CAA Norway

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Our date: 11.03.2024
Our reference: 22/06649-33

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DAT A/S - UAB DAT LT - Administrative decision - Working environment regulations

The Norwegian Civil Aviation Authority (CAA Norway) refers to previous correspondence regarding DAT A/S and UAB DAT LTs operations in Norway, most recently our advance notification dated November 6th 2023 and your e-mail of November 27th.

CAA Norway has made a final decision in the matters raised in our advance notification. In this administrative decision, we will explain in more detail our assessment and the specific administrative orders imposed on DAT A/S and UAB DAT LT.

1. Background

CAA Norway, in the capacity as labour authority for air crew, has a responsibility to conduct inspections and other oversight activities to ensure that operators and employers in Norway comply with national labour law. Based on this, we conducted investigations related to the companies' operations in Norway to clarify whether Norwegian law applies and whether the companies fulfill their obligations.

With basis in these investigations CAA Norway gave the companies an Advanced Notification on November 6th 2023 in which our preliminary assessment was presented. We also gave a description of previous dialogue between the companies and the CAA Norway. We will not repeat this in detail, but for the sake of clarity, our advanced notification is appended to this decision.

The companies were given an opportunity to submit comments to the advanced notification within the end of November 26th 2023. CAA Norway received a joint statement from both DAT A/S and UAB DAT LT on November 27th. The delay was due to a technical error. CAA Norway has taken the companies' feedback into consideration.

2. The responsibility of CAA Norway and enforcement of national legislation

Based on your feedback of 27th November, we find it necessary to highlight the legal basis and the formal responsibilities of CAA Norway before we go further into our assessment.

As previously stated, CAA Norway has a responsibility to conduct inspections and other oversight activities to ensure that operators and employers in Norway comply with national labour law, more specifically the Act relating to the working environment, working hours and employment protection, etc. of June 17th 2005 (Working Environment Act), and applicable regulations. This includes the posting of workers directive 96/71/EC, implemented in Norwegian law through the Regulations relating to posted employees of December 16th 2005.

CAA Norway must, when controlling requirements under the working environment legislation, clarify whether employment relationships with connections to other countries are regulated by Norwegian law and whether relevant requirements under the working environment legislation are met. This also involves going into more detailed assessments whether service agreements in fact must be considered employment relationships.

The Working Environment Act (short term WEA) only applies to businesses that employ workers. CAA Norway can impose orders that presuppose and are based on an employment relationship, including cases where the rules on posting will apply.

It is emphasized by DAT A/S and UAB DAT LT that legal certainty is required not only for employers, but also for the employees and relevant governmental authorities as to which law applies and should be applied in each case. Based on your feedback, we find it necessary to provide clarifications on the responsibility and basic legal conditions.

CAA Norway has the authority to supervise the implementation of the WEA and applicable regulations concerning aircrew. WEA and regulations on posted employees give CAA Norway authority to demand information from the airlines necessary to ensure that provisions are fulfilled. CAA Norway can also issue orders to ensure compliance with the provisions set out in WEA Section 18-6. To ensure necessary enforcement, compulsory fines and infringement fees can also be imposed when there is a violation of the regulations.

CAA Norway will examine whether the businesses comply with the regulations based on an assessment of the businesses' activities in Norway, operational conditions, and an assessment of individual contractual/employment conditions as well. We will not determine the legal effect of *individual* cases, but the individual assessments will be used as a basis for imposing administrative orders upon the companies to comply with mandatory requirements in general.

Individual rights must be pursued by the individual contracting party or via the trade unions through private proceedings, while the authorities enforce public law.

3. Legal Assessment

3.1 Relevant factual basis

CAA Norway has assessed the companies´ operations in Norway and the relevant documents against the provisions of the Working Environment Act of June 17th 2005, and the Regulations relating to posted employees of December 16th 2005.

DAT A/S is a company with its headquarters in Denmark and is registered in Norway as a Norwegian foreign enterprise - NUF. DAT A/S' subsidiary, UAB DAT LT, performs important organizational tasks coordinated from the office in Lithuania, including (but not limited to) key functions such as crew control and major maintenance services. The companies´ have regular operations in Norway, Denmark, Italy, and Germany.

The companies´ have established operations in Norway through the allocation of PSO-routes, as well as operations between Stord-Oslo and operations between Oslo, Ørland and Harstad/Narvik (Evenes). DAT A/S has also been awarded new contracts with the Ministry of Transport for the operation of PSO routes in Norway from April 1st 2024.

DAT A/S and UAB DAT LT have stated that their crew that operate in Norway do so on assignments originating and terminating at their assigned home bases, all of which are outside Norway - except for two individuals. Crew are not assigned exclusively to Norway and operate throughout the entire DAT network.

The crew are normally travelling passive with other airlines to and from the locations where the crewmembers will start/stop their rosters/work-periods. DAT A/S and UAB DAT LT have stated that transport and accommodation are covered by the companies. Arrangements have been made for continuously accommodation in a company crew house in Florø, as well as accommodation in hotels in other locations.

The staffing plans show that there is a large group who work relatively long working periods followed by longer periods off. The working periods are then usually approx. 15-16 days, but there are also periods of approx. 7-8 days. In some cases, there are working periods up to 20 days. There is also part of the scheduling where there is a more even workload, where the crewmember works 4-5 days and then have 3-4 days off.

A larger proportion of the operations that has taken place in Norway during the period we have carried out investigations, has been carried out with crew from Vilnius (VNO), but also with crew from Kaunas (KUN), Copenhagen (CPH), Billund (BLL) and Riga (RIX) and other airports.

A typical pattern that repeats itself for the crew is that a work period is carried out in each country, i.e. after the end of the work period and subsequent free period, they serve operations in other countries. It must be assumed that the crewmember rotates between different countries before they return to Norway after a certain time.

According to the submitted staffing lists of March 20th 2023, there were a total of 305 who serviced operations for DAT A/S and UAB DAT LT at this time. Of a total of 121 pilots, respectively 70 was contracted via First2 Resources Limited (F2R) and 51 was employed

through DAT A/S. There were also 184 cabin crew members, of which 122 contracted via F2R and 62 employed through DAT A/S. We have not received information from the companies about significant changes since then in the operational pattern or relevant aspects regarding the crew.

The contact persons from DAT A/S have stated that transportation (ferrying) is covered by the companies. This is also evident from submitted contracts from F2R. The crew is defined in the code "rest" for passive flights.

According to the staffing list and information we have received, the crew members have a defined home base outside Norway, except for two individuals (based on the latest information from the representative of DAT A/S). One of the two persons concerned was added to the most recently submitted staffing and have a sole proprietorship registered in the enterprise register and resides outside of Oslo. The person concerned is listed with OSL as home base in the staffing list and starts and stops the work periods at Oslo airport (OSL).

CAA Norway further notes that DAT A/S and UAB DAT LT do not differentiate between employees and contractors in their comments to our advance notice. The arguments from the companies relate exclusively to the choice-of-law, reference to home base principle and argument against a posting situation as such.

CAA Norway has in previous correspondence asked for the agreement between UAT DAT LT and F2R regarding crew resources. In your response to our advanced notification, it is stated that it is not possible to send the agreement in its entirety as it is necessary to ensure strict confidentiality of the terms and conditions between UAB DAT LT and F2R, and you have therefore provided a redacted version of the agreement.

The companies have been given the opportunity to provide the necessary information about operations and staffing arrangements on several occasions. We believe that there is now sufficient information and documentation to decide on the matter and have therefore not entered into a further discussion about access to the agreement at the present time. We nevertheless point out that you have an obligation to provide information deemed necessary in accordance with the WEA, Section 18-5.

3.2 Contractual relations

3.2.1 Employment

It is essential to clarify whether there exists an employment relationship, both to clarify application of Norwegian working environment legislation and to assess the application of the regulations on posting of workers.

In accordance with the enforcement directive 2014/67/EU, Article 4, the authorities can use the same legal terms that are used to clarify whether there is a genuine posting, to assess whether a person must be considered an employee even if there is information to the contrary.

The enforcement directive presupposes that the member states should assess the real conditions surrounding the work being carried out, to establish whether the contract in fact

represents an employment relationship, which will be a basic condition for the application of the posting rules. The criteria referred to in the Article 4 for determining whether an employee relationship exists are whether there is a subordination and the remuneration of the worker and the facts relating to the performance of work.

National law will be the legal basis for the assessment of whether an employment relationship exists, cf. Directive 96/71/EC, Article 2 and WEA, Section 1-8.

According to WEA, Section 1-8, an employee is a person who performs work in the service of another. An employer means anyone who has employed an employee to perform work in their service. What is determined in this Act about the employer shall apply correspondingly to the person who manages the business in place of the employer.

The adoption of amendments to WEA Section 1-8 which came into force January 1st. 2024, lays down that an employee means anyone who performs work for and subordinates to another. In the decision, emphasis must, among other things, be placed on whether the person in question makes his personal labour available on an ongoing basis, and whether the person in question is subordinate through management, leadership, and control. It must be assumed that there is an employment relationship unless the company makes its overwhelmingly likely that there is an independent employment relationship.

It is also relevant whether and to what extent the crew are entitled to work for more than one client/employee, whether and to what extent the crew are entitled to decide when and how much they want to fly and whether the personnel are included as part of the airline's organisation and operations. Specific overall assessments must be made.

CAA Norway has received information that part of the crew is directly employed by DAT A/S, while a large part originates from contracts with the company First2 Resources Limited (F2R). On request, we have been sent a random selection of contracts DAT A/S and sample contracts that are used for aircrew that originates from F2R and UAB DAT LT. Representatives with DAT A/S has stated that the sample contracts submitted are used by all F2R crew.

3.2.2 Regarding contracts for DAT A/S

Regarding the contracts for DAT A/S the employment contracts explicitly state that an employment relationship is entered, and certain basic conditions associated with the employment relationship have been included.

Based on a general assessment, it is assumed that the contracts fulfil the minimum conditions for an employment contract, even if reference is made to collective agreements to a large extent. What is decisive in this context is that an employment relationship is established in accordance with WEA Section 1-8.

Please note that we may review additional contracts at a later stage. It is nevertheless clear that the conditions regarding application of the WEA and the condition of employment in the rules on posting are met, in the case of crew members employed by DAT A/S.

3.2.3 Regarding contracts - UAB DAT LT and First2 Resources Limited

CAA Norway requested the contracts for crew that UAB DAT LT organises for the operations in Norway. The representative for DAT A/S forwarded the sample contracts used for the aircrew (Flight deck and Cabin). It was specified that the sample contracts contained identical terms compared to the specific individual contracts that initially were requested by us. It was further emphasized that the contracts are entered into between the company First2 Resources Limited (F2R) and that DAT is not a party to these contracts.

In the contracts for pilots and cabin crew, it is expressly specified that the individual does not purport to be an employee of the company or the client company and acknowledge they have no rights as an employee. The contracts also state that the individual confirm that they are fully aware of their status as a contractor and as such have full rights as contractor. By signing the agreement, the contractor acknowledges the term and conditions and that it is a contractor agreement.

The contract is entered into between First2 Resources Limited (F2R), a company registered in Malta and organized and governed by Maltese law, and the individual crew member. It is stated that the service contracts are governed by and construed in accordance with the law of Malta (choice-of-law) and that the courts of Malta shall have exclusive jurisdiction.

The contract specifies which client company the crew member is made available to and describes the contractual terms in detail. The company shall engage the individual to provide the services on the term of this agreement. The contractual relationship is not time-limited and there are also clear terms for termination.

During the engagement the individual shall provide the services on the Clients aircrafts, at the base of operation, as instructed by the Client company.

Even if the contract terms clearly states that a service agreement is signed, the contractual conditions nevertheless stipulate that the person in question makes his or her personal labour available with an indefinite duration.

F2R shall pay the individual a fee, on the 10th of each month. The Client company, in this case UAB DAT LT, covers costs related to travel and accommodation during service. The individual crew member is responsible for conditions related to income tax and social security rights etc., cf. section 5 of the contract. It is further specified that the Client company (UAB DAT LT) will pay "basic fee for the whole illness duration", and the terms agreed on appears to be an agreed sick pay scheme.

Further restrictions are placed on the right to carry out assignments for other businesses without the consent of F2R and the Client company, cf. schedule 3 point 13.

The contracts states that the individual shall serve any associated of successor Company of the Client company and/or the Company and in such event all the terms and conditions will apply.

It is emphasized that the individual shall comply with instructions given to him/her by the Client Company and shall further take leave of duty only with mutual agreement of Client

Company. The individual shall be under the direction of the person nominated by the Client Company or any Company or organisation at which the individual has been posted to perform his/her duties. The individual shall throughout the engagement be responsible to act in accordance with the reasonable instructions and standard working procedures of the Company, or any Company or organisation at which the individual has been posted to perform his or her duties and shall furthermore ensure that he or she will comply with all applicable local or international law, rules, or obligations. There is also a non-competition clause and determination of a quarantine period for work directly or indirectly under the Client Company.

According to Norwegian law, cf. WEA Section 1-8, it will be decisive whether the person in question performs work for and subordinates to another and that the person is subject to direct management and control.

After a review of specific terms in the sample contract, it is determined that the Client company, in this case UAB DAT LT (or associated company at which the individual has been posted to perform duties), has the right to instruct the crew member, and have full responsibility for manuals, workings conditions, staffing plans, flight time etc. The crew members are responsible for following the company's procedures, manuals, and guidelines, etc.

UAB DAT LT is responsible for the necessary management and control in connection with the execution of the work. The company can also demand that the individual concerned completes training etc. to ensure necessary qualifications. According to Schedule 2 of the contract, UAB DAT LT can also change the nominated home base.

Conclusion

After an assessment of the standard contract's content and legal terms, CAA Norway finds that it must be established that crew members who have entered such a contract must be considered an employee in accordance with Norwegian law and the Working Environment Act, Section 1-8, and not as an independent contractor as emphasized by the companies. We will use this as basis for our further assessment.

3.3 Choice of law

For crew members, the labour law relationship between employer and employee may be subject to the law of several alternative countries. The parties can agree on the choice-of-law, but for an agreement to be valid and binding, it must not involve a waiver of inalienable rights for the employees in the country's legislation that would have been applied without a separate choice-of-law agreement. In the absence of a valid choice-of-law agreement, the law of the country where or from which the employee usually performs his work will be applied. The restriction on the parties' freedom of agreement for choice-of-law agreements protects the weaker party and strengthens predictability.

The statutory *posting rules* with a limited set of rights for employees take precedence over the general choice-of-law rules. This is the case when aircrew are sent out from the country where they have their permanent place of work to another country to perform their duties for a limited period.

The Working Environment Act (WEA), with underlying regulations, applies to businesses that employ workers, unless otherwise expressly stipulated in WEA Section 1-2. The working environment legislation will apply on Norwegian territory and will apply to businesses that employ crewmembers who start and end their working period in Norway.

The concept of “home base” in Regulation (EU) no. 965/2012 related to air operations will also be given weight regarding the choice-of-law and clarification of jurisdiction in specific cases.

Based on the ECJ case law, cf. (C-168/16) and (C-169/16), several indicia might be taken into consideration by the national courts with a view to determine the habitual place of employment in the aviation sector: i. the place from which the worker carries out his transport-related tasks, ii. the place where he returns after his tasks, receives instructions concerning his tasks and organizes his work, iii. the place where his work tools are to be found, iv. the place where the aircraft aboard which the work is habitually performed is stationed, and v. the place where the ‘home base’ is located, being understood that its relevance would only be undermined if a closer connection were to be displayed with another place.

Both DAT A/S and UAB DAT LT have referred to Regulation (EC) No 883/2004 and points out that *“[…] it is justified to use the concept of ‘home base’ as the criterion for determining the applicable legislation for flight crew and cabin crew members. However, the applicable legislation for flight crew and cabin crew members should remain stable and the home base principle should not result in frequent changes of applicable legislation due to the industry’s work patterns or seasonal demands.”*

The choice of law rules in the *social security regulation* are given in articles 11 to 16 in the regulation. By amending regulation (EU) no. 465/2012 (regulation 465/2012), the choice of law for flying personnel in this area of law was linked to the term "home base".

CAA Norway does not have the formal competency to enforce the provisions or to determine the choice-of-law under Regulation (EC) No 883/2004 or the Social Security Act.

The choice-of-law rules in this area does not coincide with the choice-of-law rules for individual employment agreements, which means that an assessment must be made in the different legal contexts and in relation to each entitlement. However, in many cases the outcome of the choice-of-law for the employment contract and the choice-of-law for the social security area will often coincide.

The home base regarding Regulation (EU) No 965/2012 is determined by the operator for each individual crew member and is the place where the employee will normally start and end their flights, and where the operator is not normally responsible for accommodation. A temporary change of home base will not automatically lead to a change in the choice-of-law in relation to social security.

Furthermore, article 13 of Regulation (EC) No 883/2004 lays down provisions for persons who carry out work in two or more Member States, which will be able to ensure the necessary stability of social rights.

The Supreme Court of Norway has assumed that, when determining choice-of-law, emphasis must be placed on the EU's rules on choice-of-law in contractual relations as set out in Regulation (EU) No. 593/2008 (the "Rome I Regulation"). This regulation has provisions regarding choice-of-law for individual employment agreements.

According to these provisions, the parties themselves can agree which country's law will apply to the employment agreement. But such an agreement cannot deprive the employee of the rights he or she has under the mandatory rules that would have applied if the parties had not made an agreement.

An agreement on the choice-of-law is valid and binding if it does not imply that the employees' inalienable rights are waived. This applies regardless of the place where the work is otherwise carried out or is carried out from, or the other criteria for the choice of law indicate a law other than the law of the country that the choice of law agreement points out.

As a general principle, CAA Norway is of the opinion that mandatory Norwegian working environment legislation will apply for employees who work from and to a nominated Norwegian home base, even if the employer has not established an operational base as such but operates in Norwegian aviation.

Conclusion

Based on our assessment above, we are of the opinion that both crew from DAT A/S and from UAB DAT LT are considered employees according to the provisions of WEA, Section 1-8. After a review of submitted documentation and contracts, we also are of the opinion that the mandatory requirements in the Working Environment Act will apply for aircrew who are assigned to a Norwegian home base, even if a choice-of-law agreement of application of Maltese law has been entered.

3.4 Posting of workers

3.4.1 Legal basis

The posting rules are a set of special choice-of-law rules, of which the purpose is to require the member states to ensure that a core of minimum rights for workers in a host country are also applied to workers from other member countries who come for a limited time and carry out work in the country.

The posting rules, consisting of the posting directive 96/71/EC, the amending directive (EU) 2018/957 and the enforcement directive 2014/67/EU, aim to ensure fair competition and to ensure the posted workers certain rights at the level of the host country, if this is higher than they otherwise have in their employment relationship.

The posting rules have been implemented partly in the Norwegian Working Environment Act (WEA) Section 1-7, which describes what is meant by posting and in which situations posting shall be deemed to take place. Furthermore, the specific requirements are set out in regulations on posted workers of December 16th 2005.

According to WEA, Section 1-7, a posted employee means herein an employee who for a limited period works in a country other than that with which the employment is normally associated.

Posting of an employee shall be deemed to take place when a foreign undertaking in connection with the provision of services:

a) by agreement with a recipient of services in Norway, posts an employee to Norway for its own account, at its own risk and under its own management, or
b) if an employee is posted to a place of business or undertaking in Norway that belongs to the same group, or
c) in the capacity of temporary employment undertaking or another undertaking that makes employees available, posts employees to an undertaking in Norway.

The posting rules do not oblige member states to establish specific levels of minimum rights. However, the posting rules are special rules on choice-of-law and will consequently have priority over the choice-of-law according to the general choice-of-law rules.

Within their scope, they are applied regardless of which country's law otherwise regulates the employment relationship. This may mean that two sets of choice-of-law rules apply to the same employees, with precedence for the posting rules and the national implementation rules for these, rather than the general choice-of-law rules.

To clarify the range of application of the posting rules, a demarcation and clarification of the posting rules' upper and lower limits must therefore be made, i.e. against the background law and against full application of the host country's law by virtue of the general choice-of-law rules. Factors that characterize aviation, including the form of operation, organisation, personnel attachment, stationing, degree of mobility and contractual relationship, can vary from long-term, permanent stationing to so-called "highly mobile workers", with changing and short-term base affiliation.

The posting rules provides guidance in the assessment of what constitutes a real posting of workers. In the foreword of enforcement directive 2014/67/EU, point 5.5, it is emphasized that the actual conditions to which reference is made in the directive's provisions on the identification of real posting and the prevention of abuse and circumvention, are considered guidance and non-exhaustive. There should not be a requirement that all conditions must be present in every case of a posting.

In accordance with Article 4 of the enforcement directive which has been implemented in Norwegian law, an overall assessment must be made when assessing whether a posted worker temporarily performs his work in a different Member State than the one in which he usually works, where relevant points are listed. The provision concerns how the authorities must decide whether there is a real posting situation. The criteria must be regarded as guidance in the assessment, but not absolute conditions.

The posting rules require an employment relationship, either directly or with a third party. As we addressed above, the posting directive states that it is the host country´s law that applies regarding whether the individual must be considered as an employee.

According to the posting rules, it is a condition for considering an employee as posted that the performance of the employee's work must have a sufficient connection to the territory of the host Member State. Whether there is such a connection must be determined after an overall assessment of the activities the employee has carried out on the territory of the host Member State, the intensity of the connection between the employee's activities and the territory of each Member State where the employee operates.

It is also a condition for the posting rules to be applicable, that the period in question de facto entails a posting of the individual employee for a limited period. In their capacity, crew members are considered highly mobile workers. Aircrew that are working and manning routes in another Member State, may be covered by the posting rules even if it is just for short period of times.

In the road traffic sector, the European Court of Justice (ECJ) has by case law provided a legal basis that work carried out in connection with cabotage tasks has a sufficient connection to the territory of the host Member State in that the driving is fully carried out on the territory of the host Member State. The duration of the cabotage assignment is irrelevant for the assessment of whether such road transport constitutes posting. Based on high mobility in the sector and challenges related to the enforcement of the posting rules, there were adopted specific rules related to posting in the road transport sector in Directive (EU) 2020/1057. The Directive lays down specific rules needed to ensure a balance between the freedom of operators to provide cross-border services/free movement of goods, and adequate working conditions and social protection for drivers. Distinctions are made between different types of transport operations depending on the degree of connection with the territory of the host Member State.

Corresponding rules are not established in relation to the air transport sector, even though the aircrew must be considered as highly mobile workers. It would in our opinion nevertheless be reasonable to look to similar principles in aviation as well when assessments are made regarding posting within the air transport sector.

It is assumed that the conditions relating to posting will not be met when an airline carries out regular flights to or between countries other than the company's country of establishment. Furthermore, an employee who performs very limited services in the territory to which he or she is sent, for example only performs a transit assignment across a state's territory or only to and from the transport company's state of establishment, cannot be considered posted.

A person who usually carries out his work in or from a country can be considered posted to a country, even if he is not only sent to this country, but also performs cabotage flights in other countries and is thus rotated between different countries. In such a case, a person can be considered posted to several countries. It must then be assessed whether the persons concerned have sufficient connections to each individual country.

3.4.2 Regarding the alternatives of posting

WEA paragraph 1-7 (2) option a (see page 10) is a so-called “standard posting”. An air operation based on cabotage flight carried out by the airline itself, will not fulfil the condition for an agreement with a recipient of the service provided.

However, DAT and UAB DAT LT have entered into a service agreement to operate PSO routes, following a public announcement. The fact that the companies have entered an agreement as such, may entail that the activity represents posting regarding WEA Section 1-7 (2) option a.

We do not find it necessary to go further into this assessment since we are of the opinion that the operations nevertheless must be considered as posting according to option b. The legal consequences will be the same regardless which alternative of posting is deemed to apply.

According to WEA Section 1-7 (2) option b, it is not required that an agreement has been entered with a recipient of services in Norway. There will be a posting under this option if an employee is posted to a place of business or undertaking in Norway that belongs to the same group.

The Directive on posting contains no clarification of what is to be considered a corporation containing several companies. This must therefore be decided based on national law. The purpose of the directive dictates that a broad understanding must be used as a basis.

DAT or UAB DAT LT has not established a subsidiary in Norway, but DAT A/S is registered as a Norwegian-registered foreign business (NUF). The directive's second alternative must nevertheless be considered to include provision of services under the direction of both a registered foreign business (NUF) or by a company in the corporation.

Regarding the fact that the companies operate fixed routes in Norway after the allocation of PSO routes, it must be concluded that DAT A/S and UAB DAT LT have established business in Norway.

The companies have established indefinitely operations in Norway, through the allocation of PSO routes, as well as other operations. Based on the companies´ continuing and constant activities in Norway, as well as the arrangements made for accommodation in a crew house in Florø, overnight parking of aircraft, and accommodation of technicians according to the same pattern as other crew, indicates a sufficient connection in Norway. After an overall assessment, it must be concluded that WEA Section 1-7 (2) option b is fulfilled.

According to WEA Section 1-7 (2) option c, a posting of an employee shall be deemed to take place when a foreign undertaking in connection with the provision of services in the capacity of temporary employment undertaking or another undertaking that makes employees available, posts employees to an undertaking in Norway.

Employees who are sent by temporary employment undertaking or another undertaking that makes employees available to an airline to work in another country for a specific period, will represent posting in accordance with WEA Section 1-7 (2) option c. An assessment of the potential posting situation must be made, including both employment status and whether the conditions related to posting are fulfilled.

CAA Norway refer to our assessment and conclusion above regarding UAB DAT LT as an employer for crew who have entered the contractual relationship with F2R. Based on this, we will not go into the assessment of whether option c also could be relevant under the given conditions.

3.4.3 Assessment of whether employees have been posted

Regulations relating to posted employees of December 16th 2005, Section 2, states that: "When determining whether an employee works for a limited period of time in a country other than that with which the employment is normally associated, cf. Section 1-7, subsection 1 of the Working Environment Act, an overall assessment of the work and the employee's situation must be made, which may include the following factors:

a) whether the work is performed in Norway for a limited period of time,
b) the date on which the posting commenced,
c) whether the posting is to a country other than where the employee normally works,
d) whether the employee will return to or is expected to resume work in the country from which the employee was posted,
e) the type of activity that is carried out,
f) whether expenses for travel, board and lodging are covered by the employer that posts the employee and, if so, how expenses are covered,
g) previous periods in which the same or another employee has been posted for the same work".

It is an essential condition for the application of the rules that the posting is for a limited period, cf. point a. The posting rules will not cover simple flights to and from the home base. Flights from the home base to one or more countries, with return to the home base are also not considered time-limited postings, as there must be a sufficient connection to the host country.

Section 2 of the regulation further specifies several elements that must be included in an assessment of whether an undertaking is engaged in actual activities in the country of establishment that go beyond internal management or administration.

An overall assessment must be made of the activities that characterize the business. The provision implements the enforcement directive's article 4 no. 2. This is intended to prevent circumvention by the business pretending to be established in a different country than where the business is located. Such immediacy may be motivated by a desire to utilize low personnel costs through a fictitious choice of law for wages and social costs etc. and with associated jurisdiction.

Based on available information in the present case of DAT A/S and UAB DAT LT, we have no reason to question whether real business is being conducted in the countries of establishment, and it will not be relevant for us to go into more detail in this assessment.

CAA Norway has assessed the provisions and the relevant factors, cf. Section 2 (1).

Ad a and b
According to the submitted master plans, DAT A/S and UAB DAT LT use their crew to operate routes in several countries in rotation patterns. This may involve a rotation with different working periods in different countries, or the crew being routed from the home base country to

duty in two or more countries before returning to the home base country. Based on the submitted documentation, we have access to complete staffing plans over several months, and we are familiar with the duration of the various periods of staffing flights for the businesses.

Ad c and d
According to the Regulation on Air operations (EU) No 965/2012, all crew members must have a defined home base. The crew members in DAT A/S and UAB DAT LT have an assigned homebase. It must be assumed that the crew also operate routes in the country where their home base is in addition to working in other countries. Unlike in other industries, the high mobility means that the personnel largely work in other countries/internationally, and it must be assumed that the posting takes place to a different country than where the employee usually works. After each work period or flight stop in other countries, the personnel return to their home base for days or periods off.

Ad e
Aircrew are considered the most mobile of the mobile workers. This means that it is a challenge to determine which country's law applies at each point in time. The activity that is carried out internally in Norway, including cabotage assignments, must nevertheless be considered an activity based in Norway.

Ad f
Based on information from the company, all expenses for travel (ferrying), diet and accommodation are covered by the employer.

Ad g
The companies have regular and relatively extensive route activity in Norway, Denmark, Italy, and Germany. As described above, the companies use their crew in a fixed rotation to man the scheduled flights. As mentioned, the staffing plans show that there is a large group who work relatively long working periods followed by longer periods off. It is especially crew from UAB DAT LT who work according to such a pattern. The working periods are then usually approx. 15-16 days, but there are also periods of approx. 7-8 days. In some cases, there are also working periods of up to 20 days. There is also part of the scheduling where there is a more even workload in the form of 4-5 days on, and then 3-4 days off. Crew members from DAT A/S and from UAB DAT LT are used for the operations in Norway.

The crew is rotated into Norway with a pattern that varies. Even though the crew from DAT A/S and UAB DAT LT is circulated between different countries, the connection to Norway must be considered substantial. There are also recurring work periods in Norway on a regular basis.

Based on an overall assessment of the available documentation, CAA Norway are of the opinion that the individual services will have to be categorised as posting in accordance with WEA Section 1-7, cf. the Regulation relating to posted employees Section 2.

The extent of the operations in Norway indicates stable and extensive operations in Norway. Although crewmembers are rotated and operates routes in several countries, they still have substantial connection to Norway, and have rather extensive work periods in Norway.

Conclusion

CAA Norway finds that the posted aircrew has an employment relationship, and that the activity is considered posting within the legal framework. We find the aircrew is posted under a temporary assignment and that they are assigned to a location other than where he/she has his/her home base, and that the aircrew return to the home base after the respective work period.

3.4.4 Obligations in connection with posting of workers

A posting of workers initiates obligations in accordance with Section 3 of the regulation. Compliance with these obligations must be controlled and enforced by CAA Norway and other authorities within the respective areas of responsibility.

Irrespective of which country´s laws otherwise regulate the employment, and irrespective of the duration of the period of posting, the following provisions of the Regulations relating to posted employees, Section 3 will apply for posted employees in Norway:

The following provisions of WEA will apply for posted employees in Norway:

a. […Chapters 10, 11, 13 and Section 3-1, Section 3-2, Section 3-5, Section 4-1 to Section 4-5, Section 5-1, Section 5-2, Section 6-1 to Section 6-3, Section 6-5, Section 12-1 to Section 12-9, Section 14-5, Section 14-6, Section 14-8, Section 14-12 to Section 14-14, Section 14-15 subsection 6 and Section 15-9 of Act 17 June 2005 No. 62 relating to working environment, working hours and employment protection, etc. (Working Environment Act)…].

Furthermore, it is stated that: […The provisions in paragraph one shall only apply if the posted employee is not covered by more favourable working and employment conditions by agreement or pursuant to the country's laws that otherwise apply to the employment relationship.]

Foreign companies that send their employees to Norway to carry out work, or have crewmembers based in Norway, are responsible for ensuring that the employees' health, environment, and safety (HSE) are taken care of and in accordance with Norwegian law.

In order to safeguard the employees' health, environment and safety, the employer shall ensure that systematic health, environment, and safety work is performed at all levels of the organisation. This shall be carried out in cooperation with the employees and their elected representatives. Further provisions on the implementation of systematic health, environment and safety work applies in both WEA, and the requirements on documentation of the systematic health, environment, and safety work.

The working environment in the undertaking shall be fully satisfactory when the factors in the working environment that may influence the employees' physical and mental health and welfare are assessed separately and collectively. The standard of safety, health and working environment shall be continuously developed and improved in accordance with developments in society. Reference is made to WEA Chapters 3 and 4, as well as Regulations relating to Systematic Health, Environment and Safety Activities in Enterprises (Internal Control

Regulations/ICR) of December 6th 1996, that further specifies the requirements in WEA, Section 3-1.

4. Administrative decision

Based on our investigations and our conclusions above, CAA Norway has reached the following decision:

a. The Civil Aviation Authority of Norway hereby issue an administrative order in accordance with WEA, Section 18-6, for DAT A/S and UAB DAT LT to comply with the Norwegian Working Environment Act, to ensure crew members that have a nominated Norwegian home base, and who work from and to this home base, a safe working environment in accordance with the provisions listed in WEA, Section 18-6.

b. Furthermore, DAT A/S and UAB DAT LT must comply with the rules that apply to posted workers in Norway, which are laid down in WEA, Section 1-7 and the requirements specified in Regulations relation to posted employees, Section 3 subsection 1 a, which CAA Norway has authority to enforce: WEA Section 3-1, Section 3-2, Section 3-5, Section 4-1 to Section 4-5, Section 5-1, Section 5-2, Section 6-1 to Section 6-3, Section 6-5, Section 14-5, Section 14-6, Section 14-8, Section 14-12 (with the exception of subsection 4 and 5) to Section 14-14, and Section 14-15 subsection 6.

c. To carry out the necessary control of compliance with legislation, DAT A/S and UAB DAT LT, respectively, must submit documentation that will enable control of compliance with the regulations in both situations, cf. WEA, Section 18-5.

   To start with, the following documentation must be submitted:

   i. Internal control subject to documentation, cf. Internal Control Regulations/ICR, Section 5 points 4 to 8.
   ii. Documentation of completed HSE training for managers and security services.
   iii. HSE handbook (or other tool for carrying out systematic HSE work).

The documented HSE work is essential to be able to assess the HSE condition. The documentation must be submitted to the CAA **within April 8th 2024**.

Please note that the CAA will continuously consider following up with an inspection, to verify compliance between the documented HSE work and practice, and the requirements of the WEA and associated regulations. When carrying out further inspections, we will ask for additional documentation that we deem necessary to access.

Please note that we have been informed that a new staffing company (Nordic Crew Supply Ltd) has been established by DAT A/S in Cyprus. CAA Norway will continuously assess the need for further inquiries regarding contractual provisions and other required clarifications. CAA Norway will issue new orders to the extent necessary.

This administrative decision is given to both DAT A/S and subsidiary UAB DAT LT, as separate legal entities, based on the activities in Norway.

The administrative decision is sent by mail to DAT A/S, which has been the primary point of contact. Electronic copies are sent by e-mail to the contact persons for both DAT A/S and UAB DAT LT, robert@dat.dk, krh@dat.dk and mei@dat.dk. Please provide a confirmation that the administrative decision has been received, to our email address postmottak@caa.no.

5. Right to appeal

You have the right to appeal this decision to the Ministry. An appeal must be sent to CAA Norway within three weeks from receipt of this decision. You can read more here: Case processing (luftfartstilsynet.no). You may also contact CAA Norway for further information.

Yours sincerely

Nina Beate Vindvik
Legal Director
Legal and Regulatory Affairs

Anne Helene Hunstad Fodnes
Senior Legal Adviser

This document has been electronically validated, thus eliminating the need for a physical signature.

Copy: Robert Rungholm, Kristian Anders Hvass og Rolandas Meizenis.