Brussels, 25/05/2022

Contribution of the European Cabin Crew Association (EurECCA) to the public consultation on the Revision of the Air Services Regulation (EC) 1008/2008

EurECCA welcomes the Commission's call for consultation as part of the review process of Regulation (EC) 1008/2008.

The health crisis has highlighted the fragility of the aviation sector in particular the lack of social protection for the aviation workers with a consequent significant risk to the stability and ability of the aviation industry itself to recover from such an event with a consequent profound deterioration in socio-economic factors and working conditions especially for the socially weaker workers such as the cabin crew.

The European Commission has put a lot of efforts in the attempt to coordinate the Member States, especially during the pandemic crisis, however the lack of common rules and oversight has led to different measures in different member states and this is the case also when it comes to implement all social rules.

EurECCA European Cabin Crew Association AISBL
Rue du Commerce 20-22
1000 Brussels, Belgium

www.eurecca.eu
contact@eurecca.eu

A/ Operational Base

For EurECCA, this new regulation must also introduce a legal framework including a definition of the « Operational Base » which only refers to the free movement of establishment defined by Article 54 of the EU Treaty as:

"*Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.* "

Regulation (EC) No 1008/2008 must clearly define, in the binding part of the Regulation, the concept of "Operational Base": as a set of airport infrastructures from which a company carries out air transport activities on a stable, regular and continuous basis with employees who have the true center of their professional activity there (the center of an employee's professional activity is the place where he/she usually works or where he/she starts and ends his/her service).

Regulation 593/2008/CE on the law applicable to contractual obligations (Rome I):

This Operational Base definition is according to regulation 593/2008/EC in which, without law chosen by the parties, « the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract » (art 8-2). A choice « may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable ».

In this regulation, « Operational Base » definition must also be linked with a legal clarification relating to a secondary place of establishment, as the free movement of establishment allows that the main activities are not performed in the State in which it has its registered office.

Moreover Directive 2006/123 highlights the importance of making such difference in recital §77:" Where *an operator travels to another Member State to exercise a service activity there, a distinction should be made between situations covered by the freedomof establishment and those covered, due to the temporary nature of the activities concerned, by the free movement of services. As regards the distinction between the freedom of establishment and the free movement of services, according to the case law of the Court of Justice the key element is whether or not the operator is established in the Member State where it provides the service concerned. If the operator is established in the Member State where it provides its services, it should come under the scope of application of the freedom of establishment. If, by contrast, the operator is not established in the Member State where the service is provided, its activities should be covered by the free movement of services."*

This legal framework will put an end to any « legislation shopping » and « fiscal optimisation » as regards national applicable legislation and national legal competency. As a consequence, this will have the benefit to avoid social dumping and unfair competition.

B/ Wet-leasing and ACMI

EurECCA asks for a revision of the Wet-leasing and ACMI introducing clarification and binding restrictions as this practice translates into lower terms and conditions for aircrew across the industry and gives a boost to atypical employment schemes.

This development has – naturally – caught legislators off guard. EU Regulation 1008/2008 Article 13 prescribes that intra-EU wet-leases can be used without a limit in time as long as they are deemed safe. But there are neither necessary related social protections for employees, nor further considerations of the potential safety aspects of such semi-permanent use of wet-lease.

While indeed both the lessor (i.e., operator providing aircraft & crew) and the lessee (i.e. operator receiving aircraft & crew) are subject to EU/EASA rules, in practice, implementation, interpretation and enforcement vary from one EU Member State to another. The ability to oversee and scrutinize such complex operations also differs significantly from country to country, not least due to an increasing lack of resources in certain national aviation authorities.

Particularly worrying is the ability of smaller authorities to oversee complex operations with long and unclear subcontracting chains (including big ACMI operators subcontracting operations themselves to smaller ones).

EurECCA also asks for a clarification when it comes to justify the use of wet leasing and ACMI agreements in relation with the EU-UK Trade and cooperation agreement as long as it affects the protection of the public interest, in relation to social policy objectives.

Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part.

ARTICLE 429 Commercial operations:

…

7. As regards leasing:

(a) the Parties shall grant each other the right for their air carriers to provide air transportservices in accordance with Article 419 in all the following ways:

(i) using aircraft leased without crew from any lessor;

(ii) in the case of air carriers of the United Kingdom, using aircraft leased with crew from other air carriers of the Parties;

(iii) in the case of air carriers of the Union, using aircraft leased with crew from other air carriers of the Union;

(iv) using aircraft leased with crew from air carriers other than those referred to in points (ii) and (iii), respectively, provided that the leasing is justified on the basis of exceptional needs, seasonal capacity needs or operational difficulties of the lessee, and the leasing does not exceed the duration which is strictly necessary to fulfil those needs or overcome those difficulties;

(b) the Parties may require leasing arrangements to be approved by their competent authorities for the purpose of verifying compliance with the conditions set out in this paragraph and with the applicable safety and security requirements;

(c) however, where a Party requires such approval, it shall endeavour to expedite the approval procedures and minimise the administrative burden on the air carriers concerned;

(d) the provisions of this paragraph are without prejudice to the laws and regulations of aParty as regards the leasing of aircraft by air carriers of that Party.

According to EurECCA, these restrictions must be clarified to protect public health and social policy objectives.

C/ Cross-border coordination

Enforcement and cross-border coordination should be in the heart of the revised regulation. It is imperative that authorities work together in order to ensure that inspections are carried out also for carriers that are under the jurisdiction of one Member State, but mostly operating into, or within, another Member State. EurECCA believes that the European Labour Authority could play a crucial role in coordinating and supporting the enforcement of EU social law in the aviation sector.

D/ Ownership and Control (O&C)

The Commission also considers revising the current ownership and control (O&C) rules. This revision should ensure that it truly analyses all potential effects that the different policy options under consideration on O&C rules might have. It is essential that the rules continue to ensure the competitiveness of European airlines – also with regard to unfair competition by subsidized non-EU airlines - and the connectivity and employment that these airlines provide European society with.

E/ Atypical forms of employment

Atypical forms of employment as pay to fly, temporary agency employment, self-employment and bogus self-employment, zero-hour contracts must also be banned as it endangers flight safety operations as described by EASA in its guide called "Practical Guide New Business Models Hazards Mgt" published in August 2017 in which it underlines the links and the risks between socioeconomic aspects of such aircrew employment and flight safety.

1) Temporary Agency:

The use of temporary working agencies or intermediaries for aircrews highlights real dysfunctions in the application of the various European regulations legal framework on the applicable law, the legal jurisdiction competency, the coordination of social security systems and the posting of workers Directive 96/71/EC of 16 December 1996.

Recent developments in the aviation sector such as an increase in competition have had an impact on the aircrew workforce, in particular through the development of atypical forms of employment.

These atypical forms of aircrew employment were an exception not so long ago, and is now quickly spreading across all sections of the aviation industry, from low-cost carriers to legacy carriers.

Some airlines have implemented practices (such as hiring cabin crew through intermediaries or as self-employed or so- called "pay-to-fly" employees) which have an impact on the working and employment conditions of cabin crew and can give rise to legal uncertainty.

Cabin crews working for low-cost carriers (LCCs) are the most affected. In fact, LCCs are the biggest "users" of atypical employment through intermediaries/Temporary agencies. The impact of such precarious forms of employment is many and varied, ranging from lower social and working conditions for crew, unfair competitive pressures. Also has led to legal uncertainties and the potential to disrupt the level playing field between airlines.

Some “unscrupulous” companies or even some Member States take advantage of this “patchwork” of regulations and their lack of precision and control by a competent authority to optimize their productivity gains and thus reduce their operating costs, to the detriment of aircrews, with the consequence to find themselves in precarious employment conditions. "Such employment schemes” monitored by the temporary working agencies encourage both social dumping and unfair competition.

The employment of cabin crews by temporary working agencies mainly used by low-cost airlines seems to be one of the ideal tools to circumvent the European regulations in force thanks to various possible interpretations under the pretext of a lack of clarification and control and a lack of harmonization on such topic and definition between the different Member States. For example, the use of employment through intermediaries sometimes makes it difficult for aircrew to identify their employer and establish the applicable law. They may benefit from different rights and protection levels according to the national legislation that applies to them.

Greater clarification in the enforcement of these rules to complex situations will improve legal certainty for workers and employers in the sector. It will also improve the implementation of EU and national rules by national authorities and courts. In order to provide urgent solutions to such dysfunctions, EurECCA calls for:

A/ Reinforcement of the applicable law and a strict respect of the principle "in which or, failing that, from which" as defined in Regulation 593/2008/EC;

B/ Harmonization and application of the Regulation on the posting of workers for aircrews according to 5 criteria's (as described in the report: "The application of the EU posting rules to aircrew" by Van Olmen & Wynant in 2019):

1. The posted aircrew worker has an employment relationship;
2. The posting falls within the framework of Article 1.3 of the Posting of Workers Directive;
3. The aircrew is posted under a temporary assignment;
4. The posted aircrew is assigned to a secondary base in a Member State other than where he/she has his/her home base;
5. The aircrew is supposed to return to the home base at the end of the posting and with the application of the hard cores rules of the hosting Member States:
    a. maximum work periods and minimum rest periods;
    b. minimum paid annual holidays;
    c. the minimum rates of pay, including overtime rates; this point does not apply to supplementaryoccupational retirement pension schemes;
    d. the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
    e. health, safety and hygiene at work;
    f. protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
    g. equality of treatment between men and women and other provisions on non-discrimination.

C/ Publication of clear guidelines for the aviation sector in order to avoid the important problem of legal uncertainty with the result as the posting rules are not often applicable for aircrews.

D/ Given the transnational nature of air transport, the sector is especially exposed to potential non-compliance with applicable law and misapplication of EU legislation, principally because both capital (aircraft) and labour (aircrew) are highly mobile. Highly mobile aircrews moving from different « Home Base » between members states in very short time must be clearly defined as for the time being the posting rules do not apply to them. This leads to a precarious working situation as the lack of clear connection to the Member State lets the choice of the applicable law chosen/ imposed by the parties or the applicable law of the place of hiring. The difficulty is to prove a close link between aircrews and the other Member state. In that case, it is still difficult to apply the protections rules as described in Chapter 1, art. 8 of Rome 1 Regulation with the consequence that the applicable legislation would be the place of hiring.

2) Self-employment and Bogus self-employment

Due to the fact of unharmonized employment and tax laws/regulations within the EU, some airlines are trying to use all opportunities to survive in a highly cost competitive market. To achieve the most possible revenue it becomes more and more attractive to hire cabin crew on atypical forms of employment such as bogus self-employment.

We know that Air Transport is a highly cost-sensitive sector and even more now. This puts pressure on labor costs. Low-Cost Carriers (LCCs), in particular, experience much greater variation in demand between the high and low season.

These “ups and downs” as well as the cost competition within the airline industry puts a premium on more flexible but mostly atypical forms of employment. Some flexible employment arrangements are low-standing and widely used e.g. wet leasing and temporary cabin crew to cover the peak summer season whereas others are more recent in origin e.g. bogus self-employment and “pay-to-fly” contracts. As a result of the wide use of the before mentioned employment arrangements the cost-competition between airlines increases dramatically.

A bogus self-employed is a worker who meets the criteria of the worker but who declares himself self-employed.

A worker is legally defined by three conditions to be met simultaneously: a relationship of subordination with a principal, a genuine work and a salary.

There is no definition of « worker » in the Lisbon Treaty which nevertheless, contains articles using the term « workers ». The caselaw of the Court of Justice of the European Union has therefore interpreted a « worker » as covering any person who (European Commission, 11.12.2002 COM (2002) 694 final):

- undertakes genuine and effective work;
- under the direction of someone else;
- for which he is paid.

What means bogus self-employment when it comes to air transport?

Bogus self-employment is commonly understood as involving persons/workers registered as self-employed whose conditions of employment are similar to dependent employment. Where bogus self-employment exists, this often leads to other forms of undeclared work, such as under-declared work as well as tax and social security fraud.

For example, some airlines calculate cabin crew pay on the basis of “per scheduled hour”, but the actual flight time is often longer than the scheduled flight time.

Under-declared work can be more difficult to determine when the habitual place of work of cabin crew is not respected or when cabin crew are not considered as “posted workers”. Therefore, cabin crew based outside their “home country” might be paid according to the lower wage of their country of origin instead of in accordance with the host country’s wages and labour rights. Given the transnational nature of air transport, the sector is especially exposed to potential non-compliance with applicable laws and misapplication of EU legislations, mainly because both aircraft and cabin crew are highly mobile. Sadly, there are only few cases of labour inspections helping to prevent the extensive use of bogus self-employment and its crucial consequences.

In Member States where this arrangement is incompatible with national employment and/or tax laws, direct employment is circumvented by requiring workers to operate for the airline as contractors under an “umbrella company” as well as undirect employment under temporary agencies.

What could we do to prevent bogus-self-employment?

For a sustainable solution to the problems, the conventions of Brussels 1 and Rome 1 must be enforced. Within the EU the responsibility for enforcement of laws in the different members states is not harmonized. In some member states the respective civil courts are in charge to enforce laws. In other member states there are indicated public institutions or state services that are responsible.

To successfully prevent the use of bogus-self-employment, EurECCA supports the regulations of TFEU article 153 and demands that the EU should set up the minimum requirements as described in regulation TFUE article 153 to guarantee high social level standards throughout its mechanisms. Furthermore, the EU should encourage the member states to cooperate with each other to share knowledge to learn and build up concrete measures and capacities against the use of bogus-self-employment.

Possible harmonization according to TFEU article 116 regarding laws enforcement mechanisms in the member states and in the European legislation would have decisive advantages when it comes to the prevention of bogus self-employment. In addition to the harmonization of law enforcement it is crucial to also harmonize the concept of self-employment at a legal level within the EU. The role of cabin crews with its specifics e.g. link of subordination, no autonomy or performing services under the direction of another person does not fulfill with the criterias that characterise self-employment.

In conclusion EurECCA calls for the reinforcement of the European Labour Authority which still not covers the aviation industry since its establishment in 2019. In fact, discrepancies between EU Member States - in terms of legislation, inspections and supervision - not only put pressure on airline employees, but also obstruct the level playing field for airlines in Europe.

EurECCA asks for:

1. An Operational Base binding definition;
2. Enforcement agencies at the national level (e.g., labour inspectorates, the courts, and tax and civil aviation authorities);
3. Cross-border co-operation between the Member State where an airline registers its principal place of business and the Member States where the same airline operates multiple ('home') bases for aircrew;
4. Pan-European agencies such as the European Commission, Eurojust, Europol and the European Labour Authority;
5. Social partners involvement at the national and European levels.

This lack of control at the European level allows some Temporary Working Agencies to use self-employed or bogus self-employed cabin crew which do not fall under the posting rules and also escape the scope of employment law in general. This could easily be addressed if national civil aviation authorities and labour inspectorates intensified their activities and cooperated both nationally and transnationally.

As a conclusion, "social dumping" occurs 'when EU airlines organize employment models, terms of employment, and company structures to take advantage of differences between the rules of Member States, including the implementation, understanding, and administration of the EU regulatory framework, meaning that it can be described more accurately as "rule shopping"

According to EurECCA, it is therefore necessary to ban this form of atypical employment and establish direct employment as the norm.

EurECCA represents, protects and develops the rights and needs of cabin crew all over Europe

About EurECCA Established in Brussels in 2014, the European Cabin Crew Association, EurECCA, represents, protects and develops the rights and needs of cabin crew all over Europe. It is composed of cabin crew unions from European Union Member States as well as accession and bordering states, and represents some 33,000 cabin crew accounting for 70% of all organised cabin crew in Europe. EurECCAhas no political connections. EurECCA's work is mainly around cabin crew and passenger safety and cabin crew health and work and living conditions.

EurECCA European Cabin Crew Association AISBL
Rue du Commerce 20-22
1000 Brussels, Belgium

www.eurecca.eu
contact@eurecca.eu