

## **The time for aviation in Africa to take off**

### **Growth in Africa**

There has been tremendous growth in the African aviation market, mirroring the continent's economic success. An increase in wealth and demand for air travel has seen many airlines in Africa increase or renew their existing fleets. Most notable are Ethiopian Airlines, Kenya Airways, RwandAir, Air Namibia, Comair and Arik Air with predictions by some that African airlines will require over 900 aircraft in the coming 20 years. The International Air Transport Association (IATA) named Ethiopia the fourth fastest growing air cargo market in the world. Nigeria announced its plans to transform Lagos into a regional aviation hub. Such increased connectivity across the African continent and improved ease of travel will support and promote economic growth across the region.

The continent still faces several challenges, amongst which are real and perceived safety risks, for which the European Union Banned List is a popular reference, and an on-going reluctance to fully implement the Yamoussoukro Decision, which aims to fully liberalise the intra-African air transport market and remove trade barriers to airlines from one African state operating in another. This continuing protectionist approach by most African states has hampered the liberalisation of African skies and reduced opportunities for airlines to become successful pan-African airlines which would attract investment and reduce air fares.

### **Pan-African airlines**

Airlines such as Fastjet have made evident their intentions of becoming a pan-African airline and have successfully introduced new routes between some African countries, such as Tanzania and South Africa. However, this airline continues to face several challenges, not least of which are national regulatory frameworks which hamper these ambitions.

South Africa has witnessed the rise and fall of several airlines, most recently 1Time Airline. More competitive markets have shown that an increase in the number of traditional or low cost airlines lowers air fares, improves connectivity and promotes economic activity.

### **FlySafair, and the challenges faced by new entrants to the market**

The end of 2013 saw the emergence of FlySafair, a low cost scheduled air service provider (a subsidiary of Safair founded in 1969 as a non-scheduled air service provider). Unfortunately, FlySafair encountered these same hurdles and has not yet managed to take flight. In June 2013 Safair applied for an amendment of its existing air service licence to allow it to operate a commercial scheduled air service. The licence was subsequently granted by the Air Service Licensing Council.

### **Interdict**

Shortly thereafter, an interdict was sought restraining Safair from operating the commercial scheduled air service permitted by its amended air service licence, on grounds that more than 25% of the voting rights in the carrier were held by foreign persons. The court granted the interdict. In arriving at its decision the court made reference to the requirement that applicants for an air service licence must be actively and effectively in control of the air service. This requirement appears in the Air Service Licensing Act, 1990 the purpose of which is to ensure that all air services will be operated in a safe and reliable manner.

### **What is 'effective control'**

The court made reference to article 2(9) of the European Regulation 1008/2008 which defines the concept of "effective control" strictly within the context of undertakings and organisations. This interpretation therefore refers to rights derived from contracts, or other sources which allow persons to confer a decisive influence over these organisations, such as voting rights. However, this interpretation does not seem to take into consideration the context within which "effective control" is used in the Act. "Effective control" in section 16(4) (d) of the Act relates to the actual operation of the aircraft and management of the air service to ensure that it is safe and that the carrier remains accountable to the Air Service Licensing Council. In other words, the aircraft should not be operated by an entity other than the holder of the air service licence.

"Effective control" does not, in the Act, refer to voting rights. There is a separate requirement in section 16(4)(c) of the Act which requires at least 75 per cent of the voting rights in respect of the carrier to be held

by residents of South Africa. If the ordinary rules of statutory interpretation were to be applied to the Act then one must conclude that no language is superfluous and that the two requirements – relating to “effective control” and minimum voting rights held by South African persons – must be distinct from one another.

If, as the court held, FlySafair does not have at least 75% of its voting rights held by South African residents then it would be correct that it does not meet the requirement in 16(4)(c). However, it does not automatically follow that FlySafair is not in effective control of the air service. FlySafair may be in effective control of the air service even if more than 25% of its voting rights are held by foreign persons. The operation of a safe and reliable air service should not be conflated with the control and decision-making structures within a company.

FlySafair has changed its corporate structure, concluded a Black economic empowerment deal and successfully reapplied for a commercial scheduled air service licence which was granted by the Air Service Licensing Council in April 2014. It now faces a new round of objections before the Licensing Council in September 2014.

### **The year 2014**

Many hurdles need to be overcome if African aviation is to reach its full potential. Airlines, however, have not given up.

Skywise has said that it is working to comply with several civil aviation regulations and will be operating soon. Pak Africa is resurrecting 1Time. Former SAA CEO has partnered up with Theunis Potgieter and Jerome Simelane to launch Fly Blue Crane, a new South African domestic airline. Fastjet has also persisted with its ambitions to become a pan-African airline.

The coming years of aviation will be ones to watch. Only cooperation between states and the removal of needless barriers will ensure that growth in this industry is not stifled in Africa.

**Fabio Miceli**

**Associate**

**Norton Rose Fulbright**