



Commission's consultation: 'Fitness Check on EU legal migration legislation'

– ECA contribution –

1. Introductory remarks

The European Cockpit Association (ECA) is the representative body of European pilots at European Union level. It represents over 38,000 pilots from the National Pilot Associations in 37 European States and it is a recognised social partner in the EU sectoral social dialogue for Civil Aviation.

The members of ECA are highly mobile professionals. With the globalisation of the industry, ECA considers that there is a need to define in which case(s) a non-EU national must hold a valid work-permit to be able to work in the EU or/and onboard an aircraft registered in the EU (EU AOC)¹.

Therefore, ECA welcomes the Commission's Fitness Check exercise and believes that the current process of consultation is a unique opportunity to bring to the attention of DG HOME the European pilots' views concerning the situation of international air transport.

When it comes to regulating the entry, residence and work conditions of third country (non-EU) nationals in the territory of the EU, the peculiarities of several professions as well as economic sectors need to be thoroughly assessed. Civil Aviation being characterized by transnational highly mobile activities is undoubtedly one of those sectors.

2. ECA analysis of the issue of work permit requirements for non-EU aircrrew based in the EU or working onboard an EU registered aircraft

2.1 Problem definition (specific to Civil Aviation)

Given the highly mobile & global nature of aviation, European pilots want to contribute with their first-hand experience and knowledge of the sector, to the important phase of the

¹ By 'EU AOC' we refer to the Air Operator's Certificate (AOC) granted by the national aviation authority (NAA) of one of the EU Member States to an aircraft operator to allow it to use aircraft for commercial purposes. This requires the operator to have personnel, assets and system in place to ensure the safety of its employees and the general public. Currently, a single European register is not in place.

'problem definition': solutions can be found only if the right questions are asked and – given the developments in the industry over the past ten years - the ECA's members would like to take part in this debate.

Legislation in relation to third country nationals (pilots and cabin crew) working onboard aircraft that are registered in one of the EU Member States is not governed by EU law and significantly varies among the Member States. Additionally, in most of the cases, Member States apply their rules only to aircraft registered in their respective country and mostly only for the flights that takes place from or within its territory. This leaves without effective control the operations of their operators in bases outside their territory and from foreign operators within the national territory. This means that there are still significant gaps and overlaps in the regulations across the globe, providing an incentive to 'rule shopping', for example when it comes to choosing the country in which it is more advantageous to have an aircraft registered. This means that companies can use gaps in legislation to dump the aviation labour market with cheap crews from third countries or foreign base crews.

ECA, and indeed EU law, is of the opinion that aircrew are not an exception! There should be clear entry and immigration rules. As any other category of workers, non-EU aircrew members who wish to be based (temporarily or permanently) in the territory of the EU and/or work onboard an EU registered aircraft, must be in possession of a work permit issued by one of the EU Member States. Only non-EU aircrew members who hold a valid work permit will be allowed to, either:

- a) work onboard an aircraft that is registered in one of the EU Member States (EU AOC). In this case the aircrew member can be assigned to a home base² in the EU or in the 3rd country where air carriers have a genuine (non fictive) permanent base³ – or;
- b) work onboard a non-EU registered aircraft that operates habitually an intra-European air network⁴.

A non-EU aircrew member can be exempt from the work permit or be granted a visa waiver (see point 1 and 3), only when he/she:

1. is in transit; or
2. works onboard a non-EU registered aircraft and performs a commercial flight having the origin or destination at his/her home base in a 3rd country; or
3. works onboard a non-EU registered aircraft having suffered an unexpected occurrence obliging it to make a technical stopover; or
4. works onboard an EU registered aircraft (EU AOC) but he/she has his/her home base in a 3rd country and he/she flies:

² The aircrew "home base" is defined in Reg. 83/2014 as "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". The home base also determines the State whose social security scheme is applicable to the workers.

³ This case may have exceptions (derogations from the requirement of the work permit) that are detailed under point 4.

⁴ Please note that, ideally, intra-European flights should be considered *cabotage* and be flown by EU nationals only as it is the case in other major aviation markets, such as the U.S.

- I. from the EU to the 3rd country of the home base, or
- II. from the 3rd country of the home base to one connection in the EU.

Any employment situation/status other than the ones described above should require a work permit for non-EU nationals. Failing that, these situations should be regarded as illegal. Non-EU aircrew entering the Schengen area on international flights whilst on duty with a General Declaration as provided for in Annex 9 of the Chicago Convention on International Civil Aviation⁵ cannot subsequently be legally rostered (planned) to operate on intra-EU flights not directly related to their initial duty unless they have a work permit.

2.2 Schengen Borders Code and the Chicago Convention

The entry requirements for international crews in Europe are described in Article 19 and Annex VII of the Schengen Borders Code (SBC) and in Annex 9 of the Chicago Convention. Those rules were developed before the liberalisation of air transport to facilitate entry into the EU territory of foreign (non-EU) crews working on foreign registered carriers to transit through European Airports and to stay during stopovers. Those rules are not intended to allow those crews to be based or posted in Europe or to allow EU carriers to import labour from third countries.

Indeed, according to Annex VII of the SBC the holders of a pilot's licence or a crew-member certificate are exempt from border controls if they are in the course of their duties to:

- (a) embark and disembark in the stop-over airport or the airport of arrival situated in the territory of a Member State;
- (b) enter the territory of the municipality of the stop-over airport or the airport of arrival situated in the territory of a Member State;
- (c) go, by any means of transport, to an airport situated in the territory of a Member State in order to embark on an aircraft departing from that same airport.

In other words, the provisions of the Schengen Borders Code allow third country airlines' (non-EU) aircrew members to enter the territory of the EU and make (night) stopover whilst on international duty.

The Code does not permit non-EU aircrew members to remain in the territory of the EU for work purposes following an international duty.

However, some airlines use unlawfully the facilitation provisions allowing foreign crews to enter the EU and engaging those crews in illegal working patterns. Some examples are described below.

⁵ Annex 9 (Facilitation) of the Chicago Convention on International Civil Aviation (1944)

2.3 Examples of foreign crews working in the EU without work permits

a) Norwegian

Norwegian Long Haul (NLH) and Norwegian Air International (NAI) are two subsidiaries of Norwegian (a major European low-cost carrier) that both fly out of Bangkok. They operate respectively under a Norwegian and Irish AOC. In spite of the fact that NLH's and NAI's principal places of business are located in Europe (Norway and Ireland), their cabin crew has mostly Thai nationality and is Bangkok – based (home base). The Thai Bangkok-based aircrew work onboard EU registered airlines on a permanent basis.

The Thai crew members enter the EU territory with an ICAO General Declaration whilst performing an international duty (e.g. from Asia) and are subsequently and illegally re-rostered either on intra-EU flights or on flights from the EU to another foreign destination (e.g. the US: [Oslo – Las Vegas](#)).

The Thai based crew members in question must hold a valid work permit issued by e.g. Ireland or Norwegian in order to be able to legally perform services other than EU-Asia or Asia – EU.

b) British Airways /Qatar Wet-leasing

In July 2017, the UK Government granted British Airways (BA) an authorisation to wet-lease nine Qatar registered aircraft under Article 13(3)(b)(i) of Regulation 1008/2008.

The application contravenes relevant immigration labour law for third-country undertakings and workers attempting to access the UK and EU market. More specifically, the application seeks to base a number of short haul aircraft in the UK from a third country, to undertake intra-EU operations, or at the least operations other than providing UK-Qatar service.

Accordingly, the only possibilities for the workers onboard these aircraft to operate from a UK base are as:

- a) permanent employees working habitually from the UK and therefore subject to the UK labour law, rights, and taxation, and requiring valid work permits;
- b) posted workers form a third country undertaking, which is unlawful; or
- c) as *de-facto* temporary agency workers, which would not be possible for a Qatari undertaking and third country workers within the framework of the EU Temporary Agency Workers directive on multiple counts.

As illustrated by the BA/Qatar case, the only legal avenue authorising Qatari nationals to perform duties onboard aircraft that operate intra-EU flights would be option a). To the best of our knowledge, the aircrew that staff the BA flights do not hold valid work permits that would make them lawfully fly within the EU.

c) FedEx case study

FedEx is a US-based and licensed airline. In 2011, FedEx opened a pilot operational base in Cologne with 90 pilots based there. A key component of FedEx global network is the intra-European air network, which connects major economic centres in Europe to the rest of the FedEx global air network. Pilots who operate the intra-European network are assigned to the Cologne operational base and operate between Paris Charles De Gaulle Airport or Cologne and other European and Middle East destinations.

All FedEx pilots operating out of the Cologne base are US citizens who enter the EU territory with an ICAO General Declaration (only valid for 15 days), hold a Federal Aviation Administration (FAA) Air Transport Pilot license, and operate aircraft that are registered in the US.

The FedEx pilots reside in Germany where they are permanently based and from where they operate intra-EU routes but they do not have or need a work permit to perform their duties and are exempt from participating in the German social security system⁶.

As far as we know, this special regime (exemption from work permit) applies to all US air cargo pilots in Europe.

This issue is a major concern for the European pilots and should be addressed urgently by the Commission and the Member States, not least considering the absolute lack of reciprocity between the EU and the US in this matter. – In fact, European pilots would not benefit from the same treatment – hence would need a valid work permit - if they were to reside in the US and fly intra-US routes onboard EU registered airplanes.

3. ECA recommendations & concluding remarks

On the basis of this analysis, we can conclude that when it comes to international air transport, current EU legal migration policy and legislation is not 'fit for purpose'.

Therefore, ECA recommends the Commission to consider complementary actions (both legislative and non-legislative) in order to properly address the specific needs of other categories of workers (such as the aircrew) that are not covered by the current regimes.

More particularly, ECA would like the Commission to take into consideration the following actions:

1. A common set of EU rules for highly mobile professionals plus a specific regime for aircrew.
2. Amend Annex VII of the SBC with a view to addressing differentiated facilitation provisions for:

⁶ Information available in the [Study on employment and working conditions in air transport and airports](#) (Oct. 2015)

- foreign aircrew engaged by third-country carriers entering the EU for the provision of international services on routes to or from the country of registration of the carrier and;
 - foreign aircrew entering the EU with the intention of working within or from the EU.
3. Commission's interpretative guidelines on the application of the Schengen Boarders Code provisions to air transport in order to provide the appropriate clarifications and avoid the (ab)use of entry requirements to facilitate illegal work that would damage European employees' interests.
 4. EU-wide labour market tests to identify skill shortage: admissions and grants of residence/work permits or the Blue Card must be based on real and proven skill shortages (must be demand/need-driven). Labour markets test conducted across the EU, rather than at national level, could be useful in terms of an 'upstream analysis'. In a market and employment structure that is truly pan-European with highly mobile workers operating from different countries on a daily or weekly basis, the only assessment to have any real meaning would be an EU-wide one. Looking at skill shortages on a national basis when the workforce and their licensing are European will result in a misrepresentation of the situation.
 5. Application of the 'Community preference principle' to all flights of European airlines touching the EU territory: the current EU migration legislation provides less protection for mobile staff in aviation than for any other group of workers; while the general rule says that priority has to be given to EU nationals when filling a vacancy, no such rules apply to aircrew and this increases uncertainty to their future working conditions. In order to give priority to EU nationals, reliable labour market tests across the EU should be conducted.
 6. Wet-leasing of aircraft with aircrew to be assimilated to posted workers or intra-corporate transferees (ICTs): non-EU aircrew working onboard non-EU registered aircraft in order to perform services on behalf of an EU airline under a wet-lease agreement whereby the EU airline is the lessee and the third country operator is the lessor⁷ should enjoy the same rights and protections (incl. social security) as the EU workers. Third-country aircrew working under a wet-leasing agreement should be assimilated to posted workers or intra-corporate transferees (ICTs).

EU immigration rules for aviation workers are a must !

As stated by a high-ranking Commission's official in a formal letter⁸ (dated 3 August 2017): *"However, it is for the Member States concerned to examine whether these US workers comply and respect labour, employment and immigration legislation. In this regards, please note that third-country pilots who have a work contract with an undertaking established outside the EU may benefit, depending on their individual situation, from the application of the Directive 2014/66/EU on intra-corporate transfer, the Single Permit Directive 2011/98/EU,*

⁷ A wet lease is a leasing arrangement whereby one airline (the lessor) provides an aircraft, with complete crew, maintenance, and insurance to another airline (the lessee). A wet lease generally lasts 1–24 months and it is typically used during peak traffic seasons or annual heavy maintenance checks, or to initiate new routes.

⁸ A copy of the letter is available upon request.

or Directive 96/71/EC on posted workers. These tools help ensuring that third countries' workers on EU territory are equally treated with nationals of the Member State where the work is carried out, to the extent necessary depending on the situation".

This statement illustrates the problem. The EU has no power to examine whether workers comply with labour, employment and immigration laws. Due to the highly mobile nature of aviation work, Member States cannot do the job. Today, crews can be flown into Europe without any work permit for periods of 15 or more days to perform intra-European flights or flights between Europe and destinations outside Europe without having rest periods in their home country.

If not corrected, Europe might see a situation similar to the Cruise ships where a mix of cheap third country crews mans the ships. This is a real threat to European aviation that could lead to significant loss of quality jobs, tax revenue, and support of the European social model. Only coordinated EU action can effectively address this threat.

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