

Report on Social Dumping/Rule shopping in aviation

Status March 2015

Preamble

In June 2013, the Danish Minister of Transport set up a broadly composed working group containing representatives of the aviation industry, the trade unions, and the relevant ministries. The working group was tasked with preparing a report on social dumping in aviation. The working group was established under the Danish Aviation Council, which is a forum for cooperation between the Ministry of Transport and all sections of the airline industry.

The working group delivered its report to the Danish Aviation Council in April 2014. This report was subsequently translated into English and sent to the European Commission, as well as the EU Member States and the EEA countries.

The report of April 2014 on social dumping in aviation was discussed at a meeting of the Danish Aviation Council on 5 May 2014. The meeting decided that the working group should continue its work in order to monitor and assess more closely developments within aviation in relation to "social dumping/rule shopping" and to produce practical, well-prepared proposed solutions.

The working group was to continue to work on the problems and proposed initiatives raised in the aforementioned report. Against this background, work continued further along the three routes that formed the basis of the report:

1. The EU route, where, owing to EU regulations, initiatives are required at EU level.
2. The national route, where Denmark itself is able to implement initiatives to combat social dumping.
3. Ensuring that there is no deliberate circumvention of the rules.

This report must therefore be viewed in the context and as an extension of the report on social dumping in aviation that was submitted in April 2014. The purpose of this report, therefore, is to report to the Council on the measures and initiatives that have been implemented since May 2014 with regard to social dumping/rule shopping in aviation, as well as to submit proposals for possible initiatives, including in relation to the EU.

This report opens with an updated summary of both the report of April 2014 and the overall trend within the airline industry. This is followed by a report on Danish initiatives in relation to the EU since the report of April 2014, as well as on the measures implemented at national level in order to combat social dumping/rule shopping. Details are then given of the initiatives implemented by the EU with regard to social dialogue and social dumping/rule shopping and which the working group considers should be the general objectives of the proposals submitted to the Commission in this report. Finally, it is proposed that the measures for the EU route be realized as far as possible through an aviation regulation.

Contents

1	Summary	7
2	Report of April 2014	9
2.1	Summary of the report of 2014	9
2.1.1	Working group starting points	9
2.1.2	Social dumping in aviation	9
2.1.3	Developments in aviation	10
2.1.4	New employment models	10
2.1.5	Connection between new business models, terms of employment and "social dumping/rule shopping"	11
2.2	Initiatives proposed by the report	11
3	Danish initiatives in relation to the EU	12
3.1	Introduction	12
3.2	Specific initiatives that have already been implemented	13
3.2.1	Concept of the employer and applicable law in relation to social security	13
3.2.2	Aviation safety	14
4	National Danish measures, etc.	14
4.1	Introduction	14
4.1.1	Double taxation convention with Ireland	15
4.1.2	SKAT projects relating to aviation personnel, etc.	15
4.1.3	Administration and monitoring in Denmark	15
5	Reports and initiatives of the European Union	16
5.1	Introduction	16
5.2	European Commission Opening Statement	16
5.2.1	Specific initiatives from the European Commission	17
5.2.2	Work initiated by the European Commission	17
6	Continued work	19
6.1	Introduction	19
6.2	The EU route	19
7	EU legislation	22

1 Summary

As mentioned in the preamble, this report is a follow-up to the working group's report of April 2014 on social dumping in aviation and should therefore be viewed in that context.

Chapter 2 provides a brief description of the content and the initiatives proposed by the working group in the aforementioned report. These concern issues such as employment and business models, and developments within the airline industry, including the emergence of low-cost airlines. It will also be stated that social dumping in aviation can generally be classified as legal rule shopping, where airlines take advantage of the differences in the rules of Member States and in the Member States' interpretations of EU rules.

A report on Danish initiatives in relation to the EU is given in Chapter 3. This includes Danish involvement in meetings at EU and other levels and the presentation of the report and the proposals it contains at these meetings. A report is also provided on the specific initiatives that have already been implemented. These concern the concept of the employer in relation to social security, which, as a result of the Danish request, is on the agenda of the Administrative Commission for the Coordination of Social Security Systems of the European Union. The aim is to achieve a common definition within the EU Member States of the concepts of employer and employee. The EASA has also, following a Danish submission and at the request of the European Commission, initiated an analysis of the possible impact of the new business and employment models on aviation safety.

Chapter 4 reports on national Danish measures. These include double taxation conventions with other countries, including the revised convention with Ireland, as well as SKAT's projects relating to aviation personnel.

Chapter 5 reports on initiatives from the European Commission. The European Commission's opening statement, made by the President of the Commission to the European Parliament in July 2014, makes it clear that the current new Commission will prioritize efforts to combat social dumping. "We have to fight social dumping and we will do it," the President said, among other things. The Commissioner for Transport and the Commissioner for Employment, Social Affairs, Skills and Labour Mobility have also announced initiatives, including holding a joint conference on social dumping in May 2014. Finally, DG MOVE has commissioned a study, in which the issues relating to social dumping will play a prominent role.

The proposals of the working group for further work in relation to the EU are reported in Chapter 6. These include ongoing work to:

- continue to participate in the work to ensure a standardized interpretation and administration of the concept of the employer within the EU,
- follow and actively participate in the work of the EASA with regard to aviation safety,
- secure the rights of all employees to social security in an EU country,
- have established a more unambiguous, certain and specific definition of the concept of home base in connection with social security, etc.,
- ensure that all aircraft are subject to supervision of the working environment on board the aircraft and that this takes place in accordance with standardized rules and guidelines.

In view of the competitive situation between EU airlines and third-country airlines, the working group also urges the European Commission to initiate work with the aim of ensuring the competitiveness of EU airlines in relation to third-country airlines, and thereby also secure employment in the EU for flights to and from third countries.

Finally, Chapter 7 describes how the working group envisages the initiatives being implemented within the EU. It is proposed that the initiatives are implemented in a special EU aviation regulation, i.e. as far as possible in a regulation that applies solely to aviation (known in the EU as "targeted aviation regulation initiatives"). This is particularly in view of the specific conditions and nature of aviation and to ensure that there is no risk of creating unforeseen problems and inexpediencies in the regulations that apply to other sectors of industry and commerce.

2 Report of April 2014

This chapter provides a summary of the working group's report of April 2014, including an updated description of the airline industry.

2.1 Summary of the report of 2014

2.1.1 Working group starting points

The working group has worked on the basis that aviation is an international, cross-border business that operates across national borders – both in the EU and in the world as a whole, that the EU's liberalization of aviation has created opportunities for EU companies to operate freely within the entire European aviation market, as well as developments in recent years, including the emergence of "point-to-point" airlines – popularly known as low-cost airlines – as well as the development of new organizational and business models within aviation. Furthermore, the working group assessed four new transnational employment models in aviation and the associated terms of employment and on this basis a number of rules and conditions on which these new conditions within aviation impact in relation to what could potentially be characterized as "social dumping".

The working group also found that "social dumping" in aviation in particular is linked to "shopping around between different countries' rules". The new forms of organization, terms of recruitment and employment and forms of recruitment mostly appear legitimate and in compliance with current EU rules in the form of directives and regulations. However, the working group also encountered examples of conditions in the context of employment models and forms of recruitment that tend towards the deliberate exploitation of unintentional differences in the rules and their implementation in the Member States.

Based on this, the working group examined national rules and the EU regulatory framework within selected areas and evaluated them to identify what could be perceived as unintentional discrepancies in relation to the social rights of employees, employer responsibilities and employer obligations, for example. In this context, the working group was also aware of the impact of the regulations and terms of employment on competition between airlines from both a global and an EU perspective, and taking into account the free movement of workers and the freedom of establishment and market access within the EU.

Finally, the working group considered whether the new employment and organizational structures, etc., may have an impact on the working environment on board aircraft and the safety of employees.

2.1.2 Social dumping in aviation

Social dumping most often describes a situation where foreign workers working in Denmark have pay and working conditions below the normal Danish level. It can also refer to a situation where foreign companies fail to comply with Danish legislation and regulations. Within aviation, it was the opinion of the working group that social dumping and the opportunity for this relates particularly to "rule shopping", where EU airlines legally organize employment models, terms of employment, company structures, and business relationships against the background of the differences in national laws and regulations, including differences in the implementation, understanding, and administration of the EU regulatory framework by the Member States.

The working group therefore came to the conclusion that social dumping in aviation is the result of differences in the legislation and other regulations of EU Member States in

relation to employment conditions, workers' rights, employer obligations, social rights, etc., as well as both the different implementation of directives, and the interpretation and administration of regulations and directives, including different views of the Member States on, for example, employer responsibility and the concept of the employer in relation to social security and tax.

"Social dumping" in aviation mostly occurs, therefore, when EU airlines organize 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".

2.1.3 Developments in aviation

Aviation is an international, cross-border business that operates across national borders – both in the EU and in the world as a whole.

Liberalization and market deregulation within the EU between 1987 and 1992 opened the way for new business models and operators, who found non-traditional ways of differentiating themselves (low-cost, point-to-point airlines, etc.). This has been beneficial to all parties, as it has resulted in a far greater range of differentiated products and lower prices for consumers, resulting in strong growth for aviation within the EU. This development has been followed by a convergence of business models, intensifying the competition on costs.

With the liberalization of the industry and the emergence of "point-to-point" airlines, competition intensified, especially on price as the key differentiating factor, which has presented huge challenges to network carriers.

The "point-to-point" airlines have also established bases (home bases) at several airports in cities across Europe, where their aircraft "overnight" and their staff officially start and end their work. Unlike the network carriers, they have not also constructed hubs with complex facilities at the individual airports, and this allows them to relocate their services (production facilities) very quickly to other airports if this is deemed to be more appropriate and profitable.

Alongside this development, the airlines have also introduced other new measures. The airlines – both traditional carriers and "point-to-point" airlines – have now outsourced ancillary services to a very great extent, so that we can speak to some degree of virtual airlines, i.e. airlines that mostly deal only with ticket sales and preparing flight schedules, and ultimately have overall responsibility for all the safety and operational conditions. Other services are bought in from other companies. At the same time, it has become much more common for airlines to lease their aircrafts instead of owning them.

Another trend that has arisen is the emergence of transnational airlines. A number of new, legitimate company structures and business models have therefore appeared and developed in the EU, where a parent company has an EU licence (main licence) with an associated AOC (Air Operator Certificate) in one EU country and establishes subsidiaries with an EU licence and AOC in one or more other Member States, in which staff are also employed or recruited, possibly via recruitment agencies, which may be located in third countries.

2.1.4 New employment models

Since 2008, the number of and variations in so-called transnational employment models in aviation have been increasing. These new employment models are causing concern for both employer and employee organizations, as they consider the consequences of these employment models to include increased, unfair competition because the airlines disclaim responsibility for such things as their employer obligations, for example in relation to social benefits and pensions. At the same time,

these employment models far from resemble those that are the norm in Denmark, for example, and most other EU countries.

Several airlines have also begun to use recruitment agencies (in some cases these are established as subsidiaries) located in one or more EU countries and/or in third countries, through which some of the airlines' staff are recruited. Some airlines also use "self-employed" staff, i.e. where a pilot sets up his own private company with himself as the only employee, for example. The pilot's company can be located in any country – inside or outside the EU. The pilot then hires his labour out to an airline through this company.

2.1.5 Connection between new business models, terms of employment, and "social dumping/rule shopping"

The working group considered that the new employment models combined with the airlines' ability to establish subsidiaries and home bases, and use recruitment agencies and workshop facilities, etc. in different countries, enables airlines, within the law, to "rule shop" between countries – on the basis of where it is most advantageous to the airline. This relates to taxes, wages, working hours and working conditions in general, as well as working environment requirements and employer obligations, including in relation to social obligations and pensions. Such employment models therefore create complexity and a lack of transparency and thus uncertainty for the individual about which set of rules applies to the employment relationship. Moreover, the differences in the Member States' interpretation of EU rules on social security may give rise to doubt for both employees and the Member States about which country is liable to pay social security benefits.

2.2 Initiatives proposed by the report

The report of April 2014 proposed that initiatives be implemented along three main routes in order to limit the opportunities for "social dumping/rule shopping" as far as possible.

Route 1: The EU route – Ensure an uniform implementation, administration, and interpretation of EU rules.

The working group recommended that Denmark should work constructively and purposefully to ensure the uniform implementation, administration, and interpretation of EU rules. The working group found that this work could be done by having the rules formulated more unambiguously, or by working to have rules that are relevant to the field of aviation enshrined in regulations rather than directives, where possible.

In this context, the working group identified six possible areas that could be examined. These were the EU rules on social security, employment agencies, "self-employed", the home base concept, the working environment on board aircraft, and aviation safety.

Route 2: The national route – Avoid Danish rules that provide opportunities for "rule shopping/forum shopping"

The working group found that Danish rules that facilitate "rule shopping" may be either rules that attract foreign companies to Denmark or rules which make it more attractive for companies to "rule shop" outside Denmark.

The working group found only one circumstance worth examining, which was the taxation of aviation personnel in international traffic (double taxation conventions).

Route 3 – Ensure that there is no deliberate circumvention of the rules

The working group recommended that the protagonists in the airline industry should themselves assume the task of testing possible circumventions of the rules under trade union law or in the courts, in order to obtain confirmed case law.

The working group found that this could be relevant, for example, in the event of disputes on jurisdiction and applicable law in connection with an employment relationship, as well as in the event of a breach of a temporary worker's rights under the EU Directive or the Danish Temporary Employment Act.

The working group further found that the implementation of supervisory measures by the authorities could be considered, similar to those in the haulage and construction industries, for example.

3 Danish initiatives in relation to the EU

3.1 Introduction

As previously stated and also described in the report on social dumping in aviation of April 2014, social dumping in aviation is linked in particular to the opportunities for airlines to "rule shop" and so exploit differences in the implementation, administration and interpretation of the EU rules by the Member States. There is therefore a need for initiatives from the European Commission, as it is the Commission that is the initiative-making organ of the EU.

With this in mind, an English translation of the working group's report has been sent, as previously stated, to the Commission and all the Member States, as well as the EEA countries. The Danish Minister of Transport has also subsequently raised the issue with fellow ministers in the EU.

The Danish Transport Authority has also presented the report, and the issues it raises, at meetings in relevant EU forums, with the request that the European Commission carry out further work on these issues and draft proposed solutions to minimize the opportunities for "rule shopping". These include EU meetings on social dialogue in the field of aviation and a meeting of the 'Advisory Committee on Application of the Legislation on the Access for Community Air Carriers to Intra-Community Air Routes', which is a committee under DG MOVE. At the latter meeting, the Danish Transport Authority presented the report and gave an account of the main content of the Danish proposals for solutions.

At this meeting, the Danish representatives, among others, stated that with regard to initiatives relating to EU regulations, it is necessary to divide the initiatives into those that can resolve issues relating to internal flights within the EU and those that can resolve issues relating to flights to and from third countries.

It is possible at EU level to stipulate standardized requirements for airlines flying between two EU countries. In the case of flights to and from third countries, EU airlines are competing with third-country airlines, which are not subject to the same regulation as the EU airlines.

Flights to and from third countries therefore require the consideration of proposed solutions to the issue of "rule shopping" that are different to those being drawn up for internal flights within the EU. This is in order to ensure that the EU airlines are able to compete effectively with third-country airlines and also to secure employment within the aviation industry in the EU.

3.2 Specific initiatives that have already been implemented

3.2.1 Concept of the employer and applicable law in relation to social security

Social security includes health insurance and sick pay, social security pension and ATP pension, child and youth benefits, unemployment benefits, occupational health insurance, etc.

The EU coordinates social security for aircrew in Regulation (EC) No 883/2004. A person who is employed as aircrew can only be covered by one country's social security regulations at a time. This applies even if the person carries out work in several countries.

EU countries have different practices for determining who the actual employer is. This may originate from language differences, confusion of EU coordination rules with the national legislation of the country, etc. This can lead to uncertainty as to who is responsible for the employer's obligations to the employee and may result in the employer's obligations being paid in two countries or not in any country at all.

The challenge particularly arises when airlines either employ staff through a recruitment agency or employ so-called "self-employed" staff, who may be registered in a different Member State to the airline, and where the person may be posted subsequently to a third Member State. It can be difficult in such situations to determine which country's legislation should cover the employee and who is responsible for the employee having social security cover.

Against this background and in accordance with the recommendations of the report of April 2014, Denmark has therefore submitted a note regarding the concept of the employer in relation to social security/employer's contribution, etc. to the Administrative Commission for the Coordination of Social Security Systems of the European Union. The note focuses on the aforementioned inexpediency, and it is proposed that with regard to social security there should be a single interpretation of the concept of "employer who employs". With regard to aviation, this means that if a person in reality works for an airline, the airline should be considered that person's employer when determining the applicable law on social security – irrespective of the employment model.

The Danish note was presented at the formal meeting of the Administrative Commission for the Coordination of Social Security Systems that was held in Brussels on 22–23 October 2014 and the content of the note was incorporated in the mandate of the Commission's working group, which examines selected issues in the field of social security that require more in-depth analysis and mutual understanding in the Member States.

The mandate was approved at the formal meeting of the Administrative Commission in December 2014. The Commission has invited interested countries to nominate their representatives in the group, so that work can commence as soon as possible. Denmark is taking part in this work.

The Commission's working group, which will discuss the issue of the concept of the employer, among other things, held its first meeting in early February, at which the parameters were agreed for the group's work. The group will meet again on 13 March 2015, when discussions will begin on the content, including discussion of the concept of the employer.

As previously indicated, it should be stated in connection with this that it is the opinion of the working group that the Danish authorities, through supervisory measures/supervision with the airlines in accordance with the Danish proposal, work as intended. A position should be taken, with regard to both social security and taxation, on the basis of the specific circumstances in each individual case, including the method by which the person is employed and how the contract is structured

compared with the actual working conditions. This will enable the Danish authorities to determine whether this is a case of self-employment or whether there is an employer/employee relationship.

3.2.2 Aviation safety

The aviation authorities currently have no indications that those airlines which use flexible staffing and employment models have a lower level of safety than other airlines.

However, the safety rules that apply were drawn up at a time when aviation business structures, business models, and recruitment and employment models were fundamentally different than they are now. The emergence of so-called "virtual airlines" has created a new situation where large parts of production, aircraft maintenance, etc., are handled by subcontractors. The responsibility for safety in each individual part of production therefore lies with these subcontractors, while responsibility for overall safety remains with the airlines.

Against this background and in continuation of the recommendations of the report of April 2014, Denmark has contacted the EASA with the proposal that the EASA should carry out qualitative and quantitative studies on whether the structure of the aviation safety rules with regard to "safety" is appropriate in view of the trend towards more fragmented business structures and employment models, and to assess whether these developments pose or could pose a risk to aviation safety.

At the same time as Denmark's request to the EASA, the European Commission itself took the initiative to ask the EASA to set up a working group on "New Business Models in Aviation". The working group will carry out a preliminary study to evaluate the safety issues that may be associated with the new business models in aviation. Once the preliminary study is complete, a position will be taken on further work.

The working group consists of representatives from 11 countries as well as the European Commission. Denmark is represented in the working group.

At the time of writing, the working group has held two meetings, with a further meeting planned for the end of March 2015.

The focus of the first and second meetings was on identifying New Business Models and the potential risks involved in these business structures. Work was done to examine whether current legislation is adequate and to identify the challenges these business models represent for the national authorities. The agenda for the meeting at the end of March will include recommendations for solutions to these challenges.

The final recommendations of the working group are expected to be presented in the middle of 2015.

4 National Danish measures, etc.

4.1 Introduction

Aviation is fundamentally an international, cross-border business. The regulations governing aviation are therefore also largely agreed at international level in the ICAO. In addition to this is the liberalization of aviation in the EU, the aforementioned associated problems and the consequences thereof. It is ultimately these circumstances that provide the opportunities for rule shopping. The scope to act at national level is therefore very narrow in terms of limiting the opportunities for social dumping or rule shopping and relates solely to those circumstances not regulated by the EU. In Denmark this mainly means taxation.

4.1.1 Double taxation convention with Ireland

The majority of Danish double taxation conventions are drawn up so as to allow Denmark to tax persons who are domiciled in Denmark (i.e. normally resident in Denmark) on wages for work carried out on board aircraft in international traffic for an airline from the other counterparty country.

However, Denmark has some individual older agreements in place that have been drawn up in a way that does not allow Denmark to tax wages in these situations. The Danish-Irish double taxation convention was one example. Under this agreement, wages for working on board an aircraft in international traffic for an airline whose effective management is based in Ireland were taxable only in Ireland. This meant that Irish airlines could have a competitive advantage over Danish airlines.

Last year, Denmark and Ireland agreed a protocol to amend the Danish-Irish double taxation convention and on 22 July 2014 signed a protocol for the Danish-Irish double taxation convention. The protocol means that Denmark is able to tax the wages of aviation personnel who are resident in Denmark and work on board aircraft in international traffic, irrespective of whether they work for a Danish airline or an Irish airline. A deduction is made from Danish taxation for any Irish tax on the wages.

The protocol came into effect on 23 December 2014 and applies to tax years commencing on or after 1 January 2015.

Furthermore, the Danish starting point when negotiating new and renegotiating existing double taxation conventions will continue to follow the principles of the OECD Model Convention with regard to taxes on wages for work carried out on board aircraft in international traffic.

4.1.2 SKAT projects relating to aviation personnel, etc.

In autumn 2013, SKAT (the Danish Tax Agency) launched an analytical project called "Globalization 2013 – Aircrew", which was concluded in spring 2014. The project examined the compliance of aircrew. There is continued focus on this work, which is expected to be completed during the summer of 2015 and which is deeply rooted in SKAT's mandate to "Secure a census of personal taxpayers in Denmark".

In spring 2014, SKAT also launched an analytical project called "The Aviation Industry", which will examine compliance in the aviation industry in a broad sense, including employment relationships and employment models for personnel in the aviation industry. The project does not deal with issues relating to social dumping, which were analysed in the "Globalization 2013 – Aircrew" project. The project is due for completion on 31 March 2015.

4.1.3 Administration and monitoring in Denmark

Ensuring that there is no deliberate circumvention of the rules requires that there are consequences for those airlines which do deliberately circumvent the rules. This can be in the form of supervisory measures/supervision of the authorities and through the social partners initiating trade union conflicts, negotiations or arbitration, or bringing cases before the industrial or civil courts. As yet, there have been no specific initiatives in this area in Denmark. There have not yet been any specific initiatives within the field of labour law, as the working group has indicated that pilots, cabin crew, etc., do not wish to come forward and bring a case for fear of losing their current (or possible future) jobs. At the same time, it is often the case that the trade unions do not have a sufficient legal interest to be able to bring a case, as they are not party to the agreement with regard to foreign airlines, for example.

The supervisory measures/supervision of the authorities are considered to work as intended, however. In Denmark, decisions on social security and tax are made on the basis of the specific circumstances of the individual case.

When an application is received for Danish social security, for example, the method by which the person is employed and the structures of the contracts are examined when determining whether the person in question is self-employed or is an employee. There have already been several specific decisions in cases where the business structures and employment models closely resemble the structures that can be seen within the airline industry.

5 Reports and initiatives of the European Union

5.1 Introduction

Over the last six months or so the European Commission has made several statements on social dialogue, accompanied recently by specific initiatives. These include the European Commission Opening Statement made by the President of the Commission Jean-Claude Juncker on the appointment of the new Commission, as well as statements and initiatives from the Commissioner for Employment, Social Affairs, Skills and Labour Mobility Marianne Thyssen, and Commissioner for Transport Violetta Bulc.

Furthermore, meetings have been held under the auspices of the Directorate-General for Mobility and Transport (DG MOVE) on social dialogue in the field of aviation in the 'Advisory Committee on Application of the Legislation on the Access for Community Air Carriers to Intra-Community Air Routes'. DG MOVE has subsequently initiated a large-scale study of the aviation industry, including in relation to social dumping/forum shopping.

5.2 European Commission Opening Statement

The current Commission has a strong focus on social affairs in the European Union. As the current President of the Commission, Jean-Claude Juncker, said in his opening statement to the European Parliament on 15 July 2014:

"Competitiveness is often confused with one-sided social regression but competitiveness is not achieved through social regression. Competitiveness is achieved by developing a broad range of approaches. Competitiveness is essential to make the European Union a more attractive location. A location for people, for investors.

This includes the principle that the economy has to serve the people and not the other way round. The economy must serve the people.

This means that internal market provisions cannot be valued more highly than social provisions, which would otherwise just be minimum standards. The internal market does not automatically have priority; social factors must also play a role in Europe.

I am an enthusiastic supporter of the social market economy. 'Prosperity for all' was what Ludwig Erhardt said. Not 'prosperity for just a few'. 'Prosperity for all' must be the maxim followed in both economic and social policies alike. In view of the crisis, people often say that the social market economy has failed. It is not the social market economy which has failed but those who, out of greed for profit, for

money and for easy money, have disregarded the cardinal virtues of the social market economy.

The social market economy can only work if there is social dialogue. Social dialogue suffered during the crisis years. Now it must be resumed at national and especially at European level. I would like to be a President of social dialogue."

Later in his speech, Jean-Claude Juncker said:

"Free movement of workers has always been one of the key-pillars of the internal market. I will defend that principle.

Free movement is an opportunity, not a threat. The rules will not be changed. It will be up to national authorities to fight against abuse or fraudulent claims. I will initiate a targeted review of the Posting of Workers directive and of its implementation. We have to fight social dumping and we will do it."

5.2.1 Specific initiatives from the European Commission

Both the Commissioner for Employment, Social Affairs, Skills and Labour Mobility, Marianne Thyssen, and the Commissioner for Transport, Violetta Bulc, have made very positive statements with regard to social dialogue, in continuation of the Commission's opening statement to the European Parliament. Accordingly, Vice-President of the Commission Valdis Dombrovskis declared in a joint statement with Commissioner Marianne Thyssen that

"This Commission is committed to re-launching and strengthening the dialogue with our social partners. Social dialogue at all levels is a prerequisite for the functioning of Europe's social market economy and crucial to promote both competitiveness and fairness."

Furthermore, Commissioners Marianne Thyssen and Violetta Bulc announced that they would be holding a "high-level" conference in the spring, at which social dumping in both land transport and aviation would be discussed and examined.

In light of the above, it is also expected that when revising the aviation package, which is to take place in 2016 at the latest, the European Commission will focus on the social dimension and social dumping/rule shopping as one element of this.

Finally, the European Commission has announced in its legislative programme that it will formulate a comprehensive strategy for improving the competitive conditions for European airlines in relation to airlines from third countries.

It should be stated in this respect that the European Parliament is very concerned with the issues surrounding social dumping.

5.2.2 Work initiated by the European Commission

The Directorate-General for Mobility and Transport (DG MOVE), together with the European pilot organizations, has had a report drawn up on working conditions and employment relationships within the aviation industry. The report, which has been produced by Ghent University, focuses primarily on atypical employment relationships at low-cost airlines. The report was presented at a meeting in Paris at the beginning of February 2015, at which Denmark was a member of the panel and therefore had the opportunity to present the Danish work and the Danish viewpoint on social dumping and rule shopping.

Furthermore, and as previously stated, DG MOVE held a meeting in December 2014 on social dialogue in the field of aviation in the 'Advisory Committee on Application of the Legislation on the Access for Community Air Carriers to Intra-Community Air Routes',

at which Denmark was asked to present its report on social dumping in aviation. The committee is composed of government representatives from all the Member States.

As a follow-up to this, DG MOVE has commissioned a report on employment and working conditions in aviation and at airports from consultancy firm SteerDaviesGleave. The report will be completed in autumn 2015 and the preliminary results will be presented and discussed at a meeting organized by DG MOVE in June 2015.

The contract entered into between DG MOVE and the consultancy firm states that the background to the order is that

"The Commission wants to see 'a socially responsible aviation sector' and intends to evaluate 'the EU approach' to jobs and working conditions across transport modes."

The contract further states that the consultants, using the up-to-date data provided, must:

"Analyze recent developments in terms of employment relationships (including the issue of multiple employers and home bases), working and social conditions in air transport (i.e. airlines) and airport operation and handling. By industry and category of worker (occupation, gender, age group, etc.), analyze developments in:

- incomes and training opportunities*
- type of employment arrangements (recourse to part-time, temporary (agency) workers and other forms of atypical work, self-employment, etc.);*
- union membership, the affiliation of companies to employers' organizations and other social dialogue-related questions; and*
- health and safety at work;*

Present an updated assessment of outsourcing (at least in air transport and airport operation and handling, including outsourcing to new or existing subsidiaries within the same company) and restructuring trends in airlines and their possible consequences for employment and working conditions. In particular, the contractor will illustrate airlines' outsourcing practices by analyzing the operations of, and services provided by, different recruitment/temporary work agencies within and outside the EU. The contractor will also analyze the extent to which mobile workers and employees of transnational companies are still covered by a Collective Labour Agreement; and

Present and analyze the various challenges linked to the multiplication of operational bases for taxation of labour, social security issues and law applicable to employment contracts. Illustrate these trends by presenting specific cases covering at least four airlines established in different countries and following different business models. Outsourcing trends should also be illustrated for at least three airport operators (including ground handling) of different types of airports in different countries. International temporary work agencies should also be interviewed."

As can be seen from the above statements from Commission President Jean-Claude Juncker, Commissioner Marianne Thyssen and Commissioner Violetta Bulc, as well as the initiatives implemented by the Commission, including the analysis commissioned by DG MOVE, the current Commission has a strong focus on the social dimension in the European Union.

6 Continued work

6.1 Introduction

This chapter describes the continued work and follow-up on the issues raised in the report of April 2014. The three routes referred to earlier in the report are also pursued here: the EU route, the national route, and the legal route.

Route 1: The EU route. It is pleasing to see that the current Commission appears to be very aware of social affairs, including social dumping/forum shopping. This is demonstrated by both the Commission's opening statement, etc., and the measures announced and the analysis commissioned by DG MOVE. Against this background, it may be expected that the initiatives that come from the European Commission in connection with the revision of the aviation package will "take in hand" at least some of the issues raised by Denmark in relation to social dumping/forum shopping.

Route 2: The national route: There is a very limited amount more that can be done at a national level, given that aviation, as previously mentioned, is an international, cross-border business and is largely regulated by international regulations and EU legislation.

Route 3: The legal route: Here, the working group will encourage the trade unions to look for cases where there is a more or less deliberate circumvention of the rules and have these cases clarified through the trade union legal system or in the courts. At the same time, the relevant authorities are encouraged to monitor the development of new business structures, commercial methods, and employment models in order to prevent Danish rules and the interpretation and administration of EU rules providing an opportunity for social dumping/rule shopping. Furthermore, the working group encourages the authorities to consider the implementation of supervisory measures in relevant areas, similar to those in the haulage and construction industries, for example.

The following will focus solely on initiatives in relation to the EU.

6.2 The EU route

It is good to see that the European Commission will be taking initiatives in relation to social dumping and the opportunities for rule shopping within aviation. It is therefore important for Denmark to follow closely the initiatives and proposals of the European Commission and to raise awareness of the Danish viewpoints and wishes on an ongoing basis. Otherwise, it should also be actively involved in the process as far as possible.

Re: The concept of the employer

The working group supports Denmark's continued work in the Administrative Commission with regard to ensuring a standardized interpretation and administration of the concept of the employer based on the Danish viewpoints and the Danish understanding of the regulations.

Re: Applicable law

Even if there is success in getting support for the definition of the concept of the employer in the Administrative Commission for the Coordination of Social Security Systems of the European Union, according to pilots and other crew members there may still be instances where there is doubt about the applicable law with regard to social security, etc. At the same time, new employment models may be developed, which it is impossible to take into account at the present time.

This means, that, by extension, uncertainty may arise in some situations with regard to which country's laws are to apply in relation to the employer's obligations to the employee, both in terms of the country to which employer's contributions etc. are to be paid, and under the rules of which country the employee is entitled to social security, etc. This appears to be particularly relevant with regard to postings and the linking of employees to home bases.

The working group proposes that work continues with regard to the Commission in order to get the Commission to prepare initiatives designed to ensure that in the event of a change of job or home base, all employees are entitled to social security in an EU country and at the same time are given the right to be informed of the EU country in which they are entitled to social security.

Re: The concept of home base

The concept of "home base" for flight crew and cabin crew members has been developed in connection with aviation safety and is originally defined in this regulation as

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

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 adds the following consideration to the above:

"In order to facilitate the application of Title II of this Regulation for flight crew and cabin crew members, it is justified to use the concept of "home base" as the criterion for determining the applicable legislation for flight crew and cabin crew members. However, the applicable legislation for flight crew and cabin crew members should remain stable and the home base principle should not result in frequent changes of applicable legislation due to the industry's work patterns or seasonal demands."

The concept of home base is therefore used in two different contexts:

1. Aviation safety – The "working hours" of pilots and cabin crew.
2. Social security – Determining where employer's contributions etc. are to be paid, and who is to pay social security benefits to the crews.

With regard to social security, including in connection with the applicable law, there are particular problems in relation to the current definition of home base. These problems mainly relate to the rules on working in multiple countries, as well as the different interpretation of the Member States of the concept of home base.

Against this background, the working group proposes that it is stressed and constantly pressed upon the European Commission that the Commission should formulate a more unambiguous and specific definition of the concept of home base, grounded in the idea that employees should have a closer link to only one home base. At the same time, work should be done to have such a definition rooted in the EU Member States, thereby to ensure a standardized interpretation, administration, and enforcement of the concept.

Re: Aviation safety

Denmark is actively involved in the work of the working group established under the auspices of the EASA on the possible impact on aviation safety of the new business and employment models etc. of the airlines and will continuously monitor this work

closely. The work will also be closely followed by Denmark and the results of the preliminary study and the possible recommendations and proposals arising from the working group will be evaluated, and in continuation of this a position will be taken on any initiatives from the European Union and/or the EASA.

Re: Working environment on aircraft

The working environment regulations for crews on board aircraft are formulated in EU directives and relate solely to the actual working conditions, i.e. the workplace facilities, etc.

The Danish Transport Authority has sole responsibility for working environment supervision on Danish-registered aircraft. Supervision is carried out no matter where in the world a Danish-registered aircraft is located.

The EU regulations contain no requirement in relation to the performance of supervision, which is instead subject to national regulations. The Danish Transport Authority is aware that some countries perform supervision only on their own airlines at destinations in their own country. This can result in situations where there is no supervision of the working environment on board an aircraft if the aircraft is registered in a Member State but does not fly to or from that Member State.

Against this background, the working group therefore recommends that a proposal should be submitted to the EU that standardized guidelines be drawn up within the EU for the supervision of the working environment on board aircraft. The guidelines will ensure that all aircraft in the EU are subject to supervision by the authorities and will also ensure that supervision takes place in accordance with standardized rules.

Following an evaluation of all 24 working environment directives in 2013, Denmark reported back to the Commission that rule changes were not generally necessary, but that a need had been identified to focus on a more standardized enforcement in the Member States of the agreed levels of protection.

The working group finds that with regard to the working environment on board aircraft the European Commission should continue to work on the issue in order to ensure that all aircraft are subject to supervision and that the working environment requirements and the implementation of supervision on board aircraft takes place in accordance with standardized rules and guidelines.

Re: Competition with third-country airlines

The intention of the initiatives implemented and proposed above is to create a fairer competitive environment for the EU airlines and to ensure that aviation personnel are entitled to social security in an EU country. Within the EU, it is possible to adopt new standardized rules that apply in all Member States, and standardized rules have already been adopted for airlines and aviation activities in a large number of areas. The rules that are adopted within the EU do not apply, however, to third-country airlines, nor to their flights to and from the EU.

The opportunities for creating equal competitive conditions among EU airlines and between EU airlines and airlines from third countries are therefore very different. As previously mentioned, the Commission has announced that it will formulate a comprehensive strategy for improving the competitive conditions for European airlines in relation to airlines from third countries. It is the opinion of the working group that this should not only cover any state subsidization of third-country airlines, but should also include other circumstances that may help to establish fair and healthy competition between EU airlines for internal flights within the EU and at the same time enable them to compete with third-country airlines for flights between the EU and third countries.

The internal market, including the freedom of establishment and the free movement of workers, applies only to European companies and EU citizens. This should therefore be the starting point for initiatives relating to this.

It is important, in the opinion of the working group, that not only is fair and equal competition created between EU airlines for internal flights within the EU and in relation to third-country airlines for flights to and from third countries, but also that the opportunities for EU airlines to compete with third-country airlines do not provide opportunities for social dumping.

The working group also considers this important in order to ensure a continued positive trend in employment for EU citizens within the aviation industry in the EU and at the same time to safeguard the workers' rights and social security rights of the employees.

The working group therefore recommends that work is carried out with regard to the Commission in order to get the Commission to initiate work and implement initiatives with the aim of finding solutions to the aforementioned problems.

7 EU legislation

As initially stated, the working group has been unable to identify all the relevant EU legislation requiring amendments and clarifications in certain cases, including whether amendments and rule changes should be made in certain cases within the respective areas, or whether an aviation regulation could possibly be created, i.e. a regulation that applies only to aviation (known in the EU as "targeted aviation regulation initiatives"). Proposed solutions to the problems raised, or parts thereof, could beneficially be incorporated in the EU's upcoming revision of the aviation package.

The reason why the working group is advocating a solution that applies solely to aviation is that this is the best and quickest option for realizing the proposed initiatives.

At the same time, such a solution also seems appropriate, given that a number of special circumstances apply to the aviation industry compared with most other industries:

1. The aviation industry is highly mobile. Airlines can move production facilities very easily.
2. Airlines operate across national borders, including to countries outside the EU.
3. Airlines are currently able to recruit staff who are resident in third countries, including for internal EU flights.
4. The special circumstances that apply to aviation with regard to the concept of home base, among other things.
5. The many special "safety regulations" that apply to aviation.

In addition, many of the proposed measures are particular to aviation and might have an inappropriate and disruptive impact on the working and employment conditions of other sectors of industry and commerce.

The possibility exists, however, that it may be more appropriate to incorporate individual proposals in more general and specific directives/regulations.

In order to ensure a more standardized implementation, understanding, and administration of the regulations between the Member States, it is also proposed that – as is already the case for most regulations within aviation – the rules be enshrined in a regulation, as this would then apply directly in the Member States.

*Danish Transport Authority
Edvard Thomsens Vej 14
DK-2300 Copenhagen S*

*info@trafikstyrelsen.dk
www.trafikstyrelsen.dk*

**Report on Social Dumping in
Aviation**