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The Uberisation of Aircrew Through the Use of Bogus Self-Employment Contracts

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Although not a new phenomenon, the rise of the ‘gig’ economy has shed light on a bogus self-employment status flourishing all over Europe and the world. The predominant image associated with ‘bogus self-employment’ features riders and drivers engaged in platform work. Unfortunately, the heavy reliance on such status in the aviation industry is rarely discussed and debated, despite in-depth studies, reports, and campaigns by pilots and crew members. The first reports on this topic were actually made more than ten years ago. In addition to lowering social and working conditions, bogus self-employment is also preventing the proper functioning of the aviation market by creating unfair competitive pressure. Indeed, airlines relying on this type of contract have an unfair competitive advantage over other companies by lowering their prices or so-called ‘social dumping’. It is interesting to analyse situation of pilots and crew members in light of an array of case law which have ruled on bogus self-employed status. Indeed, a clear uberisation of aircrews exists, and the COVID-19 pandemic might have worsen this already complex situation.

Keywords: Uberisation; bogus self-employment; aircrew; pay-to-fly; labour law

1. Introduction

What would people think if they were told that most low-cost pilots have the same level of protection as Uber drivers or delivery workers? Unfortunately, for pilots, especially young ones, this is often the case. Actually, in some countries, which recognise Uber drivers as employees, the drivers are, in fact, more protected than pilots. These facts are even more disturbing because pilots risk their lives far more than Uber drivers or delivery workers. However, more and more pilots find themselves in this situation: self-employed or, even worse, paying to fly.

Although not a new phenomenon, the rise of the ‘gig’ economy has shed light on a bogus self-employment status, also called false self-employment or dependent self-employment, flourishing all over Europe and the world. The media coverage and lawsuits over this status in the gig economy has resulted in challenges over the nature of working relationships from increasingly diverse groups. The predominant image associated with ‘bogus self-employment’ features riders and drivers engaged in platform work. Unfortunately, the heavy reliance on such status in the aviation industry is rarely discussed or debated, despite in-depth studies, reports, and campaigns by pilots and crew members. The first reports on this topic were actually made more than ten years ago.

Bogus self-employment is not defined across the European Union (EU) and no universally accepted definition exists. According to Williams, Llobera, and Hordonic, this term ‘refers to an employment relationship where workers are self-employed but have a de facto employment relationship, economic dependence (they generate their income from one or mainly from one employer) and personal dependence (i.e., subordination and lack of authority on working

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methods, content of work, time and place). However, there is currently no consensus across countries on whether both forms of dependence need to be present, or only one, or on the criteria used to define economic and personal dependence.¹ While this status is desirable for companies, it is often very detrimental for the workers. In addition to lowering social and working conditions, bogus self-employment also prevents the proper functioning of the aviation market by creating unfair competitive pressure. Indeed, airlines relying on this type of contract have an unfair competitive advantage over other companies by lowering their prices or so-called ‘social dumping’.²

Since its deregulation in the mid-1990s, the European airline industry has undergone fundamental changes. While such deregulation brought great advantages to passengers with lower ticket prices, ‘the market adjustment has meant changed —and often worsened— employment and working conditions of pilots.’³

One of the most famous variations of bogus self-employment contracts is the ‘Pay-to-fly’ (P2F) practice, also glamorously called ‘self-sponsored line training.’ According to the European Cockpit Association (ECA), in 2019, ‘more than 1 in 5 pilots in Europe are “atypical” employees, i.e., not directly employed by the airline they fly for. While such atypical forms of aircrew employment had been the exception a decade ago, they have now spread rapidly and widely within all segments of the industry from low cost to legacy carriers.’⁴ This race to the bottom for labour standards is detrimental to workers’ rights, aviation safety, competition, and liability. The unfair advantage it gives to some airlines also endangers the EU level-playing field in aviation. Even more worrisome is possible further precarisation due to the COVID-19 pandemic.

All the mediatisation over the gig economy and the judicial decisions could help to demonstrate that bogus self-employment of pilots and crew members is impossible. Paradoxically, bogus self-employment results in a form of uberisation of pilots and aircrew. Indeed, genuine self-employment of cabin crew, in general, and pilots, in particular, is highly unlikely because of the nature of the job. There is a clear subordination link between pilots/crew and the airlines. For instance, pilots or crew do not control where and when to fly, or the pricing and costs. Moreover, safety regulations are incompatible with the concept of self-employment. This demonstrates the bogus nature of these self-employment contracts. Allowing heavy reliance on bogus self-employment results in the uberisation of pilots.

2. What Ryanair Strikes Taught Us: Self-Employed Crew Members

¹ C.C.Williams, M. Llobera and A. Hordonic, ‘Tackling undeclared work in the collaborative economy and bogus self-employment’, European Platform Tackling Undeclared Work, Brussels 2020

² Marika Melin, Emil Lager and Petra Lindfors, ‘High-flying risks: variations in working conditions, health, and safety behaviors among commercial airline pilots in relation to safety culture’, *Arbete och Hälsa (Work and Health)* N 2018; 52(2) (2018), p.2

³ Melin and others, *supra* n 1 p.2

⁴ ECA, *Atypical employment in aviation* (3 January 2019) <https://www.eurocockpit.be/campaign/atypical-employment-aviation>

Between 2017 and 2018, Ryanair had two cases of massive flight cancellations due to staff strikes impacting more than 700.000 passengers.⁵ One of the cabin crew demands was for Ryanair to adopt national employment laws for all workers instead of relying on Irish regulations. Through these massive strikes, it became clear that pilots and cabin crews were employed by non-standard contracts and were not entitled to many employees' benefits. For instance, cabin crews are only paid for their time in the air, but not when the passengers are boarding while pressured to comply with the '25 minutes turnarounds' model. Similarly, in case of delays or cancellations, crews are not paid. On their days off, crew and pilots are regularly asked to fly at their own expense to other Ryanair bases where there are staff shortages.⁶ They are also required to pay for their food, uniform, and even car parking.⁷ Some have reported being paid below the minimum wage.⁸ Finally, cabin crew and pilots have to attend a training course to work in Ryanair at the workers' own expense. Interestingly, in a lawsuit filed by investors in the United States (US), it is stated that 'the company's historical profit growth was built on an undisclosed and unsustainable foundation of worker exploitation and employee turnover.'⁹

Even more shocking, a large majority of pilots are self-employed. The Ricardo Study later confirmed that Ryanair is the champion of self-employment with almost 60% of its pilots being 'self-employed' or working on a temporary contract from an agency.¹⁰ This means that pilots working for Ryanair are, for instance, not entitled to sick pay and paid leave. They also pay their own taxes because they have to set up their own private company with them as the only employee.¹¹ Some pilots have been arrested in Germany or the United Kingdom (UK) because their taxes were paid in Ireland while they did not live there.¹²

To preserve the legal presumption of self-employment, some airlines have started to hire pilots and crew members via an agency or a 'pilot employment service provider' (PESP).¹³ For instance, Ryanair creates some legal ambiguities by using employment agencies controlled by Ryanair itself to hire junior cabin crew, exploiting especially the transnational nature of its

⁵ BEUC, *Why we need collective redress at EU level*, https://www.beuc.eu/publications/beuc-x-2019-062_why_we_need_collective_redress_at_eu_level.pdf

⁶ James Atkinson, *Unless Ryanair treats pilots like me better, this crisis will be a long haul* (20 September 2017) <https://www.theguardian.com/commentisfree/2017/sep/20/ryanair-treat-pilots-better-crisis-long-haul>

⁷ Rupert Neate, *Ryanair to face select committee investigation over working conditions* The Guardian (20 December 2017) <https://www.theguardian.com/business/2017/dec/20/ryanair-working-conditions-investigation-michael-o-leary>

⁸ Pat Sweet, *HMRC challenged to investigate Ryanair's 'opaque' crew payments* (19 January 2018) <https://www.accountancydaily.co/hmrc-challenged-investigate-ryanairs-opaque-crew-payments> ; Glassdoor, *Ryanair*, https://www.glassdoor.co.uk/Reviews/Ryanair-working-conditions-Reviews-EI_IE6965.0.7_KH8.26.htm

⁹ *City of Birmingham Firemen's and Policemen's Supplemental Pension System v. Ryanair Holdings plc et al*, No. 1:2018cv10330 -(S.D.N.Y. 2020)

¹⁰ Charlotte Brannigan, Sofia Amaral, Chris Thorpe, Samuel Levin, Hannah Figg, Rui Neiva, Samantha Morgan-Price, Miguel Troncoso Ferrer, Clara García Fernández, Sara Moya Izquierdo, Laura Castillo, Jesús Tallos, Clara Molina, *Study on employment and working conditions of aircrews in the EU internal aviation market: Final report*, DG MOVE/E1/2017-556, (January 2019), <https://op.europa.eu/en/publication-detail/-/publication/97abb7bb-54f3-11e9-a8ed-01aa75ed71a1>

¹¹ Danish Transport Authority, *Report on Social Dumping/Rule shopping in aviation*, (March 2015), p.11

¹² Deputy Brid Smith, *Joint Committee on Employment Affairs and Social Protection debate – Bogus Self-Employment* (8 November 2018) https://www.oireachtas.ie/en/debates/debate/joint_committee_on_employment_affairs_and_social_protection/2018-11-08/4/

¹³ Where the pilot is a shareholder with several other pilots.

performances, from which it takes advantage to cut down on labour costs.¹⁴ Indeed, according to an International Transport Workers' Federation (ITF) and an European Transport Workers' Federation (ETF) report, 'agencies have no meaningful role in the management process. Crew wear Ryanair uniforms exclusively, operate Ryanair flights and have their work patterns and employment conditions determined by Ryanair.'¹⁵ This also results in members of a crew working together on a Ryanair aircraft having 'different employers and very different employment conditions.'¹⁶ Thus, creating an artificial and opaque structure.

Ironically, Ireland has quite a detailed Code of Practice for Determining Employment or Self-Employment Status of Individuals, which has not been used to address bogus self-employment in the aviation sector.¹⁷ The Revenue website 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.'¹⁸ Despite various criteria not being met by pilots, Ireland is one of the first hub for self-employed pilots.

Other airlines contemplated a similar move, such as LOT Polish Airlines in 2018. Crew members went on strike over the airline's decision to make them 'self-employed.'¹⁹ These bogus self-employments prevent the proper functioning of the European aviation market on top of negatively affecting the crew working conditions. While the reasons behind the refusal to recognise cabin crew and pilots as employees are easy to guess, it still raises many questions.

3. Using Case-Law from Uber and Other Tech Companies: Are Pilot/ Crew Members Self-Employed?

Bogus self-employment contracts are not a new phenomenon and are found in many other fields. The champions in this category are, incontestably, Uber and delivery companies. Unlike in the aviation field, drivers have been questioning their self-employed status in front of national courts all over Europe and in the UK. The lack of case law involving pilots could be explained by the fact that pilots are often repaying large loans they had to take to conclude their education and are afraid to lose their jobs.²⁰ Such an argument could only partially explain the lack of

¹⁴ ETF and ITF, *A Year of Change? Ryanair's industrial relations a year after its big announcement*, https://www.etf-europe.org/wp-content/uploads/2018/12/ITF-ETF-Report_Progress_at_Ryanair_131218.pdf, p.6

¹⁵ Ibid, p.8

¹⁶ ETF and ITF, *supra* n 14, p.8

¹⁷ ECA, *(Bogus) Self-employment in aviation - ACP, ECA & EurECCA common views*, (19 February 2020),

<https://www.eurocockpit.be/positions-publications/bogus-self-employment-aviation-ACP-ECA-EurECCA-common-views>

¹⁸ Revenue.ie, Are you self employed or an employee? (22 February 2021) <https://www.revenue.ie/en/self-assessment-and-self-employment/construction-industry/are-you-self-employed-or-an-employee.aspx>

¹⁹ Mateusz Maszcynski, Should Cabin Crew Be Employed Just Like Uber Drivers? That's Exactly What's Happening in Poland (29 October 2018) <https://www.paddleyourownkanoo.com/2018/10/29/should-cabin-crew-be-employed-just-like-uber-drivers-thats-exactly-whats-happening-in-poland/>

²⁰ Yves Yorens, Dirk Gillis, Lien Valcke, Joyce De Coninck, Anneline Devolder and Marlies De Coninck, *Atypical forms of employment in the aviation sector: Final Report(2015)* <https://biblio.ugent.be/publication/6852830>

case law. Indeed, a few years back, in some countries or cities, Uber drivers were required to obtain taxi licences which could be very costly.²¹

Interestingly, the massive strike waves that shook Ryanair started around the same time as some national courts ruled that Uber drivers are, in fact, employees. Using these existing case law and the criteria set by the courts it will become evident that pilots and cabin crew are employees. Even without this case law, it seems ludicrous to claim that pilots can be self-employed. Indeed, the safety regulations and the nature of the job make it incompatible with the self-employed status.²² However, this ‘practice is growing and represents a significant proportion in Low-Cost and ACMI (airlines specialised in leasing other airlines aircraft with crew, maintenance and insurance).’²³ However, during the discussion at a 2020 seminar organised by the European Platform tackling undeclared work, it became clear that social partner organisations have divergent views on this question.²⁴ Indeed, there is no European definition of what constitutes bogus self-employment. According to a 2019 report, only in 25% of the countries analysed was bogus self-employment defined in national legislation.²⁵

According to Williams, Llobera, and Hordonic, ‘Although there is no universally accepted definition of bogus self-employment, and the definition in legislation varies across different Member States, there is some consensus. Firstly, there is a consensus that bogus self-employment is an employment relationship where workers are self-employed but have a de facto employment relationship. Secondly, there is a consensus that two types of dependence are important: economic dependence and personal dependence. Economic dependence exists where a worker generates their income from one or mainly from one employer. In contrast, personal dependence refers to subordination and lack of authority on working methods, content of work, time, and place. However, there is no consensus on whether both forms of dependence need to be present, or only one, and the measures used to define economic and personal dependence.’²⁶

The lack of legislation and consensus on this matter, facilitate the reliance on such type of contracts by airlines.

a. Case Law: Uber and Other Gig Economy Companies

²¹ <https://6-t.co/barometre-licence-taxis-2019/>; <https://www.vtc-belgium.be/>

²² 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; Yves Yorens, Dirk Gillis, Lien Valcke, Joyce De Coninck, Anneline Devolder and Marlies De Coninck, Atypical forms of employment in the aviation sector: Final Report(2015) <https://biblio.ugent.be/publication/6852830>; Brannigan, and others, supra n 9; T. W. Reader, A. Parand and B. Kirwan, *European pilots’ perceptions of safety culture in European Aviation*, (2016), https://safeorg.eu/beta/wp-content/uploads/2018/07/5_Safety-Culture.pdf

²³ ECA, supra n 17

²⁴ Peter Turnbull, *Tackling undeclared work in the air transport sector, with a special focus on bogus self-employment of aircrews: a learning resource*, European Platform tackling undeclared work (19 February 2020) p.1

²⁵ Colin Williams and Elbereth Puts, ‘European Platform tackling undeclared work – 2019 Annual Platform Survey: Tackling undeclared work in the collaborative economy and bogus self-employment, data exchange and data protection, and cross-border sanctions’ (September 2019)

²⁶ C.C.Williams, M. Llobera and A. Hordonic, ‘Tackling undeclared work in the collaborative economy and bogus self-employment’, European Platform Tackling Undeclared Work, Brussels 2020.

There are some significant cases regarding bogus self-employment status in the gig economy workers context. These rulings could pave the way for cabin crew and pilots to fight their bogus employment contracts. While bogus self-employment of cabin crew members and pilots may share important similarities with Uber, the education/training requirements are profoundly different, especially for pilots.

For instance, in 2020, the Court of Justice of the European Union (CJEU) provided some clarification around how ‘worker’ status is defined under EU law.²⁷ The CJEU was asked whether the fact that an individual who has the right to engage subcontractors or ‘substitutes’ to perform all or any part of their work meant whether they were to be regarded as a worker. The CJEU ruled that the Working Time Directive should be ‘interpreted as precluding a person engaged by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a “worker” for the purposes of that directive, where that person is afforded discretion: to use subcontractors or substitutes to perform the service which he has undertaken to provide; to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks; to provide his services to any third party, including direct competitors of the putative employer, and to fix his own hours of “work” within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer, provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer.’²⁸ While the CJEU did not make a judgment in *B v. Yodel Delivery Network*, it stated that it was the job of the employment tribunal to determine the courier’s employment status. It seems clear from the judgment that B is not Yodel’s worker.²⁹

The CJEU, ‘in order to give a useful answer to the referring court’³⁰, made the following observations: the amount of latitude B had in relation to his employer was important,³¹ and it was necessary to determine the consequences of that latitude on the independence of B or whether his independence was merely notional.³² Another crucial element is to determine whether B was in a relationship of subordination with Yodel.³³ It was also significant that the limitations on B’s right to provide a subcontractor or substitute were minimal; essentially, the substitution could be anyone who had basic qualifications and skills for the job equivalent to B.³⁴ The absolute right to accept or reject tasks assigned was of utmost significance alongside the fact that B had the right to provide his services to Yodel’s direct competitors.³⁵ Finally, B had to provide the services within particular timeslots that simply reflected the inherent nature of Yodel’s business.³⁶ If such observations are applied to self-employed pilots, it can be

²⁷ Case C-692/19, *B v. Yodel Delivery Network Ltd*, ECLI:EU:C:2020:288

²⁸ Case C-692/19, *B v. Yodel Delivery Network Ltd*

²⁹ Liz Stevens, *Employment and Immigration Law Update - Employment status: delivery driver*, (29 May 2020) <https://www.birketts.co.uk/insights/legal-updates/employment-status-delivery-driver>

³⁰ Case C-692/19, *B v. Yodel Delivery Network Ltd*, at 34

³¹ Case C-692/19, *B v. Yodel Delivery Network Ltd*, at 35

³² Case C-692/19, *B v. Yodel Delivery Network Ltd*, at 36

³³ Case C-692/19, *B v. Yodel Delivery Network Ltd*, at 37

³⁴ Case C-692/19, *B v. Yodel Delivery Network Ltd*, at 38-39

³⁵ Case C-692/19, *B v. Yodel Delivery Network Ltd*, at 40-41

³⁶ Case C-692/19, *B v. Yodel Delivery Network Ltd*, at 42

assumed that the self-employment contract will be regarded as valid in the context of the Working Time Directive. Based on this ruling, because pilots and crew members are unable to provide their ‘services’ to more than one company nor to decide on their schedule, what characterises a relation of subordination between airline companies and pilots/crew members, it would indicate that there is an employment relationship. Although possible in theory, subcontracting does not seem to be current practice in the aviation industry. The CJEU also noted that a person’s independence must not be fictitious and there should not be a relationship of subordination, which is the case in the aviation sector.

Interestingly, this 2020 judgment slightly departs from a previous case where the CJEU established the criteria to consider whether a self-employment contract was genuine.³⁷ According to this case, a self-employed contractor should be considered a worker ‘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.’³⁸ Another essential feature 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.’³⁹ Finally, a person has the status of worker within the meaning of EU law ‘as long as that person 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)⁴⁰, does not share in the employer’s commercial risks (judgment in Agegate, C-3/87, EU:C:1989:650, paragraph 36)⁴¹, and, for the duration of that relationship, forms an integral part of that employer’s undertaking, so forming an economic unit with that undertaking.’⁴² As already mentioned, self-employed pilots and crew members cannot determine their own schedule nor share the employer’s commercial risks. They are also part of the airlines’ undertaking. However, some of the elements discussed in this case were not considered in the 2020 judgment, and it can be wondered whether the CJEU will follow the latest judgments or the long list of precedents.

The 2020 judgment contrasts with recent judgments by French courts. For instance, the French Supreme Court ruled that a Take Eat Easy worker was an employee.⁴³ The Supreme Court disagreed with the Court of Appeal and found that the contract was in violation of Article L8221-6 of the French Labour Code because of the direct control the company exercised on the workers. Moreover, the fact that the platform could punish and reward workers was another element demonstrating an employment relationship. The Supreme Court disregarded the arguments that there was no exclusivity relationship, and that the worker was free to organise

³⁷ Case C-413/13, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, EU:C:2014:2411.

³⁸ Case C-413/13, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, at 33

³⁹ Case C-46/12, *LN v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte.*, EU:C:2013:97, at 40 ; Case C-270/13, *Haralambidis*, EU:C:2014:2185, at 28 ; Case C-316/13, *Fenoll*, EU:C:2015:200, paragraph 27 ; Case C-518/15, *Matzak*, EU:C:2018:82, at 28 ; Case C-413/13, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, at 34

⁴⁰ Case C-256/01, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, ECLI:EU:C:2004:18

⁴¹ Case C-3/87, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd*, ECLI:EU:C:1989:650

⁴² Case C-413/13, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, at 36

⁴³ Arrêt n°1737 de la Chambre sociale du 28 novembre 2018

his or her time. The geo-localisation system allows the platforms to know where the workers are and the counting of kilometers proves a form of control in the execution of the services. Applying this ruling to Ryanair's cabin crew, Ryanair uses a punitive management style, demonstrating a very high level of control over the crew members.⁴⁴ Some crews have even alleged that they have one hour to get to the airport after receiving a call.⁴⁵ While this is not the equivalent to the geo-localisation system used by Take Eat Easy, it also demonstrates a form of control as employees are required to live within one hour from the airport.

This decision was quickly followed by a decision in the Paris Court of Appeal⁴⁶ which ruled that an Uber driver operated under an employment contract. The Supreme Court confirmed it in March 2020.⁴⁷ In 2020, Industrial Tribunal of Paris stated that the 'services agreement entered into with Deliveroo France shall be seen as an employment agreement.'⁴⁸ This judgment is in line with the Take Eat Easy judgment using the same reasoning, namely the GPS system allowing real-time tracking and the power to inflict sanctions. Deliveroo France was, therefore, condemn to pay termination indemnities and damages for unfair dismissal. As Teixeira and Martel noted, 'the judges went even further. They also judged that Deliveroo France was guilty of concealed employment, considering that the Company had deliberately circumvented the formalities associated with the hiring of employees, the payment of social security contributions and the remittance of payslips.'⁴⁹ Similar arguments can be used in the aviation context: pilots and crew members do not own the plane they work in; they have no control over where and when they fly or on the prices. Moreover, the airlines have the power of sanction. The opaque structure created by Ryanair through the use of employment agencies that the company controls is a clear form of concealed employment.

An English High Court took an opposite decision in 2019 when it ruled that Deliveroo riders were not workers but contractors, based on the fact that the riders could abandon a job or pass it on to another rider. The fact that the platforms know where the riders are through the geo-localisation system and the containing of kilometers was not regarded as establishing worker status, as it did in France. Although the contractual situations of delivery workers bare similarities with sham contracts,⁵⁰ the High Court was not convinced by this argument. The refusal to regard Deliveroo contracts as sham contracts could also result in a similar refusal regarding Ryanair contracts.

Interestingly, while Deliveroo riders are not employees for collective bargain purposes, the Court of Appeal found that drivers for Uber are workers and not self-employed when they switch on the app, which the UK Supreme Court confirmed in 2021.⁵¹ Also interestingly, Ryanair, which was notoriously anti-union, recognised trade union after 32 years, but only for

⁴⁴ ETF and ITF, supra n 13, p.5

⁴⁵ Glassdoor, supra n7

⁴⁶ CA Paris 10 janvier 2019 n°18/08357

⁴⁷ Ruling n°374 of March 4, 2020 – Appeal n° 19-13.316

⁴⁸ Fernando L. Teixeira and Séverine Martel, *First case in France for Deliveroo of re-qualification of a services agreement into an employment agreement*, (13 February 2020)

<https://www.lexology.com/library/detail.aspx?g=9201c7bd-53c6-4614-8729-5d5f9e9a1240>

⁴⁹ Teixeira and Martel, supra n 41

⁵⁰ Fabian McNeilly, *Sham Self-Employment Contracts: Taking a Liberty?* 16 Manchester Student Law Review 15, (2013) p.16

⁵¹ *Uber BV and others v Aslam and others* [2021] UKSC 5

directly employed cabin crew.⁵² It can, therefore, be wondered if Ryanair would not use the same approach as Deliveroo, at least in the UK.

The two above-mentioned cases are somewhat conflicting, as driving for Uber or riding for Uber Eats involves similar actions. The judgment of the Supreme Court could appease this conflict. The Supreme Court judgment emphasises five aspects of the findings made by the employment tribunal, which justified its conclusion that the claimants were employees; first, ‘Uber sets the fare and drivers are not permitted to charge more than the fare calculated by the Uber app. Second, the contract terms on which drivers perform their services are imposed by Uber, and drivers have no say. Third, once a driver has logged onto the Uber app, Uber constrains the driver’s choice about whether they accept requests for rides. One way in which this is done is by monitoring the driver’s rate of acceptance (and cancellation) of trip requests and imposing what amounts to a penalty if too many trip requests are declined or cancelled by automatically logging the driver off the Uber app for ten minutes, thereby preventing the driver from working until allowed to log back on. Fourth, Uber also exercises significant control over the way in which drivers deliver their services. A fifth significant factor is that Uber restricts communications between passenger and driver to the minimum necessary to perform the particular trip and takes active steps to prevent drivers from establishing any relationship with a passenger capable of extending beyond an individual ride.’⁵³ Out of these five aspects, at least three can apply to pilots and crew members: airlines set the fare and the contract terms in addition to exercise control over the manner in which the service is delivered. One could even argue that airlines possibly monitor the rate of job acceptance to decide whether to recontact the pilot/crew member or not.

In light of these judgments, pilots and cabin crews could easily set aside their bogus self-employment contracts.

4. The Danger of P2F and Bogus Self-Employment as a Form of Uberisation of Crew Members

‘P2F or ‘self-sponsored line training’ is when a professional pilot pays to fly a commercial aircraft to ‘build up experience.’ Usually, these flight hours are part of the ‘type rating’ training or line training, a standard in-house training course on a specific type of aircraft, which is part of every pilot’s professional career.⁵⁴ While the issue of P2F has been acknowledged in various studies, no uniform definition has yet been achieved demonstrating that a grey area exists in relation to this practice.⁵⁵

The main reason pilots would participate in such a scheme is to increase their employability. As Jorens, Gillis, & De Conisck noted, ‘either get a first officer position at better conditions – e.g., base closer to home – at another air carrier or, as a first officer, clock up enough hours to be able to apply for a captain's position.’⁵⁶ The ECA arrives to the same conclusion by noting

⁵² ETF and ITF, *supra* n 13

⁵³ The Supreme Court, *Press Summary*, (19 February 2021) <https://www.supremecourt.uk/press-summary/uksc-2019-0029.html>

⁵⁴ Brannigan, and others, *supra* note 9, p.69-70

⁵⁵ European Commission, *Aviation Strategy for Europe: Maintaining and Promoting High Social Standards*, Brussels, COM(2019) 120 final, available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-120-F1-EN-MAIN- PART-1.PDF>

⁵⁶ Yorens and others, *supra* n19, p.277

that ‘Such schemes also extend to pilots who do not have much flying experience (usually under 1500h) and want to gain experience on a specific aircraft type to increase their employability.’⁵⁷ Indeed, when pilots graduate, they often have flew 200 hours while they are required a minimum of 500 hours to be employed by airlines.⁵⁸ Young graduates who try to do it independently, without P2F contracts, are very unlikely to find a job because of their lack of experience.⁵⁹ It is a dilemma, especially because young graduates only have general experience, but not on a specific aircraft type.

ECA also notes some airlines and training schools ‘sell’ these flight hours through P2F contracts because the market is saturated,. The ‘cost’ of these hours is deducted from the pilot’s (usually meager) salary and, in most cases, equals or even exceeds the salary. ‘Ironically, this means that this young pilot is the one on board who pays most for his/her seat.’⁶⁰ Unfortunately, it is difficult to estimate the costs of P2F contracts, which vary between 30.000 and 85.000€.⁶¹ P2F schemes are, therefore, allowing airlines to transfer the investment linked to line training. It seems extremely unfair that an employee has to pay for the required training while being already productive. In fact, most pilots are forced to accept P2F schemes or zero-hours contracts to repay the loans they got to conclude their education as first officers.⁶² Consequently, pilots are often reluctant to report such irregularities because of the fear of losing their jobs.

It is such a lucrative business that some major actors in the aviation sectors are offering schooling and service management through an agency providing P2F offers and finally an employment agency/broker on top of a firm offering loans to pay the P2F schemes.⁶³ If such findings are accurate, it would mean that pilots enter a very vicious circle that they cannot leave easily.

In a research into ‘Atypical forms of employment in aviation’, carried out by Ghent University, P2F schemes were identified as one of the most extreme and exploitative forms of pilot employment, especially for young pilots.⁶⁴ Indeed, young pilots can work up to 80 hours per week without salary or bare minimum. These perverse incentives will push pilots to fly at any cost, even if the pilots are not physically or mentally fit.⁶⁵ The pressure that those pilots are facing could easily lead to burnout or serious health issues. This raises important safety questions. A controversial investigation made by a French broadcasting company unveiled that some airlines would allow candidates on P2F schemes without any prior evaluation. However, the primary airline given as an example denied the allegations and even filed lawsuits against the broadcasting company.⁶⁶

In 2013, an accident occurred at Lyon Saint-Exupéry airport, whereby a plane did not stop on time. While there were no victims, passengers were shaken by the experience. According to the

⁵⁷ ECA, “Pay-to-fly” (P2F) in Pilots’ Training, *ECA Position Paper* (2015)

https://www.eurocockpit.be/sites/default/files/eca_pay_to_fly_p2f_position_pp_15_0428_f.pdf

⁵⁸ Ecole de Guerre Economique, ‘Aviation : la pratique du « Pay to fly » dénoncée’ (10 May 2016)

<https://www.ege.fr/infoguerre/2016/05/aviation-la-pratique-du-%25c2%25ab-pay-to-fly-%25c2%25bb-denoncee>

⁵⁹ Ecole de Guerre Economique, supra n 51

⁶⁰ ECA, *What is Pay-to-fly?* (23 November 2016) <https://www.eurocockpit.be/campaign/stop-pay-fly>

⁶¹ According to ECA it is situated between 30.000 and 50.000€ while according to the French investigation it could go up to 85.000€ to fly on Vietjet. see: ECA, supra n 53; Ecole de Guerre Economique, supra n 51

⁶² Yorens and others, supra n19

⁶³ Ecole de Guerre Economique, supra n 51

⁶⁴ Yorens and others, supra n19

⁶⁵ ECA, supra n50

⁶⁶ François Duclos, *Pay to fly: Royal Air Maroc attaque France 3 en justice*, *Air Journal*, (29 Mars 2016)

<https://www.air-journal.fr/2016-03-29-pay-to-fly-royal-air-maroc-attaque-france-3-en-justice-5160406.html> 1

report from the French *bureau d'enquêtes et d'analyses pour sécurité de l'aviation civile* (BEA) after this accident, one of the reasons was the inexperience of both pilots and copilot as well as the airline's desire to quickly train the pilot despite his limited experience on this specific aircraft.⁶⁷ The adaptation period was too short to counter the limited experience of the copilot.⁶⁸ Finally, the extended flight duty of almost 15 hours was likely to have resulted in crew fatigue.⁶⁹ Nothing in the report points to a P2F scheme; however, for the French pilot syndicate, this incident was the result of such a scheme.⁷⁰ If such allegations are verified, it will prove the dangers of P2F scheme for passengers' safety as the human factor is still one of the primary reasons for accidents.

The Ghent University's study also highlighted a trend by airlines to demand that pilots finance their own training, especially Low-Cost Carriers (LCCs).⁷¹ According to Panteia & PWC, Ryanair was the first carrier to introduce this practice. They also argued that Ryanair went further by providing 'instruction on the job,' resulting in pilots working for free for three years.⁷² ECA also warned that the chances of permanent employment after a P2F contract is usually very limited or even nonexistent.⁷³ As a matter of fact, some airlines are playing the system by mainly employing P2F without the intent ever to employ the pilot.

The reliance on this model is, however, not a fatality for LCCs to be competitive. The Alliance for Financial Inclusion (AFI) report used EasyJet, which, in 2015, had 80% of direct employment contracts in comparison.⁷⁴ EasyJet employment model still allows the company to be competitive and expand. This report also highlighted the different employment models adopted by Norwegian and Ryanair, comprising direct employment, self-employment, temporary employment, via company employment, and others.⁷⁵

Alongside P2F, the other major employment issue is the bogus self-employment contracts. The massive strikes of Ryanair's pilots and crew members support those findings. As discussed above, these strikes have shed light on the fact that less than half of the pilots are directly employed. The Ghent study pointed out that the number of self-employed pilots in Ireland exceeded the European average.⁷⁶ In fact, as highlighted by the Ricardo Study, Ryanair is the self-employment champion, with almost 60% of its pilots being 'self-employed' or working on a temporary agency contract.⁷⁷ The study also concluded that most pilots, 90%, are not free to work for more than one airline. Even more surprising, they found that 93% have no flexibility to decide when or how many hours to fly. This practice seems extremely similar to Uber's

⁶⁷ BEA, *Rapport: Accident survenu le 29 mars 2013 sur l'aéroport de Lyon Saint-Exupéry (69) à l'Airbus A321 immatriculé SX-BHS exploité par Hermes Airlines affrété par Air Méditerranée*, (21 August 2015) <https://www.bea.aero/fileadmin/documents/docspa/2013/sx-s130329/pdf/sx-s130329.pdf> accessed 15 March 2021, p.213-214

⁶⁸ BEA, supra n 59, p.101

⁶⁹ BEA, supra n 59, p.100

⁷⁰ Ecole de Guerre Economique, supra n 51; Darragh Golden and Anders Underthun, *Civil Aviation in an Age of De-Regulation: Social Risks and Benefits*, AFI-Report series 2016:09 (2016) https://oda.oslomet.no/oda-xmlui/bitstream/handle/20.500.12199/6275/r2016-09_CivilAviation.pdf?sequence=1&isAllowed=y, p.42

⁷¹ Yorens and others, supra n19

⁷² Panteia, & PWC, *Annex 14 Labour Market Civil, Background information for the study 'Analysis of the trends and prospects of jobs and working conditions in transport'*, (2015) <https://panteia.com/uploads/2016/12/Annex-14-Civil-Aviation-to-report-EU-labour-transport-updates-2015-1.pdf>

⁷³ ECA, supra n 53

⁷⁴ Golden and Underthun, supra n62

⁷⁵ Golden and Underthun, supra n62, p.44-45

⁷⁶ Yorens and others, supra n19

⁷⁷ Brannigan and others, supra n9

practice whereby employees are given bogus self-employed status. Unlike Uber and delivery drivers, pilots are not even able to work for more than one airline, demonstrating a strong employment linkage.

Interestingly, an equivalent conflict to the taxi-Uber one is found in aviation. Indeed, self-employed pilots and crew members are threatening the rights of employees by reducing the possible negotiations. It can also easily impact the salary of new employed staffs as Uber's entry in the market did with taxi drivers. However, unlike Uber drivers and delivery employees, pilots and cabin crew often avoid challenging their status because of their fear to lose their job or other sanctions.⁷⁸

Once again, as is the case with P2F, the lack of pilots' fixed salary and the often-lower pay rate, require pilots to fly more to make a living, raising concerns from a flight security perspective.⁷⁹ These perverse incentives will push pilots to fly at any costs, even if the pilots are not physically or mentally fit.⁸⁰ This has been further facilitated by the changes in the regulations regarding pilots' flight time and rest. For crew members, the under-declared work (such as when only flying time is paid) could incentivise them to work longer hours. Identical perverse incentives are found in the food-delivery market and Uber business model. Food-delivery workers are often struggling with unregulated working conditions while being obliged to comply with the technology platforms' terms of use and increasing competition that these companies bring.⁸¹ The lack of adequate regulation, therefore, results in employment's precariousness. Moreover, delivery workers are encouraged to reach targets that can push them to commit some delicts and endanger their lives. Additionally, the navigation system of Uber Eats is programmed for a car and not a bike, leading to some dangerous situations with riders being sent on a highway.⁸² Similarly, for drivers to earn a decent living, they must drive for long hours. While these perverse incentives have been discussed in the context of Uber/UberEats, they have not received as much mediatisation in the aviation sector.

From a liability perspective, self-employed pilots are responsible for damages to persons and property in case of error. Although these pilots are insured, it is doubtful that their insurance companies will be willing to cover all the damages. While passengers' compensations will not be affected by the pilot status,⁸³ it still feels very unfair that pilots will have to reimburse the airlines. For P2F this problem seems even more complex because the airlines' insurers could decline to compensate, because the airlines themselves did not supervise the pilots. This could be a breach of the terms of their insurance contract. Additionally, bogus self-employment could

⁷⁸ Brannigan and others, supra n9, p. 67; Turnbull, supra n21, p.1

⁷⁹ EASA, *Management of hazards related to new business models of commercial air transport operators Practical guide*, (2017) <https://www.easa.europa.eu/document-library/general-publications/management-hazards-related-new-business-models-commercial-air>; Danish Transport Authority, supra n10; Reader and others, supra n 19

⁸⁰ ECA, supra n50

⁸¹ U. Huws, *Platform labour: sharing economy or virtual wild west?*, 1 *Journal for a Progressive Economy* 24–27 (2016); J. Drahokoupil and B. Fabo, *The platform economy and the disruption of the employment relationship*, Policy Brief 5/2016, (ETUI, 2016)

⁸² Pierric Marissal, *Précarité. Franck Page, autoentrepreneur ubérisé et mort au travail*, L'Humanité, (25 January 2019), <https://www.humanite.fr/precarite-franck-page-autoentrepreneur-uberise-et-mort-au-travail-666886>

⁸³ Regulation (EC) No 785/2004 of the European Parliament and Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators

cost millions per year to the State in social insurance, as argued by the Irish Air Line Pilots' Association (IALPA).⁸⁴

The lack of legal definition and specific regulation makes it a very attractive scheme for airlines. Even after the *Ryanair* judgment⁸⁵, there is still much confusion regarding the applicable labour law to air crew. The Ricardo Study demonstrates that airlines still apply the country that is the main place of business instead of the country where the crews have their home base.⁸⁶ The Danish working group concluded that the 'new employment models combined with the airlines' ability to establish subsidiaries and home bases, and use recruitment agencies and workshop facilities, etc. in different countries, enables airlines, within the law, to "rule shop" between countries – on the basis of where it is most advantageous to the airline.⁸⁷ Such models create a lack of transparency, making it difficult for pilots or crew members to know which law is applicable. The complex structures, involving often many jurisdictions, make it difficult for authorities to fight bogus self-employment.⁸⁸ These complex structures could also enable airlines to disregard EU protection to afford posted workers.⁸⁹ Indeed, a posted worker is *per se* an employee. However, bogus self-employed pilots and cabin crew are, in fact, employees of their own companies and, therefore, not able to claim under the directive as they would be complaining against themselves. Bogus self-employment, therefore, serve to circumvent EU rules and core rights. It is, therefore, necessary to have a unique EU-wide answer and measures against such phenomenon, especially due to the high mobility of aircrew. As Jeremias Prassl and Martin Risak argued concerning the gig economy, 'Individual platforms' terms and conditions vary from country to country according to local conditions, whilst always pursuing identical aims: the denial of worker status.'⁹⁰

Finally, discrepancies in terms of legislation applicable to self-employed endanger the level playing field for European airlines by giving some airlines an unfair competitive advantage compared to socially compliant airlines. This advantage results in some air carriers dumping prices within the market. Some countries have started to fight bogus self-employment, but it is not an EU initiative.⁹¹ For instance, the Belgian Labour Relations Act of 27 December 2006

⁸⁴ Houses of Oireachtas, *Joint Oireachtas Committee on Employment Affairs and Social Protection; Bogus Self-Employment (resumed)*, (20 June 2019) https://www.oireachtas.ie/en/debates/debate/joint_committee_on_employment_affairs_and_social_protection/2019-06-20/3/

⁸⁵ C-168/16 and C-169/16 *Sandra Nogueira and Others v Crewlink Ltd and Miguel José Moreno Osacar v Ryanair*

⁸⁶ Brannigan, and others, *supra* note 9

⁸⁷ Danish Transport Authority, *supra* n10, p.11

⁸⁸ ACP-ECA-EurECCA, *ACP – ECA – EurECCA common views on (bogus) Self-employment in aviation*, https://www.eurocockpit.be/sites/default/files/2019-12/ACP_ECA_EurECCA%20joint%20views%20on%20self%20employment_F_0.pdf, point 1.3

⁸⁹ Directive 2014/67/EC on the enforcement of Directive 96/71/EC concerning the posting of workers.

⁹⁰ Jeremias Prassl and Martin Risak, *Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, *Comparative Labor Law & Policy Journal*, Forthcoming, Oxford Legal Studies Research Paper No. 8/2016, (2016)

⁹¹ For instance, Slovenia has reversed the burden of proof.

The Czech Republic has made bogus self-employment illegal in 2012. See: Hana Geissler, *New regulations aim to fight bogus self-employment*, (26 February 2012)

<https://www.eurofound.europa.eu/fr/publications/article/2012/new-regulations-aim-to-fight-bogus-self-employment>

The UK, although no more part of the EU, will implement reform for the private sector to comply with IR35 by April 2021

encompasses provisions to prevent bogus self-employment, including for transport.⁹² The criteria are similar to those analysed by the French Supreme Court in the Uber case; parties' intention, freedom to organise work and working time, and hierarchical control.⁹³ However, there are divergence in the definitions and criteria to determine bogus self-employment among Member States, hindering any attempt by one country to prohibit bogus self-employment.⁹⁴ Similarly, P2F is only illegal in some countries, such as France, creating an imbalance in the European market.⁹⁵ Moreover, these two schemes prevent the correct application of EU social related legislation, such as working time, hindering the harmonisation process.

5. The Possible Impact of COVID

While bogus self-employment has been reported since 2010, with 17 parliamentary questions discussed in the European Parliament, the lack of action by the EU and Member States is concerning. First, the lack of action 'has given operators using bogus self-employment a feeling of impunity and damaged irreparably fair competition in the aviation sector.'⁹⁶ Second and more importantly, the COVID pandemic could result in a possible increase in bogus self-employment and, consequently, precarious work. Indeed, the COVID pandemic has allowed some airlines to restructure their operations.⁹⁷ According to ECA, 'While aviation is going through its most difficult times, certain airline managers across Europe see the COVID crisis as an opportunity to permanently lower terms and conditions or slash pay for a crew. A new wave of anti-worker practices and atypical employment schemes seems to be emerging.'⁹⁸ They referenced various airlines that, according to their findings, have fired and then rehired pilots on bogus self-employment or 0-hours contracts. For instance, Wizz is advertising new jobs and training while firing some pilots because of redundancy.⁹⁹ This could mean new P2F schemes. AerLingus has cut staff wages by 70% and imposed changes to work practices and terms and conditions.¹⁰⁰ While it was necessary in some cases, it seems that the crisis was also used as an excuse to dilute flight time limitations.

According to the Belgian Cockpit Association (BeCA), Ryanair uses COVID as an excuse to bypass the Belgian labour law. They claim that 'Ryanair threatens to dismiss 25% of its pilots based in Belgium.'¹⁰¹ However, in such a situation of significant collective dismissal, 'Belgian law requires to start the so-called "Renault" procedure.'¹⁰² The Renault procedure aims to

⁹² Article 337/1 para 3

⁹³ Article 333(1)

⁹⁴ Turnbull, supra n21, p.1

⁹⁵ ECA, supra n53

⁹⁶ ACP-ECA-EurECCA, supra n81, point 2.1.1

⁹⁷ UK Parliament, 5. *Restructuring, redundancies and terms and conditions: Redundancies in the aviation sector*, (13 June 2020) <https://publications.parliament.uk/pa/cm5801/cmselect/cmtrans/268/26808.htm>

⁹⁸ ECA, *Hall of shame: a snapshot of new anti-crew practices emerging during COVID19*, (7 September 2020) <https://www.eurocockpit.be/news/hall-shame-snapshot-new-anti-crew-practices-emerging-during-covid19>

⁹⁹ ECA, supra n91

¹⁰⁰ Mary Tyrell, *Letters to the Editor: Aer Lingus is using Covid-19 as an opportunity for restructuring*, (20 June 2020) <https://www.irishexaminer.com/opinion/yourview/arid-31006262.html>

¹⁰¹ BeCA, *Ryanair: The COVID-19 does not excuse the non-respect of basic labour rights!*, (26 May 2020) <https://www.beca.be/media-corner/press-releases/554-ryanair-the-covid-19-does-not-excuse-the-non-respect-of-basic-labour-rights.html> 1

¹⁰² BeCA, supra n94

preserve as many existing jobs as possible via part-time work or economic unemployment. The company has not yet launched this procedure.¹⁰³ It can be assumed that such massive dismissal would allow the company to engage new pilots under P2F or bogus self-employment contracts schemes. Even legacy major carriers, such as British Airways, are using COVID to restructure and force new employment terms while ‘making full use of the UK Government’s Coronavirus Job Retention Scheme to pay staff wages.’¹⁰⁴

As argued above, P2F and bogus self-employment contracts are very advantageous for companies. The COVID crisis could be a good excuse for airlines with a poor track record regarding employment to dismiss contracted pilots and cabin crew members and replace them by P2F or self-employed members. Solutions are, therefore, required.

6. Possible Solutions

With the possible negative impact of the COVID crisis, it is time to develop real solutions. P2F and bogus self-employment contracts are not only unfair for the workers, but could potentially endanger passengers. While some airlines have claimed that this practice is necessary, other airlines, such as EasyJet, have generated profits with directly employed staff. P2F is not a fatality but a choice.

Currently, EU offers only a limited solution. Regarding P2F, one possible solution is the Directive on transparent and predictable working conditions, which obliges employers to provide cost-free training to employees ‘when this training is required by EU or national legislation or relevant collective agreements.’¹⁰⁵ However, this solution contains two drawbacks; first, it applies to employees in the sense due to the wording of its Article 13 ‘a worker to carry out the work for which he or she is employed.’ Second, it will depend whether such training is required by national legislation or collective agreements. Consequently, while the Directive had a great potential for changes, it fell short by providing a real solution against P2F schemes. Regarding bogus self-employment contracts of cabin crew, EU law does not provide much of a solution. Indeed, the core issue is regulated at national level rather than EU level.¹⁰⁶

Since this problem creates de facto cross-border consequences, one could argue that the EU could enact new legislation to tackle the issue. Although an EU Regulation on the topic would be by far the adequate solution, its enactment seems utopian. Indeed, the Ghent Study was published six years ago without much of a reaction. Similarly, while some Member States have strengthened their employment laws to combat bogus self-employment, pilots and crew members have not benefited from these changes. As noted above, Ireland has a very detailed code, but it also counts the highest number of self-employed pilots.

¹⁰³ BeCA, supra n94

¹⁰⁴ ECA, supra n91; BBC, *British Airways: ‘I felt forced to take redundancy’* (7 August 2020) <https://www.bbc.co.uk/news/business-53687338>

¹⁰⁵ European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Aviation Strategy for Europe: Maintaining and promoting high social standards*, 1.3.2019 COM(2019) 120 final, p.6; Article 13 Directive

¹⁰⁶ Colin Williams and Elbereth Puts, ‘European Platform tackling undeclared work – 2019 Annual Platform Survey: Tackling undeclared work in the collaborative economy and bogus self-employment, data exchange and data protection, and cross-border sanctions’ (September 2019)

The introduction of the Rider Law in Spain, recognising food-delivery workers as employees, gives a glimpse of hope for cabin crew members.¹⁰⁷ The Rider Law does not offer solutions to pilots and cabin crew members, but demonstrates a willingness of the Spanish Government to protect workers. It will, therefore, require pilots and cabin crew members to revendicate their rights in the hope of achieving similar protection. The current Spanish government is said to favour workers, and other governments could follow the Spanish example.¹⁰⁸ Although possible in theory, in practice it seems improbable. While the Rider Law shows some willingness, food-delivery workers are hardly comparable to crew members due to the lack of international element.

The use of bogus self-employment contracts and P2F is deeply rooted in the functioning of some airlines, thus only drastic solutions could end this phenomenon. Indeed, unless airlines are held financially responsible for bogus self-employment, the economic incentive of relying on such status is excessively attractive. The most viable solution in the short run seems to be a national ban, as found in France. However, such a solution presents several shortcomings; first, it does not seem to work well in practice as non-French airlines could still employ P2F on routes to and from France; second, it requires governmental willingness. Although there is a ban on P2F in France, it seems doubtful that notoriously famous companies, such as Ryanair, have offered employment contracts to every worker employed in France. Governmental willingness seems also lacking as the problem is known for some time already. For a ban at a national level to be successful on a large scale, Member States must collaborate by making information regarding airlines that do not comply with such ban. Although not realistically achievable in the foreseeable future, such a ban could be accompanied by strict monitoring from the European Commission.

7. Conclusion

It might seem preposterous to compare Uber/UberEats employment practices with practices applied to pilots and cabin crew. Unfortunately, similar issues can be found in the aviation industry. Even more surprising, Uber drivers are often better protected than pilots or crew members. While P2F and bogus self-employment contracts have been around in the aviation sector much before Uber entered the market, it did not receive the same coverage. In fact, no consensus on whether pilots can genuinely be self-employed has been reached yet.

The existing divergences have plaid in the favour of some airlines which have been able to abuse the system, obtaining a competitive advantage over socially compliant carriers. The systems that have been developed only seem to aim at circumventing obstacles to favour airlines. Similar to the situation with Uber/UberEats, atypical employment, such as P2F or bogus self-employment, serves as a smoke-screen for regular employment, allowing airlines to

¹⁰⁷ Gorca Pérez, 'Spain approves landmark law recognizing food-delivery riders as employees' (12 May 2021) https://english.elpais.com/economy_and_business/2021-05-12/spain-approves-landmark-law-recognizing-food-delivery-riders-as-employees.html accessed 28 June 2021

¹⁰⁸ Leonie Carter, 'Spain approved a law protecting delivery workers. Here's what you need to know' (11 May 2021) <https://www.politico.eu/article/spain-approved-a-law-protecting-delivery-workers-heres-what-you-need-to-know/> accessed 28 June 2021

gain more flexibility and shift social security contribution. However, they could also result in a dramatic situation because such scheme creates a situation of precarity which could result in pilots taking bigger risks to make a living. While similar problems are found in food-delivery businesses, their consequences in the aviation market can be much more severe due to the high degree of specialisation required for the profession.

While cases challenging the self-employed status or P2F practice are rare, case law against Uber/UberEats is extensive. The reason for the very few reporting within the aviation field is mainly the loss of jobs and the possibility to never find another job. Regarding P2F, the main reason is that young pilots are unlikely to find work without those flying hours. However, case law against Uber/UberEats could, in fact, help cabin crew and pilots fight their employment status.

Despite national legislation to fight bogus self-employment, national authorities have difficulties eradicating the problem due to the high mobility of workers and the differences in criteria. Although the CJEU has clarified how to determine the applicable law and forum, some airlines still disregard the judgment by imposing another law. All these lacunas leave crew and pilots with very few options to fight their bogus self-employed status. As noted, Ireland has a very detailed code; however, it also counts the highest number of self-employed pilots.

P2F brings further challenges due to its ‘taboo’ nature. Indeed, very few airlines admit using this scheme which the Ghent University report noted as one of the most extreme and exploitative forms of pilot employment. While the Directive on transparent and predictable working conditions in the EU that obliges employers to provide cost-free training to employees when ‘required by EU or national legislation or relevant collective agreements’¹⁰⁹ could offer some answers, it will depend whether such training is required by national legislation or collective agreements. Moreover, it seems to only apply to employees.

Bogus self-employment and P2F are problems of European dimension, yet, it has not received the deserved attention by legislators. Indeed, it endangers the EU level playing field for airlines by allowing some airlines to gain an unfair competitive advantage over socially compliant carriers. It is time for the EU to start acting, especially in these difficult times in which reports of airlines using the pandemic as an excuse to restructure are more and more frequent.

¹⁰⁹ Article 13.