

Economic Community of West African States, African Regional Bodies

Supplementary Act A/SP.10/02/12 Relating to the Common Rules on the Approval of Air Carriers of ECOWAS Member States Act 2-SP10 of 2012

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Supplementary Act A/SP.10/02/12 Relating to the Common Rules on the Approval of Air Carriers of ECOWAS Member States

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Economic Community of West African States

Supplementary Act A/SP.10/02/12 Relating to the Common Rules on the Approval of Air Carriers of ECOWAS Member States Act 2-SP10 of 2012

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The High Contracting Parties,

MINDFUL of articles 7, 8 and 9 of ECOWAS revised Treaty as amended establishing the Authority of Heads of State and Government and defining its composition and functions;

MINDFUL of article 32(1)(f) of the said Treaty which prescribes that Member States encourage co-operation in flight scheduling, leasing of aircraft and granting joint use of fifth freedom rights to airlines in the region;

MINDFUL of the Supplementary Act A/SA1/2/08 particularly article 4 adopting the Community Competition Rules and the Modalities of their application within ECOWAS;

MINDFUL of Decisions A/DEC.7/7/96 and A/DEC.6/12/03 of the Authority of Heads of State and Government on the conclusion of a Multilateral Air Transport Agreement among Member States and the Liberalization of the Air Transport Sector in West Africa respectively;

RECALLING the Convention on International Civil Aviation signed at Chicago, on the 7th December 1944 and its annexes;

MINDFUL of the Decision relating to the implementation of the Yamoussoukro Declaration concerning the liberalization of Access to Air Transport Markets in Africa adopted on the 14th of November 1999 by the African Ministers in charge of civil aviation; and endorsed by the OAU Heads of State in Lomé, Togo, in July 2000;

MINDFUL also of the Memorandum of Understanding (MOU) on the implementation of the Decision on the Liberalization of Air Transport in West and Central Africa signed by 23 States of West and Central Africa on 14 November 1999;

ACKNOWLEDGING that the reports of the 3rd, 4th and 5th Meetings of Ministers responsible for Civil Aviation in West and Central Africa, noted some discrepancies in national rules and Supplementary Acts concerning Slot Allocation, Denied Boarding, Ground Handling, Approval of Airline, Conditions for Market Access, Air Tariffs, Liability of Airline in case of an Accident, Rules of Competition and Exemption issued by the member States in West and Central Africa;

CONSIDERING that such disparities contradict the spirit and objectives of the Yamoussoukro Decision;

DETERMINED to address the disparities and to harmonize national legislations in matters of Air Transport Services;

DESIROUS to adopt a Common Community legal framework on the Approval of Air Carriers in ECOWAS Member States;

ON THE PROPOSAL of the Meeting of transport Ministers held in Yamoussoukro on the 17th of September 2011;

HAVING received the opinion of the ECOWAS Parliament;

ON THE RECOMMENDATION on the Sixty-seventh session of the Council of Ministers held in Abuja, from 19 to 21 December 2011.

HEREBY AGREE AS FOLLOWS

Article 1 – Definitions

For the purpose of this Supplementary Act, the following terms shall have the meanings assigned to them hereafter:

Aerial work: In-flight activity during which an aircraft is used for specialized services such as agriculture, construction, photography, topography, observation and surveillance, search and rescue, aerial advertising;

Aeronautical Authority: any governmental authority, corporate body or organ duly authorised to perform the function of civil aviation;

Air carrier: an air transport enterprise engaged in the provision of air transport by aircraft for hire or remuneration and holding a valid approval;

Air Operating Certificate (AOC): Document issued to an enterprise by the Aeronautical Authority of an ECOWAS member State certifying that the concerned enterprise has the required professional and organizational capacities to operate aircraft safely for the purpose of conducting the air transport activities mentioned therein;

Approval: an administrative authorization granted to an enterprise by the Aeronautical Authority to carry by air passengers, freight and/or mail for consideration;

Authority: The Authority of Heads of State and Government;

Capacity: Number of seats offered to the public or charge of paid freight and post for air service for a period of time.

Chicago Convention: Convention on International Civil Aviation signed in Chicago on 7 December 1944 including all its annexes;

Community: The Economic Community of West African States as referred to in article 2 of the ECOWAS Revised Treaty;

Corporate plan: detailed description of the commercial activities planned by the enterprise for the period under review, notably with respect to the evolution of the market and the investments contemplated, as well as the financial and economic implications of such activities;

Council: Council of Ministers as established under article 10 of ECOWAS revised Treaty;

ECOWAS Commission: ECOWAS Commission established in article 17 of the ECOWAS Revised Treaty as amended in June 2006;

Effective control: relationship constituted by rights, contracts or any other means which, either separately or jointly and taking into account circumstances in law and specific cases, offer the possibility to exert directly or indirectly a decisive influence on an enterprise;

Enterprise: Individual or legal entity carrying out whether for profit or not a profit air transport services;

Management accounts: Detailed description of income and expenditures for the period under review, including a breakdown between the aviation and the non aviation related income and expenditure;

Member State: A State party to the ECOWAS Revised Treaty

Montreal Convention: Convention for the Unification of Certain Rules relating to International Carriage signed at Montreal 25 May 1999 which replaced the Warsaw Convention dated 12 October 1929 and its annexes;

Article 2 – Scope

1. This Supplementary Act shall determine the criteria for the issuance and continuing validity by member States, of the approval of air carriers established in the territory of ECOWAS member States.

2. The air transport of passengers, freight or mail other than by aircraft as well as domestic air services not involving transportation between airports of two or more Member States and aerial work, shall not be covered by this Supplementary Act.

Article 3 – Air carrier’s approval

1. Without prejudice to paragraph 5 of Article 5 below, Member States shall not issue or maintain valid an air carrier’s approval for commercial air services whenever the conditions established by this Supplementary Act are not adhered to.
2. Any enterprise meeting the conditions as determined in this Supplementary Act shall be entitled to an air carrier’s approval.

Article 4 – Conditions for the issuance of an air carrier’s approval

1. An Aeronautical Authority shall issue an approval to an enterprise only if, altogether:
 - a) its main place of business, or headquarters is located in the member State issuing the approval;
 - b) its main activity is air transport, exclusively or combined with any other commercial activity including aircraft operations or aircraft maintenance and repair;
 - c) is effectively controlled by member States or nationals of member States; and the services operated by it have, in majority, as departure or arrival points one or more airports in a member State and its technical, operational and managerial staff is made, in majority, of member State’s nationals;
2. The enterprise shall be, at any time, in a position to demonstrate to the Aeronautical Authority which issued the air carrier’s approval that it meets the conditions set forth in the present article.

Article 5 – Air carrier’s obligations

1. Any enterprise applying for an air carrier’s approval for the first time shall be in a position to demonstrate to the competent Aeronautical Authority, in a convincing manner, that it will be able to:
 - a) meet, at any time for a twenty four month period from the operating date, its present and potential obligations assessed on the basis of realistic assumptions; and
 - b) bear, for a three month period from the start of operations, fixed cost and operating cost entailed by its activities in accordance with the corporate plan and assessed on the basis of realistic assumptions without resorting to the income derived from its activities.
2. For the purpose of paragraph 1 above, any air carrier’s application for approval shall be accompanied by a corporate plan covering at least the first two years of operation. The corporate plan shall also detail the financial relationship of the applicant with other commercial activities it may carry out either directly or through related enterprises. The applicant shall also provide any useful information, in particular data referred to in Annex A to this Supplementary Act.
3. Any enterprise shall, beforehand,
 - a) notify the Aeronautical Authority of its plans concerning the operation of a new scheduled or non-scheduled service to a continent or world region not connected before, changes to be made in the type and number of operated aircraft or a substantial change in the volume of its activities. The submission, three months before the period referred to, of a corporate plan for a twelve month period constitutes a sufficient notification under the present paragraph with respect to changes in the activities and/or current elements in the corporate plan; and/or

- b) any merger plan or plan of redemption or detention of any participation representing 10% or more of the entire capital of the air carrier or the parent company or the company which has the control in the last resort.
4. If the Aeronautical Authority believes that the plans or the changes as notified in accordance with paragraph 3 of this article have, major implications on the air carrier's financial situation, it shall request that a revised corporate plan be presented to it which shall include the changes as announced and cover at least a twelve month period from its implementation date as well as any useful information, including data referred to in Annex B to this Section, to be in a position to determine whether the air carrier is able to meet his/her present and potential obligations during the said period. The Aeronautical Authority shall make a decision on the revised corporate plan within three months from its date of submission. In the absence of reaction from the authority, silence gives consent.
 5. When it is clear that an enterprise which was granted an approval has been experiencing financial difficulties, the Aeronautical Authority may at any time assess the financial results of that enterprise and may suspend or withdraw the operating license if it is not certain that the enterprise is able to meet its current and potential obligations for twelve months. The Aeronautical Authority may also issue a temporary approval when the enterprise is being restructured provided that safety is not jeopardized.
 6. At each fiscal year and without undue delay, air carriers shall provide the Aeronautical Authority with certified accounts covering the preceding fiscal/financial year. At any time, at the Aeronautical Authority's request, air carriers shall provide the necessary information in compliance with paragraph 5 above and in particular, data referred to in Annex C to this Supplementary Act.
 - a) Paragraphs 1 to 4 above and paragraph 6 above shall not apply to air carriers who operate exclusively aircraft with a maximum take-off weight of ten (10) tons and/or a seating capacity below twenty (20) seats.
 - b) Such carriers shall at any time be able to demonstrate that their own funds amount to US\$10,000) at least and that they have an equivalent bank security. They shall, if necessary, provide the necessary information in compliance with paragraph 5 above, at the Aeronautical Authority's request.
 - c) However, an Aeronautical Authority may apply paragraphs 1 to 4 and paragraph 6 of the present article to air carriers to whom an approval was granted/issued and who operate scheduled air services or whose annual turnover is higher than US\$1,000,000
 - d) On the proposal of the Commission, the Council may increase the amounts referred to in item (a) if the economic evolution makes such a decision necessary.

Article 6 – Air transport enterprise managers

1. The granting of an approval to the air carrier shall be subject to verification of the integrity, competence and qualification of the persons who will effectively manage the activities of the enterprise. The production of documents issued by the appropriate authorities of the Member State of origin shall be accepted as sufficient evidence.
2. The appropriate authorities of member States may require that the documents or attestations referred to in paragraph 1 above shall not date back to more than three months at the time of their submission.

Article 7 – Insurance

An air carrier should have taken out insurance coverage from a reputable International Insurance Company sufficient to cover its liability for damage with respect to the transportation of passengers, baggage, freight, mail and third parties on the surface in compliance with the requirement of applicable International Conventions, Treaties and Protocols.

Article 8 – Granting of an approval and continuing approval

1. The granting of an approval shall not be subject to full ownership of aircraft. However, for continuing approval, the Aeronautical Authority shall require that air carriers have at their disposal one or several aircraft they own or in joint ownership or under any type of leasing contract of at least six (6) months duration.
2. An air-transport approval shall not be transferable.

Article 9 – Registration

1. Without prejudice to paragraph 3 below, the aircraft used by an air carrier shall be registered in the Member State which grants the approval on its national register and if necessary, by exemption on a national register of another member State.
2. For aircraft registered on a national register of a non-member State, a member State may grant exemptions on the conditions set forth in paragraph 1 above in case of leasing agreements aimed at meeting air carriers' temporary requirements/needs or under exceptional circumstances.
3. For the purpose of paragraph 1 above, a member State shall accept, subject to applicable national laws and Community rules, notably those dealing with airworthiness certificate, the inclusion in the national register without a discriminatory fee or delay aircraft owned by other States' nationals and transfers from other States registers.
4. There shall be no discriminatory fee for aircraft transfer in addition to the normal registration fee.

Article 10 – Air Operator Certificate (AOC)

1. The Air operator certificate shall be issued only after a satisfactory inspection of the air carrier, its facilities and staff by the Aeronautical Authority taking into account ICAO standards and in particular Annex 6 of the Convention.
2. The Air Operator Certificate shall include at least the following elements:
 - i. air carrier's identity (company name, address);
 - ii. air carriers safety and security plan;
 - iii. description of the types of authorized operations;
 - iv. descriptions of the types of authorized aircraft and the ownership status;
 - v. operating areas and authorized routes.

Article 11 – Leased aircraft operation

1. For compliance with safety and liability standards, an air carrier who uses another enterprise's aircraft or transfers the operation or ownership of an aircraft to another enterprise shall beforehand obtain an authorization from the competent Civil Aviation Authority respectively. Leasing contracts shall be subject to the Aeronautical Authority's approval.
2. The Aeronautical Authority shall not approve wet leases entered into with an air carrier to whom it granted an approval, unless safety standards equivalent to those imposed under article 10 above are adhered to.

Article 12 – Procedures for issuing approvals

1. Procedures for issuing approvals shall be specified and made public by the Member State concerned, and the Commission shall be furnished with a copy of the Procedures accordingly.
2. The concerned Member State shall decide on an application, as soon as possible taking into account all the elements received, at the latest three months after the date the required information was received. It shall inform the applying enterprise of its decision. Any refusal shall be justified.
3. An enterprise whose air carrier's application has been turned down may without prejudice lodge an appeal to the Commission. If necessary, the Commission shall make a recommendation to the said State.
4. Member States' decisions to issue or withdraw an air carrier's approval shall be published in the *National Gazette* of the State concerned and in the *Official Journal* of the ECOWAS Commission.
5. The Commission, on its own initiative or acting on a member State's request, shall verify the level of compliance with the conditions set forth in the present article.

Article 13 – Validity of an air carrier's approval

1. The air carrier's approval shall remain valid as long as the air carrier meets the obligations set forth in this Section. However, the Aeronautical Authority may impose a review at the end of the first year following the issuance of a new approval and every three years thereafter.
2. When an air carrier has interrupted its activities for six months or has not started operations six months after the license was issued, the Aeronautical Authority shall decide to review, if necessary, its case once again.
3. In case of change of one or several elements affecting the enterprise legal status, namely in case of change of ownership, restructuring and merger, the Aeronautical Authority shall decide to review the approval granted. Air carriers concerned may proceed with their activities unless the Aeronautical Authority decides, with justification, that flight safety is jeopardized.

Article 14 – Withdrawal of an air carrier's approval

1. An air carrier against whom an insolvency legal procedure has been instituted shall not be authorized to retain its license if there is no concrete possibility for satisfactory financial restructuring within a reasonable time span.
2. A Decision by the Aeronautical Authority to withdraw the approval if the conditions set forth in this Supplementary Act are not adhered to shall be justified.

Article 15 – Compliance with national legislation

1. In addition to the rules set forth in this Section, the air carrier shall also comply with the provisions of the national legislation compatible with community laws.
2. A National Regulation that is inconsistent with the provisions of this Supplementary Act shall to the extent of inconsistency be deemed null and void.

Article 16 – Transitional provisions

For a maximum duration of two years from the date of entry into force of this Supplementary Act and notwithstanding Article 3, paragraph 1 of this Supplementary Act, valid approvals in any member State shall be maintained subject to adherence to laws under which they were granted.

Article 17 – Report and cooperation

1. Member States and the Commission shall cooperate in the enforcement of these Supplementary Acts. Information obtained through the enforcement of this Supplementary Act shall be treated as confidential.
2. The ECOWAS Commission shall present a report to the Council on the enforcement of the Supplementary Act every two (2) years after their entry into force.
3. The ECOWAS Commission shall enter into cooperation with other international organizations for the purpose of implementing the present Supplementary Act.

Article 18 – Implementation of the Supplementary Act

1. The member States shall take all necessary legislative and regulatory measures for effective implementation of the present Supplementary Act.
2. The ECOWAS member States shall communicate to ECOWAS Commission any measures concerning the implementation of the present Supplementary Act.

Article 19 – Amendments

1. Any Member State may submit a proposal for amendment or revision of this Supplementary Act to the ECOWAS Commission.
2. Such proposed amendment shall be subject to the provisions of article 90 of the ECOWAS Treaty relating to the procedures of amendment and revision.

Article 20 – Entry into force and publication

1. This Supplementary Act shall enter into force from the date of its signature by the Chairman of the Authority of the Heads of State and Government of ECOWAS.
2. It shall be published in the Official journal of the Community, within thirty (30) days of its signature by the Chairman of the Authority of the Heads of State and Government of ECOWAS.

Article 21 – Depositary authority

This Supplementary Act shall be deposited at the Commission which shall transmit certified copies thereof to all member States and register same with the African Union (AU), the International Civil Aviation Organization (ICAO) and such other organizations as may be decided by the Council.

IN FAITH OF WHEREOF, WE, the Heads of State and Government of the Economic Community of West African States (ECOWAS) have signed this Supplementary Act

Done in Abuja, this 17th day of February 2012

In single original, in the English, French and Portuguese languages, all three texts being equally authentic

Annex A

Information to be supplied by an enterprise applying for an air carrier's approval for the first time in respect of its financial capacity

1. Latest in-house accounting and financial documents and, if they exist, certified accounts of the preceding financial year.
2. A balance sheet and a forecast result account for the two years ahead.
3. The base on which forecast income and expenditures were established for items such as fuel, tariffs, salaries, maintenance, depreciation, exchange rates fluctuations, airport charges, insurance, income and traffic forecasts.
4. Details on starting costs for the period from the time the application was filed to the beginning of operations and explanations on how such costs will be funded.
5. Details on current and potential sources of financing.
6. A detailed list of shareholders together with their nationality and type of shares held and statutes. If the enterprise is a member of a group of enterprises, information shall be provided on the relationship among such enterprises.
7. The gross margin of forecast self-financing and treasury plans for the first two operating years.
8. Details on the financing of aircraft purchases, and leasing, including in case of leasing contract, the leasing terms and conditions.

Annex B

Information to be provided for assessment of the financial capacity of license holders who plan to change their structures or their activities with major implications on their financial situation

1. Latest in-house accounting and financial documents and certified accounts of the preceding financial year.
2. Specific details on any changes contemplated, such as change in the type of service, repurchase or merger plans, change in the capital stock, shareholder changes, etc.
3. A balance sheet and forecast results for the current financial year taking into account contemplated changes of structures or activities with major financial implications.
4. Executed income and expenditures as well as forecast income and expenditures for items such as fuel, tariffs, salaries, maintenance, depreciation, exchange rates fluctuations, airport charges, insurance, statistics and income and traffic forecasts.
5. Gross margin of self-financing and treasury plans for next year bearing in mind any contemplated changes in structures and activities with major financial implications.
6. Details on the financing of purchases through aircraft leasing including, in case of leasing, the leasing terms and conditions.

Annex C

Information to be provided for assessment of the current financial capacity of approval holders

1. Certified accounts at the latest six months after the end of the period they relate to and if necessary, the latest in-house accounting and financial documents.
2. A balance sheet and a forecast result account for the year ahead.
3. Executed income and expenditures as well as forecast income and expenditures for items such as fuel, tariffs, salaries, maintenance, depreciation, exchange rates fluctuations, airport charges, insurance, statistics and income and traffic forecasts.
4. The gross margin of self-financing and treasury plans for the year ahead.