

Towards Joint Action on Bogus Self-employment

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Aircrew = workers

- Some airlines have introduced since the late 1990 “self-employed” aircrew as part of a new employment model in order to reduce costs
- This employment model has been contested by the social partners
- As of 2012 national authorities have expressed doubts about the possibility genuine self-employment status for aircrew
- 2015 saw a significant number of concurrent national decisions confirming the incompatibility of self-employed status with the activity of aircrew
- The Court of Justice of the EU has developed criteria for the definition of the notion of worker. The application of this criteria to the crew members’ activity clearly points towards genuine workers and against an activity of self-employment

A European Issue

- Bogus self-employment distorts the internal market by providing **an unfair competitive advantage** to airlines having integrated in their business model a systematic use of bogus self-employment for their crewmembers
- Bogus self-employment has a negative impact on European crew members:
 - Less rights
 - Pressure for cost reduction
 - Less contributions for the social security
- Possible impact on Safety

Background: 2015 decisions

- Ruling of the Scope Section of the Irish Department of Social Protection of 25/08/2015:
 - *“Based on the information on file, I am satisfied that Mr. XXX was employed by XX under a contract of services and a normal employee/employer relationship existed in this case”*
- UK HM Revenue & Customs ("HMRC") letter dated 24 March 2015
 - Requires an agency providing self-employed pilots to an airline to operate PAYE and NICs on the payments received by the pilots claiming that *"I do not consider the pilots had any genuine right of substitution whereby they could supply and pay a substitute pilot."* The letter then set out HMRC's protective assessments in respect of PAYE and NICs due from the claimant in respect of the 2010/11, 2011/12 and 2012/13 years, some £47 million in total.
- Deutsche Rentenversicherung Bund and GKV-Spitzenverband Deutsche Verbindungsstelle Krankenversicherung
 - Letters were sent to individual pilots in 2015 informing them that after an analysis of their activities as airlines pilots, the characteristics of dependent employment activity prevail.

Confirms previous decisions

- Germany's Koblenz Local Court (Amtsgericht), dated 22 January 2013 :
 - It is suspected, quite contrary to [Airline's] statements that these pilots were independent sub-contractors, that the pilots are employed by [the claimant] and are leased to [Airline] by that company.
- Norwegian foreign tax department deputy director statement from 26/04/2012
 - We generally believe that pilots flying for the major commercial airlines are employees and not self-employed

Concurrent conclusion

- The activity of crewmember **does not allow, as a general rule, for a genuine relation of self-employment** and this for several reasons:
 - **submission** to the instructions of the airline and its standards and operation procedures,
 - **no right for substitution**, (i.e. supply a substitute crew)
 - no right to choose assignments or to change **working hours and rosters**,
 - use of the **airline's equipment and uniforms**
 - **No significant economic risk taking**,
 - **no opportunity for business**, etc, etc.

Workers according to EU law

- COM (2002) 694 final, Worker is a person who:
 - undertakes genuine and effective work
 - under the direction of someone else
 - for which the person is paid.
- Art. 4§5 of the Posted Workers “Enforcement Directive” (Directive 67/2014 / EC)
 - The relationship of subordination determines whether or not an employee is a self-employed (Article 4 - paragraph 5)
- judgment FNV Kunsten Informatie in Media vs Netherlands State (Case C413-13) of 4 December 2014
 - The classification of a ‘self-employed person’ under national law does not prevent that person being classified as an employee within the meaning of EU law if his independence is merely notional, thereby disguising an employment relationship

Scope

Who should be concerned by a refutable presumption of worker status?

- Crew members working regular and charter passenger and cargo operations, company aircraft and helicopter operations
- Business operations ?
- Aerial work ?
- Instructors ?

What could Social Partners do ?

- Following concurrent and consistent decisions from different Member States re-qualifying the status of Self-employed crewmembers into employment
- Following the criteria of determined by the CJEU for the determination of the notion of worker under EU law,

The social partners could ask:

The National Authorities

(including labour inspectorates, social security and tax administrations)

- To assess the authenticity of Self-employed status of crews based or posted in their territory
- To establish a presumption of employment regarding airline crew members
- To create whistle-blowing mechanisms

The European Commission 1

- To introduce a presumption of employment for crewmembers in the areas of their competence (guidelines concerning posting, social security coordination and taxation cooperation)
- To ensure Member States' systematic assessment of the situation of aircrew members declared self-employed

The European Commission 2

- To consider ways to prevent the distortion of the market coming from bogus Self-employment through
 - Initiating state aid procedures against permissive Member States
 - The creation of whistle blowing procedures
 - Making companies involved in undeclared employment pay back not only their due but also a compensation for the unfair economic advantage they obtained