssaf du Bas-Rhin and Sozialversicherungsanstalt des Kantons Graubünden* (C-620/15) EU:C:2017:309, 27 April 2017; *Commission v Belgium (fraud)* (C-356/15) EU:C:2018:555, at [93]. [↑](#footnote-ref-20)
21. Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004 on the coordination of social security systems [2009] OJ L284/1. [↑](#footnote-ref-21)
22. *Salzburger Gebietskrankenkasse and Bundesminister für Arbeit, Soziales und Konsumentenschutz v Alpenrind GmbH and Others* (C-527/16) EU:C:2018:669, 6 September 2018, at [38]–[47]. [↑](#footnote-ref-22)
23. Opinion of AG Saugmandsgaard Øe in *Criminal proceedings against Ömer Altun and Others* (C‑359/16) EU:C:2018:63; [2018] 2 C.M.L.R. 35, at [47]. [↑](#footnote-ref-23)
24. The civil or criminal nature of the proceedings does not affect the certificates’ binding effect (*Criminal proceedings against Belu Dienstleistung GmbH & Co KG and Stefan Nikless* (C-474/16) EU:C:2017:812, 24 October 2017, at [17]). The certificates however cannot be used in cases governed by international agreements unaffected by the social security regulations (*X v Inspecteur van Rijksbelastingdienst and T. A. van Dijk v Staatssecretaris van Financiën* (C-72/14 and C-197/14) EU:C:2015:564; [2016] 1 C.M.L.R. 27) and they do not bear upon employment law (*Criminal proceedings against Bouygues travaux publics and Others* (C-17/19) EU:C:2020:379, 14 May 2020). [↑](#footnote-ref-24)
25. Art.5 Regulation 987/2009. [↑](#footnote-ref-25)
26. Opinion of AG Jacobs in *Fitzwilliam* (C-202/97) EU:C:2000:75, at [60]. [↑](#footnote-ref-26)
27. Terminology borrowed from A. Mills, *Party autonomy in private international law* (Cambridge: Cambridge University Press, 2018), p.3. [↑](#footnote-ref-27)
28. *Alpenrind* (C-527/16) EU:C:2018:669, at [70]–[77]. [↑](#footnote-ref-28)
29. Art.11(1) Regulation 883/2004. [↑](#footnote-ref-29)
30. E.g. *Altun* (C‑359/16) EU:C:2018:63, at [29]. [↑](#footnote-ref-30)
31. E.g. *Fitzwilliam* (C-202/97) EU:C:2000:75, at [52]; *Altun* (C‑359/16) EU:C:2018:63, at [38]. [↑](#footnote-ref-31)
32. *Altun* (C‑359/16) EU:C:2018:63, at [40]. [↑](#footnote-ref-32)
33. Opinion 2/13 (Accession to the ECHR) EU:C:2014:2454; [2015] 2 C.M.L.R. 21, at [191]. [↑](#footnote-ref-33)
34. E.g. *Fitzwilliam* (C-202/97) EU:C:2000:75, at [54]. [↑](#footnote-ref-34)
35. See e.g. E. van Ooij, "Highly mobile workers challenging Regulation 883/2004: Pushing borders or opening Pandora’s box?" (2020) 27 Maastricht Journal of European and Comparative Law 573. [↑](#footnote-ref-35)
36. E.g. *Fitzwilliam* (C-202/97) EU:C:2000:75, at [52]. [↑](#footnote-ref-36)
37. E.g. *Fitzwilliam* (C-202/97) EU:C:2000:75, at [28], [48], [52]; *Banks* (C-178/97) EU:C:2000:169, at [39]. [↑](#footnote-ref-37)
38. *Fitzwilliam* (C-202/97) EU:C:2000:75, at [28]; *Altun* (C‑359/16) EU:C:2018:63, at [32]. [↑](#footnote-ref-38)
39. For instance, the State of origin’s behaviour regularly does not warrant trust. Likewise, the ECJ might be overstating the extent to which the certificate draws its strength from the posting it evidences: the inference is invalid when the posting conditions are breached, which is when the certificate is most likely to be contested. [↑](#footnote-ref-39)
40. F. Van Overmeiren, *Buitenlandse arbeidskrachten op de Belgische arbeidsmarkt: Sociaal recht en vrij verkeer* (Ghent: Larcier, 2008), p.78. [↑](#footnote-ref-40)
41. *Fitzwilliam* (C-202/97) EU:C:2000:75, at [51]. [↑](#footnote-ref-41)
42. See further e.g. N. V. Munkholm, "Abuse of Companies and Posting of Workers" in H. S. Birkmose, M. Neville and K. E. Sørensen (eds), *Abuse of Companies* (Alphen aan den Rijn: Kluwer, 2019); Rennuy, "Shopping for social security law" (2021) 58 Common Market Law Review 13, 19–21. [↑](#footnote-ref-42)
43. I. Biletta, J. Cabrita and B. Gerstenberger, "Improving the monitoring of posted workers in the EU" (2020), Eurofound Ad Hoc Report, https://www.eurofound.europa.eu/sites/default/files/ef\_publication/field\_ef\_document/ef19054en.pdf, 17. [↑](#footnote-ref-43)
44. De Wispelaere, De Smedt and Pacolet, *Posting of workers* (Luxembourg: Publications Office of the European Union, 2021), p.29. [↑](#footnote-ref-44)
45. E.g. B. De Pauw, "Op zoek naar de grenzen van de rechtskracht van het E101-formulier: Loyale samenwerking of wurggreep?" in Y. Jorens (eds), *Handboek Europese detachering en vrij verkeer van diensten* (Bruges: die Keure, 2009), pp.412–413, 438–439; Y. Jorens and J.-P. Lhernould, "Procedures related to the granting of Portable Document A1: An overview of country practices" (2014), FreSsco Report, http://ec.europa.eu/social/BlobServlet?docId=13533&langId=en, 40; J. Lorré, *Misbruik en fraude in het Belgisch en Europees sociaal recht: Een gemeenrechtelijke benadering en begrippenstudie* (Brussels: Larcier, 2018), p.158; M. Pöltl and B. Spiegel, "Arbitration under International Social Security Instruments" (2014) 42 Intertax 194, 199–200. [↑](#footnote-ref-45)
46. Art.5(2) Regulation 987/2009. [↑](#footnote-ref-46)
47. Pöltl and Spiegel, "Arbitration" (2014) 42 Intertax 194, 200. [↑](#footnote-ref-47)
48. Opinion of AG Jacobs in *Fitzwilliam* (C-202/97) EU:C:2000:75, at [58]. [↑](#footnote-ref-48)
49. Art.5(4) Regulation 987/2009; Decision A1 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 883/2004 [2010] OJ C106/1. [↑](#footnote-ref-49)
50. E.g. B. De Pauw and H. Verschueren, "De rol van de detacheringsverklaringen bij de controle op de detachering en sociale zekerheid" in H. Verschueren (eds), *Detachering: Nieuwe ontwikkelingen in het Europees recht vanuit Belgisch en Nederlands perspectief* (Bruges: die Keure, 2019), p.207. [↑](#footnote-ref-50)
51. Art.259 TFEU; *Fitzwilliam* (C-202/97) EU:C:2000:75, at [58]. [↑](#footnote-ref-51)
52. J. H. H. Weiler, "The White Paper and the Application of Community Law" in R. Bieber, R. Dehousse, J. Pinder and J. H. H. Weiler (eds), *1992: One European Market? A Critical Analysis of the Commission's Internal Market Strategy* (Baden-Baden: Nomos, 1988), p.340. [↑](#footnote-ref-52)
53. For a fuller account, see Rennuy, "Posting of workers: Enforcement, compliance, and reform" (2020) 22 European Journal of Social Security 212, 224, 227. [↑](#footnote-ref-53)
54. The mainstream, if questionable, view is that posted workers cannot avail of art.45 TFEU (*Finalarte Sociedade de Construção Civil Ldª, Portugaia Construções Ldª and Engil Sociedade de Construção Civil SA v Urlaubs- und Lohnausgleichskasse der Bauwirtschaft and Urlaubs- und Lohnausgleichskasse der Bauwirtschaft v Amilcar Oliveira Rocha, Tudor Stone Ltd, Tecnamb-Tecnologia do Ambiante Ldª, Turiprata Construções Civil Ldª, Duarte dos Santos Sousa and Santos & Kewitz Construções Ldª* (C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98) EU:C:2001:564; [2003] 2 C.M.L.R. 11; for criticism, see G. Davies and D. Kramer, "The Posting of Workers" in R. Schütze and T. Tridimas (eds), *Oxford Principles of European Union Law Volume 2: The Internal Market* (Oxford: Oxford University Press, forthcoming)). In any case, workers who are unlawfully posted under Regulation 883/2004 may well be migrant workers. [↑](#footnote-ref-54)
55. Regulation 2019/1149 establishing a European Labour Authority, amending Regulations 883/2004, 492/2011, and 2016/589 and repealing Decision 2016/344 [2019] OJ L186/21; the Second Trilogue Agreement mentioned in footnote 4. [↑](#footnote-ref-55)
56. See Rennuy, "Posting of workers: Enforcement, compliance, and reform" (2020) 22 European Journal of Social Security 212. [↑](#footnote-ref-56)
57. E. Versluis, "Even Rules, Uneven Practices: Opening the 'Black Box' of EU Law in Action" (2007) 30 West European Politics 50, 50–51, 53. [↑](#footnote-ref-57)
58. Except proposed art.5(1a) Regulation 987/2009 (inserted by art.2(7) Second Trilogue Agreement). [↑](#footnote-ref-58)
59. Rennuy, "Posting of workers: Enforcement, compliance, and reform" (2020) 22 European Journal of Social Security 212, 220, 226–227. [↑](#footnote-ref-59)
60. More specifically, the State of destination has more incentives, but less capacity to enforce the posting conditions than the State of origin (Rennuy, "Posting of workers: Enforcement, compliance, and reform" (2020) 22 European Journal of Social Security 212, 227–230). [↑](#footnote-ref-60)
61. *Alpenrind* (C-527/16) EU:C:2018:669, at [58]–[64]. [↑](#footnote-ref-61)
62. Opinion of AG Saugmandsgaard Øe in *A-Rosa Flussschiff* (C-620/15) EU:C:2017:309, at [76], footnote 69; Jorens and Lhernould, "Procedures related to the granting of Portable Document A1" (2014), FreSsco Report, http://ec.europa.eu/social/BlobServlet?docId=13533&langId=en, 40; Pöltl and Spiegel, "Arbitration" (2014) 42 Intertax 194, 201. [↑](#footnote-ref-62)
63. Space precludes further discussion of the potential of single-case decision-making at EU level, e.g. by the European Labour Authority. [↑](#footnote-ref-63)
64. Verschueren, "Sécurité sociale et détachement" (2006) 48 Revue belge de sécurité sociale 403, 441. [↑](#footnote-ref-64)
65. Opinion of AG Saugmandsgaard Øe in *Caisse de retraite du personnel navigant professionnel de l’aéronautique civile (CRPNPAC) v Vueling Airlines SA and Vueling Airlines SA v Jean‑Luc Poignant* (C-370/17 and C-37/18) EU:C:2020:260; [2020] 3 C.M.L.R. 30, at [82]. The loss in revenue relating to undeclared posted workers has been estimated at EUR 380 million for France on the basis of seemingly rudimentary and partly undisclosed assumptions (Cour des comptes, "La Sécurité Sociale: Rapport sur l’application des lois de financement de la sécurité sociale" (2014) http://www.ccomptes.fr/sites/default/files/EzPublish/20140917\_rapport\_securite\_sociale\_2014.pdf, 131–132). [↑](#footnote-ref-65)
66. Opinion of AG Saugmandsgaard Øe in *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18) EU:C:2020:260, at [82]. [↑](#footnote-ref-66)
67. Opinion of AG Saugmandsgaard Øe in *Altun* (C‑359/16) EU:C:2018:63, at [46]. [↑](#footnote-ref-67)
68. Opinion of AG Saugmandsgaard Øe in *Altun* (C‑359/16) EU:C:2018:63, at [70]. On the corrosive effect of poor enforcement and compliance on trust in general, see K. E. Sørensen, "Enforcement of Harmonization Relying on the Country of Origin Principle" (2019) 25 European Public Law 381, 382; H. Wenander, "Recognition of Foreign Administrative Decisions: Balancing International Cooperation, National Self-Determination, and Individual Rights" (2011) 71 Heidelberg Journal of International Law 755, 768–769. [↑](#footnote-ref-68)
69. E.g. *Brennet AG v Vittorio Paletta* (C-206/94) EU:C:1996:182, 2 May 1996, at [24]. [↑](#footnote-ref-69)
70. *Altun* (C‑359/16) EU:C:2018:63. [↑](#footnote-ref-70)
71. Opinion of AG Saugmandsgaard Øe in *Altun* (C‑359/16) EU:C:2018:63, at [64]. [↑](#footnote-ref-71)
72. Opinion of AG Saugmandsgaard Øe in *Altun* (C‑359/16) EU:C:2018:63, at [66]. [↑](#footnote-ref-72)
73. *Altun* (C‑359/16) EU:C:2018:63, at [51]–[52]. [↑](#footnote-ref-73)
74. *Altun* (C‑359/16) EU:C:2018:63, at [53]. [↑](#footnote-ref-74)
75. A. Saydé, *Abuse of EU Law and Regulation of the Internal Market* (Oxford: Hart Publishing, 2014), p.24. [↑](#footnote-ref-75)
76. *Altun* (C‑359/16) EU:C:2018:63, at [48]–[49]. See also *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18) EU:C:2020:260, at [50]. [↑](#footnote-ref-76)
77. The same is true for *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18) EU:C:2020:260. [↑](#footnote-ref-77)
78. Opinion of AG Saugmandsgaard Øe in *Altun* (C‑359/16) EU:C:2018:63, footnote 45, emphasis in the original. [↑](#footnote-ref-78)
79. Note that this condition might only be breached because it is interpreted in such a way as to resist abuse. Abuse can be countered, not only through the principle of prohibition of abuse of EU law, but also through interpretation. For instance, in *TEAM POWER EUROPE*, the ECJ denied a Bulgarian temporary-work agency the benefit of the posting rule for lack of substantial activities in Bulgaria, as it exclusively assigned workers to clients in Germany. The ECJ adopted an anti-abusive interpretation of the posting condition relating to the substance of the activities:

“to allow temporary-work agencies … to benefit from [the] advantage [of the posting rule] when they orientate their activities of supplying temporary agency workers exclusively or mainly to one or more Member States other than that in which they are established would be likely to encourage those undertakings to choose the Member State in which they wish establish themselves on the basis of the latter’s social security legislation with the sole aim of benefiting from the legislation which is most favourable to them in that field, and thus to allow ‘forum shopping’” (*'TEAM POWER EUROPE' EOOD v Direktor na Teritorialna direktsia na Natsionalna agentsia za prihodite - Varna* (C-784/19) EU:C:2021:427, [2021] 3 C.M.L.R. 35, at [62]).

In such cases a posting condition is breached, meaning that the objective factor required by *Altun* is present. [↑](#footnote-ref-79)
80. See Rennuy, "Shopping for social security law" (2021) 58 Common Market Law Review 13, 34–35. [↑](#footnote-ref-80)
81. *A-Rosa Flussschiff* (C-620/15) EU:C:2017:309, at [54]. [↑](#footnote-ref-81)
82. *Altun* (C‑359/16) EU:C:2018:63, at [50]. [↑](#footnote-ref-82)
83. *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18) EU:C:2020:260. For comments on the judgment’s impact on the principle of the authority of *res judicata*, see L. Driguez, "Posting of workers: When the ideal of cooperation between national institutions prevails over the fight against fraud: *CRPNPAC* and *Vueling*" (2021) 58 Common Market Law Review 929, 942–943. [↑](#footnote-ref-83)
84. *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18) EU:C:2020:260, at [77]–[78], [86]. This condition was first formulated, in a softer or at least more ambiguous form, in *Altun* (C‑359/16) EU:C:2018:63, at [54]–[55]. [↑](#footnote-ref-84)
85. As the ECJ points out, the ensuing dialogue could enable institutions to resolve the case out of court, failing which it could at least help institutions and judges to gather evidence of fraud (*CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18) EU:C:2020:260, at [66]–[67], [76], [81]). I do not, however, share the ECJ’s view that “a final finding of fraud” can only be made on the basis of evidence provided by the institution of the State of origin (*CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18) EU:C:2020:260, at [61], [68], [71]). The case itself exemplifies that the courts of the State of destination can gather ample evidence of fraud without any input from the institution of the State of origin—all that is needed is solid proof of the intentional breach of one posting condition. [↑](#footnote-ref-85)
86. The problem is somewhat mitigated, but certainly not solved, by the ECJ’s demand that judges use all the means at their disposal to obtain that the institutions start the dialogue procedure, if need be staying the judicial proceedings (*CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18) EU:C:2020:260, at [79]–[80]). [↑](#footnote-ref-86)
87. *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18) EU:C:2020:260, at [81]. [↑](#footnote-ref-87)
88. *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18) EU:C:2020:260, at [72]. [↑](#footnote-ref-88)
89. Opinion of AG Saugmandsgaard Øe in *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18) EU:C:2020:260, at [76], [96], and, more fully, [64]–[104]. [↑](#footnote-ref-89)
90. I will argue below that the courts of the State of destination should be able to review posting certificates even in cases that do not involve fraud. [↑](#footnote-ref-90)
91. Similar sentiment in Driguez, "*CRPNPAC* and *Vueling*" (2021) 58 Common Market Law Review 929; H. Verschueren, "The CJEU’s case law on the role of posting certificates: A missed opportunity to combat social dumping" (2020) 27 Maastricht Journal of European and Comparative Law 484, in particular 497. [↑](#footnote-ref-91)
92. Verschueren, "The role of posting certificates" (2020) 27 Maastricht Journal of European and Comparative Law 484, 497–498. [↑](#footnote-ref-92)
93. *Herbosch Kiere* (C-2/05) EU:C:2006:69, at [32]. [↑](#footnote-ref-93)
94. Standing in the administrative courts of the Member States—i.e. the legal capacity to bring proceedings—tends to be restricted to those who have a certain interest or right (M. Eliantonio, C. W. Backes, C. H. van Rhee, T. Spronken and A. Berlee, *Standing up for Your Right(s) in Europe: A Comparative Study on Legal Standing (Locus Standi) before the EU and Member States’ Courts* (Cambridge: Intersentia, 2013), pp.67–69). [↑](#footnote-ref-94)
95. The same is true for posted self-employed persons. [↑](#footnote-ref-95)
96. Directive 96/71 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1, as amended by Directive 2018/957. [↑](#footnote-ref-96)
97. E.g. C. Barnard, "Enforcement of Employment Rights by Migrant Workers in the UK: The Case of EU-8 Nationals" in C. Costello and M. Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford: Oxford University Press, 2014); C. Barnard and A. Ludlow, "Enforcement of Employment Rights by EU-8 Migrant Workers in Employment Tribunals" (2016) 45 Industrial Law Journal 1. [↑](#footnote-ref-97)
98. The prospect of leaving the State of destination in the short or medium term reduces workers’ willingness to sue in its courts (C. Barnard, A. Ludlow and S. Fraser Butlin, "Beyond Employment Tribunals: Enforcement of Employment Rights by EU-8 Migrant Workers" (2018) 47 Industrial Law Journal 226, 236–240). [↑](#footnote-ref-98)
99. See e.g. I. Wagner, *Workers without Borders: Posted Work and Precarity in the EU* (London: Cornell University Press, 2018). [↑](#footnote-ref-99)
100. Eliantonio, Backes, van Rhee, Spronken and Berlee, *Standing up for Your Right(s)* (Cambridge: Intersentia, 2013), p.76. [↑](#footnote-ref-100)
101. See also *Alpenrind* (C-527/16) EU:C:2018:669, at [27]; correspondence with Andrzej Szybkie. [↑](#footnote-ref-101)
102. Verschueren, "Sécurité sociale et détachement" (2006) 48 Revue belge de sécurité sociale 403, 442. Correspondence with a number of well-informed observers, to whom I am very grateful, yielded no example of such proceedings (Dolores Carrascosa Bermejo, Bruno De Pauw, Jeroen Lorré, Bernhard Spiegel, Andrzej Szybkie, Henk van der Most and Herwig Verschueren). [↑](#footnote-ref-102)
103. In the same vein, see H. Verschueren, "Cross-Border Workers in the European Internal Market: Trojan Horses for Member States' Labour and Social Security Law?" (2008) 24 International Journal of Comparative Labour Law and Industrial Relations 167, 198. [↑](#footnote-ref-103)
104. If the court of the State of origin were to confirm its validity, the certificate would continue to bind the institution of the State of destination, and contributions would only be due in the State of origin; if on the contrary that court were to invalidate the certificate because its legislation is not applicable, the institution of the State of origin would not be able to levy contributions, which would only be due in the State of destination. [↑](#footnote-ref-104)
105. Opinion of AG Jacobs in *Fitzwilliam* (C-202/97) EU:C:2000:75, at [60]; Opinion of AG Saugmandsgaard Øe in *A-Rosa Flussschiff* (C-620/15) EU:C:2017:309, at [54]. [↑](#footnote-ref-105)
106. E.g. L. De Lucia, "From Mutual Recognition to EU Authorization: A Decline of Transnational Administrative Acts?" (2016) 8 Italian Journal of Public Law 90, 102. See also A. M. Keessen, *European Administrative Decisions: How the EU Regulates Products on the Internal Market* (Groningen: Europa Law Publishing, 2009), p.185. [↑](#footnote-ref-106)
107. E.g. M. Eliantonio, "Information Exchange in European Administrative Law: A Threat to Effective Judicial Protection?" (2016) 23 Maastricht Journal of European and Comparative Law 531, 537. [↑](#footnote-ref-107)
108. *Gemeente Steenbergen v Luc Baten* (C-271/00) EU:C:2002:656, 14 November 2002, at [44]. [↑](#footnote-ref-108)
109. Art.3(1) Directive 2014/54 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers [2014] OJ L128/8. [↑](#footnote-ref-109)
110. Regulation 492/2011 on freedom of movement for workers within the Union [2011] OJ L141/1. [↑](#footnote-ref-110)
111. Art.6 Directive 96/71; recital 18 and art.21 Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 (“Brussels I Regulation Recast”); art.11 Directive 2014/67 on the enforcement of Directive 96/71 concerning the posting of workers in the framework of the provision of services and amending Regulation 1024/2012 on administrative cooperation through the Internal Market Information System [2014] OJ L159/11. See further *OL and Others v Rapidsped Fuvarozási és Szállítmányozási Zrt* (C-428/19) EU:C:2021:548, 8 July 2021. [↑](#footnote-ref-111)
112. Except under *Altun* (C‑359/16) EU:C:2018:63. [↑](#footnote-ref-112)
113. *Baten* (C-271/00) EU:C:2002:656. [↑](#footnote-ref-113)
114. Except art.84 Regulation 883/2004. [↑](#footnote-ref-114)
115. See also Verschueren, "Cross-Border Workers in the European Internal Market" (2008) 24 International Journal of Comparative Labour Law and Industrial Relations 167, 194. [↑](#footnote-ref-115)
116. *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18) EU:C:2020:260, at [62]. [↑](#footnote-ref-116)
117. This faculty might be more meaningful to social security institutions and labour inspectorates than posted workers, who rarely turn to the courts of the State of destination to enforce their employment rights (A. van Hoek and M. Houwerzijl, "Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union" (2011), http://www.ec.europa.eu/social/BlobServlet?docId=6677&langId=en, Executive Summary, 35; A. van Hoek and M. Houwerzijl, "Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union" (2011), http://www.ec.europa.eu/social/BlobServlet?docId=7510&langId=en, Executive Summary, 22; Z. Rasnača and M. Bernaciak, "Conclusion" in Z. Rasnača and M. Bernaciak (eds), *Posting of workers before national courts* (Brussels: ETUI, 2020), p.247). Most of the suggested explanations—their lack of awareness of their rights; their lack of connection to the State of destination; their low unionisation; concerns about the recognition and enforcement of judgments; “financial, linguistic, cultural and similar barriers”—also apply in social security law (U. Grušić, *The European Private International Law of Employment* (Cambridge: Cambridge University Press, 2015), p.293). Nevertheless, there is a logic that draws workers to the courts of the State of origin for labour law disputes against an employer based there, and to the courts of the State of destination when claiming its social security benefits. [↑](#footnote-ref-117)
118. Opinion of AG Saugmandsgaard Øe in *A-Rosa Flussschiff* (C-620/15) EU:C:2017:309, at [50]–[54]. [↑](#footnote-ref-118)
119. Social security institutions and courts are bound by birth certificates “unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question” (*Eftalia Dafeki v Landesversicherungsanstalt Württemberg* (C-336/94) EU:C:1997:579; [1998] 2 C.M.L.R. 1, operative part). The ECJ accepts no such qualification to the binding effect of posting certificates (*A-Rosa Flussschiff* (C-620/15) EU:C:2017:309). [↑](#footnote-ref-119)
120. For minimalist rules on recognition and enforcement in social security law, see art.84 Regulation 883/2004. For a fully fledged framework, which does not apply in matters of social security, see Brussels I Regulation Recast. [↑](#footnote-ref-120)
121. See Title IV, Chapter III Regulation 987/2009; the corresponding provisions of the Second Trilogue Agreement; and proposed art.19a(2) Regulation 987/2009 (inserted by art.2(11a).new Second Trilogue Agreement). [↑](#footnote-ref-121)
122. If only social security institutions had the capacity to sue, workers would be denied judicial protection; if only workers had the capacity to sue, the enforcement of EU law would be undermined. [↑](#footnote-ref-122)
123. *Alpenrind* (C-527/16) EU:C:2018:669, at [44]. [↑](#footnote-ref-123)
124. Art.19(2) Regulation 987/2009 provides that the certificate shall be issued by “the competent institution of the Member State whose legislation is applicable”—in *Alpenrind* that would have been Austria. The possibility of certificates being issued on the basis of the *lex loci laboris* is expressly provided for by the latest version of the certificate. [↑](#footnote-ref-124)
125. Cf. Opinion of AG Saugmandsgaard Øe in *Alpenrind* (C-527/16) EU:C:2018:669, at [64]. [↑](#footnote-ref-125)
126. See e.g. *AFMB e.a. Ltd v Raad van bestuur van de Sociale verzekeringsbank* (C-610/18) EU:C:2020:565; [2021] 1 C.M.L.R. 17; Rennuy, "Shopping for social security law" (2021) 58 Common Market Law Review 13. [↑](#footnote-ref-126)
127. Art.13(1) Regulation 883/2004. [↑](#footnote-ref-127)
128. De Wispelaere, De Smedt and Pacolet, *Posting of workers* (Luxembourg: Publications Office of the European Union, 2021), p.39. [↑](#footnote-ref-128)
129. The actors might be different. Art.12 involves the State of origin and the State of destination (as well as possibly a third State that should not have issued or maintained the certificate). Art.13 might involve the State of residence, two or more States of work, and the State(s) of the registered office of the employer(s) (as well as possibly another State that should not have issued or maintained the certificate). Even when the actors are the same, they might behave differently. For instance, a worker who normally works in a Member State (multi-activity) might be more likely to sue in its courts than a worker who only temporarily works there (posting). This bolsters the argument that such court cases should not be neutralised by certificates. While the procedures regarding the certificate are largely common to art.12 and 13, there are some variations (compare art.15 to art.16 Regulation 987/2009). [↑](#footnote-ref-129)