



European Platform  
tackling undeclared work

# **Tackling undeclared work in the air transport sector, with a special focus on bogus self-employment of aircrews: a learning resource**

***Professor Peter Turnbull***  
**University of Bristol, UK**

A learning resource from the seminar of the European Platform  
tackling undeclared work

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## SUMMARY

On 19 February 2020, the European Platform tackling undeclared work organised a seminar in Brussels on 'collaboration between competent authorities to tackle undeclared work in the air transport sector, with a special focus on bogus self-employment of aircrews'. The seminar brought together 49 participants from 21 countries representing labour inspectorates and social security, tax and customs authorities, national and European social partner representatives from the air transport sector, and the European Commission.

The intention was to provide participants with an opportunity to exchange knowledge on how to tackle undeclared work in the air transport sector. This exchange of knowledge, alongside the background paper (Turnbull, 2020) and other sources of useful information, in particular different legal definitions of employment/self-employment in Member States, inform this learning resource.

The first section of the learning identifies the drivers and considers the prevalence of undeclared work in the air transport sector; section 2 focuses on the legal status of aircrew in Europe; finally, section 3 discusses the available policy approaches to tackle undeclared work in the air transport sector, particularly in relation to bogus self-employment.

### Key findings:

- **Self-employment is a relatively new phenomenon in air transport.** Although it appears to be confined to a small number of commercial airlines and only a proportion of their flight crew, it has led to growing concerns for Member States to ensure the applicable tax, social insurance and job protections.
- **There were diverging views mainly among social partner organisations** on whether pilots could be genuinely self-employed, in particular when working for the same airline over an extended period.
- As the air transport sector is typically considered to be a 'low risk' sector by the national authorities at least in terms of number of possible infringements, **there are only few cases of labour inspection.** Furthermore, airport security restrictions can sometimes make it difficult to secure access to aircraft and relevant information is not always available (e.g. when self-employed pilots are hired via an agency).
- **The different definitions, language and criteria to determine (bogus) self-employment adopted by Member States** result in legal uncertainties and contribute as well to difficulties in informing companies about how to be compliant.
- **Other key challenges to tackle undeclared work in the air transport sector** include determining the prevalence of undeclared work in the sector, and also the low number of actions started by the aircrew to bring cases before the relevant authorities. Several hypotheses have been advanced as a reason including the fear of job loss or other sanctions (e.g. fewer flights and lower earnings); the length and cost of the processes as cases are settled in courts; and the lack of 'class action' (i.e. self-employment of aircrew is determined on a case-by-case basis by the competent national authorities).
- It is important to **continue the social dialogue and to involve social partners** in tackling undeclared work in air transport. There is a need to continue efforts to find 'common ground' between airlines and representative trade unions, both at national and European levels, and the reconvened Sector Social Dialogue Committee for Civil Aviation can address these issues in future meetings.
- **National cooperation** between all the relevant actors (i.e. social security institutions, labour inspectorates, civil aviation authorities, prosecution services, social partners, tax departments etc.) is crucial in order to collect evidence and effectively determine the correct employment relationship. This also needs political will and trust in the relevant institutions.

- There is a need for more **European cooperation**, at least with respect to how to interpret and enforce existing European legislation in the air transport sector and how to issue, use and withdraw A1 certificates. The recently established expert group to look at social matters related to aircrews, set up by the European Commission, the recent Directive on Transparent and Predictable Working Conditions (2019/1152), as well as the work of the new European Labour Authority (ELA) including on joint and concerted inspections will contribute to this.
- **The use of direct controls** contributes to improve detection (e.g. a 'checklist' of criteria for labour inspectors to determine self/employment status) and facilitate compliance (e.g. clarification of the law on self-employment or the introduction of a national 'code of practice'). The scale of financial penalties for bogus self-employment varies markedly across Member States and the effectiveness of fines as a deterrent is not clear. While fines are targeted at employers, self-employed pilots may find themselves with an unpaid tax bill. This might discourage pilots to raise any concerns they might have about their employment status, social payments, tax code, etc.
- **Awareness-raising activities** involving both labour inspectorates and social security/tax agencies have proven effective measures to provide greater clarity and certainty for workers and to enable them to reach a more informed decision regarding the contractual terms and conditions of self/employment and the impact on their rights and benefits.

# 1 THE DRIVERS AND PREVALENCE OF UNDECLARED WORK IN THE AIR TRANSPORT SECTOR

## 1.1 Air transport in the Single European Aviation Market (SEAM) and the emergence of atypical forms of employment

With the creation of a Single European Aviation Market (SEAM) in 1997, following three reform packages (1987, 1990 and 1992) that opened the market to new entrants, the market for intra-European air travel increased dramatically.<sup>1</sup>

Air transport is now a highly cost-sensitive sector. This puts a particular pressure on labour costs as many other costs are beyond the immediate (short-term) control of the airline (e.g. aircraft, airport charges, and aviation fuel). Air transport is not only subject to the vagaries of external events such as terrorist attacks (e.g. 9/11), financial crises (e.g. post-2008) and epidemics (e.g. SARS and Covid-19), it is also pro-cyclical<sup>2</sup> and highly seasonal. Low cost carriers (LCCs),<sup>3</sup> in particular, experience much greater variation in demand between the high and low season, with summer profits off-setting winter losses<sup>4</sup>.

Cost competition and the 'ups and downs' of the airline industry put a premium on more flexible (atypical) forms of employment. Some flexible employment arrangements are long-standing and widely used (e.g. wet leasing<sup>5</sup> and temporary aircrew to cover the peak summer season) whereas others are more recent in origin (e.g. self-employment and 'pay-to-fly'<sup>6</sup> contracts).

Recent surveys demonstrate that the majority of European aircrew hired on 'atypical' contracts work for a LCC, with the vast majority contracted through an intermediary.<sup>7</sup> The latest study for the European Commission found that while one LCC hired the majority of its pilots on a 'self-employment' contract, all other LCCs hired fewer than 4 % (Ricardo, 2019: ix and 103-4). This study also concluded that the majority of pilots who identified themselves as 'self-employed' could not be classified as genuinely self-employed as 90 % were not free to work for more than one air carrier in parallel and 93 % had no control over when and how many hours they fly.

The question of whether these contracts thereby constituted 'bogus' self-employment was the primary focus of the Platform seminar tackling undeclared work in air transport.

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<sup>1</sup> The Seminar took place before the worldwide collapse of air travel due to the COVID-19 pandemic. The impact of the pandemic is briefly summarised in the Appendix.

<sup>2</sup> Sectors that follow a pro-cyclical pattern of demand tend to grow at a faster rate than general economic growth of GDP, and decline further and faster during periods of economic downturn and recession.

<sup>3</sup> The low-cost business model involves point-to-point services (no interlining) to predominantly secondary/regional airports, a single aircraft type with high seat density (less leg room), high aircraft utilisation (rapid airport turnaround) and direct selling (telesales and internet) of one-way fares with additional payment for different service items (e.g. checked baggage and in-flight food and drinks) (Turnbull, 2020: 4).

<sup>4</sup> Based on OAG data for 2011, a comparison between the lowest monthly flight capacity expressed as a percentage of the highest monthly flight capacity illustrates significant differences between LCCs and legacy airlines.

<sup>5</sup> A wet lease is a leasing arrangement whereby one airline (the lessor) provides an aircraft, complete crew, maintenance, and insurance to another airline or other type of business acting as a broker of air travel (the lessee), which pays by hours operated.

<sup>6</sup> So-called 'pay-to-fly' schemes typically refer to a situation where, in order to gain the requisite flight experience, a pilot will pay an airline for line training (flying under supervision) on a commercial (revenue earning) service. There is no commonly agreed definition of pay-to-fly at EU level, nor any clear information on whether such schemes are widespread within Europe (European Commission, 2019a: 5).

<sup>7</sup> Estimates range from anywhere between 9 % and 21 % of all aircrew employed on 'atypical' or 'self-employment contracts' (see, *inter alia*, European Commission, 2019a; Jorens et al, 2015; Melin et al, 2018; Reader et al, 2016; and Ricardo, 2019). Pilots on atypical contracts tend to be younger, typically under the age of 30 years.

## 1.2 The nature of undeclared work in air transport

Undeclared work is defined as 'any paid activities that are lawful as regards their nature but not declared to the public authorities, taking into account the differences in the regulatory system of Member States'.<sup>8</sup>

The seminar on air transport focused specifically on the question of **bogus self-employment<sup>9</sup> of aircrew**.<sup>10</sup> Bogus self-employment is commonly understood as involving persons/workers registered as self-employed whose conditions of employment are *de facto* dependent employment.<sup>11</sup> This (bogus) employment status might be used to circumvent tax and/or social insurance liabilities, or employers' responsibilities with respect to workers' employment rights.

National legislation and/or court decisions determine self-employment status. In some Member States, there are far-reaching presumptions in favour of an employment relationship, as documented in Box 1. Even if no statutory presumptions exist, which is the case in many European countries, the existence of certain factors, most notably 'subordination', may prompt national courts to decide that a given relationship is an employment relationship.

One of the principal indicators of subordination is control, as employers need the power of direction to ensure that work is performed to the required standard at the required time and place.

### Box 1. Legal presumptions in favour of employment

**Romania** - the Labour Code (Article 40(1) lit.d) explicitly stipulates: 'The employer has the right to exercise control over the manner in which the work is performed.'

**The Netherlands** – Two legal presumptions were included in the Flexibility and Security Act (1998) with a view to strengthening the legal status of flexi-workers. If an employee works for an employer on a regular basis for a period of three months (weekly or at least 20 hours/month), then the law automatically presumes that a contract of employment exists.

**Portugal** – Article 12 of the Labour Code states that: 'the existence of an employment contract is presumed when, in the relationship between the person that provides an activity and the other (or others) that benefit from it, some of the following elements occur: a) the activity is held in a place that belongs to the beneficiary of the activity or in a place determined by him; b) the equipment and working tools belong to the beneficiary of the activity; c) the person that provides the activity complies with a specific time to start and finish the supply, as determined by the beneficiary; d) an amount is paid to the provider, with a certain regularity, in return for the activity performed; e) the provider performs management or leadership functions in the company.'

<sup>8</sup> Such work is not declared to the public authorities for the purposes of taxation, social security, and employment law/workers' rights. Go to: <https://ec.europa.eu/social/main.jsp?catId=1298&langId=en>

<sup>9</sup> Also referred to as 'false self-employment' or 'dependent self-employment'. There is no definition of bogus self-employment at European level. The OECD (2000) has described 'bogus' or 'false' self-employment as consisting of 'people whose conditions of employment are similar to those of employees, who have no employees themselves, and who declare themselves (or are declared) as self-employed simply to reduce tax liabilities, or employers' responsibilities'. See the *Report of the Plenary and Workshops Relating to Bogus Self-Employment*, Second plenary meeting of the European Platform tackling undeclared work, 9-10 March 2017. Go to: <https://ec.europa.eu/social/main.jsp?pager.offset=5&catId=1495&langId=en>

<sup>10</sup> The work of aviation ground staff is closely regulated by airport and aviation authorities and there are very few reported cases of undeclared work. Nonetheless, it was evident from the presentation by the Hellenic Labour Inspectorate that undeclared work is still a concern in major airports such as Athens International Airport.

<sup>11</sup> In some Member States, a person is an 'employee' if s/he performs 'dependent work'. In the Czech Republic, for example, the statutory definition of 'dependent work' is contained in Section 2(1) and (2) of the Czech Labour Code. According to Section 2(1), 'dependent work' is work performed in a relationship of employer superiority and employee subordination, carried out in the name of the employer, according to instructions of the employer and the employee shall perform it in person. According to Section 2(2), 'dependent work' shall be carried out for a wage, salary or remuneration for work, at the employer's costs and liability, during working hours at the employer's workplace, or at another agreed site.

When airlines first started hiring pilots on 'self-employment' contracts, they were typically hired as individuals, via an agency, to work exclusively for a particular airline (client) on a 'zero hours' basis.<sup>12</sup> This particular method of hiring was considered incompatible with some of the key criteria used to determine 'self-employment' (a contract *for* services) as opposed to 'employment' (a contract *of* service) in several Member States. For example, does the pilot own his or her own business and is the pilot able to provide a substitute (i.e. is the pilot free to hire other pilots, on his or her terms, to do the work which has been agreed to be undertaken)?

In the face of scrutiny by the tax authorities and legal challenges in the labour courts, new contractual arrangements have been introduced by several airlines, in an attempt to preserve the legal presumption of 'self-employment'. Consequently, although they still supply their services via an agency, today it is more common for 'self-employed' pilots to work through the intermediary of a 'pilot employment service provider' (PESP) of which they are a member (shareholder) with several other (self-employed) pilots.<sup>13</sup> Even this arrangement, however, may not be compliant with the law in some Member States (e.g. Luxemburg, Germany).<sup>14</sup>

In Member States where this arrangement is incompatible with national employment and/or tax laws, direct employment is circumvented by requiring pilots to work for the airline as contractors under an 'umbrella company'.<sup>15</sup>

Where bogus self-employment exists, this often leads to other forms of undeclared work, such as under-declared work as well as tax and social security fraud.<sup>16</sup> For example, some airlines calculate aircrew pay on the basis of 'per scheduled block hour' (PSBH) (i.e. the scheduled flight time between 'blocks-off' ready for take-off and 'blocks-on' after landing when parked at the gate); but the actual flight time is often longer than the scheduled flight time due to weather conditions, (re-)routing, airport congestion, etc. When cabin crew are required to clean the aircraft during the short (20-30 minutes) turnaround at the destination airport, their work is unremunerated.

Under-declared work can be more difficult to determine when the habitual place of work of aircrew is not respected or when aircrew are not considered as 'posted workers'.<sup>17</sup> A posted worker is an *employee* sent by his/her employer to carry out a cross-border service in another EU Member State on a temporary basis under the freedom of provision of services. Bogus self-employment might be used to circumvent the legal right of posted workers to a set of core rights in force in the host Member State, including minimum rates of pay/remuneration, maximum work periods and minimum rest periods, minimum paid annual leave, and occupational safety and health. In some (bogus self-employment) situations,

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<sup>12</sup> A typical clause in the contract would state that: "*While the Contractor [agency] will use reasonable endeavours to locate or offer the Work, the EC [pilot's self-Employment Company] acknowledges that the services of the company representative are provided on an as required and/or casual basis and there is no obligation upon the Contractor [agency] to locate or offer the Work.*"

<sup>13</sup> A common procedure is that when a pilot accepts her or his contract, s/he must choose from a limited group of approved accountants to assist them with their business. These accountants will typically use a pre-existing limited company in which the pilot is made a director and allocated up to 16 % of the company shares along with a number of other directors whose identities are not disclosed to each other. In addition, the 'self-employed' (contractor) pilot cannot use this limited company for anything other than working with the airline in question. The pilot's hours worked are provided by the airline through the agency to the accountants. Pilots submit their 'expenses' each month to the accountant who prepares the required company documentation.

<sup>14</sup> In Luxembourg, for example, a contractual clause permitting an employee to subcontract his or her work will not, in itself, render an employment contract one of self-employment. Rather, such a clause will be invalid where other criteria demonstrate that an employment relationship exists (see CSJ, IIIe, 6 November 2003, No. 26971; and CSJ III, 24 May 2007, No. 31536).

<sup>15</sup> Umbrella companies act as an employer to workers who work under a fixed-term contractual arrangement with an external client (typically 2 years for aircrew but in some cases, up to 5 years for flight crew). The worker is not employed by the external client (airline) but by the umbrella company. The umbrella company allows the worker to work as an 'employee' rather than having to register as a business/self-employed.

<sup>16</sup> In evidence to Ireland's Joint Oireachtas Committee on Employment Affairs and Social Protection (hearing on Bogus Self-Employment, 20 June 2019), the Irish Air Line Pilots' Association (IALPA) estimated that, with somewhere in the region of 2,000 Irish-registered pilots working as 'self-employed' contractors, this could cost the State around €15-16 million per year in employers' PRSI (pay-related social insurance) alone.

<sup>17</sup> Directive 2014/67/EC on the enforcement of Directive 96/71/EC concerning the posting of workers.

therefore, aircrew based outside their 'home country' might be paid according to the lower wage of their country of origin rather than in accordance with the host country's wages and labour rights.

### 1.3 The prevalence of undeclared work in air transport

Undeclared work is a recent and not yet an especially widespread phenomenon in air transport. Cases of undeclared work for pilots are confined to only a proportion of flight crew of just a few commercial airlines.

The precise number of bogus self-employed pilots, *de facto*, is 'unknown'. In part, this is because labour inspection is limited in air transport and very few cases have been brought before the courts. Additionally, recent studies on atypical employment in air transport have relied on non-probability sampling methods to estimate the nature and extent of self-employment and other employment arrangements typically associated with undeclared work.<sup>18</sup>

Nonetheless, while the precise number of self-employed pilots or cabin crew hired by temporary work agencies is 'unknown', some participants at the seminar acknowledged that atypical employment arrangements in general, and bogus self-employment in particular, is fuelling cost-competition between airlines.

Given the transnational nature of air transport, the sector is especially exposed to potential non-compliance with applicable law and misapplication of EU legislation, principally because both capital (aircraft) and labour (aircrew) are highly mobile. Consequently, it is not so much the prevalence as the negative effects of undeclared work that causes most concern for aircrew and airlines alike.

Social partners disagree on some aspects relating to self-employment in this sector. The European Transport Workers' Federation (ETF),<sup>19</sup> professional pilot associations represented by the European Cockpit Association (ECA)<sup>20</sup> and the airlines represented by the Airline Coordination Platform (ACP)<sup>21</sup> consider that genuine self-employment is not possible given the nature of the work performed and, additionally, regard self-employment as incompatible with the (safety-critical) role of aircrew. Consequently, they consider that it should not be allowed in this sector.<sup>22</sup> Airlines that employ pilots on 'self-employment' contracts take a very different view, arguing that such contracts are compatible with particular national employment standards, which thereby allows both the companies and the staff to take advantage of the open.

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<sup>18</sup> See, for example, European Commission (2019a), Jorens et al (2015), Melin et al (2018), Reader et al (2016) and Ricardo (2019). Non-probability sampling does not involve random selection, which means that researchers may or may not represent the population well (with a probabilistic sample, we know the odds or probability that we have represented the population well). In applied social research there may be circumstances where it is not feasible, practical or theoretically sensible to follow random sampling methods. Instead, researchers follow a 'purposive' sampling method that targets specific groups (e.g. pilots). With a purposive sample, researchers are likely to access the opinions of their target population, but they are also likely to overweight subgroups in the population that are more readily accessible (e.g. union as opposed to non-union pilots, West European as opposed to East European pilots).

<sup>19</sup> The ETF represents over 5 million transport workers in 41 countries, including 350 000 workers in civil aviation.

<sup>20</sup> The ECA represents 41 000 pilots from the national pilot associations in 33 European states.

<sup>21</sup> ACP was established to advocate for fair competition in the European aviation sector, with a specific focus on social affairs and external air political relations. It represents the following airlines: Air Dolomiti, Air France, Austrian Airlines, Brussels Airlines, Croatia Airlines, KLM, Lufthansa, Lufthansa Cargo, SAS and TAP Air Portugal.

<sup>22</sup> For the joint positions of ACP, ECA and ETF on the social agenda for European aviation and the enforcement of the applicable law to aircrew go to: <https://www.etf-europe.org/wp-content/uploads/2018/10/ACP-ECA-ETF-Statement-Social-Dimension-EU-Aviation.pdf>; and [https://www.eurocockpit.be/sites/default/files/2019-12/ACP\\_ECA\\_EurECCA\\_joint%20views\\_applicable%20law\\_F.pdf](https://www.eurocockpit.be/sites/default/files/2019-12/ACP_ECA_EurECCA_joint%20views_applicable%20law_F.pdf) Some national aviation laws explicitly preclude self-employment. The Brazilian Flight Crew Law (Law nº 13.475/2017), for example, establishes that, for commercial flights, the paid function of the crew members on board an aircraft must be formalised by an employment contract signed directly with the aircraft operator. For private flights, the pilots or cabin crew members may only perform a paid function on board the aircraft of an operator to which s/he is not directly bound by an employment contract when the air service: (i) does not constitute a core activity, and (ii) provided that it is only for a period not exceeding 30 consecutive days, counted from the start date of the provision of services. This remunerated service may not occur more than once a year and must be formalised by a written contract, under penalty of the presumption of employment of the crew member directly with the aircraft operator.

## 2 THE LEGAL STATUS OF AIRCREW

While participants at the seminar agreed on the need for a **holistic**<sup>23</sup> approach to undeclared work, there were different opinions regarding the need for a sector-specific approach.

On the one hand, if so-called 'atypical' contracts such as self-employment are now the norm (i.e. 'typical') across many different sectors, why should air transport be treated any differently? On the other hand, does the nature of air transport (e.g. high capital investment, the requirement for all pilots to follow standard operating procedures, insurance liability and financial risk borne by the client/airline, the location, timing and duration of work determined by the airline, etc.) make 'genuine' self-employment impractical in this sector? In the first case, standard legal tests can be applied to determine if aircrew are genuinely self-employed. In the latter case, the relevant authorities, in consultation with the social partners, may need to enact new rules and restrictions on self-employment aimed specifically at aircrew.<sup>24</sup>

A major challenge and element of disagreement regarding tackling undeclared work in the air transport sector, was to establish whether self-employment contracts in air transport can be classified as bogus self-employment. This involves a two-stage process to establish: (i) the place of work and applicable law, and (ii) contractual (self-) employment status.

### 2.1 The 'place of work' and applicable law

Establishing the '**place of work**' appears to be rather straightforward under social security regulations applicable to aircrew.

EU Regulations on the coordination of social security (465/ 2012 and 987/2009)<sup>25</sup> are designed to ensure free movement of persons and continuity of their social protection, while at the same time avoiding administrative complexity and improving their working conditions. The Regulations provide for all mobile persons to be subject to the social security legislation of a single Member State only. Whether the person is employed or self-employed, the legislation of the Member State *where the activity is carried out* usually applies.<sup>26</sup> The Regulations establish that the applicable law for aircrew is the one of the "home base".<sup>27</sup> The 'home base' is where aircrew start and end their shifts, instead of the country where the airline is based (the registered office and Air Operator's Certificate).<sup>28</sup>

Pilots often work from more than one base – a standard clause in the contracts of a self-employed pilot states that they can expect to operate from an 'assigned base' for approximately 80 % of the time and at other bases the other 20 % of the time. The criterion

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<sup>23</sup> Decision 2016/344, *Establishing a European Platform to Enhance Co-operation in Tackling Undeclared Work* noted that: 'Tackling the complex problem of undeclared work ... requires a holistic approach.' This includes direct controls in the form of both deterrents (e.g. improved detection via data matching and sharing, increased penalties and sanctions) and incentives (e.g. simplifying compliance, providing better support and advice to workers) and indirect controls such as changing norms, values and beliefs, as well as building trust in the relevant institutions. For a more detailed discussion, see Williams (2016).

<sup>24</sup> [https://www.eurocockpit.be/sites/default/files/2019-12/ACP\\_ECA\\_EurECCA\\_joint%20views\\_applicable%20law\\_F.pdf](https://www.eurocockpit.be/sites/default/files/2019-12/ACP_ECA_EurECCA_joint%20views_applicable%20law_F.pdf)

<sup>25</sup> Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems; and Regulation (EU) No 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.

<sup>26</sup> The rules for determining which Member State's legislation needs to be applied are set out in Articles 11-16 of Regulation 883/2004.

<sup>27</sup> Regulation 465/2012 (Article 11 § 5): 'An activity as a flight crew or cabin crew member performing air passenger or freight services shall be deemed to be an activity pursued in the Member State where the home base, as defined in Annex III to Regulation (EEC) No 3922/91, is located.'

<sup>28</sup> Under EU flight time limitations (FTL 105.14) the 'home base' means the location, assigned 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 circumstances, the operator is not responsible for the accommodation of the crew member concerned.

of a '**substantial part of his/her activity**' (i.e. the 'assigned base') is then more than likely to be the determining factor in establishing the pilot's 'home base'.

Where the national employment laws of the 'home base' offer greater employee protection than the country where the airline is registered, aircrew have sought to enforce their employment rights in the country of the home base.<sup>29</sup>

The most notable case, to date, involved employees of Portuguese, Spanish and Belgian nationality who were hired on a contract drafted in English and subject to Irish law.<sup>30</sup> The contracts stipulated that the work of the employees concerned, as cabin crew, was regarded as being carried out in Ireland given that their duties were performed on board aircraft registered in that Member State. However, the assigned base was Charleroi airport in Belgium. Cabin crew not only started and ended their working day at Charleroi airport, but were contractually obliged to reside within an hour's travel time of their 'home base'. On this basis, six employees brought proceedings in 2011 under Belgian law, claiming that their employer should comply with Belgian law instead.

The Court of Justice of the European Union (CJEU) ruled that national courts should refer to a particular set of indicia in the air transport sector, specifically in which Member State is situated: (i) the place *from which* the employee carries out their transport-related tasks, (ii) the place *where they return* after their tasks, receives instructions concerning their tasks and organises their work, and (iii) the place *where their work tools* are to be found.<sup>31</sup>

## 2.2 Determining the contractual employment status

According to the case law of the CJEU, to determine whether the party of an employment contract is an employee for the purposes of the Brussels I and Rome I Regulations (and thus can benefit from their protective rules in relation to an individual employment contract) the relevant factors are: the creation of a lasting bond which brings the worker within the organisational framework of the business of the employer (commonly referred to as '**integration**') and a relationship of **subordination** of the employee to the employer (COM(2019) 120 final, p.13).<sup>32</sup>

Subordination can take the form of both economic dependence (e.g. income mainly or exclusively from one airline and an inability to fix the wage)<sup>33</sup> and personal dependence (e.g. time and place of work, following instructions under supervision, sanctions for poor performance, roster and base assignment).<sup>34</sup> The determination of these factors was a primary focus of the seminar discussion.

There is typically a 'grey area' between 'dependent workers' and 'independent professionals' who are genuinely self-employed, as illustrated in Figure 1 below. Put differently, it often proves difficult to determine the (self-) employment status of people in

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<sup>29</sup> For example, Alessandra Cocca, an Italian citizen working for an Irish airline from a base in Norway, fought a 4-year legal battle for her claim of unfair dismissal to be heard in Norwegian courts. After the courts determined that the case should be heard in Norway, an out-of-court settlement was agreed between the parties (compensation of €64,000, equivalent to around 3 years' salary).

<sup>30</sup> Contracts included a jurisdiction clause providing that the Irish courts had jurisdiction.

<sup>31</sup> The Court ruled that, in this particular case, the place where the aircraft aboard which the work is habitually performed are stationed must also be taken into account. Joined Cases C-168/16 and C-169/16 Sandra Nogueira and Others v Crewlink Ltd and Miguel José Moreno Osacar v Ryanair. For a summary, go to: <https://www.eubusiness.com/news-eu/ryanair-court.14cf/>

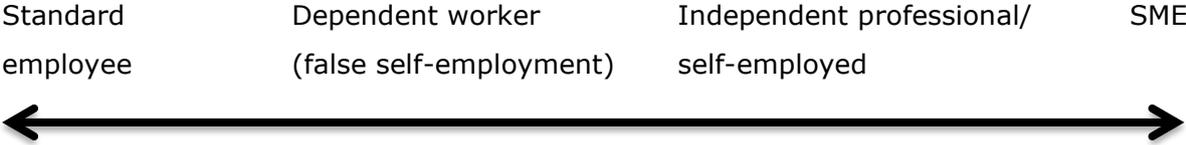
<sup>32</sup> In some Member States, the terms 'integration' and 'subordination' are co-extensive. 'Integration' typically refers to the performance of key/core activities within the organisation, especially management or leadership functions (e.g. Article 12(e) of the Portuguese Labour Code), which is certainly the case for the pilot (Captain) in command of a commercial aircraft. In general, integration is taken an indicator of the more important criterion of subordination (e.g. Italian Supreme Court, Cassazione Civile, sez. lav., December 1, 2008, No. 28525).

<sup>33</sup> If an 'independent professional' or 'self-employed' person is legally entitled to sell his or her services to the world at large, but in practice works entirely or substantially for one employer, this is often a strong indication that the individual is actually an employee. Contrariwise, the fact that a person works for more than one employer does not necessarily indicate that he or she is an 'independent professional' or 'self-employed' worker rather than an employee.

<sup>34</sup> In most countries, economic considerations play an important role in determining whether an individual is to be regarded as an employee, but mere 'economic dependence' is not singularly decisive as the existence of 'economic dependence' cannot substitute a lack of 'personal dependence'.

this 'grey area' and ultimately this is a question for the courts to decide. As the self-employed are truly independent and negotiate a contract *for* services with clients (covered by commercial legal norms), they are often subsumed under the category of small and medium-sized enterprises (SME) at the far right-hand end of the spectrum in Figure 1.

**Figure 1. The spectrum of employment relationships**



Source: Leighton and Wynn (2011: 17)

The requirement for self-employed pilots to join a SME with other self-employed pilots (the pilot employment service providers (PESPs) described in Section 1.2 above) is designed to accentuate the prevalence of 'form' over 'substance'. This runs counter to the legal 'duck test' (i.e. 'if it looks like a duck, quacks like a duck and walks like a duck, it probably is a duck').

In nearly all European countries, the practical implementation by the parties of the employment contract is decisive for its legal classification. Determination of the existence of an employment relationship is guided by the facts of what was actually agreed and performed by the parties, and not on how either or both of the parties designate the relationship.<sup>35</sup> Consequently, if a relationship has all the characteristics of employment, then the individual is probably an employee as a matter of law, regardless of the label the parties put on it.

Participants at the seminar highlighted several examples of standardised ('boilerplate') language<sup>36</sup> in the contracts of 'self-employed' European pilots, summarised in Box 2. While they might be thought of as 'standard' or even miscellaneous provisions, it is not unusual for a 'boilerplate' provision to be the cause of litigation.

**Box 2. Examples of 'contract boilerplate'**

The following extract is from a contract signed by a **Danish pilot, based in Denmark**:

*"In signing this Agreement, the contractor acknowledges the terms and conditions of the standard agreement and that this is a contractor's agreement."*

*"This Agreement (including the Standard Terms & Conditions) is governed by and shall be construed in accordance with the Guernsey law. The contractor confirms they are fully aware of their status as a contractor and as such they have full rights as contractor. The contractor does not purport to be an employee and acknowledge they have no rights as an employee."* (note: the pilot neither lives nor flies to/from Guernsey)

<sup>35</sup> It is on this basis that courts reclassify contracts (ILO, 2013: 33). In Poland, for example, employment contracts cannot be replaced by a civil law contract where the conditions of employment remain intact (i.e. where a person "undertakes to perform work of a specified type for the benefit of an employer and under his supervision, in a place and at the times specified by the employer; the employer undertakes to employ the employee in return for remuneration") (Labour Code, Article 22). The principle of the primacy of facts has been emphasised by the courts in Hungary on various occasions, such as in Case BH2002.04, in which the court stated that "contracts shall be considered with reference to their contents rather than to their name" (ibid: 35). Likewise, in France, the "Existence of an employment relationship depends neither on the will of the parties to a contract nor on the designation of this contract, but on the circumstances under which the work is performed" (Cass. Soc. 19 May 2009 No. 07-44.759)" (ibid: 34-5).

<sup>36</sup> 'Boilerplate' is the term used to describe the clauses that are included in an agreement to deal with the mechanics of how it works (e.g. what law will govern the subject matter of the contract and rules on how the agreement will be interpreted and enforced).

The following extracts are from an **Irish contract** signed by many pilots hired from all over Europe and working from **bases located in many different Member States**:

*"This is a Contract for Services."*

*"If the company representative [pilot] cannot perform the Work the Employment Company [the pilot's company] shall provide a substitute to perform the Work provided that the substitute shall have the necessary expertise and qualifications to perform the Work and is acceptable to the Contractor [agency] and the Hirer [airline]." (note: given the constraints of Flight and Duty Time Limitations, geographically dispersed base locations, and (un)familiarity with standard operating procedures, whether a substitute can be found at short notice in the event of illness or other impediments is a moot point).*

*"Neither the [self-employed pilot's] Employment Company nor the company representative shall be deemed to be an officer, agent, employee or servant of the Hirer [airline] or the Contractor [agency]."*

The following extracts are taken from contracts reviewed by the **European Transport Workers' Federation** (ETF):

*"Under the terms of the Agreement, X shall contract and the Contractor shall oblige himself, within the framework of his/her business activity, to provide services in favour of X to the Air Carrier, as a Pilot assigned by the Air Carrier to perform duties in respect of the Air Carrier's flight operations and related to the safety of flight operations, hereinafter referred to as 'Services', for the payment of the remuneration specified in the Agreement."*

*"The Contractor may temporarily provide the Services to another airline company (including for training purposes) if so requested by X."*

*"The Contractor obliges himself to take care of the entrusted property"*

### 3 POLICY APPROACHES

#### 3.1 Criteria and approaches to establish a (self-)employment relationship

In order to clarify the distinction between employment, false self-employment and genuine self-employment, as depicted in Figure 1, Member States have adopted four different approaches, namely:

- (i) Creating a hybrid status of self-employed workers with specific rights, especially with regard to social protection (e.g. Austria and Italy);
- (ii) Creating a status of economically dependent worker (e.g. Portugal, Slovakia, Slovenia and Spain);
- (iii) Using the economic dependence criteria to identify and combat bogus self-employment (e.g. Germany, Latvia and Malta); and
- (iv) Establishing criteria to more clearly distinguish employment from self-employment (e.g. Belgium, Ireland, Norway and Poland) (Eurofound, 2017: 38-45).

While the first two approaches, in different ways, create a 'third status' of employment, the second two focus on improving the criteria used to distinguish employment and (bogus) self-employment.

An example of 'third status' is the category of 'concealed labour' (*'travail dissimulé'*) that has existed in French law since 1997. This category encompasses the majority of undeclared labour practices including bogus self-employment. The 'concealed labour' category describes two types of action: (1) the 'concealment of activity', when profit-oriented activities are conducted in such a manner that they intentionally evade taxes or

socio-legislative rules; and (2) the 'concealment of an employment relationship', which includes bogus self-employment.

Ireland's Code on Self-Employment is a recent example of how some Member States are trying to clarify the criteria used to distinguish employment and self-employment. This came about through the work of a tripartite Employment Status Group, established to develop a 'code of practice on employment status' based on the criteria that the courts have indicated are useful in reaching a conclusion as to a person's (self-) employment status. The Code, which is reproduced in Box 3, was developed with an eye on both employment and taxation.<sup>37</sup>

### **Box 3. Ireland's Code of Practice on Self-Employment**

An individual would normally be classified as self-employed if he or she:

- Owns his or her own business;
- Is exposed to financial risk by having to bear the cost of making good faulty or substandard work carried out under the contract;
- Assumes responsibility for investment and management in the enterprise;
- Has the opportunity to profit from sound management in the scheduling and performance of engagements and tasks;
- Has control over what is done, how it is done, when and where it is done and whether he or she does it personally;
- Is free to hire other people, on his or her terms, to do the work which has been agreed to be undertaken;
- Can provide the same services to more than one person or business at the same time;
- Provides the materials for the job;
- Provides equipment and machinery necessary for the job, other than the small tools of the trade or equipment, which in an overall context would be an indicator of a person in business on their own account;
- Has a fixed place of business where materials, equipment etc. can be stored;
- Costs and agrees a price for the job;
- Provides his or her own insurance cover (e.g. public liability cover); and
- Controls the hours of work in fulfilling the job obligations.

For further information: <https://www.revenue.ie/en/self-assessment-and-self-employment/documents/code-of-practice-on-employment-status.pdf>

During the Platform seminar, various criteria listed in Box 3 were compared against the corresponding 'standard clause' found in the self-employment contracts of European pilots and the 'common' or 'shared' legal position reported by participants. Table 2 considers several criteria from the Code, relevant examples of contractual clauses in a pilot's self-employment contract, and the way these clauses are generally interpreted (including the potential significance of the contractual clauses in question).

However, as the **practical implementation** by the parties of the employment contract is decisive for its legal classification, interpretation of the same contract will vary from one Member State to the next. There might even prove to be substantive differences between aircrew in the same Member State, on the same contract, flying for the same airline but

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<sup>37</sup> For example, the fact that an individual has registered for self-assessment or VAT under the principles of self-assessment in Ireland does not automatically mean that he or she is self-employed.

working from different bases. It was in this context that participants at the seminar discussed the question of whether 'class actions' as opposed to individual cases brought before the courts might prove to be a more effective and expeditious way to determine contractual status.

**Table 1. Self-employment criteria, contractual clauses and the 'common' legal position**

Self-employment criteria	Typical 'self-employment' pilot contract	'Common' legal position
Can provide the same services to more than one person or business at the same time.	"['PILOT A'] is contracted directly to work exclusively for ['AIRLINE X']".	A person is deemed to be an employee when, in return for remuneration, they carry out an activity or profession, personally, directly, and predominantly for an individual or organisation on whom they are financially dependent.
Provides all necessary materials for the job.	"['AIRLINE X'] uniform must be purchased by the pilot".	The significance of this criterion is fairly limited in most European countries, and expressly excluded as being a determinative factor in others. However, substantial capital investment by the worker, such as the purchase of a vehicle, may support a finding that the worker is an independent contractor.
Provide their own insurance cover (e.g. public liability cover).	"The Hirer ['AIRLINE X'] will have in place at all times and in full force professional errors and liability insurance which will cover the company representative ['PILOT A'] in relation to the services provided for the Hirer".	It is acknowledged in most countries that the absence of financial risks may indicate the existence of an employment relationship and that the existence of financial risks may indicate self-employment.
Has control over what is done, how it is done, when are where it is done and whether s/he does it personally.	"The Hirer ['AIRLINE X'] reserves the right to change the scheduling subject to operational requirements. They do not form any part of the agreement between the Contractor ['AGENCY Y'] and ['PILOT A']".	In all European countries, the main criterion for establishing an employment relationship or an employment contract is that one individual is subordinate to or dependent on another. Situations vary across countries. Many countries use the term 'personal dependence', while others use the term 'legal dependence' to denote subordination.

At the seminar, examples of different approaches to the determination of employment vs. self-employment were presented. Box 4 describes the approaches adopted in Belgium, Slovakia, Poland, Bulgaria and Finland. The common criteria defining employment is the performance of hierarchical control and supervision. Other criteria can include the affiliation to social security, VAT registration, the modality of income declaration and the type of contract.

#### **Box 4. Determining (self-) employment status**

In **Belgium**, the labour relations law (Programme Law (I) of 27 December 2006) includes specific articles on the nature of labour relations to prevent bogus self-employment. This law applies to all sectors, including air transport. There are four

'general criteria' and five 'neutral criteria' to determine if a worker is an employee or self-employed:

General criteria: (1) will of the parties (whether the worker consents to a self-employment contract), (2) freedom of the worker to organise their own work, (3) freedom to organise their working time (including holidays), and (4) whether the worker is subject to hierarchical control (e.g. sanctions by the 'employer').

Neutral criteria: (1) affiliation to social security, (2) VAT registration, (3) affiliation to the Crossroads Bank for Enterprises, (4) how income is declared for tax purposes, and (5) the title of the contract.

Note: as social security is of public order, contracts can be requalified (i.e. a self-employment contract can be converted to an employment contract by the relevant public authorities).

In **Slovakia**, employees are considered to be dependent workers, which is defined along the following criteria: in a relation of employer's superiority and employees' subordination; in which the employee performs work personally for the employer; pursuant to the employer's instructions; in the employer's name; and during working time set by the employer.

In **Poland**, there are three possible contractual arrangements: (1) an employment contract (under the national Labour Code), (2) a civil law contract (under the national Civil Code), and (3) self-employment.

Under the Labour Code (*Article 22. § 1*) the employee undertakes to perform a specified type of work for and under supervision of the employer, in a place and at a time designated by the employer, and the employer undertakes to engage the employee in return for remuneration.

Self-employment is a legal status where a natural person undertakes economic activity on their own account and at their own risk. 'Economic activity' is any gainful activity conducted on one's own behalf and in a continuous manner.

**Bulgaria** also recognises three different forms of work: (1) employment relationship, (2) self-employment, and (3) civil law contracts. False self-employment is typically disguised as a civil law contract. The most important criterion to distinguish employment and self-employment, based on decisions laid down in the Court of Justice of the European Union (e.g. Cases 66/85, 428/09, and 216/15), is whether a natural person, for a certain period of time, performs services under the direction of another person in return for remuneration. It is the existence of subordination in this relationship that distinguishes employment from self-employment (both self-employed and those on a civil law contract are free to decide where, when and how to work).

In **Finland**, there are just two categories – employee or self-employed – with a clear definition in law (Employment Contracts Act) that identifies employees as someone who works for an employer under the employer's direction and supervision (the employer may determine how, when and where the work is performed) in return for pay or other compensation (the employee is bound by the employment contract to perform the work *personally* and for *gain*). In an employment relationship, the employee is *dependent* on the employer.

While precise legal definitions might differ, there is 'common legal ground' with respect to the core criteria of subordination and dependency. On this basis, participants agreed that more attention needs to focus on **lack of compliance and enforcement of the rules**.

This turns attention to the role of labour inspectorates and cross-border cooperation, which is especially important in air transport where a pilot from Member State A might be hired on a self-employment contract under the laws of Member State B, through an agency

whose principal place of business is Member State C, assigned to a 'home base' in Member State D, and flying on a regular daily basis to/from Member States E and F.<sup>38</sup>

### 3.2 Labour inspection

Although air transport is potentially 'at risk' of non-compliance with applicable law and misapplication of EU legislation, principally as a result of the **transnational nature** of airlines' operations with highly mobile aircraft and aircrew, labour inspectorates reported rather limited activity in this sector. Given that labour inspectorates are encouraged to move from randomly selected inspections towards risk-based selection (European Commission, 2019b: 1), and as the number of airlines known to hire pilots on 'self-employment' contracts is relatively few (Ricardo, 2019), it should be relatively straightforward to target the aircrews most 'at risk'. To date, however, there have been **very few labour inspections** reported in air transport.

Air transport is a highly regulated sector, with proactive regulatory bodies at both national and European levels (e.g. civil aviation authorities and the European Union Aviation Safety Agency - EASA). That said, several labour inspectorates at the seminar reported that airport security restrictions can sometimes make it difficult to secure access to aircraft and relevant information is not always available (e.g. when self-employed pilots are hired via an agency). Nonetheless, with so few cases of undeclared work reported to the authorities, national labour inspectorates might well determine that their time and resources are better spent investigating other sectors. However, while transport is typically considered to be a 'low risk' sector by the national authorities, the social partners claim: 'the aviation sector is particularly exposed to non-compliance with applicable law and misapplication of EU legislation in general'.<sup>39</sup>

Several participants at the seminar highlighted the reluctance of aircrew to request a reclassification of their (self-) employment status in fear of losing work opportunities (under the terms of their zero hours contract) or even their job.<sup>40</sup> As public information on (self-) employment status is typically generic rather than specific to a particular sector, participants questioned whether aircrew had access to all the necessary information on the contract they enter into with an agency/airline. There is also the possibility that the prospect of paying lower taxes as a 'self-employed' person might influence their decision-making.

Two particularly important concerns for labour inspection were identified during the seminar. First, the International Labour Organization's Labour Inspection Convention No.81, ratified by all EU Member States, applies to: 'all workplaces in respect of which legal provisions relating to conditions of work and the protection of workers while engaged in their work are enforceable by labour inspectors', but 'National laws or regulations may exempt mining and transport undertakings or parts of such undertakings from the application of this Convention'.<sup>41</sup> It was not clear whether, or to what extent, any national laws or regulations limited the scope of labour inspection in air transport.

Secondly, inspections are more problematic in air transport in terms of obtaining security clearance in airports and securing access to aircraft. In **Denmark**, for example, more than 40 % of aircraft have changed flag in recent years (i.e. they now operate under a different national Air Operator's Certificate) which restricts access to these aircraft by the Danish aviation authorities, even when aircraft are based in Denmark and employ Danish pilots.

The **Hellenic Labour Inspectorate** also reported these and other restrictions on its inspection activities at Athens International Airport, where the main obstacles were often the absence of an on-site (airport) office for the airline in question and/or difficulties

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<sup>38</sup> Arrangements are further complicated if the pilot is working from a 'home base' (airport) in Member State D in the winter months and Member State G in the summer months.

<sup>39</sup> [https://www.eurocockpit.be/sites/default/files/2019-12/ACP\\_ECA\\_EurECCA\\_joint%20views\\_applicable%20law\\_F.pdf](https://www.eurocockpit.be/sites/default/files/2019-12/ACP_ECA_EurECCA_joint%20views_applicable%20law_F.pdf)

<sup>40</sup> It was reported at the seminar that certain pilots in Poland were recently 'required' to transfer to self-employment contracts or face the prospect of losing their jobs

<sup>41</sup> [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C081](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C081)

accessing relevant information through agencies that act as an intermediary between the airline and 'self-employed' pilots.<sup>42</sup>

Box 5 recounts some of the problems experienced by **French labour inspectors** when trying to conduct an inspection and follow-up investigations to establish the 'home base' and contractual status of aircrew, as well as the response of airlines who are evidently 'rule shopping'.<sup>43</sup>

#### **Box 5. Labour inspection in France**

The French General Directorate for Labour (National Group for Monitoring, Support and Audits) conducted an inspection of a foreign airline (Member State A) operating flights from and to French airports as well as internal flights between French airports. During controls carried out by the Labour Inspectorate upon the arrival of aircraft, both the captain and co-pilot refused to cooperate.

However, it was established that aircrew members were staying in accommodation close to the airport, where the airline had a technical room with computers, maintenance equipment and other supplies. The airline maintained that the aircrew were not posted and their workplace was that of the airline's head office in Member State A. Co-operation with relevant authorities in Member State A, through the Internal Market Information (IMI) System, established that the aircrew were hired via an agency, also registered in Member State A, on a variety of temporary and 'self-employment' contracts.

Aircrew often spent several weeks in France and A1 certificates were issued. It was thereby established that the airline engaged in an economic activity in France that had not be declared, in spite of the airline having an operating base in France.

Rather than operate in France according to the French civil aviation code, the airline decided to close its operating base and service French airports from other bases outside France.

Several Member States have taken initiatives to address the challenges facing labour inspectorates in the air transport sector. In **Slovakia**, for example, a new measure was introduced in November 2019, to tackle bogus self-employment in general which would be relevant also in the air transport sector. The new measure is a checklist that lists 11 attributes that can help labour inspectors to distinguish dependent work (employment) from business activity (self-employment). These attributes are divided into five mandatory criteria that must be always present in any employment relationship and six optional criteria that might reinforce or support the mandatory criteria. For example, self-employed workers will own the means of production, issue invoices for work undertaken under a contract for services, and accept personal responsibility for the results of any business activity.

Notwithstanding the different approaches to establishing (self-) employment status (Section 3.1 above), labour inspectorates do not necessarily have the direct power to reclassify employment contracts – claims for reclassification can only be settled in the courts. This process is often protracted, costly for all concerned and especially stressful for aircrew. Fines might be anticipated to deter undeclared work in air transport, but the level of fines varies widely and with so few cases reported it is impossible to determine the deterrence effects of any financial penalties.

The social partners can play a positive and proactive role in assisting the work of labour inspectors. A particularly effective approach was reported in **Denmark**, where collective agreements, rather than national employment law, is the key determinant of a worker's

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<sup>42</sup> Airlines and shipping lines are excluded from the jurisdiction of the Hellenic Labour Inspectorate, although inspection of aircraft is possible when accompanied by the Hellenic Civil Aviation Authority. Data privacy (under the General Data Protection Regulation 2016/679) was also reported to cause some difficulties for labour inspectors when seeking information from agencies/intermediaries on 'self-employed' aircrew.

<sup>43</sup> This case was widely reported in the press at the time. Go to: <https://www.reuters.com/article/uk-france-ryanair/ryanair-hit-by-french-fine-for-work-law-breach-idUKBRE9910JQ20131002>

social protection and rights at work.<sup>44</sup> A Working Group on Fair Competition in Aviation was established under the Danish Aviation Council (a forum for cooperation between the Ministry of Transport and all sections of the airline industry, including trade unions). The Working Group successfully established a common understanding of (bogus) self-employment and other issues pertinent to the employment of aircrew. It also agreed that 'social dumping' occurs 'when EU airlines organise employment models, terms of employment, and company structures to take advantage of differences between the rules of Member States, including the implementation, understanding, and administration of the EU regulatory framework, meaning that it can be described more accurately as "rule shopping"' (Trafikstyrelsen, 2015: 10).<sup>45</sup> The ability of aircrew to secure trade union recognition and collective bargaining has enabled the social partners to tackle undeclared work when airlines are based in Denmark. However, difficulties remain when it comes to cross-border activities.

### 3.3 Cross-border cooperation

Although participants at the seminar agreed on the pressing need for greater cross-border cooperation, very few practical examples were reported during the discussion. Common problems reported by the relevant enforcement agencies included:

- The **complexity** of the relevant rules and their European dimensions (e.g. Rome I and applicable law, posting rules, social security rules and the 'home base', and compliance with aviation rules such as Flight and Duty Time Limitations);
- Contacting and interviewing **highly mobile aircrew** who can provide essential information that might establish the existence of an employment contract (e.g. rosters,<sup>46</sup> the place where the pilot 'works from', A1 certificates, etc.);
- The need to perform checks **during a certain period of time** (e.g. LCCs operate on a very tight schedule with only 20-30 minutes turnaround time at the airport).
- The **diversity** of contractual status and nationalities within the crew of any particular aircraft;
- Although air crew members speak fluent English, **controls are more effective when carried out in the worker's mother tongue**;
- **Access** to all the relevant information is usually only possible through the Member State where the airline has registered its principal place of business (there is often no 'contact person' for the airline in bases located in other Member States);
- The **Internal Market Information** (IMI) system can currently only be used in posting situations;
- The (prolonged) **time-span** of judicial and other inquiries (e.g. obtaining information from the airline's principal place of business) is not adapted to the speed at which airlines/agencies adapt (put differently, airlines/agencies appear to be 'one step ahead' of the judiciary, labour inspectorates and other enforcement agencies);

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<sup>44</sup> In principle, it is left to the parties to a collective agreement to define the parties to an employment contract with reference to the working conditions set forth in the collective bargaining agreement. As a consequence, it is possible for an individual to be considered an employee within the scope of a collective agreement, even though s/he is not regarded to be an employee under applicable employment laws (ILO, 2013: 8).

<sup>45</sup> Although a recurring term in discussions within the EU related to worker mobility, wages and the social security of workers, 'social dumping' has neither a generally accepted definition nor easily definable limits. The European Migration Network defines social dumping as: 'The practice whereby workers are given pay and/or working and living conditions which are sub-standard compared to those specified by law or collective agreements in the relevant labour market, or otherwise prevalent there.' Go to: [https://ec.europa.eu/home-affairs/what-we-do/networks/european\\_migration\\_network/glossary\\_search/social-dumping\\_en](https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/social-dumping_en)

<sup>46</sup> A clause in the 'self-employment' contract of many pilots states that as the airline's roster (accessed via the company's intra-net) "contains 'confidential' information ... You must not allow access to any person as this is in breach of the confidentiality clause."

- Difficulties establishing where the **most substantial part** of the aircrew's activity is taking place (see Section 2.1 above).

The cooperation between national agencies (e.g. social security, labour inspectorates, civil aviation authorities, prosecution services, taxation, and the social partners) has been 'scaled up' to the European level by some Member States (e.g. Belgium) with the assistance of Eurojust and Europol. With relatively few airlines hiring pilots on a 'self-employment' contract, and the (home) bases of these airlines located around Europe clearly identified on the websites of these airlines, it should be relatively straightforward to coordinate bilateral and multilateral labour inspection, targeting aircrew when they are most likely to be available in their crew-rooms at the airport (e.g. before the first flights out in the morning).

Participants also highlighted the potential future role of the European Labour Authority (ELA), which will focus on areas with sector-specific Union law such as international transport. ELA's mandate<sup>47</sup> gives the agency a role to:

- Ensure that individuals and businesses have access to reliable information and practical services to facilitate labour mobility (including information on opportunities, rules, and their rights and obligations in cross-border situations); and
- Facilitate cooperation between national authorities, providing for availability of tools to share information, develop day-to-day cooperation routines, carry out joint and concerted inspections and solve possible cross-border disputes in a speedy and efficient manner.

The importance of the working group of experts established by the European Commission and the recent Directive on Transparent and Predictable Working Conditions (2019/1152)<sup>48</sup> were also highlighted at the seminar. In addition, the importance of social dialogue at the European level via the Sectoral Social Dialogue Committee for Civil Aviation was stressed.

## 4 KEY LEARNING OUTCOMES

Although the number of reported **cases of undeclared work** in air transport are few compared to other sectors such as agriculture (Williams, 2019) and road transport (Haidinger, 2018), the transnational nature of air transport means that the sector is potentially exposed to non-compliance with applicable law and misapplication of EU legislation.

The **causes of undeclared work in air transport** – specifically bogus self-employment – are systemic in terms of the nature and intensity of (cost) competition and the possibility (and profitability) of 'rule shopping'. Bogus self-employment offers significant cost savings for airlines, largely as a result of greater flexibility but also lower social costs (taxes, holiday and sick pay, pension contributions, etc.). For the State, it represents a significant loss of tax revenue. For aircrew, it represents a more precarious employment relationship and less favourable statutory employment protection.

There is broad consensus within the Platform on the need for a **holistic approach** involving greater cooperation with and between:

- Enforcement agencies at the national level (e.g. labour inspectorates, the courts, and tax and civil aviation authorities);
- Cross-border co-operation between the Member State where an airline registers its principal place of business and the Member States where the same airline operates multiple ('home') bases for aircrew;

<sup>47</sup> See Regulation (EU) 2019/1149 establishing a European Labour Authority.

<sup>48</sup> Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.

- Pan-European agencies such as the European Commission, Eurojust, Europol and the European Labour Authority;
- Social partners at the national and European levels.

Labour inspectors and the courts can all **recognise cases of bogus self-employment** in the air transport sector, by applying general approaches and rules for self-employment. Several Member States have made this task much easier with 'codes of practice' and 'checklists' to help labour inspectors and others distinguish bogus and genuine self-employment. However, there is still legal uncertainty arising from different national definitions of 'employment' and 'self-employment', as well as around the rules for posting workers in air transport.

Labour inspections are made difficult by the limited access to aircraft and aircrew. These challenges could be overcome with better and more efficient exchange of information, inter-agency cooperation, and use of translation services to enable aircrew to discuss their contracts in their mother tongue.

It proved difficult to establish the impact of fines and other forms of deterrence given the relatively low number of cases brought before the courts or prosecuted by labour inspectorates. What is clear is that any direct controls designed to deter undeclared work have not prevented either the evolution or the increasing adoption of different 'atypical' employment models, including bogus self-employment.

Aircrew need timely, accurate and independent advice when entering into any contract with an agency or airline. There are many trustworthy institutions in air transport, at both the national and European levels (e.g. aviation training schools, civil aviation authorities, the European Union Aviation Safety Agency, transport unions, professional pilot associations, and European employers' and trade union federations) that can provide this type of advice. Online information and apps could be provided by these trusted institutions for aircrew working in different Member States.

There is equally a comparable need to build trust and security when aircrew raise concerns about their contractual status (post-hiring). This goes beyond the protection offered to 'whistle-blowers', as pilots on a zero-hours 'self-employment' contract can easily be denied work opportunities with their client (airline) and any legal case brought before the courts will invariably extend well beyond the typical (2-year) duration of any contract. Moreover, newly qualified pilots will only be 'type-rated' to fly a particular aircraft, which limits their employment opportunities with other airlines.<sup>49</sup>

An important limitation for tackling undeclared work in this sector, is the (in)ability to re-classify an entire aircrew or home base (a 'class action') as opposed to individual cases brought before the courts when the specific situation of the individual is the focus of any claim and redress.

The social partners have an important role to play in finding solutions regarding employment disputes. There are already examples of effective cooperation at the national level (e.g. Denmark, Section 3.2 above) and between some organisations at European level (e.g. between the ETF, ECA and ACP).<sup>50</sup> Eliminating undeclared work is clearly in the interests of both workers and employers, as well as the general public (as taxpayers and passengers). The social partners need to find new ways to build cooperation at both the national and European levels in order to assist in the fight against undeclared work. This includes the sectoral social dialogue for civil aviation<sup>51</sup> and European Works Councils (EWCs).<sup>52</sup>

<sup>49</sup> For example, Ryanair flies Boeing aircraft whereas easyJet flies Airbus aircraft.

<sup>50</sup> See, for example, the joint statement on A Social Agenda for European Aviation, go to: <https://www.etf-europe.org/wp-content/uploads/2018/10/ACP-ECA-ETF-Statement-Social-Dimension-EU-Aviation.pdf>

<sup>51</sup> <https://ec.europa.eu/social/main.jsp?catId=480&langId=en&intPageId=1829>

<sup>52</sup> There are surprisingly few active EWCs in civil aviation. Go to: [https://ec.europa.eu/transport/sites/transport/files/themes/social/doc/final\\_report\\_ewcs\\_in\\_transport.pdf](https://ec.europa.eu/transport/sites/transport/files/themes/social/doc/final_report_ewcs_in_transport.pdf)

At the European level, there is scope for further (non-binding) guidance with the aim of clarifying: (i) the criteria for determining the 'home base' of aircrew outside the principal place of business, and (ii) the ability of aircrew to bring legal claims before the courts of the EU Member State where he or she habitually works. This is what the expert group on social matters related to aircrews is currently working on.

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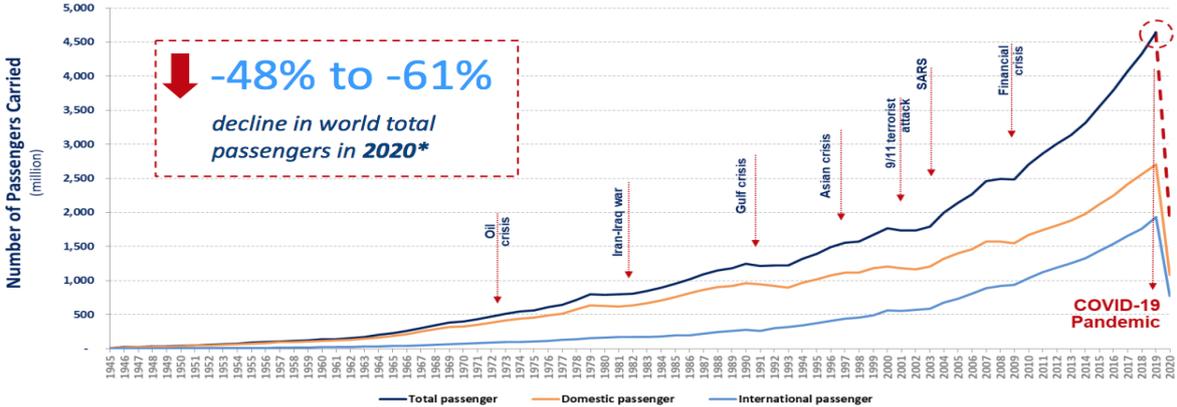
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# APPENDIX COVID-19 and Civil Aviation

The Platform seminar was held prior to the worldwide restrictions on air travel in response to the COVID-19 pandemic that almost entirely halted international travel. The impact of COVID-19 on civil aviation is far worse than previous outbreaks of disease (including SARS, H1N1 and MERS), wars, terrorist attacks, oil crises and economic crises, as illustrated below.<sup>53</sup> Moreover, recovery is expected to take much longer, especially in the absence of a coordinated approach across Europe.<sup>54</sup>

## World Passenger Traffic, 1945-2020



Source: ICAO

EUROCONTROL has estimated a total industry loss in revenues of approximately EUR 110 billion during 2020 for airlines, airports and air navigation service providers.<sup>55</sup> The International Civil Aviation Organization (ICAO), a specialised agency of the United Nations (UN), has estimated similar financial losses based on capacity cuts and the loss of domestic and international passengers, as reported in the table below.<sup>56</sup>

### Estimated Impact of COVID-19 Pandemic on Air Passenger Transport in Europe

Compared to baseline*	Domestic Traffic	International Traffic
<i>Capacity</i>	-36% to -45%	-55% to -45%
<i>Passengers</i>	-138 million to -175 million	-560 million to -672 million
<i>Revenue</i>	- EUR 9.7 to - EUR 12.4	- EUR 68.0 to - EUR 81.2

Note: \* business as usual/originally-planned flights  
Source: ICAO

In response to the 2008 financial crisis, there was clear evidence that social dialogue was an effective and preferred means to achieving a feasible, successful and acceptable business model.<sup>57</sup> Social dialogue is essential to tackling undeclared work and is especially important during the unprecedented crisis caused by COVID-19.<sup>58</sup> In the words of Ursula von der Leyen, President of the European Commission: "A well-functioning social dialogue will help us find solutions out of this crisis, while preparing the future".<sup>59</sup>

<sup>53</sup> [https://www.icao.int/sustainability/Documents/COVID-19/ICAO\\_Coronavirus\\_Econ\\_Impact.pdf](https://www.icao.int/sustainability/Documents/COVID-19/ICAO_Coronavirus_Econ_Impact.pdf) See also: <https://www.oag.com/coronavirus-airline-schedules-data>

<sup>54</sup> <https://www.eurocontrol.int/sites/default/files/2020-04/eurocontrol-aviation-recovery-factsheet-27042020.pdf>

<sup>55</sup> <https://www.eurocontrol.int/sites/default/files/2020-04/eurocontrol-aviation-recovery-factsheet-27042020.pdf>

<sup>56</sup> [https://www.icao.int/sustainability/Documents/COVID-19/ICAO\\_Coronavirus\\_Econ\\_Impact.pdf](https://www.icao.int/sustainability/Documents/COVID-19/ICAO_Coronavirus_Econ_Impact.pdf)

<sup>57</sup> Harvey, G. and Turnbull, P. (2009) *Sectoral Coverage of the Global Economic Crisis: The Impact of the Financial Crisis on Labour in the Civil Aviation Industry*, Sectoral Activities Department, ILO, Geneva, p.15. Go to: [https://www.ilo.org/public/libdoc/ilo/2009/109B09\\_221\\_engl.pdf](https://www.ilo.org/public/libdoc/ilo/2009/109B09_221_engl.pdf)

<sup>58</sup> [https://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---sector/documents/briefingnote/wcms\\_741466.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/briefingnote/wcms_741466.pdf)

<sup>59</sup> <https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=9729&furtherNews=yes>