

African Union, African Regional Bodies

Decision relating to the implementation of the Yamoussoukro declaration concerning the liberalisation of access to air transport markets in Africa

Annex 5 to the Yamoussoukro Decision: Regulations on Competition in Air Transport Services within Africa

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Annex 5 to the Yamoussoukro Decision: Regulations on Competition in Air Transport Services within Africa
 Contents

- Chapter One – Purpose, definitions, objectives and the scope of application 2
 - Article 1 – Definitions 2
 - Article 2 – Object and scope of application 3
 - Paragraph 1. 3
 - Paragraph 2. 3
- Chapter Two – Prohibited practices, agreements and decisions 3
 - Article 3 – Anti-competitive practices, agreements and decisions 3
 - Paragraph 1. 3
 - Paragraph 2. 3
 - Subparagraph (a) 3
 - Subparagraph (b) 3
 - Subparagraph (c) 3
 - Subparagraph (d) 3
 - Subparagraph (e) 3
 - Subparagraph (f) 3
 - Paragraph 3. 3
 - Subparagraph (a) 3
 - Subparagraph (b) 3
 - Subparagraph i. 3
 - Subparagraph ii. 4
 - Subparagraph iii. 4
 - Subparagraph iv. 4
 - Article 4 – Abuse of dominant position 4
 - Paragraph a) 4
 - Subparagraph i. 4
 - Subparagraph ii. 4
 - Subparagraph iii. 4
 - Paragraph b) 4
 - Subparagraph i. 4
 - Subparagraph ii. 4
 - Subparagraph iii. 4
 - Subparagraph iv. 4
 - Paragraph c) 4

Subparagraph i.	4
Subparagraph ii.	4
Subparagraph iii.	4
Subparagraph iv.	4
Paragraph d)	4
Article 5 – Non-discrimination in national and regional legislation and administrative measures	4
Paragraph 1.	4
Paragraph 2.	5
Article 6 – Subsidies	5
Paragraph 1.	5
Paragraph 2.	5
Article 7 – Exemptions and safeguard measures	5
Paragraph 1.	5
Paragraph 2.	5
Paragraph 3.	5
Paragraph 4.	5
Paragraph 5.	5
Paragraph 6.	5
Paragraph 7.	5
Paragraph 8.	5
Paragraph 9.	5
Paragraph 10.	5
Paragraph 11.	5
Chapter Three – Enforcement, investigation, negotiation, arbitration and judicial review	6
Article 8 – The Executing Agency and regional competition authorities	6
Paragraph a)	6
Paragraph b)	6
Paragraph c)	6
Paragraph d)	6
Paragraph e)	6
Paragraph f)	6
Paragraph g)	6
Article 9 – Complaints	6
Paragraph 1.	6
Paragraph 2.	6

Paragraph 3.	6
Paragraph 4.	6
Article 10 – Investigation and procedural fairness	6
Paragraph 1.	6
Paragraph 2.	6
Paragraph 3.	6
Article 11 – Hearing of the Parties concerned	6
Article 12 – Outcome of complaint	7
Paragraph 1.	7
Paragraph 2.	7
Paragraph 3.	7
Article 13 – Provisional measures	7
Paragraph 1.	7
Paragraph 2.	7
Paragraph 3.	7
Article 14 – Cooperation with Member State authorities and access to information	7
Paragraph 1.	7
Paragraph 2.	7
Paragraph 3.	7
Paragraph 4.	7
Article 15 – Penalties	7
Paragraph 1.	7
Subparagraph (a)	7
Subparagraph (b)	7
Subparagraph (c)	7
Paragraph 2.	7
Paragraph 3.	8
Article 16 – Review of the decisions of the Executing Agency	8
Article 17 – Dispute settlement among State Parties	8
Article 18 – Professional secrecy	8
Paragraph 1.	8
Paragraph 2.	8
Article 19 – Publication of decisions	8
Paragraph 1.	8
Paragraph 2.	8

Article 20 – Implementation provisions	8
Subparagraph a)	8
Subparagraph b)	8
Subparagraph c)	8
Subparagraph (i)	8
Subparagraph (ii)	8
Subparagraph d)	8
Subparagraph e)	8
Subparagraph f)	8
Subparagraph g)	8
Article 21 – Amendments	8
Paragraph 1.	8
Paragraph 2.	9
Paragraph 3.	9
Article 22 – Entry into force	9

African Union

**Decision relating to the implementation of the Yamoussoukro declaration
concerning the liberalisation of access to air transport markets in Africa**

**Annex 5 to the Yamoussoukro Decision: Regulations
on Competition in Air Transport Services within Africa**

Published

Commenced

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WE, the Ministers responsible for Transport, Infrastructure, Energy and Tourism meeting at the First Ordinary Session of the African Union Specialized Technical Committee on Transport, Transcontinental and Interregional Infrastructure, Energy and Tourism in Lome, Togo, 17th March 2017 have adopted these Regulations developed by the Bureau of the Conference of African Ministers of Transport, meeting in Malabo, Republic of Equatorial Guinea, on 18th and 19th December 2014, on the occasion of the Fourth Meeting of the Bureau of the Conference of African Ministers of Transport dedicated mainly to implement the Executive Council Decisions EX. CL/Dec. 826(XXV) endorsing the report of the Third Session of the Conference of African Ministers of Transport (CAMT);

CONSIDERING the Constitutive Act of the African Union adopted in Lome on 11th July 2000, namely its Article 3, 5, 6, 9, 13, 14, 15, 16 and 20;

CONSIDERING the Treaty establishing the African Economic Community signed in Abuja on 3rd June 1991, namely its articles 8, 10, 11, 13, 25 to 27;

CONSIDERING the Decision relating to the implementation of the Yamoussoukro Declaration concerning the liberalization of air transport markets access in Africa of 14th November 1999, hereinafter called the Yamoussoukro Decision;

CONSIDERING the African Union Commission's Statutes adopted by the Assembly of the African Union in Durban (South Africa) on 10th July 2002;

CONSIDERING EX. CL/Dec. 359 (XI) wherein the Executive Council endorsed the Resolution of the 3rd Session of the Conference of African Ministers of Transport (CAMT) in Malabo, Equatorial Guinea in 2014 entrusting the functions of the Executing Agency of the Yamoussoukro Decision of 1999 to the African Civil Aviation Commission (AFCAC), hereinafter called the Executing Agency

CONSIDERING the Resolution on the follow-up of the implementation of the Yamoussoukro Decision of 1999 adopted by the First African Union Conference of Ministers responsible for air transport in Sun City (South Africa) in May 2005;

CONSIDERING the Resolution on air transport safety in Africa adopted by the Second Conference of African Union Ministers responsible for air transport in Libreville (Gabon) in May 2006;

CONSIDERING the need to speed-up the full implementation of the Yamoussoukro Decision with a view to giving a boost to the operations of African airlines and other air transport service providers and effectively meeting the challenges of globalisation of international air transport;

DESIROUS OF ensuring fair opportunity on a non-discriminatory basis for the designated eligible African airlines, to effectively compete in providing air transport services within the African Air Transport Market.

HEREBY MAKE THE FOLLOWING REGULATIONS:

Chapter One Purpose, definitions, objectives and the scope of application

Article 1 – Definitions

In these Regulations, unless the context otherwise requires:

"**Abuja Treaty**": the Treaty Establishing the African Economic Community adopted at Abuja, Nigeria on the 3rd day of June, 1991 and which entered into force on 12 May 1994.

"**African Air Transport Executing Agency**": the Executing Agency provided for in the Article 9 of the Yamoussoukro Decision.

"**Airline**": an air transport enterprise holding a valid Air Operating Certificate and operating air transport services within the territory of a State Party.

"**Aeronautical Authority**": any Governmental authority, body corporate or organ duly authorised to perform any function to which these Regulations relate.

"**Capacity**": the number of seats and cargo space offered to the general public on air services over a given period and in a given sector.

"**Concerted practice**": means co-ordination between airlines that, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation to the exclusion of competition;

"**Competent authority**": means anybody established in each State Party charged with regulating competition in the air transport sector, or in absence of such an institution, the Civil Aviation Authority.

"**Dominant position**": means a position of one or more airlines which enables them to prevent effective competition being maintained within the market or apart of thereof, by giving them the power to behave to an appreciable extent independently of their competitors, their suppliers, their customers or end users.

"**Excessive capacity**": means more capacity than that reasonably required on a route or in a given sector.

"**Excessively high price**": means the price of a service which bears no reasonable relation to the economic value of that service and reasonable profit margin.

"**Excessively low price**": means the price of a service which bears no reasonable relation to the economic value of those services.

"**Market**": means a relevant geographic area, including routes or sector thereof and a relevant air transport service provided by an airline.

"**Member State**": means a Member State of the African Union.

"**Regional competition authority**": means an authority set up by a regional economic community with mandate to regulate and supervise the implementation of these regulations.

"**Regional Economic Community**": means a regional economic community recognised as such by the African Union.

"**Regional YD Authority**": means an authority set up by a regional economic community with mandate to regulate and supervise the implementation of the Yamoussoukro Decision within the territory of the regional economic community concerned.

"**State Party**": means each African State signatory to the Abuja Treaty and such other African country which, though not a party to the said Treaty, has declared in writing its intention to be bound by the Yamoussoukro Decision and these Regulations.

"Scheduled and non-scheduled air services": bear the same meaning assigned to them in the Chicago Convention of 1944 and in resolutions of the Council of the International Civil Aviation Organization (ICAO).

"Trade association": an association of airlines with the aim of promoting cooperation activities of its members.

Article 2 – Object and scope of application

1. The purpose of these Regulations is to promote and guarantee free and fair competition in air transport services within Africa in order to develop the air transport industry and to contribute to the welfare of the citizens of the State Parties.
2. This Decision shall apply to scheduled and non-scheduled air transport services within the State Parties, including any practice, agreement or conduct thereto which might have an anti-competitive effect within the separate and joint territories of the regional economic communities and within the entire African continent.

Chapter Two Prohibited practices, agreements and decisions

Article 3 – Anti-competitive practices, agreements and decisions

1. Any practice, agreement or decision which negates the objective of free and fair competition in air transport services shall be prohibited. To this end, State Parties shall undertake to ensure that any agreement between airlines, any decision taken by associations of airlines and any concerted practice which negatively affect the liberalization of air transport services within the continent of Africa and which has as its object or effect the prevention, restriction or distortion of competition within the continent of Africa, is prohibited.
2. Subject to paragraph 2(a) and Article 7 of these Regulations, anti-competitive practices and agreements, shall be deemed illegal. Such practices include, but are not limited to, any agreement between airlines, any decision by associations of airlines and any concerted practice which:
 - (a) directly or indirectly fixes purchase or selling or any other trading conditions including charging prices on routes at levels, which are in the aggregate, insufficient to cover the direct operating costs of providing the services to which they relate;
 - (b) limits or controls markets, technical development, or investment;
 - (c) involves the addition of excessive capacity or frequency of services;
 - (d) divides markets or sources of supply by allocating passengers, territories, or specific types of services;
 - (e) applies dissimilar conditions to similar transactions with other airlines, thereby placing them at a competitive disadvantage;
 - (f) makes the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contract; and; has a detrimental effect on consumers.
3.
 - (a) Any practice, agreement or decision prohibited or deemed illegal pursuant to this Article shall be void unless a party proves that technological efficiency or other pro-competitive gain outweighs the alleged anti-competitive effect.
 - (b) Without prejudice to the generality of paragraph (a) any practice, agreement or decision shall not be deemed to be anti-competitive unless:
 - i. it is sustained rather than temporary;

- ii. it has an adverse economic effect on or cause economic damage to any competitor;
- iii. it reflects an apparent intent or has the probable effect of crippling, excluding or driving any competitor from the market; or
- iv. it limits the rights or interests of consumers.

Article 4 – Abuse of dominant position

Any abuse by one or more airlines of a dominant position within State Parties shall be prohibited insofar as it may affect air transport services at the regional or at the African continent level. Such abuse may include:

- a) directly introducing unfair trading conditions to the prejudice of competitors such as:
 - i. the introduction on a route or sector thereof of excessive capacity, which is likely to have an adverse impact upon any competing airline;
 - ii. the introduction by an airline on a route or sector thereof of an excessively low price, which is likely to have an adverse impact on any competing airline and is likely to be perceived as specifically designed, targeted and intended to keep out a new airline or to drive out another airline; or
 - iii. the introduction by an airline on route or sector thereof of an excessively high price because of lack of a price competition or collusion.
- b) limiting capacity or markets to the prejudice of consumers such as:
 - i. charging excessively high prices to the detriment of consumers;
 - ii. the introduction by an airline on a route or sector thereof of capacity, which is designed, targeted and intended to drive out another airline;
 - iii. the intentional under-supply, by an airline, of capacity contrary to the set objectives of healthy and sustained competition; or
 - iv. the allocation of capacity by an airline on a route in a manner which is unduly discriminatory including requiring consumers not to use the services of a competitor;
- c) applying dissimilar conditions to similar transactions with other trading parties, thereby, placing them and/or resulting in other airlines being placed at a competitive disadvantage including discriminating between different consumers and competitors in equivalent transactions of services of like quality in terms of:
 - i. the price charged;
 - ii. any discount, allowance, or rebate given or allowed in relation to the supply of services;
 - iii. the provision of services;
 - iv. payment for services; or
- d) making the conclusion of contracts subject to acceptance by the other parties, of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 5 – Non-discrimination in national and regional legislation and administrative measures

1. Legislation or administrative measures in the territory of a State Party or of a regional economic community shall not discriminate against the provision of services by airlines or associations of airlines of State Parties.

2. A State Party or a regional economic community may, before enacting legislation or adopting administrative measures which in their view may have the effect of discriminating against airlines of other State Parties, invite The Executing Agency to review the legislation in question and recommend appropriate amendment of any provision that may directly or indirectly permit or promote anti-competitive behaviour.

Article 6 – Subsidies

1. These Regulations prohibit the granting of any subsidy by any State Party or regional economic community which distorts or threatens to distort competition.
2. The Executing Agency shall propose guidelines and implementing rules indicating circumstances under which subsidies may be granted.

Article 7 – Exemptions and safeguard measures

1. The Executing Agency may, by these Regulations, exempt any particular practices, agreements or decisions which may have been deemed illegal or prohibited under Article 3 hereof.
2. The Executing Agency may, on application by an airline of a State Party, approve measures designed to remedy any adverse effects the State may experience by reason of the implementation of the provisions of these Regulations.
3. Copies of all applications for exemption under paragraph 1 hereof shall be sent to all relevant regional competition authorities and the Executing agency.
4. Notwithstanding paragraph 1 of this Article, in the event of negative economy factors prevailing in a State Party following the application of the provisions of these Regulations, the State Party concerned shall, after informing the relevant regional competition authority and the Executing Agency take the necessary safeguard measures pending the written approval of the regional competition authority and/or the Agency.
5. These safeguard measures shall remain in force for a maximum period of one year and shall not distort or threaten to distort competition.
6. The regional competition authority and or the Executing Agency shall examine the method of application and the effects of these safeguard measures while they remain in force and shall in all cases determine whether any measure taken pursuant to Article 7(5) hereof distorts, threatens to distort or has the effect of distorting competition.
7. The regional competition authority and/or the Executing Agency shall recommend the withdrawal, determination or suspension of such a safeguard measure in the event of a negative determination in terms of the impact thereof.
8. Any recommendation for the withdrawal, termination or suspension shall clearly specify the grounds for making such determination, the latest date for the withdrawal, termination or suspension, and the grounds of appealing the recommendation. Such a recommendation shall be classified as a decision under the terms of Article 6 of the Regulation on the Powers, Functions and Operations of the Executing Agency of the Yamoussoukro Decision]
9. The regional competition authority and or the Executing Agency may decide to take interim measures that it deems fit when it determines that the State Party concerned has failed to take any action to address the recommendation addressed to it pursuant to Article 7(5) hereof.
10. Such interim measures shall apply for a period not exceeding ninety (90) days.
11. The relevant authority may extend the interim measures for a period not exceeding thirty (30) days thereafter in the event that subsequent to an objective assessment of the circumstances such extension is deemed necessary.

Chapter Three

Enforcement, investigation, negotiation, arbitration and judicial review

Article 8 – The Executing Agency and regional competition authorities

The Executing Agency shall be responsible for supervising and implementing these regulations and shall be responsible for:

- a) implementing measures to increase transparency in the air transport sector;
- b) implementing measures to develop public awareness of the provisions of these Regulations;
- c) investigating and evaluating alleged violations of these regulations;
- d) granting, refusing or revoking exemptions in terms of Article 7;
- e) reviewing legislation or administrative measures of Member States in terms of Article 5;
- f) reporting to CAMT on any matter relating to the application of these Regulations; and
- g) performing any other function assigned to it under these Regulations.

Article 9 – Complaints

1. Any State Party, undertaking, regional competition authority or any interested party may lodge a complaint with the Joint Competition Authority against an undertaking concerning an alleged breach of these Regulations by that undertaking.
2. The Executing Agency may, on its own motion, initiate an investigation into a suspected breach of these Regulations by an undertaking.
3. The Executing Agency shall within 30 days of receipt of a complaint made under paragraph 1, forward a copy of such complaint to the competent authorities of the Member States.
4. Such competent authorities shall have the right of audience before the Executing Agency.

Article 10 – Investigation and procedural fairness

1. In the execution of its duties under these Regulations, the Executing Agency, the relevant regional competition authority, or the competent authorities of State Parties as required by the relevant competition authorities may undertake all necessary investigations into undertakings and associations of undertakings.
2. The Executing Agency shall within a reasonable time, prior to the envisaged investigation inform the competent authorities of the State Parties of the proposed investigation and the identity of the authorised officials. The competent authorities of the Member States shall assist the officials of the Executing Agency if so requested.
3. In the execution of its duties, the Executing Agency shall act with due regard for the rules of natural justice.

Article 11 – Hearing of the Parties concerned

Before taking any decision under these Regulations affecting undertakings or associations of undertakings, the Executing Agency shall give the undertakings or associations of undertakings concerned the opportunity of being heard. There shall be a written record of the hearing.

Article 12 – Outcome of complaint

1. Where the Executing Agency finds that there has been an infringement of any provision of Chapter Two of these Regulations, it shall direct the undertaking or association of undertakings concerned to bring such an infringement to an end.
2. If the Executing Agency, acting on a complaint concludes that, on the evidence before it, there are no grounds for intervention in respect of any agreement, decision or concerted practice, it shall reject the complaint.
3. The Executing Agency shall simultaneously send a copy of its decision to the competent authorities of the Member States in whose territory the head office of the undertaking or association of undertakings is situated.

Article 13 – Provisional measures

1. Where there is *prima facie* evidence before the Executing Agency that certain practices are contrary to these Regulations and have the object or effect of directly jeopardising the existence of an undertaking it may decide to take such provisional measures that it deems fit to ensure that these practices are not implemented, or where implemented they are stopped.
2. Such provisional measures shall apply for a period not exceeding ninety (90) days.
3. The Executing Agency may extend the provisional measures for a period not exceeding thirty (30) days.

Article 14 – Cooperation with Member State authorities and access to information

1. The Executing Agency shall execute its powers and procedures in collaboration with the regional competition authorities and competent authorities of the Member States.
2. In carrying out the duties assigned to it by these Regulations, the Executing Agency may request all necessary information from the competent authorities of the Member States and from an undertaking or association of undertakings.
3. A copy of the request to an undertaking or association of undertakings shall also be sent to the competent authorities of the Member States in whose territory the head office of the undertaking or association of undertakings is situated.
4. The Executing Agency shall in its request clearly state the legal basis and purpose of the request and also the penalties for the supply of incorrect information or non-supply of information within a fixed time limit.

Article 15 – Penalties

1. The Executing Agency may decide, depending on the gravity and the duration of the infringement, to impose penalties on an undertaking or association of undertakings where they intentionally or negligently:
 - (a) infringe any provision of these Regulations; or
 - (b) supply incorrect or misleading information in connection with an application; or
 - (c) supply incorrect information in response to a request made, or do not supply information within the time limit fixed by a decision.
2. The Executing Agency shall from time-to-time review such penalties.

3. In the case of a second or subsequent infringement, the Executing Agency may impose a stiffer penalty.

Article 16 – Review of the decisions of the Executing Agency

Any party whose rights, interests or legitimate expectations have been affected by a decision of the Executing Agency may have recourse to Part One of the Dispute Settlement Regulation.

Article 17 – Dispute settlement among State Parties

If any dispute arises between State Parties relating to the interpretation or application of these Regulations, the State Parties concerned shall have recourse to the Dispute Settlement Regulation.

Article 18 – Professional secrecy

1. Information acquired as a result of the application of these Regulations shall be used only for the purpose of the relevant request or investigation.
2. The Executing Agency and the competent authorities of the State Parties, their officials and other servants shall not disclose information of a kind covered by the obligation of professional secrecy and which has been acquired by them as a result of the application of these Regulations.

Article 19 – Publication of decisions

1. The Executing Agency shall publish the decisions which it makes under these Regulations.
2. In publishing any decision the Executing Agency shall state the names of the parties and the main contents of the decision. In so doing, the Executing Agency shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 20 – Implementation provisions

The Executing Agency shall formulate implementing provisions for adoption by the relevant institutions on, *inter alia*:

- a) guidelines on subsidies in terms of Article 6;
- b) rules of procedure on exemptions granted in terms of Article 7;
- c) the standard form, content and other details pertaining to:
 - (i) applications submitted in terms of Article 7; and
 - (ii) complaints submitted in terms of Article 9 and outcomes of complaints in terms of Article 12;
- d) the rules on hearings provided for in Article 11;
- e) penalties imposed in terms of Article 15;
- f) guidelines and rules of procedure for the implementation of these Regulations; and
- g) guidelines dealing with frivolous complaints.

Article 21 – Amendments

1. Each State Party may propose amendments to this Decision.

2. Any proposal for amendment to these Regulations shall be submitted to the Executing Agency in writing, which shall within thirty (30) days of its receipt communicate it to the State Parties.
3. Amendments to this Decision shall enter into force after their approval by the Conference of Heads of State and Government of the African Union.

Article 22 – Entry into force

This Regulation shall enter into immediately force following its endorsement by Assembly of Heads of State and Government.