Airline Coordination Platform

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ECA Piloting Safety
European Cockpit Association

ACP – ECA common views on (bogus) Self-employment in aviation

Executive Summary

Bogus self-employment is preventing the good functioning of the European aviation market and impacting negatively the working conditions of aircrew.

This paper demonstrates that self-employment in commercial air transportation is unlikely to exist.

A commercial airline pilot cannot exercise his/her profession without the continuous supervision and monitoring by the operator, as required by EASA Regulations. The pilot does not have control over cost and pricing, neither owns the aircraft she/he flies or decides (how), when and where to fly. Such regulatory and organisational facts show a clear link of subordination and an absence of own risk for the pilots. This is incompatible with the status of self-employed no matter the formal arrangements organised by the carrier and or the intermediaries.

Self-employment creates an undue competitive advantage to airlines using this type of contracts. When tolerated by authorities it could constitute illegal state aid. (Bogus) self-employment has an impact on crew's social protection and on aviation safety. The liability of self-employed pilots in case of accidents is also a concern.

The use of self-employment is an issue of European dimension that needs to be addressed urgently and jointly by the Member States and by the EU.

The paper provides full analysis and supporting documentation on the issue, including best practices. Finally, ACP and ECA suggest some avenues to address the identified problems.

1. Understanding the issue

1.1 Genuine self-employment of pilots in carriers performing commercial operations in air transport is unlikely to exist given the nature of the job. The nature of the job and safety regulations make self-employment incompatible with the profession of piloting a commercial transportation aircraft for remuneration in an airline (see annexe I for the analysis of compliance). This has been confirmed by different studies, including the Commission's Study on employment and working conditions of aircrews in the EU internal aviation market of April 2019[1], and by a Dutch court[2]. There are ongoing court cases regarding tax-related requalification of pilots working under (bogus) self-employment in German, Irish and UK courts (since 2015).

1.2 The practice of hiring pilots through self-employment contracts is growing and would represent a significant proportion in Low-Cost and ACMI (airlines specialised in leasing other airlines aircraft with crew, maintenance and insurance).

1.3 Authorities have difficulties to fight bogus self-employment in aviation, faced with complex social engineering where several jurisdictions might be involved. Often airlines established in one Member State advertise vacancies for self-employed pilots in another country through an intermediary established in yet another country to work in a fourth country. The pilot can be resident in one of those countries or not…

Furthermore, the rules might be different when considering different areas of law. Procedures and criteria might be different when cases are considered under the employment law perspective or from a personal taxation or social security perspective.

Sometimes instruments exist, but they are not being applied to aviation. One example could be Ireland, which has a comprehensive Code of Practice for Determining Employment or Self-Employment Status of Individuals but, notwithstanding reports in the media of wide scale possible non-compliant practices, it has not been seriously used to address the status of self-employed crews.

Due to the evolving structure of the aviation labour market, European pilots often have to accept supposed self-employent as the only possibility to work in their own country or to work at all. Pilots in such precarious conditions will not risk entering into long judicial procedures that would give them little gain, and risk in doing so to be blacklisted for future jobs.

1.4 It is necessary to develop a specific proactive system to prevent bogus self-employment. If it is recognised that the profession of an airline pilot is *a priori* incompatible with the status of self-employment, the EU should act before irreparable damage to the wider industry and its employees happens.

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[1] BRANNIGAN, Charlotte e.a., Study on employment and working conditions of aircrews in the EU internal aviation market, EU Publications, 2019 ("Ricardo Study")
READER, TW e.a. European pilots' perceptions of safety culture in European Aviation, https://www.futuresky-safety.eu/wp-content/uploads/2016/12/FSS_P5_LSE_D5.4_v2.0.pdf, 2016
YORENS, Yves e.a. Atypical forms of employment in the aviation sector', European social dialogue, European Commission, http://hdl.handle.net/1854/LU-6852830, 2015 (University of Gent)

[2] Case AWB 16/2840 - Judgment of the statutory tax division of 17 January 2017 in the case between [X] , at [Z], and the inspector of the Tax and Customs Administration, The Hague office (see extracts in Annex 5 below)

1.5 Bogus self-employment in aviation is a problem of "European dimension." The difficulties in fighting bogus self-employment and the consequences of this malpractice are not concentrated in a small number of Member States but affect the majority of EU countries and have an impact on the internal aviation market.

2. Concerns

2.1 The internal market disruption

2.1.1 The use of bogus self-employment gives an unfair competitive advantage to the carriers using this type of employment over socially compliant carriers. Thanks to the unfair gains from this practice, some air carriers are price dumping within the market. Some recent bankruptcies might have been avoided if a level playing field had been in place.

If Member States promote, facilitate or tolerate bogus self-employment, they might encourage and de facto provide illegal state aid which should be fought by existing prohibitive mechanisms.

Bogus self-employment could be costing the state €1 billion per year

WWW.RTE.IE Updated 24/10/2019

Mr McMahon also alleged that the state was facilitating bogus self-employment through secret test cases which he claimed had no valid legal basis.
However, the Department of Employment Affairs and Social Protection said it strenuously refuted allegations that it approved of misclassification of workers.
Bogus self-employment arises where employers wrongly misclassify workers as self-employed rather than direct employees.
This results in labour cost savings of up to 30% for the employer and a loss to the PRSI-based Social Insurance Fund, as well as creating a significant competitive advantage over "compliant" companies.
Mr McMahon told the committee that this could constitute state aid in breach of EU rules.

https://www.rte.ie/news/2019/1024/1085474-bogus-self-employment/

The possible abuse of self-employment contracts has been reported regularly since 2010. Non-fewer than 17 parliamentary questions have been tabled in the European Parliament on this topic (See annexe 7). The lack of action on this topic over 10 years has given operators using bogus self-employment a feeling of impunity and damaged irreparably fair competition in the aviation sector.

2.1.2 Bogus self-employment prevents the correct application of national and European social related legislation. The EU social legislation on working time, paid vacation, transfer of undertakings, information and consultation are de facto not being applied to pilots working as self-employees.

Individuals have real difficulties to obtain judicial redress due to the transnational nature of the job and the complexity of contracts through intermediaries. Self-employed pilots and their families have lower rights regarding social security and pension.

2.1.3 Bogus self-employment represents a direct loss of revenue for social security systems.

2.2 Fundamental rights and legal certainty

The workers under bogus self-employment contracts are denied fundamental rights such as health assistance, sick leave, unemployment or parental/maternity leave and the right to collective bargaining and to take part in industrial action.

Self-employed pilots might also threaten the rights of the employee pilots by reducing the negotiation possibilities of employees and through the impossibility for bogus self-employed workers to take part in industrial action. On some occasions self-employed pilots have been obliged to fly the work of striking pilots.

The lack of a clear legal framework and of effective policies to fight against bogus self-employment put airlines in a difficult situation. Employing pilots through self-employment contracts might be illegal, but many competitors are doing it without hindrance. There is a reputational and economic risk if the airline is condemned for undeclared work on one side, and a risk of going out of business on the other side.

2.3 Airlines' Financial Liability

Under self-employed contracts, the pilot is responsible for damage to persons and property in case of error. Whilst on paper, the self-employed pilot is insured for that, it is doubtful that the individual insurance subscribed to by the pilot will be able to cover damages in case of a serious airline incident or accident.

The airline insurance will pay damages in case of an accident or incident according to EU legislation[3] but, should a self-employed pilot be involved, the insurer would seek to recover the loss from the contractor's insurance or from the air carrier that contracted the pilot. Would an insurer pay if it discovers that the airline that they ensure was not supervising the operations or the training of the pilots that committed errors?

The self-employed pilot will pay with his/her own resources and those of her/his family if the insurer or the airline would claim damages. This is an abusive term of a contract.

2.4 Safety

Bogus self-employment creates a situation of dependency and precarity where the bogus self-employed pilot will not be in a position to fully exercise their professional judgement. Precariousness could lead to fly sick or fatigued and not to report (or report less).[4]

ORO.FTL.245 requires operators to maintain (for a period of 24 months) records of the actual values of flight times, flight duty periods, rest periods and days free of all duties. Who is responsible in this case: the airline, the agency that supplies the self-employed pilot or the pilot as manager of his/her own company? Can fatigue be effectively prevented in case of self-employed crew?

[3] 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, see Annex 3 below
[4] See READER, TW, note 1 above.

2.5 Time

Action at EU level is necessary now. If we wait 10 more years until national courts rule on the issue little by little in every jurisdiction, many airlines would be out of business and many pilots unemployed or constrained to work under self-employment contracts.

3. Best practices

3.1 Sensitising / regularisation campaigns

3.1.1 Campaign organised based on coordinated exchange of data from the labour inspection, the Social Security Treasury and the tax revenue department. The campaign included transport companies.

Digital edition of El País, 9 August 2018 (consulted on 25/10/19)

La Inspección de Trabajo ha enviado unas 50.000 cartas a empresas en las que ha detectado indicios de fraude laboral. La medida es el primer paso del Plan Director por el Trabajo Decente que el Gobierno ha puesto en marcha desde el 1 de agosto. Las empresas han sido seleccionadas a partir de los "datos informáticos de la Inspección de Trabajo, la Tesorería de la Seguridad Social y la Agencia Tributaria", según ha adelantado el subsecretario del Ministerio de Trabajo, Raúl Riesco, en una entrevista en la Cadena Ser este jueves.

The Labour Inspectorate has sent some 50,000 letters to companies in which it has detected indications of labour fraud. The measure is the first step in the Master Plan for Decent Work that the Government has put in place since 1 August. The companies have been selected from "computer data from the Labour Inspectorate, the Social Security Treasury and the Tax Agency", as advanced by the Undersecretary of the Ministry of Labour, Raul Riesco, in an interview with Cadena Ser on Thursday.
Translated with www.DeepL.com/Translator

Read full article
https://elpais.com/economia/2018/08/09/actualidad/1533814136_361559.html

3.2 Targeted Inspections

3.2.1 Germany/UK: A series of investigations took place in 2017 concerning pilots hired in the UK through a UK intermediary to work as self-employees in Germany. Germany asked information from UK IR authorities.

3.2.2 Slovenia: Adopted in 2018 amendments to three laws – the Labour Inspection Act (Zakon o inšpekciji dela, ZID-1), the Employment Relationship Act and the Labour Market Regulation Act (Zakon o urejanju trga dela, ZUTD) to fight against bogus self-employment. The following measures could be highlighted:

- reversal of the burden of proof if a contract worker seeks to prove the existence of an employment relationship in legal proceedings, with the burden of proof now lying with the employer;
- higher fines for 'disguised employment relationships', that is, a fine from €10,000 to €30,000 for a legal entity (from €5,000 to €10,000 for a smaller employer and from €3,000 to €8,000 for an individual employer), and from €3,000 to €8,000 for the employer's responsible person, if a worker illegally performs work for an employer under a civil law contract;

- a fine from €500 to €2,500 for the contract worker, though, they can be exempted from payment under two conditions: (a) if they can prove that a civil law contract was the only way to get work; or (b) if they report the fake 'business partner' to authorities or initiate legal proceedings.

3.3 Shifting onus of proof

3.3.1 Slovenia (see 3.2.2 above)
3.3.2 UK's latest reform will enter into force January 2020. Under the new rules it is the user company that needs to ensure that their contractors are genuine self-employed workers.

3.4 Refutable presumptions

The Belgian Labour Relations Act of 27 December 2006 includes specific articles on the nature of labour relations to prevent the phenomenon of false self-employed and false employees.

For certain economic sectors (including transport) a presumption mechanism is introduced, based on specific criteria, listed in the Labour Relations Act or in a specific Royal Decree.

If more than half of these criteria are not met, a relationship as a self-employed person is presumed. In the opposite case, an employment relationship as an employee is assumed.
(https://www.commissionrelationstravail.belgium.be/fr/legislation.htm)

3.5 Guidelines

Ireland issued Code of Practice for Determining Employment or Self-Employment Status of Individuals. The Code is available from the governments revenue portal (https://www.revenue.ie/en/self-assessment-and-self-employment/construction-industry/are-you-self-employed-or-an-employee.aspx).

The portal contains a summary of the Code and states that *"a worker is normally self-employed if they:*

- *control how, when and where the work is done*
- *control their working hours*
- *are exposed to financial risk*
- *control costs and pricing*
- *can hire other people to complete the job*
- *provide their insurance cover*
- *own their business*
- *can provide the same services to more than one person or business at the same time".*

4. Suggested solutions

4.1 Adoption of clear guidelines and recommendations for the application of social security to regulations to aircrew.
The Administrative Commission for the coordination of social security (ELA) can agree and adopt special criteria for the issuing of A1 and similar attestations/certificates.

One recommendation would be to not to issue any certificate to self-employed pilots until the user company demonstrate that the demand corresponds to a genuine self-employment relation in accordance with agreed criteria.

4.2 Adoption of an article in the renewed 1008/2008 stating that "self-employed aircrew working from EU operational bases are to be regarded as being employed directly by the airline".

4.3 **Explore whether self-employment contracts might be possible and under which specific circumstances and authorisation processes, taking into account the current legislative framework (OL and AOC requirements and obligations).** In case where self-employment is deemed possible, self-employee pilots, flying aircraft for remuneration on their own account, would need a certificate or a license to operate their services and the airline using their services would need a release of the supervision and monitoring obligations.

4.4 In the framework of new Article 89 of EASA Basic regulation, establish specific CS/IR regarding the exceptional use of self-employed crew.

4.5 Amend regulation 785/2004 to spell out the responsibility of self-employed contractors operating aircraft for European AOC holders.

4.6 Cooperation between safety inspections and social inspection

Air operators are under the oversight of civil aviation authorities that conduct regular inspections. Links between the safety inspections and social inspections could be instituted:

- Granting CAA inspectors capacity to inspect social issues
- Establishing protocols whereby CAA communicate social related information to other inspections
- Make the declaration of self-employed crew use mandatory for the operator and establish protocols with the competent social departments in the administration to assess the legality of this practice.

4.7 In order to improve certainty and avoid lengthy litigation on what bogus self-employment is, generalise the presumption of direct employment and the reversal of the burden of proof, requiring user airlines to prove that self-employment is genuine.

4.8 Investigate possible state aid rules infringement by Member States for tolerating, promoting or facilitating bogus self-employment practices.

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ANNEXE 6: UK Tax Loan Scheme for Pilots Still Up in the Air, Ricky Steedman
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Brussels, 02/12/2019

Whom we represent:

Airline Coordination Platform (ACP) is a group of major European airlines, with the purpose of advocating for fair competition in the European aviation sector, with a specific focus on social affairs and external air political relations. The airlines of the group employ a total of around 200.000 people.

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European Cockpit Association (ECA) is the representative body of European pilot associations, representing over 41.000 pilots from across Europe, striving for the highest levels of aviation safety and fostering social rights and quality employment in Europe.

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ANNEX 1

Airline pilot = a regulated profession which excludes self-employment

1. CJEU's Criteria to determine when the self-employed should be considered worker.

There is no EU legislation but the Court of Justice of the EU has indirectly defined in its case law, following the autonomous interpretation of EU law, what is a "worker" for the implementation of EU rules and when the self-employed should be considered as workers (in other words, when the self-employment is not considered genuine).

Following case C-413/13 FNV (See annexe 3 below), a self-employed person should be considered a worker

- if he does not determine his own conduct independently on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking
- if the essential feature of that relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration
- if his independence is merely notional, thereby disguising an employment relationship
- if he works under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work, does not share in the employer's commercial risks, and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking.

It is therefore important to look at the following elements

- Dependency
  The dependency is defined by the possibility to work for more than one client. ORO.FC.120 (See annexe 3 below) requires flight crew members to complete an "*operator conversion training course*" every time they join an operator. This requirement is necessary to ensure that pilots know the specific culture of the airline where they work and de facto means that a pilot can only work for one employer at the same time.

  Furthermore, as indicated by a Dutch Court, the contracts *consist(s) almost entirely of obligations with which the claimant has to comply. These obligations point in the direction of a relationship of authority rather than in the direction of independent entrepreneurship.* (Case AWB 16/2840 - Judgement of the statutory tax division of 17 January 2017 in the case between [X], at [Z], and the inspector of the Tax and Customs Administration, The Hague office (see extracts in Annexe 5 below)).

- Working under the direction of another person as regards

  - Time of work
    Airlines usually organise the crews' work schedules (rosters), and do so in advance, thereby de facto leaving almost no possibilities for crews to organise their work patterns, duty times and days off; All airlines have more or less flexible systems for employees to bid for vacation and days off according to seniority or rang in the company or to exchange shifts with colleagues, and this is all that pilots under civil contracts get.

- Place of work
  An airline typically defines the habitual base from where pilots work, every destination that the pilot would have to serve according to the plans prepared by the company's scheduling department and the airline will also decide the type of aircraft that is used and the specific vehicle to be used.

- Content of work:
  EASA ORO.AOC 135 and AMC1ORO.GEN.200(a)(6)) require that flight operations are carried out under the responsibility, monitoring and supervision of a person nominated by the airline.

  The company decide the tools needed to carry out the work (e.g. aircraft, uniform, weather forecasts, operation manuals, airport charts, flight planning software, etc.);

  The exercise of professional judgement cannot be considered an element of economic independency from the employer as it relates to a duty to ensure the safety of the operations which do not differ from the duty of directly employed pilots.

  Some self-employment clauses allow pilots to substitute themselves. This is mostly a theoretical clause which is impracticable. The need for prior approval by the operator, for prior notification of schedules and the legal requirement to be replaced by someone that has completed the airlines' operation conversion course, severely limits the possibility to find a replacement in time. The possibility of 'exchange shifts' among colleagues that are available at the operating base makes no difference between the normal replacement as an employee and therefore cannot be considered as prove of independence. In practice, absence and replacement for sick absence is notified to airlines by (bogus)self-employed pilots in the same way that employees do, and it is the airline that finds the replacements.

- Sharing commercial risk

  The following elements that are common to self-employed pilots indicate the absence of a shared commercial risk:
  - The pilot does not have the possibility to attract more clients
  - The pilot does not have the possibility to invest on the equipment to be used such as the type of aircraft, the use of better flight planning software of meteorology predictions;
  - Pilots do not advertise their services or actively look to work for several airlines of agencies but respond to vacancy offers from specific airlines or agencies;
  - The cost of training cannot be considered a commercial risk. *A certificate or diploma does not qualify as an asset, because it cannot be disposed of or replaced, and it does not form part of the fixed capital of the company's assets. A licence is, of course, very important for the claimant to be able and allowed to do his work as a pilot, but that applies equally to a pilot who is working in employment. (See* Case AWB 16/2840, § 20 in annexe 5 below.)
  - Self-employment pilots often indicate that pilots are liable for damages to property or persons. In reality, individual pilots will not be able to pay insurance that would cover an accident or an incident.

- The will of the parties

The will of the parties is not a determining factor in defining the status of self-employment. One or both parties may think that self-employment would give them benefits (less tax, less social security contributions, less administrative hassle or more flexibility for the termination of the employment relationship...). This will does not change the essence of the employment relationship and what must be taken into account to define the real nature of the work relationship. Deliberate action to avoid fulfilling legal obligations constitutes fraud.

The manifest lack of will, or lack of choice, of one of the parties may be a sign of a bogus self-employment relationship. This is more evident when an operator proposes or imposes a change of status to perform the same task.

ANNEX 2

Background information & definitions:

Eurofund:

https://www.eurofound.europa.eu/publications/article/2008/bogus-self-employment-found-to-be-on-the-rise

Bogus self-employment refers to business activities that do not include any managerial or proprietary tasks and which possess the attributes of an employment relationship but without entitlement to the corresponding labour law protections.

Employers resort to such practices in order to reduce or avoid tax and social and health insurance contributions for employees. In addition to the lower cost of labour, this strategy of hiring self-employed workers transfers the business risk onto the subcontractor.
(…) An increase in bogus self-employment translates into losses for the state in terms of tax payments as well as health and social insurance contributions. At the same time, there is a risk that these individuals may lack adequate social security arrangements, as the law only allows them to take part in the social insurance system to a limited degree.

ANNEX 3

Legal references

1. EASA

ORO.AOC.135 Personnel requirements

(a) In accordance with ORO.GEN.210(b), the operator shall nominate persons responsible for the management and supervision of the following areas:

(1) flight operations;

[…]

(b) *Adequacy and competency of personnel*

(1) The operator shall employ sufficient personnel for the planned ground and flight operations

[…]

(c) *Supervision of personnel*

[…]

(3) The supervision of crew members and personnel involved in the operation shall be exercised by individuals with adequate experience and the skills to ensure the attainment of the standards specified in the operations manual.

AMC1ORO.GEN.200(a)(6) Management system

COMPLIANCE MONITORING — GENERAL

(a) Compliance monitoring

The implementation and use of a compliance monitoring function should enable the operator to monitor compliance with the relevant requirements of this Annexe and other applicable Annexes.

[…]

(c) Organisational set up

(1) To ensure that the operator continues to meet the requirements of this Part and other applicable Parts, the accountable manager should designate a compliance monitoring manager. The role of the compliance monitoring manager is to ensure that the activities of the operator are monitored for compliance with the applicable regulatory requirements, and any additional requirements as established by the operator, and that these activities are carried out properly under the supervision of the relevant head of functional area.

(2) The compliance monitoring manager should be responsible for ensuring that the compliance monitoring programme is properly implemented, maintained and continually reviewed and improved.

ORO.FC.120 Operator conversion training

(a) In the case of aeroplane or helicopter operations, the flight crew member shall complete the operator conversion training course before commencing unsupervised line flying:
(1) when changing to an aircraft for which a new type or class rating is required;
(2) when joining an operator.

(b) The operator conversion training course shall include training on the equipment installed on the aircraft as relevant to flight crew members' roles.

2. 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

Article 3 Definitions

(c) aircraft operator' means the person or entity, not being an air carrier, 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;

Article 4 Principles of Insurance

1. Air carriers and aircraft operators referred to in Article 2 shall be insured in accordance with this Regulation as regards their aviation-specific liability in respect of passengers, baggage, cargo and third parties. The insured risks shall include acts of war, terrorism, hijacking, acts of sabotage, unlawful seizure of aircraft and civil commotion.

2. Air carriers and aircraft operators shall ensure that insurance cover exists for each and every flight, regardless of whether the aircraft operated is at their disposal through ownership or any form of lease agreement, or through joint or franchise operations, code-sharing or any other agreement of the same nature.

3. Court of Justice of the EU

3.1 Judgement of 4. 12. 2014 – Case c-413/13 FNV Kunst Informatie en Media

33. As far as concerns the case in the main proceedings, it must be recalled that, according to settled case-law, on the one hand, a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking (see, to that effect, judgment in *Confederación Española de Empresarios de Estaciones de Servicio*, EU:C:2006:784, paragraphs 43 and 44).

34. On the other hand, the term 'employee' for the purpose of EU law must itself be defined according to objective criteria that characterise the employment relationship, taking into consideration the rights and responsibilities of the persons concerned. In that connection, it is settled case-law that the essential feature of that relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration (see judgments in *N.*, C-46/12, EU:C:2013:97, paragraph 40 and the case-law cited, and *Haralambidis*, C-270/13, EU:C:2014:2185, paragraph 28).

35. From that point of view, the Court has previously held that the classification of a 'self-employed person' under national law does not prevent that person being classified as an employee within the meaning of EU law if his independence is merely notional, thereby disguising an employment relationship (see, to that effect, judgment in *Allonby*, C-256/01, EU:C:2004:18, paragraph 71).

36. It follows that the status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that persons acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work (see judgment in *Allonby*, EU:C:2004:18, paragraph 72), does not share in the employer's commercial risks (judgment in *Agegate*, C-3/87, EU:C:1989:650, paragraph 36), and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking (see judgment in *Becu and Others*, C-22/98, EU:C:1999:419, paragraph 26).

37. In the light of those principles, in order that the self-employed substitutes concerned in the main proceedings may be classified, not as 'workers' within the meaning of EU law, but as genuine 'undertakings' within the meaning of that law, it is for the national court to ascertain that, apart from the legal nature of their works or service contract, those substitutes do not find themselves in the circumstances set out in paragraphs 33 to 36 above and, in particular, that their relationship with the orchestra concerned is not one of subordination during the contractual relationship, so that they enjoy more independence and flexibility than employees who perform the same activity, as regards the determination of the working hours, the place and manner of performing the tasks assigned, in other words, the rehearsals and concerts.

The appeal court in the Netherlands, following the instructions of the court found in that the substitute musicians were false self-employed, taking into account the fact that the substitutes:

• were doing the same work as employed members of the orchestra;
• were working alongside employees;
• had to comply with precise rules on rehearsals and concerts; and
• could not appoint other musicians as replacements.

Source:https://www.etuc.org/sites/default/files/publication/file/2018-10/CES-Brochure%20Report%20on%20self%20employment-UK.pdf

4. List of national cases

- Germany's Koblenz Local Court (Amtsgericht), dated 22 January 2013: It is suspected, quite contrary to [Airline's] statements that these pilots were independent subcontractors that the pilots are employed by [the claimant] and are leased to [Airline] by that company.
- Norwegian foreign tax department deputy director statement from 26/04/2012: "We generally believe that pilots flying for the major commercial airlines are employees and not self-employed"
- Ruling of the Scope Section of the Irish Department of Social Protection of 25/08/2015: "Based on the information on file, I am satisfied that Mr. XXX was employed by XX under a contract of services and a normal employee/employer relationship existed in this case"
- UK HM Revenue & Customs ("HMRC") letter dated 24 March 2015: Requires an agency providing self-employed pilots to an airline to operate PAYE and NICs on the payments received by the pilots claiming that "I do not consider the pilots had any genuine right of substitution whereby they could supply and pay a substitute pilot." The letter then set out HMRC's protective assessments in respect of PAYE and NICs due from the claimant in respect of the 2010/11, 2011/12 and 2012/13 years, some £47 million in total.

Deutsche Rentenversicherung Bund and GKV-Spitzenverband Deutsche Verbindungsstelle Krankenversicherung: Letters were sent to individual pilots in 2015 informing them that after an analysis of their activities as airlines pilots, the characteristics of dependent employment activity prevail.

ANNEX 4

Studies addressing, amongst other issues, self-employment in aviation:

European Commission (Ricardo Study): https://www.eurocockpit.be/sites/default/files/2019-04/Study%20on%20employment%20and%20working%20conditions%20of%20aircrew%2C%20EU%20Commission%202019.pdf

Euroconrol : https://www.eurocockpit.be/sites/default/files/2019-01/European%20pilots'%20perceptions%20of%20safety%20culture%20in%20aviation%2C%20LSE%202016.pdf

Karolinska-Institut : https://www.eurocockpit.be/sites/default/files/2019-01/Karolinska%20Institutet%20High%20Flying%20Risks.pdf

ETUC : https://www.etuc.org/sites/default/files/publication/file/2018-10/CES-Brochure%20Report%20on%20self%20employment-UK.pdf

APNA REPORT https://www.apna.asso.fr/images/PDF/APNA_mag.pdf

ANNEX 5

Uitspraak RECHTBANK GELDERLAND Belastingrecht	Judgement Economic Country Court Tax Law
uitspraak van de enkelvoudige belastingkamer van 17 januari 2017 uitspraak van de enkelvoudige belastingkamer van 17 januari 2017 in de zaak tussen [X] , te [Z] , eiser En de inspecteur van de Belastingdienst, kantoor Den Haag, verweerder	ruling of the statutory tax division of 17 January 2017 judgment of the statutory tax division of 17 January 2017 in the case between [X] , at [Z] , plaintiff And the inspector of the Tax and Customs Administration, The Hague office, defendant
14. Verweerder heeft gemotiveerd betwist dat sprake is van winst uit onderneming. Naar het oordeel van de rechtbank heeft eiser daartegenover met hetgeen hij in bezwaar en beroep heeft aangevoerd onvoldoende aannemelijk gemaakt dat in onderlinge samenhang bezien wel sprake is van winst uit onderneming. De rechtbank zal dit oordeel hieronder nader toelichten. Zelfstandigheid 15. Het ontbreekt eiser aan de vereiste zelfstandigheid. Eiser had in 2011 slechts één opdrachtgever, te weten [B], voor wie hij alle werkzaamheden in 2011 heeft uitgevoerd bij één vliegtuigmaatschappij, [C]. In de overeenkomst die eiser daarvoor met [B] heeft gesloten wordt enkel [C] als Hirer genoemd. Voorts bestaat de overeenkomst nagenoeg geheel uit verplichtingen waaraan eiser dient te voldoen. Deze verplichtingen wijzen eerder in de richting van een gezagsverhouding dan in de richting van zelfstandig ondernemerschap. Die verplichtingen zien met name op de volgende onderwerpen: - de periodes dat eiser beschikbaar moet zijn voor werk; - de plek waarvan wordt gevlogen, wanneer en waar naartoe; - het voldoen aan richtlijnen vanuit het perspectief van [C] (eiser dient o.a. een brevet te hebben uitgegeven door de Irish Aviation Authority); - de sterk éénzijdige opzegmogelijkheden van het contract door [B] ; - geheimhouding van vertrouwelijke informatie en het verbod op contact met de media; - de specifieke aanduiding van het type vliegtuig waarin de diensten die hij voor [B] uitvoert (Boeing 737-800). [C] vliegt enkel met dit type. 16. De zelfstandige beslissingen die eiser als gezagvoerder met het oog op de veiligheid van de passagiers en de bemanning moet nemen, wijken niet af van dezelfde beslissingen die een piloot in dienstbetrekking moet nemen. Dit aspect ondersteunt daarom niet de zelfstandigheid van eiser ten opzichte van de vliegtuigmaatschappij en maakt zijn ondernemerschap daardoor niet aannemelijk. 17. Op basis van de overeenkomst met [B] kan eiser zich tot vier weken voor een vlucht na de goedkeuring van [B] en [C] door een ander laten vervangen. Tegelijkertijd worden de vluchten door [C] pas vier weken vooraf ingeroosterd, waarbij op dat moment de locaties (“operating bases”) voor de piloot worden	14. The defendant has disputed the existence of company profits on the basis of reasons. In the opinion of the District Court, the plaintiff has, in response to this, with the arguments he has put forward in his objection and appeal, insufficiently demonstrated that, viewed in conjunction with each other, there is a question of profit from business. The court will explain this opinion in more detail below. Independence 15. The claimant lacks the required independence. In 2011, the claimant had only one client, namely [B], for whom he performed all the work in 2011 for one airline, [C]. In the agreement that the claimant concluded with [B] for this purpose, only [C] is mentioned as Hirer. Furthermore, the agreement consists almost entirely of obligations with which the claimant has to comply. These obligations point in the direction of a relationship of authority rather than in the direction of independent entrepreneurship. These obligations relate in particular to the following subjects: - the periods during which the claimant must be available for work; - the place from which the claimant will be flown, when and where; - compliance with directives from the perspective of [C] (plaintiff must have a certificate issued by the Irish Aviation Authority, among other things); - the highly unilateral termination of the contract by [B]; - confidentiality of confidential information and the prohibition of contact with the media; - the specific designation of the type of aircraft in which the services it performs for [B] (Boeing 737-800). C] flies only with this type. 16. The independent decisions to be taken by the claimant as captain for the safety of passengers and crew do not differ from the same decisions that a pilot in employment must take. This aspect therefore does not support the independence of the claimant in relation to the airline company and therefore does not make his entrepreneurship plausible. 17. The agreement with [B] allows the claimant to be replaced by another person up to four weeks before a flight is scheduled to take place after the approval of [B] and [C]. At the same time, the flights are scheduled by

bepaald, wat de mogelijkheid om zelf tijdig een vervanger te vinden flink beperkt. Ter zitting heeft eiser verklaard dat piloten van [C] onderling 'diensten ruilen', en dat op de operating bases iemand van [C] beschikbaar is om de acute vervanging van een piloot te kunnen regelen. Dit brengt mee dat er in wezen geen verschil is tussen de normale vervanging in loondienstverband en de wijze waarop eiser zich kan laten vervangen. Ook dit punt ondersteunt de gestelde zelfstandigheid derhalve niet.

Ondernemersrisico

18. Voor het antwoord op de vraag of zich ondernemersrisico voordoet, is van belang of de belastingplichtige voor de verwerving van opbrengsten afhankelijk is van het zelfstandig aantrekken en behouden van klanten. Voorts is van belang of in het kader van de beroepsuitoefening risico's van enige betekenis worden gelopen ter zake van investeringen in bedrijfsmiddelen of ter zake van debiteuren (vergelijk HR 16 september 1992, nr. 27 830, ECLI:NL:HR:1992:ZC5085 .

19. Eiser heeft onvoldoende aannemelijk gemaakt dat hij ondernemersrisico loopt. Eiser heeft zich in 2011 niet kenbaar gemaakt naar de markt als zijnde een zelfstandig werkende piloot. Hij stond in2011 niet ingeschreven in de Kamer van Koophandel, en ook uit de overgelegde stukken is niet gebleken dat eiser reclame heeft gemaakt of op andere wijze op zoek is gegaan naar andere opdrachtgevers. Ter zitting heeft eiser tevens erkend in 2011 geen andere bemiddelaars dan [B] , of andere vliegtuigmaatschappijen dan [C] te hebben benaderd voor opdrachten.

20. Daarnaast is geen sprake van een risico dat eiser loopt ten aanzien van het investeren in bedrijfsmiddelen. Volgens eiser moet zijn vliegbrevet worden gezien als bedrijfsmiddel. Om het brevet te behouden investeert hij zelfstandig in cursussen, simulaties en examens. Naar de geldende jurisprudentie kwalificeert een brevet of diploma echter niet als een bedrijfsmiddel, omdat het niet kan worden vervreemd of vervangen en het niet behoort tot het vaste kapitaal van het ondernemingsvermogen. Een brevet is uiteraard wel van groot belang voor eiser om zijn werk als piloot te kunnen en mogen doen, maar dat geldt in dezelfde mate voor een piloot die in dienstbetrekking werkzaam is.

21. Eiser loopt ook geen debiteurenrisico. Ondanks de stelling van eiser dat [B] enkel bemiddelt bij opdrachten, factureert eiser de gewerkte uren niet aan [C] . Eiser stuurt een urenstaat naar [B] en de betalingen worden éénmaal per maand direct door [B] verricht. Daardoor beperkt het debiteurenrisico zich tot de vorderingen op [B] . Het risico dat betaling niet (tijdig) wordt verkregen acht de rechtbank in dit verband feitelijk niet anders dan het risico dat een werknemer loopt op het niet (tijdig) uitbetaald krijgen van loon. Het risico dat eiser minder uren kan werken wanneer er in het geheel minder vluchten beschikbaar zijn, is feitelijk niet anders dan het risico dat een werknemer met een nuluren-contract loopt bij onvoldoende werk. Hetzelfde geldt voor de situatie dat eiser ziek is en geen inkomsten genereert.

22. Het voorgaande leidt de rechtbank tot de conclusie dat geen sprake is van zelfstandigheid in de relatie met [B] en ook niet van ondernemersrisico, hetgeen meebrengt dat van winst uit onderneming geen sprake

[C] only four weeks in advance, at which time the locations ("operating bases") for the pilot are determined, which severely limits the possibility to find a replacement in time. At the hearing the plaintiff stated that pilots of [C] 'exchange services' among themselves and that someone from [C] is available at the operating bases to arrange for the acute replacement of a pilot. This means that in essence there is no difference between the normal replacement as an employee and the way in which the claimant can be replaced. This point does not, therefore, support the alleged independence either.

Entrepreneurial risk

18. For the answer to the question of whether there is an entrepreneurial risk, it is important to know whether the taxpayer is dependent on independently attracting and retaining customers for the acquisition of revenue. It is also important whether, in the context of the professional practice, there are any significant risks with regard to investments in equipment or with regard to debtors (see HR 16 September 1992, no. 27 830, ECLI:NL:HR:1992:ZC5085).

19. The plaintiff has not sufficiently demonstrated that he is running entrepreneurial risk. In 2011, the claimant did not make himself known to the market as an independently working pilot. He was not registered in the Chamber of Commerce in 2011, and the documents submitted did not show either that the plaintiff advertised or looked for other clients in any other way. At the hearing the claimant also acknowledged that in 2011 he had not approached any mediators other than [B], or other airline companies than [C] for assignments.

20. In addition, there is no risk to the plaintiff with regard to investing in equipment. According to the claimant, his pilot's licence should be regarded as an asset. In order to maintain the licence, he invests independently in courses, simulations and exams. However, according to current case law, a certificate or diploma does not qualify as an asset, because it cannot be disposed of or replaced and it does not form part of the fixed capital of the company's assets. A licence is of course very important for the claimant to be able and allowed to do his work as a pilot, but that applies equally to a pilot who is working in employment.

21. The claimant does not run any debtor risk either. Despite plaintiff's assertion that [B] only mediates in assignments, plaintiff does not invoice [C] for the hours worked. Claimant sends a timesheet to [B] and the payments are made directly by [B] once a month. As a result, the risk of default is limited to the claims on [B]. In this context, the Court considers that the risk that payment is not obtained (on time) is in fact no different from the risk that an employee runs of not having his wages paid (on time). The risk that the claimant can work fewer hours if there are fewer flights available at all is in fact no different from the risk that an employee with a zero-hours contract runs in the event of insufficient work. The same applies to the situation in which the claimant is ill and does not generate any income.

22. The above leads the court to the conclusion that

is.	there is no question of independence in the relationship with [B] and also no entrepreneurial risk, which means that there is no question of profit from business. **Translated with www.DeepL.com/Translator**

ANNEX 6

1. UK Tax Loan Scheme for Pilots Still Up in the Air
Ricky Steedman,

Following on from my article on Ryanair and the pilots loan schemes the chairman of the All Party Parliamentary Loan Charge group Jim Harra, has now told campaigners that "tax officials were breaking the rule of law" in sending out tax demands for alleged unpaid tax on payments made under the guise of "loan schemes".
50,000 people are thought to have been caught up in the scandal of having been sold tax avoidance schemes by which contractors and airline pilots (particularly those working for Ryanair) were paid part of their salary in the form of a non- repayable loan.

HMRC's deputy chief executive has now said that they may not be able to force some of those hit by the controversial loan charge to pay up, However those most likely to escape are only those who made entries on their tax returns showing the exact details of the avoidance scheme.

Through not having challenged these entries the Revenue may now be 'out of time' and unable to prove in court that tax should have been paid at the point in time that the loan payments were paid and an entry referring to such a payment made on the person's individual tax return.

In the Times article of February 17 headed "Ryanair pilots fly into £3.2 bn tax storm" details of the loan charge scheme emerged, introduced by HMRC, and covering those caught up in the scheme, including agency workers, government contractors, IT workers, doctors, nurses and airline pilots.

As the all party group wages war on the government's own Treasury it does look like there will be legal challenges to tax demands issued to hundreds if not thousands of UK tax residents.

Two of those cases that I have personally come across involved HMRC 's Counter Avoidance office and are summarised below.

CASE A

The letters are headed:

"Check of Self Assessment Tax Return for the year-----"

The first paragraph acknowledges receipt of their tax return but explains that "HMRC will be checking your Return under Section 9a of the Taxes Management Act 1970." It goes on to state "I apologise for any distress or concern that our letters have caused".

The next paragraph of the letter is headed:

"What I will be checking?"

and goes on to state that "I intend to look at your income and any loan arrangements that you were party to in the year. However, when I look into this aspect I may find that I need to extend my check and if this happens I will let you know".

The third paragraph of the letter is headed:

"What you need to do now"

and explicitly states "To help me with my check please let me have the total figure of the loans, advances, or overdrawn capital account payments or anything similar that you have had in the year".

As well as this approach I have seen instances of more direct action where tax assessments are made under the "Discovery powers" of Section 29 of the Taxes Management Act 1970.

CASE B

A nurse simply received a letter on 20th March 2018 stating that "Counter Avoidance are reviewing your tax returns for years ended 5th April 2013 and 5th April 2014 and again goes on the explain that "HMRC considers that you have participated in a tax avoidance scheme" etc etc.

In this case the nurse refuted the allegations and took part in an exchange of emails (not usually a good idea). Then, a few months later she received tax assessments for £43,719 for 2012/13 and a similar amount for 2013/14.

The initial challenge letter had been received on 20th March 2018 some 5 complete tax years later than the date on which her 2012/13 and 2013/14 tax returns had been filed.

The All Party group headed up by Jim Harra will perhaps find that many of the pilots and health care workers made absolutely no entries regarding the avoidance schemes on their tax returns. In those cases I think it is unlikely that appeals against tax assessments will succeed.

On the other hand people who did draw attention to their subterfuge by making a "covering white box entry" on their returns will have a very good chance of escaping this and should appeal against any assessments that they receive.
https://www.steedman.co.uk/taxation/uk-tax-loan-scheme-pilots-still-up-air/

ANNEX 7

List of parliamentary questions on self-employment contracts in aviation

- 5 May 2010 : Gilles Pargneaux (S&D) Subject: Complaints against the Irish airline Ryanair
- 16 November 2012 : Alfredo Antoniozzi (PPE) Tax evasion due to gaps in Regulation (EC) No 44/2001
- 27 November 2012 : Emilie Turunen (Verts/ALE) Possible tax evasion for aircrew
- 6 December 2012 : Frieda Brepoels (Verts/ALE) Unfair competition between Zaventem and Charleroi
- 23 July 2013 : Ivo Belet (PPE) Bogus self-employment at Ryanair
- 12 April 2013 : Ole Christensen (S&D) Ryanair's use of temporary-work agencies
- 30 January 2014 : Cristiana Muscardini (ECR) Ryanair and competition
- 1 April 2014 : Michel Dantin (PPE) , Christine De Veyrac (PPE) Subject: Suspected bogus self-employment at Ryanair
- 27 February 2015 : Neena Gill (S&D) Self-employment in the aviation sector
- 2 June 2015 : Nuno Melo (PPE) Employment contracts at Ryanair
- 9 December 2016 : Marie-Christine Arnautu (ENF) European law and labour law, particularly in the air transport sector
- 23 May 2017 : Louis Michel (ALDE) Social dumping
- 27 September 2017 Elena Gentile (S&D) Working conditions at the airline company Ryanair
- 19 September 2018 Tania González Peñas (GUE/NGL) Addressing labour dumping by Ryanair
- 26 November 2018 : Elżbieta Katarzyna Łukacijewska (PPE) The situation of Polish employees hired on the basis of employment contracts with the Irish carrier Ryanair DAC
- 5 December 2018 : João Ferreira (GUE/NGL) Repeated violation by Ryanair of workers' and passengers' rights
- 17 January 2019 : Dominique Martin (ENF) Commission happy to let Ryanair practise social dumping
- 28 October 2019 : Isabel García Muñoz (S&D) , Estrella Durá Ferrandis (S&D) , Alicia Homs Ginel (S&D) Dismissal of Ryanair pilots in favour of pilots on suspect freelance contract