MEMO

EUROPAN AIRLINES' LONG HAUL OPERATIONS AND RECRUITMENT FROM LOW COST COUNTRIES

1. Examples on difficulties in applying national and EU legislation following from new business models

1.1 Choice of law

European legislation on choice of law[1] is based on the principle that the parties to the contract can themselves decide on the law to govern the contract. However, this principle is modified due to the special character of employment contracts: Such choice of law may not result in depriving the employee of the protection afforded to him by provision that cannot be derogated from by agreements under the national law of the EU States.[2]

We believe that these national rules are typically of a private law character, and vary between the EU/EEA States. They will typically relate to employment protection (hiring, temporary employment, dismissal protection) and sometimes to minimum wages. When they are of a private law character, each individual employee is left to uphold this legislation in the national courts.

The enforcement of these rules may be seriously hampered by the fact that it is difficult to decide if an employee is primarily providing his or her services in any of the EU/EEA States, and if so, in which state. The vagueness of the legal principles and the complicated facts of the case may add to each other. Typical examples will be

a) a person living in a country in Asia, 'checking in' at an airport in this country, but primarily working on intra EU/EEA routes for several consecutive days dominating the total working period before he or she returns to the home country.

b) a person living in one EU/EEA State working primarily in or between one or more other EU/EEA States for several days before he or she returns to the home country.

1.2 Definition of 'home base'

Application of EU law is to some extent dependent on the notion of 'home base'. The definition of home base in Regulation (EEC) No 3922/91 Subpart Q has the following wording:

> *"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*

[1] Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) Article 3 (1) and 8(1).

[2] See Article 8 (1) of the Rome I Regulation. This Regulation is not included in the EEA Agreement, but to a large extent, Norwegian non-statutory rules on choice of law can be presumed to be based on the same principles.

and where, under normal conditions, the operator is not responsible for the accommodation of the crew member concerned."

The primary purpose of this definition is of course to decide the application of the provisions in Regulation (EEC) No 3922/91 Subpart Q which are primarily of an air operative nature.

By reference from Article 11(5) of Regulation (EC) No 883/2004 on the cooperation of social security systems[3] this definition of home base also decides the application of national social security rules in the EU/EEA.

In addition we have reason to believe that Member States apply this, or a similar 'home base-criterion', when they decide on the application of their own national public legislation which so far is not harmonised.

The following example shows that the definition of home base may be problematic when applied to personnel recruited from, or activities originating from, third countries: Crew working for an EU/EEA air carrier, is 'checking in' on day one at a formal 'home base' in a third country (typically in South East Asia or the Middle East), then travelling to Europe and working on flights between EU/EEA countries for ten days, and then returning to the 'home base' again and 'checking out' on day twelve. When in Europe they are accommodated by the air carrier, and receive compensation for food expenses.

Interpreting the definition of home base in Regulation (EC) No 3922/91 Subpart Q literally, these personnel have home base in the third country where they are checking in on day one and out on day twelve. But the reality is that their work has been performed primarily in the EU/EEA. It may also be possible to determine a single place within EU/EEA from which they have started their daily service – a 'real base'.

In such cases it is difficult to accept that formal home base in the third country should be legally respected. If it is, it may make circumvention of European rules too easy.

2. Proposals for possible actions to be taken by the Commission

In its Communication on EU's External Aviation Policy[4] the Commission has already acknowledged that a balance has to be found in negotiations with partner countries between promotion of openness and liberalisation on one side, and labour standards on the other. In the following some possible ways to follow up the challenges described above are presented.

2.1 Addition to Regulation (EC) No 1008/2008

In the preamble to the basic Regulation (EC) No 1008/2008 on operation of air services in the Community, Member States are required to ensure the proper application of Community and national social legislation with respect to employees of Community carriers operating air services from an operational base outside the territory of the Member State where that Community air carrier has its principal place of business.

[3] As amended by Regulation (EU) No 465/2012 of 22 May 2012 Article 1.
[4] COM(2012) 556 final point 45.

The Norwegian Ministry of Transport and Communications is currently conducting a mapping of the various legal problems mentioned in point 1 and 2, and this work shows that it is very challenging, or practically impossible, for the licensing authority under Regulation (EC) No 1008/2008 to collect the necessary information. It is hard to document, but there is reason to ask whether the provision in the preamble is consistently applied by the Member States.

In order to provide a level playing field between European airlines, and to secure the rights of the employees, the air carriers themselves could be legally obliged to provide the licensing authorities with information on the legislation the air carrier itself considers applicable to its relation (employment or hiring) to the personnel they utilize. This is particularly important regarding personnel recruited under third country legislation.

The verification done by the licensing authorities is currently concentrated on ownership, the validity of the Air Operators Certificate (AOC) the carrier has, financial viability, access to aircraft and leasing. The Commission should consider extending the scope of this verification to include collection of an account carried out by the airline itself of the legislation applicable to its labour contracts in a wide sense.

In order for this to be a legal obligation the provision in the preamble should in some way be included in the Articles of the Regulation. Correct application of law could be a legal requirement to obtain or uphold a licence. But such a requirement is probably too severe. Instead, such an account could be used as a more general fundament for application of public law in the EU/EEA States affected by the activities of the airline. In addition it would make it possible to raise the general awareness on application of 'convenient' (typically) third country private legislation inside EU/EEA, and to use the account as foundation for private law suits on legality.

To strengthen the practical importance of the proposal above the precision of the EU rules on choice of law in labour contracts and the related definition of 'home base' in the aviation legislation should be considered adjusted (see point 2.2).

2.2 Tailor made provision on choice of law and home base for personnel in civil aviation?

The examples referred to in point 1 indicate that the choice of law provision for labour contracts leads to 'good' results when correctly applied – the law of the country where the work is actually delivered applies – but due to its vagueness it is difficult to interpret and enforce. Conversely, the home base definition in point 2 is easier to interpret, but may lead to results contravening the intention of the legislator.

One solution to be considered is to make a specialised rule on choice of law for labour contracts in aviation in order to make it clear that the principle in Article 8 (2) of Regulation (EC) No 593/2008 (the 'from which the employee habitually carries out his work'-criterion) in fact refers to the home base of the employee. For such a rule to be effective it is also necessary to avoid the use of 'non real' home bases – typically in third countries. A substantive control of the reality of home bases used by an air carrier could be connected to the account of applicable legislation mentioned in point 2.1.

2.3 Coordination of immigration rule/rules on work permit

A Member State is free to decide if a work permit or residence permit should be a criterion for personnel who are citizens of third countries working on board aircrafts visiting their country. In addition they decide themselves whether the employee must be able to present a working contract based on 'acceptable conditions' in order to obtain such permits.

By requiring a work/residence permit and a working contract based on acceptable conditions for personnel from third countries, the Member States can avoid or reduce the problems described in point 1. If only some states do impose such conditions, the remaining states will be able to attract carriers utilizing personnel with less favourable working conditions. Whether this has the potential to seriously distort competition between the air carriers within the internal market depends on the number of Member States not imposing such conditions.

The Commission should therefore evaluate whether disparities in immigration rules of the Members States constitute a problematic 'non level playing field' inside the internal market and whether the number of Member States not imposing any particular working conditions are sufficient to constitute a threat to the viability of the European aviation industry.

2.4 Fragmented organisation - complicated application and enforcement of national law

If an AOC is issued by one Member State, aircrafts registered in another, personnel recruited in a third (or several) and labour contracts governed by the legislation of a fourth country (the examples may be multiplied) the application and enforcement of national legislation may be very difficult. According to Regulation (EC) No 1008/2008 there are no formal limitations on the level of acceptable legal and operational fragmentation.

The Commission should evaluate whether this kind of fragmentation makes efficient control with some air carriers so difficult or cumbersome that it should not be accepted despite the fact that all explicit requirements in Regulation (EC) No 1008/2008 are fullfilled. To avoid unequal practice between Member States, criteria for what should be considered 'unacceptable complexity' should be included in the Regulation.