



ECA CONTRIBUTION TO THE PUBLIC CONSULTATION ON THE EU'S LABOUR MIGRATION POLICIES AND THE EU BLUE CARD

The European Cockpit Association (ECA) is the representative body of European pilots at European Union level. It represents over 38,000 pilots from the National Pilot Associations in 37 European States and it is a recognised social partner in the EU sectoral social dialogue for Civil Aviation.

The members of ECA are highly mobile workers. With the globalisation of the industry, ECA considers that there is a need to define when a pilot from a foreign airline or a non-EU national needs a work-permit to enter the EU. We believe that the current process of consultation is an opportunity for us to bring to the attention of the European Commission our views concerning specifically the situation of international air transportation, contributing in that way to the reflection recently launched by the Commission on the EU Blue Card Directive. Since the form published in the Commission's website did not allow us to adequately express our points of view, we have prepared this paper. However, at the end of this document, some specific answers are given to the questionnaire regarding the points that we considered relevant for our association.

Aviation is a fully liberalised market of European dimension, the number of airlines that operate exclusively in one national market being small or marginal. The "europeanisation" of the market created important intra-European labour mobility and difficulties in terms of labour law, social security and jurisdiction. The globalisation of the industry is coming (or is it already there?). The European market is not prepared to solve two different questions:

- When does a pilot from a third country need a Blue Card to enter the EU?
- When can an EU carrier hire a third country national?

Furthermore, there are difficulties to assess what "skill shortage" is and how to implement the community preference principle. European wide answers and tests are the only possible answers to address the migration issues of a true European industry.

Civil Aviation: a peculiar sector

When it comes to regulating the conditions of entry and residence in the EU territory of third country nationals for the purpose of highly qualified employment, **the peculiarities of certain professions as well as economic sectors should not be overlooked.**

Regrettably, in Europe there are presently economic sectors that are particularly exposed – due to their intrinsic characteristics - to commercial practices and behaviours that are on the verge of legality (and sometimes even beyond).

Civil Aviation, being characterized by transnational highly mobile activities, is certainly one of those. Legislation in relation to third country nationals working on board of an aircraft (pilots and cabin crew) is not governed by the EU and significantly varies among the Member States.

Additionally, the rules currently apply only to aircraft registered in a given country and only for that part of the flight that takes place within its territory. This means that there are still huge gaps and overlaps in the international models, providing an incentive to ‘rule shopping’, for example when it comes to choosing the country in which is more advantageous to have an aircraft registered.

Some options to tackle abuse in Aviation

ECA is interested in contributing in a positive and constructive way to the debate. Some possible measures could, if implemented, contribute greatly to improve the current situation of the Aviation industry, especially with regard to the above mentioned unfair practices.

- **Assess real/actual labour shortages and combat abuse:** admissions and grants of the EU Blue Card must be based on real and proven skill shortages (must be demand/need-driven). Labour markets test conducted across the EU, rather than at national level, could be useful in terms of an ‘upstream analysis’. In a market and employment structure that is truly pan-European with highly mobile workers operating from different countries on a daily or weekly basis, the *only* assessment to have any real meaning would be an EU-wide one. Looking at skill shortages on a national basis when the workforce and their licensing are European will result in a knowing misrepresentation of the situation.

Consequently, it is paramount that strong systems and procedures are established to identify situations in which the blue card is used primarily not to address a skill shortage, but to import labour from third countries in order to cut costs at the expense of EU citizens who could be filling those positions.

The EU is not experiencing a labour shortage but rather an over-supply in the case of professional pilots.

In this, as in other similar cases, having recourse to third country employees through the EU Blue Card should not be allowed or should only be allowed in rare cases and only if certain conditions are met. It is important to consider not only the existence of shortages but the capacity for the European employers to reduce the shortage. In the case of aviation some have inaccurately claimed that there is a shortage of pilots. In fact there are a significant number of unemployed pilots some of whom are experienced, and many less so. Airlines have the capacity to provide additional experience under productive employment, but they choose not to do it. In this case it is not justified to claim that there is a shortage.

Some EU airlines hire third-country nationals who are based outside the EU¹, to operate on international long-haul flights (from and to the EU) for cultural reasons or because, for example, the aircrew needs to speak a language spoken by the passengers. This practice could be an exception to the general rule provided that clear criteria are established (e.g. a percentage of the foreign personnel allowed to work on international flights to and from the EU), and as long as these criteria are fully enforced and respected.

It is also essential that to those third country airlines’ workers apply the same rights - in terms of labour protections and working conditions – enjoyed by the EU aircrew (both pilots and cabin crew) who are based in one of the countries of the EU.

Another practice seen is that of EU carriers establishing a genuine (not fictive) satellite base outside the EU. The EU preference principle would imply that routes from those foreign bases are staffed with EU crews unless in specific circumstances. Workers employed in those foreign bases, because they work for an EU company, should be entitled to the same rights enjoyed by EU based employees. If this is not the arrangement we would risk companies constructing arrangements to offshore their employees from Europe,

¹ The aircrew “home base” is defined as the place where the employee normally starts or ends his or her periods of duty and where, under normal conditions, the operator is not responsible for the accommodation of the aircrew member. The home base also determines the State whose social security scheme is applicable to the workers.

simply in order to deny tax revenues and social rights from EU citizens.

Before the EU Blue Card is granted and to avoid any attempt to abuse, the national authorities must ensure that the case they are handling falls within the rule or at least within one of the exceptions allowed. The Blue Card should in no way become a tool to promote 'rule shopping' and the replacement of European workforce with cheap labour imported from third countries.

- **Adjust the EU Visa Policy: EU legislation requiring work permits for third country aircrew based (temporarily or permanently) in the EU or working on board of flights of EU AOC² carriers should be adopted (as it is already the case in some Member States).**
- Member States should coordinate their visa policies to ensure that **visa waivers are only granted to non-EU aircrew who arrive in the EU on international flights whilst on duty but not to those who are subsequently rostered (planned) to operate on intra-EU flights not directly related to their initial duty.**
 - Member States should coordinate their policies to ensure that non-EU aircrews posted in the EU to operate flights from EU airports are required to obtain a work permit from the EU state into which they first entered.
 - Intra-European flights should be considered *cabotage* and be flown by EU nationals only according to international ninth freedom rights.
- **Apply the Community preference principle to all flights of EU AOC holders touching the EU territory.** The current EU migration legislation provides less protection for mobile staff in aviation than for any other group of workers; while the general rule says that priority has to be given to EU nationals when filling a vacancy, no such rules apply to aircrew and this increases uncertainty to their future working conditions. In order to give priority to EU nationals, reliable labour market tests across the EU should be conducted (rather than national market tests), the Blue Card being a harmonized instrument applicable across Europe.
- **Address the issue of the temporary work agencies,** especially in the particular case of posting of EU workers through agencies based outside the EU. Agencies providing labour in the EU market must be established in the territory of the EU and be granted a valid licence accordingly. Are there efficient systems in place to control the compliance with such a provision, including at global level? Mechanisms to facilitate compliance and control of temporary agencies in aviation might be needed (Directive 2008/104/EC). It needs to be clarified that mobile workers in aviation in the EU engaged through a non-EU based agency are illegally employed, and any flights they operate are accordingly occurring without a valid AOC with associated enforcement action.
- **Maintain the current provisions of Directive 2009/50/EC (EU Blue Card):** in general, the EU Blue Card as a tool has proven to be positive development, therefore it should not be put into question. In particular, the admission criteria laid down in Article 5 should be maintained. However, the Blue Card should be adapted to address migration issues of international highly mobile workers.

While the flexibility is needed in some professions, derogations should undergo a thorough and comprehensive assessment before they are authorised.

Additionally, the right of Member States not to grant residence permits for employment for certain

² The Air Operator's Certificate (AOC) is the approval granted by a national aviation authority (NAA) to an aircraft operator to allow it to use aircraft for commercial purposes. This requires the operator to have personnel, assets and system in place to ensure the safety of its employees and the general public.

professions (e.g. highly mobile workers), economic sectors or regions should not be questioned or challenged.

- **Apply EU social security schemes to Blue Card holders and ensure enforcement of the legislation:** Regulation 859/2003 extends the provisions of Regulation 1408/71 and Regulation 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality applies. ECA believes the above is the right approach to put EU and non-EU nationals working in the EU territory on an equal footing. Therefore, it is imperative to ensure that Regulation 859/2003 is properly enforced and efficient control mechanisms are established. In fact, compliance with social security legislation is difficult to control, especially in cross border situations and for certain groups of workers such as highly mobile professionals (international transport).
- **Conduct proper labour inspections:** one of the consequences of the emergence of new harmful business models is the (mis)use of non-EU employees. We have been witnessing the development of Norwegian Air Shuttle and its subsidiary Norwegian Air International, nominally basing their European pilots in Bangkok, using fixed-term employment contracts governed by Singapore law. In this and other similar cases the concerned employees are prevented from enforcing their rights. Furthermore, this can bring an additional (unfair competitive) pressure on other EU airlines that do respect their obligations towards national social security and pension systems and want to stick to the rules.

Against this background, labour inspections are essential for the enforcement of employees' rights, the prevention of abuse by unscrupulous employers and the establishment of a wider framework ensuring fair competition between companies. However, labour inspections barely exist in aviation, particularly for pilots and other mobile staff. This is a violation of ILO Convention n° 81 which compels all signatory States to conduct inspections in all sectors. The lack of inspections in the Aviation sector is often due to the shortage of trained staff and the ambiguity in the division of responsibilities for the inspection of flight crew between national labour and transport departments.

In order for the national authorities to conduct inspections of aircrew efficiently, a labour certificate should be made available during the inspection. This would allow the authority to determine the person (legal representative of the employer) to contact for further information concerning the aircrew. The authorities may require the employer to provide the relevant documents:

- Employment contract
- Proof of social security payments
- Work permit (if applicable)
- Posting details (if applicable)
- Home base
- Schedule followed during the last 6 months (including location, working times, responsibilities)

SPECIFIC COMMENTS TO THE CONSULTATION DOCUMENT

3.7. WHEN IS IT NECESSARY TO RECRUIT MIGRANT WORKERS: It is important to consider not only the existence of shortages but the capacity for the European employers to reduce the shortage. In the case of aviation some have inaccurately claimed that there is a shortage of pilots. In fact there are a significant number of unemployed pilots some of whom are experienced, and many less so. Airlines have the capacity to provide additional experience under productive employment, but they choose not to do it. In this case it is not justified to claim that there is a shortage.

Systems/procedures should be in place ensure that skills exist and to avoid situations in which requests for importing labour from 3rd countries are motivated only on cost reduction grounds.

3.9. NEED FOR EU INITIATIVES AND TOOLS: The assessment of actual labour shortages triggering admissions/grants of Blue Cards must be demand/need driven, focused on a real and proved skill shortage at EU scale.

5.6. NEED TO IMPROVE ATTRACTIVNESS OF THE EU: It all depends on the sector. In aviation there is no pilot shortage but rather over-supply.

5.7. ADEQUACY OF LABOUR MIGRATION MANAGEMENT: The current situation for mobile workers in civil aviation is unclear. We do not have rules that can explain when a mobile worker in civil aviation from a third country can work on board of EU registered aircraft or when third country nationals working onboard of 3rd country aircraft need a work permit to operate in or from the EU. Lately, some EU companies have used third country temporary agencies to provide workforce on foreign contracts to fly their international routes. No work permit was required. We can therefore say that the management of labour migration is nonexistent.

To address this situation it is necessary to develop legislation with regard to migration (e.g. social security schemes) and conduct effective labour inspections as required by ILO Convention 81. Visa policies regarding temporary work/ temporary agency work should be considered. The establishment of labour certificates could facilitate the management of labour migration for highly mobile workers.

6.16. ADEQUACY OF ADMISSION CRITERIA: Criteria for admission in Article 5 should be maintained. No need for more flexibility. Member States must retain the right not to grant residence and work permits for highly mobile workers, economic sectors or regions.

6.17 ATTRACTIVNESS OF THE BLUE CARD: Some of the factors listed in 6.17 (1, 3, 4, 11), need to be considered CAREFULLY to avoid abuses. N°11 is questionable: The Blue Card should not constitute a blank cheque to enter the EU market. If a blue card holder ceases to work in the job for which they were granted the card (which they only received on the basis that there was no one else available in the EU to do the job), by definition they are no longer fulfilling the originally identified need, and their right to work should cease. If they wished to seek an alternative position within the EU, they should have to re-apply for a new Blue Card, demonstrating the skill shortage and other criteria are met for the new job, before filling the vacancy. Changes in conditions of employment must continue to respond to the criteria established for admission in the first place. Any ability to use a single Blue Card received for one position to move jobs within the EU, or to access the wider employment market in the manner of an EU citizen under 'free movement of workers' provisions would constitute a gross abuse of the Blue Card system. It would also be an outcome in complete opposition to the original aims of the Blue Card system.

6.21. WHY AN EU INSTRUMENT: With a unified EU-wide procedure, non-EU nationals will face harmonised procedures. Thus, the need for coordinated policy among the Member States and above all of labour market tests at EU level

6.23. ROLE OF MEMBER STATES: Member States must retain the right not to grant permits for specific professions and sectors (e.gr. highly mobile professionals).

6.24. EXTENSION OF THE BLUE CARD SCOPE: Categories must not be added without a thorough analysis of the market's needs being conducted first.

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Brussels 21/09/2015