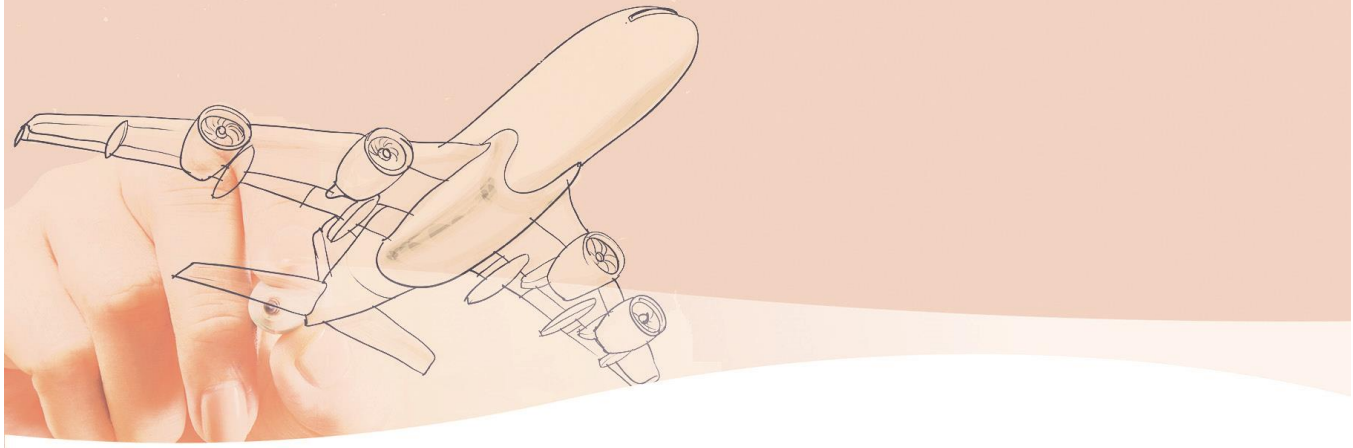
ATYPICAL EMPLOYMENT IN AVIATION
EXECUTIVE SUMMARY



ATYPICAL EMPLOYMENT IN THE AVIATION SECTOR

Executive summary[1]

The liberalisation of the European aviation market and the emergence of new business models – e.g. low-cost airlines – has given rise to numerous trends in contemporary employment relations concluded vis-à-vis pilots and cabin crew members. On the one hand this evolution significantly increased and facilitated the competitive nature of the aviation industry to the benefit of individual consumers in what concerns not only price, but equally so, accessibility. On the other hand however, atypical forms of employment (atypical for this study is every form of employment other than an open-ended employment contract) are increasingly prevalent within the aviation industry as a result thereof, including, amongst others, self-employment, fixed-term work, work via temporary work agencies as well as zero-hour contracts and pay-to-fly schemes.

Cost-efficient techniques, new business models

Whilst from a legal perspective, atypical forms of employment may not necessarily be problematic, there is rising concern that the application and usage thereof may be subject to potential abuse, to the detriment of the pilots and cabin crew members concerned. Indeed, cost-efficient techniques such as the use of atypical employment are a result of heightened competition and the prevalence of

[1] This executive summary is based on the study 'Atypical Forms of Employment in the Aviation Sector' (Y. Jorens, D. Gillis, L. Valcke & J. De Coninck, 'Atypical Forms of Employment in the Aviation Sector', European Social Dialogue, European Commission, 2015). This study was funded by the European Commission under the call for proposals: "Industrial relations and social dialogue". The European Cockpit Association (ECA), the Association of European Airlines and the European Transport Workers' Federation (ETF) executed the grant. Subsequently, the Action was granted to the Ghent University who carried out the study.

new business models that emerged in the liberalised competitive aviation market. Unfortunately some of these techniques have proven detrimental to both fair competition and workers' rights.

Assessing the contemporary employment conditions of crew members within the European aviation industry, a comprehensive approach is requisite. The latter entails that the trends and tendencies prevalent in the modern-day aviation industry cannot be understood independently from a general framework and without due insight into the catalysts which triggered their existence.

Within this context, due regard must be given to main events which acted as a catalyst and facilitator for the current competitive nature, concerning in particular, the three distinct reform phases, as well as the open skies litigation before the European Court of Justice. Also, the European legislative framework, which determines employment conditions of crew members, albeit not exclusively, and notions drafted and adopted by the European legislature aimed at resolving pressing issues are of equal importance. It suffices in this respect to refer to the notions of, amongst others, home base and flight time limitations, both of which are instrumental to the well-being of the individuals concerned, and serve as a fertile ground for analysis at a later stage.

A growing emergence of atypical forms of employment

The regulation of employment in the aviation industries of eleven States respectively was looked into. Within this vein, use is made of individualised country reports composed by national expert which, amongst others, elucidate the legislative approach to atypical forms of employment in the respective states, and measures employed to combat potential abuse with respect thereto.

Via the means of a completed survey aimed at pilots, which resulted in both quantitative and qualitative data from 6633 respondents, an overview was obtained of the contemporary forms of atypical employment relations in aviation and the effects these have.

In total, 6633 respondents participated in this study. 15.1% of respondents indicated that they are French, 15% Dutch and 11.1% to have British nationality. The largest group of respondents state that they are between 30 and 40 years Old (30%) and that they have more than 10 years of flight experience (63%). The data shows that certain age groups have a much higher chance to work for certain types of airlines, for example more respondents from the younger age categories reported to fly for a Low-Fare Airline (LFA). Next to that, the largest group of respondents in this study stated that they work for a network airline (45%). The second largest group of respondents indicated they fly for a LFA. The top 5 of airlines that the respondents reported to work for is as follows: 1. *Ryanair*, 2. *Air France*, 3. *KLM*, 4. *SAS*, 5. *Easyjet*.

With respect to forms of employment, 79 % of the total number of respondents stated to have a direct employment contract. The type of airline that was least reported by respondents who indicated that they have a direct employment contract are LFAs (52.6%). It was found that 70% of the respondents who indicated that they are self-employed also stated that they fly for an LFA. 359 respondents (5.4% of the respondents in this study) reported they work via a contract with a temporary work agency.

Furthermore, of the respondents who stated to work for an LFA, 16.7% indicated they work for the airline via a temporary work agency, whereas for network airlines and regional airlines, such an employment contract is only reported by respectively 1.7% and 1.3% of the respondents. With regard to LFAs, more diversification can be found in the types of contracts reported. These types of

employment correspond to demands for a higher degree of flexibility. On the one hand, outsourcing can in some aspects be considered more flexible. On the other hand, subcontracting is also a technique often used for social and fiscal engineering purposes.

Employee, self-employed or bogus self-employed?

In order to evaluate whether the respondents are actually self-employed, different questions were presented, e.g. about the level of decision-making. Of the respondents stating to be self-employed and stating to have no say in the amount of hours they clock up, 77.1% stated to work for an LFA and 5.6% for a network airline. With regard to amending the instructions of the airline based on e.g. objections regarding flight safety, liability, or regarding health and safety, 20% of the respondents stating to be self-employed strongly disagreed with the statement 'I can amend the instructions o the airline based on e.g. objections regarding flight safety, liability, or regarding health & safety'. Of these 20%, 83% indicated that they fly for a LFA. Furthermore, another 26.6% 'generally' disagrees with said statement, of which 90% (!) indicated they fly for a LFA. In 85.2% of the cases, the respondents stated this is decided by the registered office of the airline. Next to the type of airline, age seems to be a differentiator for the type of employment contract: almost 40% of the youngest groups of respondents indicated to fly via an atypical contract (In contrast with the 50 to 60 age group, where this is 90%).

If we look at the respondents who indicated they are not directly paid by the airline they indicated flying for, again, LFAs are more prevalent. When focussing on the types of relations with the airlines, it can be observed that a lump sum (i.e. a single) payment (with extras) is strongly related (91%) to direct contracts. Other relationship types such as temporary work agency contracts, self-employment or employment via a company are more related to pay per hour or performance-related pay. However, most respondents that stated they work via a company indicated they are either paid per hour with a minimum number of hours guaranteed or performance-related, which can be an indicator of bogus situations.

Segregation of the labour market

It seems clear, both from the answers provided by the respondents to the survey as well as from the interviews with different stakeholders, that the labour market for pilots is segregated. There is a huge difference in labour market position between, on the one hand, captains with a high number of flight hours, the right type-rating, and the willingness to work anywhere in the world on long-haul flights and, on the other hand, those Who prefer to work closer to home. First officers are in an even weaker position. Worst of all is the position of pilots entering the labour market.

Other than what seems to be the assumption in the aviation industry, consequently to the above findings there is much movement among the pilots: more than 60%, of about half of the respondents that claim not to be working for their first airline changed airlines more than 7 times. The main reason to change seems to be better terms and conditions on an individual level and the general working conditions offered by the new airline.

The determination of the applicable labour law provisions and social security legislation for crew members working in different states is a crucial but challenging undertaking. The top 5 of the reported country of the applicable labour law is: France, the Netherlands, the UK, Sweden, and Germany. With regard to the country of payment of social security contributions, France, the Netherlands and the UK are most strongly represented.

Both the survey data analysis as well as our further research learned that further reflections and legal and political actions are called for. Although several actions have been undertaken as a reaction to evolutions in the aviation sector, and although these have contributed to broader attention for and better social protection, the actual legal framework bares the risk to miss some of its objectives and faces several challenges. For this reason, the most important challenges are discussed and a number of policy options are formulated.

Looking for the connecting factor

Several issues are highlighted. In the first place it is pointed out that the connecting factors for the determination of the applicable labour law and social security legislation remain problematic. Recently, several developments and modifications tried to resolve these issues, the most important being the introduction of the home base rule into the Regulation for the coordination of social security systems. In our view, some legal issues remain unresolved as a result of which the objectives are not reached. The different policy options to address these issues are:

- amending the Regulation for the coordination of social security systems;
- conceiving a new connecting factor for the determination of the applicable social security legislation; or
- the development of a European social security rule for highly mobile workers.

However, whichever option is chosen or preferred, in any case new measures should be adopted in line with aviation law. Furthermore, the idea of a *Gleichlauf* (convergence) is an interesting but legally very challenging one. This idea is strengthened by the evolution in the case law of the Court of Justice of the European Union in the field of jurisdiction and applicable labour law, more specifically With regard to the connecting factor 'place of habitual employment', between labour law and social security legislation.

Adapting aviation legislation to a changing industry

Secondly, civil aviation legislation does not take into account the prevalence of different forms of atypical employment and outsourcing in the rapidly changing civil aviation industry. Moreover, social legislation is not able to tackle the new phenomena, leaving room for elaborate subcontracting chains and elaborate social as well as fiscal engineering. As a result, the competition nowadays is a true race to the bottom, which affects fair competition and workers' rights as well as raises important issues in the field of safety and liability.

Unfortunately, finding efficient legal means to tackle bogus situations is far from as easy as we would like, the prevalence of bogus situations being the saddest proof of this. First of all, the question can be raised whether it is excluded that pilots can operate an aircraft as a service provider (either as a self-employed person or as a shareholder of a company). Or the question can also be whether, rather to the contrary, the number of cases in which this is allowed should be limited (e.g. training exercises, air taxi services etc). Asking these questions, we bear in mind that when a prohibition of subcontracting is introduced, the operation of an aircraft will face some important legal issues that will need to be tackled and that such will not be an easy matter, neither legally nor politically. Is there not a risk that this would mean throwing away the baby with the bathwater?

In general it is clear that the problem of bogus self-employment should be tackled. The question can be raised if self-employment and the outsourcing of crew services to intermediary subcontractors

should and, if so, can be prohibited or restricted or more strictly regulated, these subcontractors thereby providing services similar to temporary work agencies but not with employees but rather with self-employed crew members or crew members that work via a company of which they own shares.

Last but not least it should be noted, as stakeholders of competent authorities stress, that building a legal (both criminal and administrative) case of bogus self-employment is far from an easy task and does not only require good anti-bogus legislation — which is not always in place in every Member State — but also building a good case for which, in most cases, the aid of the alleged bogus self-employed person is needed.

Further actions to undertake

We note that more actions and tools are required to solve these issues, as the current tools cannot solve all problems. Special measures to combat bogus self-employment in the aviation sector have hardly been taken, or raise concerns about the conformity with European law. Again, several policy options can be conceived.

- *First*, some stakeholders would like to see self-employment for pilots prohibited. In our view, this is legally near impossible and is not desirable.

- *Second*, there is a discussion between stakeholders about the relation between pilot authority and employer authority, and the impact on subordination. In our view, whether there is or is not a relation of subordination, the most important issue at present, more than the legal form of cooperation between the pilot and the airline is *dependency* of the crew member, particularly the pilot, vis-à-vis the airline said crew member is flying for.

- *Third* some stakeholders are in favour of restricting subcontracting in the civil aviation sector. With the emergence of the network airline model, this might prove little feasible.

- *Fourth*, we are of the opinion that subcontracting in the civil aviation sector should be better regulated with regard to liability and crew management.

- *Finally*, we believe that there is a clear role for the social partners as well as for competent authorities to disseminate information on workers' rights and the downsides of bogus employment situations in order to prevent as much as possible. It is our strong opinion that whistleblowers should be more protected, both legally and economically, since building cases to tackle bogus self-employment, safety reporting, acting upon pilot authority as well as the enforcement of efficient management safety systems and of a just culture highly depend on proper reporting mechanisms.

Efficient and effective monitoring and multidisciplinary cross-border cooperation

Even with strong national legislation in place an effective tackling of bogus self-employment will still be highly dependent on the cooperation of the bogus self-employed person. On the other hand, the people involved in most cases do not have an incentive to cooperate in making a legal case, as this would in most cases result in legal prosecution as well as a breach of relations with the client/employer they work for. For these reasons, other means have to be looked at. In our view, the

efficient and effective monitoring of the compliance with these provisions is a spear point measure in the prevention of and the fight against bogus as well as potentially dangerous situations.

For this, a more integrated approach is called for as well as an enhance legislative framework for multidisciplinary cross-border cooperation and information exchange between the inspection services and authorities in all legal domains concerned as well as the setting up of a comprehensive system of logging European and even global total flight hours per pilot.

Secondly, the research has revealed that there is neither a global nor a European oversight of the total amount of flight hours pilot clocks up. In the light of the findings that an important number of pilots have additional activities as a pilot, this means that the effective monitoring and enforcement of FTL regulations by the competent authorities is quasi-impossible. Taken into account the problems with the home base rule for the determination of the applicable social security legislation combined with the safety issues that ensue this quasi-impossibility of the effective monitoring and enforcement of FTL regulations by the competent authorities, this issue urgently needs to be addressed.

Third, It has been pointed out by several sources that some airlines' management styles (e.g. blame culture, non-renewal of contracts, or demotion from captain to co-pilot of crew members legitimately applying safety procedures and taking safety decisions according to their authority etc) are in total contradiction with provisions and regulations on Crew Resource Management and Safety Management Systems. In our view, the efficient and effective monitoring of the compliance with these provisions reinforced with systems of enhanced criminal liability for non-compliance as well as adequate protection for whistleblowers is another spear point measure in the prevention of and the fight against bogus as well as potentially dangerous situations and must further be looked into. Finally, in this domain further research on additional occupational activities of pilots is urgently needed. Different stakeholders regret the impossibility to monitor the total working hours in any additional occupational positions which pilots perform and the relation to FTL regulations.

Not all pilots are in the same position

The problem of bogus situations and safety issues in our view is also linked to labour market issues. Reportedly, the younger and lesser experienced pilots have a greater chance of finding a position at LCCs, whereas the network airlines rather prefer pilots with more experience. In short, captains hold a much stronger position and get significantly higher wages and conditions in general, whereas pilots at the start of their career are in such a weak position, the conditions for positions of first officers are often deplorable. We are of the opinion that the analysis of our research clearly reveals strong indications that the labour market for pilots is segregated between positions for younger and lesser experienced pilots and positions for pilots that are older and have more experience. The policy options in our view are the following.

First, the regulations on private flights schools and the licensing of pilots should be scrutinised carefully. Research taking into account the opinions of all stakeholders is called for. Second, a mandatory internship for newly licensed cadets should be considered. Pilots fresh from school are in an extremely weak labour market position often only finding jobs at deplorable conditions or even having to resort to pay-to-fly schemes in order to clock up the flight experience required by airlines offering better conditions.

However, a mandatory internship should not be introduced before a thorough impact and risk assessment has been performed and the opinion of the stakeholders has been taken into account.

One of the hardest things to tackle is the remuneration of interns. Third, it is our strong opinion that pay-to-fly schemes should be prohibited, not only in the European Union, but globally. Fourth, a European system for the financing of training is called for, taking into account that the amount of debts young pilots face often put them in a position so weak that, combined with a mala fide management style, it touches upon safety measures installed. Finally, the continued monitoring of the labour market for crew members in the civil aviation sector is called for. Neither airlines nor pilots should be able to put each other in a weak position.

Flags of convenience

Last but not least, the similarities between practices such as Flags of Convenience and Crews of Convenience resulting in a race to the bottom and subsequent social dumping in both the maritime and aviation sectors should raise an intense sense of urgency, more specifically with regard to flight safety, fair competition and workers' rights. Placing home bases outside the EU is yet another indicator that the home base rule has already become obsolete and is not up to the rapidly changing 'business models' and contemporary cost-cutting legal engineering techniques. In this respect, the Open Skies Agreement on the one hand almost literally opens perspectives. On the other hand, it is clear that the Open Skies Agreements, for the further liberalisation of the aviation market, present clear and present challenges, the new techniques involving (bases in) third countries only being the dawn thereof.

5 to midnight: time for action

We therefore call upon all stakeholders to act upon this clear warning and to not let the detrimental experiences of the maritime sector – resulting in hazardous safety issues, tax issues and sheer social dumping – be repeated in the civil aviation industry. In this respect, it's minutes passed midnight.

Both airlines' and flight crew members' concerns should be taken seriously both with regard to legitimate demands for flexibility and workers' rights as well as with regard to fair competition (between airlines as well as between flight crew members) and – last but certainly not least – concerns with regard to safety issues. In this respect, a fair balance between safety employers' and workers' rights is of paramount importance.