FAIR AVIATION FOR ALL

A discussion on some legal issues

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EUROPEAN TRANSPORT WORKERS' FEDERATION

TABLE OF CONTENTS

FOREWORD

The 'Aviation Strategy for Europe' published by the European Commission on 7 December 2016 describes aviation as "a strong driver of economic growth, jobs, trade and mobility for the European Union". The ETF has contributed to the consultation launched by the European Commission and adopted an extensive response document on 19 January 2016. Although we agree with the analysis of importance of aviation, we believe that the current Strategy is much too market-oriented and does not sufficiently address social rights and labour standards as an important part of fair competition.

Continuous pressure to reduce costs that started within the low fares sector and spilled over to the network or full-service carriers has intensified competition. As a result, airlines are increasingly focusing on wages and working conditions and exerting an enormous pressure to cut prices of all their service providers. This creates a never-ending downward spiral for aviation workers.

The ETF insists that European aviation industry including all of its sub-sectors (airlines, ground handling, security, air navigation services, etc.) must offer fair opportunities for all stakeholders and rogue competition under the pretext of "getting cheaper airfares" should not be allowed. In this spirit, the ETF and its affiliated unions wish to contribute to the development of the social chapter of the Strategy and come up with concrete proposals on how to address some of these challenges.

This project aims at capacity building and promoting fair competition on the basis of social fairness, quality and safety (as opposed to price competition) in the environment of increased global competition. This includes notably identifying ways to avoid discrimination between workers and promoting decent working conditions especially for aircrew and ground handling workers.

Under the principles of change management, the workers' representatives need to better understand the current regulatory framework in order to be able to come up with concrete proposals vis-à-vis the EU institutions, the Member States and the other stakeholders. These proposals may be related to intra-European matters and/or a more global perspective.

As the ETF did not have the internal resources to carry out a legal study on these issues, it was agreed to call for an external expert. With financial support from the European Union, the ETF awarded the project to Yves Jorens from Ghent University. The following report is the result of the study undertaken by Yves Jorens. The ETF contributed to the process through a steering committee of the project and through seminars and a final conference held in November 2018. However the proposals contained in the report are solely those of Yves Jorens.

The ETF thank Yves Jorens for having led this study with both professionalism and a lot of enthusiasm.

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FAIR AVIATION FOR ALL, A DISCUSSION ON SOME LEGAL ISSUES

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I THE LEGAL FRAMEWORK FOR LABOUR LAW AND SOCIAL SECURITY LAW IN THE AVIATION SECTOR

A. A CHANGING WORLD OF EMPLOYMENT

The aviation sector is per definition a strongly internationalised sector because of the nature of the work. Many aviation workers work in multiple countries, are dispatched to other countries altogether, or work in a country other than the one they live in. All in all, many different types of workers are involved in the successful operation of flights, all more or less dependent on the services that the airline companies provide to their customers. This dependency applies to aircrew, ground staff, airfield security, cleaning staff and management alike. This does, however, not mean that all staff in the aviation sector enjoys the same type of regular employment relationship with an airline company. Many workers in the sector work either for other companies that provide a service to the airline (i.e. cleaning crews at the airport) or for subsidiaries or subcontractors that lease out their labour to airlines (i.e. certain cabin crew). In recent years, concerns have been raised about the increasing number of people that are atypically employed in the aviation sector.[1] Because of the prevalence of new and more

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

complex employment constructions in the sector, the concerns focus on the question what kind of labour law and/or social security law applies in case of labour disputes. A well-known issue is the appearance of so-called 'flags of convenience'.[2] This concept (borrowed from the maritime sector) means that some airlines favour certain States as their State of registry, since the responsible authority in that State is either unable or unwilling to perform thorough checks. Because of the prevalence of leasing structures in the aviation sector, this also leads to 'crews of convenience': crews forced to being subject to the (often lower) social security standards of the country of the home base. At the same time, States and the EU are wary to regulate this otherwise, since they do not want to impose certain regulation on airlines.[3] Moreover, they want to promote free movement of workers and businesses, which is a relevant factor for a sector as globalised as civil aviation.

HOW TO DETERMINE THE APPLICABLE LABOUR LAW FOR LABOUR CONTRACTS WITH AN INTERNATIONAL ELEMENT?

Apply Rome I Regulation (EC) No 593/2008 on the law applicable to contractual obligations and go through these steps:

Step 1: Is it either explicitly or implicitly mentioned in the contract which labour law is applied?
- If yes, apply that law and look at steps 3, 4 and 5.
- If no, go on to step 2 and only then to steps 3, 4 and 5.
- If not sure, first look at how clear the implicit mention is.

Step 2: If no choice of law is given, look at the following things in order:
1. What is the place where the employee 'normally works' (see the *Voogsgeerd* and *Koelsch* cases)?
2. What is the place of the business which engaged the employee?
3. Is the case maybe 'more closely connected to the legislation of another country' (*Schlecker* case)?

2 Y. Jorens, D. Gillis, L. Valcke & J. De Coninck (2015): 'Atypical Forms of Employment in the Aviation Sector', European Social Dialogue, European Commission, 2015: p. 20.

3 M. Tretheway & R. Andriulaitis (2015): 'What do we mean by a level playing field in international aviation?' in *Transport Policy*, Vol. 45, 2015, pp. 96-103: p. 100.

Step 3: Check if there are other correction mechanisms that might affect the choice of applicable labour law.

- Principle of protection: minimal labour standards guaranteed by national law will always apply.
- Principle of favourability: in case of conflicting law, more favourable conditions should be applied.

Step 4: Check whether there are 'overriding mandatory provisions' that can affect the choice of labour law.

- Examples: public order provisions that protect the health of the worker.

Step 5: In case of posting: apply Posting Directive 97/71/EC.

- Check whether the labour law chosen is in accordance with the 7 mandatory terms of employment.
- But restrictions apply for short-term posting (see *Mazzeloni* case) and applying national collective labour agreements to posted workers from other countries (see the *Viking and Laval* cases).

B. APPLICABLE LABOUR LAW

The basic provision that determines the applicable labour law is Article 8 of Rome I Regulation (EC) No 593/2008.

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 which 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." [4]

When it comes to the legislation applicable to contractual obligations, the general principle of autonomy of the will of the parties applies.[5] 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.[6] In the case of an employment contract, the aim is to protect the worker.[7]

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.[8] Parties are even allowed to choose a legislation from a completely exotic country which has no connection whatsoever with the case at hand.[9] 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.

4 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).

5 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).

6 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).

7 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).

8 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).

9 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.

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 s/he 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.[10] To a certain extent, this helps an aircrew person to get protection which s/he would not receive because the choice is mainly the employer's.

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. However, EU legislation and case law have developed in such a way that this is no longer automatically the case.

According to the Court of Justice of the European Union (CJEU), the place where an employee habitually carries out his or her work is the place where s/he 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 s/he performs the essential part of his or her duties vis-à-vis his or her employer.[11] A good example of the reasoning of the CJEU can be found in the *Koelzsch* case. In this case

10 The problem with highly mobile workers of course being the determination of the place where they habitually carry out their activities.

11 Judgment of 27 February 2002, *Weber*, C-37/00, 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.

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 for 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 s/he 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 s/he 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.[12] 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.

It is also important to mention that the Rome I Regulation further strengthens the application of the legislation of the country of habitual employment to the disadvantage of the employer's place of establishment.[13] 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.[14] Thus, the connection is made with the worker's station in order to apply

12 Judgment of 15 March 2011, *Koelzsch*, C-29/10, 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".

13 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.

14 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).

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.[15] 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 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.[16]

C. THE APPLICABLE SOCIAL SECURITY LEGISLATION

The main legal provisions can be found in 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. The ground rule is the application of the country of employment, the *lex loci laboris*. Workers will receive and pay for social security benefits in the country they work.

However, if the worker works in multiple countries, it has to be considered where the worker carries out substantial activities (i.e. more than 25% of the time spent and/or money earned):

- If there is no substantial activity outside the country of residence, only the social security legislation of the country of residence applies.
- If there is substantial activity outside the country of residence, different rules can apply (e.g. the social security of the employer's country of residence).
- If the worker works in two countries, but neither is the country of residence, the social security law of the country in which the worker habitually works applies.

These rules apply to all workers, regardless of their profession. An exception is, however, introduced for some aviation personnel: i.e. flight or cabin crew. These coordinating provisions are of importance for air crew members on international flights who per definition work in two or more Member States. The previous coordination Regulations, i.e. Regulations (EEC) No 1408/71 and (EEC) No 574/72, contained

15 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.

16 Judgment of 15 December 2011, Voogsgeerd, C-384/10, EU:C:2011:842.

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.[17] 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.

1. 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).[18]

17 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."

18 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.

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 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 modified the coordination Regulations in place.[19] 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. All in all, EU legislators held that '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.'[20]

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,[21] 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".[22] 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

19 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.

20 Regulation (EU) No 465/2012, pre-amble, paragraph 4.

21 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.

22 This being identical, at world level, to the definition by the International Civil Aviation Organization.


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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. Regulation (EU) No 83/2014[23] changed the concept of home base enshrined in Subpart Q of Annex III to Regulation (EEC) No 3922/91 by adapting Regulation (EU) No 965/2012.[24] 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.

2. HOME BASE: MORE LEGAL SECURITY?

But is this really the case? 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 assigned 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 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.[25]

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.[26] 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

23 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.

24 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.

25 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".

26 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?

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 assigns the 'home base' of the worker, hence determines the applicable social security legislation for said worker![27]

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.[28]

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. This complicates the question to define who will be responsible for social security contributions. 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. It is legally not impossible for a crew member working for different airlines, to have different home bases, in different countries, at the same time.[29] 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).[30] And what with a self-employed air crew member? 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

27 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.

28 Y. Jorens, D. Gillis, L. Valcke & J. De Coninck (2015): 'Atypical Forms of Employment in the Aviation Sector', European Social Dialogue, European Commission, 2015, 245-250.

29 The same applies to crew members working for more than one airline simultaneously either as an employee or as a self-employed service provider.

30 Again, the term 'operator' is not defined in Regulation (EC) No 883/2004.

that the abovementioned scenarios also reduce transparency and legal certainty in employment relations between cockpit and cabin crew vis-à-vis employers.

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 s/he has a home base in different Member States, nor does it limit the way and number of times a home base may be changed. Also the application of the posting provisions seems not to be excluded. This indicates that the home base might be less stable than expected.

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 neither without political hurdles nor solves all legal issues.[31]

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 s/he is an EU national – has his or her home base outside the EU, from which s/he 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.[32] 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. In case people are working from outside the European Union, the question where (aviation) personnel will be insured for social security will depend on the application of bilateral agreements and national law.

31 Y. Jorens, D. Gillis, L. Valcke & J. De Coninck (2015): 'Atypical Forms of Employment in the Aviation Sector', European Social Dialogue, European Commission, 2015: p.260.

32 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.

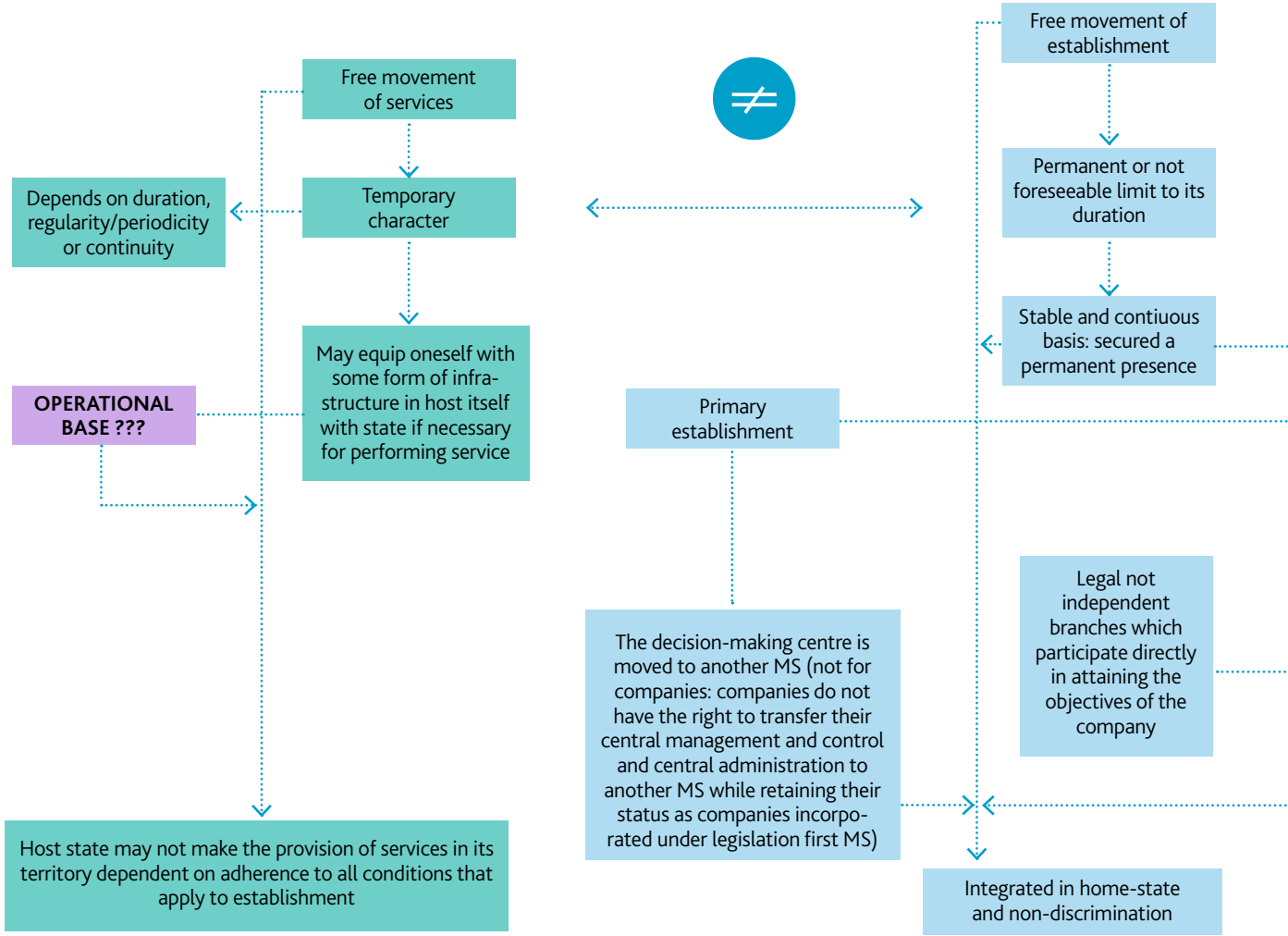
II. PRINCIPLE PLACE OF BUSINESS AND OPERATIONAL BASES: REGULATION (EC) NO 1008/2008

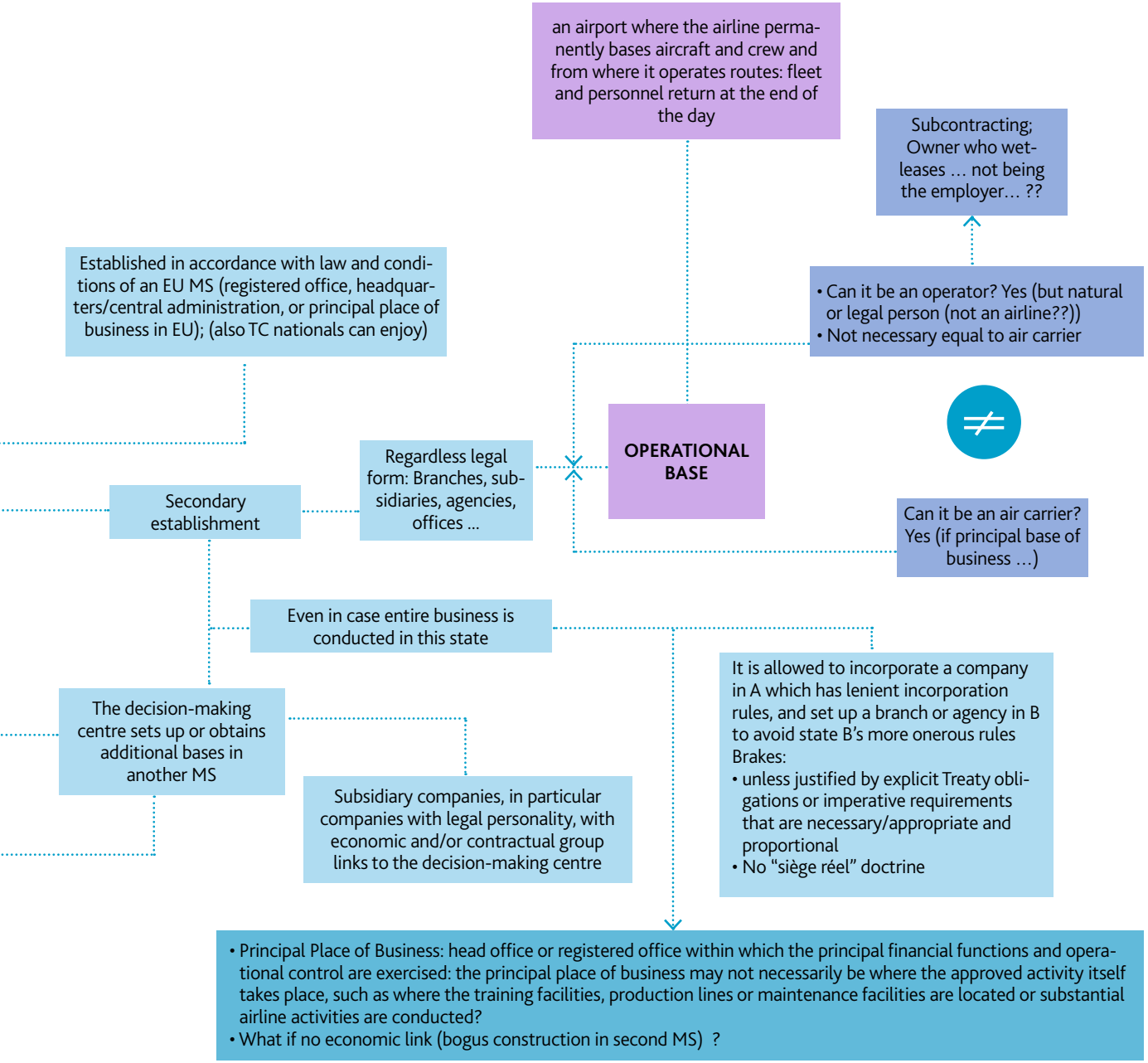
A. THE SET-UP OF BASES BY AIRLINE COMPANIES

As a result of the liberalisation of the aviation market, airline companies more often develop new organisational structures by setting up (permanent) operational bases and branches in other Member States – sometimes without an extensive activity in that State – from where activities are carried out. In Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community, the notion 'principal place of business' can be found. This implies that there are other places of business. 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. Or, 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. This again potentially endangers the equal treatment of individual crew members and the safety throughout air operations. But does fiscal and social legislation evasion in the vast majority of cases – one could say always – not involve 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 illegally hiring out workers through subcontracting chains)? In turn, 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. This raises issues and a demand for legal clarification about the role and the legal situation of these bases and branches. Which rules apply and who can monitor these companies? To which labour and social security law are the people involved in activities in these bases subject?

B. THE APPLICATION OF FREE MOVEMENT OF SERVICES AND FREE MOVEMENT OF ESTABLISHMENT

1. SCHEMATIC OVERVIEW




an airport where the airline permanently bases aircraft and crew and from where it operates routes: fleet and personnel return at the end of the day
Subcontracting; Owner who wet-leases … not being the employer… ??
Established in accordance with law and conditions of an EU MS (registered office, headquarters/central administration, or principal place of business in EU); (also TC nationals can enjoy)
• Can it be an operator? Yes (but natural or legal person (not an airline??))
• Not necessary equal to air carrier
≠
OPERATIONAL BASE
Regardless legal form: Branches, subsidiaries, agencies, offices …
Secondary establishment
Can it be an air carrier? Yes (if principal base of business …)
Even in case entire business is conducted in this state
It is allowed to incorporate a company in A which has lenient incorporation rules, and set up a branch or agency in B to avoid state B's more onerous rules
Brakes:
• unless justified by explicit Treaty obligations or imperative requirements that are necessary/appropriate and proportional
• No "siège réel" doctrine
The decision-making centre sets up or obtains additional bases in another MS
Subsidiary companies, in particular companies with legal personality, with economic and/or contractual group links to the decision-making centre
• Principal Place of Business: head office or registered office within which the principal financial functions and operational control are exercised: the principal place of business may not necessarily be where the approved activity itself takes place, such as where the training facilities, production lines or maintenance facilities are located or substantial airline activities are conducted?
• What if no economic link (bogus construction in second MS) ?

2. SERVICES OR ESTABLISHMENT: A DIFFERENT REGULATORY FRAMEWORK

The starting point is the question if these operational bases are functioning within the framework of the free movement of services or the free movement of establishment? This question is important 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.[33] Full equal treatment must even be considered as a negation of the free movement of services! The same goes for the question who is allowed to supervise the foreign company or workers. The CJEU determined that compelling reasons of public interest that justify the substantive provisions of a regulation also justify the supervision measures necessary to guarantee that these provisions are complied with.[34] But, these measures still need to be applied in accordance with the free movement of services principle, which may hereby not be made illusory. All national supervision measures need to be tested against the principle of free movement of services, checking whether they do not constitute a limitation to this freedom. Under the free movement of services principle the check should be first and primarily done by the State of origin with some help from the host State. Under the principle of free movement of establishment, however, it is the State where one is established that must perform the check.

3. THE DIFFERENCE BETWEEN SERVICES AND ESTABLISHMENT

It is therefore extremely important to decide whether one is in a situation of the freedom of establishment or the free movement of service provision. It is not always easy to elucidate the difference between both concepts. 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 another country. So how can the distinction between the

33 Judgment of 25 July 1991, Säger / Dennemeyer (C-76/90, ECR 1991 p. I-4221) EU:C:1991:331, 13; confirmedb by *inter alia* judgment of 4 December 1986, Commission / Germany (205/84, ECR 1986 p. 3755) (SVVIII/00741 FIVIII/00769) 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) EU:C:1991:76.

34 Judgment of 27 March 1990, *Rush-Portuguesa*, C-113/89, EU:C:1990:142 .

free movement of services and the freedom of establishment be made? The CJEU held in its case *Gebhard*[35] that 'establishment' can be understood as "[s]ubject to the exceptions and conditions laid down, [freedom of establishment] allows all types of self-employed activity to be taken up and pursued on the territory of any other Member State, undertakings to be formed and operated, and agencies, branches or subsidiaries to be set up. […]" The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons. This definition covers the activities of both natural and legal persons. A self-employed activity can be taken up by a natural person, while setting up agencies, branches and subsidiaries are activities that can be performed by legal persons. Forming an undertaking can be done by both natural and legal persons.

a) Temporary versus permanent

The key criterion is the degree of stability of the establishment. A service provider mainly continues to perform activities in the country of origin and temporarily goes to the host State – irrespective of how the services are provided – to perform these services there; on the other hand, a person who wants to establish in another country has the intention to integrate in the host State's economy. Is it the intention to do this continually for an unlimited duration, or is it merely temporary? It is impossible to set fixed boundaries here, as it depends on the individual circumstances. The temporary nature of the provision of services must be assessed according to the duration, frequency, periodicity and continuity of the service. In this context, the concept of establishment means that the operator offers its services on a stable and continuous basis from an established professional base in the Member State of destination. In principle three criteria are important: a qualitative one (the actual pursuit of an economic activity): a temporal one (for an indefinite period) and a geographical one (through a stable infrastructure (or actual establishment) in a Member State (host State)).

On the other hand, constitute provision of services: all services that are not offered on a stable and continuous basis from an established professional base in the Member State of destination. Likewise, may be considered as such: services which a business established in a Member State supplies with a greater or lesser degree of frequency or regularity, even over an extended period, to persons established in one or more other Member States, for example the giving of advice or information for remuneration. In *Duomo Gpa* the CJEU held "that no provision of the [EU] Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service can no longer be regarded as the provision of services, and accordingly 'services' within the meaning of the Treaty may cover services varying widely in nature, including services which are provided over an extended period, even

35 Judgment of 30 November 1995, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, C- 55/94, EU:C:1995:411.

over several years".[36,37] Consequently, the fact that an economic operator established in one Member State provides services in another Member State over an extended period is not in itself sufficient for that operator to be regarded as established in the latter Member State.[38]

b) Infrastructure or fixed establishment

It is, however, required that there is a fixed establishment in the host State. This is, unlike the criterion of stability, no indicator to make a distinction between the free movement of services and the freedom of establishment. 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 that infrastructure is necessary to provide the service in question.[39] The exact form of the establishment is insignificant. This could be an office, an enterprise, a practice etc, as long as it exists continually. The way in which it is organised is more the result of the activities performed.

The free movement of services therefore does not exclude the situation where an airline sets ups and uses some (infra)structure in another country. Consequently, some branches, agencies etc of airline companies might fall under the free movement of services. 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.

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.[40] It cannot be excluded from the beginning that air crew members are considered as *posted* workers.[41]

36 Judgment of 10 May 2012, *Duomo Gpa Srl and others v Comune di Baranzate and Comune di Venegono Inferiore*, joint cases C-357/10 to C-359/10, EU:C:2012:283, paragraph 32.

37 F. WEISS, C. KAUPA, *European Union. Internal Market Law*, Cambridge, Cambridge University Press, 2014, 203.

38 Judgment of 29 April 2004, *Commission v Portugal*, C-171/02, EU:C:2004:270.

39 Judgment of 30 November 1995, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, C- 55/94, EU:C:1995:411.

40 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) EU:C:2001:564, 22.

41 See supra 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.

C. FREE MOVEMENT OF ESTABLISHMENT AND OPERATIONAL BASES

1. PRIMARY AND SECONDARY ESTABLISHMENT

Freedom of establishment is defined by Article 54 of the EU Treaty as: "Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States." 'Companies or firms' means "companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making." For the sake of completeness, it has to be noted that there is a difference between primary and secondary establishment. When a self-employed activity is started or an undertaking is set up, this is primary establishment. Community law confers a secondary right of establishment to companies (not the primary right to move their seat) incorporated under the laws of a Member State to set up agencies, branches and subsidiaries in other Member States. Under secondary establishment a part of the business is moved to or set up newly in another State while keeping in the State of origin the main activity, so that through branches in at least two Member States economic activities are performed. The decision-making centre sets up or obtains additional bases in the EU. The secondary establishment allows the set-up of legal independent firms, subsidiary companies, subsidiaries with their own legal personality and who have economic and/or contractual group links to the decision-making centre or the set-up of legally not independent branches which participate directly in attaining the objectives of the company. Under the secondary establishment one has the right to set up agencies, branches or subsidiaries, and offices regardless the legal form.

The undertaking thus needs to be established in accordance with the law and conditions of a certain EU Member State. In accordance with Article 54 TFEU the company must have its registered office, central registration or principal place of business within the Union. Also companies with their registered office outside the EU may fall under the field of application of Article 54 TFEU insofar as they have their central registration or principal place of business within the Union. A company which has its registered office, central registration or principal place of business outside the EU will only be able to apply the rules on free movement of establishment or free movement of services, insofar as this company has set up an independent subsidiary company set up in accordance with the law of a Member State of the EU and with its seat in the EU. These fundamental freedoms will be exercised by this subsidiary company. Companies that have no link with the EU cannot rely on this freedom of establishment. This is also the case when a company set up in accordance with the legislation of a third state, transfers its central registration into an EU Member State, as we cannot speak in these circumstances of the set-up of a foreign company (but only the recognition of this company). Such companies remain the option to set up an independent sub-

sidiary company in accordance with the law of an EU Member State and to settle its seat or principal place of business there and from that moment exercise the free movement principles through this subsidiary company.

2. WHAT IS A SECONDARY PLACE OF ESTABLISHMENT?

On the abuse of the right of establishment, the CJEU has pointed out the following[42]: "the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment." "The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty." This means that, when a parent company does not conduct any business in the Member State in which it has its registered office and pursues its activities only in the Member State where its branch is established, this is not sufficient to prove the existence of abuse or fraudulent conduct. It follows that the latter Member State would not be entitled to deny that company the benefit of the provisions of Community law relating to the right of establishment. In the same vein, and in line with this case law, Regulation (EC) No 1008/2008 defines the 'principal place of business' as "the head office or registered office of a Community air carrier in the Member State within which the principal financial functions and operational control, including continued airworthiness management, of the Community air carrier are exercised." This definition does not require that the main activities of the company take place in the same State. Consequently, the principal place of business is not necessarily the State where the approved activity itself takes place, such as where the training facilities, production lines or maintenance facilities are located or substantial activities are conducted. Reinforcing the definition of a principal place of business is therefore not immediately the path to follow.

So nothing opposes to incorporate a company in state A, which has lenient incorporation rules, and set up a branch or agency in state B to avoid state B's more onerous rules.

It is a difficult task for the Member States to counteract such consequences. Member States could nonetheless find a restriction that is justified by explicit Treaty obligations or by imperative requirements (e.g. combating fraud). National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest (e.g. combating fraud or the protection of certain groups of people); they must be suitable for securing the attainment of

42 Judgment of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126.

the objective which they pursue; and they must not go beyond what is necessary in order to attain it. In a case concerning the maritime sector, the CJEU decided[43] on a requirement attached to the registration of a vessel, namely that the vessel must be managed and its operations directed and controlled within the Member State in which it is to be registered. The CJEU stated that this essentially coincides with the actual concept of establishment laid down in the Treaty, which implies a fixed establishment. However, such a requirement would not be compatible with this concept of establishment in the following case: "if it had to be interpreted as precluding registration in the event that a secondary establishment or the centre for directing the operations of the vessel in the Member State in which the vessel was to be registered acted on instructions from a decision-taking centre located in the Member State of the principal establishment." This means that the seat of a legal person being located in a Member State may not be required, as a condition, for the registration or operation with a view to carrying out in that Member State an economic activity of vessels owned by that legal person.

An additional argument could be found in company law, in the so-called *siège réel* doctrine (or 'real seat' doctrine). According to this doctrine a company is subject to the company law of the country where it has its real seat. This theory contrasts with countries that follow the state of incorporation rule, which allows a company to be incorporated in their State and have its main operations in another Member State. So there is no need to have a physical presence in the first State. This would not be possible under Member States that follow the *siège réel* doctrine, according to which the real situation is looked at and a genuine link is required to the corporate activity and to where the actual business is done. It seems that the CJEU is not really following the *siège réel* doctrine, as a company with its principal place of business within the European Union cannot be denied access to any other Member State.[44]

As EU law allows undertakings to set up a seat in another State in addition to the principal seat, there is a chance that a letterbox company is set up. This is a formal undertaking that has a seat, but in reality does not have any economic activities (a bogus undertaking). It cannot be argued that the seat may not be established because the principal seat is located in another Member State and all activities are performed there. The only condition is that this company is set up in accordance with the law of the location where this seat is established.

3. THE (LACK OF) CONVERGENCE OF CONCEPTS IN THE AIRLINE SECTOR

The question is what the relation is between a branch and/or subsidiary on the one hand, and an (operational) base on the other hand. Can the operator of an aircraft, a concept of great importance in the

43 Judgment of 7 March 1996, *Commission v France*, C-334/94, EU:C:1996:90 .

44 See C. BARNARD, *The Substantive Law of the EU. The Four Freedoms*, Oxford, Oxford University Press, 2013, 344.

aviation sector, also be considered as such a base? We have to highlight that in the airline sector many concepts are used that not always lead to legal certainty. We may, however, not forget that Regulation (EC) No 1008/2008 does not itself contain any definition of an (operational) base. An operational base is an airport at which the airline permanently bases aircraft and crew and from where it operates routes. Both fleet and personnel return to the base at the end of the day.

Can a branch be the operator of the airline? Article 2 of Regulation (EEC) No 3922/91 on the harmonisation of technical requirements and administrative procedures in the field of (safety) of civil aviation 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 […] at least for the use of this regulation." It can be mentioned here that this is the definition which, pursuant to Article 11 (5) of Regulation (EC) No 883/2004, nominates the home base of the worker, hence determines the applicable social security legislation for the workers[45]. This definition of an operator can fall under the concept of branch or subsidiary (although also natural persons may be an operator). Still, several problems remain. If we use the definition of operator as defined in Regulation (EEC) No 3922/91, it cannot be deduced that an operator can only be deemed the airline that possesses the requisite certificates allowing the operator to engage in commercial air transport. Referring to an air operator's certificate (AOC) might also prove difficult in those cases where an aircraft is leased. For instance, suppose 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 not legally the employer of the crew members. Who is to be regarded as the operator determining the home base of the crew operating the aircraft? Furthermore, does the definition of operator include 'the natural person using an aircraft'? An additional issue is that the term operator is not uniformly defined in aviation regulation. In other texts, e.g. Regulation (EC) No 785/2004 on insurance requirements for air carriers and aircraft operators, an operator is defined as "the person or entity, not being an airline; 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". At least one can say that the concept of operator does not always equal that of a branch.

Can a branch be an air carrier? An 'air carrier' means an undertaking with a valid operating licence or equivalent. An 'undertaking' means any natural or legal person, whether profit-making or not, or any official body whether having its own legal personality or not. It is however required that this undertaking is granted an operating licence by the competent licensing authority of the Member State where its principal place of business is located.

45 As mentioned, the term 'operator' is not defined in Regulation (EC) No 883/2004.

4. TO INCLUDE A DEFINITION OF OPERATIONAL BASE

How should we consider these bases? In a number of tax-related cases, the CJEU has paid attention to the requirement that there should be a certain economic link. It ruled that a national measure restricting freedom of establishment may be justified where it specifically relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned.[46] This give rise to the question whether and to what extent the CJEU would also apply this reasoning and use this requirement in company law, and this way prevent purely artificial arrangements such as letterbox companies, which lack any economic reality, and exclude them from the benefits of the freedom of establishment?

We would recommend to include and work out a definition of this concept of 'operational base'. This definition could help to indicate that this concept implies an infrastructure from which a company runs a business in a stable and continuous way. As such, it could also help to indicate if we are dealing with a situation of secondary establishment, in which case the provisions of free movement of establishment apply.

In the Insolvency Regulation (Regulation (EU) No 2015/848) establishment is defined as "any place of operations where a debtor carries out or has carried out in the three-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets". In particular the wording "human means and assets" are of importance. In *Interedil*, the CJEU makes clear that the added value of the reference to the use of human means, "is to [show] that a minimum level of organisation and a degree of stability are required".[47] In *Athinaïki Chartopoïïa* the CJEU added that "an 'establishment', in the context of an undertaking within the collective redundancies directive 98/59 -where no definition of establishment is mentioned, may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks".[48]

One could imagine to include a definition of the secondary place of establishment. This definition could refer to and explain in more detail what should be understood by a 'stable infrastructure', indicating a minimum economic link.

46 Case C-524/04, *Test claimants*, 2007, 2107), and *Cadbury Schweppes*, 196/04, 2006, 7995).

47 Judgment of 20 October 2011, *Interedil Srl v Fallimento Interedil Srl and Intesa Gestione Crediti spA*, C- 396/09, EU:C:2011:671 paragraph 62.

48 Judgment of 15 February 2007, *Athinaïka Chartopoïïa AE v L. Panagiotidis and Others*, C-270/05, EU:C:2007:101, paragraph 27.

D. RECOMMENDATIONS

Our recommendation is the following.

Taking into account the set-up of several bases outside the country of the principal place of business, and the demand for legal clarification about the role and legal situation of these bases and branches, there is a need to:

- clarify when the free movement of services or the free movement of establishment applies;
- clarify, in Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community, what can be understood as a secondary place of establishment, as the free movement of establishment does not oppose that the main activities are not performed in the State in which it has its registered office;
- include a definition of operational base in Regulation (EC) No 1008/2008 indicating that this concept implies an infrastructure from which a company runs a business in a stable and continuous way with a minimum economic link;
- work on further clarification and convergence of concepts such as operational base, operator, home base and air carrier.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III. THE AVIATION SECTOR: GROUNDHANDLING STAFF AND TRANSFER OF UNDERTAKINGS

A. THE LIBERALISATION OF THE GROUNDHANDLING MARKET: THE ADOPTION OF DIRECTIVE 96/67/EC

For a long time, the sector of groundhandling was dominated by a monopoly and closed from competition. Airports often abused their dominant position, as they did not grant airlines the right to provide groundhandling services themselves (selfhandling) nor did they give access to other companies to provide such services (third party handling). The issue of airport groundhandling has been dealt with on a case-by-case basis using the Treaty articles on competition. This changed with the adoption of Directive 96/67/EC on access to the groundhandling market at Community airports. Moreover, free competition increased in this sector. This legislation complements the Union's air liberalisation programme, because groundhandling is a significant part of operating costs of airlines who often did not have a choice of provider. Such additional costs are passed on to consumers in the form of higher fares. The Directive's aim, as stated in the preamble, is twofold: the gradual liberalisation of access to the market, and the introduction of fair and genuine competition in the groundhandling market. These provisions clearly state the principle that most categories of groundhandling services should be opened up to the maximum possible extent. However, because of the specific situation and role of an airport, and in particular constraints of safety and security, but also considerations of space and capacity which can arise in some sections of most airports, the Directive does not demand total freedom. It requires that both self-handling services and four categories of services located airside – that is to say, in a particularly sensitive area of the airport – are to a minimum degree opened up to third parties. These four categories concern ramp handling, baggage handling, fuel handling and certain freight and mail handling operations. However, groundhandling services are coming under increased pressure due to growing competition from low-cost airlines – often coupled with rising airport infrastructure costs – and the demand to bring down costs within the air transport sector. Subcontracting is growing also in the groundhandling sector as well as the transfer of groundhandling contracts from one operator to another.

1. SOCIAL RIGHTS UNDER DIRECTIVE 96/67/EC: AN UNSUCCESSFUL STORY

Factors relating to social protection, however, are elaborated to a far lesser extent, as this Directive basically aims to lay down detailed rules on access to the groundhandling market and the idea was to ring-fence national labour law from the influence of the internal market rules. Article 18 only determines that "without prejudice to the application of this Directive, and subject to the other provisions of Community law, Member States may take the necessary measures to ensure protection of the rights of workers and respect for the environment". From that point of view, these provisions are seen as supplementary.[49] The adoption of social protection measures are governed by three conditions. First, when exercising that jurisdiction, the Member State must not adversely affect the operation of the Directive as a whole. Secondly, other provisions of Community law must be respected. Finally, measures taken under this jurisdiction must be necessary to ensure the protection of workers' rights. For a long time, further discussions were held to strengthen the social protection level.

In the Commission proposal of 2011 a new Article 12 was proposed on safeguarding employees' rights in the event of transfer of staff for services subject to market access restrictions. This provision determined that:

> "2. where, following the selection procedure […], a supplier of groundhandling services mentioned loses its authorisation to provide these services, Member States may require supplier(s) of groundhandling services which subsequently provide these services to grant staff previously hired to provide these services the rights to which they would have been entitled if there had been a transfer within the meaning of Council Directive 2001/23/EC".
>
> 3. Member States shall limit the requirement in paragraph (2) to the employees of the previous supplier who are involved in the provision of services for which the previous supplier lost authorisation, and who voluntarily accept to be taken on by the new supplier(s).

49 See conclusion advocate-general Léger in case Judgment of 9 December 2004, *Commission v Italy*, C-460/02, EU:C:2004:780, par. 38.

4. Member States shall limit the requirement in paragraph (2) so that it is to be proportionate to the volume of activity effectively transferred to the other supplier(s).

[…]

6. Where a supplier of groundhandling services stops providing to an airport user groundhandling services which constitute a significant part of the groundhandling activities of this supplier in cases not covered by paragraph (2), or where a self-handling airport user decides to stop self-handling, Member States may require the supplier(s) of groundhandling services or self-handling airport user which subsequently provide these groundhandling services to grant staff previously hired to provide these services the rights to which they would have been entitled if there had been a transfer within the meaning of Council Directive 2001/23/EC."[50]

In its legislative resolution of April 2013 the European Parliament notably underlined that as free market access is the norm in Union transport policy, the ultimate goal should be the complete liberalisation of the groundhandling market and the enhancement of the quality of groundhandling services. The resolution reinforced the social and safety provisions, asking for an adequate level of social protection, as well as decent working conditions for the staff of groundhandling undertakings, including in subcontracting and service contracts, and for minimum safety standards for ground handling services.[51] Due to the lack of agreement in the Council on this dossier – not least on this social dimension – the European Commission withdrew its proposal in 2015. Does this imply that groundhandling staff is now deprived of any social protection? What is the consequence for groundhandling staff when the operator changes? Some will emphasise that discontinuity of staff can have a detrimental effect on the quality of groundhandling services.

50 Proposal for a Regulation of the European Parliament and of the Council on groundhandling services at Union airports and repealing Council Directive 96/67/EC. COM/2011/0824 final.

51 Legislative Resolution of 16 April 2003; http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-116#BKMD- 26.

B. THE DIRECTIVE ON TRANSFERS OF UNDERTAKINGS (DIRECTIVE 2001/23/EC): A WAY OUT?

The ground handling Directive (Directive 97/67/EC) provides that Member States must respect other provisions of EU law. In particular we can refer to the Directive on transfers of undertakings (Directive 2001/23/EC).[52] The ground handling Directive could enable Member States to clarify the protection going beyond the personal and material field of application of the Directive on transfers of undertakings.[53] For that reason it is recommendable for the social partners to further negotiate to find a compromise on an article that deals with the social rights, amending the current ground handling Directive. At the same time, the Directive on transfers of undertakings could offer some protection to employees in the event that the operator changes.

1. PROTECTION OF RIGHTS

In the event of a transfer of an undertaking, Directive 2001/23/EC offers employees four elements of protection:

1. Safeguarding of the rights and obligations that arise from a contract of employment that exists on the date of the transfer. The CJEU argued that all employment contracts of employees who fall under the transferred branch of the undertaking are automatically transferred from the transferor to the transferee by the mere fact of the transfer.[54]

   The protection which the Directive offers is a matter of public policy. It follows that the rights provided by the Directive can neither lose their effect as a result of the transferor's or transferee's consent, nor as a result of the consent of the employees' representative or of the employees themselves.[55] The transferee is obliged to respect the terms of employment that are part of the employment contract, e.g. remuneration (including benefits under the contract), professional qualification, length of service,

52 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. This Directive, hereinafter "the Directive", is the continuation of its namesake Directive 77/187/EEC, as amended by Directive 95/50/EC.

53 And depending also on the implementation by the national legislations: e.g. the Directive provides that "unless Member States provide otherwise, it […] shall not apply in relation to employees' rights to old-age, invalidity or survivors' benefits under supplementary company or intercompany pension schemes outside the statutory social security schemes in Member States or it states that Member States may limit the period for the transferee to observe the terms and conditions agreed in any collective agreement by the transferor, to one year." A quite important element in this exception is that these supplementary schemes are part of the wage package which the employee agreed with the transferor. Wage is a substantial component of the employment contract. Changing this unilaterally constitutes a breach of contract. Therefore, although he is not bound by the transferor's schemes, the transferee will have to be able to offer the employee a benefit of an equal value.

54 Judgment of 25 July 1991, *D'Urso and Others*, C-362/89, EU:C:1991:326.

55 Judgment of 10 February 1988, *Tellerup v Daddy's Dance Hall*, C-324/86, EU:C:1988:72.

responsibilities, work regime etc. A question of particular importance is whether these terms of employment may be amended by the transferee. Article 4 (2) of the Directive stipulates that if the terms of employment are substantially changed to the detriment of the employee, the contract is terminated, caused by the employer. In addition, the transferee may conclude a new employment contract with the transferred employee and the transferee may use the unilateral right to change the employment contract (*ius variandi*) within the same limits as the transferor.

2. Limited joint and several liability of transferor and transferee. The transferred employee may hold both the transferee and the transferor liable in *solidum*. S/he may claim debts, which exist at the time of the transfer due to an incorrect compliance with his or her employment contract, from both parties.

3. Protection against dismissal. According to the above provisions, a dismissal is only irregular when the transfer was the only reason for the dismissal. This offers national courts the opportunity to qualify dismissals as irregular when they occur at a time which basically coincides with the transfer. Dismissals before as well as dismissals after the transfer fall under the above-mentioned prohibition of dismissal. According to the CJEU, an employee who is dismissed in an irregular manner prior to the transfer of the undertaking is nevertheless considered employed at the time of the transfer. Moreover, the prohibition of dismissal goes for the transferee as well.[56] Dismissal for economic, technical or organisational reasons or for misconduct does not fall under this prohibition. Both the transferor and the transferee may dismiss employees for these reasons.[57]

4. Information and consultation of the employees or their representatives. The undertaking is obliged to provide information each time when certain events or an internal decision may have an important impact on the undertaking, but also when the undertaking takes decisions on a merger, concentration, transfer, closure or other important structural changes. This information must be provided in good time prior to any disclosure: in other words, prior to the realisation of the transfer. This information has to be given to the representatives of their own employees. The consultation obligation applies when the transferor or transferee are considering measures with regard to their own employees. The consultation must take place prior to a decision being taken about the measures with regard to the employees.

56 Judgment of 15 June 1988, *Bork International*, C-101/87, EU:C:1988:308.

57 Judgment of 12 March 1998, *Déthier Equipment*, C-319/94, EU:C:1998:99.

In case an employee considers that his or her rights should be protected as there is a transfer of undertaking, but they are refused, s/he can go to the national tribunal or court. This court can where necessary ask the CJEU a question for interpretation of European Union law or to rule on its validity. It is not for the CJEU either to decide issues of fact raised in the main proceedings or to resolve differences of opinion on the interpretation or application of rules of national law. Any court or tribunal of a Member State may as a rule refer a question for a preliminary ruling to the CJEU, insofar as it is called upon to give a ruling in proceedings intended to arrive at a decision of a judicial nature. It is for the national court alone to decide whether to refer a question for a preliminary ruling to the CJEU, irrespective of whether the parties to the main proceedings have requested it to do so. Courts or tribunals in last resort, which are courts or tribunals for whose decisions there is no judicial remedy under national law, must refer such a question to the CJEU.

2. WHEN IS THERE A TRANSFER OF AN UNDERTAKING?

The Directive shall apply where and insofar as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty.[58] It can be deduced that the transferred undertaking must be located within the European Union or within the European Economic Area. The location to which the activity is transferred is therefore of no importance, and neither is the location of the ownership of the business. As a consequence, if the transferred business is located outside the EU and is transferred to an undertaking inside the EU, the Directive is not applicable. Also, in the event of a transfer of a business which is located outside the EU but which belongs to a company whose head office is within the EU, the Directive is not applicable. The situation is different when the national law implementing the Directive does regulate such cases.

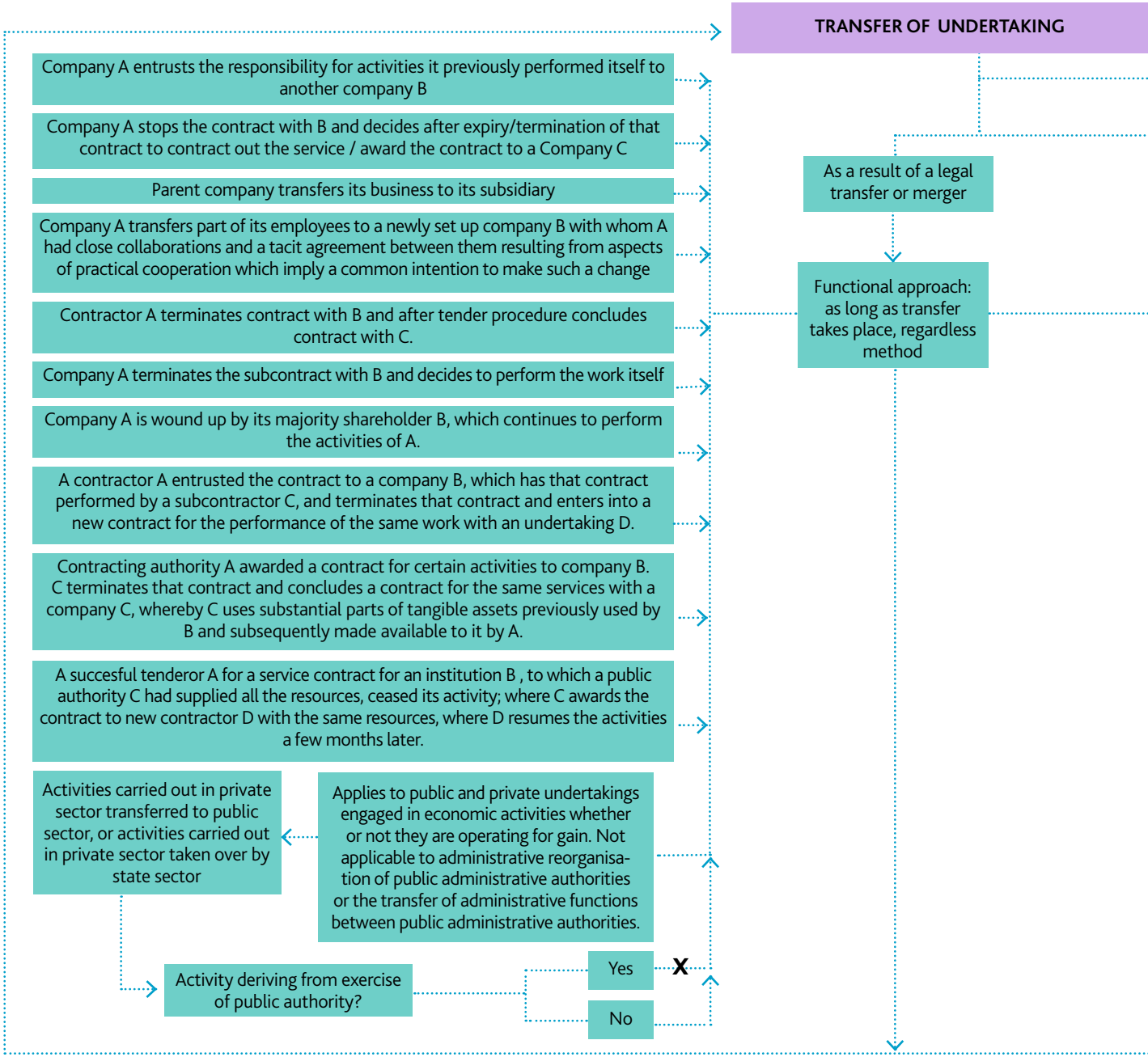
In this respect it is to be defined first when we can speak of a transfer of an undertaking? The Directive on transfers of undertakings is applicable whenever in the context of contractual relations there is a change in the natural or legal person responsible for carrying on the undertaking and entering into obligations of an employer towards employees of the undertaking.

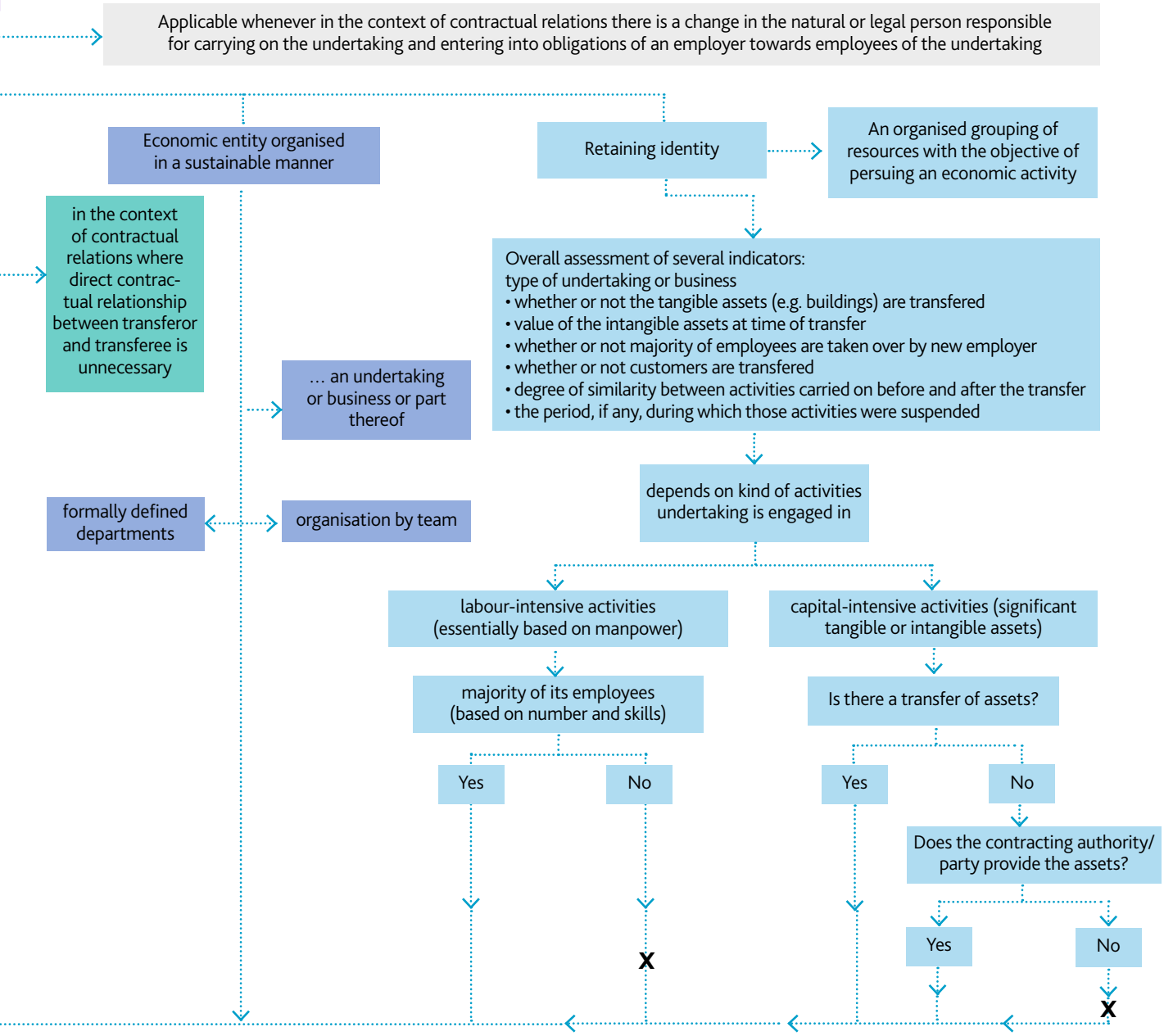
The application of the Directive is therefore subject to a condition that is threefold. First, the transfer of the undertaking must take place as a result of a legal transfer or merger. Second, it should concern an economic entity that is organised in a sustainable manner. Third, this economic entity must retain its identity after the transfer.

The schematic overview below describes the conditions that have to be fulfilled for the application of the Directive on transfers of undertakings.

58 See Article 1 (2) of the Directive.

a) A schematic overview




Applicable whenever in the context of contractual relations there is a change in the natural or legal person responsible for carrying on the undertaking and entering into obligations of an employer towards employees of the undertaking
Economic entity organised in a sustainable manner
in the context of contractual relations where direct contractual relationship between transferor and transferee is unnecessary
… an undertaking or business or part thereof
formally defined departments
organisation by team
Retaining identity
An organised grouping of resources with the objective of persuing an economic activity
Overall assessment of several indicators:
type of undertaking or business
• whether or not the tangible assets (e.g. buildings) are transfered
• value of the intangible assets at time of transfer
• whether or not majority of employees are taken over by new employer
• whether or not customers are transfered
• degree of similarity between activities carried on before and after the transfer
• the period, if any, during which those activities were suspended
depends on kind of activities undertaking is engaged in
labour-intensive activities (essentially based on manpower)
capital-intensive activities (significant tangible or intangible assets)
majority of its employees (based on number and skills)
Is there a transfer of assets?
Yes
No
Yes
No
Does the contracting authority/ party provide the assets?
Yes
No
X
X

b) Transfer as a result of a legal transfer or merger

1) A functional approach

The transfer must first and foremost take place 'as a result of a legal transfer or merger'. The CJEU has repeatedly stated that it has "given that concept a sufficiently flexible interpretation in keeping with the objective of the directive, which is to safeguard employees in the event of a transfer of their undertaking".[59] As a result, a literal explanation is not possible, giving the CJEU the freedom to determine the scope of the Directive. The CJEU thus uses the protection of the employees as a starting point for the interpretation of the Directive, and logically decides that the employees may benefit from the widest scope of application possible. This approach has considerably weakened this condition, as it no longer really lets a transfer be determined by a contract – notwithstanding that the CJEU may at times be unclear. It follows that an actual written contract does not seem to be required, and it can be assumed that a legal transfer could be understood as "by contract, or by some other disposition or operation of law, judicial decision or administrative measure".[60] This indicates a functional approach: as long as the transfer takes place, it is sufficient regardless the method used. A transfer of an undertaking may therefore take place in a range of different situations.

2) A wide variety of scenarios

An airport authority sets up a new tender procedure for granting a licence for groundhandling. Company A, which had obtained the contract for the last years, loses the contract and the contract is now awarded to groundhandling company B. Company B refuses to take over some of the employees of company A. The employees of A go the court as they are of the opinion that B is obliged to give them a contract under the same labour conditions as they got with A. B is of the opinion that if they would be obliged to take over these employees under such conditions, they would immediately fire them.

Without being exhaustive, below we give a more detailed description of some possible scenarios which are considered exemplative – some straightforward, but also some more complicated scenarios legally speaking – e.g.:

59 Judgment of 19 May 1992, *Redmond Stichting,* C-29/91, EU:C:1992:220.

60 BARRETT, G., "Light acquired on acquired rights: examining developments in employment rights on transfers of undertakings", *CMLR*, 2005, 1084 on the European Commission's proposal to amend the Directive.

- A company transfers one of its sections to its subsidiary as a contribution in kind (*Amatori*[61]).
- A subsidiary receives from its parent company certain activities by means of a transfer of business (*Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmungen*[62]).
- The owner takes over the leased undertaking following the break of the lease by the lessee (*Ny Mølle Kro*[63]).
- The lease expires and a third employer takes over from the lessee (*Tellerup v Daddy's Dance Hall*[64]).
- At the same moment that the stage of liquidation of a company A is opened, company B takes over some of the establishments of A, including the employees working there (*Vigano*[65]).
- After A acquires the materials and the list of suppliers and customers of B, and takes over a part of the employees, a liquidation procedure is initiated against B. The CJEU ruled that if the functional link between the various elements of production transferred is preserved, the Directive applies, even if its organisational autonomy is not retained (*Ferrotron*)[66]).
- Employees of a school that is managed by an insolvent commercial company establish a new company to take over the school (*Gimnasio Deportivo*[67]).
- A transfer between two subsidiary companies in the same group, the companies having the same ownership, management and premises (*Allen* [68]).

61 Judgment of 6 March 2014, *Amatori*, C-458/12, EU:C:2014:124.

62 Judgment of 11 September 2014, *Österreichischer Gewerkschaftsbund v Wirtschaftskammer Österreich — Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmungen*, C-328/13, EU:C:2014:2197.

63 Judgment of 17 December 1987, *Ny Mølle Kro,* C-287/86, EU:C:1987:573.

64 Judgment of 10 February 1988, *Tellerup v Daddy's Dance Hall*, C-324/86, EU:C:1988:72.

65 Judgment of 16 October 2008, *Vigano*, C-313/07, EU:C:2008:574.

66 Judgment of 12 February 2009, *Ferrotron*, C-466/07, EU:C:2009:85:

67 Judgment of 28 January 2015, *Gimnasio Deportivo*, C-688/13, EU:C:2015:46.

68 Judgment of 2 December 1999, *Allen*, C-234/98, EU:C:1999:594.

- Subcontracting: A stops the contract with B and concludes a new contract with C (first and second round of subcontracting) (*Süzen* [69]*; Hidalgo and Others* [70]*; Temco* [71]).

- Outsourcing/contracting in: the undertaking terminates the subcontracting and decides to perform the work itself (*Hernandez Vidal* [72]).

- A temporary employment business which has been declared bankrupt transfers part of its employees (management personnel and employees assigned on a temporary basis) to another temporary employment business with whom the first business has a collaboration. Also part of the clients of the bankrupt temporary employment business are transferred. For the transferred employees, this does not imply any alteration to the activities to be carried out by them. The transferred employees bring an action for payment by the transferee of outstanding salary claims. However, the transferee is of the opinion that no transfer has taken place. It argues that there was no "stable economic entity". The CJEU's decision states that the Directive applies to the transfer described "where […] the assets affected by the transfer are sufficient in themselves to allow the services characterising the economic activity in question to be provided without recourse to other significant assets or to other parts of the business" (*Princess Personal Service*[73]).

- Within a group of companies, employees have a contractual relationship with an undertaking other than the one where they are assigned to on a permanent basis. The company where the employees are *de facto* working transfers its activities to a company outside the group. The absence of a contractual relationship does not prevent the undertaking where the employees were *de facto* working from being considered as a transferor as meant in the Directive, as a result of which the transfer falls within the scope of the Directive (*Albron*[74]).

- A, the main shareholder of air company B, has contracted to continue to perform part of the activities of B after it is wound up. Moreover, A undertakes a number of activities in which it has not itself been active, but B has been. For the latter activities, A uses the equipment of B. A takes over a number of leases, as well as a number of employees from B. The Court of Appeal rules that there has been no transfer, as the fact that a commercial activity is merely continued is not sufficient to conclude that

69 Judgment of 11 March 1997, *Süzen*, C-13/95, EU:C:1997:141.

70 Judgment of 10 December 1998, *Hidalgo and Others*, C-173/96 and C-247/96, EU:C:1998:595.

71 Judgment of 24 January 2002, *Temco*, C-51/00, EU:C:2002:48.

72 Judgment of 10 December 1998, *Hernandez Vidal*, C-127/96, C-229/96 and C-247/96, EU:C:1998:594.

73 Judgment of 13 September 2007, *Princess Personal Service,* C-458/05, EU:C:2007:512.

74 Judgment of 21 October 2010, *Albron*, C-242/09, EU:C:2010:625.

there has been a transfer. Furthermore, A does not use an entity identical to the entity that belonged to B. The CJEU does not follow this reasoning and decides that there has been a transfer in the meaning of the Directive considering all elements which A has taken over (*Ferreira da Silva e Brito*[75]).

- An undertaking does not get its contract with another party renewed and extended, and this contract is granted to another undertaking when the equipment essential to the performance of those services has been taken over by the second undertaking (*Securitas*[76]).

- A is declared insolvent. B, a sister company of the main shareholder of A, establishes a new company to take over a number of businesses of A and the majority of its employees. An agreement stipulates that this had already been concluded before the declaration of insolvency. A number of employees who were not taken over are of the opinion that the agreement concluded before the insolvency falls within the scope of the Directive. The CJEU rules that the protection provided by the Directive is maintained, even if the objective of the agreement concluded prior to the insolvency is to maximise the proceeds of the transfer (*Smallsteps*[77]).

- A public undertaking has a contract with A that stipulates that A will use the equipment provided by the public undertaking. During the final months of the agreement, the public undertaking posts a number of employees to A for immersion training. Upon the expiry of the agreement, the public undertaking decides that it does not wish to extend the agreement and that it will perform the activity itself. It does not wish to take over the personnel of A. However, an employee of A is of the opinion that a transfer of undertaking has taken place and that the public company should take him over. However, the transferee believes he does not, considering that the material resources used to belong to the public undertaking at all times. The CJEU finally ruled that the mere fact that those material resources belonged to the public undertaking does not preclude a transfer from being regarded as a transfer of undertaking (*ADIF*[78]).

The examples above demonstrate that transfers of undertakings can take place in situations involving sub-contracting where the undertaking decides to contract out activities (e.g. groundhandling services) which it initially performed itself, but also in situations of second-round (or even further) subcontracting. The latter means that user undertaking A again puts the work out to tender, finalises the contract with B, and enters into a contract with C; as such there is a contract between A and C, but not between B and C.

75 Judgment of 9 September 2015, *Ferreira da Silva e Brito*, C-160/14, EU:C:2015:565.

76 Judgment of 19 October 2017, *Securitas - Serviços e Tecnologia de Segurança SA v. ICTS Portugal* – Consultadoria de Aviação Comercial SA and Others, C-200/16, EU:C:2017:780.

77 Judgment of 22 June 2017, *Smallsteps*, C-126/16, EU:C:2017:489.

78 Judgment of 26 November 2015, *ADIF*, C-509/14, EU:C:2015:781.

As the CJEU has held, the absence of a contractual link between the transferor and transferee cannot preclude a transfer within the meaning of the Directive. The transfer can be effected in two successive contracts concluded by the transferor and transferee with the same legal or natural person (see *Tellerup v Daddy's Dance Hall*[79] concerning a change of lessee-manager of a restaurant; *Redmond Stichting*[80] concerning the conclusion of a contract by a municipal authority with an association following termination of a previous contract with another association to carry out the same activities; and joined cases *Merckx* and *Neuhuys*[81] concerning a change in the ownership of a car dealership). This case law certainly also applies in a situation where, as in the case in the main proceedings, a contractor enters into two successive cleaning contracts, the second on termination of the first, with two different undertakings.[82] "The fact that the transferor undertaking is not the one which concluded the first contract with the original contractor but only the subcontractor of the original co-contractor has no effect on the concept of legal transfer since it is sufficient for that transfer to be part of the web of contractual relations even if they are indirect."[83]

3) The irrelevance of the public or private character

Furthermore, one may not forget that the Directive applies to transfers and mergers by both public and private companies. No other set of rules applies to public companies. Consequently, the interpretation of the concept of a legal transfer or merger does not depend on the private or public character of the company, whether or not they are operating for gain. In *Sozialhilfeverband Rohrbach* for example, a local authority social assistance association governed by public law wants to hive off two companies. To this end, it forms two new companies to which the local authority association transfers the existing companies as contributions in kind. The local authority association guarantees the protection of the rights of the employees transferred. Afterwards, the shares of the local authority association in the new companies are transferred under a contract of transfer to a limited liability company operating in the public interest, whose sole shareholder is a private association. In this case, the CJEU judged that there has been a transfer from the local authority association to the newly formed companies.[84] In UGT-FSP, a municipality insources an activity that until then was performed by another (private) undertaking. The municipality takes over in-house a number of public services as well as the existing personnel.[85]

79 Judgment of 10 February 1988, *Tellerup v Daddy's Dance Hall,* C-324/86, EU:C:1988:72.

80 Judgment of 19 May 1992, *Redmond Stichting*, C-29/91, EU:C:1992:220.

81 Judgment of 7 March 1996, *Merckx and Neuhuys*, C-171/94 and C-172/94, EU:C:1996:87.

82 Judgment of 11 March 1997, *Süzen*, C-13/95, EU:C:1997:141, paragraphs 11 and 12.

83 Judgment of 24 January 2002, *Temco*, C-51/00, EU:C:2002:48, paragraph 32.

84 Judgment of 26 May 2005, *Sozialhilfeverband Rohrbach*, C-297/03, EU:C:2005:315.

85 Judgment of 29 July 2010, *UGT-FSP*, C-151/09, EU:C:2010:452.

There are only two situation that explicitly fall outside its scope: "an administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities"[86] and "seagoing vessels".[87]

Activities that are carried out in the private sector and are subsequently transferred to or taken over by the public sector, could fall under the Directive on the transfers of undertakings. So the fact that the airport is run by a public law institution does not imply that there is no transfer of an undertaking. In *Hidalgo* the CJEU stated that "the fact that the service or contract in question has been contracted out or awarded by a public body cannot exclude application of [the Directive] if neither the activity of providing a home-help service to persons in need nor the activity of providing surveillance involves the exercise of public authority".[88] Thus, only when public authority is exercised, the Directive is not applicable. It is the exercise of public powers – an activity that in itself has a direct and specific connection with the exercise of official authority – that therefore distinguishes between public sector reorganisations that fall under the Directive and those that do not. This concept does certainly not seem applicable to a situation concerning baggage handling.

c) An economic entity organised in a sustainable manner

A second condition for the application of the Directive is that the transfer relates to an economic entity that is organised in a sustainable manner. The concept 'entity' means 'an organised grouping of persons – this can also be a part of a group of persons[89] – and assets enabling an economic activity which pursues a specific objective to be exercised'.[90] "The term 'undertaking' within the meaning of [the Directive] covers any economic entity organised on a stable basis, whatever its legal status and method of financing. Any grouping of persons and assets enabling the exercise of an economic activity pursuing a specific objective and which is sufficiently structured and independent will therefore constitute such an entity." It is not necessary that the entity is a formally defined department. In the EFTA case *Rasmussen*[91] the Court considered that it is sufficient that the entity is distinguishable from its other activities, and normally has employees mostly assigned to that unit. The application of the Directive is not precluded when the maintenance and support functions of an undertaking are transferred while the production function is not, and the employees of all these functions work as a team both before and after the transfer. Although organ-

86 Article 1(1)(c) Directive 2001/23/EC.

87 Article 1(3) Directive 2001/23/EC.

88 Judgment of 10 December 1998, *Hidalgo and Others*, C-173/96 and C-247/96, EU:C:1998:595, paragraph 24.

89 As long as this part has and keeps its own identity (see *infra*).

90 Judgment of 10 December 1998, *Hernandez Vidal*, C-127/96, C-229/96 and C-247/96, EU:C:1998:594, paragraph 26.

91 Case E-2/04 (10 december 2004).

isation by teams as opposed to organisation by formally defined departments potentially makes it more difficult to identify an entity within the meaning of the directive, choice of organisational structure, as such, cannot render the Directive inapplicable.

d) Retaining identity

1) An assessment of several indicators

As a third condition, the economic entity must retain its identity at the time of the economic entity's transfer as a result of a legal transfer or merger. This condition has resulted in extensive case law by the CJEU. According to the CJEU, for the Directive to be applicable, the transfer must relate to "a stable economic entity whose activity is not limited to performing one specific works contract."[92] "The term entity thus refers to an organized grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective."[93] This method is also called the 'going concern' model, where the transferred branch keeps its identity. The mere fact that the transferor and the transferee carry out a similar, or even identical, activity "does not lead to the conclusion that an economic entity has retained its identity". "An entity cannot be reduced to the activity entrusted to it. Its identity emerges from several indissociable factors, such as its workforce, its management staff, the way in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it".[94] Whether or not there is in fact a transfer of an undertaking is therefore not so much determined by the fact that the activity is continued. It is determined by whether the resources necessary for the continuation of the activities are passed on. In the same vein, it could be stated that "[t]he mere loss of a service contract to a competitor cannot therefore by itself indicate the existence of a transfer within the meaning of the directive. In those circumstances, the service undertaking previously entrusted with the contract does not, on losing a customer, thereby cease fully to exist, and a business or part of a business belonging to it cannot be considered to have been transferred to the new awardee of the contract."[95]

Determining this is no easy task. The method used can be found in the *Spijkers* judgment of the CJEU, which is a reference case.[96] The CJEU argues that the question whether the identity of the undertaking is retained, depends on the overall assessment of several indicators:

92 Judgment of 19 September 1995, *Rygaard*, C-48/94, EU:C:1995:290, paragraph 20.

93 Judgment of 11 March 1997, *Süzen*, C-13/95, EU:C:1997:141, paragraph 13.

94 Judgment of 20 January 2011, *CLCE*, C-463/09, EU:C:2011:24, paragraph 41.

95 Judgment of 20 January 2011, *CLCE*, C-463/09, EU:C:2011:24, paragraph 16.

96 Judgment of 18 March 1986, *Spijkers*, C-24/85, EU:C:1986:127.

- the type of undertaking or business;
- whether or not the tangible assets, e.g. buildings, are transferred;
- the value of the intangible assets at the time of the transfer;
- whether or not the majority of the employees are taken over by the new employer;
- whether or not the customers are transferred;
- the degree of similarity between the activities carried on before and after the transfer;
- the period, if any, during which those activities were suspended.

These may not be considered in isolation.

In *Commission v Italy*, the CJEU condemned Italy. It argued that an Italian rule which "obliges the suppliers of groundhandling services to ensure that, on each occasion of a 'transfer of activity' in one or more of the categories of groundhandling referred to in the annexes to the decree, the staff of the previous supplier are transferred to the subsequent supplier in proportion to the volume of traffic or the scale of the activities being taken over by the latter, clearly goes beyond the definition laid down in Directive 2001/23, as interpreted by the Court."[97]

The CJEU points out that this provision applies, "irrespective of the nature of the transaction concerned, to 'any transfer of activity' in the sector in question" and that, in the light of the case law mentioned above, "it is only by having regard to the specific characteristics of each transfer of activity concerning one or more categories of groundhandling services that it is possible to determine whether the transaction concerned constitutes a transfer [of undertakings]". The problem for the CJEU was that the Italian government argued that the continuity of the activity, which moves from one supplier to another – without looking at the taking over of tangible or intangible assets – is sufficient for a transfer of an undertaking. Similarly, we believe that a condition in a collective labour agreement is contrary to European law if it requires the following: every new entrepreneur who wishes to perform activities as a baggage handler at an airport and who thereby takes over the activities of another enterprise is immediately bound by the provisions in that agreement (regarding social standards and benefits) for what concerns its staff, in the absence of which the entrepreneur will not obtain a licence. After all, an automatic obligation without first verifying whether there is in fact a transfer in the sense of the Directive, is not allowed. Nevertheless, it is of course not excluded that in many circumstances there will indeed be a transfer of an undertaking in the sense of the Directive.

97 Judgment of 9 December 2004, *Commission v Italy*, C-460/02, EU:C:2004:780, paragraph 16.

2) The relevance of the sector: labour-intensive or capital-intensive activities

As a result of the *Spijkers* judgment many criteria thus needed to be taken into account. This allowed much room to come to the conclusion that there is in fact a transfer of an undertaking. Nevertheless, the fact that no difference in weight was given to these criteria added to the uncertainty. Therefore, it is perhaps not surprising that the CJEU started to pay special attention to two criteria, which had originated from two different understandings of the concept 'undertaking': an enterprise-activity model (a labour law approach) and an enterprise-organisation model (a corporate law approach). While the former model considers the transferred activity (to what extent will the employees perform the same activities before and after the transfer) the latter considers the organisation (it is thereby assumed that not only the activities are decisive; the transfer of tangible or intangible assets is also taken into consideration, e.g. the workforce, the way in which the work is organised, the operating methods.) The activity-based theory was most apparent in the Schmidt judgment, where the CJEU rules that also in the cleaning service where work was performed by one employee, there was a transfer of undertaking. In later case law, the CJEU clarified that the term entity "refers to an organized grouping of persons and assets facilitating the

exercise of an economic activity which pursues a specific objective".[98] This greatly reduced the significance of the enterprise-activity approach. Losing a service contract to a competitor is not by itself an indication of a transfer of undertaking. This allows to make a distinction between a one specific works contract of limited duration and contracting out a continuing function. It is also immaterial that a company lost its autonomy following the takeover.

In the case of *Ferrotron*,[99] the CJEU was asked if the transfer of undertaking applies when the transferee did not retain the organisational autonomy of the relevant part of the business, insofar as the re-engaged employees were integrated into different units, and the functions taken over are now carried out in the framework of a different organisational structure. The CJEU confirmed that a loss of autonomy does not prevent a transfer of undertaking. It added that what is relevant to assess whether the identity of the transferred entity has been preserved is the functional link of interdependence and complementarity between the various elements transferred.[100] The retention of a functional link of that kind between the various elements transferred allows the transferee to use them – even if they are integrated, after the transfer, in a new and different organisational structure – to pursue an identical or similar activity.

Taking this into account and to find out if an economic entity has been transferred according to the enterprise organisation model, in practice the sector in which a transfer takes place is essential. It is thereby important that the CJEU distinguishes between labour-intensive and capital-intensive activities. In labour-intensive sectors – e.g. security services and cleaning services – the emphasis is on the staff and the work they perform; whether the activity is more or less the same before and after the transfer, is central. In capital-intensive sectors, it is therefore important that there is a transfer of tangible or intangible assets. This is not, however, an alternative arrangement irrespective of the asset or non-asset nature of the undertaking. As a result, the transfer of assets is in fact a condition to decide that there is a transfer of an undertaking, except in the one situation where the economic activity is based almost entirely on manpower – namely where an organised grouping of wage earners are specifically and permanently assigned to a common task – and the entity is thus able to continue its work without there being any significant tangible or intangible assets required. In such cases, a majority of the staff (based on the number and skills) thus has to be transferred. Determining this is not easily done. What is more, the fact that the CJEU for example also refers to the staff's number and skills indicates that it does not suffice to consider the number of staff alone. If the sector can be regarded as labour-intensive, the transfer of a small number of employees will usually not result in a transfer of an undertaking.

98 Judgment of 11 March 1997, *Süzen*, C-13/95, EU:C:1997:141, paragraph 13.

99 Judgment of 12 February 2009, *Ferrotron*, C-466/07, EU:C:2009:85, paragraphs 46 and 47.

100 Paragraphs 32 and 33.

3) Groundhandling: an asset-reliant business

It is therefore almost universal, across European Union and domestic legislation and case law of Member States, that whether outsourcing is covered by the protection of the Directive depends on the facts, and that this is governed by whether the service is asset-reliant (in which case the transfer of assets is important) or labour-intensive (where the taking over of people is the determining factor). The question therefore arises to what extent groundhandling services can be seen as labour-intensive or capital-intensive. However, it looks like the number of manpower-intensive undertakings is rather limited and has to be considered an exception. In the *Oy Liikennen* case, the CJEU indeed already ruled that bus transport is not based mainly on manpower. Also regarding the general air transport sector, the CJEU decided that "the fact that tangible assets are transferred must be regarded as a key factor for the purpose of determining whether there is a 'transfer of a business'."[101] Along the same lines, the CJEU ruled that also "catering cannot be regarded as an activity based essentially on manpower since it requires a significant amount of equipment."[102] Looking at e.g. groundhandling services, it could be said that this is a business that is mainly based on tangible assets, because the activities require a great deal of rolling stock (baggage conveyor belts, trolleys etc).

As the CJEU follows a broad interpretation, it should certainly not be excluded that employees working in luggage handling can rely on the transfer of undertakings.

Some countries interpret and implement the Directive as follows: in cases of e.g. outsourcing, for the transfer of undertakings to take place it is required that the group has deliberately been organised by the employer to provide a service for a particular client and that the employees are assigned to this group. This would for example imply that when an airline company terminates a contract with a groundhandler even for one flight/destination, and signs a new contract with another groundhandler, employees working for several customers at the same time could not rely on the transfer of undertakings. This would complicate the application of the Directive on transfers of undertakings in certain cases. It is questionable whether this view is always tenable. A lot will depend on the circumstances. Imagine a case where an airline company ends a service contract with a groundhandler A and concludes a contract with a groundhandler B. The Directive will not apply, as also the employees of groundhandler A will remain working for A and will not be transferred to B. The situation would be different if, for example, groundhandler B took over groundhandler A and as such the personnel of A.

101 Judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraph 29.

102 Judgment of 20 November 2003, *Abler and Others*, C-340/01, EU:C:2003:629, paragraph 36.

Or, imagine that a groundhandler, in order to avoid the possible application of the Directive, decides to let people move between a dedicated group and a multi-usable group just before a contract changes. Such practice, in such circumstances, can at least be seen as abuse and as contrary to the spirit of the Directive, which is to protect the employees. Generally speaking, it is questionable whether employees can really be dedicated to a particular company or airline model and perform distinguishable activities. Can we say that groundhandling activities to be performed for company A are so different from the activities performed for another company, even if the latter uses a different model of plane? In our opinion, it might be argued that a transfer of an undertaking could apply if the criteria and indicators as described above are fulfilled.

Still, there is one risk: attempts could be made to avoid the transfer of (a significant) part of the assets. The possible outcome could thereby be determined in advance and the application of the Directive could be avoided. But there is one remedy against this approach. A transfer of actual ownership of assets is indeed unnecessary. This has been clarified by the CJEU in a number of cases, e.g. in *Allen* and later in *Abler*, which deal with catering services. The latter case concerned the catering in a hospital. The contractor was of the opinion that it did not take over from the previous contractor "any tangible or intangible assets such as stock, menu plans, diet plans, recipe collections, accounting data or general records, or even any part of the latter's workforce." It also contended that "the fact that the management authority remains the owner of the premises and equipment necessary for the performance of the activity precludes a mere change in the contractor from being regarded as a transfer of an economic entity." The CJEU pointed to a defining feature: the express and fundamental obligation to prepare the meals in the hospital kitchen and thus to take over those tangible assets. The transfer of the premises and the equipment provided by the hospital, which are indispensable for the preparation and distribution of meals to the hospital patients and staff, is in these circumstances sufficient to make this a transfer of an economic entity.[103] In another case some employees were working as security attendants assigned to carry out security checks on passengers and their baggage at Düsseldorf airport. A new contractor took over responsibility for implementing the contract. As stipulated in the contract, the German State made available to this contractor the aviation security equipment necessary to carry out the security checks on passengers. They could neither obtain any additional economic benefit from it, nor determine the manner and extent of its use. Furthermore, under the contractual specifications, the contractor was obliged to use that equipment.

According to the CJEU the fact that the tangible assets were taken over by the new contractor without those assets having been transferred to him for independent commercial use does not preclude there being either a transfer of assets, or a transfer of an undertaking or business within the meaning of Directive 2001/23.[104]

103 Judgment of 20 November 2003, *Abler and Others*, C-340/01, EU:C:2003:629. See also case C-509/14136

104 Judgment of 15 December 2005, *Güney-Görres*, C-232/04, EU:C:2005:778.

It can be concluded from the above that each situation in which a third party, e.g. a contracting institution, makes assets available such as materials or premises, and the new contractor continues the activities of the transferor, constitutes a transfer of an undertaking. An exception is only possible if the third party makes no assets available and the transferee declines every asset made available.[105] So the fact that the equipment required for baggage handling is not the property of the transferor, but belongs to the airport operators, has little significance. The mere use of substantial parts of the assets by the transferee previously used by the first contractor is important, and it is immaterial whether or not ownership of the assets was transferred.

C. RECOMMENDATIONS

Our recommendation is the following.

Taking into account that with the adoption of Directive 96/67/EC on access to the groundhandling market at Community airports there is a need to take additional measures for safeguarding employees' rights, there are several options:

- to encourage the social partners to further discuss and negotiate, and reach an agreement on guidelines for a protection of social rights under Directive 97/67/EC;
- to rely on the protection offered by Directive 2001/23/EC on transfers on undertakings, as this Directive could apply in several situations to employees working in luggage handling if the conditions are fulfilled;
- to consider groundhandling, for the application of Directive 2001/23/EC, as an asset-reliant business where in cases of outsourcing/insourcing/taking over, or in cases of awarding a contract after tendering etc, even when the assets are made available by a third party (contracting institution), it is likely that the Directive on transfer of undertakings will apply;
- to look for an appropriate case before a national tribunal or court where the court would ask the CJEU a question for interpretation of this Directive.

105 BARRETT, G., "Light acquired on acquired rights: examining developments in employment rights on transfers of undertakings", *CMLR*, 2005, 1063.

IV. AVIATION AGREEMENTS AND SOCIAL CLAUSES

A. LIBERALISATION OF TRADE AND SOCIAL CLAUSES: THE DEVELOPMENT OF AN EU AVIATION POLICY IN THREE PHASES

The growing liberalisation of international trade has major consequences for cross-border employment. This gives rise to certain questions. What are the consequences for persons' labour law situation? What is the impact on the local labour market? And more fundamentally, to what extent does growing competition increase the deregulation of terms of employment?

The aviation sector has witnessed a growing liberalisation as well. In the EU this process started with the so-called 'open skies' judgments by the CJEU.[106] According to these judgments, EU Member States could no longer act in isolation when negotiating international air services agreements. The CJEU ruled that the nationality clauses in the agreements, which restrict international traffic rights to the national flag carriers of the countries concerned, are contrary to the Treaty. These clauses undermined the fundamental right of establishment laid down in the Treaty, under which EU nationals are free to establish businesses throughout the EU free from any discrimination. Following the CJEU's judgment, the EU developed an external aviation policy to restore legal certainty to the bilateral agreements. This included the negotiation at EU level of so-called Horizontal Agreements with partner countries, which allowed amending all bilateral agreements that EU Member States have with a third country.[107]

In a first phase the bilateral agreements that were not in line with EU law had to be amended to ensure legal certainty and to put all EU airlines on an equal footing for flights to countries outside the EU. Since 2002, some 50 Horizontal Agreements have been negotiated. At the same time, many more third countries have amended their bilateral agreements with individual EU Member States directly. Today, more than 120 countries in the world recognise the principle of EU designation, which implies that any EU carrier is eligible to fly from any EU Member State to a non-EU country provided that traffic rights are available under the bilateral agreements with these countries.

106 Cases C-466/98, C-467/98, C468/98, C-469/98, C-472/98, C-475/98 and C-476/98.

107 Commission Staff Working Document Impact Assessment, Accompanying the document proposal for a Regulation of the European Parliament and of the Council on safeguarding competition in air transport, repealing Regulation (EC) N° 868/2004, SWD/2017/0182 final - 2017/0116 (COD).

In the second phase, the EU is working to develop a Common Aviation Area with neighbouring countries to the South, South-East and East of the EU. It does so through a parallel process: it is gradually opening up the market, and it is aiming at a wider convergence of EU aviation legislation and regulation.

In the third phase, "the EU is negotiating comprehensive agreements to integrate the EU aviation market with those of its key international trading partners by enhancing and normalising aviation relations through a combination of market opening, removal of investment barriers (airline ownership), regulatory cooperation and convergence and resolving 'doing business issues'."[108]

In this third and last phase negotiations with the US and Canada have been finalised, and negotiations are on-going with the Association of South East Asian Nations (ASEAN) (Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam), the Gulf region (the UAE and Qatar, Bahrain, Oman, Saudi Arabia and Kuwait) and China.

B. AVIATION POLICY AND SOCIAL CONSEQUENCES

These Open Skies Agreements clearly open new business perspectives. But it is also clear that these agreements present clear and present challenges, and new flags of convenience and crew of convenience techniques involving third countries are only the dawn thereof.[109] The next level of social and fiscal engineering is this: an airline provides flights by entering the EU, and subsequently it provides intra-EU connections with a crew consisting of third country nationals who do not have a home base within the EU. And this is already happening.[110]

These tendencies do raise the question what the social effects are of this growing liberalisation. There is a growing risk of competitive bidding down of standards in order to attract new investments or to retain existing investments. And this leads to a race to the bottom. There is a growing fear for the phenomenon of social dumping. Opening the borders for cheap labour force may bring with it a risk of economic exploitation, where cheap workers are considered modern slaves, who are armed with a labour contract that is not respected, who often work for longer periods than legally allowed, and who sleep in unhealthy

108 See European Parliament, Directorate-general for Internal Policies, Policy Department, Structural and Cohesion Policies, "An overview of the air services agreements concluded by the EU", Brussels, 2013.

109 Y. Jorens, D. Gillis and L. Valcke, Atypical Employment in the European Aviation Sector, (2016) *Labour law and social progress : holding the line or shifting the boundaries?* p. 229-256.

110 Y. Jorens, D. Gillis, L. Valcke and J. De Coninck, Atypical Employment in the Aviation Sector (2015).

places without any supervision of labour safety and labour conditions.[111] As Franklin D. Roosevelt stated in 1937: "Goods produced under conditions which do not meet a rudimentary standard of decency should be regarded as contraband and not to be allowed to pollute the channels of interstate commerce."

C. A NEED FOR SOCIAL CLAUSES?

In this respect we can notice a demand for including social clauses in many trade agreements.[112] Different reasons are given for including such clauses. The most important are economic arguments, often related to avoiding a race to the bottom. It is thereby asserted that competition cheapens labour and deprives workers of the profits gained through economic growth. These social clauses should compensate for the expected negative social effects that might result from a further liberalisation, where countries might try to set up an unfair competitive advantage by lowering the labour standards. Social protection means increased costs for a country. Liberalisation gives companies the opportunity to perform their activities from another country, which may mean that jobs are lost in the first country. This will definitely be the case if the costs are lower in the second country. And this may inspire a state to reduce its costs of social protection, but with it, the level of social protection. If other states follow suit, this may lead to a race to the bottom. Moreover, states will often make this choice without any apparent proof. The race to the bottom might thus not only be triggered by an actual situation, but also by the mere possibility that it might occur. States will indeed often lower their benefits as a preventive act. They want to be on the safe side. Because of the flexibility that companies have, they are able to avoid certain labour and social rights. But it goes further that this: further liberalisation offers employers from countries that used to work only with more expensive local employees the opportunity to work with cheaper labour. This means that not only local employers, but also employers established in the more liberal country can use this opportunity. Only if in the host country conditions have been laid down regarding the terms of employment for workers from another country, this can in part be remedied. However, low-wage countries in particular will often argue that linking liberalisation with the level of protection under labour law is a protectionist argument in disguise, meant to counter the competitive advantage of these countries. They call this ille-

111 See eg Report French Senate la Commission des affaires européennes, assemblée nationale sur la proposition de directive relative à l'exécution de la directive sur le détachement des travailleurs", Senat, N° 527, session ordinaire de 18 avril 2013.

112 See also about this topic: Quentin Delpech and Franz Ebert Labour Market Concerns and Trade Agreements:The Case of Employment Policy Provisions, ILO, 2014; Adalberto Perulli ,"Sustainability, Social Rights and International Trade: The TTIP', International Journal of Comparative Labour Law and Industrial Relations, 2015; Asif Salahuddin, "Infusion of social clauses into Global Trade Agreements: How necessary are They?", http://uap-bd.edu/lhr/wp-content/uploads/2017/05/3-1.pdf; Simon Tans, "Wereldorganisatie en liberalisering van dienstverlening: gevolgen voor het toepasselijke arbeidsrecht", in *Toepasselijk arbeidsrecht over de grenzen heen*, H. Verschueren and M.Houwerzijl, Kluwer, 2009; Bart Kerremans, Jan Orbie '"The Social Dimension of European Union Trade Policies'", *European Foreign Affairs Review* , 2009

gitimately protecting workers in developed countries as opposed to legitimate comparative advantages of workers in developing countries. It follows that migrant workers who are willing to work for lower wages cannot simply be rejected, as economic arguments against the free movement of natural persons are based on the narrow perspective of domestic workers' welfare while ignoring the benefit for the economy as a whole. Countries that do not admit migrant service providers willing to work for lower wages, are giving up economic output which they could have in order to protect the wages of domestic workers who might be displaced or have their wages lowered.

Apart from these more economic arguments for social clauses, an argument of a more ethical nature is also often heard: the inclusion of labour standards could be used to try to improve the terms of employment in these third countries. The motivation here is not to protect domestic workers against unfair competition abroad, but rather to promote better local standards in the third country. One problem with this argument is that it is often extremely difficult to find out if such aims have been reached. In addition, this only offers an indirect solution for the consequences of liberalisation of service provision.

For all these reasons a growing number of countries consider the promotion and protection of labour standards as an underlying dimension of trade policy. That is why many free trade agreements and partnerships have social clauses that follow a different approach. The following part demonstrates these evolutions by some examples.

D. A WORLDWIDE DEBATE: THE WTO AND THE INCLUSION OF SOCIAL CLAUSES

1. GATS: THE DECLARATION OF SINGAPORE

A first example of the inclusion of social clauses in agreements is an important one: the negotiations held within the WTO about the GATS (General Agreement on Trade in Services). These can be considered to have paved the way for discussions about social clauses. During the GATS negotiations, a long discussion took place about the relationship between international trade and labour law. This led to the WTO Ministerial Declaration of Singapore of 13 December 1996, which for the first time links labour standards with trade liberalisation. A compromise on the issue resulted in a paragraph on labour standards in the final Declaration of the Conference. Also for the first time, a WTO document made a reference to labour standards. This declaration will make it possible to give social clauses a place and will open the way for linking labour standards with trade liberalisation.

The declaration points out: "We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration."

2. THE DECLARATION OF SINGAPORE: GIVING SOCIAL CLAUSES A PLACE

This declaration highlights a number of things:

1. There is a shift away from discussing whether there should be a debate about trade and labour standards, towards discussing where and how to conduct that debate. It seems that the appropriate institution for dealing with international labour standards is the ILO and not the WTO. And, the debate about the enforcement of the compliance with these international labour standards should take place within the *institutional context of the ILO*. This has its consequences.

2. Compliance is sought with international standards and with core principles and rights of international labour law. The parties are asked to strive to ensure the protection of these standards based on their national legislation and the compliance with it. It seems that herewith the content is more clearly defined. So, these *international standards are a kind of benchmark* to evaluate the effectiveness of national labour law. In a way, minimum standards have thus been set. It is therefore important to define the concept of international core labour standards.

   The fact that the Singapore Declaration refers to the ILO shows two things: (1) the labour law norms to be protected have somewhere been refined, and (2) they are now determined by referring to a human rights approach. This human rights approach is further determined by the core provisions of the ILO, which are laid down in the ILO conventions (Convention Nos 87 and 98 on the freedom of association and on collective bargaining; Convention Nos 138 and 182 on child labour; Convention Nos 29 and 105 on forced labour; and Convention Nos 100 and 111 on non-discrimination). Human rights are not solely a labour law, or an economic matter. Freedom of association and collective bargaining are specific labour law matters; they have the advantage of being rights to a process, and not


ATR 72
-235

to a substantive outcome. The right to freedom of association and collective bargaining is a right to organise and bargain about wages, hours and other terms and conditions of employment. It is not a right to any particular result or standard in these areas. As such, they do not involve the more difficult discussion about other sorts of "substantive" labour standards – such as wages, hours of work, leave – for which the achievement of a coherent multinational consensus constitutes a greater challenge. The question that arises here is therefore not really whether there is an equal level playing field, but whether any fundamental rights as recognised by the ILO have been denied.

3. *Compliance is sought with international labour law norms*. This will also be found in many other agreements. Very rarely another model can be found that includes a social clause that does not require formal compliance with a minimum supranational standard, but rather the effectiveness of national social standards. An example is the North American Agreement on Labor Cooperation (NAALC). This is an agreement between the US, Mexico and Canada signed in 1993. The main objective of the NAALC is to provide "a mechanism for member countries to ensure the effective enforcement of existing and future domestic labor standards and laws without interfering in the sovereign functioning of the different national labor systems." The preferred approach of the agreement to reach this objective is through cooperation: exchanges of information, technical assistance, and consultations. The agreement also provides some oversight mechanisms to ensure that labour laws are being enforced in all three countries. "If a Party believes that another Party is demonstrating a persistent pattern of failure to effectively enforce its occupational safety and health, child labor or minimum wage technical standards, an arbitral panel may be established." "The ultimate outcome of the dispute settlement process as a last resort for non-enforcement of labor law by a Party may be a monetary assessment backed by a suspension of trade benefits." This agreement thus strives for the effectiveness of national social standards. A much broader perspective on labour standards is adopted here; one that does refer to national labour law. This does not necessarily make this an effective instrument.

4. The fact that the enforcement takes place within the framework of the ILO has its impact, as the ILO is essentially a "voluntary" organisation. It does not impose sanctions. Consequently, the ILO will play more of a *soft and cooperative role*. It will mainly pay attention to providing information, engaging in dialogue between all parties involved, helping to explain these norms etc. We may not forget that the ratification of ILO conventions does not imply that these instruments are immediately implemented. This does not mean that the ILO does not have an appropriate supervising method. Within the ILO there is a Committee of Experts on the Application of Conventions and Recommendations, a body of 20 independent lawyers representing the different countries and their legal systems. This committee can act as a more effective supervisory system that can determine the compliance with national legislation, at least under the condition that the ILO conventions have been ratified. The question therefore arises what should be preferred. A follow-up mechanism? Or a more voluntaristic approach

often based on arguments of moral value and shame? In this approach there is control through a system of soft law instruments (such as consultations, consultative public forums, recommendations). Or, should the focus be on the carrot and stick approach? Here, not complying with minimum labour standards would lead to sanctions, financial or commercial, or to a loss of certain benefits and advantages, after the application of a dispute resolution procedure. The question whether sanctions should be used is crucial. It also points out the differences between countries with regard to the approach taken, and it is often used as an argument to explain why the world is divided between those who support WTO consideration of the core labour standards issues, and those who do not. Some will argue that the effect of sanctions should not be overrated, as it would not help their labour standards, but would only hurt their economic aspirations. There is a clear link between improving and strengthening the ILO supervisory mechanism and the call for trade sanctions. The more this ILO mechanism is strengthened, the less the need will arise to use trade sanctions to enforce labour standards. In any case, it should be pointed out that unlike the ILO, the EU definitely has no monitoring mechanism.

E. GATS AND AIRPORT TRANSPORT SERVICES

The GATS distinguishes between four modes of supplying services: cross-border trade, consumption abroad, commercial presence, and presence of natural persons. In particular this last mode, Mode 4, is of interest to the issue discussed here. "Presence of natural persons consists of persons of one Member entering the territory of another Member to supply a service." "The Annex on Movement of Natural Persons specifies, however, that Members remain free to operate measures regarding citizenship, residence or access to the employment market on a permanent basis." The countries may thus decide themselves in which sectors and under which terms they want to allow natural persons from other countries to perform services on their territory.[113] This means that they may also impose that national labour law is applied, which usually entails the wage level and the working conditions that are in force in the country. However, it should be noted that it is primarily higher-skilled workers who move to another country. They are paid well and have an employment contract before they move. Moreover, the number of agreements which the Members have entered into is low, certainly with regard to lower-skilled and/or lower-paid workers, not least to protect their labour market, thereby adopting a restrictive immigration policy. Of course it is these lower-skilled workers who are most often the victims of abusive working conditions. The wages and conditions of those workers will be governed by their employment contract with the supplier of the

113 The GATS has a general exception rule that "permits Members in specified circumstances to introduce or maintain measures in contravention of their obligations under the Agreement." This is the case for measures to protect public morals or maintain public order, or to protect human health. It would however include a very wide and perhaps disguised interpretation to cover human rights, including labour rights set out in the ILO conventions or sectoral instruments, under these exceptions.

service and be governed by the relevant law for that contract. It is possible that the contract of service requires the workers to be employed under the labour laws of the country in which they are supplying the service, but that is uncommon. It is also possible that the country where the service is supplied requires that local labour laws, for example on minimum wages, apply to foreign employees of foreign contractors, but that is usually not the case.

Air transport services are governed by a specific annex of the GATS. This annex excludes from the agreement the largest part of air transport services: traffic rights and services directly related to traffic. These services are nevertheless subject to a regular review by the Council of Trade in Services. This review is performed to consider the possible further application of the GATS to the sector. The GATS applies to measures affecting:

a. aircraft repair and maintenance services;
b. the selling and marketing of air transport services, including all aspects of marketing such as market research, advertising and distribution;
c. computer reservation system (CRS) services.

Are however excluded:

a. traffic rights, however granted; or
b. services directly related to the exercise of traffic rights.

Nevertheless, this does not imply that other services might not be included, for example if they are related to a separate service (e.g. leasing of an aircraft without operators might fall under the business service).

F. TISA AND AIRPORT TRANSPORT SERVICES

Although the temporary service provision by natural persons is consequently rather limited, it can be expected that the effect this has and the discussions about it will increase. The ongoing negotiations about the TiSA (Trade in Services Agreement) are an example of this.[114] The European Commission and 22 parties are currently negotiating this trade agreement for the services sector, but the negotiations temporarily broke down in 2016. They will be resumed as soon as the political climate allows so. No deadline has been set to end the negotiations.

114 See also Fr. Ebert Stiftung, J.Kelsey, *The trouble with TISA*, Brussels, 2017.

One of the TiSA's most important outcomes will be that service activities within the air transport sector will be expanded from three to six services. The three additional services proposed are:

- ground handling[115];
- airport operation,[116] i.e. supply of air terminal, airfield and other airport infrastructure operation services on a fee or contract basis; and
- speciality air services,[117] i.e. any specialised commercial operation using an aircraft whose primary purpose is not the transportation of goods or passengers.

In addition, it should be mentioned that the EU even proposed to add to the list 'rental of aircraft with crew' (wet leasing) and 'air navigation services', consistent with its own Free Trade Agreements. These were, however, not included in the latest version of the text.

G. EU AGREEMENTS ON THE LIBERALISATION OF THE AVIATION INDUSTRY AND THE SOCIAL CLAUSE

How do the European trade agreements reflect the demand for protection of minimum labour standards, more specifically with regard to the liberalisation of the aviation industry? What is the EU's approach to this issue in relation to third countries? International liberalisation agreements also increase labour mobility with a possible tension between on the one hand the rules on free movement of services and establishment and on the other hand the safeguarding of social norms. It is obvious that this situation can cause social dumping, and that countries have different approaches to this problem. The US adopts an approach that focuses more on a sanctioning mechanism. This mechanism is implemented in varying ways: for example pre-ratification requirements for reforms in labour laws and practices, coupled with cooperative activities and monitoring reports to build capacity and assess progress. Another approach is taken in the trade agreements which the EU has entered into with third countries: the focus is on a soft pressure on third states and a cooperative system. Most references to workers' rights or standards

115 the supply at an airport, on a fee or contract basis, of the following services: airline representation, administration and supervision; passenger handling; baggage handling; ramp services; catering, except the preparation of the food; air cargo and mail handling; fuelling of an aircraft; aircraft servicing and cleaning; surface transport; and flight operations, crew administration and flight planning. Ground handling services do not include: self-handling; security; line maintenance; aircraft repair and maintenance; or management or operation of essential centralised airport infrastructure, such as de-icing facilities, fuel distribution systems, baggage handling systems and fixed intra-airport transport systems.

116 Airport operation services do not include air navigation services.

117 such as aerial fire-fighting, flight training, sightseeing, spraying, surveying, mapping, photography, parachute jumping, glider towing, and helicopter-lift for logging and construction, and other airborne agricultural, industrial and inspection services.

adopt a more promotional approach, as they are based on cooperative activities that do not yet include – but is it excluded? – the development of binding labour commitments. The handling of labour violations is explicitly excluded from the general dispute settlement procedure established for other issues in these agreements. So the focus is on consultations or persuasion through political pressure rather than through monetary sanctions or suspension of benefits. A particular exception to this approach can be found in the Economic Partnership Agreement between the EU and the CARIFORUM, which again focuses on upholding levels of social protection, the minimum level being the ILO labour standards. But, at the same time it attaches sanctions to labour provisions based on arbitral dispute settlement.[118] However, the agreement also states that in disputes under the social chapter, the suspension of trade concessions under the agreement is not an appropriate measure.[119] This makes it unclear what the impact is of this sanction-based arbitral dispute settlement, and so it remains more in line with the traditional soft approach.

The Open Skies Agreements that the EU have concluded until now, have a social clause in which the parties from both sides commit themselves to implement the agreement in a way that does not undermine labour rights. For the first time an air transport agreement includes an explicit commitment to high labour standards.

In the Open Skies Agreement with the US, Article 17 bis reads: "The Parties recognise the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards. The opportunities created by the Agreement are not intended to undermine the labour standards or the labour-related rights and principles contained in the Parties' respective laws. The principles in paragraph 1 shall guide the Parties as they implement the Agreement including regular consideration by the Joint Committee, pursuant to Article 18 of the social effects of the Agreement and the development of appropriate responses to concerns found to be legitimate. "Similar provisions can be found in the agreement with Canada: "The Parties recognise the importance of considering the effects of this Agreement on labour, employment and working conditions. 2. Either Party may request a meeting of the Joint Committee under Article 17 in order to discuss the labour matters referred to in paragraph 1 of this Article."

118 Article 191 and 193 of the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, OJ L 289, 30.10.2008, p. 3-195.

119 Article 213 (2).

However, the wording of these provisions makes it clear that they are rather empty, or nothing more than a declaration of interest. They basically only refer to the need to continue and have "regular consideration" by the joint committee. It is just a demand for a commitment to progress the issue in the joint committee without the possibility to really enforce labour standards. These provisions are certainly no guarantee that the existing legal rights of airline employees are preserved. Whether the implementation of the agreement will contribute to high labour standards is far from obvious. Take, for example, the application of this agreement to the low-cost carrier Norwegian Airlines International. There were serious allegations about Norwegian's application to be able to profit from this EU-US agreement, as its Irish subsidiary, Norwegian Airline International, was actively outsourcing its labour to be able to lower their costs. Article 4 of the agreement states that the applicant has to be "qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air transportation by the party considering the application", which in this case was the American Department of Transportation (DOT). For DOT there was no real issue, as the provision in the EU-US agreement that addresses labour law does not afford a basis for rejecting an applicant that is otherwise qualified to receive a permit. This confirms the rather empty shell of these social clauses.

H. WHERE TO GO TO FROM HERE?

The further liberalisation of the air transport sector may be a cause for concern. Will this sector not head in the same direction as the maritime sector and its flags of convenience?

It is beyond dispute that the international agreements which the EU is currently concluding with its strategic partners should pay attention to social standards. International agreements on trade and services concluded today have far-reaching influence also in the aviation sector. It therefore seems incomprehensible sometimes that no social clause is included. Studies demonstrate that trade agreements with or without labour provisions do not have a significantly different impact on trade between developed economies (North-North), or exports from developing to developed economies (South-North). Trade agreements that include labour provisions are found to even have a significantly stronger positive impact on trade flows for trade between developing economies (South-South) and exports from developed to developing economies (North-South). This all urges to include social clauses in aviation agreements. The Open Skies Agreements with the US and Canada have however demonstrated the limitations of the current formula. The current negotiations with Qatar show that higher ambitions can be strived for.

In this part we give some arguments for a social clause model that can be used in further negotiations and that can be introduced in the agreement.

1. First, apart from a separate clause, it is important to introduce express references to social considerations in the preambles. Even if these preambles do not produce legally enforceable rights, they nevertheless form part of the Treaty for the purposes of interpretation, and they can contribute to clarifying the Treaty objectives. An argument could also be made for including the obligation to provide information on the labour standards to everybody. For a good monitoring process, providing up-to-date easy accessible information for and targeted communication to all parties involved, is of paramount importance.

2. Second, international agreements usually refer to the obligations included in the ILO conventions. We would therefore also like to encourage the ratification of further ILO conventions. Some international trade agreements concluded by the US and Canada with third countries go a step further: it is a condition, already before the international agreements are concluded, that the third country ratifies these ILO conventions. This establishes the governmental duty to provide for a minimum of regulation to protect labour rights. However, when comparing countries that concluded trade agreements, with or without labour provisions, with Canada,

the EU and the US, hardly any significant difference can be found in the ratification rate. Yet, although ratification may not immediately result in the implementation of the ILO conventions, it makes monitoring easier. The countries can rely on the supervising bodies of the ILO, who watch over the implementation of these conventions, and this increases the pressure on the state (often through a system of shame and blame).

3. As mentioned above, minimum social standards can be regulated using a human rights approach. However, as discussed, in such case only a very narrow core of provisions has to be complied with. Also, it is not always entirely clear to what extent violations of social standards and rights can and will be met with effective sanctions, and whether enforcement can be guaranteed. This is also why it is more appropriate to refer to the ILO conventions rather than to the often mentioned 1998 ILO Declaration on Fundamental Principles and Rights at Work and its follow-up. This declaration commits Member States to respect and promote principles and rights in four categories, whether or not they have ratified the relevant Conventions.

   These categories are: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour, and the elimination of discrimination in respect of employment and occupation. Although a reporting mechanism has been set up, when the relevant convention has not been ratified and there are no other monitoring bodies, assessing conformity is obviously more difficult and may also lead to a fragmentation of the interpretation of the fundamental labour rights.[120] We believe a progressive approach should be followed: in addition to ratifying the eight core ILO provisions, attention should be paid to other ILO conventions covering a more far-reaching protection in the domain of labour standards. For that reason we define labour law broadly, "to include laws and regulations, or provisions thereof, directly related to: freedom of association and protection of the right to organize; the right to bargain collectively; the right to strike; prohibition of forced labor; labor protections for children and young persons; minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements; elimination of employment discrimination on the basis of race, religion, age, sex, or other grounds as determined by each country's domestic laws; equal pay for men and women; prevention of occupational injuries and illnesses; compensation in cases of occupational injuries and illnesses; and protection of migrant workers." Two bodies of labour standards are referred to: firstly the parties will respect the fundamental principles and rights as described in the international – more in particular ILO – norms, and secondly the parties will enforce their national labour laws. A prospective element, previewing the possibility of strengthening the

120 See European Parliament, Directorate-general for Internal Policies, Policy Department, Structural and Cohesion Policies, "TTIP and Labour Standards", Brussels, 2013.

state's social standards in the future, may demonstrate an ambition to guarantee the states' rights to regulate social protection as well to further balance social rights on an international level.

4. To the same extent a non-derogation clause should be included obliging the states not to lower their domestic labour law standards for increased competitive advantages. This would act as a social safeguard in order to avoid social dumping. It would also be consistent with the horizontal social clause of the TFEU (Article 9): "[i]n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health."

5. The question remains: should the EU follow its traditional soft version approach, or should a more binding and enforceable social clause be favoured, with harder sanctions? Would the inclusion of any sanction mechanism not strengthen the emphasis which the EU puts on its social aspirations and add legitimacy? It is true that hard sanctions are difficult to accept for third states. They are often seen as an intrusion in their national sovereignty. Another idea could perhaps also be to promote labour rights by an alternative solution, namely to award more advantages if the third country complies with the ILO core labour standards. But could the possibility be provided to include sanctions, albeit only as a last resort, after the cooperative approach has failed? There should not be a contradiction between cooperation and (ultimately) sanctioning, as the 'stick' of sanctions should rather be considered as a way of leveraging the cooperative approach. Of course, setting up sanctions should not be seen as excluding the co-existence of other support mechanisms, for example the technical support of an organisation such as the ILO. In this respect we would combine soft with hard law techniques.

6. Sufficient guarantees also have to be built in to ensure that the labour law standards are efficiently monitored and enforced. This is done through different means including access to administrative, quasi-judicial, judicial, or labour tribunals. Exactly, in order to strengthen the monitoring and cooperative approach we would propose that the different stakeholders and the civil society are taken on board more often, and that it is guaranteed that the governments reckon with their views more. Should severe infractions to the social standards be detected, as no real sanction mechanism is put in place, the dispute settlement procedures could be launched, as these exist for other infractions of this agreement.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I. RECOMMENDATIONS

MODEL FOR SOCIAL CLAUSE

Preamble

Considering the difference in levels of social development existing between the Parties.

Recognising that an increased liberalisation of the aviation market and the significant economic gains from open and competitive markets may not undermine the Parties' labour or labour-related standards and that such markets should be accompanied by high labour and social standards.

Recognising the importance of considering the effects of this Agreement on labour, employment and working conditions, of taking into account the promotion of a high level of employment, and of guaranteeing adequate social protection and labour standards when implementing this Agreement.

Considering the Parties' intention to cooperate in ensuring compliance with the social provisions of this Agreement.

Article

1. The Parties reaffirm their obligations as members of the International Labour Organization (ILO). Each Party shall adopt, promote, implement and maintain in its laws and regulations, and practices thereunder, the rights, as stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) (ILO Declaration):

The Parties shall promote the objectives included in the ILO Decent Work Agenda and the ILO Declaration on Social Justice for a Fair Globalization of 2008 adopted by the International Labour Conference at its 97th Session.

Each Party shall make continued and sustained efforts towards ratifying, to the extent it has not yet done so, the fundamental ILO conventions. The Parties shall also consider the ratification and effective implementation of other ILO conventions and international standards in the labour and social domain relevant to the civil aviation sector, taking into account domestic circumstances.

2. The parties recognise the importance of the social dimension of this Agreement and the benefits that arise when open markets are accompanied by high labour and social standards. The parties recognise that the opportunities created by this Agreement shall not undermine the labour standards or labour-related rights and principles as determined by international norms and the national laws of the Parties.

Labour standards include laws and regulations, or provisions thereof, directly related to: freedom of association and protection of the right to organize; the right to bargain collectively; the right to strike; the prohibition of forced labour; labour protections for children and young persons; minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements; elimination of employment discrimination on the basis of race, religion, age, sex, or other grounds as determined by each country's domestic laws; equal pay for men and women; prevention of occupational injuries and illnesses; compensation in cases of occupational injuries and illnesses; and protection of migrant workers.

3. The Parties recognise that the principles and rights as determined in (1) and (2) shall guide the Parties when they implement this Agreement.

In defining and implementing their policies and activities, the Parties shall take into account requirements linked to the promotion of a high level of employment, the protection of the fundamental rights at work, and the guarantee of adequate social protection and working conditions in the aviation sector.

The Parties agree not to encourage any activities within this Agreement to enhance or maintain a competitive advantage by:

(a) lowering the level of protection provided by international and domestic social and labour legislation;

(b) derogating from or failing to apply such legislation and standards.

4. Each Party shall effectively enforce their labour laws, as defined in (1) and (2), by means of a sustained or recurring course of action or inaction, in a manner affecting the aviation market between the Parties, after the date of entry into force of this Agreement.

Each Party shall ensure that persons with a legally recognized interest in a particular matter have appropriate access to tribunals for the enforcement of the Party's labour laws. Such tribunals may include administrative, quasi-judicial, judicial, or labour tribunals, as provided by the Party's law.

5. Each Party shall promote public awareness of its labour laws, and shall ensure that information about its social protection, labour laws and working conditions related to aviation is made generally available free of charge in a clear, transparent, comprehensive and easily accessible manner, including by means of: (a) ensuring the availability of public information related to its labour laws and enforcement and compliance procedures; and (b) encouraging education of the public regarding its labour laws.

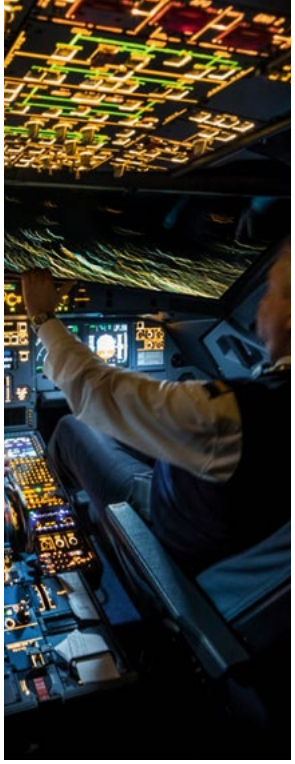
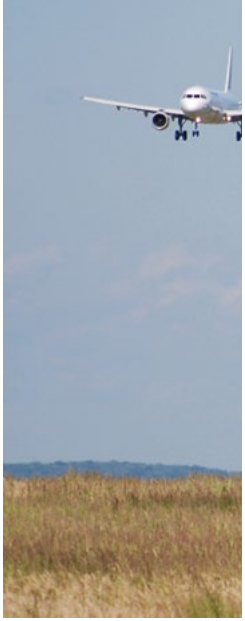
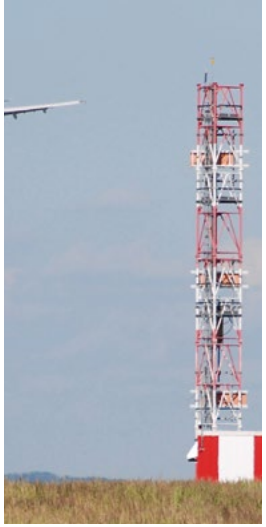
6. The Parties recognise the importance of cooperating, including by facilitating support, on social and labour issues in order to achieve the objectives of this Agreement.

In identifying areas for labour cooperation and capacity building and in carrying out cooperative activities, the Parties shall consider the views of their workers' and employers' representatives, as well as the views of other members of the public.

The Parties shall at all times endeavour to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation, consultations, or other means to arrive at a mutually satisfactory resolution of any matter that might affect its operation.

Either Party may request a meeting of the Joint Committee to address labour issues and exchange information that the requesting Party identifies as significant. A Party must demonstrate that the other Party has failed to adopt or maintain a statute, regulation, or practice in a manner affecting the aviation market between the Parties.



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