

## REVIEW OF THE BILATERAL AIR SERVICE AGREEMENTS WITHIN THE NIGERIAN CIVIL AVIATION CONTEXT



**T**he Director-General of the Nigerian Civil Aviation Authority at a press conference held in January, 2017 revealed that as at December, 2016, Nigeria had executed Bilateral Air Service Agreements with 90 countries. However, it is quite important to note that only about thirty-nine of these executed agreements are active.

Over the years, questions have been raised as to the effectiveness and profitability of these Agreements to the Nigerian economy.

This GEPLAW Focus Report analyses the Country's position during the negotiation of these Agreements and the issues flowing from them alongside other related concerns within the Nigerian Air Transport Industry.

### NEGOTIATION OF BILATERAL AIR SERVICE AGREEMENTS: THE NIGERIAN PERSPECTIVE

Bilateral Air Service Agreements ("BASAs") are treaties signed between Countries to allow international commercial air transport services between territories. BASAs promote

international air link between countries, which supports and enables movement of persons, cargo, trade and tourism. These agreements provide the framework under which identified airlines from the two countries fly into designated ports in each other's country. It usually covers issues regarding traffic rights, use of intermediate routes, type of aircraft, safety standards, competition, policy on ownership, design and control of airlines, etc in order for both countries to benefit from the agreement, fares and tax issues.

Negotiations to enter into BASAs are usually spearheaded by the Ministry of Aviation after extensive consultation with Aviation regulatory authorities and concerned institutions, for example, immigration authorities. However, it is quite common to see airline operators, desirous of expanding their routes to a target destination, lobby the Ministry of Aviation through diplomatic channels, to engage in formal talks which usually lead to the commencement of negotiations between countries. In general, BASAs are negotiated based on the five freedoms prescribed under the International Air Transport Agreement ("IATA") which are



stated as follows:

- 1) The privilege to fly across a state's territory without landing,
- 2) The privilege to land for non-traffic purposes, for example, for refuelling, repairs and maintenance,
- 3) The privilege of an airline from one country to carry traffic from its own country to another country,
- 4) The privilege of an airline from one country to carry traffic from another country to its own country and
- 5) The privilege of an airline from one country to carry traffic between two other countries, provided that the flight originates and terminates in its own country.

Out of the five freedoms mentioned, the first two freedoms are considered technical rights while the last three are considered economic and commercial traffic rights.

In Nigeria, negotiations are largely conducted based on economic considerations and reciprocity under the last 3 freedoms to ensure fair and equal opportunities. For example, under Article 10 of the Bilateral Air Service Agreement between Nigeria and the United Kingdom, the Commercial Opportunities Clause, the designated airlines are allowed to have at least one of its own staff in the foreign country, a sales office and airline agents. The Clause also specifically provides that a contracting party shall be allowed to establish and maintain a ticket sales office in the territory of the other contracting party and shall be allowed to maintain residence and accommodation, employment, managerial, sales, technical, operational and other specialist staff requirement for the provision of air transportation in accordance with the existing laws and regulations in operation in the Country. This provision effectively affords each designated airline the opportunity to effectively conduct business in the countries being served.

Consequently, Nigerian airlines are allowed the reciprocal opportunity to conduct business and attract customers in the United Kingdom. However, as attractive as the concept of reciprocity of rights is in BASAs negotiation, Nigeria as an economy is not primed to take full advantage of the concept. This is because the concept of reciprocity of rights must be exploited within the body of the existing regulatory framework of each participant country. Consequently, whereas the United Kingdom's extant laws on commerce, immigration and registration of companies are robust enough to streamline foreign entry into their domestic market; Nigerian extant laws are not yet that robust. This results in a huge gap between Nigerian airlines and their foreign counterparts.

Another example of the effect of commercial considerations in negotiating BASAs can be found under the 2008 Memorandum of Understanding between Nigeria and the United Kingdom which amended the existing BASA between the Countries. This Memorandum specifically provides that any Airline holding an Air Operators Certificate from one state may, subject to applicable laws and regulations governing competition, enter into Code Sharing arrangements with any other airline or airlines. Code Sharing, within the aviation context, is where two or more airlines operate the same flight and tickets can be purchased on one airline which is actually being operated by a cooperating airline under a different flight number or code. The airline that operates the flight is called the Operating Carrier, while the company(ies) that sell the tickets for the flight but do not operate the flights are called the Marketing Carrier.

However, it is important to note that the flexibility of the provisions relating to the Nigeria-UK BASA are subject to certain conditions which are notably absent in the BASA between Ghana and Nigeria which grants the same opportunity for co-operative marketing arrangements under

Article 11. This difference can be attributed to the Yamoussoukro Declaration that called for a complete liberalisation of the African air space and of which Nigeria is a signatory. The Declaration has been nationalised under Article 8.1 of the Nigerian Civil Aviation Policy, 2013. It is quite crucial to note that the Declaration is for the liberalisation of the African air space to foreign countries and this benefit does not necessarily incur to the benefit of counterpart African countries.

#### ROLE OF BARGAINING POWER IN NEGOTIATIONS

The bargaining power of the negotiating countries plays a significant role in the negotiations of the BASAs. In determining bargaining power of negotiating countries, the following should be considered:

- a) the air transport policy of each party (whether liberal or restricted);
- b) the volume of the air transport market of each party and,
- c) the size of each country's national carrier.

In analysing the issues inherent in the current BASAs, we must understand Nigeria's position bearing in mind the foregoing considerations.

Nigeria is generally viewed as having one of the most liberalised air transport industries in Africa. As mentioned earlier, Nigeria is a signatory to the Yamoussoukro Declaration and has implemented the declaration into its national air transport policy.. The Yamoussoukro Decision calls for, among others:

- a) Full liberalization of intra-African air transport services in terms of access, capacity, frequency, and tariffs;
- b) Free exercise of first, second, third, fourth and fifth freedom rights for passenger and freight air services by eligible airlines (These rights, granted by most international air service agreements, enable, among others, non-national carriers to land in a state and take on traffic coming from or destined for a third state.);
- c) Liberalized tariffs and fair competition, and
- d) Compliance with established ICAO safety standards and recommended practices.

In 2015 at the African Union Summit in Addis Ababa, Nigeria recommitted to the complete implementation of the Yamoussoukro Decision by 2017. This zealously, although commendable, must be critically monitored especially with regard to Nigeria's bargaining power in its negotiations of BASAs to ensure full economic realisation of

the benefits of these BASAs.

Although Nigeria currently lacks a National Carrier, a number of foreign airlines operate to and from the Country at varying levels of frequencies to multiple destinations from Nigeria's international airports located in Lagos, Abuja, Port-Harcourt and Kano. In addition, prospective foreign airlines are permitted and encouraged to enter into the Country to operate flights to, from and within the Country. However, the said operation is always subject to extensive conditions found under Part 10 of the Nigerian Civil Aviation Regulations which prohibits foreign air operators from operating into, out of or within the Country without obtaining Operation Specifications issued solely by the Nigerian Civil Aviation Authority.

In addition to foreign carriers, Nigeria also has privately owned carriers that operate both domestically and internationally. According to World Bank statistics, in 2015, Nigeria had an estimated number of 52,496.8 international and domestic departures worldwide by carriers registered in Nigeria. However, this figure is significantly lower than the estimated 65,631.5 reported in 2012. As such, it is clear that Nigeria's air transport industry saw a sharp decline after the fall in oil prices reported in 2014. The fall in oil prices weighed heavily on the financial market in Nigeria and resulted in negative effects on foreign exchange thereby leading to a sharp increase in the cost of airline operations. A number of international and domestic air carriers were forced to cease operations.

The foregoing may lead to the conclusion that Nigeria, although still competitive within Africa, has a significantly weaker bargaining power when faced with BASAs with non-African Countries thereby leading to an imbalance when entering into negotiations and renegotiations with results spanning from increased dominance of foreign airlines to capital flight.

For example, after the renegotiations of the BASA between Nigeria and Qatar, Harold Demuren, the former Director-General of the Nigerian Civil Aviation Authority, in a 2016 press stated that the agreement gave Qatar's designated airline, which, at the time, had seven frequencies into Nigeria, more entry points into the Country thereby compounding the problems of domestic airlines. His argument was that the Country did not have an indigenous carrier to compete favourably with Qatar Airways thereby making the Agreement one-sided despite the confidence of the Minister of Finance, Mrs. Kemi Adeosun that the signing of the agreement would lead to much more investments and business opportunities between Qatar and Nigeria.



## THE NATIONAL CARRIER ARGUMENT

The Formal Director-General of the NCAA is not alone in his contention that the Government should invest in the revival of the National Carrier. The argument broadly circles around Nigeria's competitiveness under its active BASAs in that it is believed that a National Carrier would be able to operate in foreign countries much like Qatar Airways, British Airways, Ethiopian Airlines and other foreign national carriers. In addition, it has been argued that a national carrier would be based in the Country, thereby creating jobs and business opportunities for the citizens of Nigeria. However, the reality of operating a national carrier is not as clear cut. A national carrier, unlike other Government owned institutions, must be run as a business. In arguing for a national carrier, a lot of confidence is inadvertently placed on the Ministry of Aviation's ability to operate the national carrier as a profitable business. The Ministry would be expected take pains to ensure that costing, pricing, advertising, marketing and other business fundamentals are effectively and efficiently carried out to a professional standard.

Currently, the national carrier would be subject to the same difficulties being faced by private carriers. As such, the Government should focus on creating a more conducive business environment within which a national carrier may strive. Once this has been achieved, the Government may consider entering into a Public Private Partnership ("PPP") with a strong private investor whose expertise should bring the desired professional and strategic business planning to ensure success.

## CONCLUSION

It is apparent that certain BASAs have been negotiated or

renegotiated without extensive consideration of the commercial elements required for the industry to experience the proposed targeted benefits of BASAs neither has there been much emphasis on the economic realities under which the Country is operating. For example, most Agreements provide for royalties to be paid to the Nigerian Government where the nominated Nigerian air carriers are unable to reciprocate under the Agreement. This measure may be a sound way of boosting Government revenue under the Agreement but it does nothing commercially for the industry. In some cases, agreements have been signed to stop the payment of these royalties altogether. In stark contrast, in 2014, Emirates entered into an Agreement with South African authorities for additional frequencies from South Africa to Dubai. It was reported that the additional frequencies were granted on the condition that the airline pay 40 per cent of the cost of each ticket to South Africa Airways. As such, there was a commercial benefit to the national carrier and the nation, by extension. It is recommended that the Government consider similar options or other commercial options so as to give an incentive for indigenous carriers to continue operations and possibly expand their operations internationally. The idea is not to reduce the frequencies or entry points of foreign carriers but to increase the indigenous air transport industry to a level of competitiveness that would rival that of any foreign country. Furthermore, the Government and industry stakeholders must look internally to the improvement of aviation infrastructure and other related areas in order to strengthen our bargaining power before seeking to renegotiate current agreements or negotiate future agreements.