

Economic Community of West African States, African Regional Bodies

## Supplementary Act A/SP.9/02/12 Relating to the Common Rules on Certain Categories of Agreements, Decisions and Concerted Practices Relating to Rules of Competition in Air Transport Services within ECOWAS Member States

Act 2-SP9 of 2012

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 Contents

Chapter 1 – Definitions, objective and scope ..... 2

    Article 1 – Definitions ..... 2

    Article 2 – Objective and scope ..... 3

        Paragraph 1. .... 3

        Paragraph 2. .... 3

Chapter II – Exemptions concerning joint planning and coordination of schedules, joint operations and joint consultations on passengers and freight tariffs on regular flights ..... 3

    Article 3 – Block exemption ..... 3

    Article 4 – Special provisions for joint planning and coordination of schedules ..... 4

        Paragraph 1. .... 4

            Subparagraph (a) ..... 4

            Subparagraph (b) ..... 4

        Paragraph 2. .... 4

        Paragraph 3. .... 4

        Paragraph 4. .... 4

        Paragraph 5. .... 4

        Paragraph 6. .... 4

    Article 5 – Special provision for joint operations ..... 4

        Paragraph 1. .... 4

        Paragraph 2. .... 4

        Paragraph 3. .... 4

        Paragraph 4. .... 4

        Paragraph 5. .... 4

    Article 6 – Special provisions for consultations on passenger and cargo tariffs ..... 5

        Paragraph 1. .... 5

            Subparagraph (a) ..... 5

            Subparagraph (b) ..... 5

                Subparagraph i. .... 5

                Subparagraph ii. .... 5

                Subparagraph iii. .... 5

            Subparagraph (c) ..... 5

            Subparagraph (d) ..... 5

            Subparagraph (e) ..... 5

Subparagraph (f) .....	5
Paragraph 2. ....	5
Paragraph 3. ....	5
Article 7 – Withdrawal of the block exemption .....	5
Chapter III – Rules of exemption with regard to ground handling services .....	6
Article 8 – Exemption on ground handling services .....	6
Article 9 – Ground handling services .....	6
Paragraph 1. ....	6
Paragraph 2. ....	6
Paragraph 3. ....	6
Article 10 – Implementation of exemptions .....	6
Paragraph 1. ....	6
Paragraph 2. ....	6
Paragraph 3. ....	6
Paragraph 4. ....	6
Paragraph 5. ....	6
Paragraph 6. ....	6
Article 11 – Withdrawal of block exemption .....	6
Chapter IV – Rules of procedure .....	7
Article 12 – The Regional Competition Authority .....	7
Article 13 – Complaints, investigation and arbitration .....	7
Paragraph 1. ....	7
Paragraph 2. ....	7
Chapter V – Miscellaneous and final provisions .....	7
Article 14 – Report and cooperation .....	7
Paragraph 1. ....	7
Paragraph 2. ....	7
Paragraph 3. ....	7
Article 15 – Amendments .....	7
Article 16 – Entry into force and publication .....	7
Paragraph 1. ....	7
Paragraph 2. ....	7
Article 17 – Depositary authority .....	7

Economic Community of West African States

# **Supplementary Act A/SP.9/02/12 Relating to the Common Rules on Certain Categories of Agreements, Decisions and Concerted Practices Relating to Rules of Competition in Air Transport Services within ECOWAS Member States**

## **Act 2-SP9 of 2012**

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**Commenced in full**

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### **The High Contracting Parties,**

**MINDFUL** of articles 7, 8 and 9 of the Treaty of ECOWAS as amended establishing the Authority of Heads of states 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/SA.1/2/08 particularly article 4 adopting the Community Competition Rules and the Modalities of their application within ECOWAS;

**MINDFUL** of the Supplementary Act A/SA.2/12/2008 on the establishment, function and operation of the regional competition authority for 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 opened for signature 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 14<sup>th</sup> 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 and regulations in matters of Air Transport Services;

**DESIROUS** to adopt a Common Community legal framework on Rules of Competition and Exemptions in Air Transport Services, for the member States of West Africa;;

**ON THE PROPOSAL** of the Meeting of transport Ministers held in Yamoussoukro on the 17<sup>th</sup> of September 2011;

**HAVING** received the opinion of the ECOWAS Parliament;

**ON THE RECOMMENDATION** of the Sixty-seventh Session of the Council of Ministers held in Abuja, from 19 to 21 December 2011;

**HEREBY AGREE AS FOLLOWS**

## **Chapter 1** **Definitions, objective and scope**

### **Article 1 – Definitions**

For the purpose of this Regulation, the following terms shall have the meanings assigned to them;

**Aeronautical Authority:** any governmental authority, corporate body or organ duly authorised to perform this function;

**Airline:** Any air transport enterprise offering or operating any international air services.

**Air Service:** any flight or series of flights carrying, subject to consideration, passengers, freight and/or mail;

**Air Tariff:** prices expressed in any currency of a member State to be paid for the carriage of passengers freight and mail on an air service together with the applicable conditions of such prices, including the remuneration and conditions offered to agencies and other ancillary services;

**Capacity:** the number of seats and cargo space made available by an airline to the general public and/or the payload in freight and mail on air service over a given period and in a given sector;

**Capacity Dumping:** the introduction into a market of capacity far in excess of anticipated demand which is likely to have significant adverse impact upon a competing carrier or carriers;

**Chicago Convention:** Convention on International civil aviation signed at Chicago, on 7th December 1944 and its Annexes;

**Concerted practice:** 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;

**Council:** the Council of Ministers as established under Article 10 of the ECOWAS Revised Treaty;

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

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

**Inordinately high Pricing:** the introduction by a carrier or carriers into a market of a price increase which is unreasonably high because of a lack of price competition, or abuse of a dominant position, or collusion;

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

**Montreal Convention:** Convention on the Unification of Certain Rules concerning International Air transport signed in Montreal 28th May 1999 replacing the convention of Warsaw signed on 12 October 1929 and its protocol Annexes;

**Non-scheduled air service:** Charter or special flights performed for remuneration on an irregular basis other than those operated under scheduled service.

Price Predation: the introduction by a carrier into a market of an excessively low price which is likely to be perceived as specifically designed, targeted and intended to keep out a new entrant carrier or to drive out a weaker incumbent;

Regional Competition Authority: The structure responsible for the implementation of the competition rules established pursuant to Article 1 of the Supplementary Act A/SA2/12/2008 on the establishment, function and operation of the regional competition authority for ECOWAS;

"Scheduled air service: a series of flights with all the following characteristics:

- i) it is performed, subject to payment, with aircraft to carry passengers, freight and/or mail in such conditions that, on each flight, individual seats are made available to the public either directly by the airlines, or through its authorized agents;
- ii) it is organized for the purpose of connecting two airports or more:
  - either according to a published schedule; or
  - with such a regularity or frequency that it becomes part of an obvious systematic series;

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

Traffic Right: The right granted to airline to carry passengers, freights and mail for remuneration.

## **Article 2 – Objective and scope**

1. The community competition rules and the modalities for their implementation as defined in the Supplementary Act No. A/SA1/11/08 dated 19 November 2008, shall apply to air transport services within the member States of ECOWAS:
2. The objective of the present Supplementary Act is to establish the modalities of exemption in matters of air transport services within the member States of ECOWAS.

## **Chapter II Exemptions concerning joint planning and coordination of schedules, joint operations and joint consultations on passengers and freight tariffs on regular flights**

### **Article 3 – Block exemption**

The Regional Competition Authority may authorize exemptions concerning agreements between airlines, decisions and concerted practices dealing with:

- the joint planning and coordination of the schedule of an air transport service by airlines,
- the joint operation of a scheduled air service on a new or on a lowdensity route,
- the holding of consultations on tariffs for the carriage of passengers, with their baggage, and of freight on scheduled air services.

#### **Article 4 – Special provisions for joint planning and coordination of schedules**

The exemption concerning joint planning and coordination of the schedule of an air service shall apply provided the following conditions are fulfilled:

1. the planning and coordination are intended:
  - (a) to ensure by means of a non-binding arrangement a satisfactory supply of services during low traffic periods, or on low density routes; or
  - (b) to establish by means of a binding arrangement schedules which will facilitate interline connections for passengers, cargo or mail between services operated by the participants and minimum capacity to be provided for such schedules;
2. the agreements, decisions and concerted practices do not include arrangements which limit, directly or indirectly, the capacity to be provided or shared by the participants;
3. the agreements, decisions and concerted practices do not prevent any other airline taking part in the planning and coordination from introducing additional services, without incurring penalties and without being required to obtain the approval of the other participants;
4. the agreements, decisions and concerted practices do not prevent any other airline from withdrawing from the planning and coordination for future seasons without penalty on giving notice of not more than three (3) months to that effect;
5. the agreements, decisions and concerted practices do not seek to influence the schedules adopted by airlines not participating in them.
6. the agreements, decisions or concerted practices do not seek to nor have the effect of restricting access to, or preventing, any airline from operating on any particular route.

#### **Article 5 – Special provision for joint operations**

The exemption concerning the joint operation of an air service shall apply provided the following conditions are met:

1. the joint operation concerning the sharing, by one airline, of the costs and revenues of another airline in respect of a scheduled air service which the latter is operating;
2. there was no direct air service between the two airports concerned during all of the two traffic seasons preceding the beginning of the joint operation; or the capacity on the route covered by the joint operation does not exceed one-tenth of the seats per year in each direction;
3. neither party is prevented from operating additional air services on its own account between the two (2) airports concerned nor from independently determining the fares, capacity and schedules of such air services;
4. no other airline is prevented from operating air services between any two airports within ECOWAS member States.
5. either party can terminate the joint operation on giving notice of not more than three (3) months, to expire at the end of a traffic season.



## **Article 6 – Special provisions for consultations on passenger and cargo tariffs**

1. The exemption concerning the holding of consultation on tariffs and rates shall apply provided the following conditions are met:
  - (a) the participants only discuss air fares and cargo rates to be charged directly to a participating airline or to its authorized agents, for the carriage of passengers or freight on a scheduled service, as well as the conditions relating to those fares and rates. The consultations shall not extend to the capacity for which such tariffs are to be available;
  - (b) where the consultations give rise to interlining, air transport users must be able:
    - i. to combine on a single passenger ticket or cargo document the service which was the subject of the consultation, with services on the same or on connecting routes operated by other airlines, whereby the applicable fares, rates and conditions are set by the airline(s) effecting carriage; and
    - ii. to the extent permitted by the conditions governing the initial reservation, to change a reservation on a service which was the subject of the consultations onto a service on the same route operated by another airline at the fares, rates and conditions applied by that other airline;
    - iii. provided that an airline may refuse to allow such combinations and changes of reservation on a non-discriminatory basis of a technical or commercial nature, in particular where the airline effecting carriage is concerned with the credit-worthiness of the airlines who would be collecting payment for this carriage: in such case the latter airline must be notified thereof in writing;
  - (c) the passenger or cargo tariffs which are the subject of the consultations are applied by participating airlines without discrimination on grounds of the passenger's nationality or place of residence or on grounds of the origin of the freight;
  - (d) participation in the consultations is voluntary and open to any airline which operates or intends to operate direct or indirect services on the route concerned;
  - (e) the consultations are not binding on participants: following the consultations the participants retain the right to act independently in respect of passenger and cargo tariffs;
  - (f) The consultations do not entail agreement on agents' remuneration or other elements of the tariffs discussed.
2. The Regional Competition Authority may send observers to tariff consultations. For this purpose, airlines shall give the Member States concerned and the Regional Competition Authority the same notice as is given to participants, but not less than fourteen (14) days notice, of the date, venue and subject matter of the consultations.
3. A full report on these consultations shall be submitted to Regional Competition Authority by or on behalf of the airlines involved at the same time as it is submitted to participants, but not later than forty five (45) days after those consultations were held.

## **Article 7 – Withdrawal of the block exemption**

The Regional Competition Authority may withdraw the benefit of the block exemption where it finds in a particular case that an agreement, decision or concerted practice exempted by this Supplementary Act, is incompatible or prohibited by Article 5 of the Supplementary Act No. A/SA1/12/08 dated 19 December 2008 on the adoption of the community rules and the modalities of their application within ECOWAS.

## **Chapter III**

### **Rules of exemption with regard to ground handling services**

#### **Article 8 – Exemption on ground handling services**

The Regional Competition Authority may grant exemptions concerning ground handling services in airports of the ECOWAS member States.

#### **Article 9 – Ground handling services**

The exemption granted under Article 8 shall apply to the following services:

1. all technical and operational services generally provided on the ground at airports, such as the provision of the necessary flight documents and information to crews, apron services, including loading and unloading, safety, aircraft servicing and refueling, and operations before take-off;
2. all services connected with the handling of passengers, mail, freight and baggage, such as information to passengers and visitors, the handling of passengers and their baggage before departure and after arrival, and the handling and storage of freight and mail in conjunction with the postal services;
3. all services for the provision of in-flight catering, including the preparation, storage and delivery of meals and supplies to aircraft and the maintenance of catering equipment.

#### **Article 10 – Implementation of exemptions**

The exemption shall apply only if:

1. the agreements, decisions or concerted practices do not oblige the airlines to obtain any or all of the ground handling services referred to in Article 9 exclusively from a particular supplier;
2. the supply of the ground handling services referred to in Article 9 is not tied to the conclusion of contracts for or acceptance of other goods or services which, by their nature or according to commercial usage, have no connection with the services referred to in Article 9 or to the conclusion of a similar contract for supply of services at another airport;
3. the agreements, decisions or concerted practices do not prevent an airline from choosing from the range of ground handling services offered by a particular supplier those it wants to take from that supplier and do not deny it the right to procure similar or other services from another supplier or to provide them itself;
4. the supplier of the ground handling services does not impose, directly or indirectly, prices or other conditions which are unreasonable and which in particular, bear no reasonable relation to the cost of the services provided;
5. the supplier of the ground handling services does not apply dissimilar conditions to equivalent transactions with different customers;
6. the airline is able to withdraw from the agreement with the supplier of the ground handling services without penalty, on giving notice in accordance with the terms of the contract between the airline and the handling company, and in any case the period of the notice shall not exceed three (3) months.

#### **Article 11 – Withdrawal of block exemption**

The Regional Competition Authority may withdraw the benefit of the block exemption where it finds in a particular case that an agreement, decision or concerted practice exempted is incompatible or prohibited with the conditions laid down by Article 5 of the Supplementary Act No. A/SA1/12/08 dated 19 December 2008 adopting community competition rules and the modalities of their application within ECOWAS.

## **Chapter IV**

### **Rules of procedure**

#### **Article 12 – The Regional Competition Authority**

The Regional Competition Authority in collaboration with the Air Transport Committee is hereby charged with the enforcement of the rules of procedure in matters of complaints, investigation and arbitration.

#### **Article 13 – Complaints, investigation and arbitration**

1. Any Member State, airline or any concerned party may file a complaint before the Regional Competition Authority against a State, an airline, a ground handling company and any other person concerning an alleged breach of this present Supplementary Act.
2. The Rules and Procedures established under the provisions of Articles 3 to 11 of the Supplementary Act No. A/SA2/12/08 dated 19 December 2008 on the establishment, functions and operation of the Regional Competition Authority for ECOWAS shall apply to the exemptions in matters of air transport services.

## **Chapter V**

### **Miscellaneous and final provisions**

#### **Article 14 – Report and cooperation**

1. Member States and the ECOWAS Commission shall cooperate for the implementation of this Supplementary Act
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 15 – Amendments**

Any Member State may submit proposal for amendment or revision of this Supplementary Act to the ECOWAS Commission in accordance with the provisions of article 90 of the ECOWAS Treaty relating to the procedures of amendment and revision.

#### **Article 16 – 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 17 – 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 17<sup>th</sup> day of February 2012

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