

Airline Coordination Platform



European Cabin Crew Association

## ACP – ECA – EurECCA common views on the enforcement of the applicable law to aircrew

### Executive Summary

This paper concerns applicable legislation both from a social security (Regulation 883/2004) and an employment law perspective (Rome I Regulation). While social security law applicable to aircrew depends on the home base, applicable employment law is in principle determined based on the “habitual place of work”. The habitual place of work is also the main criterion for determining the competent jurisdiction when a dispute arises between an employer and its employee (Brussels Ibis Regulation). Recently, in the Crewlink cases (C-168/16 and C-169/16), the European Court of Justice clarified that the home base is a significant factor/*indicium* when it comes to locating the “habitual place of work”.

As demonstrated by several studies, reports and recent court cases, the aviation sector is particularly exposed to non-compliance with applicable law and misapplication of EU legislation in general. The reason identified by many is the transnational nature of the airlines’ operations and, consequently, the highly mobile character of the pilots/aircrew jobs that makes it difficult to determine the law applicable to employees as well as the State(s) with the regulatory oversight responsibility (incl. in the employment and taxation domains).

Our associations concur that both the social and competition dysfunctions of the EU aviation market need to be addressed as a matter of urgency at both EU and national level.

Our associations developed this joint paper to express their concerns and to jointly propose concrete actions to remedy the identified problems. The suggested solutions focus mainly on two aspects and can be summarized as follows:

- 1) Establish a link from the legal and oversight perspective between *any* airline’s operational base (other than the Principal Place of Business) and the Member State where the base is located. Prior notification about the opening of each base and compliance with local/national law would be required.
- 2) Clarify by EU law that the ‘home base’ equates to ‘the habitual place of work’ and as such it should be as stable as possible. Change of home base entails a change of applicable legislation.

## 1. ECA, EurECCA and ACP concerns: distortion of competition and lack of social dimension in the EU aviation internal market.

The EU aviation internal market is considered by many a success in terms of regional integration and liberalisation (removal of all operational/commercial restrictions). However, it was found by the EU Commission's report on the evaluation of the Air Services Regulation<sup>1</sup> that the founding legal act of the aviation market - the Air Services Regulation<sup>2</sup> - has *not* fully reached at least two of its overarching objectives: the establishment of a level playing field between EU airlines and a market where all players - incl. employees – can benefit from the created growth.

**ECA, EurECCA and ACP identified two main reasons for this *partial* achievement** and those were recently confirmed by the EU Commission's report on the evaluation of the Air Services Regulation:

- 1) **Lack of compliance and enforcement of the obligation for the airlines that operate in a stable and continuous manner from multiple operational bases (in several countries) to comply with every country/base's set of national laws & regulations.** Trans-national airlines operating in several Member States or subsidiaries, holding multiple Air Operator Certificates (AOC) and Operating Licenses (OL) in different countries have become a widely spread business model.
- 2) **Lack of (binding) provision on the aircrew's home base principle.** More generally, the social repercussions of a fully integrated & liberalized EU aviation market were completely neglected so far.

[For background information on the notions of 'home base' and 'operational bases', see **Annex 1**].

**ACP members** and several other airlines that are committed to socially responsible business models are being gradually **undermined by those 'ingenious' operators** that exploit the legal loopholes of the Regulation to gain a competitive advantage and unduly benefit from advantageous regulatory frameworks and more lenient oversight mechanisms.

**ECA & EurECCA members – pilots and cabin crew** - are equally impacted by these legal loopholes that are indeed at the origin of **numerous adverse social consequences**. In fact, although the Regulation does not specifically cover social aspects, it has been recognised that some of its provisions have an impact on workers (e.g. leasing, ownership & control)<sup>3</sup>.

The Regulation, for instance, does not, within itself, set an obligation to tie an operational base to the compliance with the applicable employment & broader social legislation of a given country, although wider EU law would expect this. A reference can be only found in Recital 9<sup>4</sup> that implies that there is a link between the opening of a base outside the country of the

<sup>1</sup> SWD (2019) 295 final COMMISSION STAFF WORKING DOCUMENT: EVALUATION of the Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community.

<sup>2</sup> Regulation (EC) n. 1008/2008 on common rules for the operation of air services in the Community

<sup>3</sup> The Commission only recently acknowledged in its Inception Impact Assessment that measures to allow the control of EU air carriers by foreign capital might also have an impact on jobs for EU nationals.

<sup>4</sup> Recital 9: "With respect to employees of a Community air carrier operating air services from an operational base outside the territory of the Member State where that Community air carrier has its principal place of business, Member States should ensure the proper application of Community and national social legislation".

Principal Place of Business (PPoB) and aircrews' social conditions. However, Recital 9 served so far as a mere *recommendation* to Member States.

Today, airlines are free to designate (= choose) *any* country in the EU as their PPoB even though they do not have substantial air transport activities in that country. The Air Services Regulation does not adequately reflect the reality of today's operations, namely the extensive use of outsourcing and *multiple* operational bases by certain airlines that operate in a *permanent* and *stable* manner from EU/EEA States *other than* their designated PPoB<sup>5</sup>. This is a practice/business model that spread on a large scale *after* the Regulation was adopted and this process was also eased by the legal vacuum present in the Regulation itself.

As long as air carriers are allowed, under the Air Services Regulation, to conveniently pick a country for their regulatory compliance, some operators will continue designating the State(s) with a more business-friendly regulatory environment - incl. in the areas of taxation and employment<sup>6</sup>. But this flexibility & commercial freedoms (i.e. provision of services in a systematic manner from *any* point in the EU) – when unfairly exercised by some market players – do come at the expense of the employees, who are currently paying the highest price, and are subject to the gradual but steady deterioration of their working conditions. Additionally, those airlines that, by playing by the rules and operating in a responsible way - including towards their workforce - are gradually losing competitiveness, are faced with a decline of market share or may even see themselves compelled to go in a similar direction.

In some cases, it was ascertained that where the PPoB was set up in a country where the airline performed none or only a very few flights, the choice of PPoB was mainly – if not only - driven by regulatory/fiscal considerations specific to the employment/labour area e.g. loose national regulation on temporary agency work and self-employment, statutory restrictions to the right to strike, more advantageous social security regime.

**The evaluation report issued by the Commission concluded, in fact, that there are indications that some level of 'rule shopping' to avoid higher labour costs is indeed taking place<sup>7</sup>.**

The ever-increasing use of multiple operational bases (outside the PPoB) raises also questions as to **which labour law is applicable to aircrew** who are based *outside* the State of the PPoB and creates a high degree of **legal uncertainty**. This legal uncertainty leads to **risks of an unlevel playing field** in the internal market as well.

In joined cases 168/16 and 169/16 relating to aircrew specifically, the ECJ clarified that the concept of 'home base' constitutes a significant *indicium* for the purposes of determining the 'place where the employee habitually carries out his work' to establish jurisdiction of the courts in employment disputes<sup>8</sup>. However, the ECJ's conclusions (September 2017) have not yet been linked to the applicable labour law (consistently with the jurisdiction aspect) and more importantly, have not been codified into EU law (e.g. through an amendment to the Air Services Regulation). This means that airlines are not required *by law* to abide by this

<sup>5</sup> Commission's report [SWD \(2019\) 295 final](#) p. 81 found that the current definition of PPoB is open to interpretations as to which precise functions need to be exercised in the Member State of the PPoB, making the concept not easy to apply.

<sup>6</sup> Malta and Ireland receive more operating licenses applications than other EU countries according to the Commission's report SWD (2019) 295 final, p. 30

<sup>7</sup> SWD (2019) 295 final, p. 30.

<sup>8</sup> C-168/16 and C-169/16 – Nogueira and others vs. Crewlink and Moreno vs. Ryanair

principle, and employees, who are subject to malpractices can only try to bring a case before the national Court (provided they know which State has the competent jurisdiction) and wait to see if the judge rules in accordance with the ECJ's conclusions.

- ⇒ For all the reasons stated above, our associations conclude that **the Air Services Regulation is no longer fit for purpose in this particular context**:

In fact, the Commission's report itself concluded that despite the significant increase in the total level of flight activity across the EU, the overall **level of employment in the aviation sector has decreased** because of significant productivity improvements<sup>9</sup> (e.g. outsourcing). And in terms of fair competition, **the overarching internal market objectives of the Air Services Regulation** linked to the creation of a level playing field and prevention of discrimination between EU carriers and market distortions, **have only been partially met**<sup>10</sup>.

## 2. Best practices.

Certain EU countries have developed or amended national legislation to address the issue of 'rule shopping' and now require airlines that perform flights from their territory through operational bases but have their PPOB in *another* EU Member State, to comply with *their* national labour law. The right & freedom to provide services is therefore guaranteed but it is also made conditional to the respect of local social legislation. In 2006, France adopted a decree that amended both the French Civil Aviation code and the French Labour Code to clarify that all operational bases of any airline (EU and non-EU) located in the French territory will fall under the scope of the French Labour Code [Décret 2006 - 1425](#) (see **Annex 3**).

## 3. Suggested solutions.

### - Operational base (Applicable Law)

**#1 - Amend the Air Services Regulation to create an obligation for airlines that provide in a stable and continuous manner services from operational bases outside their PPOB country to comply with the national legislations – incl. employment & labour law of the country where the base is located.** One simple way would be to turn Recital 9 into an Article, hence a binding provision.

In 2007 during the legislative process that led to the adoption of the Regulation, the EU Commission missed the opportunity to introduce such a requirement. Despite the support of the EU Parliament, the amendment n. 35 (see **Annex 4**) was finally not retained in the Regulation.

One of the following proposals could be considered to amend the Regulation:

- EU air carriers shall comply, in accordance with EU law, with the rules on employment conditions, including those laid down in collective agreements, of the Member States where that carrier operates air services through an operational base.

<sup>9</sup> SWD (2019) 295 final, p. 17

<sup>10</sup> SWD (2019) 295 final, p. 28

- The Member State (other than the PPOB country) in which an EU air carrier operates services through an operational base shall not be prevented from applying, in accordance with EU law, its rules on employment conditions, including those laid down in collective agreements.

## **#2 - Amend the Air Services Regulation to introduce a mandatory prior notification for the airlines that plan on opening a base in a Member State outside their PPOB.**

Airlines should be required to notify their PPOB Member State about the opening of operational base(s) in other EU countries. The PPOB Member State should subsequently send the information to the Member State(s) of the new base(s). The prior notification will provide all relevant authorities with certainty about all operational bases of the airlines they will have to oversee. Moreover, a simple notification does not represent a disproportionate administrative burden.

## **#3- Amend the Air Services Regulation to introduce an obligation for airlines to notify the labour authorities of the Member State(s) in which they open stable operational bases.**

Labour authorities should be notified about the personnel - incl. crew members - that will be (home) based in that *given* base and any other employee who may be temporarily transferred (in some cases, posted) from other bases. Base visits by the authorities should be regular to verify the lawfulness of the contractual employment relations (and social security affiliation) of the mobile personnel working in those operational bases.

Considering the highly mobile nature of aircrew's jobs and because such a notification to labour authorities would be justified for **reasons of 'overriding general interest'** (see **Annex 5**), it does not represent an obstacle to the free provision of services.

Directive on Services in the Internal Market 2006/123/EC (that excludes transport from its scope) contains this important principle. The need felt by the regulators at that time was, in fact, to balance the fundamental economic freedom to provide services in the internal market with other no-less important considerations – incl. the **need to comply with labour law** - that could in some cases derogate/restrict that freedom.

The Air Services Regulation was adopted two years later to precisely regulate a type of services not covered by that general Directive. Therefore, for consistency, the Regulation should be changed to make air services also subject to the principle of overriding general interest. The Commission's report itself refers to the necessity of balancing complete commercial freedoms against the interests of the society, by maintaining the safety of the operations, protecting consumers and workers<sup>11</sup>.

### **- Home Base**

**#1 - Amend the Air Services Regulation to codify the 'home base' as the *default* criterion for determining the competent jurisdiction and applicable mandatory labour law for aircrew**, in line with the case law of the ECJ (C-168/16 and C-169/16). The ***default* criterion of the home base** should apply to all carriers with operational bases in the EU (incl.

<sup>11</sup> SWD (2019) 295 final, p. 96.

non-EU carriers). This solution should cover both **employees** (i.e. all employed aircrews, including those hired by intermediaries) and **self-employed**, as is the case for social security and safety rules.

**#2 - A new definition of ‘home base’** should be introduced: *“For the purpose of establishing applicable social security legislation and applicable labour law valid for a crew member based outside the territory of the Member State where the community carrier has its principal place of business, and notwithstanding the definition in Annex II of Regulation (EU) 83/2014 laying down technical requirements and administrative procedures related to air operations, the home base is the aircrew’s place of work which shall be considered the location from which the crew member is carrying out his/her actual duties and main activities, and where under normal circumstances the operator is not responsible for the accommodation of the crew member concerned. This location shall remain stable. When a crew member is transferred to a home base in a different Member State this implies a change in an essential part of the employment contract (the place of work) and a change in the corresponding legislative framework”.*

However, the ‘home base’ should not be made by law the *only* possible mandatory criterion to determine the applicable law (and jurisdiction), employees should be entitled to invoke other criteria, if need be. In practice, aircrew will enjoy the right to challenge the ‘home base’ criterion when their home base has been artificially assigned to them and demonstrate that there is a *more relevant connecting factor* to determine the applicable labour law. This way, unscrupulous employers would not be able to circumvent the labour/employment legislation of a Member State by assigning a fake home base to their aircrew members or by changing their home base regularly – which is another creative (and bad) practice we observe in the market (so called mobile pilots or ‘floaters’).

Brussels, 02/12/2019

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Whom we represent:

**Airline Coordination Platform (ACP)** is a group of major European airlines, with the purpose of advocating for fair competition in the European aviation sector, with a specific focus on social affairs and external air political relations. The airlines of the group employ a total of around 200.000 people.

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**European Cockpit Association (ECA)** is the representative body of European pilot associations, representing over 41.000 pilots from across Europe, striving for the highest levels of aviation safety and fostering social rights and quality employment in Europe.

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**European Cabin Crew Association (EurECCA):** is made up of cabin crew unions from ten European countries, representing over 70% of organized cabin crew in Europe, and promoting better living and work conditions, as well as aviation safety.

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## ANNEX 1

### Background information & definitions: home base, operational bases, Principal Place of Business (PPoB)

The notions of **home base** and **operational base** are often confused, and this may result in the improper choice of the legal instruments that govern both or one of the two concepts. It is worth reminding that *the* 'home base' relates to the aircrews (pilots and cabin crew), whereas *an* 'operational base' relates to the airline. Each individual crewmember can only have a *single* home base, while an airline can establish *multiple* operational bases in different countries.

The **home base is a legal concept** and is defined as the location from where the crewmember normally starts and ends a duty period or series of duty periods and where under normal circumstances the operator is not responsible for the accommodation of the crewmember concerned. It is the location where the crewmember reports for duties. Home base related legal references can be found in the **Annex 2** of this document. However, it must be stressed that the Air Services Regulation (Regulation (EC) 1008/2008) – i. e. the founding act of the EU aviation internal market, neither includes the home base concept, nor defines it.

Although there is no legal definition of *an operational base* in the Air Services Regulation, one can infer from the recitals<sup>12</sup> that an operational base is one of the (several) locations (airports) at which an air carrier bases its aircraft and crew and from where it operates routes, transports passengers, cargo or mail for an indefinite period.

The Air Services Regulation only defines the **Principal Place of Business (PPoB)**<sup>13</sup>. The concept of PPoB was introduced in 2008 in order to address the increasing trend of air carriers having *multiple* operational bases (= places of business) in *several* Member States<sup>14</sup>. However, in order to designate one place of business as 'principal', it is necessary to clarify first that any *other* operational base is a 'place of business', and the implications of that, something that the Regulation currently fails to do. Only then, it will be possible to determine the *criteria* which make *one* of these places of business '*principal*', and the further implications of this designation.

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<sup>12</sup> Recitals 4, 9 and 26

<sup>13</sup> Recital 26 of Reg. 1008/2008: 'principal place of business' means the head office or registered office of a Community air carrier in the Member State within which the principal financial functions and operational control, including continued airworthiness management, of the Community air carrier are exercised.

<sup>14</sup> The opening of permanent operational bases outside the country where an airline has its PPoB is a direct consequence of the liberalisation of the internal aviation market where air carriers are free to exercise their freedom to provide services from *any* EU/EEA country.

## ANNEX 2

### Home base legal references

#### EASA rules:

#### ORO. FTL.105 Definitions

(14) '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.

#### CS FTL.1.200 Home base

- (a) The home base is a single airport location assigned with a high degree of permanence.
- (b) In the case of change of home base, the first recurrent extended recovery rest period prior to starting duty at the new home base is increased to 72 hours, including 3 local nights. Travelling time between the former home base and the new home base is positioning.

#### Directive 91/533

An employer shall be obliged to notify an employee:

(b) the place of work; where there is no fixed or main place of work, the principle that the employee is employed at various places and the registered place of business or, where appropriate, the domicile of the employer;

#### **ANNEX III, Subpart Q of Regulation (EC) 3922/91 as amended by Regulation (EC) No 859/2008**

Home base:

The location nominated by the operator to the crew member from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal conditions, the operator is not responsible for the accommodation of the crew member concerned.

## ANNEX 3

## French Decree 2006-1425

## Code de l'aviation civile - Article R330-2-1

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## Article R330-2-1

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## Article R330-2-1

Créé par [Décret n°2006-1425 du 21 novembre 2006 - art. 1 JORF 23 novembre 2006](#)

L'article L. 342-4 du code du travail est applicable aux entreprises de transport aérien au titre de leurs bases d'exploitation situées sur le territoire français.

Une base d'exploitation est un ensemble de locaux ou d'infrastructures à partir desquels une entreprise exerce de façon stable, habituelle et continue une activité de transport aérien avec des salariés qui y ont le centre effectif de leur activité professionnelle. Au sens des dispositions qui précèdent, le centre de l'activité professionnelle d'un salarié est le lieu où, de façon habituelle, il travaille ou celui où il prend son service et retourne après l'accomplissement de sa mission.

## ANNEX 4

### EU Parliament's amendment

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2007-0178+0+DOC+XML+V0//EN>

#### Amendment 35 Article 14 b (new)

##### *Article 14b*

##### *Social legislation*

*With respect to employees of a Community air carrier operating air services from an operational base outside the territory of the Member State where that Community air carrier has its principal place of business, Member States shall ensure the proper application of Community and national social legislation.*

##### *Justification*

*The operation of bases other than country of origin has created problems as to the determination of the applicable laws to crews on the employment. In order to solve this problem a clear provision should be introduced in this regard.*

##### Result of final vote

+	32
-	3
0	0

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2007-0337&language=EN&ring=A6-2007-0178>

## ANNEX 5

### Excerpts from the Directive on Services (Directive 2006/123/EC)

Recital 7: (...) That coordination of national legislative regimes should ensure a high degree of Community legal integration and a high level of protection of general interest objectives, especially protection of consumers, which is vital in order to establish trust between Member States. This Directive also takes into account other general interest objectives, including the protection of the environment, public security and public health **as well as the need to comply with labour law.**

Recital 40: The concept of '**overriding reasons relating to the public interest**' to which reference is made in certain provisions of this Directive has been developed by the Court of Justice in its case law in relation to Articles 43 and 49 of the Treaty and may continue to evolve. The notion as recognised in the case law of the Court of Justice covers at least the following grounds: public policy, public security and public health, within the meaning of Articles 46 and 55 of the Treaty; the maintenance of order in society; social policy objectives; the protection of the recipients of services; consumer protection; the protection of workers, including the social protection of workers; animal welfare the preservation of the financial balance of the social security system; the prevention of fraud; the prevention of unfair competition; the protection of the environment and the urban environment (...)

Recital 47: With the aim of administrative simplification, general formal requirements, such as presentation of original documents, certified copies or a certified translation, should not be imposed, except where objectively justified by an **overriding reason** relating to the public interest, such as the **protection of workers**, public health, the protection of the environment or the protection of consumers. (...)

Art. 4 § 8 (Definitions) : '**overriding reasons relating to the public interest**' means reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives.