ATYPICAL EMPLOYMENT IN THE EUROPEAN AVIATION SECTOR[1]

YVES JORENS, DIRK GILLIS AND LIEN VALCKE[2]

A. Evolution: Regulation to liberalisation

The European single market is one of the greatest achievements of the European Union through its positive effects by bringing down barriers, creating more jobs and increasing overall prosperity.[3] Whilst the impact of the single market was adamantly clear in other economic sectors, in the European aviation sector its impact and its liberalisation is a relatively young phenomenon. Prior to 1987, the European aviation industry was highly regulated, inflexible, and consisted predominantly of bilateral agreements between Member States.[4] As a consequence of the liberalisation of the European aviation industry, airlines were able to choose routes, fares, and schedules. In addition, the civil aviation industry transformed fundamentally pursuant to the entry, growth and domination of low-fare airlines (LFAs),[5] which were generally based upon the model of Southwest Airlines in the United States.[6]

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1 This article is based on a study financed by the European Social Dialogue Committee (Y. Jorens, D. Gillis, L. Valcke & J. De Coninck, 'Atypical Forms of Employment in the Aviation Sector', European Social Dialogue, European Commission, 2015, 287 p.) ECA, AEA and ETF have executed the Grant Agreement concerning the action entitled "Atypical forms of aircrew employment in European aviation industry (with a focus on bogus self-employment) with the number VS/2013/0346.
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3 http://ec.europa.eu/internal_market/top_layer/historical_overview/index_en.htm.

4 K. J. Button, *Wings across Europe: towards an efficient European air transport system*, 2004, Aldershot: Ashgate. p. 95; E. M. Giemulla, H. Van Schyndel & A. M. Donato, 'From Regulation to Deregulation', in E. M. Giemulla & L. Veber, *International and EU Aviation Law: Selected Issues*, 2011, Alphen aan den Rijn: Kluwer Law International. p. 129-173.

5 LFAs are often known as low-cost airlines (LCAs). The distinction is not insignificant. Whereas to the public they present themselves as LFAs, in reality they are of course LCAs, and costs are cut wherever possible.

6 G. Harvey & P. Turnbull, 'The development of the low cost model in the European civil aviation industry', European Transport Workers' Federation, 2012. p. 20.

Due to the emergence of LFAs, new markets opened up, with new routes predominantly for leisure travellers, and low-fare air transportation grew considerably.[7] With the evolution of the low-cost model, competition has intensified both within the low-fare sector and LFAs and the 'network' or 'legacy' airlines. Government involvement was reduced, to the benefit of the consumer, as consumer choice increased due to the point-to-point business model used by LFAs. This business model, distinct from the networks used by network airlines, operates solely between two destinations, thus allowing for transport to regional airports. In addition, the point-to-point business models allow for lower fares, again to the benefit of consumers generally, all the while attracting a new group of consumers that were previously hindered in enjoying air transport as a result of the steep fares imposed by national network airlines. Moreover, it has contributed to increased employment with respect to the direct operation of the airport,[8] as well as with respect to ancillary services such as the establishment of shops, restaurants, and parking.[9]

The combination of these two types has further led to the emergence of a third type of airline, which uses hubs and a network for long-haul flights, and the point-to-point model for short-haul flights,[10] which is demonstrative of the convergence, insofar possible, between the two predominant business models in European aviation.

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7 G. Harvey & P. Turnbull (2012) *ibid.* p. 6.

8 European Low Fares Airline Association, 'Social Benefits of Low Fares Airlines in Europe', York Aviation, 2007.

9 European Low Fares Airline Association, 'Liberalisation of European Air Transport: The Benefits of Low Fares Airlines to Consumers, Airports, Regions and the Environment', 2004.

10 Danish Transport Authority, 'Report of the working group on "Social dumping" in aviation', Copenhagen, 2014.

B. Current state of affairs

1. Casualization of the workforce in aviation

Within this context of increased competition, however, continuous efforts were made by both (former) national airlines as well as newly emerged (low-cost) airlines, to reduce costs to the greatest extent possible.[11] While most LFAs typically enjoy a 30-50% cost advantage over their network rivals on short-haul routes, for some LFAs the cost advantage is even of the order of 60%. In order to allow passengers to pay lower fares, airlines cut costs per passenger (cpp). This is done by several means: e.g. by a ruthless adherence to the mantra of low costs (e.g. reducing the size of the in-flight magazine from an A4 to an A5 format to save weight/fuel and printing costs, and cutting the weight of trolleys and seats to save fuel); a rationalisation of routes, of the aircraft fleet; by raising the number of passengers on each flight; less expensive airports; the unbundling and wet leasing of different components of air travel (luggage, food and drinks, insurance etc.); but also based on labour cost cutting strategies.

One of the most significant cost-cutting techniques in the contemporary European aviation industry is increased labour productivity,[12] which should be understood in tandem with the 'casualization' of the aviation workforce. Within this context, casualization of employment refers to a process in which open-ended employment contracts and relations are substituted with other types of employment, i.e. atypical relations. In particular, the liberalisation of the European aviation industry served as a catalyst for an increased use of outsourcing for a myriad of tasks as well as for a surge in the use of atypical employment contracts.[13]

The foregoing surge of atypical employment is a widespread phenomenon which is ascertainable within all legal systems and several sectors in the European Union and which

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[11] Steer Davies Gleave, 'Study on the effects of the implementation of the EU aviation common market on employment and working conditions in the Air Transport sector over the period 1997/2010', European Commission - DG Move, 2012. p. 79-91; Booz&Co, 'Effects of EU Liberalisation on Air Transport Employment and Working Conditions', European Commission - DGl for Energy and Transport, 2009. p. 9-10.

[12] See S. D. Barrett, 'The sustainability of the Ryanair model', 2004, *International Journal of Transport Management* 2. p. 93. In 2011, *Ryanair* carried almost 9,000 passengers per employee (ppe) whereas *easyJet*, Europe's second largest LFA, carried less than 6,600 ppe. Despite its adoption of many low-cost business practices, *Aer Lingus* carried just over 2,700 ppe in 2011.

[13] Steer Davies Gleave, 'Study on the effects of the implementation of the EU aviation common market on employment and working conditions in the Air Transport sector over the period 1997/2010', European Commission - DG Move, 2012.

exerts pressure on the classic dichotomy between the concepts of an employed person on the one hand and a self-employed person on the other.[14] This traditional binary divide which regulates the performance of work by and the labour relations of subordinate workers and, alternatively, self-employed individuals, serves as the cornerstone of labour and social security law across Member States.[15]

In recent years, forms of (atypical) employment that do not entirely correspond to the traditional distinction between employment and (genuine) self-employment have become increasingly prevalent. However, often such alleged self-employed workers are *de facto* 'disguised' employees, a phenomenon also known as *bogus* or *false* self-employment.[16] These 'bogus self-employed' persons perform work and tasks as an employee, but are officially registered as self-employed. Bogus self-employment is to all intents and purposes identical to subordinate employment, yet disguised as autonomous work, usually in order to reduce labour costs, for tax reasons and to avoid payment of high(er) social security contributions.

Transport is a sector where these atypical forms of employment are becoming more and more prevalent (as a self-employed person, as a single shareholder of a one-man enterprise, as a (minority) shareholder of a cooperative company etc.[17]) and where transnational companies 'shop around' for the most favourable employment, social security and/or tax regime.[18] Some airlines[19] have developed or are developing business strategies "*geared*

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[14] See Y. Jorens, 'Self-employment and bogus-self-employment in the European Construction industry. A comparative study of 11 Member States', EFBWW, FIEC, Brussels, 2008, available at http://www.efbww.org/pdfs/annex%208%20-%20Brochure%20part%201%20[EN].pdf.

[15] Amongst others, this clear distinction acts as the basis for determining entitlement to benefits and advantages and generally for the legal status of the persons concerned.

[16] *Ibid*.

[17] A study on 'economically dependent workers' in the EU-15 and Norway, for example, identified road haulage (own-account workers) as a sector with precarious employment in seven Member States, but there is no mention of civil aviation. http://eurofound.europa.eu/observatories/eurwork/comparative-information/economically-dependent-workers-employment-law-and-industrial-relations.
See also Eurofound, 'Self-Employed Workers: Industrial Relations and Working Conditions', 2010; and S. McKay, S. Jeffreys, A. Paraksevopoulou, & J. Keles, 'Study on Precarious Work and Social Rights: Final Report', Working Lives Research Institute, London Metropolitan University, 2010. p 44-5 and 47.

[18] Maritime transport is the obvious example, with flag of convenience (FoC) shipping and crews of convenience (CoC). See N. Lillie, 'Global Collective Bargaining on Flag of Convenience Shipping', 2004, *British Journal of Industrial Relations* 42(1). p. 47-67; and N. Lillie, 'Bringing the Offshore Ashore: Transnational Production, Industrial Relations and the Reconfiguration of Sovereignty', 2010, *International Studies Quarterly*, 54(3). p. 683-704.

towards the lowering of wage or social standards for the sake of enhanced competitiveness […] indirectly involving their employees and/or home or host country governments".[20] For example, an airline registered in European country A might hire a worker from country B and base this worker in country C. The worker in question might be hired via a temporary work agency under a 'contract for services' as a self-employed person in order to reduce labour costs (e.g. social insurance payments) and in order to shift business risks from the airline onto the worker.[21] In many cases, these forms of subcontracting are legally sound and correspond to a change in supply mechanisms. Nevertheless, in a growing number of cases, questions about the reality of these legal positions are unavoidable. One of the ways to cut costs is the outsourcing of processes which are not a part of the business' 'core activities'. It is believed that this leads to further efficiency and flexibility. Also, by means of subcontracting, one can often externalize a part of the transaction costs such as costs related to legal issues such as applicable legislation (e.g. labour and social security legislation) and liability (e.g. employers' liability for employees).

Unfortunately, outsourcing techniques have also been an inspiration for social engineering.[22] In most cases, the same parties can be identified: a 'client' seeking to acquire 'labour', a 'worker' willing to provide (sell) his or her labour, and, depending on the ingenuity of the 'construction', at least one third party, either providing 'legal advice' or acting as a 'broker' or an 'agency' (not unlike a temporary work agency or private employment company.

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19 The distinction between low-fare and network business models is no longer clear-cut. There is currently a degree of 'convergence' between network airlines and LFAs on short-haul routes.

20 M. Bernaciak, 'Social Dumping: Political Catchphrase or Threat to Labour Standards?', European Trade Union Institute, 2012; and G. Harvey & P. Turnbull, 'The Development of the Low Cost Model in the European Civil Aviation Industry', *op cit*.

21 Subordinated labour, as opposed to independent or autonomous workers (the self-employed), would claim to work under a contract *of* service.

22 E.g. the engineering of bogus constructions.

2. *Atypical employment and (bogus) outsourcing in civil aviation*[23]

a. Some figures

Via the means of a completed survey aimed at pilots, which resulted in both quantitative and qualitative data from 6633 respondents,[24] an overview was obtained of the contemporary forms of atypical employment relations in aviation and the effects these have.

The data shows that certain age groups have a much higher chance to work for certain types of airlines, for example more respondents from the younger age categories reported to fly for a Low-Fare Airline (LFA). Next to that, the largest group of respondents in this study stated that they work for a network airline (45%). The second largest group of respondents indicated they fly for an LFA. The top 5 of airlines that the respondents reported to work for is as follows: 1. *Ryanair*, 2. *Air France*, 3. *KLM*, 4. *SAS*, 5. *Easyjet*.

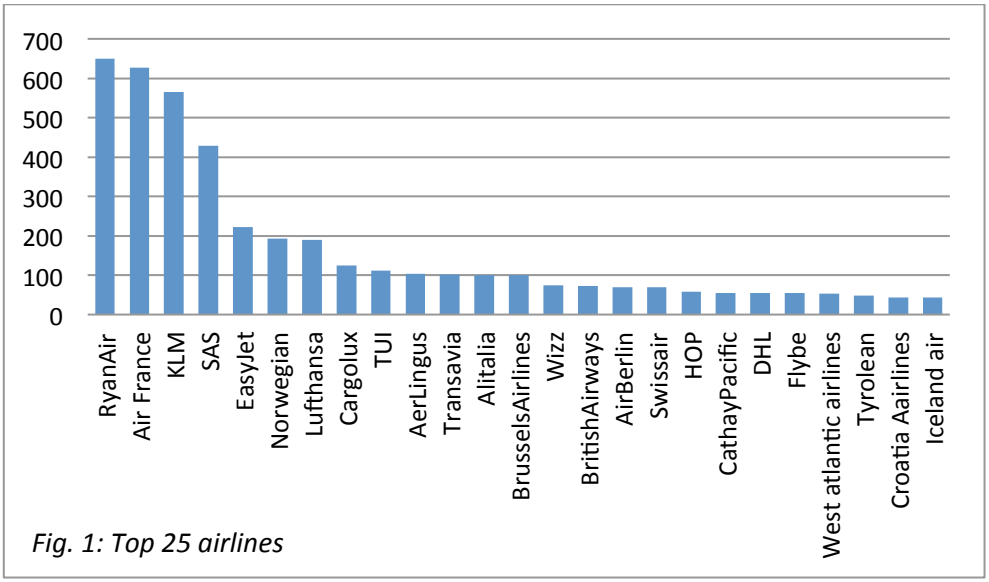

Fig. 1: Top 25 airlines

With respect to forms of employment, 79 % of the total number of respondents stated to have a direct employment contract. The type of airline that was least reported by respondents who indicated that they have a direct employment contract are LFAs (52.6%). It was found that 70% of the respondents who indicated that they are self-employed also stated that they fly for an LFA. 359 respondents (5.4% of the respondents in this study) reported they work via a contract with a temporary work agency. Furthermore, of the

[23] For the purpose of this study, 'atypical work' constitutes all forms of employment or cooperation between a member of the cockpit or cabin crew and an airline other than an open-ended employment contract concluded between said crew member and said airline directly.

[24] After cleaning the data.

respondents who stated to work for an LFA, 16.7% indicated they work for the airline via a temporary work agency, whereas for network airlines and regional airlines, such an employment contract is only reported by respectively 1.7% and 1.3% of the respondents. With regard to LFAs, more diversification can be found in the types of contracts reported..

b. Types of employment

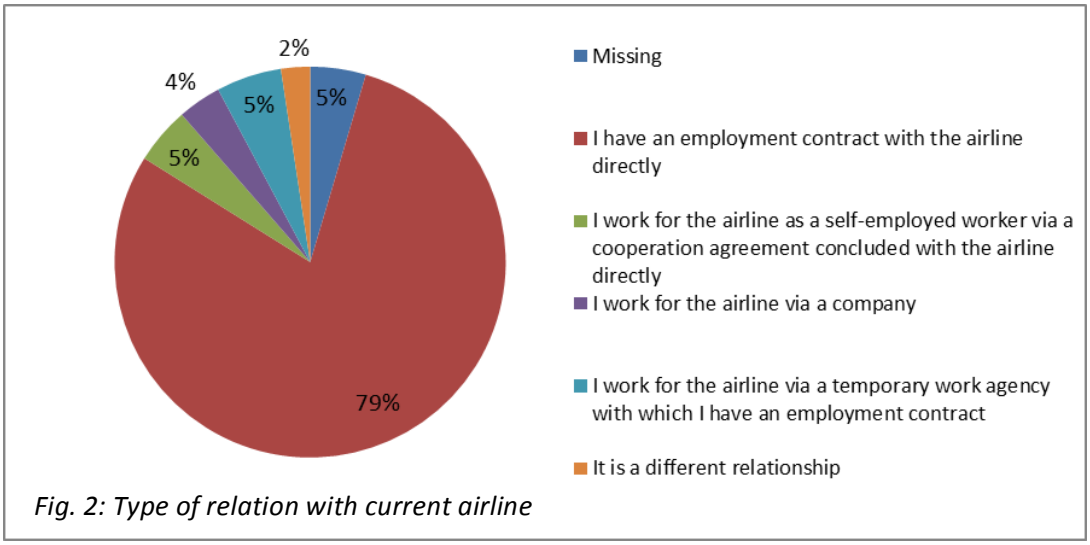

Fig. 2: Type of relation with current airline

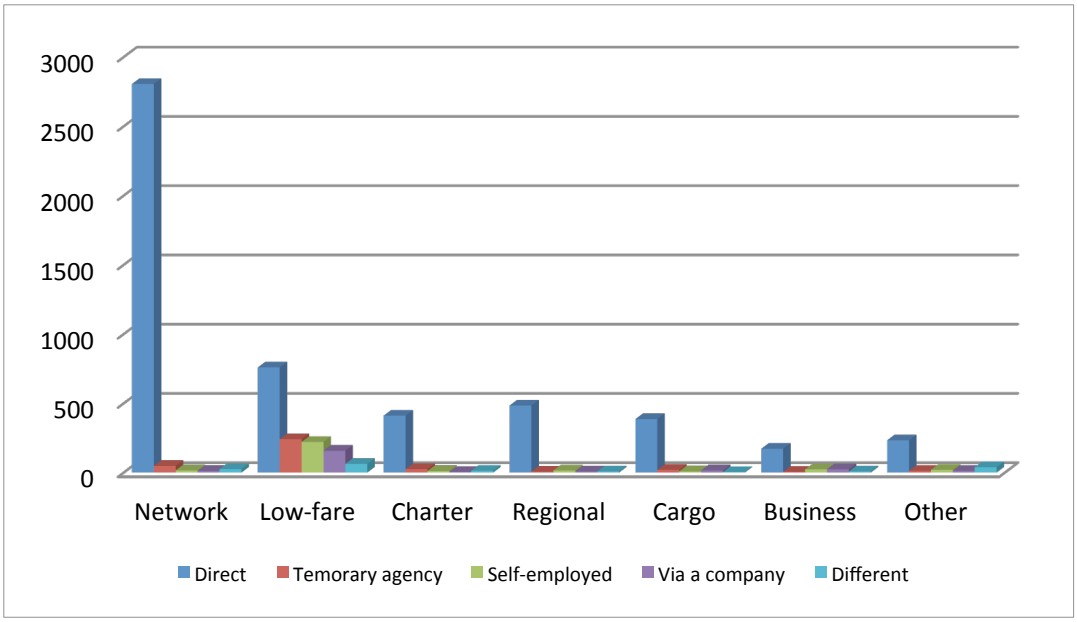

Fig. 3: Overview of different types of contracts per type of airline

In order to evaluate whether the respondents are actually self-employed, different questions were presented, e.g. about the level of decision-making. Of the respondents stating to be self-employed and stating to have no say in the amount of hours they clock up, 77.1% stated to work for an LFA and 5.6% for a network airline.

Respondents were also presented questions with regard to the decision-making process, hence the freedom respondents have in exercising their function and authority. This is important vis-à-vis safety and liability, but might also tell us something about (bogus) employment relationships. For instance, theoretically a greater number of self-employed pilots would be expected to report having freedom in the decision-making process than e.g. typically employed pilots.

The following figure shows that respondents who indicated to fly for an airline with a direct employment contract (mostly) agree upon the statement '*I can amend the instructions of the airline based on e.g. objections regarding flight safety, liability, or regarding health & safety'.* And, although the largest amount of respondents who indicated to have another type of employment also stated that they agree, a larger group of respondents (in comparison to the directly contracted respondents) disagrees.

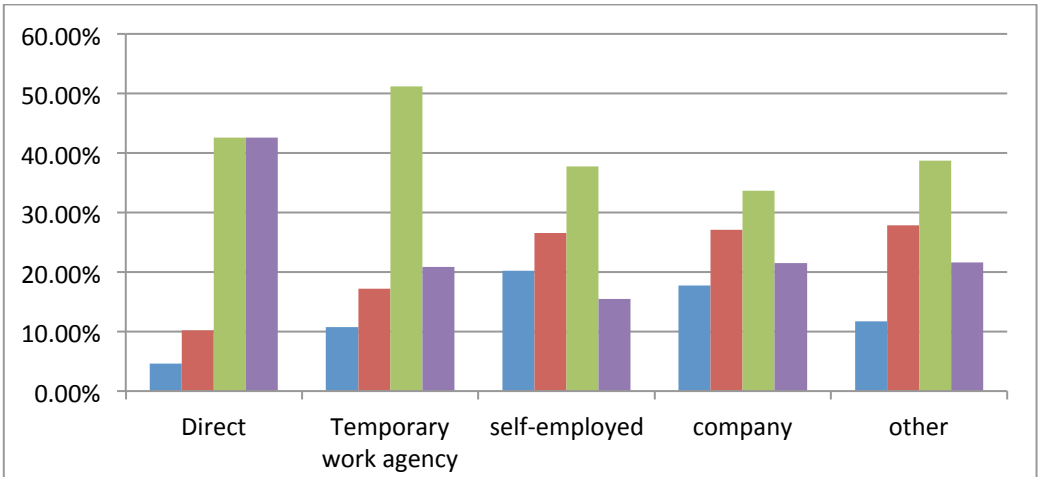

Fig. 4: Decision-making - type of employment

With regard to amending the instructions of the airline based on e.g. objections regarding flight safety, liability, or regarding health and safety, 20% of the respondents stating to be

self-employed strongly disagreed with the statement '*I can amend the instructions of the airline based on e.g. objections regarding flight safety, liability, or regarding health & safety*'. Of these 20%, 83% indicated that they fly for an LFA. Furthermore, another 26.6% 'generally' disagrees with said statement, of which 90% (!) indicated they fly for an LFA. In 85.2% of the cases, the respondents stated this is decided by the registered office of the airline.

When respondents were asked if they were sometimes reluctant to take decisions, the majority indicating to be directly employed answered 'no' (red graphs).

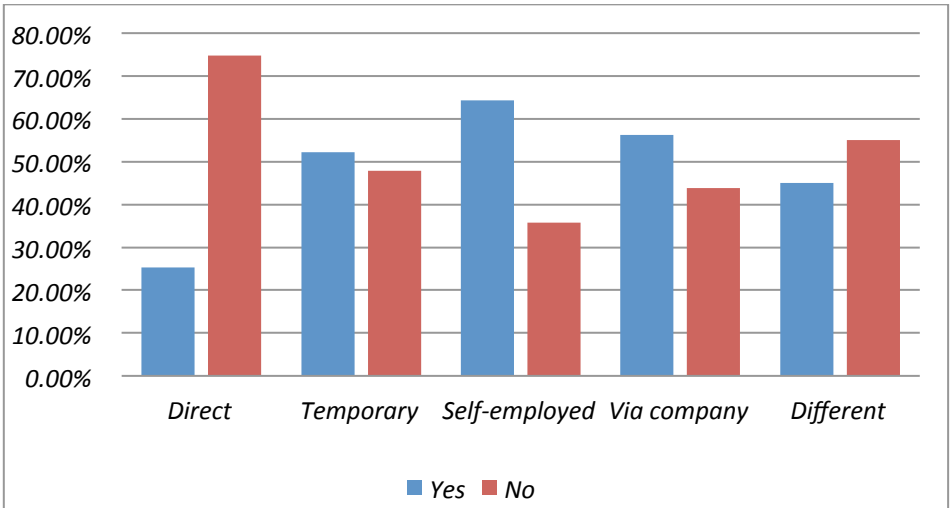

Fig. 5: Decision-making - type of contract

When asked if their employment status affects their ability to take such decisions, again, especially the respondents indicating to be atypically employed more frequently answered that this is the case.

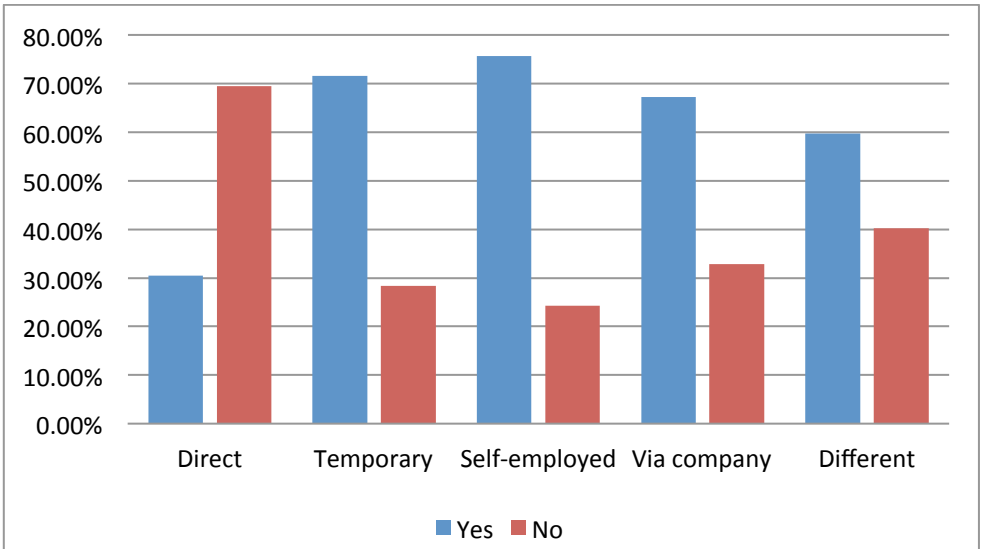

Fig. 6: Employment status affected?

c. An overview of the employment situations

In European civil aviation, the typical employment relationship between an airline and the crew as shown in figure 7 has changed.

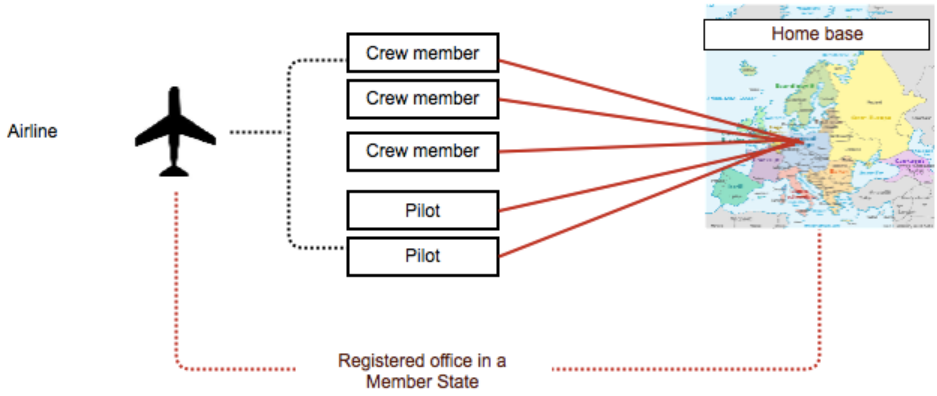

Fig. 7: Typical employment relationship between airline and the crew

During the last decades, a growing number of air crew members work for airlines via different kinds of atypical forms of employment, often in the 'grey' area between 'traditional employment'[25] and (genuine) self-employment. Along with an increasing number of passengers and destinations came an increase in variations in seasonal demands. These are

[25] This model of employment, which predominated in most industrialised countries for much of the last century, was based on the idea of an employee (the 'male breadwinner') working full-time, with standard hours (usually '9 to 5', five days a week) for a single employer with a fixed wage and well-defined benefits (e.g. sickness benefits, paid holidays, company pension scheme etc.).

often covered through the use of fixed-term contracts or temporary agency work or even students working holidays as cabin crew members or the relocating or changing of (home-) base.

At the same time, the number of self-employed workers among air crew members was on the rise. In this scenario, the employer of the worker takes a number of his or her existing employees who are employed directly and engages them - directly or indirectly - on a self-employed basis. The duties that the workers undertake remain the same; it is only the worker's legal status that changes.[26]

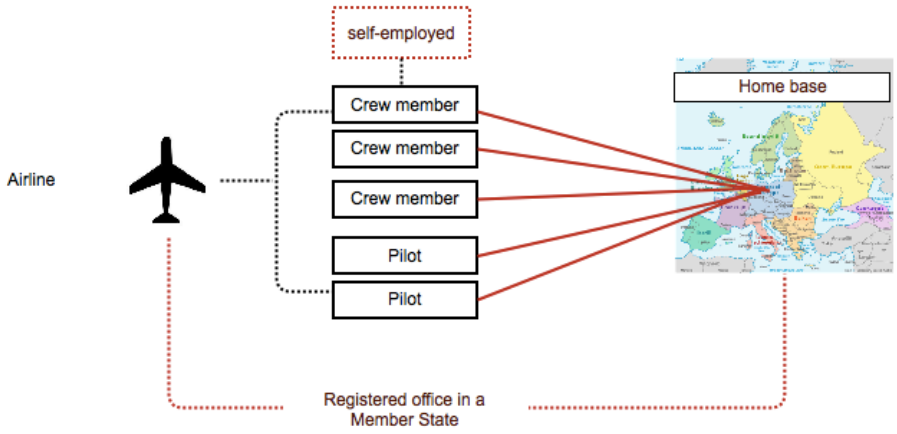

Fig. 8: Typical employment relationship between airline and the crew

These workers would in first instance have a direct link with an airline. Again, in some cases, this can be legally sound and correspond to an economic activity. However, in many cases, questions could be raised with regard to the bogus character of this kind of outsourcing.
In a next step, the self-employed worker would no longer be hired by the airline directly, but through an intermediary subcontractor.

[26] And, of course, the legal implications of such a change with regard to social protection, liability etc.

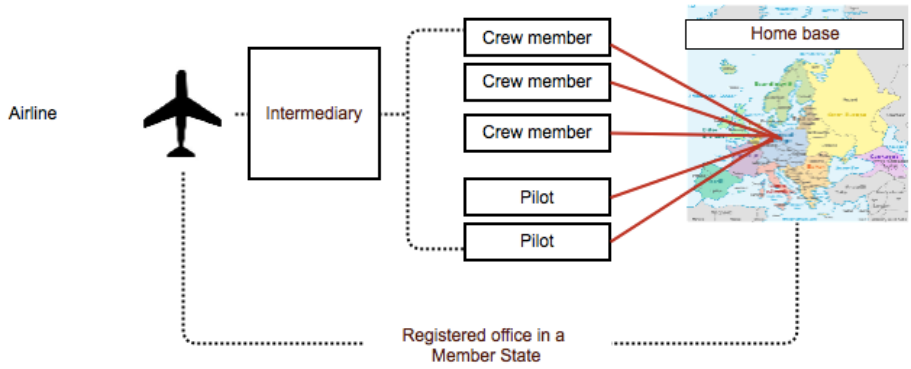

Fig. 9: Typical employment relationship between airline and the crew

As a result, the worker is 'one step further down' the subcontracting chain, which can raise questions with regard to who has the authority and liability on specific matters (safety instructions, FTLs etc.). A new worker may agree on terms with the engager, including pay, after which the engager stipulates, however, that the worker must be paid by a specific employment intermediary or he or she will not be engaged. This scenario often involves the supply of temporary labour to an end client by a temporary work agency, an employment or recruitment agency.[27] Some intermediaries act as crew agencies for service providers, i.e. brokers who will 'liaise' between the airline and self-employed crew members. In this scenario the temporary work agency, employment or recruitment agency provides the 'labour' or service (possibly via other intermediaries), but gives the crew member no choice but to be 'self-employed'.[28]

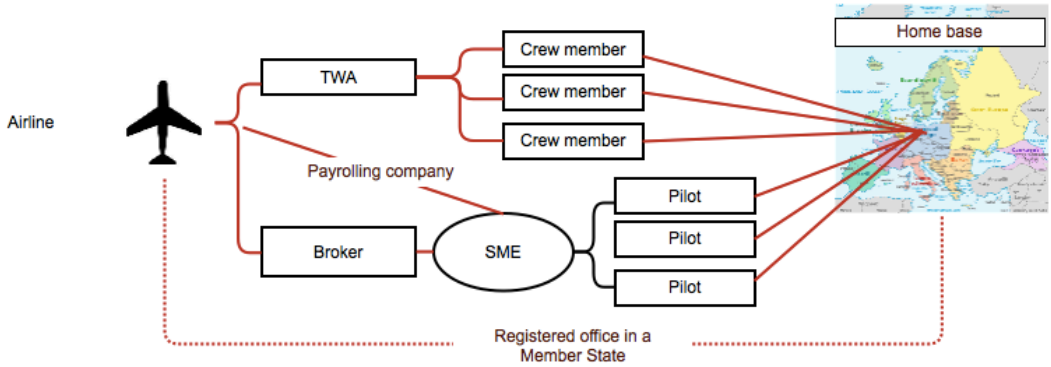

Fig. 10: Introduction of temporary work agency and an employment or recruitment agency – pilot self-employed

[27] Also known as a crew agency, this intermediary company not necessarily being established as a temporary work agency.

[28] Note that the self-employed entity often is an SME, creating the potential for quadrilateral relationships between the parties that are more complex than the triangular relationships.

Despite being ‘self-employed’, the crew member is, through the use of specific clauses in the contracts, often highly dependent on the client (the airline, often denominated user), to the extent that in some cases one could say the client's authority over the service provider is not unlike the authority an employer has vis-à-vis an employee (*subordination* rather than *subcontracting*).

As such, a crew can consist of employed or self-employed pilots who fly for the airline directly or via different and/or multiple intermediary companies, and cabin crew members who are employees of the airline or the lessor wet-leasing out the aircraft, self-employed crew members, temporary agency and student workers.

A next step is the introduction of even more intermediary subcontractors or the creation of a company by the crew member. In most cases, such a company would, for obvious reasons, be a limited liability company. Recently, an evolution can be seen where a small number of crew members — mostly pilots — establish a company together (a so-called micro enterprise). In such cases, an intermediary is often responsible for the subcontracting of the work, whereas a fourth (and sometimes a fifth) party is responsible for payment and legal advice (e.g. on the (most profitable place of) establishment of the micro-enterprise, social security and/or tax legislation etc.).

According to some, it is debatable whether commercial airline pilots in general can be self-employed or subcontractors that fly for an airline via a company of which they own shares. One of the issues is that genuinely self-employed workers ‘provide materials for the job’, but the ‘materials’ supplied (bought) by ‘self-employed’ pilots working for an airline are often no more than their uniforms and ID cards. Another issue according to some is that genuinely self-employed workers ‘provide their own insurance cover (e.g. public liability cover)’.

One of the main issues with these forms of subcontracting typical of the aviation industry is the identification of the operator. Is the end user the operator? Or is (one of) the intermediary subcontractor(s) the operator? Or can the self-employed pilot (or the company he or she is a shareholder of and which acts as a subcontractor) be qualified as an operator?

This question is linked not only to the determination of the home base, and thus of the social legislation applicable, but also to FTLs as well as different kinds of liability in aviation.

This question is even more important with regard to a form of subcontracting that is known in aviation as the wet-leasing of aircraft. Annex III to Regulation (EEC) No 3922/91 defined the *wet-leasing out* of an aircraft as "*A Community operator providing an aeroplane and complete crew to another Community operator, in accordance with Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers(1), and retaining all the functions and responsibilities prescribed in Subpart C, shall remain the operator of the aeroplane*".[29]

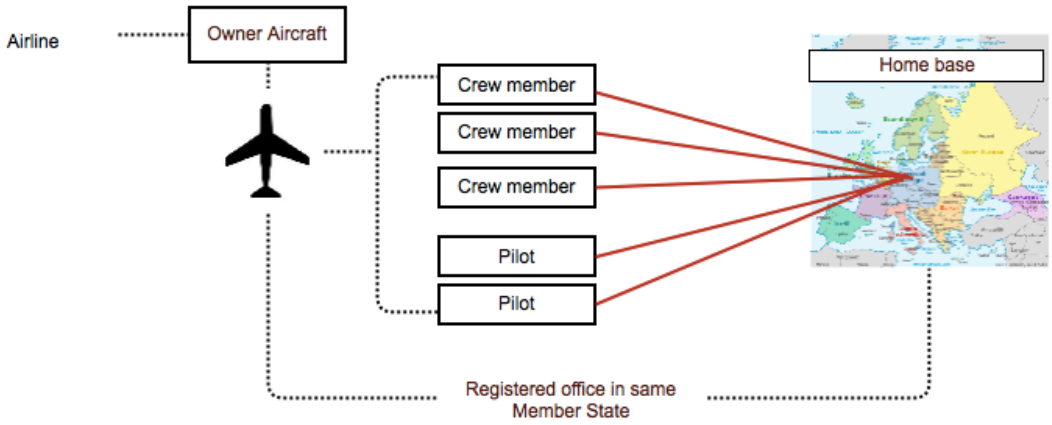

Fig. 11: Wet-leasing

However, what with a Community operator not "*retaining all the functions and responsibilities prescribed in Subpart C*"? Furthermore, Article 2 of said Regulation states: "*For the purpose of this Regulation: (a) 'operator' means a natural person residing in a Member State or a legal person established in a Member State using one or more aircraft in accordance with the regulations applicable in that Member State, or a Community air carrier as defined in Community legislation*". The question remains who will be the operator of a wet-leased aircraft equipped with crew that is not employed by the Community operator outleasing said aircraft? Note that the definition of *wet-lease out* entails the act of providing "an aeroplane and complete crew". It is not stated this crew has to be employed by the Community operator who wet-leases out the aircraft!

[29] OPS 1.165 of Subpart B of Annex III to Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation.

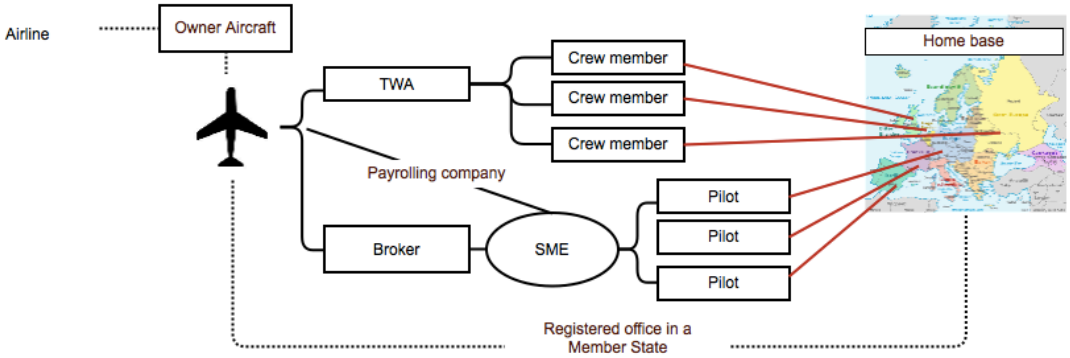

Fig. 12: Wet-leasing in combination with temporary work agency an employment or recruitment agency

We can even imagine a scenario where a number of crew members of the wet-leased airplane do not have a home base in the EU.

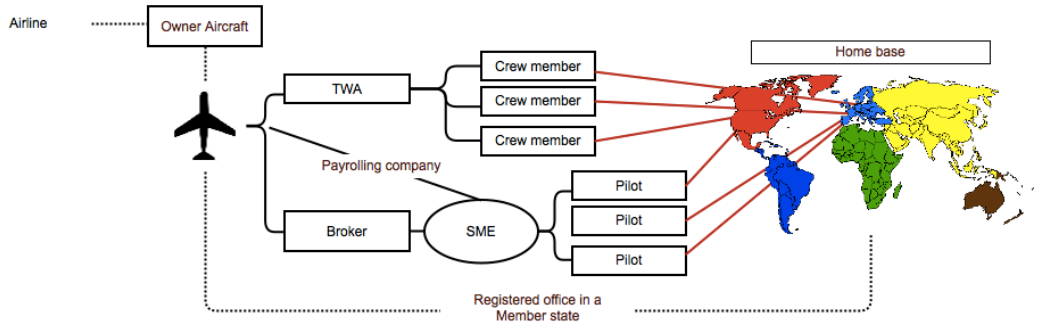

Fig. 3 Wet-leasing – crew members with home base outside of EU

One of the most atypical forms of employment reported to be on the rise in civil aviation actually can no longer be easily considered employment. More and more accounts are reported of airlines making use of the service of pilots by means of so-called pay-to-fly schemes. Pay-to-fly is the situation where a pilot actually pays an airline to fly one of its aircraft, often in order to either obtain or keep enough flight hours required to obtain e.g. a 'type rating' or remain licensed or to get more flight hours either to get a position as first officer or even to get enough flight hours to qualify as captain. It goes without saying that when a pilot *pays* an airline to fly one of its aircraft, questions regarding authority, safety and liability are even more pressing.

3. *Labour law applicable to crew members*

a. Which law applies?

Contracts of air crew members working on international flights are in particular characterised by several international elements. For example, it might be that a pilot or cabin crew member was recruited in country A for an airline registered in country B and flies between countries C and D. Which country's labour law applies to workers in an international/European context is determined by international private law, more in particular the so-called Rome I Regulation.[30] Due to its universal character[31], the rules apply to the nationals of a Member State as well as to nationals of third-party countries and persons with their domicile or residence in the Member States with their domicile or residence in the latter countries. Due to the variety of international connecting factors in the aviation sector, it is far from easy to determine which legislation applies to air crew. The system of reference rules of the Rome I Regulation works with a multi-stage composite connecting factor.

b. Applicable legislation: the options

The parties' choice being the general principle, they have the requisite freedom to determine by mutual consultation which labour law applies to them. Consequently, it is possible to choose any legal system – although they cannot avoid the (overriding) mandatory provisions.[32] As such, it is perfectly legal for a European airline and a crew member to choose the labour law of e.g. an Asian country, with which they have no connection at all, to be applicable to the agreement they conclude. On a side note, at present, there is at least one European airline with crew members based in at least one Asian country. It might be expected that more airlines will follow this example.[33] If the parties have not made a choice

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[30] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Because the Rome I Regulation only applies to contracts concluded after 17 December 2009, the 1980 Rome Convention will continue to be valid for 20 years, for example, so long as we are only dealing with contracts concluded before or 17 December 2009. The European Convention on Contracts will consequently remain applicable for some considerable time to come. It should in any case be noted that, apart from a couple of exceptions, the Rome I Regulation follows the Rome Convention for contracts of employment. What applies for one thus applies for the other.

[31] Article 2 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[32] Cfr. Articles 8 and 9 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[33] Even more so since nothing precludes an operator from designating or assigning a home base outside the EU.

or if this choice is unclear, the worker enjoys the protection of the legislation of the country where he or she works, i.e. the *lex loci laboris*, not in the least because it can be expected that the contract of employment will have a close connection with this country. However, the worker can never lose the protection offered by the mandatory provisions of another country with which there is a close connection. These are those provisions of labour law installed in favour of the employee and which may not be deviated from by agreement. In principle this is the legislation of the country where the worker 'habitually' works, unless the contract of employment is 'more closely connected' to another country. It is self-evident that it is a complicated issue to determine the place where a crew member is (habitually) working on international flights, as by definition they work in different places. According to the CJEU, the place where an employee habitually carries out his or her work is the place where he or she has established the actual centre of his or her working activities and where the employee actually performs the work covered by the contract concluded with his or her employer and from which he or she performs the essential part of his or her duties vis-à-vis his or her employer.[34] Although this case law relates to the jurisdiction of courts[35], the CJEU has interpreted the similar concepts of the two Regulations in the same way, so that there is a certain *Gleichlauf* between both instruments. The *Koelzsch* case is a nice example. This case concerns an employee in the international road transport sector, the contract was signed in Luxembourg, the driver was domiciled in Germany and engaged as an international driver by a company (with no seat in Germany) to transport goods from Denmark to Germany. The lorries were registered in Luxembourg and the drivers were covered by Luxembourg social security law. The question was which labour law was applicable. The CJEU emphasised that it is of importance to take due account of the need to guarantee adequate protection to the employee, the employee being the weaker of the contracting parties. For

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[34] Judgment of 27 February 2002, Weber (C-37/00, ECR 2002 p. I-2013) ECLI:EU:C:2002:122, 44 and 49. The concept 'habitually' implies that the person concerned must perform the substantial part of his or her professional activities there. This does not exclude that the employee also performs occasional activities in another Member State.

[35] In accordance with Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters a claimant, an employee has the following possibilities. First, he or she can always bring the case before the courts of the Member State where the employer is domiciled. Second, and if a State is involved other than the State of the employer's domicile, the employee may also take the case to the courts in the country where he or she habitually works or to the courts of the last place where he or she habitually worked. Or, third, if the employee does not work or has not habitually worked in any one country, he or she may bring the case before the courts where the business which engaged the employee is or was situated.[35]

that reason, the appropriate provisions should be interpreted as guaranteeing the applicability of the law of the State in which he or she carries out his or her working activities rather than the law of the State in which the employer is established. The criterion of the country in which the employee "*habitually carries out his or her work*" must be given a broad interpretation and be understood as referring to *the place in which or from which* the employee actually carries out his or her working activities and, in the absence of a centre of activities, to the place where he or she carries out the majority of his or her activities.

It is also important to mention that the Rome I Regulation already strengthens the application of the legislation of the country of habitual employment as the predominant factor to the disadvantage of the employer's place of establishment.[36] It does so by specifying that the law applicable to an individual employment contract is governed by the law of the country in which or, failing this, from which the employee habitually does his or her work in performance of the contract.[37] This rule was exactly introduced to take into account the situation of the international transport sector and the above described CJEU case law confirms this trend. Thus, the connection is made with the worker's station in order to apply this rule to staff working on board an aircraft if there is a fixed place from where the work is organised and where this staff fulfils other obligations towards their employer, such as checking in passengers or performing safety checks.[38] It is therefore up to the national courts to further investigate and determine which criteria should be considered to give an indication of the habitual place of employment.

In this respect an interesting evolution took place in France. The legislature has intervened to determine the legislation applicable to international air crew by looking to combine the place of habitual work of the air crew with the place where the airline has a stable infrastructure. However, the choice for a (to a certain extent) new conflict rule is not without

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[36] See Y. Jorens, 'Detachering en het individuele arbeidsrecht', in Y. Jorens (ed.) *Handboek Europese detachering en vrij verkeer van diensten*, 2009, Bruges: die Keure. p. 160.

[37] Article 8 (2) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[38] European Commission, Opinion of the European Economic and Social Committee on the 'Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM(2002)654 final', 14 January 2003. On the other hand, bearing the maritime sector in mind, it should be noted that the search for flags of convenience outside the EU can already be observed in the European aviation industry; *cfr* the *Norwegian* example.

danger nor is it deprived of certain loopholes. Exactly in order to reduce the abuse by predominantly foreign airlines, the Civil Aviation Code was amended by a decree which stipulates that the Labour Code is applicable to airlines which have an *operational base* in France.[39] Therefore, the notion of an operational base is conceptually linked to the European notion of home base, and is defined as being a unit or infrastructure from which a company runs an air transport business in a stable, habitual and continuous manner, with employees whose work is centred there. The centre of employment is subsequently defined, in accordance with European legislation pertaining to home base, as being the place where the employee usually works, or where he or she begins working from and returns to after completing his or her tasks. A direct link is therefore set up between the home base and the worker's place of habitual work. Several non-French EU airlines were convicted on the grounds of this décret and subsequently appealed the judgements, arguing that it violated the EU freedom of establishment and free movement of services. The French Court (Council of State) – perhaps sometimes too general – rejected the complaints and elucidated that the Labour Code does not infringe the European provisions on the free movement of services, as it stipulates that the provisions relating to the transnational posting of workers do not apply to companies from another Member State whose activity is directed entirely towards the French territory or is performed in a stable, habitual and continuous way in premises or with infrastructures located on this territory.[40] The reasoning of the French Council of State is, however, not completely free from criticism. According to the CJEU, the rules regarding the free provision of services, applies to service providers not establishing, but temporarily providing services in another Member State. The CJEU stated very clearly that a Member State may not make the provision of services in its territory dependent on adherence to all the conditions that apply to establishment, because that would deprive the Treaty provisions designed to ensure the free provision of services of any useful effect.[41] Full equal treatment must even be considered as a negation of the free movement of services! The temporary

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[39] Décret n° 2006-1425 du 21 novembre 2006 relatif aux bases d'exploitation des entreprises de transport aérien et modifiant le code de l'aviation civile, available at http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000278532&dateTexte=&categorieLien=id.

[40] The Council of State on 11 July 2007 in reply to applications by *EasyJet* and *Ryanair*, which employed flight crew under Irish law on services to and from French airports.

[41] Judgment of 25 July 1991, Säger / Dennemeyer (C-76/90, ECR 1991 p. I-4221) ECLI:EU:C:1991:331, 13; confirmed by *inter alia* judgment of 4 December 1986, Commission / Germany (205/84, ECR 1986 p. 3755) (SVVIII/00741 FIVIII/00769) ECLI:EU:C:1986:463, or Judgment of 26 February 1991, Commission / France (C-154/89, ECR 1991 p. I-659) (SVXI/I-43 FIXI/I-55) ECLI:EU:C:1991:76.

nature of the provision of services must be assessed according to the duration, frequency, periodicity and continuity of the service. This does, however, not mean that a service provider within the meaning of the Treaty may not equip him or herself with some form of infrastructure in the host country (including office chambers or consulting rooms), if that infrastructure is necessary to provide the service in question.[42] The free movement of services therefore does not exclude the situation where an airline sets ups and uses some (infra)structure in another country. Air crew members performing activities for their companies in another country within the framework of the free movement of services are basically posted workers. Therefore, their employment conditions must be looked at from the perspective of the provisions concerning the posting of workers in the framework of the provision of services.[43] Due to this case law Member States have no general or unlimited freedom to declare all the provisions of their labour legislation automatically applicable to employees working there temporarily. It may be deduced from this case law that only a somewhat minimal core of provisions of the country of temporary work can be declared applicable to foreign service providers.[44] These provisions are further elaborated in the Posting of Workers Directive 96/71/EC, which imposes an obligation on the Member States to include a number of provisions in their labour legislation.[45]

The automatic application of the French provision to foreign air crew personnel might therefore infringe the free movement of services. The very difficult question is where the borderline lies between the free movement of services and the freedom of establishment and from which moment it could be said that we are dealing with a company that has a permanent infrastructure in the country. Linking the concept of the *place of the stable and permanent infrastructure* to the concept of the employee's *place of habitual work* is

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[42] Judgment of 30 November 1995, Gebhard / Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (C-55/94, ECR 1995 p. I-4165) ECLI:EU:C:1995:411.

[43] Judgment of 25 October 2001, Finalarte and others (C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98., ECR 2001 p. I-7831) ECLI:EU:C:2001:564, 22.

[44] Judgment of 27 March 1990, Rush Portuguesa / Office national d'immigration (C-113/89, ECR 1990 p. I-1417) (SVX/00389 FIX/00407) ECLI:EU:C:1990:142; judgment of 3 February 1982, Seco / EVI (62 and 63/81, ECR 1982 p. 223) (ES1982/00027 SVVI/00299 FIVI/00311) ECLI:EU:C:1982:34; judgment of 28 March 1996, Guiot (C-272/94, ECR 1996 p. I-1905) ECLI:EU:C:1996:147; judgment of 23 November 1999, Arblade (C-369/96 and C-376/96, ECR 1999 p. I-8453) ECLI:EU:C:1999:575.

[45] See also Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 25 July 2003 on the implementation of Directive 96/71/EC in the Member States COM(2003)458 final. p. 7.

therefore not without any legal danger. In this respect, bogus situations such as the use of letterbox companies to simulate cross-border service provision cannot be treated in the same way as a genuine service provider making use of the free movement of services to provide services in another Member State and making use, in the host Member State, of some infrastructure, necessary for the activities said service provider legitimately and legally deploys in said host Member State. The strengthening of the connecting factor 'place of habitual employment' by widening it to 'the country in which or, failing that, from which', could lead for some to the idea that we are dealing with a general connecting factor for the determination of both court competence and applicable labour law, and at the same time for the determination of the applicable social security legislation. In this respect, the 'country in which or, failing that, from which' would coincide with the concept of home base. Whether this reasoning stands, remains however far from sure.

4. Social security legislation shopping?

Next to the search of the most favourable labour law, legislation shopping can also result from the search of the social security legislation which leads to the lowest social security contributions due. The country where social security contributions should be paid is determined by Regulation (EC) No 883/2004 and its implementing Regulation (EC) No 987/2009. These provisions want to avoid possible complications that could ensue if a person were subject to the social security legislation of more than one Member State at the same time (positive conflict of law), or if a person is left without social security coverage because no legislation is applicable to him or her (negative conflict of law). The main rule is that the person is subject to the legislation of the country of work, the *lex loci laboris,* even if he or she resides in another Member State and — if he or she is an employed person: even if the employer has his or her registered office or place of business in another Member State. When a person pursues activities as an employed or self-employed person in two or more Member States, the general rule of the *lex loci laboris* would not result in the application of just one legislation and an alternative connecting factor should apply.[46] In the situation when a person normally pursues an activity as an *employed* person, the first step is to determine if a substantial part of this person's activity is pursued in the Member State of

[46] Article 13 of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems.

residence. If the answer is yes, the legislation of the Member State of residence applies.[47] If not, then Article 13 (1) (b) of Regulation (EC) No 883/2004 provides that a person normally working in two or more Member States is subject to either (i) the legislation of the Member State in which the registered office or place of business of the undertaking employing him or her is situated if he or she is employed by one undertaking or employer or (ii) the legislation of the Member State in which the registered office or place of business of the undertakings employing him or her is situated if he or she is employed by two undertakings which each have their registered office or place of business in the same Member State.[48]

Air crew members on international flights per definition work in two or more Member States and by definition do not have a fixed place of work and part of their activity is performed outside the territory of a Member State. Moreover, these people work from different starting points, entailing an enormous mobility. It did therefore not come as a surprise that the application of these basic principles raised concerns and gave rise to bogus situations and 'constructions'.

a. The home base: a new specific rule for air crew members

In the past, the applicable legal framework gave airlines operating from Member States with lower social security contributions a clear advantage and provided for ample 'legislation shopping' opportunities. This was even more so since the vast majority of LCCs are *not hub-based,* but on the contrary provide *point-to-point* connections, hence operate from *different 'bases'* in *different Member States*. All that was needed was to either make sure cockpit and cabin crew members did not perform a substantial part of their work in *just one* Member State, or to *post* them from the 'home base', generally located in a Member State the social security contributions of which *cost less* to a Member State where social security contributions represent(ed) a *higher cost.* Airlines could therefore change the applicable legislation by arranging the crew members' flight patterns.

[47] Article 13 (1) (a) of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems.

[48] Article 13 (1) (b) of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems. Article 13 (2) provides a similar rule for self-employed people.

In order to prevent such possibilities, Regulation (EU) No 465/2012, applicable as of 28 June 2012, modified the Coordination Regulations in place.[49] This modification introduced a connecting factor — the 'home base' — a legal fiction aiming to bring more continuity and legal certainty — to determine the social security legislation applicable to cockpit and cabin crew.

However, whether or not the objectives of more legal certainty were reached remains questionable and subject of debate. To define the concept of home base, inspiration was found not in the field of social security but in another, i.e. in Regulation (EEC) No 3922/91 on the harmonization of technical requirements and administrative procedures in the field of (safety of) civil aviation (providing crew members adequate and appropriate resting periods). A home base is defined as "*[t]he location nominated by the operator to the crew member from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal conditions, the operator is not responsible for the accommodation of the crew member concerned*".[50] The starting point is therefore that the concept of home base should be interpreted on the basis of criteria as determined in the aviation sector and that it is agreed between the worker and the employer and not by the social security institutions in accordance with social security criteria. It is therefore the *operator* who has the prerogative to change the crew members' home base, and such at its *own* discretion and *as many times as it wants.*

But are all elements of the concept sufficiently clear? Mindful of the relation between an individual cockpit or cabin crew member with an airline, be it directly or indirectly via an agency, it is of relevance to determine who is to be deemed the operator of (an) air operation(s). Regulation (EEC) No 3922/91 defines an operator as *"a natural person residing in a Member State or a legal person established in a Member State using one or more aircraft in accordance with the regulations applicable in that Member State, or a Community air carrier as defined in Community legislation*" at least "*for the use of this regulation*". From this definition, it cannot be derived that an operator can only be deemed the airline that

[49] Regulation (EU) 465/2012 of the European Parliament and of the Council of 22 May 2012 amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004.

[50] This being identical, at world level, to the definition by the International Civil Aviation Organization.

disposes of the requisite certificates allowing the operator to engage in commercial air transport.[51] Furthermore, does the definition of operator include *the natural person using an aircraft*? To this day, and like it or lump it, it remains legally unclear (although legally not yet disputed) what the exact definition is of 'the operator' who pursuant to the new Article 11 (5) of Regulation (EC) No 883/2004 nominates the 'home base' of the worker, *hence* determines the applicable social security legislation for said worker![52]

b. Issues with regard to the application of Article 11 (5) of Regulation (EC) No 883/2004

The lack of an unambiguous definition of what constitutes an operator for the correct application of Article 11 (5) of Regulation (EC) No 883/2004 renders it difficult for pilots and cabin crew members to determine who is ultimately responsible for the safeguarding of their rights. This is particularly so, in case of intermediary companies such as crew or temporary work agencies, brokers, or the owner of a wet-leased aircraft. The type of contractual relationship (typical or atypical employment) by which an individual crew member is hired will therefore determine the obligations by which the operator/airline will be bound e.g. with regard to the determination of the home base of said crew member.

It has become daily practice that an airline buys the services of a subcontractor from the same or in most cases from another Member State who either provides flight and/or cabin services, provides flight and/or cabin crew members, or wet-leases out an aircraft. If the individual crew member is engaged via an intermediary and/or is self-employed, the operator will not be responsible for the payment of social security contributions.[53] However, if the intermediary does not qualify as an operator, and the airline does, then the airline nominates the home base for said and thus nominate the social security legislation applicable to the worker as well as the Member State where the social security contributions for said worker are due. This raises the question what happens when e.g. a temporary agency worker works for several airlines. If these airlines qualify as operator, then they must

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[51] Referring to an AOC might also prove difficult in those cases were an aircraft is leased. For instance: if an aircraft is wet-leased by an airline (holding an AOC), e.g. operating the wet-leased aircraft under the aircraft's owner's AOC, who is to be regarded as the operator determining the home base of the crew operating the aircraft?

[52] Note that Regulation (EC) No 883/2004 does not provide us with a legal definition of 'operator' that should be used for the interpretation and application of the home base rule introduced in said Regulation.

[53] Regulation (EC) No 883/2004 *in juncto* subpart Q of Regulation (EEC) No 3922/91 (operator shall nominate a home base).

each nominate a home base for this worker. So it is legally possible for a crew member working for different airlines, to have different home bases, in different countries, at the same time. What if an airline uses a plane via a wet-lease agreement (according to which an airplane and the complete crew is provided)? The *operator* will remain accountable for its crew. However, this situation becomes much more complicated if the owner of the aircraft who wet-leases out the aircraft (and thus provides both aircraft and crew) is legally not the employer of the crew members (e.g. crew members are hired through a broker — e.g. the pilots who often are self-employed — or a temporary work agency — e.g. the cabin crew members). On the other hand, if an operator is bound by a lease agreement which does not constitute a wet-lease agreement, the responsibilities will be, amongst others, the subject of the lease agreement.[54] And what with a self-employed air crew member? Could that person decide where his or her home base is situated? The fact that an *operator* (e.g. an airline) would decide where the home base is, could be considered as an indicator of employer's authority and hence of bogus self-employment according to many Member States' national applicable legislation. After all, it is the employer that at his or her own discretion decides where the home base is situated, which can lead to a swift change of the home base.[55]

And even when we have defined who the operator is and how to deal with the different employment relationships, the question remains where the home base is to be situated *over time*. After all, the definition given to this concept does not limit the number of home bases that an individual crew member may have *over time* and does not even exclude that he or she has a home base in different Member States, nor does it limit the way and number of times a home base may be changed.

Consequently, a different home base even in another Member State can be assigned. As such this is not surprising, as exactly air crew members working on international flights by definition perform activities in more than one Member State and the aviation regulations the social security regulations refer to do not exclude home bases in more than one Member

[54] Annex III, Subpart B of Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation.

[55] This possibility may even be greater in cases of outsourcing crew services. The place of employment in some countries might be considered an essential part of the terms and conditions of the employment agreement and e.g. in Belgium, the unilateral change of an essential condition can give rise to a breach of contract indemnity claim or even be considered a dismissal formally unsound.

State. Moreover Recital (18b) to Regulation (EC) No 883/2004 explicitly entails this possibility.[56]

Hence, operators have the possibility to change the designation or assignment of air crew members to (a) different (home) base(s). This is in particular possible in case of temporary assignments or in case of assignment of different home bases over a short period of time. But there is more: the *operator* nominates[57] the crew member's home base *and thus* the social security legislation applicable to the crew member(!) — whatever position vis-à-vis social security legislation this crew member adheres to (employee, self-employed, temporary agency worker etc.). Moreover, the operator can *change* the home base of the crew member, without such a change of home base *ipso facto* resulting in changes of applicable legislation if this new home base is located in a different Member State. These rules seem to indicate that, as a response to the industry's work patterns or seasonal demands involving short assignments and in order to guarantee stability in the applicable legislation, the posting provisions might apply. Nevertheless, it is a well-known fact that the variation in seasonal demands is, when it comes to crew allocation, a bigger problem in a point-to-point business model than in hub-based airline models. Here, the allocation of personnel to another line will not as often result in a change of home base, the home base in the majority of cases being and remaining to be the hub.[58]

In the near future Regulation (EU) No 83/2014 will bring about a minor change to the concept home base. The new definition of the concept home base after its entry into force (it will apply from 18 February 2016) states: "*'home base' means the location, assigned by the operator to the crew member, ….*" .[59] The difference is that the location is no longer *nominated* by the operator, but *assigned*. The difference in wording would result in the

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[56] "However the applicable legislation for cockpit and cabin crew members should remain stable and the home base principle should not result in frequent changes of applicable legislation due to the industry's work patterns or seasonal demands."

[57] In the future: 'assigns' (see *infra*,).

[58] Nevertheless, as a result of the higher demand of seats in specific seasons, hub-and-spoke airlines often suffer shortages of flight crew members on specific moments.

[59] ORO.FTL.105 Definitions (14) of Section 1 of Subpart FTL to be added to Annex III to Regulation (EU) No 965/2012 as contained in Annex II to Regulation 83/2014. Note the only difference with the previous definition.

positive consequence that only one home base at the same time is possible.[60] Whether these changes will resolve all issues remains to be seen and in our view is highly debatable.

C. Conclusion

After having described in the previous part, some challenges and trends the aviation sector is confronted with, we would like in this part to describe some general conclusions that in our opinion need further reflection and legal and political actions.

1. Social security law: towards a new rule or connecting factor for air crew?

The core of European civil aviation legislation stems from the pre-liberalisation era. In this era, typical employment was about the only form in which crew members were working for airlines, which then where mostly national airlines registered in and mainly operating from the country of their nationality. At the time the home base was introduced as a connecting factor in the European coordination regulations for social security expectations were rather high and it was considered an important step into the direction of a solution. However, making the direct link between the aviation regulations and the social legislations turned out not to be without any risk. In the meantime, both the civil aviation industry as well as the business and management models have continued to change significantly, to the extent that one could say the home base rule actually provided for new means of setting up subcontracting chains. Subcontracting chains, although not *ipso facto* bogus, illegal or unwanted – e.g. wet-leasing, a for civil aviation typical form of subcontracting – are often used to 'hide' bogus constructions and often result in social dumping. Under the new definition of home base introduced by Regulation (EU) No 83/2014, the operator will no longer *nominate* but rather *assign* a crew member a home base. Whether this change will solve the existing issues is not really clear. Even after the introduction of the change, it will still be possible for crew members working for multiple airlines — e.g. temporary agency workers or self-employed crew members — to have different home bases, even in different

[60] See CS ORO.FTL.200 Home Base and CS FTL.1.200 Home Base.

Member States. An operator would still be able to change the home base assigned to a crew member.[61]

Last but not least, even the new home base rule will not resolve the growing issue of European-based operators to assign home bases *outside* the European Union.[62] In fact, this practice allows for new forms of evasion: for the determination of the social security legislation applicable to a crew Member with a home base outside the European Union, the home base rule would not easily apply, since it falls outside the EU. In most cases, the application of the coordination rules in these circumstances would mostly result in the legislation of the Member State of establishment of the airline being applicable, whereas the home base rule was adopted to avoid this kind of results! Moreover, if this practice is on the rise,[63] it should be feared that as a result, civil aviation, much like the maritime sector, will not only see the emergence of flags of convenience but also crews of convenience, the paramount of social dumping.

The similarities between the aviation and the civil maritime sector should raise an intense sense of urgency, more specifically with regard to flight safety, fair competition and workers' rights. Placing home bases outside the EU is yet another indicator that the home base rule has already become obsolete and is not up to the rapidly changing 'business models' and contemporary cost-cutting legal engineering techniques.

In this respect, the Open Skies Agreements on the one hand almost literally opens perspectives. On the other hand, it is clear the Open Skies Agreements present clear and

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[61] The Certification Specification on home base expressly provides for a changing of the home base Furthermore, the Certification Specifications allow derivations and it can be argued if legally, they have any effect at all within the domain of social security legislation (cfr. EASA opinion of September 2012, in which EASA acknowledged the fact that operators can get a derivation pursuant to Article 22 (2) of Regulation (EC) No 2016/2012: European Aviation Safety Agency, 'Opinion No 04/2012 of the European Aviation Safety Agency of 28th September 2012'. p. 16. Available at http://www.easa.europa.eu/system/files/dfu/EN%20to%20Opinion%2004-2012.pdf).

[62] See e.g. recent cases of *Norwegian Air Shuttle* (through its subsidiaries, *Norwegian Long Haul AS* and *Norwegian Air International Limited*) and *Primera*. See also e.g. *Vueling* reportedly assigning planes and crew members to fly routes in South America during the low season in the EU.

[63] See e.g. 'Practical guide: The legislation that applies to workers in the European Union (EU), the European Economic Area (EEA) and in Switzerland', European Commission, 2013. p. 33.

present challenges, new Flags of Convenience and Crew of Convenience techniques involving third countries only being the dawn thereof.

As we discussed before, to a certain extent the idea of the home base is encouraged, as it might be seen as leading to a *Gleichlauf* (convergence) between the home base as a connecting factor for the determination of the applicable social security legislation and the interpretation of the CJEU of the 'place of habitual work' in the field of labour law and court competence, thus in the end providing for a connecting factor for both the applicable labour law provisions and social security legislation. In labour law there is a clear tendency to strengthen the place of habitual work as the connecting factor. However, the road to such a *Gleichlauf* between labour law and social security legislation is not without political hurdles and legal impediments, not in the least since social security law and labour law envisage other interests and the conflict rules in both domains have different starting points.
One might envisage the idea of a new connecting factor for crew members in the civil aviation sector as for highly mobile workers in general.

In our view, the place of residence of crew members should not be taken into account, since this will result in bogus residences, which can easily be set up, even more so in the case of highly mobile workers, and which cannot always be easily monitored. The choice for the place where the employer is based as a connecting factor is even more problematic and a return to the problems of the past.

2. Direct employment vs genuine self-employment and genuine self-employment vs bogus self-employment

Currently, civil aviation legislation does not take into account the prevalence of different forms of atypical employment and the constructions of social as well as fiscal engineering. As a result, the competition nowadays is a true race to the bottom, which affects fair competition and workers' rights as well as raises important issues in the field of safety and liability. Unfortunately, finding efficient legal means to tackle bogus situations is far from as easy as we would like, the prevalence of bogus situations being the saddest proof of this.

The question can be raised whether pilots can operate an aircraft as a service provider (either as a self-employed person or as a shareholder of a company). Or the question can also be whether, rather to the contrary, the number of cases in which this is allowed should be limited (e.g. training exercises, air taxi services etc.). Asking these questions, we bear in mind that when a prohibition of subcontracting is introduced the operation of an aircraft will face some important legal issues that will need to be tackled and that such will not be an easy matter, neither legally nor politically (e.g. since wet-leasing, which can be considered a form of subcontracting specific to aviation, is a widespread practice that is both legally and generally accepted and applied). Is there not a risk that this would mean throwing away the baby with the bathwater? To what extent might it be said that the profession of pilots is so different from other professions that self-employment should be excluded by definition? Is it because one is of the opinion that pilots normally only fly for one specific type of airplane?

The emergence of atypical employment relationships raises issues about the protection of the persons concerned. Most of the Member States recognise a dual classification or binary divide within the concept of 'labour relations': workers/employees on the one hand and self-employed on the other. However important this binary divide might be for the persons concerned, due to the changing economic reality and the growing prevalence of business models depending on outsourcing, it has become a far from easy task to classify persons under one or the other category. The difficulties in distinguishing between employees and self-employed should, however, be clearly distinguished from the deliberate miss-classification of (self)-employment. The demarcation between on the one hand direct employment/genuine self-employment and on the other hand genuine self-employment/bogus self-employment is, however, difficult to draw, not least due to the blurring of the distinction between these categories. The difficult fight against bogus self-employment deals with the question how to correctly assess and legally classify employment using the tools provided by legislation or prescribed by case law. Special measures to combat bogus self-employment in the aviation sector have hardly been taken, and if they are, raise concerns about the compatibility with European law.

When handling the phenomenon of bogus self-employment, Member States could perhaps find some inspiration and guidelines in an EU context. It is worthwhile to refer in the first

place to the new Enforcement Directive.[64] The Enforcement Directive is aimed at strengthening the means to tackle bogus situations, bogus posting of workers constructions as well as what is referred to in Recital 10 of said Directive as 'false self-employment'. The Enforcement Directive provides some indicators — performance of work, subordination and remuneration — for the fight against bogus self-employment.[65] These elements are however "*indicative factors in the overall assessment to be made and therefore shall not be considered in isolation*". Each case will still have to be judged on its particular merits and the fight against bogus situations will still highly rely on the measures adopted by the Member States in their national legislation or the interpretation by the national courts.

In the second place it could e.g. be deducted from the case law of the CJEU[66] that clear precedence is given to the facts, more than to the formal (written) qualification *inter parties* of a contractual employment relationship. The CJEU also refers to *certain* elements – such as the freedom to choose the timetable, the place and content of the work. These elements can often also be found in measures different Member States have introduced in their national legislation.

However, some caution is in order, since some of these criteria, depending on the specifics of the sector and the work concerned, may be directly influenced by the economic activity and business environment. In this case the employer or client does not enjoy the freedom of choice with regard to such criteria. Such is also the case in particular situations in the aviation sector. For instance, the fact that a pilot cannot choose his or her hours freely, that he or she has to fly at certain moments, follows first of all from the peculiarity of the civil aviation sector (timeslots) rather than from the authority of an employer. On the other

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[64] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative co- operation through the Internal Market Information System ('the IMI Regulation').

[65] Article 4 (5) of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation').

[66] Judgment of 13 January 2004, Allonby (C-256/01, ECR 2004 p. I-873) ECLI:EU:C:2004:18. See (in the context of the free movement of workers) judgment of 8 June 1999, Meeusen (C-337/97, ECR 1999 p. I-3289) ECLI:EU:C:1999:284. See recently in the context of companies and competition law judgment of 4 December 2014, FNV Kunsten Informatie en Media (C-413/13) ECLI:EU:C:2014:2411 ; Judgment of 11 November 2010, Danosa (C-232/09, ECR 2010 p. I-11405) ECLI:EU:C:2010:674

hand, the authority a pilot has with respect to e.g. safety stems directly from aviation regulations and can therefore not *ipso facto* be regarded as the absence of subordination. The same is true for fighting bogus (cross-border) subcontracting constructions. The fact that the service provider does make use of some infrastructure in the host Member State does not ipso facto mean that said provider is established there. In that respect, every case of bogus self-employment or bogus subcontracting should be the subject of a 'simulation test' which takes into account all relevant facts and elements and the relation between those facts and elements. If an airline is actually established in a Member State but stating to be providing services within the framework of the free movement of services, this would come down to simulation, which probably entails violations of fiscal, labour and social security legislation.

Furthermore one might not forget that bogus constructions are like communicating containers: if you put pressure on only one container, the volume in that particular container may decline, but it will decrease in the other container(s). In this respect, fighting bogus self-employment hastily without taking effective measures against the abuse of other means of setting up bogus constructions, e.g. through the use of company law structures or through basing planes and crew in third countries, bares the risk of merely fighting symptoms without curing the disease.

An issue of importance in this respect is the pilot authority and the relation to employer authority, and the impact on subordination. The pilots' positions vis-à-vis such airlines being so weak, pilots often refrain from acting upon their authority with regard to flight safety regulations and issues (illness, fatigue, fuel etc.) and such regardless of the fact whether this crew member is typically or atypically employed. In our view, whether there is or is not a relation of subordination, is the most important issue at present, more than the legal form of cooperation between the pilot and the airline is *dependency* of the crew member, particularly the pilot, vis-à-vis the airline said crew member is flying for. As such, both an employee as well as a self-employed person who is dependent on the airline and as such refrains from acting upon the authority legally bestowed upon him or her is a safety hazard and is incompatible with rules and regulations on Flight Time Limitations, Crew Resource Management, Safety Management Systems and a so called 'Just (Safety) Culture'. Hence, the

management style of the airline is in our view an issue as big — if not bigger — than bogus situations. This does not mean that bogus situations should not be tackled. On the contrary, *mala fide* management styles and bogus situations often go hand in hand and the enforcement of efficient management safety systems as well as the enforcement of a Just Culture will leave *mala fide* managers much less room for manoeuvring.