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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE
COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE
COMMITTEE OF THE REGIONS**

Aviation Strategy for Europe: Maintaining and promoting high social standards

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Aviation Strategy for Europe: Maintaining and promoting high social standards

1. INTRODUCTION

In 2017, the EU not only celebrated 25 years of its internal market for aviation¹, it also proclaimed the European Pillar of Social Rights². This is an EU success story. In particular, the success of the EU's aviation market is made possible thanks to the many Europeans who work and serve in the sector every day. By making it easier and cheaper for Europeans to fly the internal aviation market has brought them closer and better connected to the rest of the world. The unprecedented choice of air travel opportunities has enabled many Europeans to travel, study and work in Europe and beyond. The number and frequency of flights have grown substantially. The daily number of flights has increased from less than 10,000 in 1992 to around 25,000 in 2017³ and the routes from fewer than 2,700 to 8,400⁴. In 2017, over 1 billion passengers travelled by air within, from or to the EU⁵.

Air transport rules have been harmonised within the EU, guaranteeing that all operators, wherever they are located in the EU, have the same access to the air transport market. However, social protection and labour law remain primarily a responsibility of the Member States⁶. This means that while all aviation staff benefit from the protection offered by EU law they may enjoy different rights and levels of protection depending on the national law that applies to them. This situation can be particularly challenging for aircrew (i.e., cabin crew and pilots)⁷ due to the cross border nature of their jobs.

Pressure to reduce costs in a highly competitive market has stimulated innovation. It has also required the workforce to adapt to a fast-developing environment. Some airlines have introduced practices (such as hiring aircrews via intermediaries or as self-employed or so-called "pay-to-fly") which impact aircrew's working and employment conditions and may give rise to legal uncertainty. A series of strikes among aircrew across a number of Member States over recent years are an expression of the discontent of some aircrew with the change in their employment and working conditions.

There is substantial EU legislation that sets minimum standards, and national legislation that protects workers, including aircrews. A set of specific EU rules also aims to protect them in their cross-border activities and ensures that aircrew can seize job opportunities and be protected when exercising their freedom of movement in the internal market. However, the

¹ https://ec.europa.eu/transport/modes/air/25years-eu-aviation_en

² https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf.

³ Eurocontrol.

⁴ OAG.

⁵ Eurostats, 2018.

⁶ See Article 153 of the Treaty of the functioning of the European Union.

⁷ As regards ground handlers, the unintended social impacts of the EU legislation on ground handling, notably on working conditions, will be part of the analysis in the upcoming evaluation in 2019. As regards air traffic controllers, see COM(2017) 286 final and SWD(2017)207 final.

European Parliament, the European and Economic and Social Committee, Member States, airlines and social partners have expressed concerns about the negative impact that some practices by certain airlines have had on the employment and working conditions of some aircrews. They are concerned that this has led to legal uncertainty, different levels of worker protection and an uneven playing field for air carriers. The Commission has received requests for clarifications on these issues.

In 2015, the Commission presented an Aviation Strategy for Europe⁸, which highlighted the social agenda in aviation as a priority. It has since acted on all of its commitments. The Commission is actively supporting social dialogue in aviation, in particular through the sectorial social dialogue committee on civil aviation. The Commission published a practice guide on applicable labour law and competent courts in 2016⁹. To gain further insights into the situation of aircrews and their employment and working conditions in today's EU aviation market, the Commission commissioned a study on employment and working conditions of aircrews in the EU internal aviation market (the 'Ricardo study')¹⁰. It also benefited from external studies¹¹, regular exchanges with and input from stakeholders. In the context of the evaluation of the Air Services Regulation¹², the Commission is also assessing the unintended social impacts of this legislation, notably on working conditions.

In 2017, the European Parliament called on the Member States and the Commission to act on social issues in aviation, in particular in the case of highly mobile aircrews¹³. The European Economic and Social Committee also encouraged the Commission to undertake further practical measures to prevent the negative effects on employment, creating good quality jobs¹⁴ while the European Committee of the Regions highlighted that a competitive and sustainable European aviation sector in the long term is essential for development at both local and regional level. The European Pillar of Social Rights was proclaimed in November 2017 by the European Parliament, the Council and the European Commission. It expresses principles and rights essential for fair and well-functioning labour markets and welfare systems in 21st century Europe.

More recently, and in the context described above, a number of Member States called for action at national and EU level to develop and implement an ambitious and meaningful social agenda in aviation. They highlighted the importance of ensuring healthy and fair competition and fair working conditions for the sector and called on the Commission to work further on "concrete and effective measures to tackle the major unresolved issues"¹⁵. An airline organisation representing almost a quarter of the EU aviation market and two trade union

⁸ COM(2015) 598 final.

⁹ <https://publications.europa.eu/en/publication-detail/-/publication/41547fa8-20a8-11e6-86d0-01aa75ed71a1>

¹⁰ Study on the employment and working conditions of aircrews in the EU internal aviation market, [to be published].

¹¹ Studies on the effects of the implementation of the EU aviation common market on employment and working conditions in the Air Transport Sector over the period 1997/2010, July 2012 and on employment and working conditions in air transport and airports, October 2015 (the 'Stear Davies Gleave study').

¹² Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, OJ L 293, 31.10.2008, p. 3.

¹³ Resolution of 16.02.2017 on the 2015 Aviation Strategy for Europe.

¹⁴ Opinion TEN/581 on the Aviation Strategy for Europe, 14 July 2016, referring to Opinion TEN/565 on Social dumping in the European civil aviation sector, 16.09.2015.

¹⁵ Joint declaration on a social agenda in aviation by Belgium, Denmark, France, Germany, Luxembourg and The Netherlands, 2.10.2018.

associations representing the European aircrew also made an urgent appeal¹⁶ to EU and national decision-makers "to ensure appropriate social standards and a fair level playing field" in the EU aviation market focusing on aircrew.

With this report, the Commission takes stock of progress on the social agenda in aviation which was set out in the 2015 aviation strategy. Focussing on aircrews, and in line with the Commission's political priorities on jobs, growth and fairness, the report reviews the main opportunities and challenges for aircrews today, building on the findings of the Ricardo study which analysed the key issues identified by the European aircrew organisations, while aiming to improve legal certainty for mobile aircrew. It also identifies some concrete actions for a stronger social agenda in aviation in the short term.

2. JOBS AND EMPLOYMENT IN TODAY'S AVIATION MARKET

Aviation is an important source of employment. In 2016, it was estimated that the aviation sector in the Union had directly generated 2 million jobs, out of which 18.8% were jobs in airlines, and has overall supported 9.4 million jobs¹⁷. Air transport¹⁸ in the EU directly accounts for 437,000 workers (193,000 women and 244,000 men)¹⁹. It is expected that aviation will continue to generate more jobs²⁰. There are no figures available regarding specifically aircrew.

Traditionally, air carriers had their fleet and aircrew based within a single country, i.e., the country where they had their principal place of business²¹. This also corresponded to the place where aircrews worked, the place where social legislation applied and the place that had jurisdiction. In a liberalised and competitive market that requires greater flexibility and cost-effectiveness, airlines' business models have evolved significantly. In this context, various employment arrangements and practices have developed in the sector, as they have in many other sectors of the economy. Low-cost flights, that typically operate point to point, grew by 61% from 2007 to 2016²², taking almost 50% of the intra-EU market in terms of available seats²³. With the increase in point to point routes, the number of operational bases has steadily grown since 2008, and aircraft and aircrew of the same airline are increasingly based outside the principal place of business of the airline, in the territory of other Member States or even sometimes in third countries. As highlighted by the Ricardo study, the use of multiple foreign operating bases has been a particular feature of low cost carriers. Some legacy carriers have, however, also started developing in a limited way additional operating bases.

This trend has intensified the cross-border nature of aircrew activities and added complexity to their legal status under EU and national law. In particular, it has created uncertainty as to how to determine what court has jurisdiction and what labour law applies to the employment

¹⁶ "A social agenda for European Aviation", Airline Coordination Platform, European Cockpit Association and European Transport Workers' Federation, 2.10.2018.

¹⁷ https://aviationbenefits.org/media/166344/abbb18_full-report_web.pdf.

¹⁸ Airport operations and repair and maintenance of aircraft or aircraft engines are not included.

¹⁹ Eurostats, Q2 2018.

²⁰ According to Airbus forecasts, there will be a worldwide demand for additional 538,000 pilots between 2017 and 2037 (219,000 in the Asia Pacific region, 68,000 in North America, 94,000 in Europe, 57,000 in the Middle East, 52,000 in Latin America, 25,000 in Africa and 23,000 in Russia/ Central Asia).

²¹ See Article 2(26) of the Air Services Regulation.

²² Eurocontrol.

²³ OAG summer schedules.

contract of aircrews assigned to a home base outside the principal place of business of the airline.

The **Air Services Regulation**, which is the EU legal framework for the EU internal aviation market, acknowledges the *"growing importance of air carriers with operational bases in several Member States"* (Recital 4) and provides that *"With respect to employees of a Community air carrier operating air services from an operational base outside the territory of the Member State where that Community air carrier has its principal place of business, Member States should ensure the proper application of Community and national social legislation"* (Recital 9). Therefore, the Air Services Regulation applies without prejudice to the application of relevant EU law and national law protecting employees, such as rules on social security. This report focuses on the rules that are relevant for aircrews in the context of current developments in the market.

3. SOCIAL DIMENSION AS PART OF THE SAFETY ASSESSMENT

Safety is the first priority in aviation. EU aviation safety rules apply the same way to aviation personnel, regardless of their contractual relationship with the airline. The EU aviation safety rules contain the concept of home base which serves as a reference to calculate flight and duty times limitations. The concept of home base means *"the location, assigned by the operator to the crew member, from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal circumstances, the operator is not responsible for the accommodation of the crew member concerned"*²⁴.

The potential impact that different employment conditions may have on safety is taken very seriously and is subject to ongoing analysis by the European Union Aviation Safety Agency (EASA) and the Commission. Two recent developments further incorporate the social dimension in airlines' safety assessments.

In August 2017, the European Union Aviation Safety Agency issued **recommendations on new business models of commercial air transport operators**²⁵. Given the different contractual arrangements among aircrews (e.g. temporary employment models, employment via intermediaries or self-employment), the report recommended that operators focus on the monitoring by type of contract or category of staff in the light of a number of indicators as part of an operator's safety management system.

Moreover, under the **New Basic Aviation Safety Regulation**, which entered into force on 11 September 2018²⁶, the socioeconomic factors are taken into account in order to address socioeconomic risks to aviation safety. In addition, when EASA drafts rules that could have important social implications it must appropriately consult stakeholders, including EU social partners.

4. OPPORTUNITIES AND CHALLENGES FOR AIRCREWS IN TODAY'S EU AVIATION MARKET

²⁴ See footnote 29.

²⁵ EASA Practical Guide, Management of hazards related to new business models of commercial air transport operators.

²⁶ Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, OJ L 212, 22.8.2018, p. 1.

4.1. Attracting and training young people – maintaining and creating highly skilled jobs in air transport

The future of the European aviation sector depends on its ability to attract and retain a highly skilled workforce. According to prognoses, there will be a worldwide demand for an additional 538,000 pilots between 2017 and 2037²⁷.

Stakeholders, in particular trade unions, some airlines and the European Parliament, are concerned that pilots have to pay for training purposes, such as for their line training while operating as a regular pilot on an aircraft in commercial service.

Becoming a pilot requires lengthy and costly training. In general, access to the profession includes three main steps: **basic training** to obtain the airline transport pilot licence (ATPL)²⁸; **type rating** to fly a specific type of aircraft; **line training** where the pilot gains the requisite flight experience to operate as a regular pilot by flying on a commercial passenger flight as a regular pilot (as second or first officer), alongside a line training captain.

Pilot training practices have changed significantly over the last decades. Airlines typically used to pay for the training of their pilots, who were then very often bonded to their employer for a number of years. A large number of pilots also came from the military. The Ricardo study highlights that today most pilots need to contribute to financing their training (to some extent) at all levels. Most of them have to pay for their basic training and type rating. Such costs typically constitute education costs (similar to other professions) which in the case of aviation are particularly high: basic training can cost up to €100,000; type rating costs around €30,000.

4.1.1. Pay to fly

Today, line training may be provided by the employer as part of a newly educated pilot's employment, or pilots may need to pay to gain flight experience. According to the Ricardo study, it is the latter situation that is typically referred to as 'pay-to-fly' or 'self-sponsored line training'. There is no commonly agreed definition of pay-to-fly at EU level²⁹. There is no clear information on whether or not such schemes are widespread within Europe. In order to gain requisite flight experience, between 2.2 and 6.1%³⁰ of the surveyed pilots in the Ricardo study have had to contribute financially while flying on commercial flights. Conversely, 19 out of the 27 surveyed airlines had not made use of (or participated in) such schemes over the last 3 years³¹. The potential reasons for participating in such schemes might be (1) to qualify

²⁷ See footnote 20.

²⁸ The licence will be "frozen" until the pilot has gained the requisite line training. The pilot can fly as a second or first officer.

²⁹ Pay-to-fly typically refers, in the study and in this report, to a situation where, in the context of line training, a pilot operates an aircraft in commercial service (e.g. revenue earning flight), pays the air carrier for the training. The pilot may or may not have a contract with the air carrier. It should be noted that line training can be, and is often, packaged with type rating, which was not considered to constitute pay-to-fly.

³⁰ Depending on whether type rating was included in the response.

³¹ Among the 8 airlines that said they had used such schemes, four were traditional scheduled air carriers, one low-cost, one 'other', and two unspecified.

faster to be able to operate as a captain and more in general (2) to increase employability³². Younger, less experienced pilots tend to be more likely to participate in such schemes.

Pay-to-fly is not specifically regulated or prohibited at EU or national level. However, some countries such as France or Germany consider that such practices are potentially part of an employment relationship and should therefore not be paid by the pilot³³. In this context, it can also be noted that the Commission **proposal for a Directive on transparent and predictable working conditions in the European Union**³⁴ obliges employers to provide cost free training to employees when this training is required by EU or national legislation or relevant collective agreements.

4.1.2. Quality of training

The Aircrew Training Policy Group³⁵ has raised concerns about the quality of the training programmes offered by certified flight schools. Skills gained by the cadets may not always match the skills required by airlines. Airlines representing a significant share of the EU market have reported that a large proportion of pilots that hold an airline transport pilot licence do not meet the airlines' basic entry requirements. This represents a serious issue for young pilots who are not able to get a job after completing an expensive education. It might also, in the long run, lead to a possible shortage of qualified and employable pilots, which could affect growth in the aviation industry.

Moreover, the development of new technologies and automation, such as drones, will have an impact on the workforce in civil aviation, including aircrew. The conference organised by the Commission on 20 November 2018 on Automation in transport and how it affects the labour force identified the need to accompany the transition by addressing the digital divide and inequalities, filling the skills gap and being prepared to address the consequences of jobs moving more easily to other parts of the world³⁶.

ACTION³⁷

The Commission, with the support of the European Union Aviation Safety Agency (EASA) and in close cooperation with relevant stakeholders, will continue to assess how traditional training process could be gradually moved towards evidence and competency-based training to maintain the highest level of aviation safety while preserving the employability of pilots in the future.

³² The majority of surveyed pilots in the Ricardo study (62.5%) had participated with the expectation of getting a permanent position. It has also been argued that participating in such schemes may be the only way to be recruited by one airline. The Ricardo study does not provide any further evidence on this, nor data on the split between (1) and (2).

³³ Elements such as dependency or a longer relationship with the air carrier could be indicators of a de facto employment relationship.

³⁴ COM(2017)797.

³⁵ Who assists EASA by offering advice on commercial pilot training matters.

³⁶ https://ec.europa.eu/transport/themes/social/automation_en

³⁷ See also horizontal actions in the conclusion of this Report.

The Commission [urges the co-legislator to adopt the proposal for a Directive on transparent and predictable working conditions and] will monitor how this Directive, once transposed, impacts the training of aircrew.

In 2019, the Commission will launch a study to identify various policy options to support the transition towards automated transport for workers in all transport modes, including training and reskilling.

4.2. Maintaining and promoting high EU social standards for aircrews: trends and challenges

4.2.1. Applicable law and competent jurisdiction

According to the Ricardo study, the majority of aircrew members who responded to the survey (82% of pilots and 88% of cabin crew) said that the law applicable to their contracts is that of their contractual home base. Air carriers who tend to operate multiple operational bases where aircrews are based were found to be more likely to apply the law corresponding to the country where they have their principle place of business, regardless of where their aircrews are based.

Due to the high mobility of aircrews, identifying which social security legislation and which labour law they are entitled to, and in which court they can claim their rights can be challenging.

The **Regulation on the Coordination of Social Security Systems**³⁸ provides coordination rules to protect the social security rights of workers who moving within Europe. As a rule, persons are subject to the legislation of a single Member State. In the specific case of aircrews, it is the legislation of the Member State where the home base of the aircrew as defined under aviation safety legislation³⁹ is located that is applicable. The introduction of this connecting factor has contributed to more legal certainty as to aircrews' social security coverage.

The **Practice guide that was prepared in 2016 by the European Judicial Network in civil and commercial matters**⁴⁰ provides guidance which is highly relevant for mobile aircrew. Parties to an individual employment contract can choose the applicable national law and competent jurisdiction for the purpose of their contract. In order to protect the employee as the weakest party to the contract, a choice of jurisdiction is valid only under the strict conditions set out in the **Brussels I Regulation**⁴¹ dealing with cross-border situations. As far as the applicable law is concerned, the rules of the **Rome I Regulation**⁴² guarantee that

³⁸ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Regulation (EU) No 465/2012.

³⁹ Subpart FTL, ORO.FTL.105 (14), Commission Regulation (EU) No 83/2014 of 29 January 2014 amending Regulation (EU) No 965/2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council.

⁴⁰ <https://publications.europa.eu/en/publication-detail/-/publication/41547fa8-20a8-11e6-86d0-01aa75ed71a1>

⁴¹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 351, 20.12.2012, p. 1.

⁴² Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6.

irrespective of any choice made, employees are entitled to protection under the mandatory rules of the law of the country that would apply in the absence of such choice. This law corresponds first to the law of the place where, or from where, the employees habitually carry out their work. The words "or from where" were added by the co-legislators acting on a proposal by the Commission⁴³ to make it possible to apply the rule to personnel working on board aircraft.

In an important judgment, the Court of Justice of the EU clarified how to determine the place where, or from where, employees habitually work in a dispute involving specifically aircrews⁴⁴. The Court ruled that the "home base" of aircrew, within the meaning of the EU air safety rules, plays a significant role among the relevant indicia when it comes to determining that place. Its relevance for this purpose could only be questioned if closer connections were to exist with a place other than the home base⁴⁵, which requires a case-by-case assessment. The Court also ruled that the habitual place of work cannot be equated with the 'nationality' of the aircraft⁴⁶. The case concerned the application of the Brussels I Regulation but the same considerations equally apply to the determination of the applicable law which cannot be derogated from under the Rome I Regulation. In this respect, Rome I refers to the same concept of habitual place of work. The Court specifically stated that the two instruments should be interpreted and applied consistently.

The Commission has referred to this development in case law in its recent exchanges with Member States, the European Parliament and social partners. It has expressed its expectation that companies operating in the EU's internal aviation market respect all applicable European and national laws.

In the context of its evaluation of the Air Services Regulation, which covers the most central internal aviation market aspects, the Commission is assessing *inter alia* the unintended social impacts of this legislation, notably on working conditions. In parallel, it has commissioned a study as part of the preparation for a future impact assessment in view of a possible review of the Air Services Regulation on all its aspects.

ACTION

The Commission will continue working with the European Judicial Network to raise awareness of the recent rulings of the Court of Justice of the EU and their implications for matters of international jurisdiction and the law applicable to employment contracts, including a possible update of the 2016 Practice guide on the Rome I and Brussels I Regulations to take into account the recent rulings of the Court of Justice of the EU.

The Commission is conducting a study that will help it assess whether further measures are necessary to improve the functioning of the EU internal aviation market, *inter alia* to improve legal certainty for mobile aircrews, including crews from non-EU countries working in the EU, as regards the law applicable to their employment contracts.

⁴³ COM(2005)650 final.

⁴⁴ Judgment of 14 September 2017 in joined cases C-168/16 and C-169/16, *Nogueira and Others*.

⁴⁵ See paragraph 73 of the judgment.

⁴⁶ See paragraphs 75 and 76 of the judgment.

The Commission urges Member States to ensure, by the appropriate means, the enforcement of existing rules at national level and also to ensure continued compliance with EU law, as interpreted by the Court of Justice of the EU.

4.2.2. Employment via intermediaries, including temporary agency work

As confirmed by the Ricardo study, various forms of employment or working arrangements, such as indirect employment arrangements, short-term contracts or self-employment, have developed in the internal aviation market, as an alternative to the traditional open-ended employment contract. The European social partners in particular but also some Member States have raised concerns about the risk of adverse impact of some of these forms on aircrews' employment and working conditions. Concerns have also been raised about the situation of an uneven playing field resulting from abuse or circumvention of the applicable labour law by some air carriers to the detriment of air carriers who actually comply with the relevant EU and national rules.

The aviation sector has historically been offering high-skilled jobs and mostly better-than-average employment and working conditions for aircrew⁴⁷. This remains true in the large majority of cases, as shown by the Ricardo study: having a direct and permanent employment contract with an airline carrier remains the predominant form of employment for 80% of cabin crew and 82% of pilots working in the EU⁴⁸. Today's challenge is to ensure that employers have the necessary flexibility to adapt to changes in the economic context while ensuring quality working conditions and a level playing field, in compliance with the relevant rules and principles of EU law⁴⁹.

The Ricardo study points to the difficulty of gathering reliable data on the use of temporary work agencies or other intermediary organisations⁵⁰. A majority of air carriers surveyed said they had not contracted aircrew through an intermediary and considered there had been no change in this respect over recent years. However, the study indicates that between 9 and 19% of cabin crew⁵¹ and around 8% of pilots said they are **employed through some form of intermediary organisation**, and that the vast majority of those hired through such an intermediary would be working for low cost carriers (97% of the cabin crew surveyed and 69% of the pilots surveyed). Young cabin crew are more likely to work under a contract with an intermediary organisation⁵².

Employment via intermediaries includes various arrangements that may sometimes involve complex chains of employment relationships. This makes it sometimes difficult for aircrew to identify their actual employer. Some may have an employment contract or have an

⁴⁷ E.g., whilst temporary agency work and self-employment have grown, levels remain significantly lower than in other sectors of the economy as a whole (see SWD(2015)261).

⁴⁸ However, figures vary significantly depending on the type of air carrier and the age of the aircrew member.

⁴⁹ See SWD(2018) 67 recalling the legal framework for each of the key principles of the Pillar and how it is being implemented.

⁵⁰ Many survey respondents were not able to identify by which form of intermediary organisation they had been hired. Nor were they always able to identify their actual employer.

⁵¹ 19% of cabin crew who responded to the survey said they have an employment contract with an intermediary manning agency whereas air carriers who responded to the survey indicated that they employ 9% of cabin crew via such contracts.

⁵² The share is higher in the age group 18-29 (34%) and 30-39 (27%) compared to 11% for the age group 40-49 and 50-59 (3%). The share of pilots with such contracts is relatively small for all age groups.

employment relationship with a temporary work agency and be temporarily assigned to work for an air carrier under the supervision and direction of the airline. Such temporary agency workers are protected by the **Directive on Temporary Agency Work**⁵³ which establishes that workers employed by a temporary work agency, who work temporarily under the supervision and direction of a user undertaking, must be provided with at least the same basic working and employment conditions as if they had been recruited directly by the undertaking to occupy the same job. This applies for the duration of their assignment at the user undertaking.

The aircrew may also be employed by another form of intermediary agency or a subsidiary of the air carrier (human resource agency). These practices are far more prevalent among a few air carriers and more common among younger aircrew entering the market.

The conditions under which companies can use employment via intermediaries, including temporary agency work vary depending on the Member State legislations. But in all Member States allegations of abuse have to be monitored and assessed on a case by case basis by the competent authorities, notably labour inspectorates, and by the competent national courts, taking into consideration relevant EU and national rules. Legal certainty also needs to be improved. In this context, it is important to distinguish unlawful situations from highly complex but lawful situations. Moreover intermediaries/recruitment agencies may be based in a Member State different from the one in which the air carrier and/or the worker are based (see section 4.2.3). Increased cooperation between labour inspectorates should be further promoted across the EU.

At EU level, aviation safety rules may impact the use of ground workers external to the company. At least half the staff that performs maintenance in each workshop, hangar or flight line on any shift should be employed to ensure organisational stability⁵⁴. For aircrews, EU safety rules apply equally to all crew regardless of their status as employed or self-employed, and airlines are recommended to identify and mitigate any specific risks in their safety management system⁵⁵.

ACTION

The Commission will in close cooperation with the European Union Aviation Safety Agency (EASA) and stakeholders take the necessary steps to ensure that the airlines' safety management systems take into account all forms of employment and working arrangements, including staff employed via intermediaries and self-employed.

The Commission urges Member States to ensure, by the appropriate means, the enforcement of existing rules protecting temporary agency workers at national level and also to ensure continued compliance with EU law.

4.2.3. Posting of workers

⁵³ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008.

⁵⁴ Acceptable Means of Compliance (AMC 145.A.30(d) Personnel requirements) issued by EASA under Commission Regulation (EU) No 1321/2014 on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks, OJ L 362, 17.12.2014, p. 1.

⁵⁵ See also section 3.

Questions have been raised about the extent to which posting has been used for pilots and cabin crews and to what extent the Posting of Workers Directive⁵⁶ is relevant to them. One question in particular is whether these rules have been circumvented by some air carriers to send workers with lower paid contracts into countries with a higher cost of living.

The Ricardo study considers that the Posting of Workers Directive⁵⁷ is in principle applicable to the transnational provision of services by temporary employment agencies or placement agencies. It considered two additional situations that could fall within the scope of this Directive: wet leasing and the temporary assignment of aircrews to an operational base outside their home base.

It also suggests that using crew on a temporary basis outside their home base is relatively infrequent in aviation. 6% of cabin crew and 12% of pilots indicated they were in some form of temporary placement in another Member State. 18 out of 24 air carriers said they were not placing crew outside their home base. Moreover, the study confirms that wet leases are not a common occurrence. Only 4 out of 23 air carriers reported making use of workers temporarily working from a base different from their home base as part of a lease agreement⁵⁸.

Stakeholder interviews also confirm that the Posting of Workers Directive is generally not applied in the case of aircrew. At the same time, some respondents to the study pointed to a lack of awareness among stakeholders, including national authorities of the rights applicable in the Member State where they were temporarily assigned and a lack of information from the employer about these rights. Stakeholders also indicated issues with enforcement of the rules, beginning with who is responsible for enforcing the rules.

Wet-leasing operations add another layer of legal complexity for aircrews since they consist in leasing aircraft with aircrew operated on behalf of another air carrier (the lessee). These operations can involve aircraft and aircrew from non-EU countries. The field research performed in the Ricardo study points to the concerns of workers' representatives about the possible use of wet-leasing arrangements to circumvent strikes or applicable social and labour law rules⁵⁹.

The Posting of Workers Directive applies to airlines, temporary work agencies and other types of intermediaries that temporarily post workers ("posted workers") to another Member State in the context of providing cross-border services in that Member State.

An aircrew who is effectively assigned to temporarily work in another Member State, which may be the case in the context of a wet-lease contract, would by definition qualify as a posted worker should there be an employment relationship between the aircrew and the lessor during the whole period of the leasing. This should be assessed case by case. Aircrews who are transferred to another base (i.e. who are assigned to a new home base) would not be

⁵⁷ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1 (and Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC, OJ L 159, 28.5.2014, p. 11, 'the Enforcement Directive').

⁵⁸ Numbers to be interpreted with caution since wet-leases are usually used only temporarily, sometimes only for a single flight.

⁵⁹ Due to the small sample size of respondents, it was not possible to test and verify these claims as pointed out in the Ricardo study.

considered to be posted, unless they fulfil the specific conditions set out in the Posted Workers Directive for this purpose.

The recent amendments to the Posting of Workers Directive⁶⁰ which establishes the principle of equal pay for equal work on the same place need to be transposed by Member States by 30 July 2020 and applied as from that date. It will facilitate the transnational provision of services, whilst ensuring fair competition and respect for the rights of posted workers. One important set of amendments consists in extending the principle of equal treatment as described in section 4.2.2⁶¹ to posted temporary or placement agency workers, including aircrew, while keeping the possibility for the host Member States to decide to apply also other terms and conditions of employment which apply to temporary agency workers in that state.

A more effective application and enforcement of the Posting of Workers Directive by the relevant national authorities to situations that fall within the scope of the Directive will help to improve the working conditions of aircrews and the legal certainty as well as to ensure a level playing field within the European Economic Area. The **Enforcement Directive** aims to ensure that rules on the posting of workers are adequately enforced and respected by all undertakings. In order to identify genuine posting situations and to prevent abuse and circumvention of the rules, Article 4 of that Directive lists factual elements that may be taken into account in the overall assessment of each specific case.

The creation of the **European Labour Authority**⁶² will also help ensure that EU rules on labour mobility are enforced in a fair, simple and effective way. The Authority is expected to be up and running in 2019 and reach its full operational capacity by 2023. The Commission proposes that the role of the Authority be to support cooperation between EU countries in the cross-border enforcement of relevant EU law, including in tackling undeclared work, thus giving continuity to the work done by the current European Platform tackling Undeclared Work. This includes facilitating joint inspections. The Authority should mediate and facilitate a solution in cases of cross-border disputes between national authorities. It should also make it easier for individuals and employers to access information on their rights and obligations and to access relevant services.

ACTION

The Commission will continue to work with the Member States through the Expert Committee on Posting of Workers to improve the application of the Posting of Workers Directive and the Enforcement Directive, and in particular to assist in the transposition and application of the revised Directive, with a view notably to improve equal treatment and prevent cross border fraud.

The Commission urges Member States to ensure by the appropriate means, the enforcement of existing rules protecting posted workers at national level and also to ensure continued compliance with EU law, as interpreted by the Court of Justice of the EU.

4.2.4. *Self-employment*

⁶⁰ Amendments introduced through Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC on posting of workers, OJ L 173, 9.7.2018, p. 16.

⁶¹ Article 5 of Directive 2008/104/EC.

⁶² COM(2018)131.

According to the Ricardo study, self-employment arrangements typically involve air carriers contracting the services of a self-employed pilot either directly or via an intermediary organisation. More complex arrangements exist as well. These may involve, for example, several intermediaries or the setting-up of a limited liability firm by a group of self-employed pilots. The Ricardo study suggests that self-employment is not a commonly used form of employment among European carriers. Self-employment appears to be insignificant among cabin crew. Of the pilots surveyed, 9% identified themselves as self-employed⁶³. 75% of these pilots said that they worked for a low cost carrier, out of whom 59% worked for one specific carrier.

Self-employment arrangements in general can offer air carriers increased flexibility, enable them to respond to changes in a highly competitive market. An analysis of the answers to the survey suggests that a significant proportion of the pilots who identified themselves as self-employed work solely for one air carrier. They are carrying out a professional activity under the authority and subordination of the carrier and hence are unlikely to be considered as genuinely self-employed⁶⁴.

The extent to which aircrew are genuinely self-employed, or *de facto* in an employment relationship (i.e. bogus self-employment), has been the subject of several studies⁶⁵. Whether such practices may be considered as genuine or disguised self-employment, in line with relevant EU and national law, is primarily for the competent national authorities to monitor and assess, on a case-by-case basis. Approaches to self-employment differ from one Member State to the other, both in terms of definition and in terms of the rights and obligations of the self-employed workers.

However, according to the case law of the Court of Justice of the EU, to determine whether the party of an employment contract is an employee for the purposes of the Brussels I and Rome I Regulations (and thus can benefit from their protective rules in relation to an individual employment contract) the relevant factors are: the creation of a lasting bond which brings the worker to some extent within the organisational framework of the business of the employer⁶⁶ and a relationship of subordination of the employee to the employer⁶⁷.

As regards free movement of workers, a well-established case law of the Court of Justice of the EU defines the notions of "worker" and "service" (which is a cross border activity performed outside an employment relationship). The mere fact that a person performs activities outside the ties of a contract of employment does not mean that the person does not constitute a worker within the meaning of Article 45 of the Treaty on the Functioning of the EU. This has to be assessed on a case-by-case basis. In its case law, the Court of Justice of the EU has established the following autonomous European notion of worker: "A natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration." A person who is *de facto* a worker for the purposes of EU labour law should be qualified as a worker and be made subject to the relevant EU labour law. On the other hand, genuine self-employed persons providing services independently, under

⁶³ 8% said they had been hired via intermediary agencies and 1% directly by the air carrier.

⁶⁴ 90% of the self-employed pilots surveyed said they were not free to work for more than one air carrier in parallel and 93% said that they could not choose when, where and for whom they want to work – two strong indicators of self-employment.

⁶⁵ See the Ricardo study.

⁶⁶ Judgment of 15 January 1987 in Case 266/85, Shenavai; See also judgment of 15 February 1989 in Case 32/88, Six Constructions.

⁶⁷ Judgment of 10 September 2015 in Case 47/14.

their own responsibility and bearing the risk of their business should not be considered as workers since they do not fulfil the criteria developed by the Court of Justice of the EU⁶⁸.

To help address some of the issues identified above, in particular false self-employment, the Commission put forward a number of initiatives. In addition to the creation of the European Labour Authority (see section 4.2.3), the Commission's **proposal for a Directive on a Transparent and Predictable Working Conditions** provides all workers, including those in flexible non-standard and new forms of work, additional protection (e.g. access to transparent information on their relationship, new material rights and enforcement measures). Aircrew, falsely categorised as self-employed, would fall under the scope of this Directive.

Moreover, the **European Platform on Undeclared Work**, established in May 2016 to enhance cooperation at European level in tackling undeclared work, has already addressed the issue of bogus self-employment through a dedicated seminar on road transport (June 2018) and a study on bogus self-employment⁶⁹. Representatives exchange information and good practices, and they are developing closer cooperation across borders, also with a view to prevent cross border fraud. Within each country, the aim is to forge closer ties between all authorities dealing with undeclared work, such as labour inspectorates, tax authorities and social insurance bodies.

In line with the European Pillar of Social Rights, the Commission also supports effective access to social protection for workers and the self-employed⁷⁰ and adopted a proposal to this effect⁷¹. Self-employed people and persons with atypical employment contracts are not always well covered in terms of social security, lacking unemployment insurance or access to pension rights.

ACTION

The Commission urges the co-legislators to adopt the proposal for a Directive on transparent and predictable working conditions in the European Union.

The Commission invites the Member States to implement the Recommendation⁷² on access to social protection for all workers and self-employed people politically agreed in December 2018, in particular for those who, due to their employment status, are not sufficiently covered by social security schemes.

The European Platform on Undeclared Work will organise in 2019 a seminar to explore ways to tackle undeclared work in the aviation sector with a special focus on bogus self-employment of aircrews and cross border collaboration between competent authorities⁷³.

⁶⁸ Judgments of 3 July 1986 in Case 66/85, Deborah Lawrie-Blum; 14 October 2010 in Case C-428/09, Union Syndicale Solidaires Isère; 9 July 2015 in Case C-229/14, Balkaya; 4 December 2014 in Case C-413/13, FNV Kunsten; And 17 November 2016 in Case C-216/15, Ruhrlandklinik.

⁶⁹ "Practices of Enforcement Bodies in Detecting and Preventing Bogus Self-Employment" (Heyes & Hastings, 2017)

⁷⁰ IP 18-1624.

⁷¹ COM(2018) 132.

⁷² A political agreement was reached on 6.12.2018.

⁷³ Work Programme 2019-2020 adopted on 19.10.2018.

The Commission urges Member States to ensure, by the appropriate means, the enforcement of existing labour law rules at national level and also to ensure continued compliance with EU law as interpreted by the Court of Justice of the EU.

4.2.5. Non-EU country crews in the EU and international aspects

European Economic Area licenced air carriers have historically used crews from non-EU countries on specific routes for cultural and language reasons. The Ricardo study confirms this to be the case mainly for flights to/from third countries and less so for flights within the EEA. It points to specific cases of air carriers using third country crews. It is not possible to tell, on the basis of the data collected, how common this practice is, nor whether the home base of the aircrew used was located in a third country or in the EU. Most of the surveyed airlines indicated they never use third country crews on intra EU routes.

The **Schengen Borders Code**⁷⁴ contains specific rules for aircrew transiting or resting in a Schengen country. Holders of a pilot's licence or of a crew member certificate may embark or disembark at the stop-over or arrival airport without having to fulfil the conditions for short term stay in a Member State (up to three months).

Other EU or national rules may, however, apply which regulate the conditions of stay and work in the country concerned. According to EU legal migration legislation, non-EU aircrews who are based in a Member State and hold a work and residence permit must be guaranteed equal treatment with the nationals of that state in terms, for instance, of working conditions and social security. This serves as a safeguard to reduce unfair competition resulting from the possible exploitation of non-EU nationals.

However, the lack of global labour standards for civil aviation affects the effectiveness of the EU and Member States' labour legislation for both intra EU and extra EU routes. The International Labour Organization maritime labour convention, which has been transposed by EU law, has been very successful in regulating working conditions and their enforcement for the global maritime transport industry. Unlike the maritime sector there is however no consensus within the International Labour Organization to consider the discussion of an international labour convention for civil aviation.

Traditionally, bilateral air transport agreements do not contain provisions on social and labour aspects. The EU has sought to include ambitious social and labour clauses in its aviation agreements with third countries and will continue to do so.

⁷⁴ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, p. 1.

ACTION

The Commission is undertaking a fitness check on EU legal migration legislation⁷⁵ which will *inter alia* assess the situation of highly mobile third-country aircrews.

It will continue to promote high social and labour standards for international aviation by proposing ambitious social and labour clauses in EU aviation agreements with third countries.

4.3. Promoting gender equality and work-life balance

Working in the air transport sector retains a very positive image⁷⁶ for both women and men. The gender balance in aviation is also better than in other transport modes. Women account for 40% of the labour force in air transport⁷⁷. However, while there is a high share of female cabin crew, only around 5%⁷⁸ of pilots worldwide are women.

In the decades to come, the aviation sector is expected to grow and must therefore remain an attractive work place for young people attract more women to the pilot profession.

In 2017, the Commission launched the *Women in Transport - EU Platform for Change*⁷⁹ to strengthen women's employment and equal opportunities for women and men in the transport sector. In 2019, the Commission published a Business case to increase female employment in Transport⁸⁰ which includes good examples from the aviation sector on how to stimulate the recruitment of women. Gender stereotypes are actually still very relevant when it comes to the pilot profession.

In terms of employment arrangements, the Ricardo study shows that female aircrew are slightly more likely to be directly employed than via an intermediary. The difference is however rather linked to factors other than gender, such as experience, age and job role of the employee in the company.

Although self-employment should in principle provide greater control over the hours worked, pilots on this arrangement explained that the opposite was true and that working less than full-time put them at risk of losing further work. This resulted in a significant drop in the number of self-employed aircrew reporting satisfaction with the amount of time spent at home.

A better sharing of caring responsibilities between women and men will attract more women to the labour market, including in the air transport sector. The proposed **Directive on Work-Life Balance**⁸¹ aims at increasing uptake of family leaves by men, thus contributing to this objective. In addition, flexible working time arrangements allowing both men and women to better balance professional duties with family obligations will increase job satisfaction and contribute to the attractiveness of the profession.

⁷⁵ A high-level consultation process will be launched based on its findings (see COM(2018) 635).

⁷⁶ https://ec.europa.eu/transport/themes/social/studies/social_en.

⁷⁷ Whereas only 22 % women work in the transport sector as a whole (*Eurostat Labour Force Survey*).

⁷⁸ <https://sesarju.eu/sites/default/files/documents/SESAR%20women%20in%20aviation.pdf>.

⁷⁹ https://ec.europa.eu/transport/themes/social/women-transport-eu-platform-change_en. Good practices can also be shared on that webpage and the Declaration on equal opportunities for women and men in the transport sector can be signed online (it has gathered about 1000 signatures so far).

⁸⁰ available on the Platform webpage.

⁸¹ COM(2017) 253 final.

Data on maternity and paternity benefits gathered in the Ricardo study confirms that women and men in alternative forms of employment⁸² are unlikely to receive the same maternity/paternity pay and leave as their colleagues in direct employment⁸³. Less than half of pilots employed via an intermediary have access to maternity/paternity leave. For female temporary agency workers the most significant issue is the risk of losing their job, as temporary contracts are sometimes not renewed after pregnancy. According to the Ricardo study, these risks are higher for people working for some low-cost air carriers than for legacy carriers.

ACTION

The Commission is actively encouraging aviation stakeholders to bring concrete actions to the *Women in Transport - EU Platform for change* to improve employment and working conditions to attract and retain women in aircrew professions.

The Commission will actively support the finalisation of the negotiations on the Work-Life Balance Directive⁸⁴, to support a more gender-balanced workforce. It will also launch two studies to help it to (1) develop a toolkit for primary and secondary school teachers to fight gender stereotypes and raise awareness about transport professions among young people; (2) identify good practices on how to organise rosters in the best family friendly way, to be made available to all stakeholders.

5. PROMOTING AN ACTIVE AND COMPREHENSIVE SOCIAL DIALOGUE

The Commission is fully committed to supporting the European social dialogue, as reflected in the eighth principle of the European Pillar for Social Rights⁸⁵ and the Joint Statement on a New Start for Social Dialogue of 27 June 2016⁸⁶. The European Sectoral Social Dialogue Committee in civil aviation covers three working groups: aircrew, ground handling and air traffic management⁸⁷.

The major challenges that this Committee has identified include the absence of a global level playing field, the increasingly competitive environment and the structural changes in forms of employment and the development of the single European sky initiative⁸⁸.

In this context, it is important to stress that, to find agreed solutions to industrial demands and interests, social dialogue at European level requires representativeness, the mutual recognition of social partners and the willingness to enter into mutually binding negotiations. The lack of

⁸² Alternative to direct and permanent contracts.

⁸³ According to the survey 59% of cabin crew and 69% of pilots employed directly with an air carrier stated that they had access to maternity/ paternity pay in accordance with applicable law. 48% of cabin crew and 48% of pilots employed via an intermediary confirmed that they have access to maternity/ paternity pay in accordance with applicable law.

⁸⁴ Proposed on 26 April 2017

⁸⁵ https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en

⁸⁶ ec.europa.eu/social/BlobServlet?docId=16099&langId=en

⁸⁷ <http://ec.europa.eu/social/main.jsp?catId=480&langId=en&intPageId=1829>

⁸⁸ The work of the SSDCs is supported through the organisation of meetings and the funding of projects following European calls for proposals.

representativeness of the airlines since 2017⁸⁹ has weakened the possibility to have a meaningful European social dialogue.

Other positive signs of greater consultation of the European social partners can be mentioned. Article 115 of the New Basic Safety Regulation on the rulemaking procedure and consultation mechanism requires involving the EU social partners and other relevant stakeholders when consulting on the possible social impact of regulatory proposals of the Agency.

ACTION

The Commission will continue to actively support and facilitate the social dialogue between representatives of the airlines and aircrews, including between the European social partners in the civil aviation field in the context of the European Social Dialogue Committee.

The Commission encourages the social partners to ensure the appropriate representation of airlines and aircrews to make the best use of this tool to find voluntary and mutually satisfactory solutions to the challenges they face.

It will continue to provide regular assessments of the social partners' organisations involved in social dialogue through the European Foundation for the Improvement of Living and Working Conditions representativeness studies. A study in the civil aviation sector will be launched in 2019.

6. CONCLUSION

In producing this report, the Commission has drawn on the input received from all interested parties since 2015, in particular at the high-level conference that the Commission organised that year⁹⁰. The Commission has also drawn on the findings of the Ricardo study, earlier studies and its regular exchanges with stakeholders over the past 3 years.

The air transport sector is still a major and generally attractive employer for aircrew but has undergone and continues to undergo profound structural changes. Whereas labour and social rules remain largely regulated at national level, EU legislation and procedures exist today to protect aircrews, while ensuring their freedom to move and work in the EU.

This report shows the need to maintain a strong social agenda to support air transport. It is in the common interest of all parties involved, including airlines and their staff and passengers and in the interest of connectivity that EU aviation remain competitive and socially responsible.

Delivering on this agenda is not something the Commission should do on its own. Member States, the Commission, the other EU Institutions, individual airlines, employers' and aircrew organisations, both at EU and national level, should work together, in line with the principles of the European Pillar of Social Rights, towards achieving socially responsible air transport

⁸⁹ Until 2017 the airlines were represented by three organisations representing different segments of the market, legacy, leisure and regional airlines. Since the legacy airline organisation (AEA) ceased its activities, it was not replaced in the social dialogue committee. Some airlines, including low cost carriers, have recently requested to become members of the social dialogue committee but at the moment of writing this report their membership has not yet been confirmed by the committee.

⁹⁰ https://ec.europa.eu/transport/media/events/event/high-level-conference-2015-social-agenda-transport_en

where safety, sustainable growth and competitiveness are enhanced while social rights are safeguarded.

Better enforcement of EU and national rules is essential in all forms of employment of aircrews. This is primarily a matter for the Member States, their relevant authorities and their national courts. Proper enforcement is crucial to avoid bogus self-employment and other practices which constitute abuse or circumvention of applicable law, and to ensure a level playing field. The Commission remains committed to support Member States in their task.

HORIZONTAL ACTIONS

In 2019, the Commission will organise a high-level workshop with all interested parties to take stock of the progress made on the social agenda for aircrew since 2015 and to help it identify possible ways forward.

The Commission will convene an ad hoc group of Member State experts dealing with aviation and labour law matters to identify best practices ensuring a level playing field and quality working conditions. The expert group will also be given the task *inter alia* of taking stock of the actions listed in this report, involving the social partners wherever appropriate, and advising the Commission and the Member States on how labour law may be appropriately enforced in aviation.