ECA COMMENTS: EVALUATION ROADMAP of the Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community

Summary of key issues:

- Atypical work
- Foreign crews on board of EU carriers
- Carriers with operational bases in several states thus operating though secondary establishments
- The Principal Place of Business of an airline cannot be in a place where no flights are operated
- Fair competition on taxation and labour
- Wet leasing of foreign aircraft and crew should remain exceptional. Complexity and new use of intra-European wet leasing creates oversight challenges.

C. 1 Topics to be covered

1. Social issues in civil Aviation

It is true that social issues have been discussed by stakeholders and they have been highlighted by the 2015 Aviation Strategy. However no specific legislative actions have been taken. Guidelines on international private law were published[1] but their capacity to provide the clear and indisputable legal framework needed to set up a level playing field is questionable. There are two ongoing prejudicial questions (Cases Moreno C169/16 and Pontes C242/16) which might highlight the need for specific solutions appropriate mobile employees of companies providing air services.

- Atypical work, the lack of common definitions of abuses and of prosecution of abuses has created market inefficiencies. It should be analyzed whether the lack of proper implementation of social legislation has not been an element that distorted competition and favoured some business models over others. Not all the countries apply or have the means (qualified and sufficient labour inspectors) to apply EU and national social legislation. This might have led some airlines to move to more complacent jurisdictions and gaining unfair competitive advantages.

  There are questions related to the objective to ensure the proper application of Community and national social legislation which will not solved by the guidelines.

- Some new social issues became apparent after the drafting of Regulation 1008/2008 notably on the issue of foreign crews on board of EU registered airplanes and of working conditions on EU registered aircraft owned or controlled by non EU investors.

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The operation of air services in the Community by third country aircraft following the conclusion of Air Services Agreements is also posing problems with regard to the application of EU and national social legislation. The EU must develop a system to ensure efficient supervision of these operations including of the respect for social laws, to prevent the development of flags of convenience. Not addressing possible loopholes in social legislation regarding operations of third country carriers in and from the EU and non-monitoring of third country carriers' compliance with International social standards and - in some specific cases - with EU social legislation will create distortions in the European Aviation Market.

- The importance of carriers with operational bases in several states has not ceased to grow. It is questionable whether the state of the AOC and of the OL can effectively and efficiently supervise aircraft based outside their territory in the same way as they do supervise operations inside their territories. This is especially true when a carrier registered in one country has neither operations nor crews at all in that country or only to a very limited extent. This situation should be analyzed and possibly eliminated. Some choose to operate in different bases through different AOCs but seek authorization to mix their crews and their fleets. This poses also problems in terms of effective supervision and *in fine* about safety. Finally, the impact of the privatization of certain supervision activities has to be analyzed since the supervisor acts as a private company with the aim of profit making (offering maybe a more accommodating framework) rather than fulfilling a safety related public service.

2. Wet Leasing

Regulation 1008/2008 developed rules to avoid excessive recourse to leasing agreements of aircraft registered in third countries and limited recourse to this practice to exceptional circumstances. This approach is justified by the need to ensure compliance with the community preference principle and to prevent the development of virtual airlines and social dumping. Access to third country aircraft has not been applied equally by all authorities. Others are trying to open ways to facilitate leasing of foreign carriers through international agreements or safety regulations. However, the original reasons to make foreign leasing exceptional are now even more valid and should be reaffirmed to avoid external initiatives from eroding them.

Wet-leasing with third countries should not be dealt with separately or in another context. Possible amendments to leasing provisions must be fully addressed by the ongoing evaluation and substantial amendments to these provisions should be a pre-requisite of any future arrangements between the EU and third country partners aimed at establishing open and unrestricted regimes for wet-leasing.

Intra-European wet leasing has significantly developed and its forms became more and more complex, less transparent and sometimes became a permanent way of operating rather than a solution for short-term needs. This new way of wet leasing aircraft makes oversight (of safety but also of labour and other issues) much more challenging. Prior approval requirements need to be strengthened.

3. Pricing

Transparency in pricing has improved significantly leading to a situation where competition is no longer on ticket prices but on ancillary services and overall on taxes and on labour. It is essential, in order to achieve a more efficient market to introduce mechanisms to avoid tax and labour anticompetitive behaviour, including regulatory forum shopping.

4. Principal Place of Business

There are airlines that are established in countries where they do not operate one single flight. This is surprising for an air carrier but perfectly possible under the Regulation. If it makes sense that the AOC and the OL stay in the same country, it is also common sense that an airline is established in a country where they operate a significant number of flights.
A difference should be made between carriers operating under the freedom to provide services and those operating from bases in different countries under the principle of freedom of establishment. In order to designate one place of business as 'principal, it is important to clarify that (and how) any operational or management base is a 'place of business', and the implications of that. Following this, it is then possible to determine the criteria which make one of these places of business 'principle', and the further implications of this designation. Every operational base of a carrier must be considered as a secondary establishment and its operations should be subject to the laws of that country – at present these establishments are often permitted to be treated incorrectly solely as some sort of service provision leading to a significant loophole.

C.2 Topics to be examined

Effectiveness:

- Success in creating level playing field, increasing market efficiency and improving safety and consumer protection
  See our points above in C.1:
  - There is no clear and indisputable legal framework to set up a level playing field on employment matters. Without clear rules or with loopholes in legislation the market is not transparent and cannot be efficient;
  - Abuses of atypical work are not defined uniformly throughout the EU and provide unfair competitive advantages to certain carriers and to certain business models;
  - The importance of carriers with operational bases in several carriers has not ceased to grow. It is questionable whether the state of the AOC and of the OL can effectively supervise efficiently aircraft based outside their territory in the same way as they do supervise operations inside their territories. This is especially true when a carrier registered in one country has no operations at all in that country.

- Was O&C successful in allowing EU carriers to maintain traffic rights?
  The capacity to maintain traffic rights is not the only criteria to assess the need for O&C rules. The dependence of some EU carriers on foreign investment is a critical strategic threat for the industry. As in the Metal industry, foreign investment may decide to pull off their investment at any moment reducing in that way European connectivity and economic performance.

- Freedom to operate intra-EU flights successful in ensuring equal treatment of EU carriers and creating a level playing field:
  Some Member States offer a tax, social and safety environment that offer advantageous competitive advantages to carriers under their registry. It is therefore not possible to speak about equal treatment between carriers operating in one country with the aircraft registered in that country and carriers operating under the registration of another EU Member State.

Relevance

- Adequacy of original instruments
  - Directive 2006/123/EC of 12 December 2006 on services in the internal market excluded from its scope services in the field of transport, including port services, falling within the scope of Title V of the Treaty. Regulation 1008/2008 "on common rules for the operation of air services in the Community" was further developed to address the provision of air services in the Community. It is therefore assumed that carriers provide air services under EU rules on freedom to provide services (air services) and it is not clearly addressed what should happen when a carrier provides air services from establishments in different countries.

  - Regulation 1008/2008 states that Member States shall not subject the operation of intra- Community air services by a Community air carrier to any permit or authorisation. But it does not say that Member States should not subject the setting of an establishment to a permit/authorisation. This question should be addressed by the Regulation. When air services are provided though stable and permanent bases, e.g. information exchange mechanisms should be put in place;

  - The operation of air services in the Community by third country aircraft following the conclusion of Air Services Agreements is also posing problems with regard to the application of EU and national social legislation. The EU must develop a system to ensure efficient supervision of these operations including of the respect for social laws, to prevent the development of flags of convenience;

  - The impact of the privatization of certain supervision activities has to be analyzed since the supervisor acts as a private company, seeking to attack a maximum of operators (clients) to its registry with the aim of profit making (offering maybe a more accommodating framework) rather than fulfilling a safety related public service;

  - The means for some national authorities are not sufficient to provide the services they are required;

  - The requirements for prior authorisation for wet leasing should be further strengthened.

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