

CIVIL AVIATION REGULATION (REFORM) ACT, 2003

No. 15



of 2003

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SCHEDULE

An Act to reform the regulation of scheduled air transport services

Date of Assent: 27th August, 2003

Date of Commencement: On Notice

ENACTED by the Parliament of Botswana.

PART I — *Preliminary*

Short title and
commence-
ment

1. This Act may be cited as the Civil Aviation Regulation (Reform) Act, 2003, and shall come into operation on such date as the Minister may, by Order published in the Gazette, appoint.

Interpretation

2. In this Act, unless the context otherwise requires —

“Air Botswana” means Air Botswana as registered under the Companies Act;
“air transport licence” means a licence issued by the Regulator, granting an operator the authority to carry passengers, mail or cargo, by air, for hire or reward, on such scheduled air transport services, and subject to such conditions, as may be specified in the licence;

“closing date” means the date when all or part of Air Botswana’s equity is first owned by a person other than the Government;

“exclusivity period” means the period commencing on the closing date and ending on the fifth anniversary of the closing date;

“IATA” means the International Air Transport Association;

“Independent Regulator” means the independent body responsible for the economic regulation of civil aviation, that may be established;

“licensee” means the holder of an air transport licence;

“maximum tariff” means the maximum tariff that may be charged by the licensee in connection with an air route, as set out in the relevant air transport licence;

“national” means an individual, company, government or agency thereof, or trust established by an individual, company, government or agency thereof, that is not a non-national;

“non-national” means —

(a) an individual, other than a Botswana citizen;

(b) a body corporate incorporated, formed or otherwise organised outside Botswana;

(c) a foreign government or an agency thereof;

(d) a body corporate that is effectively controlled by a non-national, as defined in any of paragraphs (a) to (c) of this section;

(e) a trust —

(i) established by a non-national, as defined in any of paragraphs (b) to (d) of this section, other than a trust for the administration of a pension fund for the benefit of individuals, the majority of whom are nationals, or

(ii) in which non-nationals, as defined in any of paragraphs (a) to (d) of this section have more than 50% of the beneficial interests; or

(f) a body corporate that is effectively controlled by a trust described in paragraph (e) of this section;

“operator”, in relation to an air service, means a person providing, or offering to provide, an air service;

“Regulator” means —

(a) the Independent Regulator; or

(b) until the Independent Regulator is established, the Director of Civil Aviation; and

“tariff cap mechanism” means an independent, fair and transparent method of adjusting tariffs to offset inflation and other factors, set out in the Schedule hereto.

3. A body corporate shall be deemed to be effectively controlled by a person if —

(a) the securities of the body corporate to which are attached more than 50% of the votes that may be cast to elect the directors of the body corporate are held, otherwise than by way of security only, by, or for the benefit of, that person; and

(b) the votes attached to the securities referred to in paragraph (a) are sufficient, if exercised, to elect a majority of the directors of the body corporate.

4. An air transport service operator shall be deemed to be substantially owned by nationals if such nationals beneficially own, in the aggregate, more than 50% of the equity of such air transport service operator.

5. Any person who beneficially owns, directly or indirectly, more than 35% of the equity of any licensee shall be prohibited from beneficially owning more than 10% of the equity of any other licensee.

PART II — *Domestic and International Air Routes*

6. (1) The Regulator shall issue, to Air Botswana, an air transport licence for the routes for which Air Botswana provides scheduled air transport services on the closing date:

Provided that, in relation to such route, Air Botswana declared, to the Regulator, prior to the closing date, its intent to continue to provide such service.

(2) The Regulator shall issue, to Air Botswana, an air transport licence in relation to the air routes for which it does not provide scheduled air transport services on the closing date if, in relation to such route, Air Botswana declares to the Regulator, within 6 months of the closing date, its intent to provide such service:

Provided that Air Botswana commences service on such route prior to the first anniversary of the closing date.

7. (1) An air transport licence issued to Air Botswana under section 6 shall confer, on Air Botswana, the right, during the exclusivity period, to be the only provider of scheduled air transport services on the air routes covered by the air transport licence, and no other air transport licence shall confer such right on any other operator.

(2) Notwithstanding the provisions of subsection (1), if Air Botswana abandons or fails to perform on any air route referred to in subsection (1) before the exclusivity period expires, its air transport licence for that route may be revoked.

When body corporate may be deemed to be effectively controlled by a person

When air transport service operator may be deemed to be substantially owned by nationals
Limitation on equity ownership

Domestic air transport licence

Effect of air transport licence

Licensing of air routes after exclusivity period, etc.

8. After the expiry of the exclusivity period, or the six month period or the first anniversary referred to in section 6(2) without commencement of service by Air Botswana, or the routes referred to in section 7(2), as the case may be, licensing for such routes shall be the function of the Regulator.

Air Botswana to be sole designated airline during exclusivity period

9. Until the expiry of the exclusivity period, the Government shall ensure that Air Botswana is Botswana's designated airline for all international air routes:

Provided that, at all times, substantial ownership and effective control of the licensee is vested in one or more nationals.

PART III — *Tariff cap mechanism*

Increases in maximum tariff

10. Until the third anniversary of the closing date, or the first anniversary of the establishment of the Independent Regulator, whichever is the later, all increases in the maximum tariff shall be made in accordance with the tariff cap mechanism, and thereafter, all increases in the maximum tariff shall be determined by the Independent Regulator.

Licensee may charge less than maximum tariff

11. Nothing in this Act shall be construed as prohibiting a licensee from charging less than the maximum tariff for any given route.

Application of tariff cap mechanism

12. Notwithstanding any other provision of this Act or any other written law to the contrary, the tariff cap mechanism, referred to in section 10, shall apply to all operators of domestic and international scheduled air transport services.

PART IV — *Miscellaneous provisions*

Monitoring compliance with the Act

13. (1) The Regulator shall ensure that a licensee complies with the provisions of this Act.

(2) A licensee shall provide to the Regulator, within 10 days from the date of a request being made by the Regulator, such information as the Regulator may require to enable it to monitor compliance by the licensee with the licensee's obligations under this Act.

Appeals

14. A person who is aggrieved by anything done under this Act may, within 28 days of the decision being made, appeal to the High Court.

Offences and penalties

15. A person who contravenes any provision of this Act, any condition of an air transport licence, or any decision of the Regulator, shall be guilty of an offence and liable to a fine of not less than P500,000, but not more than P5,000,000 and, where such person is a licensee, the Regulator may revoke any or all of the licensee's air transport licences.

Regulations

16. The Minister may make regulations for the better carrying out of the provisions of this Act.

SCHEDULE
(Section 2)

TARIFF CAP MECHANISM

1. In this Schedule, unless the context otherwise requires — Interpretation
“adjustment” means —
(a) the tariff increase approved by the IATA Tariff Co-ordinating Conference; or
(b) the Botswana Consumer Price Index increase most recently published by the Central Statistics Office,
whichever is the greater:
Provided that, in the absence of the tariff increase by the IATA Tariff Co-ordinating Conference, the Botswana Consumer Price Index shall apply.
2. This tariff cap adjustment mechanism shall apply to domestic and international air routes: Application
Provided that, in relation to international routes, only paragraph 1(a) shall apply.
3. The purpose of this tariff cap adjustment mechanism is the assurance of an independent, fair and transparent mechanism to adjust tariffs to offset inflation and other factors. Purpose
4. Within 30 days of the approval, in whole or in part, of a tariff increase proposed by a licensee, the Regulator shall notify the licensee of the adjustment. Notification
5. The maximum tariff shall be increased by adjustment. Such increase shall become effective immediately following the notification of a tariff increase by the IATA Tariff Co-ordinating Conference or the publication of the Consumer Price Index by the Central Statistics Office, as the case may be. Increase
6. Paragraphs 4 and 5 shall apply *mutatis mutandis* to a tariff increase resulting from an IATA recommendation not solicited by a licensee, and, “adjustment”, for the purposes of paragraphs 3 and 4, shall refer only to that tariff increase. Unsolicited recommendation
7. A licensee may petition the Regulator for permission to increase the maximum tariff in order to compensate for — Extraordinary events
(a) a cumulative devaluation of 20% or more in the value of the Pula against the United States Dollar:
Provided that —
(i) the devaluation has occurred within any period of 90 consecutive days or less, and
(ii) the devaluation has remained in effect for at least 120 consecutive days calculated from the date the threshold of 20% has been achieved;
(b) a cumulative increase of 20% or more in the price of aviation fuel in Pula:

Provided that —

- (i) the increase has occurred within any period of 90 consecutive days or less, and
- (ii) the increase has remained in effect for at least 120 consecutive days calculated from the date the increase threshold of 20% has been achieved.

PASSED by the National Assembly this 4th day of August, 2003.

A. MATLHAKU,
Clerk of the National Assembly.