European Cockpit Association
'Piloting Safety'

SUMMARY OF ECA POSITION
ON THE
REVISON OF THE 3RD PACKAGE OF LIBERALISATION IN AIR TRANSPORT

1. PRINCIPAL PLACE OF BUSINESS

ECA has repeatedly made the case for a clear definition of Principal Place of Business both in the context of the EU internal reforms and in the EU/US OAA negotiations context.

In the framework of the liberalisation of the European aviation market, and in view of the EU policy to grant access to foreign carriers to the internal market, it is essential to have clear criteria of attachment of airlines to a given jurisdiction.

Regulation 2407/92 states that Member States should only grant an operating license to airlines whose Principal Place of Business and registered offices are in its territory. This is a standard clause from ICAO texts (See Annex VI). In the framework of the EU/US regulations, at the US request, the Commission has confirmed that EU legislation requires an airline's AOC and Principal Place of Business to be in the same country (Memorandum Of Consultations, paragraph 8).

Even though the principle is recognised and accepted, the lack of a definition of Principal Place of Business results, in our opinion, in this important provision not being respected.

The problem with not having a definition of Principal Place of Business is that it opens the way to *flags of convenience*: airlines will try to operate though the license of the country offering the most favourable, maybe less strict, regulations.

A clear definition of Principal Place of Business will:

- Help in determining where the main responsibilities for safety oversight lie. It is logical that the authority of the country where an airline carries out the majority of its operations is designated responsible for the control thereof.

- Be crucial in the framework of international aviation agreements that the EU is negotiating. For example, the EU is fully opening its market, readily granting 5th and certain 7th freedom rights to foreign carriers. If the EU does not define Principal Place of Business, it would be possible for foreign carriers to operate mainly or even exclusively in our internal market, according to their own conditions. The EU would not have any or only limited control over those operations in terms of safety oversight.

- Ensure that the economic returns remain in the country where the majority of the airline's production is carried out, benefiting the community where companies operate.

Rue du Commerce 41
B-1000 Brussels, Belgium
www.eurocockpit.be
eca@eurocockpit.be
Tel: (32 2) 705 3293
Fax: (32 2) 705 0877

During the meetings of the Industry Consultative Forum on aviation agreements, Commission representatives repeatedly stressed that this point will be solved in the context of the revision of the Third Package. ECA very much supports this approach.

Based on ICAO work during the 5th Worldwide Air Transport Conference (31 March 2003), whose main subject was the liberalisation of air transport, we propose the following, slightly adapted,[1] definition of Principal Place of Business:

> ***"Principal Place of Business"*** *means the Member State in which an air carrier is established and incorporated in accordance with the appropriate laws and regulations, and where the carrier undertakes the largest portion of its activities.*
>
> *The following factors shall be considered to determine where the largest portion of activities is located: where the carrier has a significant portion of its operations (i.e. the largest portion of flights commencing and returning each week), a significant capital investment in physical facilities, pays income tax, registers its aircraft, and employs a significant number of nationals in managerial, technical and operational positions.*

2. DETERMINATION OF LAWS APPLICABLE TO AIRCREWS

Liberalisation of the European Aviation Market was aimed at providing benefits to the whole aviation industry: airlines, passengers and employees. However, the opening of the internal market has revealed a loophole in European systems for the determination of the jurisdiction and the laws applicable to aircrews.

Both Council Regulation 44/2001 on jurisdiction and the Rome Convention on the Law Applicable to Contracts stipulate that, on issues concerning individual employment contracts, the law and the judges of *the place where the employee habitually carries out its duties* shall apply. In many cases, however, judges have found it difficult to determine where air crew "habitually" carry out their duties because of the fact that crews work "in the air".

There is emerging case law[2] which points to the *base of the aircrews* as the "habitual" place of work for this category of employees.

ECA calls upon the European legislator to address this issue within the revision of the 3rd Package. The new Regulation should provide explicit criteria of attachment for aircrews following the case law above. We suggest that the Commission proposes a new article on social aspects containing the following points:

- Airlines shall nominate a base for their crews and inform the authority granting the operating license thereof.
- The laws and the provisions defined in the aircrews' employment contracts or collective agreements apply within the European aviation single market.
- Notwithstanding the above, the choice of law made by the parties in the employment contract or in the collective agreement, shall not have the result of depriving the

[1] ECA adapted the ICAO text in order to give more flexibility and effectiveness to the definition.
[2] Arrêt du Tribunal du Travail de Charleroi, in the case Legros c. Ryanair LTD (March 2005). See also Arrêt Ruten of 9 January 1997 (J.T.T. 1997, pp 75 & 76)

employee of the protection afforded by *the mandatory rules of the law of the country in which the employee is based,* (i.e. where the aircrew member habitually carries out its duties) even if the aircrew member is temporarily employed in another country.

- The courts for the place where aircrews are based or the courts of the last place where the crews were based, have full jurisdiction over contracts of employment.

3. WET LEASING

Under Regulation 2407/92 European carriers are only authorised to "short-term" wet lease non-EU registered aircraft (i.e. hire foreign aircraft with crew) for one of the following reasons: to meet temporary needs or in exceptional circumstances. The absence of guidelines to define what is "temporary need" or "exceptional circumstance" has lead to significant abuses of the Regulation.

Despite ECA's complaints, foreign aircraft have been operated in Europe with no adequate safety oversight for periods over two years. Even if 2 years cannot be considered as a short-term lease, the national authorities were able to ignore the complaints due to the lack of guidelines.

An abusive use of foreign wet leasing is a threat to European aviation safety as well as to the local crews' working conditions. It is also an open door to "virtual airlines"[3] and to cheap labour substitution to the detriment of European jobs and training standards.

ECA therefore suggests that the Commission sets up clear rules on wet leasing of foreign aircraft, limiting its duration in time to maximum one IATA season (maximum 6 months in a 12 month period) and laying down clear rules as to how these operations are going to be effectively monitored.

The Commission should also set clear guidelines to define an exceptional circumstance which may justify the lease of a foreign aircraft with crew.

Finally, the new legislative package should contain a monitoring mechanism that brings transparency to the system and helps to prevent abuses.

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[3] I.e. airlines operating exclusively though wet leasing agreements and without any assets of their own.

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www.eurocockpit.be
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