

# **Report of the working group on “Social dumping” in avia- tion”**



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# 1 Introduction

## 1.1 Mandate

The working group was set up as part of the government's efforts to combat "Social dumping" and by extension the discussions that took place at the Danish Aviation Council on "Social dumping" in aviation, as well as follow-up to the Transport Minister's letter of 24 June 2013 to the European Commissioner for Transport. The working group has the following mandate:

### **"Mandate for the Working Group on Social Dumping of the Danish Aviation Council"**

*The working group's primary task is to deal with matters relating to "Social dumping" in aviation, specifically the following:*

- *Prepare an overview of circumstances that can be described as "social dumping" and a description of the legal provisions, etc. governing these circumstances.*
- *Report on whether it is possible to regulate these circumstances in a national (Danish) context, if desired, and report on the consequences of doing so.*
- *Examine whether work has been undertaken or strategies pursued in the field of "Social dumping" in selected European countries.*
- *Monitor any initiatives from the European Commission in the field of "Social dumping", particularly in view of the enquiries of the Danish Transport Minister or other Danish ministers.*
- *Examine interfaces and overlap with any other similar work at other ministries, in part with a view to avoiding duplication.*

*The Transport Minister encourages members of the Danish Aviation Council to appoint members of the working group.*

*The Transport Minister urges his colleagues from the Ministry of Employment, Ministry of Taxation and the Ministry of Children, Gender Equality, Integration and Social Affairs to appoint members of the working group.*

*The Deputy Director General of the Danish Transport Authority, Keld Ludvigsen, will act as the chairman of the working group. The Danish Transport Authority will provide secretariat services to the working group. The working group will report to the Danish Aviation Council before the New Year 2014."*

The working group's deadline for reporting its results was subsequently deferred to the end of Q1 2014, and later extended to the end of April 2014.

## 1.2 Composition of the working group

|  |                             |
|--|-----------------------------|
| Danish Transport Authority   | Keld Ludvigsen<br>Chairman  |
| Danish Transport Authority   | Niels Remmer                |
| Danish Ministry of Taxation  | Majken Wågensø<br>Landström |
| SKAT (Danish Customs and Tax Administration)                                 | Rene Brølles Frederiksen    |
| Danish Ministry of Children, Gender Equality, Integration and Social Affairs | Jørgen W. Lund              |
| Danish Ministry of Children, Gender Equality, Integration and Social Affairs | Vijitha Pradeesh            |
| Danish Supplementary Labor Marked Pension Fund (ATP)                         | Daida Hadzic                |
| Danish Ministry of Employment  | Trine Hougaard              |

|   |                           |
|---|---------------------------|
| Danish Aviation Association   | Dan Banja                 |
| United Federation of Danish Workers (3F)                              | Henrik Berlau             |
| Billund Airport   | Anders Nielsen            |
| Danish Airline Pilots Association (DALPA)                             | Lars Bjørking             |
| Scandinavian Airline System (SAS)                                     | Lars Wigelstorp Andersen  |
| Danish Aviation Industry Association/Confederation of Danish Industry | Per Henriksen             |
| Danish Flight Personnel Union   | Thilde Waast<br>Mortensen |
| Danish Airline Pilots Union   | Helle Jungersen           |
| The Union of Commercial and Clerical Employees                        | Klara Hoffritz            |
| Danish Metalworkers' Union  | Henrik Nipper             |
| Cabin Union Denmark (CUD)   | Henrik Parelus            |

The secretariat function was fulfilled by consultant Alex Klug of the Danish Transport Authority, with the assistance of the representatives of the respective ministries.

The working group has held eight meetings

## 1.3 The work of the working group

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 and deregulation 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 – and the development of new organizational and business models.

Specifically, the working group assessed four new international employment models and terms of employment in aviation and on this basis a number of rules and conditions which these new conditions with-in aviation impact on in relation to what could potentially be characterized as "social dumping".

The working group has 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 all appear legitimate and in compliance with current EU rules in the form of directives and regulations. However, the working group has 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 has examined national rules and the EU regulatory framework within selected areas and evaluated them to identify what may 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 has also been 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 has considered whether the employment and organizational structures, etc. may have an impact on the working environment and safety of employees.

Based on these assessments, the working group has drawn up a set of proposals for initiatives to work on further, including in relation to the EU.

## 1.4 Summary

### Section 1

Section 1 states the mandate and composition of the working group. There is a brief description of the working group's basis for work relating to developments within the aviation industry in recent years, both in terms of new organizational structures and employment models and the resulting potential impact on the social rights of employees, employer responsibilities and employer obligations. There is also a description of a number of proposals for possible future initiatives to combat or limit the opportunities for "social dumping" within aviation.

### Section 2

This section describes the working group's understanding of the term social dumping within aviation. The working group is of the opinion that social dumping in aviation must be considered in a broader perspective than what is often referred to as social dumping in Denmark. Social dumping most often refers to a situation where foreign workers have pay and working conditions below the normal Danish level and/or where foreign companies fail to comply with Danish legislation and regulations. Within aviation, it is 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 and company structures to take advantage 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. For this reason, the working group has decided to place *social dumping* in quotation marks in the report.

Furthermore, the development of the aviation industry over the last 20 years is also described, with the rise of "point-to-point" airlines, the move towards virtual airlines and the emergence of international corporations. In relation to this, typical new recruitment and employment models are described, which were unknown years ago. Four known examples of these are included.

The end of the section describes the relationship between new business models, terms of employment and "social dumping" within aviation.

### Section 3

Based on the development that has taken place and the new employment models, business models and company structures, as described in section 2, this section describes and discusses five regulations and issues which the working group has identified in relation to "social dumping" within aviation. These are: jurisdiction and applicable law, temporary employment/recruitment agencies/"self-employed", social security, third-country crews and tax.

In addition, the working group also discusses in this section whether the new company structures and different employment models and terms of employment could have an impact on the working environment and safety.

### Section 4

This section reports, based on the inquiries made by the working group, on initiatives in selected European countries, including the contact made by the Norwegian Minister of Transport and Communications with the European Commission, the Danish Transport Authority's visit to the Norwegian Ministry of Transport and Communications and a French lawsuit against the Irish airline Ryanair.

Of those countries that responded to the inquiry, all state that they have identified a similar trend as in Denmark and emphasize that they are very focused on the potential safety aspects of this development.

In the case of Norway, the Norwegian Minister of Transport and Communications has launched an initiative similar to the one in Denmark and the Norwegian working group expects to submit its report later this year.

It also states that the Danish Transport Authority wants to take the initiative to establish a working group across the Nordic aviation authorities in order to share information and experiences about "social dumping" within aviation, including trying to establish common positions at EU level.

### Section 5

This section reports on the work on social dumping at selected Danish ministries, as well as European Commission initiatives.

None of the Danish ministries contacted has implemented any initiatives derived from the EU Commission in relation to social dumping.

The Danish Ministry of Employment provides information about the general efforts made by the government to combat social dumping. The Danish Ministry of Housing, Urban and Rural Affairs reports that action has been taken within its area of responsibility to implement the use of labor clauses for construction work, while the Danish Ministry for Justice has stated that funds have been allocated to the police in the Budget to increase the level of police action to combat illegal cabotage. The Danish Ministry of Taxation also reports that several initiatives have been implemented in the field of taxation as part of efforts to combat social dumping, including the tightening up of labor contracting rules in 2012, while the Danish Tax Authority, SKAT, has increased its efforts to combat social dumping.

There are no European Commission initiatives on "social dumping" within aviation at present, but a number of reports, etc. have been commissioned and produced in relation to the problem, as briefly explained in the section.

### Section 6

On the basis of the working group's work, discussions and considerations, as reported in the preceding sections, possible initiatives aimed at reducing "social dumping" within aviation are outlined here. The proposed initiatives go down three main routes: 1. Support the uniform implementation, administration and interpretation of EU rules. 2. Evaluate the Danish rules that facilitate "rule shopping". 3. Work to



prevent deliberate circumvention of the rules. They do not represent specific initiatives that have been discussed in detail by the committee and therefore do not necessarily reflect the proposals that currently enjoy the support of the committee, but are included merely as examples of possible initiatives.

It is also proposed that a working group with in-depth knowledge of the industry be established to monitor and assess developments within aviation more closely and to produce practical, well-prepared proposals along all three main routes.

For specific proposed initiatives, see the following part 5 of this section.

## Section 7

This section contains appendices to the report, including extended reports and descriptions of the regulations and issues referred to in section 3, as well as a description of the framework for Danish and European aviation.

### **1.5 Proposed initiatives**

For a more detailed description of each proposal, see Section 6.

Initially, the working group proposes that a working group be established under the Danish Aviation Council to perform the task of monitoring and assessing more closely developments within aviation in relation to "social dumping/rule shopping" and to produce practical, well-prepared proposed solutions.

The working group also proposes that in order to ensure uniform implementation, administration and interpretation of EU rules, the following be considered:

the Danish Ministry of Children, Gender Equality, Integration and Social Affairs initiates a discussion at the Administrative Commission appointed by the European Commission on the concept of the employer in relation to the applicable law on social security in order to achieve a more uniform understanding and implementation of the rules on social security coordination. This is particularly relevant to the scenario in which an airline employs staff via temporary-work agencies or employment agencies;

that Denmark must work within the EU to ensure that employees who actually work for an airline are to be regarded as an employee of the airline and on a par with permanent employees;

that Denmark must work within the EU to ensure that the "self-employed" who actually work for an airline, along with employees recruited via employment agencies, are to be regarded as being employed directly by the airline;

that Denmark must work within the EU and EASA to establish a firmer concept of a home base, so as to formulate a clear and more up-to-date definition of the term home base that is grounded in employees have a closer link to only one home base. At the same time, Denmark should work to achieve the consistent enforcement of this in the EU Member States;

that Denmark must work under the auspices of the EU to examine the issues in relation to the working environment on aircraft, and through dialogue between the authorities to ensure that there are more uniform rules and that there is appropriate monitoring by the proper authorities;

that Denmark should urge the EASA to carry out qualitative and quantitative studies on whether the structure of the rules is appropriate in view of the trend towards more fragmented business structures and employment models, and to assess whether these developments could pose a threat to aviation safety. Any problems identified should be followed up with solutions; and

that the EASA should be encouraged to consider the introduction of rules requiring the direct and permanent employment of a proportion of both pilots and cabin crew on each individual flight.

With regard to the Danish rules that facilitate "rule shopping", the working group proposes

that the Danish Ministry of Taxation considers contacting Ireland in order to renegotiate the tax treaty between Denmark and Ireland to allow Denmark to tax aviation personnel who are resident in Denmark and working aboard an aircraft in international traffic for an Irish airline; and

that the Danish starting point when negotiating new and renegotiating existing double taxation conventions will continue to be the principles of the OECD Model Convention with regard to taxes on remuneration derived in respect of an employment exercised aboard an aircraft operated in international traffic.

In order to avoid the deliberate circumvention of the rules and to obtain clarification,

employees and trade unions can seek a civil court ruling in the event of disputes on jurisdiction and applicable law in connection with equivalent or similar employment models.

a temporary worker or their union can bring a case either in the civil courts or under trade union law, where there is a collective agreement in place, if they become aware of a breach of the temporary worker's rights under the EU Directive on temporary agency work or the Danish Temporary Agency Workers Act.

These proposals do not represent specific initiatives that have been discussed in detail by the committee and therefore do not necessarily reflect the proposals that currently enjoy the support of the committee, but are included merely as examples of possible initiatives.

## 2 Aviation and "Social dumping"

### 2.1 "Social dumping" in aviation

Aviation is an international business that operates across national borders – both in the EU and in the world as a whole. As a consequence, conditions relating to the ability of airlines to operate across international borders have always been fairly liberal. The EU's liberalization of aviation in the early 1990s generated completely free opportunities for EU companies to operate across the entire European aviation market.

The working group believes that the term "Social dumping" in aviation must be considered in a broader perspective than what is often referred to as social dumping in Denmark.

In the report of the "Committee on the prevention of social dumping" of October 2012, social dumping is defined as follows:

*"The term social dumping normally refers to a situation where foreign workers have pay- and working conditions below the usual Danish level. This refers to conditions equivalent to the relevant collective agreement for the professional field in question.*

*Social dumping also refers to situations on the labor market where foreign companies operate in Denmark without complying with Danish laws and regulations on issues such as tax, working environment, social security, and residence and work permits."*

The working group believes that the term "social dumping" within aviation relates to employment models, employment terms and new company structures, combined with EU rules on free market access, free competition and free movement of workers and services between the Member States and the directives and regulations issued for the development and promotion of this.

The free movement of workers and services in the EU, combined with free market access gives airlines licensed in the EU the opportunity – as demonstrated by the examples given below of employment structures and business models – to legally "shop" between the differences in the rules of Member States in relation to issues such as social security and health benefits, employer contributions, workers' rights, wage and tax issues, etc., depending on where it is financially most advantageous. There are also differences in the Member States with regard to the airlines' ability to use third-country nationals on board aircraft, for example, and there may also be differences in working environment requirements and the supervision of this.

It should be noted in this context that the European Union basically does not stipulate rules on matters such as wages, taxes, etc., but simply the free movement of EU citizens between the Member States as well as their rights, such as their right to receive social security payments in the respective Member States. The premise here is that workers from another EU country should have the same rights, including to the receipt of welfare benefits and social security benefits, as the country's own nationals.

"Social dumping" within aviation is therefore the result – as can be seen below – partly of differences in the legislation and other regulations of Member States in relation to employment conditions, workers' rights, employer obligations, social rights, etc., as well as the different implementation of directives, and the interpretation and administration of regulations and directives, including different views of the Member States on, for example, the responsibility and role of employers in relation to social security and tax.

"Social dumping" within aviation therefore occurs when EU airlines organize employment models, terms of employment and company structures to take advantage of such differences between countries. The working group therefore finds that "social dumping" is more akin to rule shopping.

The following first describes the developments in the aviation industry, including the new organizational and business models, and then, against this background, provides an opinion on the known new terms of

recruitment and employment, the airlines' new organizational and business models, and their relationship to the EU regulatory framework.

## 2.2 Developments in aviation<sup>1</sup>

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

The rules of civil aviation in Denmark are contained in Danish aviation legislation and relevant EU legislation. Both aviation law and EU law are fundamentally based on the Chicago Convention of 1944, which contains a number of key provisions on the establishment and regulation of cooperation in many fields of civil aviation.

Deregulation during the period 1987–1992 opened the way to 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. But as the "low-hanging fruit" has gradually been harvested, this development has been followed by a convergence of business models, intensifying the competition on costs. It is likely that this increased competition on costs is what has prompted some companies to test the limits of how costs can be reduced further.

The development from liberalization to the present day is described below.

### 2.2.1 The emergence of 'point-to-point' companies

In the period 1987–1992, a single market for aviation in the EU was gradually established through the adoption of three "aviation packages", each of which contained regulations on the licensing of airlines, on market access and on pricing.

Previously, aviation was characterized by a large number of major national network carriers. The vast majority of countries had just such a national carrier. These companies had and usually have hubs where their networks combined for the arrival of passengers and onward flights to the rest of the world. Examples of this include SAS, which has hubs in Copenhagen, Stockholm and Oslo, Lufthansa, which has hubs in Frankfurt and Munich among others, and Finnair, which has a hub in Helsinki.

In the past, these airlines usually handled all aspects of the services associated with flying, apart from ticket sales, which were partly handled by travel agents on commission. The airlines owned the aircraft and took care of workshop facilities, passenger handling, baggage handling, catering, etc. This involved building more complex facilities at their hubs, which makes it difficult to relocate to other airports.

These airlines had and have permanent employees directly associated with the airline, and it was and is characteristic of them that they had and have agreements with the trade unions on pay and working conditions.

With the liberalization of aviation within the EU and the growth in passenger numbers, a new type of airline emerged, whose business model differentiates itself significantly from the traditional network carriers: "Point-to-point" airlines that operate solely between two destinations, and therefore do not invest in a network and hubs, as they are not dependent on the flow of passengers from other airports for onward flight. They have therefore not constructed complex facilities at the individual airports and can therefore very quickly relocate their services to other airports if this is deemed to be more appropriate and profitable.

<sup>1</sup> For a more detailed description of the overall framework for Danish and European aviation, see section 7.8

Consequently, they have established bases at several airports in European cities, where their aircraft "overnight" and staff officially start and end their job.

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.

There seems at present to be a new development on the way, where some "point-to-point" airlines have evolved into something between a network carrier and a "point-to-point" airline. This is supported by the fact that they have begun operating long-haul flights and have established hubs. The "Point-to-point element" of these airlines continues to account for by far the largest share. The traditional network carriers have also worked hard to reduce their costs so that they are competitive with "point-to-point" airlines. There appears therefore to be a tendency towards convergence of the business models.

The "point-to-point" airlines currently have approximately one third of the seat capacity and well over 40 per cent of the passengers on intra-European flights. The two largest companies in Europe – in terms of passengers – are "point-to-point" airlines. From 1999 to 2008, the traditional carriers achieved an average annual profit of 1.1 per cent, while "point-to-point" airlines had an average profit of around 10 per cent.

### **2.2.2 The emergence of 'virtual airlines'**

Liberalization, the emergence of "point-to-point" airlines and the increased competition have in recent years affected the development of new company structures and business strategies within the aviation industry.

The airlines – both traditional carriers and "point-to-point" airlines – have now largely outsourced ancillary services such as check-in, baggage handling, workshop facilities, etc., so that they now buy these services from others. At the same time, it has become much more common for airlines to lease their aircraft instead of owning them.

Today, we can speak to some extent of virtual airlines, i.e. airlines that deal only with ticket sales, preparing flight schedules and ultimately have overall responsibility for all the safety and operational conditions, while buying various other services from other companies. This gives airlines greater flexibility to scale their production quickly to fluctuations in demand, but also brings a number of challenges in relation to responsibility for overall production, for example.

### **2.2.3 The emergence of international companies**

Alongside the liberalization of the industry, new, legitimate company structures and international companies have appeared and developed in the EU, where a parent company has an EU license (main license) with an associated AOC (Air Operator Certificate) in one EU country and establishes subsidiaries with an EU license and AOC in one or more other Member States. An EU license and AOC for an airline is issued by the particular Member State's aviation authority on the basis of requirements for ownership, finances and organizational and security conditions, including having licensed basic staff. These requirements are specified in regulations and are binding on all Member States. An EU license issued in a Member State allows airlines to freely operate all destinations in the EU.

As mentioned, some airlines set up subsidiaries, which have a license and AOC issued in other Member States. The reason for this can be, for example, to gain access to use traffic rights to third countries under the bilateral aviation agreements of this country/these countries or on the basis of legislation in those countries that are not governed by EU regulations or directives in order to obtain certain freedoms, such as gaining access to use third-country nationals as cabin crew on board aircraft.

It is common for airlines to establish so-called home bases in several countries. Council Regulation No 3922/91 defines a home base as:

*"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."*

In recent years, developments have resulted in airlines having established a growing number of home bases in different countries and in several cities in individual countries. This enables airlines to move personnel between bases.

The premise is also that the airline's employees with a home base in a given EU Member State have the same right to welfare benefits and social security as the country's own nationals.

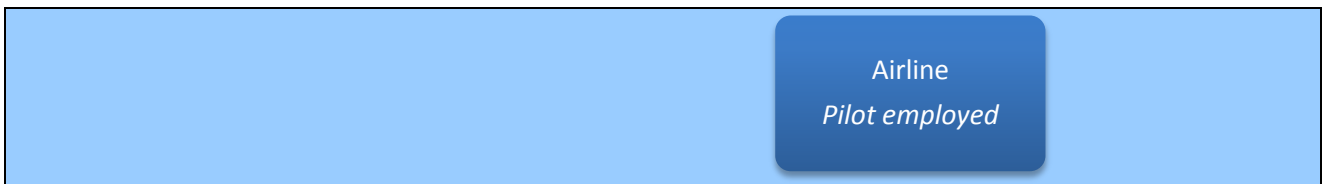
Several airlines have also begun to use recruitment agencies (in some cases these are established as subsidiaries) from one or more EU countries and/or from third countries, through which some of the airlines' staff are recruited. Whether a recruitment agency is a temporary agency or an employment agency depends on a specific assessment under the Directive on Temporary Agency Work. Airlines can use or even establish such agencies in different countries, depending on where it is most appropriate and beneficial for the company.

Some companies also use self-employed staff. A self-employed person can be, for example, a pilot who creates a privately owned company with himself as the only employee. This company can be located in any country. The pilot then leases himself (is employed) through this company to an airline. This can also be done through the airline's own recruitment agency.

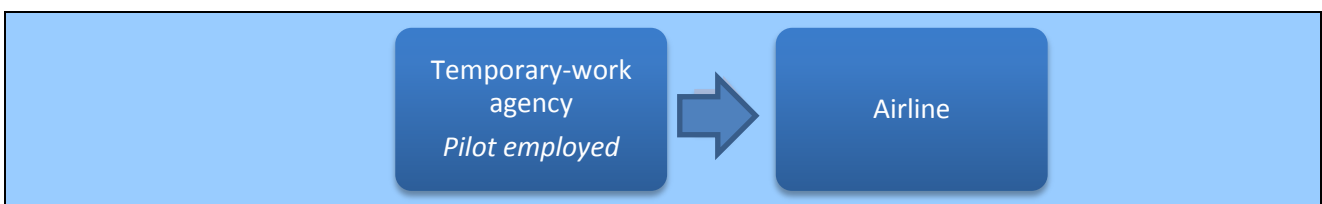
There appears to be a tendency for some companies to make significantly greater use of loosely associated personnel than others. Moreover, some companies are reluctant to enter into agreements with the trade unions or only do so for a very limited number of staff.

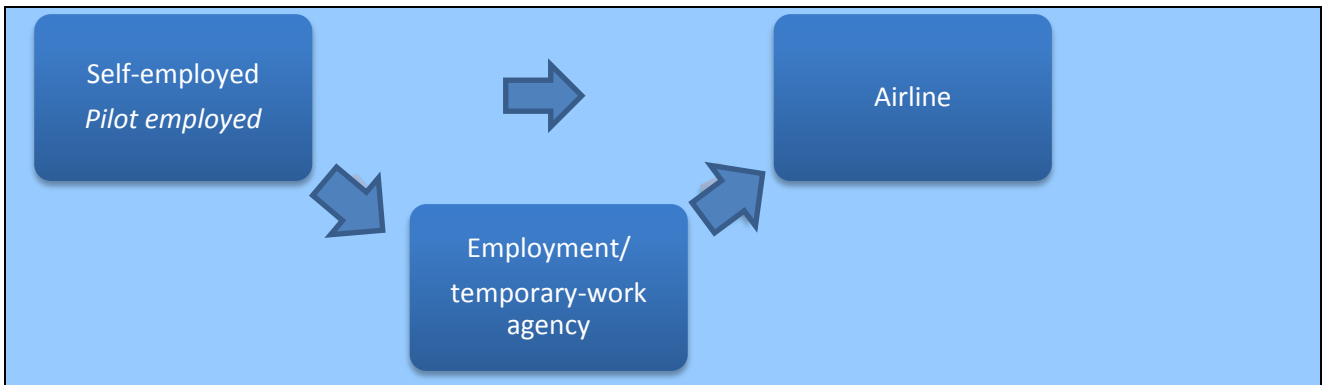
Diagrammatically, the different employment models typically look like this:

#### **Direct employment**



#### **Employment through a temporary-work agency**



**Self-employed or sole proprietorship****2.3 New employment models**

Since 2008, the number of and variations in so-called international positions in aviation have been increasing and have created a whole new market for those involved in aviation. These employment models are causing concern for both employer and employee organizations, as they consider the consequences of these positions 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. Overall, this enables the airlines to significantly reduce their wage costs and to make savings on items such as social security costs, health costs and pension costs.

The following four examples are real examples known to the Danish aviation trade unions.

**2.3.1 Example 1: Danish pilot residing in Denmark**

He takes a job at recruitment agency X in an EU country other than Denmark as a captain for commercial scheduled airline services.

Recruitment agency X hires his labor out to airline A2 in a third EU country, which hires out the pilot to fly for airline A1, which is domiciled in an EEA country. Airline A2 is a subsidiary of airline A1.

A1 and A2 assign his home base to a fourth EU country.

Flights are mainly operated from or via Denmark.

Contractual position:

The contract contains a provision that recruitment agency X must pay the employer's contribution of any social security contributions, where they are liable to do so in the country that is specified as the home base, i.e. the fourth EU country.

The contract, which runs for a period of two years, specifies, among other things:

that where legally stipulated, the company is liable to deduct income tax. Since the pilot lives in Denmark, however, he is responsible for paying his taxes,

that annual leave will be determined in accordance with the legislation of the home base country, i.e. the fourth EU country,

that the contract has a 30-day notice period from either party,

that all disputes relating to the contract will be settled in accordance with the legislation of the home base country and through its courts. (This applies even though the pilot is Danish, the recruitment agency is from another EU country and the work is carried out for an airline in a third EU country),

that paid sick leave will be limited to a maximum of 30 days per year. 90 per cent of the basic salary without bonuses will be paid,

that holiday pay will only be paid if this is compulsory in the home base country,

that the operating company (airline A1) will provide accommodation at destinations outside the home base, and

that the home base can be moved to any other location in Europe with two months' notice.

The contract also contains a clause stipulating complete confidentiality about the content of the contract both during and after the period of employment. Failure to comply with this confidentiality clause will result in immediate termination of employment.

### **2.3.2 Example 2: Danish pilot residing in Denmark**

He takes a job at recruitment company B in a country outside the EU as a pilot for commercial scheduled airline services.

Recruitment company B hires his labor out to airline A in an EEA country.

#### Contractual position:

The pilot is employed as a "self-employed contractor".

The contract specifies:

that the pilot is responsible for paying taxes and all other charges on his income,

that the notice period from the company's side is 30 days, except in a number of circumstances listed, whereupon termination can occur without notice, including in the event of more than seven consecutive sick days, and

that the notice period from the employee's side is 35 days after the first three months. If the employee fails to comply with the 35-day notice period, he is liable to pay one month's salary to the company.

### **2.3.3 Example 3: Cabin crew, EU citizen (not Danish) with the home base in Denmark**

She takes a job at recruitment agency Z, which is domiciled in another EU country.

Recruitment agency Z hires her labor out to airline C from the same EU country as recruitment agency Z.

Airline C stations her at a home base in Denmark.

#### Contractual position:

The contract specifies:

that the applicable legislation is that of the airline's home country, as the aircraft operated are registered in the home country of airline C,



that complete flexibility is expected in relation to the relocation of the employee to any other base without compensation. No notice period is specified,

that there are no upper limits for working hours and that the employee may be required to work on any day of the week throughout the year,

that the employee must be willing to work irregular hours and overtime without receiving any additional salary,

that 20 days' annual leave are offered and that leave may be cancelled without notice if production requires,

that there is no paid sick leave,

that an unspecified fee for ID cards must be paid, as well as an unspecified price to buy a mandatory uniform,

that the employee must accept unpaid leave in the event of overstaffing,

that the notice period from the company's side is:

- No notice during the first 13 weeks of employment
- one week's notice after 13 weeks and up to two years of employment
- two weeks' notice from two years up to five years of employment, and

that the notice period from the employee's side is one month at all times.

The company schedules four weeks' unpaid leave every year between November and March as a result of the difference in personnel requirements between the summer and winter timetables.

#### **2.3.4 Example 4: EU citizen (not Danish), who is a pilot with a home base in a country outside the EU/EEA**

He takes a job at recruitment agency W, which is domiciled in a country outside the EU/EEA.

Recruitment agency W hires his labor out to airline A3 in the same country outside the EU as recruitment company W. Airline A3 is a subsidiary of airline A1, which is domiciled in an EEA country.

The airline bases the pilot in a country outside the EU with a view to long-haul flights between Europe and destinations outside the EU.

##### Contractual position:

The contract specifies:

that the length of the contract is 36 months, with the possibility of extension,

that the pilot will be given eight days off per calendar month,

that the pilot can apply for extended outstation layover (EOL<sup>2</sup>), which is four or more consecutive days off at a base other than the home base. This EOL can also include the weekly rest periods,

that the pilot is responsible for the payment of all taxes and charges to the relevant authorities, except where the pilot is a citizen of the country in which airline A1 is domiciled, in which case tax is payable to this country,

that the recruitment agency and the airline disclaims liability for any and all tax matters,

that two days leave are earned per month,

that the pilot is entitled to up to 30 days paid sick leave per calendar year,

that parental leave is provided in accordance with the rules of the country in which recruitment agency W is domiciled,

that the contract may be terminated by the employer with 30 days' notice. After six months, the pilot can terminate the contract with a minimum of 90 days' notice. If this notice is not given, the pilot must pay one month's salary,

that the pilot is not permitted to talk to the media,

that the employment relationship is governed by the laws of the country outside the EU where recruitment agency W is domiciled, and

that the employee must accept unpaid leave in the event of overstaffing

The company schedules four weeks' unpaid leave every year between November and March as a result of the difference in personnel requirements between the summer and winter timetables.

## **2.4 Connection between new business models, terms of employment and "social dumping"**

The opportunities for and examples of "social dumping" within aviation are linked, as previously mentioned, in particular to new business models and terms of employment, combined with the EU's rules on free market access, free competition and free movement of workers and services between Member States.

The aforementioned employment models and terms of employment combined with the airlines' ability to establish subsidiaries, home bases and use recruitment agencies and workshop facilities, etc. in different countries, enables airlines, within the law, to "rule shop" between countries – depending on where it is most advantageous to the airline in terms of taxes, wages, working hours and working conditions in general, working environment requirements, as well as employer obligations, including in relation to social obligations and pensions.

These employment models create complexity and lack of transparency and thus insecurity 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 cause doubt for both employees and the Member States about which country is liable to pay social security benefits.

<sup>2</sup> An example of EOL is when a pilot at an outstation has some waiting time, such as if there is a stopover, before the next flight the pilot is working on leaves.

For those employed under such conditions, it can also mean poorer working conditions, lower pay and a lack of employer-paid social security and pension savings than for employees employed in a traditional employer/employee relationship. Moreover, the differences in the Member States' welfare benefits cause doubt for both employees and the Member States about which benefits the individual employee is entitled to, under which country's law and thus also which country is liable to pay welfare benefits.

On this basis, a number of issues are examined below in relation to the term "social dumping" in aviation, which – as previously described – more closely resembles "rule shopping" between the different laws of Member States and their implementation, administration and interpretation of EU regulations.

Against this background, therefore, five rules and related issues have been identified and examined, all of which originate in the above examples of new employment models, forms of recruitment and company structures.

The areas involved are:

- Jurisdiction and applicable law
- Temporary employment/recruitment agency/"self-employed"
- Social security
- Third-country crew
- Tax

Each individual area is compared with the relevant EU regulations and international guidelines and agreements and their interpretation, including differences in the Member States' understanding of the regulatory framework, and where appropriate the separate Danish rules. This is discussed in sections 3.1-3.5.

In addition, the working group has discussed in sections 3.6 and 3.7 whether the new company structures and looser employment models and terms of employment, including employees' significantly looser relationship with some airlines, could potentially have an impact on the working environment and safety.

## 3 General description of regulations and problematic issues

### 3.1 Jurisdiction and applicable law

Rules have been adopted within the EU on competence and on the recognition and enforcement of judgments on civil and commercial matters, including which courts are competent in international civil cases (jurisdiction). The general rule of jurisdiction in the EU is that an employer domiciled in a Member State may be sued in the courts of that Member State or in the courts in the place where the employee habitually carries or carried out their work (permanent place of work).

If aviation personnel permanently fly from one destination (home base), this is assumed to indicate definitively that the employee has a permanent place of work. If there is no permanent place of work, the courts in the place where the company that engaged the employee is or was situated will have jurisdiction.

Denmark has adopted these rules on jurisdiction.

When someone works for an employer in Denmark, Danish rules apply and these guarantee the employee a high degree of protection, including with regard to illness, parental leave, annual leave and working environment. However, there may be some cases where the person in question is employed by a foreign employer which has its registered office in another EU country.

Accordingly, rules are stipulated within the EU on which country's rules apply to an employment relationship in a situation where the employment relationship is connected to several countries: Rules on applicable law in contracts. The premise here is that the parties can agree which country's law will govern their mutually agreed employment contracts.

This means that the law that applies is either the law of the country in which the employee habitually carries out his or her work, or if there is no country of habitual employment, the law of the country in which the employer's place of business is located. If, based on an overall assessment of the circumstances, the contract proves to be more closely connected to another country, the law of that country will apply.

The level of protection that applies with regard to illness, parental leave, annual leave, etc. thus depends in this situation first and foremost on what is agreed between the parties and the legislation of the country in which the work is carried out, as some compulsory protection rules cannot be waived by agreement on applicable law.

In the event of doubt, it is up to the courts to decide which country's mandatory requirements apply. The decision on where such cases will be heard and judged is determined in accordance with the jurisdiction rules set out above.

Denmark has adopted the EU rules on applicable law.

The new employment models in aviation described in section 2 mean that there is not necessarily any overlap between the employee's place of residence, place of work, place of employment and the airline's domicile. An example of this is given in Section 2.3.3, where the pilot is Danish, the recruitment agency is from another EU country and the work is carried out for an airline in a third EU country.

This can cause confusion as to which country's legislation applies to the employment relationship. The reality is probably that employees and residents of Denmark are covered by the laws of another country, which may mean poorer conditions for employees and a competitive advantage for the airline.

In a recent case in Norway, the Norwegian court ruled that a case concerning an Italian who is resident in Norway and employed by an Irish company could be heard in the Norwegian courts. In its decision, the Norwegian court referred to the judgments of the European Court of Justice in two cases within international freight transport and shipping. On this basis, the court placed specific emphasis on the employee's place of residence, which was the place where the employee went to work and received instructions from the employer. Neither the fact that the employee was working on an Irish-registered aircraft nor the existence of an agreement that Ireland should have jurisdiction were regarded as significant.

The Norwegian ruling and the aforementioned EU court judgments may provide an indication of how instances of new employment models in Danish aviation could be handled.

To the extent that the cases could be heard by Danish courts, it may be the case in the event of repeated lending/leasing of labor, which may be covered by the Danish Temporary Employment Act, that the Danish Temporary Employment Act may be applied with reference to Section 3 (4) of the Act relating to successive assignments without objective justification.

For Danish aviation, this may mean that Danish airlines may, for competitive reasons, make use of equivalent terms of employment, which could mean less protection for employees in employment relationships and the erosion of employee rights and the loss of Danish jobs.

See section 7.1 for a more detailed and extensive description of the regulations.

### **3.2 Temporary employment/recruitment agencies/"self-employed"**

Some airlines employ staff under temporary-like conditions either through the employee's own company ("self-employed") or through employment with the airline through a recruitment agency owned by the airline or an actual temporary-work agency. Often these employees do not appear to enjoy the same conditions as permanent employees. In some cases they are paid only by flying hours worked.

#### Temporary employment

The EU Directive on temporary agency work and the Danish act om the legal rights of temporary agency workers upon assignment by a temporary-work agency, etc. (Temporary agency workers Act) stipulate the principle of equal treatment, which means that the temporary-work agency must ensure that during assignment to a user undertaking the temporary worker has conditions in respect of working hours, overtime, breaks, rest periods, night work, annual leave, public holidays and pay that are at least equivalent to what would have been applicable under law, collective agreements or other binding general provisions if the temporary worker had been employed directly by the user undertaking to perform the same job.

The Directive on temporary agency work deals only with temporary agency workers in the strict sense. Companies that act as employment agencies are not covered therefore by the Danish Temporary agency workers Act and the Directive.

The EU Directive on temporary agency work does not take a specific position on the cross-border use of temporary workers, which the Danish Temporary agency workers Act does. The Danish Temporary agency workers Act contains a regulation that the Danish Temporary agency workers Act also applies to temporary workers posted to Denmark by a foreign temporary-work agency in order to work at a Danish user undertaking.

Neither the EU Directive on temporary agency work nor the Danish Temporary agency workers Act apply, however, in situations where a temporary worker from a foreign temporary-work agency is assigned to a foreign user undertaking, which subsequently posts the temporary worker to Denmark. As there is no Danish user undertaking in this scenario, the conditions of the posted temporary worker are governed by Danish Posted Workers Act and any implementation of the Directive on temporary agency work in the home country of the temporary-work agency and/or the foreign user undertaking.

Against this background, it is considered in a Danish context that the Danish Temporary agency workers Act's implementation and transposition of the Directive on temporary agency work does not contain any

risk of "social dumping", as is in order for a temporary-work agency to be able to waive the principle of equal treatment, the temporary-work agency must be covered by a nationwide, representative Danish collective agreement. With regard to other Member States, it should be noted that the exemption possibilities in the Directive give Member States some room to allow temporary workers to be treated less favorably than comparable permanent employees at a user undertaking.

The current regulatory framework therefore allows airlines and others to "rule shop" between Member States by using temporary workers, depending on how the Directive is implemented.

#### Employment through recruitment agencies

The recruitment agencies used by the airlines, as described in section 2.2.3., can be either actual temporary-work agencies or companies that only supply labor to the airline. The recruitment agencies can be located in a country other than the airline's home country or the employee's place of work.

The status as a temporary-work agency or an employment agency is determined through a specific assessment of the situation. If this results in the companies actually being classified as temporary-work agencies, then they are covered by the above regulations. If, on the other hand, they are deemed to be an employment agency, it may be assumed that employment has taken place directly at the airline.

#### "Self-employed"

A "self-employed" person is, for example, a pilot who – as described in section 2.2.3 – sets up their own private company and hires their labor out to an airline through this company. This can be direct or through a temporary-work agency or an employment agency. Just as temporary-work agencies and employment agencies can be located anywhere, so too can a pilot's personally owned company.

See section 7.2 for a more extensive description of the regulations.

### **3.3 Social security**

Social security includes health insurance and sick pay, social pension and supplementary labor market pension (ATP), family benefits, unemployment benefits, occupational health insurance, etc.

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

Until June 28, 2012, aircrew had to work at least 25% of their working hours in their country of residence in order for that country's social security legislation to apply. Aircrew who carried out less than 25% of their work in their country of residence were covered by social security in the country where their employer was situated.

These rules proved to be inadequate for aircrew, as the Member States had difficulty calculating the working hours in different countries and identifying employers in situations where a person is employed through a temporary-work agency or alike, as these are often situated in other countries.

The EU amended Regulation (EC) No 883/2004 and from June 28, 2012, introduced the provision that aircrew are covered by social security in the country in which the person has their home base, i.e. the place where the person's actual work begins and ends. The home base rule seems to be more appropriate for aircrew. However, it has not solved the problem of identifying the real employer in situations where a person is employed via a temporary-work agency, etc.

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

A commission has been established in connection with Regulation (EC) No 883/2004. The Administrative Commission (AC) contains one representative from each Member State, as well as observers from Norway, Iceland, Liechtenstein and Switzerland. The Administrative Commission is responsible for dealing with all administrative questions or questions of interpretation arising in relation to the provisions of Regulation (EC) No 883/2004, etc. Denmark is represented on the commission by the Ministry of Children, Gender Equality, Integration and Social Affairs.

For a more detailed description of the regulatory framework and its administration, see section 7.3.

### **3.4 Third-country crew**

A work permit is required for employment aboard a Danish ship or aircraft which, as part of scheduled traffic or otherwise, regularly calls at Danish ports or airports.

Section 33 (6) of the Danish Aliens Act states that cabin crew members serving on Danish aircraft flying routes with a flight time of at least five hours between Denmark and the alien's country of origin or countries associated by language or culture with the alien's country of origin, and where, due to language or cultural barriers, including lack of knowledge of European languages, local passengers demand cabin crew members with knowledge of the language and the culture relevant to the passengers are exempt from the work permit requirement.

In Denmark it is a requirement for third-country crews on Danish-registered aircraft to have residence and work permits. There is one exemption contained in the Danish Aliens Order, however, where up to 20% of the cabin crew on intercontinental flights can be third-country nationals, subject to certain conditions. See also section 7.4.

In Norway, for example, third-country nationals cannot be used on board aircraft, while there are no limitations in Sweden or Ireland, for example.

National aliens legislation in EU Member States in relation to third-country nationals working on board aircraft is therefore not governed by the EU and varies greatly. The rules apply only to aircraft registered in the country in question and only for that portion of the flight that takes place within its territory.

This means that there are gaps and overlaps in the international models, providing an incentive to rule shop, for example when choosing the country in which to register aircraft. If, for example, the aircraft is registered in Ireland, the Irish rules for Irish-registered aircraft apply, but only to the extent that the aircraft is within Irish territory. So if this aircraft flies to Danish territory, neither Irish nor Danish aliens legislation applies.

A Danish work permit is therefore not required for third-country nationals on a foreign-registered aircraft (irrespective of whether the aircraft is registered in an EU country or a third country), even if the aircraft operates regular services to Denmark or otherwise regularly lands in Denmark. However, if the foreign aircraft primarily or exclusively flies in Denmark (domestic flights), foreign employees from third countries must generally hold a Danish work permit.

This means, for example, that an Irish-registered aircraft can employ third-country crews without restriction on flights between EU countries and third countries and on flights between EU countries.

In view of the Danish legal reservations in the EU and the purpose of the working group, the working group has refrained from making proposals in this area.

### **3.5 Taxation of aviation personnel in international traffic**

A person is generally liable to tax in Denmark on their entire worldwide income, whether earned in Denmark or abroad, if that person has full tax liability in Denmark and is not resident abroad, in Greenland or on the Faroe Islands according to a tax treaty. A person typically has full tax liability in Denmark if that person is resident in Denmark.

In order to avoid double taxation, i.e. the same person paying tax on the same income in more than one country, the taxpayer is entitled to relief on foreign tax under internal Danish relief rules or according to a tax treaty, which is an agreement between two or more countries on the allocation of taxation rights for cross-border transactions in order to avoid double taxation.

Denmark has tax treaties with over 80 other countries. The majority of Danish tax treaties are drawn up on the basis of the OECD Model Tax Convention.

According to Article 15 Section 3 of the OECD Model Convention, "remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic...may be taxed in the Contracting State in which the place of effective management of the enterprise is situated."

The distribution of taxation rights in Article 15 Section 3 is related to Article 8 of the OECD Model Convention, which states that "profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated". As this state normally allows the company to deduct the wage payments to its employees when calculating the company's taxable income, this state is also granted a right to tax the employees' wages.

In order to avoid double taxation, the country in which the employee resides grants relief, using either the exemption method or the credit method, depending on what is agreed in the individual double taxation convention.

The general rule in Denmark's tax treaties is that Denmark, as far as wages for working on aircraft in international traffic are concerned, grants relief according to the credit method, i.e. Denmark taxes the income earned at Danish level less a deduction for the foreign tax paid.

However, Denmark has some older tax treaties where an exemption relief has been granted instead, i.e. the foreign-earned income is only taxed abroad. The tax treaty between Denmark and Ireland is one example. Under this tax treaty, wages for working aboard an aircraft in international traffic for an airline whose place of business effective management is based in Ireland, are taxable only in Ireland.

SKAT's project "Globalization 2013 – Aircrew", which examined the compliance of aircrew with a Danish license, evaluated three typical employment contracts for pilots operating aircraft in international traffic for a foreign airline. These are contracts where the pilot is employed by a company, but is leased to the airline operating the flight. In summary, the assessment is that the different employment models for aviation personnel in international traffic in principle do not result in different taxation of the employee's wages than direct employment at the foreign airline, as the tax treatment of the remuneration is determined by whether the foreign airline is deemed, on the basis of a specific assessment, to be the actual employer. In the employment contracts examined by the project, the airline has in all cases been deemed to be the actual employer.

The binding responses given in relation to the taxation of pilots who work on aircraft in international traffic for foreign airlines with similar employment contracts have reached the same conclusion.

Where foreign airlines are able to operate from Denmark using employees who are resident in Denmark without those employees paying Danish taxes, this gives the foreign airlines a competitive advantage over Danish airlines. According to section 2.1, this situation can be considered social dumping.

For a more detailed description of the regulations, see section 7.5.

### **3.6 Working environment and supervision thereof within Danish aviation**

The working environment in aviation cannot be characterized as "Social dumping". Any possible impact on the working environment must therefore be seen as a possible consequence of the increased competition and the resulting tightening of finances and demands for savings at airlines, which in terms of working environment can be detrimental to the working and health conditions of employees, both on land and in the air.



There appear to be divergent national rules for the working environment and its supervision in relation to the implementation of various directives. However, there is no evidence that the working environment conditions and supervision in any individual EU country are better or worse than in Denmark. The Danish Working Environment Authority is tasked with legislating on and supervising the working environment in Denmark, including ground-based personnel, while supervision inside the aircraft is the responsibility of the Danish Transport Authority. In Norway, until 2008 the supervision of the working environment (health/environment/safety) was carried out by the Norwegian Labor Inspection Authority and not by the respective professional supervisory bodies. As of 2008, the Norwegian Civil Aviation Authority took over responsibility for the working environment of aircrew from the Norwegian Labor Inspection Authority. In Sweden, there is a separate authority, the Swedish Work Environment Authority, which is responsible for regulation and supervision. However, the Swedish Transport Agency has responsibility for the working environment of aircrew. This work includes both regulation and supervision.

For a more detailed description, see section 7.6.

### **3.7 Aviation safety**

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

Generally, crews that are employed by or work for a commercial airline must have successfully completed the required education and training courses and passed the relevant examinations. It is the airline's responsibility to ensure that its crews meet the necessary requirements and that they otherwise comply with and support the airline's safety culture.

The general safety rules that apply were drawn up at a time when aviation business structures, business models and recruitment and employment models were fundamentally different and otherwise reasonably uniform across national borders within the EU. Where the airlines themselves were responsible for all parts of the production chain and therefore had full control over the level of safety in both the individual parts of the airlines and the airline as a whole.

This has created a situation that was unheard of 15-20 years ago.

With this development, there is also the fear that the employment model as described above, with frequent changes of personnel, could affect the corporate culture in relation to safety. In addition, the emergence of "point-to-point" airlines and the new business structures, including "virtual airlines", have created a new situation where large parts of production 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. Establishing Safety Management Systems (SMS) is one way of ensuring there is coordinated safety responsibility. However, continued and increased fragmentation represents a challenge even for these systems.

Finally, it should be noted that there has been ongoing development in aircraft manufacture over the years, including in relation to safety. As a result, what could be termed technology-based safety in aircraft has constantly increased as new aircraft have been developed. The "Human factor" has therefore also become increasingly important with regard to safety.

For a more detailed description, see section 7.7.

## 4 Initiatives, special rules in selected European countries

In extension to its mandate, the working group has examined whether work has been undertaken or strategies pursued in the field of "social dumping" in selected European countries. This has been done by contacting the Danish Transport Authority's sister organizations in 10 European countries (Norway, Sweden, Finland, Germany, the United Kingdom, Ireland, the Netherlands, France, Spain and Italy) about pay and working conditions within aviation and asking them to indicate whether they have received similar approaches from their airline industries in relation to the new business and employment models, including the use of "self-employed" staff, and the resulting "shopping" by some airlines between the rules of EU Member States. They were also asked whether they had looked into the matter and taken any action, as well as if they had any plans to look into the matter. Finally, they were asked whether they considered the development that has taken place within aviation to be a problem and if so how.

A copy of the request is enclosed, see section 7.9.

The Danish Transport Authority received replies from five countries: the United Kingdom, Germany, Sweden, Finland and Norway. They all state that they have identified a similar trend to the one in Denmark and they stress that they are highly focused on the potential safety aspects of this development.

From Norway, the working group also received a copy of a letter from the Norwegian Minister of Transport and Communications, Ketil Solvik-Olsen, to European Commissioner Siim Kallas, accompanied by a memorandum on similar circumstances and a copy of the reply from European Commissioner Siim Kallas to the Minister of Transport and Communications. The Danish Transport Authority also held a meeting with the Norwegian authorities on the issues raised.

During discussions with Norway and Finland on their answers to our questions, the idea arose of establishing a working group across the Nordic aviation authorities, where we can share information and experiences about "social dumping" and "rule shopping", including trying to establish common positions on action at EU level. The Danish Transport Authority has taken the initiative to attempt to establish this group.

In addition, the working group was given information about the ruling in a French court case against Ryanair.

### 4.1 Responses from the Danish Transport Authority's sister organizations

#### United Kingdom

In its reply, the United Kingdom states that it notes the work carried out by the Commission in relation to this and refers in this context to the Commission's working paper "Fitness Check – Internal Aviation Market (Report on the suitability of economic regulation of the European air transport market and of selected ancillary services)", section 7 of which discusses employment and working conditions.

Moreover, the United Kingdom states that its (the CAA's) regulatory area is safety and consumer protection, while labor market policy is a government responsibility, therefore they have forwarded the request to the Ministry of Transport, from which we have not as yet received any further information.

#### Germany

The German authority indicates its agreement with the conditions we in Denmark have highlighted, although it also states that the German aviation authority is primarily concerned with aviation safety. The German aviation authority also indicates that an opportunity to resolve the problem – at least in part – will be provided by the introduction of a requirement for employment contracts between crews and air-

lines to comply with EU operational rules, and concludes by saying that it will be able to endorse such an initiative at EASA level.

### Sweden

The Swedish Transport Agency states that it is experiencing similar developments in Sweden as those in Denmark, especially in relation to the outsourcing of cabin crew. At the same time, the Agency indicates that social dumping is not a political issue solely in the aviation sector, but generally within the transport sector as a whole.

The Agency does not see this as a major problem, however, as it believes that companies must be able to organize themselves in such a way as to be competitive, within the bounds of labor market regulations.

It also states that the Swedish Transport Agency is very concerned about the possible impact on everyday safety of the outsourcing and fragmentation of the airlines. It is therefore following developments closely and is focusing in particular on the reporting culture of companies and other safety aspects.

### Finland

The Finnish Transport Safety Agency states that it is seeing a similar trend and that some of the savings made by certain airlines have been achieved by introducing new contracts where the employees are employed and/or work in somewhere other countries than in the country where the airline has been issued with an AOC. The Agency has not itself taken action with regard to "social dumping", but as a safety authority has contacted the Finnish authorities responsible for labor market conditions and social conditions on the subject of safety. At the same time, it indicates that "social dumping" is a complex issue that involves aviation safety, labor market conditions, tax, employment, the free market, competition, etc.

It is also stated that they believe the problem cannot be solved at national level, but that it needs to be addressed by the EU and in this context refers to the matter recently being taken up by the "EU Market Access (Aviation) Committee" and being on the agenda for the next meeting of the committee in June 2014.

Finally, it is also stated that safety issues can become problematic if there is too much distance between pilots, cabin crew and maintenance workers.

### Norway

The Norwegian Civil Aviation Authority reported that an initiative has been launched in Norway in order to establish the relevant circumstances and challenges within aviation in relation to the increased competition and globalization of the airline industry.

It is also stated that the emergence of different employment models is just one of many factors that will be analyzed. The impact of these models on safety, incident reporting, tax, wages and working conditions will be examined.

Norway has also stated that the Norwegian Minister of Transport and Communications has contacted European Commissioner Siim Kallas to report the launch of the Norwegian analysis, the reasoning behind it and the immediate Norwegian views.

The inquiry was accompanied by a memorandum, which stated, from a Norwegian perspective, the problems related to the airlines' new business models as a result of differences in national legislation and EU legislation. It argues that the problems relate to issues such as the applicable law, as it is often difficult for aircrew to determine in which EU/EEA country they primarily carry out their work. There is also the problem of a person being able to have a home base in a third country, while making the vast majority of their flights internally between EU/EEA countries.

As a result of this, Norway is calling for the definition of a home base to be amended and does not consider it acceptable for an EU airline to have a home base in a third country.

Furthermore, it finds it problematic for competition between EU airlines that Member States have different rules concerning the use of crew members from third countries, including for internal flights within the EU/EEA.

It also proposes that the Commission should evaluate the significance for the authorities' effective supervision of the airlines of the fragmentation of airlines, where an airline can have an AOC in one country, its aircraft registered in another country, its staff recruited in a third country and the employment relationship governed by the laws of a fourth country.

## **4.2 The visit of the Danish Transport Authority to the Norwegian Ministry of Transport and Communications**

As stated above, the Danish Transport Authority has discussed the problems with the Norwegian Ministry of Transport and Communications and the Norwegian Civil Aviation Authority. These discussions showed that the work in Norway not only covered issues relating to "social dumping" in the broadest sense, but also placed emphasis on the fact that aviation involves international competition that you also have to deal with.

In terms of "social dumping" and "shopping" between countries' rules, implementation of EU directives and interpretation and administration of EU regulations, they were essentially concerned with the same issues as described above in section 3.

## **4.3 The French lawsuit**

On October 2, 2013, Irish airline Ryanair was found guilty of social dumping in France. The company was fined 200,000 euros and must pay just over 9 million euros in damages for infringement of the French Labor Code. The case was brought by a division of the French social security department, with which a company is required to register and pay both the employer and employee social security contributions.

According to the information available, the judgment is based on a decree of 2006 which deals with rules for European airlines with bases within the EU and stipulates whether authorization is required from the local authorities. Under the decree, aviation companies with a base in France are governed by French law, i.e. French company law, tax rules and labor law. The decree is based on French labor law, but in France's opinion is in accordance with the relevant European legislation.

According to the judgment, Ryanair has not registered in France, even though it has employed 127 employees residing and based in France, and has therefore failed to pay employer and employee contributions as stipulated by the decree. In France's opinion, Ryanair has also failed to comply with the French rules on taxation and has not complied with the French labor law.

According to the information available, Ryanair is of the opinion that the French decree of 2006 is in contravention of EU rules, because the aircraft are registered in Ireland. In addition, Ryanair had argued that the jobs in question did not have a permanent link to France, which is why they are governed by Irish law. Ryanair also referred to EU legislation and declared that the company has already paid these employer and employee contributions in Ireland.

It would appear that Ryanair has appealed against the judgment.

## 5 Work on social dumping at other Danish ministries and European Commission initiatives

In connection with the work of the working group, the Danish Transport Authority approached selected ministries and asked them to carry out monitoring in their respective fields and also to provide information about the content of any proposals from the European Commission and any subsequent discussions or initiatives.

A copy of the Danish Transport Authority's letter to the ministries is enclosed, see section 7.10.

In addition to the work and the initiatives of the ministries represented in the working group as reported in section 3, the working group has received responses from the Ministry for Justice, the Ministry of Business and Growth, the Ministry of Housing, Urban and Rural Affairs and the Ministry of Taxation.

The working group will also refer to the "Report of the Committee on the prevention of social dumping" published in October 2012 by this government-appointed committee in relation to the ministries' work on social dumping.

### 5.1 Ministries' response

The Ministry of Employment stated that it is coordinating the enforced official action to combat social dumping. The Danish Working Environment Authority, Danish Tax Administration and the police implemented a number of national and regional initiatives in 2012 and 2013, where the authorities perform unannounced workplace inspections. Efforts will continue following the Danish Budget for 2014. The Register of Foreign Service Providers has also been tightened up and improved. In addition, the government has focused on the increased use of labor clauses in public procurement contracts for construction projects, including in municipalities and regions.

The Ministry for Justice has stated that the ministry has no immediate cases of social dumping, including those from the European Commission on social dumping. The Ministry for Justice also draws attention to the European Commission's Communication on free movement and social benefits.

The Ministry for Justice also states that to counteract illegal cabotage, funds have been allocated to the police in the Budget to increase the level of police action.

The Ministry of Business and Growth stated that it is not familiar with any proposals from the European Commission.

The Ministry of Housing, Urban and Rural Affairs stated that the Danish Social Housing Sector and the National Building Fund require developers to use labor clauses when procuring construction work.

It also stated that the ministry chairs the government's inter-ministerial committee on the Fehmarn Belt. As well as the Ministry of Housing, Urban and Rural Affairs, the committee consists of representatives from the Ministry of Transport, the Ministry of Employment, the Ministry of Education and the Ministry of Business and Growth. The committee will coordinate inquiries on cross-border issues relating to the construction of the Fehmarn Belt Fixed Link, with matters relating to labor market conditions representing an important issue. Finally, the Ministry states that a key player in the fight against social dumping in relation to the establishment of the Fehmarn Belt Fixed Link is the state-owned company Femern A/S under the Ministry of Transport.

The Ministry of Taxation stated that there have been no proposals from the European Commission in relation to social dumping in the field of taxation, nor has it approached the European Commission on the subject of social dumping in the field of taxation, nor is it aware of any approaches made to the European Commission by other countries. The Ministry of Taxation also stated that several initiatives have been

implemented in the field of taxation as part of efforts to combat social dumping, including the tightening up of the rules on international hiring-out of labor in 2012, just as the Tax Authority, SKAT, has increased its efforts to combat social dumping.

## 5.2 European Commission initiatives

There are no European Commission initiatives on "social dumping" within aviation at present, but a number of reports have been commissioned and produced in relation to some of the problems described in section 3.

As previously mentioned, the European Commission has established the Administrative Commission, consisting of one representative from each Member State, as well as observers from Norway, Iceland, Liechtenstein and Switzerland. The Administrative Commission is responsible for dealing with all administrative questions or questions of interpretation arising in relation to the provisions of Regulation (EC) No 883/2004, etc. The Ministry of Children, Gender Equality, Integration and Social Affairs is involved in the work of the commission on behalf of Denmark.

As stated by the Ministry for Justice, the European Commission has published a Communication on the free movement of EU citizens and their families. The Communication, which mostly aims to promote free movement, states, among other things, that "The European Commission will work closely with the Member States to develop uniform rules on social security, and will help authorities implement EU rules which allow them to fight potential abuses of the right to free movement."

A market access committee has been established under the European Commission's Directorate-General for Mobility and Transport. The committee will meet in June 2014 to discuss work-related and social issues within aviation with regard to market access. The Directorate-General has asked for contributions with regard to what the Member States wish to discuss at the meeting.

The Commission has also – as indicated by the United Kingdom – prepared a report on the current situation within European aviation, which includes a section on employment and working conditions within aviation. This merely provides a description of developments and the regulatory framework.

The Directorate-General Internal Market commissioned a study in 2013 on issues including "Employment and Social Affairs". Again this is merely a description of the situation, including social rights for the "self-employed".

The European Commission has also provided financial support for a project initiated by aviation organizations and trade unions within aviation on "Atypical forms of aircrew employment in the European aviation industry (with a focus on bogus self-employment)".

Finally, the European Commission has established working groups in different sectors for social dialogue at European level. These are composed of representatives from both employers and employee organizations. A working group has also been established within aviation, with both employee organizations and airline organizations represented.

## 6 Proposed initiatives

As can be seen from the above, "social dumping" within aviation is largely related to the EU regulatory framework and the opportunity for airlines to "rule shop" between the Member States. The reason why airlines have the opportunity for "shopping" is that there are differences in the legislation of Member States, including differences in the Member States' implementation of directives and their administration and interpretation of EU regulations.

It should be noted in this context that the European Union basically does not stipulate rules on matters such as wages, welfare benefits and employer contributions, which is why airlines – like other businesses – are able to set themselves up or establish subsidiaries/home bases in those Member States where it is most appropriate and/or beneficial.

There are three main routes for any possible initiatives to go down. The first is to support the uniform implementation, administration and interpretation of EU rules. The second is to evaluate Danish rules that facilitate "rule shopping". The third main route is to work to prevent the deliberate circumvention of the rules.

As can be seen from section 2, competition between companies has developed unceasingly within aviation and has been accompanied by the emergence of new business structures and business models, while recruitment and employment models have also changed. This trend is continuing at a very high speed, so developments need to be continuously monitored in order to evaluate and propose specific initiatives, including those mentioned in this section.

There would appear to be a need in this context for a forum with in-depth knowledge of the industry to monitor and assess these developments more closely and to produce practical, well-prepared proposals along all three main routes.

It is therefore proposed

that a working group be established under the Danish Aviation Council to carry out this work.

As the work of the working group is highly likely to address issues under the scope of a number of ministries, the relevant ministries must also be involved in the work.

### 6.1 Ensure uniform implementation, administration and interpretation of EU rules

Denmark must work constructively and purposefully to ensure the uniform implementation, administration and interpretation of EU rules. This can be done by working to have 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. As we know, regulations are directly enforceable and therefore do not need to be implemented in national legislation, which allows room for interpretation. Experience shows, however, that there are also differences in the understanding and administration of some regulations in the Member States.

The working group of the Danish Aviation Council will be the main body for drafting proposals. Wherever possible, active use must be made of the joint Nordic aviation work with which the Danish Transport Authority is involved, and which is described in more detail in section 4 above, to generate joint Nordic support for these proposals.

Below are some examples of possible initiatives. They do not represent specific initiatives that have been discussed in detail by the committee and therefore do not necessarily reflect the proposals that currently enjoy the support of the committee, but are included merely as examples of possible initiatives.

#### A. Social security

Currently EC Regulation 883/2004 is not interpreted uniformly and with the same understanding in the EU countries. There are therefore different perceptions of the concept of the employer in relation to the applicable law and social security. The following could therefore be considered:

the Ministry of Children, Gender Equality, Integration and Social Affairs initiates a discussion at the Administrative Commission on the concept of the employer in relation to the applicable law on social security in order to achieve a more uniform understanding and implementation of the rules on social security coordination. This is particularly relevant to the scenario in which an airline employs staff via temporary-work agencies or employment agencies.

For a more detailed description of the issues, see section 3.3.

#### B. Employment agencies

Recruitment agencies, including those belonging to the airlines, are mostly employment agencies by nature and so are not covered by the Directive on temporary agency work, including the principle of equal treatment. Employees who are recruited through such employment agencies should therefore be regarded as an employee of the airline and on a par with permanent employees.

The following could therefore be considered:

Denmark must work within the EU to ensure that employees who actually work for an airline are to be regarded as an employee of the airline and on a par with permanent employees.

This is also supported by the fact that it is the airline that manages and allocates work and determines where the employee's home base is.

The issues raised in relation to this appear to be partially resolved if there is a more uniform understanding and implementation of the concept of the employer, cf. point A above.

For a more detailed description of the issues, see section 3.2.

#### C. "Self-employed"

A "self-employed" person has virtually no influence on their work situation once the contract has been signed. The same is true of an employee who is recruited via an employment agency. In both cases, it is the airline that manages and allocates work and determines where the employee's home base is.

The following could therefore be considered:

Denmark must work within the EU to ensure that the "self-employed" who actually work for an airline, along with employees recruited via employment agencies, are to be regarded as being employed directly by the airline.

As for those employed through employment agencies, the problems in relation to the "self-employed" are considered partially resolved if there is a more uniform understanding and implementation of the concept of the employer, cf. point A above.

In some situations, the recruitment of "self-employed" workers also appears to be tantamount to the deliberate circumvention of the rules. Where this is suspected, the matter should be brought before the courts.



For a more detailed description of the issues, see section 3.2.

#### "D. The home base concept

As described in section 3.1 on jurisdiction and applicable law and in section 3.3 on social security, and as is also evident from the approach made by the Norwegian Minister of Transport and Communications to the European Commissioner Siim Kallas, there are particular problems in relation to the definition and interpretation of the concept of a home base. The problems with the current definition of a home base mainly relate to the rules on working in multiple countries, as well as the different interpretation of the countries of the concept of a home base.

The following could therefore be considered:

Denmark must work within the EU and EASA to establish a firmer concept of a home base, so as to formulate a clear and more up-to-date definition of the term home base that is grounded in employees have a closer link to only one home base. At the same time, Denmark should work to achieve the consistent enforcement of this in the EU Member States.

#### E. Working environment on board aircraft

As mentioned above, there is some risk that the working environment on board aircraft will deteriorate as a consequence of increased competition and the resulting possible cost-cutting in this area for both ground-based personnel and aircrew.

In order to ensure a good working environment, the following could therefore be considered:

Denmark must work under the auspices of the EU to examine the issues in relation to the working environment on aircraft, and through dialogue between the authorities to ensure that there are more uniform rules and that there is appropriate monitoring by the proper authorities.

For a more detailed description of the issues, see section 3.6.

#### F. Aviation safety

There are no indications that those airlines which use flexible staffing and employment models have a lower level of safety than other airlines.

There have been major changes in the business models and recruitment and employment models in aviation over the past 15-20 years. The current rules were drawn up at a time when the business models and employment policies of airlines were fundamentally different.

The following could therefore be considered:

Denmark should urge the EASA to carry out qualitative and quantitative studies on whether the structure of the rules is appropriate in view of the trend towards more fragmented business structures and employment models, and to assess whether these developments could pose a threat to aviation safety. Any problems identified should be followed up with solutions; and

the EASA should be encouraged to consider the introduction of rules requiring the direct and permanent employment of a proportion of both pilots and cabin crew on each individual flight.

For a more detailed description of the issues, see section 3.7.

## **6.2 Evaluation of the Danish rules that facilitate "rule shopping"**

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.

This area must be handled with the utmost care, as there will often be a number of considerations to be weighed against one other when assessing such conditions. The working group under the Danish Aviation Council will therefore probably be able to identify potential initiatives, but a broader assessment of these will be required before any decision can be taken on implementation.

Below are some examples of possible initiatives. They do not represent specific initiatives that have been discussed in detail by the committee and therefore do not necessarily reflect the proposals that currently enjoy the support of the committee, but are included merely as examples that it is considered could counteract incentives for "rule shopping".

#### A. Taxation of aviation personnel in international traffic

Where foreign airlines are able to operate from Denmark using employees who are resident in Denmark without those employees paying Danish taxes, this gives the foreign airlines a competitive advantage over Danish airlines.

The following could therefore be considered:

The Danish Ministry of Taxation considers contacting Ireland in order to renegotiate the tax treaty between Denmark and Ireland to allow Denmark to tax aviation personnel who are resident in Denmark and working aboard an aircraft in international traffic for an Irish airline; and

The Danish starting point when negotiating new and renegotiating existing double taxation conventions will continue to be the principles of the OECD Model Convention with regard to taxes on remuneration derived in respect of an employment exercised aboard an aircraft operated in international traffic.

For a more detailed description of the issues, see section 3.5.

### **6.3 Ensure that there is no deliberate circumvention of the rules**

Efforts to ensure there is no deliberate circumvention of the rules can take several forms. First, the protagonists in the airline industry should themselves assume the task of testing possible circumvention in the courts, in order to obtain confirmed case law. Second, the implementation of supervisory measures could be considered, as there are in the haulage and construction industries for example, which thirdly would lead to prosecutions.

The working group under the Danish Aviation Council could act as a forum for the industry's major players to swap their experiences of testing possible circumventions of the rules in the courts. In addition, the working group could draft proposals for national supervisory measures.

Below are some examples of possible initiatives. They do not represent specific initiatives that have been discussed in detail by the committee and therefore do not necessarily reflect the proposals that currently enjoy the support of the committee, but are included merely as examples of initiatives that could clarify the legal position, among other things.

#### A. Jurisdiction and applicable law

The Norwegian case referred to in section 3.1 above, in which a Norwegian court ruled in the case of an Italian woman resident in Norway and employed by an Irish company that there was jurisdiction in Norway on the basis of two judgments of the European Court of Justice, provides an indication of how examples of alternative forms of employment in Denmark could be handled.

In the Norwegian case, specific emphasis was placed on the employee's place of residence/place where the employee went to work and received instructions from the employer. At the same time, the fact that the work was carried out on an Irish-registered aircraft was set aside, as was an agreement between the airline and the employee that Ireland should be the place of jurisdiction.

Once the Norwegian court has ruled on the case of jurisdiction, it must then decide on the applicable law (i.e. the laws of which country are to apply to the case).

Clarification could be provided by

employees and trade unions seeking a civil court ruling in the event of disputes on jurisdiction and applicable law in connection with equivalent or similar employment models.

For a more detailed description of the issues, see section 3.1.

#### B. Temporary employment/recruitment agencies/"self-employed"

The Directive on temporary agency work – irrespective of the principle of equal treatment – gives EU Member States scope to allow temporary workers to be treated less favorably than comparable permanent employees at a user undertaking.

In Denmark, the Temporary agency workers Act stipulates that in order for a temporary-work agency to be able to waive the principle of equal treatment, the temporary-work agency must be covered by a nationwide, representative Danish collective agreement.

Clarification could be provided by

a temporary worker or their union bringing a case either in the civil courts or under trade union law, where there is a collective agreement in place, if they become aware of a breach of the temporary worker's rights under the EU Directive or the Danish Temporary agency workers Act.

For a more detailed description of the issues, see section 3.3.

## 7 Appendices -

## 7.1 Jurisdiction and applicable law

### 7.1.1 Jurisdiction

Rules on jurisdiction in this area have been agreed at EU level.

On December 22, 2000, the Council adopted Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), which replaced the Brussels Convention.

The regulation, which came into force on March 1, 2002, contains rules that apply between the EU Member States (excluding Denmark) on which courts have jurisdiction in international civil cases (jurisdiction) and on the reciprocal recognition and enforcement of judgments in civil cases. The content of the regulation is to a very great extent similar to the Brussels Convention.

The adoption of the regulation was based on point (c) of Article 61 of the Treaty Establishing the European Community, having regard to Article 65 on judicial cooperation in civil matters having cross-border implications, and Article 67. The regulation is therefore covered by the Danish opt-out from the Area of freedom, security and justice, and Denmark therefore was not party to the adoption, just as the regulation is not binding on or applicable in Denmark.

On October 19, 2005, the European Community and Denmark entered into a parallel agreement, under which Denmark, on an intergovernmental basis, adopted the rules of the Brussels I Regulation such that the rules of the Regulation came into force between Denmark and the other EU Member States. The agreement was incorporated into Danish law by way of Act No 1563 of 20 December 2006 on the Brussels I Regulation, etc., which entered into force on July 1, 2007.

On January 5, 2011, the Commission tabled a proposal for the revision of the Brussels I Regulation (recast), which was adopted by the European Parliament and the Council on December 12, 2012. In accordance with the parallel agreement, Denmark incorporated the recast Brussels I Regulation into Danish law by way of Act No 518 of 28 May 2013 amending the Act on the Brussels I Regulation, etc., which entered into force on June 1, 2013, under which the rules of the Regulation apply between the European Union and Denmark.

The following is taken from the regulation's rules on jurisdiction over individual contracts of employment (Section 5):

#### *Article 20*

*1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6, point 5 of Article 7 and, in the case of proceedings brought against an employer, point 1 of Article 8<sup>3</sup>.*

*2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.*

#### *Article 21*

*1. An employer domiciled in a Member State may be sued:*

<sup>3</sup> Article 6

a) in the courts of the Member State in which he is domiciled; or

b) in another Member State:

i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1), in the same way as nationals of that Member State.

#### Article 7

A person domiciled in a Member State may be sued in another Member State: ...

5) as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place where the branch, agency or other establishment is situated

#### Article 8

A person domiciled in a Member State may also be sued:

1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

2) as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

3) on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

4) in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the Member State in which the property is situated.

ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.

#### Article 22

1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

#### Article 23

The provisions of this Section may be departed from only by an agreement:

- 1) which is entered into after the dispute has arisen; or
- 2) which allows the employee to bring proceedings in courts other than those indicated in this Section.

If aviation personnel permanently fly from one destination/home base, this is assumed to indicate definitively that the employee has a permanent place of work. If there is no permanent place of work, the courts in the place where the company that engaged the employee is or was situated will have jurisdiction.

### 7.1.2 Applicable law

When someone works for an employer in Denmark, Danish rules apply and these guarantee the employee a high degree of protection, including with regard to illness, parental leave, annual leave and working environment.

However, there may be some cases where the person in question is employed by a foreign employer which has its registered office in another EU country.

When a person chooses to work for a foreign employer, they are not automatically entitled to a level of protection equivalent to that under Danish rules. The level of protection that applies with regard to illness, parental leave, annual leave and working environment depends in this situation primarily on what has been agreed between the parties as well as the law of the country concerned.

Where employment is linked to several countries – as will be the case in the instances referred to within the aviation sector, the rules concerning applicable law in contracts apply.

In Denmark, the Convention 80/934/EEC on the law applicable to contractual obligations (Rome Convention), implemented by way of Act No 188 of 9 May 1984, as amended, applies.

In the rest of the EU, however, the Rome Convention has been replaced by Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation), cf. Article 24 of the regulation. As a result of the Danish opt-out, the Rome I Regulation does not apply in Denmark, so Danish law still applies the rules contained in the Rome Convention.

Under Article 1 (1), the Rome Convention applies to contractual obligations in any situation involving a choice between the laws of different countries.

Article 6 of the Convention, which concerns the law applicable to individual employment contracts, states the following:

1. *Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.*
2. *Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:*
  - a) *by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or*
  - b) *if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;*

#### Article 3 – Freedom of choice

1. *A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.*

2. *The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.*

3. *The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".*

4. *The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.*

#### Article 4 – Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.

4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

The basis of the Rome Convention is that the parties may choose the law that will govern their mutual contract in accordance with Article 3 of the Convention. This basis also applies to individual employment contracts.

However, under Article 6 (1) the employee may not, as a result of a choice of law in a contract of employment, be deprived of the protection afforded by mandatory rules of the law that would apply to the employment contract in the absence of a choice of law.

The law that applies to the employment contract in the absence of a choice of law is either the law of the country in which the employee habitually carries out his work, cf. point (a) of Article 6 (2), or if there is no country of habitual employment, the law of the country in which the employer's place of business is located, cf. point (b) of Article 6 (2). If, based on an overall assessment of the circumstances, the con-



tract proves to be more closely connected to another country, the law of that country will nevertheless apply unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

It is noted that Article 8 of the Rome I Regulation contains a rule on the law applicable to individual contracts of employment, which in the main corresponds to Article 6 of the Rome Convention.

In the event of doubt, it is up to the courts to decide which country's mandatory rules should apply in relation to the employment relationships.

Where such a case will be heard is determined in accordance with the jurisdiction rules set out above.

### **7.1.3 Specific court rulings**

A recent Norwegian ruling on the proper venue for the hearing of a case concerning an Italian who is resident in Norway and employed by an Irish airline, finds that the complainant could bring a tangible employment law case before the Norwegian courts.

The case concerned solely the matter of whether the Norwegian courts had jurisdiction to hear the case.

The employee was temporarily employed by an Irish company for three years and hired out to an Irish airline for the same period of time.

The ruling referred to two judgments from the European Court of Justice on the applicable law in one case concerning international road transport and one concerning ship transport. In these cases, in determining the applicable law, emphasis was placed on where the center of the performance of the work is considered to be, following a specific assessment. In the Norwegian case involving the question of jurisdiction, specific emphasis was placed on the employee's place of residence/place where the employee went to work and where she received instructions from the employer. The fact that the work was carried out on an Irish-registered aircraft was considered irrelevant, while an agreement that Ireland should be the place of jurisdiction was also set aside, having regard to the Lugano Convention, Article 21. 4

It is noted that Norway is not covered by the Brussels I Regulation, as described above, but is a party to the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 1988, which is a parallel convention to the Brussels Convention of 1968, on which the Brussels I Regulation is based.

With regard to the specific examples

The Norwegian ruling and the aforementioned EU court judgments may provide an indication of how instances of alternative employment models in Danish aviation could be handled.

To the extent that the cases could be heard by Danish courts, it may be the case in the event of repeated lending/leasing of labor, which may be covered by the Danish Temporary Employment Act, that the Danish Temporary Employment Act may be applied with reference to Section 3 (4) of the Act relating to successive assignments without objective justification.

## 7.2 "Self-employed" and temporary employment

### 7.2.1 Regulatory basis and scope

This section describes the relevant aspects of the regulation of the rights of temporary agency workers. These aspects primarily concern the scope, and by extension the relevant definitions and the principle of equal treatment, as well as possible exemptions from it. The issue of enforcement and the situation in other Member States will also be covered briefly. Reference will be made to both the Directive on temporary agency work (Directive 2008/104/EC) and the Danish Temporary agency workers Act (Act No 595 of 12 June 2013 on the legal status of temporary workers assigned by a temporary-work agency, etc.), which entered into force July 1, 2013 .

#### Regarding scope

Article 1 of the Directive specifies the scope of the Directive. The first two paragraphs are reproduced below:

"1. This Directive applies to workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction.

2. This Directive applies to public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities whether or not they are operating for gain."

It can be seen that the Directive covers only temporary-work agencies. The Directive does not take any more specific position on territorial issues or problems relating to the posting of temporary workers. This is done to a certain extent in Section 1 (1) of the Danish Temporary Employment Act concerning the scope of the Act:

"Section 1. This Act applies to temporary workers with a contract of employment or employment relationship with a Danish or foreign temporary-work agency, who are assigned by the temporary-work agency to user undertakings in Denmark to work temporarily under their supervision and direction."

The Danish Temporary agency workers Act therefore applies to temporary workers assigned by a foreign temporary-work agency and thereby posted to Denmark to work for a Danish user undertaking. The ability to allow this cross-border situation to be covered by the Danish Temporary agency workers Act is based on the application of the provisions of the Posting of Workers Directive (Directive 96/71/EC), with specific reference to Article 3 (9) of this Directive.

The Danish Temporary agency workers Act does not apply to situations where a foreign temporary-work agency assigns a temporary worker to a foreign user undertaking and the foreign user undertaking posts the temporary worker to Denmark. This is not a "user undertaking in Denmark", and this situation will be governed partly by the Danish Posted Workers Act and partly by the implementation of the Directive on temporary agency work, which may apply in the home country of the temporary-work agency and the user undertaking.

There is no clarification of what is meant by a "user undertaking in Denmark" in the Danish Temporary Employment Act or the preliminary work therefor. There is thus no reason to believe that the criteria under the provisions of the Danish Temporary Employment Act to determine whether or not a company is Danish, differ from what otherwise applies in relation to Danish legislation.

#### Relevant definitions

Section 2 of the Temporary agency workers Act contains a number of definitions that are also relevant to determining the scope of the Act. These definitions correspond almost word for word to the definitions of the Directive, therefore only the definitions of the Temporary agency workers Act are reproduced here:

"Section 2. For the purpose of this Act:

- 1) "Temporary-work agency" means any natural or legal person who concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction.
- 2) "Temporary agency worker" means a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction.
- 3) "User undertaking" means any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily.
- 4) "Assignment" means the time period during which the temporary agency worker performs work temporarily for the user undertaking under its supervision and direction."

The preliminary work for the Temporary agency workers Act provides more detail on these definitions. In particular, reference is made to section 3.1. in the general comments on the bill, which describe in more detail what is meant by a temporary-work agency in relation to other forms of business, such as contracting and employment agency, which fall outside the scope of the Act. It should be emphasized that a specific assessment based on, for example, the definition of a "temporary-work agency", will be required to determine whether an individual case relates to a temporary-work agency within the meaning of the law.

#### The principle of equal treatment

The fundamental rights of temporary workers under the Danish Temporary agency workers Act and the Directive on temporary agency work are based on the principle of equal treatment. This is particularly true in the context of "Social dumping", as the principle of equal treatment relates to fundamental terms of employment, such as remuneration. The principle of equal treatment in the Temporary agency workers Act, which represents the textual implementation of the directive, is defined in Section 3 (1) of the Act:

*"Section 3. The temporary-work agency must ensure that during assignment to a user undertaking the temporary worker has conditions in respect of working hours, overtime, breaks, rest periods, night work, annual leave, public holidays and pay that are at least equivalent to what would have been applicable under law, collective agreements or other binding general provisions if the temporary worker had been employed directly by the user undertaking to perform the same job."*

This principle of equal treatment is described in more detail in the preliminary work for the Temporary agency workers Act. In particular, reference is made to section 3.2. in the general comments on the bill.

It is important to note that the rights of temporary workers with regard to salary, for example, are derived from what is applicable at the user undertaking and therefore the principle of equal treatment does not necessarily in itself provide tangible requirements in relation to remuneration; there is no statutory minimum wage in Denmark, and if there is no collective agreement in force at the user undertaking, the principle of equal treatment does not guarantee the temporary agency worker any specific wage level.

#### Exemption from the principle of equal treatment

Article 5 of the Directive provides several possible exemptions from the principle of equal treatment (this principle can be found in Article 5 (1) of the Directive:

*"2. As regards pay, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph 1 where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments.*

*3. Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish*

arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1.

4. Provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment."

The Temporary agency workers Act makes use of the opportunity provided in Article 5 (3). This is stipulated in Section 3 (5) of the Act, which reads as follows:

"(5) (1)-(4) do not apply in the event that the temporary-work agency is covered by or has joined a collective agreement that has been concluded by the most representative social partners in Denmark, and which is valid within the entire Danish area, by which the general protection of temporary agency workers is respected."

In a Danish context, the Temporary agency workers Act's implementation of Article 5 (3) does not involve any risk of "Social dumping", as in order for a temporary-work agency to be able to waive the principle of equal treatment, the temporary-work agency must be covered by a nationwide, representative Danish collective agreement. With regard to other Member States, it must be noted that the possibilities of derogation in Article 5 (2)-(4) give Member States some scope to allow temporary workers to be treated less favorably than comparable permanent employees at a user undertaking.

#### Enforcement

Article 10 of the Directive contains a customary provision on penalties. Section 8 of the Temporary agency workers Act stipulates that temporary workers will be entitled to compensation if their rights are violated. Intentional or grossly negligent violations of Section 3 (1)-(4) may also be punishable by a fine. Where the rights of a temporary worker under an agreement referred to in Section 3 (5) are violated, the case may be dealt with by the industrial courts.

The authorities in Denmark therefore do not generally monitor compliance with the Temporary agency workers Act. The premise is that the temporary agency worker themselves or their union must bring a case if the temporary worker's rights are violated.

#### The situation in other Member States

The Commission is currently preparing a report on the implementation of the Directive on temporary agency work in the Member States. There is therefore no clear picture at present of the Member States' implementation of the Directive.

### 7.3 Social security

The EU has adopted new rules on the coordination of social security systems in EC Regulation No 883/2004, which applies from 1 May 2010.

In the form which EC Regulation No 883/2004 has from 1 May 2010, the rules for international transport, including aircrew, are formulated such that a person is covered by social security in their country of residence if they perform a substantial part (25 per cent or more) of their activities there.

If they do not perform a substantial part (25 per cent or more) of their activities in their country of residence, the social security rules of the country of the employer apply. Article 13 (1) of the EC Regulation defines the employer as:

*"... the undertaking or employer employing him..."*

The Danish interpretation of this is that the employer is the one that employs the person, i.e. the airline for which the actual work is performed. If, for example, a person is employed by a temporary-work agency that hires out the person in question to an airline, we consider the airline to be the employer with regard to the rules on the coordination of social security systems.

Separate arrangements for the EFTA countries (Norway, Iceland, Liechtenstein and Switzerland)

The EFTA countries are not EU Member States. This means that they must adopt the EU rules before they can apply. Until the EFTA countries adopt the new rules in the EU, the old rules still apply when these countries are party to the case. "Party to the case" is when one or more of the following conditions are met:

- the person is an EFTA citizen,
- EFTA is one of the countries of employment
- EFTA is the place of residence of the employee
- EFTA is the place of residence of the employer

For example, a Danish pilot is employed by a company in Sweden on 1 May 2010 and he/she will be flying in all EEA countries and Switzerland. In this situation, the rules for international transport in EC Regulation No 1408/71, apply as the EFTA countries are among the countries of employment and EC Regulation No 883/2004 has not been adopted in the EFTA countries.

Switzerland adopted the rules of EC Regulation No 883/2004 (the formulation the Regulation had from 1 May 2010) from 1 April 2012.

Norway, Iceland and Liechtenstein adopted the rules from 1 June 2012.

The coordination of social security for aircrew from 28 June 2012.

The EU has revised EC Regulation No 883/2004 with regard to aircrew and these rules apply from 28 June 2012. The EU has adopted a "home base" rule in Article 11 (5) of the EC Regulation.

The "home base" rule stipulates that a person is covered by social security in the country in which the person's home base is situated. The home base is the place where the person normally starts and ends their periods of duty.

It is therefore irrelevant where in the EU the person lives or where the employer is established, as it is the social security rules of the country of employment that apply. The country of employment is the place where the person's home base is situated.

As the home base is equivalent to working in the country where the home base is situated, this means that a person who changes their home base is covered by the rules on working in more than one country, cf. Article 13 of EC Regulation No 883/2004. The change of home base must be agreed in advance in order for it to be covered by the rules on working in more than one country.

In the application of the rules on working in more than one country, the employer is the one that employs the person, i.e. the airline for which the actual work is performed.

Separate arrangements for the EFTA countries (Norway, Iceland, Liechtenstein and Switzerland)

The EFTA countries are not EU Member States. This means that they must adopt EU rules before they can apply to them.

For example, a Danish pilot is employed by a company in Sweden on 28 June 2012 and she will be flying in all EEA countries and Switzerland. In this situation, the rules on working in more than one country apply, cf. Article 13 of EC Regulation No 883/2004.

The home base rule cannot be applied in EFTA countries from 28 June 2012.

Norway, Iceland and Liechtenstein adopted the rules of EC Regulation No 883/2004 (the formulation the Regulation had from 28 June 2012) from 2 February 2013.

Switzerland has not yet adopted the rules regarding home base for aircrew. This means that home base rules cannot apply to a person when one or more of the following conditions are met:

- the person is a Swiss citizen,
- Switzerland is one of the countries of employment,
- Switzerland is the place of residence of the employee,
- Switzerland is the place of residence of the employer.

#### Conciliation procedure at the Administrative Commission

The Administrative Commission has issued a Practical Guide to help Member States achieve a more uniform interpretation and application of EU rules on the coordination of social security systems.

Experience shows, however, that the interpretations of international transport itself differ from country to country and particularly in relation to who is actually the employer. This can be explained in part by language differences. For example, there is a distinction in Danish between "at ansætte" and "at beskæftige", whereas English only uses the term "to employ".

The Administrative Commission has adopted Decision No A1, which specifies a procedure for conciliation when Member States disagree on the law to be applied in a particular case.

Decision No A1 describes two stages of a dialogue procedure through which countries should endeavor to reach an agreement. If they cannot reach an agreement within the decision timelines, the countries refer the matter to the Administrative Commission. The Administrative Commission has set up a Conciliation Board, which examines the case and issues an opinion, which constitutes the Commission's position on the case.

The Conciliation Board is composed of experts on the applicable law for social security from different countries. The Commission's position on the matter is not legally binding, but so far no country has failed to abide by it.

The Conciliation Board also provides suggestions on how to change the rules, interpretations, etc. The Administrative Commission then decides whether to take the next step and whether the Board's opinion is accepted and will form the basis for the future handling of cases with the same conditions.

## 7.4 Third-country crew

### Danish rules on work permits for employment on aircraft

Section 13 of the Danish Aliens Act states that an alien must have been issued with a work permit to be allowed to take paid or unpaid employment, to be self-employed or to provide services with or without remuneration in Denmark. A work permit is also required for employment aboard a **Danish ship or aircraft, which, as part of scheduled traffic or otherwise, regularly calls at Danish ports or airports**. Reference is made to Section 14 of the Danish Aliens Act.

Section 14 (2) of the Danish Aliens Act states that the Danish Ministry of Employment may order that other aliens are exempt from the requirement of a work permit. Such regulations are contained in Section 33 of the Danish Aliens Order.

Section 33 (6) of the Danish Aliens Order states that cabin crew members serving on Danish aircraft flying routes with a flight time of at least five hours between Denmark and the alien's country of origin or countries associated by language or culture with the alien's country of origin, and where, due to language or cultural barriers, including lack of knowledge of European languages, local passengers demand cabin crew members with knowledge of the language and the culture relevant to the passengers are exempt from the work permit requirement.

It is a condition:

that the alien holds a valid crew member license or crew member certificate,

that during the employment the alien lives in his country of origin or lives and lawfully resides in the country in which the destination served by the route is located,

that the alien only stays in Denmark during rest periods between the flights,

that the alien only carries out tasks usually incumbent on the crew,

that the alien is remunerated with usual pay according to Danish conditions for at least 15 per cent of the estimated flight time, and

that the alien is otherwise subject to the same working conditions, including the rules on flying time and rest periods and access to training, as the rest of the cabin crew.

Cabin crew members exempt from a work permit may not constitute more than 20 per cent of the cabin crew on any one flight.

Where an airline wishes to use foreign workers from third countries on a Danish-registered aircraft which, as part of scheduled traffic or otherwise, regularly calls at Danish airports (i.e. in situations where not all the conditions of Section 33 (6) of the Danish Aliens Order are met) – work permits are required for the third-country nationals. In this context it is irrelevant whether it is a foreign employer/temporary-work agency or similar which provides the foreign labor, or whether the foreign workers are employed by a Danish employer under normal Danish pay and working conditions.

Under part (vi) of Section 9a (2) of the Danish Aliens Act, a work permit may be issued to an alien on the basis of employment or self-employment, if essential employment or business considerations otherwise make it appropriate to grant the application. In practice, cf. here part (vi) of Section 9a (2) of the Danish Aliens Act, a work permit cannot normally be expected to be issued for general skilled or unskilled work, such as cabin crew, among other things because it is considered possible to fill such positions with Danish or EU/EEA labor. However, an alien may be issued a work permit (and the right to employment as cabin crew for example) where such employment is covered by other schemes, such as the amount scheme, which requires an annual salary of at least DKK 375,000.

According to the wording of Section 13 of the Danish Aliens Act, a Danish work permit is therefore not required for third-country nationals on a foreign-registered aircraft (irrespective of whether the aircraft is

registered in an EU country or a third country), even if the aircraft operates regular services to Denmark or otherwise regularly lands in Denmark. However, if the foreign aircraft primarily or exclusively flies in Denmark (domestic flights), foreign employees from third countries must generally hold a Danish work permit.

It has not been investigated further or clarified whether EU-registered aircraft may be entitled to operate individual domestic flights in connection with an international flight to Denmark (equivalent to cabotage for trucks).



## 7.5 Taxation of aviation personnel in international traffic

### 7.5.1 Danish rules for the taxation of earned income for aviation personnel in international traffic

#### 7.5.1.1 Persons with full tax liability

A person will typically have full tax liability in Denmark if that person is resident in Denmark. A person with full tax liability in Denmark is liable to pay tax in Denmark on their entire salary, whether earned in Denmark or abroad (global income).

In order to avoid double taxation, i.e. the same person paying tax on the same income in more than one country, the taxpayer is entitled to relief on foreign tax under internal Danish relief rules or under a tax treaty (TT) (see section 7.5.1.3.).

Although a person has full tax liability in Denmark under Danish law and is therefore, in principle, liable to pay tax in Denmark on their entire global income, the person is nonetheless only taxed on income originating from Denmark if the person is considered to be a resident of a country other than Denmark under a TT. In this situation, taxation therefore takes place as if the person had limited tax liability (see section 7.5.1.2.).

According to the OECD Model Convention, Article 4, which the Danish DTCs generally follow on this point, the following criteria, in order of priority, are used to determine where an individual should be regarded as resident: 1) where the person has a permanent home available to him, 2) where the person has his center of vital interests 3) where the person has an habitual abode or 4) where the person is a national. If the person is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

#### Cessation of tax liability on emigration

In assessing whether the tax liability has ceased on emigration, in practice the greatest emphasis is placed on whether the person still has a permanent home available to them. In cases where the person still has a permanent residence available after emigration, this is usually sufficient grounds for considering their residence to be maintained.

In practice, instead of selling their home in Denmark, a person can choose to let/sublet the dwelling without the right of termination for at least 3 years. It must not be possible for the lease to be terminated by the landlord during this period. The continued possession of a holiday home or other property that cannot be equated to a permanent home, is generally not considered a residence if the holiday home is used only for holidays or similar.

If a spouse moves abroad, without this taking place in connection with the actual termination of cohabitation, it is generally considered for tax purposes that the spouse has maintained their residence here, if the remaining spouse maintains the family home. This does not apply, however, if the remaining spouse has only postponed their departure from Denmark for special reasons, such as to complete their work or education.

### 7.5.1.2 Persons with limited tax liability

Persons who do not have full tax liability in Denmark (foreign nationals) have tax liability in Denmark limited to income originating from Denmark, and are subject only to deductions related to this income, unless they have chosen to be covered by the "cross-border rules"<sup>4</sup>.

Foreign persons who work on aircraft registered in Denmark (Danish aircraft) for a Danish airline have limited tax liability in Denmark on their earned income. The same also applies to foreign nationals on foreign aircraft if the aircraft is leased by a Danish airline.

### 7.5.1.3 Relief calculation methods

Relief can be calculated using two methods:

- The credit method
- The exemption method

When using the credit method, Denmark allows a reduction for the foreign tax actually paid on the foreign income in its tax assessment. However, the maximum reduction is equal to that portion of Danish tax that falls proportionately on the foreign income. Relief under the credit method will typically result in the foreign-earned income being taxed at Danish level as the foreign tax is usually lower than the Danish tax.

When using the exemption method, Denmark allows a reduction in the calculated Danish tax that falls proportionately on the foreign income in its tax assessment. The amount of the foreign tax actually paid is irrelevant, since the size of the relief is dependent solely on the Danish tax that falls proportionately on the foreign income. Relief under the exemption method means that the foreign-earned income is only taxed abroad.

If Denmark has entered into a TT with the country of employment, the relief method for earned income will be specified in the TT. If the person meets the conditions for relief under a domestic Danish relief rule, the person may, however, opt for relief under this provision instead.

Denmark has two domestic relief rules. Sections 33 and 33A of the Danish Tax Assessment Act respectively.

#### Assessment Act Section 33A (LL Section 33A)

LL Section 33A is a domestic Danish relief rule, which the taxpayer may opt to apply, if the conditions are met. LL Section 33A provides persons with full tax liability and persons covered by cross-border rules with the opportunity for exemption relief on earned income, i.e. where the foreign-earned income is not taxed in Denmark if the taxpayer resides outside the Kingdom of Denmark for at least six months, which may be interrupted for necessary work, holidays or similar in Denmark for a total maximum of 42 days. If Denmark has the right to tax on the foreign-earned income under a TT, only half the relief is provided. This provision applies only to wages and salaries.

#### Assessment Act Section 33 (LL Section 33)

<sup>4</sup> A foreign national whose earned income from Denmark constitutes at least 75 per cent of their total income in a tax year can choose to be covered by the "cross border rules". The person then has their tax calculated in the same way as persons with full tax liability and receives the deductions for expenses relating to personal and family circumstances, etc.

LL Section 33 allows for credit relief and is primarily used in those cases where there is no TT in place between Denmark and the country of employment, and where the taxpayer does not qualify to be covered by LL Section 33A. In its tax assessment, Denmark allows a reduction for documented foreign tax paid on income earned abroad.

### 7.5.2 The OECD Model Tax Convention and the Danish TTs

Denmark has DTCs with over 80 other countries. The majority of Danish TTs are drawn up on the basis of the OECD Model Tax Convention.

According to Article 15 Section 3 of the OECD Model Convention, "remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic...may be taxed in the Contracting State in which the place of effective management of the enterprise is situated."<sup>5</sup>

The distribution of taxation rights in Article 15 Section 3 is related to Article 8 of the OECD Model Convention, which states that "profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated". As this state normally allows the company to deduct the wage payments to its employees when calculating the company's taxable income, this state is also granted a right to tax the employees' wages.

In order to avoid double taxation, the country in which the employee is resident grants relief, using either the exemption method or the credit method, depending on what is agreed in the individual TT.

The general rule in Denmark's TTs is that Denmark, as far as wages for working on aircraft in international traffic are concerned, grants relief according to the credit method, i.e. Denmark taxes the income earned at Danish level less a deduction for the foreign tax paid.

However, Denmark has some older tax treaties where an exemption relief has been granted instead. The Danish-Irish TT is one example. Under this TT, wages for working on board an aircraft in international traffic for an airline whose place of effective management is based in Ireland, are taxable only in Ireland.

### 7.5.3 SKAT's project Globalization 2013 – "Aircrew"

This project focuses specifically on the target group of "flight attendants, pilots and cabin crew" – a group about which SKAT (Danish Customs and Tax Administration) does not have extensive knowledge. Aspects of the airline industry's need for employees who can be reorganized quickly and easily has resulted in a shift from permanent employment to contract employment. The new contractual relationships between employee and employer have brought the focus on having correct tax returns for global income and on how income is to be treated in relation to relief rules.

#### Summary of experiences from the project

The project examined the compliance of aircrew who within the last three years have received or had renewed a license to be either a pilot or cabin crew on an aircraft operating in commercial traffic. Compliance with regard to tax return requirements for those with full tax liability, together with the tax calculations, show that most people in the target group are aware that foreign income must be declared in Denmark, even if taxes are paid abroad – and even if a TT has been entered into which means that Denmark, as the country of residence of the aircrew, does not have the right to tax the income.

<sup>5</sup> In determining whether the place of effective management of an enterprise is situated in Denmark, a specific assessment is made of the actual circumstances of the decision-making of the enterprise. In making this assessment, Denmark primarily focuses on the day-to-day management of the company.

## Summary of new findings from the project

### *Relief under LL Section 33A*

Overflight of Danish airspace – without landing – is covered by the provision on necessary work in Denmark directly related to work abroad, and thus does not exclude aircrew from LL Section 33A. This has been incorporated in SKAT's legal guidance.

The experiences from the project have also shown that up to 75 per cent of Danish-resident pilots who are eligible for relief under a TT or under domestic relief rules (see section 7.5.1.3) opt for relief under LL Section 33A.

### *Interpretation of Article 15 (4) of the TT between Denmark and the United Kingdom*

Under Article 15 (4) of the Anglo-Danish TT, exemption relief is subject to the income being taxable income under English law. If this condition is not met, the income is subject to the general rule of Article 15 (1), whereby aviation personnel residing in Denmark are taxed in Denmark on their earned income.

The UK tax authorities have stated in response to a specific inquiry that income for work on British aircraft is not taxable in the UK to the extent that the work is performed outside the UK's borders. This means that Danish-resident pilots and cabin crew who work in international traffic for a British airline are taxed in Denmark on their earned income. This will be incorporated in SKAT's legal guidance.

### *Assessment of the new employment models for pilots on aircraft in international traffic for foreign airlines*

Project Globalization 2013 – "Aircrew" has assessed three typical employment contracts. These are contracts where the pilot is employed by a company, but is leased to the airline operating the flight. The project has carried out an assessment of the contracts in order to determine whether the employment contract the formal employer has entered into with the individual pilot can be considered to be transparent. The contracts assessed have in all cases resulted in the airline being considered to be the actual employer.

The binding responses given in relation to the taxation of pilots who work on aircraft in international traffic for foreign airlines with similar employment contracts have achieved the same result.

## **7.5.4 Examples**

The tax assessment of the new employment models for pilots who work in international traffic for a foreign airline can be illustrated using the following two simple examples:

### Example 1

Airline A1 enters into a contract with recruitment agency X for the supply of flying hours for aircraft to operate in international traffic from A to B. A1 is domiciled in Ireland. X enters into a contract with the pilot to fly for A1 between A and B. X is resident in Estonia. The formal employer of the pilot is temporary-work agency X.

The pilot has full tax liability in Denmark. It is also assumed that the pilot is not resident in another country under a DTC.

### *Assessment of the employment model*

In the specific tax assessment of the employment model, emphasis is placed on factors such as:

- The work the pilot performs is an integral part of the airline's business.
- The temporary-work agency bears neither the responsibility nor the risk for work performance.
- The pilot receives instructions from the airline and is under its day-to-day direction.
- The pilot is obliged to adhere to Airline A1's Operational Manual.
- The work is carried out at a workplace controlled by the airline and for which it is responsible.
- The aircraft is not owned by the temporary-work agency.
- The pilots' qualifications are determined by the airline.
- Leave/days off in accordance with the airline's wishes.

The above conditions are met in this example. On this basis, airline A1 is considered to be the pilot's actual employer.

X is considered to be established solely to carry out purely administrative tasks, such as payment of salary, responsibility for any deduction of tax and social security contributions, notification of airbase, etc. These administrative powers, and any right of X for example to fire the employee, is of no particular significance to the assessment if it is considered that it is the underlying contractual relationship between A1 and X that determines whether, and how, X exercises its powers. An example of this could be if the contract closely links the employment of the pilot at X to their hiring out to A1, or if the contract states that the purpose of the employment contract between X and the pilot is to enable X to provide assistance to A1.

It is noted that the fact that the contract of employment between the pilot and the temporary-work agency X, for example, explicitly states that there is no employment relationship between A1 and the pilot, and that X is the sole employer from both a legal and tax perspective, is not in itself relevant.

#### *Taxation of earned income*

Under the Danish-Irish TT, Denmark grants relief in accordance with the exemption principle, i.e. Denmark does not tax earned income from work carried out on board aircraft in international traffic for Irish airlines. The Danish-Irish TT means that the earned income is taxable only in Ireland.

#### Example 2

Airline A1 enters into a contract with recruitment agency X for the supply of flying hours on aircraft operated in international traffic from A to B. A1 is domiciled in Norway. X enters into a contract with the pilot's company, P ApS., for the pilot to fly in traffic between A and B. X is domiciled in Ireland.

P is domiciled in Malta, where it is not tax exempted. The pilot receives a salary from P corresponding to the agreement entered into between X and P. P is the formal employer. The pilot has full tax liability in Denmark. It is also assumed that the pilot is not resident in another country under a DTC.

#### *Assessment of the employment model*

The tax assessment of the employment model is the same as for example 1. The airline A1 is therefore considered to be the pilot's actual employer, just as it is in example 1.

#### *Taxation of earned income*

Under the Nordic TT, earned income for work on aircraft in international traffic is taxable only in the Contracting State in which the employee is resident. In this example, therefore, only Denmark is able to tax the wages. The pilot will be able to get half relief on the Danish tax under LL Section 33A (3) if the pilot meets the conditions for this (see section 7.5.3.1.).

## 7.6 Working environment and supervision thereof within aviation

Under working environment legislation, work must be able to be performed safely and without risk to the health of the employees of a company.

Section 1 of the Danish Working Environment Act states that the provisions of the Act have a view to creating:

*a safe and healthy working environment which shall at all times be in accordance with the technical and social development of society, and*

*(b) the basis on which the enterprises themselves are able to resolve issues relating to health and safety under the guidance of the labor market organizations, and under the guidance and supervision of the Danish Working Environment Authority.*

Working environment legislation is characterized by rules designed to protect employees from hazards that may be detrimental to health.

The hazards to which employees may be exposed in the course of their work are often divided into physical, chemical, ergonomic, biological, social and psychological. In aviation, this can be from, for example, engine noise, vibration, furnishings, radiation and psychosocial influences.

The task of legislating for and supervising the working environment in Denmark is carried out by the Danish Working Environment Authority. This excludes the following areas, however:

- Energy, which is handled by the Danish Energy Agency
- Maritime activities (fishing), which are handled by the Danish Maritime Authority, and
- Aviation, which is handled by the Danish Transport Authority

These three agencies coordinate their efforts on the working environment in conjunction with the Danish Working Environment Authority.

The mandate to supervise the working environment in aviation is pursuant to Section 4A of the Aviation Act.

More detailed working environment provisions are the result of a range of EU directives that have been implemented in Danish aviation legislation through:

Order No. 918 of 18 November 2003 on working environment conditions for crew members during service on aircraft and for their employers. This Order is being revised and a new draft is currently at the public consultation stage, with a deadline of October 31, 2013.

The current Order has been supplemented subsequently by:

Order No. 617 of 23 June 2005 on the exposure of crew members to vibration, and

Order No. 18 of 9 January 2006 on the exposure of crew members to noise

The scope is specified by Section 3 of the Order:

This Order applies to crew members serving aboard Danish civil aircraft and for their employers.

(2) An aircraft is considered to be Danish, if it is Danish-registered or is operated under a Danish operating license.

The scope is therefore limited to pilots and cabin crew who work on Danish-registered aircraft or foreign-registered aircraft operating under a Danish AOC.

The Danish Transport Authority's supervision of the working environment forms part of the authority's overall supervision plan. Fundamentally, a working environment inspection is made of companies every two years. In practice, inspections over the past two years have been based on a risk assessment, which for some companies, has resulted in a three-yearly cycle between inspections, while for others has led to more frequent inspections.

It is noted that the scope of working environment legislation does not include aviation safety considerations, such as with regard to flying time and rest periods, which are regulated by other EU rules for the protection of passengers and third parties.

### **7.6.1 Issues**

The working environment in aviation cannot be characterized directly as "Social dumping".

A possible consequence of "Social dumping" and increased competition may be savings made at airlines in relation to the working environment to the detriment of the working and health conditions of employees.

There appear to be divergent national rules for the working environment and its supervision in relation to the implementation of the directives. However, there is no evidence that the working environment conditions and supervision in any individual EU country are better or worse than in Denmark.

## **7.7 Aviation safety**

### **7.7.1 Background**

The emergence of "low-cost airlines" on the European aviation market has resulted in a significant increase in competition between airlines, and, as the name suggests, competition is mainly on price.

This is leading to a greater focus on pay and employment conditions.

One recent development in this competition on prices has seen some airlines introduce flexible staffing systems with a looser employment structure.

Pilots and cabin crew are hired through temporary-work agencies abroad to perform specific temporary assignments.

This makes it easier for the airlines to adjust their staffing levels in relation to their specific crew scheduling needs.

In many cases the airlines are able to temporarily employ staff at a lower wage, as, among other things, they are able to avoid responsibility for a number of employer obligations.

A recent development in this field is recruitment from countries outside the EU, with employment under valid air operator certificates from the countries concerned.

These new business models mean that aircraft crews can consist of many different nationalities with different crew and corporate cultures.

Members of the working group have raised the issue that this trend towards more fragmented employment models may pose a threat to aviation safety, and asked whether it is possible to ensure that this does not become a problem.

### **7.7.2 Aviation safety in Denmark**

The Danish Transport Authority oversees Danish airline safety and security.

The Danish Transport Authority cannot oversee pay and working conditions, except with regard to working environment issues (protection of employees from hazards that may be detrimental to health) as well as flying time and rest periods.

The authority inspects the aircraft and safety organization of Danish airlines. Systematic inspections are carried out in accordance with international rules.

The Danish Transport Authority carries out spot checks on foreign companies' aircraft and crews for their operations in Denmark.

The aforementioned staffing and employment models at some airlines have so far not prompted the authority to issue any safety notices.

Under aviation legislation, Danish crew members must notify the airline if they consider they are not in a position to perform their job in a responsible manner. This requirement also applies to crew members of foreign aircraft within Danish territory.

There is also a system in place for the compulsory, confidential reporting, without fear of reprisal, of incidents of a safety nature for the crew of Danish aircraft. There are similar reporting systems in other EU countries.



The Danish Transport Authority has not received reports of any safety incidents in relation to these employment models.

### **7.7.3 EU rules on employment at airlines**

Employment and recruitment models are not governed by EU rules (EASA-OPS).

Generally, crews that are employed by or work for a commercial airline must have successfully completed the required education and training courses and passed the relevant examinations, including, for example, in Crew Resource Management (CRM). It is the airline's responsibility to ensure that its crews meet the necessary requirements and that they otherwise comply with and support the airline's safety culture.

The aforementioned employment models at some airlines have, as stated above, so far not prompted the authority to issue any safety notices.

Major differences in crew and corporate culture for a large proportion of the crew over a longer period could have a negative impact on the culture and cooperation on board an aircraft. It is assumed, however, that slight differences in the crew and corporate culture of a smaller proportion of the crew over a shorter period would only have a minor impact on the culture and cooperation.

#### EU rules on personnel licenses

As early as the late 1990s, common European rules were drawn up for personnel licensing, called Joint Aviation Requirements for Flight Crew Licenses (JAR-FCL).

These provisions were introduced in Denmark on June 1, 1999, through the entry into force of BL 6-09.

Since then there has been mutual recognition within the JAA member countries of JAR-FCL licenses issued, which has meant that pilots and cabin crews are free to fly within the member countries without further formalities in the form of validation, etc.

Within the EU, Basic Regulation No 216/2008 of 20 February 2008 extended the scope for personnel licensing and Regulation No 1178/2011 of 3 November 2011 adopted detailed implementation provisions that will take effect gradually until 2018 and will replace the current JAR-FCL rules.

There is therefore full reciprocal recognition of personnel licenses across the EU, and the EU licenses are immediately valid throughout the EU. License holders are therefore free to move between jobs at airlines throughout the EU.

One of the EU's fundamental freedoms in the form of free movement of labor is thus implemented through aviation licensing.

#### EU rules for validation and conversion of personnel licenses

There are no international agreements in place on the immediate and reciprocal recognition of personnel licenses from third countries.

Fundamentally, therefore, those working as a pilot or cabin crew on board an EU-registered aircraft must be EU-licensed personnel.

However, there are two ways of working on an EU-registered aircraft with a foreign license:

#### Validation

A certificate from a third country can be validated in accordance with the provisions of Regulation 1178/2011 (pilot license) or BL 6-69 (cabin crew license). There are a number of specifically defined requirements for such validation and the requirements for pilots are described in Annex III A of the Regula-

tion. A validation is valid for 12 months – with the possibility of only one extension. The validation process is relatively quick and cheap.

It must be admitted, however, that the validation process is open to abuse, as a license holder who has "used" his 1-year validation may apply for revalidation in another EU Member State and thereby begin a new 1-year period.

### Conversion

Following the 12-month period of validation, a license must be "converted" in accordance with the provisions of Regulation 1178/2011 or BL 6-69, to enable its continued use within the EU. This conversion procedure involves a high cost and is time consuming.

It is therefore considered that there is little risk of a major flood of conversions.

### Conclusion

It should be emphasized that there are no immediate indications that those airlines which use flexible staffing and employment models have a lower level of safety than other airlines.

However, it cannot completely be ruled out that major differences in crew and corporate culture for a large proportion of the crew over a longer period could have a negative impact on the culture and cooperation on board an aircraft, which may ultimately impact on aviation safety.

## 7.8 General description of the framework for Danish and European aviation

The rules of civil aviation in Denmark are contained in Danish aviation legislation and relevant EU legislation. Both aviation law and EU law are fundamentally based on the Chicago Convention of 1944, which contains a number of key provisions on the establishment and regulation of cooperation in many fields of civil aviation.

### 7.8.1 Chicago Convention

In 1944, a convention was drawn up – the Chicago Convention of 1944 – which contains a number of key provisions on the establishment and regulation of cooperation in many fields of civil aviation. Countries that are members of the United Nations are eligible to sign up to the Convention. The Convention came into force in 1947 and today there are 190 contracting parties.

Alongside the Chicago Convention, an organization was set up called the "International Civil Aviation Organization", or ICAO, which is headquartered in Montreal. This organization consists of an Assembly, a Council and such other bodies as may be necessary, in accordance with Article 43 of the Convention.

Article 37 of the Chicago Convention states that each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.

In order to help fulfil Article 37, the ICAO must prepare and update Annexes to the Chicago Convention containing international Standards And Recommended Practices (SARPs). The Annexes should cover the following areas:

- Communications systems and air navigation aids
- Characteristics of airports and landing areas
- Rules of the air and air traffic control practices
- Licensing of operating and mechanical personnel
- Airworthiness of aircraft
- Registration and identification of aircraft
- Collection and exchange of meteorological information
- Log books
- Aeronautical maps and charts
- Customs and immigration procedures
- Aircraft in distress and investigation of accidents.

The ICAO Council adopts SARPs, and this usually takes place on the recommendation of the permanent commission, the Air Navigation Commission (ANC), which consists of 19 members appointed by the Council. The Nordic countries have one member on the ANC.

So far 19 Annexes have been issued containing standards and recommended practices.

Standards must be complied with, while recommended practices should be observed by the contracting states.

The setting of standards provides for a minimum level of safety for civil aviation at global level.

#### Market access – Bilateral air services agreements

Under Articles 6 and 7 of the Chicago Convention, no scheduled air services may be operated to/from or within the territory of another Contracting State. Basic market access for airlines is therefore regulated by bilateral air services agreements in a "spider's web" between countries around the world. Denmark has approximately 80 bilateral air services agreements. Such agreements were previously very restrictive and only gave access to air services between certain cities in the two Contracting States and then only a few times a week, but over time many of the contracts have generally been liberalized.

With regard to charter flights, Article 5 of the Chicago Convention grants the right to pick up or set down passengers in another Contracting State subject to the restrictions which the Contracting State wishes to impose.

#### **7.8.2 Danish Air Navigation Act**

The fundamental Danish rules for civil aviation, which are based on the Chicago Convention, are contained in the Danish Air Navigation Act of 1960, as amended, see Consolidation Act no. 1036 of 28 August 2013.

The Danish Air Navigation Act is a framework law that confers a number of powers on the Minister of Transport to lay down more detailed regulations, primarily with regard to safety. Order no. 893 of 31 August 2012, issued pursuant to Section 152 of the Danish Air Navigation Act, stipulates which functions and powers are entrusted to the Danish Transport Authority in relation to the Danish Air Navigation Act.

The detailed rules, including rules for the implementation of international obligations under the Chicago Convention and EU cooperation, etc. are stipulated in the form of orders and Regulations for Civil Aviation, known as BLs.

A total of around 160 BLs have been issued in 11 series.

Sections 1 and 2 state that the Act applies within Danish territory for aviation with both Danish and foreign aircraft. Furthermore, the Act also applies as a basis for aviation with Danish aircraft outside Danish territory in accordance with Section 4.

As regards the scope of the Act in relation to Greenland and the Faroe Islands, the Act applies in accordance with Section 158 as a basis for Greenland, while for the Faroe Islands it requires implementation through a Royal Decree. See the section in Chapter 16 for more details regarding Greenland and the Faroe Islands.

Generally, aviation within Danish territory must take place in accordance with the provisions of the Act and with the regulations issued in pursuance thereof (orders and Regulations for Civil Aviation), unless otherwise stipulated in EU regulations, cf. Section 1.

Thus, EU rules are stipulated, to varying degrees, for areas that previously were covered only by the provisions of the Danish Air Navigation Act and the administrative regulations issued in pursuance thereof.

EU rules do not apply to Greenland and the Faroe Islands, as they are not members of the EU. However, in practice, equivalent rules can be introduced in an Order or a BL, for example, so that the matter in question has identical rules throughout the Kingdom of Denmark.

Under Section 1 a, regulations may also be laid down that are necessary to implement the directives on aviation issued by the European Union, or that are necessary to apply the regulations on the aviation area issued by the European Union.

Moreover, under Section 2, aviation within Danish territory may only be carried out with aircraft that are

- a) of Danish nationality, or
- b) of a nationality of a foreign State with which agreement has been entered into on such aviation, or
- c) authorized by special permission from the Minister of Transport.

An aircraft has Danish nationality when it is registered in the register of nationality, cf. Section 17, cf. Section 20 (1).

#### Market access

Charter flights can be operated to/from Denmark. Under the Danish charter flight regulations (BL 10-1), charter flights to/from Denmark must meet the following requirements: A. The entire used capacity of the aircraft shall have been hired by one or more charterer(s), B. The destination of the flight shall have been determined by the charterer(s) and C. Tickets must not be offered to the public directly from the operator or its agents.

A number of separate conditions must also be met for special categories of charter flight (including tours, seat only, own use, special event).

It is also possible to operate scheduled services under bilateral air services agreements as described above under "1. International regulations".

Finally, EU airlines are able to operate within the EU internal market, as described below under "3. EU rules".

#### Licensing of aircraft personnel

Sections 32-40 of the Danish Air Navigation Act specify the basic requirements for the staffing of an aircraft.

An aircraft must therefore be adequately staffed, for which specific rules may be laid down, cf. Section 32.

Conditions may also be stipulated, in accordance with Section 34, with regard to age, physical and mental suitability, sobriety, training and experience, etc.

The owner or user of an aircraft is responsible for ensuring that the aircraft is properly staffed, cf. Section 32 (3).

When an applicant complies with the conditions applicable for the issue of a license, the license is issued by the Danish Transport Authority, cf. Section 35 (3).

Today this area is closely regulated by EU rules, cf. section 3 below on EU rules.

#### Working environment when on duty on board an aircraft

Sections 40 a-40 i of the Danish Air Navigation Act contain basic provisions for the working environment on board Danish aircraft.

##### 7.1. Supervision of the working environment for aviation – the Danish Air Navigation Act and Working Environment Order

Supervision of the working environment in Denmark is usually carried out by the Danish Working Environment Authority. This does not apply, however, within aviation, maritime activities and energy, where the relevant authorities perform this function: the Danish Transport Authority, the Danish Maritime Authority and the Danish Energy Agency respectively.

The rules for working environment conditions within aviation are specified in Order no. 918 of 18 November 2003 on working environment conditions for crew members. This Order lays down detailed guidelines for the performance of working environment work in aviation, as the Order applies only to crew members serving on board Danish civil aircraft and their employers. The same rules can be assumed to apply in other EU countries, however, as they are bound to implement the same directives.

#### Crew members from third countries on Danish aircraft

Under the Danish Aliens Order, the work permit requirement for third country nationals does not apply to cabin crew members serving on Danish aircraft flying routes with a flight time of at least five hours between Denmark and the alien's country of origin or countries associated by language or culture with the alien's country of origin, and where, due to language or cultural barriers, including lack of knowledge of European languages, local passengers demand cabin crew members with knowledge of the language and the culture relevant to the passengers.

It is a condition of this that the alien only carries out tasks usually incumbent on the crew, that the alien is remunerated with usual pay according to Danish conditions for at least 15 per cent of the estimated flight time, and that the alien is otherwise subject to the same working conditions, including the rules on flying time and rest periods and access to training, as the rest of the cabin crew.

Cabin crew members exempt from a work permit may not constitute more than 20 per cent of the cabin crew on any one flight. According to SAS, which uses Chinese cabin crew among others, there are no similar restrictions in Norway and Sweden.

#### Permission to carry out aviation activities

Sections 74 a-81 of the Danish Air Navigation Act contain detailed provisions on permission to carry out aviation activities.

With regard to EU aircraft operating commercial air services, these services are governed by EU Regulation No 1008/2008 of 24 September 2008.

Scheduled commercial air traffic over Danish territory requires permission in accordance with Section 75 (1).

The same applies to other commercial air traffic, including charter flights, unless otherwise decided, cf. Section 75 (2).

Commercial air traffic mean air traffic operated against payment.

Under Section 78 of the Act, permission is granted for a specified period of time and may be made conditional.

The more detailed provisions for aviation between Denmark and non-EU countries are based on Section 75 (2) of the Act and are specified in BL 10-1 Regulations on charter flights and taxi flights to/from Denmark.

### **7.8.3 EU rules**

Aviation is generally exempt from the general rules of the EU Treaties, including the Treaty rules on the free movement of services, among other things, and the freedom of establishment.

Aviation is instead regulated separately at EU level – naturally with a strong influence from the above-mentioned principles of free movement under the EU Treaties.

The scope of EU regulation on aviation is extensive; particularly with regard to the detailed rules on aviation safety, referred to in the section as Safety. This section describes the key elements of the EU regulations.

### Market access

In the period 1987–1992, a single market for aviation in the Community was gradually established through the adoption of three "aviation packages", each of which contained regulations on the licensing of airlines, on market access and on pricing. The third package, which entered into force in 1993, was revised in 2008 and merged into a single regulation: No 1008/2008 on common rules for the operation of air services in the Community. This Regulation is discussed below. (Norway and Iceland are also included in the internal aviation market through the EEA Agreement).

An airline established in the EU may not engage in commercial aviation unless licensed to do so by a competent authority of a Member State. The conditions for the issuing of a license are objective and there is a requirement that the undertaking holds a valid AOC (a certificate confirming that the operator has the professional ability and organization to ensure the safety of operations) issued by the same Member State, that it is majority owned and controlled by Member States and/or their nationals, and that it meets certain technical and financial requirements.

The license is valid as long as the company fulfils the requirements of the Regulation. This also contains provisions concerning the authority's monitoring of the undertaking's finances and concerning the action to be taken in the event of potential or actual problems, including revocation of a license. Finally, the Regulation contains provisions concerning the hire/leasing of aircraft from airlines in other Member States or third countries.

When a company is licensed as a European airline, it has the right to operate freely commercial flights (scheduled and charter) within the EU, including domestic flights within another Member State, and this right cannot be made conditional on special permission. These air services are nevertheless subject to Community and national, regional or local regulations governing safety and the environment, as well as the allocation of airport slots.

There is therefore a completely open internal aviation market – in terms of both international flights within the EU and domestic flights (domestic cabotage).

It should be noted that the opening up of the market in the aviation sector is far more extensive than for surface transport, such as road haulage, where access to domestic transport in the Member States is very limited, e.g. through a stipulation that cabotage can only take place in connection with international transport and with only three trips per international transport.

### Relations with third countries

Air services between an EU Member State and a third country were until 2002 regulated solely through bilateral air services agreements between the two countries in question. Since a ruling at that time by the European Court of Justice determined that the bilateral agreements in their traditional formulation contravened the EU Treaties and that relations with third countries within the field of aviation were subject to joint jurisdiction, relations with third countries have been governed by three main elements:

- 1) Member States may continue to conclude bilateral agreements, but they must follow certain procedures, and they are required to negotiate the inclusion of "EU clauses" in aviation agreements to replace the traditional national clauses.
- 2) The Commission has been mandated to negotiate with all third countries on so-called horizontal aviation agreements, which insert "EU clauses" in all the bilateral agreements between Member States and third countries at once, which is a simpler process than in the first method.
- 3) The Commission may seek a specific mandate for negotiation with selected third countries to conclude a joint aviation agreement between the EU and the third country that replaces all bilateral agreements.

The EU has concluded joint agreements as referred to under 3) with a small number of countries, the most significant of these being the USA and the Western Balkans. A number of major aviation countries have not yet been willing to enter into such agreements with the EU, and Denmark therefore occasionally conducts bilateral negotiations with countries such as Russia, China, Japan and India on any changes to their bilateral air services agreements on issues such as increased capacity and more destinations (negotiations are otherwise normally conducted together with Norway and Sweden as part of the Scandinavian aviation cooperation agreement).

In the same way, Denmark conducts bilateral negotiations with a number of smaller countries, where the Commission has not found it appropriate to seek a mandate for the negotiation of joint aviation agreements.

### Safety

Regulation No 1592/2002, later replaced by Regulation No 216/2008, constitutes the Basic Regulation on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (EASA). The Regulation sets out rules for the design and construction of aircraft and aeronautical parts, including laying down essential requirements for airworthiness and guidelines for ensuring the continuing airworthiness of these products. The Regulation has led to the implementation of Commission Regulations No 1702/2003 and No 2042/2003, which contain a number of detailed requirements in the areas referred to by the Basic Regulation.

The Regulation also contains guidelines for establishing the European Aviation Safety Agency (EASA), including how the Agency is to be controlled and managed, and the tasks the Agency is to perform. The responsibility for the type design approval of all aeronautical products in the EU is transferred from the national authorities to the Agency, while the Agency is also responsible for the authorization and safety oversight of companies that produce aircraft and aeronautical parts. The Agency is also responsible for submitting proposals to the Commission for drafting rules on the scope of the Regulation and for developing certification standards and guidance material. Finally, the Agency acts as the Commission's tool for assessing the Member States' correct application of the Basic Regulation and its Implementing Regulations.

This Regulation has now been replaced by Regulation No 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency.

Regulation No 216/2008 extends the scope of Regulation No 1592/2002 beyond airworthiness to also include common general rules for the operation of aircraft (OPS), including third country operators, as well as personnel licenses for flight crew (FCL). Detailed implementation rules for these areas are established in Regulation No 965/2012 of 25 October 2012 (operations, EASA OPS) and Regulation No 1178/2011 of 3 November 2011 (licensing).

### Licensing of aircraft personnel

The training and licensing of pilots is described in ICAO Annex 1, which specifies standards and recommended practices within the individual areas of training and licensing.

However, the ICAO regulations in this area did not prevent each Contracting State from derogating from these rules and having its own standards in this area.

The states therefore developed their own national regulations in this area. This meant there was no reciprocal recognition of pilot licenses, for example.

There has long been a desire for the development of common standards in the area of personnel licensing within the European countries.

With this in mind, common European rules were developed for pilot training, called the Joint Aviation Requirements (JAR).



These provisions were implemented in Denmark on June 1, 1999, through the entry into force of BL 6-09, cf. above under "2. Danish Air Navigation Act".

Since then there has been mutual recognition within the JAA member countries of JAR-FCL licenses issued, which has meant and means that pilots and cabin crews can fly within the member countries without further formalities in the form of conversion, etc.

Within the EU, Regulation No 216/2008 of 20 February 2008 adopted the basic rules for licensing flight crew and Regulation No 1178/2011 of 3 November 2011 adopted detailed implementation provisions that will take effect gradually until 2018 and will replace the current JAR-FCL rules.

EU licenses are immediately valid throughout the EU and their holders are therefore free to move between jobs at airlines throughout the EU. In other words, there is complete reciprocal recognition.

### Certification of aeronautical products

Commission Regulation No 748/2012 of 3 August 2012 (formerly 1702/2003) on airworthiness and environmental certification contains implementing rules for the certification of aeronautical products, including rules on amending the certification conditions and how repair designs, etc. are to be approved. In principle, all aircraft must hold a type-certificate, which describes how the aircraft type meets the applicable certification requirements. The Regulation also stipulates requirements for issuing individual certificates of airworthiness for aircraft.

The Regulation also contains approval rules for companies that design and manufacture aircraft and aeronautical products.

### Airworthiness

Commission Regulation No 2042/2003 lays down requirements for the continuing airworthiness of aircraft as well as rules for the organizations which are authorized to undertake the management of the same (Part M).

There are also requirements concerning the conditions for the approval of maintenance organizations, both in terms of the maintenance of commercial (Part 145) and non-commercial (Part M Subpart F) aircraft.

The Regulation also stipulates rules for issuing personnel licenses to flight engineers and rules on continuing to maintain a certificate.

There is also a section that specifies rules on how and to what extent the owner of an aircraft, who has a valid license to fly it, can carry out certain maintenance tasks themselves.

Finally, the Regulation contains a section on the approval and supervision of schools for training flight engineers (Part 147).

### Commercial air transportation by fixed-wing aircraft

Regulation No 3922/91 on the harmonization of technical requirements and administrative procedures in the field of civil aviation and its annexes contain detailed rules on commercial air transportation by fixed-wing aircraft. The framework largely reflects the previous common rules in this area in the JAA system, and is sometimes referred to as "EU OPS". The framework is comprehensive and contains a number of "subparts" (A to S), containing detailed requirements in a number of relevant areas.

This regulatory framework is gradually being replaced, however, as the implementation rules of the new "EASA OPS" Regulation No 965/2012 of 25 October 2012 come into force.

### Rules on flying time and rest periods

A draft amendment to the aforementioned Regulation No 965/2012 contains, among other things, specific rules on flying time and rest periods for aircraft crews, and involves the complete harmonization of European rules on flying time and rest periods. All EU airlines will then be subject to standardized rules on how long and how much their crews can work.

According to the EASA, the regulations reflect the fact that fatigue is one of the major factors affecting human performance, and no rules are being stipulated that will result in increased flight duty time for flight crew. In contrast, night duty periods are being limited, rest periods for flights that cross time zones are being increased significantly and new rules are being introduced to limit the amount of standby time.

According to the EASA, this proposal will help to create a level playing field in the EU, thus contributing to fair competition. If the national differences between the flying time and rest period provisions of EU Member States are removed, this will help to prevent "Social dumping" in terms of Flying time and rest periods.

Flying time and rest periods was voted through the committee with the support of 26 countries, with 2 opposed (the Netherlands and Austria). At the time of writing, the matter is being passed to the Parliament and the Council for final adoption (or rejection), but the content cannot be amended during this process. Final adoption is expected in late November with subsequent entry into force.

## **7.9 The Danish Transport Authority's request sent to selected "agencies"**

### **"Subject: Pay and working conditions within aviation"**

Dear Colleagues,

In Denmark we are at the moment having a principal debate on the development of pay and working conditions within the aviation field. The Danish Transport Authority has therefore been asked to look into the matter with the purpose of casting some light on the situation.

We have written to the European Commission in order to have their opinion on the subject. Furthermore, we find it important to test the situation in relevant EU member states.

The background of the discussion is complaints and concerns which we have received from large parts of the aviation industry – both on the part of employers and employees. The concern of the industry is that there could be a serious threat against the Danish as well as the European aviation sector when certain companies seemingly are exploiting loopholes across borders in e.g. labour market and tax regulation.

Focus is on any employment constructions which solely have the purpose of avoiding usual tax, social security or other employment obligations – by some called social dumping. An example of this could be new employment constructions where a pilot forms a company in another EU country and then is hired as self-employed as opposed to being organized and directly employed by the airline company.

This development may not, as it is described to us, necessarily be unlawful, but certainly seems undesirable and not according to the spirit of the relevant regulations. If competition *solely* is based on reducing costs to as low a level as possible, including pay and working conditions, this does not seem appropriate. It should not be possible i.e. to obtain competition advantages due to the setting up of establishments in tax havens or the exploiting of tax loopholes.

We therefore very much would like to hear about the situation in your country:

1. Have you had similar approaches from your industry?
2. Have you looked into the matter or taken any course of action?
3. Do you have any plans to look into the issue?
4. Do you regard the development as a problem?
5. And if so – in what way?

Any opinions or results of your investigations would be greatly appreciated.

We realize that these issues may involve several ministries in your country as the subject touches upon e.g. taxation, employment and social matters. I hope you in spite of this fact will find it worth while to look into the matter.

We look forward to hearing from you, preferably before 1<sup>st</sup> December 2013. Your remarks may be sent to: [alkl@trafikstyrelsen.dk](mailto:alkl@trafikstyrelsen.dk).

Yours sincerely,

Keld Ludvigsen  
Deputy Director General"

## **7.10 The Danish Transport Authority's request sent to selected Danish ministries**

### **"Working Group on social dumping in aviation"**

The Minister of Transport has set up a working group on "social dumping" in aviation, which is chaired by the undersigned, please see the attached mandate.

Among other things, the working group is to prepare a report on what can be termed "social dumping" in the broadest sense. So far, therefore, the working group has considered issues relating to taxation, employment, the labor market and social policy. Besides the Danish Transport Authority, therefore, the Ministry of Taxation, the Ministry of Employment, and the Ministry of Children, Gender Equality, Integration and Social Affairs have all been involved in the working group.

As can be seen from the mandate, the working group is tasked, among other things, with monitoring any initiatives from the European Commission in the field of social dumping, particularly in view of the inquiries submitted to the Commission by the Danish Transport Minister or other Danish ministers.

The Danish Transport Authority had really wanted to ask the Permanent Representation to the European Union to undertake this monitoring. The Ministry of Foreign Affairs did not, however, consider this appropriate, as it believed that the respective ministries would be more likely to have knowledge and information about such discussions and initiatives.

The Danish Transport Authority is therefore compelled to request that the aforementioned ministries carry out this monitoring in their respective areas and in conjunction therewith disclose the content of any proposals from the European Commission and any subsequent discussions or initiatives.

The Danish Transport Authority is also compelled, by extension, to request to be informed of any inquiries from other countries of which the ministry is or becomes aware, as well as any response given to such by the European Commission.

In this context and for your information, I append the letter of former Transport Minister Henrik Dam Kristensen, dated 25 June 2013, to the Vice-President of the European Commission, Transport Commissioner Siim Kallas.

In view of the fact that the working group must report before the end of the year, I must request a response from the ministry, where possible, by 1 December 2013.

Yours sincerely,

Keld Ludvigsen

Deputy Director General





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**Report of the working group  
on "Social dumping" in  
aviation**