

African Union, African Regional Bodies

Appendix A to Annex 5 to the Yamoussoukro Decision: Guidelines and Procedures for the Implementation of the Regulations on Competition in Air Transport Services within Africa

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African Union

Appendix A to Annex 5 to the Yamoussoukro Decision: Guidelines and Procedures for the Implementation of the Regulations on Competition in Air Transport Services within Africa

Not commenced

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Whereas the Regulations on Competition in Air Transport Services within Africa (hereinafter cited as the Competition Regulations) calls for a number of guidelines, implementing provisions and rules of procedure for the application of the Regulations by the regional competition authorities and the Executing Agency:

Now therefore the following Guidelines and Procedures shall apply:

1

The following airline industry standards shall normally not be considered as a violation of Article 3 of the Competition Regulations and shall be presumed excepted under Article 3 (3) (a) (b) of the Competition Regulations:

- (a) certain technical agreements and concerted practices, to the extent that their sole object and effect is to achieve technical improvements or co-operation: the introduction or uniform application of mandatory or recommended technical standards for aircraft, aircraft parts, equipment and aircraft supplies, where such standards are set by an organisation normally accorded international recognition, or by an aircraft or equipment manufacturer; the introduction or uniform application of technical standards for fixed installations for aircraft, where such standards are set by an organisation normally accorded international recognition; the exchange, leasing, pooling, or maintenance of aircraft, aircraft parts, equipment or fixed installations for the purpose of operating air services and the joint purchase of aircraft parts, provided that such arrangements are made on a nondiscriminatory basis; the introduction, operation and maintenance of technical communication networks, provided that such arrangements are made on a non-discriminatory basis; and the exchange, pooling or training of personnel for technical or operational purposes;
- (b) agreements or concerted practices between airlines with respect to capacity, frequency and scheduling co-operation, provided that joint planning and co-ordination of capacity, frequencies and flight schedules to be provided on scheduled air services be limited to agreements and practices that help to ensure a spread of services at the less busy times of a week or day, or on less busy routes, and/or improve inter-regional connectivity, provided any partner may withdraw without penalty from agreements or practices by giving not more than three months' notice of its intention not to participate in such joint planning and co-ordination for future (summer or winter) seasons;
- (c) consultations and agreements on interlining and tariff co-ordination, for the purpose of promoting the establishment of fully interlineable air fares and rates, upon the following conditions: that the inter-carrier consultations (inside or outside the framework of global or regional airlines organizations) on the development of interlineable tariffs (passenger fares and cargo rates) be transparent and open to all carriers operating direct or indirect services on air routes concerned; and that the consultations are not binding upon participants that is, following consultations, airline participants retain the right to act independently in respect of passenger and cargo tariffs;
- (d) provision of common rules for the appointment of airlines agents, whether developed inside or outside the IATA (International Air Transport Association) Agency Conferences, as long as those rules are limited to the professional and financial fitness of agents (accreditation) and do not limit the number of agency establishments in any Member State, and do not fix agency commission rates; systems for the clearing

of accounts between airlines or between airlines and agents should normally not be considered as anti-competitive;

- (e) airline alliances and other commercial arrangements between airlines, provided that these arrangements do not go beyond code-sharing and blocked space agreements, and that in the case of blocked space agreements the purchasing airline will sell the purchased seats as its own, at its own prices and at its own risk; where the arrangements go beyond code-sharing and blocked space agreements, and involve common pricing, common capacity provision, common scheduling and/or revenue and/or cost pooling (joint ventures), such arrangements shall normally not be permissible under Article 3 of the Regulations, save where an exemption is obtained from the relevant authority under Article 7 of the Regulations;
- (f) slot co-ordination agreements and practices between airlines at airports, provided that all air carriers concerned are entitled to participate in such agreements and arrangements, that the national and multilateral procedures (including, but not limited to IATA Scheduling Conferences) for such agreements and arrangements are transparent, and that they take into account any constraints and distribution rules defined by national and international authorities and any rights which air carriers may have historically acquired; and
- (g) agreements and arrangements on the joint ownership and operation or participation in Global Distribution Systems (GDS), on condition that all airlines of State Parties have access to such systems on equal terms, that participating carriers have their services listed on a nondiscriminatory basis, that any participant may withdraw from the system on giving reasonable notice, and that the system operate in accordance with the policies and regulatory framework of the International Civil Aviation Organization (ICAO).

2

The following shall apply to the implementation of State subsidies under the terms of Articles 6 of the Competition Regulations:

- a) in the context of granting or denying subsidies, State Parties shall not discriminate between publicly-owned, state-owned and privately-owned airlines;
- b) a State Party may grant a subsidy to an airline, provided that it is for airline restructuring purposes, or in extraordinary circumstances beyond the control of the airline, including acts of war; and
- c) the prohibition on subsidies does not prevent the operation by a State Party of an essential air services programme or of public service obligations, where certain air services cannot be operated profitably.
- d) Where the relevant authority finds that a subsidy has been granted illegally by a State Party or is about to be given by a State Party, it may issue a cease and desist order against the State Party in question; and
- e) Where the relevant authority finds that a subsidy, illegally given by a State Party, has already been paid in fact, it may order that the moneys given as illegal subsidy be paid back to the State Party in question, in whole or in part.

3

Where a State Party wishes to obtain a prejudicial ruling from the regional competition authority or the Executing Agency (hereafter, relevant authorities) on non-discrimination in national legislation and administrative measures under Article 5 of the Competition Regulations:

- a) that State shall submit a written request to that effect to the relevant authority through diplomatic channels, giving reasons for its request;
- b) the relevant authority shall endeavour to respond to such a request within ninety days from its reception in an advice;

- c) where the relevant authority is of the opinion that the proposed legislation or administrative measure in question needs amendment, it shall give reasons therefore in its advice; and
- d) the relevant authority shall send copies of its advice to all competent authorities of the State Parties.

4

Applications by any undertaking, or association of undertakings to the EXECUTING AGENCY for exemptions under Article 7(1) of the Regulations shall be made using Form A provided for in the Schedule to these Guidelines, Provisions and Procedures.

5

In addition to the information and procedures contained in Form A of the Schedule mentioned in Article 5, the relevant authority:

- a) shall render decisions on applications for exemptions under Article 7 of the Regulations within ninety days from their submission;
- b) shall not take legal action under the Regulations against an applicant for an exemption, before the application has been decided upon; and
- c) may revoke an exemption granted, before its normal expiry date, considering also that the maximum duration of validity of an exemption is five years, where there has been any material change on any of the facts upon which the exemption was based; or where the parties breach any condition attached to the exemption; or the granting of the exemption was based on incorrect information or induced by deceit; or where the parties abuse the exemption as provided for under Article 4 of the Regulations.

6

Where a State Party wishes to apply to the relevant authority to approve safeguard measures under Article 7(2) of the Regulations:

- a) the application shall be in writing, through diplomatic channels, giving reasons for the application;
- b) the relevant authority shall send copies of such applications for approval of safeguard measures to the competent authorities of the State Parties;
- c) the relevant authority shall decide upon an application for approval of safeguard measures within ninety days from its reception, giving reasons for its decision;
- d) The relevant authority may approve or disapprove the application, or approve it subject to conditions; and
- e) The approval of an application for safeguard measures may be valid for one year. A State Party may apply for an extension provided such State Party shall furnish proof that it has taken the necessary and reasonable steps to overcome or correct imbalances for which safeguard measures are being applied and that the measures applied are on the basis of non-discrimination.

Rules of procedure

7

- (a) Complaints, lodged with the relevant authority by any undertaking or association of undertakings, shall be made using Form B provided for in the Schedule to these Guidelines and Procedures; and

- (b) Relevant shall advise the complainant of its decision within a period of ninety days from receipt of the complaint. Where it is not in a position to do so, it shall advise the complainant of the procedure to be followed under Articles 7 8, 9, 10, and 11 of these Guidelines, Provisions and Procedures.

8

In addition to the provisions contained in Form B of the Schedule to these Guidelines, Provisions and Procedures, the relevant authority, in carrying out investigations under Article 8 of the Competition Regulations, shall:

- a) appoint and empower officials to examine the books and other business records, make copies of or extracts from the books and business records, demand oral or written explanations and enter any premises, land and vehicles used by undertakings or associations of undertakings provided that, in performing their duties, the authorised officials shall respect applicable national laws and regulations pertaining to privileged information on the part of the undertakings;
- b) ensure its authorised officials shall exercise their powers upon production of written authorisation, specifying the subject matter and purpose of the investigation and the penalties provided for in Article 13 of the Regulations in cases where production of the required books or business records is incomplete, provided that the relevant authority shall inform the competent authority of the State Party, in whose territory same is to be made, of the investigation and the identity of the authorised officials;
- c) specify the subject matter and purpose of the investigation, indicate the date on which the investigation will commence, indicate the penalties as provided for in Article 13 of the Competition Regulations and the right to have the decision of the Executing Agency under Article 10 and any penalties reviewed under Article 16 of the Regulations.

In addition:

- d) Undertakings and associations of undertakings shall submit to investigations authorised by the Executing Agency. The authorisation shall specify the subject matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provide for in Article 15 of the Competition Regulations, and the right to have the decision of the Executing Agency under Article 12 and any penalties reviewed under Article 16 of the Competition Regulations;
- e) Officials of the competent authorities of the State Parties in whose territory the investigation is to be made should assist the officials of the relevant authority in carrying out their duties, at the request of such authority, and they shall observe the privileges and secrecy of information as provided under Article 10(b) of these Guidelines and Procedures; and
- f) Where an undertaking or association of undertakings opposes an investigation authorised pursuant to these procedures, the State Party concerned shall afford the necessary assistance to the officials authorized by the Executing Agency to enable them to carry out their investigation.

9

Where, under the Competition Regulations, the Executing Agency must hear an undertaking or association of undertakings, the following rules of procedure shall apply:

- a) Before taking a decision negatively affecting an undertaking or association of undertakings, the Executing Agency shall give such undertaking or association the opportunity to be heard on (the) matter(s) to which the Agency objects; affected undertakings and associations of undertakings shall be so informed in writing;
- b) Officials of interested State Parties shall be entitled to attend oral hearings;
- c) If the Agency, upon its own motion or upon the recommendation of interested State Parties, finds it necessary, it may also hear other natural or legal persons. Applications to the Executing Agency by such persons to be heard shall be granted when they show sufficient interest;

- d) Before the oral hearing, the affected undertaking or association of undertakings may submit its views on the objection(s) raised in writing; it may in its written comment set out all matters relevant to its defense; it may attach any relevant documents in proof of the facts set out. It may also propose that the Executing Agency hear persons who may corroborate those facts;
- e) The Executing Agency shall in its decision deal only with those objections raised against undertakings and associations of undertakings in respect of which they have been afforded the opportunity of making known their views;
- f) The Executing Agency shall summon the persons to be heard to attend on such date as it shall appoint; copy of the summons shall be sent to the officials of interested State Parties;
- g) Hearings shall be conducted by the persons appointed for that purpose by the Agency;
- h) Persons summoned to attend shall either appear in person or by a duly authorised legal representative, and may be assisted by lawyers, duly admitted to the practice of law in their respective States of principal residence;
- i) Hearings shall not be public. Persons shall be heard separately or in the presence of other persons summoned to attend. In the latter case, regard shall be had to the legitimate interests of the undertakings in the protection of their business secrets; and
- j) The essential content of the statements made by each person heard shall be recorded in minutes, which shall be read and approved by such person. In case of refusal to approve, the person in question shall nevertheless sign that he has read the minutes.

10

The Executing Agency shall, in making decisions in accordance with Article 12 of the Regulations, adhere to the following rules of procedure:

- a) where the Executing Agency is of the opinion that there has been an infringement in terms of Article 12(1) of the Regulations, it may render a decision containing a cease and desist order;
- b) the decision shall be in writing and accompanied by reasons for judgment;
- c) the decision may be accompanied by an imposition of penalties in accordance with Article 15 of the Regulations;
- d) in the event of a prohibited subsidy under Article 6 of the Regulations, the Executing Agency may, in addition to the cease and desist order, order that the moneys given as prohibited subsidy be paid back to the relevant State Party, in whole or in part;
- e) in the event of abuse of an exemption under Article 7 of the Regulations, the Executing Agency may also revoke such exemption;
- f) where the Executing Agency is of the opinion that a complaint is ill founded in law and/or in fact in the sense of Article 12(2) of the Competition Regulations, it shall reject the complaint in a written decision accompanied by reasons for judgment;
- g) where the Executing Agency is of the opinion that a complaint is frivolous in the sense of Article 20(g) of the Regulations, it may dismiss it summarily;
- h) the Executing Agency shall apportion the costs among the parties engaged in the proceedings; and
- i) in all cases, the Executing Agency shall abide by the rules of Article 12(3) of the Regulations.

11

Where the Executing Agency is of the opinion that provisional measures must be ordered in terms of Article 13 of the Regulations, the following rules of procedure shall apply:

- a) where there is evidence of anti-competitive behaviour by one undertaking or association of undertakings, seriously threatening the existence of another undertaking, the Executing Agency may suspend the practices, agreements or decisions of the former undertaking or association for a period not exceeding ninety days, provided that such suspension can only be renewed once for thirty days. Such decision by the Executing Agency shall be taken within a period of thirty days from the receipt of the complaint; and
- b) without limiting the generality of the foregoing, such suspension may include the withdrawal of the excessively high or excessively low prices charged by the undertaking or association of undertakings involved, and, where excessively high or excessively low frequencies have been introduced by the undertakings involved, either decrease or increase them accordingly.

12

Where, in terms of Article 14 of the Regulations, the Executing Agency finds it necessary to communicate with Member States or undertakings or associations of undertakings, the Executing Agency shall:

- a) conduct such communications preferably through diplomatic channels; and
- b) conduct communications with undertakings or associations of undertakings through registered mail or other appropriate means.

13

In imposing penalties under Article 15 of the Regulations, the Executing Agency shall apply the following rules of procedure and schedule of penalties and fines:

- a) The Executing Agency may impose fines on undertakings or associations of undertakings, not less than one hundred special Drawing Rights and not more than five thousand special Drawing rights per infringement, where, intentionally or negligently, they supply incorrect or misleading information in connection with an application for an exemption or in connection with the revocation of an exemption, or where they file a frivolous complaint, or where they supply incorrect information in response to a request made, or do not supply information within the limit fixed by the Executing Agency, or do not or incompletely produce books or business records in the framework of an investigation, or refuse to submit to an investigation;
- b) the Executing Agency may impose fines on undertakings or associations of undertakings of no less than one thousand Special Drawing Rights and no more than one hundred thousand Special Drawing Rights, or a sum in excess thereof but not exceeding 10 percent of the turnover in the preceding business year of the undertaking or association of undertakings participating in the infringement, where, either intentionally or negligently, they infringe Articles 3 and/or 4 of the Regulations, or do not comply with a cease and desist order under Article 12 of the Regulations;
- c) in fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement;
- d) in the event of a second or subsequent infringement of the same nature and perpetrated by the same offending undertaking or association of undertakings, the Executing Agency may double or triple a previously imposed fine, without nevertheless exceeding the maximum amounts indicated in (a) and (b) above; and
- e) The Executing Agency shall periodically review the Schedule of penalties and fines.

Schedule

Form A

Application for an exemption

By the Executing Agency

Under Article 7(1) of the Competition Regulations for competition in air transport services

Identity of the parties:

1. **Identity of applicant**

Full name and address, telephone, telex and facsimile numbers, and brief description of the undertaking(s) or association(s) of undertakings submitting the application.

2. **Identity of other parties**

Full name and address and brief description of any other parties to the agreement, decision or practice (hereinafter referred to as the "arrangements")

Purpose of the application:

Applicant(s) to state for which length of time an exemption is sought. The maximum duration is five years.

Full description of the arrangements:

Applicant(s) should provide details of the arrangements, including financial details (which enjoy professional secrecy under Article 18 of the Regulations) (if necessary, Appendixes to the application may be used)

Reasons for an exemption:

Applicant(s) must state why the sought exemption is merited, in fact and in law (if necessary, Appendixes to the application may be used). In particular, applicant(s) must comment upon the effects of the sought exemption on competition in the relevant geographical markets (air routes) and product markets (air transportation *versus* other modes of transportation).

Notice to applicant(s)

- (a) Copy of this signed application and any Appendixes thereto will be sent to the competent authorities of State Parties according to Article 7(3) of the Competition Regulations;
- (b) Applicant(s) will receive an acknowledgement of receipt of the application, accompanied by the text of the Regulations, any implementing provisions and rules of procedure;
- (c) The Joint Competition Authority may ask applicant(s) for any additional information (which will enjoy professional secrecy under Article 18 of the Regulations) and may set a deadline for the provision of such information;
- (d) Applicant(s) should realise that the provision of any late, incorrect or misleading information may lead to the imposition of a penalty under Article 16 of the Regulations;
- (e) Where the Joint Competition Authority, on the basis of the written evidence, is of the opinion that an exemption should be granted, it may do so in writing for a period not exceeding five years, either unconditionally or subject to conditions;
- (f) Where the Joint Competition Authority tends towards a rejection of the application, it shall so inform the applicant(s) who remain(s) entitled to a hearing under Article 11 of the Regulations;

- (g) Where the Joint Competition Authority rejects the application, it shall give written reasons therefore;
- (h) An exemption that has been granted may be revoked for reasons set out in the implementing provisions, referred to under (b) above.

Place and date:

Signature(s):

Form B

Complaint

To the Executing Agency

Under Article 9 of the Competition Regulations for competition in air transport services

Identity of the complainant(s):

Full name and address, telephone, telex and facsimile numbers of the complainant or complainants.

Object of the complaint:

Complainant(s) to state which practice(s), agreement(s), decision(s), abuse(s) of dominant position or abuse(s) of exemption it contests.

Subject of the complaint:

Complainant(s) to state against which undertaking(s) (or association[s] of undertakings) the complaint is addressed.

Remedy(ies) sought:

Complainant(s) to state which remedy or remedies they seek under Article 12 (cease and desists orders) and/or Article 15 (penalties)

Full description of the fact(s):

Complainant(s) to describe the fact or facts leading to the complaint, including financial details (which enjoy professional secrecy under Article 18 of the Regulations) (if necessary, Appendixes to the complaint may be used)

Reasons for the complaint:

Complainant(s) to state why the complaint is justified, in fact and in law (if necessary, Appendixes to the complaint may be used). In particular, complainant(s) must comment upon the effects of the attacked practice, agreement, decision, abuse of dominant position or abuse of exemption on competition in the relevant geographical markets (air routes) and product markets (air transportation *versus* other modes of transportation).

Notice to applicant(s):

- (a) Copy of this signed complaint and any Appendixes thereto will be sent to the competent authorities of Member States according to Article 9(3) of the Regulations;
- (b) Complainant(s) will receive an acknowledgement of receipt of the complaint, accompanied by the text of the Regulations, any implementing provisions and rules of procedure. The Executing Agency shall advise the complainant of its decision within ninety days or advise the complainant of further procedures to be followed;
- (c) The Executing Agency may ask complainant(s) for any additional information (which will enjoy professional secrecy under Article 18 of the Regulations) and may set a deadline for the provision of such information;

- (d) Complainant(s) should realise that the provision of any late, incorrect or misleading information may lead to the imposition of a penalty under Article 15 of the Regulations;
- (e) The undertaking (or association of undertakings) against whom a complaint has been made be entitled to a hearing under Article 11 of the Regulations;
- (f) The Executing Agency shall endeavour to render a decision on the complaint under Article 12 of the Regulations (cease and desist orders) and/or Article 15 of the Regulations (Penalties) within a period of thirty days from receipt of the complaint;
- (g) Complainant(s) is (are) reminded that frivolous complaints are forbidden and may result in fines under the Regulations and provisions implementing these.

Place and date:

Signature(s):