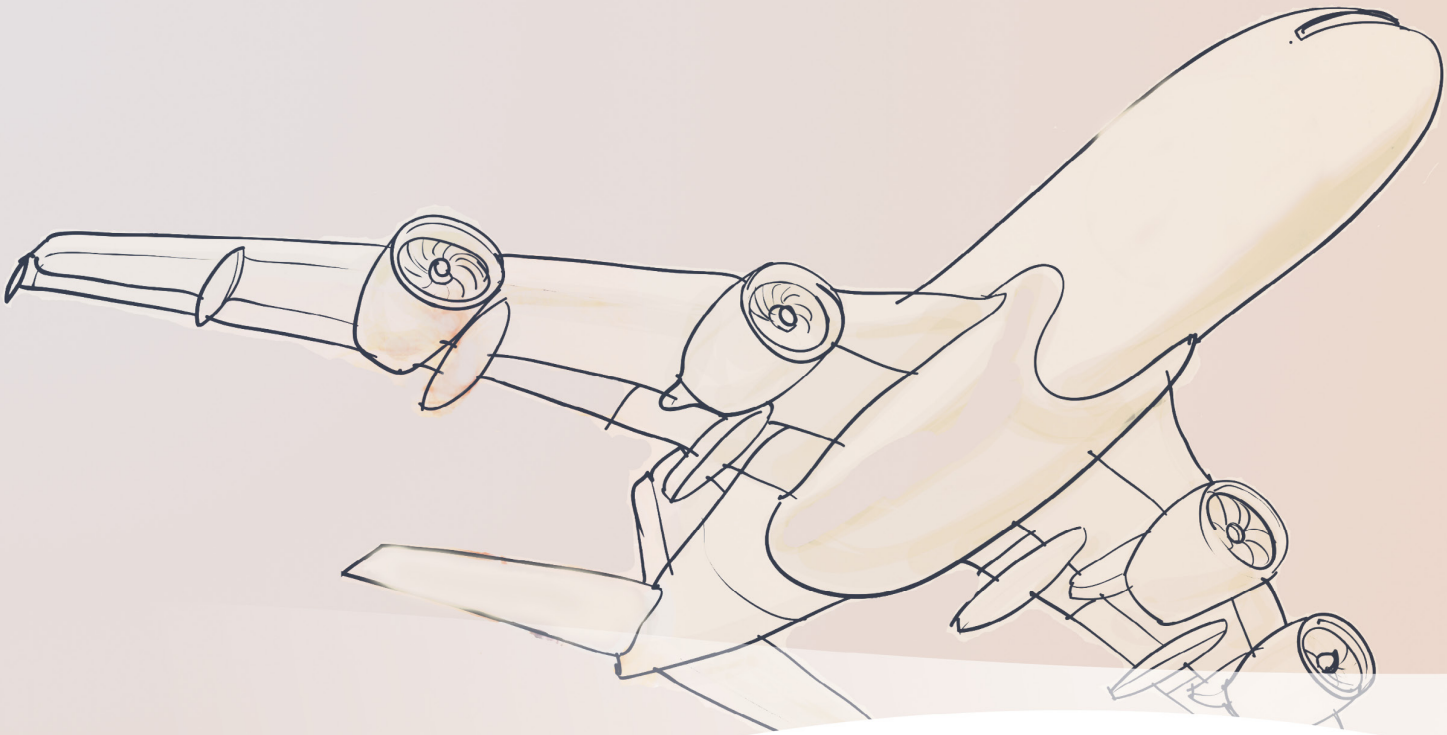
Atypical Employment in Aviation

Final Report



with financial support of :

European Commission

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Disclaimer

These data are the result of an anonymous online survey disseminated by the European social partners in the aviation sector and within the secure environment of an internal network site for pilots. By making use of these channels a large number of pilots could be reached. The survey took into account the response freedom of respondents. Some survey questions were developed as open questions asking the respondents to give their personal vision. The data predominantly indicate what answers respondents gave to the questions contained in the online survey. They do not represent the point of view of the administrators of the internal network site for pilots, nor of the European social partners, nor of Ghent University. None of these instances are responsible for using the information which this document contains.

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This study was financed by the European Social Dialogue Committee.

ECA, AEA and ETF have executed the Grant Agreement concerning the action entitled "Atypical forms of aircrew employment in European aviation industry (with a focus on bogus self employment) with the number VS/2013/0346.

Subsequently, the Action was granted to Ghent University, who carried out the study.

SUGGESTED CITATION:

Y. Jorens, D. Gillis, L. Valcke & J. De Coninck, 'Atypical Forms of Employment in the Aviation Sector', European Social Dialogue, European Commission, 2015.

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LIST OF ABBREVIATIONS

AEA	Association of European Airlines
CJEU	Court of Justice of the European Union
CLA	collective labour agreement
EASA	European Aviation Safety Agency
ECA	European Cockpit Association
ETF	European Transport Workers' Federation
Eurofound	European Foundation for the Improvement of Living and Working Conditions
FTL	flight and duty time limitations
LCC	low-cost carrier
LFA	low-fare airline
PPRuNe	Professional Pilots Rumour Network
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

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. 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 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.

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 experts which, amongst others, elucidate the legislative approach to atypical forms of employment in these 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 gave stated that they are between 30 and 40 years old (30%) and that they have more than 10 years (<1000 flight hours) 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 an 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.

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 of the airline based on e.g. objections regarding flight safety, liability, or regarding health & safety*'. Of these 20%, 83% indicated that they fly for an LFA. Furthermore, another 26.6% 'generally' disagrees with said statement, of which 90% (!) indicated they fly for an 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 group 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.

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.

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 even 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.

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.

We notice 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.

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. *First*, in our view, the efficient and effective monitoring of the compliance with these provisions is a spearpoint

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 enhanced 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 a 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 with staff legitimately applying safety procedures and according 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 spearpoint 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.

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.

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 (based in) third countries only being the dawn thereof.

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 – legitimate concerns with regard to safety issues. In this respect, a fair balance between safety provisions, employers' and workers' rights is of paramount importance.

INTRODUCTION

The establishment of the internal market has had a profound impact on numerous employment sectors – not in the least upon the aviation industry. Interestingly, however, the liberalisation of the aviation industry is – contrary to other sectors – a relatively young phenomenon. Prompted by a number of events, deregulation commenced in 1987 by means of three successive deregulatory reform packages. These reform packages had profound consequences for business structures within European aviation and for employment relations with respect thereto. This is exemplified by the emergence of low-cost carriers (LCCs), as a result of which new short-haul destinations became feasible and affordable, rendering air travel accessible to a new clientele. Via substantial cost-cutting techniques, LCCs, as well as network carriers seeking to retain a competitive edge, have ensured that the aviation landscape has changed, providing consumers with an abundance of choice in air travel and associated services.

Mindful of the foregoing, the question arises what the effect is of cost-cutting efficiency and the liberalisation of the aviation industry generally on the business structures of European airlines, and what the subsequent effect of this is on employment relations of pilots and cabin crew members. Therefore, the European Cockpit Association, the Aircrew Working Group of the Sectoral Social Dialogue for Civil Aviation, the Association of European Airlines and the European Transport Workers' Federation commissioned a study on the existence of *atypical work* in the European aviation industry. Subsequently, this study analyses atypical work in selected Member States, the effect of atypical work on safety and company cultures, the means by which atypical work is regulated and combated insofar necessary, as well as its implications on individual and collective representation. This study is composed of five distinct sections.

Part 1. Scope and Methodology makes introductory observations pertaining to the objective and methodology of this study. Next, **Part 2. The European Aviation Industry** gives insight into the contemporary aviation industry in Europe, by highlighting the main events which acted as a catalyst and facilitator for its current competitive nature. Supplementing the foregoing, an introduction is provided of the legal framework which has been established as a result of the liberalisation of the aviation market. Here, emphasis is placed on those topics that affect the employment relations of pilots and cabin crew in particular. These topics are discussed in depth at a later stage in the report. This introduction is elaborated upon by referencing several significant studies that were previously conducted within this field. This first section furthermore focuses upon the regulation of atypical employment from a European regulatory perspective as well the regulation thereof in eleven selected States. Within this vein, use is made of country reports which, amongst others, elucidate the legislative approach to atypical employment in these respective States, the measures employed to combat abuse, as well as perceived advantages and disadvantages of atypical employment. The plethora of sources which serve to provide an initial introduction into the contemporary European aviation industry, also facilitate the identification of areas of concern pertaining to employment relations of pilots and cabin crew members. These areas of concern again serve as an introduction into the next section of this report.

Following the chapter concerning the contemporary European aviation industry, the next section of this report (**Part 3. Survey Findings**) elucidates the findings from a survey. This survey was directed at pilots in Europe and concerned, amongst others, the quality of working conditions, motivation,

perceived advantages and disadvantages, as well as the consequences of being employed via atypical forms of employment. The survey was composed of three main parts and one additional open question. The first part sought to collect general information about the respondents such as age, the employment relation with the airline they work for, and the level of experience. In the second part of the survey, respondents were asked about their social situation and working conditions. For example, questions were asked about the received wages/remuneration, the applicable labour law and effects thereof on social security entitlements. In these first two parts, all questions were multiple-choice. However, where deemed relevant or necessary, respondents were furthermore given the possibility to provide additional information via open subquestions. The third part of the survey consisted of questions about the satisfaction with respect to the working conditions, the level of competition between colleagues experienced or the extent to which the respondents feels supported by the airline in the event of concerns. For the majority of questions in this last part, respondents were asked to indicate to what extent they agreed with each statement on a 5-point Likert scale, ranging from 1=strongly disagree to 5=strongly agree. Finally, in an additional open question pilots were given the opportunity to provide general remarks.

The following section of the report (**Part 4. Analysis of the findings**) seeks to analyse the survey findings as discussed in *Part 3. Survey Findings.* It references and elaborates upon the legislative framework and the findings from the country studies briefly introduced in *Part 2. The European Aviation Industry.* In doing so, certain concepts and consequences of the liberalised aviation market are identified and discussed with regard to the implications thereof for the employment relations of pilots and cabin crew. In particular, the analysis within this section focuses upon the regulation of various types of employment in the aviation industry, and the impact this has on the employment experience vis-à-vis pilots and cabin crew members. Additionally, the analysis focuses on the notion of legislation shopping and the applicable social legislation as a result of the liberalised aviation industry. The latter is furthermore supplemented by an analysis with respect to the applicable labour law and additionally, the applicable social security legislation with respect to the notion home base. Lastly, an analysis is made of the impact of atypical employment with respect to the taxation of pilots and cabin crew members.

Mindful of the foregoing, the final section of this report (**Final conclusions and recommendations**) formulates certain recommendations that suggest solutions with regard to legal issues and identify areas of concern. Moreover, recommendations are developed with respect to the safeguarding of rights bestowed upon pilots and cabin crew, both from a European and national perspective. This final section ultimately concludes by identifying areas of concern that may require further research and analysis.

THEORETICAL ANALYSIS AND NATIONAL REPORTS

PART 1. SCOPE OF THE STUDY AND RESEARCH METHODOLOGY

The liberalisation in the aviation industry has increased competitive pressure, which has led to growing flexibility and a broad range of working arrangements implying outsourcing and downsizing that deviate from more traditional forms of employment relationships. While several of these tendencies aim to safeguard the economic survival of the aviation sector, worries exist about the impact of these changes on the protection of the personnel in the aviation industry.

Whereas several studies have been conducted that look into the impact of these new forms of employment (self-employment and bogus self-employment; agency workers etc) in several economic sectors,[1] the situation of mobile staff in civil aviation has been less the subject of academic research.

For these reasons, the Aircrew Working Group of the Sectoral Social Dialogue for Civil Aviation (applicants being the European Cockpit Association (ECA); the Association of European Airlines (AEA) and the European Transport Workers' Federation (ETF)) decided to set up a study on the situation of 'a-typical work' in the aviation industry. During the process also the Norwegian Ministry of Transport and Communications decided to join the study.

For the purpose of this study, 'atypical work' constitutes all forms of employment or cooperation between a member of the cockpit or cabin crew and an airline other than an open-ended employment contract concluded between said crew member and said airline directly. The general objective of this study is to provide social partners with objective data to assess the impact of these new forms of aircrew employment emerging in Europe, such as self-employment, temporary and temporary agency work and (chains of) subcontracting companies, and to detect abuses and identify the subjective and objective reasons that motivate airlines and crew members to use or not use forms of atypical employment.

This general objective can be divided more specifically into the following objectives:

- To investigate the existence of atypical work within the aviation sector in 10 selected Member States (Belgium, the Czech Republic, Estonia, the UK, Spain, Ireland, Germany, Austria, France and Iceland) as well as Norway and to identify the legal framework, the ways in which (the use of) they atypical work is facilitated or restricted, recent developments, as well as ways to distinguish employees, temporary agency workers, (bogus) self-employed persons and atypical work.

- To assess the legal, regulatory, administrative, organisational and practical aspects of atypical forms of employment and their impact in the aircrew sector (number of people, weight) and to study the 'supply chain factors', which favour the development of atypical work in the aviation industry. This includes understanding how airlines often work with crews who are based outside the national territory but operate habitually/occasionally within and outside of their national territory or the territory of the EU.

[1] We can refer e.g. to studies on self-employment and bogus self-employment in the construction sector (http://www.efbww.org/default.asp?Issue=Self-employment%20and%20Bogus%20Self-employment&Language=EN) or on agency workers.

- To analyse the possible impact of atypical contracts on safety and company cultures based on interviews with operators, crew, regulators and HR specialists.

- To give an overview of the measures Member States have taken to organise and control atypical forms of employment in the aircrew sector: special procedures developed by labour inspection services to control the atypical forms of employment (also when the crew is based outside the territory) and to combat possible forms of abuse of atypical work.

- To study the individual/collective representation of temporary agency workers in the selected countries.

- To prepare and conduct a survey to analyse the quality of working conditions, the motivation, perceived advantages, disadvantages and threats of aircrew working with 'atypical contracts'.

- To draft a report of the analysis made.

For the implementation of this project and in order to achieve its aims, various qualitative and quantitative research methods/tools were applied. These tools were discussed and approved by a steering committee composed by representatives of the applicant organisations.

The first important part of the project was the set-up of a survey for pilots. The survey was drafted based upon the research team's previous expertise on new and atypical forms of employment and cooperation in other sectors, and a preliminary literature review.[2] The objective of this survey was to obtain objective academic quantitative data as well as qualitative appreciations of market conditions and trends in the Member States. The final survey was published online using LimeSurvey, hosted on a server of the ICT department (DICT) of Ghent University. The introductory part of the survey clearly mentioned that the survey was set up for research purposes, the confidentiality of the data was guaranteed, and the data were only used within an academic context.

The survey was composed of three main parts and one additional open question. The first part was aimed at collecting general information about the respondents such as age, their relation to the airline they work for, their level of experience, total flight hours etc. In the second part, respondents were asked about their social situation and working conditions. For example, questions were asked about wages/remunerations, the applicable labour law and social security situation. In these first two parts, all questions were multiple-choice. Still, when we deemed it relevant or necessary, respondents were given the possibility to provide additional information via an open subquestion. In the third part, another type of questions was presented to the respondents. This part asked about e.g. satisfaction with the working conditions, the level of competition between colleagues experienced or the support they felt by the airline in case of any concerns. For almost all the questions in this last part, respondents were asked to indicate the extent to which they agreed with each statement on a 5-point Likert scale, ranging from 1=strongly disagree to 5=strongly agree.

[2] European Cockpit Association, 'Upheaval in the European Skies: Low Cost Carriers in Europe: Economic Data, Market and Pilot Demand Forecast', 2006; ELFAA, 'Liberalisation of European Air Transport: The Benefits of Low Fares Airlines to Consumers, Airports, Regions and the Environment'; The Forum of European Regional Airports and the Assembly of European Regions, 'Social benefits of Low Fares Airlines in Europe', 2007; A. Graham & N. Dennis, 'The impact of low cost airline operations to Malta', 2010, *Journal of Air Transport Management* 16. p. 127-136.

Finally, in the fourth and last section, an open question was presented in order to collect general remarks.

All questions generated quantitatively analysable data, apart from the last question, which offered respondents room for free comments. The results of the latter thus fall in the category of qualitative data.

Several measures were undertaken to guarantee that a sufficient number of surveys was completed by a number of pilots representative of the sector, as well as to guarantee that all questions were answered. The overall concern was the number of questions and the possible adverse effect on the recipients' motivation to complete the survey. This concern was countered by the finding that 75% of the respondents answered the last question. Thus, there was no systematic outfall. Nevertheless, it can be noticed that when questions were composed of different levels, the lowest levels were often filled in by a small group of respondents. This is rather the result of a funnel construction in combination with a temporary small sample outfall for that specific question. For the development of the survey the required quality tools were acquired.

The survey was first tested (in the last week of August) by a small group of pilots. Ten pilots of different countries and different airlines completed the online survey and gave us direct input about their experience doing so; going into the workability, the completeness, quality, relevance and accuracy of the survey. After the required fine-tuning the survey was ready to be presented to a wider audience.

Starting with no preconceived sample profile, we mainly used what the scientific reference books call Exponential Non-Discriminative Snowball Sampling: "*Snowball sampling uses a small pool of initial informants to nominate, through their social networks, other participants who meet the eligibility criteria and could potentially contribute to a specific study. The term 'snowball sampling' reflects an analogy to a snowball increasing in size as it rolls downhill."*[3] Advantages of this sampling method are the following:

- The chain referral process allows the researcher to reach populations that are difficult to sample when using other sampling methods.
- The process is cheap, simple and cost-efficient.
- This sampling technique requires little planning and fewer workforces compared to other sampling techniques.[4]

Furthermore, this method is mostly used for hidden populations, which are difficult to access for researchers and in research that relies on very sensitive data, as is the case in our project.[5]

The starting point for this chain reaction is of key importance. After consultation with the steering committee we could conclude that the Professional Pilots Rumour Network (PPRuNe)[6] satisfied all

[3] D. Morgan, 'Snowball Sampling', in L. Given (ed.), *The SAGE Encyclopedia of Qualitative Research Methods*, 2008, Los Angeles, CA: SAGE. p. 816–817.
[4] X., 'Snowball sampling', 2014, available at https://explorable.com/statistical-sampling-techniques, consulted 2 December 2014.
[5] M. Kurant, A. Markopoulou & P. Thiran, 'On the bias of BFS', 2010, International Teletraffic Congress, available at http://arxiv.org/abs/1004.1729.

requirements. The applicants of the project (ECA, AEA and ETF) and their partners were responsible for the actual dissemination of the survey. They introduced the survey on the PPRuNe website using our message (similar to the introductory message of the online survey), and sent this to their partners and the trade unions. These actors in turn sent the message out with their support to their members. Recipients had one month (from 1 September until 1 October 2014) to complete the survey. After two weeks a reminder was sent using the same channels.

It was of utmost importance that a sufficiently large group of respondents completed the survey. How many pilots are actually flying? To answer this question, it is first of all necessary to have a good understanding of the term representativeness. *"Representativeness refers to how well the sample drawn for the questionnaire research compares with (e.g., is representative of) the population of interest. Can the reader evaluate the study findings with assurance that the sample of respondents reflects elements of the population with breadth and depth?"*[7]

One of the main characteristics of the snowball method is the fact that there is no control over the sample; the response cannot be adjusted with the pure view of representativeness.

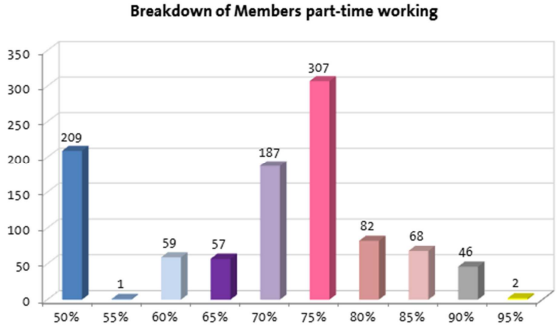
After a thorough cleaning of the primary dataset, the number of respondents was decreased from 13008 to 6633. In a first phase, approximately 4200 surveys were deleted. The main reason for this deletion was that all of these respondents "completed" the survey within a time span of on average 35.01 seconds. The total time which the selected respondents in this study needed to fill in the survey completely was on average 726 seconds. This means that this group of respondents would have been "able" to read and fill in a 13-page long survey in the same time span during which other pilots are only able to read the introduction of the survey. Moreover, of this deleted group of surveys, 2137 respondents stated that they worked for the same low-cost carrier (LCC).[8] In a second phase, another set of data was excluded, for instance because the survey had been started but no questions were answered. This concerned 2175 respondents.

To assess the representativeness of the respondents per airline in our research we relied on data provided by the client (ECA) and its contacts. This also gave us an overview of the pilots working in Europe. The confirmed figures are (for the airlines where we had at least 5 participants):

[6] http://www.pprune.org/.
[7] D. Fincham, 'Response Rates and Responsiveness for Surveys, Standards, and the Journal', 2008, *American Journal of Pharmaceutical Education.* p. 43.
[8] The data filled in state *Ryanair*. There are no other supporting elements that allow us to conclude that all of these deleted questionnaires were completed by pilots flying for *Ryanair*.

Airline	Frequency	Number confirmed by airlines[9]
Ryanair	650	3000
Air France	627	3864
KLM	565	2800
Scandinavian Airlines	429	1500
EasyJet	223	2400
Norwegian	193	1000
Lufthansa	190	4500
Cargolux	124	468
TUI Travel Belgium	112	500
Transavia	102	655
Brussels Airlines	101	507
Wizz	75	595
British Airways	73	3662
Air Berlin	70	1300
Swiss	69	1340
HOP	58	870
Cathay Pacific	55	
Flybe	54	564
DHL	54	217
West Atlantic airlines	53	60
Tyrolean	49	910
Croatia Airlines	44	121
Icelandair	43	335
Emirates	42	2237
TNT	41	

[9] ECA asked the airlines and their partners (e.g. BALPA) to confirm the number of pilots that were flying for them (or are a member). This was a question separate from contracting types. If in our study the number of respondents of a certain airline is higher than the confirmed number of pilots, this probably means that the airline works with seasonal hiring of pilots. The respondents answering are, at that time, identifying with that company. If we did not receive any response to our question, we left the second column open. We only wanted to provide data confirmed by the airlines and the partners of ECA. They are not necessarily expressed in FTE, as it is well known that there is a big diversification in part-time contracts as shown in the following graph, provided by BALPA.



Braathens Regional	38	130
TAP	37	700
CHC	36	190
Arke	36	155
Malmö Aviation	36	103
Wideroe	33	500
Thomas Cook	32	494
Jetair	32	
Germanwings	30	700
Iberia	29	1300
Thomson	28	866
Quatar Airways	26	
Monarch	24	800
Martinair	24	240
AirAtlanta	24	221
Luxair	23	160
Vueling	22	750
SunExpress	22	
Etihad Airlines	21	
NIKI	20	222
Tarom	20	209
Condor	19	750
Jet Time	19	220
Nextjet	19	
LOT Polish	18	340
Virgin	17	845
Stobart Air	17	
BMI Regional	16	121
Jet2.com	15	514
Loganair	15	172
Primera Air	13	80
Amapola	13	43
Turkish Airlines	12	3260
Star Air	12	120
Lufttransport	12	
NetJets	11	2000
SunAir	11	40
Air Contractors	11	
AeroLogic	11	
Europe Airpost	11	

TwinJet	11	
Eastern Airways	10	80
CityJet	10	
Germania	10	
Finnair	9	720
PrivatAir	9	120
Air Austral	9	
airBaltic	9	
Nova Airways	9	
Air Europa	8	575
Scandinavian Air Ambulance	8	51
Bristow Helicopters	7	295
Sundt Air	7	20
Corsair International	7	
Lion Air	7	
Susi Air	7	
INAER	6	450
Portugalia Airlines	6	150
Farnair	6	120
Aigle Azur	6	
Air Dolomiti	6	
Aurigny	6	
ExecuJet	6	
Open Skies	6	
Air Nostrum	5	380
Swiftair	5	180
Corendon Dutch Airlines	5	100
Edelweiss	5	100
Volotea	5	80
Aegean	5	
Avies	5	
XL Airways France	5	
SkyWest	5	
VistaJet	5	
	5196	52245

It can be stated that we achieved a successful response rate[10] of more than 10% of the known population of pilots currently flying professionally within Europe. Our sample consists of 6633 respondents in a known population of 55,000 to 70,000 pilots (see the confirmed numbers above). This high participation rate makes it possible to give a clear overview of the current aviation sector. Nevertheless, this is no guarantee that all cases in this sector are covered or that due to possible higher participation rates of certain types of pilots, the outlines of this study may show some more variation than might be prevalent in the sector. The data in this study is in all cases interpreted within the case itself. Nevertheless, in order to be able to interpret the meaning behind the figures, other cases are also presented.

The second part of the study consisted of national reports with regard to 10 selected European States and Norway. These country studies were performed by independent experts in each of the countries and coordinated and supported by the project team of Ghent University. The objective of these national studies was to analyse the situation of air crew (i.e. both cabin and cockpit crew) in these selected countries.

The country studies looked at the global situation of atypical employment in the country concerned in general and more in particular in the aviation sector (and which examples can be found in case law, the press etc). These country studies also examined how these different forms of employment are regulated and what the impact of these types of employment is on the conditions of employment and on the social protection of the persons concerned. Furthermore, these studies examined the number (and its evolution) of different types (or the ratio of the different types) of atypical employment in the country and how bogus situations are regulated and checked and the relevant legislation enforced. Have national inspection services enacted special measures to combat these forms of employment?

The Ghent team designed the outline of a template to fill in any gaps that could arise from the analyses of the quantitative data of the questionnaire, allowing to further substantiate the conclusions.

The reports are based on desktop research, but have been supplemented by some interviews which our national experts held with the main stakeholders. The interviews are to guarantee that a complete overview of the situation in the sector could be achieved.

For that reason, interviews were held with at least a representative of the national organisations for employers; a representative from the pilots; a representative from the cabin crew; someone from a big, established airline; someone from an LCC; and someone from the labour inspection services. It was decided that it might also be interesting to meet representatives from the major broker companies and the Civil Aviation Authority. In some countries additional interviews were held.

[10] *"A survey's response rate is the result of dividing the number of people who were interviewed by the total number of people in the sample who were eligible to participate and should have been interviewed."* See 'Response Rates – An Overview', 29 September 2008, American Association for Public Opinion Research (AAPOR), available at http://www.aapor.org/responseratesanoverview.

PART 2. THE EUROPEAN AVIATION INDUSTRY

I. EVOLUTION: REGULATION TO LIBERALISATION

The European single market is one of the greatest achievements of the European Union through its positive effects by bringing down barriers, creating more jobs and increasing overall prosperity.[11] Whilst the impact of the single market was adamantly clear in other economic sectors, in the European aviation sector its impact and its liberalisation is a relatively young phenomenon. Prior to 1987, the European aviation industry was highly regulated, inflexible, and consisted predominantly of bilateral agreements between Member States.[12]

Initially excluded from EU policy, the European aviation industry did not benefit from a single regulatory aviation body, and competition amongst Member States and airlines was scarce.[13] The bilateral arrangements which shaped the European aviation industry hardly allowed for the existence of non-flag airlines, entailing that only a limited number of destinations were available by air transport.[14] Moreover, the strict national regulation of the European aviation industry with respect to the available routes, the types of aircrafts to be used and the frequencies of travel resulted in, amongst others, steep fares, rendering aviation an unattractive means of transport.[15] Not inconceivably, this state of affairs called for reform within the European aviation industry, particularly so in view of the adoption of the Rome treaty. The Rome treaty called for increased free competition within Europe, to be achieved by the alleviation of protective tariffs and barriers with respect to both goods and services. Clearly this ideological perspective stood in stark contrast with the non-competitive aviation policy that had been predominant in Europe thus far. However, whilst the Common Transport Policy underwent further liberalisation, air transport, as an exception thereto, initially remained steadfast in its non-competitive nature.[16]

The French Merchant Seamen Case in 1974 marked a significant step in the evolution towards a liberalised aviation policy in Europe.[17] In its judgment, the Court of Justice of the European Union (CJEU) held that the principles enshrined in the Treaties are equally applicable to the air transport sector, seemingly giving the European Commission the power to regulate the latter.[18] This gave rise to the first Civil Aviation Memorandum of 1979-1981, which endeavoured to increase entry and innovation within the field of civil aviation in Europe, as well as reduced airfare and additional cross-border services.[19] Supplementing this first Memorandum, the second Civil Aviation Memorandum of

[11] http://ec.europa.eu/internal_market/top_layer/historical_overview/index_en.htm.
[12] K. J. Button, *Wings across Europe: towards an efficient European air transport system*, 2004, Aldershot: Ashgate. p. 95; E. M. Giemulla, H. Van Schyndel & A. M. Donato, 'From Regulation to Deregulation', in E. M. Giemulla & L. Veber, *International and EU Aviation Law: Selected Issues*, 2011, Alphen aan den Rijn: Kluwer Law International. p. 129-173.
[13] K. J. Button, *Wings across Europe: towards an efficient European air transport system*, 2004, Aldershot: Ashgate. p. 95.
[14] E. M. Giemulla, H. Van Schyndel & A. M. Donato, 'From Regulation to Deregulation', in E. M. Giemulla & L. Veber, *International and EU Aviation Law: Selected Issues*, 2011, Alphen aan den Rijn: Kluwer Law International. p. 129-173.
[15] *Ibid.*
[16] *Ibid*. p. 99.
[17] *Ibid*. p. 99-102.
[18] Judgment of 4 April 1974, Commission / France (167/73, ECR 1974 p. 359)(EL1974/00179 PT1974/00187 ES1974/00179 SVII/00257 FIII/00259)ECLI:EU:C:1974:35.
[19] K. J. Button, *Wings across Europe: towards an efficient European air transport system*, 2004, Aldershot: Ashgate. p. 100-101.

1984 sought more flexibility for airfare.[20] In addition, the Memorandum explained that whilst the existing bilateral agreements between national airlines were to remain untouched, additional airlines were to be granted operating rights for unused flight routes.[21] The Second Memorandum furthermore envisaged control, albeit limited, of inter-airline agreements.[22] The aforementioned Memorandums pertaining to civil aviation in Europe were supplemented by a study carried out in 1981, which elucidated the limitations inherent to civil aviation in Europe. These actions were furthermore strengthened by the first election of the European Parliament in 1979, which resulted in the establishment of an Intergovernmental Conference. This conference gave rise to the Single European Act, which sought to solidify the internal market and thus, equally so, to address the restrictions inherent to European air transport. A last element which paved the path for general liberalisation in the aviation sector in Europe concerned the *Nouvelles Frontieres* case before the CJEU,[23] about the inflexible nature of airfares. [24]

Prompted by the foregoing events, the liberalisation of the European aviation industry with increasing EU involvement was effectuated from 1987 to 1997 and was characterised by three distinct stages.[25]

The first reform package in 1987 resulted in deregulation, and allowed the EC to apply anti-trust rules directly to airline operations, albeit limited to inter-state operations. Additionally the reform resulted in secondary European legislation on pricing freedom. However, it need be noted that the first reform package did not result in effective free competition. The second package in 1990 allowed for further deregulation. It is the third reform package which embedded free competition in the European aviation industry. The third reform package was ultimately revised in 2008 and merged into one single regulation, i.e. Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community, and thus culminated in a single market for aviation.[26] For that reason it is not surprising that, in tandem with the development of free competition, the European legislature paid increasing attention to matters within aviation that would benefit from European support.[27] Particularly, pricing and tariffs, as well as market access, licensing, capacity limits, traffic rights, slot allocation, bilateral agreements with parties outside of the EU and reservation systems were perceived as areas of interest for European coordination. In addition, interest was sparked for coordination with respect to ground handling, cargo services, competition rules and merger regulation as well as (the legitimacy of) state aid.[28]

Amidst the on-going reforms, the CJEU was called upon to rule on the applicability of general EU treaty rules upon the aviation sector, as a result of various bilateral 'open skies' arrangements which

[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*
[23] Judgment of 30 April 1986, Ministère public / Asjes (209 to 213/84, ECR 1986 p. 1425)(SVVIII/00549 FIVIII/00571) ECLI:EU:C:1986:188.
[24] *In casu,* the CJEU held that European provisions concerning the regulation of competition are equally so applicable to the European aviation industry. Moreover, the judgment elucidated the powers of the European Commission with respect to aviation, despite not having explicitly been included within the context of transport generally.
[25] E. M. Giemulla, H. Van Schyndel & A. M. Donato, 'From Regulation to Deregulation', in E. M. Giemulla & L. Veber, *International and EU Aviation Law: Selected Issues*, 2011, Alphen aan den Rijn: Kluwer Law International. p. 129-173.
[26] 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.
[27] P. S. Dempsey, *European Aviation Law*, 2004, The Hague: Kluwer Law International.
[28] *Ibid.*

had been concluded by EU Member States with the United States.[29] This was of particular importance as it sought to elucidate the competence of the EU in matters concerning aviation transport policy, which until then had been somewhat ambiguous. However, the CJEU held in the 'open skies' proceedings that indeed the EU was competent in matters concerning aviation, pursuant to the effectuated reforms, and subsequently held that the bilateral agreements adopted by selected Member States and the United States violated EU law on various accounts. The judgments concerned furthermore solidified the liberalised approach which was being exercised by European Member States with regard to the respective aviation industries.

As a consequence of the liberalisation of the European aviation industry, airlines were henceforth able to independently choose routes, fares, and schedules. In addition, the civil aviation industry transformed fundamentally pursuant to the entry, growth and domination of low-fare airlines (LFAs),[30] which were generally based upon the model of Southwest Airlines in the United States.[31] As these national network airlines initially handled all aspects of the services associated to flying and as no need existed to call upon external organisations to provide additional services, LFAs employ a different business model[32] as summarised in Figure 1, which entails significant cost-cutting techniques.

Due to the emergence of LFAs and the cost-cutting techniques they employ, new markets opened up, with new routes predominantly for leisure travellers, and demand for low-fare air transportation grew considerably.[33] With the evolution of the low-cost model, competition has intensified both within the low-fare sector and LFAs and the 'network' or 'legacy' airlines. Government involvement was reduced to a minimum, to the benefit of the consumer, as consumer choice increased due to the point-to-point business model used by LFAs. This business model, distinct from the networks used by network airlines, operates solely between two destinations, thus allowing for transport to regional airports. In addition, the point-to-point business models allow for lower fares, again to the benefit of consumers generally, all the while attracting a new group of consumers that were previously hindered in enjoying air transport as a result of the steep fares imposed by national network airlines.
Equally so, the emergence of low-cost carriers (LCCs) has been beneficial for airports due to the emergence of low-cost airports making additional regions accessible by air transport. It has furthermore resulted in increased regional development and a general rise in tourism across Member States. Moreover, it has contributed to increased employment with respect to the direct

[29] B. F. Havel, *Beyond Open Skies: A New Regime for International Aviation* - Volume 4 of Aviation Law and Policy Series, 2009, Alphen aan den Rijn: Kluwer Law International. p. 57.
[30] LFAs are often known as low-cost airlines (LCAs). The distinction is not insignificant. Whereas to the public they present themselves as LFAs, in reality they are of course LCAs, and costs are cut wherever possible.
[31] G. Harvey & P. Turnbull, 'The development of the low cost model in the European civil aviation industry', European Transport Workers' Federation, 2012. p. 20.
[32] See, for example, Air Scoop, 'Ryanair's Skyrocketing Success: Flying on Thin Air?', 2010; and Air Scoop, 'Ryanair's Business Model 2011', 2011, both available at www.airscoop.com; F. Alamdari & S. Fagan, 'Impact of the Adherence to the Original Low-cost Model on the Profitability of Low-Cost Airlines', *Transport Reviews* 25(3). p. 377-392; G. Harvey & P. Turnbull, 'The development of the low cost model in the European civil aviation industry', European Transport Workers' Federation, 2012.
[33] G. Harvey & P. Turnbull (2012) *ibid.* p. 6.

operation of the airport,[34] as well as with respect to ancillary services such as the establishment of shops, restaurants, and parking.[35]

The combination of these two types has further led to the emergence of a third type of airline, which uses hubs and a network for long-haul flights, and the point-to-point model for short-haul flights,[36] which is demonstrative of the convergence, insofar possible, between the two predominant business models in European aviation.

Figure 1. Low-fare airlines vs network airline business models

Low-fare airlines (LFAs)	***Network airlines***
Point-to-point	Network/hub-and-spoke
Secondary/regional airports	Primary airports
Multi-European bases	Home country hub
No interlining	Interlining and code sharing
High aircraft utilisation/quick turnaround	Lower aircraft utilisation on short-haul flights
Single aircraft type (e.g. B737-800 or A319)	Mixed fleet
High seat density	Mixed class cabin
Pay-for-service items (e.g. checked baggage)	Inclusive service/price
Exclusively one-way fares	Round trips are most often cheaper
Exclusively direct selling (telesales/internet)	Different channels, for example: Travel agents,…

[34] European Low Fares Airline Association, 'Social Benefits of Low Fares Airlines in Europe', York Aviation, 2007.
[35] European Low Fares Airline Association, 'Liberalisation of European Air Transport: The Benefits of Low Fares Airlines to Consumers, Airports, Regions and the Environment', 2004.
[36] Danish Transport Authority, 'Report of the working group on "Social dumping" in aviation', Copenhagen, 2014.

II. CURRENT STATE OF AFFAIRS

A. CASUALIZATION OF THE WORKFORCE IN AVIATION

Quote pilot[37]

I have seen the pilot profession terms and conditions in Europe deteriorate constantly over the last 15 years. Today young people are tricked into the business by an industry advertising career content that does not exist anymore.

The entire industry is in a negative spiral with decreasing conditions, salaries, standards and competence. Mostly because low cost airlines sell too cheap tickets due to too tough competition, and many smaller ones go bankrupt but another one pops up just as quickly with even cheaper tickets and hence worse conditions for employees. This makes the larger airlines cut their prices and also losing money. The pilots conditions are constantly made worse since there are way more pilots than jobs, and airlines hire cheap pilots rather than skilled and/or experienced pilots.

In this climate of liberalisation, LFAs have not only grown; some have grown profitably. Within this context of increased competition, however, continuous efforts were made by both (former) national airlines as well as newly emerged (low-cost) airlines, to reduce costs to the greatest extent possible.[38] While most LFAs typically enjoy a 30-50% cost advantage over their network rivals on short-haul routes, for some LFAs (e.g. *Ryanair*) the cost advantage is even of the order of 60%. They have done so not only because of organic growth but also, even predominantly so, through mergers and acquisitions.[39] In order to allow passengers to pay lower fares, airlines cut costs per passenger (cpp). This is done by several means: e.g. by a ruthless adherence to the mantra of low costs (e.g. reducing the size of the in-flight magazine from an A4 to an A5 format to save weight/fuel and printing costs, and cutting the weight of trolleys and seats to save fuel);[40] a rationalisation of routes, of the aircraft fleet; by raising the number of passengers on each flight; less expensive airports; the unbundling and wet leasing of different components of air travel (luggage, food and drinks, insurance etc); but also based on labour cost cutting strategies.[41] Equally so, advances in technology have oftentimes rendered the availability of direct staff redundant.[42] However, the distinction between the low-fare and the network business models is not clear-cut. There is currently a degree of 'convergence' between network airlines and LFAs on short-haul routes. For example, network airlines have adopted many of the cost-saving business practices of LFAs, albeit with a greater concern to maintain the service standards expected by customers. At the same time, LFAs increasingly target business passengers and primary airports in order to grow revenue, with priority boarding, assigned seating

[37] These quotes are taken literally from the comments given by the respondents of the survey. Spelling mistakes have, however, been corrected.
[38] Steer Davies Gleave, 'Study 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', European Commission - DG Move, 2012. p. 79-91; Booz&Co, 'Effects of EU Liberalisation on Air Transport Employment and Working Conditions', European Commission - DGl for Energy and Transport, 2009. p. 9-10.
[39] G. Harvey & P. Turnbull, 'The development of the low cost model in the European civil aviation industry', European Transport Workers' Federation, 2012, p. 12.
[40] Irish national report.
[41] *Ibid*. p. 13.
[42] *Ibid.*

and other 'innovations' borrowed from the network airlines, albeit with a continuing (overriding) concern to maintain low fares. Many network airlines have also set up low-cost subsidiaries to operate 'feeder' services to the airline's major hub(s),[43] typically on lower pay and benefits,[44] or franchise routes to other (lower-cost) airlines.

Quote pilot

There is a constant focus on cost reduction – caused by competition from low cost carriers. This creates fatigue and cynicism among pilots. A so called "race to the bottom" in terms of pay & working conditions.

Quote pilot

I used to work for a low cost company for almost 3 years and I have to say that the only way to stop this industry from becoming like the shipping or trailor business, with social dumping and taking in cheap labour from other countries and having everybody self-employed, is to convince the leaders in the EU to enforce more strict laws. But they don't seem to care about that at all. If there is one thing I have learned working for this company it is that they will always twist and bend the regulations to find loopholes to earn more money and lower the standard of the whole industry and put more responsibility on the individual.

One of the most significant cost-cutting techniques in the contemporary European aviation industry is increased labour productivity,[45] which should be understood in tandem with the 'casualization' of the aviation workforce. Within this context, casualization of employment refers to a process in which open-ended employment contracts and relations are substituted with other types of employment, i.e. atypical relations. As aforementioned, *in casu,* atypical relations refer to all forms of employment or cooperation between crew members and an airline other than an open-ended employment contract between the crew member and the airline directly. In particular, the liberalisation of the European aviation industry served as a catalyst for an increased use of outsourcing for a myriad of tasks as well as for a surge in the use of atypical employment contracts.[46]

In this respect, the liberalised single market for air transport in Europe followed a trend existing throughout all economic sectors in the European labour market. Indeed, over the course of the past few decades, the European labour market has experienced some fundamental changes: particularly a growing flexibility, fragmentation and casualization of employment, whereby employers rely increasingly upon outsourcing and the downsizing of the workforce. Consequently, the labour market is increasingly characterised by atypical employment yielding great diversity amongst workers, who all contribute to a growing pan-European labour market. It cannot be ignored that this changing labour market and the spread of practices such as outsourcing and contracting out has led to a growing interest of employers for workers with a non-traditional labour relationship.

[43] Examples include *Lufthansa*/*Germanwings*, *Air France-KLM*/*Transavia* and *Iberia*/*Iberia Express*.
[44] Cabin crew employed by *Germanwings*, for example, are paid 40% less than mainline *Lufthansa* crew and with much slower progression up the pay scale.
[45] See S. D. Barrett, 'The sustainability of the Ryanair model', 2004, *International Journal of Transport Management* 2. p. 93. In 2011, *Ryanair* carried almost 9,000 passengers per employee (ppe) whereas *easyJet*, Europe's second largest LFA, carried less than 6,600 ppe. Despite its adoption of many low-cost business practices, *Aer Lingus* carried just over 2,700 ppe in 2011.
[46] Steer Davies Gleave, 'Study 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', European Commission - DG Move, 2012.

The foregoing surge of atypical employment is a widespread phenomenon which is ascertainable within all legal systems in the European Union and which exerts pressure on the classic dichotomy between the concepts of an employed person on the one hand and a self-employed person on the other.[47] This traditional binary divide which regulates the performance of work by and the labour relations of subordinate workers and, alternatively, self-employed individuals, serves as the cornerstone of labour and social security law across Member States. This clear distinction acts as the basis for determining entitlement to benefits and advantages and generally for the legal status of the persons concerned. In essence, national labour and social security systems are both built upon these two concepts. The labour rights granted pursuant to this distinction concern, amongst others, rules regarding wage and salary protection (working time, minimum remunerations, manner and place of payment), terms and conditions of employment, the working schedule (limits on working hours, rest periods, Sunday rest, breaks), rules on social records, supplementary pensions, interim work, additional social advantages, the continuation of the payment of remuneration by the employer during sick leave, the protection against dismissal, annual and special leave (medical leave, maternity leave etc) paid by the employer, as well as representation in labour organisations and councils. Traditionally, employed persons enjoy more rights than self-employed individuals.

In recent years, forms of (atypical) employment that do not entirely correspond to the traditional distinction between dependent employment and (genuine) self-employment have become increasingly prevalent. Indeed, oftentimes an employer who resorts to self-employed workers instead of salaried employees can avoid paying considerable social and tax contributions and circumvent other labour law obligations. However, often such alleged self-employed workers are *de facto* 'disguised' employees, which is also known as **bogus self-employment**.[48] These 'bogus self-employed' persons are individuals who perform work and tasks as an employee, despite being registered as self-employed. Bogus self-employment is to all intents and purposes identical to subordinate employment, yet disguised as autonomous work, usually in order to reduce labour costs, for tax reasons and to avoid payment of high social security contributions. Not inconceivably, these forms of atypical employment are a significant source of concern.

Transport is more and more a sector where these atypical forms of employment are prevalent,[49] and where transnational companies 'shop around' for the most favourable employment/tax regime,[50] there is certainly leeway for 'social engineering' where both capital and labour are mobile, as depicted in Figure 2.

[47] See Y. Jorens, 'Self-employment and bogus-self-employment in the European Construction industry. A comparative study of 11 Member States', EFBWW, FIEC, Brussels, 2008, available at http://www.efbww.org/pdfs/annex%208%20-%20Brochure%20part%201%20[EN].pdf.
[48] *Ibid*.
[49] A study on 'economically dependent workers' in the EU-15 and Norway, for example, identified road haulage (own-account workers) as a sector with precarious employment in seven Member States, but there is no mention of civil aviation. http://eurofound.europa.eu/observatories/eurwork/comparative-information/economically-dependent-workers-employment-law-and-industrial-relations. See also Eurofound, 'Self-Employed Workers: Industrial Relations and Working Conditions', 2010; and S. McKay, S. Jeffreys, A. Paraksevopoulou, & J. Keles, 'Study on Precarious Work and Social Rights: Final Report', Working Lives Research Institute, London Metropolitan University, 2010. p 44-5 and 47.
[50] Maritime transport is the obvious exception, with flag of convenience (FoC) shipping and crews of convenience (CoC). See N. Lillie, 'Global Collective Bargaining on Flag of Convenience Shipping', 2004, *British Journal of Industrial Relations* 42(1). p. 47-67; and N. Lillie, 'Bringing the Offshore Ashore: Transnational Production, Industrial Relations and the Reconfiguration of Sovereignty', 2010, *International Studies Quarterly*, 54(3). p. 683-704.

Figure 2. Capital and Labour Mobility.

LABOUR / FIRMS	Localised	Mobile
Localised	Site-specific services (e.g. government; private sector)	Transport and distribution (land-based)
Mobile	Non-site specific services (e.g. manufacturing; literate services)	'Knowledge' industries; international transport (air, road, sea)

Source: adapted from Levi, M. and Ahlquist, J. S. 'Labor Power and Mobile Capital: The Market Geography of Solidarity', 2004, mimeo, University of Washington.

A recent study on self-employed workers by the European Foundation for the Improvement of Living and Working Conditions (Eurofound) identified five basic categories of self-employment, i.e.:

(1) Entrepreneurs, who run their business with the help of employees.

(2) Traditional 'free professionals', who, in order to work in their occupation, must meet specific requirements, abide by regulations and duty-bound codes and often pass examinations to be listed in public registers. They generally carry out their activities alone or in association with other professionals and with the help of a limited number of employees, if any.

(3) Craft workers, traders and farmers, who represent the traditional forms of self-employment. These self-employed workers often work with their family members and possibly a small number of employees.

(4) Self-employed workers in skilled but unregulated occupations, sometimes referred to as 'new professionals'.

(5) Self-employed workers in unskilled occupations, who run their business without the help of employees, but can sometimes be assisted by family members.

Air crew in general, encompassing both pilots and cabin crew members, do not sit easily in any of these categories. This is an immediate indication that, until recently, pilots conformed to the traditional model of direct employment with the airline as permanent employees. To be sure, they must pass examinations and abide by regulations and duty-bound codes to obtain and retain a commercial pilot's license (category 2), and there is certainly the opportunity for pilots to sell their labour around the world (Figure 1: see *supra* – Part 1. Scope of the study and research methodology), which in turn suggests 'freedom of choice'. Yet, the key test of (self)-employment still rests on the

independent/dependent worker dichotomy and whether the employment relationship is based on legal subordination.[51]

Indeed, an increase can be observed in workers in the European civil aviation industry whose employment relationship is unclear – the 'grey' area between 'traditional employment'[52] and (genuine) self-employment – and who find themselves excluded from various employment and social protections granted to those defined as being an 'employee'.[53] LCCs in particular have developed business strategies "*geared towards the lowering of wage or social standards for the sake of enhanced competitiveness […] indirectly involving their employees and/or home or host country governments*".[54] For example, an airline registered in European country A might hire a worker from country B and base this worker in country C. The worker in question might be hired via a temporary work agency under a 'contract for services' as a self-employed person in order to reduce labour costs (e.g. social insurance payments) and in order to shift business risks from the airline onto the worker.[55]

B. THE LEGAL FRAMEWORK

European aviation policy finds its origins in the Chicago Convention signed on 7 December 1944 by 52 states.[56] The Chicago Convention established the International Civil Aviation Organisation (ICAO), which became a specialised agency of the United Nations. Initially the ICAO focused upon technical standards as opposed to detailed economic regulation of the aviation industry.[57] However, much more relevant for the conditions of employment pertaining to EU citizens engaged in the field of aviation, are the provisions relating to free movement of workers generally and the subsequent secondary legislation with respect thereto.

i. EUROPEAN PROVISIONS CONCERNING EMPLOYMENT

Articles 45 to 48 TFEU[58] encompass the provisions relating to the free movement of workers in the European Union. Depending upon where cabin crew and pilots are employed, these provisions will thus be applicable, irrespective of whether they are directly employed, or, alternatively, self-

[51] See Eurofound (2010) *op cit*. This definition corresponds to the classification used by the ILO and the OECD. In addition to autonomy in the labour market, self-employed workers typically invest their own capital, are responsible for and control their own work, and either employ or certainly have the option to employ other workers (a key test is often whether the self-employed worker can provide a replacement or substitute worker to perform the work in question). In practice, self-employed workers are defined in various ways in different countries in relation to employment law, tax law, trade or competition law, and social security law.

[52] This model of employment, which predominated in most industrialised countries for much of the last century, was based on the idea of an employee (the 'male breadwinner') working full-time, with standard hours (usually '9 to 5', five days a week), for a single employer with a fixed wage and well-defined benefits (e.g. sickness benefits, paid holidays, a company pension scheme etc).

[53] G. Harvey & P. Turnbull, 'Evolution of the Labour Market in the Airline Industry due to the Development of the Low Fares Airlines (LFAs)', European Transport Workers' Federation, 2012, available at http://www.etf-europe.org/files/extranet/-75/44106/LFA%20final%20report%20221014.pdf; and G. Harvey & P. Turnbull, 'The Development of the Low Cost Model in the European Civil Aviation Industry', European Transport Workers' Federation, 2012, available at http://www.itfglobal.org/files/extranet/75/35584/Final%20Brochure%20LFAs%20220812.pdf.

[54] M. Bernaciak, 'Social Dumping: Political Catchphrase or Threat to Labour Standards?', European Trade Union Institute, 2012; and G. Harvey & P. Turnbull, 'The Development of the Low Cost Model in the European Civil Aviation Industry', *op cit*.

[55] Subordinated labour, as opposed to independent or autonomous workers (the self-employed), would claim to work under a contract *of* service.

[56] K. J. Button, *Wings across Europe: towards an efficient European air transport system*, 2004, Aldershot: Ashgate. p. 95-106.

[57] *Ibid*. p. 95-106.

[58] European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01.

employed. In addition, the provisions pertaining to the promotion of employment, improved working conditions, social protection and social dialogue as enshrined in Title IX and Title X TFEU are applicable and safeguard the rights of EU workers. In particular with respect to (air) transport, Article 100 TFEU is of relevance, as it provides the legal basis to apply the abovementioned principles related to the free movement of workers, to the sector for transportation.

Further substantiating and implementing the provisions pertaining to free movement of workers, Regulation (EU) No 492/2011 imposes, amongst others, the principle of equal treatment vis-à-vis European workers. Equally of relevance within this context is Regulation (EC) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as well as Regulation (EC) No 593/2008 on the law applicable to contractual obligations.

Free movement of EU workers is furthermore facilitated by Regulation (EC) No 883/2004 on the coordination of social security amongst Member States. With respect to crew members in the aviation sector specifically it need be noted that this Regulation was adapted to take into account the situation of air crew generally, by introducing the concept of home base as enshrined in Annex III of Regulation (EEC) No 3922/91 (see *infra* – Part 2. II. B. ii. (Implementing) Regulations), which is to facilitate the determination of applicable legislation.

As a means to safeguard adequate conditions of employment as endeavoured by the foregoing principles, Directive 2003/88/EC sets out the minimum standards of working time and rest periods for workers in general, irrespective of the type of employment.

Pertaining particularly to the posting of workers as well as to temporary agency work, which is increasingly the case within the field of employment in the European aviation industry, **Directive 96/71/EC**[59] and **Directive 2008/104/EC**[60] are of relevance, respectively. Article 3 of the former explains that workers posted to the territory of another Member State are entitled to the conditions of employment in the Member State where the work is carried out. The latter ensures that a hard core of minimum conditions are adhered to via legal, regulatory and/or administrative procedures, to the benefit of the posted employee. Article 2 of Directive 2008/104/EC provides for the equal treatment of temporary agency workers.

Furthermore, **Directive 1999/70/EC** of 28 June 1999 concerning the framework agreement on fixed-term work is of relevance due to the increase of fixed-term work in the European aviation industry. The framework agreement, equally so, provides for the equal treatment of fixed-term workers. In addition, mention need be made of **Directive 97/81/EC** of 15 December 1997 concerning the Framework Agreement on part-time work, which is of relevance with respect to the liberalised aviation industry in Europe.

Within the framework of the aforementioned legislation, and in view of the fact that the principles enshrined in the treaties are to be deemed applicable to the European aviation industry, air crew should thus legally be granted equal treatment with respect to conditions of employment and the rights associated thereto. As a result of the increased liberalisation of the industry, however, it

[59] 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.
[60] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

appears that the *de facto* conditions they are effectively confronted with are slightly more precarious. In furtherance of social protection of air crew generally, including both pilots and cabin crew members, in an increasingly competitive field, the EU has adopted a myriad of legislative measures aimed at securing and safeguarding the rights of air crews, as discussed below.

ii. PERTINENT EUROPEAN AVIATION LEGISLATION[61]

Pursuant to the liberalisation of the aviation industry in the European Union, a plethora of measures were adopted, of which the most relevant to pilots and cabin crew members will be discussed. Forming the basis of European regulation within the field of aviation, **Regulation (EC) No 216/2008**[62] (hereinafter also 'the Basic Regulation') lays down the common rules in the field of aviation and equally so establishes the European Aviation Safety Agency (EASA). The emphasis and objective of Regulation (EC) No 216/2008, as stipulated in Article 2, is to ensure the safety of civil aviation in Europe, as well as, amongst others, to facilitate the free movement of goods, persons, and services. It declares its content applicable to, amongst others, personnel involved in the operation of an aircraft as well as personnel involved in the design, production and maintenance of aircrafts. In furtherance of the objectives enshrined in Regulation (EC) No 216/2008, a vast number of implementing regulations have been adopted. These relate to, amongst others, air crew, air operations and third-country operators. Each of these implementing regulations are supplemented by Acceptable Means of Compliance and Guidance Material, in the form of EASA decisions, although these decisions are not binding.

(IMPLEMENTING) REGULATIONS

Within the ambit of social protection of air crew, the European legislature has undertaken initiatives and introduced legislative measures in order to accord air crew necessary social protection and adequate conditions of employment. Mindful of the strenuous nature of employment in aviation, factors such as the allowed working time, health conditions and resting times, as well as air crew responsibility required specific attention, thus warranting legislative measures to this end. The **Basic Regulation** serves as the starting point by elaborating upon the qualifications and licensing of *pilots* (Article 7 in conjunction with Annex III of Regulation (EC) No 216/2008) as well as *cabin crew* (Article 8 in conjunction with Annex IV of Regulation (EC) No 216/2008). In addition, Annex IV elaborates upon the responsibility of the pilot-in-command in instances of disruptive passenger behaviour as well as potential emergencies. Furthermore, this Annex explicitly acknowledges the need for adequate resting periods for *all* crew members (cabin crew in conjunction with pilots), so as to minimise deteriorated task achievement and/or decision-making to the detriment of flight safety. In particular, the provisions concerned note, amongst others, the dangers of fatigue accumulation, sleep deprivation and sectors flown as potential factors which could negatively affect flight safety. The provisions furthermore emphasise the necessity of regular (medical) assessment of competences. As aforementioned, these provisions are supplemented with a myriad of implementing regulations, the most important of which pertaining to the conditions of employment of pilots and cabin crew are undoubtedly Regulation (EEC) No 3922/91 and Regulation (EU) No 1178/2011.

[61] P. S. Dempsey, *European Aviation Law*, 2004, The Hague: Kluwer Law International.
[62] Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency.

Regulation (EEC) No 3922/91[63] on the harmonization of technical requirements and administrative procedures in the field of (safety of) civil aviation is possibly the most important regulation relating to the conditions of employment of flight and cabin crew. As elaborated upon in the Regulation's subpart N of Annex III, a distinction is made between *flight crew* and, alternatively, *cabin* crew. The former relates to the individual pilots, amongst which the pilot-in-command, as well as the co-pilots. The provisions subsequently define cabin crew members as being "*any crew member, other than a flight crew member, who performs, in the interests of safety of passengers, duties assigned to him/her by the operator or the commander in the cabin of an aeroplane.*" Next to providing additional clarifications with respect to the definition, the composition, the duties and qualifications of flight crew generally, and of pilots and cabin crew, the Regulation concerned elaborates upon the necessity of **Operations Manuals**. These manuals contain all relevant instructions and requisite information for the personnel to correctly and safely perform their duties. In accordance with the provisions in Annex III of Regulation (EEC) No 3922/91, the Operations Manual is subject to a compulsory structure and held to include amongst others, the flight time limitations, the composition of the crew, and crew health precautions.

More importantly, however, Regulation (EEC) No 3922/91 contains elaborated provisions with respect to **flight and duty time limitations** (FTLs). Mindful of the increasing competition between airlines in the European Union, such obligations are of paramount importance vis-à-vis cabin crew and pilots, as this is conceptually linked to the notions of safety and security throughout air operations. In subpart Q of Annex III the Regulation clarifies that the operator is to establish the FLTs for its crew members, which should be read in tandem with Directive 2000/79/EC (see *infra* – Part 2. II. B. ii. Directives) concerning the allowed block flying time.[64] Within this context the operator is held to provide for adequate, pre-notified resting time for its crew members, taking into consideration not only the block flying time, but equally so the pre-flight duties. Particularly, an operator is to ensure that the total duty periods, which include standby duties, do not exceed 190 duty hours in 28 consecutive days spread as proportionally as possible, and additionally, 60 hours in any 7 consecutive days. Recalling the block time limitations, an operator is to ensure that crew members do not exceed 900 hours in a calendar year, as well as 100 block hours in any consecutive 28 days. This is furthermore supplemented by the limitation of a daily flight duty period of a maximum of 13 hours for flight crew, which may exceptionally be extended by one hour. Flight duty periods are to be defined as "*any time during which a person operates in an aircraft as a member of its crew*". The flight duty period starts when "*the crew member is required by an operator to report for a flight or a series of flights; it finishes at the end of the last flight on which he/she is an operating crew member*".

As a corollary to the FTLs, Regulation (EEC) No 3922/91 elucidates the notion of **rest period** as being "*an interrupted and defined period of time during which a crew member is free from all duties and airport standby*". This is to be distinguished from minimum rest which obliges the operator to ensure the crew member 12 hours of rest or, alternatively, rest at least as long as the preceding duty period when departing from the home base, or ten hours of rest if the departure is not from the home base

[63] Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation.
[64] The provisions in the Directive concern limitations of the block flying time, which is defined as being "*The time between an aeroplane first moving from its parking place for the purpose of taking off until it comes to rest on the designated parking position and all engines or propellers are stopped*".

(see *infra* – following paragraph). In both scenarios, the greater amount of minimum rest will be granted. Within this context it need be noted that time zone differentiation is to be taken into account. On the other hand, rest periods are to be on a weekly basis, in accordance with the foregoing considerations, entailing that the crew member is to have 36 hours free from duty, including two local nights. Not inconceivably, the foregoing limitations may be subject to certain modifications, but it need be stressed that such modifications need to adhere to specific conditions, and are thus exceptional by nature. Furthermore, guaranteeing compliance with these obligations the operator must ensure that a record is kept of the foregoing information for its respective crew members.

In conformity with Annex III, subpart Q of Regulation (EEC) No 3922/91, the operator is obligated to nominate a **home base** for its crew members. A home base is to be established taking into consideration the pattern and frequencies of flight duties, with the objective of providing crew members adequate and appropriate resting periods in compliance with the aforementioned provisions. A home base is defined as "*The location nominated by the operator to the crew member from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal conditions, the operator is not responsible for the accommodation of the crew member concerned*". Recalling the foregoing and as discussed at a later stage (see *infra* – Part 4. III. B. iii. Labour law applicable to crew members and Part 4. III. Legislation shopping: the applicable social legislation), the determination of a home base is of relevance not only for general social protection of crew members with respect to the applicable social security provisions, but equally so for the determination of minimum rest.

Pertaining to the social protection of air crew generally, the aforementioned Annex III of Regulation (EEC) No 3922/91 was amended on two separate occasions, albeit whilst taking into consideration the requisite transitional period during which the provisions concerned are still applicable. Firstly, Regulation (EU) No 965/2011 amended the entirety of Annex III of Regulation (EEC) No 3922/91 with the exception of subpart Q, which concerns in particular FTLs. The provisions on FTLs were recently amended by Regulation (EU) No 83/2014 in January 2014, which will enter into force on 18 February 2016.[65]

Regulation (EU) No 965/2012[66] amends Annex III of Regulation (EEC) No 3922/91, with the exception of FTLs as encompassed therein (see *infra* – **Regulation (EU) No 83/2014**). Particularly, Annex I to Regulation (EU) No 965/2012 elaborates upon the definitions given by the Basic Regulation. Amongst others, cabin crew members are defined as "*an appropriately qualified crew member, other than a flight crew or technical crew member, who is assigned by an operator to perform duties related to the safety of passengers and flight during operations*." The latter are thus distinguished from crew members generally, who are defined as "*a person assigned by an operator to perform duties on board an aircraft*". In addition, similar to the definition encompassed in Regulation (EEC) No 3922/91, the pilot-in-command, as pre-defined in the Basic Regulation, is confirmed as being the "*pilot designated as being in command and charged with the safe conduct of the flight. For the purpose of*

[65] Article 2 of 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.
[66] Commission Regulation (EU) No 965/2012 of 5 October 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.

commercial air transport operations, the 'pilot-in-command' shall be termed the 'commander'". Regulation (EU) No 965/2012 furthermore elaborates on the obligations incumbent upon the operator as defined in the Basic Regulation. The Annex concerned renders the operator responsible for the overall operation of an aircraft, for the implementation of the operations manual, and for the competence and qualifications of the cabin crew members as well as the pilots. In addition, the operator is to ensure full awareness of the relevant crew members of the applicable procedures and instructions for the safe operation of the aircraft, in conjunction with requisite awareness of the applicable national legislation.

Subpart FC of Annex III to Regulation (EU) No 965/2012 further elaborates upon flight crew training, the potential of substitution between flight crew members and, albeit to a limited extent, operator responsibility with respect to potential variation in employment contracts of flight crew members.[67] The foregoing provisions are supplemented by subpart CC of Annex III, which refers specifically to cabin crew, the designated required number of cabin crew members on a commercial flight, in conjunction with other general requirements pertaining to, amongst others, age and training that need be abided by. Lastly, subpart A of Annex IV, section 1 stipulates the obligations and responsibilities of the commander throughout the duration of a commercial air transport operation.

While achieving its obligations, the operator, similar to former Annex III of Regulation (EEC) No 3922/91, remains obligated to maintain an Operations Manual as well as a journal log with respect to data concerning the crew members, as explained in subpart MLR.

The EASA Certification Specifications supplementing the recently adopted **Regulation (EU) No 83/2014**[68] amend subpart Q of Annex III with respect to FTLs, bringing about numerous changes which, amongst others, elaborate upon and specify the former rules. In particular the notion of home base, which is relevant in view of attaining adequate rest time, is amended so as to prevent that numerous home bases are assigned to an individual crew member[69] (see *infra* Part 4. III. B. iii. Labour law applicable to crew members and Part 4. III. Legislation shopping: the applicable social legislation). Furthermore, Regulation (EU) No 83/2014 revises, adds, and supplements definitions pertaining to, amongst others, *suitable accommodation*, *duty period,* and *flight duty*. Concerning FTLs specifically, the limits for flight times and duty periods remain the same, but are nevertheless supplemented by additional limits.[70] In particular, an operator may not allow its crew members to perform beyond 110 duty hours in 14 consecutive days and 1000 flight hours in 12 consecutive months.

[67] "*ORO.FC.100 Composition of flight crew: [...] (e) When engaging the services of flight crew members who are working on a freelance or part-time basis, the operator shall verify that all applicable requirements of this Subpart and the relevant elements of Annex I (Part-FCL) to Regulation (EU) No 1178/2011, including the requirements on recent experience, are complied with, taking into account all services rendered by the flight crew member to other operator(s) to determine in particular:*
(1) the total number of aircraft types or variants operated; and
(2) the applicable flight and duty time limitations and rest requirements".
[68] 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.
[69] It need be noted, however, that the Certification Specifications by EASA could be considered soft law and thus not necessarily binding.
[70] ORO.FTL.210 Flight times and duty periods – 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.

In the assessment of the conditions of employment with respect to pilots and cabin crew, **Regulation (EU) No 1178/2011**[71] pertaining to air crew is, equally so, significant. This Regulation encompasses the technical requirements and administrative procedures related to civil aviation crew. In addition to regulating the licensing of pilots, the Annexes provide additional definitions supplementary to the Basic Regulation. By means of example, Annex I defines the pilot-in-command, as referred to in the Basic Regulation, as the "*pilot designated as being in command and charged with the safe conduct of the flight*." Also of relevance with respect to the social protection of pilots and cabin crew in the European aviation industry is the notion of flight time, which is defined in Annex I, albeit limited to aeroplanes, as "*the total time from the moment an aircraft first moves for the purpose of taking off until the moment it finally comes to rest at the end of the flight*."

Various provisions concerning the safety and security of air operations have implications vis-à-vis the cabin crew members as well as the pilots, although these provisions are not directly related to their social protection. Within this context, **Regulation (EC) No 300/2008**[72] on common rules in the field of civil aviation security is noteworthy, in conjunction with **Regulation (EC) No 2027/97**[73] concerning liability in case of accidents on board of an aircraft.

DIRECTIVES

In addition to the numerous Regulations which, albeit often indirectly, affect the conditions of employment and social protection of crew members, several Directives have equally so contributed thereto. Amongst these legislative measures, **Directive 89/391/EEC**[74] on the introduction of measures to encourage improvements in the safety and health of workers at work stipulates the rules on the health and safety at work, in a general manner. Its provisions encompass obligations incumbent upon the employers, which remain applicable irrespective of the means by which an individual is employed. Hence, if an employer engages external services, he or she remains bound by the obligations to provide for adequately safe and healthy working conditions.

Directive 2000/79/EC stipulates what constitutes working time for mobile staff in civil aviation, defining the latter as being "*any period during which the worker is working, at the employer's disposal and carrying out his activities or duties, in accordance with national laws and/or practice.*" The Directive furthermore stipulates that working time for civil aviation crew should be assessed in view of national legislation with respect thereto, but should not exceed 2000 hours annually, which includes – albeit in a limited manner – certain moments of standby for duty. Within the maximum permitted working time, block flying time is to be limited to 900 hours. This Directive furthermore defines block flying time as being the *"time between an aircraft first moving from its parking place for the purpose of taking off until it comes to rest on the designated parking position and until all engines are stopped".* In order to ensure safety on board and diminish the potential of human error, the European legislature thus explicitly acknowledged the necessity for flight crew to be adequately

[71] Commission Regulation (EU) No 1178/2011 of 3 November 2011 laying down technical requirements and administrative procedures related to civil aviation aircrew pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council.
[72] Regulation (EC) No 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security.
[73] Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents.
[74] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

rested. In this same Directive, it was furthermore stipulated that civil aviation crew are to be granted seven previously notified free days of all duties and standby activities every month, which may include rest periods, and that the working time of air crew is to be spread as evenly as possible throughout the year.

Lastly, a number of Directives seek to improve the conditions of employment of air crew by focusing, amongst others, upon the mutual recognition of personnel licenses (**Directive 91/670/EEC**[75]) as well as on occurrence reporting in civil aviation (**Directive 2003/42/EC**[76]).

C. PREVIOUSLY CONDUCTED STUDIES

Despite the myriad of applicable European provisions aimed at safeguarding the social protection and welfare of cabin crew members and pilots, the *de facto* conditions of employment crew members have been subjected to have sparked and subsequently resulted in various studies and reports.

Various studies[77] have been conducted with a view to elucidating the emergence of atypical employment contracts within the European aviation industry as result of its liberalisation, of which some will be discussed briefly in what ensues.

Within this context, the **Study 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**,[78] conducted by Steer Davies Gleave, is particularly noteworthy. Generally the study seeks to provide insight into the effects upon employment in the aviation sector as a result of the establishment of the common market of this sector. Specifically the study elaborates upon the employment quality and conditions of employment which crew members are subjected to. According to its findings, the liberalisation of the European aviation industry served as a catalyst for increased use of outsourcing, including for core functions, as opposed to solely supporting functions. Amongst others, it is increasingly prevalent amongst airlines, and typically LCCs, to outsource core functions such as the provision of cabin crew and pilots. As a result of this growing trend of outsourcing, the

[75] Council Directive 91/670/EEC of 16 December 1991 on mutual acceptance of personnel licences for the exercise of functions in civil aviation.
[76] Directive 2003/42/EC of the European Parliament and of the Council of 13 June 2003 on occurrence reporting in civil aviation.
[77] Steer Davies Gleave, 'Study 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', European Commission - DG Move, London, 2012; Booz&Co, 'Effects of EU Liberalisation on Air Transport Employment and Working Conditions', European Commission - DGl for Energy and Transport, 2009; Ecorys, 'Social Developments in the EU air transport sector. A study of developments employment, wages and working conditions in the period 1997-2007', European Commission, DG Energy and Transport, 2007; European Cockpit Association, 'Flight Plan to Safety: European pilots' perspective: Threats and challenges to commercial air transport', 2013; European Cockpit Association, 'Pilot Fatigue Barometer', 2012; European Cockpit Association, 'The Case for Fair Competition in Europe's Aviation - Why action is needed to safeguard our aviation's future', 2014; Danish Transport Authority, 'Report of the working group on "Social dumping" in aviation', 2014; European Commission, 'Report on the suitability of economic regulation of the European air transport market and of selected ancillary services', Commission Staff Working Document, 2013; European Commission, 'Impact assessment of the Single Aviation Market on employment and working conditions for the period 1997-2007', Commission staff working document, 2010; European Low Fares Airline Association, 'Liberalisation of European Air Transport: The Benefits of Low Fares Airlines to Consumers, Airports, Regions and the Environment', 2004; European Low Fares Airline Association, 'Social Benefits of Low Fares Airlines in Europe', York Aviation, 2007; G. Harvey & P. Turnbull, 'The Development of the Low Cost Model in the European Civil Aviation Industry', European Transport Workers' Federation, 2012.
[78] Steer Davies Gleave, 'Study 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', European Commission - DG Move, 2012.

relationships between cabin crew and the airline as well as between pilots and the airline are becoming increasingly vague.

Exemplifying the ambiguity that characterises the employment relationships, the study concerned elaborates upon the various types that have emerged within this context, noting in particular the use of temporary work agencies, part-time and seasonal contracts, and fixed-term employment.

The findings of the report explain that the motivation substantiating the use of these types of contracts is highly similar. Specifically, such employment relationships enable cost reduction, provide more flexibility and easy adaption to the fluctuations of the market, and generally increase the competitive edge airlines have. Nevertheless, the report holds that as a result of this flexibility, according to which airlines more easily open and close bases across Europe pursuant to market fluctuations, it is feared that this may have a negative impact upon the job security and conditions of employment of individual crew members. However, despite these concerns no conclusive evidence can be found which supports the assertion that the increased use of part-time as well as fixed-term work has resulted in deteriorated working conditions.

The **Study on the effects of liberalisation** conducted by Booz and Co,[79] further explains the variation in employment contracts and the restructuring of the aviation industry that has emerged following the establishment of a common aviation market. It notes in particular the increased entry of LCCs in the industry in conjunction with the increase of outsourcing by means of wet leasing.[80] Whilst the report indicates that Member States are generally compliant with the regulatory aviation framework, to the extent that certain Member States have imposed additionally stringent measures for the protection of crew members, the report equally so acknowledges that there are irrefutable areas of concern that need be addressed as a result of the aforementioned liberalisation.[81] Firstly, job security and tenure are increasingly endangered as a result of the fierce competition.[82] The increasing use of outsourcing, the automation of certain services, as well the use and substitution of temporary contracts has rendered the job security of individual crew members less secure.[83] Additionally, as a result of these new employment models combined with free movement provisions enshrined in the Treaties, it has been noted that a means to curb abuse and social dumping by employers vis-à-vis individual crew members need be established.[84] Within this context, the report refers to the rising trend of '*legislation shopping*' within the European aviation industry. This entails that employers can seek to employ individuals in Member States which provide for the economically most advantageous hiring conditions, although this is often to the detriment of the individual employee. The report furthermore notes that the rules on duty time, safety and health and the adherence thereto remain an area of concern.[85]

[79] Booz&Co, 'Effects of EU Liberalisation on Air Transport Employment and Working Conditions', European Commission - DGl for Energy and Transport, 2009.
[80] *Ibid*. p. 9-10.
[81] *Ibid*. p. 19.
[82] *Ibid*. p. 19-20.
[83] *Ibid.*
[84] Booz&Co. 'Effects of EU Liberalisation on Air Transport Employment and Working Conditions', European Commission - DGl for Energy and Transport, 2009. p. 20-22.
[85] *Ibid*. p. 22.

With respect to the terms of employment of air crew generally, the report makes a number of observations. It notes the most relevant legislative measures which safeguard the rights and obligations of crew members.[86] In addition, it recalls that the vast majority of Member States has implemented the pertinent European legislation in the respective Member States and thus are in compliance with respect thereto.[87] Moreover, it notes that various Member States have taken measures in furtherance of the European provisions, with respect to, amongst others, the explicit calculation of standby duty when determining the working time of crew members, the calculation of working time in view of changing time zones, as well as the granting of greater amounts of leisure and/or rest times. Moreover, according to the findings of the report, various Member States have adopted more stringent rules on health and medical checks of crew members.

Despite the noted increased productivity and efficiency in the aviation sector, however, numerous studies have revealed the social implications of the increased liberalisation. The study **Social developments in the EU air transport sector**[88] describes the evolution of employment conditions from 1997 to 2007 as a result of the aforesaid liberalisation. Generally, it finds that there has been an increase in wages for aviation employees. Interestingly, however, this does not necessarily apply to cabin crew as the results with respect thereto are inconclusive. Furthermore, the report holds that contradictory perspectives exist between employers and relevant unions on the adequacy of and evolution of conditions of employment. Whilst the latter are of the opinion that they have deteriorated, the former contest this. Nevertheless, in its findings the report is clear about the fact that the operational pressure and duty time for the respective crew members have increased. Furthermore, there have been developments with respect to the rest time *during* and the rest time *between* shifts. Interestingly, the report equally so mentions the emerging trend that employers increasingly demand pilots to finance their own training or, alternatively, ask crew members to reimburse the investment they have made in engaging them.

The report **Rapport d'information fait au nom de la commission des affaires européennes (1) sur le dumping social dans les transports européens**[89] elaborates in particular upon two distinct issues that have arisen vis-à-vis air crew generally, as a result of the liberalisation of the aviation industry in Europe. In addition to providing insight into the liberalisation of the aviation industry, focus is placed upon the notion of home base, and how these components have and are affecting the potential for social dumping within contemporary aviation employment relations. The report notes, amongst others, the difficulties that have arisen with respect to the notion of home base, concerning in particular the impact this has upon the applicable legislation. Whilst the determination of a home base, in accordance with aforementioned Regulation (EC) No 883/2004, facilitates the designation of the competent State for social security entitlements, this cannot be said for the applicable labour law

[86] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time; Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA) (Text with EEA relevance); Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation.
[87] Booz&Co, 'Effects of EU Liberalisation on Air Transport Employment and Working Conditions', European Commission - DGl for Energy and Transport, 2009. p. 120.
[88] Ecorys, 'Social Developments in the EU air transport sector. A study of developments employment, wages and working conditions in the period 1997-2007', European Commission, DG Energy and Transport, 2007.
[89] E. Bocquet, Sénateur, Enregistré à La Présidence du Sénat le 10 Avril 2014, 'Le Dumping Social Dans Les Transports Européens'.

legislation. The legal ambiguity that may arise as a result thereof is, not inconceivably, problematic for the legal certainty of the worker concerned and may result in a loss of entitlements and benefits (see *infra* – Part 4).

A final study of particular relevance with respect to the social protection of crew members is the **Report of the working group on "social dumping" in aviation**.[90] As a preliminary remark, it need be noted that this report departs from a national – *in casu* Danish – perspective. However, despite its national focus it contains invaluable recent insight into the notion of social dumping with respect to aviation on a European level.

The report corroborates the findings of the aforementioned ECA report concerning fair competition in Europe's aviation, by stating that indeed the newly emerged business models have increased the risk of 'rule shopping', to the detriment of the notion of equal treatment of the respective crew members. Consequently, the report notes that social dumping is the result of the regulatory framework upon which free movement of workers and services is substantiated, in conjunction with these newly emerged employment models.

The report commences by explaining the evolution towards these adverse effects of competition. It notes in particular that the aviation market prior to its liberalisation was characterised by national network airlines. These airlines had and still have hubs where their respective networks combine(d). Moreover, these national network airlines initially handled all aspects of the services associated to flying and no need existed to call upon external organisations to provide additional services. Consequently, they had and to a certain extent still have direct and permanent employees. Due to deregulation, as aforementioned new types of airlines emerged with different employment models which were conceptually distinct from the traditional national network carriers. Specifically, this gave rise to the emergence of point-to-point air carriers, which operate solely between two destinations and thus do not invest in networks or hubs. The establishment of their facilities in these destinations is thus not very complex, and transferring to other networks is easily achieved if need be, pursuant to market fluctuations. This furthermore stimulates the increase of transnational employment. Finally, the report notes that the combination of these two types has led to the emergence of a third type of airline that uses hubs and a network for long-haul flights, and the point-to-point model for short-haul flights.

The report subsequently delves into the different types of employment models that have been established by these different types of airlines. Not inconceivably, as noted in the report, these developments have contributed to the increasing internationalisation of airlines, whereby a given parent company has subsidiaries in other Member States. In turn, the establishment of subsidiaries in certain Member States may render access to traffic rights of third countries possible due to bilateral arrangements with the Member State concerned.

The increasingly international nature of these airlines along with the noticeable use of transnational employment has prompted the necessity for employers to assign crew members a home base. The latter is to ensure that individual crew members are accorded sufficient resting time and that they

[90] Danish Transport Authority, 'Report of the working group on "social dumping" in aviation', 2014.

are effectively guaranteed the rights they are entitled to. The premise the notion departs from is that crew members, pursuant to their assigned home base, have access to the welfare benefits of that State as well as adequate rest time in the State concerned.

Further elaborating upon the notion of social dumping in the European aviation industry, the report continues by describing the trends pertaining to employment. It notes the increased use of self-employed staff and subsequently links all the foregoing observations to the phenomenon of social dumping. As a result of the increasing complexities in the structures of airlines, and of the increasing complexities in the employment relations between airlines, agencies and individuals, transparency is lost and legal ambiguity prevails. Not inconceivably, as previously noted, this can give rise and has given rise to poorer terms of employment.

Summarising the aforementioned studies, the following conclusions can be drawn:

- Firstly an increased use of agencies as intermediaries in providing pilots and cabin crew can be ascertained.
- Secondly a trend is discernible, leading to the outsourcing of core tasks, such as the provision of pilots and cabin crew members, albeit without the interference of an intermediary organisation, to self-employed individuals.
- Thirdly, an increased use of part-time contracts and seasonal contracts can be observed, which can either be established as direct employment, or alternatively via the use of temporary contracts.
- Fourthly, in reducing the labour and social security costs of their employees, there is an increased and increasing use of 'legislation shopping' by airline companies.
- Fifthly, these atypical employment situations have resulted in an increased risk of the prevalence of bogus self-employment as well as a trend by which employers increasingly demand pilots to finance their own training or, alternatively, ask crew members to reimburse the investment they have made in engaging them.

As pointed out by various studies, briefly described in what follows, the liberalisation of the European aviation industry has had some notable positive effects as well.

The Market report on the suitability of economic regulation of the European air transport market and of selected ancillary services[91] further elucidates the effects of liberalisation of the European aviation market. It notes that as a result thereof, there has been a significant surge in air transport, which has positively impacted direct employment. Additionally, it is noted that a lack of statistics render an impact assessment with respect to indirect employment or induced employment rather difficult. Ascertaining the employment conditions, the report finds, similar to the foregoing study, that there has been an increase in the use of outsourcing, as well as in the use of part-time work. Whilst salaries have been maintained for the highest skilled workers, however, the report indicates that there have been various complaints pertaining to abuse with respect to the posting of individual crew members.

[91] European Commission, 'Report on the suitability of economic regulation of the European air transport market and of selected ancillary services', Commission Staff Working Document, European Commission, 2013.

Similarly, the Commission staff working document (impact assessment of the single aviation market on employment and working conditions for the period 1997-2007)[92] notes that the establishment of a single market for aviation has resulted in an upward trend of direct employment. However, in conjunction with this increase in direct employment, the study equally so ascertains the increased use of outsourcing and restructuring processes. As a consequence of evolving business models in the aviation industry, the impact assessment notes the general increase of productivity and employment flexibility. Additionally, it notes the development and increase of transnational employment, as a result of the establishment of bases across Europe by carriers combined with the notions of free movement of workers and services.

In contrast to the foregoing, certain studies emphasise positive effects of liberalisation of the aviation market, and in particular the emergence of LFAs. In the report by the European Low Fares Airline Association, i.e. **Liberalisation of European Air Transport: The Benefits of Low Fares Airlines to Consumers, Airports, Regions and the Environment**,[93] the positive effects of LFAs are enumerated. The report notes the benefits vis-à-vis consumers, such as increased consumer choice due to the point-to-point business model allowing for transport to regional airports. In addition, the point-to-point business models allow for lower fares, again to the benefit of consumers generally, all the while attracting a new group of consumers that were previously hindered in enjoying air transport as a result of the steep fares imposed by national network airlines. Equally so, the report explains that the emergence of LCCs has been beneficial for airports due to the emergence of low-cost airports, making additional regions accessible by air transport. It has furthermore resulted in increased regional development and a general rise in tourism across Member States. Lastly, it notes that the emergence of LCCs has resulted in increased employment with respect to the direct operation of the airport, as well as with respect to ancillary services such as the establishment of shops, restaurants, and parking. Interestingly, the study furthermore concerned attempts to refute some of the negative stories that have arisen with respect to LFAs. Referring to these stories, the report makes note of the assumption that crew members are not well treated, as well as the assumption that LFAs find backdoors to circumvent European safety regulations. However, the report merely makes the unsubstantiated statement that this is not true for both stories, respectively.

Similarly the study by York Aviation, **Social Benefits of Low Fares Airlines in Europe**,[94] vehemently defends the business model employed by the LFAs. Firstly, it commences by elaborating upon the characteristics of an LFA. Amongst others, it notes that it is distinguishable from national network airlines due to the fact that it uses a single class cabin, that it has hardly – if any – on board frills and, as aforementioned, that it employs the point-to-point business model. The report continues by emphasising that the positive effects that LFAs have resulted in are dual, affecting both airports and (traditional) airlines, which ultimately serve to benefit the consumer. Concerning employment and employment conditions specifically, the report stipulates that direct employment has risen radically as a result of the emergence of LFAs. Moreover, it reiterates on several occasions that the cost gap between LFAs and traditional network airlines is not in the slightest due to savings on labour costs.

[92] European Commission, 'Impact assessment of the Single Aviation Market on employment and working conditions for the period 1997-2007', Commission staff working document, 2010.
[93] European Low Fares Airline Association, 'Liberalisation of European Air Transport: The Benefits of Low Fares Airlines to Consumers, Airports, Regions and the Environment', 2004.
[94] European Low Fares Airline Association, 'Social Benefits of Low Fares Airlines in Europe', York Aviation, 2007.

Within this context the report explains that the 3% crew costs advantage they do have in comparison with traditional network airlines is to be attributed to more efficient rosters. Additionally, it is noted that the point-to-point business model entails that fewer overnight stops are required for crew members, thus reducing costs. Within this context, however, no mention is made of voiced concerns pertaining to FTLs and disadvantageous social conditions for crew members.

III. EMPLOYMENT CONDITIONS OF PILOTS AND CABIN CREW MEMBERS THROUGHOUT SELECTED EUROPEAN STATES

A. THE REGULATION OF ATYPICAL WORK

i. PRELIMINARY OBSERVATIONS

Globally, the aviation sector has developed in such a way that various types of (atypical) employment relationships have emerged which raise concerns about the possible impact of unfair competition in the aviation labour market. Prior to giving a detailed overview of different kinds of employment relations in the aviation industries of selected countries, a brief overview ensues of the most prevalent forms of atypical employment. *In casu* atypical employment in the aviation industry refers to all forms of employment or cooperation between a member of the cockpit or cabin crew and an airline other than an open-ended employment contract concluded between the crew member concerned and the airline, respectively. An open-ended employment contract conversely refers to a typical employment relation, in which an employee (crew member) is bound by a contract vis-à-vis his or her employer (airline), for whom he or she performs certain tasks in return for remuneration. Mindful of this distinction, atypical employment in the European aviation industry generally manifests itself as fixed-term work, part-time work, fixed-term work via (temporary) work agencies, (bogus) self-employment and/or zero-hour contracts.

Prior to delving into the various forms of atypical employment, however, some nuance is in order. Note need be made of the fact that, despite the potentially detrimental effects these forms of employment may have on pilots and cabin crew members, oftentimes there are good reasons to make use of atypical employment from an employer perspective. In an increasingly liberalised and competitive market, employers need to retain a competitive edge. Whilst this can be achieved by, amongst others, higher usage of aircrafts and traffic, it is clear that labour costs constitute a considerable strain on the maintenance of a competitive edge, thus resulting in initiatives to decrease these costs. By engaging individual pilots and/or cabin crew members via atypical forms of employment, employers decrease labour costs as they, for example, are no longer obliged to pay (the full amount of) social security contributions. Additionally, employers can potentially avoid being subject to stringent labour law provisions with respect to dismissals, wages and resting time. It is clear that a competitive edge serves the benefit of the consumer. However, as will be portrayed, the maintenance of this competitive edge stands in direct correlation with the employment conditions of pilots and cabin crew members, requiring caution in the use of atypical forms of employment.

FIXED-TERM EMPLOYMENT

Firstly, both regular direct employment as well as self-employment for an airline may be limited in duration. Within this context, all Member States concerned recognise the notion of **fixed-term employment**. As explained in the Framework Agreement on Fixed Term Work, fixed-term employment is explained as being "*a person having an employment contract or relationship entered into directly between an employer and a worker* ***where the end of the employment contract or relationship is determined by objective conditions*** *such as reaching a specific date, completing a specific task, or the occurrence of a specific event*".[95]

Example: Fixed-term work in aviation

A full-time contractual arrangement whereby a cabin crew member is hired to work for airline *X* for the duration of four months, allowing this airline to adequately respond to the additional need for staff members in the high season, without having to deal with a surplus of cabin crew members during the off-season.

PART-TIME EMPLOYMENT

Similarly, all Member States recognise part-time employment. Part-time workers are described by the Framework Agreement on Part-time Work as being "*an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker*".[96] Clearly, part-time work is thus described in tandem with the notion of full-time work. However – not inconceivably – what constitutes full-time work varies across various Member States, entailing that the precise definition of what constitutes part-time work will invariably differ as well. Full-time hours may be determined either on a daily, weekly, monthly or yearly basis, and as a result of these potential discrepancies, it need be recalled that individuals deemed as a full-time employee in one Member State, may be deemed a part-time employee in another Member State. By means of an example, it suffices to reference full-time employment in France, which is held to constitute 35 hours per week or more, whilst in Austria, full-time work is only deemed to exist when 40 hours per week have been performed.[97] Mindful of the foregoing considerations and the aforementioned internationalisation of employment contracts in the aviation industries of various Member States, it is clear that the legal consequences accorded to the qualification of a given employment contract are becoming exceedingly hard to decipher.

Example: Part-time work in aviation

A contractual arrangement whereby a cabin crew member for a given airline works 20 hours a week as opposed to the planned 40 hours per seven days, which constitutes full-time employment in accordance with the national legislation of that Member State.

[95] Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

[96] DIRECTIVE 97/81/EC OF 15 DECEMBER 1997 CONCERNING THE FRAMEWORK AGREEMENT ON PART-TIME WORK CONCLUDED BY UNICE, CEEP AND THE ETUC.

[97] S. Burri & H. Aune, 'Sex Discrimination in Relation to Part-Time and Fixed-Term Work. The application of EU and national law in practice in 33 European countries, European Union 2013, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/sex_discrimination_in_relation_to_part_time_and_fixed_term_final_en.pdf.

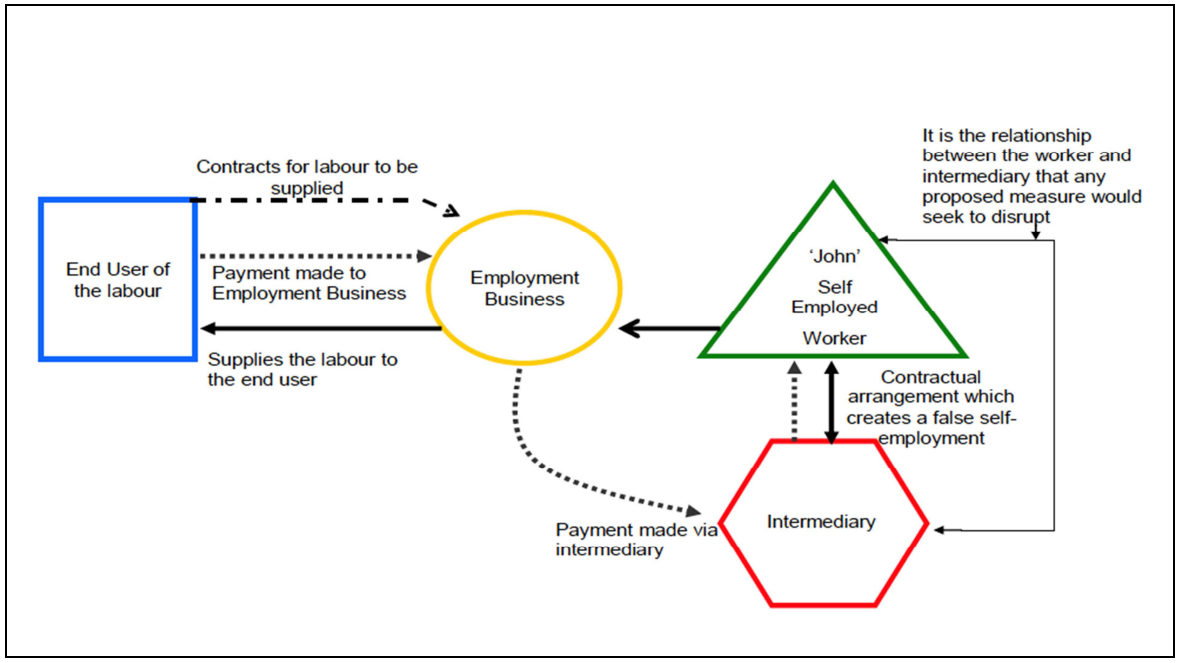
EMPLOYMENT VIA (TEMPORARY) WORK AGENCIES

In addition, the liberalisation of the European aviation industry has resulted in the increased use of **(temporary) work agencies** as intermediaries to provide (self-employed) pilots and (self-employed) cabin crew to airlines for fixed-term contracts. This serves to provide staff to airlines in a more flexible manner, based upon immediate, short-term needs of the airline pursuant to market and seasonal fluctuations. These agencies either engage or place, for a fixed term, a limited company of crew members, or alternatively, individual crew members. This results in a three-way relationship including the airline, the agency and the limited company and/or individual crew members. These work agencies can take the form of regular work agencies and temporary work agencies.[98] Whilst the former entails that the limited company or, alternatively, the individual, is *not* bound by an employment contract vis-à-vis the agency, the latter – temporary work agencies – do effectively employ the limited company or individual concerned.[99]

Within the aviation industry predominantly temporary work agencies are made use of, whereby a trilateral relation is established between crew members generally, the temporary work agency and the user airline, for a temporary fixed-term contract. However, the determination of what is temporary is not codified in European legislation and may, again, differ on a Member State level. Whilst the airline may influence who is engaged, it is the agency that will be deemed responsible for the disbursement of wages as well as for the payment of social security contributions, due to the fact that the employment contract binds the employee to the agency. Notwithstanding the foregoing, however, the individuals engaged by a temporary work agency for a particular airline are nevertheless bound by the rules and regulations imposed by this airline. Furthermore, it need be noted that temporary work agencies – as is often the case in the aviation industry – can additionally opt to engage *self-employed* individuals, rather than regular workers, thus allowing them to further circumvent the obligations arising from the status of an employee as opposed to a self-employed individual.

[98] European Parliament – think tank report: http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-EMPL_ET%282013%29507459.
[99] *Ibid*.

Example: Schematic overview of complex quadrilateral employment relationships[100]



Source: Irish national report

The use of this form of employment relationships has resulted in the emergence of much legal ambiguity due to its complex and internationalised nature – particularly within the aviation industry. Not only does temporary agency work encompass both fixed-term work and outsourcing, it can equally so result in the applicability of the Posting Directive. Namely, if temporary work agencies provide workers to user undertakings/airlines in a different Member State, this can be qualified as the posting of workers, which sparks the applicability of the Posting Directive.

Example: Increasing internationalisation and complexity of labour relations in Europe

An airline registered in European **country A** might hire a worker from **country B** and base this worker in **country C**. The worker in question might be hired via a (temporary work) agency under a 'contract *for* services' as a self-employed person in order to reduce labour costs (e.g. social insurance payments) and in order to shift business risks from the airline onto the worker.

Not inconceivably, the use of atypical employment contracts which conjointly encompass the intermediary services of (temporary work) agencies, fixed-term work and potentially give rise to questions concerning posting, results in legal ambiguity with regard to the qualification of the employment relation. Consequently, it may thus be extremely ambiguous to the individual pilot

[100] In addition to the prevalent trilateral employment relations in the European aviation industry, it has equally been observed that more complex quadrilateral employment relations have arisen, whereby additional use is made of a payrolling company – the 'intermediary' in this example. Companies as such are solely responsible for the remuneration of the pilot or cabin crew member (see *infra* – Part 4. II. A. v. Atypical employment and (bogus) outsourcing in civil aviation).

and/or cabin crew member who, insofar possible, is to be deemed the employer and what the obligations and rights are associated to his or her particular status.

By means of such contracts, as opposed to direct employment contracts, airlines in particular manage to negate pilot union safeguards. Moreover, the continuous ambiguity with respect to the potential renewal of such (temporary work) contracts may detrimentally affect the means by which a crew member performs his or her tasks. With a view to the competitive nature of finding employment in the aviation sector, by opting for such (temporary work) contracts, cockpit and cabin crew members may ultimately prioritise the economic and commercial needs of the employer as opposed to the safety of the air operation, in order to solidify their potential to maintain the respective employment. Lastly, as the (self-)employed pilot and/or cabin crew member nevertheless works under the direction of the airline, this raises questions as to whether the airline should be deemed an employer, despite the trilateral relation resulting from this form of atypical employment. Particularly in cases where the individual has little to no input in the manner and when his or her tasks are to be executed, it becomes highly questionable whether the airline concerned is not simply attempting to circumvent its obligations it would normally have if the employment relation had been qualified as a regular employment contract.

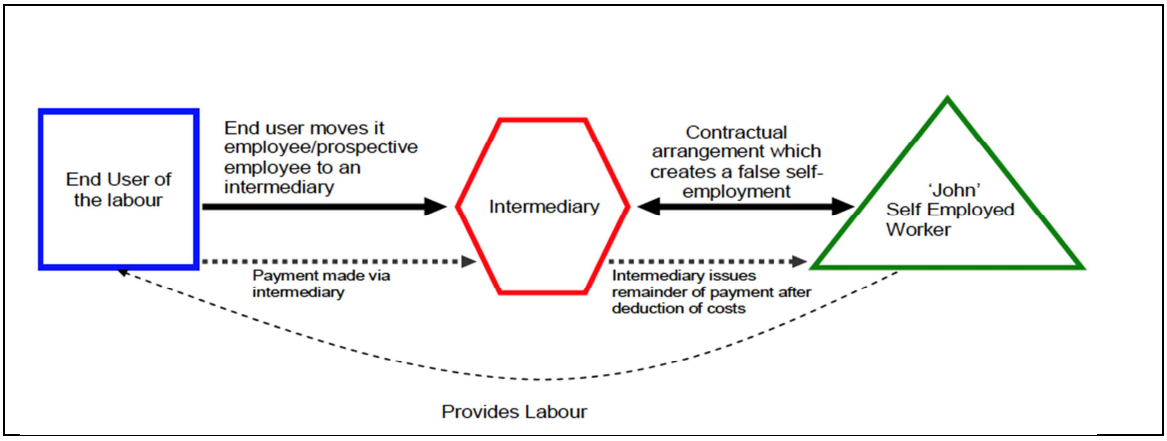
BOGUS SELF-EMPLOYMENT AND OTHER PROBLEMATIC EMPLOYMENT RELATIONS

As implied by the foregoing, the liberalisation of the European aviation industry has equally resulted in an increased existence of bogus self-employment (“*obliging pilots to set up their own limited liability company that offers its services through agencies to the airline”)*, zero-hour contracts, and the notion of *pay to fly*.[101] These kinds of employment relationships are considered the most problematic as they can be regarded as mechanisms to decrease the labour costs at the detriment of the persons themselves.

Bogus self-employment, as aforementioned, occurs when an individual pilot or cabin crew member is registered as being self-employed, but is *de facto* bound by an employment relationship. The latter is thus deprived of any safeguards awarded to direct employees, whereas the same restrictions and rules are nevertheless imposed as for a direct employee. The latter entails that, despite being registered as self-employed, the crew members do not have any control with respect to remuneration, working time, holidays or place of employment, rendering their position vis-à-vis direct employees substantially more precarious and disadvantageous.[102] Moreover, bogus self-employment can arise via an intermediary such as a (temporary work) agency or, alternatively, directly vis-à-vis the employer. As can be deduced, employment relations constructed as such include at least three to four parties. Needless to say, this form of atypical contract is highly disadvantageous for an individual worker and places him or her in a particularly precarious employment situation.

[101] European Cockpit Association, ‘The Case for Fair Competition in Europe's Aviation - Why action is needed to safeguard our aviation's future’, 2014. p. 7.
[102] European Cockpit Association, ‘The Case for Fair Competition in Europe's Aviation - Why action is needed to safeguard our aviation's future’, 2014.

Example: From direct employment to bogus self-employment



Source: UK national report

Mention need furthermore be made of **zero-hour** employment schemes. Such contracts entail that individual crew members are solely remunerated for the duration of the flight. These contracts do not give rise to paid annual leave, maternity leave and/or sick leave.[103]

Lastly, a new phenomenon that has arisen with respect to employment relations in the aviation industry are the **pay-to-fly** employment schemes. These schemes oblige pilots to financially contribute to the airline in order to be allowed to fly and thus gain requisite flight experience. This practice is particularly worrisome for junior pilots, who are generally already deeply indebted following their training and education as a pilot. Similarly a growing trend is perceived whereby airlines increasingly demand pilots to finance their own training or, alternatively, ask crew members to reimburse the investment they have made in engaging them.[104]

The entirety of the aforementioned employment relations, whereas not necessarily being explicitly illegal, are on the verge of being deemed incompatible with European provisions concerning employment. Additionally, as a result of abuse with respect thereto, which potentially amounts to social dumping vis-à-vis flight and cabin crew members, such atypical relations furthermore endanger not only the health and safety of those employed, but equally so the safety of air operations. This is in stark contradiction to the European legislative provisions in this regard (see *infra* – Part 2. IV. Perceived areas of concern and disadvantages of atypical employment).

[103] *Ibid.*
[104] Ecorys, 'Social Developments in the EU air transport sector. A study of developments employment, wages and working conditions in the period 1997-2007', European Commission - DG Energy and Transport, 2007.

Quote pilot

The problem of the declining terms and conditions of airline pilots is not because of the airlines but because of the uncontrolled grow of flight schools which are private organisations and don't care about the fact that their students find a job afterwards. Each student delivers about 100,000 euros in revenue and that's the main problem. The flight schools are selling a dream to 18 year old kids but the reality is that there are too many pilots for too few jobs. The excessive supply of young pilots willing to work for free brings down terms and conditions. If you are 100,000 euros in debt after finishing your flight school with no options available for a job you become desperate and start working even for free with hopes of building up experience and leave as soon as possible for a better (and paid) job. In between the damage has been done. Flight schools should be only allowed to train pilots based on demand and be regulated by the European government. This would result in better trained pilots and safer operations because then the pilot can concentrate on flying without having to worry how to pay for his food at the end of the month.

Quote pilot

I have followed an integrated and recognised professional pilot training I self-sponsored. 2 years after having passed my licences I have not found a job as a pilot yet. I am considering to go back to university to find a decent job in order to pay back my debts.

ii. THE REGULATION OF ATYPICAL WORK IN SELECTED MEMBER STATES[105]

A generalised assessment of employment relations across the aviation industries of the assessed States is hard to ascertain. If nothing else, it is adamantly clear that much variation exists in the use of employment models across these Member States, but equally so, within the analysed Member States. Indeed, all Member States analysed (**AT**, **BE**, **CZ**, **EE**, **DE**, **FR**, **IE**, **IS**, **ES**, **NO**) distinguish between similar types of employment. Specifically, all Member States maintain, albeit to different degrees, the dichotomy between direct (open-ended) employment and self-employment, and accord particular consequences thereto. This distinction, which serves as the cornerstone of contemporary labour legislation across Member States, has specific implications with respect to individuals' rights and obligations.

Use of the aforementioned varied employment models in the Member States may vary in the aviation industry depending upon a large number of factors. In certain Member States (**AT**, **EE**, **DE**, **IS**, **ES**, **NO**) the most predominant factors are the *type of airline* where an individual is engaged, as well as the *classification of the crew member* – a pilot as opposed to cabin crew. LCCs typically tend to opt for finite employment contracts such as fixed-term work, part-time work and temporary agency work, whereas larger airlines tend to opt for direct employment. This is ascribed to the different business models they operate under, as indicated below. Finite – atypical – contracts are one of the main sources for the competitive cost advantage LCCs have vis-à-vis larger national airlines. This

[105] The content of this chapter is substantiated, in its entirety, upon the findings derived from national country reports of selected States – see *supra* – Part 1. Scope of the study and research methodology). Several of the country reports encompassed contracts under which pilots are engaged, which have equally so been a source of information for the current analysis. However, for reasons of confidentiality, the these contracts cannot be disclosed.

explains, to a certain extent, the increased use of atypical contracts by larger airlines as well, and is demonstrative of the increasing convergence of the two business models.

The variation of employment models used across aviation industries in Europe is rendered even more complex as a result of the introduction of employment models which do not necessarily hinge upon the classical dichotomy between self-employment and regular employment. Certain Member States (**AT**, **CZ**, **DE**) have introduced forms of employment which cannot be defined as being either self-employment or regular employment (see *infra* – Part 2. III. A. ii. Regulation of employment relations in selected States), making the legal classification and the consequences associated thereto a difficult task. What is further aggravating this trend of increasingly complex employment relations in the respective aviation industries, is the increasing internationalisation of these employment relations. Pursuant to the establishment of the internal market, which proclaims, amongst others, free movement of workers, it is entirely plausible for an individual pilot to be engaged by an airline in a foreign country whilst being based in a third country.

Lastly, it need be noted that the analysis of the employment models in the aviation industries concerned remains limited in a certain respect, as analysis of the employment models used by *foreign* airlines with operational bases in the States concerned is not generally taken into account.

REGULATION OF EMPLOYMENT RELATIONS IN SELECTED STATES

As aforementioned, the foundation of labour law in the selected countries rests upon the dichotomy between regular employment and self-employment, albeit that the assessment thereof may vary amongst the States concerned.

In certain States (**AT**, **EE**), the distinction between self-employment and regular employment hinges upon the notion of personal dependence, which manifests itself via the notion of subordination of the individual worker vis-à-vis the employer. Certain other States on the other hand (**BE**, **IE**, **IS, UK**) do not predominantly focus upon the notion of subordination in order to determine the existence of regular employment. Rather, they focus on various factors which may or may not be determinative of the characterisation of the employment relation.

Austrian employment relations are governed primarily by Austrian labour law, which elucidates that for an employment relationship to exist, an employee must perform tasks in a state of *personal dependence* vis-à-vis the employer. In order to verify whether an element of subordination is discernible in the employment relation, regard will be had for the discretion the employer has in, amongst others, determining the place and time of work. Similarly, labour relations in **Estonia** are governed by legislative provisions which stipulate that the element of subordination is pivotal in the assessment of an employment relation. The foregoing is assessed by reference to the manner by which an individual can freely choose how to and when to complete his or her duties.

The **French** *Code du travail* and the **German** *Burgerliches Gesetzbuch* along with its accompanying statutes clearly define what constitutes a regular employment relation. In France, which maintains a strict dichotomy between employment and self-employment, open-ended employment contracts are the standard means of employment. Employment contracts as such are understood similarly to German legislation, which defines a regular worker as being an individual who is obliged to perform

services on the basis of a contract for remuneration under the direction of the employer whilst being personally dependent.

Similarly to the foregoing, **Belgium** maintains a clear distinction between employment and self-employment in its *'Employment Relations Act of 27 December 2006 ('Arbeidsrelatieswet'*). In order to distinguish between self-employment and regular direct employment, recourse is made to three categories of criteria, i.e. neutral criteria, general criteria and (industry-)specific criteria. Without delving into the particularities of these criteria, and acknowledging the importance of subordination in the qualification of an employment relation, it need be noted that none of these criteria are self-sufficient. This entails that in order to determine the qualification of an employment relation, regard need be had for the entirety of the characteristics inherent to the relationship. In this same vein, it need be noted that the said Act was furthermore amended by the Act of 25 August 2012, which gave rise to the establishment of the Advisory Committee for the Regulation of the Employment Relationship (see *infra* – Part 2. III. B. iii. Enforcement).[106]

Irish legislation, such as the *Terms of Employment Act of 1994* as well as the *Minimum Notice and Terms of Employment Act of 1973*, on the other hand does not encompass a legal definition of what constitutes direct (regular) employment and as a result does not elucidate what constitutes self-employment. Rather, it has left Irish courts the discretion to enumerate the conditions that must be fulfilled in order to classify a given contract as being a contract *for* services (self-employment) or, alternatively, a contract *of* services (direct and regular employment relation). Distinct from the aforementioned States, Irish courts have not perceived the notion of subordination as the principal factor in determining the distinction between self-employment and regular employment. Rather, focus is on a three-tiered test, whereby *control*, *integration* and *economic reality* are tested. In addition, the (tripartite) Employment Status Group[107] developed a code of practice pertaining to both employment status as well as a code of practice pertaining to self-employment. These codes of practice enumerate a range of factors which will determine whether an individual is either employed or self-employed.

Example: Code of practice to determine employee status in Ireland

- is under the control of another person who directs as to how, when and where the work is to be carried out;
- supplies labour only;
- receives a fixed hourly/weekly/monthly wage;
- cannot subcontract work (if the work can be subcontracted and paid for by the person subcontracting the work, the employer/employee relationship may simply be transferred on);

[106] The Advisory Committee for the Regulation of the Employment Relationship is competent for the requalification of an employment relationship when so requested by a party to the employment relationship.
[107] Established in Ireland to develop a 'code of practice on employment status'.

- does not supply materials for the job;
- does not provide equipment other than small tools of the trade (the provision of tools or equipment might not have a significant bearing on coming to a conclusion that employment status may be appropriate, having regard to all the circumstances of a particular case);
- is not exposed to personal financial risk in carrying out work;
- does not assume any responsibility for investment and management in the business;
- does not have the opportunity to profit from sound management in the scheduling of engagements or in the performance of tasks arising from the engagements;
- works set hours or a given number of hours per week or month;
- works for one person or for one business;
- receives expense payments to cover subsistence and/or travel expenses; and
- is entitled to extra pay or time off for overtime.

Example: Code of practice to determine self-employment in Ireland

- owns his or her own business;
- is exposed to financial risk by having to bear the cost of making good, faulty or substandard work carried out under the contract;
- assumes responsibility for investment and management in the enterprise;
- has the opportunity to profit from sound management in the scheduling and performance of engagements and tasks;
- has control over what is done, how it is done, when and where it is done and whether he or she does it personally;
- is free to hire other people, on his or her terms, to do the work which has been agreed to be undertaken;
- can provide the same services to more than one person or business at the same time;
- provides the materials for the job;
- provides equipment and machinery necessary for the job, other than the small tools of the trade or equipment, which in an overall context would be an indicator of a person in business on their own account;

- has a fixed place of business where materials, equipment etc can be stored;
- costs and agrees a price for the job;
- provides his or her own insurance cover (e.g. public liability cover); and
- controls the hours of work in fulfilling the job obligations.

In the **United Kingdom** the *Employment Rights Act 1996* simply defines an employee as being an individual who is bound by a contract of employment. Equally so, no additional definition is given and no additional legislation has been adopted concerning what constitutes self-employment. Similarly to other States, this is somewhat problematic in view of a vast group of workers who find themselves in between these two categories of employment. In order to clarify the distinction to a certain extent, UK courts have developed, similarly to Ireland, a myriad of legal tests to assess the qualification as a self-employed worker or, alternatively, as a worker.

Example: Legal tests employed by UK courts to determine employment

Regular Employment

- 'personal service' on the part of the individual;
- 'control' by the employer over the individual's work;
- 'mutuality of obligation', i.e. the employer's duty to offer work over a period of time and the employee's duty to accept such work if it is offered

Self-employment

- No obligation to provide a *personal* service;
- No mutuality of obligation;
- The worker is carrying out a business and the other party is the customer, as demonstrated by the following:
    - The client does not exert a high level of control over the individual.
    - The individual is not integrated in the client's business.
    - The individual actively markets his or her services in general.
    - The engagement is relatively short in duration.
    - The individual is providing specialist services.
    - The individual invoices for fees.

- The individual supplies the equipment needed to perform the service.
- The individual carries a level of risk.

Despite these legal tests, however, much ambiguity remains as to those that are not categorised as employees or self-employed individuals, which is furthermore aggravated by the fact that adjudication with respect thereto is highly rare. In this same vein, notwithstanding the various factors that are used to determine employment status in the UK, it appears that case law is not consistent in designating the determinative factors that will result in qualification of (self-)employment, thus further intensifying the potential for legal uncertainty amongst employees.

In addition to the legal ambiguity inherent to atypical forms of employment contracts in the UK, it has been noted that the enforcement and subsequently the employment protection associated thereto is equally so cause for concern.

Employment relations in **Iceland** are governed by general legislation, case law and collective labour agreements (CLAs), and are to a certain extent affected by individual arrangements. Much like in Ireland and the UK, self-employment is determined by reference to various factors. These factors include, amongst others, the duration and continuity of the task, the duty rosters, and independence vis-à-vis the employer. CLAs particularly play an instrumental role in shaping the labour market in Iceland and set the minimum generalised standards of treatment of workers. In furtherance of these minimum standards, no exceptions and/or deviations from these minimum standards are tolerated. CLAs can be established by umbrella trade unions that cover all sectors, but equally so by trade unions specific to certain sectors. Interestingly, in addition to general principles applicable to all forms of employment relations, the aviation sector in Iceland has a specific set of provisions – the *Aviation Act* – applicable solely to the conditions of employment in this sector, distinct from general labour legislation in Iceland. This act applies to the labour conditions of, amongst others, pilots and cabin crew, referring primarily to health and safety issues within this sector.

The **Norwegian** National Insurance Act states that the distinction between employees and self-employed persons must be considered in each case. The main conditions for being self-employed is that the work is performed at your *own risk and expense*. The following criteria indicate, according to Norwegian case law, that there is an employee relationship and not self-employment:

- The employee is obliged to be available for the task, and cannot pay assistants to perform the job.
- The employee is obliged to submit to the employer's management and control of work.
- The employer is responsible for the workspace, machinery, equipment, labour supply etc necessary to do the work.
- The employer carries the risk of the work result, meaning that the employees do not receive reduced payment in the event of errors.

- The employee receives compensation in one form or other for wages.
- The relationship between the parties has a fairly stable character and can be terminated subject to certain time limits.
- If the work is done mainly for one employer, this will also indicate that there actually is an employee relationship (NOU 2004:5).

The Working Environment Act (section 14-9) states that the main rule is that workers are to be permanently employed without time limitations.

FIXED-TERM EMPLOYMENT

Similarly, concerning the use of fixed-term employment, the principle of equal treatment must be adhered to, and different treatment is solely tolerated if it is justified based on objective grounds. However, despite the applicability of the principle of equal treatment, various disadvantages nevertheless arise concerning fixed-term work. Within this context it suffices to note the risk inherent to fixed-term contracts, whereby there is no right to a contract renewal. As a result, job insecurity is inevitably associated to fixed-term employment. Moreover, fixed-term employment does not impose obligations with respect to its termination. In order to combat abuse in this respect, various States (**BE, CZ**, **EE**, **FR**, **DE**, **IS**, **IE**, **NO**) have undertaken measures to the benefit of the employee. These measures generally encompass durational limitations of fixed-term contracts as well as the prohibition of unlimited renewals of fixed-term contracts insofar an objective justification does not warrant a renewal.

Fixed-term contracts are often used in the **Czech Republic**, albeit generally subject to durational limitations. Namely, continuous renewals are prohibited and the duration of a fixed-term contract is not allowed to exceed three years. An exception to this principle is provided for, however, with respect to seasonal workers. Equally so, in **France** fixed-term contracts are highly regulated, and conditionally applicable in a limited manner. It must encompass mandatory provisions, and must be applied solely in certain specific circumstances. Renewal is also possible, albeit in a limited manner.

In a similar vein, **Estonian** law, in the *Estonian Employment Contracts Act,* dictates that fixed-term contracts can solely be concluded for up to five years, and additionally holds that two consecutive renewals of the same type of fixed-term arrangements will result in the assumption that the contract was entered into for an unspecified amount of time. Furthermore, in safeguarding the rights of fixed-term workers, Estonian law explains that the latter need be notified of vacancies for jobs of an indefinite duration within the realm of their capacities. Moreover, it is held that compelling reasons are required to warrant the use of fixed-term contracts. Lastly, in order to prevent abuse in the termination of fixed-term contracts, Estonian law has regulated the means by which fixed-term contracts can ordinarily be terminated.

In order to prevent abuse by means of successive fixed-term contracts, **German** legislation provides that objective reasons must either be given warranting the renewal, or measures must be taken that impose durational limitations upon the amount of times a fixed-term contract can be renewed. Within this context, Germany introduced a rule that stipulates that a fixed-term contract may be

extended up to 24 months without justifications; beyond these 24 months, objective justification is required.

Belgian legislation makes a distinction between two types of fixed-term work. The first type of fixed-term work determines a time frame within which an activity need be performed, whereas the second type of fixed-term work refers to a clearly predefined task of which the durational limitations are less meticulously delineated. In preventing abuse of employees engaged via fixed-term contracts, Belgian legislation encompasses the obligation for the temporary contract to be drafted in writing. In the event of consecutive fixed-term contracts, the presumption of the existence of an indefinite contract is triggered, whereby the fixed-term contract is assumed to be an indefinite regular employment contract instead. The latter ensures that use of fixed-term contracts does not prevail over the use of regular indefinite employment contracts, to the detriment of the employees.[108]

In **Iceland**, fixed-term work is not regulated by legislation. However, pursuant to the European provisions pertaining to fixed-term work, certain limitations have been established in minimising the abuse of fixed-term contracts. An employee is entitled to work for an employer for a maximum duration of two years unless adequate breaks have been established between the successive fixed-term assignments. Similarly, in **Ireland** abuse with respect to successive fixed-term contracts is hindered by the imposition of a durational limitation, which holds that when an employee is employed under two or more successive fixed-term contracts, the aggregate duration thereof cannot exceed four years.

According to the **Norwegian** Working Environment Act[109] (section 14 to 19), the main rule is that workers are to be permanently employed without time limitations. This means that employment continues until terminated by one of the parties. Under specific conditions, a worker may however be employed *temporarily*. If a person is employed temporarily, one or more of the following conditions must be present:

- The work differs from the work which is ordinarily performed in the undertaking. Examples are seasonal work and project work. The ordinary day-to-day tasks of the undertaking are not to be performed by temporary employees.
- The work is work as a trainee or as a temporary replacement for another person or persons, e.g. the replacement of a person on sick leave or in connection with other leave or holidays.
- It concerns participants in the labour market schemes under the auspices of or in cooperation with the Labour and Welfare Service, and certain posts in organised sports.

[108] Three exceptions exist to the triggered presumption of an indefinite contract rather than a fixed-term contract:
1. The employer provides proof of the necessity to consecutively engage an individual in fixed-term employment contracts. The latter could, amongst others, be due to the nature of the work.
2. A maximum of four consecutive temporary contracts can be concluded if each contract is not less than three months, and if the total duration of the contracts does not exceed two years.
3. Consecutive contracts of a duration of a maximum of three years can be allowed if prior approval is acquired of the Directorate-General of the Social Legislation Inspection Service. The minimum duration of a fixed-term contract in this case cannot be set at less than six months.

[109] http://www.arbeidstilsynet.no/binfil/download2.php?tid=92156.

A person who has been temporarily employed for a consecutive period of more than four years in the same undertaking must be regarded as a permanent employee. If the provisions are breached, the court can, upon demand of the employee, decide that there is a permanent employment or that the employment continues.[110]

Interestingly, in stark contrast with the aforementioned regulations that impose limitations upon the use of fixed-term contracts, **Austrian** legislation does not provide for provisions to counter abuse of successive fixed-term contracts, which is solely aggravated by the fact that there are no durational limitations upon the use of successive fixed-term contracts. To counter such practices, however, Austrian courts have imposed the obligation to provide objective reasons, following a first renewal of a fixed-term contract, for not granting the employee an open-ended employment contract.

PART-TIME EMPLOYMENT

European legislation accords part-time workers the right to equal treatment. However, as can be recalled, part-time work is to be determined in view of the notion of full-time work, which is dependent upon national legislation. Consequently, this entails that, particularly within the context of European aviation and its internationalisation, it is not inconceivable that unequal treatment may arise or at the very least is hard to ascertain. Hence, in certain States (**AT**, **CZ**, **EE**) mention is made of the *de iure* equality and the discrepancies vis-a-vis the *de facto* treatment of part-time workers.

Whilst work, beyond the part-time employment agreed upon, is compensated financially or, alternatively, by additional free days, it has been noted that Austrian legislation leaves leeway for abuse in this regard.

In this same vein, it appears that part-time workers who are nevertheless held to perform duties and tasks beyond the planned part-time hours, are solely remunerated for the alleged part-time tasks in the **Czech Republic**.

Part-time work in **Estonia** refers to work amounting to forty hours or less per week. Whereas there are no minimum hours that need be agreed upon, part-time work in Estonia cannot exceed 40 hours on a weekly basis. Interestingly this can subsequently give rise to the use of zero-hour contracts, a serious source of concern in Germany (see national report). The potential for unequal treatment can be clearly observed here, as Member State differences with respect to what qualifies part-time work, may result in the aforementioned equal treatment. It suffices in this regard to note that part-time work in **Belgium** is only deemed to exist insofar an employee does not perform more than 38 hours per week.

EMPLOYMENT VIA (TEMPORARY WORK) AGENCIES

Recalling that temporary agency work in a vast majority of cases encompasses a fixed-term contract, it will not surprise that similar observations can be made concerning the regulation thereof in the respective States. Indeed, although European provisions pertaining to temporary agency work

[110] According to a stakeholder, the contracts (for the self-employed pilots) are very variable. A contract period may be two to three months, and many of the contracts can be terminated within 30 days. When being a contract pilot, you also have to take care of your own pension benefits. According to statistics, in Norway 8.5% is currently engaged by non-permanent contracts. This number has been stable for the last five years.

principally impose the principle of equal treatment in fixed-term employment relations, its *de facto* application is questionable. This is furthermore aggravated by the fact that the Temporary Agency Work Directive[111] allows for a deviation from this principle, albeit in a limited manner.

Despite provisions warranting equal treatment of temporary agency work in **Austria**, temporary agency workers are subject to significant disadvantages. Similarly to fixed-term work, temporary agency work is not subject to explicit durational limitations. This entails that a temporary work agency assignment can be concluded for an extensive amount of time. This has been further solidified by an Austrian provision introduced in 2013, which holds that the temporary agency worker can participate in the user undertaking's pension scheme, if the assignment lasts beyond four years. It is unclear, however, whether this perspective is reconcilable with the European provisions on temporary agency work, which consistently underline the temporary nature of an assignment. Moreover, this may place the employee in a perpetually precarious position, as this type of employment does not accord the same safeguards as regular open-ended employment.

Belgian legislation regulates the use of temporary agency work stringently. Prior to exercising tasks as a temporary work agency, approval and recognition need to be acquired officially from the competent regional authorities. The use of temporary agency work is furthermore regulated by the *Act of 24 July 1987 on temporary work, temporary agency work and the hiring out of employees on behalf of a user undertaking,* as well as *collective labour agreement n°108 of 16 July 2013,* and additional CLAs concluded in the Joint Committee for Temporary Agency Work. Amongst others, the foregoing strive for the protection of the employees by according temporary agency workers an analogous status as enjoyed by regularly employed individuals. As a result thereof they are thus legally protected as regular employees in all respects by labour legislation. Furthermore, the legislation concerned limits the availability and potential use of temporary agency work by allowing it solely in specific circumstances. Within this same vein, remuneration cannot be below that of regular employees, the importance of which cannot be negated. By according equal treatment with respect to remuneration to temporary agency workers, employers will be disincentivised from preferring temporary agency work as opposed to regular employment. Lastly, amendments to the *Act of 24 July 1987* imposed in 2012 ensure that temporary agency work is limited in time as it can solely be used for the purpose of a *temporary* task.

In contrast, **Estonia** did not make use of the exception provided for in Directive 2008/104/EC, according to which temporary agency workers can be – albeit in a limited manner – subjected to differential treatment vis-à-vis regular workers. Rather, Estonia has taken measures to prevent abuse via successive renewals of assignments as a means to avoid the obligations associated to regular employment. It has applied the same durational limitations as is the case for fixed-term work (see *supra* – Part 2. III. A. ii. Fixed-term employment).

Analogously to Estonia, **France** has taken measures to curb the abuse of temporary agency work. In particular, the intermediary must limit its activities to the hiring-out of employees and must hire individuals under aforementioned fixed-term contracts, which are subject to a range of limitations.

[111] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

Such contracts may be renewed once if the total amount of employment does not exceed 18 months.

Temporary agency work in **Germany** has been subject to some changes. Initially, temporary agency work was strictly regulated and required prior authorisation by the Federal Employment Agency in order to establish an agency as such. As a result, the use of temporary work agencies in employment structures in Germany was highly marginal. This stands in contrast with the use thereof nowadays. Following the deregulation of temporary agency work in 2003, an exponential growth of temporary agency work can be observed. In order to counter the lack of protective rules in the event of dismissals inherent to temporary agency work in Germany, the principle of equal treatment was introduced. However, the *de facto* application and success thereof was highly limited as CLAs were entitled to deviate from the equal treatment provision, as is equally tolerated by European provisions. In order to further prevent maltreatment of agency workers, several additional amendments to German legislation sought to provide additional protection to the individuals concerned. By means of example it suffices to mention the rule according to which an employer is prohibited from dismissing employees to subsequently hire them as agency workers. Increasing pressure as a result of abuse of temporary agency workers ultimately led to more regulation, and gave rise to a decrease in agency work, demonstrative of the aforementioned fluctuations in employment structures in Germany.

European provisions concerning temporary agency work in **Iceland** were implemented in 2013, emphasising additional safeguards to prevent abuse thereof vis-à-vis workers generally. As is the case in certain other Member States, temporary work agencies in Iceland are subject to prior notification of the intent to engage in such services. Similar to practice in Germany, Icelandic legislation stipulates that it is prohibited to engage an individual as a temporary agency worker in a company where the latter had been previously employed if the termination of the contract ended within six months prior thereto.

Norwegian legislation originally prohibited both temporary agency work and the hiring out of workers. A legislative amendment in 2000 made it possible to hire labour from temporary work agencies in cases where temporary employment is allowed. In 2015, these regulations will probably be changed. The government has proposed to provide a general right to temporary employment, without conditions, for a period of twelve months. This is combined with some limitations: 1) a quarantine period of twelve months for similar general temporary employments; 2) if the contract is terminated after 12 months, it is not possible to employ another person on a temporary basis to perform the same tasks; and 3) a maximum on 15% of the workforce in a business can be hired on a general temporary basis (it will always be allowed to have at least *one* temporary employee, regardless of the total number of workers in the business).

This proposal will probably pass in the Norwegian parliament during spring of 2015, and will make it easier for the airlines to employ on a temporary basis, also in Norway, if this is not restricted by the CLAs.

OTHER FORMS OF ATYPICAL EMPLOYMENT

As aforementioned, certain Member States (**AT**, **CZ**, **EE**, **DE**) – particularly in the field of aviation – have seen a surge in the use of various other forms of atypical employment, which are not necessarily reconcilable with the traditional dichotomy between self-employment and regular employment. As a result, the classification and the subsequent consequences associated thereto are not always clear to the employee concerned, and may thus ultimately be to his or her detriment.

Austrian law introduced the notion of *quasi-subordinate employment*, which serves to soften the distinction between direct employment and self-employment. This category of individuals is *economically* dependent as opposed to *personally* dependent vis-à-vis the employer. Hence, to determine whether an individual is engaged in quasi-subordinate employment, it need be assessed whether the individual has his or her own entrepreneurial organisation and whether he or she is employed by different contractual partners. Individuals in quasi-subordinate employment are granted, albeit in a limited manner, several of the safeguards granted to regular employees. Within the aviation industry, however, this form of employment is seemingly non-existent.

Similar to the foregoing, **German** law introduced the status of *an individual similar to an employee*. Persons similar to employees are not personally dependent, but are economically dependent. In some aspects this group of individuals are in fact treated as regular employees, albeit limited to certain areas of labour legislation. Furthermore, German legislation provides for the notion of *Werkvertrag*. *Werkvertrag* is an employment relation whereby an employee is bound by a contract, and which serves as an unregulated substitute for temporary agency work for a specific service. However, the use thereof and of temporary agency work generally varies tremendously, and it is highly questionable to what extent this has any effect on the German aviation industry. Another form of employment relations worth mentioning are the zero-hour contracts, which conversely to temporary agency work in Germany are seemingly somewhat troublesome in the German aviation industry. Zero-hour contracts entail that a party agrees to perform a certain task for the employing party in return for remuneration, but with the one peculiarity that no minimum hours of work are agreed upon. The latter thus entails that there is no minimal durational requirement with respect to the hours worked. This phenomenon with roots in the United Kingdom has spilled over in Germany, and case law thus far with respect thereto is highly limited. As a result, much ambiguity remains as to the scope of this type of contract, its legal classifications, and the protection and safeguards associated thereto. Depending on these factors it may result in the employee being deemed self-employed or, alternatively, a regular employee, which may have significant implications vis-à-vis the obligations the employer has with respect to the latter.

Similarly to German legislation, the **UK** introduced the notion of 'worker'[112] via its *Employment Rights Act 1996*. This qualification refers to individuals who supply their services in a situation of economic dependence, yet who do not enjoy sufficient stability and regularity in their occupation so as to be considered a regular employee. These quasi-dependent workers, similarly to the Austrian and German approach, enjoy limited social rights and coverage, which are not conditioned upon regular

[112] Not to be confused with the European term 'worker', which has a general connotation, as opposed to refering to a particular form of employment.

and stable employment, such as the right to minimum wage and the right to not be discriminated against.

Legislation in the **Czech Republic** has introduced the notion of *agreements on work performed outside an employment relationship*. This notion encompasses two forms of employment relations: the *agreement on work performance*, and secondly, *the agreement on work activity*. Whilst the former is subject to a durational limitation of 300 hours per year and does not result in social insurance and health coverage by the employer, the latter is slightly more advantageous. The *agreement on working activity* is a form of an employment agreement, whereby a limited amount of hours can be worked as agreed upon within a week, and is used for one-off rare assignments. This second type of agreement for work outside an employment relation does give rise to social security contributions by the employer. Although no conclusive data is available with respect to the prevalence of these types of arrangements (within the aviation industry), its significance is growing. In the aviation sector, use is particularly made of *agreements on working activity*.

In **Estonia** use is additionally made of traineeship agreements for young pilots. These types of arrangements are proving to be a significant source of concern as they oftentimes result in deplorable working conditions for the individuals concerned.

B. THE IMPACT OF ATYPICAL WORK ON THE AVIATION INDUSTRY

Pursuant to introductory observations concerning the aviation industries of the selected States, an overview will be given of the prevalence of various employment contracts within the aviation industries of the selected Member States, and the subsequent impact this has had on the employment conditions of pilots and cabin crew members in the respective aviation industries.

i. FINDINGS

Quote pilot

I love my job but if I had my time again, I would do something else. I would not recommend anyone joins this profession. Our profession is being destroyed by the greed of the airlines and their shareholders. I am seriously concerned about the slow shift towards 'self-regulation'. We need trans-national action by pilots to stop this trend and regain fair reward and security of employment for our skills.

Quote pilot

The job of pilot has become a very unstable situation for the new generation.
Working as a pilot means more and more like fighting in the jungle. Precariousness is today the main characteristic of the pilot's job.

The **Austrian** aviation industry is home to three major airlines, i.e. *Austrian Airlines*, *Tyrolean Airways* and *flyniki*. Generally speaking *Austrian Airlines* has, pursuant to a CLA with respect thereto, better working conditions than *Tyrolean Airways*. In seeking to reduce its labour costs, however, *Austrian Airlines* sought to transfer its employees to *Tyrolean Airways* and subsequently terminated its CLA.

However, the Austrian trade union association reciprocated by bringing an end to the CLA with *Tyrolean Airways* in order to spark the 'continuing effect' of the terminated CLA for the transferred employees of *Austrian Airlines*. This notion of continuing effect, according to which the terminated CLA of *Austrian Airlines* remains applicable to the employees transferred to *Tyrolean Airways*, was confirmed by the CJEU.[113] Subsequently, a new CLA was negotiated which will take effect in 2015 and which will result in a transfer of employees from *Tyrolean Airways* back to *Austrian Airlines*. Hence, assessing the aviation industry for pilots and cabin crew in Austria, focus will be predominantly limited to *Tyrolean Airways* and *flyniki*.

Belgium is home to five registered airline companies and six commercial airports. However, the most important airports in Belgium are undoubtedly the national airport (Brussels Airport) and Brussels South Charleroi Airport. Of relevance within the present context are the LCCs operating to and from these airports and predominantly operating from Charleroi Airport, amongst which *Ryanair* and *Wizzair*, in addition to network airline *Brussels Airlines* and charter companies *Jetairfly* and *Thomas Cook*. Whilst growth in the aviation industry is below the global average, Charleroi Airport has seen a tremendous growth in business since 2000 as a direct result of the arrival of *Ryanair*, and subsequently focuses solely upon LCCs.

Despite lacking statistics on atypical employment in the aviation industry in **Estonia**, it has generally been observed that there has been a surge in the use of atypical employment for pilots and cabin crew. However, governmental agencies and authorities have thus far not taken any measures to regulate the use thereof. The latter is, in all likelihood, to be attributed to the fact that – despite the aforementioned surge in atypical employment – the use thereof remains limited in the Estonian aviation labour arrangements. Currently, atypical employment accounts for an estimated 20% of the labour relations in aviation. Employment conditions in particular are currently the topic of media coverage insofar it concerns the negotiations on a new CLA, which is to be deemed applicable to the pilots of *Estonia Air* – the national Estonian airline.

In terms of total employment in 2010, **France** was the third largest Member State with respect to the number of air transport employees. However, it has been noted that there has been a steady decrease in the airline workforce between 2008 (76,603 employees) and 2012 (71,954 employees). Particularly notable, the entirety of employees engaged by *Air France* decreased from 52,000 in 2012 to 48,676 in 2013 as a result of reorganisation initiatives. This decrease encompassed a 5% decrease for pilots specifically. However, no general statistics can be obtained on the prevalence of illegal atypical employment, hiring-out of employees and/or bogus self-employment generally,[114] due to the fact that these forms of employment are strictly forbidden and highly regulated. Whilst certain types of derogations may conditionally apply, this is not the case for the civil aviation industry.

The largest airline in **Germany** is *Lufthansa*, followed by *Air Berlin*. In addition, the largest LCC is *Germanwings* – a subsidiary of *Lufthansa* – which competes with other foreign LCCs such as *Ryanair* and *EasyJet*. Air traffic in Germany has shown a consistent growth in the last decade, which in 2012 accounted for approximately 50% of both outward and inward travel. The latter is demonstrative of

[113] Judgment of 11 September 2014, Österreichischer Gewerkschaftsbund (C-328/13) ECLI:EU:C:2014:2197.
[114] I.e. not limited to the aviation industry.

the significant impact air transport has upon the German market. Despite this significance, however, statistical data on atypical employment of pilots and cabin crew has yet to be obtained. In any event, it is clear that the use of various types of employment has fluctuated tremendously in the German aviation market throughout the last two decades.

No comprehensive, all-encompassing data is available with respect to the employment structures in the **Icelandic** aviation industry. However, certain conclusions can nevertheless be drawn pursuant to communications with stakeholders. Much variation exists in the employment contracts depending, in particular, upon the high season as opposed to the low season.

The aviation industry in **Ireland** is irrefutably marked by the LCC *Ryanair*, in addition to the national airline *Aer Lingus*. Whilst figures do exist on the registered pilot and cabin crew members at the airline concerned, these are by no means accurate, as these figures do not take into account the portion of hired crew members from different EU Member States, in order to meet the multi-base expansion of airlines in Europe. In addition, *Aer Lingus*, in order to retain a competitive edge vis-à-vis *Ryanair*, is increasingly attempting to make use of LCC strategies via its low-cost subsidiary (*Stobart Air*) for short-haul routes, to the detriment of its pilots and cabin crew members.

There are currently three main actors in the **Norwegian** civil aviation sector: *SAS*, *Norwegian* and *Widerøe*. *SAS* and *Widerøe* have so far been loyal to the traditional model with regard to employing their staff, including pilots and cabin crew on permanent contracts. *Widerøe*'s attitude might be illustrative: the company consider it important to take care of the employment and training of their staff, and they do not think that it will be any cheaper to hire the personnel (e.g. from a temporary work agency).[115] In what follows, the situation in *Norwegian* is therefore described. *Norwegian Air Shuttle* or *Norwegian* from 2002 started domestic flights in Norway. The company opted for a low concept and grew rapidly. *Norwegian* is Scandinavia's second largest airline and the third largest low-price company in Europe. The company is now the world's seventh largest LCC. At the same time, *Norwegian* has moved large parts of its business out of the country. It has established bases in Sweden, Denmark, Finland, the UK, Spain, Bangkok and the USA. Reportedly, less than half of the total cabin crew of *Norwegian* is now permanently employed. In 2014, *Norwegian* established two new companies, i.e. *Cabin Services Norway* (CSN) and *Cabin Services Denmark* (CSD), which meant that the cabin crews from Norway and Denmark were transferred to these companies. There were between 800 and 900 Norwegian employees and around 250 Danish employees that were transferred to the new companies. Reportedly, it could be stated that there are around 3,500 pilots (including those hired from temporary work agencies) and cabin crew (estimated share of around 75 %) working for *Norwegian*.

In **Spain** pilots and cabin crew are employed in two manners – there is employment by strictly Spanish airlines, and employment by foreign airlines which have operational bases in Spain, with Spanish crew stationed there accordingly. Spanish airlines include larger airlines such as *Iberia* and *Air Europa*, as well as LCCs, such as *Veuling*, *Air Nostrum* and *Iberia Express* or *Swiftair*. Notable

[115] A. Underthun & A. C. Bergene, 'Framtida til norsk luftfart. Selskapsstrategier og partsrelasjoner i en liberalisert luftfartsvirkelighet', AFI-rapport 11/2014, AFI/Høgskolen i Oslo og Akershus.

foreign airlines with operational bases in Spain are *Ryanair* and *Norwegian*. No comprehensive data is available with respect to the types of atypical employment of pilots and cabin crew in Spain.

Mindful of these preliminary considerations, first an assessment ensues of the demarcation of the usage of various employment models in the different aviation industries. Secondly, an analysis is made of the regulation of bogus self-employment in these same Member States in conjunction with the means by which such practices are hindered. Next, an overview is given, insofar possible, of the employment conditions that prevail in the aviation industries of the Member States concerned.

GENERAL FINDINGS

Employment conditions in the respective Member States are the culmination of a myriad of factors. Within this context, the importance of sector-specific CLAs, and independent sector-specific representation cannot be underestimated (**FR**, **DE**, **UK**). Equally of relevance in the determination of employment conditions is the type of airline an individual is engaged by. Not only do discrepancies exist in this regard between national large airlines and national LCCs, additional discrepancies are furthermore observed between national LCCs vis-à-vis foreign LCCs with operating bases in the respective Member States (**AT**, **CZ**, **IS**, **ES**, **UK**). Generally, it can furthermore be held that the increasing complexity in employment relations across the respective aviation industries has served to diminish external representation. This renders employment conditions increasingly precarious for both pilots as well as cabin crew members.

	General observations	Direct employment	Fixed-term work	Part-time work	Temporary work agency	Other types of employment
Austria		**Network airlines**: predominant use **LCCs**: minimal use	**Network airlines**: see Temporary work agency **LCCs**: see Temporary work agency	**Network airlines**: upon demand employee (*de facto* limited to cabin crew) **LCCs**: upon demand employee (*de facto* limited to cabin crew)	**Network airlines**: minimal use **LCCs**: predominant use via fixed-term contracts	**LCCs**: use pay-to-fly schemes
Belgium		**Network airlines:** predominant use pilots **LCCs:** limited use pilots	**Network airlines:** occasional use pilots; predominant use cabin crew	**Network carriers:** inconclusive **LCCs:** inconclusive	**Network airlines:** minimal use pilots; occasional use cabin crew **LCCs:** inconclusive	Student contracts: occasional use cabin crew
Czech Republic	Seasonal variation	**Network airlines:** predominant use pilots and cabin crew **LCCs:** frequent use pilots	**Network airlines:** limited use **LCCs:** predominant use cabin crew	**Network airlines:** inconclusive **LCCs:** limited use pilots	**Network airlines:** occasional use **LCCs:** occasional use	**LCCs -** Agreements on working activity**:** frequent use pilots, limited use cabin crew
Estonia		**Network airlines:** predominant use pilots and cabin crew **LCCs:** frequent use pilots and cabin crew	**Network airlines:** limited use pilots and cabin crew **LCCs:** occasional use pilots and cabin crew	**Network airlines:** occasional use pilots and cabin crew **LCCs:** occasional use pilots and cabin crew	**Network airlines:** occasional use pilots **LCCs:** occasional use pilots	**LCCs -** Traineeships: frequent use pilots; limited use cabin crew
France	Seasonal variation concerning use temporary work agencies	**Network airlines** predominant use pilots and cabin crew **LCCs:** predominant use pilots and cabin crew	**Network airlines:** limited use pilots and cabin crew **LCCs:** frequent use pilots and cabin crew	**Network airlines:** minimal use pilots, occasional use cabin crew **LCCs:** minimal use pilots, occasional use cabin crew	**Network airlines**: limited use pilots and cabin crew **LCCs:** limited use pilots and cabin crew	Not applicable
Germany	No distinctions between airlines	Predominant use	Inconclusive	Limited use pilots and occasional use cabin crew	Limited use pilots and cabin crew	*Werkvertrag*: limited use Zero-hour contracts: frequent use by LCCs
Iceland	No distinctions between airlines	Predominant use for pilots, frequent use for cabin crew	Frequent use for pilots and cabin crew	Occasional use – upon mutual consent for pilots, can be obligatory for cabin crew	Occasional use	**LCCs -** Wet lease agreements with foreign airlines
Ireland	No distinction between pilots and cabin crew	**Network airlines**: frequent use pilots and cabin crew **LCCs:** minimal use pilots and cabin crew	**Network airlines**: see Temporary work agency **LCCs:** see Temporary work agency	**Network airlines**: Limited use pilots and cabin crew **LCCs:** limited use pilots and	**Network airlines:** occasional use pilots **LCCs:** predominant use in combination with fixed-term	**LCC:** zero-hour contracts – frequent use pilots and cabin crew

				cabin crew	agreements and self-employment for pilots and cabin crew	
NORWAY	Distinction between airlines	**Network airlines:** frequent use pilots and cabin crew **LCCs:** less than half of cabin crew	8.5% of the total work force is employed by non-permanent contracts. For the self-employed pilots contracts of 2-3 months have become the norm	Inconclusive	Prohibited until 2000; now only for cases where temporary employment is allowed. This will probably change in 2015 to a general right to temporary employment	Not applicable
SPAIN	Seasonal variation	**Network airlines**: predominant use for pilots; frequent use for cabin crew; **LCCs:** limited use pilots and cabin crew	**Network airlines**: limited use for pilots; **LCCs:** frequent use for cabin crew	**Network airlines**: Limited use pilots and cabin crew **LCCs:** limited use pilots and cabin crew	**Network airlines**: limited use by pilots and cabin crew **LCCs:** frequent use for cabin crew	Not applicable
UNITED KINGDOM	Seasonal variation	**Network airlines:** Inconclusive **LCCs:** inconclusive	**Network airlines:** inconclusive **LCCs:** occasional use for cabin crew, particularly during peak seasons	**Network airlines:** occasional use for both pilots and cabin crew upon mutual consent **LCCs:** occasional use cabin crew, limited use pilots	**Network airlines:** inconclusive **LCCs:** frequent use, particularly in peak seasons	Increased use of zero-hour contracts pilots and cabin crew

COMPARATIVE ASSESSMENT

In **Austria** the regulation and use of varying employment models predominantly depends on the airline, which an individual is engaged by. Employment relations at *flyniki* are significantly different from *Austrian Airlines*/*Tyrolean Airways*. Whilst the latter predominantly makes use of direct employment, the former predominantly engages crew members via temporary work agencies. During the summer of 2012 the latter made short-lived use of self-employed pilots as a result of the aforementioned operational transfer from *Austrian Airlines* to *Tyrolean Airways*. As a result of this transfer, many pilots left the organisation, leaving the airline in need of additional pilots in order to cope with the shortage and maintain the anticipated air traffic. Similarly it can be held that *Tyrolean Airways* does not make use of fixed-term work. The sole exception to this is again related to the transfer of operations to and back from *Tyrolean Airways* to *Austrian Airlines*, which resulted in employment contracts with pilots and cabin crew members being concluded for three years. *flyniki,* on the other hand, relies on the temporary work agency Labour Pool Personalleasing GmbH. In addition thereto, this entailed that no CLA was adopted with respect to the employment conditions at *flyniki*. The temporary agency workers concerned are employed by fixed-term contracts whilst also making use of the 'pay-to-fly' scheme, according to which individuals pay in order to pilot airbuses and thus gain invaluable flying experience. However, this entails that experienced pilots are increasingly being replaced by trainee pilots who engage in these 'pay-to-fly' schemes. This potentially affects not only the labour market, but equally so gives rise to certain safety concerns. Within this context it has been explicitly noted that issues have arisen and may continue to arise with respect to safety reporting, level of fuel filling, as well as de-icing.

The employment conditions at *Tyrolean Airways* stand in stark contrast with the conditions of employment at *flyniki*, particularly insofar it concerns pilots. As can be recalled, the latter is not covered by a CLA at the moment, and cabin crew and pilots are predominantly employed via a temporary work agency.[116] It is thus near impossible to ascertain to what extent *flyniki* employees are being given equal treatment, as there is no grounds for comparison as a result of the consistent and extensive use of temporary agency workers. Such lacking transparency, not inconceivably, leaves room for potential abuse and maltreatment of agency workers. In addition – despite the CLA that is due to enter into force for *flyniki* employees in 2015 – the remuneration paid to pilots and cabin crew appears to be deploringly low, and is in part subject to variations depending upon actual hours flown. Naturally this entails significant fluctuations depending on the seasons during which an individual is employed. Furthermore, one of the main concerns inherent to temporary agency work is the lack of certainty employees have in retaining their positions, or having their contracts renewed. As a result, employees have been found to consistently prioritise the oftentimes economically tainted needs of the user undertaking, as opposed to their own well-being, so not to face the threat of losing the temporary contract or endanger its renewal.

A particular problem that arises with respect to temporary agency work in Austria is the minimal notification period in the event of spontaneous termination of the assignment. Although initially no notification period was required, this was later amended by the introduction of a 14-day notification period for assignments that last beyond three months. However, particularly within the aviation

[116] A CLA is due to enter into force in 2015.

sector, this does not solve any problems as the sanctions are minimal and thus not likely to deter the parties concerned from nevertheless breaching this obligation. This practice can also be ascertained on a larger scale vis-à-vis temporary work agencies in the aviation sector – whilst complaints can be made against discriminatory practice by the agencies concerned, the consequences thereof are unclear, entailing that individuals are not necessarily incentivised to contest such malpractice.

For both *flyniki* and *Tyrolean Airways*, part-time work is solely of relevance insofar individuals ask for part-time employment. However, again, with *flyniki* part-time work can result in potentially precarious employment conditions, particularly with respect to wages. This is due to the fact that *flyniki* determines, albeit in part, remuneration based upon actual hours flown. For both airlines, however, it appears that part-time work is limited predominantly to cabin crew rather than pilots.

In **Belgium** the employment conditions of pilots and cabin crew are protected by the individual employment contracts, company rules and CLAs, of which the latter category may not be underestimated. Moreover, for a large part crew members generally are not subject to general labour law provisions, entailing that large differences exist between crew member employment contracts and contracts within other sectors. Similarly, employment contracts for pilots and cabin crew can diverge substantially, and no standard means of employment for pilots can seemingly be distinguished. Insofar it concerns pilots, frequent use is made of permanent/indefinite regular employment. Only a limited number of pilots are engaged based on fixed-term employment and/or temporary agency work. The latter is usually due to seasonal demands, whereby the airline employs individuals, directly or indirectly, for a duration of approximately six months to cover the seasonal peak in business. Not inconceivably, this results in job uncertainty for the pilot concerned. However, within this context the seasonal demands of a particular airline can equally so not be negated in its entirety. In coping with these balancing interests, it appears that certain airlines in Belgium – to a certain extent – tailor contracts to the pilots concerned with the nuance that the contract is effectively limited in duration. In addition to the limited use of temporary agency work and fixed-term employment generally, it appears that no distinct trend concerning self-employment can be observed in the Belgian aviation industry. It appears that in Belgian airlines self-employment amongst pilots is limited, whilst use thereof by foreign LCCs such as *Ryanair* would be the rule as opposed to the exception. However, it need be noted that the use of self-employment and other forms of atypical employment are not necessarily areas of concern in the Belgian aviation industry. It is rather the use of contract addenda, whereby pilots are provided with a basic contract that is supplemented by regular addenda, which leaves pilots in a perpetual state of uncertainty. The latter is furthermore aggravated in the event of atypical work such as fixed-term work and/or temporary agency work, of which job insecurity is an inherent characteristic. Compounding this insecurity, is the extremely competitive market for pilots in the Belgian aviation industry. It has been noted that a vacancy can generate as much as 2000 to 3000 applications.

Despite the competitive nature of the Belgian industry pertaining to pilots, it has been observed that types of atypical employment such as pay-to-fly have not (yet) emerged. Yet, it appears that a number of pilots are being employed at extremely low wages, entailing that they are barely capable of refunding their undertaken basic training. Lastly, a related phenomenon has arisen, whereby pilots are subject to type rate training. The latter entails that pilots are obliged to complete an in-house

training period with a particular airline in order to be eligible for an employment contract with this airline.

In stark contrast with the employment of pilots in the Belgian aviation industry, it appears that cabin crew are predominantly engaged via fixed-term contracts, and occasionally via temporary work agencies, both foreign and domestic. Additionally, the use of student contracts for cabin crew members has emerged, whereby students are hired via fixed-term contracts following a training of two to three weeks.

This having been said, note need be made of the high labour costs inherent to the Belgium regulation of employment which nevertheless results in low net wages. As a result, Belgian airlines are at a significant disadvantage vis-à-vis foreign airlines, even network airlines from neighbouring countries. The lack of initiatives in this respect has been noted as facilitating the use of doubtful and ambiguous employment structures such as wet-leasing, whereby the focus is no longer (solely) upon the well-being and protection of employees.

To assess the employment conditions in the **Czech Republic**, reference need be made to the airlines responsible for the employment of the majority of pilots and cabin crew, i.e. *Czech Airlines* and *Travel Services*. Depending upon where an individual is employed, the conditions will – similarly to the conditions in Austria – vary. Within this context, it need be noted that *Czech Airlines* is the sole airline with active trade unions. In particular, employment conditions at *Czech Airlines* are moulded by the Czech Airline Pilots Association as well as the Air Crew Union Organisation.

Safeguarding employment conditions, *Czech Airlines* regularly concludes CLAs, which result in perceived better employment conditions vis-à-vis *Travel Service*. Unfortunately, however, *Czech Airlines* has repeatedly fallen victim to economic losses that resulted in forced layoffs on numerous occasions. The economic hardship and subsequent restructuring has persisted until now, leaving employees of *Czech Airlines* in a constant state of job insecurity. Due to the competitive nature of the industry alternatives are scarce, and generally, reluctance is perceived to seek employment at the *Travel Services* airline, as a result of the particularly bad employment conditions.

Travel Services does not have the input of a trade union with respect to the determination of employment conditions vis-à-vis its staff. This is allegedly due to the absolute reluctance by the employer to engage in negotiations. Interestingly, pilots and cabin crew are subject to various forms of atypical employment in *Travel Services*. Concerning pilots in particular, it appears that many are in fact engaged in direct employment. However, many pilots at *Travel Services* are equally so employed by agreements on working activity, which were originally intended for one-off and/or rare projects. Whilst it is unclear as to whether this is necessarily illegal vis-à-vis European legislation, it is at the very least questionable as to the safeguards in place for pilots. Moreover, as the core of business at *Travel Services* is the operation of charter flights, large discrepancies exist between the on and off-season. During the off-season *Travel Services* typically leases out its pilots to foreign airlines, which is obligatory for the pilots if vacancies with foreign partners are not filled on a voluntary basis. This naturally has significant implications for individuals who have families in the home base in the Czech Republic, and are subsequently obliged to work from a home base elsewhere abroad. Additionally, *Travel Services* does provide for the possibility to engage in part-time work, albeit subject to stringent

conditions. Concerning starting pilots specifically, employment conditions seem particularly subpar at *Travel Airlines*. A pilot will be deemed a starting pilot insofar as 1000 flight hours have not yet been attained. Classification as a starting pilot at *Travel Services* entails that the individual will be deemed a starting pilot for 18 months upon commencing employment, and will be remunerated by a fixed low monthly amount, which does not nearly suffice in view of the costs of their education, and the acquisition of the requisite licenses.

Concerning cabin crew, it appears that the conditions stand in stark contrast with those for pilots at *Travel Services*. The majority (60-70%) of cabin crew members are employed by fixed-term contracts during the main season. In addition, approximately 10% of the cabin crew members are employed by an agreement on working activity. This is particularly worrisome in view of the fact that recruitment procedures take place on a yearly basis. During the off-season, in contrast with the pilots, cabin crew are not given the alternative of taking up employment with a foreign airline partner. Hence, cabin crew are in an even greater state of constant job uncertainty.

Whilst much variation exists between the employment contracts used for pilots, in the **Estonian** aviation industry contractual relations with cabin crew are limited to full-time employment, fixed-term employment and part-time employment. Also, the type of employment contract used is, for a large part, dependent upon the type of airline which an individual has been engaged by. The employment relations in the aviation industry are rendered more complex due to the combined use of these various contracts in particular situations.

Of the airlines operating in Estonia, in accordance with findings by national stakeholders, it can generally be held that the larger airlines make more use of full-time, open-ended employment, whereas smaller airlines make more use of fixed-term contracts. Remuneration, albeit hard to determine due to the diverse means to compose a wage package, is deemed acceptable by stakeholders for larger Estonian airlines as opposed to smaller and low-cost airlines. Whilst working time, vacation and training are all deemed to be adequate for pilots and cabin crew in Estonia, much will again depend upon the type of contract. Health and safety standards are deemed acceptable in the large Estonian airlines, but seemingly not in a sufficient manner in the smaller airlines.

Use is additionally made of part-time work, whereby workers are expected to perform their duties and tasks for approximately 50% of the normal working time. It appears that use is often made of this type of employment as a result of the employer's discretion, and that it is sometimes the result of an employer dividing a full-time job in two part-time functions. Temporary agency workers are equally so prevalent in Estonia. However, the cross-border element with respect thereto need be emphasised. Particularly UK-based agencies are used in hiring self-employed persons for air operations in Estonia.

In addition to self-employment in the aviation industry, use is also made of traineeship agreements. These types of arrangements are proving to be a significant source of concern as they oftentimes result in deplorable working conditions for the individuals concerned. By means of an example, it suffices to note that a traineeship lasts approximately 1.5 years, during which the trainee is obliged to pay the airline € 50,000 per year, in addition to having to provide for their own living expenses.

These atypical working situations such as temporary agency work, fixed-term work, self-employment and part-time work have been noted to detrimentally affect the health of the staff members concerned, and potentially their safety assessments during an air operation. Due to the risk inherent to forms of atypical employment, it appears that oftentimes individuals find themselves working during illness, and prioritising the economic needs of the employer as opposed to their own well-being as well as the well-being of passengers during air operations. Moreover, in Estonia generally, it has been found that the surge of atypical employment detrimentally affects the bargaining power of those who are directly employed and represented via the means of social dialogue. However, within this context, the distinction need be recalled between the employment conditions of the smaller airlines vis-à-vis the larger airlines, which are generally deemed to be adequate.

The conditions of employment for pilots (and cabin crew) in **France** are determined via four distinct means: the Civil Aviation Code as well as the Labour Code, and CLAs as well as company-level agreements further elucidate the employment conditions applicable to pilots.

In the French Civil Aviation Code and the Labour Code a clear distinction is made between pilots and cabin crew. The Codes were supplemented in 2009 by provisions pertaining to the maximum allowed working time, in accordance with European legislation. Whereas sectoral agreements, pursuant to collective bargaining, have resulted in a CLA pertaining to cabin crew, this does not apply to pilots, however. Hence, no CLAs elaborate upon the employment conditions for pilots in France. Lastly, company-level agreements are conceivably the most pertinent and extensive source of employment conditions for pilots in France. As a result of the liberalisation of the aviation industry, a law was adopted in France, granting all relevant parties two years to adapt and negotiate social agreements. As a result, *Air France* reached four CLAs by 2006 relating respectively to (i) all employees, (ii) ground staff, (iii) cabin crew and (iv) technical cabin crew, relating, amongst others, to the pilots and the commander. These CLAs detail conditions pertaining to hiring, classification, career training, promotion, annual leave, wages and the termination of contracts. In addition to these general company-level agreements, *Air France* has negotiated agreements with respect to particular topics which may affect pilots (and cabin crew) specifically, such as, amongst others, psychological risks, gender equality and professional training. Lastly, additional CLAs have been adopted particularly applicable to pilots, which has been perceived as a difficult task to complete.

In terms of different types of employment prevalent in the aviation sector of France, there is limited use of short-term/fixed-term employment contracts. Open-ended contracts are rather standard. However, additional use is made of fixed-term contracts to cope with peaks of activities in certain seasons, particularly by LCCs and certain subsidiaries of *Air France*. Part-time work on the other hand is virtually non-existent for pilots in France, whilst it is used for cabin crew – albeit currently without a legal framework applicable in the aviation sector. Nevertheless, part-time work in France generally has experienced a constant increase over the last decade. Lastly, temporary agency work is seemingly not prevalent in the French airline industry concerning pilots and cabin crew. On the other hand, generally the prevalence of temporary agency work has been subject to variation, and has known five distinct peaks since 2000.

The adoption of a decree in 2006, *Decret n°2006-1425 du 21 novembre 2006,* which rendered the Labour Code applicable to the airlines with operational bases in France, has resulted in numerous

cases before French courts. Notably, foreign LCCs (*EasyJet, CityJet, NetJets,* and *Ryanair*) have been held accountable for having employed pilots and cabin crew under foreign employment contracts and via temporary work agencies, thus avoiding the French social security regime, despite these airlines having operational bases and subsequent home bases in France. As a result, these LCCs have been obliged to conform to the social security regime in France, or, alternatively, reorganise their business so as to have an operational base elsewhere. These cases have served to substantially elucidate the rights and obligations inherent to employment relations concerning pilots and cabin crew in the French aviation industry.

Generally, concerning **Germany** it can be held that employment in the aviation industry pertaining to cabin crew and pilots has been quite volatile during the past two decades, and in part additionally depends upon the type of airline.

Traditionally, CLAs in Germany dictated employment relations generally in each sector and enjoyed widespread applicability. Despite the existence of small trade unions within specific fields of different sectors, additional smaller CLAs seeking to defend the rights of individuals within a given profession were prohibited as a result of the nation-wide applicable CLAs. Eventually this practice gave rise to protest and resulted in the possibility for smaller-scale and more specific CLAs to be made, not only by smaller trade unions but equally so individual employers, ultimately to the benefit of individual employees. Notwithstanding this positive evolution, however, trade union impact on the German aviation industry with respect to pilots and cabin crew specifically has remained somewhat limited. It is becoming exceedingly hard for smaller trade unions to organise due to the complexity of the aviation sector, which often includes German pilots and cabin crew members, employed by a foreign airline or temporary work agency, subject to the legislation of yet another Member State. Moreover, depending on the status and classification accorded to individual pilots and cabin crew members these unions are subject to exclusion from CLAs that may be established. Lastly, it has been noted that oftentimes the individuals concerned are no longer incentivised to organise themselves, as this may have detrimental repercussions upon their employment relationships in an already highly competitive environment.

Not inconceivably, the conditions of employment thus depend on various factors, amongst which the type of airline acting as an employer, and the type of employment relation with the latter. Generally, it has been held that employees are hired directly by German airlines. However, as a result of the competitive aviation market, employment relations are set to change. As aforementioned, the use of temporary agency work has varied and still varies tremendously within the aviation sector – albeit nevertheless limited at the moment. This type of employment relation is disadvantageous to the pilots and cabin crew concerned as it provides no protection against dismissals, and renders the individuals concerned in a perpetual state of uncertainty. However, it has been held by stakeholders that the employment conditions are not negatively affected by these types of contracts. Similarly, concerning part-time and fixed-term work, no data is available on the impact this has on conditions of employment. However, following interviews with stakeholders it has been noted that this does not detrimentally affect the health and safety standards in place pursuant to European and national legislation.

Contrary to the foregoing, zero-hour contracts and, additionally, the increased use of the notion pay-to-fly in the German aviation industry is a source of worry. Particularly in LCCs these forms of employment are highly prevalent. In one particular airline, 60% of the pilots are employed by zero-hour contracts. As the legal classification of these contracts is currently ambiguous, it places the individuals concerned in a precarious situation where there is no clarity as to the rights available to them.

Determining the conditions of employment for pilots and cabin crew in **Iceland**, a distinction need be made between the largest airline and the Icelandic LCC. The CLAs applicable to the largest airline in Iceland generally set the precedent for other airlines. These CLAs set forth the minimum standards, which may not be deviated from. These CLAs encompass, amongst others, *priority rules,* which serve to give Icelandic pilots priority in employment relations vis-à-vis foreign pilots. Additionally, *age priority rules* are included in the CLAs whereby, in view of the termination of a pilot's contract, adequate regard is had for his or her length of performed service. Furthermore, the CLAs with respect to the largest Icelandic airline provide for more advantageous employment conditions which exceed the minimum obligations. It suffices to note the additional holidays granted to these pilots and cabin crew members.

The aviation sector in Iceland is marked predominantly by direct employment of pilots and cabin crew, in conjunction with fixed-term employment. Pertaining to the direct employment of pilots, however, a nuance is requisite. The Icelandic Airline Pilots Association and the largest airline in Iceland have negotiated that when a slow season is anticipated which requires far less employees than normally employed, the airline may invoke the practice of 'winter termination'. This entails that the full-time open-ended contracts are terminated with three months of notice. These pilots are subsequently hired back upon commencement of the high season. Cabin crew members on the other hand are invariably subject to either regular employment or fixed-term contracts. However, they undergo a similar 'winter termination' insofar this is warranted by market fluctuations.

Market fluctuations also affect the use of part-time employment by Icelandic airlines. Whilst pilots can only be engaged in part-time employment as a result of mutual consent, the regulation thereof differs somewhat with respect to cabin crew members. Cabin crew members can additionally be subjected to *involuntary* part-time employment. Whereas initially there was hesitance amongst Icelandic airlines to make use of such type of employment contracts, this is slowly evolving in tandem with the need for increasing flexibility in the aviation industry.

Lastly, note is made of the fact that employment relations for Icelandic pilots and cabin crew are also determined by the business structure of Icelandic airlines. The Icelandic LCC for example hires Bulgarian pilots to operate in Iceland via the means of wet lease agreements, whereby the pilots and aircrafts are provided for by *Air VIA Bulgaria*. Similar practices are prevalent with airlines established outside of Europe.

Nevertheless, despite fluctuations in the usage of various employment models atypical employment and its consequences vis-à-vis pilots and cabin crew have not been a source of media coverage and have, equally so, not been an area of concern in court proceedings.

Similar to Iceland, labour conditions in the **Irish** aviation industry depend for a large part upon the airline by which an individual is engaged and the business model that airline pursues. Whilst employment conditions at *Aer Lingus* are generally perceived as being superior to labour conditions at *Ryanair*, convergence of the two business models – national and LCCs – has been observed, however to the detriment of the employees concerned. Despite the equal treatment provisions encompassed in European and Irish legislation, it is held that *de facto* equal treatment cannot be maintained for employees that are increasingly employed via atypical employment vis-à-vis regular employees directly engaged by the airlines concerned.

The decreasing labour conditions are furthermore aggravated by the lacking trade union recognition in Ireland. Although the 1990s experienced a surge of court cases pertaining to union representation in the Irish transport sector, these attempts at enhanced recognition of trade unions in transport was made redundant by a ruling of the Irish Supreme Court with respect to *Ryanair*.[117] In essence, the ruling held that in Ireland a business retains the right to operate a non-unionised company. The Supreme Court furthermore elucidated the definition of collective bargaining which clearly contradicts the ILO interpretation of collective bargaining. As a result of the increasing tension in this regard, in combination with an official complaint which was submitted to the ILO, a new law on collective bargaining was negotiated. The law concerned seeks to safeguard the possibility for collective bargaining and union membership *without* employer interference, as had been the case at *Ryanair*.

Whilst part-time work is of less relevance in the Irish aviation industry, the impact of (bogus) self-employment in this sector is seemingly significant. Generally, an estimated 14% of the workforce in Ireland are self-employed, indicating that self-employment in Ireland exceeds the European average.

The foregoing considerations pertaining to (temporary) agency work and self-employment are irrefutably relevant within the Irish aviation industry, as some state 70% of pilots at *Ryanair* are self-employed and provide services to *Ryanair* via UK based crew agencies.

The use of (temporary work) agency contracts has additionally increased for pilots working at subsidiaries of *Aer Lingus* which, particularly due to *Ryanair,* is subject to extreme competition. However, despite the convergence towards the LCC model *Aer Lingus* still bares significant labour costs, which is demonstrative of the aforementioned divide and differentiation between national airlines and LCCs in the various aviation industries across Europe.

The conditions of employment at *Ryanair* are observed to be an area of concern. This is in particular due to the fact that *Ryanair* stringently adheres to the low cost mantra. In addition to decreasing the labour cost by the excessive use of atypical contracts, *Ryanair* creates its cost advantage vis-à-vis other airlines by, for example, "*reducing the size of the in-flight magazine from an A4 to an A5 format to save weight/fuel and printing costs, and cutting the weight of trolleys and seats to save fuel*".[118]

Particularly in view of the extreme prevalence of intervening (temporary work) agencies in *Ryanair's* business and employment models, it appears that the position of pilots is becoming increasingly

[117] Ryanair v the Labour Court (2007) IESC 6.
[118] Irish national report.

more precarious. By means of an example, it suffices to note the observed practice whereby individuals are hired for zero-hour contracts whilst the agency is under no obligation to provide and/or locate work, and the employee concerned has no voice in the matter. As a result of this lacking representation, fears pertaining to constant changing of home bases and subsequent taxation and social security regimes, are solely aggravated.

In addition, the application process is particularly disconcerting due to the consistent imposition of payable fees in order to be allowed to partake in the recruitment process. Pilots are required to pay € 15 to download the online application form, which is to be supplemented by € 35 in order to submit the completed application form. Furthermore, the training fee amounts to € 28,500, which is to be paid in advance. Particularly for junior pilots, these fees are an area of concern, as they are usually in large depth as a result of the requisite studies in order to become a pilot.

Because of the increasing competition *Ryanair* is subjected to, it has become increasingly difficult to generate a profit during certain seasons, obliging *Ryanair* to become exceedingly cost-efficient. Within this context, since 2009 *Ryanair* has been compelled to offset losses during the slow winter season by further exploiting the busy summer season. To this end pilots and cabin crew members are immediately held to work the maximum flight and duty hours, to subsequently be dismissed during the winter season.

According to stakeholders, for the assessment of the employment status of the **Norwegian**[119] pilots a distinction has to be made between the airlines: as *SAS* and *Widerøe* have so far been loyal to the traditional model with employing their staff, including pilots and cabin crew on permanent contracts, it is most interesting to concentrate on the analyses of the pilots and cabin crew employed by the LCC *Norwegian*. *Norwegian* has foreign bases in Sweden, Denmark, Finland, the UK, Spain, Bangkok and the USA. At the foreign bases, the cabin crew is recruited from temporary work and crew agencies. According to one of the informants, less than half of *Norwegian*'s total cabin crew is now permanently employed. On the other hand, when we look at the pilots who work for *Norwegian* we see that they are divided in three groups: pilots who are 1) permanently employed, 2) hired through temporary work agencies, and 3) self-employed who often hire themselves out to a temporary work agency. Since the ban on temporary work agencies and on the leasing of labour was lifted in 2000, we have seen a significant trend towards methods 2 and 3. According to the airline, the bases are established to serve important traffic interchanges. At the same time, they underline that to meet the competition outside Scandinavia, it is necessary to pay local salaries. At the same time, the airline admits that the use of temporary work agencies and self-employed pilots has been part of their strategy to ensure the necessary flexibility in an expansion phase. Contract periods of two or three months have become the norm for self-employed pilots, resulting in great job uncertainty. The contracts between the self-employed pilot and the temporary work agency will determine whether the pilot is actually a self-employed person or whether he or she is in fact employed by the agency. If the pilot is self-employed, the agency's role is to be a broker of assignments between the pilot and the airline. In some of the most typical contracts the pilots are, according to national law, in reality employed by the temporary work agency. *Norwegian* claims that the pilots can choose whether they want to have a contract, which implies that they have to take care of paying taxes themselves or be

[119] Norwegian national report.

employed by a temporary work agency. In addition, the literature talks about a significant group of persons (a newspaper article talks about 1000 persons in 12 months) who were hired by OSM Aviation Group (provider of crew employment and crew management services) to staff *Norwegian*'s and *Finnair*'s flights to the USA and the Far East. Their working conditions are in general much poorer than the pilots employed in Norway. The job insecurity accompanied by the added pressure of recent layoffs rightly raises questions concerning the self-reporting system about working conditions with the contract pilots (an audit in *Norwegian*, carried out by the CAA in the autumn of 2014 reveals that "no reports of Commander's discretions have been received the last 12 months"). The assessment of the employment conditions is undoubtedly limited insofar the reporting in repeated working environment surveys is honest.

Employment of pilots and cabin crew in **Spain** entails employment by strictly Spanish airlines, and employment by foreign airlines, which have operational bases in Spain, with Spanish crew stationed there accordingly. Spanish airlines include larger airlines such as *Iberia* and *Air Europa*, as well as LCCs such as *Veuling*, *Air Nostrum* and *Iberia Express* or *Swiftair*. Notable foreign airlines with operational bases in Spain are *Ryanair* and *Norwegian*.

An assessment of the employment conditions is undeniably limited insofar it pertains to pilots and cabin crew employed by foreign airlines in Spain. As these are not affiliated to trade unions in Spain, and the exceedingly complex and international contracts are subject to foreign legislation, it is extremely difficult to obtain pertinent information about the employment conditions with respect thereto. However, it has been noted that amongst these airlines, as well as national LCCs, increased use is being made of the pay-to-fly scheme.

Stakeholders in Spain, however, maintain that the surge of atypical employment amongst Spanish airlines and foreign airlines operating in Spain is responsible for the worsening of the labour conditions of pilots and cabin crew. Moreover, complaints have been raised with respect to the arbitrariness of the employers and the unrelenting fear of temporary contracts not being renewed. In addition to these concerns, it appears that the increase in atypical employment in the aviation sector has caused fixed wages to decrease and wages to become more variable. The latter subsequently entails that individuals are pushing themselves to work, irrespective of health and safety concerns, in order to nevertheless maintain adequate remuneration. Additionally it was noted that these temporary forms of employment furthermore inhibit the potential for promotion and recognition of gained experience.

Generally pilots are employed in Spain by means of permanent, regular employment. However, a nuance is in order, as in some instances use will be made of temporary contracts in view of seasonal and productive requirements. *Iberia*, one of the larger Spanish airlines, does not sign temporary contracts for pilots, whilst Spanish LCCs do hire a certain number of pilots via temporary contracts, albeit subject to numerical limitations. Temporary contracts on the other hand are made use of by both foreign airlines and, in a limited manner, national airlines. However, these temporary contracts are solely allowed if they are warranted due to a backlog, a specific project or service, or to provide substitution for an employee. These limitations seek to protect individuals against abuse of temporary contracts. Similar to other Member States, an employment relation can be established by

means of a traineeship, which is also subject to a large number of limitations in order to prevent abuse thereof.

Employment of cabin crew on the other hand is far more varied. Cabin crew, depending upon the airline, are employed via direct regular employment contracts, fixed-term contracts and temporary contracts. However, airlines such as e.g. *Iberia* do limit the number of temporary contracts allowed. However, such limitations are far less stringent in other Spanish (low-cost) airlines such as *Veuling* and *Air Europa*.

Neither part-time employment nor fixed-term work are prevalent amongst pilots and cabin crew in the Spanish aviation sector.

Foreign airlines with operational bases in Spain, who employ Spanish pilots and cabin crew, equally make use of a variety of forms of atypical employment. These individuals are frequently bound by foreign contracts entailing that the competent Spanish trade unions have no input in the establishment and safeguards of these contractual arrangements. The contractual arrangements used by airlines such as *Ryanair*, for example, are predominantly, if not exclusively, employment contracts via (temporary work) agencies. These foreign contracts for workers and self-employed individuals are oftentimes facilitated by brokers and crew agencies. This stands in stark contrast with the Spanish airlines in Spain, which employ most of the crew directly, albeit not always for open-ended contracts.

In the **UK**, employment conditions are, not inconceivably, to a great extent dependent upon trade union involvement. Within this context, it need be noted that trade union membership declined consistently since 1979, whilst LFAs generally were and still are reluctant to recognise trade unions in order to facilitate collective bargaining. Additionally, most LCCs generally are established as non-union affiliated companies, with the exception of network airline subsidiaries, such as the airline *Go,* a subsidiary of *British Airways*. The discrepancies between employment conditions for pilots and cabin crew at airlines affiliated to trade unions and those not affiliated to trade unions is seemingly very clear. Not inconceivably the lesser employment conditions at non-unionised (low-cost) airlines paved the path for trade union recognition by *easyJet* for pilots and cabin crew in 2001. Pursuant to a recent survey concluded by the European Transport Workers' Federation, it was found that *easyJet* crew members are generally satisfied with their contracts of employment, pay, rosters, and benefits vis-à-vis other LCCs. The foregoing is particularly interesting in view of the negative perception held by employees at the same airline in 2001, prior to its unionisation, as demonstrated in the table below. It is clear from contemporary findings that the employment conditions at *easyJet* have improved considerably following trade union recognition, not only for UK staff, but equally so for staff recruited abroad and increasingly employed by local (as opposed to UK) employment contracts.

Example: Flight crew satisfaction at easyJet (2001)[120]

Aspect of work	*% Dissatisfied*	*% Satisfied*
Salary	33	67

[120] G. Harvey & P. Turnbull, 'On the Go: Piloting High Road Employment Practices in the Low Cost Airline Industry', 2010, *International Journal of Human Resource Management*, 21(2). p 236.

Pension	52	48
Leave entitlement	31	69
Sickness benefits	38	62
Access to flight manager	38	62
Disciplinary procedures	84	16
Status	49	51
Job security	20	80
Relationship (flight crew and management)	95	5
Management of human relations problems	75	25
Management of industrial relations problems	97	3
Flight rosters	84	16

ii. SELECTED SAMPLES OF POSSIBLE ABUSES OF ATYPICAL WORK

In the foregoing, an overview was given of potential (adverse) implications as a result of atypical forms of employment within the aviation industries of selected States. This chapter seeks to elucidate the potential typical forms of abuse that may arise therefrom within these respective States.

One of the primary concerns is the phenomenon of bogus self-employment in the aviation sector. The classic distinction between regular employment and self-employment not only serves as a cornerstone of traditional employment legislation, but is also pivotal with respect to labour and social security law.

As is the case in various Member States (**BE**, **CZ**, **FR**, **DE**, **ES**), in **Austria** the qualification given to an employment relation by the parties concerned is not decisive. More important are the factual circumstances of relevance in the relationship. Hence, whether an individual is in fact subject to bogus self-employment will – in accordance with Austrian practice – depend primarily upon an assessment of the characteristics of the employment relationship. In Austria, the qualification of employment relations can either be contested by the employee him or herself, or by the competent authorities.

An additional phenomenon that has arisen as a result of bogus self-employment in Austria, and subsequent bogus companies, is the notion of *payrolling*. *Payrolling* refers specifically to the employment by a (temporary work) agency for pilots, irrespective of their specific status as a worker or self-employed individual. It entails that the agency exercises a minimal role in the employment of the individual concerned, and the user undertaking makes all relevant decisions, which in a normal employment relationship only the contractual employer is entitled to make. The contractual employer, thus being the agency, is accorded solely the responsibility of remunerating the worker, and has no additional say in matters of employment whatsoever. This raises the question as to who is to be considered the actual employer. This becomes especially relevant in view of the fact that

employment relationships are assessed upon the factual circumstances of the case rather than upon the qualification given by the parties concerned. Moreover, it raises the question as to the repercussions vis-à-vis the agency in the event of retroactive requalification of the employment relationship.

One of the greatest concerns with respect to bogus self-employment in the **Belgian** aviation industry is the lacking statistics and available information on the matter. Despite the *Programme Act of 27 December 2006*, which clearly stipulates what constitutes *genuine* self-employment, and the *'qualification judgments'*[121] by the Belgian Court of Cassation, the prevention of bogus self-employment is perceived as extremely difficult in Belgium. Indeed, several mechanisms are in place in order to prevent this particularly detrimental form of atypical work. However, gaining insight into the magnitude of the issue within the aviation industry is reportedly very difficult. Individual complaints are hard to come by due to fear of repercussions. Consequently, the aviation industry in Belgium is particularly closed off from outside interference, which significantly complicates the identification and solving of issues pertaining to atypical forms of employment.

Despite it being prohibited, bogus self-employment is prevalent in the **Czech Republic**. It has been observed and unveiled in a multitude of sectors and the use has generally increased, prevailing particularly in small to medium-sized enterprises. Whilst no data is available with respect to bogus self-employment in the aviation sector, it can be assumed, according to national stakeholders, that this form of employment has also spilled over with respect to employment relations concerning pilots and cabin crew.

In **France** a strict dichotomy prevails between regular employment and self-employment. The main criteria to decipher whether an individual is employed as opposed to being self-employed, is by referring to the notion of subordination. In cases of bogus self-employment, in France legal intervention would be necessary, as automatic conversion of self-employment to employment is not feasible. Again, when determining whether there is illegal bogus self-employment, a judge will investigate to what extent a bond of legal subordination is applicable to the relations at hand, and will render a judgment accordingly. The bogus self-employed individual is deemed a victim, entailing that the employer will be deemed culpable and be potentially subject to three years imprisonment, in conjunction with a € 45,000 fine, which may reach € 225,000 if the employer is a company. Moreover, mention need be made of the newly enacted French Act against social dumping in France, i.e. *Loi du 10 juillet 2014 visant à lutter contre la concurrence sociale déloyale*. This new law obliges, amongst others, companies that are not established in France to comply with the provision of requested documents, imposes stringent due diligence requirements and generally strengthens the sanctions applicable to social dumping.

Similar to France, when unveiling bogus self-employment in **Germany**, reference is made to the characteristics which describe a regular employment relationship. In particular, the condition of personal dependence will be determinant of whether an individual is to be deemed self-employed or an employee. Personal dependence is to be distinguished from economic dependence, as the latter refers to a situation where an individual is dependent upon the remuneration by the employer, yet

[121] These judgments concerned the requalification of an employment relationship and ventured into the elements requisite for the qualification of self-employment.

has discretion in how and when he or she performs the required services and/or duties. Personal dependence on the other hand is the scenario whereby an individual is not only economically dependent upon the employer, but is also not free to decide the manner by which the required services are performed. If a self-employed individual in his or her relations with the employer is thus personally dependent vis-à-vis the latter, this will in all likelihood constitute a case of prohibited bogus self-employment. The determination of a duty roster by the employer is paramount in this regard and a strong indicator of potential bogus self-employment. When discovered, the employment relation will be retroactively treated as direct employment and result in severe fines as well as potential imprisonment up to five years. Interestingly, the severity of the consequences depend for a large part upon the notion of intent – negligent use of bogus self-employment is sanctioned less severely than the use of bogus self-employment on purpose.

In addition to the applicable legislation with respect to bogus self-employment in German legislation – albeit not specifically related to the aviation industry – it has been observed that airlines specifically have internal procedures in order to combat such maltreatment. However, due to lacking information with respect thereto, little is known as to its effectiveness and impact.

Bogus employment in **Spain** is both dealt with by legislation and further developed by increasing case law. A distinction is made between various kinds of bogus employment ranging from bogus temporary work, bogus self-employment, bogus outsourcing and illegal use of temporary work agencies. As is the case in France and Germany, when determining whether an individual is self-employed as opposed to a regular employee, attention is had for the notion of subordination. *In casu* this is assessed by reference to the ability of an individual to complete his or her duty roster rather than having it imposed by the employer.

In **Estonia** the distinction between self-employment and a regular direct employment hinges upon the notion of subordination. The element of subordination is assessed by referencing the capacity of an individual to freely choose how and when he or she will complete the requested duties, the obligation to follow internal rules and the obligation to obey orders from the employer. However, Estonian legislation does not, in contrast to the aforementioned Member States, regulate the notion of bogus self-employment, entailing that no specific regulations are applicable which define or provide for safeguards against bogus self-employment in Estonia.

Comparable to the situation in Estonia, in **Iceland**, as a result of the lack of legislation concerning self-employment, no relevant legislation can be found that regulates and sanctions bogus self-employment. The taxation authorities are the sole parties involved in unveiling and discovering bogus self-employment in Iceland. Moreover, Icelandic courts have had marginal input in further elucidating the notion of bogus self-employment, in particular concerning the aviation industry.

In contrast with the aforementioned Member States, in **Ireland** (bogus) self-employment does not hinge solely upon the notion of subordination. Rather, as aforementioned, as a result of the lacking conclusive definition of what constitutes (self-)employment in Irish legislation, Irish courts have been instrumental in the determination thereof. In addition to the three-tiered test entailing a verification of control, integration and economic reality, various others factors have been enumerated which

serve as a means of distinction between self-employment and regular employment (see *supra* – Part 2. III. B. i. Comparative Assessment – **Ireland**).

Much like Ireland, bogus self-employment in the **UK** does not hinge upon the notion of subordination only. Rather, recalling the aforementioned legal tests (see *supra* – Part 2. III. A ii. Regulation of employment relations in selected States), bogus self-employment will be determined based upon the entirety of various factors taken together. This is particularly interesting in view of the fact that (bogus) self-employment has been on the rise generally and in the aviation sector specifically.

In addition to the ambiguity that may arise due to the lacking finite and conclusive legislation pertaining to (bogus) self-employment and the qualification of regular employment, zero-hour contracts are proving to be an area of concern as well. In particular, it has been raised that self-employed crew members are often engaged on a zero-hour contract which is generally understood not to include a mutuality of obligation, as would normally be the case in a regular employment relation. Whilst allegedly the self-employed individuals are free to accept offered work under these contracts, *de facto* they are obliged to accept the work. Moreover, it appears that individuals employed by such contracts are usually under-employed, younger, lower-paid and generally have difficulties securing entitlement to social benefits. In addition, it has been held that the workers assume more risk, whereas the employer enjoys much more flexibility with the management of his or her crew members. This particular combination of self-employment via zero hour contracts, which ultimately *de facto* embodies a form of bogus self-employment, is demonstrative of the cost-cutting techniques employed by contemporary airlines, whereby social security fees are avoided and the greatest flexibility is maintained, all the while potentially detrimentally affecting the individuals concerned.

iii. ENFORCEMENT

Generally, it can be held that despite the predominant condemnation of the notion of bogus self-employment, and general concern for the adverse effects of atypical employment relations, enforcement thereof remains difficult. Rather, it appears that measures pertaining to atypical forms of employment and bogus self-employment in the aviation sector in particular have not been formulated. As a result, these forms of atypical employment are generally dealt with by relying upon generally formulated provisions, applicable in all sectors, as opposed to being sector-specific. In this same vein, it can be held that enforcement authorities have not been established with the objective of combating bogus self-employment in the aviation sector particularly. Equally so, in order to unveil bogus self-employment in the aviation sector, general authorities such as social security and tax authorities must be relied upon, which again are not sector-specific.

In **Austria**, it is primarily the social security agencies that have undertaken initiatives to counter abusive practices by airlines as well as bogus self-employment in the aviation industry. Despite the foregoing, however, no specific regulatory action has been taken within the field of aviation to counter these tendencies and the labour inspectorate has yet to play a role here. In addition to the social security agencies, Austro Control – a public company that checks regulatory adherence in the Austrian aviation industry – has undertaken checks on adherence to conditions of employment pertaining to, amongst others, maximum flight hours and rest periods. However, it has been

criticised for not adequately regulating temporary agency work, thus leaving room for abuse. Moreover, it has been held that there may be issues of conflicting interests as certain employees of Austro Control equally work as freelancers themselves in the airlines concerned.

As mentioned above, little insight is available with respect to bogus self-employment in **Belgium.** Despite the mechanisms in place to facilitate the eradication of bogus self-employment, prevention remains a particularly arduous task in the Belgian aviation industry. Nevertheless, a myriad of measures are available for the prevention of such employment techniques. Within this context, mention need also be made of the Social Inquiry and Tracing Service, which in parallel with the social security and labour authorities additionally contributes in the fight against social fraud.

In furtherance of the objective of eradicating such fraud, the aforementioned *Programme Act of 27 December 2006* was amended in 2012, bringing about two essential changes to the legislation. Firstly, a refutable presumption of regular employment now governs employment relations, substantiated upon nine indicators. Depending on whether half of the nine indicators are complied with, the employment relationship will or will not be presumed to be regular employment. Secondly, the 2012 amendments allow for the possibility of a *social ruling*. This entails that the *administrative commission for the regulation of working relations*[122] are able to rule upon the qualification of an employment relation up until one year following its commencement. The findings of this commission would subsequently be binding for the social security authorities and effective for three years.

The aforementioned measures are additionally supplemented by the Belgian *blinker system*, whereby the National Institute for the Social Security of the Self-Employed cooperates with the National Social Security Institute, by notifying the latter of potential cases of bogus self-employment. Both institutes can subsequently initiate investigations.

Lastly, an array of sanctions govern the notion of bogus self-employment, ranging from social security sanctions (retroactive claim of social security contributions with an interest of 10% and an additional 7%), wage claims, holiday pay claims, and resignation remuneration, to criminal sanctions (eight days to three months imprisonment and/or a fine anywhere between € 26 to 500 multiplied by 5.5).

In order to gain insight into the prevalence of self-employment and into the compliance as a result thereof with, amongst others, tax and customs, the **Estonian** government adopted the Employment Register. A self-employed individual is thus obligated to register the particularities of his or her self-employment. Needless to say, this could be used as a tool to further eradicate bogus self-employment. In addition, courts have attempted to counter such practices, by interpreting the notion of an employment contract in a broad manner so as to include bogus self-employment. Equally so, labour dispute committees have proven resourceful in combating abuse of atypical forms of employment, including open-market traineeships, which – as aforementioned – are a serious area of concern in the aviation industry in Estonia.

In **France** three distinct institutions can be identified as combating bogus self-employment, i.e. the labour inspectorate, the social inspectorate and the National Delegation Against Fraud. The latter

[122] Replacing the former normative department of the commission for the regulation of working relations.

was created in 2008 with the intent of coordinating the efforts by public authorities in the fight against social and tax fraud. It operates via operational anti-fraud committees which coordinate the tasks of social institutions and state services. In addition to the strict legal framework which explicitly prohibits bogus self-employment, the cooperation between the competent and relevant institutions is continuously reinforced so as to ensure zero tolerance for bogus self-employment. Moreover, the pilot unions play a pivotal role in detecting abuse in atypical employment of pilots and actively participate in court proceedings in order to minimise its prevalence.

Similar to France, bogus self-employment is prosecuted by various authorities in **Germany**, including, amongst others, the Public Prosecutors' Office, social insurance agencies, and treasury authorities. In addition, individual employees can unveil bogus self-employment by filing a complaint themselves. The efficacy thereof, however, is highly questionable, again due to the repercussions this may have on the individual in an exceedingly competitive aviation industry.

The enforcement of employment rights in **Ireland** has been noted to be extremely difficult. This is in part due to the trilateral implications a requalification of bogus self-employment to employment would have. Specifically, this would have employment-related consequences, tax-related consequences, and finally social security related consequences. Moreover, whilst for certain social security related purposes an individual may be perceived as being bogus self-employed, it is entirely conceivable that tax authorities do not consider the individual as bogus self-employed. The lacking cooperation and lacking shared perspectives amongst governmental agencies leaves the individuals concerned in a realm of legal ambiguity as to their status.

In **Norway** the inspections in the aviation sector are carried out by the Civil Aviation Authority (CAA). Topics concerning health and safety (working environment)[123] are separated from general safety procedures (flight security) for the personnel. The CAA's responsibility concerning health and safety for the pilots and cabin crew result from public law. Questions concerning employment result from private law, and are not part of the CAA's area of inspections. It will therefore be up to the worker him or herself to bring the case to court with claims about any unlawful employment practice. According to the representative from the CAA, the inspectors do not ask about the worker's type of employment and they do not monitor this issue. They concentrate on health and safety issues for the pilots and cabin crew, regardless of nationality or regardless of whether the worker is permanently or temporarily employed. Their responsibility includes foreign airlines with bases in Norway.

In the aviation sector, the working environment responsibility has, since 2010, been divided between the CAA and the Norwegian Labour Inspection. The latter performs inspections with regard to the ground crew. However, the two authorities cooperate, both formally and in more practical terms.

In **Spain** the labour inspectorate is responsible for supervising and enforcing adherence to the applicable labour legislation and thus responsible for unveiling bogus self-employment. If a case of bogus self-employment does arise, the employment relation would be re-qualified as a full-time employment contract.[124] Nevertheless, despite this mandate, investigations into bogus self-employment and abuse of atypical employment relations in the aviation industry in Spain are limited.

[123] The aviation sector is exempt from some of the regulation in the law. The most important exemption is working time.
[124] The consequences seem rather limited vis-à-vis other Member States.

This is in part accredited to the fact that many of the complaints arise from employees in foreign airlines with operational bases in Spain, making it politically more sensitive to intervene and investigate. Additionally, despite the employment conditions, which are often declared deplorable, political considerations serve to tolerate these conditions. It suffices to reference the increased source of tourism in Spain as a result of the increased access to remote areas by LCCs.

IV. PERCEIVED AREAS OF CONCERN AND DISADVANTAGES OF ATYPICAL EMPLOYMENT

	BEST PRACTICES	AREAS OF CONCERN
AUSTRIA	Social dialogue is pivotal as demonstrated in the transfer from Austrian Airlines to Tyrolean Airways. The national culture allows for social dialogue between all parties concerned and ensures equitable solutions for those involved.	Agency work is not adequately regulated. Lacking provisions to combat atypical employment in the aviation sector. Despite *de iure* equal treatment provisions and a newly adopted collective agreement, pilots and cabin crew members are significantly disadvantaged by LCCs. Despite regulatory provisions, there is enough leeway for abuse to be made of forms of atypical employment.
BELGIUM	CLAs on a sectoral level and company level significantly contribute to the amelioration of employment conditions for both pilots and cabin crew. Temporary agency work is highly regulated to the benefit of pilots and cabin crew, in order to ensure that this form of employment is not used to the detriment of regular employment. Despite comprehensive insight into the magnitude of the detrimental effects of atypical employment and bogus self-employment in particular, numerous mechanisms have been established in preventing such practices.	Lacking statistics and insight into the magnitude of (illegitimate) atypical forms of employment. The application of the notion home base is subject to many variations and thus does not necessarily provide pilots and cabin crew members with the protection it seeks to achieve. Continuously altered contract addenda place pilots and cabin crew members in a constant state of uncertainty, particularly in cases of atypical employment. Steep fees of training programmes may result in a loss of quality of crew members generally. For numerous reasons pilots engage in additional second jobs, whereby resting periods are not respected, potentially affecting flight safety.
CZECH REPUBLIC	Various atypical forms of employment are effectively regulated thus providing legal certainty and minimising ambiguity. The employment conditions at the network airline with trade union representation are deemed acceptable. Atypical employment is not very prevalent in the aviation industry.	Discrepancies exist between pilots and cabin crew members, whereby the latter are noted to be subject to lesser conditions. Lacking trade union recognition for airlines stands in correlation with the lesser working conditions of pilots and cabin crew members. Classification as a junior pilot in certain airlines entails inadequate remuneration to cover essential costs.
ESTONIA	Employment conditions are generally above average at bigger airlines, with wages, leave, working time,	Ambiguity concerning the qualification of an

	training, termination, and health and safety being considered average or above. The existence of labour dispute committees has helped improve the employment rights of atypical workers, such as those of trainees.	employment relation. Trainees are performing tasks of experienced pilots without requisite supervision. Health and safety standards may be affected as a result of atypical work. Commercial interests may be prioritised over safety concerns. Atypical employment decreases bargaining power of trade unions. No specific measures to combat bogus self-employment / abuse of atypical employment. CLAs have a minimal role in determining employment conditions.
FRANCE	Trade union involvement has resulted in company level agreements to the benefit of, amongst others, pilots and cabin crew members. Company level agreements are supplemented by agreements pertaining to specific issues, such as psychological risks, gender equality, and financial participation. In addition to the labour inspectorate and the social security inspectorate, in 2008 the National Delegation Against Fraud was established, which fights, amongst others, bogus self-employment, by coordinating the competences of various governmental authorities.	Despite the strong regulatory framework to combat abuse of atypical employment, foreign airlines operating in France remain able to subject pilots and cabin crew to potentially detrimental employment conditions.
GERMANY	Agency work serves as a catalyst to enter and re-enter the employment market.	Despite *de iure* equal treatment provisions, pilots and cabin crew may still be subject to *de facto* unequal treatment. Unclarity with respect to atypical forms of employment such as, amongst others, the increased use of zero-hour contracts. Problems persist with respect to home bases, which results in legislation shopping to the detriment of pilots and cabin crew members.
ICELAND	CLAs set the minimum standard for employment conditions and cannot be deviated from. Specific trade unions have been established, as opposed to representation solely by an umbrella	Increasingly complex employment relations give rise to accountability in the event of air operation mishaps. No specific measures aimed at combating bogus self-

	trade union. Specific legislation (amongst others for health and safety) has been adopted for the aviation industry supplementing and prevailing insofar necessary over general employment legislation. The employment conditions, pursuant to CLAs, at a large airline do not differ substantially from employment conditions at LCCs.	employment. Lacking surveillance renders it difficult to acquire a comprehensive overview of the employment conditions in Iceland.
IRELAND	A new law on collective bargaining is envisaged to come into force mid-2015, serving as an additional ground to ensure enforcement of employment rights. Convergence of the two typical employment models, moderating employment conditions from both perspectives. LCCs provide flexible rosters which may benefit the pilot and/or cabin crew member.	Enforcement of employment rights is complex and time-consuming. The determination of employment status is equally so complex due to the taxation, social security and employment authorities involved. Lacking statistics. *De facto* unequal treatment for atypical workers, despite *de iure* equal treatment guarantees. The prevalence of a 'blame culture' at certain LCCs as opposed to a 'safety culture'.
NORWAY	Good relations between the social partners. Unlike the rest of the Norwegian labour market, the agreements have been tied to each company, not to the whole sector. Successful business models of two of the main actors where able to ensure their position due to cost-effective measures without reducing the security of their staff (permanent contracts are the norm). Working on statistics (planned national working environment survey)	"Norwegian has become a holding company, almost without employees" as a result of transfer of employees outside Norway (cost-effective – 'Good but local salaries'). Cost-effective measures implied cut-down (employees are forced to cut salaries and accept more flight hours and reduced pension benefits). Questions of unlawful employment practices fall under private law and are the responsibility of the employer him or herself to bring before the court. No mentioned specific measures aimed at combating bogus self-employment. Increasingly complex employment relations make it hard to establish where the pilots or cabin crew are based, and it is hard to control this.
SPAIN	Trade unions have proven essential in ensuring employment rights enforcement. Successful business models are able to remain on the market due to cost-effective measures that do not jeopardise employment conditions, but rather, focus	Commercial interests are prioritised at the expense of health and safety concerns. Discrepancies between national and European standards result in the negation of the stricter Spanish standards.

	on intensive use of aircrafts.	Lacking certainty concerning home bases results in unforeseen and arbitrary changes of home bases. Legal enforcement of employment rights is complex and time-consuming. Malpractice is contagious. Lacking governmental transparency with respect to statistics. Lacking preventative action.
UNITED KINGDOM	Trade union intervention led to a change in the corporate culture of *easyJet*, resulting in significantly ameliorated employment conditions for pilots and cabin crew.	Lacking trade union recognition at LCCs. Lacking cooperation between competent authorities in discovering bogus self-employment. Increasing use of zero-hour contracts.

It is clear that the aircrew sector is confronted with and subject to growing flexibility and a broad range of working arrangements, where a balance need be made between safeguarding the economic survival of this sector and the protection of its personnel. As a result of the decreased use of direct employment, and the increased use of variations of outsourcing, temporary (agency) work, and fixed-term or part-time employment, there is a growing number of workers whose employment status is unclear – the 'grey' area between 'traditional employment'[125] and (genuine) self-employment – and who are consequently outside the scope of protection normally associated with a traditional employment relationship.[126] LCCs in particular have developed business strategies "*geared towards the lowering of wage or social standards for the sake of enhanced competitiveness […] indirectly involving their employees and/or home or host country governments*".[127] While some will say that employment by some LCCs are borderline cases of 'slave contracts',[128] others will state that "*a more critical analysis allows a better understanding of the processes*".[129] Contradictory perspectives exist between employers and relevant unions on the adequacy of and evolution of employment

[125] This model of employment, which predominated in most industrialised countries for much of the last century, was based on the idea of an employee (the 'male breadwinner') working full-time, with standard hours (usually '9 to 5', five days a week) for a single employer with a fixed wage and well-defined benefits (e.g. sickness benefits, paid holidays, company pension schemes etc).

[126] G. Harvey & P. Turnbull, 'Evolution of the Labour Market in the Airline Industry due to the Development of the Low Fares Airlines (LFAs)', European Transport Workers' Federation, 2012, available at http://www.etf-europe.org/files/extranet/-75/44106/LFA%20final%20report%20221014.pdf; and G. Harvey & P. Turnbull, 'The Development of the Low Cost Model in the European Civil Aviation Industry', European Transport Workers' Federation, 2012, available at http://www.itfglobal.org/files/extranet/75/35584/Final%20Brochure%20LFAs%20220812.pdf.

[127] M. Bernaciak, 'Social Dumping: Political Catchphrase or Threat to Labour Standards?', European Trade Union Institute, 2012; and G. Harvey & P. Turnbull, 'The Development of the Low Cost Model in the European Civil Aviation Industry', *op cit*.

[128] AIRSCOOP, 'Ryanair's strategy', 2013. p. 9.

[129] In the words of AIRSCOOP on Ryanair: "*Ryanair managed to achieve incredible cost control by forming the perfect alliance of flexibility and productivity*". AIRSCOOP, 'Ryanair's strategy', 2013. p. 9.

conditions. Whilst the latter are of the opinion that they have deteriorated, the former contest this.[130]

In this respect, the potential downsides of the evolutions and adverse effects vis-à-vis pilots and cabin crew generally become increasingly clear. Generally, it can be held that the concerns associated to the far-reaching effects of the liberalisation of the European aviation industry manifest themselves in various manners. Concerns are in particular notable regarding applicable legislation, the determination of the employer and subsequent competent States with respect to social security entitlements. Moreover, safety issues are increasingly being reported as a potential adverse effect of the liberalised aviation industries in the selected States and Europe generally. Lastly, it appears that the lacking transparency surrounding employment models within the aviation industry render adequate assessment thereof extremely difficult, which furthermore renders enforcement more difficult.

A. APPLICABLE LAW

Firstly, the aforementioned emergence of atypical contracts has prompted uncertainty with respect to the applicable law in the employment relationships. For example, an airline registered in European country A might hire a worker from country B and base this worker in country C. The worker in question might be hired via a (temporary work) agency under a 'contract *for* services' as a self-employed person in order to reduce labour costs (e.g. social insurance payments) and to shift business risks from the airline onto the worker.[131] Additionally, depending on the type of employment, differing Regulations and/or Directives with differing obligations will be applicable. Several studies note that access to social security benefits constitutes an additional matter of concern with respect to crew members in the aviation sector and the potential of being denied certain (welfare) benefits.[132] In this respect it is of the utmost importance to determine the labour law and social security legislation that applies to the EU citizens engaged in the field of aviation. Of high relevance for the employment conditions of these persons are therefore the European provisions pertaining to free movement of workers and free movement of services generally and the subsequent secondary legislation with respect thereto.

Mindful of the increasingly complex employment relations and structures, it is rendered particularly difficult to determine the place of employment of individual crew members. As a result, the applicability of Regulation (EC) No 883/2004 on the coordination of social security benefits is potentially threatened. Not inconceivably, this could result in the denied receipt of certain social security benefits, despite entitlement thereto. Within this context it need be noted that Regulation (EC) No 883/2004 accords much weight to the employer in determining the responsible state for the disbursement of certain benefits. As aforementioned, insofar different types of agencies are called upon for the provision of air crew generally, it may be hard to decipher who is effectively to be deemed the employer – subsequently rendering it difficult to determine the responsible Member

[130] Ecorys, 'Social Developments in the EU air transport sector. A study of developments employment, wages and working conditions in the period 1997-2007', European Commission - DG Energy and Transport, 2007.
[131] Subordinated labour, as opposed to independent or autonomous workers (the self-employed), would claim to work under a contract *of* services.
[132] See e.g. Danish Transport Authority, 'Report of the working group on "Social dumping" in aviation', 2014.

State. Indeed the notion of home base was introduced amongst others to clarify which State is competent for social security claims and thus to provide the pilots and cabin crew members with additional clarity concerning the applicable legislation. However, as will be demonstrated below (see *infra* – Part 4. III. C. ii. The home base: a new specific rule for flight air crew members) much ambiguity nevertheless persists. As aforementioned, it is clear that currently much variance is detectable as to the application of the notion of home base: certain airlines do not specify the effective home base, whereas others assign a home base while nevertheless invoking that this can be liable to change. Not inconceivably this renders the pilots and cabin crew members in a state of potential legal uncertainty, whereby they may lose entitlements to a number of rights.

Within this context, there is a rising trend of *'legislation shopping'* within the European aviation industry: employers can seek to employ individuals in Member States which provide for the economically most advantageous hiring conditions, albeit oftentimes to the detriment of the individual employee.[133]

B. TRANSPORT UNION PROTECTION

Additionally, these atypical forms of employment may render individual crew members stripped of air transport union protection. Job security and tenure are increasingly endangered as a result of the fierce competition.[134] As derived from the State findings, in numerous instances, the recognition of trade unions has proven pivotal in securing the employment rights of pilots and cabin crew. Whilst trade union recognition and representation is generally not deemed problematic at network carriers, it has been repeatedly noted that LCCs are generally not keen, not to say hostile, towards trade union involvement in the employment conditions of the respective staff members. Moreover, in some instances, mere trade union representation has generally not proven sufficient, and recourse is had to sectoral and industry-specific trade union representation. Here, insight into the particularities of the aviation industry is determinative for the employment conditions of pilots and cabin crew.

Other concerns in this respect deal with the rules on duty time, safety and health and the adherence thereto.[135] Reference is made to the dangers associated to pilot fatigue, which in turn can be ascribed to the lack of social protection as a result of the cost-efficient, newly emerged employment models. ***[136]***

[133] *Ibid.* p. 22.
[134] *Ibid.* p. 19-20.
[135] *Ibid.* p. 22.
[136] European Cockpit Association, 'Flight Plan to Safety: European pilots' perspective: Threats and challenges to commercial air transport', 2013.

C. SAFETY CONCERNS

Quote pilot

Fair contracts are important not only for the pilot himself, but also for flight safety. Special employment contracts like "pay to fly" endanger flight safety and should be prohibited!

Quote pilot

This industry is a disgrace. European employment law and working regulations do not seem to apply to the aviation industry and those that are certainly not enforced. I guess we will just have to wait for another major accident for things to change, fortunately for the traveling public, auto flight systems are so reliable these days that the appalling standards of training and the tiredness and generally abysmal levels of morale can be hidden by the perceived current safety record.

In a market of substantial competition, employers seek to operate in the most efficient manner possible, which is often to the detriment of individual crew members, who as a result of fading job security are expected to perform beyond what is reasonable. Oftentimes pilots and crew members are subjected to long flight hours, irregular sleep and work patterns, difficult night duties, work in various sectors and working at the 'commander's discretion'[137].[138] The effects of these unreasonable working conditions serve to detrimentally affect the safety of air operations.[139] Basing itself upon the self-assessment of 6,000 pilots across Europe, a study conducted by the European Cockpit Association – ***Pilot Fatigue Barometer***[140] – notes the prevalence of pilots and co-pilots who doze off mid-flight, as well as the increased errors as a result of fatigue. Moreover, it notes the reluctance of pilots to declare fatigue and subsequent unfitness for work. These findings are further corroborated by the ***Flight Plan to Safety***[141] as well as by recent media coverage, which reveal pilots falling asleep in the cockpit[142] or flying while ill.[143] Causes mentioned are respectively the high working pressure (and long working hours), and the direct correlation between flight hours and income applied by some airline companies.

In particular safety concerns have arisen as a result of problematic application of FTLs. Particular areas of concern in this regard – presumably to be addressed by Regulation (EU) No 83/2014 to be applied in 2016 – are night time duties, as well as cumulative fatigue. Equally noted as an issue concerning FTLs are the discrepancies with respect to standby duties. Under the current rules, standby duty from home or from an airport is subject to limitations by national legislation and thus

[137] See Annex II, Section 2(f) of 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.
[138] European Cockpit Association, 'Flight Plan to Safety: European pilots' perspective: Threats and challenges to commercial air transport', 2013.
[139] *Ibid*.
[140] European Cockpit Association, 'Pilot Fatigue Barometer', 2012.
[141] European Cockpit Association, 'Flight Plan to Safety: European pilots' perspective: Threats and challenges to commercial air transport', 2013.
[142] http://www.knack.be/nieuws/belgie/acht-op-de-tien-belgische-piloten-dommelen-wel-eens-in-achter-stuur/article-normal-109671.html.
[143] http://www.knack.be/nieuws/belgie/piloten-ryanair-vliegen-als-ze-ziek-zijn-ryanair-ontkent/article-normal-83324.html.

not to regulation by European provisions. Yet again, this implies discretion for employers to legislation shop in acquiring the most advantageous and cost-efficient conditions for employees, often to the detriment of the latter. A similar issue arises with respect to rest times, which is regulated by a combination of national provisions as well as European provisions. Again, depending on the national obligations and limitations imposed vis-à-vis rest times, employers may be able to set up establishments in those Member States which provide the least adequate rest time to crew members, again potentially endangering the equal treatment of individual crew members and the safety throughout air operations. In this same vein, the precarious nature with respect to the establishment of multiple home bases for crew members under the current system endangers the safety during air operations as a result of excessive fatigue of crew members (see *infra* – Part 4. III. C. The applicable social security legislation).

A recurring concern as observed in selected Member States is the effect of atypical forms of employment upon the pilot's authority during air operations. Whilst pilots, and the pilot-in-command in particular, are deemed responsible for the safety of the aircraft and those on board during an air operation, it has been repeatedly held that due to the bogus self-employment relations, adherence to safety regulations is becoming increasingly precarious. Specifically, it has been noted that the independence of pilots-in-command may be jeopardised as a result of job insecurity inherent to atypical forms of employment. Adhering to the economic objective sought by the employer is thereby gaining importance as opposed to maintaining a high safety threshold. This is furthermore corroborated by the fact that atypical forms of employment, which do not provide job security, additionally result in pilots and cabin crew members performing duties despite potentially feeling ill, as opposed to taking required sick leave. Needless to say, given the particular nature of air operations, such practices may also negatively influence safety whilst being on board during an air operation.

Not inconceivably, emerging atypical forms of employment such as zero-hour contracts and pay-to-fly employment schemes may serve only to aggravate existing safety concerns. There may be reason for concern particularly when such contracts are offered to younger pilots, who are indebted as a result of their training, and often underemployed. It suffices to recall the practice whereby junior pilots are held to operate a flight without adequate supervision, or where pilots are held to operate flights with limited machinery in the cockpit in order to minimise costs (see *supra* – Part 2. III. B. The impact of atypical work on the aviation industry). Without appropriate guidance and/or experience such scenarios could have a detrimental affect on flight safety, overshadowing the competitive edge this may give employers.

D. LACKING TRANSPARENCY

Linked to these concerns, it need be noted that lacking general transparency and oversight in the aviation sector by labour inspection authorities render it highly difficult to distinguish between the legal reality and the *de facto* conditions crew members are subjected to.[144] Moreover, mindful of the transnational nature of contemporary airline employers and the establishment of bases and

[144] European Cockpit Association, 'The Case for Fair Competition in Europe's Aviation - Why action is needed to safeguard our aviation's future', 2014.

subsidiaries across and outside of Europe, in conjunction with the free movement provisions enshrined in the Treaties, it is becoming increasingly more difficult to verify compliance with European provisions of the employment conditions of crew members. The lacking oversight and subsequent enforcement – not inconceivably – further prompt lower compliance and abuse of the lacunas in European aviation law.[145]

E. CONCLUDING OBSERVATIONS

The growing concern for these employment conditions and the possible precarious situation of flight personnel lead to the conclusion that attention should be paid to further developments in this regard and that further analysis is needed. Workers also more and more raise their voice protesting against these evolutions in the aviation sector. In several countries strikes emerged driven by the personnel's wish to voice their disagreement with the working conditions. There are several examples from the past years. A first example were the protests by pilots and the strikes by the cabin crew of the Portuguese airline company *TAP* and of subsidiary company *Portugalia*, which pleaded for better employment conditions, longer resting periods and higher pay.[146] *Aer Lingus'* cabin crew went on strike in May 2014 because new working rosters did not allow the personnel to plan their rest time, and thus did not provide for adequate rest between blocks of duty.[147]

Another interesting case that does not only voice concerns about working conditions, but at the same time aptly illustrates an important characteristic of LCCs, are the strikes by pilots of *Air France* in September 2014. *Air France* had plans to expand the low-cost operations of its brand *Transavia*, by setting up foreign bases to thus face the fierce competition of budget airlines and boost earnings.[148] The pilots held a fourteen-day strike to counter this proposal; foreign bases would mean different employment contracts for the crew, entailing less optimal benefits and conditions.[149] Pilots of the German airline company *Lufthansa* went on strike for the same reasons.[150] In November 2013, pilots of *Norwegian* airline went on strike because of a disagreement with the management, which wanted to employ its pilots in Scandinavian countries by a staffing firm within the airline's company structure. However, the union rejected the move, arguing it would weaken the pilots' employment security.[151]

Competition is tough, and the industry fragile; airlines put considerable efforts into staying profitable and competitive. Unsurprisingly, such restructuring efforts often also involve personnel cost savings. Negotiations between personnel and company have not always resulted in an agreement. Several airlines have recently faced strikes because of the lingering threat of dismissals. In October 2014, during the strikes at *Air France-KLM*, such rumours also spread.[152] *Iberia* employees went on strike in 2013 against the job cuts proposed in the airline's transformation plan.[153] New business models, such

[145] European Cockpit Association, 'Flight Plan to Safety: European pilots' perspective: Threats and challenges to commercial air transport', 2013. p. 8.
[146] http://theportugalnews.com/news/tap-goes-on-four-day-strike/33089.
[147] http://www.thejournal.ie/aer-lingus-strike-disruption-1492512-May2014/.
[148] http://www.reuters.com/article/2014/09/20/us-air-france-klm-strike-idUSKBN0HF08920140920.
[149] http://www.businessweek.com/articles/2014-09-29/europe-gets-fed-up-with-striking-pilots-at-air-france-luftansa.
[150] http://fortune.com/2014/10/30/pilots-strikes-ravage-earnings-at-europes-airlines/.
[151] http://www.newsinenglish.no/2013/11/01/norwegian-tries-to-ward-off-strike/.
[152] http://www.wsj.com/articles/air-france-klm-profit-falls-as-pilots-strike-hurts-third-quarter-sales-1414563302.
[153] http://centreforaviation.com/analysis/iberia-strikes-the-challenge-to-one-of-europes-least-productive-workforces-98577.

as LCCs, provide an extra impetus for airlines to remain competitive. However, questions can be raised with respect to the way in which LCCs achieve their highly competitive position: if such an airline manages to employ personnel under more advantageous social and fiscal schemes than other airlines, they have an edge on other airlines from the very start. Other airlines have attempted to take measures in this respect: in May 2014, the Belgian Air Transport Association, a group of the main Belgian airline companies, lodged a complaint against *Ryanair* for unfair competition at the Brussels commercial court. It stated that the Ryanair personnel is covered by Irish fiscal and social conditions, while the employees are working in Belgium.[154] The behaviour of LCCs has been picked up by the media irrespective of strikes as well. The working conditions for pilots and cabin crew are far from ideal, as reported by the pilots themselves. The Ryanair Pilot Group, which represents more than half of *Ryanair*'s pilots, revealed in the spring of 2014 that *Ryanair*'s pilots are unhappy with several aspects of *Ryanair*'s employment policies and working conditions. Pilots reported that more than 70% of them were working for *Ryanair* as self-employed pilots, although they only flew for *Ryanair*. By not being permanently employed by *Ryanair*, these pilots cannot build up social rights in the same way as actual Ryanair employees, while also having no job security.[155] The Ryanair Pilot Group explicitly pleads for one equal contract for all *Ryanair* pilots.[156] Other irregular efforts of LCCs to push prices down have been reported as well. In this respect, several stories have appeared stating that *Ryanair* only takes on board the minimum of kerosene needed to fly, thus risking compromising safety as unplanned detours might cause severe fuel emergencies.[157] Press and television reports condemning this behaviour are consistently not commented on by the airline company under scrutiny.

Quote pilot

Business Aviation is like the Wild West or in todays terms, Wild East!

I worked for a low cost company (but several others work the same way) before and what they are doing is terrible. My life together with my family started the same second as I stopped working for them. The race to the bottom needs to be regulated by the EU before passengers are going to get killed. People are committing suicide because of this outrageous way they are being threated. Look towards the west, they have started to do something about it regarding terms, conditions and flight time limitations. I am very happy that you are doing this survey because the situation today is terrible and it's becoming worse every year.

My airline is an angel in relation to others in the EU. There is a ticking bomb when it comes to the work situation for many pilots in the EU.

Quote pilot

Ask me again in two years time and see what my situation looks like then ...

[154] http://www.standaard.be/cnt/dmf20140513_01103288.
[155] http://trends.knack.be/economie/bedrijven/piloten-zijn-niet-te-spreken-over-werkomstandigheden-bij-ryanair/article-normal-219129.html.
[156] http://trends.knack.be/economie/ryanair-pilot-group-eist-eenzelfde-contract-voor-alle-piloten/article-normal-254103.html.
[157] http://www.economist.com/blogs/gulliver/2013/08/ryanair.

STATISTICAL DATA AND ANALYSIS

PART 3. SURVEY FINDINGS

I. INTRODUCTION

As mentioned before, the general objective of this study is to provide the social partners in the aviation sector with objective data to assess the impact of new forms of aircrew employment emerging in the European Union, to detect potential abuses and to identify the subjective and objective reasons that motivate airlines and aircrews to use or not use forms of employment different from the 'typical' open-ended employment contract.

Atypical forms of employment of cabin crew have been the subject of previous studies. In order to obtain objective data on the state of affairs of forms of employment of cockpit crew, we drafted a questionnaire aimed at pilots specifically which was presented as an online survey (see *supra* – Part 1. Scope of the study and research methodology).

II. PART A: GENERAL INFORMATION CONCERNING THE RESPONDENTS

First of all we provide you with some basic data provided by the respondents that took part in the online survey.

In total, 6633 respondents participated in this study (after the cleaning of the data; see *supra* – Part 1. Scope of the study and research methodology). Since for none of the questions it was mandatory to provide an answer, the following data represent the known data complemented with the data on the answers missing. The missing data are represented for the primary questions since the unwillingness of the respondents to answer some questions that go into sensitive information might in itself be significant. This requires some further research. On the other hand, the missing data would reduce the clarity in the subquestions, since a loss of this data is always evidence of other reasons than substantiated unwillingness by the participants to answer (e.g. the reduced motivation to complete a long questionnaire, time considerations etc). This means that if there are no missing data in the graphs and we also do not mention missing data, the percentages shown only relate to the participants who gave an answer to the question.

The concrete questions of the survey are provided in a frame and accompanied with the actual data from the survey after the quantitative analysis.

1. What is your nationality? *[drop-down list of countries]*

15.1% of respondents indicated that they are French, 15% Dutch and 11.1% to have UK nationality. The graph below presents all nationalities that are represented at a level of at least 0.2% in the group of respondents.

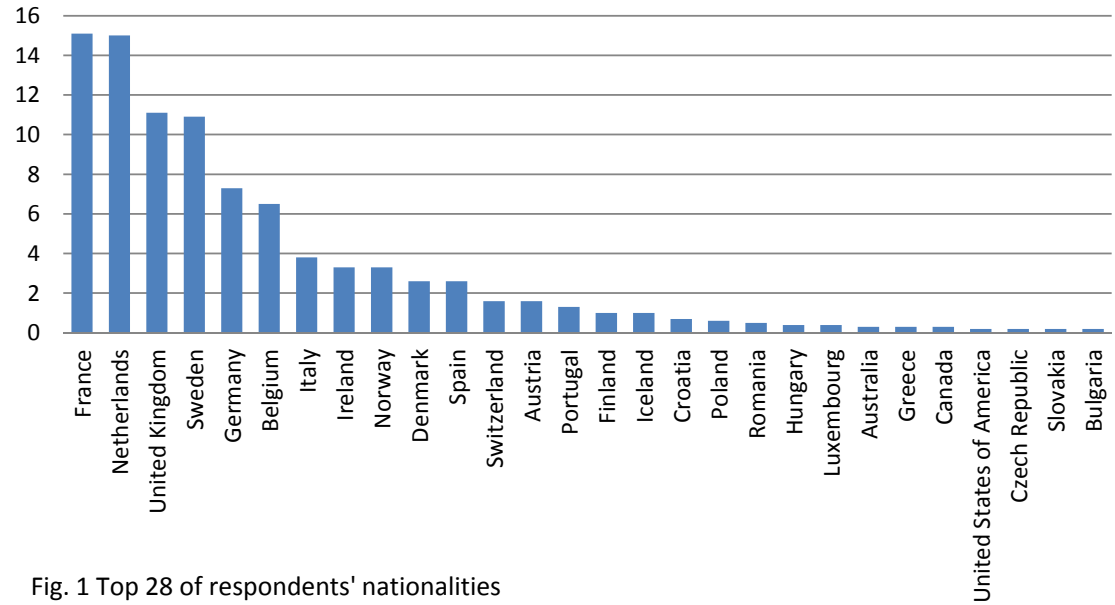


Fig. 1 Top 28 of respondents' nationalities

Table 1 What is your nationality?

	Frequency	%
France	1001	15.1
Netherlands	996	15.0
United Kingdom	737	11.1
Sweden	723	10.9
Germany	485	7.3
Belgium	429	6.5
Italy	250	3.8
Ireland	219	3.3
Norway	217	3.3
Denmark	175	2.6
Spain	172	2.6
Switzerland	108	1.6
Austria	107	1.6
Portugal	87	1.3
Finland	68	1.0
Iceland	68	1.0

Croatia	47	0.7
Poland	37	0.6
Romania	32	0.5
Hungary	28	0.4
Luxembourg	25	0.4
Australia	23	0.3
Greece	21	0.3
Canada	17	0.3
United States of America	13	0.2
Czech Republic	11	0.2
Slovakia	11	0.2
Bulgaria	10	0.2

2. What is your age?

a. 20-30
b. 30-40
c. 40-50
d. 50-60
e. 60 or older

In this study, the largest group of respondents indicated being aged between 30 and 40 years old (30% or 1974 respondents). Of all respondents, 0.6% did not provide us with an answer to this question (reported under missing).

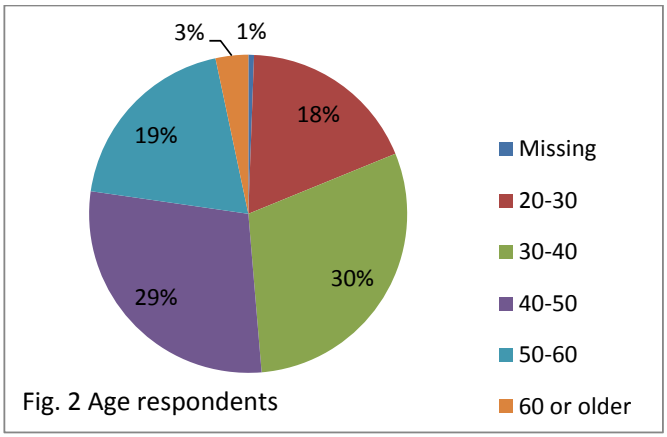


Fig. 2 Age respondents

3. How many years of work experience do you have as a pilot?

a. 0-1
b. 1-3
c. 3-5
d. 5-10
e. more than 10

The largest group of respondents in this study indicated having more than 10 years of flight experience, which comes down to 63% or 4158 of respondents. The second largest group indicated having 5 to 10 years experience (18% or 1225).

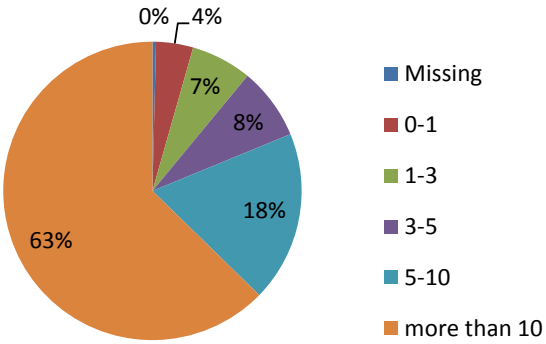


Fig. 3 Years of work experience

4. In total, how many flight hours do you have so far?

a. less than 500
b. 500-600
c. 600-700
d. 700-800
e. 800-900
f. 900-1000

In this study, 93% of respondents indicated having more than 1000 flight hours. This comes down to 6151 respondents.

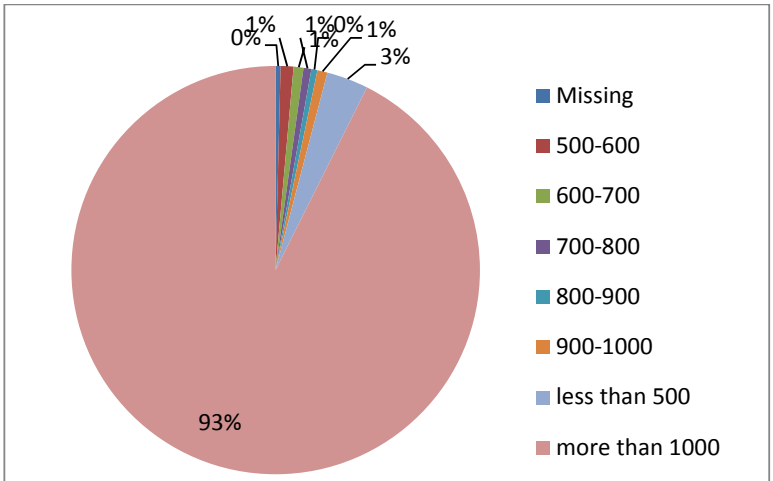


Fig. 4 Accumulated flying hours

5. What kind of airline do you work for?
    a. Network airline
    b. Low-fare airline
    c. Charter airline
    d. Regional airline
    e. Cargo airline
    f. Business aviation
    g. Other – please specify *[open question]*

The largest group of respondents (N=3008) in this study stated they work for a network airline (45%). The second largest group of respondents indicated they fly for an LFA (22% or 1482 respondents).

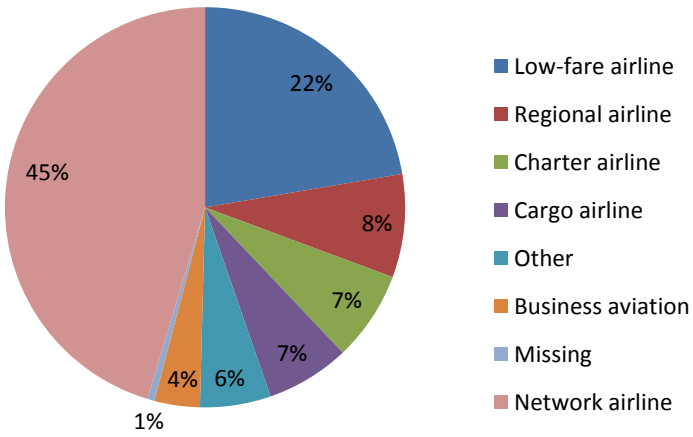
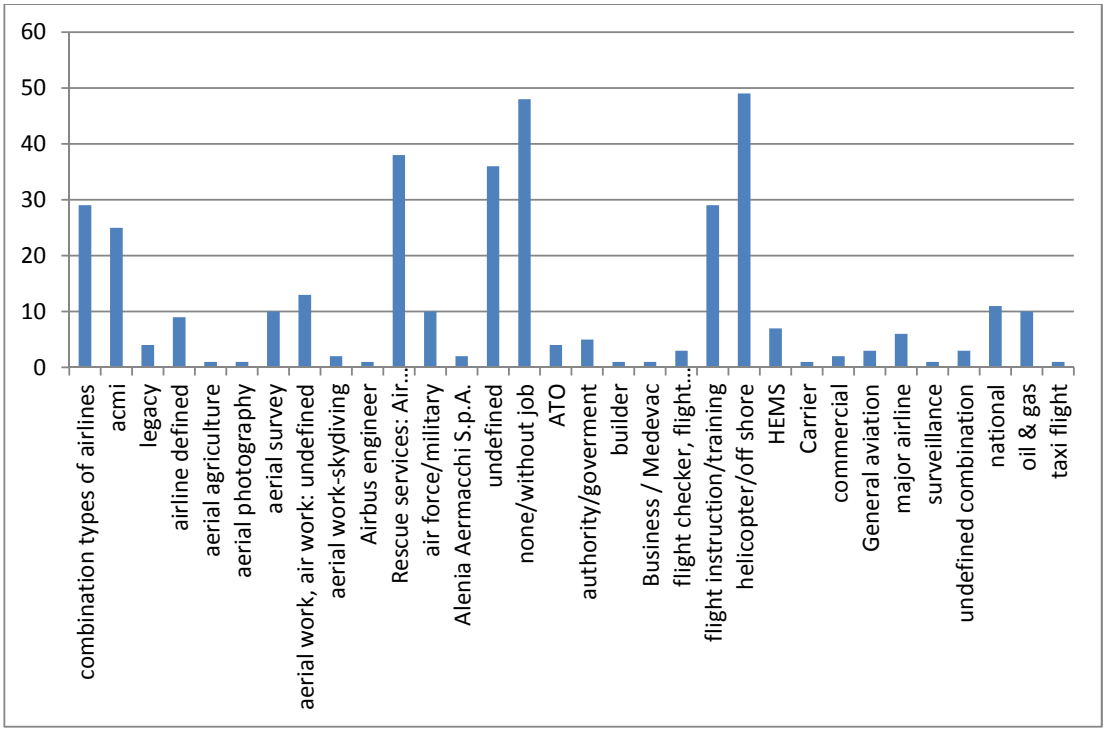


Fig. 5 Kind of airline

Table 2 What kind of airline do you work for? – Other



6. Your activity is
   a. long-haul
   b. medium and short-haul

71% of respondents stated to work medium and short-haul. This comes down to a number of 4733 respondents in this study.

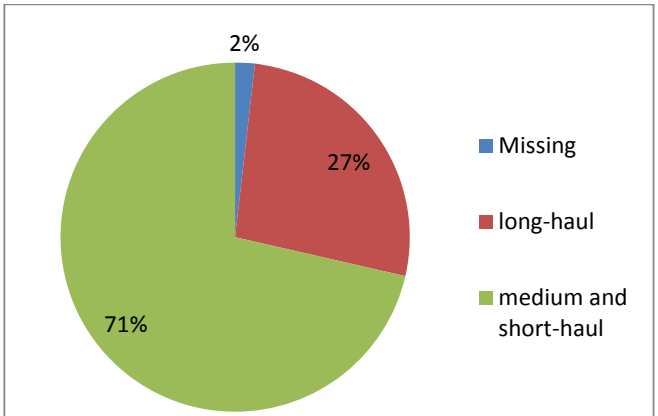


Fig. 6 Activity

7. What airline do you work for? *[open question]*

Figure 7 presents the top 25 of airlines which respondents reported they fly for. In total, 5400 respondents responded to this question.

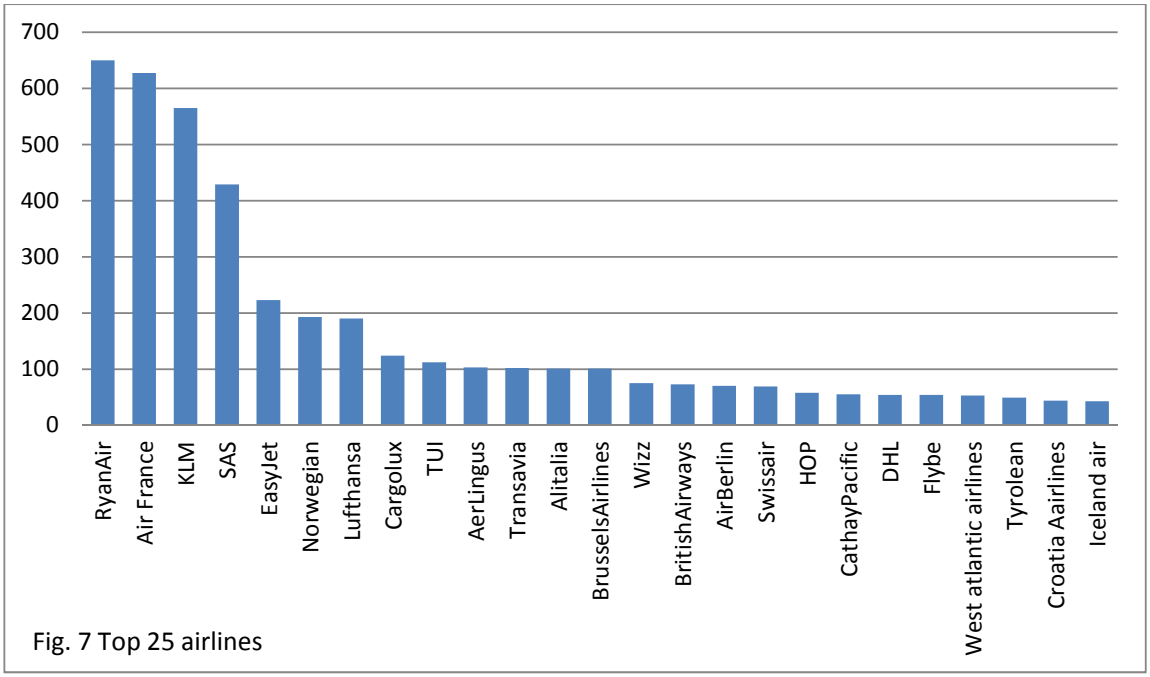


Fig. 7 Top 25 airlines

Table 3 What airline do you work for? Top 25 (If ≥0.1% representation)

	Frequency	%	Valid[158] %
TOTAL	5400	81.4	
Ryan Air	650	9.8	12
Air France	627	9.5	11.6
KLM	565	8.5	10.5
SAS	429	6.5	7.9
Easy Jet	223	3.4	4.1
Norwegian	193	2.9	3.6
Lufthansa	190	2.9	3.5
Cargolux	124	1.9	2.3
TUI	112	1.7	2.1
Aer Lingus	103	1.6	1.9
Transavia	102	1.5	1.9
Alitalia	101	1.5	1.9
Brussels Airlines	101	1.5	1.9
Wizz	75	1.1	1.4
British Airways	73	1.1	1.4
Air Berlin	70	1.1	1.3
Swissair	69	1	1.3
HOP	58	0.9	1.1
Cathay Pacific	55	0.8	1
DHL	54	0.8	1
Flybe	54	0.8	1
West atlantic airlines	53	0.8	1
Tyrolean	49	0.7	0.9
Croatia Airlines	44	0.7	0.8
Iceland air	43	0.6	0.8

8. Is the airline you currently work for the first airline you have worked for?
   a. Yes
   b. No

49% of respondents claimed they still work for their first airline (N=3222). For another 49% this is not the case (N=3129). 4% of respondents did not provide us with an answer to this question.

[158] Note: Valid % colums shows the percentage of pilots recalculated without the missing data.

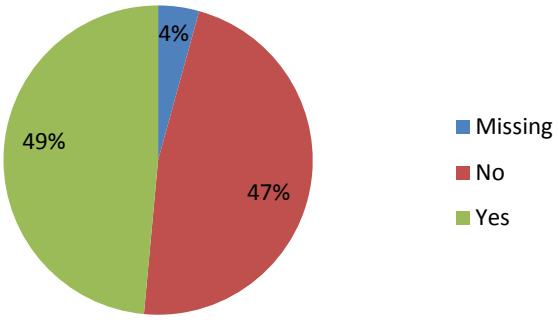


Fig. 8 Current airline first airline?

If no (8)

i. How many other airlines have you worked for? *[open question]*

Figure 9 shows how many respondents stated to have worked for 1 to 10 different airlines (N=3084).

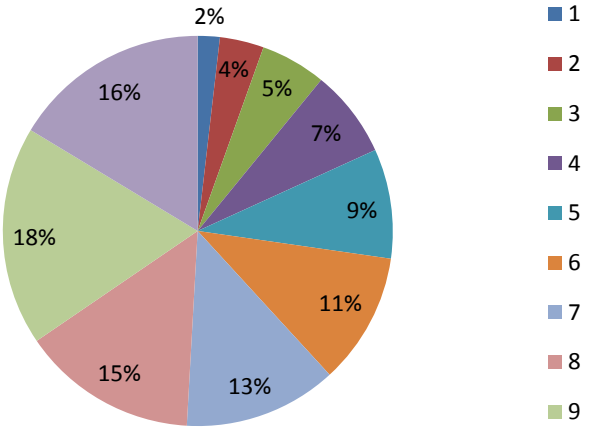


Fig. 9 How many other airlines worked for?

ii. For what reasons did you start working for the new airline? *[multiple answers may be given]*

a. To get closer to your home and family

b. Better wages

c. Better terms & conditions

d. Better general working conditions

e. More flight hours

f. Type of airplane

g. Regional / continental / intercontinental flights

h. Public image of the company

i. Other reasons – please specify *[open question]*

The first main reason that was indicated for the changing of airline was to get better terms and conditions (N=1418), which comes down to 45% of respondents stating to have changed their first airline. The second main reason indicated was to get better general working conditions. This was stated by 41% of respondents stating to have changed their first airline (N=1278).

Table 4 Reason to change airline company

	Frequency	%
A. To get closer to your home and family	**984**	14.8
B. Better wages	**996**	15
C. Better terms & conditions	**1418**	21.4
D. Better general working conditions	**1278**	19.3
E. More flight hours	**125**	1.9
F. Type of airplane	**774**	11.7
G. Regional/continental/intercontinental flights	**454**	6.8
H. Public image of the company	**378**	5.7

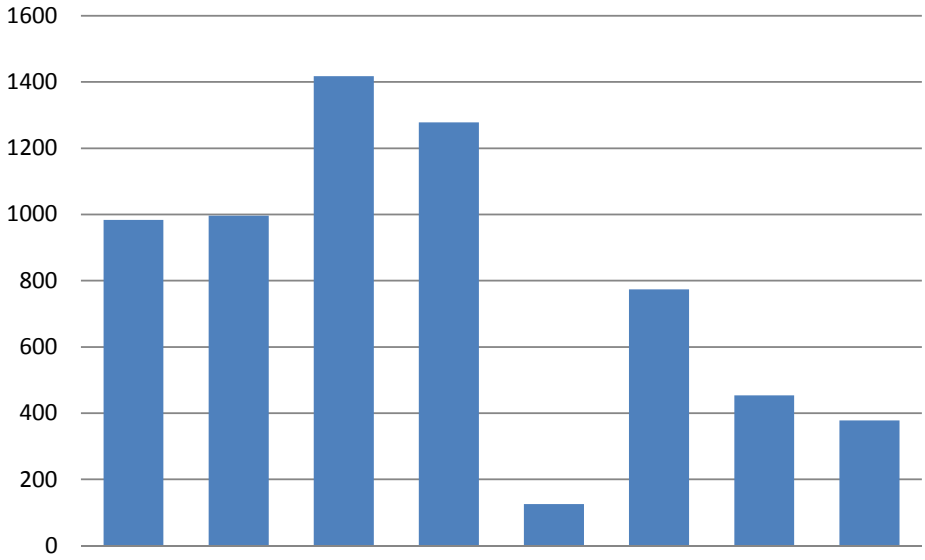


Fig. 10 Reason changing airline

9. What is your relationship with the airline you currently work for?

   a. I have an employment contract with the airline directly

      What kind of employment contract?

      a. an open-ended employment contract

      b. a fixed-term employment contract

      c. a stand-by / on-call contract

   b. I work for the airline via a temporary work agency with which I have an employment contract.

      What kind of employment contract is this?

      a. this is an open-ended employment contract

      b. this is a fixed-term employment contract

      c. this is a stand-by / on-call contract

   c. I work for the airline as a self-employed worker via a cooperation agreement concluded with the airline directly

In this study, 5259 respondents, which is 79.3% of the total number of respondents, stated that they have a direct employment contract with the airline they currently work for. This means that 1071 or 16.1% of the respondents in this study reported another type of contract which, according to this study's definition, can be called atypical.

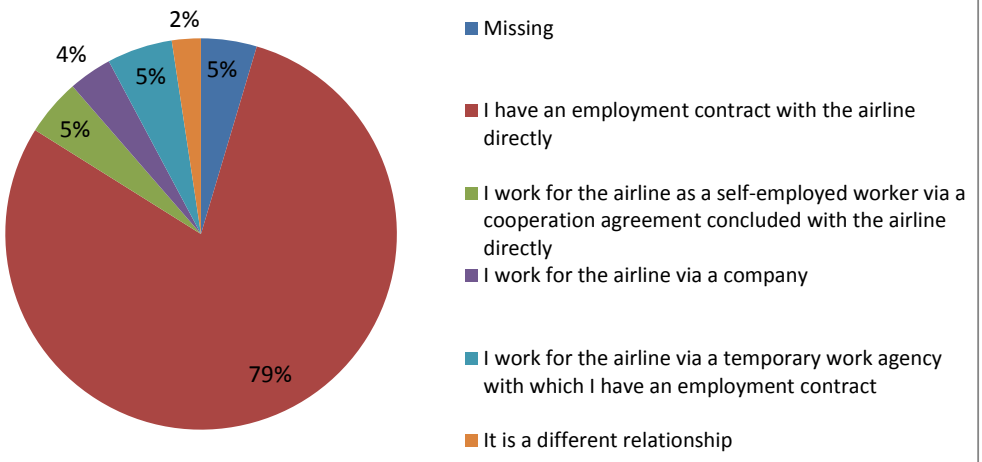


Fig. 11 Type of relation with current airline

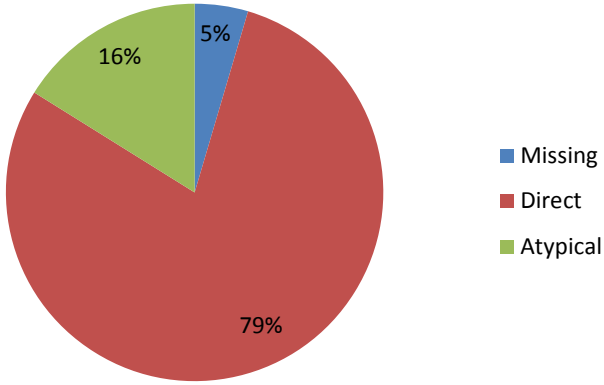


Fig. 12 Direct employment?

Of the 5259 respondents with a direct employment contract, 4515 pilots (87%) stated that they have an open-ended employment contract, 690 (13%) that they have a fixed-term employment contract and 17 (0.3%) that they have a stand-by/on-call contract.

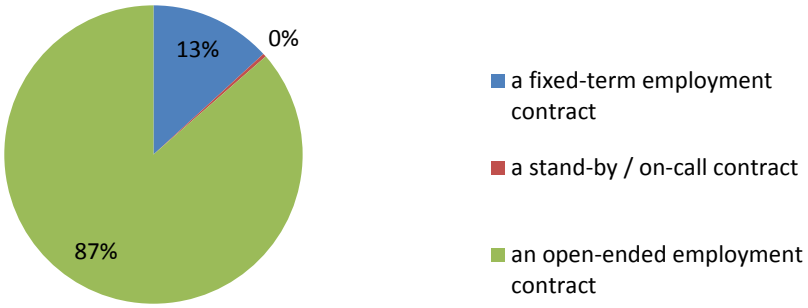


Fig. 13 Types of direct employment contracts

359 respondents (5.4% of the respondents in this study) reported they work via a contract with a temporary work agency. Of these, 258 (72%) reported they work via a temporary work agency under a fixed-term employment contract, 88 or 24% under an open-ended employment contract and 12 or 4% under a stand-by or on-call contract.

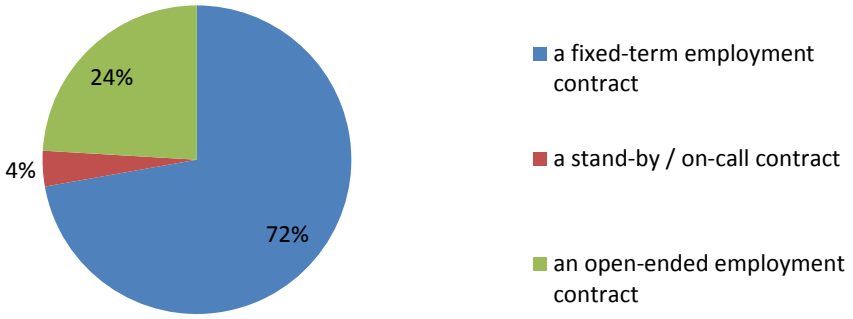


Fig. 14 Types of contracts via a temporary work agency

In this study, 237 or 3.6% of respondents reported working for an airline via a company. As Figure 15 shows, of these 237 respondents, only 12% is a shareholder of the company via which they reported working for the airline. Furthermore, as can be seen in Figure 16, 27% reports not to be bound by an employment contract to this company, whereas 32% of this group reports to be bound via an open-ended employment contract. 35% of respondents indicate having a fixed-term employment contract and 6% having a stand-by contract.

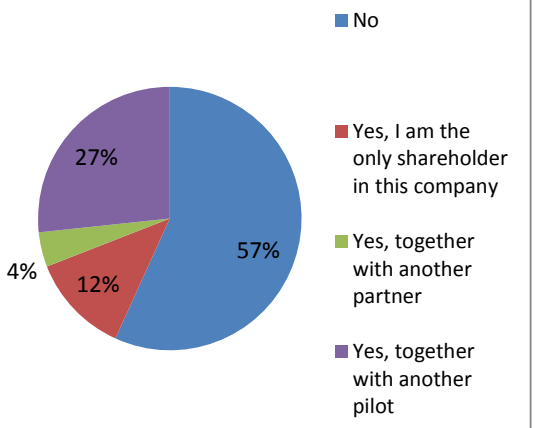


Fig. 15 Shareholder in company?

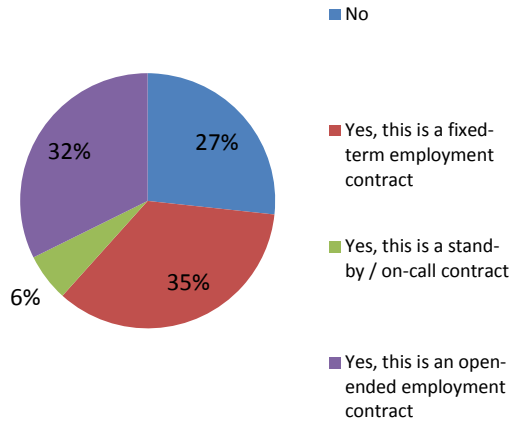


Fig. 16 Type of contract with company

71% of the respondents that answered this question stated that their company is a limited liability company. When asked if these companies have a cooperation agreement with the airline, 65% of respondents confirmed this, whereas 35% stated that there is no contract between the airline and the company (see Figure 18). Of these companies, 15% is not registered in the EU (see figure 19).

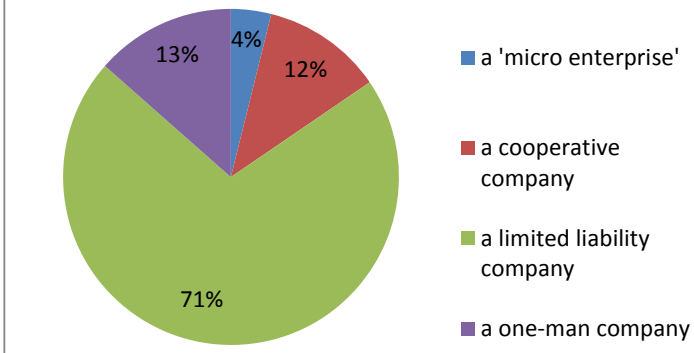


Fig. 17 Type of company

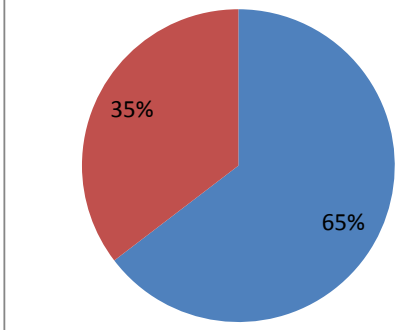


Fig. 18 Cooperation agreement airline

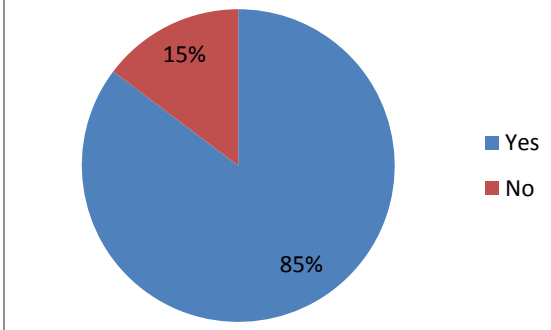


Fig. 19 Registered office company in EU?

Finally, respondents were given the possibility to indicate a relation to the airline, other than the ones already mentioned.

Table 5 Other kind of relationship

Comment of pilot	Frequency
3 man company	1
A company part of my airline group, called the French branch	1
A company set up to make pilots fly Swedish aircraft on a Luxemburgish contract	3
A limited company, however a suspicious forced arrangement: I have no information who are the other shareholders etc.	1
A UK branch of a HKG company	1
Agency	1
airline	1
ATO, a/c training org.	1
broker	1
Carriage salary	1
Company set up by West Atlantic/West Air to outsource cheaper contracts in Denmark via Grant Thornton Corporation	1
Contractor - Brookfield	1
CTC Aviation	1

I work for Norwegian Air Norway, a daughter company of Norwegian Air Shuttle.	1
ltd	1
not sure	1
Off shore	2
Standard Leasing company	1
the mother company	1
They only provide contract for us.	1
Wholly owned subsidiary of Cathay	1

10. Which country's labour law is applicable to you (according to your contract)? *[drop-down list of countries]*
[question only visible for those interviewees who answered that he or she work under an employment contract]

    a. This is the labour law of the country of your official home base
    b. This is the labour law of the country of the airline's registered office *[choose this option if different from the official home base]*
    c. This is not mentioned in the employment agreement
    d. I don't know
    e. Other - please specify *[open question]*

Figure 20 shows the countries that were indicated as the country of the applicable labour law by the respondents that indicated to have an employment contract (see question 9 of part A of the survey *supra* – previous question) (N=5674). This graph gives an overview of the countries that are represented by at least 0.5% of the respondents in this study. Only respondents with an employment contract (direct, via a temporary work agency, or via a company) were presented this question/were able to provide an answer to this question.

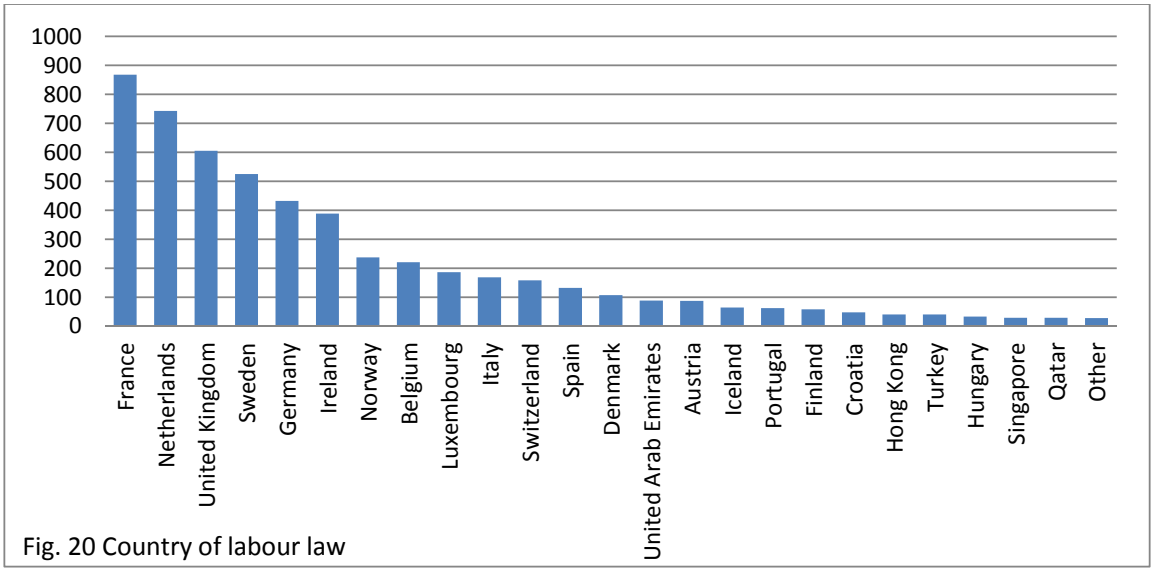


Fig. 20 Country of labour law

Table 6 Countries of labour law

	Frequency	%
Missing	893	13.5
France	868	13.1
Netherlands	743	11.2
United Kingdom	623	9.4
Sweden	525	7.9
Germany	432	6.5
Ireland	422	6.4
Norway	237	3.6
Belgium	223	3.4
Luxembourg	186	2.8
Italy	169	2.5
Switzerland	158	2.4
Spain	133	2
Denmark	108	1.6
United Arab Emirates	89	1.3
Austria	87	1.3
Iceland	65	1
Portugal	62	0.9
Finland	59	0.9
Croatia	48	0.7
Hong Kong	41	0.6
Turkey	41	0.6
Hungary	33	0.5

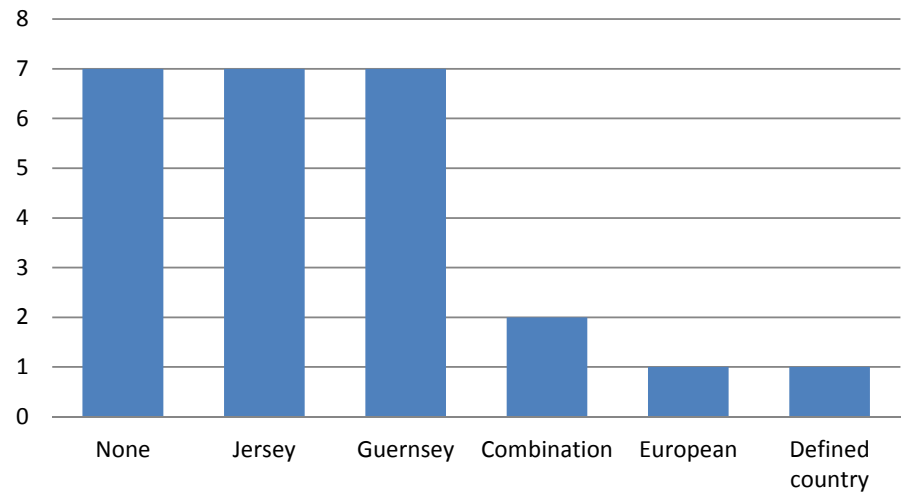


Fig. 21 Country of labour law - Other

85% of respondents indicated that this country is the same country as their official home base. In 10% of the other cases respondents stated that the country of the labour law applicable to them is the labour law of the country where the airline's registered office is located.

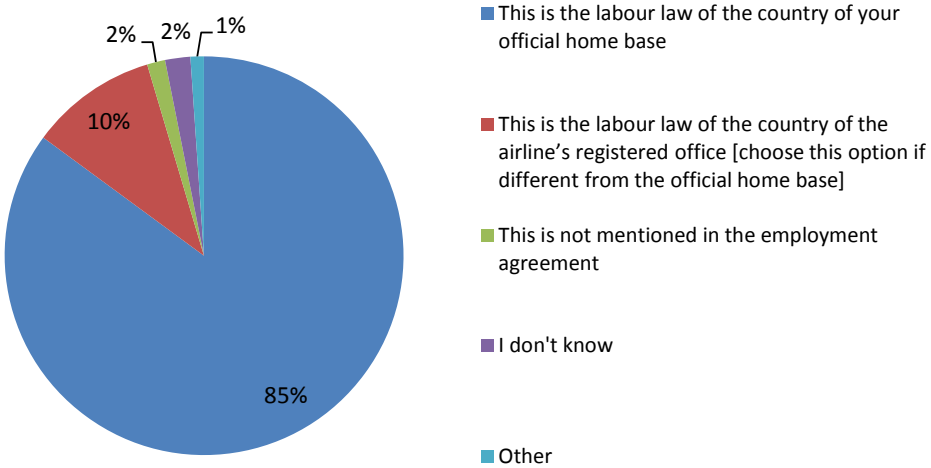


Fig. 22 Country labour law same country home base?

11. Is the registered office of the airline in the same country as the registered office of the company with which you have concluded an agreement?
    a. Yes
    b. No

For this question, 79% of respondents (N=5231) indicated that the registered office of the airline is in the same country as the registered office of the company with which they concluded an agreement.

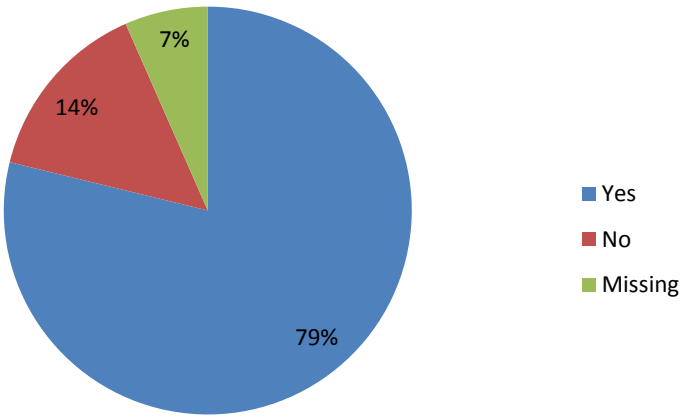


Fig. 23 Country registered office of airline same country registered office of company with which agreement?

12. In which country were you recruited/first contacted by the company? *[drop-down list of countries]*

Figure 24 presents the countries (top 0.5% representation) in which respondents reported to have been recruited or first contacted by the company.

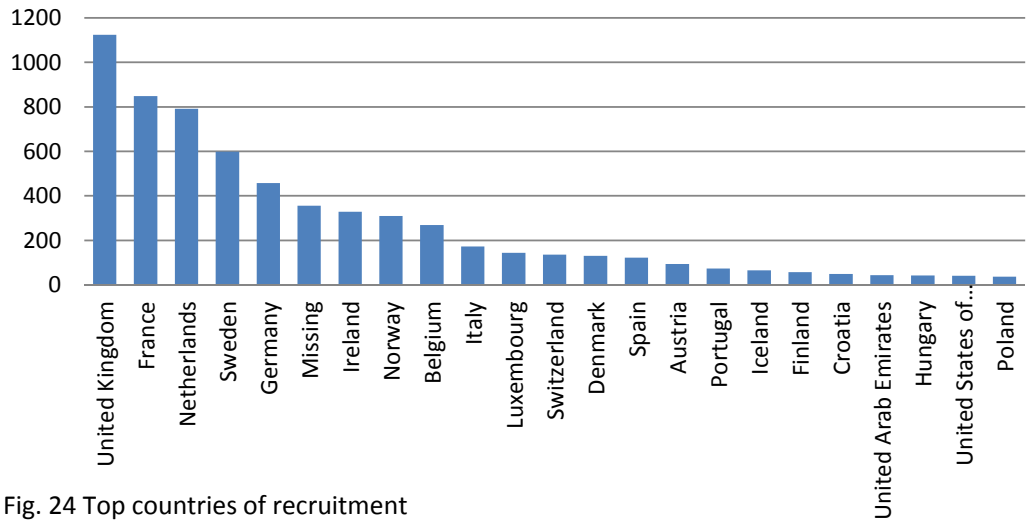


Fig. 24 Top countries of recruitment

Table 7 In which country were you recruited/first contacted by the company? (Top 0,5% representation)

	Frequency	%
United Kingdom	1124	16.9
France	848	12.8
Netherlands	792	11.9
Sweden	598	9
Germany	457	6.9
Missing	356	5.4
Ireland	328	4.9
Norway	310	4.7
Belgium	269	4.1
Italy	172	2.6
Luxembourg	144	2.2
Switzerland	136	2.1
Denmark	130	2
Spain	122	1.8
Austria	94	1.4
Portugal	73	1.1
Iceland	65	1
Finland	57	0.9
Croatia	49	0.7
United Arab Emirates	43	0.6
Hungary	42	0.6
United States of America	40	0.6
Poland	36	0.5

13. In which country did you sign your contract? *[drop-down list of countries]*

Figure 25 shows the countries (top 0.5% representation) where respondents indicated to have signed their contracts.

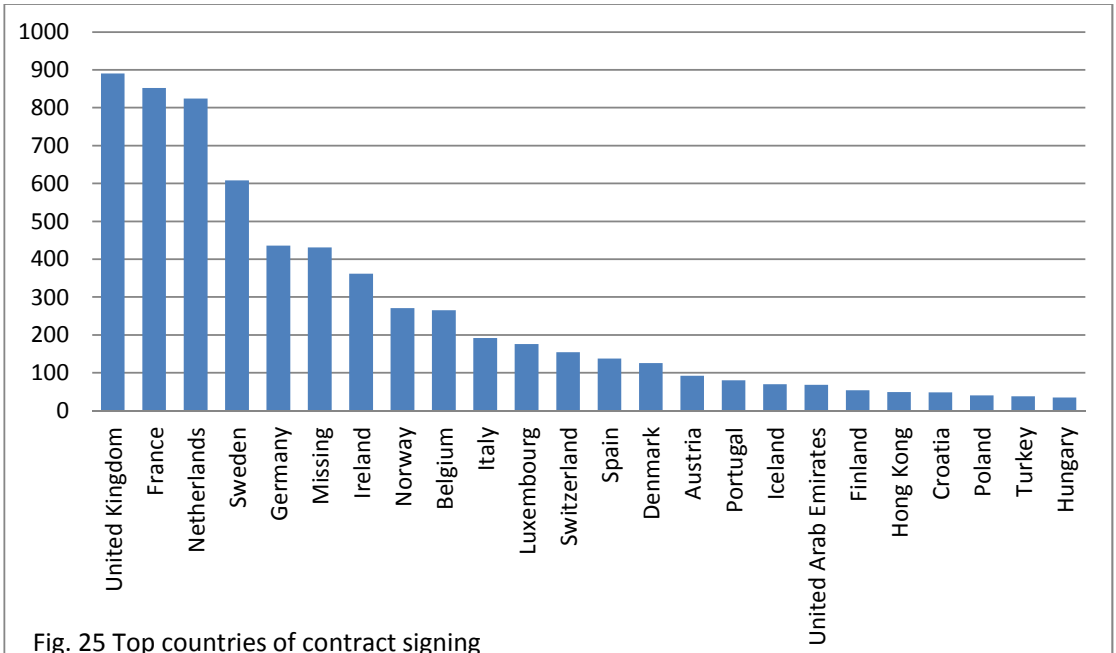


Fig. 25 Top countries of contract signing

Table 8 In which country did you sign your contract?

	Frequency	%
United Kingdom	890	13.4
France	852	12.8
Netherlands	824	12.4
Sweden	608	9.2
Germany	436	6.6
Missing	431	6.5
Ireland	362	5.5
Norway	271	4.1
Belgium	265	4
Italy	192	2.9
Luxembourg	176	2.7
Switzerland	154	2.3
Spain	138	2.1
Denmark	126	1.9
Austria	92	1.4
Portugal	80	1.2
Iceland	70	1.1
United Arab Emirates	68	1
Finland	54	0.8
Hong Kong	49	0.7
Croatia	48	0.7

Poland	40	0.6
Turkey	38	0.6
Hungary	35	0.5

14. Do you have any other occupational activities?
    a. No
    b. Yes

        These other occupational activities are

        1. In the aviation industry, as a pilot

            This other occupational activity as a pilot is

            a. on your own account
            b. for another airline
                1. What kind of airline?
                    a. Network airline
                    b. Low-fare airline
                    c. Charter airline
                    d. Regional airline
                    e. Cargo airline
                    f. Business aviation
                    g. Other – please specify *[open question]*
                2. Is this airline part of the same corporate structure as your main airline?
                    a. Yes
                    b. No
        2. In the aviation industry, not as a pilot

            This other occupational activity not as a pilot is

            a. on your own account
            b. in the same airline
            c. other airline
        3. Outside of the aviation industry

            1.1. What are these occupational activities? *[open question]*

Respondents were presented questions about possible other occupational activities. As Figure 26 shows, 82% of respondents stated to have no other occupational activities and 13% (N=856) reported having other occupational activities.

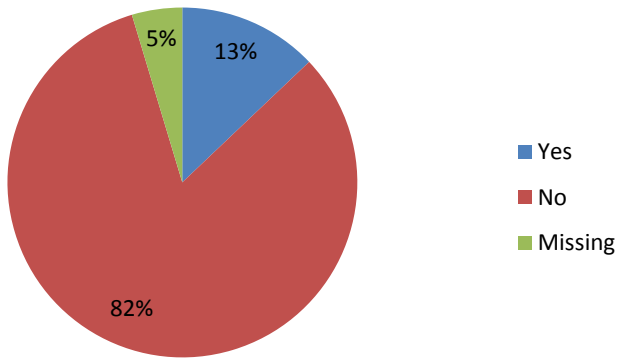


Fig. 26 Other occupational activities?

If respondents stated having other occupational activities, they were presented a question about the nature of these activities. 43% of respondents stated these are activities outside the aviation sector, 37% stated that it regards activities within the aviation industry be it not as a pilot, and 20% indicated having occupational activities as a pilot.

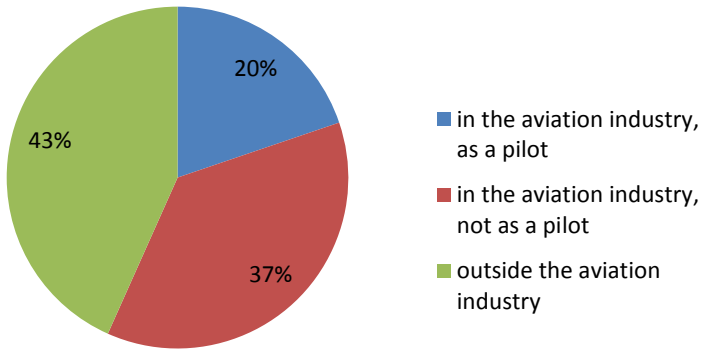


Fig. 27 Type of other activities

If respondents stated having other occupational activities as a pilot, 90% stated that this was for their own account.

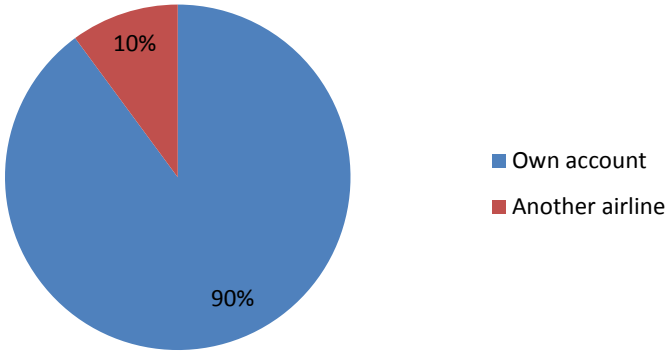


Fig. 28 Other activities as pilot

When respondents indicated that they have other occupational activities in the aviation industry (N=315) not as a pilot, 62% indicated working for their own account, whereas 31% indicated working for the same airline and 7% working for another airline.

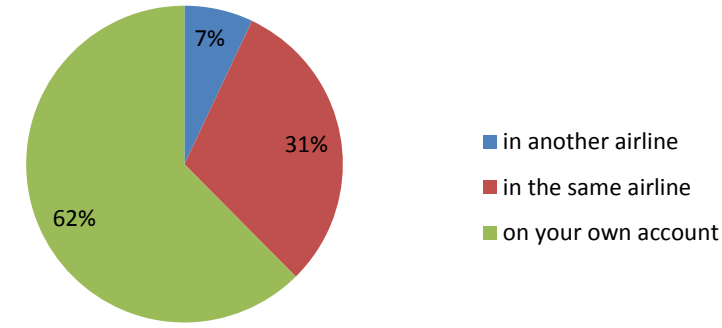


Fig. 29 Other activities not as pilot

If respondents stated having other occupational activities outside of the aviation industry, the following answers were e.g. provided: bar keeper, attorney, accountant, self-employed – not defined, cultural sector, sport sector, teaching, agriculture, IT, lecturer etc.

III. PART B: GENERAL INFORMATION CONCERNING THE SOCIAL SITUATION AND WORKING CONDITIONS

1. Are your wages/remunerations paid directly by the airline you mainly fly for?
   a. Yes
      i. Are they paid by the registered office of this airline (i.e. not by a subsidiary of this airline)?
         a. Yes
         b. No
   b. No
      i. By whom are they paid?
         a. Temporary work agency
         b. Intermediary (e.g. payroll services company)
         c. Other – Please specify *[open question]*

Respondents were asked to indicate if they were paid directly by the airline they mainly fly for. Results show that 67% of respondents indicated this is the case (N=4456). Of the respondents who indicated that they are paid directly, 96% indicated being paid by the registered office of the airline.

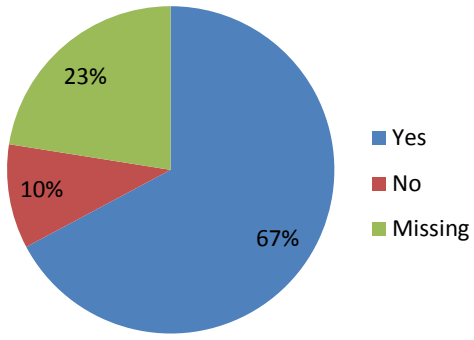


Fig. 30 Directly paid by airline?

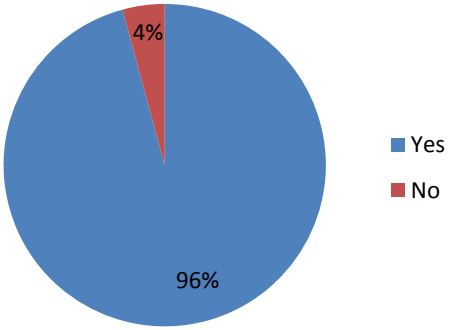


Fig. 31 Directly paid by registered office?

Next to the respondents that did not provide an answer to this question, 10% (N=685) stated that they are paid differently. Of this group, 47% indicated being paid by a temporary work agency, 39% being paid by an intermediary and 14% being paid in another way.

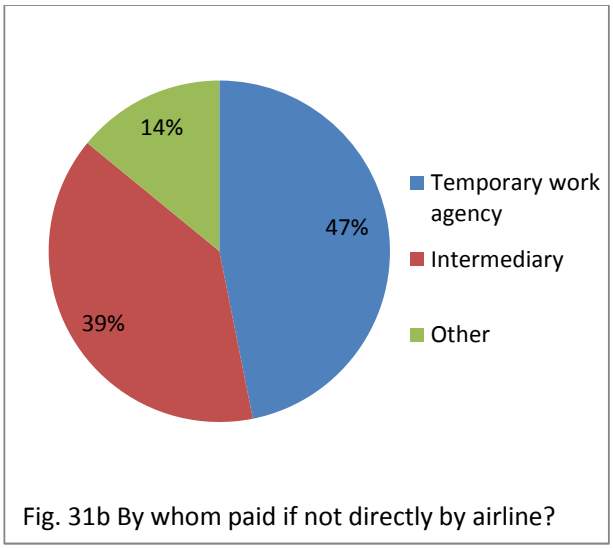


Fig. 31b By whom paid if not directly by airline?

14% of respondents stated that they are paid in another way. Figure 32 shows that a majority of these respondents indicated that they are paid by agencies (often contracting agencies).

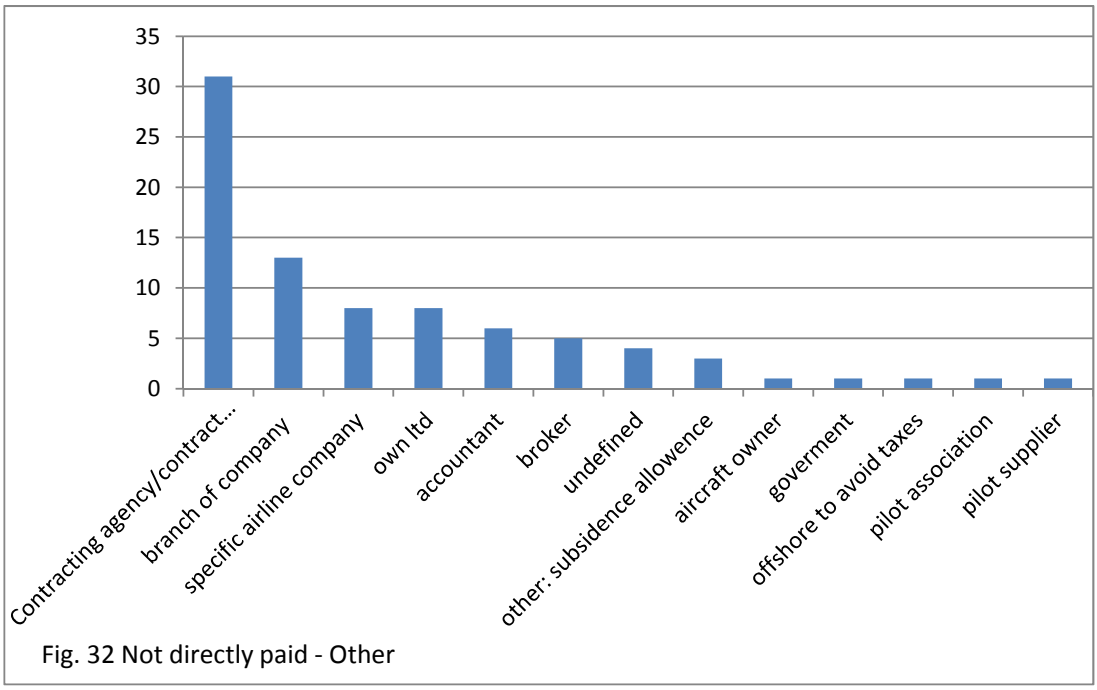


Fig. 32 Not directly paid - Other

2. How are you paid?
    a. lump sum
    b. lump sum + extras
        i. Which extras? *[open question]*
    c. per hour with a minimum number of flight hours guaranteed
        i. Please specify how many hours are guaranteed *[open question]*
    d. per hour without a minimum number of flight hours guaranteed
    e. performance-related pay

Figure 33 shows that 37% (N=2422) of respondents reported being paid a 'lump sum with extras'. Another 20% (N=1296) indicated being paid only a lump sum. 14% (N=942) of respondents indicated being paid per hour albeit with a minimum number of hours guaranteed, and 7% (N=487) indicated being paid per hour without a minimum number of hours guaranteed. Finally, 1% of respondents indicated being paid according to performance.

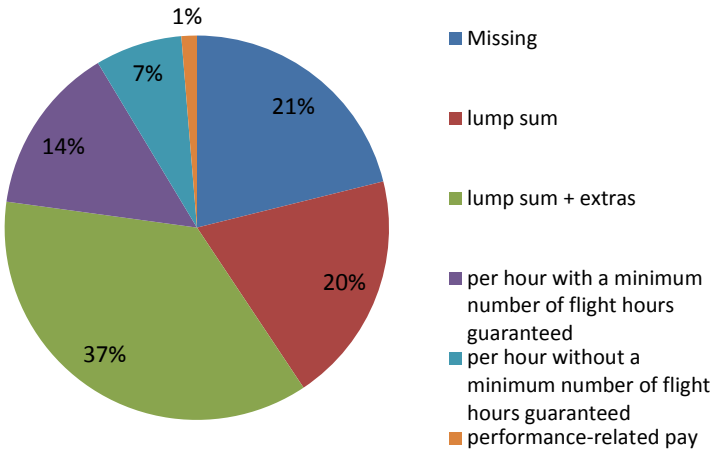


Fig. 33 Types of payment

According to respondents, extras can be for instance a 13th month, vacation pay, daily allowances, travel expences, supplements for nights, Sundays and public holidays, a uniform, overtime, bonuses (e.g. on-time performance bonus), instructor compensation, housing allowance etc. With regard to the minimum number of guaranteed hours, respondents for instance stated to have 100 hours guaranteed over a period of 3 months; others reported 105 to 120 hours guaranteed per month. Other respondents reported having a guarantee of 30 hours a month, often under the condition of not being ill or having no days off. Moreover, other respondents indicated this varies between 50 per week up to 60 to 80 per month.

3. Which activities are you being paid or compensated for? *[multiple answers may be given]*

   a. Flight hours
   b. Positioning ('dead-heading')
   c. Time during layovers
   d. Hotel
   e. Meals between flights
   f. Meals during flights
   g. Costs of retaining licenses
   h. Uniforms
   i. Crew ID cards
   j. Other – Please specify *[open question]*

Activities that respondents indicated they are compensated for are flight hours (61.5% of respondents), positioning (54.9%), time during lay-over (46.8%), hotel (52.7%), meals between flights (27.5%), meals during flights (41%), costs of retaining licenses (49.1%), uniforms (53.9%), and crew ID cards (51%). Next to this, 495 respondents also stated — by means of the 'other' option — that they are compensated for e.g. breakfast, car parking, mobile phone, medical costs, glasses, hotels, instruction, passports, shoes etc.

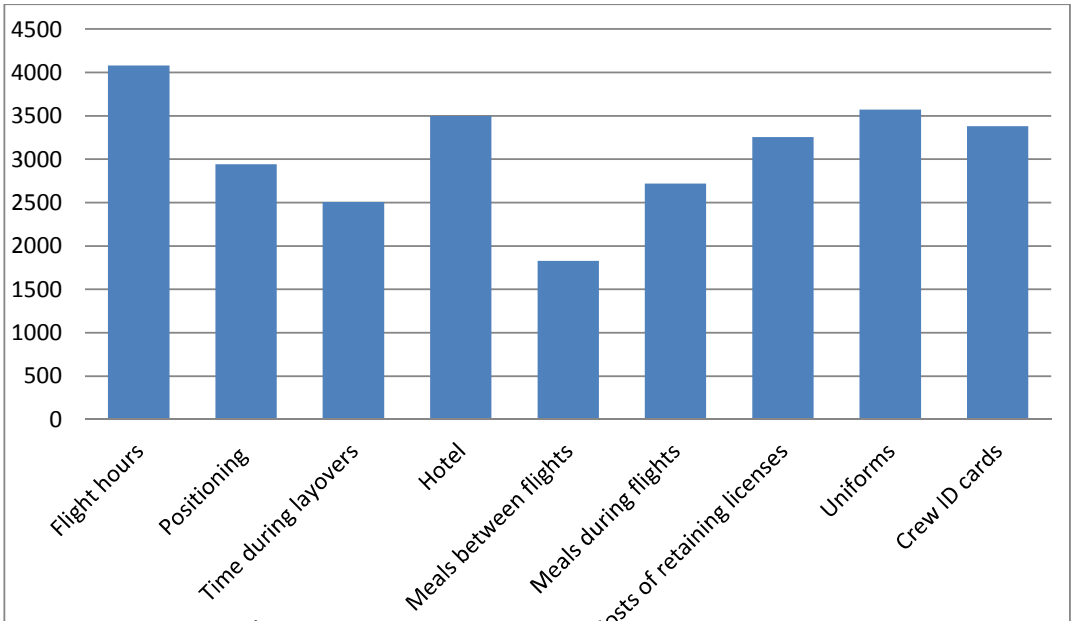


Fig. 34 Compensated activities

Table 9 Compensated activities

	Frequency	%
Flight hours	4082	61.5
Positioning	2942	44.4
Time during layovers	2506	37.8
Hotel	3498	52.7
Meals between flights	1827	27.5
Meals during flights	2721	41
Costs of retaining licenses	3257	49.1
Uniforms	3574	53.9
Crew ID cards	3382	51

4. Is part of your income fixed and guaranteed?
   a. Yes
   b. No

In this study, 70% of respondents answered that a part of their income was fixed and guaranteed.

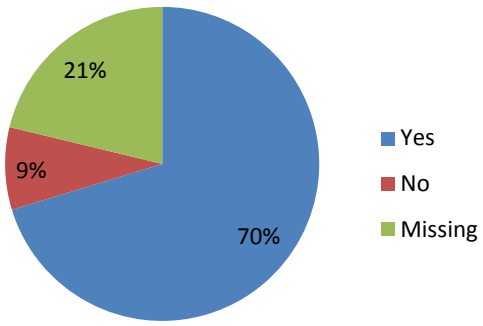


Fig. 35 Part of income fixed and guaranteed?

5. Is your income variable?
   a. Yes
   b. No

Half of respondents stated they have a variable income. These respondents indicated that this income depends on the performed block hours, bonuses for fuel savings and on-time performances, company profit, the amount of days worked or the number of flights received, duty hours etc.

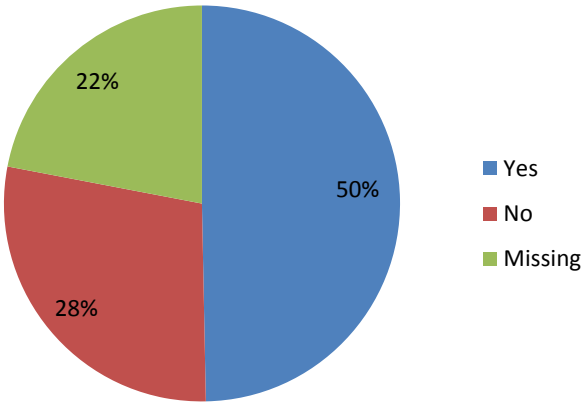


Fig. 36 Is your income variable?

6. Where do you pay your social security contributions? *[drop-down list of countries]*

   This country is

   a. the country where your official home base is located

   b. the country where the registered office of the airline you fly for is located *[choose this option if different from the official home base]*

   c. the country where the registered office of your own company is located *[choose this option if different from the official home base]*

   d. the country where you live *[choose this option if different from the official home base]*

   e. This a different country

      i. Please specify *[open question]*

With regard to the country of social security, France, the Netherlands and the UK are mostly referred to by the respondents. Figure 37 shows the top representation of ≥ 0.2%.

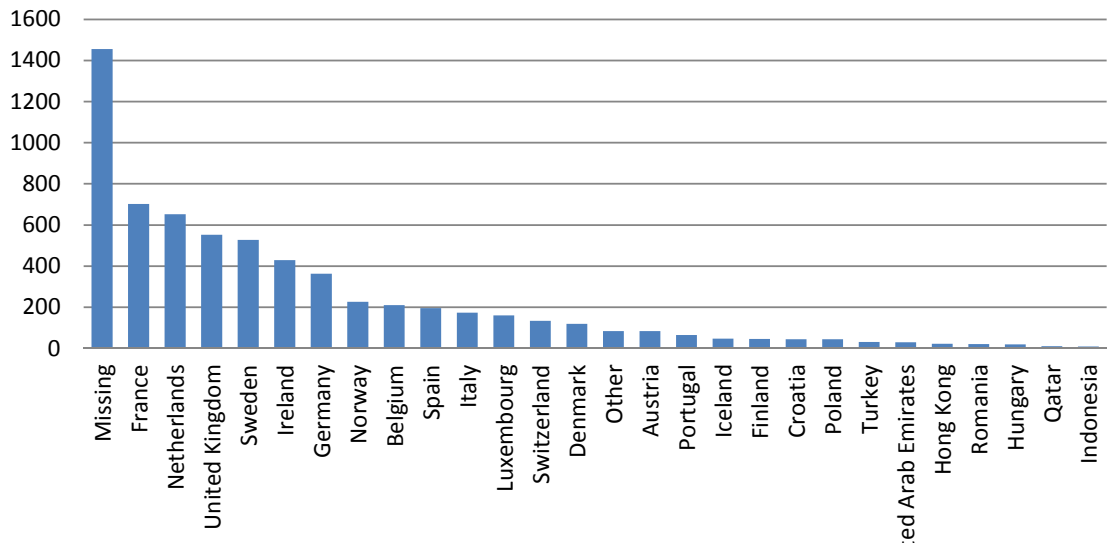


Fig. 37 Countries payment social security contributions

Table 10 Where do you pay social security contributions?

	Frequency	%
Missing	1455	21.9
France	702	10.6
Netherlands	653	9.8
United Kingdom	552	8.3
Sweden	527	7.9
Ireland	429	6.5
Germany	363	5.5
Norway	226	3.4
Belgium	211	3.2
Spain	196	3
Italy	174	2.6
Luxembourg	161	2.4
Switzerland	134	2
Denmark	119	1.8
Other	85	1.3
Austria	84	1.3
Portugal	65	1
Iceland	48	0.7
Finland	46	0.7
Croatia	44	0.7
Poland	44	0.7
Turkey	31	0.5
United Arab Emirates	30	0.5

Hong Kong	23	0.3
Romania	21	0.3
Hungary	19	0.3
Qatar	11	0.2
Indonesia	10	0.2

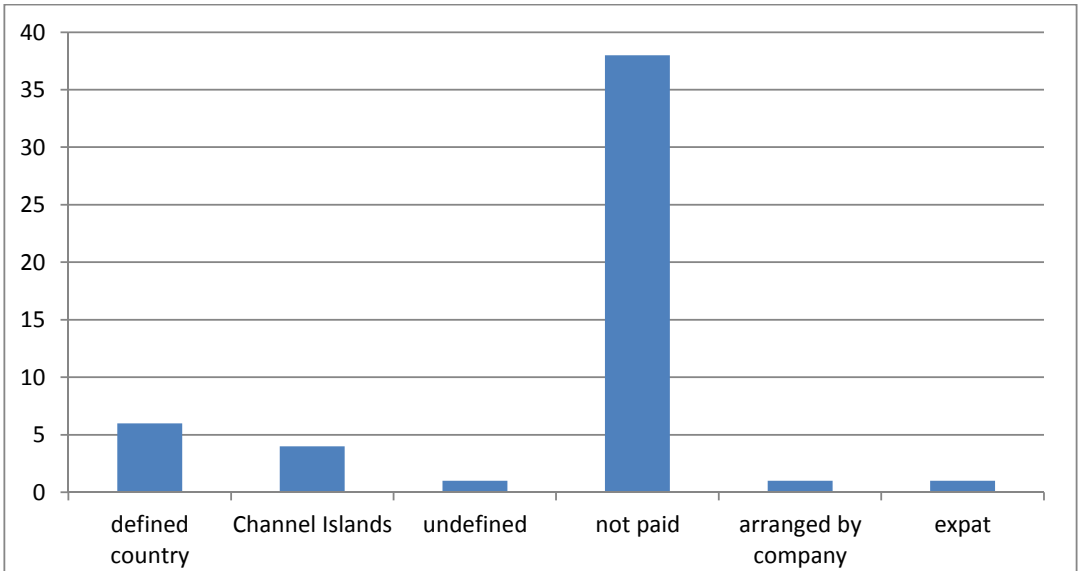


Fig. 38 Countries payment social security contributions - Other

Most of these respondents (85%) indicated that this country is the country of their official home base.

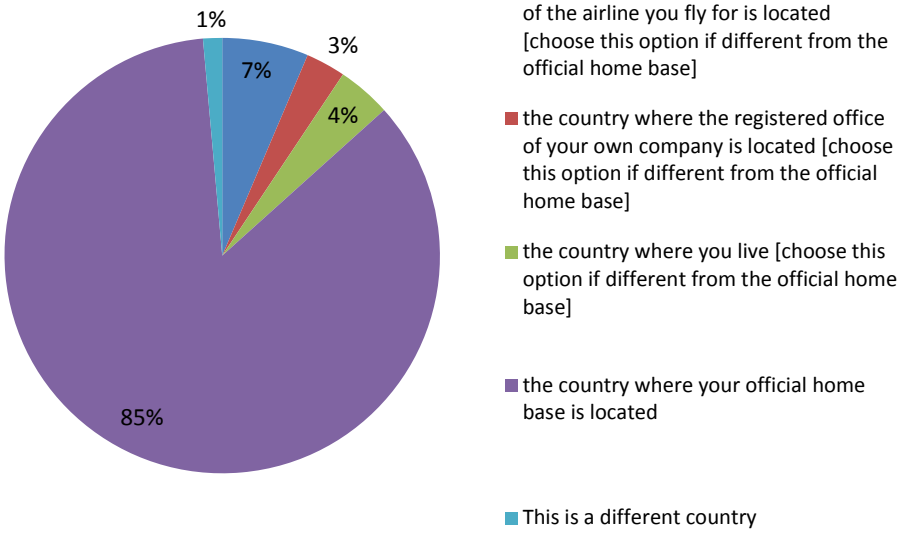


Fig. 39 Country payment social security contributions is ...

7. Are you yourself responsible for the payment of your social security contributions?
   a. Yes
   b. No

13% of respondents in this study indicated that they are responsible for the payment of their social security contributions, whereas 65% indicated this is not the case. 22% of respondents did not provide us with an answer to this question.

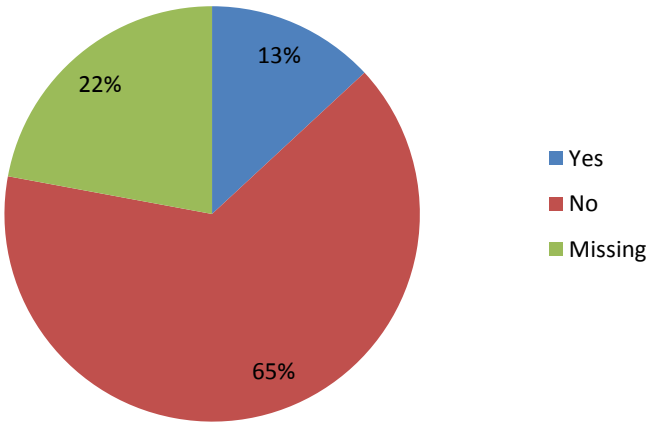


Fig. 40 You yourself responsible for payment of social security contributions?

8. Where do you pay your taxes? *[drop-down list of countries]*
   This country is

   a. the country where your official home base is located

   b. the country where the registered office of the airline you fly for is located *[choose this option if different from the official home base]*

   c. the country where the registered office of your own company is located *[choose this option if different from the official home base]*

   d. the country where you live *[choose this option if different from the official home base]*

   e. this is a different country

   f. Please specify *[open question]*

Next to France and the Netherlands, Sweden is the third country in which a large part of the respondents state that they pay their taxes, followed by again the UK and Ireland. Figure 41 again represents the top ≥ 0.2%.

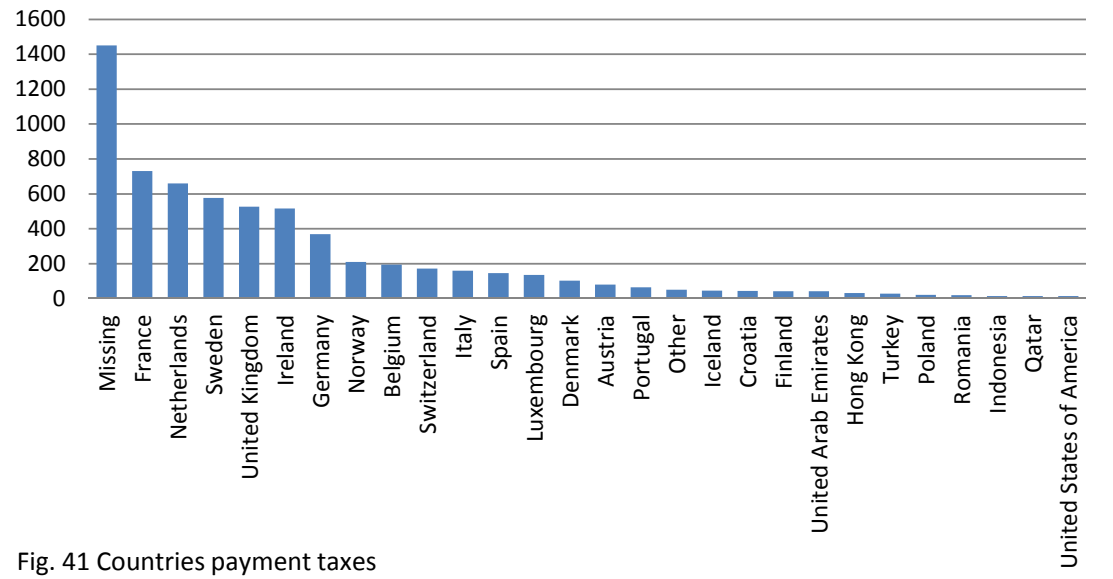


Fig. 41 Countries payment taxes

Table 11 Where do you pay your taxes?

	Frequency	%
Missing	1451	21.9
France	731	11
Netherlands	659	9.9
Sweden	577	8.7
United Kingdom	526	7.9
Ireland	517	7.8
Germany	369	5.6
Norway	210	3.2
Belgium	194	2.9
Switzerland	172	2.6
Italy	160	2.4
Spain	146	2.2
Luxembourg	136	2.1
Denmark	102	1.5
Austria	81	1.2
Portugal	64	1
Other	50	0.8
Iceland	46	0.7
Croatia	44	0.7
Finland	42	0.6
United Arab Emirates	42	0.6
Hong Kong	32	0.5
Turkey	28	0.4

Poland	21	0.3
Romania	19	0.3
Indonesia	14	0.2
Qatar	14	0.2
United States of America	14	0.2

80% of respondents indicated this is the same country as the one where their home base is located.

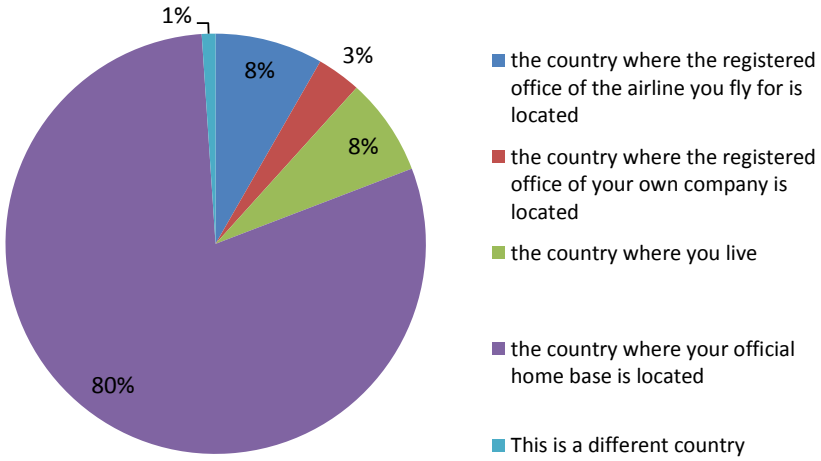


Fig. 42 Country payment taxes is ...

9. On average how many flying hours do you clock up per month?
   [open question]

   i. Can you choose this freely?

      a. Yes

      b. No

         i. If not, who decides this?

            a. Registered office of the airline

            b. Regional office of the airline

            c. Temporary work agency

            d. intermediary

            e. Other – Please specify *[open question]*

   ii. How are your hours counted?

      a. Per hour worked

      b. Per actual flying hour ('block hours')

   iii. Are flight preparations and checks considered and remunerated as hours worked?

      a. Yes

      b. No

   iv. Do you consider you have enough time for pre/post-flight duties?

      a. Yes

      b. No

Table 12 shows the top 27 of the flying hours which respondents stated to clock up per month.

Table 12 Top 27 of average flying hours (> 0.1 representation)

Amount of hours	Frequency	%
70	906	13.7
80	636	9.6
75	616	9.3
60	581	8.8

50	443	6.7
65	405	6.1
85	214	3.2
90	196	3
40	180	2.7
55	153	2.3
30	132	2
45	95	1.4
35	62	0.9
25	56	0.8
20	49	0.7
100	38	0.6
95	33	0.5
78	32	0.5
72	19	0.3
68	18	0.3
67	17	0.3
15	16	0.2
700	12	0.2
73	12	0.2
84	11	0.2
63	11	0.2
82	10	0.2

Figure 43 shows the data which is presented above per interval. As can be seen, 54% of respondents in this study stated that they fly between 50 and 75 hours a month.

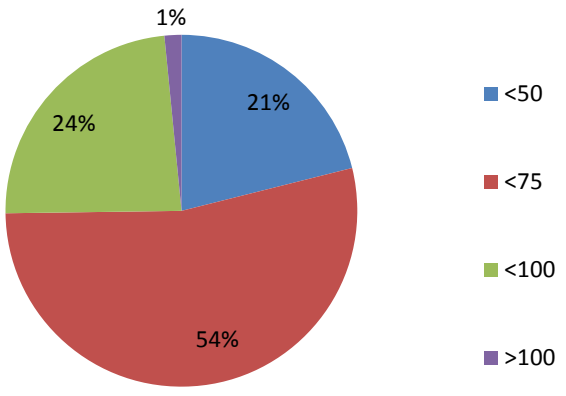


Fig. 43 How many hours do you clock up per month?

Of these respondents, 71% indicated (N=4710) that they cannot choose the hours freely. 95% of respondents in this group stated that this is decided by the registered office of the airline they fly for.

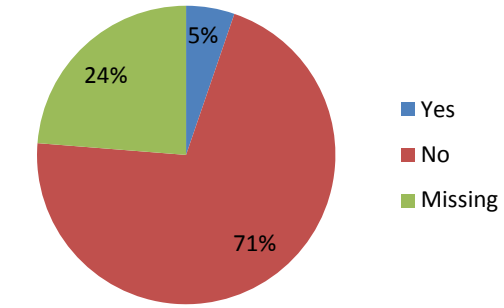


Fig. 44 Choose hours freely?

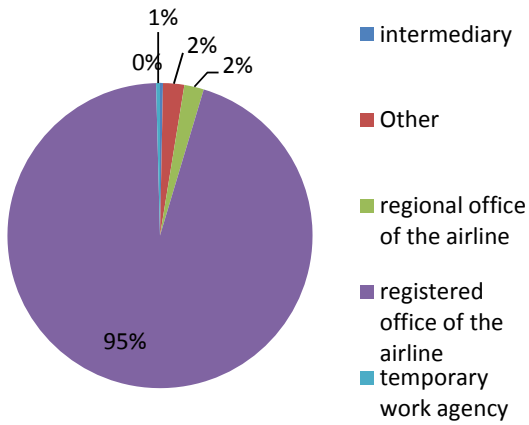


Fig. 45 Who decides hours?

75% of respondents stated that hours are counted per flying hour or (or 'block hour'). For 63%, flight preparations and checks are considered and remunerated as hours worked.

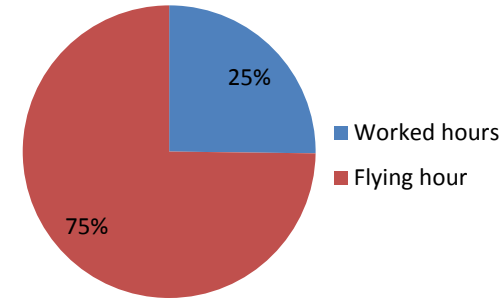


Fig. 46 How hours counted?

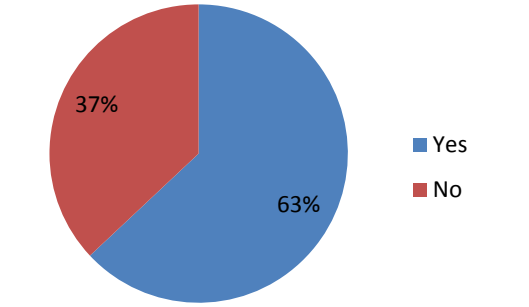


Fig. 47 Do preparations and checks counts as hous worked?

When respondents were asked if they consider having enough time for pre/post-flight duties, 62% confirmed this.

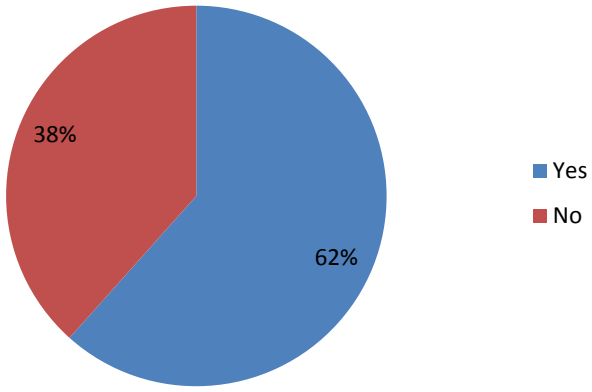


Fig. 48 Do you have enough time for pre/post-flight duties?

10. Which country's legislation is applicable to your cooperation with the airline? *[drop-down list of countries]*

[question only visible for those interviewees who answered that they are not employed under an employment contract]

a. This is the legislation of the country where your official home base is
b. This is the legislation of the country where the airline's registered office is *[choose this option if different from the official home base]*
c. This is the legislation of the country where the temporary work agency you work for is *[choose this option if different from the official home base]*
d. This is the legislation of the country where you have established your own company *[choose this option if different from the official home base]*
e. I don't know
f. Other – Please specify *[open question]*

The respondents who stated that they are self-employed, the respondents who stated that they work via a company and have no employment contract with this company, the respondents who stated that they work via a company and are shareholder, as well as the respondents who stated that it is a different relationship answered this question (N=440). Top representation of > 0.5%.

Table 13 Which country's legislation is applicable to your cooperation with the airline? (N=397)

	Frequency	%
Ireland	213	39.4
United Kingdom	36	6.7
Sweden	16	3
Hungary	12	2.2
Germany	11	2
Denmark	10	1.9
Italy	8	1.5
Other	8	1.5
France	7	1.3
Iceland	7	1.3
Spain	7	1.3
Estonia	5	0.9
Latvia	5	0.9
Netherlands	5	0.9
Austria	4	0.7
Hong Kong	4	0.7
Norway	4	0.7
Portugal	4	0.7
Belgium	3	0.6
Switzerland	3	0.6

31% of this group stated that the legislation applicable to their cooperation with the airline is the legislation of the country where the official home base is located. 47% stated that this is the legislation of the country where the airline's registered office is.

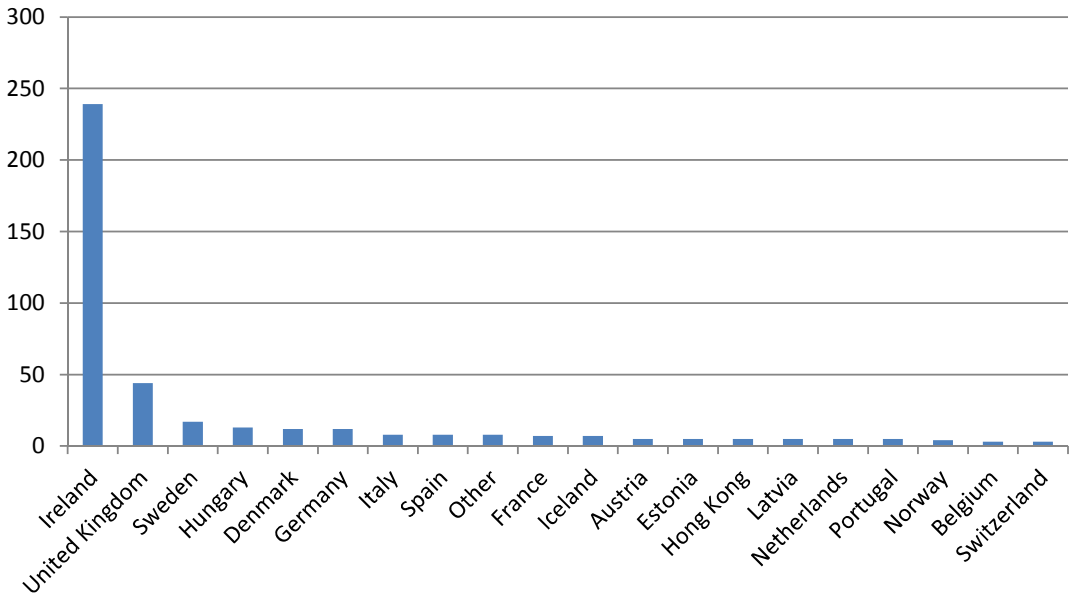


Fig. 49 Legislation applicable to cooperation with airline

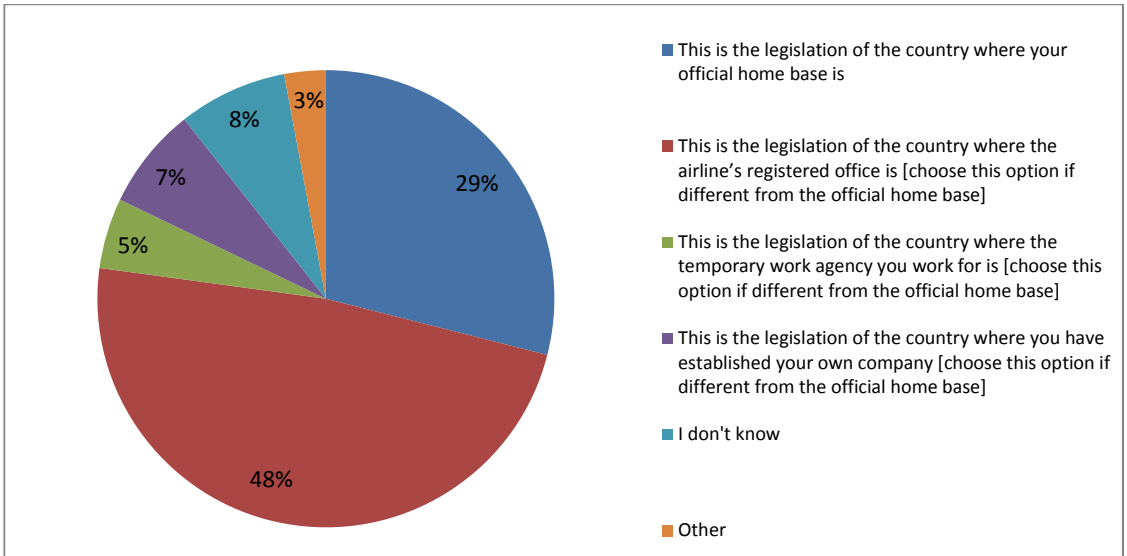


Fig. 50 Legislation applicable to cooperation with airline is ...?

11. In which country is your official home base?

[drop-down list of countries]

i. Do you consider that this isn't your real home base?

a. No

b. Yes

i. Which country do you consider your real home base is in?

[drop-down list of countries]

The top 3 of countries most answered by respondents are France, the Netherlands and the UK. More prevalent is that Ireland falls just outside the top 10. The following figure shows the countries represented at a level of > 0.5%. Note the high number of respondents who did not provide us with an answer to this question. The unwillingness of the respondents to answer some questions that go into sensitive information might in itself be significant.

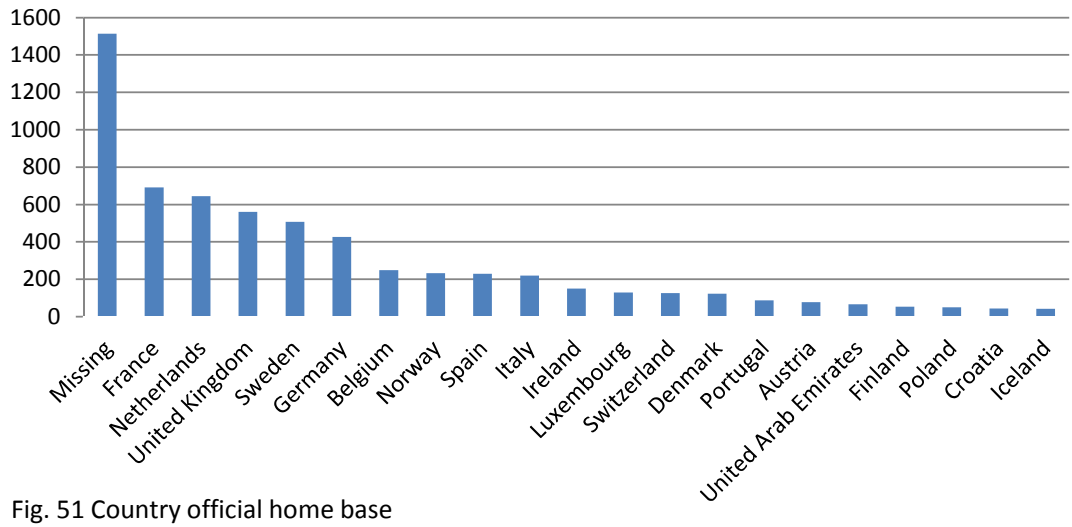


Fig. 51 Country official home base

Table 14 In which country is your official home base?

	Frequency	%
Missing	1513	22.8
France	692	10.4
Netherlands	645	9.7
United Kingdom	561	8.5
Sweden	507	7.6
Germany	427	6.4

Belgium	249	3.8
Norway	233	3.5
Spain	229	3.5
Italy	220	3.3
Ireland	151	2.3
Luxembourg	130	2
Switzerland	126	1.9
Denmark	123	1.9
Portugal	87	1.3
Austria	78	1.2
United Arab Emirates	66	1
Finland	54	0.8
Poland	50	0.8
Croatia	44	0.7
Iceland	42	0.6
Romania	35	0.5
Hong Kong	30	0.5
Turkey	30	0.5

However, respondents were also asked whether they considered their official home base to be their real home base. 91% of respondents stated that they consider the official home base to be their real home base.[159]

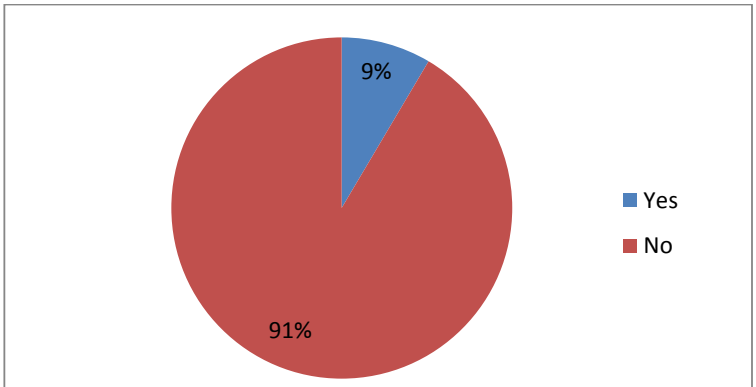


Fig. 52 Do you consider this not to be your real home base?

When respondents indeed indicated that they consider their home base no to be their real home base, the following countries were stated as being the real home base.

[159] We note that the question was problably a bit misleading because of the double negation which led to a distorted image of the reality concerning home base.

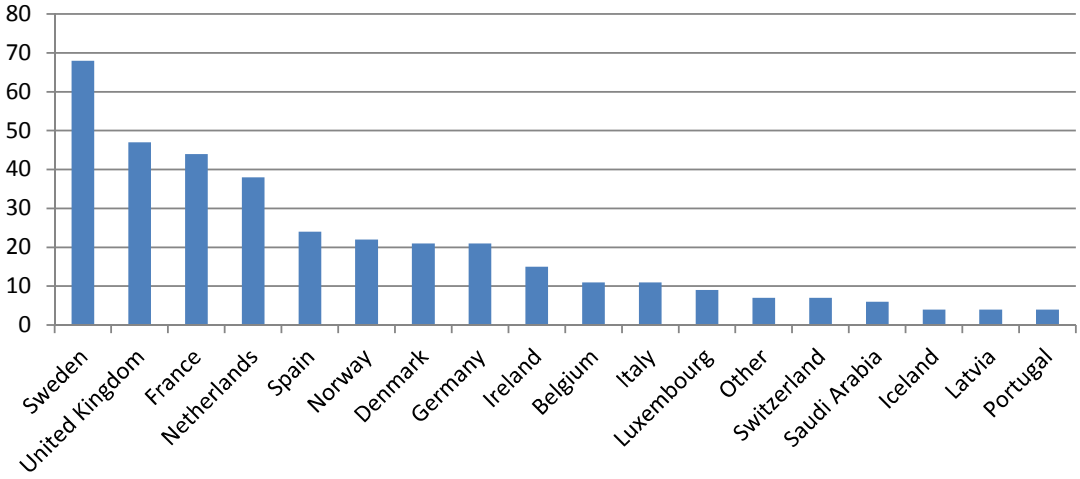


Fig. 53 Other for real home base

Table 15 Which country considered as real home base?

	Frequency	%
Sweden	68	1
United Kingdom	47	0.7
France	44	0.7
Netherlands	38	0.6
Spain	24	0.4
Norway	22	0.3
Denmark	21	0.3
Germany	21	0.3
Ireland	15	0.2
Belgium	11	0.2
Italy	11	0.2
Luxembourg	9	0.1
Other	7	0.1
Switzerland	7	0.1
Saudi Arabia	6	0.1
Iceland	4	0.1
Latvia	4	0.1
Portugal	4	0.1

12. Do you live in the country where your home base is located?

    a. Yes

    b. No

64% of respondents stated that they live in the country of their home base. 13% stated that they live elsewhere. 23% did not provide us with answer to this question.

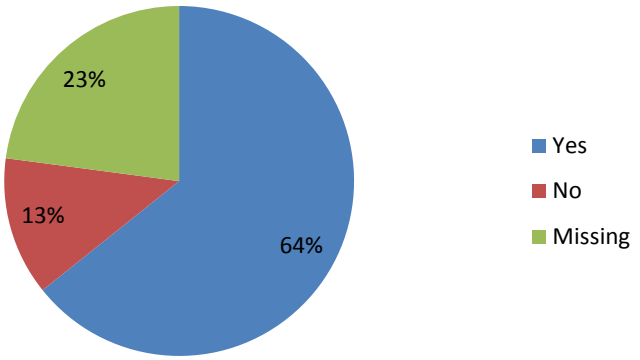


Fig. 54 Do you live in the country where your home base is located?

13. Do you always fly from the same home base?
    a. Yes
    b. No

[Questions below will appear regardless of the answer given above]

i. Who decides where your home base is?
    a. Registered office of the airline
    b. Regional office of the airline
    c. Temporary work agency
    d. intermediary
    e. You yourself
    f. Other – please specify *[open question]*

ii. Do you have any say in this matter?
    a. Yes
    b. No

iii. Within what term can your home base be changed
    a. no notice
    b. a few days
    c. a few weeks
    d. a few months
    e. other – please specify *[open question]*

When the respondents were asked whether they always fly from the same home base, 54% of respondents answered in the positive: they indicate they always fly from the same home base. 23% indicated that their home base can be changed, while 23% did not answer this question.

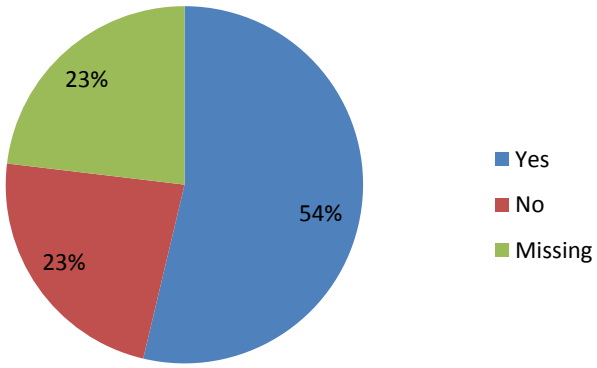


Fig. 55 Do you always fly from the same home base?

87% of respondents stated that the home base is decided by the registered office of the airline. 8% stated they can decide this themselves.

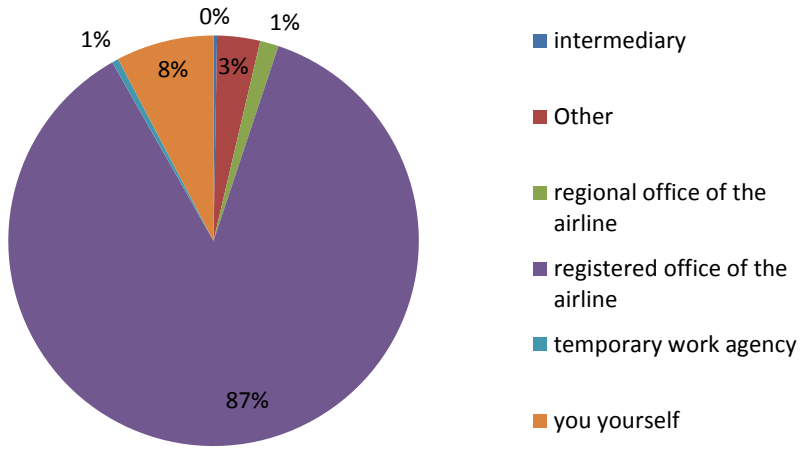


Fig. 56 Who decides where your home base is?

32% of respondents stated they have a say in this matter, whereas 45% stated that they do not.

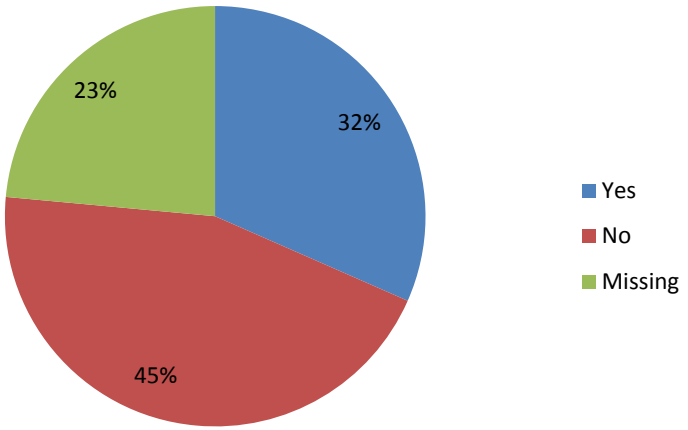


Fig. 57 Do you have a say in where your home base is located?

When respondents were asked within what term the home base can be changed, most indicated a few months or 'other'.

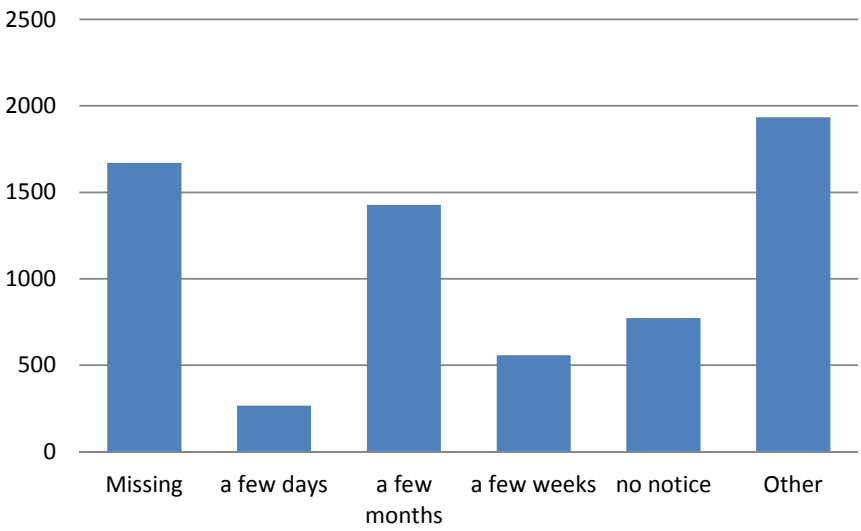


Fig. 58 Term change of home base

Table 16 Within what term can your home base be changed?

	Frequency	%
	1671	25.2
a few days	267	4
a few months	1428	21.5
a few weeks	558	8.4
no notice	774	11.7

Other	1935	29.2
Total	6633	100

14. From whom do you get your instructions? *[multiple answers may be given]*
    a. Registered office of the airline
    b. Regional office of the airline
    c. Temporary work agency
    d. intermediary
    e. You yourself
    f. Other – please specify *[open question]*

As the Figure 59 shows, almost all respondents stated that they receive instructions via the registered office of the airline.

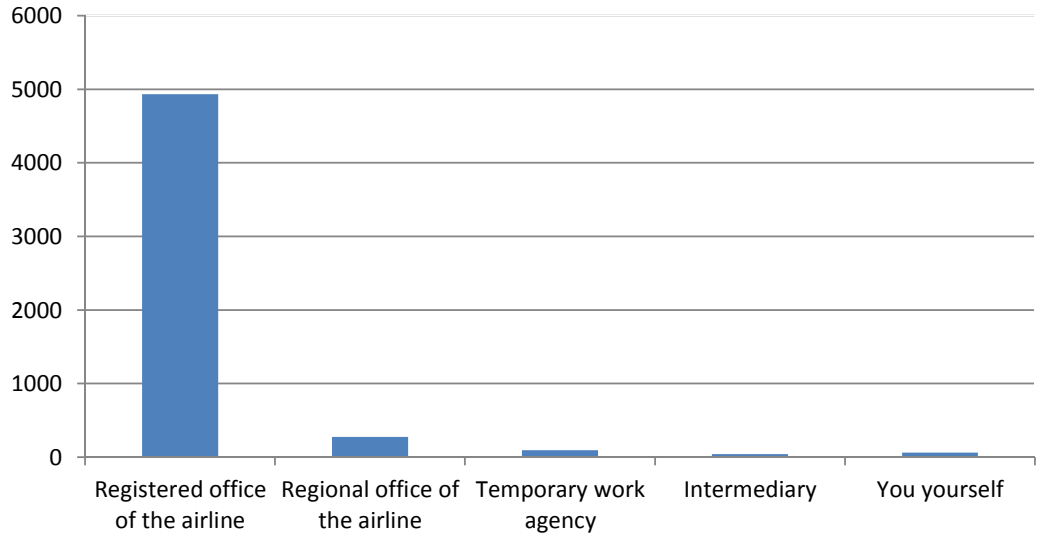


Fig. 59 From whom do you get instructions?

Table 17 From whom do you get your instructions?

	Frequency	%	Valid %
Registered office of the airline	4935	74.4	92.2

Regional office of the airline	277	4.2	5.2
Temporary work agency	96	1.4	1.8
Intermediary	41	0.6	0.8
You yourself	63	0.9	1.2

Table 18 Other parties who give instructions

Statement of pilot	Frequency
Acft type Unit manager	1
airline	1
ambulance Dispatch center	1
base manager	1
Both Ryanair and Brookfield aviation	1
Chief pilot	1
client	1
client-student	1
Collective agreement	1
Commanding Officer, always rank of Lieutenant Colonal	1
crewdispatch	1
Don’t know	1
Union[160]	1
From our shareholders	1
I apply for it	1
I was already qualified for the acft type	1
Internet	1
It's from their crew website	1
Lead Pilot	1
Main Airline in the group	1
Main operating company	1
ON THE ROSTER	1
Only one home base	1
Operations control of parent company	1
ops	1
or the company I'm chartered to work for	1
owner of the plane	1
Owner of the private jet I fly	1
planning in Sweden, ops in UK	1
regional and registered office of airline e.g. rotering UK, HR is UK office etc.	1
scheduling department of the airline	1
UK	1

[160] Anonymised.

15. What do these instructions involve? *[multiple answers may be given]*

a. Schedules
b. Flight routes / Flight plan
c. Maximum daily / monthly flight hours
d. How much extra fuel you take aboard
e. Safety and operational aspects
f. Working hours
g. Training requirements
h. Cockpit crew composition
i. Cargo content (weight, kind etc)
j. Other – please specify *[open question]*

Mostly, respondents stated to acknowledge these instructions. There is less agreement about what the instructions concern: the maximum daily/monthly flight hours, cargo content and the amount of extra fuel pilots want take aboard.

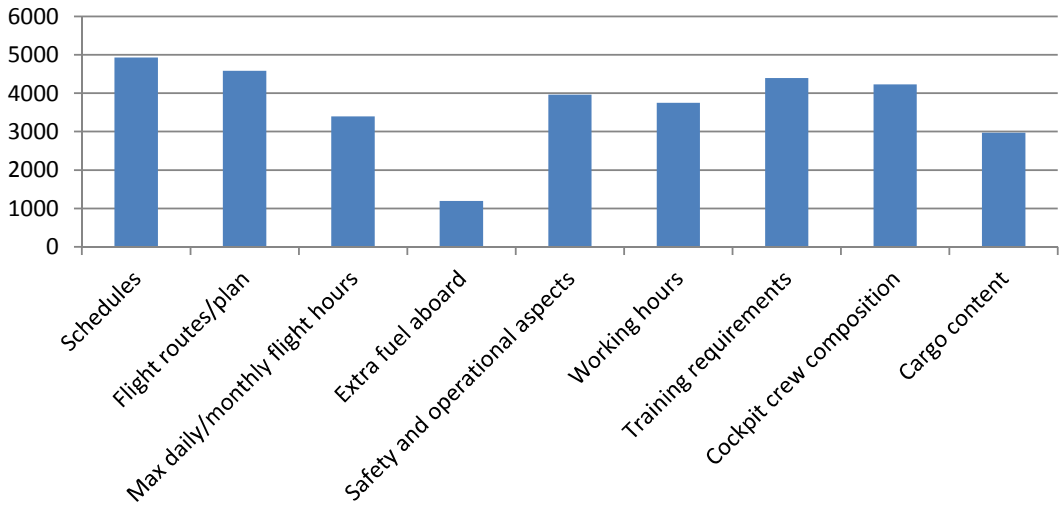


Fig. 60 What do the instructions involve?

Table 19 What do these instructions involve?

	Frequency	%	Valid %
Schedules	4927	74.3	92
Flight routes/plan	4584	69.1	85.6
Max daily/monthly flight hours	3399	51.2	63.5
Extra fuel aboard	1194	18	22.3

Safety and operational aspects	3959	59.7	73.9
Working hours	3752	56.6	70.1
Training requirements	4391	66.2	82
Cockpit crew composition	4230	63.8	79
Cargo content	2974	44.8	55.5

16. I can amend the instructions of the airline based on e.g. objections regarding flight safety, liability, or regarding health & safety
[strongly agree – mostly agree – mostly disagree – strongly disagree]

[Questions below will appear regardless of the answer given above]

i. Who decides which safety objections are valid to amend the instructions of the airline?

a. Registered office of the airline
b. Regional office of the airline
c. Temporary work agency
d. intermediary
e. You yourself
f. Other – please specify *[open question]*

ii. Are you sometimes reluctant to take such decisions for fear of possible negative consequences for your professional career?

a. Yes
b. No

iii. Are your colleagues sometimes reluctant to take such decisions for fear of possible negative consequences for their professional career?

a. Yes
b. No

iv. Do you think that your employment status may affect your ability to take such decisions?

a. Yes
b. No

v. Do you think that your colleagues' employment status may affect their ability to take such decision?

a. Yes
b. No

Of the respondents that provided us with an answer to this question (N=5049), 82% agreed with this statement.

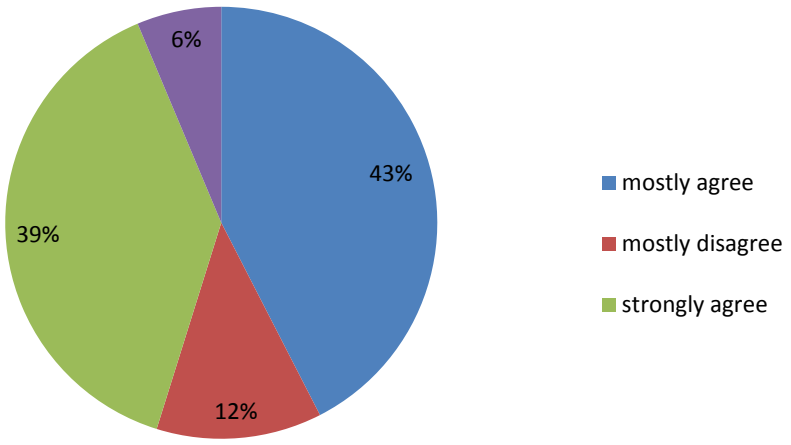


Fig. 61 I can amend the instructions of the airline based on e.g. objections regarding flight safety, liability, ...

When asked who decides which safety objections are valid to amend the instructions of the airline, 69% of the respondents stated this is the registered office of the airline.

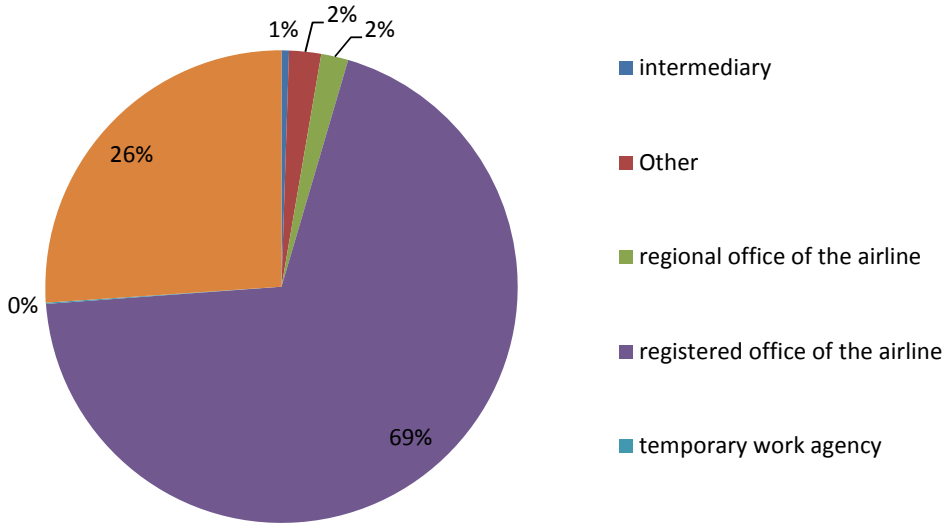


Fig. 62 Who decides which safety objections are valid?

When respondents were asked about the decision-making process with regard to the possibility to amend the instructions of the airline based on e.g. objections regarding flight safety, liability, or regarding health & safety, 30% stated being reluctant to take such decisions themselves, whereas more (47%) respondents stated they think colleagues are reluctant to take such decisions.

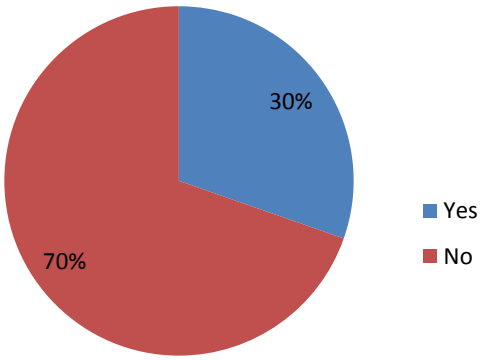


Fig. 63 Are you sometimes reluctant to take such decisions for fear of possible negative consequences for career?

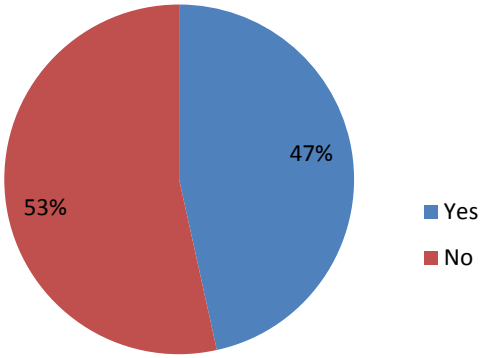


Fig. 64 Are your colleagues sometimes reluctant to take such decisions for fear of possible negative consequences for their career?

When we asked respondents if they are sometimes reluctant to take such decisions for fear of possible negative consequences for their professional career, 30% answered yes.

When we asked respondents if they think their colleagues are sometimes reluctant to take such decisions for fear of possible negative consequences for their professional career, 47 % answered yes.

When asked if their employment status may affect their ability to take such decisions, again, 37% of the respondents stated this is the case. When asked if they think their colleagues' employment status may affect their ability to take such decisions 46% of the respondents answered yes.

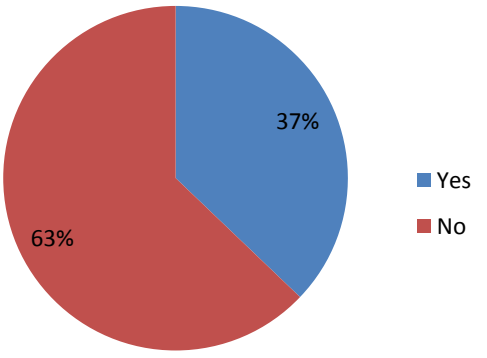


Fig. 65 Do you think your employment status affects your ability fo decide?

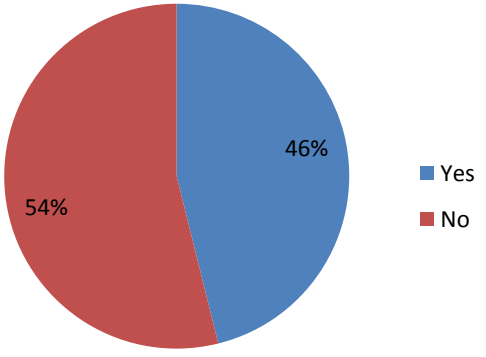


Fig. 66 Do you think your colleagues' employment status affects their ability to decide?

17. I can decide not to fly for legitimate reasons of illness etc.

[strongly agree – mostly agree – mostly disagree – strongly disagree]

[Questions below will appear regardless of the answer given above]

i. Are you sometimes reluctant to take such decisions for fear of possible negative consequences for your professional career?

   a. Yes

   b. No

ii. Are your colleagues sometimes reluctant to take such decisions for fear of possible negative consequences for their professional career?

   a. Yes

   b. No

iii. Do you think that your employment status may affect your ability to take such decisions?

   a. Yes

   b. No

iv. Do you think that your colleagues' employment status may affect their ability to take such decisions?

   a. Yes

   b. No

93% of respondents that provided us with an answer to the question if they "can decide not to fly for legitimate reasons of illness etc" (N=5044) agrees or strongly agrees with this statement.

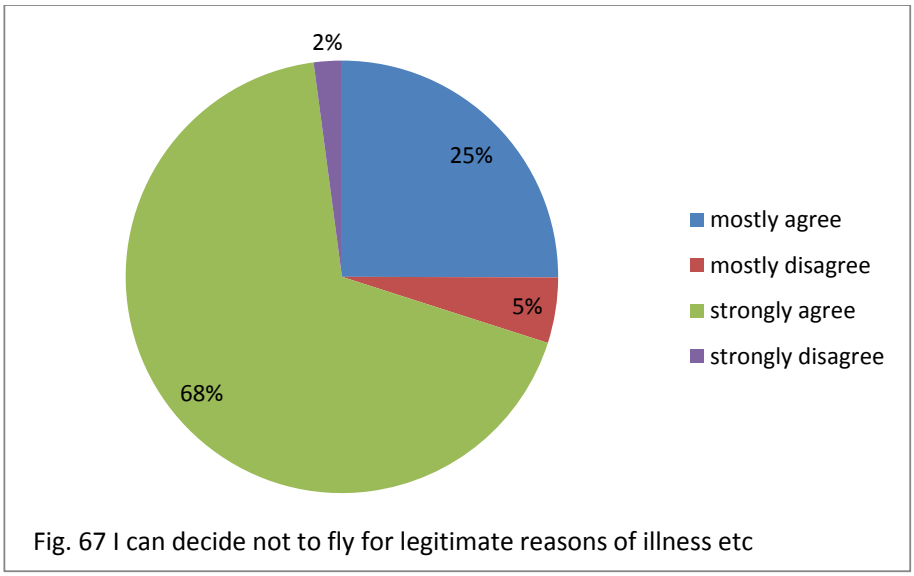


Fig. 67 I can decide not to fly for legitimate reasons of illness etc

With regard to the decision-making process, Figures 68 to 71 show what respondents answered.

28% states being reluctant sometimes to take such decisions out of fear of possible negative consequences for their professional career. 43% states they think their colleagues are sometimes reluctant to take such decisions for fear of possible negative consequences for their professional career.

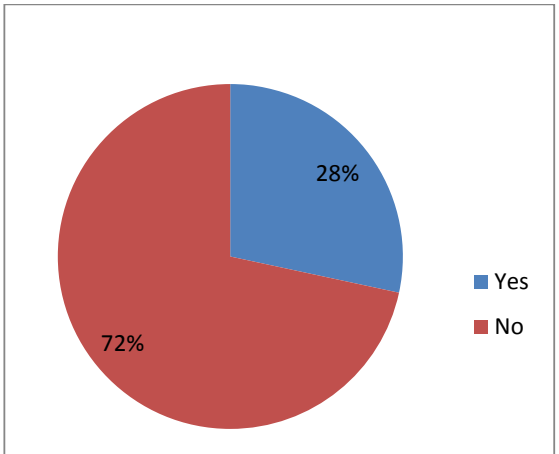


Fig. 68 Are you sometimes reluctant to take such decisions for fear of possible negative consequences for career?

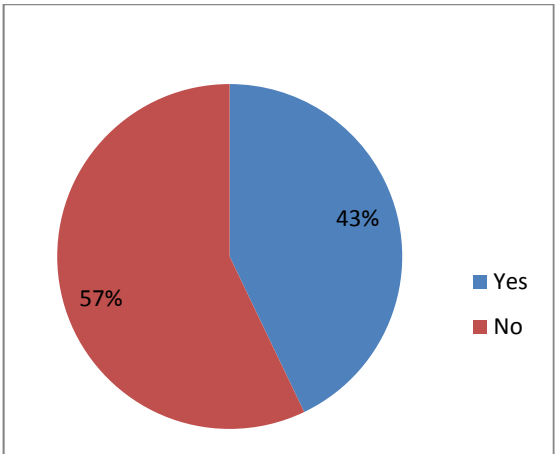


Fig. 69 Are your colleagues sometimes reluctant to take such decisions for fear of possible negative consequences for their career?

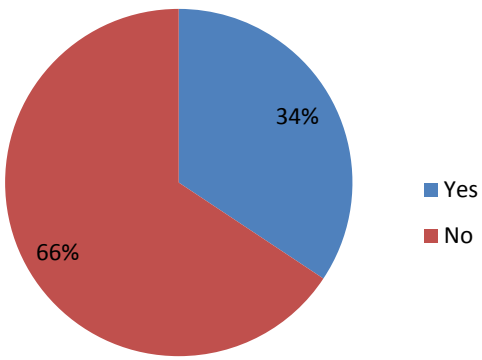


Fig. 70 Do you think your employment status affects your ability to decide?

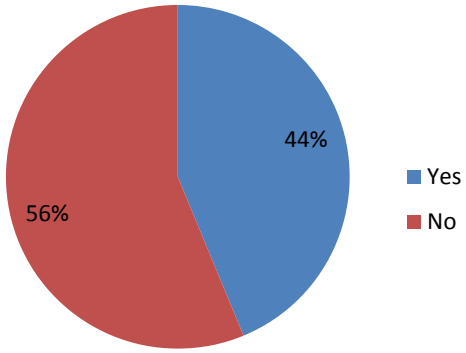


Fig. 71 Do you think your colleagues' employment status affects their ability to decide?

34% of the respondents indicated that they think their employment status may affect their ability to take such decisions, and 44% indicated that they think their colleagues' employment status may affect their ability to take such decisions.

IV. PART C: GENERAL INFORMATION CONCERNING POSSIBLE ISSUES

1. I am satisfied with my working conditions
2. I receive sufficient education and training
3. There is competition between the pilots on the European job market
4. This competition between pilots is a consequence of the difference in working conditions between different carriers
5. This competition between pilots is a consequence of what the pilot costs for the airline
6. This competition between pilots is a consequence of the increasing demand for flexibility
7. I would consider other types of cooperation (e.g. to set up your own limited liability company) to make yourself more attractive for airlines (e.g. cheaper etc)
8. Do you enjoy working for your current airline?
    a. Yes
    b. No

    [Options below will appear regardless of the answer given above] [scaled options are given per option]

    because of the general working conditions

    because of the health and safety provisions

    because of the terms & conditions

    because of the wages

    because of the flexibility
9. I can choose the airline/company I work for
10. I feel supported by my airline in case of any remarks or concerns

For each question the following scaled options are shown: 1 strongly disagree – 2 disagree – 3 neither agree nor disagree – 4 agree – 5 strongly agree

In response to this question, the largest group of answering respondents, i.e. 60%, indicated that they are (very) satisfied with their working conditions and that they receive sufficient education and

training (70% of respondents that answered the question) (see Figure 72). Furthermore, a vast majority (82%) of the respondents that answered this question indicated that they indeed believe there to be competition between pilots on the European job market. Again, 81% of the answering respondents also indicated that they believe this competition to be a consequence of the difference in working conditions between different airlines. A smaller majority of the answering respondents (65%), agrees or strongly agrees with the statement that the competition is a consequence of what pilots cost for airlines. Again, about that same amount of respondents (73%) state believing this competence is also a consequence of the increasing demand for flexibility of the pilots. More than 60% of the respondents that answered stated that they would not consider other types of cooperation. More than half of the respondents acknowledged not to be able to choose the airline they work for and more than 50% of respondents indicated that they feel supported by their airline.

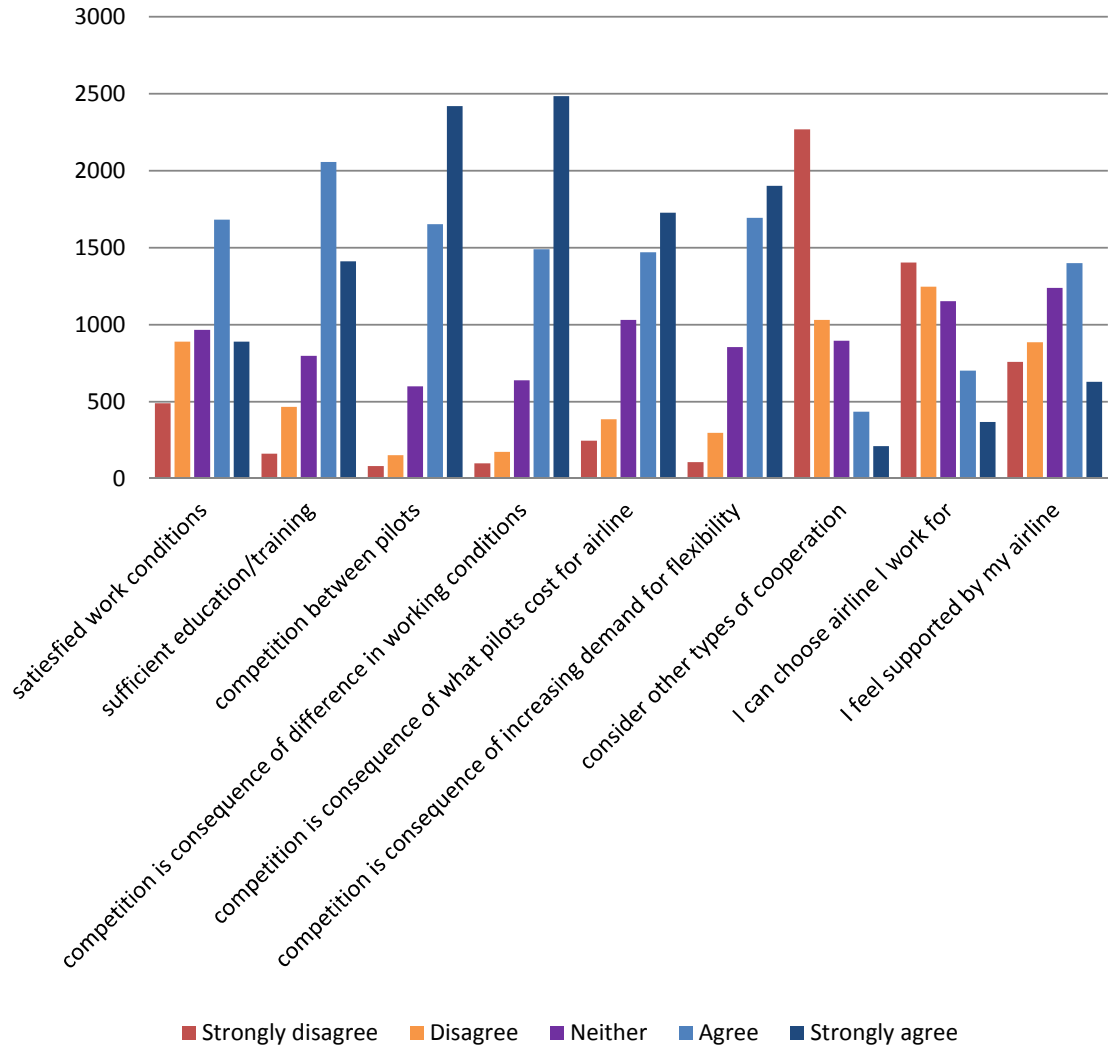


Fig. 72 Issues of respondents: Review and analysis sub-questions 1-7 and 9-10

58% of respondents stated that they enjoy working for their airline (16% stated that they do not; 26% did not provide us with an answer).

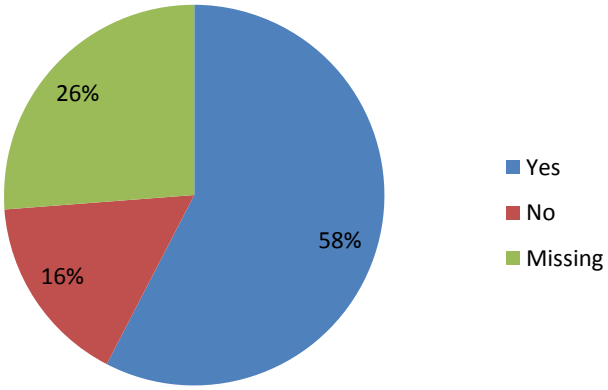


Fig. 73 Do you enjoy working for your current airline?

75.6% of respondents stated that they enjoy working for their airline because of the general working conditions; 62.9% because of the health and safety provisions; 69.4% because of the terms and conditions; 63% because of the wages; and 46.6% because of the flexibility.

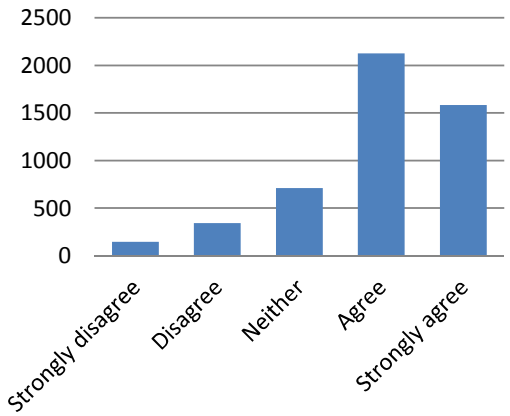


Fig. 74 Working conditions

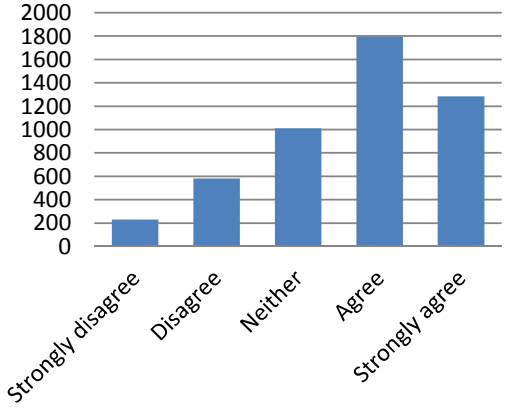


Fig. 75 Health

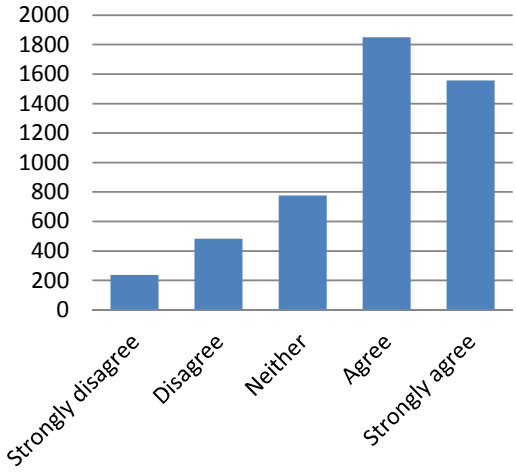


Fig. 76 Terms & conditions

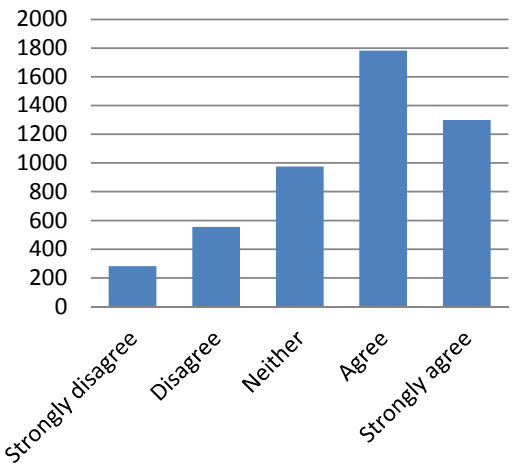


Fig. 77 Wages

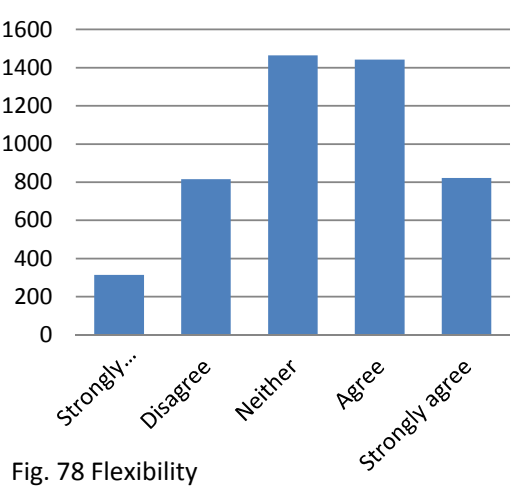


Fig. 78 Flexibility

PART 4. ANALYSIS OF THE FINDINGS

I. INTRODUCTION

What is known to the public as a low-fare or a no-frills airline or carrier, is mostly referred to by experts, both in the legal and the economic field as well as in aviation, as a low-cost carrier (LCC). The low-cost business model in aviation and the development thereof has been described multiple times, mostly from a legal, an economic or a human resources point of view. The impact of this business model on the evolution of employment relations and conditions in aviation is clear and exemplary. Labour costs being at the centre of many debates deemed 'economic' entail much more than the sheer cost of the wages of an employee.

Since the low-cost business model tries to maximise profit as well as market penetration through cutting costs wherever possible, it comes as no surprise also labour related costs will be minimised to the fullest. A closer look at the effects of the introduction of the low-cost model in European aviation reveals an evolution that deserves more attention.

II. A CLOSER LOOK AT SOME OF THE DATA

A. TYPICAL VERSUS ATYPICAL EMPLOYMENT

As mentioned above, for the purpose of this study, 'atypical work' constitutes all forms of employment or cooperation between a member of the cockpit or cabin crew and an airline other than an open-ended employment contract concluded between said crew member and said airline directly.

One of the core questions of the survey was question 9 of part A.: 'What is your relationship with the airline you currently work for?'. This question was specifically aimed at gaining a perception of the different types of legal bonds between respondents and airlines. Four types of cooperation were presented: an employment contract, temporary agency work, providing services as a self-employed pilot or via a company.

In this study, 5259 respondents, which is 79.3% of the total respondents in this study, stated to have a direct employment contract with the airline they currently work for. This means that 1071 or 16.1% of the respondents in this study reported another type of contract that is according to this studies' definition atypical.

Quote pilot

I am very satisfied with being directly employed by the airline I work for. Safety is never an issue, nor is calling in sick or not being fit for flight. These things are never questioned nor tested, and are not held against those concerned. [My airline company] is where they should be, and pay is always on time and correct. The airline

and the union appear to have a mutual understanding of the benefit of having a good dialogue, and collective agreements are met and held by both parts. In all, it is my understanding that is how things are supposed to be.

Quote pilot

I am extremely happy with my airline, work environment, aircraft, lifestyle but the fact of not being hired directly by the airline, having to sort out the taxes and pension scheme myself is very disappointing and unacceptable. If I decide to leave the airline that will be the ONLY reason.

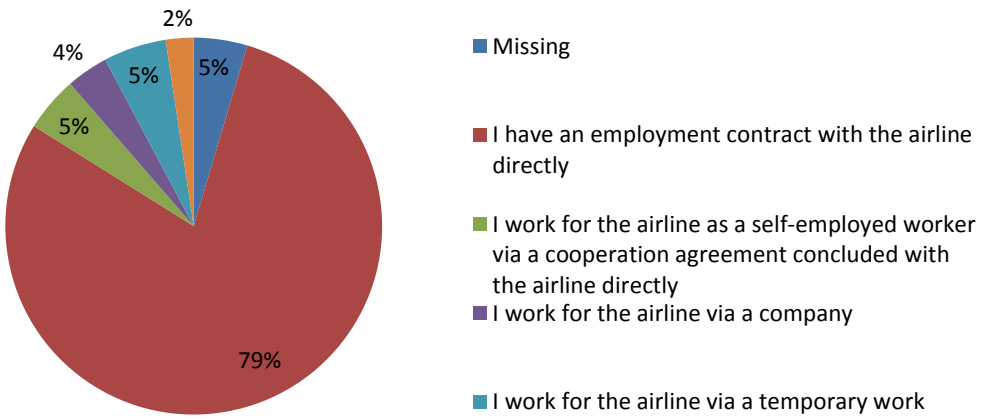


Fig. 79 Type of relationship with airline

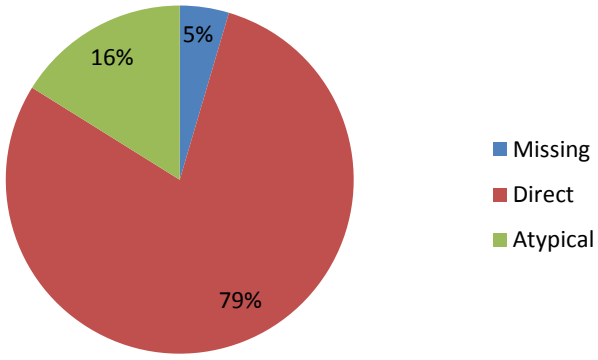


Fig. 80 Direct employment vs atypical employment

Of the 5259 respondents with a direct employment contract, 4515 respondents (87%) stated to have concluded an open-ended employment contract with the airline directly, 690 respondents (13%) indicated to have concluded a fixed-term employment contract with the airline directly, and 17 respondents (0.3%) stated to have concluded a stand-by/on-call contract with the airline directly.

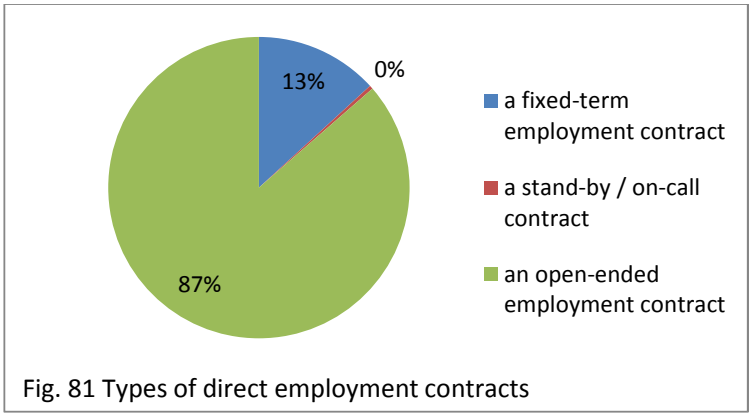


Fig. 81 Types of direct employment contracts

359 respondents (5.4% of the respondents in this study) reported to work via a contract with a temporary work agency. Of these 359 respondents, 258 subjects (72%) stated to have a fixed-term employment contract, 88 respondents (25%) to have an open-ended employment contract and 12 (3%) to have a stand-by or on-call contract.

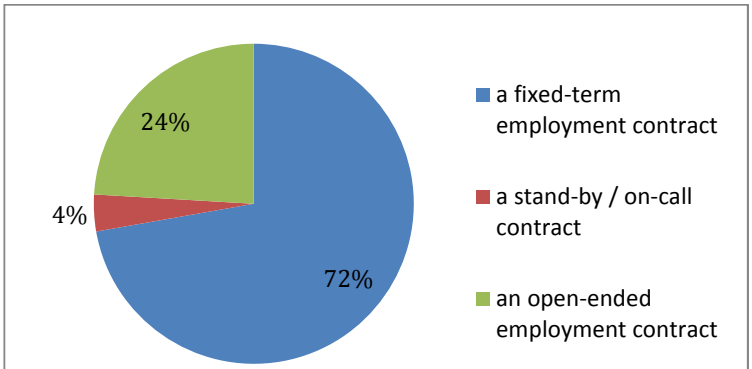


Fig. 82 Types of contracts via a temporary work agency

In this study, 237 or 3.6% of the respondents reported to work for an airline via a company.

Of these 237 respondents only 12% stated to be a shareholder of the company via which they report working for the airline (see Figure 83).

Figure 84 shows that 27% of these 237 respondents stated not to have concluded an employment contract with this company (32% stated to have concluded an open-ended employment contract, 35% to have concluded a fixed-term employment contract and 6% to have concluded a stand-by/on-call contract).

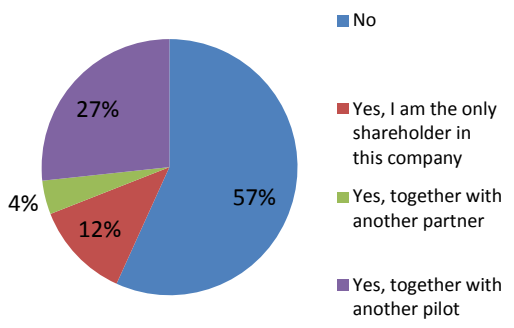


Fig. 83 Are you a shareholder in the company?

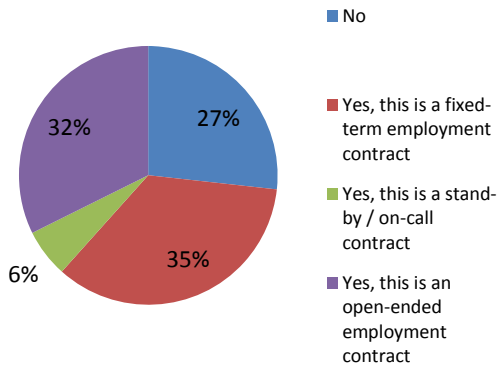


Fig. 84 Type of contract with the company

147 respondents stated their company is a limited liability company (71% of the respondents that answered this question). When asked if these companies have a cooperation agreement with the airline, 65% of the respondents confirmed this, whereas 35% stated that there is no contract between the airline and the company (see Figure 86). Of these companies, 15% is reported not to be registered in the EU.

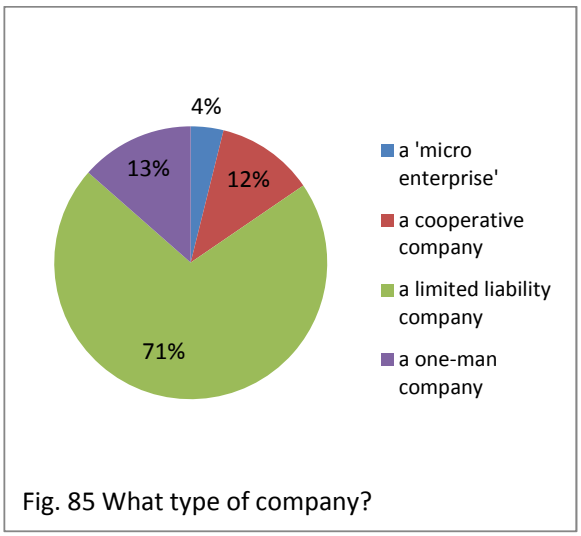


Fig. 85 What type of company?

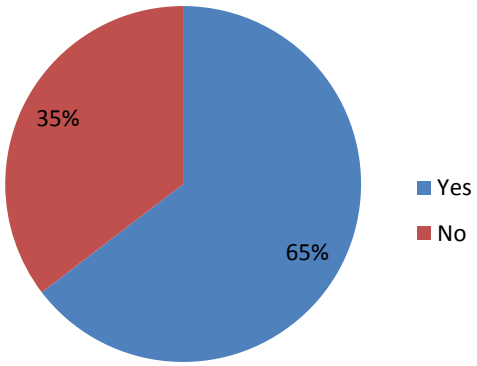


Fig. 86 Is there a cooperation agreement with the airline company?

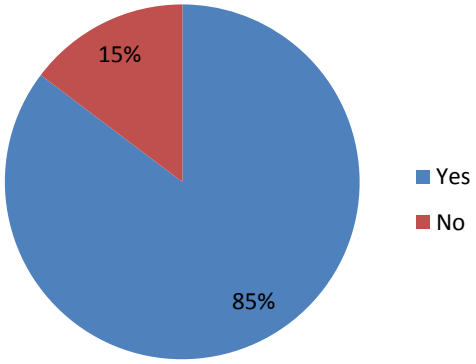


Fig. 87 Is the registered office of the company in the EU?

When we put the data on the answers to the questions above next to other variables, we get an interesting picture.

Looking at these figures one should notice that although direct employment contracts still seem to form the majority reported, different new types of employment relations emerge. If combined with other variables, we will be able to see some interesting trends, which we will elaborate on further down in the text.

Quote pilot

If I want to keep my job I say nothing. I have no choice in how much I work, therefore no stable income. I am forced to operate as self-employed so the company can keep its costs down and pass employment costs on to me. I don't understand all the tax legislation that the company forces onto me. They should be paying these costs. I should have a proper employment contract. I have no rights, no job security, no say.

Little by little, pilots are becoming enslaved by an open labour market system and getting fair conditions is proving more and more difficult. The broker system should be strictly regulated. The role of the regulator is to have the same safety and working conditions everywhere within the union and have them strictly enforced.

Quote pilot

To be clear, the way pilots are employed today is frightening. To be a director of a company, and signing a contract with an agency which in turn signs a contract with the airline that you will work for exclusively. Who has responsibility? Where will I pay my taxes correctly? Am I socially secured anywhere? Will I receive a pension? Can I settle down here for a few years or will they move me again? These are questions that have to be dealt with in the best interest of aviation safety! I can honestly say that I think about these issues almost every day. Sometimes more and sometimes less. I would like to see a solution that forces airlines to take responsibility over their workers. By working for an airline exclusively I consider myself as an employee and nothing else. It is just a way of getting rid of so many problems by signing a few papers saying that one is hired and not employed.

i. TYPOLOGIES OF EMPLOYMENT IN RELATION TO TYPES OF AIRLINES

Respondents were asked about additional occupational activities. As the following graph shows, 82% of respondents stated to have no other occupational activities. 13% (N=856) stated they indeed have other occupational activities.

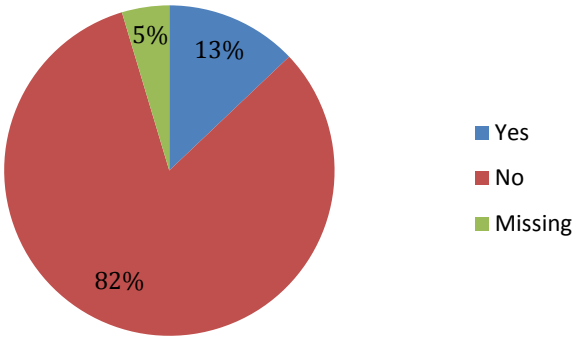


Fig. 88 Do you have other occupational activities?

If respondents stated they indeed have other occupational activities, they were asked what these activities entailed. 43% stated that these are activities outside the aviation sector, 37% stated these to be activities in the aviation sector, although not as a pilot, and 20% stated this to be occupational activities as a pilot.

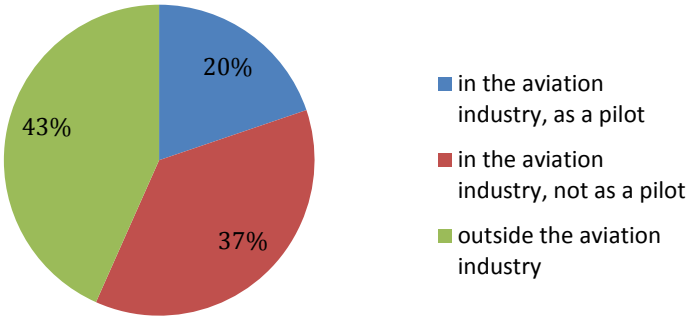


Fig. 89 What type of other activity?

If respondents stated that they have another occupational activity as a pilot, 90% stated this to be for their own account.

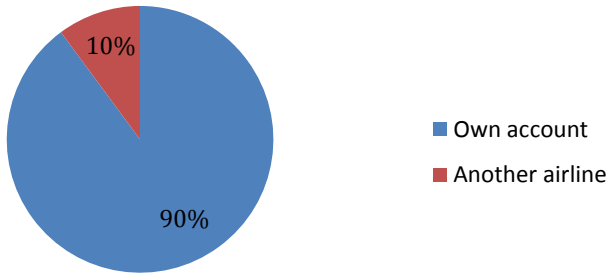


Fig. 90 How activity when other activity as pilot?

When respondents reported other occupational activities in the aviation sector (N=315) although not as a pilot, 62% stated working for their own account, whereas 31% reported working for the same airline and 7% to work for another airline.

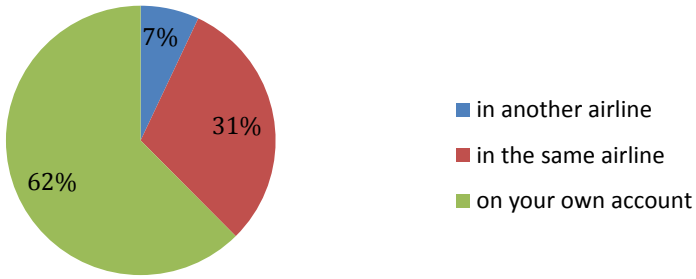


Fig. 91 How activity when other activity not as a pilot?

The proportion of network versus low-fare reported by respondents stating to have additional occupational activities per type of activity rather equals the general proportion of respondents indicating to fly for a network airline and respondents indicating to fly for a low-fare airline in this study.

A central focus point in this study is the relationship between respondents and the airline they report currently flying for. Therefore, in this section, we focus more in detail on the types of relation that can be found when analysing the data.

Previous results have shown that the majority of respondents that took part in the survey (79.3%) indicate working for an airline via a direct employment contract. This means that, next to the missing data, 16.1% reported flying with an atypical contract. Starting from this point, the question arises if *typologies* with regard to types of employment can be identified.

In order to do so, first of all, we examined how the types of employment/working relations respondents stated to have with airlines are distributed between the different *types of airlines*.

With regard to the direct contracts, at the level of network airlines, 96.5% of the respondents in this study reported being employed via a direct employment contract. The type of airline that was least reported with regard to the variable direct employment contracts is low-fare (52.6%).

Table 20 Overview of the percentage of pilots with a direct employment contract per type of airline

Type of airline	Percentage of pilots with a direct contract for the different types of airlines
Business aviation	73.8
Cargo airline	88.7
Charter airline	88.4
Low-fare airline	52.6
Network airline	96.5
Regional airline	92.7

If these results are then regarded at the level of all the respondents with a direct contract, it seems that 53% of these pilots work for a network airline.

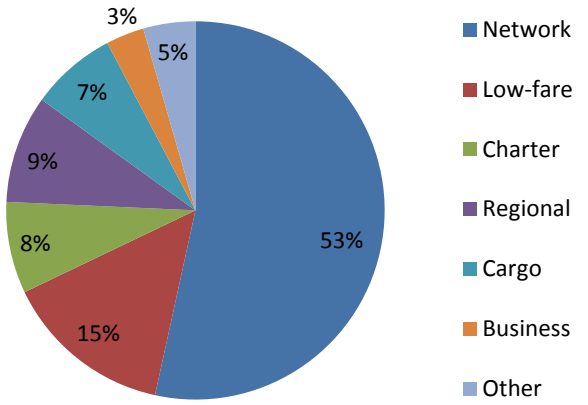


Fig. 92 Representation of direct contracts in types of airlines

Figure 93 shows the percentual proportion of respondents stating to fly for a network airline with a direct employment contract to the total amount of respondents stating to fly for a network airline. For example, all respondents (100%) that indicated to fly for *Aigle Azur* seem to have reported a direct employment contract since all these pilots also stated to work for a network airline. This also accounts for *Finnair* and *Turkish airlines*.

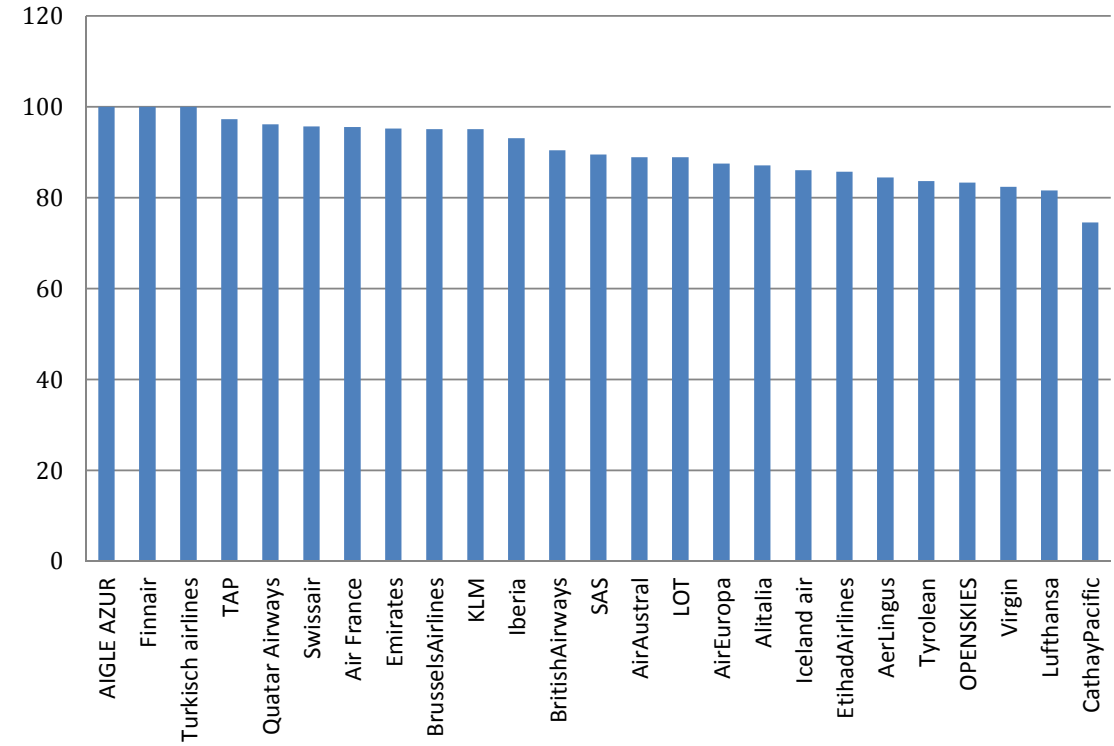


Fig. 93 Proportion of respondents stating to fly with a direct employment contract for a network airline to total amount of respondents stating to fly for a network airline per network airline (%)

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.

Table 21 Overview of the percentage of respondents stating to fly under an employment contract via a temporary work agency per type of airline

Type of airline	% of respondents stating to fly via an employment contract via a temporary work agency per type of airline
Business aviation	2.6
Cargo airline	4.6
Charter airline	5.4
Low-fare airline	16.7
Network airline	1.7
Regional airline	1.3

Moreover, analysis of the results shows that 67% of the respondents who stated to work via a temporary work agency also stated to fly for a low-fare airline.

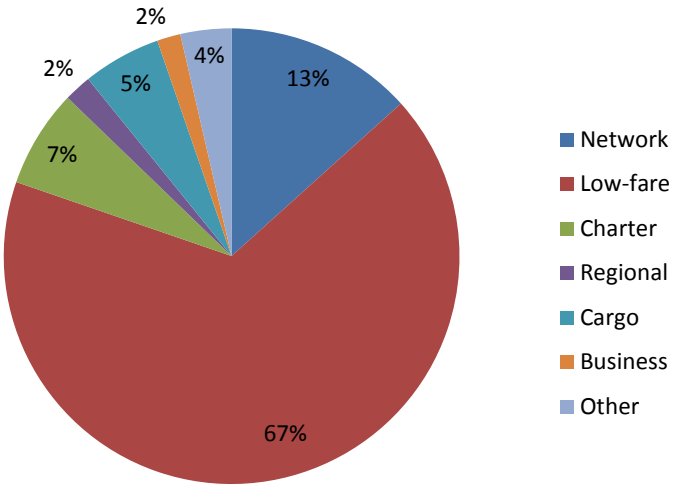


Fig. 94 Representation of temporary contracts per type of airline

Of the respondents who stated they work for an LFA, 15.3% reported working as a self-employed pilot. Also 9.9% of the respondents who stated to work in business aviation reported they are self-employed. In the group of respondents who stated they work for a network airline, this type of contract seems to be less commonly reported (0.6%).[161]

Table 22 Overview of the percentage of self-employed respondents per type of airline

Type of airline	% self-employed
Business aviation	9.9
Cargo airline	2.1
Charter airline	2.4
Low-fare airline	15.3
Network airline	0.6
Regional airline	2.9

It was found that 70% of the respondents who indicated that they are self-employed also stated that they fly for an LFA.

[161] Whereas, as we will see later, in business aviation, self-employed pilots are not necessarily a contradiction in terminis, in the case of LCCs (or passenger airlines in general), this is far less evident.

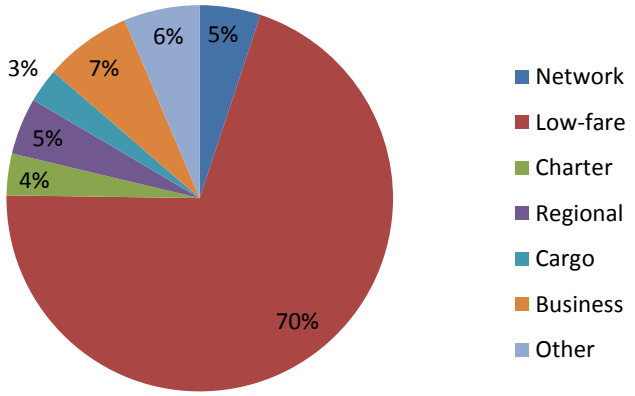


Fig. 95 Representation of self-employment per type of airline

As already mentioned, 237 or 3.6% of respondents that took part in our survey indicated to fly for an airline via a company (see *supra* – Part 4. II. A. Typical versus atypical employment). This rather low percentage can be looked at in a different way at the level of the different types of airlines: again at the level of LCCs, this type of contract is more prevalent in respondents' answers. At the level of business aviation, respondents indicating to work in business aviation tend to work more via this type of contract in comparison to e.g. network airlines or regional airlines.[162]

Table 23 Overview of the percentage of respondents contracted via a company

Type of airline	% of respondents contracted via a company
Business aviation	10.3
Cargo airline	3.7
Charter airline	1.1
Low-fare airline	11
Network airline	0.4
Regional airline	1.1

Of all respondents in this study who stated they work via a company, it was found that, again, the largest group stated to fly for an LFA.

[162] Again, given the nature of business aviation, this might not be surprising. Rather the contrary could be said: business aviation and LCCs being so different, the prevalence of this type of employment in LCCs might be considered extraordinary.

Quote pilot

I have my own limited company along with a group of pilots working for the same the same airline. I have never met these fellow company directors, or even know their names. An accountant that my airline has nominated, has, without my permission signed off the company accounts on my behalf. My limited company then contracts my labour to another intermediary employment company who then supplies the labour to the parent airline. In reality they are the ones who decide everything like schedules etc. I have no day-to-day decision over which work I do or even when I can take leave.

I constantly live in fear as a contractor because I have virtually no rights, in any country. As a contractor I can simply be told that my "services are no longer required" and be dismissed. In my company that can be over an issue as simple as not having an ID card to more serious issues as declining to fly extra flights because I feel fatigued.

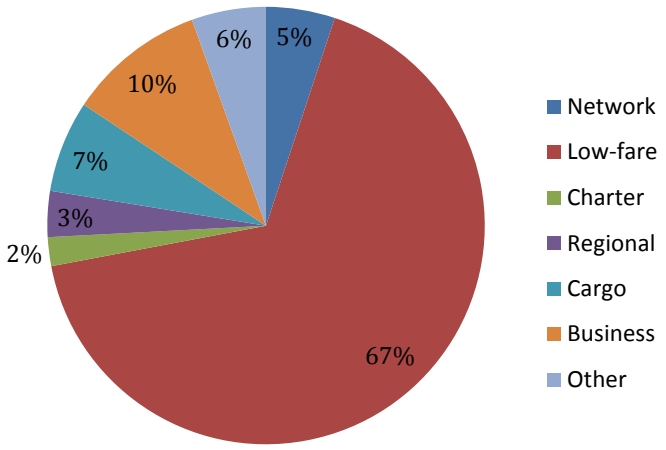


Fig. 96 Representation of work via a company per type of airline

To sum up, the above results show the different types of contracts which respondents indicated to have. Figure 97 gives a general overview of the types of contracts reported in relation to the different types of airlines reported. As can be seen, for all types of airlines a direct contract is most commonly reported, although as was shown earlier, for LFAs there is more variation in the types of contracts.

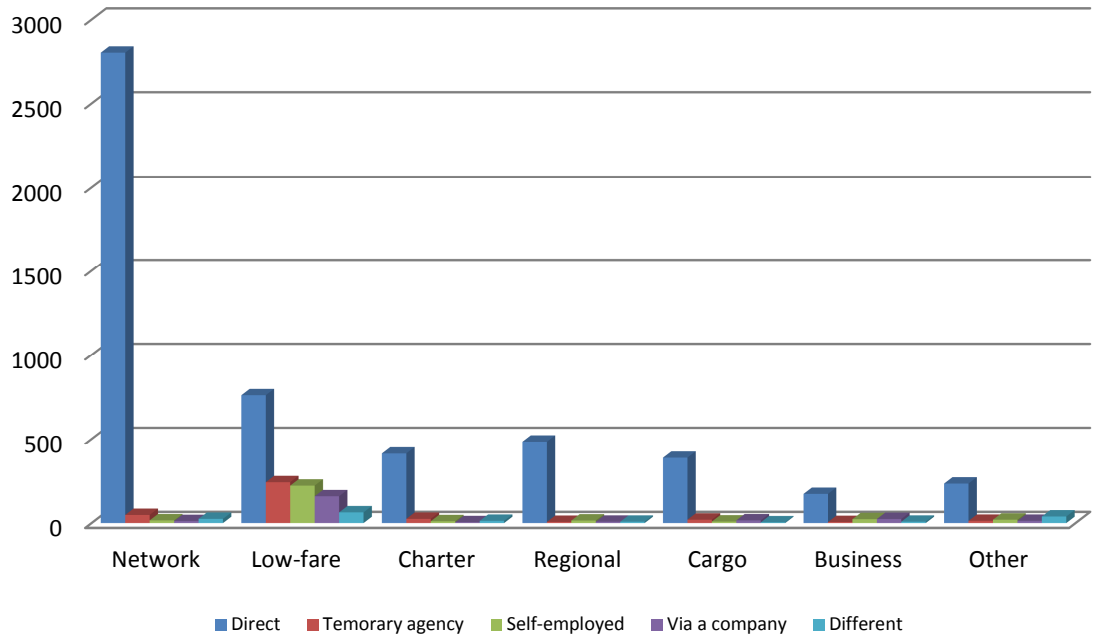


Fig. 97 Overview of different types of contracts per type of airline

These results clearly show the difference in prevalence of different types of employment reported in different business models in the aviation sector. As mentioned before, network airlines are still, to a large extent, structured 'hub-and-spoke', the hub being the home base of the majority of the crew members. Such does offer possibilities for intra-state crew management and allocation in terms of the aviation's work patterns and seasonal demands.[163]

ii. TYPES OF CONTRACTS PER TYPE OF AIRLINE: LFAS

Above presentations of our data show that with regard to LFAs, more diversification can be found in the types of contracts reported. In this section, the LFAs are focussed on in more detail in the light of types of employment reported.

As Figure 98 shows, of the respondents who stated they work for an LFA, 53% reported to have a direct employment contract, whereas 15% reported to be self-employed, 11% to work via a company and 17% via a temporary work agency.

[163] Recital (18b) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

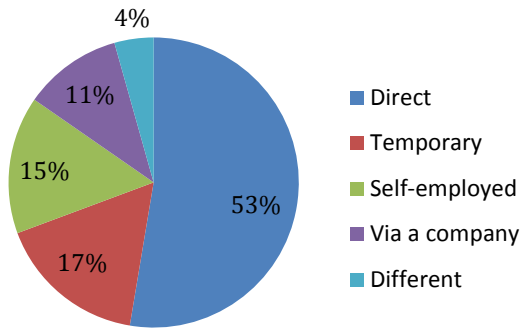


Fig. 98 Contract types in LFAs

Figure 99 shows the top 15 percentual proportion of respondents that indicated to fly for an LFA via a direct employment contract to the total amount of respondents stating to fly for that LFA. In this study, the amount of respondents stating to fly for an LFA with a direct employment contract is N= 670.

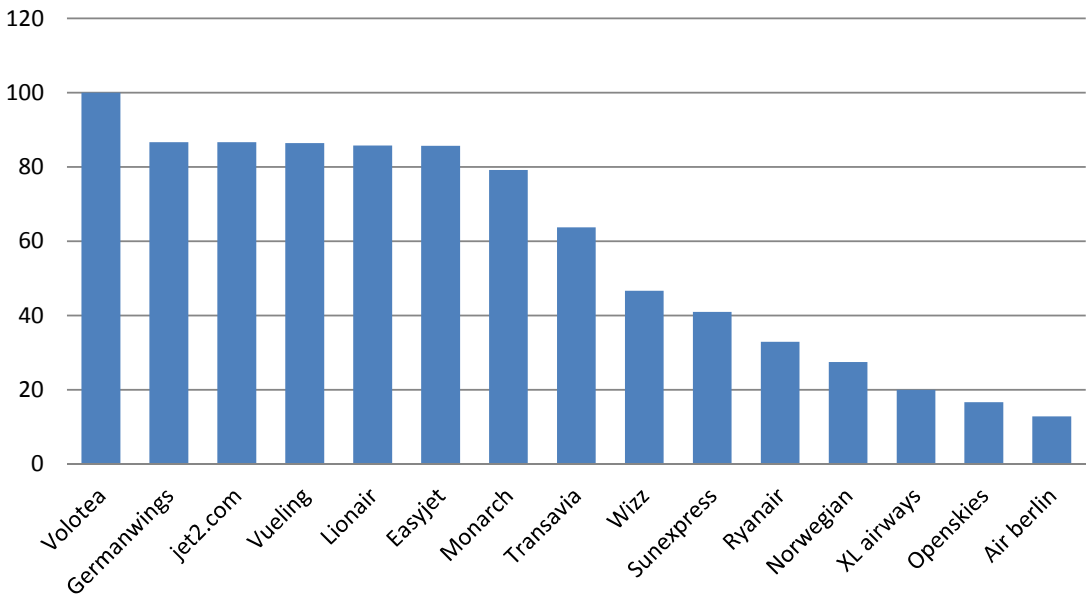


Fig. 99 Proportion of direct employment contracts per LFA (%)

Figure 99 furthermore shows that *all* (100%) respondents in this study who indicated that they fly for *Volotea* also indicated they work for the airline via a direct employment contract. With regard to *Germanwings*, *Jet2.com*, *Vueling*, *Lionair*, *Easyjet*, *Monarch* and *Transavia*, *more than* 50% of respondents indicated working via a direct employment contract. *Less than* 50% of the respondents who reported to fly for *Wizz*, *Sunexpress*, *Ryanair*, *Norwegian*, *XL airways*, *Openskies* and *Air Berlin* stated to work via a direct employment contract.

Furthermore, 217 respondents indicated working for an LFA via a temporary work agency. As Figure 100 shows, 58% of the respondents stating to fly for *Norwegian airlines* reported to have a temporary work agency contract.

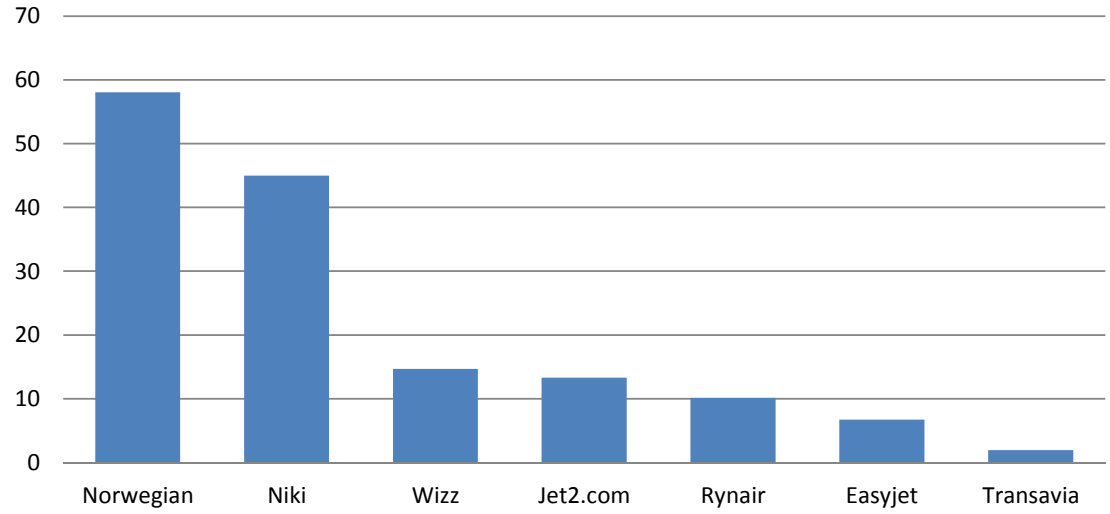


Fig. 100 Proportion of temporary work agency contracts reported to total amount of respondents stating to fly for an LFA (%)

Figure 101 and table 24 show the percentages of respondents indicating to work as a self-employed for LFAs. As can be seen, only four airlines which respondents indicated to be an LFA are reported to work with self-employed pilots (*Easyjet*: 1.3%; *Norwegian*: 1%; *Ryanair*: 27%; *Wizz*: 21%).

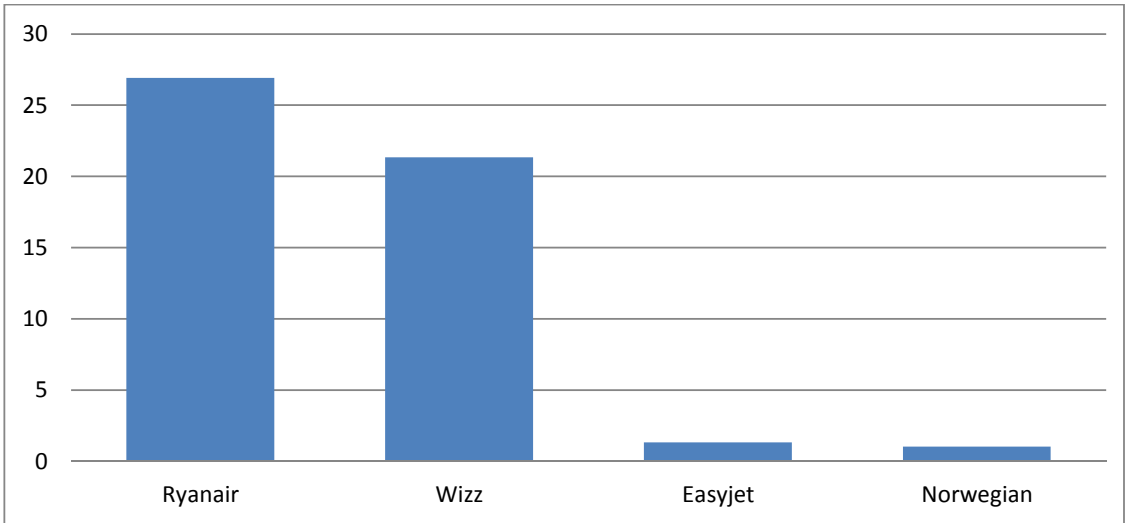


Fig. 101 Proportion of respondents stating to be self-employed per LFA

Table 24 Proportion of respondents stating to be self-employed per LFA

		Frequency	%	Valid %
Easyjet	44	2	1.2	1.3
Norwegian	78	1	0.6	0.6
Ryanair	84	137	83	89
Wizz	115	14	8.5	9.1
	Total	154	93.3	100
Missing	0	11	6.7	
Total		165	100	

Figure 102 shows the percentage of respondents who indicated to fly for an LFA via a company. 30% of these respondents stated to fly for *NIKI*, 18% for *Ryanair*, whereas for *Wizz*, *Norwegian*, *Easyjet* and *Transavia* this is less than 10%.

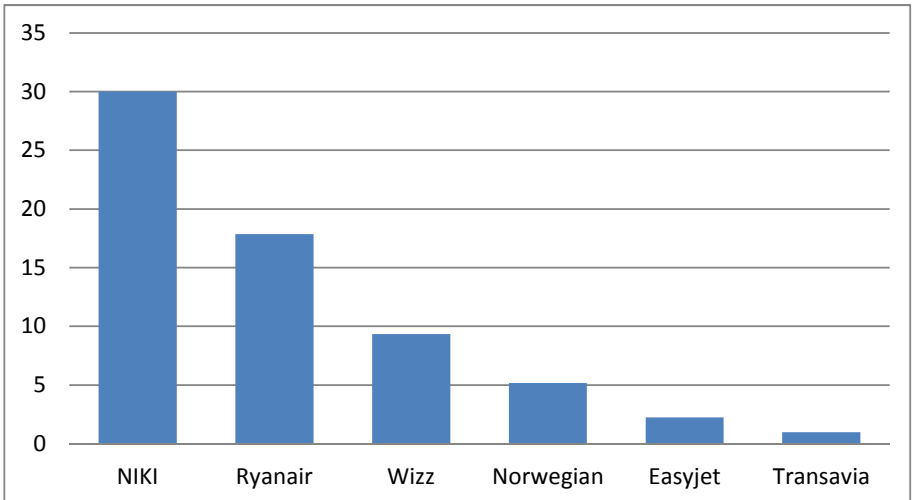


Fig. 102 Proportion of contracts via a company per LFA (%)

In what follows, the four LFAs that were reported to provide all types of contracts are examined in more detail. These specific airlines are *Easyjet*, *Norwegian*, *Ryanair* and *Wizz*.

EASYJET (N=223)

97.8% of the 223 respondents that stated they fly for *Easyjet* also stated this is an LFA. 88% of them stated to have a direct employment contract; 7% to work via a temporary work agency and less than 5% reported being self-employed or having a contract via a company.

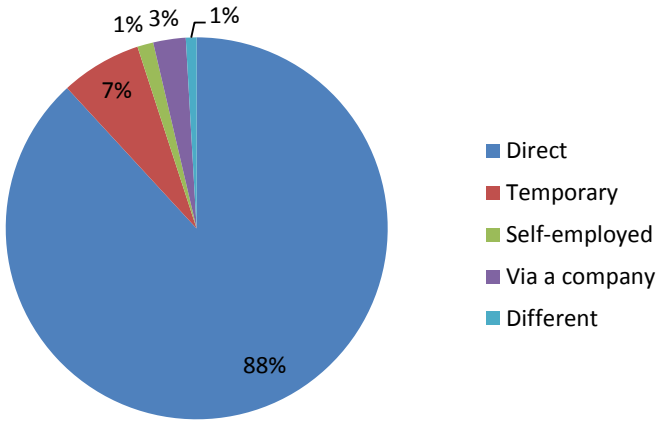


Fig. 103 *Easyjet* - percentage of different contract types

NORWEGIAN (N=193)

95.3% of the 193 respondents stating to fly for *Norwegian* stated this is an LFA. As can be seen in Figure 104, 30% of these respondents reported they are directly employed, whereas 63% reported to have a contract via a temporary work agency. Only 1% reported being self-employed and 5% reported to work via a company.

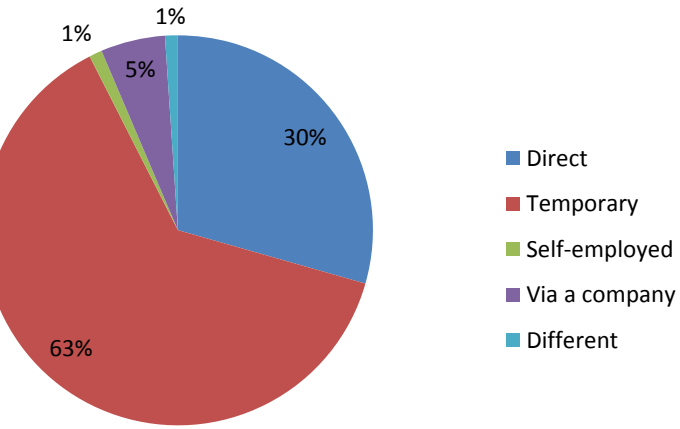


Fig. 104 percentage of different contract types - *Norwegian*

RYANAIR (N=650)

98% of the 650 respondents stating to fly for *Ryanair* stated this is an LFA. 34% of these stated to have a direct employment contract (of which 80% open-ended, 19% fixed-term and 1% stand-by/on call); 27% reported being self-employed; 18% to work via a company; and 10% via a temporary work agency. This means that of the 650 respondents in this study who stated to fly for *Ryanair*, 416 reported to have an atypical contract.

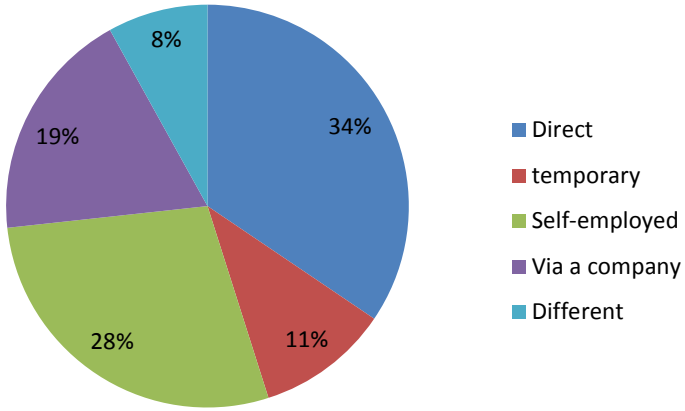


Fig. 105 *Ryanair* - percentage of different contract types

Wizz (N=75)

All respondents who stated they fly for *Wizz* indicated this airline is an LFA. Of these respondents, 49% reported to work with a direct contract, 22% to be self-employed, 15% to work via a temporary work agency and 10% to work via a company.

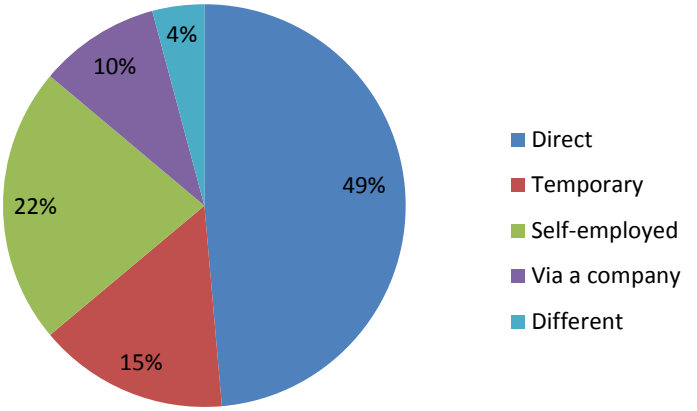


Fig. 106 *Wizz* - Percentage of different contract types

iii. The pilots: who are they?

Age

As can be seen in Table 25 and Figure 107, in this study, the largest group of respondents indicated to be aged between 30 and 40 years. The second group of respondents, which is almost as big as the first group, indicated to be between 40 and 50 years old. As can be expected, the age groups in this study are normally distributed.

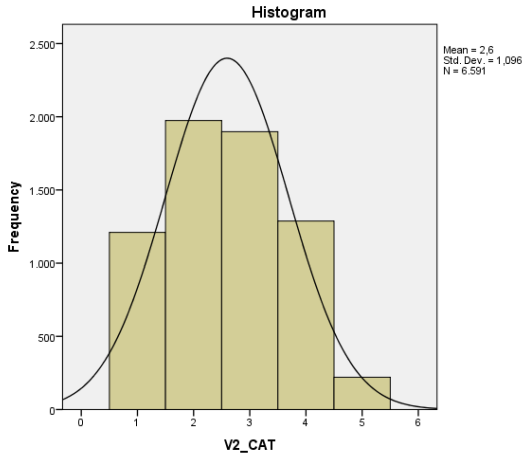


Figure 107 Normal distribution of the variable 'age'

Table 25 Data of the age groups of the participants

	Frequency	%
Missing	42	0.6
1) 20-30	1210	18.2
2) 30-40	1974	29.8
3) 40-50	1898	28.6
4) 50-60	1288	19.4
5) 60 or older	221	3.3
Total	6633	100

However, when age is examined in the light of the types of airlines respondents stated to fly for, results are significantly different: X^2 analyses (χ^2=592,66, df=24, p≤0.00) show that certain age groups have a much higher chance to work for certain types of airlines. For instance, as Figures 108 to 113 show, with regard to network airlines, age is normally distributed. However, more respondents from the *younger* age categories reported to fly for LFAs. For the other types of airlines, the distribution is also rather normal, except for business airlines (more pilots reported to belong to younger age categories).

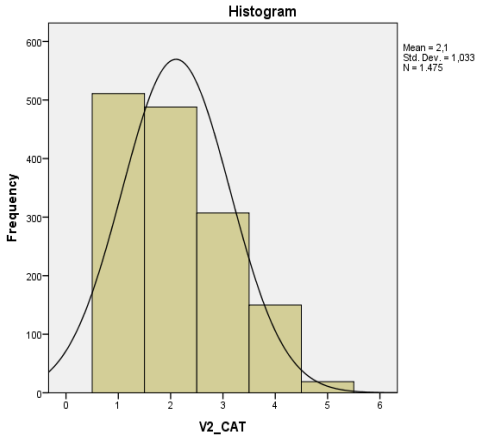


Figure 108: Low-fare airline

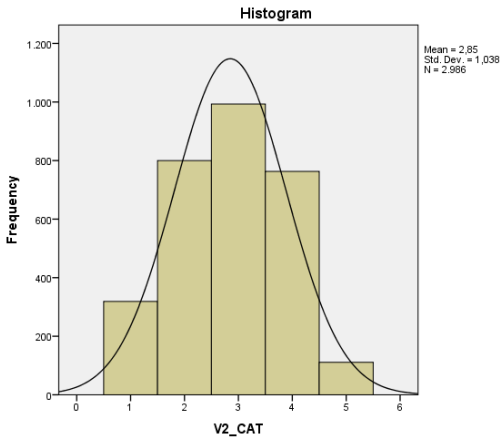


Figure 109: Network airline

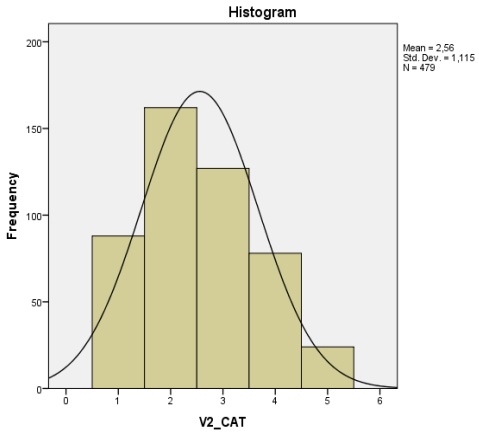


Figure 110: Regional airline

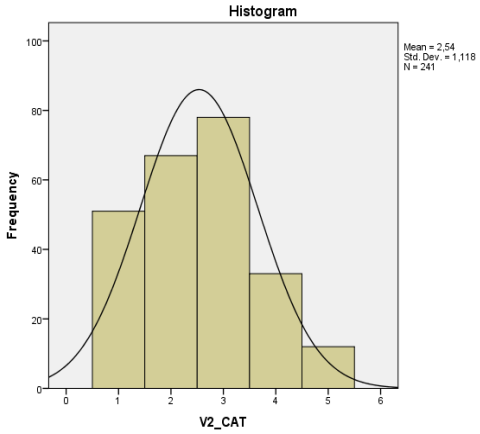


Figure 111: Charter Airline

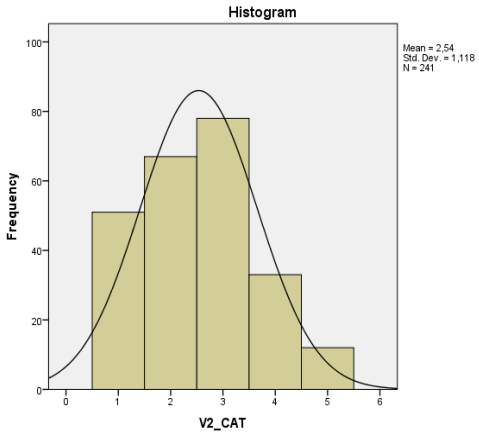


Figure 112: Cargo airline

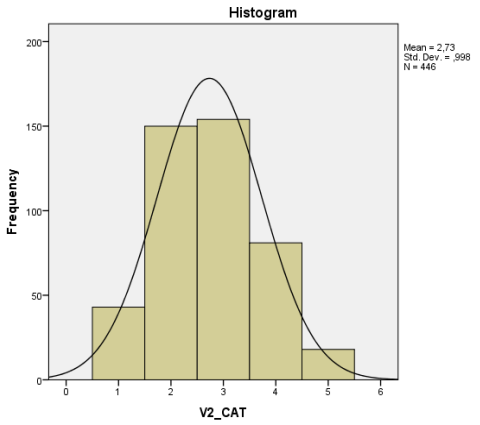


Figure 113: Business aviation

Table 26 provides the percentages of the age groups per type of airline. Figure 114 shows the exact data of the age distribution per type of airline. For instance, with regard to network airlines, the largest group is aged between 40 and 50 years. For LFAs, the largest group is 20-30 years old.

Table 26 Age per type of airline

	Network (%)(1)	Low-fare (%)(2)	Charter (%)(3)	Regional (%)(4)	Cargo (%)(5)	Business (%)(6)
20-30	10.7	34.6	18.4	17.1	9.6	24
30-40	26.8	33.1	33.8	36.9	33.6	26.1
40-50	33.3	20.8	26.5	25.3	34.5	23.7
50-60	25.6	10.2	16.3	17.5	18.2	21.3
60 or older	3.7	1.3	5	3.3	4	4.8

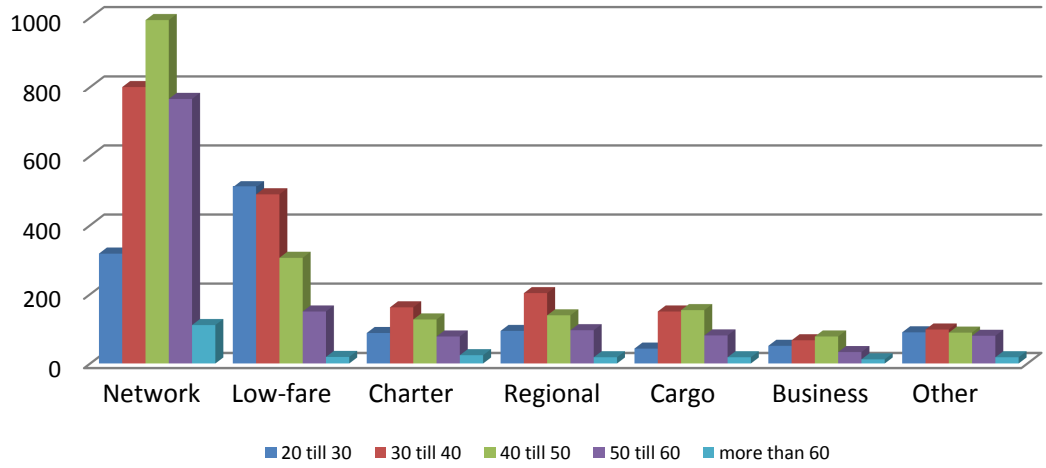


Fig. 114 Age groups per type of airline

Above results showed that younger respondents seem to be employed in a greater ratio in LFAs in comparison to, for instance, network airlines. The question then remains if the type of contracts which these respondents indicated having concluded, also vary in comparison to other age groups, or to the *same* age group but working for *another type of airline*.

Table 27 shows that 61.5% of the respondents who indicated that they belong to the youngest group, indicated that they work for an airline via a direct employment contract. This means that almost 40% of this group of respondents indicated to fly via an atypical contract. In comparison to the other age groups, this is the largest percentage of atypical contracts within an age group (e.g. compared with the 50-60 age group, of which more than 90% indicated to fly for an airline via a direct employment contract).

Table 27 percentage of contracts per age group

	Direct	Temporary work agency	Self-employed	Via a company	Different
20-30 (N=1210)	61.5	11	14.5	7.8	5.20
30-40 (N=1974)	84.2	5.4	4.5	3.7	2.2

40-50 (N=1898)	90.3	4.2	1.7	2.7	1.2
50-60 (N=1288)	91.2	3	1.9	1.5	2.4
+60 (N=221)	80.8	7.4	3.9	3.4	4.4

Figure 115 shows the amount of respondents per age group for the different types of employment relations. Since in this study 79.3% of respondents indicated to work via a direct contract, the diagrams for direct contracts are clearly 'higher'. With regard to the atypical contracts, it can be observed that the blue diagrams, representing the age group between 20-30 years old, are more prevalent in comparison to the other age groups.

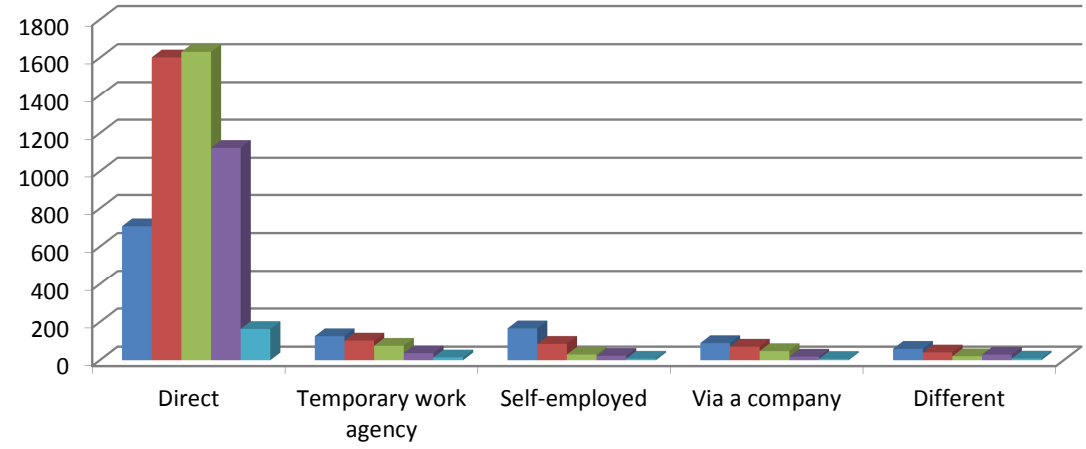


Fig. 115 Percentage of contracts per age group

Figures 116 to 119 show how the different types of contracts are distributed over the different types of network airlines, represented per age group. These figures again show that, for respondents who indicated they are directly employed, network airlines are most prevalent. For those who stated to have atypical contracts (temporary, self-employed or via a company), LFAs are more strongly represented.

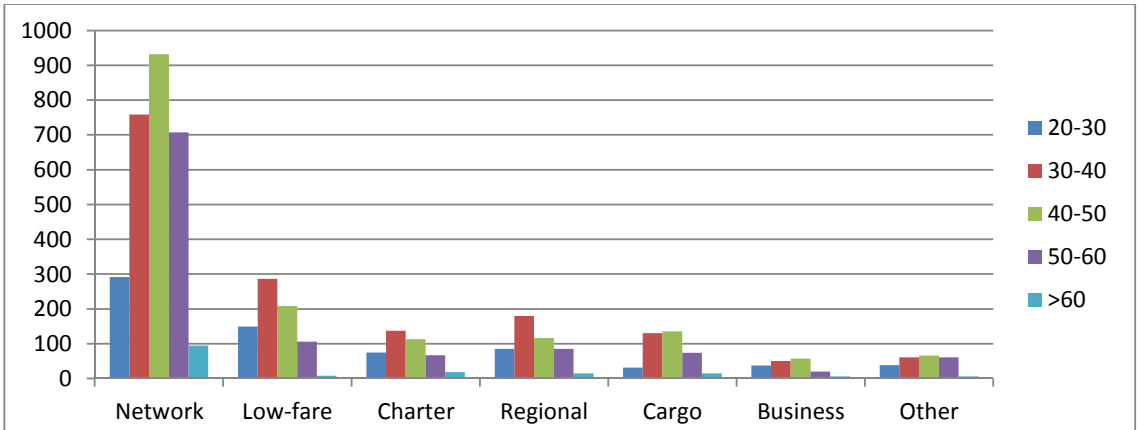


Fig. 116 Directly employed

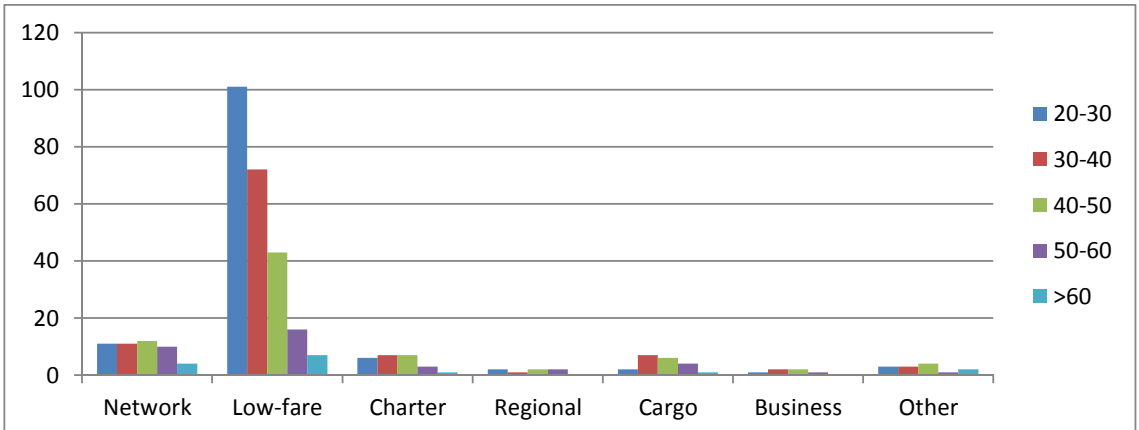


Fig. 117 Temporarily employed

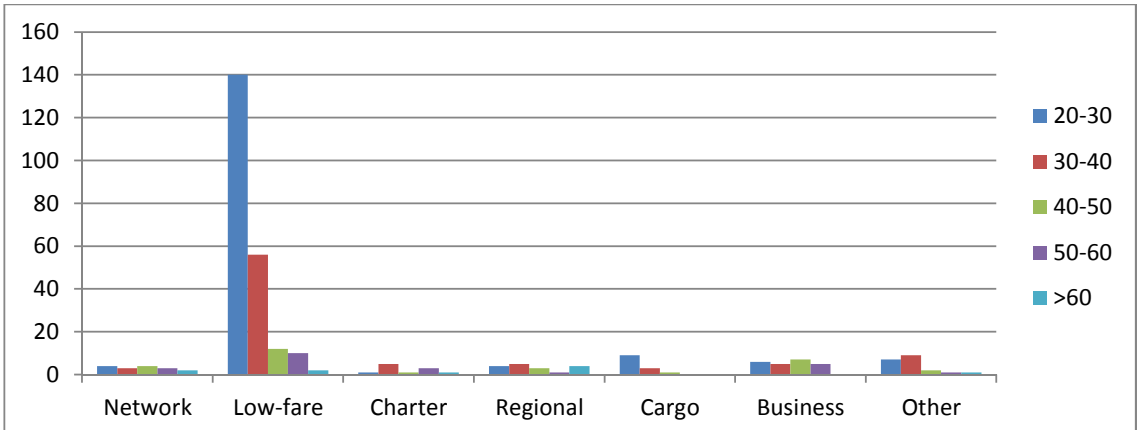


Fig. 118 Self-employed

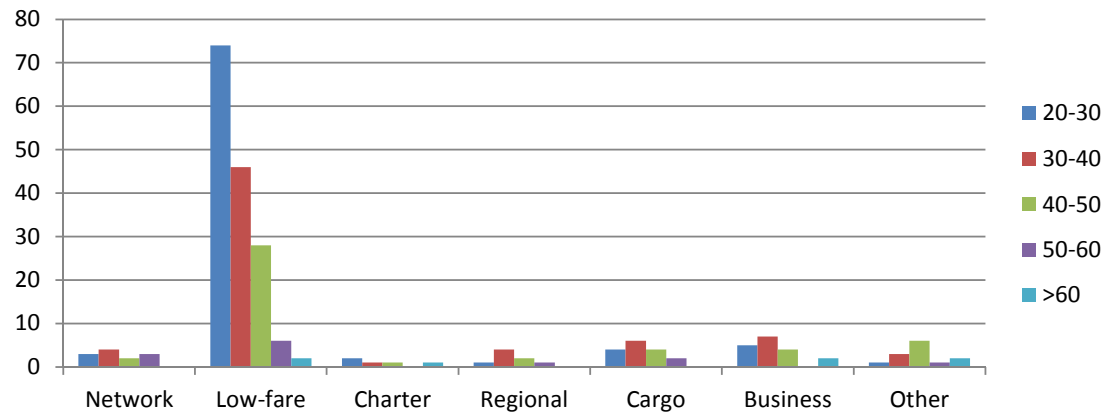


Fig. 119 Via a company

Since above results show that the group of 20-30 years old (N=1210) specifically shows a greater tendency to be more atypically employed, in the following section, this age group is examined in more detail.

Figure 120 shows the distribution of the different contract types reported for the age group of 20-30 years old. In this age group, 61% of the respondents states to be directly employed. Of this group, 41.3% states to be related to a network airline (largest groups are *KLM* – 26.7% and *Air France* – 12%), 21.1% to an LFA (*Easyjet* – 41.5% and *Ryanair* – 18.8%), 10.6% to a charter airline (*ARKE* – 14.7% and *Tui Travel* – 13.3%), 12% to a regional airline (*Flybe* – 22.4%), 4.4% to a cargo airline and 5.2% to business aviation.

As stated before, and as can be seen in Figure 121, 40% of the respondents belonging to the 20-30 years old group state they are atypically employed.

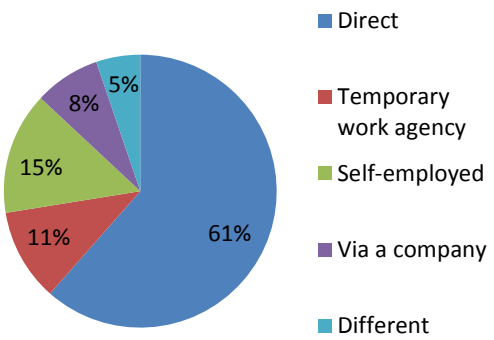


Fig. 120 Age group 20-30 - Type of contract

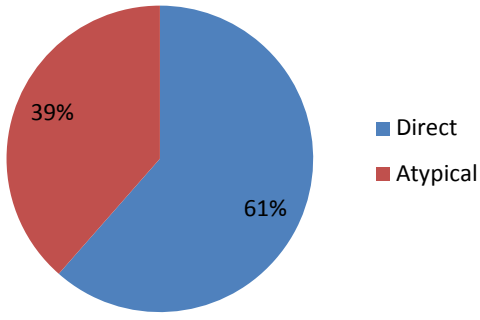


Fig. 121 Age group 20-30 - Direct?

If we focus on the types of airlines, it can be observed that, of the respondents that indicated to fly for a network airline, 93% of the respondents from the younger ages (N=319) indicated being employed via a direct contract.

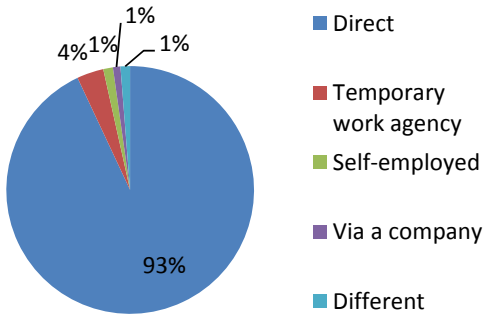


Fig. 122 Age group 20-30 - Network

However, Figure 123 shows that more of the respondents from the younger ages that indicated to fly for an LFA (N=511) indicated to be atypically employed in comparison to the respondents indicating to be working for a network airline.

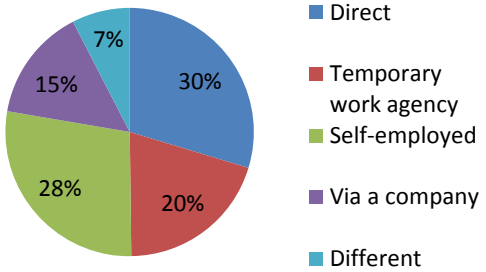


Fig. 123 Age group 20-30 - Low-fare

Figures 124 to 127 show the types of contracts which respondents aged 20-30 stated to have when working for charter airlines (N=88), regional airlines (N=94), cargo airlines (N=94) and in business aviation (N=55). In comparison to LFAs, these types of airlines employ at least 44% more of these young respondents in a directly.

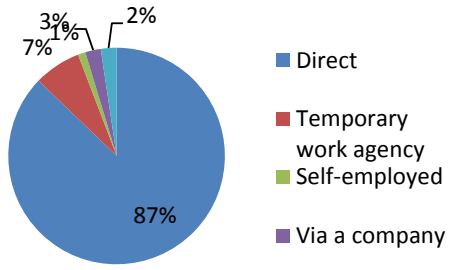


Fig. 124 20-30 years - Charter

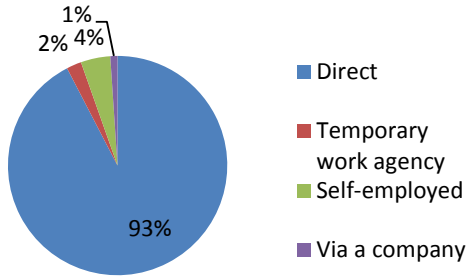


Fig. 125 20-30 years - Regional

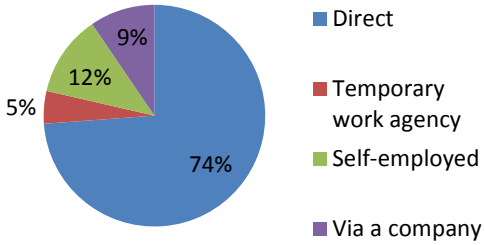


Fig. 126 20-30 years - Cargo

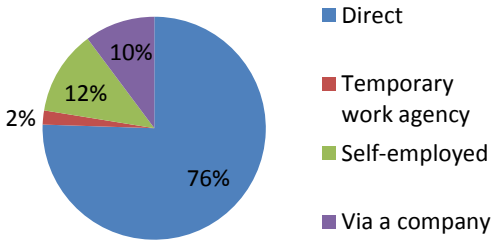


Fig. 127 20-30 years Business

If we consider the atypical contracts together, as shown in Figure 128, it can be deduced that 80% of these contracts are reported to be with LFAs.

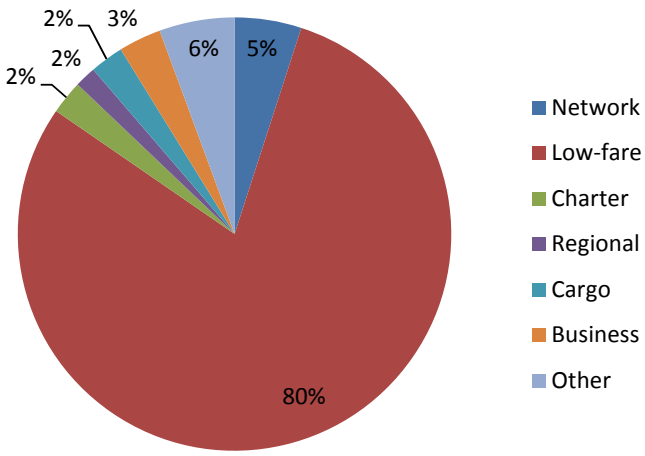


Fig. 128 Representation atypical contracts per type of airline

The question then remains if this finding is something that is *typical* of LFAs or rather of specific airline companies. In what follows, the relation of the 20-30 year-old respondents is examined at the level of the airline companies indicated as being low-fare by the respondents themselves.

Table 28 presents the different LFAs and the percentage of the youngest respondents with an atypical contract. Since some companies have a larger participation grade, results might give a misrepresentation of the percentages. Therefore, data were recalculated with regard to the total "LFA group" in this study[164] and with regard to "company level" in this study. As such, it can for instance be seen that at level of Norwegian, 13.8% of the respondents in this study reported to be atypically contracted, although at the level of the total low-fare respondents in this study, these *Norwegian* pilots form 2.7% of this group. At the level of the participating *Norwegian* respondents, this is 23%. This data also shows that for instance at the level of *Ryanair*, 36% of the young respondents reported to be atypically employed. This group of young pilots forms 16% of all pilots at low-fare level in this study.

Table 28 percentage age group 20-30 with atypical contracts with regard to LFAs

Airline	Percentage	... % of total low fare group	% of pilots working for the company at level of study
Easyjet	5.3	1.1	7
Niki	1.6	0.3	25
Lionair	0.3	0.07	14
Norwegian	13.8	2.7	23
Ryanair	74.9	16	36
Transavian	0.9	0.2	3
Vueling	0.3	0.07	5
Wizz	2.5	0.5	11

[164] Although this number is low due to missing data, so this number provides the minimum estimation; hence, in reality this number could be higher.

'EXPERIENCE'

Quote pilot

Being a pilot with quite a lot of experience puts me in a very different situation than pilots with little/less experience when choosing where and for which company to work for. I think the situation for many other pilots in Europe today the job market is much worse and many find themselves in situations where they "have to" accept work conditions that are extremely bad and often outright dangerous to flight safety.

Quote pilot

The issue discussed in this survey is a huge problem in Europe. And if the EU will not put some sort of legislation in place in the near future this will have a huge impact on flight safety. I developed my career the "right" way, after finishing training I became a flight instructor, after that I was flying on business jets and only then I changed my job to work for an airline job on an Airbus. I already was a pilot with developed basic skills and a decision-making model when I started flying on the airbus. But generally today you have cadets coming straight from the flight school to airlines with absolutely no experience and appreciation of our profession. They want everything now and do not care about the costs. The big flight training organizations and also low cost airlines know this and are part of the problem. Because they are able to lower the terms & conditions and exploit these young wannabe pilots. And that is bad for safety. … Not to mention the airlines that require people to PAY TO WORK!!! In my opinion the EU should put some legislation in place like the USA did. If a pilot wants to work for an airline he/she must have 1500 hours. Now 1500 hours is too much for EU because with the current economy there is no way to get 1500 hours and will only promote some new pay to fly model.

The largest group of respondents in this study reported to have more than 10 years of flight experience, which comes down to 63% or 4158 respondents. The second largest group stated to have 5 to 10 years' experience (18% or 4158).

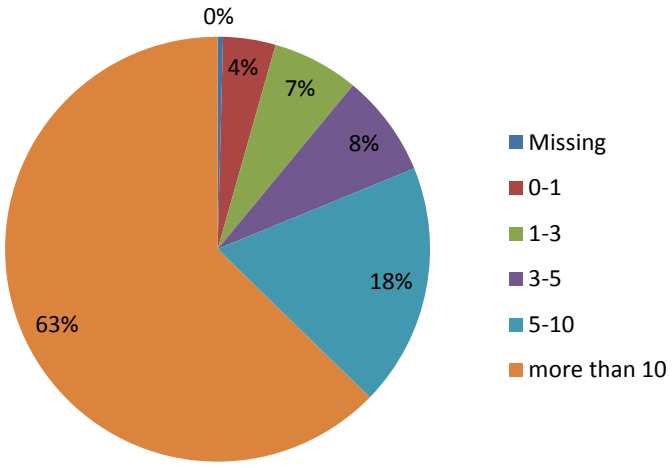


Fig. 129 How many years of work experience do you have as a pilot?

Since in aviation, the amount of flight hours is the factor considered decisive, respondents were asked to indicate their experience in terms of flight hours. This was also asked because it was deemed that it might be interesting to see if there were respondents with a higher number of

experience in terms of years but a lower amount of total flight hours. In this study, 93% of all the respondents reported more than 1000 flight hours experience. This comes down to 6151 respondents.

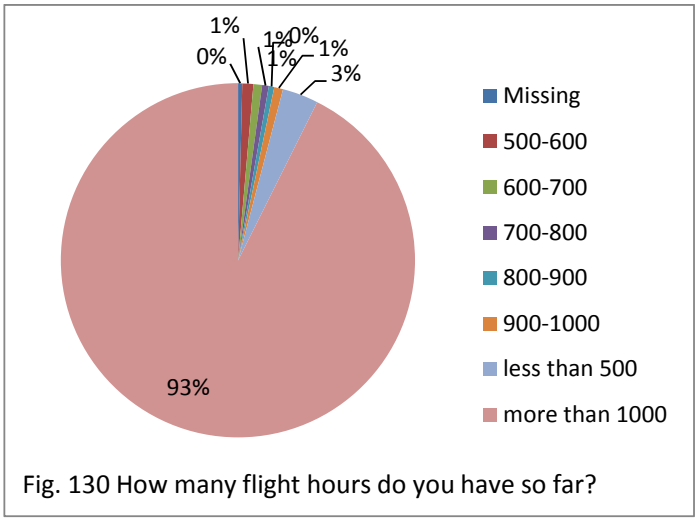


Fig. 130 How many flight hours do you have so far?

STATED NUMBER OF AIRLINES WORKED FOR IN THE PAST

The largest group of respondents (N=3008) in this study stated to work for a network airline (45%). LFAs are the second largest represented group in this study (22% or 1482 respondents).

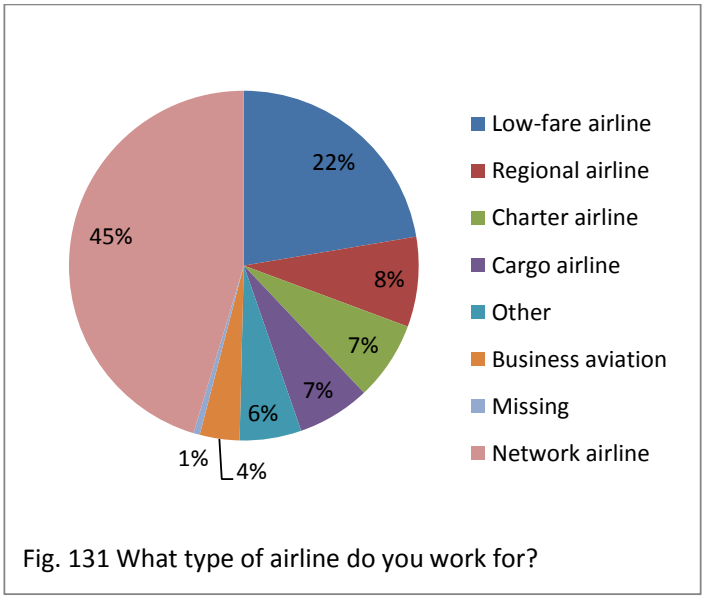


Fig. 131 What type of airline do you work for?

71% of respondents stated to work medium and short-haul. This comes down to 4733 respondents in this study.

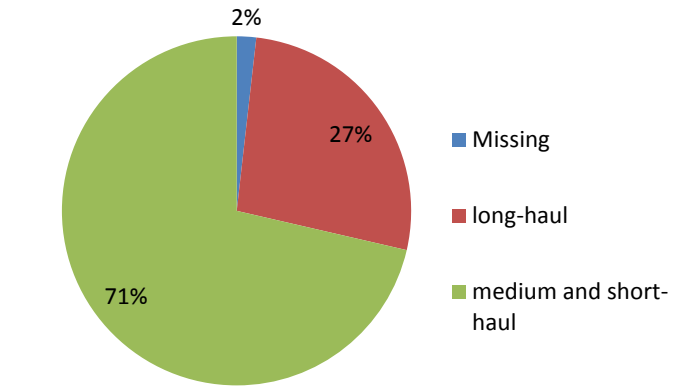


Fig. 132 Your activity is…

We also asked respondents to indicate which airline they currently work for.

Figure 133 presents the top 25 of reported airlines. In total, 5400 respondents provided us with an answer to this question.

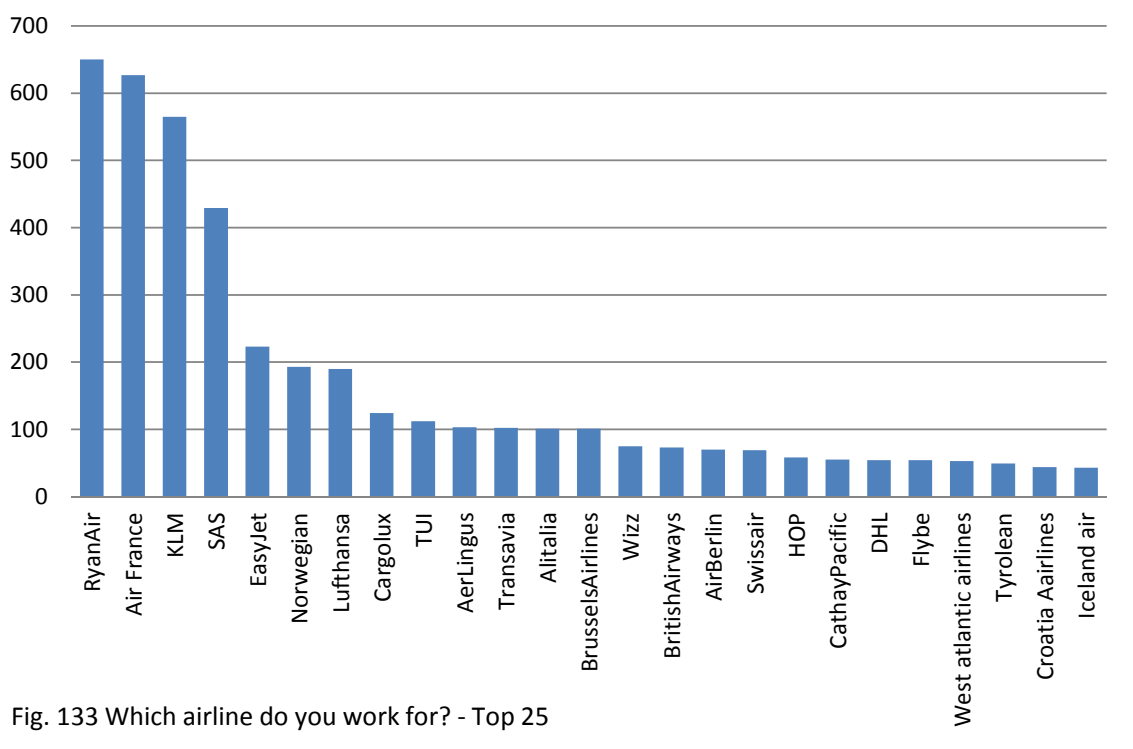


Fig. 133 Which airline do you work for? - Top 25

Of these respondents, 49% indicated that they still work for their first airline (N=3222) and 49% to have already worked for another airline (N=3129).

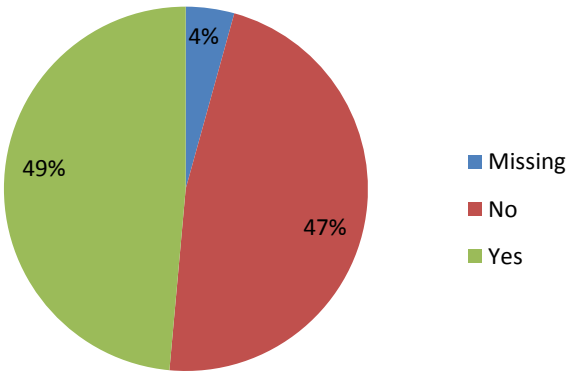


Fig. 134 Is the airline you currently work for the first airline you have worked for?

Figure 135 shows how many respondents stated they already worked for 1 to 10 different airlines (N=3084).

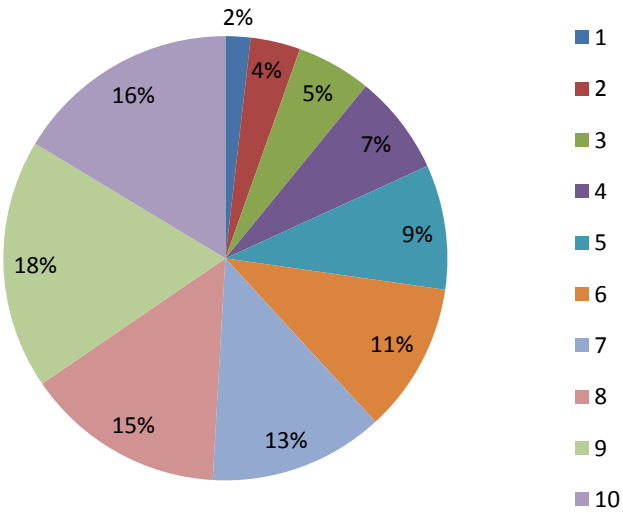


Fig. 135 How many other airlines have you worked for?

AGE, EXPERIENCE AND TYPE OF AIRLINE REPORTED

A hypothesis that can be drawn from above results is that low-fare relates more to respondents indicating they belong to younger categories, which might mean that a larger group of respondents indicating they fly for LFAs also indicated they have less experience. In the following section, we try to examine, for the respondents that took part in our survey, if such is really the case.

As can be seen in Table 29, more than 60% of respondents indicated to have more than 10 years of experience.

Table 29 Years of experience

	Frequency	%
Missing	28	0.4
0-1	267	4
1-3	439	6.6
3-5	516	7.8
5-10	1225	18.5
more than 10	4158	62.7

When examining the differentiation of the variable 'experience' over the type of airline, it is prevalent that more respondents indicating to have less experience also indicated to fly for an LFA.

For instance, Figure 136 shows that 14.3% of respondents that indicated to fly for an LFA indicated to have only 1 to 3 years of experience. For network airlines, this number is only 2.3%.

For LFAs, 34.4% of respondents indicated to have 0 to 5 years of experience, whereas for network airlines, this is only 8.6%. For cargo airlines, this number is also lower, i.e. 9.4%.

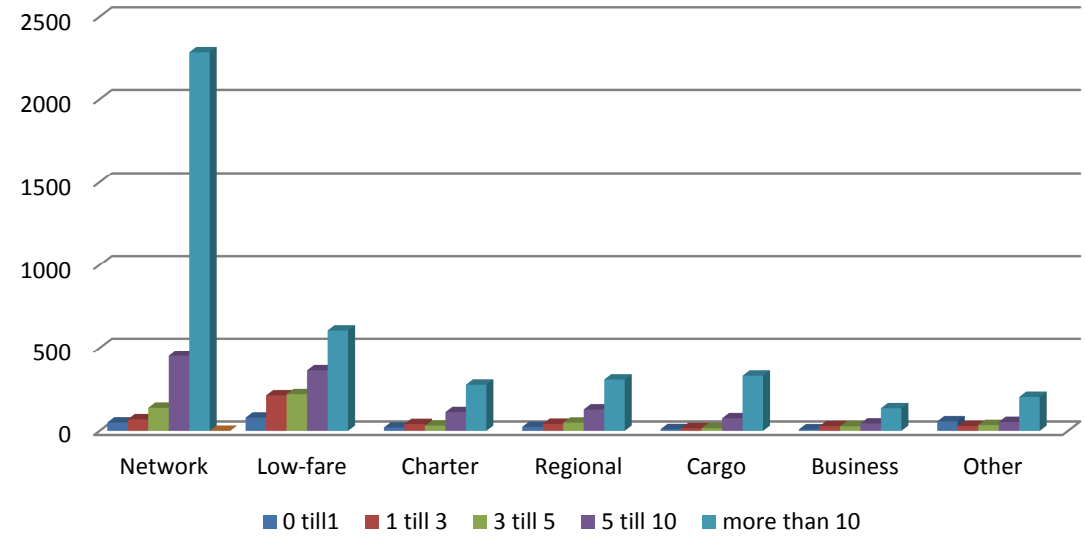


Fig. 136 Experience per type of airline

Fewer respondents who stated they fly for LFAs indicated they have a direct employment contract with the airline they fly for. More respondents reportedly of a younger age are a member of that group.

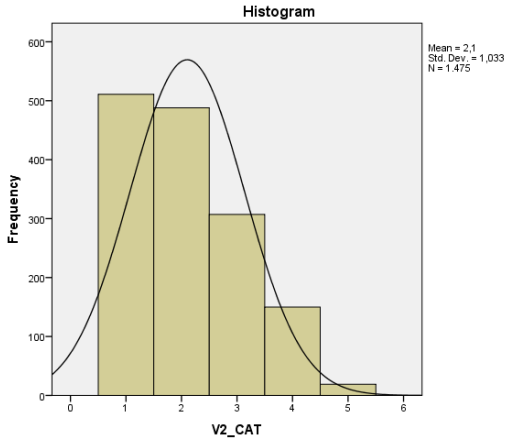


Figure 137 Low-fare airline

This means that the number of respondents stating to be younger and to have fewer experience who reported to fly for an LFA is higher than the number of the same respondents who reported to fly for a network airline.

So, perhaps LFAs offer the younger and lesser experienced pilots a chance whereas the network airlines only want pilots that have more experience. In a way, this is true. On the other hand, we cannot look at the data: age is normally distributed in the group of respondents that reported to fly for a network airline. This is not case for the group that reported to fly for an LFA.

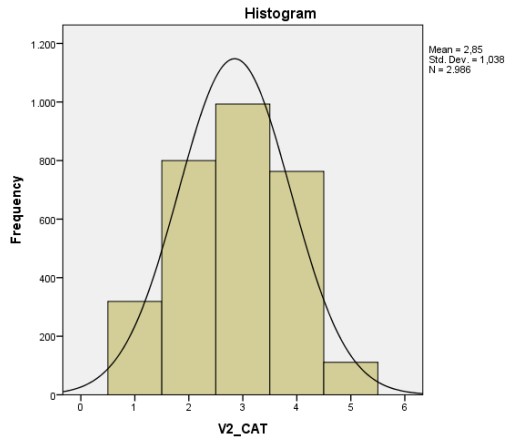


Figure 138 Network airline

An alternative explanation is that the oldest groups directly employed in a network airline stem from another era: they have 20-25 years of experience and thus lived the opening of the aviation market.[165] In other words: they were recruited in a different time: a time when the open-ended employment contract concluded directly with the airline was the typical employment relationship. However, times are changing.

[165] This was confirmed in interviews with representatives from the employers' side as well as with pilots.

iv. PILOTS AND THEIR LABOUR CONDITIONS

PAYMENT

Quote pilot

The problem within the airline industry is that all crewmembers, cockpit and cabin crew, are considered as a factor of costs. Young co-pilots have to pay the full price for their education which can price up to 150 000€ and often more and then you will start with a salary of 1200€ or less before tax. The airline industry wants a flexible crew meaning you should be available 24/7 and better work 21 hours a day. There must be a change in the whole airline industry system to see all employees as what they really are: Human beings and not machines.

Above results show that the different airlines reported are related to different types of contracts, age, experience etc. We were curious to see if differences could also be found related to payment. In this section, this data is looked at in more detail.

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. On the one hand, this is to be expected, since more atypical forms of employment were reported for LFAs and these atypical forms should in practice relate to more indirect types of payment.

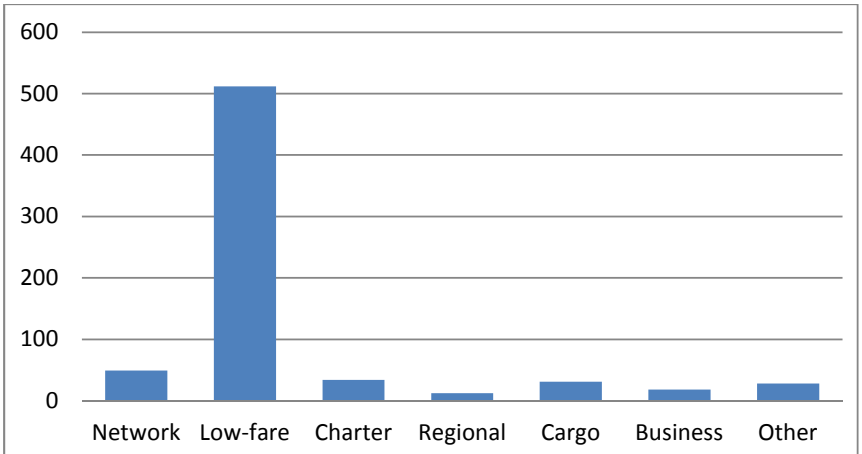


Fig. 139 No direct payment results per airline type

Table 30 Not paid directly (N=511)

	Frequency	%	Valid %
Temporary work agency	241	16.3	47.2
Intermediary	206	13.9	40.3
Other	64	4.3	12.5
Missing	971	65.5	

Table 31 shows which airline companies within the LFAs are reported not to pay directly. As can be observed almost 50% of all respondents that indicated to fly for *Ryanair* indicated that they are not paid directly via the airline. For respondents who stated they fly for *Norwegian* or *Niki*, this percentage is even higher.

Table 31 Airline companies that do not pay directly (LFAs)

Airline	Frequency	%	Valid %	Proportion within airline company
Ryanair	307	60	63.2	47.2
Norwegian	114	22.3	23.5	59.0
Wizz	26	5.1	5.3	34.6
Easyjet	18	3.5	3.7	8.0
NIKI	13	2.5	2.7	65
Transavia	5	1	1	4.9
Jet2.com	2	0.4	0.4	13.3
Air Berlin	1	0.2	0.2	1.4

Respondents were also asked to indicate how they were paid. Figure 140 shows that 37% (N=2422) of respondents reported to be paid a 'lump sum with extras'. Another 20% (N=1296) is reportedly only paid a lump sum. 14% (N=942) of respondents stated they are paid per hour although with a minimum of hours guaranteed, and 7% (N=487) per hour without a minimum of hours guaranteed. Finally, 1% reported performance-related pay.

Quote pilot

Pilots fly while sick because they are paid per hour flown. No kind of pressure should be put on pilots and their decisions when calling sick. Now there is fear/pressure from the company and huge training accumulated debts to be paid.

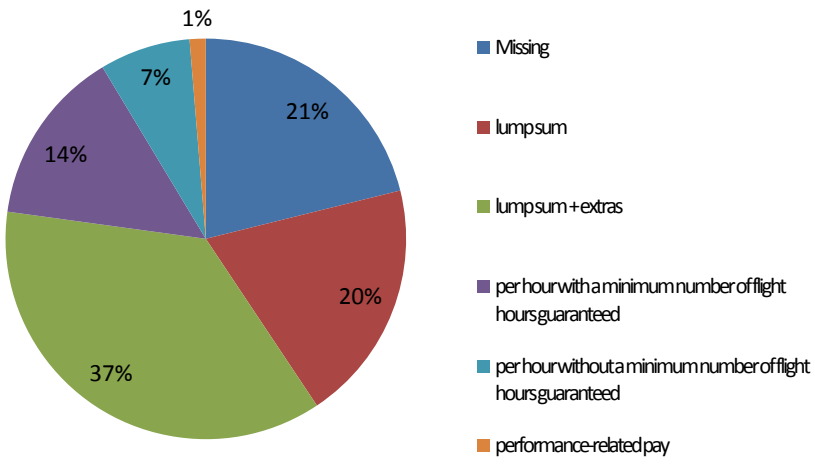


Fig. 140 Payment types

When focussing on the types of relations with the airlines, it can be observed that a lump sum 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.

Figure 141 shows the distribution of payment types reported per type of relation with the airline. Note the 'lump sum (extras)' part in the directly employed group and the 'per hour with minimum hours guaranteed' part in the group of temporary agency work.

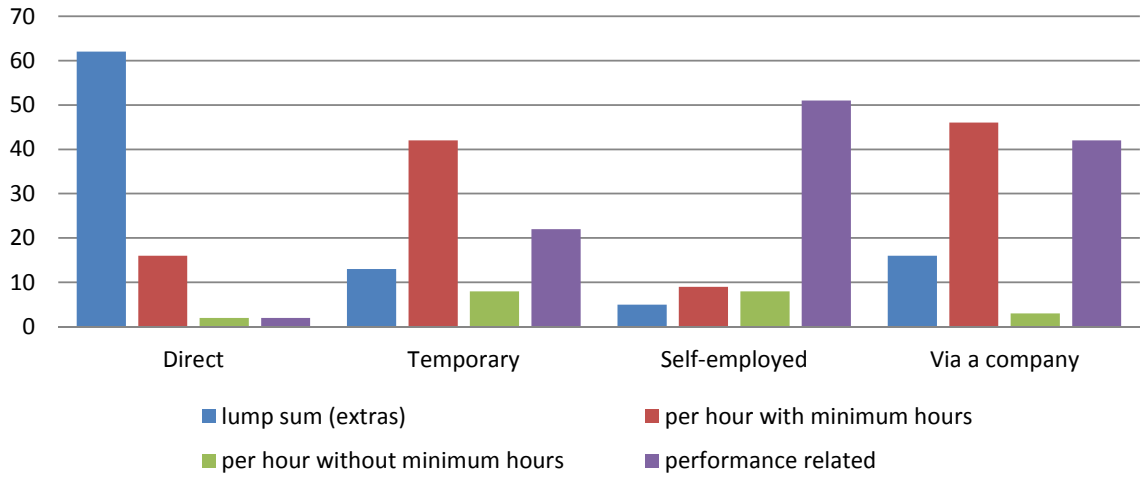


Fig. 141 Payment in relation to employment types

Respondents who indicated to be self-employed in most cases reported to be paid in relation to their performances, which is to be expected. 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.

When we take a closer look at how the types of payment reported differ with regard to the different types of employment relationships reported, we can observe a few peculiarities (Figure 142).

Respondents who stated to be directly employed in most cases stated they received a lump sum payment with extras (N=4242).

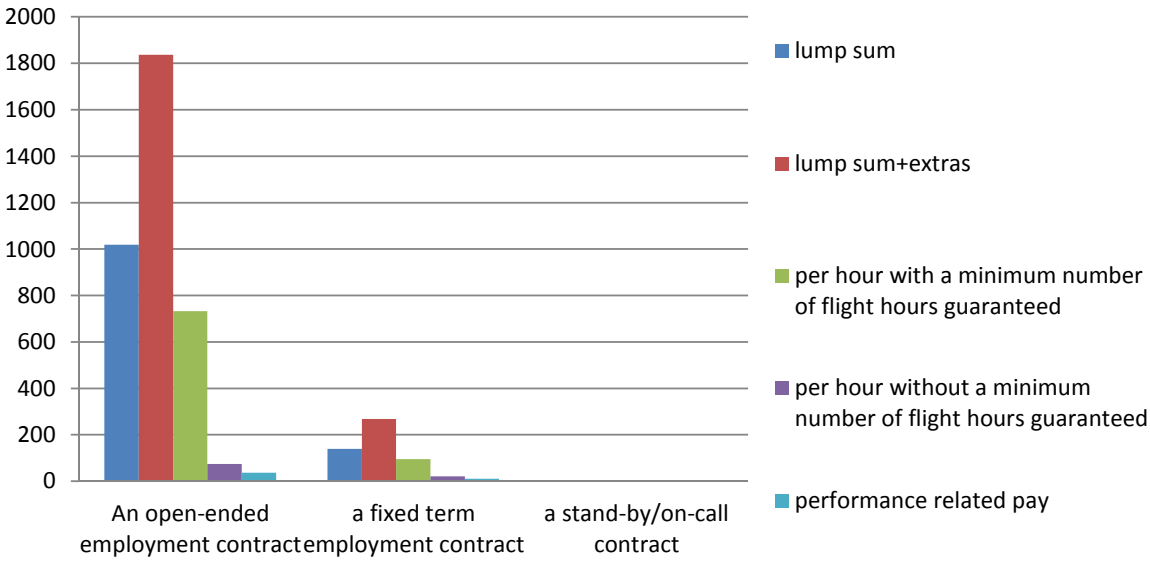


Fig. 142 Direct employment

Respondents who stated they fly for an airline via a temporary work agency (N=308) reported to be paid per hour without a minimum number of flight hours guaranteed. However, the majority indicated to be paid a lump sum with extras! Note that in this last group the number of respondents who indicated they work for the temporary work agency via a fixed-term contract is higher. This is rather strange: working for a temporary work agency via a fixed-term contract is nothing unusual. However, a temporary work agency contract in combination with lump sum payments is extraordinary. In our view, this might be a strong indicator for a socially engineered construction or a bogus situation.

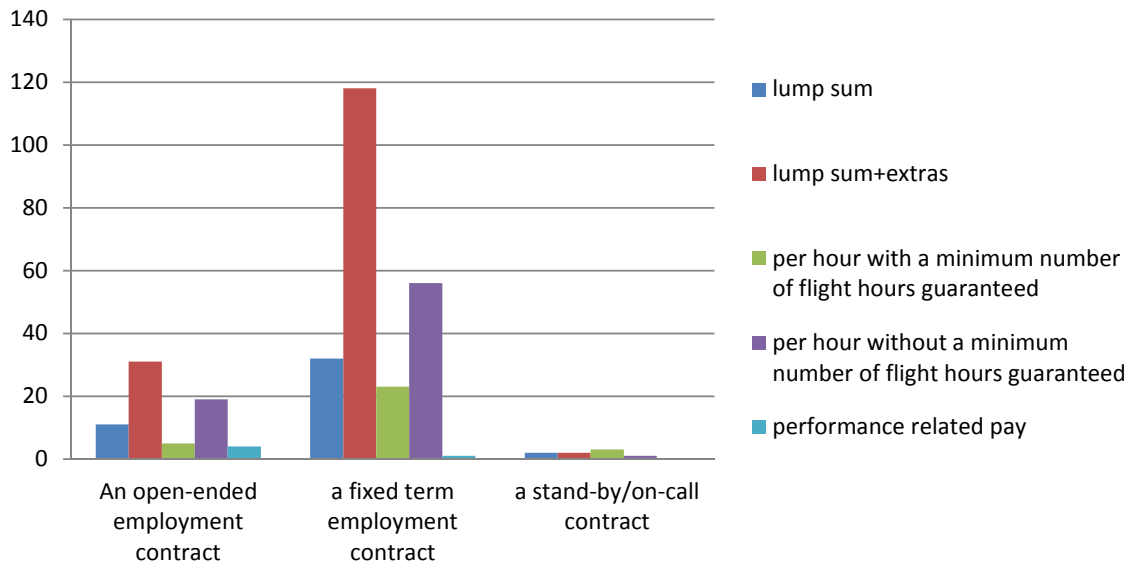


Fig. 143 Via a temporary work agency

With regard to the airlines reported to be behind these figures, it was found that of the respondents stating to be paid per hour without a minimum guaranteed, a high amount of respondents stated to fly for *Ryanair* (48% of respondents indicating to fly for *Ryanair* and 75% of the respondents indicating this type of payment). The second most represented company with regard to this type of payment is *Alitalia* (17% of respondents indicating to fly for *Alitalia*). With regard to performance-related payment, *Ryanair* (25.4% of the group with this type of payment – 2.3% of the respondents who indicated to fly for *Ryanair*) and *Wizz* (20.3% of the respondents in this group – 16% of the respondents indicating to fly for *Wizz*) are most strongly represented.

Quote pilot

The most serious item in my airline in my opinion is the fact that we fly all day without water and food provided by the company.

Activities of which respondents state that they are compensated are flight hours (61.5%), positioning (54.9%), time during lay-over (46.8%), hotel (52.7%), meals between flights (27.5%), meals during flights (41%), costs of retaining licenses (49.1%), uniforms (53.9%), and crew ID cards (51%). Figures 144 to 152 provide a general overview of compensated activities reported per type of airline reported.

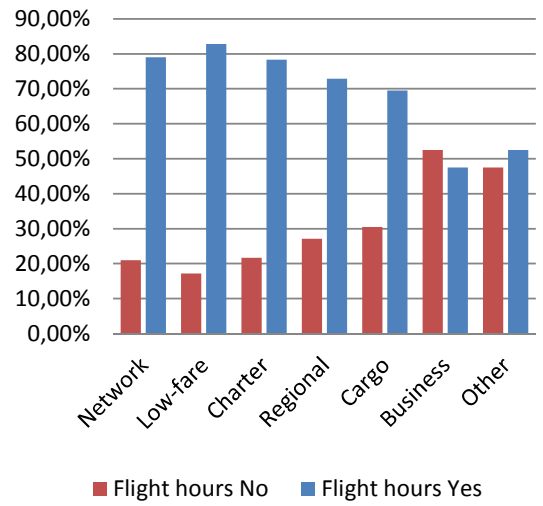


Fig. 144

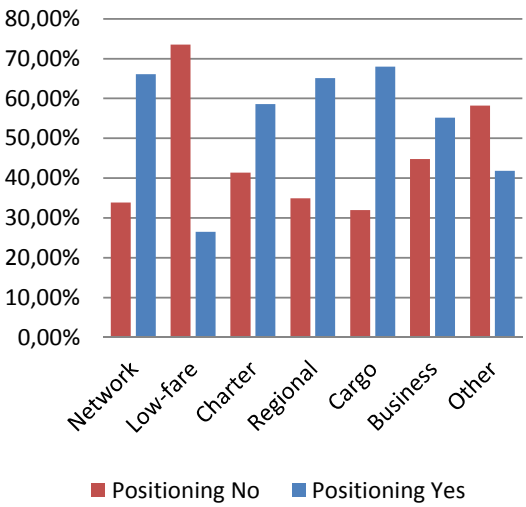


Fig. 145

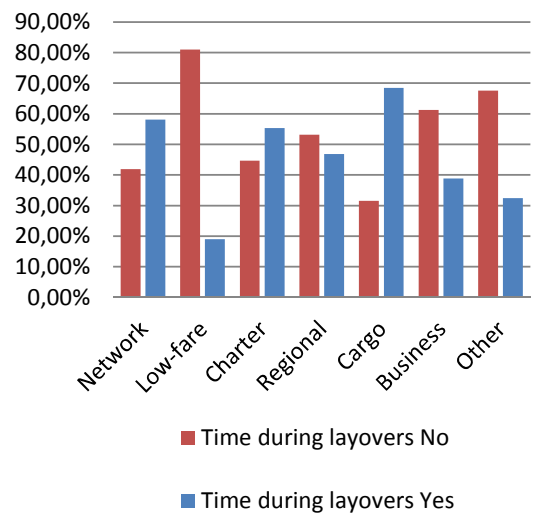


Fig. 146

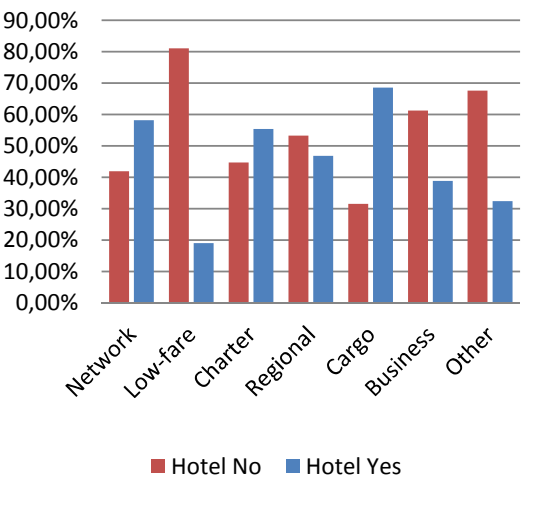


Fig. 147

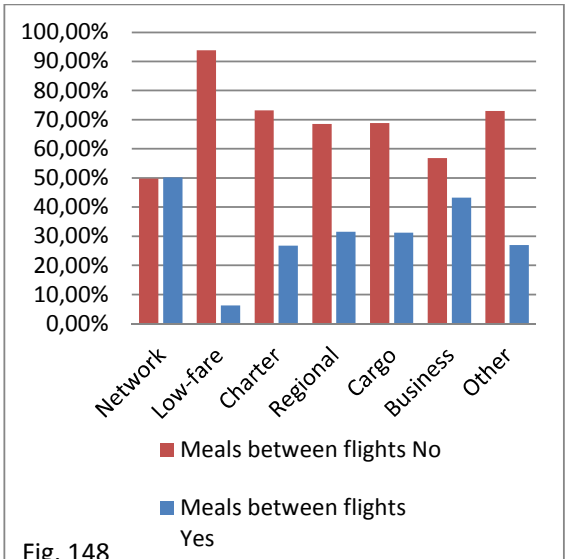


Fig. 148

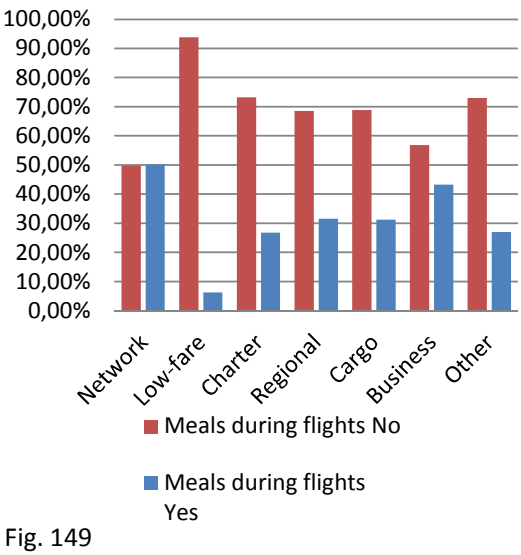


Fig. 149

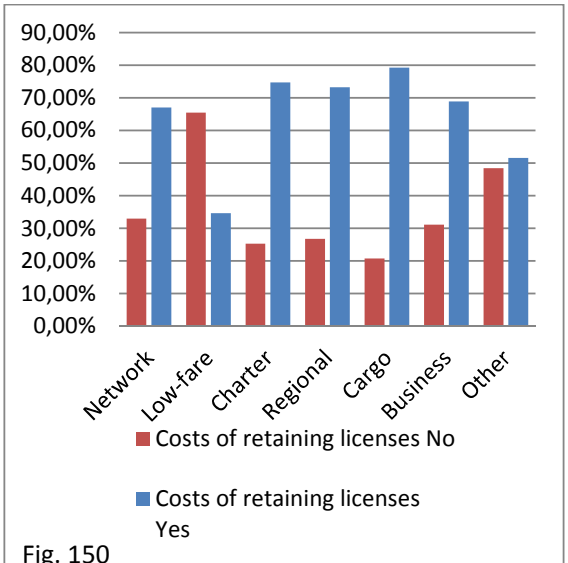


Fig. 150

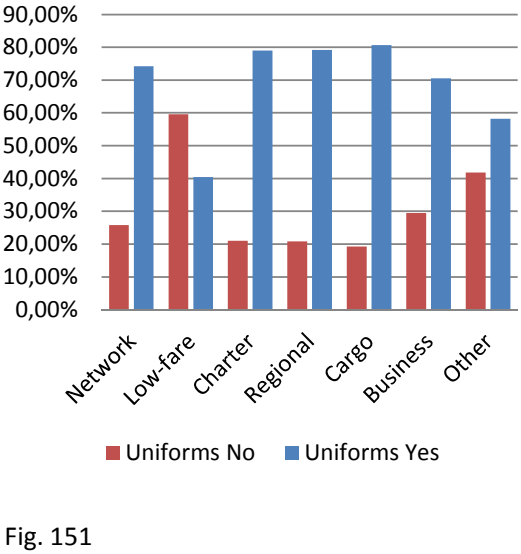


Fig. 151

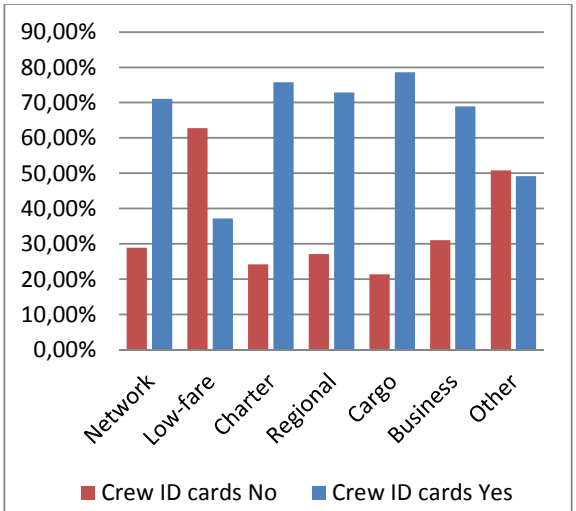


Fig. 152

Respondents indicating to fly for LFAs are, according to the answers they provided, least compensated. Figures 153 to 161 show, per variable, the top five of the airlines of which respondents stated to be compensated or not. The blue graphs (No) are the amount of respondents who answered this question in the negative. The red graphs are the total amount of respondents in this study. As such, a comparison can be made between the number of respondents who stated they fly for a particular company and the number of respondents who stated not being compensated for a particular item. With regard to the flight hours, the respondents (especially respondents indicating to fly for *Ryanair*) stated that they are not compensated for this because (according to their statements about the 'other' option) they are e.g. only paid for the scheduled block hours. So when delayed, they are not paid for those hours.[166]

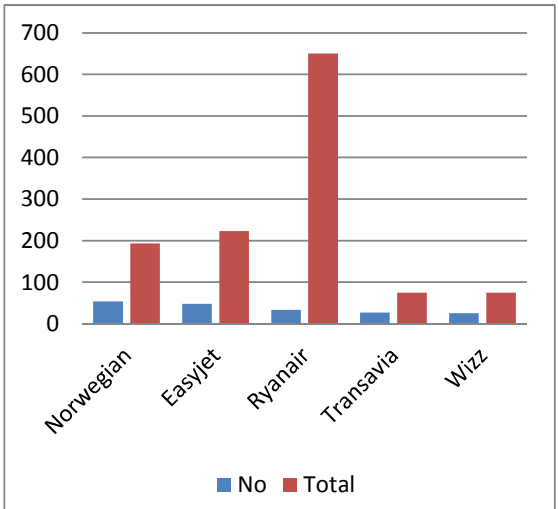


Fig. 153 Flight hours

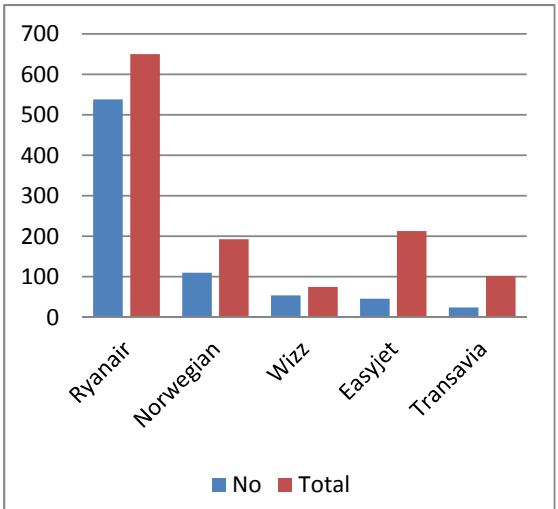


Fig. 154 Positioning

[166] If they fly for an airline as a subcontractor (as a self-employed person or via a company) the opposite could be an indicator for a bogus situation.

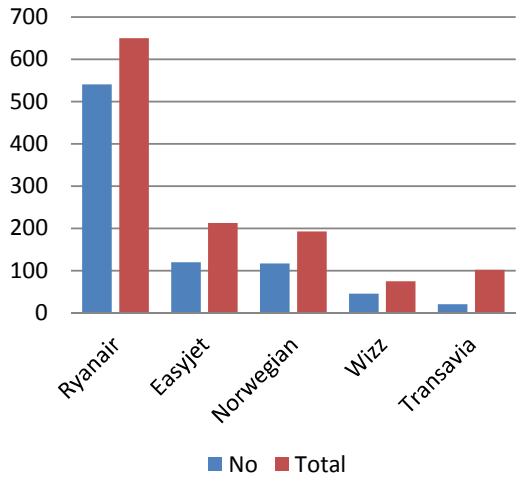


Fig. 155 Time during layovers

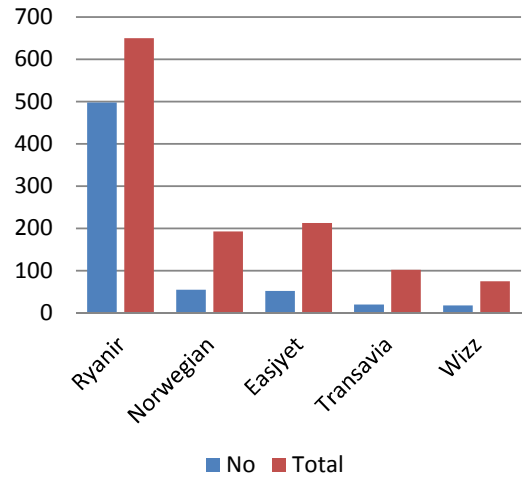


Fig. 156 Hotel

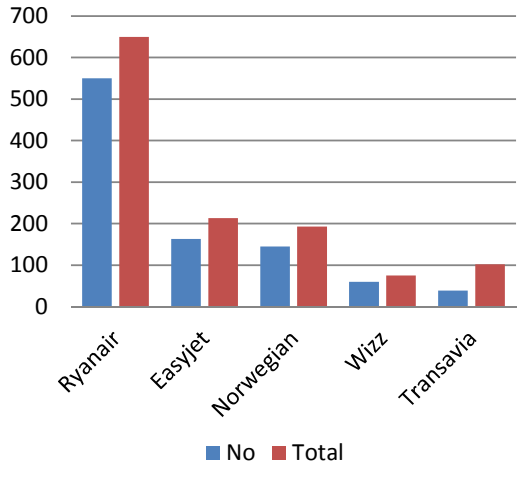


Fig. 157 Meals between flights

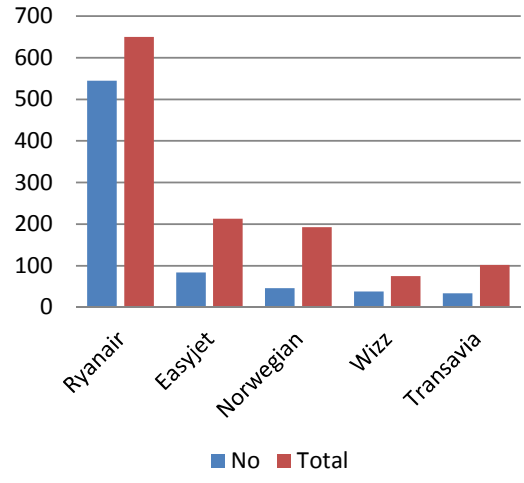


Fig. 158 Meals during flights

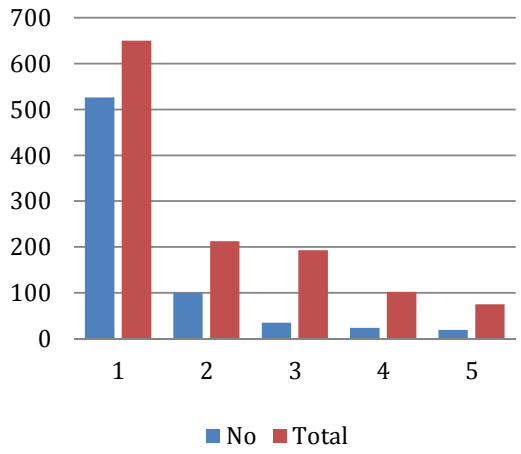


Fig. 159 Costs of retaining licenses

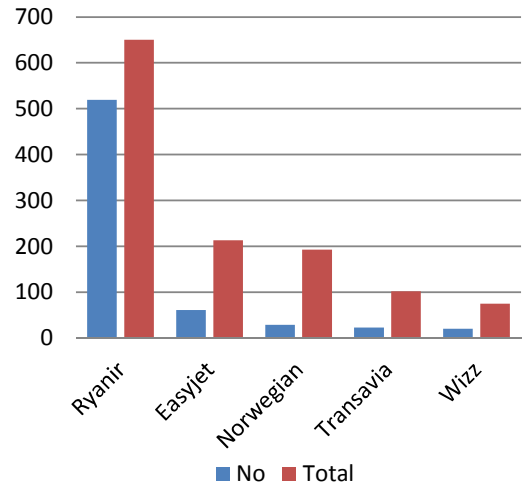


Fig. 160 Uniforms

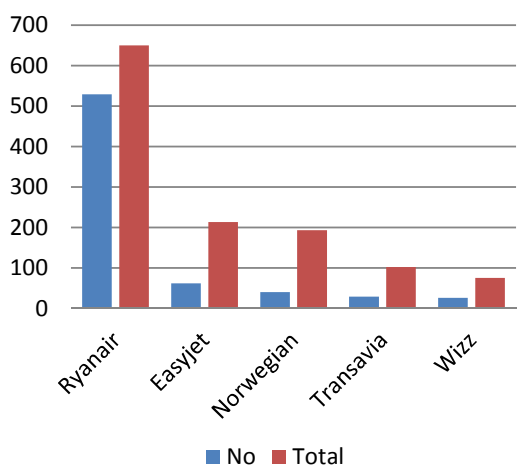


Fig. 161 Crew ID cards

Most notable is the high number of respondents who stated that they are not paid for hotel costs. As we will see, the *home base* is defined as: "*the location nominated by the operator to the crew member from where the crew member normally starts and ends a duty period, or a series of duty periods, and where, under normal conditions, the operator is not responsible for the accommodation of the crew member concerned*".[167] [emphasis added]

70% of the respondents of our survey indicated that their income is fixed or guaranteed. For almost all types of airlines reported, a fixed income accounts for more than 90% of the respondents. However, the number of respondents indicating to fly for LFAs drops to 66.5%.

[167] Article 11 (5) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

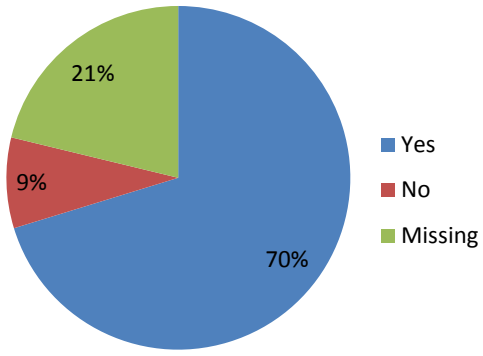


Fig. 162 Is part of your income fixed?

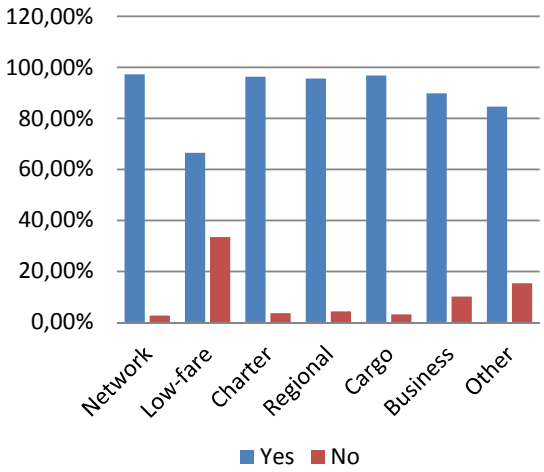


Fig. 163 Fixed income - Types of airlines

V. TYPES OF ATYPICAL EMPLOYMENT

As mentioned before, for this study, typical employment has been defined as the direct relation between an employer and an employee, more specifically an open-ended employment contract concluded between an employer and an employee directly.

The fact that specific legislation[168] tries to strengthen the position of the fixed-term, part-time or temporary agency worker can be seen as an indication that the open-ended employment contract concluded between employer and employee is still considered the typical form of employment. On the other hand, the growing need for such legislation can be considered an indication of atypical forms of employment becoming more and more prevalent in the contemporary economy and labour market. Furthermore, these types of employment correspond to demands from both employers and employees for a higher degree of flexibility.[169]

Whereas fixed-term, part-time and temporary agency work are still forms of employment, a growing evolution towards even more atypical forms can be observed. Nowadays, in professional sectors in which historically only the typical form of employment could be observed — e.g. the (international) transport, construction, and meat sector (both slaughter and processing) — a growing number of workers can be found working as a self-employed person, as a single shareholder of a one-man enterprise, as a (minority) shareholder of a cooperative company etc. In many cases, these forms of subcontracting are legally sound and correspond to a change in supply mechanisms. Nevertheless, in

[168] See among others Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work; Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP; and Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.

[169] Employers often ask for flexibility when it comes to variations in seasonal demands (e.g. the holiday sector) or even variation in demand per day or during the week (e.g. the hotel and catering sector), whereas employees often demand flexibility in order to obtain a better life-work balance. Both parties sharing a demand in the same field does not, of course, necessarily mean that these demands are compatible, in some cases, one would find, even on the contrary.

a growing number of cases, questions about the reality of these legal positions are unavoidable. In a large part of these cases, these 'constructions' primarily come to the benefit of the *client*, not of the *provider*. Furthermore, in many of these cases, intermediary companies can be found who are legally subcontractors but in reality do nothing more than provide work force (labour), their only similarity with temporary work agencies being the *triangular relationship* between 'agency', 'client' and 'worker'.

After WWII, triangular employment relationships were initially forbidden. During the economic boom of the golden sixties, labour supply was short and on high demand and (illegal) gangmasters became a problem, mostly in the construction sector. In the last quarter of the last century, the hiring-out of workers became more and more legalised, mostly through the strict regulation of temporary agency work.[170]

Triangular work relationships hold specific dangers that are or at least should be well known to all stakeholders, not only with regard to workers' rights concerning social security,[171] but also with regard to workers' health and safety,[172] not in the least because health and safety provisions represent a high cost to service providers: among others, they require special or extra equipment, they tend to slow down work — hence have a negative impact on productivity — etc.

The last few decades have been characterised by a growing liberalisation of the economy, both within the EU and globally. At the same time, within the EU, both prosperity as well as labour costs have risen.[173] In some sectors, problems such as the bogus posting of workers, bogus self-employment and social dumping are more and more reported, to the point where, in some cases, employers' organisations are the ones to report the problem and to ask governments and EU institutions to take action.

One of the ways to cut costs is the outsourcing of processes which are not a part of the business' 'core activities'. Hence, cleaning, catering and maintenance often are or have been outsourced to subcontractors, the philosophy being these subcontractors are experts in their domain and can offer an efficiency the none-expert cannot obtain. Hence, subcontracting is cheaper. Furthermore, outsourcing can in some aspects be considered more flexible. Also, by means of subcontracting, one can often externalise a part of the transaction costs such as costs related to legal issues such as applicable legislation (e.g. labour and social security legislation) and liability (e.g. employers' liability for employees).

Unfortunately, outsourcing techniques have been an inspiration for social engineering and the engineering of bogus constructions. In most cases, the same parties can be identified: a 'client'

[170] The disadvantages of a complete deregulation of temporary agency work can often be observed in bogus subcontracting constructions: in many cases, temporary work agencies from Member States with little or no regulation of temporary work agencies will play a role in such constructions. The Netherlands can be a good case study when it comes to the observation of the limits of self-regulation and soft law compliance of the temporary work agency sector.

[171] The illegal hiring-out of workers in all cases means this work is undeclared; hence no taxes are paid, no social security contributions, and workers are not covered by any of the protective rules of labour law with regard to dismissal, holidays, but also sickness leave etc.

[172] The fact that in many cases a form of joint and several liability was implemented in the domain of health and safety — if not through specific health and safety regulations than through general criminal law — can be considered proof of the importance of the legal goods protected thereby.

[173] After all, a welfare state comes at a certain price.

seeking to acquire 'labour', a 'worker' willing to provide (sell) his or her labour, and, depending on the ingenuity of the 'construction', a third party, either providing 'legal advice' or acting as a 'broker' or an 'agency' (not unlike a temporary work agency or private employment company).[174]

One of the main problems of these constructions is that, to a certain extent, this outsourcing comes down to avoiding applicable legislation, i.e. labour, social security, as well as tax legislation, often — though not always — to the detriment of both workers' rights as well as to the fairness of the competition.[175]

TYPES OF SUBCONTRACTING BOTH LEGALLY SOUND AND BOGUS

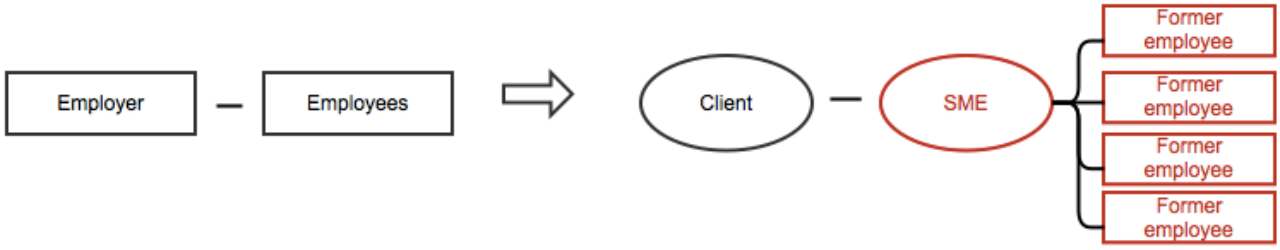
In the most basic form of bogus outsourcing, an employer becomes the client of a self-employed person, who formally was an employee of said employer:

Fig. 164 Basic form bogus outsourcing

A variation is where one or more former employees set up an SME, often a limited liability company, and start to provide services for their former employer:

Fig. 165 Basic form bogus outsourcing with the set-up of an SME

Fig. 166 Basis form bogus outsourcing with the set-up of an SME variation



However, and as mentioned above, such forms of subcontracting can be legally sound and can correspond to an economic reality. As long as these former employees-now-service-providers also

[174] An outside of France not well-known example of such triangular relations initially forbidden but now legalised is 'portage salarial', which, however, is the reverse movement where a self-employed person acts as an employee.

[175] Furthermore, and last but not least, these constructions are detrimental to product or service quality, resulting in the consumer not getting value for money and resulting in downward consumer trust which, in times of economic crisis, is essential for economic recovery and thus for GDP.

provide services to other clients, and depending on other criteria,[176] this situation can be a legitimate and not a bogus one.

In a further development of these techniques, people, potential employees, are joined into a company.[177] Again, for those who have reasons not to perform the same activities as an employee, this might be a sound mechanism to work as a self-employed person. However, in a growing number of these cases, this company is a shell, and often remuneration, social security contributions and taxes are not paid or not paid in the country they ought to be; often the mandatory insurances are not in order etc.[178] In many of these cases, often found in the construction and meat sectors, a gangmaster can be identified or presumed working behind the scenes, organising the scheme.

The next step in bogus outsourcing, of course, is the introduction of an intermediary legal person which in turn subcontracts its activities to self-employed workers or workers who set up an SME.

Fig. 167 Introduction intermediary

In many cases, the third party will be 'split' into two or more parties: e.g. a broker provides work force and another company provides payrolling services (sometimes though not always including the payment of fees), and in some cases yet another company provides legal advice (e.g. tax consulting, the setting up of companies etc.).[179]

In many bogus situations, a chain of subcontractors can be observed: not only will there be an intermediary between the client (the one who finally needs the services) and the provider of the services (often this would be the employee of the client, if not for the bogus construction), there will also be one or more intermediaries between the first subcontractor and the last subcontractor in the chain. In bogus situations, this is done for several reasons. First of all, as in politics, it provides *plausible deniability*. Second, it externalises, or tries to externalise, various forms of civil liability. Third, it tries to externalise criminal liability, which in many cases works quite well. Fourth, it is a perfect means of fragmenting the work force, not only by putting individuals in different subcontracting companies, but also by turning them into full blown competitors. Last but not the

[176] Various Member States have adopted legal criteria trying to make a legal distinction between genuine and bogus self-employment. In many cases, this proves to be a difficult exercise. Sector-specific criteria are called for and often opposition is faced from lawyers who question the objective grounds of such criteria and fear arbitrariness and legal uncertainty. See *supra* – Part 2. III. A. i. Bogus self-employment and other problematic employment relations.

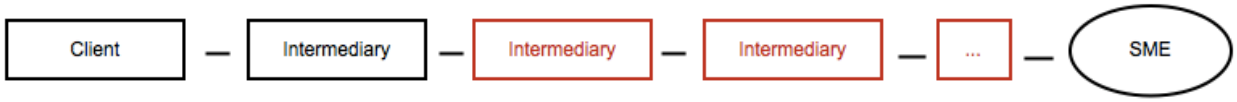
[177] Depending on the sector and the Member State's company law, often a limited liability or cooperative company (the latter with or without limited liability since in some cases a cooperative company with unlimited liability is 'more flexible' for bogus purposes).

[178] In many of those cases, the activities performed qualify as social fraud or undeclared work (*cfr* the definition first given by the European Commisison in its 1998 Communication on undeclared work where it is stated that "*Undeclared work*" is "*therefore defined here as any paid activities that are lawful as regards their nature but not declared to the public authorities, taking into account differences in the regulatory system of Member States*". Communication from the Commission on undeclared work, COM(1998)0219 final. p. 4).

[179] Sometimes, these constructions are similar or similar to so-called 'spider constructions' that can be found in e.g. VAT carroussels, money-laundring schemes or company structures used to hide straightforward criminal activities (e.g. smuggling and selling cigarettes, counterfeiting products, arms and/or drugs. human trafficking etc).

least of the factors we discuss here is the fact that the individual who is at the bottom of the subcontracting chain finds him or herself in an extremely volatile and precarious situation. This situation is characterised by high dependency and no protection whatsoever, often *topped up* by the threat of both civil and criminal liability which he or she would most often not be subject to as an employee.

Fig. 168 Introduction more than one intermediary



As mentioned before, in the vast majority of cases, atypical forms of employment as well as subcontracting chains are economically necessary and legally sound. However, history has proven that in some sectors, outsourcing became more and more prevalent without any correspondence to economic or technical realities or necessities. Furthermore, such bogus outsourcing schemes became less and less legally sound, albeit that often they could or cannot be called outright illegal. Moreover, whenever national borders can easily be crossed, the enforcement of applicable legislation is hampered, be it because of different legislation interfering or competent authorities being confronted with legal or practical impediments to their competence.[180] Wherever the enforcement of applicable legislation is low, we enter the dark realm of illegality, where everything becomes possible.

ATYPICAL EMPLOYMENT AND (BOGUS) OUTSOURCING IN CIVIL AVIATION

International transport is, by definition, a sector where the legislation of different countries comes in to play. Furthermore, it has become an increasingly competitive sector. Last but not least, international transport is not just European, but global. To understand the trends in employment in, for instance, the civil aviation sector, one should take a look at the history of employment in the maritime sector. In the latter sector flags of convenience lead to crews of convenience. The labour market position of captains and of crews is totally incomparable and a detrimental race to the bottom could and still can be observed with regard to crew members' rights. *Flags of convenience* would then best be rephrased to *red flags*!

In European civil aviation, a growing number of workers can be observed whose employment relationship is unclear — the 'grey' area between 'traditional employment'[181] and (genuine) self-employment — and who find themselves excluded from various social law protective rules attached to the status of 'employee'.

During the last decades, a growing number of air crew work for airlines based on all kinds of atypical forms of employment. Along with an increasing number of passengers and destinations came an

[180] *Cfr* the many issues with regard to administrative cooperation and information exchange between competent authorities in the field of e.g. the posting of workers in the framework of the free movement of services.

[181] This model of employment, which predominated in most industrialised countries for much of the last century, was based on the idea of an employee (the 'male breadwinner') working full-time, with standard hours (usually '9 to 5', five days a week) for a single employer with a fixed wage and well-defined benefits (e.g. sickness benefits, paid holidays, company pension scheme etc).

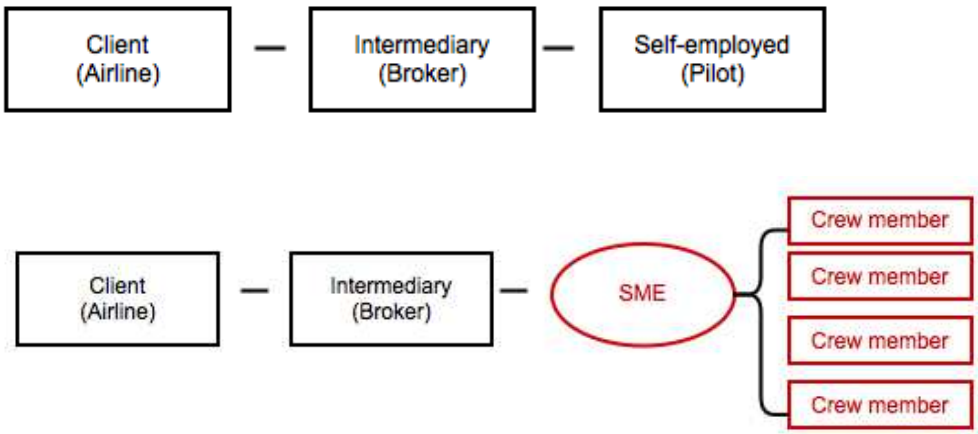
increase in variations in seasonal demands. These are often covered through the use of fixed-term contracts or temporary agency work or even students working holidays as cabin crew members. Some temporary work agencies specialised in the hiring-out of air crew became known as crew agencies.

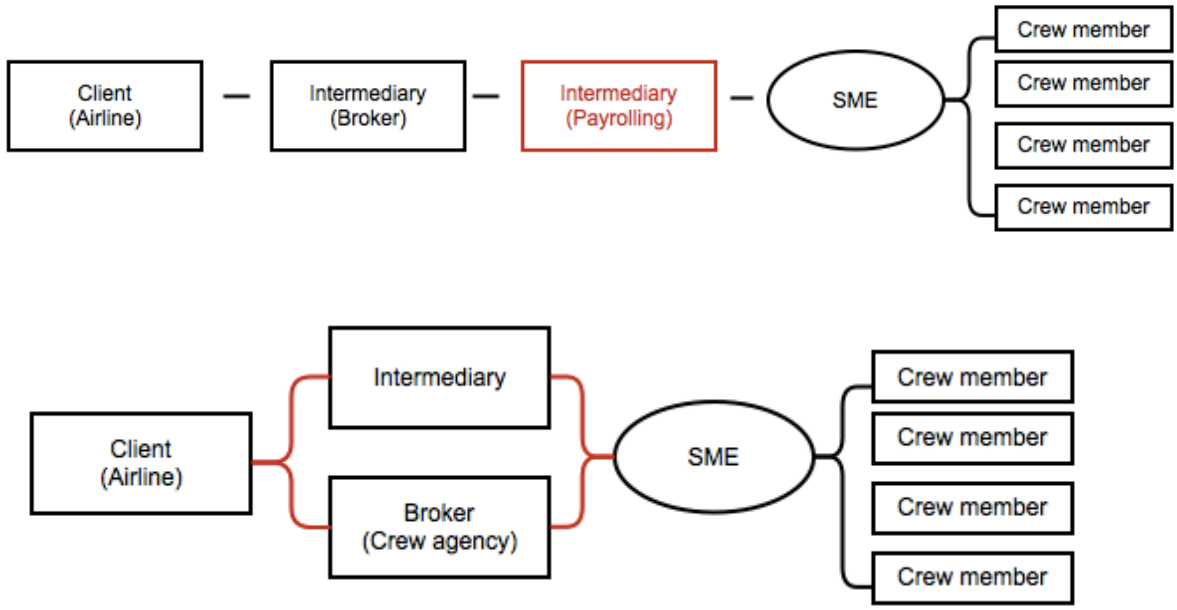
At the same time, the number of self-employed workers among air crew members was on the rise. These workers would in first instance have a direct link with an airline. Again, in some cases, this can be legally sound and correspond to an economic activity. However, in many cases, questions could be raised with regard to the bogus character of this kind of outsourcing.

In a next step, the self-employed worker would no longer be hired by the airline directly, but through an intermediary subcontractor. As a result, the worker is 'one step further down' the subcontracting chain, which can raise questions with regard to who has the authority and liability on specific matters (safety instructions, FTLs etc). Some intermediaries act as crew agencies for service providers, i.e. brokers who will 'liaise' between the airline and self-employed crew members. Some airlines work with more than one of these 'crew agencies', the main difference between these agencies often being that they will not hire out both cockpit and cabin crew members, although this is not always so. Furthermore, more and more airlines employ students as cabin crew members. As such, a crew can consist of employed or self-employed pilots who fly for the airline directly or via different and/or multiple intermediary companies, and cabin crew members who are employees of the airline or the lessor wet-leasing out the aircraft, self-employed crew members, temporary agency and student workers.

A next step is the introduction of even more intermediary subcontractors or the creation of a company by the crew member. In most cases, such a company would, for obvious reasons, be a limited liability company. Recently, an evolution can be seen where a small number of crew members — mostly pilots — establish a company together (a so-called micro enterprise). In such cases, the crew agency is often responsible for the subcontracting of the work, whereas a fourth (and sometimes a fifth) party is responsible for payment and legal advice (e.g. on the (most profitable place of) establishment of the micro-enterprise, social security and/or tax legislation etc).

Fig. 169 Steps in construction of a (limited liability) company by crew member





As aforementioned, the difference between legally sound and bogus subcontracting is not always easy to make. According to some, it is debatable whether commercial airline pilots in general can be self-employed or subcontractors that fly for an airline via a company of which they own shares. One of the issues is that genuinely self-employed workers 'provide materials for the job', but the 'materials' supplied (bought) by 'self-employed' pilots working for an airline are often no more than their uniforms and ID cards. Another issue according to some is that genuinely self-employed workers 'provide their own insurance cover (e.g. public liability cover)', whereas some of the contracts *for* services between self-employed pilots and e.g. crew agencies state that: "*The Hirer [the airline] will have in place at all times and in full force professional errors and liability insurance which will cover the company representative [pilot] in relation to the services provided for the Hirer*".[182] Genuinely self-employed workers "*have control over what is done, how it is done, when are where it is done and whether he or she does it personally*". Such clauses are often contradicted by another clause in the same contract, e.g.: "*The Hirer is operating predominantly short sectors whose continuing success depends in part upon high crew efficiency and flexibility in an extremely competitive environment … The Hirer reserves the right to change the scheduling subject to operational requirements. They do not form any part of the agreement between the Contractor [the crew agency] and the Employment Company [pilot]*".

The clearest violations of the status of self-employment could be the various financial bonds and penalties in such contracts for services. For instance, the Mayors & City of London Court has concluded that a clause – originally inserted in the 2007 iteration of the contract as a 'penalty' – was designed not to compensate a crew agency for any pre-estimate of loss if a pilot quits the job (e.g. the cost of assigning another pilot to the base in question). The court ruled that this clause was

[182] The legal value of this clause is also highly debatable, since many Member States do not recognise clauses that imply obligations for a third party to the contract (*unless* that party is part of a group of companies …).

rather "*an 'in terrorem' sum to deter breach*". At the trial, it emerged that Brookfield calculated the sum (penalty) of € 5,000 on the basis of what they thought pilots were prepared to tolerate as an 'exit cost' (i.e. if the penalty was any higher it would deter recruitment).[183] Moreover, there is a discrepancy between the contracting parties' rights and obligations in many crew agencies' contracts. For instance, clauses may entail that a pilot can be 'dismissed' at practically no notice and without any indemnity due, whereas the pilot does not have the same rights of 'exit' but, as mentioned above, is faced with 'penalties'.[184]

Whereas bogus self-employment and the supply of pilot services to an airline via e.g. limited companies (Figure 164, *infra*) imposes significant costs on the individual pilot, the benefits for the airline are considerable if not critical to the continued growth and profitability of their business.

Hiring pilots as subcontractors is very cheap, especially when supply far outstrips demand.[185] This is even more so if the subcontractor is given 'social and tax engineering' advice on how to avoid high social security contributions and taxes, allowing the subcontractor to get more net income out of the same gross fee/price or, in other words, to get the same net income out of a lower fee/price.

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

[183] Mayors & City of London Court, Case No.1IR65128, 26 July 2013, Brookfield International Ltd v Robertus Johannes Willhelmus Van Boekel.

[184] For instance, the Mayors & City of London Court (Case No.1IR65128, 26 July 2013, Brookfield International Ltd v Robertus Johannes Willhelmus Van Boekel) concluded that this clause – originally inserted in the 2007 iteration of the contract as a 'penalty' – was designed not to compensate Brookfield for any pre-estimate of loss if a pilot quits the job (e.g. the cost of assigning another pilot to the base in question) but "an 'in terrorem' sum to deter breach". At the trial, it emerged that Brookfield calculated the sum (penalty) of € 5,000 on the basis of what they thought pilots were prepared to tolerate as an 'exit cost' (i.e. if the penalty was any higher it would deter recruitment).

Moreover, some crew agencies' contracts holds a clause which entails a pilot can be 'dismissed' at practically no notice and without any indemnity due.
"*Contractor's Right to Terminate*
Should the EC or the company representative:
(a) engage in any serious misconduct or any conduct tendering to bring the Hirer or Contractor into disrepute; or
(b) fail to comply with any of their express or implied obligations under this Contract or any contract supplemental to it; or
(c) fail or cease to perform their duties under this Contract to the Contractor's reasonable satisfaction; or
(d) fail the requisite airline pilots' medical examination; or
(e) fail any initial or periodic simulator or aircraft proficiency check conducted by or on behalf of the Hirer; or
(f) fail to pass or maintain the relevant pilot licence; or
(g) fail to maintain a valid passport; or
(h) approach any personnel of the Hirer or Contractor, for, or on behalf of any other airline or agency; or
(i) publish defamatory statements about the Hirer or the Contractor to any person; or
(j) fail to maintain standards acceptable to the Hirer in relation to punctuality and attendance;
Then the Contractor shall have the right (in addition to any other rights which it has at law) to terminate this Contract immediately and without liability for compensation or damages. The EC shall then only receive payment as shall have accrued to the last day in which the company representative effectively carried their duties, but without prejudice to any prior existing claims of either party."

In other contracts, there is a sub clause stating:
"*5. Termination*
Should the Service Company or the Company Representative:
(…) or
(n)
The Hirer decides to exclude the Company Representative from their premises, airplanes or areas of work or control.
Then the Contractor shall have the right (in addition to any other rights which it has at law) to terminate this Contract immediately and without liability for compensation or damages. The Service Company shall then only receive payment as shall have accrued to the last day in which the Company Representative effectively carried out their duties, but without prejudice to any prior existing claims of either party."

[185] One airline claims to have a waiting list of over 5,000 qualified pilots and cabin crew.

flights[186] 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.

New recruits fresh from flying school[187] will typically arrive with a six-figure training debt (depending on the situation, between € 80,000 and € 150,000) and little or no flight experience or type-rating. On their first job, they are often assigned to a foreign base where they will work hard to pay off their debts, accumulate flight hours and try to secure a transfer to their (preferred) 'home base'. If they get a transfer to their home base of preference, first officers will then want to accumulate flying time to be able to apply for a captain's position. In some airlines, getting a captain's position is invariably conditional on a base transfer. The newly promoted captains will then work hard and 'keep their noses clean' in order to secure a transfer back to their preferred 'home base', where they can try to establish a better work-life balance.[188]

This process may allow airlines to exploit different 'pressure points' in the pilot's career path at critical junctures. Needless to say, this kind of company behaviour is detrimental to an effective safety culture. "*An airline culture that heavily emphasizes punitive actions is not compatible with SMS [safety management system] because discipline deters people from voluntarily reporting safety events and concerns, makes them less forthcoming with information when they participate in event investigations, and alters their usual performance to model expected behavior when they are observed during normal operations*".[189]

As aforementioned, outsourcing can also be an effective means to externalise liability, both civil as well as criminal (see *supra*). The triangular employment relationship between the airline, the subcontractor (e.g. a crew agency) and the pilots[190] also serves to distance workers from those who use their labour, *in casu* the airline. Direct employees usually have at least some say in the decisions that affect their daily working lives. Yet, as a result of the fragmentation of the workforce, workers under atypical contracts on the other hand often find they have no voice in the organisation. This is even more so when they must accept a one-sided zero-hour contract, which entails that the contractor (e.g. the crew agency) is under no obligation to offer them work,[191] but that the worker (e.g. a self-employed pilot) is under pressure to accept whatever work is made available, wherever it is made available.[192]

[186] Captain wages of more than $ 250,000 have been reported not to be exceptional in e.g. the Middle or Far East regions.

[187] Some airlines actively recruit pilots at all stages of the business cycle, and some demand only 200 hours of flying experience. On the other hand, legacy airlines often have rules in place which prohibit the recruitment of 'direct entry captains', meaning they have to recruit captains among their staff. Since the staff in network airlines is predominantly typically employed, these airlines have less room for price bargaining. The rules that prohibit the recruitment of 'direct entry captains' are often laid down in CLAs, either at company or at sector level. In some cases, these 'rules' are unwritten and based upon a 'legal habit' or unwritten 'gentlemens' agreements' between the airline and the pilots that work there. Some airlines where such unwritten rules are 'in place' refrain from hiring direct entry captains out of fear that breaching such rules would result in collective action, or otherwise seriously disrupt the 'social peace'.

[188] In the words of a pilot: "*If you're a married man with kids, commuting home on your days off and forever trying unsuccessfully to get a transfer to your home base, it absolutely sucks*". Base transfers are used as an 'incentive', a 'disciplinary measure', as well as an incentive to boost productivity by some airlines.

[189] J. M. Ma & W. L. Rankin, 'Creating a more effective safety culture', *Aero Magazine* 53(1), Boeing Commercial Airplanes. p. 16.

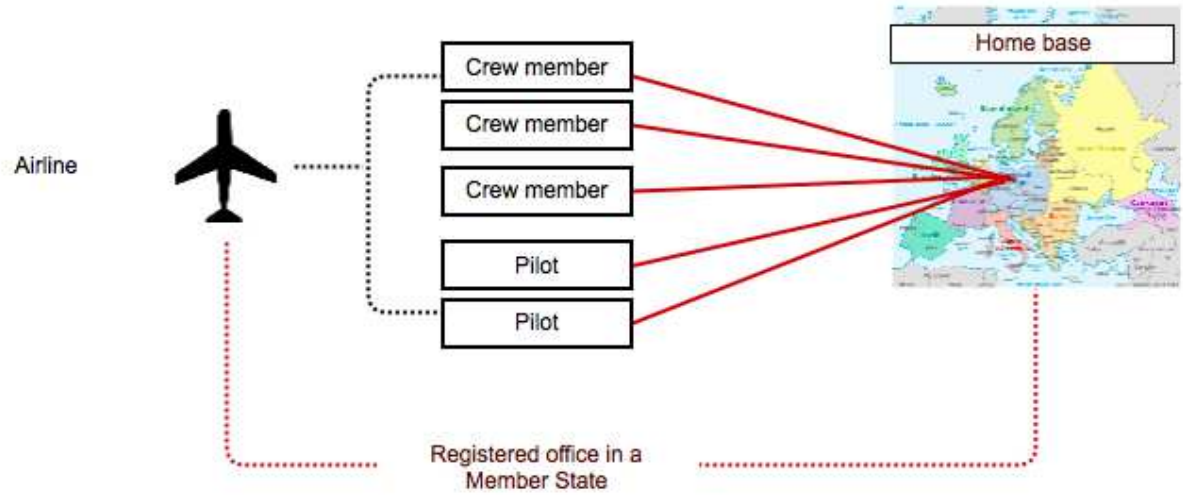
[190] In some contracts sometimes referred to as Employment Company or EC. As we will see later on, the concept operator can not always be identified with the airline.

[191] Clause 1(b) (Engagement) of one of such crew agencies' contracts states that: "*While the Contractor will use reasonable endeavours to locate or offer the Work, the EC acknowledges that the services of the company representative are provided on an as required and/or casual basis and there is no obligation upon the Contractor to locate or offer the Work*".

[192] Pilots are advised that they can expect to work 80% of their hours 'on base' and 20% 'away from base'.

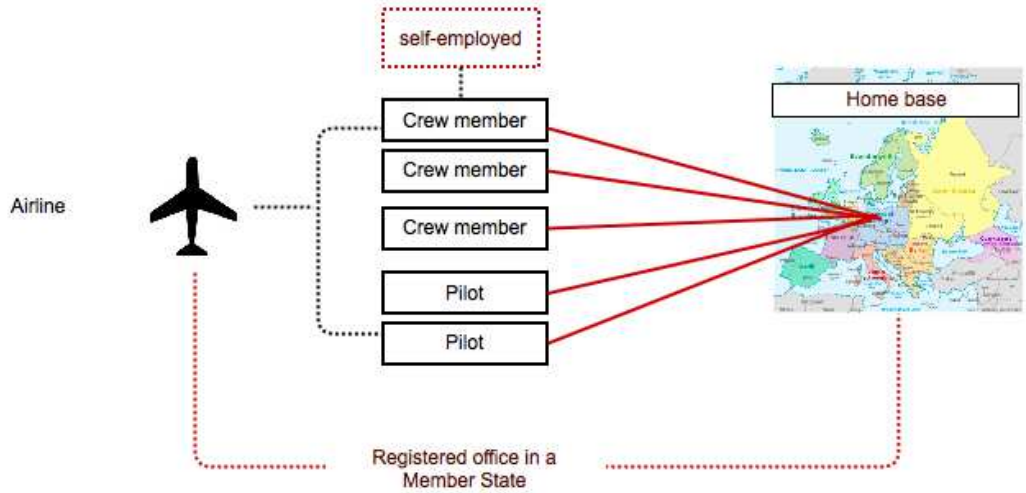
As mentioned above, in terms of the relationships between the worker, the intermediary or intermediaries and the 'end user' (*in casu* an airline), bogus self-employment can be achieved in several ways. The typical employment relationship between an airline and the crew is shown in Figure 170.

Fig. 170 Typical employment relationship between airline and the crew



In a first scenario, the employer of the worker takes a number of his or her existing employees who are employed directly and engages them on a self-employed basis. The duties that the workers undertake remain the same; it is only the worker's legal status that changes.[193]

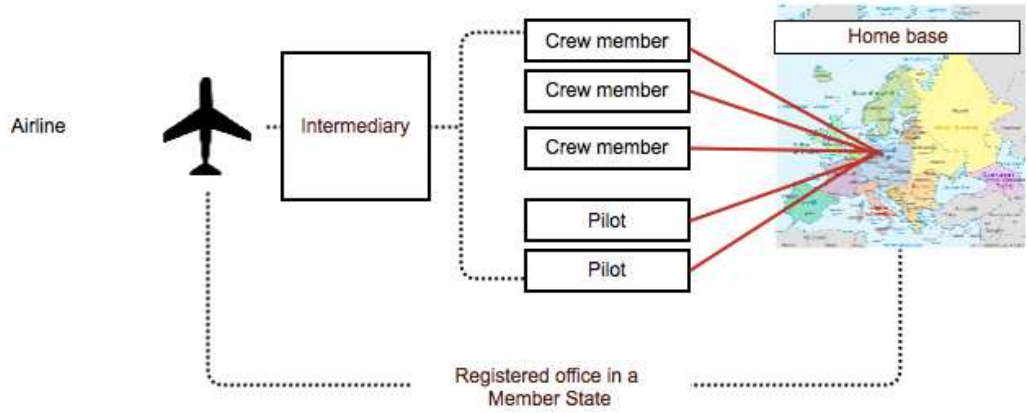
Fig. 171 Employee's legal status changes to self-employed



[193] And, of course, the legal implications of such a change with regard to social protection, liability etc

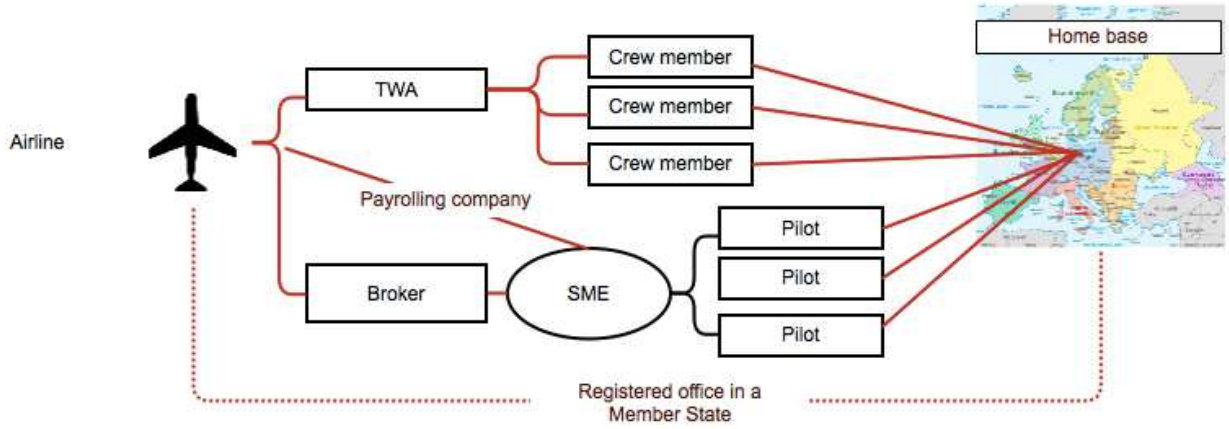
In the second scenario a new worker may agree on terms with the engager, including pay, after which the engager stipulates, however, that the worker must be paid by a specific employment intermediary or he or she will not be engaged.

Fig. 172 Introduction of the intermediary



A third scenario, illustrated by Figure 173, involves the supply of temporary labour to an end client by a temporary work agency, an employment or recruitment agency.[194] The temporary work agency, employment or recruitment agency provides the 'labour' or service (possibly via other intermediaries), but gives the pilot no choice but to be 'self-employed'.[195]

Fig. 173 Introduction of temporary work agency and an employment or recruitment agency – pilot self-employed



[194] Also known as a crew agency, this intermediary company not necessarily being established as a temporary work agency.

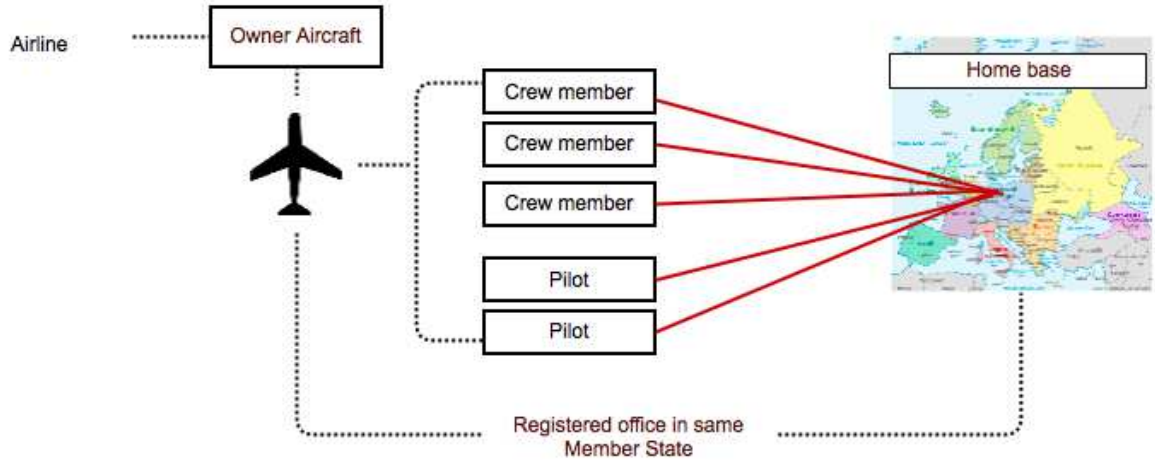
[195] Note that the self-employed entity often is an SME, creating the potential for quadrilateral relationships between the parties that are more complex than the triangular relationships.

Despite being 'self-employed', the worker is, through the use of specific clauses in the contracts, often highly dependent on the client, to the extent that in some cases one could say the client's authority over the service provider is not unlike the authority an employer has vis-à-vis an employee (subordination rather than subcontracting).

One of the main issues with these forms of subcontracting typical of the aviation industry is the identification of the operator. Is the end user the operator? Or is (one of) the intermediary subcontractor(s) the operator? Or can the self-employed pilot (or the company he or she is a shareholder of and which acts as a subcontractor) be qualified as an operator? This question is linked not only to the determination of the home base, and thus of the social legislation applicable, but also to FTLs as well as different kinds of liability in aviation.

This question is even more important with regard to a form of subcontracting that is known in aviation as the wet-leasing of aircraft. OPS 1.165 of Subpart B of Annex III to Regulation (EEC) No 3922/91 defines the *wet-leasing out* of an aircraft as "*A Community operator providing an aeroplane and complete crew to another Community operator, in accordance with Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers(1), and retaining all the functions and responsibilities prescribed in Subpart C, shall remain the operator of the aeroplane*".[196]

Fig. 174 Wet-leasing

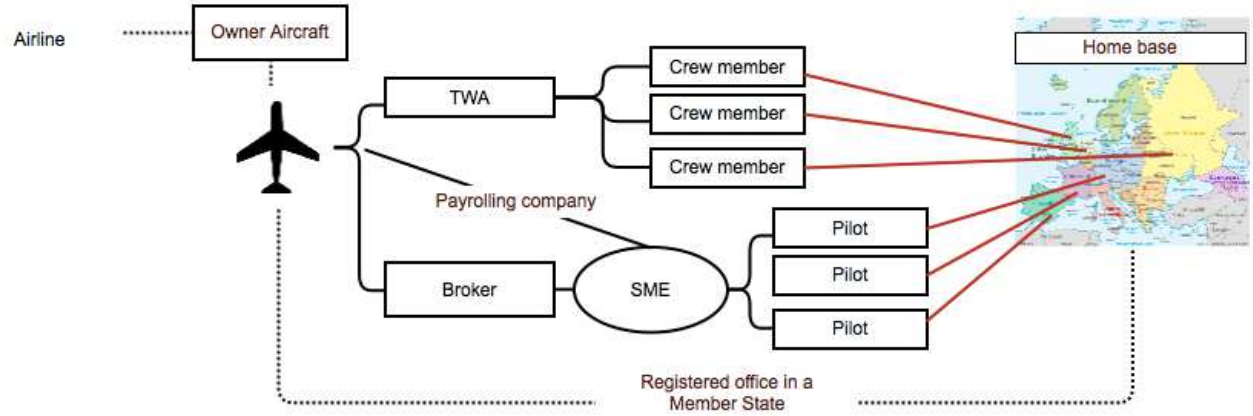


However, what with a Community operator not "*retaining all the functions and responsibilities prescribed in Subpart C*"? Furthermore, Article 2 of said Regulation states: "*For the purpose of this Regulation: (a) 'operator' means a natural person residing in a Member State or a legal person established in a Member State using one or more aircraft in accordance with the regulations applicable in that Member State, or a Community air carrier as defined in Community legislation*". The question remains who will be the operator of a wet-leased aircraft equipped with crew that is not employed by the Community operator outleasing said aircraft? Note that the definition of *wet-*

[196] OPS 1.165 of Subpart B of Annex III to Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation.

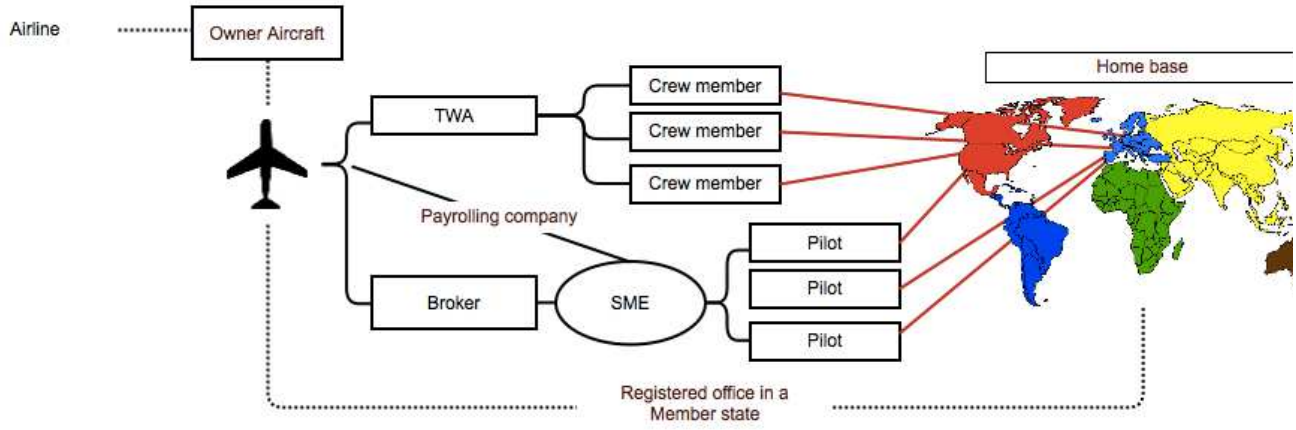
lease out entails the act of providing "an aeroplane and complete crew". It is not stated this crew has to be employed by the Community operator who wet-leases out the aircraft!

Fig. 175 Wet-leasing in combination with temporary work agency an employment or recruitment agency



We can even imagine a scenario where a number of crew members of the wet-leased airplane do not have a home base in the EU.

Fig. 176 Wet-leasing – crew members with home base outside of EU



One of the most atypical forms of employment reported to be on the rise in civil aviation actually can no longer be easily considered employment. More and more accounts are reported of airlines making use of the service of pilots by means of so-called pay-to-fly schemes. Pay-to-fly is the situation where a pilot actually pays an airline to fly one of its aircraft, often in order to either keep

enough flight hours required to remain licensed or to get more flight hours in order to get more flight hours, either to get a position as first officer or even to get enough flight hours to qualify as captain. It goes without saying that when a pilot *pays* an airline to fly one of its aircraft, questions regarding authority, safety and liability are even more pressing.

WORKING TIME

As we have seen above and based upon the data we collected, a majority of respondents indicated to work for a network airline via an open-ended employment contract concluded with the airline directly. This means that they are employees and thus labour law applies (which country's labour law is another question, however; see *infra* – Part 4. III. B. iii. Labour law applicable to crew members).

The survey presented the respondents with questions regarding time worked, an issue that is on the junction between labour law and flight safety regulations.[197]

Respondents were asked to give an estimation of the hours they worked per month. As can be seen, the percentage of respondents who stated to work between 50 and 75 hours a month is rather equal for LFAs, charter airlines and regional airlines. The largest group of respondents stating to work between 75 hours and 100 hours per month can be found in the group that stated to fly for an LFA.

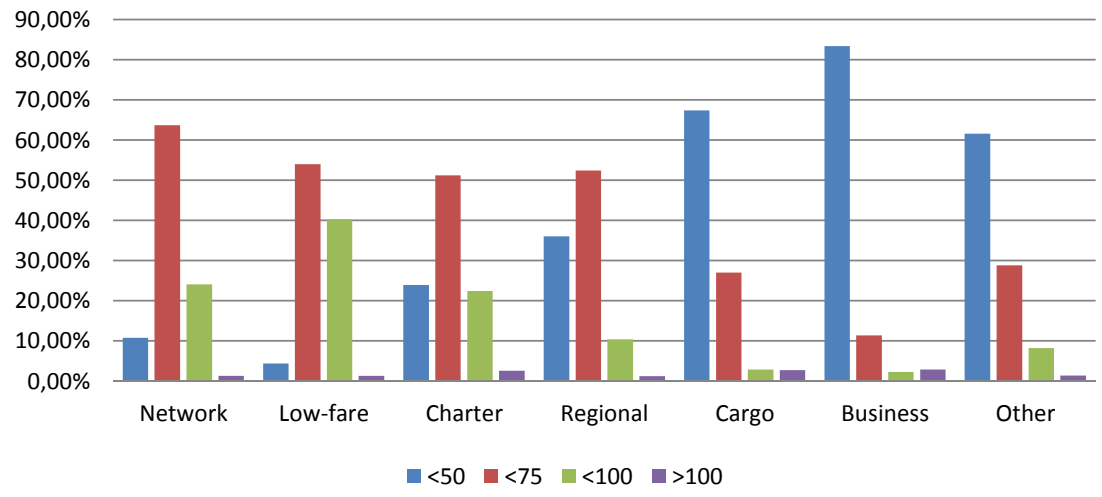


Fig. 177 Hours worked per month - type of airline

When these data are outlined per type of relation with the airline, it can be observed that the amount of hours reported by respondents who indicated to be directly employed and those who indicated to be self-employed is comparable, although slightly more respondents who indicated to be self-employed indicated to work more than 75 hours a month. However, of the group of respondents who indicated to fly for an airline via a temporary work agency, the number that indicated to work more than 75 hours a month is higher when compared to the other types of employment relationships.

[197] *Cfr* FTL regulations.

Fig. 178 Hours worked per month - type of employment

900 hours per year on average means 75 hours/month, if no vacation is counted. However, one should also take into account what is considered working time and what not. The respondents were asked if hours counted per hour worked or per actual flying hour ('block hours') and if flight preparations and checks were considered and remunerated as hours worked. Most respondents who stated to fly for a network airline, LFA, charter airline or in business aviation indicated that only the actual hours flown are counted (pilots per hour < 50% of pilots per block hour).

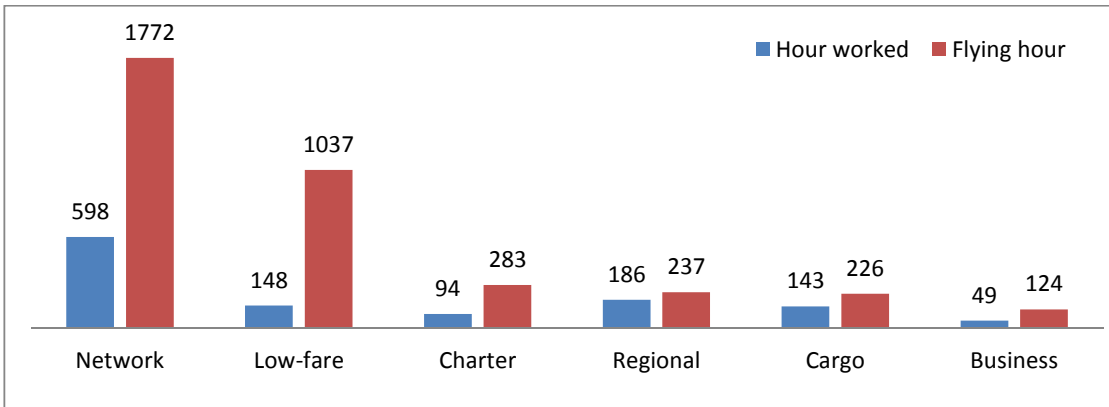


Fig. 179 Which hours are counted?

Almost one third of the respondents stating to fly for an LFA reported that preparations and checks are not counted as hours worked. Only 15% of the respondents stating to fly in business aviation reported that preparations and checks are counted as hours worked.

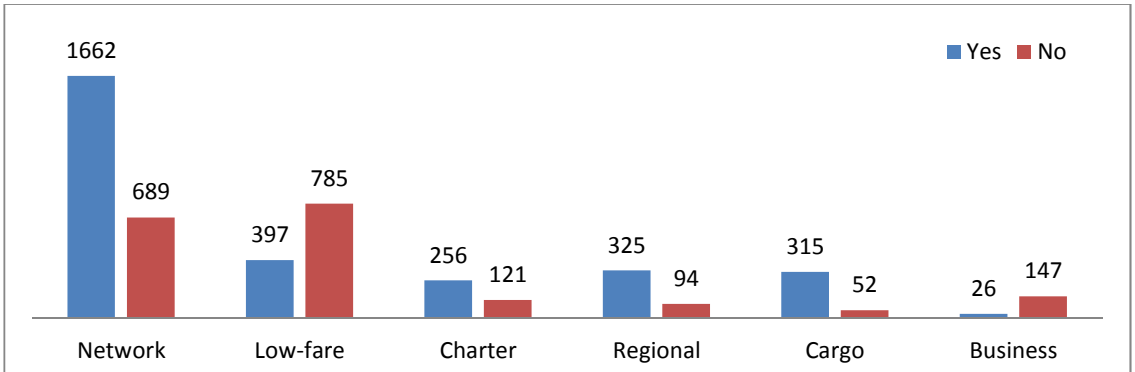


Fig. 180 Preparations and checks = hours worked?

Furthermore, a majority of the respondents who stated to fly for an LFA indicated that they do not have enough time for pre and post-flight duties!

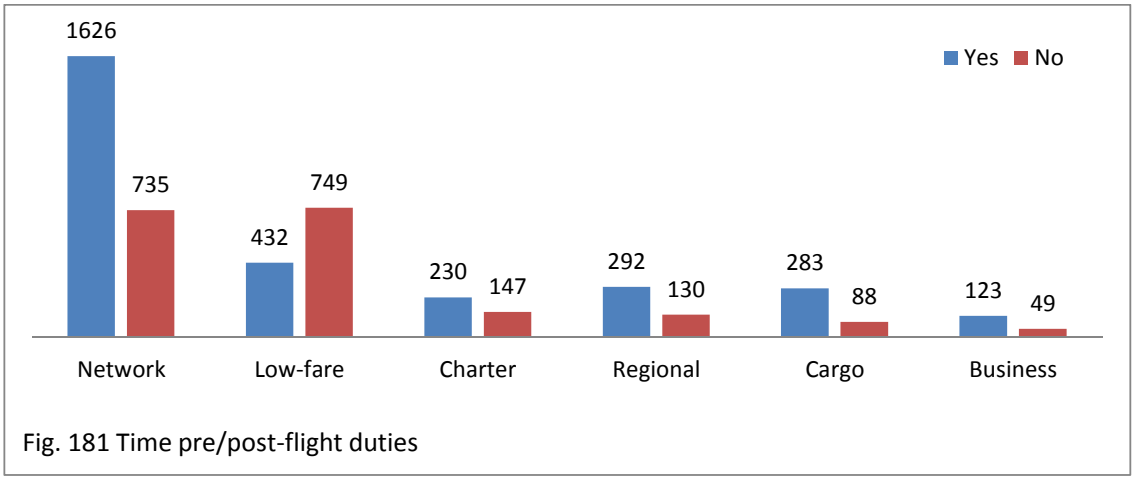


Fig. 181 Time pre/post-flight duties

vi. PILOT AUTHORITY AND DECISION POWER

Quote pilot

Was working 3 years for a low cost company. In this company I was and my ex colleagues were reluctant to take extra fuel, refusing going into cpt discretion. To big power distance between management and pilots. People in ops had no idea what they were doing either, just got their job as ex-cabin crew because they always said yes to questions. Illegal setup of limited companies in this country. I became a pilot to fly aircrafts, not to be an international tax criminal working for an airline that only takes and takes. Don't give any reward or human respect. There needs to be some kind of security, only get paid by actual hours without basic, people were reluctant to call sick, due two things. 1. People lost too much money. 2. Pilots might get sent for tea and biscuits with middle management, just to scare people off.

Quote pilot

I have flown when ill and when under stress. It is too convenient for the regulators and the airlines to say it is my responsibility to only operate when fit but then to ignore the pressure we are put under. Back to work interviews and phone calls from the parent companies management make it clear that sickness will not be tolerated.

Respondents were also presented questions with regard to the decision-making process, hence the freedom respondents have in exercising their function and authority. This is important vis-à-vis safety and liability, but might also tell us something about (bogus) employment relationships. For instance, theoretically a greater number of self-employed pilots would be expected to report having freedom in the decision-making process than e.g. typically employed pilots.

Figure 182 shows that respondents who indicated to fly for an airline with a direct employment contract (mostly) agree upon the statement '*I can amend the instructions of the airline based on e.g. objections regarding flight safety, liability, or regarding health & safety'*. And, although the largest amount of respondents who indicated to have another type of employment also stated that they agree, a larger group of respondents (in comparison to the directly contracted respondents) disagrees.

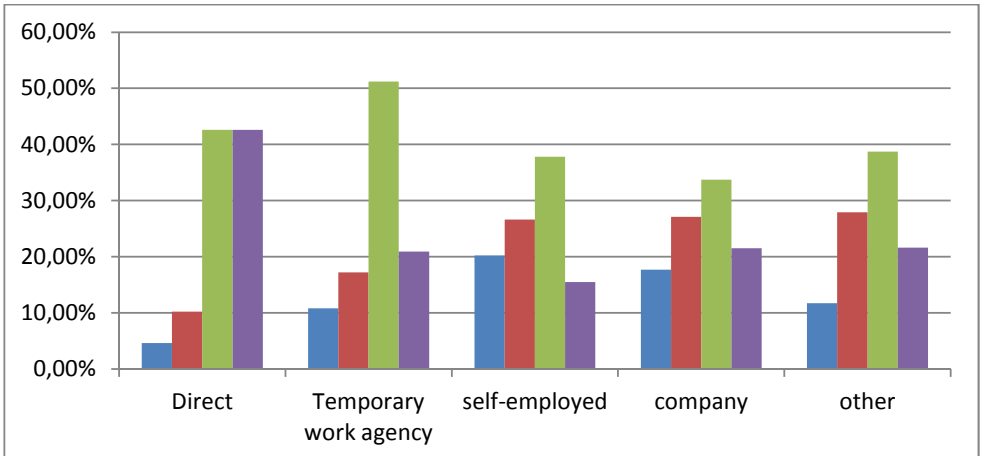


Fig. 182 Decision-making - type of employment

When respondents were asked if they were sometimes reluctant to take decisions, the majority indicating to be directly employed answered 'no' (red graphs).

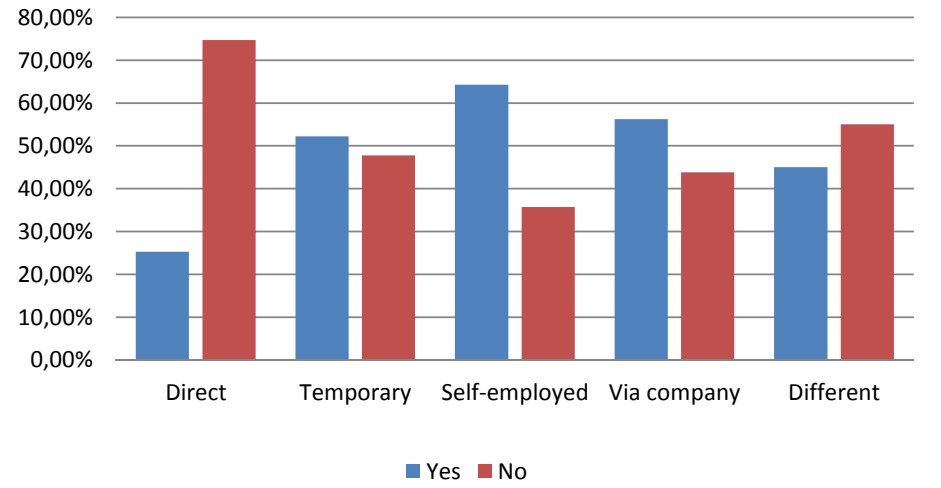


Fig. 183 Decision-making - type of contract

When this question was presented with regard to the respondents' colleagues,[198] again, especially the ones (and most of all those indicating to be self-employed) with an atypical employment contract more frequently indicated that they believe that their colleagues are indeed reluctant to take such decisions.

Quote pilot

Apart from social considerations, safety is impacted. "Oh, so you want to keep working with us, but, see, you took 2 sick leaves last year, and you refused the dispatch with technical deviations once, and, you know, we have your personal fuel statistics ...".

Quote pilot

When you are sick more than 4 times a year you get called in for a talk with the office to discuss the reason why.

[198] One of the reasons this question was asked in this way is that it was expected that pilots tend to not easily admit and thus underreport safety-related issues (e.g. fatigue) about themselves (bias), but are less biased when it comes to identifying such issues in colleagues. This is, by the way, one of the reasons why a 'four eyes' principle is implemented in crew composition. Many interviewed stakeholders as well as respondents reported this 'four eyes' principle as being highly compromised due to 'certain crew management styles'. Someone referred to a certain crew management style as a 'blame culture'. One interviewee told the story about a manager from an airline adressing pilots flying for the airline who told them: 'If you are looking for respect, buy a dog'. Needless to point out that working time limitations and safety requirements and procedures are costly and, from one point of view, have a negative impact on crew productivity — the aviation industry not being different from other sectors be it in transport or not. Nevertheless, such limitations do have a clear *ratio legis* and should be enforced according to the importance of the legal goods they aim to protect.

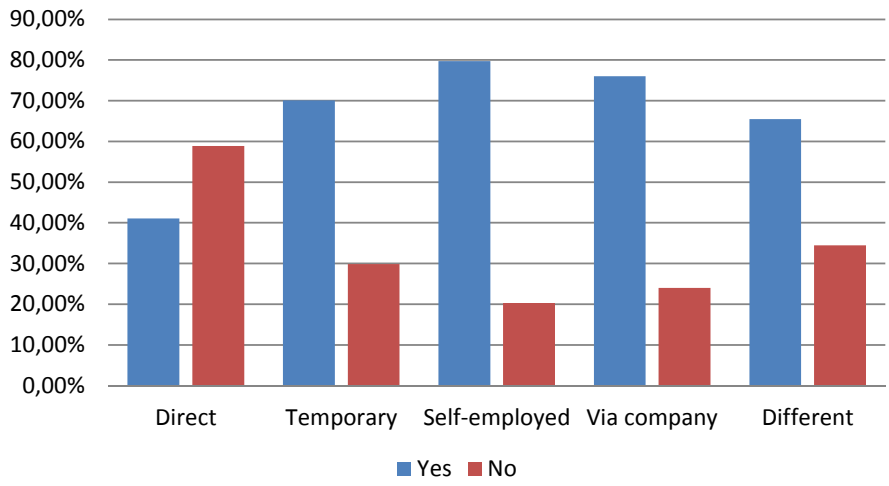


Fig. 184 Decisions of colleagues - types of relations

When asked if their employment status affects their ability to take such decisions, again, especially the respondents indicating to be atypically employed more frequently answered that this is the case.

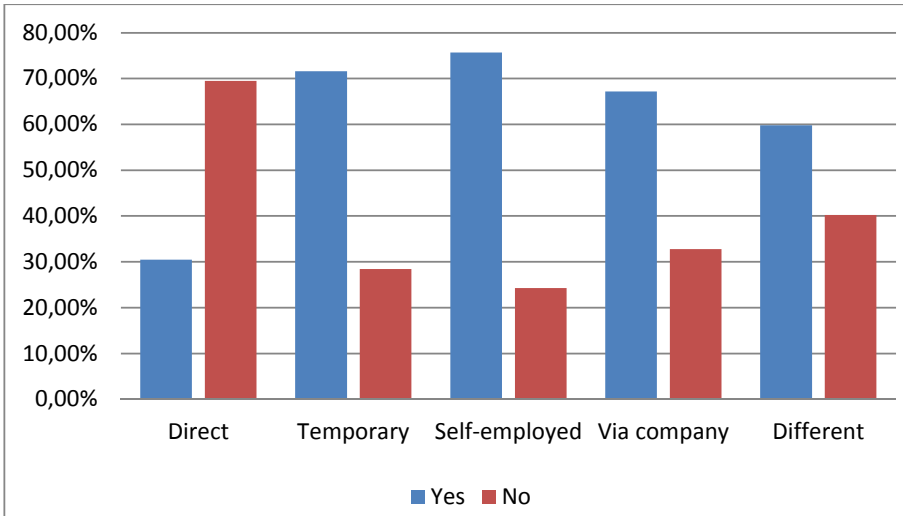


Fig. 185 Employment status affected?

Quote pilot

I feel unsafe to make decisions that I need to as a Captain. Not following the company line or the company's wishes puts me in a position where I have to try and balance what is right and what is the right choice for my career. This applies to sickness, and applies to my operational decisions like fuel. I have flown with many clearly ill colleagues who were either fearful of calling in sick and the subsequent phone calls and enquiries from the company or who would not be paid for their days flying as they only get paid by the hour they fly, there is no sickness pay.

Quote pilot

I'm not the typical young pilot on the euro market. But I do see what is going on around in the business. I believe I am like a dinosaur still around blocking companies from totally unplugging the flying business. Being a Captain with most of my career behind me, I fly with young eager pilots. They come from several of the existing low cost carriers. When asked what the difference is compared to my company and if they like it with us, their answer is most often that it feels more serious that we can take operational decisions based on operational and safety matters only. Without fear of losing employment status.

This same pattern can be found when looking at the answers to the same question regarding the respondents' colleagues. Again the results are more outspoken.

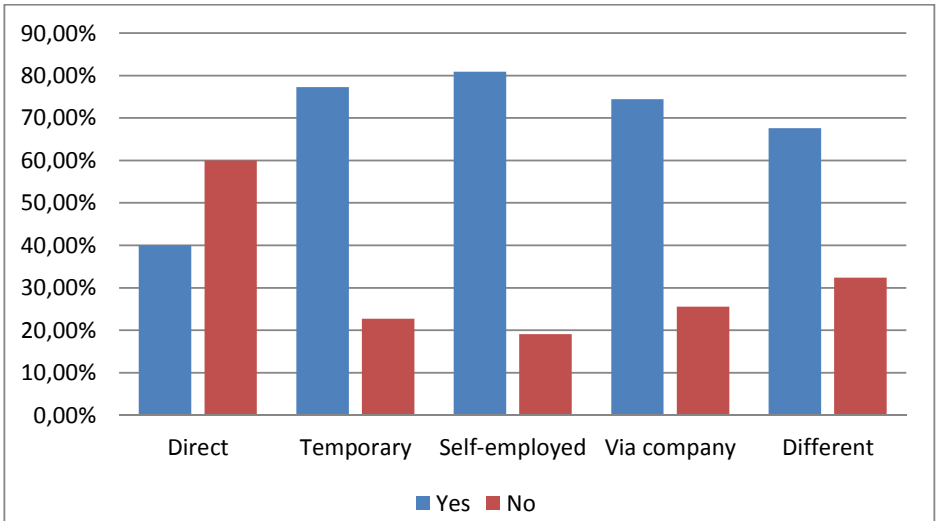


Fig. 186 Employment status colleagues affected

These figures show that decision-making problems are most prevalently indicated by respondents claiming to be self-employed pilots. Therefore, these are examined more closely in the next section, since these might be an indicator of a bogus situation.

vii. THE SITUATION OF SELF-EMPLOYED WORKERS

When we take a closer look at the group of respondents that indicated they are self-employed, as Figure 187 shows, the group of the respondents indicating to belong to the younger group is more strongly represented (53% of the respondents stating to be self-employed stated being 20-30 years old, which relates to 14.5% of the respondents claiming to be aged 20-30 years).

Figure 188 shows the respondents who stated to be self-employed per age group. Figure 177 shows the respondents who stated to be 20-30 years old per type of airline.

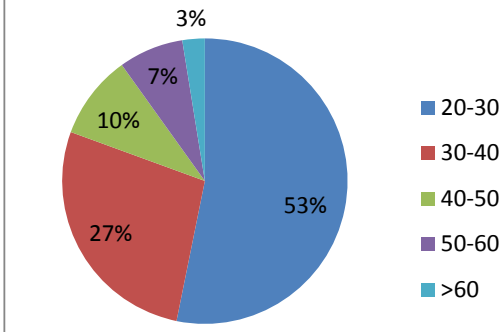


Fig. 187 How old are you?

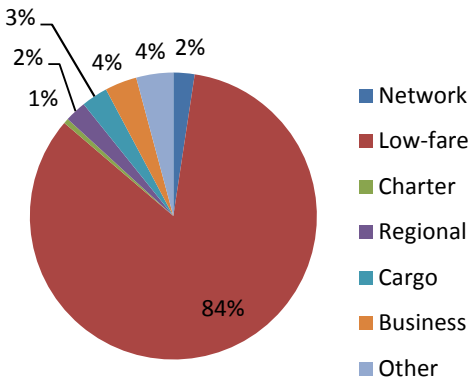


Fig. 188 What type of airline do you fly for?

Table 32 shows the companies these 'young self-employed' respondents reported to fly for. Almost 97% of all the respondents stating to be self-employed and stating to fly for an LFA indicated that they fly for *Ryanair*. This means that 18.5% of the respondents stating to fly for *Ryanair* stated that they are 20-30 years old and self-employed.

Table 32 Youngest self-employed respondents flying for an LFA

Airline company	Percentage	... % of total low-fare group	% of pilots working for the company at level of study
Easyjet	0.8	0.06	0.46
Ryanair	96.8	8.1	18.46
Wizz	2.4	0.02	4

In order to evaluate whether these respondents are actually self-employed, different questions were presented, e.g. about the level of decision-making. In this section, these different variables are presented per type of airline and at company level.[199]

Figure 189 shows the amount of respondents stating to be self-employed who also stated to have no choice with regard to the *amount* of flying hours.

[199] Due to outfall upon these questions, sample sizes can be small.

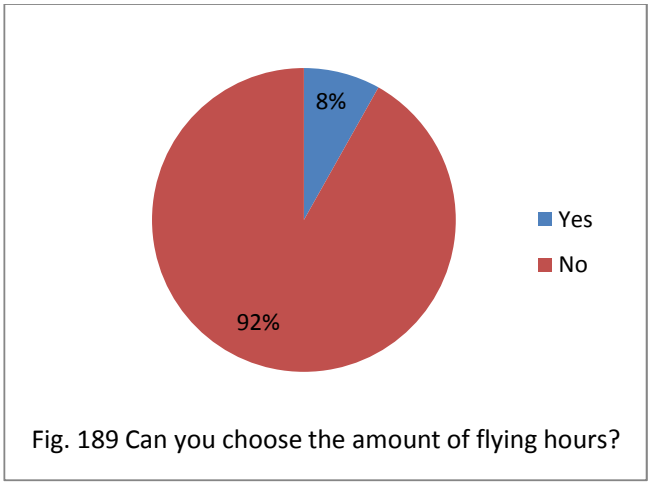


Fig. 189 Can you choose the amount of flying hours?

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 (0.9% *Easyjet*; 0.5% *Norwegian*; 21% *Ryanair*; 18.6% *Wizz*) and 5.6% for a network airline.

In 89.6% of the cases (respondents stating to be self-employed and also stating to have no say in the amount of hours they clock up), they report this is a decision taken by the registered office of the airline.

89% of *this* group stated that hours are counted per actual flying hour ('block hours'). Of *this* group, 75% stated to fly for an LFA.

82% of this group stated that flight preparations and checks are *neither* considered *nor* remunerated as hours worked. Of this group, 83% indicated to fly for an LFA.

Moreover, 66.5% stated *not to have sufficient time for pre/post-flight duties*. Again, 88% of these respondents indicated to fly for an LFA.

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 of the airline based on e.g. objections regarding flight safety, liability, or regarding health & safety*'. Of these 20%, 83% indicated that they fly for an LFA. Furthermore, another 26.6% 'generally' disagrees with said statement, of which 90% (!) indicated they fly for an LFA. In 85.2% of the cases, the respondents stated this is decided by the registered office of the airline.

When asked if they were sometimes reluctant to take such decisions out of fear of possible negative consequences for their professional careers, 64.3% of respondents answered in the affirmative!

When asked if they think colleagues are sometimes reluctant to take such decisions for fear of possible negative consequences for their professional career, even more respondents, i.e. 79.7%, answered affirmatively!

Furthermore, 75.7% of the respondents who reported they are self-employed indicated that they believe their employment status affects their ability to take such decisions!

Moreover, 80.9% of respondents believes this to be the case for their colleagues!

6.1% of the respondents stating to be self-employed strongly disagreed and 17.8% generally disagreed when asked if they were able to decide not to fly for legitimate reasons, e.g. due to illness. This means that in total more than 1 out of 5 respondents reported problems with regard to taking the decision not to fly for legitimate reasons!

When asked if they were sometimes reluctant to take such decisions out of fear of possible negative consequences for their professional careers, 64.3% of this group of respondents answered yes.

When asked if their colleagues were sometimes reluctant to take such decisions for fear of possible negative consequences for their professional career, 78.5% answered affirmatively.

Moreover, 72.1% of the respondents stating to be self-employed indicated that they believe that their employment status affects their ability to take such decisions. 79.5% of the respondents stating to be self-employed confirmed this statement when this question is projected upon their colleagues.

III. LEGISLATION SHOPPING: THE APPLICABLE SOCIAL LEGISLATION

Quote pilot

I am very satisfied with my company, but the future is concerning me. With all the focus on "low cost" I don't know where it will end. The last company I worked for was based in State A, airplanes were registered in State B and we worked in State C. Tax and salary where paid in State A even though we were flying in State C. So, I hope the future will take care of these problems.

A. INTRODUCTION

In Part 2 we already described the liberalisation of the aviation sector and the emergence of the low-cost carrier (LCC). One of the characteristics of this model is the search for reducing costs.

Since the low-cost business model tries to maximise profit as well as market penetration by cutting costs wherever possible, it comes as no surprise that also labour-related costs will be minimised to the fullest. A closer look at the effects of the introduction of the low-cost model in European aviation reveals an evolution that deserves more attention.

The constant search for cost-reducing measures in particular related to the labour cost of employees has led to a trend of increased risk of 'legislation shopping' within the European aviation industry: (some) employers seek to engage individuals in Member States which offer the economically most advantageous hiring conditions or the lowest (overriding) mandatory labour law provisions.[200] In addition, airlines will be looking for the countries where the lowest social security contributions must

[200] See e.g. Article 9 of 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).

be paid. This search for the cheapest employment conditions entails the risk that air crew become the victims of these actions by the employers for economic success. For that reason, it is of cardinal importance to determine which labour law and social security law is applicable to the persons concerned. In both domains the European legislature has been active from the earliest stages of the founding of the European Union.[201] Moreover, the European legislature has adapted European legislation in the field of the applicable social security legislation and the applicable labour law to better take into account the specific situation of the aviation sector.[202]

From the outset, however, it must be kept in mind that there is a fundamental difference between labour law and social security law. Labour law is in its origin private law — and thus leaves parties room and the freedom for negotiations, also about the choice which legislation will be applicable to the agreement they conclude. Most of the times, this leaves the employer with several options, bringing the employee in a vulnerable position. This is one of the main and most fundamental differences with social security legislation, which is in its origin[203] public law, and thus does not leave parties room for negotiations, nor the freedom to deviate from the rules included in the Regulations that coordinate social security systems.[204] Although it might be expected that this difference would make it more difficult for employers to revert to 'legislation shopping' in the domain of social security than in the domain of labour law, practice shows that the application of the social security coordination provisions is not without problems.

B. APPLICABLE LABOUR LAW

i. THE DATA

Quote pilot

I am based in a country where I pay no social tax, no income tax but use all the social services. Although I start and finish my day and have my home in this country, I am somehow exempt from the labour laws that are far stricter than the country where my airline has their headquarters. Local airlines whose business we are now taking have much higher responsibilities towards their employees and are at a competitive disadvantage. How is this fair in a single market?

To get a view on the state of affairs with regard to labour law, we presented the respondents questions relating thereto.

First of all, we asked respondents who indicated that they are connected with the airline through an employment contract which labour law is applicable according to this contract. Figure 190 shows the countries of the applicable labour law reported (N=5674). This Figure gives an overview of the

[201] Regulation (EEC) No 3/58 of 25 September 1958 on social security for migrant workers.

[202] See e.g. Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004. p. 4-10

[203] And to date in most countries still is public law.

[204] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community; Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

countries that are represented by at least 0.5% of respondents in this study. Only respondents who reported to have an employment contract (direct, via a temporary work agency or via a company) were presented this question.

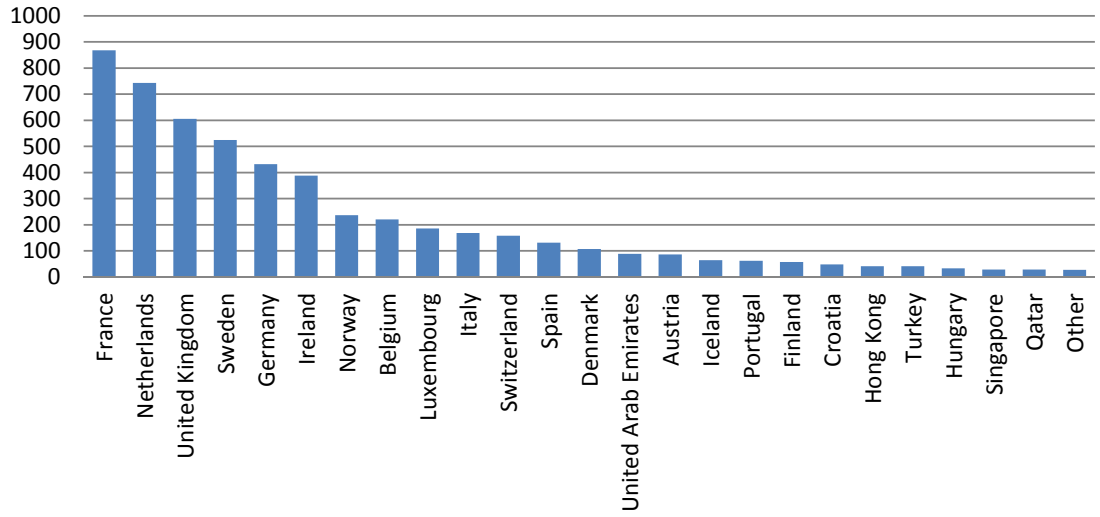


Fig. 190 Which country's labour law is applicable to you?

We also wanted to know if this labour law legislation is also the legislation of the country where the official home base is situated. 85% of the respondents stated this to be the case. In 10% of the other cases, it was stated that the country of the applicable labour law is the labour law of the country where the airline's registered office is situated.

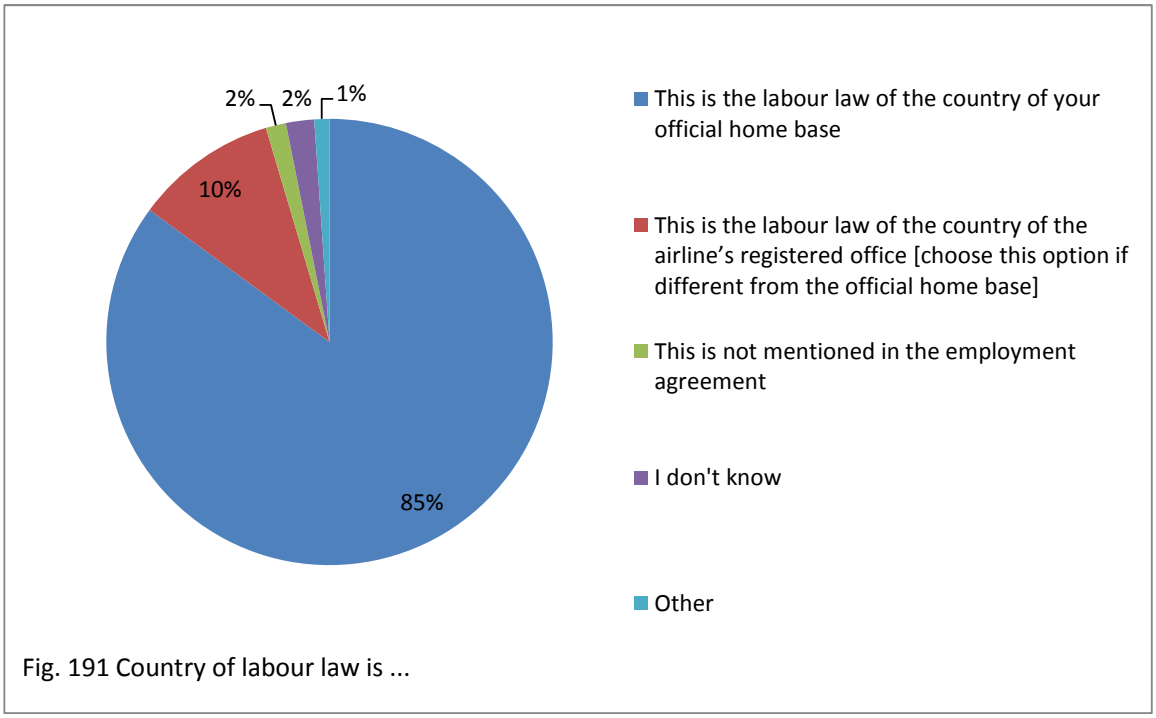


Fig. 191 Country of labour law is ...

When asked if the registered office of the airline is in the same country as the registered office of the company with which the respondents reported having concluded an agreement, 79% of the respondents concerned confirmed this (N=5231).

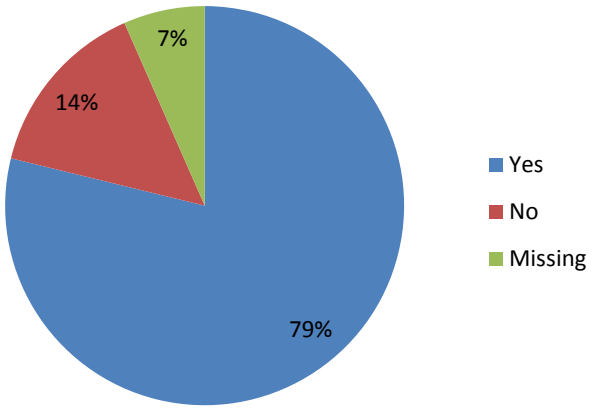


Fig. 192 Is the registered office of the airline in the same country as the registered office of the company with which you have concluded an agreement?

Since also the place of recruitment or the place where the contract was signed *can* be a connecting factor and an indicator of a bogus situation or of social engineering, we also presented respondents with questions relating thereto.

Figure 193 presents the countries (top 0.5% representation) where the respondents reported to have been recruited or first contacted by the company.

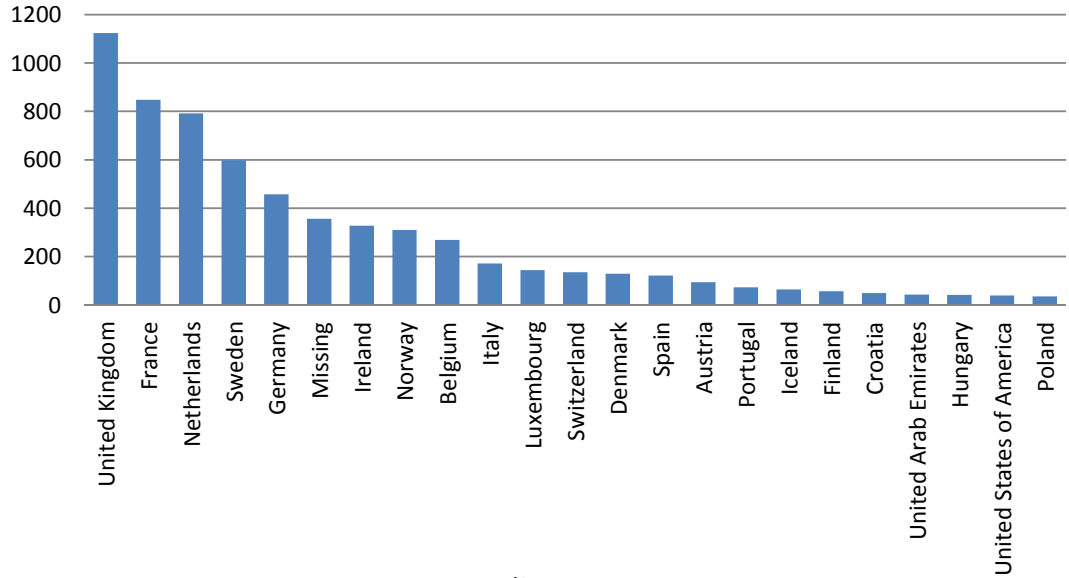


Fig. 193 In which country were you recruited/first contracted by the company?

Figure 194 shows the countries (top 0.5% representation) where the respondents indicated to have signed their contracts.

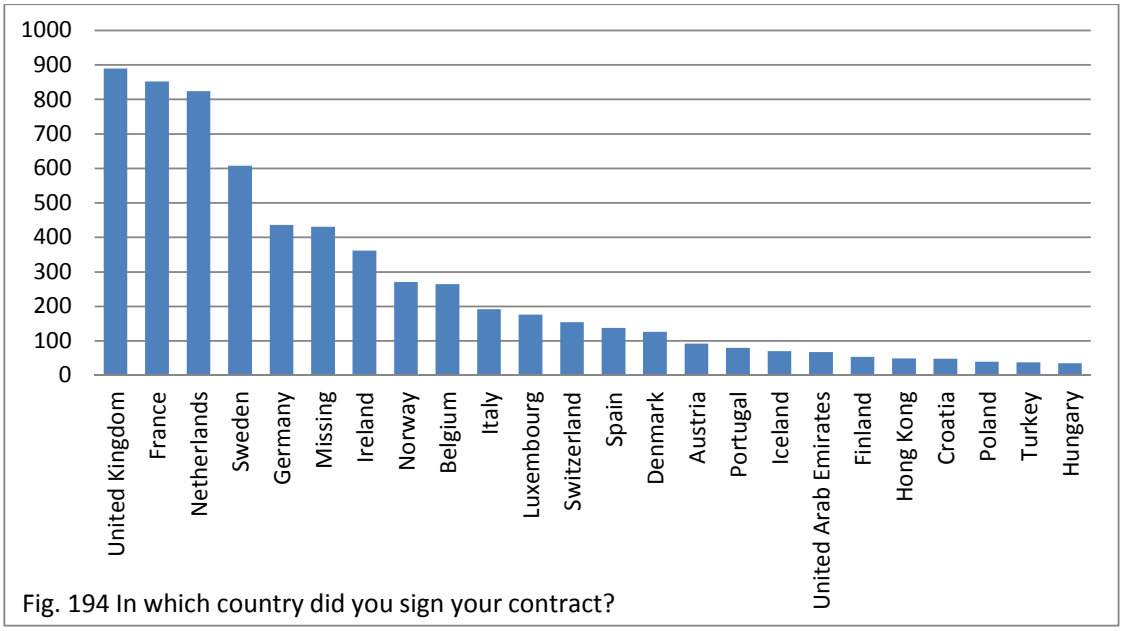


Fig. 194 In which country did you sign your contract?

ii. SUBCONTRACTING

The respondents who indicated that they are self-employed, the respondents who indicated that they work for an airline via a company and have no employment contract, the respondents who indicated that they work via a company and do have an employment contract and are shareholder, as well as the respondents with a different relation were asked which legislation is applicable to their cooperation agreement with the airline (N=440; top representation of >0.5%).

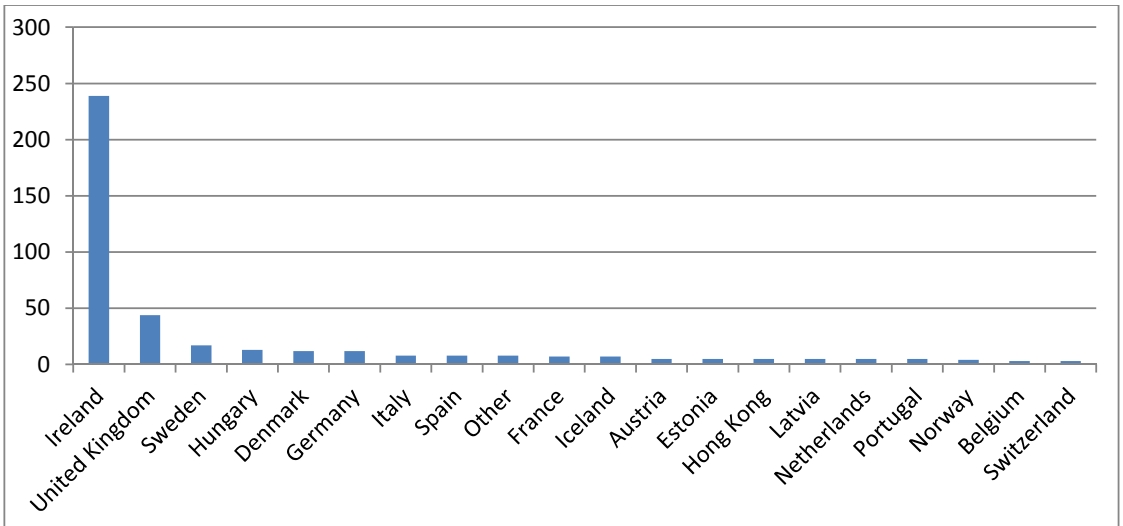


Fig. 195 Which country's legislation is applicable to your cooperation with the airline

Surprisingly, only 31% of these respondents stated that this country is the country where the official home base is located. A majority of about 48% stated that this country is the country where the airline's registered office is.[205] *Only 7%* of the respondents who provided an answer to this question indicated the legislation applicable to their cooperation agreement with the airline is the legislation of the country *where they established their own company*.[206] Another 5% indicated that it is the legislation of the country of the temporary work agency they work for (!).

In our view, and in the view of many, these data do not come as a surprise and give clear indications that the relation between the *client* and the *service provider* (between the *contractor* and the *subcontractor*) is *not a level one*. Whereas this is often the case, it does come as a surprise that it is *the client* who clearly holds the upper hand. This is a situation which will hardly be observed when it is a *private* client of a service provider (e.g. the customer of a provider of telecom services), but which does prevail in e.g. the construction sector when the subcontractor is not specialised. It might also be a clear indication that supply is higher than demand, leading to lower prices the client is willing (or able) to offer for the service all the while demanding higher quality or a higher return on investment in general.

[205] This might be an indicator of a bogus situation, but is not necessarily a *definite sign* thereof, but from an enforcement point of view, this might be an interesting fact to look into

[206] In our view, this is a clear sign that something is going on.

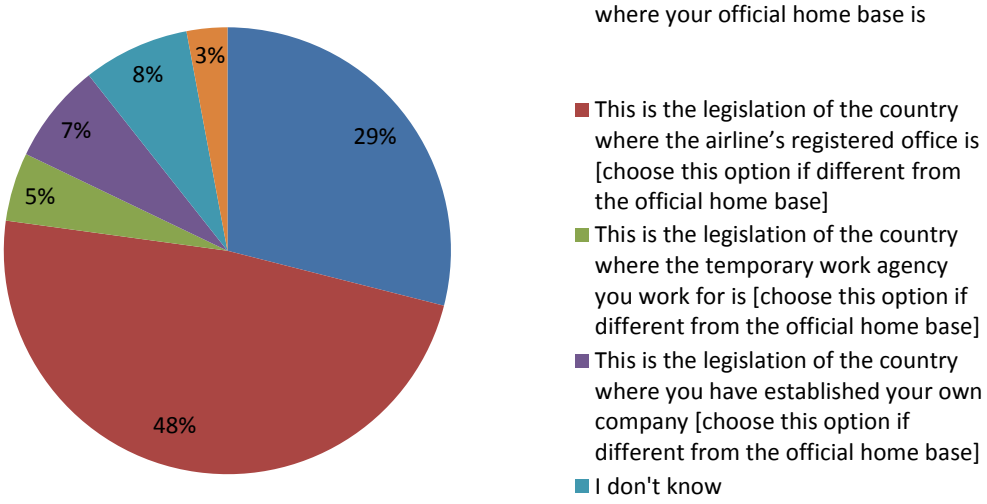


Fig. 196 Legislation applicable to cooperation with airline is ...

iii. LABOUR LAW APPLICABLE TO CREW MEMBERS

WHICH LAW APPLIES?

Contracts of air crew working on international flights are in particular characterised by several international elements. By definition, the law of several countries will apply. For example, it might be that a pilot or cabin crew member was recruited in country A for an airline registered in country B and flies between country C and country D. It may happen that legislations of several countries not only apply but conflict with each other. It is e.g. here that international private law pops up. The question which country's labour law applies to workers in an international/European context is governed by international private law. After all, whereas the provisions concerning the free movement of workers which are included in the TFEU, i.e. Articles 45 *et seq*, do govern access to the national labour markets, and state that foreign workers must be given the same treatment as a Member States' own nationals, they do not specify which labour law is applicable. Consequently, international private law remains fully applicable. Initially, the 1980 Rome Convention 80/934/ECC on the law applicable to contractual obligations was concluded between a number of Member States and although it was not an EU legal instrument (it is not based on the EC Treaty), it is nevertheless considered part of the acquis communautaires.

After many years of discussion, an EU instrument was concluded that replaced the Rome Convention: the so-called Rome I Regulation.[207]

[207] 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). Because the Rome I Regulation only applies to contracts concluded after 17 December 2009, the 1980 Rome Convention will continue to be valid for 20 years, for example, so long as we are only dealing with contracts concluded before or 17 December 2009. The European Covention on Contracts will consequently remain applicable for some considerable time to come. It should in any case be noted that, apart from a couple of exceptions, the Rome I Regulation follows the Rome Convention for contracts of employment. What applies for one thus applies for the other

Which law is applicable is determined with the aid of reference rules or conflict rules. These rules must enable the court to refer a matter in which a foreign element appears, this element having been included in a legal category (the so-called reference subject), to a foreign legal system (consequence of the referral), by means of a connecting factor (the so-called reference norm).[208] The law on conflicts will thus look for the law applicable to a legal relationship that has an international character.[209] Reference rules contain no material law solution to a dispute, but try to bring the international relationship under a particular national legal system.[210] The connecting factor establishes the relationship between the actual international legal relationship and the legal system to be applied thereto.[211] This factor must make it possible to localise a particular legal relationship territorially. This can either be a subjective connecting factor, such as the desire of the parties, or usually an objective connecting factor, such as the place where the service is provided, where the contract is concluded, the place of the employer's establishment, the worker's domicile or place of establishment, the nationality of the parties etc.

The *conditio sine qua non* for the Rome I Regulation to come into play is a legal relationship with an international character. In other words, a situation must arise in which a choice has to be made between the laws of different countries. The rules of the Rome I Regulation have a universal character.[212] Consequently, this instrument applies not only to situations where there is a link with one of the Member States of the European Union. The conflict rules of the Regulation can also give rise to the application of the laws of a country which is not a member of the European Union.[213] Consequently, the rules apply to the nationals of a Member State and persons with their domicile or residence in the Member States as well as to nationals of third-party countries with their domicile or residence in the latter countries.

Due to the variety of international connecting factors in the aviation sector, it is far from easy to determine which legislation applies to air crew. It thus comes as no surprise that many disputes are brought before the courts to determine the labour law applicable to air crew.

The system of reference rules of the Rome I Regulation works with a multi-stage composite connecting factor. This means that if the first point of connection does not lead to the allocation of the applicable legal system, matters proceed to the next rung on the reference ladder.

However, one should make a clear distinction between the determination of the applicable labour law and the determination of the competent court. The Rome I Regulation deals with the determination of the legislation applicable to contractual obligations (*in casu* the applicable labour law),[214] whereas as of 10 January 2015, Regulation (EU) No 1215/2012 determines the competent

[208] J. Briers & Y. Jorens, 'Detachering en het collectieve arbeidsrecht: een probleemstelling', in A. Van Regenmortel & Y. Jorens (eds), *Internationale detachering*, 1993, Bruges: die Keure. p. 258.
[209] L. Strikwerda, *Inleiding tot het Nederlandse Internationaal Privaatrecht*, 2002, Deventer: Kluwer. p. 27.
[210] A. Van Hoek, *Internationale mobiliteit van werknemers*, 2000, The Hague: Sdu Uitgevers. p. 64.
[211] L. Strikwerda, *Inleiding tot het Nederlandse Internationaal Privaatrecht*, 2002, Deventer: Kluwer. p. 31.
[212] Article 2 of 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).
[213] Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I , OJ C 282, 31 October 1980. p. 1-50.
[214] 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).

court in civil and commercial matters with an international character.[215] The fact that one regulation makes the court of a Member State competent to rule on (a part of the) case does not automatically imply that the *legislation* of that Member State (e.g. labour law) is also applicable to the facts of the case! International private law often leads to the courts of a country having to apply the legislation of another country, since a court of a country can be competent without that country's legislation being the applicable legislation!

APPLICABLE LEGISLATION: THE OPTIONS

When it comes to the legislation applicable to contractual obligations, the general principle of autonomy of the will of the parties applies.[216] However, if the parties have not made a choice, then the law will be specified on the basis of a number of objective points of connection.[217] In the case of an employment contract, the aim is to protect the worker.[218]

being the autonomy of the will of the parties, the parties have the requisite freedom to determine by mutual consultation which labour law applies to them. Consequently, it is possible to choose any system – although they cannot avoid the (overriding) mandatory provisions.[219] Parties are even allowed to choose a legislation from a completely exotic country which has no connection whatsoever with the case at hand.[220] As such, it is perfectly legal for a European airline and a crew member to agree the labour law of e.g. an Asian country with which they have no connection at all to be applicable to the agreement they conclude. On a side note, at present, there is at least one European airline with crew members based in an Asian country. It might be expected that more airlines will follow this example.

Article 8 of the Rome I Regulation states that:

"*1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law 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 pursuant to paragraphs 2, 3 and 4 of this Article.

2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from

[215] 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. Regulation (EU) No 1215/2012 is a recast of and replaces Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[216] Article 3 of 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).

[217] Article 4 and following of 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).

[218] See e.g. Article 8 (1) *in fine* of 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).

[219] Cfr. Articles 8 and 9 of 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).

[220] Y. Jorens, 'Detachering en het individuele arbeidsrecht', in Y. Jorens (ed.) *Handboek Europese detachering en vrij verkeer van diensten*, 2009, Bruges: die Keure. p. 152 155.

which[221] *the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.*

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply."[222]

If the parties have not made a choice or if this choice is unclear, the Rome I Regulation itself specifies which law applies to the parties involved. The aim here is to ensure that the worker enjoys the protection of the legislation of the country where he or she does his or her work, i.e. the *lex loci laboris*, not least because it can be expected that the contract of employment will have a close connection with this country.

But even if a choice has been made, the worker can never lose the protection offered by the mandatory provisions of another country with which there is a close connection. These mandatory provisions institute a sort of minimum protection. These are those provisions of labour law installed in favour of the employee and which may not be deviated from by agreement.

The free choice for the legal system of an 'exotic country' therefore does not prevent certain provisions of a different legal system from being applicable. In principle this is the legislation of the country where the worker 'habitually' works in performance of his or her contract, unless the contract of employment is 'more closely connected' with another country. This indicates that it is a matter of exception and must therefore be considered restrictive.[223] To a certain extent, this helps a pilot to get protection which he would not receive because the choice is mainly the employer's.

WHERE DO RESPONDENTS STATE THEY WORK?

It is self-evident that it is a complicated issue to determine the place where a crew member is (habitually) working on international flights, as by definition they work in different places. However, what then to say about the rule in the Rome I Regulation that stipulates the following: if it cannot be determined in which country the worker performs his or her habitual activities, the worker is subject to the legislation of the country where the place of business which engaged the worker is situated. How do these rules relate to each other? There is a possibility to argue that due to the international mobility of air crew such persons per definition do not work in one State and that it is almost impossible to determine the place of habitual work. As a result, the legislation of the country where the place of business which engaged the worker is situated would almost always apply. As we will

[221] As we will see later on the wording "from which" is not unimportant as it was introduced in particular for the aviation sector.

[222] Article 8 of 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).

[223] The problem with highly mobile workers of course being the determination of the place where they habitually carry out their activities.

see, EU legislation and case law have developed in such a way that this is no longer automatically the case.

COURT COMPETENCE AND CONNECTING FACTORS

National case law

Answering these issues, another EU instrument is often referred to which might at first sight seem unrelated to the question of the applicable labour law. This instrument is Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[224] This Regulation answers the question which courts are competent with regard to, among others, contracts of employment. This instrument is interesting for several reasons. In the first place, airlines often defend the thesis, and often successfully, that the national court handling a case in which they are involved is not competent.[225] Examples of such a successful defence can be found in some cases before certain Belgian labour courts.

A first case before the Charleroi Labour Court involving air crew members working for an LCC revealed some of the difficulties determining whether or not the court was competent. In 2005, the Charleroi Labour Court ruled on a case brought by three former LCC employees. They had been dismissed in 2002, just before their legal notice period ended. They claimed that this was not in conformity with Belgian labour law.[226] Their contracts of employment were established under the legislation of the airline's Member State of origin, as the crew worked most of the time on board of an Irish aircraft registered in Ireland.[227] Nonetheless, the Charleroi Labour Court agreed with the claim of the employees; firstly, because Regulation (EC) No 44/2001 allows an employer to be brought before the courts of the Member State where the employee habitually carries out his or her work, even if this Member State is different from the one where the employer is domiciled. Secondly, the Court referred to the Rome Convention of 1980, which states that, for individual employment contracts for which the law applicable was explicitly chosen (in this case: Irish law), the mandatory provisions of the law of the country where the worker habitually works should nonetheless be applied if the free choice of the applicable law would deprive the worker of the protection afforded to him or her by those mandatory rules of the law that would be applicable if no choice would have been made. As Belgian employment protection is more favourable to employees than the Irish legislation, the Court considered all Belgian rules to be applicable in this case, and ordered the airline to pay compensation. In 2007, however, the Mons Appeal Court overruled this decision, stating it did not have jurisdiction over air crew employed by another EU airline. The Mons Appeal Court argued that, as the employees' place of work crosses borders and therefore jurisdictions, it is impossible to determine a place of habitual work. According to the Court, the only court competent to rule is the one in the country where the employer is based, and the airline registered.[228]

[224] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[225] See the Charleroi case discussed above.
[226] Tribunal du travail de Charleroi (21 03 2005) – 2.086/05 *Madame Anne Legros versus Ryanair*.
[227] Ecorys, 'Social Developments in the EU air transport sector. A study of developments employment, wages and working conditions in the period 1997-2007', European Commission, DG Energy and Transport, 2007. p. 61.
[228] *Ibid*. p. 62.

Another case was launched by six former employees from an LCC who sought payment of some premiums, such as holiday pay and end-of-year bonuses, which they would have been entitled to under Belgian labour law.[229] The employees claimed Belgian labour law to be applicable, because they were living in Belgium and Brussels South Charleroi Airport was their main place of work where, amongst other things, their flights started and ended, and where their personnel affairs were handled. The airline, however, argued that Brussels South Charleroi Airport was only an airport called in at in between flights, that most of the work was performed during the flight, and that its division present in Charleroi could not independently organise anything without cooperation with the Dublin headquarters. Therefore, the airline maintained that Belgian labour law was in no way applicable – conveniently so, as from the company's point of view Belgian labour law was more disadvantageous than Irish labour law.[230]

Stating that the claimants had not sufficiently substantiated their arguments and that the activities in Belgium were not preponderant, the Charleroi Labour Court agreed with the company and declared itself incompetent to rule the case.[231] It reasoned that decisions that affected the crew were taken in Ireland, a fact which convinced the Court that Belgian law could not be relied on to judge the case.[232]

The problem here is that the Court interprets the place of habitual work from an employers' perspective, based on the question whether or not the airline has a seat in the country from where it sets up the business. However, the starting point is the crew member's position and finding out where the latter arranges his or her activities. Secondly, Regulation (EC) No 1215/2012 and the Rome I Regulation use similar concepts to determine which legislation is applicable.

In accordance with Regulation (EC) No 1215/2012,[233] as a claimant, an employee has the following possibilities. First, he or she can always bring the case before the courts of the Member State where the employer is domiciled. Second, and if a State is involved other than the State of the employer's domicile, the employee may also take the case to the courts in the country where he or she habitually works or to the courts of the last place where he or she habitually worked. Or, third, if the employee does not work or has not habitually worked in any one country, he or she may bring the case before the courts where the business which engaged the employee is or was situated.[234] The second and third alternatives are mutually exclusive.[235] Regrettably, many ambiguities remain which are inherent in the interpretation of these rules. This is partly due to a number of ambiguities in the terminology used. The meaning of the term 'habitual' is also less clear.

[229] Tribunal du travail de Charleroi (4 11 2013) – RG 11/53/23/A.
[230] http://www.demorgen.be/economie/morgen-uitspraak-in-zaak-ryanair-tegen-zes-ex-werknemers-a1734144/.
[231] 'Ryanair: le tribunal du travail de Charleroi se déclare incompetent', available at http://www.lavenir.net/article/detail.aspx?articleid=DMF20131104_00384720.
[232] 'Ryanair: le tribunal du travail incompétent, la CNE va en appel', available at http://www.lavenir.net/article/detail.aspx?articleid=DMF20131108_00386701.
[233] 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.
[234] Consequently, it is possible to file a claim in both the country where the establishment that engaged the employee is located at that time and in the country where the establishment was located at the time the employee entered into the employment (S. Bouzoumita & H. Storme, 'Arbeidsovereenkomsten in internationaal privaatrecht', 2005, *Nieuw Juridisch Weekblad* 295, footnote 69).
[235] Regulation (EC) No 1215/2002 has yet another special fourth possibility for the employee as a claimant. After all, the employee can always file a claim – if it is a dispute concerning the operation of a branch, an agency or any other establishment – before the courts where these are located. The employer's options to sue are much more limited. An employee (defendant) can only be sued by the employer before the courts of the Member State where that employee is domiciled. The wider possibilities and alternative grounds for jurisdiction given to the employee were inspired by the notion that the weaker party has to be protected.

CJEU case law and the Gleichlauf theory

According to the CJEU, the place where an employee habitually carries out his or her work is the place where he or she has established the actual centre of his or her working activities and where the employee actually performs the work covered by the contract concluded with his or her employer and from which he or she performs the essential part of his or her duties vis-à-vis his or her employer.[236] This is in particular so when work is performed in more than one country. The mere fact that an employee performs work on the territory of more than one Member State does not immediately imply that Article 19 (2) (b) of Regulation (EC) No 44/2001 (now Article 21 of Regulation 1215/2012) — the courts of the Member State where the employer is established — becomes applicable.[237] Consequently, it is not possible to choose between the application of Article 19 (2) (a) and Article (2) (b), as it is an alternative rule.[238] The possibility provided in Article 19 (2) (b) to bring the employer before the courts of the place where the establishment is located could only be invoked if the court cannot determine where the place of habitual work is, as stated in Article 19 (2) (a).[239] It is up to the national courts to check where a person has his or her place of habitual work, with the aid of the factual circumstances.[240] The criteria that might play a role here are, for instance, the fact that the employee has an office in a Member State from where he or she organises the work to be done for his or her employer and to which he or she returns after every journey made in connection with his or her work.[241]

However, things became much more problematic when in the *Weber* case the CJEU also stated that *the place where an employee habitually carries out his or her work* is in principle also the place where the employee spends most of his or her working hours for his or her employer.[242] Although the period during which a person has worked in a particular Member State can be important – certainly if it appears that the person did most of his or her work in that country – this does, however, not automatically imply this is the place where he or she habitually works. Not only should the duration of the period of work be considered, but all other circumstances as well. In the earlier *Rutten* and

[236] Judgment of 27 February 2002, Weber (C-37/00, ECR 2002 p. I-2013) ECLI:EU:C:2002:122, 44 and 49. The concept 'habitually' implies that the person concerned must perform the substantial part of his or her professional activities there. This does not exclude that the employee also performs occasional activities in another Member State.

[237] Article 19 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, now Article 21 of 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, which states:
"*1. An employer domiciled in a Member State may be sued:*
(a) in the courts of the Member State in which he is domiciled; or
(b) in another Member State:
(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or
(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.
2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1." [emphasis added]

[238] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. See Y. Jorens, 'Detachering en het individuele arbeidsrecht', in Y. Jorens (ed.), *Handboek Europese detachering en vrij verkeer van diensten*, 2009, Bruges: die Keure. p. 122-123.

[239] Judgment of 27 February 2002, Weber (C-37/00, ECR 2002 p. I-2013) ECLI:EU:C:2002:122, 58.

[240] J. Kropholler, *Europäisches Zivilprozeßrecht*, 2002, Heidelberg: Verlag Recht und Wirtschaft. p. 134.

[241] Judgment of 13 July 1993, Mulox IBC / Geels (C-125/92, ECR 1993 p. I-4075) (SVXIV/I-285 FIXIV/I-319) ECLI:EU:C:1993:306, I-57. A concept that could be said to have some similarities with the concept of home base in the aviation sector; See Y. Jorens, 'Detachering en het individuele arbeidsrecht', in Y. Jorens (ed.), *Handboek Europese detachering en vrij verkeer van diensten*, 2009, Bruges: die Keure. p. 1125-131.

[242] Judgment of 27 February 2002, Weber (C-37/00, ECR 2002 p. I-2013) ECLI:EU:C:2002:122, 50 en 52.

Mulox cases, the CJEU in fact considered it important that the person concerned had a station from where he or she undertook his or her work and to which he or she also returned. In that case, the Member State from where a person's work is organised would be the actual centre of his or her interests, even if the person concerned spent more time in other Member States.[243]

Although this case law relates to the jurisdiction of courts, the interpretation of the CJEU can *mutatis mutandis* be applied in the context of the Regulations on applicable labour law. The CJEU has indeed interpreted the similar concepts of the two Regulations in the same way, so that there is a *Gleichlauf* between both instruments.

In the *Koelzsch* case, a case concerning an employee in the international road transport sector, the contract was signed in Luxembourg, the driver was domiciled in Germany and engaged as an international driver by a company (with no seat in Germany) to transport goods from Denmark to Germany. The lorries were registered in Luxembourg and the drivers were covered by Luxembourg social security law. The question was which labour law was applicable. The CJEU emphasised that it is of importance to take due account of the need to guarantee adequate protection to the employee, the employee being the weaker of the contracting parties. For that reason, the appropriate provisions should be interpreted as guaranteeing the applicability of the law of the State in which he or she carries out his or her working activities rather than the law of the State in which the employer is established. The criterion of the country in which the employee "*habitually carries out his or her work*" must be given a broad interpretation and be understood as referring to the place in which or from which the employee actually carries out his or her working activities and, in the absence of a centre of activities, to the place where he or she carries out the majority of his or her activities. On the other hand, the criterion of "*the place of business through which [the employee] was engaged*" ought to apply in cases where the court dealing with the case is not in a position to determine the country in which the work is habitually carried out. It must, in particular, determine in which State the place is situated from which the employee carries out his or her transport tasks, receives instructions concerning his or her tasks and organises his or her work, and the place where his or her work tools are situated. It must also determine the places where the transport is principally carried out, where the goods are unloaded, and the place to which the employee returns after completion of his or her tasks.[244] This case thus confirms that if it is possible, for the court involved, to determine the State with which the work has a significant connection, the place of habitual work can apply also in a situation such as the situation at issue in the main proceedings, where the employee carries out his or her activities in more than one contracting State.

In another case before the CJEU the following question was asked: how do the provisions of the country in which the employee "*habitually carries out his work*" (a), or, in the absence of such a place, the country of the seat of "*the place of business through which he was engaged*" (b), relate to the rule that these two last linking factors do not apply if it appears from the circumstances as a whole that the contract of employment is more closely connected with another country, in which

[243] Judgment of 13 July 1993, Mulox IBC / Geels (C-125/92, ECR 1993 p. I-4075) (SVXIV/I-285 FIXIV/I-319) ECLI:EU:C:1993:306, 57.

[244] Judgment of 15 March 2011, Koelzsch (C-29/10, ECR 2011 p. I-1595) ECLI:EU:C:2011:151. (Dictum: "*Article 6(2)(a) of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, must be interpreted as meaning that, in a situation in which an employee carries out his activities in more than one Contracting State, the country in which the employee habitually carries out his work in performance of the contract, within the meaning of that provision, is that in which or from which, in the light of all the factors which characterise that activity, the employee performs the greater part of his obligations towards his employer*".

case the law of that other country is to apply if it appears from the circumstances as a whole that the contract of employment is more closely connected with another country. According to the CJEU, priority must be given to the nexus between the employment contract at issue and the country where the employee habitually carries out his or her work. The application of that criterion precludes consideration of the secondary criterion of the country in which the place of business through which the employer was engaged is situated.[245] There is clearly a hierarchy between the factors to be taken into account in order to determine the law applicable to the contract of employment.[246] One of the significant factors suggestive of a connection with a particular country that should in particular be taken into account is the country in which the employee pays taxes on the income from his or her activity and the country in which he or she is covered by a social security scheme and pension, sickness insurance and invalidity schemes. In addition, the national court must also take account of all the circumstances of the case, such as the parameters relating to salary determination and other working conditions.[247] It appears that the CJEU again endorses the importance of the country of habitual work as the connecting factor.

More national case law

It is also important to mention that the Rome I Regulation already strengthens the application of the legislation of the country of habitual employment to the disadvantage of the employer's place of establishment.[248] It does so by specifying that the law applicable to an individual employment contract is governed by the law of the country in which or, failing this, from which the employee habitually does his or her work in performance of the contract.[249] This rule was exactly introduced to take into account the situation of the international transport sector and the above described CJEU case law confirms this trend. As mentioned above, a similar trend could be observed in the Brussels Ibis Regulation.[250] Thus, the connection is made with the worker's station in order to apply this rule to staff working on board an aircraft if there is a fixed place from where the work is organised and where this staff fulfils other obligations towards their employer, such as checking in passengers or performing safety checks.[251] In this respect, all the factors which characterise the activity of the employee must be taken into account, and, in particular e.g. in the maritime sector, it must be determined in which State the place is situated from which the employee carries out his or her

[245] This last concept of 'the place of business through which the employee was engaged' must be understood as referring exclusively to the place of business which engaged the employee and not to the place of business with which the employee is connected by his or her actual employment. In addition, it is not required that this place of business has legal personality. What is required is a stable structure of an undertaking that has a degree of permanence (see the *Voogsgeerd* case: judgment of 15 December 2011, Voogsgeerd (C-384/10, ECR 2011 p. I-13275) ECLI:EU:C:2011:842).

[246] Judgment of 15 December 2011, Voogsgeerd (C-384/10, ECR 2011 p. I-13275) ECLI:EU:C:2011:842.

[247] Judgment of 12 September 2013, Schlecker (C-64/12) ECLI:EU:C:2013:551.

[248] See Y. Jorens, 'Detachering en het individuele arbeidsrecht', in Y. Jorens (ed.) *Handboek Europese detachering en vrij verkeer van diensten*, 2009, Bruges: die Keure. p. 160.

[249] Article 8 (2) of 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).

[250] See footnote 236.

[251] European Commission, Opinion of the European Economic and Social Committee on the 'Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM(2002)654 final', 14 January 2003. On the other hand, bearing the maritime sector in mind, it should be noted that the search for flags of convenience outside the EU can already be observed in the European aviation industry; *cfr* the *Norwegian* example.

transport tasks, receives instructions concerning his or her tasks and organises his or her work, and the place where his or her work tools can be found.[252]

The place of habitual employment interpreted by the national courts

All these evolutions lead to an interpretation according to which the place of habitual employment (or the place from which the work is carried out) is the predominant factor to determine the applicable legislation in employment in general, and in the aviation sector in particular. This is to the detriment of stipulations in employment contracts which would make airline air crew subject to criteria such as the place of registration of the airline or the place where the business is situated of the company that engaged the crew member. It is therefore up to the national courts to further investigate and determine which criteria should be considered to give an indication of the habitual place of employment. This is not always an easy task and does not exclude divergent opinions, as several national cases indicate. One Belgian case concerned some pilots who were working for an LCC. Here, the labour court decided that, in spite of the choice for the law of the Isle of Man, the person concerned could not be deprived of the mandatory provisions of the country of habitual employment – in this case, Belgium. The claimant was the captain of an aircraft which was owned or leased by an airline established in Belgium. However, all correspondence, instructions and announcements were sent to the claimant from the seat of operation of the airline in Melsbroek, Belgium. In addition, the claimant's flights never took off from any other airport than Zaventem, Belgium. The fact that the claimant flew abroad as a pilot (and of course always returned) was perfectly obvious according to the labour court, but not relevant.[253] In Norway, the court was confronted with an Italian citizen who was employed by an LCC through a recruitment agency. Her employment agreement stated that her employment was in Ireland, and that Irish law was to govern the employment relationship. However, the contract also stated that she was to be located at Rygge Airport in Norway. Less than a year after the start of her employment, she was dismissed. Shortly after, she issued a writ against the LCC, claiming that she was permanently employed by the LCC. From that point, the LCC pleaded for dismissal, referring to the agreement that states that only Irish courts have jurisdiction. She, on the other hand, claimed that she also had the right to try the case before a Norwegian court and lodged her complaint before a Norwegian court. Since then, five court decisions have contemplated whether Norwegian courts have jurisdiction. The LCC meanwhile held that only Irish courts have jurisdiction, as this is stated by the agreement. Relying on the Rome I Regulation and on EU law cases (e.g. C-383/95, Rutten, C-29/10, Koelzsch, and C-384/19, Voogsgeerd),[254] the Borgarting Court of Appeal held that a comprehensive assessment was in order, which takes into account the special conditions of the aviation sector. In this respect, the employee's centre of work activity is decisive, while factors such as formal relationships or employer associations are not.[255] The Court found that the fact that her work was conducted in international airspace was not as important to determine the centre of her work activity as other elements available. The Court took into account that she received a salary supplement for being located in Norway, that she could

[252] Judgment of 15 December 2011, Voogsgeerd (C-384/10, ECR 2011 p. I-13275) ECLI:EU:C:2011:842.

[253] Industrial Court of Appeal Brussels (10 06 2008), 2008, Tijdschrift@ipr.be. p. 344.

[254] Judgment of 9 January 1997, Rutten / Cross Medical (C-383/95, ECR 1997 p. I-57) ECLI:EU:C:1997:7; Judgment of 15 March 2011, Koelzsch (C-29/10, ECR 2011 p. I-1595) ECLI:EU:C:2011:151; Judgment of 15 December 2011, Voogsgeerd (C-384/10, ECR 2011 p. I-13275) ECLI:EU:C:2011:842.

[255] http://www.sbdl-eng.com/2014/07/09/supreme/.

not live more than one hour from the airport, that she had some defined tasks on the ground at the airport, and that she had stand-by duties, which forced her to stay in the area.[256] In Spain, the Superior Court of Catalonia[257] defined the place of habitual work as the place where the worker was expected to be based, rendered services on the ground on a regular basis and received orders, such as the roster. However, it cannot be the plane itself. Nevertheless, the Spanish Court was not considered competent concerning working relationships ruled by contracts signed abroad with brokers that have no base in Spain, as the contract was signed abroad. The employer had no local base, and the services were rendered abroad.[258]

Codifying the criteria of the principle of habitual employment? The French example

An interesting evolution took place in France. The legislature has intervened to determine the legislation applicable to international air crew by looking to combine the place of habitual work of the air crew with the place where the airline has a stable infrastructure. However, the choice for a (to a certain extent) new conflict rule is not without danger nor is it deprived of certain loopholes. Exactly in order to reduce the abuse by predominantly foreign airlines, the Civil Aviation Code was amended in 2006.[259] The latter was amended by a decree which stipulates that the Labour Code is applicable to airlines which have an *operational base* in France. The objective of the French legislature was to apply French labour law to all those companies who have an operational base in France. Therefore, the notion of an operational base is conceptually linked to the European notion of home base, and is defined as being a unit or infrastructure from which a company runs an air transport business in a stable, habitual and continuous manner, with employees whose work is centred there. The centre of employment is subsequently defined, in accordance with European legislation pertaining to home base, as being the place where the employee usually works, or where he or she begins working from and returns to after completing his or her tasks. A direct link is therefore set up between the home base and the worker's place of habitual work. Several non-French EU airlines subsequently started a case against this Decree, arguing that it violated the EU freedom of establishment and free movement of services. The French Court (Council of State) – perhaps sometimes too general – rejected the complaints and elucidated that this provision wants to clarify that employees who work habitually in premises or infrastructures which are used by air transport companies to run their business in a stable, habitual and continuous way on French territory are subject to the French Labour Code. The Labour Code does not infringe the European provisions on the free movement of services, as it stipulates that the provisions relating to the transnational posting of workers do not apply to companies from another Member State whose activity is entirely directed towards the French territory or is performed in a stable, habitual and continuous way in premises or with infrastructures located on this territory,.[260] Recent judgments in France have confirmed the applicability of the Labour Code with respect to operational bases despite

[256] http://www.sbdl-eng.com/2014/07/09/supreme/.

[257] Superior Court of Catalonia (26 03 2010), Review number 8144/2008.

[258] Supreme Court (30 12 2013), Review number 930/2013.

[259] Décret n° 2006-1425 du 21 novembre 2006 relatif aux bases d'exploitation des entreprises de transport aérien et modifiant le code de l'aviation civile, available at http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000278532&dateTexte=&categorieLien=id.

[260] The Council of State on 11 July 2007 in reply to applications by *EasyJet* and *Ryanair*, which employed flight crew under Irish law on services to and from French airports.

employees having been bound by foreign employment contracts, and in one move entailing the applicability of the French social security regime.

Several cases have indeed been brought before the French courts where in particular LCCs were condemned, as they had engaged staff working in France using foreign contracts. A very recent example is the judgment by a local court in Aix-en-Provence, France, in 2013. This case concerned the non-payment of social security contributions in France by *Ryanair* for its flight and cabin crew flying from its Marseille base from 2007 to 2010. The crew members involved were bound by Irish contracts, for which *Ryanair* paid the Irish social security contributions. These were substantially lower than the contributions required in France. This practice stood in stark contrast with the French legislation imposed in 2006 according to which airlines in France were to pay and employ individuals under French contracts, which thus also entailed the obligation to pay French social security contributions. Indeed, this practice by *Ryanair* did not seemingly contravene the provisions on home base enshrined in Regulation (EEC) No 3922/91. *Ryanair* decided to go to the Supreme Court (*Cour de cassation*). However, apparently the Court of Aix-en-Provence opened a new judicial investigation against the Irish company, which seemed not to affiliate its cabin crew to the French social security, as they were supposed to work in Ireland. These decisions force LCCs to apply French labour and social security law – the option chosen by *EasyJet* – or to reorganise their activities to avoid any home base in France, as *Ryanair* does by developing its activities from Barcelona in Spain rather than from Toulouse in France.

The reasoning of the French Council of State is, however, not completely free from criticism. There is a fundamental difference between the free movement of services and the freedom of establishment, as the applicable law fundamentally differs in such circumstances according to the applicable freedom. The general provisions on the free movement of services are the touchstone for the question to what extent the host country can apply its national conditions of employment. Whereas under the freedom of establishment there may be no difference in treatment between the own citizens and persons who are nationals of other Member States, the situation is different with regard to the free movement of services. According to the CJEU, the rules regarding the free provision of services, at least if the service provider goes to another Member State, concern a situation in which the latter goes from one Member State to another, not to establish him or herself there, but to temporarily provide services. The CJEU stated very clearly that a Member State may not make the provision of services in its territory dependent on adherence to all the conditions that apply to establishment, because that would deprive the treaty provisions designed to ensure the free provision of services of any useful effect.[261] Full equal treatment must even be considered as a negation of the free movement of services! It is therefore extremely important to decide whether one is in a situation of the freedom of establishment, the free movement of workers, or the free movement of service provision. The temporary nature of the provision of services must be assessed according to the duration, frequency, periodicity and continuity of the service. This does, however, not mean that a service provider within the meaning of the Treaty may not equip him or herself with some form of infrastructure in the host country (including office chambers or consulting rooms), if

[261] Judgment of 25 July 1991, Säger / Dennemeyer (C-76/90, ECR 1991 p. I-4221) ECLI:EU:C:1991:331, 13; confirmed by *inter alia* judgment of 4 December 1986, Commission / Germany (205/84, ECR 1986 p. 3755) (SVVIII/00741 FIVIII/00769) ECLI:EU:C:1986:463, or Judgment of 26 February 1991, Commission / France (C-154/89, ECR 1991 p. I-659) (SVXI/I-43 FIXI/I-55) ECLI:EU:C:1991:76.

that infrastructure is necessary to provide the service in question.[262] The free movement of services therefore does not exclude the situation where an airline sets ups and uses some (infra)structure in another country. It might certainly not be excluded in this respect that some of the infrastructures which airlines use in France would be permitted under the free movement of services.

Air crew members performing activities for their companies in another country within the framework of the free movement of services are basically posted workers. Therefore, their employment conditions must be looked at from the perspective of the provisions concerning the posting of workers in the framework of the provision of services.[263] It cannot be excluded from the beginning that air crew members are considered as *posted* workers.[264] If and to what extent the host country can then apply its labour law provisions must also be assessed along these lines. Indeed, the CJEU has regularly confirmed that EU law does not impede the Member States from applying their legislation or CLAs to anyone who – even temporarily – undertakes work in salaried employment within their territory, regardless of the country where the employer is established, nor does EU law prohibit the Member States from enforcing adherence to these rules with appropriate means.[265] Consequently, EU law does not prevent international private law[266] regarding labour legislation from being applied further. However, this does not mean that the Member States have a general or unlimited freedom to declare all the provisions of their labour legislation automatically applicable to employees working there temporarily. It may be deduced from this case law that only a somewhat minimal core of provisions of the country of temporary work can be declared applicable to foreign service providers.

To facilitate the free movement of services, it was therefore considered necessary and opportune to harmonise the legislation of the Member States to which this CJEU case law relates and draw up a hard core of mandatory provisions at EU level for minimum protection. These mandatory provisions must be honoured in the host country by employers that make employees available for the purpose of undertaking temporary work in the territory of the Member State where the service is being provided.[267] It is in the interests of the parties to lay down the terms and conditions governing the employment relationship that are applicable to an international situation of service provision.[268] It was this concern that gave rise to the adoption of the Posting of Workers Directive 96/71/EC, which

[262] Judgment of 30 November 1995, Gebhard / Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (C-55/94, ECR 1995 p. I-4165) ECLI:EU:C:1995:411.

[263] Judgment of 25 October 2001, Finalarte and others (C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98., ECR 2001 p. I-7831) ECLI:EU:C:2001:564, 22.

[264] See *infra* the discussion on the concept home base as it was introduced in Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

[265] Judgment of 27 March 1990, Rush Portuguesa / Office national d'immigration (C-113/89, ECR 1990 p. I-1417) (SVX/00389 FIX/00407) ECLI:EU:C:1990:142; judgment of 3 February 1982, Seco / EVI (62 and 63/81, ECR 1982 p. 223) (ES1982/00027 SVVI/00299 FIVI/00311) ECLI:EU:C:1982:34; judgment of 28 March 1996, Guiot (C-272/94, ECR 1996 p. I-1905) ECLI:EU:C:1996:147; judgment of 23 November 1999, Arblade (C-369/96 and C-376/96, ECR 1999 p. I-8453) ECLI:EU:C:1999:575.

[266] One should bear in mind that international private law is, in first instance, *national* law: it is a competence of the legislature of each country to determine the international private law applicable in said country. This *national* international private law can, of course, be influenced by international and/or supranational legislation or treaties.

[267] See Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 25 July 2003 on the implementation of Directive 96/71/EC in the Member States, COM(2003)458 final. p. 5.

[268] Preamble of 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, 6.

imposes an obligation on the Member States to include a number of provisions in their labour legislation.[269] The entire national legislation can therefore not be applied to air crew members.

The automatic application of the French provision to foreign air crew personnel might therefore infringe the free movement of services. The very difficult question is where the borderline lies between the free movement of services and the freedom of establishment and from which moment it could be said that we are dealing with a company that has a permanent infrastructure in France. Linking the concept of the *place of the stable and permanent infrastructure* to the concept of the employee's *place of habitual work* is therefore not without any legal danger. In this respect, bogus situations such as the use of letterbox companies to simulate cross-border service provision cannot be treated in the same way as a genuine service provider making use of the free movement of services to provide services in another Member State and making use, in the host Member State, of some infrastructure, necessary for the activities said service provider legitimately and legally deploys in said host Member State.

Lastly it must also be mentioned that the reasoning of some courts to deduce the right to levy French social security from the application of the French labour law based on the operational base, is not in line with the idea that labour law and social security law are two different fields of law with their own objectives, criteria and rules. The application of labour law cannot immediately lead to the application of French social security law without looking at the relevant European provisions and regulations.

The strengthening of the connecting factor 'place of habitual employement' by widening it to 'the country in which or, failing that, from which', an idea as we described above, was developed by the CJEU in its case law and subsequently inserted in Rome I. This has led to some stakeholders believing that this could be a general connecting factor for the determination of both court competence and applicable labour law, and at the same time for the determination of the applicable social security legislation. In this respect, the 'country in which or, failing that, from which' would coincide with the concept of home base. The big advantage thereof is that court competence as well as applicable labour law and social security legislation would all fall within the framework of the national legislation of only one Member State. A strong defender of this thesis is AEA. AEA is of the opinion that all these elements point into the direction of one stable and continuous base from where the activities of both employer and employee take place. In this respect, they are of the opinion that home base also implies the place where an airline is established.

In this respect, also the legal value of the A1 forms[270] cannot be ignored, since according to CJEU case law these certificates are binding until the issuing State either withdraws or alters them.[271] As a result, as long as the A1 form has not been withdrawn, altered or declared invalid, it takes effect in the internal legal order of the Member State to which the workers concerned are posted and, therefore, binds its institutions, *including domestic courts*.

[269] See also Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 25 July 2003 on the implementation of Directive 96/71/EC in the Member States COM(2003)458 final. p. 7.
[270] Formerly E101 forms.
[271] Judgment of 30 March 2000, Banks and others (C-178/97, ECR 2000 p. I-2005) ECLI:EU:C:2000:169.

The CJEU case law on E101/A1 forms lays down a two-fold principle of cooperation: a certificate issued by a Member State is binding to other Member States; and a dialogue between institutions may help resolve the dispute between the Member States involved, possibly leading to the withdrawal of the certificate by the issuing country. Member States may therefore not make the workers subject to their social security legislation without ignoring this binding effect and only after this certificate has been withdrawn. However, in France on 11 March 2014 the highest court, i.e. the French Court of Cassation, disregarded this CJEU case law in two judgements – without making a request for a preliminary ruling to the CJEU.[272] In a criminal case against two airline companies who have their operational base in France, the competent Court of Appeal had sentenced these companies for not registering the airline air crew which they employed *from (and to)* France at the competent French social security institution. These companies had E101 certificates for these employees which, among others, the Spanish competent institution had delivered based on the posting rules of Regulation (EC) No 1408/71.[273] The Court of Appeal sentenced both companies, stating that French law was intentionally and knowingly evaded with the purpose of reducing labour costs.[274] In other words, the posting rules were abused. Still, the company dismissed this argument, claiming that it had E101 certificates that were legitimately delivered: the company could in good faith assume that this staff was subject to Spanish social security legislation. However, in its judgments, the French Court of Cassation followed this argumentation by the French Court of Appeal. It is however far from convincing whether this reasoning, heavily criticised by among others some of the French social law scholars,[275] can be followed. This is ultimately for the CJEU to decide.

C. THE APPLICABLE SOCIAL SECURITY LEGISLATION

Quote pilot

I have had 5 bases in 4 countries in 3 years. I am away from home most of the month, paying my own travel and accommodation to-from/at the "home" base. With a variable roster, planning your life is impossible.

In the past, social engineering could give rise to practices of unfair (social) competition. As we will explain later on, in an attempt to prevent such practices, home base was made the new connecting factor for the determination of the applicable social security legislation. Therefore, we presented respondents with a number of questions with regard to their home base and social security contributions, e.g. question 6 of part B (Where do you pay your social security contributions) and 7 of part B (Are you yourself responsible for the payment of your social security contributions?).[276] The

[272] CASS France, 11 March 2014, No 1078 and 1079, available at: http://www.courdecassation.fr/IMG///CC_crim_arret1078_140311.pdf and http://www.courdecassation.fr/IMG///CC_crim_arret1079_140311.pdf.

[273] Article 14 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

[274] "*la société […] ayant, d'évidence, volontairement méconnu ces règles pour se placer sous un régime social et fiscal moins lourd et plus permissif*".

[275] *Cfr* J-P. Lhernould, 'Certificat E101/A1: il est indispensable de saisir la Cour de justice de l'Union européenne', *Droit Social* 12, 2014, and J-C. Fillon, 'EasyJet et Vueling: un trou d'air dans l'application du droit européen', *Liaisons Sociales Europe*, No 350 of 3 April 2014.

[276] As we mentioned above, the home base rule has been introduced fairly recently, so does not apply to all members of cockpit crew. However, we deemed an insight on the present situation might shed some light on the usability of the now much debated home base rule.

country where social security contributions are paid is the country the social security legislation of which is the legislation applicable to the person concerned.[277]

i. THE DATA

With regard to the country of social security, France, the Netherlands and the UK are most strongly represented. The following graphs show the top representation of ≥ 0.2%.

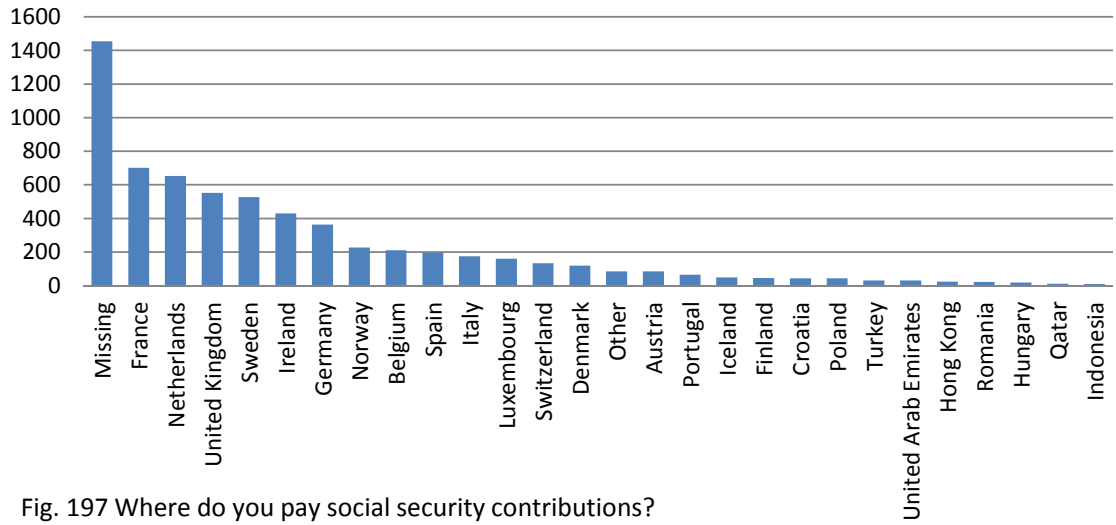


Fig. 197 Where do you pay social security contributions?

For most of these respondents (85%), this country is the country of the official home base of the pilots.

[277] Article 11 (a) of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems, see *infra* – Part 4. III. C. ii. Social security shopping?.

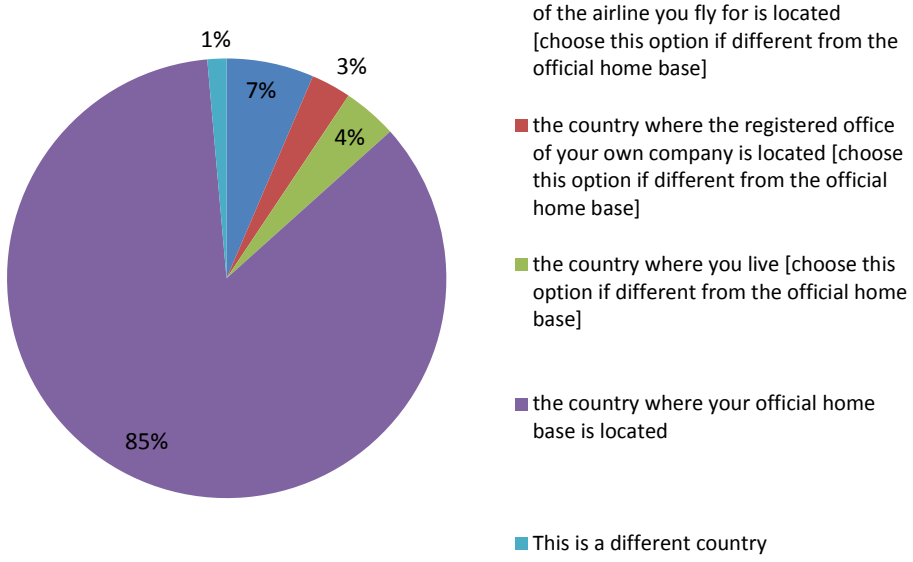


Fig. 198 Country payment social security contributions is ...

Since the home base rule is a connecting factor for the payment of social security contributions, we asked respondents in which country their real home base is located.

The top 3 most answered countries are France, the Netherlands and the UK. More prevalent is that Ireland just falls out of the top 10. Figure 199 shows the countries represented at a level of >0.5%. Note the high number of missing answers.

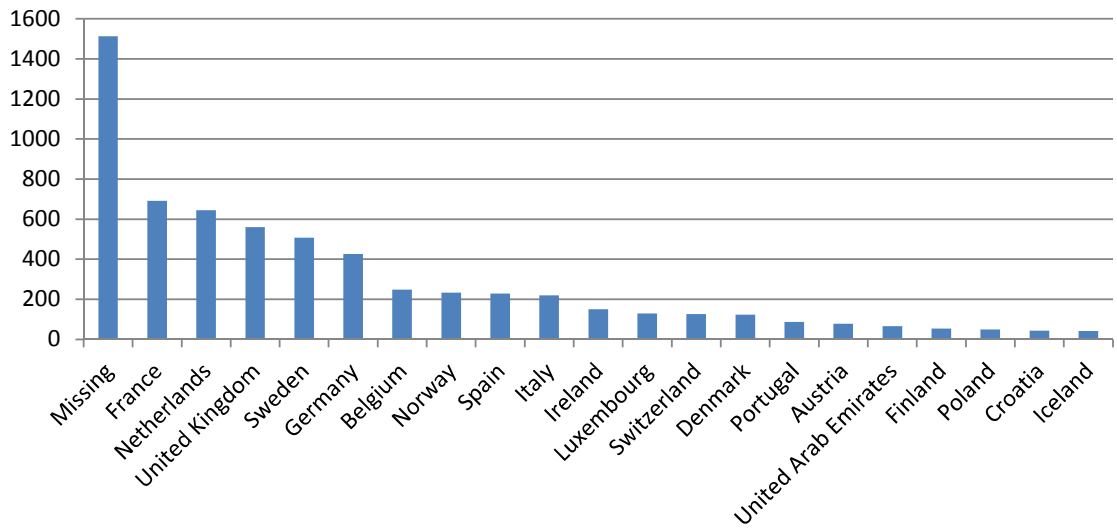


Fig. 199 In which country is your official home base located?

However, respondents were also asked if they considered their official home base to not be their real home base. 91% of the respondents considers the official home base to be their real home base. [278]

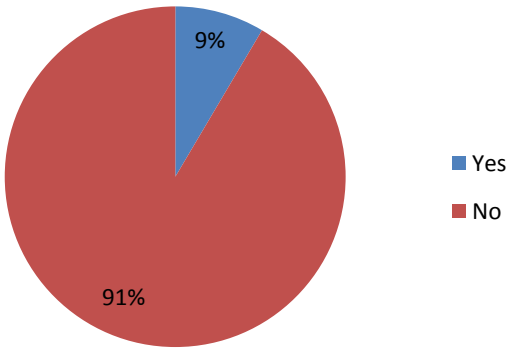


Fig. 200 Do you consider this not to be your real home base?

If respondents indeed considered their home base as not being their real home base, the following countries were stated as their real home base. [279]

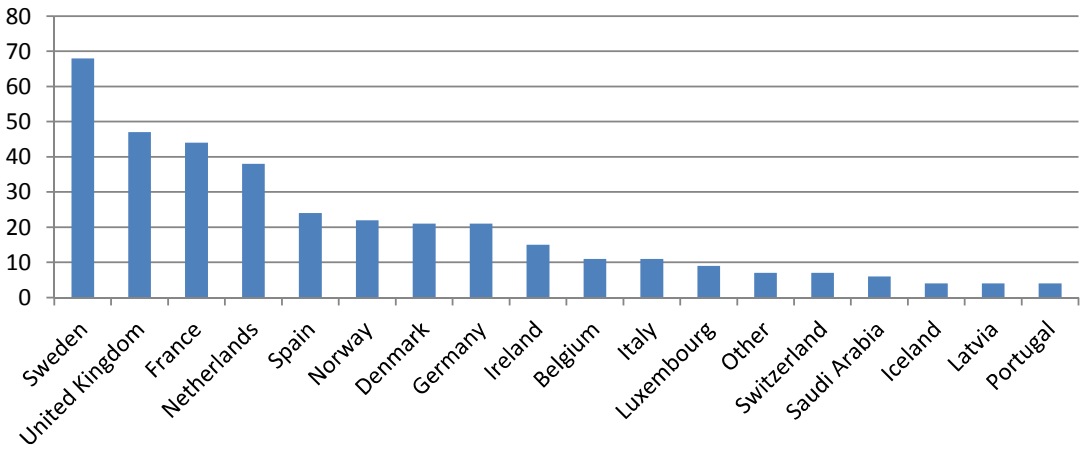


Fig. 201 Real home base - Other

If we now look at where most discrepancies can be found, it is clear that this is mostly the case for respondents who reported to fly for LCCs.

Figure 202 shows the amount of respondents per type of airline who consider (blue graph) that the official home base is not their real home base.

[278] In retrospect, we now consider the wording of the question to be unfortunate since there is a negation in the question itself. See footnote 159, at page 131, where we noted that the double negation might be misleading and might have led to a distorted image of the reality concerning home base.

[279] Note the high number of respondents that indicated they consider the UK to be their real home base and the low number of respondents indicating to fly for e.g. *British Airways*.

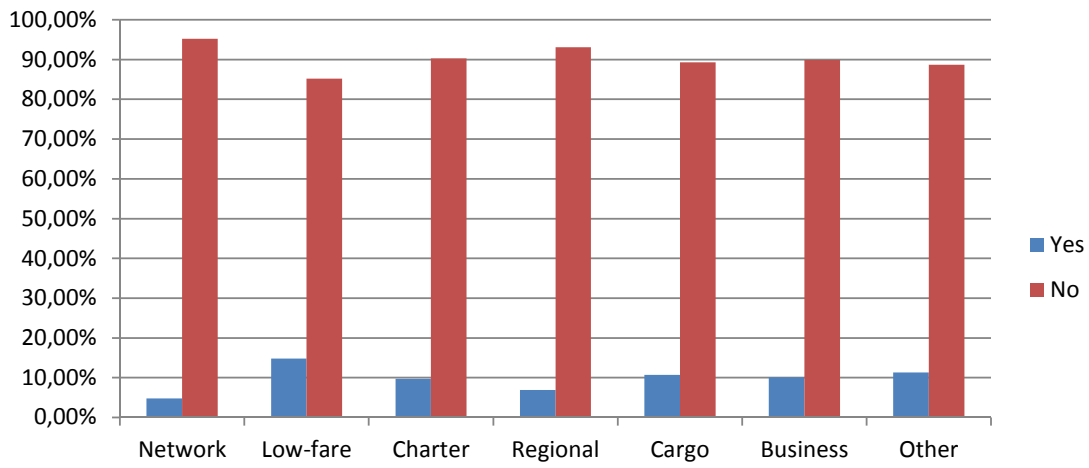


Fig. 202 Real home base - type of airline

When respondents were asked if they live in the same country as their home base, more respondents indicating to fly for a low-fare or cargo airline stated this not to be the case. *An sich*, this does not always mean there might be a *problem*. After all, a cockpit crew member can be a frontier worker as any other worker.[280] However, more respondents reporting to fly for an LCC as well as those reporting to fly for a cargo airline reported *not* to live in the country where their home base is located.

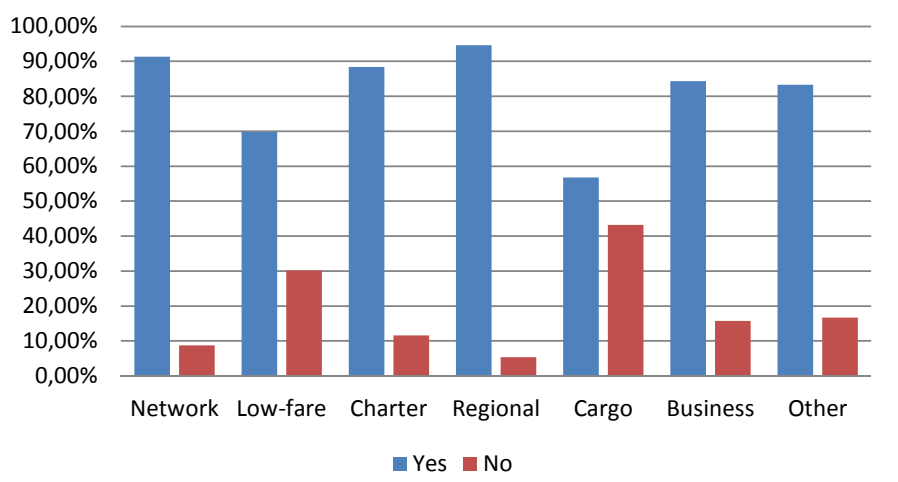


Fig. 203 Live in country where home base is located?

When we asked respondents if they always fly from the same home base, 54% answered in the positive: they always fly from the same home base. 23% stated that this can change, while 23% did not answer this question.

[280] Or maybe even more so, since he or she has more readily access to a means of transport which is rather fast to cover greater distances. Furthermore, one could argue that airports where LCCs operate are often located in border regions, thus providing access to the service to clients from different countries.

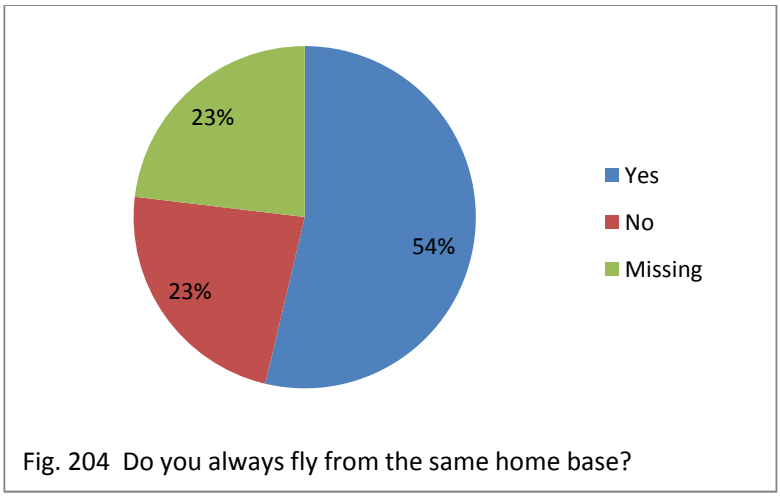


Fig. 204 Do you always fly from the same home base?

As Figure 205 shows, it is again mostly respondents reporting to work for an LCC or charter airline that report not to always fly from the same home base.

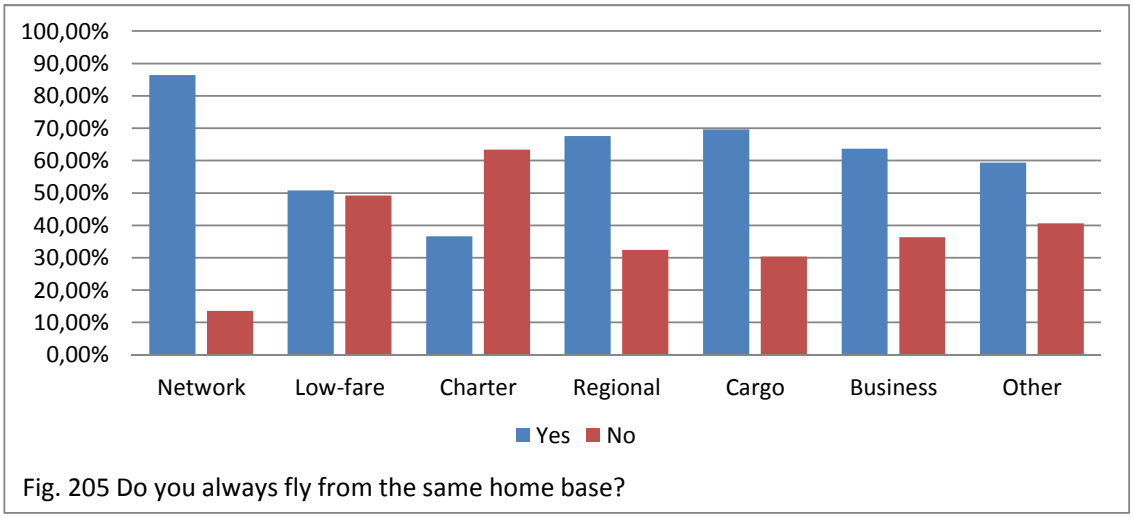


Fig. 205 Do you always fly from the same home base?

To end this section, we come back to question 7 of part B to see that most (65%) respondents claim not to be responsible for the payment of their social security contributions (13% claim they are responsible and 22% did not provide us with an answer to this question).

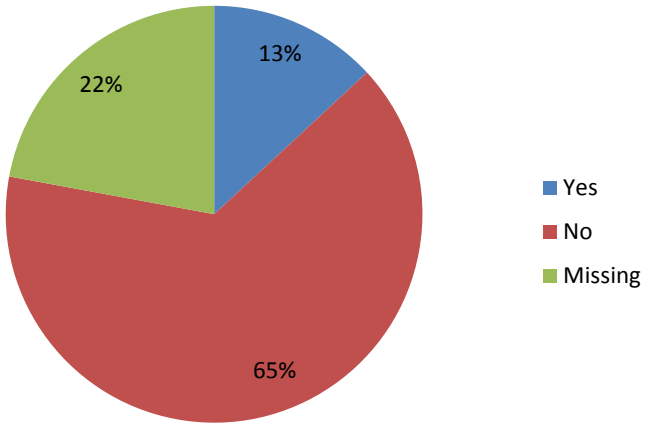


Fig. 206 Are you yourself responsible for the payment of your social security contributions?

ii. SOCIAL SECURITY LEGISLATION SHOPPING?

INTRODUCTION

Next to the search of the most favourable labour law, legislation shopping can also result from the search of the social security legislation which leads to the lowest social security contributions due. The country where social security contributions should be paid is determined by Regulation (EC) No 883/2004 and its implementing Regulation (EC) No 987/2009.[281] These social security Coordination Regulations are one of the oldest and most important parts of EU legislation.[282] One of their main objectives is to determine which social security legislation is applicable to a person. This way, in the interest of the migrant worker, it is ensured that there is complete protection, immediately available, wherever the worker is working at the time without social security contributions having to be paid for said worker in more than one Member State. Doing so, these regulations provide an answer to the question as to where one has to *pay* social security *contributions* and according to which scheme one *receives* social security *benefits*.

The rules determining the applicable legislation are designed to facilitate free movement by avoiding possible complications (e.g. positive as well as negative conflicts of law). These complications could otherwise ensue if a person were subject to the social security legislation of more than one Member State at the same time (positive conflict of law), or if a person is left without social security coverage because no legislation is applicable to him or her (negative conflict of law). The main rule is that the person is subject to the legislation of the country of work, the *lex loci laboris,* even if he or she resides in another Member State and — if he or she is an employed person: even if the employer has his or her registered office or place of business in another Member State. Only the nature of some

[281] Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems; Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.
[282] See Regulation (EEC) No 3/58 of 25 September 1958 on social security for migrant workers.

types of employment or activities may render the strict application of the *lex loci laboris* rule impossible, and only then may alternative connecting factors, such as the place of residence or the location of the employer, come into play.[283]

The coordination rules are exclusive, neutral and compulsory. The principle of *exclusivity* implies that if the legislation of a Member State is applicable, a person can only rely on that legislation, even if he or she would have greater entitlement under the legislation of another Member State.[284] The rules are also *neutral,* implying that migrant workers should not have to either fall between two stools or have to pay twice for protection due to the different national criteria used. However, by no means does this imply that the migrant worker has a right to the *highest* benefits. The rules are also *compulsory*, implying that social security regulations do not provide for the possibility of free choice to determine which social security legislation would apply.

when a person pursues activities as an employed or self-employed person in two or more Member States, as the general rule of the *lex loci laboris* would not result in the application of just one legislation.[285] In the situation when a person normally pursues an activity as an *employed* person, the first step is to determine if a substantial part of this person's activity is pursued in the Member State of residence. If the answer is yes, the legislation of the Member State of residence applies.[286] If not, then Article 13 (1) (b) of Regulation (EC) No 883/2004 provides that a person normally working in two or more Member States is subject to either (i) the legislation of the Member State in which the registered office or place of business of the undertaking employing him or her is situated if he or she is employed by one undertaking or employer or (ii) the legislation of the Member State in which the registered office or place of business of the undertakings employing him or her is situated if he or she is employed by two undertakings which each have their registered office or place of business in the same Member State.[287]

There is also a similar special rule for persons normally *self-employed* in two or more Member States.[288] This rule provides that a person who is normally self-employed in two or more Member States is subject to either (a) the legislation of the Member State of residence if he or she pursues a substantial part of his or her activity in that Member State; or (b) the legislation of the Member State in which the centre of interest of his or her activity is situated if he or she does not reside in one of the Member States in which he or she pursues a substantial part of his or her activity.[289]

[283] See e.g. Title II of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

[284] However, some nuance is to be added to this principle, as the CJEU has determined that application of this principle does not preclude a migrant worker, who is subject to the social security scheme of the Member State of employment, from receiving, pursuant to the national legislation of the Member State of residence, benefits in the latter State. (See the *Bosmann* and *Hudzinski* cases: judgment of 20 May 2008, Bosmann (C-352/06, ECR 2008 p. I-3827) ECLI:EU:C:2008:290; judgment of 12 June 2012, Hudzinski and Wawrzyniak (C-611/10 and C-612/10, Publié au Recueil numérique) ECLI:EU:C:2012:339).

[285] Article 13 of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems.

[286] Article 13 (1) (a) of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems.

[287] Article 13 (1) (b) of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems.

[288] Article 13 (2) of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems.

[289] Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems.

SOCIAL SECURITY LEGISLATION APPLICABLE IN INTERNATIONAL (AVIATION) TRANSPORT

Introduction: the abolishment of a specific rule for international transport workers

These coordinating provisions are of importance for air crew members on international flights who per definition work in two or more Member States. Previous Coordination Regulations, i.e. Regulations (EEC) No 1408/71 and (EEC) No 574/72, contained specific provisions for international transport workers. However, these specific rules contained in the previous Regulation (EEC) No 1408/71 were not withheld in the new Regulation (EC) No 883/2004. In the process of simplifying and modernising the coordination rules, the latter abolished special rules for special categories of professions.[290] As a result, the same general provisions which apply to persons working in two or more Member States also apply to international transport workers and a separate rule for aviation personnel was not provided for. Aviation personnel working on international flights by definition do not have a fixed place of work and part of their activity is performed outside the territory of a Member State. Moreover, these people work from different starting points, entailing an enormous mobility. It did therefore not come as a surprise that the application of these basic principles raised concerns and gave rise to bogus situations and 'constructions'. In 2012, a new rule was introduced.

THE HOME BASE: A NEW SPECIFIC RULE FOR AIR CREW MEMBERS

The application of the normal rules indeed implies that an air crew member is subject to the legislation of the country of *residence* if a substantial part of his or her activities is performed in this State. This provision gave airlines operating from Member States with lower social security contributions a clear advantage and provided for ample 'legislation shopping' opportunities. This is even more so since the vast majority of LCCs are *not hub-based,* but on the contrary provide *point-to-point* connections, hence operate from *different 'bases'* in *different Member States*. All that was needed was to either make sure cockpit and cabin crew members did not perform a substantial part of their work in *just one* Member State, or to *post* them from the 'home base', generally located in a Member State the social security contributions of which *cost less* to a Member State where social security contributions represent(ed) a *higher cost. Thus,* the legal framework provided for legal means to reduce costs related to social security, and as a result a rise could be observed in the prevalence of wholly or partially fictitious situations (constructions).[291]

A possible consequence of this was a constant change of applicable legislation depending on how substantial the activities were in the place of residence. Airlines could change the applicable legislation by arranging the crew members' flight patterns. Some were of the opinion that it was

[290] According to Regulation (EEC) No 1408/71 "a *worker employed in international transport in the territory of two or more Member States as a member of travelling or flying personnel and who is working for an undertaking which, for hire or reward or on own account, operates transport services for passengers or goods by rail, road, air or inland waterway and has its registered office or place of business in the territory of a Member State, shall be subject to the legislation of the latter State, with the following restrictions:*
(i) where the said undertaking has a branch or permanent representation in the territory of a Member State other than that in which it has its registered office or place of business, a worker employed by such branch or agency shall be subject to the legislation of the Member State in whose territory such branch or permanent representation is situated;
(ii) where a worker is employed principally in the territory of the Member State in which he resides, he shall be subject to the legislation of that State, even if the undertaking which employs him has no registered office or place of business or branch or permanent representation in that territory."

[291] Some argue this gave (and to a certain extent still gives) some LCCs a clear advantage over network airlines based in 'more expensive' Member States.

debatable whether e.g. pilots could have their home base in country A while residing in country B, where they pursued a substantial part of their activities.

In order to prevent these possibilities, Regulation (EU) No 465/2012, applicable as of 28 June 2012, modified the Coordination Regulations in place.[292] This modification introduced a connecting factor — the 'home base' — that can be considered a legal fiction aiming to bring more continuity and legal certainty. As a result of this modification, the main rules were not modified, as the criterion of the place in which the activity is pursued was retained. However, a criterion was added adapted to this profession, recognised and used in the sector and already defined by EU law. The idea was that this new legal concept, the *'home base',* would now become the only decisive criterion to determine the social security legislation applicable to both cockpit and cabin crew.

However, whether or not the objectives of more legal certainty were reached remains questionable and the subject of debate. To define the concept of home base, inspiration was found not in the social security sector but in another sector, i.e. in Regulation (EEC) No 3922/91 on the harmonization of technical requirements and administrative procedures in the field of (safety of) civil aviation. In conformity with Annex III, subpart Q of Regulation (EEC) No 3922/91,[293] the operator is obligated to nominate a home base for its crew members. A home base is to be established taking into consideration the pattern and frequencies of flight duties, with the objective of providing crew members adequate and appropriate resting periods. A home base is defined as "*[t]he location nominated by the operator to the crew member from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal conditions, the operator is not responsible for the accommodation of the crew member concerned*".[294] The starting point is therefore that the concept of home base should be interpreted on the basis of criteria as determined in the aviation sector and that it is agreed between the worker and the employer and not by the social security institutions in accordance with social security criteria. It is therefore the *operator* who has the prerogative to change the crew members' home base, and such at its *own* discretion and *as many times as it wants*.

One of the problems is indeed that the definition as described above raises concerns and questions. Are all elements of the concept sufficiently clear? The home base is the location nominated by the operator. Mindful of the relation between an individual cockpit or cabin crew member with an airline, be it directly or indirectly via an agency, it is of relevance to determine who is to be deemed the operator of (an) air operation(s), and the social implications thereof upon the crew members. Regulation (EEC) No 3922/91 defines an operator as *"a natural person residing in a Member State or a legal person established in a Member State using one or more aircraft in accordance with the regulations applicable in that Member State, or a Community air carrier as defined in Community legislation*" at least "*for the use of this regulation*". Can we therefore transpose this definition to the

[292] Regulation (EU) 465/2012 of the European Parliament and of the Council of 22 May 2012 amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004.

[293] Annex III to Regulation (EEC) 3922/91 was amended by Regulation No 965/2012 of 5 October 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.

[294] This being identical, at world level, to the definition by the International Civil Aviation Organization.

social security domain, e.g. to Regulations (EC) No 883/2004 and (EC) No 987/2009? Furthermore, we are faced with the fact that the term operator is not uniformly defined in the aviation regulation.[295]

If we use the definition of operator as defined in Regulation (EEC) No 3922/91, it cannot be derived that an operator can only be deemed the airline that disposes of the requisite certificates allowing the operator to engage in commercial air transport.[296] Furthermore, does the definition of operator include *the natural person using an aircraft*? To this day, and like it or lump it, it remains unclear (although legally not yet disputed) what the exact definition is of 'the operator' who pursuant to the new Article 11 (5) of Regulation (EC) No 883/2004 nominates the 'home base' of the worker, *hence* determines the applicable social security legislation for said worker![297]

Issues with regard to the application of Article 11 (5) of Regulation (EC) No 883/2004

The lack of an unambiguous definition of what constitutes an operator for the correct application of Article 11 (5) of Regulation (EC) No 883/2004 renders it difficult for pilots and cabin crew members to determine who is ultimately responsible for the safeguarding of their rights. As mentioned above, this is particularly so, as there potentially is intervention by intermediary companies such as crew or temporary work agencies, brokers, or the owner of the wet-leased aircraft. The type of contractual relationship (typical or atypical employment) by which an individual crew member is hired will therefore determine the obligations by which the operator/airline will be bound e.g. with regard to the determination of the home base of said crew member. It has become daily practice that an airline buys the services of a subcontractor from the same or in most cases from another Member State who either provides flight and/or cabin services, provides flight and/or cabin crew members, or wet-leases out an aircraft. If the individual crew member is engaged via a temporary work agency, the operator will presumably not be responsible for social security contributions, whereas if this is not the case, it will be responsible for this.[298] However, if the temporary work agency does not qualify as an operator, and the airline does, then the airline will nominate the home base for said temporary agency worker and thus nominate the social security legislation applicable to said worker as well as the Member State where the social security contributions for said worker are due. This raises the question what happens when a temporary agency worker works for several airlines. If these airlines qualify as operator, then they must nominate a home base for this worker. Some stakeholders firmly believe a crew member cannot have more than one home base.[299] However, it is

[295] See e.g. Article 3 (c) of Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators, which defines the aircraft operator as "*the person or entity, not being an airline*, who has *continual effective disposal of the use or operation of the aircraft*; the natural or legal person in whose name the aircraft is registered shall be presumed to be the operator, unless that person can prove that another person is the operator" [emphasis added].

[296] Referring to an AOC might also prove difficult in those cases were an aircraft is leased. For instance: if an aircraft is wet-leased by an airline (holding an AOC), e.g. operating the wet-leased aircraft under the aircraft's owner's AOC, who is to be regarded as the operator determining the home base of the crew operating the aircraft?

[297] Note that Regulation (EC) No 883/2004 does not provide us with a legal definition of 'operator' that should be used for the interpretation and application of the home base rule introduced in said Regulation.

[298] Regulation (EC) No 883/2004 *in juncto* subpart Q of Regulation (EEC) No 3922/91 (operator shall nominate a home base).

[299] Furthermore, it looks as if the authors of Regulation (EU) No 465/2012 which introduced the home base rule in Coordination Regulation (EC) No 883/2004 and also amended, among others, Article 14 of implementing Regulation (EC) No 987/2009 (by inserting among others the following paragraph: "*5a. For the purposes of the application of Title II of the basic Regulation, 'registered office or place of business' shall refer to the registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out; For the purposes of Article 13(1) of the basic Regulation, an employed flight crew or cabin crew member normally pursuing air passenger or freight services in two or more Member States shall be subject to the legislation of the Member State where the home base, as defined in Annex III to Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of*

legally not impossible for a crew member working for different airlines, to have different home bases, in different countries, at the same time.[300] As stated above, what if an airline uses a plane via a wet-lease agreement (according to which an airplane and the complete crew is provided to this airline)? The operator will remain accountable for its crew. However, this situation becomes much more complicated if the owner of the aircraft who wet-leases out the aircraft (and thus provides both aircraft and crew) is legally not the employer of the crew members (e.g. crew members are hired through a broker — e.g. the pilots who often are self-employed — or a temporary work agency — e.g. the cabin crew members).[301] On the other hand, if an operator is bound by a lease agreement which does not constitute a wet-lease agreement, the responsibilities will be, amongst others, the subject of the lease agreement.[302] And what with a self-employed air crew member? Could that person decide (for) him or herself where the home base is situated? The fact that an *operator* (e.g. an airline) would decide where the home base is, could be considered as an indicator of employer's authority and hence of bogus self-employment according to many Member States' national applicable legislation. As the liberalisation of the European aviation industry has resulted in increased outsourcing and the emergence of a plethora of new business models, it need not surprise that the abovementioned scenarios also reduce transparency and legal certainty in employment relations between cockpit and cabin crew vis-à-vis employers. Even if we do not challenge the concept of 'home base' on its legal soundness as such, we can, as already mentioned, point out a few problems when making application of the 'home base' rule. It is the employer that at his or her own discretion decides where the home base is situated, which can lead to a swift change of the home base.[303]

And what to be said about the condition that, under normal conditions, the operator is not responsible for the accommodation of the crew member concerned. In cases where a crew member is not an employee of said operator, but on the contrary is (an employee of) a subcontractor of the operator or perhaps even a subcontractor of a subcontractor, the operator will under normal circumstances *never* be responsible for the accommodation of the crew member concerned.[304]

And even when we have defined who the operator is and how to deal with the different employment relationships, the question remains where the home base is to be situated *over time*. After all, the definition given to this concept does not limit the number of home bases that an individual crew member may have *over time* and does not even exclude that he or she has a home base in different Member States, nor does it limit the way and number of times a home base may be changed.

Consequently, a different home base even in another Member State can be assigned. As such this is not surprising, as exactly air crew members working on international flights by definition perform activities in more than one Member State and the aviation regulations the social security regulations

technical requirements and administrative procedures in the field of civil aviation, is located") did not take into account this possibility which is by no means made legally impossible by any Regulation up to date.

[300] The same applies to crew members working for more than one airline simultaneously either as an employee or as a self-employed service provider.

[301] Again, the term 'operator' is not defined in Regulation (EC) No 883/2004.

[302] Annex III, Subpart B of Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation.

[303] This possibility may even be greater in cases of outsourcing crew services. The place of employment in some countries might be considered an essential part of the terms and conditions of the employment agreement and e.g. in Belgium, the unilateral change of an essential condition can give rise to a breach of contract indemnity claim or even be considered a dismissal formally unsound.

[304] Some may depend on the agreement between the airline and the subcontractor.

refer to do not exclude that there cannot be a home base in more than one Member State.[305] Also Recital (18b) to Regulation (EC) No 883/2004 entails this possibility.[306] As stated, the applicable legislation for cockpit and cabin crew members should remain stable and *the home base principle should not result in frequent changes of applicable legislation due to the industry's work patterns or seasonal demands*.

Hence, operators have the possibility to change the designation or assignment of air crew members to (a) different (home) base(s). This is in particular possible in case of temporary assignments or in case of assignment of different home bases over a short period of time. But there is more: the *operator* nominates[307] the crew member's home base *and thus* the social security legislation applicable to the crew member(!) — whatever position vis-à-vis social security legislation this crew member adheres to (employee, self-employed, temporary agency worker etc). Moreover, the operator can *change* the home base of the crew member, without such a change of home base *ipso facto* resulting in changes of applicable legislation if this new home base is located in a different Member State. These rules seem to indicate that, as a response to the industry's work patterns or seasonal demands involving short assignments and in order to guarantee stability in the applicable legislation, the posting provisions might apply. However, even when the posting provisions cannot be applied, alternatively successive changes of base should, in the reasoning of said Recital 18b, not lead to automatic changes of applicable legislation.[308] Due to the implied possibility of frequently changing the home base, one might wonder if it is required to apply the posting provisions at all! In such cases, Article 14 of Regulation (EC) No 987/2009 applies.[309] Herewith, one wants to avoid the so-called 'yo-yo' effect. This means that the determination of the applicable legislation for flight crew members should not be subject to review for a period of at least 12 months following the last decision on applicable legislation, on the condition that there is no substantial change in the situation of the person concerned, but only a change in the usual work patterns.[310]

Nevertheless, it is a well-known fact that the variation in seasonal demands is, when it comes to crew allocation, a bigger problem in a point-to-point business model than in hub-based airline models.

[305] It is extremely important to bear in mind that an important part of aviation legislation stems from the pre-liberalisation era when the open-ended employment contract concluded between a flight crew member and the airline said member worked for was indeed still typical. The legislation that stems from that era is not up to some of the modern business models where atypical employment and outsourcing through subcontracting chains are rule rather than exception.

[306] Recital (18b) to Regulation (EC) No 883/2004 states: "*In Annex III to Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation (5), the concept of "home base" for flight crew and cabin crew members is defined as the location nominated by the operator to the crew member from where the crew member normally starts and ends a duty period, or a series of duty periods, and where, under normal conditions, the operator is not responsible for the accommodation of the crew member concerned. In order to facilitate the application of Title II of this Regulation for flight crew and cabin crew members, it is justified to use the concept of "home base" as the criterion for determining the applicable legislation for flight crew and cabin crew members. However, the applicable legislation for flight crew and cabin crew members should remain stable and the home base principle should not result in frequent changes of applicable legislation due to the industry's work patterns or seasonal demands" [emphasis added]. Inserted by Article 1 (2) of Regulation (EU) 465/2012. This is an almost an exact copy of recital (4) of said Regulation "The concept of 'home base', for flight crew and cabin crew members, under Union law is defined in Annex III to Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation (4). In order to facilitate the application of Title II of Regulation (EC) No 883/2004 to this group of persons, it is justified to create a special rule whereby the concept of 'home base' becomes the criterion for determining the applicable legislation for flight crew and cabin crew members. However, the applicable legislation for flight crew and cabin crew members should remain stable and the 'home base' principle should not result in frequent changes of applicable legislation due to the industry's work patterns or seasonal demands*".

[307] In the future: 'assigns' (see *infra*, the comments on Regulation (EU) No 83/2014).

[308] Recital 18(b) expressly states so, see *supra* footnote 304.

[309] See *supra* footnote 297..

[310] See also Practical Guide. p. 31-34. The Practical Guide explicitely refers to crew members working for more than one airline.

Here, the allocation of personnel to another line will not as often result in a change of home base, the home base in the majority of cases being and remaining to be the hub.[311]

As the concept of a 'home base' for pilots and cabin crew members is an EU concept, this provision is only valid – like the Regulation provisions – within the EU and therefore cannot be applied if a person concerned – even if he or she is an EU national – has his or her home base *outside the EU*, from which he or she undertakes flights to different EU Member States. In this situation, the general conflict rule for working in two or more Member States continues to apply.[312] In the situation where an EU national resides in a third country but works as a pilot or cabin crew member from a home base in a Member State, that Member State will be competent for his or her overall activities within the EU.

A NEW HOPE?

Will Regulation (EU) No 83/2014 change the concept of home base entailed in Regulation (EC) No 883/2004?[313] Regulation (EU) No 83/2014 amends 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. It does *not* amend Regulation (EC) No 883/2004 and it is not stated that its purpose is to do so. However, Article 11 (5) of Regulation (EC) No 883/2004 states: "*An activity as a flight crew or cabin crew member performing air passenger or freight services shall be deemed to be an activity pursued in the Member State where the home base, as defined in Annex III to Regulation (EEC) No 3922/91, is located*". Regulation (EU) No 83/2014 amends Regulation (EU) No 965/2012, which concerns technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council. Regulation (EU) No 965/2012 does not entail any provisions with regard to the coordination of social security schemes. Nevertheless, Regulation (EU) No 83/2014 does not amend Regulation (EU) No 465/2012, which leaves Recital 18 (b) introduced by the latter untouched.

Furthermore, Regulation (EU) No 83/2014 will only bring about a minor change to the concept home base. The new definition of the concept home base after its entry into force (it will apply from 18 February 2016) states: "'*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*".[314] The difference is that the location is no longer *nominated* by the operator, but *assigned*. The difference in wording would result in the positive

[311] Nevertheless, as a result of the higher demand of seats in specific seasons, hub-and-spoke airlines often suffer shortages of flight crew members on specific moments.

[312] The EU regulations on the coordination of social security apply regardless of nationality. They thus apply to a third-country national who is legally resident in an EU Member State and who is working as a crew member from a home base located in another EU Member State.

[313] 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.

[314] ORO.FTL.105 Definitions (14) of Section 1 of Subpart FTL to be added to Annex III to Regulation (EU) No 965/2012 as contained in Annex II to Regulation 83/2014. Note the only difference with the previous definition.

consequence that only one home base at the same time is possible.[315] Whether these changes will resolve all issues remains to be seen.

D. TAXES

Quote pilot

My tax situation is the greatest fear that I have. I am forced to pay the employer's share of social insurance and the employee contributions both in the country I am based AND the country where the airline has its headquarters. I pay my income tax in the country where the airline is based and none in the country where I actually live. I have already been forced to leave one country because of tax investigations and I am in no way certain that this structure is even legal where I live now.

Quote pilot

I have also personally been the subject of a very serious tax inquiry, I was left to defend myself with no help from the company, despite this chronic worry and pressure I needed to keep flying to keep my income coming in despite the fact that I was making many mistakes at work as I was preoccupied with fear over my tax situation. I am a "contractor" not by choice but because the company, through middlemen use this structure not only to avoid paying social insurance but also to ride rough shod over the employment laws of most countries. I am taxed at source but still have to face the tax authorities as if I was an independent business. The tax authorities seemingly turn a blind eye and don't care about the underlying issues as long as the money keeps coming in. Meanwhile other reasonable employers are forced to join this race to the bottom and have also started copying these methods. A larger, pan-European view is needed.

We also presented participants a question aimed at finding out where respondents indicate that they pay their taxes. The reason behind this question was, among others, to get a view on the different countries involved when it comes to the applicable labour, social security and tax legislation. Highly mobile workers are often confronted with the legislation of different countries, since different domains of law use different criteria to determine whether or not that legislation applies. Furthermore, in cases of social and tax engineering, it can often be observed that the legislation of different countries is 'made' applicable. In some cases, depending on the factors involved, certain countries might raise doubts about whether or not they represent actual situations.[316] Furthermore, 'drawing the map' is extremely useful to get a better understanding of the complexity for the actors involved (and thus of the possibility of *errors* occurring in the determination *and* the application of the applicable legislation) as well as of the possibility of schemes of social and tax engineering (and, a step further, possible *fraud*).

[315] See CS ORO.FTL.200 Home Base and CS FTL.1.200 Home Base.

[316] According to some accouts, crew members often do not have a 'choice' and are ordered to 'seek' legal advice or are confronted with a legal construction as a result of which the legalislation of a Member State which under normal circumstances would not apply is 'made' applicable to their situation and such not always to their benefit. For instance, the social security coverage in Member States with lower social security contributions is not always at the same level of social security coverage of a Member State with higher social security contributions. Furthermore, if the 'applicable' social security legislation is not the social security legislation of the Member State that under normal circumstances would be applicable, this can have a negative impact on the rights of the worker involved, e.g. when the latter Member State does not agree with the situation at hand, things can become very complicated for the workers involved. This is even more so in cases where tax legislation is 'made' applicable (often without the worker seeking tax advantages) and the tax authorities of the Member State the legislation of which under normal circumstances would be applicable, start proceedings e.g. on the grounds of tax evasion or in application of anti-avoidance legislation.

Next to France and the Netherlands, Sweden is now the third country where a large part of the respondents reported that they pay their taxes, followed by the UK and Ireland. Figure 207 again represents the top ≥0.2%. However, note the very high number of respondents not providing or refusing to provide us with an answer to this question.[317]

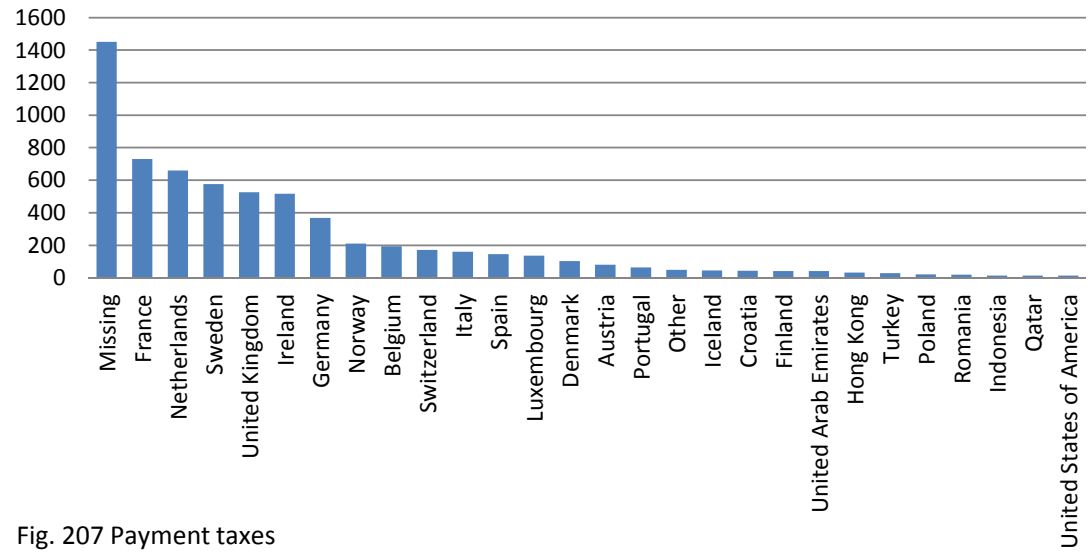


Fig. 207 Payment taxes

80% of the respondents stated that this is the same country as the one where their home base is located.

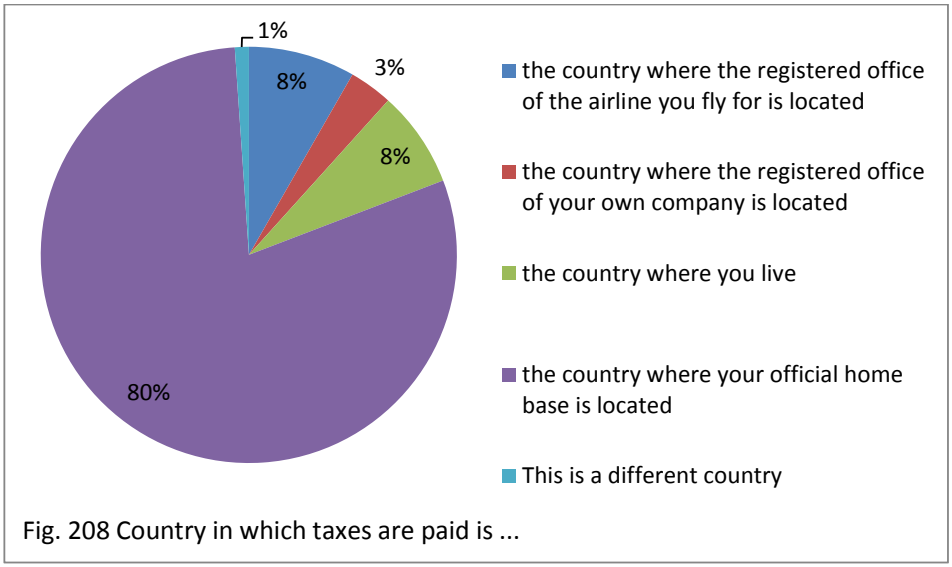


Fig. 208 Country in which taxes are paid is ...

[317] Online pilot forums indicate that many pilots, especially those who are 'required' to work as a self-employed person, hire (or are required to hire) the services of tax consultants, which very often results in taxes being paid in tax safe havens (e.g. Guernsey, Jersey, Luxembourg, etc).

FINAL CONCLUSIONS AND RECOMMENDATIONS

FINAL CONCLUSIONS AND RECOMMENDATIONS

In this part we will describe some general conclusions that in our opinion need further reflection and legal and political actions. 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. This is the reason why after each of the challenges, some options for action are described. Some of these options are based on interviews undertaken with stakeholders.

Quote pilot

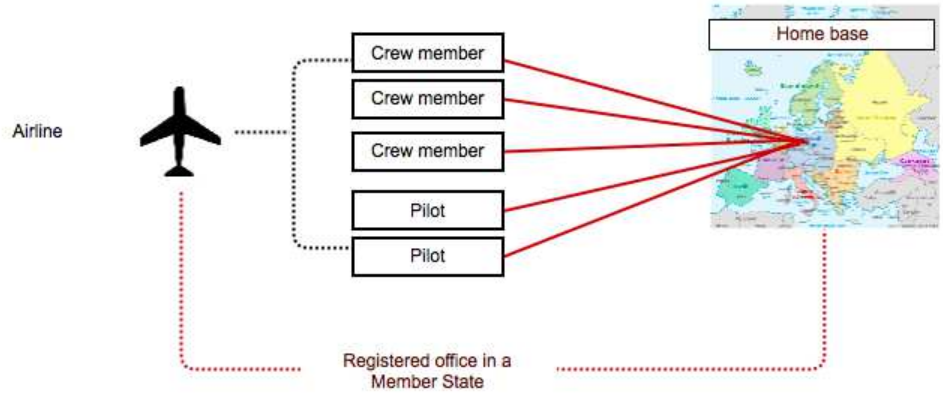
After 30 years of flying I can only see that this profession is by far not what it used to be. I cannot recommend this job to any young guy or girl. Maybe with the exception of the national carriers. Aviation managers are bending, if not breaking the laws and expecting this from at least the young pilots as well.

Being a European pilot means no job guarantee, no home base for the family and exploitation thanks to European loopholes in the law s.a. low cost companies in certain EU states. It's an endless race to the bottom which will take its toll sooner or later. Strong demotivation, fatigue, reduced training and pushing beyond limits are common practice to reduce costs and hand out bonuses to 'leading' managers ... The catch is that pilots really love to fly otherwise not a plane takes off anymore with these conditions nowadays ...

I. SOCIAL SECURITY LAW: TOWARDS A NEW RULE OR CONNECTING FACTOR FOR AIR CREW?

The core of civil aviation legislation stems from the pre-liberalisation era. In this era, typical employment was about the only form in which crew members were working for airlines, which then where mostly national airlines registered in and mainly operating from the country of their nationality. In those times, the 'home base' was exactly what it says: the 'home' where the airline's principal base was located. Crew members were mostly nationals of the country where the airline was established and where the airplanes of that airline were registered, not unlike the maritime sector before the 1950s. The only transnational element in play was when airlines would have transnational flights. Nowadays, this has changed dramatically. Since the liberalisation of the EU civil aviation industry, new business models emerged, in particular the low-cost airline model and in a later stage, the network airline model.

Fig. 209 Typical situation



Regulation (EEC) No 1408/71 also stems from the pre-liberalisation of civil aviation in the EU.[318] After the liberalisation, the coordination rules for social security enshrined in Regulation (EEC) No 1408/17 did not lead to the solutions sought and gave rise to the emergence of bogus situations. Regulation (EC) No 883/2004, the new Regulation for the coordination of social security systems, and its implementing Regulation did not resolve these issues.[319] Hence, Regulation (EC) No 883/2004 was amended by Regulation (EU) No 465/2012, which introduced the home base rule as a connecting factor for civil aviation crew members, paying tribute to the aviation rules.[320] The expectations were rather high and it was an important step into the direction of a solution. Unfortunately, the home base rule proved unable to resolve these issues as well.[321] It is noticed that making the direct link between the aviation regulations and the social legislations is not without any risk. In the meantime, both the civil aviation industry as well as the business and management models have continued to change significantly, to the extent that one could say the home base rule actually provided for new means of setting up subcontracting chains. Subcontracting chains, although not *ipso facto* bogus, illegal or unwanted – e.g. wet-leasing, a for civil aviation typical form of subcontracting – are often used to 'hide' bogus constructions and often result in social dumping. The following figures picture some of the typical forms currently encountered in the aviation sector.

[318] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.
[319] Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.
[320] Regulation (EU) 465/2012 of the European Parliament and of the Council of 22 May 2012 amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004.
[321] *Supra* – Part 4. III. C. 2. Social security legislation shopping?.

Figure 210 Subcontracting with the same home base for all crew members

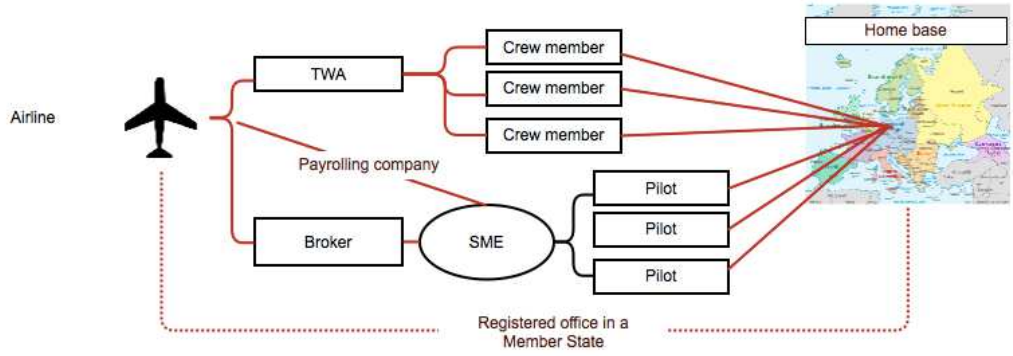


Figure 211 Subcontracting with different home bases for different crew members

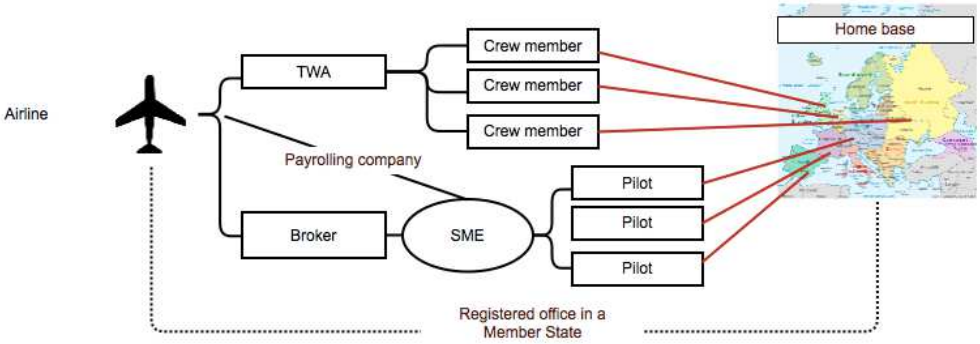


Figure 212 'Ordinary' wet-leasing: same home base for all crew members which are directly employed

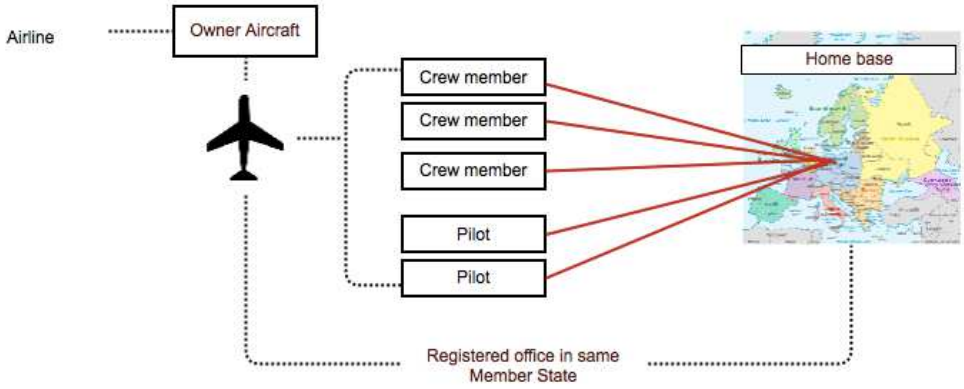


Figure 213 Wet-leasing and a subcontracted crew with same home base for all crew members

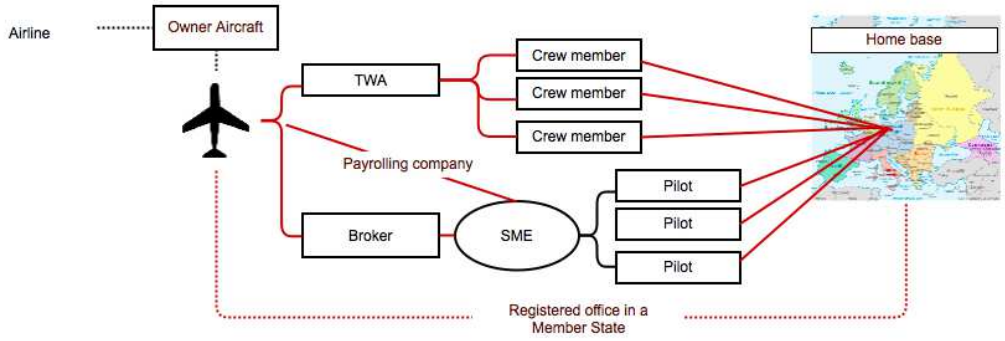
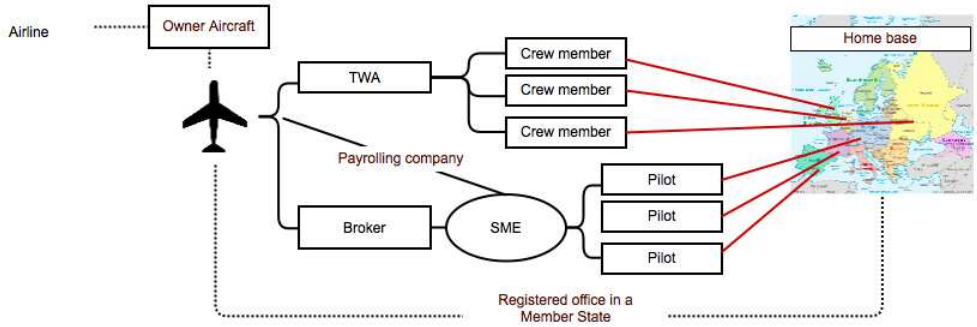


Figure 214 Wet-leasing and a subcontracted crew with different home bases for different crew members



Regulation (EU) No 83/2014[322] will change the concept of home base enshrined in Subpart Q of Annex III to Regulation 3922/91 by adapting Regulation (EU) No 965/2012.[323] Under the new definition of home base, the operator will no longer nominate but rather assign a crew member a home base. Some believe this change will make the home base more permanent. However, whether the changes that will be introduced by Regulation (EU) No 83/2014 will solve the existing issues is not really clear. Even after the introduction of the change, it will still be possible for crew members working for multiple airlines — e.g. temporary agency workers or self-employed crew members — to have different home bases, even in different Member States.

The question with regard to the changing of home base, the possibility of multiple home bases, and the change of the concept 'home base' by Regulation (EU) No 83/2014 was raised during the 338th meeting of the Administrative Commission for the Coordination of Social Security Systems on 12 and

[322] 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.

[323] Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation; and Regulation (EU) No 965/2012 of 5 October 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.

13 March 2014. At this meeting it was confirmed that originally the 'home base' principle was developed *in the field of aviation safety for the determination of rest periods* and that only later it became a connecting factor for the determination of the applicable social security legislation.[324] It was stated that an operator could only nominate one home base to a crew member at the same time. However, it was also stated *there could be specific cases where a flight crew member works for two airlines, and thus can have more than one home base*. Furthermore, the Administrative Commission was informed that Regulation (EC) No 83/2014 does not change the definition of 'home base' in substance, as it only replaced the word 'nominated' by 'assigned'. It was furthermore reported that this Regulation also provides that *a single airport* location would need to be assigned with a high degree of permanence.[325]

However, with the new definition of home base applicable, an operator would still without too many problems be able to change the home base assigned to a crew member.[326] The Certification Specification on home base expressly provides for a changing of home base.[327] Furthermore, as mentioned before, the Certification Specifications allow derivations[328] and it can be argued if legally, the have any effect at all within the domain of social security legislation.[329] Moreover, the "*high degree of permanence*" enshrined in the new Certification Specifications did not get any legal definition, the only legal boundaries being the mandatory rest times specified in the FTL regulations in the event that a change of the home base takes place.[330]

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[324] AC 021/14, Minutes of the 338th meeting of the Administrative Commission, Brussels, 12-13 March 2014, p. 17-18.

[325] *Ibid*.

[326] It should be noted the word assigned is also used in another definition and with a meaning that implicates much less permanence: ANNEX I to Regulation 965/2012 defines a 'crew member' as "a person *assigned* by an operator to perform duties on board an aircraft" (emphasis added; Annex I to 965/2012, Definitions for terms used in Annexes II to V).

[327] In its opinion of September 2012, EASA acknowledged the fact that operators can get a derivation pursuant to Article 22 (2) of Regulation (EC) No 2016/2012: "*Home base*

77. The operator responsibility to assign a home base to each crew member stems from Subpart Q and is reflected in ORO.FTL.200. Neither the definition of home base nor this IR specify if the home base should be a single airport location. Since however the single airport home base concept is without a doubt used by the large majority of operators, the provisions in draft CS FTL.1.200 take note of the concern that changing home base and operating out of more than one airport within a multiple airport system creates additional fatigue and specify that the home base should be a single airport location assigned with a high degree of permanence. In case of a change of home base, the draft CS foresees prolonging the extended recovery rest prior to starting duty at the new home base to once 72 hours, including 3 local nights. The travel time between the old and the new home base shall also be counted. Therefore it is required that travelling time between the former and the new home base is either positioning or FDP.

78. The need for some operators to use a multiple airport system as a home base is nonetheless acknowledged by the choice of regulatory tool. Placing this provision in CS provides flexibility through the deviation process described in Article 22.2 of the BR" [Emphasis added]. European Aviation Safety Agency, 'Opinion No 04/2012 of the European Aviation Safety Agency of 28th September 2012'. p. 16. Available at http://www.easa.europa.eu/system/files/dfu/EN%20to%20Opinion%2004-2012.pdf).

[328] "ORO.FTL.125 Flight Time Specification Schemes

(...)

(c) To demonstrate compliance with Regulation (EC) No. 216/2008 and this Subpart, the operator shall apply the applicable certification specifications adopted by the Agency. Alternatively, if the operator wants to deviate from those certification specifications in accordance with Article 22(2) of Regulation (EC) No. 216/2008, it shall provide the competent authority with a full description of the intended deviation prior to implementing it. The description shall include any revisions to manuals or procedures that may be relevant, as well as an assessment demonstrating that the requirements of Regulation (EC) No. 216/2008 and of this Subpart are met." (See e.g. UK Civil Aviation Authority, *EASA FTL Regulations – Combined Document*, 18 February 2014, p. 16; http://www.caa.co.uk/docs/620/20140218EASACombinedFTLRegulations.pdf).

[329] As mentioned above, derivations from Certification Specifications of EASA are possible. Furthermore, from a legal point of view it is not clear if Certification Specifications have any effect within the field of e.g. the coordination of social security legislation.

[330] "*ORO.FTL.200 Home Base*

An operator shall assign a home base to each crew member.

CS FTL.1.200 Home Base

(a) The home base is a single airport location assigned with a high degree of permanence.

Last but not least, even the new home base rule will not resolve the growing issue of European-based operators to assign home bases outside the European Union.[331]

Figure 215 Subcontracting with different home bases for different crew members; some home bases are not located within the EU

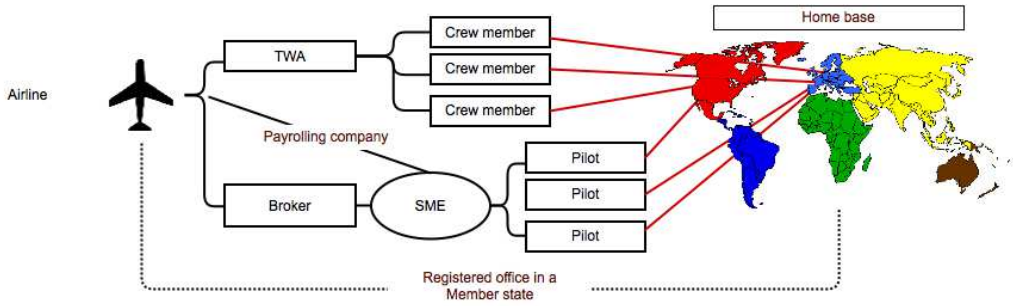
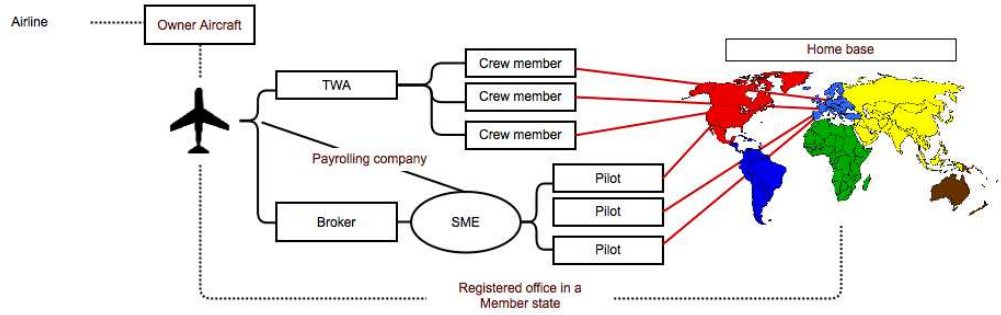


Figure 216 Wet-leasing with different home bases for different crew members; some home bases are not located within the EU



In fact, this practice allows for new forms of evasion: for the determination of the social security legislation applicable to a crew Member with a home base outside the European Union, the home base rule would not easily apply, since it falls outside the EU. In most cases, the rules of working in different Member States would apply, which would mostly result in the legislation of the Member State of establishment of the airline being applicable, whereas the home base rule was adopted to avoid this kind of results! Moreover, if this practice is on the rise,[332] it should be feared that as a result, civil aviation, much like the maritime sector, will not only see the emergence of flags of convenience but also crews of convenience, the paramount of social dumping. This raises doubts

(b) In the case of a change of home base, the first recurrent extended recovery rest period prior to starting duty at the new home base is increased to 72 hours, including 3 local nights. Travelling time between the former home base and the new home base is positioning." [Emphasis added] See e.g. UK Civil Aviation Authority, 'EASA FTL Regulations – Combined Document', 18 February 2014. p. 16. Available at http://www.caa.co.uk/docs/620/20140218EASACombinedFTLRegulations.pdf.

[331] See e.g. recent cases of *Norwegian Air Shuttle* (through its subsidiaries, *Norwegian Long Haul AS* and *Norwegian Air International Limited*) and *Primera*. See also e.g. *Vueling* reportedly assigning planes and crew members to fly routes in South America during the low season in the EU.

[332] See e.g. 'Practical guide: The legislation that applies to workers in the European Union (EU), the European Economic Area (EEA) and in Switzerland', European Commission, 2013. p. 33.

about the appropriateness of the coordination provisions. Therefore, some options could be envisaged.

Policy options:

1. Regulations (EC) No 883/2004 and (EC) No 987/2009 could be amended before Regulation (EU) No 83/2014 comes into force. This amendment could entail 1) adapting Recital (18b) and replacing also the word 'nominate' with 'assign', as well as 2) inserting a clear definition of the term operator. The latter might proof a difficult exercise in many atypical yet non-bogus situations such as temporary agency work, genuine self-employment and *bona fide* wet-lease constructions. To a certain extent the idea of the home base is encouraged, as it might be seen as leading to a *Gleichlauf* (convergence) between the home base as a connecting factor for the determination of the applicable social security legislation and the interpretation of the CJEU of the 'place of habitual work' in the field of labour law and court competence, thus in the end providing for a connecting factor for both the applicable labour law provisions and social security legislation. In labour law there is a clear tendency to strengthen the place of habitual work as the connecting factor. However, the road to such a *Gleichlauf* between labour law and social security legislation is not without political hurdles and legal impediments, not in the least since social security law and labour law envisage other interests and the conflict rules in both domains have different starting points. Furthermore, such a *Gleichlauf*, certainly when the home base is conceived as the place of establishment of the airline, could have the adverse effect of a return to the old rules. Moreover, the reservation of the home base as a connecting factor for the determination of social security legislation does not resolve the issues with home bases nominated or assigned outside the EU.

2. A new connecting factor could be conceived for crew members in the civil aviation sector. In our view, the place of residence of crew members should not be taken into account, since this will result in bogus residences, which can easily be set up, even more so in the case of highly mobile workers, and which cannot always be easily monitored. This connecting factor might even weaken crew members' positions vis-à-vis airlines providing *malafide* airlines with new ‘pressure points’ towards employees or service providers. The choice for the place where the employer is based as a connecting factor is even more problematic and a return to the problems of the past. Nevertheless, a new rule should in our view be considered rather than tampering with the old ones, even more so since we fear the home base rule, even after its change, will provide ample opportunities for crews of convenience and the social dumping which is the result thereof. It might be an option to implement policy option 1 while in the meantime conceiving a new rule for highly mobile workers.

3. Although in our opinion not a feasible option at this stage, a well-conceived genuine European rule for highly mobile workers could be able to resolve most of the issues both at hand and emerging. This rule requires an impact assessment in order to know which parties (employee, employer, insurance institution) are favoured and which are disadvantaged, so that a balanced solution can be found.

4. In general, the question arises if also no modifications should be made to aviation law in this regard. In this respect, a general advice is whatever policy option is chosen, adaptations for crew members in the civil aviation sector should not be made without taking into account both general and specific regulations of that sector.

Quote pilot

The social dumping of the flying personnel working market with contract pilots forced to work as "independent consultants" with only one contractor allowed by the airline which you are actually tied and dependent on, creates pressure among employees to work longer hours for less pay under poorer working conditions causing a negative environment for the pilots to prioritise safety in their profession without taking risks of letting it impact their personal "employment" situation and its condition. Social dumping forces all competing airlines that have an interest in remaining competitive on the market to follow the same path as the concerned airlines, resulting in an overall deterioration in working conditions, job security and most importantly flight safety. Political regulation within EU is crucial to be able to maintain fair competition between airlines and maintain current safety standards within the business.

II. DIRECT EMPLOYMENT VS GENUINE SELF-EMPLOYMENT AND GENUINE SELF-EMPLOYMENT VS BOGUS SELF-EMPLOYMENT

Currently, 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 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 (e.g. since wet-leasing, which can be considered a form of subcontracting specific to aviation, is a widespread practice that is both legally and generally accepted and applied). Is there not a risk that this would mean throwing away the baby with the bathwater? To what extent might it be said that the profession of pilots is so different from other professions that self-employment should be excluded by definition? Is it because one is of the opinion that pilots normally only fly for one specific type of airplane?

Second, the question can be raised if 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.

On the other hand, some stakeholders believe that the concept of the captain's authority to a certain extent overruling employer's authority is such that a captain's position is more similar to a free profession than to the position of an employee. These stakeholders hold the view that captains

should be self-employed pilots, whereas first officers should always be employees. A benefit of such a system would bring about a significant reduction of labour costs for captains, whereas it would, still according to these stakeholders, strengthen the position of first officers who are now often forced to work as subcontractors. However, this argument also has several legal pitfalls (one issue is e.g. the relation between pilot authority (mainly on safety issues) and employer authority, and the impact on subordination, an issue also investigated in our survey) and might be problematic, even more so since EU aviation law does not exclude freelance and self-employed air crew members.[333] In addition, this argument also faces strong opposition. For the European cockpit Association (ECA), captain authority should not be confounded with lack of employment subordination. Captain authority should be considered as the professional judgment existing in many other professions such as judges or university professors. According to ECA, direct employment with protections against dismissal for the exercise of professional judgment is the best guarantee to safeguard the independence, objectivity and fairness of those professionals and is not incompatible with a normal employment relation.

In general it is clear that the problem of bogus self-employment should be tackled. In this respect there is no difference between own citizens and foreign citizens, as *foreign* bogus self-employed people are as bogus as own nationals who are self-employed.

However, we note that more actions and tools are required to solve these issues, as the current tools cannot solve all problems. National practices have shown how difficult it often is to tackle bogus self-employment throughout all economic sectors. Special measures to combat bogus self-employment in the aviation sector have hardly been taken, or raise concern about the conformity with European law.

The emergence of atypical employment relationships raises issues about the protection of the persons concerned. Most of the Member States recognise a dual classification or binary divide within the concept of 'labour relations': workers/employees on the one hand and self-employed on the other. In essence, both national labour and social security law systems are built upon those two concepts. Labour law was enacted exactly to protect the worker, i.e. the weaker party. Contrary to workers, self-employed persons are (supposed to be) independent and less in need of protection. In this respect, employees, due to their subordinate position, rather conclude a contract *of service*, whereas self-employed persons conclude a contract *for services,* as they sell a product or provide a service.

However important this binary divide might be for the persons concerned, due to the changing economic reality and the growing prevalence of business models depending on outsourcing, it has become a far from easy task to classify persons under one or the other category. Every Member State struggles with this dual classification. The problem has becomes even more complex due to the fact that a considerable group of people situate themselves in between these two categories. The traditional strictly binary distinction between 'employees' and the independent 'self-employed' is no longer an adequate depiction of the economic and social reality of work. A new growing group of people can be discovered, sometimes described as economically dependent workers. The concept of

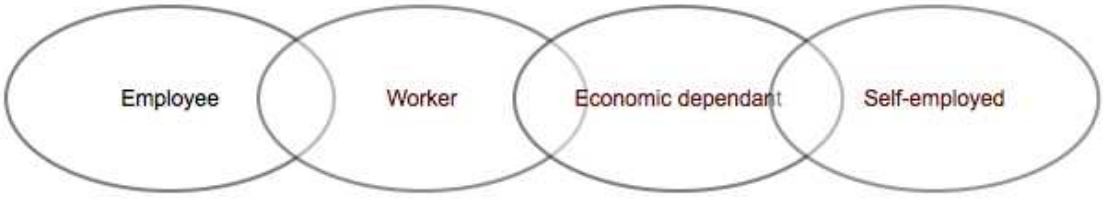
[333] See e.g. ORO.TC.105 'Conditions for assignment to duties' and ORO.FC.100 'Composition of flight crew'.

'economically dependent work' covers situations which fall between the two established concepts of subordinate employment and independent self-employment. These workers do not have a contract of employment and they may not be covered by labour law, since they occupy a 'grey area' between labour law and commercial law. Although formally 'self-employed', they remain economically dependent on a single principal or client/employer as their single or main source of income.[334]

This trend can be noticed throughout almost all professions, including the aviation sector. This phenomenon should, however, be clearly distinguished from the deliberate miss-classification of (self)-employment. The demarcation between direct employment and genuine self-employed is therefore also very difficult to draw. Several techniques have been developed either by means of legislation or by the courts.

While in some countries, no statutory definition of these concepts is envisaged, in other Member States the statutory definition is provided only for direct employment. Also, there are a few countries which provide a statutory definition of both concepts. However, the fact that a clear definition is provided, by means of either legislation or case law, should not be overestimated, as it does not follow that those countries that do have a legal definition have a more clear-cut distinction between employment and self-employment.[335]

The question then arises if these national concepts of employee and self-employed could be found on EU level and in the case law of the CJEU, and if some support could be found for an interpretation in one or other direction? First of all, it should be noted that the EU Treaty lacks a positive definition of both concepts of employee or self-employed.[336] The description of these concepts can be found through the term 'worker' with regard to the free movement of workers. From the very beginning, the CJEU developed an extensive case law on the free movement of workers and determined that the concept of 'a worker' has a community meaning, referring to all those who, as such and in whatever way, are covered by the different national systems of social security.[337] The CJEU has interpreted the notion of 'worker' *broadly*, highlighting that it defines the scope of one of the fundamental freedoms granted by the Treaty.[338]



[334] See European Commission, Green Paper, 'Modernising labour law to meet the challenges of the 21st century', COM(2006)708 final. p. 11.

[335] Y. Jorens, 'Self-employment and bogus self-employment in the European construction industry', European report, EFBWW and FIEC, 2008, Brussels. p. 15.

[336] See also C. Barnard, *EU employment law*, 2012, 4th edition, Oxford: Oxford University Press. p. 144 *et seq*.

[337] Judgment of 19 March 1964, Unger / Bedrijfsvereniging voor Detailhandel en Ambachten (75/63, ECR 1964 p. 177) (FR1964/00347 NL1964/00371 DE1964/00381 IT1964/00351 EN1964/00177 DA1954-1964/00471 EL1954-1964/01069 PT1962-1964/00419 ES1964-1966/00029) ECLI:EU:C:1964:19.

[338] C. Barnard, *EU employment law*, 2012, 4th edition, Oxford: Oxford University Press. p. 148.

Accordingly, the notion of 'worker' must not be interpreted restrictively and must be seen independent from national definitions.[339] According to the CJEU, the EU concept of 'worker' has three basic elements, namely the provision of labour, remuneration and subordination: "*The essential feature of an employment relationship is that a person performs services of some economic value for and under the direction of another person in return for which he receives remuneration*."[340] The bond of subordination appears to be the most important element by which one may distinguish 'workers' from the 'self-employed'. National courts must base their examination on objective criteria and make an overall assessment of all the circumstances of the case relating to the nature both of the activities concerned and of the employment relationship at issue.[341]

Taking into consideration the broad definition of 'workers', as honed by case law, the self-employed are perhaps considered a residual category. Just as is the case for workers, the Treaty does not give us a definition of self-employed. The CJEU has confirmed that "*any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity for the purposes of the Treaty*." This implies that, in order to make a proper distinction between these categories, the presence or absence of a relationship of subordination is significant. However, whenever a preliminary ruling is called for (Article 234 EC) only national courts are competent to decide whether a person is either a worker or a self-employed person.

Within this framework, the CJEU provides some 'guidelines', in order to guide the national courts. An (economic) activity, pursued by a self-employed person, falls under the scope of the right of establishment if it is carried out by the person providing the services (1) outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration, (2) under that person's own responsibility, and (3) in return for remuneration paid to that person directly and in full.[342]

Bogus (or false) self-employment occurs when a person who is an employee is classified other than as an employee so as to hide his or her true legal status and to avoid or evade costs that may include (higher) taxes and social security contributions. It has to be mentioned, and the fight against bogus situations is proof thereof, that the demarcation between on the one hand direct employment/genuine self-employment and on the other hand genuine self-employment/bogus self-employment is, however, very difficult to draw, not least due to the blurring of the distinction between these categories. The fight against bogus self-employment deals with the question how to correctly assess and legally classify employment using the tools provided by legislation or prescribed by case law. How does the judge expose bogus self-employment and classify it as employment?

On EU level, the CJEU, although be it in another domain of EU law, i.e. Article 157 TFEU (former Article 141 TEC) on equal pay between male and female workers, stressed that the term 'worker'

[339] Judgment of 23 March 1982, Levin / Staatssecretaris van Justitie (53/81, ECR 1982 p. 1035) (ES1982/00219 SVVI/00335 FIVI/00351) ECLI:EU:C:1982:105; judgment of 15 March 1989, Echternach and others / Minister van Onderwijs en Wetenschappen (389/87 and 390/87, ECR 1989 p. 723) ECLI:EU:C:1989:130..

[340] Judgment of 3 July 1986, Lawrie-Blum / Land Baden-Württemberg (66/85, ECR 1986 p. 2121) (SVVIII/00661 FIVIII/00687) ECLI:EU:C:1986:284.

[341] Judgment of 6 November 2003, Ninni-Orasche (C-413/01, ECR 2003 p. I-13187) ECLI:EU:C:2003:600; judgment of 7 September 2004, Trojani (C-456/02, ECR 2004 p. I-7573) ECLI:EU:C:2004:488.

[342] Judgment of 20 November 2001, Jany and others (C-268/99, ECR 2001 p. I-8615) ECLI:EU:C:2001:616.

within Article 141 (now 157) should be judged on its own merits.[343] Since there is no single definition in Union law, the meaning of the concept varies according to the area in which the definition is to be applied, and it cannot be defined by reference to the legislation of the Member States but has an autonomous meaning specific to the Acquis Communautaire. Moreover, it is clear from this definition that the authors of the Treaty did not intend that the term 'worker', within the meaning of Article 141 TEC (now Article 157 TFEU), should include independent providers of services who are not in a subordinate relationship with the person who receives the services.[344]

However, the question whether such a relationship exists must be answered in each particular case bearing in mind all the factors and circumstances which determine the relationship between the parties. The formal classification of a self-employed person under national law does not exclude the possibility that such a person may be classified as a worker within the meaning of Article 141 EC if his or her independence is merely notional, thereby disguising a subordinate employment relationship within the meaning of that Article.[345] It is necessary in particular to consider the extent of any limitation on their freedom to choose their timetable, and the place and content of their work. Because of the absence of a subordinate relationship, the self-employed person has more independence in this respect. Elements of importance are furthermore the nature of the duties entrusted to the person; the context in which those duties are performed; the scope of the person's powers and the extent to which he or she was supervised; and the circumstances under which the person could be removed.[346] What we can deduct from this case law is that the CJEU seems to give a clear precedence to the facts, more than to the formal (written) qualification *inter parties* of a contractual employment relationship.

It is also worthwhile to refer in this respect to the new Enforcement Directive.[347] The Enforcement Directive is aimed at strengthening the means to tackle bogus situations, bogus posting of workers constructions as well as what is referred to in Recital 10 of said Directive as 'false self-

[343] Article 157 TFEU states:
"*(ex Article 141 TEC)*
1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
2. For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
Equal pay without discrimination based on sex means:
(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
(b) that pay for work at time rates shall be the same for the same job.
3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.
4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers".

[344] *See Article 157.2 TFEU: "For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer*".

[345] Judgment of 13 January 2004, Allonby (C-256/01, ECR 2004 p. I-873) ECLI:EU:C:2004:18. See (in the context of the free movement of workers) judgment of 8 June 1999, Meeusen (C-337/97, ECR 1999 p. I-3289) ECLI:EU:C:1999:284. See recently in the context of companies and competition law judgment of 4 December 2014, FNV Kunsten Informatie en Media (C-413/13) ECLI:EU:C:2014:2411.

[346] Judgment of 11 November 2010, Danosa (C-232/09, ECR 2010 p. I-11405) ECLI:EU:C:2010:674.

[347] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative co- operation through the Internal Market Information System ('the IMI Regulation').

employment'.[348] As the Posting Directive only applies to workers, the classification as a self-employed person would allow these people to avoid falling under this Directive. The fifth paragraph of Article 4 of the Enforcement Directive provides some indicators for the fight against bogus self-employment, at least within the context of posted workers.[349] This is nevertheless under certain conditions. Although the Enforcement Directive gives some indicators – performance of work, subordination and remuneration – it does not provide for clear-cut measures on bogus self-employment at the level of individual cases! Article 4 (1) of said Directive also states that those elements are "*indicative factors in the overall assessment to be made and therefore shall not be considered in isolation*". Each case will still have to be judged on its particular merits and the fight against bogus situations will still highly rely on the measures adopted by the Member States in their national legislation or the interpretation by the national courts. If and where necessary, these measures could be adapted to the typicalities of the sector concerned (i.e. the aviation sector) in close collaboration with the social partners.[350]

When EU employment rights are at stake, the abovementioned case law could be taken on board to judge the way national legislation and/or case law determine the employment relationship or the status of self-employment. Indeed, in this respect it may not be forgotten that the question inspection services and competent authorities or courts have to solve – whether or not we are confronted with a case of *bogus* self-employment – does not depend on the fact whether the worker concerned is a national citizen or a national citizen from another country. To find out if a pilot is bogus self-employed the same criteria have to be applied as with any other bogus self-employed national.

Subsequently, first of all the way the Member States' national legislations handle the phenomenon of bogus self-employment should be looked at. The abovementioned case law of the CJEU can give only *some* inspiration and guidelines in an EU context. In the first place the precedence of facts (matter) over (legal) form seems to be predominant, and this is also confirmed in the Enforcement Directive. In the second place the CJEU refers to *certain* elements – such as the freedom to choose the timetable, the place and content of the work. These elements can often also be found in measures different Member States have introduced in their national setting. However, some caution is in order, since some of these criteria, depending on the specifics of the sector and the work concerned,

[348] Recital (10) to Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation') stipulates: "*The elements set out in this Directive relating to the implementation and monitoring of posting may also assist the competent authorities in identifying workers falsely declared as self-employed. According to Directive 96/71/EC, the relevant definition of a worker is that which applies in the law of the Member State to whose territory a worker is posted. Further clarification and improved monitoring of posting by relevant competent author- ities would enhance legal certainty and provide a useful tool contributing to combating bogus self-employment effectively and ensuring that posted workers are not falsely declared as self-employed, thus helping prevent, avoid and combat circumvention of the applicable rules*".

[349] Article 4 (5) of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation') states that the elements that are referred to in Article 4 of the Enforcement Directive "*used by the competent authorities in the overall assessment of a situation as a genuine posting may also be considered in order to determine whether a person falls within the applicable definition of a worker in accordance with Article 2(2) of Directive 96/71/EC. Member States should be guided, inter alia, by the facts relating to the performance of work, subordination and the remuneration of the worker, notwithstanding how the relationship is characterised in any arrangement, whether contractual or not, that may have been agreed between the parties*".

[350] Note our caviat on taking specific measures for the aviation sector and the need for a further codification of aviation law, taking into account the prevalence of forms of atypical employment as well as bogus situations.

may be directly influenced by the economic activity and business environment. In this case the employer or client does not enjoy the freedom of choice with regard to such criteria.[351] Such is also the case in particular situations in the aviation sector. For instance, the fact that a pilot cannot choose his or her hours freely, that he or she has to fly at certain moments, follows first of all from the peculiarity of the civil aviation sector (timeslots) rather than from the authority of an employer. Hence, it is harder to take this fact as an indication of bogus self-employment. On the other hand, the authority a pilot has with respect to e.g. safety stems directly from aviation regulations and can therefore not *ipso facto* be regarded as the absence of subordination.

The same is true for fighting bogus (cross-border) subcontracting constructions. Here also, facts are more important than form. For instance, whether an undertaking is established rather than providing services in a Member State is not always an easy matter to decide on. The fact that the service provider does make use of some infrastructure in the host Member State does not ipso facto mean that said provider is established there. Again, all depends on the facts. One element is never sufficient to decide on particular cases. In that respect, every case of bogus-self employment or bogus subcontracting should be the subject of a 'simulation test' which takes into account all relevant facts and elements and the relation between those facts and elements. If an airline is actually established in a Member State but stating to be providing services within the framework of the free movement of services, this would come down to simulation, which probably entails violations of fiscal, labour and social security legislation.

Last but not least it should be noted, as stakeholders of competent authorities stress, that building a 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. The overall and general application of 'indicators' to particular cases is legally neither feasible nor desirable. Each case has to be judged on its particular merits and the fight against bogus situations highly relies on the measures adopted by the Member States in their national legislation.[352] Furthermore, many cases with a cross-border dimension fatally crash due to a lack of efficient cooperation and information exchange between the bodies and authorities of the different Member States concerned. Last but not least, as mentioned above, both union and authorities stress the fact that building a good case of bogus self-employment that can be won in court, requires the cooperation of the bogus-self employed.

Furthermore one might not forget that bogus constructions are like communicating containers: if you put pressure on only one container, the volume in that particular container may decline, but it will decrease in the other container(s). In this respect, fighting bogus self employment hastly without taking effective measures against the abuse of other means of setting up bogus constructions, e.g. through the use of company law structures or through basing planes and crew in third countries, bares the risk of merely fighting symptoms without curing the disease. Given the gravity of the

[351] For instance, opening hours are often determined by both regulations and market customs (e.g. Monday being the traditional day off for barbers).

[352] The opposite would, by the way, be a clear violation of, amongst others, Article 6 (1) of the European Convention on Human Rights (Rome, 4 november 1950), which clearly provides: "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*".

affliction, we fear such an approach will result in the patient dying in the process of trying to find the right 'cure'.[353] In this respect, attention needs to be drawn to the new proposal for the setting up of one man companies.[354] White-collar crime, money laundering, and fiscal and social legislation evasion in the vast majority of cases – one could say always – involves the use of company structures with companies being set up in countries with no or very little formal or material requirements or conditions (e.g. for the purpose of the illegal hiring-out of workers through subcontracting chains). Whereas from a contemporary economic point of view, transaction costs and administrative procedures should be minimised as much as possible, from a prevention and enforcement point of view, little or no pre-establishment requirements often prove detrimental to the prevention or prosecution of different kinds of fraud or other criminal activities committed by means of company structures.[355]

Policy options:

1. Some stakeholders would like to see self-employment for pilots prohibited. In our view, this is legally near impossible and is not desirable. As indicated above, there is a huge risk that as a result of a ban on self-employment, those who want to work as a service provider as well as those seeking fiscal and social engineering will be driven to the setting up of companies in Member States in which company law poses little to no restrictions and with which administrative cooperation and information exchange is inefficient, insufficient or outright non-existent in practice. Nevertheless, Member States should adopt efficient counter measures (e.g. on the hiring-out of workers to tackle bogus subcontracting constructions). It is clear that efficient cross-border administrative cooperation and information exchange is paramount in this respect. The Member States, with the aid of the European Commission, should strengthen said cooperation and information exchange between all authorities and bodies concerned. This means that an integrated cross-border approach is called for. Also at this point, the pending implementation of the Enforcement Directive could be an opportunity for Member States to consult and cooperate in the process of implementing said Directive into their national legislation in order to improve the fight against bogus situations and detect legal (and other) loopholes allowing for *mala fide* entrepreneurs to take advantage for unwanted social and fiscal engineering strategies.

353 The Enforcement Directive is of course not without measure: as mentioned above, in the fight against bogus or false self-employment, the CJEU's case law prefers fact over form. This is now clearly stated in Article 4 (e.g. Article 4 (1) en 4 (5)) of the Enforcement Directive.
354 See e.g. Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies, COM(2014)0212 final - 2014/0120 (COD), (Societas Unius Personae (SUP)).
355 For instance VAT carroussels, bankruptcy fraud, human trafficking for labour exploitation etc.

2. 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, is 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. As such, both an employee as well as a self-employed person who is dependent on the airline and as such refrains from acting upon the authority legally bestowed upon him or her is a safety hazard. Hence, the management style of the airline is in our view a bigger issue than bogus situations. This does not mean that bogus situations should not be tackled. On the contrary, *mala fide* management styles and bogus situations often go hand in hand and the enforcement of efficient management safety systems as well as the enforcement of a Just Culture will leave *mala fide* managers much less room for manoeuvring.

3. 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. However, in our view it is clear that subcontracting in the civil aviation sector should be better regulated with regard to liability and crew management. Again, the concept of operator should be amended in view of several regulations implying operator liability as well as the possibility to set up bogus constructions. In this respect, the regulations on e.g. wet-leasing should be reviewed, since they do not seem to take any account of the possibility of crew members being atypically employed through subcontracting chains. In any case a risk assessment is clearly called for.

4. In our view, 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. There is a clear role here for both the competent legislatures as well as the social partners.

Quote pilot

I used to work for a low cost company, and they are terrible. Something must be done now in terms of regulation. People are afraid to call in sick, could be fired with a moment's notice and subtle threats from the management was part of daily life there. Horrendous work conditions, zero-hour contracts and low pay. For cabin crew it was even worse.

III. SAFETY, MANAGEMENT STYLES AND MONITORING AND ENFORCEMENT

Building cases of bogus self-employment, even with strong national legislation in place will still be highly dependent on the cooperation of the bogus self-employed. 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 fact, it can be observed that safety issues are reported for airlines which both typically and atypically employed crew members fly for. In most of those cases, pilot authority in the field of aviation safety is impaired due to the dependent relation the pilot experiences and the management style, and such regardless of the fact whether this crew member is typically or atypically employed. The dependency of the crew member as well as the prevalence of a management style is in most cases caused by said crew member's position on the labour market as well as the lack of proper representation. Either way, in view of safety issues, the biggest problem is the management style being too focussed on cost reduction, regardless of its consequences. Such management style is incompatible with rules and regulations on FTLs, Crew Resource Management, Safety Management Systems and a Just Culture.[356] 'Business models' and management styles that involve a 'blame culture' and are aimed at or result in crew members not reporting or being afraid to report safety issues or pilots not acting on pilot authority in situations where such action is called for, are incompatible with such safety provisions. Hence, in our view, the efficient and effective monitoring of the compliance with these provisions is a spearpoint measure in the prevention of and the fight against bogus as well as potentially dangerous situations

Related to safety issues is the regulatory framework regarding FTLs. The research has revealed that there is neither a global nor European oversight of the total amount of flight hours a pilot clocks up per day/week/month/year. 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, in the interest of passengers, airlines as well as the crew members concerned. Furthermore, in view of the prevalence of pilots with additional occupational activities, often as a pilot, a more effective and comprehensive means of monitoring and enforcing FTL regulations is urgently called for. For instance, point (b) of ORO.FTL.115 Crew Member Responsibilities stipulates that crew members shall "*make optimum use of the opportunities and facilities for rest provided and plan and use their rest periods properly*". However, as mentioned above, and surprisingly in view of potential safety issues and the extensive regulations on FTLs, at present there is in practice no comprehensive means to monitor and enforce pilots' compliance to said regulations.

A more integrated approach is called for – both with regard to the effective monitoring and enforcement of Crew Resource Management, Safety Management Systems and a Just Culture

[356] See e.g. Regulation (EU) No 691/2010 of 29 July 2010 laying down a performance scheme for air navigation services and network functions and amending Regulation (EC) No 2096/2005 laying down common requirements for the provision of air navigation services; Regulation (EU) No 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC; Regulation (EU) No 376/2014 of the European Parliament and of the Council of 3 April 2014 on the reporting, analysis and follow-up of occurrences in civil aviation, amending Regulation (EU) No 996/2010 of the European Parliament and of the Council and repealing Directive 2003/42/EC of the European Parliament and of the Council and Commission Regulations (EC) No 1321/2007 and (EC) No 1330/2007.

provisions and regulations, and with regard to the effective monitoring and enforcement of the home base rule, the latter with regard to FTL regulation as well as the determination of the applicable social security legislation. Also called for is an enhanced legislative framework for multidisciplinary cross-border cooperation and information exchange between the inspection services and authorities *in all legal domains concerned* (labour and tax inspectorates, EASA and national aviation authorities) as well as the setting up of a comprehensive system of logging European and even global total flight hours per pilot. Such system should be fraud and error proof and readily accessible by competent authorities, airlines, subcontractors as well as the crew member concerned.

Pilot log books are not sufficient since pilots can at the same time have an EU, an FAA and a national license (e.g. for an aircraft that still falls under national legislation only). Hence they would have multiple log books. Furthermore, it has been reported that it is possible for pilots not to fill in the log books as legally required.

Policy options:

1. As mentioned above, a more integrated approach is called for as well as an enhanced 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.

2. It has been pointed out by several sources that some airlines' management styles (e.g. blame culture, non-renewal of contracts with staff legitimately applying safety procedures and according authority etc) are in total contradiction with provisions and regulations on Crew Resource Management and Safety Management Systems. The pilots' positions vis-à-vis such airlines being so weak, pilots often refrain from acting upon their authority with regard to flight safety regulations and issues (illness, fatigue, fuel etc). Furthermore, since the first officer next to the captain is in an even weaker position, in such situations it has been observed that the 'four eyes' principle is no longer effective and although installed on paper not effectively put into practice. Effective means of ruling out the possibility of a management style overruling provisions and regulations on Crew Resource Management and Safety Management Systems are of paramount importance. 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 a spearpoint measure in the prevention of and the fight against bogus as well as potentially dangerous situations and must further be looked into.

3. 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. In short, a *bona fide* airline does not like a pilot stating he or she is not fit to fly due to this pilot performing additional occupational activities without informing said airline. New recruits working for very little pay having to pay high monthly premiums to pay off their training debts are sometimes forced to take on a second or third job. However, according to many stakeholders, also captains with high remuneration often have a second job. While it is reasonable for any worker to work at his or her discretion, the fact remains that while at the same time FTLs are strictly regulated (although not always strictly enforced, see *supra*), at present there is no effective and comprehensive way of monitoring working hours performed in additional occupational activities. Therefore, solutions should be found to have information on additional occupational activities of pilots insofar as these would lead to risks for safety etc.

Quote pilot

Competition between pilots (or in other words too many pilots on the job market) is a result of flight schools making false promises and training too many people.

I think the difference in wages and labour conditions is caused by the surplus amount of pilots looking for a job, carrying an excessive amount of debt because of the expensive education.

IV. LABOUR MARKET SEGREGATION AND TRAINING MARKET ISSUES

In the survey, we presented respondents with questions regarding job satisfaction, labour market issues etc. Below we present the answers the respondents provided. The answers give a clear indication of some issues at hand.

The largest group of respondents that provided us with answers to these questions, i.e. 60%, indicated that they are (very) satisfied with their working conditions and that they receive sufficient education and training (70% of respondents that answered the question) (see Figure 217).

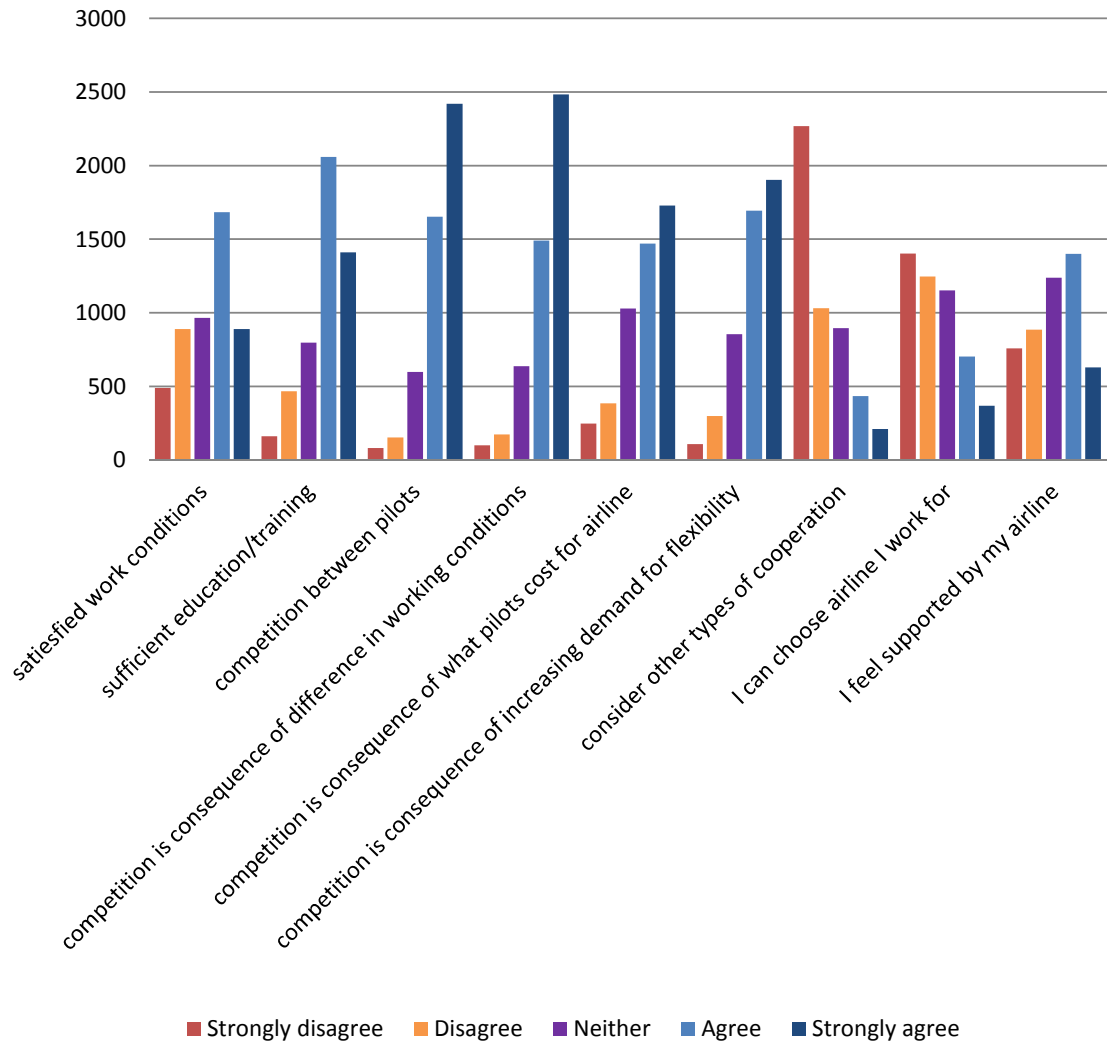


Fig. 217 Issues of respondents: Review and analysis sub-questions 1-7 and 9-10

Furthermore, a vast majority (82%) of the respondents that answered this question indicated that they indeed believe there to be competition between pilots on the European job market. 81% of the respondents who provided an answer also indicated that they agree with the statement that this competition is a consequence of the difference in working conditions between different airlines. A smaller majority of the answering respondents (65%, still about two thirds) agrees or strongly agrees with the statement that the competition is a consequence of what pilots cost for airlines. About three quarters of the respondents (73%) state that they agree with the statement that this competition is also a consequence of the increasing demand for flexibility of the pilots.

More than 60% of the respondents that answered stated that they would not consider other types of cooperation. More than half of the respondents acknowledged not being able to choose the airline

they work for and more than 50% of respondents indicated that they feel supported by their airline. 58% of respondents stated that they enjoy working for their airline (16% stated that they do not; 26% did not provide us with an answer).

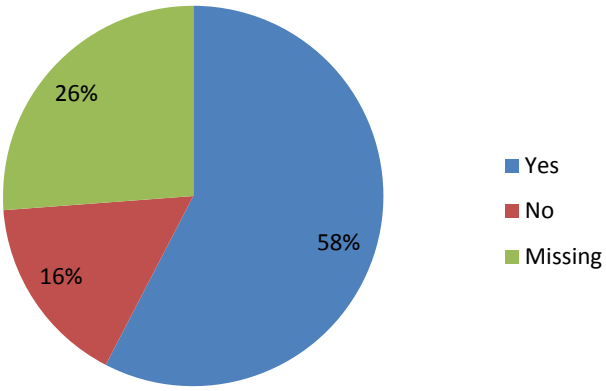


Fig. 218 Do you enjoy working for your current airline?

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.

In addition, we also asked respondents to indicate how many airlines they previously worked for. Figure 219 shows how many respondents stated they already worked for 1 to 10 different airlines (N=3084).

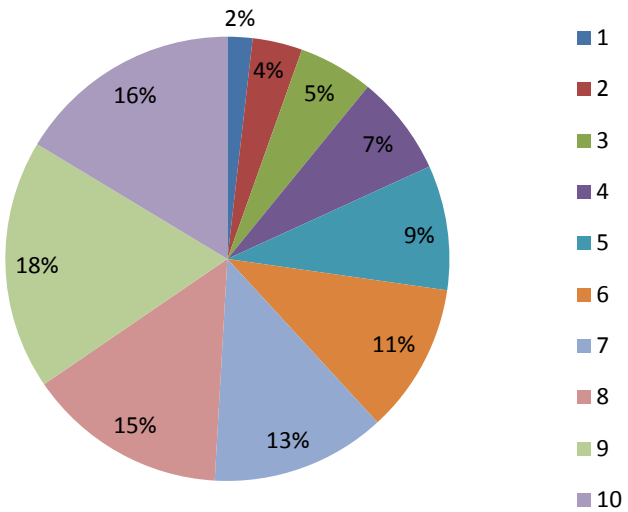


Fig. 219 How many other airlines have you worked for?

Note the low number of respondents stating that this is the first airline they worked for and the high number of respondents that state they worked for 5 or more airlines. In our view, this indicates there is a high 'mobility' of pilots between airlines.

When we looked into the differentiation of the variable 'experience' over the type of airline, we saw that more respondents indicating to have less experience also indicated to fly for an LFA. For instance, Figure 220 shows that 14.3% of respondents that indicated to fly for an LFA indicated to have only 1 to 3 years of experience. For network airlines, this number is only 2.3%. For LFAs, 34.4% of respondents indicated to have 0 to 5 years of experience, whereas for network airlines, this is only 8.6%. For cargo airlines, this number is also lower, i.e. 9.4%.

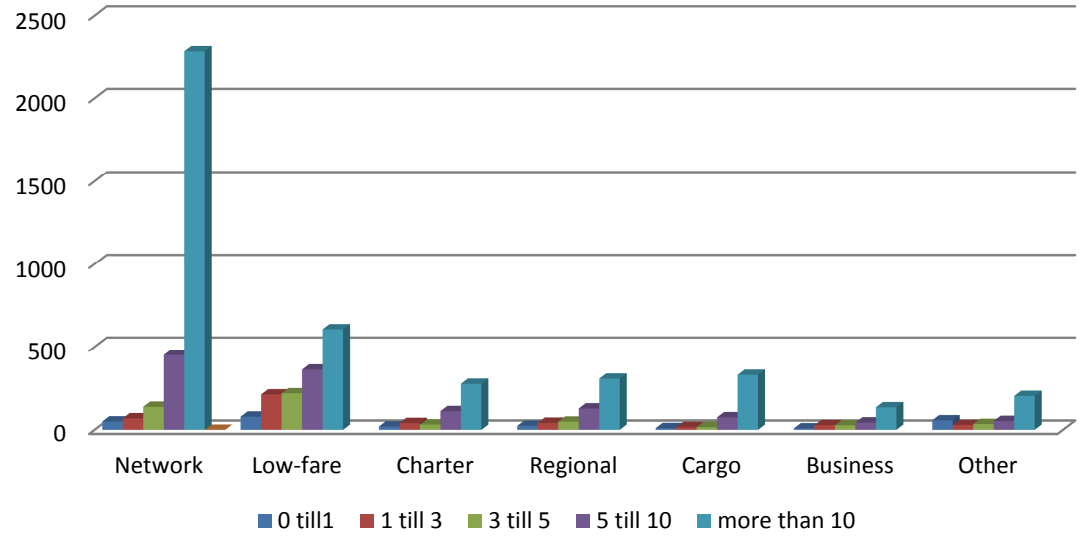


Fig. 220 Experience per type of airline

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.[357] 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.

Many stakeholders point the finger at the privatisation of the flight schools. In short, training is so expensive that young 'cadets' 'enter' the labour market with a debt of somewhere between € 80,000 and 100,000. On top of this they need a type rating which easily costs another € 25,000 to 30,000. Some airlines provide the type rating for the new recruits and provide additional training. As one representative of an airline put it: most new recruits do not meet the training quality the airline this representative works for requires. Reportedly, such is often caused by flight schools by providing additional training hours for which the cadet pays until the cadet obtains the license. Reportedly, some airlines would offer such cadets a position – at deplorable conditions – or even resort to *pay-to-fly schemes* where the pilot actually *pays* to fly an airline aircraft in order to 'build up experience' by clocking up flight hours so as to either get a first officer position at better conditions – e.g. a home base closer to *home* – at another airline or, as a first officer, clock up enough hours to be able to apply for a captain's position.

[357] This does not exclude that young pilots may be hired in the low-cost subsidiaries of network airlines.

Policy options

1. 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.

2. 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. Taking into account the cost of training and the fact that the 'wage market' in the European Union is far from level, any form of abuse of the position of the interns as well as excessive competition between interns, leading to a race to the bottom, must be avoided. It should be looked into if a mandatory quota of internships for all airlines is feasible. An airline investing in a pilot might furthermore improve airline-pilot relations as well as Safety Management Systems and Just Culture.

3. It is our strong opinion that pay-to-fly schemes should be prohibited, not only in the European Union, but globally.

4. 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.

5. A 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.

Quote pilot

I feel lucky to work for an airline who takes responsibility in the best sense of the word. Hopefully we can stop the race to the bottom about terms of employment to keep it safe for everybody working or traveling in aviation.

V. CHALLENGES OF THE FUTURE

As mentioned above, aviation law is not up to speed with the new emerging business models such as outsourcing through elaborate subcontracting chains, involving various types of atypical employment in order to reduce labour costs and enhance competitiveness. In some cases this results in social and fiscal engineering and social dumping through flags of convenience and crews of convenience practices involving third countries with crew members being 'home based' outside the EU. Therefore, one cannot but recall the post WWII history and experience with the civil maritime sector.[358]

[358] See e.g. A. Mendelsohn, 'Flags of convenience: maritime and aviation', *Journal of Air Law and Commerce* 79, 2014. p. 152:

The similarities between both 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 Agreements on the one hand almost literally opens perspectives. On the other hand, it is clear the Open Skies Agreements present clear and present challenges, new Flags of Convenience and Crew of Convenience techniques involving third countries only being the dawn thereof.

In our view, an airline providing flights by entering the EU and subsequently providing intra-EU connections with a crew consisting of third country nationals who do not have a home base within the EU is the next level of social and fiscal engineering. And it is already happening.[359]

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 – legitimate concerns with regard to safety issues. In this respect, a fair balance between safety provisions, employers' and workers' rights is of paramount importance.

"*II. REASONS FOR FLAGS OF CONVENIENCE*
Now, why did the U.S. owners of these vessels decide to trade in their U.S. flags? There were three main reasons at the time. First, U.S. vessel owners could avoid paying U.S. taxes and instead pay only the far more modest taxes — if any were imposed or required at all — of their adopted foreign flags and governments. Second, the owners could avoid hiring U.S. citizen seamen crews, which were invariably represented by either the National Maritime Union (NMU) or the Seafarers International Union (SIU). In their place, they were able to hire far cheaper, and usually non-unionized, foreign seamen crews from countries like the Philippines, Hong Kong, or other less developed countries in Latin America and Asia. Lastly, U.S. vessels could avoid the much higher and more regularly enforced safety standards imposed on U.S.-flagged vessels under U.S. law, which were, at the time, not imposed by most other countries on their own flagged vessels."

[359] In this respect the question can be raised whether the intentions enshrined in Articles 17bis and 18 of the Open Skies Agreement between the US and the EU will have a direct impact and enforceability on the issues already at hand.

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About

The study is co-financed by the European Commission and carried out on behalf of the European Sectoral Social Dialogue Committee for Civil Aviation, which comprises the social partners from the airlines, both employers and employees.

The Sectoral Social Dialogue Committees are the official EU representative forum for the socioeconomic interests, established by Commission Decision of 20 May 1998. The Sectoral Social Dialogue for Civil Aviation is therefore the European Labour Management Body and expresses the genuine democratic position of employers and employees in the EU aviation sector.

The European Cockpit Association (ECA), the European Transport Workers' Federation (ETF) and the Association of European Airlines (AEA) are among the members of the Social Dialogue Committee.

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www.eurocockpit.be
www.aea.be
www.etf-europe.org

ECA Piloting Safety
European Cockpit Association

ETF

AEA ASSOCIATION OF EUROPEAN AIRLINES